

THE YALE LAW JOURNAL

CARY FRANKLIN

The New Class Blindness

ABSTRACT. There is a widespread perception that class receives no special protection under the Fourteenth Amendment. That perception arose forty years ago, when the Supreme Court shifted to the right, rejected the idea that the Constitution protects positive rights, and declined to recognize class as a suspect classification under the Equal Protection Clause. But those consequential developments have obscured an important, ongoing form of class-related constitutional protection: one that resides not in equal protection but in fundamental rights doctrine. This Article shows that a nontrivial number of fundamental rights came to be recognized as such — particularly during the Warren Court era — because they are essential not only to individual liberty but also to the equal citizenship of people without financial resources. Today, there are still doctrinal mechanisms in fundamental rights law that require courts to consider class when adjudicating the constitutionality of rights-burdening state action.

To illustrate this phenomenon, this Article focuses on reproductive rights, a major area of fundamental rights law whose connection to class is poorly understood. The Court's opinions in *Griswold v. Connecticut* and *Roe v. Wade* were not framed in terms of class, but class-related concerns informed the Court's decision to recognize birth control and abortion as fundamental rights. In the contexts of voting and criminal procedure too, the Court identified certain rights as fundamental in part because the state was denying them to financially disadvantaged people. In all of these areas, the Court developed fundamental rights doctrines that limited the extent to which the state could block such people from exercising their rights.

Today, these long-standing class-sensitive doctrines are under threat. An increasing number of conservative judges — including a number of Supreme Court Justices — have begun to argue that class-related concerns have no place under the Fourteenth Amendment. In support of this new class-blind approach, these judges cite Burger Court precedents rejecting positive rights claims and declining to treat the poor as a protected class under the Equal Protection Clause. But the Burger Court never held that courts are prohibited from considering class when interpreting the Fourteenth Amendment. Indeed, it preserved many of the class-sensitive mechanisms its predecessor had developed to protect fundamental rights. Thus far, the Court has rejected attempts to eradicate these remaining forms of class-related protection from the law. But the composition of the federal judiciary is now in flux, and it is not clear that resistance to the new class blindness will endure. What is clear is that the emergent notion that class-based considerations have no place anywhere under the Fourteenth Amendment is a product not of the Burger Court era, but of our own.



AUTHOR. W.H. Francis, Jr. Professor of Law, University of Texas School of Law. For cogent and insightful comments, I am grateful to Bruce Ackerman, Kate Andrias, Joey Fishkin, Willy Forbath, Daryl Levinson, Trevor Morrison, Bill Novak, Robert Post, David Pozen, Judith Resnik, Larry Sager, and Reva Siegel. Many thanks as well to the participants in the Legal Theory Workshop at Columbia Law School, the Legal History Workshop at the University of Michigan Law School, the Colloquium on Constitutional Theory at NYU School of Law, the Equality Roundtable at Cardozo Law School, and the Faculty Workshops at the George Washington School of Law, the University of Texas School of Law, Vanderbilt Law School, and Yale Law School. For outstanding research assistance, thanks are due to Kevin Trahan, Kelsey Chapple, and Anne Swift.



ARTICLE CONTENTS

INTRODUCTION	5
I. THE CLASS-BASED FOUNDATIONS OF MODERN FUNDAMENTAL RIGHTS LAW	17
A. Class and the Fundamental Right to Use Birth Control	19
B. What Privacy Hides	35
C. Equality Under the Rubric of Fundamental Rights	40
II. THE INCORPORATION AND PRESERVATION OF CLASS-BASED CONCERNS IN ABORTION LAW	47
A. Class and the Fundamental Right to Abortion	48
B. The Survival of Class-Based Concerns in Abortion Doctrine	63
III. THE EMERGENCE OF THE NEW CLASS BLINDNESS	70
A. Efforts Toward a New Class Blindness in Abortion Law	73
B. The New Class Blindness Across Fourteenth Amendment Law	82
1. Class Blindness in Voting	83
2. Class Blindness in Criminal Procedure	91
CONCLUSION	94

INTRODUCTION

In the 1960s, class was a major focus of constitutional concern. It was the era of *Gideon v. Wainwright*¹ and *Harper v. Virginia Board of Elections*,² an era in which the Court often spoke about the necessity of “[p]roviding equal justice for poor and rich,” and sometimes held that universally applicable fees “invidious[ly] discriminat[ed]” against people who could not afford to pay.³ There was disagreement at the time about how to interpret these holdings. Some scholars viewed them as part of an “egalitarian revolution”⁴—evidence that the poor were on their way to becoming a protected class for equal protection purposes. Others argued that these holdings vindicated a constitutional right to minimum welfare.⁵ On that view, the Warren Court was not demanding *equal* treatment of rich and poor, but rather “charting some islands of haven from economic disaster in the ocean of . . . free enterprise.”⁶ Either way, it seemed clear by the end of the 1960s that economic disadvantage had assumed a constitutional dimension—that the Court had embarked on the development of a Fourteenth Amendment jurisprudence of class.

That jurisprudence never materialized. In the 1970s, the New Right rose to political power, a new form of economic libertarianism (sometimes called neo-liberalism) became dominant, and Supreme Court decision-making turned in a

-
1. 372 U.S. 335 (1963) (holding that indigent defendants have a constitutional right to the assistance of state-provided legal counsel in a criminal trial).
 2. 383 U.S. 663 (1966) (holding that poll taxes violate the equal protection rights of those too poor to pay).
 3. *Griffin v. Illinois*, 351 U.S. 12, 16–17 (1956).
 4. Philip B. Kurland, *The Supreme Court, 1963 Term—Foreword: “Equal in Origin and Equal in Title to the Legislative and Executive Branches of the Government,”* 78 HARV. L. REV. 143, 144–45 (1964); see also Archibald Cox, *The Supreme Court, 1965 Term—Foreword: Constitutional Adjudication and the Promotion of Human Rights*, 80 HARV. L. REV. 91, 91 (1966) (“For a decade and a half the Supreme Court has been broadening and deepening the constitutional significance of our national commitment to Equality.”).
 5. Frank I. Michelman, *The Supreme Court, 1968 Term—Foreword: On Protecting the Poor Through the Fourteenth Amendment*, 83 HARV. L. REV. 7, 9 (1969); see also Albert M. Bendich, *Privacy, Poverty, and the Constitution*, 54 CALIF. L. REV. 407, 408 (1966) (drawing on recent decisions to argue in favor of “requiring, as matters of constitutional entitlement, provision of the minimal necessities of membership, not merely existence, in our society” (internal quotation marks omitted)); Arthur Selwyn Miller, *Toward a Concept of Constitutional Duty*, 1968 SUP. CT. REV. 199, 200 (arguing that “a judicial concept of constitutional duty, of obligation to take action, is being evolved out of a series” of recent decisions involving, among other things, race relations and criminal law).
 6. Michelman, *supra* note 5, at 33.

decidedly more conservative direction.⁷ Those developments had significant ramifications for the interpretation of the Fourteenth Amendment. The Burger Court declined to recognize class-based discrimination as suspect under the Equal Protection Clause,⁸ and it rejected the idea that the Constitution guarantees affirmative rights.⁹ Those jurisprudential moves generated a widespread perception—beginning in the late 1970s and persisting to this day—that class merits no special consideration under the Fourteenth Amendment. As a result, the amount of space in constitutional law casebooks devoted to class-related questions has shrunk.¹⁰ Class is now taught in constitutional law courses, if at

-
7. For more on this rightward shift in law and politics, see JEFFERSON COWIE, *STAYIN' ALIVE: THE 1970S AND THE LAST DAYS OF THE WORKING CLASS* (2012); MICHAEL J. GRAETZ & LINDA GREENHOUSE, *THE BURGER COURT AND THE RISE OF THE JUDICIAL RIGHT* (2016); LAURA KALMAN, *RIGHT STAR RISING: A NEW POLITICS, 1974-1980* (2010); and BRUCE J. SCHULMAN, *THE SEVENTIES: THE GREAT SHIFT IN AMERICAN CULTURE, SOCIETY, AND POLITICS* (2001).
 8. GRAETZ & GREENHOUSE, *supra* note 7, at 90-94 (discussing *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1 (1973), in which the Burger Court declined to extend heightened scrutiny to class-based discrimination).
 9. Helen Hershkoff, *Positive Rights and State Constitutions: The Limits of Federal Rationality Review*, 112 HARV. L. REV. 1131, 1132-35 (1999) (discussing the Burger Court's rejection of Fourteenth Amendment claims to welfare, housing, public education, and medical services on the ground that "the government does not owe its citizens any affirmative duty of care"); *see also*, e.g., *DeShaney v. Winnebago Cty. Dep't of Soc. Servs.*, 489 U.S. 189, 195-96 (1989) ("The [Due Process] Clause is phrased as a limitation on the State's power to act, not as a guarantee of certain minimal levels of safety and security. . . . [It] was intended to prevent government 'from abusing [its] power, or employing it as an instrument of oppression' The Framers were content to leave the extent of governmental obligation . . . to the democratic political processes." (citations omitted) (quoting *Davidson v. Cannon*, 474 U.S. 344, 348 (1986))).
 10. *See, e.g.*, Stephen Loffredo, *Poverty, Inequality, and Class in the Structural Constitutional Law Course*, 34 FORDHAM URB. L.J. 1239, 1242 (2007) ("Not long ago, poverty law issues held a vibrant, if not central, place in many constitutional law classes, and even elite law journals routinely featured articles examining the constitutional dimensions of wealth, poverty, and class. Yet for all appearances these issues have faded from the constitutional law curriculum It seems that each year the major constitutional law casebooks devote fewer pages and less attention to the constitutional status of poverty and economic inequality."). This situation stands in sharp contrast to the period before the Burger Court narrowed class-related constitutional protections. For instance, in the early 1970s, poverty law was a burgeoning field of study, and there were entire law school courses and textbooks devoted to the subject. *See, e.g.*, ARTHUR L. BERNEY ET AL., *LEGAL PROBLEMS OF THE POOR: CASES AND MATERIALS* (1975); GEORGE COOPER ET AL., *CASES AND MATERIALS ON LAW AND POVERTY* (2d ed. 1973); ARTHUR B. LAFRANCE ET AL., *LAW OF THE POOR* (1973); *see also* LAFRANCE, *supra*, at xvii (observing that poverty-related concerns have begun to infuse the law school curriculum and that "[e]ven basic subjects, such as property and constitutional law, have begun to reflect developments concerning the law of the poor").

all, from a historical perspective: it is a dead-end street, a road not taken.¹¹ If one were to tell the story of class over the past half century in the context of the Fourteenth Amendment, the narrative arc would look like a bell curve: the rise and fall of class as a matter of constitutional concern.

This Article differs from most of what has been written about class in constitutional law over the past few decades. It focuses not on the class-related doctrine the Court curtailed and rejected in the 1970s, but rather on the class-related doctrine that survived that retrenchment. Despite the very significant doctrinal changes that occurred in the Burger Court era, concerns about class did not simply vanish from Fourteenth Amendment law. There remain strains of Fourteenth Amendment law in which class still matters. Long-standing doctrine still constrains state action that infringes the rights of the financially disadvantaged.

Recently, however, these remaining domains of class-related concern have come under threat from a new form of judicial class blindness considerably more extreme than any doctrine wrought by the Burger Court. The Court in the 1970s made it more difficult in all sorts of ways to challenge the constitutionality of laws that disproportionately burden people without financial resources. But the Court in those years never held—never even suggested—that judges are flatly prohibited from taking class into account when interpreting the Fourteenth Amendment. Yet that is precisely what some litigants and judges have recently begun to contend in a range of legal contexts: that courts are bound by 1970s precedent to ignore class entirely when adjudicating Fourteenth Amendment claims. Thus far, these concerted and transcontextual efforts categorically to exclude class from the realm of constitutional concern have fallen below the radar of legal scholarship. This Article seeks to remedy this oversight and to make clear what is at stake in these new and emerging constitutional battles over class.

In almost all cases today, people without financial resources receive no special protection under the Equal Protection Clause: discrimination on the basis of class is subject only to rational basis review.¹² Outside of a very few contexts—

11. See Loffredo, *supra* note 10, at 1242 (postulating that “most law students hear virtually nothing in their basic constitutional law classes about [poverty law]; or about poor people, burgeoning economic inequality, plummeting mobility, the persistence of hunger and homelessness in the United States, class-based distribution of privilege and power, the political and social marginalization of people living in poverty, state responsibility regarding any of these phenomena, or the constitutional significance of a legal and political system that perpetuates this order of things”).

12. See, e.g., *Maher v. Roe*, 432 U.S. 464, 471 (1977) (stating that the Court “has never held that financial need alone identifies a suspect class for purposes of equal protection analysis”); *Ortwein v. Schwab*, 410 U.S. 656, 660 (1973) (“Appellants urge that the filing fee violates the Equal Protection Clause by unconstitutionally discriminating against the poor. . . . [T]his litigation . . . ‘is in the area of economics and social welfare.’ No suspect classification, such as

most notably in the area of criminal justice¹³ – class-based arguments grounded solely in equal protection are exceedingly unlikely to prevail. But the Court’s decision, nearly half a century ago, not to accord heightened scrutiny to class-based state action under the Equal Protection Clause did not mean that it simply abandoned the project of protecting people without financial resources under the Fourteenth Amendment. Rather, it decided to do (almost all of) that work under the Due Process Clause. Under substantive due process, the Court accords special constitutional protection not to particular groups, but to certain fundamental rights. When the state regulates in ways that infringe those rights, the Court generally applies heightened scrutiny; it bars the state from too severely restricting those rights without a compelling reason for doing so.¹⁴

This doctrine has long functioned as an important source of protection for the financially disadvantaged. Substantive due process protections are, for the most part, negative rights protections; the Court does not require the state to fund the exercise of fundamental rights.¹⁵ Fundamental rights jurisprudence of-

race, nationality, or alienage, is present. The applicable standard is that of rational justification.” (citations omitted) (quoting *United States v. Kras*, 409 U.S. 434, 446 (1973))).

13. For a notable, but limited, exception to the rule that discrimination on the basis of financial disadvantage triggers only rational basis review under equal protection, see, for example, *ODonnell v. Harris County*, 892 F.3d 147, 161 (5th Cir. 2018), which held that although indigents do not ordinarily “constitute a suspect class . . . heightened scrutiny is required when criminal laws detain poor defendants *because of their indigence*” (internal quotation marks omitted). See also, e.g., *Tate v. Short*, 401 U.S. 395, 397-99 (1971) (invalidating a facially neutral statute that authorized imprisonment for failure to pay fines because it violated the equal protection rights of indigents); *Williams v. Illinois*, 399 U.S. 235, 241-42 (1970) (invalidating a facially neutral statute that required convicted defendants to remain in jail beyond the maximum sentence if they could not pay fines and court costs associated with their sentences because it violated the equal protection rights of indigents). Reviewing these precedents and others in *San Antonio v. Rodriguez*, 411 U.S. at 20, the Court observed that the indigents “who constituted the class discriminated against in our prior cases shared two distinguishing characteristics: because of their impecuniness they were completely unable to pay for some desired benefit, and as a consequence, they sustained an absolute deprivation of a meaningful opportunity to enjoy that benefit.”
14. See, e.g., *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 357 (1978) (Brennan, White, Marshall & Blackmun, JJ., concurring in the judgment in part and dissenting in part) (“[A] government practice or statute which restricts ‘fundamental rights’ . . . is to be subjected to ‘strict scrutiny’ and can be justified only if it furthers a compelling government purpose and, even then, only if no less restrictive alternative is available.”).
15. Of course, legal scholars have long questioned the distinction between positive and negative rights. Stephen Holmes and Cass Sunstein have argued that we ought to think of rights – even so-called “negative” rights – as “taxpayer-funded and government-managed social services” because they “presuppose taxpayer funding of effective supervisory machinery for monitoring and enforcement.” STEPHEN HOLMES & CASS R. SUNSTEIN, *THE COST OF RIGHTS*:

ten works nonetheless to safeguard the rights of people without financial resources. In fact, a nontrivial number of the rights labeled fundamental in our constitutional tradition came to be recognized and protected as such because the state was denying them to financially disadvantaged people. In other words, in a substantial number of cases, concerns about the equal citizenship of the financially disadvantaged helped to shape what rights the Court recognized as fundamental in the first place.

This Article examines the genealogy and development of class-based protections that operate through substantive due process. Not all fundamental rights protected under the Fourteenth Amendment work to safeguard the equality interests of people without financial resources. But a wider range of such rights than we generally recognize do function this way, especially those that emerged in the Warren Court era. Even when the Court did not explicitly address class, its landmark fundamental rights decisions often reflected widespread concern about the inability of the financially disadvantaged to vindicate their constitutional interests.¹⁶

WHY LIBERTY DEPENDS ON TAXES 44, 48 (1999). Holmes and Sunstein observe that when one tallies up what the state spends on the judicial system, law enforcement, and the vast network of government-funded agencies necessary to the enforcement of rights, the total annual cost of rights to American taxpayers runs into the billions. *See id.* at 233-36. This observation provides a theoretical foundation for arguing that interpreting the Fourteenth Amendment to guarantee affirmative welfare rights is perfectly consistent with our legal tradition. But the Court has been resistant to this proposition for decades.

16. This Article focuses on the role of class in the development of fundamental rights doctrine, but that is not the only constitutional domain in which class-related considerations have shaped the law in profound and lasting ways. This Article touches briefly on the “right to travel” cases of the early 1970s, in which the Court held that states could not deprive newly resident poor people of the welfare and nonemergency medical benefits they provided to longer-term indigent residents because doing so violated the constitutional right to travel. *See infra* text accompanying notes 166-167. But there was a much greater revolution in those years where freedom of movement was concerned, and it had to do with the Court’s invalidation of vagrancy laws, which had been used for centuries to police the visibly poor and underemployed. In its landmark 1972 decision striking down a Florida vagrancy law, the Court relied on void-for-vagueness doctrine to find the law unconstitutional. *See Papachristou v. City of Jacksonville*, 405 U.S. 156 (1972). But there was no question that concerns about the rights of people without financial resources helped to drive the Court’s decision. *See, e.g., id.* at 170 (“Those generally implicated by the imprecise terms of the ordinance – poor people, nonconformists, dissenters, idlers – may be required to comport themselves according to the lifestyle deemed appropriate by the Jacksonville police Where, as here, there are no standards governing the exercise of . . . discretion . . . , the scheme furnishes a convenient tool for harsh and discriminatory enforcement by local prosecuting officials, against particular groups deemed to merit their displeasure. It results in a regime in which the poor and the unpopular are permitted to stand on a public sidewalk . . . only at the whim of any police officer.” (internal quotation marks and citation omitted)). The dismantling of vagrancy laws profoundly transformed policing and criminal procedure in this country and thus is another example of the

To illustrate this phenomenon, this Article focuses on one major area of fundamental rights jurisprudence whose connection to class is poorly understood: reproductive rights, particularly birth control and abortion. In 1965, the Court recognized the fundamental right of married people to use birth control in *Griswold v. Connecticut*.¹⁷ In 1973, in *Roe v. Wade*, the Court recognized abortion as a fundamental right.¹⁸ Neither of these decisions discussed class-based inequality in the way that, for example, the Court's contemporaneous equal protection decision in *Harper*, invalidating a state poll tax, did.¹⁹ Indeed, *Griswold* and *Roe* barely touched on the issue. But this was the era of the War on Poverty and the Poor People's Campaign.²⁰ Class-related concerns played a major role in constitutional contestation over birth control and abortion, both inside and outside the Court. Reproductive rights advocates in these years routinely argued that laws restricting access to birth control and abortion discriminated against the poor.²¹ Such laws did not necessarily prevent rich women from safely accessing these services, but they did often block the access of less privileged women. Over time, the increasing dominance of other (frequently overlapping) frames²² has obscured the extent to which class-based concerns motivated the campaign for

way in which class-related concerns have deeply shaped and continue to infuse our law in ways we do not always recognize. For an excellent account of this history, see RISA GOLUBOFF, *VAGRANT NATION: POLICE POWER, CONSTITUTIONAL CHANGE, AND THE MAKING OF THE 1960S* (2016).

17. 381 U.S. 479 (1965). A few years later, in *Eisenstadt v. Baird*, the Court held that the right to use birth control applied to unmarried individuals as well. 405 U.S. 438, 453 (1972) (“If the right of privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.”).
18. 410 U.S. 113 (1973).
19. See *Harper v. Va. Bd. of Elections*, 383 U.S. 663, 668 (1966) (“Wealth, like race, creed, or color, is not germane to one’s ability to participate intelligently in the electoral process. Lines drawn on the basis of wealth or property, like those of race, are traditionally disfavored.” (citation omitted)).
20. For more on the War on Poverty, see *THE WAR ON POVERTY: A NEW GRASSROOTS HISTORY, 1964-1980* (Annelise Orleck & Lisa Gayle Hazirjian eds., 2011). For more on the Poor People’s Campaign, see SYLVIE LAURENT, *KING AND THE OTHER AMERICA: THE POOR PEOPLE’S CAMPAIGN AND THE QUEST FOR ECONOMIC EQUALITY* (forthcoming Jan. 2019).
21. See *infra* Sections I.A, II.A.
22. See generally LINDA GREENHOUSE & REVA SIEGEL, *BEFORE ROE V. WADE: VOICES THAT SHAPED THE ABORTION DEBATE BEFORE THE SUPREME COURT’S RULING 167-77* (2d ed. 2012), https://documents.law.yale.edu/sites/default/files/beforeroe2nded_1.pdf [<https://perma.cc/Z5NP-7XML>] (collecting primary source documents that reveal the multiplicity of frames through which Americans viewed reproductive rights in the years before *Roe*).

constitutional rights in these contexts—and how deeply embedded such concerns were in the logic of the fundamental rights protections the Court constructed.

Scholars have long noted that due process and equal protection are not perfectly distinct, but rather overlapping and mutually reinforcing constitutional values.²³ The lines between these two constitutional values were particularly indistinct in the middle decades of the twentieth century, when the Warren Court breathed new life into the Fourteenth Amendment and began to develop the doctrinal frameworks that govern due process and equal protection today. In those years, class-based equality concerns were often at the center of hybrid due process-equal protection litigation under the Fourteenth Amendment. As a result, such concerns were built into many of the fundamental rights protections the Court established half a century ago, in more and less explicit ways.²⁴

In arguing that concerns about people without financial resources were an engine driving the establishment of some fundamental rights in the 1960s and

-
23. See, e.g., Rebecca L. Brown, *Liberty, The New Equality*, 77 N.Y.U. L. REV. 1491, 1491-92 (2002) (arguing that “a key feature of American constitutional structure” is “the interdependence of equality and liberty”); Pamela S. Karlan, *Equal Protection, Due Process, and the Stereoscopic Fourteenth Amendment*, 33 MCGEORGE L. REV. 473, 474 (2002) (noting that the intertwining of due process and equal protection “can have synergistic effects, producing results that neither clause might reach by itself”); Kenneth L. Karst, *The Liberties of Equal Citizens: Groups and the Due Process Clause*, 55 UCLA L. REV. 99, 102 (2007) (observing that “for a century, concerns about group subordination have profoundly influenced the doctrinal growth of substantive due process”); Laurence H. Tribe, *Lawrence v. Texas: The “Fundamental Right” That Dare Not Speak Its Name*, 117 HARV. L. REV. 1893, 1898 (2004) (arguing that “due process and equal protection, far from having separate missions and entailing different inquiries, are profoundly interlocked in a legal double helix”); Kenji Yoshino, *The New Equal Protection*, 124 HARV. L. REV. 747, 749 (2011) (arguing that “[t]oo much emphasis has been placed on the formal distinction between the equality claims made under the equal protection guarantees and the liberty claims made under the due process or other guarantees” and that “[i]n practice, the Court does not abide by this distinction”); see also *Lawrence v. Texas*, 539 U.S. 558, 575 (2003) (“Equality of treatment and the due process right to demand respect for conduct protected by the substantive guarantee of liberty are linked in important respects, and a decision on the latter point advances both interests.”); *Bearden v. Georgia*, 461 U.S. 660, 665-66 (1983) (observing that “[d]ue process and equal protection principles [often] converge in the Court’s analysis” and warning against the resolution of Fourteenth Amendment cases “by resort to easy slogans or pigeonhole analysis”).
24. *Gideon* is an example of a fundamental rights decision in which class-based equality concerns were relatively close to the surface. *Gideon* recognized the right of an indigent defendant in a state criminal prosecution to state-appointed counsel, reaffirming the fundamentality of the right to legal representation in the criminal justice system. *Gideon v. Wainwright*, 372 U.S. 335, 341-45 (1963). Yet the Court’s opinion also raised concerns about the rights of indigents. See *id.* at 344 (asserting that the “noble ideal [of equality before the law] cannot be realized if the poor man charged with crime has to face his accusers without a lawyer to assist him”).

early 1970s, this Article does not mean to suggest that those rights are equivalent to the equal protection rights that might have developed if the Court had recognized financial disadvantage as a suspect classification. Equal protection protects groups across the board, against all kinds of discriminatory state action; substantive due process protects against the infringement only of particular rights. More importantly, the Court's failure to develop a class-based equal protection jurisprudence meant that it never fully defined the concept of class. There was voluminous conversation about class in the 1960s and early 1970s, and the Court responded to that conversation, explicitly and otherwise, in multiple landmark opinions. But all that conversation never crystalized into a shared understanding of what we mean when we talk about class in the context of the Fourteenth Amendment.²⁵ The Court's decision not to protect class under the Equal Protection Clause meant that it was not required to develop a coherent definition of the

25. Especially given this lack of consensus, a note is in order about the meaning of the term "class" in this Article. "Class" has a number of different meanings. In some prominent discourses, particularly those influenced by Marxist thought and its legacy, "class" is fundamentally about relations of production: people are assigned to different classes based on their relationship to processes of production. See, e.g., Erik Olin Wright, *A General Framework for the Analysis of Class Structure*, in *THE DEBATE ON CLASSES* 3 (Erik Olin Wright et al. eds., 1989). Sociological conceptions of class rooted in the thought of Max Weber focus on the nature and prestige of different forms of work to define different classes based mainly on occupation. See, e.g., ROBERT ERICKSON & JOHN H. GOLDTHORPE, *THE CONSTANT FLUX: A STUDY OF CLASS MOBILITY IN INDUSTRIAL SOCIETIES* (1992). Some important works of legal scholarship have made use of conceptions of class that are similarly group-based—indeed caste-like—and tied fundamentally to work, ownership, and production. See, e.g., William E. Forbath, *Caste, Class, and Equal Citizenship*, 98 MICH. L. REV. 1 (1999). This Article does not use the term "class" in any of these ways. Instead, it uses the term as it is increasingly used in the American vernacular, to refer to an individual's level of access to material resources—that is, to where an individual falls on a spectrum that stretches from destitution to great wealth. This use of the term "class" situates individuals along a scale, as economists do when they conceptualize inequality in terms of income and/or wealth. See, e.g., THOMAS PIKETTY, *CAPITAL IN THE TWENTY-FIRST CENTURY* 252 (2014) (defining class in terms of wealth and income and noting that "the underlying social reality is always a continuous distribution").

From this perspective, class-related constitutional concerns include, but are not limited to, concerns about people who fall below some specific economic threshold, such as the poverty line or the court-defined concept of indigency. Such concerns may be triggered by various forms of regulation that impinge on the rights of people with relatively limited financial resources, including people who struggle to find legal representation, or to access abortion, because they cannot afford to obtain these goods through the market. Legal scholars sometimes use the term "wealth" (as in "wealth-based discrimination") to describe the family of concerns that are the focus of this Article. However, that term gives rise to unnecessary confusion because on its face it appears to be distinguishing wealth (as in net assets) from income (as in earnings)—a distinction that is critically important in economics and increasingly important in conversations about inequality, but not one that this Article means to invoke. Legal scholars sometimes focus instead on "poverty," and in that way evoke a subset, but not the entirety, of

term. Indeed, that may have been one of the reasons the Justices leaned toward protecting the rights of people without financial resources under due process instead.²⁶

The fact that “class” never gained a fixed meaning in American constitutional law, however, does not diminish the fact that the Court in the 1960s made clear that an individual’s lack of financial resources has consequences for equal citizenship that are sometimes a matter of constitutional concern. This Article shows how a particular line of substantive due process rulings, in the context of reproductive liberty, responded to those concerns and protected the rights of people without financial resources. These rulings did not simply deem certain rights fundamental and thereby bar the state from blocking financially disadvantaged women’s access to goods and services essential to their equal standing in society; they also built into substantive due process doctrine particular mechanisms that sometimes require courts to examine the effects of governmental regulation on women without financial resources in particular. These mechanisms have been part of Fourteenth Amendment jurisprudence for almost half a century, and they remain an often overlooked, but important, form of class-based constitutional protection.

These doctrinal mechanisms, and the basic idea that the Fourteenth Amendment sometimes offers special protection to people without financial resources, are currently under attack. Some states, and some judges, have begun to argue — across a variety of substantive due process contexts, including abortion, voting, and criminal procedure — that it is impermissible for courts to consider the particular burdens that government action places on those without financial resources when determining the constitutionality of that action. Advocates of this new class blindness claim that they are simply applying precedent. They cite landmark decisions from the Burger Court era declining to recognize the financially disadvantaged as a protected class under the Equal Protection Clause and rejecting the assertion that the Fourteenth Amendment guarantees affirmative welfare rights.

But those decisions were not about protecting fundamental rights from state interference under the Due Process Clause. The Burger Court was not willing to apply heightened scrutiny to class-based discrimination under equal protection,

the set of concerns that are the focus of this Article. Fifty years ago, many commentators believed the Court was poised to recognize “the poor” as a protected class. This Article is not simply about “the poor.” The kinds of constitutional protections it identifies may protect a wider swath of people than those who would qualify as “poor” according to federal definitions of poverty. For these reasons, this Article uses the term “class” to refer to an individual’s financial circumstances — and the term “class blindness” to refer to the insistence that those circumstances ought to be irrelevant to the adjudication of Fourteenth Amendment claims.

26. See *infra* Section I.C.

and it was not willing to recognize positive rights under the Constitution. It never suggested, however, that the government could restrict the exercise of fundamental rights with no regard for the effects of those restrictions on people without financial resources. Instead, the Court made clear, in the contexts of abortion, voting, and criminal procedure, that there *were* constitutional limitations on how far the government could go when it regulated in ways that truncated the ability of financially disadvantaged people to exercise their rights. Indeed, the Court was quite explicit about the fact that—although it was not prepared to engage in other, broader forms of class-based constitutional protection—it would carefully scrutinize governmental action that blocked the financially disadvantaged from exercising fundamental rights. Today, some jurists are attempting to use the Burger Court’s reticence to engage in bolder forms of class-based constitutional protection to do away with the more limited forms of class-based protection the Burger Court affirmed.

In order to recognize what is now under threat, and to appreciate the radical nature of the new class blindness, it is necessary to recover some of the forgotten history of class-related protections under the Due Process Clause and to see how deeply embedded class-based concerns are in some prominent strains of substantive due process doctrine. To those ends, Part I of this Article examines *Griswold*, one of the central and most generative foundations of modern fundamental rights law. The Court’s recognition of a right to privacy that encompasses the use of birth control spawned decades of debate about the legitimacy of judicial protection of unenumerated constitutional rights. But the intense scholarly focus on privacy—much like the focus on privacy in the Court’s opinion—masks the role that concerns about people without financial resources played in *Griswold*. Constitutional contestation over birth control was shot through with class-related concerns in the Warren Court era, and those concerns informed popular and judicial understandings of what was at stake in the case. The Court did not issue a class-based equal protection ruling in *Griswold*, as some had urged. It relied instead on fundamental rights doctrine—indeed, helped to develop that doctrine—to invalidate a law whose harshest effects were felt by women without financial resources. In this way, although we often overlook it today, *Griswold* was of a piece with the Warren Court’s other, more overtly class-focused decisions. Indeed, it was an important part of the trend in this era toward using fundamental rights doctrine to safeguard the equal citizenship of the financially disadvantaged.

The 1970s undoubtedly marked a turning point, not just with respect to class, but with respect to Fourteenth Amendment law more generally. The Burger Court narrowed the protection afforded historically subordinated groups

under the Equal Protection Clause.²⁷ It declined to recognize the financially disadvantaged as a protected class for equal protection purposes and it rejected the idea that the Constitution guarantees affirmative rights – closing two major avenues of class-based constitutional protection. But closing those two avenues did not spell the end of constitutional concerns about class. Part II examines the survival, through the Burger Court era and beyond, of the idea that class matters in assessing the constitutionality of laws that impinge on fundamental rights protected by the Fourteenth Amendment. It focuses in particular on abortion, a context in which class-related protections were built into the substantive due process doctrine the Court constructed in *Roe* and *Planned Parenthood of Southeastern Pennsylvania v. Casey*.²⁸ *Roe*'s trimester framework and *Casey*'s undue burden test both reflect concerns about the rights of financially disadvantaged women. The undue burden test, which remains operative today, sometimes *requires* courts to examine how an abortion restriction will affect the ability of women without financial resources to exercise their rights.

Part III examines current challenges to the past half century of class-conscious fundamental rights adjudication in a range of constitutional contexts. It looks first at attempts to block the consideration of class in the context of abortion, including, most prominently, by the Fifth Circuit and several Justices on the Supreme Court. It then turns to voting, where a similar struggle over the role of class in Fourteenth Amendment law is now occurring in contexts such as voter identification laws. Finally, it turns to criminal procedure, a context in which some Supreme Court Justices have argued that the Burger Court effectively overruled a number of landmark class-related Warren Court holdings, and that those holdings no longer afford constitutional protection to people without financial resources.

27. One of the key ways in which the Court narrowed equal protection was by holding that evidence of disparate impact alone is insufficient to prove discrimination under the Fourteenth Amendment. By the end of the 1970s, equal protection plaintiffs challenging facially neutral laws were required to prove that the state acted with discriminatory purpose, which “implies more than intent as volition or intent as awareness of consequences. It implies that the decisionmaker . . . selected or reaffirmed a particular course of action at least in part ‘because of,’ not merely ‘in spite of,’ its adverse effects upon an identifiable group.” *Pers. Adm’r v. Feeney*, 442 U.S. 256, 279 (1979) (citation and footnote omitted). For more on this standard, see Ian Haney-López, *Intentional Blindness*, 87 N.Y.U. L. REV. 1779, 1825-37 (2012), which characterizes the constitutional standard in cases involving facially neutral state action as one of “malicious intent”; and Reva B. Siegel, *Equality Talk: Antisubordination and Anticlassification Values in Constitutional Struggles over Brown*, 117 HARV. L. REV. 1470, 1536-37 n.227 (2004), which asserts that by the late 1970s, the Court had “define[d] discriminatory purpose as involving a mental state akin to malice.”

28. 505 U.S. 833 (1992).

Thus far, the Court has resisted invitations categorically to exclude class from consideration in these areas, and in fundamental rights jurisprudence more generally. But it has said very little about why class-based protections persist under due process, what function they serve, and what is wrong with the historical and doctrinal accounts being offered by proponents of the new class blindness. This Article seeks to answer those questions – questions that will only become more pressing as the Supreme Court and the federal appeals courts shift even further to the right.²⁹ This shift in the composition of the federal courts may very well result in the destruction or diminishment of long-standing Fourteenth Amendment protections for financially disadvantaged people; it will certainly intensify pressure in that direction. The history this Article recovers should enable us to argue in more informed ways about constitutional precedent, to better appreciate the important role class has played in our constitutional tradition, and to recognize all that is at stake in coming battles over the meaning of landmark Fourteenth Amendment precedents. Most importantly, this history demonstrates that the emergent notion that class-related considerations have no place anywhere under the Fourteenth Amendment is a product not of the Burger Court era, but of our own.

29. See John Gramlich, *With Another Supreme Court Pick, Trump Is Leaving His Mark on Higher Federal Courts*, PEW RES. CTR. (July 16, 2018), <http://www.pewresearch.org/fact-tank/2018/07/16/with-another-supreme-court-pick-trump-is-leaving-his-mark-on-higher-federal-courts> [https://perma.cc/SH9U-BB3K] (“Donald Trump has successfully appointed more federal appeals court judges so far in his presidency than Barack Obama and George W. Bush combined had appointed at the same point in theirs”); Thomas Kaplan, *Trump Is Putting Indelible Conservative Stamp on Judiciary*, N.Y. TIMES (July 31, 2018), <https://www.nytimes.com/2018/07/31/us/politics/trump-judges.html> [https://perma.cc/XNW4-5P4R] (“President Trump and Senate Republicans are leaving an ever-expanding imprint on the judiciary, nudging powerful appeals courts rightward through a determined effort to nominate and confirm a steady procession of young conservative jurists.”); *id.* (“I think it’s the longest-term sort of impact we can have on the future of the country,” Senator Mitch McConnell, Republican of Kentucky and the majority leader, said in an interview “[I]t’s my top priority.”); Rorie Spill Solberg & Eric N. Waltenburg, *Are Trump’s Judicial Nominees Really Being Confirmed at a Record Pace? The Answer Is Complicated*, WASH. POST (June 14, 2018) <https://www.washingtonpost.com/news/monkey-cage/wp/2018/06/14/are-trumps-judicial-nominees-really-being-confirmed-at-a-record-pace-the-answer-is-complicated> [https://perma.cc/KQ82-5A47] (“[A]bout three-quarters of [Trump’s] nominees have been men, and 90 percent are white, reversing a presidential trend And Trump is selecting considerably more conservative judges than have previously served in these spots. So it is indeed likely that many federal benches will shift to the right.”).

I. THE CLASS-BASED FOUNDATIONS OF MODERN FUNDAMENTAL RIGHTS LAW

In 1969, Frank Michelman published *On Protecting the Poor Through the Fourteenth Amendment*, one of the most famous Harvard Forewords ever written.³⁰ The consensus among constitutional scholars in the late 1960s was that the Warren Court’s increasing sensitivity to class evidenced an emerging “judicial hostility towards official discrimination, be it de jure or de facto, according to pecuniary circumstance.”³¹ “If the commentators are right,” Michelman observed, “relative impecuniousness appears to be joining race and national ancestry to compose a complex of traits which, if detectible as a basis of officially sanctioned disadvantage, render such disadvantage ‘invidious’ or ‘suspect.’”³² Michelman, however, saw things differently. He argued that the Court’s supposedly egalitarian holdings “could be more soundly and satisfyingly understood as vindication of a state’s duty to protect against certain hazards which are endemic in an unequal society, rather than vindication of a duty to avoid complicity in unequal treatment.”³³

Michelman’s “minimum welfare” theory is famous in its own right, but it remains well known today in part because, within a few years of the Foreword’s publication, the Burger Court rejected this theory with impressive force. By the late 1970s, the Court had made it clear that the Fourteenth Amendment *did not* impose a duty on the state to protect people “against certain hazards associated with impecuniousness which even a society strongly committed to competition and incentives would have to find unjust.”³⁴ Unjust though those hazards may be, the Burger Court held, constitutional law offers no remedies. Of course, the egalitarians of the 1960s fared no better than Michelman when the political winds shifted. The Burger Court rejected their theory too, holding that class-based discrimination did not trigger heightened scrutiny under the Equal Protection Clause. For this reason, Michelman’s essay functions today not only as a work of constitutional theory, but also as a historical artifact. It provides a fading snapshot of a lost world—a world in which legal scholars took the Court’s solicitude toward the financially disadvantaged as a given and the real argument was about how best to understand the shape of the emerging constitutional protection accorded this group.

30. Michelman, *supra* note 5.

31. *Id.* at 19.

32. *Id.*

33. *Id.* at 9 (emphasis omitted).

34. *Id.* at 42.

This Part returns to that lost world, but it differs from most such excursions today in that its aim is not to describe all that has changed since the 1960s but rather to identify the germ of something that persists. There is no question that much has changed. It would be “off-the-wall”³⁵ in our current constitutional regime to argue, as legal scholars did in the Warren Court era, that “relative impecuniousness” triggers heightened scrutiny or that the state is constitutionally obligated to provide people with social welfare benefits.³⁶ When it comes to class, Fourteenth Amendment doctrine today provides less protection than it did in the 1960s – and less protection than scholars at the time imagined it would provide in the future. But there is a difference between asserting that sensitivity to class under the Fourteenth Amendment has declined, and asserting, as some courts and advocates now do, that it has been extinguished.

This Part focuses on the Court’s growing recognition in the 1960s of an interrelationship between class and fundamental rights – a recognition that economic disadvantage often interferes with the exercise of such rights in ways that can deprive people without financial resources of the guarantees of the Fourteenth Amendment. The 1960s was a period of tremendous growth in the number and scope of fundamental rights protections, in no small part because the Court in 1965 dramatically recommitted itself to the idea that the Constitution protects unenumerated rights in addition to those explicitly contained in the document’s text. This Part begins by examining *Griswold*, the case in which the Court recognized an unenumerated, constitutionally protected right to privacy that encompasses the use of birth control. Today, we do not think of *Griswold* as a case about class. But concerns about the ability of poor and low-income women to obtain birth control fueled the litigation in *Griswold* and informed the litigants’ and the Court’s sense of why judicial intervention was necessary to protect a fundamental right in this context. This Part then looks with a wider lens at some of the cases in which the Court in the 1960s and 1970s more directly addressed the relationship between protecting people without financial resources and safeguarding fundamental rights. These cases reveal the Court’s anxiety about the potential of a class-based equal protection approach to unsettle too

35. JACK M. BALKIN, *LIVING ORIGINALISM* 17–18 (2011) (describing as “off-the-wall” constitutional arguments that are inconsistent with “existing understandings and existing doctrines”).

36. This is not categorically true. For a limited exception on the equal protection front, see *supra* note 13, which discusses courts’ application of intermediate scrutiny in some criminal procedure contexts in which the state detains poor defendants *because* of their indigence. In addition, some legal academics have argued that all rights are effectively positive rights. See *supra* note 15. This point provides a theoretical foundation for advocating recognition of positive social welfare rights under the Constitution, but the Court has remained resistant.

much socioeconomic regulation and its surprising volubility about the benefits of doing class-based equality work under due process instead.

A. Class and the Fundamental Right to Use Birth Control

When the Court decided in 1973 that the Fourteenth Amendment protects the right to abortion, and when it decided in 2015 that the Fourteenth Amendment protects same-sex couples' right to marry, it cited *Griswold* as precedent.³⁷ It is not surprising to see *Griswold* cited in these contexts. When we think about the right to birth control today, we group it with other Fourteenth Amendment rights involving reproduction, sexuality, and the family. *Griswold* may not have been the first Supreme Court decision to address these topics, but it is widely considered the progenitor of the important and controversial line of cases that protect rights to reproductive and sexual autonomy. More recently, scholars have also begun to link *Griswold* with sex-based equal protection doctrine.³⁸ Although concerns about women's equality do not appear on the surface of the opinion, even in the early 1960s some Americans had begun to view the right to use birth control as a prerequisite for women's equal standing in American society.³⁹ Over time, the links between reproductive autonomy and women's equality have become clearer, to the public and to the Court.⁴⁰

Yet at the time *Griswold* was decided, sexual liberty and women's equality were not the only frames for thinking about laws that restricted access to contraception. The women's movement, the sexual revolution, and the gay rights movement had not yet gotten off the ground in 1965. Early constitutional battles over birth control predated the founding of the National Organization for Women and the Summer of Love. This is not to say that ideas about sexual freedom and women's equality did not inform early debates about birth control.

37. See *Obergefell v. Hodges*, 135 S. Ct. 2584, 2597-98 (2015); *Roe v. Wade*, 410 U.S. 113, 155 (1973).

38. See, e.g., Neil S. Siegel & Reva B. Siegel, *Contraception as a Sex Equality Right*, 124 YALE L.J.F. 349, 349-50 (2015) (recovering the history of Connecticut's birth control ban and showing the ways in which that ban reflected and reinforced traditional gender roles).

39. See Melissa Murray, *Overlooking Equality on the Road to Griswold*, 124 YALE L.J.F. 324 (2015) (discussing the birth control cases that immediately predated *Griswold* and that explicitly linked access to birth control with women's equality).

40. See Reva B. Siegel, *Sex Equality Arguments for Reproductive Rights: Their Critical Basis and Evolving Constitutional Expression*, 56 EMORY L.J. 815, 820, 828-34 (2007) (describing the growing recognition in American constitutional law of a close nexus between reproductive rights and women's equality).

They did.⁴¹ But at the time of *Griswold*, there were other prominent frames for thinking about the right to birth control – frames that were later obscured by the increasing dominance of gender and sexuality frames. One of those early frames for thinking about the right to birth control was class.

Concerns about financially disadvantaged women were interwoven with the campaign for birth control from the start. Margaret Sanger, the founder of Planned Parenthood and the leader of the national birth control campaign in the first half of the twentieth century, began her career as a nurse on the Lower East Side of Manhattan, where she witnessed scores of women grow ill and sometimes die for lack of any effective means of controlling their fertility.⁴² In her autobiography, Sanger describes how her patients, many of them immigrants, “implored [her] to reveal the ‘secret’ that rich people had” for spacing their pregnancies.⁴³ Her goal, when she became a birth control advocate, was to create a publicly accessible “‘chain’ of clinics” throughout the country that would enable

41. See, e.g., Murray, *supra* note 39, at 325-27 (discussing *Trubek v. Ullman*, 367 U.S. 907 (1961), an early challenge to Connecticut’s birth control ban – dismissed by the Court for lack of jurisdiction – that was brought by a married couple who viewed “contraception [as] an essential tool for effective family planning in a marriage that was organized as a partnership of equals”); Siegel & Siegel, *supra* note 38, at 355-56 (citing the American Civil Liberties Union’s amicus brief in *Griswold*, which argued that laws barring the use of birth control violated the Fourteenth Amendment because “the right of the individual to engage in any of the common occupations . . . applies to women as well as men. . . . [I]n addition to its economic consequences, the ability to regulate child-bearing has been a significant factor in the emancipation of married women. In this respect, effective means of contraception rank equally with the Nineteenth Amendment in enhancing the opportunities of women who wish to work in industry, business, the arts, and the professions. Thus, the equal protection clause protects the class of women who wish to delay or regulate child-bearing effectively.” (internal quotation marks and citations omitted)); see also Mary L. Dudziak, *Just Say No: Birth Control in the Connecticut Supreme Court Before Griswold v. Connecticut*, 75 IOWA L. REV. 915, 937 (1990) (quoting an anti-birth control campaigner who claimed in the early 1960s that “a Planned Parenthood Center is like a house of prostitution,” in that it augments sexual freedom at the expense of morality and contravenes the important precept that “marital relations are for procreation and not entertainment”).

42. *Margaret Sanger Is Dead at 82; Led Campaign for Birth Control*, N.Y. TIMES (Sept. 7, 1966), <https://archive.nytimes.com/www.nytimes.com/learning/general/onthisday/bday/0914.html> [<https://perma.cc/74E3-9GZZ>].

43. MARGARET SANGER, AN AUTOBIOGRAPHY 89 (Cooper Square Press 1999) (1938). A study conducted in New York at the time Sanger was working as a nurse revealed that forty-one percent of women treated at the city’s health clinics had never used contraception, and, of those, a majority had had at least one abortion. See Jill Lepore, *Birthright*, NEW YORKER, Nov. 14, 2011, at 48. “These were not merely ‘unfortunate conditions among the poor,’” Sanger wrote. “I knew the women personally.” SANGER, *supra*, at 89.

women – especially those who lacked financial resources – to obtain birth control.⁴⁴ Sanger viewed her advocacy work as part of “a fighting, forward, no fooling movement, battling for the freedom of the poorest parents and for women’s biological freedom and development.”⁴⁵ It was no small battle. As Jill Lepore observes, “[f]rom the start, the birth control movement has been as much about fighting legal and political battles as it has been about staffing clinics, because, in a country without national healthcare, making contraception available to poor women has required legal reform.”⁴⁶

One such reform occurred in 1936, in a case called *United States v. One Package* (of Japanese pessaries), in which the Second Circuit invalidated a federal law barring the importation of contraceptive devices.⁴⁷ The court held in *One Package* that when Congress in the late nineteenth century passed its infamous Comstock laws – which barred, among other things, the transport of birth control⁴⁸ – it could not have intended to “prevent the importation, sale, or carriage by mail of things which might intelligently be employed by conscientious and competent physicians for the purpose of saving life or promoting the wellbeing of their patients.”⁴⁹ This broad holding, which effectively legalized the dissemination of contraceptive devices in much of the United States, was a major victory for birth control advocates and providers, who had lived under the very real threat of arrest in previous decades.⁵⁰ Morris Ernst, general counsel of the American Civil

44. MARGARET SANGER, MY FIGHT FOR BIRTH CONTROL 144 (1931).

45. See Lepore, *supra* note 43, at 50.

46. *Id.* at 49; cf. Martha J. Bailey, *Fifty Years of Family Planning: New Evidence on the Long-Run Effects of Increasing Access to Contraception*, 2013 BROOKINGS PAPERS ON ECON. ACTIVITY 341, 349, https://www.brookings.edu/wp-content/uploads/2016/07/2013a_bailey.pdf [<https://perma.cc/3GAY-JB73>] (noting that, in the early 1960s, an annual supply of Enovid (the pill) cost an amount of money equivalent to more than three weeks of full-time work at the 1960 minimum wage, meaning that many low-income women could not afford it on their own).

47. 86 F.2d 737 (2d Cir. 1936).

48. In 1873, Congress passed an “Act for the Suppression of Trade in, and Circulation of, Obscene Literature and Articles of Immoral Use.” Act of Mar. 3, 1873, ch. 258, 17 Stat. 598. This criminalized the use of the United States Postal Service to send contraceptives, abortifacients, and other materials deemed obscene – including books and pamphlets containing information about these items. This law, along with other federal and state laws of similar character and vintage, are known as Comstock laws, after Anthony Comstock, the head of the New York Society for the Suppression of Vice and the driving force behind this regulation. For more on Comstock and his legal legacy, see NICOLA BEISEL, IMPERILED INNOCENTS: ANTHONY COMSTOCK AND FAMILY REPRODUCTION IN VICTORIAN AMERICA 76-103 (1997).

49. *One Package*, 86 F.2d at 739.

50. For descriptions of various arrests of advocates and medical professionals for providing women with birth control or information about birth control in the years between the two

Liberties Union and lead attorney challenging the law in *One Package*, jubilantly declared in 1936 that the decision “mean[t] the end of birth control laws.”⁵¹

Ernst spoke too soon. Around the time of *One Package*, activists in Connecticut decided to defy that state’s birth control ban and open a chain of reproductive-healthcare clinics intended to meet the needs of women who lacked the resources to find ways around the law.⁵² By 1938, they had opened nine.⁵³ But when police began to arrest clinic personnel, the Second Circuit’s decision in *One Package*, invalidating a federal law, was of little help. In 1940, the Connecticut Supreme Court upheld the state’s ban,⁵⁴ and all of the state’s clinics were forced to close.⁵⁵

For two decades after the Connecticut court’s decision, those clinics remained closed, leaving women without financial resources very limited options for obtaining birth control.⁵⁶ By the early 1960s, however, pressure to expand access to contraception was mounting, even in the heavily Catholic states of the Northeast. By that point, most Americans – even most Catholics – believed birth control should be legal.⁵⁷ Millions of women had begun taking the new pill –

World Wars, see PETER C. ENGELMAN, A HISTORY OF THE BIRTH CONTROL MOVEMENT IN AMERICA 83–86, 96, 157–58 (2011).

51. *Id.* at 168.

52. See DAVID J. GARROW, LIBERTY AND SEXUALITY: THE RIGHT TO PRIVACY AND THE MAKING OF *ROE V. WADE* 1–78 (1994). Connecticut’s law barred the distribution or use of any drug, medicinal article, or instrument for the purpose of preventing conception. It was originally enacted in 1879, one of many Comstock laws enacted in that period. See Act of March 28, 1879, ch. 78, 1879 Conn. Pub. Acts 428; see also JOHN W. JOHNSON, *GRISWOLD V. CONNECTICUT: BIRTH CONTROL AND THE CONSTITUTIONAL RIGHT OF PRIVACY* 15 (2005) (noting that some private doctors in Connecticut in the decades before *Griswold* were willing to bend the law for married couples, but that many women, “particularly those of lower socio-economic status,” lacked this special access).

53. GARROW, *supra* note 52, at 78.

54. *State v. Nelson*, 11 A.2d 856, 862–63 (Conn. 1940).

55. GARROW, *supra* note 52, at 78.

56. Catherine G. Roraback, *Griswold v. Connecticut: A Brief Case History*, 16 OHIO N.U. L. REV. 395, 396 (1989) (noting that between 1940 and the time *Griswold* and Buxton opened their clinic, “there was no public or private clinic or facility in Connecticut providing free birth control or family planning service”); see also SUSAN M. HARTMANN, THE HOME FRONT AND BEYOND: AMERICAN WOMEN IN THE 1940S 171 (1982); Dudziak, *supra* note 41, at 917; Jonathan Daniels, *Birth Control and Democracy*, NATION, Nov. 1, 1941, at 429.

57. DANIEL K. WILLIAMS, DEFENDERS OF THE UNBORN: THE PRO-LIFE MOVEMENT BEFORE *ROE V. WADE* 59–60 (2016) (“A January 1965 Gallup survey showed that 78 percent of American Catholics supported making birth control information available to anyone who requested it . . . [I]ndeed, a survey conducted in 1965 revealed that 53 percent of Catholic wives in their late teens or twenties were using a form of contraception forbidden by the Church.”).

first approved for contraceptive use in 1960—and millions more were using other artificial means of contraception.⁵⁸ In many places, aside from Connecticut, governments had gone from suppressing birth control to, at least tentatively, supporting its use by funding reproductive-health clinics and subsidizing the cost of contraception through public health programs.⁵⁹

Against this backdrop, birth control advocates in Connecticut decided to try again. In November of 1961, they opened a Planned Parenthood clinic in the city of New Haven.⁶⁰ Several days later, police arrested the clinic’s directors—Estelle Griswold, the Executive Director of Planned Parenthood in Connecticut, and Dr. Lee Buxton, head of Obstetrics and Gynecology at the Yale School of Medicine and the clinic’s medical director—for violating the birth control ban.⁶¹

When contemporary constitutional scholars tell the story of *Griswold*, they almost always describe Connecticut’s birth control law as antiquated.⁶² They regularly assert that the law had fallen into desuetude long before the Court invalidated it.⁶³ This characterization assumes that, despite the law on the books, birth control was readily available in practice to those who wanted it. Commentators frequently note that, by the early 1960s, condoms were available in drug stores in Connecticut (ostensibly for the purpose of preventing disease, which

58. ELIZABETH SIEGEL WATKINS, ON THE PILL: A SOCIAL HISTORY OF ORAL CONTRACEPTIVES, 1950-1970, at 34-35 (1998); Steven M. Spencer, *The Birth Control Revolution*, SATURDAY EVENING POST (Jan. 15, 1966), <http://www.saturdayeveningpost.com/2015/12/31/history/post-perspective/50-years-ago-the-birth-control-revolution.html> [https://perma.cc/S5DG-RADT].

59. See generally Brief for Planned Parenthood Federation of America, Inc., as Amicus Curiae at app. A, *Griswold v. Connecticut*, 381 U.S. 479 (1965) (No. 496), 1965 WL 115612 [hereinafter *Planned Parenthood Griswold Brief*]; *id.* at 26 (explaining that, by the mid-1960s, the architects of the War on Poverty had begun to devote “significant federal funds and federal effort to aiding Americans . . . to secure . . . contraceptive services”).

60. *Griswold*, 381 U.S. at 480.

61. *Id.*

62. See, e.g., 2 THE SOCIAL HISTORY OF CRIME AND PUNISHMENT IN AMERICA: AN ENCYCLOPEDIA 714 (Wilbur R. Miller ed., 2012); Nathan S. Chapman & Michael W. McConnell, *Due Process as Separation of Powers*, 121 YALE L.J. 1672, 1797 (2012).

63. See, e.g., ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 95 (1990) (“If any Connecticut official had been mad enough to attempt enforcement, the law would at once have been removed from the books and the official from his office.”); Cass R. Sunstein, *What Did Lawrence Hold? Of Autonomy, Desuetude, Sexuality, and Marriage*, 2003 SUP. CT. REV. 27, 50 (arguing that by the early 1960s, Connecticut’s birth control ban had fallen into desuetude because it was so “hopelessly out of touch with existing convictions”).

the law allowed).⁶⁴ For women, however, this was insufficient: women generally needed to see a doctor to obtain birth control. Some doctors would skirt the law for women in their social milieu, and women with money could sometimes visit other states with less restrictive laws.⁶⁵ But this hardly amounted to universal access. Thus, even as late as the 1960s, Connecticut's law effectively impeded many women's access to birth control. For young and unmarried women,⁶⁶ and for poor women and women of color, obtaining contraception remained a struggle.⁶⁷

That lack of access—particularly acute in Connecticut, but still a problem even in states that officially permitted the use of birth control—had real consequences for women's health. Unwanted pregnancies could be dangerous, especially for poor women and women of color. In 1960, the maternal mortality rate for nonwhite women was nearly four times higher than it was for white

-
64. See Daniel J. Kevles, *The Secret History of Birth Control*, N.Y. TIMES (July 22, 2001), <https://www.nytimes.com/2001/07/22/books/the-secret-history-of-birth-control.html> [<https://perma.cc/G7V5-SRSQ>] (discussing the availability of condoms in this period). Indeed, in 1961, in a case predating *Griswold* that ducked the question of the law's constitutionality, the Court itself observed that "contraceptives are commonly and notoriously sold in Connecticut drug stores." *Poe v. Ullman*, 367 U.S. 497, 502 (1961); see also Senior Lawyers Div., *Oral History of Catherine G. Roraback*, A.B.A. (2006) [hereinafter *Oral History*], https://www.americanbar.org/content/dam/aba/directories/women_trailblazers/oraback_interview_1.authcheckdam.pdf [<https://perma.cc/R9RZ-BJHY>] (noting that in the early 1960s, "things like condoms were sold in drug stores and other places around Connecticut" because the phrase "for the prevention of disease" was printed on the box, and law enforcement "couldn't prove that the physicians or the druggists' intention was to purchase it to be preventing conception").
65. Lori Ann Brass, *An Arrest in New Haven, Contraception and the Right to Privacy*, 41 YALE MED., Spring 2007, at 16, 16; Jonathan T. Weisberg, *In Control of Her Own Destiny: Catherine G. Roraback and the Privacy Principle*, YALE L. REP., Winter 2004, at 39, 41.
66. Even Planned Parenthood would not provide birth control to unmarried women in Connecticut: *Griswold* and Buxton's clinic "gave information, instruction, and medical advice to married persons" only. *Griswold v. Connecticut*, 381 U.S. 479, 480 (1965); see also Weisberg, *supra* note 65, at 42 (quoting Katie Roraback, who noted that doctors in Connecticut would not prescribe birth control to unmarried women and that even in New York clinics, where Connecticut women would sometimes go to obtain birth control, "there was a need to be a married person, in quotes" — a requirement unmarried women sometimes tried to satisfy by borrowing a ring).
67. See C. THOMAS DIENES, LAW, POLITICS, AND BIRTH CONTROL 116 (1972) (observing that although many women in Connecticut obtained birth control prior to *Griswold*, "the poor, dependent on free medical services, were effectively denied assistance"). It is worth noting that *Griswold* did not end this struggle. See, e.g., La'Tasha D. Mayes, *Black Women are Dying from a Lack of Access to Reproductive Health Services*, TIME (Jan. 19, 2018), <http://time.com/5109797/black-women-dying-reproductive-health> [<https://perma.cc/HJS5-CGNC>].

women.⁶⁸ A significant percentage of those deaths resulted from illegal abortions, which biostatisticians in this period estimated, at the high end, occurred at a rate of 1.2 million a year.⁶⁹

Women with limited financial resources were dramatically overrepresented in these statistics. A study of low-income women in New York City in the 1960s found that, of those who reported having had an abortion, approximately eighty percent reported that they had attempted to perform the procedure on themselves, and only two percent said that a physician had been involved in any way.⁷⁰ Unsurprisingly, this situation constituted a grave danger to women's health. In 1962, nearly 1,600 women were admitted to the Harlem Hospital Center for incomplete abortions, which amounted to one abortion-related hospital admission for every forty-two deliveries at that hospital that year.⁷¹ In 1968, the University of Southern California Los Angeles County Medical Center – another public facility serving primarily indigent patients – admitted just over 700 women with septic abortions, one admission for every fourteen deliveries.⁷²

68. 2 U.S. DEP'T OF HEALTH, EDUC., & WELFARE, VITAL STATISTICS OF THE UNITED STATES 1960 pt. A 1-49 (1963).

69. Statistics regarding abortion were difficult to come by in this period because the procedure was generally illegal and even abortions performed legally were not always recorded as such. The upper-range estimate of 1.2 million a year was first reported in 1955, at a landmark conference on abortion, by a committee chaired by the prominent biostatistician Christopher Tietze. The committee's lower-range estimate for induced abortions was 200,000. See CAROLE JOFFE, DOCTORS OF CONSCIENCE: THE STRUGGLE TO PROVIDE ABORTION BEFORE AND AFTER *ROE V. WADE* 211 n.1 (1995). Joffe notes that the 1.2 million estimate was considered "credib[le] in most medical and social science circles" in the 1960s, and that in 1968, Michael Burnhill, a physician and demographer, estimated that the number of illegal abortions in the United States fell between 650,000 and 1.3 million annually. *Id.* Another analysis, extrapolating from data from North Carolina, estimated that in 1967, there were 829,000 illegal or self-induced abortions in the United States. Rachel Benson Gold, *Lessons from Before Roe: Will Past Be Prologue?*, 6 GUTTMACHER REP. ON PUB. POL'Y 8, 8 (2003). As far as abortion-related deaths were concerned: in the 1930s, the number of reported deaths from illegal abortion annually numbered in the thousands. *Id.* By the mid-1960s, that number had dropped into the hundreds, but in the year *Griswold* was decided, illegal abortions still accounted for seventeen percent of all deaths attributed to pregnancy and childbirth. *Id.* That figure included only deaths that were officially attributed to illegal abortion – the actual figure was likely much higher. *Id.*

70. Gold, *supra* note 69, at 8.

71. *Id.*

72. *Id.* For further discussion of the toll that lack of access to reproductive-health services took in this period, especially on poor women and women of color, see DAVID A. GRIMES & LINDA G. BRANDON, EVERY THIRD WOMAN IN AMERICA: HOW LEGAL ABORTION TRANSFORMED OUR NATION 8-14 (2014); and Steven Polgar & Ellen S. Fried, *The Bad Old Days: Clandestine Abortions Among the Poor in New York City Before Liberalization of the Abortion Law*, 8 FAM. PLAN. PERSP. 125 (1976).

The consequences that resulted from a lack of access to birth control were particularly dire for women of color.⁷³ When Martin Luther King, Jr., received the Margaret Sanger Award from Planned Parenthood in 1966, he focused on this disparity. “Negroes have no mere academic nor ordinary interest in family planning,” he asserted. “They have a special and urgent concern.”⁷⁴ “Like all poor,” he noted, African Americans experience real suffering as a result of being deprived of access to contraception.⁷⁵ “For th[is] reason[,]” he contended, “we are natural allies of those who seek to inject any form of planning in our society that enriches life and guarantees the right to exist in freedom and dignity.”⁷⁶

Disadvantaged women were foremost in the minds of the advocates who challenged Connecticut’s birth control ban in *Griswold*. As Executive Director of Connecticut Planned Parenthood, Estelle Griswold made the accessibility of birth control to poor women and outreach to minority communities her top priorities.⁷⁷ In 1956, she launched a service through which women in Connecticut

73. See Melanie Tervalon, *Black Women’s Reproductive Rights*, in *WOMEN’S HEALTH: READINGS ON SOCIAL, ECONOMIC, AND POLITICAL ISSUES* 136 (Nancy Worcester & Marianne Whatley eds., 1988).

74. MARTIN LUTHER KING, JR., *FAMILY PLANNING—A SPECIAL AND URGENT CONCERN* 3 (1966), <http://www.thekingcenter.org/archive/document/family-planning-special-and-urgent-concern> [<https://perma.cc/D95E-KYX4>].

75. *Id.* at 4.

76. *Id.* at 5. Not all leaders in the civil rights movement supported expanding African American women’s access to birth control. In the late 1960s and 1970s, some members of the Black Panthers and the Black Muslims strongly opposed increased access to contraception among black women, viewing it as “a white plot to decimate the black race.” Simone M. Caron, *Birth Control and the Black Community in the 1960s: Genocide or Power Politics?*, 31 J. SOC. HIST. 545, 545, 547 (1998). Although African American women in this period shared deep concerns about racist uses of birth control, including the forced sterilization of women of color (which many women in the civil rights movement campaigned against), the “genocide arguments espoused by the Black Power Movement” against birth control “made little headway” among them—or, indeed, among most African American men. *Id.* at 549. A study in the early 1970s showed that eighty-seven percent of African Americans approved of publicly financed birth control clinics and sharply differentiated voluntary forms of contraception from involuntary ones. Barbara Williams, *Blacks Reject Sterilization—Not Family Planning*, *PSYCHOL. TODAY*, June 1974, at 26; see also DOROTHY ROBERTS, *KILLING THE BLACK BODY: RACE REPRODUCTION, AND THE MEANING OF LIBERTY* 101 (1997) (reporting that a 1970 study showed that eighty percent of black women in Chicago approved of birth control, and noting that one reason black women “supported family planning was that they were disproportionately victims of unsafe abortions”).

77. See GARROW, *supra* note 52, at 135-40. In 1962, when Alan Guttmacher became president of the national Planned Parenthood, his priorities overlapped significantly with those of Griswold. His top three priorities for the national organization were “improving Planned Parenthood’s relationship with the black community, securing federal support for family-planning programs for the poor, and liberalizing abortion law.” Lepore, *supra* note 43, at 50.

could obtain free referrals and transportation to a birth control clinic in New York, just across the state line.⁷⁸ In 1961, when she was arrested for opening the New Haven clinic, Griswold told reporters: “It is the woman of the lower socio-economic group who does not know she can space her children, who cannot afford to go to a private doctor, who is being discriminated against by the Connecticut law.”⁷⁹ Such concerns also motivated Buxton, the Yale School of Medicine professor who served as the clinic’s chief physician. “It’s the poor women I worry about,”⁸⁰ he explained, because what the state’s enforcement of the birth control ban “adds up to [is] the rich getting contraceptives and the poor getting children.”⁸¹ Catherine (Katie) Roraback, one of the lead attorneys in *Griswold*, recalled that Buxton was very insistent that “the issue [wa]s that [he] c[ould]n’t prescribe to poor patients,” and that the ultimate goal of the case was to “take care of poor women.”⁸²

Roraback and the handful of other young female lawyers who litigated the early reproductive rights cases discussed in this Part and the next shared this class-based perspective.⁸³ These pioneering lawyers have largely been written out of legal scholarship on the foundational reproductive rights cases.⁸⁴ But they

Of course, one reason outreach to minority communities was necessary was that the mainstream campaign for reproductive rights, in the period of *Griswold* and *Roe*, was led by whites and often excluded people of color. See Amy Kesselman, *Women Versus Connecticut*, in *ABORTION WARS: A HALF-CENTURY OF STRUGGLE, 1950-2000*, at 42, 51 (Rickie Solinger ed., 1998) (observing that “[a]lthough New Haven . . . had a sizable African-American and growing Puerto Rican population” in the late 1960s and 1970s, “[i]n Connecticut, as in the rest of the country, the racist policies and practices of population control groups had left a bitter legacy in communities of color”).

78. GARROW, *supra* note 52, at 139-40.

79. *Id.* at 197 (quoting Griswold).

80. *Oral History*, *supra* note 64, at 50 (quoting Buxton).

81. Philip S. Cook, *For Connecticut, a Chain of Birth Control Clinics*, N.Y. HERALD TRIB., June 21, 1961, at 14 (quoting Buxton); see also Jack V. Fox, *Court Test to Bring Birth Control Issue into Open*, CHI. DAILY DEFENDER, Dec. 6, 1961, at 10 (quoting Buxton explaining that clinics are necessary because, among low-income women, “it is almost invariably the responsibility of the woman alone to avoid pregnancy. She hasn’t the money to go to a doctor. And, anyway, she wouldn’t think of going to a private doctor for that reason.”).

82. *Oral History*, *supra* note 64, at 50 (quoting Buxton).

83. For more on the young female lawyers who made feminist class-based arguments in cases challenging restrictive abortion laws pre-*Roe*, see *infra* notes 226-241 and accompanying text.

84. For notable exceptions to the general erasure in legal scholarship of these pioneering young lawyers’ contributions to the development of reproductive rights law, see, for example, Dudziak, *supra* note 41, at 932-33; Linda Greenhouse & Reva B. Siegel, *The Unfinished Story of Roe v. Wade*, in *REPRODUCTIVE RIGHTS AND JUSTICE STORIES* (Melissa Murray, Kate Shaw & Reva Siegel eds., forthcoming 2019) (manuscript at 11-13), https://law.yale.edu/system/files/documents/faculty/papers/ssrn_-_greenhouse_siegel_-_the_unfinished_story_of_roe_v

played a crucial role in championing those cases and in constructing constitutional frames that ultimately influenced the development of reproductive rights law under the Fourteenth Amendment.

Roraback—who went on from *Griswold* to represent Ericka Huggins, one of the defendants in New Haven’s famous Black Panther trials⁸⁵—argued that “the important thing about the *Griswold* case always was the fact that it . . . [was] an issue of whether poor people could get access to birth control.”⁸⁶ Harriet Pilpel, who authored Planned Parenthood’s amicus brief in the case, was similarly attuned to “the class discrimination angle which . . . characterized the enforcement of the birth control laws.”⁸⁷ Pilpel, an important civil liberties lawyer who worked for Planned Parenthood and the ACLU, had been involved in legal challenges to birth control regulations for decades.⁸⁸ She argued in 1952 that Connecticut’s enforcement of its birth control ban meant that “sales of less reliable, expensive and ‘capable of other use’ contraceptives continued to flourish,” while “lower income women whose health urgently required the prescription of contraceptive devices were no longer able to obtain them at low prices or free from medically supervised clinics.”⁸⁹ By 1965, Pilpel sensed among the American public a “growing awareness that birth control legislation and policy is often class legislation and discrimination in the extreme.”⁹⁰

_wade_7-9.pdf [https://perma.cc/AB27-CBSG]; Murray, *supra* note 39, at 324-26; and Siegel & Siegel, *supra* note 38, at 354-55.

85. See Kesselman, *supra* note 77, at 47. For more on the extraordinary challenges Roraback faced in these cases and more generally as a young female lawyer at a time when there were not many women practicing law, see *Interview with Catherine Roraback*, by Marilyn Kuberka, ORAL HISTORY ARCHIVE OF THE CONNECTICUT WOMEN’S HALL OF FAME (Feb. 14, 2003), <http://cwhf.org/media/upload/files/Transcripts/Roraback%20Interview%20Transcript.pdf> [https://perma.cc/492M-LQP2].
86. *Oral History*, *supra* note 64, at 41; see also Roraback, *supra* note 56, at 396 (“The persons most disadvantaged by the legal situation in Connecticut were poor women whose only sources of medical advice and service were public or private clinic facilities.”).
87. Harriet F. Pilpel, *The Crazy Quilt of Our Birth Control Laws*, 1 J. SEX RES. 135, 140 (1965).
88. See *id.* at 139. Indeed, one of the first cases she worked on as a young lawyer was *United States v. One Package*, 86 F.2d 737 (2d Cir. 1936). She also worked on *State v. Nelson*, 11 A.2d 856 (Conn. 1940), and *Tileston v. Ullman*, 26 A.2d 582 (Conn. 1942), cases in which the Connecticut Supreme Court upheld the state’s birth control ban. See GARROW, *supra* note 52, at 64-68, 101-02.
89. HARRIET F. PILPEL & THEODORA ZAVIN, *YOUR MARRIAGE AND THE LAW* 175 (1952).
90. Pilpel, *supra* note 87, at 135; see also LEIGH ANN WHEELER, *HOW SEX BECAME A CIVIL LIBERTY* 115 (2013) (noting that Pilpel gave a presentation at the ACLU’s Biennial Conference in 1964 in which she argued that “sex laws” constitute a form of “class legislation” because they are applied primarily against poor and underprivileged people).

Like many of the other birth control advocates in *Griswold*, Pilpel viewed the challenge to Connecticut's birth control ban as part of a broader campaign for reproductive freedom with both class and race dimensions. The point of *Griswold*, she observed, was to establish the idea "of free choice in the birth control field,"⁹¹ a freedom that would allow women to use birth control—and also not to use it. *Griswold* was founded on "a constitutional principle of voluntarism in reference to procreation," she argued—a principle that not only disallowed bans on birth control but also prohibited the compulsory and involuntary sterilization of women,⁹² a form of abuse the state continued to visit on poor women and women of color.⁹³ Buxton shared this broad conception of the case. Immediately after the oral argument at the Supreme Court, he began to talk to his lawyers "about the abortion statutes,"⁹⁴ which, in his view, also violated the principle of voluntarism with respect to procreation. They agreed: a few years after *Griswold*, both Roraback and Pilpel became involved in challenges to abortion bans.⁹⁵ The

91. Harriet F. Pilpel, *Birth Control and a New Birth of Freedom*, 27 OHIO ST. L.J. 96, 98 (1967).

92. *Id.* at 98-99; see also WHEELER, *supra* note 90, at 95 (reporting that in addition to providing legal assistance to Planned Parenthood and the American Birth Control League, Pilpel also provided such assistance to the Association for Voluntary Sterilization and the Kinsey Institute).

93. For more on the brutal history of involuntary sterilization among women of color in the middle decades of the twentieth century, see ANGELA DAVIS, *WOMEN, RACE, AND CLASS* 215-21 (1981); ROBERTS, *supra* note 76, at 89-103; and JOANNA SCHOEN, *CHOICE AND COERCION: BIRTH CONTROL, STERILIZATION, AND ABORTION IN PUBLIC HEALTH AND WELFARE* 202-16 (2005). See also LESLIE J. REAGAN, *WHEN ABORTION WAS A CRIME* 207 (1997) ("The ease with which doctors sterilized poor women, a crucial issue to black feminists and other feminists of color by the 1970s, was already apparent in 1965.").

94. *Oral History*, *supra* note 64, at 50.

95. Roraback was one of the chief architects of *Abele v. Markle*, also known as *Women v. Connecticut*, in which a federal district court invalidated Connecticut's ban on abortion one year prior to *Roe v. Wade*. See *Abele v. Markle*, 342 F. Supp. 800, 800 (D. Conn. 1972). Roraback and her colleague Nancy Stearns of the Center for Constitutional Rights ultimately recruited nearly two thousand women to serve as plaintiffs in the case, and their arguments against the ban were grounded in broad, feminist conceptions of reproductive rights—including the idea that banning abortion discriminates against poor women. For more on this case and the litigation strategy behind it, see GREENHOUSE & SIEGEL, *supra* note 22, at 167-77 (reprinting primary source documents related to the case); and Kesselman, *supra* note 77. Harriet Pilpel was also deeply involved in the legal campaign for abortion rights in the 1960s and 1970s; among other things, she authored amicus briefs in *Roe v. Wade* and *Maher v. Roe*. See Brief Amici Curiae & Annexed Brief of the American Public Health Ass'n et al., *Maher v. Roe*, 432 U.S. 464 (1977) (Nos. 75-1440, 75-442), 1976 WL 181644; Supplemental Brief for Amici Curiae Planned Parenthood Federation of America, Inc. et al., *Roe v. Wade*, 410 U.S. 113 (1973) (Nos. 70-18, 70-40), 1972 WL 126043.

idea that the fight for access to contraception was part of a larger fight for reproductive justice was also taking hold in this period outside the courtroom, as African American, Asian, Latina, and Native American activists began to argue that “[t]he lack of the availability of safe birth control methods, . . . forced sterilization practices and the inability to obtain legal abortions” relegated women of color – and poor women of color in particular – to the status of second-class citizens.⁹⁶

The Court’s opinion in *Griswold* does not (visibly) reflect any of this history. It focuses, famously, on privacy – more specifically, on the privacy that inheres within marriage. “Would we allow the police to search the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives?” an outraged Justice William O. Douglas asked in his majority opinion. “The very idea is repulsive to the notions of privacy surrounding the marriage relationship.”⁹⁷ As commentators at the time noted, Justice Douglas had simply conjured up this image of “fictional police invading a fictional bedchamber of a fictional couple.”⁹⁸ There was no evidence that police had ever – in the history of Connecticut’s law – searched a married couple’s bedroom for contraceptives.⁹⁹ Yet in the half century that has elapsed since *Griswold* was decided, this imaginary scene of marital disruption has substantially obscured the actual facts in the case and the class-related concerns that pervaded the litigation.

In 1965, however, those concerns were readily apparent, even to the Justices on the Supreme Court. Indeed, four years prior to *Griswold*, in *Poe v. Ullman*, the Court cited the state’s enforcement of the law exclusively against birth control clinics as a justification for ducking the question of the law’s constitutionality.¹⁰⁰ *Poe* was brought by Buxton and three patients in his private medical practice,

96. Frances Beal, *Double Jeopardy: To Be Black and Female*, in BLACK WOMAN’S MANIFESTO 29 (1969), https://library.duke.edu/digitalcollections/wlmpc_wlmmso1009/#info [<https://perma.cc/E26B-RWN8>]; see also ROBERTS, *supra* note 76, at 100-03 (discussing reproductive-justice arguments by African American women in the late 1960s and 1970s). See generally Jael Silliman et al., UNDIVIDED RIGHTS: WOMEN OF COLOR ORGANIZE FOR REPRODUCTIVE JUSTICE (2004) (discussing reproductive-justice activism among African Americans, Native Americans, Latinas, and Asians and Pacific Islanders).

97. *Griswold v. Connecticut*, 381 U.S. 479, 485-86 (1965).

98. Robert G. Dixon, Jr., *The Griswold Penumbra: Constitutional Charter for an Expanded Law of Privacy?*, 64 MICH. L. REV. 197, 218 (1965).

99. See Transcript of Oral Argument at *3, *Griswold v. Connecticut*, 381 U.S. 479 (1965) (No. 496) [hereinafter *Griswold* Oral Argument], <http://academic.brooklyn.cuny.edu/history/johnson/griswoldoral.htm> [<https://perma.cc/2RFM-62TK>] (“The only prosecutions, actually, have been in the case of clinics, where the prosecutions have been brought against doctors, nurses and assistants.”).

100. 367 U.S. 497, 508-09 (1961).

who argued that the birth control ban violated their Fourteenth Amendment rights.¹⁰¹ The Court concluded the case was nonjusticiable because there was no evidence the law would be enforced against “the conduct in which the present appellants wish to engage—the giving of private medical advice by a doctor to his individual patients, and their private use of the devices prescribed.”¹⁰² Justice Felix Frankfurter, who authored the Court’s opinion in *Poe*, complained to his colleagues that what the plaintiffs were actually seeking was not the right to use birth control or to dispense it in the context of a private medical practice, but rather, authorization to open clinics accessible to the public.¹⁰³ Justice William Brennan echoed this assessment, asserting in his concurring opinion that “[t]he true controversy in this case is over the opening of birth-control clinics on a large scale . . . [as] it is that which the State has prevented in the past.”¹⁰⁴

As the dissenters in *Poe* heatedly pointed out, the fact that Buxton and his patients would have been required to break the law and at least potentially risk prosecution to prescribe and use birth control ought to have been sufficient to render the case justiciable.¹⁰⁵ The real problem in *Poe* was that, for a number of

101. *Id.* at 498–500.

102. *Id.* at 502, 508–09.

103. See GARROW, *supra* note 52, at 183. To persuade a skeptical Court that the birth control ban did indeed make a material difference in people’s lives, Fowler Harper, the Yale Law professor who represented Buxton and his patients at the Supreme Court, argued in *Poe* that, as a result of the State’s continued enforcement of the law, “no public or private clinic for the purpose of advising on contraception[]” had existed in the State for twenty years. Oral Argument at 43:30, *Poe v. Ullman*, 367 U.S. 497 (1961) (No. 60), <https://www.oyez.org/cases/1960/60>. Thus, he asserted, “[t]he people in Connecticut who need contraceptive advice from doctors most, the people in the lower income brackets and lower education brackets, the people who need it most do not get it because there are no clinics available.” *Id.* at 43:55. But these arguments were of no avail. Indeed, the Court seized on them to avoid deciding the case.

104. *Poe*, 367 U.S. at 509 (Brennan, J., concurring); see also GARROW, *supra* note 52, at 198–99 (noting that just after *Poe* came down, Justice Brennan informed an audience of British barristers that the plaintiffs “actually were seeking invalidation of the Connecticut statute in the interest of opening birth control clinics”).

105. See *Poe*, 367 U.S. at 533 (Harlan, J., dissenting) (“I find it difficult to believe that doctors . . . would continue openly to disseminate advice about contraceptives . . . in reliance on the State’s supposed unwillingness to prosecute, or to consider that high-minded members of the profession would in consequence of such inaction deem themselves warranted in disrespecting this law so long as it is on the books.”); *id.* at 511–12 (Douglas, J., dissenting) (“[T]he Court feels that it can, contrary to every principle of American or English common law, go outside the record to conclude that there exists a ‘tacit agreement’ that these statutes will not be enforced. No lawyer, I think, would advise his clients to rely on that ‘tacit agreement.’ No police official, I think, would feel himself bound by that ‘tacit agreement.’” (footnote omitted)); *id.* at 513 (“What are these people—doctor and patients—to do? Flout the law and go to prison? Violate the law surreptitiously and hope they will not get caught?”).

historical and jurisprudential reasons, the Court (and particularly Justice Frankfurter) did not want to adjudicate the Connecticut law's constitutionality in 1961.¹⁰⁶ The way the Court ducked the question in *Poe*, however, ensured that clinics would play a central role in *Griswold*. On his second trip to the Supreme Court, Buxton contested the constitutionality of the Connecticut law as medical director of the new Planned Parenthood clinic downtown. At oral argument, Thomas Emerson, the Yale Law School professor who took over the case when it reached the Supreme Court, repeatedly drew the Justices' attention to the class-based impact of the birth control ban.¹⁰⁷ "[T]he newly developed devices [i]n the contraceptive field[] require medical supervision,"¹⁰⁸ he argued, and by closing clinics, the state limited access to these essential forms of birth control to middle-class women. Thus, he contended, *Griswold* was not simply about the right to use birth control; it was also about the "right to operate a birth control center, and of persons unable to afford private medical advice to make use of those facilities."¹⁰⁹ Emerson emphasized that the state was directing its enforcement authority exclusively against clinics, and that "what this means is not only that contraceptive devices are not available as such to persons who cannot afford

106. For further discussion of the Court's desire to avoid adjudicating the constitutionality of Connecticut's law in 1961, see Philip P. Frickey, *Getting from Joe to Gene (McCarthy): The Avoidance Canon, Legal Process Theory, and Narrowing Statutory Interpretation in the Early Warren Court*, 93 CALIF. L. REV. 397, 412 n.65, 444 n.278 (2005), which argues that the Court in *Poe* invoked "dubious justiciability grounds" and "treated its mandatory appellate jurisdiction as discretionary to avoid addressing sensitive constitutional issues"; and Jonathan D. Varat, *Variable Justiciability and the Duke Power Case*, 58 TEX. L. REV. 273, 317 (1980) (footnote omitted), which observes that "the Court occasionally appears to use justiciability doctrine, as in *Poe v. Ullman*, to avoid decision of controversial constitutional issues that the Court would rather decide at a later, more politically acceptable time, if at all." See generally Ryan C. Williams, *The Paths to Griswold*, 89 NOTRE DAME L. REV. 2155 (2014) (providing an extensive and thoughtful account of the Court's resistance to deciding this question in the early 1960s).

107. Katie Roraback served as lead attorney for *Griswold* and Buxton as their case made its way through the lower courts. Kesselman, *supra* note 77, at 47. Emerson took over that role when the case reached the Supreme Court; "[h]e argued *Griswold v. Connecticut* . . . with Catherine Roraback sitting beside him at the counsel's table." Weisberg, *supra* note 65, at 43. Like his colleagues on the *Griswold* case, Emerson had a broad interest in civil rights; in the 1930s, he served on the defense team that successfully appealed the conviction of the Scottsboro boys. Glenn Fowler, *Thomas I. Emerson*, 83, *Scholar Who Molded Civil Liberties Law*, N.Y. TIMES (June 22, 1991), <https://www.nytimes.com/1991/06/22/obituaries/thomas-i-emerson-83-scholar-who-molded-civil-liberties-law.html> [https://perma.cc/9D4T-4UAE].

108. *Griswold* Oral Argument, *supra* note 99, at *16.

109. Brief for Appellants at 20, *Griswold v. Connecticut*, 381 U.S. 479 (1965) (No. 496), 1965 WL 115611.

to go to private doctors, but that the whole range of medical services which are supplied by a clinic are not available to those people.”¹¹⁰

Planned Parenthood’s brief in *Griswold*, authored by Harriet Pilpel, amplified this point in a lengthy appendix listing all of the government programs now devoted to helping low-income people obtain birth control, nearly everywhere aside from Connecticut, which cut off disadvantaged people from such assistance.¹¹¹ Unsurprisingly, the brief focused heavily on the need for birth control clinics to serve populations for whom contraception would otherwise be inaccessible. Many of its arguments were framed in terms of public health—a frame that was highly prevalent in debates about reproductive rights in the 1960s.¹¹² Planned Parenthood argued that “far from guarding the public morals, the public safety and the public health,” Connecticut’s birth control law undermined those values.¹¹³ It drew extensively on statements by the American Public Health Association and various government entities concerned with public health to explain why it was essential, particularly for financially disadvantaged people, for the Court to protect “the right to mitigate the evils of poverty and ill health by family planning.”¹¹⁴

Had John Hart Ely, who was then clerking for Chief Justice Warren, had his way, the Court’s opinion in *Griswold* would have been framed almost entirely in terms of class. Ely wrote a series of memoranda for the Chief Justice that focused on the starkly class-stratified landscape of birth control provision Connecticut’s ban had created.¹¹⁵ Women without financial resources were the ones who wanted most for birth control, he observed.¹¹⁶ “Clinics are of course the answer,” Ely asserted, “[y]et it is only against the clinics that the law is enforced Thus

110. *Griswold* Oral Argument, *supra* note 99, at *16.

111. See Planned Parenthood *Griswold* Brief, *supra* note 59, at app. A.

112. For a notable example of this public health frame in early debates over reproductive rights, see Mary Steichen Calderone, *Illegal Abortion as a Public Health Problem*, 50 AM. J. PUB. HEALTH 948 (1960), reprinted in GREENHOUSE & SIEGEL, *supra* note 22, at 22-24.

113. Planned Parenthood *Griswold* Brief, *supra* note 59, at 6 (internal quotation marks omitted).

114. *Id.* at *20; see also *id.* at *28-32 (quoting representatives of the American Medical Association and American Public Health Association to stress the importance of rendering safe contraceptives accessible to all).

115. See Bench Memorandum from J.H. Ely to Chief Justice Earl Warren 27-28 (Feb. 26, 1965) [hereinafter Ely Bench Memo] (on file with the Library of Congress, Earl Warren Papers, box 267, folder 2); Memorandum from J.H. Ely to Chief Justice Earl Warren 3-5 (Apr. 27, 1965) [hereinafter Ely Memo re Douglas Opinion] (on file with the Library of Congress, Earl Warren Papers, box 520, folder 3).

116. Ely Bench Memo, *supra* note 115, at 27 (“It is the poor and ill-informed who most need contraception and advice on family planning.”); Ely Memo re Douglas Opinion, *supra* note 115, at 4 (same).

those who need birth control most are the only ones who are denied it.”¹¹⁷ Ely argued that this amounted to discrimination of the sort the Court had deemed unconstitutional in *Yick Wo v. Hopkins*,¹¹⁸ a late-nineteenth-century decision that invalidated a facially neutral law that was administered in a prejudicial way.¹¹⁹ The only difference, he argued, was that in *Griswold*, the discrimination was based on class rather than race.¹²⁰

Before the Chief Justice could develop the “*Yick Wo* theory,”¹²¹ Justice White circulated his own opinion, observing that “the clear effect of these statutes, as enforced, is to deny disadvantaged citizens of Connecticut, those without either adequate knowledge or resources to obtain private counseling, access to medical assistance and up-to-date information in respect to proper methods of birth control.”¹²² “In my view,” Justice White continued, “a statute with these effects bears a substantial burden of justification when attacked under the Fourteenth

117. Ely Bench Memo, *supra* note 115, at 27; Ely Memo re Douglas Opinion, *supra* note 115, at 4 (same).

118. 118 U.S. 356 (1886). *Yick Wo* invalidated a San Francisco ordinance that required operators of commercial laundries in wooden buildings to obtain permits from the city; virtually all white applicants received permits, while all Chinese applicants were denied permits.

119. Ely Bench Memo, *supra* note 115, at 28; Ely Memo re Douglas Opinion, *supra* note 115, at 3-5.

120. Today, the Court would likely also differentiate *Yick Wo* from *Griswold* on the ground that the facts in the former case clearly demonstrated discriminatory purpose, while the facts in the latter case did not. Closing clinics undeniably had a disparate impact on women without financial resources, but the Burger Court would introduce into Fourteenth Amendment doctrine a sharpened conception of discriminatory purpose under which such an undeniable and foreseeable impact is not enough to establish a constitutional violation. See Pers. Adm’r v. Feeney, 442 U.S. 256, 279 (1979) (defining discriminatory purpose under the Equal Protection Clause to mean that the state “selected or reaffirmed a particular course of action at least in part ‘because of,’ not merely ‘in spite of,’ its adverse effects upon an identifiable group). Ely, of course, was writing before *Feeney* or *Washington v. Davis*, 426 U.S. 229 (1976), which held that to challenge a facially neutral form of state action on equal protection grounds, a plaintiff must show the state acted with discriminatory purpose. Ely’s failure to distinguish between proof of impact and proof of intent to discriminate was characteristic of equal protection jurisprudence prior to the late 1970s. See Reva B. Siegel, *The Supreme Court, 2012 Term—Foreword: Equality Divided*, 127 HARV. L. REV. 1, 11-23 (2013) (discussing the period, prior to the end of the 1970s, in which equal protection doctrine did not sharply distinguish between purpose and impact).

121. Evidence in the Chief Justice’s papers suggests that he seriously considered writing an opinion in *Griswold* based on *Yick Wo*. See Ely Bench Memo, *supra* note 115 (handwritten annotation on the final, unnumbered page, apparently by Chief Justice Warren, stating of *Griswold* and Buxton’s claim: “I might sustain it on a *Yick Wo* theory or on the basis that the statute is not tightly drawn.”).

122. See *Griswold v. Connecticut*, 381 U.S. 479, 503 (1965) (White, J., concurring).

Amendment.”¹²³ Very likely at the urging of the Chief Justice,¹²⁴ Justice White added a citation to *Yick Wo* here, driving home the point that the burden Connecticut’s law placed on low-income women was a problem of constitutional magnitude.¹²⁵

In the end, the Chief Justice decided not to write in *Griswold*, and the “*Yick Wo* theory” never made it into the published opinion. Justice White’s brief discussion of the “disadvantaged citizens of Connecticut” is the only explicit indication in the text of *Griswold* that the case had anything to do with class. Over time, Justice Douglas’s arresting image of police invading the marital bedroom has come to define how we think about *Griswold*: as a bulwark against state intervention in people’s sexual and reproductive lives, but not as a bulwark against state action that infringes the rights of people without financial resources.

B. *What Privacy Hides*

The Court’s decision in *Griswold* to protect sexual and reproductive rights under the banner of privacy has led some commentators to portray the case as an outlier. This characterization rests on the idea that “[t]he doctrinal themes with which the Warren Court is most closely associated—such as the protection of racial . . . minorities, refashioning the law of democracy, and solicitude for First Amendment values and for the rights of the criminally accused and the poor—played either no role or only a tangential role” in the case.¹²⁶ On this view, “*Griswold*, which involved a criminal prosecution of two upper middle class white defendants,” was simply out of step with its time.¹²⁷

Yet as the discussion above suggests, this view of the case obscures the centrality of class-based concerns to the story of *Griswold*—and the case’s continuity, in that respect, with other cases central to the Warren Court’s constitutional jurisprudence. But this underlying continuity leads to a new question: why did the Court place *Griswold* on a distinctive doctrinal path? Why did it protect the right to use birth control—a right that would plainly have enormous consequences for

123. *Id.*

124. See Memorandum from J.H. Ely to Chief Justice Earl Warren re Justice White’s Concurrence in No. 496, *Griswold v. Connecticut* 2 (May 19, 1965) (on file with the Library of Congress, Earl Warren Papers, box 520, folder 3) (suggesting to the Chief Justice that Justice White might be persuaded to include a citation to *Yick Wo* in his opinion).

125. *Griswold*, 381 U.S. at 503 (White, J., concurring).

126. Williams, *supra* note 106, at 2155 (citation omitted).

127. *Id.* at 2156; see also *id.* (arguing that, “[w]ith its focus on sexual privacy, procreative liberty, and unenumerated rights, *Griswold* shares a much greater affinity with the decisions of the later Burger Court of the 1970s” than with those of the Warren Court).

the poor – as part of the fundamental right to privacy? This Section seeks to explain this development, which has obscured the class-related concerns central to *Griswold* for over half a century.

At the time *Griswold* was decided, privacy was not a fringe concern. Anxieties about threats to privacy burst onto the scene in the late 1950s, triggered by the rise of totalitarianism in Eastern Europe and by concurrent and rapid advances in surveillance technology in the United States. By the end of the decade, warnings about Big Brother were everywhere.¹²⁸ These concerns reached their apex in the first half of the 1960s.¹²⁹ Best-selling books warned in breathless prose that there were forces “loose in our modern world . . . that threaten to annihilate everybody’s privacy,” and that such forces were “establishing the preconditions of totalitarianism that could endanger the personal freedom of modern man.”¹³⁰ That ominous warning came from the prominent social commentator Vance Packard, whose book *The Naked Society* elicited an enormous response when it was published in 1964.¹³¹ By the following year, “no fewer than three standing House committees – the Post Office, Government Operations, and the Judici-

128. See David Alan Sklansky, *Too Much Information: How Not to Think About Privacy and the Fourth Amendment*, 102 CALIF. L. REV. 1069, 1076 (2016); see *id.* at 1076 n.27 (noting that “[t]here is a book to be written about the role of *Nineteen Eighty-Four* in discussions of privacy”); see also DEBORAH NELSON, PURSUING PRIVACY IN COLD WAR AMERICA 9 (2002) (observing that “[t]he stunning appearance of privacy as a lost thing” in this period could be “observed in an astonishing variety of locations – journalistic exposés, television programs, law review articles, mass-market magazines, films, Supreme Court decisions, poems, novels . . . and in response to an extraordinary range of stimuli – satellites, surveillance equipment such as ‘spike mikes’ and telephoto lenses, job testing, psychological surveys . . . and more”).

129. See SARAH E. IGO, THE KNOWN CITIZEN: A HISTORY OF PRIVACY IN MODERN AMERICA 141 (2018) (“By the time the 1960s rolled around, a veritable explosion of public discussion centered on the shrinking sphere of personal privacy in American life.”).

130. VANCE PACKARD, THE NAKED SOCIETY 4 (1964).

131. See, e.g., John Brooks, *There’s Somebody Watching You*, N.Y. TIMES (Mar. 15, 1964), <https://www.nytimes.com/1964/03/15/theres-somebody-watching-you.html> [<https://perma.cc/NT8K-Z9HX>] (“Mr. Packard makes an overwhelming case for his contention that the new spying and snooping tools, in the hands of the morally unaware or indifferent, or the down-right totalitarian-minded, constitute a new and extraordinarily vivacious threat to privacy and individual liberty.”). Myron Brenton’s *The Privacy Invaders* made a similar splash when it was published that same year – as did Fred Cook’s *The F.B.I. Nobody Knows*. See MYRON BRENTON, THE PRIVACY INVADERS (1964); FRED COOK, THE F.B.I. NOBODY KNOWS (1964). For other prominent discussions of the loss of privacy in this era, see SAMUEL DASH ET AL., THE EAVES-DROPPERS (1959); MORRIS L. ERNST & ALAN U. SCHWARTZ, PRIVACY: THE RIGHT TO BE LET ALONE (1962); EDWARD V. LONG, THE INTRUDERS (1967); JERRY M. ROSENBERG, THE DEATH OF PRIVACY (1969); and ALAN F. WESTIN, PRIVACY AND FREEDOM (1967).

ary – not to mention ad hoc committees on ‘data processing and information retrieval,’ were hearing testimony on invasions of privacy as Congress prepared to draft new legislation.”¹³²

In the light of these developments, it is hardly surprising that the Court adopted privacy as the dominant frame for analyzing Connecticut’s birth control ban. It is even less surprising when one considers that Justice Douglas wrote the majority opinion in *Griswold*. By the time *Griswold* reached the Court, Justice Douglas was a leading commentator on the right to privacy. In 1957, he delivered a series of lectures warning of creeping totalitarianism in Eastern Europe and decrying invasions of privacy on American shores as one step in that direction.¹³³ In one of those lectures, entitled “The Right to Be Let Alone,” Douglas described privacy as a penumbral right, yet one deeply rooted in American constitutional history.¹³⁴ Indeed, he argued, the right to privacy was one of the chief forms of protection the Constitution offered against an ever-more-interventionist and technologically sophisticated state.¹³⁵ By the time the Court heard *Griswold*, references to Justice Douglas’s views (“The right to be let alone is indeed the beginning of all freedom”) had become ubiquitous in popular and scholarly discussions about the impending death of privacy.¹³⁶

Of course, Justice Douglas did not simply lecture on the right to privacy. He also advocated for its protection in his judicial opinions, particularly those involving the Fourth Amendment. In one such opinion, he declared: “We are rapidly entering the age of no privacy, where everyone is open to surveillance at all times; where there are no secrets from government.”¹³⁷ Citing examples derived from the Senate Judiciary Committee’s 1965 hearings on “Invasions of Privacy,” Douglas lamented the “alarming trend whereby the privacy and dignity of our citizens is being whittled away by sometimes imperceptible steps.”¹³⁸ “[W]hen viewed as a whole,” he claimed, “there begins to emerge a society quite unlike

132. NELSON, *supra* note 128, at 19.

133. WILLIAM O. DOUGLAS, *THE RIGHT OF THE PEOPLE* (1958) (reprinting a series of three lectures delivered at Franklin and Marshall College in 1957).

134. *Id.* at 87-89.

135. *Id.*

136. The quotation comes from Justice Douglas’s dissenting opinion in *Public Utilities Commission v. Pollak*, 343 U.S. 451, 467 (1952), one of a number of dissenting opinions prior to *Griswold* in which Douglas expressed his views on privacy. For a representative deployment of this quotation, see Glendy Culligan, *Brothers of Assorted Sizes Are Kibitzing on Our Lives*, WASH. POST & TIMES-HERALD, Mar. 18, 1964, at A4.

137. *Osborn v. United States*, 385 U.S. 323, 341 (1966) (Douglas, J., dissenting).

138. *Id.* at 343.

any we have seen—a society in which government may intrude into the secret regions of man’s life at will.”¹³⁹

There were few regions more secret, in midcentury America, than the physical space of the bedroom and the intimate landscape of sexual relationships. Years before the controversy over Connecticut’s birth control ban even reached the Court, Justice Douglas had begun to describe the core of privacy as the “right to keep the officers of the law out of one’s bedroom.”¹⁴⁰ When *Poe* arrived at the Court, Douglas argued the ban should be invalidated on privacy grounds. “If we imagine a regime of full enforcement of the law in the manner of an Anthony Comstock,” he wrote in his dissenting opinion, “we would reach the point where search warrants issued and officers appeared in bedrooms to find out what went on.”¹⁴¹ A few years later, he spun out an even more dramatic version of this image in his majority opinion in *Griswold*, when he imagined police bursting into people’s bedrooms in search of evidence of contraceptive use.¹⁴²

Although one can clearly trace the lineage of *Griswold*’s privacy right through Justice Douglas’s earlier writings, he was far from the only legal actor in this period thinking in terms of privacy. Katie Roraback made speeches in the years before *Griswold* about the risk that computers could be used to create centralized health records that would be easier to access than scattered paper files.¹⁴³ She later cited the privacy concerns generated by the McCarthy hearings and the sensational U2 spy plane as major influences on the shape *Griswold* took.¹⁴⁴ In addition, she noted, the Court issued its decision in *Poe* on the same day as its landmark decision in *Mapp v. Ohio*,¹⁴⁵ in which it held that evidence obtained through an unconstitutional search of the defendant’s home was inadmissible in court and that the state had violated the defendant’s right to privacy.¹⁴⁶ “Naturally as we went up on *Griswold*,” Roraback observed, “privacy became integrated

139. *Id.*

140. DOUGLAS, *supra* note 133, at 149.

141. *Poe v. Ullman*, 367 U.S. 497, 519–20 (1961) (Douglas, J., dissenting).

142. *Griswold v. Connecticut*, 381 U.S. 479, 485–86 (1965).

143. Weisberg, *supra* note 65, at 42.

144. *See id.* (“Suddenly you thought that up in the sky somebody might be photographing you doing something that you wanted to keep to yourself.”).

145. 367 U.S. 643 (1961).

146. Weisberg, *supra* note 65, at 42; *see also* WHEELER, *supra* note 90, at 104 (observing that the privacy argument in the context of birth control—“and its eventual acceptance by the High Court—owed a great deal to *Mapp* and to the broad . . . civil liberties agenda that brought the two cases together”).

into the arguments.”¹⁴⁷ Privacy had obvious appeal, as Justice Douglas and some of his colleagues were already avidly developing the concept in the context of the Fourth Amendment.¹⁴⁸

But privacy was also appealing for a different reason. The class-based concerns that were central to the litigation and argument in *Griswold* could be folded into a variety of doctrinal frameworks. Griswold and Buxton’s lawyers considered presenting the Court with a “bare equal protection”¹⁴⁹ claim: that Connecticut’s law was unconstitutional because “in actual operation the law did not apply to the private sector of medical practice but did restrict the public sector, thereby discriminating against persons of low income.”¹⁵⁰ But this *Yick Wo*-like approach raised hard questions. The lawyers were concerned that the Justices might find it difficult “to reconcile such equal protection theories with the economic and social laissez-faire assumptions upon which our society has operated over many years.”¹⁵¹ Although the Court in the early 1960s seemed potentially receptive to class-based equal protection arguments, Griswold and Buxton’s lawyers were uncertain about “how much further the Court w[ould] go in utilizing this constitutional provision to aid the economically and socially disadvantaged.”¹⁵² Fortunately, from their perspective, equal protection was not the only constitutional provision in play. The lawyers concluded that “there was little to gain in raising bare equal protection issues,”¹⁵³ but that they could still make the same underlying point, that the ban “operate[s] discriminatorily, as part of [their] due process argument”¹⁵⁴ – which is exactly what they did. The idea that Connecticut’s law discriminated against the poor became one part, but not the doctrinal home, of a legal claim based instead on a fundamental right to privacy.

147. Weisberg, *supra* note 65, at 42; see also WHEELER, *supra* note 90, at 259–60 n.20 (noting that there is scholarly disagreement about precisely which of Buxton and Griswold’s lawyers was initially responsible for developing the argument that the birth control ban violated the constitutional right to privacy).

148. See David Alan Sklansky, “One Train May Hide Another”: Katz, Stonewall, and the Secret Subtext of Criminal Procedure, 41 U.C. DAVIS L. REV. 875, 923 (2008) (describing how “the fear of a kind of creeping totalitarianism, the slow emergence, as Justice Douglas put it, of ‘a society in which government may intrude into the secret regions of a man’s life at will,’” motivated the development of Fourth Amendment privacy doctrine in the 1960s and 1970s (quoting *Osborn v. United States*, 385 U.S. 323, 343 (1966) (Douglas, J., dissenting))).

149. Thomas I. Emerson, *Nine Justices in Search of a Doctrine*, 64 MICH. L. REV. 219, 221 (1965).

150. *Id.* at 220.

151. *Id.* at 221.

152. *Id.* at 220.

153. *Id.* at 221.

154. *Griswold* Oral Argument, *supra* note 99, at *3.

C. Equality Under the Rubric of Fundamental Rights

The lawyers challenging the birth control ban in *Griswold* had ample reason to believe it would be possible to incorporate constitutional equality concerns into a fundamental rights framework. The Court in this period frequently protected the Fourteenth Amendment rights of the financially disadvantaged in decisions that blended due process and equal protection values. For example, in 1956, in *Griffin v. Illinois*, the Court ruled that the state was obligated to provide indigent criminal defendants with trial transcripts at no cost where such transcripts were necessary to appeal their convictions.¹⁵⁵ The Court stated in *Griffin* that both the “Due Process and Equal Protection Clauses protect persons like petitioners from invidious discriminations” and that “[b]oth equal protection and due process emphasize the central aim of our entire judicial system” — equality before the law.¹⁵⁶ In 1963, the Court held in *Gideon v. Wainwright* that due process obligated the state to provide indigent criminal defendants with legal representation at trial, in a decision that also reflected constitutional equality concerns.¹⁵⁷ That same year, the Court held in *Douglas v. California* that the state was obligated to provide legal representation to indigent defendants statutorily entitled to appeal their convictions.¹⁵⁸ Again, “the Court appear[ed] to rely both on the Equal Protection Clause and on the guarantees of fair procedure inherent in the Due Process Clause.”¹⁵⁹

Griffin, *Gideon*, *Douglas*, and the line of equally hybrid decisions that followed in their wake involved criminal procedure.¹⁶⁰ But the Court’s constitutional solicitude for the fundamental rights of the financially disadvantaged was

155. 351 U.S. 12 (1956).

156. *Id.* at 17–18.

157. 372 U.S. 335 (1963). For more on the intertwining of due process and equal protection concerns in *Gideon*, see *supra* note 24.

158. 372 U.S. 353 (1963).

159. *Id.* at 360–61 (Harlan, J., dissenting).

160. For additional criminal procedure decisions evincing class-related concerns, see, for example, *Mayer v. City of Chicago*, 404 U.S. 189 (1971), which held that an indigent person cannot be denied an adequate record to appeal a conviction under a fine-only statute; *Tate v. Short*, 401 U.S. 395 (1971), which held that a state cannot convert a fine imposed under a fine-only statute into a jail term solely because the defendant is indigent and cannot immediately pay the fine in full; *Williams v. Illinois*, 399 U.S. 235 (1970), which held that a state cannot subject a certain class of convicted defendants to a period of imprisonment beyond the statutory maximum solely because they are too poor to pay fines and court costs; and *Roberts v. LaVallee*, 389 U.S. 40 (1967), which held that an indigent defendant is entitled to a free transcript of a preliminary hearing for use at trial. One might also include *Miranda v. Arizona*, 384 U.S. 436 (1966), in this list. The Court in *Miranda* held that prosecutors may not use statements arising from

not confined to the criminal law context. In *Harper*, the Court invalidated a state poll tax on the ground that “the requirement of fee paying causes an ‘invidious’ discrimination that runs afoul of the Equal Protection Clause”¹⁶¹ – while also asserting that “the right of suffrage is a fundamental matter in a free and democratic society.”¹⁶² In *Boddie v. Connecticut*, a case brought by female welfare recipients, the Court invalidated on due process grounds divorce-related filing fees those women could not afford to pay.¹⁶³ Justice Brennan argued in a concurring opinion that the question in *Boddie* “inevitably implicates considerations of both due process and equal protection,”¹⁶⁴ and Justice Douglas too viewed Connecticut’s divorce-related fees as “discrimination against the indigent.”¹⁶⁵ In *Shapiro v. Thompson*, the Court held that a state violated equal protection when it denied welfare benefits to poor residents who had lived in state for less than a year, thereby disproportionately burdening “the fundamental right of interstate movement.”¹⁶⁶ A few years later, the Court issued a similar ruling in *Memorial Hospital v. Maricopa County*, holding that a state could not condition eligibility for state-provided nonemergency medical care on a year of in-state residency.¹⁶⁷

the custodial interrogation of a suspect unless certain procedural safeguards were in place, including, among other things, the now-famous requirement that police inform suspects of their rights to remain silent and to have an attorney present while being questioned. For more on the class-related concerns motivating the Court’s decision in *Miranda*, see LUCAS A. POWE, JR., *THE WARREN COURT AND AMERICAN POLITICS* 397–98 (2000).

161. *Harper v. Va. Bd. of Elections*, 383 U.S. 663, 668 (1966) (citation omitted). The Court framed its concerns in *Harper* in terms of economic discrimination. But it is worth noting that, as in *Griswold*, class was not the only equal protection issue raised by the controverted regulation. See Justin Driver, *Recognizing Race*, 112 COLUM. L. REV. 404, 445 (2012) (“Even though Justice Douglas did not deliver *Harper* in the register of racial equality, there can be little doubt that black Virginians formed a disproportionately large percentage of the group that benefited from the poll tax’s elimination.”).
162. *Harper*, 383 U.S. at 667 (quoting *Reynolds v. Sims*, 377 U.S. 533, 561–62 (1964)); see also *id.* (“Long ago in *Yick Wo v. Hopkins* the Court referred to ‘the political franchise of voting’ as a ‘fundamental political right, because [it is] preservative of all rights.’” (citation omitted)).
163. 401 U.S. 371 (1971).
164. *Id.* at 388 (Brennan, J., concurring in part).
165. *Id.* at 384 (Douglas, J., concurring in the result) (quoting *Douglas v. California*, 372 U.S. 353, 355 (1963)).
166. 394 U.S. 618, 638 (1969).
167. 415 U.S. 250 (1974). Fourteenth Amendment concerns about people without financial resources were also evident in this period in procedural due process cases such as *Goldberg v. Kelly*, 397 U.S. 254 (1970), in which the Court held that the state is constitutionally obligated to conduct pretermination evidentiary hearings before discontinuing public assistance payments to welfare recipients.

Today, we generally situate these decisions within a familiar taxonomy of Fourteenth Amendment doctrine: fundamental rights, equal protection, and the fundamental rights strand of equal protection (although even the name of that last category hints at the difficulty involved in this project).¹⁶⁸ These categories are not meaningless, but they are very fuzzy around the edges, and the question of which case belongs in which category is highly contestable.¹⁶⁹

At first glance, equal protection seemed the most obvious doctrinal rubric in the 1960s for challenging state action that disproportionately burdened the financially disadvantaged. *Brown v. Board of Education* breathed new life into equal protection law in 1954,¹⁷⁰ and, by the mid-1960s, race-based equal protection jurisprudence was rapidly developing. Analogizing class to race seemed a promising strategy for winning greater constitutional protection for people without financial resources.¹⁷¹ It seemed entirely possible in these years that the Court might declare class a suspect classification.

It thus came as a significant blow to advocates of class-based Fourteenth Amendment protections when the Burger Court declined to extend heightened scrutiny to laws with disproportionate class-based effects. In 1973, the Court rejected the race-class analogy, bluntly stating in *Ortwein v. Schwab*—a challenge brought by welfare recipients who could not afford the filing fees necessary to appeal decisions lowering their benefits—that “[n]o suspect classification, such as race, nationality, or alienage, is present.”¹⁷² Two weeks later, in *San Antonio Independent School District v. Rodriguez*, the Court similarly (and more famously) rejected a class-based equal protection challenge to Texas’s school financing

168. Under the rubric of fundamental rights equal protection, the Court invalidates state action that unequally distributes or affects constitutional rights and interests deemed fundamental. For more on the fundamental rights strand of equal protection, see Michael Klarman, *An Interpretive History of Modern Equal Protection*, 90 MICH. L. REV. 213, 264–69 (1991); and *id.* at 266, which observes that, as the Court’s class-based Fourteenth Amendment jurisprudence developed, “[t]he virtually limitless reach of a constitutional rule condemning disparate wealth effects pressured the Court to restrict its wealth discrimination rationale to ‘fundamental’ rights.” Today, the Court engages in this form of analysis far less often than it did in the 1960s and early 1970s.

169. See, e.g., *Ross v. Moffitt*, 417 U.S. 600, 608–09 (1974) (“The precise rationale for the *Griffin* and *Douglas* lines of cases has never been explicitly stated, some support being derived from the Equal Protection Clause . . . and some from the Due Process Clause Neither Clause by itself provides an entirely satisfactory basis for the result reached” (footnote omitted)).

170. 347 U.S. 483 (1954).

171. Indeed, the Court itself made the analogy in *Harper v. Virginia Board of Elections*, 383 U.S. 663, 668 (1966). See *supra* note 19.

172. 410 U.S. 656, 660 (1973).

scheme, which left some school districts much poorer than others.¹⁷³ In both cases, the Court applied rational basis review and upheld the challenged laws.¹⁷⁴

These decisions were highly consequential. But even in the mid-1960s, when the Court's receptivity to class-based arguments was at its apex, it was apparent that the Court might curtail its use of "bare equal protection" doctrine to protect people without financial resources. As noted above, this concern helped to convince the lawyers who litigated *Griswold* to emphasize privacy, rather than class-based equality, in the arguments they presented to the Supreme Court.¹⁷⁵ The worry, even then, was that the broad sweep of equal protection law, its potential indictment of *all* state action that disproportionately affects those on the lower rungs of the economic ladder, would deter the Justices from recognizing class as a suspect classification – particularly given that the Court had not yet insulated state action with a disparate impact on protected classes from review under the Equal Protection Clause.¹⁷⁶ The Warren Court had issued a number of decisions interpreting the Fourteenth Amendment to protect the rights of the indigent. But, the lawyers in *Griswold* feared, the Court might ultimately be unwilling to unsettle the "economic and social laissez-faire assumptions" upon which American society rested in the way that reckoning with economic inequality under the Equal Protection Clause would require.¹⁷⁷

173. 411 U.S. 1, 44-55 (1973).

174. See *id.* at 40; *Ortwein*, 410 U.S. at 660.

175. Concerns about the potentially limitless reach of class-based equal protection arguments became particularly acute when the case was heading to the Supreme Court. But Roraback and her colleagues who wrote the briefs at the state-court level did not lead with class-based equal protection arguments there either – both, one suspects, because they were worried about the potential reach of such arguments and because they calculated that a conservative bench would not be prepared to give constitutional voice to the intersectional feminist and antiracist class-based arguments they were beginning to develop in the early 1960s in support of reproductive rights. For more on the development of the briefs in *Griswold* in the Connecticut courts, see GARROW, *supra* note 52, at 221; and Weisberg, *supra* note 65, at 41-42.

176. The Court did not insulate state action with a disparate impact on protected classes from review under the Equal Protection Clause until the second half of the 1970s, when it decided *Washington v. Davis*, 426 U.S. 229 (1976), and *Personnel Administrator v. Feeney*, 442 U.S. 256, 279 (1979). For more on these two cases, see *supra* note 120. Had the Court in the 1960s declared that all class-based state action was subject to strict scrutiny, it would have called into question the constitutionality of vast numbers of laws and policies. The number of laws and policies that have a disparate impact on the financially disadvantaged is staggering – and that fact no doubt fueled the Court's reticence to treat class as a protected classification under the Equal Protection Clause.

177. See Emerson, *supra* note 149, at 221.

Another “obvious difficult[y]”¹⁷⁸ with according class special status under equal protection was one the Court itself raised: how to define the category of people protected? This question proved to be a major stumbling block to the equal protection argument in *Rodriguez*. The Court devoted page after page of its opinion to demonstrating the difficulty of defining the set of individuals who would qualify for class-based equal protection.¹⁷⁹ It accused the district court, which had found a class-based equal protection violation, of ignoring “the hard threshold questions, including whether it makes a difference . . . under the Constitution that the class of disadvantaged ‘poor’ cannot be identified or defined in customary equal protection terms, and whether the relative – rather than absolute – nature of the asserted deprivation is of significant consequence.”¹⁸⁰ The Court reasserted its concerns about the relative nature of wealth and the challenges this presented under equal protection in *Bearden v. Georgia*, which involved the constitutionality of revoking an indigent defendant’s probation because he was too poor to pay a fine and make restitution.¹⁸¹ Because “indigency in this context is a relative term rather than a classification,” the Court concluded, “fitting ‘the problem of this case into an equal protection framework is a task too Procrustean to be rationally accomplished.’”¹⁸²

The solution to this problem? Due process. The Court observed in *Bearden* that “[a] due process approach has the advantage . . . of directly confronting the intertwined question of the role that a defendant’s financial background can play in determining an appropriate sentence,” without requiring courts to confront the difficulties associated with an equal protection approach.¹⁸³ Moreover, the Court noted, very little was lost in this case by taking account of class under due

178. *Id.*

179. *Rodriguez*, 411 U.S. at 18-28.

180. *Id.* at 19; see also *id.* (“The case comes to us with no definitive description of the classifying facts or delineation of the disfavored class.”). The Court drew a distinction in *Rodriguez* between the relatively precisely defined class of indigents protected in cases such as *Griffin* and the large and amorphous group of children and parents in relatively less well-funded school districts who served as the plaintiffs in this case. *Id.* at 20-22. But its lengthy discussion of the difficulties of identifying the group of people class-based equal protection law would protect spelled the beginning of the end for that nascent doctrine. For more on the Court’s equal protection holding in *Rodriguez*, see *infra* note 202.

181. 461 U.S. 660 (1983).

182. *Id.* at 666 n.8 (citing *North Carolina v. Pearce*, 395 U.S. 711 (1969)); *id.* (observing that “a defendant’s level of financial resources is a point on a spectrum rather than a classification”).

183. *Id.*

process, rather than equal protection, because the central question “is substantially similar” either way.¹⁸⁴ Is the state infringing an important right—a right central to full and equal membership in our constitutional democracy—in a way that relegates people without financial resources to the status of second-class citizens? “Whether analyzed in terms of equal protection or due process,” the Court observed, that question “cannot be resolved by resort to easy slogans or pigeon-hole analysis,” but must take into account both liberty and equality considerations.¹⁸⁵

The use of due process to vindicate equal protection values did not originate with the Burger Court. Due process has functioned this way for much of the life of the Fourteenth Amendment. In 1923, the Court held in *Meyer v. Nebraska* that the Fourteenth Amendment protects the right of parents to direct the upbringing of their children, including by sending them to schools where learning happens in languages other than English.¹⁸⁶ Two years later, in *Pierce v. Society of Sisters*, it held that that right also protected parents’ choice to send their children to private school.¹⁸⁷ Both decisions were framed in terms of fundamental rights. But the litigants challenging the laws in both cases were members of historically subordinated minority groups: *Meyer* was brought by German Americans and *Pierce* by Catholics, during a period in American history in which discrimination against those groups was pervasive. Indeed, the Court itself later characterized *Meyer* and *Pierce* as involving “prejudice” against “national” and “religious . . . minorities.”¹⁸⁸

The difficulties that arose with respect to class-based equal protection law in the 1960s—the seeming lack of a limiting principle and the challenges associated

184. *Id.* at 666; *see also id.* at 665-66 (“To determine whether this differential treatment violates the Equal Protection Clause, one must determine whether, and under what circumstances, a defendant’s indigent status may be considered in the decision whether to revoke probation. This is substantially similar to asking directly the due process question of whether and when it is fundamentally unfair or arbitrary for the State to revoke probation when an indigent is unable to pay the fine.”).

185. *Id.* at 666. For a more recent articulation of these principles, see *In re Humphrey*, 228 Cal. Rptr. 3d 513, 526-30 (Ct. App. 2018) (alteration in original) (citation omitted) (quoting *Bearden*, 461 U.S. at 665), which finds that “[d]ue process and equal protection principles converge” to yield a ruling that requiring money bail as a condition of pretrial release at an amount impossible for an arrestee to pay, without first considering the arrestee’s ability to pay or alternatives to money bail, is unconstitutional.

186. 262 U.S. 390 (1923).

187. 268 U.S. 510 (1925).

188. *United States v. Carolene Prods. Co.*, 304 U.S. 144, 153 n.4 (1938).

with defining precisely who counts as financially disadvantaged¹⁸⁹—helped to drive *Griswold* into this precedential line.¹⁹⁰ It led the lawyers challenging Connecticut’s birth control ban to tuck their equal protection concerns into their privacy arguments— or, as they framed it to the Court, to argue that the ban “operate[s] discriminatorily, as part of [their] due process argument.”¹⁹¹ This way of framing the case meant that class-based equality concerns did not appear on the surface of *Griswold*. But it also meant that those concerns were built into the decision on a fundamental level. In all of these cases—from *Meyer* and *Pierce* to *Griswold* and *Bearden*—the deprivation of the equal citizenship of a historically subordinated group (or groups) helped to drive the establishment of a fundamental right. The inability of subordinated groups to exercise particular rights helped to demonstrate how central those rights were to full and equal participation in our constitutional democracy and why those rights required heightened protection under the Fourteenth Amendment. Thus, when class-based equal protection law faltered, concerns about class did not simply disappear from the law.¹⁹² As Part II shows, fundamental rights remained—and remain, to this day—an important source of class-based constitutional protection.

189. Kenji Yoshino has observed that increasing “pluralism anxiety”—anxiety about the seemingly endless emergence of new and different social groups—also informed the Burger Court’s general retreat from equal protection and turn toward due process to protect subordinated groups. Yoshino, *supra* note 23, at 747–49. The Court itself expressed such a concern in explaining its decision not to treat disability as a suspect classification for equal protection purposes in *City of Cleburne v. Cleburne Living Center*. See 473 U.S. 432, 445–46 (1985) (“[I]f the large and amorphous class of the mentally retarded were deemed quasi-suspect . . . it would be difficult to find a principled way to distinguish a variety of other groups One need mention in this respect only the aging, the disabled, the mentally ill, and the infirm. We are reluctant to set out on that course . . .”).

190. See *Griswold v. Connecticut*, 381 U.S. 479, 482–83 (1965) (locating *Griswold* in a line of cases beginning with *Meyer* and *Pierce*, and asserting that the later decision “reaffirm[s] the principle of the *Pierce* and the *Meyer* cases”); Brief for Appellants, *supra* note 109, at 15–23 (relying heavily on *Meyer* and *Pierce*).

191. *Griswold* Oral Argument, *supra* note 99, at *3.

192. Yoshino, who has written in general terms about the Court’s practice of using due process to advance equal protection aims, observes, in describing this phenomenon, that “[s]queezing law is often like squeezing a balloon. The contents do not escape, but erupt in another area, in a dynamic that Professor Louis Henkin once dubbed ‘constitutional displacement.’” Yoshino, *supra* note 23, at 748.

II. THE INCORPORATION AND PRESERVATION OF CLASS-BASED CONCERNS IN ABORTION LAW

It is hard to believe the Burger Court era—which spanned from 1969 to 1986—was ever considered “a chapter of Supreme Court history during which nothing much happened.”¹⁹³ There are few areas of the law that were not affected in some important way by the political and ideological shift that occurred in the mid-to-late 1970s on the Court and in the country itself.¹⁹⁴

In no Fourteenth Amendment context was that shift more profound than in the context of class. The forms of constitutional protection the Court was willing to extend to people without financial resources were considerably smaller in number and narrower in scope when President Reagan took office than they had been when President Nixon did. When constitutional scholars in the late 1970s and 1980s began to write about what had happened with respect to class under the Fourteenth Amendment, their narratives almost invariably focused on this decline. They chronicled all that the Court had rejected, foreclosed, and left behind. Scholars on the left often asserted that the law had completely abandoned people in the lower echelons of the American class structure.¹⁹⁵

These narratives are not incorrect in their broad outlines. Financially disadvantaged people now have a much harder time winning class-based constitutional protection than they did in the 1960s; the Burger Court almost entirely

193. GRAETZ & GREENHOUSE, *supra* note 7, at 7.

194. For a collection of essays on the effects of this political and ideological shift across a wide range of legal fields, see *Law and Neoliberalism*, 77 LAW & CONTEMP. PROBS., no. 4, 2014 (David Singh Grewal & Jedediah Purdy, eds.).

195. See, e.g., William H. Clune III, *The Supreme Court's Treatment of Wealth Discriminations Under the Fourteenth Amendment*, 1975 SUP. CT. REV. 289, 290 (“[T]he beginnings of open doctrines about wealth discriminations established by the Warren Court have been halted or reversed by the Burger Court, principally through doctrines which are not open, or sensitive, to these discriminations.”); Peter B. Edelman, *The Next Century of Our Constitution: Rethinking Our Duty to the Poor*, 39 HASTINGS L.J. 1, 3 (1987) (“The present Supreme Court will surely not adopt the ideas advanced in this Essay,” including a “constitutional right to a ‘survival income.’” “Indeed, this particular Court has essentially already rejected them.”); Kenneth L. Karst, *Citizenship, Race, and Marginality*, 30 WM. & MARY L. REV. 1, 19 (1988) (“[R]ecent majorities of the Supreme Court have been unwilling to embrace any broad-scale theory of affirmative state responsibility to afford citizens the necessities for effective citizenship. Even in the face of poverty that excludes people from respected membership in the society, the prevailing equal protection doctrine imposes no remedial obligation on government absent a showing of state ‘action’ that can be called invidious discrimination.”); William L. Taylor, Brown, *Equal Protection, and the Isolation of the Poor*, 95 YALE L.J. 1700, 1728–29 (1986) (“[T]he courts have sent a clear message, particularly over the past decade, that they will not serve as major vehicles for redressing economic injustices visited on the poor.”).

crushed class-based equal protection law. But the Court never held – not even in the late 1970s – that class has no role in the adjudication of Fourteenth Amendment claims. In fact, where some fundamental rights are concerned, the Court preserved space for taking class into account.

This Part examines the ongoing role of class-related concerns in the context of abortion jurisprudence. That might seem precisely the wrong place to look: abortion lies at the center of narratives describing the decline in judicial sensitivity in the Burger Court era to the plight of people without financial resources. The abortion funding decisions of the late 1970s eviscerated a number of the class-based constitutional protections the Warren Court had constructed. Those decisions are now regularly cited, even outside the abortion context, by proponents of the new class blindness as evidence that it is illegitimate to take class into account when adjudicating Fourteenth Amendment claims.¹⁹⁶ To demonstrate that this is not so, this Part examines how concerns about class helped to inform the initial recognition of abortion as a fundamental right, how the funding decisions left space for certain key forms of class-based constitutional protection while terminating others, and how due process doctrine in the abortion context continues to this day to take class into account.

A. *Class and the Fundamental Right to Abortion*

Between 1977 and 1980, the Court issued a string of decisions delineating the scope of the abortion right it had identified a few years earlier in *Roe*. At issue in these decisions was the question of when, if ever, the government is constitutionally obligated to pay for abortion. Understanding what the Court held – and what it did not hold – in these decisions is crucial to understanding the role that class initially played, and continues to play, in the area of abortion rights, because these decisions have shaped current perceptions not only of the abortion cases that followed them, but also of the cases that preceded them.

¹⁹⁶ For examples of this phenomenon, inside and outside the context of abortion, see, for example, *infra* notes 338 and 380 and accompanying text.

Maher v. Roe,¹⁹⁷ *Harris v. McRae*,¹⁹⁸ and *Williams v. Zbaraz*¹⁹⁹ concerned Medicaid funding. The question was: if the government uses Medicaid funds to pay for medical care related to pregnancy and childbirth, must it also use Medicaid funds to pay for abortion? *Poelker v. Doe* raised a similar question about public hospitals: if those hospitals provide publicly financed care to pregnant women, are they constitutionally obligated to provide such care to women seeking abortions?²⁰⁰

In all four cases, the Court said no.²⁰¹ By the time of the funding cases, the Burger Court had already expressed skepticism about the idea that class-based state action triggers heightened scrutiny under the Equal Protection Clause.²⁰² But it was not entirely clear, circa 1977, where the law stood with respect to that question. The indigent plaintiffs in the abortion funding cases argued that they qualified as a protected class.²⁰³ The Court rejected that argument, declaring that

197. 432 U.S. 464 (1977) (considering the constitutionality of a Connecticut statute prohibiting the funding of elective, nontherapeutic abortions).

198. 448 U.S. 297 (1980) (considering the constitutionality of the Hyde Amendment, which barred the use of federal funds to reimburse the cost of abortions under the federal Medicaid program except in cases involving rape or incest or where necessary to save a woman's life).

199. 448 U.S. 358 (1980) (considering the constitutionality of an Illinois statute that prohibited state medical-assistance payments for all abortions except those necessary to save a woman's life).

200. 432 U.S. 519 (1977).

201. See also *Beal v. Doe*, 432 U.S. 438 (1977) (holding that Title XIX of the Social Security Act does not require states that participate in the Medicaid program to fund the cost of "nontherapeutic" abortions).

202. See, e.g., *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973) (upholding Texas's property-tax-based school financing system against such a challenge). *Rodriguez* has subsequently become legal shorthand for the proposition that wealth is not a suspect classification (as well as the proposition that education is not a fundamental right). But the decision itself is somewhat more diffident on both counts. The Court held that there was no suspect classification in *Rodriguez* because there was "reason to believe that the poorest families are not necessarily clustered in the poorest property districts," and there was no "evidence that the financing system discriminate[d] against any identifiable category of 'poor' people." *Id.* at 23, 25; see also *id.* at 21 (noting that the individuals "who constituted the class discriminated against in our prior cases shared two distinguishing characteristics: because of their impecuniosity they were completely unable to pay for some desired benefit, and as a consequence, they sustained an absolute deprivation of a meaningful opportunity to enjoy that benefit," and leaving open the question of whether poor people could constitute a protected class if those criteria were met).

203. See, e.g., Brief of Appellees at 15-16, *Maher v. Roe*, 432 U.S. 464 (1977) (No. 57-1440), 1976 WL 181642 ("Plaintiffs are members of a disfavored class . . . [because] [t]hey are denied the right to choose an abortion solely because of their indigency."); Brief for Respondents at 48, 53, *Poelker*, 432 U.S. 519 (No. 75-442), 1976 WL 181351 ("In recent years, this Honorable Court has focused upon laws which in effect discriminate against individuals because of poverty

it had “never held that financial need alone identifies a suspect class for purposes of equal protection analysis.”²⁰⁴ The Court also rejected the argument, under the fundamental rights strand of equal protection, that if the state paid for childbirth, then it was constitutionally obligated to pay for abortion as well.²⁰⁵ The Court held that the government was under no obligation to provide services to those who could not afford them and that the decision not to fund abortion through Medicaid and public hospitals did not place any obstacles in the path of women seeking to end their pregnancies. It simply left them alone, no worse off than they otherwise would have been — a course of action that raised no constitutional concerns.²⁰⁶

The abortion funding decisions thus disabled two of the key doctrinal mechanisms the Warren Court had used to protect people without financial resources. This prompted many critics on the left to characterize these decisions as the end of the line for class-based constitutional protections. These critics argued that the Court had rendered “the right to abort meaningless for poor women”²⁰⁷ and “extinguished for [those] women the practical importance of the fundamental right to an abortion.”²⁰⁸ Indeed, these critics argued, the funding decisions “treat[ed] the privacy interests of poor people as commodities which are protected only to the extent that the person claiming privacy has the money to pay

In the instant case . . . the statutes in question have resulted in a discrimination against the poor.”).

204. *Maier*, 432 U.S. at 471; *see also id.* at 471 n.6 (acknowledging Warren Court decisions like *Griffin* and *Douglas* that accord heightened scrutiny to class-based state action, but asserting that those decisions were “grounded in the criminal justice system, a governmental monopoly in which participation is compelled,” and that “subsequent decisions have made it clear that the principles underlying *Griffin* and *Douglas* do not extend to legislative classifications generally”).
205. *Harris v. McRae*, 448 U.S. 297, 317-18 (1980) (“Although the liberty protected by the Due Process Clause affords protection against unwarranted government interference with freedom of choice in the context of certain personal decisions, it does not confer an entitlement to such funds as may be necessary to realize all the advantages of that freedom.”).
206. *Id.* at 317 (“[T]he Hyde Amendment leaves an indigent woman with at least the same range of choice in deciding whether to obtain a medically necessary abortion as she would have had if Congress had chosen to subsidize no health care costs at all. We are thus not persuaded that [it] impinges on the constitutionally protected freedom of choice recognized in *Wade*.”); *Maier*, 432 U.S. at 474 (“[The State] has imposed no restriction on access to abortions that was not already there. The indigency that may make it difficult — and in some cases, perhaps, impossible — for some women to have abortions is neither created nor in any way affected by the Connecticut regulation.”).
207. Lenore DiStefano, *A Meaningful Right to Abortion for Indigent Women?*, 24 *LOY. L. REV.* 301, 307 (1978).
208. Laura Crocker, *Harris v. McRae: Whatever Happened to the Roe v. Wade Abortion Right?*, 8 *PEPP. L. REV.* 861, 861 (1981).

for the material goods . . . required to exercise privacy.”²⁰⁹ In other words, “[w]omen with privileges get rights”;²¹⁰ those without do not.

Many of these critics blamed the Court’s decision to root *Griswold* and *Roe* in the fundamental right to privacy for the subsequent outcome of the funding cases. Feminist critics argued that the Court’s embrace of privacy had essentially reinscribed the public/private divide, shielding what happens in the bedroom from state intervention while offering no protection to those who require state assistance to effectuate their rights. From this perspective, Catharine MacKinnon contended in an influential essay, “a right to privacy looks like an injury got up as a gift.”²¹¹ MacKinnon argued that the idea that a man’s house is his castle had shielded from legal inquiry vast amounts of gender-based inequality.²¹² She also argued that “[f]reedom from public intervention coexists uneasily with any right that requires social preconditions to be meaningfully delivered”²¹³ – by which she meant that the decision to base constitutional protection for reproductive rights on the concept of privacy gave rise to a doctrine that did next to nothing for women who could not afford to obtain abortions. All *Roe* had done for financially disadvantaged women, MacKinnon asserted, was to take jail out of the equation.²¹⁴ On her view, the funding decisions only confirmed what the Court’s landmark reproductive rights decisions had themselves suggested: that abortion law offers virtually no protection to women without financial resources.

There is now a vast literature criticizing the Court for relying on privacy as the conceptual foundation of modern reproductive rights law.²¹⁵ Judges and

209. Robin Morris Collin & Robert William Collin, *Are the Poor Entitled to Privacy?*, 8 HARV. BLACK-LETTER J. 181, 182 (1991).

210. CATHARINE A. MACKINNON, *Privacy v. Equality: Beyond Roe v. Wade*, in FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW 93, 100 (1987).

211. *Id.* at 100.

212. *Id.* at 96-102.

213. *Id.* at 100.

214. *Id.*

215. The most prominent critic of the privacy rationale (among supporters of the abortion right) is Justice Ginsburg. She has long criticized the Court’s reliance on privacy in *Roe*. See, e.g., Ruth Bader Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to Roe v. Wade*, 63 N.C. L. REV. 375, 383 (1985); Ruth Bader Ginsburg, *Speaking in a Judicial Voice*, 67 N.Y.U. L. REV. 1185, 1200 (1992); see also *Gonzales v. Carhart*, 550 U.S. 124, 172 (2007) (Ginsburg, J., dissenting) (“[L]egal challenges to undue restrictions on abortion procedures do not seek to vindicate some generalized notion of privacy; rather, they center on a woman’s autonomy to determine her life’s course, and thus to enjoy equal citizenship stature.”); Cass R. Sunstein, Opinion, *Ginsburg’s Dissent May Yet Prevail*, L.A. TIMES (Apr. 20, 2007), <http://articles.latimes.com/2007/apr/20/opinion/oe-sunstein20> [<https://perma.cc/96ZY-2FES>] (noting that in *Carhart*, Ginsburg sought “to justify the right to abortion squarely in terms of women’s

scholars today often emphasize other grounds when discussing the constitutional foundations of the abortion right.²¹⁶ In fact, it is not even clear what role privacy currently plays in reproductive rights law. In recent decades, the Court has almost entirely omitted discussion of privacy from its abortion decisions, relying instead on concepts such as liberty, equality, and dignity to describe the constitutional locus of the right.²¹⁷ This Article offers no defense of the Court's decision to ground reproductive rights law in the fundamental right to privacy. But it does aim to show that, contrary to the conventional wisdom, privacy did not entirely displace class-related constitutional concerns in reproductive rights jurisprudence.

As in *Griswold*, the Court framed its decision in *Roe* in terms of privacy. But once again, class-related concerns were not very far from the surface. The plaintiff in *Roe* was in her early twenties and had already had a tough life.²¹⁸ After

equality rather than privacy"). John Hart Ely also famously criticized the Court's reliance on privacy in *Roe*, though for reasons different from those cited by Justice Ginsburg. See John Hart Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L.J. 920, 937-43, 947 (1973) (arguing that *Roe's* embrace of an unenumerated right to privacy is *Lochner*-like, and that the decision "is bad because it is bad constitutional law, or rather because it is *not* constitutional law and gives almost no sense of an obligation to try to be"). In addition to these critiques, there is a substantial literature that began to develop long before *Roe*, and continued after it, that questions the philosophical coherence of the concept of privacy and argues that "when we study the cases in which the law (or our moral intuitions) suggest that a 'right to privacy' has been violated, we always find that some other interest has been involved." Ruth Gavison, *Privacy and the Limits of Law*, 89 YALE L.J. 421, 422 (1980) (describing this literature). Indeed, even Ruth Gavison, who penned an important defense of privacy, agrees that "privacy is seldom protected in the absence of some other interest." *Id.* at 424. Ultimately, this Article is interested not in the question of whether "privacy is indeed a distinct and coherent concept" from a jurisprudential standpoint, *id.* at 423, but rather, in the way that privacy has masked concerns about class in the context of reproductive rights law.

216. See, e.g., Thomas P. Crocker, *From Privacy to Liberty: The Fourth Amendment After Lawrence*, 57 UCLA L. REV. 1, 10 (2009) (observing that in contexts such as "marriage and procreation, the Court has shifted significantly away from further development of privacy protections in favor of protecting a realm of personal and interpersonal liberty grounded in the Due Process Clauses of the Fifth and Fourteenth Amendments").

217. See, e.g., *id.* at 15 (noting that in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992), the Court's most important abortion decision since *Roe*, "[p]rivacy, as a separate analytic category . . . faded back into the liberty right from whence it in part emerged").

218. The *New York Times* referred to Norma McCorvey's early life as "a Dickensian nightmare" in her obituary. Robert D. McFadden, *Norma McCorvey, 'Roe' in Roe v. Wade, Is Dead at 69*, N.Y. TIMES (Feb. 18, 2017), <https://www.nytimes.com/2017/02/18/obituaries/norma-mccorvey-dead-roe-v-wade.html> [<https://perma.cc/UY7L-SK7A>]. For more on McCorvey's early struggles, see *The Consequences of Roe v. Wade and Doe v. Bolton: Hearing Before the Subcomm. on the Constitution, Civil Rights & Prop. Rights of the Sen. Comm. on the Judiciary*, 109th Cong. 7-9 (2005) (statement of Norma McCorvey); GARROW, *supra* note 52, at 402-03; and Sabrina Tavernise, *Roe v. Wade, Part I: Who Was Jane Roe?*, N.Y. TIMES (July 23, 2018), <https://www>

suffering abuse as a child and dropping out of high school, she had a baby at sixteen; she lost that baby to her mother, who filed for custody on the ground that her daughter was unfit, by virtue of her lesbianism and substance abuse problems, to care for a child. Not long after losing custody of her first child, she had a second child, whom she put up for adoption. When she got pregnant a third time, still mired in addiction and barely making ends meet, she had had enough. She visited a doctor, who told her that abortion was prohibited in her home state of Texas and that if she wanted to end her pregnancy, she would have to travel to New York or California—both journeys well beyond her limited means. So there she was: impoverished, addicted, and unhappily pregnant.

While her situation may have been particularly bleak, the plaintiff in *Roe* was far from alone. It was difficult for women in most places in the United States to obtain legal abortions in the early 1970s. Between 1967 and 1970, four states enacted “repeal” statutes that permitted abortion without restriction early in pregnancy, and another twelve enacted “reform” statutes that authorized medical committees to review women’s requests for abortion and to allow the procedure if necessary for reasons of health, sexual assault, or concern about birth defects.²¹⁹ But abortion remained a challenge to obtain even for many women in the “reform” states,²²⁰ and, in most places, the procedure was still banned. This regulatory landscape placed legal abortion beyond the reach of many of the same groups of women that struggled to obtain birth control prior to *Griswold*, including racial minorities and the economically disadvantaged.²²¹ Women in these groups, among others, frequently resorted to illegal abortion, and this practice exacted a massive toll on public health. Every year, tens of thousands of women required medical attention as a result of illegal abortions, and some of them died.²²² The risk of dying from an abortion was strongly correlated with race and class.²²³ One study found that well over half of the puerperal deaths of Puerto

.nytimes.com/2018/07/23/podcasts/the-daily/roe-wade-abortion-norma-mccorvey.html
[<https://perma.cc/QZM3-CMXL>].

219. Linda Greenhouse & Reva B. Siegel, *Before (and After) Roe v. Wade: New Questions About Backlash*, 120 YALE L.J. 2028, 2047 (2011).

220. *Abortion and the Unwanted Child: An Interview with Alan F. Guttmacher, M.D. and Harriet F. Pilpel*, 2 FAM. PLAN. PERSP. 16, 18 (1970) (“Some of these reform laws have had virtually no impact on the number of abortions performed legally. Nor have they significantly reduced the number of dangerous illegal abortions. In few of the reform states have abortions become more available to poor women.”).

221. See REAGAN, *supra* note 93, at 193-215; Polgar & Fried, *supra* note 72, at 125.

222. REAGAN, *supra* note 93, at 210-11.

223. *Id.* at 211-14; *Abortion and the Unwanted Child*, *supra* note 220, at 24 (“It is the poor . . . whom we see with the complications—infection, hemorrhage, peritonitis, renal failure and, sometimes, death.”); see also text accompanying notes 68-72.

Rican women in New York City between 1960 and 1962 were associated with botched abortions (among white women, the figure stood at a much smaller but still-alarming twenty-five percent).²²⁴ Another found that in Georgia, between 1965 and 1967, the maternal death rate among black women due to illegal abortion was fourteen times that of white women.²²⁵

Reproductive rights advocates in the late 1960s and early 1970s worked hard to direct courts' attention to the ways in which abortion restrictions disproportionately burdened women who were already disadvantaged. Whereas earlier challenges to abortion laws had focused on the rights of medical professionals, an emergent wave of abortion litigation focused on the rights of women themselves.²²⁶ This new litigation was highly attuned to the issue of class. In Illinois, for instance, class was the focal point of a successful constitutional challenge to the state's abortion ban in 1971.²²⁷ Susan Grossman, the Legal Aid lawyer who brought the case, explained that her "feeling from the beginning . . . was that the women who were most hurt by the statute were the poor women of Illinois"; Grossman felt that she was bringing the case on their behalf.²²⁸ She and her co-counsel argued that Illinois's law "systematically discriminates against poor women, depriving them of equal access to the treatment available to women of means solely because they are poor."²²⁹ Immediately after they won their case,²³⁰

224. Edwin M. Gold et al., *Therapeutic Abortions in New York City: A 20-Year Review*, 55 AM. J. PUB. HEALTH 964, 965 (1965); see also *id.* at 966 (reporting that, in addition to receiving the most dangerous nonmedical abortions, Puerto Rican and nonwhite women received very few of the abortions granted by hospital committees: between 1960 and 1962, white women obtained 92.7% of the hospital abortions granted in New York City, nonwhite women received 6.4%, and Puerto Rican women received 0.9%).

225. See Tervalon, *supra* note 73, at 136.

226. See Janice Goodman, Rhonda Copelon Schoenbrod & Nancy Stearns, *Doe and Roe: Where Do We Go from Here?*, WOMEN'S RTS. L. REP., Spring 1973, at 20, 23; Reva B. Siegel, *Roe's Roots: The Women's Rights Claims that Engendered Roe*, 90 B.U. L. REV. 1875, 1885 (2010); see also Siegel, *supra*, at 1885-94 (providing a detailed account of the woman-focused efforts of reproductive rights litigators in the years prior to *Roe*).

227. See REAGAN, *supra* note 93, at 235.

228. *Id.* at 236. One of the two plaintiffs in the case actually was an indigent woman who "was compelled to bear an unwanted child since the option of a foreign abortion was economically foreclosed." *Doe v. Scott*, 321 F. Supp. 1385, 1386 (N.D. Ill. 1971).

229. REAGAN, *supra* note 93, at 236. Grossman's cocounsel was Sybille Fritzsche, a lawyer for the ACLU. *Id.* at 235. Reagan explains that "[t]he Illinois challenge grew out of [Grossman's and Fritzsche's] commitment to the poor." *Id.* at 236.

230. See *Doe*, 321 F. Supp. at 1391 (invalidating Illinois's prohibition of abortions performed in the first trimester of pregnancy in licensed medical facilities).

Cook County Hospital in Chicago received hundreds of phone calls from poor women seeking abortions.²³¹

About a thousand miles to the east, advocates—including Nancy Stearns of the Center for Constitutional Rights and Katie Roraback—were also working to educate courts and the public about the tremendous hardships that restrictive abortion laws placed on women who lacked financial resources.²³² To recruit women to serve as plaintiffs in a suit against Connecticut’s abortion ban, these advocates issued a pamphlet pointing out that wealthy women “can afford to travel to London or Puerto Rico for abortions” and also have the “opportunity to learn of private New York hospitals that perform abortions for out-of-state women at fees of \$500-600.”²³³ The pamphlet noted that “poor women . . . cannot afford the prices charged by hospitals in New York . . . nor can they afford a trip out of the country.”²³⁴ Thus, it alleged, among other things, that Connecticut’s law violated equal protection by discriminating against the poor.²³⁵

These arguments were not simply a recruiting tool. They resurfaced in the (ultimately successful) complaint in the Connecticut case,²³⁶ and—because abortion-rights litigators shared their strategies and court filings²³⁷—in many other briefs as well. In the years before *Roe*, abortion-rights litigators in lawsuits challenging state abortion laws frequently emphasized how little access women with limited financial resources had to reproductive healthcare, the enormous health risks associated with the unsafe abortions poor women disproportionately obtained, and the ways in which lack of access to abortion interacted with discrim-

231. REAGAN, *supra* note 93, at 240.

232. Class was not the only concern of Stearns, Roraback, and their allies in the Connecticut case. Their central aim was to educate the court and the public about the ways in which abortion restrictions denied women equal citizenship. But class played a key role in those arguments, because poor women, among other doubly disadvantaged groups of women, particularly suffered as a result of the state’s infringement of their reproductive rights. For more on the feminist arguments of the Connecticut litigants, see Siegel, *supra* note 226, at 1886-94; and Greenhouse & Siegel, *supra* note 84, at 11-13.

233. WOMEN VS. CONNECTICUT ORGANIZING PAMPHLET (1970), reprinted in GREENHOUSE & SIEGEL, *supra* note 22, at 174.

234. *Id.*

235. *Id.*

236. See Kesselman, *supra* note 77, at 52 (observing that, among other things, “[c]ount one, the most substantial portion of the complaint, claimed that Connecticut’s abortion laws . . . denied ‘equal protection of the law’ to poor women”).

237. See REAGAN, *supra* note 93, at 335 n.67.

ination against pregnant workers to trap low-income women in a cycle of poverty.²³⁸ In the Connecticut case, *Abele v. Markle*,²³⁹ these litigators “proved remarkably successful in communicating with the judiciary the social meaning and consequences of forced motherhood for women.”²⁴⁰ The court in *Abele* held, among other things, that the Fourteenth Amendment protects the right to abortion because “[t]he decision to carry and bear a child has extraordinary ramifications for a woman The working or student mother frequently must curtail or end her employment or educational opportunities. The mother with an unwanted child may find that it overtaxes her and her family’s financial . . . resources.”²⁴¹

In *Roe*, as in *Griswold*, concerns about the lived experience of financially disadvantaged women seeking reproductive healthcare did not appear on the surface of the Court’s opinion. The Court held in *Roe* that due process protects the right to be “free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child,”²⁴² and that “[t]hat right necessarily includes the right of a woman to decide

238. For a sample of these arguments, across a number of states, see Siegel, *supra* note 226, at 1889 n.66 (citing Complaint at 6, *Women of Mass. v. Quinn*, Civ. No. 71-2420-W (D. Mass. Nov. 1, 1971)) (“[Poor women] without economic means are unable to procure psychiatric and medical evaluations that are necessary to obtain ‘legal’ abortions in Massachusetts, thus violating the constitutional guarantee of equal protection of the laws.”); Brief of Plaintiff at 12, *Ryan v. Specter*, 321 F. Supp. 1109 (E.D. Pa. 1971) (No. 70-2527) (“[B]y far the most disastrous [sic] effect of this comfortable and closely guarded monopoly [on therapeutic abortions] is the fact that it makes safe medical abortions unavailable to most women of low income, and consequently condemns them to choose between bearing an unwanted child and risking a self-induced abortion or an abortion at the hands of an unqualified practitioner.”); *id.* at 13 (“[T]he inevitable effect of the statute has been systematically to deny safe medical abortions to the poor, Negroes, and Puerto Ricans The law operates in a socio-economic environment which could lead to no other results.”); First Amended Complaint at 6, *Women of R.I. v. Israel*, No. 4605 (D.R.I. May 14, 1971) (“[I]n their application, [the laws] affect least those with the money and contacts to afford and obtain a legal abortion . . . ; a legal abortion out of the State; or at least a safe and discreet illegal abortion. Most women who die or become seriously ill or sterile from unsafe self-abortions, or illegal abortions, are poor women.”); and Complaint at 15, *Abramowitz v. Kugler*, 342 F. Supp. 1048 (D.N.J. 1972) (No. 431-70), which employs the same language used in the Rhode Island complaint to challenge the socioeconomic effect of New Jersey’s laws.

239. 342 F. Supp. 800, 801 (D. Conn. 1972) (invalidating Connecticut’s abortion ban on the ground that it “trespasses unjustifiably on the personal privacy and liberty of [the state’s] female citizenry”).

240. Siegel, *supra* note 226, at 1892.

241. *Abele*, 342 F. Supp. at 801-02.

242. *Roe v. Wade*, 410 U.S. 113, 169-70 (1973) (quoting *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972)).

whether or not to terminate her pregnancy.”²⁴³ It invalidated Texas’s law, which barred abortion except where necessary to save a woman’s life, for infringing this right. In *Doe v. Bolton*, decided the same day, the Court also invalidated several provisions of Georgia’s “reform” statute, including the requirements that abortions be performed only in licensed hospitals, that they be approved by hospital committees, that two other physicians agree with the woman’s own doctor that an abortion was necessary, and that abortion patients reside in-state.²⁴⁴ These decisions established abortion as a fundamental right.²⁴⁵ But they focused predominantly on doctors’ interest in practicing medicine free from overly intrusive state intervention, and they treated pregnancy largely “as a physiological problem,” rather than analyzing the social and economic consequences to women of laws that sought to force them to bear children.²⁴⁶

The consequences of such laws for financially disadvantaged women did, however, very much play a part in the litigation in *Roe* and *Doe*.²⁴⁷ Lawyers challenging Georgia’s “reform” statute in *Doe* argued that the statute

operates in such a way that (1) white women of means get an overwhelmingly disproportionate share of the legal hospital abortions as compared to poor, non-white women; and (2) women of means are able to obtain illegal but medically safe abortions while poorer women are forced to choose between bearing children they do not want and cannot afford to feed, or risking death or maiming at the hands of an inexpensive abortionist.²⁴⁸

243. *Id.* at 170.

244. 410 U.S. 179 (1973).

245. See, e.g., *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 953 (1992) (Rehnquist, C.J., concurring in part and dissenting in part) (acknowledging that *Roe* “classified a woman’s decision to terminate her pregnancy as a ‘fundamental right’ that could be abridged only in a manner which withstood ‘strict scrutiny’”); *Roe*, 410 U.S. at 152-53 (“[O]nly personal rights that can be deemed ‘fundamental’ or ‘implicit in the concept of ordered liberty’ are included in [the constitutional] guarantee of personal privacy This right of privacy . . . founded in the Fourteenth Amendment’s concept of personal liberty and restrictions upon state action . . . is broad enough to encompass a woman’s decision whether or not to terminate her pregnancy.” (citation omitted)).

246. Reva Siegel, *Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection*, 44 STAN. L. REV. 261, 274 (1992).

247. See Linda Greenhouse, *How the Supreme Court Talks About Abortion: The Implications of a Shifting Discourse*, 42 SUFFOLK U. L. REV. 41, 45-46 (2008) (observing that there was a “disconnect between what the Court heard in *Roe* and what it chose to say”).

248. Brief as Amici Curiae & Appendix for State Communities Aid Ass’n at 10-11, *Roe*, 410 U.S. 113 and *Doe v. Bolton*, 410 U.S. 179 (1973) (Nos. 70-18, 70-40), 1971 WL 126671; see also Brief as

Advocates in *Roe* made similar arguments. *Roe*'s lawyers pointed out that unplanned pregnancies were far more common among poor women than they were among the more affluent²⁴⁹ and that "the procedures which are open to the poor . . . can be very risky not only to the life of the individual but to her future health."²⁵⁰

Justice Thurgood Marshall emphasized these disparities at one of the Justices' postargument conferences on *Roe* and *Doe*. Justice Marshall's biographer, Juan Williams, notes that "[g]oing back to his days in Baltimore and Harlem, [Marshall] had heard stories about penniless black women who suffered or died" as a result of obtaining illegal abortions.²⁵¹ Justice Marshall urged his colleagues to protect abortion under the Fourteenth Amendment because, he argued, rich women could often get around state laws by going to private doctors or leaving the country, while poor women who wished to end their pregnancies had no safe options.²⁵² In other words, he argued, recognizing abortion as a fundamental right would be a class-salient move.

Although concerns about the hardships faced by women seeking abortions — rather than by doctors who performed them — were muted in the Court's opinion in *Roe*, they helped to shape the fundamental rights framework the Court constructed. When Justice Harry Blackmun first circulated his draft opinion in the case, it identified the end of the first trimester of pregnancy as the moment at which the balance of constitutional interests tipped in favor of the state.²⁵³ But several of his colleagues, including Justice Marshall, pushed back against this early date, arguing that women's interests should prevail until the fetus became

Amici Curiae for the American College of Obstetricians & Gynecologists et al. at 67, *Doe*, 410 U.S. 179 (No. 70-40), 1971 WL 126685 (arguing that Georgia's statute discriminates "between the patient with means, and the patient with none," and condemning the "socio-economic and racially discriminatory aspects of this type of legislation").

249. Brief for Appellants at 44, *Roe*, 410 U.S. 113 (No. 70-18) (quoting Larry Bumpass & Charles F. Westoff, *The "Perfect Contraceptive" Population*, 169 SCIENCE 1177, 1179 (1970)), 1971 WL 128054.

250. *Id.* at 30 (quoting J.L. McKelvey, *The Abortion Problem*, 50 MINN. MED. 119, 124 (1967)); see also, e.g., Brief Amicus Curiae on Behalf of New Women Lawyers et al. at 22-23, *Roe*, 410 U.S. 113 and *Doe*, 410 U.S. 179 (Nos. 70-18, 70-40), 1971 WL 134283 (describing the "cycle of poverty" in which women of limited means may find themselves as a result of unplanned pregnancies and resulting discrimination in numerous social contexts); Brief as Amici Curiae for Planned Parenthood Federation of America, Inc. et al. at 26-27, *Roe*, 410 U.S. 113 and *Doe*, 410 U.S. 179 (Nos. 70-18, 70-40), 1971 WL 128049 (discussing the ways in which economic deprivation increases women's need for abortion and compounds the hardships associated with unwanted pregnancies).

251. JUAN WILLIAMS, THURGOOD MARSHALL: AMERICAN REVOLUTIONARY 354 (1998).

252. *Id.*

253. LINDA GREENHOUSE, BECOMING JUSTICE BLACKMUN 95 (2005).

viable, at the end of the second trimester.²⁵⁴ “Given the difficulties which many women may have in believing that they are pregnant and in deciding to seek an abortion,” Justice Marshall wrote, “I fear the earlier date may not in practice serve the interests of those women, which your opinion does seek to serve.”²⁵⁵ Such concerns about timing have always been particularly acute for poor women, who typically take more time than wealthier women to confirm suspected pregnancies and also to obtain an abortion after deciding to seek one.²⁵⁶ For this reason, the Court’s ultimate adoption of the viability, or second-trimester, line²⁵⁷ as the point at which the state’s interest in protecting fetal life becomes compelling strongly promoted the interests of financially disadvantaged women.

Roe and *Doe* also promoted those interests by limiting the ways in which the state could regulate the infrastructure of abortion provision. Like the birth control ban in *Griswold*, laws banning abortion or restricting it to accredited hospitals prevented the development of a publicly accessible infrastructure of reproductive-healthcare providers. The resulting prevalence of reproductive-healthcare deserts particularly hurt women of limited means, who could neither travel to places where abortion was legally available nor access reliable, but expensive, illegal providers closer to home. *Roe* expressed concern about the “illegal ‘abortion mills’” that had arisen to meet this need.²⁵⁸ As long as the government continued to ban or tightly restrict abortion, those mills would remain one of the only options for disadvantaged women who wanted to end pregnancies — and this situation did not afford such women much control over “matters so fundamentally affecting a person as the decision whether to bear or beget a child.”²⁵⁹

The Court’s concerns about the infrastructure of abortion provision in the United States were responsive to the many public health arguments made in this

254. *Id.* at 96-97.

255. Bob Woodward, Opinion, *The Abortion Papers*, WASH. POST (Jan. 22, 1989), <https://www.washingtonpost.com/archive/opinions/1989/01/22/the-abortion-papers/ce695bcc-a7f9-4b09-bd57-8d7efff37a46> [<https://perma.cc/DE5W-L8GR>] (quoting a memo from Justice Marshall to Justice Blackmun dated December 12, 1972).

256. See Heather D. Boonstra, *The Heart of the Matter: Public Funding of Abortion for Poor Women in the United States*, GUTTMACHER POL’Y REV., Winter 2007, at 12, 14-15 (explaining that poor women are delayed even after deciding to obtain abortions because they need time to come up with money and may do so at great sacrifice to themselves and their families).

257. See *Roe v. Wade*, 410 U.S. 113, 164-65 (1973) (holding that the state may regulate abortion during the second trimester only to protect women’s health and that its interest in promoting fetal life does not ripen until after fetal viability, which at that time coincided with the end of the second trimester).

258. *Id.* at 150 (discussing “[t]he prevalence of high mortality rates at illegal ‘abortion mills’”).

259. *Id.* at 169-70 (Stewart, J., concurring) (quoting *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972)).

period by opponents of restrictive abortion laws.²⁶⁰ As noted above, illegal abortion could be dangerous, particularly for poor women.²⁶¹ Arguments for abortion rights grounded in public health concerns suggested that “what made illegal abortion a social disease were the health harms that [it] inflicted on women; and . . . the disproportionate burden of that harm that poor women had to endure.”²⁶² As the public health argument developed in this period, it “[i]mplicitly—and over time explicitly— . . . invoked the equality claim that there should be one law, for wealthy women and for poor.”²⁶³ This class-inflected argument made its way to the Supreme Court in a number of the briefs in *Roe* and *Doe*.²⁶⁴ By invalidating fetal-protective restrictions on previability abortions, those decisions paved the way for the development of a legal infrastructure of abortion providers able to perform the procedure “under safe, clinical conditions”²⁶⁵—a development that responded to the needs of financially disadvantaged women in particular. As in *Griswold*, the most tangible result of *Roe* and *Doe* was an explosion in the number of clinics providing reproductive-health services.²⁶⁶

260. For more on the prevalence of public health arguments for the right to abortion in the 1960s and early 1970s, see Greenhouse & Siegel, *supra* note 219, at 2036-38.

261. See *supra* notes 221-225 and accompanying text.

262. Greenhouse & Siegel, *supra* note 219, at 2036.

263. *Id.*

264. See, e.g., Brief as Amici Curiae for the American College of Obstetricians & Gynecologists et al., *supra* note 248, at 11-13; Supplemental Brief for Amici Curiae Planned Parenthood Federation of America, Inc. et al., *supra* note 95, at 22-29, 41-43; Brief as Amici Curiae & Appendix for State Communities Aid Ass’n, *supra* note 248, at 4-12.

265. *Roe v. Wade*, 410 U.S. 113, 121 (1973); see also *Doe v. Bolton*, 410 U.S. 179, 195 (1973) (“Appellants . . . have presented us with a mass of data purporting to demonstrate that some facilities other than hospitals are entirely adequate to perform abortions The State, on the other hand, has not presented persuasive data to show that only hospitals meet its acknowledged interest in insuring the quality of the operation We feel compelled to agree with appellants that the State must show more than it has in order to prove that only the full resources of a licensed hospital, rather than those of some other appropriately licensed institution, satisfy these health interests. We hold that the hospital requirement of the Georgia law, because it fails to exclude the first trimester of pregnancy . . . is . . . invalid.”); *Roe*, 410 U.S. at 163 (stating that, prior to the second trimester, the decision to have an abortion “may be effectuated by an abortion free of interference by the State” and that health-related questions, such as whether abortion must be performed in “a hospital or may be [performed in] a clinic or some other place of less-than-hospital status,” arise only with respect to second- and third-trimester abortions).

266. The number of nonhospital abortion providers, including clinics, in the United States more than quadrupled in the years after these decisions, from approximately 350 in 1973 to 1,500 in 1982. See GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* 197 (1991) (combining data sources to estimate the rapid increase in the number of nonhospital abortion providers in the years after *Roe* and *Doe*).

The Court's conclusion in *Roe* and *Doe* that the state could no longer bar the development of an infrastructure of abortion provision, and thereby impede women's access to abortion, led many federal appellate and district courts to conclude that the state was now required to pay for poor women's abortions when it paid for childbirth.²⁶⁷ Indeed, every court that considered this question in the years after *Roe* and *Doe* reached the same conclusion.²⁶⁸ Courts viewed the determination that it was unconstitutional to exempt abortion from coverage in public hospitals and Medicaid-type programs that covered childbirth as flowing directly from *Roe* and *Doe*.²⁶⁹ They held that to allow governments to exempt abortion from coverage in these situations would be to permit discrimination against poor women "by reason of [their] poverty."²⁷⁰ Post-1973, affluent women often had a choice about whether to become mothers, but social welfare programs that paid for poor women to deliver babies while depriving them of abortion care robbed them of that choice. Federal district and appellate courts held that governmental programs that funded childbirth and not abortion coerced poor women into giving birth, and, in so doing, impinged on their fundamental

267. Most of the relevant lawsuits in this period involved the exemption of abortion where childbirth was covered, but some involved the exemption of elective abortions where "medically necessary" abortions were covered. See, e.g., *Doe v. Hale Hosp.*, 500 F.2d 144, 147 (1st Cir. 1974) ("A public medical facility . . . may not forbid elective abortions so long as it offers medically indistinguishable procedures, without violating the fundamental rights associated with the decision to terminate pregnancy set out in *Roe v. Wade* and *Doe v. Bolton*.").

268. See, e.g., *Wulff v. Singleton*, 508 F.2d 1211 (8th Cir. 1974); *Hale Hosp.*, 500 F.2d; *Doe v. Rose*, 499 F.2d 1112 (10th Cir. 1974); *Nyberg v. City of Virginia*, 495 F.2d 1342 (8th Cir. 1974); *Klein v. Nassau Cty. Med. Ctr.*, 409 F. Supp. 731 (E.D.N.Y. 1976) (per curiam); *Doe v. Westby*, 383 F. Supp. 1143 (D.S.D. 1974); *Roe v. Norton*, 380 F. Supp. 726 (D. Conn. 1974); *Doe v. Wohlgemuth*, 376 F. Supp. 173 (W.D. Pa. 1974); *Doe v. Rampton*, 366 F. Supp. 189 (D. Utah 1973); *Nyberg v. City of Virginia*, 361 F. Supp. 932 (D. Minn. 1973); see also *Hathaway v. Worcester City Hosp.*, 475 F.2d 701 (1st Cir. 1973) (invalidating on fundamental rights equal protection grounds a public hospital's refusal to provide voluntary sterilizations).

269. See, e.g., *Rose*, 499 F.2d at 1115-16 ("Without analyzing in depth *Roe v. Wade* . . . and *Doe v. Bolton*, a contrary holding in the instant case [involving Utah's welfare program's exemption of abortion from coverage] would in our view fly in the face of those two cases." (citations omitted)); *Wohlgemuth*, 376 F. Supp. at 189 (concluding that "*Roe v. Wade* . . . must be considered as dispositive of the contentions in the instant case," which involved the denial of abortion coverage by Pennsylvania's medical assistance program).

270. *Wulff*, 508 F.2d at 1215-16; see also *Rose*, 499 F.2d at 1117 (holding that when an indigent woman "is denied the medical assistance that is in general her statutory entitlement, and that is otherwise extended to her even with respect to her pregnancy[,] . . . [s]he is . . . discriminated against both by reason of her poverty and by reason of her behavioral choice").

right to choose abortion free from state interference in the first trimester of pregnancy and subject only to legitimate maternal-health regulations in the second.²⁷¹

The Supreme Court ultimately rejected this interpretation in the abortion funding cases. It held that the state was not constitutionally obligated to pay for abortion simply because it opted to pay for childbirth, and it declined to treat poor women as a protected class for equal protection purposes. These decisions were obviously a major blow to advocates of reproductive rights, particularly for poor women. But the Court did not hold in the funding cases that class is categorically irrelevant to the adjudication of Fourteenth Amendment claims. Indeed, the funding decisions were explicitly predicated on a distinction between a state's decision not to fund abortion, on the one hand, and state action that actually infringes abortion rights, on the other.²⁷² No amount of concern about poor women is sufficient to trigger the imposition of affirmative obligations on the state because the Fourteenth Amendment is not built to impose such obligations: its purpose is "to protect Americans from oppression by state government, not to secure them basic governmental services."²⁷³ A state's decision to fund childbirth in no way detracts from women's ability to have abortions, the Court reasoned.²⁷⁴ It simply means that the state has declined to subsidize that particular choice, which is not a Fourteenth Amendment problem.

271. See, e.g., *Rose*, 499 F.2d at 1116-17 (holding that the exemption of abortion from coverage under Utah's welfare program "would deny indigent women the equal protection of the laws" because "[t]hey alone are subjected to State coercion to bear children which they do not wish to bear" (internal quotation marks omitted)); *id.* at 1117 ("The indigent is advised by the State that the State will deny her medical assistance unless she resigns her freedom of choice and bears the child." (internal quotation marks omitted)); *Rampton*, 366 F. Supp. at 173 (holding that Utah's exemption of abortion from Medicaid coverage "is invalid because it would limit exercise of the right to an abortion by the poor in all trimesters, for reasons having no apparent connection to health of the mother or child" and that "[t]he State may not so use its Medicaid program to limit abortions").

272. See, e.g., *Maier v. Roe*, 432 U.S. 464, 475-76 (1977) ("Our conclusion signals no retreat from *Roe* or the cases applying it. There is a basic difference between direct state interference with a protected activity and state encouragement of an alternative activity consonant with legislative policy. Constitutional concerns are greatest when the State attempts to impose its will by force of law; the State's power to encourage actions deemed to be in the public interest is necessarily far broader."); *Harris v. McRae*, 448 U.S. 297, 315 (1980) (quoting same); *id.* at 317-18 ("Although the liberty protected by the Due Process Clause affords protection against unwarranted government interference with freedom of choice in the context of certain personal decisions, it does not confer an entitlement to such funds as may be necessary to realize all the advantages of that freedom.").

273. *Jackson v. City of Joliet*, 715 F.2d 1200, 1203 (7th Cir. 1983) (Posner, J.).

274. See *supra* note 206.

It is a different story, the Court held, when a state acts in ways that actually restricts the abortion right. That is what the state did in *Roe* and *Doe*: it regulated abortion in ways that made it more difficult for women – particularly those without financial resources – to effectuate a fundamental right. The state did the same in *Griswold* in the context of birth control. The funding decisions reaffirmed that in situations like this – where the state regulates in ways that burden a constitutionally protected liberty interest – Fourteenth Amendment concerns are activated and courts must determine whether the state has encroached too far on people’s rights.²⁷⁵ The funding decisions in no way suggested that concerns about class, by that point deeply interwoven with concerns about liberty and equality in the context of reproductive rights, were now irrelevant to that analysis.

B. *The Survival of Class-Based Concerns in Abortion Doctrine*

Progressive critics of the Court’s abortion jurisprudence often portray the funding decisions as a kind of terminus: the official end of judicial class-consciousness under the Fourteenth Amendment. But the Burger Court’s rejection of its predecessor’s more capacious understanding of governmental obligation was not tantamount to a declaration that concerns about class have no place in Fourteenth Amendment law. *Maher*, *Poelker*, *McRae*, and *Zbaraz* were the products of a major political shift; they reflected the resurgence of judicial conservatism and the emergence of an influential new brand of libertarianism. They enshrined in the law a more circumscribed account of governmental obligation under the Fourteenth Amendment. But those decisions did not suggest that class is irrelevant in determining the constitutionality of regulations that burden the abortion right. In fact, in *Planned Parenthood of Southeastern Pennsylvania v. Casey*²⁷⁶ – decided more than a decade after the funding cases – the Court developed a doctrinal mechanism that sometimes requires courts to take financial disadvantage into account when determining the constitutionality of laws restricting abortion.

In the run-up to *Casey*, commentators variously hoped and feared the Court would seize the opportunity to overrule *Roe*.²⁷⁷ Instead, the Court responded to

275. See *supra* note 272.

276. 505 U.S. 833 (1992).

277. See Linda Greenhouse, *High Court, 5-4, Affirms Right to Abortion but Allows Most of Pennsylvania’s Limits*, N.Y. TIMES, June 30, 1992, at A1 (reporting that *Casey* left the abortion right “stronger than many abortion-rights supporters had expected and opponents had hoped for from a Court that had appeared for the last three years to be on a course leading inevitably to the evisceration, if not complete overruling, of *Roe v. Wade*”).

the enormous public conflict over abortion with a compromise. On the abortion-rights side of the ledger, *Casey* reaffirmed abortion's status as a fundamental right, declaring several times that "the essential holding of *Roe v. Wade* should be retained and once again reaffirmed."²⁷⁸ *Roe* recognized abortion as a fundamental right because decades of precedent, from *Meyer* and *Pierce* through *Griswold* and *Loving*, had "ma[d]e clear that freedom of personal choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause."²⁷⁹ Indeed, the Court observed in *Roe* that

the interests of a woman in giving of her physical and emotional self during pregnancy and the interests that will be affected throughout her life by the birth and raising of a child are of a far greater degree of significance and personal intimacy than the right to send a child to private school protected in *Pierce v. Society of Sisters* or the right to teach a foreign language protected in *Meyer v. Nebraska*.²⁸⁰

In *Casey*, the Court reaffirmed that abortion rights "involv[e] the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy," and that those rights are therefore "central to the liberty protected by the Fourteenth Amendment."²⁸¹ In subsequent decisions, the Court has reiterated this understanding of the right to abortion as fundamental.²⁸²

But *Casey* also changed abortion doctrine in ways that allowed the government more leeway to regulate. *Roe*'s trimester framework permitted almost no regulation of abortion in the first trimester, on the ground that the state's interests in protecting maternal health and fetal life did not become compelling until

278. *Casey*, 505 U.S. at 846; see also *id.* at 870-71 (describing the Court's "unbroken commitment . . . to the essential holding of *Roe*" and stating that this holding "should be reaffirmed"); Michael C. Dorf, *Make No Mistake: Abortion Is a Fundamental Right*, NEWSWEEK (Jan. 1, 2016, 3:27 PM), <https://www.newsweek.com/abortion-roe-wade-fundamental-right-412908> [<https://perma.cc/76MU-9ZUR>] (observing that "abortion remains a fundamental right" even after *Casey*'s application of "the relatively permissive undue-burden test").

279. *Roe v. Wade*, 410 U.S. 113, 169 (1973).

280. *Id.* at 170 (quoting *Abele v. Markle*, 351 F. Supp. 224, 227 (D. Conn. 1972)).

281. *Casey*, 505 U.S. at 851.

282. See, e.g., *Lawrence v. Texas*, 539 U.S. 558, 565 (2003) ("*Roe* recognized the right of a woman to make certain fundamental decisions affecting her destiny and confirmed once more that the protection of liberty under the Due Process Clause has a substantive dimension of fundamental significance in defining the rights of the person."); *Stenberg v. Carhart*, 530 U.S. 914, 921 (2000) ("[C]onsidering the matter in light of the Constitution's guarantees of fundamental individual liberty, this Court, in the course of a generation, has determined and then redetermined that the Constitution offers basic protection to the woman's right to choose.").

the second and third trimesters, respectively.²⁸³ *Casey* held “that the State has legitimate interests from the outset of the pregnancy in protecting the health of the woman and the life of the fetus that may become a child” – meaning that the state could regulate abortion “throughout pregnancy.”²⁸⁴ *Casey* also modified the standard of review used to assess the constitutionality of abortion regulations. Whereas *Roe* applied strict scrutiny to such regulations,²⁸⁵ *Casey* adopted an undue burden test. Under this test, states may regulate abortion – even in ways designed to persuade women to continue their pregnancies – but not in ways that unduly burden the abortion right. The Court defined an undue burden as a “regulation [that] has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus.”²⁸⁶ It went on to explain that a “statute with this purpose is invalid because the means chosen by the State to further the interest in potential life must be calculated to inform the woman’s free choice, not hinder it.”²⁸⁷ In practice, this undue burden test has come to occupy a “middle ground” between strict scrutiny and rational basis review.²⁸⁸

The relevant question for purposes of this Article is what happened to class-related concerns in the abortion context when the Court adopted the undue burden test. One of the first challenges the Court confronted was determining which set of people – or whose difficulties accessing abortion – it should consider when analyzing whether a challenged regulation constitutes a substantial obstacle to the exercise of the abortion right. In other words, when assessing whether the

283. *Roe*, 410 U.S. at 163-64.

284. *Casey*, 505 U.S. at 846, 878.

285. *Roe*, 410 U.S. at 153, 164-66 (holding that the fundamental right to privacy “is broad enough to encompass a woman’s decision whether or not to terminate her pregnancy” and that the state must therefore offer “compelling justifications for intervention” when regulating abortion).

286. *Casey*, 505 U.S. at 877.

287. *Id.*

288. *Planned Parenthood Se., Inc. v. Strange*, 33 F. Supp. 3d 1330, 1337-38 (M.D. Ala. 2014) (describing the undue burden standard as a “middle ground between those who would impose strict-scrutiny review of such regulations and those who would require only a rational basis” (internal quotation marks omitted)); see also Adam Winkler, *Fundamentally Wrong About Fundamental Rights*, 23 CONST. COMMENT. 227, 227, 234-35 (2006) (explaining that not all – or even most – fundamental rights trigger strict scrutiny and citing abortion as an example of a fundamental right that triggers a standard of review somewhat lower than strict scrutiny); Clarke D. Forsythe et al., *Constitutional Law & Abortion Primer*, AM. UNITED FOR LIFE 23, <https://www.aul.org/wp-content/uploads/2011/02/Constitutional-Law-and-Abortion-Primer.pdf> [<https://perma.cc/K8KA-NPYC>] (observing that in *Gonzales v. Carhart*, 550 U.S. 124 (2007), the Court “expressly readopted *Casey* and its undue-burden, intermediate standard of review”).

state has substantially impeded women's access to abortion, whose access should courts focus on? All women? All women seeking abortions? A particular subset of women seeking abortions?

This question arose most pointedly in *Casey* in the context of Pennsylvania's husband-notification provision. This provision required married women seeking abortions to produce signed statements attesting that they had informed their husbands of their intentions.²⁸⁹ The state argued that, by definition, the notification provision could not constitute a substantial obstacle because it burdened only a very small fraction of women seeking abortions.²⁹⁰ In fact, the state claimed, because only 20% of women seeking abortions are married, and because 95% of those women voluntarily inform their husbands of their plans, the effects of the notification provision were felt by only 1% of women seeking abortions.²⁹¹ The state argued that nothing that affects only 1% of abortion seekers could possibly qualify as "substantial."²⁹²

The Court in *Casey* rejected that argument. It held that "[t]he proper focus of constitutional inquiry is the group for whom the law is a restriction, not the group for whom the law is irrelevant."²⁹³ Thus, it explained, "[t]he analysis does not end with the one percent of women upon whom the statute operates; it begins there."²⁹⁴ When assessing whether an abortion restriction constitutes an undue burden, courts must look to the group of women actually burdened by the law and ask, for the women in that group, whether the law imposes a substantial obstacle to the exercise of their rights. Thus, in the context of the husband-notification provision, the Court asked: does the notification requirement place a substantial obstacle in the path of "married women seeking abortions who do not wish to notify their husbands of their intentions"?²⁹⁵ The Court concluded that the provision did create such an obstacle because in a large fraction of the cases in which married women choose not to inform their husbands that they intend to obtain an abortion, they are concerned for their safety.²⁹⁶ For women

289. *Casey*, 505 U.S. at 887-88.

290. *Id.* at 894.

291. *Id.*

292. In fact, the state argued that the provision burdened less than one percent of women because some of the women who do not notify their husbands of their plans could safely do so or could qualify for an exception to the notification provision. *Id.*

293. *Id.*

294. *Id.*

295. *Id.* at 895.

296. *Id.* at 897-98.

in that position, the notification requirement constitutes a substantial obstacle to obtaining an abortion.

The issue of class did not arise in the Court's discussion of the husband-notification provision. But elsewhere in *Casey*, it did. The plaintiffs also challenged Pennsylvania's imposition of a twenty-four-hour waiting period, which required women seeking abortions to meet with their providers at least one day prior to undergoing the procedure.²⁹⁷ The district court invalidated this requirement on the ground that it was "particularly burdensome to those women who have the least financial resources"—women for whom two trips to a clinic might require transportation, motel stays, childcare, and missed workdays they could scarcely afford.²⁹⁸ The Supreme Court acknowledged that this situation was "troubling in some respects."²⁹⁹ But it drew a distinction between a "particular" burden and one that was "undue."³⁰⁰ The district court found only that the waiting period "particularly burdened" women without financial resources. It did not also find that the waiting period placed a substantial obstacle in their path. This was a problem, in the Court's view, because a "particular burden is not of necessity a substantial obstacle."³⁰¹ For the waiting period to be invalid, there would need to be evidence that, in addition to having a disparate impact on women without financial resources, it also significantly impeded their ability to obtain abortions.³⁰² As the district court's opinion did not cite any such evidence, the Court observed that, "on the record before [it]," there was insufficient ground to conclude that the waiting period constituted an undue burden.³⁰³

This holding was hardly an exemplar of judicial sensitivity to the challenges faced by financially disadvantaged women seeking to terminate pregnancies. But it was not tantamount to a declaration that class is irrelevant to the determination of whether an abortion regulation violates the Fourteenth Amendment. Indeed, some courts, post-*Casey*, invalidated waiting periods and other such regulations, explicitly citing their effects on financially disadvantaged women as

297. *Id.* at 885-86.

298. *Planned Parenthood of Se. Pa. v. Casey*, 744 F. Supp. 1323, 1352 (E.D. Pa. 1990), *aff'd in part, rev'd in part*, 947 F.2d 682 (3d Cir. 1991), *aff'd in part, rev'd in part*, 505 U.S. 833 (1992).

299. *Casey*, 505 U.S. at 886 (acknowledging the district court's finding "that for those women who have the fewest financial resources . . . the 24-hour waiting period will be 'particularly burdensome'").

300. *Id.* at 886-87.

301. *Id.* at 887.

302. *Id.* ("Whether a burden falls on a particular group is a distinct inquiry from whether it is a substantial obstacle even as to the women in that group.")

303. *Id.*

evidence of their unconstitutionality.³⁰⁴ Other courts have been more permissive toward laws restricting abortion.³⁰⁵ The trend over time has been toward greater permissiveness – certainly relative to what courts permitted in the way of abortion regulation prior to *Casey*.

In that sense, *Casey* represented another shift to the right, in line with the funding decisions fifteen years earlier. But just as the funding decisions preserved space in abortion doctrine for taking class into account, so too did *Casey*. The decision supported the basic proposition that when the state substantially burdens women's right to decide whether or not to carry a pregnancy to term, it deprives them of the liberty and equal citizenship the Fourteenth Amendment

304. See, e.g., *Planned Parenthood Minn., N.D., S.D. v. Daugaard*, 799 F. Supp. 2d 1048, 1065 (D.S.D. 2011) (enjoining numerous provisions of a South Dakota law, including a seventy-two-hour waiting period, after finding that the vast majority of state residents who obtain abortions are poor and that “[t]he effective doubling of the financial burden” caused by the waiting period “constitute[d] a substantial obstacle for a large fraction of the relevant cases”); *Reprod. Servs. v. Keating*, 35 F. Supp. 2d 1332, 1335 (N.D. Okla. 1998) (issuing a temporary restraining order against an Oklahoma law requiring second-trimester abortions to be performed in hospitals after noting plaintiff’s claim “that the increased burdens of which it complains will fall most heavily upon the poor, the young, and the uneducated”); *Planned Parenthood of S. Ariz., Inc. v. Woods*, 982 F. Supp. 1369, 1373 (D. Ariz. 1997) (invalidating a law banning “partial birth abortions” after observing that women who obtain later abortions often do so because they are “indigent,” “homeless,” or “poverty stricken,” and thus do not receive timely abortion care); see also *Tucson Woman’s Clinic v. Eden*, 379 F.3d 531, 541 (9th Cir. 2004) (asserting that “[a] significant increase in the cost of abortion or the supply of abortion providers and clinics can, at some point, constitute a substantial obstacle to a significant number of women choosing an abortion”); cf. *A Woman’s Choice–E. Side Women’s Clinic v. Newman*, 904 F. Supp. 1434, 1460 (S.D. Ind. 1995) (enjoining an Indiana law requiring women to receive certain information in the presence of a medical professional at least eighteen hours before obtaining an abortion after finding that it constituted an undue burden – and distinguishing *Casey* on the ground that the Court in *Casey* “did not have available to it evidence showing that such a law had in fact caused a significant drop in the incidence of abortion”), *rev’d* 305 F.3d 684 (7th Cir. 2002).

305. See, e.g., *Cincinnati Women’s Servs., Inc. v. Taft*, 468 F.3d 361 (6th Cir. 2006) (upholding an Ohio law requiring a woman to attend an in-person meeting with a physician for informed consent purposes at least twenty-four hours prior to obtaining an abortion); *A Woman’s Choice–E. Side Women’s Clinic v. Newman*, 305 F.3d 684 (7th Cir. 2002) (reversing the injunction of an Indiana law requiring women to receive certain information in the presence of a medical professional at least eighteen hours before obtaining an abortion); *Greenville Women’s Clinic v. Bryant*, 222 F.3d 157 (4th Cir. 2000) (upholding a law imposing licensure and operational requirements on abortion clinics); *Karlin v. Foust*, 188 F.3d 446 (7th Cir. 1999) (upholding various provisions of a Wisconsin abortion law, including a twenty-four-hour waiting period); *Fargo Women’s Health Org. v. Schafer*, 18 F.3d 526 (8th Cir. 1994) (upholding North Dakota’s twenty-four-hour waiting period); *Utah Women’s Clinic, Inc. v. Leavitt*, 844 F. Supp. 1482 (D. Utah 1994) (upholding a Utah abortion law imposing a twenty-four-hour waiting period and informed consent requirements).

was designed to protect.³⁰⁶ And it reaffirmed that it was appropriate—in fact, sometimes necessary—for courts assessing the constitutionality of abortion regulations to consider the particular, compounding forms of disadvantage experienced by the women subject to those regulations.³⁰⁷

In the 1970s, the constitutional question with respect to financial disadvantage was whether the state was constitutionally obligated to fund abortions through welfare programs that funded childbirth. By the time of *Casey*, the scope of constitutional protection under the Fourteenth Amendment had narrowed, and the question with respect to financial disadvantage was different. The question now was whether courts could legitimately consider the experiences of particular subgroups of disadvantaged women when determining whether the state had substantially burdened the right to abortion. On this narrower question, the Court answered in the affirmative. It developed a doctrinal framework that in certain circumstances mandated special consideration of the real-world challenges facing particular subsets of women seeking abortions. Although less protective of financially disadvantaged women than *Roe*'s trimester framework, *Casey*'s undue burden test reflected the Court's recognition that abortion regulations that do not necessarily prevent every woman, or even most women, from exercising their constitutional rights may nonetheless infringe the rights of *some* women—most often, less privileged women. *Casey* reaffirmed the basic principle that burdening the rights of disadvantaged women in this way was a constitutional problem. In this sense, *Casey* preserved the law's ability to respond to class-related deprivations of the fundamental right to abortion.

306. Indeed, *Casey* made the sex-equality dimensions of the abortion right more visible than they had been in previous Supreme Court decisions. See Reva B. Siegel, *Dignity and the Politics of Protection: Abortion Restrictions Under Casey/Carhart*, 117 *YALE L.J.* 1694, 1753–66 (2008); *id.* at 1766 (“*Casey* . . . interprets the Due Process Clause in ways that are deeply informed by modern understandings of the Equal Protection Clause *Casey* appreciates that for women, a crucial dimension of freedom is freedom from legally imposed family roles At multiple junctures . . . the Court explains that there are equality values secured by the decisional autonomy *Casey* protects.”).

307. See *Casey*, 505 U.S. at 887–98 (engaging in a lengthy and detailed analysis of the way Pennsylvania's husband-notification provision affected the ability of married women who suffered domestic violence to obtain abortions); *id.* at 894 (explaining that the constitutional analysis of this provision focuses on the provision's effects not on all abortion-seekers, but on abortion-seekers who experience domestic violence, as “[l]egislation is measured for consistency with the Constitution by its impact on those whose conduct it affects”).

III. THE EMERGENCE OF THE NEW CLASS BLINDNESS

Not too long ago, a prominent constitutional scholar called for “de-constitutionalizing” the right to abortion.³⁰⁸ What made this call for jettisoning *Roe* atypical is that it came from a progressive scholar who believes women ought to be able to obtain abortions.³⁰⁹ The logic behind the argument was this: when the Court determined in the funding cases that the state bears no constitutional obligation to pay for abortion, it drained constitutional law of any ability to help financially disadvantaged women. “To be a meaningful support for women’s equality or liberty,” the argument went, “a right to legal abortion must mean much more than a right to be free . . . to purchase one. It must guarantee access to one.”³¹⁰ Thus, given that “[i]t is so unlikely as to be a certainty that neither this Court nor likely any Court will commence a jurisprudence of positive constitutional rights[] by beginning in the contested terrain of mandating public funds for abortions,”³¹¹ there is no point in reproductive-justice advocates continuing to waste their energies on constitutional battles.³¹² The vast majority of women who seek abortions lack financial resources, and constitutional law simply has nothing to offer them.³¹³

308. Robin West, *From Choice to Reproductive Justice: De-Constitutionalizing Abortion Rights*, 118 YALE L.J. 1394, 1394 (2009).

309. *Id.* at 1431 (arguing that “[w]omen need legal abortion . . . in order to live better and more integrated lives in their families and workplaces both”). For discussion of a different kind of call from the left for jettisoning *Roe*, based on the idea that the decision is too politically costly to defend, see Cary Franklin, *Roe as We Know It*, 114 MICH. L. REV. 867, 886 (2016).

310. West, *supra* note 308, at 1403 (“To be a meaningful support for women’s equality or liberty, a right to legal abortion must mean much more than a right to be free of moralistic legislation that interferes with a contractual right to purchase one. It must guarantee access to one. And, for a right to legal abortion to guarantee that a woman who needs an abortion will have access to one, whether or not she can pay for it, the state must be required to provide considerable support.”). In fact, West locates the blame for what she views as constitutional law’s abandonment of low-income women even earlier than the funding cases, in *Roe* itself. She argues that *Roe* created only “a negative right against the criminalization of abortion in some circumstances” and that the funding decisions logically followed from that paltry conception of what was necessary genuinely to protect women’s liberty and equality in this domain. *Id.*

311. *Id.*

312. *Id.* at 1431 (arguing that “a shift in focus away from courts to more democratic fora might open the door to moral and political opportunities to which we have been blinded by the light of the promises of a living Constitution”); *id.* at 1432 (“The reproductive justice that might be achieved through [pro-life and pro-choice] coalitions—that is, achieved through ordinary modes of political persuasion—might prove more enduring than what we have garnered to date from the Court.”).

313. *Id.* at 1425 (“It is not possible . . . to read *Roe* as a part of an adjudicative, narrative movement toward a robust conception of reproductive justice. That is ruled out by the right’s negativity.”).

This scholarly, feminist complaint that constitutional law offers no protection to financially disadvantaged women seeking abortions overlaps – in the way that claims from opposite ends of the political spectrum sometimes do – with a recent push by some conservative judges to suggest that the challenges facing such women fall outside the scope of constitutional concern. These judges too cite the funding decisions as evidence that the particular struggles low-income women encounter when seeking abortions are irrelevant under the Fourteenth Amendment and that constitutional law offers such women no special protection.

Whatever the motivation behind this claim, this Part argues against it. It shows how an overly broad, and in some instances just plain wrong, interpretation of the funding decisions has obscured extant constitutional protections for women of limited financial means. Abortion doctrine today still contains a mechanism for taking financial disadvantage into account and for ratcheting up constitutional protection when the state regulates in ways that substantially burden the rights of those on the lower rungs of the economic ladder.

This is an important form of constitutional protection. It was not so long ago that there was no protection for abortion under the Fourteenth Amendment, even as a so-called negative right. Those were not great days as far as women's health was concerned – particularly the health of poor women and women of color.³¹⁴ In the period before *Roe*, “[e]very large municipal or county hospital had a ‘septic abortion ward,’ and infected induced abortion was the most common reason for admission to gynecology services nationwide.”³¹⁵ A study conducted in New York City in the mid-1960s revealed the truly ghastly assortment of chemicals and instruments women used to perform abortions on themselves in the years before the Court extended constitutional protection to the abortion right.³¹⁶ Today, rates of abortion-related injuries and death remain quite high in countries with the most restrictive abortion laws and are much lower in countries

Reproductive justice requires a state that provides a network of support for the processes of reproduction The Court is not equipped to mandate [such support] The negative right that it *has* recognized suggests something very different: it suggests at best a right to nonreproductive sex, and at worst, a right to end a pregnancy by killing the fetus so as to free oneself of the burden of impossible parental obligations in an unjust world. Either way, it is not all that clear that women, parents, or children are the beneficiaries.”).

314. See *supra* notes 68-76, 221-225 and accompanying text.

315. GRIMES & BRANDON, *supra* note 72, at 8.

316. *Id.* at 10-14.

that permit abortion.³¹⁷ There is no disputing that the Burger Court’s determination that the government was not constitutionally obligated to pay for abortion, even where it paid for childbirth, has resulted in substantial hardship for poor women seeking abortions. But it makes an enormous difference in those women’s lives that American law limits how far states may go in restricting access to abortion – and that it sometimes requires courts to consider how abortion restrictions impede their access in particular. The more restrictive abortion laws passed in recent years often force poor women to delay their abortions³¹⁸ and to forgo paying rent and utility bills or buying food for themselves and their children.³¹⁹ But the fact that abortion is still constitutionally protected in the United States means that currently – even in the face of ever-tightening regulation – “most low-income women who want an abortion manage to obtain one.”³²⁰

Recently, however, some judges have attempted radically to curtail this remaining protection by holding that class-based considerations can play no role in the adjudication of abortion-rights claims under the Fourteenth Amendment. A few years ago, the Fifth Circuit embraced what this Article calls the “new class

317. Lisa B. Haddad & Nawal M. Nour, *Unsafe Abortion: Unnecessary Maternal Mortality*, 2 *REVIEWS OBSTETRICS & GYNECOLOGY* 122, 124 (2009) (“Data indicate an association between unsafe abortion and restrictive abortion laws. The median rate of unsafe abortions in the 82 countries with the most restrictive abortion laws is up to 23 of 1000 women compared with 2 of 1000 in nations that allow abortions. Abortion-related deaths are more frequent in countries with more restrictive abortion laws (34 deaths per 100,000 childbirths) than in countries with less restrictive laws (1 or fewer per 100,000 childbirths).”).

318. Rachel K. Jones et al., *At What Cost? Payment for Abortion Care by U.S. Women*, 23 *WOMEN’S HEALTH ISSUES* e173, e174 (2013) (noting that patients seeking second-trimester abortions cite travel and procedure costs – which have been driven up by abortion regulation – as among the most common reasons for delays in seeking care); Sarah C.M. Roberts et al., *Out-of-Pocket Costs and Insurance Coverage for Abortion in the United States*, 24 *WOMEN’S HEALTH ISSUES* e211, e215 (2014) (finding, in a study of women seeking abortions at thirty clinics throughout the country, that fifty-four percent of respondents reported that raising money for an abortion delayed obtaining care); see also Heather D. Boonstra, *Abortion in the Lives of Women Struggling Financially: Why Insurance Coverage Matters*, 19 *GUTTMACHER POL’Y REV.* 49 (2016) (reporting that low-income women seeking abortions can “get caught in a cruel cycle, in which the delays associated with raising the funds to pay for the abortion can lead to additional costs and delays,” because “[a]bortion in the second trimester can cost 2-3 times as much as abortion in the first trimester”).

319. Jones et al., *supra* note 318, at e176.

320. Boonstra, *supra* note 318, at 49. That said, it is important to note that a substantial minority of low-income women who want abortions do not manage to obtain them and are forced to bear children against their wishes. See Stanley K. Henshaw et al., *Restrictions on Medicaid Funding for Abortions: A Literature Review*, *GUTTMACHER INST.* 27 (2009), https://www.guttmacher.org/sites/default/files/report_pdf/medicaidlitreview.pdf [<https://perma.cc/L2PZ-XUM5>] (“[A] reasonable estimate is that lack of funding influences about a quarter of Medicaid-eligible women to continue unwanted pregnancies.”).

blindness,” holding that class-related concerns have no purchase in constitutional abortion doctrine. Although the Supreme Court ultimately rejected that proposition,³²¹ this new class blindness appeared to garner support among some of the Justices. This Part shows how these recent efforts to exclude class-related considerations from the analysis of abortion regulation threaten to rewrite history and reformulate Fourteenth Amendment doctrine in unprecedented ways.

In fact, the new class blindness is not limited to the context of reproductive rights. It is part of a transcontextual effort to restrict judicial consideration of class in the realm of fundamental rights. Thus, the second Section of this Part turns from the context of abortion to the contexts of voting and criminal procedure. In voting, the new class blindness has arisen in ways strikingly parallel to the ways it has arisen in the context of reproductive rights. In the context of criminal procedure, a number of Supreme Court Justices have argued that the Burger Court effectively overruled some of its predecessor’s landmark class-related decisions – decisions such as *Griffin* and *Douglas*, which to this day provide important protections for indigent criminal defendants.

Thus far, the Court has rejected these efforts to expunge class-related concerns from fundamental rights law. But it has devoted very little space in its opinions to explaining the reasons behind its rejection of these efforts. This Part aims to show how the new class blindness misreads constitutional precedent and why the recent push to strike class-related concerns from Fourteenth Amendment jurisprudence is inconsistent with due process and equal protection as those concepts have been understood for the past half century.

A. Efforts Toward a New Class Blindness in Abortion Law

In 2013, the state of Texas enacted a new law regulating abortion. The law, known as H.B. 2, required that abortion providers obtain admitting privileges at

321. See *Whole Woman’s Health v. Hellerstedt*, 136 S. Ct. 2292 (2016).

nearby hospitals and that abortion clinics outfit themselves as ambulatory surgical centers.³²² H.B. 2 was one of hundreds of similar abortion restrictions enacted in the wake of the 2010 midterm elections.³²³ Those elections swept into office a host of Tea Party and other conservative candidates for whom outlawing abortion was a top priority.³²⁴ Indeed, state legislators passed more laws regulating abortion in 2011 than in any other year in American history.³²⁵ More than

322. See H.B. 2, 2013 Tex. Gen. Laws 5013 (codified at TEX. HEALTH & SAFETY CODE ANN. §§ 171.0031, 171.041-048, 171.061-064, 245.010-011 (West 2015) and TEX. OCC. CODE ANN. §§ 164.052, 164.055 (West 2015)). For more on the ambulatory surgical center requirement, see *Whole Woman's Health v. Lakey*, 46 F. Supp. 3d 673, 682 (W.D. Tex. 2014), *aff'd in part, modified in part, vacated in part, and rev'd in part sub nom.* *Whole Women's Health v. Cole*, 790 F.3d 563 (5th Cir. 2015), *rev'd sub nom.* *Whole Women's Health v. Hellerstedt*, 1363 S. Ct. 2292 (2016), which notes:

The requirement applies equally to abortion clinics that only provide medication abortion, even though no surgery or physical intrusion into a woman's body occurs during this procedure. The standards prescribe electrical, heating, ventilation, air conditioning, plumbing, and other physical plant requirements as well as staffing mandates, space utilization, minimum square footage, and parking design. Notably, grandfathering of existing facilities and the granting of waivers from specific requirements is prohibited for abortion providers, although other types of ambulatory-surgical facilities are frequently granted waivers or are grandfathered due to construction dates that predate the newer construction requirements.

For more on the admitting privileges requirement, see *Planned Parenthood of Greater Texas Surgical Health Services v. Abbott*, 951 F. Supp. 2d 891, 897-98 (W.D. Tex. 2013), *aff'd in part and rev'd in part*, 748 F.3d 583 (5th Cir. 2014), which explains that the law assesses a criminal penalty against any physician who performs an abortion without having admitting privileges at a hospital within thirty miles of where the abortion is performed. For more on the legislative history of H.B. 2, see Cary Franklin, *Whole Woman's Health v. Hellerstedt and What It Means to Protect Women*, in REPRODUCTIVE RIGHTS AND JUSTICE LAW STORIES, *supra* note 84 (manuscript at 3-11) (on file with author).

323. See Linda Greenhouse & Reva B. Siegel, *Casey and the Clinic Closings: When "Protecting Health" Obstructs Choice*, 125 YALE L.J. 1428, 1449-54 (2016) (describing the concerted passage of similar types of antiabortion legislation around the country in the wake of the 2010 elections).

324. See Elizabeth Nash & Rachel Benson Gold, *In Just the Last Four Years, States Have Enacted 231 Abortion Restrictions*, GUTTMACHER INST. (Jan. 5, 2015), <https://www.guttmacher.org/article/2015/01/just-last-four-years-states-have-enacted-231-abortion-restrictions> [https://perma.cc/8FNX-QGKX] (noting that the new wave of abortion laws were enacted after "the 2010 midterm elections swept abortion opponents into power in state capitals across the country"); Robert Pear, *Push for Stricter Abortion Limits Is Expected in House*, N.Y. TIMES (Dec. 11, 2010), <https://www.nytimes.com/2010/12/12/health/policy/12abortion.html> [https://perma.cc/4WTZ-EA7K] (reporting that, in the U.S. House of Representatives, "[o]pponents of abortion gained about 45 seats in the midterm elections").

325. See Alastair Gee, *Anti-Abortion Laws Gain More Ground in the USA*, 377 LANCET 1992, 1992-93 (2011); Sarah Kliff, *2011: The Year of the Abortion Restrictions*, WASH. POST (Dec. 29, 2011), https://www.washingtonpost.com/blogs/wonkblog/post/2011-the-year-of-the-abortion-restrictions/2011/12/29/gIQAbJqjOP_blog.html [https://perma.cc/J6UP-XJGY].

a quarter of *all* abortion regulations passed since *Roe* were passed in the five years after those legislators took office.³²⁶ The effect of much of this new regulation was to block women’s access to abortion, often by forcing the closure of clinics that provided it.³²⁷ H.B. 2’s admitting-privileges requirement closed roughly half of Texas’s forty-one abortion clinics. The surgical-center requirement threatened to halve the remaining number, leaving Texas—a state with a population of twenty-five million—with only seven or eight clinics.³²⁸

Whole Woman’s Health, which operates a number of women’s health clinics that provide abortions, challenged the law’s constitutionality and prevailed in the district court.³²⁹ The district court found that Texas had no legitimate health interest in requiring abortion providers to meet these new requirements, as there was no evidence in this context that admitting privileges enable doctors to provide better care³³⁰ or that outfitting clinics as ambulatory surgical centers would further reduce the already very low complication rates associated with abortion.³³¹ Moreover, while the health benefits of the law were negligible, the effects

326. *Last Five Years Account for More than One-Quarter of All Abortion Restrictions Enacted Since Roe*, GUTTMACHER INST. (Jan. 13, 2016), <https://www.guttmacher.org/article/2016/01/last-five-years-account-more-one-quarter-all-abortion-restrictions-enacted-roe> [<https://perma.cc/BFC5-BMEN>].

327. Esmé E. Deprez, *Abortion Clinics Are Closing at a Record Pace*, BLOOMBERG (Feb. 24, 2016), <https://www.bloomberg.com/news/articles/2016-02-24/abortion-clinics-are-closing-at-a-record-pace> [<https://perma.cc/VT4M-JJBE>] (reporting that “[a]bortion access in the U.S. has been vanishing at the fastest annual pace on record, propelled by Republican state lawmakers’ push to legislate the industry out of existence,” and that “[s]ince 2011, at least 162 abortion providers have shut or stopped offering the procedure, while just 21 opened”).

328. *See Whole Woman’s Health v. Lakey*, 46 F. Supp. 3d 673, 682 (W.D. Tex. 2014), *aff’d in part, modified in part, vacated in part, and rev’d in part sub nom.* *Whole Women’s Health v. Cole*, 790 F.3d 563 (5th Cir. 2015), *rev’d sub nom.* *Whole Women’s Health v. Hellerstedt*, 1363 S. Ct. 2292 (2016); *see also* Alexa Ura et al., *Here Are the Abortion Clinics that Have Closed Since 2016*, TEX. TRIB. (June 28, 2016), <https://www.texastribune.org/2016/06/28/texas-abortion-clinics-have-closed-hb2-passed-2013> [<https://perma.cc/G7CT-TBDW>] (listing the names and locations of the Texas clinics that closed in the wake of H.B. 2).

329. *See Lakey*, 46 F. Supp. 3d 673.

330. *Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott*, 951 F. Supp. 2d 891, 899–901 (W.D. Tex. 2013) (finding that abortion is so safe that abortion providers rarely treat patients in hospitals and thus rarely qualify for admitting privileges and that whether or not a provider has such privileges has no impact on the quality of care patients receive in the rare instances when they are treated in hospitals), *aff’d in part and rev’d in part*, 748 F.3d 583 (5th Cir. 2014).

331. *Lakey*, 46 F. Supp. 3d at 684 (“The great weight of the evidence demonstrates that, before the act’s passage, abortion in Texas was extremely safe with particularly low rates of serious complications and virtually no deaths occurring on account of the procedure [R]isks are not

on women's access to abortion were enormous. The court found that if both provisions of H.B. 2 were allowed to take effect, approximately 2 million women would live in a county further than 50 miles from an abortion provider, 1.3 million would live further than 100 miles from a provider, 900,000 would live further than 150 miles from a provider, and 750,000 would live further than 200 miles from a provider.³³² The problem was not just distance, the court found. It was the way these distances interacted with other "practical concerns," such as "lack of availability of child care, unreliability of transportation, unavailability of appointments at abortion facilities, unavailability of time off from work, immigration status and inability to pass border checkpoints, poverty level, the time and expense involved in traveling long distances, and other, inarticulable psychological obstacles" to render abortion inaccessible, particularly to "poor, rural, or disadvantaged women."³³³ The court acknowledged that many middle-class women would still be able to access abortion in the wake of H.B. 2.³³⁴ But, the court asserted, "Roe's essential holding guarantees to all women, not just those of means, the right to a previability abortion."³³⁵

On appeal, the Fifth Circuit rejected this reasoning. It held that a state is entitled to near-total deference on the question of whether a law advances its interest in protecting women's health.³³⁶ The Fifth Circuit also rejected the district court's reasoning about the interplay between travel distance and financial disadvantage. It held that obstacles that arise from women's own lack of funds are irrelevant to determining whether a regulation qualifies as a substantial obstacle under *Casey*.³³⁷ That, the court reasoned, was the lesson of the abortion funding

appreciably lowered for patients who undergo abortions at ambulatory surgical centers as compared to nonsurgical-center facilities.").

332. *Id.* at 681.

333. *Id.* at 683.

334. *Id.*

335. *Id.*

336. See *Whole Woman's Health v. Cole*, 790 F.3d 563, 587 (5th Cir. 2015) (holding that, if "any conceivable rationale exists for an enactment," the state has satisfied its burden, and that it is "not required to prove that the objective of the law would be fulfilled" (quoting *Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott*, 748 F.3d 583, 594 (5th Cir. 2014), *rev'd sub nom.* *Whole Women's Health v. Hellerstedt*, 136 S. Ct. 2292)).

337. See *id.* at 589 ("We do not doubt that women in poverty face greater difficulties. However, to sustain a facial challenge, the Supreme Court and this circuit require Plaintiffs to establish that the law itself imposes an undue burden on at least a large fraction of women." (quoting *Whole Woman's Health v. Lakey*, 769 F.3d 285, 299 (5th Cir.), *vacated in part*, 135 S. Ct. 399 (2014))).

decisions: the state is not responsible under the Fourteenth Amendment for burdens it did not create.³³⁸ The only burdens courts ought to take into account are those created by “the law itself.”³³⁹ Difficulties that arise out of women’s own straitened financial circumstances – such as lack of transportation, childcare, days off work, and money for travel – are not part of the constitutional calculus when determining the size of the burden an abortion regulation imposes.³⁴⁰ With all those considerations pushed to one side, the court determined that H.B. 2 did not constitute a substantial obstacle to abortion.³⁴¹

There was some support for this reasoning at the Supreme Court. Justice Alito, joined by Chief Justice Roberts and Justice Thomas, rejected the idea that courts should focus on the struggles of particular subgroups of women when applying the undue burden test.³⁴² Justice Alito argued that Whole Woman’s Health “must show, at a minimum, that [the controverted provisions of H.B. 2] have an unconstitutional impact on at least a ‘large fraction’ of Texas women of reproductive age.”³⁴³ Indeed, Justice Alito went so far as to suggest that it is never appropriate to narrow the scope of the undue burden inquiry to particular subgroups of women in the context of a facial challenge to an abortion law. For one thing, he argued, doing so would predetermine the outcome. If courts examine a law’s effects only on women who are burdened by the law, the fraction of women burdened will “always [be] ‘1,’” he reasoned, “which is pretty large as fractions go.”³⁴⁴

338. *See id.* (citing the Court’s observation in *Maier v. Roe* that “[t]he indigency that may make it difficult – and in some cases, perhaps, impossible – for some women to have abortions is neither created nor in any way affected by the state’s regulation” (alteration in original) (internal quotation marks omitted) (quoting 432 U.S. 464, 474 (1977))). The Court in *Maier*, however, made this observation in the course of explaining why the state was not constitutionally obligated to fund abortion. The Fifth Circuit cited this observation (out of context) to suggest that the difficulties financially disadvantaged women face when the state restricts abortion are not properly considered when assessing the magnitude of the obstacles such restrictions generate – a proposition for which *Maier* provides no support. *See supra* note 272 and accompanying text.

339. *Cole*, 790 F.3d at 589.

340. *See id.*

341. *Id.* at 591 (holding that the ambulatory surgical center requirement did not constitute a substantial obstacle to abortion); *Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott*, 748 F.3d 583, 600 (5th Cir. 2014) (holding that the admitting privileges requirement did not constitute a substantial obstacle).

342. *See Whole Woman’s Health v. Hellerstedt*, 136 S. Ct. 2292, 2343 (2016) (Alito, J., dissenting).

343. *Id.*

344. *Id.* at 2343 n.11.

This is a misreading of the doctrine. *Casey* held that courts must begin with the subset of women actually burdened by a regulation and then ask whether that regulation constitutes a substantial obstacle for a large fraction of those women. Not all burdens constitute substantial obstacles, as the Court's analysis of the twenty-four-hour waiting period in *Casey* demonstrated. Had Justice Alito's interpretation prevailed, the central doctrinal mechanism for protecting the rights of financially disadvantaged women in the context of abortion would have been eviscerated.³⁴⁵

The Court, however, declined to follow that path. It did not devote significant attention in *Whole Woman's Health* to class-related questions because H.B. 2 was so sweeping in its effects, and so baseless as a purported regulation of health, that no particularized inquiry was necessary.³⁴⁶ But the Court went out of its way to reaffirm that abortion doctrine not only permits, but in some cases requires, such an inquiry. The Court observed that "*Casey* used the language 'large fraction' to refer to 'a large fraction of cases in which [the contested provision] is relevant,' a class narrower than 'all women,' 'pregnant women,' or even 'the class of women seeking abortions.'"³⁴⁷ "Here, as in *Casey*," the Court wrote, "the relevant denominator is 'those [women] for whom [the provision] is an actual rather than an irrelevant restriction.'"³⁴⁸ If a regulation impedes access to abortion for "poor, rural, or disadvantaged women,"³⁴⁹ then those are the subgroups on which the constitutional inquiry must focus—regardless of whether the state is responsible for the difficult life circumstances faced by many women in these groups.

345. In fact, Justice Alito objected not only to the way the Court deployed the "large fraction" test, but also to the fact that it deployed that "more plaintiff-friendly" test at all. *Id.* He argued—contrary to the assumptions of the majority in *Whole Woman's Health*—that "[t]he proper standard for facial challenges is unsettled in the abortion context" and that a litigant bringing a facial challenge to an abortion regulation might be required to "show that no set of circumstances exists under which the [regulation] would be valid." *Id.* (quoting *Gonzales v. Carhart*, 550 U.S. 124, 167 (2007) (internal quotation marks omitted)). This standard would bar facial challenges to laws that burden the rights of some, but not all, women. It would mean that any particular burdens a law places on financially disadvantaged women would be irrelevant in the context of a facial challenge.

346. *See id.* at 2319 (majority opinion) (observing that the challenged provisions of H.B. 2 "vastly increase the obstacles confronting women seeking abortions in Texas without providing any benefit to women's health capable of withstanding any meaningful scrutiny").

347. *Id.* at 2320 (quoting *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 894-95 (1992)).

348. *Id.* (quoting *Casey*, 505 U.S. at 895 (alterations in original)).

349. *Id.* at 2302 (quoting *Whole Woman's Health v. Lakey*, 46 F. Supp. 3d 673, 683 (W.D. Tex. 2014), which found that H.B. 2's requirements "erect a particularly high barrier" for such women).

This facet of *Whole Woman's Health* had immediate and significant consequences for abortion law, particularly for women without financial resources. In the years leading up to *Whole Woman's Health*, courts assessing the constitutionality of post-2010 abortion regulations frequently invoked *Casey's* teachings with regard to subgroup analysis under the undue burden test. They began to hold that some of these laws were unconstitutional in part because they placed a substantial obstacle in the path of financially disadvantaged women seeking abortions. Judges in these cases engaged in lengthy analysis of the class-related effects of the new laws. They observed that a “woman who does not own her own car may need to buy two inter-city bus tickets (one for the woman procuring the abortion, and one for a companion) in order to travel to another city.”³⁵⁰ They noted that “[w]ithout regular internet access, it is more difficult to locate an abortion clinic in another city or find an affordable hotel room.”³⁵¹ They pointed out that “many low-income women have never left the cities in which they live,” and that “[t]he idea of going to a city where they know no one and have never visited, in order to undergo a procedure that can be frightening in itself, can present a significant psychological hurdle.”³⁵² They explained that the fact “that a woman has some conceivable opportunity to exercise her right does not mean that a substantial obstacle to the exercise of that right is not imposed.”³⁵³ Nor,

350. *Planned Parenthood Se., Inc. v. Strange*, 33 F. Supp. 3d 1330, 1357 (M.D. Ala. 2014); *see also* *Planned Parenthood of Wis., Inc. v. Schimel*, 806 F.3d 908, 919 (7th Cir. 2015) (noting that an admitting privileges law could force women to make a ninety-mile trip by bus or train, which could make the process of obtaining an abortion “prohibitively expensive”); *Planned Parenthood Se., Inc. v. Bentley*, 951 F. Supp. 2d 1280, 1286 (M.D. Ala. 2013) (noting that for women without a car, the increased distances between providers “would be no mere encumbrance, but an insurmountable barrier to obtaining an abortion”).

351. *Strange*, 33 F. Supp. 3d at 1357; *see also* *Schimel*, 806 F.3d at 919 (observing that “more than 50 percent of Wisconsin women seeking abortions have incomes below the federal poverty line” and that “[f]or them a round trip to Chicago, and finding a place to stay overnight in Chicago” is a serious, and potentially impossible, undertaking); *McCormack v. Hiedeman*, 694 F.3d 1004, 1017 (9th Cir. 2012) (noting that travel, which sometimes necessitates making arrangements for an overnight stay, “has been shown to be a significant factor when a woman delays an abortion, and low-income women are more likely to have this problem”).

352. *Strange*, 33 F. Supp. 3d at 1357; *see also* *McCormack v. Hiedeman*, 900 F. Supp. 2d 1128, 1145 (D. Idaho 2013) (observing that “low-income women living in rural areas . . . often must travel long distances to the closest abortion provider, requiring an already financially strapped pregnant woman to miss work, find childcare, make arrangements for travel and for an overnight stay to satisfy the 24-hour requirement,” and finding that “[t]hese obstacles, coupled with the threat of criminal prosecution based on an abortion provider’s purported failure to comply with state abortion regulations, are simply too much”).

353. *Bentley*, 951 F. Supp. 2d at 1286; *see also* *Planned Parenthood of Wis, Inc. v. Van Hollen*, 963 F. Supp. 2d 858, 867 (W.D. Wis. 2013) (citing this language in *Bentley*); *Jackson Women’s Health Org. v. Carrier*, 940 F. Supp. 2d 416, 422 n.4 (S.D. Miss. 2013) (“A significant increase

these judges held, “can a serious burden be ignored because some women of means may be able to surmount [an] obstacle while poorer women . . . cannot.”³⁵⁴

The Fifth Circuit’s decision in *Whole Woman’s Health*—which deemed constraints attributable to women’s own financial circumstances constitutionally irrelevant—raised serious questions about the legitimacy of this analysis. Indeed, after the Fifth Circuit issued its decision, courts in that circuit began to excise all consideration of class from their abortion rulings. A Louisiana district court deciding whether to grant a preliminary injunction against that state’s admitting privileges law observed that “[t]he vast majority of women who undergo abortions in Louisiana are poor” and that “[a]s a result of that poverty, the burden of traveling farther to obtain an abortion would be significant, fall harder on these women than those who are not poor and cause a large number of these women to either not get an abortion, perform the abortions themselves, or have someone who is not properly trained and licensed perform it.”³⁵⁵ But, the court concluded, it was barred by the Fifth Circuit’s decision in *Whole Woman’s Health* from taking such “‘real-world’ factors” into account when assessing the law’s constitutionality.³⁵⁶

When the plaintiffs in the Louisiana case returned to court the following year in pursuit of a permanent injunction against the admitting privileges law, the court’s analysis looked very different.³⁵⁷ Now—as a result of the Supreme Court’s decision in *Whole Woman’s Health*—the class-related evidence the Louisiana court had previously refused to consider formed the centerpiece of its analysis. The court wrote extensively about the hardships that closing clinics would impose on low-income Louisianans, noting among other things that “[w]omen

in the cost of abortion or the supply of abortion providers and clinics can, at some point, constitute a substantial obstacle to a significant number of women choosing an abortion.” (quoting *Tucson Woman’s Clinic v. Eden*, 379 F.3d 531, 541 (9th Cir. 2004)).

354. *Bentley*, 951 F. Supp. 2d at 1286; see also *Schimmel*, 806 F.3d at 919 (observing that “a 90-mile trip is no big deal for persons who own a car or can afford an Amtrak or Greyhound ticket,” but that evidence showed that “18 to 24 percent of [Wisconsin] women who would need to travel to Chicago or the surrounding area for an abortion would be unable to make the trip”); *McCormack*, 694 F.3d at 1017 (“Because they do not have the financial wherewithal to confirm suspected pregnancies, low-income women are often forced to wait until later in their pregnancies to obtain an abortion Delayed confirmation compounds the financial difficulties, as the cost of abortion services increases throughout the gestational period.”).

355. *June Med. Servs. v. Kliebert*, 158 F. Supp. 3d 473, 505-06 (M.D. La. 2016).

356. *Id.* at 525.

357. See *June Med. Servs. v. Kliebert*, 250 F. Supp. 3d 27 (M.D. La. 2017), *rev’d sub nom.* *June Med. Servs. v. Gee*, No. 17-30397, 2018 WL 4611031 (5th Cir. Sept. 26, 2018). For more on this reversal, see *infra* note 360.

who cannot afford to pay the costs associated with travel, childcare, and time off from work may have to make sacrifices in other areas like food or rent expenses, rely on predatory lenders, or borrow money from family members of abusive partners or ex-partners, sacrificing their financial and personal security.”³⁵⁸ The Louisiana court granted the injunction³⁵⁹ – joining a number of other courts that have engaged in similar forms of analysis and reached similar conclusions about the constitutionality of abortion regulation in the wake of *Whole Woman’s Health*.³⁶⁰

358. *Id.* at 83.

359. *Id.* at 89.

360. See, e.g., *Whole Woman’s Health v. Paxton*, 280 F. Supp. 3d 938, 953 (W.D. Tex. 2017) (invalidating a statute effectively banning the standard dilation and evacuation (D&E) procedure because, by lengthening the number of days required for an abortion, it would increase costs associated with “travel, lodging, time away from work, and child care,” and that “delay and extra cost would be particularly burdensome for low-income women”); *W. Ala. Women’s Ctr. v. Miller*, 299 F. Supp. 3d 1244, 1261 (M.D. Ala. 2017) (invalidating statutes effectively banning the D&E procedure and limiting provider proximity to schools, in part because the need to travel longer distances would be “particularly devastating for low-income women who represent the majority of women seeking abortions in Alabama”); *Hopkins v. Jegley*, 267 F. Supp. 3d 1024, 1061 (E.D. Ark. 2017) (invalidating a regulation that would effectively end standard D&E practice in part because abortion “would become time and cost-prohibitive for some women,” and faced with new “financial and logistical burden[s], some low income women may delay obtaining an abortion or not have an abortion at all”); *Planned Parenthood of Ind. & Ky. v. Comm’r, Ind. State Dep’t of Health*, 273 F. Supp. 3d 1013, 1022-26 (S.D. Ind. 2017) (invalidating a law requiring an ultrasound eighteen hours prior to an abortion after finding that “the burdened group is low-income women who do not live near one of [Planned Parenthood’s] six health centers at which ultrasounds are available” and that the regulation substantially burdens a large fraction of women in this group, who often lack “access to a car,” “do not have employment that pays them for days during which they do not work,” and may “delay scheduling an appointment because they cannot arrange childcare, which they now must do on two occasions rather than one”); *Planned Parenthood of the Heartland v. Reynolds ex. rel. Iowa*, 915 N.W.2d 206, 232 (Iowa 2018) (observing that “it is axiomatic that a right that is only accessible to the wealthy or privileged is no right at all,” and invalidating Iowa’s seventy-two-hour waiting period after hearing from poverty experts, considering the challenges the waiting period presented to low-income women, and “measur[ing] its constitutionality by its impact on those whose conduct it affects” (internal quotation marks omitted)).

Just as this Article was going to print, however, two federal circuit courts pushed back against this trend, emboldened in the wake of Justice Kennedy’s retirement to press once again toward class blindness. In late September 2018, the Fifth Circuit reversed the Louisiana district court’s 2017 ruling in *June Medical Services*, dismissing the challenge to Louisiana’s admitting privileges law. *Gee*, 2018 WL 4611031. In this recent decision, the Fifth Circuit characterized *Whole Woman’s Health* as “highly fact-bound,” *id.* at *22, and once again applied the undue burden test in a manner blind to the particular burdens faced by financially disadvantaged women, *see id.* at *31-33 (Higginbotham, J., dissenting) (criticizing the majority’s rejection of the district court’s finding that the law would significantly burden the rights of large numbers of women seeking abortions, particularly “low-income women in the state, one of the poorest

Early commentary on *Whole Woman's Health* focused on its preservation of the intermediate scrutiny standard.³⁶¹ The Fifth Circuit had applied rational basis review, holding that courts should defer to the government when it regulates abortion in the name of protecting women's health. Had the Supreme Court adopted the Fifth Circuit's approach, there would be little left in the way of constitutional protection for the abortion right. All the government would have to do to justify an abortion regulation (in many jurisdictions) would be to cite an ostensibly health-related and not aggressively irrational reason for the regulation. But intermediate scrutiny was not the only important feature of *Casey* that *Whole Woman's Health* preserved. By reaffirming *Casey's* holding that courts must consider the real-world effects of abortion regulation on the (sub)groups of women actually burdened by it, *Whole Woman's Health* averted a very significant attempt to expunge class-related considerations from the law. By a majority of five votes to three, the Court preserved the law's ability to protect the rights of financially disadvantaged women – its ability to recognize that an obstacle that may be a surmountable nuisance to some can deprive others of their most fundamental liberties.

B. The New Class Blindness Across Fourteenth Amendment Law

This Article challenges the idea that the Court's rightward turn in the 1970s spelled the end of Fourteenth Amendment concerns about class. As we have seen, the Burger Court rejected a number of doctrinal mechanisms the Warren Court developed to protect the rights of people without financial resources. But this Article reveals what the simple story about the Burger Court's treatment of class obscures. Decisions like *Rodriguez* and *McRae* did not completely expunge class-related concerns from Fourteenth Amendment doctrine. Such concerns lived on, in more circumscribed ways, in the Court's fundamental rights jurisprudence in

in the country"); see also *Comprehensive Health of Planned Parenthood Great Plains v. Hawley*, No. 17-1996, 2018 WL 4288362, at *5-6 (8th Cir. Sept. 10, 2018) (vacating a district court decision enjoining Missouri's admitting privileges and "physical plant" requirements and remanding the case to the lower court to engage in further fact-finding on questions such as whether abortion really was safe in Missouri: *Whole Woman's Health* had held only that it was safe in Texas).

361. See, e.g., Comment, *Whole Woman's Health v. Hellerstedt*, 130 HARV. L. REV. 397 (2016); David Gans, *No More Rubber-Stamping State Regulation of Abortion*, SCOTUSBLOG (June 27, 2016, 5:15 PM), <http://www.scotusblog.com/2016/06/symposium-no-more-rubber-stamping-state-regulation-of-abortion> [<https://perma.cc/69ZH-W9YA>]; Jane S. Schacter, *SCOTUS Whole Woman's Health Decision: Casey Endures*, STAN. LAW. (June 27, 2016), <https://law.stanford.edu/2016/06/27/scotus-whole-womans-health-decision-casey-endures> [<https://perma.cc/Z63W-GDXS>].

the area of reproductive rights. Indeed, by curtailing other class-sensitive doctrinal mechanisms, cases such as *Rodriguez* and *McRae* underscored the important role of fundamental rights law in limiting how substantially the state may interfere with the ability of financially disadvantaged people to exercise their constitutional rights.

This Article does not claim that class-related concerns motivated the recognition of all fundamental rights or that all strains of fundamental rights doctrine protect people without financial resources. More historical work must be done in order to understand what role, if any, class has played in various fundamental rights contexts outside the sphere of reproductive rights, which has been the primary focus of this Article. But this Section focuses on two additional constitutional contexts – voting and criminal procedure – in which there is no question that class-related concerns have shaped fundamental rights doctrine in significant and lasting ways.

This Section focuses on these additional contexts in order to show that the new class blindness that has recently emerged in abortion law is part of a broader effort to delegitimize judicial consideration of class. In both election law and criminal procedure, some judges have begun to argue that it is illegitimate for courts to take class into account when adjudicating Fourteenth Amendment claims – not only in the context of equal protection, but also where fundamental rights are concerned. These judges have begun to argue, as they have in the area of abortion, that Burger Court precedent compels courts to adopt a permissive approach toward regulation that particularly burdens the fundamental rights of people without financial resources. Thus far, the Supreme Court has resisted this argument, as it has in the context of abortion. But advocates of the new class blindness have nonetheless continued to try to strip important and enduring class-based protections from Fourteenth Amendment law.

1. *Class Blindness in Voting*

There are a number of striking parallels between voting rights law and reproductive rights law. The Fifteenth Amendment expanded constitutional protection for voting in the aftermath of the Civil War. But modern voting rights law, like modern reproductive rights law, arguably dates back to the mid-1960s,³⁶² a period in which constitutional concerns about class were at their

362. See, e.g., Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (codified as amended in scattered sections of 52 U.S.C.) (creating the modern law of race discrimination in voting); *Harper v. Va. Bd. of Elections*, 383 U.S. 663 (1966) (invalidating the poll tax); *Reynolds v. Sims*, 377 U.S. 533 (1964) (revolutionizing the law of districting with the one-person, one-vote rule).

apex. Such concerns were apparent in decisions like *Harper*.³⁶³ Decided the year after *Griswold*, *Harper* invalidated Virginia's \$1.50 tax on voting. The majority opinion, written by Justice Douglas, was a perfect hybrid of due process and equal protection. It cited the burden the poll tax imposed on the right to vote as evidence of its unconstitutionality. Because "the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights," the Court declared, "any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized."³⁶⁴ But the Court placed even greater emphasis on the state's "invidious discrimination" against poor voters. It likened class-based discrimination to race-based discrimination and claimed that both had traditionally been disfavored under the Fourteenth Amendment.³⁶⁵ The (perfectly hybrid) problem with the poll tax was that it placed a significant obstacle in the path of poor Virginians seeking to exercise a "fundamental political right."³⁶⁶

For many years after *Harper*, the Court applied strict scrutiny to laws that infringed the right to vote. In 1992, however, in the same month it decided *Casey*, the Court adopted a more "flexible" standard of review in a case called *Burdick v. Takushi*,³⁶⁷ which involved a Hawaii law that barred write-in voting. The Court had gestured in the direction of this new standard a few years earlier in a case involving early filing deadlines for political candidates.³⁶⁸ But *Burdick* applied the new standard in a case involving a law that arguably burdened the right to vote itself. The Court declared in *Burdick* that "[a] court considering a challenge to a state election law must weigh the character and magnitude of the asserted

363. 383 U.S. 663.

364. *Id.* at 667.

365. *See supra* notes 19 and 161.

366. *Harper*, 383 U.S. at 667-68. For more on the hybrid character of *Harper*, see Karlan, *supra* note 23, at 479 (citing *Harper* as a paradigm case of a "de facto stereoscopic" approach to due process and equal protection, involving both values though formally relying only on the latter). Congress, in the text of the Voting Rights Act itself, framed the problem of the poll tax in terms of this same intersection of class and fundamental rights, plus race. Because "the payment of a poll tax as a precondition to voting . . . precludes persons of limited means from voting" and also often has a disparate racial impact, "Congress declares that the constitutional right of citizens to vote is denied or abridged" by poll taxes. Voting Rights Act of 1965 § 10 (codified as amended at 52 U.S.C. § 10306 (2018)). The statute then invokes Congress's enforcement powers under Section 5 of the Fourteenth Amendment and Section 2 of the Fifteenth Amendment to authorize litigation to invalidate poll taxes. *See* 3 BRUCE ACKERMAN, WE THE PEOPLE: THE CIVIL RIGHTS REVOLUTION 83-104 (2014) (situating section 10 and the struggle over the poll tax at the center of the Civil Rights Revolution).

367. 504 U.S. 428, 434 (1992).

368. *See Anderson v. Celebrezze*, 460 U.S. 780 (1983).

injury to the rights protected by the First and Fourteenth Amendments against the precise interests put forward by the State as justifications for the burden imposed by its rule, taking into consideration the extent to which those interests make it necessary to burden the plaintiff's rights."³⁶⁹ When the restrictions placed on First and Fourteenth Amendment rights are "severe," the Court held, the state's regulation must be "narrowly drawn to advance a state interest of compelling importance."³⁷⁰ When those restrictions are reasonable and nondiscriminatory, a "State's important regulatory interests are generally sufficient to justify" them.³⁷¹

This new test resembled the undue burden test the Court unveiled a few weeks later in *Casey* in a number of key respects. It offered less protection than strict scrutiny. Henceforth, when the state restricted the right to vote, it would most of the time face a balancing test similar to the one in *Casey*.³⁷² Like *Casey*'s undue burden test, the new voting test preserved some elements of the old doctrinal regime. It too functioned as a doctrinal mechanism for taking into account special circumstances, such as financial disadvantage, that the Court had long recognized as a concern in the context of voting (even though *Burdick* itself did not implicate any such concern).

Today, the United States is awash in new voting restrictions that directly implicate class-related concerns. The paradigmatic example of these new restrictions is probably the voter identification laws that have swept the nation in the past decade and that condition the right to vote (in person) on the presentation of particular forms of government-issued photo identification. In 2008, the Court heard a Fourteenth Amendment challenge to one such law in *Crawford v.*

369. *Burdick*, 504 U.S. at 434 (internal quotation marks omitted).

370. *Id.*

371. *Id.*

372. Courts continue to apply strict scrutiny, rather than the *Burdick* balancing test, to laws that outright prohibit some citizens from voting. See *Kramer v. Union Free Sch. Dist. No. 15*, 395 U.S. 621 (1969) (applying strict scrutiny in striking down a rule that only parents and property owners were permitted to vote in school board elections); see also, e.g., *Obama for Am. v. Husted*, 697 F.3d 423, 429 (6th Cir. 2012) (distinguishing vote denial claims where "strict scrutiny is the appropriate standard" from those where the *Burdick* balancing test applies); *Carlson v. Wiggins*, 675 F.3d 1134, 1139 (8th Cir. 2012) (observing that laws denying the right to vote for reasons other than "age, residence, and citizenship . . . are suspect and must withstand strict scrutiny to survive a constitutional attack"). Essentially, the *Burdick* balancing test applies to laws that burden or restrict, rather than flatly prohibit, the right to vote. Today, that describes most vote denial claims.

Marion County Election Board.³⁷³ The Court in *Crawford* applied *Burdick*'s balancing test – the first time it had done so in a case involving “vote denial.”³⁷⁴ After weighing the burden the ID requirement imposed on voters' Fourteenth Amendment rights against the state's interests in preventing voter fraud and safeguarding voter confidence in the electoral system, the Court determined that the state had not unduly burdened the right to vote.³⁷⁵ Although the Court acknowledged that the photo-ID requirement might make it harder for poor people and others who tend to lack government-issued ID to vote, it held that, “on the basis of the record that has been made in this litigation,” it could not “conclude that the statute imposes ‘excessively burdensome requirements’ on any class of voters.”³⁷⁶ There simply was not enough evidence in this case – a facial challenge – to show that the burden on poor people and other populations that tend to lack government-issued ID was of sufficient magnitude to outweigh the state's strong interests in preventing voter fraud and safeguarding voter confidence.³⁷⁷

In his concurring opinion in *Crawford*, Justice Scalia, joined by Justices Thomas and Alito, took issue with the fact that the Court had inquired into the law's effects on financially disadvantaged voters at all. “The lead opinion assumes petitioners' premise that the voter-identification law ‘may have imposed a special burden on’ some voters, but holds that petitioners have not assembled evidence

373. 553 U.S. 181 (2008) (plurality opinion).

374. See Daniel Tokaji, *The New Vote Denial: Where Election Reform Meets the Voting Rights Act*, 57 S.C. L. REV. 689 (2006) (arguing that a variety of new controversies surrounding who can cast a ballot, such as those surrounding voter ID laws, are best viewed as a revival of old questions of “vote denial” rather than the more familiar set of modern controversies about vote dilution).

375. See *Crawford*, 553 U.S. at 202.

376. *Id.* (quoting *Storer v. Brown*, 415 U.S. 724, 738 (1974)).

377. See *id.* at 200–01 (observing that “the evidence in the record does not provide us with the number of registered voters without photo identification,” nor does it “provide any concrete evidence of the burden imposed on voters who currently lack photo identification”); *id.* at 201–02 (“The record says virtually nothing about the difficulties faced by . . . indigent voters. While one elderly man stated that he did not have the money to pay for a birth certificate, when asked if he did not have the money or did not wish to spend it, he replied, ‘both.’ From this limited evidence we do not know the magnitude of the impact [the law] will have on indigent voters in Indiana. The record does contain the affidavit of one homeless woman who has a copy of her birth certificate, but was denied a photo identification card because she did not have an address. But that single affidavit gives no indication of how common the problem is.” (citations omitted)). The *Crawford* plurality, in carefully characterizing their decision as a rejection of a facial challenge to the law, left open the possibility of further litigation by voters for whom the law was an especially heavy burden.

to show that the special burden is severe enough to warrant strict scrutiny,” Justice Scalia observed.³⁷⁸ “That is true enough,” he asserted, but “I prefer to decide these cases on the ground[] that petitioners’ premise is irrelevant.”³⁷⁹

Why irrelevant? For one thing, Justice Scalia argued, the Burger Court determined in the abortion funding decisions that wealth is not a protected classification and triggers no special constitutional concern under the Fourteenth Amendment.³⁸⁰ Moreover, he argued, the plaintiffs’ complaint was ultimately one of disparate impact: their objection was to a facially neutral law that disproportionately burdens indigents and others who tend to lack government-issued IDs.³⁸¹ Justice Scalia pointed out that, in addition to the abortion funding decisions, the Burger Court decided *Washington v. Davis*, which established that without proof of discriminatory intent, facially neutral laws with a disparate impact raise no constitutional concerns.³⁸² Thus, he concluded that the plurality in *Crawford* was wrong to inquire into the particular effects of the voter ID law on indigents. Such effects are constitutionally irrelevant, Justice Scalia asserted. The only thing that matters under the Fourteenth Amendment is the size of the burden the law imposes on “voters generally”³⁸³ – which in this case is de minimis, as most voters already have a government-issued ID. Thus, the state should be free to pursue its “important regulatory interests.”³⁸⁴ It would be hard to find a better encapsulation of the logic of the new class blindness.

Crawford undoubtedly restricted constitutional protection for voting rights. It further narrowed the category of voting rights claims to which strict scrutiny applies. It upheld a voter ID law that impeded the ability of poor and otherwise disadvantaged citizens to vote, and it enabled the spread of such laws throughout the country.³⁸⁵ Like *Whole Woman’s Health*, however, *Crawford* also fended off a

378. *Crawford*, 553 U.S. at 204 (Scalia, J., concurring in the judgment).

379. *Id.*

380. *Id.* at 207 (citing *Harris v. McRae*, 448 U.S. 297 (1980), for the proposition that the Equal Protection Clause offers no special protection against laws that burden some people because of “poverty”).

381. *See id.* at 207-08.

382. *See* 426 U.S. 229 (1976); *see also* *Pers. Adm’r v. Feeney*, 442 U.S. 256, 279 (1979) (holding that discrimination claims under the Equal Protection Clause require a showing of discriminatory purpose, and defining that term to mean that the state “selected or reaffirmed a particular course of action at least in part ‘because of,’ not merely ‘in spite of,’ its adverse effects upon an identifiable group”).

383. *Crawford*, 553 U.S. at 206 (Scalia, J., concurring in the judgment).

384. *Id.* at 204.

385. *See generally* Richard L. Hasen, *Softening Voter ID Laws Through Litigation: Is It Enough?*, 2016 WIS. L. REV. 100, 111 (finding that *Crawford* and the challenges to other voter ID laws that

significant challenge by proponents of the new class blindness. Three Justices were prepared to hold in *Crawford* that class-based effects are doctrinally irrelevant when assessing the constitutionality of voter ID laws. They were prepared to hold that courts must ignore the particular difficulties such laws impose on subgroups of disadvantaged voters and consider only the effects of such laws on voters generally.³⁸⁶ But the Court in *Crawford* rejected that reasoning. It refused to extend *Washington v. Davis* into the voting rights context and to hold that real-world effects do not matter absent discriminatory intent. And it rejected the suggestion that the nonsuspect status of class under equal protection means that courts are barred from paying attention to the interaction between financial disadvantage and laws restricting the right to vote. *Crawford* upheld the idea that voting, like abortion, is different. There are fundamental liberties at stake in these contexts, and that necessitates preserving a constitutional doctrine capable of recognizing when the state is preventing people without financial resources from exercising those liberties.

Preserving a doctrine that facilitates judicial consideration of class does not guarantee robust class-based protection, as *Crawford* itself demonstrates. But the Court's reaffirmation of the relevance of class in the context of voting means that class continues to shape the constitutional inquiry. It means that disparate class-based effects continue to trigger constitutional concerns, and it provides courts with a doctrinal mechanism for addressing those concerns. *Crawford* itself may have made limited use of this doctrine, evaluating the evidence of burdens on financially disadvantaged voters in a relatively stingy way. But it left space open

have followed in its wake have blunted or softened those laws, but that these effects have so far been "underwhelming"). Some of the most effective challenges to these laws have occurred at the three-way intersection of race, class, and fundamental rights. *See infra* note 387.

386. Like the Fifth Circuit's opinion in *Whole Woman's Health*, the circuit court opinion in *Crawford* avoided any analysis of the statute's class dimensions. The opinion, by Judge Posner, observed: "No doubt most people who don't have photo ID are low on the economic ladder." *Crawford v. Marion Cty. Election Bd.*, 472 F.3d 949, 951 (7th Cir. 2007), *aff'd*, 553 U.S. 181 (2008). But it found this conjecture significant only in that it might help give the Democratic Party Article III standing, since lower socioeconomic status is predictive of Democratic votes. In its actual constitutional analysis, the opinion focused on the burden the law imposed on an *average* person rather than the specific burden it might impose on a poor person. *See id.* (noting that "it is exceedingly difficult to maneuver in today's America without a photo ID (try flying, or even entering a tall building such as the courthouse in which we sit, without one)," and declining to inquire into the burden the law might impose on people who lack such an ID because they are poor).

to expand on that protection in the future, if evidence indicates that new regulations are screening out financially disadvantaged voters without doing much to advance the state's interest in sound elections.³⁸⁷

A few years after *Crawford*, Judge Richard Posner, who wrote the Seventh Circuit's opinion in the case upholding the law,³⁸⁸ repudiated his earlier opinion. At the time of the *Crawford* litigation, Posner explained, voter ID laws were new and courts did not have enough information about them to make informed decisions about their constitutionality. “[T]here hadn’t been that much activity in the way of voter identification,” he asserted, and judges “weren’t really given strong indications that requiring additional voter identification would actually disenfranchise people entitled to vote.”³⁸⁹ However, he argued, by 2013 it had become clear that that is precisely what such laws were doing: blocking otherwise qualified voters—particularly financially disadvantaged voters—from casting ballots. Had he the case to decide again, Judge Posner asserted, he would declare the law unconstitutional.³⁹⁰

387. *Crawford*'s balancing test is not the only doctrinal mechanism for addressing problems at the intersection of financial disadvantage and the right to vote. Courts have also applied the Voting Rights Act, which implements the Fourteenth and Fifteenth Amendments, in ways that consider damage inflicted at the intersection of race, class, and the right to vote. This occurs in at least two ways. First, courts have recognized the interrelation of race and class, and have therefore found evidence that election regulations burden the poor to be highly probative—occasionally even sufficient—to prove a violation of the Voting Rights Act's prohibition on race discrimination. See, e.g., *Texas v. Holder*, 888 F. Supp. 2d 113, 127 (D.D.C. 2012) (holding that because Texas's voter ID law “will weigh more heavily on the poor,” and “racial minorities in Texas are disproportionately likely to live in poverty,” it follows that the voter ID law “will likely have retrogressive effect” under section 5 of the Voting Rights Act (VRA)), *vacated*, 570 U.S. 928 (2013). Second, courts have constructed constitutional and statutory tests for determining when voting laws constitute race discrimination that incorporate concerns about poverty. See, e.g., *White v. Regester*, 412 U.S. 755, 768-69 (1973) (introducing, in a Fourteenth Amendment case that today would be a Voting Rights Act case, the idea that “economic realities” matter, so that the “low income and high rate of unemployment” of residents of the San Antonio “Barrio,” along with their race, were factors relevant to the assessment of whether current voting rules were unconstitutionally hindering this group's political participation); *League of Women Voters of N.C. v. North Carolina*, 769 F.3d 224, 246 (4th Cir. 2014) (treating the fact that black “citizens of North Carolina currently lag behind whites in several key socioeconomic indicators, including education, employment, income, access to transportation, and residential stability,” as a reason for concluding that North Carolina's rules on same-day registration and out-of-precinct voting likely violate section 2 of the VRA).

388. *Crawford*, 472 F.3d 949.

389. John Schwartz, *Judge in Landmark Case Disavows Support for Voter ID*, N.Y. TIMES (Oct. 15, 2013), <https://www.nytimes.com/2013/10/16/us/politics/judge-in-landmark-case-disavows-support-for-voter-id.html> [<https://perma.cc/MLX7-F33H>].

390. See RICHARD A. POSNER, REFLECTIONS ON JUDGING 84-85 (2013) (“I plead guilty to having written the majority opinion” in *Crawford*.); Schwartz, *supra* note 389.

Judge Posner retired in 2017 without writing another opinion in a voter ID case. But in 2013, at the same time he was repudiating his decision in *Crawford*, he was confronted with *Planned Parenthood v. Van Hollen*, a case involving a Wisconsin law requiring abortion providers to obtain admitting privileges at nearby hospitals.³⁹¹ In that case, Judge Posner focused on the ways in which the resulting closure of two-and-a-half of the state's four abortion clinics would affect "the financially strapped," who would "be unable to afford the longer trips they'll have to make to obtain an abortion when the clinics near them shut down."³⁹² Posner noted that most of the clinics' patients lived below the federal poverty line, and that traveling long distances was not easy for many women in that position, especially in light of the waiting period the state also imposes on abortion patients.³⁹³ "When one abortion regulation compounds the effects of another, the aggregate effects on abortion rights must be considered," he wrote.³⁹⁴ Only then will courts have a complete picture of the challenges women face in obtaining abortions and only then will they be able to determine whether a law constitutes a substantial obstacle for a large fraction of the women it affects.

Assessing these factors, and weighing them against the state's purported interest in protecting women's health, Judge Posner and his colleagues declared Wisconsin's admitting privileges law unconstitutional.³⁹⁵ It is tempting to read Posner's opinion in *Van Hollen* as a direct repudiation of his opinion in *Crawford*. Regardless of whether the judge himself thought in those terms, however, his two opinions illustrate what Americans without financial resources stand to lose if the new class blindness prevails: not a guarantee that courts will determine that their rights outweigh the interests of the state in any particular case, but a doctrine that at least requires courts to take account of the real-world effects on financially disadvantaged rights holders of regulations that impinge on fundamental constitutional liberties. Judge Posner's opinion invalidating Wisconsin's

391. *Planned Parenthood of Wis., Inc. v. Van Hollen*, 738 F.3d 786 (7th Cir. 2013).

392. *Id.* at 796. Had the law taken effect, "two of the state's four abortion clinics — one in Appleton and one in Milwaukee — would have had to shut down . . . and a third clinic would have lost the services of half its doctors." *Id.* at 789.

393. *Id.* (appending a map illustrating the increased travel distances that would result from the new law and that would, in combination with the state's waiting period, constitute "a non-trivial burden on the financially strapped"); see also *Planned Parenthood of Wis., Inc. v. Schimel*, 806 F.3d 908, 919 (7th Cir. 2015) (Posner, J.) (observing "that a 90-mile trip is no big deal for persons who own a car or can afford an Amtrak or Greyhound ticket . . . [b]ut more than 50 percent of Wisconsin women seeking abortions have incomes below the federal poverty line," and for them, a round-trip ticket to one of the very few clinics the law would leave standing "may be prohibitively expensive").

394. *Van Hollen*, 738 F.3d at 796 (affirming preliminary injunction).

395. *Schimel*, 806 F.3d at 922 (permanently enjoining the law challenged in *Van Hollen*).

admitting privileges law demonstrates the ongoing relevance of this doctrine and the kind of protection it still affords those who are especially likely to be shut out when the state erects barriers to the exercise of fundamental constitutional rights.

2. *Class Blindness in Criminal Procedure*

The ongoing role of class in the adjudication of cases involving fundamental rights was also recently on display in a groundbreaking set of criminal procedure cases involving money bail. Early in 2018, a California Court of Appeal held that there were significant class-based constitutional problems with the way the state administered its money bail system.³⁹⁶ The court held that requiring money bail as a condition of pretrial release at an amount that was impossible for an arrestee to pay (without first considering the arrestee's ability to pay or alternatives to money bail) violated the Fourteenth Amendment.³⁹⁷ The court employed an explicitly hybrid form of due process-equal protection reasoning to conclude that incarcerating poor arrestees simply because they could not afford to post bail, while allowing richer ones to pay their way out of pretrial detention, violated the poor arrestees' rights.³⁹⁸ Shortly thereafter, the Fifth Circuit reached a similar conclusion about the use of money bail in Harris County, Texas.³⁹⁹ The Fifth Circuit noted that, as a result of posting bail, "the wealthy arrestee is less likely to plead guilty, more likely to receive a shorter sentence or be acquitted, and less likely to bear the social costs of incarceration."⁴⁰⁰ The poor arrestee, on the other hand, "must bear the brunt of all of these, simply because he has less money than his wealthy counterpart."⁴⁰¹ The court concluded that such a system violates due process and equal protection by converting bail into an "instrument of oppression."⁴⁰²

³⁹⁶. See *In re Humphrey*, 228 Cal. Rptr. 3d 513 (Ct. App. 2018).

³⁹⁷. *Id.* at 526 (concluding that "a court may not order pretrial detention unless it finds either that the defendant has the financial ability but failed to pay . . . ; or that the defendant is unable to pay that amount and no less restrictive conditions of release would be sufficient to reasonably assure such appearance").

³⁹⁸. *Id.* at 526-31; see also *supra* note 185.

³⁹⁹. *O'Donnell v. Harris Cty.*, 892 F.3d 147 (5th Cir. 2018).

⁴⁰⁰. *Id.* at 163.

⁴⁰¹. *Id.*

⁴⁰². *Id.* at 158 (internal quotation marks omitted); see also *id.* at 159 (observing that "[f]ar from demonstrating sensitivity to the indigent misdemeanor defendants' ability to pay, Hearing Officers and County Judges almost always set a bail amount that detains the indigent," and finding that this almost automatic imposition of bail fees deprives indigent defendants of due

Both courts in these money bail cases located their holdings in a line of hybrid due process-equal protection cases stretching back to *Griffin* and *Douglas*⁴⁰³ – key decisions in the Warren Court’s so-called criminal procedure revolution. As Part I showed, many of the decisions that constituted this revolution sought to secure access to justice for people without financial resources.⁴⁰⁴ In *Griffin*, the Court held that the Fourteenth Amendment prohibits the state from conditioning criminal defendants’ right to appeal on their ability to pay for a trial transcript.⁴⁰⁵ In *Douglas*, the Court held that when the state grants criminal defendants a statutory right to appeal, it must provide legal representation to indigent defendants who wish to exercise that right.⁴⁰⁶

These longstanding decisions and the substantial body of law to which they gave rise have now come under attack by advocates of the new class blindness. Justice Thomas, for instance, has argued that the problem alleged in *Griffin* and *Douglas* was disparate impact. He claims that the Court in *Griffin* and *Douglas* found constitutional fault with facially neutral policies – requiring defendants to pay for trial transcripts and legal representation on appeal – on the ground that those policies had a disparate impact on people without financial resources.⁴⁰⁷ Subsequent to *Griffin* and *Douglas*, however, the Court decided *Washington v. Davis*, which held that disparate impact alone is insufficient to establish an equal protection violation.⁴⁰⁸ In so holding, Justice Thomas argues, the Burger Court undermined the jurisprudential foundation of the *Griffin-Douglas* line of cases.⁴⁰⁹ Indeed, he argues that the Burger Court effectively overruled those cases

process); *id.* at 163 (“[T]ake two . . . arrestees who are identical in every way . . . except that one is wealthy and one is indigent. Applying the County’s current custom . . . with [its] lack of individualized assessment and mechanical application of the secured bail schedule, both arrestees would . . . receive identical secured bail amounts. . . . [T]his state of affairs violates . . . equal protection . . .”).

403. See *id.* at 161 (citing *Griffin*); *In re Humphrey*, 228 Cal. Rptr. 3d 513, 527 (Ct. App. 2018) (“In imposing a judicial responsibility to inquire into the financial circumstances of an allegedly indigent defendant, the *Bearden* court relied heavily on the reasoning of its earlier opinions in *Williams v. Illinois* and *Tate v. Short*, both of which advanced the process of mitigating the disparate treatment of indigents in the criminal justice system initially set in motion by *Griffin v. Illinois* and *Douglas v. California*.” (citations omitted)).

404. See *infra* notes 155-162 and accompanying text.

405. *Griffin v. Illinois*, 351 U.S. 12 (1956).

406. *Douglas v. California*, 372 U.S. 353 (1963).

407. *M.L.B. v. S.L.J.*, 519 U.S. 102, 133-35 (1996) (Thomas, J., dissenting).

408. 426 U.S. 229 (1976).

409. See, e.g., *M.L.B.*, 519 U.S. at 135-39 (Thomas, J., dissenting) (arguing that the *Griffin-Douglas* line of cases is no longer viable after *Davis*); *Lewis v. Casey*, 518 U.S. 343, 375-77 (1996) (Thomas, J., concurring) (arguing the same); cf. *Halbert v. Michigan*, 545 U.S. 605, 629

and that they are inconsistent with contemporary Fourteenth Amendment law, which no longer polices disparate impact and which repudiated the Warren Court’s “fetish for indigency” decades ago.⁴¹⁰

Thus far, the Court has rejected this reading of Burger Court precedent. It has repeatedly held that *Washington v. Davis* “does not have the sweeping effect [Justice Thomas] attribute[s] to it.”⁴¹¹ *Davis* held that disparate impact alone is not enough to prove discrimination for equal protection purposes. But *Davis* did not suggest that *when fundamental rights and interests are at stake*, a law’s actual effects on financially disadvantaged rights holders are constitutionally irrelevant. On this point, the Court has explained that there are certain forms of state action that “work a unique kind of deprivation.”⁴¹² Among the forms of state action that fall into this category are those that severely encroach on important liberty interests and cause targeted harm to people without financial resources. The Court has repeatedly made clear that *Davis* did not repudiate this hybrid due process-equal protection form of reasoning. Indeed, in a few cases, the Rehnquist and Roberts Courts have not only reaffirmed the *Griffin-Douglas* line of cases, but actually extended it.⁴¹³

To be sure, the Court has not extended that line of cases very far. It has in recent decades been relatively conservative when it comes to protecting the rights of historically subordinated groups, and it has inherited the Burger Court’s wariness of recognizing anything that looks like an affirmative benefit. Fourteenth Amendment law today does not require courts to take account of class-based effects when assessing the constitutionality of most of the legislation that states and the federal government enact. But when the government legislates in areas such as abortion, voting, and criminal procedure, where fundamental constitutional liberties are involved, the law does, through a variety of doctrinal mechanisms, require courts to take class into account and to ensure that the government is not unwarrantedly depriving people without financial resources of those

(2005) (Thomas, J., dissenting) (arguing that “the precise rationale for the *Griffin/Douglas* line of cases has never been made explicit” and dissenting from the Court’s extension of that line of cases in *Halbert*).

410. *M.L.B.*, 519 U.S. at 134 (Thomas, J., dissenting) (quoting *Douglas*, 372 U.S. at 359 (Clark, J., dissenting)).

411. *Id.* at 126 (majority opinion).

412. *Id.* at 127 (quoting *Lassiter v. Dep’t of Soc. Servs.*, 412 U.S. 18, 27 (1981)).

413. See, e.g., *Halbert*, 545 U.S. at 610 (holding that due process and equal protection require the appointment of counsel for defendants convicted on guilty or nolo contendere pleas who seek first-tier review in the Michigan Court of Appeals); *M.L.B.*, 519 U.S. at 107 (holding that a state violates due process and equal protection when it “condition[s] appeals from trial court decrees terminating parental rights on the affected parent’s ability to pay record preparation fees”).

liberties. To jettison the long-standing Fourteenth Amendment doctrines that require courts to consider class would imperil the equal citizenship of an already vulnerable group of Americans, those least able to rely on private funds to protect themselves. That is why, even forty years after its rightward shift, the Court has retained these basic forms of constitutional protection.

CONCLUSION

In 2016, the Texas Supreme Court overturned a trial court ruling favorable to the plaintiffs in “the most far-reaching funding challenge in Texas history”⁴¹⁴ – a challenge to the state’s school finance system. Unlike the Federal Constitution, the Texas Constitution expressly guarantees a right to education. To ensure the “general diffusion of knowledge,” it requires the state “to establish and make suitable provision for the support and maintenance of an efficient system of public free schools.”⁴¹⁵ In this latest round of Texas school finance litigation, a large group of school districts alleged, among other things, that poor students were being excluded from the “general diffusion of knowledge.”⁴¹⁶ The trial court agreed.⁴¹⁷ It found that the state’s school finance system, based largely on local property taxes, yielded an education system constitutionally inadequate to meet the needs of economically disadvantaged students and English language learners (ELL), a group of students that was highly overlapping with economically disadvantaged students.⁴¹⁸

The Texas Supreme Court rejected this finding. It held that the trial court erred in considering the effects of the school finance system on a “subgroup” of the student population.⁴¹⁹ The Court observed that it had “never squarely held

414. *Morath v. Tex. Taxpayer & Student Fairness Coal.*, 490 S.W.3d 826, 833 (Tex. 2016).

415. TEX. CONST. art. VII, § 1 states: “A general diffusion of knowledge being essential to the preservation of the liberties and rights of the people, it shall be the duty of the Legislature of the State to establish and make suitable provision for the support and maintenance of an efficient system of public free schools.”

416. *Morath*, 490 S.W.3d at 858. Texas courts refer to the requirement that the state achieve a “general diffusion of knowledge” as the “adequacy” requirement. *Id.* at 849 (“The school system is constitutionally adequate if it achieves a general diffusion of knowledge.”). The adequacy claim on behalf of economically disadvantaged students was not the only claim in the case, but it was a central one.

417. See *Tex. Taxpayer & Student Fairness Coal. v. Williams*, No. D-1-GN-11-003130, 2014 WL 4254969 (Tex. Dist. Ct. Aug. 28, 2014), *aff’d in part, rev’d in part sub nom. Morath*, 490 S.W.3d 826.

418. *Id.* at *78, *107.

419. *Morath*, 490 S.W.3d at 857-63.

that a separate, cognizable adequacy claim can be asserted by a student subpopulation such as economically disadvantaged or ELL students.”⁴²⁰ Instead, the Court embraced the State’s argument that the constitutional adequacy provision “only requires *an* efficient system of free public schools, considering *the system as a whole*, not a system with efficient components.”⁴²¹ In other words, the Court concluded, the Texas Constitution “only requires a *general* diffusion of knowledge, not a diffusion of knowledge to particular groups.”⁴²² Considering the system as a whole, the Court concluded that Texas was providing its students with an adequate education.⁴²³

This was not a Fourteenth Amendment case. But the Texas Supreme Court’s determination that it was illegitimate to consider the school finance system’s effects on economically disadvantaged students, rather than on students in general, strongly resembles the Fifth Circuit’s holding two years earlier in *Whole Woman’s Health* that it was illegitimate to consider H.B. 2’s effects on economically disadvantaged women, rather than on women in general. This refusal to consider the effects of regulation on economically disadvantaged people, even in contexts involving fundamental constitutional rights and interests, is part of the broader rise of the new class blindness. Advocates of this approach have begun to claim that it is outside, or even anathema to, our constitutional tradition for courts to take account of economic disadvantage when determining the constitutionality of state action that burdens fundamental rights and interests. They have begun to assert that precedent requires courts to take a more general view, asking only whether laws that interfere with the exercise of fundamental rights and interests substantially burden rights holders in general, which often seems to mean focusing on the burdens imposed on the average rights holder. This more general view would in many cases make it impossible to see the distinctive, class-linked burdens some laws impose on the exercise of fundamental rights.

Contrary to what these advocates suggest, however, there is a long history in American constitutional law of taking class into account in the adjudication of at

420. *Id.* at 858.

421. *Id.* (quoting *Neely v. W. Orange-Cove Consol. Indep. Sch. Dist.*, 176 S.W.3d 746, 790 (Tex. 2005)).

422. *Id.* (internal quotation marks omitted). The Court asserted that its decision did not “foreclose completely a ruling of constitutional inadequacy as to subgroups,” but it made clear “that the showing necessary for such a ruling would have to be truly exceptional.” *Id.* at 859. Such a showing would have to be “truly exceptional,” the Court claimed, because it seemed more legally sound to consider the system as a whole and because, if it granted this claim, other subpopulations might follow the economically disadvantaged in seeking constitutional redress of perceived education inadequacies—a situation that could become unmanageable. *Id.* (“Some resort to practical concerns is appropriate in constitutional decisionmaking, because our Constitution’s framers were practical people with practical concerns and intentions.”).

423. *Id.* at 863.

least some fundamental rights claims. Indeed, this Article argues that concerns about the equal citizenship of the economically disadvantaged in some cases helped to shape what rights the Court recognized as fundamental in the first place. When the Court in the 1950s and 1960s recognized a right as fundamental, it often examined how a challenged regulation interfered with poor people's ability to exercise that right in determining whether the regulation violated the Fourteenth Amendment. If the Court in *Griffin* and *Harper* had asked whether the small fees associated with voting or obtaining a trial transcript substantially burdened the rights of the average American, those cases would probably have come out differently. It was the practice of examining the particular burdens those fees imposed on the financially disadvantaged that enabled the Court to recognize the state's actions as constitutional violations.

In 1963, Justice Tom Clark accused his colleagues of having a "fetish for indigency."⁴²⁴ To the extent that the word fetish implies a certain irrationality, a subconscious drive, it does not seem like the right word to describe the Warren Court's development of class-related constitutional protections. Those protections were born of an understanding that the Fourteenth Amendment emerged in the aftermath of the Civil War to protect an impoverished and disenfranchised group of people – people whose liberty and equal citizenship were especially vulnerable to infringement. If the Court failed to take economic disadvantage into account when interpreting the Fourteenth Amendment – which it in fact did in the *Lochner* era⁴²⁵ – the risk was high that encroachments on the rights of people without financial resources might go unnoticed. Adopting a doctrine wholly insensitive to the class-based effects of state action would render the Fourteenth

424. *Douglas v. California*, 372 U.S. 353, 359 (1963) (Clark, J., dissenting).

425. Indeed, the Court in the *Lochner* era often interpreted the Fourteenth Amendment as a bar to assisting the economically disadvantaged. *Lochner* itself is sometimes remembered as a pure freedom-of-contract case, but that is not quite right. In a way that makes the case emblematic of the jurisprudence of its era, the Court in *Lochner* rejected what it called "a labor law, pure and simple" – a term the Court used, in a derogatory way, to describe a law "designed to alter the bargaining power between employers and employees, or more generally, the haves and the have-nots, the rich and the poor." Akhil Reed Amar, *The Constitutional Virtues and Vices of the New Deal*, 22 HARV. J.L. & PUB. POL'Y 219, 220 (1998); see also *id.* ("The essence of *Lochner* . . . [is] the illegitimacy of governmental redistribution."); Jed Rubenfeld, *The Anti-Anti-discrimination Agenda*, 111 YALE L.J. 1141, 1146-47 (2002) (showing that *Lochner* era jurisprudence was essentially "antiredistributive" at its core, across doctrinal settings); Laurence H. Tribe, *The Supreme Court, 1972 Term – Foreword: Toward a Model of Roles in the Due Process of Life and Law*, 87 HARV. L. REV. 1, 6, 12 n.69 (1973) (explaining that "[i]n the era of *Lochner v. New York*, the crucial substantive judgment [was] one denying the legitimacy of legislation designed to redress economic inequalities").

Amendment powerless to protect a group of people who in many ways resembled the disenfranchised and economically disadvantaged Americans whose rights the Amendment was originally designed to secure.

Advocates of the new class blindness claim that Fourteenth Amendment doctrine has indeed been almost wholly insensitive to class since the late 1970s, when the Burger Court rejected the Warren Court's class-based jurisprudence. Thus far, the Court has resisted this characterization, preserving the law's sensitivity to class where certain fundamental rights and interests are concerned. But the Court now seems poised to shift even further to the right, as do the federal appeals courts.⁴²⁶ These are ideal conditions for the continued promotion of the new class blindness. There is every reason to believe that its advocates will continue to try to expunge the remaining forms of class-based protection from Fourteenth Amendment law, fundamentally altering the way courts adjudicate fundamental rights claims—all the while insisting that they are simply applying Burger Court precedent.

As this Article has shown, the Burger Court substantially limited the ability of Fourteenth Amendment law to redress class-related harms. The Court in the 1970s was concerned about the ramifications of formally extending protected-class status to the poor; it was wary of imposing funding mandates on the state in the name of vindicating constitutional rights. But it never suggested that when confronted with claims that the state had actively infringed fundamental rights and interests—some of which gained constitutional protection in the first place because people without financial resources had been deprived of them—it was somehow constitutionally suspect to take class into account. That kind of class blindness harkens back not to the Burger Court era, but to an earlier period in American history, a period that predates the constitutional revolution that occurred in the mid-twentieth century.

In the 1950s and especially the 1960s, the Court began to interpret the Fourteenth Amendment in ways that protected, rather than harmed, economically disadvantaged people. It began to interpret the Fourteenth Amendment to protect voting rights, welfare rights, reproductive rights, and the rights of criminal defendants. It began to deploy due process and equal protection to protect people who were actually subordinated and disenfranchised. Not all of the constitutional protections that emerged in the Warren Court era survived the Court's conservative turn in the mid-to-late 1970s. Constitutional law offers less protection to people without financial resources today than it did at the start of that decade. Despite all that changed since then, however, the Court has never repudiated the idea that the Fourteenth Amendment limits the extent to which the state may deprive economically disadvantaged people of the ability to exercise

426. See *supra* note 29.

certain fundamental rights. Through decades of narrowing constitutional protection for historically subordinated groups, the Court has preserved doctrinal mechanisms for scrutinizing state action that tramples the fundamental rights of people without financial resources. It has done so because to do otherwise – to abandon these last important constitutional limitations on the state’s power to block economically disadvantaged people from exercising fundamental rights – would return Fourteenth Amendment law to an era, long before our own, in which the liberty and equal citizenship of such people fell outside the scope of constitutional concern.