Leaving People Alone
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A few decades ago, sociologist Robert Bellah embarked on an ambitious project to discover what Americans value most.[1] After years of interviewing and observing hundreds of people, Bellah concluded that "the most resonant, deeply held American value" is freedom.[2] Of course, freedom can mean many things. For Americans, Bellah found, freedom "turns out to mean being left alone."[3]

It is not news that Americans like to be left alone. No mythic hero has captured the American imagination over the past century more fully than the cowboy—the Lone Ranger—a figure who personifies "the ideal of individualist freedom pushed into a sort of inescapable jail by the closing of the frontier and the coming of the big corporations."[4] (Consider, by way of contrast, that Canada's version of the hero-on-horseback is the Mountie—a member of a national police force, clad in a smart, official uniform, who brings government and public order to the hinterlands.) Bellah found that Americans' attachment to being left alone was so deep and pervasive it had generated a shared vocabulary, a sort of national language, which he referred to as "the 'first language' of American individualism."[5]

The fact that Americans feel most comfortable speaking the language of individualism undoubtedly says something about what we value. Yet when Bellah compared how his subjects described their lives with what he actually observed of those lives, he noted a discrepancy. In the individualistic language his subjects used, "their lives sound more isolated and arbitrary than . . . they actually are."[6] Bellah's subjects seemed to "have difficulty articulating the richness of their commitments."[7] They spoke easily about how much they prized being left alone, and much more haltingly about their other values and commitments.

This Article identifies a similar discrepancy in contemporary American rights discourse. It is a truism that the United States Constitution is "a charter of negative liberties."[8] Courts routinely assert that "[t]he men who wrote the Bill of Rights were not concerned that government might do too little for the people, but that it might do too much to them."[9] Thus, courts claim, the framers bestowed on the nation a governing document that does not obligate the state to look out for its citizens' welfare, but simply "tells the state to let people alone."[10]

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[1] The results of this project are recounted in Robert Bellah et al., Habits of the Heart: Individualism and Commitment in American Life (1985), now a classic in late twentieth-century sociology.
[2] Id. at 23.
[3] Id. at 23.
[4] Eric Hobsbawm, The Myth of the Cowboy, Guardian, Mar. 20, 2013. For more on America's "most mythic individual hero," who "can never fully belong to society," see Bellah, supra, at 144-47.
[5] Bellah, supra note, at 20.
[6] Id. at 21.
[7] Id. at 20-21.
[8] Bowers v. DeVito, 686 F.2d 616, 618 (7th Cir. 1982).
[9] Jackson v. City of Joliet, 715 F.2d 1200, 1203 (7th Cir. 1983).
[10] Bowers, 686 F.2d at 618.

It is not a coincidence that much of the rhetoric about leaving people alone in contemporary constitutional jurisprudence—particularly contemporary Fourteenth Amendment jurisprudence—dates from the late 1970s and 1980s, the same period in which Bellah conducted his study. Those years witnessed the rise of a new libertarianism, exemplified by President Reagan's iconic declaration that "government is not the solution to our problem; government is the problem."[11] Sometimes actually clad as a cowboy,[12] Reagan vowed to liberate Americans from governmental interference, to leave them alone to make their way in their world unhampered by bureaucratic red tape and social welfare programs. Courts in this period often spoke in the same idiom. In an oft-quoted opinion from the early 1980s, Judge Richard Posner declared that "[t]he Fourteenth Amendment, adopted in 1868 at the height of laissez-faire thinking, sought to protect Americans from oppression by state government, not to secure them basic governmental services."[13]

Of course, one reason courts in the 1980s were so insistent on the negative character of American constitutional rights is that, a decade or so earlier, that character had been called into question. In addition to requiring the state to leave people alone, courts in the 1960s and early 1970s expressed concern about *people being left alone*: stranded, unable to effectuate their rights or participate fully in American democracy, even, or perhaps especially, as a result of poverty. The Court in this era held that states were obligated, among other things, to provide indigent criminal defendants with lawyers,[14] to do away with the poll tax,[15] to waive the fees associated with divorce for those who could not afford them,[16] and to provide welfare benefits and hospital care to poor newcomers on the same terms as they provided those goods and services to long-term residents.[17] Surveying these decisions at the time, Frank Michelman concluded that the Court was on the verge of recognizing a constitutional entitlement to "minimum welfare."[18] Others interpreted these decisions as extending heightened scrutiny to laws that particularly burden the poor, suggesting poverty was now a suspect classification under the Fourteenth Amendment.[19]

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[11] Ronald Reagan, Inaugural Address, (Jan. 20, 1981), reprinted in Joint Cong. Comm. on Inaugural Ceremonies, Inaugural Addresses of the United States 331, 333 (1989); id. at 332-34 ("If we look to the answer as to why for so many years we achieved so much, prospered as no other people on Earth, it was because here in this land we unleashed the energy and individual genius of man to a greater extent than has ever been done before. . . . It is no coincidence that our present troubles parallel and are proportionate to the intervention and intrusion in our lives that result from unnecessary and excessive growth of government.").

[12] For photographs of President Reagan in cowboy gear, see Reagan Presidential Library, Photo Gallery: Ranch at https://reaganlibrary.gov/photo-galleries/ranch. When Reagan died, Time and Newsweek magazines both chose the same iconic photograph, of Reagan in a cowboy hat, to run on their covers. David Carr, 2 Weeklies' Covers Separated By a Common Reagan Picture, N.Y. Times, June 8, 2004 ("'I am not completely surprised,' said Jim Kelly, managing editor of Time magazine. 'Yes, there are a lot of images of Reagan out there, but very few . . . tell a story the way this one did."). See also Why Republicans Run in Cowboy Boots, Time, Jan. 26, 2015.

[13] Jackson, 715 F.2d at 1203.

[14] Douglas v. California, 372 U.S. 353 (1963); Gideon v. Wainwright, 372 U.S. 335 (1963).

[15] Harper v. Virginia Board of Elections, 383 US 663 (1966).

[16] Boddie v. Connecticut, 401 U.S. 371 (1971).

[17] Shapiro v. Thompson, 394 U.S. 618 (1969); Memorial Hospital v. Maricopa County, 415 U.S. 250 (1974).

[18] Frank I. Michelman, Foreword: On Protecting the Poor Through the Fourteenth Amendment, 83 Harv. L. Rev. 7 (1969); see also Arthur S. Miller, Toward a Concept of Constitutional Duty, 1968 Sup. Ct. Rev. 199; Albert M. Bendich, Privacy, Poverty, and the Constitution, 54 Cal. L. Rev. 407 (1966).

[19] In fact, several Supreme Court Justices took this position in the early 1970s. See, e.g. James v. Valtierra, 402 U.S. 137 (1971) (Marshall, J., dissenting) (asserting, in an opinion joined by Justices William Brennan and Harry

By the late 1970s, the debate on the left about how to interpret these cases was over—and both sides had lost. The Burger Court rejected the notion that Americans are constitutionally entitled to state-provided "minimum welfare"[20] and declined to recognize the poor as a protected class.[21] Courts began to speak much less often about the importance of enabling poor people to effectuate their rights and much more often about the importance of liberating people—including the corporate kind—from state regulation. In part for this reason, a growing number of scholars have described the last few decades as a period of neo-*Lochner*ism,[22] in which judicial enforcement of constitutional rights has functioned solely to "keep the state off our backs and out of our lives"[23]—protecting individual freedom to transact on the free market but offering next to nothing to those whose market power is substantially constrained by social and economic inequality.

Like the discourse of American individualism, the discourse of negative rights, with its focus on the importance of liberating individuals from government, captures something important: American law really did shift in a libertarian direction in the 1970s across a wide range of contexts.[24] But negative rights discourse is like the discourse of individualism in another way as well: it makes it difficult to express the full richness of our values and commitments. It enables us to talk about leaving people alone, but makes it hard to talk about ways in which the law, even today, expresses concern about people being left alone.

Positive rights—defined as rights that entitle people to things from government, rather than simply requiring the government to leave people alone—are one way of expressing such concern. Many scholars have argued that, in fact, the United States Constitution does protect some rights of this sort.[25] Steven Holmes and Cass Sunstein have famously argued that all rights are positive rights because "all rights presuppose taxpayer funding of effective supervisory machinery for monitoring and enforcement."[26] They note that when one tallies up what the state

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Blackmun, that "an explicit classification on the basis of poverty [is] a suspect classification which demands exacting judicial scrutiny"). [See also, e.g., Cox, The Supreme Court, 1965 Term, Foreword: Constitutional Adjudication and the Promotion of Human Rights, 80 HARV. L. REV. 91 (1966); Kurland, The Supreme Court, 1963 Term, Foreword: "Equal in Origin and Equal in Title to the Legislative and Executive Branches of the Government," 78 HARV. L. REV. 143 (1964).]

[20] See Dandridge v. Williams; Harris v. McRae; DeShaney v. Winnebago County Dep't of Soc. Servs., 489 U.S. 189, 196 (1989) (stating in dicta that there is no right to government aid); see also Jedidiah Purdy, Neo-Lochnerism ("A brief move in the direction of constitutional guarantees of minimum social benefits and equal protection scrutiny of policies that ill-served the poor, such as inequitable public-school funding tied to property taxes, collapsed between 1970 and 1973, leaving such policies almost entirely to legislative discretion.").

[21] See San Antonio v. Rodriguez, 411 U.S. 1 (1973).

[22] See, e.g., Jedidiah Purdy, Yale Law Journal (Purdy points to anti-regulatory doctrines that have developed in a range of contexts post-1980 as evidence of courts' embrace an extreme form of "constitutional individualism" and a purely "negative conception[] of autonomy").

[23] West, supra.

[24] Grewal, Purdy symposium.

[25] See, e.g., Fishkin (arguing that the right to vote is a positive right); Susan Bandes (arguing that in some cases the First Amendment protects positive rights); Amar (arguing that the Reconstruction Amendments obligate the government to protect individuals against private racial violence); Cross (conceding that the Thirteenth Amendment requires the government affirmatively to end slavery and prevent it from re-occuring).

[26] Steven Holmes & Cass Sunstein, The Cost of Rights 44 (1999). This basic idea has a long history in legal scholarship. See Barbara Fried, The Progressive Assault on Laissez Faire: Robert Hale and the First Law and

spends on the judicial system, law enforcement, and the vast network of government-funded agencies necessary to the enforcement of rights, the total annual cost of rights to American taxpayers runs into the billions.[27] Thus, they argue, we should think of rights not as tools for hobbling the state, but rather as "taxpayer-funded and government-managed social services."[28]

This Article argues that imposing funding mandates on the state—whether in the form of enforcement costs, or otherwise—is not the only way in which American constitutional law facilitates people's ability to effectuate their rights. It argues that one important and underappreciated way courts express and address constitutional concerns about people being left alone is by protecting and facilitating access to infrastructures—or sets of mediating institutions—that enable individuals to exercise their rights. It is easy to see how the Court facilitated access to rights-enabling infrastructure in cases like *Gideon v. Wainwright*,[29] where the Court effectively ordered the state to create a network of public defenders' offices to enable poor criminal defendants to effectuate their right to counsel. But imposing affirmative funding mandates on the state is not the only judicial mechanism for broadening people's access to rights-enabling forms of infrastructure. Courts also pursue this goal through a kind of selective deregulation—not clearing the state out altogether, but rather, invalidating state action that too severely limits access to forms of infrastructure necessary to the effectuation of rights. This mode of rights enforcement complicates the conventional understanding of negative rights as rights that simply require the state to leave people alone. When courts protect and facilitate individuals' access to rights-enabling infrastructure, they may be restraining government, but if so they are doing it in a very particular way, with an eye toward ensuring that people are *not* left alone.

To illustrate this phenomenon, this Article focuses on the right to privacy. Privacy would seem an especially challenging domain in which to demonstrate that judicial enforcement of constitutional rights does anything other than leave people alone. For over a century, the right to privacy has been known, literally, as the "right to be let alone."[30] In 1965, in *Griswold v. Connecticut*,[31] and eight years later, in *Roe v. Wade*,[32] the Court recognized privacy as a fundamental constitutional right. By 1980, the Court had made it clear that the government is not constitutionally obligated to fund this right: the Fourteenth Amendment entitles women to have abortions but does not require the state to pay for them.[33] Today, these funding decisions are treated as a paradigmatic illustration of the notion that the sole function of American constitutional rights is to leave people alone. As Mary Ann Glendon observed in the wake of

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Economics Movement (1998) (describing Robert Hale's legal realist critique of the traditional distinction between the public and private action and negative and positive rights in the middle of the twentieth century).

[26] 372 U.S. 335 (1963).

[27] Id. at 233-36.

[28] Id. at 48.

[29] 372 U.S. 335 (1963).

[30] Louis Brandeis & Charles Warren, The Right to Privacy, 4 Harv. L. Rev. 193 (1890).

[31] 381 U.S. 479 (1965).

[32] 410 U.S. 113 (1973).

[33] See Maher v. Roe, 432 U.S. 464 (1977); Poelker v. Doe, 432 U.S. 519 (1977); Beal v. Doe, 432 U.S. 438 (1977); Harris v. McRae, 448 U.S. 297 (1980). See also Webster v. Reproductive Health Services, 492 US 490 (1989).

these cases: "No aspect of American rights discourse more tellingly illustrates the isolated character of the rights-bearer than our protean right of privacy."[34]

This way of talking about the right to privacy obscures a richer and more complicated reality. *Griswold* invalidated a Connecticut law that barred using and abetting the use of birth control. When we talk about the case today, we tend to focus on the Court's invocation of the "sacred precincts of the marital bedroom," and the offense it evidently took at the thought of police raiding that private domestic space in search of the "telltale signs of the use of contraceptives."[35] But Part I of this Article uncovers a largely forgotten dimension of the case: the dispute over Connecticut's law was as much about public access to birth control clinics as it was about the sanctity of private relationships. As everyone involved in the case was aware, police in Connecticut did not target birth control users, they targeted birth control clinics—leaving the state without any at a time when such clinics were opening in great numbers throughout the rest of the country.[36] Media accounts at the time made clear the central role that clinics and their largely poor clientele played in the dispute over the law—as did advocates for and against the law. There was even talk behind the scenes at the Court about invalidating the law on class-based equal protection grounds, because the state applied it solely against the institutions through which poor women obtained birth control.[37] None of this appears on the surface of the Court's opinion. Yet as this Part shows, it deeply inflected contemporary understandings of what was at stake in the case and what it would mean to find a right to privacy in this context.

Constitutional concerns about women's ability to access infrastructures of reproductive healthcare made their way to the surface a few years later in *Roe.* The plaintiff in *Roe* was young, poor, and addicted. She had already lost custody of one child and put another up for adoption and did not want to go through either of those things again. When she became unhappily pregnant for the third time, she sought an abortion, but Texas law barred the procedure, so she had nowhere to turn. Roe's lawyers and some of her amici argued before the Court that Texas was constitutionally required to deregulate abortion—to absent itself from the field completely. The Court rejected that argument. In addition to its interest in protecting potential life, the Court held, the state had an interest in protecting the health and safety of women. Texas's prohibition of abortion had led to the proliferation of "illegal 'abortion mills'"[38] and to self-abortion, both potentially dangerous. Roe was not asking to have this kind of abortion, the Court observed: she was asking for a "legal abortion under safe conditions."[39] The way to obtain that, the Court concluded, was not through total deregulation but through a regulated infrastructure of abortion provision—the kind of infrastructure Texas had unconstitutionally suppressed.

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[34] Mary Ann Glendon, Rights Talk (1991).
[35] Griswold, 381 U.S. at 485.
[36] See The Politics of Abortion and Birth Control in Historical Perspective (Donald Critchlow, ed. 1996); Rose Holz, The Birth Control Clinic in a Marketplace World (2012); Elaine Tyler May, America and the Pill (2010).
[37] See infra.
[38] Roe v. Wade, 410 U.S. 113, 150.
[39] Id. at 120.

Major constitutional scholars in the years after *Roe* criticized the opinion for reading like a "model statute"[40] or a "set of hospital rules and regulations"[41] rather an interpretation of the Fourteenth Amendment. Part II argues that all of the talk in *Roe* about who may perform abortions, and when and where the procedure may be performed—"whether it must be a hospital or may be a clinic or some other place of less-than-hospital status"[42]—was, in fact, part of the constitutional analysis. The Court had begun to articulate the abortion right with respect to the social field in which it would be exercised. *Roe* did not simply deregulate abortion; it began to develop guiding principles for its regulation. It held that the state could regulate abortion to vindicate its interests in potential life and women's health and safety, but that it could not do so in ways that too severely limited women's access to a safe, legal infrastructure of abortion provision. That is what Texas had done by outlawing the procedure—and what Georgia had done with its law, which required, among other things, that women seeking abortions secure the approval of multiple doctors.[43] These sorts of regulations left women—particularly poor women—stranded and alone, with no way of effectuating their rights. The doctrine the Court articulated in *Roe* was aimed at rectifying this problem. It sought to protect and facilitate women's access to a set of institutions that would enable them to exercise their newfound right.

A few years ago, a prominent constitutional scholar called for the "de-constitutionalization" of the right to abortion.[44] This call came after several decades of (punctuated) progress by the pro-life movement, a period in which obstacles to abortion have proliferated, both on the ground and in constitutional doctrine. Increased regulation has made it more difficult to operate abortion clinics, leading to the closure of many. The kind of scrutiny courts apply to such regulations has loosened—a shift that was reflected in the Court's adoption in *Planned Parenthood of Southeastern Pa. v. Casey* of an undue burden standard that permits the state to burden the abortion right as long as it refrains from regulation that has "the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion."[45] This history, coupled with the enduring legacy of the funding decisions, have led some to conclude that constitutional law is incapable of providing any meaningful protection for the right to abortion, especially for poor women.

Although it was not framed in these terms, *Whole Women's Health v. Hellerstedt*, the Court's most recent abortion decision—and the most important decision in this area in a generation—was in many ways a referendum on that question. At issue in *Hellerstedt* were two provisions of a Texas law that would have resulted in the closure of most of the clinics in the state. The Court declared the provisions unconstitutional. It held that, when evaluating health and safety justifications offered in support of abortion regulation, judges need not, indeed should

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[40] ALEXANDER M. BICKEL, THE MORALITY OF CONSENT 27 (1975).
[41] ARCHIBALD COX, THE ROLE OF THE SUPREME COURT IN AMERICAN GOVERNMENT 113 (1976).
[42] Roe, 410 U.S. at 163.
[43] See Doe v. Bolton, 410 US 179 (1973) (invalidating most of Georgia's statutory scheme for regulating abortion, which required, among other things, that abortion be performed in a hospital accredited by the Joint Commission on Accreditation of Hospitals, that the procedure be approved by a special hospital abortion committee, and that the performing physician's judgment be confirmed by independent examinations of the patient by two other licensed physicians.).
[44] Robin West, From Choice to Reproductive Justice: De-Constitutionalizing Abortion Rights, 118 Yale L.J. 1394 (2009).
[45] 505 U.S. 833, 877 (1992).

not, simply defer to the state's contention that the regulation actually serves its purported ends. The Court also held that judges should gauge the size of the burden a regulation imposes by looking to the particular subset of people affected by the regulation—a group that in almost all cases will be composed primarily of poor women.

Part III argues that both of these holdings were in furtherance of the notion that the state should not be permitted to infringe on an infrastructure of abortion provision without substantial reasons for doing so. As Justice Thomas suggests in his dissenting opinion in *Whole Women's Health*, this way of the thinking about the abortion right has potentially far-reaching implications. Even if applied in the most robust of ways, it would still not guarantee women access to abortion, in the way a positive right to abortion (at least theoretically) would.[46] But it could dramatically reshape the landscape of abortion provision in this country by vastly increasing the number of providers, significantly expanding availability, and driving down costs. Put differently, robust protection of the negative right to abortion, when understood as a defense against regulation that too severely limits women's access to rights-enabling infrastructure, could do a lot of the work that a positive right to abortion would do. The aim of Part is not to predict the future, but to demonstrate the extent to which the law, as it now stands, incorporates (or, if we want to harken back to the Warren Court era, continues to reflect) an understanding that in some contexts the basic commitments of the Fourteenth Amendment cannot be realized simply by leaving people alone. In the case of abortion, the law must do more: it must protect and preserve the institutional structures through which the right is exercised.

This Article is skeptical of sweeping generalizations about the essential nature of American constitutional rights: they vary too widely in the kinds of protections they offer and the kinds of demands they place on the state for such generalizations to be of much use. The deep dive into the right to privacy in Parts I-III is motivated by the conviction that examining how constitutional rights develop and function in particular contexts will generally be more edifying than trying to affix them all with a single label. That said, Part IV moves beyond the context of privacy to argue that the same infrastructure-protecting dynamic at work there is also at work in other constitutional contexts, including the First and Second Amendments. Courts in both the free speech and the free exercise contexts have developed doctrines that guard against state action that would eviscerate or too severely restrict people's access to rights-enabling infrastructure. Courts in Second Amendment cases have fashioned doctrine that looks very much like abortion doctrine and that serves the same infrastructure-preserving end. Of course, protections for infrastructure in these other contexts are no more absolute than in the context of abortion; they are limited by counter-vailing concerns, about discrimination and health and safety among other things. As in the context of abortion, however, they reflect an often unspoken recognition of the fact that in some cases people being left alone is a cause for constitutional concern.

Protecting access to rights-enabling forms of infrastructure is not always—perhaps not even in most cases—about protecting the poor. But as the Parts of this Article about the right to privacy show, it can have that function; it can be a way of expressing concerns that conventional accounts of constitutional rights in the late-twentieth-century suggest ended in the Burger Court era. This Article ends by taking a brief look at another context in which protecting infrastructure

[46] West, supra note, 1403.

has served this function: voting. In 1966, in *Harper v. Virginia Board of Elections*, the Court invalidated the poll tax, asserting that "[l]ines drawn on the basis of wealth or property, like those of race, are traditionally disfavored."[47] *Harper* was one of the Warren Court's landmark poverty decisions; as in other areas, it represented a high watermark of constitutional concern about poor people's ability to effectuate their rights. Today, voting rights law is less protective of the rights of the poor. But Part IV identifies some ways in which the law still serves this function, including by gauging the size of the burden the state has placed on the right to vote not by asking how it affects the general population but by asking how it affects the group that is actually burdened by it. The Court in *Whole Women's Health* whole-heartedly endorsed this approach in the context of abortion; in the context of voting, it seems more imperiled.[48] With such battles in the foreground, it seems important to think about how we tell the story of what happened to constitutional rights in the last quarter of the twentieth century. One version of the story suggests the Burger Court simply repudiated the Warren Court's concerns about poor people's ability to effectuate their rights. But there is another way of telling the story that suggests those concerns, though diminished, survived, and live on in the law in forms that traditional ways of thinking about rights obscure.

Part I

In 1965, the Court held for the first time that privacy was a fundamental right that warranted special constitutional protection under the Fourteenth Amendment. The occasion, of course, was *Griswold v. Connecticut*, in which the Court invalidated Connecticut's ban on using and abetting the use of birth control for the purpose of preventing contraception.[49] Accounts of *Griswold* tend agree about two things. First, that Connecticut's law was an archaic holdover from the late nineteenth century, the era of Anthony Comstock's infamous anti-contraception crusade.[50] When judges today vote to uphold laws they do not like, they sometimes describe those laws as "uncommonly silly."[51] That language comes from Justice Potter Stewart's dissenting opinion in *Griswold*,[52] and it reflects, and has reinforced, the notion that, by the 1960s, Connecticut's ban on birth control was a relic that had long ceased to serve any purpose.

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[47] 383 U.S. 663, 668 (1966).

[48] See, e.g. Crawford v. Marion County Election Bd., 553 U.S. 181 (2008) (Scalia, J., concurring) ("Insofar as our election-regulation cases rest upon the requirements of the Fourteenth Amendment, weighing the burden of a nondiscriminatory voting law upon each voter and concomitantly requiring exceptions for vulnerable voters would effectively turn back decades of equal-protection jurisprudence. A voter complaining about such a law's effect on him has no valid equal-protection claim because, without proof of discriminatory intent, a generally applicable law with disparate impact is not unconstitutional. The Fourteenth Amendment does not regard neutral laws as invidious ones, even when their burdens purportedly fall disproportionately on a protected class. A fortiori it does not do so when, as here, the classes complaining of disparate impact are not even protected. See Harris v. McRae, 448 U. S. 297, 323, and n. 26 (1980) (poverty). . . .").

[49] 381 U.S. 479, 480 (1965).

[50] Indeed, Connecticut's ban on birth control was originally enacted in 1879; it was one of many of "Comstock laws" enacted in that period.

[51] See, e.g., Lawrence v. Texas, 539 U.S. 558, 605 (2003) (Thomas, J., dissenting) ("I write separately to note that the law before the Court today "is . . . uncommonly silly." . . . If I were a member of the Texas Legislature, I would vote to repeal it.").

[52] Griswold, Stewart, J., dissenting.

The second thing conventional accounts of *Griswold* agree about is that the Court's holding—or more specifically, its reasoning—was highly controversial. *Griswold*'s critics argue that the Court's discovery of a right to privacy, unenumerated anywhere in the text of the Constitution, and its effective revival of substantive due process was all the more illegitimate for having occurred in a case where there was no live controversy. Indeed, a recurrent theme in scholarship on *Griswold*, by scholars across the ideological spectrum, has been the suggestion that the Court could or should have invalidated Connecticut's law on the ground that it had fallen into desuetude—in other words, that the Court could or should have held that because the statute was archaic and no longer enforced, any prosecution under its auspices would be inherently arbitrary and unreasonable and therefore unconstitutional.[53]

As this Part shows, however, Connecticut's birth control ban had not fallen into desuetude. It was consistently enforced in a targeted and non-arbitrary way, even into the 1960s. One reason this history of enforcement has remained so obscured is that there is a surprising amount of confusion about the basic facts of the case, beginning with the identity of the person challenging the law. Often, commentators assume Griswold was a physician, perhaps a gynecologist (and, concomitantly, a "he").[54] Sometimes, they imagine he or she was part of a married couple, barred by law from using birth control.[55] In some accounts, Griswold is portrayed as the "wife of a Yale University Professor."[56] Elsewhere, she appears as "a very prim and proper elderly lady from New Haven and widow of the former president of Yale University."[57]

Of course, some details are just details, and collective memories of the facts of cases half-a-century-old—even cases as monumental as *Griswold*—understandably grow dim. But some of the amnesia about the facts in *Griswold* stems from the widespread perception that this was a "test case," a case essentially ginned up in order to challenge the law.[58] From this perspective, whoever Griswold was, her story does not really matter.[59] Her arrest, which precipitated one of the landmark decisions of the twentieth century, was as at best a jurisdictional hook, and at worst a kind of trick, that enabled the Court to make significant changes in constitutional doctrine in a case involving a statute that was in reality a dead letter.[60]

What follows is a revisionist history of *Griswold.* It suggests that, in this case, facts matter—not because they are important in and of themselves but because they help to capture more fully what was at stake in the battle over Connecticut's Comstock law. We remember *Griswold* today as the decision in which the Court identified in the shadows of various

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[53] See, e.g., Robert Bork. Cass Sunstein. Alexander Bickel.

[54] See David J. Garrow, Liberty and Sexuality 268 (1994). See Bork confirmation hearings—Senator Biden refers to Griswold as doctor.

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[58] Bork confirmation hearings, 116, 243. And others.

[59] Bork, Tempting of America, supra at 95 ("The 1965 decision in *Griswold v.* Connecticut was insignificant in itself by momentous for the future of constitutional law."); Bloom, The Legacy of Griswold ("The specific factual and legal issues resolved by *Griswold* were not of great practical significance.").

[60] Bork takes the "trick" view—see confirmation hearings about Yale profs ginning up case.

constitutional provisions a powerful limitation on the state's power to interfere in the intimate lives of its citizens. That limitation has been invoked on many subsequent occasions—one might even argue that the shift from protecting economic substantive due process in the early part of the twentieth century to protecting intimate or personal privacy via substantive due process in the latter part has been one of the defining constitutional developments of our time.[61] Nothing in this Part challenges that assessment or detracts from the importance of the Court's determination that the Fourteenth Amendment protects a fundamental right to privacy. What it calls into question is the seemingly universal assumption that protecting people's privacy means ensuring that they are left alone. Attending to the facts in the case that gave us Fourteenth Amendment privacy doctrine—to who Estelle Griswold was, why she was arrested, and the very substantial effects Connecticut's birth control ban had in one highly salient set of circumstances—helps to show there is more to the story.

A.

During his 1987 confirmation hearings, Supreme Court nominee Robert Bork asserted before the Senate Judiciary Committee what he had often argued in print: that *Griswold* was "a wholly bizarre and imaginary case."[62] The Court in *Griswold* had expressed horror at the thought of state police, under the auspices of state law, invading "the sacred precincts of the marital bedroom in search of telltale signs of the use of contraceptives."[63] But, Bork insisted, in the eighty-plus years Connecticut's birth control ban was on the books, that had never happened, and it never would: "Nobody is going to get a warrant" to search a bedroom for contraceptives, he argued, "and no prosecution is going to be upheld for that."[64]

Defenders of *Griswold*, such as then-Senator Joseph Biden, initially contested Bork's characterization of the state of affairs in Connecticut in the 1960s, suggesting police might well have obtained warrants to search private homes for contraceptives in those years. But when Bork seemed to have the better of this argument, Biden quickly retreated to the position that, even if the law was never enforced, its mere presence on the books justified judicial intervention.[65] This was a perfectly reasonable position; law need not actually be enforced by police to constrain people's behavior and degrade their social standing.[66] But what Biden's colloquy with Bork—and, in fact, almost all commentary on *Griswold*—overlooks is that Connecticut police *did* enforce the ban on birth control. Numerous Connecticut residents had been arrested in the decades prior to *Griswold* for violating the anti-contraceptive law. It was not a dead letter in the early 1960s and it never had been—at least, not with respect to those who attempted to create institutions dedicated to the public provision of birth control.

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[61] Ackerman, Fiss: look at Bernstein.
[62] Bork confirmation hearings, 241.
[63] Griswold, .
[64] Bork confirmation hearings, 242. See also Bork, Tempting of America, supra at 95 ("If any Connecticut official had been mad enough to attempt enforcement, the law would at once have been removed from the books and the official from his office.").
[65] Bork confirmation hearings, 241.
[66] See, e.g., Lawrence v. Texas.

Birth control advocates in Connecticut had been working for decades prior to *Griswold* to create a publicly accessible infrastructure through which women could access birth control. They were heartened in 1936 when the United States Court of Appeals for the Second Circuit held that federal birth control regulation could not be applied in ways that obstruct public health.[67] Margaret Sanger, leader of the national campaign for birth control, had orchestrated the legal challenge at the Second Circuit in order to advance her goal of creating a "'chain' of clinics"[68] throughout the country, a goal stymied by the ambiguous status of federal birth control regulation. Sanger and many others interpreted the Second Circuit's decision to mean that the way was clear to start building. Even before the court issued its ruling, birth control advocates in Connecticut had begun to open clinics; by 1937, they had opened nine. Yet when Connecticut police began to arrest clinic personnel under state law, the Second Circuit's ruling was of little avail. In 1940, in *State v. Nelson*, the Connecticut Supreme Court upheld the state ban.[69]

All nine clinics in the state closed immediately, and for the next twenty years, as clinics sprouted up across the country, not a single new one opened in Connecticut. This did not mean that no women in Connecticut could obtain birth control. Those with access to private doctors (who were willing to dispense it) and those who could afford to travel out-of-state often did so. But in the absence of in-state clinics, poor women's access was much more constricted. This was the problem Estelle Griswold was trying to solve when she opened a birth control clinic in New Haven in the fall of 1961. As the executive director of Connecticut Planned Parenthood, Griswold had made the accessibility of birth control to poor women her top priority.[70] In 1956, she launched a service through which poor women in Connecticut who wished to obtain birth control could obtain free referrals and transportation to a clinic in Port Chester, New York, just across the state line.[71] In 1961, she decided to challenge Connecticut's law directly by opening a clinic within state lines that offered its services for free to the poor.[72]

Griswold did not expect her clinic to stay open for long—and indeed, just about a week after it opened, police arrested Griswold and her colleague Dr. Lee Buxton, a Yale obstetrician who treated patients at the clinic, and shut their operation down. But the fact that Griswold was expecting the police does not make her case "imaginary." Indeed, it underscores what she was trying to demonstrate, which is that Connecticut's birth control ban remained very much in force against clinics and the primarily poor clientele they served. Griswold informed the reporters who flocked to New Haven after her arrest that "[i]t is the woman of the lower socio-economic group who does not know she can space her children, who cannot afford to go to a private doctor, who is being discriminated against by the Connecticut law."[73] Her colleague, Dr. Buxton, echoed this view,[74] as did many other medical professionals interviewed in the early 1960s: It was poor women who were hardest hit by the state's suppression of a publicly accessible infrastructure of birth control provision.

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68 Margaret Sanger, My Fight for Birth Control 144 ().

69 State v. Nelson, 126 Conn. 412 (Conn. 1940).

70 Garrow, Liberty and Sexuality.

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It was precisely the building of such an infrastructure that the law's proponents wished to forestall. James Morris, a concerned citizen who launched a very vocal (and initially successful) campaign to shut down the New Haven clinic, was willing to concede that "[b]irth control is a private thing, and people do have a right to believe in birth control."[75] But, Morris informed reporters, he drew the line at clinics or any other institution that sought to disseminate birth control to the public. "A Planned Parenthood Center is like a house of prostitution," he argued: It takes something that should be private and makes it publicly available, which is exactly what the state's ban on birth control was supposed to prevent.[76]

It was not just activists who viewed the existence of clinics as central to the dispute over Connecticut's law. In 1961, prior to *Griswold*, Dr. Buxton and several patients in his private practice had sought a declaratory judgment against the law in a case called *Poe v. Ullman.*[77] At the oral argument in *Poe*, the Justices pressed the plaintiffs' lawyer to demonstrate that his clients faced an imminent, or even plausible, threat of arrest.[78] He conceded they did not.[79] But he observed, the state did apply the law against clinics, with the result that "no public or private clinic for the purpose of advising on contraception" had existed in the state for twenty years.[80] Thus, he argued, "[t]he people in Connecticut who need contraceptive advice from doctors most—the people in the lower income brackets and lower educational brackets—the people who need it most, do not get it, because there are no clinics available."[81] This caused Justice Felix Frankfurter to complain, in the Justices' post-argument conference, that what the *Poe* plaintiffs actually sought was not the right they were purportedly asking for—the right to use birth control in their homes, or prescribe it in private practice—but rather, authorization to open public clinics.[82] Frankfurter's view that the Court should not decide the case ultimately prevailed: the Court dismissed *Poe* on justiciability grounds, finding no live controversy.[83] Justice Brennan added a very brief opinion concurring in the judgment in which he noted that "[t]he true controversy in this case is over the opening of birth control clinics on a large scale," as "it is that which the State has prevented in the past."[84] "[W]hen, if ever, that real controversy flares up again," Brennan noted, the Court would address the constitutional question.[85]

The vote count in *Poe* was five to four—and the arguments in the dissenting opinions are rather more compelling than those in Justice Frankfurter's plurality opinion. The plurality characterized *State v. Nelson*, the 1940 case upholding Connecticut's law in the wake of the

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[75] Morris interview.
[76] Morris interview. Robert Bork made the same point, analogizing the birth control ban to an anti-gambling ordinance.
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[78] Transcript of oral argument.
[79] Id. at.
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[82] Garrow, supra at 183.
[83] Poe.
[84] Poe, (Brennan, J., concurring); See also William J. Brennan, Remarks, The Law Society, London July 10, 1961, at 2-3, in John Marshall Harlan Papers, Princeton University Library, Box 587, Folder: Privacy, 1957-1971 (explaining that the Court had not reached the merits in *Poe* because "the plaintiffs were not truly caught in an inescapable dilemma and actually were seeking invalidation of the Connecticut statute in the interest of opening birth control clinics").
[85] Poe, (Brennan, J., concurring).

state's closure of nine birth control clinics, as a "test case"—a case that was manufactured to enable advocates to challenge the law and thus not good evidence that the plaintiffs in *Poe* faced any real threat of prosecution. Justices Harlan and Douglas disputed this characterization. "[T]he respect in which *Nelson* was a test case is only that it was brought for the purpose of making entirely clear the State's power and willingness to enforce" the law, Harlan argued.[86] At the very least, the decision had a chilling effect. "I find it difficult to believe that doctors generally—and not just those operating specialized clinics—would continue openly to disseminate advice about contraceptives after *Nelson* in reliance on the State's supposed unwillingness to prosecute," Harlan asserted, "or to consider that high-minded members of the profession would, in consequence of such inaction, deem themselves warranted in disrespecting this law so long as it is on the books."[87] Justice Douglas (who would soon thereafter write for the Court in *Griswold*) echoed this assertion, pointing out that the nine clinics *Nelson* closed remained closed, and nobody had dared open another in decades.[88] Thus, Douglas concluded, the birth control ban was not "a dead letter. Twice since 1940, Connecticut has reenacted these laws as part of general statutory revisions. . . . far from being the accidental left-overs of another era . . . [they] are the center of a continuing controversy in the State."[89]

Scholarship on *Poe* suggests justiciability was merely a convenient way of getting rid of a case the Court—and particularly Justice Frankfurter—did not want to hear in 1961.[90] Had the Court wished to, it could have invalidated Connecticut's birth control ban in *Poe*; it did not need to wait for a case that concerned clinics directly. But the sequence of events, as they transpired, served to highlight the centrality of clinics in the dispute over the ban. Even Robert Bork, whose long-running criticism of *Griswold* was premised on the notion that the ban was a dead letter, was forced to concede that clinics were an exception to the state's non-enforcement of the ban. Indeed, in retrospect, he argued that the ban was analogous to an anti-gambling statute: prohibiting all gambling on its face, but in practice enforced only against commercial establishments, not against "friends having their monthly poker game at home." Cracking down on birth control clinics is no more unconstitutional than cracking down on casinos, he argued, and *Griswold* was wrong to imply otherwise.

Of course, *Griswold* did not explicitly address clinics at all. The Court's opinion focused on married couples, at risk of having their bedrooms stormed by contraception-hunting police. No doubt the thought genuinely offended the Court. And focusing on married couples was likely

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[86] Poe, Harlan; see also Poe, (Douglas, J., dissenting) ("The Court refers to the *Nelson* prosecution as a 'test case,' and implies that it had little impact. Yet its impact was described differently by a contemporary observer who concluded his comment with this sentence: 'This serious setback to the birth control movement (the *Nelson* case) led to the closing of all the clinics in the state. . . .').

[87] Poe, Harlan; see also Poe, (Douglas, J. dissenting) ("What are these people—doctor and patients—to do? Flout the law and go to prison? Violate the law surreptitiously and hope they will not get caught? By today's decision, we leave them no other alternatives.").

[88] Poe, (Douglas, J., dissenting) ("At oral argument, counsel for appellants confirmed that the clinics are still closed. In response to a question from the bench, he affirmed that 'no public or private clinic' has dared give birth control advice since the decision in the *Nelson* case. These, then, are the circumstances in which the Court feels that it can, contrary to every principle of American or English common law, go outside the record to conclude that there exists a 'tacit agreement' that these statutes will not be enforced. No lawyer, I think, would advise his clients to rely on that 'tacit agreement.' No police official, I think, would feel himself bound by that 'tacit agreement.'").

[89] Id. at 512.

[90] Ryan Williams, The Paths to Griswold.

the most conservative way for the Justices to achieve their not-so-conservative ends. The effect was that the central role of clinics in the social and constitutional contestation over Connecticut's law got buried—and it rarely, if ever, surfaces in legal scholarship on *Griswold* today.[91] Legal scholars do not go hunting beneath the surface of the opinion due because everyone accepts that the facts in this case do not matter much to the constitutional analysis: whatever happened to Griswold was just a lever to get the law before the Court. But the facts do matter in at least one important way: they show that from the very beginning, legal actors perceived there to be a significant relationship between the constitutional right to use birth control and one key set of institutions that enabled individuals to effectuate that right. Looking back at this history, birth control clinics seem entirely wrapped up in the constitutional debate that transpired over the right to privacy in the early 1960s. Yet, the role of these institutions, if any, in the right itself remained wholly unarticulated—even after the Court decided *Griswold* and enabled all those clinics the state had closed to reopen their doors.

B.

Legal scholars often portray *Griswold* as an atypical Warren Court case on the ground that it had nothing to do with "[t]he doctrinal themes with which the Warren Court is most closely associated—such as the protection of racial and religious minorities, refashioning the law of democracy, and solicitude for First Amendment values and for the rights of the criminally accused and the poor."[92] On this view, *Griswold*, which concerned sexual privacy and involved the "criminal prosecution of two upper middle class white defendants," was simply out of step with its time. With its focus on sexual privacy and procreative liberty, scholars argue, *Griswold* "shares a much greater affinity with the decisions of the later Burger Court of the 1970s."[93]

One way of thinking about *Griswold* that challenges this characterization is as an anti-totalitarian decision. Richard Primus has argued that we should view *Griswold* as the one of the last in a long line of mid-twentieth-century decisions that seek to distinguish the United States from Nazi Germany and the Soviet Union and that articulate principles designed to prevent totalitarianism from taking root in American soil.[94] Sometimes, this anti-totalitarian agenda appeared right on the surface of the Court's opinions. The year before *Griswold*, the Court decided *Escobedo v. Illinois*,[95] which established the right of a defendant to confer with counsel when being questioned by police. The Court in *Escobedo* cited Nikita Khruschev's 1956 report to the Soviet Communist Party Congress, discussing confessions obtained during Stalinist purges, as an example of the kind of thing our Constitution guarded against.[96] In an earlier case, upholding the convictions of Communist Party leaders who had been convicted of advocating the overthrow of the U.S. government, Justice Douglas argued in his dissenting opinion that the United States must tolerate dissent so as not to reproduce the evils of communism, which he

[91] For a rare exception, see Mary Dudziak, .
[92] Ryan Williams.
[93] Id.
[94] Richard Primus, Note, A Brooding Omnipresence: Antitotalitarianism in Post-War Constitutional Thought, 106 Yale L.J. 423 (1996).
[95] 378 U.S. 478 (1964).
[96] Id. at .

illustrated by citing a 1930 volume entitled *The Law of the Soviet State*.[97] Justice Douglas did not make any explicit anti-totalitarian references in his majority opinion in *Griswold*. But Primus argues, by discussing censorship and discrimination against political dissidents and raising the specter of police who monitor all aspects of citizens' lives, including what they do in their bedrooms, "Douglas hinted that the necessary alternative to a state that recognized a right to privacy was a Soviet-style police state."[98]

Primus's historical account of *Griswold* as an anti-totalitarian decision dovetails nicely with Jed Rubenfeld's philosophical conception of the right to privacy as anti-totalitarian.[99] Rubenfeld argues that we ought to understand constitutional privacy doctrine as affording individuals protection against having their lives "too totally determined by a progressively more normalizing state."[100] In other words, he argues, "privacy analysis must not look to what a law prohibits . . . but rather to what the law affirmatively brings about."[101] Laws violate privacy when they conscript individuals into well-defined roles and identities that "affirmatively and very substantially shape a person's life."[102] For instance, laws banning abortion violate privacy because they conscript women into motherhood: an undertaking that "substantially shape[s] the totality of a person's daily life and consciousness."[103] Rubenfeld argues that *Griswold* is explicable along the same lines, as a ban on contraception—especially at a time when abortion was still generally prohibited—is a means of enforcing childbearing and putting individuals' sexual desire and sexual pleasure to state use. Rubenfeld's argument is not historical, but he links his anti-totalitarian reading of *Griswold* with the explicit anti-totalitarianism of mid-century cases like *West Virginia State Board of Education v. Barnette*,[104] which invalidated a law that required schoolchildren to salute the flag and profess their loyalty to the U.S. partly out of concern that such governmental efforts to coerce uniformity could open the door to the kind of creeping totalitarianism that had recently overtaken Europe.[105]

Viewing *Griswold* as an anti-totalitarian decision is not the only perspective from which it appears to be at home in the Warren Court era. This section focuses on another avenue of continuity between *Griswold* and other Warren Court cases—though a rather different set of cases than the ones mentioned above. The anti-totalitarian theme resonates strongly with the notion that the Constitution requires the government to leave people alone—and *Griswold* does tell the government to leave people alone, in a very meaningful way. But leaving people alone—constraining the extent to which the state may interfere with people's lives—was not the Warren Court's only concern. The Court was also concerned about people—particularly poor people—being left alone, and it decided a quite a few cases in the years before and after *Griswold* aimed

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[97] Dennis v. United States, 341 U.S. 494 (1951) (Douglas, J., dissenting).
[98] Primus, supra.
[99] Jed Rubenfeld, The Right of Privacy, 102 Harv. L. Rev. 737 (1989).
[100] Id.
[101] Id.
[102] Id.
[103] Id; see also id. 801-02 ("The point is this: childbearing, marriage, and the assumption of a specific sexual identity are undertakings that go on for years, define roles, direct activities, operate on or even create intense emotional relations, enlist the body, inform values, and in sum substantially shape the totality of a person's daily life and consciousness. Laws that force such undertakings on individuals may properly be called 'totalitarian,' and the right to privacy exists to protect against them.").
[104] 319 U.S. 624 (1943).
[105] Rubenfeld, supra.

at facilitating people's access to institutions necessary to the effectuation of their rights. For instance, in *Griffin v. Illinois*, the Court held that the state was required to waive the fee for trial transcripts necessary to appeal criminal convictions.[106] In *Gideon v. Wainwright*[107] and *Douglas v. California*,[108] the Court held that states were obligated to provide indigent criminal defendants with legal representation. In *Goldberg v. Kelly*, the Court held that states must afford public aid recipients pre-termination evidentiary hearings before discontinuing their aid.[109] In *Harper v. Virginia Board of Elections*, the Court invalidated the poll tax.[110] In *Boddie v. Connecticut*, the Court invalidated fees required to obtain a divorce hearing.[111]

All of these decisions imposed direct financial costs on the state; they effectively required the state to provide various goods and services. *Griswold* did not do this, and that is a real difference between it and these other cases. But this difference—which became highly salient in the late 1970s—has completely obscured an important thread of similarity running through all these decisions, which is that they all facilitated people's access to sets of institutions necessary to the effectuation of their constitutional rights. And in the background of all of these access-facilitating decisions was a particular concern about poor people's ability to effectuate their rights.

Griswold is not framed in these terms. The Court does not articulate the right to privacy in its decision with any reference to the institutions through which people obtain birth control. But numerous legal actors at the time—including some at the Court itself—believed that it should have. John Hart Ely, who was clerking for Chief Justice Earl Warren when *Griswold* reached the Court, made a concerted effort to convince his boss and his boss's colleagues to make the state's closure of birth control clinics the focus of their opinion.[112] Ely wrote a series of memoranda in which he pointed out that it was poor women in Connecticut who most wanted for birth control.[113] "Clinics are of course the answer," he asserted, "and [y]et it is only against the clinics that the law is enforced. . . . Thus those who need birth control most are the only ones who are denied it."[114] He argued that this amounted to discrimination of the sort the Court had deemed unconstitutional in *Yick Wo v. Hopkins*,[115] a late-nineteenth-century decision that

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[106] 351 U.S. 12 (1956).
[107] 372 U.S. 335 (1963).
[108] 372 U.S. 353 (1963).
[109] 397 US 254 (1970). In the same way historians refer to "the long nineteenth century," extending until the period of the First World War, we might refer to the long Warren Court era, extending into the early 1970s. Across a whole range of contexts, including class and race, the Burger Court's decisions in the early 1970s resemble those of the Warren Court much more than they resemble those of the later Burger Court.
[110] 383 U.S. 663 (1966).
[111] 401 U.S. 371 (1971).
[112] See Bench Memorandum from J.H. Ely to Chief Justice Earl Warren 27-28 (Feb. 26, 1965) (on file with Library of Congress, Earl Warren Papers, box 267, folder 2) [hereinafter Bench Memo]; Memorandum from J.H. Ely to Chief Justice Earl Warren re Justice Douglas' Opinion in No. 496, Griswold v. Connecticut 3-5 (Apr. 27, 1965) (on file with Library of Congress, Earl Warren Papers, box 520, folder 3) [hereinafter Memo re Douglas Opinion].
[113] Bench Memo, supra note 24, at 27 ("It is the poor and ill-informed who most need contraception and advice on family planning."); Memo re Douglas Opinion, supra note 24, at 4 (same)
[114] Bench Memo, supra note 24, at 27; Memo re Douglas Opinion, supra note 24, at 4 (same).
[115] 118 U.S. 356 (1886). *Yick Wo* invalidated a San Francisco ordinance that required operators of commercial laundries in wooden buildings to obtain permits from the city; virtually all white applicants received permits, while 199 of 200 Chinese applicants were denied permits.

invalidated a law that was neutral on its face but administered in a discriminatory way.[116] Ely urged the Chief Justice to draft an opinion in *Griswold* articulating the constitutional right in a way that foregrounded concerns about access to infrastructure, particularly with respect to the obstacles faced by poor people. And indeed, Warren considered doing so[117]—before deciding not to write at all.

If one reads *Griswold* carefully, it is possible to detect some of these concerns interlaced with the Justices' much more prominent discussions about the importance of affording married couples a modicum of privacy. Justice White wrote a concurring opinion in *Griswold* arguing that the birth control ban violated substantive due process—in part because "the clear effect of these statutes, as enforced, is to deny disadvantaged citizens of Connecticut, those without either adequate knowledge or resources to obtain private counseling, access to medical assistance and up-to-date information in respect to proper methods of birth control."[118] He argued that "a statute with these effects bears a substantial burden of justification when attacked under the Fourteenth Amendment"—a burden Connecticut's law could not satisfy.[119] White even added a citation to *Yick Wo* here, likely at the Chief Justice's urging,[120] to drive home the point that the state's targeting of birth control clinics was constitutionally problematic. But aside from this brief discussion, there is not much in *Griswold* to suggest the newly recognized right did anything more than get the state out of married people's bedrooms.

On the ground in Connecticut, however, *Griswold* had a much more visible relationship to the infrastructure of birth control provision. After the decision came down, Planned Parenthood began to open clinics in cities throughout the state.[121] *Griswold* also allowed federal and state money to flow to the provision of birth control in Connecticut, enabling public hospitals, among other entities, to provide birth control for free to patients who could not afford it on their own. These developments did not end the debate over birth control, but they shifted its terms. The Catholic Church, which had been the primary proponent of Connecticut's birth control ban, largely ended its crusade to shut down (private) clinics and instead began to focus on the issue of state funding. Motivating this shift in focus was the Church's understanding that in protecting the right to birth control under the Fourteenth Amendment, *Griswold* had, by extension, protected "[t]he actions of privately supported agencies in the promoting of education in birth control, the setting up by them of clinics, and their furnishing of contraceptive materials."[122]

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[116] Bench Memo, supra note 24, at 28; Memo re Douglas Opinion, supra note 24, at 3-5.
[117] See Bench Memo, supra note 24 (handwritten annotation on final, non-numbered page, apparently by Chief Justice Warren, stating of Griswold's claim: "I might sustain it on a *Yick Wo* theory or on the basis that the statute is not tightly drawn").
[118] Griswold, (White, J., concurring).
[119] Id.
[120] See Memorandum from J.H. Ely to Chief Justice Earl Warren re Justice White's Concurrence in No. 496, Griswold v. Connecticut 2 (May 19, 1965) (on file with Library of Congress, Earl Warren Papers, box 520, folder 3) (suggesting to the Chief Justice that Justice White might be persuaded to include a citation to *Yick Wo* in his opinion).
[121] Garrow, supra at 269.
[122] Statement of William B. Ball, General Counsel, Pennsylvania Catholic Conference, Hearings Before the Subcommittee on Foreign Aid Expenditures of the Committee on Government Operations, S.1676, Aug. 24, 1965. Ball was a former constitutional law professor at Villanova Law School who left his post to become a prominent lawyer and spokesman for the Church. Two months after *Griswold* was decided, he testified before Congress to

Spokesmen for the Church were not the only ones to suggest *Griswold* had done more than simply protect people's right to be left alone. In one of the first scholarly commentaries on the case, constitutional law professor (and future Assistant Attorney General of the United States) Robert Dixon argued that the Court's invalidation of Connecticut's birth control ban was at least as much about "making privacy effective" as it was about "a right to be let alone."[123] "Clearly," he argued, "the 'rights of husband and wife' which Mr. Justice Douglas had in mind did not consist merely of an interest in having the statute nullified so that the couple could use contraceptives without fear of police invasion of their bedroom."[124] "When marital privacy is recognized, and then used to defend birth control clinics, an added dimension, which is neither secrecy nor solitude, seems to appear,"[125] Dixon asserted. The problem was that the Court was not at all clear about the nature of that added dimension or its bearing on the constitutional right articulated in this case. What did seem clear to Dixon was that the right *Griswold* recognized was not just about walling off certain "zones of privacy" from state intervention, but also had something to do with protecting people's access to institutions that dispensed birth control.[126]

This was a question worth puzzling over. But if Dixon hoped set the terms of the academic debate over *Griswold* by publishing his commentary the same year the case came down, he must have been sorely disappointed. Almost all of the scholarly commentary on the case—then as now—focused on the question of legitimacy: Did the Court have the authority to extend constitutional protection to an unenumerated right, like the right to privacy, or was *Griswold* the second coming of *Lochner*, and therefore illegitimate? One of the reasons the Court hadn't wanted to reach the merits in *Poe* is that it was concerned it would face accusations of *Lochner*ing if it invalidated Connecticut's statute.[127] The Court tried to inoculate *Griswold* against such accusations in various ways—including explicitly asserting that it was doing different from what the *Lochner* Court had done[128]—largely to no avail. The dissenting Justices in *Griswold* hammered the Court for protecting a right not enumerated in the Constitution, as *Lochner* had, and this hammering continued in the law reviews.

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urge the government to stop funding birth control programs. That the Constitution protects private birth control clinics "appears clearly in the recent decision of the Supreme Court in the Connecticut case," Ball asserted. Id. But "[i]t is a totally different thing," he argued, for the government to fund birth control through "the use of subsidies, derived from the taxes contributed by all." Id.

[123] Robert G. Dixon, *The* Griswold *Penumbra: Constitution Charter for an Expanded Law of Privacy?*, 64 MICH. L. REV. 197, 217, 213 (1965); id. at 214 (observing that "both elements [are] unavoidably present in the" decision).

[124] Id. at 212.

[125] Id. at 205.

[126] Id. at 212. Dixon suggested, that although the Court provided little guidance to what it was getting at in *Griswold*, we might think of the "added dimension" of the right to privacy as a "right of access to birth control information so that [couples] could regulate, more safely and satisfactorily, the intimacies of their marital relationship." Id. Dixon did not know quite where to locate this right in the Constitution—he suggested it might be rooted in the First Amendment, or perhaps the Ninth Amendment, or maybe it was just part of the right to privacy itself. Nor did he say anything about whether the government was obligated to fund this right or simply to stop blocking information from being provided by others. What did seem clear to him was that after *Griswold*, it was no longer sufficient to describe the right to privacy as a "right to be let alone."

[127] Williams, supra.

[128] Griswold.

This debate about legitimacy is relevant here only to this limited extent: It completely overtook any discussion of the role of birth control clinics in *Griswold*. And more than that: it provided a framework for thinking about the case that made the role of clinics harder to see. The Court in the *Lochner* era invalidated hundreds of state laws on the ground that they interfered with classic negative rights to property and contract. Those decisions constrained the growth of the worker-protective infrastructure states were attempting to create in the early part of the twentieth century; they also thwarted the development of institutions such as unions on the ground that such institutions interfered with individual liberty. The Court in the *Lochner* era conceived of what it was doing in explicitly libertarian terms: clearing the state out and leaving people alone. Thus, the decades-long association of *Griswold* with *Lochner*—though motivated by the Court's shared reliance in these cases on substantive due process—has served to strengthen the conventional understanding that *Griswold* was all about leaving people alone.

The continuing preoccupation among legal scholars with the question of how *Griswold* relates to *Lochner* continues to obscure the question Dixon asked: whether the right to privacy should be understood solely as a right to be let alone, or whether it might entail more than that—whether, in fact, it might serve to facilitate and protect people's access to rights-enabling infrastructures, a kind of help that is particularly crucial to the exercise of constitutional rights by the poor. Concerns of this latter sort were swirling under and around the constitutional challenges to Connecticut's ban on birth control in the early 1960s. But then the Court wrote an opinion in *Griswold* focused almost entirely on marital bedrooms, and legal scholars, taken with the debate over substantive due process, placed that opinion in a libertarian frame—and those concerns, which had seemed so pressing to the people on the ground, slipped beneath the surface.

Part II

When Richard Nixon ran for President in 1968, he campaigned explicitly against the Warren Court and the "soft-headed judges"[129] that implemented its liberal agenda. Nixon promised an end to all this: "law and order" instead of coddling of criminals, and liberty and local control rather than the continued "forced integration" of schools. Had the Court's personnel remained unchanged for the entirety of Nixon's tenure in the White House, these promises might have been hard to keep. As it happened, four vacancies opened on the Court in quick succession and Nixon was able about immediately to replace just about half of the Justices. For some time, legal scholars described this shift as "the counter-revolution that wasn't": They pointed out that, by and large, the Burger Court let the Warren Court's most famous precedents stand. Only from the most formalistic perspective, however, does the relationship between the Warren Court and the Burger Court appear to be one of continuity rather than change. The Burger Court hollowed out the more robust criminal procedure guarantees of the 1960s, making it harder for criminal defendants to enforce their rights in court. In the context of race, the Court drastically limited efforts at school integration, raised serious constitutional questions about affirmative action, and made it significantly more difficult for racial minorities to challenge state action that had foreseeable, deleterious effects on their communities.

[129] Richard Nixon, Radio Address About the State of the Union on Law Enforcement and Drug Abuse Prevention, Mar. 10, 1973, in Public Papers of the Presidents of the United States: Richard Nixon, 1973, at 182 (1991).

Even from a starkly formalistic perspective, it would be difficult to construct an account of constitutional decisionmaking with regard to class from, say, 1965 to 1975 that was more about continuity than change. In the 1960s, there was an extended debate among legal scholars about how to interpret the landmark Supreme Court victories of poor litigants. By 1975, a dramatic string of losses by poor plaintiffs in cases structurally similar to those they had won in the 1960s had extinguished that debate. In *Boddie*, decided in 1971, the Court held that requiring filing fees of people seeking divorce violated the Fourteenth Amendment.[130] In *United States v. Kras*, decided two years later, the Court held (over the votes of almost all the remaining Warren Court Justices) that requiring filing fees of people seeking to discharge their debts in bankruptcy had a rational basis and did not violate the rights of indigents.[131] In 1968, in *Goldberg v. Kelly*, the Court held that the government was constitutionally obligated to afford public aid recipients pre-termination evidentiary hearings before discontinuing their aid.[132] In 1976, in *Matthews v. Eldridge*, the Court held that the government was not obligated to provide such hearings before terminating Social Security disability benefits.[133] These Burger Court decisions made celebrated law review articles of the 1960s, such as Charles Reich's *The New Property*[134] and Frank Michelman's *On Protecting the Poor Through the Fourteenth Amendment*,[135] appear outdated—or at least deeply out of step with the zeitgeist—just years after they were published. And then of course there was *San Antonio v. Rodriguez*, in which the Court suggested that even rights as basic as education were not constitutionally guaranteed and that discrimination against the poor did not warrant heightened scrutiny under the Fourteenth Amendment.[136] *Rodriguez* made clear the Burger Court's determination "that the poor have no claim to special constitutional concern."[137]

That, in a nutshell, is how we tell the story of the rise and fall of the Court's concern about the rights of the poor under the Fourteenth Amendment. This story is not wrong. In fact, it is right, and it is good history to know. These developments gave rise, however, to a particular discourse of rights—the discourse of negative rights, founded on the idea that all American constitutional rights do is leave people alone. The Burger Court itself contributed to the rise of this discourse, and by the late 1970s, it was common parlance in the lower courts. Conservative and libertarian scholars embraced this discourse. And, in a way, the Court's critics did too. Progressive scholars published countless articles criticizing the Court for adopting a thoroughly negative conception of rights and leaving countless Americans—indeed, the most vulnerable among us—without the forms of constitutional protection they needed.

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[130] 401 U.S. 371 (1971).
[131] 409 U.S. 434 (1973). The Court in *Kras* differentiated the context of bankruptcy from that of divorce by arguing that, unlike bankruptcy, divorce implicated a fundamental constitutional right (the right to marry), id. at 444-45, and that the government's control over the establishment, enforcement, and dissolution of debts was not nearly so exclusive as its control over the marriage relationship, id. at 445-46.
[132] 397 U.S. 254 (1970).
[133] 424 U.S. 319 (1976). The Court in *Matthews* gave the following reasons for treating welfare benefits differently from Social Security disability benefits: eligibility for disability benefits is not based upon financial need, id. at 340; other forms of government assistance are available when the termination of disability benefits places a recipient below the subsistence level, id. at 342; and the risk of error is substantially lower in the context of welfare than in the context of disability, id. at 344-45.
[134] Charles Reich, The New Property, 73 Yale L.J. 733 (1964).
[135] Michelman, supra.
[136] 411 U.S. 1 (1973).
[137] Graetz & Greenhouse, supra, 92.

The Court's handling of reproductive rights cases was central to this criticism. In 1973, the Court held that the Fourteenth Amendment protects the right to abortion. Several years later, it held that this protection does not encompass a right to state funding. This determination triggered an outpouring of criticism from the left. Indeed, much of the talk by progressive scholars in the 1980s about how American constitutional law protects only negative rights appeared in articles about abortion. If one focuses only on the issue of state funding, then what happened in abortion law in the Burger Court era seems perfectly consistent with—even a paradigmatic illustration of—the idea that all American constitutional rights do is leave people alone. But ordering the government to fund a right is only one of the mechanisms available to courts for facilitating people's ability to exercise their rights. This Part shows how concerns about women's access to infrastructures of reproductive healthcare—concerns that remained latent in *Griswold*—made their way to the surface in the 1970s, and in fact were explicitly incorporated into constitutional privacy doctrine. The Burger Court made it clear that the government was not constitutionally obligated to pay for abortion. What the conventional narrative about this period obscures is that the Court also began to articulate the abortion right in ways that explicitly protected and facilitated women's access to rights-enabling forms of infrastructure—without which they would simply be on their own.

A.

If *Griswold* involved two "upper-middle-class" professionals,[138] *Roe* most certainly did not. The plaintiff in *Roe* was in her early twenties, but had already had a tough life.[139] After suffering terrible abuse as a child and dropping out of high school, she had a baby at sixteen; she lost that baby to her mother, who filed for custody of the child because she disapproved of her daughter's lesbianism and substance abuse. Not long after losing custody of her first child, she had a second child, who she put up for adoption. When she got pregnant a third time, still mired in addiction and barely making ends meet, she had had enough. She visited a doctor, who told her that abortion was prohibited in Texas and that if she wanted to end her pregnancy, she would have to travel to New York or California, both journeys well beyond her means. On a tip, she sought out a place rumored to perform illegal abortions, but when she got there, it was deserted. She was unhappily pregnant, addicted, impoverished—and completely alone with nowhere to turn.

Today, we think of the right to abortion as vindicating both constitutional privacy or liberty interests and constitutional interests in sex equality. But when courts first began to confront constitutional challenges to abortion regulations, in the late 1960s, these were not necessarily the first constitutional frames that came to mind. The campaign to overturn abortion bans and other strict regulations of the procedure in that era looked quite different than it does today.[140] Among other constituencies, doctors and medical associations were much more

[138] Williams, supra.
[139] The *New York Times* recently referred to her early life as "a Dickensian nightmare." Robert T. McFadden, Norma McCorvey, "Roe" in Roe v. Wade, is Dead at 68, N.Y. Times, Feb. 18, 2017.
[140] Reva Siegel & Linda Greenhouse, Before Roe.

prominent in this campaign than they are today. Their chief concerns were twofold: they viewed the hundreds of thousands of illegal abortions performed each year in the United States as a public health crisis and they were worried about the legal liabilities abortion regulations imposed on medical professionals and the establishments in which they worked. In states that banned abortion, doctors who wished to perform abortions faced the prospect of jail time; in states where abortion was permitted to protect the life or health of the mother, they also faced a threat of arrest, as it was often unclear what circumstances fit into these exceptions. Thus, one of the most prominent constitutional grounds on which abortion laws were challenged prior to 1973 was vagueness.

Framing abortion regulations as void for vagueness tied the constitutional argument against such regulations directly to the medical infrastructure in which abortion was performed. For this reason, among others, it appealed to Justice Harry Blackmun. Before joining the Court, Blackmun served as general counsel at the Mayo Clinic, an experience that left him with a deep and abiding respect for the medical profession. Blackmun was seriously concerned about the potential liability doctors and medical institutions could incur under restrictive abortion laws simply for engaging in what they considered best medical practices, and about the chilling effect this potential liability had on the practice of medicine. At the time *Roe* reached the Court, Blackmun was following the case of Dr. Jane Hodgson, a prominent Mayo Clinic-trained obstetrician from his home state of Minnesota who had been arrested for performing an abortion on a woman who had contracted German measles early in her pregnancy.[141] Blackmun was obviously also aware of the case of Dr. Milan Vuitch, a gynecologist who was arrested for violating the District of Columbia's abortion law, which made it a crime for a doctor to perform an abortion except when "necessary for the preservation of the mother's life or health."[142] A federal district judge found this law to be void for vagueness in 1969—the first time in American history a federal court found an abortion regulation to be unconstitutional.[143] The Supreme Court reversed that ruling in 1971, in its first abortion decision.[144] But concerns about the threat vague abortion laws posed to the organized medical community persisted,[145] and in 1972, when Blackmun wrote the first draft of his opinion in *Roe*, he declared Texas's abortion law void for vagueness.

By the time Blackmun issued his majority opinion in *Roe* the following year, the constitutional justification for invalidating the law had shifted to privacy. But the opinion retained its medical focus. In *Griswold*, the Court conceives of a married couple as the object of the Constitution's privacy protections. In *Roe*, it conceives of the woman and her doctor as the unit in need of protection. The Court in *Roe* asserts that the possible consequences of not having

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[141] Carole Joffe, Doctors of Conscience: The Struggle to Provide Abortion Before and After Roe v. Wade 23 (1995) (noting that shortly after *Roe* came down, Justice Blackmun met with Dr. Hodgson and told her he had been following her case from the beginning). At the time *Roe* was decided, Dr. Hodgson's appeal from the Minnesota Supreme Court's decision to uphold her conviction was pending at the Court.

[142] United States v. Vuitch, 305 F. Supp. 1032, 1033 (D.D.C. 1969).

[143] Id.

[144] United States v. Vuitch, 402 U.S. 62 (1971).

[145] See, e.g., State v. Barquet, 262 So.2d 431 (Fla. 1972) (invalidating an abortion regulation on vagueness grounds); People v. Barksdale (Cal. 1972) (same); Doe v. Scott, 321 F.Supp. 1385 (N.D. Ill. 1971) (same); California v. Belous, 71 Cal.2d 954 (1969), cert. denied, 397 U.S. 915 (1970) (same).

an abortion and the potential distress occasioned by the birth of an unwanted child "are factors the woman and her responsible physician necessarily will consider in consultation."[146] At another point, the Court suggests that "a physician and his pregnant patient might decide that she should have an abortion in the early stages of pregnancy."[147] Sometimes, the pregnant woman seems to drop out of the equation almost entirely, as when the Court suggests that, prior to viability, "[t]he attending physician, in consultation with his patient, is free to determine, without regulation by the State, that, in his medical judgment, the patient's pregnancy should be terminated."[148] At the end of its opinion, the Court explicitly declares that *Roe* "vindicates the right of the physician to administer medical treatment according to his professional judgment" because "[t]he abortion decision in all its aspects is inherently, and primarily, a medical decision."[149]

Feminist scholars have long criticized *Roe*'s physician-centered rhetoric and reasoning. They have argued that the Court's framing of abortion obscures women's interests and agency—a point that is hard to dispute in light of the Court's conclusion that because abortion is a medical procedure, "the basic responsibility for it must rest with the physician."[150] There is a long history of paternalistic assertion of control over women's bodies in the medical arena, and *Roe*'s seeming assignment of decision-making authority to doctors can be read as perpetuating that history. The medical focus of the opinion indisputably privileges medical ways of thinking about abortion over "social questions of gender"—a mode of reasoning that tends to "obscure[] the possibility that [abortion] regulation may be animated by constitutionally illicit judgments about women."[151]

Yet if *Roe*'s focus on abortion as a medical procedure obscures some important aspects of its regulation, it underscores others. Most notably, it underscores the idea that exercising the right to abortion requires an infrastructure of healthcare provision. It is not something women can (safely) do entirely on their own. This point was brought home to Justice Blackmun in the interim between his first and second drafts in *Roe*, when he traveled back to Minnesota to spend some time at the Mayo Clinic's library learning all he could about the practice of abortion. Mortality and morbidity statistics relating to illegal abortion (which accounted for most abortion) in this period were grim. As the plaintiff in *Roe* emphasized, poor women in particular suffered from the ill effects of such abortions. Large municipal hospitals in the 1950s and 1960s had dedicated "septic abortion wards."[152] Treatment for the complications of "incomplete abortion" was a leading cause of hospital admission for obstetric and gynecological services.[153] Thus, when Roe and some of her amici argued that the right to abortion is absolute and the procedure immune from state regulation, the Court rejected this argument.[154] "The pregnant woman cannot

[146] Roe v. Wade, 410 U.S. 113, 153 (1973).
[147] Id. at 156.
[148] Id. at 163.
[149] Id. at 165-66.
[150] Id. at 166.
[151] Reva B. Siegel, *Reasoning From the Body: An Historical Perspective on Abortion Regulation and Questions of Equal Protection*, 44 STAN. L. REV. 261 (1992).
[152] David A. Grimes & Linda G. Brandon, Every Third Woman in America: How Legal Abortion Transformed Our Nation 8 (2014).
[153] Id.
[154] Roe, 410 U.S. at 153-54.

be isolated in her privacy," the Court declared.[155] In part, this was because the state had an interest in protecting potential life. But it was also because a regulated infrastructure of provision was essential to the effectuation of the abortion right, properly understood. Indeed, the Court observed that what the plaintiff in *Roe* actually sought was not the right to a completely unregulated abortion, but—in her own words—the right to "a legal abortion under safe conditions."[156] The way to achieve that goal was not to completely deregulate the procedure, but to selectively deregulate it: to block restrictions that eviscerated the infrastructure of abortion provision, as Texas's law had done, but to allow those that genuinely advanced the state's legitimate constitutional "interests in safeguarding health [and] . . . maintaining medical standards."[157]

To this end, the Court devoted considerable effort in *Roe*, and in its companion case, *Doe v. Bolton*,[158] to the articulation of guidelines for the regulation of the new institutions and practitioners that would make abortion available to women. *Roe* held that states could require that the procedure be performed by doctors.[159] It also held that state could regulate the type and licensing of facilities in which second and third trimester abortions would be performed: "whether it must be a hospital or may be a clinic or some other place of less-than-hospital status."[160] The Court's invocation of clinics was notable, as Roe had not asked the Court to authorize clinics to perform abortions.[161] The Court flagged that issue itself, and its authorization of clinics[162] had a dramatic impact on the infrastructure of abortion provision in this country. In the early 1970s, the campaign for abortion clinics was driven by feminist doctors and other advocates of abortion rights who had witnessed the hostility toward women seeking abortions at the few hospitals willing to perform the procedure; they believed clinics would enable women "to obtain abortions at a lower cost, with less discomfort, and . . . with more humane treatment."[163] In fact, in 1971, with the appeal of her conviction pending at the Minnesota Supreme Court, Dr. Jane Hodgson moved to Washington, D.C., to become director of the recently opened Preterm Clinic there—one of the earliest freestanding abortion clinics in the nation.[164]

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[155] Id. at 159.
[156] Id. at 120; id. ("Roe alleged that she was unmarried and pregnant . . . [and] that she wished to terminate her pregnancy by an abortion 'performed by a competent, licensed physician, under safe, clinical conditions.'").
[157] Id. at 154.
[158] 410 U.S. 179 (1973).
[159] Id. at 165.
[160] Id. at 163.
[161] See Appellant's Brief in Roe v. Wade.
[162] See *City of Akron v. Akron Center for Reproductive Health*, 462 U.S. 416 (1983) (invalidating a law that required all post-first-trimester abortions to be performed in hospitals on the ground that it "unreasonably infringes upon a woman's constitutional right to obtain an abortion"); *Planned Parenthood of Kansas City v. Ashcroft*, 462 U.S. 476 (1983) (same).
[163] Joffe, supra, 160.
[164] Joffe, supra. When asked where the language in *Roe* about clinics came from, Sarah Weddington, Roe's lawyer, said that as far as she knew, that language came entirely from Justice Blackmun himself. See Interview with Sarah Weddington, by Gerald Rosenberg, University of Chicago Law School, Jan. 22, 1988 cited in Gerald Rosenberg, The Hollow Hope 201 (1991). With his background in the organized medical community, and all the reading he did on abortion while writing *Roe*, Justice Blackmun had plenty of reasons to know about the campaign for freestanding abortion clinics being waged in the late 1960s and early 1970s. His interest in Dr. Hodgson's case—and the fact that he reached out to her shortly after *Roe* came down, suggest one way in which this issue may have attracted his attention.

The Court's nod to clinics in *Roe* was a major boon to this campaign. In the years after *Roe*, the number of abortion clinics in the United States increased exponentially, from approximately 350 in 1973 to 1,500 a decade later.[165] *Doe* did not address clinics specifically, but it too blocked regulations that restricted women's access to medical infrastructure, invalidating, among other things, Georgia's requirement that abortion be pre-approved by a special abortion committee at each hospital and that the performing physician's judgment be confirmed by independent examinations of the patient by two other physicians.[166]

Alexander Bickel, Archibald Cox, and numerous other commentators in the mid-1970s, harshly criticized the Court's decision in *Roe* on the ground that it "read like a set of hospital rules and regulations" rather than an articulation of principled legal doctrine.[167] Bickel referred to the Court's opinion, derisively, as a "model statute," suggesting the Justices were more concerned with devising specific guidelines for the provision of abortion than engaging in any kind of constitutional reasoning.[168] What these criticisms miss is that the articulation of guidelines governing the state's regulation of the infrastructure through which abortion is provides *was part of the constitutional analysis*. The Court had begun to articulate the abortion in a way that was specifically designed to protect the infrastructure through which it would be exercised. When it held that the government needed to cease regulating abortion in ways that constricted women's access to hospitals and clinics without sufficient health-protective justifications, it was not suggesting this would be a good idea, as a policy matter. It was holding that the right to abortion was more than simply a right to decriminalization in some circumstances. It was a right against state action that too severely limited women's ability to exercise their newfound right through a safe, legal infrastructure of abortion provision. Indeed, it was this more capacious understanding of the right that caused Justice William Rehnquist to complain in his dissenting opinion that "privacy"—the term the Court had used to describe the right at issue in *Roe*—was inadequate to capture the form of constitutional protection the Court had extended to the practice of abortion. After all, he asserted, *Roe* seemed to protect women's ability to access medical providers, and any "transaction resulting in an operation such as this is not 'private' in the ordinary usage of that word."

He had a point. Proponents of laws restricting birth control and abortion had been grumbling, since before *Griswold* was even decided, that those seeking to overturn these laws were not only seeking privacy in the traditional sense of that word, they were seeking access. *Griswold* did not articulate the right to privacy in a way that explicitly sought to protect women's access to an infrastructure of reproductive healthcare—but *Roe* and *Doe* did. Those decisions presupposed a certain set of institutional arrangements through which the right to abortion would be effectuated, and they developed a constitutional doctrine that aimed to entrench such arrangements.

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[165] GERALD ROSENBERG, THE HOLLOW HOPE (1991).
[166] The Court in *Doe* also held that the Fourteenth Amendment barred states from requiring that abortions be performed in hospitals accredited by the Joint Commission on Accreditation of Hospitals.
[167] ARCHIBALD COX, THE ROLE OF THE SUPREME COURT IN AMERICAN GOVERNMENT 113 (1976).
[168] ALEXANDER M. BICKEL, THE MORALITY OF CONSENT 27 (1975).

In his influential 1991 book, *The Hollow Hope*, political scientist Gerald Rosenberg cites *Roe* and *Doe* as paradigmatic examples of his thesis that Court decisions themselves bring about very little change on the ground. Rosenberg's chief evidence in support of this thesis in the context of abortion is that after *Roe* and *Doe* came down, there was not a dramatic increase in the number of hospitals performing abortions. In 1973, slightly more than three-quarters of public and non-Catholic private hospitals refused to perform abortions. In 1977, Planned Parenthood released data showing that vast majority of public and private hospitals had still never performed an abortion. Numerous studies show that in the decade after *Roe*, there was not much change, in the nation as a whole, in the percentage of hospitals performing abortions. Where there was massive change was in rates of abortion performed by clinics. Between 1973 and 1976, the number of non-hospital providers of abortion grew overall by 152%; in non-metropolitan areas, that number grew by a whopping 304%. Between 1973 and 1983, the number of freestanding abortion clinics in the United States more than quadrupled. Based largely on the discrepancy between the increase in clinical providers and the lack of increase in hospital providers in this period, Rosenberg concludes that it was not the Court's decision in *Roe* that was primarily responsible for the massive expansion in the availability of abortion in the 1970s, but rather, the market.

There is now a wealth of scholarship contesting the central thesis of *The Hollow Hope*. My aim here is not to contribute to that project, but simply to point out that Rosenberg's perception of the skyrocketing numbers of abortion clinics in this country in the 1970s as only marginally attributable to *Roe* reflects and reinforces the notion that all *Roe* did was decriminalize abortion. Whatever happened after that, Rosenberg attributes exclusively to autonomous market forces. But *Roe* did not simply decriminalize abortion. It reasoned about the abortion right in a way that was explicitly attentive to the medical infrastructure through which abortion is provided. It allowed states to continue regulating that infrastructure for legitimate health and safety reasons, and to protect potential life, but barred regulation that too tightly constrained women's access to legal providers. Prior to 1973, the provision of abortion was either flatly prohibited or restricted in vague and potentially expansive ways that deterred doctors from engaging in it. By articulating the abortion right in a manner that sought to facilitate women's access to an infrastructure of abortion provision—what Justice Blackmun later referred to as the "substance" of the abortion right[169]—*Roe* altered the landscape for providers. It reduced doctors' vulnerability to criminal punishment for providing abortion and it offered clinics and other providers constitutional protection against legislation aimed at their evisceration. The market responded. To view that response as largely unconnected from *Roe* is to miss how the right to privacy evolved in 1973, from a right that ostensibly functioned only to leave people alone to one that also sought to ensure they were not left alone.

B.

It would be an understatement to say that *Roe* has come in for a lot of criticism. When the war over abortion heated up, in the late 1970s and 1980s,[170] most of the criticism of the right to privacy that had been centered on *Griswold* was transplanted onto *Roe*. Conservative critics,

[169] Greenhouse, Becoming Justice Blackmun, supra, 199.
[170] See Reva Siegel; Cary Franklin.

like Robert Bork, continued to insist that the problem with the Court's recognition of privacy as a fundamental constitutional right resided not with the concept of privacy itself, but rather with the fact that this right was not enumerated in the Fourteenth Amendment. In general, Bork argued, legal protections for privacy, like everything else that keeps the government at bay, are a good thing: "No civilized person wants to live in a society without a lot of privacy in it."[171] Indeed, he noted, the framers of the Constitution had explicitly protected privacy in a variety of ways: the First Amendment protects the free exercise of religion; the Fourth Amendment prohibits illegal searches and seizures; the Fifth Amendment provides a right against self-incrimination. But nowhere in the Constitution does it say the state has to stay out of decisions about women's reproductive healthcare.

Criticism of *Roe* from the left looked quite strikingly like the mirror image of this. Catharine MacKinnon, *Roe*'s most influential feminist critic, did not question the constitutional legitimacy of the Court's holding; indeed, she believed the Fourteenth Amendment clearly protected women's right to abortion.[172] The problem, she argued, resided with the concept of privacy itself. "The liberal ideal of the private . . . holds that, so long as the public does not interfere, autonomous individuals interact freely and equally"—and in this way, non-intervention by the state gets defined as freedom.[173] But, she argued, the so-called private sphere is already an arm of the state, which has used and continues to use many levers to shape the relationships, divisions of labor, and power imbalances that exist in that sphere, as elsewhere. The private sphere is also a context in which significant amounts of harm is done to women, domestic violence being just one example. "In this light," MacKinnon argued, "a right to privacy looks like an injury got up as gift."[174] It shields private violence and various forms of inequality, which the state had a hand in creating, from examination under the law. And it deprives women without financial resources of the support they need in order to actually effectuate the right to abortion. "Freedom from public intervention coexists uneasily with any right that requires social preconditions to be meaningfully delivered," she argued—and the right to privacy "is not thought to require any social preconditions to be meaningfully delivered."[175]

Today, these opposing viewpoints continue to frame scholarly debate over *Roe* and the right to privacy. But it is significant that these arguments, particularly the feminist argument, arose not in the early-1970s, in the immediate aftermath of *Roe*, but rather, in the late 1970s and 1980s—the period from which so many of the frames that continue to shape our understanding of the Fourteenth Amendment sprang. MacKinnon's critique of constitutional privacy doctrine was not a direct response to *Roe*. It was a response to *Roe* mediated through the filter of later abortion decisions—specifically, a series of decisions issued between 1977 and 1980 in which the Court held that the government is not constitutionally obligated to provide abortion in public hospitals or to cover the procedure under Medicaid and similar government health programs.[176]

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[171] Bork confirmation hearings, 241.
[172] MacKinnon viewed abortion as a matter of women's equality; she would have protected it under the Equal Protection Clause. MacKinnon, Privacy v. Equality, Feminism Unmodified; Catharine A. MacKinnon, Reflections on Sex Equality Under Law, 100 Yale L. J. 1281, 1319-24 (1991).s
[173] MacKinnon, Privacy v. Equality, Feminism Unmodified, 101.
[174] Id. at 100.
[175] Id.
[176] *Maher v. Roe*, 432 U.S. 464 (1977); *Poelker v. Doe*, 432 U.S. 519 (1977); *Beal v. Doe*, 432 U.S. 438 (1977); *Harris v. McRae*, 448 U.S. 297 (1980).

These decisions made it more difficult for poor women to access abortion. They also substantially contributed to the explosion of negative rights talk in American constitutional law in these years. The Court determined in the funding cases that the state cannot prohibit a pregnant woman from purchasing an abortion (at least early on in her pregnancy), but that if she lacks sufficient funds to do so, the state is under no obligation to provide her with one. This determination was, and still is, taken as a prime illustration of the fact that the United States Constitution protects only the negative right to be left alone.

Feminist critics of *Roe* often assert that the seeds of the Court's funding decisions were planted in 1973 when the Court chose to frame the right to abortion in terms of privacy. By framing the right in this way, they argue, the Court essentially predetermined the outcome in the funding cases: if all the right to privacy does is keep the state out, it logically follows that the state is not required to provide people with abortions.[177] But, in fact, the outcome in the funding decisions did not follow automatically or inevitably from *Roe*. In the aftermath of that decision, plaintiffs across the country began to challenge the refusal of public hospitals to provide abortion and the exclusion of abortion from government healthcare programs aimed at low-income people. In almost all of those cases—between 1973 and 1976—federal courts concluded that the state's refusal to fund abortion violated the Fourteenth Amendment, both because it discriminated against the poor and because it infringed the fundamental right to abortion.[178] "It is not only complete proscription of abortion that is unconstitutional," courts observed, "but also governmental erection of barriers that 'unduly restrict' the rights of the pregnant woman."[179] These courts viewed the state's refusal to provide abortion in public hospitals and its exemption from coverage in government health plans as barriers erected by the state that unduly restricted women's access to abortion. Courts in this period viewed these restrictions as particularly problematic because they targeted the poor; they deprived poor women of an adequate opportunity to exercise their fundamental rights.

The courts that issued these rulings argued that they followed directly from *Roe* and *Doe*. In a decision holding unconstitutional Utah's refusal to use public welfare funds to pay for abortions except in the most extreme circumstances, the Tenth Circuit asserted that *Roe* and *Doe* compelled this result, and that "a contrary holding . . . would . . . fly in the face of those two cases."[180] In a decision concerning a Missouri law that made medical assistance benefits available to women who carried their pregnancies to term but not to those who sought abortions, the Eighth Circuit concluded that the law was "a clear violation" of the Fourteenth Amendment "when viewed against the glare of . . . *Roe v. Wade*; *Doe v. Bolton*, and the precedent which has

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[177] See, e.g., MacKinnon, Privacy vs. Equality, supra, 96 ("It is apparently a very short step from that which the government has a duty *not* to intervene in to that which it has *no* duty to intervene in."); West.

[178] See, e.g., Doe v. Rose, 499 F.2d 1112 (10th Cir. 1974); Nyberg v. City of Virginia, 495 F.2d 1342 (8th Cir. 1974); Wulff v. Signleton, 508 F.2d 1211 (8th Cir. 1974); Klein v. Nassau Co. Medical Center, 409 F.Supp. 731 (E.D.N.Y. 1976); Doe v. Westby, 383 F.Supp. 1143 (W.D.S.D. 1974); Roe v. Norton, 380 F.Supp. 726 (D.Conn. 1974); Doe v. Wohlgemuth, 376 F.Supp. 173 (W.D.Pa. 1974); Doe v. Hale Hospital, 500 F.2d 144 (1st Cir. 1974); Doe v. Rampton, 366 F.Supp. 189 (D.Utah 1973); Nyberg v. City of Virginia, 361 F.Supp. 932 (D.Minn. 1973); Klein v. Nassau Co. Medical Center, 347 F.Supp. 496 (E.D.N.Y. 1972); see also Hathaway v. Worcester City Hospital (1st Cir 1973) (invalidating city hospital's policy refusing to provide voluntary sterilizations).

[179] Westby, 383 F.Supp. at 1146.

[180] Rose, 499 F.2d at 1115-16.

developed as a result of those cases."[181] Even the few dissenting judges in these cases viewed protecting women's access to abortion as an important constitutional concern. They argued that there was a difference between the state refusing to pay for abortion and the state erecting barriers to the procedure. Were the state to withdraw funding, they asserted, women would still have access to an infrastructure of abortion provision and they would still be constitutionally protected against attempts by the state to suppress that infrastructure.[182]

By 1980, the law had reversed course on the funding question. The Court had adopted the position of the dissenting judges in the earlier cases: It held that the government was not constitutionally obligated to fund abortion through Medicaid and public hospitals. This caused a great uproar in the law reviews. It effectively quashed any remaining hope that the Court might adopt Michelman's minimum welfare thesis.[183] It prompted many scholars to point out the tremendous impact of this determination on the hundreds of thousands of women who depended on public assistance to meet their basic needs and who had previously relied on state money to fund the exercise of their reproductive rights.[184]

The funding decisions unquestionably had a great impact on the ground. They also had a great impact on the way scholars talked about the abortion right. In the years after the funding decisions came down, the law reviews were full of articles proclaiming the right to abortion dead for poor women. By allowing the government to withhold state funding from abortion, scholars argued, the Court had "ma[de] the right to abort meaningless for poor women"[185]—had

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[181] Wulff, 508 F.2d at 1215; see also Comment, Abortion on Demand in Post-Wade Context: Must the State Pay the Bills?, 41 Fordham L. Rev. 921 (1973).

[182] See Wohlegmuth, 376 F.Supp. at 193 (Weis, J., dissenting) ("It is crucial here that the State has no monopoly on performing abortions and in fact is not in the business to any degree. It is only the money from the State which is at issue and the absence of State funds, on this record, will not absolutely prevent the plaintiffs from obtaining the services which they desire. . . . It may be assumed that various non-profit organizations interested in advancing their point of view of the desirability of abortions on demand realistically could be expected to give financial assistance if approached. While it has been urged that the existence of private charitable funds should not enter into consideration of cases involving welfare rights, for example, it is an element which points out that payment of monies, not the exercise of fundamental rights, is the point of issue here."); Nyberg, 495 F.2d at 1348 (Heaney, J., dissenting from denial of petition for rehearing en banc) ("*Doe* and *Roe* are primarily concerned with protecting the right of a pregnant woman to have an abortion. If that right can be reasonably protected without compelling every public clinic and hospital in the United States to perform the procedure, consideration should be given to doing so. An inquiry should perhaps be made into the question of whether the [court's] order is reasonably necessary to protect the constitutional rights of pregnant women. Central to such an inquiry would be the cost and availability of alternate facilities, the effect on the staff and routine of the hospital being asked to perform the procedure, and whether public assistance is available to assist the person in having the abortion performed at another public or private facility willing to undertake the procedure. In Minnesota, for example, many public and private clinics and hospitals perform abortions in accordance with the decisions in *Doe* and *Roe*. It may be, therefore, that the rights of those desiring abortions who live in the Virginia area are not significantly dampened by the policy of the municipal hospital in that community.").

[183] See Susan Frelich Appleton, Beyond the Limits of Reproductive Choice: The Contributions of the Abortion-Funding Cases to Fundamental-Rights Analysis and to the Welfare-Rights Thesis, 81 Colum. L. Rev. 721 (1981).

[184] See, e.g., Dorothy E. Roberts, The Future of Reproductive Choice for Poor Women and Women of Color, 12 Women's Rights L. Rep. 59 (1990); Lawrence H. Tribe, The Abortion Funding Conundrum: Inalienable Rights, Affirmative Duties, and the Dilemma of Dependence, 99 Harv. L. Rev. 330 (1985); Richard Lincoln et al., The Court, the Congress, and the President: Turning Back the Clock on the Pregnant Poor, 9 Family Planning Perspectives 207 (1977).

[185] Lenore DiStefano, A Meaningful Right to Abortion for Indigent Women?, 24 Loy. L. Rev. 301 (1978).

"extinguished for indigent women the importance of the fundamental right to an abortion recognized in *Roe v. Wade*."[186] Many agreed that the funding decisions had made clear "the Court's position that poor women have no right effectively to exercise their choice to terminate their pregnancy."[187] In other words, scholars argued, abortion was now a constitutional right enjoyed only by women of means: the funding decisions "treat the privacy interests of poor people as commodities which are protected only to the extent that the person claiming privacy has the money to pay for the material goods and benefits that are required to exercise that privacy."[188]

The abortion right obviously took a hit—and a serious one—in the funding cases. The Court essentially immunized the state's decision not to fund abortion funding from constitutional scrutiny, with substantially deleterious consequences for poor women's ability to access abortion. But to conclude, as many scholars did and still do, that this move signaled the end of any concern under the Fourteenth Amendment for poor women's ability to effectuate the right recognized in *Roe* is to misread, or over-read, the funding decisions. The Court's holding in those decisions was dependent on the notion that the state's choice not to fund abortion left indigent women in no worse position than they were to begin with: "An indigent woman who desires an abortion suffers no disadvantage,"[189] other than those which arise from indigency itself, as a result of the state's funding choices. In other words, the Court held, the state's funding choices did not offend the Constitution because they "imposed no governmental restrictions on access to abortions."[190] If they had, the Court held, they would be subject to rigorous constitutional scrutiny, because as *Roe* and *Doe* established, "the government may not place obstacles in the path of a woman's exercise of her freedom of choice."[191]

One could reasonably contest the Court's characterization of the government's decision to provide funds for childbirth and not abortion as not erecting any barriers to the latter path; many have.[192] But it is important not to overlook the Court's reaffirmation in the funding cases of the idea that the imposition of barriers to the effectuation of the abortion right triggers constitutional concern. Despite their practical effect, the funding cases emphasize, perhaps even more pointedly than the foundational abortion cases did, that one of the key functions of constitutional doctrine in this context is to detect and remove barriers that limit women's access to abortion. Indeed, in the immediate wake of the funding cases, the Court held that laws requiring that all abortions after the second trimester to be performed in hospitals violated the Fourteenth Amendment, in substantial part because such laws raised the cost of abortion, placing it beyond the reach of some women.[193]

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[186] Laura Crocker, Harris v. McRae: Whatever Happened to the Roe v. Wade Abortion Right?, 8 Pepperdine L. Rev. 861 (1981).
[187] Roberts, supra, 65.
[188] Robin Morris Collin & Robert William Collin, Are the Poor Entitled to Privacy?, 8 Harv. Blackletter J. 181 (1991).
[189] Maher v. Roe, 432 U.S. 464, 474 (1977).
[190] Harris v. McRae, 448 U.S. 297, 315 (1980).
[191] Id. at 316.
[192] See, e.g., Harris, 448 U.S. (Brennan, J., dissenting).
[193] Akron v. Akron Ctr. for Reproductive Health, 462 U.S. 416 (1983); id. at 434-35 ("There can be no doubt that [the] second trimester hospitalization requirement places a significant obstacle in the path of women seeking an

That post-funding-decisions decision illustrates one of the central arguments of this Article, which is that imposing funding mandates on the state is not the only judicial mechanism for facilitating people's ability to effectuate their rights. The funding decisions spelled the end of such mandates in the context of abortion. But they did not signal the end of the Court's recognition, now translated into doctrine, that the right to abortion presupposes and depends upon women's ability to access an infrastructure of abortion provision—and that fulfilling the promise of the Fourteenth Amendment requires the preservation of such an infrastructure.

Part III

A few years ago, Robin West, a leading progressive constitutional scholar, called for the "de-constitutionalization" of the right to abortion.[194] Advocates of abortion ought to give up on courts and turn to legislatures, she argued, because courts are willing to protect only negative rights and a negative right to abortion can never provide "meaningful support for women's equality or liberty."[195] A positive right to abortion could offer that kind of support, but West counseled her readers not to hold their breath, as "the Court has consistently read the Constitution as not including positive rights to much of anything from the state," and "[i]t is so unlikely as to be a certainty that neither this Court nor likely any Court will commence a jurisprudence of positive constitutional rights, by beginning in the contested terrain of mandating public funds for abortions."[196] Thus, she argued, the only thing courts have to offer is a promise to "keep the state off our backs and out of our lives"[197]—a promise that might be sufficient for rich women seeking to purchase an abortion on the free market, but does next to nothing, indeed worse than nothing, for poor women.

Although the Court's most recent abortion decision, *Whole Women's Health v. Hellerstedt*, was not explicitly framed in these terms, it was in many ways a referendum on the question of what kind of protection the right to abortion affords women—and poor women in particular. Is it simply "a negative right against the criminalization of abortion in some circumstances,"[198] as West suggested? Or, as Robert Dixon asked half a century ago, do reproductive privacy rights protect more than that?

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abortion. A primary burden created by the requirement is additional cost to the woman. The Court of Appeals noted that there was testimony that a second trimester abortion costs more than twice as much in a hospital as in a clinic. . . . Moreover, the court indicated that second trimester abortions were rarely performed in Akron hospitals. . . . Thus, a second trimester hospitalization requirement may force women to travel to find available facilities, resulting in both financial expense and additional health risk. It therefore is apparent that a second trimester hospitalization requirement may significantly limit a woman's ability to obtain an abortion."); see also Planned Parenthood Assn. v. Ashcroft, 462 U.S. 476 (1983) (striking down a nearly identical restriction for the same reason).

[194] West, supra note.

[195] Id. at 1403.

[196] Id.

[197] Id. at 1398.

[198] Id. at 1403.

A.

In 2013, David Dewhurst, then-Lieutenant Governor of Texas, posted on Twitter a map of Texas nearly denuded of abortion clinics, beneath which he jubilantly declared, "We fought to pass S.B. 2 thru the Senate last night, & this is why!"[199] The law to which Dewhurst was referring, which eventually became known as H.B. 2, required doctors who perform abortions to obtain admitting privileges at nearby hospitals and clinics that provide abortions to outfit themselves as ambulatory surgical centers. Very few abortion providers in Texas (or anywhere else) are able to comply with such requirements, so the legislation had its intended effect. The admitting-privileges requirement closed down roughly half of the forty-one clinics in the state; the surgical-center requirement threatened to half the remaining number, leaving Texas—a state with a population of 25 million—with only seven or eight clinics.

A lawsuit, brought by Whole Women's Health, a feminist organization that ran a couple of the clinics that were closed by the law, ensued. The Court could have responded to the suit in any number of ways. For instance, it could have held that the plaintiffs lacked standing—a position vigorously urged by Justice Thomas and Justice Alito. Justice Thomas argued that there was no justification for permitting a clinic to assert rights that actually belonged to its clients; after all, he pointed out, there was no shortage of abortion-seeking women in Texas and no reason they could not assert their own rights. Justice Alito suggested that the majority's decision to allow the suit to proceed was yet another example of the favoritism the Court has exhibited toward advocates of abortion rights dating all the way back to *Doe*, in which the Court found that a group of doctors who treated pregnant women had standing to challenge their state's abortion regulations. Thomas argued that the Court's "creat[ion] [of] special rules that cede [the] enforcement" of the abortion right to providers is particularly galling in light of the fact that the Court has characterized that right as "involv[ing] the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy."

Even if the Court had resolved the standing question in favor of Whole Women's Health, it might still have found that the plaintiff had failed to show that the regulation constituted an undue burden—the test the Court established in *Casey* to determine if an abortion regulation violates the Fourteenth Amendment.[200] To determine whether a regulation constitutes an undue burden, courts weigh the strength of the state's asserted interests against the size of the obstacle it places in the path of women seeking abortions. Texas asserted that the admitting privileges and ambulatory surgical center requirements vindicated a powerful state interest in protecting women's health and safety. In *Casey* itself, the Court upheld various health and safety regulations, and in subsequent cases, it had upheld others. The Court might have held that a substantial degree of deference to the legislature is warranted when determining whether a challenged regulation genuinely advances the state's important interests in health and safety.

In determining the size of the obstacle Texas's law created, the Court might have adopted the reasoning of the Fifth Circuit. The Fifth Circuit held that Texas's law did not create a substantial obstacle to abortion because it left most women within reasonable driving distance of a clinic (even if that clinic happened to be in a neighboring state). The court conceded that the

[199] Dewhurst Twitter posting.
[200] 505 U.S. 833, 877 (1992).

closure of dozens of clinics might make it particularly difficult for poor women to obtain abortions, but argued that when applying this test, judges ought to measure the general effect of a regulation, not its effect on a particular subset of women. Moreover, the court reasoned, obstacles that arise from unfortunate circumstances in women's private lives—such as a lack of transportation or inability to afford childcare—are not created by the state and are therefore irrelevant to the determination of whether a law restricting access to abortion qualifies as an undue burden. In support of this proposition, the Fifth Circuit cited the abortion funding decisions, which explicitly recognized that "[t]he financial constraints that restrict an indigent woman's ability to enjoy the full range of constitutionally protected freedom of choice are the product not of governmental restrictions on access to abortions, but rather of her indigency."[201] In other words, the Fifth Circuit concluded, the kinds of factors that made the clinic closures triggered by the admitting privileges and ambulatory surgical center requirements particularly burdensome to poor women resulted not from anything the state had done, but rather, from women's own life circumstances—which, the abortion funding decisions made clear, do not factor into the constitutional analysis.[202]

The Court in *Whole Women's Health* rejected all of these arguments. It held that Whole Women's Health did have standing to challenge the regulation. The dissenting Justices in this case were inclined to see this as an incidence of favoritism and special treatment for abortion providers, who had no business asserting the privacy rights of their clients. But another explanation for the Court's perennial willingness to permit clinics to bring constitutional challenges to abortion regulations is that the right to abortion has never entailed a simple right to privacy, in the conventional sense of that term. The prevalence of providers among the ranks of plaintiffs challenging the constitutionality of abortion regulations over the past forty years reflects the fact that abortion rights are inextricably bound up with the infrastructure that enables their exercise. As Judge Posner observed in a 2013 decision with facts analogous to those in *Whole Women's Health*, abortion is not a context in which "[t]he principal objection to third-party standing[,] . . . that it wrests control of the lawsuit from the person or persons primarily concerned in it," comes into play.[203] Women who wish to have abortions are "seeking the same thing the clinics are seeking": the invalidation of statutes that eviscerate infrastructures of abortion provision.[204]

On the question of deference to the legislature: the Court held that judges are required independently to determine whether a challenged regulation serves the state's asserted interest in health and safety. This too was a way of recognizing the deep dependence of the right to abortion on the institutions that provide it. Subjecting the state's proffered health and safety justifications to a form of heightened scrutiny is a way of saying that the state cannot suppress rights-enabling infrastructure in the context of abortion unless it has a very important reason for doing so.

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[201] Abbott (quoting Harris v. McRae); see also Abbott, (quoting the Court's observation in *Maher v. Roe* that "'[t]he indigency that may make it difficult—and in some cases, perhaps, impossible—for some women to have abortions is neither created nor in any way affected by the' state's regulation").
[202] Whole Women's Health v. Cole (5th Cir. 2015) (citing Maher and McRae).
[203] Planned Parenthood of Wisconsin v. Van Hollen, 738 F.3d 786, 794 (7th Cir. 2013).
[204] *Id*.

The Court also held that the two challenged provisions of Texas's law placed a substantial obstacle in the path of women seeking abortions. The Court noted that the closure of a substantial percentage of the state's clinics would mean "fewer doctors, longer waiting times, and increased crowding" at the clinics that remained. These were not abstract generalities. The Court specifically noted that after the admitting-privileges requirement took effect in Texas, "the number of women of reproductive age living in a county . . . more than 150 miles from a provider increased from approximately 86,000 to 400,000 . . . and the number of women living in a county more than 200 miles from a provider from approximately 10,000 to 290,000." In other words, the Court explained,

> Texas seeks to force women to travel long distances to get abortions in crammed-to-capacity superfacilities. Patients seeking these services are less likely to get the kind of individualized attention, serious conversation, and emotional support that doctors at less taxed facilities may have offered. Healthcare facilities and medical professionals are not fungible commodities. Surgical centers attempting to accommodate sudden, vastly increased demand may find that quality of care declines.

Needless to say, the right to privacy has come a long way since *Griswold*. Today, the Court looks explicitly at what regulations do to the institutions through which women exercise their privacy rights. Far from simply decriminalizing the right to abortion, constitutional privacy doctrine seeks to protect and preserve an infrastructure of abortion provision.

B.

Speculation about the implications of *Whole Women's Health* began even among the Justices themselves and even before the opinion was published. Justice Ginsburg argues in her concurring opinion that the decision spells the end of TRAP, or Targeted Regulation of Abortion Providers, laws—laws that impose specific health and safety regulations on abortion providers but not on other medical providers who perform procedures with similar levels of risk. The state's decision not to impose such regulations across the board suggests they are not essential to the protection of women's health and safety—if they even advance those interests at all. In most cases, the obstacles they generate are quite large. The constitutional calculus articulated in *Whole Women's Health* does not seem to favor them.

Justice Thomas argues in his dissenting opinion that the Court's decision imperils a range of consequential abortion restrictions. Thomas notes that, in the late 1990s, the Court upheld "a Montana law authorizing only physicians to perform abortions—even though no legislative findings supported the law, and the challengers claimed that "all health evidence contradict[ed] the claim that there is any health basis for the law."[205] Were the Court to scrutinize such a law

[205] (Thomas, J., dissenting) (noting that the Court's decision to uphold Montana's physician-only law rested on the notion, seemingly contradicted by *Whole Women's Health*, that "the Constitution gives the States broad latitude to decide that particular functions may be performed only by licensed professionals, even if an objective assessment might suggest that those same tasks could be performed by others").

today, it would find that all medical evidence indicates that first-trimester abortions are just as safe when performed by trained nurse practitioners, physician assistants and certified nurse midwives as when performed by physicians.[206] Nearly a third of states already allow such practitioners to perform medical abortions, and some states allow them to perform surgical abortions as well. There is scant evidence to suggest that barring licensed and medically trained non-physicians from performing abortions yields any health benefits for women.

Nor is there any evidence to suggest that barring the use of telemedicine as a method of administering abortion makes women safer. More than thirty states already permit this practice and medical research shows it to be exceedingly safe—no more prone to complications than other medical protocols states allow to be implemented through telemedicine and often less so.[207] As the Iowa Supreme Court recently observed in a decision invalidating that state's ban on telemedical abortions: there are no documented health benefits that stem from requiring a physician to be physically, as opposed to virtually, present in the room when the patient takes the first of the two pills that are part of the medical abortion protocol (the second pill the patient takes at home regardless of the circumstances under which she took the first pill).

If the health benefits of banning telemedical abortions are "very limited,"[208] the interests on the other side of the scale are profound. This same imbalance is present in the context of physician-only laws. These laws, particularly when they operate together, have a devastating effect on access to abortion, particularly among the "poor, rural, or disadvantaged" women about whom *Whole Women's Health* expressed special concern.

The aim of this discussion is not to prognosticate about what forms of regulation will survive *Whole Women's Health* but rather to demonstrate how much conventional negative rights discourse obscures. That discourse suggests that all the right to abortion can do is decriminalize the procedure in some circumstances and that the only way to secure any meaningful kind of access to abortion is through a positive right to state-funding. But just as laws like the one Texas enacted can have a dramatic negative impact on the availability of abortion, robust application of the undue burden test can have a dramatic effect in the other direction. As the Court has articulated it, the right to abortion does substantially more than simply keep women out of jail; it works to preserve and facilitate women's access to institutions on which the right depends. This right may not require the state to fund the procedure, but it can significantly shape the marketplace for abortion by selectively blocking forms of regulation that decrease the number of providers and increase wait times and costs.

And contrary to what the Fifth Circuit suggested, constitutional abortion doctrine can and does express special concern about regulations that have a disproportionate impact on the poor. Consider, for instance, the Seventh Circuit's application of the undue burden test in a case quite analogous to *Whole Women's Health*. In the middle of an opinion striking down Wisconsin's

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[206] See Armstrong v. State, 989 P.2d 364, 386 (Mont. 1999) (collecting studies and concluding that they required invalidation of a physician-only law); see also Tracy A. Weitz, *Safety of Aspiration Abortion Performed by Nurse Practitioners, Certified Nurse Midwives, and Physician Assistants Under a California Legal Waiver*, 103 Am. J. of Pub. Health 454 (2013) (finding no differences between different categories of providers).

[207] The rate of clinically significant adverse events from medication abortion is 0.16 percent, comparable to those of commonly prescribed antibiotics.

[208] Planned Parenthood of the Heartland v. Iowa Bd. of Medicine 268 (Iowa) (2015).

admitting-privileges law, the Seventh Circuit inserted a map illustrating how the closure of half of the state's clinics would affect access to abortion. The court noted that 60% of the clinics' patients have incomes below the federal poverty line, and found that increased driving times were "a nontrivial burden on the financially strapped and others who have difficulty traveling long distances to obtain an abortion, such as those who already have children."[209] District Judge Myron Thompson expanded on this point in his opinion invalidating Alabama's admitting-privileges law. Judge Thompson observed that, "[a]s a preliminary matter," when evaluating the constitutionality of abortion restrictions, "it is essential to understand that the large majority of abortion patients, particularly in Alabama, survive on very low incomes."[210] Thompson then described the challenges the Alabama law would present for poor women:

> For these women, going to another city to procure an abortion is particularly expensive and difficult. Poor women are less likely to own their own cars and are instead dependent on public transportation, asking friends and relatives for rides, or borrowing cars; they are less likely to have internet access; many already have children, but are unlikely to have regular sources of child care; and they are more likely to work on an hourly basis with an inflexible schedule and without any paid time off or to receive public benefits which require regular attendance at meetings or classes. A woman who does not own her own car may need to buy two inter-city bus tickets (one for the woman procuring the abortion, and one for a companion) in order to travel to another city. Without regular internet access, it is more difficult to locate an abortion clinic in another city or find an affordable hotel room. The additional time for travel to the city requires her to find and pay for child care or to miss one or several days of work[211].

This opinion treats such factors as critical in determining whether a law restricting abortion violates the Fourteenth Amendment.

The Supreme Court did not go into such detail in *Whole Women's Health* about the lives of the women affected by Texas's abortion law. But, in its own way, it made just as bold a declaration of concern about their ability to effectuate their rights. The Fifth Circuit read the funding cases to stand for the proposition that concerns about poverty have no place in the constitutional analysis of an abortion restriction. The Supreme Court rejected this interpretation. It made clear in *Whole Women's Health* that the undue burden calculus considers the interaction between the life circumstances of women—especially those who are "poor, rural, [and] disadvantaged"—and the restriction imposed by the state in determining whether that restriction constitutes a substantial obstacle. The Fifth Circuit erred when it interpreted the funding decisions to mean that concerns about poor women's access to abortion are categorically irrelevant under the Fourteenth Amendment. What those decisions actually held was that the state is not constitutionally obligated to devote public funds to helping women overcome financial barriers it had no part in creating. As we have seen, those decisions drew a sharp line between the state's unwillingness to pay for abortion and its imposition of barriers to abortion.

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[209] Planned Parenthood of Wisconsin v. Van Hollen, 738 F.3d 786, 794 (7th Cir. 2013).
[210] For example, the Judge noted that more than 70% of the patients at Planned Parenthood's clinics in Mobile and Birmingham live at or below 150% of the poverty line, and that the administrator of the Mobile clinic testified that 90% of that clinic's patients live in poverty.
[211] Planned Parenthood Southeast, Inc. v. Strange (M.D. Al. 2014)

The Court in no way suggested that concerns about poor women's access to abortion were irrelevant to the constitutional evaluation of laws that actively impeded that access; indeed, it suggested the opposite.

The Fifth Circuit's misreading of the funding cases was not a random error. It was the product of a certain dichotomous way of thinking about constitutional rights. Abortion is not a positive right, the court reasoned; it is a purely negative one. Negative rights are intended to thwart the state and to enable "private individuals to mind their own business, to breathe and act freely in unregulated social realms."[212] Disregarding the fact that everything about the market for abortion in this country—including its accessibility—is a product of state regulation, the Fifth Circuit conceived of poor women as free-market actors and viewed their diminished capacity to exercise the right to abortion solely as a product of their own impecunity. Constitutional law does not guarantee or even facilitate people's ability to exercise their rights, the court reasoned: it merely places some restrictions on what the state may do and leaves people free to take advantage of their rights to whatever extent their inclinations and resources permit.

Parts I-III of this Article examine what this conception of constitutional rights obscures in the reproductive context. The Burger Court's repeated rejection of positive rights claims to affirmative financial support from the government did not signal the end of judicial concern about people's practical ability to exercise their rights. The Court rejected the notion that the Fourteenth Amendment requires the state to pay for abortion through Medicaid and public hospitals. Indeed, one of the central and ongoing aims of constitutional doctrine in the reproductive context is to protect women's access to a set of institutions necessary to the realization of their rights. As *Whole Women's Health* indicates, this doctrine is particularly skeptical of forms of regulation that make abortion clinics difficult to access, in part because this type of regulation may abrogate poor women's ability to exercise their rights altogether.

This dynamic—in which the law seeks to entrench institutions essential to the realization of constitutional rights—is not limited to the reproductive context. The next Part considers some other contexts in which the same dynamic occurs.

Part IV

[NOTE: I am in the midst of reconceptualizing Part IV so have only this sketch to offer. I look forward to your comments on this Part in particular.]

- We generally draw a sharp distinction between rights claims that trigger the direct payment of money by the government and rights claims that do not—a distinction tied to the conceptual one between negative and positive rights.

- Indeed this distinction is at the center of our conventional account of the constitutional rights of the poor.

[212] HOLMES & SUNSTEIN, *supra*.

    - On the one hand, we have a limited set of cases in which the Court actually granted what look like positive rights to the poor, such as *Gideon* (criminal defense); *Boddie* (divorce), etc.
    - Instead of continuing along this path, the abortion funding cases marked a sharp break with it, in that the state was not required to fund abortion. As a result, we think of our law of privacy and reproductive rights as standing in sharp contrast to the early cases protecting the rights of the poor in ways that required the expenditure of government funds.

- But this familiar way of thinking obscures a great deal, and part of what it obscures is a common feature of many rights claims on *both* sides of this divide:

    - Part of the way the state protects some rights is by protecting the infrastructure that is needed in order to access the right. Protecting infrastructure is part of how American law protects rights—both negative and positive—and it is especially important for protecting the rights of the poor.

A. First Amendment and Second Amendment

- I plan to write about both free exercise and free speech but have not yet decided which examples to use. There's an interesting case, Minneapolis Star and Tribune Co. v. Minnesota Comm'r of Revenue, in which the Court bars a state from taxing newspapers in order to vindicate First Amendment rights. I might write about the ministerial exception here too. Any thoughts on constitutional infrastructure in the context of the First Amendment are most welcome.

- The path through the Second Amendment is more obvious—there are numerous cases protecting the infrastructure through which individuals obtain guns and courts even use a balancing test much like the one in the abortion context to assess the constitutionality of restrictions.

B. Voting: A Case Study

- In contrast to the sphere of privacy and reproductive rights, voting is a positive right, and running an election always involves a substantial expenditure of government funds.

- But, elections, like reproductive rights, are an arena where many people, especially poor people, face challenges in accessing the relevant institutions—in getting to a polling place or accessing a voting booth. When we protect the right to vote, in a variety of contexts, the way we do it is by protecting access to this infrastructure.

    - (This is true both of direct constitutional claims and claims under the Voting Rights Act, a statute that does constitutional work.)

- In constitutional fundamental rights claims over issues such as voter ID laws (so-called "vote denial" controversies), the Court has developed a doctrinal test that involves weighing the extent of the burden on the right to vote against the state's asserted interests.

    - This doctrinal framework closely resembles the undue burden test in reproductive rights law in a number of respects, including the way the Court weighs the burden: it is not a question of the effect of the voter ID law on the average voter, but a question of whether for any subset of voters, the law prevents them from accessing the voting booth and exercising their right.

- Many other vote denial controversies involve race-based equality claims (of course, many reproductive rights controversies are similarly, on some level, sex-based equality claims). The adjudication of these claims often turns out to be an indirect way of protecting poor voters.

    - Courts sometimes make this explicit; for instance, in an early race-based challenge to Texas' voter ID law (*Texas v. Holder,* D.C. District Court, 2012), the court held that "record evidence conclusively shows that the implicit costs of obtaining SB 14-qualifying ID will fall most heavily on the poor and that a disproportionately high percentage of African Americans and Hispanics in Texas live in poverty. . . . We therefore conclude that SB 14 is likely to lead to 'retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise.'"

- Section 5 of the Voting Rights Act, now suspended from operation, had a particularly instructive infrastructure-protecting function. Any attempt to move a polling place, change its hours, or otherwise alter the infrastructure that exists on election day to facilitate voting triggered legal review, and would be enjoined if it lessened a racial group's effective access to the franchise.

    - Section 5 is interesting for the purposes of this Article in part because it operated as a fairness regime without a particular baseline: whatever infrastructure the state offered, it could not reduce this or remove access to it without triggering Section 5 review. This demonstrates how it is possible to protect infrastructure without creating a "right to" particular infrastructure, but rather, by selectively blocking the state's efforts to destroy the infrastructure or access to it.

- Today, under Section 2 of the Voting Rights Act, a variety of challenges are proceeding that aim at legal changes to the days polling places are staffed and open for voting, the methods by which voter registration drives are allowed to register voters, and many other questions essentially about the infrastructure of voting and elections. What most of these cases have in common is that they are very consequential for, and occasionally turn specifically on, poor people's access to that infrastructure.