

SUBSTANTIVE DUE PROCESS AND BRIDGING THE GAP OF TITLE VII LATERAL TRANSFER VIOLATIONS

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ABSTRACT

Title VII of the Civil Rights Act of 1964 was originally intended to provide extensive protections against discrimination in the workplace. However, in practice, courts have limited the applicability of Title VII by imposing an additional “tangible harm” requirement for plaintiffs seeking to enforce their statutory rights. The “tangible harm” requirement is a judicially imposed standard that remains unsupported by the express language of Title VII. The consequence of the requirement shields discriminatory practices, such as discriminatory denials and forced lateral transfers from judicial review. The D.C. Circuit has eliminated the “tangible harm” requirement and has determined that discriminatory denials and forced lateral transfers, in and of itself, can constitute actionable discrimination. In the wake of *Dobbs v. Jackson Women’s Health Organization*, which signaled a departure from Substantive Due Process jurisprudence that has historically reinforced workplace protections, tensions are heightened as constitutional safeguards are being redefined. The need for statutory enforcement of employment protections, such as Title VII, is essential as once-reliable

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“We all declare for liberty; but in using the same word, we do not all mean the same thing.”

-Abraham Lincoln

protections are being transformed with limited applicability. This article sets forth the argument that eliminating the “tangible harm” requirement will fulfill the purpose and intent of Title VII by ensuring that employees who are subjected to discriminatory practices, such as denials or forced transfers, will be protected without requiring unwarranted evidentiary requirements.

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INTRODUCTION

Suppose you are a novel petroleum engineer at a notable oil company in Houston, Texas, and you have just celebrated your two-year anniversary on the job. You worked alongside American Society of Mechanical Engineers (ASME) Medal recipients,² and have contributed to innovative research on breakthrough cost-effective oil extraction techniques. Obtaining such a resume was your dream coming out of your master's program. You have accomplished such achievements as a woman of color who has broken into a predominantly male-dominated field.

Then, imagine a similar opportunity opens in the Huntington Beach, California, branch of your current oil company. California has always been your dream destination, and you spend almost every vacation traveling to the Californian coast. The Huntington Beach position is tempting, not because it is an enormous promotion that allows you to ascend within the company, but because it allows you to move to a place you have always dreamed of living. The position is merely a lateral position of your current job, with no additional pay, except for the cost of living adjustment. You are confident that your commitment to your company has been evident from the ingenious advances you have independently made in oil extracting. The transfer portal opens as you are one of the first individuals to complete your transfer application, and you wait patiently as you have been informed that interest interviews will begin within a week. Two weeks go by, and you have not heard any new developments. You decide to give it another week before discussing the matter with your immediate supervisor. He assures that you should not fret, and you should be receiving a decision within a few days.

After waiting for more than a month, you receive a letter from your supervisor informing you that the transfer position has been filled—you did not receive the position or even an interview. In actuality, a younger male who has only been with the company for two months received the position. Not only was your co-worker

²ASME Medals are awarded to “eminently distinguished engineering achievement[s].” See *ASME Medal*, AMERICAN SOCIETY OF MECHANICAL ENGINEERS, <https://www.asme.org/about-asme/honors-awards/achievement-awards/asme-medal> (last visited Jan. 7, 2025).

not as experienced as you, but what would have been a lateral move for you was a promotion for him. Your mind tries to make sense of the decision. However, you cannot help but dwell on the rampant alleged reports of discrimination at the company. What recourse do you have in such a situation? Should you report it within the company? Should you bypass company reporting and file legal action? The answers are not quite as straightforward as they could be. Although Title VII is a federal employment statute protecting workers seeking promotions, this provision does not clearly cover discrimination in the lateral context, as opposed to the promotion and demotion context.

A cognizable harm is required to prove a Title VII discrimination claim.³ However, a denial or forced lateral transfer is not considered to be an adequate cognizable harm in the same presumptive way of a promotion or demotion.⁴ An employer's denial or forced lateral transfer can be based on one of the many protected classifications.⁵ For example, the employer in the aforementioned hypothetical could have denied the young petroleum engineer's transfer because she is in the ideal age range for a pre-viable abortion. Suppose the company has pro-life viewpoints and denies the young woman's lateral promotion based on this perspective. In that case, the woman will not have a Title VII claim because denial of the lateral transfer is not classified as a cognizable harm. They are only de minimis.

This hypothetical young petroleum engineer's protected classifications, i.e., gender and age, have been grounded in Substantive Due Process. Following *Dobbs*

³ *Alvarado v. Texas Rangers*, 492 F.3d 605, 612 (5th Cir. 2007).

⁴ *Id.*

⁵ Protected classifications include "race, color, religion, sex (including pregnancy, sexual orientation, or gender identity), national origin, age (40 or older), disability and genetic information (including family medical history)." *Who is Protected from Employment Discrimination?*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, <https://www.eeoc.gov/employers/small-business/3-who-protected-employment-discrimination> (last visited Feb. 23, 2025).

v. Jackson,⁶ Substantive Due Process has been weakened significantly.⁷ There could be a possible enervation of Substantive Due Process rights, leaving these once-protected classifications vulnerable. In light of *Dobbs*, this paper will demonstrate how the cognizable harm requirement glossed into Title VII discrimination claims needs to be eliminated. Eradicating the additional element will prevent employees who have been discriminated against from having an unnecessarily heightened burden to substantiate Title VII discrimination claims.

Part I of this article introduces the Civil Rights Act and Title VII's protections for work-related employment discrimination. Additionally, this section will discuss the impact Substantive Due Process jurisprudence may have on Title VII. Part II focuses on the additional requirement, termed *tangible harm*, for substantiating Title VII violations that some courts have glossed into Title VII discrimination claims. Part III highlights how forced transfers or the denial of transfers are sufficient for a *prima facie* Title VII violation claim. The DC Circuit has eliminated the tangible harm standard, signaling a sufficient Title VII claim by forcing or denying a transfer without concrete justification. Part IV discusses *Dobbs*,⁸ where the U.S. Supreme Court determined that the availability of pre-viable abortions is not a fundamental right because this right is not rooted in our nation's history and traditions. This section will detail the implications of the *Dobbs* decision on future Substantive Due Process rights. In Part V, this section proposes the solution to the Title VII Circuit Split, emphasizing eradicating the tangible harm standard from Title VII jurisprudence to ensure that the rights of those within each protected class are shielded from discriminatory forced transfers or denial of transfers in the workplace.

⁶ *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215 (2022).

⁷ *Id.* at 260-61. (postulating a new framework for substantiating substantive due process that assesses whether a certain right is rooted in the history and tradition of the United States).

⁸ *Dobbs*, 597 U.S. at 215.

I. PERTINENT LAW

A. *The Civil Rights Act of 1964: Title VII Provision*

The Civil Rights Act of 1964 prohibits discrimination in the workplace based on race, color, national origin, religion, sex, sexual orientation, or gender identity.⁹ The separate titles of the Civil Rights Act of 1964 highlight the specific discriminatory prohibitions and civil rights guarantees backed by the act.¹⁰ Specifically, Title VII pertains to employment discrimination and states that it is unlawful to discriminate against individuals in the workplace for work-related actions, such as hiring, firing, compensation, and transfers.¹¹ Title VII of the Civil Rights Act of 1964 makes it unlawful to discriminate against individuals in work-related acts based on race, color, national origin, religion, or sex.

Title VII §2000e-2(a) reads:

It shall be an unlawful employment practice for an employer – (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s race, color, religion, sex, or national origin; or (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual’s race, color, religion, sex, or national origin.¹²

Despite the clear language prohibiting discrimination in Title VII subsection 2(a), some circuit courts have held that a complaint based on a denied lateral

⁹ Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a)(1); *Bostock v. Clayton Cnty., Georgia*, 590 U.S. 644 (2020) (holding that Title VII of the Civil Rights Act of 1964 protects gay or transgender employees from discriminatory acts by an employer).

¹⁰ 42 U.S.C. §§ 1981–2000h-6.

¹¹ 42 U.S.C. §§ 2000-e–2000e-17.

¹² 42 U.S.C. § 2000e-2(a).

transfer—even based on a protected classification—is not actionable due to Title VII subsection 2(k).¹³

Title VII §2000e–2(k) reads:

An unlawful employment practice based on disparate impact is established under this subchapter only if (i) a complaining party demonstrates that a respondent uses a particular employment practice that causes a *disparate impact* on the basis of race, color, religion, sex, or national origin and the respondent fails to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity.¹⁴

These circuits reason that lateral transfers cannot amount to cognizable or actual harm to an employee.¹⁵ Any conduct that cannot be classified as a cognizable harm is considered legally insignificant.¹⁶ This view is consistent with judicial gloss deriving from Title VII subsection (k), which prohibits discriminatory actions by an employer that has a *disparate impact* on the individual's status as an employee.¹⁷ A Title VII violation does not exist without this adverse effect on the employee. Therefore, in the lateral transfer context, suits are not permitted without an actual tangible, cognizable harm, such as a salary increase that would have resulted from the transfer.

The DC Circuit, however, holds that a refusal to transfer based on a suspect classification is itself actionable.¹⁸ The refusal to transfer itself inherently adversely impacts the employee.¹⁹ The plaintiff is not required to demonstrate additional harm (such as loss of additional money from a promotion, etc.).²⁰ The

¹³ *Alvarado v. Texas Rangers*, 492 F.3d 605, 613 (5th Cir. 2007); *Boone v. Goldin*, 178 F.3d 253, 256 (4th Cir. 1999). *See also* *Blackburn v. Shelby Cnty.*, 770 F. Supp. 2d 896, 920 (W.D. Tenn. 2011).

¹⁴ 42 U.S.C. § 2000e–2(k) (emphasis added).

¹⁵ *Alvarado*, 492 F.3d at 613.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Chambers v. D.C.*, 35 F.4th 870, 870 (D.C. Cir. 2022).

¹⁹ *Id.*

²⁰ *Id.*

requirement to demonstrate additional *tangible harms* involves another layer to demonstrate a civil rights violation. The D.C. Circuit's application of the applicable test under Title VII highlights the original intent of the Civil Rights Act of 1964.²¹ In this test, no additional harm, such as demotions, lost wages, or adverse employment actions must be demonstrated to make a sufficient claim under Title VII.²²

B. The Fourteenth Amendment and Substantive Due Process

The Due Process Clause of the Fourteenth Amendment²³ has been the avenue utilized in Due Process jurisprudence. The Due Process Clause has subscribed to two avenues: Procedural Due Process and Substantive Due Process.²⁴ Procedural Due Process focuses on the constitutional approach the government must take before depriving an individual of life, liberty, or property.²⁵ Substantive Due Process creates a class of fundamental rights that the government cannot infringe upon without a compelling reason.²⁶

From the onset of Substantive Due Process jurisprudence, the U.S. Supreme Court has inferred a fundamental right to privacy.²⁷ This fundamental right to privacy laid the groundwork for fundamental rights to pre-viability abortions, contraceptives, interracial marriage, same-sex marriage, and contraceptives.²⁸ Fundamental rights guaranteed by the Fourteenth Amendment's Due Process Clause are not a generally agreed upon jurisprudence.²⁹

²¹ *Id.*

²² *Id.*

²³ U.S. CONST. amend. XIV.

²⁴ Erwin Chemerinsky, *Substantive Due Process*, 15 TUORO L. REV. 1501, 1501 (1999).

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Roe v. Wade*, 410 U.S. 113 (1973); *Obergefell v. Hodges*, 576 U.S. 644 (2015); *Lawrence v. Texas*, 539 U.S. 558 (2003); *Loving v. Virginia*, 388 U.S. 1 (1967).

²⁹ *See Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215, 215-16 (2022) (arguing that substantive due process derives from the Fourteenth Amendment and these rights are determined by questioning whether the right was fundamental in our nation's history and tradition); *see also Id.* at 331-33 (Thomas, C., concurring) (arguing that the due process

Critics of Substantive Due Process harken back to the words of the Fourteenth Amendment and suggest that the due process clause only guarantees procedural process.³⁰ Under this framework, the government is not forbidden from infringing on certain fundamental rights because the actual words of the Fourteenth Amendment do not provide support for such an interpretation.³¹ The government is only required to follow certain processes before depriving an individual of life, liberty, or property.³²

Conversely, proponents of Substantive Due Process acknowledge the absence of an explicit mention of substantive rights in the Constitution.³³ Under this framework, the due process clause implicitly guarantees some rights that the government cannot constrain.³⁴ Other Substantive Due Process proponents believe that some rights are “deeply rooted in this Nation’s history and traditions” that the Due Process Clause completely protects.³⁵ Despite much controversy, Substantive Due Process is still a valid jurisprudence courts are wrestling with defining.

Throughout the history of the Court, privacy has been protected as a Substantive Due Process right. In *Griswold v. Connecticut*, the court upheld the right to contraceptives [for married couples] through the Due Process Clause of the Fourteenth Amendment.³⁶ In *Obergefell v. Hodges*, the court upheld same-sex marriages through the Due Process Clause of the Fourteenth Amendment.³⁷ In *Loving v. Virginia*, the court upheld interracial marriages through the Due Process Clause and the Equal Protection Clause of the Fourteenth Amendment.³⁸ In *Roe v.*

clause of the Fourteenth Amendment only guarantees process, so all substantive due process does not exist pursuant to the Constitution).

³⁰ *Dobbs*, 597 U.S. at 329-333.

³¹ *Id.*

³² *Id.*

³³ *Griswold v. Connecticut*, 381 U.S. 479,485 (1965).

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Obergefell v. Hodges*, 576 U.S. 644 (2015).

³⁸ *Loving v. Virginia*, 388 U.S. 1, 2 (1967).

Wade, the court upheld the right to pre-viability abortions through the Due Process Clause of the Fourteenth Amendment.³⁹

Each of these cases were premised and affirmed by the U.S. Supreme Court based on privacy as a fundamental right. Due to Selective Incorporation, the right to contraceptives, same-sex marriage, interracial marriage, and pre-viability abortions were deemed fundamental rights that the individual states were not permitted to infringe upon. States were prevented from encroaching upon these rights without having a compelling state interest that was narrowly tailored to effectuate such interest.⁴⁰ Essentially, once a right was deemed a fundamental right rooted in our nation's history and tradition, both federal and state legislatures were prevented from depriving individuals of their "life, liberty, or property without due process of law."⁴¹

Substantive Due Process jurisprudence has spawned with privacy to include the protection of interracial marriage, use of contraceptives, pre-viability abortions, same-sex intimacy, and same-sex marriage.⁴² Effectively, these fundamental rights that are rooted in our nation's history and traditions comprise the number of Substantive Due Process rights created by the Fourteenth Amendment. However, the Title VII Circuit Split presents a possible material change to those protected classes once safeguarded by the Substantive Due Process clause of the Fourteenth Amendment in the wake of *Dobbs v. Jackson Women's Health Organization*.

Notably, in *Dobbs v. Jackson*, the U.S. Supreme Court recanted on its longstanding perspective of pre-viability abortions as a Substantive Due Process right procured by the Fourteenth Amendment and an individual's right to personal

³⁹ *Roe v. Wade*, 410 U.S. 113, 164 (1973).

⁴⁰ *Id.* at 154.

⁴¹ U.S. CONST. amend. XIV, § 1.

⁴² Substantive Due Process was expanded to include protecting interracial marriage in *Loving v. Virginia*, use of contraceptives in *Griswold v. Connecticut*, same-sex intimacy in *Lawrence v. Texas*, and same-sex marriage in *Obergefell v. Hodges*.

privacy.⁴³ In doing so, the Court held that there is no such constitutional right.⁴⁴ In the wake of *Dobbs*, the future of Substantive Due Process rights has been seemingly left exposed and vulnerable. The fundamental rights once upheld by rationales underpinned in the right to privacy are no longer concretely supportable.⁴⁵ Substantive Due Process rights materialize in categories of protected classes highlighted by the Civil Rights Act (such as race, gender, and sexual orientation).

Dobbs presupposes the potential enervating state of Substantive Due Process. Protected classes, such as race, gender, or sexual orientation, have been upheld by the U.S. Supreme Court's Equal Protection jurisprudence.⁴⁶ Substantive Due Process is linked to these categories of protected classes. However, this landmark decision can be construed as the complete erosion of Substantive Due Process jurisprudence completely

The possible evisceration of such fundamental rights prescribed to these protected classes once safeguarded by the Due Process Clause of the Fourteenth Amendment lends to the necessity of strengthening the protection of fundamental rights under Title VII of the Civil Rights Act of 1964. For example, a business could deny an employment transfer based on someone's race, gender, or sexual orientation. Without a showing of tangible harm, an employer could infringe on those individual rights provided to those within protected classes.

⁴³ *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215, 299-302 (2022); *Roe*, 410 U.S. 113 at 164; *Doe v. Bolton*, 410 U.S. 179, 201 (1973); *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 833-34 (1992).

⁴⁴ *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215, 299-302 (2022); *Roe*, 410 U.S. 113 at 164; *Doe v. Bolton*, 410 U.S. 179, 201 (1973); *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 833-34 (1992).

⁴⁵ *Dobbs* majority opinion does not question the other Substantive Due Process rights, but Justice Thomas questions these rights in his concurrence. *See Dobbs*, 142 S. Ct. 2228 at 2277; *see also Dobbs*, 597 U.S. at 331-33 (Thomas, C., concurring) (arguing that all of the court's substantive due process precedents should be reconsidered, including *Griswold*, *Lawrence*, and *Obergefell*).

⁴⁶ *Roe v. Wade*, 410 U.S. 113 (1973); *Obergefell v. Hodges*, 576 U.S. 644 (2015); *Lawrence v. Texas*, 539 U.S. 558 (2003); *Loving v. Virginia*, 388 U.S. 1 (1967).

More specifically, businesses and companies that were once prohibited from intruding on fundamental rights with Title VII's adverse impact bar would be immunized from these discriminatory practices that fail to show a tangible harm. Additionally, proving Title VII violations is a higher bar to meet.

II. TANGIBLE HARM

Title VII (a) makes it unlawful to “limit, segregate, or classify...employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.”⁴⁷ Some circuits have construed Title VII (a) language as cementing an additional prong to a discrimination analysis. Proving that an employer made a discriminatory act based on a protected classification is insufficient for particular circuits.⁴⁸

In these circuits, an individual alleging discrimination under Title VII of the Civil Rights Act of 1964 must demonstrate that they are: (1) a member of a protected class, (2) qualified for the job, (3) suffered an adverse employment action, and that (4) individuals outside of the protected class were treated more favorably by the employer.⁴⁹ Adverse employment actions include “discharges, demotions, refusals to hire, refusals to promote, and reprimands.”⁵⁰ Tangible harm substantiates the adverse employment prong of the prima facie showing of a Title VII violation.

For example, Betty Bell was a teacher for South Delta School District in Mississippi from 1977 to 2000.⁵¹ Bell taught classes in the Vocational Education and Business and Computer Technology programs for high school pupils.⁵² The

⁴⁷ See 42 U.S.C. § 2000e-2 (2018).

⁴⁸ *Alvarado v. Texas Rangers*, 492 F.3d 605 (5th Cir. 2007). The 4th, 5th, 6th, 7th, and 11th circuits have upheld the additional tangible harm requirement.

⁴⁹ See *Thakkar v. Station Operators Inc.*, 697 F. Supp. 2d 908 (N.D. Ill. 2010).

⁵⁰ *Breaux v. City of Garland*, 205 F.3d 150, 157 (5th Cir. 2000).

⁵¹ *Bell v. S. Delta Sch. Dist.*, 325 F. Supp. 2d 728, 731 (S.D. Miss. 2004).

⁵² *Id.*

relationship between Bell and her immediate supervisor soured. Bell was informed that she would be transferred to the District's Middle School the following year, where she would teach seventh-grade Career Discovery vocational courses.⁵³

The superintendent informed Bell that the transfer was initiated because of the tension between Bell and her supervisor, but the transfer was aimed at balancing the racial composition of the vocational instructors in the vocational programs.⁵⁴ The school offered a different rationale for the transfer – the school wanted to hire someone with more educational expertise to teach at the high school level.⁵⁵ Bell was transferred again while she was employed at the middle school.⁵⁶ She resigned shortly thereafter.⁵⁷

The court opined that Bell did not prove a *prima facie* case for such a Title VII race discrimination claim. Though Bell was a member of a protected class, highly qualified for the position, and the position was filled by someone who was not a member of a protected class, the court reasoned that Bell's transfer did not qualify as an adverse employment action because the transfer did not, "cause harm to her...sufficiently serious to constitute a constitutional injury."⁵⁸ To qualify, there must be a causal link between the alleged discrimination and job benefits, "such as compensation, terms, conditions, or privileges of employment."⁵⁹ Additionally, there needs to be some objective, tangible harm, which Bell failed to prove because the transfer itself did not merit objective, tangible harm.⁶⁰

The District Court and some circuits have established that a forced transfer or denial of a transfer itself does not sufficiently satisfy the requirement for a tangible harm in the adverse employment prong.⁶¹ Transfers may only constitute adverse employment actions so long as transfers or denials are "more disruptive than a

⁵³ *Id.* at 732.

⁵⁴ *Id.* at 733.

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.* at 734.

⁵⁸ *Id.* at 736 – 37.

⁵⁹ *Id.* at 737.

⁶⁰ *Id.*

⁶¹ *Kubik v. Cent. Mich. Univ. Bd. of Trs.*, 221 F. Supp. 3d 885 (E.D. Mich. 2016).

mere inconvenience or an alteration of job responsibilities.”⁶² However, a lateral transfer or lateral denial does not implicitly rise to the level of an adverse employment action due to an individual’s displeasure with their employer’s actions.⁶³ There must be a connection between the discrimination and the denial of a related benefit.

III. DENIAL OF LATERAL TRANSFERS ARE INHERENTLY DISCRIMINATORY HARM

The D.C. Circuit has determined that the denial of lateral transfers is a Civil Rights Act violation without showing the additional tangible harm other circuits have glossed into Title VII, §2. In *Chambers v. D.C.*, the en banc D.C. Circuit overruled its *Brown v. Brody* precedent.⁶⁴ In *Brown*, the court determined that discrimination claims based on the denial of a transfer was not actionable under Title VII of the Civil Rights Act of 1964 unless forced transfers or the denial of transfers levied some kind of “legally cognizable adverse employment action.”⁶⁵

Legally cognizable adverse harm was the primary factor in actuating Title VII discrimination claims, in addition to being a member of a protected class and the unfavorable harm leading to an inference of such discrimination.⁶⁶ A lateral transfer or the denial of a lateral transfer that did not materialize as a demotion, lost benefits, or changed “terms, conditions or privileges of employment” did not substantiate a cognizable adverse harm under Title VII.⁶⁷

In *Chambers v. D.C.*, the court determined that the objectively tangible harm requirement was inconsistent with the essence of Title VII.⁶⁸ Mary Chambers, a twenty-year employee of the District of Columbia’s Office of the Attorney General, filed a sex discrimination charge with the Equal Opportunity Employment

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Chambers v. Dis. Of Columbia*, 35 F.4th 870 (D.C. Cir. 2022).

⁶⁵ *Brown v. Brody*, 199 F.3d 446 (D.C. Cir. 1999).

⁶⁶ *McKenna v. Weinberger*, 729 F.2d 783 (D.C. Cir. 1984).

⁶⁷ *Brown*, 199 F.3d at 457.

⁶⁸ *Chambers*, 35 F.4th at 872.

Commission after she sought several transfers to other units within the office.⁶⁹ Chambers filed suit against the District alleging sex discrimination, which violated Title VII.⁷⁰ The district court granted summary judgment to the District of Columbia after applying the *Brown* tangible harm framework.⁷¹

The D.C. Circuit affirmed the district court's decision under the same *Brown* rationale.⁷² However, the D.C. Circuit panel members grew concerned with the tangible harm framework and voiced concern that Title VII does not reference an additional tangible harm prong for a cognizable claim.⁷³ The full court met en banc to overrule *Brown* and eliminate the tangible harm requirement in *Chambers* to be congruous with the literal words of Title VII.⁷⁴ The court reasoned that Title VII prohibits all forms of discrimination that impact the terms and conditions of employment, and the actions taken in this case impacted the employee's "terms, conditions, or privileges of employment."⁷⁵ Consequently, refusing an employee's transfer or forcing a transfer while declining to do so for an employee in a similar position would essentially deprive that employee of a job opportunity.⁷⁶ Additionally, an employer discriminates against the employee when the decision to forcibly transfer or deny a transfer request is made based on one of the employee's protected classifications.⁷⁷

Chambers eliminated the additional prong and held that the forced transfer or denying the transfer of an employee into a new role or location does, in fact, change the "terms, conditions, or privileges of employment."⁷⁸ The word discrimination is not construed to include a narrow meaning distinguishing tangible versus intangible harm.⁷⁹ Therefore, *Chambers* determined that all discrimination

⁶⁹ *Id.* at 873.

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.* at 874.

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Chambers*, 35 F.4th at 875.

⁷⁹ *Id.* at 874.

impacting the “terms, conditions, and privileges of employment” is actionable under Title VII, with the analysis ceasing once that determination has been made.⁸⁰ Any additional analysis to prove more than a *prima facie* showing of harm is no longer required nor harmonious with Title VII.⁸¹

The Title VII circuit split encompasses forced transfers or denials of transfer as possible actionable Title VII lawsuits. The reasoning underlying these transfers or denials of transfers could be rooted in any of the Substantive Due Process protected rights, such as denying a young woman a transfer to a location where pre-viable abortions are protected or denying a transgender woman a transfer to a state that permits gender affirmation procedures. Pre-viable abortions and transgender status are examples of Substantive Due Process rights that have been protected by the Due Process clause of the Fourteenth Amendment.⁸² These protected classes can be utilized in transferring or denying a transfer of an employee, and the employee would not have any Title VII recourse with the additional cognizable harm required by most circuits.

IV. *DOBBS* DECISION AND IMPLICATIONS

Dobbs presents a possible uncertainty regarding the future of protected classes, and the Title VII circuit split highlights how employers could actualize transfers or denials of transfers based on once-protected classes without reproach. In *Dobbs*, the U.S. Supreme Court noted that the U.S. Constitution does not explicitly reference abortion, nor does it implicitly protect abortion as a fundamental right.⁸³ Hence, the U.S. Supreme Court surmised that the appropriate tier of scrutiny to apply in reviewing the abortion restriction at issue was rational basis.⁸⁴

⁸⁰ *Id.* at 874–75.

⁸¹ *Id.*

⁸² *Dobbs v. Jackson Women’s Health Org.*, 597 U.S. 215, 302 (2022); *Roe v. Wade*, 410 U.S. 113, 164 (1973); *Doe v. Bolton*, 410 U.S.179, 201 (1973); *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 834 (1992); *Bostock v. Clayton Cnty., Ga.*, 590 U.S. 644, 644(2020); *Obergefell v. Hodges*, 576 U.S. 644, 644 (2015).

⁸³ *Dobbs*, 597 U.S. at 231.

⁸⁴ *Id.* at 300–01.

To start its analysis, the *Dobbs* Court stipulated that the history and tradition framework governed its inquiry.⁸⁵ The Court announced that under this framework, if an allegedly fundamental right is not mentioned in the Constitution, the Court must assess whether our nation's history and traditions protect that right.⁸⁶ In making this assessment, the Court's key consideration was whether a right to abortion was so entrenched in history that abortion could be considered a fundamental right.⁸⁷ Ultimately, the Court held that abortion failed to pass muster under the history and tradition framework because it was not a right that was ingrained into our nation's history.⁸⁸ In its reasoning, the Court asserted that legal abortion was not known until the 20th century, and it noted that abortion was criminalized in several states when the Fourteenth Amendment was ratified.⁸⁹ Consequently, the U.S. Supreme Court found that abortion did not have a history and tradition of being protected in our country; therefore, the Court held that abortion is not a fundamental right protected by the U.S. Constitution.⁹⁰

A. Other Substantive Due Process Rights

The Court distinguished abortion from other rights that are recognized and protected under the jurisprudence of Substantive Due Process, such as same-sex marriage, interracial marriage, and contraceptives.⁹¹ The Court suggested that, unlike abortion, these other rights did not involve the destruction of a "potential life."⁹² As such, it distinguished abortion from these fundamental rights.⁹³ By distinguishing these other rights, the Court limited its holding to abortion. Despite

⁸⁵ *Id.* at 237.

⁸⁶ *Id.*

⁸⁷ *Id.* at 240.

⁸⁸ *Id.*

⁸⁹ The court even dismissed Equal Protection Clause arguments made by proponents of the right to abortion. *Id.* at 236–37.

⁹⁰ *Id.* at 250.

⁹¹ *Dobbs*, 597 U.S. at 256–57.

⁹² *Id.* at 257.

⁹³ *Id.*

the Court's disclaimer, however, neither the history and tradition framework nor stare decisis supports this limited holding.

Evidence of such a contradiction is seen in Justice Thomas's concurring opinion in *Dobbs*, wherein he stated, "[in] future cases, we should reconsider all of this Court's substantive due process precedents, including *Griswold*, *Lawrence*, and *Obergefell*."⁹⁴ As such, despite the Court's reassurances that the *Dobbs* decision would not implicate other Substantive Due Process cases, the history and tradition framework may still be applied to those other rights. To be sure, *Dobbs* does leave these other Substantive Due Process cases untouched by the Court's ruling. However, there remains an opportunity for these rights to be overturned if the Court were to take the same history and tradition approach with those rights as they did in *Dobbs*.

The history and tradition framework's narrow application to abortion provides little comfort when this same framework would eviscerate the fundamental rights that have insulated protected classes of people under Title VII and the Civil Rights Act. The right to same-sex marriage, interracial marriage, or contraceptives is not explicitly noted in the U.S. Constitution. Therefore, the court would have to analyze these rights under the history and tradition framework to determine if they were indeed fundamental rights protected by the Fourteenth Amendment. This framework is faulty, and no particular right outside of the individual rights and liberties outlined in the Bill of Rights would be constitutionally protected under the tradition and history framework. No other provisions of the Constitution would protect these Substantive Due Process rights if the history and tradition framework is applied and the Fourteenth Amendment no longer protected certain classifications of people.⁹⁵

Despite stare decisis in *Roe* and *Casey*, the court substantiated a sufficient rationale to overturn the right to abortion. The implications of such a decision are

⁹⁴ *Id.* at 332 (Thomas, J., concurring).

⁹⁵ Arguments have been made that the Equal Protection Clause of the Fourteenth Amendment could suffice to defend the protected classes if the Due Process Clause would no longer protect these rights. These arguments have not been sufficient.

momentous, in addition to the repeal of the right to pre-viability abortions. The Court partially reversed *Roe* and *Casey* due to the lack of conformity with older legislative norms of abortions.⁹⁶ The Court argued that *Roe* and *Casey* did not align with authorities who criminalized pre-and post-quickening abortions.⁹⁷ The specific authorities cited in *Dobbs* were Sir Matthew Hale and Sir William Blackstone of England, who classified post-quickening abortion as homicide.⁹⁸ The U.S. Supreme Court referenced these authorities in anticipation of critics who would argue that this decision would contravene stare decisis.

Additionally, the *Dobbs* court was deliberate in postulating the limitations of stare decisis. There have been decisions handed down by the court necessitating eventual review, such as the anti-cannons of *Plessy v. Ferguson* and *Lochner v. New York*.⁹⁹ There were times when decisions were “egregiously wrong.”¹⁰⁰ In this, stare decisis is “not a straitjacket” that confines the court indefinitely.¹⁰¹ The *Dobbs* justices opined *Roe* was “deeply damaging...[its] constitutional analysis was far outside the bounds of any reasonable interpretation of the various constitutional provisions to which it vaguely pointed.”¹⁰² The Court argued that *Dobbs* had to overrule the precedential *Roe*, despite arguments and sentiments countering the Court’s rationale.

In *Dobbs*, the majority relied on Sir Matthew Hale and Sir William Blackstone as proper authority. The court postulated their views as evidence of our Framers’ mindsets at the Constitution’s inception. Not only were the drafters of *Roe* and *Casey* not bound by historically English law, but the drafters of the *Roe* and *Casey*

⁹⁶ *Dobbs*, 597 U.S. at 218.

⁹⁷ *Id.* at 251–52.

⁹⁸ *Id.* at 242.

⁹⁹ In *Plessy*, the court suggested that enslaved individuals do not have standing to sue in court because they were not considered citizens. In *Lochner*, the court suggested that the government could not regulate the labor market and the individual had the right to contract in employment without the state’s police powers oversight. These cases were overruled, despite being utilized as stare decisis. See *Plessy v. Ferguson*, 163 U.S. 537, 552 (1896); *Lochner v. New York*, 198 U.S. 45, 64 (1905).

¹⁰⁰ *Dobbs*, 597 U.S. at 268.

¹⁰¹ *Id.* at 294.

¹⁰² *Id.* at 268.

decisions utilized *Griswold* as a foundation for the penumbra of privacy substantiating the right to abortion. At the time of the *Dobbs* decision, *Roe* and *Casey* were still precedent, yet the Court nonetheless overturned the right to abortion. This implication is crucial: it demonstrates that precedent is not secure and nullifies reliance, the bedrock of contemporary jurisprudence.¹⁰³

Currently, stare decisis in the Fourteenth Amendment cases remains volatile in the U.S. Supreme Court's Substantive Due Process jurisprudence. In *Casey*, stare decisis and reliance interest are discussed as the legal rationale for upholding significant portions of *Roe*.¹⁰⁴ However, the *Dobbs* Court did not find a reliance interest in jeopardy in overturning the nearly fifty-year abortion precedent stemming from *Roe*. The Court could likely use this same rationale in assessing the other Substantive Due Process rights, such as the use of contraceptives, same-sex intimacy, and same-sex marriage. Overturning these rights would obliterate Substantive Due Process rights, and these cases could fall into the category of anti-cannons, such as *Plessy* and *Lochner*.

Prior to *Dobbs*, the right to privacy protected a woman's right to pre-viability abortions—the right to pre-viability abortions was considered a fundamental right.¹⁰⁵ However, *Dobbs* not only eliminated the fundamental right to pre-viability abortions but it could also be used to undermine other fundamental rights derived from the right to privacy and Substantive Due Process.¹⁰⁶ The Title VII circuit split highlighting the cognizable harm requirement by most circuits reveals how the

¹⁰³ The majority in *Dobbs* applies the history and tradition framework to abortion, and only overturns this particular jurisprudence. However, the history and tradition framework can be applied to other Substantive Due Process rights. The Court could possibly overturn most of the Substantive Due Process jurisprudence when applying the tradition and framework test.

¹⁰⁴ Specifically, which part is upheld, and which part is overturned. *Casey*, 505 U.S. at 856, 870.

¹⁰⁵ See *Dobbs*, 597 U.S. at 302 (overruling *Roe* and *Casey*); *Roe*, 410 U.S. 113 at 164 (ruling that the constitutional right to privacy protects a woman's right to have an abortion); *Doe*, 410 U.S. at 194 (ruling that an abortion law violates due process by requiring hospital accreditation); *Casey*, 505 U.S. at 833 (ruling that the doctrine of *stare decisis* requires reaffirmance of *Roe*'s essential holding recognizing a woman's right to choose an abortion before fetal viability).

¹⁰⁶ See *Dobbs*, 597 U.S. at 332 (Thomas, J., concurring).

protected classes are left vulnerable if Substantive Due Process is rescinded. Employers may facially discriminate against employees based on protected classifications by denying or forcing transfers. However, this discrimination will not be actionable because these circuits do not classify denying or forcing transfers as an actionable adverse impact. Protected classes will be left vulnerable unless the additional adverse impact is eliminated.

V. CIVIL RIGHTS ACT OF 1964 IMPLICATIONS, SUBSTANTIVE DUE PROCESS, AND THE SOLUTION

Fourteenth Amendment jurisprudence has been a critical tool upholding rights for groups of protected classes, created by Title VII of the Civil Rights Act of 1964. However, the *Dobbs* decision highlights the unsteady state of Substantive Due Process in the same ways critics have contemplated and encouraged the retrenching of Substantive Due Process rights.

The Fourteenth Amendment can no longer be the sole tool utilized in supporting the protected classes. The current state of Substantive Due Process is uncertain due to the *Dobbs* decision. Reliance on the history and tradition framework underpinning the *Dobbs* decision could reasonably be applied to every other Substantive Due Process right at any time in the future, completely rewriting the concept of Substantive Due Process as it currently stands. This has dire implications for the classification of protected classes. The Fourteenth Amendment can no longer provide constitutional protection for those protected classes in the way that this has been substantiated historically, leaving the Civil Rights Act of 1964 and Title VII as the lone protector of those within protected classes.

The cognizable harm requirement and *Dobbs*' implications indicate that an employer could refuse to transfer or force a transfer of an employee within a company based on one of the many protected classifications. The Fourteenth Amendment ensures that the protected classifications are safeguarded by the U.S. Constitution. However, without the Fourteenth Amendment protections, these protected classifications can be disregarded and even utilized in making transfer determinations within a company. The employee would be required to demonstrate

tangible harm beyond the forced transfer or denial of the transfer itself, which is a heightened burden that undermines the essence of the Civil Rights Act of 1964.

Consequently, the tangible harm standard glossed into Title VII should be eliminated in the wake of the teetering state of Substantive Due Process rights. The Civil Rights Act and Title VII must be strengthened to protect those within these protected classes. Business entities and employees may be able to infringe upon those within protected classes by forcing a transfer or denying a transfer solely on a protected classification. Additionally, the employee would have the burden of showing a cognizable tangible harm that adversely impacts the employee's employment in addition to the forced transfer or denial of transfer if the U.S. Supreme Court overturns the current Substantive Due Process jurisprudence. Proving Civil Rights violations within workplaces would be more difficult, leaving those within the protected classes without the protection provided by the Fourteenth Amendment and subsequent legislation (i.e., The Civil Rights Act of 1964 and Title VII).

The D.C. Circuit's elimination of the tangible harm standard would alleviate a burden on those individuals who have historically been adversely impacted by discriminatory practices. This framework ensures adequate due process during a time when the due process once highlighted in the Fourteenth Amendment is no longer rooted in the confidence of a legitimate legal or constitutional pillar. Strengthening Title VII by excluding the tangible harm standard would safeguard the individuals within the protected classes and ensure that all employees, regardless of classification, receive equal protection under the law when facing forced transfers or denial of transfers in the workplace.¹⁰⁷

¹⁰⁷ There are many means to any one end. In 2024, the U.S. Supreme Court reached this same conclusion in *Muldrow v. City of St. Louis*. However, that ruling was predicated on alternative means of support. Nevertheless, history has shown that Supreme Court rulings of this nature are not everlasting, as evidenced by *Dobbs*. As such, it is vital that academia recognizes and evaluates the multitudes of means by which this conclusion can be met and the unique merits of each legal support.

