SUPREME COURT DECISION-MAKING AND THE SOCIAL CONSTRUCTION PROCESS: CONTINUITY IN A POLARIZED AGE

RONALD KAHN

ABSTRACT

The contributors to this volume offer thought-provoking questions about my contributions to the study of constitutional law, individual rights, and American political development. In particular, numerous contributors ask a similar question: are we careening toward a "rights Armageddon" under the modern Roberts Court? This article argues that the Supreme Court today operates as it always has—it engages in bidirectional decision-making with a critical social construction process at its core. The Court applies polity and rights principles to the lived lives of persons in social, political, and economic reality. These applications—social constructions—become memorialized in precedent, and the Court, through an analogical process, compares these social constructions to polity and rights principles and lived lives presented in the case before it. Through this process, rights develop. Although the recent confirmations of Justices Neil Gorsuch and Brett Kavanaugh have caused many commentators to question whether the Court is headed toward a reactionary era, the Court is unlikely to begin rolling back significant progressive rights decisions, like *Casey*, *Lawrence*, and *Obergefell*. Instead, because bidirectionality is intrinsic to the Court, the Court will continue making decisions through the social construction process, and the staying power of these decisions will depend on how meaningfully the Court engages

Constitutional Studies, Volume 4

in the bidirectional social construction process so critical to its institutional role in driving American political development.

KEYWORDS: *Roberts Court, rights, social construction process, bidirectionality, Armageddon*

I. INTRODUCTION[1]

First, thank you to Mark Graber and the other contributors for their gracious words about my teaching, mentoring, and scholarship. Drawing on his views and those of the conference participants, Graber lays out what they consider to be the most significant contributions of my approach to the study of law and courts as institutions in American political development, writing that I "steadfastly maintain[] [that] judicial decision-making is a function of the interaction between the internal and the external. Any attempt to isolate one or the other will miss crucial features of Supreme Court practice" (Graber 2019, 4). Key to this interaction is the social construction process—"[my] seminal contribution to constitutional scholarship" (4)—which "examines how the interaction between these internal and external dimensions of decision-making drive the path of American constitutional law" (5). Graber continues:

> The process of social construction is "bidirectional," . . . as justices on the Supreme Court of the United States attempt to harmonize their polity and rights principles with their perceptions of the world outside the court. Judges do not apply fixed internal logics to perceived social developments. . . . "[L]egal principles and the world outside the Court become symbiotic and mutually construct each other." (6)

Graber argues that my work on the social construction process "captured important features of the twentieth-century American constitutional regime missing from both the dominant legal thinking and dominant political science thinking of that time" (1–2).

My contribution to this volume of *Constitutional Studies* will center on questions raised by Graber and the other contributors as to whether my approach to studying the Supreme Court and social change will continue to have an impact in this age of polarized politics in the United States. After a stunning exploration of what he calls the "long state of courts and parties," Graber writes,

1. On Friday, April 14, 2017, Oberlin College held the following symposium in honor of my retirement from teaching: The Constitution in American Political Development. This volume of *Constitutional Studies* includes papers delivered at that symposium. Here, I address participants' concerns about the future of bidirectional Court decision-making and the social construction process.

> The constitutional order in the United States during the 1970s began transforming from the long state of courts and parties into the state of polarized parties and polarized courts. In this regime, ideologically polarized parties with distinctive constitutional visions encompassing almost all the political issues of the day struggle for dominance. (2019, 31)

Graber and several of his fellow contributors are worried about the effect of this polarization on the Court as an independent legal decision-making body and wonder if the Court will continue to employ my approach to doctrinal change.[2] He argues that "[d]uring the state of polarized parties and polarized courts, both parties articulate detailed constitutional visions. Each new judicial appointment toes the party line more firmly than the previous judicial appointment. In this political universe, justices are more often tasked with implementing a partisan constitutional vision than with developing one" (2019, 35).[3]

Carol Nackenoff has similar concerns, with a particular emphasis on the Roberts Court. She notes that "a number of recent decisions have been made by a closely divided Court, and that makes the next appointment—and the appointer—very important" (2019, 12). "[I]f the current administration get[s] another appointment opportunity," says Nackenoff (2019), "*Roe* [*v. Wade*, 410 U.S. 113 (1973)] is likely gone—and the rights-expanding parts of [*Planned Parenthood of Southeastern Pennsylvania v.*] *Casey* [505 U.S. 833 (1992)] with it" (13). Indeed, although elements of my methodology may remain relevant, their application to abortion rights cases will change: "The conservative alternative to *Roe* may, indeed, reflect polity and rights principles, but they will be different ones as concerns abortion. Different principles could include federalism and deference to democratic decision-making as the way to resolve such issues" (13).[4]

---

2. Graber argues that "[j]udicial appointments . . . do a better job explaining the path of constitutional law in the state of polarized parties and polarized courts than in the long state of courts and parties" (34). "The distinctions between politics inside and outside the court that the social construction process explains are far less than was the case several generations ago" (35–36). "Courts have fallen in line with the rest of the political system. The most liberal Republican appointee to the Supreme Court is considerably more conservative than the most conservative Democratic appointee to the Supreme Court" (32).

3. "With the retirement of Justice Anthony Kennedy, the Supreme Court will likely consist of five reliable conservative Republican appointees and four reliably liberal Democratic appointees" (32).

4. Julie Novkov (2019), in a similar vein, writes,

> Precedential social facts are powerful, as Kahn's work reveals. . . . The prospects for change look dim if we consider the Court's makeup and the possibility of further conservative appointments. We must couple Kahn's recognition of the importance of an embedded conception of rights and their scope along with a recognition that the heavily politicized and polarized climate may bleed over even into Supreme Court appointments and subsequent deliberations. (15)

Sounding themes similar to Nackenoff, Ken Kersch (2019) writes,

> I wondered how Ron's formulations would apply to the religious liberty claims currently being advanced by certain Christians involving requirements that they contribute to the cost of contraceptive services, as in the Supreme Court's recent *Burwell v. Hobby Lobby* (2014) decision. . . . It seems to me that, in that case, for example, the nub of the matter less often involved the apprehension of social facts than the determination, as a matter of principle, to *ignore those facts* – the determination that, on these matters, at least, these facts are irrelevant. (15–16)

With regard to *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014), Nackenoff (2019) writes, "The Court seems to be moving toward a principle that government should not prefer irreligion to religion" (14–15).

Contributors also ask whether my approach leads to conclusions about the Court's impact on the development of individual rights that are too positive or too quintessentially progressive. Nackenoff (2019) sees me as too likely to "characterize[] the glass as at least half full" (10) in affirmative action cases like *Schuette v. Coalition to Defend Affirmative* Action, 572 U.S. 291 (2014) and abortion rights cases like *Casey*, writing:

> I would *like* to believe there is some kind of path dependence such that Precedential Social Facts, once embraced, do not get eroded. I'd *like* to believe that the "lived lives" the justices think about are those we see being noticed in *Roe, Casey, and Lawrence* [*v. Texas*, 539 U.S. 558 (2003)]. But I would also like to see Kahn talk about what it would take to falsify the claim that once embraced, precedential social facts do not get eroded. Securing rights via the judiciary may instead be contingent and insecure. Why are we sure that it isn't chiefly about counting votes? (10–11)

Weaving a narrative that is less than overwhelmingly progressive, Sara Chatfield does a superb job in using the social construction process and bidirectional Court decision-making to find that, between 1800 and the end of the *Lochner v. New York* (198 U.S. 45 [1905]) era, there have been two competing social constructions: female workers as vulnerable victims needing special laws for support and female workers as independent actors who can make decisions on their own. She writes,

> [B]oth of these constructions reflected women's lived reality in important ways—women did increasingly play active roles in the economy and were generally as competent as men to make independent economic decisions, but female workers

> were also often subject to poorer working conditions and lower wages than their male counterparts. (1–2)

Chatfield (2019) notes that, although

> *West Coast Hotel* [*v.* Parrish, 300 U.S. 379 (1937)] provided clear benefits for female workers—and ultimately all workers—by endorsing legislative labor protections and ending the 'right to contract' . . . the case also validated long-lasting constructions of women as belonging to a legal category separate from men in the workplace. (20)

Chatfield sees the effect of these principles and social constructions to this day. Like other participants, Chatfield concludes that "the social construction process—the embedding of social realities and lived experiences into judicial doctrine—can have both rights-expanding and rights-limiting implications" (20).

Like Chatfield, Julie Novkov mentions areas of equal protection analysis where the Supreme Court chose *not* to expand individual rights. Drawing of the work of Robert Cover, Novkov notes

> that judges' authority incorporates destructive capacity as well. When they select an argumentative strand to prioritize and develop, they reject others, engaging in what Cover describes as jurispathic activity. These roads not taken may be abandoned silently or specifically discussed and rejected in judicial opinions, but once they are eschewed, they become difficult to revive. . . . If a court, especially the Supreme Court, closes a line of constitutional development, the legal community pressing arguments in favor of preferred outcomes will eventually abandon attempts to use the foreclosed path to achieve that outcome. This type of behavior can produce a shadow type of precedential social fact in the form of an absence. The dynamism of this process undermines the capacity for any judicial decision to have a single, unified meaning. (3)

Novkov uses the Court's failure to make wealth a suspect classification under equal protection principles—culminating in *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1 (1973)—as a prime example of the destructive capacity of the Court.[5] Novkov (2019) does offer some hope for the future of individual rights

5. Ken Kersch makes similar points in his essay. Kersch (2019) notes that the Court is a "synthesizing institution" that has "a major role in *constituting* the American polity under conditions of complexity"

and my approach to studying them, arguing that my work "emphasizes the role of the Court in creating rights principles and embedding them in ways that resonate out into the political sphere, transforming political conversations" (15). In terms of poverty and wealth as suspect classifications, she posits that the changing discourse around "health care and health-care insurance affordability may provide an interesting political, and ultimately constitutional, moment" (15).[6] With "more talk of health-care access as a right," Novkov (2019) concludes that,

> [i]f political changes help to spark and legitimize more rights-based discourse," then "we could eventually see the creation of new ground for constitutional analysis . . . . [that] might . . . provide the foothold to recognize both the irrationality and the cruelty behind governmental policies that deny basic rights to Americans living in poverty. (15)

Discussing social constructions in gender rights cases, Evan Gerstmann sees inconsistency by the Court. In *Craig v. Boren*, 429 U.S. 190 (1976), the Court said gender classifications would be subject to an intermediate level of scrutiny, under which the government must demonstrate an important interest in the law and that the classifications is not over- and underinclusive with regard to that interest. Gerstmann mentions *Michael M. v. Superior Court of Sonoma County*, 450 U.S. 464 (1981) as inconsistent with heightened scrutiny for gender classifications because the

---

(13). But Kersch argues that this synthesizing capacity may be affected by powerful interests or uneven in its outputs. He writes,

> Development involves not the apprehension of facts, or just the apprehension of facts, but rather decisions, made across time, by the justices *to apprehend some social facts and ignore others*, in ways that change across time and are patterned. The key criterion for doing so is *relevance*. Relevance to what? Relevance to the narrative—what trial lawyers call "the theory of the case." All of these matters, Kahn rightly recognizes, although doesn't fully digest, involved both facts and the interpretations of/narratives offered by powerfully influential "interpretative communities." (16)

6. Novkov (2019) also details the way in which post–Warren Court cases have conceptualized rights principles:

> The trajectory for many national constitutional rights since the twilight of the Warren Court's expansion has been their expansion and/or maintenance in terms of individuals' private capacity to purchase access to them. Abortion and contraception, high quality and racially diverse primary and secondary education, the privileges and protections associated with marriage, even the right to bear arms—all are available at a price, and the rightwardly shifting center of American politics was, through the 1980s, 1990s, and early 2000s, less willing to complain if the free exercise of protected civil rights and civil liberties was shrinking primarily among those who required government largesse or assistance to exercise them. (15)

Supreme Court upheld a statutory rape law in California while subjecting it to intermediate scrutiny. Gerstmann might also have mentioned *Rostker v. Goldberg*, 453 U.S. 57 (1981), in which the Supreme Court found a law that required the registration of men, but not women, for the draft constitutional. The Court said this was permissible because, at the time, only men went into combat, even though the military asserted a need for women in military mobilization.

Gerstmann questions the importance of *United States v. Virginia*, 518 U.S. 515 (1996) (often called the VMI case) to later gender rights cases in light of decisions like *Nguyen v. INS*, 533 U.S. 53 (2001) and *Sessions v. Morales-Santana*, 137 S. Ct. 1678 (2017). Gerstmann (2019) writes, "In *Nguyen* the pendulum swung . . . and the Court simply accepted the government's explanation that mothers are more likely to be bonded to children than fathers" (13). Gerstmann then notes that *Sessions* "is a sharp contrast from the Court's approach in *Nguyen*" (14). Gerstmann concludes:

> Thus, rather than represent an evolution in intermediate scrutiny, the *Michael M.*, *VMI* and *Nguyen* cases demonstrate that intermediate scrutiny is applied in vastly different ways at different times with no judicial explanation or guidance as to which version to apply. Phrases such as "exceedingly persuasive justification" [in *VMI*] and "important government interest" [in *Craig*] have little explanatory power. Further, it should be noted that *Craig, Michael M.* and the *VMI* case all apply very different standards with regard to the level of proof required that the gender distinction sufficiently advances the government interest. (15)

Finally, Tom Keck asks whether the Trump presidency will be a disjunctive presidency for the political right, with political time closing in on the conservative era of Ronald Reagan, like the disjunctive Jimmy Carter presidency on the political left. Keck (2019), quoting Stephen Skowronek—another former student of mine—asks whether "'[t]he Trump administration will foment a decisive, if wrenching, crack up'" (2) of a conservative era. Keck is asking similar questions to those of Graber and other contributors about the future of bidirectional Court decision-making in this age of polarized politics, noting that "Republicans are likely to have a majority on the Supreme Court at least until 2030" (6). Keck also questions whether Trump will be successful in breaking up classic patterns of political time by "dismantling the institutions of American constitutional democracy" (7), thereby undermining the ability of political institutions, the Supreme Court, and other essential institutions, such as the free press, to limit presidential abuses of power.

I will respond to these concerns about my approach by comparing findings about bidirectional Supreme Court decision-making in quite different doctrinal areas with regard to individual rights. These include findings about when the Court chooses to overturn landmark decisions and comparing lines of cases involving the following doctrinal areas: the right to sexual intimacy and same-sex marriage for gay men and lesbians, gender and race classifications under the Equal Protection Clause, and First Amendment rights to free exercise of religion and freedom of speech and expressive action.

II. BIDIRECTIONAL COURT DECISION-MAKING AND THE SOCIAL CONSTRUCTION PROCESS BEFORE THE ROBERTS COURT

Throughout the contributions to this Festschrift, one theme (among several) has been pronounced: as the composition of the Supreme Court shifts with further presidential appointments, we are careening toward a conservative rights "Armageddon," in which major "liberal" rights and policies such as abortion, affirmative action, sexual intimacy, and same-sex marriage will be curtailed or rolled back entirely. A related theme details how the Court has deployed the social construction process, yet not always arrived at cohesive, uniform, or traditionally "progressive" results. Here, I want to examine the development of individual rights in specific doctrinal areas, drawing on insights from my forthcoming book, *Constructing Individual Rights in a Conservative Age: The Supreme Court and Social Change in the Rehnquist and Roberts Court Eras*. I will pay particular attention to recent Roberts Court cases, both as a way to examine the social construction process through time, how this process varies across doctrinal areas, and whether recent decisions portend the Armageddon some see on the horizon.

In my forthcoming book, I explore bidirectional Court decision-making and the role of social constructions in establishing gay rights under the Due Process and Equal Protection Clauses of the Constitution. I ask whether both originalist and nonoriginalist justices engage in bidirectional decision-making and the social construction process, whether differences in the specification of polity and rights principles are related to differences in the use of the social construction process, and whether the process is deep or muted. I find a robust social construction process in these doctrinal areas. The following doctrinal areas are chosen for analysis: (1) Fourteenth Amendment equal protection issues involving invidious sex discrimination and affirmative action; (2) Fourteenth Amendment equal protection

issues involving invidious race discrimination and affirmative action;[7] and (3) First Amendment speech, expressive conduct, and Free Exercise rights.[8]

In the book, I compare differences among the social construction processes found in these doctrinal areas and explore the degree to which the bidirectional Court decision-making process and the social construction process are important to the definition of individual rights in these doctrinal areas. Instead of conceiving of justices as applying only polity and rights principles in a given case, it is useful to examine how justices draw on constructs of the social, economic, and political world as they try to determine whether individual rights or polity principles have been violated. In so doing, they determine what precedential social constructs, developed in prior cases, are to inform the case before them. If the precedential social construct seems relevant to the new case, they decide whether granting a new right would violate or build on that precedential social construct. Considering precedential social constructs alongside the impact of social, political, and economic structures on the individuals and groups asking for new rights in the case at hand is central to Supreme Court decision-making, especially on questions of the rights of subordinated groups. Precedential social constructs allow justices to better determine whether a right has been violated, in that they can compare the previous state of society with the current state, thereby gauging the extent to which society has changed. We should view precedential social constructs as the culmination of a major decision, or, more accurately, a line of decisions, in which polity and rights principles are identified, chosen as controlling, and placed within a more integrated construct of social facts that future courts must consider when new cases

---

7. Affirmative action cases involve the constitutionality of gender and race classifications in laws that are designed to remedy the effects of past racial and sex discrimination of meet societal policy objectives where there is no legal determination of purposeful gender and racial discrimination by government officials.

8. I consider the following questions in the analysis of cases: What is the relationship between whether the Court engages in a social construction process, the depth of that process, and whether a case becomes a critical juncture in the definition of individual rights? How do such choices influence the direction of the critical juncture; do they lead to an expansion or contraction in individual rights? What is the relationship among principles, social constructions, and critical junctures? Is there a difference among the doctrinal areas as to whether rights principles and social constructions in prior cases are settled or unsettled? What determines whether they are settled? Do settled principles and social constructions improve the chances for the establishment of new rights and the extension of prior rights to a wider group of persons? Do unsettled social constructions tend to stunt the development of new rights or the extension of rights?

are to be decided. Precedential social constructs help define what questions must be answered in a case before the Court.

The Supreme Court's analysis and creation of social constructs helps us understand the process through which the Supreme Court redefines legal principles as our society changes—a process that accepts key historical institutionalist premises, such as viewing Supreme Court decision-making as constitutive, as occurring in history, and as taking place in institutions and a political system that are not homeostatic. Finally, whether constitutional scholars recognize the importance of bidirectional decision-making and the social construction process informs the narrative of constitutional principles as they are (re)conceptualized by constitutional theorists and the wider interpretive community.

A. The Social Construction of Gender

In the case of gender-based classifications, since *Reed v.* Reed, 404 U.S. 71 (1971) and *Craig v. Boren*, for instance, the Supreme Court has not allowed men to be favored over women as a matter of public policy when it grants government privileges and immunities. After these cases, which set new rights principles, all precedential social constructs by elected officials, judges, and justices would be under review.[9] As the social construction of women in society changes, the Court's jurisprudence changes as well. One only has to look at the far more complex conceptions of women in society in *Casey* compared with *Roe*, as well as in *United States v. Virginia* as compared with prior gender discrimination cases, to see that the Court has an evolving conception (or social construction) of women in society—one that recognizes the changing realities of women in the workplace, home, and social and political venues. Thus, "precedential social constructs" combine abstract principles of "law" (principles that provide the grounds for legitimate action) with beliefs about the social, economic, and political contexts to which the law is applied. By comparing and contrasting the precedential social constructs found in doctrinal areas, we can begin to gain an understanding of important factors that affect the willingness of justices to define new individual rights. We also learn that justices do so with a great concern for the fact that institutions are embedded in social, political, and economic structures, which affect each other in important ways.

---

9. For example, in *Craig*, disparities in DWIs for men and women were viewed as the result of gender stereotypes that the Equal Protection Clause cannot allow to continue. See *Craig*, 429 U.S. at 202 n. 14. While the Court noted that there was a statistical correlation between gender and arrests for drunk driving, it viewed the data as resulting from archaic gender stereotypes held by police. Id.

One sees continuing patterns of bidirectional Court decision-making in doctrinal areas by comparing case development in doctrinal areas. There is a lower level of Court scrutiny for gender compared with race classifications, and more acceptance of government policies to affirmatively help women compared with policies favoring African Americans. There has been a deeper, more complex social construction process for gender rights than for racial classifications. Court scrutiny of gender classifications increases with a more complex view of how political, economic, and social systems favor men over women. Therefore, in each case the Court looks at the complexities of structural inequalities in society based on gender through time. The robustness of the social construction process in the area of gender discrimination matches that found with regard to gay rights, sexual intimacy, and marriage.

B. The Social Construction of Race

When we compare cases involving race and gender classifications and permissible government policy, we find the Supreme Court far more dubious about governmental use of race classifications than gender classifications. The Court has a greater fear that race classifications will perpetuate the stereotyping of African Americans as a group, whereas the Court is less concerned about this possibility of stereotyping with gender. The Court also worries that race classifications will lead to hostility among blacks and whites, more than it worries that gender classifications will lead to hostility between women and men. Informing these differences are the place of polity principles employed by the Court. In the race cases, we see questions about institutions at different levels of government with regard to whether to allow race classifications to achieve affirmative action. In the area of race discrimination in the criminal justice system, a clear reliance on polity principles results in a nonsearching social construction process. In *McCleskey v. Kemp*, 481 U.S. 279 (1987), the Court feared the effects of Court review of data showing great differences in the likelihood that whites and blacks would be subject to the death penalty in Georgia. The Court deferred to polity principles respecting the criminal justice system, leading to a weak social construction of the relationship between race and the death penalty. Similarly, in *Washington v. Davis*, 426 U.S. 229 (1976), the Court eschewed a deep social construction process as to the cause of differences in rates at which blacks and whites passed a test on writing skills. The Court feared that invalidating any government program in which the effects were different among racial groups would lead to the Court becoming much more active in assessing laws' constitutionality.

Moreover, the requirement that there be a finding of clear purpose to discriminate by government to invalidate racial classifications also reduces the depth of the social construction process in these cases. This need to find purposeful discrimination before finding a constitutional violation was not preordained by either the Fourteenth Amendment or by *Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954). The Supreme Court has chosen the most conservative requirement—that is, the need for purposefulness—to find that a race classification or government action is invidious. Thus, with regard to race classifications in admission to higher education, the Court was willing to have a lower level of scrutiny, even though strict, than it was willing to have in cases involving invidious gender classification.

Polity and rights principles and social constructions have much to do with whether and under what conditions the Court will find race discrimination in contemporary cases. The Court is much more willing to support polity principles that limit state and local government in most areas of law involving race discrimination. Only in the area of affirmative action in higher education has the Court allowed such policies, according to the principles of *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978). In the area of affirmative action in the awarding of government contracts, the Court's scrutiny is more strict than in higher education. With regard to social change in the future, because few if any laws include overt invidious racial discrimination, and as the complexity of our nation increases, the Court must increase the depth of the social construction process and develop principles in support of that complexity.

C. Social Construction in First Amendment Jurisprudence

In First Amendment cases, the Court emphasizes neutral principles and, over the past several decades, has moved to a more formalist analytical process when assessing laws that affect speech rights. Content-based restrictions must meet an unyielding strict scrutiny, and even content-neutral laws face an increasingly stringent intermediate scrutiny. But in this area of the law, the analytical "tests" are central, and because the Court believes that First Amendment principles should apply to all and not be based on the content or views of the speaker, one could say that the Court engages in a more muted, less robust social construction process. Clearly, it is more muted than the social construction process found in the definition of rights of privacy and personhood under the Due Process Clauses of the Constitution. Yet, this does not mean that First Amendment speech rights have declined—they have not. It means that First Amendment rights expand for all, in ways that are

less protective of the social needs of minority communities and the wider society. That the objective of universality in the area of First Amendment law has resulted in a more muted social construction process suggests that securing truly equal First Amendment rights for minority groups, such as LGBTQ citizens and minority religions, will be difficult.

In the Free Exercise context, the Court continues to follow precedent in upholding neutral, generally applicable laws that only incidentally burden religion. But the Court in recent years has been more sensitive toward claims of religious discrimination or government bias, and cases touching on both Free Exercise and Establishment Clause issues tend to be viewed through the Free Exercise lens. Despite rumblings over a more expansive jurisprudence in this area, however, the Court's underlying constitutional doctrine (at least at its core) has remained stable.

III. GENDER, RACE, AND FIRST AMENDMENT JURISPRUDENCE IN THE ROBERTS COURT

I now want to briefly explore some significant Roberts Court cases in these doctrinal areas to assess whether we have seen any major course changes or repudiations of persistent, precedential social constructs.

A. Gender in the Roberts Court

In the Roberts Court era, a standout case concerning gender is *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292 (2016), a substantive sequel to *Casey*. The Court announced, based on a robust social construction process, that Texas's proposed restrictions on abortion procedures constituted needless regulations with "the purpose or effect of presenting a substantial obstacle to a woman seeking an abortion," thereby "impos[ing] an undue burden on the right" (136 S. Ct. 2292 [2016], 2309). At bottom, we see a continuation of the social construction process running through *Roe* and *Casey*, and, in particular, *Casey*'s stronger construct of women as autonomous drives the logic of the Court's opinion. The strength of the social construct informs the internal legal principles applied in the case, the analysis of the real world outside the Court, and the robustness of the bidirectional fusion of the two. In terms of internal principles, the majority clarifies and reaffirms that deference is not the watchword of its reproductive jurisprudence. Within this standard is a specific interplay of polity and rights principles. The majority does not place the polity principle of deference to legislative fact-finding at the heart of its legal principles; rather, it relegates this to a secondary role,

behind the importance of the woman's right to choose. In other words, the Court's legal test reflects that a rights principle is at the core of its sex and gender jurisprudence—and the rights principle is at the core *because* the social construction of women as equal, autonomous, and capable of making their own reproductive choices is baked into cases like *Casey*.

Because polity principles play second fiddle in this context, the Court embarks on a deep and specific analysis of the regulations' impact on the lived lives of women. The Court examines the world outside its walls through the lens of polity and rights principles—seeking what an "undue burden" might mean, while simultaneously allowing the realities of women's lives to affect the meanings and weights assigned to polity and rights principles. Moreover, the analysis is constantly influenced by the social construction of women operating at its core. Whereas the Court could have conceptualized women more impersonally, they instead look closely at the way women have to deal with these regulations, and how these regulations affect the day-to-day lives of women who may become pregnant. That is, because the Texas law is ultimately conceived as paternalistic by the majority, the Court strikes it down in light of its social construction of women, as women themselves are capable of making health-care decisions for themselves.

B. Race in the Roberts Court

The twenty-first century brought significant developments in case law dealing with race and equal protection, particularly in the areas of education and voting rights. In *Gratz v. Bollinger*, 539 U.S. 244 (2003), the Court struck down the University of Michigan's use of race in its undergraduate admissions.[10] Drawing on precedent, particularly the Court's decision in *Bakke*, the majority held that the undergraduate program's use of race was unconstitutional under the Fourteenth Amendment's Equal Protection Clause.[11] In particular, the Court believed that the points system used by the University of Michigan was too rigid and automatic, and it deprived admissions counselors of the opportunity to assess each applicant as a unique individual, rather than as a class representative.[12] Conversely, in *Grutter v. Bollinger*, 539 U.S. 306 (2003), a majority (primarily composed of the dissenters in *Gratz*) upheld the University of Michigan Law School's use of

10. 539 U.S. 244 (2003) at 249–51.

11. Id. at 275.

12. Id. at 271–72.

race in its admissions.[13] The Court noted that the Law School had a more flexible and holistic review process than the undergraduate admissions program, in which race was one "plus factor" that could play a role in a student's overall admissions profile, but did not garner any kind of point value or quantitative measure, as with the undergraduate program.[14] The Court also acknowledged that diversity in higher education is a compelling interest; thus, a university may use race in its admissions policies as long as it is narrowly tailored toward achieving diversity in the student body.[15]

Merely four years after *Gratz* and *Grutter*, the Court's jurisprudence on race turned decidedly more restrictive. In *Parents Involved in Community School v. Seattle School District No. 1*, 551 U.S. 701 (2007), the Court struck down two school selection systems that utilized race as a factor in student placement.[16] Chief Justice John Roberts, writing for the majority, noted that the use of race in both programs was geared toward the diversity levels in the districts in which the schools are located, rather than some "critical mass" of diversity aimed at educational goals.[17] Roberts also criticized the systems for using a binary model of race, such that schools that would normally be considered diverse would need diversification because of the proportion of black students.[18] In a passage that encapsulates his attitude toward the use of race, Roberts—after citing *Brown* to justify striking down an affirmative action program—writes: "The way to stop discrimination on the basis of race is to stop discriminating on the basis of race" (551 U.S. 701 [2007], 747–48).

More recently, however, the Court appears to have shifted back toward its position in *Grutter* and *Bakke*. In *Fisher v. University of Texas at Austin*, 136 S. Ct. 2198 (2016), the Court upheld the university's use of race in its admissions policy, relating it to the system approved in *Grutter*.[19] Under the university's system, 75 percent of enrollment is determined by those who graduate in the top 10 percent of their high school classes.[20] The remaining quarter is determined through a holistic

13. 539 U.S. 306 (2003) at 343–44.

14. Id. at 315.

15. Id. at 328–30, 334.

16. 551 U.S. 701 (2007) at 748.

17. Id. at 726–27.

18. Id. at 724, 735.

19. 136 S. Ct. 2198 (2016) at 2214–15.

20. Id. at 2206–08.

review process not dissimilar from the University of Michigan's process, in which race is a factor.[21] Surveying its precedent, the Court quickly acknowledged that the Texas program falls within the scope of *Bakke* and *Grutter* as an acceptable use of race in admissions, given its limited effect on ultimate class composition and its function in a broader, holistic assessment of the individual.[22]

Perhaps the most consequential case on race, however, is *Shelby County, Alabama v. Holder* (570 U.S. 529 [2012]), in which a 5–4 majority struck down the preclearance coverage formula in §4(b) of the Voting Rights Act.[23] Roberts and the majority rejected the preclearance formula in the law, despite the fact that it was reauthorized with widespread bipartisan support in 2006.[24] Within this rejection are the seeds of the majority's social construction, or lack thereof. For Roberts and his colleagues, the lack of juridical discrimination is almost dispositive, and the Court refuses to acknowledge congressional fact-finding that concluded the preclearance coverage formula was still relevant fifty years after the law's initial passage.[25]

The majority's ultimate refusal to follow Congress's lead and uphold the preclearance coverage formula signals a larger issue, a "reification" of race relations by Roberts and his colleagues. That is, the majority views discrimination and racist policy as an historical event, an almost tangible development that occurred at a fixed point in time and space. Now that conditions have improved and the state no longer overtly discriminates, the laws and policies designed to remedy the original discrimination are deemed illegitimate and stale. However, this view fails to grapple with the realities of race relations in the county, and it also ignores that the laws attempted to make true constitutional principles that were being given short shrift. Roberts and the majority are incredulous that Congress could rationally reauthorize the same coverage formula from 1964—so incredulous that they strike it down.[26]

Several broad themes arise out of the Roberts Court race cases. First, there is a distinct lack of social construction in the opinions authored by Chief Justice Roberts. In *Parents Involved* and *Shelby County*, Roberts takes, at most, a superficial glance at the situation on the ground, failing to survey the lived lives of citizens in

21. Id.

22. Id. at 2208–09.

23. 570 U.S. 529 (2012) at 556–57.

24. Id. at 539–40.

25. Id. at 546–47.

26. Id. at 555–57.

his assessment of whether the Fourteenth Amendment is being violated and failing to incorporate meaningful social constructions in precedent.[27] Second, the concept of individual autonomy becomes overriding in both *Parents Involved* and *Shelby County*—so much so that, in the latter, the Court combines the polity principle of federalism and states' rights to concoct a new right of "equal sovereignty among the states." That is, the Voting Rights Act becomes partly illegitimate because it encroaches on a state's individual right—backed up by federalism—to be treated equally, with dignity. Concomitantly, Roberts and the majority on the Court eschew deference to state and federal legislatures.

This speaks to what is overwhelming in these opinions: a thorough lack of bidirectionality and a weak social construction process. The Court applies "equal protection" in a wholly formalist fashion, refusing to look at the world beyond the Court for guidance as to how the principles might apply or what they mean in a modern world. This is coupled with a notion of "equal protection" whose locus is the individual, rather than the group. In other words, laws that attempt to level the playing field for disadvantaged groups are illegitimate, as they strike at the inviolability of other citizens as individuals. But Roberts is guilty of the same reification he accuses affirmative action programs of perpetuating. "Race," for Roberts, is an historical phenomenon—it happened, it can be read about and studied—but the time has passed in which "race" matters. Roberts rules in this way because he refuses to look outside the walls of the Court; because discrimination is no longer emblazoned in the U.S. Code, it must not exist.

Cases dealing with affirmative action in higher education, like *Grutter* and *Fisher*, however, evince deeper social construction and bidirectional decision-making, with

---

27. Justice Stevens' dissent in *Parents Involved in Community School v. Seattle School District No. 1* vividly illustrates this:

> There is a cruel irony in The Chief Justice's reliance on our decision in *Brown v. Board of Education*. The first sentence in the concluding paragraph of his opinion states: "Before *Brown*, schoolchildren were told where they could and could not go to school based on the color of their skin" . . . The Chief Justice fails to note that it was only black schoolchildren who were so ordered; indeed, the history books do not tell stories of white children struggling to attend black schools. In this and other ways, The Chief Justice rewrites the history of one of this Court's most important decisions . . . The Chief Justice rejects the conclusion that the racial classifications at issue here should be viewed differently than others, because they do not impose burdens on one race alone and do not stigmatize or exclude . . . Even today, two of our wisest federal judges have rejected such a wooden reading of the Equal Protection Clause . . . "It would be the height of irony if the racial imbalance act, enacted as it was with the laudable purpose of achieving equal educational opportunities, should, by prescribing school pupil allocations based on race, founder on unsuspected shoals in the Fourteenth Amendment." (551 U.S. 701 [2007], 798–802)

a majority of the Court looking outside its walls into the lived lives of citizens, socially constructing what "equal protection" means in reality. This dialectic synergy is key for the race cases, and its ebb and flow helps explain the unevenness of rulings since *Brown*. Although certain members of the Court remain willing to apply the Constitution in real life and real time—and rightly believe that its meaning is perceived only through such application—others, such as Roberts, rely on an historically stunted conception of textual meaning—and, thus, a textual meaning devoid of social reality—that, when applied, is facially out of place and falls short of the fidelity it purports to ensure.

C. The Roberts Court's First Amendment Jurisprudence

Perhaps in no other area has the Roberts Court been more active and impactful than in First Amendment speech and Free Exercise cases. On the speech side, *Citizens United v. FEC*, 558 U.S. 310 (2010) was a landmark First Amendment case that continues to have repercussions for political discourse and campaign financing. In *Citizens United*, a five-justice majority struck down limitations on "corporate political speech" (558 U.S. 310 [2010], 319), holding that these limitations were an impermissible infringement on corporations' rights. Likening restrictions on advocacy groups to "censorship," the majority focused heavily on the "marketplace" conception of democracy and political speech, concerned that limitations on corporate speech would have an impermissible "chilling" effect (558 U.S. 310 [2010], 337–40). In particular, the Court viewed the restrictions as based on speaker identity—effectively a back door to content-based restrictions.[28]

One of the notable features of the majority's opinion is the tension between the well-established "neutral principles" underlying its First Amendment jurisprudence and the "crowding out" of the marketplace that its holding might produce. For instance, Justice Anthony Kennedy, writing for the majority, evokes his well-worn "autonomy" language, but this language of "worth" and "value" is in the service of corporate speech; Kennedy uses the rationale of "disadvantage" as a gloss upon actors that, by his own account, are advantaged, at least economically. The majority, in other words, lacks deep social construction in its opinion, taking the "neutral principles" of past cases and stretching them to their fullest extent, with little regard for the realities in which they play out. Although *Citizens United* may be regarded as the acme of "neutrality" as a First Amendment virtue, it is arguably

28. 558 U.S. 310 (2010) at 340.

devoid of a thorough social construction of the realities of political speech outside the Court, with the result being decidedly *un*neutral.

The majority eschews an opportunity for bidirectional decision-making, looking to internal doctrine and concepts without allowing them to engage with the facts on hand. Additionally, the majority shackles itself to a strong rights principle—one that could fully jettison the strong and concomitant polity principles simultaneously at work in the First Amendment. That is, although the majority is strenuously focused on individuals' speech rights, it ignores the strong polity principles—democratic discourse, civic virtue, free and open dialogue—working in tandem with speech rights. Kennedy's language paints an overly atomistic vision of free speech under the First Amendment; no doubt, the First Amendment is a vast repository of rights principles, but the potency of these rights principles is directly and meaningfully informed by the potency of polity principles, operating in synergy. Unlimited corporate expenditures, wrapped in the raiment of free speech, threaten to infringe *other's* speech rights—and the reality of these expenditures completely ignores the necessary tension and duality between freedom of speech and democratic discourse, between polity and rights principles functioning within the First Amendment. The majority ignores this duality because it ignores a robust social construction process, resting its opinion on formalist grounds that fail to capture the true meaning of "neutral principles."

The Court has continued its emphasis on neutral principles in recent cases, expanding the scope of First Amendment protections, using the Amendment more affirmatively and aggressively, and applying an increasingly rigid analytical methodology that rests on an increasingly shallow social construction process. In *National Institute of Family and Life Advocates v. Becerra*, 138 S. Ct. 2361 (2018), the Court struck down notice requirements in the California Reproductive Freedom, Accountability, Comprehensive Care, and Transparency Act (FACT Act).[29] The Act, in part, aimed to regulate crisis pregnancy centers, "'pro-life (largely Christian belief-based) organizations that offer a limited range of free pregnancy options, counseling, and other services to individuals that visit a center'" (138 S. Ct. 2361 [2018], 2368). Under the Act, "'licensed covered facilit[ies]'" must "disseminate a government-drafted notice on site" (138 S. Ct. 2361 [2018], 2368–69) notifying women that California offers free family planning services (including abortion services). In a majority opinion by Justice Clarence Thomas, the Court struck down these notice requirements as violating the First Amendment.[30] The Court held the licensed

29. 138 S. Ct. 2361 (2018) at 2368.

30. Id. at 2370.

notice requirement to be a "content-based regulation of speech," as it "compel[s] individuals to speak a particular message" (138 S. Ct. 2361 [2018], 2371), thereby changing the content of their speech. "By requiring petitioners to inform women how they can obtain state-subsidized abortions—at the same time petitioners try to dissuade women from choosing that option—the licensed notice plainly 'alters the content' of petitioners' speech" (138 S. Ct. 2361 [2018], 2371). Moreover, the Court refused to view the regulation as a species of informed-consent requirements, which *Casey* upheld in the face of a free-speech challenge.[31]

Justice Stephen Breyer, in a four-justice dissent, disputed the majority's conclusions. Unclear as to why the licensed notice requirement would not qualify as a notice related to health concerns, which the majority seems to bless, Justice Breyer feared that the Court's "test invites courts around the Nation to apply an unpredictable First Amendment to ordinary social and economic regulation, striking down disclosure laws that judges may disfavor, while upholding others, all without grounding their decisions in reasoned principle" (138 S. Ct. 2361 [2018], 2381). Indeed, Breyer raised the specter of *Lochner*, nothing that "the Court has been wary of claims that regulation of business activity, particular health-related activity, violates the Constitution" and that, since *Lochner*, "ordinary economic and social legislation has been thought to raise little constitutional concern" (138 S. Ct. 2361 [2018], 2381). "Medical professionals do not, generally speaking, have a right to use the Constitution as a weapon allowing them rigorously to control the content" (138 S. Ct. 2361 [2018], 2382) of reasonable conditions states may place on the practice of medicine.

In *Janus v. American Federation of State, County, and Municipal Employees, Council 31*, 138 S. Ct. 2448 (2018), the Court considered an Illinois law that required public employees to pay an "agency fee" to the union representing the bargaining unit of which they are a part, even if they choose not to join the union.[32] Overturning precedent, the Court held that the agency fee constituted impermissible coerced speech.[33] Justice Samuel Alito, writing for the majority, recited the many harms stemming from private persons being forced to subsidize others' speech.[34] Alito also found concerns about so-called free-riders unconvincing, speculating that the allure of exclusive representation would motivate unions

31. Id. at 2373–74.

32. 138 S. Ct. 2448 (2018) at 2459–61.

33. Id. at 2459–60.

34. Id. at 2463–65.

to compete for bargaining units even if a substantial subset of the unit decline union membership.[35]

Justice Elena Kagan, writing the principal dissent, saw things differently. As she saw it, unions could "require public employees to pay a fair share of the cost . . . incur[red] when negotiating on [nonmembers'] behalf over terms of employment," but no portion of these fees "could go to any of the union's political or ideological activities," perhaps closer to the "core speech" of the First Amendment (138 S. Ct. 2448 [2018], 2487). Despite the majority's assertion that free-rider arguments "'are generally insufficient to overcome First Amendment objections,'" Justice Kagan noted that this assertion "disregards the defining characteristic of *this* free-rider argument—that unions, unlike . . . many other private groups, must serve members and non-members alike" (138 S. Ct. 2448 [2018], 2490). Absent agency fees, "the class of union non-members spirals upward" as employees, even those supportive of the union, "realize that they can get the same benefits even if they let their memberships expire" (138 S. Ct. 2448 [2018], 2490–91).

Ultimately, Justice Kagan castigated the Court for its activist use of the First Amendment:

> There is no sugarcoating today's opinion. The majority overthrows a decision entrenched in this Nation's law—and in its economic life—for over 40 years. As a result, it prevents the American people, acting through their state and local officials, from making important choices about workplace governance. And it does so by weaponizing the First Amendment, in a way that unleashes judges, now and in the future, to intervene in economic and regulatory policy. . . . Speech is everywhere—a part of every human activity (employment, health care, securities trading, you name it). For that reason, almost all economic and regulatory policy affects or touches speech. So the majority's road runs long. And at every stop are black-robed rules overruling citizens' choices. The First Amendment was meant for better things. It was meant not to undermine but to protect democratic governance—including over the role of public-sector unions. (138 S. Ct. 2448 [2018], 2501–502)

In the Free Exercise context, the Court seemed to signal that large-scale developments were on the horizon in *Hobby Lobby*, yet recent cases have shown far less earth-shaking results. In *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014), the

35. Id. at 2466–68.

Supreme Court held 5–4 that the Affordable Care Act's contraceptive mandate[36] substantially burdened the religious expression of closely held, for-profit corporations, violating the Religious Freedom Restoration Act (RFRA).[37] RFRA was a congressional response to the Court's decision in *Employment Division v. Smith*, 494 U.S. 872 (1990), that rejected the "balancing test set forth in *Sherbert* [*v. Verner*, 374 U.S. 398 (1963)]," which held that "under the First Amendment, 'neutral, generally applicable laws may be applied to religious practices even when not supported by a compelling governmental interest'" (134 S. Ct. 2751 [2014], 2760–61). Pushing back against *Smith*, RFRA provides that the federal government "shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability" (134 S. Ct. [2014], 2761), and it subjects such substantial burdens to strict scrutiny.

Justice Alito, in his majority opinion, proceeds step by step through the reasons why Hobby Lobby may refrain from directly providing their employees with specific contraception they assert violates their deeply held beliefs. First, Justice Alito reads RFRA and recent amendments as establishing a Free Exercise right broader than that guaranteed under the First Amendment.[38] The Court also concludes that RFRA applies to nonhuman "persons" as a function of the federal Dictionary Act (1 U.S. Code § 1).[39] Once the Court concludes that RFRA allows claims by nonhumans, the analysis is swift and straightforward. It quickly decides that the law substantially burdens corporations' religious exercise, as businesses would be subject to millions in fines were they to refuse to comply with the law.[40] And, noting that "[t]he least-restrictive-means standard is exceptionally demanding" (134 S. Ct. 2751 [2014], 2780–83), the Court immediately announces that the contraceptive mandate is not the least restrictive means—primarily because, in its eyes, the government could reduce the burden on the corporations by funding contraception coverage directly or by allowing the corporations to avail themselves of an exception for religious organizations. Sensing from the outset that the majority's

36. The Affordable Care Act requires employers with at least fifty full-time employees to offer health insurance to their employees. 26 U.S.C. §§ 4980H (2012). This health insurance must cover preventive care as specified by the Health Resources and Services Administration guidelines. 42 U.S.C. § 330gg-13 (2012). These guidelines include all Food and Drug Administration–approved "contraceptive methods, sterilization procedures, and patient education and counseling for all women with reproductive capacity." 77 Fed. Reg. 8725-01.

37. 42 U.S.C. § 2000bb–bb-4 (2012).

38. 134 S. Ct. [2014] at 2761–62.

39. Id. at 2768–69.

40. Id. at 2275–79.

decision is potentially unwieldy, the Court insists that its holding is narrow.[41] Moreover, the Court argues that the decision *does not* open the door to "discrimination in hiring, for example on the basis of race" (134 S. Ct. 2751 [2014], 2780), because laws such as Title VII meet the strict scrutiny called for by RFRA.[42]

Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission, 138 S. Ct. 1719 (2018) was a chance for the Court to apply the expansive constructions in *Hobby Lobby* in the constitutional context. Instead, the Court issued an exceptionally narrow ruling for the petitioner, while affirming much of its gay rights and free exercise jurisprudence to this point. The case involved a baker who refused to sell or design a cake for a same-sex couple's wedding in 2012.[43] The baker asserted his deeply held beliefs against same-sex weddings, but was nevertheless found in violation of Colorado's antidiscrimination statute, which expanded antidiscrimination protections in public accommodations to gay Coloradans.[44] In one of his final opinions, Justice Kennedy, writing for the majority, attempts a reconciliation between his notable gay rights jurisprudence and Free Exercise rights:

> Our society has come to the recognition that gay persons and gay couples cannot be treated as social outcasts or as inferior in dignity or worth. For that reason the laws and the Constitution can, and in some instances must, protect them in the exercise of their civil rights. The exercise of their freedom on terms equal to others

41. "[O]ur holding is very specific. We do not hold, as the principal dissent alleges, that for-profit corporations and other commercial enterprises can 'opt out of any law (saving only tax laws) they judge incompatible with their sincerely held religious beliefs.' Nor do we hold, as the dissent implies, that such corporations have free rein to take steps that impose 'disadvantages . . . on others' or that require 'the general public [to] pick up the tab.' And we certainly do not hold or suggest that 'RFRA demands accommodation of a for-profit corporation's religious beliefs no matter the impact that accommodation may have on . . . thousands of women employed by Hobby Lobby.'" Id. at 2760 (citations omitted) (alteration original).

42. Justice Alito's majority opinion prompts an acerbic dissent from Justice Ginsburg:

> In a decision of startling breadth, the Court holds that commercial enterprises, including corporations . . . can opt out of any law (saving only tax laws) they judge incompatible with their sincerely held religious beliefs. Compelling governmental interests in uniform compliance with the law, and disadvantages that religion-based opt-outs impose on others, hold no sway . . . at least when there is a "less restrictive alternative." . . . In the Court's view, RFRA demands accommodation of a for-profit corporation's religious beliefs no matter the impact that accommodation may have on third parties who do not share the corporation owners' religious faith . . . . Persuaded that Congress enacted RFRA to serve a far less radical purpose, *and mindful of the havoc the Court's judgment can introduce*, I dissent. Id. at 2787.

43. Colorado did not recognize same-sex marriages when the events in the case took place. 138 S. Ct. 1719 (2018) at 1724.

44. Id. at 1724–27.

> must be given great weight and respect by the courts. At the same time, the religious and philosophical objections to gay marriage are protected views or in some instances protected forms of expression. . . . Nevertheless, while those religious and philosophical objections are protected, it is a general rule that such objections do not allow business owners and other actors in the economy and in society to deny protected persons equal access to goods and services under a neutral and generally applicable public accommodations law. (138 S. Ct. 1719 [2018], 1727)

Justice Kennedy avoids, however, the ultimate question lurking throughout—Do the sincerely held religious beliefs of citizens warrant exceptions to otherwise valid, neutral, and generally applicable laws, in contrast to *Smith*'s holding?—by finding that the Colorado Civil Rights Commission displayed impermissible hostility toward the baker's religious beliefs.[45] Thus, although the baker ultimately prevailed, Justice Kennedy's opinion lends strength to the longevity of *Smith* and cast doubt on the notion that *Hobby Lobby* will soon breach its statutory confines and infect constitutional jurisprudence.[46]

---

45. Id. at 1728–29.

46. Justice Kagan, in a concurring opinion, reinforces this reading of the majority opinion. She notes that a separate line of cases cited by the majority—the "Jack cases," where several Colorado bakeries were found *not* in violation of the state anti-discrimination statute when they refused to bake a homophobic cake for potential customer William Jack—are distinguishable from the case at bar because of the nature of the bakeries' actions and the status of the refused consumer:

> The three bakers in the Jack cases did not violate [Colorado's anti-discrimination statute]. Jack requested them to make a cake (one denigrating gay people and same-sex marriage) that they would not have made for any customer. In refusing that request, the bakers did not single out Jack because of his religion, but instead treated him in the same way they would treated any else—just as [the statute] requires. By contrast, the same-sex couple in this case requested a wedding cake that Phillips [the baker] would have made for an opposite-sex couple. In refusing that request, Phillips contravened [the statute's] demand that customers receive "the full and equal enjoyment" of public accommodations irrespective of their sexual orientation. The different outcomes in the Jack cases and the Phillips case could thus have been justified by a plain reading and neutral application of Colorado law—untainted by any bias against a religious belief. Id. at 1733.

In a footnote, Justice Kagan contrasts this with Justice Gorsuch's framing of the issue in his concurrence, which characterizes the product at issue as a cake celebrating same-sex marriage, not simply a wedding cake. Id. This, however, is incorrect, for the coupled refused service requested a cake serviceable for any wedding ceremony. Id. Moreover, "a vendor cannot escape a public accommodations law because his religion disapproves selling a product to a group of customers, whether defined by sexual orientation, race, sex, or other protected trait." Id. (citing *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400, 402, n. 5 [1968]). Although vendors may choose *what* they sell, they may *not* choose *to whom* they sell. Id. at 1733–34.

IV. CONCLUSIONS: THE SOCIAL CONSTRUCTION PROCESS TODAY

By comparing different doctrinal areas, we can assess how the Court deploys the social construction process, whether there are differences in that deployment depending on the substantive area being examined, and how the differences across areas may affect the path of rights and the staying power of particular decisions. In my forthcoming book, I examine bidirectional Court decision-making with its social construction process in cases involving gays rights and rights to sexual intimacy, such as *Romer v. Evans*, 517 U.S. 620 (1996); *Lawrence v. Texas*; *United States v. Windsor*, 570 U.S. 774 (2013); and *Obergefell v.* Hodges, 135 S. Ct. 2584 (2015). In these cases, the Court applies internal polity and rights principles to the lived lives of gay persons outside the Court in a deep, thoughtful, and nuanced social construction process. The Court compares social constructions in past cases, like *Brown* and *Casey*, to the social constructions in the case before the Court, asking whether the constructions in past precedents resemble those in the case at bar. For these cases, the Court answered in the affirmative, finding rights to sexual intimacy and marriage equality based in part on the way in which the application of polity and rights principles in these cases resembled past applications in race and gender rights cases. I also compare the gay rights cases to "conservative" rights cases like *National Federation of Independent Business v. Sebelius*, 567 U.S. 519 (2012) and *District of Columbia v. Heller*, 554 U.S. 570 (2008), concluding that the individual rights asserted in those cases are unlikely to have the lasting or broad impact of the rights in *Lawrence* and *Obergefell* because of disparities in the social construction processes behind each rights principle.

More broadly, examining this social construction process tells us a great deal about its use in specific doctrinal areas and how the Court deploys it in varied ways. First, the gender rights cases from the Supreme Court exhibit a robust, deep social construction process, similar to the gay rights and sexual intimacy cases (a similarity that makes sense, given that gay rights issues are often characterized as a species of sex and gender issues). Since *Reed*, the Court has explored the lived lives of women throughout the United States and throughout the country's history, assessing long-running stereotypes and "conventional wisdom" in determining whether gender-based classifications in laws stem from tired clichés rather than legitimate and exceedingly persuasive government interests. Although fairly predictable polity and rights principles appear in these cases, in the form of "intermediate scrutiny," the Court's decision-making is decidedly bidirectional, as rights interests (such as women's rights to autonomy, self-determination, and fullness of citizenship) are realized by scrutinizing gendered classifications and gendered policies. These social

constructions spill over into other caselaw as well, as seen with *Casey*, *Lawrence*, and *Obergefell*. Thus, gender rights are an exemplar of the Court's bidirectional decision-making process.

Conversely, race cases have exhibited far less bidirectionality, shallower social constructions, and an increasing formalism, particularly in the Roberts Court era. Somewhat similarly to First Amendment caselaw, cases examining racial classifications have relied increasingly on a narrow doctrinal application of strict scrutiny, with little to no social construction of the lived lives of racial minorities and the effects of government programs. Cases such as *Parents Involved* and *Shelby County* show a deafness to the lived lives of citizens in their assessment of race-based policies. Such deafness has led to uneven results as well. Whereas polity principles of deference to state remedial policies have withstood sustained attack in the area of affirmative action (because of a more robust social construction process in these cases), rights principles—particularly on an individual level—and lack of deference dominate decisions that strike down even remedial policies outside the higher education context. *Shelby County*, again, exemplifies this. Hence, a more inward-looking, ossified jurisprudence on race—especially compared with gender rights cases—may lead to more "activist" decisions, in which state policies aimed at achieving greater diversity, greater access to the ballot box, and greater equality are ruled invalid because of an unflinching, blind strict scrutiny.

First Amendment cases are somewhat a creature unto themselves, but in some ways they share similarities with race cases and lack the robust social construction process of gender and gay rights cases. In the free speech context, the Court has settled, particularly in recent cases, on a straightforward application of tiers of scrutiny, only venturing into a social construction process when grappling with how free speech principles apply to new forms of communication and media. With this greater emphasis on "neutral principles" and legalistic analysis, however, has come broader decisions that are less focused on protecting dissidents' rights to express unpopular opinions. Instead, cases such as *Janus* and *Becerra* see the Court wielding the First Amendment more offensively, striking down laws in contexts unlike prototypical free speech cases. In *Janus*, an expansive reading of free speech principles sees the downfall of agency fees for unions, which has real potential to stymie public-sector unionization. In *Becerra*, disclosure requirements for state clinics fall as a species of forced speech, even though they closely resemble informed-consent regulations upheld in cases like *Casey*. Thus, as the Roberts Court continues to apply the First Amendment with little regard for the real-life impact of its decisions, there could be further invalidations of a wider swath of laws than simply those pertaining to speech.

In the Free Exercise context, however, the Court has failed to translate the expansive *Hobby Lobby* into a constitutional principle. *Masterpiece Cakeshop* presented a prime opportunity for the Court to greatly increase free exercise rights and overrule *Smith*; instead, the Court issued an exceedingly narrow decision that featured prominent language upholding the right of states to pass public accommodations laws. Although the Court is particularly cognizant of rights principles in the Free Exercise space, polity principles remain robust, and the Court is deferential both to the State's interest in ensuring open access to commerce and to minority rights that may be infringed upon should Free Exercise rights begin encroaching on other's activities. In Justice Kennedy's majority opinion in *Masterpiece Cakeshop*, we see a familiar sensitivity to the rights of minorities traditionally discriminated against, whether in the name of longstanding tradition or deeply held religious beliefs. With continued apocalyptic prognostications about the Court's First Amendment jurisprudence after *Citizens United* and *Hobby Lobby*, we have yet to see a *Lochner*-level weaponization of free speech and religious rights, although recent decisions regarding the former may portend a greater offensive deployment of the First Amendment.

Finally, although this truncated foray into recent caselaw demonstrates how the Court's social construction process varies across doctrinal areas, it nevertheless shows continuity across these areas, with the Roberts Court tending to follow precedential social constructs from past cases and build on longstanding precedent. Although the Court has broken from past decisions at specific points, the longer trajectory of caselaw in substantive areas is more even than one might think from reaching individual cases without overall context. And—crucially—the social construction process is seen throughout this caselaw, although its depth, complexity, and nuance may vary. This variance may have ramifications for the lasting power of specific rights outcomes; that is, rights resting on shallow social constructions are less likely to have the staying power of rights built on deep social constructions, such as the right to sexual intimacy, same-sex marriage, or abortion choice.

V. ARE WE CAREENING TOWARD ARMAGEDDON?

The contributors to this Festschrift have offered incisive and insightful contributions, to which I would like to offer a few comments. First, to summarize, my work centers on the bidirectional decision-making process, with its crucial social construction process, intrinsic to the Supreme Court as a unique institution in American politics and American political development. Court decision-making involves the

mutual construction of internal and external elements—legalist polity and rights principles, on one hand, and social, economic, and political realities of the lived lives of persons on the other hand. Through the social construction process, these polity and rights principles gain meaning, weight, and significance through their application to and engagement with lived lives. Moreover, as these social constructions of legal principles and external realities become embedded in caselaw and developed through precedent, they become essential to the development of individual rights—whether to the expansion, contraction, establishment, or eradication of such rights. That is, whether rights are established, disestablished, expanded, or narrowed depends in part on the depth and scope of the social construction undergirding them *and* in part on whether the social construction continues to "make sense" in light of the changing realities of life outside the Court. If the social construction appears out of step with the way in which the polity and rights principles at issue in a case interact with reality *now*, it is likely that the Court will cease resting decisions on that social construction, perhaps overturning the rights based upon it, perhaps only casting aside the construction itself. This is why the Court overturned *Lochner v. New York* in *West Coast Hotel v. Parrish*; *Plessey v. Ferguson*, 163 U.S. 537 (1896) in *Brown v. Board of Education*; and *Bowers v. Hardwick*, 478 U.S. 186 (1986) in *Lawrence v. Texas*; but did *not* overturn *Roe v. Wade* in *Planned Parenthood of Southeastern Pennsylvania v. Casey*. In the first three cases, the social constructions in the prior precedent no longer made sense in light of changing social realities, whereas *Roe*'s social construction was sustained and buttressed in *Casey*—even considering *Casey*'s supplanting of *Roe*'s strict scrutiny with its "undue burden" standard—by viewing abortion rights through the lens of autonomy, personhood, and gender equality, rather than passive notions of privacy.

Mark Graber makes convincing arguments about the interplay of the more political branches and the Supreme Court, as well as the shift from a "long state of courts and parties" to a more polarized time in our nation's political and legal development. I would argue, however, both that the Court maintains a greater autonomy from the partisan political environment of electorally accountable branches of government *and* that the bidirectional decision-making process I outline in my work is embedded in and intrinsic to the Court as an institution itself, such that it will outlast changes in the appointment process or in the composition of the Court.

This, I believe, will offer some of the hope Carol Nackenoff seeks in her essay. Professor Nackenoff's points are compelling, and I broadly agree with her statements about nonparallel trajectories. This, of course, is what I just outlined in my examination of caselaw across different doctrinal areas. We see shallow social constructions in race as compared with gender and a greater emphasis on internal rights

principles and legal analysis than on bidirectionality in First Amendment jurisprudence. Although this does not necessarily translate into "liberal" or "conservative" entrenchments in particular areas of the law, such disparities and nuances may lead to different rights outcomes that are subsequently classed in partisan terms. The larger point is that the Court remains bidirectional in its decision-making and social constructs as it makes decisions; ultimately, however, unevenness in this process across doctrinal areas may have ramifications for the legitimacy or longevity of particular cases.

Several of the contributors present varied meditations on this point. Sara Chatfield's piece on the social construction of female workers notes how the social construction process plays out over decades, and how specific conceptions of women in the workplace lag behind other, related case developments. Julie Novkov's essay examines the Court's failure to engage in the robust social construction process of gender and gay rights cases in the context of poverty and wealth, with the Court declining to view these as suspect classifications. Or, put differently (and perhaps more accurately), the Court has long held on to constructions of poverty and wealth that limit rights-expansive decisions for the economically marginalized.

Evan Gerstmann looks at the use of the social construction process, too, although he does so in the context of gender rights cases. Gerstmann rightly analyzes several cases by looking at the analogical process that leads to particular conclusions—that is, thinking about the Court's gender rights jurisprudence only through the lens of "tiers of scrutiny" fails to capture the decades-long precedential developments going on in this doctrinal area. But I tend to see more continuity in this area than Gerstmann does. By analyzing each case as part of a long line of cases, one can pinpoint cases that are outliers—that is, they differ in the level of scrutiny called for in the most recent landmark decision. However, a long-term look at cases finds that outliers, such as *Michael M.* and *Rostker*, in later years are no longer valid as precedents because of subsequent development of principles in a doctrinal area, as well as because the social constructions on which they were based no longer make sense given changes in society, such as the role of women in the military. Thus, Gerstmann, Novkov, and Chatfield all demonstrate the complex history of the social construction process through Court decision-making, but the key is that this process permeates the decision-making itself—permeates the Court as an institution—regardless of whether the end result is "progressive" or rights-expansive.

To the observations of Nackenoff and several of her colleagues, the recent retirement announcement of Justice Kennedy will offer a chance to see the Roberts Court move into a new era—or, perhaps, retain relative continuity. Just this last term, when many commentators were predicting a new explosion of Free Exercise

rights and claims in light of *Hobby Lobby* and the Court's consideration of *Masterpiece Cakeshop*, the Court instead issued a rather tepid and exceedingly narrow decision in the latter case. Indeed, the majority opinion, written by Justice Kennedy, waxed poetic on the gay rights themes he has explicated from *Lawrence* through *Obergefell*, implying strongly that individuals and businesses in commerce will not be able to assert Free Exercise rights as a loophole to generally applicable, neutral public accommodations laws. In these statements we see the social construction process at work: Justices Kennedy and Kagan both assert the primacy of public accommodations laws by analogizing the situation in *Masterpiece Cakeshop* to past cases invalidating racial discrimination asserted on religious grounds, such as *Newman v. Piggie Park Enterprises*, 390 U.S. 400 (1968). Moreover, six justices join the majority opinion, and the two dissenters—Justices Ruth Bader Ginsburg and Sonia Sotomayor—agree with the majority as to its comments on public accommodations laws. Thus, the more expansive rights announced in *Hobby Lobby* remain a creature of statute, on hold in the constitutional arena for another day, if that day shall ever come. But increased polarization did not produce a major course shift for the Court in this area of the law; rather, the Court has maintained continuity with its previous free exercise precedent and built on its gay rights and sexual intimacy precedents, even in the face of Republican appointments and pressure.

More broadly, I remain convinced that the Court will continue as an independent and thoroughly unique institution in American political development—although I concede that its role in the development of individual rights is at least partially contingent on how fully and actively it engages in the social construction process. This speaks to the arguments raised by Tom Keck in his examination of the Trump presidency to this point. Whereas Keck draws on Stephen Skowronek's work in arguing that Trump's presidency is disjunctive, and that political ossifications and complexities will hem in his ability to upend or transform American democracy, I would complement this corralling of Trump's executive power with the *legal* complexity and sophistication of the Supreme Court as an institution. That is, the Court's bidirectional decision-making process, with a robust social construction process at its core, makes the Court the peerless American institution that it is. And critically, additional Trump appointments to the Court, should they come, will continue to have a less-than-transformational effect on American political development because of institutional facets of the Court itself.

Court independence is no new thing; scholars like Brian Tamanaha (2009) have convincingly argued that the Court has been bidirectional throughout its history, despite scholarly narratives of formalism or realism dominating academia. Additionally, assertions of partisan splits on the Court often ignore the sheer number

of unanimous or near-unanimous opinions issued by the Court, or the number of decisions that run counter to the prevailing, partisan narrative attributed to the Court. Even during the *Lochner* era, characterized both as a high point for judicial activism and as a bygone acme for economic due process rights, New Deal legislation was upheld as constitutional in more than half of the cases brought before the Court (see Stone et al. 2018, 759). Graber, for example, makes interesting points about the consensus among legal elites and how this phenomenon interacts with growing partisanship through American politics. But I wonder how these "elite consensus" and "polarization" narratives comport with the reality that seven of the eight current justices attended Harvard or Yale University for their legal education; that recently retired justice Anthony Kennedy attended Harvard University; that newly-appointed Justice Brett Kavanaugh attended Yale University; and that Justice Ginsburg, although a Columbia University graduate, began her legal education at Harvard University. It would seem that the Supreme Court is at its all-time elitist, which arguably portends relative consensus on a host of issues.

Of course, the specter of a concerted, partisan judicial agenda has always hung over the Court. Yet this reality has never come to fruition, and I would posit that this is a result of the social construction process and bidirectionality of the Court as an institution. This bidirectionality appears throughout all (or virtually all) decisions, whether "liberal" or "conservative." This reality also responds to Ken Kersch's incisive argument. Kersch (2019) sees my work as evincing a conceptualization of facts and case outcomes that is "off-the-rack liberal/progressive" (14). I do argue that "progressive" victories, such as the right to sexual intimacy and same-sex marriage, exhibit particularly full, robust social construction processes, and that this reality has implications for the longevity of these rights and the legitimacy of the Court overall. Kersch makes similar observations about the legitimacy of the Court in his essay. But I would add two more points. First, the social construction process itself is not progressive—rather, it is a facet of the Court's institutional decision-making process. It appears in varying forms across different doctrinal areas, as outlined earlier in this essay, but it is a critical element of the Court's institutional legitimacy. Moreover, if the Court is to remain relevant in influencing and building individual rights, then a robust social construction process is essential. Second, in my forthcoming book, I compare "conservative rights cases," such as *Sebelius* and *Heller*, with "liberal rights cases" like *Obergefell*. In *Sebelius*, for instance, five justices announced an affirmative rights principle against compulsory participation in interstate commerce, and in *Heller*, the Court recognized an individual right to bear arms (in *Heller*, for the defense of the home). Both of these rights principles rest on a bidirectional decision-making process, with a critical social construction

process engaging internal polity and rights principles with the lived lives of persons (Kahn and D'Emilio 2018). But the reason why these rights are unlikely to either persist or be expanded on is because the social constructions acting as their foundation are significantly shallower and less sophisticated than those found in *Roe*, *Casey*, *Lawrence*, and *Obergefell* (to name a few). Likewise, future cases cutting against abortion rights would likely rest on shallow, excessively doctrinal social constructions.

Deep social constructions are not only salient to the longevity of rights, however. They are also relevant to the Court's institutional legitimacy. As the plurality opinion in *Casey* explains in its discussion of *stare decisis*, Court decisions about overturning or sustaining rights must be seen as legitimate by the polity and not merely the product of shifting electoral fortunes. Thus, the right of abortion choice in *Roe* and *Casey* is likely to weather a conservative Court regime because of the depth of the social construction behind it—and this depth matters because the Court's legitimacy would suffer mightily were it to overturn these cases, as the social constructions remain closely related to the reality outside the Court. In addition, the Court would be unable to merely shift to an emphasis on polity principles in this area—greater deference to democratic decision-making would be as unconvincing today as it would have been in 1992 or even 1973, as women only continue to gain in autonomy, power, and agency. Abortion choice, therefore, remains an essential facet of gender equality, as it did in *Casey*, and a meaningful shift in this doctrinal area beyond the margins would be seen as nakedly political and, consequently, illegitimate. Because of this, future Courts would be unlikely to sustain it—as they were unwilling to sustain *Plessey*, *Lochner*, and *Bowers*.

The Supreme Court is a unique and hugely significant institution in American political development. I believe it will continue as such. And I know that the discourse it has generated, still generates, and will generate—of which this Festschrift is a small sample—will persist along with it.

* * *

I thank Mark Graber for organizing the April 13–14, 2017, symposium in my honor at Oberlin College entitled "The Constitution in American Political Development," and Howard Schweber for publishing the symposium papers in *Constitutional Studies*. I thank Stephen Skowronek, my first honors student, who spoke at the symposium dinner about his years at Oberlin, and Sara Chatfield, Evan Gerstmann, Mark Graber, Tom Keck, Ken Kersch, Carol Nackenoff, and Julia Novkov for their participation in the Festschrift. Thanks for your praise and for the professionalism with which you explored the impact of my approach on the study of law and courts. My heartfelt thanks for the joy that each of you brought

to me as we interacted as teacher and student; young scholars trying to make our way in the discipline; and as friends as we talked at professional conferences, and at our home institutions, about our families and children. I thank my colleagues in the Department of Politics, and Oberlin College, for their support of the symposium and my research and teaching over forty-nine years. I would be remiss not to thank the Oberlin students who were class tutors and research assistants, including Gerard Michael D'Emilio—a former honors student, recent law school graduate and coauthor of a book chapter with me—who was crucial to the completion of my contribution to this Festschrift and the forthcoming book. Finally, I want to thank my family (Diana, Rachel, Beth, Saul, and Judah) for the love and joy they bring to me each day.

REFERENCES

Chatfield, Sara. 2019. "Competing Social Constructions of Female Workers in *Lochner* Era Judicial Decision-Making." *Constitutional Studies* 4: 105–130.

Gerstmann, Evan. 2019. "Women's Rights as a Concern for the 'Lives Lived as Citizens Under a Rights Regime.'" *Constitutional Studies* 4: 89–104.

Graber, Mark. 2019. "Ron Kahn and the Glorious Long State of Courts and Parties." *Constitutional Studies* 4: 1–29.

Kahn, Ronald. Forthcoming. *Constructing Individual Rights in a Conservative Age: The Supreme Court and Social Change in the Rehnquist and Roberts Court Eras.*

Kahn, Ronald, and Gerard Michael D'Emilio. 2018. "Chapter 9: The Jurisprudence of Justice Scalia: Common-Law Judging Behind an Originalist Façade." In *The Conservative Revolution of Antonin Scalia*, edited by David A. Schultz and Howard Schweber, 219–44. Lanham, MD: Lexington Books.

Keck, Thomas M. 2019. "Is President Trump More Like Viktor Orbán or Franklin Pierce?" *Constitutional Studies* 4: 131–154.

Kersch, Ken I. 2019. "The Distinctiveness of the Supreme Court: An Historical Institutionalist Perspective." *Constitutional Studies* 4: 31–44.

Nackenoff, Carol. 2019. "The Supreme Court and 'The Reality of Lived Lives.'" *Constitutional Studies* 4: 45–63.

Novkov, Julie. 2019. "Precedential Social Facts and the Disappearance of Poverty from Constitutional Analysis." *Constitutional Studies* 4: 65–88.

Stone, Geoffrey R., Seidman, Louis Michael, Sunstein, Cass R., Tushnet, Mark V., and Karlan, Pamela S. 2018. *Constitutional Law.* 8th ed. New York: Wolters Kluwer.

Tamanaha, Brian Z. 2009. *Beyond the Formalist-Realist Divide: The Role of Politics in Judging.* Princeton, NJ: Princeton University Press.

CASES CITED

Bowers v. Hardwick, 478 U.S. 186 (1986)

Brown v. Board of Education of Topeka, 347 U.S. 483 (1954)

Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751 (2014)

Citizens United v. FEC, 558 U.S. 310 (2010)

Craig v. Boren, 429 U.S. 190 (1976)

District of Columbia v. Heller, 554 U.S. 570 (2008)

Employment Division v. Smith, 494 U.S. 872 (1990)

Fisher v. University of Texas at Austin, 136 S. Ct. 2198 (2016)

Gratz v. Bollinger, 539 U.S. 244 (2003)

Grutter v. Bollinger, 539 U.S. 306 (2003)

Janus v. American Federation of State, County, and Municipal Employees, Council 31, 138 S. Ct. 2448 (2018)

Lawrence v. Texas, 539 U.S. 558 (2003)

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

Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission, 138 S. Ct. 1719 (2018)

McCleskey v. Kemp, 481 U.S. 279 (1987)

Michael M. v. Superior Court of Sonoma County, 450 U.S. 464 (1981)

National Federation of Independent Business v. Sebelius, 567 U.S. 519 (2012)

National Institute of Family and Life Advocates v. Becerra, 138 S. Ct. 2361 (2018)

Newman v. Piggie Park Enterprises, 390 U.S. 400 (1968)

Nguyen v. INS, 533 U.S. 53 (2001)

Obergefell v. Hodges,135 S. Ct. 2584 (2015)

Parents Involved in Community School v. Seattle School District No. 1, 551 U.S. 701 (2007)

Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833 (1992)

Plessey v. Ferguson, 163 U.S. 537 (1896)

Reed v. Reed, 404 U.S. 71 (1971)

Regents of the University of California v. Bakke, 438 U.S. 265 (1978)

Roe v. Wade, 410 U.S. 113 (1973)

Romer v. Evans, 517 U.S. 620 (1996)

Rostker v. Goldberg, 453 U.S. 57 (1981)

San Antonio Independent School District v. Rodriguez, 411 U.S. 1 (1973)

Schuette v. Coalition to Defend Affirmative Action, 572 U.S. 291 (2014)

Sessions v. Morales-Santana, 137 S. Ct. 1678 (2017)

Shelby County, Alabama v. Holder, 570 U.S. 529 (2012)

Sherbert v. Verner, 374 U.S. 398 (1963)

United States v. Virginia, 518 U.S. 515 (1996)

United States v. Windsor, 570 U.S. 774 (2013)

Washington v. Davis, 426 U.S. 229 (1976)

West Coast Hotel [*v.* Parrish, 300 U.S. 379 (1937)

Whole Woman's Health v. Hellerstedt, 136 S. Ct. 2292 (2016)