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Constitutional Cohesion and the Right to Public Health

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CONSTITUTIONAL COHESION AND THE RIGHT TO PUBLIC HEALTH*

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Despite years of significant legal improvements stemming from a renaissance in public health law, Americans still face major challenges and barriers in assuring their communal health. Reversals of legal reforms coupled with maligned policies and chronic underfunding contribute to diminished public health outcomes. Underlying preventable morbidity and mortality nationally are realities of our existing constitutional infrastructure. In essence, there is no general obligation of government to protect or promote the public's health. Under principles of "constitutional cohesion," structural facets and rights-based principles interwoven within the Constitution protect individuals and groups from governmental vices (i.e., oppression, overreaching, tyranny, and malfeasance). Structural impediments and rights infringements provide viable options to challenge governmental efforts inapposite to protecting the public's health. Through corollary applications framed as auxiliary, creative, and ghost righting, courts are also

* This article is based in part on (a) the trilogy of brief essays published as part of the Public Health Law column in the *Journal of Law, Medicine, and Ethics* from 2017-2018 as follows: James G. Hodge, Jr., *Constitutional Cohesion and Public Health Promotion, Part I*, 45(4) J.L. MED. & ETHICS 688 (2017); James G. Hodge, Jr., *Constitutional Cohesion and Public Health Promotion, Part II*, 46(1) J.L. MED. & ETHICS 185 (2018); James G. Hodge, Jr., Jennifer Piatt, & Walter G. Johnson, *Constitutional Cohesion and Public Health Promotion, Part III: Ghost Righting*, 46(2) J.L. MED. & ETHICS 802 (2018); (b) my (JGHJr) lecture/discussion session at the American Society for Law, Medicine & Ethics Health Law Professors' Conference in Cleveland, Ohio on June 8, 2018; and (c) my (JGHJr) lecture/discussion session on December 3, 2018 at Harvard Law School as part of its Bioethics and Health Policy Seminar series sponsored by the Petrie-Flom Center for Health Law Policy, Biotechnology, and Bioethics (special thanks to Professor Glenn Cohen and other attendees for their remarks).

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empowered to recognize core duties or rights that the Constitution may not explicitly denote, but assuredly contains, to remedy identifiable vices. Notably, ghost righting charts a course for recognizing a constitutional right to public health that Americans are owed, and government must respect, to assure basic public health needs.

TABLE OF CONTENTS

INTRODUCTION.....	174
I. CONSTITUTIONAL COHESION: IN THEORY.....	179
A. <i>Oppression</i>	183
B. <i>Overreaching</i>	184
C. <i>Tyranny</i>	185
D. <i>Malfesance</i>	187
II. CONSTITUTIONAL COHESION: IN APPLICATION.....	188
A. <i>Intervening Rights</i>	190
B. <i>Structural Swords</i>	193
C. <i>Constitutional Inferences</i>	197
III. AUXILIARY, CREATIVE, AND GHOST RIGHTING.....	200
A. <i>Auxiliary Righting</i>	201
B. <i>Creative Righting</i>	204
C. <i>Ghost Righting</i>	206
IV. CONSTITUTIONAL RIGHT TO PUBLIC HEALTH.....	210
A. <i>Shadows of the Right</i>	212
B. <i>Judicial Navigation</i>	215
C. <i>Parameters of the Right</i>	218
CONCLUSION.....	225

INTRODUCTION

Laws have been used for centuries to address threats to the public's health,¹ sometimes in invidious, inconsistent, or unsubstantiated ways.² In the late 1990s, however, scholars and policymakers began championing a “renaissance” in public health law and poli-

1. While historic and modern definitions of what constitutes “public health” vary extensively, for purposes of this manuscript, public health may be defined in the broadest conception as “what we, as a society, do collectively to assure the conditions for people to be healthy.” INSTITUTE OF MEDICINE, *THE FUTURE OF PUBLIC HEALTH* 19 (1988).

2. See, e.g., JAMES G. HODGE, JR., *PUBLIC HEALTH IN A NUTSHELL* 135 (3d ed. 2018) [hereinafter HODGE, JR., *NUTSHELL*] (“In addition to public health powers to test, screen, treat, and vaccinate . . . [s]ocial distancing powers including quarantine, isolation, curfew, and closure are among the oldest (and some may say the most antiquated) public health measures. Although wielded historically in ways that occasionally castigated affected persons, social distancing powers are not punitive *per se*.”).

cy.³ Bolstered by new and progressive definitions of the field,⁴ public health laws moved beyond traditional boundaries focused typically on controlling infectious diseases to serve as distinct tools to promote communal health with greater respect for individual rights. Antiquated federal, state, and local laws featuring heavy-handed approaches under the guise of public health were amended or dispelled. Enlightened model law approaches⁵ and jurisprudence increasingly reflected a balance of communal and individual interests to reach a legal equilibrium that, in turn, contributed to tangible health outcomes.

To date, the public health law renaissance has unquestionably altered perceptions of the role of law to improve health outcomes through extensive, revolutionary legal and policy reforms. These reforms and their public health benefits, however, are at significant risk. Rollbacks, rescissions, and repudiations of solidified public health principles and “best practices” dominate political agendas at all levels of government.⁶ National health law reforms are under siege, spearheaded by proposed repeals⁷ or judicial undermining⁸ of the Affordable Care Act (ACA),⁹ which extended health

3. Lawrence O. Gostin, *Public Health Law: A Renaissance*, 30 J. L. MED. & ETHICS 136, 137 (2002) (calling for conformity among modern scientific and legal standards, consistency in efforts among states, and uniformity in approaching diverse public health threats through law); Lawrence O. Gostin, F. Ed Thompson & Frank P. Grad, *The Law and the Public's Health: The Foundations*, in LAW IN PUBLIC HEALTH PRACTICE 42 (Richard A. Goodman et al. eds., 2d ed. 2007) (“Public health law is experiencing a period of renaissance in the United States.”).

4. Professor Gostin defines public health law as “the study of the legal powers and duties of the state . . . to ensure the conditions for people to be healthy (to identify, prevent, and ameliorate risks to health in the population) and of the limitations on the power of the state to constrain for the common good the autonomy, privacy, liberty, proprietary, and other legally protected interests of individuals.” LAWRENCE O. GOSTIN, PUBLIC HEALTH LAW: POWER, DUTY, RESTRAINT 4 (2d ed. 2008). Professor Parmet notes, “[p]ublic health law . . . focuses on the authority of government agencies charged with protecting public health as well as the rights of individuals subject to such regulations.” WENDY E. PARMET, POPULATIONS, PUBLIC HEALTH, AND THE LAW 212 (2009). Based on these approaches, *public health law* is defined for purposes of this manuscript as: “laws (e.g., constitutional, statutory, regulatory, judicial), legal processes, or policies at every level of government (e.g., federal, tribal, state, local) that: (1) are *primarily* designed to assure the conditions for people to be healthy; or (2) concern structural or rights-based limitations on the powers of government to act in the interests of communal health.” HODGE, JR., NUTSHELL, *supra* note 2, at 14.

5. See TURNING POINT MODEL STATE PUB. HEALTH ACT § 1-101 (2003); see also James G. Hodge, Jr. et al., *Transforming Public Health Law: The Turning Point Model State Public Health Act*, 34 J.L. MED. & ETHICS 77, 77 (2006) [hereinafter Hodge, Jr. et al., *Transforming Public Health Law*].

6. James G. Hodge, Jr. et al., *Emerging Legal Threats to the Public's Health*, 46 J.L. MED. & ETHICS 547 (2018).

7. See C. STEPHEN REDHEAD & JANET KINZER, CONG. RESEARCH SERV., LEGISLATIVE ACTIONS IN THE 112TH, 113TH, AND 114TH CONGRESSES TO REPEAL, DEFUND, OR DELAY THE AFFORDABLE CARE ACT (Feb. 7, 2017), <https://fas.org/sgp/crs/misc/R43289.pdf>.

8. *Texas v. United States*, 352 F. Supp. 3d 665 (N. D. Tex. 2018) (holding that the ACA is an unconstitutional exercise of Congressional authority absent an effective tax penalty for the ACA's individual mandate provision following Congress' 2017 enactment of the Tax Cuts and Jobs Act); see also Paul Krugman, *Op-ed: Conservatism's Monstrous Endgame*, N.Y.

care access and coverage to millions of Americans. Public health sciences are debunked or outright ignored in favor of private industry interests¹⁰ or draconian threats of criminal sanctions in response to public health crises.¹¹ Each of the last five years is among the hottest ever in recorded history, yet federal authorities blatantly ignore environmental interventions.¹² Deregulatory efforts in health care, housing, and education are reversing decades of public health achievements and gains to address health disparities and social determinants of health. Preemptive efforts styming state and local public health legal innovations are a common tactic among some federal and state lawmakers.¹³ Prevailing federal and state health and tax policies favoring the wealthy fall hard on lower and middle classes diminishing their ability to lead healthy lives.¹⁴

Even as national expenditures on health care costs continue to rise to unprecedented levels,¹⁵ public health budgets at all levels of government have been decimated.¹⁶ A grossly underfunded and underperforming public health system allows for the spread of communicable diseases and the rise of some chronic conditions and injuries.¹⁷ Consequently, many Americans are sinking deeper into a cesspool of preventable poor health outcomes. Life expect-

TIMES, Dec. 18, 2018, at A22 (“What Nancy Pelosi called the ‘monstrous endgame’ of the Republican assault on health care is just the leading edge of an attack on multiple fronts, as the G.O.P. tries to overturn the will of the voters and undermine democracy in general.”).

9. 42 U.S.C. § 18001 (2010).

10. Lawrence O. Gostin et al., *Politics “Trumps” Health in America*, O’NEILL INSTITUTE (July 23, 2018), <http://oneill.law.georgetown.edu/politics-trumps-health-in-america/> (“[I]t seems politics trumps health, emboldened by a President and his Cabinet appointees who prioritize the rich over the poor and big business over healthy communities.”).

11. Lawrence O. Gostin, James G. Hodge, Jr. & Chelsea L. Gulinson, *Supervised Injection Facilities Legal and Policy Reforms*, 321 JAMA 745, 746 (2019) (quoting Deputy Attorney General Rod Rosenstein “[Jurisdictions] should expect [DOJ] to meet the opening of any [Supervised Injection Facilities] with swift and aggressive action.”).

12. John Schwartz & Nadja Popovich, *2018 Continues Warming Trend, As 4th Hottest Year Since 1880*, N.Y. TIMES, Feb. 7, 2019, at A1.

13. James G. Hodge, Jr. et al., *Public Health Preemption Plus*, 45 J.L. MED. & ETHICS 156, 156 (2017) (preemptive efforts “include political posturing and legal efforts to directly threaten state or local public agencies or officials, withdraw or deny local funds, and strip regulatory authorities”).

14. Robert Pear et al., *Trump to Scrap Critical Health Care Subsidies, Hitting Obamacare Again*, N.Y. TIMES (Oct. 12, 2017), <https://www.nytimes.com/2017/10/12/us/politics/trump-obamacare-executive-order-health-insurance.html>.

15. Robert Pear, *Growth of Health Care Spending Slowed Last Year*, N.Y. TIMES (Dec. 7, 2018), <https://www.nytimes.com/2018/12/06/us/politics/us-health-spending-2017.html> (noting that health spending in the U.S. equaled \$3.5 trillion last year, up 3.9% from 2016, or about \$10,740 a person, and nearly 18% of the gross domestic product).

16. David Himmelstein & Steffie Woolhandler, *Public Health’s Falling Share of US Spending*, 106 AM. J. PUB. HEALTH 56 (2016) (“Public health’s share of total health expenditures [was] 3.18% in 2002, [but] then fell to 2.65% in 2014; it is projected to fall to 2.40% in 2023.”).

17. *Id.*

tancy among all Americans, notably specific subpopulations,¹⁸ has actually gone down for the first time in decades.¹⁹ Today's youth may live shorter lives than their parents due largely to public health failures nationally.

Changes in laws and policies threaten the continuity of the modern public health law renaissance absent aggressive efforts to realign national and regional priorities to further communal health.²⁰ Diminutions in American public health outcomes, however, are not a foregone conclusion thanks to affirmative counter-efforts of legislators, policymakers, ethicists, and scholars. Collectively, they are generating an array of hard and soft law approaches to advance communal health. Legislatures articulate multiple principles supporting government's obligations to counter specific public health threats.²¹ Policymakers promote a litany of interventions, including suing and shaming government officials, to advance public health.²² Ethicists conceptualize practical models of public health ethics that require or support governmental responsibilities.²³ Human rights advocates push for greater respect for rights-based access to basic health services.²⁴ Enhanced notions of principles of health equity and justice foster fairness in public health and health care services across populations.²⁵

18. Bindu Kalesan et al., *Cross-sectional Study of Loss of Life Expectancy at Different Ages Related to Firearm Deaths Among Black and White Americans*, 24 *BMJ EVIDENCE-BASED MED.*, 1,1 (2018) (documenting how life expectancies for African Americans are actually several years less than for Caucasian Americans due mostly to public health impacts of gun violence on African Americans).

19. Jennifer Karas Montez, *Deregulation, Devolution, and State Preemption Laws' Impact on US Mortality Trends*, 107 *AM. J. PUB. HEALTH* 1749, 1749 (2017) (citing the National Center for Health Statistics, "between 2014 and 2015, life expectancy at birth for the nation as a whole declined by 0.1 years").

20. James G. Hodge, Jr., *Revisiting the Renaissance in Public Health Law*, 46 *J.L. MED. & ETHICS* 1031, 1033 (2019) ("For the renaissance to thrive . . . public and private actors should reconsider how law may accomplish varied ends without constraining its capacity to address multifarious challenges.").

21. Hodge, Jr., et al., *Transforming Public Health Law*, *supra* note 5, at 77–79.

22. Lance Gable & James W. Buehler, *Criticized, Fired, Sued, or Prosecuted: Hindsight and Public Health Accountability*, 132 *PUB. HEALTH REP.* 676, 676 (2017) (following the Flint water crisis the director of the Michigan state health department and others were publically criticized, sued, and prosecuted).

23. *See, e.g.*, Nancy E. Kass, *An Ethics Framework for Public Health*, 91 *AM. J. PUB. HEALTH* 1776 (2001); James C. Thomas et al., *A Code of Ethics for Public Health*, 92 *AM. J. PUB. HEALTH* 1057 (2002); James Childress et al., *Public Health Ethics: Mapping the Terrain*, 30 *J.L. MED. & ETHICS* 170, 175–76 (2002).

24. Lawrence O. Gostin et al., *Seventy Years of Human Rights in Global Health: Drawing on a Contentious Past to Secure a Hopeful Future*, 392 *LANCET* 2731 (2018).

25. Sandro Galea, *The Real Reason Why American Lives Are Getting Shorter*, *HUFFINGTON POST* (Dec. 7, 2018), https://www.huffingtonpost.com/entry/opinion-life-expectancy-americans_us_5c0982b0e4b0b6cdfaf5d37c8 (stating that the opioid epidemic emerges from the social, economic, and political context of contemporary American life, and without addressing this context, the problem will not be solved); *cf.* MADISON POWERS & RUTH FADEN, *SOCIAL JUSTICE: THE MORAL FOUNDATIONS OF PUBLIC HEALTH AND HEALTH POLICY* (2006).

These meaningful efforts are influential and impactful, especially within certain populations. Yet, they are also collectively insufficient to assure Americans' public health needs. Legal patches and ethical aspirations alone do not administer vaccines, conduct disease surveillance, provide basic treatments, or assure other core public health services.²⁶ They do not prevent government inaction amidst public health crises or fairly allocate benefits and risks across populations. While some governmental entities, particularly at the state and local levels, may choose to legally act to provide core functions, many do not. With divergent views among the courts, government leaders too often stand idle as populations suffer from largely preventable conditions (e.g., infectious diseases, obesity, addiction, injuries). Preventing or proactively addressing these conditions early on would take pennies on the dollar compared to the costs of resulting harms and associated treatments.

Despite the enormous achievements extending from the public health law renaissance, clear and substantial risks to population health remain. This failure of the renaissance reflects an interpretive reality of our existing constitutional infrastructure. *In essence, there is no affirmative obligation of government to protect or promote the public's health.* Except in special cases, government does not have to act to assure the health of communities through provision of basic public health services. As a result, from a constitutional point of view, any benefits societies derive from public health interventions are subject to the whim of governmental authorities. Lacking constitutional requirements to act, populations are left riding a roller coaster of selective, fleeting interventions determined by ever-changing administrations.

Americans should not have to endure such indignities and threats to their health. Yet, solutions to the paucity and discontinuity of public health services are elusive because of a lack of constitutional support for basic public health services. Just because the

26. What constitutes "core public health services" is subject to identification and refinement for purposes of setting legally-recognized duties. Traditional public health services include epidemiological investigations, testing, screening, surveillance, vaccination, social distancing measures, inspections, and nuisance abatement. *Cf.* HODGE, JR., NUTSHELL, *supra* note 2, at 11–12, 26. These services, however, do not reflect the scope of modern public health interventions designed to assure conditions for people to be healthy. *Cf.* INSTITUTE OF MEDICINE, THE FUTURE OF PUBLIC HEALTH 19 (1988). The federal Centers for Disease Control and Prevention (CDC) describes ten essential public health services that all communities should engage in addressing social determinants of health inequities (SDOH). CTRS. FOR DISEASE CONTROL & PREVENTION, THE TEN ESSENTIAL PUBLIC HEALTH SERVICES (2014), <https://www.cdc.gov/publichealthgateway/publichealthservices/pdf/essential-phs.pdf>. These services include monitoring community health through active health assessments; addressing social and structural determinants of health inequities through collaborative, outreach, and education efforts; ensuring a competent health care workforce; and evaluating service program effectiveness.

Constitution does not explicitly provide for communal health rights does not mean that such rights do not exist. Crafting a broader right to public health entails nuanced or ephemeral interpretations of constitutionally-grounded concepts embedded in its structure and other norms. Consistent with defined principles of “*constitutional cohesion*”²⁷ and corollary applications of these principles known as “ghost righting,”²⁸ courts are empowered to recognize or create core duties or rights that the Constitution may not explicitly denote, but assuredly contains. That constitutional obligations of government to protect the public’s health can arise almost from “thin air” may seem fanciful,²⁹ but it is viable when necessary to address known governmental vices (e.g., oppression, overreaching, tyranny, malfeasance).³⁰

As addressed in the sections below, crafting an affirmative “constitutional right to public health” in theory (Part I) and application (Part II) is not merely about sustaining a renaissance in public health law. Rather, it is about crafting a new assessment of the breadth of constitutional interpretation (Part III) essential to avert the specter of preventable morbidity and mortality through the generation of an original “right to public health” (Part IV) benefiting all Americans in the twenty-first century.

I. CONSTITUTIONAL COHESION: IN THEORY

Determining that government has an affirmative legal duty to protect and promote the public’s health is invariably tied to the U.S. Constitution based on (1) its structure and (2) the rights it protects. First, constitutional structural arguments grounded in principles of federalism, separation of powers, and preemption surface in light of interjurisdictional disputes and policies. Protecting the public’s health is a primary (even if unstated) function of government at all levels (federal, state, local) and branches (legislative, executive, judicial). As governments seek to respond to this essential function, structural conflicts between different levels and divisions invariably arise.

27. See *infra* Parts II and III.

28. See *infra* Part IV.

29. Sometimes even “fanciful” ideas emerging from popular discourse become mainstream, including calls for greater access to health care services enveloped in “Medicare for All” proposals surfacing again as campaign platforms for the 2020 Presidential election. See Maggie Astor, *Once Radical, Now Mainstream: Explaining Shifts in Discourse*, N.Y. TIMES, Feb. 25, 2019, at A18.

30. See *infra* Part I, Figure 2.

Second, while governmental public health agencies routinely encourage voluntary, positive changes in individual or community health behaviors, they are also empowered legally to mandate public health efforts among private individuals and entities.³¹ Consequently, mandatory public health powers regularly implicate rights-based constitutional principles, including due process, equal protection, or freedoms of speech, assembly, and religion.³²

That public health law entails structural and rights-based constitutional concepts is obvious. Less clear is how best to assess and apply them. Legal scholars, judges, policymakers, practitioners, and students are apt to separate structural and rights-based constitutional arguments when considering or challenging varied public health laws.³³ This makes intuitive sense. Discrete constitutional arguments flow logically from the nature of a purported violation. For example, when one level of government intrudes on the interests of another level, infringements are often framed in terms of federalism.³⁴ If Congress attempts to legislate in an area of public health typically reserved to states via the Tenth Amendment,³⁵ federalism arguments by offended states may naturally follow.³⁶

Conversely, when government acts under the guise of public health to derail or infringe on individual interests, rights-based objections emerge. If a state-level public health agency seeks to use its social distancing powers (e.g., quarantine, isolation, curfews) that unjustifiably infringe on a person's freedom of movement, an individual may raise liberty-based objections extending from principles of substantive or procedural due process.³⁷

These intuitive constitutional responses, however, are not always the norm. Historical and modern conceptions of *constitutional cohesion* support how structural facets and rights-based principles are

31. See HODGE, JR., NUTSHELL, *supra* note 2, at 85 (citing ERNST FREUND, *THE POLICE POWER: PUBLIC POLICY AND CONSTITUTIONAL RIGHTS* 3–4 (1904)). Most state and local public health powers are derived from the “police powers,” historically defined as “the inherent authority of the state to enact laws and promulgate regulations to protect, preserve and promote the health, safety, morals, and general welfare of the people.”

32. Cf. GOSTIN, *supra* note 4, at 85–86.

33. Ozan O. Varol, *Structural Rights*, 105 *GEO. L.J.* 1001, 1054 (2017) (pigeonholing “structures” and “rights” into distinct buckets negates the opportunity to examine how to fit them into a coherent, harmonious whole).

34. HODGE, JR., NUTSHELL, *supra* note 2, at 33–39.

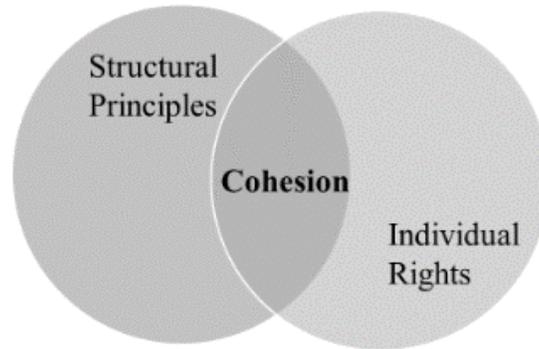
35. U.S. CONST. amend. X (“[T]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”).

36. *United States v. Lopez*, 514 U.S. 549 (1995) (holding it is outside Congress’ commerce power to determine criminal sanctions for the mere possession of firearms near school zones).

37. See, e.g., *Kirk v. Wyman*, 65 S.E. 387 (S.C. 1909) (striking down a quarantine order served on an elderly woman with leprosy in part because she was removed from her home to an unsafe pesthouse without justification given her lack of infectivity).

interwoven within the fabric of federal or state constitutions³⁸ (see Figure 1).

FIGURE 1. CONSTITUTIONAL COHESION



The concept is derived from expressed views among constitutional Framers, legal scholars, policymakers, and courts assessing how varied constitutional principles work in tandem to stabilize governments and preserve individual freedoms. In *San Antonio Independent School District v. Rodriguez* (1973),³⁹ the Supreme Court links federalism with assessments of principles of equal protection.⁴⁰ In *Printz v. United States* (1997),⁴¹ it cites the Federalist Papers supporting its proposition that constitutional structural components (e.g., separation of powers and federalism) are both designed to protect individual liberty.⁴² The Court equates structural provisions in *Na-*

38. Rebecca L. Brown, *Separated Powers and Ordered Liberty*, 139 U. PA. L. REV. 1513, 1531 (1991) (advocating for the use of an “ordered liberty” model to approach issues of separation of powers to further the purpose of protecting citizens from tyranny. Principles of ordered liberty assimilate constitutional cohesion to the extent they acknowledge how structural and rights-based provisions align).

39. 411 U.S. 1 (1973) (holding Texas’ school financing system did not violate equal protection because the system assured a basic education for every child via state contributions to each district and was not the product of purposeful discrimination against any class).

40. *Id.* at 43.

[E]very claim arising under the Equal Protection Clause has implications for the relationship between national and state power under our federal system. Questions of federalism are always inherent in the process of determining whether a State’s laws are to be accorded the traditional presumption of constitutionality, or are to be subjected instead to rigorous judicial scrutiny.

41. 521 U.S. 898 (1997) (invalidating firearm purchase background checks required by federal law to be conducted by state officials as unconstitutional).

42. *Id.* at 921.

tional Labor Relations Board v. Canning (2014)⁴³ as “no less critical to preserving liberty than the later adopted provisions of the Bill of Rights.”⁴⁴ Some Framers, intimates the Court, assert that the Bill of Rights is unnecessary on the premise that existing constitutional provisions providing checks and balances are sufficient to protect individual liberties.⁴⁵

Multiple scholars concur. Professor J. Harvie Wilkinson argues that there is no firewall between structure and rights: “guarantees of rights and principles of structure are sprinkled throughout [the Constitution].”⁴⁶ The Framers’ vision centered on the primacy of democratic processes and the premise that state sovereignty is only achievable if structural- and rights-based provisions of the Constitution align.⁴⁷ Professor Akhil Reed Amar suggests that structure and rights are tightly interwoven.⁴⁸ “Structural overtones” like federalism are vital to protecting liberty interests from governmental overreaching.⁴⁹

The intersection of constitutional structural foundations and rights is undeniable because they are designed to accomplish primarily the same end: *protect individuals and groups from identifiable government vices*.⁵⁰ Government acts (or omissions) constituting vices are universally disdained by law- and policy-makers as well as the public. Consequently, governmental vices are constitutionally susceptible to diminution or extinction. These vices, forged from common law traditions and Framers’ original perspectives, include governmental acts of oppression, overreaching, tyranny, and malfeasance (*see* Figure 2),⁵¹ as defined and explained below.

43. 134 S. Ct. 2550 (2014) (holding that president’s recess appointments, made in three days between two pro forma sessions of the U.S. Senate, violated the Recess Appointments Clause).

44. *Id.* at 2593.

45. *Id.*; THE FEDERALIST NO. 84, at 435 (Alexander Hamilton) (Ian Shapiro ed., 2009) (To the extent structural components sufficiently protect individual liberties, the Bill of Rights arguably allows claims to more powers than those explicitly enumerated by the Constitution.).

46. J. Harvie Wilkinson, *Our Structural Constitution*, 104 COLUM. L. REV. 1687, 1691, 1707 (2004) (arguing that the structure of the Constitution is largely disregarded in favor of a rights-based view).

47. *Id.*

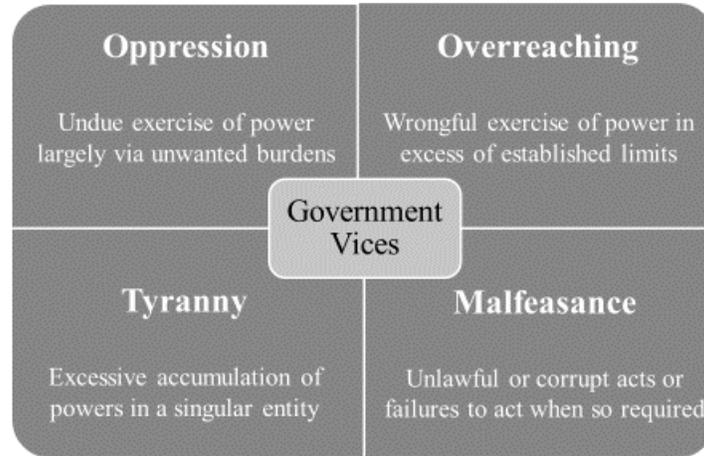
48. Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131, 1132 (1991) (“A close look at the Bill [of Rights] reveals structural ideas tightly interconnected with language of rights.”).

49. *See, id.*

50. *See, e.g.,* Gregory v. Ashcroft, 501 U.S. 452, 453 (1991) (quoting *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 242 (1985)) (“The ‘constitutionally mandated balance of power’ between the States and the Federal Government was adopted by the Framers to ensure the protection of ‘our fundamental liberties.’”).

51. Based in part on THE FEDERALIST NO. 47 (James Madison).

FIGURE 2. GOVERNMENTAL VICES



A. *Oppression*

Oppression refers to the undue exercise of power via governmental imposition of unwarranted burdens.⁵² The Framers clearly recognized the need to protect individuals against governmental oppression⁵³ through an independent judiciary and principles of substantive due process.⁵⁴ Regarding expansive notions of the concept of liberty, Justice Cardozo notes in *Palko v. Connecticut* (1937)⁵⁵ “it was recognized [long ago] that liberty is something more than exemption from physical restraint, and that even in the field of substantive rights and duties the legislative judgment, if oppressive and arbitrary, may be overridden by the courts.”⁵⁶

In *Chambers v. Florida* (1940), the Court holds that when police officers “turn their questioning into an instrument of mental op-

52. *Oppression*, BLACK’S LAW DICTIONARY (2d ed. 1910) (defining oppression as “[t]he misdemeanor committed by a public officer, who under color of his office, wrongfully inflicts upon any person any bodily harm, imprisonment, or other injury”).

53. Judicial independence “is equally requisite to guard the Constitution and the rights of individuals from the effects of those ill humours, which” can, at times, lead to serious oppressions of the minor party in the community. THE FEDERALIST NO. 78, at 395 (Alexander Hamilton) (Ian Shapiro ed., 2009).

54. See, e.g., THE FEDERALIST NO. 18, at 91 (James Madison) (Ian Shapiro ed., 2009) (“Shame and oppression ere long awaken their love of liberty.”); *Treigle v. Acme Homestead Assoc.*, 297 U.S. 189, 197 (1936) (holding that the police power “must be exercised for an end which is in fact public and the means adopted must be reasonably adapted to the accomplishment of that end and must not be arbitrary or oppressive”).

55. 302 U.S. 319 (1937) (holding that a state law allowing the prosecution to appeal the results of a criminal conviction by jury trial does not violate the due process clause of the Fourteenth Amendment).

56. *Id.* at 327.

pression” they violate constitutionally protected rights.⁵⁷ In *Southwest Telephone v. Danaher* (1915), a utility regulation is deemed unconstitutional because the fine imposed on the company was “so oppressive as to be nothing short of a takings,” depriving defendants of property rights protected by the Fourteenth Amendment.⁵⁸

Courts are often bastions against oppressive acts of government, but can sometimes acquiesce. In the Supreme Court’s infamous decision in *Plessy v. Ferguson* (1896),⁵⁹ racial segregation is held lawful on the premise that Fourteenth Amendment protections did not extend to social rights violations. In the notorious World War II case, *Korematsu v. United States* (1944),⁶⁰ the Court upholds President Roosevelt’s order for the internment of Japanese Americans. These outlier decisions disregarding oppressive acts are “stain[s] on American jurisprudence,”⁶¹ that have subsequently been overturned.

B. *Overreaching*

Legally distinct from oppression is the vice of *overreaching*, or the wrongful exercise of power outside of established limits, particularly structural limits like separation of powers. Any branch of government, legislative, executive, or judicial, may engage in overreaching. Courts, however, seem particularly concerned about their capacity to overreach inapposite to separation of powers limitations. In *Degen v. United States* (1996),⁶² Justice Kennedy explains. “The extent of [judicial powers] must be delimited with care, for there is a danger of overreaching when one branch of the Government, without the benefit of cooperation or correction from

57. *Bridges v. California*, 314 U.S. 252 (1941) (Frankfurter, J., dissenting) (citing *Chambers v. Florida*, 309 U.S. 227 (1940)).

58. 238 U.S. 482, 491 (1915) (invalidating \$3,600 fine imposed on a telephone company for suspending patron service under established and uncontested regulations as arbitrary and oppressive).

59. 163 U.S. 537, 541 (1896), *abrogated by* *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

60. 323 U.S. 214, 227 (1944), *overruled by* *Trump v. Hawaii*, 138 S. Ct. 2392 (2018) (“*Korematsu* was gravely wrong the day it was decided, has been overruled in the court of history, and—to be clear—has no place in law under the Constitution.”).

61. Carl Takei, *The Incarceration of Japanese Americans in World War II Does Not Provide a Legal Cover for a Muslim Registry*, L.A. TIMES (Nov. 27, 2016), <https://www.latimes.com/opinion/op-ed/la-oe-takei-constitutionality-of-japanese-internment-20161127-story.html>; *see also* Richard A. Primus, *Canon, Anti-Canon, and Judicial Dissent*, 48 DUKE L.J. 243 (1998) (defining anti-canon as a term for cases which are so flawed that they are now taken as exemplars of bad legal decision making, such as *Lochner*, *Plessy*, and *Korematsu*).

62. 517 U.S. 820 (1996) (holding that the fugitive disentitlement doctrine did not permit the district court to enter summary judgment in favor of the government in a civil forfeiture case, on grounds that the claimant was outside the U.S. and could not be extradited to face federal drug charges).

the others, undertakes to define its own authority.” In the Supreme Court’s death penalty case, *Furman v. Georgia* (1972),⁶³ then Justice Rehnquist elucidates further in dissent: “[w]hile overreaching by the Legislative and Executive Branches may result in the sacrifice of individual protections that the Constitution was designed to secure against action of the State, judicial overreaching may result in sacrifice of the equally important right of the people to govern themselves.”⁶⁴

In the 2016 abortion rights case, *Hodes & Nauser, MDs, P.A. v. Schmidt*,⁶⁵ concurring Judge Gordon Acheson of the Kansas Court of Appeals eloquently calls for exacting judicial review related to Kansas’ constitutional right to self-determination. “Doing otherwise,” he concludes, “vaults legislation ahead of an *elemental constitutional barrier to governmental overreach*, undercutting the very purpose of a bill of rights in shielding a select set of fundamental precepts from the vicissitudes of politics and the cravenness of politicians” (emphasis added).⁶⁶ As per the court, corrections for legislative overreach find their source through judicial adherence to fundamental constitutional norms.

C. *Tyranny*

Tyranny refers to the excessive accumulation and use of powers in a singular entity.⁶⁷ The Framers recognized the threat that tyranny poses to individual liberty and freedoms.⁶⁸ To guard against it, society must be protected generally against oppression by its leaders, and minorities must not be subjected to the unfettered will of majorities.⁶⁹

63. 408 U.S. 238 (1972) (per curiam) (invalidating the death penalty, as customarily prescribed and implemented, based on a violation of cruel and unusual punishments prohibited via the Eighth Amendment).

64. *Id.* at 470.

65. 368 P.3d 667 (Kan. Ct. App. 2016) (holding that the Kansas Constitution’s Bill of Rights provides the same protection for abortion rights as the Due Process Clause of the Fourteenth Amendment of the U.S. Constitution).

66. *Id.* at 328.

67. THE FEDERALIST NO. 47, at 245 (James Madison) (Ian Shapiro ed., 2009) (denoting “[t]he accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny”). Merriam-Webster’s Dictionary defines tyranny as (1) “oppressive power,” inherently having some external effect, and (2) “a government in which absolute power is vested in a single ruler,” focusing just on accumulation of power. *Tyranny*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/tyranny> (last visited Mar. 4, 2019).

68. See generally THE FEDERALIST NO. 47 (James Madison) (Ian Shapiro ed., 2009) (noting that if one branch exercises powers assigned to another branch, resulting laws would be arbitrary and in contravention of principles of liberty).

69. THE FEDERALIST NO. 51 at 266–67 (James Madison) (Ian Shapiro ed., 2009).

Justice Kennedy clarifies in *Loving v. United States* (1998)⁷⁰ that deterrence of tyranny is one “reason for dispersing the federal power among three branches.”⁷¹ “Even before the birth of this country,” he notes, separation of powers is known as an effective “defense against tyranny.”⁷² Justice O’Connor attributes structural federalism with alleviating the risks of tyranny in *Gregory v. Ashcroft* (1991): “[j]ust as the separation and independence of the coordinate branches of the Federal Government serve to prevent the accumulation of excessive power in any one branch, a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front.”⁷³ Tyranny flourishes when government abdicates its responsibility to assure proper checks and balances. Accordingly, the Supreme Court has clarified and reigned in unfettered executive power.⁷⁴ In his concurring opinion in *Department of Transportation v. Association of American Railroads* (2015),⁷⁵ Justice Thomas, quoting William Blackstone’s commentaries on the English Constitution, characterizes a tyrannical government “as one in which ‘the right both of making and of enforcing the laws . . . is vested in one and the same [person], or one and the same body of [people].’”⁷⁶ Still, as with oppression, the Court has at times endorsed or permitted excessive executive powers. In *Trump v. Hawaii* (2018), it affirms an immigration policy targeting vulnerable minorities on the premise that the judiciary lacks the capacity to question executive branch judgments.⁷⁷ Cases like these illustrate the complexities of limiting tyranny against the backdrop of core separation of powers principles.

70. 517 U.S. 748 (1996) (Separation-of-powers principles do not preclude Congress from delegating its constitutional authority to the President to define aggravating factors that permit imposition of statutory penalty of death in military capital cases.).

71. *Id.* at 757.

72. *Id.* at 756. It is a “basic principle of our constitutional scheme that one branch of the Government may not intrude upon the central prerogatives of another.” *Id.* at 757.

73. *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991) (holding that Missouri state judges constitute appointees “on a policymaking level,” within the meaning of exclusion to Federal Age Discrimination in Employment Act; consequently, Missouri Constitution’s mandatory retirement provision for judges does not violate equal protection).

74. *Youngstown Sheet & Tube Co. v. Sawyer*, 72 S. Ct. 863, 868 (1952) (invalidating Presidential Executive Order No. 10340 directing the Secretary of Commerce to take possession of and operate most of the nation’s steel mills).

75. 135 S. Ct. 1225 (2015) (finding Amtrak is a governmental entity, rather than autonomous private entity, for purposes of determining the validity of metrics and standards created under Passenger Rail Investment and Improvement Act).

76. *Id.* at 1244. Justice Thomas notes that separation of powers is in direct opposition to tyranny as espoused by the Framers, *citing* FEDERALIST NO. 47 (James Madison).

77. *See Trump v. Hawaii*, 138 S. Ct. 2392, 2419 (2018) (upholding a travel ban for entry of nationals of Muslim countries as within the President’s statutory authority and First Amendment Establishment Clause); Elizabeth Goiten, *Trump v. Hawaii: Giving Pretext a Pass*, BRENNAN CTR. FOR JUSTICE (June 27, 2019), <https://www.brennancenter.org/blog/trump-v-hawaii-giving-pretext-pass> (explaining that courts lack authority to question executive decisions regarding immigration or national security).

D. Malfeasance

Malfeasance represents an amalgam of reprehensible governmental abuses. Generally stated, it relates to unlawful or corrupt acts by governmental agents or within governmental entities.⁷⁸ Some examples of malfeasance extend from positive actions;⁷⁹ others relate to abject failures.⁸⁰ Traditionally, courts do not consistently distinguish between positive acts and omissions in labeling fault.⁸¹ Malfeasance may thus arise where a governmental agent or entity acts inappropriately or fails to act when required or obligated to do so.⁸²

Drawing distinctions over governmental acts or omissions as the source of malfeasance may seem non-purposeful when harm to the public's health is at stake. Still, the Supreme Court has historically centered on this distinction at least for purposes of assessing liability. In *Dalehite v. United States* (1953), it rejects the notion that the federal government is liable under the Federal Tort Claims Act "for failure to impose a quarantine" in a hypothetical disease outbreak.⁸³ In *DeShaney v. Winnebago County Department of Social Services* (1989), it holds that liberty interests under substantive due process do not require county employees to act to protect minors at risk of

78. In the context of tort law, misfeasance may be defined as "an act which a reasonably prudent person would not do, or failing to do something which a reasonably prudent person would do." Brian D. Bender, *Torts: The Failings of the Misfeasance/Nonfeasance Distinction and the Special Relationship Requirement in the Criminal Acts of Third Persons—State v. Back*, 37 WM. MITCHELL L. REV. 390, 391 (2010) (quoting *Lewis v. Razzberries, Inc.*, 584 N.E.2d 437, 441 (Ill. App. Ct. 1991)).

79. Malfeasance is characterized by performing an act one should not perform. See *Actions and Remedies Against Government Units and Public Officers for Nonfeasance*, 11 LOY. U. CHI. L.J. 101, 105, n. 71 (1979).

80. Nonfeasance is commonly defined as a failure to act most often pursuant to an obligation to do so. See *id.* at 103. Some theorize, however, that nonfeasance includes omissions even in the absence of a duty to act. See, e.g., Bender, *supra* note 78, at 391.

81. Compare *Smith v. Iowa City*, 239 N.W. 29 (Iowa 1931) (holding that a municipal agency's failure to maintain safe park conditions was nonfeasance, not malfeasance), with *Commercial News Co. v. Beard*, 116 Ill. App. 501 (1904) (holding that the government's failure to enforce a gambling law was misfeasance, not nonfeasance). These inconsistencies are problematic when analyzing tort liability. Through sovereign immunity, "absent an express statutory duty [and] voluntary exercise of . . . authority," governmental entities are generally not liable for nonfeasance. *Singleton v. City of Hamilton*, 515 N.E.2d 8 (Ohio Ct. App. 1986); see also James Fleming, Jr., *Tort Liability of Government Units and Their Officers*, 22 U. CHI. L. REV. 610, 622 (1955).

82. As Justice Harlan dissents in *Briggs v. Spaulding*, 141 U.S. 132 (1891), citing commentary from English common law related to the liability of corporate officers for breaches of trust: "[i]n this respect they may be guilty of acts of commission or omission, of malfeasance or non-feasance." *Id.* at 172. Disagreements among courts related to these terms have led some legal theorists to claim distinctions are "hopeless." Paul T. Wangerin, *Actions and Remedies Against Government Units and Public Officers for Nonfeasance*, 11 LOY. U. CHI. L.J. 101, 102 (1979).

83. *Dalehite v. United States*, 346 U.S. 15, 44 (1953) ("To impose liability for the alleged nonfeasance of the Coast Guard would be like holding the United States liable in tort for failure to impose a quarantine for, let us say, an outbreak of foot-and-mouth disease.").

child abuse.⁸⁴ In a forceful dissent, Justice Brennan argues that precedent suggests a governmental entity “may be found complicit in an injury even if it did not create the situation that caused the harm.”⁸⁵ As he acknowledges in his majority opinion in *Owen v. City of Independence* (1980), liability is vital in “vindicating cherished constitutional guarantees,” especially “when the wrongdoer is the institution that has been established to protect the very rights it has transgressed.”⁸⁶ By this logic, liability deters government malfeasance based on action or inaction.

II. CONSTITUTIONAL COHESION: IN APPLICATION

A primary objective underlying recognition of principles of *constitutional cohesion* is to better assess how legal challenges are, or may be, used strategically to confront legal and policy approaches threatening public health and safety. Can cohesive principles generate new strategies to counter or challenge an increasing array of federal, state, and local laws supporting actions or omissions that are antithetical to the public’s health?

Beyond theory, the promise of *constitutional cohesion* in practice relates to greater stability to mitigate changing governmental relationships or significant affronts to individual rights that contravene public health promotion. As Professor Rebecca Brown prognosticated in 1991, the intersection of structural principles of separation of powers and individual rights with due process brings “a welcome coherence to the law developing around the body of the Constitution, and [helps] to ensure the future balance of government powers in a changing nation.”⁸⁷

Such bold assurances presuppose that applications of *constitutional cohesion* are predictable and constant. In actuality, they fluctuate over time, along with pendulum-like shifts in understanding and interpreting structural principles and individual rights. As Professor Wendy Parmet notes, for decades courts tended to discount

84. *DeShaney v. Winnebago Cty. Dep’t of Social Serv.*, 489 U.S. 189 (1989). Later, in *Castle Rock v. Gonzalez*, 545 U.S. 748 (2005), the Court rejected application of property interests via due process to require county law officers to enforce a restraining order designed to protect a woman and her children from an abusive spouse/father.

85. *DeShaney*, 489 U.S. at 207. Consistent with Justice Brennan’s view, one commentator suggests governing bodies should be liable for actions or omissions, irrespective of categorization, that “play[] a part in the creation or exacerbation of a social problem.” Jenna MacNaughton, *Positive Rights in Constitutional Law: No Need to Graft, Best Not to Prune*, 3 U. PA. J. CONST. L. 750, 763 (2001).

86. *Owen v. City of Independence*, 445 U.S. 622 (1980) (A municipality is not immune under 42 U.S.C. § 1983 for constitutional violations based on a defense of good faith actions by its law enforcement officers.).

87. Brown, *supra* note 38, at 1516.

rights-based arguments against state and local public health measures. She concludes that individual due process, equal protection, and other rights must give way to structurally-based police and *parens patriae* powers.⁸⁸ Only later did affirmative interpretations of individual rights override core public health efforts to address specific or general threats.⁸⁹ On first glance, these developments simply illustrate how balancing public health and individual interests might favor either the community or individuals. The reality is, however, far more complex.⁹⁰

At the core of modern conflicts over public health services is the extent to which structural- and rights-based violations are “mirror images”⁹¹ within a cohesive constitutional framework. In several instances, structural- or rights-based principles may alternatively be argued to advance public health objectives. In this sense, structural impediments or rights infringements may be equally viable options to challenge government laws and policies that inadequately promote the public’s health under three primary applications (*see* Figure 3): intervening rights, structural swords, and constitutional inferences. As explained below, the first two applications provide clear opportunities for positive interventions but carry some risks related to adverse outcomes. The latter application, constitutional inferences, takes principles of *constitutional cohesion* beyond mere practice and back to its roots in legal theory.

88. Wendy E. Parmet et al., *Individual Rights Versus the Public’s Health—100 Years After Jacobson v. Massachusetts*, 352 NEW ENG. J. MED. 652 (2005) (stating that vaccination laws, isolation, or quarantines imposed for communicable diseases and laws about reporting sexually transmitted diseases rely on the state police power affirmed in *Jacobson*).

89. *Id.*

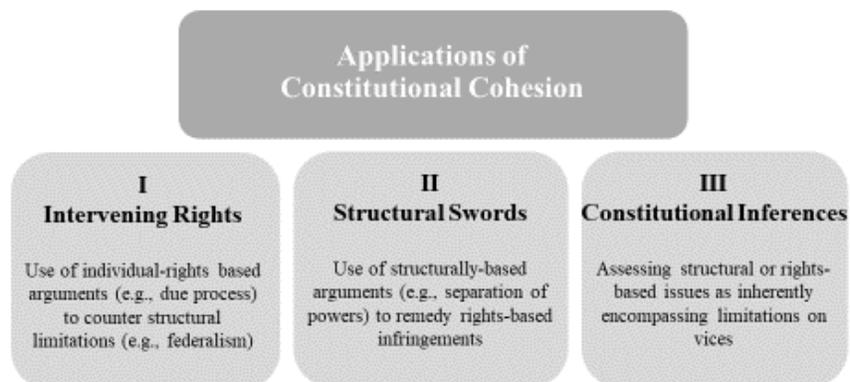
90. Professor Lawrence Gene Sager suggests that limitations of Supreme Court rights-based jurisprudence are based in part on “institutional” constructs that curbed the Court’s willingness or capacity to intervene.

[T]he important difference between a true constitutional conception and the judicially formulated construct is that the judicial construct may be truncated for reasons which are based not upon analysis of the constitutional concept but upon various concerns of the Court about its institutional role. These concerns operate to produce some judicial constructs which are not at all exhaustive of the constitutional concepts they reflect. Thus, a federal judicial construct may not be a true constitutional conception because it may not exhaust the concept from which it derives

Lawrence Gene Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212, 1214–15 (1978).

91. Varol, *supra* note 33, at 1004 (“[C]onstitutional structure affects individual liberty, its mirror image has been left understudied. Scholars have largely assumed that individual rights have little resemblance to constitutional structure.”).

FIGURE 3. APPLICATIONS OF CONSTITUTIONAL COHESION



A. *Intervening Rights*

Constitutional exercises of public health powers among all levels of government must conform to structural foundations like federalism, separation of powers, sovereign powers, and preemption. Adherence to structural norms, however, is not the only measure to assess their constitutionality. When government uses structural principles to infringe unnecessarily on individual rights, cohesive arguments may follow. These arguments may be framed in the context of “intervening rights” to counter governmental exercises consistent with traditional structural norms.

One of the premier illustrations of the role of rights-based arguments to challenge core public health powers arose in *Jacobson v. Massachusetts*.⁹² In 1905, the Supreme Court issues its seminal decision upholding a state-based exercise of police powers authorizing Massachusetts’ localities to require adult vaccinations for smallpox. Reverend Henning Jacobson challenges state and local vaccination powers based largely on liberty norms via due process and equal protection violations (since elements of the vaccine law did not apply uniformly to adults and children). The Commonwealth of Massachusetts argues vehemently against Jacobson’s rights-based arguments under common public health powers. Yet, the Commonwealth also advances specific objections grounded in federalism and separation of powers that were heavily relied upon in Justice Harlan’s majority opinion.

In essence, Massachusetts asserts that deciding disputes over the scope of public health powers is the province of sovereign states,

92. 197 U.S. 11 (1905).

and not the federal Supreme Court. The premise resonates with the Court. “The safety and the health of the people of Massachusetts are, in the first instance, for that commonwealth to guard and protect. They are matters that do not ordinarily concern the national government.”⁹³ The Commonwealth additionally purports that to the extent judicial courts must respect the legislative judgments of state and local governments, the Supreme Court is not well-positioned to assess a locality’s implementation of, or basis for, a vaccination law. Again, the Court acquiesces: “[T]he court would usurp the functions of another branch of government if it adjudged, as matter of law, that the mode adopted under the sanction of the state, to protect the people at large was arbitrary, and not justified by the necessities of the case.”⁹⁴ Essentially, Massachusetts requests the Court to step away from the case entirely based largely on structural foundations of federalism and separation of powers. The Court declines, choosing instead to fully assess Jacobson’s rights-based arguments but ultimately finding in favor of the Commonwealth.⁹⁵

To the degree that Jacobson loses his appeal centered on individual rights, the Court’s decision resounds the aforementioned, longstanding judicial acceptance of the overriding power of state and local public health efforts.⁹⁶ However, Justice Harlan also clarifies how liberty principles do not succumb completely to public health police powers.⁹⁷ In so doing, he examines the interrelatedness of structural foundations and individual rights to craft reasonable and fair impositions on individual freedoms from vaccination requirements justified by the need to protect the public’s health.⁹⁸

93. *Id.* at 38.

94. *Id.* at 28.

95. *Id.* at 38 (“[W]e do not perceive that this legislation has invaded any right secured by the Federal Constitution.”).

96. See Parmet et al., *supra* note 88, at 329.

97. Justice Harlan explains:

If there is any such power in the judiciary to review legislative action in respect of a matter affecting the general welfare, it can only be when that which the legislature has done comes within the rule that, if a statute purporting to have been enacted to protect the public health, the public morals, or the public safety, has no real or substantial relation to those objects, or is, beyond all question, a plain, palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge, and thereby give effect to the Constitution.

Jacobson, 197 U.S. at 31.

98. HODGE, JR., NUTSHELL, *supra* note 2, at 66, 85–95. Rights-based challenges to state and local public health powers proliferate in modern day. In 2016, a gestational surrogate of three babies challenged California public health officials (among others) in *Cook v. Harding*, 190 F. Supp. 3d 921 (C.D. Cal. 2016), *aff’d*, 879 F.3d 1035 (9th Cir. 2018), *cert. denied*, 139 S. Ct. 72 (2018). She alleged that a California statute protecting surrogacy contracts violated her due process and equal protection rights. Reluctant to invade issues of state law due to federalism concerns, the court acknowledged the plaintiff’s constitutional assertions, but

Decades later in *Morrison v. Olson* (1988),⁹⁹ the Court examines a provision of the Ethics in Government Act of 1978¹⁰⁰ authorizing a judiciary panel to appoint independent counsel to investigate specific crimes among high-ranking executive officials. Separation of powers principles are clearly at play, but the Court focuses instead on due process interests.¹⁰¹ To the extent the statute guarantees the impartiality of decision-makers consistent with due process, it survives constitutional scrutiny. The next year the Court incorporates comparable analyses in *Mistretta v. United States* (1989),¹⁰² approving the structure of the U.S. Sentencing Commission.

Similar cross-cutting analyses are reflected increasingly in contemporary judicial challenges and decisions.¹⁰³ In 2017, a Florida-based advocacy group claims that the state's gun statutes preempt multiple ordinances passed by the City of Tallahassee.¹⁰⁴ The City counters that state law and its accompanying penalties violate structural principles of legislative immunity as well as freedoms of speech.¹⁰⁵ That same year in *State ex rel. Brnovich v. City of Tucson*,¹⁰⁶ joint arguments grounded in local home rule authority and municipal due process¹⁰⁷ are presented in response to the Arizona State legislature's preemptive scheme to withhold all state funds from localities whose public health (or other) laws conflict with state

ultimately deferred to ongoing state court proceedings. *Id.* In *Baddock v. Baltimore Cty.*, 239 Md. App. 467 (2018), a hookah lounge operator challenged a county ordinance restricting its hours of operation on grounds of equal protection and due process violations. The court upheld the statute under a minimal rational basis review consistent with the public's health. *Id.*

99. 487 U.S. 654 (1988) (holding that a federal act vesting the judiciary with the power to appoint an inferior executive officer and prohibiting the Attorney General from removing the officer without good cause did not violate separation of powers principles).

100. 28 U.S.C. §§ 591-599 (1988).

101. LAURENCE TRIBE, *AMERICAN CONSTITUTIONAL LAW* 125-26 (2000).

102. 488 U.S. 361 (1989) (holding that sentencing guidelines were constitutional, amounting to neither excessive delegation of legislative power nor violation of separation of powers principles).

103. Professor David Orentlicher addresses the overlap of structural power and intervening rights in the context of the Food and Drug Administration (FDA) regulation of the marketing of off-label drugs. David Orentlicher, *Off-Label Drug Marketing, the First Amendment, and Federalism*, 50 WASH. U. J.L. & POL'Y 89 (2016). By regulating off-label marketing, FDA avoids federalism concerns arising from regulating the actual off-label use itself. *Id.* First Amendment arguments centered on how the regulation of promotional speech is preferable to "the federal government's intrusion into the regulatory space of the states" is raised but rejected. *Id.* at 102.

104. *Florida Carry, Inc. v. City of Tallahassee*, 212 So. 3d 452 (Fla. 2017).

105. *Id.* at 456 ("Appellees asserted that the penalty provisions provided in § 790.33 violated legislative immunity and the right of free expression."). The case was dropped later only because the ordinances were never actually enforced.

106. 242 Ariz. 588 (2017).

107. Josh Bendor, *Municipal Constitutional Rights: A New Approach*, 31 YALE L. & POL'Y REV. 389 (2012) (explaining that municipalities have constitutional rights, such as the right to just compensation under the Fifth Amendment takings clause when the federal government takes property).

laws. Though ultimately rejected by the Arizona Supreme Court,¹⁰⁸ Tucson's rights-based challenge (e.g., due process) to structurally-based strategies (e.g., preemption) illuminates the state's suspect legal tactics. Intervening rights arguments do not always succeed but they represent a potent avenue for addressing potential vices.

B. *Structural Swords*

The flipside of intervening rights arguments is the use of structural arguments as a sword to limit unwarranted infringements of individual rights contrary to the public's health. Among other claims, government impositions on individual rights may be circumvented via arguments that: (1) the wrong level of government is acting (i.e., federalism);¹⁰⁹ (2) the wrong division of government is acting (e.g., separation of powers);¹¹⁰ (3) a lower government's effort is negated (i.e., preemption);¹¹¹ (4) a government agency lacks authority to implement the measure (e.g., non-delegation doctrine, a subcomponent of separation of powers);¹¹² or (5) insufficient evidence supports a proposed outcome under standards of judicial review.¹¹³

Judicial use of structural swords has its greatest application when damaging public health policies are reversed or abandoned. In 2017, President Trump issued Executive Order 13768¹¹⁴ threaten-

108. *Brnovich*, 242 Ariz. at 600 (holding that regulation of unclaimed firearms is within the state's "broad police powers," which are not inherent in its municipalities).

109. *See* *United States v. Lopez*, 514 U.S. 549 (1995) (finding under principles of federalism that Congress exceeded its commerce powers by statutorily making gun possession within a local school zone a federal criminal offense).

110. *Morrison v. Olson*, 487 U.S. 654, 654 (1988).

111. *See, e.g., Cippollone v. Liggett Group, Inc.*, 505 U.S. 504 (1992) (preserving state-based failure to warn claims against cigarette manufacturing companies on grounds that federal statutory law did not preempt state-based tort law claims. Preserving these claims provided opportunities for consumer retribution and incentivized tobacco manufacturers to companies to promote the public's health).

112. *See, e.g., Boreali v. Axelrod*, 71 N.Y.2d 1 (Ct. App. 1987) (invalidating New York State's Public Health Council tobacco regulations as outside the Council's delegated authority from the legislature); *see also* N.Y. Statewide Coal. of Hispanic Chambers of Commerce v. N.Y. Dep't of Health & Mental Hygiene, No. 653584/12 (N.Y. App. Div. July 30, 2013) (striking down New York City's proposed ban on large portion sizes of sugar sweetened beverages).

113. In *Motor Vehicle Mfrs. Ass'n of U.S. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 46–48 (1983), the Court held that withdrawal of a passive restraint requirement in automobiles was arbitrary and capricious, due in large part to a lack of evidence that costs of passive restraints outweigh their safety benefits. *Id.* at 38. Consistent with principles of judicial review, an agency "must examine the relevant data and articulate a satisfactory explanation for its action" before withdrawing its standards. *Id.* at 43.

114. Exec. Order No. 13,768, 82 Fed. Reg. 8799 (2017).

ing to federally-defund “sanctuary cities.”¹¹⁵ It is a classic example of governmental overreaching leading to instant judicial challenges grounded in individual rights.¹¹⁶ In *City of Chicago v. Sessions*,¹¹⁷ however, a federal district court in Illinois rejects the Order as violative of separation of powers principles.¹¹⁸ Congress had not authorized the setting of special conditions for the receipt of all federal grants as relied upon by the federal executive in invoking the Order.¹¹⁹

Use of structural swords, however, can be double-edged akin to protection and promotion of the public’s health.¹²⁰ As part of its “new federalism” jurisprudence in the 1990s,¹²¹ the Supreme Court issued a series of decisions including structural arguments derailing legitimate public health or environmental objectives of Congress. In *Gregory v. Ashcroft* (1991),¹²² the Court weighs a mandatory retirement age law for Missouri state judges against alleged violations of principles of equal protection and the federal Age Discrimination in Employment Act. In her majority opinion, however, Justice O’Connor looks alternatively to principles of federalism.¹²³ She concludes “congressional interference with [Missouri’s age limits] would upset the usual constitutional balance of federal and state

115. Suzannah Gonzales et al., *U.S. Sides Against Trump in Fight Over Sanctuary Cities*, CHI. TRIBUNE (Sept. 15, 2017), <https://www.reuters.com/article/us-usa-immigration-sanctuary/u-s-judge-sides-against-trump-in-fight-over-sanctuary-cities-idUSKCN1BQ2VL>.

116. See, e.g., *City of Santa Clara v. Trump*, No. 17-CV-00574-WHO, 2017 WL 1459081, at *24 (N.D. Cal. Apr. 25, 2017) (Santa Clara and San Francisco were granted an injunction on a finding that the Order was “unconstitutionally vague in violation of the Fifth Amendment’s Due Process Clause”).

117. No. 17 C 5720, 2017 WL 4081821, *1 (N.D. Ill. Sept. 15, 2017), *aff’d*, 888 F.3d 272 (7th Cir. 2018).

118. *Id.* at 280–90 (“[The district court] concluded that . . . the Attorney General lacks the authority to impose [certain] Notice and Access conditions and that Chicago would suffer irreparable harm without an injunction” against the conditions.).

119. *Id.* at 943. In addition, the Court found that the Attorney General lacked the statutory authority to impose compliance conditions.

120. Public health is not the only legal area in which this observation is relevant. Professor Sager examines how the Supreme Court’s analyses of equal protection rights related to state-based school financing laws in *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1 (1973), were dictated in part by the Court’s concerns over “institutional” limits. These notably included the Court’s recognition that (1) assessing school finance and management provisions “raise[es] very complicated and controversial questions, and an inexperienced and inexpert Supreme Court ought not to impose [restraints] which curtail state experimentation” in violation of separation of powers and (2) “substantial federalism concerns are threatened by the prospect of upsetting” state-based school finance provisions. See Sager, *supra* note 90, at 1218.

121. See generally James G. Hodge, Jr., *The Role of New Federalism and Public Health Law*, 12 J.L. & HEALTH 309 (1998).

122. 501 U.S. 452, 453 (1991).

123. *Id.* at 457–58.

powers.”¹²⁴ Despite individual rights concerns, mandatory retirement ages for state judges is purely a matter of state concern.¹²⁵

In *New York v. United States* (1992),¹²⁶ Justice O’Connor, again writing for the majority, invalidates “take title” provisions¹²⁷ of the Low-Level Radioactive Waste Policy Amendments Act of 1985.¹²⁸ To the extent states are presented with an option of taking ownership of nuclear waste or held liable for its disposal, Congress unconstitutionally attempted to “commandeer the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program.”¹²⁹ Consistent with a cohesive view of principles of federalism, she notes: “[T]he Constitution divides authority between federal and state governments, . . . for the protection of individuals.”¹³⁰

In *United States v. Lopez* (1995),¹³¹ a minor faced criminal charges for possessing a gun at school in violation of the federal Gun Free School Zones Act (GFSZA).¹³² His attorneys look beyond rights-based arguments to craft a successful federalism challenge to Congress’ commerce authority¹³³ to implement the Act itself. Chief Justice Rehnquist agrees that Congress lacks commerce powers to penalize the mere possession, absent more, of a gun on or near school grounds. “To uphold the Government’s contentions,” asserts the Court, “we would have to . . . convert congressional au-

124. *Id.* at 460. Justice O’Connor noted that States’ authority to determine the qualifications of important government officials is at the heart of a representative government and protected under the Tenth Amendment. *Id.* at 463.

125. *Id.*

126. 505 U.S. 144 (1992).

127. The “take title” provisions of the Act required that any state that fails to provide for disposal of low-level nuclear waste generated within its borders by January 1, 1996, must either take title to, or possession of, the waste, or else be liable for all damages incurred by an in-state generator or owner of such waste. 42 U.S.C. § 2021(b) (1992).

128. *Id.*

129. *New York*, 505 U.S. at 202. As Justice O’Connor elucidates further:

States are not mere political subdivisions of the United States. State governments are neither regional offices nor administrative agencies of the Federal Government. The positions occupied by state officials appear nowhere on the Federal Government’s most detailed organizational chart. The Constitution instead “leaves to the several States a residuary and inviolable sovereignty.”

citing THE FEDERALIST NO. 39, at 245 (C. Rossiter ed., 1961), reserved explicitly to the States by the Tenth Amendment. *Id.* at 188.

130. *New York*, 505 U.S. at 181. As Robert Schapiro concludes, “[F]ederalism protects citizens, not states.” ROBERT SCHAPIRO, POLYPHONIC FEDERALISM: TOWARD THE PROTECTION OF FUNDAMENTAL RIGHTS 76 (2009).

131. 514 U.S. 549 (1995).

132. Gun-Free School Zones Act, 18 U.S.C. § 922(q)(1)(A) (1990) [hereinafter GFSZA].

133. U.S. CONST. art. I, § 8, cl. 3 (“[Congress shall have] power to regulate Commerce with foreign Nations, and among the several States and with the Indian Tribes.”).

thority under the Commerce Clause to a general police power of the sort retained by the States.”¹³⁴

As a result of Supreme Court decisions in cases like *Gregory, New York*, and *Lopez*,¹³⁵ portions of federal acts designed to promote public health and safety nationally are repudiated solely on structural grounds. Similar decisions abound among lower courts. In *ACORN v. Edwards* (1996),¹³⁶ for example, the Fifth Circuit Court of Appeals invalidates a provision of the federal Lead Contamination Control Act of 1988,¹³⁷ requiring states to create remedial programs to limit lead in drinking fountains.¹³⁸ Congress’ attempt to implement the program is an “unconstitutional intrusion upon the States’ sovereign prerogative to legislate as it sees fit.”¹³⁹

In November 2018, a federal district court in Michigan ruled that Congress lacked commerce authority to criminalize interstate cases of female genital mutilation (FGM). In *United States v. Nagarwala*,¹⁴⁰ the court sees a disconnect between specific commercial activity and the local practice of FGM under themes previously laid out in *Morrison*.¹⁴¹ “[F]ederalism concerns,” suggests the court,

134. *Lopez*, 514 U.S. at 567–68.

135. After the Court’s decision in *Lopez*, Congress amended GFSZA to require that affected firearms must have “moved in or otherwise affect interstate or foreign commerce.” GFSZA § 922(q)(2)(A) (1990). GFSZA declares,

Congress has the power, under the interstate commerce clause . . . to ensure the safety of the nation’s schools by reasoning that crime involving firearms is a nationwide problem, firearms and ammunition move easily in interstate commerce, and violent crime in school zones results in a decline in the quality of education which adversely impacts interstate commerce.

Id. at § 922(q)(1)(A)-(I). Correspondingly, most courts have upheld convictions under GFSZA. *See, e.g.*, *United States v. Weekes*, 224 F. App’x 200 (3d Cir. 2007); *United States v. Smith*, (6th Cir. 2005); *United States v. Dorsey*, 418 F.3d 1038 (9th Cir. 2005); *United States v. Nieves-Castano*, 480 F.3d 597 (1st Cir. 2007); *United States v. Cruz-Rodriguez*, 541 F.3d 19 (1st Cir. 2008). *But see* *United States v. Tait*, 202 F.3d 1320 (11th Cir. 2000); *United States v. Haywood*, 657 Fed. Appx. 97 (3rd Cir. 2016); *United States v. Guzman-Montanez*, 756 F.3d 1 (1st Cir. 2014).

136. 81 F.3d 1387 (5th Cir. 1996).

137. H.R. REP. No. 1041, at 6–8 (1988), *reprinted in* 1988 U.S.C.C.A.N. 3793, 3793–95.

138. Section 300j-24(d) of the Lead Contamination Control Act “requires each State to ‘establish a program, consistent with this section,’ to assist local educational agencies, schools, and day care centers in remedying potential lead contamination in their drinking water systems.” *ACORN*, 81 F.3d at 1394.

139. *ACORN*, 81 F.3d at 1394.

140. 350 F. Supp. 3d 613 (E.D. Mich. 2018).

141. *See e.g.*, *United States v. Morrison*, 529 U.S. 598, 610–13 (2000) (The Supreme Court delineated four factors to assess the viability of congressional acts under the commerce power: (1) the economic nature of the activity; (2) a jurisdictional element limiting the reach of the law to a discrete set of activities with explicit connections with, or effect on, interstate commerce; (3) express congressional findings regarding the regulated activity’s effects on interstate commerce; and (4) the link between the regulated activity and interstate commerce.). In *Nagarwala*, 350 F. Supp 3d, the court held that FGM was not a commercial activity because of a lack of an interstate market and that it was essentially a violent

“deprive Congress of the power to enact [the statute prohibiting FGM]”¹⁴² given an absence of proof of substantial effects on interstate commerce.¹⁴³ In December 2018, federal district court Judge Reed O’Connor invalidated the ACA¹⁴⁴ in *Texas v. United States*.¹⁴⁵ When Congress zeroed out the penalty assessed on eligible persons who did not acquire health insurance via the individual mandate in 2017,¹⁴⁶ the court concludes that the entire ACA is voided under an obtuse interpretation of principles of severability embedded within separation of powers.

In each of these cases, results inapposite to Congress’ laudable public health objectives reflect the risks of advancing structural arguments. Structural principles may help stabilize government levels and branches, but not always lead to favorable public health outcomes.

C. *Constitutional Inferences*

The prior two applications of *constitutional cohesion* reflect fairly-settled, albeit often under-utilized, principles of constitutional law. Despite risks inherent in the utilization of these themes, the merits of applied arguments grounded in intervening rights and structural swords are indubitable. Intervening rights principles illuminate unconstitutional elements of government acts that may otherwise be adjudged as lawful. Structural swords may derail governmental interventions that may not fully rise to the level of rights infringements, but still reflect unconstitutional vices.

There are, however, additional opportunities to interject constitutional norms challenging existing laws or policies. A court may identify that a specific act (or omission) negatively impacts the public’s health, but fail to conclude that it impinges one’s rights

crime, which the Supreme Court has previously held to not be economic activity. *See* *United States v. Lopez*, 514 U.S. 549, 561 (1995).

142. *Nagarwala*, 350 F. Supp. 3d at 618.

143. The court determined there were no significant congressional findings or other evidence of a substantial effect on interstate commerce despite Congress’ findings that the practice of FGM (1) is carried out by members of certain cultural and religious groups; (2) often results in physical and psychological health effects among affected women; (3) infringes on specific rights; (4) can be difficult for any single State or local jurisdiction to prohibit; and (5) can be prohibited without violating persons’ religious freedoms under the First Amendment. *Nagarwala*, 350 F. Supp. 3d at 629 n.8.

144. 42 U.S.C. § 18001 (2010).

145. No. 4:18-CV-00167-O (N. D. Tex. Dec. 14, 2018).

146. Sarah Somers & Jane Perkins, *Texas Court Decision on the Affordable Care Act: The Ruling and What to Expect*, NAT’L HEALTH LAW PROGRAM (Dec. 17, 2018) <https://healthlaw.org/texas-court-decision-on-the-affordable-care-act-the-ruling-and-what-to-expect/>; *see also* James G. Hodge, *Judicial Invalidation of the Affordable Care Act*, JURIST (Dec. 19, 2018), <https://www.jurist.org/commentary/2018/12/james-hodge-judge-invalid-aca/>.

under a prevailing balance test or other interpretation.¹⁴⁷ Such an outcome could easily be attributed to a consequence of constitutional balancing: sometimes an offending law or policy does not sufficiently implicate structural or rights-based infringements. However, it also may extend from a failure to properly recast a constitutional issue in terms of an identifiable vice. The principle of constitutional inferences suggests that vices may be inferred from governmental violations.

Constitutional vices may arise even when clear breaches of specific, enumerated rights or aberrations of structural norms do not. During the 1920s, the Supreme Court justified incorporating key Bill of Rights principles to the states via the Fourteenth Amendment in part to counter known vices. In *De Jonge v. State of Oregon* (1937), Chief Justice Hughes elucidates: “[E]xplicit mention [of rights to assemble in the First Amendment] does not argue [for its] exclusion elsewhere. For the right is one that cannot be denied without violating those fundamental principles of *liberty* and *justice* which lie at the base of *all civil and political institutions*” (emphasis added).¹⁴⁸ Years later, in 1945, concurring Justice Jackson acknowledges inherent vices at stake in *Northwestern Bands of Shoshone Indians v. United States*,¹⁴⁹ denying Native Americans’ property rights to reservation lands.¹⁵⁰

In 2015, the Supreme Court recognized a constitutional right to same-sex marriage under substantive due process in *Obergefell v. Hodges*.¹⁵¹ Justice Kennedy equates vice determinations within a framework of injustices:

147. Many courts may be leery of arguments disguised as “vices” but actually grounded in ethical or normative judgments. Samuel Enoch Stumpf, *The Moral Element in Supreme Court Decisions*, 6 VAND. L. REV. 41, 41 (1952) (“[T]he past twenty years reveals a manful resistance on the part of [Supreme Court] judges to intrude their moral and ethical judgments into their decisions.”). In cases unrelated to constitutional questions, judicial efforts to correct injustices may be expressed through proclaimed public policy exceptions to long-settled doctrines. See generally G.N. Williams, *Importance of Public Policy Considerations in Judicial Decision Making*, 25 INT’L LEGAL PRAC. 134 (2000).

148. *De Jonge v. Oregon*, 299 U.S. 353 (1937). See also *Adamson v. California*, 332 U.S. 46, 53 (1947). The Court failed to incorporate all of the first eight constitutional amendments to the states, Justice Black’s dissent relied extensively on statements from Rep. John Bingham, a primary framer of the Fourteenth Amendment in 1868. He justified the amendment to thwart the “[m]any instances of State injustice and oppression [that had] already occurred in the State legislation of this Union.” *Id.* at 107.

149. *Northwestern Bands of Shoshone Indians v. United States*, 324 U.S. 335, 355 (1945) (“The generation of Indians who suffered the privations, indignities, and brutalities of the westward march of the whites have gone to the Happy Hunting Ground, and nothing that we can do can square the account with them.”).

150. *Id.* (“[J]udgment or no judgment—a moral obligation of a high order rests upon this country to provide for decent shelter, clothing, education, and industrial advancement of [Native Americans] . . . The Indian problem is essentially a sociological problem, not a legal one.”).

151. 135 S. Ct. 2584, 2589 (2015).

The nature of *injustice* is that we may not always see it in our own times. The generations that wrote and ratified the Bill of Rights . . . did not presume to know the extent of freedom in all its dimensions *When new insight reveals discord between the Constitution's central protections and a received legal stricture*, a claim to liberty must be addressed (emphasis added).¹⁵²

Generating new rights, in essence, begins with identification of “injustices” (or governmental vices) through new “insights.” It is the Court’s unique role, in fact, its constitutional duty,¹⁵³ to consistently look for and clarify these vices¹⁵⁴ even when the underlying issues are politically dynamic.¹⁵⁵ Still, ascertaining the scope and nature of constitutional vices is complicated and controversial. Reasonable minds differ on what actually constitutes a vice. Some may, for example, denote the allowance of rampant acts of gun violence nationally as a form of government oppression. Others insist that the Second Amendment right to bear arms (which supports populations’ liberal access to guns) exists to deter government oppression.¹⁵⁶ Somewhere between these views lies an appropriate legal balance that respects Second Amendment rights and enhances communal health pursuant to principles of *constitutional cohesion*.

Despite the complexities of ascertaining vices, whenever a constitutional vice can be tied to government action or inaction, concomitant remedies assuredly exist to address it. The notion that the Constitution provides fixed provisions of unbending nature may be the mantra of originalists, but it hardly befits the role of the judiciary, particularly the Supreme Court, to assess vices and ascribe protections. As Professor Cass Sunstein notes, “[c]onstitutional change is often a product not of constitutional amendment, but of interpretation, leading to new understandings of old provisions.”¹⁵⁷ As Justice Kennedy concludes in *Obergefell*, the Constitution is suffi-

152. *Id.* at 2598.

153. *See id.* (“The identification and protection of fundamental rights [are] an enduring part of the judicial duty to interpret the Constitution . . . [that] has not been reduced to any formula.”).

154. As the Supreme Court denotes in *Marbury v. Madison*, 5 U.S. 137, 177 (1803), it is “emphatically the province and duty of the judicial department to say what the law is.”

155. *See generally* Juliana v. United States, 217 F. Supp. 3d 1224, 1263 (D. Or. 2016); *see infra* discussion Part IV A.

156. *Mosby v. Devine*, 851 A.2d 1031, 1052 (R.I. 2004) (Flanders, J., dissenting) (arguing that an armed populace was needed to “provide a republican counterweight to the omnipresent threat that government rulers exercising arbitrary power would usurp the people’s rights and liberties”).

157. Cass R. Sunstein, *Why Does the American Constitution Lack Social and Economic Guarantees*, 56 SYR. L. REV. 1, 10–11 (citing David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877 (1996)).

ciently flexible, to permit “future generations [to] protect . . . the right of all persons to enjoy liberty as we learn its meaning.”¹⁵⁸

III. AUXILIARY, CREATIVE, AND GHOST RIGHTING

At the crux of principles of *constitutional cohesion* is the premise that constitutional remedies exist to counter known or identified vices, specifically among governmental actors. These remedies may be found within structural foundations or explicit enumerated rights. Yet sometimes, as per the notion of constitutional inferences, the cure for a known vice may not be explicitly framed in rights-based protections or structural principles. In such cases, it may be easy to conclude there is no constitutional remedy for an identified vice. This is simply untrue.

Constitutional interpretations in response to governmental actions or inactions implicating vices take many forms, most notably framed in rights-based parlance. Long-standing Supreme Court jurisprudence reveals that not every right has to be specified constitutionally to warrant protection.¹⁵⁹ Unstated rights may flow from new interpretations of express language in the Bill of Rights as well as the structure of the Constitution itself.¹⁶⁰ Some legal scholars assert that the Ninth Amendment¹⁶¹ supports unenumerated rights¹⁶² by clarifying how the limited provisions in the Bill of Rights did not foreclose the existence of other rights.¹⁶³ Professor Akhil Reed Amar posits that the judiciary is poised via the Ninth Amendment to

158. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2598 (2015).

159. Sunstein, *supra* note 157, at 11.

160. See Randy E. Barnett, *Unenumerated Constitutional Rights and the Rule of Law*, 14 HARV. J.L. & PUB. POL'Y 615, 628 (1991) (James Wilson has proclaimed that “[i]n all societies, there are many powers and rights, which cannot be particularly enumerated.”).

161. U.S. CONST. amend. IX (“The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.”).

162. See, e.g., Randy E. Barnett, *The Ninth Amendment: It Means What It Says*, 85 TEX. L. REV. 1, 1, 3 (2006) (classifying multiple models for interpreting the purposes of the Ninth Amendment and concluding that one, the individual natural rights model, “preserve[s] unenumerated individual rights”); see also Kurt Lash, *The Lost Original Meaning of the Ninth Amendment*, 83 TEX. L. REV. 331, 347, 362 (2004) (suggesting Barnett’s individual natural rights interpretation could protect a “collective right of the people to state or local self-government” under principles of federalism).

163. See, e.g., 1 ANNALS OF CONGRESS 439 (1789). Concerning the proposition of the Bill of Rights, Framers James Madison stated:

It has been objected also against a bill of rights, that, by enumerating particular exceptions to the grant of power, it would disparage those rights which were not placed in that enumeration; and it might follow by implication, that those rights which were not singled out, were intended to be assigned into the hands of the General Government, and were consequently insecure. This is one of the most plausible arguments I have ever heard against the admission of a bill of rights into this system; but, I conceive, that it may be guarded against.

consider unexpressed individual rights “that nevertheless might deserve constitutional status.”¹⁶⁴

Under these and other perspectives examined below, new rights may emerge (1) from cobbled interpretations of a penumbra of rights (“auxiliary righting”); (2) expanded conceptions of existing rights (“creative righting”); or (3) ethereal rights generated from principles embedded within structural foundations or unstated constitutional norms (“ghost righting”).

A. *Auxiliary Righting*

Constitutional textualists tend to look solely at the express language of the Constitution to ascertain whether rights exist.¹⁶⁵ However, Supreme Court jurisprudence is not limited to the actual, specific text or originalist notions of the Framers’ intended meaning.¹⁶⁶ To the extent the Constitution is a living document capable of modern application, the Court has consistently demonstrated a willingness to view its protections beyond antiquated notions.¹⁶⁷

A clear example of constitutional flexibility relates to the Court’s expansive view of rights of privacy. Modern privacy rights evolved from initial conceptions dating back to the late nineteenth century,¹⁶⁸ but it was not until the mid-1960s that the Supreme Court explicitly acknowledged a standalone “right to privacy.” In *Griswold v. Connecticut* (1965),¹⁶⁹ the Court strikes down a state law prohibiting birth control. As Justice Douglas explains for the majority, privacy rights are not explicitly framed in the Constitution. Rather, they are undergirded via the First, Third, Fourth, Ninth, and Fourteenth Amendments. Collectively, these provisions provide “penumbras” from which “zones of privacy” originate.¹⁷⁰ In this way, the Court examines the Constitution as a cohesive whole instead of a mere assemblage of principles to craft auxiliary privacy rights that were otherwise unstated textually. Modern privacy rights buttress

164. AKHIL REED AMAR, *AMERICA’S CONSTITUTION: A BIOGRAPHY* 328 (2005). Professor Amar prompts judges to “look for rights that the people themselves have truly embraced—in the great mass of state constitutions, perhaps, or in widely celebrated lived traditions, or in broadly inclusive political reform movements.” *Id.* at 329.

165. See Victoria Nourse, *Two Kinds of Plain Meaning*, 76 *BROOK. L. REV.* 997, 1003 (2011).

166. See Michael A. Livermore & Theodore D. Rave, *Conversation, Representation, and Allocation: Justice Breyer’s Active Liberty*, 81 *N.Y.U. L. REV.* 1505, 1508 (2006).

167. Terrance Sandalow, *Constitutional Interpretation*, 79 *MICH. L. REV.* 1033, 1054 (1981).

168. See S. D. Warren & L. D. Brandeis, *The Right to Privacy*, 4 *HARV. L. REV.* 193 (1890).

169. 381 U.S. 479, 486 (1965).

170. *Id.* at 484.

reproductive and other freedoms¹⁷¹ with significant corollary public health benefits.

One of Americans' cherished freedoms is their claim of a right to citizenship pursuant to the Fourteenth Amendment.¹⁷² The amendment's text, however, does not speak to one's right to remain a citizen. In 1958, the Court holds that federal authority to revoke citizenship resides in Congress' implied power to regulate foreign affairs.¹⁷³ In *Afroyim v. Rusk* (1967),¹⁷⁴ it reverses course. Writing for the majority, Justice Black finds that the Constitution "grants Congress no express power to strip people of their citizenship."¹⁷⁵ Citizenship is so fundamental to societal structure that the Fourteenth Amendment must be interpreted to protect one's right to be free from involuntary expatriation.¹⁷⁶ This auxiliary right arising in *Afroyim* cannot be "shifted, canceled, or diluted at the will of the Federal Government, the States, or any other governmental unit."¹⁷⁷

In a remarkable modern case, *Juliana v. United States* (2016),¹⁷⁸ climate activists sue multiple federal entities during President Obama's administration in a federal district court in Oregon.¹⁷⁹ They raise several claims, including substantive due process violations regarding federal failures to address climate change.¹⁸⁰ Feder-

171. *Roe v. Wade*, 410 U.S. 113, 155 (1973).

172. U.S. CONST. amend. XIV, § 1 ("All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside.")

173. *Perez v. Brownell*, 356 U.S. 44, 62 (1958) (affirming Congress' right to revoke the petitioner's citizenship after he voted in a foreign election).

174. 387 U.S. 253, 268 (1967) (striking down a federal statute enabling revocation of citizenship based on a person's actions to vote in another country's legislative body).

175. *Id.* at 257, 258–62 (discussing the legislative history of expatriation, including a proposed bill to require the consent of the federal government before an individual can voluntarily renounce his or her citizenship).

176. *Id.* at 268.

177. *Id.* at 262.

178. 217 F. Supp. 3d 1224, 1233 (D. Or. 2016). In 2018, the Ninth Circuit Court of Appeals denied the U.S. petition for a writ of mandamus. After multiple procedural maneuvers, including two Supreme Court orders, the case is currently stayed pending a decision by the Ninth Circuit.

179. *See, e.g.*, Steve Kroft, *The Climate Change Lawsuit that Could Stop the U.S. Government from Supporting Fossil Fuels*, CBS NEWS (Mar. 3, 2019), <https://www.cbsnews.com/news/juliana-versus-united-states-the-climate-change-lawsuit-that-could-stop-the-u-s-government-from-supporting-fossil-fuels-60-minutes/>.

180. *Juliana*, 217 F. Supp. 3d at 1233. The constitutionally-framed arguments raised by the plaintiffs make more sense in part due to the 2011 decision of the U.S. Supreme Court in *American Electric Power Co. v. Connecticut*, 564 U.S. 410 (2011), denying state-based claims for damages related to greenhouse gas emissions as violations of federal public nuisance law. Justice Ginsburg, writing for the majority, determined that Congress' passage of multiple federal laws empowering the Environmental Protection Agency (EPA) to regulate greenhouse gases effectively circumvented any nuisance claim even if the EPA failed to properly or fully regulate. *Id.* at 420–29.

al defendants challenge plaintiffs' standing¹⁸¹ and question the court's capacity to adjudicate non-justiciable political questions under principles of separations of powers.¹⁸² Recognizing the case is no "ordinary lawsuit,"¹⁸³ Judge Aiken disagrees with the federal defendants, systematically striking down their structural arguments.¹⁸⁴ She then sweeps aside the government's contention that it need only demonstrate a minimal rationale for its efforts concerning climate change under substantive due process.

In so doing, Judge Aiken paves the way for a unique and aggressive interpretation of plaintiffs' liberty interests. Citing Supreme Court precedents, the court clarifies that fundamental liberty interests include enumerated rights as well as rights (1) "deeply rooted in this Nation's history and tradition" or (2) "fundamental to our scheme of ordered liberty[.]"¹⁸⁵ While the Supreme Court is leery of expansive interpretations of liberty interests,¹⁸⁶ recognition of new fundamental rights is not "out of bounds."¹⁸⁷ "[I] have no doubt," concludes Judge Aiken, "that *the right to a climate system capable of sustaining human life is fundamental to a free and ordered society.*"¹⁸⁸ Consistent with Supreme Court reasoning in *Obergefell v.*

181. The defendants' claim that the U.S. could not be sued for failure to act was rejected by the court. *See Massachusetts v. EPA*, 549 U.S. 497 (2007) (finding that the Commonwealth had standing to challenge the EPA's refusal to regulate greenhouse gas emissions). When the federal government exercises its powers, states may sue to compel it to act in accordance with that power where state's public health, environmental, or other interests are at risk. *Id.*

182. *Juliana*, 217 F. Supp. 3d at 1235.

183. *Id.* at 1234. ("[T]his lawsuit is not about proving that climate change is happening or that human activity is driving it . . . those facts are undisputed. The questions before the Court are whether defendants are responsible for some of the harm caused by climate change, whether plaintiffs may challenge defendants' climate change policy in court, and whether this Court can direct defendants to change their policy without running afoul of the separation of powers doctrine.").

184. *Id.* at 1251. As the court explicates, separation of powers principles may limit its jurisdiction outside actual cases or controversies; "federal courts retain broad authority 'to fashion practical remedies when confronted with complex and intractable constitutional violations.'" *Id.* at 1242–43 (citing *Brown v. Plata*, 563 U.S. 493, 526 (2011)).

185. *Id.* at 1249 (citing *McDonald v. City of Chicago*, 561 U.S. 742, 767 (2010)) (internal citations, quotations, and emphasis omitted).

186. *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997) (citation and quotation marks omitted).

187. *Juliana*, 217 F. Supp. 3d at 1249 (emphasis added). Assessing whether a right is fundamental requires courts to engage in "reasoned judgment," keeping in mind that "[h]istory and tradition guide and discipline this inquiry but do not set its outer boundaries." *See Obergefell v. Hodges*, 135 S. Ct. 2584, 2598 (2015).

188. *Juliana*, 217 F. Supp. 3d at 1250 (emphasis added). Judge Aiken compares her crafting of this specific right akin to the Supreme Court's elucidation of a right to same-sex marriage from substantive due process principles in *Obergefell*, 135 S. Ct. 2584. "Just as marriage is the 'foundation of the family,' a stable climate system is quite literally the foundation 'of society, without which there would be neither civilization nor progress.'" *Juliana*, 217 F. Supp. 3d at 1250–51 (quoting *Maynard v. Hill*, 125 U.S. 190, 211 (1888)); *cf. Minors Oposa v. Sec'y of the Dep't of Env't'l & Nat. Res.*, G.R. No. 101083, 33 I.L.M. 173, 187–88 (S.C., July 30, 1993) (Phil.) (stating that without "a balanced and healthful ecology," future generations "stand to inherit nothing but parched earth incapable of sustaining life").

Hodges,¹⁸⁹ she views a stable climate system as essential to exercising other rights to life, liberty, and property.¹⁹⁰ Failing to assure it, whether via direct action or omission, infringes plaintiffs' fundamental rights under substantive due process.¹⁹¹

The bold illustration of auxiliary righting in *Juliana* is potentially short-lived. The federal government has appealed the decision multiple times to the Ninth Circuit Court of Appeals and the Supreme Court. Both courts have allowed the trial court to proceed while signaling incongruities with its determinations. Regardless of its fate, the decision provides key insights for other activist courts seeking to identify constitutional vices with supporting rights to address them.¹⁹²

B. Creative Righting

Through auxiliary righting, courts look beyond unstated principles to craft individual rights via enhanced interpretations emanating from constitutional foundations. In other cases, courts rely on creative assessments of explicit rights-based language. In either instance, the result is the same: new rights conceptions are born from jurists wielding constitutional principles toward a specific end.

"Creative righting" can behoove the public's health. For example, the Supreme Court has increasingly culled from the prohibitive language of the Eighth Amendment an affirmative obligation to protect prisoners' health. In *Helling v. McKinney* (1993),¹⁹³ it

189. *Obergefell*, 135 S. Ct. at 2599.

190. *Juliana*, 217 F. Supp. 3d at 1250.

191. *Id.* at 1251 (citing *Penilla v. City of Huntington Park*, 115 F.3d 707, 709 (9th Cir. 1997) (keeping its analyses within what has been labeled the "danger creation" exception to the Supreme Court's determination in *DeShaney v. Winnebago County Department of Social Services*, 489 U.S. 189 (1989), that government generally is not required to act for one's benefit under the liberty principle, and pursuant to this exception, government may plausibly be required to act when it "places a person in peril in deliberate indifference to their safety"). In *Juliana*, the alleged peril is the government's failure to limit third-party CO2 emissions contributing to climate change and negative health and environmental effects. For the claim to prevail, plaintiffs would have to demonstrate at trial that "(1) the government's acts created the danger to the plaintiff; (2) the government knew its acts caused that danger; and (3) the government with deliberate indifference failed to act to prevent the alleged harm." *Juliana*, 217 F. Supp. 3d at 1252.

192. See *infra* text accompanying note 322; see also Alfred T. Goodwin, *A Wake-Up Call for Judges*, 2015 Wis. L. REV. 785, 785–86, 788 (2015) ("The third branch can, and should, take another long and careful look at the barriers to litigation created by modern doctrines of subject-matter jurisdiction and deference to the legislative and administrative branches of government.").

193. 509 U.S. 25, 25, 31 (1993) (addressing whether a viable Eighth Amendment claim exists "by alleging that his compelled exposure to [environmental tobacco smoke] poses an unreasonable risk to his health").

rules that involuntary exposure to second-hand smoke can form the basis of an Eighth Amendment injunction. While such protections historically apply to more egregious government conduct (e.g., torture),¹⁹⁴ *Helling* extends them to obviate mere risks of injury to prisoners.¹⁹⁵ Using a similar analysis in *Brown v. Plata* (2011),¹⁹⁶ the Court limits prison overcrowding in California on grounds of inadequate access to mental health care. “A prison that deprives prisoners of basic sustenance, including adequate medical care,” notes the Court, “is incompatible with the concept of human dignity and has no place in civilized society.”¹⁹⁷

In *Cruzan v. Director, Missouri Department of Health* (1990),¹⁹⁸ a fundamental right to refuse medical treatment is deduced from substantive due process via the Fourteenth Amendment. The guardians of a patient in a vegetative state fought to exercise her wish to terminate artificial hydration and nutrition.¹⁹⁹ Under due process, the Court infers a “constitutionally protected liberty interest in refusing unwanted medical treatment.”²⁰⁰ Justice Antonin Scalia, in concurrence, belies the Court’s apparent departure from the Constitution’s text and purpose.²⁰¹

Unfortunately, public health promotion can also be lost in constitutional translations. In 2008, the Supreme Court’s interpretation of the right to bear arms in *District of Columbia v. Heller*²⁰² led to a substantial reassessment of the Second Amendment.²⁰³ Justice Scalia bifurcates the Amendment’s (1) prefatory clause (“A well regulated Militia, being necessary to the Security of a free State”) from the (2) operative clause (“the right of the people to keep and bear arms, shall not be infringed”). Dismissing the former clause as nonessential despite long-standing established precedent,²⁰⁴ Justice

194. See *Robinson v. California*, 370 U.S. 660 (1962) (incorporating the Eighth Amendment against the state of California and all other states as a result); *Wilkerson v. Utah*, 99 U.S. 130, 136 (1878) (“[I]t is safe to affirm that punishments of torture . . . and all others in the same line of unnecessary cruelty, are forbidden by” the Eighth Amendment.).

195. *Helling*, 509 U.S. at 35. In dissent, Justice Clarence Thomas argued that the Court’s expansion of Eighth Amendment’s protections went “beyond all bounds of history and precedent.” *Id.* at 37 (Thomas, J., dissenting).

196. 563 U.S. 493, 510–11 (2011).

197. *Id.* at 511.

198. 497 U.S. 261 (1990).

199. *Id.* at 278.

200. *Id.*

201. “The text of the Due Process Clause does not protect individuals against deprivations of liberty *simpliciter*. It protects them against deprivations of liberty ‘without due process of law.’” *Id.* at 293 (Scalia, J., dissenting).

202. 554 U.S. 570, 573 (2008).

203. U.S. CONST. amend. II (“A well regulated militia, being necessary to the security of a free state, the right of the people to keep and bear arms, shall not be infringed.”).

204. *Lewis v. United States*, 445 U.S. 55, 65–66 (1980) (holding that a federal statute prohibiting a felon from owning a firearm “is consonant with the concept of equal protection embodied in the Due Process Clause of the Fifth Amendment”); *United States v. Miller*,

Scalia argues that the operative language creates a right to self-defense at home with a lawful firearm. In dissent, Justice Stevens alleges that the “Court appear[s] to have fashioned [its interpretation] out of whole cloth.”²⁰⁵

The Court’s re-envisioning of Second Amendment language reflects a modern example of creative righting that drew immediate criticism with lasting repercussions on public health and safety. Countless gun laws and policies survive public health challenges due, in part, to the Court’s aggressive assessment of individual rights to bear arms.²⁰⁶ Tens of thousands of Americans are injured or killed needlessly due to lax gun control measures.²⁰⁷ In 2018, retired Justice Stevens called for a complete repeal of the Second Amendment given the horrendous escalation of gun-related deaths nationally.²⁰⁸ Early in 2019, the Court agreed via a slim 5-4 vote to hear oral arguments in *New York State Rifle and Pistol Association v. City of New York* in which gun rights proponents challenge a restrictive local handgun possession ordinance.²⁰⁹ Public health officials are already prognosticating the Court’s further expansion of Second Amendment rights in its forthcoming decision.²¹⁰

C. Ghost Righting

As ready examples of constitutional inferences, auxiliary or creative righting involve interpretive judicial exercises based on existing Constitutional provisions. “Ghost righting,” however, is distinct.

307 U.S. 174, 178 (1939) (stating that the Court “cannot say that the Second Amendment guarantees the right to keep and bear” a “shotgun having a barrel of less than eighteen inches in length”).

205. *Heller*, 554 U.S. at 646 (Stevens, J., dissenting).

206. See Jon S. Vernick & Stephen P. Teret, *Firearms & Health: The Right to be Armed with Accurate Information About the Second Amendment*, 83 AM. J. PUB. HEALTH 1773, 1773; Daniel W. Webster et al., *Flawed Gun Policy Research Could Endanger Public Safety*, 87 AM. J. PUB. HEALTH 918 (1997).

207. *Guns in the US: The Statistics Behind the Violence*, BBC NEWS (Jan. 5, 2016) <https://www.bbc.com/news/world-us-canada-34996604>; Michelle Samuels, *Black American Life Expectancy Decreasing Disproportionately Due to Firearms*, B.U. SCH. OF PUB. HEALTH (Dec. 4, 2018) <https://www.bu.edu/sph/2018/12/04/gun-deaths-have-taken-2-5-years-off-us-life-expectancy/>.

208. John Paul Stevens, *Repeal the Second Amendment*, N.Y. TIMES (Mar. 27, 2018), <https://www.nytimes.com/2018/03/27/opinion/john-paul-stevens-repeal-second-amendment.html>.

209. *N.Y. State Rifle & Pistol Ass’n v. City of New York*, 883 F.3d 45 (2d Cir. 2018) (holding that a gun licensing scheme limiting the transportation of a firearm from the licensed address only “to and from an authorized small arms range/shooting club, unloaded, in a locked container, the ammunition to be carried separately” did not violate the Second Amendment), *cert. granted*, 139 S. Ct. 939 (U.S. Jan. 22, 2019) (No. 18-280).

210. Adam Liptak, *Justices Accept New York Case on Gun Rights*, N.Y. TIMES, Jan. 23, 2019, at A1 (“It could be a landmark case with major implications for gun policy”) (quoting gun control advocate Adam Winkler).

It refers to the capacity of courts to recognize or create core principles that neither the structure nor language of the Constitution explicitly convey or denote. Ghost righting seems mysterious, even shadowy. However, its foundations under advanced interpretations of constitutional norms are clearly seen related to expressed rights to education and travel.

In 1971, a federal district court in Massachusetts recognizes a constitutional right to education without specifying any underlying authority.²¹¹ A year later, another federal district court in New Hampshire acknowledges a right to public school education despite the absence of constitutional textual support.²¹² “[N]o authority was needed,” held the court, “for the fundamental American principle that a public school education through high school is a basic right of all citizens.”²¹³ In *San Antonio Independent School District v. Rodriguez* (1973),²¹⁴ the Supreme Court states, in dicta, that there is no explicit or implicit constitutional right to education.²¹⁵ Thirteen years later, however, in *Papasan v. Allain* (1986), the Court clarifies that whether a minimally adequate education is a fundamental right is “not yet definitively settled.”²¹⁶ Consequently, lower court cases holding that education is a fundamental right remain valid.

Modern scholars concur. Professor Susan Bitensky argues that Justice Powell, writing for the majority in *Rodriguez*, does not “adopt a rigid and absolutist position against the right [to education].”²¹⁷ Professor Derek Black argues for recognition of a collec-

211. *Ordway v. Hargaves*, 323 F. Supp. 1155, 1158 (D. Mass. 1971) (holding that a public school must reinstate a student given a failure by the school to demonstrate direct harms to the student or others). The court finds it is “beyond argument that the right to receive a public school education is a basic personal right or liberty.” *Id.*

212. *Cook v. Edwards*, 341 F. Supp. 307, 310–11 (D.N.H.1972) (holding a student’s indefinite expulsion from school implicated substantive due process because it could end the plaintiff’s scholastic career). The identified constitutional vice which the court was arguably attempting to address in its pronouncement relates most closely to oppression. In *Cook*, plaintiff alleges the defendant school board acted in excess of school district regulations regarding appropriate grounds and process for expulsion. *Id.*

213. *Id.* at 310–11.

214. 411 U.S. 1 (1973).

215. *Id.* at 34–35 (“It is not the province of this Court to create substantive constitutional rights in the name of guaranteeing equal protection of the laws. . . . Education, of course, is not among the rights afforded explicit protection under our Federal Constitution. Nor do we find any basis for saying it is implicitly so protected.”). Based in part on guidance from the Supreme Court, other lower courts have since disagreed with the findings in Massachusetts and New Hampshire. *See infra* Part IV.C.

216. 478 U.S. 265, 285 (1986) (deciding whether a disparate public school funding scheme unconstitutionally deprived children of a minimally adequate education). In *Rodriguez*, differences in public school funding resulted from “allowing local control over local property tax funding of the public schools.” *Id.* at 266–67. In *Papasan*, such differences resulted from state decisions to allocate resources. *Id.*

217. Susan H. Bitensky, *Theoretical Foundations for a Right to Education Under the U.S. Constitution: A Beginning to the End of the National Education Crisis*, 86 NW. U.L. REV. 550, 567 (1992)

tive constitutional right to education on historical bases as a means to obviate state malfeasance.²¹⁸ What prior courts adjudicated as a fundamental right to education absent any explicit textual sources exemplifies ghost righting.

The technique resurfaces in the Court's long-standing and multi-faceted recognition of rights to travel. Like privacy or education rights, nowhere in the language of the Constitution is there an explicit reference to rights to travel. Yet, in a series of cases, the Court specifically recognizes travel rights to address governmental infringements constituting malfeasance and other vices. In *Aptheker v. Secretary of State* (1964)²¹⁹ the Court invalidates a federal law barring members of communist organizations from using a passport.²²⁰ It notes:

Freedom of movement across frontiers in either direction, and inside frontiers as well, [is] a part of our heritage. Travel abroad, like travel within the country, . . . may be as close to the heart of the individual as the choice of what he eats, or wears, or reads. Freedom of movement is basic in our scheme of values.²²¹

Two years later, in *United States v. Guest* (1966),²²² the Supreme Court acknowledges that the “freedom to travel throughout the United States has long been recognized as a basic right under the Constitution,”²²³ despite any specific identified textual support.²²⁴ Instead, it relies on structural principles. State unification via the Constitution, surmises the Court in *Guest*, is not possible absent a right to travel.²²⁵

(suggesting that the Court would only adjudge the existence of such a right if presented with a case of a government that completely denied children access to an education).

218. Although Professor Black acknowledges education rights are not expressly guaranteed via the Constitution, he asserts that states attending the Constitutional Convention were required to add an education mandate to their state constitutions. Education, he posits, is fundamental to being a citizen and must not be infringed by state malfeasance. See Derek W. Black, *The Constitutional Compromise to Guarantee Education*, 70 STAN. L. REV. 735, 743, 745–46 (2018) (“[O]ne of the points of ensuring education as a basic right of citizenship was to place it beyond manipulation. Failure to do so would jeopardize the republican form of government itself.”). Unlike prior decisions, he would tie a right to education as an auxiliary to Fourteenth Amendment guarantees of citizenship. *Id.* at 744.

219. 378 U.S. 500 (1964).

220. See *id.* at 503–05 (holding unconstitutional § 6 of the Subversive Activities Control Act, making it a felony for a member of a Communist organization to apply for or use a passport).

221. *Id.* at 505–06 (citation omitted).

222. 383 U.S. 745 (1966).

223. *Id.* at 758.

224. See *id.* at 759. The Court briefly considers whether a right to travel flows from the Commerce Clause, but ultimately rejects this exploration.

225. See *id.* at 757.

Two decades later, Justice Brennan denotes how the “elusive” right to travel is historically inferred from “the federal structure of government adopted by our Constitution.”²²⁶ Even as the Court later connects some aspects of the right to travel to specific constitutional provisions, it reaffirms that at least one element of the right exists despite any textual support. In *Saenz v. Roe* (1999), it examines three components of the right to travel, only two of which have textual sources.²²⁷ First, U.S. citizens have a right “to be treated as a welcome visitor . . . when temporarily present” in another state under Article IV’s privileges and immunities clause. Second, they have a right to be treated like other citizens who are permanent state residents pursuant to the Fourteenth Amendment’s privileges and immunities clause.

In *Saenz*, the Court also finds that citizens have rights to ingress and egress across state borders. As in prior decisions, however, it cannot specify a constitutional source for this component.²²⁸ Borrowing language from earlier jurisprudence, the Court concludes that such rights “may simply have been ‘conceived from the beginning to be a necessary concomitant of the stronger Union the Constitution created.’”²²⁹ In essence, the right to ingress and egress exists despite a complete lack of direct constitutional support.²³⁰

The Court’s evolving analysis regarding the scope of a right to travel evinces a clear case of ghost righting. Unwritten rights on an individualized level arise from the very structure of the Constitu-

226. *Att’y Gen. of N.Y. v. Soto-Lopez*, 476 U.S. 898, 902 (1986) (emphasis added). As in *Guest*, the Court again considered and rejected enshrining the right specifically in the commerce clause (as well as in the Fourteenth Amendment). *Id.* at 902–03. As Justice Brennan opined, “the important role that [the right to travel] has played in transforming many States into a single Nation” precluded any need to textually base it. *Id.* at 902.

227. *Saenz v. Roe*, 526 U.S. 489, 500–03 (1999) (holding that the right to travel “protects the right of a citizen of one State to enter and to leave another State, the right to be treated as a welcome visitor rather than an unfriendly alien when temporarily present in the second State, and, for those travelers who elect to become permanent residents, the right to be treated like other citizens of that State”).

228. *Id.* at 498; see also *Soto-Lopez*, 476 U.S. at 902 (emphasis added).

229. *Saenz*, 526 U.S. at 501 (citing *United States v. Guest*, 383 U.S. 745, 758 (1966)). An alternative view related to the Court’s observation in this regard relates to its recognition that the right to ingress and egress extends from the prior structural relationship between the states that preceded constitutional framing. To this end, the right to ingress and egress is not so much about its “ghostly” presence within the Constitution, but the Court’s acknowledgment it preceded the development of the Constitution entirely. Even if this view is partially true, the Court attributes the right to constitutional structural facets.

230. See *Papachristou v. City of Jacksonville*, 405 U.S. 156, 164 (1972) (“[Walking, strolling, and wandering] are historically part of the amenities of life as we have known them. They are not mentioned in the Constitution or in the Bill of Rights. These unwritten amenities have been in part responsible for giving our people the feeling of independence and self-confidence, the feeling of creativity.”); see also Timothy Baldwin, *The Constitutional Right to Travel: Are Some Forms of Transportation More Equal Than Others?*, 1 NW. J.L. & SOC. POL. 213, 254 (2006) (“Justice Douglas sought to protect the act of walking, even if it is not mentioned in the Constitution or in the Bill of Rights.”) (citation omitted).

tion with manifold public health ramifications. Recognition of constitutional rights to ingress and egress necessitate balancing individual and communal interests across diverse policies related to sex offender registries, juvenile curfews, drug and gun free exclusion zones, and emergency evacuations/relocations.²³¹ The Court has shown particular disdain for state-based residency requirements to acquire health or other benefits. In *Shapiro v. Thompson* (1969),²³² it disfavors a one-year residency requirement for persons in the District of Columbia to become welfare eligible.²³³ Later, in *Memorial Hospital v. Maricopa County* (1974),²³⁴ it strikes down an Arizona statute mandating a one-year residency to garner non-emergency medical care at government's expense.²³⁵

IV. CONSTITUTIONAL RIGHT TO PUBLIC HEALTH

Theoretic and applied principles of *constitutional cohesion* broaden the range of arguments to address identifiable vices of government which the Constitution is designed to obviate or remedy. As Professor Sunstein recognizes, “the American Constitution has come to be interpreted in ways that depart from its original meaning.”²³⁶ In essence, “[t]he Constitution means what the Supreme Court says that it means.”²³⁷ Under this view, cohesive principles are significantly illustrated in multiple contexts. Infringements of rights may intervene to derail improper exercises of public health powers. Structural arguments may slice through misplaced or aggressive use of powers to promote communal health. Constitutionally-grounded positive and negative rights may be inferred from the identification of governmental vices. Auxiliary or creative right-

231. See generally Rebecca Eaton, *Escape Denied: The Gretna Bridge and the Government's Armed Blockade in the Wake of Katrina*, 13 TEX. WESLEYAN L. REV. 127 (2006); Larry E. Gee, *Federalism Revisited: The Supreme Court Resurrects the Notion of Enumerated Powers by Limiting Congress's Attempt to Federalize Crime*, 27 ST. MARY'S L.J. 151, 182 (1995); Kathryn E. Wilhelm, *Freedom of Movement at a Standstill? Toward the Establishment of a Fundamental Right to Intrastate Travel*, 90 B.U.L. REV. 2461 (2010).

232. 394 U.S. 618 (1969).

233. See *id.* at 642 (“[The] Due Process Clause of the Fifth Amendment prohibits Congress from denying public assistance to poor persons otherwise eligible solely on the ground that they have not been residents of the District of Columbia for one year at the time their applications are filed.”).

234. 415 U.S. 250 (1974).

235. See *id.* at 251, 253 (upholding the right to travel, in addition to guarding against government malfeasance, the Court sympathized with the plight of an impaired indigent needing access to medical care).

236. Sunstein, *supra* note 157, at 11. “I have emphasized that the meaning of the American Constitution changes because of new interpretations. If the Constitution meant, in all respects, what it originally meant, American constitutional rights would be thin indeed.” *Id.* at 19.

237. *Id.* at 5.

ing presents novel approaches to generate (or limit) rights-based objections to substantial legal threats to public health.

The ethereal concept of ghost righting, however, manifests something more. Though its applications are few, it provides a route for addressing governmental vices (oppression, overreaching, tyranny, malfeasance) captured in the spirit of the Constitution, but not necessarily its text.²³⁸ At a minimum, ghost righting provides a way for the Court to justify its assessments of inherent rights untethered to textual guideposts. Most rights are enumerated or derived from penumbras of various rights fashioned by the Court based on the Framers' perceptions or its own volition.²³⁹ Yet, some select rights are "conceived" solely because they are a "necessary concomitant" of the principles for which the Constitution stands.²⁴⁰ And, like enumerated, auxiliary, or creative rights, ghost rights carry an imprimatur of constitutional weight, meaning, and enforcement.²⁴¹

At its apex, ghost righting may help usher in a new constitutional right to public health. Judicial recognition of this right, however, faces considerable challenges. Exploration of the possible dimensions of the right begins with a recognition of (1) its legal shadows already entrenched in Supreme Court parlance; (2) "rights to health" principles enveloped in human rights, foreign and domestic constitutions, and other laws; and (3) opposition to navigating new, unenumerated rights through courts traditionally reluctant to recognize them.²⁴² For a pathway to emerge, the right to public health must be couched narrowly on assuring uniform protections

238. See, e.g., AKHIL REED AMAR, *THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION* 299 (1998) ("If rights can be unenumerated, is it possible to imagine entire constitutional amendments that are unwritten?").

239. See Sunstein, *supra* note 157, at 15.

240. See *Saenz v. Roe*, 526 U.S. 489, 501 (1999).

241. Professor Sager argues that just because a specific right may not be recognized fully, or "underenforced" as he describes it, does not mean it lacks constitutional support. The Supreme Court may lack the fortitude to have carved out a specific constitutional requirement based on institutional limitations, but government actors may still observe it. As he notes "government officials have a legal obligation to obey an underenforced constitutional norm which extends beyond its interpretation by the federal judiciary to the full dimensions of the concept which the norm embodies." This may require "governmental officials to fashion their own conceptions of these norms and measure their conduct by reference to these conceptions." Sager, *supra* note 90, at 1227.

242. Professor Sunstein attributes this failure in part to specific Justices appointed to the Court during an era of conservatism that militated against expansion of rights consistent with social and economic guarantees. See, e.g., Sunstein, *supra* note 157, at 5 ("[W]ith a modest shift in personnel, the Constitution would have been understood to create social and economic rights of the sort recognized in many modern constitutions."). Sunstein ultimately concludes "that judicial interpretation of the law, including the Constitution, has a great deal to do with the political commitments of the judges. The realist explanation stresses that American constitutional law is, to a considerable degree, a form of common law, based on analogical reasoning." *Id.* at 19–20.

of basic public health services without the constant specter of legislative or executive diminution.

A. *Shadows of the Right*

Unlike citizens of industrialized nations that long ago embraced universal health care,²⁴³ most Americans do not enjoy access to basic health services via governmental duties. Some Americans, however, do have a legitimate constitutional claim to these services. The shadow of a ghost right to public health is cast in the Court's recognition of governmental obligations to protect the health of specific populations, particularly prisoners and other wards of the state. Denying medical services to prisoners is an affront to human dignity²⁴⁴ in violation of the Eighth Amendment.²⁴⁵ Consistent with substantive liberty interests, government must also provide appropriate medical care for persons involuntarily committed or confined via quarantine, isolation, or for mental health purposes.²⁴⁶

The Court, however, historically refuses to interpret the Constitution as including anything approaching a positive right to health for all. In the aforementioned decision, *Memorial Hospital v. Maricopa County* (1974),²⁴⁷ it identifies health care as a "basic necessity of life,"²⁴⁸ but clarifies three years later in *Maher v. Roe* (1977)²⁴⁹ that "[t]he Constitution imposes no obligation on the States to pay" for indigent medical expenses.²⁵⁰ Subsequently, the Court finds that due process confers no specific rights to governmental aid for affected individuals²⁵¹ or impacted third parties.²⁵² Principles of equal protection support nondiscriminatory access to governmental

243. See, e.g., LAWRENCE O. GOSTIN, *GLOBAL HEALTH LAW* 263 (2014) (noting that Chile's 1925 constitution included a right to health).

244. *Brown v. Plata*, 563 U.S. 493, 511 (2011) (holding that prison overcrowding leading to improper mental health care is a violation of the Eighth Amendment).

245. *Estelle v. Gamble*, 429 U.S. 97, 97 (1976) ("Deliberate indifference by prison personnel to a prisoner's serious illness or injury constitutes cruel and unusual punishment contravening the Eighth Amendment.").

246. *Youngberg v. Romero*, 457 U.S. 307, 314–25 (1982) (holding the Fourteenth Amendment ensures reasonably safe conditions of confinement, freedom from unreasonable bodily restraints, and such minimally adequate training as reasonably might be required by these interests).

247. 415 U.S. 250, 269–70 (1974) (striking down an Arizona state law requiring residency status for access to publicly-funded medical care as a right to travel violation); see discussion *supra* Part III.C.

248. *Id.* at 259.

249. 432 U.S. 464, 469–80 (1977) (finding that the Equal Protection Clause did not require a state to pay Medicaid expenses incident to nontherapeutic abortions for indigent women simply because it had made a policy choice to pay expenses incident to childbirth).

250. *Id.* at 469.

251. *DeShaney v. Winnebago Cty., Dep't of Soc. Servs.*, 489 U.S. 189, 195 (1989).

252. *Town of Castle Rock v. Gonzales*, 545 U.S. 748, 768 (2005).

medical services,²⁵³ but do not actually require government to fund services in the first place.²⁵⁴ Absent recognition of an affirmative right to health, courts have allowed government to deny access to certain medical treatments²⁵⁵ and reject claims against parties alleged to have committed human rights abuses (including violations of rights to health) abroad.²⁵⁶

Given the jurisprudential black hole regarding access to health services for all Americans,²⁵⁷ proposals have arisen for federal constitutional or congressional recognition²⁵⁸ of globally-developed concepts on the “right to health.”²⁵⁹ In his State of the Union address on January 11, 1944, President Franklin Delano Roosevelt listed within his prospective Second Bill of Rights “[t]he right to adequate medical care and the opportunity to achieve and enjoy good health.”²⁶⁰ His vision has never been realized domestically, but multiple other countries explicitly provide for a right to health inclusive of basic public health services and medical care.²⁶¹ Varying

253. See Tom Stacy, *The Courts, the Constitution, and a Just Distribution of Health Care*, 3 KAN. J.L. & PUB. POL’Y 77, 83 (1993).

254. *Harris v. McRae*, 448 U.S. 297, 318 n.20 (1980) (quoting *Maher v. Roe*, 432 U.S. 464, 469 (1977)) (“The Constitution imposes no obligation on the [government] to pay the pregnancy-related medical expenses of indigent women, or indeed to pay any of the medical expenses of indigents.”).

255. In *Abigail All. for Better Access to Developmental Drugs v. Von Eschenbach*, 495 F.3d 695 (D.C. Cir. 2007), the court held that terminally ill persons have no constitutional right to acquire drugs not yet fully approved by FDA. In *Gonzales v. Raich*, 545 U.S. 1 (2005), the Supreme Court denied access to medicinal cannabis to patients seeking it under California state law as the drug remains unlawful via the federal Controlled Substances Act.

256. *Kiobel v. Royal Dutch Petro. Co.*, 569 U.S. 108, 118, 124 (2013). In 2018, the Court denied access to courts for similar suits against foreign corporations. See *Jesner v. Arab Bank, PLC*, 200 L. Ed. 2d 612, 632, 636 (2018).

257. See, e.g., Kenneth R. Wing, *The Right to Health Care in the United States*, 2 ANNALS OF HEALTH L. 161, 161 (1993) (“There is nothing that can be characterized . . . as a constitutional right to health care in the United States. The federal Constitution does not require any level of government to provide for or maintain the health of the population as a whole or any portion of it; there are a few circumstances under which an individual can make a constitutionally-based claim for a health or medical benefit, but these circumstances are rare and the use of the term ‘right to health care’ in reference to them would be both misleading and inappropriate.”).

258. See, e.g., H.R.J. Res. 30, 109th Cong. (2005).

259. Gostin, *supra* note 24; Sunstein, *supra* note 157, at 1–2.

260. See Sunstein, *supra* note 157, at 2 (citing President Franklin D. Roosevelt, Message to Congress on the State of the Union (Jan. 11, 1944) in 13 THE PUBLIC PAPERS & ADDRESSES OF FRANKLIN D. ROOSEVELT 40–42 (Samuel I. Rosenman ed., 1950)).

261. Many of these constitutional provisions are based on similar concepts within the Universal Declaration for Human Rights. G.A. Res. 217 (III) A, Universal Declaration of Human Rights, at 71 (Dec. 10, 1948) [hereinafter UDHR]. UDHR Article 25 explicitly proclaims that everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control. *Id.* at 76. Additional human rights norms resonate similar language and principles, including the International Covenant on Economic, Social and Cultural Rights (ICESCR). See, e.g., GOSTIN, *supra* note 243, at 68.

rights to health have been recognized in over 130 constitutions or human rights documents²⁶² based on multiple human rights treaties.²⁶³

Several American states also acknowledge health rights in some way through their constitutions.²⁶⁴ New York's constitution provides that "[t]he protection and promotion of the health of the inhabitants of the state are matters of public concern."²⁶⁵ Hawaii's constitutional language is even stronger: "[t]he State shall provide for the protection and promotion of the public health."²⁶⁶ Though purposeful, these provisions fall short of enunciating a clear right to public health.²⁶⁷ Even though the New Jersey state constitution prioritizes "the preservation of health," the state's highest court observes that it "does not guarantee explicitly a fundamental right to health."²⁶⁸ Montana's constitution conveys that "[a]ll persons . . . have certain inalienable rights [including] . . . to . . . [seek] their . . . health . . . in all lawful ways."²⁶⁹ Montana's Supreme Court, however, refuses to interpret this language as sustaining an affirmative, enforceable right to health.²⁷⁰

Some advocates have unsuccessfully proposed state constitutional amendments to solidify positive rights to health care.²⁷¹ Even some local jurisdictions espouse the critical need for base levels of public health and health services. In 2019, New York City Mayor Bill de Blasio committed \$100 million of local resources for medi-

262. GOSTIN, *supra* note 243, at 263.

263. *Id.* at 243–54 (describing UDHR, ICESCR, and the International Covenant on Civil and Political Rights (ICCPR)). Some countries' constitutional provisions guarantee elements or determinants of health, such as Ecuador, where "water, food, education, sports, work, and social security" are enumerated rights. *Id.* at 264. Other nations ensure a right to all-encompassing, holistic health for all citizens. Kenya's constitution provides a right "to the highest attainable standard of health." *Id.* The Dominican Republic includes a "comprehensive right to health." *Id.* at 263.

264. *See, e.g.*, E. W. Leonard, *State Constitutionalism and the Right to Health Care*, 12(5) J. CONST. L. 1335, 1347, 1406 (2010).

265. N.Y. CONST. art. XVII, § 3.

266. HAW. CONST. art. IX, § 1.

267. Leonard, *supra* note 264, at 1348.

268. N.J. CONST., art. 1, ¶ 1 (recognizing "certain natural and unalienable rights," including "life and liberty . . . safety and happiness"); *Horizon Health Ctr. v. Felicissimo*, 638 A.2d 1260, 1269 (N.J. 1994).

269. MONT. CONST. art. II, § 3 (1972).

270. *See, e.g.*, *Simms v. Mont. Eighteenth Judicial Dist. Court*, 68 P.3d 678, 682 (Mont. 2003); *see also* Mich. Universal Health Care Action Network v. State, No. 261400, 2005 Mich. App. LEXIS 2929, at *4 (Mich. Ct. App. Nov. 22, 2005) (rejecting imposing a duty on the legislature to establish a plan for greater access to health services).

271. *See, e.g.*, Kathrin Rüegg, *Embedding the Human Right to Health Care in U.S. State Constitutions*, NAT'L ECON. & SOC. RTS INITIATIVE, (2009), https://www.nesri.org/sites/default/files/Constitutional_amendment_report.pdf. The effects of these constitutional platitudes on public health promotion are not well known; one 2015 study links stronger state right to health provisions and subsequent decreases in infant mortality. Hiroaki Matsuura, *State Constitutional Commitment to Health and Health Care and Population Health Outcomes: Evidence from Historic US Data*, 105 AM. J. PUB. HEALTH, e48, e53 (2015).

cal care of undocumented persons and others unqualified for health coverage.²⁷² Still, a right to public health in America is more mirage than reality.

B. *Judicial Navigation*

Neither shadows of health rights for specific populations nor aspirational rights language in presidential speeches or state constitutions leads to recognition of a fundamental right to public health. This right must be generated at a higher level of constitutional parlance grounded in the judiciary's unique capacity to craft new rights to address known vices. Navigating this path is daunting. The Supreme Court has long expressed a strong reluctance to recognize new constitutional norms for manifold reasons grounded in legal theory, political science (notably among its conservative members), and its own established limits. Accordingly, the Court has expressed substantial concerns about actively expanding rights or reading new obligations into the Constitution regardless of the magnitude of interests at stake.²⁷³

On January 9, 2019, for example, the Court heard oral arguments in *Franchise Tax Board of California v. Hyatt*.²⁷⁴ An aggrieved plaintiff sued California tax authorities in a Nevada state court. His counsel argues that the Framers support his right to sue another state. In oral arguments, Justice Sotomayor retorts, “[i]t’s nice that [the Framers] felt that way, but what we know is that they didn’t put it into the Constitution.”²⁷⁵ Constitutional text and its meaning equally concern Justice Alito: “We are always very vigilant to read things into the Constitution that can’t be found in the text.”²⁷⁶ Justice Kavanaugh characterizes the Constitution as a document of “majestic specificity,”²⁷⁷ consistent with his views expressed before his ascendancy to the Court in October 2018.²⁷⁸

272. J. David Goodman, *Free Health Care for the Uninsured Under Mayor’s \$100 Million Plan*, N.Y. TIMES, Jan. 9, 2019, at A19.

273. See, e.g., *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 30 (1973) (“[T]he importance of a service performed by the State does not determine whether it must be regarded as fundamental for purposes of examination under the Equal Protection Clause.”).

274. 139 S. Ct. 1485 (2019) (presenting an opportunity for the Court to reconsider its longstanding precedent allowing states to be sued by parties in courts of other states).

275. Transcript of Oral Argument at 4, *Franchise Tax Bd. of Cal. v. Hyatt*, 139 S. Ct. 1485 (2019) (No. 17-1299), <https://www.oyez.org/cases/2018/17-1299>; see also Adam Liptak, *Nevada Man v. California, But in Which State’s Court?*, N.Y. TIMES, Jan. 10, 2019, at A16.

276. Transcript of Oral Argument at 18, *Franchise Tax Bd. of Cal. v. Hyatt*, 139 S. Ct. 1485 (2019) (No. 17-1299), <https://www.oyez.org/cases/2018/17-1299>.

277. *Id.* at 20.

278. As the newest member of the Court, Justice Kavanaugh brings an understanding of how structural principles protect individual rights. He states in a 2017 lecture to the American Enterprise Institute that “[t]he framers believed that in order to protect individual liber-

Prior opinions reflect the Court's circumspection over identifying or crafting new fundamental rights,²⁷⁹ especially positive rights necessitating government action.²⁸⁰ Concerning due process rights, for example, Chief Justice Roberts opines how the Court has "consistently refused to allow litigants to convert the shield provided by constitutional liberties into a sword to demand positive entitlements from the State."²⁸¹ In the Court's wisdom, new rights should be crafted via constitutional amendment or by Congress,²⁸² and not by activist jurists²⁸³ for several reasons:

ty, power should not be concentrated in one person or one institution." Brett Kavanaugh, *From the Bench: The Constitutional Statesmanship of Chief Justice William Rehnquist*, AM. ENTERPRISE INSTITUTE, 1–2 (2017). Separation of powers and federalism, notes Kavanaugh, "are not mere matters of etiquette or architecture, but are essential to protecting individual liberty." Brett M. Kavanaugh, *Keynote Address: Two Challenges for the Judge as Umpire: Statutory Ambiguity and Constitutional Exceptions*, 92 NOTRE DAME L. REV. 1907, 1909 (2017) [hereinafter *Two Challenges for the Judge as Umpire*]. Prior to ascending to the Court, Justice Kavanaugh wrote: "the Framers understood that a bill of rights without a structure to protect those rights would be largely meaningless." Brett M. Kavanaugh, *Our Anchor for 225 Years and Counting: The Enduring Significance of the Precise Text of the Constitution*, 89 NOTRE DAME L. REV. 1907, 1909 (2014). However, his conception of liberty is framed around "freedom from government regulation," and not positive rights. Kavanaugh, *Two Challenges for the Judge as Umpire*, *supra*, at 1916. His approach to unenumerated rights is similarly constrained. He lauds the late Chief Justice William Rehnquist for "his view that unenumerated rights could be recognized by the courts only if the asserted right was rooted in the nation's history and tradition." Brett Kavanaugh, *From the Bench: The Constitutional Statesmanship of Chief Justice Rehnquist*, AM. ENTERPRISE INSTITUTE, 16 (2017). Amending the Constitution is the only way to change the profile of constitutional rights. Otherwise, courts would be "snatching that constitutional or legislative authority for themselves." *Id.* at 4.

279. See, e.g., *Moore v. E. Cleveland*, 431 U.S. 494, 502 (1977) ("There are risks when the judicial branch gives enhanced protection to certain substantive liberties without the guidance of the more specific provisions of the Bill of Rights. As the history of the *Lochner* era demonstrates, there is reason for concern lest the only limits to such judicial intervention become the predilections of those who happen at the time to be Members of this Court.").

280. See *DeShaney v. Winnebago Cty. Dep't of Soc. Servs.*, 489 U.S. 189, 196 (1989) ("[O]ur cases have recognized that the Due Process Clauses generally confer no affirmative right to governmental aid, even where such aid may be necessary to secure life, liberty, or property interests of which the government itself may not deprive the individual."). Litigant attempts to characterize positive rights as mere negative rights may be rebuffed. See, e.g., *Gary B. v. Snyder*, 329 F. Supp. 3d 344, 364–65 (E.D. Mich. 2018) ("[T]he allegations state the violation of a negative right. But a violation of negative rights is not what the Complaint truly seems to argue. . . . Complaint points exclusively to a positive-right argument: Plaintiffs are entitled to a minimum level of instruction on learning to read, yet the State, vis-à-vis Defendants, has failed to give it to them. The Court will therefore construe the Complaint in that manner.").

281. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2620 (2015) (Roberts, C.J., dissenting).

282. See, e.g., *Lindsey v. Normet*, 405 U.S. 56, 74 (1972) (holding that a double-bond prerequisite for appealing FED action does violate the equal protection clause the Court stated "the Constitution does not provide judicial remedies for every social and economic ill. We are unable to perceive . . . any constitutional guarantee of access to dwellings of a particular quality . . . Absent constitutional mandate, the assurance of adequate housing and the definition of landlord-tenant relationships are legislative, not judicial, functions.").

283. See, e.g., Martin A. Schwartz, *Due Process and Fundamental Rights*, 17 *TOURO L. REV.* 237, 237 (2016) ("In more recent years, the Supreme Court has consistently expressed its reluctance to expand the doctrine of substantive due process, claiming that it poses a threat to the legitimacy of the Court's decision-making processes."). Justice Thomas has rebuked the Court for favoring "judicially created rights" over "rights actually enumerated in the

- (1) appointed, non-accountable²⁸⁴ judges should not superimpose their positions on society under principles of representative democracy;²⁸⁵
- (2) adjudicating such rights devalues political debates, particularly at state and local levels;²⁸⁶
- (3) courts cannot address unanticipated consequences or problems emanating from newly-recognized rights,²⁸⁷ and
- (4) rights have an aura of permanency that can exceed expectations or be hard to undo or adapt.²⁸⁸

Grassroots recognition of expansive new rights or duties among lower courts may fare no better. Over the last decade, federal courts have rejected calls to recognize (a) duties to protect public

Constitution.” See *Whole Woman’s Health v. Hellerstedt*, 136 S. Ct. 2292, 2329 (2016) (Thomas, J., dissenting). Alternatively, Justice Kennedy opined in *Schuette v. Coal. to Defend Affirmative Action*, 572 U.S. 291 (2014) that arguments favoring judicial solutions to complex policies are:

inconsistent with the underlying premises of a responsible, functioning democracy. One of those premises is that a democracy has the capacity—and the duty—to learn from its past mistakes; to discover and confront persisting biases; and by respectful, rational deliberation to rise above those flaws and injustices. That process is impeded, not advanced, by court decrees based on the proposition that the public cannot have the requisite repose to discuss certain issues.

Id. at 312–13.

284. See, e.g., *Obergefell*, 135 S. Ct. at 2624 (Roberts, C.J., dissenting) (“Those who founded our country . . . would never have imagined yielding . . . on a question of social policy to unaccountable and unelected judges.”).

285. See *id.* at 2612 (Roberts, C.J., dissenting) (“Five lawyers have closed the debate and enacted their own vision of marriage as a matter of constitutional law.”); *Lawrence v. Texas*, 539 U.S. 558, 602 (2003) (Scalia, J., dissenting) (“Today’s opinion is the product of a Court, which is the product of a law-profession culture, that has largely signed on to the so-called homosexual agenda.”).

286. See *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997) (“By extending constitutional protection to an asserted right or liberty interest, we, to a great extent, place the matter outside the arena of public debate and legislative action.”).

287. See *id.* at 720 (“But we have always been reluctant to expand the concept of substantive due process because guideposts for responsible decisionmaking in this unchartered area are scarce and open-ended.”) (internal citation omitted). *Contra* Erwin Chemerinsky, *Washington v. Glucksberg Was Tragically Wrong*, 106 MICH. L. REV. 1501 (2008). See also *Obergefell*, 135 S. Ct. at 2625 (Roberts, C.J., dissenting) (“Federal courts are blunt instruments when it comes to creating rights. . . . [T]hey do not have the flexibility of legislatures to address concerns of parties not before the court or to anticipate problems that may arise.”).

288. See, e.g., *Obergefell*, 135 S. Ct. at 2624 (Roberts, C.J., dissenting) (“But those whose views do not prevail . . . can gear up to raise the issue later, hoping to persuade enough on the winning side to think again. That is exactly how our system of government is supposed to work.”) (internal citation omitted); see also *Lawrence*, 539 U.S. at 604–05 (Scalia, J., dissenting) (“One of the benefits of leaving regulation of this matter to the people rather than to the courts is that the people, unlike judges, need not carry things to their logical conclusion.”).

school students against onsite gun violence²⁸⁹ or offsite physical abuse;²⁹⁰ (b) requirements to act to prevent further harms from gun-related violence in a private nightclub;²⁹¹ (c) rights to primary or secondary education;²⁹² (d) rights to higher education;²⁹³ or (e) “rights to literacy.”²⁹⁴

C. Parameters of the Right

Against this backdrop, judicial recognition of a right to public health necessitates precision crafting along a narrow constitutional route. Clearly, it cannot be framed in terms of a generalized right to health services guaranteeing individual health care coverage for all. The Supreme Court has considered and rejected this notion.²⁹⁵ Nor is it about assuring all Americans are free from the threats of communicable diseases, chronic conditions, or avoidable injuries. As noted initially, these are aspirational goals, not parameters for constitutional rights.²⁹⁶

As illustrated in Figure 4, consistent with constitutional inferences,²⁹⁷ recognizing new, unenumerated rights starts with the

289. *L.S. v. Peterson*, No. 18-cv-61577, 2018 U.S. Dist. LEXIS 210273, at *10–12 (S.D. Fla. Dec. 12, 2018) (finding that law enforcement officials did not violate the due process clause by not intervening during the Parkland, Florida school shooting); Adeel Hassan, *Officers Don't Have Duty to Help*, *U.S. Judge Rules*, *N.Y. TIMES*, Dec. 19, 2018, at A19.

290. *See Doe v. Covington Cty. Sch. Dist.*, 675 F.3d 849, 855–56 (5th Cir. 2012) (holding that the special relationship between students and public schools does not create a constitutional duty to ensure student safety related to violence outside the school, notably molestation by a person pretending to be the student's father).

291. *Vielma v. Gruler*, 347 F. Supp. 3d 1122, 1131 (M.D. Fla. 2018) (finding no due process violation related to an officer who failed to enter a nightclub to neutralize a shooter who went on to murder forty-nine people and injure fifty-three others concluding that due process does not include an affirmative right to government aid, even when it may be necessary to secure otherwise protected rights).

292. *Martinez v. Malloy*, 350 F. Supp. 3d 74 (D. Conn. 2018). *Contra* Complaint at 2, *A.C. v. Raimondo*, No. 1:18-cv-645 (D.R.I. Nov. 18, 2018) (awaiting decision on similar right to education claims).

293. *Salau v. Denton*, 139 F. Supp. 3d 989, 1004 (W.D. Mo. 2015) (rejecting a University of Missouri student's due process claims arising from a disciplinary proceeding on the grounds that a violation could not proceed because there is no constitutionally protected right to a public college education); *see also Simms v. Pa. State Univ.*, No. 3:17-cv-201, 2018 U.S. Dist. LEXIS 45051, at *13–14 (W.D. Pa. Mar. 19, 2018) (finding no right to a college education where a Penn State student faced disciplinary and criminal charges after an on-campus altercation).

294. *Gary B. v. Snyder*, 329 F. Supp. 3d 344, 366 (E.D. Mich. 2018) (holding children do not have a right of access to literacy under the due process clause of the Fourteenth Amendment because the clause does not “demand that a state affirmatively provide each child with a defined, minimum level of education by which the child can attain literacy”); *see also Jacey Fortin*, *Judge Rejects Detroit Students' Lawsuit Ruling “Adequate Education” Is Not a Right*, *N.Y. TIMES*, Jul. 5, 2018, at A11.

295. *See supra* Part IV.A.

296. *See supra* Part IV.A.

297. *See supra* Introduction.

identification of a known vice for which a constitutional solution may follow. Structural principles may suffice to stymie generalized vices. Generating more specific remedies tied to some identified vices requires consideration of auxiliary, creative, or ghost rights. In any of these scenarios, courts may presumably craft either positive (+) or negative (-) rights. Thus, there are at least twenty-four distinct options for generating a right to public health presuming a vice is identified. Given extreme judicial reticence in the modern era to directly recognize positive rights,²⁹⁸ realistic, viable options for a right to public health lie among the twelve remaining options centered on the recognition of negative rights to counter specific vices.

FIGURE 4. RIGHTS OPTIONS EXTENDING FROM CONSTITUTIONAL INFERENCES

Vices	Righting					
	Auxiliary		Creative		Ghost	
Oppression	+	-	+	-	+	-
Overreaching	+	-	+	-	+	-
Tyranny	+	-	+	-	+	-
Malfesance	+	-	+	-	+	-

The premier question is whether a national failure to provide routine, efficacious population health services implicates a constitutional vice for which a remedy must flow.²⁹⁹ Clearly, it does.³⁰⁰

298. See *supra* Part IV.B.

299. That remedies flow from identified constitutional vices is analogous to concomitant remedies for specific wrongs arising from tort law and policy. See, e.g., *Curlender v. Bio-Sci. Labs.*, 106 Cal. App. 3d 814, 830 (1980) (citing *Crisci v. Sec. Ins. Co.*, 426 P.2d 173, 178 (Cal. 1967)) (“[W]e have long adhered to the principle that there should be a remedy for every wrong committed. Fundamental in our jurisprudence is the principle that for every wrong there is a remedy and that an injured party should be compensated for all damage proximately caused by the wrongdoer.”).

300. See *Hodge, Jr.*, *supra* note 121, at 310 (“There is perhaps no facet of governmental regulation more important to the public welfare than the maintenance of public health . . . American public health law is as old as the formation of the colonies themselves. It owes its early origins to the need of colonial governments to protect the public health for the literal

Professor Amar asserts that the Constitution mandates the provision of “minimal entitlements” including sustenance and other basic services, plausibly including public health protections.³⁰¹ He frames entitlements largely in the realm of property interests grounded in affirmative requirements under the Thirteenth Amendment, among other claims. “[W]hether we begin with a vision of individual dignity and human rights, or . . . stress the structural requirements of . . . government, we are led to the idea of guaranteed minimal entitlements,”³⁰² including minimum sustenance and shelter.³⁰³

So why doesn’t the Constitution expressly address these entitlements? Professor Parmet purports that the Framers’ expectation that government protect the public’s health obviated any need for express constitutional language authorizing public health services or powers.³⁰⁴ “The assertion that the framers assumed a public health obligation on the part of government,” notes Parmet, “is surprisingly compatible with modified versions of [Lockean or republican] theories, and may even highlight the ways in which the framing generation interwove theories that, considered abstractly, appear antagonistic.”³⁰⁵ That governments, notably sovereign states or tribes, hold inherent³⁰⁶ and irrevocable³⁰⁷ public health powers is

survival of the community . . . Public health law then was as much a necessary practice as it was a governmental responsibility.”).

301. Akhil Reed Amar, *Forty Acres and a Mule: A Republican Theory of Minimal Entitlements*, 13 HARV. J.L. & PUB. POL’Y 37 (1990).

302. *Id.* at 43.

303. *Id.* at 39.

304. Wendy E. Parmet, *Health Care and the Constitution: Public Health and the Role of the State in the Framing Era*, 20 HASTINGS CONST. L.Q. 267, 270–71 (1993) (“[U]nderstanding of public health law in the framing era may have comported with the political theories prevalent at the time, especially liberalism, republicanism, and social contract theory.”).

305. *Id.* at 306.

306. The role of government to protect the public’s health has been affirmed by the Supreme Court for hundreds of years. In early cases like *Gibbons v. Ogden*, 22 U.S. 1 (1824), the Court accepted that states and localities have a fundamental role in protecting public health. *Id.* at 178–79. See also *Gonzales v. Oregon*, 546 U.S. 243, 280 (2006) (referring to states’ “police powers to legislate as to the protection of the lives, limbs, health, comfort, and quiet of all persons”) (internal citation omitted); *McDonald v. City of Chicago*, 561 U.S. 742, 901 (2010) (Stevens, J., dissenting) (“[T]he ability to respond to the social ills associated with dangerous weapons goes to the very core of the States’ police powers.”). In *Phalen v. Virginia*, 49 U.S. 163 (1850), the Court stated that “the suppression of nuisances injurious to public health or morality is among the most important duties of government.” *Id.* at 168. In *Breard v. City of Alexandria*, 341 U.S. 622 (1951), the Court said in dicta that “[t]he police power of a state extends beyond health, morals and safety, and comprehends the duty, within constitutional limitations, to protect the well-being and tranquility of a community.” *Id.* at 640 (emphasis added) (internal citation omitted).

307. See, e.g., *Stone v. Mississippi*, 101 U.S. 814, 819 (1880) (“No legislature can bargain away the public health or the public morals. The people themselves cannot do it, much less their servants. The supervision of both these subjects of governmental power is continuing in its nature, and they are to be dealt with as the special exigencies of the moment may require. Government is organized with a view to their preservation, and cannot divest itself of

largely a given helps explain the absence of affirmative constitutional language effectuating public health protections. The Framers did not need to state what is obvious—that government must act in the interests of societal health.

This constitutional absence, however, does not resolve whether the federal government has a distinct role in public health promotion. To the contrary, principles of federalism suggest (at least in theory) that reserving sovereign police powers to the states through the Tenth Amendment may actually negate a federal role in protection of the public's health. That is, to the extent police powers used historically and primarily to protect the public's health are allotted to the states, there must be little to no role or responsibility for the federal government to intervene in the same sphere.³⁰⁸

Even if this premise pervaded early judicial conceptions, cumulative assessments of federalism recognize that the division of federal and state powers is by no means a clean split.³⁰⁹ Federal and state governments share significant responsibilities over an array of public duties, including public health.³¹⁰ Expansive interpretations of federal commerce and tax powers during the New Deal era are often tied directly to the national government's role in public health³¹¹ and the environment.³¹² Among a unified nation of states, the national role is essential to thwart eminent national public health threats and needs. In the modern era, the federal govern-

the power to provide for them.”); *see also* *New Orleans Gas Co. v. La. Light Co.*, 115 U.S. 650, 668 (1885) (disallowing states from contractually limiting the exercise of police powers related to public health and the public morals. “The preservation of these [powers] is so necessary to the best interests of social organization, that a wise policy forbids the legislative body to divest itself of the power to enact laws for the preservation of health and the repression of crime.”) (internal citation omitted).

308. This proposition is asserted by the Commonwealth of Massachusetts in *Jacobson v. Massachusetts*, 197 U.S. 1 (1905). *See supra* Part II.A.

309. *See, e.g.*, PARMET, *supra* note 4, at 96–104 (examining the role of federalism in relation to different and overlapping responsibilities of federal and state governments to promote population health); *see also* Adam Babich, *Our Federalism, Our Hazardous Waste, and Our Good Fortune*, 54 MD. L. REV. 1516, 1532–33 (1995) (arguing that cooperative federalism allows states continued power in the realm of public health while providing national protections under minimum federal standards).

310. *See* Erwin Chemerinsky et al., *Cooperative Federalism and Marijuana Regulation*, 62 UCLA L. REV. 74, 116–19 (2015) (discussing the successes of cooperative federalism in the establishment of health care exchanges under the ACA, the Clean Water Act, and the Clean Air Act).

311. Alex Kreit & Aaron Marcus, *Raich, Health Care, and the Commerce Clause*, 31 WM. MITCHELL L. REV. 957, 995 (2005) (overviewing the expansion of federal intervention in the public health arena during the 1900s).

312. *See, e.g.*, PARMET, *supra* note 4, at 82 (“From the New Deal until the 1990s, the Supreme Court adopted a highly deferential stance toward both state and federal laws that either appeared to protect public health or purported to do so.”); *see also* Hodge, Jr., *supra* note 121, at 338 (explaining how the New Deal provided “fertile ground” for the growth of federal intervention into public health).

ment unquestionably possesses immense powers to address the public's health.³¹³ Declinations to adequately and uniformly wield these powers over time and across administrations contribute to negative health repercussions.

Millions of Americans needlessly suffer each year from preventable causes of morbidity and mortality across an array of physical and mental health conditions. The interests of individuals and the body politic in public health protections are intrinsic to every other right bestowed constitutionally.³¹⁴ Yet, as Professor Gostin has eloquently espoused, no citizen, group, entity, or state can accomplish alone what the national government can assure collectively to protect the public's health.³¹⁵ Failure in this regard reflects more than poor political choices by an administration or legislative excuses framed as funding limitations. It is a constitutional vice tied most closely to malfeasance, notably government's failure to act in the interests of the public's health despite an obligation to do so.³¹⁶ The Framers understood this essential role of government; the Court should acknowledge it as well.

Constitutional recognition of a right to public health embodies a fundamental governmental responsibility to respect the essential public health needs of populations. It is about a national commitment to properly balance government interests in protecting and promoting health across populations through efficacious public health interventions. Generating a constitutional remedy to address the identified vice of national public health failures prompts three distinct possibilities. First, the Court could craft a right to public health from a patchwork of provisions as it has done previously through auxiliary rights to privacy or citizenship.³¹⁷ Yet the Court has already signaled in prior jurisprudence and modern

313. See, e.g., GOSTIN, *supra* note 4, at 98 ("The federal government possesses considerable authority to act and exerts extensive control in the realm of public health and safety."); see also Wendy K. Mariner et al., *Jacobson v. Massachusetts: It's Not Your Great-Grandfather's Public Health Law*, 95 AM. J. PUB. HEALTH 581 (2005) (describing the important role the federal government plays in public health promotion).

314. See, e.g., Jonathan M. Mann et al., *Health and Human Rights*, in HEALTH AND HUMAN RIGHTS 7, 11–18 (Jonathan M. Mann et al. eds., 1999) (arguing that public health is essential to fulfilling the requirements of the International Bill of Human Rights, which parallel similar rights expressly and impliedly guaranteed by the U.S. Constitution).

315. See Lawrence O. Gostin, *Mapping the Issues: Public Health, Law and Ethics*, in PUBLIC HEALTH LAW AND ETHICS: A READER 2 (2d ed., 2010) ("Individuals can do a great deal to safeguard their health, particularly if they have the economic means to do so. . . . Yet there is a great deal that individuals cannot do to secure their health, and therefore these individuals need to organize and collaborate on building infrastructure and developing shared resources. Acting alone, people cannot achieve environmental protection, hygiene and sanitation, clean air and surface water, uncontaminated food and drinking water, safe roads and products, or control of infectious disease.").

316. See *supra* Part I.D.

317. See *supra* Part III.A.

views its reticence to bring together bits and pieces of constitutional language to generate new wholesale rights. Textualists like Justices Thomas and Kavanaugh would likely object vehemently to the Court's machinations in this regard.³¹⁸

Second, the Court might reconsider its interpretation of rights to life or liberty under substantive due process in an exercise of creative righting.³¹⁹ However, modern calls for the Court to amplify due process interests in other contexts unrelated to the public's health have fallen flat. Through either auxiliary or creative righting, tying a constitutional right to public health to a re-purposed interpretation of enumerated rights, or penumbras of such rights, only heightens the Court's queasiness over expansions of fairly-settled norms.³²⁰

By process of elimination, principles of ghost righting may appear as a final option to generate a right to public health. In reality, it is the premier route to effectuate the right. Remedying malfeasance embedded in national failures to act in the interests of the public's health through ghost righting makes constitutional sense. Exercises of ghost righting allow for legitimate expansions of constitutional conceptions unmoored to existing provisions weighed down by decades of limitations. Unlike enumerated rights designed to inhibit explicit vices, ghost righting is premised on the need to address non-explicit ones. Even if the Framers recognized government's role in protecting communal health, they could not have imagined how advancements in public health sciences and practices would vault such efforts beyond sovereign states to the national level. Members of every branch of government can now envision a defined public health role for the federal government, but too often selectively choose to ignore it. While the Constitution

318. See, e.g., *Two Challenges for the Judge as Umpire*, *supra* note 278, at 1916; Nancie G. Marzulla, *The Textualism of Clarence Thomas: Anchoring the Supreme Court's Property Jurisprudence to the Constitution*, 10 AM. U.J. GENDER SOC. POL'Y & L. 351, 683 (2002) (discussing Justice Thomas' "fidelity to textualism and original intent").

319. See *supra* Part III.B.

320. The Supreme Court's reticence to play an overly-active role in adjudicating new rights or standards for national implementation is unquestionably a factor to the extent federal agencies may be well-positioned to respond via delegations of powers via Congress. See, e.g., *Am. Elec. Power Co. v. Connecticut*, 564 U.S. 410, 428–29 (2011) ("[Federal executive agencies are] surely better equipped to [regulate greenhouse gases] than individual district judges issuing ad hoc, case-by-case injunctions. Federal judges lack the scientific, economic, and technological resources an agency can utilize in coping with issues of this order Judges may not commission scientific studies or convene groups of experts for advice, or issue rules under notice-and-comment procedures inviting input by any interested person, or seek the counsel of [State] regulators Rather, judges are confined by a record comprising the evidence the parties present. Moreover, federal district judges, sitting as sole adjudicators, lack authority to render precedential decisions binding other judges, even members of the same court.").

is not designed to remedy every last ill that Americans may suffer,³²¹ it is capable of interpretations that alleviate harms only government, particularly federal, can mend. Malfeasance embedded in national failures to protect the public's health finds its cure in ghost righting.

A right to public health is a distinct right embedded in the fabric of a Constitution drafted with sufficient flexibility to allow its recognition as an essential role of government. It takes form most clearly as a negative right that government not impede absent sufficient justification. What may constitute a "sufficient justification" for breaching a right to public health is subject to further adjudication, although it may clearly surpass a mere rational basis for failures to act under principles of substantive due process.³²² Like most negative rights,³²³ however, it also requires something more than idle responses by governments to public health threats that impair individual or group entitlements to a healthier society.³²⁴ Delineating the contours and breadth of services owed to Americans via a ghost right to public health is reserved for further exploration pursuant to a suitable "case or controversy" persuasively arguing for its existence.³²⁵ For now, it is enough to chart a course for bringing a

321. See, e.g., *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 32 (1973) (quoting *Lindsey v. Normet*, 405 U.S. 56, 74 (1972)) ("[T]he Constitution does not provide judicial remedies for every social and economic ill.").

322. The Supreme Court's treatment of claims expressing a right to education provides an apt example. Despite the Court's reticence to recognize such rights in *Rodriguez*, 411 U.S. at 18, it later arguably employed a heightened form of scrutiny in invalidating a Texas statute that allowed local school districts to refuse schooling to undocumented kids in *Plyler v. Doe*, 457 U.S. 202, 203 (1982). In *Plyer*, the Court stressed that a complete denial of education to a suspect class requires "something more than a rational basis." *Id.* at 235.

323. *Parmet*, *supra* note 304, at 331 (discussing the Framers' views on public health and arguing that constitutional rights were not "purely negative" but dependent on reciprocal obligations).

324. The Supreme Court affirmed the need for positive government obligations in negatively phrased rights. See *Sessions v. Morales-Santana*, 137 S. Ct. 1678, 1698 (2017) (citing *Heckler v. Mathews*, 465 U.S. 728, 740 (1984)) (stating rights to equal protection can be remedied via a positive extension of benefits to excluded classes); see also *Griffin v. Illinois*, 351 U.S. 12 (1956) (requiring the state to furnish an indigent with a free transcript of the trial); David P. Currie, *Positive & Negative Constitutional Rights*, 53 U. CHI. L. REV. 864, 884 (1986) (citing *Douglas v. California*, 372 U.S. 353 (1963)) ("[T]he Court invoked not the right to counsel or due process but equal protection to hold that a state must provide counsel to represent an indigent on appeal.").

325. A case may potentially be framed consistent with plaintiffs' claims in *Juliana v. United States*, 217 F. Supp. 3d 1224, 1251 (D. Or. 2016). See discussion *supra* Part III.A. In *Juliana*, plaintiffs allege substantial harms from the environment stemming from federal failures to address climate change over decades. Similarly-situated plaintiffs directly impacted by poor public health, environmentalists or outcomes unrelated to their specific behaviors or choices may petition the government for remedies to address long-standing injuries and harms. As in *Juliana*, viable remedies may only flow if plaintiffs can demonstrate a federal constitutional obligation. Plaintiffs in *Juliana* focus on an expansion of substantive due process to frame a "right to a climate system capable of sustaining human life." *Juliana*, 217 F. Supp. 3d at 1251. In a future case centered on a right to public health, ghost righting presents a viable option to an auxiliary righting route pursued in *Juliana*.

principled case with the goal of generating a right that citizens are owed, and government must respect.

CONCLUSION

Generating a constitutionally-viable argument for the existence of a right to public health by no means assures it will be recognized. Odds against it may seem long. National politics focus more on assuring healthcare access than public health services. The public is either unaware of or apathetic to base level public health efforts. Industries directly lobby against public health services that tamp down sales or profits. Congress insufficiently funds responses to known public health threats like infectious diseases, opioid misuse, and obesity, as well as behind-the-scenes communal health services. The Supreme Court seems extremely reluctant to expand interpretations of existing rights, much less engage in ghost righting to craft new duties on government. Yet, therein lies a key in this latter observation. A ghost right to public health is not about thrusting new duties onto government. Rather, it is about recognizing a duty that government always had, framed appropriately around a collective right owed to the public.

Promoting and protecting the public's health are not optional services. They are prime responsibilities for government at every level. The soundness of a right to public health extends from the reality that organized society absent these services is unhealthy and unsustainable. Effectuation of every other right citizens are owed, whether enumerated or not, starts first with their capacity to exercise them. A right to public health makes that possible for every American, not just those who can afford a higher standard of living. As the remedy for an identified vice, the right is about providing Americans an opportunity for improved communal health through sustained services applied equitably across populations nationally.

