WHEN SUBSTANTIVE DUE PROCESS MEETS EQUAL PROTECTION: RECONCILING *OBERGEFELL* AND *GLUCKSBERG*

by
*Katherine Watson**

[Equality] is one note of liberty which all
democrats affirm to be the principle of their state.[1]
–Aristotle

This Article argues that the Court can reconcile its splintered approaches to substantive due process by elucidating the role equal protection plays in the analysis. Part I of this Article examines the seemingly irreconcilable approaches to substantive due process, as exemplified by Washington v. Glucksberg *and* Obergefell v. Hodges. *It demonstrates that, had* Obergefell *utilized the* Glucksberg *test, the Court would have reached a contrary conclusion. Part II of this Article delineates how, contrary to Justice Roberts' claim in dissent that* Lochner v. New York *is* Obergefell's *sole precedent,* Obergefell *is a culmination of a long line of cases that utilize a more expansive approach to substantive due process when equal protection interests are also implicated. Thus, both* Obergefell *and* Glucksberg *emerged as distinct responses to the* Lochner *era. Part III of this Article examines the benefits and drawbacks of each substantive due process approach and concludes that both approaches are needed.* Obergefell *represents the expansive approach to substantive due process that the Court should use when due process and equal protection converge.* Glucksberg, *by contrast, represents the more circumscribed approach that the Court should use when there is no due-process-equal-protection synthesis.*

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[1] ARISTOTLE, POLITICS (350 B.C.E.), *reprinted in* THE POLITICS OF ARISTOTLE 260 (Benjamin Jowett trans., The Modern Library 1943).

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INTRODUCTION

'*Glucksberg* is dead! *Glucksberg* is dead!' Or at least so bemoans Chief Justice Roberts's dissent in *Obergefell v. Hodges*,[2] claiming that the majority effectively overruled *Washington v. Glucksberg*[3] and years of traditional substantive due process inquiry, to get to the result at hand. Needless to say, *Obergefell* is a controversial decision on many levels.[4] It is of course a decision that recognizes same-sex marriage as a matter of constitutional right across the country.[5] But *Obergefell* is also a decision that potentially charts the future course of substantive due process jurisprudence.

On the one hand, *Obergefell* favors the more expansive substantive due process analysis associated with *Lawrence v. Texas*[6] over the due process test utilized in *Glucksberg*.[7] Thus, if "the battle for the soul of substantive due process . . . come[s] down to whether *Glucksberg* or *Lawrence* triumphs,"[8] then *Obergefell* appears to be a victory for *Lawrence*. As Professor Lawrence H. Tribe contends, "*Glucksberg*'s cramped methodology cast a

[2] 135 S. Ct. 2584, 2620–21 (2015) (Roberts, C.J., dissenting).

[3] 521 U.S. 702 (1997).

[4] *See, e.g.*, Darlene C. Goring, *Premature Celebration:* Obergefell *Offers Little Immigration Relief to Binational Same-Sex Couples*, 59 HOW. L.J. 305, 316–18 (2016).

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

[6] 539 U.S. 558, 562 (2003).

[7] *Obergefell,* 135 S. Ct. at 2602.

[8] Douglas S. Broyles, *Have Justices Stevens and Kennedy Forged a New Doctrine of Substantive Due Process? An Examination of* McDonald v. City of Chicago *and* United States v. Windsor, 1 TEX. A&M L. REV. 129, 140 (2013).

significant pall that Justice Kennedy's *Lawrence v. Texas* opinion in 2003 only partially swept away . . . and that his *Obergefell* opinion in 2015 finally displaced decisively."[9] Professor Tobias Barrington Wolff similarly claims that *Obergefell* "repudiated the *Glucksberg* approach altogether."[10]

On the other hand, inasmuch as *Obergefell* appears to "dispens[e] with *Glucksberg*,"[11] it also offers a possible means by which the Court in the future can reconcile its divergent approaches to substantive due process—namely equal protection. More than any other case to date, *Obergefell* examines the synthesis between the Due Process and Equal Protection Clauses. *Obergefell* demonstrates that, when the Equal Protection Clause and the Due Process Clause interact, each clause expands the reach and scope of the other. Rather than using the traditional substantive due process analysis exemplified by *Glucksberg*, the Court undertakes a hybrid approach that ultimately gives each clause more teeth.

This Article argues that, when taking into account the equal protection component of the Due Process Clause, *Glucksberg* and its predecessors need not be outliers in the trajectory of substantive due process analysis. While *Obergefell* and *Glucksberg* inevitably limit each other's scope through their conflicting due process inquiries, the two decisions can each stand on their own bottoms. Part I of this Article explores *Obergefell's* and *Glucksberg*'s divergent approaches to substantive due process analysis, and Part II situates the two cases in the Court's jurisprudence. Part III of this Article examines the benefits and drawbacks of each approach but ultimately concludes that *Obergefell* and *Glucksberg* should serve as relevant bookends of substantive due process: *Obergefell* represents the more expansive approach that is warranted when the rights of discrete and insular minorities are implicated; *Glucksberg* represents the more circumscribed approach that should be used when equal protection and due process concerns do not converge. Viewed from this vantage point, *Glucksberg* is not dead. It can and should be alive and well—as a much needed check on judicial discretion in cases where an equal-protection-due-process synthesis is not present and a more narrow description of the right at issue is warranted.

I. *OBERGEFELL* V. *GLUCKSBERG*: SUBSTANTIVE DUE PROCESS DIVIDED AGAINST ITSELF

Under the Fifth and Fourteenth Amendments, no person shall be "deprived of life, liberty, or property, without due process of law."[12] Tex-

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[9] Laurence H. Tribe, *Equal Dignity: Speaking Its Name*, 129 HARV. L. REV. F. 16, 17 (2015).

[10] Tobias Barrington Wolff, *The Three Voices of Obergefell*, L.A. L. REV., Dec. 2015, at 28, 33.

[11] Tribe, *supra* note 9, at 17.

[12] U.S. CONST. amend. V; *see also* U.S. CONST. amend. XIV, § 1.

tually, the Due Process Clause appears to be procedural in nature. "[T]here is simply no avoiding the fact that the word that follows 'due' is 'process.' . . . '[S]ubstantive due process' is a contradiction in terms—sort of like 'green pastel redness.'"[13] Nevertheless, the Court has interpreted the Due Process Clause to have a substantive component, "barring certain government actions regardless of the fairness of the procedures used to implement them."[14]

Critics of substantive due process argue that it is an oxymoron, unsupported by the text or history of the Constitution, and a means by which the Court can impose its policy preferences on the people.[15] Justice Thomas, for example, has consistently argued that the Due Process Clause should never be construed as a source of substantive rights, lest judges distort the text of the Constitution and decide on issues properly left to the people.[16] The majority of the Court, however, has concluded otherwise: Not only has the Court gradually incorporated the Bill of Rights through the "liberty" phrase of the Due Process Clause, but it has also held that there are certain, nontextual liberty interests that due process protects.[17]

Yet, in spite of this limited agreement around the contours of substantive due process by majorities of the Court, locating and defining these nontextual liberty interests has proven far more controversial. On the one hand, the Court has recognized that the Constitution protects

[13] JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 17, 18 (1980).

[14] Daniels v. Williams, 474 U.S. 327, 331 (1986).

[15] James W. Ely, Jr., *The Oxymoron Reconsidered: Myth and Reality in the Origins of Substantive Due Process*, 16 CONST. COMMENT. 315, 315 (1999); *see* ELY, *supra* note 13, at 18.

[16] *See* Obergefell v. Hodges, 135 S. Ct. 2584, 2632 (2015) (Thomas, J., dissenting) (stating substantive due process is not defensible); McDonald v. City of Chicago, 561 U.S. 742, 811 (2010) (Thomas, J., concurring) ("The notion that a constitutional provision that guarantees only 'process' before a person is deprived of life, liberty, or property could define the substance of those rights strains credulity for even the most casual user of words."); Troxel v. Granville, 530 U.S. 57, 80 (2000) (Thomas, J., concurring) ("I write separately to note that neither party has argued that our substantive due process cases were wrongly decided and that the original understanding of the Due Process Clause precludes judicial enforcement of unenumerated rights under that constitutional provision.").

[17] *See, e.g.*, Washington v. Glucksberg, 521 U.S. 702, 720 (1997) (discussing how, "in addition to the specific freedoms protected by the Bill of Rights, the 'liberty' specially protected by the Due Process Clause" also includes certain, nontextual liberty rights); Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 846 (1992) (holding abortion is a liberty right under substantive due process); Loving v. Virginia, 388 U.S. 1, 12 (1967) (holding freedom to marry is protected under substantive due process and cannot be restricted by racial discrimination); Pierce v. Soc'y of Sisters, 268 U.S. 510, 534–35 (1925) (holding parents' right to direct upbringing and education of children is protected under substantive due process).

certain nontextual liberty rights, including the right to have children,[18] the right to use contraception,[19] the right to direct the education and upbringing of one's children,[20] the right to bodily integrity,[21] the right to abortion,[22] and the right to marry.[23] On the other hand, the Court has also emphasized that it does not have "unfettered discretion" to define the term "liberty" in the Due Process Clause.[24] Accordingly, the Court has counseled "judicial self-restraint" in its substantive due process jurisprudence,[25] "lest the liberty protected by the Due Process Clause be subtly transformed into the policy preferences of the Members of this Court."[26]

These competing objectives of upholding certain nontextual liberty rights on the one hand while exercising judicial self-restraint on the other have led the Court to adopt two contrasting approaches to substantive due process. The first is the traditional approach exemplified by *Glucksberg*, which advocates a narrow description of the right at issue, a right that must be "deeply rooted in this Nation's history and tradition" to be deemed fundamental.[27] The second is the more expansive approach associated with *Lawrence*, an opinion that, along with its predecessors, views history as the starting point but not the ending point of substantive due process analysis, and defines the right in question at a broader level of generality, taking into account the dignity and autonomy of the affected individuals.[28]

In *Glucksberg*, the Court upheld a Washington statute banning assisted suicide under the Due Process Clause.[29] According to the *Glucksberg* Court, the Court's "established method of substantive-due-process analysis has two primary features":[30] First, due process affords special protec-

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

[19] Eisenstadt v. Baird, 405 U.S. 438, 443, 453 (1972); Griswold v. Connecticut, 381 U.S. 479, 485 (1965).

[20] *Pierce*, 268 U.S. at 534–35; Meyer v. Nebraska, 262 U.S. 390, 399–400 (1922).

[21] Rochin v. California, 342 U.S. 165, 172 (1952).

[22] *Casey*, 505 U.S. at 846.

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

[24] *See* Ryan C. Williams, *The One and Only Substantive Due Process Clause*, 120 YALE L.J. 408, 411–12 (2010) ("And if a hypothetical constitutional provision were to embody language that was widely understood by the ratifying public to confer upon judges unfettered discretion to recognize and enforce unenumerated rights, the exercise of such discretion could hardly be condemned as constitutionally illegitimate.").

[25] Obergefell v. Hodges, 135 S. Ct. 2584, 2618 (2015) (Roberts, C.J., dissenting) (quoting Collins v. City of Harker Heights, 503 U.S. 115, 125 (1992)).

[26] Washington v. Glucksberg, 521 U.S. 702, 720 (1997) (citing Moore v. City of E. Cleveland, 431 U.S. 494, 502 (1976)).

[27] *Id.* at 720–21 (quoting *Moore*, 431 U.S. at 503).

[28] Lawrence v. Texas, 539 U.S. 558, 567–72 (2003).

[29] *Glucksberg*, 521 U.S. at 737–38.

[30] *Id.* at 720.

tion to "those fundamental rights [that] are deeply rooted in this Nation's history and tradition."[31] Second, courts must offer a "'careful description' of the asserted liberty . . . interest."[32] Utilizing this framework, the *Glucksberg* Court claimed that the Ninth Circuit failed to provide a "careful description" of the asserted liberty interest.[33] While the Ninth Circuit had defined the right more broadly as a right to "determin[e] the time and manner of one's own death,"[34] the *Glucksberg* Court concluded that the right should be interpreted narrowly as a "right to commit suicide with another's assistance."[35]

This debate over the level of generality at which to define the asserted liberty interest first came to play in *Michael H. v. Gerald D.*[36] In a footnote to that opinion, Justice Scalia suggested that courts should "refer to the most specific level at which a relevant tradition protecting, or denying protection to, the asserted right can be identified."[37] The *Glucksberg* Court did not directly reference Justice Scalia's footnote in *Michael H.* when it advocated a "careful description" of the liberty right. However, by rejecting the Ninth Circuit's more general formulations and defining the right in a "most circumscribed manner,"[38] the Court suggested that a "careful description" meant that the right should be defined in a manner similar to the methodology endorsed by Justice Scalia in *Michael H.*[39]

After defining the liberty interest as a right to assisted suicide, the Court then evaluated whether this interest was "deeply rooted in this Nation's history and tradition."[40] Concluding that the right to assisted suicide has no place in our Nation's history or traditions, the *Glucksberg* Court upheld Washington's statute banning assisted suicide under rational basis review.[41]

Six years after *Glucksberg*, the Court took a starkly different approach to substantive due process in *Lawrence*. *Lawrence* concerned the validity of

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[31] *Id.* at 720–21 (quoting *Moore*, 431 U.S. at 503).

[32] *Id.* at 721 (quoting Reno v. Flores, 507 U.S. 292, 302 (1993)).

[33] *Id.* at 722–24 (quoting *Flores*, 507 U.S. at 302).

[34] Compassion in Dying v. Washington, 79 F. 3d 790, 793 (9th Cir. 1996) (en banc), *rev'd sub nom. Glucksberg*, 521 U.S. 702.

[35] *Glucksberg*, 521 U.S. at 724.

[36] 491 U.S. 110 (1989).

[37] *Id.* at 127 n.6.

[38] *See* Obergefell v. Hodges, 135 S. Ct. 2584, 2602 (2015) ("*Glucksberg* did insist that liberty under the Due Process Clause must be defined in a most circumscribed manner, with central reference to specific historical practices.").

[39] *See* Kenji Yoshino, *A New Birth of Freedom?:* Obergefell v. Hodges, 129 HARV. L. REV. 147, 158 (2015) ("Chief Justice Rehnquist, the only Justice who had joined Justice Scalia's *Michael H.* footnote, penned [the *Glucksberg*] opinion. He manifestly had a similar methodology in mind.").

[40] *Glucksberg*, 521 U.S. at 721 (quoting Moore v. City of E. Cleveland, 431 U.S. 494, 503 (1976)); *id.* at 723.

[41] *Id.* at 728.

a Texas statute criminalizing homosexual sodomy.[42] Lower courts had upheld the statute per *Bowers v. Hardwick*,[43] a case that found that a Georgia antisodomy statute did not violate the fundamental rights of homosexuals.[44] The *Lawrence* Court, however, disagreed with the lower courts' disposition. First, it concluded that the *Bowers* Court's narrow definition of the right as a right to engage in homosexual sodomy "discloses the Court's own failure to appreciate the extent of the liberty at stake" and "demeans the claim the individual put forward."[45] The *Lawrence* Court thereby defined the right more broadly as a right to conduct a personal relationship in private,[46] in contrast to *Glucksberg*'s "careful approach."[47] Second, the *Lawrence* Court determined that society's "emerging awareness" regarding a person's right to conduct sexual relations in private without governmental interference was most relevant.[48] Thus, the *Lawrence* Court departed from both prongs of the *Glucksberg* test: It neither defined the right narrowly nor did it focus on history and tradition. Rather, it used a more open-ended analysis to overrule *Bowers* and hold that the Texas statute violated the petitioner's right to engage in private sexual conduct.[49]

These two contrasting approaches to substantive due process came to a head in *Obergefell*. A bare majority in *Obergefell* endorsed *Lawrence*'s more expansive approach to due process analysis, where history marks the beginning but not the outermost point, and the right at issue is defined in a more comprehensive manner.[50] Rather than rely exclusively on history and tradition, the majority used "broad principles" regarding the nature of marriage and "new insight" about injustice to conclude that same-sex couples have a fundamental right to marry.[51] Additionally, the majority claimed that the liberty right should be defined broadly as a right to marry, as past precedent "inquired about the right to marry in its comprehensive sense, asking if there was a sufficient justification for excluding the relevant class from the right."[52] The four dissenters, by contrast, argued that, at a minimum, substantive due process must follow the

[42] Lawrence v. Texas, 539 U.S. 558, 562 (2003).

[43] 478 U.S. 186 (1986).

[44] *Id.* at 195–96.

[45] *Lawrence*, 539 U.S. at 567.

[46] *Id.*

[47] *See* Obergefell v. Hodges, 135 S. Ct. 2584, 2620–21 (2015) (Roberts, C.J., dissenting) ("Perhaps recognizing how little support it can derive from precedent, the majority goes out of its way to jettison the 'careful' approach to implied fundamental rights taken by this Court in *Glucksberg*.").

[48] *Lawrence*, 539 U.S. at 572.

[49] *Id.* at 578–79.

[50] *Obergefell*, 135 S. Ct. at 2598, 2602.

[51] *Id.* at 2598–602.

[52] *Id.* at 2602.

rule delineated in *Glucksberg*, which recognizes only those asserted liberty interests that are deeply rooted in history and tradition and defined narrowly.[53]

Given these divergent viewpoints, perhaps it belabors the obvious to state that the due process analyses of *Glucksberg* and *Obergefell* do not appear to peaceably coexist. Indeed, had the *Obergefell* majority applied the *Glucksberg* due process framework, the result would have been clear—and contrary: There is no right to same-sex marriage rooted in American history or tradition, and therefore laws banning same-sex marriage present no due process violation.

The majority sidesteps this issue by appearing to relegate *Glucksberg* to its facts:[54] "[W]hile [*Glucksberg*'s] approach may have been appropriate for the asserted right there involved (physician-assisted suicide), it is inconsistent with the approach this Court has used in discussing other fundamental rights, including marriage and intimacy."[55] Unlike the *Lawrence* Court, which ignored *Glucksberg* altogether,[56] *Obergefell* addresses *Glucksberg* head-on, stating that its due process inquiry should not apply for marriage, intimacy and other fundamental rights.[57] Justice Roberts in his dissent bemoans this treatment of *Glucksberg*, claiming that the majority "effectively overrule[s]" *Glucksberg* by "go[ing] out of its way to jettison the 'careful' approach to implied fundamental rights."[58]

Yet, the majority need not have "effectively overrule[d]" *Glucksberg*.[59] Inasmuch as *Obergefell* highlights the Justices' contrasting views on substantive due process analysis, it also offers a means by which the Court in the future can reconcile its divergent approaches through equal protection.

[53] *See id.* at 2618 (Roberts, C.J., dissenting); *id.* at 2628 (Scalia, J., dissenting); *id.* at 2635 (Thomas, J., dissenting); *id.* at 2640 (Alito, J., dissenting).

[54] *See* Tribe, *supra* note 9, at 16 ("*Obergefell* has definitively replaced *Washington v. Glucksberg*'s wooden three-prong test focused on tradition, specificity, and negativity with the more holistic inquiry of Justice Harlan's justly famous 1961 dissent in *Poe v. Ullman*, a mode of inquiry that was embodied in key opinions from the mid-1960s to the early 1970s."); Wolff, *supra* note 10, at 33 ("Instead, *Obergefell* repudiated the *Glucksberg* approach altogether, appearing to limit the earlier case to its facts.").

[55] *Obergefell*, 135 S. Ct. at 2602.

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

[57] *Obergefell*, 135 S. Ct. at 2602.

[58] *Id.* at 2620–21 (Roberts, C.J., dissenting).

[59] *Id.* at 2621.

II. THE DOCTRINAL ROOTS OF *OBERGEFELL*: TRACING EQUAL PROTECTION IN SUBSTANTIVE DUE PROCESS

"Doctrinal limbs too swiftly shaped . . . may prove unstable."[60]
—Justice Ruth Bader Ginsburg

Equal protection—and its impact on due process—serves as a justification for the more expansive due process analysis of *Obergefell* and provides a reason why *Glucksberg* need not be relegated to "that dustbin of constitutional blunders."[61] In his majority *Obergefell* opinion, Justice Kennedy explains how, in due process cases that implicate equal protection principles, each clause "may be instructive as to the meaning and reach of the other."[62] This intersection between due process and equal protection "furthers our understanding of what freedom is and must become."[63] Thus, *Obergefell* indicates that the overlap between due process and equal protection can trigger a synergy in which each clause broadens the scope of the other.

The dissent is not convinced by Justice Kennedy's references to equal protection. Justice Roberts finds it "difficult to follow,"[64] and he ignores any impact a due-process-equal-protection synthesis may have on the analysis when arguing that *Obergefell* is neither rooted in principle nor tradition.[65] According to Justice Roberts, after the *Lochner* era,[66] a time

[60] Ruth Bader Ginsburg, *Speaking in a Judicial Voice*, 67 N.Y.U. L. REV. 1185, 1198 (1992).

[61] Laurence H. Tribe, Lawrence v. Texas*: The "Fundamental Right" That Dare Not Speak Its Name*, 117 HARV. L. Rev. 1893, 1925 (2004) ("*Lawrence* . . . put *Bowers* in its proper place—that dustbin of constitutional blunders.").

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

[63] *Id.*

[64] *Id.* at 2623 (Roberts, C.J., dissenting).

[65] *See id.* at 2618–23.

[66] For a more in-depth discussion of the *Lochner* era, see *infra* notes 72–78 and accompanying text. The *Lochner* era was a time in the early 20th century when the Supreme Court used substantive due process prominently to invalidate laws that violated a liberty of contract. Although increasingly subject to revisionist interpretation, the *Lochner* era has since been discredited as a time when the Supreme Court Justices struck down laws they found to be improvident, under "an economic theory which a large part of the country [did] not entertain." Lochner v. New York, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting); *see also* David E. Bernstein, Lochner *Era Revisionism, Revised:* Lochner *and the Origins of Fundamental Rights Constitutionalism,* 92 GEO. L.J. 1, 57 (2003) ("[T]heorists such as Bruce Ackerman and Owen Fiss . . . argued that *Lochner*'s error was not in establishing a strong judicial role in protecting unenumerated fundamental rights, but in choosing the wrong rights to emphasize."); John Hart Ely, *The Wages of Crying Wolf: A Comment on* Roe v. Wade, 82 YALE L.J. 920, 937 (1973) ("There was a time when the Due Process Clause was used by this Court to strike down laws which were thought unreasonable, that is, unwise or incompatible with some particular economic or social philosophy.").

when judges repeatedly struck down laws based on their personal policy preferences, "the Court recognized its error and vowed not to repeat it."[67] Instead, it advocated "judicial self-restraint"[68] to curb its own overreach, and it introduced the test most clearly articulated in *Glucksberg*: For a liberty right in the Due Process Clause to be constitutional, it must be rooted in history and tradition and defined narrowly.[69] *Obergefell*, claims Justice Roberts, represents a deviation from this established approach and a return to "the unprincipled approach of *Lochner* [*v. New York*]."[70]

Yet, Justice Roberts' historical account tells only one part of the story. While *Glucksberg* and its predecessors emerged as one response to *Lochner*, *Obergefell* and its predecessors emerged as another—one that provides a more searching form of inquiry when the rights of subordinated groups are implicated. *Obergefell* can thereby be seen as a culmination of another line of precedents, adopting a more expansive analysis when substantive due process and equal protection converge. Indeed, a look at some of the major cases in substantive due process since *Lochner* indicates that, contrary to Justice Roberts' assertions, *Obergefell* is firmly rooted in modern-day precedent.

A. The Carolene Products *Footnote Four and Its Legacy*

United States v. Carolene Products Co.[71] is the first case that introduced the proposition that the Court may use a more searching inquiry when examining the constitutionality of laws burdening subordinated groups. To understand the role of *Carolene Products* in substantive due process, one must travel back to *Lochner v. New York*,[72] a 1905 Supreme Court case which marked "the Court's first sustained . . . use of substantive due process."[73] In *Lochner*, the Court invalidated a statute that set maximum hours for bakery employers, because it deprived the bakery employer of "liberty" of contract without "due process of law."[74] Justice Holmes, in a now-famous dissent, claimed that the majority decided the case by embracing a particular economic theory, laissez-faire economics, rather than utilizing valid principles of constitutional law.[75] For the next 30 years, and

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[67] *Obergefell*, 135 S. Ct. at 2617 (Roberts, C.J., dissenting).

[68] *Id.* at 2618 (quoting Collins v. City of Harker Heights, 503 U.S. 115, 125 (1992)).

[69] *Id.*

[70] *Id.* at 2618–19.

[71] 304 U.S. 144 (1938).

[72] 198 U.S. 45 (1905).

[73] Daniel O. Conkle, *The Second Death of Substantive Due Process*, 62 IND. L.J. 215, 216 (1987).

[74] *Lochner*, 198 U.S. at 53.

[75] *Id.* at 75 (Holmes, J., dissenting).

often over vigorous dissents,[76] the Court continued to use substantive due process to invalidate a number of economic regulations.[77] Eventually, however, the Court embraced Justice Holmes' viewpoint that courts could not use the Due Process Clause to strike down laws because they may be "unwise, improvident, or out of harmony with a particular school of thought."[78]

In 1937, the Court expressly repudiated Lochnerian due process in *West Coast Hotel v. Parrish*,[79] and in 1938, the Court in *Carolene Products* articulated its new deferential standard that "regulatory legislation affecting ordinary commercial transactions" is presumed to be constitutional.[80] Yet, in a now famous footnote ("Footnote Four") appended to that statement, the *Carolene Products* Court noted that in some cases a more expansive analysis may be warranted: "[W]hen legislation appears on its face to be within a specific prohibition of the Constitution," then "[t]here may be narrower scope for operation of the presumption of constitutionality."[81] Footnote Four also suggested that laws restricting the political process and laws directed against "discrete and insular minorities" may be subject to a more exacting scrutiny,[82] and it reinterpreted several civil liberty decisions during the *Lochner* era, including *Meyer v. Nebraska*[83] and *Pierce v. Society of the Sisters of the Holy Names of Jesus and Mary*,[84] as decisions that invalidated statutes because the laws were directed at "particular religious, or national, or racial minorities."[85] Thus, while *Carolene Products* cemented the demise of *Lochner* by articulating the Court's new deferential standard for economic regulation, it also offered a potential new role for substantive due process: Laws affecting economic contract were now subject to rational basis review, but laws affecting politically powerless minority groups may call for a more searching scrutiny.

"For thirty years after *Carolene Products*, substantive due process seemed to be dead."[86] Gradually, however, the Court took tentative steps towards reviving the largely discredited substantive due process analysis. In 1965, the Court decided *Griswold* v. *Connecticut*,[87] a case that is consid-

[76] *See, e.g.*, Adkins v. Children's Hosp., 261 U.S. 525, 562 (1923) (Taft, C.J., dissenting); Coppage v. Kansas, 236 U.S. 1, 26 (1915) (Holmes, J., dissenting).

[77] Conkle, *supra* note 73, at 217.

[78] Williamson v. Lee Optical, Inc., 348 U.S. 483, 488 (1955).

[79] 300 U.S. 379 (1937).

[80] United States v. Carolene Prods. Co., 304 U.S. 144, 152 (1938).

[81] *Id.* at 152 n.4.

[82] *Id.* at 153 n.4.

[83] 262 U.S. 390 (1922).

[84] 268 U.S. 510 (1925).

[85] *Carolene Prods.*, 304 U.S. at 153 n.4.

[86] JOHN V. ORTH, DUE PROCESS OF LAW: A BRIEF HISTORY 76 (2003).

[87] 381 U.S. 479 (1965).

ered to be the modern-day progenitor of substantive due process.[88] Reluctant to invoke the ghost of *Lochner* past, the Court instead used the "penumbras" of other amendments to conclude that a fundamental right to privacy exists in the Constitution and invalidate laws banning contraceptives.[89]

Relying on *Griswold*, the Court in *Roe v. Wade*,[90] and later in *Planned Parenthood v. Casey*,[91] held that the right of privacy, founded in the Fourteenth Amendment's concept of liberty, is "broad enough to encompass a woman's decision whether or not to terminate her pregnancy."[92] Other cases similarly used the right to privacy first articulated in *Griswold* to afford constitutional protection to certain "personal decisions and relationships" under the Due Process Clause.[93]

Then, in 1986, the Court held in *Bowers v. Hardwick*[94] that no fundamental right to homosexual sodomy existed in the Constitution, because a fundamental liberty right must be "'rooted in this Nation's history and tradition' or 'implicit in our concept of ordered liberty' . . . ."[95] At least one commentator wrote that *Bowers* marked the possible demise of substantive due process.[96] Yet, fourteen years later, in *Lawrence*, the Court overruled *Bowers*, causing some commentators to predict that *Bowers* would be a mere footnote in substantive due process analysis and the more expansive approach adopted by the *Lawrence* Court would become the norm.[97]

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[88] ORTH, *supra* note 86, at 78; Conkle, *supra* note 73, at 219.

[89] *Griswold*, 381 U.S. at 483–86.

[90] 410 U.S. 113 (1973).

[91] 505 U.S. 833 (1992).

[92] *Roe*, 410 U.S. at 153; *accord Casey*, 505 U.S. at 846 (stating that "the essential holding of *Roe v. Wade* should be retained and once again reaffirmed").

[93] Conkle, *supra* note 73, at 215 ("Over the last twenty years, the *Griswold* line of cases has granted constitutional protection to a variety of personal decisions and relationships . . . ."); *see also* City of Akron v. Akron Ctr. for Reprod. Health, 462 U.S. 416, 426–27 (1983); Carey v. Population Servs. Int'l, 431 U.S. 678, 685 (1977).

[94] 478 U.S. 186 (1986).

[95] *Id.* at 194 (internal quotation marks omitted).

[96] Conkle, *supra* note 73, at 215 ("But now the Court has called the evolution of [substantive due process] to a halt and, I believe, has rendered a decision [*Bowers v. Hardwick*] that may portend the second death of substantive due process.").

[97] *See* Broyles, *supra* note 8, at 162 ("For the present, the understanding of constitutionally protected 'liberty' that prevails in the High Court has been defined and delimited by Justices Stevens and Kennedy. Moreover, the conservative members of the Court lack a convincing counter-argument."); E. Benton Keatley, *The Liberty of Innocent Delights: Obscene Devices and the Limits of State Power After* Lawrence v. Texas, 16 WASH. & LEE J. C.R. & SOC. JUST. 257, 260 (2009) ("Scholars have argued that *Lawrence* marks the Court's implicit shift toward a 'presumption of liberty[]' . . . ."); Tribe, *supra* note 61, at 1925 ("*Lawrence* . . . put *Bowers* in its proper place—that dustbin of constitutional blunders.").

B. Casey *and* Glucksberg

In between *Bowers* and *Lawrence*, the Supreme Court decided two cases that at first glance appear to exemplify these inconsistent approaches to due process analysis. On the one hand is *Glucksberg*, adopting an approach that effectively reins in substantive due process. On the other hand is *Casey*, a case that vindicates the more expansive approach of *Roe*.

The parallels between these two cases are striking. Both cases involve the right to choose whether or not to continue or end a life. *Casey* involved the life of a fetus—whether to abort the pregnancy or bring it to term;[98] and *Glucksberg* involved the life of a competent, terminally ill individual.[99]

It is perhaps not surprising then that the Court initially used similar analyses when deciding these cases. In *Casey*, the Court expressly repudiated a due process analysis that defined the liberty right at the most specific level, stating that such an approach was "inconsistent with our law."[100] Instead, the Court quoted Justice Harlan's dissent in *Poe v. Ullman*[101] for the proposition that due process "has not been reduced to any formula."[102] Rather, it includes freedom from "arbitrary impositions and purposeless restraints,"[103] and it requires the Court in some instances to exercise "reasoned judgment."[104]

Under this broader framework, the Court upheld *Roe*'s central holding that a woman's decision to terminate her pregnancy was a liberty right under substantive due process.[105] It reasoned in part that a woman's right to choose is "of the same character" as the liberty rights protected in cases involving contraception, family relationships and child rearing:[106] "These matters, involving the most intimate and personal choices a person may make in a lifetime . . . are central to the liberty protected by the Fourteenth Amendment."[107] They touch upon "the heart of liberty . . . the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life."[108] The Court then used a balancing test to determine at which point the interests of the state in protecting human life outweighed the liberty interest of the woman to terminate

[98] Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 844 (1992).

[99] Washington v. Glucksberg, 521 U.S. 702, 707–08 (1997).

[100] *Casey*, 505 U.S. at 847.

[101] 367 U.S. 497 (1961).

[102] *Casey*, 505 U.S. at 849 (quoting *Poe*, 367 U.S. at 542 (Harlan J., dissenting)).

[103] *Id.* at 848 (quoting *Poe*, 367 U.S. at 543 (Harlan J., dissenting)).

[104] *Id.* at 849.

[105] *Id.* at 869.

[106] *Id.* at 851–52.

[107] *Id.* at 851.

[108] *Id.*

her pregnancy.[109] Under this test, any state regulation that imposed an "undue burden" on a woman's right to choose was impermissible.[110]

In *Compassion in Dying v. State of Washington*,[111] the lower court's disposition of *Glucksberg*, the Ninth Circuit, rehearing en banc, agreed with the District Court that the reasoning in *Casey* was "'highly instructive' and 'almost prescriptive' [in] determining 'what liberty interest may inhere in a terminally ill person's choice to commit suicide.'"[112]Like the right to abortion, the right to die "involv[es]the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy," which "are central to the liberty protected by the Fourteenth Amendment."[113] Accordingly, the court concluded that there was a due process liberty interest in determining "the time and manner of one's death."[114] The court then followed the balancing approach of *Casey* to hold that the provision of the Washington statute banning assisted suicide was unconstitutional as applied to competent, terminally ill adults who wish to hasten their deaths through doctor-prescribed medication.[115]

Yet, the Supreme Court in *Glucksberg* disagreed and in a unanimous opinion reversed the Ninth Circuit's decision, adopting instead the traditional approach to due process analysis and suggesting by implication that *Roe* and *Casey* were aberrations in substantive due process analysis.[116] According to the Court, "the development of this Court's substantive-due-process jurisprudence . . . has been a process whereby the outlines of the 'liberty' specially protected by the Fourteenth Amendment . . . have . . . been carefully refined by concrete examples involving fundamental rights found to be deeply rooted in our legal tradition."[117] This tradition of "carefully formulating the interest at stake in substantive-due-process cases" meant that the right should be defined narrowly as a right to assisted suicide, not as a broad right to choose the time and manner of one's death, as the Ninth Circuit had stipulated.[118] Moreover, the Court concluded that assisted suicide has no place in our Nation's

[109] *Id.* at 876.

[110] *Id.*

[111] 79 F.3d 790 (9th Cir. 1996) (en banc), *rev'd sub nom.* Washington v. Glucksberg, 521 U.S. 702 (1997).

[112] *Id.* at 813 (quoting Compassion in Dying v. Washington, 850 F. Supp. 1454, 1459 (W.D. Wash 1994)).

[113] *Id.* (quoting *Casey*, 505 U.S. at 851).

[114] *Id.* at 816.

[115] *Id.* at 838.

[116] *See* Lawrence v. Texas, 539 U.S. 558, 588 (2003) (Scalia, J., dissenting) ("*Roe* and *Casey* have been equally 'eroded' by *Washington v. Glucksberg* . . . ."); Daniel O. Conkle, *Three Theories of Substantive Due Process*, 85 N.C. L. REV. 63, 90 (2006) ("[T]he Court in *Glucksberg* appeared to view *Casey* (and therefore *Roe*) as aberrational . . . .").

[117] Washington v. Glucksberg, 521 U.S. 702, 722 (1997).

[118] *Id.* at 722–23.

history or traditions, and it thereby could not be characterized as a fundamental-liberty interest.[119]

The Court does not attempt to reconcile this approach with *Casey*, nor could it, and so one has to question why these two cases—decided a mere five years apart—had such drastically different results. Why is it that in *Casey*, the right was defined broadly—as the right to reproductive choice—and history was given short-shift; whereas in *Glucksberg*, the Court advocated a "careful description" of the right. The question presented to the Court effectively begged the answer: There is no history or tradition in our country of a right to assisted suicide.

What explains these different tests? While there is an argument to be made that *Casey* gained a majority of the Court because of the Court's commitment to stare decisis,[120] that fact does not explain why all nine members of the Court agreed with the result in *Glucksberg*. There is no reason to presume that some of the Justices suddenly decided that the traditional test was more appropriate, but then changed their views again in *Lawrence*. Nor does Justice Scalia's argument that *Glucksberg* implicated a right that the Justices did not like, whereas other cases involved a right that the Court desired to be made constitutional, hold much water.[121] Justice Kennedy for example, personally abhorred the idea of abortion,[122] yet he still voted to uphold a woman's right to choose in *Casey*.

Equal protection offers arguably the only sound explanation—and justification—for the different approaches. When a law is directed at a historically subordinated group, then issues of access and inequality are necessarily raised, and the Court may be more inclined to favor a test that broadens the scope of laws that can be found unconstitutional. As stated in *Carolene Products*' footnote, cases implicating the rights of subordinated groups may call for a "more searching judicial inquiry."[123]

While the *Casey* Court did not explicitly reference *Carolene Products*' footnote, it nevertheless actively heeded that suggestion in its reasoning. The Court in *Casey* continuously referred to the right at issue as the *woman's* right to choose. It emphasized that the right at stake involved "the

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[119] *Id.* at 728.

[120] *See* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 844 (1992) ("Liberty finds no refuge in a jurisprudence of doubt.").

[121] *See* Obergefell v. Hodges, 135 S. Ct. 2584, 2630 (2015) (Scalia, J., dissenting) ("It stands for nothing whatever, except those freedoms and entitlements that this Court *really* likes. And the Equal Protection Clause, as employed today, identifies nothing except a difference in treatment that this Court *really* likes."); *Lawrence*, 539 U.S. at 595 (2003) (Scalia, J., dissenting) ("The *Roe* Court . . . based its conclusion . . . on its own normative judgment that antiabortion laws were undesirable.").

[122] Jeffrey Toobin, The Nine: Inside the Secret World of the Supreme Court 62 (2008) ("Abortion repelled [Kennedy].").

[123] United States v. Carolene Prods. Co., 304 U.S. 144, 153 n.4 (1938).

liberty of the woman,"[124] and it determined that the process of childbirth was "too intimate and personal for the State to insist, without more, upon its own vision of the woman's role, however dominant that vision has been in the course of our history and our culture."[125] The Court also noted that the woman's control over her reproductive life implicated her "ability . . . to participate equally in the economic and social life of the Nation"[126] and concluded that "the urgent claims of the woman to retain the ultimate control over her destiny and her body, claims implicit in the meaning of liberty,"[127] empowered the Court to determine the line at which the woman has the right to choose to terminate her pregnancy.[128]

Thus, equal protection issues pertaining to a woman's right to participate equally in society pervade the opinion, and the Court's more expansive approach to due process can be justified when one takes into account the equal protection interests involved: After all, no right implicat-implicating women would have a basis in our history and tradition, when women were historically denied rights in our culture. To rely on history and tradition, then, would be to effectively render the due process analysis in this case a dead letter.

In *Glucksberg*, by contrast, equal protection issues if anything acted as a shield rather than a sword by pushing the Court to hold that the terminally ill did not have a fundamental right to die.[129] The Court expressed concern over the possible exploitation of vulnerable individuals, and it determined that the State had a legitimate interest in protecting "the poor, the elderly, and disabled" from "abuse, neglect, and mistakes."[130] The Court also noted that individuals who contemplate suicide often suffer from mental disorders,[131] and it determined that the State's assisted suicide ban helped counteract prejudice and "societal indifference" by reinforcing its policy that the lives of terminally ill people should be valued. [132] The *Glucksberg* Court therefore used equal protection interests to counter the plaintiff's due process argument and demonstrate the validity of the law banning physician assistant suicide.

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[124] *Casey*, 505 U.S. at 852.

[125] *Id.*

[126] *Id.* at 856.

[127] *Id.* at 869.

[128] *Id.*

[129] *See* Kenji Yoshino, *The New Equal Protection*, 124 HARV. L. REV. 747, 802 (2011) ("The fact that social subordination presses the Court to refuse rights . . . as well as to grant rights . . . means that equality can be a brake as well as a goad . . . .").

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

[131] *Id.* at 730.

[132] *Id.* at 732 (quoting Compassion in Dying v. Washington, 49 F.3d 586, 592 (9th Cir. 1995), *rev'd sub nom. Glucksberg*, 521 U.S. 702).

In sum, *Casey* and *Glucksberg* demonstrate that the "slippery slope" of substantive due process rights is not "as slippery as it seems."[133] The interaction between equal protection and due process may trigger a more expansive analysis. However, when equal protection issues are proffered by the State as a means to justify the law at hand, then they can rein in substantive due process and facilitate the use of the traditional approach.

C. Lawrence *and* Windsor

After *Glucksberg*, the Supreme Court decided two cases that adopted an expansive approach to substantive due process reminiscent of *Roe* and *Casey*. In *Lawrence*, a bare majority of the Court invalidated a Texas statute criminalizing same-sex sodomy, and in *United States v. Windsor*,[134] also a 5–4 decision, the Court held that the provision of the Defense of Marriage Act (DOMA),[135] which defined marriage so as to exclude same-sex unions, was unconstitutional.[136] Although DOMA's definitional provision did not prevent states from regulating marriage at the state level, it did affect over 1,000 federal laws where spousal status was at issue;[137] and it prevented the petitioner in the case from obtaining a tax refund under the Federal Estate Tax as a surviving spouse.[138] Accordingly, the petitioner sued for the refund, claiming that the definitional provision violated equal protection as applied to the Federal Government through the Fifth Amendment.[139]

Lawrence is explicitly a due process case.[140] The Court noted that the equal protection argument was "tenable,"[141] but it nevertheless decided to evaluate the Texas statute on due process grounds. Writing for the majority, Justice Kennedy invalidated the statute and overruled *Bowers* by excising the Court from the traditional due process analysis. First, he states that *Bowers* "fail[ed] to appreciate the extent of the liberty at stake."[142] According to Justice Kennedy, the issue presented was not whether homosexuals have a fundamental right to engage in sodomy, as *Bowers* had

[133] Yoshino, *supra* note 129, at 802.

[134] 133 S. Ct. 2675 (2013).

[135] 28 U.S.C. § 1738C (2012). For the generally provided definition of "marriage," see 1 U.S.C. § 7 (2012).

[136] *Windsor*, 133 S. Ct. at 2695.

[137] *Id.* at 2683.

[138] *Id.*

[139] *Id.*

[140] *But see* Miranda Oshige McGowan, *From Outlaws to Ingroup:* Romer, Lawrence, *and the Inevitable Normativity of Group Recognition*, 88 MINN. L. REV. 1312, 1313 (2004) ("In fact, *Lawrence* is more of an equal protection case than a substantive due process case."). While *Lawrence* was decided under the due process clause, it utilized equal protection principles. *Id.*

[141] Lawrence v. Texas, 539 U.S. 558, 574–75 (2003).

[142] *Id.* at 567.

stipulated. Such a narrow construction of the right "demeans the claim[s]" of the plaintiffs, "just as it would demean a married couple were it to be said marriage is simply about the right to have sexual intercourse."[143] Rather, argues Justice Kennedy, the liberty right at issue encompasses the freedom of an individual to enter into a personal relationship.[144]

Having construed the liberty right as such, Justice Kennedy then "struck the chains of history"[145] from the due process analysis: "[H]istory and tradition are the starting point but not in all cases the ending point of the substantive due process inquiry."[146] In the case at hand, argues Justice Kennedy, it is society's "emerging awareness" that liberty should encompass an adult's personal choices in matters pertaining to sex and sexuality that is most relevant, not whether the right is rooted in history or tradition.[147]

Justice Kennedy never declares that the right at issue is a fundamental right, nor does he specify the level of review he uses to conclude that the statute is unconstitutional. Rather, his opinion reads as an analysis in which "due process and equal protection principles converge."[148] As Justice Kennedy states, "Equality of treatment and the due process right to demand respect for conduct protected by the substantive guarantee of liberty are linked in important respects, and a decision on the latter point advances both interests."[149] Not only does equal protection expand the definition of the right, so as not to demean gay individuals,[150] but it also restructures the role of history and tradition in the analysis. While the Due Process Clause "often looks backward"[151] to determine whether the law is valid, the Equal Protection Clause is a forward-looking clause that actively repudiates history to rectify past discrimination against disadvantaged groups.[152] When equal protection and due process concerns

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[143] *Id.*

[144] *Id.*

[145] Yoshino, *supra* note 129, at 780.

[146] *Lawrence*, 539 U.S. at 572 (quoting Cty. of Sacramento v. Lewis, 523 U.S. 833, 857 (1998) (Kennedy, J., concurring)).

[147] *Id.* at 572.

[148] M.L.B. v. S.L.J., 519 U.S. 102, 120 (1996) (quoting Bearden v. Georgia, 461 U.S. 660, 665 (1982)).

[149] *Lawrence*, 539 U.S. at 575.

[150] *Id.* at 567 ("To say that the issue in *Bowers* was simply the right to engage in certain sexual conduct demeans the claim the individual put forward, just as it would demean a married couple were it to be said marriage is simply about the right to have sexual intercourse.").

[151] Cass R. Sunstein, *Sexual Orientation and the Constitution: A Note on the Relationship Between Due Process and Equal Protection*, 55 U. CHI. L. REV. 1161, 1163 (1988).

[152] *Id.* at 1163, 1168.

converge, however, *Lawrence* indicates that history and tradition guide the inquiry but "do not set its outer boundaries."[153]

In *Windsor*, the Court blurs the lines between equal protection and due process even further than it had in *Lawrence*. While *Lawrence* was explicitly a due process case, *Windsor* invalidates DOMA's definitional provision under both due process and equal protection principles.[154]

The majority opinion, again written by Justice Kennedy, holds that the law deprives the affected individuals of "liberty" protected by the Fifth Amendment.[155] Yet, Justice Kennedy does not clearly define that liberty right, nor does he examine whether it is rooted in history or tradition. Instead, he focuses on the class of people denied the full benefits that come with federal recognition of their marriages.[156]

Accordingly, while Justice Kennedy frames the issue in due process "liberty" terms, his reasoning sounds in equal protection. Quoting equal protection cases such as *U.S. Department of Agriculture v. Moreno*[157] and *Romer v. Evans*,[158] Justice Kennedy claims that that the law is rooted in animus against gay people as a class.[159] By depriving same-sex couples of federal recognition, DOMA imposes "a disadvantage, a separate status, and so a stigma" upon those who legally enter state-sanctioned, same-sex marriages.[160] It creates "two contradictory marriage regimes within the same State,"[161] and it "places same-sex couples in an unstable position of being in a second-tier marriage," unworthy of federal recognition.[162] The "resulting injury and indignity," Justice Kennedy concludes, deprives same-sex couples of the "liberty" protected by the Due Process Clause of the Fifth Amendment.[163]

For all its equal protection language, however, the case is not a purely equal protection case either, because Justice Kennedy does not specify the level of review that he uses. The parties had disputed whether sexual orientation should be subject to heightened scrutiny or rational basis review under equal protection. Justice Kennedy employs an analysis that appears to be somewhere in between the two levels of scrutiny—what scholars have termed "rational basis with bite" for cases where the Court

[153] Obergefell v. Hodges, 135 S. Ct. 2584, 2598 (2015) (citing *Lawrence*, 539 U.S. at 572); *see also* Yoshino, *supra* note 129, at 781 (stating that *Lawrence* revealed liberty and equality to be "horses that ran in tandem rather than in opposite directions").

[154] United States v. Windsor, 133 S. Ct. 2675, 2695 (2013).

[155] *Id.*

[156] *See id.* at 2692–96.

[157] 413 U.S. 528 (1973).

[158] 517 U.S. 620 (1996).

[159] *Windsor*, 133 S. Ct. at 2693.

[160] *Id.*

[161] *Id.* at 2694.

[162] *Id.*

[163] *Id.* at 2692.

purports to use rational basis review—but in practice implements a less deferential analysis.[164] In his opinion, however, Justice Kennedy does not resolve this dispute or specify the appropriate level of review that the Court should use for sexual orientation under equal protection.

Thus, the claim is perhaps best viewed not simply as an equal protection claim or a due process claim, but rather as what Professor Lawrence Tribe has termed a "dignity" claim that emanates from principles of both liberty and equality.[165] It is the insult on the dignity and worth of the subordinated class of individuals that makes the law unconstitutional and allows for a more open-ended analysis under both equal protection and due process principles. Accordingly, as in *Lawrence*, rather than adhere to the traditional due process framework of *Glucksberg*, or a tiered equal protection analysis, the Court implements a hybrid due-process-equal-protection approach that expands the reach of both clauses.

D. Obergefell

When viewed from this doctrinal lens, *Obergefell* appears almost as an inevitability. In his *Obergefell* opinion, Justice Kennedy discusses how the *Lawrence* Court held that "same-sex couples have the same right as heterosexual couples to enjoy intimate association."[166] Yet, while *Lawrence* "confirmed a dimension of freedom" by allowing same-sex couples to "engage in intimate conduct without criminal liability," that freedom does not end there, argues Justice Kennedy:[167] "Outlaw to outcast may be a step forward, but it does not achieve the full promise of liberty."[168] Justice Kennedy also cites both *Lawrence* and *Windsor* for the proposition that the State cannot demean same-sex couples' existence or control their destiny by placing them in an unequal position with heterosexual couples.[169]

Perhaps, then, Justice Scalia is prescient in his dissenting opinions in both *Lawrence* and *Windsor* when he predicts that all roads lead to gay marriage. In *Lawrence,* Justice Scalia writes:

> If moral disapprobation of homosexual conduct is 'no legitimate state interest' for purposes of proscribing such conduct; and if, as the [Lawrence] Court coos . . . , 'when sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring,' what

[164] *See, e.g.*, Romer v. Evans, 517 U.S. 620 (1996); City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432 (1985); U.S. Dep't of Agric. v. Moreno, 413 U.S. 528 (1973). Commentators have considered the Court in each of these cases to use a "rational basis with bite" standard. *See* Yoshino, *supra* note 129, at 760.

[165] Tribe, *supra* note 61, at 1898.

[166] Obergefell v. Hodges, 135 S. Ct. 2584, 2600 (2015).

[167] *Id.*

[168] *Id.*

[169] *Id.* at 2599–600, 2604.

> justification could there possibly be for denying the benefits of marriage to homosexual couples exercising 'the liberty protected by the Constitution'?[170]

In *Windsor*, Justice Scalia goes even further, arguing that a future decision that laws banning same-sex marriage are motivated by a bare desire to harm gay couples will not only be "easy" for the Court to make but "inevitable," after the Court's analogous holding regarding DOMA.[171] Thus, according to Justice Scalia, the reasoning in both *Lawrence* and *Windsor* is directly transposable to the issue of same-sex marriage.

Justice Roberts appears less willing to acknowledge the connection between *Obergefell* and modern-day substantive due process cases such as *Lawrence* and *Casey*. In his *Obergefell* dissent, Justice Roberts claims that *Obergefell* digresses from modern-day precedent, because the *Griswold* line of cases involved an implied fundamental right to privacy, whereas the petitioners in *Obergefell* seek the exact opposite: public recognition for their relationships and government benefits.[172] "The *Glucksberg* Court also drew a distinction between negative and positive liberties," and suggested that while the Court may use substantive due process to protect a negative right—or a right to have the Government refrain from doing an act that could cause harm—it was less willing to protect positive rights—or rights that require the Government to act affirmatively for some benefit.[173]

Yet, a more thorough examination of recent precedent reveals that Justice Roberts' argument is beset with holes. First, *Windsor* cannot be reconciled with the privacy-line of cases any more than *Obergefell*, as *Windsor* is not about privacy at all but rather public recognition. Indeed, the respondent in *Windsor* sought the very same type of relief sought by petitioners in *Obergefell*: Government entitlements and federal recognition of their marriages.[174] Second, *Lawrence* distances itself from the privacy language of *Griswold*, and focuses instead on the liberty and equality interests in personal relationships.[175] Thus, *Lawrence* signals that the issue is

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[170] Lawrence v. Texas, 539 U.S. 558, 604–05 (2003) (Scalia, J., dissenting) (quoting *id.* at 567 (majority opinion)).

[171] United States v. Windsor, 133 S. Ct. 2675, 2709 (Scalia, J., dissenting).

[172] *Obergefell*, 135 S. Ct. at 2619–20 (Roberts, C.J., dissenting).

[173] *See* Washington v. Glucksberg, 521 U.S. 702, 725–26 (1997) ("In *Cruzan* itself, we recognized that most States outlawed assisted suicide—and even more do today—and we certainly gave no intimation that the right to refuse unwanted medical treatment could be somehow transmuted into a right to assistance in committing suicide."); *see also* Yoshino, *supra* note 39, at 159.

[174] *See Windsor*, 133 S. Ct. at 2683.

[175] Randy E. Barnett, *Justice Kennedy's Libertarian Revolution:* Lawrence v. Texas, 2003 CATO SUP. CT. REV. 21, 34 ("Justice Kennedy puts rhetorical distance between the decision in *Lawrence* and the right of privacy protected in *Griswold* . . . . Indeed, the 'right of privacy' makes no other appearance in this opinion . . . . In contrast

less about a privacy right than it is about a synthesized liberty and equality right to dignity.[176] Third, and finally, while both *Roe* and *Casey* are textually grounded in the right to privacy, equal protection better explains the analyses.[177] As Professor Cass R. Sunstein states, "there is much to be said in favor of the mounting academic consensus that *Roe v*[.] *Wade* involved issues of sex discrimination as well as privacy, and that the problem of abortion might plausibly have been approached in equal protection terms."[178] Moreover, as described *supra*,[179] equal protection offers arguably the only rational explanation as to why abortion rights are constitutionally protected, whereas other rights, such as death with dignity, are not.

Thus, when one acknowledges equal protection's impact on substantive due process analysis, *Obergefell* no longer appears as a deviation from established jurisprudence. Rather, it is a culmination of a long line of cases, from *Meyers, Pierce,* and *Carolene Products*, to *Roe*, *Casey*, *Lawrence*, and *Windsor*.

1. History and Tradition

As with other cases utilizing an expansive substantive due process approach, history and tradition in *Obergefell* structure the inquiry without

'liberty' appears in the opinion at least twenty-five times."); *see also* Pamela S. Karlan, *Foreword: Loving* Lawrence, 102 MICH. L. REV. 1447, 1463 (2004) ("The reason the *Lawrence* Court could recognize that Texas's prohibition on same-sex intimacy violated the Due Process Clause was because it had already implicitly recognized that gay people are entitled to equal respect for their choices about how to live their lives.").

[176] *See* Anthony O'Rourke, Windsor *Beyond Marriage: Due Process, Equality & Undocumented Immigration*, 55 WM. & MARY L. REV. 2171, 2181 (2014) (quoting Jack Balkin, *Teaching Materials for the Marriage Cases*, BALKINIZATION (July 26, 2013), https://balkin.blogspot.com/2013/07/teaching-materials-for-marriage-cases.html) ("Thus, another possibility is that the Court has abandoned the tiered standards of review—as evidenced by *Casey*, *Romer*, and *Lawrence*—and will simply proceed on a case-by-case basis, relying on the unifying concepts of dignity, which straddles liberty and equality concerns."); Tribe, *supra* note 61, at 1915 ("[T]he [*Lawrence*] Court understood itself to be protecting the right to dignity and self-respect of those who enter into such relationships."); Yoshino, *supra* note 129, at 779 ("The majority opinion also repeatedly referred to the right at issue as one pertaining to individual 'dignity.' . . . In my terms, *Lawrence* formulated a liberty-based dignity claim.").

[177] *See* Ginsburg, *supra* note 60, at 1199–200 (*Casey* recognized the equality dimension of the claim more explicitly than *Roe* by connecting the woman's right to her reproductive life with her ability to participate equally in society.).

[178] Sunstein, *supra* note 151, at 1175; *see also* Ginsburg, *supra* note 60, at 1200 ("The *Roe* decision might have been less of a storm center had it both homed in more precisely on the women's equality dimension of the issue and, correspondingly, attempted nothing more bold at that time than the mode of decisionmaking the Court employed in the 1970s gender classification cases.").

[179] *See supra* notes 123–128 and accompanying text.

setting its outermost boundaries.[180] In his majority opinion, Justice Kennedy discusses how the institution of marriage is one of "both continuity and change."[181] While before the Nation's founding marriage was viewed as an arrangement between the couple's parents, it evolved into a "voluntary contract between a man and a woman."[182] The institution of marriage also used to subscribe to the doctrine of coverture, in which the State considered married men and women to be "single, male-dominated legal entit[ies]."[183] As society began to recognize women's rights, however, the "law of coverture was abandoned" in the United States.[184] According to Justice Kennedy, these developments demonstrate how, "as new dimensions of freedom become apparent to new generations," the institution of marriage has evolved accordingly.[185]

Justice Kennedy then discusses how this dynamic has played out with regard to the legal status of gay individuals. Once condemning homosexuality as a crime and illness, society has now become more tolerant; and courts have increasingly recognized that gay men and women are entitled to equal rights in the eyes of the law.[186] Against this backdrop, Justice Kennedy begins his due process inquiry, rooted not in history and tradition, but rather in society's evolving notions of equality.[187]

2. *Defining the Issue*

Justice Kennedy also frames the issue by taking into account society's "new insight" regarding the legal and political status of gay individuals.[188] *Glucksberg* insisted that the due process right be defined in a "most circumscribed manner."[189] Yet, Justice Kennedy argues that, with regards to same-sex marriage, the right must be defined more broadly. *Loving v. Virginia*[190] did not frame the issue as a right to interracial marriage, Justice Kennedy reasons. *Turner v. Safley*[191] did not discuss the right of inmates to marry; and *Zablocki v. Redhail*[192] did not ask about the right of fathers with unpaid child support to marry. Instead, past precedent defined marriage in its comprehensive sense as a fundamental right,[193] and Justice Kennedy

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[180] Obergefell v. Hodges, 135 S. Ct. 2584, 2598 (2015).
[181] *Id.* at 2595.
[182] *Id.*
[183] *Id.*
[184] *Id.*
[185] *Id.* at 2596.
[186] *Id.* at 2596–97.
[187] *Id.* at 2598.
[188] *Id.*
[189] *Id.* at 2602.
[190] 388 U.S. 1 (1967).
[191] 482 U.S. 78 (1987).
[192] 434 U.S. 374 (1978).
[193] *Obergefell*, 135 S. Ct. at 2602.

supports that approach: "If rights were defined by who exercised them in the past, then received practices could serve as their own continued justification and new groups could not invoke rights once denied."[194] Thus, when rights implicate a historically subordinated group, the *Glucksberg* approach only serves to foster continued discrimination.

Accordingly, rather than rely on *Glucksberg*, the *Obergefell* Court utilizes a due process inquiry that also has established footing in modern-day due process jurisprudence—where history and tradition are the starting but not the ending point of the inquiry, and the right is defined more broadly, taking into account the dignity of the affected individuals. As with other substantive due process cases involving historically subordinated groups, the petitioners' plea is not presented as a right defined at a narrow level of generality. Rather, the petitioners' plea is presented as a more abstract claim to "equal dignity in the eyes of the law."[195] With the issue framed as such, the *Obergefell* Court concludes that "[t]he Constitution grants [petitioners] that right."[196]

III. RECONCILING *OBERGEFELL* AND *GLUCKSBERG*

Having established that, contrary to Justice Roberts's assertions, *Lochner* is not *Obergefell*'s sole precedent, the question remains: Are *Obergefell* and its predecessors a valid approach to substantive due process, or should they be overruled or at least limited to their facts?

A. *The Case for* Glucksberg*'s Limited Substantive Due Process Test*

On the one hand, there are valid reasons for favoring the *Glucksberg* substantive due process test over the analysis used in *Obergefell*, as demonstrated by *Obergefell*'s dissenting opinions. The dissenting Justices in *Obergefell* all agree that the Fourteenth Amendment to the Constitution does not explicitly or implicitly guarantee a right to same-sex marriage.[197] According to the dissenting Justices, instead of upholding the Constitution, the majority created a constitutional right to same-sex marriage out of whole cloth based on its own policy preferences.[198] Justice Scalia characterizes the majority's opinion as an act of "constitutional revision" that usurps from the American people their right to govern themselves.[199] Justice Alito similarly accuses the majority of robbing the people of their

[194] *Id.*

[195] *Id.* at 2608.

[196] *Id.*

[197] *Id.* at 2616 (Roberts, C.J., dissenting); *id.* at 2628 (Scalia, J., dissenting); *id.* at 2634 (Thomas, J., dissenting); *id.* at 2640 (Alito, J., dissenting).

[198] *Id.* at 2615–16 (Roberts, C.J., dissenting).

[199] *Id.* at 2627 (Scalia, J., dissenting).

right to decide how they want to define marriage;[200] and Justice Thomas expresses foreboding over the "inestimable consequences" the decision will have on the Constitution and American society.[201] "Just who do we think we are?" Justice Roberts asks.[202]

These criticisms are not new. In *Lawrence*, Justice Scalia accused the majority of "la[ying] waste to the foundations of our rational-basis jurisprudence" and "dismantl[ing] the structure of constitutional law" to reach its holding.[203] The dissent in *Roe* similarly compared the majority opinion to *Lochner*,[204] and, in *Casey*, the dissent lamented the majority's decision to uphold the core holding of *Roe* rather than correct its prior error.[205]

Nor are these concerns without merit. While it may be "the province and duty of the judicial department to say what the law is,"[206] the Court should not have unfettered discretion to decide what such an amorphous term as "liberty" in the Due Process Clause means. Otherwise, the clauses of the Constitution might very well become "more or less suitable pegs on which judicial policy choices are hung."[207]

Even if, as some scholars have argued, *Lochner*'s error was not in using an expansive approach, but rather in "choosing the wrong rights to emphasize,"[208] its more open-ended substantive due process approach still rendered the Justices more susceptible to imposing their policy preferences on the American people. Thus, when the Court deviates from the circumscribed *Glucksberg* rule and embraces a more expansive approach, as it did in *Obergefell* and its predecessors, it mirrors *Lochner* by giving itself more power to define "liberty" in the Due Process Clause based on its own "reasoned judgment."[209] As Justice Scalia warns: "With each decision

[200] *Id.* at 2642 (Alito, J., dissenting).

[201] *Id.* at 2640 (Thomas, J., dissenting).

[202] *Id.* at 2612 (Roberts, C.J., dissenting).

[203] Lawrence v. Texas, 539 U.S. 558, 604 (2003) (Scalia, J. dissenting).

[204] Roe v. Wade, 410 U.S. 113, 174 (1973) (Rehnquist, J., dissenting) ("While the Court's opinion quotes from the dissent of Mr. Justice Holmes in *Lochner v. New York*, the result it reaches is more closely attuned to the majority opinion of Mr. Justice Peckham in that case.") (internal citations omitted).

[205] Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 957 (1992) (Rehnquist, C.J., concurring in the judgment in part and dissenting in part).

[206] Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).

[207] Ely, *supra* note 66, at 945 (quoting Hans A. Linde, *Judges, Critics, and the Realist Tradition*, 82 YALE L.J. 227, 254 (1972)).

[208] Bernstein, *supra* note 66, at 57 ("[T]heorists such as Bruce Ackerman and Owen Fiss . . . argued that *Lochner*'s error was not in establishing a strong judicial role in protecting unenumerated fundamental rights, but in choosing the wrong rights to emphasize.").

[209] *Compare* Obergefell v. Hodges, 135 S. Ct. 2584, 2598 (2015) (citing Poe v. Ullman, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting)) ("The identification and protection of fundamental rights . . . requires courts to exercise reasoned

of ours that takes from the People a question properly left to them—with each decision that is unabashedly based . . . on the 'reasoned judgment' of a bare majority of the Court—we move one step closer to being reminded of our own impotence."[210] The more limiting substantive due process rule of *Glucksberg* helps check this potential for judicial overreach.

B. *The Case for the Expansive Due Process Approach Utilized in* Obergefell

On the other hand, a more expansive substantive due process test should also have a valid place in constitutional law. In the first place, inasmuch as the substantive due process approach utilized in *Obergefell* and its predecessors may revive *Lochner*, it also turns *Lochner* on its head. The *Lochner* era has largely been discredited as a time when the Court invalidated a number of laws as a violation of the "liberty of contract" under "an economic theory which a large part of the country does not entertain."[211] By contrast, modern-day substantive due process cases using an expansive approach demonstrate that, while the economic contracts of *Lochner* are forbidden territory—deemed not to raise personal freedom or choice but rather to enable the rich—the personal contracts and choices involving social, rather than economic, relations are guarded fiercely as a hallmark of American liberty.[212] These latter views of liberty protect the rights of people on a more abstract plane, as they focus on broader principles of dignity and autonomy rather than just on the specific conduct at issue.[213] They embrace rights that honor the inherent dignity of all peoples and guard against generating classes amongst citizens that the constitution "neither knows nor tolerates."[214] Thus, while the *Lochner* era in effect perpetuated a class system, this new era of substantive due process rights helps create equality in the eyes of the law.

Moreover, in cases where equal protection concerns are present, a more expansive approach is necessary, because the rule of *Glucksberg* would essentially render substantive due process a dead letter. Our framers had a limited vision of who encompassed the "We" in "We the People," to say the least.[215] It would have been impossible for our Founding

judgment . . . ."), *with* Lochner v. New York, 198 U.S. 45, 58 (1905) ("We think the limit of the police power has been reached and passed in this case. There is, in our judgment, no reasonable foundation for holding this to be necessary . . . .").

[210] *Obergefell*, 135 S. Ct. at 2631 (Scalia, J, dissenting).

[211] *Lochner*, 198 U.S. at 72, 75 (1905) (Holmes, J., dissenting); *see also* Ely, *supra* note 66 at 937.

[212] *See* ORTH, *supra* note 86, at 80–81.

[213] E. THOMAS SULLIVAN & TONI M. MASSARO, THE ARC OF DUE PROCESS IN AMERICAN CONSTITUTIONAL LAW 122–67 (2013).

[214] Plessy v. Ferguson, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting).

[215] Ginsburg, *supra* note 60, at 1187 ("[T]he framers had a distinctly limited vision of those who counted among 'We the People.'").

Fathers to conceive of a right to same-sex marriage at a time when homosexuality was deemed to be a "crime against nature."[216] Nor could the framers have envisioned a woman's right to choose, when wives were considered the property of their husbands.[217] Thus, the *Glucksberg* substantive due process analysis becomes a circular and fruitless inquiry when it involves locating and defining the liberty rights of historically subordinated groups:[218] By definition, a right implicating a historically subordinated group will not be so rooted in our history or tradition as to render it fundamental.

This weakness in the *Glucksberg* approach justifies broadening the scope of substantive due process in a limited subset of cases. Specifically, if the law is directed at a historically subordinated group, then it makes sense that the more expansive due process analysis utilized in *Obergefell*—which defines the right more broadly and focuses not just on history but also on our "emerging awareness"[219]—should be applied. As Professor Kenneth L. Karst writes, "If the timeworn maxim is made rigid—if 'old process is due process' forever—subordinated groups are in serious trouble. Justice Kennedy's reading of due process offers them hope."[220]

Finally, while an expansive due process analysis may give Justices broad discretion to say what the law is, this power is not completely unfettered. First, the prudential concern of ripeness offers one check on judicial overreach.[221] *Roe* is a good example of a decision in which the Court arguably stepped too far in front of the political process.[222] Abortion

[216] Yao Apasu-Gbotsu et al., *Survey on the Constitutional Right to Privacy in the Context of Homosexual Activity*, 40 U. MIAMI L. REV. 521, 526 (1986) (quoting 4 WILLIAM BLACKSTONE, COMMENTARIES *215).

[217] Jay Sitton, *Old Wine in New Bottles: The "Marital" Rape Allowance*, 72 N.C. L. REV. 261, 265 (1993).

[218] *See Recent Cases: Constitutional Law—Substantive Due Process—Eleventh Circuit Upholds Florida Statute Barring Gays from Adopting*—Lofton v. Secretary of the Department of Children & Family Services, *538 F.3d 804 (11th Cir. 2004)*, 117 HARV. L. REV. 2791, 2795 (2004) (characterizing "the chief weakness of the Glucksberg method" as "its reduction of substantive due process to a trivial and circular analysis").

[219] Lawrence v. Texas, 539 U.S. 558, 572 (2003).

[220] Kenneth L. Karst, *The Liberties of Equal Citizens: Groups and the Due Process Clause*, 55 UCLA L. REV. 99, 140 (2007).

[221] *See, e.g.*, Cty. Concrete Corp. v. Town of Roxbury, 442 F.3d 159, 167 (3d Cir. 2006) (holding "[landowners' claim] is ripe for federal adjudication"); Taylor Inv., Ltd. v. Upper Darby Twp., 983 F.2d 1285, 1292–94 (3d Cir. 1993) (holding owners' substantive and procedural due process claims and equal protection claim were not ripe for review); Southview Ass'n v. Bongartz, 980 F.2d 84, 99 (2d Cir. 1992) (holding "Southview's taking and substantive due process claims remain unripe").

[222] Michael J. Klarman, Windsor *and* Brown*: Marriage Equality and Racial Equality*, 127 HARV. L. REV. 127, 148 (2013) ("Many scholars and judges believe that the Court in *Roe* fomented such a backlash by intervening so aggressively on the abortion issue in 1973.").

faced political backlash after the decision,[223] and the Court in subsequent cases largely eroded the foundations of *Roe*.[224] Perhaps heeding the lesson of *Roe*,[225] in *Hollingsworth v. Perry*,[226] the Court declined to reach the merits of the case to determine whether a state could ban same-sex marriage.[227] Instead, the Court held that the petitioners lacked standing to bring their claim.[228] Similarly, in *Windsor*, the Court expressly limited its holding to "those lawful marriages,"[229] leaving the larger issue of same-sex marriage for another day. Thus, the *Obergefell* decision came only after the Court had evaded the issue on two prior occasions. By the time the Court decided *Obergefell*, public opinion was increasingly in favor of gay marriage.[230] Accordingly, the Justices may have felt prepared to make a holding favoring same-sex marriage without igniting the backlash of *Roe*.

Moreover, the more expansive approach to substantive due process does not reject history entirely. Rather, it looks to both the traditions from which we came and the "traditions from which [we] broke."[231] This approach suggests that it is the people, not the Justices, that still have the most say in defining the term "liberty" in substantive due process based on their evolving notions of equality.[232] While the *Obergefell* dissent argues

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[223] *Id.*

[224] *See* Gonzalez v. Carhart, 550 U.S. 124, 146–48 (2007); Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 873–77 (1992).

[225] *See* Klarman, *supra* note 222, at 148. ("It seems likely that one or more of the Justices in the Windsor majority worried that a broad constitutional ruling in favor of gay marriage in *Hollingsworth* would have ignited a powerful political backlash.").

[226] 133 S. Ct. 2652 (2013).

[227] *Id.* at 2659.

[228] *Id.* at 2668.

[229] United States v. Windsor, 133 S. Ct. 2675, 2696 (2013).

[230] Klarman, *supra* note 222, at 133 ("The coming-out phenomenon has profoundly influenced popular attitudes toward homosexuality. The number of Americans believing that homosexuals should have equal employment rights grew from 56% in 1977 to 80% in 1997, and the number believing that gays should be legally permitted to adopt children rose from 14% to 50% over roughly the same time period."); *see also* Deboer v. Snyder, 772 F.3d 388, 395 (6th Cir. 2014) ("From the vantage point of 2014, it would now seem, the question is not whether American law will allow gay couples to marry; it is when and how that will happen.").

[231] Poe v. Ullman, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting); *see also* Obergefell v. Hodges, 135 S. Ct. 2584, 2598 (2015) ("History and tradition guide and discipline this inquiry but do not set its outer boundaries. That method respects our history and learns from it without allowing the past alone to rule the present.") (internal citations omitted).

[232] *Windsor*, 133 S. Ct. at 2692–93 ("It reflects both the community's considered perspective on the historical roots of the institution of marriage and its evolving understanding of the meaning of equality."); Lawrence v. Texas, 539 U.S. 558, 572 (2003) ("These references show an emerging awareness that liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex.").

that this approach recklessly relies on the "heady days of the here and now,"[233] the rejoinder is that, when dealing with issues of access, inequality and discrimination—the time to rectify our past history of discrimination is always here and now.

Past precedent also limits the Justices' power to arbitrarily impose their policy preferences on the American people. For example, *Brown v. Board of Education*[234] came about, in part, because Thurgood Marshall and others "carefully set the stepping stones leading up to the landmark ruling."[235] Similarly, Justice Kennedy laid the foundation for *Obergefell* through his majority opinions in *Lawrence* and *Windsor*.

Thus, when using an expansive substantive due process analysis, the Court cannot simply create a liberty right out of thin air—there needs to be a certain amount of political consensus and judicial precedent demonstrating that we are under a constitutional obligation to rectify our past history of discrimination against a particular group. These checks on judicial overreach serve as further justification for a more expansive approach to due process in cases where equal protection is also implicated.

C. *Predictions—Where is the Court Headed?*

It is difficult to predict the fate of *Obergefell* or *Glucksberg* in substantive due process jurisprudence. The Court in the future can—and, in this writer's opinion, should—use the equal-protection-due-process synthesis as a means to justify a more expansive approach. So far, however, the Court has not fully done so. The *Obergefell* majority, for example, discusses the synthesis between due process and equal protection at length,[236] but it does not use this synthesis as the reason to implement the more expansive substantive due process analysis. Instead, the majority states that a more comprehensive approach is appropriate for rights such as the right to marry, and it appears to limit the *Glucksberg* approach to the asserted right—physician-assisted suicide.[237]

If the Court continues to fluctuate between the more expansive and circumscribed substantive due process approaches without more clearly elucidating the role equal protection plays in the analysis, then the fate of substantive due process may largely depend on the future make-up of the Court. As Justice Blackmun stated in his *Casey* concurrence: "While

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

[234] 349 U.S. 294 (1955).

[235] Ginsburg, *supra* note 60 at 1207 & n.138 (noting that Justice Marshall and others laid stepping stones for *Brown* in cases such as McLaurin v. Okla. St. Regents for Higher Educ., 339 U.S. 637 (1950), Sweatt v. Painter, 339 U.S. 629 (1950), Shelley v. Kraemer, 334 U.S. 1 (1948), and Sipuel v. Bd. of Regents of the Univ. of Okla., 332 U.S. 631 (1948)).

[236] *See Obergefell*, 135 S. Ct. at 2602–05.

[237] *Id.* at 2602.

the majority and dissenting viewpoints in *Casey* may have been "worlds apart[,] . . . in another sense, the distance between the two approaches is short—the distance is but a single vote."[238] This statement carries particular weight in the context of substantive due process. Like *Casey*, many substantive due process cases, including *Windsor*[239] and *Obergefell*,[240] were 5–4 decisions that would have gone the other way but for one Justice's vote. Unless the Justices can articulate a more uniform rubric that they are following, the course of substantive due process jurisprudence will likely depend on the composition of the Court.

D. Proscriptions—Where Should the Court Be Headed?

Despite the splintered views on the Court towards substantive due process, there does appear to be some middle ground that has established footing in substantive due process jurisprudence. Although the Court has never articulated the rule as such, past precedent indicates that, generally, the Court uses the *Glucksberg* approach, unless equal protection and due process interests converge, in which case a more expansive approach is warranted. In other words, the extent and manner in which a law implicates a subordinate group ultimately charts the course of substantive due process.

If the Court articulates more clearly what it appears to be doing in practice, then the *Glucksberg* and *Obergefell* approaches can each stand on their own bottoms, as relevant bookends of substantive due process. *Glucksberg* represents the limited approach that should be utilized when due process and equal protection do not interact to create a more expansive right. *Obergefell*, by contrast, represents the approach that should be used when due process and equal protection interests converge.

Moreover, by reconciling the *Glucksberg* and *Obergefell* approaches, the Court can better uphold both the spirit and the letter of the Constitution. The *Obergefell* substantive due process approach helps give meaning to the constitutional ideals of freedom and equality. By contrast, the *Glucksberg* approach helps curb judicial overreach by ensuring that the Court does not deviate too far from the letter of the law. In sum, equal protection provides a means by which both the *Glucksberg* and the *Obergefell* tests can and should be utilized in modern-day substantive due process jurisprudence. While the contours of substantive due process may never be firmly delineated, equal protection offers a good framework for the inevitable push-pull between judicial overreach on the one hand and the role of the judiciary to "say what the law is"[241] on the other.

[238] Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 943 (1992) (Blackmun, J., concurring in part, concurring in the judgment in part, and dissenting in part).

[239] United States v. Windsor, 133 S. Ct. 2675 (2013).

[240] *Obergefell*, 135 S. Ct. at 2591.

[241] Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).

CONCLUSION

Glucksberg and *Obergefell* need not vie against one another for their constitutional legacies. Rather, the two cases can peacefully coexist as the Court more clearly elucidates the role of equal protection in due process jurisprudence.

Both a sword and a shield, equal protection ultimately should inform the type of due process analysis that is used. When equal protection interests are not implicated, then the *Glucksberg* rule should prevail: The Court should only deem a liberty right to be fundamental if it is rooted in our history and tradition. When the due-process-equal-protection synthesis is triggered, however, then the more expansive due process approach utilized in *Obergefell* is warranted: The Court should focus not only on the history and tradition from which we came, but also on the history and "tradition from which [we] broke"[242] and the right should be defined more broadly. In this way, the Court can prudently work to right the wrongs of our history of discrimination, and expand our Constitutional protections so that they truly include the liberties of all.

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