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Ordered Liberty After *Dobbs*

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Ordered Liberty After *Dobbs*

by

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I. Introduction

“I heard the roar of a wave that could drown the whole world.” These lines from Bob Dylan’s prophetic “A Hard Rain’s A-Gonna Fall” express what we heard in Justice Alito’s majority opinion in *Dobbs v. Jackson Women’s Health Organization*, which overruled both *Roe v. Wade* and *Planned Parenthood of Southeastern Pennsylvania v. Casey*¹: the roar of a wave that could drown the whole world of substantive due process liberties protecting personal autonomy, bodily integrity, familial relationships (including marriage), sexuality, and reproduction. Put another way, *Dobbs* may represent “the second death” of substantive due process.² The first death was in 1937 with *West Coast Hotel v. Parrish*,³ decided during the New Deal, which repudiated the *Lochner* era’s protection of economic liberties under the Due Process Clause (“DPC”).⁴ Nonetheless, some cases from the *Lochner* era—*Meyer v. Nebraska* and *Pierce v.*

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** The Honorable Paul J. Liacos Professor of Law, Boston University School of Law. This article incorporates and expands the analysis of a two-page piece, James E. Fleming, *How Justice Alito’s Hidebound Conservatism in Dobbs Shreds the Fabric of Ordered Liberty*, CTLA FORUM (Fall 2022) (a magazine published by the Connecticut Trial Lawyers Association). It also draws from the analysis of a book written on the eve of *Dobbs*—James E. Fleming, *Constructing Basic Liberties: A Defense of Substantive Due Process* (2022)—in analyzing ordered liberty after *Dobbs*.

¹ *Dobbs v. Jackson Women’s Health Org. et al*, 597 U.S. __ (2022), 142 S. Ct. 2228, 2242 (2022) (overruling *Roe v. Wade*, 410 U.S. 113 (1973), *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992)).

² For the idea of a “second death” of substantive due process, see JAMES E. FLEMING, *CONSTRUCTING BASIC LIBERTIES: A DEFENSE OF SUBSTANTIVE DUE PROCESS 2* (2022).

³ 300 U.S. 379 (1937).

⁴ *Lochner v. New York*, 198 U.S. 45 (1905).

*Society of Sisters*⁵—survived as building blocks for the framework of substantive due process liberties touching on family life. They are familiar texts for family law scholars, teachers, and lawyers. Indeed, the *Dobbs* majority cited to those cases while contending that they lent no support to *Roe* and *Casey*.⁶

This Essay explores the implications of *Dobbs* for the future of substantive due process—a topic that seems apt and urgent for a symposium on the intersection of constitutional law and family law. We situate *Dobbs* in the context of prior battles on the Court over whether “liberty” under the DPC includes substantive rights at all and, if it does, what is the proper interpretive approach to deciding the contours of such “liberty.” As a framing device, we will refer to two competing approaches as “the party of Harlan or *Casey*” versus “the party of *Glucksberg*.” In *Dobbs*, the dissent co-authored by Justices Breyer, Sotomayor, and Kagan represents the party of Harlan, while Justice Alito’s majority opinion reflects the party of *Glucksberg*.

By “the party of Harlan,” we refer to those who embrace Justice Harlan’s famous articulation of how to determine the scope of due process “liberty” in his dissent in *Poe v. Ullman*,⁷ in which the Court dismissed—for lack of standing—a challenge to the Connecticut birth control statute that the Court subsequently held unconstitutional in *Griswold v. Connecticut*.⁸ Harlan explained, “Due process has not been reduced to any formula,” and its content “cannot be determined by reference to any code.”⁹ As we elaborate below, Harlan argued that the Court’s decisions about due process liberty represent “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.”¹⁰ Examining “history” and “tradition” was important to determining that balance of ordered liberty, but

⁵ *Meyer v. Nebraska*, 262 U.S. 390 (1923); *Pierce v. Soc’y of Sisters*, 268 U.S. 510 (1925). A third case typically cited with these two is *Prince v. Massachusetts*, 321 U.S. 158 (1944), decided after the repudiation of *Lochner*, and frequently invoked for its statement that there is a “private realm of family life which the state cannot enter.” *Prince*, 321 U.S. at 166-67.

⁶ 142 S. Ct. at 2257, 2268.

⁷ *Poe v. Ullman*, 367 U.S. 497, 542-43 (1961) (Harlan, J., dissenting).

⁸ 381 U.S. 479 (1965).

⁹ *Poe*, 367 U.S. at 542-43 (Harlan, J., dissenting).

¹⁰ *Id.* at 542.

Harlan made clear that elaborating the “rational continuum” of ordered liberty had “regard to what history teaches are the traditions from which [this country] developed *as well as the traditions from which it broke,*” in short, “that tradition is a living thing.”¹¹

In 1977, Justice Powell favorably enlisted Justice Harlan’s approach to deciding what rights are “deeply rooted in this Nation’s history and tradition” in *Moore v. City of East Cleveland* in justifying why East Cleveland’s zoning ordinance sliced too deeply into the family.¹² The *Casey* joint opinion also applied Justice Harlan’s approach,¹³ as did the majority in *Obergefell v. Hodges*, (in an opinion written by Justice Kennedy), which held that the right to marry “is a fundamental right inherent in the liberty of the person” and that, under both the DPC and Equal Protection Clause, same-sex couples “may not be deprived of that right and that liberty.”¹⁴ The notion that tradition is a “living thing” resonates in *Obergefell*’s language about evolving understandings of the Constitution’s “promise” of “liberty.”¹⁵ The *Dobbs* dissenters exemplify this approach when they explain that, rather than freezing the understanding of liberty to whether “those living in 1868”—when the Fourteenth Amendment was ratified—would recognize the claim, “the sphere of protected liberty has expanded, bringing in individuals formerly excluded.”¹⁶

By “the party of *Glucksberg*,” we refer to the narrower approach that some conservative justices have taken to determining the scope of “liberty” under the DPC set out in *Washington v. Glucksberg*, in which Chief Justice Rehnquist (writing for the majority) rejected Justice Souter’s appeal to Justice Harlan’s methodology. Instead, he stated that the Court’s “established method” of substantive due process analysis had two “primary features”: (1) the DPC protects only “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’”; and (2) “a ‘careful description’ of the asserted

¹¹ *Id.* (emphasis added).

¹² *Moore v. City of East Cleveland*, 431 U.S. 494, 503 (1977).

¹³ *Casey*, 505 U.S. at 848-50.

¹⁴ *Obergefell v. Hodges*, 576 U.S. 644, 675 (2015).

¹⁵ *Id.* at 651 (“The Constitution promises liberty to all within its reach”).

¹⁶ *Dobbs*, 142 S. Ct. at 2329 (Breyer, Sotomayor, and Kagan, JJ., dissenting).

fundamental liberty interest.”¹⁷ Applying that approach, the majority held that Washington’s prohibition of “physician-assisted suicide” did not violate the Fourteenth Amendment because there is no “specifically protected” liberty under the DPC to “commit suicide” or have assistance in doing so.¹⁸ Similarly narrow approaches to the DPC that focus on concrete historical practices before and as of 1868 appeared in Justice Scalia’s pre-*Glucksberg* plurality opinion in *Michael H. v. Gerald D.*¹⁹ and in his dissent in *Casey*.²⁰ Notably, Chief Justice Roberts’s dissent in *Obergefell* insisted that *Glucksberg* should have been the proper approach, under which there was no basis for the majority’s holding.²¹ Indeed, Roberts protested that the *Obergefell* majority opinion “effectively overrules” *Glucksberg*, which he called the “leading modern case” interpreting the Due Process Clause.²²

In *Dobbs*, Justice Alito repeatedly cites *Glucksberg* as the proper approach to determine what rights are protected under the DPC and asserts that, under that test, a right to abortion is not within the scope of “the Nation’s scheme of ordered liberty.”²³ In 1868, the majority repeatedly declares, there was no such right; that should settle the matter. In this Essay, we argue that *Glucksberg* is the “leading modern case” and the proper approach only for justices who oppose and wish to eliminate the expansion of substantive due process rights. In fact, none of the decisions in the past century that has protected a basic personal liberty under the Due Process Clause would have come out as it did had the Court applied *Glucksberg*’s framework.²⁴

The *Dobbs* dissenters recognize this when they observe that, if the correct test is whether the framers of the Fourteenth Amendment recognized a particular right in 1868, many cherished liberties would fail the test.²⁵ They point out another failing of the majority’s “core legal postulate” that “we in the 21st cen-

¹⁷ *Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997).

¹⁸ *Id.* at 728.

¹⁹ *Michael H. v. Gerald D.*, 491 U.S. 110 (1989).

²⁰ *Casey*, 505 U.S. at 981-84 (Scalia, J., concurring in the judgment in part and dissenting in part).

²¹ *Obergefell*, 576 U.S. at 698-99 (Roberts, C.J., dissenting).

²² *Id.* at 702.

²³ *Dobbs*, 142 S. Ct. at 2246.

²⁴ For this analysis, we draw on FLEMING, *supra* note 2, at 38.

²⁵ *Dobbs*, 142 S. Ct. at 2327, 2329-30.

tury must read the Fourteenth Amendment just as its ratifiers did”: “the ratifiers—both in 1868 and when the original Constitution was approved in 1788—did not understand women as full members of the community embraced by the phrase ‘We the People.’”²⁶ As they powerfully explained, *Roe* and *Casey* were “part of the same constitutional fabric” as these other precedents protecting basic liberties. They argued for the *Casey* view, not the *Glucksberg* view, as the best account of our practice of substantive due process. The dissenters invoke Justice Harlan’s language about striking the “right balance,” and further emphasize that “applications of liberty and equality can evolve while remaining grounded in constitutional principles, constitutional history, and constitutional precedents.”²⁷

In Part II, we first offer a brief account of substantive due process (“SDP”) and of the basic liberties that the modern practice of substantive due process has protected—at least, prior to *Dobbs*. We elaborate two contrasting approaches to this set of basic liberties, one (following *Glucksberg*) that regards them as the unprincipled result of “rogue” judges reading their own views into the Constitution and another (following *Casey* and Harlan) that views this set of liberties as resulting from justices’ exercise of reasoned judgment.

Then in Part III we address an often-vexing question of importance to family law lawyers and teachers: what is the standard of review for cases about substantive due process liberty? Textbook accounts often suggest that a fundamental right triggers a strict scrutiny test, in which the government must demonstrate a compelling state interest and no less restrictive alternative. Some of the fiercest critics of SDP liberty, such as Justice Scalia, have insisted that the Court must use either strict scrutiny if a fundamental right is implicated or a deferential, rational basis test if one is not.²⁸ They have done so, generally, to curb recognition of protected “liberty” under the DPC. We argue that the Court has not in fact applied such a rigid two-tier framework. Indeed, some family law scholars have recognized that, in leading due process liberty cases implicating individual and family privacy, the Court has “side-stepped strict scrutiny in favor of a less determinate,

²⁶ *Id.* at 2324-25.

²⁷ *Id.* at 2326-27.

²⁸ *Lawrence v. Texas*, 539 U.S. 558, 593-94 (2003) (Scalia, J., dissenting).

indeterminate approach that would leave room for constitutional validation of unconventional family bonds” (as in *Lawrence v. Texas*’s protection of same-sex sexual intimacy).²⁹ This approach rejects not only the insistence on a rigid, two-tier approach, but also the narrower focus of Justice Scalia and others on defining the rights at stake in an “excessively specific way.”³⁰ Rejecting this approach, *Dobbs* first overrules *Roe* and *Casey* with the majority’s narrow focus on historical practices, and then declares the lower tier the proper approach for any future challenges to restrictive abortion laws: such laws enjoy a “strong presumption of validity” and must be sustained if there is “any rational basis” for a legislature thinking that they “serve legitimate state interests” (which the majority defines expansively).³¹

We conclude in Part IV with some thoughts about the future of SDP and strategies for liberals and progressives concerned about the protection of the “fabric” of constitutional liberty going forward. We situate our reflections, as of 2023, in the context of family law scholar David Meyer’s earlier reflections on the likely future of “the constitutionalization of family law,” including its possible “deconstitutionalization.”³² Meyer wrote in 2008, in the wake of the Court’s robust reaffirmation of SDP first in *Troxel v. Granville* and then in *Lawrence* as the issue of civil marriage equality for same-sex couples was percolating. How does the landscape look now, in the wake of *Obergefell* and *Dobbs* and their diametrically contrasting approaches to “liberty” under the Due Process Clause?

II. Substantive Due Process and the Competing Approaches in *Dobbs*

What is substantive due process? The DPC provides: “Nor shall any State deprive any person of life, liberty, or property without due process of law.”³³ Two fundamentally different readings of the Clause frame the current debate: One reading empha-

²⁹ David D. Meyer, *The Constitutionalization of Family Law*, 42 FAM. L.Q. 529, 551 (2008).

³⁰ *Id.* at 550.

³¹ *Dobbs*, 142 S. Ct. at 2284.

³² Meyer, *supra* note 29, at 559-72.

³³ CONST. amend. XIV, § 1.

sizes the word “process.” The other reading stresses “liberty” as well as “process.” Substantive due process involves interpreting the commitment to “liberty” in the DPC to protect basic liberties or fundamental rights: those essential to the scheme of “ordered liberty” in our constitutional democracy.³⁴

What basic liberties has the modern practice of substantive due process protected? Imagine that you are a constitutional archaeologist who digs up the following bones and shards of a constitutional culture:³⁵

1. liberty of conscience and freedom of thought;
2. freedom of association, including both expressive association and intimate association, whatever one’s sexual orientation;
3. the right to live with one’s family, whether nuclear or extended;
4. the right to travel or relocate;
5. the right to marry, whatever the gender of one’s partner;
6. the right to decide whether to bear or beget children;
7. the right to direct the education and rearing of children; and
8. the right to exercise dominion over one’s body, including the right to bodily integrity and ultimately the right to die (at least to the extent of the right to refuse unwanted medical treatment).

The challenge that you face is to decide whether these bones and shards fit together into, and are justifiable within, a coherent structure.

There are two radically different views concerning this list. The first was Justice Scalia’s view—and it is reflected in the *Dobbs* majority opinion—that the list is a subjective, boundless product of rogue judges reading their own moral predilections into the Constitution under the guise of interpreting it.³⁶ But according to the competing view, this list represents what *Casey*,

³⁴ The phrase “ordered liberty” comes from *Palko v. Connecticut*, 302 U.S. 319, 325 (1937).

³⁵ The explication of SDP offered in this Part draws on FLEMING, *supra* note 2, at 34-44.

³⁶ *Casey*, 505 U.S. at 995-96 (Scalia, J., concurring in the judgment in part and dissenting in part); *Lawrence*, 539 U.S. at 589-91 (Scalia, J., dissenting); *Obergefell*, 576 U.S. at 708-11 (Roberts, C.J., dissenting).

following Justice Harlan, called a “rational continuum” of ordered liberty stemming from “reasoned judgment” concerning individual rights to make certain unusually important decisions fundamentally affecting their identity, destiny, or way of life—without compulsion by the government.³⁷ It protects the kinds of decisions that hardly anyone, conservative or liberal, wants the government to tell them how to make. On this second view, this line of cases has been built out over time through ordinary common law constitutional interpretation: reasoning by analogy from one case to the next on the basis of experience, new insights, and moral learning, and making normative judgments about whether to extend rights previously recognized based on the basic reasons we protected those rights in the first place. We defend the second view.

In substantive due process, the conflict between these two views is encapsulated in the battle between the *Glucksberg* and the *Casey* frameworks for the due process inquiry. In *Dobbs*, the new conservative majority, including three nominees of President Donald Trump, held that the right to abortion is not “deeply rooted in this nation’s history and tradition” or essential to “ordered liberty.”³⁸

What is tradition? We can distinguish between two competing conceptions of tradition in the due process inquiry: tradition as historical practices versus tradition as aspirational principles. *Dobbs* conceives “our nation’s history and tradition” as historical practices. The SDP line of cases protecting basic liberties from *Meyer* and *Pierce* in the nineteen twenties to *Roe*, *Casey*, and *Obergefell* instead conceives traditions as a “living thing” or aspirational principles.³⁹

Nevertheless, the Court in *Dobbs* ruled that *Washington v. Glucksberg* provides the proper test for deciding what basic liberties the Due Process Clause protects: only those specific liberties protected in the concrete historical practices as of 1868, when the Fourteenth Amendment was adopted.⁴⁰ *Glucksberg* rejected the competing approach of *Casey*, which had interpreted the con-

³⁷ *Casey*, 505 U.S. at 848-50.

³⁸ *Dobbs*, 142 S. Ct. at 2242-43.

³⁹ For development of this distinction and argument, see FLEMING, *supra* note 2, at 28-32.

⁴⁰ *Dobbs* 142 S. Ct. at 2242, 2246-48.

stitutional commitment to liberty and traditions instead as abstract aspirational principles whose meaning is built out over time: principles to which we as a people aspire, and for which we as a people stand, whether or not we have fully realized them in our concrete historical practices. For example, “all persons are created equal” is part of our tradition, despite concrete historical practices of inequality, including slavery, Jim Crow, and gender discrimination. Therefore, being faithful to the Fourteenth Amendment requires criticizing historical practices because of commitments to aspirational principles of liberty and equality, as many scholars of race and gender have argued.⁴¹

In dissent in *Obergefell*, which had adopted the *Casey* framework in extending the right to marry to same-sex couples, Chief Justice Roberts protested that the case “effectively overrules” *Glucksberg*, which he called the “leading modern case” interpreting the Due Process Clause.⁴² But, as elaborated by one of us (Fleming) elsewhere, *Glucksberg* is the leading modern case only for justices who oppose and wish to shut down the practice of substantive due process. Indeed, *Obergefell* is inconsistent with *Glucksberg*.⁴³ So are *Lawrence*, which extended the right to sexual intimacy to gays and lesbians, and *Griswold*, which recognized the right to use contraceptives. In fact, to put it bluntly: every decision in the past century that has protected a basic personal liberty under the Due Process Clause is inconsistent with *Glucksberg*. None would have come out as it did had the Court applied *Glucksberg*’s framework. In short, none protected rights as a matter of vindicating longstanding, concrete historical practices as the *Glucksberg* framework conceives them. Instead, the decisions stemmed from judgments that our commitment to liberty, as an abstract principle, requires protecting rights to make certain decisions fundamentally affecting one’s identity, destiny, or way of life (the *Casey* framework).⁴⁴

⁴¹ See, e.g., Peggy Cooper Davis, *The Reconstruction Amendments Matter When Construing Abortion Rights*, WASH. POST (Made by History) (May 3, 2022); Michele Goodwin, *No, Justice Alito, Reproductive Justice Is in the Constitution*, N.Y. TIMES (Jun. 26, 2022).

⁴² *Obergefell*, 576 U.S. at 702 (Roberts, J., dissenting).

⁴³ FLEMING, *supra* note 2, at 38.

⁴⁴ See *id.* at 35-37.

Before *Dobbs*, *Glucksberg* in 1997 provided a method of damage control for conservatives who opposed these cases but did not have the votes to overrule them. So they had to settle for going “this far and no further.” Today, conservative justices have the votes to overrule these cases, even though Alito’s majority opinion in *Dobbs* states that “nothing in this opinion should be understood to cast doubt on precedents that do not concern abortion.”⁴⁵

Senator Lindsey Graham praised Alito’s opinion in *Dobbs* for “setting the right tone” by assuring that it would not endanger other rights.⁴⁶ But Justice Thomas’s concurring opinion said the quiet part out loud: if the Court applies Justice Alito’s approach, it will conclude that all of the due process decisions protecting personal autonomy and bodily integrity—including *Griswold*, *Lawrence*, and *Obergefell*—were “demonstrably erroneous” and should be overruled.⁴⁷ In truth, the *Glucksberg* test would find that contraception, same-sex intimacy, and same-sex marriage—not to mention interracial marriage, which Thomas rather conveniently overlooked—are not protected liberties for the same reason that abortion is not: none of those rights, any more than abortion, was protected specifically in the concrete historical practices as of 1868.

Moreover, as recently as 2020, Alito joined Thomas’s statement in Kentucky clerk Kim Davis’s case calling for overruling *Obergefell*.⁴⁸ If this Court does not overrule precedents like *Obergefell*, *Lawrence*, and *Griswold*, it will be because of political judgments (like Senator Graham’s) about Republican Party politics, not because of any principled legal framework.

The *Dobbs* dissenters rightly called out this “hypocrisy” and warned that *Roe* and *Casey* were “part of the same constitutional fabric” as these other precedents.⁴⁹ They argued for the *Casey* view, not the *Glucksberg* view, as the best account of our practice

⁴⁵ *Dobbs*, 142 S. Ct. at 2277-78, 2281.

⁴⁶ Brad Dress, *Graham: Alito “Set the Right Tone” in Roe Ruling by Arguing Same-Sex Marriage, Contraception not in Jeopardy*, The Hill (June 26, 2022, 1:15 PM ET), <https://thehill.com/homenews/sunday-talk-shows/3537502-graham-alito-set-the-right-tone-in-roe-ruling-by-arguing-same-sex-marriage-contraception-not-in-jeopardy/>.

⁴⁷ *Dobbs*, 142 S. Ct. at 2301 (Thomas, J., concurring).

⁴⁸ *Davis v. Ermold*, 592 U.S. __ (2020) (slip op. at 2, 4).

⁴⁹ *Dobbs*, 142 S. Ct. at 2319.

of substantive due process.⁵⁰ All of the prior cases protecting personal autonomy and bodily integrity have rejected the hide-bound historical practices framework of *Glucksberg* and *Dobbs* in favor of the abstract aspirational principles framework of *Casey* and *Obergefell*.

III. The Stringency of the Protection of Liberty Under the Due Process Clauses

We turn next to the question of the stringency of the protection of liberties under the Due Process Clauses.⁵¹ In constitutional law, it is commonplace to say that the Supreme Court applies absolutist “strict scrutiny” in protecting fundamental rights or liberties under the Due Process Clauses. Dissenting in *Lawrence*, Justice Scalia stated that, under the Due Process Clauses, if an asserted liberty is a “fundamental right,” it triggers “strict scrutiny” that almost automatically invalidates any statute restricting it. For strict scrutiny requires that the challenged statute, to be upheld, (1) must further a “compelling governmental interest” and (2) must be “necessary” or “narrowly tailored” to doing so. Scalia also wrote that if an asserted liberty is not a fundamental right, it is merely a “liberty interest” that triggers rational basis scrutiny that is so deferential that the Court all but automatically upholds the statute in question. For deferential rational basis scrutiny requires merely that the challenged statute, to be valid, (1) must further a “legitimate governmental interest” and (2) need only be “rationally related” to doing so.⁵² In attempting to limit the protection of substantive liberties under the Due Process Clauses, Scalia argued for a narrow approach to what constitutes a “fundamental right” and a broad approach to what constitutes a mere “liberty interest.”

Lawrence deviated from this regime. The Court did not hold that gays’ and lesbians’ right to autonomy was a fundamental right requiring strict scrutiny. Nor did it hold that their right was merely a liberty interest calling for highly deferential rational ba-

⁵⁰ *Id.* at 2317-24.

⁵¹ In this section, we draw upon JAMES E. FLEMING & LINDA C. MCCLAIN, *ORDERED LIBERTY: RIGHTS, RESPONSIBILITIES, AND VIRTUES* 237-72 (2013); FLEMING, *supra* note 2, at 45-69.

⁵² 539 U.S. at 593-94 (Scalia, J., dissenting).

sis scrutiny. Instead, the Court applied an intermediate standard—what is commonly called “rational basis scrutiny with bite”—and struck down the statute forbidding same-sex sexual conduct. Instead of deferring to the state’s proffered “legitimate governmental interest” in preserving traditional sexual morality, the Court (explicitly in *Romer v. Evans* (1996) and implicitly in *Lawrence*) put some bite into its scrutiny of the legitimacy of the end and found illegitimate “animosity” toward and a “bare desire to harm” a “politically unpopular group.”⁵³

Consequently, Scalia chastised the Court for not following the rigid two-tier framework that all but automatically decides rights questions one way or the other.⁵⁴ Many scholars and judges have questioned whether the Court’s actual practice has followed or should follow this framework.⁵⁵ Indeed, the only substantive due process case ever to recognize a “fundamental right” implicating “strict scrutiny”—requiring that the statute further a compelling governmental interest and be necessary to doing so—was *Roe*.⁵⁶ And those aspects of *Roe* were overruled in *Casey*, which adopted an “undue burden” test,⁵⁷ and of course *Dobbs* has now overruled both *Roe* and *Casey*.⁵⁷

Moreover, the leading due process cases protecting liberty and autonomy—from *Meyer* (1923) and *Pierce* (1925) through *Moore* (1977) on up through *Lawrence* (2003) and *Obergefell* (2015)—have not applied the framework that Scalia propounds: the Court has not recognized two rigidly-policed tiers of scrutiny, with strict scrutiny automatically invalidating laws and deferential rational basis scrutiny automatically upholding them. Instead, actual practice in the leading cases protecting liberties maps onto a continuum of ordered liberty, with several intermediate levels of review.⁵⁸ These tiers include the rational basis scrutiny “with

⁵³ *Romer v. Evans*, 517 U.S. 620, 632-34 (1996); *Lawrence*, 539 U.S. at 574; 539 U.S. at 580, 582-83 (O’Connor, J., concurring).

⁵⁴ 539 U.S. at 593-94 (Scalia, J., dissenting).

⁵⁵ Richard H. Fallon, J., *Strict Judicial Scrutiny*, 54 UCLA L. REV. 1267 (2007); Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 VAND. L. REV. 793 (2006). We argue along these lines in FLEMING & McCLAIN, *supra* note 51, at 237-72.

⁵⁶ *Roe*, 410 U.S. at 155-56.

⁵⁷ *Casey*, 505 U.S. at 851-53, 877.

⁵⁸ The following analysis draws upon our prior argument in FLEMING & McCLAIN, *supra* note 51, at 243-72; FLEMING, *supra* note 2, at 48-69.

bite” illustrated by *Lawrence*. Early cases like *Meyer* and *Pierce* reflect a form of review resembling that in *Lawrence*.

A form of intermediate scrutiny is also exemplified by *Moore*. *Moore* protected the right of an extended family to live together and invalidated an ordinance limiting occupancy of each dwelling unit to members of a single family, with “family” defined essentially as the nuclear family of parents and their children. *Moore* did not officially articulate intermediate scrutiny as the framework for Due Process analysis. Still, it formulated the test as: “[W]hen the government intrudes on choices concerning family living arrangements, this Court must examine carefully the importance of the governmental interests advanced and the extent to which they are served by the challenged regulation.”⁵⁹ Justice Powell added: “Of course, the family is not beyond regulation.”⁶⁰ Like *Moore*, many cases surrounding the legal regulation of the family (e.g., *Prince v. Massachusetts* (1944) and *Troxel v. Granville* (2000)) demonstrate the following two-step framework that amounts to a form of intermediate scrutiny:

1. Determine that the right in question—for example, the right to marry, the right to decide one’s family living arrangements, or the right to parental liberty—is fundamental.
2. Conclude that even though the right is fundamental, it does not entail that reasonable regulations are unconstitutional.⁶¹

Thus, the cases *protecting* substantive liberties reflect a continuum of judgmental responses, not a framework with two rigidly-policed tiers.⁶²

The cases that have applied Scalia’s framework have been the cases *refusing to recognize* asserted rights: *Bowers*, *Michael H.*, *Glucksberg*, and now *Dobbs*. In these cases, the Court was

⁵⁹ 431 U.S. 494, 499 (1977) (Powell, J., plurality opinion).

⁶⁰ *Id.*

⁶¹ See FLEMING & McCLAIN, *supra* note 51, at 247-50, 254-57, 263-65; FLEMING, *supra* note 2, at 53-54, 58-60, 64-65.

⁶² Compare Justice Stevens’s and Justice Marshall’s well-known analyses of actual practice under the Equal Protection Clause. See *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 451 (1985) (Stevens, J., concurring) (“continuum of judgmental responses”); *San Antonio v. Rodriguez*, 411 U.S. 1, 98 (1973) (Marshall, J., dissenting) (“spectrum of standards”).

attempting to narrow the protection of substantive liberties under the Due Process Clauses.

IV. The Future of Substantive Due Process

In concluding, we offer some thoughts about the future of substantive due process. We then offer a pep talk for dismayed liberals and progressives and end by providing some words of caution for jubilant conservatives.⁶³

A. *A Second Death of Substantive Due Process?*

Returning to the opening image of hearing the roar of a wave that could drown the whole world, we want to consider whether *Dobbs* represents a second death of substantive due process. Before *Dobbs*, reports of the second death of substantive due process had been greatly exaggerated. *Bowers* (1986) and *Michael H.* (1989) tried to be the second death of it by narrowing the DP inquiry after *Roe* (1973). But *Casey* (1992) revived it by broadening the DP inquiry. *Glucksberg* (1997) attempted to be the second death by narrowing the DP inquiry after *Casey*. But *Lawrence* (2003) and *Obergefell* (2015) thwarted *Glucksberg* by applying the *Casey* framework. *Dobbs* narrowed the DP inquiry back to the *Glucksberg* framework.

Only time will tell whether *Dobbs* is more like *Glucksberg*—taking a “this far and no further” approach to the line of substantive due process cases protecting personal liberties—or *West Coast Hotel*—and thus the second death of substantive due process, repudiating that entire line of cases, not just *Roe* and *Casey*.

Beyond *Dobbs*, what approach(es) might we expect the Court and, in particular, the two most recent justices, to take to interpreting the Due Process Clause generally? Are they likely to vote to overrule the substantive due process cases at the core of Justice Kennedy’s legacy such as *Lawrence* and *Obergefell*? At his initial confirmation hearings, Kavanaugh said that *Glucksberg* provides the proper framework for the due process inquiry.⁶⁴

⁶³ In this concluding section, we draw from FLEMING, *supra* note 2, at 222-28.

⁶⁴ At his confirmation hearings, then-Judge Kavanaugh said “I think all roads lead to the *Glucksberg* test.” *Kavanaugh Supreme Court Hearing*. CNN (Sept. 5, 2018), <http://www.cnn.com/TRANSCRIPTS/1809/05/cnr.08.html>.

And Barrett is a professed originalist who is viewed as a disciple of Scalia. On that basis, we might expect both to side with the dissenters' approach in *Obergefell* and against that of Kennedy in any future cases involving claims to basic liberties under the Due Process Clause. That certainly proved true in *Dobbs*.

Considering "the road ahead" for the constitutionalization of family law as it looked one decade after *Glucksberg*, David Meyer observed that critics of SDP liberty (including Chief Justice Rehnquist, author of the *Glucksberg* majority opinion) have "sometimes seemed willing to freeze the boundaries of constitutional protection where they are, saying, in effect, we will go 'this far, and no more;'" more ambitious critics, he noted, have considered "'deconstitutionalization' of the field," by "rolling back constitutional protection."⁶⁵ Those different roads of containment and reversal (even beyond *Roe* and *Casey*) remain pertinent in the wake of *Dobbs*.

For the time being, we can expect the Court, under the *Glucksberg* approach, not to extend any substantive due process precedents, by analogy, to cutting-edge claims of previously unrecognized rights. And even if the *Glucksberg* framework itself does not dictate overruling any of those precedents, it does entail draining them of any generative vitality in future cases that might provide occasions for extending them. For example, after *Obergefell* recognized the right of same-sex couples to marry, some states resisted its implications concerning the parenthood of same-sex spouses. In a per curiam order in *Pavan v. Smith* (2017), the Court reversed an Arkansas Supreme Court decision which had concluded that "*Obergefell* did not necessarily require the State to issue birth certificates listing the nonbiological mother as a parent when her same-sex spouse gives birth."⁶⁶ That stands to reason, since Kennedy's majority opinion in *Obergefell* emphasized extending the rights, responsibilities, and protections of marriage to same-sex couples and their children: "civil marriage on the same terms and conditions as opposite-sex couples."⁶⁷ His opinion even "expressly identified 'birth and death certificates'" as among those "rights, benefits, and respon-

⁶⁵ Meyer, *supra* note 29, at 559.

⁶⁶ Douglas NeJaime, *The Constitution of Parenthood*, 72 STAN. L. REV. 261, 317 (2020) (discussing *Pavan v. Smith*, 137 S. Ct. 2075 (2017)).

⁶⁷ *Obergefell*, 576 U.S. at 676.

sibilities.”⁶⁸ Kennedy was concerned that the state not deny equal respect to same-sex spouses (and their children) by denying them the protections of marriage, understood as a status and package of benefits.

Nonetheless, in *Pavan*, in a dissenting opinion in a Glucksbergian vein, Justice Gorsuch distinguished between *Obergefell*—which he said “‘addressed the question whether a State must recognize same-sex marriages’”—and the issue of parental recognition, to which he said “nothing in *Obergefell* spoke.”⁶⁹ Gorsuch seemed to accept Arkansas’s implausible characterization of its birth certificate law as a biology-based registration scheme, even though, under it, husbands with no biological connection to their wife’s child were listed as the father as long as they consented to the wife’s alternative insemination. Fortunately, Douglas NeJaime observes, the majority “made clear that *Obergefell* reaches questions of nonbiological parental recognition.”⁷⁰ Thomas and Alito joined Gorsuch’s dissent.⁷¹ But Roberts notably did not. Hopefully, this signals that he does not wish to revisit *Obergefell* or to resist its clear implications. It is unclear which way Kavanaugh or Barrett would have gone here,

⁶⁸ *Pavan*, 137 S. Ct. at 2078 (citing *Obergefell*, 576 U.S. at 670 [majority opinion]).

⁶⁹ *Id.* at 2079 (Gorsuch, J., dissenting, joined by Thomas, J., and Alito, J.).

⁷⁰ NeJaime, *supra* note 66, at 317.

⁷¹ Despite his dissent in *Pavan*, adopting a narrow view of *Obergefell*, Justice Gorsuch took a broad view of Title VII’s prohibition of discrimination on the basis of sex in his 6-3 majority opinion in *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731 (2020), interpreting it to prohibit discrimination on the basis of sexual orientation or gender identity. Gorsuch wrote: “[A]pplying protective laws to groups that were politically unpopular at the time of the law’s passage”—such as gay, lesbian, or transgender employees—“often may be seen as unexpected.” *Id.* at 1751. However, he continued, to refuse enforcement for that reason would “tilt the scales of justice in favor of the strong or popular and neglect the promise that all persons are entitled to the benefit of the law’s terms.” *Id.* This formulation seems to echo the opening words of Justice Kennedy’s opinion in *Obergefell*: “The Constitution promises liberty to all within its reach,” including same-sex couples seeking to marry. 576 U.S. at 651. We hasten to acknowledge that *Bostock* involved statutory interpretation, whereas *Obergefell* involved constitutional interpretation. Not surprisingly, Justices Thomas and Alito, who had joined Gorsuch’s dissent in *Pavan*, dissented from his majority opinion in *Bostock*.

but we reasonably might fear that they would have agreed with Gorsuch, Thomas, and Alito, as they did in *Dobbs*.

More generally, under the Glucksberg approach, even if the Supreme Court does not overrule precedents protecting the rights of same-sex couples to intimate association and to marry, we should not be surprised if today's Court "never extends the rights of gays and lesbians beyond where they are now."⁷² One reason for our prediction is the Roberts Court's increasingly robust protection of religious liberty in the face of competing constitutional and civil rights. Notably, in *Bostock v. Clayton County*, a significant LGBTQ victory, Justice Gorsuch added the caveat: "how these doctrines protecting religious liberty [both the First Amendment and RFRA] interact with Title VII are questions for future cases."⁷³

On the one hand, in a recent case involving a clash between the rights of same-sex couples and religious liberty, *Fulton v. City of Philadelphia* (2021), Justices Kavanaugh and Barrett joined Chief Justice Roberts—along with the three liberal justices—in a narrow opinion that rejected the arguments in concurrence by Justices Alito, Thomas, and Gorsuch that the Court should overrule *Employment Division, Department of Human Resources v. Smith* (1990).⁷⁴ Overruling *Smith* might have opened the door to broad religious exemptions, even from neutral and generally applicable laws. That was a relief, but, on the other hand, in *Fulton* the Court still did rule in favor of a Catholic social services agency that refused to work with same-sex couples who apply to take in foster children.⁷⁵ Hence, that case is consistent with the possibility that the Court will not extend the rights of LGBTQ

⁷² Adam Liptak, *How Brett Kavanaugh Would Transform the Supreme Court*, N.Y. TIMES, Sept. 3, 2018, at A1 (quoting Irv Gornstein), <https://www.nytimes.com/2018/09/02/us/politics/judge-kavanaugh-supreme-court-justices.html>.

⁷³ *Bostock*, 140 S. Ct. at 1754.

⁷⁴ 494 U.S. 872 (1990).

⁷⁵ *Fulton v. City of Philadelphia*, 593 U.S. ___, 141 S. Ct. 1868 (2021). Roberts's narrow opinion prompted Alito to write a "caustic," "disappointed" concurrence, joined by Thomas and Gorsuch, criticizing the Court for passing up the opportunity to overturn *Smith*. See Adam Liptak, *Supreme Court Backs Catholic Agency in Case on Gay Rights and Foster Care*, N.Y. TIMES, June 17, 2021, <https://www.nytimes.com/2021/06/17/us/supreme-court-gay-rights-foster-care.html?searchResultPosition=4>.

persons beyond where they are now. Speaking not only of the *Fulton* decision but more generally of the 2020–21 term, Michael C. Dorf said: “More than in most recent terms, Chief Justice Roberts was able to present a credible picture of a nonpartisan court, with Justices Breyer, Kagan, Kavanaugh and Barrett in particular seeming to go out of their way to forge centrist alliances.”⁷⁶ “However,” Dorf continued, “the justices appear to have reached a truce rather than a lasting peace. With high-profile abortion and gun control cases already on the docket for the next term, the ideological disagreements will likely re-emerge sooner rather than later.”⁷⁷ Indeed, this occurred with a vengeance in the 2021-22 term.

B. *Pep Talk for Dismayed Liberals: Or, What to Do Next?*

For liberals and progressives, things look really bleak. But instead of quoting Dante’s *Inferno*: “Abandon all hope, you who enter here,” we offer some more constructive thoughts about concrete actions liberals and progressives can take to make the best they can of a bad situation. First, we urge liberals finally to open their eyes and stop harboring “hollow hopes” (in Gerald Rosenberg’s famous formulation⁷⁸) that courts will protect their rights or pursue (or even enable) liberal or progressive change. They should turn more to legislatures and executives than to courts. Here we include not only the national legislature and executive but also state and local governments. For the foreseeable future, these are likely to be the best institutions through which liberals and progressives might effectively pursue justice.

It is worth revisiting Meyer’s reminder that state constitutions are a generative source of the “constitutionalization” of family law. Meyer pointed both to successful litigation invoking “state constitutional guarantees of equality or liberty to advance same-sex marriage,” and to “preemptive and reactionary” use of state constitutions to prevent such challenges and freeze “traditional understandings of marriage.”⁷⁹ He observed a “growing

⁷⁶ Adam Liptak, *The Supreme Court’s Newest Justices Produce Some Unexpected Results*, N.Y. TIMES, June 18, 2021, <https://www.nytimes.com/2021/06/18/us/politics/supreme-court-conservatives-liberals.html>.

⁷⁷ *Id.*

⁷⁸ GERALD N. ROSENBERG, *THE HOLLOW HOPE* (2d ed. 2008).

⁷⁹ Meyer, *supra* note 29, at 560-61.

assertiveness” by state courts to invoke state constitutions to protect “personal and family privacy” and “fill the vacuum” when federal constitutional protection fell short, as with *Bowers* and *Michael H.*⁸⁰ State constitutions and state law have similar generative potential today. For example, after *Dobbs*, Michigan, California, and Vermont amended their state constitutions to protect reproductive freedom.⁸¹ Also post-*Dobbs*, and in the wake of anti-abortion and anti-trans laws being enacted in other states, the Massachusetts legislature invoked rights under the state constitution in passing a law protecting persons’ access to reproductive health care and to gender-affirming care and the rights of medical professionals to provide that care.⁸²

Second, we encourage liberals and progressives to learn from and emulate what the conservatives did over the past two generations in resisting the Supreme Court decisions with which they vigorously disagreed. Pass laws that challenge or undermine objectionable Supreme Court holdings and provide occasions to narrow those holdings.

Third, liberals and progressives should learn to appreciate the virtues of federalism as a structural mechanism for accommodating diversity and pluralism in circumstances of disagreement. Relatedly, they should learn that federalism is also a mechanism for resistance to the national government by states that disagree with the party in control of the Presidency, Congress, and/or the Supreme Court. Just as conservatives have practiced culture war federalism, it is time for liberals and progressives to practice progressive federalism! Use the national government, when you have power there, to advance your substantive constitutional vision and political conception of justice. Use state governments, when you lack national power, to resist the national government. Many liberals and progressives learned to do this during the Trump administration. For example, some states and cities resisted the Trump administration’s harsh immigration policies through becoming sanctuary states or sanctuary cities, limiting their cooperation with the federal government in enforcing na-

⁸⁰ *Id.* at 561.

⁸¹ Mitch Smith and Ava Sasani, *Michigan, California, and Vermont Affirm Abortion Rights in Ballot Proposals*, N.Y. TIMES (Nov. 9, 2022).

⁸² See, e.g., An Act Expanding Protections for Reproductive and Gender-Affirming Care, Mass. Gen. Laws. Ch. 127 (2022).

tional immigration laws. At the interstate level, post-*Dobbs*, some states have invoked these earlier efforts in passing “safe harbor” laws to protect pregnant persons who travel from out of state and the health care providers who help them by limiting interstate cooperation with law enforcement efforts by states that criminalize abortion.⁸³

Fifth, liberals and progressives should turn to state courts as well as state legislatures to pursue constitutional justice. In 1977, Justice William Brennan published *State Constitutions and the Protection of Individual Rights*, reminding readers that state constitutions were a “font of individual liberties,” with their protections often extending beyond the U.S. Supreme Court’s interpretation of federal constitutional law.⁸⁴ Given the racist history surrounding federalism and the states’ rights tradition, liberals and progressives understandably have been wary of them. But the relative success of the LGBTQ rights movement in the states between *Bowers* (1986) and *Obergefell* (2015) is instructive. During this period, as noted above, this movement effectively used state courts together with state legislatures to secure such rights in circumstances of national disagreement, at a time when the prospects for victory in places like Vermont and Massachusetts were greater than in the U.S. Supreme Court or Congress.⁸⁵ In *Goodridge v. Department of Public Health*, in which the Supreme Judicial Court of Massachusetts held that same-sex couples had a right to marry under Massachusetts’s constitution, Chief Justice Margaret Marshall’s opinion echoed Justice Brennan on the vitality of state constitutions for protecting individual liberty: “The Massachusetts Constitution protects

⁸³ See, e.g., *id.*; Alejandra Caraballo et al, *Extradition in Post-Roe America*, __ CUNY L. REV. __, __ (forthcoming 2023) (describing limited success of “sanctuary cities” and “sanctuary states” (such as Washington State) and how Connecticut’s “safe harbor” abortion legislation used similar language to that of Washington State’s immigrant-protective legislation) (unpublished manuscript on file with authors).

⁸⁴ William J. Brennan, *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 491 (1977).

⁸⁵ For an informative account of the “brick by brick” efforts by LGBTQ advocates at the state level in Massachusetts, Vermont, California, and elsewhere, see NATHANIEL FRANK, *AWAKENING: HOW GAYS AND LESBIANS BROUGHT MARRIAGE EQUALITY TO AMERICA* (2017). Frank uses the term “brick by brick” to describe progress at the state level. *Id.* at 193.

matters of personal liberty against government incursion as zealously, and often more so, than does the Federal Constitution, even where both Constitutions employ essentially the same language.”⁸⁶ Proponents of LGBTQ rights assiduously avoided federal court initially, and were prudent to do so. For example, only after a mostly successful run in state courts and state legislatures for over a decade did they take the issue of marriage equality to the U.S. Supreme Court in *Obergefell*. Indeed, by the time of *Obergefell*, thirty-seven states already had recognized same-sex marriage.⁸⁷ At a time when the current Supreme Court seems unlikely greatly to expand parental “liberty” or the definition of legal parenthood, legal scholars (including NeJaime and Courtney Joslin), LGBTQ advocates, and family groups have successfully worked with several state legislatures to adopt comprehensive law reform modeled on the Uniform Parentage Act of 2017, which provides numerous pathways to parenthood beyond biology and marriage.⁸⁸

As an example of state courts protecting reproductive liberty after *Dobbs*, the Supreme Court of South Carolina recently held that the right to privacy guaranteed in South Carolina’s constitution includes the decision to terminate a pregnancy and that South Carolina’s Fetal Heartbeat and Protection from Abortion Act was an “unreasonable restriction” upon “a woman’s right to privacy.”⁸⁹ Writing for the majority in *Planned Parenthood South Atlantic v. South Carolina*, Justice Kaye G. Hearn pointedly noted that, because *Dobbs* criticized *Roe v. Wade* for resting on a right to “privacy” that (Justice Alito wrote) nowhere appeared in

⁸⁶ 798 N.E.2d 941, 959 (2003).

⁸⁷ See, e.g., Governing: State and Local Government News and Analysis, *State Same-Sex Marriage State Laws Map: Thirty-Seven States Had Legalized Same-Sex Marriage Prior to the Supreme Court Ruling* (Mar. 25, 2013), <https://www.governing.com/gov-data/same-sex-marriage-civil-unions-doma-laws-by-state.html>.

⁸⁸ See, e.g., An Act Concerning the Implementation and Adoption of the Connecticut Parentage Act, Public Act No. 21-15; see also *Uniform Parentage Act of 2017*, UNIFORM LAW COMMISSION, <https://www.uniformlaws.org/committees/community-home?CommunityKey=C4f37d2d-4d20-4be0-8256-22dd73af068f> (enactment map showing enactment in seven states and proposed legislation in three).

⁸⁹ *Planned Parenthood South Atlantic v. South Carolina*, Op. No. 28127 (S. Ct. S. Car. Jan. 25, 2023) (slip op. at 5).

the text of the U.S. Constitution, *Dobbs* “does not control, or even shed light on our decision today,” because of the express inclusion of the right of privacy in the South Carolina Constitution.⁹⁰ The high court found it instructive that in states with similar explicit constitutional guarantees of privacy, state courts that had considered the question of whether such privacy included the decision to terminate a pregnancy had answered in the affirmative. The court also stated that, because state courts were construing their own state constitutions, the “sea change” wrought by *Dobbs* in “federal abortion jurisprudence” did not invalidate these state court decisions.⁹¹

Sixth, when litigation in federal courts is unavoidable, liberals and progressives should pursue minimalist strategies seeking narrow rulings. For example, in litigating cases, they may need to be prepared to attempt to minimize the maximum damage the most conservative justices can do by making second-best arguments for narrow resolutions that may appeal to Chief Justice Roberts and, on occasion, Justice Kavanaugh.

Finally, liberals and progressives should develop social movements that are committed to playing the long game and promoting the gradual transformation of the constitutional culture in their direction (e.g., doing for reproductive freedom and LGBTQ rights what the conservatives did for the individual right to bear arms). Notably, the Women’s Health Protection Act, passed in the House but stalled in the Senate, incorporated the concept of “reproductive justice,” suggesting the influence of the reproductive justice movement pioneered by Black feminists.⁹² Post-*Dobbs*, another important example is “health justice,” which is both a framework for health law and policy and a social movement for transformational change to address health inequities.⁹³

⁹⁰ *Id.* at 11.

⁹¹ *Id.* at 15-18. To be sure, courts, legislatures, or voters may also contract such rights. The South Carolina Supreme Court observed that, after the Tennessee Supreme Court held that its state constitutional right to privacy included protection of abortion rights, a voter referendum amended the Tennessee Constitution to state that that it *not* do so. *Id.* at 17.

⁹² Women’s Health Protection Act of 2022, S. 4132.

⁹³ Lindsay F. Wiley et al., *What Is Health Justice?*, __ J. L. MED. & ETHICS __ (forthcoming 2023).

C. *Words of Caution for Jubilant Conservatives*

Finally, we caution jubilant conservatives who hope the long-awaited conservative counterrevolution is nigh: “Be careful what you wish for.” For years, conservative judges and scholars have been calling for restoring the “Constitution in exile” or for “restoring the lost [libertarian] Constitution.”⁹⁴ Their wishes—for a Supreme Court restoration of the conservative Constitution that has been “in exile” since the New Deal liberal revolution in 1937—may be about to come true.

But beware that such a Court may come to live in infamy—an infamy that may surpass even that of its prior incarnation, the *Lochner* Court. In fulfilling such conservative wishes, rather than protecting basic personal liberties in substantive due process cases culminating in *Obergefell*, the Court would truly repeat the “grave errors” of *Lochner*.⁹⁵

⁹⁴ See, e.g., RANDY E. BARNETT, *RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY* (2004); Douglas H. Ginsburg, *Delegation Running Riot*, 1 *REGULATION* 83-84 (1995).

⁹⁵ See FLEMING, *supra* note 2, at 127-47, 228 (rebutting Chief Justice Roberts’s argument, in dissent in *Obergefell*, 576 U.S. at 704, that the majority opinion in that case repeats the “grave errors” of *Lochner*).

Ordered Liberty After *Dobbs*

by

Linda C. McClain* & James E. Fleming**

I. Introduction

“I heard the roar of a wave that could drown the whole world.” These lines from Bob Dylan’s prophetic “A Hard Rain’s A-Gonna Fall” express what we heard in Justice Alito’s majority opinion in *Dobbs v. Jackson Women’s Health Organization*, which overruled both *Roe v. Wade* and *Planned Parenthood of Southeastern Pennsylvania v. Casey*¹: the roar of a wave that could drown the whole world of substantive due process liberties protecting personal autonomy, bodily integrity, familial relationships (including marriage), sexuality, and reproduction. Put another way, *Dobbs* may represent “the second death” of substantive due process.² The first death was in 1937 with *West Coast Hotel v. Parrish*,³ decided during the New Deal, which repudiated the *Lochner* era’s protection of economic liberties under the Due Process Clause (“DPC”).⁴ Nonetheless, some cases from the *Lochner* era—*Meyer v. Nebraska* and *Pierce v.*

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¹ *Dobbs v. Jackson Women’s Health Org. et al*, 597 U.S. __ (2022), 142 S. Ct. 2228, 2242 (2022) (overruling *Roe v. Wade*, 410 U.S. 113 (1973), *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992)).

² For the idea of a “second death” of substantive due process, see JAMES E. FLEMING, *CONSTRUCTING BASIC LIBERTIES: A DEFENSE OF SUBSTANTIVE DUE PROCESS 2* (2022).

³ 300 U.S. 379 (1937).

⁴ *Lochner v. New York*, 198 U.S. 45 (1905).

*Society of Sisters*⁵—survived as building blocks for the framework of substantive due process liberties touching on family life. They are familiar texts for family law scholars, teachers, and lawyers. Indeed, the *Dobbs* majority cited to those cases while contending that they lent no support to *Roe* and *Casey*.⁶

This Essay explores the implications of *Dobbs* for the future of substantive due process—a topic that seems apt and urgent for a symposium on the intersection of constitutional law and family law. We situate *Dobbs* in the context of prior battles on the Court over whether “liberty” under the DPC includes substantive rights at all and, if it does, what is the proper interpretive approach to deciding the contours of such “liberty.” As a framing device, we will refer to two competing approaches as “the party of Harlan or *Casey*” versus “the party of *Glucksberg*.” In *Dobbs*, the dissent co-authored by Justices Breyer, Sotomayor, and Kagan represents the party of Harlan, while Justice Alito’s majority opinion reflects the party of *Glucksberg*.

By “the party of Harlan,” we refer to those who embrace Justice Harlan’s famous articulation of how to determine the scope of due process “liberty” in his dissent in *Poe v. Ullman*,⁷ in which the Court dismissed—for lack of standing—a challenge to the Connecticut birth control statute that the Court subsequently held unconstitutional in *Griswold v. Connecticut*.⁸ Harlan explained, “Due process has not been reduced to any formula,” and its content “cannot be determined by reference to any code.”⁹ As we elaborate below, Harlan argued that the Court’s decisions about due process liberty represent “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.”¹⁰ Examining “history” and “tradition” was important to determining that balance of ordered liberty, but

⁵ *Meyer v. Nebraska*, 262 U.S. 390 (1923); *Pierce v. Soc’y of Sisters*, 268 U.S. 510 (1925). A third case typically cited with these two is *Prince v. Massachusetts*, 321 U.S. 158 (1944), decided after the repudiation of *Lochner*, and frequently invoked for its statement that there is a “private realm of family life which the state cannot enter.” *Prince*, 321 U.S. at 166-67.

⁶ 142 S. Ct. at 2257, 2268.

⁷ *Poe v. Ullman*, 367 U.S. 497, 542-43 (1961) (Harlan, J., dissenting).

⁸ 381 U.S. 479 (1965).

⁹ *Poe*, 367 U.S. at 542-43 (Harlan, J., dissenting).

¹⁰ *Id.* at 542.

Harlan made clear that elaborating the “rational continuum” of ordered liberty had “regard to what history teaches are the traditions from which [this country] developed *as well as the traditions from which it broke,*” in short, “that tradition is a living thing.”¹¹

In 1977, Justice Powell favorably enlisted Justice Harlan’s approach to deciding what rights are “deeply rooted in this Nation’s history and tradition” in *Moore v. City of East Cleveland* in justifying why East Cleveland’s zoning ordinance sliced too deeply into the family.¹² The *Casey* joint opinion also applied Justice Harlan’s approach,¹³ as did the majority in *Obergefell v. Hodges*, (in an opinion written by Justice Kennedy), which held that the right to marry “is a fundamental right inherent in the liberty of the person” and that, under both the DPC and Equal Protection Clause, same-sex couples “may not be deprived of that right and that liberty.”¹⁴ The notion that tradition is a “living thing” resonates in *Obergefell*’s language about evolving understandings of the Constitution’s “promise” of “liberty.”¹⁵ The *Dobbs* dissenters exemplify this approach when they explain that, rather than freezing the understanding of liberty to whether “those living in 1868”—when the Fourteenth Amendment was ratified—would recognize the claim, “the sphere of protected liberty has expanded, bringing in individuals formerly excluded.”¹⁶

By “the party of *Glucksberg*,” we refer to the narrower approach that some conservative justices have taken to determining the scope of “liberty” under the DPC set out in *Washington v. Glucksberg*, in which Chief Justice Rehnquist (writing for the majority) rejected Justice Souter’s appeal to Justice Harlan’s methodology. Instead, he stated that the Court’s “established method” of substantive due process analysis had two “primary features”: (1) the DPC protects only “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’”; and (2) “a ‘careful description’ of the asserted

¹¹ *Id.* (emphasis added).

¹² *Moore v. City of East Cleveland*, 431 U.S. 494, 503 (1977).

¹³ *Casey*, 505 U.S. at 848-50.

¹⁴ *Obergefell v. Hodges*, 576 U.S. 644, 675 (2015).

¹⁵ *Id.* at 651 (“The Constitution promises liberty to all within its reach”).

¹⁶ *Dobbs*, 142 S. Ct. at 2329 (Breyer, Sotomayor, and Kagan, JJ., dissenting).

fundamental liberty interest.”¹⁷ Applying that approach, the majority held that Washington’s prohibition of “physician-assisted suicide” did not violate the Fourteenth Amendment because there is no “specifically protected” liberty under the DPC to “commit suicide” or have assistance in doing so.¹⁸ Similarly narrow approaches to the DPC that focus on concrete historical practices before and as of 1868 appeared in Justice Scalia’s pre-*Glucksberg* plurality opinion in *Michael H. v. Gerald D.*¹⁹ and in his dissent in *Casey*.²⁰ Notably, Chief Justice Roberts’s dissent in *Obergefell* insisted that *Glucksberg* should have been the proper approach, under which there was no basis for the majority’s holding.²¹ Indeed, Roberts protested that the *Obergefell* majority opinion “effectively overrules” *Glucksberg*, which he called the “leading modern case” interpreting the Due Process Clause.²²

In *Dobbs*, Justice Alito repeatedly cites *Glucksberg* as the proper approach to determine what rights are protected under the DPC and asserts that, under that test, a right to abortion is not within the scope of “the Nation’s scheme of ordered liberty.”²³ In 1868, the majority repeatedly declares, there was no such right; that should settle the matter. In this Essay, we argue that *Glucksberg* is the “leading modern case” and the proper approach only for justices who oppose and wish to eliminate the expansion of substantive due process rights. In fact, none of the decisions in the past century that has protected a basic personal liberty under the Due Process Clause would have come out as it did had the Court applied *Glucksberg*’s framework.²⁴

The *Dobbs* dissenters recognize this when they observe that, if the correct test is whether the framers of the Fourteenth Amendment recognized a particular right in 1868, many cherished liberties would fail the test.²⁵ They point out another failing of the majority’s “core legal postulate” that “we in the 21st cen-

¹⁷ *Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997).

¹⁸ *Id.* at 728.

¹⁹ *Michael H. v. Gerald D.*, 491 U.S. 110 (1989).

²⁰ *Casey*, 505 U.S. at 981-84 (Scalia, J., concurring in the judgment in part and dissenting in part).

²¹ *Obergefell*, 576 U.S. at 698-99 (Roberts, C.J., dissenting).

²² *Id.* at 702.

²³ *Dobbs*, 142 S. Ct. at 2246.

²⁴ For this analysis, we draw on FLEMING, *supra* note 2, at 38.

²⁵ *Dobbs*, 142 S. Ct. at 2327, 2329-30.

tury must read the Fourteenth Amendment just as its ratifiers did”: “the ratifiers—both in 1868 and when the original Constitution was approved in 1788—did not understand women as full members of the community embraced by the phrase ‘We the People.’”²⁶ As they powerfully explained, *Roe* and *Casey* were “part of the same constitutional fabric” as these other precedents protecting basic liberties. They argued for the *Casey* view, not the *Glucksberg* view, as the best account of our practice of substantive due process. The dissenters invoke Justice Harlan’s language about striking the “right balance,” and further emphasize that “applications of liberty and equality can evolve while remaining grounded in constitutional principles, constitutional history, and constitutional precedents.”²⁷

In Part II, we first offer a brief account of substantive due process (“SDP”) and of the basic liberties that the modern practice of substantive due process has protected—at least, prior to *Dobbs*. We elaborate two contrasting approaches to this set of basic liberties, one (following *Glucksberg*) that regards them as the unprincipled result of “rogue” judges reading their own views into the Constitution and another (following *Casey* and Harlan) that views this set of liberties as resulting from justices’ exercise of reasoned judgment.

Then in Part III we address an often-vexing question of importance to family law lawyers and teachers: what is the standard of review for cases about substantive due process liberty? Textbook accounts often suggest that a fundamental right triggers a strict scrutiny test, in which the government must demonstrate a compelling state interest and no less restrictive alternative. Some of the fiercest critics of SDP liberty, such as Justice Scalia, have insisted that the Court must use either strict scrutiny if a fundamental right is implicated or a deferential, rational basis test if one is not.²⁸ They have done so, generally, to curb recognition of protected “liberty” under the DPC. We argue that the Court has not in fact applied such a rigid two-tier framework. Indeed, some family law scholars have recognized that, in leading due process liberty cases implicating individual and family privacy, the Court has “side-stepped strict scrutiny in favor of a less determinate,

²⁶ *Id.* at 2324-25.

²⁷ *Id.* at 2326-27.

²⁸ *Lawrence v. Texas*, 539 U.S. 558, 593-94 (2003) (Scalia, J., dissenting).

indeterminate approach that would leave room for constitutional validation of unconventional family bonds” (as in *Lawrence v. Texas*’s protection of same-sex sexual intimacy).²⁹ This approach rejects not only the insistence on a rigid, two-tier approach, but also the narrower focus of Justice Scalia and others on defining the rights at stake in an “excessively specific way.”³⁰ Rejecting this approach, *Dobbs* first overrules *Roe* and *Casey* with the majority’s narrow focus on historical practices, and then declares the lower tier the proper approach for any future challenges to restrictive abortion laws: such laws enjoy a “strong presumption of validity” and must be sustained if there is “any rational basis” for a legislature thinking that they “serve legitimate state interests” (which the majority defines expansively).³¹

We conclude in Part IV with some thoughts about the future of SDP and strategies for liberals and progressives concerned about the protection of the “fabric” of constitutional liberty going forward. We situate our reflections, as of 2023, in the context of family law scholar David Meyer’s earlier reflections on the likely future of “the constitutionalization of family law,” including its possible “deconstitutionalization.”³² Meyer wrote in 2008, in the wake of the Court’s robust reaffirmation of SDP first in *Troxel v. Granville* and then in *Lawrence* as the issue of civil marriage equality for same-sex couples was percolating. How does the landscape look now, in the wake of *Obergefell* and *Dobbs* and their diametrically contrasting approaches to “liberty” under the Due Process Clause?

II. Substantive Due Process and the Competing Approaches in *Dobbs*

What is substantive due process? The DPC provides: “Nor shall any State deprive any person of life, liberty, or property without due process of law.”³³ Two fundamentally different readings of the Clause frame the current debate: One reading empha-

²⁹ David D. Meyer, *The Constitutionalization of Family Law*, 42 FAM. L.Q. 529, 551 (2008).

³⁰ *Id.* at 550.

³¹ *Dobbs*, 142 S. Ct. at 2284.

³² Meyer, *supra* note 29, at 559-72.

³³ CONST. amend. XIV, § 1.

sizes the word “process.” The other reading stresses “liberty” as well as “process.” Substantive due process involves interpreting the commitment to “liberty” in the DPC to protect basic liberties or fundamental rights: those essential to the scheme of “ordered liberty” in our constitutional democracy.³⁴

What basic liberties has the modern practice of substantive due process protected? Imagine that you are a constitutional archaeologist who digs up the following bones and shards of a constitutional culture:³⁵

1. liberty of conscience and freedom of thought;
2. freedom of association, including both expressive association and intimate association, whatever one’s sexual orientation;
3. the right to live with one’s family, whether nuclear or extended;
4. the right to travel or relocate;
5. the right to marry, whatever the gender of one’s partner;
6. the right to decide whether to bear or beget children;
7. the right to direct the education and rearing of children; and
8. the right to exercise dominion over one’s body, including the right to bodily integrity and ultimately the right to die (at least to the extent of the right to refuse unwanted medical treatment).

The challenge that you face is to decide whether these bones and shards fit together into, and are justifiable within, a coherent structure.

There are two radically different views concerning this list. The first was Justice Scalia’s view—and it is reflected in the *Dobbs* majority opinion—that the list is a subjective, boundless product of rogue judges reading their own moral predilections into the Constitution under the guise of interpreting it.³⁶ But according to the competing view, this list represents what *Casey*,

³⁴ The phrase “ordered liberty” comes from *Palko v. Connecticut*, 302 U.S. 319, 325 (1937).

³⁵ The explication of SDP offered in this Part draws on FLEMING, *supra* note 2, at 34-44.

³⁶ *Casey*, 505 U.S. at 995-96 (Scalia, J., concurring in the judgment in part and dissenting in part); *Lawrence*, 539 U.S. at 589-91 (Scalia, J., dissenting); *Obergefell*, 576 U.S. at 708-11 (Roberts, C.J., dissenting).

following Justice Harlan, called a “rational continuum” of ordered liberty stemming from “reasoned judgment” concerning individual rights to make certain unusually important decisions fundamentally affecting their identity, destiny, or way of life—without compulsion by the government.³⁷ It protects the kinds of decisions that hardly anyone, conservative or liberal, wants the government to tell them how to make. On this second view, this line of cases has been built out over time through ordinary common law constitutional interpretation: reasoning by analogy from one case to the next on the basis of experience, new insights, and moral learning, and making normative judgments about whether to extend rights previously recognized based on the basic reasons we protected those rights in the first place. We defend the second view.

In substantive due process, the conflict between these two views is encapsulated in the battle between the *Glucksberg* and the *Casey* frameworks for the due process inquiry. In *Dobbs*, the new conservative majority, including three nominees of President Donald Trump, held that the right to abortion is not “deeply rooted in this nation’s history and tradition” or essential to “ordered liberty.”³⁸

What is tradition? We can distinguish between two competing conceptions of tradition in the due process inquiry: tradition as historical practices versus tradition as aspirational principles. *Dobbs* conceives “our nation’s history and tradition” as historical practices. The SDP line of cases protecting basic liberties from *Meyer* and *Pierce* in the nineteen twenties to *Roe*, *Casey*, and *Obergefell* instead conceives traditions as a “living thing” or aspirational principles.³⁹

Nevertheless, the Court in *Dobbs* ruled that *Washington v. Glucksberg* provides the proper test for deciding what basic liberties the Due Process Clause protects: only those specific liberties protected in the concrete historical practices as of 1868, when the Fourteenth Amendment was adopted.⁴⁰ *Glucksberg* rejected the competing approach of *Casey*, which had interpreted the con-

³⁷ *Casey*, 505 U.S. at 848-50.

³⁸ *Dobbs*, 142 S. Ct. at 2242-43.

³⁹ For development of this distinction and argument, see FLEMING, *supra* note 2, at 28-32.

⁴⁰ *Dobbs* 142 S. Ct. at 2242, 2246-48.

stitutional commitment to liberty and traditions instead as abstract aspirational principles whose meaning is built out over time: principles to which we as a people aspire, and for which we as a people stand, whether or not we have fully realized them in our concrete historical practices. For example, “all persons are created equal” is part of our tradition, despite concrete historical practices of inequality, including slavery, Jim Crow, and gender discrimination. Therefore, being faithful to the Fourteenth Amendment requires criticizing historical practices because of commitments to aspirational principles of liberty and equality, as many scholars of race and gender have argued.⁴¹

In dissent in *Obergefell*, which had adopted the *Casey* framework in extending the right to marry to same-sex couples, Chief Justice Roberts protested that the case “effectively overrules” *Glucksberg*, which he called the “leading modern case” interpreting the Due Process Clause.⁴² But, as elaborated by one of us (Fleming) elsewhere, *Glucksberg* is the leading modern case only for justices who oppose and wish to shut down the practice of substantive due process. Indeed, *Obergefell* is inconsistent with *Glucksberg*.⁴³ So are *Lawrence*, which extended the right to sexual intimacy to gays and lesbians, and *Griswold*, which recognized the right to use contraceptives. In fact, to put it bluntly: every decision in the past century that has protected a basic personal liberty under the Due Process Clause is inconsistent with *Glucksberg*. None would have come out as it did had the Court applied *Glucksberg*’s framework. In short, none protected rights as a matter of vindicating longstanding, concrete historical practices as the *Glucksberg* framework conceives them. Instead, the decisions stemmed from judgments that our commitment to liberty, as an abstract principle, requires protecting rights to make certain decisions fundamentally affecting one’s identity, destiny, or way of life (the *Casey* framework).⁴⁴

⁴¹ See, e.g., Peggy Cooper Davis, *The Reconstruction Amendments Matter When Construing Abortion Rights*, WASH. POST (Made by History) (May 3, 2022); Michele Goodwin, *No, Justice Alito, Reproductive Justice Is in the Constitution*, N.Y. TIMES (Jun. 26, 2022).

⁴² *Obergefell*, 576 U.S. at 702 (Roberts, J., dissenting).

⁴³ FLEMING, *supra* note 2, at 38.

⁴⁴ See *id.* at 35-37.

Before *Dobbs*, *Glucksberg* in 1997 provided a method of damage control for conservatives who opposed these cases but did not have the votes to overrule them. So they had to settle for going “this far and no further.” Today, conservative justices have the votes to overrule these cases, even though Alito’s majority opinion in *Dobbs* states that “nothing in this opinion should be understood to cast doubt on precedents that do not concern abortion.”⁴⁵

Senator Lindsey Graham praised Alito’s opinion in *Dobbs* for “setting the right tone” by assuring that it would not endanger other rights.⁴⁶ But Justice Thomas’s concurring opinion said the quiet part out loud: if the Court applies Justice Alito’s approach, it will conclude that all of the due process decisions protecting personal autonomy and bodily integrity—including *Griswold*, *Lawrence*, and *Obergefell*—were “demonstrably erroneous” and should be overruled.⁴⁷ In truth, the *Glucksberg* test would find that contraception, same-sex intimacy, and same-sex marriage—not to mention interracial marriage, which Thomas rather conveniently overlooked—are not protected liberties for the same reason that abortion is not: none of those rights, any more than abortion, was protected specifically in the concrete historical practices as of 1868.

Moreover, as recently as 2020, Alito joined Thomas’s statement in Kentucky clerk Kim Davis’s case calling for overruling *Obergefell*.⁴⁸ If this Court does not overrule precedents like *Obergefell*, *Lawrence*, and *Griswold*, it will be because of political judgments (like Senator Graham’s) about Republican Party politics, not because of any principled legal framework.

The *Dobbs* dissenters rightly called out this “hypocrisy” and warned that *Roe* and *Casey* were “part of the same constitutional fabric” as these other precedents.⁴⁹ They argued for the *Casey* view, not the *Glucksberg* view, as the best account of our practice

⁴⁵ *Dobbs*, 142 S. Ct. at 2277-78, 2281.

⁴⁶ Brad Dress, *Graham: Alito “Set the Right Tone” in Roe Ruling by Arguing Same-Sex Marriage, Contraception not in Jeopardy*, The Hill (June 26, 2022, 1:15 PM ET), <https://thehill.com/homenews/sunday-talk-shows/3537502-graham-alito-set-the-right-tone-in-roe-ruling-by-arguing-same-sex-marriage-contraception-not-in-jeopardy/>.

⁴⁷ *Dobbs*, 142 S. Ct. at 2301 (Thomas, J., concurring).

⁴⁸ *Davis v. Ermold*, 592 U.S. __ (2020) (slip op. at 2, 4).

⁴⁹ *Dobbs*, 142 S. Ct. at 2319.

of substantive due process.⁵⁰ All of the prior cases protecting personal autonomy and bodily integrity have rejected the hide-bound historical practices framework of *Glucksberg* and *Dobbs* in favor of the abstract aspirational principles framework of *Casey* and *Obergefell*.

III. The Stringency of the Protection of Liberty Under the Due Process Clauses

We turn next to the question of the stringency of the protection of liberties under the Due Process Clauses.⁵¹ In constitutional law, it is commonplace to say that the Supreme Court applies absolutist “strict scrutiny” in protecting fundamental rights or liberties under the Due Process Clauses. Dissenting in *Lawrence*, Justice Scalia stated that, under the Due Process Clauses, if an asserted liberty is a “fundamental right,” it triggers “strict scrutiny” that almost automatically invalidates any statute restricting it. For strict scrutiny requires that the challenged statute, to be upheld, (1) must further a “compelling governmental interest” and (2) must be “necessary” or “narrowly tailored” to doing so. Scalia also wrote that if an asserted liberty is not a fundamental right, it is merely a “liberty interest” that triggers rational basis scrutiny that is so deferential that the Court all but automatically upholds the statute in question. For deferential rational basis scrutiny requires merely that the challenged statute, to be valid, (1) must further a “legitimate governmental interest” and (2) need only be “rationally related” to doing so.⁵² In attempting to limit the protection of substantive liberties under the Due Process Clauses, Scalia argued for a narrow approach to what constitutes a “fundamental right” and a broad approach to what constitutes a mere “liberty interest.”

Lawrence deviated from this regime. The Court did not hold that gays’ and lesbians’ right to autonomy was a fundamental right requiring strict scrutiny. Nor did it hold that their right was merely a liberty interest calling for highly deferential rational ba-

⁵⁰ *Id.* at 2317-24.

⁵¹ In this section, we draw upon JAMES E. FLEMING & LINDA C. MCCLAIN, *ORDERED LIBERTY: RIGHTS, RESPONSIBILITIES, AND VIRTUES* 237-72 (2013); FLEMING, *supra* note 2, at 45-69.

⁵² 539 U.S. at 593-94 (Scalia, J., dissenting).

sis scrutiny. Instead, the Court applied an intermediate standard—what is commonly called “rational basis scrutiny with bite”—and struck down the statute forbidding same-sex sexual conduct. Instead of deferring to the state’s proffered “legitimate governmental interest” in preserving traditional sexual morality, the Court (explicitly in *Romer v. Evans* (1996) and implicitly in *Lawrence*) put some bite into its scrutiny of the legitimacy of the end and found illegitimate “animosity” toward and a “bare desire to harm” a “politically unpopular group.”⁵³

Consequently, Scalia chastised the Court for not following the rigid two-tier framework that all but automatically decides rights questions one way or the other.⁵⁴ Many scholars and judges have questioned whether the Court’s actual practice has followed or should follow this framework.⁵⁵ Indeed, the only substantive due process case ever to recognize a “fundamental right” implicating “strict scrutiny”—requiring that the statute further a compelling governmental interest and be necessary to doing so—was *Roe*.⁵⁶ And those aspects of *Roe* were overruled in *Casey*, which adopted an “undue burden” test,⁵⁷ and of course *Dobbs* has now overruled both *Roe* and *Casey*.⁵⁷

Moreover, the leading due process cases protecting liberty and autonomy—from *Meyer* (1923) and *Pierce* (1925) through *Moore* (1977) on up through *Lawrence* (2003) and *Obergefell* (2015)—have not applied the framework that Scalia propounds: the Court has not recognized two rigidly-policed tiers of scrutiny, with strict scrutiny automatically invalidating laws and deferential rational basis scrutiny automatically upholding them. Instead, actual practice in the leading cases protecting liberties maps onto a continuum of ordered liberty, with several intermediate levels of review.⁵⁸ These tiers include the rational basis scrutiny “with

⁵³ *Romer v. Evans*, 517 U.S. 620, 632-34 (1996); *Lawrence*, 539 U.S. at 574; 539 U.S. at 580, 582-83 (O’Connor, J., concurring).

⁵⁴ 539 U.S. at 593-94 (Scalia, J., dissenting).

⁵⁵ Richard H. Fallon, J., *Strict Judicial Scrutiny*, 54 UCLA L. REV. 1267 (2007); Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 VAND. L. REV. 793 (2006). We argue along these lines in FLEMING & McCLAIN, *supra* note 51, at 237-72.

⁵⁶ *Roe*, 410 U.S. at 155-56.

⁵⁷ *Casey*, 505 U.S. at 851-53, 877.

⁵⁸ The following analysis draws upon our prior argument in FLEMING & McCLAIN, *supra* note 51, at 243-72; FLEMING, *supra* note 2, at 48-69.

bite” illustrated by *Lawrence*. Early cases like *Meyer* and *Pierce* reflect a form of review resembling that in *Lawrence*.

A form of intermediate scrutiny is also exemplified by *Moore*. *Moore* protected the right of an extended family to live together and invalidated an ordinance limiting occupancy of each dwelling unit to members of a single family, with “family” defined essentially as the nuclear family of parents and their children. *Moore* did not officially articulate intermediate scrutiny as the framework for Due Process analysis. Still, it formulated the test as: “[W]hen the government intrudes on choices concerning family living arrangements, this Court must examine carefully the importance of the governmental interests advanced and the extent to which they are served by the challenged regulation.”⁵⁹ Justice Powell added: “Of course, the family is not beyond regulation.”⁶⁰ Like *Moore*, many cases surrounding the legal regulation of the family (e.g., *Prince v. Massachusetts* (1944) and *Troxel v. Granville* (2000)) demonstrate the following two-step framework that amounts to a form of intermediate scrutiny:

1. Determine that the right in question—for example, the right to marry, the right to decide one’s family living arrangements, or the right to parental liberty—is fundamental.
2. Conclude that even though the right is fundamental, it does not entail that reasonable regulations are unconstitutional.⁶¹

Thus, the cases *protecting* substantive liberties reflect a continuum of judgmental responses, not a framework with two rigidly-policed tiers.⁶²

The cases that have applied Scalia’s framework have been the cases *refusing to recognize* asserted rights: *Bowers*, *Michael H.*, *Glucksberg*, and now *Dobbs*. In these cases, the Court was

⁵⁹ 431 U.S. 494, 499 (1977) (Powell, J., plurality opinion).

⁶⁰ *Id.*

⁶¹ See FLEMING & McCLAIN, *supra* note 51, at 247-50, 254-57, 263-65; FLEMING, *supra* note 2, at 53-54, 58-60, 64-65.

⁶² Compare Justice Stevens’s and Justice Marshall’s well-known analyses of actual practice under the Equal Protection Clause. See *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 451 (1985) (Stevens, J., concurring) (“continuum of judgmental responses”); *San Antonio v. Rodriguez*, 411 U.S. 1, 98 (1973) (Marshall, J., dissenting) (“spectrum of standards”).

attempting to narrow the protection of substantive liberties under the Due Process Clauses.

IV. The Future of Substantive Due Process

In concluding, we offer some thoughts about the future of substantive due process. We then offer a pep talk for dismayed liberals and progressives and end by providing some words of caution for jubilant conservatives.⁶³

A. *A Second Death of Substantive Due Process?*

Returning to the opening image of hearing the roar of a wave that could drown the whole world, we want to consider whether *Dobbs* represents a second death of substantive due process. Before *Dobbs*, reports of the second death of substantive due process had been greatly exaggerated. *Bowers* (1986) and *Michael H.* (1989) tried to be the second death of it by narrowing the DP inquiry after *Roe* (1973). But *Casey* (1992) revived it by broadening the DP inquiry. *Glucksberg* (1997) attempted to be the second death by narrowing the DP inquiry after *Casey*. But *Lawrence* (2003) and *Obergefell* (2015) thwarted *Glucksberg* by applying the *Casey* framework. *Dobbs* narrowed the DP inquiry back to the *Glucksberg* framework.

Only time will tell whether *Dobbs* is more like *Glucksberg*—taking a “this far and no further” approach to the line of substantive due process cases protecting personal liberties—or *West Coast Hotel*—and thus the second death of substantive due process, repudiating that entire line of cases, not just *Roe* and *Casey*.

Beyond *Dobbs*, what approach(es) might we expect the Court and, in particular, the two most recent justices, to take to interpreting the Due Process Clause generally? Are they likely to vote to overrule the substantive due process cases at the core of Justice Kennedy’s legacy such as *Lawrence* and *Obergefell*? At his initial confirmation hearings, Kavanaugh said that *Glucksberg* provides the proper framework for the due process inquiry.⁶⁴

⁶³ In this concluding section, we draw from FLEMING, *supra* note 2, at 222-28.

⁶⁴ At his confirmation hearings, then-Judge Kavanaugh said “I think all roads lead to the *Glucksberg* test.” *Kavanaugh Supreme Court Hearing*. CNN (Sept. 5, 2018), <http://www.cnn.com/TRANSCRIPTS/1809/05/cnr.08.html>.

And Barrett is a professed originalist who is viewed as a disciple of Scalia. On that basis, we might expect both to side with the dissenters' approach in *Obergefell* and against that of Kennedy in any future cases involving claims to basic liberties under the Due Process Clause. That certainly proved true in *Dobbs*.

Considering "the road ahead" for the constitutionalization of family law as it looked one decade after *Glucksberg*, David Meyer observed that critics of SDP liberty (including Chief Justice Rehnquist, author of the *Glucksberg* majority opinion) have "sometimes seemed willing to freeze the boundaries of constitutional protection where they are, saying, in effect, we will go 'this far, and no more;'" more ambitious critics, he noted, have considered "'deconstitutionalization' of the field," by "rolling back constitutional protection."⁶⁵ Those different roads of containment and reversal (even beyond *Roe* and *Casey*) remain pertinent in the wake of *Dobbs*.

For the time being, we can expect the Court, under the *Glucksberg* approach, not to extend any substantive due process precedents, by analogy, to cutting-edge claims of previously unrecognized rights. And even if the *Glucksberg* framework itself does not dictate overruling any of those precedents, it does entail draining them of any generative vitality in future cases that might provide occasions for extending them. For example, after *Obergefell* recognized the right of same-sex couples to marry, some states resisted its implications concerning the parenthood of same-sex spouses. In a per curiam order in *Pavan v. Smith* (2017), the Court reversed an Arkansas Supreme Court decision which had concluded that "*Obergefell* did not necessarily require the State to issue birth certificates listing the nonbiological mother as a parent when her same-sex spouse gives birth."⁶⁶ That stands to reason, since Kennedy's majority opinion in *Obergefell* emphasized extending the rights, responsibilities, and protections of marriage to same-sex couples and their children: "civil marriage on the same terms and conditions as opposite-sex couples."⁶⁷ His opinion even "expressly identified 'birth and death certificates'" as among those "rights, benefits, and respon-

⁶⁵ Meyer, *supra* note 29, at 559.

⁶⁶ Douglas NeJaime, *The Constitution of Parenthood*, 72 STAN. L. REV. 261, 317 (2020) (discussing *Pavan v. Smith*, 137 S. Ct. 2075 (2017)).

⁶⁷ *Obergefell*, 576 U.S. at 676.

sibilities.”⁶⁸ Kennedy was concerned that the state not deny equal respect to same-sex spouses (and their children) by denying them the protections of marriage, understood as a status and package of benefits.

Nonetheless, in *Pavan*, in a dissenting opinion in a Gluck-sbergian vein, Justice Gorsuch distinguished between *Obergefell*—which he said “‘addressed the question whether a State must recognize same-sex marriages’”—and the issue of parental recognition, to which he said “nothing in *Obergefell* spoke.”⁶⁹ Gorsuch seemed to accept Arkansas’s implausible characterization of its birth certificate law as a biology-based registration scheme, even though, under it, husbands with no biological connection to their wife’s child were listed as the father as long as they consented to the wife’s alternative insemination. Fortunately, Douglas NeJaime observes, the majority “made clear that *Obergefell* reaches questions of nonbiological parental recognition.”⁷⁰ Thomas and Alito joined Gorsuch’s dissent.⁷¹ But Roberts notably did not. Hopefully, this signals that he does not wish to revisit *Obergefell* or to resist its clear implications. It is unclear which way Kavanaugh or Barrett would have gone here,

⁶⁸ *Pavan*, 137 S. Ct. at 2078 (citing *Obergefell*, 576 U.S. at 670 [majority opinion]).

⁶⁹ *Id.* at 2079 (Gorsuch, J., dissenting, joined by Thomas, J., and Alito, J.).

⁷⁰ NeJaime, *supra* note 66, at 317.

⁷¹ Despite his dissent in *Pavan*, adopting a narrow view of *Obergefell*, Justice Gorsuch took a broad view of Title VII’s prohibition of discrimination on the basis of sex in his 6-3 majority opinion in *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731 (2020), interpreting it to prohibit discrimination on the basis of sexual orientation or gender identity. Gorsuch wrote: “[A]pplying protective laws to groups that were politically unpopular at the time of the law’s passage”—such as gay, lesbian, or transgender employees—“often may be seen as unexpected.” *Id.* at 1751. However, he continued, to refuse enforcement for that reason would “tilt the scales of justice in favor of the strong or popular and neglect the promise that all persons are entitled to the benefit of the law’s terms.” *Id.* This formulation seems to echo the opening words of Justice Kennedy’s opinion in *Obergefell*: “The Constitution promises liberty to all within its reach,” including same-sex couples seeking to marry. 576 U.S. at 651. We hasten to acknowledge that *Bostock* involved statutory interpretation, whereas *Obergefell* involved constitutional interpretation. Not surprisingly, Justices Thomas and Alito, who had joined Gorsuch’s dissent in *Pavan*, dissented from his majority opinion in *Bostock*.

but we reasonably might fear that they would have agreed with Gorsuch, Thomas, and Alito, as they did in *Dobbs*.

More generally, under the Glucksberg approach, even if the Supreme Court does not overrule precedents protecting the rights of same-sex couples to intimate association and to marry, we should not be surprised if today's Court "never extends the rights of gays and lesbians beyond where they are now."⁷² One reason for our prediction is the Roberts Court's increasingly robust protection of religious liberty in the face of competing constitutional and civil rights. Notably, in *Bostock v. Clayton County*, a significant LGBTQ victory, Justice Gorsuch added the caveat: "how these doctrines protecting religious liberty [both the First Amendment and RFRA] interact with Title VII are questions for future cases."⁷³

On the one hand, in a recent case involving a clash between the rights of same-sex couples and religious liberty, *Fulton v. City of Philadelphia* (2021), Justices Kavanaugh and Barrett joined Chief Justice Roberts—along with the three liberal justices—in a narrow opinion that rejected the arguments in concurrence by Justices Alito, Thomas, and Gorsuch that the Court should overrule *Employment Division, Department of Human Resources v. Smith* (1990).⁷⁴ Overruling *Smith* might have opened the door to broad religious exemptions, even from neutral and generally applicable laws. That was a relief, but, on the other hand, in *Fulton* the Court still did rule in favor of a Catholic social services agency that refused to work with same-sex couples who apply to take in foster children.⁷⁵ Hence, that case is consistent with the possibility that the Court will not extend the rights of LGBTQ

⁷² Adam Liptak, *How Brett Kavanaugh Would Transform the Supreme Court*, N.Y. TIMES, Sept. 3, 2018, at A1 (quoting Irv Gornstein), <https://www.nytimes.com/2018/09/02/us/politics/judge-kavanaugh-supreme-court-justices.html>.

⁷³ *Bostock*, 140 S. Ct. at 1754.

⁷⁴ 494 U.S. 872 (1990).

⁷⁵ *Fulton v. City of Philadelphia*, 593 U.S. ___, 141 S. Ct. 1868 (2021). Roberts's narrow opinion prompted Alito to write a "caustic," "disappointed" concurrence, joined by Thomas and Gorsuch, criticizing the Court for passing up the opportunity to overturn *Smith*. See Adam Liptak, *Supreme Court Backs Catholic Agency in Case on Gay Rights and Foster Care*, N.Y. TIMES, June 17, 2021, <https://www.nytimes.com/2021/06/17/us/supreme-court-gay-rights-foster-care.html?searchResultPosition=4>.

persons beyond where they are now. Speaking not only of the *Fulton* decision but more generally of the 2020–21 term, Michael C. Dorf said: “More than in most recent terms, Chief Justice Roberts was able to present a credible picture of a nonpartisan court, with Justices Breyer, Kagan, Kavanaugh and Barrett in particular seeming to go out of their way to forge centrist alliances.”⁷⁶ “However,” Dorf continued, “the justices appear to have reached a truce rather than a lasting peace. With high-profile abortion and gun control cases already on the docket for the next term, the ideological disagreements will likely re-emerge sooner rather than later.”⁷⁷ Indeed, this occurred with a vengeance in the 2021-22 term.

B. *Pep Talk for Dismayed Liberals: Or, What to Do Next?*

For liberals and progressives, things look really bleak. But instead of quoting Dante’s *Inferno*: “Abandon all hope, you who enter here,” we offer some more constructive thoughts about concrete actions liberals and progressives can take to make the best they can of a bad situation. First, we urge liberals finally to open their eyes and stop harboring “hollow hopes” (in Gerald Rosenberg’s famous formulation⁷⁸) that courts will protect their rights or pursue (or even enable) liberal or progressive change. They should turn more to legislatures and executives than to courts. Here we include not only the national legislature and executive but also state and local governments. For the foreseeable future, these are likely to be the best institutions through which liberals and progressives might effectively pursue justice.

It is worth revisiting Meyer’s reminder that state constitutions are a generative source of the “constitutionalization” of family law. Meyer pointed both to successful litigation invoking “state constitutional guarantees of equality or liberty to advance same-sex marriage,” and to “preemptive and reactionary” use of state constitutions to prevent such challenges and freeze “traditional understandings of marriage.”⁷⁹ He observed a “growing

⁷⁶ Adam Liptak, *The Supreme Court’s Newest Justices Produce Some Unexpected Results*, N.Y. TIMES, June 18, 2021, <https://www.nytimes.com/2021/06/18/us/politics/supreme-court-conservatives-liberals.html>.

⁷⁷ *Id.*

⁷⁸ GERALD N. ROSENBERG, *THE HOLLOW HOPE* (2d ed. 2008).

⁷⁹ Meyer, *supra* note 29, at 560-61.

assertiveness” by state courts to invoke state constitutions to protect “personal and family privacy” and “fill the vacuum” when federal constitutional protection fell short, as with *Bowers* and *Michael H.*⁸⁰ State constitutions and state law have similar generative potential today. For example, after *Dobbs*, Michigan, California, and Vermont amended their state constitutions to protect reproductive freedom.⁸¹ Also post-*Dobbs*, and in the wake of anti-abortion and anti-trans laws being enacted in other states, the Massachusetts legislature invoked rights under the state constitution in passing a law protecting persons’ access to reproductive health care and to gender-affirming care and the rights of medical professionals to provide that care.⁸²

Second, we encourage liberals and progressives to learn from and emulate what the conservatives did over the past two generations in resisting the Supreme Court decisions with which they vigorously disagreed. Pass laws that challenge or undermine objectionable Supreme Court holdings and provide occasions to narrow those holdings.

Third, liberals and progressives should learn to appreciate the virtues of federalism as a structural mechanism for accommodating diversity and pluralism in circumstances of disagreement. Relatedly, they should learn that federalism is also a mechanism for resistance to the national government by states that disagree with the party in control of the Presidency, Congress, and/or the Supreme Court. Just as conservatives have practiced culture war federalism, it is time for liberals and progressives to practice progressive federalism! Use the national government, when you have power there, to advance your substantive constitutional vision and political conception of justice. Use state governments, when you lack national power, to resist the national government. Many liberals and progressives learned to do this during the Trump administration. For example, some states and cities resisted the Trump administration’s harsh immigration policies through becoming sanctuary states or sanctuary cities, limiting their cooperation with the federal government in enforcing na-

⁸⁰ *Id.* at 561.

⁸¹ Mitch Smith and Ava Sasani, *Michigan, California, and Vermont Affirm Abortion Rights in Ballot Proposals*, N.Y. TIMES (Nov. 9, 2022).

⁸² See, e.g., An Act Expanding Protections for Reproductive and Gender-Affirming Care, Mass. Gen. Laws. Ch. 127 (2022).

tional immigration laws. At the interstate level, post-*Dobbs*, some states have invoked these earlier efforts in passing “safe harbor” laws to protect pregnant persons who travel from out of state and the health care providers who help them by limiting interstate cooperation with law enforcement efforts by states that criminalize abortion.⁸³

Fifth, liberals and progressives should turn to state courts as well as state legislatures to pursue constitutional justice. In 1977, Justice William Brennan published *State Constitutions and the Protection of Individual Rights*, reminding readers that state constitutions were a “font of individual liberties,” with their protections often extending beyond the U.S. Supreme Court’s interpretation of federal constitutional law.⁸⁴ Given the racist history surrounding federalism and the states’ rights tradition, liberals and progressives understandably have been wary of them. But the relative success of the LGBTQ rights movement in the states between *Bowers* (1986) and *Obergefell* (2015) is instructive. During this period, as noted above, this movement effectively used state courts together with state legislatures to secure such rights in circumstances of national disagreement, at a time when the prospects for victory in places like Vermont and Massachusetts were greater than in the U.S. Supreme Court or Congress.⁸⁵ In *Goodridge v. Department of Public Health*, in which the Supreme Judicial Court of Massachusetts held that same-sex couples had a right to marry under Massachusetts’s constitution, Chief Justice Margaret Marshall’s opinion echoed Justice Brennan on the vitality of state constitutions for protecting individual liberty: “The Massachusetts Constitution protects

⁸³ See, e.g., *id.*; Alejandra Caraballo et al, *Extradition in Post-Roe America*, __ CUNY L. REV. __, __ (forthcoming 2023) (describing limited success of “sanctuary cities” and “sanctuary states” (such as Washington State) and how Connecticut’s “safe harbor” abortion legislation used similar language to that of Washington State’s immigrant-protective legislation) (unpublished manuscript on file with authors).

⁸⁴ William J. Brennan, *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 491 (1977).

⁸⁵ For an informative account of the “brick by brick” efforts by LGBTQ advocates at the state level in Massachusetts, Vermont, California, and elsewhere, see NATHANIEL FRANK, *AWAKENING: HOW GAYS AND LESBIANS BROUGHT MARRIAGE EQUALITY TO AMERICA* (2017). Frank uses the term “brick by brick” to describe progress at the state level. *Id.* at 193.

matters of personal liberty against government incursion as zealously, and often more so, than does the Federal Constitution, even where both Constitutions employ essentially the same language.”⁸⁶ Proponents of LGBTQ rights assiduously avoided federal court initially, and were prudent to do so. For example, only after a mostly successful run in state courts and state legislatures for over a decade did they take the issue of marriage equality to the U.S. Supreme Court in *Obergefell*. Indeed, by the time of *Obergefell*, thirty-seven states already had recognized same-sex marriage.⁸⁷ At a time when the current Supreme Court seems unlikely greatly to expand parental “liberty” or the definition of legal parenthood, legal scholars (including NeJaime and Courtney Joslin), LGBTQ advocates, and family groups have successfully worked with several state legislatures to adopt comprehensive law reform modeled on the Uniform Parentage Act of 2017, which provides numerous pathways to parenthood beyond biology and marriage.⁸⁸

As an example of state courts protecting reproductive liberty after *Dobbs*, the Supreme Court of South Carolina recently held that the right to privacy guaranteed in South Carolina’s constitution includes the decision to terminate a pregnancy and that South Carolina’s Fetal Heartbeat and Protection from Abortion Act was an “unreasonable restriction” upon “a woman’s right to privacy.”⁸⁹ Writing for the majority in *Planned Parenthood South Atlantic v. South Carolina*, Justice Kaye G. Hearn pointedly noted that, because *Dobbs* criticized *Roe v. Wade* for resting on a right to “privacy” that (Justice Alito wrote) nowhere appeared in

⁸⁶ 798 N.E.2d 941, 959 (2003).

⁸⁷ See, e.g., Governing: State and Local Government News and Analysis, *State Same-Sex Marriage State Laws Map: Thirty-Seven States Had Legalized Same-Sex Marriage Prior to the Supreme Court Ruling* (Mar. 25, 2013), <https://www.governing.com/gov-data/same-sex-marriage-civil-unions-doma-laws-by-state.html>.

⁸⁸ See, e.g., An Act Concerning the Implementation and Adoption of the Connecticut Parentage Act, Public Act No. 21-15; see also *Uniform Parentage Act of 2017*, UNIFORM LAW COMMISSION, <https://www.uniformlaws.org/committees/community-home?CommunityKey=C4f37d2d-4d20-4be0-8256-22dd73af068f> (enactment map showing enactment in seven states and proposed legislation in three).

⁸⁹ *Planned Parenthood South Atlantic v. South Carolina*, Op. No. 28127 (S. Ct. S. Car. Jan. 25, 2023) (slip op. at 5).

the text of the U.S. Constitution, *Dobbs* “does not control, or even shed light on our decision today,” because of the express inclusion of the right of privacy in the South Carolina Constitution.⁹⁰ The high court found it instructive that in states with similar explicit constitutional guarantees of privacy, state courts that had considered the question of whether such privacy included the decision to terminate a pregnancy had answered in the affirmative. The court also stated that, because state courts were construing their own state constitutions, the “sea change” wrought by *Dobbs* in “federal abortion jurisprudence” did not invalidate these state court decisions.⁹¹

Sixth, when litigation in federal courts is unavoidable, liberals and progressives should pursue minimalist strategies seeking narrow rulings. For example, in litigating cases, they may need to be prepared to attempt to minimize the maximum damage the most conservative justices can do by making second-best arguments for narrow resolutions that may appeal to Chief Justice Roberts and, on occasion, Justice Kavanaugh.

Finally, liberals and progressives should develop social movements that are committed to playing the long game and promoting the gradual transformation of the constitutional culture in their direction (e.g., doing for reproductive freedom and LGBTQ rights what the conservatives did for the individual right to bear arms). Notably, the Women’s Health Protection Act, passed in the House but stalled in the Senate, incorporated the concept of “reproductive justice,” suggesting the influence of the reproductive justice movement pioneered by Black feminists.⁹² Post-*Dobbs*, another important example is “health justice,” which is both a framework for health law and policy and a social movement for transformational change to address health inequities.⁹³

⁹⁰ *Id.* at 11.

⁹¹ *Id.* at 15-18. To be sure, courts, legislatures, or voters may also contract such rights. The South Carolina Supreme Court observed that, after the Tennessee Supreme Court held that its state constitutional right to privacy included protection of abortion rights, a voter referendum amended the Tennessee Constitution to state that that it *not* do so. *Id.* at 17.

⁹² Women’s Health Protection Act of 2022, S. 4132.

⁹³ Lindsay F. Wiley et al., *What Is Health Justice?*, __ J. L. MED. & ETHICS __ (forthcoming 2023).

C. *Words of Caution for Jubilant Conservatives*

Finally, we caution jubilant conservatives who hope the long-awaited conservative counterrevolution is nigh: “Be careful what you wish for.” For years, conservative judges and scholars have been calling for restoring the “Constitution in exile” or for “restoring the lost [libertarian] Constitution.”⁹⁴ Their wishes—for a Supreme Court restoration of the conservative Constitution that has been “in exile” since the New Deal liberal revolution in 1937—may be about to come true.

But beware that such a Court may come to live in infamy—an infamy that may surpass even that of its prior incarnation, the *Lochner* Court. In fulfilling such conservative wishes, rather than protecting basic personal liberties in substantive due process cases culminating in *Obergefell*, the Court would truly repeat the “grave errors” of *Lochner*.⁹⁵

⁹⁴ See, e.g., RANDY E. BARNETT, *RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY* (2004); Douglas H. Ginsburg, *Delegation Running Riot*, 1 *REGULATION* 83-84 (1995).

⁹⁵ See FLEMING, *supra* note 2, at 127-47, 228 (rebutting Chief Justice Roberts’s argument, in dissent in *Obergefell*, 576 U.S. at 704, that the majority opinion in that case repeats the “grave errors” of *Lochner*).

