

The New Textualism, Progressive Constitutionalism, and Abortion Rights

A Reply to Jeffrey Rosen

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Jack Balkin's *Living Originalism* deserves all of the attention that it has received.¹ It is one of the most important works of constitutional theory in recent years, and it is likely to inspire much theorizing by others.²

Jeffrey Rosen's contribution to this symposium on Balkin's book is brimming with insights.³ In clear and concise prose, Rosen usefully categorizes the different kinds of progressives and conservatives who occupy today's political and legal landscape. He wisely counsels legal progressives not to run from constitutional text and history where those forms of authority can help to decide constitutional questions. He correctly advises that possessing the "right" constitutional methodology is no substitute for defending a substantive constitutional vision. And he makes a thought-provoking case for the present pertinence of Justice Louis Brandeis's approach to judging. It is no wonder that Rosen is a leading public intellectual about the subject of the U.S. Supreme Court.

In this Essay, I offer a few thoughts in response to Rosen's contribution. I will first focus on what he writes about the "new textualism." I will then reply to what he intimates about the continuing validity of *Roe v. Wade*.⁴ In short, I will argue that Rosen offers progressives little reason to accept the new textualism or to reject *Roe* in the name of legal fidelity.

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1. JACK M. BALKIN, *LIVING ORIGINALISM* (2011).
2. Balkin provoked me sufficiently that I was moved to review the book elsewhere. See Neil S. Siegel, *Jack Balkin's Rich Historicism and Diet Originalism: Health Benefits and Risks for the Constitutional System*, 111 MICH. L. REV. (forthcoming 2013).
3. Jeffrey Rosen, *How New Is the New Textualism?*, 25 YALE J.L. & HUMAN. 43 (2013).
4. 410 U.S. 113 (1973).

I. THE NEWNESS AND TEXTUALISM OF THE “NEW TEXTUALISM”

In Rosen’s view, *Living Originalism* “represents a growing constitutional movement among liberal activists and legal scholars that James Ryan has called the “new textualism.”⁵ “The movement,” according to Rosen, “seeks to beat conservatives at their own game by insisting that arguments about the text, history, and structure of the Constitution often lead to liberal rather than conservative results.”⁶ Rosen adds that the ultimate “success or failure of the New Textualism will depend on the ability of liberals to stop squabbling about constitutional methodology and to agree on the substantive values that they believe the Constitution protects.”⁷ These passages, provocative though they are, seem problematic to me both descriptively and normatively.

As a jurisprudential matter, it is not apparent that there is such a thing as the “new textualism.” The phrase suggests something methodologically novel or distinct. There is, however, nothing methodologically novel or distinct about academic constitutional lawyers—whatever their ideological bent—who make textual, structural, and historical (whether pre- or post-ratification) arguments in interpreting the Constitution. What is more, I doubt that any self-described new textualist means to rule out of bounds doctrinal arguments and the institution of *stare decisis*, which is essential if decisions endorsed by new textualists are to constrain Justices who are not new textualists. The only standard method of constitutional argument that I have yet to mention invokes the constitutional authority of the American ethos, which often works hand in hand with other interpretive modalities.⁸ So, in substance and in practice, the new textualism seems to me more appropriately described as fidelity to the Constitution that Chief Justice John Marshall interpreted in *McCulloch v. Maryland*.⁹ Akhil Reed Amar, whom Rosen justly celebrates, relied heavily on *McCulloch* in his defense of the constitutionality of health care reform.¹⁰ I do not see what the idea of a “new textualism” adds to the old Marshallianism. It is not new, and it is not focused primarily on the text.

Normatively, I fear that any progressive approach to constitutional interpretation (whatever one chooses to call it) will not succeed if the point of the exercise is primarily “to beat conservatives at their own game”¹¹ by insisting that various constitutional arguments often lead to outcomes that

5. Rosen, *supra* note 3, at 44.

6. *Id.*

7. *Id.* at 45.

8. See, e.g., *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 408 (1819) (describing national borders that do not yet exist).

9. *Id.*

10. Akhil Amar, *The Lawfulness of Health-Care Reform* (Yale Law Sch. Pub. Law Working Paper No. 228, 2011), available at <http://papers.ssrn.com/abstract=1856506>.

11. Rosen, *supra* note 3, at 44.

progressives favor. Just as the use of originalism for political purposes by some on the right has undermined originalism's claims to legal authority, I doubt things will end well for left-leaning activists and scholars if they view constitutional law principally "[a]s a strategic matter"¹² that requires "engaging conservatives on their own turf."¹³ To be clear, I am not so naive or irresponsible as to believe that outcomes are irrelevant in evaluating constitutional arguments. But if outcomes are all (or almost all) that matter to the activist or scholar, then one is not faithfully discharging one's legal responsibilities, and one may end up losing credibility in the eyes of those who are potentially persuadable.

One may lose credibility for at least two reasons. First, one will probably make some relatively weak and unconvincing legal arguments. Consider, for example, how a results-oriented practitioner or scholar is likely to deploy arguments based on American history and tradition. As every historian knows, history is often a notoriously mixed bag. It is delusional to think that historical arguments almost always validate the values of today's progressives, moderates, or conservatives. America was and is too diverse a place for any such luck (or misfortune).

Second, one may lack the conviction necessary to persuade others. I myself do not think that progressives should be asking themselves how to beat conservatives at their own game. I instead think that progressives should be asking themselves how to think of the practice of constitutional adjudication as something other than a game—how they can authentically believe in the soundness of their own constitutional arguments. Such conviction is a powerful thing. Those who possess it can confidently and publicly assert their constitutional arguments as law. Armed with conviction, one may not get all of the outcomes that one desires, because one will inevitably end up having to make concessions in the name of legal fidelity. But, ironically, one may secure more favorable outcomes than one would obtain if obtaining them were the only objective.¹⁴

A distinct normative concern is raised by Rosen's assertion that the ultimate "success or failure of the new textualism will depend on the ability of liberals to stop squabbling about constitutional methodology and to agree on the substantive values that they believe the Constitution protects."¹⁵ This statement renders puzzling Rosen's enthusiastic embrace of the new textualism. If substantive constitutional values are primary and

12. *Id.* at 44.

13. *Id.* at 47.

14. For example, some legal progressives may not favor the constitutional limits on the tax power that the U.S. Supreme Court imposed in *National Federation of Independent Business v. Sebelius*, 132 S. Ct. 2566 (2012). But the availability of those limits may have informed the decision of Chief Justice Roberts to uphold the Affordable Care Act's minimum coverage provision under the Taxing Clause. See Neal Kumar Katyal, *Foreword: Academic Influence on the Court*, 98 VA. L. REV. 1189 (2012).

15. Rosen, *supra* note 3, at 44-45.

constitutional methodology is secondary to Rosen, then it is not clear why he champions a movement seemingly inspired by the thought that what progressives need most is a more powerful interpretive methodology (or justificatory rhetoric?). The “older generation of liberal legal scholars”¹⁶ referenced by Rosen tends to believe that causation runs in the opposite direction—that if progressives get their substantive constitutional values straight and mobilize successfully to achieve them, then methodological approaches will be pluralistic, and questions of appropriate legal form in particular settings will tend to take care of themselves.¹⁷ Rosen seems to agree with both points. But they appear to be in tension, so it is not clear how he can have it both ways.

II. THE LAWFULNESS OF THE ABORTION DECISIONS

Rosen believes that some progressive legal scholars “strenuously resist[.]” the new textualism because they “fear that addressing conservative Justices in terms they can understand will make it harder to defend landmark Warren and Burger Court liberal precedents such as *Roe v. Wade*.”¹⁸ Rosen calls *Roe* the “elephant in the room” that “explains much of the liberal legal establishment’s skepticism” about the new textualism.¹⁹ I suspect that Rosen misdiagnoses progressive resistance for the reasons offered above: it is more likely that these progressives view the progressive legal movement as already possessing sufficient methods and labels.

In any event, I will now consider—far too briefly—whether embracing the new textualism (or the old Marshallianism) would oblige one to repudiate *Roe* and *Planned Parenthood of Southeastern Pennsylvania v. Casey*.²⁰ Rosen does not explicitly counsel progressives to call for *Roe*’s and *Casey*’s abandonment, but he intimates as much.²¹ He calls “Balkin’s textualist defense of *Roe* . . . the least convincing part of his book.”²² He contrasts the new textualism, which he endorses, with “*Roe*-style living constitutionalism,”²³ which he seems to reject. And in the same paragraph, with *Roe* apparently in mind, he writes the following:

16. *Id.* at 44.

17. *See, e.g.*, Robert C. Post & Reva B. Siegel, *Democratic Constitutionalism*, in *THE CONSTITUTION IN 2020*, at 25, 31 (Jack M. Balkin & Reva B. Siegel eds., 2009) (“Americans mobilize because they care about constitutional ideals. It is exactly backward to argue that the most important need of progressives is for a method of constitutional interpretation.”).

18. Rosen, *supra* note 3, at 44.

19. *Id.* at 48.

20. 505 U.S. 833 (1992).

21. In the past, Rosen has more clearly stated his view that *Roe* was wrongly decided. *See* *WHAT ROE V. WADE SHOULD HAVE SAID: THE NATION’S TOP LEGAL EXPERTS REWRITE AMERICA’S MOST CONTROVERSIAL DECISION 170-86* (Jack M. Balkin ed., 2005) (dissenting opinion of Jeffrey Rosen).

22. Rosen, *supra* note 3, at 48.

23. *Id.* at 49.

[T]o the degree that Balkin and other new textualists refuse to recognize that textualist arguments have their limits, and that not every liberal policy goal can be justified in constitutional terms, they diminish the new textualism's appeal as a principled framework for structuring political and legal debate.²⁴

For Rosen, apparently, *Roe* is an example of “free-floating textualism,” which “makes it harder to criticize conservatives for being similarly results-oriented when they manipulate the levels of abstraction of constitutional text and history in order to justify their own preferred policies.”²⁵

If *Roe* is as lawless as Rosen seems to think, then perhaps he should simply say so. Whatever the reason for his diffidence, the implication of what he writes is evident. Rosen, however, does not really defend his intimations. Nor does he explain why his criticisms of *Roe* do not similarly condemn other landmark Supreme Court decisions protecting liberty and equality, including the Court's invalidation of compulsory sterilization in *Skinner v. Oklahoma*,²⁶ its declaration of a right to contraception in *Griswold v. Connecticut*²⁷ and *Eisenstadt v. Baird*,²⁸ and its invalidation of anti-miscegenation laws in *Loving v. Virginia*.²⁹

I will focus on *Loving* because it may seem like the easiest case for Rosen to distinguish. It is not so easy. Just as the *Loving* Court relied on both the explicit, textual authority of the Equal Protection Clause and an unenumerated fundamental right that was supported by tradition only if conceived at a relatively high level of abstraction,³⁰ so too may the abortion right be defended in both ways. Just as the textual basis for *Loving* did not render the equality right protected by the Court obvious or uncontroversial for most of the post-ratification history of the Equal

24. *Id.* at 49.

25. *Id.*

26. 316 U.S. 535 (1942).

27. 381 U.S. 479 (1965).

28. 405 U.S. 438 (1972).

29. 388 U.S. 1 (1967) (invalidating Virginia's statutory ban on miscegenation because it (1) unconstitutionally discriminated and subordinated based on race and (2) violated the fundamental right to marry, even though the right had traditionally been limited to same-race couples).

30. In *Casey*, Justice Scalia declined to acknowledge the second ground on which the *Loving* Court invalidated the Virginia law. See 505 U.S. at 980 n.1 (Scalia, J., dissenting) (“The Court's suggestion . . . that adherence to tradition would require us to uphold laws against interracial marriage is entirely wrong. Any tradition in that case was contradicted by a text—an Equal Protection Clause that explicitly establishes racial equality as a constitutional value.”). Perhaps the implication of Scalia's response is that there is no fundamental right to marry, or that the fundamental right to marry extends only to same-race couples. Both assertions contradict our law, and I doubt Rosen subscribes to either of them. Moreover, neither the plain meaning nor the original understanding of the text of the Equal Protection Clause is what Justice Scalia asserts it to be. See Michael Klarman, Brown, *Originalism, and Constitutional Theory: A Response to Professor McConnell*, 81 VA. L. REV. 1881, 1919-20 (1995) (noting the distinctions among civil, social, and political equality drawn by the framers of the Fourteenth Amendment). Scalia did not explain why nondecisive text trumps tradition when government discriminates based on race but not when it restricts access to abortion.

Protection Clause, so too the abortion right need not be obvious or uncontroversial in that history in order to be textually grounded. Of course it is contestable whether the equal protection framework compels protection of the abortion right. But the same was true of racial segregation and bans on miscegenation,³¹ just as it is true of many other rights protected under equal protection.³²

To be clear, I would ground the abortion right in both the Equal Protection Clause and the Due Process Clauses. The protections offered by these clauses are often overlapping, given the intimate relationship between constitutional equality and constitutional liberty. I focus on the Equal Protection Clause here not because I find liberty arguments for the abortion right unpersuasive, but because they are probably more familiar.³³

Why, exactly, are there insufficient interpretive resources to defend *Roe* and—more to the point—*Casey*? After all, Rosen insists that “the new textualism is broad enough to embrace all the different strands of legal liberalism” in existence today, and he usefully points out that these groups are numerous and diverse.³⁴ They include Great Society liberals; liberals who seek equal citizenship stature for women, homosexuals, and racial and ethnic minorities; neo-progressives; civil libertarians; and economic populists.³⁵

Because text by itself does not decide the constitutionality of many questions, including bans on racial intermarriage, the problem cannot be that the text of the Equal Protection Clause does not clearly decide the abortion issue one way or the other. Surely, a right to abortion is no more difficult to justify *textually* than the right to marry or the right to travel.³⁶ What is more, originalist and traditionalist arguments are hardly decisive in interpreting the Equal Protection Clause in the area of gender equality or racial equality. For example, the Justices, including the self-described conservative “originalists,” debate the original meaning of *Brown v. Board of Education*,³⁷ not the Fourteenth Amendment.³⁸ And unless one adopts

31. See Klarman, *supra* note 30, at 1919-20 (noting “the conventional view that the framers of the Fourteenth Amendment distinguished civil from political and social rights, and barred racial discrimination only with regard to the former,” and further noting that “[j]ury service, like voting, was plainly deemed at the time to constitute a political right and interracial marriage a social one”).

32. See, e.g., *Romer v. Evans*, 517 U.S. 620 (1996).

33. For a discussion of the relationship between liberty and equality arguments for the abortion right, see generally Neil S. Siegel & Reva B. Siegel, *The Equality Argument for Abortion Rights*, 60 UCLA L. REV. DISCOURSE (forthcoming 2013).

34. Rosen, *supra* note 3, at 52.

35. *Id.* at 53.

36. See *Loving v. Virginia*, 388 U.S. 1 (1967) (right to marry as a fundamental right); *Zablocki v. Redhail*, 434 U.S. 374 (1978) (same); *Shapiro v. Thompson*, 394 U.S. 618 (1969) (right to travel as a fundamental right).

37. 347 U.S. 483 (1954).

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

Balkin's idiosyncratic view (which Rosen seems to resist) that the original semantic meaning of "the equal protection of the laws" is the same as its contemporary meaning,³⁹ there appears to be no good originalist or traditionalist argument for striking down state laws that prohibit miscegenation.⁴⁰ Almost no one has even tried to make such an argument.⁴¹

As an interpretive community, we do not worry about the constitutionality of anti-miscegenation laws anymore because they are no longer politically controversial—not because text, structure, and history give us the answer that we want as a matter of political morality.⁴² Rosen does not assert that those who embrace the new textualism must be prepared to live with anti-miscegenation laws (or, for that matter, racial discrimination in jury service and access to public facilities).⁴³ So it is not immediately evident why text, structure, and history impose insurmountable barriers in the area of abortion rights. One thing we know for sure about the text of the Equal Protection Clause is that it is not limited to racial discrimination, as is Section One of the Fifteenth Amendment.

When text and structure do not decide a constitutional question, and when originalism and traditionalism are widely regarded as not controlling interpretation of a constitutional provision, mediating principles (Balkin calls them "underlying principles"⁴⁴) become particularly important. Such principles are not part of the text; rather, they underlie it. They may be needed to apprehend and apply the text. Often in constitutional interpretation, participants ascribe principles to the text in order to make sense of it. These principles are often informed by historical analysis, but they are not determined by original meanings or post-ratification traditions. On the contrary, mediating principles may be anti-traditionalist in orientation.⁴⁵

39. See JACK M. BALKIN, *CONSTITUTIONAL REDEMPTION* 231 (2011). For an argument that Balkin's originalism is originalist mostly in name, see generally Siegel, *supra* note 2.

40. See Klarman, *supra* note 30, at 1919-20.

41. For the only example I know of, see Steven G. Calabresi & Andrea Matthews, *Originalism and Loving v. Virginia*, 2013 B.Y.U. L. REV. 1393.

42. Of course, anti-miscegenation laws, like *Brown* itself, used to be intensely controversial. For an account of how long it took for *Brown* to achieve canonical status, see generally Brad Snyder, *How the Conservatives Canonized Brown v. Board of Education*, 52 RUTGERS L. REV. 383 (2000).

43. See Klarman, *supra* note 30.

44. See BALKIN, *supra* note 1, at 260.

45. In the area of equal protection, examples of mediating principles include (1) the nineteenth century distinctions among civil, social, and political equality; (2) the anticlassification principle espoused by contemporary race conservatives; (3) the antisubordination principle espoused by contemporary race progressives; and (4) the antibalkanization principle espoused by contemporary race moderates. For discussion of the first principle, see Klarman, *supra* note 30. For discussion of the latter three, see Neil S. Siegel, *Race-Conscious Student Assignment Plans: Balkanization, Integration, and Individualized Consideration*, 56 DUKE L.J. 781 (2006); Neil S. Siegel, *The Virtue of Judicial Statesmanship*, 86 TEX. L. REV. 959 (2008); and Reva B. Siegel, *From Colorblindness to*

What is the basic, animating purpose of the Equal Protection Clause? What work is it charged with doing in the American constitutional system? A persuasive answer to this question will focus on combatting various forms of group subordination in addition to various forms of group classification. One cannot make full sense of the meaning of the Civil War, the first and second Reconstructions, the women's movement, and fights over gay rights today without taking into account the antisubordination understanding of constitutional equality—that is, the view that the Equal Protection Clause presumptively prohibits governmental practices that reflect or reinforce the inferior social status of historically excluded groups.⁴⁶

To take just one timely example, consider facially race-neutral laws that have the race-conscious purpose of expanding economic or educational opportunities for racial and ethnic minorities. Instances include programs that use various proxies for race in order to enhance minority business opportunities,⁴⁷ race-conscious attendance zones that reduce the racial identifiability of public schools,⁴⁸ and affirmative action admission programs that use “percent plans,” which rely on racial segregation at the high school level to produce racial integration in public universities.⁴⁹ At least some (although probably not all) race conservatives on the U.S. Supreme Court do not regard such laws as triggering strict scrutiny.⁵⁰ There is no discriminatory purpose under *Washington v. Davis*⁵¹ and *Personnel Administrator v. Feeney*⁵² because the perceived objective is to

Antibalkanization: An Emerging Ground of Decision in Race Equality Cases, 120 YALE L.J. 1278 (2011).

46. For example, the seminal gay rights case of *Lawrence v. Texas*, 539 U.S. 558 (2003), was technically a substantive due process decision, but the Court continuously appealed to values of substantive equality. *See, e.g., id.* at 578 (writing that the petitioners “are entitled to respect for their private lives,” and that “[t]he State cannot demean their existence or control their destiny by making their private sexual conduct a crime”).

47. *City of Richmond v. J. A. Croson Co.*, 488 U.S. 469, 526 (1989) (Scalia, J., concurring in the judgment) (“A State can, of course, act ‘to undo the effects of past discrimination’ in many permissible ways that do not involve classification by race. In the particular field of state contracting, for example, it may adopt a preference for small businesses, or even for new businesses—which would make it easier for those previously excluded by discrimination to enter the field. Such programs may well have racially disproportionate impact, but they are not based on race.”).

48. *Parents Involved in Community Schools v. Seattle School District No. 1*, 551 U.S. 701, 789 (2007) (Kennedy, J., concurring in part and concurring in the judgment) (“School boards may pursue the goal of bringing together students of diverse backgrounds and races through other means, including strategic site selection of new schools; drawing attendance zones with general recognition of the demographics of neighborhoods; allocating resources for special programs; recruiting students and faculty in a targeted fashion; and tracking enrollments, performance, and other statistics by race.”).

49. In *Fisher v. University of Texas at Austin*, No. 11-345, the percent-plan component of the university admissions program is not being challenged as violative of the Equal Protection Clause.

50. *See supra* notes 47-49.

51. 426 U.S. 229 (1976).

52. 442 U.S. 256, 279 (1979) (“[D]iscriminatory purpose’ . . . implies more than intent as volition or intent as awareness of consequences. It implies that the decisionmaker, in this case a state legislature, 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.”).

help racial and ethnic minorities, not to harm whites.⁵³

And yet the Court would surely strike down, by a vote of 9-0, facially race-neutral laws that had the race-conscious purpose of increasing economic or educational opportunities for whites or reducing racial integration. The Court would interpret facially neutral laws designed to help whites as a racial group or to prevent racial integration as designed to harm racial and ethnic minorities. In other words, the Court would apply a zero-sum logic to laws intended to benefit whites or to prevent racial integration, but would likely not apply a zero-sum logic to laws aimed at expanding opportunities for racial minorities or integrating workforces and universities. The Court would conclude that laws designed to prevent integration are actually designed to harm minorities, but that laws designed to promote integration are not designed to harm whites as a racial group. An anticlassification approach to the Equal Protection Clause cannot make any sense of this asymmetry. An antisubordination approach can.

If this is right, then a key constitutional question in the abortion context is whether there is a close connection between restrictions on access to abortion and the enforced inequality of women—whether abortion-restrictive regulations may be shaped, at least in part, by gender bias.⁵⁴ Progressive legal scholars have identified links between prohibitions on abortion and the perpetuation of the sex-role stereotypes of the separate spheres tradition—the dyadic structuring of sex roles in which men are expected to perform as breadwinners and women are expected to perform as economically dependent caregivers.⁵⁵ These scholars have shown the

53. Some race conservatives have begun to challenge this understanding of *Davis* and *Feeney* because they want to attack disparate impact liability under Title VII. See, e.g., Ricci v. DeStefano, 129 S. Ct. 2658, 2682 (2009) (Scalia, J., concurring). But they would have to overrule *Davis* and *Feeney* in order to do so. Currently, facially neutral laws that aim to help racial minorities or promote racial integration do not contravene *Davis* and *Feeney*. Percent plans pose a problem for Justice Scalia and other race conservatives who target disparate impact liability. They cannot argue simultaneously that percent plans are a less restrictive alternative to facial racial classifications and that such plans are unconstitutional because they are designed to help racial minorities.

54. That is not the only pertinent constitutional question. Another concerns potential infringement of a pregnant woman's constitutional liberty.

55. For examples of work in the equality tradition written before *Casey*, see generally LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 15-10, at 1353-59 (2d ed. 1990); Ruth Bader Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to Roe v. Wade*, 63 N.C. L. REV. 375 (1985); Sylvia A. Law, *Rethinking Sex and the Constitution*, 132 U. PA. L. REV. 955 (1984); Catharine A. MacKinnon, *Reflections on Sex Equality Under Law*, 100 YALE L.J. 1281 (1991); Reva Siegel, *Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection*, 44 STAN. L. REV. 261 (1992); Cass R. Sunstein, *Neutrality in Constitutional Law (with Special Reference to Pornography, Abortion and Surrogacy)*, 92 COLUM. L. REV. 1 (1992). For more recent work, see, for example, Reva B. Siegel, *Sex Equality Arguments for Reproductive Rights: Their Critical Basis and Evolving Constitutional Expression*, 56 EMORY L.J. 815, 833-34 (2007) [hereinafter Siegel, *Sex Equality Arguments*] (surveying equality arguments after *Casey*); WHAT ROE V. WADE SHOULD HAVE SAID: THE NATION'S TOP LEGAL EXPERTS REWRITE AMERICA'S MOST CONTROVERSIAL DECISION (Jack M. Balkin ed., 2005) (sex equality opinions by Jack Balkin, Reva Siegel, and Robin West).

various ways in which laws that withdraw from women control over the timing of motherhood reflect not just concern for the unborn. While they typically do reflect genuine concern to protect fetal life, they also reflect and enforce traditional views about female sexuality outside the context of marriage and procreation; traditional views about the propriety of a pregnant woman's choosing to be a breadwinner instead of a caregiver; and traditional views about the capacity of women to make autonomous and momentous choices for themselves and their families.⁵⁶

Put differently, the abortion right is central not only to preserving women's physical health, but also to protecting their ability to experience sexual intimacy on terms of equality with men, to ensuring their own economic well-being and that of their families, and to securing their enjoyment of the same social status and dignity as men. These insights explain why the *Casey* Court—at the very instant it reaffirmed constitutional protection for the abortion right—poignantly wrote that a pregnant woman's "suffering is too intimate and personal for the State to insist, without more, upon its own vision of the woman's role, however dominant that vision has been in the course of our history and our culture."⁵⁷ This idea also underlies Justice Ginsburg's more recent insistence for four Justices that "legal 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."⁵⁸ Whereas *Casey* used equality values to inform the meaning of the Due Process Clause, Justice Ginsburg went further by deploying lines of precedent interpreting the Equal Protection Clause.⁵⁹ Both might have invoked—and a differently composed Court may yet invoke—the explicit, textual authority of the Equal Protection Clause itself.⁶⁰

56. See Siegel, *Sex Equality Arguments*, *supra* note 55, at 817-22.

57. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 852 (1992).

58. *Gonzales v. Carhart*, 550 U.S. 124, 185 (2007) (Ginsburg, J., dissenting); *cf.* *Nev. Dep't of Human Res. v. Hibbs*, 538 U.S. 721, 731 (2003) (Rehnquist, C.J.) (asserting that differential workplace leave policies for fathers and mothers "were not attributable to any differential physical needs of men and women, but rather to the pervasive sex-role stereotype that caring for family members is women's work"); *id.* at 736 (quoting Congress's finding that the "prevailing ideology about women's roles has . . . justified discrimination against women when they are mothers or mothers-to-be").

59. In rejecting the Court's reliance on the woman-protective rationale for restricting access to abortion, Justice Ginsburg appealed to the Court's equal protection jurisprudence in the area of sex equality. See *Carhart*, 550 U.S. at 185 (comparing *Muller v. Oregon*, 208 U.S. 412, 422-23 (1908), and *Bradwell v. Illinois*, 83 U.S. (16 Wall.) 130, 141 (1873) (Bradley, J., concurring), with *United States v. Virginia*, 518 U.S. 515, 533, 542, n.12 (1996), and *Califano v. Goldfarb*, 430 U.S. 199, 207 (1977)).

60. In *Casey*, Justices Blackmun and Stevens relied explicitly on the Equal Protection Clause. See *Casey*, 505 U.S. at 928 (Blackmun, J., concurring in part, concurring in judgment in part, and dissenting in part) ("This assumption—that women can simply be forced to accept the 'natural' status and incidents of motherhood—appears to rest upon a conception of women's role that has triggered the protection of the Equal Protection Clause.").

It may be possible to imagine a society in which restrictions on abortion do not reflect and reinforce traditional sex-role stereotypes, just as it may be possible to imagine an egalitarian, multicultural society in which government-mandated racial segregation does not subordinate any racial group. But neither accurately characterizes American society past or present. In America, *de jure* racial segregation sounds only in the inequality of people of color,⁶¹ and views about abortion are highly correlated with views about the traditional family.⁶²

In America, restrictions on abortion have much (although not all) to do with views on how it is “natural” and appropriate for a woman to respond to a pregnancy. If the two had little to do with each other, legislatures that sought to coerce childbirth in the name of protecting life would bend over backwards to provide material support for the women who are required to bear—too often alone—the awesome physical, emotional, and financial costs of pregnancy, childbirth, and childrearing.⁶³ *Only by viewing pregnancy and motherhood as the natural order of things can a legislature dismiss these costs as modest in size and private in nature.* When abortion restrictions reflect or enforce the sex-role stereotypes of the separate spheres tradition, such restrictions may violate the Equal Protection Clause.⁶⁴

To a significant extent, longstanding Supreme Court doctrine reflects this understanding of the abortion right. There has been a constitutional right to abortion in the United States *for forty years*, and the Court has increasingly come to understand its sex-equality dimensions—as the quotation above from *Casey* indicates.⁶⁵ The equal protection rationale for the abortion right has come into focus only in recent years because the Court in 1973 (when *Roe* was decided) had barely yet conceived of the Equal Protection Clause as having anything to say about sex discrimination.⁶⁶ Since that time, the abortion right has repeatedly been challenged and has repeatedly been reaffirmed by the Court. For four decades now, many American women have relied on this right and have

61. See Charles L. Black, Jr., *The Lawfulness of the Segregation Decisions*, 69 YALE L.J. 421 (1960).

62. See, e.g., Robert Post & Reva Siegel, *Roe Rage: Democratic Constitutionalism and Backlash*, 42 HARV. C.R.-C.L. L. REV. 373, 377 (2007) (defining “*Roe* rage” as “a broad-based social movement hostile to legal efforts to secure the equality of women and the separation of church and state”).

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

64. See Reva B. Siegel, *You’ve Come a Long Way, Baby: Rehnquist’s New Approach to Pregnancy Discrimination in Hibbs*, 58 STAN. L. REV. 1871, 1891-97 (2006).

65. See *supra* note 57 and accompanying text. For a discussion of this doctrinal development, see Neil S. Siegel & Reva B. Siegel, *Pregnancy and Sex Role Stereotyping: From Struck to Carhart*, 70 OHIO ST. L.J. 1095 (2009).

66. See *Reed v. Reed*, 404 U.S. 71 (1971); *Frontiero v. Richardson*, 411 U.S. 677 (1973). The Court did not hold that sex classifications trigger heightened scrutiny for another three years. See *Craig v. Boren*, 429 U.S. 190 (1976).

organized their lives around its availability.⁶⁷ There is thus a very strong doctrinal argument in favor of preserving *Roe* and *Casey*.

To be sure, justifying abortion rights under the Equal Protection Clause requires one to engage *Geduldig v. Aiello*.⁶⁸ But, as Reva Siegel has argued elsewhere,⁶⁹ the conventional wisdom about *Geduldig* is incorrect. The *Geduldig* Court did not hold that governmental regulation of pregnancy never qualifies as a sex classification. Rather, the *Geduldig* Court held that governmental regulation of pregnancy does not always qualify as a sex classification. The Court acknowledged that “distinctions involving pregnancy” might inflict “an invidious discrimination against the members of one sex or the other.”⁷⁰ The *Geduldig* Court’s use of the term “invidious” is best read to reference what Wendy Williams’ brief in *Geduldig* used the term “invidious” to reference—namely, traditional sex-role stereotypes.⁷¹

Of course, this response is way too brief to qualify as a complete constitutional defense of the abortion right. For one thing, I have not discussed familiar liberty rationales for the right. For another thing, I have not examined the state’s interests in protecting fetal life, which *Casey* accommodated to a greater extent than did *Roe*. But what I have written suffices for my purposes here: if the abortion right is *ultra vires* because a lack of decisive warrant in text, structure, and history trumps mediating equality principles and legal doctrine, then so is much else that progressives view as constitutional law. If the new textualism lacks the interpretive resources to justify the abortion right, then neither can it justify other core progressive constitutional commitments. Indeed, abandoning *Roe* and *Casey* would be no mere concession that legal progressives would make in the name of fidelity to law. Abandoning the abortion right would entail a huge sacrifice of the very substantive understanding of equality that binds together most progressive understandings of equal citizenship in the areas of discrimination based on race, national origin, ethnicity, sex, sexual orientation, and disability.⁷²

67. See *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 856 (1992) (“[F]or two decades of economic and social developments, people have organized intimate relationships and made choices that define their views of themselves and their places in society, in reliance on the availability of abortion in the event that contraception should fail.”).

68. 417 U.S. 484 (1974). Alternatively, one could try to show that *Feeney*’s requirement of discriminatory purpose is met when government prohibits abortion, but that would be difficult to do. See *supra* note 52.

69. See Siegel, *supra* note 64, at 1891-97; see also Siegel & Siegel, *supra* note 65, at 1111-13; Siegel & Siegel, *supra* note 33.

70. 417 U.S. at 496-97 n.20.

71. See Brief for Appellees at 38, *Geduldig v. Aiello*, 417 U.S. 484 (1974) (No. 73-640) (“The issue for courts is not whether pregnancy is, in the abstract, *sui generis*, but whether the legal treatment of pregnancy in various contexts is justified or invidious. The ‘gross, stereotypical distinctions between the sexes’ . . . are at the root of many laws and regulations relating to pregnancy.”).

72. See, e.g., Neil S. Siegel, “*Equal Citizenship Stature*”: Justice Ginsburg’s Constitutional Vision, 43 NEW ENG. L. REV. 799 (2010); Erik Eckholm, *Push Expands for Legalizing Gay Marriage*,

The stakes are enormous.⁷³

And so: progressives proceed at their peril if they persuade themselves that the abortion right can be abandoned with few collateral consequences for progressive constitutional commitments. Like many such commitments, the abortion right is textually grounded, infused with antisubordination values, and supported by legal doctrine while nonetheless remaining contestable and contested. True, the abortion right is politically more controversial than some other progressive legal commitments. But given the consistent, solid majority of Americans who do not want to see *Roe* overturned,⁷⁴ progressives who are politically squeamish about defending *Roe* and *Casey* may have less to fear than they imagine. What is more, by speaking law to the politicians and judges who seek to end abortion rights in America, progressives (including Jeffrey Rosen) would be standing up for other legal commitments that they rightly champion—and rightly regard as possessing principled legal justification.

N.Y. TIMES, Nov. 13, 2012, at A1, A15 (“The most ardent opponents of same-sex marriage, led by evangelical Christians and the Roman Catholic Church, have vowed to redouble their defense of ‘natural marriage,’ even comparing it to the continuing fight against legal abortion.”).

73. The stakes are enormous as well for liberty rights the Court protects that are core progressive commitments. See, e.g., *supra* notes 27, 28, 46 and accompanying text (discussing *Griswold*, *Eisenstadt*, and *Lawrence*).

74. See PEW RESEARCH CENTER, *ROE V. WADE AT 40: MOST OPPOSE OVERTURNING ABORTION DECISION* (2003), available at <http://www.pewforum.org/uploadedFiles/Topics/Issues/Abortion/Roe-v-wade-full.pdf> (“More than six-in-ten (63%) say they would not like to see the court completely overturn the *Roe v. Wade* decision Only about three-in-ten (29%) would like to see the ruling overturned. These opinions are little changed from surveys conducted 10 and 20 years ago.”).