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-

[*] Chief Justice Earl Warren Professor of Constitutional Law, New York University School of Law. I gratefully acknowledge receiving financial support from the Filomen D'Agostino and Max E. Greenberg Research Fund. I thank Perri Ravon and Annmarie Zell for their research assistance and Professor Reva Siegel for her comments.

[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.