No. 15-274

IN THE

Supreme Court of the United States

WHOLE WOMAN'S HEALTH, ET AL.,
Petitioners,
v.
KIRK COLE, COMMISSIONER,
TEXAS DEPARTMENT OF STATE
HEALTH SERVICES, ET AL.,
Respondents.

On Writ of Certiorari to the United States
Court of Appeals for the Fifth Circuit

BRIEF OF *AMICUS CURIAE* LAMBDA LEGAL DEFENSE AND EDUCATION FUND, INC. IN SUPPORT OF PETITIONERS AND SUPPORTING REVERSAL

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INTEREST OF *AMICUS CURIAE*

Amicus Curiae Lambda Legal Defense and Education Fund, Inc. ("Lambda Legal") is the nation's oldest and largest legal organization working for full recognition of the civil rights of lesbian, gay, bisexual, and transgender ("LGBT") people and people living with HIV through impact litigation, education, and policy advocacy. *Amicus* submits this brief in support of Petitioners.[1]

Amicus submits this brief to explain why laws restricting access to abortion implicate not only the Due Process Clause's liberty guarantee but also the equal protection guarantee of the Fourteenth Amendment because such laws deprive women of equal dignity, moral agency, and participation in the life of this nation. For several interrelated reasons, *Amicus* has an interest in opposing restrictions to abortion that unduly burden women.

First, the landmark cases in which this Court vindicated lesbian and gay individuals' constitutional guarantees of liberty and equality share a common doctrinal foundation with this Court's jurisprudence protecting procreative decision-making, access to contraception, and abortion. Lambda Legal participated as party counsel in *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), *Lawrence v. Texas*, 539 U.S. 558 (2003), and *Romer v. Evans*, 517 U.S. 620 (1996),

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[1] All parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *Amicus*, its members, or its counsel made a monetary contribution to its preparation or submission.

and as counsel for *amici curiae* in *United States v. Windsor*, 133 S. Ct. 2675 (2013), which together provide some of the most explicit recent articulation of the interconnected and mutually reinforcing nature of liberty and equality claims brought under the Due Process and Equal Protection Clauses. These landmarks addressing the constitutional rights of lesbian and gay people to be free from discrimination and to exercise their fundamental rights to marry, to family integrity and association, and to sexual intimacy demonstrate how the values and protections embodied in the Due Process and Equal Protection Clauses reinforce and inform one another. These cases also reaffirm the Constitution's protection for the principles of equal dignity and equal participation in society.

Second, women (whether lesbian, bisexual, or heterosexual) and LGBT people share a common history of discrimination and subordination in this country, including through application and enforcement of sex stereotypes—such as those that undergird laws restricting abortion. This history of discrimination and related stigma continues to pose an obstacle to equal respect and participation in society by members of both groups, and to their ability to protect themselves in the political arena against discriminatory legislative measures. *Amicus* has an interest in challenging laws that require conformity with sex stereotypes or otherwise reinforce related double standards with respect to sexuality, marriage, and parenting, especially as such laws often work to the detriment of LGBT people.

Third, *Amicus* has an interest in this case because many members of the LGBT community need and use

abortion services, and share an interest in preservation of the constitutionally protected right of each woman not to continue a pregnancy.

SUMMARY OF THE ARGUMENT

When government intrudes on a fundamental right as central to individual autonomy and dignity as marriage, sexual intimacy, contraception, or abortion, government infringes on the burdened individual's ability to participate equally in society. Equality and liberty principles are inextricably linked and reinforcing when the right at stake is the ability to control one's destiny by defining for oneself whether, with whom, and when to create a family. A woman's constitutional right to elect an abortion is essential to her dignity and integral to her autonomy to determine her life's course, including the structure of her family, her educational and career trajectory, and her economic future, especially given persistent inequality in societal gender role expectations with respect to parenting. Laws unduly restricting access to abortion therefore not only deprive women of liberty but also deny them the ability to participate equally in society relative to men, and accordingly should be reviewed with care to satisfy the dictates of both the liberty and equality guarantees.

The legislative justifications for state laws regulating abortion also warrant close scrutiny for the additional reason that women who exercise their constitutional right to have an abortion experience stigma and discrimination, which, in turn, creates a structural obstacle to their ability to advocate in the political arena against measures that unduly burden their decision to end a pregnancy. In cases involving lesbians and gay men, courts have acknowledged a

similar social dynamic—that stigma and discrimination can impede the ability of a disfavored group to participate effectively in the political process to rectify unjust laws, including those designed to coerce personal decision-making and independence. As cases involving lesbians and gay men demonstrate, when a law disadvantages a stigmatized group that historically has been the target of discrimination and moral condemnation, equality principles require courts to take particular care in scrutinizing legislative justifications to determine whether they serve their stated purposes, and whether those purposes have a basis in fact. This Court should exercise similar care here—not only because the Due Process Clause requires it, but also because the Equal Protection Clause does as well.

This Court's jurisprudence concerning abortion, pregnancy, and other aspects of a woman's reproductive autonomy has recognized that laws regulating such autonomy implicate not just a woman's liberty but also her ability to be respected fully and to participate equally in society relative to men. *Amicus* urges this Court to hold expressly that the constitutional right to choose abortion finds protection under the Equal Protection Clause as well as the Due Process Clause.

ARGUMENT

I. Government Intrusion on Fundamental Rights Central to Individual Autonomy, Dignity, and Moral Agency Burdens the Individual's Ability to Participate Equally in Society.

This Court has recognized on numerous occasions, including recently in *Obergefell*, *Windsor*, and *Lawrence*, that liberty and equality principles are linked and mutually reinforcing when the right at stake concerns choices an individual makes about marriage, sexual intimacy, and reproductive autonomy, including the decision to terminate a pregnancy. These decisions can be intimate, self-defining, and capable of changing one's life course. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 851 (1992) ("Our law affords constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education. Our cases recognize the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person.") (citation omitted) (emphasis in original). The Constitution shields such decisions from undue government interference both out of respect for individual liberty and autonomy, and also because the ability to make these decisions for oneself is central to a person's equal dignity and ability to participate in society relative to other people.

1. "The Due Process Clause and the Equal Protection Clause are connected in a profound way, though they set forth independent principles." *Obergefell*, 135 S. Ct. at 2602-03. Although the two Clauses are not always co-extensive, in cases

concerning intimate decision-making about family life, "the two Clauses may converge in the identification and definition of the right." *Id.* at 2603. "Each concept—liberty and equal protection—leads to a stronger understanding of the other," and the "interrelation of the two principles furthers our understanding of what freedom is and has become." *Id*.

Thus, the exclusion of same-sex couples from the fundamental right to marry implicated equality concerns because it stigmatized and demeaned lesbian and gay people, disparaged their life choices, and diminished their personhood. *Id.* at 2602; *see also* Laurence H. Tribe, *Equal Dignity: Speaking Its Name*, 129 Harv. L. Rev. F. 16, 19-20, 22 (2015); Kenji Yoshino*, The Supreme Court 2014 Term—Comment: A New Birth of Freedom?:* Obergefell v. Hodges, 129 Harv. L. Rev. 147, 172-75 (2015). Denying same-sex couples the right to marry, "[e]specially against a long history of disapproval of their relationships," imposed a disability on lesbian and gay people that "serve[d] to disrespect and subordinate them," violating not just due process but equal protection as well. *Obergefell*, 135 S. Ct. at 2604; *see also* Kenji Yoshino, *The New Equal Protection*, 124 Harv. L. Rev. 747, 802 (2011) (Supreme Court's "liberty-based dignity jurisprudence synthesizes both equality and liberty claims"). Key to this Court's ruling in *Obergefell* was the recognition that laws denying same-sex couples the fundamental right to marry "serve[d] to disrespect and subordinate them," which the Equal Protection Clause, like the Due Process Clause, forbids. *Obergefell*, 135 S. Ct. at 2604.

Liberty and equality principles were also mutually reinforcing in *Windsor*. That case struck down Section 3 of the "Defense of Marriage Act" ("DOMA"), which denied federal respect to the marriages of same-sex couples validly entered under state law, because DOMA violated these couples' "equal dignity." 133 S. Ct. at 2695. This Court explained that both liberty and equality values drove the result because, while the due process guarantee "withdraws from government the power to degrade or demean . . ., the equal protection guarantee . . . makes that Fifth Amendment right all the more specific and all the better understood and preserved." *Id*. By permitting same-sex couples to marry, states "conferred upon them a dignity and status of immense import." *Id.* at 2692. Denying respect to these marriages deprived couples of equality by denying them "a relationship deemed by the State worthy of dignity in the community *equal with all other marriages*," a marriage reflective of "the community's . . . evolving understanding of the meaning of equality." *Id.* at 2692-93 (emphasis added); *see also* Nancy C. Marcus, *Deeply Rooted Principles of Equal Liberty, Not "Argle Bargle": The Inevitability of Marriage Equality After* Windsor, 23 Tul. J. L. & Sexuality 17, 25 (2014); Tribe, *Equal Dignity*, *supra*, at 17. Thus, *Windsor* established that state laws respecting a couple's autonomy in determining for themselves whether to marry were central to the couple's dignity, and that a federal law denying respect for their autonomy in such matters deprived the couple not only of liberty but of equality in relation to others.

Lawrence similarly recognized the connection between liberty and equality principles, explaining that vindicating gay peoples' fundamental right to

enter intimate relationships with the individuals of their choice resolved the inequality problem created by sodomy laws. 539 U.S. at 575, 578. "[E]quality of treatment and the due process right to demand respect for conduct protected by the substantive guarantee of liberty are linked in important respects, and a decision on the latter point advances both interests." *Id.* at 575. As this Court explained, laws criminalizing intimacy between people of the same sex "demean the lives" and "control the . . . destiny" of lesbian and gay people. *Id.* at 578; *see also* Kenneth L. Karst, *The Liberties of Equal Citizens: Groups and the Due Process Clause*, 55 U.C.L.A. L. Rev. 99 (2007); Nan D. Hunter, *Living with* Lawrence, 88 Minn. L. Rev. 1103 (2004). *Lawrence* "both presupposed and advanced an explicitly equality-based and relationally situated theory of substantive liberty." Laurence H. Tribe, Lawrence v. Texas: *The "Fundamental Right" that Dare not Speak Its Name*, 117 Harv. L. Rev. 1893, 1898 (2004). Thus, the anti-subordination principle that undergirds *Obergefell*, *Windsor*, and *Lawrence* demands consideration of more than just how a challenged law restricting exercise of a fundamental right infringes liberty and autonomy, but also how the law may stigmatize burdened individuals and deprive them of full and equal membership in society.

2. *Obergefell*, *Windsor*, and *Lawrence* also acknowledge that societal understandings of liberty may evolve over time, and that the burden imposed on a person's dignity in relation to others may not be evident at first.

> 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 and the Fourteenth Amendment did not presume to know the extent of freedom in all of its dimensions, and so they entrusted to future generations a charter protecting the right of all persons to enjoy liberty as we learn its meaning. When new insight reveals discord between the Constitution's central protections and a received legal stricture, a claim to liberty must be addressed.

Obergefell, 135 S. Ct. at 2598; *see Windsor*, 133 S. Ct. at 2689-90, 2695; *Lawrence*, 539 U.S. at 578-79; *see also Schuette v. Coal. to Defend Affirmative Action*, 134 S. Ct. 1623, 1636 (2014) ("liberty's full extent and meaning may remain yet to be discovered and affirmed").

The scope of the liberty guarantee's protections may expand in new generations as the nation comes over time to understand and respect emerging claims to equal personhood by members of minority groups formerly dismissed or unheard. Prejudice can stem from "simple want of careful, rational reflection" or from "indifference or insecurity as well as from malicious ill will," *Bd. of Trustees of the Univ. of Alabama v. Garrett*, 531 U.S. 356, 374-75 (2001) (Kennedy, J., concurring), and it can take time and familiarity for society to recognize the way a law has subordinated a group of people. "[N]ew insights and societal understandings can reveal unjustified inequality within our most fundamental institutions that once passed unnoticed and unchallenged." *Obergefell*, 135 S. Ct. at 2603. Thus, liberty and

equality principles not only reinforce each other but inform each other over time.

Indeed, over the years society has held differing and evolving views of the morality and social acceptability of individual decisions about relationships, marriage, and reproductive autonomy alike. States for generations condemned and criminalized interracial marriage. *Casey*, 505 U.S. at 847-48. Lesbian and gay people also faced condemnation and criminalization of their relationships. *Lawrence*, 539 U.S. at 570. So, too, did society disapprove of and criminalize a woman's decision not to continue with a pregnancy. *Roe v. Wade*, 410 U.S. 113, 138-40 (1973).

However, as the nation grew to understand both the significance of decisions concerning family life, intimacy, and reproduction for all individuals, and the ways in which laws interfering with individual autonomy in these arenas stigmatize people and deprive them of dignity in relation to their peers, courts stepped in to protect against such government interference, recognizing that all individuals have a fundamental liberty interest in making such decisions for themselves. Thus, this Court struck down bans on interracial marriage as "[t]he reasons why marriage is a fundamental right became more clear and compelling from a full awareness and understanding of the hurt that resulted from laws barring interracial unions." *Obergefell*, 135 S. Ct. at 2603. Likewise, "[a]s women gained legal, political, and property rights, and as society began to understand that women have their own equal dignity," laws subordinating married women also fell. *Id.* at 2595; *see also id.* at 2604 (citing cases invalidating laws imposing sex-based marriage

inequality); *J.E.B. v. Ala. ex rel. T.B.*, 511 U.S. 127, 135 (1994) (rejecting barriers to women serving as jurors that had been grounded in "outdated misconceptions concerning the role of females in the home rather than in the 'marketplace and world of ideas.'") (citations omitted).

Similarly, with respect to lesbians and gay men, although *Lawrence* invalidated laws that made same-sex intimacy a criminal act, this Court recognized in *Obergefell* that striking down laws criminalizing lesbian and gay couples' relationships did not sufficiently accord respect to these couples' equal dignity. "While *Lawrence* confirmed a dimension of freedom that allows individuals to engage in intimate association without criminal liability, it does not follow that freedom stops there. Outlaw to outcast may be a step forward, but it does not achieve the full promise of liberty." *Obergefell*, 135 S. Ct. at 2600. To extend the full promise of constitutional guarantees of liberty and equality to lesbian and gay people, this Court afforded affirmative recognition to their fundamental right to marry. Thus, it became evident that members of interracial couples, lesbians and gay men, and women cannot participate equally in society without governmental respect for their autonomy to make decisions about the structure of their families for themselves. To recognize the equal dignity and personhood of members of these groups, it was necessary to respect their moral agency.

Such decisions recognizing the common humanity of subordinated groups were not always universally well-received at the time or over time. With respect to each of these claims for equal dignity, "reasonable and sincere people" in good faith held opposing views.

Obergefell, 135 S. Ct. at 2594. The Court's abortion rights jurisprudence, for example, has recognized from the start the diversity of religious traditions and moral views about pregnancy and women's related life interests. *See, e.g., Roe*, 410 U.S. at 160-62 (noting the contrasts among Jewish, Protestant, and Catholic beliefs, *inter alia*, about when legally cognizable life begins, morality of abortion, and proper locus of decision). Given the longstanding disagreements among those moral visions—including some that oppose abortion in all circumstances, and others that charge individuals not to bring children into the world absent capacity to parent them—the Court appropriately and consistently has recognized that government may not substitute the preferences of legislative majorities for the individual's freedom to make decisions about matters "so fundamentally affecting a person." *Casey*, 505 U.S. at 851. Majoritarian moral disapproval is never, standing alone, an adequate justification for interfering in individual autonomy in these areas. *Romer*, 517 U.S. at 633-34; *see also Lawrence*, 539 U.S. at 582 (O'Connor, J., concurring). For government to choose sides among competing moral views and constrain an individual's autonomy on that basis would be to deprive that person of equal dignity.

3. The analysis this Court described for identifying and defining the fundamental right at issue in *Obergefell* constitutes an additional, independent reason to recognize the equality values implicated by a woman's constitutional right to choose to have an abortion. *Obergefell* held that fundamental rights cannot be defined by the identity of the persons seeking to exercise those rights for the first time, because if that were permitted, "received practices

could serve as their own continued justification and new groups could not invoke rights once denied." *Obergefell*, 135 S. Ct. at 2602 (citing *Loving v. Virginia*, 388 U.S. 1, 12 (1967); *Lawrence*, 539 U.S. at 566-67). *Obergefell's* guidance for identifying fundamental rights, together with this Court's repeated recognition that the liberty guarantee protects an evolving understanding of personhood and dignity—the full parameters of which may never be seen or appreciated by any one generation—means that laws implicating fundamental liberty interests may belatedly be recognized as having subordinated certain groups, thereby infringing on the equal liberty of members of those groups.

Obergefell's fundamental rights analysis also makes clear that it is not necessarily material whether a government practice that infringes a group's fundamental right was *intended* at the time of its passage to target that particular group. The oppressive and unjustified aspects of the law may become evident over time in light of current experience and understanding. "The limitation of marriage to opposite-sex couples may long have seemed natural and just, but its inconsistency with the central meaning of the fundamental right to marry is now manifest." *Obergefell*, 135 S. Ct. at 2602. When courts redress infringements of fundamental rights to a historically subordinated group, courts not only remedy the deprivation of the fundamental right, but also the equality problem. Tribe, *Equal Dignity*, *supra*, at 19. In such cases—when a restriction impinges on both liberty and equality interests, stigmatizing a historically subordinated group by denying members of that group equal dignity—the Court need not determine whether purposeful intent to discriminate

against that group was present in order to conclude that the restriction violates the Equal Protection Clause. Thus, this Court could find that marriage bans infringe the Equal Protection Clause without having to perform an inquiry into whether such laws were motivated by a desire to discriminate against same-sex couples. Similarly, laws unduly restricting abortion can—and do—offend equal protection principles because they subordinate women and deprive women of dignity, even if these laws were not expressly intended to discriminate based on sex at the time they were passed.

As these and other precedents of this Court show, when burdens on a fundamental right rest heavily upon a disempowered group, "the Equal Protection Clause can help to identify and correct inequalities," thereby "vindicating precepts of liberty and equality under the Constitution." *Obergefell*, 135 S. Ct. at 2604.

II. Laws Unduly Burdening Access to Abortion Implicate the Equal Protection Guarantee Because They Deny Women Equal Participation in Society and Equal Dignity.

Laws restricting women's access to abortion implicate equality values as a result of the unequal "organization of work and family roles in American society," which continue to reflect deep and enduring differences in gender roles, and "double standards in sex and parenting." Neil S. Siegel & Reva B. Siegel, *Contraception as a Sex Equality Right*, 124 Yale L. J. F. 349, 350 (2015). Control over whether and when to give birth is not only of crucial dignitary importance,

it also affects women's health and sexual freedom, ability to enter and end relationships, education and job training, and ability to negotiate work-family conflicts in institutions organized on the basis of traditional sex-role assumptions and expectations—particularly for those who already are marginalized as a result of class, income, race, or marital status. Reva B. Siegel, *Sex Equality Arguments for Reproductive Rights*, 56 Emory L. J. 815 (2007). Laws infringing upon a woman's reproductive autonomy prevent her from participating in full partnership with men in the nation's social and economic life. Ruth Bader Ginsburg, *Sex Equality and the Constitution: The State of the Art*, 4 Women's Rights L. Rep. 143, 143-44 (1978).

Although this Court in *Roe*, 410 U.S. at 129, located the abortion right in the due process guarantee, this Court also has recognized that laws restricting abortion or contraception, or containing pregnancy-related regulations, implicate equality values as well as due process concerns. For example, in *Casey*, equality considerations guided this Court in identifying the kinds of restrictions on abortion that violate the undue burden test. *See* 505 U.S. at 852, 856, 898. "The ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives," *id.* at 856, and a pregnant woman's "suffering is too intimate and personal for the State to insist, without more, upon its own vision of the woman's role, however dominant that vision has been in the course of our history and our culture." *Id.* at 852. "The destiny of the woman must be shaped . . . [by] her own conception of her spiritual imperatives and her place in society." *Id.*

Similarly, in *Thornburgh*, this Court explained, "A woman's right to make [the] choice freely [to end her pregnancy] is fundamental. Any other result . . . would protect inadequately a central part of the sphere of liberty that our law guarantees *equally* to all." *Thornburgh v. Am. College of Obstetricians & Gynecologists*, 476 U.S. 747, 772 (1986) (emphasis added); *see also Gonzales v. Carhart*, 550 U.S. 124, 172 (2007) ("[L]egal challenges to undue restrictions on abortion procedures do not seek to vindicate some generalized notion of privacy; *rather, they center on a woman's autonomy to determine her life's course, and thus to enjoy equal citizenship stature*.") (emphasis added).

The principles woven through these cases demonstrate that enforcing a woman's liberty and autonomy to make choices about terminating a pregnancy is central to women's equality in society and under the law. Regulations unduly interfering with a woman's ability to make such decisions for herself fetter a woman's access to equality in family, economic, and civic life, imposing unconstitutional burdens on her that a man need not suffer.

III. Equality Principles, as Well as Due Process Principles, Require Close Scrutiny of Legislative Justifications of Abortion Restrictions Because of the Difficulty of Rectifying by Legislative Means Laws Unduly Burdening Access to Abortion.

Cases vindicating equality claims brought by lesbian and gay litigants counsel close judicial review of the legislative justifications for abortion restrictions

for an additional and independent reason—because abortion has become a stigmatized medical procedure. This Court and many others have acknowledged and described, in the context of equality claims brought by lesbians and gay men, how stigma and discrimination can impede the ability of a stigmatized group to participate effectively in the political arena to prevent legislative passage of discriminatory measures. The obstacles posed by stigma, moral condemnation, and the history of discrimination experienced by members of a disfavored group warrant skeptical evaluation by courts of related legislation to ensure that a challenged law does not violate equality principles. An equality framework permits courts to acknowledge this dynamic and scrutinize the asserted governmental interests for an abortion restriction more closely—to ensure that these interests are sufficiently important and that the law is adequately tailored in service of those interests.

A substantial majority of women who have exercised their constitutional right to choose to end a pregnancy experience stigma, discrimination, and moral condemnation as a result. Tracy A. Weitz & Katrina Kimport, *The Discursive Production of Abortion Stigma in the Texas Ultrasound Viewing Law*, 30 Berkeley J. Gender L. & Just. 6, 8 n.8 (2015) (collecting studies).[2] This stigma results not just from the multiple and conflicting moral views about

[2] This is not to suggest that women later regret this choice or that their right to this autonomy should be diminished in any way. Research does not show evidence of a post-abortion "syndrome" of regret. *See, e.g.,* Brenda Major, Mark Appelbaum, Linda Beckman, Mary Ann Dutton, Nancy Felipe Russo, Carolyn West, *Abortion and Mental Health, Evaluating the Evidence*, 64 American Psychologist 9 (2009).

abortion in our society, but also because abortion challenges deep-seated gender norms about ideals of womanhood, including traditional stereotypes of women as mothers and self-sacrificing nurturers. *Id.* at 9-10; Paula Abrams, *Abortion Stigma: The Legacy of* Casey, 35 Women's Rights L. Rep. 299, 307 (2014); Anuradha Kumar, Leila Hessini, & Ellen M. H. Mitchell, *Conceptualising Abortion Stigma*, 11 Culture, Health & Sexuality 625, 628 (2009). Abortion has been further stigmatized as a medical procedure through laws that separate reproductive health services from mainstream medicine. Abrams, *supra*, at 302.

Abortion and same-sex relationships share a common history of criminalization and stigmatization. In the mid-nineteenth century, states began enacting legislative restrictions on abortion. *Roe*, 410 U.S. at 129; *see also* Reva Siegel, *Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection*, 44 Stan. L. Rev. 261, 281-82 (1992). Prior to that, abortion was governed by common law, and was not a criminal offense if performed before "quickening," the point at which a pregnant woman could perceive fetal movement—typically late in the fourth month of pregnancy. *Id.* at 282. Although statutes varied in form and severity, the cumulative effect of the new legislation was to prohibit abortion from fertilization. *Id.* The new statutes also "subjected women seeking abortions to criminal sanctions, and increased criminal penalties [for health care providers who violated state law] generally." *Id.*

Although many states removed these criminal restrictions in the years prior to *Roe*, this history of

criminalization contributed to abortion-related stigma. When government criminalizes constitutionally protected conduct, such a "declaration in and of itself is an invitation" to subject the people who engage in that conduct "to discrimination both in the public and in the private spheres." *Lawrence*, 539 U.S. at 575.

Criminal laws and other discriminatory measures that branded lesbian and gay people as immoral similarly stigmatized them and deprived them of dignity for much of our nation's history. "Until the mid-20th century, same-sex intimacy long had been condemned as immoral by the state itself in most Western nations, a belief often embodied in the criminal law. For this reason, among others, many persons did not deem homosexuals to have dignity in their own distinct identity." *Obergefell*, 135 S. Ct. at 2596. Indeed, homosexuality was treated as an illness for much of the 20th century, and classified as a mental disorder. *Obergefell*, 135 S. Ct. at 2596; William N. Eskridge, Jr., *No Promo Homo: The Sedimentation of Antigay Discourse and the Channeling Effect of Judicial Review*, 75 N.Y.U. L. Rev. 1327, 1328-29 (2000). As is true of abortion-related stigma, many of the negative attitudes toward lesbian and gay people related directly to their failure to conform to traditional sex stereotypes. *Latta v. Otter*, 771 F.3d 456, 495 (9th Cir. 2014) (Berzon, J., concurring) ("[T]he social exclusion and state discrimination against lesbian, gay, bisexual, and transgender people reflects, in large part, disapproval of their nonconformity with gender-based expectations."). In the context of lesbians and gay men, the stereotypes often involved assumptions that women should enter relationships only with men, and

men only with women. *Id.* at 486; Sylvia A. Law, *Homosexuality and the Social Meaning of Gender*, 1998 Wisc. L. Rev. 187, 221 (1998).

Fear of social and familial ostracism as well as the legal repercussions of "coming out" historically kept many lesbians and gay men "in the closet." *See* Kenji Yoshino, *Suspect Symbols: The Literary Argument for Heightened Scrutiny for Gays*, 96 Colum. L. Rev. 1753, 1795 n.184 (1996); William N. Eskridge, Jr., *Challenging the Apartheid of the Closet: Establishing Conditions for Lesbian and Gay Intimacy, Nomos, and Citizenship, 1961-1981*, 25 Hofstra L. Rev. 817, 819 (1997); *see also* Cary Franklin, *Marrying Liberty and Equality: The New Jurisprudence of Gay Rights*, 100 Va. L. Rev. 817, 882 (2014) ("Even when states began to repeal their anti-sodomy statutes and police harassment eased, the social stigma associated with homosexuality caused many individuals to continue to camouflage their sexual orientation for fear of losing their jobs, their friends, and their membership in various communities."). More than a quarter century ago, Eve Sedgwick described "the closet [a]s the defining structure for gay oppression in this century." Eve Kosofsky Sedgwick, EPISTEMOLOGY OF THE CLOSET 71 (1990). It is "a figurative space" that allows persons "to conceal their sexual orientation or gender identity to avoid the varied legal, social, and political consequences" that might result from one's sexual orientation or identity being discovered. Rose Cuison Villazor, *The Undocumented Closet*, 92 N.C. L. Rev. 1, 11 (2013). And while the closet can provide some limited protection from discrimination until disclosure happens, it is itself "threatening" and stigmatizing because it is "always a confinement—really a badge of inferiority." William N. Eskridge, Jr., *Privacy*

Jurisprudence and the Apartheid of the Closet, 1946-1961, 24 Fla. St. U. L. Rev. 703, 705-07 (1997).

The closet poses a particular obstacle to achievement of legislative goals, as it is challenging for lesbians and gay men to advocate on their own behalf in the political arena if they cannot disclose that they are lesbian or gay. In an early case acknowledging the political costs of the closet, *Gay Law Students Ass'n v. Pacific Tel. & Tel. Co.*, 595 P.2d 592 (Cal. 1979), the California Supreme Court explained that coming "out of the closet" is essential before lesbian and gay people can associate with others to advocate in the political realm for equal rights. *Id.* at 610. Accordingly, that court held that a company's decision to refuse to hire "manifest homosexuals" is necessarily a limitation on "political freedom." *Id.* at 609, 611 (quotation marks omitted). Likewise, the Connecticut Supreme Court observed in striking down Connecticut's ban on marriage for same-sex couples, "Gay persons . . . continue to face an uphill battle in pursuing political success" because discrimination and fears of violence "undermine efforts to develop an effective gay political identity." *Kerrigan v. Comm'r of Pub. Health*, 957 A.2d 407, 452 (Conn. 2008) (citing Kenneth D. Wald, *The Context of Gay Politics, in* THE POLITICS OF GAY RIGHTS 1, 14 (Craig A. Rimmerman, Kenneth D. Wald & Clyde Wilcox eds., 2000) (quotation marks omitted)). Consequently, lesbian and gay people "are disinclined to risk retaliation by open identification with the movement, and potential allies from outside the gay [and lesbian] community may think twice about allying their fortunes with such a despised population." *Id.* (alteration in original). The Court explained that this reality is one of the reasons why

lesbian and gay people "have not enjoyed the same level of political success" as other minority groups. *Id.*

Obergefell also recognized the connection between public disclosure of stigmatized characteristics and successful public policy advocacy, describing a period of such intense discrimination against lesbian and gay people in this country that "[a] truthful declaration by same-sex couples of what was in their hearts had to remain unspoken." 135 S. Ct. at 2596. Only when lesbian and gay people began to live "more open and public lives" was there "a shift in public attitudes toward greater tolerance." *Id.* Thus, one of the consequences of stigma and concealment is that it impedes people's ability to associate with each other to achieve social change. *See* Yoshino, *Suspect Symbols*, *supra*, at 1756 ("[T]he closet captures the invisibility and isolation that hinder gays [and lesbians] in their political mobilization."); *see also* Erving Goffman, STIGMA: NOTES ON THE MANAGEMENT OF SPOILED IDENTITY at 3, ch. 1 (1963) (stigma reduces the bearer "from a whole and usual person to a tainted, discounted one," can fundamentally define a person's social identity, and can restrict the opportunities of stigmatized groups).

The stigma associated with abortion has created for many women a "closet" of their own, causing them to be reluctant to "come out" as having had an abortion. Abrams, *supra*, at 301, 306 (it is common that women who obtain abortions perceive or experience stigma and a need for secrecy; and many women conceal they have had abortions out of fear of social opprobrium), *see also, e.g.*, Kristen M. Shellenberg & Amy O. Tsui, *Correlates of Perceived and Internalized Stigma Among Abortion Patients in*

the USA: An Exploration by Race and Hispanic Ethnicity, 118 Int'l J. Gynecology & Obstetrics (Supp. 2) S152, S152, S155 (2012); Alison Norris, Danielle Bessett, Julia R. Steinberg, Megan L. Kavanaugh, Silvia De Zordo & Davida Becker, *Abortion Stigma: A Reconceptualization of Constituents, Causes, and Consequences*, 21 Women's Health Issues (Supp. 3) S49, S50 (2011); Brenda Major & Richard H. Gramzow, *Abortion as Stigma: Cognitive Implications of Concealment*, 77 J. of Personality & Soc. Psychol. 735, 735, 739-40 (1999). Indeed, this Court has recognized the importance to women of preserving the confidentiality of their decisions to terminate a pregnancy given the potential for hostile, coercive reactions. *See Thornburgh*, 476 U.S. at 766-67.

As with the stigma experienced by lesbians and gay men, the fact of having had an abortion can be "concealable," meaning that the stigmatizing characteristic is unknown to others unless disclosed. Norris et al.*, supra*, S49, S50. The stigma experienced by women who have abortions "advances a culture of secrecy around abortion" and "perpetuates the misconception that abortion is uncommon, further marginalizing the procedure." Abrams, *supra*, at 302; *see also* Norris et al., *supra*, at S52 ("Silence is an important mechanism for individuals coping with abortion stigma; people hope that if no one knows about their relationship to abortion, they cannot be stigmatized. Nevertheless, even a concealed stigma may lead to an internal experience of stigma and health consequences."). And just as is true for lesbians and gay men, the reluctance of many women to identify themselves as having used abortion services interferes with their ability to advocate on their own behalf and participate in the political process to rectify

burdensome abortion measures by legislative means. Norris et al., *supra*, at S50 ("concealing abortion is part of a vicious cycle that reinforces the perpetuation of stigma").

These factors militate close scrutiny of the legislative justifications for abortion restrictions under an equality framework. Especially in contexts where society holds differing and conflicting moral views and legislation subordinates a stigmatized group, the Equal Protection Clause requires courts to exercise particular care in scrutinizing the expressed purpose for a law to ensure that it is grounded in fact rather than moral disapproval. *Romer*, 517 U.S. at 634-45; *Lawrence*, 539 U.S. at 583 (O'Connor, J., concurring) ("Moral disapproval of a group cannot be a legitimate governmental interest under the Equal Protection Clause. . . ."). *See also generally Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 440 (1985) (elevated scrutiny is appropriate in some circumstances at least in part because laws targeting groups for discriminatory treatment using these classifications are unlikely to be rectified by legislative means). Moreover, legislative justifications for laws that subordinate women "must be genuine, not hypothesized or invented *post hoc* in response to litigation," and "must not rely on overbroad generalizations about the different talents, capacities, or preferences of males and females." *United States v. Virginia*, 518 U.S. 515, 533 (1996). The equality guarantee thus informs how the undue burden standard is applied, demanding rigorous review of whether an abortion restriction in fact serves its stated purpose. In the context of abortion restrictions that purport to serve women's health needs, the Equal Protection Clause and the Due Process Clause converge to require a searching inquiry into whether the restriction actually promotes

women's health in determining whether the law unduly burdens abortion access.

CONCLUSION

The interlocking rights to due process and equal protection require careful review of the legislative justifications for the law challenged here, which operates to severely restrict women's access to abortion services and so perpetuates barriers denying women the autonomy to make such life-defining decisions for themselves. Women's equal dignity and ability to participate as full and equal members in family, educational, economic, and civic arenas hang in the balance.

The judgment of the Court of Appeals should be reversed.

Respectfully submitted,

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January 4, 2016

15-274

IN THE

Supreme Court of the United States

WHOLE WOMAN'S HEALTH; AUSTIN WOMEN'S HEALTH CENTER; KILLEEN WOMEN'S HEALTH CENTER; NOVA HEALTH SYSTEMS

(*Caption continued on inside cover*)

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF *AMICI CURIAE* NATIONAL CENTER FOR LESBIAN RIGHTS, GAY AND LESBIAN ADVOCATES AND DEFENDERS, EQUAL JUSTICE SOCIETY, NATIONAL BLACK JUSTICE COALITION, FAMILY EQUALITY COUNCIL, HUMAN RIGHTS CAMPAIGN, NATIONAL LGBTQ TASK FORCE, GLMA: HEALTH PROFESSIONALS ADVANCING LGBT EQUALITY, EQUALITY FEDERATION, SEXUALITY INFORMATION AND EDUCATION COUNCIL OF THE UNITED STATES, IMMIGRATION EQUALITY, NATIONAL HEALTH LAW PROGRAM, THE MOVEMENT ADVANCEMENT PROJECT, AND BAY AREA LAWYERS FOR INDIVIDUAL FREEDOM IN SUPPORT OF PETITIONERS, URGING REVERSAL

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d/b/a Reproductive Services; Sherwood C. Lynn, Jr., M.D.; Pamela J. Richter, D.O.; and Lendol L. Davis, M.D., on behalf of themselves and their patients,

Petitioners,

—v.—

Kirk Cole, M.D., Commissioner of the Texas Department of State Health Services; Mari Robinson, Executive Director of the Texas Medical Board, in their official capacities,

Respondents.

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INTEREST OF *AMICI CURIAE*[1]

Amici Curiae are the National Center for Lesbian Rights, Gay and Lesbian Advocates and Defenders, Equal Justice Society, National Black Justice Coalition, Family Equality Council, Human Rights Campaign, National LGBTQ Task Force, GLMA: Health Professionals Advancing LGBT Equality, Equality Federation, Sexuality Information and Education Council of the United States, Immigration Equality, National Health Law Program, Movement Advancement Project, and Bay Area Lawyers for Individual Freedom. *Amici* have substantial expertise related to governmental invocations of spurious scientific and health-related rationales to justify infringing upon the constitutionally protected liberties of vulnerable groups, including lesbian, gay, bisexual, and transgender (LGBT) people, people of color, women, and people with disabilities. Their expertise bears directly on the issues before the Court. Descriptions of individual *Amici* are set out in the Appendix.

SUMMARY OF ARGUMENT

The Constitution protects fundamental liberty interests that are essential to ordered liberty and belong to every person. Our history, however, is replete with attempts to exclude individuals and

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[1] No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution to the preparation or submission of this brief. All parties have consented in writing to the filing of this brief.

groups from the full protection of those liberties, often based on health and safety-related rationales that lacked a substantial basis in science. Discrimination against African Americans and other historically excluded racial and ethnic minorities was grounded in pseudo-science well into the twentieth century. Similarly, LGBT people have been subjected to exclusion and discrimination on the basis of scientifically unsupported health-based rationales and just now are beginning to experience full protection of their liberties. Courts have played a vital role in subjecting these repressive laws to meaningful review and thereby advancing core constitutional values. However, when courts have abdicated that role and simply deferred to unsubstantiated public health and scientific claims, the principles of equal dignity and freedom have been compromised.

Great injury has resulted when liberty and rights are denied or trammeled by laws based on empirically indefensible rationales. For decades, governments in America used pseudo-science to justify oppressive statutes outlawing interracial marriage, restricting the freedom of women, and subjecting people with psychiatric and intellectual disabilities to forced sterilization. Until relatively recently, public entities have imposed with impunity draconian restrictions on the liberties of LGBT people, including criminal penalties on same-sex intimacy, blanket deportation policies, public employment bans, child custody prohibitions, and marriage bans. In each instance, unsupported public health claims and baseless sociological assertions were invoked to defend the denial of fundamental liberties.

In this case, the State of Texas has imposed arbitrary and unnecessary regulations on abortion providers, enacting measures that will result in the closure of most abortion clinics in the state and that will undermine, rather than advance, women's health. In defense of its restrictive policies, the State has cited public health concerns that lack a basis in scientifically valid evidence. Here again, this Court should not defer to the State's mere invocation of asserted health justifications. Rather, the Court should draw on the best traditions of our judicial history by meaningfully scrutinizing the State's asserted rationales for imposing such significant and harmful restrictions on the fundamental right to reproductive autonomy.

ARGUMENT

I. COURTS ARE CRITICAL GATEKEEPERS IN CAREFULLY ASSESSING THE VALIDITY OF ASSERTED RATIONALES FOR LAWS THAT RESTRICT CONSTITUTIONAL LIBERTIES.

When fundamental constitutional liberties are at stake, courts serve the vital function of carefully evaluating the asserted justifications for laws limiting such personal freedoms. That responsibility is just as strong, and the required scrutiny just as searching, when the government's justification for a restriction on liberty is based on an asserted interest in advancing public health or safety. Facially, such health-related objectives may be "perfectly legitimate," *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632, 643 (1974), but when a law restricts fundamental constitutional

rights, this Court has emphasized the need to carefully scrutinize the scientific basis for the restriction to determine "whether the rules sweep too broadly." *Id.* at 644 (holding that a public school policy requiring female teachers to take mandatory unpaid maternity leave in the final four or five months of pregnancy could not be justified based on an interest in keeping physically unfit teachers out of the classroom, on the ground that the policy "applies even when the medical evidence as to an individual woman's physical status might be wholly to the contrary"); *see also United States v. Virginia*, 518 U.S. 515, 549 (1996) (rejecting argument that Virginia Military Institute's males-only admission policy was justified based on different "learning and developmental needs" and "psychological and sociological differences" between men and women).

In this case, the State of Texas has imposed significant restrictions on women's ability to access abortion, requiring abortion providers to have admitting privileges at a hospital within 30 miles of the location where an abortion is performed and requiring abortion facilities to qualify as "ambulatory surgical centers." The restrictions are couched as public health measures, and the State has claimed that the requirements "raise the standard of care for all abortion patients" and "will improve the health and safety of women." Brief in Opposition to Petition for Writ of Certiorari at 2, *Whole Woman's Health v. Cole*, No. 15-274. However, mainstream professional medical and public health organizations have strongly opposed the requirements as medically and scientifically unwarranted. For example, contrary to the State's

claims, the American Public Health Association (APHA) has concluded that the law "jeopardizes the public health in Texas by imposing legislative constraints on access to safe and legal abortion with no public health or medical basis." Brief for the APHA as Amicus Curiae in Support of Petition for Certiorari at 4, *Whole Woman's Health v. Cole*, No. 15-274. The APHA has determined that far from advancing women's health, the restrictions have "create[d] a severe, immediate, and concrete risk to public health." *Id.* at 5.

Fulfilling its vital gatekeeping role, the district court in this case heard testimony from nineteen witnesses and concluded that the "great weight of the evidence" demonstrates that abortion in Texas is already very safe and that the challenged restrictions fail to protect the health or safety of Texas women. *Whole Woman's Health v. Lakey*, 46 F. Supp. 3d 673, 684 (W.D. Tex. 2014). The district court further concluded that the State's professed concerns about the safety of abortion in Texas were "largely unfounded and … without a reliable basis." *Id*. The Fifth Circuit reversed the district court on the grounds that the district court should have deferred to the State's asserted rationales and accepted them at face value, without assessing their validity. *Whole Woman's Health v. Cole*, 790 F.3d 563, 587 (5th Cir.). Characterizing the public health value of the restrictions as a matter of "medical uncertainty" based on the State's mere assertion of health-related justifications, the Fifth Circuit chastised the district for failing to defer to the legislature's "wide discretion." *Id.* at 585. Similarly, the State of Texas now urges this Court to hold that even where fundamental liberties are at stake, courts should not scrutinize the validity

of the state's health-related justifications but rather should limit their inquiry to whether "any conceivable rationale [for the law] exists." *Id.* at 587 (internal quotations omitted); Brief in Opposition to Petition for Writ of Certiorari at 15-16, *Whole Woman's Health v. Cole*, No. 15-274.

The *amici* who present this brief speak from experience about how individuals and groups—women, people of color, people with disabilities, and LGBT people—have suffered impermissible deprivations of liberty under such deferential judicial review of purportedly "scientific" rationales for oppressive laws.

Some of the most regrettable moments in our legal history have resulted when courts failed to examine and reject empirically indefensible claims asserted to justify infringing upon the protected liberties of disfavored or vulnerable groups. Courts have identified "conceivable rationale[s]" for anti-miscegenation laws, laws barring women from certain professions, forced sterilization of those deemed genetically "unfit," and criminalization of same-sex intimacy, even as those policies defied the established science and medical knowledge of their time. Only by undertaking a meaningful examination of the State's asserted public health rationales in this case can the Court give due weight to women's liberty and dignity and properly assess the validity of the State's restriction on access to a fundamental right.

II. THE REPEATED INVOCATION OF SCIENTIFICALLY UNSUPPORTED HEALTH AND SAFETY RATIONALES TO JUSTIFY LAWS THAT INFRINGED UPON THE PROTECTED LIBERTIES OF VULNERABLE GROUPS IN THE PAST UNDERSCORES THE NEED FOR MEANINGFUL JUDICIAL SCRUTINY OF TEXAS' RATIONALES IN THIS CASE.

A. Anti-Miscegenation Statutes Were Long Upheld on the Basis of Deference to States' Pseudo-Scientific Justifications.

Opponents of interracial marriage employed spurious science and unsupported public health rationales to justify prohibitions on marrying across racial and ethnic lines. For decades, courts across the country accepted such justifications of anti-miscegenation statutes without subjecting them to meaningful review, resulting in a string of shameful court decisions upholding anti-miscegenation laws on the force of patently erroneous biological and sociological claims. For example, in the late nineteenth century, an unnamed white woman was prosecuted in Missouri "for having intermarried with Dennis Jackson, a person having more than one-eighth part of negro blood." *State v. Jackson*, 80 Mo. 175, 175 (1883). The Missouri court deferred to the broad and "unquestionable" power of the state's political branches to regulate marriages within their jurisdiction. *Id.* at 178. The court took notice of the "well authenticated fact that if the issue of a black man and a white woman, and a white man and a black woman, intermarry, they cannot

possibly have any progeny....” *Id.* at 179. Citing no evidence for this remarkable assertion, the court concluded that “such a fact sufficiently justifies those laws which forbid the intermarriage of blacks and whites.” *Id.*

In many cases, eugenic ideology supplied a veneer of empiricism for social projects rooted in white supremacy. Eugenic theory counseled that miscegenation posed a biological threat by working harm to the bloodline and contaminating the white race. *See* Paul A. Lombardo, *Medicine, Eugenics, and the Supreme Court: From Coercive Sterilization to Reproductive Freedom*, 13 J. Contemp. Health L. & Pol’y 1, 20-23 (1996). Many courts accepted this pseudo-scientific ideology, repeatedly upholding exclusionary laws on the basis of proponents’ spurious arguments about the “deteriorat[ion of] the Caucasian blood,” *Bowlin v. Commonwealth*, 65 Ky. 5, 9 (1867), and the “corruption of races,” *State v. Gibson*, 36 Ind. 389, 404 (1871).

In the mid-nineteenth century, the Supreme Court of Georgia upheld a statute “forever prohibit[ing] the marriage relation between the two races, and declar[ing] all such marriages *null* and *void*.” *Scott v. State*, 39 Ga. 321, 323 (1869) (emphasis in original). Citing no evidence, the court found: “The amalgamation of the races is not only unnatural, but is always productive of deplorable results. Our daily observation shows us, that the offspring of these unnatural connections are generally sickly and effeminate, and that they are inferior in physical development and strength, to the full-blood of either race.” *Id.* The court then concluded that Georgia’s anti-miscegenation law was “necessary and proper.” *Id.*

Similar eugenics-based rationales were offered in support of racial segregation laws. In *Berea Coll. v. Kentucky*, 211 U.S. 45, 58 (1908), the Court rejected a challenge brought by Kentucky's only racially integrated college to a state law mandating racial segregation in all schools in the state. Although not directly addressed in the Court's opinion, Kentucky's defense of the law relied extensively on rationales derived from the spurious field of so-called "anthropometrics"—the study of the physical characteristics of the races—including arguments about the presumed mental capacities of white and African-American students based on measurements of brain size. *See* Herbert Hovenkamp, *Social Science and Segregation before* Brown, 1985 Duke L.J. 624, 629-37.

Even where litigants directly challenged the principles of eugenic "science," courts frequently refused to exercise reasoned judgment in evaluating the states' asserted justifications. A federal court in Georgia stated that it would "not discuss the argument of defendants' counsel to the effect that the intermarriages of whites and blacks do not constitute an evil or an injury against which the state should protect itself." *State v. Tutty*, 41 F. 753, 762 (C.C.S.D. Ga. 1890). The court concluded—as the State of Texas urges with respect to the law at issue here—that such determinations fall exclusively "within the range of legislative duty," and that courts lack "the right or power to interfere." *Id.* at 762-63.

As late as 1955, the Supreme Court of Appeals of Virginia invoked the principles of eugenic pseudo-science in rejecting a challenge to the state's anti-miscegenation statute. An interracial couple, Han Say Naim and Ruby Elaine Naim, had

married in a neighboring state and returned to Virginia as husband and wife. *Naim v. Naim*, 197 Va. 80, 81 (1955). The court upheld the state's anti-miscegenation law against a constitutional challenge, finding that the state could regulate marriage in "the interest of the public health, morals, and welfare." *Id.* at 89. The court deferred to the state's judgment that prevention of the "corruption of blood" and the creation of "a mongrel breed of citizens" constituted legitimate public health goals. *Id.* at 89-90. This Court refused to review the Virginia court's decision, dismissing the appeal on the grounds that it was "devoid of a properly presented federal question." *Naim v. Naim*, 350 U.S. 985 (1956). It took eleven years before this Court reviewed Virginia's anti-miscegenation law and unanimously declared it unconstitutional. *Loving v. Virginia*, 388 U.S. 1 (1967).

A deep vein of paternalism courses through cases such as *Naim*, which rely on spurious science to deny individual liberty and rights. In *Naim,* the Virginia court denied the liberty of African Americans (and others) to make their own marriage decisions and simultaneously credited the proposition that that the denial of that liberty "[m]anifestly" advances "the peace and happiness of the colored race." 197 Va. at 84 (citing *Green v. State*, 58 Ala. 190, 195 (1877)). The notion that denying individual freedoms *benefits* the individuals who lose their liberty is recurrent in American legal history. *See*, *e.g.*, *State v. Jackson*, 80 Mo. at 176 (crediting the state's desire to "preserve the purity of the African blood" by "prohibiting intermarriages between whites and blacks"). Similarly, in this case, the State of Texas

claims that its abortion restrictions advance women's interests despite their manifest impact of eliminating safe and legal health care options and denying many women the right to make their own choices about their bodies and their destinies.

The California Supreme Court was the first to expose and squarely reject the specious public health and sociological arguments offered to justify anti-miscegenation laws. In a case still recognized for its thoughtful consideration of the empirical and moral arguments surrounding interracial marriage, the California Supreme Court rejected the pseudo-scientific justifications offered in defense of the state's anti-miscegenation statute. *Perez v. Lippold*, 32 Cal. 2d 711 (1948). The court found that "the categorical statement that non-Caucasians are inherently physically inferior is without scientific proof" and that environmental factors instead caused divergent sociological outcomes among Americans of different races. *Id.* at 722-23. The court rejected the language of "contaminat[ion]" advanced by proponents of the law and declined to credit the state's "blanket condemnation of the mental ability" of non-Caucasians. *Id.* at 722, 724. The court recognized the existence of reliable scientific evidence demonstrating that "the progeny of marriages between persons of different races are not inferior to both parents." *Id.* at 720. A concurring opinion did not mince words in rejecting the respondents' hollow resorts to public health in defense of the statute, holding that the law "cannot be considered vitally detrimental to the public health, welfare and morals," but rather represented a tool of "ignorance, prejudice and intolerance." *Id.* at 735 (Carter, J., concurring).

The court concluded that the anti-miscegenation statute "arbitrarily and unreasonably discriminat[ed] against certain racial groups" and could not withstand constitutional scrutiny. *Id.* at 732. The decision stands as a model of reasoned analysis in the face of a pseudo-scientific assault on our constitutional values.

Decades later, in *Loving,* the state of Virginia advanced familiar eugenic arguments in support of its anti-miscegenation statute, citing "authority for the conclusion that the crossing of the primary races leads gradually to retrogression and to eventual extinction of the resultant type unless it is fortified by reunion with the parent stock." Brief of Appellee, *Loving v. Virginia*, 388 U.S. 1 (1967) (No. 395), 1967 WL 93641, at *42. The state also urged the Court not to trouble itself with "conflicting scientific opinion upon the effects of interracial marriage, and the desirability of preventing such alliances, from the physical, biological, genetic, anthropological, cultural, psychological and sociological point of view." *Id.* at *41. Virginia asserted, as Texas does now, that it needed only to invoke some modicum of medical and scientific uncertainty, unsupported by substantial evidence, in order to justify its oppressive measures. Controversies about the scientific or medical value of a law, the State asserted, "are properly addressable to the legislature." *Id.*

This Court appropriately declined to abdicate its essential gatekeeping role in evaluating Virginia's statute. Instead, the Court subjected the statute to rigorous analysis, concluding that the law constituted no more than a series of "measures designed to maintain White Supremacy." *Loving*,

388 U.S. at 11. In soaring language that vindicates our most fundamental constitutional values, the Court held that "[u]nder our Constitution, the freedom to marry or not marry, a person of another race resides with the individual and cannot be infringed by the State." *Id.* at 12.

Here, too, the Court has an obligation to fulfill its constitutional mandate by refusing to blindly defer to state policies that infringe upon basic human liberties. The Court must subject the justifications supplied by the State of Texas to meaningful review.

B. Unsupported Scientific Rationales Have Also Been Used To Justify Sex-Based Restrictions on Educational and Career Opportunities for Women.

Unsupported scientific and medical justifications have also been cited in support of laws that imposed gender-based restrictions on women's freedom to pursue educational and career opportunities of their choosing. As with race-based restrictions, the Court has subjected such rationales to more careful scrutiny over time and, in recent years, has invalidated laws that limit women's ability to pursue an education or earn a living based on asserted governmental interests in protecting women's health or recognizing purportedly "real" differences between the sexes. Frequently, such restrictions lacked a substantial basis in science, and instead served only to preserve and reinforce antiquated notions of "a wide difference in the respective spheres and destinies of man and woman." *Bradwell v. Illinois*, 83 U.S. 130, 141 (1872) (Bradley, J., concurring) (upholding exclusion of women from the practice of law).

Laws imposing restrictions on women's freedom to work were once upheld based on specious assumptions about the unique capabilities and health and safety needs of women. In *Goesaert v. Cleary*, 335 U.S. 464 (1948), for example, this Court upheld a Michigan law that forbade a woman from becoming a licensed bartender unless she was the wife or daughter of the male owner of a licensed liquor establishment. The Court refused to subject the law to meaningful review, holding that the case involved "one of those rare instances where to state the question is in effect to answer it." *Id.* at 465. The Court declined to scrutinize the rationale that "bartending by women may, in the allowable legislative judgment, give rise to moral and social problems" and further deferred to State's presumed judgment "that the oversight assured through ownership of a bar by a barmaid's husband or father minimizes hazards that may confront a barmaid without such protecting oversight." *Id.* at 466.

In other cases, and especially in recent times, this Court has carefully scrutinized laws that, in the name of health and safety, excluded women from opportunities that remained open to men. In *LaFleur,* 414 U.S. at 647-48, this Court struck down a rule requiring pregnant public school teachers to take mandatory unpaid maternity leave beginning no later than the end of the fourth or fifth month of pregnancy. The school district argued that the rule was justified in part by "the necessity of keeping physically unfit teachers out of the classroom." *Id.* at 643. In evaluating the "plethora of conflicting medical testimony," the Court observed that "[w]hile the medical experts in these cases differed on many points, they

unanimously agreed on one—the ability of any particular pregnant woman to continue at work past any fixed time in her pregnancy is very much an individual matter." *Id.* at 644-45. Because the maternity leave policy did not allow for medical determinations as to whether a particular teacher's health would be jeopardized by continuing to teach past the fourth or fifth month of pregnancy, the Court held that the restriction violated the Due Process by "employ[ing] irrebuttable presumptions that unduly penalize a female teacher for deciding to bear a child." *Id.* at 648. Such a restriction on the constitutionally protected liberty to bear children could not be justified because it applied "even when the medical evidence as to an individual woman's physical status might be wholly to the contrary." *Id.* at 644. *Cf. Int'l Union, United Auto., Aerospace & Agr. Implement Workers of Am., UAW v. Johnson Controls, Inc.*, 499 U.S. 187, 198 (1991) (holding that employer policy barring fertile women, but not fertile men, from jobs involving potential lead exposure based on concerns about health impact on children violated Title VII of the Civil Rights Act of 1964, where the Court evaluated medical evidence and determined that it failed to support the policy's gender-based distinction).

In *United States v. Virginia,* the Court struck down Virginia Military Institute's males-only admission policy. 518 U.S. at 558. The State attempted to justify VMI's single-sex admissions rule in part by asserting that the rule was "'justified pedagogically,' based on 'important differences between men and women in learning and developmental needs,' 'psychological and sociological differences' Virginia describe[d] as

'real' and 'not stereotypes.'" *Id.* at 549 (quoting Brief for Respondents at 28). The Court held that even if such differences exist between men and women as groups, they could not justify a rule prohibiting all women, regardless of their individual capabilities and needs, from attending VMI: "[G]eneralizations about 'the way women are,' estimates of what is appropriate for *most women*, no longer justify denying opportunity to women whose talent and capacity place them outside the average description." *Id.* at 550 (emphasis in original). In short, the Court carefully examined the State's asserted scientific justifications and determined that the single-sex admission policy did not significantly advance the purported objective of serving the differing educational needs of men and women.

In sum, as with racial restrictions, this Court in recent times has rejected scientific or health-related justifications for gender-based restrictions when careful review demonstrates that the restriction at issue does not sufficiently advance the State's asserted objective.

C. Until Recently, All Levels of Government in this Country Relied on Empirically Indefensible Social Science and Public Health Claims to Justify Forced Sterilization, Involuntary Institutionalization, and the Denial of Custody and Marriage Rights to Gay, Lesbian, Bisexual and Transgender People.

LGBT people have long borne the brunt of social policies justified by spurious social science and public health claims. States and municipalities

have drawn on pseudo-scientific sources to justify deprivations of the greatest magnitude directed at LGBT people and others deemed to have deviant or nonconforming sexual identities and practices. Prior to this Court's recent decisions striking down so-called "sodomy" laws and state and federal marriage bans, courts across the country repeatedly upheld homophobic laws at the local, state, and federal levels based on claims that lacked empirical credibility.

1. Courts Across the Country Routinely Upheld Draconian Measures Against LGBT People And Others Based on Unsupported Public Health and Scientific Justifications.

In the early twentieth century, champions of eugenic pseudo-science promoted forced sterilization of the "socially inadequate" as a means to improve society. They sought to cleanse the nation's gene pool of "the feebleminded, the insane, the criminalistic, the epileptic, … the blind, the deaf, [and] the deformed," among others. Lombardo, 13 J. Contemp. Health L. & Pol'y at 3. Proponents of eugenic ideology pursued their social program in the courts "in large measure by portraying their legal program as a public health initiative." *Id.* at 4.

The embrace of eugenics by many states notoriously led to the forced sterilization of Carrie Buck, a young woman in the custody of the Virginia State Colony for Epileptics and Feeble Minded. *Buck v. Bell*, 274 U.S. 200, 205 (1927). In a case subsequently cited at the Nuremberg trials

in defense of Nazi sterilization practices, the Court affirmed a state statute that provided for the forced sterilization of so-called "mental defectives," proclaiming that "experience has shown that heredity plays an important part in the transmission of insanity, imbecility, etc." *Id*. at 205-06; *see also* Michael G. Silver, *Eugenics and Compulsory Sterilization Laws: Providing Redress for the Victims of A Shameful Era in United States History*, 72 Geo. Wash. L. Rev. 862, 871 (2004). The Court held, in haunting language, that the state properly possessed the authority to undertake forced sterilizations "in order to prevent our being swamped with incompetence. It is better for all the world, if instead of waiting to execute degenerate offspring, or let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind." *Id*. at 207.

Many of the same eugenics-driven laws that propelled the forced sterilization of so-called "mental defectives" like Carrie Buck also authorized the sterilization, forced commitment, and criminal prosecution of LGBT people. In 1935, for example, the Governor of Alabama sought judicial guidance regarding the constitutionality of a law authorizing the involuntary sterilization of certain individuals. The act provided for the sterilization of individuals in mental hospitals who were deemed to be "afflicted with mental disease which may have been inherited or which ... is likely to be transmitted to descendants, such as the various grades of mental deficiency, those suffering from perversions, [and] constitutional psychopathic personalities." *In re Opinion of the Justices*, 230 Ala. 543, 544 (1935). Included in the

broad scope of the act was "any sexual pervert, Sadist, homosexualist, Masochist, [or] Sodomist." *Id.* While the court advised the governor that the law failed to provide constitutionally sufficient procedural protections, the court stated in no uncertain terms that "[w]e do not doubt the police power of the state to provide for the sterilization of the subjects enumerated in the bill when the proper method is prescribed for the ascertainment or adjudication of their status...." *Id.* at 547.

Throughout the first half of the twentieth century, state statutes looked upon LGBT people as sexual psychopaths "whose social deviance appeared to elude traditional regulatory mechanisms." Susan R. Schmeiser, *The Ungovernable Citizen: Psychopathy, Sexuality, and the Rise of Medico-Legal Reasoning*, 20 Yale J.L. & Human. 163, 166 (2008); *see also* William N. Eskridge, Jr., *Laws and the Construction of the Closet: American Regulation of Same-Sex Intimacy, 1880-1946*, 82 Iowa L. Rev. 1007, 1059 (1997). Similarly, federal immigration and naturalization laws contained "psychopathic personality" provisions that were used to exclude LGBT people from this country on public health grounds. *See* Marc Stein, *Boutilier and the U.S. Supreme Court's Sexual Revolution*, 23 Law & Hist. Rev. 491, 508 (2005).

In response to this perceived threat to public health, states enacted draconian laws providing for the sterilization, involuntary commitment, forced treatment, and deportation of individuals deemed to be sexual deviants. A 1942 decision of the Michigan Supreme Court upheld the involuntary institutionalization of an adult male alleged to have "committed in private ... an act of gross indecency with another male person." *People*

v. Chapman, 301 Mich. 584, 593 (1942). In affirming the lower court decision, the court accepted the conflation of gay identity and pedophilia by two psychiatrists who had examined the petitioner and concluded that he "must be considered a distinct sexual menace and a source of serious concern in a free community not only because of his homosexual practices but also his psychosexual deviation is very likely to assume a much more ominous manifestation, that of pedophilia (the use of children as sexual objects)." *Id.* The court upheld the petitioner's involuntary institutionalization because "[t]here is little likelihood that his desire for sexual gratification by abnormal methods can be overcome soon and further activity of a similar nature may be expected if he is allowed freedom of access in a free community." *Id.*

The Michigan court conceded that the forced institutionalization statute was "not perfect." *Id.* at 607 (citation omitted). It was, however, "expressive of a state policy apparently based on the growing belief that, due to the alarming increase in the number of degenerates, criminals, feeble-minded and insane, our race is facing the greatest peril of all time." *Id.* Disinclined to assess the veracity of that "peril," the court simply concluded that "it is our duty to sustain the policy which the state has adopted." *Id.*

Two decades later, this Court endorsed the baseless and homophobic notion that LGBT people pose a threat to public health in affirming a deportation order against Clive Michael Boutilier, a Canadian man who confessed to "shar[ing] an apartment with a man with whom he had had homosexual relations." *Boutilier v. Immigration &*

Naturalization Serv., 387 U.S. 118, 120 (1967). Based on Mr. Boutilier's account of his sexual history, the Public Health Service determined that he was "afflicted with a ... psychopathic personality." *Id.* at 120. Deportation proceedings were instituted pursuant to a provision of the Immigration and Nationality Act excluding immigrants deemed to be "feeble-minded," "insane," or "afflicted with psychopathic personality." Brief for Respondent at 20-21, *Boutilier v. Immigration & Naturalization Serv.*, 387 U.S. 118 (1967) (No. 440), 1967 WL 113946, at *21. On appeal, the government defended the validity of the deportation proceedings by citing legislative history stating that the provision excluding individuals "afflicted with psychopathic personality or a mental defect ... is sufficiently broad to provide for the exclusion of homosexuals and sex perverts." *Id.* at *22. Despite the submission of statements from "an extraordinary collection of scientific experts, including Sigmund Freud, Alfred Kinsey, and Margaret Mead, who claimed that homosexuality was not, per se, a sign of psychopathology," the Court adopted the government's position and affirmed the deportation of Mr. Boutilier on the sole basis of his sexual orientation. Stein, 23 Law & Hist. Rev. at 511; *Boutilier*, 387 U.S. at 125. Only the dissent offered any resistance to the notion that "homosexual" persons were properly classified as psychopaths. *See id.* at 128 (Douglas, J., dissenting) (disputing that homosexuality is necessarily a form of psychopathy and calling for individualized assessments).

Even as the specter of sexual psychopathology began to fade, state legislatures continued to cast LGBT persons as posing a grave threat to public

health and safety. State legislatures enacted laws banning "homosexuals" from public employment, on the theory that allowing LGBT people to participate in the workforce would threaten the welfare and safety of society. Courts repeatedly deferred to state enactments of public employment bans, particularly in the area of education, in which states and localities frequently asserted that LGBT teachers would prey upon children or "convert" them into sexual deviants.

In *Sarac v. State Board of Education*, 249 Cal. App. 2d 58, 63 (1967), an appellate court upheld the revocation of a gay teacher's professional credential on the grounds that "[h]omosexual behavior has long been contrary and abhorrent to the social mores and moral standards of the people of California as it has been since antiquity to those of many other peoples." *Id.* Invoking the conflation of gay identity and pedophilia and observing the teacher's "necessarily close association with children in the discharge of his professional duties as a teacher," the court deferred to the state's asserted interest in protecting children. *Id.* at 63-64. In reaching that conclusion, the court failed to cite, observe, or demand any evidence that rates of pedophilia were higher among LGBT persons than among heterosexual persons, or that the particular teacher in question had any history of pedophilia. The court concluded that the revocation of the petitioner's teaching credential raised no "constitutional questions whatsoever." *Id.* at 64; *see also Gaylord v. Tacoma Sch. Dist. No. 10*, 88 Wash. 2d 286, 297 (1977) (upholding the termination of a gay high school teacher and citing with alarm the "danger of encouraging ...

approval and ... imitation" of homosexuality among students).

Courts continued to regard being gay, lesbian, or bisexual as dangerous and socially deviant long after "homosexuality" was removed from the Diagnostic and Statistical Manual of Mental Disorders (DSM) in 1973. *See* Ryan Goodman, *Beyond the Enforcement Principle: Sodomy Laws, Social Norms, and Social Panoptics*, 89 Cal. L. Rev. 643, 725 (2001). That year, the American Psychiatric Association formally declared that being gay, lesbian, or bisexual "does not constitute a psychiatric disorder" and "implies no impairment in judgment, stability, reliability, or general social or vocational capabilities." Brief of the American Psychiatric Association et al. as Amicus Curiae, *Romer v. Evans*, 517 U.S. 620 (1996) (No. 94-1039), 1995 WL 17008445, at *3. Despite the growing scientific consensus that being gay, lesbian, or bisexual is not an illness or a disorder that can or should be changed, states continued to enact oppressive and punitive statutes directed at LGBT people. Time and again, the courts dispensed with a critical assessment of the evidence cited by the states, instead endorsing sources that lacked any indicia of scientific methodology or credibility.

The idea that LGBT people represent a unique and potent threat to youth also extended into the private sphere, leading to laws prohibiting LGBT people from adopting children and to widespread court decisions denying custody to LGBT parents. Appellate courts frequently upheld these discriminatory policies without undertaking a reasoned analysis of the justifications supplied by the states as a veneer for the laws' homophobic purposes. For example, in *Lofton v. Secretary of Department*

of Children and Family Services, the Eleventh Circuit upheld a Florida state law banning adoption by any "homosexual" person. 358 F.3d 804, 806 (11th Cir. 2004). The court acknowledged the "social science research and the opinion of mental health professionals and child welfare organizations ... that there is no child welfare basis for excluding homosexuals from adopting." *Id*. at 824. Nonetheless, the court held that the state need not base its policy on evidence, finding the presumed superiority of opposite-sex parents "to be one of those 'unprovable assumptions' that nevertheless can provide a legitimate basis for legislative action." *Id*. at 819-20 (citation omitted); *see also id*. at 825 ("[W]e must credit any conceivable rational reason that the legislature might have for choosing not to alter its statutory scheme in response to this recent social science research.").

In *Ex Parte J.M.F.*, 730 So. 2d 1190 (Ala. 1998), the Alabama Supreme Court upheld a decision to remove custody from a child's mother solely on the grounds that she was a lesbian. In so doing, the court acknowledged that a "number of scientific studies as to the effect of child-rearing by homosexual couples ... suggest[] that a homosexual couple with good parenting skills is just as likely to successfully rear a child as is a heterosexual couple." *Id*. at 1195. The court nonetheless held that it was reasonable for the trial court to have deferred to the conclusion of a single report by a law professor who had long advocated against marriage and parenting by same-sex couples. *Id*. at 1196; *see also* Carlos A. Ball and Janice Farrell Pea, *Warring with Wardle: Morality, Social Science, and Gay and Lesbian Parents*, 1998 U. Ill. L. Rev. 253, 338 (1998).

In some cases, courts deemed even rank speculation sufficient to support the removal of children from the custody of their LGBT parents. For example, a Kentucky appeals court relied on the admitted speculation of a psychologist to reverse a lower court's decision that had allowed a lesbian mother to retain custody of her child. *S v. S*, 608 S.W.2d 64, 66 (Ky. Ct. App. 1980). The court credited the psychologist's contention that despite the absence of any actual data on the issue, "it [was] reasonable to suggest that [the child] may have difficulties in achieving a fulfilling heterosexual identity of her own in the future." *Id.*; *see also Ward v. Ward*, 742 So. 2d 250, 252-54 (Fla. Dist. Ct. App. 1996) (concluding that child's "problematic behavior," such as wearing men's cologne, demonstrated that she was being harmed by living with lesbian mother and awarding custody to the father, who had been convicted of murdering his first wife).

2. Courts Increasingly Repudiate Unsupported Claims in Assessing Laws That Restrict the Fundamental Liberties of LGBT People.

In contrast to this history of deference to prejudice and stereotypes, courts in recent years have subjected governmental justifications for infringing upon the liberty of LGBT people to meaningful review. This Court, in particular, has robustly upheld the constitutional liberties of LGBT people by declining to accept the empirical fallacies on which past cases have relied.

In *Lawrence v. Texas*, 539 U.S. 558 (2003), the Court declined to defer to the state's asserted

justifications for restricting the liberty of LGBT people. In overturning *Bowers v. Hardwick*, 478 U.S. 186 (1986), and striking down a Texas statute criminalizing same-sex intimacy, the Court repudiated its past failure to question the premises on which *Bowers* had relied. The Court critiqued "the historical grounds relied upon in *Bowers*" as "more complex than the majority opinion and the concurring opinion [in *Bowers*] ... indicate." *Id.* at 571. In a powerful vindication of the courts' gatekeeping responsibility, the Court lamented its past failure to "take account of other authorities pointing in an opposite direction" from those cited in *Bowers*. *See id.* at 572. The decision represents not only a watershed defense of constitutional liberty, but also a commanding call upon courts to employ greater rigor in analyzing laws that abridge the fundamental freedoms of historically disfavored groups. *See also Romer v. Evans*, 517 U.S. 620, 635 (1996) (striking down state constitutional amendment prohibiting state and local anti-discrimination protections for LGBT people because "[t]he breadth of the amendment is so far removed from [the] particular justifications that we find it impossible to credit them").

More recently, this Court squarely confronted the unsupported social science rationales advanced to support federal and state laws excluding same-sex couples from the freedom to marry. In *United States v. Windsor*, 133 S. Ct. 2675 (2013), the Court affirmed the Second Circuit's judgment that Section 3 of the Defense of Marriage Act (DOMA) was unconstitutional. In defense of DOMA, Respondent Bipartisan Legal Advisory Group of the U.S. House of Representatives (BLAG) made a litany of social science and public health claims

about the protection of children, asserting that "a child's biological mother and father are the child's natural and most suitable guardians and caregivers." Respondent's Brief on the Merits, *United States v. Windsor*, 133 S. Ct. 2675 (2013) (No. 12-307), 2013 WL 267026, at *47. In a familiar pattern, BLAG also defended the law on the basis of asserted scientific uncertainty, arguing that there was "ample room for a wide range of rational predictions about the likely effects" of recognizing the marriages of same-sex couples, and that such uncertainty counseled against judicial involvement. *Id*. at *42. In *Windsor*, as in this case, professional public health and sociological associations weighed in strongly and unequivocally: "[T]he claim that same-sex parents produce less positive child outcomes than opposite-sex parents ... contradicts abundant social science research." Brief for the American Sociological Association (ASA) as Amicus Curiae, *United States v. Windsor*, 133 S. Ct. 2675 (2013) (No. 12-307), 2013 WL 4737188, at *3. Citing "nationally representative, credible, and methodologically sound social science studies," the ASA concluded that "the overwhelming scientific evidence shows clearly that same-sex couples are equally capable of generating positive child outcomes." *Id*. at *4, *6. The ASA took BLAG's unsupported social science claims head on, observing that the respondent "rel[ied] on studies analyzing, inter alia, stepparents, single parents, and adoptive parents—none of which address same-sex parents or their children—in order to make speculative statements about the wellbeing of children of same-sex parents" and concluding that "[s]uch inappropriate, methodologically baseless comparisons provide no factual support" for BLAG's contentions. *Id*. at *22. This Court credited the

professional organizations and the social science consensus regarding same-sex parenting, finding not only that the federal government's refusal to recognize the marriages of same-sex couples "impose[s] a disadvantage, a separate status, and so a stigma" on same-sex relationships, but also that it "humiliates tens of thousands of children now being raised by same-sex couples" and "makes it … more difficult for [them] to understand the integrity and closeness of their own family." *Windsor*, 133 S. Ct. at 2693-94.

The Court's recent decision in *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), similarly repudiates erroneous, outdated, and irrelevant rationales for denying same-sex couples the right to marry. There, this Court "exercised reasoned judgment" in identifying the human liberty interests at stake in marriage bans and evaluating the countervailing arguments. *Id.* at 2598. The Court credited the scientific consensus that "sexual orientation is both a normal expression of human sexuality and immutable" and the social science demonstrating that marriage "affords the permanency and stability important to children's best interests." *Id.* at 2596, 2600. With respect to the respondents' sociological prediction that allowing same-sex couples to marry would "lead[] to fewer opposite-sex marriages," the Court determined that the respondents simply "have not shown a foundation for the conclusion that allowing same-sex marriage will cause the harmful outcomes they describe." *Id.* at 2606-07. Like *Lawrence* and *Windsor*, *Obergefell* advances our respect for fundamental individual liberties and also models the appropriate and essential role of the courts in critically examining public health and sociological

justifications offered to support abridgements of personal freedom.

In recent times, courts increasingly have played their rightful role in guarding against the use of pseudo-science to harm historically vulnerable groups. They have refused to permit states and other public entities to use a mere assertion of scientific uncertainty, unsupported by substantial evidence, as carte blanche to abridge core individual liberties. Courts have demanded that lawmakers base laws on more than bias and paternalism. These decisions draw on the best traditions of our legal history.

D. These Historical Examples Illustrate the Vital Importance of Scrutinizing the State's Asserted Public Health Rationales in This Case.

This Court has recognized that the right to reproductive autonomy is fundamental and plays an essential role in securing women's ability to participate as equal members of our society. In order to fulfill its critical constitutional function of safeguarding fundamental liberties, this Court must reaffirm its precedents requiring courts to subject health-based rationales for regulating abortion providers to meaningful review. Statutes burdening rights so fundamental as a woman's decisional autonomy over whether to bear a child demand more than a toothless form of judicial review.

As this Court held in *Roe v. Wade*, 410 U.S. 113 (1973), and has affirmed in subsequent cases, the Fourteenth Amendment protects a woman's fundamental right to reproductive autonomy,

including the right to determine whether to carry a pregnancy to term. *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833 (1992); *Gonzales v. Carhart*, 550 U.S. 124 (2007). In affirming that fundamental right, *Casey* explained that the freedom to make this intensely personal decision is central to women's liberty and dignity as equal persons and citizens: "Her suffering is too intimate and personal for the State to insist, without more, upon its own vision of the woman's role, however dominant that vision has been in the course of our history and culture. The destiny of the woman must be shaped to a large extent on her own conception of her spiritual imperatives and her place in society." 505 U.S. at 852. Similarly, in *Carhart*, the Court held that a law is invalid "if its purpose or effect is to place a substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability." 550 U.S. at 146 (quoting *Casey*, 505 U.S. at 878).

Consistent with the importance of this fundamental right, this Court has required careful evaluation of laws that regulate abortion, regardless of whether the state seeks to justify the laws based on an asserted interest in protecting potential life or in protecting the health and safety of women seeking abortion. When reviewing such regulations, the Court has sought to ensure that they do not enforce paternalistic or otherwise impermissible gender-stereotypical understandings of women's capacities or societal roles. For example, in *Casey*, the Court rejected a spousal notice requirement on the grounds that the law reflected "a view of marriage consonant with the common-law status of married women but repugnant

to our present understanding of marriage and of the nature of the rights secured by the Constitution." 505 U.S. at 898. Moreover, as the Court noted in *Carhart*, "[t]he Court retains an independent constitutional duty to review factual findings where constitutional rights are at stake." 550 U.S. at 165.

With respect to abortion regulations that rest on an asserted interest in women's health, like those at issue in this case, the Court has held that courts must carefully scrutinize such laws to ensure that they actually serve health-related goals and do not simply obstruct women's access to abortion. "As with any medical procedure, the State may enact regulations to further the health or safety of a woman seeking an abortion." *Casey*, 505 U.S. at 878. However, "[u]nnecessary health regulations that have the purpose or effect of presenting a substantial obstacle to a woman seeking an abortion impose an undue burden on that right." *Id*. Under this standard, courts must examine both a law's purpose and effect. To be constitutional, a regulation enacted for the asserted purpose of protecting women's health must actually do so. In contrast, a restriction enacted for the asserted purpose of protecting women's health is invalid if it is not supported by evidence of necessity or "serve[s] no purpose other than to make abortions more difficult." *Id*. at 901.

Appellate courts that have carefully reviewed health-justified restrictions similar to those at issue here, which single out abortion providers and subject them to burdensome regulations that are not imposed on providers who perform comparable medical procedures, have concluded that they do not further legitimate health-related

goals and undermine, rather than protect, women's health. Both the Seventh and Ninth Circuits have examined ostensibly health-related regulations that apply only to abortion providers and concluded that the laws in question lack a valid medical or scientific basis and actually undermine, rather than advance, women's health. *See Planned Parenthood Az. v. Humble*, 753 F.3d 905, 916 (9th Cir. 2014) ("Plaintiffs have introduced uncontroverted evidence that the Arizona law [requiring an outdated protocol for the administration of a medication used to perform abortion early in pregnancy] substantially burdens women's access to abortion services, and Arizona has introduced no evidence that the law advances in any way its interest in women's health."); *Planned Parenthood of Wis., Inc. v. Schimel*, 806 F.3d 908, 921 (7th Cir. 2015) (concluding the purpose of Wisconsin's admitting privileges law was not to protect women's health, but rather "to discourage abortions by making it more difficult for women to obtain them").

In contrast, the Fifth Circuit's refusal to meaningfully examine the state's health-based rationales for the burdensome restrictions at issue in this case contravenes this Court's precedent and abdicates the judicial responsibility to subject health-based rationales to careful scrutiny, including a careful examination of whether such rationales are supported by medical and scientific evidence and actually further their stated goals of protecting health and safety. In this case, the district court undertook just such a careful review and determined—consistent with the findings of other courts that have carefully examined similar laws—that the Texas measures

at issue in this case do not have a sound medical basis and do not actually further women's health. *Whole Woman's Health v. Lakey*, 46 F. Supp. 3d 673 (W.D. Texas 2014).

CONCLUSION

Consistent with this Court's longstanding approach to reviewing restrictions on fundamental constitutional rights, and informed by our nation's unfortunate history of relying on spurious scientific and health-based rationales to justify oppressive measures that impermissibly curtailed the fundamental liberties of disfavored groups, the Court should reverse the judgment of the Fifth Circuit and reaffirm that state laws that impose health-justified restrictions on abortion providers require careful review.

Respectfully submitted,

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APPENDIX

LIST OF *AMICI*

National Center for Lesbian Rights

National Center for Lesbian Rights (NCLR) is a national legal nonprofit organization founded in 1977 and committed to advancing the rights of lesbian, gay, bisexual, and transgender (LGBT) people and their families through litigation, public policy advocacy, and public education. NCLR represented six plaintiffs in the 2015 cases before this Court that resulted in the recognition of marriage equality for same-sex couples. NCLR is cognizant of the dangers inherent in allowing health-related justifications that do not have substantial scientific support—such as those advanced in opposition to marriage equality—to be used to undermine the fundamental rights of disfavored groups. NCLR is dedicated to ensuring the rights of all people to reproductive and bodily autonomy, as well as access to essential reproductive health care services.

Gay and Lesbian Advocates and Defenders

Gay and Lesbian Advocates and Defenders (GLAD) works in New England and nationally to eradicate discrimination against LGBT people and people with HIV/AIDS from all communities, through litigation, public policy advocacy, and education. GLAD has participated in this Court, as well as other federal and state courts, as counsel or amici to address equal protection and due process issues.

Equal Justice Society

The Equal Justice Society (EJS) is transforming the nation's consciousness on race through law, social science, and the arts. A national legal organization focused on restoring constitutional safeguards against discrimination, EJS's goal is to help achieve a society where race is no longer a barrier to opportunity. Specifically, EJS is working to fully restore the constitutional protections of the Fourteenth Amendment and the Equal Protection Clause, which guarantees all citizens receive equal treatment under the law. EJS uses a three-pronged approach to accomplish these goals, combining legal advocacy, outreach and coalition building, and education through effective messaging and communication strategies. EJS's legal strategy aims to broaden conceptions of present-day discrimination to include unconscious and structural bias by using cognitive science, structural analysis, and real-life experience.

National Black Justice Coalition

The National Black Justice Coalition (NBJC) is a nonprofit, civil rights organization dedicated to the empowerment of black lesbian, gay, bisexual and transgender people and their families. NBJC envisions a world where all people are fully-empowered to participate safely, openly and honestly—in family, faith and community—regardless of race, class, gender identity or sexual orientation. NBJC advocates through its vast network of affiliates and members nationwide working to expand equality in our nation, including elected officials, clergy and media that

focus on black communities. Black people have historically suffered from discrimination, including many forms of discrimination justified by appeals to spurious "scientific" and eugenic rationales, and have turned to the courts for redress. NBJC has a strong interest in ensuring that courts faithfully perform their role of safeguarding individual liberties and equality by subjecting laws that restrict fundamental constitutional rights based on purportedly "scientific" rationales to careful review.

Family Equality Council

Family Equality Council, founded in 1979, is a national nonprofit, nonpartisan organization working on behalf of the 3 million parents who are lesbian, gay, bisexual, transgender and queer (LGBTQ) and their 6 million children across the country. Family Equality Council works to achieve social and legal equality for LGBTQ families by providing direct support, educating the American public, and advancing policy reform that ensures full recognition and protection for all families under the law at the federal, state and local levels. Family Equality Council is especially concerned with the ability of families—particularly women—to access safe, affordable, and competent reproductive health services, including abortions.

Human Rights Campaign

Human Rights Campaign (HRC), the largest national lesbian, gay, bisexual and transgender political organization, envisions an America where LGBT people are ensured of their basic equal

rights, and can be open, honest and safe at home, at work and in the community. Among those basic rights is freedom from discrimination and access to equal opportunity.

National LGBTQ Task Force

Since 1973, the National LGBTQ Task Force has worked to build power, take action, and create change to achieve freedom and justice for (LGBTQ) people and their families. As a progressive social justice organization, the Task Force works toward a society that values and respects the diversity of human expression and identity and achieves equity for all.

GLMA: Health Professionals Advancing LGBT Equality

GLMA: Health Professionals Advancing LGBT Equality (GLMA) is the largest and oldest association of LGBT healthcare and health professionals. GLMA's mission is to ensure equality in healthcare for LGBT individuals and healthcare professionals, using the medical and health expertise of GLMA members in public policy and advocacy, professional education, patient education and referrals, and the promotion of research. GLMA (formerly known as the Gay & Lesbian Medical Association) was founded in 1981 in part as a response to the call to advocate for policy and services to address the growing health crisis that would become the HIV/AIDS epidemic. Since then, GLMA's mission has broadened to address the full range of health concerns and issues affecting LGBT people, including by ensuring that sound science and

research informs health policy and practices for the LGBT community.

Equality Federation

Equality Federation is the strategic partner to state-based equality organizations advocating on behalf of LGBTQ people. Since 1997, we have worked throughout the country with our member organizations to make legislative and policy advances on critical issues including marriage, nondiscrimination, safe schools, and healthy communities.

Sexuality Information and Education Council of the United States

The Sexuality Information and Education Council of the United States (SIECUS) was founded in 1964 to provide education and information about sexuality and sexual and reproductive health. SIECUS affirms that sexuality is a fundamental part of being human, one that is worthy of dignity and respect. SIECUS advocates for the right of all people to accurate information, comprehensive education about sexuality, and access to sexual health services.

Immigration Equality

Immigration Equality is the nation's largest legal service provider for LGBT and HIV-positive immigrants. Each year, the organization provides legal advice to nearly 5,000 individuals and families, maintains an active docket of more than 550 immigration cases, and regularly appears in federal circuit courts as counsel or amicus curiae. Immigration Equality has focused on family recognition and health issues since its founding in

1994, with an emphasis on equal treatment for same-sex couples and ending discrimination against immigrants living with HIV.

National Health Law Program

Founded in 1969, the National Health Law Program (NHeLP) protects and advances the health rights of low-income and underserved individuals. NHeLP advocates, educates, and litigates at the federal and state levels to further its mission of improving access and overcoming barriers to quality health care, including sexual and reproductive health care. NHeLP seeks to ensure that affordable, quality health care is provided in accordance with evidence-based standards of care.

Movement Advancement Project

The Movement Advancement Project (MAP), founded in 2006, is an independent think tank that provides rigorous research, insight, and analysis that help speed equality for LGBT people. MAP focuses its work in three areas: policy and issues analysis, LGBT movement overviews, and providing effective messaging about the most important issues facing LGBT people.

Bay Area Lawyers for Individual Freedom

Bay Area Lawyers for Individual Freedom (BALIF) is a bar association of more than 600 LGBT members of the San Francisco Bay Area legal community. As the nation's oldest and largest LGBT bar association, BALIF promotes the professional interests of its members and the legal interests of the LGBT community at large.

To accomplish this mission, BALIF actively participates in public policy debates concerning the rights of LGBT individuals. BALIF frequently appears as *amicus curiae* in cases, like this one, in which it can provide valuable perspective and argument on matters of broad public importance.

GIVE JUSTICE GINSBURG WHAT SHE WANTS: USING SEX EQUALITY ARGUMENTS TO DEMAND EXAMINATION OF THE LEGITIMACY OF STATE INTERESTS IN ABORTION REGULATION

PRISCILLA J. SMITH*

INTRODUCTION

Sex equality jurisprudence, both in theory and now in constitutional doctrine, has developed in two important ways that have the potential to provide new tools to advocates challenging abortion regulations. First, sex

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equality doctrine has evolved from its original construction under which courts recognized sex inequality in laws that treated men and women differently in ways that are not explained by differences between the sexes. This original construction was referred to as the "sameness-difference" model of sex equality and is still the model that is most widely understood.[1] Supreme Court jurisprudence now also recognizes sex inequality in laws that reinforce a hierarchy of the sexes under what has been referred to as a "dominance and subordination" model of sex equality.[2] In this latter model, equality principles protect against laws that reinforce a gender caste system, recognizing that laws that reinforce traditional sex roles—that are based on the notion that these traditional roles are naturally ordained for men and women—promote sex inequality in violation of the constitution and statutory demands for sex equality.[3]

The second important development in sex equality doctrine has been its evolving relationship with laws restricting women's control over reproduction. Doctrine has followed theory again, has put the infamous case *Geduldig v. Aiello*[4] in its place, and now allows us to argue that restrictions on abortion violate constitutional sex equality guarantees, at least where their purpose is to reinforce outmoded forms of stereotyping.[5] These arguments are available to us *even if Geduldig* has not been completely overruled, that is *even if* the argument that abortion restrictions are *per se* discriminatory—because they treat a medical procedure that only women need differently from all other medical procedures—is not successful.

Unlike sex equality doctrine, the due process liberty jurisprudence that protects abortion has been in a downward spiral since the mid-1980s and is now in danger of losing its ability to protect women even from irrational and cruel regulations designed to foster the view that motherhood is their natural

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[1] *See, e.g.*, CATHARINE A. MACKINNON, *Difference and Dominance: On Sex Discrimination (1984)*, *in* FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW 32, 32–34 (1987) [hereinafter MACKINNON, *Difference and Dominance*] (discussing "sameness/difference" theory of sex equality and how it dominates sex discrimination law and policy).

[2] *See, e.g.*, *id.* at 40 (proposing "dominance approach" as description of an alternative approach to the question of equality that views gender equality as "a question of power, specifically of male supremacy and female subordination").

[3] *See, e.g.*, United States v. Virginia, 518 U.S. 515, 533 (1995) (holding that justification for classifications based on gender "must not rely on overbroad generalizations about the different talents, capacities, or preferences of males and females"); *see also infra* text accompanying notes 31–37.

[4] 417 U.S. 484, 496–97 (1974) (holding that discrimination against pregnancy was not *inherently* sex discriminatory and declining to apply heightened scrutiny to the exclusion of benefits for disability due to pregnancy in California's state disability program).

[5] *See* Nev. Dep't of Human Res. v. Hibbs, 538 U.S. 721, 730 (2003) (recognizing that pregnancy-based distinctions in state administration of leave benefits constituted unconstitutional sex discrimination because the distinctions were based on invalid gender stereotypes); Tucson Woman's Clinic v. Eden, 379 F.3d 531, 548 (9th Cir. 2004) ("*Hibbs* strongly supports plaintiffs' argument that singling out abortion in ways unrelated to the facts distinguishing abortion from other medical procedures is an unconstitutional form of discrimination on the basis of gender.").

destiny, the creation of life is their duty, and children are their golden tickets to redemption. The right to abortion grounded in due process liberty jurisprudence is based on a balancing of women's rights to decisional autonomy, bodily integrity, and informational privacy, as against the state's interest in regulating abortion to protect potential life and pregnant women's health.[6] As a result of a concerted anti-abortion legal strategy, and the Court's resulting decision in *Planned Parenthood of Southeastern Pennsylvania v. Casey*,[7] however, the ability of a state to regulate abortion in furtherance of its interest in protecting potential life has expanded, first in *Casey* and perhaps now in *Gonzales v. Carhart*.[8]

I have argued, as have others, that *Gonzales v. Carhart* did not ultimately alter the underlying standard of review for abortion regulations set out in *Casey*.[9] However, as I and others have also recognized, the danger of *Carhart* is not to be underestimated.[10] Its greatest danger lies in how courts

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[6] *See* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 857 (1992) (noting that "*Roe* stands at an intersection of two lines of decisions," and "may be seen not only as an exemplar of *Griswold* liberty but as a rule (whether or not mistaken) of personal autonomy and bodily integrity"); Thornburgh v. Am. Coll. of Obstetricians & Gynecologists, 476 U.S. 747, 766 (1986) (overruling part of decision striking provisions requiring mandatory information) ("The decision to terminate a pregnancy is an intensely private one that must be protected in a way that assures anonymity."), *overruled in part by Casey*, 505 U.S. at 870; *id.* at 767–68 (invalidating reporting requirements that "raise the specter of public exposure and harassment of women who choose" abortion); Roe v. Wade, 410 U.S. 113, 153 (1973) (holding that "right of privacy, whether it be founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action, as we feel it is, or, [in other bases], is broad enough to encompass a woman's decision whether or not to terminate her pregnancy"); *id.* at 152–53 (citing precedent protecting right to bodily integrity and decisional autonomy); *id.* at 154 (holding that "[a]t some point in pregnancy," the state's interests "in safeguarding health, in maintaining medical standards, and in protecting potential life" become "sufficiently compelling to sustain regulation of the factors that govern the abortion decision").

[7] 505 U.S. 833, 875 (1992) (reaffirming central principles of *Roe*, but contending that *Roe's* framework "in practice . . . undervalues the State's interest in the potential life within the woman").

[8] 550 U.S. 124 (2007) (upholding federal law banning method of abortion as long as alternative safe methods of abortion were available).

[9] *See generally* David J. Garrow, *Significant Risks:* Gonzales v. Carhart *and the Future of Abortion Law*, 2007 SUP. CT. REV. 1, 22, *available at* http://www.davidgarrow-com.hb2hosting.net/File/DJG%202008%20SCtRevAbortion.pdf ("[The holding in *Carhart*] reaffirmed the continuing validity and applicability of *Casey*'s decisive undue burden test, and, in conjunction with the majority's earlier acknowledgment that a ban which covered standard D&E procedures would indeed violate that standard, thus created a serious if not fatal impediment to this opinion serving as a direct stepping stone toward further prohibitions of second-trimester abortions."); Priscilla J. Smith, *Is the Glass Half-Full?:* Gonzales v. Carhart *and the Future of Abortion Jurisprudence*, 2 HARV. L. & POL'Y REV. 1, 13 (2008) http://hlpronline.com/wordpress/wp-content/uploads/2009/12/Smith_HLPR.pdf [hereinafter Smith, *Half-Full*] ("[T]he opinion [in *Carhart*] does not impact the 'substantial obstacle' effect prong of the undue burden standard; pre-viability abortions still cannot be banned . . . . Nor does the opinion eliminate the rule that [a] woman's health must always remain the 'physician's paramount consideration' . . . .").

[10] *See, e.g.*, *Carhart*, 550 U.S. at 183 n.7 (Ginsburg, J., dissenting) (discussing the majority's reliance on discredited claims that abortion harms women); *id.* at 171 (discussing "blur[red]" distinction between pre- and post-viability abortions); *id.* at 161–69 (ma-

will respond to the inevitable use anti-abortion activists will make of the Court's discussion of the state's ability to restrict abortion in furtherance of interests in protecting potential life and in protecting women's health. The danger is that those interests will become so broad that someday you will be able to drive an abortion ban truck right through them. The first arrows shot from the anti-abortion bow post-*Carhart* are statutes banning some pre-viability abortions based on the state's interest in protecting the fetus from pain—statutes that are part of a concerted campaign to stress "fetal pain."[11] This campaign picks up where the partial-birth abortion campaign left off, talking about the fetus as if the fetus were already a baby, with all the emotional power that the word "pain" conveys. Ironically, the only way in which liberty jurisprudence has evolved in a *potentially* helpful direction is that it has come to incorporate a sex equality analysis, as I will discuss below.

Despite the positive evolution of sex equality analyses in both equal protection and liberty jurisprudence, and despite urging from the academy to press sex equality arguments, litigators have not wholeheartedly pursued these arguments in federal court challenges to restrictions on abortion. Instead, lawyers challenging abortion restrictions in federal court today rely mainly[12] on claims that a given restriction violates the woman's liberty and privacy interest under standards set out in *Roe* and *Casey* by imposing an "undue burden" on the woman's right to abortion under *Casey* and/or failing to adequately protect the woman's life or health as required by both *Roe* and *Casey*.[13] Reproductive rights litigators have certainly pled sex equality

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jority opinion) (discussing impact of shifting burden of proof on proving health claims); Talcott Camp, *The "Partial-Birth Abortion" Ban: Health Care in the Shadow of Criminal Liability*, 17 J.L. & Pol'y 1, 9–11, 14 (2008) (arguing that decision undermines health requirement and is "very scary"); Smith, *Half-Full*, *supra* note 9, at 2–3 & n.12 (discussing dangers); *id.* at 10 (discussing shifting burden of proof on health).

[11] *See infra* notes 119–123 and accompanying text.

[12] Litigators also use vagueness claims and other constitutional claims where appropriate. *See, e.g.*, Planned Parenthood of the Heartland v. Heineman, 724 F. Supp. 2d 1025, 1047–48 (D. Neb. 2010) (claiming that, in addition to imposing an undue burden on the woman's decision to obtain an abortion, mandatory information law was unconstitutionally vague and violated the First Amendment).

[13] For example, in 2005, abortion providers challenged H.B. 1166 (S.D. 2005) which prohibited abortion unless the woman was provided with a written statement "[t]hat the abortion will terminate the life of a whole, separate, unique, living human being"; "[t]hat the pregnant woman has an existing relationship with that unborn human being and that the relationship enjoys protection under the United States Constitution and under the laws of South Dakota"; "[t]hat by having an abortion, her existing relationship and her existing constitutional rights with regards to that relationship will be terminated"; and describing "all known medical risks of the procedure and statistically significant risk factors to which the pregnant woman would be subjected, including . . . [d]epression and related psychological distress; [and] . . . [i]ncreased risk of suicide ideation and suicide." Planned Parenthood Minn., N.D., S.D. v. Rounds, 375 F. Supp. 2d 881, 884 (D.S.D. 2005), *vacated*, 530 F.3d 724 (8th Cir. 2008). In addition to bringing First Amendment claims on behalf of abortion providers and an overall vagueness claim, the plaintiffs alleged that the statute imposed an undue burden on women's right to abortion protected by the Fourteenth Amendment substantive due process liberty right, violated

claims in targeted state and federal courts in the past[14] and continue to do so where possible in state courts under state constitutions.[15] However, after the Ninth Circuit's decision in *Tuscon Woman's Clinic v. Eden*,[16] such claims are rarely briefed in the trial courts, much less preserved on appeal in federal courts.[17]

In Part I of this essay, I briefly outline sex equality arguments and argue that, even if they do not earn heightened scrutiny in litigation, these arguments offer specific advantages that can assist embattled litigators and supplement the use of liberty claims. In Part II, I review the greatest weakness of the liberty claim, describing how a well-developed anti-abortion strategy has resulted in tepid inquiry into legitimate state interests or legisla-

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women's right not to receive false and misleading information under the liberty right, violated their right not to be forced to listen to the state's ideological message under the First and Fourteenth Amendments, and contained an inadequate health exception in violation of the liberty right. *Id.* at 885. Similarly, in *Heineman*, 724 F. Supp. 2d 1025, a challenge to Nebraska's mandatory information law, L.B. 594 (Neb. 2010), the plaintiffs pled, *inter alia*, that the law was unconstitutionally vague and violated due process liberty rights and First Amendment rights by (1) requiring disclosure of false and misleading information; (2) banning abortion as a result of vague disclosure requirements and thus imposing an undue burden on abortion; and (3) requiring disclosure of patient information in violation of the right to informational privacy. 724 F. Supp. 2d at 1031. They also alleged that the law violated medical providers' and patients' rights of Equal Protection under the Fourteenth Amendment because the bill treated informed consent for abortion differently from informed consent for any other medical service or procedure. *Id.* The plaintiffs did not include a sex equality claim. *Id.*

[14] *See* Reva B. Siegel, Roe*'s Roots: The Women's Rights Claims that Engendered* Roe, 90 B.U. L. REV. 1875, 1886–94 (2010) [hereinafter Siegel, Roe*'s Roots*] (outlining the use of equality arguments in pre-*Roe* litigation and in *Roe* itself). Most recently, litigators pressed equality claims in federal courts by challenging physical plant and other regulations of physicians' offices where abortions were performed. *See, e.g.*, Tucson Woman's Clinic v. Eden, 379 F.3d 531, 547–49 (9th Cir. 2004) (collapsing sex equality arguments into undue burden inquiry).

[15] *See, e.g.*, Doe v. Maher, 515 A.2d 134, 162 (Conn. 1986) (holding Medicaid funding ban violated state Equal Rights Amendment); *id.* at 157 (holding funding ban also violates right to privacy under state constitution); Moe v. Sec'y of Admin. & Fin., 417 N.E.2d 387, 397 (Mass. 1981) (holding that Medicaid funding ban violated state constitutional right to privacy and declining to reach sex equality argument under state constitution's Equal Rights Amendment); New Mexico Right to Choose/NARAL v. Johnson, 975 P.2d 841, 857 (N.M. 1998) (holding that the state's ban on Medicaid funding of abortions violated state Equal Rights Amendment); Petition, Nova Health Sys. v. Edmondson, No. CV-2010-533 (Okla. Cnty. Dist. Ct. Apr. 27, 2010), *aff'd*, 233 P.3d 380 (Okla. 2010) (challenging Oklahoma's H.B. 2780, which prohibited abortion unless women were shown and had described to them in detail an ultrasound of the fetus, alleging *inter alia* that statute discriminated on the basis of sex in violation of Oklahoma Constitution), *available at* http://reproductiverights.org/sites/crr.civicactions.net/files/documents/Petition.pdf.

[16] *Tucson Woman's Clinic*, 379 F.3d at 549 (in challenge to physical plant regulation of doctors' offices that performed abortion in which plaintiffs alleged *inter alia* unconstitutional sex discrimination, court collapsed sex equality claim into undue burden liberty claim, holding that "elements of intermediate scrutiny review particular to sex-based classifications, such as the rules against paternalism and sex-stereotyping, . . . are evident in the *Casey* opinion, and should be considered by courts assessing the legitimacy of abortion regulation under the undue burden standard").

[17] *See supra* note 13. This conclusion is also drawn from my own experience litigating reproductive rights cases.

tive purpose. While such an analysis is required in the liberty framework under *Roe*[18] and *Casey*,[19] it has been remarkably anemic and illogical in recent cases.

In Part III, I then examine some of the stated reasons for litigators' reluctance to press sex equality arguments in their cases, including some of the practical impediments to bringing and preserving these claims, as well as ongoing skepticism about the benefits of equality arguments. I argue that there are important reasons to overcome the reluctance to press sex equality arguments and, though I recognize and sympathize with the difficulty of the task, that the practical impediments can be overcome.

I conclude in Part IV that using sex equality arguments to bolster the battered liberty argument—"sistering the joist"[20]—may not *necessarily* provide heightened scrutiny of abortion restrictions in the form of traditional "intermediate" or "strict" scrutiny and may not result in greater overall success in the courts. However, sex equality arguments, which have not been as widely criticized by commentators as the liberty right has been, not only provide additional support for a woman's right to abortion, but will also force courts to grapple with the regressive views of women that propel many abortion restrictions. Because they focus the inquiry on a potential discriminatory purpose, sex equality arguments have the capacity to reinvigorate the required analysis of the legitimacy of state interests in abortion regulations. This renewed analysis should include exacting inquiry into the broad category of interests advanced under the guise of the state's interest in "potential life," and some of the interests advanced under the guise of protecting maternal health. Reinvigorating this review is essential to prevent further erosion of the standards used to examine abortion restrictions.

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[18] *See* Roe v. Wade, 410 U.S. 113, 164–65 (1973) (providing that the state can regulate abortion starting at the beginning of the second trimester "to promote its interest in the health of the mother" and can regulate and even ban abortion post-viability "in promoting its interest in the potentiality of human life," except where necessary for the preservation of the life or health of the mother).

[19] 505 U.S. 833, 877 (1992) (holding that "a statute which, *while furthering the interest in potential life or some other valid state interest*," also imposes "a substantial obstacle in the path of the woman's choice," is invalid) (emphasis added).

[20] In construction terms, adding the equality argument to bolster the weakened liberty argument would be what is referred to as "sistering a joist." Rather than removing a weakened beam entirely, a new structurally sound beam is bolted onto a weakened one. The two together provide stronger structural support to the building. *How to Reinforce Floors with Sister Joists*, EHOW, http://www.ehow.com/how_4802264_reinforce-floors-sister-joists.html (last visited Feb. 25, 2011).

I. A Brief History of Sex Equality Arguments in Abortion Reform

The movement for reform of the criminal abortion laws was a central part of the movement for women's liberation in the 1960s and 1970s.[21] Sex equality arguments central to that movement were in turn used during the political and legal movements for abortion reform of the 1960s and early 1970s, in early litigation as well as in other forms of advocacy.[22] However, for both doctrinal and social reasons—including the fact that constitutional sex equality arguments were still in their infancy in the early 1970s—the Court neglected the equality arguments presented in *Roe*,[23] deciding the case using a substantive due process liberty frame instead of an equality one.[24] Just a year and a half later, in *Geduldig v. Aiello*, the Court refused to apply heightened scrutiny to the exclusion of benefits for disability due to pregnancy in California's state disability program, holding that discrimination against pregnancy was not *inherently* sex discriminatory, and the exclusion did not constitute unlawful sex discrimination under the Equal Protection Clause.[25] The case was read as a broad rejection of the claim that pregnancy discrimination is sex discrimination,[26] further discouraging advocates from relying on sex equality arguments in challenges to restrictions on women's

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[21] Siegel, Roe*'s Roots*, *supra* note 14, at 1886–94 (discussing equality arguments used in pre-*Roe* litigation, other movement advocacy, and in the *Roe* litigation itself); *see also* Reva B. Siegel, *Constitutional Culture, Social Movement Conflict and Constitutional Change: The Case of the de facto ERA*, 94 Calif. L. Rev. 1323, 1419 (2006); Reva B. Siegel, *Sex Equality Arguments for Reproductive Rights: Their Critical Basis and Evolving Constitutional Expression*, 56 Emory L.J. 815, 826 (2007) [hereinafter Siegel, *Sex Equality Arguments*].

[22] Siegel, *Sex Equality Arguments*, *supra* note 21, at 824–26.

[23] *Id.* at 826–28 (discussing doctrinal and political reasons for Court's failure to adopt equality frame in *Roe* or its progeny).

[24] Roe v. Wade, 410 U.S. 113, 153 (1973) (noting that "we feel" that the right to privacy which protects abortion is "founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action").

[25] Geduldig v. Aiello, 417 U.S. 484, 496–97 (1974).

[26] Although *Geduldig* is often said to stand for the proposition that pregnancy discrimination is not sex discrimination, its holding was more limited. It merely held that pregnancy discrimination is not *always* sex discrimination. *Id.* at 496 n.20 ("While it is true that only women can become pregnant, it does not follow that *every* legislative classification concerning pregnancy is a sex-based classification . . . .") (emphasis added). The Court declined to apply heightened scrutiny, finding that the state had a legitimate interest in the self-supporting nature of the program that required keeping benefit payments and contributions at appropriate levels, supplying "an objective and wholly noninvidious basis" for the pregnancy exclusion. *Id.* at 496. However, the Court left open the possibility that heightened scrutiny would apply where the plaintiff established that the pregnancy discrimination was a "mere pretext[ ] designed to effect an invidious discrimination against" women. *Id.* at 496 n.20. *See* Jennifer Keighley, *Health Care Reform and Reproductive Rights: Sex Equality Arguments for Abortion Coverage in a National Plan*, 33 Harv. J.L. & Gender 357, 389–91 (2010); Reva B. Siegel, *You've Come a Long Way, Baby: Rehnquist's New Approach to Pregnancy Discrimination in Hibbs*, 58 Stan. L. Rev. 1871, 1873 (2006) [hereinafter Siegel, *You've Come a Long Way*].

control over their reproduction, particularly in the form of abortion restrictions.

While advocates generally moved away from equality doctrine, preferring to rely on the heightened scrutiny applied to abortion restrictions in the liberty/privacy frame in *Roe*, legal scholars became more engaged with equality. They first began to promote equality arguments in the mid-1970s, when Kenneth Karst articulated *Roe* as a "woman's role" case that "involve[s] some of the most important aspects of a woman's independence, her control over her own destiny."[27] Karst argued that the equality principle[28] advanced by the Fourteenth Amendment was implicated by the aspect of abortion that furthers the "woman's claim of the right to control her own social roles," and saw a benefit to moving the jurisprudence away from a balancing of woman versus fetus towards an examination of abortion as "a feminist issue, an issue going to women's position in society in relation to men."[29]

The scholarship on the application of sex equality arguments to reproductive decision-making exploded in the 1980s and early 1990s with works by Sylvia Law, Ruth Bader Ginsburg, Catharine MacKinnon, and Reva Siegel.[30] These scholars built on an important advance in equal protection doctrine occurring in the 1970s that recognized sex inequality in laws relying on sex stereotypes to support gender distinctions.[31] With this view of

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[27] *See* Kenneth L. Karst, *Foreword: Equal Citizenship Under the Fourteenth Amendment*, 91 HARV. L. REV. 1, 57–58 (1977) [hereinafter Karst, *Equal Citizenship*]; *see also* Kenneth L. Karst, *Book Review*, 89 HARV. L. REV. 1028, 1036–37 (1976); Kenneth L. Karst, *Constitutional Equality as a Cultural Form: The Courts and the Meanings of Sex and Gender*, 38 WAKE FOREST L. REV. 513, 531 n.113 (2003) ("I have been harping on this theme since 1976.").

[28] This equality principle "is a principle of equal citizenship, which presumptively guarantees to each individual the right to be treated by the organized society as a respected, responsible, and participating member." Karst, *Equal Citizenship*, *supra* note 27, at 4.

[29] *Id.* at 58.

[30] *See generally* CATHARINE A. MACKINNON, *Privacy v. Equality: Beyond* Roe v. Wade *(1983)*, *in* FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW 93, 93–102 (1987); Ruth Bader Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to* Roe v. Wade, 63 N.C. L. Rev. 375 (1985); Sylvia A. Law, *Rethinking Sex and the Constitution*, 132 U. PA. L. REV. 955 (1984); Catharine A. MacKinnon, *Reflections on Sex Equality Under Law*, 100 YALE L.J. 1281 (1991) [hereinafter MacKinnon, *Reflections on Sex Equality*]; Reva B. Siegel, *Abortion As a Sex Equality Right: Its Basis in Feminist Theory*, in MOTHERS IN LAW: FEMINIST HISTORY AND THE LEGAL REGULATION OF MOTHERHOOD 43 (Martha Albertson Fineman & Isabel Karpin eds., 1995) [hereinafter Siegel, *Sex Equality Right*]; Reva Siegel, *Reasoning From the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection*, 44 STAN. L. REV. 261 (1992) [hereinafter Siegel, *Reasoning from the Body*].

[31] "[T]he Court's 1970s cases prohibited sex-based state action premised on the assumption—descriptive or prescriptive—that husbands are breadwinners and wives are dependent caregivers." Siegel, *You've Come a Long Way*, *supra* note 26, at 1887 (discussing Frontiero v. Richardson, 411 U.S. 677, 685 (1973) (striking down the military's sex-based dependent benefits statute noting that the view that women's "paramount destiny" is to be wife and mother supported "gross, stereotyped distinctions between the sexes"); *see also* Califano v. Westcott, 443 U.S. 76, 89 (1979) (disapproving of the

equality protections as background, the scholars argued that physiological differences, and specifically reproductive differences, between the sexes had been used as a central justification for the subjugation of women, achieved through the promotion of stereotyped notions of women's role, and that so-called "women-protective" regulations were a core mechanism for oppression of women.[32] They argued that sex equality principles had to be able to distinguish between differential treatment based on biological differences that promoted equality and differential treatment based on differences that reinforced inequality.[33] They "repudiate[d] equality theory focused on similarity and difference and . . . argue[d] for an inquiry focused on issues of hierarchy and subordination."[34] Articulating the promise of equal protection as a promise of protection against legislation that enforces subordination of certain groups rather than solely as protection against irrational differential treatment revealed regulation of reproduction as an equal protection concern. Rather than having to demonstrate sex discrimination by comparing women to a group of similarly situated men, an impossible feat with regard to pregnancy[35]—at least so far and at least outside the transgendered context[36]—instead, it was enough to show, as Reva Siegel put it, that "the policy or practice in question integrally contributes to the maintenance of an under-

"'baggage of sexual stereotypes' that presumes the father has the 'primary responsibility to provide a home and its essentials,' while the mother is the 'center of home and family life'"); Craig v. Boren, 429 U.S. 190, 198–99 (1976) (striking down law premised on "increasingly outdated misconceptions concerning the role of females in the home rather than in the 'marketplace and world of ideas'"); Weinberger v. Wiesenfeld, 420 U.S. 636, 643 (1975) (law premised on "archaic and overbroad generalization . . . namely, that male workers' earnings are vital to the support of their families, while the earnings of female wage earners do not significantly contribute to their families' support" is not allowed under the Constitution). For an important discussion of the development of sex equality jurisprudence using anti-stereotyping arguments, see Cary Franklin, *The Anti-Stereotyping Principle in Constitutional Sex Discrimination Law*, 85 N.Y.U. L. Rev. 83 (2010).

[32] *See, e.g.*, Law, *supra* note 30, at 957, 960–61.

[33] *See id.*, *supra* note 30, at 962–63.

[34] Siegel, *Sex Equality Right*, *supra* note 30, at 62 (citing Catharine A. MacKinnon, Sexual Harassment of Working Women (1979)); *see also* MacKinnon, *Difference and Dominance*, *supra* note 1, at 40–41; Robin West, *Equality Theory, Marital Rape, and the Promise of the Fourteenth Amendment*, 42 Fla. L. Rev. 45, 57–62 (1990).

[35] Siegel, *Sex Equality Right*, *supra* note 30, at 60 (arguing that physiologically, "no man is similarly situated to the pregnant woman facing abortion restrictions; hence, state action restricting a woman's abortion choices does not seem to present a problem of sex discrimination"); *see also* Geduldig v. Aiello, 417 U.S. 484, 496 n.20 (claiming disability insurance program's exclusion of coverage for disability due to pregnancy not *per se* sex discrimination because it "divides potential recipients into two groups—pregnant women and nonpregnant persons [and w]hile the first group is exclusively female, the second includes members of both sexes").

[36] *See* Alan B. Goldberg & Katie N. Thomson, *Barbara Walters Exclusive: Pregnant Man Expecting Second Child*, ABC News (Nov. 13, 2008), http://abcnews.go.com/Health/story?id=6244878; *see generally* Pregnant Man, http://www.pregnantman.net (last visited Mar. 21, 2011) (discussing cases of men who were born as women becoming pregnant).

class or a deprived position because of gender status."[37] Despite the scholarship, however, *Geduldig* remained as an impediment to further doctrinal developments.

The second major development in equality jurisprudence came with the Court's 2003 decision in *Nevada Department of Human Resources v. Hibbs*,[38] which reflected a significant transformation in the Court's understanding of pregnancy discrimination from that revealed in the Court's 1974 *Geduldig* decision.[39] Reva Siegel traces the change to a shift in Justice Rehnquist's view of pregnancy, arguing that "[w]here Rehnquist once saw questions of women's bodies, he now saw questions of women's roles."[40] In *Geduldig*, the Court was unable to see the pregnancy classification as *per se* sex discrimination because it divided recipients into two groups—pregnant women and "nonpregnant persons" which included women and men—and, seeing sex equality through a sameness-difference model, viewed the pregnancy "difference" as justification for the discrimination at issue.[41] While *Geduldig* left open the possibility that some pregnancy classifications would constitute sex discrimination, the Court gave little insight into how to determine when pregnancy classifications would violate sex equality guarantees.[42]

In *Hibbs*, the Court finally was able to answer this question. At least before Chief Justice Rehnquist was replaced by Chief Justice Roberts, the Court was able to understand sex equality protections differently—arguably viewing the question through a "dominance-subordination" equality lens—and was not blinded by the pregnancy "difference." The *Hibbs* Court recognized that pregnancy classifications that rest on "the pervasive sex-role stereotype that caring for family members is women's work" are "gender-discriminatory" in violation of constitutional equal protection guarantees.[43]

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[37] Siegel, *Sex Equality Right*, *supra* note 30, at 62 (citing CATHARINE A. MACKINNON, SEXUAL HARASSMENT OF WORKING WOMEN 117 (1979)); *see also* Karst, *Equal Citizenship*, *supra* note 27, at 55 ("[T]o the extent that the stereotype is embodied in law or otherwise brought to bear in the public life of the society—in other words, to the extent that the phenomenon of women's dependency on men is socially imposed—the principle of equal citizenship presumptively requires intervention by the courts."); Siegel, *Reasoning from the Body*, *supra* note 30, at 263; Cass R. Sunstein, *Neutrality in Constitutional Law (with Special Reference to Pornography, Abortion, and Surrogacy)*, 92 COLUM. L. REV. 1, 32–33 (1992) [hereinafter Sunstein, *Neutrality*] (arguing that despite the continued validity of *Geduldig*, "restrictions on abortion should be seen as a form of sex discrimination . . . . A statute that is explicitly addressed to women is of course a form of sex discrimination. A statute that involves a defining characteristic or a biological correlate of being female should be treated in precisely the same way.").

[38] 538 U.S. 721 (2003) (upholding Family Medical Leave Act as a proper exercise of Congressional power under Section 5 of the Fourteenth Amendment).

[39] Reva Siegel and Jennifer Keighley have detailed the transformative power of *Hibbs*. *See* Keighley, *supra* note 26, at 389–91; Siegel, *You've Come a Long Way*, *supra* note 26, at 1873.

[40] Siegel, *You've Come a Long Way*, *supra* note 26, at 1897.

[41] *Geduldig*, 417 U.S. at 496 n.20.

[42] *See id.*

[43] Nev. Dep't of Human Res. v. Hibbs, 538 U.S. 721, 731 (2003) (holding that parental leave policies that provided pregnancy disability leave to women in excess of the

The Court provided specific examples of many such legislative classifications, such as those that grant "maternity" but not "paternity" leave, or provide overlong "disability" leave for pregnant women beyond their actual disability.[44] Holding that "the States' record of unconstitutional participation in, and fostering of, gender-based discrimination in the administration of leave benefits is weighty enough to justify the enactment of prophylactic § 5 legislation,"[45] *Hibbs* properly limits *Geduldig* to its terms and makes clear that abortion restrictions violate constitutional sex equality principles where they are based on or reinforce sex stereotypes. If the classifications rest on or reinforce stereotypes, plaintiffs will not need to establish discriminatory "purpose" separately.[46]

With the *Geduldig* hurdle passed, the next step for scholars was to demonstrate how abortion regulations have *in fact* functioned as tools of subordination and reinforced sex role stereotypes.[47] As Reva Siegel summarized, these equality arguments would "emphasize that abortion restrictions are (1) a form of class legislation that (2) reflects status-based judgments about women and (3) inflicts status-based injuries on women."[48] Siegel demonstrated exhaustively in her 1992 article *Reasoning from the Body* that abortion restrictions coerce women into motherhood in social settings in which motherhood has been, and remains, subordinating, and that such restrictions continue to reflect traditional views of women's roles.[49]

Importantly for our purposes here, scholars examining abortion restrictions with this view of equal protection in mind also recognized that the rationales used to justify these regulations—i.e., the state interests in regulation articulated in support of abortion restrictions in the liberty cases—are themselves gender-biased, reflecting, as Siegel puts it, "a distinctive set of

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amount medically indicated but did not provide any similar time for men violated constitutional sex equality principles because these "differential leave policies were not attributable to any differential physical needs of men and women, but rather to the pervasive sex-role stereotype that caring for family members is women's work"); *see also id.* at 732 n.5 ("Evidence pertaining to parenting leave is relevant here because state discrimination in the provision of both types of benefits is based on the same gender stereotype: that women's family duties trump those of the workplace.").

[44] *Id.* at 733–35.

[45] *Id.* at 735.

[46] Siegel, *You've Come a Long Way*, *supra* note 26, at 1892–93; *see also* Tucson Woman's Clinic v. Eden, 379 F.3d 531, 548 (9th Cir. 2004) ("*Hibbs* strongly supports plaintiffs' argument that singling out abortion in ways unrelated to the facts distinguishing abortion from other medical procedures is an unconstitutional form of discrimination on the basis of gender.").

[47] *See, e.g.*, MacKinnon, *Reflections on Sex Equality*, *supra* note 30, at 1320–21; Siegel, *Reasoning from the Body*, *supra* note 30, at 361–68; Siegel, *Sex Equality Right*, *supra* note 30, at 64–65; Sunstein, *Neutrality*, *supra* note 37, at 36–37.

[48] Siegel, *Sex Equality Right*, *supra* note 30, at 64.

[49] Siegel, *Reasoning from the Body*, *supra* note 30, at 361 (noting that the highest support for abortion came when pregnancy was the result of rape or incest—in other words, situations in which the woman did not *want* sex—and that the greatest opposition to abortion was for situations where the woman reported having an abortion because of her career—in other words, when her desire for a career conflicted with acceptance of the maternal role).

judgments about the unborn, not consistently expressed in other social settings and often controverted by other social practices."[50] For example, although pregnant women are expected to sustain and save the lives of the "unborn," no one else has the duty to save the life even of people who have already been born, much less to the detriment of their own life circumstances and physical or mental health.[51] This "selectivity," as Siegel suggests,[52] has been invisible to many of us because we have internalized this unique expectation of pregnant women to preserve the life of a fetus in a way that no one else is expected to preserve the life of another person.[53] The expectation of women to create people and then parent them carries over into our differential expectations of the parenting abilities of mothers versus fathers. For example, although mothers are more likely than fathers to cause the death of their children,[54] Americans have higher expectations of maternal behavior and are much more fascinated and outraged by mothers killing children, either intentionally (Susan Smith and Andrea Yates)[55] or through neglect,[56] than fathers killing children.

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[50] Siegel, *Sex Equality Right*, *supra* note 30, at 65.

[51] Law, *Rethinking Sex*, *supra* note 30, at 1021 & n.239 (referencing Donald Regan, *Rewriting* Roe v. Wade, 77 MICH. L. REV. 1569 (1979) and discussing "general common law principle that people are not required to aid others, particularly when aid can only be provided at significant cost and risk to the rescuer" and that equal protection "demands respect for the woman's right to refuse to aid the fetus").

[52] Siegel, *Sex Equality Right*, *supra* note 30, at 65; *see also* Sunstein, *Neutrality*, *supra* note 37, at 33–35 (discussing selectivity of compulsion to save the life of another).

[53] Siegel, *Sex Equality Right*, *supra* note 30, at 65 (citing LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 1354 (2d ed. 1988) and Siegel, *Reasoning from the Body*, *supra* note 30, at 318 n.236, 365–66).

[54] A significantly higher percentage of the 1,247 children killed in 2009 were killed by their mother acting alone or with the help of a non-parent (37.1%), than were killed by their father acting alone or with the help of a non-parent (16.2%). ADMIN. ON CHILDREN, YOUTH & FAMILIES, U.S. DEP'T OF HEALTH & HUMAN SERVS., CHILD MALTREATMENT 2009, at 64 tbl.4–6 (2010), *available at* http://www.acf.hhs.gov/programs/cb/pubs/cm09/cm09.pdf (27.3% were killed by the mother alone; 9.8% were killed by the mother along with a non-parent; 14.8% were killed by the father acting alone; 1.4% were killed by the father acting with a non-parent). An additional 22.5% of the children killed in 2009 were killed by mothers and fathers acting together. *Id.*

[55] *See* Elena Arteaga, *Florida Mom Shoots, Kills Teenage Children For Talking Back*, KTSM NEWS CHANNEL 9 (Jan. 31, 2011), http://www.ktsm.com/news/florida-mom-shoots-kills-teenage-children-for-talking-back; Katherine Ramsland, *Andrea Yates: Ill or Evil*, TRUTV, http://www.trutv.com/library/crime/notorious_murders/women/andrea_yates/index.html (last visited Mar. 22, 2011); Tom Turnipseed, *Continuing Saga of Sex, Murder & Racism: Susan Smith is Still Scheming in Prison*, COMMON DREAMS.ORG, http://www.commondreams.org/views/091400-101.htm (last visited Mar. 22, 2011).

[56] *See* Michele Oberman, *Mothers Who Kill: Cross-Cultural Patterns in and Perspectives on Contemporary Maternal Filicide*, 26 INT'L J.L. & PSYCHIATRY 493, 497 (2003) (arguing that "[i]n the past, [cases of fatal child neglect] might have been regarded as tragic accidents. In the contemporary United States, however, we treat them as homicides. This is a reflection of the social construction of motherhood, which is more than simply a full-time job. The unwritten rules that govern the role of mother require constant vigilance and altruism. To the extent that these child neglect cases occur when a mother is entertaining a male lover, or visiting a beauty parlor, society is merciless in its scorn and fury.").

II. Why Liberty Needs a Sister Joist: A Right Under Attack

Given that the right to abortion grounded in the due process liberty clause has taken a significant beating over the almost forty years since the right was first announced, it may seem ludicrous to suggest that the liberty right might *not* need help. On the other hand, from a litigator's perspective, one could view the right as weakened but amazingly resilient, especially given the disparity in the number of Supreme Court Justices appointed by Republicans[57] versus those appointed by Democrats that existed until the recent appointments of Justices Sotomayor and Kagan.[58] I have previously pointed out, as have others, that much of the *Casey* standard remains intact.[59] However, a significant crack has developed.

A. The Weakened Evaluation of State Regulatory Interests

The most significant area of weakness in liberty doctrine rests in the courts' unwillingness to carefully evaluate the legitimacy of state interests in regulating abortion. In *Roe v. Wade*, the Supreme Court identified just two legitimate state interests that could justify state regulation of abortion: the state's "important and legitimate interest[s] in preserving and protecting the health of the pregnant woman . . . and in protecting the potentiality of human life."[60] After the first trimester, the State could, "*in promoting its interest in the health of the mother* . . . regulate the abortion procedure in ways that are reasonably related to maternal health."[61] After the point of fetal viability, the State could "*in promoting its interest in the potentiality of human life* . . . regulate, and even proscribe, abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother."[62]

1. *Anti-Abortion Strategy*

Since the 1970s, anti-abortion strategists have pursued a remarkably consistent and successful strategy to attack *Roe v. Wade*, much of which is set forth in a 1987 book entitled *Abortion and the Constitution: Reversing*

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[57] The Republican Party platform still calls for an Amendment to the Constitution that would ban abortion throughout the nation. Katharine Q. Seelye, *G.O.P. Holds to Firm Stance on Abortion*, N.Y. Times, Aug. 31, 2008, at A27.

[58] Until the recent appointments of Justices Sotomayor and Kagan, Republican appointees outnumbered Democratic appointees 7–2. The imbalance is now reduced, and Republicans outnumber Democratic appointees 5–4. *See Members of the Supreme Court of the United States*, Supreme Ct. of the United States, http://www.supremecourt.gov/about/members.aspx (last visited Mar. 22, 2011).

[59] *See generally* Garrow, *supra* note 9; Smith, *Half-Full*, *supra* note 9.

[60] Roe v. Wade, 410 U.S. 113, 162 (1973).

[61] *Id.* at 164 (emphasis added).

[62] *Id.* at 164–65 (emphasis added).

Roe v. Wade *Through the Courts*,[63] and in books and articles written by James Bopp, Jr.[64] of the National Right to Life Committee.[65] Most public attention has been focused on the efforts of anti-abortion advocates to overturn *Roe* by changing the membership of the Court or through adoption of a Human Life Amendment to the Constitution insuring the right to life from conception.[66] Anti-abortion advocates, however, also designed an incremental strategy to proceed in tandem with efforts to alter the composition of the Supreme Court. This strategy was to weaken the right to abortion bit by bit by devaluing women's interests in abortion on the one hand while expanding the breadth of the legitimate state interests in regulating abortion on the other.[67]

In their 1987 article, *Strategies for Reversing* Roe v. Wade,[68] Victor Rosenblum and Thomas Marzen described this alternative "incrementalist"[69] approach to *Roe* reversal. They contended that expanding the state's interest in the fetus and "widen[ing] the state's interest in maternal health" to allow greater regulation of abortion throughout pregnancy, along with efforts to change the judiciary, would create the conditions necessary for reversal.[70] To expand the state's interest in the fetus, the authors argued, advocates must attack the viability line and the requirement that a woman's health must be protected even in a ban on abortions after viability,[71] which the authors saw

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[63] *See generally* ABORTION AND THE CONSTITUTION: REVERSING *ROE V. WADE* THROUGH THE COURTS (Denis J. Horan, Edward R. Grant & Paige C. Cunningham eds., 1987) [hereinafter, ABORTION AND THE CONSTITUTION].

[64] Bopp describes himself as "an attorney and Supreme Court advocate whose clientele spans the conservative spectrum from Focus on the Family, the National Right to Life Committee, and the Christian Broadcasting Network to the Club for Growth, Citizens United, and the National Federation of Independent Businesses. He [was] special adviser on life issues for the Mitt Romney presidential campaign." James Bopp, Jr., *The Eve of Destruction?*, NAT'L REV. ONLINE (Jan. 2, 2008), http://www.nationalreview.com/articles/223241/eve-destruction/james-bopp-jr.

[65] *See, e.g.*, James Bopp, Jr. & Richard E. Coleson, *The Right to Abortion: Anomalous, Absolute, and Ripe for Reversal*, 3 BYU J. PUB. L. 181 (1989) (asserting a critique of *Roe* based on judicial inconsistencies within the opinion); James Bopp, Jr., *Will There Be a Constitutional Right to Abortion After the Reconsideration of* Roe v. Wade*?*, 15 J. CONTEMP. L. 131 (1989) (arguing that *Roe* should be overruled).

[66] *See, e.g.*, Memorandum from James Bopp, Jr. & Richard E. Coleson on Pro-life Strategy Issues 1–3 (Aug. 7, 2007), *available at* http://personhood.net/docs/BoppMemorandum1.pdf [hereinafter Bopp Memo].

[67] *See generally* ABORTION AND THE CONSTITUTION, *supra* note 63; *see also* Victor G. Rosenblum & Thomas J. Marzen, *Strategies for Reversing* Roe v. Wade, *in* ABORTION AND THE CONSTITUTION, *supra* note 63, at 195–96 ("A constructive reversal process can begin when one of the five justices in the pro-Roe majority [existing in 1986] is replaced with a judge who opposes Roe.").

[68] Rosenblum & Marzen, *supra* note 67.

[69] *See, e.g.*, Michael J. New, *The I's Have It: Three cheers for pro-life incrementalism*, NAT'L REV. ONLINE (Apr. 19, 2007), http://www.nationalreview.com/articles/220661/have-it/michael-j-new.

[70] Rosenblum & Marzen, *supra* note 67, at 197 ("Once these goals are achieved, the abortion privacy right would be drained of content, lose its significance and could be directly attacked.").

[71] *Id.* at 197–201.

as the only two "conceptual hurdles" to a state's ability to ban abortions throughout pregnancy.[72] To attack the viability line, they recommended using statutes that "rais[ed] critical biological issues," and "emphasiz[ed] the biologically human character of the fetus," all with the goal of laying the "groundwork for recognizing the constitutional personhood of the unborn."[73] The main goal, they wrote, is "the passage of legislation offering an opportunity for a willing Supreme Court to begin the reversal process by discarding 'viability' as a valid criterion for the onset of a compelling state interest in protecting life."[74]

Anti-abortion advocates in the 1970s and 1980s had already been pursuing this strategy, enacting statutes testing their ability to regulate in the interests of women's health and to protect potential life[75] by regulating abortion clinics and mandating that certain information designed to dissuade women from obtaining abortions be given to the woman.[76] Other statutes were enacted to test the viability line, such as Pennsylvania's 1974 statute requiring a physician who had "sufficient reason to believe that the fetus may be viable" to use the procedure that would provide "the best opportunity for the fetus to be aborted alive so long as a different technique would not be necessary in order to preserve the life or health of the mother,"[77] and Missouri's 1986 statute declaring that life begins at conception and requiring physicians

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[72] *Id.* at 198.

[73] *Id.*

[74] *Id.* at 199. Rosenblum and Marzen also recommended strategies to weaken the status of women's right to abortion. *Id.* at 203 ("If abortion were not protected as a *fundamental* right," then the "sometimes compelling interests in the protection of unborn human life and in maternal health . . . even if not 'compelling' at all stages of pregnancy and even if the fetus were not a 'person,' would be sufficient to warrant governmental regulation and eventually prohibition.") (emphasis added).

[75] Interestingly, Rosenblum and Marzen viewed strategies that made it more difficult for certain populations to obtain abortions—such as the enactment of parental or spousal notice or consent statutes for minors and married women, respectively, and funding ban statutes—as much less helpful to the ultimate goal of overturning *Roe*. *Id.* at 201–03. As they put it, "state interests in the minor's or married woman's abortion, or in demographic or eugenic considerations, provide scant help in assaulting any principle critical to the survival of Roe" because the issues raised by these "special, circumstantial interests are too remote from the core of the *Roe* doctrine to be of any use in a reversal strategy." *Id.* at 203. Attempts to regulate on behalf of such interests often failed. *See, e.g.*, Bellotti v. Baird (*Bellotti II*), 443 U.S. 622 (1979) (striking parental consent statute); Planned Parenthood of Cent. Miss. v. Danforth, 428 U.S. 52 (1976) (striking statute banning abortions using saline method and requiring spousal and parental consent). *But see, e.g.*, Harris v. McRae, 448 U.S. 297 (1980) (upholding ban on federal funding for abortion in federal Medicaid program).

[76] Thornburgh v. Am. Coll. of Obstetricians & Gynecologists, 476 U.S. 747, 760 (1986) (striking requirement that physician give patient information designed "to influence the woman's informed choice between abortion or childbirth," and holding that state interests in health or potential life could not justify efforts to "intimidate women into continuing pregnancies"); City of Akron v. Akron Ctr. for Reprod. Health, 462 U.S. 416 (1983) (striking mandatory delay and biased counseling provision).

[77] Colautti v. Franklin, 439 U.S. 379 (1979) (striking the Pennsylvania Abortion Control Act, 35 PA. STAT. ANN. § 6605 (Purdon 1977), as impermissibly vague).

to test for fetal viability starting at twenty weeks of pregnancy.[78] While the Supreme Court consistently rejected these attempts to restrict abortion through the 1970s and mid-1980s, the strategy began to pay off with the Court's 1989 decision in *Webster v. Reproductive Health Services*, which reviewed the 1986 Missouri statute.[79] The pay-off came not so much from the ruling in *Webster*—which upheld the statute's requirement that physicians test for viability on any twenty-week-old fetus—but because of its strong criticism of *Roe* and its indication that the Court would be ready to, at the very least, abandon the trimester framework and perhaps do more if a case properly presenting the question of *Roe*'s legitimacy came before it.[80]

2. *The Result of the Strategy*

After almost two decades of statutory thrusts and litigation parries, and with a significant change in membership on the Supreme Court, the Court in *Planned Parenthood v. Casey* considered Pennsylvania's comprehensive abortion regulations, putting the incremental strategy to the test. In the end, the Court reaffirmed *Roe* and its basic requirement that regulations must advance legitimate state interests.[81] However, it discarded *Roe*'s trimester approach as promised in *Webster* and held that as long as abortion regulations do not otherwise impose an undue burden[82] on the woman's decision to have an abortion, a state may (1) regulate abortions to serve the state's interest in maternal health throughout pregnancy,[83] and (2) "[e]ven in the earliest stages of pregnancy, . . . enact rules and regulations designed to encourage [the pregnant woman] to know that there are philosophic and social arguments of great weight that can be brought to bear in favor of continuing the pregnancy to full term"[84] in furtherance of the state's interest in potential life.

It is important to remember that the Court placed significant limitations on the state's ability to regulate in furtherance of its interest in potential life that must be enforced. This power was limited to circumstances (1) where

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[78] Webster v. Reprod. Health Servs., 492 U.S. 490 (1989) (reviewing MO. ANN. STAT. §§ 1.205.1(1), 188.029 (1986)).

[79] 492 U.S. 490 (1989).

[80] *Id.* at 518–22.

[81] Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 877 (1992) ("[Even] *while furthering the interest in potential life or some other valid state interest*," a regulation "cannot be considered a permissible means of serving its *legitimate ends*" if it places an undue burden on the right.) (emphasis added).

[82] The Court described an undue burden as "shorthand for the conclusion that a state regulation has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus." *Id.* at 877. There has been some confusion regarding the use of the term "purpose" in this description of undue burden. The "purpose" of imposing an undue burden, itself invalid, should not be confused with the requirement that the state have a legitimate interest in the regulation. *Id.*

[83] *Id.* at 846, 887.

[84] *Id.* at 872–73 (finding that allowing such regulations was "the inevitable consequence of our holding that the State has an interest in protecting the life of the unborn").

the means chosen by the state to further that interest was "calculated to inform the woman's free choice, not hinder it,"[85] (2) where the information is truthful and not misleading,[86] and (3) where a physician can decline to comply if "he or she can demonstrate . . . that he or she reasonably believed that furnishing the information would have resulted in a severely adverse effect on the physical or mental health of the patient," an exception included in the statute at issue in *Casey*, and specifically noted by the Court.[87]

From the viewpoint of those who sought total elimination of the right to abortion, *Casey* could be seen as dealing a significant blow to the incremental strategy. But those who advocated transforming legal standards piece by piece, reducing the right to abortion incrementally, recognized the significance of the gains they had won in *Casey* and looked for ways to build on those gains.[88] They developed new strategies to expand the state's ability to regulate in the interests of the fetus, such as the campaign to ban "partial-birth abortions" described below.

3. *New Strategies—Abortion Harms Women*

As Reva Siegel has documented exhaustively,[89] some anti-abortion strategists came to believe that in a straight-up battle between fetal interests and women's interests, the woman would win.[90] They decided that the two interests must be linked and so developed strategies to argue that abortions (harming fetuses) harmed women. The state, they claimed, had an interest in limiting abortions in order to protect women's physical and mental health.[91]

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[85] *Id.* at 877.

[86] *Id.* at 882.

[87] *Id.* at 883–84; *see also* Summit Med. Ctr. of Ala. v. Riley, 318 F. Supp. 2d 1109, 1113 (M.D. Ala. 2003) (issuing limited injunction under this provision of *Casey* that allowed doctors to waive a statutory requirement that they give information about normal fetal development to women who were seeking abortions because of serious fetal anomaly).

[88] Cynthia Gorney, *Gambling with Abortion: Why Both Sides Think They Have Everything to Lose*, HARPER'S MAG., Nov. 1, 2004, at 35–37 [hereinafter Gorney, *Gambling*].

[89] Reva B. Siegel, *The New Politics of Abortion: An Equality Analysis of Woman-Protective Abortion Restrictions*, 2007 U. ILL. L. REV. 991 (discussing growth of strategy to undermine abortion by arguing that abortion harms women, causing "post-abortion syndrome" and its symptoms of suicide and madness, breast cancer, failed lives, broken homes, divorce, and general ruination) [hereinafter Siegel, *New Politics*].

[90] *See* Bopp Memo, *supra* note 66, at 4 n.2.

[91] *Id.* Numerous studies have refuted claims that abortion harms women physically or mentally. *See, e.g.*, Gonzales v. Carhart, 550 U.S. 124, 184 n.7 (2007) (Ginsburg, J., dissenting) (discussing numerous studies refuting claims that abortion causes mental health problems); BRENDA MAJOR ET AL., REPORT OF THE APA TASK FORCE ON MENTAL HEALTH AND ABORTION 4 (2008), *available at* http://www.apa.org/pi/wpo/mental-health-abortion-report.pdf (reporting that the task force "reviewed no evidence sufficient to support the claim that an observed association between abortion history and mental health was caused by the abortion per se, as opposed to other factors"). Similarly, data from another recent study showed that "the risk of a psychiatric contact did not differ significantly after first-trimester abortion as compared with before abortion (P=0.19) but did

Siegel documented the spread of the claim that abortion harms women in the anti-abortion movement from its initial articulation by Vincent Rue and Anne Speckhard in the early 1980s through its use in the movement today.[92] Rue and Speckhard called the harm they claimed abortion caused "post-abortion syndrome" ("PAS"), borrowing from the new concept of post-traumatic stress disorder, and spread the idea through testimony in Congress and speeches at National Right to Life Committee conferences.[93] The idea of focusing on the woman and not the fetus was opposed by some anti-abortion advocates in the 1980s, and, as Siegel has documented, that conflict still exists within the anti-abortion movement today.[94] However, PAS discourse became a form of expression for women unhappy after abortions, and it is used in appeals to women in so-called "crisis pregnancy centers."[95] The PAS discourse, which began as an expressive and therapeutic one, was then transformed into a political strategy designed for the 1990s.[96]

Although claims about abortion causing depression were first refuted during the Reagan Administration by anti-abortion Surgeon General C. Everett Koop[97] and have been repeatedly rebutted by the scientific community,[98] anti-abortion advocates did not give up. They have, however, altered the tenor of the arguments. They couched claims about the existence of PAS in a "pro-woman" frame promoted by Feminists for Life.[99] However, as Siegel notes, the real harm that promoters of PAS claimed was caused by abortion was a harm they believed came from rejection of traditional sexual and family roles—roles PAS promoters believe are "natural" and God-

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increase after first childbirth as compared with before childbirth ($P<0.001$)." Trine Munk-Olsen et al., *Induced First-Trimester Abortion and Risk of Mental Disorder*, 364 NEW ENG. J. MED. 332, 335, 338 (2011) (concluding that the data "does not support the hypothesis that there is an overall increased risk of mental disorders after first-trimester induced abortion").

[92] Reva B. Siegel, *The Right's Reasons: Constitutional Conflict and the Spread of Woman-Protective Antiabortion Argument*, 57 DUKE L.J. 1641, 1656–69 (2008) [hereinafter Siegel, *Right's Reasons*].

[93] *Id.* at 1656–57.

[94] *Id.* at 1661–64, 1680.

[95] *See* Siegel, *New Politics*, *supra* note 89, at 1022 n.131. Crisis pregnancy centers ("CPCs") are volunteer organizations—often set up close to medical clinics providing abortions—that seek to discourage women from having abortions. *Id.*

[96] Siegel describes how anti-abortion advocate David Reardon opened an institute dedicated to the study of PAS and was instrumental in transforming PAS into a political strategy. Siegel, *Right's Reasons*, *supra* note 92, at 1667–69.

[97] *See* Nada L. Stotland, Commentary, *The Myth of the Abortion Trauma Syndrome*, 268 J. AM. MED. ASS'N 2078, 2078 (1992) (referencing letter from Surgeon General C. Everett Koop to President Ronald Reagan (Jan. 1989) (as described in C. EVERETT KOOP, KOOP: THE MEMOIRS OF AMERICA'S FAMILY DOCTOR (1991)), noting the anti-abortion Surgeon General's finding that "the available scientific evidence did not demonstrate significant negative (or positive) mental health effects of abortion").

[98] *See, e.g.*, MAJOR ET AL., *supra* note 91; *see also* Gonzales v. Carhart, 550 U.S. 124, 183 n.7 (2007) (Ginsburg, J., dissenting) (listing numerous studies refuting claim that abortion causes depression).

[99] Siegel, *New Politics*, *supra* note 89, at 1020–21 & n.124.

given.[100] In other words, their supposedly "pro-woman" claims that abortion restrictions promoted women's health and well-being were actually infused with anti-feminist stereotypes about women's roles and women's inability to function happily outside of those traditional mores.[101]

4. Gonzales v. Carhart—*Two Strategies Come Together in the New Century*

In the mid-2000s, the "abortion harms women" strategy was gaining traction, most notably through its use to support South Dakota's 2006 law banning abortion.[102] At the same time, a ban on so-called "partial-birth abortion" headed to the Supreme Court for a second time.[103] The campaign to ban "partial-birth" abortions harkened back to the Rosenblum strategy of the 1980s that took aim at the viability line and the health requirement[104] and sought to undermine the strength of women's interest in abortion.[105] The campaign reflected Rosenblum's call to expand the state's ability to regulate abortions in the interests of the fetus before viability by "emphasi[zing] the biologically human character of the fetus."[106] For example, the federal statute at issue in *Carhart* used "anatomical markers" to delineate the procedures being banned and required detailed discussion of abortion procedures in litigation.[107] Although none of the physicians testifying before the trial court in *Carhart* performed procedures post-viability that would be banned under the Act, and although the ban applied to pre-viability procedures,[108] the campaign sold the restrictions as measures to outlaw abortions occurring post-viability, if not at full term—abortions, we were told, that took place inches from life.[109] As anti-abortion strategist James Bopp, Jr. describes it,

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[100] *Id.* at 1018–20.

[101] Siegel, *Right's Reasons*, *supra* note 92, at 1686–88.

[102] Siegel, *New Politics*, *supra* note 89, at 1009–14 (describing the use of "woman-protective arguments" to justify the 2006 South Dakota ban on abortion, H.B. 1215, 2006 Leg., 81st Sess. (S.D. 2006) (repealed 2006), and the broader anti-abortion movement's use of such arguments). South Dakota voters rejected the ban in a November 2006 referendum. *Id.* at 992 n.2.

[103] For a discussion of the campaign to ban abortions by calling them "partial-birth" abortions, see Smith, *Half-Full*, *supra* note 9, at 4–5.

[104] *Id.*; *see also* Bopp Memo, *supra* note 66, at 4 n.2.

[105] The argument is suggested by, among others, Justice White in his dissent in *Thornburgh*. Thornburgh v. Am. Coll. of Obstetricians & Gynecologists, 476 U.S. 747, 790–94 (1986) (White, J., dissenting) ("I can certainly agree with the proposition—which I deem indisputable—that a woman's ability to choose an abortion is a species of 'liberty' that is subject to the general protections of the Due Process Clause. I cannot agree, however, that this liberty is so 'fundamental' that restrictions upon it call into play anything more than the most minimal judicial scrutiny.").

[106] Rosenblum & Marzen, *supra* note 67, at 198.

[107] *See* Gonzales v. Carhart, 550 U.S. 124, 135–40 (2007); Partial-Birth Abortion Ban Act of 2003, 18 U.S.C. § 1531 (2006).

[108] Carhart v. Ashcroft, 331 F. Supp. 2d 805, 1042–47 (D. Neb. 2004), *aff'd* Carhart v. Gonzales, 413 F.3d 791 (8th Cir. 2005), *rev'd on other grounds*, 550 U.S. 124 (2007).

[109] *See, e.g.*, Gorney, *Gambling*, *supra* note 88, at 36.

the campaign was designed as much to "change the hearts and minds of the public on abortion[,] . . . to set before the public . . . a developed baby, capable of life outside the womb, within inches of birth, being slaughtered by a stab in the skull and the suctioning of its brains," as it was to be victorious in the courts.[110] The public relations campaign imagery was powerful and it worked in state legislatures, where bans were enacted in thirty states.[111]

In the Court's decision in *Carhart*, many of the goals of the incrementalist strategy were achieved. While the decision was not a complete doctrinal victory for the anti-abortion movement,[112] in upholding the federal Partial-Birth Abortion Ban Act of 2003,[113] the decision has the potential to allow increased regulation based on a broadened interest in potential life.[114] Moreover, in an unexpected twist, it has brought together the efforts to increase the state's interest in protecting fetal interests with the new PAS strategy, thus opening a crack in the door to expanding the ability to limit abortions based on a state interest in women's health. After a long exegesis on the necessity of saving women from their decisions,[115] the Court in *Carhart* does not actually examine whether the statute's ban on abortion procedures actually protected women from their own decisions to have abortions, much less whether women needed that protection in the first place. Instead, the Court claims that a "necessary effect" of the existence of the ban on a particular method of abortion "and the knowledge [such a ban] conveys"—presumably by existing in the statute books and describing how the procedure is performed—will be to "reduc[e] the absolute number of late-term abortions."[116] Of course, the statute at issue in *Carhart* was not an "in-

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[110] Bopp Memo, *supra* note 66, at 5.

[111] Stenberg v. Carhart, 530 U.S. 914, 977 (2000) (Kennedy, J., dissenting).

[112] *See generally* Garrow, *supra* note 9; Smith, *Half-Full*, *supra* note 9.

[113] The statute claimed to ban something it called "partial-birth abortions." The Court limited the reach of the ban to certain defined intact dilation and evacuation abortion procedures ("intact D & Es"), where the physician intended to remove the fetus intact when he or she began the procedure. *See* Gonzales v. Carhart, 550 U.S. 124, 150–56 (2007). Dilation and evacuation ("D & E") is the most frequently used abortion procedure during the second trimester of pregnancy, and intact D & E is a variant of the D & E procedure. *See id.* at 173 n.3 (Ginsburg, J., dissenting). For further discussion of the Court's interpretation of the scope of the ban, see Camp, *supra* note 10, at 9–10 and Smith, *Half-Full*, *supra* note 9, at 6–8.

[114] The Court relied on the state's interest in protecting potential life, approving a ban on certain pre-viability abortion procedures as an appropriate expression of respect for the "dignity of human life." *Carhart*, 550 U.S. at 157. As I have argued before, I believe that *Carhart* was a unique case both because of the subject matter, *see id.* at 158 ("Congress could nonetheless conclude that the type of abortion proscribed by the Act requires specific regulation because it implicates additional ethical and moral concerns that justify a special prohibition."), and because Justice Kennedy was determined to elevate what he saw as the neglected principle of *Casey*: the state's ability to regulate to protect potential life within the limitations prescribed by the Court in *Casey*. *See* Smith, *Half-Full*, *supra* note 9, at 12.

[115] *See Carhart*, 550 U.S. at 159–60.

[116] *Id.* at 160.

formed consent" statute and conveyed no information. Rather, it was a ban on a method of abortion that the American College of Obstetricians and Gynecologists thought was the safest for some women in some circumstances; a ban with no exception for circumstances in which the woman's choice was fully informed or for her health; a ban that applied whether or not she would suffer serious medical complications, uterine perforation, scarring, hysterectomy, hemorrhage, and whether or not she had a bleeding placenta previa, chorioamnionitis, uterine or placental cancer, etc.[117]

The Court's language[118] is already being exploited to promote restrictive statutes, such as the Nebraska ban on pre-viability abortions based on fetal pain,[119] and others like it currently being proposed.[120] As the legislative findings in Nebraska's Pain-Capable Unborn Child Protection Act provide: "It is the purpose of the State of Nebraska to assert a compelling state interest in protecting the lives of unborn children from the stage at which substantial medical evidence indicates that they are capable of feeling pain."[121]

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[117] *Id.* at 177–80 (Ginsburg, J., dissenting).

[118] For a discussion of the "scariness" of the *Carhart* decision and the Court's reference to broad potential interests such as "an interest in protecting the integrity and ethics of the medical profession,'" and in protecting women from making decisions they will regret, see Camp, *supra* note 10, at 12–14 (internal quotation mark omitted).

[119] Pain-Capable Unborn Child Protection Act, NEB. REV. STAT. §§ 28-3,102–28-3,111 (Supp. 2010) (banning all abortions starting at twenty weeks after fertilization with an extremely narrow exception only in cases where the mother "has a condition which so complicates her medical condition as to necessitate the abortion . . . to avert her death or to avert serious risk of substantial and irreversible physical impairment of a major bodily function"). Note that twenty weeks after fertilization is twenty-two weeks of pregnancy in normal medical and lay parlance, which date pregnancies from the first day of the woman's last menstrual period ("LMP"), rather than from fertilization. For a discussion of gestational age dating and its use in abortion politics, *see* Priscilla J. Smith, *Responsibility for Life: How Abortion Serves Women's Interests in Motherhood*, 17 J.L. & POL'Y 97, 104 n.14 (2009).

[120] *See* H.B. 2218, 2011 Leg., Reg. Sess. (Kan. 2011), *available at* http://www.kslegislature.org/li/b2011_12/year1/measures/hb2218/ (Pain-Capable Unborn Child Protection Act would ban abortions starting at twenty-two weeks of pregnancy LMP; signed into law by Governor on April 8, 2011); *see also* H.B. 18, 2011 Leg., Reg. Sess. (Ala. 2011), *available at* http://alisondb.legislature.state.al.us/acas/ViewBillsStatusACASLogin.asp?BillNumber=HB18 (same; bill under consideration in House); S.B. 1165, 61st Leg., 1st Reg. Sess. (Idaho 2011), *available at* http://legislature.idaho.gov/legislation/2011/S1165.pdf (Pain-Capable Unborn Child Protection Act would ban abortions starting at twenty-two weeks of pregnancy LMP; signed into law by Governor with immediate effective date Apr. 13, 2011); H.B. 1888, 53d Leg., 1st Sess. (Okla. 2011), *available at* http://www.oklegislature.gov/BillInfo.aspx?Bill=HB1888 (same; passed House 94–2, Senate 38–8); *see also Pro-Life Laws Move Ahead in Kansas, Oklahoma, and Idaho*, NAT'L RIGHT TO LIFE NEWS TODAY (Mar. 30, 2011), http://www.nationalrighttolifenews.org/news/2011/03/pro-life-laws-move-ahead-in-kansas-oklahoma-and-idaho (reporting that thirteen bills patterned on Nebraska's fetal pain ban have been introduced in states since 2010).

[121] NEB. REV. STAT. § 28-3,104(5) (Supp. 2010). The Nebraska legislature found that "[a]t least by twenty weeks after fertilization there is substantial evidence that an unborn child has the physical structures necessary to experience pain." NEB. REV. STAT. § 28-3,104(1) (Supp. 2010). *But cf., e.g.*, ROYAL COLLEGE OF OBSTETRICIANS AND GYNAECOLOGISTS, FETAL AWARENESS: REVIEW OF RESEARCH AND RECOMMENDATIONS

These statutes should fall under *Casey*'s undue burden standard, which provides that the government may not rely on its interest in the potential life of the fetus to interpose a significant obstacle to abortion before viability.[122] Whether these statutes will fall, though, will depend on a number of factors: the ability of anti-abortion advocates to enact a statute in a jurisdiction where doctors are performing procedures at twenty-two weeks of pregnancy, the willingness of physicians to challenge such laws, a political calculus made by abortion rights advocates about the advisability of walking into another debate that is all about the fetus and not about the woman, and the possibility that doctors affected by these laws will simply relocate their medical practices to other states, thereby avoiding the necessity of going to court.[123] The main point, though, is that under the liberty doctrine rubric, the focus will be completely on the fetus.

The question facing us after *Carhart* is the scope of the state's ability to regulate abortion short of an outright ban under state interests in potential life and maternal health, and how closely courts will analyze whether regulations actually promote valid state interests. The trial court's decision in *Planned Parenthood of the Heartland v. Heineman*[124] is illustrative of the limitations of analysis of state interests in a substantive due process liberty

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FOR PRACTICE (2010), *available at* http://www.rcog.org.uk/files/rcog-corp/RCOGFetalAwarenessWPR0610.pdf. This report found the following:

> It was apparent that connections from the periphery to the cortex are not intact before 24 weeks of gestation and, as most neuroscientists believe that the cortex is necessary for pain perception, it can be concluded that the fetus cannot experience pain in any sense prior to this gestation. After 24 weeks there is continuing development and elaboration of intracortical networks such that noxious stimuli in newborn preterm infants produce cortical responses. Such connections to the cortex are necessary for pain experience but not sufficient, as experience of external stimuli requires consciousness. Furthermore, there is increasing evidence that the fetus never experiences a state of true wakefulness *in utero* and is kept, by the presence of its chemical environment, in a continuous sleep-like unconsciousness or sedation. This state can suppress higher cortical activation in the presence of intrusive external stimuli.

Id.; see also Susan J. Lee et al., *Fetal Pain: A Systematic Multidisciplinary Review of the Evidence*, 294 J. AM. MED. ASS'N 947, 952 (2005) ("[T]he capacity for conscious perception of pain can arise only after thalamocortical pathways begin to function, which may occur in the third trimester around 29 to 30 weeks' gestational age, based on the limited data available. Small-scale histological studies of human fetuses have found that thalamocortical fibers begin to form between 23 and 30 weeks' gestational age, but these studies did not specifically examine thalamocortical pathways active in pain perception.").

[122] Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 878 (1992); *see also* Gonzales v. Carhart, 550 U.S. 124, 164 (2007) (upholding ban on intact D&E because, *inter alia*, "[a]lternatives are available to the prohibited procedure"); Planned Parenthood of Wis. v. Doyle, 162 F.3d 463, 466–67 (1998).

[123] Rob Stein & Lena H. Sun, *Doctor planning new late-term abortion clinics in D.C. area*, WASH. POST, Nov. 10, 2010, at B1 (reporting that Nebraska doctor had decided to open clinics in other jurisdictions "because Nebraska had implemented a new law [making] it illegal to perform abortions beyond the 20th week of a pregnancy").

[124] 724 F. Supp. 2d 1025 (D. Neb. 2010).

frame. While the decision may represent the absolute best the liberty clause currently has to offer in terms of a court's willingness to question the legitimacy of statutory purpose, it demonstrates the difficulties we face.

In *Heineman*, the plaintiffs challenged an extensive set of information requirements imposed only on abortion providers and their patients.[125] Rather than taking the state's claim that the regulations served the state's interest in protecting women's health on face value, the court looked behind the claim.[126] The court relied on a plain reading of the statute and "the absence of any similar statutory 'protections' for the health of [male or female] patients in other contexts" to reject the state's claim that the statute was designed to further the state's interest in protecting women's health.[127]

With the health justification out of the way, the court "infer[red] that the objective underlying [the statute] is the protection of unborn human life," and noted that protection of potential life is a legitimate state interest under *Casey* and *Carhart.*[128] However, the court did not evaluate whether the statute actually served the state's interest in protecting potential life by providing information that would inform the woman's choice and might lead her to change her mind and carry a pregnancy to term. Nor did the court question whether the state's interest in protecting potential life as expressed in the statute was based on or reinforced a desire to preserve a separate-spheres tradition for men and women.[129] Instead, the court was only willing to evaluate the state's interest in fetal protection under *Casey*'s "purpose or effect" rule.[130] Under that standard, the court asked whether the state sought "to effect this [fetal protective] goal by placing a substantial obstacle in the path of women seeking an abortion," i.e., by imposing an undue burden on the right.[131] The court held that the vagueness of, or impossibility of compli-

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[125] *Id.*

[126] *Id.* at 1044.

[127] *Id.*

[128] *Id.* at 1043–44 (citing Gonzales v. Carhart, 550 U.S. 124, 146 (2007); Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 846 (1992)).

[129] Reva Siegel has made this argument in the most detail. *See* Siegel, *Reasoning from the Body*, *supra* note 30, at 266 (noting that those leading campaigns to criminalize abortion in the United States in the 1800s argued that restricting abortion "was necessary, not only to protect the unborn, but also to ensure that women performed their obligations as wives and mothers"); *id.* at 296–97, 302–04 (discussing claims that women had a duty to procreate within marriage). Siegel has also pointed out that those leading the nineteenth century criminalization campaign sought to reduce access to abortions "to preserve the ethnic character of the nation." *Id.* at 266, 297–300 (discussing claim that abortion and contraception threaten the political power of the middle class). Criminalization campaign leaders also sought to "appropriate management of the birthing process from midwives." *Id.* at 300.

[130] *Heineman*, 724 F. Supp. 2d. at 1043–46 ("'It also may not impose upon this right an undue burden, which exists if a regulation's 'purpose or effect is to place a substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability.'") (quoting *Carhart*, 550 U.S. at 126 (quoting *Casey*, 505 U.S. at 878) (internal quotation marks omitted)). For a discussion of the *Casey* standard, see generally Smith, *supra* note 9.

[131] *Heineman*, 724 F. Supp. 2d at 1044.

ance with, the statute would essentially result in a ban on abortions in the state and therefore the statute had the purpose of imposing an undue burden.[132] In other words, the proof of the illegitimate purpose was synonymous with proof of illegitimate effect.

Although the result was positive for the plaintiffs in this case, it is unclear whether plaintiffs will ever be able to establish under liberty jurisprudence that an abortion regulation does not promote a valid state interest without proof of illegitimate effect, i.e., proof that a substantial obstacle to abortion exists. If the purpose inquiry is the only method to review legitimacy of state interest and if "substantial obstacle" is the only impediment to validity, then the scrutiny of state interests may indeed remain tepid and even illogical.

This is certainly not a foregone conclusion, and the Court's decisions do not support the idea. For example, it is possible that the district court in Heineman would have inquired more closely into the validity of the state's interests if the effect of the law had not so clearly been to ban abortion, or perhaps if that aspect of the ruling had been overturned on appeal to the Eighth Circuit. After all, the court noted that Eighth Circuit precedent directed courts to "'look to direct and indirect evidence to determine whether a state adopted a statute with a discriminatory purpose,' which may include evidence in the form of 'statements by lawmakers.'"[133] We will never know because the case settled before appeal.[134]

To prevent expansion of state interests from swallowing the right to abortion, as Rosenblum and Marzen envisioned, abortion rights advocates must be as vigilant as our opponents in developing strategies to change the Constitutional abortion equation. The best strategy now is to reinvigorate the Court's examination of the validity and efficacy of claimed state interests by adding considerations of equality both under the Equal Protection Clause and our liberty claims.[135]

B. Scholarly Criticism of Liberty Right and Embracing of Equality Right

The second reason to sister the liberty joist is that protection of the right to abortion as a matter of liberty and privacy has taken a beating in academic circles as well as in the courts. Beginning almost immediately, *Roe* was disparaged for recognizing a right that critics argued the Founders never meant to protect. These critics contended that *Roe* was incorrectly decided because neither the right of abortion nor the right to privacy is written in the

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[132] *Id.*

[133] *Id.* at 1044 n.8 (quoting Jones v. Gale, 470 F.3d 1261, 1269 (8th Cir. 2006)).

[134] *Neb. Agrees to Permanent Injunction Blocking Abortion Screening Law*, WOMEN'S HEALTH POL'Y REP., (Aug. 19, 2010), http://www.nationalpartnership.org/site/News2?news_iv_ctrl=-1&abbr=daily2_&page=newsArticle&id=25651.

[135] *See infra* Part IV.

text of the Constitution, and neither is supported by the original understanding of its principles or values.[136]

Coming from anti-abortion conservatives or from those who call themselves "originalists," such claims would not necessarily counsel in favor of a change in strategy. We would expect nothing less. Indeed, it has long been a goal of the anti-abortion movement to undermine scholarly support for the right to abortion.[137] But when progressives began responding to the attacks on *Roe* by originalists and engaging in a sort of *Roe* exceptionalism, there was more cause for alarm.

Roe became the progressive punching bag at the center of the seemingly interminable discussion about how to resolve the so-called "dilemma" of Madisonian Democracy.[138] While perfectly comfortable with the use of substantive due process in cases like *Griswold v. Connecticut*[139] and later *Lawrence v. Texas*,[140] some progressive scholars have thrown *Roe* to the wolves. These scholars attacked the grounding of the right to abortion in a substantive due process liberty right,[141] notably without explaining why they did not take issue with *Griswold* or *Lawrence* on the same grounds.

Other scholars blamed *Roe* for engendering an enormous backlash against the judiciary, claiming that this backlash ended a legislative abortion reform movement that was successfully creating abortion reform in a more "natural" and democratic way through state legislatures.[142] These and other scholars went so far as to claim that *Roe* was bad for women, bad for the

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[136] *See* John Hart Ely, *The Wages of Crying Wolf: A Comment on* Roe v. Wade, 82 YALE L.J. 920, 935–36 (1973) [hereinafter Ely, *Crying Wolf*] (arguing that the right to abortion "is not inferable from the language of the Constitution, the framers' thinking respecting the specific problem in issue, any general value derivable from the provisions they included, or the nation's governmental structure") (internal footnote omitted).

[137] *See, e.g.*, Rosenblum & Marzen, *supra* note 67, at 196 ("*Roe* must be subject to legitimate historical, legal, and social criticism.").

[138] *See, e.g.*, Paul Brest, *The Fundamental Rights Controversy: The Essential Contradictions of Normative Constitutional Scholarship*, 90 YALE L. J. 1063, 1096–1105 (1981) (discussing fact that because a Madisonian democracy is not completely democratic but also provides protections against majority rule, there will always be tension between majority rule and minority rights and arguing that there may not be a resolution to this controversy).

[139] 381 U.S. 479 (1965).

[140] 539 U.S. 558 (2003).

[141] *See, e.g.*, Sunstein, *Neutrality*, *supra* note 37, at 31 ("There are serious difficulties . . . in treating the abortion right as one of privacy, not least because the Constitution does not refer to privacy and because the abortion decision does not involve conventional privacy at all."). Sunstein does argue, however, that abortion should be protected under a constitutional equality analysis. *Id.* at 31–33.

[142] *See, e.g.*, William N. Eskridge, Jr., *Pluralism and Distrust: How Courts Can Support Democracy by Lowering the Stakes of Politics*, 114 YALE L.J. 1279, 1312 (2005); Cass R. Sunstein, *Three Civil Rights Fallacies*, 79 CAL. L. REV. 751, 766 (1991) [hereafter Sunstein, *Three Fallacies*] ("Perhaps more fundamentally, the decision may well have created the Moral Majority, helped defeat the equal rights amendment, and undermined the women's movement by spurring opposition and demobilizing potential adherents. At the same time, *Roe* may have taken national policy too abruptly to a point toward which it was groping more slowly, and in the process may have prevented state legislatures from working out long-lasting solutions based upon broad public consensus.").

women's movement, bad for the entire progressive movement, and unjustly "politicized" the judicial nomination process.[143] The claims that the liberty right is not the proper source of a right to abortion, that *Roe* put an end to a burgeoning legislative movement of abortion reform sweeping the states, that judicial decision-making in the service of political reform is "anti-democratic," and that *Roe* was bad for women and the women's movement, have been directly and extensively rebutted in the works of Jack Balkin, Reva Siegel, and others; these rebuttals will not be repeated here.[144]

Some of the same progressive scholars who have criticized the grounding of the right to abortion in a constitutional liberty right have recognized the legitimacy of the judicial role in protecting a right to abortion in service of constitutional equality principles, at least as asserted under the Equal Protection Clause.[145] As Cass Sunstein recognized:

> [T]he equality principle . . . will on occasion call for a judicial role under the Equal Protection Clause. At a minimum, it requires a powerful sex-neutral justification for laws that are aimed, on their face or in their motivation, at women. For this reason laws restricting abortion, which contain a sex-based classification, raise a serious equal protection problem.[146]

I am not arguing that advocates should adopt equality arguments because of the scholarly criticisms of the liberty right, criticisms I believe are misplaced and often actually a result of a failure to understand the importance of abortion to women's lives. Rather, pressing equality arguments in conjunction with liberty arguments defuses one prong of the anti-abortion attack without giving up anything.

C. Vulnerability to Reversal

A third reason to sister the liberty joist remains, after all these years, the possibility of reversal of the *Roe* rationale. Despite the election of a pro-

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[143] *See, e.g.*, Sunstein, *Three Fallacies*, *supra* note 142, at 766. Reva Siegel and Robert Post, in perhaps their best punny title, dubbed this petulant attitude towards *Roe* "*Roe* rage." *See* Robert Post & Reva Siegel, Roe *Rage: Democratic Constitutionalism and Backlash*, 42 HARV. C.R.–C.L. L. REV. 373 (2007) [hereinafter Post & Siegel, Roe *Rage*].

[144] *See generally* Jack M. Balkin, Roe v. Wade*: An Engine of Controversy*, *in* WHAT *ROE V. WADE* SHOULD HAVE SAID 3 (Jack M. Balkin ed., 2005) (rebutting criticisms of liberty claim); Post & Siegel, Roe *Rage*, *supra* note 143 (pointing out that the political movement in opposition to the right to abortion had developed first in response to legislative advocacy and was well-developed before the decision in *Roe* was issued and arguing that even if "backlash" to the *Roe* decision occurred, such dissatisfaction is an integral part of the democratic process that impacts future judicial decisions).

[145] Sunstein, *Neutrality*, *supra* note 37, at 16; *see also* Jack M. Balkin, *Opinion in* Roe v. Wade, *in* WHAT *ROE V. WADE* SHOULD HAVE SAID, *supra* note 144, at 31 (expressing opinion that abortion statutes at issue in *Roe* and *Doe* should have been held to violate right to liberty *and* equality and that these rights are intertwined).

[146] Sunstein, *Neutrality*, *supra* note 37, at 16.

choice President in 2008, years of Republican administrations and Supreme Court appointments have taken their toll. The right to abortion likely rests on a mere 5–4 majority in the U.S. Supreme Court, with Justice Kennedy the protector of a narrow right to abortion. Thus, the right remains vulnerable to defeat depending on when certain justices leave the Court and who is elected President (and thus who holds the nomination power) in the next two terms. The use of sex equality arguments will not protect the right from an anti-choice justice intent on eliminating the right to abortion from the Constitution at all costs. These arguments do, however, give us another ground for the right, which could appeal to a justice who is uncomfortable with the liberty analysis but is similarly uncomfortable with state control of reproduction and enforcement of motherhood that rests on stereotypes about women's roles and reinforces women's social and economic inequality.[147]

III. Resistance to Adding Equality Claims: Practical Impediments and Substantive Concerns

The question for litigators is how to present equality arguments to busy judges who would rather rely on the well-developed liberty doctrine. In fact, litigators may find they do not get much action on sex equality arguments made in trial or even appellate courts. However, the recent return to "woman protective" arguments[148] gives litigators an opportunity. These arguments make the underlying regressive notions behind abortion regulations—even those labeled "fetal protective"—more transparent and thus more easily established now.[149] The limits of liberty jurisprudence may preclude or at least discourage this searching examination and rejection of restrictions whose purpose is to reinforce stereotyped notions of women's roles in society, to idealize motherhood, and impose it as a natural duty on those who reject it or a particular instance of it.

I am not arguing that sex equality arguments should be used as replacements for liberty arguments. As Reva Siegel has pointed out, "developing equality arguments for the abortion right can in fact reinvigorate privacy discourse . . . [and] encourage us to identify the peculiar strengths of privacy discourse."[150] In some cases, the best course will be to bring the sex equality argument as a complementary but equal claim to the liberty argu-

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[147] *See* Siegel, *New Politics*, *supra* note 89, at 991–92.

[148] *See* Siegel, *Right's Reasons*, *supra* note 92, at 1648–51 (discussing gender-based anti-abortion arguments and appearance in Supreme Court's opinion in *Carhart*).

[149] For example, the legislative history of the South Dakota ban explicitly relied on many stereotyped notions of women's role, as Reva Siegel carefully documents, providing excellent evidence of the law's discriminatory purpose. *Id.* at 1651–56.

[150] Siegel, *Sex Equality Right*, *supra* note 30, at 69; *see also* Ginsburg, *supra* note 30, at 382–83 (arguing that the *Roe* Court "presented an incomplete justification for its action" and that equality rights are "also in the balance"); *id.* at 386 ("Court's *Roe* position is weakened . . . by the opinion's concentration on a medically approved autonomy idea, *to the exclusion of* a constitutionally based sex-equality perspective.") (emphasis added).

ment.[151] In some cases, it will make sense to combine them, to argue sex equality rights as a violation of the liberty doctrine.[152] It no longer makes sense to argue one without the other.

Before outlining in Part IV the potential benefits of adding equality arguments to our liberty claims, I first want to address what I believe are the two primary reasons for resistance to bringing sex equality claims in federal court today and those are: (1) the valid practical impediments to raising and preserving these claims, and (2) the substantive concerns about raising new claims, especially in front of today's very conservative federal courts.

A. Practical Concerns

Abortion litigation differs from much other litigation brought to establish and preserve individual constitutional rights. First, litigators protecting abortion rights are in a defensive posture politically, protecting an established right, but in an aggressive posture in litigation as the plaintiffs challenging restrictions on that right and seeking to preserve its breadth. As they set out to challenge restrictions on the right currently held by their plaintiffs, litigators challenging abortion restrictions have more to lose than those seeking to enjoin the anti-miscegenation law in *Loving v. Virginia*[153] or the laws preventing same-sex marriage in recent years.[154] If pro-choice litigators lose, not only does the challenged restriction stay in place, but the courts could use the case to diminish the right in some way. Litigators who seek to establish new rights and lose, on the other hand, fight the good fight. While they may leave the law in a worse place because the possibility of the new right is rejected, their individual plaintiffs are no worse off than if they had never brought the case.

Moreover, because anti-abortion advocates have enacted thousands of restrictions since the decision in *Casey*, pro-choice litigators are on the run, seeking to protect clients in states throughout the nation. Because anti-abor-

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[151] *See* Loving v. Virginia, 388 U.S. 1, 11–12 (1967) (holding that prohibition on interracial marriage violated the Lovings' rights to equal protection *and* liberty).

[152] For example, Justice Ginsburg supports her statement that "legal challenges to undue restrictions on abortion procedures do not seek to vindicate some generalized notion of privacy; rather, they center on a woman's autonomy to determine her life's course, and thus to enjoy equal citizenship stature" by reference to liberty jurisprudence. Gonzales v. Carhart, 550 U.S. 124, 172 (2007) (Ginsburg, J., dissenting). *See generally* Pamela S. Karlan, *Equal Protection, Due Process, and the Stereoscopic Fourteenth Amendment*, 33 McGeorge L. Rev. 473 (2002) (describing use of hybrid claims combining liberty and equality principles) [hereinafter Karlan, *Equal Protection*]; Pamela S. Karlan, *Loving* Lawrence, 102 Mich. L. Rev. 1447 (2004) [hereinafter Karlan, *Loving* Lawrence] (arguing that Lawrence decision while based in liberty jurisprudence, incorporates equality principles); Siegel, *Sex Equality Right*, *supra* note 30, at 68.

[153] 388 U.S. 1 (1967).

[154] *See* Kerrigan v. Comm'r of Pub. Health, 957 A.2d 407, 481 (Conn. 2008) (state law precluding same-sex marriage violates state equal protection guarantees); Varnum v. Brien, 763 N.W.2d 862, 906 (Iowa 2009) (same); Goodridge v. Dep't of Public Health, 798 N.E.2d 941, 968 (Mass. 2003) (same).

tion statutes are most likely to pass in the most conservative states, litigation is likely to take place in the most conservative courts in front of the most conservative judges and appellate courts. Understandably, litigators are reticent to raise new claims, especially claims that have been lionized like the equality claims, in hostile federal courts.[155]

Finally, abortion litigation is consistently fast-paced. New restrictions are adopted at an alarming rate and almost always go into effect within a few months of enactment, sometimes immediately on signing.[156] Thus, cases are brought on Motions for a Temporary Restraining Order ("TRO") and/or preliminary injunction. Oral arguments on a TRO are often scheduled quickly with a preliminary injunction set for two weeks later.[157] Sometimes the length of time between a TRO hearing and a hearing on preliminary injunction is extended with the consent of the parties, given the state's equal interest in additional preparation time. However, there is often political pressure to move forward quickly so that the state does not seem to be presenting less than a vigorous defense of the constitutionality of a statute. In these cases, the state will sometimes agree to the additional preparation time between the TRO and the preliminary injunction, as long as the hearing on preliminary injunction is consolidated with the trial on the merits. In other cases, there is no need for a trial and the case can be decided on summary judgment after a short discovery period because there are no material issues of fact in dispute. Discovery periods and briefing schedules are often expedited in these cases as well.[158]

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[155] Of the eleven active judges on the Eighth Circuit Court of Appeals, which has jurisdiction over cases coming out of the federal courts in Nebraska and South Dakota, among others, nine were appointed by Republican Presidents (seven by President George W. Bush) and only two by a Democratic President. *Eighth Circuit Court of Appeals Judges*, U.S. CT. OF APP. FOR THE 8TH CIR., http://www.ca8.uscourts.gov/newcoa/judge.htm (last visited Mar. 23, 2011) (listing the appointment date of judges on court). Similarly, seven of the ten active judges on the Seventh Circuit Court of Appeals were appointed by Republicans and only three by Democrats, for a 70% Republican majority. *Seventh Circuit Report*, ALLIANCE FOR JUSTICE, http://www.afj.org/assets/resources/nominees/seventh-circuit-report.pdf (last visited Mar. 23, 2011). Interestingly, the Ninth Circuit and the Fourth Circuit Courts of Appeals, once considered the most liberal (Ninth) and most conservative (Fourth) circuits, have actually become more moderate. In the Ninth Circuit, eleven of the twenty-seven active judges were appointed by Republican presidents. *Ninth Circuit One Pager*, ALLIANCE FOR JUSTICE, http://www.afj.org/advisory-committees/ninth_circuit_one_pager.pdf (last visited Mar. 23, 2001). The Fourth Circuit now has six judges appointed by Republicans, five by Democrats (counting one nominated by a Democrat and then re-nominated by a Republican), and four vacancies. *Fourth Circuit Report*, ALLIANCE FOR JUSTICE, *http://www.afj.org/assets/resources/fourth-circuit-report.pdf* (last visited Mar. 23, 2011).

[156] *See, e.g.*, Petition, Nova Health Sys. v. Edmondson, No. CV-2010-533 (Okla. Cnty. Dist. Ct. Apr. 27, 2010), *aff'd*, 233 P.3d 380 (Okla. 2010) (suit challenging an Oklahoma law, which went into effect immediately upon signing and which prohibits an abortion unless the woman first has an ultrasound, is shown the ultrasound image, and listens to the doctor describe the image in detail).

[157] *See* FED. R. CIV. P. 65 (TRO issued without notice may not exceed fourteen days).

[158] The patterns described in this paragraph are drawn from my own experience litigating reproductive rights cases.

As anyone who has sought a TRO and/or preliminary injunction under a short timeframe knows, many judges will be angry and indisposed to grant the needed relief if the case appears complicated. For this reason, litigators are even more wary of an innovative argument in cases seeking immediate injunctive relief than in other cases. Losing the TRO can mean that a clinic shuts down, leaving hundreds of women at risk of not being able to obtain an abortion.[159] Unfortunately, this can lead a busy litigator to omit the claim that is framed in an innovative way rather than risk a grouchy judge. Delaying briefing on a claim at the TRO stage would be fine if the cases proceeded normally to trial where all the claims could be presented in an orderly fashion; however, it is not fine if the decision on TRO becomes the decision on preliminary injunction and the decision on preliminary injunction becomes the final decision. Poof, the claim, so nicely presented in the complaint, disappears, unpreserved for appeal.

B. Dreams of Strict Scrutiny

I suspect that some of the reluctance to press equality claims at this juncture stems from disappointment at the result in the *Tucson Women's Clinic* case. Litigators have been looking for ways to increase the scrutiny applied by courts to abortion restrictions and attempted to use sex equality arguments in cases challenging medical facility licensing regulations to do just that. In *Tucson Woman's Clinic v. Eden*,[160] the Ninth Circuit agreed that abortion regulations should be seen as a form of gender discrimination and supported the idea that treating abortion differently from other medical procedures should be recognized as unconstitutional sex discrimination.[161]

Rather than adjudicating the sex equality claim under the Equal Protection Clause, however, and applying intermediate scrutiny as would normally be required under *United States v. Virginia*,[162] the Ninth Circuit held that the

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[159] Tamar Lewin, *Wisconsin Abortion Clinics Shut Down, Citing New Law*, N.Y. TIMES, May 15, 1998, at A16 (reporting that all Wisconsin abortion clinics stopped performing abortions after federal judge refused to block a new state law from going into effect).

[160] 379 F.3d 531 (9th Cir. 2004).

[161] *Id.* at 548 (noting that *Hibbs* "strongly supports plaintiffs' argument that singling out abortion in ways unrelated to the facts distinguishing abortion from other medical procedures is an unconstitutional form of discrimination on the basis of gender"); *id.* at 549 (noting that under *Casey* "abortion is tied to the right to be free from sex discrimination in a manner unlike any other medical service that only one gender seeks" and that "[a]bortion is unique"); *id.* (quoting Planned Parenthood of Se. Pa. v. Casey, 505 U.S 833, 856 (1992)) ("The ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives.").

[162] 518 U.S. 515, 533–34 (1996) (holding under "heightened review standard" that "Virginia has shown no 'exceedingly persuasive justification' for excluding all women from the citizen-soldier training afforded by VMI" and finding Virginia in violation of the Equal Protection Clause).

equality arguments were subsumed in the undue burden liberty claim.[163] This disappointed plaintiffs looking for intermediate scrutiny of their claim. However, the Ninth Circuit's decision should not be so quickly dismissed. The court recognized that

> elements of intermediate scrutiny review particular to sex-based classifications, such as the rules against paternalism and sex-stereotyping, are evident in the *Casey* opinion, and should be considered by courts assessing the legitimacy of abortion regulation under the undue burden standard.[164]

Recognition that the Court's liberty jurisprudence includes prohibitions against sex inequality in regulation of abortion, including constitutional bans on paternalism or sex-stereotyping rationales, holds significant promise for unmasking these sources of bias that fuel many abortion restrictions. Though a similar claim was rejected by the Fourth Circuit in *Greenville Women's Clinic v. Bryant*,[165] this exercise in bringing sex equality claims did no harm to the jurisprudence and could be a model for the future.

IV. Framing Sex Equality Arguments

Reva Siegel has identified a number of important advantages to analyzing abortion restrictions using a sex equality analysis, so I will not repeat them all here. However, three advantages are particularly important and worth stressing for advocates. First, an equality analysis allows us to place abortion restrictions in their proper historical context, which involved the enforcement of family roles.[166] By placing discriminatory motive at issue in litigation, we can seek information through traditional discovery and trial techniques about the justifications most commonly offered in defense of abortion restrictions—the interests the state claims in protection of potential fetal life and women's health. This will allow us to reveal when these interests are in fact based on stereotypes of women's proper place in society, such as a woman's duty—hers alone—to save the life of the fetus at her own physical expense. This skeptical evaluation of state interests and legislative

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[163] *Tucson Woman's Clinic*, 379 F.3d at 539.

[164] *Id.* at 549 (internal citations omitted) (citing *Casey*, 505 U.S. at 882) ("approving only of information provided to a woman seeking an abortion that is 'truthful and not misleading'"); *id.* (citing *Casey*, 505 U.S. at 898) ("A State may not give to a man the kind of dominion over his wife that parents exercise over their children. Section 3209 embodies a view of marriage consonant with the common-law status of married women but repugnant to our present understanding of marriage and of the nature of the rights secured by the Constitution.").

[165] Greenville Women's Clinic v. Bryant, 222 F.3d 157, 159 (4th Cir. 2000).

[166] Siegel, *Sex Equality Right*, *supra* note 30, at 67–68.

purpose with an eye toward discriminatory motives has become mostly unavailable under liberty jurisprudence, as currently litigated.[167]

Second, evaluating abortion restrictions as a form of "caste-enforcing" regulation allows us to tell the difference between regulation of reproduction that reinforces women's subordination and regulation of reproduction that supports equality for women.[168] For example, some forms of regulation of assisted reproductive technologies seek to equalize women's power in situations where inequality may be the norm, such as limitations on dual legal representation in adoption,[169] or proposals for informed consent requirements for surrogacy and adoption.[170]

Third, sex equality arguments shift the focus away from the physical aspects of reproduction, which are currently set in stone—the burden we women must bear, however nobly.[171] The focus turns instead to the social conditions in which we are pregnant, and in which we bear and raise children. These aspects of reproduction are socially determined and therefore alterable.[172] Using equality arguments, we can demand state action to create conditions of equality, especially through legislative advocacy.

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[167] *See generally* Kim Shayo Buchanan, Lawrence v. Geduldig*: Regulating Women's Sexuality*, 56 EMORY L.J. 1235 (2007); Karlan, *Equal Protection*, *supra* note 152; Karlan, *Loving* Lawrence, *supra* note 152; *cf.* Planned Parenthood of the Heartland v. Heineman, 724 F. Supp. 2d 1025 (D. Neb. 2010) (examining state interest under purpose prong).

[168] Siegel, *Sex Equality Right*, *supra* note 30, at 68.

[169] *See generally* Debra Lyn Bassett, *Three's a Crowd: A Proposal to Abolish Joint Representation*, 32 RUTGERS L.J. 387, 427 (2001) (discussing proposals to limit joint representation of birth mothers and adoptive parents); Stephen Doherty, *Joint Representation Conflicts of Interests: Toward a More Balanced Approach*, 65 TEMP. L. REV. 561 (1992) (discussing various approaches to conflicts of interest that arise in the context of joint representation).

[170] *See, e.g.*, Lucy S. McGough & Annette Peltier-Falahahwazi, *Secrets and Lies: A Model Statute for Cooperative Adoption*, 60 LA. L. REV. 13, 77–78 (1999) (proposing regulation to ensure knowledge about contractual options in adoption agreements); Ester Murdukhayeva, *A Right to Know: Mandatory Disclosures, Informed Consent and the Future of Surrogacy* 6 (May 2010) (unpublished manuscript) (on file with author) (arguing that recognition of a "cognizable interest in reasonable access to information by all parties involved in [surrogacy] contracts would promote [*inter alia*] more equal bargaining power," and that "unregulated surrogacy market would likely exacerbate the valid concerns about exploitation of poor and minority women"); Rupali Sharma, *Regulating Commercial Surrogacy Agreements between Indian Women and Foreign Intended Parents to Protect the Interests of Surrogates* 1–2 (May 20, 2010) (unpublished manuscript) (on file with author) (proposing, *inter alia*, mandatory disclosure of basic information about the surrogacy process in all surrogacy advertisements to destabilize traditional gender norms that harm Indian women).

[171] *See* Planned Parenthood of Se. Pa. v. Casey, 505 U.S 833, 852 (1992) (lauding the "sacrifices" made by the woman who carries a child to full term that "have from the beginning of the human race been endured by [her] with a pride that ennobles her in the eyes of others and gives to the infant a bond of love").

[172] Siegel, *Sex Equality Right*, *supra* note 30, at 68–69.

A. Sex Equality Claims Under the Equal Protection Clause

Sex equality analysis of abortion restrictions conducted under the Equal Protection Clause will allow a close analysis of legislative purpose that can unmask the sex discriminatory purpose underlying the legislation. This is because "the burden of justification [in a sex discrimination case] is demanding and it rests entirely on the State."[173] The Court has held that justification for a law "must not rely on overbroad generalizations about the different talents, capacities, or preferences of males and females."[174] Differences that do exist between the sexes cannot be used to justify "denigration of the members of either sex or for artificial constraints on an individual's opportunity."[175] "Sex classifications may be used to compensate women 'for particular [harms they have] suffered, [and] to promot[e] equal[ity],"[176] but can no longer be used "to create or perpetuate the legal, social, and economic inferiority of women."[177]

Reva Siegel conducted an exhaustive analysis of South Dakota's proposed ban on abortion, demonstrating, through a close examination of legislative history, that the proposed ban was justified by many regressive notions of woman's natural role as mother.[178] Under an equality analysis, laws like the South Dakota ban—whose enactment was partially motivated by the idea that abortion harms women and thereby reinforces gender stereotypes—violate constitutional equality principles.[179] An interest in protecting the potential life of the fetus cannot save a statute that is also justified by

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[173] United States v. Virginia, 518 U.S. 515, 533 (1996). As the Court explained, "The state must show 'at least that the [challenged] classification serves important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives.'" *Id.* (alteration in original) (internal quotation marks omitted) (quoting Miss. Univ. for Women v. Hogan, 458 U.S. 718, 724 (1982)). Moreover, "the proffered justification must be 'exceedingly persuasive.'" *Id.*

[174] *Id.* (citing Califano v. Goldfarb, 430 U.S. 199, 223–224 (1977) (Stevens, J., concurring); Weinberger v. Wiesenfeld, 420 U.S. 636, 643, 648 (1975)).

[175] *Virginia*, 518 U.S. at 533.

[176] *Id.*

[177] *Id.* at 534.

[178] Siegel, *New Politics*, *supra* note 89, at 1006–07 ("In prohibiting abortion, the South Dakota Legislature expressed and enforced understandings of women's family role much like those expressed in the nineteenth-century criminalization campaign, and more recently in the World Congress of Families' *Natural Family Manifesto*. The South Dakota statute regulated women, not simply as an incident of the state's interest in protecting unborn life, but as an end in itself. The abortion ban reflected and enforced beliefs about women and the family, as well as the unborn.").

[179] *Id.* at 1041 ("[A]n assertedly benign interest in protecting unborn life cannot save an abortion ban from claims of sex discrimination if government recites woman-protective justifications to secure the statute's enactment."). *See, e.g.*, Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 265–66 (1977) ("When there is a proof that a discriminatory purpose has been *a* motivating factor in the decision, this judicial deference is no longer justified.") (emphasis added); *see also* Price Waterhouse v. Hopkins, 490 U.S. 228 (1989) (discussing framework for proving mixed motive in a Title VII sex discrimination case).

"woman-protective" rationales or promotion of the naturalness of motherhood.[180]

Nor should a state's alleged interest in protecting fetal life go unexplored in a sex equality analysis. Under equal protection principles, even alleged "benign" justifications "for gender-based classifications will not be accepted automatically; a tenable justification must describe actual state purposes, not rationalizations for actions in fact differently grounded."[181]

Another commentator, Jennifer Keighley, analyzed restrictions on coverage for abortion in health care reform legislation under constitutional sex equality principles.[182] She argues that restrictions on abortion coverage in any publicly administered plan, whether Medicaid or a "public option," are class-based restrictions that harm women as a group in violation of constitutional sex equality principles.[183] As she explains, "as public plans begin to cover more and more women, abortion restrictions within such plans should be viewed as affecting all women as a class."[184] She also argues that a federal restriction on private insurers' coverage of abortion deprives women of equal protection—"[w]omen who have earned or paid for their own health insurance coverage, or who have received coverage through their employment, [and who] deserve to receive the same comprehensive coverage offered to men."[185] She points out that these restrictions will "affect all women as a class, limit the reach of private insurance expenditures, and impose new burdens on women who currently receive abortion coverage."[186]

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[180] Siegel, *New Politics*, *supra* note 89, at 1040–48 ("[South Dakota] sought to intervene in women's decision making for the stated reason that a pregnant woman does not have the independence of judgment to make decisions about motherhood in her own best interest. The state sought to intervene in women's decision making in the stated belief that she would 'suffer[ ] significant psychological trauma and distress' for acting contrary to 'the normal, natural, and healthy capability of a woman whose natural instincts are to protect and nurture her child.' South Dakota prohibited abortion to enforce sex-role morality on resisting women.") (internal citations omitted).

[181] *Virginia*, 518 U.S. at 535–36 (quoting Weinberger v. Wiesenfeld, 420 U.S. 636, 648, 648 n.16 (1975)) ("'[M]ere recitation of a benign [or] compensatory purpose' does not block 'inquiry into the actual purposes' of government-maintained gender-based classifications."); Califano v. Goldfarb, 430 U.S. 199, 212–13 (1977) (rejecting government-proffered purposes after "inquiry into the actual purposes" (internal quotation marks omitted)).

[182] Keighley, *supra* note 26 (employing a model of legislative constitutionalism to argue that Congress's debate over abortion coverage in a national health insurance scheme should recognize the ways in which state regulation of women's reproductive capacities violates equal protection principles).

[183] *Id.* at 396–98.

[184] *Id.* at 396 ("The argument advanced in *Harris* that Medicaid restrictions only affect indigent women, not women as a class, will be much harder to apply to an expanded version of Medicaid and a public plan. Restrictions in the national health insurance scheme will harm all women.").

[185] *Id.* at 398.

[186] *Id.* at 400.

B. Sex Equality Claims as Part of the Liberty Right

As Justice Ginsburg recognized in her *Carhart* dissent, the Court's liberty jurisprudence has incorporated elements of constitutional guarantees against sex inequality.[187] In *Thornburgh*, Justice Blackmun wrote for the Court: "A woman's right to make that choice [to have an abortion] freely is fundamental. *Any other result, in our view, would protect inadequately a central part of the sphere of liberty that our law guarantees equally to all.*"[188] In *Casey*, the Court recognized that the liberty right to abortion implicated equality guarantees and noted that the ability to control their own reproductive lives facilitated the "ability of women to participate equally in the economic and social life of the Nation."[189] Justice Blackmun stressed this aspect of the decision in his *Casey* concurrence, forcefully declaring that abortion regulations implicate "constitutional guarantees of gender equality."[190] Abortion restrictions "compel women to continue pregnancies," "conscript[ ]" their bodies into the service of the state, "forc[e]" them to "suffer the pains of childbirth[,] and in most instances, provide years of maternal care."[191] Moreover, Blackmun saw the state's failure to compensate women for forced childbearing and caretaking as proof of the state's assumption that women "owe this duty as a matter of course."[192] He then connected the dots, tying these forms of state coercion and stereotyping to the equal protection cases, declaring "[t]his assumption—that women can simply be forced to accept the 'natural' status and incidents of motherhood—appears to rest upon a conception of women's role that has triggered the protection of the Equal Protection Clause."[193] He also tied the plurality opinion's analysis to his own, highlighting the plurality's recognition that

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[187] Gonzales v. Carhart, 550 U.S. 124, 171 (2007) (Ginsburg, J., dissenting) (quoting Planned Parenthood of Se. Pa. v. Casey, 505 U.S 833, 897 (1992)) (noting that stereotyped views of women's status "are no longer consistent with our understanding of the family, the individual, or the Constitution").

[188] Thornburg v. Am. Coll. of Obstetricians & Gynecologists, 476 U.S. 747, 772 (1986) (emphasis added), *overruled in part on other grounds by Casey*, 505 U.S. at 870, 882–83 (overruling part of *Thornburgh* striking mandatory information requirements); *see also* Adkins v. Children's Hosp., 261 U.S. 525, 554 (1923) (noting that after adoption of the Nineteenth Amendment, adult women had an equal liberty right to contract and were "legally as capable of contracting for themselves as men"), *overruled in part by* W. Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937). The Court in Adkins held that "[i]n view of the great—not to say revolutionary—changes which have taken place since [*Muller v. Oregon*], in the contractual, political, and civil status of women, culminating in the Nineteenth Amendment, it is not unreasonable to say that these [sex] differences have now come almost, if not quite, to the vanishing point." *Id.* at 553.

[189] *Casey*, 505 U.S. at 856; *see also id.* at 898 (implicating gender equality by rejecting spousal notice requirement as embodying a "repugnant" and outmoded view of marriage).

[190] *Id.* at 928 (Blackmun, J., concurring in part and dissenting in part).

[191] *Id.*

[192] *Id.*

[193] *Id.* at 928–29 (citing Miss. Univ. for Women v. Hogan, 458 U.S. 718, 724–26 (1982); Craig v. Boren, 429 U.S. 190, 198–99 (1976)); *see also id.* at 928 n.4.

"these assumptions about women's place in society 'are no longer consistent with our understanding of the family, the individual, or the Constitution.'"[194]

Most recently, Justice Ginsburg—joined by three other Justices—wrote in dissent in *Gonzales v. Carhart* that what is "at stake in cases challenging abortion restrictions is a woman's 'control over her [own] destiny.'"[195] Notably, rather than citing to equal protection jurisprudence, Justice Ginsburg cited provisions in the due process liberty jurisprudence rejecting stereotyping[196] and reaffirming women's right "to participate equally in the economic and social life of the Nation,"[197] a right that is "intimately connected to 'their ability to control their reproductive lives.'"[198] As a result she wrote: "[L]egal challenges to undue restrictions on abortion procedures do not seek to vindicate some generalized notion of privacy; rather, they center on a woman's autonomy to determine her life's course, and thus to enjoy equal citizenship stature."[199] A sex equality claim in a liberty framework should argue that a woman's right to liberty is violated when a law reinforces gender stereotypes or otherwise subordinates women, reinforcing their unequal status as citizens. Sex equality claims should be presented in both frameworks, under the Equal Protection Clause and under the liberty doctrine. Pursuing sex equality arguments in a liberty framework may overcome some of the practical impediments to bringing these claims, especially concerns about overwhelming a trial court judge with a completely new framework. Advocates can argue that a restriction that promotes stereotyped views of women's roles violates *Casey*, which prohibited such an unlawful purpose, and therefore places an undue burden on the woman's liberty right.

Conclusion

Arguing that a restriction on abortion violates constitutional guarantees of sex equality in either equal protection or liberty frames allows advocates to investigate and requires the court to examine the purpose behind the restriction. Any restriction found to promote sex stereotyping will fail constitutional equality guarantees. This examination of state interests should also reinvigorate the requirement that states' interests must be legitimate, placing a break on the erosion of the liberty right.

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[194] *Id.* at 928 (quoting *Casey* plurality opinion at 897).

[195] Gonzales v. Carhart, 550 U.S. 124, 171 (2007) (Ginsburg, J., dissenting) (quoting *Casey*, 505 U.S. at 869).

[196] *Id.* (citing *Casey*, 505 U.S. at 852, 896–97).

[197] *Casey*, 505 U.S. at 856.

[198] *Carhart*, 550 U.S. at 171 (quoting *Casey*, 505 U.S. at 856).

[199] *Id.* at 172 (citing Law, *supra* note 30, at 1002–28; Siegel, *Reasoning from the Body*, *supra* note 30).

A NEW BIRTH OF FREEDOM?: *OBERGEFELL V. HODGES*

Kenji Yoshino[*]

The decision in *Obergefell v. Hodges*[1] achieved canonical status even as Justice Kennedy read the result from the bench. A bare majority held that the Fourteenth Amendment required every state to perform and to recognize marriages between individuals of the same sex.[2] The majority opinion ended with these ringing words about the plaintiffs: "Their hope is not to be condemned to live in loneliness, excluded from one of civilization's oldest institutions. They ask for equal dignity in the eyes of the law. The Constitution grants them that right."[3]

While *Obergefell*'s most immediate effect was to legalize same-sex marriage across the land, its long-term impact could extend far beyond this context. To see this point, consider how much more narrowly the opinion could have been written. It could have invoked the equal protection and due process guarantees without specifying a formal level of review, and then observed that none of the state justifications survived even a deferential form of scrutiny. The Court had adopted this strategy in prior gay rights cases.[4]

Instead, the Court issued a sweeping statement that could be compared to *Loving v. Virginia*,[5] the 1967 case that invalidated bans on in-

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[1] 135 S. Ct. 2584 (2015).

[2] The case presented two questions: (1) "Does the Fourteenth Amendment require a state to license marriage between two people of the same sex?" and (2) "Does the Fourteenth Amendment require a state to recognize a marriage between two people of the same sex when their marriage was lawfully licensed and performed out-of-state?" 135 S. Ct. 1039, 1040 (2015) (mem.). Counsel for the respondents acknowledged during oral arguments that an affirmative answer to the first question would indicate an affirmative answer to the second. Transcript of Oral Argument at 44, *Obergefell*, 135 S. Ct. 2584 (No. 14-556) (discussing the second question presented). The Court's opinion focused almost all of its attention on justifying its affirmative answer to the first question, and it ended with three paragraphs giving an affirmative answer to the second. *See Obergefell*, 135 S. Ct. at 2607–08.

[3] *Obergefell*, 135 S. Ct. at 2608.

[4] *See, e.g.*, United States v. Windsor, 133 S. Ct. 2675, 2682–83 (2013) (invalidating federal definition of marriage as a union of one man and one woman under Fifth Amendment's Due Process Clause without specifying a level of review); Lawrence v. Texas, 539 U.S. 558, 578–79 (2003) (invalidating state ban on same-sex sodomy under Fourteenth Amendment's Due Process Clause without specifying a level of review); Romer v. Evans, 517 U.S. 620, 623 (1996) (invalidating state constitutional amendment barring protected status for gays, lesbians, or bisexuals under Fourteenth Amendment's Equal Protection Clause without specifying a level of review).

[5] 388 U.S. 1 (1967).

terracial marriage.[6] Like *Loving*, *Obergefell* held that the marriage bans at issue not only violated the Due Process Clause but also violated the Equal Protection Clause.[7] Yet *Obergefell* differed from *Loving* in two important respects. Where *Loving* emphasized equality over liberty,[8] *Obergefell* made liberty the figure and equality the ground.[9] *Obergefell* also placed a far stronger emphasis on the intertwined nature of liberty and equality.[10]

In doing so, *Obergefell* became something even more than a landmark civil rights decision. It became a game changer for substantive due process jurisprudence. This Comment will discuss how *Obergefell* opened new ground in that great debate.

I. LIBERTY BOUND

For well over a century, the Court has grappled with what unenumerated rights are protected under the due process guarantees of the Fifth and Fourteenth Amendments.[11] The Court has rejected positions at both extremes. On the one hand, the position that the Constitution protects *no* unenumerated rights leads to embarrassments of various kinds. The Ninth Amendment provides textual assurance of the existence of unenumerated rights.[12] And as a practical matter, the Court has recognized many unenumerated rights — including the right to direct the education and upbringing of one's children,[13] the right to procreate,[14] the right to bodily integrity,[15] the right to use contraception,[16] the right to abortion,[17] the right to sexual

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[6] *See id.* at 2.

[7] *Compare id.* at 12, *with Obergefell*, 135 S. Ct. at 2604–05.

[8] The *Loving* Court dedicated only two paragraphs to the Due Process Clause. *See* 388 U.S. at 12.

[9] In an opinion that rested largely on the due process analysis, the Court spent only a few pages on the equal protection analysis. *See Obergefell*, 135 S. Ct. at 2602–05 (discussing Equal Protection Clause).

[10] *See id.* at 2602–03 ("The Due Process Clause and the Equal Protection Clause are connected in a profound way . . . . This interrelation of the two principles furthers our understanding of what freedom is and must become.").

[11] *See* Dred Scott v. Sandford, 60 U.S. (19 How.) 393, 450–53 (1857) (invalidating Missouri Compromise under unenumerated liberty interest found in the Due Process Clause of the Fifth Amendment).

[12] 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.").

[13] Pierce v. Soc'y of Sisters, 268 U.S. 510, 534–35 (1925); Meyer v. Nebraska, 262 U.S. 390, 400 (1923).

[14] Skinner v. Oklahoma *ex rel.* Williamson, 316 U.S. 535, 541 (1942).

[15] Rochin v. California, 342 U.S. 165, 172–73 (1952).

[16] Eisenstadt v. Baird, 405 U.S. 438, 443 (1972); Griswold v. Connecticut, 381 U.S. 479, 485–86 (1965).

[17] Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 845–46 (1992); Roe v. Wade, 410 U.S. 113, 153 (1973).

intimacy,[18] and, yes, the right to marry.[19] On the other hand, the Court has rejected the position that it has unfettered discretion to conjure unenumerated rights, noting that it "has 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."[20] We are arguing over the difficult middle in this area of law.

In shaping that middle ground, the Court has articulated two contrasting approaches. One is an open-ended common law approach widely associated with Justice Harlan's dissent in *Poe v. Ullman*[21] (a dissent given precedential weight by its adoption by a majority of the Court in *Planned Parenthood of Southeastern Pennsylvania v. Casey*[22]). The other is a more closed-ended formulaic approach associated with the majority in *Washington v. Glucksberg*.[23] *Obergefell* did not categorically resolve the ongoing conflict between the two models, but it heavily favored *Poe*.

Decided in 1961, *Poe* concerned a criminal ban on the use of contraception.[24] The Court dodged the issue of whether the law violated the Constitution by deeming the case nonjusticiable on standing and ripeness grounds.[25] In dissent, Justice Harlan maintained that the Court should have reached the merits,[26] and used the occasion to articulate standards for when a right could be deemed protected under the due process guarantees.[27] He wrote:

> Due process has not been reduced to any formula; its content cannot be determined by reference to any code. The best that can be said is that through the course of this Court's decisions it has represented the balance which our Nation, built upon postulates of respect for the liberty of the individual, has struck between that liberty and the demands of organized society. If the supplying of content to this Constitutional concept has of necessity been a rational process, it certainly has not been one where judges have felt free to roam where unguided speculation might take them. The balance of which I speak is the balance struck by this country, having regard to what history teaches are the traditions from which it developed as well as the traditions from which it broke. That tradition is a living thing. A decision of this Court which radically departs from it could not

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[18] Lawrence v. Texas, 539 U.S. 558, 578 (2003).

[19] Loving v. Virginia, 388 U.S. 1, 12 (1967).

[20] Collins v. City of Harker Heights, 503 U.S. 115, 125 (1992) (citing Regents of the Univ. of Mich. v. Ewing, 474 U.S. 214, 225–26 (1985)).

[21] 367 U.S. 497 (1961).

[22] 505 U.S. at 848–49.

[23] 521 U.S. 702, 720–22 (1997).

[24] *Poe*, 367 U.S. at 498.

[25] *See id.* at 503–09.

[26] *Id.* at 522–24 (Harlan, J., dissenting).

[27] *Id.* at 539–45.

> long survive, while a decision which builds on what has survived is likely to be sound. No formula could serve as a substitute, in this area, for judgment and restraint.[28]

With these words, Justice Harlan outlined a balancing methodology that weighed individual liberties against governmental interests in a reasoned manner. Such an approach always occurred against the backdrop of tradition, but was not shackled to the past, not least because tradition was itself "a living thing."[29] Based on this analysis, Justice Harlan deemed the law restricting contraception unconstitutional.[30]

In *Washington v. Glucksberg*, the Court took a starkly different approach. It observed that to be recognized as a due process liberty a right had to be "'deeply rooted in this Nation's history and tradition,' and 'implicit in the concept of ordered liberty.'"[31] It also required a "'careful description' of the asserted fundamental liberty interest."[32] Finally, *Glucksberg* implied that the Court was more open to recognizing negative "freedom from" rights than positive "freedom to" rights — though, to be clear, it did not formally require the alleged right to fall on the "negative-right" side of the divide.[33] Each of these three restrictions — the restriction based on tradition, the restriction based on specificity, and the restriction relating to negative rights — significantly departed from the *Poe* dissent's methodology.

That departure was self-conscious. In *Glucksberg*, Justice Souter's concurrence observed that the *Poe* dissent's methodology, which the *Casey* Court had embraced,[34] should control in *Glucksberg*.[35] Chief Justice Rehnquist, however, strongly disagreed in his majority opinion:

> In Justice Souter's opinion, Justice Harlan's *Poe* dissent supplies the "modern justification" for substantive-due-process review. But although Justice Harlan's opinion has often been cited in due process cases, we have never abandoned our fundamental-rights-based analytical method. Just four Terms ago, six of the Justices now sitting joined the Court's opinion in *Reno v. Flores*; *Poe* was not even cited. And in *Cruzan v. Director, Mo. Dept. of Health*, neither the Court's nor the concurring opinions relied on *Poe*; rather, we concluded that the right to refuse unwanted medical

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[28] *Id.* at 542.

[29] *Id.*

[30] *Id.* at 553.

[31] Washington v. Glucksberg, 521 U.S. 702, 721 (1997) (citations omitted) (quoting Moore v. City of East Cleveland, 431 U.S. 494, 503 (1977) (plurality opinion); Palko v. Connecticut, 302 U.S. 319, 325 (1937)).

[32] *Id.* (quoting Reno v. Flores, 507 U.S. 292, 302 (1993)).

[33] *See id.* at 719–20 (recognizing the Due Process Clause's protection of both positive and negative liberty interests but describing its protection as one "against government interference with certain fundamental rights and liberty interests").

[34] *See* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 848–49 (1992) (quoting *Poe*, 367 U.S. at 543 (Harlan, J., dissenting)).

[35] *Glucksberg*, 521 U.S. at 765–66 (Souter, J., concurring in the judgment).

> treatment was so rooted in our history, tradition, and practice as to require special protection under the Fourteenth Amendment. True, the Court relied on Justice Harlan's dissent in *Casey*, but, as *Flores* demonstrates, we did not in so doing jettison our established approach. Indeed, to read such a radical move into the Court's opinion in *Casey* would seem to fly in the face of that opinion's emphasis on *stare decisis*.[36]

The Chief Justice's vehemence suggests that he understood the significance of the choice between the two methodologies — and, more specifically, of the three restrictions articulated in *Glucksberg*.

A. Tradition

In *Glucksberg*, the Court found "that the Due Process Clause specially protects those fundamental rights and liberties which are, objectively, 'deeply rooted in this Nation's history and tradition,' and 'implicit in the concept of ordered liberty,' such that 'neither liberty nor justice would exist if they were sacrificed.'"[37] *Glucksberg* did not coin these formulations. In the 1986 case of *Bowers v. Hardwick*,[38] for instance, the Court invoked both formulations in ruling that the Due Process Clause did not protect the right to engage in same-sex sodomy:

> Striving to assure itself and the public that announcing rights not readily identifiable in the Constitution's text involves much more than the imposition of the Justices' own choice of values on the States and the Federal Government, the Court has sought to identify the nature of the rights qualifying for heightened judicial protection. In *Palko v. Connecticut* (1937), it was said that this category includes those fundamental liberties that are "implicit in the concept of ordered liberty," such that "neither liberty nor justice would exist if [they] were sacrificed." A different description of fundamental liberties appeared in *Moore v. East Cleveland* (1977) (opinion of Powell, J.), where they are characterized as those liberties that are "deeply rooted in this Nation's history and tradition." It is obvious to us that neither of these formulations would extend a fundamental right to homosexuals to engage in acts of consensual sodomy. Proscriptions against that conduct have ancient roots. . . . Against this background, to claim that a right to engage in such conduct is "deeply rooted in this Nation's history and tradition" or "implicit in the concept of ordered liberty" is, at best, facetious.[39]

At the time of *Bowers*, then, a majority of the Court referenced both formulations — the formulation relating to tradition and the formulation relating to "the concept of ordered liberty."

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[36] *Id.* at 721 n.17 (majority opinion) (citations omitted).

[37] *Id.* at 720–21 (citations omitted) (quoting Moore v. City of East Cleveland, 431 U.S. 494, 503 (1977) (plurality opinion); Palko v. Connecticut, 302 U.S. 319, 325 (1937)).

[38] 478 U.S. 186 (1986), *overruled by* Lawrence v. Texas, 539 U.S. 558 (2003).

[39] *Id.* at 191–92, 194 (first alteration in original) (citations omitted).

Yet the *Bowers* Court did not need to clarify whether both standards had to be met, as it found that the right in question met neither.[40] As such, it left room for the Court in future cases to turn away from tradition. After all, the "implicit in the concept of ordered liberty" requirement is atemporal — a right without historical provenance could still be deemed necessary to secure ordered liberty. So if *Bowers* still supplied the controlling test, a Court could sidestep the historical inquiry altogether. In making the two requirements conjunctive, *Glucksberg* made the tradition inquiry inescapable.

As a practical matter, the Court after *Glucksberg* has focused more on the tradition requirement than on the "implicit in the concept of ordered liberty" requirement. Even when the Court has been at its most aggressive in discerning "new" rights in its substantive due process jurisprudence, it has thrown sops to tradition. In *Roe v. Wade*,[41] the Court spent eighteen pages demonstrating that draconian prohibitions on abortion were of "relatively recent vintage."[42] Similarly, in *Lawrence v. Texas*,[43] the Court discussed at length how history showed that the prohibitions on sodomy were directed more generally at both opposite-sex and same-sex acts.[44] This history seemed somewhat beside the point — the absence of a robust history militating against a right is not the same as the presence of a robust history militating for it.[45] But the gratuitousness of the analysis only underscores the force of the imperative to reason from history.

In the academic literature, Professor Cass Sunstein has affirmed the "backward-looking" nature of the Due Process Clause, distinguishing it from the "forward-looking" nature of the Equal Protection Clause.[46] As he observed in a 1988 article: "From its inception, the Due Process Clause has been interpreted largely (though not exclusively) to protect traditional practices against short-run departures."[47] He elaborated that the clause "safeguards against novel developments brought about by temporary majorities who are insufficiently sensitive to the claims

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[40] *Id.* at 194.

[41] 410 U.S. 113 (1973).

[42] *Id.* at 129; *see id.* at 129–47.

[43] 539 U.S. 558 (2003).

[44] *See id.* at 568–71.

[45] *See* McDonald v. City of Chicago, 561 U.S. 742, 804 n.10 (2010) ("By the way, Justice Stevens greatly magnifies the difficulty of an historical approach by suggesting that it was *my* burden in *Lawrence* to show the 'ancient roots of proscriptions against sodomy.' *Au contraire*, it was *his* burden (in the opinion he joined) to show the ancient roots of the right of sodomy." (citation omitted)).

[46] *See, e.g.*, Cass R. Sunstein, *Homosexuality and the Constitution*, 70 IND. L.J. 1, 3 (1994); Cass R. Sunstein, *Sexual Orientation and the Constitution: A Note on the Relationship Between Due Process and Equal Protection*, 55 U. CHI. L. REV. 1161, 1163 (1988) [hereinafter Sunstein, *Sexual Orientation and the Constitution*].

[47] Sunstein, *Sexual Orientation and the Constitution*, *supra* note 46, at 1163.

of history."[48] By contrast, the Equal Protection Clause "has been understood as an attempt to protect disadvantaged groups from discriminatory practices, however deeply engrained and longstanding."[49]

Sunstein's intervention, which occurred in the wake of *Bowers v. Hardwick* and discussed that case at length, has always seemed to me to be a heroic attempt to litigate around *Bowers* — that is, to underscore that the due process loss there need not foreclose equal protection wins for gay rights in the future. This contention countered a live argument. The year after *Bowers*, the D.C. Circuit rejected an equal protection claim based on sexual orientation in *Padula v. Webster*.[50] It observed: "If the Court was unwilling to object to state laws that criminalize the behavior that defines the class, it is hardly open to a lower court to conclude that state sponsored discrimination against the class is invidious."[51] Several years later, in *Romer v. Evans*,[52] Justice Scalia dissented from the Court's holding that an anti-gay law violated the Equal Protection Clause.[53] He maintained that *Bowers* precluded any such claim, drawing from the text of *Padula* with approval.[54]

Yet strategies often have consequences beyond the goals they are intended to achieve. If I have correctly understood Sunstein's approach, I cannot say the game was worth the candle. The cost of keeping open the equal protection space for gay individuals was the concession that, as a general matter, due process was a backward-looking enterprise.

A better approach would have been simply to say that *Bowers* was wrongly decided. The Court ultimately did so in *Lawrence v. Texas* in 2003.[55] As noted above, the Court did pay some obeisance to history in the beginning of its opinion. At the end of the opinion, however, it dramatically struck the chains of history from the due process analysis:

> Had those who drew and ratified the Due Process Clauses of the Fifth Amendment or the Fourteenth Amendment known the components of liberty in its manifold possibilities, they might have been more specific. They did not presume to have this insight. They knew times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress. As the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom.[56]

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[48] *Id.*
[49] *Id.*
[50] 822 F.2d 97, 103 (D.C. Cir. 1987).
[51] *Id.*
[52] 517 U.S. 620 (1996).
[53] *Id.* at 623.
[54] *Id.* at 641 (Scalia, J., dissenting) (quoting *Padula*, 822 F.2d at 103).
[55] 539 U.S. 558, 578 (2003).
[56] *Id.* at 578–79.

From the fact that the Framers left "liberty" as an abstraction in the Fourteenth Amendment, Justice Kennedy inferred that they intended to leave the meaning of the term to the intelligence of successive generations.

Even at the time *Lawrence* was decided, it was difficult to see how these final words could be squared with the first *Glucksberg* requirement.[57] And remarkably, Justice Kennedy's *Lawrence* opinion never mentioned *Glucksberg*, even though he had joined the *Glucksberg* majority opinion in full.[58] This pointed omission left the status of *Glucksberg* in doubt.

B. Specificity

The second *Glucksberg* restriction related to specificity. The *Glucksberg* Court stated that it had "required in substantive-due-process cases a 'careful description' of the asserted fundamental liberty interest."[59] To understand the "careful description" requirement, one must travel back to the 1989 case of *Michael H. v. Gerald D.*,[60] in which the Justices had a *battle royale* over how abstractly an alleged liberty interest could be defined. The case concerned a woman, Carole D., who, while married to a man named Gerald D., conceived and gave birth to Victoria D. Victoria was almost certainly the child of a different man, Michael H.[61] Michael argued that he had a substantive due process right to maintain a relationship with his genetic offspring.[62] The Court ruled against him.[63] Writing for a four-Justice plurality of the Court, Justice Scalia observed that "our traditions have protected the marital family (Gerald, Carole, and the child they acknowledge to be theirs) against the sort of claim Michael asserts."[64] In dissent, Justice Brennan observed that only a "pinched conception

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[57] *See* Kenji Yoshino, *The New Equal Protection*, 124 HARV. L. REV. 747, 781 (2011) ("Under the *Glucksberg* formulation, a long history of discrimination against a group would count against its due process claim. Under the *Bowen v. Gilliard* formulation, in contrast, a history of discrimination would count in favor of the group's equal protection claim because it would support its claim to protected status. *Lawrence* cleared up this confusion. Liberty and equality became — or were revealed to be — horses that ran in tandem rather than in opposite directions." (footnotes omitted)).

[58] As Justice Scalia put it in his dissent, the Court had described how subsequent precedents (such as *Romer* and *Casey*) had "eroded" the legitimacy of *Bowers*, but had not noted how *Casey* had in turn been eroded by *Glucksberg*. *Lawrence*, 539 U.S at 588–89 (Scalia, J., dissenting).

[59] Washington v. Glucksberg, 521 U.S. 702, 721 (1997) (quoting Reno v. Flores, 507 U.S. 292, 302 (1993)). In discussing the "careful description" standard, the *Glucksberg* Court also drew on its previous decisions in *Collins v. City of Harker Heights*, 503 U.S. 115 (1992); and *Cruzan v. Director, Missouri Department of Health*, 497 U.S. 261 (1990).

[60] 491 U.S. 110 (1989).

[61] *Id.* at 113–14 (plurality opinion).

[62] *Id.* at 121.

[63] *Id.* at 124.

[64] *Id.*

of 'the family'" would lead to the plurality's result.[65] As in most, if not all, substantive due process cases, the level of generality at which the Court construed the claim would determine the outcome.

In footnote six of the plurality opinion, Justice Scalia proposed a technique for ascertaining the relevant level of specificity. He wrote:

> Though the dissent has no basis for the level of generality it would select, we do: We refer to the most specific level at which a relevant tradition protecting, or denying protection to, the asserted right can be identified. If, for example, there were no societal tradition, either way, regarding the rights of the natural father of a child adulterously conceived, we would have to consult, and (if possible) reason from, the traditions regarding natural fathers in general. But there is such a more specific tradition, and it unqualifiedly denies protection to such a parent.[66]

Justice Scalia imagined a ladder of rights: (1) "the rights of the natural father of a child adulterously conceived"; (2) the rights of "natural fathers in general"; (3) the rights of "parenthood"; (4) the rights attending "family relationships"; (5) the rights stemming from "personal relationships"; and (6) the rights relating to "emotional attachments in general."[67] His technique would require the jurist to climb the ladder rung by rung and, while standing on a particular rung, to cast about to see if a tradition existed that either supported or undermined that right. Here, given the long tradition of not recognizing the rights of genetic parents who had children out of wedlock (primarily because of the stigma placed on illegitimate children[68]), the inquiry ended on the first rung. Justice Scalia apparently disagreed with the *Poe* dissent's suggestion that due process could not be "reduced to any formula."[69]

Notably, Justice Kennedy did not join this footnote, even though he signed on to the rest of the opinion.[70] That position could be construed as an early signal that he favored the *Poe* analysis. Three years later, Justice Kennedy would coauthor the joint opinion in *Planned Parenthood v. Casey*, which favorably cited *Poe* (and garnered a majority on this point).[71] Justice O'Connor, who similarly joined all of

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[65] *Id.* at 145 (Brennan, J., dissenting).

[66] *Id.* at 127 n.6 (plurality opinion).

[67] *See id.*

[68] *See id.* at 140 (Brennan, J., dissenting) ("In the plurality's constitutional universe, we may not take notice of the fact that the original reasons for the conclusive presumption of paternity are out of place in a world . . . in which the fact of illegitimacy no longer plays the burdensome and stigmatizing role it once did.").

[69] Poe v. Ullman, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting).

[70] *See Michael H.*, 491 U.S. at 113 (plurality opinion).

[71] Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 848–50 (1992) (citing *Poe*, 367 U.S. at 542–43 (Harlan, J., dissenting)).

Michael H. except this footnote,[72] was another coauthor of the *Casey* joint opinion.[73]

The academic backlash to the *Michael H.* methodology was swift and vehement. Professors Laurence Tribe and Michael Dorf published an important critique a year after the decision.[74] Tribe and Dorf observed that Justice Scalia had purported to have "discovered a value-neutral method of selecting the appropriate level of generality."[75] However, they asserted: "Far from providing judges with a value-neutral means for characterizing rights, it provides instead a method for disguising the importation of values."[76] They suggested that Justice Scalia's approach had "truly frightening potential" — it promised to depart from value-laden decisionmaking, but then smuggled in those values without taking accountability for them.[77]

To demonstrate how Justice Scalia's methodology failed to provide the objective constraints it promised, Tribe and Dorf took up the fact pattern of *Michael H.* They asked the reader to imagine the alleged right in that case as that "of the natural father of a child conceived in an adulterous relationship, where the father has played a major, if sporadic, role in the child's early development."[78] Applying Justice Scalia's methodology, they maintained that it was "unlikely that any tradition" exists for such a right "at this precise level of specificity."[79] The judge would thus have to climb up one level of generality. However, the authors maintained that they could "find no single dimension or direction along which to measure the degree of abstraction or generality."[80] For instance, they could "abstract away the father's relationship with his child and her mother, as Justice Scalia does."[81] Yet they could just as easily "abstract away the fact that the relationship with the mother was an adulterous one, as Justice Brennan does."[82] The direction in which they moved would lead to a different determination about the existence of a supportive tradition, and therefore, potentially, about the existence of a due process right. However, they emphasized, Justice Scalia had "no greater justification for abstracting away the

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[72] *See Michael H.*, 491 U.S. at 113 (plurality opinion).

[73] *See Casey*, 505 U.S. at 843.

[74] Laurence H. Tribe & Michael C. Dorf, *Levels of Generality in the Definition of Rights*, 57 U. CHI. L. REV. 1057 (1990).

[75] *Id.* at 1058.

[76] *Id.* at 1059.

[77] *Id.* at 1098.

[78] *Id.* at 1092 (emphasis omitted).

[79] *Id.*

[80] *Id.*

[81] *Id.*

[82] *Id.*

father-child relationship than Justice Brennan had for abstracting away the adultery."[83]

In their analysis, Tribe and Dorf advanced what should by now be a familiar alternative: they endorsed the approach taken by Justice Harlan's dissent in *Poe*.[84] They observed that "Justice Harlan was engaged in a process of interpolation and extrapolation. From a set of specific liberties that the Bill of Rights explicitly protects, he inferred unifying principles at a higher level of abstraction . . . ."[85] Against the charge that this approach was arbitrary or guided only by the judge's values, they observed that precedent and tradition still operated as constraints.[86] They also pointed out that their approach had the virtue of candor, given that any value judgments would be made openly, rather than "surreptitiously."[87]

Justice Scalia's technique secured only one additional vote in *Michael H.*[88] Yet in what might be taught as a master class on jurisprudential strategy, Justice Scalia imported a version of this technique into Supreme Court jurisprudence just four years later. In the 1993 case of *Reno v. Flores*,[89] the Court confronted whether the due process guarantee required the Immigration and Naturalization Service — which permitted juveniles detained for deportation proceedings to be released to parents, close relatives, or guardians — to release them to *any* responsible adult.[90] Writing for the majority, Justice Scalia opined: "'Substantive due process' analysis must begin with a careful description of the asserted right, for '[t]he doctrine of judicial self-restraint requires us to exercise the utmost care whenever we are asked to break new ground in this field.'"[91] "Careful description" was a transparent Trojan horse for "specific description." Justice Scalia rejected general formulations of the alleged right at issue, such as the "freedom from physical restraint," or the "right to come and go at will."[92] He favored a dramatically more specific description: "the alleged right of a child who has no available parent, close relative, or legal guardian, and for whom the government is responsible, to be placed in the custody of a

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[83] *Id.* at 1093.
[84] *Id.* at 1068–69.
[85] *Id.* at 1068.
[86] *See id.* at 1102–04.
[87] *Id.* at 1096.
[88] *See* Michael H. v. Gerald D., 491 U.S. 110, 113 (1989) (plurality opinion).
[89] 507 U.S. 292 (1993).
[90] *Id.* at 294.
[91] *Id.* at 302 (alteration in original) (quoting Collins v. City of Harker Heights, 503 U.S. 115, 125 (1992)).
[92] *Id.*

willing-and-able private custodian rather than of a government-operated or government-selected child-care institution."[93]

By the time the Court decided *Glucksberg*, the majority opinion could cite back to the language of "careful description" in *Flores*.[94] Chief Justice Rehnquist, the only Justice who had joined Justice Scalia's *Michael H.* footnote,[95] penned this opinion. He manifestly had a similar methodology in mind.[96] His opinion rejected more open-ended descriptions of the right at issue in that case, such as the "liberty to choose how to die,"[97] or the "right to choose a humane, dignified death,"[98] because they violated the requirement of "carefully formulating the interest at stake."[99] He cast the alleged right as the "right to commit suicide with another's assistance."[100]

I have discussed how *Lawrence* differed without acknowledgment from *Glucksberg* in its treatment of tradition.[101] The same can be said with regard to specificity. We can see this phenomenon in *Lawrence*'s analysis of the case it overruled. *Lawrence* stated that the *Bowers* Court framed the right in question as the right of "homosexuals to engage in sodomy."[102] The *Lawrence* majority challenged that characterization, observing: "That statement, we now conclude, discloses the Court's own failure to appreciate the extent of the liberty at stake."[103] It elaborated: "To say that the issue in *Bowers* was simply the right to engage in certain sexual conduct demeans the claim the individual put forward, just as it would demean a married couple were it to be said marriage is simply about the right to have sexual intercourse."[104] The *Lawrence* Court formulated the right as the ability to engage in "the most private human conduct, sexual behavior, and in the most private

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[93] *Id.*

[94] Washington v. Glucksberg, 521 U.S. 702, 721 (1997) (quoting *Flores*, 507 U.S. at 302).

[95] *See* Michael H. v. Gerald D., 491 U.S. 110, 113 (1989) (plurality opinion).

[96] The methodology in *Glucksberg* is not identical to that in *Michael H.*'s footnote six, given that in *Glucksberg* the "careful description" need not be the "most specific" one for which a tradition exists. However, as commentary has pointed out, this distinction may not be a large one. *See* Steven G. Calabresi, *Substantive Due Process After* Gonzales v. Carhart, 106 MICH. L. REV. 1517, 1522 (2008) ("The only significant difference between *Michael H.* and *Glucksberg* is that in the former, Justice Scalia insisted in footnote six that one must look at tradition at the most specific level of generality available, while in *Glucksberg*, Chief Justice Rehnquist was a bit more ambiguous on that point." (footnote omitted)).

[97] *Glucksberg*, 521 U.S. at 722 (quoting Brief for Respondents at 7, *Glucksberg*, 521 U.S. 702 (No. 96-110), 1996 WL 708925).

[98] *Id.* (quoting Brief for Respondents, *supra* note 97, at 15).

[99] *Id.*

[100] *Id.* at 724.

[101] *See supra* notes 55–58 and accompanying text.

[102] Lawrence v. Texas, 539 U.S. 558, 566 (2003) (quoting Bowers v. Hardwick, 478 U.S. 186, 190 (1986)).

[103] *Id.* at 567.

[104] *Id.*

of places, the home."[105] That new characterization might be equally "careful," but no one could say that it was the most "specific" formulation of the potential right at stake. Again, however, *Lawrence*'s refusal to reference *Glucksberg* left the extent of the alteration unclear.

C. Negative Liberties

The *Glucksberg* Court also drew a distinction between negative and positive liberties. While the Court did not include any mention of that distinction as part of its test, this distinction has been a time-honored one in constitutional law. *Glucksberg* distinguished a precedent — *Cruzan v. Director, Missouri Department of Health*[106] — that assumed the existence of a right to refuse life-giving care.[107] The *Glucksberg* Court stated: "In *Cruzan* itself, we recognized that most States outlawed assisted suicide — and even more do today — and we certainly gave no intimation that the right to refuse unwanted medical treatment could be somehow transmuted into a right to assistance in committing suicide."[108] In other words, the freedom *from* being forced to stay alive was distinguished from the freedom *to* choose death.

The distinction made in *Cruzan* relates to the distinction between so-called negative and positive rights. The provenance of this distinction is complex,[109] and mostly beyond the scope of this Comment. For these purposes, the crux of the distinction can be captured in broad strokes. *Black's Law Dictionary* defines a negative right as "[a] right entitling a person to have another refrain from doing an act that might harm the person entitled."[110] It defines a positive right as "[a] right entitling a person to have another do some act for the benefit of the person entitled."[111] According to those definitions, the Court protected a negative right in *Cruzan* but balked at protecting a positive one in *Glucksberg*. More broadly, it is often said that our Constitution has traditionally protected negative liberties rather than positive ones.[112] This may be particularly the case when we move into the realm of unenumerated rights.

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[105] *Id.*

[106] 497 U.S. 261 (1990).

[107] *Id.* at 279.

[108] Washington v. Glucksberg, 521 U.S. 702, 725–26 (1997).

[109] *See generally* Isaiah Berlin, *Two Concepts of Liberty*, *in* FOUR ESSAYS ON LIBERTY 119 (1969).

[110] *Right: Negative Right*, BLACK'S LAW DICTIONARY (10th ed. 2014).

[111] *Right: Positive Right*, BLACK'S LAW DICTIONARY, *supra* note 110.

[112] *See, e.g.*, Mark A. Graber, *Does It Really Matter? Conservative Courts in a Conservative Era*, 75 FORDHAM L. REV. 675, 706 (2006) ("The Constitution, most judges and scholars believe, 'is a charter of negative rather than positive liberties.'" (quoting Jackson v. City of Joliet, 715 F.2d 1200, 1203 (7th Cir. 1983))).

Consider in this regard *San Antonio Independent School District v. Rodriguez*[113] and *DeShaney v. Winnebago County Department of Social Services*.[114] In *Rodriguez*, the Court declined to find that the right to education, which is not enumerated in the Federal Constitution, was a fundamental right.[115] The Court considered the argument that education was necessary for the proper vindication of the right to free speech or the right to vote. It acknowledged that "[t]he Court has long afforded zealous protection against unjustifiable governmental interference with the individual's rights to speak and to vote."[116] However, it asserted that it had "never presumed to possess either the ability or the authority to guarantee to the citizenry the most *effective* speech or the most *informed* electoral choice."[117] The Court observed the slippery-slope implications of such a "positive" protection of the right to speak or to vote, questioning how education was "to be distinguished from the significant personal interests in the basics of decent food and shelter."[118]

Similarly, in *DeShaney*, the Court underscored the difference between freedom from government intrusion and the freedom to command government action.[119] In that case, the question was whether Winnebago County's Department of Social Services violated the young boy Joshua DeShaney's constitutional rights through its inaction.[120] Over time, the Department of Social Services received evidence that Joshua's father Randy might be beating him.[121] After establishing a record of abuse, the County entered into an agreement with Randy to protect Joshua's safety.[122] However, the County did not intervene even after the County's caseworker observed breaches of the agreement.[123] Then, in 1984, Randy "beat . . . Joshua so severely that he fell into a life-threatening coma."[124] Joshua and his mother brought suit against the County, alleging that the respondents had violated Joshua's liberty rights by failing to protect him against a risk of vio-

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113 411 U.S. 1 (1973).

114 489 U.S. 189 (1989).

115 *See* 411 U.S. at 35 ("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.").

116 *Id.* at 36.

117 *Id.*

118 *Id.* at 37.

119 *See* 489 U.S. at 195.

120 *Id.* at 193.

121 *Id.* at 192–93.

122 *Id.* at 192.

123 *Id.* at 192–93.

124 *Id.* at 193.

lence of which they knew or should have known.[125] In rejecting that claim, the Court stated:

> [N]othing in the language of the Due Process Clause itself requires the State to protect the life, liberty, and property of its citizens against invasion by private actors. The Clause is phrased as a limitation on the State's power to act, not as a guarantee of certain minimal levels of safety and security. It forbids the State itself to deprive individuals of life, liberty, or property without "due process of law," but its language cannot fairly be extended to impose an affirmative obligation on the State to ensure that those interests do not come to harm through other means.[126]

In other words, the liberty guaranteed by due process was solely a negative one — the right to be free from governmental intrusion. Indeed, the Court partially justified the County's failure to act by observing that if the County had acted prematurely, it would "likely have been met with charges of improperly intruding into the parent-child relationship, charges based on the same Due Process Clause that forms the basis for the present charge of failure to provide adequate protection."[127]

While *Lawrence* challenged the other two *Glucksberg* restrictions, it did not disturb the one that came into play in *Rodriguez* and *DeShaney* — the restriction based on the negative nature of the liberty exercised. The right in *Lawrence* was emphatically a negative one, concerning the right of adults to engage in sexual conduct in the privacy of their homes.[128] The Court's opinion stressed two aspects of the negative liberty involved in the case at the outset:

> Liberty protects the person from unwarranted government intrusions into a dwelling or other private places. In our tradition the State is not omnipresent in the home. And there are other spheres of our lives and existence, outside the home, where the State should not be a dominant presence. Freedom extends beyond spatial bounds. Liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct. The instant case involves liberty of the person both in its spatial and in its more transcendent dimensions.[129]

By locating itself at the confluence of zonal and decisional forms of privacy,[130] the *Lawrence* Court could draw upon precedents such as *Griswold v. Connecticut*,[131] which considered where the conduct was

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125 *See id.*
126 *Id.* at 195.
127 *Id.* at 203.
128 *See* Lawrence v. Texas, 539 U.S. 558, 567 (2003).
129 *Id.* at 562.
130 *See* Kendall Thomas, *Beyond the Privacy Principle*, 92 COLUM. L. REV. 1431, 1443 (1992) (distinguishing "zonal," "relational," and "decisional" forms of privacy).
131 381 U.S. 479 (1965).

occurring,[132] as well as on precedents such as *Eisenstadt v. Baird*,[133] which focused on the intimate nature of the decision, without regard to where the decision was made.[134] Indeed, it was perhaps in part because the Court was dealing with a "negative" liberty, and specifically the "right to privacy," that it could plausibly avoid dealing with *Glucksberg* as a precedent. Nestled within a network of "right to privacy" cases, the Court was under less pressure to apply the methodology for discerning a "new" right.

The *Glucksberg* restrictions — the restriction based on tradition, the restriction based on specificity, and, less formally, the restriction based on the negative nature of the liberty exercised — placed severe constraints on substantive due process jurisprudence. *Lawrence* clearly affected these constraints. Yet even after *Lawrence*, *Glucksberg* was still treated as good law,[135] surfacing in the briefs in *Obergefell* as controlling authority.[136]

II. LIBERTY UNBOUND

After *Obergefell*, it will be much harder to invoke *Glucksberg* as binding precedent. As Chief Justice Roberts's dissent observed, "the majority's position requires it to effectively overrule *Glucksberg*, the leading modern case setting the bounds of substantive due process."[137] *Obergefell* pressed against or past the three *Glucksberg* constraints more definitively than *Lawrence* did.

A. Tradition

Obergefell transformed the role *Glucksberg* assigned to tradition. Justice Alito's *Obergefell* dissent put the *Glucksberg* understanding succinctly: "the Court has held that 'liberty' under the Due Process

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[132] *See id.* at 485–86 (noting that the idea that police could search the "sacred precincts of marital bedrooms for telltale signs of the use of contraceptives" was "repulsive to the notions of privacy surrounding the marriage relationship").

[133] 405 U.S. 438 (1972).

[134] *See id.* at 453 ("If the right of privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.").

[135] *See* Calabresi, *supra* note 96, at 1518 (predicting that "the overwhelming majority of future substantive due process cases are going to be decided as *Gonzales* [*v. Carhart*] was, with citation to *Glucksberg* and without reference to *Lawrence*").

[136] *Compare, e.g.*, Brief for the Respondents at 21, *Obergefell*, 135 S. Ct. 2584 (No. 14-571) (brief filed in companion case *DeBoer v. Snyder*) ("Under this Court's long-established test, substantive-due-process rights must be 'deeply rooted in this Nation's history and tradition.'" (quoting Washington v. Glucksberg, 521 U.S. 702, 721 (1997))), *with* Brief for Petitioners at 22, *Obergefell*, 135 S. Ct. 2584 (No. 14-574) (brief filed in companion case *Bourke v. Beshear*) ("It is true that this Court's cases require 'a "careful description" of the asserted fundamental liberty interest.'" (quoting *Glucksberg*, 521 U.S. at 721)).

[137] *Obergefell*, 135 S. Ct. at 2621 (Roberts, C.J., dissenting).

Clause should be understood to protect only those rights that are 'deeply rooted in this Nation's history and tradition.'"[138] He elaborated that "it is beyond dispute that the right to same-sex marriage is not among those rights."[139] Chief Justice Roberts's dissent noted that this insistence on tradition had been articulated not only in *Glucksberg*, but also in opinions before and after that case.[140]

In contrast with *Roe* and *Lawrence*, *Obergefell* presented the Court with an escape hatch that would have allowed it to leave the *Glucksberg* view of tradition intact. While the "right to same-sex marriage"[141] was not "deeply rooted in this Nation's history and tradition,"[142] the "right to marry" certainly was.[143] Justice Kennedy could have avoided the issue of tradition by using the latitude afforded by the levels-of-abstraction enterprise. Instead, Justice Kennedy chose to force the question of what role tradition should play in substantive due process analysis.

The *Obergefell* majority unmistakably echoed the *Lawrence* passage[144] in its discussion of tradition:

> 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 and the Fourteenth Amendment did not presume to know the extent of freedom in all of its dimensions, and so they entrusted to future generations a charter protecting the right of all persons to enjoy liberty as we learn its meaning.[145]

It was all there again — the problem of the blindness of each generation, the modesty of the Framers in recognizing this blindness, their use of abstraction as a way to bequeath the question of liberty to future generations, and the attendant responsibility of constitutional interpreters in each generation to take up that legacy.

Yet *Obergefell*'s discussion of tradition differed significantly from the *Lawrence* discussion. *Obergefell* made explicit what had remained implicit in *Glucksberg* by invoking *Poe* directly. In doing so, it indicated that it was departing from the *Glucksberg* approach (though it waited until later in its analysis to raise *Glucksberg* directly).[146] Discussing the Court's responsibility with regard to "[t]he identification and pro-

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138 *Id.* at 2640 (Alito, J., dissenting) (quoting *Glucksberg*, 521 U.S. at 721).

139 *Id.*

140 *See id.* at 2618 (Roberts, C.J., dissenting) (citing Dist. Attorney's Office for Third Judicial Dist. v. Osborne, 557 U.S. 52, 72 (2009); Reno v. Flores, 507 U.S. 292, 303 (1993); United States v. Salerno, 481 U.S. 739, 751 (1987); Moore v. City of East Cleveland, 431 U.S. 494, 501 (1977) (plurality opinion)).

141 *Id.* at 2640 (Alito, J., dissenting).

142 *Id.* (quoting *Glucksberg*, 521 U.S. at 721) (citing United States v. Windsor, 133 S. Ct. 2675, 2714–15 (2013)).

143 *See id.* at 2599 (majority opinion) (quoting Loving v. Virginia, 388 U.S. 1, 12 (1967)).

144 *See* Lawrence v. Texas, 539 U.S. 558, 578–79 (2003).

145 *Obergefell*, 135 S. Ct. at 2598.

146 *Id.* at 2602.

tection of fundamental rights,"[147] Justice Kennedy quoted the *Poe* dissent to emphasize that this responsibility "has not been reduced to any formula."[148] He elaborated that the *Poe* methodology instead "requires courts to exercise reasoned judgment in identifying interests of the person so fundamental that the State must accord them its respect."[149]

Justice Kennedy identified four such "principles and traditions" that suggested that "the reasons marriage is fundamental under the Constitution apply with equal force to same-sex couples."[150] First, Justice Kennedy observed that "the right to personal choice regarding marriage is inherent in the concept of individual autonomy."[151] Second, he noted that "the right to marry is fundamental because it supports a two-person union unlike any other in its importance to the committed individuals."[152] Third, he maintained that the right to marry "safeguards children and families and thus draws meaning from related rights of childrearing, procreation, and education."[153] Finally, he contended that "marriage is a keystone of our social order."[154]

While tradition remains important in this four-part analysis, it plays a much less rigid role than it does in the *Glucksberg* analysis. Rather than pursuing the tradition supporting or undermining a particular right, the *Obergefell* Court looked to a confluence of various traditions. And each of the traditions is studded with precedents, suggesting a jurist's common law approach to the question rather than a historian's approach to it. The analysis comported with Tribe and Dorf's critique of *Michael H.*, a critique the scholars reiterated in an amicus brief in *Obergefell*.[155]

B. Specificity

The *Obergefell* majority also challenged the "specificity" requirement embodied in the *Glucksberg* commandment that the Court offer a "careful description" of the alleged right.[156] Justice Kennedy addressed this issue directly:

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147 *Id.* at 2598.

148 *Id.* (quoting Poe v. Ullman, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting)).

149 *Id.* (quoting *Poe*, 367 U.S. at 542 (Harlan, J., dissenting)).

150 *Id.* at 2599.

151 *Id.*

152 *Id.*

153 *Id.* at 2600.

154 *Id.* at 2601.

155 *See* Brief of Amici Curiae Professors Laurence H. Tribe and Michael C. Dorf in Support of Petitioners at 1 & n.2, *Obergefell*, 135 S. Ct. 2584 (No. 14-556) (citing Tribe and Dorf's 1990 article as a basis for the argument in the brief).

156 Washington v. Glucksberg, 521 U.S. 720, 721 (1997) (quoting Reno v. Flores, 507 U.S. 292, 302 (1993)).

> Objecting that this does not reflect an appropriate framing of the issue, the respondents refer to *Washington v. Glucksberg*, which called for a "'careful description'" of fundamental rights. They assert the petitioners do not seek to exercise the right to marry but rather a new and nonexistent "right to same-sex marriage." *Glucksberg* did insist that liberty under the Due Process Clause must be defined in a most circumscribed manner, with central reference to specific historical practices. Yet while that approach may have been appropriate for the asserted right there involved (physician-assisted suicide), it is inconsistent with the approach this Court has used in discussing other fundamental rights, including marriage and intimacy. *Loving* did not ask about a "right to interracial marriage"; *Turner* did not ask about a "right of inmates to marry"; and *Zablocki* did not ask about a "right of fathers with unpaid child support duties to marry." Rather, each case inquired about the right to marry in its comprehensive sense, asking if there was a sufficient justification for excluding the relevant class from the right.[157]

This important passage is open to at least two interpretations. Some unarticulated principle may distinguish physician-assisted suicide from marriage, such that *Glucksberg* would remain good law outside the context of marriage. Alternatively, the Court may be taking the familiar step of isolating a precedent before overruling it altogether. While only future case law will provide a definitive answer, the latter seems more plausible for several reasons.

For *Glucksberg* to remain good law in at least some contexts, a future Court would need a distinguishing principle between the "right to physician-assisted suicide" and the "right to marry." The distinction may be that in the context of physician-assisted suicide, there was no more general right that had been recognized — such as the "right to commit suicide." In contrast, in the context of marriage, the major cases — *Loving v. Virginia*,[158] *Zablocki v. Redhail*,[159] and *Turner v. Safley*[160] — had all referenced a higher-level right, namely, the "right to marry."[161] Given that this higher-level right was not only available, but also was repeatedly adduced in those cases as the right in question, it would seem myopic to discuss the right at issue in *Obergefell* as the right to same-sex marriage. So we might glean two distinguishing principles: either a notion that "marriage and intimacy" were somehow different, or that cases in which a higher-order principle had already been established were somehow different.

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[157] *Obergefell*, 135 S. Ct. at 2602 (citations omitted).
[158] 388 U.S. 1 (1967).
[159] 434 U.S. 374 (1978).
[160] 482 U.S. 78 (1987).
[161] *See Obergefell*, 135 S. Ct. at 2598 (discussing *Turner*, 482 U.S. at 95; *Zablocki*, 434 U.S. at 384; *Loving*, 388 U.S. at 12).

Yet these distinctions could be challenged on many fronts. As a tonal matter, Justice Kennedy's statement that the *Glucksberg* approach "*may* have been appropriate" in certain contexts sounds a note of qualification.[162] The Court's determination that the *Glucksberg* methodology would be inapposite "in discussing other fundamental rights, *including* marriage and intimacy"[163] reinforces that impression in presenting "marriage and intimacy" as exemplary rather than exhaustive instances of rights for which the *Glucksberg* methodology would not obtain. Nor does it seem plausible to say that a higher-level right was established in the marriage context but not in the "physician-assisted suicide" context, as *Cruzan* could have been interpreted to secure the right to control the means of one's demise. Finally, *Obergefell* had categorically rejected *Glucksberg*'s tradition analysis in a prior part of the opinion.[164] Given that the level of specificity serves as a handmaiden to the tradition inquiry, it is hard to see specificity as a constraint in the absence of tradition. All in all, *Obergefell* seems to have laid waste to the entire *Glucksberg* edifice. As Chief Justice Roberts observed: "At least this part of the majority opinion has the virtue of candor. Nobody could rightly accuse the majority of taking a careful approach."[165]

The Chief Justice was certainly correct that the abandonment of careful description signified a seismic shift. For instance, once the idea of specificity is removed from the substantive due process analysis, one can advert — as Justice Kennedy did in *Lawrence* and *Obergefell* — to the much higher generality of discussing the right in question as part of the "liberty" protected by the due process guarantees. Once the Court adopts this register, it moves away from a jurisprudence of "unenumerated" rights and toward a jurisprudence of interpreting the "enumerated" right of "liberty." The Court's legitimacy is often challenged when it makes decisions based on "unenumerated rights."[166] The shift toward thinking about this jurisprudence as a textually grounded interpretation of "liberty" brings a new legitimacy to the enterprise.

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[162] *Id.* at 2602 (emphasis added).

[163] *Id.* (emphasis added).

[164] *See id.* at 2598.

[165] *Id.* at 2621 (Roberts, C.J., dissenting).

[166] *See* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 981 (1992) (Scalia, J., dissenting) ("The Court's temptation is . . . towards systematically eliminating checks upon its own power; and it succumbs."); Griswold v. Connecticut, 381 U.S. 479, 521 (1965) (Black, J., dissenting) ("The adoption of . . . a loose, flexible, uncontrolled standard for holding laws unconstitutional . . . will amount to a great unconstitutional shift of power to the courts which I believe . . . will be bad for the courts, and worse for the country."); *see also* Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 11 (1971) ("[S]ubstantive due process, revived by the *Griswold* case, is and always has been an improper doctrine.").

C. Negative Liberties

In *Lawrence*, Justice Kennedy was at pains to point out that he was not making any claims about marriage.[167] Justice Scalia disagreed, asking:

> If moral disapprobation of homosexual conduct is "no legitimate state interest" . . . what justification could there possibly be for denying the benefits of marriage to homosexual couples exercising "[t]he liberty protected by the Constitution"? Surely not the encouragement of procreation, since the sterile and the elderly are allowed to marry.[168]

He concluded: "This case 'does not involve' the issue of homosexual marriage only if one entertains the belief that principle and logic have nothing to do with the decisions of this Court."[169]

Many, however, disagreed in turn with Justice Scalia's analysis on the ground that freedom from government intrusion differed from the freedom to receive government affirmation. In 2015, only months before *Obergefell*, the Supreme Court of Alabama denied same-sex couples the right to marry under the state constitution by making this distinction: "[T]he *Lawrence* Court [struck down antisodomy laws] under the rationale that government had no interest in interfering with the sexual conduct of consenting adults in the privacy of their bedrooms. That rationale does not work here because same-sex partners expressly seek public state-government approval of their relationships."[170]

The *Obergefell* dissenters took up this distinction. Chief Justice Roberts's dissent stated: "*Lawrence* relied on the position that criminal sodomy laws, like bans on contraceptives, invaded privacy by inviting 'unwarranted government intrusions' . . . ."[171] In contrast, he found, the "petitioners do not seek privacy,"[172] but rather "public recognition of their relationships, along with corresponding government benefits."[173] Justice Thomas's dissent took a similar stance: "In the American legal tradition, liberty has long been understood as individual freedom *from* governmental action, not as a right *to* a particular governmental entitlement."[174]

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[167] *See* Lawrence v. Texas, 539 U.S. 558, 578 (2003).

[168] *Id.* at 604–05 (Scalia, J., dissenting) (citations omitted) (quoting *id.* at 578, 567 (majority opinion)).

[169] *Id.* at 605.

[170] *Ex parte* State *ex rel.* Ala. Policy Inst., No. 1140460, 2015 WL 892752, at *33 (Ala. Mar. 3, 2015) (per curiam); *see also* Hernandez v. Robles, 855 N.E.2d 1, 10 (N.Y. 2006) (plurality opinion) ("Plaintiffs here do not, as the petitioners in *Lawrence* did, seek protection against state intrusion on intimate, private activity. They seek from the courts access to a state-conferred benefit . . . .").

[171] *Obergefell*, 135 S. Ct. at 2620 (Roberts, C.J., dissenting) (quoting *Lawrence*, 539 U.S. at 562).

[172] *Id.*

[173] *Id.*

[174] *Id.* at 2634 (Thomas, J., dissenting).

The majority opinion gave this distinction short shrift. It stated that "while *Lawrence* confirmed a dimension of freedom that allows individuals to engage in intimate association without criminal liability, it does not follow that freedom stops there."[175] "Outlaw to outcast may be a step forward," the Court continued, "but it does not achieve the full promise of liberty."[176]

Justice Kennedy's use of "liberty" rather than "equality" here is significant. He could have preserved the historical "negative right/positive right" distinction by relying on equality principles. Equality principles apply even to benefits that are not rights — for example, an individual has no right to attend the Virginia Military Institute, but has the right not to be excluded on the basis of gender.[177] The Court could have circumvented the issue of whether the negative right at issue in *Lawrence* should be extended to the positive right at issue in *Obergefell* by relying on the fact that even if marriage were not a right, it could not be denied on the basis of gender or orientation. Instead, however, Justice Kennedy chose to deal with the issue as a matter of liberty, deliberately eliding the negative/positive liberty distinction in this context. Like his refusal to take the escape hatch offered with regard to tradition, this analogous refusal may reflect his desire to revamp the substantive due process inquiry *tout court*.

This swift shift from negative to positive rights could have radical implications. Consider the "positive liberty" cases of *Rodriguez* and *DeShaney*.[178] "Being denied education by virtue of your indigency rather than by the state may be a step forward," a progressive might say, "but it does not achieve the full promise of liberty." "Being beaten by your father rather than by the state may be a step forward," the same progressive might continue, "but it does not achieve the full promise of liberty."

To be sure, this juncture may be where marriage exceptionalism will operate in the future, as marriage has the somewhat distinctive feature of being both a positive and a negative right. Marriage is a positive right in that it requires the state to grant the parties recognition and benefits.[179] At the same time, marriage is a negative right in that it creates a zone of privacy into which the state cannot intrude, as we see in privacy cases such as *Griswold*, which spoke of the "sacred precincts of the marital bedroom,"[180] or in the testimonial privileges

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175 *Id.* at 2600 (majority opinion).

176 *Id.*

177 *See* United States v. Virginia, 518 U.S. 515, 519 (1996).

178 *See supra* pp. 160–61.

179 *See* United States v. Windsor, 133 S. Ct. 2675, 2691–92 (2013).

180 381 U.S. 479, 485 (1965).

that permit spouses to refuse to testify against each other.[181] It may be that *Obergefell* will represent a "one-off" in the context of bridging the negative/positive liberty divide because the marriage right itself spans this divide. But again, Justice Kennedy's opinion contains no such qualification.

D. A New Methodology and Its Discontents

The *Obergefell* methodology is strikingly different from the *Glucksberg* methodology. It is much more akin to what Justice Kennedy did in *Lawrence*. Laurence Tribe described Justice Kennedy's majority opinion in *Lawrence* as follows:

> By implicitly rejecting the notion that its task was simply to name the specific activities textually or historically treated as protected, the [*Lawrence*] Court lifted the discussion to a different and potentially more instructive plane. It treated the substantive due process precedents invoked by one side or the other not as a record of the inclusion of various activities in — and the exclusion of other activities from — a fixed list defined by tradition, but as reflections of a deeper pattern involving the allocation of decisionmaking roles, not always fully understood at the time each precedent was added to the array. The Court, it seems, understood that the unfolding logic of this pattern is constructed as much as it is discovered. Constructing that logic is in some ways akin to deriving a regression line from a scatter diagram, keeping in mind, of course, that the choice of one method of extrapolation over another is, at least in part, a subjective one.[182]

In short, we seem to be back in the world of Justice Harlan's *Poe* dissent, in which substantive due process is not reducible to any formula, but is left instead to a common law methodology.[183]

Obergefell more clearly endorsed this methodology. Indeed, Justice Kennedy's repeated confrontations with the *Glucksberg* restrictions suggested that he chose to take this opportunity to fashion a fully realized vision of how liberty analysis should proceed. At some level, he was finally forced to write this essay on substantive due process. In the 2013 case of *United States v. Windsor*,[184] Justice Kennedy's majority opinion relied both on principles of federalism and on principles of

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[181] *See, e.g.*, Wolfle v. United States, 291 U.S. 7, 17 (1934).

[182] Laurence H. Tribe, Lawrence v. Texas*: The "Fundamental Right" that Dare Not Speak Its Name*, 117 HARV. L. REV. 1893, 1899 (2004).

[183] *See* Poe v. Ullman, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting); *cf.* McDonald v. City of Chicago, 561 U.S. 742, 881 (2010) (Stevens, J., dissenting) (noting that "[i]n the substantive due process field," the Court has employed "the common-law method — taking cases and controversies as they present themselves, proceeding slowly and incrementally, building on what came before"). Professor David Strauss has lucidly defended this common law method as a general approach to constitutional interpretation. *See generally* DAVID A. STRAUSS, THE LIVING CONSTITUTION (2010).

[184] 133 S. Ct. 2675 (2013).

liberty (flowing from the Fifth Amendment's Due Process Clause).[185] *Windsor*'s federalism rationale, which deemed marriage to be a matter of state law, was obviously unavailable in *Obergefell*. To the contrary, after underscoring the state's power over marriage in *Windsor*, Justice Kennedy needed to articulate in *Obergefell* why individual liberty would trump that power.

In doing so, Justice Kennedy seemed at pains to take up the liberty jurisprudence in its own terms. This was not a foregone conclusion. In previous cases, such as *Lawrence*, *Casey*, and *Windsor*, he relied heavily on the notion of "dignity."[186] While *Obergefell* makes repeated reference to dignity, it focuses more on the concept of liberty.[187] It addressed the substantive due process methodology question by using the argot of liberty.

Chief Justice Roberts saw this methodology as no methodology at all. He observed that "[t]he need for restraint in administering the strong medicine of substantive due process is a lesson this Court has learned the hard way," noting that "[t]he Court first applied substantive due process to strike down a statute in *Dred Scott v. Sandford*."[188] In this way, he compared — in however limited a way — the majority opinion to an opinion that struck down legislation restricting slavery on the ground that it infringed upon the liberty and property interests of slaveholders. He went on to recall Justice Curtis's *Dred Scott* dissent, which opined that when "fixed rules which govern the interpretation of laws [are] abandoned, and the theoretical opinions of individuals are allowed to control . . . we have no longer a Constitution; we are under the government of individual men . . . ."[189]

Perhaps because it was less inflammatory, the real stick the Chief Justice brandished at the majority was the decision in *Lochner v. New York*.[190] In *Lochner*, the Court famously struck down a labor regulation that limited the number of hours bakers could work under the unenumerated "freedom of contract."[191] The *Lochner* decision is seen as the paradigmatic case of judicial activism, and is one of the most

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185 *See id.* at 2691–96.

186 *See, e.g.*, *id.* at 2692–93; Lawrence v. Texas, 539 U.S. 558, 567 (2003); Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 851 (1992) (joint opinion of O'Connor, Kennedy, and Souter, JJ.).

187 Although word counts provide only weak evidence, *Windsor* used the term "dignity" twice as often as it used the word "liberty," while *Obergefell* reversed that ratio.

188 *Obergefell*, 135 S. Ct. at 2616 (Roberts, C.J., dissenting).

189 *Id.* at 2617 (alteration in original) (quoting Dred Scott v. Sandford, 60 U.S. (19 How.) 393, 621 (1857) (Curtis, J., dissenting)).

190 198 U.S. 45 (1905).

191 *Id.* at 57.

reviled cases in constitutional law.[192] Chief Justice Roberts's dissent invoked *Lochner* no fewer than sixteen times.[193]

The Chief Justice made clear that he was not calling for a wholesale rejection of substantive due process: "Rejecting *Lochner* does not require disavowing the doctrine of implied fundamental rights, and this Court has not done so."[194] He acknowledged that the "right to privacy" cases — starting with *Griswold* — remained good law.[195]

Yet *Lochner* is arguably more consistent with the *Glucksberg* methodology than *Griswold* is. The idea of laissez faire could be said to be deeply rooted in the Nation's history and traditions. Conversely, it is hard to say that the right to use contraception was deeply rooted in the Nation's traditions, or that the "right to privacy"[196] was a specific or careful description of the right at stake.

But in the name of fair play, it is worth taking up the challenge as posed — does the *Obergefell* majority have a principled way of distinguishing what it did from what the Court did in *Lochner* (or *Dred Scott*)?

III. LIBERTY REBOUND

It does.[197] The Court provided that principle in its synthesis of liberty and equality. In a key passage, Justice Kennedy wrote:

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[192] Richard A. Primus, *Canon, Anti-Canon, and Judicial Dissent*, 48 DUKE L.J. 243, 245 (1998) ("Constitutional law . . . has not only a canon composed of the most revered constitutional texts but also an anti-canon composed of the most reviled ones. *Lochner* and *Plessy* are anti-canonical cases.").

[193] *See* Michael C. Dorf, *Symposium: In Defense of Justice Kennedy's Soaring Language*, SCOTUSBLOG (June 27, 2015, 5:08 PM), http://www.scotusblog.com/2015/06/symposium-in-defense-of-justice-kennedys-soaring-language [http://perma.cc/4AB8-5F9X].

[194] *Obergefell*, 135 S. Ct. at 2618 (Roberts, C.J., dissenting).

[195] *See id.* at 2620.

[196] *See* Griswold v. Connecticut, 381 U.S. 479, 485 (1965).

[197] The Court could have used a different argument than the one I discuss below to distinguish *Lochner* from *Obergefell*. The freedom to contract could be distinguished from the freedom to marry because the former concerns economic and contractual relationships that the government itself has called into being, while the latter concerns issues of individual control over one's own body or relationships that could be deemed in some sense prepolitical. I am skeptical. On the one hand, some economic rights would seem to be prepolitical. Certainly some theorists — John Locke comes to mind — would say that it follows from my inalienable ownership of my body that I also own my labor and the products of that labor. *See* JOHN LOCKE, TWO TREATISES OF GOVERNMENT 287–88 (Peter Laslett ed., Cambridge Univ. Press 1988) (1690) ("[Y]et every Man has a *Property* in his own *Person*. This no Body has any Right to but himself. The *Labour* of his Body, and the *Work* of his Hands, we may say, are properly his."). On the other hand, the idea that marriage exists "before the law" seems to court an essentialism inimical to the result in *Obergefell*. The idea that marriage is prepolitical fosters reasoning from the body in problematic ways — including arguments that just because only a man and a woman can procreate within their relationship that only they can have a "true" marriage. *See, e.g.*, SHERIF GIRGIS, RYAN T. ANDERSON & ROBERT P. GEORGE, WHAT IS MARRIAGE? MAN AND WOMAN: A DEFENSE 48 (2012). On these grounds, I do not rely on this distinction here.

> The Due Process Clause and the Equal Protection Clause are connected in a profound way, though they set forth independent principles. Rights implicit in liberty and rights secured by equal protection may rest on different precepts and are not always co-extensive, yet in some instances each may be instructive as to the meaning and reach of the other. In any particular case one Clause may be thought to capture the essence of the right in a more accurate and comprehensive way, even as the two Clauses may converge in the identification and definition of the right. This interrelation of the two principles furthers our understanding of what freedom is and must become.[198]

As noted, *Obergefell* followed *Loving* in striking down state laws on both liberty and equality grounds. However, *Loving* generally treated the liberty and equality claims as parallel rather than intertwined claims.[199] In contrast, *Obergefell* explicitly viewed the two claims to be "interlocking," such that "[e]ach concept — liberty and equal protection — leads to a stronger understanding of the other."[200]

The Chief Justice wrote in dissent that this approach was "quite frankly, difficult to follow."[201] He observed that the majority's "central point seems to be that there is a 'synergy between' the Equal Protection Clause and the Due Process Clause, and that some precedents relying on one Clause have also relied on the other."[202] "Absent from this portion of the opinion, however," he criticized, "is anything resembling our usual framework for deciding equal protection cases."[203] In applying the Court's usual framework, he implied that classifications based on sexual orientation drew only rational basis review by invoking the means-ends test associated with that level of scrutiny — that the classification be rationally related to a legitimate governmental interest.[204] He found that this standard was easily met.[205]

Yet in fairness to Justice Kennedy's analysis, the synergy that he discussed meant that equal protection analysis could inform substantive due process in such a way that would perforce change the "usual framework" of analysis. *Lawrence* again provides the best guide to Justice Kennedy's analysis. In that case, Justice Kennedy wrote that

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198 *Obergefell*, 135 S. Ct. at 2602–03 (citations omitted).

199 This can be seen by examining state court decisions striking down bans on same-sex marriage that are much more clearly patterned on *Loving*. *See, e.g.*, *In re* Marriage Cases, 183 P.3d 384 (Cal. 2008) (noting that ban on same-sex marriage violated both liberty and equality principles, but for the most part addressing the claims separately); Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941 (Mass. 2003) (same). *Obergefell*'s discussion of liberty and equality is far more similar to the analysis in *Lawrence* than the analysis in these cases.

200 *Obergefell*, 135 S. Ct. at 2603–04.

201 *Id.* at 2623 (Roberts, C.J., dissenting).

202 *Id.* (quoting *id.* at 2603 (majority opinion)).

203 *Id.*

204 *Id.*

205 *Id.*

both liberty and equality issues were implicated, but that a liberty analysis advanced both interests.[206] He therefore decided it as a substantive due process case inflected with equality concerns.[207]

Lest that sound too abstract, consider the more traditional equality analysis offered by Justice O'Connor's concurrence in *Lawrence*. Her opinion maintained that the Equal Protection Clause could be used to strike down the sodomy statutes only in the states that punished exclusively same-sex sodomy.[208] Of course, to conform to a ruling under the Equal Protection Clause, the states may either "level up" to eliminate all prohibitions on sodomy or "level down" to prohibit sodomy regardless of the sex of the participants. Justice O'Connor remained confident that if states chose to level down, their electorates would vote out the prohibitions.[209] Yet it is not at all clear that a choice to have *unenforced* sodomy statutes would be voted down, because the dignitary slight of such sodomy statutes would be largely directed toward same-sex sodomy.

By engaging in a liberty analysis in *Lawrence*, Justice Kennedy required the states to level up to treat both straights and gays equally, which in that case meant the elimination of all sodomy statutes. Put differently, the equality concerns implicated in that case were, against intuition, better served under the Due Process Clause than under the Equal Protection Clause.

Similarly, in *Obergefell*, a standard equal protection ruling would have permitted the states either to level up by granting both same-sex couples and opposite-sex couples marriage licenses or to level down by refusing to grant licenses to both sets of couples. As the South African Constitutional Court framed it in a similar case before *Obergefell*, it was a decision between the "equality of the vineyard" and the "equality of the graveyard."[210] By basing its ruling on the Due Process Clause (this time in addition to, rather than in lieu of, the Equal Protection Clause), the *Obergefell* Court required the equality of the vineyard. And even then, as we have seen, some state actors have chosen to refuse to issue marriage licenses across the board rather than to issue them to same-sex couples.[211] Those actors violate a due process ruling in a way that would not violate an equal protection ruling.

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[206] Lawrence v. Texas, 539 U.S. 558, 575 (2003).

[207] *See id.* at 575–79.

[208] *See id.* at 585 (O'Connor, J., concurring).

[209] *See id.* at 584–85.

[210] *Minister of Home Affairs v. Fourie* 2006 (1) SA 524 (CC) at 580 para. 149.

[211] Sheryl Gay Stolberg, *Kentucky Clerk Defies Court on Marriage Licenses for Gay Couples*, N.Y. TIMES (Aug. 13, 2015), http://www.nytimes.com/2015/08/14/us/kentucky-rowan-county-same-sex-marriage-licenses-kim-davis.html [http://perma.cc/Q2KW-WWZ6] (discussing Kentucky clerk Kim Davis's refusal to issue licenses and noting that "[i]n Alabama, probate judges in 13 of 67 counties are, like Ms. Davis, declining to issue marriage licenses to anyone").

And again, that due process ruling protects the *true* equality interests of gays and lesbians more than an equal protection decision ever could. An individual could take the principled view that the state should not be in the business of running recreational facilities. Yet even that individual should have qualms if the reason a municipality closes a public pool is to avoid integrating it on racial lines (the occurrence that triggered *Palmer v. Thompson*[212]). Similarly, an individual could hold the principled view that the state should be out of the marriage business. Yet even that individual should have qualms if the reason for shutting down civil marriage is the threat of same-sex couples entering the institution.

Obergefell differs from *Lawrence* in that it invokes both values — due process and equal protection — rather than relying solely on due process. But the similarities are, in my view, more important than the differences. What emerges from *Lawrence* and *Obergefell* is a vision of liberty that I will call "antisubordination liberty." While the path forward for substantive due process will now rely on a common law–based analysis rooted in the *Poe* dissent, one of the major inputs into any such analysis will be the impact of granting or denying such liberties to historically subordinated groups. The doctrinal rubric under which such extensions of liberty occur may be less important than the concept that, as the Court stated in a canonical equal protection case: "[T]he history of our Constitution . . . is the story of the extension of constitutional rights and protections to people once ignored or excluded."[213]

As that quotation suggests, this idea is not new. I have pointed out in these pages that "[t]he Court has long used the Due Process Clauses to further equality concerns, such as those relating to indigent individuals, national origin minorities, racial minorities, religious minorities, sexual minorities, and women."[214] At the same time, I have also noted that "equality concerns can lead the Court to *deny* as well as to *recognize* the ostensible liberty."[215] I invoked the example of *Glucksberg* itself, where the Court declined to rule in favor of plaintiffs seeking to commit physician-assisted suicide.[216] One of the rationales for its decision was that "the State has an interest in protecting vulnerable groups — including the poor, the elderly, and disabled persons — from abuse, neglect, and mistakes."[217] What *Obergefell* does is to drive this idea

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[212] *See* 403 U.S. 217, 218–19 (1971).

[213] United States v. Virginia, 518 U.S. 515, 557 (1996) (citing RICHARD B. MORRIS, THE FORGING OF THE UNION, 1781–1789, at 193 (1987)).

[214] Yoshino, *supra* note 57, at 749–50 (footnotes omitted).

[215] *Id.* at 801.

[216] *See id.*

[217] Washington v. Glucksberg, 521 U.S. 702, 731 (1997).

further to the surface — asserting that in the common law adjudication of new liberties, the effect on those subordinated groups should matter.[218]

Chief Justice Roberts declared the majority's reasoning on this point "difficult to follow,"[219] and so it should come as no surprise that he raised concerns about how the Court risked repeating the error of *Dred Scott* and *Lochner*.[220] To apprehend a liberty principle inflected with a notion of antisubordination, however, is to meet his most immediate concerns. Few would argue that the liberty interest articulated in *Dred Scott* could be justified on the ground that it redressed the subordination of slaveholders.

Similarly, the *Lochner* Court emphasized that it was upholding the freedom to contract in part because the bakers protected by the law were not a vulnerable class.[221] To be sure, defenders of *Lochner* argue that the freedom of contract benefited vulnerable bakers.[222] However, that interpretation does not take away the Court's emphasis on vulnerable individuals; it just suggests that the Court made an incorrect judgment about vulnerability. This solicitude for vulnerable groups led the Court just three years later to uphold a maximum-hours law for women, precisely because it deemed them to be the weaker sex.[223] Moreover, the case that effectively overruled *Lochner* emphasized how the freedom of contract ignored how "proprietors of these establishments and their operatives do not stand upon an equality."[224] An analysis of substantive due process inflected with equality concerns, then, constrains as well as expands the field of possible liberties.

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[218] In *Glucksberg*, the protection of vulnerable groups entered into the analysis after the Court had deemed, for other reasons, that the right to physician-assisted suicide was not a protected substantive-due-process right. *Obergefell*, in contrast, considers the impact on vulnerable groups in discerning whether the alleged right should be recognized in the first place. If anything, *Obergefell* will only heighten the extent to which antisubordination concerns will affect substantive-due-process analysis because it loads those concerns into the threshold inquiry regarding the existence of the right.

[219] *Obergefell*, 135 S. Ct. at 2623 (Roberts, C.J., dissenting).

[220] *See id.* at 2616–18.

[221] Lochner v. New York, 198 U.S. 45, 57 (1905) ("There is no contention that bakers as a class are not equal in intelligence and capacity to men in other trades or manual occupations, or that they are not able to assert their rights and care for themselves without the protecting arm of the State . . . .").

[222] *See, e.g.*, DAVID E. BERNSTEIN, REHABILITATING LOCHNER 23 (2011); George F. Will, *The 110 Year-Old Case that Still Inspires Supreme Court Debates*, WASH. POST (July 10, 2015), http://www.washingtonpost.com/opinions/110-years-and-still-going-strong/2015/07/10/f30bfe10-2662-11e5-aae2-6c4f59b050aa_story.html [http://perma.cc/3HJQ-4DTK] (criticizing Chief Justice Roberts's *Obergefell* dissent by noting that the 1895 law invalidated in *Lochner* constituted "rent-seeking by large, unionized bakeries and their unions," who wished "to crush their small, family-owned, nonunionized competitors that depended on flexible work schedules").

[223] Muller v. Oregon, 208 U.S. 412, 421–23 (1908).

[224] W. Coast Hotel Co. v. Parrish, 300 U.S. 379, 393 (1937) (quoting Holden v. Hardy, 169 U.S. 366, 397 (1898)).

Of course what counts as a "subordinated group" will be up for debate. Several of the *Obergefell* dissents pointed out that granting the right to marry to same-sex couples would have negative effects on people with religious objections to same-sex marriage.[225] Such a claim calls for the careful analysis that *Poe* requires (in contrast to the mechanical "careful description" that *Glucksberg* requires).[226] Individuals who object to the simple existence of same-sex marriage on religious grounds not only have an extremely attenuated claim of harm, but also run up against the prohibition on creating civil law based on religious viewpoints.[227] So the objection must be limited to individuals alleging a more particularized injury, such as the florist or restaurateur who does not wish to cater a gay wedding. But the real reason that such individuals are being asked to violate tenets of their faith is not same-sex marriage per se, but laws forbidding discrimination on the basis of sexual orientation.

To see this, consider two jurisdictions. One allows same-sex marriage but does not require equal treatment on the basis of sexual orientation (either because no federal or state law covers sexual orientation or because an exemption has been written into that law). The other does not recognize same-sex marriage but requires equal treatment on the basis of sexual orientation. In the former jurisdiction, a caterer could discriminate with impunity among the weddings she works. In the latter jurisdiction, a wedding caterer may well not be able to distinguish among ceremonies, even though the event at issue cannot result in a civil marriage. This was the fact pattern of *Elane Photography, LLC v. Willock*,[228] in which a photographer was held liable for refusing to photograph a same-sex couple in a civil commitment ceremony in New Mexico.[229] At the time, New Mexico did not allow same-sex couples to marry, but had a human rights law that barred discrimination on the basis of sexual orientation.[230] The photographer lost her case all the way up to the state supreme court,[231] and the United States Supreme Court denied review.[232] Given this backdrop, religious objectors to same-sex marriage should not be advocating

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[225] *See Obergefell*, 135 S. Ct. at 2625–26 (Roberts, C.J., dissenting); *id.* at 2638–39 (Thomas, J., dissenting); *id.* at 2642–43 (Alito, J., dissenting).

[226] *See supra* note 136.

[227] *See, e.g.*, Edwards v. Aguillard, 482 U.S. 578, 585 (1987); Wallace v. Jaffree, 472 U.S. 38, 56 (1985); Stone v. Graham, 449 U.S. 39, 41 (1980) (per curiam); Lemon v. Kurtzman, 403 U.S. 602, 612 (1971).

[228] 309 P.3d 53 (N.M. 2013), *cert. denied*, 134 S. Ct. 1787 (2014).

[229] *See id.* at 59.

[230] *Id.*

[231] *See id.*

[232] Elane Photography, LLC v. Willock, 134 S. Ct. 1787 (2014) (mem.), *denying cert. to* 309 P.3d 53.

against the rights of same-sex couples to marry, but rather should be appealing to state and federal legislators to create exemptions from antidiscrimination laws. It is those antidiscrimination laws, not marriage laws, that are driving their losses in court.

Looking beyond *Obergefell*, we might ask what an antisubordination liberty approach might presage for other alleged rights. Chief Justice Roberts put one front and center — the question of plural marriage.[233] If same-sex couples have a constitutional right to marry under the theory of equal dignity, he queried, what would prevent a "throuple" from seeking marriage?[234] Justice Kennedy's opinion did not directly respond to this contingency, but his analysis appeared to anticipate it. One tradition it emphasized, for instance, was the special "bilateral loyalty" created by marriage.[235] Yet given the Court's willingness to jettison the opposite-sex tradition of marriage, the dissenters fairly approached these implicit assurances with skepticism.[236] Under a *Poe* analysis, it might well be that the Court would find a new tradition supporting polygamy.

Nonetheless, the antisubordination principle likely provides a strong constraint on recognition of polygamous unions as a fundamental right. For the would-be plaintiffs, the antisubordination principle offers less succor. Bans on same-sex marriage prohibit gay individuals from marrying anyone to whom they might be sexually attracted. By contrast, bans on polygamy prohibit polyamorously oriented individuals not from marrying someone to whom they are attracted, but from marrying more than one such individual.[237] To paraphrase the immortal Alice, one can't have more if one hasn't had any.[238] And this difference — between any and more — seemed important to Justice Kennedy in his claim about the importance of avoiding human loneliness.[239] The difference also seemed to drive Justice Kennedy's immutability analysis: after finding that homosexuality is immutable, he concluded gays would be necessarily consigned to a lonely life if same-sex marriage were not available.[240] Because the would-be plaintiff in a plural marriage case is not subject to this necessary loneliness, her antisubordination interest would likely be weaker.

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[233] *See Obergefell*, 135 S. Ct. at 2621–22 (Roberts, C.J., dissenting).

[234] *Id.*

[235] *Id.* at 2599 (majority opinion) (quoting Griswold v. Connecticut, 381 U.S. 479, 486 (1965)).

[236] *See id.* at 2621 (Roberts, C.J., dissenting) (stating that the majority has "randomly insert[ed] the adjective 'two' in various places" without principled justification).

[237] JONATHAN RAUCH, GAY MARRIAGE: WHY IT IS GOOD FOR GAYS, GOOD FOR STRAIGHTS, AND GOOD FOR AMERICA 126 (2004).

[238] LEWIS CARROLL, ALICE IN WONDERLAND 57 (Donald J. Gray ed., W.W. Norton & Co. 2013) (1865).

[239] *See Obergefell*, 135 S. Ct. at 2608.

[240] *See id.* at 2596.

In addition to providing little support for a plural-marriage plaintiff, the antisubordination principle provides significant support for a state defending its prohibition of polygamy. Most forms of polygamy are polygynous (concerning a man married to more than one wife) rather than polyandrous (concerning a woman married to more than one husband).[241] Polygynous marriages raise the concern that men are subordinating their wives. Commentary has long observed that bans on same-sex marriage reflect and reinforce subordination on the basis of gender.[242] Bans on polygamous marriages, in contrast, arguably prevent such subordination.[243]

To take another live example, we might consider the various challenges to reproductive rights. Here again, antisubordination claims can be mounted on either side of the right to have an abortion. On the side of the plaintiffs, we see that both *Roe* and *Casey* showed rising concern with how the abortion right was necessary to prevent the subordination of women.[244] On the side of the state, we see an antisubordination claim being adduced on the part of the potential life represented by the fetus.

Here, I wish to make a fairly parsimonious intervention. Recent years have seen a new argument in this storied debate, which is that women themselves are hurt by the abortions they choose.[245] This so-called "woman-protective argument"[246] was made by Justice Kennedy in *Gonzales v. Carhart*,[247] which upheld the federal Partial-Birth Abortion Ban Act of 2003.[248] The *Gonzales* majority stated: "While we find no reliable data to measure the phenomenon, it seems unexceptionable

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[241] *Polygamy, in* ENCYCLOPEDIA OF HUMAN RELATIONSHIPS 1256, 1257 (2009) ("Among the 1,231 societies in the *Ethnographic Atlas Codebook*, 186 (15 percent) were monogamous, 453 (37 percent) had occasional polygyny, 588 (48 percent) had more frequent polygyny, and 10 (less than 1 percent) had polyandry.").

[242] *See, e.g.*, Andrew Koppelman, *Why Discrimination Against Lesbians and Gay Men Is Sex Discrimination*, 69 N.Y.U. L. REV. 197 (1994).

[243] To be sure, as Justice Alito appeared to suggest during oral arguments, there could be instances in which individuals sought to enter a plural marriage on terms of total equality. *See* Transcript of Oral Argument at 17–18, *Obergefell*, 135 S. Ct. 2584 (No. 14-556) (discussing the first question presented). But such arguments would still not invalidate bans on polygamy across the board.

[244] *See* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 856 (1992) (suggesting that the right to abortion is necessary so that women may exercise their right "to participate equally in the economic and social life of the Nation"); Roe v. Wade, 410 U.S. 113, 153 (1973) ("Maternity, or additional offspring, may force upon the woman a distressful life and future.").

[245] This contention is analogous to the claim made in the context of racially conscious affirmative action, where opponents have stated that affirmative action hurts its ostensible beneficiaries. *See, e.g.*, Grutter v. Bollinger, 539 U.S. 306, 372–73 (2003) (Thomas, J., dissenting).

[246] Reva B. Siegel, *The New Politics of Abortion: An Equality Analysis of Woman-Protective Abortion Restrictions*, 2007 U. ILL. L. REV. 991.

[247] 550 U.S. 124 (2007).

[248] *See id.* at 133.

to conclude some women come to regret their choice to abort the infant life they once created and sustained."[249] This argument is inconsistent with a sex-based antisubordination principle. As Justice Ginsburg pointed out in her dissent, this romantic paternalism had been rejected by the Court's equal protection jurisprudence starting in the 1970s.[250] So while at times the antisubordination concern will enter into the debate at the wholesale level to decide entire cases, at times it will enter into it more narrowly, at the retail level, to take particular arguments off the table.

I do not attempt a complete study here of how the post-*Obergefell* substantive due process analysis should proceed in either the case of polygamy or reproductive rights. Rather, I suggest that the antisubordination component of due process can guide a proper understanding of the guarantee of "liberty" in the future (as it has in the past). It provides a crucial component to the common law analysis advocated by *Poe* and *Obergefell*, which teaches us "what freedom is and must become."[251]

CONCLUSION

Discerning new liberties has always been, and will always be, more an art than a science. After *Obergefell*, it is simply much more openly an art. *Obergefell* retired many of the restrictions on due process analysis, reinvigorating the analysis of Justice Harlan's dissent in *Poe*. Yet *Obergefell* also underscored and amplified the role antisubordination concerns have played in due process analysis. This increased emphasis could serve to close as well as to open new channels of liberty. For this reason, this new birth of freedom is also a new birth of equality.

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[249] *Id.* at 159.

[250] *See id.* at 183–86 (Ginsburg, J., dissenting); *see also* Reva B. Siegel, *Dignity and the Politics of Protection: Abortion Restrictions Under* Casey/Carhart, 117 YALE L.J. 1694, 1792 (2008) ("Gender paternalism of *this* kind denies women the very forms of dignity that *Casey* — and the modern equal protection cases — protect.").

[251] *Obergefell*, 135 S. Ct. at 2603.

EQUAL DIGNITY: SPEAKING ITS NAME

Laurence H. Tribe[*]

INTRODUCTION

In certain circles, it has become a sign of sophistication to speak of Justice Anthony M. Kennedy's seminal gay rights decisions, *Obergefell v. Hodges*[1] now foremost among them, with a knowing condescension. Even among those who emphatically agree with Justice Kennedy that the Constitution affords same-sex couples the right to marry, many are quick to claim that his sweeping opinion was heavy on rhetoric and light on legal reasoning — a political masterstroke but a doctrinal dud.[2]

Professor Kenji Yoshino's splendid Comment[3] makes clear just how misguided these glib detractions are, and eloquently elaborates the important doctrinal work done by Justice Kennedy's decision, which represents the culmination of a decades-long project that has revolutionized the Court's fundamental rights jurisprudence. As Yoshino demonstrates, *Obergefell* has definitively replaced *Washington v. Glucksberg*'s[4] wooden three-prong test focused on tradition, specificity, and negativity with the more holistic inquiry of Justice Harlan's justly famous 1961 dissent in *Poe v. Ullman*,[5] a mode of inquiry that was embodied in key opinions from the mid-1960s to the early 1970s.[6]

Although Yoshino credits *Glucksberg*'s formulaic approach with having established a firmer foothold in the constitutional firmament

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[1] 135 S. Ct. 2584 (2015).

[2] *See, e.g.*, Ilya Somin, *A Great Decision on Same-Sex Marriage — But Based on Dubious Reasoning*, WASH. POST: VOLOKH CONSPIRACY (June 26, 2015), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/06/26/a-great-decision-on-same-sex-marriage-but-based-on-dubious-reasoning [https://perma.cc/H4AT-K3LC]; Mark Joseph Stern, *Kennedy's Marriage Equality Decision Is Gorgeous, Heartfelt, and a Little Mystifying*, SLATE: BREAKFAST TABLE (June 26, 2015, 11:18 AM), http://www.slate.com/articles/news_and_politics/the_breakfast_table/features/2015/scotus_roundup/supreme_court_2015_decoding_anthony_kennedy_s_gay_marriage_decision.html [http://perma.cc/5K4T-XDS2]; *see also* Jeffrey Rosen, *The Dangers of a Constitutional "Right to Dignity,"* THE ATLANTIC (Apr. 29, 2015), http://www.theatlantic.com/politics/archive/2015/04/the-dangerous-doctrine-of-dignity/391796 [http://perma.cc/W87V-X3FD] (anticipating and criticizing a ruling based on the notion of dignity).

[3] Kenji Yoshino, *The Supreme Court, 2014 Term — Comment: A New Birth of Freedom?:* Obergefell v. Hodges, 129 HARV. L. REV. 147 (2015).

[4] 521 U.S. 702 (1997).

[5] 367 U.S. 497 (1961); *see id.* at 522–55 (Harlan, J., dissenting).

[6] Yoshino, *supra* note 3, at 149–50.

from 1997 to 2003[7] than I would be inclined to attribute to that decision, there is no doubt that *Glucksberg*'s cramped methodology cast a significant pall that Justice Kennedy's *Lawrence v. Texas*[8] opinion in 2003 only partially swept away, that Justice Kennedy's *United States v. Windsor*[9] opinion in 2013 further eroded, and that his *Obergefell* opinion in 2015 finally displaced decisively. As Yoshino rightly says, Justice Kennedy has thereby fashioned a major shift in constitutional doctrine, one that will have ramifications in many cases to come.[10]

But by dispensing with *Glucksberg*, Justice Kennedy has not left the courts completely without guidance when identifying fundamental rights. Justice Kennedy's opinion also sets forth a foundational principle that gives form and substance to the *Poe* dissent's common law spirit. Yoshino calls this core component of *Obergefell* the "antisubordination principle,"[11] but although I certainly agree that antisubordination plays an important role in the doctrinal achievement of *Obergefell*, I would characterize the decision's core in different, more expansive terms. I argue that *Obergefell*'s chief jurisprudential achievement is to have tightly wound the double helix of Due Process and Equal Protection into a doctrine of *equal dignity* — and to have located that doctrine in a tradition of constitutional interpretation as an exercise in public education. Equal dignity, a concept with a robust doctrinal pedigree, does not simply look back to purposeful past subordination, but rather lays the groundwork for an ongoing constitutional dialogue about fundamental rights and the meaning of equality. *Obergefell* is an important landmark, but it will not be — and should not be — the last word.

I. THE ANTISUBORDINATION PRINCIPLE: DISTINGUISHING *LOCHNER*

Picking up the line of criticism taken by Chief Justice Roberts in his dissent, legal conservatives have argued that the *Obergefell* decision's expansive take on fundamental rights is indistinguishable from *Lochner v. New York*,[12] the bête noire of substantive due process in which the Court struck down laws setting maximum hours and minimum wages and other forms of purely economic regulation.[13] Without

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[7] *Id.* at 162.

[8] 539 U.S. 558 (2003).

[9] 133 S. Ct. 2675 (2013).

[10] Yoshino, *supra* note 3, at 179.

[11] *Id.* at 177; *see also id.* at 174 (referring to "antisubordination liberty").

[12] 198 U.S. 45 (1905).

[13] *See, e.g.*, Symposium, *The Supreme Court Has Legalized Same-Sex Marriage: Now What?*, NAT'L REV. ONLINE (June 27, 2015, 4:00 AM) http://www.nationalreview.com/article/420420/supreme-court-has-legalized-same-sex-marriage-now-what-nro-symposium [http://perma.cc

an ostensibly constraining test like the one proposed by *Glucksberg*, these conservatives worry, substantive due process will run riot, with outcome-driven judges inventing new fundamental rights as it strikes their fancy. Yoshino persuasively dismisses the *Lochner* comparison, which the Court conspicuously (and no doubt deliberately) declines to address explicitly, by pointing to the Court's invocation of an "antisubordination principle" in *Obergefell*. If anything, Yoshino understates the extent to which the antisubordination principle keeps the *Lochner* bogeyman at bay. It's true, as Yoshino notes, that contemporary "defenders of *Lochner* argue that the freedom of contract benefited vulnerable bakers."[14] But he suggests that the Court simply "made an incorrect judgment about vulnerability"[15] when it decided *Lochner* in 1905, adding that the Court's "solicitude for vulnerable groups led the Court just three years later to uphold a maximum-hours law for women, precisely because it deemed them to be the weaker sex."[16] A good point, though it understates the difference between the *Lochner* framework and that of *Obergefell*. The treatment of women as categorically "weaker" than men, coupled with *Lochner*'s idealization of the baking industry as built on equal bargaining power, reflected the hierarchical worldview of the laissez-faire workplace — not a misguided empirical judgment about relative degrees of subordination. It is only through the eyes of modern observers that *Lochner* can plausibly be reconfigured as simply miscalculating the place of various social groups on the ladder of relative power. The truth is that few argued at the time of *Lochner* that the freedom of contract it espoused was justifiable as a means to redress the economic subordination of the master bakers. By contrast, the freedom to marry championed in *Obergefell* was understood by all to directly redress the subordination of LGBT individuals.

Beyond that understatement, the most potent of the dissenting Justices' arguments is one that Yoshino does not really address at all. It is, to quote the Chief Justice, that "[t]he fundamental right to marry does not include a right to make a State change its definition of marriage."[17] To this argument, Justice Kennedy's majority opinion offered a masterful rejoinder: in extending the right to marry to same-sex couples, the Court was not simply indulging a fashionable preference for *redefining* the always-fluid concept of "marriage" but was reasoning

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/W9YJ-P4ZR] (comments of Matthew J. Franck); Gil Troy, *Who Let the Supreme Court Make Laws?*, DAILY BEAST (July 11, 2015, 4:00 AM), http://www.thedailybeast.com/articles/2015/07/11/how-to-restrict-the-lawmaking-power-of-the-supreme-court.html [http://perma.cc/E35L-E77V].

[14] Yoshino, *supra* note 3, at 175.

[15] *Id.*

[16] *Id.* (citing Muller v. Oregon, 208 U.S. 412, 421–23 (1908)).

[17] *Obergefell*, 135 S. Ct. at 2611 (Roberts, C.J., dissenting).

that rights *cannot* be "defined by who exercised them in the past" without allowing "received practices [to] serve as their own continued justification."[18] Justice Kennedy thereby deftly demonstrated that the dissenting Justices' definitional gambit was, in truth, just a circular argument for preventing "new groups [from] invok[ing] rights once denied."[19] So the *Obergefell* opinion does more than respond to the *Lochner* bugaboo by invoking the theme of antisubordination. It responds as well to the claim that the Court is vindicating a non-existent right to compel reluctant states to redefine an ancient institution and thereby, to quote Chief Justice Roberts, "[s]tealing this issue from the people . . . , making a dramatic social change that much more difficult to accept."[20]

Crucially, in response to the dissenting argument that the denial of those rights was "not . . . a result of a prehistoric decision to exclude gays and lesbians,"[21] Justice Kennedy's opinion strongly argues that a government practice that limits the options available to members of a particular group need not have been *deliberately* designed to harm the excluded group if its oppressive and unjustified effects have become clear in light of current experience and understanding.[22] Redressing those injuries to a historically subordinated group, Justice Kennedy reasoned, itself fulfills the promise of the Fourteenth Amendment's Equal Protection Clause alongside its Due Process Clause in a way that protecting the "freedom of contract" invoked by *Lochner* could not be said to have done.[23] And in recognizing that even *unintended* effects can render a traditional practice or definition inconsistent with the Fourteenth Amendment, *Obergefell* may well have laid the foundation for reexamining a longstanding but always controversial doctrinal obstacle, embodied in decisions like *Washington v. Davis*,[24] requiring proof of *intentional* discrimination as an element of an asserted Fourteenth Amendment violation.[25]

II. EQUAL DIGNITY UNDER LAW

As we have seen, Yoshino focuses on Justice Kennedy's anticaste theme as the Court's antidote to the Chief Justice's repeated invoca-

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[18] *Id.* at 2602 (majority opinion).
[19] *Id.*
[20] *Id.* at 2612 (Roberts, C.J., dissenting).
[21] *Id.* at 2613.
[22] *Id.* at 2598 (majority opinion).
[23] *Id.* at 2604–05.
[24] 426 U.S. 229 (1976).
[25] *Id.* at 239. In a case decided the day before *Obergefell*, Justice Kennedy (joined by the rest of the *Obergefell* majority) took a dramatic step in the same direction in the statutory context, finding disparate-impact claims cognizable under the Fair Housing Act. *See* Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, Inc., 135 S. Ct. 2507, 2525 (2015).

tion of *Lochner*. And I have further described how the Court's analysis limited the need to demonstrate that a challenged deprivation was initially *intended* to injure an excluded group. But *Obergefell* goes further, by furnishing an even more capacious frame for evaluating future fundamental rights claims. The core around which Justice Kennedy wound the double helix of Equal Protection and Due Process, and the rubric under which fundamental rights should be evaluated going forward, is what I will call the doctrine of equal dignity.

The language of dignity is not accidental. As numerous scholars have recognized in recent years, the concept of dignity is central to contemporary human rights discourse.[26] "Dignity" has become "a crucial watchword, going global in various constitutions and international treaties, and offering judicial guidance for the protection of basic values."[27] The concept has a multifarious history: in some ways it bears the imprint of a premodern, hierarchical society in which only the nobility were deemed to possess dignity[28] — a vision of dignity addressed and dismissed, perhaps, in our Constitution's Titles of Nobility Clause.[29] But dignity also has deep roots in the Christian notion of grace, extended to all humanity in equal measure.[30] This religious conception of dignity was given secular expression in Kant's liberal universalism, best captured in his famous maxim that human individuals should be treated as ends in themselves, and never as means to an end.[31] It was this version of equal dignity that the Universal Declaration of Human Rights,[32] adopted by the newly formed United Nations in 1948, invoked by declaring in Article I: "All human beings are born free and equal in dignity and rights."[33] "Dignity" came to occupy a central place in the post–World War II constitutions of Germany, Japan, and Italy, countries that knew well the destruction that could be caused by authoritarian regimes,[34] as well as newly independent countries like India and Ireland that were emerging from centuries of foreign domination.[35] And in the 1990s, South Africa gave pride of

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[26] *See, e.g.*, MICHAEL ROSEN, DIGNITY: ITS HISTORY AND MEANING (2012).

[27] Samuel Moyn, *The Secret History of Constitutional Dignity*, 17 YALE HUM. RTS. & DEV. L.J. 39, 40 (2014).

[28] *See generally* JEREMY WALDRON, DIGNITY, RANK, AND RIGHTS (2012).

[29] U.S. CONST. art. I, § 9, cl. 8.

[30] *See* Christopher McCrudden, *Human Dignity and Judicial Interpretation of Human Rights*, 19 EUR. J. INT'L L. 655, 658 (2008).

[31] *See* IMMANUEL KANT, GROUNDWORK OF THE METAPHYSICS OF MORALS (Mary Gregor ed. & trans., Cambridge Univ. Press 1998) (1785); *see also* McCrudden, *supra* note 30, at 659–60.

[32] G.A. Res. 217A, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc. A/810 (Dec. 10, 1948).

[33] *Id.* art. I.

[34] McCrudden, *supra* note 30, at 664.

[35] *Id.* at 664–65.

place to dignity in its new constitution,[36] as that country threw off the yoke of apartheid.

Justice Kennedy, a noted cosmopolitan who spends his summers teaching law in places like Salzburg, Austria,[37] is aware of equal dignity's deep international resonance. For nearly twenty-five years, Justice Kennedy has been pushing "dignity" closer to the center of American constitutional law and discourse, bringing our centuries-old Constitution into harmony with the founding charters of our postwar, postcolonial world.

But dignity is not some alien import with no place in our own constitutional tradition. Just as Germany and South Africa adopted universal human dignity as a lodestar of their legal systems after rejecting devastating racist ideologies, so too the United States adopted the Fourteenth Amendment in the wake of the Civil War for strikingly similar reasons — to atone for our nation's own original sin and extend our Constitution's promises to all citizens.[38]

That Amendment's full potential was abridged by the Supreme Court in the infamous *Slaughter-House Cases*,[39] where the Supreme Court invoked a misguided form of federalism to neuter the Amendment's promise that no state could "abridge the privileges or immunities of citizens of the United States."[40] But Justice Kennedy unified the two *other* operative clauses of the Amendment, Equal Protection and Due Process, in the name of "dignity," to generate a concept of great analytic strength and political power. This combination does the work that the Privileges or Immunities Clause was originally designed to do.

Earlier in his judicial career, Justice Kennedy's references to dignity hearkened back to a more hierarchical version of the concept. This hierarchical concept was displayed most famously in *Windsor*,[41] which invoked the prerogative of the states to *confer* dignity upon same-sex marriages.[42] But this version of dignity is seen even more starkly in *Alden v. Maine*,[43] where the Court, speaking through Justice Kennedy, held that Congress cannot strip a state of sovereign immunity in its

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[36] *See, e.g.*, S. AFR. CONST., 1996, § 1(a) (listing "[h]uman dignity, the achievement of equality and the advancement of human rights and freedoms" as one of the four fundamental values of South Africa); *id.* § 10 ("Everyone has inherent dignity and the right to have their dignity respected and protected.").

[37] *See, e.g.*, *Justices Kagan and Kennedy to Teach in Salzburg Summer Program*, MCGEORGE SCH. OF LAW (Dec. 13, 2012), http://www.mcgeorge.edu/News/Justices_Kagan_and_Kennedy_to_Teach_in_Salzburg_Summer_Program.htm [http://perma.cc/Q2VZ-4Z5A].

[38] *See, e.g.*, MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS (2004).

[39] 83 U.S. (16 Wall.) 36 (1870).

[40] U.S. CONST. amend. XIV, § 1, cl. 2.

[41] 133 S. Ct. 2675 (2013).

[42] *Id.* at 2695–96.

[43] 527 U.S. 706 (1999).

own courts.[44] The idea was that doing so would impermissibly deny the "*dignity*" of any state subjected to such humiliation.[45] But Justice Kennedy has otherwise made clear that he views the sovereignty of the states as important much less as an *end in itself* than as a *means* to the end of protecting the liberties of those who reside in those states — both their *negative* liberties from oppressive regulation and their *positive* liberties to take part in politically accountable self-government.[46] From that perspective, there is no significant gap between the older concept of dignity as an attribute that attaches to powerful institutions, and the newer concept of dignity as an attribute of all individuals in society. So it is that the dominant strain in Justice Kennedy's writings on dignity — the strain that achieved full expression in *Obergefell* — has become the notion of *equal dignity* as the very foundation of individual human rights.

That notion — the idea that *all individuals* are deserving in equal measure of personal autonomy and freedom to "define [their] own concept of existence"[47] instead of having their identity and social role defined by the state — has animated Justice Kennedy's most memorable decisions about the fundamental rights protected by the Constitution, from *Planned Parenthood of Southeastern Pennsylvania v. Casey*[48] to *Parents Involved in Community Schools v. Seattle School District No. 1*.[49] The importance of this idea to Justice Kennedy's jurisprudence has been most apparent in the gay-rights triptych of *Lawrence v. Texas*,[50] *United States v. Windsor*,[51] and now *Obergefell*. In each suc-

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[44] *Id.* at 712.

[45] *Id.* at 714–15 (emphasis added).

[46] *See* Bond v. United States, 131 S. Ct. 2355, 2364 (2011) ("Federalism secures the freedom of the individual. It allows States to respond, through the enactment of positive law, to the initiative of those who seek a voice in shaping the destiny of their own times without having to rely solely upon the political processes that control a remote central power. True, of course, these objects cannot be vindicated by the Judiciary in the absence of a proper case or controversy; but the individual liberty secured by federalism is not simply derivative of the rights of the States.").

[47] Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 851 (1992).

[48] 505 U.S. 833 (plurality opinion co-written by Justices O'Connor, Kennedy, and Souter, but nowhere mentioned in *Obergefell*).

[49] *See* 551 U.S. 701, 797 (2007) (Kennedy, J., concurring in part and concurring in the judgment) ("To be forced to live under a state-mandated racial label is inconsistent with the dignity of individuals in our society."). In *Parents Involved*, Justice Kennedy recognized that the historical and ongoing reality of race-based inequality permitted schools to implement race-conscious policies in order to encourage diversity, so long as the state did not impair personal liberty through individual classification on the basis of race. *Id.* at 797–98. Just last Term, Justice Kennedy affirmed his sensitivity to the equality side of this balance, invoking "our 'historic commitment to creating an integrated society'" in finding disparate-impact claims cognizable under the Fair Housing Act. Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, Inc., 135 S. Ct. 2507, 2525 (2015) (quoting *Parents Involved*, 551 U.S. at 797 (Kennedy, J., concurring in part and concurring in the judgment)), noted in note 25, *supra*.

[50] 539 U.S. 558 (2003).

[51] 133 S. Ct. 2675 (2013).

cessive case, and in the opinion Justice Kennedy wrote in *Romer v. Evans*[52] invalidating a state constitutional amendment that he rightly described as making each LGBT individual a "stranger to its laws,"[53] Justice Kennedy has wound the Equal Protection and Due Process Clauses more tightly, finally fusing them together in *Obergefell* with the notion of "equal dignity in the eyes of the law."[54]

In his dissent, Chief Justice Roberts claimed that a conception of dignity which conferred the right to marriage on same-sex couples lacked any foundation either in our country's history or in that of other nations[55] (in a tacit acknowledgment of the international cast of Justice Kennedy's notion of dignity and of its relevance). And countless commentators, in bars and blog posts, have found it difficult to dignify *Obergefell*'s discussion of dignity as anything beyond mere rhetoric.[56] But the conception of equal dignity in fact has a considerable doctrinal pedigree, one stretching across some of the most high-profile cases decided by the Court in the past half-century. The notion that *Obergefell* had no foundation is simply wrong.

III. DIGNITY IN DIALOGUE

While both Yoshino and I have sought to deconstruct the view that *Obergefell* was all flash and no substance, the opinion's detractors are undeniably right in at least one respect: the *Obergefell* opinion contains plenty of rhetoric — and powerful rhetoric at that. But the opinion's critics — predominantly legal scholars — have missed the point of Justice Kennedy's deliberate selection of universally accessible, nontechnical prose and his attempts to move a less technically experienced reader. They have focused instead on nitpicky peccadilloes, like the opinion's near-heretical (for the academic crowd) lack of legal citations or footnotes. Justice Kennedy's rhetoric of equal dignity, particularly in his series of gay-rights decisions, has always been fundamentally rooted in the importance of fostering dialogue among ordinary citizens and, in a sense, even among the very clauses of the Constitution itself.

Justice Kennedy's opinions have repeatedly emphasized the notion that, through the decisions it announces and the reasons it offers for those decisions, the Court does more than resolve the particular "cases" and "controversies" entrusted to it for resolution. He has observed: "By our opinions, we teach."[57] That has long been Justice Kennedy's

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[52] 517 U.S. 620 (1996).

[53] *Id.* at 635.

[54] *Obergefell*, 135 S. Ct. at 2608.

[55] *See id.* at 2612–13, 2623–24 (Roberts, C.J., dissenting).

[56] *See, e.g.*, sources cited *supra* note 2.

[57] Lani Guinier, *The Supreme Court, 2007 Term — Foreword: Demosprudence Through Dissent*, 122 HARV. L. REV. 4, 7 (2008) (quoting Justice Kennedy responding to a Harvard Law

view of the Court's role in helping to structure and stimulate public debate regarding the rights that should be afforded to LGBT individuals and to same-sex couples, as well as the evolving character of marriage as an institution. In *Obergefell*, Justice Kennedy's discussion of the history of marriage is manifestly structured not just to respond in legal terms to the dissenters' claim that the institution has had a fixed meaning for millennia[58] but also to make ordinary people focus more closely on how the evolution of gender roles, among many other developments, has silently but assuredly transformed the institution's meaning.[59] The idea that the populace at large will actually read the Court's opinions may seem naive. But if one reflects on how those opinions reverberate through both traditional and social media outlets, the idea's innocence may come to be appreciated and even admired in time.

The focus on the importance of dialogue, both among people and institutions at any given time and across the centuries, is evident throughout *Obergefell*. It becomes most explicit when Justice Kennedy describes the multitude of ways in which "new dimensions of freedom become apparent to new generations, often through perspectives that begin in pleas or protests and then are considered in the political sphere and the judicial process."[60]

Indeed, Justice Kennedy poignantly lays bare his own, internal dialogue when he discusses — in a way that is rare if not unprecedented for a Supreme Court opinion — the difficulty of deciding between more gradually building a solid foundation for the recognition of new constitutional rights and immediately addressing serious indignities and other harms, whenever or wherever they may be found.[61] To leave newly recognized constitutional wrongs that undermine the equal

School student's question: "The Constitution is the enduring and common link that we have as Americans and it is something that we must teach to and transmit to the next generation. Judges are teachers. By our opinions, we teach."). This vision of the Constitution as a great teacher recurs throughout Justice Kennedy's writings on the bench in *Obergefell* and elsewhere. *See Obergefell*, 135 S. Ct. at 2598 ("The generations that wrote and ratified the Bill of Rights and the Fourteenth Amendment did not presume to know the extent of freedom in all of its dimensions, and so they entrusted to future generations a charter protecting the right of all persons to enjoy liberty as we learn its meaning."); *id.* at 2602–03 ("The Due Process Clause and the Equal Protection Clause . . . may be instructive as to the meaning and reach of the other."); *see also* Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2676 (2012) (joint dissent) ("It should be the responsibility of the Court to teach . . . ."); Lawrence v. Texas, 539 U.S. 558, 579 (2003) ("As the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom."); Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 901 (1992) ("Each generation must learn anew that the Constitution's written terms embody ideas and aspirations that must survive more ages than one.").

58 *See, e.g.*, *Obergefell*, 135 S. Ct. at 2612–13 (Roberts, C.J., dissenting).

59 *See id.* at 2595–96 (majority opinion).

60 *Id.* at 2596.

61 *See id.* at 2605–06.

dignity of individuals uncorrected in the name of caution beyond the point where those wrongs have at last become clear to a majority of the Court, Justice Kennedy says, causes unjustified "pain and humiliation."[62] Whatever might be said for moving more slowly, he observes, "men and women [are] harmed in the interim," and "[d]ignitary wounds cannot always be healed with the stroke of a pen."[63]

There is some irony, for a Justice so dedicated to dialogue, in the fact that Justice Kennedy's majority opinions rarely wrestle directly with the arguments made by the dissenting Justices. In *Obergefell*, for example, despite the way his antisubordination theme provides a ready response to the repeated invocation of *Lochner*'s ghost in the dissenting opinions, it is noteworthy that Justice Kennedy's majority does not mention the *Lochner* decision even once.

Yet there is one central argument made in all the *Obergefell* dissents, and particularly emphasized in the principal dissent by the Chief Justice, that Justice Kennedy engages head-on: it is the argument that a commitment to democracy renders the Court's intervention in the marriage wars fundamentally illegitimate.[64] With that argument in mind, Justice Kennedy reminds his readers — conspicuously including Chief Justice Roberts — that, for all its presumptive virtues, democracy has its limits.[65] Although some mix of direct and representative democracy is presumed by our Constitution to be the "appropriate process for change" and indeed is "most often" the vehicle through which "liberty is preserved and protected in our lives," the "dynamic of our constitutional system is that individuals need not await legislative action before asserting a fundamental right."[66] In particular, Justice Kennedy rejects the argument that the proper way to construct a foundation for a newer conception of rights in a democratic republic would have required the Court, in the instance of marriage equality, to wait for majority votes in state legislatures and statewide referenda. To address that argument, Justice Kennedy cuts directly to the chase and, rather than losing readers in the weeds of complex political and philosophical theories about the judiciary's role, embraces the simple vision that the "idea of the Constitution,"[67] quoting Justice Robert H. Jackson, is "to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and offi-

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[62] *Id.* at 2606.

[63] *Id.*

[64] *See id.* at 2611–12 (Roberts, C.J., dissenting); *id.* at 2626–29 (Scalia, J., dissenting); *id.* at 2631–32 (Thomas, J., dissenting); *id.* at 2640–41 (Alito, J., dissenting).

[65] *See id.* at 2605 (majority opinion).

[66] *Id.*

[67] *Id.* at 2605–06.

cials and to establish them as legal principles to be applied by the courts."[68]

Notably, the decision Justice Kennedy quotes for that commonsense reminder about the purpose of a Bill of Rights is *West Virginia State Board of Education v. Barnette*,[69] the 1943 case in which the Court held that schoolchildren may not be compelled to recite the Pledge of Allegiance.[70] In drawing on *Barnette*, Justice Kennedy selects one of the Court's most enduring and celebrated precedents; it is no coincidence that *Barnette*, like *Obergefell*, relies on no single clause of the Bill of Rights but on the broader postulates of our constitutional order.

Justice Kennedy's choice of *Barnette* is particularly apt in light of a central point made by Chief Justice Roberts in his *Obergefell* dissent, which noted the absence of any "'Companionship and Understanding' or 'Nobility and Dignity' Clause in the Constitution"[71] — as though that absence were somehow decisive. Justice Kennedy's opinion lets the Court's towering *Barnette* decision — a precedent he knows Chief Justice Roberts admires greatly and cites often[72] — speak for itself as a rebuttal to Chief Justice Roberts's "No Such Clause" observation. Justice Kennedy knows that the dissenters, led by Chief Justice Roberts, realize that the right affirmed in *Barnette* extends not only to religious objectors but to everyone. *Barnette*, and other decisions that followed in its wake, also reached well beyond a right to speak one's mind; it applied even if those under compulsion to convey beliefs with which they disagreed remained free to voice their disagreement with those beliefs.[73] *Thus the line of cases Justice Kennedy invokes conspicuously protects rights resting not on any particular clause, like the Freedom of Speech Clause or the Free Exercise of Religion Clause, but instead on the dignity and autonomy of the individual standing against the forces of coerced conformity* — on principles *underlying* the written Constitution but nowhere expressly articulated in its text.

Although Justice Kennedy's subtext in leaning so heavily on *Barnette* could not have escaped his dissenting colleagues, he was not principally speaking to insiders, as his choice of rhetorical style made clear. Justice Kennedy's opinions can be best understood as deliberately fostering and enriching broad public debate regarding issues like

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[68] *Id.* at 2606 (quoting W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 638 (1943)).

[69] 319 U.S. 624.

[70] *Id.* at 642.

[71] *Obergefell*, 135 S. Ct. at 2616 (Roberts, C.J., dissenting).

[72] *See, e.g.*, Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n, 135 S. Ct. 2652, 2689 (2015) (Roberts, C.J., dissenting); Rumsfeld v. Forum for Acad. and Institutional Rights, Inc., 547 U.S. 47, 61 (2006).

[73] *See, e.g.*, Wooley v. Maynard, 430 U.S. 705 (1977).

same-sex marriage. That ambition is not far removed from the idea — espoused by Alexander Bickel, Christopher Eisgruber, Ralph Lerner, and Eugene Rostow, among others — that the Court should play an educative role in society, furthering the public's knowledge and understanding both of the Constitution and of the vast array of legal issues that the Court confronts each year.[74]

While we have seen that Justice Kennedy ascribes to the view that the Court's own opinions serve to spur debate and educate both lower courts and the public at large, even more noteworthy is his insistence that the *greatest* teacher in these matters is not any opinion drafted by the Justices but the Constitution itself.[75]

A too-rarely noted aspect of Justice Kennedy's opinions in this realm, beginning in *Romer* and *Lawrence* and culminating in *Obergefell*, is the belief that the Constitution is written and designed to shed light on society's evolving experience, framing windows through which to view and assess that experience, and to thereby educate us in how we might proceed to form an ever more perfect union. It does so in part by opening with a conspicuously aspirational preamble, in part by deliberately casting some of the rights it protects and principles it embodies at a high level of abstraction and generality, and in part by manifestly leaving spaces and silences between the specific guarantees it enumerates, expressly instructing that the text's failure to enumerate a particular right may not be "construed to deny or disparage" that right's existence.[76]

Nowhere is this educative or pedagogical vision of the Constitution more present than in Justice Kennedy's creative intertwining of the Equal Protection and Due Process Clauses into a principle of equal dignity.

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[74] *See, e.g.*, ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS (1962); Christopher L. Eisgruber, *Is the Supreme Court an Educative Institution?*, 67 N.Y.U. L. REV. 961 (1992); Ralph Lerner, *The Supreme Court as Republican Schoolmaster*, 1967 SUP. CT. REV. 127; Eugene V. Rostow, *The Democratic Character of Judicial Review*, 66 HARV. L. REV. 193, 208 (1952).

[75] I first began expanding upon this notion in *A Constitution We Are Amending: In Defense of a Restrained Judicial Role*, 97 HARV. L. REV. 433, 441–42 (1983). Others have also remarked that the Constitution itself may serve an educative function. *See, e.g.*, Akhil Reed Amar, *The Supreme Court, 1999 Term — Foreword: The Document and the Doctrine*, 114 HARV. L. REV. 26, 27 (2000) ("[W]e would do well to study our amended Constitution with care, because it can teach us a great deal about who We are as a People, where We have been, and where We might choose to go."); Rebecca L. Brown, Essay, *Tradition and Insight*, 103 YALE L.J. 177, 177 (1993) ("The Constitution educates Americans about the political values that permit this nation to survive and to mature. The Framers wrote the Constitution to teach future generations of Americans the lessons they had learned about political freedom. The Constitution and its traditions are the core of our political education."); *id.* at 218 ("[T]he Constitution has much to teach us about general concepts, such as equality.").

[76] U.S. CONST. amend. IX.

Yoshino rightly emphasizes how Justice Kennedy's 2003 *Lawrence* opinion had already illustrated one way in which the Equal Protection and Due Process Clauses each taught a lesson about the necessary reach of the other[77] — a lesson that the Court concluded required it not only to strike down the gender-specific antisodomy law at issue in *Lawrence* but also to hold that, from the day it was decided, *Bowers v. Hardwick* had been wrong to uphold even a gender-*neutral* antisodomy law.[78] But in *Obergefell*, the lesson went further, teaching that the deeper purposes of neither equal protection nor due process could be satisfied if only *negative* liberty — the liberty "to engage in intimate association without criminal liability" — was entitled to constitutional protection.[79]

IV. THE FEDERAL STRUCTURE AS EXEMPLIFYING INTRATEXTUAL "CONVERSATION"

Justice Kennedy's decisions repeatedly recognize the ways in which distinct pieces of our constitutional structure are put into a kind of "conversation" with one another. In *Windsor*, Justice Kennedy leaned heavily and deliberately on the structural principles of federalism in closely scrutinizing the federal government's unusual intrusion into marriage, the traditional province of the states.[80] In essence, he treated the federal structure as telling the Court to question why the federal Defense of Marriage Act departed from the norm by displacing state definitions of marriage in one and only one respect. This reliance on federalism reflected in part Justice Kennedy's earlier interest in the dignity of the states as such — but reflected as well his frequent reminder that federalism, like the separation of powers, exists not just to protect the component parts of our governmental architecture, but for the more basic reason of protecting the individuals that architecture serves. For Justice Kennedy, these structures ensure both the *positive* liberty of collective self-governance within a system whose accountability is preserved by the way it vertically allocates power, and the *negative* liberty of shielding persons from government subordination that invades their equal dignity. The proposition, advanced in many leading cases (like *Bond v. United States*[81]) by Justice Kennedy in particular, that the Constitution's implicit division of powers between the national government and the states exists principally to protect personal liberty and equality, is thus fully consistent with the more fun-

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[77] *See, e.g.*, Yoshino, *supra* note 3, at 152, 154 n.57, 172–73.
[78] *See* Lawrence v. Texas, 539 U.S. 558, 574–75 (2003).
[79] *Obergefell*, 135 S. Ct. at 2600.
[80] 133 S. Ct. 2675, 2695–96 (2013).
[81] 131 S. Ct. 2355 (2011).

damental demand that *no* level of government exercise its power in a manner that, however rooted in tradition, ends up depriving individuals of those very rights.[82]

It was that fundamental demand that dominated both public dialogue and lower court decisions in the wake of *Windsor*. As Justice Scalia's *Windsor* dissent had rightly forecast,[83] people around the nation, including federal and state judges, rapidly recognized that equal dignity could not permanently be contained by the federalism frame in which Justice Kennedy had initially set it. Partly because it became evident that the spreading legal recognition of same-sex marriage did not cause the skies to fall; partly because that phenomenon in turn led more LGBT individuals to emerge from the shadows and generate both more empathy and less fear; and partly because that emergence cast a light on the lodestar of human dignity that had guided earlier decisions like *Windsor* even without being fully articulated in those decisions, a cascade was set in motion for which the *Windsor* Court must have hoped, but that it could not confidently predict.[84]

After *Windsor* the lower federal courts began to strike down same-sex marriage bans across the country in rapid succession.[85] In some states, the public, through the passage of statutes or referenda, directly affirmed the dignity of same-sex marriages.[86] By the time Justice Kennedy wrote the Court's opinion in *Obergefell*, he observed that the dialogue in the states and the lower courts had begun to allow equal dignity to shake off its constraining armature and stand on its own. He properly recognized that the time had come to jettison the federalism scaffolding with which he had earlier surrounded that core right.

V. THE WORLD AFTER *OBERGEFELL*: A NEW ORTHODOXY?

Obergefell's doctrine of equal dignity points a way forward in the still ongoing struggle for equal rights for LGBT individuals — a

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[82] *See supra* note 46.

[83] *See* 133 S. Ct. at 2710 (Scalia, J., dissenting) ("[T]he majority arms well every challenger to a state law restricting marriage to its traditional definition. . . . The majority's limiting assurance will be meaningless . . . .").

[84] *See* Laurence H. Tribe, *Structural Due Process*, 10 HARV. C.R.-C.L. L. REV. 269, 308–09 (1975) (explaining how a new, more tolerant moral consensus may emerge as courts permit more and more individual dissenters to deviate from a previously rigid rule); *see also* Heather K. Gerken, Lecture, Windsor*'s Mad Genius: The Interlocking Gears of Rights and Structure*, 95 B.U. L. REV. 587 (2015) (praising *Windsor* for "clearing the channels of political change," *id.* at 600 (quoting JOHN HART ELY, DEMOCRACY AND DISTRUST 105 (1980)), by striking down the Defense of Marriage Act and giving full federal recognition to same-sex marriages, *id.* at 601–02).

[85] *See, e.g.*, Baskin v. Bogan, 766 F.3d 648 (7th Cir. 2014); Bostic v. Schaefer, 760 F.3d 352 (4th Cir. 2014).

[86] *See, e.g.*, Religious Freedom and Marriage Fairness Act, 2013 Ill. Legis. Serv. P.A. 98-597 (West).

struggle that will have to be waged not just in the courts but in regulatory bodies, legislatures, and popular lawmaking through initiatives and referenda. The doctrine of equal dignity signals the beginning of the end for discrimination on the basis of sexual orientation in areas like employment and housing, which remains legal in many states and has yet to be expressly banned in federal legislation. The Equal Employment Opportunity Commission (EEOC) has recently ruled that federal laws banning gender discrimination in employment should be understood to ban discrimination based on sexual orientation as well,[87] but a future EEOC might rule otherwise, and new federal legislation making such a ban explicit would clearly help to secure that principle as an enduring part of our national law. Such legislation might also be needed to give fuller meaning to the principle of equal dignity for women, who remain the too-often forgotten half of the human equation.

The constitutional principle of equal dignity also gives the lie to public officials who discriminate against LGBT individuals, like the Kentucky county clerk who defied a federal court order by refusing to issue any marriage licenses at all unless and until she is permitted, in accord with her religious convictions, to issue them only to opposite-sex couples.[88] As the *Obergefell* majority makes clear, the First Amendment must protect the rights of such individuals, even when they are agents of government, to *voice* their personal objections — this, too, is an essential part of the conversation — but the doctrine of equal dignity prohibits them from *acting on* those objections, particularly in their official capacities, in a way that demeans or subordinates LGBT individuals and their families by preventing them from giving legal force to their marriage vows.

But the doctrine of equal dignity, much as it protects same-sex couples from discrimination, does not, as Justice Alito suggested, amount to a "new orthodoxy."[89] Like the right affirmed in *Barnette*, *Obergefell*'s promise extends beyond same-sex couples to ensure that *all* individuals are protected against the specter of coerced conformity. Thus, much as I admired it otherwise, Justice Kennedy's opinion left me with one major pang of disappointment for the degree to which it privileged marriage as an institution that it described as essential to human flourishing — and as the only viable antidote to a life of lonely yearning. Many scholars and activists, Nancy Polikoff perhaps fore-

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[87] *See* Complainant v. Foxx, No. 0120133080, 2015 WL 4397641 (E.E.O.C. July 15, 2015).

[88] *See generally* Alan Blinder & Richard Pérez-Peña, *Kim Davis, Released from Kentucky Jail, Won't Say If She Will Keep Defying Court*, N.Y. TIMES (Sept. 8, 2015), http://www.nytimes.com/2015/09/09/us/kim-davis-same-sex-marriage.html.

[89] *Obergefell*, 135 S. Ct. at 2642 (Alito, J., dissenting).

most among them,[90] have cautioned against the fight for marriage equality as a surrender to a crabbed vision of the diverse ways in which individuals can build their lives and relationships. While Justice Kennedy's final rhetorical flourish, suggesting that unmarried individuals are "condemned to live in loneliness,"[91] may seem to give comfort to this enemy, I am heartened by the knowledge that the Court *learns* as well as *teaches*. The right to marry the person of one's choice is nowhere mentioned in the Constitution. Nor is the right *not* to marry. Yet the Supreme Court as early as 1971, in *Boddie v. Connecticut*,[92] in an opinion written by Justice Harlan (the author of the *Poe v. Ullman* dissent that Yoshino rightly identifies as an important building block for *Obergefell*[93]), recognized a right to dissolve a marriage when it held unconstitutional a state's insistence on limiting that right to those who could afford to pay a filing fee for the privilege of obtaining a divorce.[94] The *Boddie* opinion, unlike *Obergefell*, spoke only of the right not to be deprived of liberty without due process of law and did not rely at all on equal protection, but it clearly drew on ideas from both of those Fourteenth Amendment strands, just as the Court did decades earlier in *Skinner v. Oklahoma ex rel. Williamson*[95] in 1942 and, of course, in *Loving v. Virginia*[96] in 1967.

Such precedents would be difficult to cabin in any principled way that does not encompass a *right to remain unmarried* without suffering penalties for that choice. And while selective exclusion from marriage as an institution for those who desire to share in its rights and responsibilities deeply harms their dignity, it would be wrong to equate the Court's recognition of that hurtful reality with a view that demeans those choosing other forms of intimate companionship — or choosing to live without the solace of any close companionship at all. To penalize individuals for living either alone or in intimate nonmarital arrangements in the name of honoring and encouraging marriage is akin to denying same-sex couples the right to marry in the name of honoring and encouraging marriage by opposite-sex couples — a justification that Justice Kennedy's *Obergefell* opinion rightly repudiated. *Nei-*

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[90] *See* NANCY D. POLIKOFF, BEYOND (STRAIGHT AND GAY) MARRIAGE: VALUING ALL FAMILIES UNDER THE LAW 84 (2008) ("Advocating marriage for same-sex couples is a sensible way to champion equal civil rights for gay men and lesbians. Unfortunately, it is not a sensible approach toward achieving just outcomes for the wide range of family structures in which LGBT people, as well as many others, live.").

[91] *Obergefell*, 135 S. Ct. at 2608.

[92] 401 U.S. 371 (1971).

[93] Yoshino, *supra* note 3, at 163–64 (citing Poe v. Ullman, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting)).

[94] *Boddie*, 401 U.S. at 374.

[95] 316 U.S. 535 (1942).

[96] 388 U.S. 1 (1967).

ther limiting marriage to opposite-sex couples *nor* excluding the unmarried from the circle of those whose autonomy the law respects is consistent with the commitment to equal dignity that lies at the heart of *Obergefell*. Thus, while Justice Kennedy may have displayed a distressing marriage myopia in parts of his *Obergefell* opinion, that opinion is otherwise farsighted and fully capable of expanding our understanding of the Constitution to protect new freedoms as we come to appreciate them.

CONCLUSION

Justice Alito, dissenting in *Obergefell*, complains that the majority's position enables "those who cling to old beliefs . . . to whisper their thoughts in the recesses of their homes" but condemns them to "risk being labeled as bigots and treated as such by governments, employers and schools" if they "repeat those views in public."[97] As a matter of constitutional *law*, he is surely wrong. But even as a matter of constitutional *culture*, everything he says could equally have been said by those whose "old beliefs" told them to exclude African Americans from their lunch counters or to refuse to bake cakes for the weddings of interracial couples, not to mention those county clerks whose religious convictions supposedly prevented them from granting such couples marriage licenses. The great advance of *Obergefell* is to have pointed the way forward for resolving these remaining conflicts by creating a legal and social environment in which dignity can proudly speak its name.[98]

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[97] *Obergefell*, 135 S. Ct. at 2642–43 (Alito, J., dissenting).

[98] *Cf.* Laurence H. Tribe, Essay, Lawrence v. Texas*: The "Fundamental Right" That Dare Not Speak Its Name*, 117 HARV. L. REV. 1893, 1895 (2004) (situating *Lawrence* within "the larger project of elaborating, organizing, and bringing to maturity the Constitution's elusive but unquestionably central protections of liberty, equality, and — underlying both — respect for human dignity").