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Progressive Constitutionalism and Its Libertarian Discontents: The Case of LGBTQ Rights

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PROGRESSIVE CONSTITUTIONALISM AND ITS LIBERTARIAN DISCONTENTS: THE CASE OF LGBTQ RIGHTS

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ABSTRACT

This Article, based on the 2023 Childress Memorial Lecture given at the Saint Louis University School of Law, argues that libertarian political morality and constitutionalism constitute double-edged swords for progressives. On the one hand, libertarian principles have helped advance some progressive objectives inside and outside of the courts, including several related to LGBTQ rights. On the other hand, libertarian understandings of the Constitution have undermined a wide array of other progressive distributive and egalitarian objectives. In promoting a generalized skepticism of state action, a progressive constitutionalism that embraces (or fails to question) the libertarian ethos of limited government and exclusively negative rights to liberty might help protect against some of the worst forms of state coercion, but does little to help build a progressive society constructed around distributive justice and the attainment of egalitarian objectives.

This Article argues that if progressives want to successfully harness the power of the state to redistribute resources in ways that make our society more fair and egalitarian as a means of permitting everyone—regardless of class, race, ethnicity, gender, sexual orientation, or disability—to flourish, then we need to purposefully and systematically explore how to make sure that, in pursuing particular political or legal objectives, including those related to LGBTQ rights, we do not unintentionally strengthen the libertarian ethos that so powerfully stands in the way of the attainment of distributive and egalitarian objectives in the U.S. This Article urges LGBTQ rights proponents to articulate and defend moral and constitutional frameworks that are not grounded in a

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libertarian ethos characterized by atomistic understandings of the self and exclusively negative conceptions of liberty that fail to impose affirmative obligations on the government to create the necessary social and economic conditions that are essential for everyone, and not just the wealthy and powerful, to exercise meaningful liberty and attain meaningful equality.

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INTRODUCTION

Crucial aspects of conservative policy and legal positions in the U.S. are constructed around a libertarian ethos that repeatedly challenges the purposes, efficacy, and constitutionality of governmental economic, environmental, health, and safety policies and regulations.[1] The libertarian ethos is deeply skeptical of government, almost never viewing it as a source of solutions to economic and social problems, while almost always blaming it for causing or exacerbating those problems.[2] The libertarian ethos seeks to protect individual autonomy from governmental interference, including through the enforcement of constitutional rights to negative liberty.[3] From a libertarian perspective, the key to promoting both human flourishing and societal good is to let individuals pursue their economic and other interests as they deem best and as free as possible from government intervention or interference.[4]

There is much to contemporary American conservatism that departs from libertarian principles by calling for significant expansions rather than diminishments of governmental authority. There are several examples of this phenomenon, including conservative efforts to expand law enforcement and correctional bureaucracies to administer the massive growth in incarceration rates since the 1970s, the immense enlargement of the national security state since the attacks of 9/11, and the Trump administration's vast expansion of immigration enforcement.[5] Many conservatives also demand that the

1. For a critical history of the link between right-wing politics and libertarian ideas, see generally NANCY MACLEAN, DEMOCRACY IN CHAINS: THE DEEP HISTORY OF THE RADICAL RIGHT'S STEALTH PLAN FOR AMERICA (2017).

2. This sentiment was famously captured by Ronald Reagan in his first inauguration speech when he stated that "government is not the solution to our problems; government is the problem." President Ronald Reagan, *Inaugural Address*, REAGAN LIBR. (Jan. 20, 1981), http://www.reaganfoundation.org/pdf/Inaugural_Address_012081.pdf [https://perma.cc/3N7E-XHJH]. Libertarian theorists call for a minimal state whose authority is generally limited to protecting property, enforcing contracts, and deterring violence. *See, e.g.*, ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA ix (1974) (advocating a "minimal state, limited to the narrow functions of protection against force, theft, fraud, enforcement of contracts, and so on").

3. *See, e.g.*, BRIAN DOHERTY, RADICALS FOR CAPITALISM: A FREEWHEELING HISTORY OF THE MODERN AMERICAN LIBERTARIAN MOVEMENT 4–5 (2007) ("Libertarians believe [that individuals] have a *right* to be mostly left alone to conduct their own affairs inasmuch as they don't harm others . . . .[P]eople will flourish and be happiest to the extent they are free to choose their own life plans and pursue them as best they are able.").

4. *See, e.g.*, DOHERTY, *supra* note 3, at 3 ("Libertarians' economic reasoning leads them to the conclusion that, left to their own devices, a free people would spontaneously develop the institutions necessary for a healthy and wealthy culture."); Randy E. Barnett & Douglas B. Rasmussen, *The Right to Liberty in a Good Society*, 69 FORDHAM L. REV. 1603, 1610 (2001) (arguing that negative liberty rights of non-interference by the government are essential to promoting "human flourishing").

5. *See, e.g.*, CARLOS A. BALL, PRINCIPLES MATTER: THE CONSTITUTION, PROGRESSIVES, AND THE TRUMP ERA 94 (2021).

government, for example, restrict the ability of individuals to make reproductive decisions and to live openly according to their gender identity.[6] At the same time, conservative political movements in the U.S. in recent decades have generally embraced the libertarian ethos to defend existing allocations of wealth, income, and property that are presumed to be fair and just because they are determined by the choices of individuals acting freely through market transactions.[7] From this perspective, existing resource allocations serve as baselines to be protected, oftentimes constitutionally, from state-sponsored distributive and egalitarian interventions.[8] From a conservative libertarian perspective, economic markets are almost always both more efficient and more just in their distribution of resources than allocations engendered by even the best-intended government policies and programs.[9]

In stark contrast, a progressive vision of a fair and just society is grounded in a distributive ethos that demands significant governmental involvement in redistributing resources to promote human flourishing and reduce inequality.[10]

6. For a comprehensive examination of conservative claims regarding the need for the government to strictly regulate abortions, see generally MARY ZIEGLER, ABORTION AND THE LAW IN AMERICA: *ROE V. WADE* TO THE PRESENT (2020). For a summary of recent laws enacted by conservative legislatures targeting transgender individuals, *see infra* notes 385–391 and 420–423 and accompanying text.

7. *See, e.g.*, Robin West, *Progressive and Conservative Constitutionalism*, 88 MICH. L. REV. 641, 651–52 (1990) ("Modern political conservatism is grounded in and united by an aversion to the distributive normative authority of the political state and a commitment to the preservation, or conservation, of existing social, economic, and legal entitlements and structures.").

8. *See, e.g.*, BRINK LINDSEY & STEVEN M. TELES, THE CAPTURED ECONOMY: HOW THE POWERFUL ENRICH THEMSELVES, SLOW DOWN GROWTH, AND INCREASE INEQUALITY 7 (2017) ("Many conservatives and libertarians have taken it as their mission to defend the distribution of income in capitalist societies.") (footnote omitted); West, *supra* note 7, at 657 ("For free-market conservatives, it is the market, and the economic power to which it gives voice, that is the sole legitimate source of normative authority. The political state should accordingly defer to the normative authority of successful market processes and the economic power that underlies them.").

9. *See, e.g.*, RANDY BARNETT, THE STRUCTURE OF LIBERTY: JUSTICE AND THE RULE OF LAW 302 (1998) (arguing that the intervention of state power to ameliorate insecurity and inequality is "far more troublesome and dangerous than the disease"); LINDSEY & TELES, *supra* note 8, at 10 ("Conservatives and libertarians [believe that] [o]nce government assumes any responsibility to regulate in a given area, . . . it is inevitable that rent-seeking will corrupt policymaking. . . . The only way to get less rent-seeking is, in Grover Norquist's colorful phrase, to make government small enough that you can 'drown it in the bathtub.'") (footnote omitted).

10. Professor Frank Michelman offers

> a seven-point definition of progressivism in politics: (1) a commitment to the destruction of caste (or "social subordination") wherever it appears; (2) politics open to persuasion by dissenting, insurgent, and marginal views; (3) . . . a multiculturally respectful and hospitable society; (4) a material as opposed to a formal conception of equality, encompassing (5) assurance of basic levels of well-being and functioning to every member of society; (6) refusal to distinguish categorically between the oppressive or subjugative potential of the state and the oppressive or subjugative potential of various formations of

Such a vision requires state intervention to make sure that either the government or the market provide all members of society with basic goods such as education, housing, and healthcare.[11] It also requires government action to protect society's members from the environmental, safety, and discriminatory harms, among others, engendered by the workings of unrestrained and unregulated economic markets.[12]

While the libertarian ethos defends market-based allocations of wealth, income, and property, the progressive distributive ethos defends vigorous government interventions in the marketplace to reduce inequality and protect those at the bottom of society's economic, social, racial, and gender hierarchies.[13] For progressives, existing allocations of economic power and benefits—which, if unrestrained, inevitably dominate the political sphere[14]—are suspect given the long histories of exclusion and subordination of poor people, of people of color, of women, of disabled people, and of LGBTQ individuals, among others.[15] Principles of distributive justice call for a state that is willing and able to reallocate wealth and income as distributed by the economic marketplace.[16] And while the libertarian ethos calls only for the protection of

private or market-based power; and, accordingly (7) a constant readiness to consider the active application of state power wherever in society it may be needed in pursuit of requirements (1)-(5).

Frank I. Michelman, *What (if Anything) is Progressive-Liberal Democratic Constitutionalism?*, 4 WIDENER L. SYMP. J. 181, 185 (1999).

11. For a detailed historical account of the push for positive rights to governmental provision in American history, see generally MARK PAUL, THE ENDS OF FREEDOM: RECLAIMING AMERICA'S LOST PROMISE OF ECONOMIC RIGHTS (2023).

12. *See generally* STEVEN P. CROLEY, REGULATION AND PUBLIC INTERESTS: THE POSSIBILITY OF GOOD REGULATORY GOVERNMENT (2008) (arguing that regulatory government can advance the public's welfare on crucial policy matters).

13. *See, e.g.*, West, *supra* note 7, at 645 ("For the conservative, social institutions depend on distributions of wealth, power, and normative authority that are worthy of respect and preservation, while for the progressive those institutions are as often as not the illegitimate fruit of damaging and hurtful patterns of oppression, domination, and subordination."). *See also* Jedediah Purdy, *Neoliberal Constitutionalism: Lochnerism for a New Economy*, 77 L. & CONTEMP. PROBS. 195, 213 (2014) ("If Americans do not reestablish ideals of equality and personal liberty that take account of vast social and economic inequality and give government a strong role in addressing it, the United States will get the Constitution, and the country, it has earned.").

14. For a comprehensive exploration of the ways in which concentrations of economic power undermine constitutional democracy from a progressive perspective, see generally JOSEPH FISHKIN & WILLIAM E. FORBATH, THE ANTI-OLIGARCHY CONSTITUTION: RECONSTRUCTING THE ECONOMIC FOUNDATIONS OF AMERICAN DEMOCRACY (2022).

15. *See generally* JAMIE MANILOFF, UNDERSTANDING AND NAVIGATING DISCRIMINATION IN AMERICA (2021) (explaining bias, prejudice, and discrimination prevailing in the U.S.).

16. *See, e.g.*, Robin West, *Is Progressive Constitutionalism Possible?*, 4 WIDENER L. SYMP. J. 1, 3 (1999).

negative liberty rights of non-interference,[17] a progressive ethos embraces a positive understanding of liberty that calls on the government to act affirmatively to create the necessary social and economic conditions that make the exercise of meaningful liberty possible.[18]

In addition, while the libertarian ethos views the state as the principal source of oppression and coercion of individuals, progressives believe both (1) that private concentrations of power can be as or more oppressive and coercive than the government, and (2) that meaningful liberty and equality are unattainable unless the government acts affirmatively to reduce those concentrations and mitigate their harmful effects.[19] Progressive political morality calls on the government to intervene in the economic marketplace, regulate economic actors, and redistribute resources in order to try to break up the concentrations of private power that harm society, the polity, and individuals.[20] From this perspective, libertarian political, moral, and constitutional norms that require leaving

17. *See, e.g.*, Anne L. Alsott, *Neoliberalism in U.S. Family Law: Negative Liberty and Laissez-Faire Markets in the Minimal State*, 77 L. & CONTEMP. PROBS. 25, 38 (2014).

18. Professor Lisa Heinzerling criticizes contemporary conservative justices for embracing a particular and privileged strain of liberty: the freedom that comes from the government staying out of your business, *not the freedom that comes from meaningful government protections against harmful human behavior*. In the name of "liberty," the conservative justices have rejected rules and structures addressing climate change, workplace safety, financial fraud, and more—without acknowledging that, in these cases, liberty was at stake on both sides of the legal issue. On one side, regulated groups wanted to go about their business unimpeded by federal law, but on the other, the broad public wanted a reasonable assurance that the government had our back in protecting us against coming to harm at other people's hands.

Lisa Heinzerling, *Resisting Originalism, Even When "Done Well"*, YALE J. ON REGULATION (Oct. 31, 2022), https://www.yalejreg.com/nc/symposium-shane-democracy-chief-executive-05/ (emphasis added). *See also* ROBIN WEST, PROGRESSIVE CONSTITUTIONALISM: RECONSTRUCTING THE FOURTEENTH AMENDMENT 5 (1994) ("[C]urrent understandings of the Fourteenth Amendment rest on the mistaken premise that the substantive liberties protected by the amendment (if any at all) must be 'negative' in nature, rather than protective of the positive rights to a free, civic, participatory life."). The distinction between negative and positive liberty is usually traced back to a famous essay written by the political theorist Isaiah Berlin. *See* ISAIAH BERLIN, FOUR ESSAYS ON LIBERTY 119 (1969).

19. As Professor Robin West explains, "progressives, while agreeing that some obstacles [to justice] emanate from the state, argue that *for the most part* the most serious impediments emanate from unjust concentrations of *private* power—the social power of whites over blacks, the intimate power of men over women, the economic power of the materially privileged over the materially deprived." Robin West, *Constitutional Skepticism*, 72 B.U. L. REV. 765, 774 (1992) (emphasis in original).

20. *Id*. (noting that progressives believe that "it is . . . concentrations of private power that must be targeted, challenged, and reformed by progressive political action. That action, in turn, will often involve state intervention into the private spheres within which hierarchies of private power are allowed to thrive, and that simple fact will commonly pit the progressive strategy of ending private domination against the liberal goal of minimizing the danger of an oppressive state.").

concentrations of private power in place aid and abet inequality and injustice.[21] In short, for progressives, it is impossible to construct a fair and just society without significant governmental intervention and involvement.[22]

As presented so far, there are clear and irreconcilable differences between a conservative libertarian ethos and a progressive distributive one. The question that I address in this Article is how the introduction of issues related to sex, sexuality, and gender identity into politics and law has brought crucial aspects of the libertarian ethos into progressive constitutionalism. In seeking to promote and protect the personal, sexual, intimate, reproductive, and gender-identity freedoms of all persons—especially women, LGBTQ people, and gender non-conforming individuals—progressive constitutionalism has either embraced or failed to effectively challenge three crucial components of the libertarian ethos. The first aspect is an atomistic understanding of the self, that is one which views individuals as largely disconnected and independent from others.[23] The second component is a deep skepticism of governmental interventions grounded in the notion that the state, on matters of personal autonomy, is almost always the source of the problems and almost never the font of their solutions.[24] The third feature is an exclusively negative conception of liberty that, in emphasizing rights to privacy and to be left alone, imposes on the government duties of non-intervention without also requiring that it act affirmatively in order to protect liberty.[25]

This Article focuses particularly on the pursuit of LGBTQ rights and the extent to which these three components of the libertarian ethos, while helping achieve important gains for LGBTQ equality, have also served to undermine broader progressive distributive and egalitarian objectives.[26] To put it

21. *See, e.g.*, Eric Blumenson, *Economic Rights as Group Rights*, 15 U. PA. J. L. & SOC. CHANGE 87, 96–97 (2011). For an account of how libertarianism undermines the ability of the government to protect individuals from a broad array of harms, see generally THOMAS O. MCGARITY, FREEDOM TO HARM: THE LASTING LEGACY OF THE LAISSEZ FAIRE REVIVAL (2013).

22. There is an extensive literature, much of it feminist in nature, criticizing the distinction between protected negative rights in the private sphere and unprotected positive rights in the public sphere. *See, e.g.*, Susan Bandes, *The Negative Constitution: A Critique*, 88 MICH. L. REV. 2271, 2292–93 (1990); Deborah L. Rhode, *Feminism and the State*, 107 HARV. L. REV. 1181, 1187 (1994); Frances E. Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 HARV. L. REV. 1497, 1501 (1983).

23. *See infra* notes 95–97 and 111 and accompanying text.

24. *See infra* notes 200, 214–218, and 222–228 and accompanying text.

25. *See infra* notes 112–115 and 275–278 and accompanying text.

26. Professor Marc Spindelman makes a similar point in summarizing the perils for progressives of relying on judge-based constitutionalism more broadly: "judicial superintendence of our Constitution, including our individual and equality rights, has a distinctly double-edged quality to it. Even where it has helped secure freedom, it has regularly, if not always, done so by creating potential impediments to further social progress and reform." Marc Spindelman, *Toward a Progressive Perspective on Justice Ginsburg's Constitution*, 70 OHIO ST. L.J. 1115, 1116 (2009).

differently, the general willingness of progressives to deploy libertarian moral and constitutional claims to promote LGBTQ rights has made the attainment of other crucial progressive objectives more difficult. In promoting a generalized skepticism of state action, a progressive constitutionalism that embraces (or fails to question) the libertarian ethos of limited government and exclusively negative rights to liberty might help protect against some of the worst forms of state coercion, but does little to help build a progressive society constructed around distributive justice and the attainment of egalitarian objectives.

My main argument is that if progressives want to successfully harness the power of the state to redistribute resources in ways that make our society more fair and egalitarian as a means of permitting everyone—regardless of class, race, ethnicity, gender, sexual orientation, or disability—to flourish, we need to purposefully and systematically explore how to make sure that, in pursuing particular political or legal objectives, including those related to LGBTQ rights, we do not unintentionally strengthen the libertarian ethos that so powerfully stands in the way of the attainment of distributive and egalitarian progressive objectives. As I see it, a crucial challenge for progressive LGBTQ rights proponents is how best to articulate and defend moral and constitutional frameworks that are not grounded in a libertarian ethos characterized by atomistic understandings of the self and exclusively negative conceptions of liberty that fail to impose affirmative obligations on the government. From a progressive perspective, those obligations are essential in creating the social and economic conditions that allow everyone, and not just the wealthy and powerful, to exercise meaningful liberty and attain meaningful equality.

The enforcement of individual rights crafted, defined, and implemented through the libertarian ethos will help progressives mitigate or reduce some forms of repressive and discriminatory state action.[27] But that enforcement will also serve to fortify the same libertarian ethos that prevents the attainment of broader progressive objectives.[28] Claims grounded in the libertarian ethos may allow progressives to win in discrete cases and on particular issues, but as long as that ethos remains highly influential in both legislative and judicial spheres, the formation of a truly progressive society that guarantees basic goods such as education, housing, and healthcare to all will remain firmly beyond our reach.[29] When progressives win on discrete issues based on the enforcement and application of the libertarian ethos those victories undermine, however unintentionally, broader progressive objectives. Progressives, this Article argues, must recognize this internal inconsistency and then proceed to address or mitigate it.

27. *See infra* notes 104–108 and 154–159 and accompanying text.
28. *See infra* Part II.
29. *See infra* Part II.

The Article proceeds as follows. Part I explores the influential role that the libertarian ethos has played, since the 1950s, both in the push by progressives for the recognition of the constitutional rights of LGBTQ people and in the Supreme Court's understanding of substantive due process doctrine, including in Justice Anthony Kennedy's crucial opinion in *Lawrence v. Texas*.[30] Part II examines other parts of Justice Kennedy's constitutional jurisprudence that go beyond issues of LGBTQ rights to show how the same libertarian principles that have advanced LGBTQ positions in the courts have also served to judicially block the attainment of many other progressive objectives. Part III offers some thoughts on how progressives, going forward, can articulate and defend LGBTQ rights positions in ways that challenge rather than strengthen the libertarian ethos.

I. LGBTQ RIGHTS AND THE LIBERTARIAN ETHOS

The expansion of LGBTQ rights in the U.S. has resulted from and contributed to the growing prevalence and influence of a libertarian ethos "characterized by the belief that government regulation should be limited in order to maximize individual freedom."[31] This libertarian ethos has greatly impacted a broad swath of public policies, including, but by no means limited to, those related to sexuality. As Professors Mark Rosen and Christopher Schmidt note,

> [t]he general contours of this development have been well documented. Cultural libertarian trends toward sexuality and expression that were ignited in the 1960s merged with disillusionment toward government in the wake of the Vietnam War and Watergate, producing an antiauthoritarian groundswell in America. Conservatives proved particularly effective at capitalizing on this sentiment. Popular resentment toward taxes, social welfare policy, and civil rights energized a grassroots movement fueled by a potent combination of social conservatism and economic libertarianism. . . .These developments brought an era defined by tax revolts and deregulation, by a sharply chastened vision of the social welfare state, and by a general atmosphere of antagonism toward government.[32]

The question of why and how the pursuit of LGBTQ rights has been an important component of a broader move in American politics and law toward a libertarian skepticism of government is a complicated subject that I cannot fully address here. Instead, my objective in this Part is the more modest one of examining the intersection of substantive due process doctrine, LGBTQ rights, and the libertarian ethos. Section A explores the ways in which the priorities of

30. 539 U.S. 558 (2003).

31. Mark D. Rosen & Christopher W. Schmidt, *Why Broccoli? Limiting Principles and Popular Constitutionalism in the Health Care Case*, 61 UCLA L. REV. 66, 129 (2013).

32. *Id*. at 129–30.

LGBTQ activists, before the push for marriage equality, meshed neatly with the Supreme Court's libertarian understanding of the doctrine of substantive due process. Section B examines how both the push for marriage equality and the Supreme Court's ruling in *Obergefell v. Hodges*[33] striking down same-sex marriage bans represented missed opportunities, for both progressive supporters of LGBTQ rights and the Court, to break free from the libertarian ethos.

A. Negative Liberty Rights and Same-Sex Sexual Conduct

It is hardly surprising that the early LGBTQ rights movement (then known as the homophile movement) of the 1950s and 1960s prioritized the shielding of sexual minorities from the coercive powers of the state. The federal government around this time repeatedly conducted witch hunts to "uncover" the existence of LGBTQ people among its civilian and military workforces, viewing them, along with communists and fellow travelers, as threats to national security.[34] During a sixteen-month period in the early 1950s, the federal government dismissed an average of forty civil servants a month (not counting those who were permitted to resign quietly) on "sexual perversion" grounds.[35] For their part, state and local officials arrested thousands of lesbians, gay men, and bisexuals between 1946 and 1961 for engaging in consensual sexual intimacy, as well as for dancing, kissing, and engaging in other open displays of affection.[36] During this period, police officials repeatedly raided business establishments where LGBTQ people congregated to harass, arrest, and even physically attack patrons, with the most famous raid taking place at the Stonewall Inn in New York City in 1969.[37]

In such a repressive environment, early activists by necessity focused on protecting LGBTQ people from the outright brutality, intimidation, and harassment carried out by government actors. Early LGBTQ rights proponents generally believed that the best way of accomplishing this objective was through the recognition of rights to noninterference that would protect LGBTQ people from some of the worst manifestations of state repression.[38] Early activists

33. 576 U.S. 644 (2015).

34. For a comprehensive study of the federal government's effort to identify, harass, and dismiss lesbian and gay employees during the 1950s, see generally DAVID K. JOHNSON, THE LAVENDER SCARE: THE COLD WAR PROSECUTION OF GAYS AND LESBIANS IN THE FEDERAL GOVERNMENT (2004).

35. JOHN D'EMILIO, SEXUAL POLITICS, SEXUAL COMMUNITIES: THE MAKING OF A HOMOSEXUAL MINORITY IN THE UNITED STATES, 1940–1970 44 (1983).

36. WILLIAM N. ESKRIDGE, JR., GAYLAW: CHALLENGING THE APARTHEID OF THE CLOSET 60–67 (1999).

37. CARLOS A. BALL, THE FIRST AMENDMENT AND LGBT EQUALITY: A CONTENTIOUS HISTORY 61–66 (2017). *See also* ANNA LVOSKY, VICE PATROL: COPS, COURTS, AND THE STRUGGLE OVER URBAN GAY LIFE BEFORE STONEWALL 3–4, 217 (2021) (exploring urban anti-gay policing in the 1950s and 1960s).

38. CARLOS A. BALL, THE MORALITY OF GAY RIGHTS: AN EXPLORATION IN POLITICAL PHILOSOPHY 2 (2003).

thought that if they could, perhaps with some assistance from the courts, persuade government officials that LGBTQ people, like heterosexuals, were entitled to privacy in their personal and intimate lives, then perhaps the state would reduce its harassment of lesbians, gay men, and bisexuals.[39] This might, in turn, permit those who were physically and emotionally attracted to individuals of the same sex to lead quiet and peaceful lives with reduced fears of incarceration and discrimination.[40]

At a time when same-sex sexuality was subject to vicious and relentless social, legal, and moral disapprobation, the notion of restricting the state's authority to criminalize private and consensual sexual conduct that did not tangibly affect others, much less harm them, was obviously appealing to those who had progressive views on human sexuality.[41] As a result, the libertarian philosopher John Stuart Mill's harm principle seemed particularly well-suited to the push to decriminalize same-sex sexuality while limiting the coercive powers of the state as deployed against LGBTQ people. Mill contended in his famous essay *On Liberty* that "the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others."[42] Mill reasoned that a person's "own good, either physical or moral," does not justify the exercise of state power; an individual "cannot rightfully be compelled to do or forbear because it will be better for him to do so, because it will make him happier, because, in the opinions of others, to do so would be wise, or even right."[43] This type of reasoning was behind the recommendations, in the 1950s, by the Wolfenden Committee in the United Kingdom and by the American Law Institute in the United States, to decriminalize consensual sodomy.[44]

A few years later, the Supreme Court in *Griswold v. Connecticut* first recognized a constitutional right to privacy by protecting the ability of married couples to use contraceptives.[45] The Court later expanded that right to include unmarried couples in *Eisenstadt v. Baird*.[46] And in *Roe v. Wade*, the Court

39. *Id*.

40. *Id*.

41. *Id*.

42. JOHN STUART MILL, ON LIBERTY 13 (David Spitz ed., 1975) (1859).

43. *Id*. at 13–14.

44. Robert C.L. Moffat, "*Not the Law's Business:" The Politics of Tolerance and the Enforcement of Morality*, 57 FLA. L. REV. 1097, 1098 (2005) (noting that the Wolfenden Committee "based its recommendations on the harm principle of John Stuart Mill"); Ephraim Heiliczer, *Dying Criminal Laws: Sodomy and Adultery from the Bible to Demise*, 7 VA. J. CRIM. L. 48, 95 (2019) ("The Model Penal Code, like [John Stuart] Mill . . . , found that sodomy and adultery should not be criminalized as 'the power of the state [should not be used] to enforce purely moral or religious standards' and 'the government [should not] attempt to control behavior that has no substantial significance except as to the morality of the actor.'") (internal citations omitted).

45. 381 U.S. 479, 485–86 (1965).

46. 405 U.S. 438, 452–53 (1972).

explicitly relied on a right to privacy under the Due Process Clause to protect the ability of pregnant women to choose to have pre-viability abortions free from state coercion or interference.[47] The Court made it clear in *Roe* that a pregnant woman's right to decide, in consultation with her doctor, what was best for her trumped the state's interests in regulating pre-viability abortions.[48]

At the same time that the Court was recognizing the negative rights of individuals not to be interfered with by the state in making important personal decisions impacting their intimate lives and reproductive capabilities, it consistently rejected the notion that the Constitution imposed *affirmative* obligations on the government to advance the liberty and equality interests of individuals.[49] Thus, for example, the Court in *San Antonio Independent School District v. Rodriguez*, decided the same year as *Roe v. Wade*, held that the Constitution does not afford children an affirmative fundamental right to an education.[50]

About half a century earlier, the Court had held in *Pierce v. Society of Sisters* that the government, under the doctrine of substantive due process, could not *prevent* parents from sending their children to private schools.[51] But the Court in *Rodriguez* refused to hold that the state has a constitutional obligation to *provide* education to children.[52] In other words, according to the Court, the Constitution protects parents, as consumers of educational services, to use private funds, if they have them, to pay for the education that they believe is best for their children.[53] But parents, as members of society, do not have a constitutional right to state-provided education for their children.[54] The Due Process Clause, as interpreted by the Court, protects the negative right of financially secure parents to be free from state interference while participating in the educational marketplace to pursue their preferred educational objectives for their children. But the Clause does not offer parents an affirmative right to have the government provide even the basic and essential good of public education, which the Court conceded in *Rodriguez* is of "grave significance . . . both to the individual and to society."[55]

The juxtaposition of *Society of Sisters* and *Rodriguez* illustrates the Court's embrace of the libertarian ethos. The Court's understanding of constitutional liberty in these cases was strictly limited to its negative components; such an

47. 410 U.S. 113, 154–55 (1973).

48. *Id*. at 143, 155.

49. *See infra* notes 50–85 and accompanying text.

50. 411 U.S. 1, 30 (1973).

51. 268 U.S. 510, 534–35 (1925).

52. *Rodriguez*, 411 U.S. at 36.

53. *Pierce*, 268 U.S. at 534–35. *See also* Meyer v. Nebraska, 262 U.S. 390, 400 (1923) (striking down state law restricting foreign-language education).

54. *Rodriguez*, 411 U.S. at 36.

55. *Id*. at 30 (internal citation omitted).

understanding prevents the government from interfering with a parental decision that the justices have deemed to be of fundamental importance: how should children be educated?[56] But when the *Rodriguez* litigation essentially asked the same question from the perspective of the public sphere of governmental policy rather than from that of the private sphere of family life, the Court concluded that the Constitution had nothing to say because there was no governmental interference to speak of.[57] What mattered to the Court, when it came to the meaning of liberty under the Fourteenth Amendment, was not the importance of education as a public good, but whether there was governmental interference with important personal and private decisions.[58] This distinction exempts the government from any constitutional obligation to provide educational services to children. As a result, the Constitution, as interpreted by the Court, protects the ability of parents with financial resources to deploy them to pursue what they believe is an adequate private education for their children, but the Constitution offers no guarantees to parents, many of whom cannot afford private schooling, that their children will receive such an education from public schools.[59]

The Court also abided by the libertarian ethos in *Rodriguez* when it further concluded that wealth is not a suspect classification under the Equal Protection Clause.[60] Although the Warren Court had earlier intimated that a higher level of judicial scrutiny than rational basis review might apply to government regulations and programs that distinguished on the basis of wealth,[61] the

56. *Pierce*, 268 U.S. at 534–35.

57. *Rodriguez*, 411 U.S. at 37–38 ("The present case . . . is significantly different from any of the cases in which the Court has applied strict scrutiny to state or federal legislation touching upon constitutionally protected rights. Each of our prior cases involved legislation which 'deprived,' 'infringed,' or 'interfered' with the free exercise of some such fundamental personal right or liberty.") (citations omitted).

58. *Id*. at 30 ("the importance of a service performed by the State does not determine whether it must be regarded as fundamental for purposes of examination under the Equal Protection Clause"). *See also* Lindsey v. Normet, 405 U.S. 56, 74 (1972) ("the Constitution does not provide judicial remedies for every social and economic ill. We are unable to perceive in that document any constitutional guarantee of access to dwellings of a particular quality. . . . Absent constitutional mandate, the assurance of adequate housing and the definition of landlord-tenant relationships are legislative, not judicial, functions.").

59. *Rodriguez*, 411 U.S. at 35–36.

60. *Id*. at 28.

61. *See, e.g.*, Goldberg v. Kelly, 397 U.S. 254, 264–65 (1970) (requiring hearings before the government terminates welfare payments); Shapiro v. Thompson, 394 U.S. 618, 633 (1969) (constitutionally requiring welfare benefits for recently arrived state residents when state provides benefits to long-term residents); Griffin v. Illinois, 351 U.S. 12, 19 (1956) (holding that the Constitution ensures a right to a transcript to judicial proceedings to be used for a criminal appeal). On the ways in which the Warren Court used the Fourteenth Amendment to protect the interests of poor people, see generally Frank I. Michelman, *The Supreme Court, 1968 Term—Foreword: On Protecting the Poor Through the Fourteenth Amendment*, 83 HARV. L. REV. 7 (1969).

Rodriguez Court explicitly held to the contrary.[62] This means that the government, in setting policy, is free to leave existing allocations of wealth and income, no matter how unequal, as they are, without any affirmative constitutional obligation to render them more equal or to try to mitigate their negative effects on the ability of poor individuals to participate in or contribute to society. As a result, the government is able to constitutionally defend its funding and regulatory choices, including in the critical sphere of education, as long as they are not irrational.[63]

The specific issue in *Rodriguez* was whether linking the funding of public education to local property tax revenues that depend on real estate values, which the state conceded led to "major disparities in spendable funds,"[64] was unconstitutional.[65] The Court answered that question in the negative,[66] thus upholding the ability of wealthier communities to use their higher real estate tax revenues to provide public education resources to children not available to students living in poorer communities. In refusing to place constitutional roadblocks limiting the ways in which real estate values, through property taxes, help to determine the funding of public education, the Court gave a constitutional green light to the ability of wealthy people to leverage the benefits they accrue in the economic marketplace to gain access to better government services, including those related to a basic and essential good such as education.[67]

The Court's unwillingness to account for market-based allocations of wealth and income in the distribution and provision of government services and benefits when interpreting the Constitution has had immense social implications by failing to require the government to do more to address poverty and economic

62. *Rodriguez*, 411 U.S. at 28.

63. *Id*. at 54–55.

64. *Id*. at 63–64 (White, J., dissenting). A study of public school funding conducted in Texas a few years before *Rodriguez* "revealed that the 10 richest districts examined, each of which had more than $100,000 in taxable property per pupil, raised through local effort an average of $610 per pupil, whereas the four poorest districts studied, each of which had less than $10,000 in taxable property per pupil, were able to raise only an average of $63 per pupil." *Id*. at 74–75 (Marshall, J., dissenting).

65. *Id*. at 4–6 (majority opinion). For a detailed exploration of *Rodriguez* that examines the connection between discrimination and school funding, see generally PAUL A. SRACIC, *SAN ANTONIO V. RODRIGUEZ* AND THE PURSUIT OF EQUAL EDUCATION: THE DEBATE OVER DISCRIMINATION AND SCHOOL FUNDING (2006).

66. *Rodriguez*, 411 U.S. at 54–55 ("[T]o the extent that the Texas system of school financing results in unequal expenditures between children who happen to reside in different districts, we cannot say that such disparities are the product of a system that is so irrational as to be invidiously discriminatory.").

67. After *Rodriguez*, progressive advocates turned their attention to state constitutions in targeting funding disparities between wealthy and poor school districts. *See, e.g.*, JUSTIN DRIVER, THE SCHOOLHOUSE GATE: PUBLIC EDUCATION, THE SUPREME COURT, AND THE BATTLE FOR THE AMERICAN MIND 328–30 (2018).

inequality. As Professor Jamal Greene puts it in discussing *Rodriguez*, "[i]t takes a special failure of common sense, imagination, empathy, or all three to refuse to align rights with what individuals need in order to flourish, and yet American courts refuse."[68] In this regard, imagine, for a moment, just how different our society would be if the Court, for the last five decades, had applied anything like the type of skeptical judicial review to government policies that disadvantage poor people as it has to affirmative action policies that purportedly disadvantage white people.[69]

Juxtaposing *Roe v. Wade* with the abortion funding cases that followed shortly thereafter also illustrates the ways in which the Court's understanding of liberty under the Due Process Clause, in the abortion context, tracked the libertarian ethos, at least until the Court overruled *Roe* in 2022.[70] The Court in the abortion funding cases made clear that the constitutional right to an abortion was limited to the negative right of pregnant women not to have the state interfere with—or, as the Court later put it, unduly burden[71]—the decision of whether to carry a pre-viability fetus to term. But there was a crucial constitutional distinction, the Court reasoned only four years after *Roe*, between not being able to get an abortion because of state restrictions on the procedure and not being able to get an abortion because of the state's refusal to fund them for those who could not afford them.[72] As in *Rodriguez*, the critical constitutional baseline, as far as the Court was concerned, was the allocation of economic resources that already existed. While the government's attempt to restrict abortions called for significant constitutional scrutiny, its refusal to address or mitigate how poverty limits the ability to choose an abortion were constitutionally irrelevant.[73] As the Court explained, "[t]he financial constraints that restrict an indigent woman's ability to enjoy the full range of constitutionally protected freedom of choice are the product not of governmental restrictions on access to abortions, but rather of her indigency."[74] To impose on the government constitutional obligations to affirmatively take steps aimed at

68. JAMAL GREENE, HOW RIGHTS WENT WRONG: WHY OUR OBSESSION WITH RIGHTS IS TEARING AMERICA APART 97 (2021).

69. *Compare Rodriguez*, 411 U.S. at 52–53 (applying rational basis review in upholding funding disparities between wealthy and poor school districts) *with* Students for Fair Admissions, Inc., v. President and Fellows of Harvard College, 143 S. Ct. 2141, 2166 (2023) (applying strict scrutiny in striking down university admissions policy that used race among other factors to promote diversity in student body).

70. Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2242 (2022).

71. Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 877 (1992), *overruled by Dobbs*, 142 S. Ct. 2228 (2022).

72. Maher v. Roe, 432 U.S. 464, 475 (1977) (noting the "basic difference between direct state interference with a protected activity and state encouragement of an alternative activity consonant with legislative policy").

73. Harris v. McCrae, 448 U.S. 297, 316, 323 (1980).

74. *Id*. at 316.

mitigating the impact of indigency on the opportunity to exercise a constitutional right, the Court warned, would "confer an entitlement . . . [that] would mark a drastic change in our understanding of the Constitution."[75] For the Court, it was beyond the realm of the imaginable to interpret the nation's founding document in a way that, for example, would impose on the government "an affirmative constitutional obligation to ensure that all persons have the financial resources to obtain contraceptives or send their children to private schools."[76] Those were issues of economics and of access to private financial resources, not of constitutional law.

The abortion funding cases embraced the libertarian ethos in two crucial ways. First, they understood the substantive due process right at issue as limited exclusively to a negative right of noninterference without also encompassing a positive right to government provision.[77] Second, the cases deemed burdens imposed on the exercise of fundamental rights by the unequal allocation of financial resources to be constitutionally irrelevant.[78] The distribution of those resources was for the market to determine; it was the workings of the market and not of government that were responsible for the indigency in question. How the government addressed the ways in which poverty limited the opportunities of indigent people, *even those related to their ability to meaningfully exercise fundamental rights*, was entirely a matter of state discretion (as long as it did not act irrationally) rather than a question of constitutional obligation.

It is worth noting that the Court's embrace of the libertarian ethos in disputes such as *Rodriguez* and the abortion funding cases preceded by several decades the current conservative majority on the Court.[79] That embrace was evident decades before the Roberts Court, for example, used libertarian understandings of the First Amendment, as I explore in Part II, to protect the interests of powerful economic actors and of the Second Amendment to protect the priorities of gun owners.[80] *Rodriguez* and the abortion funding cases were handed down by a Burger Court that was relatively liberal, at least when compared to the Rehnquist Court and especially the Roberts Court that followed.[81] Nonetheless,

75. *Id*. at 317–18.

76. *Id*.

77. *See supra* notes 69–78 and accompanying text.

78. *See supra* notes 69–78 and accompanying text.

79. *See, e.g.*, Anita Kumar, *Trump's Legacy is Now the Supreme Court*, POLITICO (Sept. 26, 2020), https://www.politico.com/news/2020/09/26/trump-legacy-supreme-court-422058 [https://perma.cc/ESF8-9EBZ].

80. *See infra* Part II.C and Part II.E.

81. For analyses of the Burger Court, see generally THE BURGER COURT AND THE COUNTERREVOLUTION THAT WASN'T (Vincent Blasi ed., 1983); MICHAEL J. GRAETZ & LINDA GREENHOUSE, THE BURGER COURT AND THE RISE OF THE JUDICIAL RIGHT (2016).

the Court in the 1970s evinced a strong commitment, as it does today,[82] to interpreting the Constitution through the lens of the libertarian ethos.

A few years after the abortion funding cases, the Court reaffirmed an exclusively negative understanding of the Due Process Clause in *DeShaney v. Winnebago County Dept. of Social Services*.[83] *DeShaney* involved a constitutional challenge to the government's failure to protect a child from being nearly beaten to death by his father and left with permanent brain damage even though state officials knew that permitting the father to have contact with his child threatened the latter's physical safety. In rejecting the constitutional claim, the Court concluded that:

> [N]othing in the language of the Due Process Clause itself requires the State to protect the life, liberty, and property of its citizens against invasion by private actors. The 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.[84]

The Court added that the Fourteenth Amendment "forbids the State itself to deprive individuals of life, liberty, or property without 'due process of law,' but its language cannot fairly be extended to impose an affirmative obligation on the State to ensure that those interests do not come to harm through other means."[85]

It was in this libertarian constitutional environment that the challenge to Georgia's sodomy statute in *Bowers v. Hardwick* arose.[86] Not surprisingly, therefore, the constitutional challenge was grounded in the type of negative liberty claim that the Court was most likely to accept: that the Constitution protects the right of individuals to be free from governmental interference in important personal matters, in this instance the choice to engage in sexual intimacy with another adult of the same gender in the privacy of the home. According to the Supreme Court brief filed by Professor Laurence Tribe on behalf of Michael Hardwick, the gay man arrested by an Atlanta police officer for engaging in consensual sex with another man in his home,[87] there were two privacy-based reasons why the government needed a "substantial justification" for the enforcement of its sodomy law against him.[88] The first reason was that the conduct in question took place in the home, a constitutionally privileged site already protected from undue governmental intrusion under the First and Fourth Amendments.[89] The second reason was that the statute implicated personal and

82. *See infra* Part II.

83. 489 U.S. 189 (1989).

84. *Id*. at 195.

85. *Id*.

86. 478 U.S. 186, 187–88 (1986).

87. CARLOS A. BALL, FROM THE CLOSET TO THE COURTROOM: FIVE LGBT RIGHTS LAWSUITS THAT HAVE CHANGED OUR NATION 12–13 (2010).

88. Brief for Respondent, Bowers v. Hardwick, 478 U.S. 186 (1986) (No. 85–140), p. 5.

89. *See, e.g.*, United States v. Orito, 413 U.S. 139, 142 (1973); Stanley v. Georgia, 394 U.S. 557, 565 (1969).

intimate relationships between consenting adults—as the brief explained, "it is one of the hallmarks of difference between our free society and a totalitarian one that our government cannot lightly trespass in the intimacies of our sexual lives."[90]

Given the ways in which the enforcement of the sodomy law at issue intruded on the spatial and decisional privacy interests of individuals, the brief asked the Court to rule in a way that would constitutionally codify Mill's harm principle: while the state had considerable constitutional authority to regulate sex-related conduct that took place in the "community environment outside of the home" due to the government's "fundamental duty to shield us from harms wrought by others," such "a concern [was] wholly absent in the case of consensual adult sexual conduct."[91] The state, when it came to intruding into the "sanctum of the private bedroom," needed justifications other than the mere majoritarian moral disapproval of same-sex sexual conduct.[92] As the brief explained, because the state's sodomy statute sought to regulate "intimate relations" conducted in private, that "law [could not] be defended . . . by 'the mere assertion that the action of the State finds justification in the controversial realm of morals.' Rather, th[e] law [could] be defended only if it [could] be shown to serve closely some state objective other than the bald assertion of one possible moral view."[93]

Before proceeding, I want to make it clear that I am not criticizing the strategic decision made by lawyers in *Bowers v. Hardwick* and other cases that have tried to fit LGBTQ rights claims into the type of normative libertarian vision that the Court has embraced for decades and that has served to block the attainment of crucial progressive objectives.[94] It is not incumbent on attorneys, in trying to win cases on behalf of their clients, to account for the ways in which their claims may impact the broader policy objectives of political movements. But it is important for progressive activists, commentators, and academics to consider how specific constitutional claims made in court impact the framing of

90. *Brief for Respondent*, *supra* note 88, at 12.

91. *Id*. at 6, 22–23.

92. *Id*. at 25 (footnote omitted).

93. *Id*. at 26–27 (internal citation and footnote omitted).

94. As Cary Franklin notes,

> [g]iven the general animosity toward homosexuals in this period, "the only course that seemed viable to [Tribe] was to highlight the scary reach of Big Brother's gaze and of his long, accusing arm into the most private of places and most intimate of relationships." Tribe hoped that by focusing on the state's intrusion on the fundamental right to privacy, rather than on its discrimination against homosexuals as a class, he might persuade the Court to view the criminalization of sodomy as an issue that implicated the freedom of all Americans, not only gays and lesbians.

Cary Franklin, *Marrying Liberty and Equality: The New Jurisprudence of Gay Rights*, 100 VA. L. REV. 817, 854 (2014) (quoting Laurence H. Tribe, Lawrence v. Texas*: The "Fundamental Right" That Dare Not Speak Its Name*, 117 HARV. L. REV. 1893, 1953 (2004)) (footnotes omitted).

policy questions outside of the judicial context. I further explore this point in Part III.A.

From a progressive perspective, there are at least three interrelated limitations that inhere in a libertarian privacy claim. First, the claim fails to provide or promote a conception of the self that goes beyond self-sufficiency and independence from others. The libertarian privacy claim presents an understanding of the self that, aside from the pursuit of sexual intimacy, is not otherwise embedded in or dependent on ongoing relationships or communities. Instead, the claim offers a conception of the self as an atomistic creature who is entitled to protection from state coercion, but otherwise has no particular needs to be nurtured, encouraged, or supported by others.[95] Although progressive understandings of the self can vary in emphases and dimensions, they generally prioritize the self's relationships with and interdependencies on others, factors that are entirely missing from or irrelevant to a libertarian conception of personhood.[96]

Some non-libertarian defenders of robust substantive due process protections in general and the right to privacy in particular have offered non-atomistic understandings of the self that view autonomy-seeking individuals as embedded in relationships of care and dependency.[97] My argument is not that all defenses of the right to privacy are intrinsically atomistic. Instead, my contention is that a *libertarian* understanding of the right to privacy relies on a thin and atomistic conception of the self.

The libertarian privacy claim's first limitation fosters a second one: an understanding of liberty that is exclusively confined to negative rights, that is to the notion that the only obstacles to freedom that matter morally and

95. *See, e.g.*, Aya Gruber, *A Distributive Theory of Criminal Law*, 52 WM. & MARY L. REV. 1, 8 (2010) ("The standard libertarian view endorses as its utopian vision a society in which atomistic individuals pursue any private end, and the government plays the minimal role of protecting a bare-bones set of rights.") (footnote omitted).

96. For explorations of progressive, non-atomistic conceptions of the self, see, for example, Susan D. Carle, *Theorizing Agency*, 55 AMER. U. L. REV. 307, 314–15 (2005) ("[T]he classical pragmatists' theory of the self does not depend on implausible notions that actors possess the ability to 'choose' their identities or destinies; it instead embraces the social constructivist insight that actors in a legal system are thoroughly constituted, in their identities, values, desires and goals, by their social context."); Laura T. Kessler, *Transgressive Caregiving*, 33 FLA. ST. U. L. REV. 1, 6 (2005) ("seek[ing] to develop a theory of cultural feminism based on individuals' capacity for political agency within the context of nurturing functions"); Sonia M. Suter, *Disentangling Privacy from Property: Toward a Deeper Understanding of Genetic Privacy*, 72 GEO. WASH. L. REV. 737, 773 (2004) ("[W]e come to understand ourselves in terms of what matters or has significance to us. But this self-discovery does not, and cannot, occur in isolation. Instead, it can only unfold in relation to others with whom we confront our thoughts against their thoughts and reactions.") (footnote omitted).

97. Linda McClain, for example, has offered a liberal and feminist understanding of the relationship between family life, politics, and liberty. *See generally* LINDA MCCLAIN, THE PLACE OF FAMILIES: FOSTERING CAPACITY, EQUALITY, AND RESPONSIBILITY (2006).

constitutionally are restrictions and constraints imposed by the government on independent and self-sufficient individuals.[98] This understanding of liberty is inconsistent with the progressive view "that social and economic conditions [can] be as destructive to conditions of individual freedom as can [coercive] state regulation, or even more so."[99] From a progressive perspective, liberty "depends upon the existence of social conditions that facilitate the individual's capacity for meaningful choice under prevailing social conditions."[100] This is why a progressive understanding of liberty calls for not only negative rights of non-interference, but also for positive rights to governmental interventions aimed at creating social and economic conditions that provide individuals with meaningful choices.[101] As Professor Robin West explains, "as long as the argument over the meaning of liberty is premised on the assumption that whatever its content, it must be negative, the liberty to which the Constitution entitles us will be either antagonistic or irrelevant to progressive moral arguments against class, race or . . . gender privilege."[102]

Third, and relatedly, an exclusive focus on negative rights to liberty exercised by atomistic individuals fails to ask a crucial question for the attainment of progressive distributive and egalitarian objectives: what are the government's moral and constitutional *obligations to act*? Under a libertarian privacy claim, the government can cure the constitutional violation at issue entirely by ending its involvement with the matter at hand. If the *Bowers* Court had accepted rather than rejected the constitutional claim, the government would have been required to cease regulating or interfering with the intimate sexual conduct in question. But when we broaden the analytical lens to focus more intently on progressive objectives related to distributive and egalitarian justice,

98. *See infra* notes 112–115 and 275–278 and accompanying text.

99. J.L. Hill, *The Five Faces of Freedom in American Political and Constitutional Thought*, 45 B.C. L. REV. 499, 505 (2004). Hill described the views held by progressives in the late nineteenth and early twentieth centuries. The quoted language also accurately describes the view of many contemporary progressives.

100. *Id*.

101. *Id*. *See also* Alsott, *supra* note 17, at 26 ("Negative liberty, as important as it is, is insufficient for justice. We can imagine—indeed, other countries have adopted—constitutional interpretations that convey positive rights. We can also imagine—and, again, other countries have enacted—law that looks beyond the minimalist task of settling private disputes and instead aims to correct market distributions and promote a family life open to all.").

102. West, *supra* note 16, at 8. West criticizes progressives for "conced[ing] [that] the property-protecting and status-quo-conserving role of liberty" provides the contours of substantive due process doctrine. *Id*. She adds that "if liberty is the goal of [the Fifth and Fourteenth] [A]mendments, and understood in the context of the history that produced them, it must be positive, not negative liberty that the states are required to protect." *Id*. at 9. She adds that "the central point [of the Due Process and Equal Protection clauses] seems to require state intervention into those private orderings that cause undue and unjust suffering. The central point of the Fourteenth Amendment is neither liberal nor conservative, but is progressive through-and-through." *Id*. at 12.

the staying of the government's regulatory hand, whether constitutionally mandated or prudentially chosen, impedes rather than advances the attainment of those objectives. Among other things, when the government fails to act, it leaves in place existing market-based allocations of wealth and income. While this is the outcome that the libertarian ethos requires, it is the precise opposite of what the progressive ethos demands.[103]

As a result, from a progressive perspective, the government's duty not to unduly interfere with the ability of individuals to make decisions regarding how they pursue sexual intimacy in private should constitute the floor and not the ceiling of what is morally and constitutionally required of the government. When progressives limit their understanding of liberty rights to negative ones that dovetail with and do not go beyond libertarian understandings of the self and the right to be left alone, they end up strengthening, even if unintentionally, principles of political morality and constitutional theory that call for little more than a minimal libertarian state.

In short, even if the constitutional claim in *Bowers* made on behalf of the gay man arrested in his home for engaging in consensual sex had succeeded, it would have done so largely within the confines of the libertarian ethos. The gain for progressives of rendering sodomy statutes unconstitutional would have come at the cost of reinforcing the type of libertarian principles that make the attainment of progressive distributive and egalitarian objectives more difficult.

This is essentially what happened when the Court overruled *Bowers* seventeen years later in *Lawrence v. Texas*.[104] It is undoubtedly true that Justice Anthony Kennedy's majority opinion in *Lawrence*, by recognizing that individuals have a constitutional right to engage in consensual same-sex sexual conduct in the privacy of the home, was a historical milestone that benefited LGBTQ people in important ways.[105] Sodomy laws relegated LGBTQ individuals to the status of outlaws and second-class citizens.[106] As long as the state retained the power to criminalize same-sex sexuality, it could seek to justify a whole series of oppressive laws and policies, including barring lesbians, gay men, and bisexuals from government employment and limiting their parental rights.[107] *Lawrence*, building on Justice Kennedy's earlier equality-based ruling

103. *See supra* notes 10–18 and accompanying text.

104. 539 U.S. 558 (2003).

105. *See generally* BALL, *supra* note 87, at 236–47 (exploring the impact of *Lawrence* on LGBTQ rights).

106. *See, e.g.*, William N. Eskridge Jr.*, Original Meaning and Marriage Equality*, 52 HOU. L. REV. 1067, 1095 (2015) ("Even without a criminal conviction, the suspected 'homosexual' was a presumptive outlaw who was subject to a wide array of civil discriminations.").

107. *See, e.g.*, Diana Hassel, *The Use of Criminal Sodomy Laws in Civil Litigation*, 79 TEX. L. REV. 813, 836–37 (2001); Christopher R. Leslie, *Creating Criminals: The Injuries Inflicted by "Unenforced" Sodomy Laws*, 35 HARV. C.R.-C.L. L. REV. 103, 170–73 (2000).

on behalf of the Court in *Romer v. Evans*, was an important step forward in the push to render sexual minorities equal under the law.[108]

In addition, Justice Kennedy in *Lawrence*, to his credit, acknowledged the *relational* component of the right to sexual intimacy. As he explained, the case was not just about the liberty implications of restricting sexual *conduct*; it was also about the impact of those restrictions on intimate *relationships*. As he put it, "[w]hen sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring."[109] In this sentence, Justice Kennedy offers a relational understanding of the right to sexual intimacy that includes a conception of the self that is not exclusively atomistic because it recognizes the connection that often exists between sexual conduct and the building and strengthening of intimate relationships.[110]

Despite this recognition, Justice Kennedy elsewhere in *Lawrence* offers a generally libertarian and atomistic understanding of the self, one that views individuals as fully capable of exercising liberty by making isolated and insulated choices free from connections to or dependencies on others. As Justice Kennedy put it, in quoting from the earlier plurality opinion upholding the constitutional right to choose an abortion that he co-wrote in *Planned Parenthood of Southeastern Pennsylvania. v. Casey*, "matters[] involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is *the right to define one's own concept* of existence, of meaning, of the universe, and of the mystery of human life."[111] Under this reasoning, individuals exercise liberty entirely on their own; the autonomous individual is envisioned as a self-determining and self-sufficient person who stands apart from others. What matters are the choices that individuals make independently and separately from others, rather than the choices they make while situated in relationships of dependency, care, or nurture with others.

Justice Kennedy in *Lawrence* also understood liberty entirely as a negative right to be protected from governmental interference.[112] This is clear from the

108. Romer v. Evans, 517 U.S. 620, 639 (1996).

109. *Lawrence*, 539 U.S. at 567.

110. *See, e.g.*, Erin Daly, *The New Liberty*, 11 WIDENER L. REV. 221, 242–43 (2005); Laurence H. Tribe, Lawrence v. Texas: *The "Fundamental Right" That Dare Not Speak Its Name*, 117 HARV. L. REV. 1893, 1898 (2004).

111. *Lawrence*, 539 U.S. at 574 (quoting Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 877 (1992), *overruled by* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022)) (emphasis added).

112. Kenji Yoshino, *A New Birth of Freedom?* Obergefell v. Hodges, 129 HARV. L. REV. 147, 161 (2015) ("The right in *Lawrence* was emphatically a negative one, concerning the right of adults to engage in sexual conduct in the privacy of their homes.") (footnote omitted). *See also* Hill, *supra*

definition of liberty he provided in the opinion's first sentence: "Liberty," Justice Kennedy wrote, "protects the person from unwarranted government *intrusions* into a dwelling or other private places."[113] Under this definition, state action is understood only as a threat to liberty, never as a precursor to or originator of it. Protecting liberty, from this vantage point, *requires the regulatory diminishment of the state*. As Justice Kennedy explained, the "right [of individuals] to liberty under the Due Process Clause gives them the full right to engage in their conduct without intervention of the government."[114] The constitutional objective, under *Lawrence*'s libertarian understanding of liberty, is to determine "the spheres of our lives and existence, [in our homes and elsewhere], *where the State should not be a dominant presence*."[115]

Lawrence understood liberty only in its negative sense, grounded in the protection *from* government, with nothing to say about how government can affirmatively foment or encourage the meaningful exercise of liberty. The ruling's normative emphasis was on individual choice exercised entirely free from governmental involvement. Not surprisingly, therefore, *Lawrence* did not consider the possibility that the government might have constitutional obligations *to act* (as opposed to refrain from acting) in order to promote human liberty.

This is a crucial omission for progressives because while issues related to LGBTQ sexual freedom are an important part of the progressive agenda on sexual matters, that agenda is far broader. For example, protecting victims of sexual crimes and domestic violence also has been a crucial progressive objective.[116] And such protection is impossible, progressives have argued, without significant governmental intervention, not only in terms of enforcing criminal laws against abusers, but also in supporting and funding the needs of the victims of sexual and domestic violence.[117] The protection of the liberty rights of such victims, that is their rights to be free from intimidation and

note 99, at 575 ("Justice Anthony Kennedy's majority opinion [in *Lawrence*] articulates a notion of freedom that is reminiscent of John Stuart Mill.").

113. *Lawrence*, 539 U.S. at 562 (emphasis added).

114. *Id.*

115. *Id.* (emphasis added).

116. *See, e.g.*, Deborah M. Weissman, *Countering Neoliberalism and Aligning Solidarities: Rethinking Domestic Violence Advocacy*, 45 SW. L. REV. 915, 917 (2016) (offering "proposals to advance economic security in ways that join domestic violence advocacy with other forms of socio-economic advocacy that provide additional progressive promise. . . .").

117. *See, e.g.*, Ryan Slocum, *The Difficult Decision for Victims of Sexual Abuse from Clergy in New Jersey: Comparative Analysis of New State Legislation Expanding Statute of Limitations for Sexual Abuse Victims the Same Year the NJ Diocese Victim Compensation Fund is Established*, 21 RUTGERS J.L. & RELIG. 326, 330–33 (2020); Heidi M. Grogan, *Characterizing Criminal Restitution Pursuant to the Mandatory Victims Restitution Act: Focus on the Third Circuit*, 78 TEMP. L. REV. 1079, 1096 (2005).

physical and psychological abuse, requires significant governmental involvement rather than the staying of its regulatory powers.[118]

And yet *Lawrence* has nothing to say or offer on that front. As Professor Marc Spindelman puts it,

> *Lawrence* captures as much of the progressive outlook as it can. But its ability to capture the entire picture is limited—even blinkered—by constitutional ground norms that keep it from imagining a constitutional universe in which the State is obligated to provide victims of sexual harm protections of the law.[119]

An understanding of the Constitution as protecting only negative rights "does not prime—and it may not even allow—the Court to imagine that what is needed to secure sexual freedom is not less law, but a different mix of legal regulation and deregulation, perhaps even in some respects, more law altogether."[120]

Lawrence's commitment to a negative understanding of liberty culminated with its distinction, in the opinion's last paragraph, between the unconstitutionality of sodomy laws, which can be remedied through governmental omission, and the then possible unconstitutionality of the government's failure to recognize same-sex marriage, which requires governmental action.[121] For the *Lawrence* Court, the fact that the government could not constitutionally criminalize consensual sodomy between same-sex adults did not mean that it had a constitutional obligation to take the affirmative step of recognizing same-sex marriages.[122] But that was, of course, the conclusion reached by the Court twelve years later in *Obergefell v. Hodges*.[123]

B. Same-Sex Marriage and Affirmative Government Obligations

In his majority opinion in *Obergefell*, Justice Kennedy made clear that the understanding of liberty set forth in *Lawrence* was not enough to fully protect the liberty rights of lesbians, gay men, and bisexuals. As he put it, "while *Lawrence* confirmed a dimension of freedom that allows individuals to engage in intimate association without criminal liability, it does not follow that freedom stops there."[124] Justice Kennedy added that "outlaw to outcast may be a step forward, but it does not achieve the full promise of liberty."[125] Such a promise,

118. *See, e.g.*, Grogan, *supra* note 117, at 1079, 1081; Jennifer Honig & Susan Fendell, *Meeting the Needs of Female Trauma Survivors: The Effectiveness of the Massachusetts Mental Health Managed Care System*, 15 BERKELEY WOMEN'S L.J. 161, 167–69, 188–90 (2000).

119. Spindelman, *supra* note 26, at 1122–23 (footnote omitted).

120. *Id*. at 1123.

121. Kennedy explained that the case before the Court "does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter." *Lawrence*, 539 U.S. at 578.

122. *Id*.

123. 576 U.S. at 644, 681.

124. *Id*. at 667.

125. *Id*.

he now concluded, required the government to offer same-sex couples the opportunity to marry.[126]

It can be argued that Justice Kennedy in *Obergefell*, at least implicitly, recognized a link between the ability of individuals to exercise their liberty rights, on the one hand, and positive governmental action, on the other, given that the constitutional violation in that case, unlike in *Lawrence*, was remedied through governmental regulation rather than through its absence. The constitutional problem in *Obergefell* was not that the state was regulating too much, as was the case in *Lawrence*. Instead, the problem with same-sex marriage bans was that the government was *not regulating enough*. When it came to same-sex marriage, it was the government's decision to stay its regulatory hand that led to the liberty (and equality) violation.[127]

But Justice Kennedy's understanding of the link between governmental action and human liberty in *Obergefell* was not due to a normative or constitutional commitment to the idea that protecting liberty sometimes requires the government to deploy, rather than stay, its regulatory authority in order to create the social and economic conditions that make the exercise of meaningful autonomy possible.[128] Instead, for Justice Kennedy, the obligation on the state to act affirmatively by recognizing the relationships of same-sex couples as marital was the result of the unique value of the institution of marriage.[129] That he understood its value to be unique is evinced by the fact that most of his substantive due process analysis in *Obergefell* entailed an extended discussion of the distinctive benefits that marriage affords to individuals and society.[130]

126. *Id.* at 665.

127. *See* Carlos A. Ball, *The Positive in the Fundamental Right to Marry: Same-Sex Marriage in the Aftermath of* Lawrence v. Texas, 88 MINN. L. REV. 1184, 1186 (2004) ("[T]he fundamental right to marry includes within its ambit a positive component that places on the state obligations of recognition of marital relationships that go beyond noninterference with those relationships.").

128. Writing shortly after *Obergefell*, Professor Kenji Yoshino suggested that Justice Kennedy's choice to ground the decision in liberty considerations, while equality principles played only a supportive role, might reflect an interest by Justice Kennedy to question the "negative/positive liberty distinction," and, in the process, "reflect his desire to revamp the substantive due process inquiry *tout court*," which would have "radical implications." Yoshino, *supra* note 112, at 168. Although Professor Yoshino's point is an interesting one, I do not see anything in the reasoning of *Obergefell*, or in Justice Kennedy's broader constitutional jurisprudence, see *infra* Part II, to support this optimistic (from a progressive perspective) reading of *Obergefell*.

129. Susan Frelich Appleton, Obergefell*'s Liberty: All in the Family*, 77 OHIO ST. L.J. 919, 952 (2016) ("Justice Kennedy goes out of his way to describe marriage in exceptional terms, suggesting that he regards the issue in *Obergefell* as distinctive.") (footnote omitted).

130. These are some of the ways in which, according to Justice Kennedy in *Obergefell*, marriage uniquely contributes to the well-being of individuals and society: "Rising from the most basic human needs, marriage is essential to our most profound hopes and aspirations." *Obergefell*, 576 U.S. at 657; "[c]hoices about marriage shape an individual's destiny," *id*. at 666; "the right to marry is fundamental because it supports a two-person union unlike any other in its importance to

In Part II, I explore how Justice Kennedy's commitment to the libertarian ethos served to undermine a slew of progressive objectives outside of the context of LGBTQ rights. For now, I want to note that *Obergefell*, when looked at from a positive liberty perspective, was an outlier in Justice Kennedy's constitutional jurisprudence. Although he was generally skeptical of government regulation and understood liberty rights only in the negative sense of precluding state action,[131] *Obergefell* at least implicitly recognized the benefits for human liberty of governmental intervention—in this case, the regulation of same-sex relationships through the institution of marriage. Nothing in Justice Kennedy's opinion, however, suggests that he believed that governmental involvement could play a positive role in promoting human liberty outside of the—for him—*sui generis* context of marriage.[132]

It is worth noting that the critique of Justice Kennedy's reasoning from the right found in some of the *Obergefell* dissents took him to task for purportedly embracing a positive understanding of constitutional liberty. Thus, Chief Justice John Roberts chastised the majority opinion for erroneously "convert[ing] the shield provided by constitutional liberties into a sword to demand positive entitlements from the State."[133] Similarly, Justice Clarence Thomas claimed that Justice Kennedy departed from the correct constitutional understanding of liberty "as freedom *from* government action, not entitlement *to* government benefits."[134] But, again, there is no indication in *Obergefell* that Kennedy's conception of constitutional liberty, beyond what he took to be the unique institution of marriage, imposed positive obligations on the state.[135]

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the committed individuals," *id*.; "[m]arriage responds to the universal fear that a lonely person might call out only to find no one there. It offers the hope of companionship and understanding and assurance that while both still live there will be someone to care for the other," *id*. at 667; "marriage allows children 'to understand the integrity and closeness of their own family and its concord with other families in their community and in their daily lives.' Marriage also affords the permanency and stability important to children's best interests," *id*. at 668 (internal citation omitted); and "marriage is 'the foundation of the family and of society, without which there would be neither civilization nor progress,'" *id*. at 669 (quoting Maynard v. Hill, 125 U.S. 190, 211 (1888)).

131. *See supra* notes 112–115 and *infra* notes 275–278 and accompanying text.

132. *See supra* note 130 and accompanying text.

133. *Obergefell*, 576 U.S. at 702 (Roberts, C.J., dissenting). Roberts added that the "petitioners do not seek privacy. Quite the opposite, they seek public recognition of their relationships, along with corresponding government benefits." *Id*.

134. *Id*. at 721 (Thomas, J., dissenting).

135. Professor Susan Appleton explains why the institution of marriage in particular might appeal to those who abide by what I call the libertarian ethos and she labels "neoliberalism": "Although marriage long predates contemporary talk of neoliberalism, neoliberals would have invented marriage had it not already existed! Marriage locates the primary source of support for dependents in the 'private sphere,' consistent with neoliberalism's deference to laissez-faire markets and the minimal state." Appleton, *supra* note 129, at 951 (footnotes omitted). She adds that "[t]hese considerations counsel against imagining that *Obergefell* heralds a new dawn of enforceable positive or welfare rights." *Id*. at 952.

But it was not only Justice Kennedy who failed to broaden the analytical lens to consider the possibility that sometimes governmental involvement might expand rather than restrict the ability of individuals to make meaningful choices on matters related to personal relationships and sexuality. For the most part, marriage equality proponents did as well.

As both a conceptual and normative matter, the question of marriage equality was not about the right to privacy and to be left alone. Same-sex couples who wanted to marry were not asking the government to get out of their lives; instead, they *demanded government regulation* as a means of attaining meaningful liberty and equality.[136] The government's *failure to intervene* by regulating their relationships as marital undermined rather than promoted the liberty and equality interests of same-sex couples.[137] Theoreticians of marriage equality, therefore, could have emphasized how the exercise of liberty and the attainment of equality often depend on the government taking affirmative steps to create the social and economic conditions that provide individuals with meaningful choices and opportunities. In making the point that liberty entails more than the negative right to be left alone, constitutional theorists and others who supported marriage equality could have challenged the libertarian ethos by noting that if the government has a constitutional *obligation* to create the legal framework that provides same-sex couples with the opportunity to marry, then it might also have constitutional duties to act affirmatively in other crucial spheres of government policy—including education, housing, and healthcare—that impact the ability of individuals to make meaningful choices on how to lead their lives. Unfortunately, marriage equality proponents generally failed to make that connection. This was one of the reasons why some on the left criticized a political and legal push for marriage equality that was not linked to broader distributive questions such as whether individuals have adequate access to employment, housing, and healthcare.[138]

I argued twenty years ago that the push for marriage equality offered an opportunity for proponents of LGBTQ rights to replace a thin conception of liberalism, disconnected to considerations of the good, with a thicker conception of personal liberty that focused not just on the negative right to be left alone, but

136. Carlos A. Ball, *This is Not Your Father's Autonomy: Lesbian and Gay Rights from a Feminist and Relational Perspective*, 28 HARV. J.L. & GENDER 345, 346 (2005).

137. *Id*. at 367.

138. *See, e.g.*, Paula Ettelbrick, *Since When is Marriage a Path to Liberation?*, OUT/LOOK NAT'L GAY & LESBIAN Q. (Fall 1999) at 9, 14–17, *reprinted* in CARLOS A. BALL ET AL., CASES AND MATERIALS ON SEXUALITY, GENDER IDENTITY, AND THE LAW 467, 471 (7th ed., 2022) ("Gay marriage will not help us address the systemic abuses inherent in a society that does not provide decent health care to all of its citizens, a right that should not depend on whether the individual (1) has sufficient resources to afford health care or health insurance, (2) is working and receives health insurance as part of compensation, or (3) is married to a partner who is working and has health coverage which is extended to spouses.").

also on what is required of the state to create the conditions that make human flourishing possible for all.[139] I argued that the push for marriage equality made clear that meaningful liberty and equality for lesbian, gay, and bisexual individuals could not be attained or experienced in isolation from others and the broader society.[140] The negative right to liberty might protect what took place in the bedroom, but bedroom activity, so to speak, is only one facet of what it means to construct relationships, families, and communities around a same-sex sexuality.[141] Indeed, it is entirely possible to fully protect the right to privacy in the bedroom while leaving firmly in place the repressive consequences for LGBTQ people of being forced to lead closeted lives.[142]

A fuller and richer understanding of liberty than that offered by the libertarian ethos can account not only for the freedom that individuals enjoy when they close the door to their homes behind them, but also for the range of options and opportunities available to them when they open those doors and come out to participate in the social and communal world as open LGBTQ people.[143] In many ways, the push for marriage equality was a *community-wide coming out of the closet* for LGBTQ people. What truly mattered to those pushing for marriage equality, as a moral, social, and political matter, was not the negative liberty right that protected bedroom activity and the opportunity to be left alone, but the liberty and equality implications of being able to live public and open lives, defined in part through same-sex intimacy and sexuality, without being relegated to a second-class citizenship.[144]

139. This is the main thesis of my book *The Morality of Gay Rights*. *See* BALL, *supra* note 38, at 2.

140. *Id*. at 3–4.

141. *See id*. at 145–51 (exploring the role of community in the lives of lesbians and gay men); *id*. at 208–12 (exploring the role of mutuality in a lesbian and gay sexual ethic).

142. *See generally* STEVE SEIDMAN, BEYOND THE CLOSET: THE TRANSFORMATION OF GAY AND LESBIAN LIFE (2002) (analyzing the history and implications of the closet for LGBTQ people). *See also* Kendall Thomas, *Beyond the Privacy Principle*, 92 COLUM. L. REV. 1431, 1455 (1992) ("The problem with the reliance on privacy . . . is that 'the closet' is less a refuge than a prisonhouse.").

143. *See* Carlos A. Ball, *Sexual Ethics and Postmodernism in Gay Rights Philosophy*, 80 N.C. L. REV. 371, 430 (2002) ("[T]he very idea of a gay and lesbian sexual ethic suggests shared values by collective entities (gay and lesbian friendships, relationships, families, and communities). It is not an individualistic ethic in the libertarian sense . . . —rather, it is a collective ethic . . . developed by a group of individuals whom society has marginalized and stigmatized because of their sexuality and whose ethical values and practices of freedom are direct responses to that oppression.").

144. *See* Danaya C. Wright, *The Logic and Experience of Law:* Lawrence v. Texas *and the Politics of Privacy*, 15 U. FLA. J.L. & PUB. POL'Y 403, 421 (2004) (noting that the "success [in *Lawrence*] is . . . tempered by a fear that [its] true legacy may be the mere protection of intimate private behavior, i.e., protection of the closet, and not protection of the visible act of coming out of the closet that thousands of gay couples have begun by demanding legal recognition of their intimate relationships. . . . [In] want[ing] public recognition of their love, these people make visible the reality that the private is the public.").

The state has a crucial *affirmative* duty in this process by having to define legal marriage in a way that includes same-sex couples.[145] Although marriage equality proponents rarely articulated it in this way, what they were asking of the state was that it act affirmatively by offering the opportunity for government regulation of their relationships as a means for lesbians, gay men, and bisexuals to be able to enjoy meaningful liberty and equality.[146]

I suspect that one of the reasons why marriage equality proponents did not emphasize the affirmative or positive role that the state can play in promoting LGBTQ liberty and equality is that government actors in the U.S. have been intimately involved in the repression of sexual and gender identity minorities, including through the enforcement of criminal laws, immigration restrictions, and military service bans.[147] But I suspect another reason for that failure is the influence of the libertarian ethos, which in framing so much of our moral, political, and constitutional debates in this country, discourages explorations of affirmative government obligations and positive understandings of liberty.[148]

As *Lawrence* made clear, the idea of protecting negative individual liberty from government coercion had much to offer proponents of LGBTQ rights.[149] On the question of sodomy regulation, the government was undoubtedly the problem and not the solution.[150] But the libertarian notion that the government is only an impediment to individual liberty and never a promoter of it was not only inconsistent with what was truly at stake in the marriage equality debates, but was also deeply incompatible with broader progressive objectives.[151] To put it simply, rights protecting individuals from governmental interference with

145. BALL, *supra* note 38, at 3–4.

146. In explaining why a libertarian understanding of autonomy is insufficiently capacious to account for the issue of marriage equality, I noted in 2005 that

> [m]any members of the lesbian and gay community, as well as their supporters, now believe that state action is *required* to create the necessary social conditions that will provide lesbians and gay men with the opportunity to lead autonomous lives. From this perspective, the *failure* of the state to act, for example, by refusing to legally recognize the relationships and families of lesbians and gay men, constitutes a failure to create the necessary social conditions that make the realization of autonomy by lesbians and gay men possible.

Ball, *supra* note 136, at 367.

147. *See supra* notes 34–37 and accompanying text.

148. *See, e.g.*, Rosen & Schmidt, *supra* note 31 at 130 ("The basic premise of libertarianism—that government regulation inflicts substantial liberty costs on the American people, costs that must be borne in many instances, but not all—seems to have captured broad swaths of the American people.") (footnote omitted). *See also* Corinne Blalock, *Neoliberalism and the Crisis of Legal Theory*, 77 L. & CONTEMP. PROBS. 71, 83 (2014) (arguing "that neoliberalism is now hegemonic—it is not one theoretical account among many but, like liberalism before it, a set of principles and modes of governance so ingrained as to constitute the common sense of the age").

149. *See supra* notes 104–115 and accompanying text.

150. *See supra* notes 104–115 and accompanying text.

151. *See supra* notes 136–146 and accompanying text.

certain personal and intimate decisions are necessary but not sufficient in the construction of a society that, from a progressive perspective, is fair and just.

The push for marriage equality was a missed opportunity to frame LGBTQ rights positions in ways that challenged rather than strengthened the libertarian ethos and, in the process, the push helped promote rather than undermine the attainment of other progressive objectives. Justice Kennedy may have been correct that it is not possible for individuals to exercise meaningful liberty and for society to thrive without the government providing couples with the opportunity to marry.[152] But progressives believe that the same is true of government-provided or -guaranteed education, housing, and healthcare.[153] The struggle for marriage equality was an overlooked opportunity for progressives to analogize between the positive role that the government can play in promoting liberty and equality in the context of marriage and the role that it can play in other vital areas of social policy.

In the end, it seemed that many marriage equality proponents agreed with Justice Kennedy that, when it comes to the relationship between positive government action and the promotion of human liberty, the institution of marriage is *sui generis*. From this perspective, the government's constitutional obligations to affirmatively act in the context of marriage by making the legal institution available to all who are interested in participating tells us little about how the state may be constitutionally obligated to affirmatively act in other policy areas by creating economic and social conditions that make the exercise of meaningful liberty and equality possible. The victory in *Obergefell*, as important as it was for LGBTQ people, failed to challenge the libertarian ethos that so powerfully impedes the attainment of other crucial progressive objectives.

II. THE PITFALLS FOR PROGRESSIVES OF JUSTICE KENNEDY'S CONSTITUTIONAL LIBERTARIANISM

It is widely recognized that Justice Kennedy's LGBTQ rulings on behalf of the Supreme Court were vital judicial victories for LGBTQ people.[154] This is true not only of the two cases already discussed, *Lawrence* and *Obergefell*, but also of the equality-based rulings in *Romer v. Evans*,[155] striking down a state constitutional amendment prohibiting antidiscrimination protection for lesbians, gay men, and bisexuals, and *Windsor v. United States*,[156] striking down part of

152. *See supra* notes 124–130 and accompanying text.

153. *See supra* notes 10–11 and accompanying text.

154. *See, e.g.*, Carlos A. Ball, *The Judicial Activism of Justice Anthony Kennedy*, 72 AMER. U. L. REV. 1501, 1585–88 (2023).

155. 517 U.S. 620, 635–36 (1996).

156. 570 U.S. 744 (2013).

the Defense of Marriage Act of 1996.[157] The protection of equality interests, whether constitutionally mandated under the Equal Protection Clause or statutorily provided through antidiscrimination laws, constitutes a vital way in which the government acts affirmatively to provide protections to individuals and groups subjected to discrimination.[158] It is undoubtedly the case that Justice Kennedy's LGBTQ rulings advanced important progressive objectives by challenging the ways in which American laws, policies, and practices helped render LGBTQ individuals second-class citizens under the law.[159]

But a broader examination of Justice Kennedy's jurisprudence shows the extent to which its libertarian components served to repeatedly block the attainment of a slew of other progressive objectives. As I seek to establish in this Part, when we widen the lens to assess the impact of other parts of Justice Kennedy's constitutional jurisprudence on progressive objectives beyond the realm of LGBTQ rights, it helps illustrate how promoting and strengthening the libertarian ethos to realize some progressive ends can undermine the attainment of other progressive goals.

A commitment to the libertarian ethos, such as that reflected in important parts of Justice Kennedy's constitutional jurisprudence, goes hand-in-hand with a simultaneously assertive and benign understanding of the power of judicial review.[160] I have elsewhere detailed the extent to which Justice Kennedy's willingness to strike down laws as unconstitutional made him a singularly activist judge when compared to the justices with whom he served for extended periods of time.[161] Justice Kennedy's judicial activism was reflected in his voting record—he voted to strike down federal, state, and local laws at a higher rate than most of the justices with whom he served.[162] His judicial activism was also reflected in the fact that, unlike justices to his ideological right and left, he rarely expressed concerns about the importance of accounting for either the policy preferences of elected legislators or the possible dangers of judges overreaching in exercising the power of judicial review.[163] In addition, Justice Kennedy was unique among the justices with whom he served in evincing what I have called an "equal opportunity" judicial activism because he was willing to repeatedly strike down laws in response to constitutional claims raised by advocates from *both* the right and the left.[164]

157. Pub. L. No. 104-199, 110 Stat. 2419 (1996) (repealed 2022).

158. *See generally* BRUCE ACKERMAN, THE CIVIL RIGHTS REVOLUTION (2014) (exploring how political pressure during the civil rights era encouraged Congress and the Supreme Court to embrace a more expansive understanding of equality).

159. Ball, *supra* note 154, at 1585–88.

160. *See infra* notes 165–167 and accompanying text.

161. Ball, *supra* note 154, at 1506–08.

162. *See id*. at 1518–43.

163. *See id*. at 1543–70.

164. *See id*. at 1570–96.

Libertarian constitutional theorists, such as Randy Barnett and Richard Epstein, call for vigorous judicial interventions in policing the boundaries of government power to promote their understandings of constitutionally guaranteed liberty, property, and contract rights.[165] Constitutional libertarianism trusts judges by empowering them to constantly and vigorously monitor what libertarians believe are the significantly restricted boundaries of constitutional government authority.[166] Contemporary libertarian constitutional theorists, therefore, defend a robust and activist role for the judiciary while rejecting the calls of earlier conservative commentators for judicial restraint.[167]

For libertarians, the Constitution's individual rights provisions place substantial limits on the government's distributive *and* moral objectives.[168] Generally speaking, conservative justices in recent decades have concluded that many of the distributive laws and policies that come before the Court are unconstitutional (such as Obamacare's expansion of Medicaid and affirmative action programs), but not those that seek to promote majoritarian morality (such

165. *See, e.g.*, Jeffrey Rosen, *Economic Freedoms and the Constitution*, 35 HARVARD J.L. & POL'Y 13 (2012) (noting that "libertarians like Professor Epstein and Professor Randy Barnett . . . support aggressive enforcement of unenumerated rights, such as the liberty of contract"). *See also* David E. Bernstein & Ilya Somin, *The Mainstreaming of Libertarian Constitutionalism*, 77 L. & CONTEMP. PROBS. 43, 43–44 (2014) (noting that libertarians believe "that there should be significant constitutional limits on government in order to protect both economic and 'noneconomic' rights. Given that constitutional rights are most often vindicated in modern America through judicial review, most libertarian constitutionalists believe that the courts should enforce these rights."); Ilya Somin, *Libertarianism and Judicial Deference*, 16 CHAPMAN L. REV. 293, 294 (2013) ("[L]ibertarian thought can make at least one distinctive contribution to constitutional theory: greater skepticism about doctrines of judicial deference to the supposedly superior expertise of the political branches of government.").

166. *See, e.g.*, William Wayne Justice, *The New Awakening: Judicial Activism in a Conservative Age*, 43 SMU L. REV. 657, 672 (1989) ("[L]ibertarian theorists advocate the reemergence—in the manner of *Lochner*—of active judicial scrutiny of the substance of economic legislation."); West, *supra* note 7, at 676 ("Free-market libertarianism, as is increasingly well understood, requires considerable judicial activism and seems to mandate legislative rather than judicial restraint."). *See also* CLINT BOLICK, DAVID'S HAMMER: THE CASE FOR AN ACTIVIST JUDICIARY 49 (2007) (defending active judicial roles in the protection of economic liberties and property rights).

167. *See, e.g.*, David M. Mayer, *Justice Clarence Thomas and the Supreme Court's Rediscovery of the Tenth Amendment*, 25 CAP. U.L. REV. 339, 416 (1996) ("[t]o the libertarian proponents of 'principled judicial activism,' the conservative originalists' emphasis on judicial restraint is misplaced; judges ought to be 'activist' in enforcing the libertarian guarantees of the Constitution.").

168. For example, the libertarian constitutionalist Randy Barnett argued that *both* Obamacare and sodomy laws were unconstitutional. *See* Randy E. Barnett, *Commandeering the People: Why the Individual Health Insurance Mandate Is Unconstitutional*, 5 N.Y.U. J.L. & LIBERTY 581, 586–87 (2010) (arguing that Obamacare's individual mandate was unconstitutional); Randy E. Barnett, *Justice Kennedy's Libertarian Revolution:* Lawrence v. Texas, 2003 CATO SUP. CT. REV. 21, 21 (praising *Lawrence* for "how it returns us, in a fundamental way, to our first principles as a nation").

as sodomy laws and same-sex marriage bans).[169] For their part, liberal justices generally have concluded the opposite.[170] Justice Kennedy was different because he was willing to grant judicial veto points to conservative advocates who challenged laws with distributive objectives *and* to progressive advocates who challenged laws with moral objectives.[171] Whether the cases that reached the Court during Justice Kennedy's tenure implicated laws supported by progressives, such as gun control regulations or affirmative action programs, or by conservatives, such as anti-LGBTQ measures, Justice Kennedy repeatedly sided with the challengers and against the government.[172] Justice Kennedy's abiding skepticism of government action worked well for progressives on LGBTQ issues, but not so well, as I discuss in this Part, in many other policy areas.

Section A explores Justice Kennedy's anti-distributive understanding of the Equal Protection Clause as applied to affirmative action policies. Section B examines Justice Kennedy's use of constitutional federalism principles, which he framed as means to attain individual liberty ends, to repeatedly vote to strike down federal laws and programs with distributive and egalitarian objectives. Section C discusses how Justice Kennedy's conception of the First Amendment helped turn it into a shield protecting powerful economic actors from government regulation. Section D examines the libertarian understanding of the Federal Arbitration Act that Justice Kennedy repeatedly endorsed. Finally, Section E focuses on the libertarian understanding of the Second Amendment that Justice Kennedy supported.

Academics have disagreed on the question of whether it is appropriate to label Justice Kennedy a libertarian. Although no one seems to take issue with

169. For example, the conservative Justices Antonin Scalia and Clarence Thomas voted to strike down affirmative action programs and healthcare reforms, see, for example, Grutter v. Bollinger, 539 U.S. 306, 381 (2003) (Rehnquist, C.J., dissenting with Justices Scalia and Thomas joining); Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 646–47 (2012) (joint dissent by Justices Scalia, Kennedy, Thomas, and Alito), while voting to uphold sodomy laws, *Lawrence*, 539 U.S. at 586–89 (Scalia, J., dissenting); *id*. at 605 (Thomas, J., dissenting), and same-sex marriage bans. *Obergefell*, 576 U.S. at 713–17 (Scalia, J., dissenting); *id*. at 721–23 (Thomas, J., dissenting).

170. For example, the liberal Justices Ruth Bader Ginsburg and Stephen Breyer voted to strike down sodomy laws and same-sex marriage bans, *see Lawrence*, 539 U.S. at 561; *Obergefell*, 576 U.S. at 648, 666, while voting to uphold affirmative action programs and healthcare reforms. *See, e.g.*, *Grutte*r, 539 U.S. at 310, 327–28; *Nat'l Fed'n of Indep. Bus*., 567 U.S. at 589–92 (Ginsburg, J., concurring in part and dissenting in part).

171. Ball, *supra* note 154, at 1570–96. *See also* Mark Tushnet, *Understanding the Rehnquist Court*, 31 OHIO N.U. L. REV. 197, 199 (2005) ("Justice Kennedy has an instinctive attraction to libertarian positions on a wide range of issues. Libertarianism is obviously compatible with the deregulatory impulses shared by modern and traditional Republicans. But, modern Republicans are strongly regulatory on the social issues, whereas Justice Kennedy's libertarian inclinations lead him to be skeptical about efforts to regulate abortion and sexual conduct.").

172. Ball, *supra* note 154, at 1570–96.

the fact that at least some of his judicial reasoning and votes embraced or reflected libertarian principles,[173] the disagreement seems to center around whether he was libertarian enough to qualify for the label.[174] My interest here is not in showing that Justice Kennedy was sufficiently committed to libertarian principles—including a belief in a minimal state as envisioned by libertarian theorists such as Robert Nozick, Randy Barnett, and Richard Epstein—to be labeled a "true blue" libertarian. Instead, my objective is to illustrate how crucial aspects of Justice Kennedy's constitutional jurisprudence were consistent with the libertarian ethos: promoting an atomistic conception of the self; expressing a deep skepticism of the motivations and purposes of government regulations and interventions; and holding a negative conception of individual rights that only imposes on the government duties of non-intervention without also requiring that it act affirmatively to promote the general welfare and advance individual liberty and equality. Justice Kennedy's constitutional commitments to the libertarian ethos meant that his track record on the Court served to impede a wide range of progressive objectives outside of the sphere of LGBTQ rights.

A. The Equal Protection Clause and Affirmative Action

Progressives generally defend affirmative action programs as efforts to create economic and social opportunities for groups subjected to past discrimination and exclusion.[175] From this perspective, meaningful equality (and liberty) for traditionally subordinated groups is not possible in the absence of *affirmative* governmental action.[176] Public affirmative action programs aim

173. *See* ANTHONY D. BARTL, THE CONSTITUTIONAL PRINCIPLES OF JUSTICE KENNEDY: A JURISPRUDENCE OF LIBERTY AND EQUALITY 10 (2014) (noting that "the libertarian interpretation of Kennedy is ascendant").

174. *Compare* HELEN J. KNOWLES, THE TIE GOES TO FREEDOM: JUSTICE ANTHONY M. KENNEDY ON LIBERTY 3 (2009) (noting that "libertarian principles play prominent roles in Justice Kennedy's judicial opinions . . . .") *with* Ilya Shapiro, *A Faint-Hearted Libertarian at Best: The Sweet Mystery of Justice Anthony Kennedy*, 33 HARV. J.L. & PUB. POL'Y 333, 335–36 (2010) (contending that "few people would label Justice Kennedy 'libertarian' in any sense of the word").

175. "Under a distributive justice theory an individual is entitled to affirmative action . . . because he or she deserves a greater share of community resources" given the close "correlation between race or sex and relative inequality of opportunity." Myrl L. Duncan, *The Future of Affirmative Action: A Jurisprudential/Legal Critique*, 17 HARV. CIV. RIGHTS & CIV. LIBERTIES L. REV. 503, 521, 523 (1982). *See also* Anita Bernstein, *Diversity May Be Justified*, 64 HASTINGS L.J. 201, 227 (2012) ("Affirmative action when implemented operates as a source of redistribution, recognizing groups that, due to historical injustice, possess either too much or too little."). A distributive model is not the only justification for affirmative action programs; compensatory and social utility arguments, for example, can also be deployed in their defense. *See, e.g.*, Duncan, *supra*, at 510–20 & 524–29.

176. *See, e.g.*, Gregory K. Davis, C*reating a Roadmap to a LGBTQ Affirmative Action Scheme: An Article on Parallel Histories, the Diversity Rationale, and Escaping Strict Scrutiny*, 26 NAT'L BLACK L.J. 43, 78–80 (2017); Mae Kuykendall & Charles Adside, *Unmuting the Volume:* Fisher*, Affirmative Action Jurisprudence, and the Legacy of Racial Silence*, 22 WM. & MARY BILL RTS. J.

to make it more likely that members of traditionally excluded and subordinated groups have opportunities to derive some of the financial and social advantages enjoyed by groups that benefited from prior exclusionary policies.[177] As Professor Cheryl Harris notes, "affirmative action calls for equalizing treatment by redistributing power and resources in order to rectify inequities and to achieve real equality."[178]

The distributive aspirations and egalitarian objectives of affirmative action programs help explain the Supreme Court's growing hostility to them in recent decades. As Professor Harris explains, the call for affirmative action

> exposes the illusion that the original or current distribution of power, property, and resources is the result of "right" and "merit." It places in tension the settled expectations of whites, based on both the ideology of white supremacy and the structure of the U.S. economy, that have operated to subordinate and hyper-exploit groups identified as the "other." . . . It conceives of equality in transgenerational terms, and demands a new and different sense of social responsibility *in a society that defines individualism as the highest good, and the "market value" of the individual as the just and true assessment*.[179]

Justice Kennedy was highly skeptical of the constitutionality of government affirmative action policies and their distributive and egalitarian objectives. For example, he dissented in *Grutter v. Bollinger*,[180] disagreeing with the Court's decision to uphold the constitutionality of the University of Michigan Law School's admissions policy.[181] That policy aimed to create diverse student classes along different lines, including racial ones, to improve and strengthen the school's educational program in ways that expanded opportunities for groups that had suffered the brunt of prior exclusionary policies.[182] In his dissent, Justice Kennedy made no reference to how the admissions policy sought to help members of traditionally disadvantaged groups gain access to the economic, social, and political opportunities conferred by law degrees from prestigious educational institutions. For Justice Kennedy, there was no acceptable or recognizable constitutional distinction between past racially-invidious policies and more recent measures intended to address and rectify the unequal opportunities that resulted from the skewed distribution of economic and other

1011, 1052–53 (2014); John Valery White, *What is Affirmative Action?*, 78 TUL. L. REV. 2117, 2152–53 (2004).

177. White, *supra* note 176, at 2153–54, 2200; Ian Ayres & Fredrick E. Vars, *When Does Private Discrimination Justify Public Affirmative Action?*, 98 COLUM. L. REV. 1577, 1613 (1998).

178. Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1709, 1788 (1993). *See also id*. at 1784 ("[D]istributive justice . . . focus[es] [on] the question of . . . what would have been the proper allocation in the absence of the distortion of racial oppression.").

179. *Id*. at 1778 (footnote omitted) (emphasis added).

180. 539 U.S. 306, 387 (2003) (Kennedy, J., dissenting).

181. *Id*. at 343 (majority opinion).

182. *Id*. at 315–16.

resources engendered by those same discriminatory policies of the past.[183] As he put it in constitutionally lumping all race-conscious policies together, "[p]referment by race, when resorted to by the State, can be the most divisive of all policies, containing within it the potential to destroy confidence in the Constitution and in the idea of equality."[184]

Similarly, Justice Kennedy voted to strike down an affirmative action ordinance in *City of Richmond v. J.A. Croson Co*.[185] That law represented an effort by the Richmond, Virginia, government to use its police powers to provide greater economic opportunities to groups that traditionally had been excluded from city contracts.[186] The measure's supporters pointed to the racial inequality engendered by the skewed allocation of city contracts as illustrated by a study "indicat[ing] that, while the general population of Richmond was 50% [B]lack, only 0.67% of the city's prime construction contracts had been awarded to minority businesses in the 5-year period from 1978 to 1983."[187] Rather than focusing on the economic and social implications for Black communities and individuals of this grossly inegalitarian distribution of government funds, Justice Kennedy and other members of the majority concluded that the equality interests of white business owners mandated the striking down of a law requiring construction businesses that contracted with the city to give at least 30% of the value of their subcontracts to minority-owned businesses.[188] As he put it in his concurrence in *Croson* defending a strictly color-blind understanding of the Constitution, "[t]he moral imperative of racial neutrality is the driving force of the Equal Protection Clause."[189]

Rather than understanding affirmative action policies from the perspective of groups that had borne the brunt of racist and discriminatory policies in the past, Justice Kennedy chose to look at the policies from the perspective of white people who might be negatively impacted by them.[190] As he put it in his dissent in *Metro Broadcasting, Inc. v. Federal Communications Commission*, "[t]he history of governmental reliance on race demonstrates that racial policies defended as benign often are not seen that way by the individuals affected by them."[191] In that same dissent, Justice Kennedy charged that the majority, in upholding the constitutionality of a federal affirmative action program, "exhumes . . . the deferential approach to racial classifications" adopted by the

183. *Id*. at 388 (Kennedy, J., dissenting).
184. *Id*.
185. 488 U.S. 469 (1989).
186. *Id*. at 471.
187. *Id.* at 479–80.
188. *Id*. at 506–07.
189. *Id*. at 518 (Kennedy, J., concurring in part and concurring in the judgment).
190. *See infra* notes 191–193 and accompanying text.
191. 497 U.S. 547, 635 (1990) (Kennedy, J., dissenting).

Court in *Plessy v. Ferguson*[192] when it shamefully upheld the constitutionality of the "separate but equal" Jim Crow regime.[193] He also contended that the "relaxed standard of review embraced [by the Court] today would validate" *Korematsu v. United States*, the case in which the Court, also shamefully, upheld the federal government's policy that led to the internment of Japanese Americans during World War II.[194] Again, for Justice Kennedy, no constitutional distinction was possible between the horrifically discriminatory policies of the past and well-intended but race-conscious affirmative action policies of the present.

While many progressive supporters of LGBTQ rights embraced Justice Kennedy's conception of the atomistic individual who only needed to be left alone by the state to attain liberty in *Lawrence*,[195] few on the left seemed to realize that he used *the same understanding of the self* to question the constitutionality of affirmative action programs. This is clear from his 2007 concurrence in *Parents Involved in Community Schools v. Seattle School District No. 1*.[196] The Court in *Parents Involved* assessed the constitutionality of policies that took race into account in assigning students to public schools with the objective of having the racial composition of individual schools reflect the composition of school districts as a whole.[197] In his concurring opinion agreeing with the Court that the program was unconstitutional, Justice Kennedy wrote that "[u]nder our Constitution the individual, child or adult, *can find his own identity, can define her own persona, without state intervention* that classifies on the basis of his race or the color of her skin."[198] This reasoning, except for the racial component, was exactly the same as the one he had relied on only a few years earlier in *Lawrence*.[199] From Justice Kennedy's libertarian perspective, there seems to have been little constitutional difference between sodomy laws and affirmative action programs: both sets of regulations involved problematic

192. 163 U.S. 537 (1896).

193. *Metro Broadcasting*, 497 U.S. at 632.

194. *Id*. at 633.

195. *See supra* note 111 and accompanying text.

196. 551 U.S. 701 (2007).

197. *Id*. at 710.

198. *Id*. at 797 (Kennedy, J., concurring) (emphasis added). Although Justice Kennedy in *Parents Involved* seemed more open to the possibility that, at least in the educational context, affirmative action was sometimes constitutional, he ultimately sided with the majority in striking down the policies at issue. *Id*. at 794 (Kennedy, J., concurring). For a detailed discussion of Justice Kennedy's position in *Parents Involved*, see Heather K. Gerken, *Justice Kennedy and the Domains of Equal Protection*, 121 HARV. L. REV. 104, 119 (2006) (arguing that "the unique nature of the domain [of public schools] seems to soften his libertarian instinct by suggesting a link between integration and the mission of schools"). Two years before he retired, Justice Kennedy wrote an opinion, on behalf of a 4 to 3 Court, upholding a university admissions policy that contained an affirmative action component. Fisher v. Univ. of Tex. at Austin, 579 U.S. 365, 381–84 (2016).

199. *See supra* note 111 and accompanying text.

state interventions that interfered with personal autonomy and choices.[200] The solution was to faithfully abide by the libertarian ethos in both instances by constitutionally mandating that the government cease regulating.

From a progressive perspective, the state intervention at issue in cases like *Parents Involved* is a crucial exercise of the state's authority—many progressives would say the state's *obligation*—to advance distributive and egalitarian understandings of justice.[201] Those understandings, however, have little chance of surviving constitutional scrutiny grounded in the libertarian ethos. As Professor Jedediah Purdy puts it, the libertarian ethos (which he calls the "neoliberal approach") "to race . . . is . . . respectful of a certain kind of individual choice, wary of government attempts to engineer the system, and mainly blind to the ways that inequality persists and makes race real in practice, even as the Supreme Court works to make it irrelevant in principle."[202]

Although it is easy to miss because we have become so used to the term of art, the modifier *affirmative* in "affirmative action" is an accurate descriptor of the state involvement at issue: distributive and equality objectives call for affirmative or positive action by the government to create meaningful economic opportunities for traditionally excluded groups.[203] But under a libertarian and anti-distributive understanding of the Equal Protection Clause, such as the one embraced by Justice Kennedy, it is the government action or intervention that is the cause of, rather than the solution to, the constitutional problem.

B. Federalism and Individual Liberty

Justice Kennedy took a similarly libertarian and anti-distributive position in *National Federation Independent Business v. Sebelius*, the case assessing the constitutionality of the Patient Protection and Affordable Care Act of 2010 ("ACA") that created the government program colloquially known as Obamacare.[204] By enacting the ACA, Congress sought to make it easier for millions of Americans to access the health insurance market and therefore to receive adequate medical care.[205] Obamacare was the most significant social program adopted by the federal government in decades and, as such, was the

200. *See supra* notes 104–115 and 180–198 and accompanying text.

201. *See, e.g.*, West, *supra* note 7, at 695 ("If . . . the *reason we have equality law in the first place* is to eradicate the subordination of some groups by others, then states are not only permitted, but obligated to take affirmative steps to achieve social equality.").

202. Purdy, *supra* note 13, at 212. *See also* Steven J. Heyman, *The Conservative-Libertarian Turn in First Amendment Jurisprudence*, 117 W. VA. L. REV. 231, 254 (2014) (noting the different ways in which the striking down of affirmative action programs is consistent with a "conservative-libertarian" understanding of the self and of the state).

203. *See supra* notes 10–18 and accompanying text.

204. 567 U.S. 519 (2012).

205. *See generally* DANIEL E. DAWES, 150 YEARS OF OBAMACARE (2016) (examining the ACA within the historical context of previous healthcare reform efforts).

subject of frenzied attacks by libertarians.[206] From a libertarian perspective, as Professors Joseph Fishkin and William Forbath put it,

> the underlying problem with Obamacare is simple: it is a large and novel form of social insurance. Like Medicare before it, Obamacare threatens certain foundational commitments—in favor of economic individualism, against social insurance and solidaristic thinking—that lie very close to the heart of a neo-Lochnerian vision of political economy.[207]

The challengers to Obamacare homed in on two of its most important distributive components. The first was the so-called individual mandate, which required some individuals who refused to obtain health insurance to make an annual payment to the federal government to help subsidize the health insurance costs of indigent individuals.[208] The second was an expansion of Medicaid to some individuals, not previously covered by the joint federal-state health insurance program for the poor, who lacked the financial resources to purchase health insurance in the private marketplace.[209]

Justice Kennedy joined a co-written opinion (with Justices Antonin Scalia, Clarence Thomas, and Samuel Alito) which concluded that both of these provisions were unconstitutional because they violated federalism principles. Specifically, the opinion contended that the measures under challenge went beyond Congress's powers under the Commerce, Taxing, and Spending Clauses and therefore trampled on states' constitutional prerogatives.[210] And, in a breathtaking assertion of judicial power, the joint opinion would have struck down the ACA *in its entirety*, including the dozens of provisions that had nothing to do with either the individual mandate or the Medicaid expansion.[211]

Federalism proponents have traditionally defended the need to protect state sovereignty from federal encroachment on different grounds. One basis is the belief that states serve, as Justice Louis Brandeis famously put it, as laboratories of experimentation for different and novel policy ideas.[212] Another claim on behalf of federalism is that states are closer to the people than the federal government and therefore more responsive to their needs and concerns.[213]

206. For an account of and a response to the libertarian attacks on Obamacare, see generally ANDREW KOPPELMAN, THE TOUGH LUCK CONSTITUTION AND THE ASSAULT ON HEALTHCARE REFORM (2013).

207. FISHKIN & FORBATH, *supra* note 14, at 421.

208. *Sebelius*, 567 U.S. at 539.

209. *Id*. at 542.

210. *Id*. at 678, 707 (Justices Scalia, Kennedy, Thomas, and Alito, dissenting).

211. *Id*. at 707.

212. New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

213. ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 328 (6th ed. 2019).

A third claim in support of federalism, strongly embraced by Justice Kennedy, is that it helps to preserve individual liberty.[214] According to Justice Kennedy, "federalism was the unique contribution of the Framers to political science and political theory. Though on the surface the idea may seem counterintuitive, it was the insight of the Framers that freedom was enhanced by the creation of two governments, not one."[215] Justice Kennedy claimed that "in the tension between federal and state power lies the promise of liberty" and that "federalism secures to citizens the liberties that derive from the diffusion of sovereign power."[216]

According to Justice Kennedy, "[b]y denying any one government complete jurisdiction over all the concerns of public life, federalism protects the liberty of the individual from arbitrary power. When government acts in excess of its lawful powers, that liberty is at stake."[217] As Frank Colucci puts it, Justice Kennedy "recast[] questions of constitutional structure in the rhetoric of personal liberty, implicating the same moral considerations as matters of individual rights."[218]

Although an exploration of the link between federalism and liberty goes beyond the scope of this Article, it is important to note that the repeated reliance on federalism principles by those promoting racist policies throughout our nation's history powerfully challenges the notion that there is somehow an intrinsic relationship between limiting federal authority (the cause) and protecting liberty (the end). Federalism claims grounded in the need to devolve power to the states, or to maintain power with them and away from the federal government, were used to purposefully deny equality and liberty rights to Black Americans from the founding of the Republic until, at least, the second half of the twentieth century.[219] Meaningful protections for the equality and liberty rights of Black Americans, including those related to their ability to exercise the fundamental right to vote, to seek employment, and to purchase goods and services from public accommodations, were not put in place until the federal government *acted affirmatively* through legislation—most prominently through

214. Laurence H. Tribe, *Equal Dignity: Speaking Its Name*, 129 HARV. L. REV. F. 16, 22 (2015) ("Justice Kennedy has otherwise made clear that he views the sovereignty of the states as important much less as an end in itself than as a means to the end of protecting the liberties of those who reside in those states.").

215. United States v. Lopez, 514 U.S. 549, 575–76 (1995) (Kennedy, J., concurring) (citations omitted).

216. *Id*. at 576 (citations omitted).

217. Bond v. United States, 564 U.S. 211, 222 (2011).

218. FRANK J. COLUCCI, JUSTICE KENNEDY'S JURISPRUDENCE: THE FULL AND NECESSARY MEANING OF LIBERTY 139 (2009). Colucci adds that "Kennedy has supported judicial limitations on federal power and preservation of state prerogatives. He considers them so essential to personal liberty that they cannot be left solely to the political process." *Id*. at 135.

219. *See, e.g.*, BALL, *supra* note 5, at 34–45.

the Civil Rights Act of 1964 and the Voting Rights Act of 1965—over the fierce opposition of states' rights proponents.[220]

But the relationship between affirmative government action and protecting liberty and equality was not visible to Justice Kennedy. In fact, his understanding of the link between federalism and liberty—which he shared with some other justices[221]—illustrates the extent to which protecting liberty, from his perspective, entailed only shielding individual autonomy from governmental intrusion. To go back to *Sebelius*, the libertarian objection to Obamacare was grounded in the notion that it was coercive for the government to force individuals (primarily the young and healthy) to participate in the health insurance market as a means of subsidizing the healthcare provided to others.[222] For libertarians, Obamacare infringed on the freedom of individuals to decide how and when to become market participants.[223] As Professors Fishkin and Forbath explain, "[t]he prospect of altering the American social compact by creating 'a comprehensive national plan to provide universal health insurance' is a lot to stomach for . . . Supreme Court Justice[s] committed to an anti-redistributive, Lochnerian vision of constitutional political economy."[224]

Although the doctrinal challenge to Obamacare was based on federalism principles and not on freedom of contract and substantive due process grounds, opponents of the law centered their rhetorical opposition on considerations of negative liberty and the right to be free from government coercion.[225] In

220. *See generally* ACKERMAN, *supra* note 158 (exploring the landmark federal civil rights statutes of the 1960s).

221. *See, e.g.*, Printz v. United States, 521 U.S. 898, 921 (1997) (majority opinion by Justice Scalia claiming that the "separation of the two spheres is one of the Constitution's structural protections of liberty"); Gregory v. Ashcroft, 501 U.S. 452, 458 (1991) (majority opinion by Justice O'Connor contending that federalism "was adopted by the framers to ensure protection of our fundamental liberties").

222. The libertarian objection was reflected in the following question asked by Justice Samuel Alito during the oral argument in *Sebelius*: "[I]sn't it the case that what this mandate is really doing is not requiring the people who are subject to it to pay for the services that they are going to consume? It is requiring them to subsidize services that will be received by somebody else." Transcript of Oral Argument at 10, Nat'l Fed. of Ind. Bus. v. Sebelius, 567 U.S. 519 (2012) (No. 11-393). Justice Alito's question led Justice Ruth Bader Ginsburg to point out that "[i]f you're going to have insurance, that's how insurance works." *Id*.

223. For a critical assessment of the libertarian claim that Congress lacks the constitutional authority to regulate a lack of participation in commerce, see KOPPELMAN, *supra* note 206, at ch. 3.

224. FISHKIN & FORBATH, *supra* note 14, at 459 (quoting Nat'l Fed. of Ind. Bus. v. Sebelius, 567 U.S. 519, 583 (2012) (footnote omitted)).

225. Rosen & Schmidt, *supra* note 31, at 113–14 ("From the perspective of popular constitutional opposition to the ACA, the core issue was one of individual liberty . . . . Yet as a matter of constitutional adjudication, the challenge involved questions of federalism and constitutional structure, not individual rights. Efforts to challenge the mandate on Fifth Amendment due process grounds, the logical home for an individual liberty-based claim, went nowhere in the

particular, they emphasized the so-called broccoli argument, that is the claim that "it is as wrong for the government to require individuals to purchase health insurance as it would be for the government to force individuals to buy (or perhaps even eat) broccoli."[226] As Professors Mark Rosen and Christopher Schmidt put it, "[t]he idea that the federal government could require the nation to purchase or even consume broccoli . . . became a memorable shorthand reference for the liberty dangers of unlimited federal power."[227] The broccoli controversy resonated with the Supreme Court:

> The three main written opinions included twelve references to broccoli and five separate discussions of the broccoli mandate's legal implications. Five justices cited the government's inability to provide a satisfying answer to the broccoli hypothetical as a justification for creating a novel limitation on Congress's Commerce Clause powers and for concluding that the ACA's mandate exceeded that limit. [228]

In the end, while Obamacare's opponents were unable to persuade the Court to strike down the individual mandate, they succeeded in getting a majority of the justices to rule that Congress's distributive and egalitarian expansion of Medicaid was unconstitutional. And, as already noted, Justice Kennedy would have voided the statute *in its entirety*, endangering the access to healthcare for millions of Americans.[229] As Professor Andrew Koppelman pointedly puts it, "[y]ou need to embrace a mighty tough libertarianism in order to cheerfully strive to take health care away from millions of people."[230]

A distributive and egalitarian progressive perspective offers a radically different understanding of the link between Obamacare and liberty (and equality) than that proffered by the libertarian ethos. The progressive perspective focuses on the benefits of government intervention in the healthcare marketplace

courts.") (footnote omitted); Jedediah Purdy & Neil S. Siegel, *The Liberty of Free Riders: The Minimum Coverage Provision, Mill's "Harm Principle," and American Social Morality*, 38 J.L. & MED. 374, 376 (2012) (arguing that "an economic substantive due process objection to [Obamacare's] minimum coverage provision is doctrinally unavailable . . . [and that] its unavailability explains why opponents of the provision take the less straightforward doctrinal approach of recasting the Commerce Clause in libertarian terms").

226. FISHKIN & FORBATH, *supra* note 14, at 427–28.

227. Rosen and Schmidt, *supra* note 31, at 101.

228. *Id*. at 69–70.

229. The Court's striking down of the ACA's extension of Medicaid "resulted in well over two million Americans becoming uninsured. . . . A vastly disproportionate number of them are Black." FISHKIN & FORBATH, *supra* note 14, at 458 (endnote omitted).

230. ANDREW KOPPELMAN, BURNING DOWN THE HOUSE: HOW LIBERTARIAN PHILOSOPHY WAS CORRUPTED BY DELUSION AND GREED 21 (2022). *See also* Purdy, *supra* note 13, at 206 ("[T]he limit on federal power that the *Sebelius* Court announced complements the First Amendment cases' protection of buying, selling, and marketing in a single, nascent conception of economic liberty.").

for individuals who would otherwise lack access to it.[231] Without such access, the life choices of individuals are significantly impaired and limited. Universal access to adequate healthcare helps *everyone*—and not just those who can afford it—manage the limitations and frailties of the human body.[232] Such access is essential to almost all important human activities, including having families and raising children, successfully holding jobs and pursuing other economic opportunities, and actively participating in the social and political life of the country. From this progressive perspective, Obamacare does much more to *enhance* personal liberty than to restrict it.

This positive understanding of liberty, dependent on government action as opposed to only omission, was completely foreign to the libertarian ethos embraced and promoted by Justice Kennedy's brand of constitutionalism. For him, government almost always constituted a threat to liberty, and almost never a source of it.[233] This perspective was good enough for progressives to gain his votes in crucial LGBTQ rights cases, but not in many other constitutional disputes raising distributive and egalitarian justice questions.

Justice Kennedy not only voted to limit the federal government's regulatory power in the name of federalism—and therefore, from his perspective, in the name of individual liberty—in the Obamacare case. He did the same in voting with the majority in *Shelby County v. Holder*.[234] The Court in that case used what Professor Leah Litman calls the "invented" principle of "equal sovereignty,"[235] which ostensibly prohibits the federal government from differentiating among states, to render Section 5 of the Voting Rights Act unenforceable.[236] Before the Court eviscerated Section 5, Congress had

231. *See, e.g.*, Christina S. Ho, *Are We Suffering from an Undiagnosed Health Right?*, 42 AM. J.L. & MED. 743, 770–74 (2016) (arguing that without regulations that enable risk-pooling, the government could not assure a functioning market for health insurance that would serve people with preexisting conditions). Studies show that Obamacare has helped reduce inequality. *See, e.g.*, Matthew Buettgens et al., *The Affordable Care Act Reduced Income Inequality in the US*, 40 HEALTH AFFS. 121 (2021), https://doi.org/10.1377/hlthaff.2019.00931 [https://perma.cc/T326-FW2F]; Ajay Chaudry et al., *Did the Affordable Care Act Reduce Racial and Ethnic Disparities in Health Insurance Coverage?*, THE COMMONWEALTH FUND (Aug. 21, 2019), https://www.commonwealthfund.org/publications/issue-briefs/2019/aug/did-ACA-reduce-racial-ethnic-disparities-coverage [https://perma.cc/FH4B-26K2].

232. *See, e.g.*, David B. Evans et al., *Universal Health Coverage and Universal Access*, 91 BULL WORLD HEALTH ORG. 546 (2013).

233. *See supra* notes 200 and 214–218 and accompanying text.

234. 570 U.S. 529 (2013).

235. Leah M. Litman, *Inventing Equal Sovereignty*, 114 MICH. L. REV. 1207 (2016); *but see* Thomas B. Colby, *In Defense of the Equal Sovereignty Principle*, 65 DUKE L.J. 1087, 1091 (2016) (contending that while "critics are correct that the Court seemingly pulled the equal sovereignty principle out of thin air—that it played a little too fast and loose with precedent and failed to wrestle adequately with constitutional text, structure, and history— . . . there is indeed a deep structural principle of equal sovereignty that runs through the Constitution").

236. *Shelby County*, 570 U.S. at 540.

mandated that jurisdictions with a long history of racial discrimination in voting, located primarily but not exclusively in the South, receive preclearance approval from either the Department of Justice or a federal court before instituting new voting requirements.[237] But as Professors Fishkin and Forbath explain, "[t]he idea that past racial wrongs are relevant to present constitutional conflicts—as Section 5 . . . forcefully asserted, correctly and with great effect, before [*Shelby County*] destroyed it—is . . . offensive to an anti-distributive, 'colorblind' vision of constitutional political economy."[238]

It is interesting to note that Justice Kennedy was the only justice who voted to render unenforceable a crucial provision of the Voting Rights Act of 1965 in *Shelby County* while also voting, in the same term, to strike down the Defense of Marriage Act in *United States v. Windsor*.[239] Ilya Shapiro, of the libertarian Cato Institute, praised the "libertarian trend" reflected in the two rulings.[240] But the juxtaposition of the two votes, issued one day apart, illustrates the extent to which Justice Kennedy's libertarian constitutional jurisprudence, while helpful to progressives on some issues, was devastatingly counterproductive on others.

Justice Kennedy also joined Court majorities in using federalism, and its purported liberty-enhancing objectives, to void inter alia two federal gun control measures;[241] to strike down the civil remedies provision of the federal Violence Against Women Act;[242] and to make the Americans with Disabilities Act's provision prohibiting employment discrimination against people with disabilities unenforceable against the states in lawsuits seeking monetary damages.[243] In all of these cases, Justice Kennedy used his understanding of negative liberty, as refracted through federalism principles, to block the federal government from using its regulatory authority to attain generally progressive objectives.[244]

237. *Id*. at 548–49.

238. FISHKIN & FORBATH, *supra* note 14, at 459.

239. 570 U.S. 744, 769 (2013).

240. Ilya Shapiro, *Introduction*, 2014 CATO SUP. CT. REV. 1, 6.

241. Printz v. United States, 521 U.S. 898, 900 (1997); United States v. Lopez, 514 U.S. 549, 550, 568–69 (1995).

242. United States v. Morrison, 529 U.S. 598, 617–18 (2000); *but see* Gonzales v. Raich, 545 U.S. 1, 5 (2005) (Justice Kennedy joined the Court in upholding Congress's power under the Commerce Clause to criminalize the possession of home-grown medicinal marijuana).

243. Bd. of Trs. of the Univ. of Ala. v. Garrett, 531 U.S. 356, 360 (2001). *See also* Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 66–67 (2000) (prohibiting enforcement of Age Discrimination in Employment Act against states on sovereign immunity grounds).

244. Heyman, *supra* note 202, at 251 (noting that "conservative-libertarian" members of the Court "have used the doctrine of federalism to limit national power and thereby impose barriers to the expansion of the modern regulatory and welfare state, which conservative libertarians regard with deep skepticism") (footnote omitted).

C. The First Amendment as a Deregulatory Tool

There have been several recent explorations in the legal literature of how the Roberts Court has repeatedly used the First Amendment in ways that advance deregulatory objectives that, as in the *Lochner* era, challenge a wide array of social welfare legislation.[245] As in the early twentieth century, the Court is using a constitutional provision (in this instance, the First Amendment rather than the Due Process Clause) to protect market-based allocations of property, wealth, and income.[246] As Professor Genevieve Lakier puts it, "[t]he result has been the creation of a body of law that, like *Lochner*-era substantive due process, insists that most legislative efforts to protect the expressive freedom of the less powerful by limiting the expressive freedom of the more powerful are constitutionally impermissible."[247] In this Subpart, I explore how Justice Kennedy's rulings and votes in several crucial free speech cases helped litigants successfully pursue de-regulatory agendas that have served to reify existing hierarchies of economic and social power.

Arguably, the most prominent example of this phenomenon is Justice Kennedy's infamous majority opinion in *Citizens United v. Federal Elections Commission*.[248] That case involved a modest effort by Congress to restrict the ways in which corporations use their money to influence the outcome of elections. The provision in question was modest because it applied only in the weeks before federal elections;[249] impacted only activities that explicitly called for the election or defeat of particular candidates while leaving activities related to issue advocacy unregulated even when that advocacy "was closely associated with particular candidates";[250] and it did not restrict the ability of corporations

245. *See, e.g.*, Charlotte Garden, *The Deregulatory First Amendment at Work*, 51 HARV. C.R.-C.L. L. REV. 323, 323, 325 (2016); Genevieve Lakier, *The First Amendment's Real* Lochner *Problem*, 87 U. CHI. L. REV. 1241, 1328–29 (2020); Robert Post & Amanda Shanor, *Adam Smith's First Amendment*, 128 HARV. L. REV. F. 165, 166–67 (2015); Amanda Shanor, *The New* Lochner, 2016 WIS. L. REV. 133, 135–136 (2016).

246. *See, e.g.*, Heyman, *supra* note 202, at 236 ("[C]onservative judges have used the First Amendment to erect a barrier against regulation that aimed to promote liberal or progressive values."); Shanor, *supra* note 245, at 135 (arguing that because "nearly all human action operates through communication or expression, the contours of speech protection—more than other constitutional restraint—set the boundary of permissible state action. Put differently, the First Amendment possesses near total deregulatory potential").

247. Lakier, *supra* note 245, at 1245.

248. 558 U.S. 310 (2010).

249. *Id*. at 321.

250. Michael C. Dorf, *The Marginality of* Citizens United, 20 CORNELL J. L & PUB. POL. 739, 748–49 (2011). Professor Dorf notes that "[e]ven before *Citizens United*, corporations or, more precisely, persons and entities with substantial accumulated wealth, already had, and frequently took advantage of, the opportunity to exert enormous influence over American politics, both directly and indirectly." *Id*. at 739. The statute at issue in *Citizens United* defined "electioneering activities" as "'any broadcast, cable, or satellite communication' that 'refers to a clearly identified

to continue using their political action committees to advocate for the election of preferred candidates.[251] But for Justice Kennedy even this modest congressional effort, supported by legislators of both political parties after years of negotiations and compromises, was too much for the Constitution to bear.[252] According to his ruling in *Citizens United*, the Free Speech Clause prohibited Congress from limiting the ways in which corporations attempt to influence election outcomes as long as they do so without directly coordinating their efforts with candidates.[253] In doing so, Justice Kennedy rejected the notion that Congress has the constitutional authority to restrict the ways in which the accumulation of wealth through market transactions in the economic sphere spill onto the political sphere.[254] For Justice Kennedy, the right of corporations to speak through the expenditure of money in electioneering activities trumped Congress's effort to maintain and promote public confidence in the electoral system while reducing opportunities for the actual or perceived corruption of public officials.[255]

Justice Kennedy in *Citizens United* refused to give any weight to the need to police the boundaries between the political marketplace where ideas and policies are considered and debated and the economic marketplace where goods and services are sold for profit. As Professor Steven Heyman puts it, "[f]or [Justice] Brandeis and [Alexander] Meiklejohn, citizens have two different capacities: their capacity as private persons with their own particular interests, including their economic interests, and their capacity as citizens."[256] But *Citizens United* "efface[s] these distinctions [by] seeing personhood, property rights, and political participation as closely connected."[257] For Justice Kennedy, wealth accumulated in the economic sphere is a marker of identity that, when moved into the political sphere, deserves robust protection under the Free Speech Clause. As he reasoned in *Citizens United*, "[t]he rule that political speech cannot be limited based on a speaker's wealth is a necessary consequence of the premise that the First Amendment generally prohibits the suppression of political speech based on the speaker's identity."[258]

candidate for Federal office' and is made within 30 days of a primary or 60 days of a general election [and] is 'publicly distributed.'" *Citizens United*, 558 U.S. at 321.

251. ADAM WINKLER, WE THE CORPORATIONS: HOW AMERICAN BUSINESSES WON THEIR CIVIL RIGHTS 334 (2018) ("[T]he Bipartisan Campaign Reform Act allowed a corporation to fund election ads if the money were raised through a PAC . . . .").

252. *Citizens United,* 558 U.S. at 370.

253. *Id*. at 360, 370–71.

254. *Id*. at 355, 358.

255. *Id*. at 357–60.

256. Heyman, *supra* note 202, at 263 (footnote omitted).

257. *Id*.

258. *Citizens United*, 558 U.S. at 350.

Citizens United holds a pervasively and conveniently benign view of the effects of deploying vast concentrations of private wealth created through market forces onto the public spheres of elections and government policies. While Congress believed, as the Court had explained in a case decided only two decades earlier and overruled by *Citizens United*, that it could constitutionally prevent corporations from using "resources amassed in the economic marketplace to obtain an unfair advantage in the political marketplace,"[259] Justice Kennedy in *Citizens United* concluded that the Constitution deprived Congress of the authority to restrict the expenditure of corporate money for electioneering purposes in order to protect the independence of the political sphere and the representativeness of elections.[260] While Congress viewed the unrestricted use of private wealth as a distorting and potentially corrupting influence on elections and, ultimately, on government policies, for Justice Kennedy the influence that money buys for wealthy corporations and individuals in the political sphere is simply the way *in which democracies are supposed to work*. As he explained, in quoting from one of his earlier opinions,

> Favoritism and influence are not . . . avoidable in representative politics. It is in the nature of an elected representative to favor certain policies, and, by necessary corollary, to favor the voters and contributors who support those policies. It is well understood that a substantial and legitimate reason, if not the only reason, to cast a vote for, or to make a contribution to, one candidate over another is that the candidate will respond by producing those political outcomes the supporter favors. Democracy is premised on responsiveness.[261]

As Professor Heyman points out, "[o]n this view, the democratic process works by a sort of supply and demand in much the same way an economic market does: individuals and other participants offer contributions to, and make independent expenditures on behalf of, particular candidates, who respond by adopting the policies that their supporters favor."[262] Professor Heyman adds that

259. Austin v. Michigan Chamber of Commerce, 494 U.S. 652, 659 (1990), *overruled* by *Citizens United*, 558 U.S. 310 (2010) (citation omitted) (internal quotation marks omitted).

260. *Citizens United*, 558 U.S. at 340, 355–57.

261. *Id*. at 359 (quoting McConnell v. Fed. Elec. Comm'n, 540 U.S. 93, 297 (2003) (Kennedy, J., concurring in part and dissenting in part), *overruled* by *Citizens United*, 558 U.S. 310 (2010)). *See also* McCutcheon v. Fed. Elec. Comm'n, 572 U.S. 185, 193 (2014) (Justice Kennedy joined a 5-4 majority striking down a federal law that limited how much money a donor could contribute to political candidates in the aggregate).

262. Heyman, *supra* note 202, at 264–65. *See also* Purdy, *supra* note 13, at 202 (arguing that the Court's First Amendment "neo-Lochnerism supposes that the distinction between politics and markets, or principles and interests, is spurious: a democratically adopted policy is just the aggregation of some people's interests, and a company's economic interests make as worthy a basis for political argument as any principle."); Zephyr Teachout, *Neoliberal Political Law*, 77 L. & CONTEMP. PROBS. 215, 231–32 (2014) (arguing that for "[t]he modern Court[,] . . . [c]itizens are not imagined as either publicly oriented or responsible for most decisions. Instead, citizens are

"when *Citizens United* speaks of truth, it refers to the outcome of a market-like process in which wealthy individuals and corporations enjoy significant advantages."[263]

It bears noting, as a brief but important aside, that Justice Kennedy's belief that the policy "responsiveness" that money buys in our capitalist-infused democracy is a key feature of how representative government is supposed to work is reflected in the Roberts Court's treatment of public corruption cases. In recent years, the Court has overturned the convictions of trade associations, wealthy individuals, and government officials in ways that make it significantly more difficult for prosecutors to fight public corruption. For example, in *United States v. Sun-Diamond Growers of California*, the Court granted certiorari to answer the question of whether a trade association's gifts of thousands of dollars to the Secretary of Agriculture violated federal gratuities law.[264] The Court answered that question in the negative on the ground that the prosecution had failed to prove that the Secretary had engaged in an "official act" as a result of the trade association's generous gifts.[265] This means, as Professor Randall Eliason explains, that it is, "in effect, . . . not a violation of the federal gratuities statute for an individual or corporation to have a public official on private retainer."[266]

In the same year that the Court decided *Citizens United*, it also held, in *Skilling v. United States*, that the federal mail fraud statute applied only to bribery and kickback schemes and therefore did not cover "undisclosed self-dealing by a public official or private employee—i.e., the taking of official action by the [official or] employee that furthers his own undisclosed financial interests while purporting to act in the interests of those to whom he owes a fiduciary duty."[267] And in *McDonnell v. United States*, the Court reversed the bribery convictions of a governor and his wife for accepting $175,000 in "loans, gifts, and other benefits" from a business owner who wanted the state's public universities to conduct research that would financially benefit his company.[268] Although the governor asked his subordinates to meet with the businessman, hosted an event to encourage university officials to conduct the research, and

imagined as self-interest maximizers. One of the ways this portrait is drawn is by portraying people as consumers instead of citizens.").

263. Heyman, *supra* note 202, at 265.

264. 526 U.S. 398, 403 (1999).

265. *Id*. at 414.

266. Randall D. Eliason, *Why the Supreme Court is Blind to Its Own Corruption*, N.Y. TIMES, May 18, 2023 [https://perma.cc/E7B9-CSY7].

267. 561 U.S. 358, 409 (2010). Although the ruling on the statutory interpretation issue was unanimous, Justice Kennedy (along with Justices Scalia and Thomas) would have gone further by striking down as unconstitutional the relevant provision at issue in the case. *Id.* at 415 (Scalia, J., dissenting).

268. 579 U.S. 550, 555 (2016).

contacted government officials to encourage that the research be done, that was not enough, according to the Roberts Court, to show that he had committed an "official act" in return for the $175,000.[269] As Professor Eliason puts it, the Court essentially "held that selling government access is not unlawful."[270]

It would seem, then, that in a capitalist country in which most things are for sale, there is nothing illegal about trade associations, corporations, and wealthy individuals using market-derived funds to buy access to government officials as long as there is no *quid pro quo* transaction evincing "a specific intent to give or receive something of value in exchange for an official act."[271] This position is consistent with Justice Kennedy's reasoning in *Citizens United* that while the government can criminalize bribery, it cannot use its interest in preventing the public's perception of corruption to regulate corporate electioneering speech.[272] It is also consistent with his summary conclusion in *Citizens United*, provided without any factual support, that "[t]he appearance of influence or access . . . will not cause the electorate to lose faith in our democracy."[273] From this perspective, the very notion of "corruption" becomes suspect, as do government efforts to address it. As Professor Zephyr Teachout puts it,

> corruption is a concept that simply does not make sense in the world view of Kennedy and Roberts. They have not been worried about corruption because at some deep level they do not see it. To them, the word "corruption" is actually incoherent because corruption depends upon the idea that people can have interactions with government that are not inherently self-oriented.[274]

Justice Kennedy's opinion for the Court in *Citizens United* also reflects an exclusively negative understanding of liberty rights. According to the ruling, the

269. *Id*. at 567.

270. Eliason, *supra* note 266. Professor Eliason draws a link between, on the one hand, the Court's benign understanding of the role of money in government policymaking reflected in its reversals of public corruption convictions and, on the other, the apparent failure of at least some of the justices to grasp the ethical implications of their accepting free trips and other gifts from wealthy individuals. *Id*. *See also* Michael Ponsor, *A Federal Judge Asks: Does the Supreme Court Realize How Bad it Smells?*, N.Y. TIMES, July 14, 2023 (arguing that some of the justices seem oblivious to the ethical issues surrounding their acceptance of gifts from wealthy individuals) [https://perma.cc/F9PG-DFL7].

271. *Sun-Diamond*, 526 U.S. at 404–05.

272. *Citizens United,* 558 U.S. at 357–60.

273. *Id*. at 360. *See also* Teachout, *supra* note 262, at 228 ("[T]he Court's decisions in the campaign-finance realm have changed who has power in making distributional decisions. Since *Citizens United* and *Wisconsin Right To Life*, it has been easier for very wealthy individuals and the wealthiest companies to have greater power in shaping who is elected to office and what policies the elected representatives support. That these companies and individuals might have 'undue influence' seems not to trouble Justices Kennedy and Roberts.").

274. Teachout, *supra* note 262, at 230. *See also* Cynthia Estlund, *The "Constitution of Opportunity" in Politics and in the Courts*, 94 TEX. L. REV. 1447, 1458 (2016) (noting "the prevailing libertarian attachment to the freedom to buy political clout").

First Amendment is "[p]remised on mistrust of governmental power."[275] Not surprisingly, therefore, *Citizens United* viewed the campaign reform provision at issue only from the perspective of its potential *threat* to corporate speech. But it was also possible to view the provision from a positive liberty perspective that recognized the state action under challenge as an affirmative step to *expand* opportunities for speech. The modest limits on the electioneering activities of corporations in the weeks before federal elections could have been viewed as an effort to foment and promote the free speech interests of those who lack access to the millions of dollars that our capitalist society allows wealthy corporations and individuals to accumulate and who therefore cannot use massive amounts of money to amplify *their* speech.[276] From this perspective, the regulation promoted more rather than less speech by reducing the risk that the money-propelled voices of some participants in politics and elections would drown out the voices of those with far fewer financial resources.[277] But Justice Kennedy was once again unable or unwilling to entertain the notion that state action could sometimes enhance personal liberty. Instead, *Citizens United* faithfully and predictably abided by the libertarian ethos both by being highly skeptical of governmental motivations and interventions, and by understanding liberty rights

275. *Citizens United*, 558 U.S. at 312.

276. This is a point that Justice Stevens made in his compelling dissent in *Citizens United*. As he put it, the campaign finance reform provision at issue "reflects a concern to *facilitate* First Amendment values by preserving some breathing room around the electoral 'marketplace' of ideas, the marketplace in which the actual people of this Nation determine how they will govern themselves. The majority seems oblivious to the simple truth that laws such as § 203 do not merely pit the anticorruption interest against the First Amendment, but also pit competing First Amendment values against each other." *Id*. at 473 (Stevens, J., dissenting) (internal citation omitted).

277. Justice Breyer made this point in his dissent in *McCutcheon v. Fed. Elec. Comm'n*, 572 U.S. 185 (2014), when he noted that

> [T]he First Amendment advances not only the individual's right to engage in political speech, but also the public's interest in preserving a democratic order in which collective speech matters.
>
> What has this to do with corruption? It has everything to do with corruption. Corruption breaks the constitutionally necessary "chain of communication" between the people and their representatives. It derails the essential speech-to-government-action tie. *Where enough money calls the tune, the general public will not be heard*. Insofar as corruption cuts the link between political thought and political action, *a free marketplace of political ideas loses its point*.

Id. at 237 (Breyer, J., dissenting) (emphases added). *See also* Lakier, *supra* note 245, at 1248 (noting that "if the problem is . . . the almost entirely negative conception of freedom of speech that underpins contemporary First Amendment jurisprudence, then the solution . . . must be to reimagine freedom of speech as a positive right, and as a right that consequently protects individuals against both public and private power").

only in the negative sense that exclusively calls for the regulatory *diminishment* of government.[278]

Citizens United was not the only case in which Justice Kennedy interpreted the First Amendment in ways that prioritized the interests of corporations over the government's regulatory authority to advance the public interest. He did the same in assessing the constitutionality of a Vermont statute prohibiting pharmacies from selling doctors' prescription-writing histories when that information was to be used by pharmaceutical companies to market drugs.[279] The state argued in *Sorrell v. IMS Health Inc*. that its law protected the privacy of medical information and diminished the likelihood that the marketing of pharmaceutical drugs would be inconsistent with patients' welfare.[280] But the state's policy positions and regulatory preferences had little chance of surviving judicial review once Justice Kennedy, in writing for the Court, concluded that laws restricting particular types of corporate marketing campaigns are content-based regulations that merit rigorous judicial review under the First Amendment.[281]

Justice Kennedy's main concern in *Sorrell* was the negative impact that the state law would have on the ability of pharmaceutical companies to speak through their drug marketing campaigns.[282] According to his reasoning, the statute in question did not advance the public interests claimed by its supporters; instead, the law did little more than target disfavored corporate speakers.[283]

While Justice Kennedy's ruling in *Sorrell* expressed great concerns about the government's regulation of corporate speech,[284] he failed to address, much less refute, the objection, raised by Justice Stephen Breyer in dissent, that the Court was using the First Amendment to protect economic interests from

278. Heyman, *supra* note 202, at 265–66 (noting that "[i]n much of the opinion, . . . freedom is presented as a form of negative liberty. In Kennedy's words, the First Amendment is '[p]remised on mistrust of governmental power.' The federal ban on corporate electoral speech amounted to a 'vast' system of 'censorship' which improperly sought to 'control thought' by 'silenc[ing] entities whose voices the Government deems to be suspect'") (footnotes omitted). *See also* Lakier, *supra* note 245, at 1246 (noting that "the real source of the similarities between contemporary free speech law and *Lochner*-era freedom of contract jurisprudence is that both construe the constitutional right they vindicate as a strong but limited negative autonomy right: as a right that guarantees freedom from intentional government interference with an individual's autonomy, but one that provides almost no protection whatsoever against private interference and constraint"); Morgan N. Weiland, *Expanding the Periphery and Threatening the Core, The Ascendant Libertarian Speech Tradition*, 69 STAN. L. REV. 1389, 1397 (2017) ("the libertarian tradition decouples the speech right from individuals and publics that [were] central to [earlier] traditions, creating an impersonal speech right that is narrowly understood as a negative freedom from the state.").

279. Sorrell v. IMS Health Inc., 564 U.S. 552, 557 (2011).

280. *Id*. at 576.

281. *Id.* at 564–66.

282. *Id*. at 573–74.

283. *Id*. at 564.

284. *Id*. at 566.

government regulation in ways that were analogous to what the Court, in interpreting the Due Process Clause, had done during the discredited *Lochner* era.[285] As Professor Jedediah Purdy puts it, the distributive and inegalitarian implications of cases like *Sorrell* are significant:

> the First Amendment has helped the Supreme Court . . . do for the consumer capitalism of the information age what freedom of contract did for the industrial age: constitutionally protect certain transactions that lie at the core of the economy. This makes unequal economic power much harder for democratic lawmaking to reach, because there are only a few ways to reduce the effect of economic inequality: redistribute wealth, guarantee certain goods (such as education or health care) regardless of wealth, and limit what the wealthy can do with their money. Constitutional protection of marketing and spending takes the last option off the table at a time when the other two are politically embattled.[286]

Professor Purdy adds that the Court's interpretation of the First Amendment in ways that protect the economic interests of corporations and wealthy individuals means that when legislatures attempt to regulate the market to make it

> more equitable, safe, and healthful, . . . wealthy interests burdened by social and economic legislation can appeal from the political process to the Supreme Court, delaying regulation and raising its costs, and sometimes they win, sending lawmakers back to the start of an often-fractious process. Moreover, these cases give wealthy interests a rhetorical leg up: they can denounce regulation as

285. *Id*. at 591–92 (Breyer, J., dissenting). Professors Grewal and Purdy have noted the libertarian (or what they call "neoliberal") implications of cases like *Citizens United* and *Sorrell*:

> Neoliberal constitutional doctrines have recently extended market-modeled liberty into areas of law where other versions of liberty have previously been important (such as campaign-finance law) or where legislatures have long regulated market transactions to address distributive concerns (such as transfers of prescription data for marketing purposes). Decisions based on neoliberal commitments also cultivate in constitutional reasoning a habit of ignoring structure, even restricting legislative attention to it, in favor of exclusive concern with the negative liberty of the choosing individual or corporation.

David Singh Grewal & Jedediah Purdy, *Introduction: Law and Neoliberalism*, 77 L. & CONTEMP. PROBS. 1, 15 (2014) (footnote omitted).

286. Purdy, *supra* note 13, at 202–03. Professor Purdy, in explaining the implications of *Sorrell*, notes that its "doctrinal development is not that access to medicine is a constitutional interest: it is that the consumer tracking prices, as much as the citizen following debates, is exercising the liberty that the Constitution enshrines." *Id*. at 200. He adds that "the doctrine addresses the human interest in getting essential resources—medicine—or, more generically, fulfilling consumer preferences, through a specific act of constitutional imagination: it treats the market as the assumed vehicle for satisfying this interest." *Id*. For a defense of a libertarian understanding of the First Amendment, see generally Jane R. Bambauer & Derek E. Bambauer, *Information Libertarianism*, 105 CALIF. L. REV. 335 (2017).

> "censorship" with the Supreme Court and the neoliberal Constitution behind them.[287]

The ways in which Justice Kennedy's opinion in *Sorrell* vigorously protected corporate speech rights illustrate the dangers for progressives of adopting arguments and claims that lead to what can be important victories in the short-term but that can also, however unintentionally, strengthen the libertarian ethos over the long-term and therefore undermine broader progressive goals. Before the 1970s, the Supreme Court had refused to provide First Amendment protection to commercial speech.[288] In 1973, the Public Citizen Litigation Group, the litigation arm of Ralph Nader's Public Citizens consumer advocacy organization, sued the Virginia State Board of Pharmacy on behalf of consumers challenging a regulation prohibiting pharmacies from advertising the price of prescription drugs.[289] The consumer group's novel theory was that the First Amendment protected not only the rights of speakers but also those of *listeners*.[290] The Court in *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumers Council, Inc.* agreed and, in striking down the regulation, reasoned that "[s]o long as we preserve a predominantly free enterprise economy, the allocation of our resources in large measure will be made through numerous private economic decisions. It is a matter of public interest that those decisions, in the aggregate, be intelligent and well informed."[291]

The doctrine of protected commercial speech, which began with an ostensibly consumer-friendly understanding of the Free Speech Clause, was soon dramatically transformed by corporations' repeated use of it to successfully challenge economic regulations, promote their profit objectives, and limit the power of government. As Professor Adam Winkler explains, in the years that followed,

> the doctrine created by *Virginia Pharmacy* would rarely be used by consumers . . . but would be invoked instead by tobacco companies challenging restrictions on tobacco advertising; gaming interests seeking to overturn restrictions on television and radio ads for casinos; the liquor industry in an effort to invalidate laws limiting alcohol advertising; and dairy producers hoping to defeat requirements to disclose the use of synthetic growth hormones.[292]

287. Purdy, *supra* note 13, at 203 (footnotes omitted). *See also* Tamara R. Piety, "*A Necessary Cost of Freedom": The Incoherence of* Sorrell v. IMS, 64 ALA. L. REV. 1, 5 (2012) ("[T]reating global pharmaceutical companies as if they were embattled, under-represented minorities risks trivializing the real life-and-death struggles of plaintiffs who are in fact relatively powerless and elides the Court's exercise of its counter-majoritarian power on behalf of the powerful.").

288. *See, e.g.*, Valentine v. Chrestensen, 316 U.S. 52, 54 (1942).

289. WINKLER, *supra* note 251, at 290–95.

290. *Id*. at 294.

291. 425 U.S. 748, 765 (1977).

292. WINKLER, *supra* note 251, at 299–300.

In the face of a barrage of corporate constitutional litigation using the Free Speech Clause as a shield against government regulation, as Morgan Weiland puts it, the justices' original "purported goal of upholding listeners' rights by instrumentally favoring corporate speech rights" has been turned on its head by a Court that "instrumentalizes listeners' rights in the service of consistently vindicating corporate speech rights."[293] *Sorrell* was the culmination of this process given that Justice Kennedy, in his opinion for the Court, called for a form of judicial scrutiny of commercial speech regulations that is analogous to that used to protect political speech in order to immunize pharmaceutical companies' marketing campaigns from the state's regulatory efforts to protect the public's health and safety.[294]

Justice Kennedy's corporation-friendly understanding of the First Amendment was also evident in his vote in *Janus v. AFSCME* to strike down laws allowing unions to charge so-called agency fees, covering the costs of collective-bargaining, to non-members on the ground that the fees constituted compelled speech in violation of the First Amendment.[295] As in *Citizens United* and *Sorrell*, Kennedy's understanding of the Free Speech Clause in *Janus* advanced the interests of corporations by diminishing the government's ability to regulate (in this instance, through laws allowing unions to charge agency fees).[296] *Janus* also advanced the interests of corporations by restricting the

293. Weiland, *supra* note 278, at 1396 (footnote omitted). Weiland adds that "[i]t is deeply ambiguous whether the Court's deregulatory [free speech] holdings actually benefit listeners, though corporate interests are always served." *Id*. Professor Tamara Piety makes a similar point when she notes that "*Sorrell*'s reasoning eviscerates the rationale on which *Virginia Pharmacy* was based—protection of listeners' interests—and substitutes for it a rationale which elevates the interests of commercial speakers over that of listeners, such that even where the speech presents a detriment to listeners, it is protected because of its value to the speaker." Piety, *supra* note 287, at 5. *See also* John C. Coates IV, *Corporate Speech & the First Amendment: History, Data, and Implications*, 30 CONST. COMMENT. 223, 223–24 (2015) (finding that "corporations have increasingly displaced individuals as direct beneficiaries of First Amendment rights").

294. As Professor Piety puts it, "[w]ith *Sorrell* the Supreme Court finally gave industry most of what it sought in earlier cases by . . . engrafting a content neutrality test onto the commercial speech doctrine that will likely make it easier to invalidate any regulation of commercial speech. *Sorrell* may mean that henceforth, in practice, if not formally, commercial speech will be treated as fully protected." Piety, *supra* note 287, at 4 (footnote omitted). *See also* COLUCCI, *supra* note 218, at 79 (noting that "Kennedy has . . . been a leader on the Court in expanding protection for commercial and corporate speech").

295. Janus v. AFSCME, 138 S. Ct. 2448, 2465 (2018).

296. J. Maria Glover, *All Balls and No Strikes: The Roberts Court's Anti-Worker Activism*, 2019 J. DISP. RES. 129, 133 (arguing that in "*Janus*, the conservative members of the Court engaged in an aggressive interpretation of the right to free speech and expression embodied in the First Amendment in order to reduce employee access to collective action, diminish employee power at the bargaining table, and advance employer-based economic and (de)regulatory policy").

power and influence of unions.[297] Seeking judicial protection from the distributive objectives of unions has been a central component of corporations' antilabor strategy for more than a century.[298] *Janus* exemplifies the extent to which, as Professors Fishkin and Forbath put it, "the Supreme Court has never been more actively allied with the antilabor movement than it is today."[299]

From a progressive perspective, labor unions can play a vital role in the functioning of the American democracy because, when strong enough, they can partly check and balance the power of wealthy corporations in the political and policy spheres.[300] Strong unions, through their participation in collective bargaining and in political processes, can help place some constraints on the ways in which large corporations and their executives use the vast amounts of capital that our society allows them to accumulate to promote their private interests over the general welfare.[301] It is precisely for this reason that conservative libertarians since the early twentieth century have vigorously objected to the use of government authority to protect unions.[302] Antilabor forces have succeeded in diminishing the power of unions through the decades, with devastating results for progressives.[303] As Professor Forbath explains,

> [m]ore than any other factor, it may be the erosion of organized labor over the past few decades that explains Congress's failures to counteract—as well as Congress's positive contributions to—the growing inequalities and inequities of

297. *See generally* William B. Gould IV, *How Five Young Men Channeled Nine Old Men:* Janus *and the High Court's Anti-Labor Policymaking*, 53 UNIV. S.F. L. REV. 209 (2019) (examining impact of *Janus*). *See also* Charlotte Garden, *Speech Inequality After* Janus v. AFSCME, 95 IND. L.J. 269, 270 (2020) ("arguing that the Court's solicitude towards the First Amendment rights of wealthy or corporate speakers is in tension with its cramped view of the First Amendment rights of unions and union members").

298. Professors Fishkin & Forbath summarize this history as follows:

> Starting with the counterrevolution of the late 1940s and continuing through today, the "right to work" movement has waged an ongoing campaign of legislation and litigation, funded and supported by corporate executives and employers' associations as well as wealthy anti-union ideological activists, to destroy the New Deal vision and the politically powerful unions it yielded.

FISHKIN & FORBATH, *supra* note 14, at 442. *See also* ELIZABETH FONES-WOLF, SELLING FREE ENTERPRISE: THE BUSINESS ASSAULT ON LABOR AND LIBERALISM, 1945–1960 5 (1994) (describing how conservative business leaders sought to reorient workers away from government and unions and toward the view that free markets could better advance their interests).

299. FISHKIN & FORBATH, *supra* note 14, at 442.

300. *See generally* PHILIP DRAY, THERE IS POWER IN A UNION: THE EPIC STORY OF LABOR IN AMERICA (2010) (exploring the accomplishments of unions and their crucial political, social, and economic roles).

301. FISHKIN & FORBATH, *supra* note 14, at 441–42.

302. *Id*. at 442 (noting that, for decades, the vision of labor as a countervailing power to capital has "been squarely in the crosshairs of conservative politicians and judges").

303. William Forbath, *The Distributive Constitution and Workers' Rights*, 72 OHIO ST. L.J. 1115, 1118 (2011).

> the past few decades. The process has resembled a slow-motion disaster for constitutional democracy, as progressives understand it.[304]

Professor Forbath adds that "[r]einvigorating labor rights thus is both a constitutional good in itself and also may be a condition for redeeming" a distributive understanding of the Constitution.[305] Although other institutional players, including Congress, may someday adopt such an understanding, it is unimaginable that the Court that issued rulings such as *Citizens United*, *Sorrell*, and *Janus*, which deploy the Free Speech Clause to protect corporations from distributive and egalitarian exercises of governmental authority,[306] would do the same.

Justice Kennedy's simultaneous commitments to the anti-distributive and anti-egalitarian libertarian ethos, on the one hand, *and* to LGBTQ equality, on the other, were tested in the First Amendment case of *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*, one of the last disputes he helped adjudicate while on the Court.[307] The case arose after a bakery owner refused a same-sex couple's request to make their wedding cake on the ground that their union was inconsistent with his Christian values.[308] The Colorado Civil Rights Commission found that the baker had violated a state law prohibiting public accommodations from discriminating on the basis of sexual orientation, a determination that was upheld by the Colorado Court of Appeals.[309] The baker appealed to the Supreme Court, contending that the application of the antidiscrimination law to him violated his First Amendment rights to free speech and the free exercise of religion.[310]

In writing for the Court, Justice Kennedy deemed it unnecessary to reach the ultimate question of whether the Constitution provided a private business, which sold goods to the general public, with a constitutional right to refuse to serve patrons because of their sexual orientation.[311] Instead, the Court, through Justice Kennedy's opinion, ruled more narrowly by concluding that some members of the Colorado Civil Rights Commission had violated the baker's

304. *Id*.

305. *Id*. That understanding, Forbath explains, "call[s] on government to craft law and policy so that all Americans can enjoy a real measure of equal opportunity and equal citizenship: a decent education and livelihood, a voice and some genuine freedom and dignity at work, provision for when they can't work, a chance to do something that has value in their own eyes, and a chance to engage in the affairs of their communities and the larger society." *Id*. at 1138.

306. *See supra* notes 248–299 accompanying text.

307. 138 S. Ct. 1719, 1719 (2018).

308. *Id.* at 1724.

309. *Id.* at 1726–27; Craig v. Masterpiece Cakeshop, Inc., 370 P.3d 272, 276–77 (2015), *rev'd sub nom.*, Masterpiece Cakeshop Ltd. v. Colo. C.R. Comm'n, 138 S. Ct. 1719 (2018).

310. *Masterpiece Cakeshop*, 138 S. Ct. at 1727.

311. *Id.* at 1728–29, 1732.

rights to free exercise by expressing antireligious animus during their consideration of his case.[312]

The Court, five years later in *303 Creative LLC v. Elenis*, held that the Free Speech Clause prohibited the application of a sexual orientation antidiscrimination law to a web designer who wanted to sell her services to couples celebrating marriages, but who had religious objections to doing so for same-sex couples.[313] According to the Court, legally requiring the web designer to provide her commercial services to same-sex couples impermissibly compelled her to speak in ways that were inconsistent with her values in violation of the Free Speech Clause.[314] The fact that the antidiscrimination law became applicable only after the designer chose to sell her services to the general public was constitutionally irrelevant to a Court that prioritized her right to restrict who was eligible to purchase her services over the equality rights of LGBTQ customers.[315] According to *303 Creative*, there is no constitutional difference between, on the one hand, imposing an antidiscrimination obligation on a business owner who, while making her wedding-related services available to the general public, refuses to serve same-sex couples and, on the other, forcing children to recite the Pledge of Allegiance in public schools, as West Virginia did in the 1940s, over the religious objections of their Jehovah Witness parents.[316]

As Professor Kenji Yoshino notes, *303 Creative* shows how not even antidiscrimination laws are safe from the Roberts Court's antiregulatory constitutional vision.[317] As he puts it, antidiscrimination "laws seek to overcome systemic inequality in American society. Creating speech exemptions to blunt their force will only reinstate the status hierarchies they sought to disestablish."[318] Professor Yoshino adds that "such deregulatory uses of the Free Speech Clause will favor the more powerful in society because they restore the status hierarchies that antidiscrimination laws seek to combat."[319]

312. *Id.* at 1729–31.

313. 143 S. Ct. 2298, 2313–14 (2023).

314. *Id*. at 2315.

315. *See* Carlos A. Ball, *Free Speech Exemptions for Some*, 137 HARV. L. REV. F. 46, 61–62 (2023) (explaining how the *303 Creative* Court ignored the ruling's impact on questions of LGBTQ equality).

316. *303 Creative*, 143 S. Ct. at 2311 (analogizing the facts in *303 Creative* to those in *West Virginia Bd. of Ed. v. Barnette*, 319 U.S. 624 (1943)). For an insightful exploration of the role that *Barnette* played in *303 Creative*, see Linda C. McClain, *Do Public Accommodations Law Compel "What Shall Be Orthodox"?: The Role of* Barnette *in* 303 Creative, 68 ST. LOUIS UNIV. L.J. (forthcoming June 2024).

317. Kenji Yoshino, *Rights of First Refusal*, 137 HARV. L. REV. 244, 244 (2023).

318. *Id*. at 273.

319. *Id*. at 246. For an examination of libertarian attacks on public accommodations law in particular, see generally Samuel R. Bagenstos, *The Unrelenting Libertarian Challenge to Public Accommodations Law*, 66 STAN. L. REV. 1205 (2014).

We do not know, of course, how Justice Kennedy would have voted in *303 Creative* had he still been on the Court when it was decided. But his opinions in cases like *Citizens United* and *Sorrell* suggest that he would have been highly skeptical of the state's claim that regulations of those who voluntarily participate in commerce merit a lower form of constitutional scrutiny in the face of a free speech challenge.[320] It is not difficult to imagine, therefore, Justice Kennedy siding with the *303 Creative* Court in concluding that the government violates the Free Speech Clause when it conditions the choice of business owners to sell goods and services with expressive content to the general public on their abiding by antidiscrimination laws that are inconsistent with their personal beliefs.[321] For the author of *Citizens United* and *Sorrell*, it may very well have been that the free speech rights of business owners would have trumped the government's regulatory interests in promoting the equality rights of LGBTQ people.

D. The Federal Arbitration Act

As we have seen, Justice Kennedy, when interpreting the Constitution, was not troubled by the ability of powerful actors in the economic sphere to leverage their wealth to gain benefits in the political sphere to the detriment of the less powerful.[322] His constitutional jurisprudence was also neither impacted by nor concerned with power imbalances *within* economic or commercial spheres.[323] This is reflected in how Justice Kennedy voted in cases implicating the question of whether employees and consumers who sign boilerplate arbitration provisions can be denied access to judicial processes.[324] In seeking to resolve disputes through private arbitration rather than through the courts, employers and businesses in recent years have repeatedly claimed that the Federal Arbitration Act of 1925 (FAA), through the Constitution's Supremacy Clause, preempts

320. *See supra* notes 248–299 and accompanying text.

321. It is worth noting that Justice Kennedy in *Masterpiece Cakeshop* expressed concerns about what broad First Amendment exemptions from antidiscrimination laws would mean for LGBTQ equality. *Masterpiece Cakeshop*, 138 S. Ct. at 1727. As he put it, if the scope of exemptions is not limited, "then a long list of persons who provide goods and services for marriages and weddings might refuse to do so for gay persons, thus resulting in a community-wide stigma inconsistent with history and dynamics of civil rights laws that ensure equal access to goods, services, and public accommodations." *Id.* At the same time, and pointing in the other direction, Justice Kennedy provided the fifth vote in upholding the First Amendment right of the Boy Scouts to dismiss an assistant scoutmaster on the sole basis that he had self-identified as a gay man in a newspaper interview that did not mention his volunteer work for the organization. Boy Scouts of America v. Dale, 530 U.S. 640, 660 (2000). The Court in *303 Creative* relied heavily on the *Dale* precedent. *303 Creative*, 143 S. Ct. at 2311, 2315.

322. *See supra* notes 248–299 and accompanying text.

323. *See infra* notes 326–328 and accompanying text.

324. *See infra* notes 326–328 and accompanying text.

state laws that seek to protect the interests of employees and consumers.[325] By my count, Justice Kennedy heard seven such cases, voting to preempt state laws in all of them.[326] Also, by my count, Justice Kennedy heard an additional thirteen cases in which the Court decided whether an arbitration clause, in an employment or consumer context, was enforceable; he voted in favor of the enforceability of the clause in eleven of the thirteen cases.[327] And in one of the

325. *See, e.g.,* Katherine V. W. Stone & Alexander J. S. Colvin, *The Arbitration Epidemic: Mandatory Arbitration Deprives Workers and Consumers of their Rights*, Economic Policy Institute 7–10 (Dec. 7, 2015), https://www.epi.org/publication/the-arbitration-epidemic/ [https://perma.cc/6GQA-Z9C9]. *See also* Jessica Silver-Greenberg & Robert Gebeloff, *Arbitration Everywhere, Stacking the Deck of Justice*, N.Y. TIMES (Oct. 31, 2015), https://www.nytimes.com/2015/11/01/business/dealbook/arbitration-everywhere-stacking-the-deck-of-justice.html?unlocked_article_code=1.cU0.gYiJ.iVZaK4q8Ej_V&smid=url-share [https://perma.cc/9JHH-5KPF] (exploring businesses' increasing use of arbitration enforcement litigation to bar judicial review of their practices).

326. Kindred Nursing Centers Ltd. Partnership v. Clark, 581 U.S. 246, 251–52 (2017) (Justice Kennedy joined a unanimous Court holding that the FAA preempted Kentucky's clear-statement rule); DIRECTV, Inc. v. Imburgia, 577 U.S. 47, 58 (2015) (Justice Kennedy joined a 6-3 majority holding that the FAA preempted the California Court of Appeal's interpretation of California law); Nitro-Lift Technologies, L.L.C. v. Howard, 568 U.S. 17, 21–22 (2012) (Justice Kennedy joined a unanimous Court holding that Oklahoma Supreme Court did not correctly interpret the FAA in finding noncompetition agreements unenforceable under state law); Marmet Health Care Center, Inc. v. Brown, 565 U.S. 530, 533 (2012) (Justice Kennedy joined a unanimous Court holding that the FAA preempted a West Virginia law prohibiting arbitration clauses for personal-injury and wrongful-death claims); AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 357 (2011) (Justice Kennedy joined a 5-4 majority holding that the FAA preempted California's judicial rule regarding the unconscionability of class arbitration waivers in consumer contracts); Circuit City Stores, Inc. v. Adams, 532 U.S. 105, 109 (2001) (Justice Kennedy joined a 5-4 majority holding that the FAA preempts state discrimination claims for employees who have signed arbitration clauses except those brought by employees in the transportation sector); Doctor's Associates, Inc. v. Casarotto, 517 U.S. 681, 682 (1996) (Justice Kennedy joined an 8-1 majority holding that the FAA preempted a Montana law requiring that arbitration agreements in contracts appear on the first page of the contract in underlined capital letters). I was able to find only one FAA case in which Justice Kennedy voted to preempt a state law in a way that was helpful to a consumer or employee. *See* Mastrobuono v. Shearson Lehman Hutton, Inc., 514 U.S. 52, 62 (1995) (Justice Kennedy joined an 8-1 majority holding that the FAA preempted a New York law prohibiting arbitrators from awarding punitive damages).

327. Epic Systems v. Lewis, 138 S. Ct. 1612, 1632 (2018) (Justice Kennedy joined a 5-4 majority holding that a National Relations Labor Act provision did not displace the FAA); American Express v. Italian Colors Restaurant, 570 U.S. 228, 236 (2013) (Justice Kennedy joined a 5-3 majority holding that arbitration clauses can be used to deny plaintiffs the right to join a class action lawsuit); CompuCredit Corp. v. Greenwood, 565 U.S. 95, 104 (2012) (Justice Kennedy joined an 8-1 majority holding that the FAA required that an arbitration clause be enforced in a case brought by consumers against credit card companies and their banks); Rent-A-Center, Inc. v. Jackson, 561 U.S. 63, 71–72 (2010) (Justice Kennedy joined a 5-4 majority holding, in a case involving a claim of racial discrimination, that if the agreement to arbitrate includes a provision stating that the arbitrator will determine the enforceability of the contract, then the arbitrator and not the courts must decide its enforceability); 14 Penn Plaza LLC v. Pyett, 556 U.S. 247, 274 (2009)

two cases in which Justice Kennedy concluded that the arbitration clause was *not* enforceable, the party seeking to enforce the arbitration agreement was a union over the opposition of a corporate employer.[328]

In the same way that Justice Kennedy's libertarian constitutional vision was neither troubled nor impacted by the structural imbalances of political and economic power that have served to benefit the interests of white people and corporations,[329] his voting record in arbitration cases evinced a lack of concern with the structural bargaining advantages that employers and businesses have over employees and consumers in negotiating contracts.[330] The fact that employees and consumers routinely sign arbitration clauses in boilerplate contracts without realizing their implications and without being in a position to bargain for better terms has not mattered to the Roberts Court, including when

(Justice Kennedy joined a 5-4 majority holding that an arbitration clause in a collective bargaining agreement required employees to arbitrate claim for age discrimination against employer); Buckeye Check Cashing, Inc. v. Cardegna, 546 U.S. 440, 448–49 (2006) (Justice Kennedy joined a 7-1 majority holding that a claim that a contract was usurious and therefore void for illegality had to be heard by an arbitrator and not a court); Green Tree Financial Corp. v. Bazzle, 539 U.S. 444, 455 (2003) (Rehnquist, C.J., dissenting) (Justice Kennedy joined a dissent from the Court's ruling that the FAA did not foreclose class arbitration in a lawsuit brought by homeowners against a commercial lender); Citizens Bank v. Alafabco, Inc., 539 U.S. 52, 57 (2003) (per curiam) (Justice Kennedy joined a unanimous Court in holding that, under the FAA, an arbitration clause is enforceable even though everyone involved in the contract was an Alabama resident and the contract was executed in Alabama); Green Tree Financial Corp.-Alabama v. Randolph, 531 U.S. 79, 92 (2000) (Justice Kennedy joined a 5-4 majority holding that an arbitration clause's failure to include arbitration costs and fees does not render it unenforceable on the theory that it failed to affirmatively protect a party from potentially steep arbitration costs); Allied-Bruce Terminix Companies, Inc. v. Dobson, 513 U.S. 265, 281 (1995) (Justice Kennedy joined a 6-3 majority in holding that the applicability of the FAA was coextensive with Congress's power under the Commerce Clause); Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 35 (1991) (Justice Kennedy joined a 7-2 majority holding that a claim under the Age Discrimination in Employment Act was subject to compulsory arbitration under arbitration agreement).

The two cases in which Justice Kennedy voted to hold an arbitration clause unenforceable were Granite Rock Co. v. International Broth. of Teamsters, 561 U.S. 287, 309 (2010) (Justice Kennedy joined a 7-2 majority rejecting a union's claim that the arbitration clause that was part of a collective bargaining agreement required arbitration in its dispute with the employer); EEOC v. Waffle House, Inc., 534 U.S. 279, 297–98 (2002) (Justice Kennedy joined a 6-3 majority in holding that an arbitration agreement did not bar the EEOC from pursuing a discrimination lawsuit on behalf of an employee).

328. *Granite Rock*, 561 U.S. at 309.

329. *See supra* Part II.A and Part II.C.

330. *Cf.* Judith Resnick, *Diffusing Disputes: The Public in the Private of Arbitration, the Private in Courts, and the Erasure of Rights*, 124 YALE L.J. 2804, 2809–10 (2015) ("Justices who object to reading the federal Constitution as imposing positive obligations to support civil litigants and who are leery of court-based class actions can avoid debates about the scope of such rights by obliging disputants to use single-file arbitration. The consequence… is a system that exacerbates inequalities.") (footnotes omitted).

Justice Kennedy served on it.[331] From the Court's perspective, as Professor Andrew Koppelman puts it, "a regime in which employees' rights are nullified by boilerplate contract terms is … imagined as *a new form of freedom*, in which the parties commit to 'individualized arbitration procedures of their own design.' The libertarian premises are clear: the transactions are consented to in a market, hence legitimate."[332]

According to the libertarian ideology reflected in Justice Kennedy's voting record in arbitration cases, employers and corporations, on the one hand, and employees and consumers, on the other, have equal bargaining power with all sides equally free to walk away from the so-called negotiations at any point.[333] As Professors Fishkin and Forbath note, "[a]s in the *Lochner* era, the aggrandizement of the FAA through these fictions of consent helps elevate the logic of private contract over the logic of public law—even public law statutes that do constitutionally essential work, such as the National Labor Relations Act and the Civil Rights Act."[334]

E. The Libertarian Understanding of the Second Amendment

Justice Kennedy's constitutional skepticism of government efforts to promote the public's health and safety interests was evident not only in the context of economic regulations (as in *Sebelius* and *Sorrell*), but was also apparent in the area of gun control. Constitutional disputes over gun safety regulations pit a progressive understanding of the government as an essential protector of the public's interests against the libertarian understanding of the government as a constant and intrinsic threat to individual liberty.[335]

331. *See supra* notes 326–328 and accompanying text.

332. KOPPELMAN, *supra* note 230, at 165 (quoting Epic Systems v. Lewis, 138 S. Ct. 1612 (2018) (emphasis added)). *See also* Kenneth A. DeVille, *The Jury is Out: Pre-Dispute Binding Arbitration Agreement for Medical Malpractice Claims*, 28 J. LEGAL MED. 333, 339 (2007) ("The underlying justification for arbitration is unabashedly libertarian. Arbitration agreements are contracts. According to free market ideology, arbitration agreements cum contracts should be honored ethically and legally because they reflect individuals freely deciding what best suits their circumstances.").

333. FISHKIN & FORBATH, *supra* note 14, at 463 ("Perhaps the most striking thing about the Court's FAA jurisprudence is the way it neatly retraces the *Lochner* era view that there is no such (relevant) thing as unequal bargaining power in employment contracts.").

334. *Id*. Private arbitrators, as repeat players, have strong incentives to side with the interests of corporations that are also repeat players in arbitration over the interests of non-repeat players like workers and consumers. KOPPELMAN, *supra* note 230, at 165. "Arbitration, properly used, can be a fair way of resolving low-level disputes. In the consumer and labor context, however, it is heavily biased in favor of the business and the employer." *Id*.

335. *See infra* notes 336–353 and accompanying text.

Beginning in the 1970s, gun rights advocacy "voiced a libertarian spirit that was increasingly hostile to the government in any guise."[336] In the decades that followed, gun advocates repeatedly claimed that constitutionally protecting gun rights was essential to protecting individual liberty against government's coercive and tyrannical powers.[337] The gun right as a constitutional right is a paradigmatic negative right: it calls for the government to *cease regulating* the conduct in question (in this case, the possession of weaponry) as a means to promote personal liberty and freedom.[338] For this reason, the claimed constitutional right to possess weaponry was conceived and defended as a libertarian right "grounded in a mistrust of government."[339] In pushing for the constitutional right, gun advocates repeatedly argue that the government, in regulating and restricting the use of firearms, seeks to impermissibly interfere with personal liberty.[340]

The Supreme Court in recent years has agreed. In 2008, the Court in *District of Columbia v. Heller*, with Justice Kennedy in the majority, held that the Second Amendment protects the right of individuals to possess guns in the home.[341] Two years later, the Court in *McDonald v. City of Chicago*, with Justice Kennedy once again in the majority, held that the right to possess guns is a fundamental liberty under the Due Process Clause of the Fourteenth Amendment and therefore restricts the regulatory authority of state and local governments.[342] It was *McDonald* that made it possible for the Court in *N.Y. State Rifle & Pistol Association v. Bruen*, four years after Justice Kennedy retired, to render unconstitutional a New York law that regulated the possession of concealed weapons in public.[343]

From a progressive perspective, the libertarian framing of the gun regulation question as being constitutionally determined through a negative right of

336. Reva B. Siegel, *Dead or Alive: Originalism as Popular Constitutionalism in* Heller, 122 HARV. L. REV. 191, 209 (2008).

337. *See, e.g.*, Steven J. Heyman, *Natural Rights and the Second Amendment*, 76 CHICAGO-KENT L. REV. 237, 240 (2000); Skylar Petitt, *Tyranny Prevention: A "Core" Purpose of the Second Amendment*, 44 S. ILL. UNIV. L.J. 455, 456 (2020).

338. Jacob D. Charles, *Securing Gun Rights by Statute: The Right to Keep and Bear Arms Outside of the Constitution*, 120 MICH. L. REV. 581, 621 (2022).

339. *Id*. *See also* Saul Cornell, *The Long Arc of Arms Regulation in Public: From Surety to Permitting*, *1328–1928*, 55 U.C. DAVIS L. REV. 2545, 2548 n.9 (2022) ("The Federalist Society has consistently endorsed a strongly libertarian reading of the Second Amendment.") (citing Symposium, *The Second Amendment in the New Supreme Court*, 43 HARV. J.L. & PUB. POL'Y 319 (2020)).

340. *See, e.g.*, Stephen P. Halbrook, *The Second Amendment Was Adopted to Protect Liberty, Not Slavery: A Reply to Professors Bogus and Anderson*, 20 GEO. J.L. & PUB. POL'Y 575, 579–80 (2022).

341. 554 U.S. 570, 635 (2008).

342. 561 U.S. 742, 778, 791 (2010).

343. 142 S. Ct. 2111, 2122 (2022).

noninterference devalues and degrades the government's interest in protecting the public's health and safety.[344] As a result, the devastating physical, psychological, and economic harms caused by rampant gun violence in the United States become subservient to the negative right of non-interference.[345] From a libertarian constitutional perspective it is irrelevant, for example, that almost *50,000 people died* in the U.S. from gunshot wounds in the calendar year before *Bruen*.[346] It is also constitutionally irrelevant that *guns have become the leading cause of death for children and teenagers* in the U.S.[347] and that in "the past quarter century, *more than three hundred thousand American children* have experienced armed civilians attacking their schools."[348] Instead, the only thing that matters to the libertarian Constitution is whether the negative right of individuals to possess weaponry is sufficiently respected by the government.[349] In protecting that right, the *Bruen* Court went so far as to prohibit judges from taking into account *any* societal interest in preventing deaths and injuries.[350] Instead, the only thing that matters under *Bruen* is whether courts are able to conclude that the gun safety regulations under challenge have historical analogs.[351]

As Professor Areto Imoukhuede puts it, the Supreme Court, in this area of law, "has applied its libertarian bias and lost sight of the constitutional duties of

344. *See infra* notes 345–353 and accompanying text.

345. *See, e.g.*, Robert Gebeloff et. al., *Childhood's Greatest Danger: The Data on Kids and Gun Violence*, N.Y. TIMES MAG. (Dec. 14, 2022) https://www.nytimes.com/interactive/2022/12/14/magazine/gun-violence-children-data-statistics.html [https://perma.cc/JE29-UN48] (reporting that by 2020 guns had become the leading cause of death for children in the U.S. and that Black children are six times as likely as white children to be killed with a gun); EVERYTOWN RSCH. & POL'Y, THE ECONOMIC COST OF GUN VIOLENCE (2021) https://everytownresearch.org/report/the-economic-cost-of-gun-violence/ [https://perma.cc/3HYN-CHZY] (estimating the cost of gun violence in the U.S. to be $557 billion, including $489.1 billion in quality of life losses. $53.8 billion in income loss due to death or disability, and $2.8 billion in medical costs).

346. John Gramlich, *What the Data Says About Gun Deaths in the U.S.*, Pew Rsch. Ctr., Apr. 26, 2023, available at https://www.pewresearch.org/short-reads/2023/04/26/what-the-data-says-about-gun-deaths-in-the-u-s/ [https://perma.cc/22K4-NQ9G].

347. Robert Gebeloff, et. al., *Childhood's Greatest Danger: The Data on Kids and Gun Violence*, N.Y. TIMES MAG. (Dec. 14, 2022) [https://perma.cc/7QM5-4VN8].

348. Jill Lepore, *Truth and Consequences*, NEW YORKER, Mar. 10, 2024 (emphasis added) [https://perma.cc/4YJU-WDDU].

349. *Bruen*, 142 S. Ct. at 2126.

350. *Id*. ("[W]e hold that when the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct. To justify its regulation, the government may not simply posit that the regulation promotes an important interest.").

351. *Id*. ("the government must demonstrate that the regulation is consistent with this Nation's historical tradition of firearm regulation. Only if a firearm regulation is consistent with this Nation's historical tradition may a court conclude that the individual's conduct falls outside the Second Amendment's 'unqualified command.'") (citation omitted).

government. In the specific context of the Second Amendment and gun rights, the Court has lost sight of the duty to protect the public safety."[352] He adds that

> public safety concerns today are real, yet the Court's decisions with regard to gun control laws appear to consistently relegate them to being a secondary concern in their hierarchy of constitutional rights. This is because of their distorted libertarian perspective, under which jurists follow Justice Kennedy's model for rights that are exclusively framed in negative, libertarian form without appreciation for the very purpose of government.[353]

A libertarian understanding of the Second Amendment leaves no room for considering the liberty interests of those who suffer gun-related deaths or injuries due to *the absence of government regulation*. In protecting the health and safety of individuals, gun regulations protect inter alia *the ability of individuals to exercise their constitutional rights*. To put it bluntly, one cannot exercise constitutionally protected rights if one is dead. This applies, ironically enough, to what is now, according to the Court, a fundamental right to possess guns. But, once again, the liberty-promoting features of government regulations are utterly invisible to a Supreme Court that repeatedly views constitutional disputes implicating individual rights through the lens of the libertarian ethos.

The year after the Supreme Court ruled in *Lawrence v. Texas*,[354] Professor Randy Barnett published an article hailing the ruling for setting the stage for a "libertarian revolution" while praising the Court for its apparent willingness to break free from well-established doctrine calling on judges to presume the constitutionality of social and economic legislation, as famously articulated by footnote four in *United States v. Carolene Products*.[355] Professor Barnett celebrated *Lawrence* because he believed it signaled that the Court might once again be prepared to use substantive due process doctrine to protect economic liberties, as it had done during the *Lochner* era.[356] This prediction, in its specificity, turned out to be off the mark because the Court in the decades that followed *Lawrence* has not used the Due Process Clause in the ways that Professor Barnett hoped. But as this Part has shown, the Court during those years used other constitutional understandings—in particular of the Equal Protection Clause (in the context of affirmative action), of federalism principles, and of the First and Second Amendments—to promote the type of libertarian philosophy

352. Areto A. Imoukhuede, *Gun Rights and the New Lochnerism*, 47 SETON HALL L. REV. 329, 332 (2017).

353. *Id*. at 389.

354. 539 U.S. 558 (2003).

355. Barnett, *supra* note 168, at 28–29 (discussing footnote four of United States v. Carolene Products Co., 304 U.S. 144 (1938)). For a critical assessment of Professor Barnett's claim, *see* Dale Carpenter, *Is* Lawrence *Libertarian?*, 88 MINN. L. REV. 1140 (2004).

356. Barnett, *supra* note 168, at 41 ("[T]he Court's defense of liberty must not be limited to sexual conduct. The more liberties the Court protects, the less ideological it will be and the more widespread political support it will enjoy.").

and constitutional vision that the libertarian Professor Barnett supports. Justice Kennedy, in particular, helped foment a "libertarian revolution," even if he did not do so in the precise ways that Professor Barnett predicted in 2004.

Not all of Justice Kennedy's votes on the Supreme Court, of course, reflected a libertarian position. For example, he twice voted to uphold bans on so-called partial birth abortions, upholding the government's regulatory power over the liberty and autonomy interests of pregnant individuals to choose abortions.[357] He also voted to uphold the government's exercise of its power of eminent domain to promote economic development in the controversial case of *Kelo v. City of New London*,[358] a position that was anathema to libertarians.[359] In addition, his equality jurisprudence, as seen in the context of LGBTQ rights, sometimes adopted relatively robust understandings of equality protections.[360] But when Justice Kennedy's constitutional jurisprudence is looked at as a whole it evinces an abiding commitment to the libertarian ethos as reflected in an atomistic conception of the self;[361] a strong skepticism of government regulations and interventions;[362] and a negative conception of individual rights that imposes on the government duties of non-intervention without also requiring that it act affirmatively to promote the general welfare and advance individual liberty.[363]

The purpose of this Part's exploration of Justice Kennedy's constitutional jurisprudence has been to emphasize the ways in which some of the same libertarian principles that sometimes helped progressives prevail before the Court on LGBTQ rights issues during his tenure undermined the attainment of many other progressive objectives by restricting the distributive, regulatory, and liberty-enhancing powers of government. Although Justice Kennedy's constitutional understandings allowed for the realization of some progressive objectives, most particularly in the context of LGBTQ rights, they also served as significant obstacles to the attainment of many others. The same type of libertarian constitutionalism embraced by the Justice whose opinions have undoubtedly been the most supportive of LGBTQ rights in the history of the Supreme Court also served to block the implementation of many crucial laws and policies supported by progressives. It therefore behooves progressive proponents of LGBTQ rights, going forward, to articulate and defend moral and

357. Gonzales v. Carhart, 550 U.S. 124, 125-130 (2007); Stenberg v. Carhart, 530 U.S. 914, 956–57 (2000) (Kennedy, J., dissenting).

358. 545 U.S. 469, 490 (2005) (Kennedy, J. concurring).

359. Ilya Shapiro points to *Kelo* and the partial-birth abortion cases, among others, to contend that Justice Kennedy was only partially committed to libertarian principles. Shapiro, *supra* note 174, at 355–58.

360. *See supra* notes 158–159 and accompanying text.

361. *See supra* notes 111 and 195–199 and accompanying text.

362. *See supra* notes 200, 214–218, and 233 and accompanying text.

363. *See supra* notes 112–115 and 275–278 and accompanying text.

constitutional frameworks that challenge rather than strengthen the libertarian ethos. I offer some thoughts on how to do that in the next Part.

III. LOOKING TO THE FUTURE OF LGBTQ RIGHTS

My contention that progressive supporters of LGBTQ rights should make claims and arguments that challenge rather than strengthen the libertarian ethos raises two fundamental questions. First, in which spheres—judicial, legislative, or political—should such challenges be formulated and advanced? Second, how can pro-LGBTQ claims be conceived and articulated without strengthening the libertarian ethos? Section A addresses the first question, while Section B explores the second one.

A. The Judicial Sphere vs. Legislative and Political Spheres

As already noted, the libertarian ethos relies on a simultaneously robust and benign understanding of judicial power.[364] Libertarians believe that judges have a crucial and positive role to play in issuing rulings that constitutionally block redistributive and egalitarian laws.[365] In sharp contrast, some progressive theorists have criticized a judicially-centered constitutionalism, viewing it as at best a distraction from, and at worst an impediment to, the attainment of progressive objectives.[366] Although there are some disagreements between them, these theorists have argued that progressives in recent decades have been too focused and dependent on trying to persuade judges, rather than legislators and the voters who elect them, of the normative appeal of progressive causes and of the constitutional validity of progressive claims.[367]

364. *See supra* notes 165–167 and accompanying text.

365. *See supra* notes 165–167 and accompanying text.

366. *See, e.g.*, FISHKIN & FORBATH, *supra* note 14, at 29; LARRY D. KRAMER, THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW 247–48 (2004); MARK TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS 154 (1999); Robin West, *The Missing Jurisprudence of the Legislated Constitution*, *in* THE CONSTITUTION IN 2020, at 79 (Jack M. Balkin & Reva B. Siegel eds., 2009).

367. *See supra* note 360 and accompanying text. *See also* Jonathan S. Gould, *Puzzles of Progressive Constitutionalism*, 135 HARV. L. REV. 2053, 2071 (2022) ("Constitutionalism disadvantages arguments about the just distribution of resources and the consequentialist impacts of policy choices, since each of these sorts of arguments are seen as more within the domain of 'policy' than 'law.'"); Alex Gourevitch, *The Contradictions of Progressive Constitutionalism*, 72 OHIO ST. L. J. 1159, 1161 (2011) ("Progressive constitutionalism has tended to focus on creating the right legal doctrines, and getting these doctrines approved by judges and legal activists. However, the focus might best be placed on creating the kinds of progressive majorities that can advance the cause of equal freedom.") (footnote omitted); Jamal Greene, *How Constitutional Theory Matters*, 72 OHIO ST. L. J. 1183, 1197 (2011) ("[E]mphasizing constitutionalism, especially as practiced in the courts, carries significant costs for progressives that may outweigh its limited benefits . . . . Judges cannot make politics happen, and progressives, more than conservatives, need politics to happen.").

On the questions that interest me in this Article, namely why and how LGBTQ rights supporters should challenge rather than strengthen the libertarian ethos, there is an entirely pragmatic reason for supporting the view that progressives should focus their energies and attention on the legislative and political spheres rather than on the judicial one: The Supreme Court, as currently constituted and for the foreseeable future, is highly unlikely to be receptive to moral, policy, and constitutional understandings that challenge rather than promote the libertarian ethos.[368]

I will argue in the next Section that LGBTQ rights supporters should purposefully and consistently ground their claims in the idea that the government has moral and constitutional obligations to create the conditions that make the meaningful attainment of liberty and equality possible. In so doing, LGBTQ rights proponents should strive to reach and persuade elected officials and the broader public rather than Supreme Court justices. If progressives are going to succeed in challenging the libertarian ethos, that success will come in the legislative and political spheres rather than before a Supreme Court that insists in viewing many crucial constitutional issues through the lens of libertarian ideology and orthodoxy.[369] Even if the Court is unlikely, anytime soon, to find that the Constitution affords individuals enforceable rights to affirmative state action that enhance both liberty and equality, that "does not imply that it imposes no political, constitutional, or moral duties on legislators that might be interpreted by representative bodies and enforced by the people through the ballot box."[370]

The suggestions that I make in the next Section on how best to frame moral, political, and constitutional arguments on behalf of LGBTQ rights in ways that challenge rather than strengthen the libertarian ethos are not intended for courts that are likely to reject them out of hand, at least for the foreseeable future. The framing discussed in that Section, therefore, is aimed at persuading legislators and the general public, rather than federal judges.[371]

368. *See supra* Part II.

369. *See* West, *supra* note 7, at 650 ("[F]or both strategic and theoretical reasons, the proper *audience* for the development of a progressive interpretation of the Constitution is Congress rather than the courts. The progressive Constitution should be meant for, and therefore must be aimed toward, legislative rather than adjudicative change.").

370. Robin West, *Unenumerated Duties*, 9 U. PA. J. CONST. L. 221, 235 (2006). *See also* WEST, *supra* note 18, at 4 (arguing "that the progressive promise the Fourteenth Amendment guarantees must be delivered through congressional enactment rather than judicial enforcement").

371. Professors Joseph Fishkin and William Forbath encourage contemporary progressives to rediscover the now largely forgotten claims of earlier generations of progressives, *made primarily outside of the courts*, contending that the government not just has the constitutional *power*, but also the constitutional *duty* to enact social welfare legislation in order to advance democratic, egalitarian, and distributive objectives. FISHKIN & FORBATH, supra note 14, at 20–21. *See also id*. at 419 ("Past generations of progressive reformers operated under a different set of constitutional axioms. In their view, constitutional *obligations* impelled the legislature to act.") (emphasis added).

At the same time, the reality for LGBTQ communities on the ground is that they will need to seek federal judicial protection as long as conservative state legislatures continue to enact harmful and discriminatory anti-LGBTQ laws.[372] This places progressives in a dilemma with no easy solutions. On the one hand, as I argued in Part I and Part II, working within the libertarian ethos to which courts are likely to be predisposed has real negative consequences for the attainment of crucial progressive objectives. On the other hand, in our current historical moment of significant backlash against LGBTQ rights gains, we cannot dispense with judicial strategies altogether. I do not believe that LGBTQ supporters will be able to afford to ignore or bypass the courts for the foreseeable future. We need courts to act as break points for particularly invidious and harmful laws targeting LGBTQ communities and, as a practical matter, libertarian-type arguments are the ones that are most likely to prevail before federal judges who must comply with and follow the Supreme Court's libertarian rulings.

As a result, it will not be possible or desirable for LGBTQ rights supporters, at least in the judicial sphere, to completely dispense with libertarian arguments. Nonetheless, it is important for progressive activists, commentators, and academics to consider how specific constitutional claims made in court impact the framing of policy questions outside of the judicial context. This is particularly vital given the ways in which constitutional arguments in the United States often set the boundaries of broader moral and political discourses.[373] How the Court interprets the Constitution often frames how the American society and body politic go about understanding and discussing the underlying moral and policy disagreements that lie behind disputed constitutional questions.[374]

Professors Fishkin and Forbath point to the turn by progressives, after WWII, to judicially-centered strategies that neglected constitutionally-mandated obligations on the part of Congress to redistribute economic and political power in ways that precluded anti-democratic concentrations of both. As they put it, when postwar "[l]iberal social reformers and advocates for racial minorities, women, the consumer, and the environment all embraced individual rights claims addressed to courts[,] . . . [t]he rest of the democracy-of-opportunity tradition—the arguments about constitutional political economy that speak to the concentration and distribution of economic and political power—was forgotten." *Id*. at 25.

372. *See infra* notes 386–391 and 420–423 and accompanying text.

373. This is a point that Professor Michael Sandel, in writing about abortion and sexuality three years after *Bowers v. Hardwick*, 478 U.S. 186 (1986), made when he noted that "[a]ssumptions drawn from constitutional discourse increasingly set the terms of political debate in general." Michael J. Sandel, *Moral Argument and Liberal Toleration: Abortion and Homosexuality*, 77 CAL. L. REV. 521, 538 (1989).

374. Professor Robin West notes that "we tend, both in popular consciousness and at the level of theory to blur constitutionality with morality—to see the Constitution as more or less in line with moral and political virtue." West, *supra* note 19, at 771. She adds that "we have become societally accustomed to understanding the Constitution as the repository of public and public-spirited morality. We have also, however, become accustomed to understanding the courts, rather than the Congress, as the forum for constitutional articulation and obligation." West, *supra* note 7, at 719.

Although it may be pragmatically necessary for progressive legal advocates to frame constitutional claims made before judges who are ideologically sympathetic to the libertarian ethos (or, at least, bound by libertarian judicial precedents) in ways that are consistent with that ethos, my contention is that progressives should not further strengthen libertarian principles when making and defending moral and constitutional claims outside of the courts. If progressives can succeed in helping the country move beyond the libertarian ethos in moral, political, and constitutional discourses *outside of the courts*, that may help, over time, break the pervasive influence that such an ethos has on constitutional thinking *within* the judicial sphere, especially on matters that implicate individual rights to liberty and equality. The bottom line is that the arguments made in court to try to persuade libertarian-inclined judges should not frame how progressive political morality and constitutionalism approach LGBTQ issues more broadly.

The contemporary Court repeatedly decides many of the most important constitutional issues that come before it in ways that promote libertarian values and objectives.[375] But that does not mean that progressive supporters of LGBTQ rights, when making moral and constitutional arguments in the political and legislative spheres, should do the same. I urge LGBTQ rights proponents to frame and explore the relevant moral and constitutional questions outside of the parameters set and demanded by the libertarian ethos. In particular, as I explore next, proponents should examine and articulate the link between affirmative state action, on the one hand, and the protection and promotion of meaningful liberty and equality for LGBTQ people, on the other.

B. Non-Libertarian Understandings of LGBTQ Rights

There are two related threads that run across much of progressive political morality. One consists of an overarching commitment, admittedly driven by different priorities and manifested in different ways, to making society more egalitarian along a series of axes, including economic, social, racial, gender, and sexual.[376] A second commitment is a belief that the government has the obligation, authority, and ability to redistribute resources in ways that help promote human flourishing.[377] The particular manifestations of this commitment vary. Some progressives, for example, emphasize the need to deploy state power to counterbalance and regulate the economic marketplace to protect health,

This is so even though "[w]hat is morally required of our representatives, and ourselves, when we exercise political power over one another is by no means necessarily coextensive with what is constitutionally required." West, *supra* note 370, at 260.

375. *See supra* Part II.

376. *See supra* notes 10–18 and accompanying text.

377. *See supra* notes 10–18 and accompanying text.

safety, and the environment,[378] while others prioritize the need for government to address and remedy historical, structural, and harmful economic, racial, and gender hierarchies and inequalities.[379] But however manifested and emphasized, progressive political morality is grounded in the *duty* of the state to make society more equal and just through different means, including education, taxation, regulation, and the spending of public funds.[380] To put it simply, progressive political theory is grounded in the necessity and appropriateness of robust exercises of state power to attain distributive and egalitarian objectives.[381]

The construction of an American society based on progressive values will remain an unfulfilled aspiration until progressives can convince a majority of Americans that the government has moral and constitutional *obligations* to act affirmatively to create the necessary economic and social conditions that promote human flourishing and protect liberty and equality for all. Some progressive constitutionalists have promoted this vision, including welfarists who emphasize positive rights to healthcare and housing,[382] feminists who prioritize government's obligations to support relationships of care and dependency,[383] and those who defend anti-oligarchical understandings of the Constitution.[384] In my estimation, more supporters of LGBTQ rights should join similar efforts to articulate and defend moral and constitutional understandings that impose affirmative obligations on the state to promote human flourishing and advance liberty and equality for all. Framing LGBTQ rights issues in this manner will help link questions associated with how society should respond to the existence of sexuality and gender identity minorities to broader progressive distributive and egalitarian objectives in ways that question rather than

378. *See supra* notes 10–18 and accompanying text.

379. *See supra* notes 10–18 and accompanying text.

380. *See generally* West, *supra* note 370 (exploring the constitutional obligations of legislators to achieve welfarist ends).

381. *See supra* notes 10–18 and accompanying text.

382. *See, e.g.*, Peter B. Edelman, *The Next Century of Our Constitution: Rethinking Our Duty to the Poor*, 39 HASTINGS L.J. 1, 3 (1987); Frank I. Michelman, *In Pursuit of Constitutional Welfare Rights: One View of Rawls' Theory of Justice*, 121 U. PA. L. REV. 962, 966 (1973). *See also* LAWRENCE G. SAGER, JUSTICE IN PLAINCLOTHES: A THEORY OF AMERICAN CONSTITUTIONAL PRACTICE 8 (2004) (arguing that "some version of [a] minimal demand for the opportunity of material gain is within the domain of constitutional justice, albeit in a form that is generally elusive of judicial enforcement").

383. *See, e.g.*, MAXINE EICHNER, THE SUPPORTIVE STATE: FAMILIES, GOVERNMENT, AND AMERICA'S POLITICAL IDEALS 3 (2010); Martha Albertson Fineman, *The Inevitability of Dependency and the Politics of Subsidy*, 9 STAN. L. & POL'Y REV. 89, 90 (1998).

384. FISHKIN & FORBATH, supra note 14, at 30 (explaining that anti-oligarchical understandings impose "affirmative constitutional obligations [on] government today: to prevent an oligarchy from emerging and amassing too much power; to preserve a broad and open middle class as a counterweight against oligarchy and a bulwark of democratic life; and to include everyone, not just those privileged by race or sex, in a democracy of opportunity that is broad enough to unite us all").

strengthen the libertarian principles and norms that, for decades, have undermined the attainment of those objectives.

I concede that framing LGBTQ rights issues around the government's affirmative moral and constitutional obligations may seem like a luxury at a time when LGBTQ people in general, and transgender individuals in particular, are the target of well-organized and virulent political and legal campaigns that deploy government power to restrict their rights. I am thinking in particular of laws that deny Medicaid benefits to transgender individuals;[385] prohibit doctors from providing gender-affirming healthcare to minors;[386] exclude transgender women and girls from participating in sporting competitions open to cisgender women and girls;[387] prohibit transgender individuals from using public bathrooms and similar facilities that match their gender identity;[388] call for the exclusion of LGBTQ books from public schools;[389] prohibit public schools from acknowledging the gender identity of transgender students through the use of pronouns reflecting that identity;[390] and prohibit teaching public school students about issues related to sexual orientation and gender identity.[391]

It is tempting, in this coercive and frightening political environment, for supporters of LGBTQ rights to articulate, defend, and promote the interests of LGBTQ communities in the traditional libertarian way, that is by emphasizing *only* the types of negative rights to liberty and equality that *limit* governmental power. We should resist that temptation for two main reasons. First, as I explained in Part I and Part II, such an emphasis makes the attainment of broader distributive and egalitarian objectives more difficult because they strengthen the libertarian ethos. Second, as I explain in the remainder of this Section, the attainment of meaningful liberty and equality for LGBTQ people depends on moral and constitutional claims that impose positive, and not just negative, obligations on the government.[392]

385. *See, e.g.*, ARIZ. ADMIN. CODE § 9-22-205 (2023); TENN. COMP. R. & REGS. 1200-13-13-.10. (2023).

386. *See, e.g.*, ARK. CODE ANN. §§ 20-9-1501 to 20-9-1501-1504 (2021); N.C. GEN. STAT. ANN. § 90-21.151 (West 2023).

387. *See, e.g.*, ALA. CODE § 16-1-52 (2023); W. VA. CODE ANN. § 18-2-25d (2021).

388. *See, e.g.*, ALA. CODE § 16-1-54 (2023); FLA. STAT. § 553.865 (2023).

389. *See, e.g.*, FLA. STAT. § 1006.28(2)(a) (2023); IOWA CODE § 279.77(2) (2024).

390. *See, e.g.*, FLA. STAT. § 1000.071 (2023); KY. REV. STAT. ANN. § 158.191 (West 2023).

391. *See, e.g.*, FLA. STAT. § 1001.42(8)(c)(3) (2023) ("Classroom instruction by school personnel or third parties on sexual orientation or gender identity may not occur in prekindergarten through grade 8 . . . ."); IOWA CODE § 279.80(2) (2024) ("A school district shall not provide any program, curriculum, test, survey, questionnaire, promotion, or instruction relating to gender identity or sexual orientation to students in kindergarten through grade six."). On the so-called "Don't Say Gay" laws, *see* Clifford Rosky, *Don't Say Gay: The Government's Silence and the Equal Protection Clause*, 2022 U. ILL. L. REV. 1845, 1845.

392. Professor Robin West made a similar point when addressing the limitations of framing abortion rights and politics only from the perspective of negative liberty, without also exploring

A traditional libertarian way of responding, for example, to the growing number of laws banning gender-affirming healthcare for minors is to criticize them for violating the liberty rights of parents to make important decisions about their children's well-being.[393] As explored in Part I, the right of parental autonomy, long recognized by the Supreme Court as a matter of substantive due process, is a negative right that protects the decision-making authority of parents on matters related to their children's welfare.[394] And, indeed, the recognition and enforcement of a negative right to parental autonomy, as applied to the issue of gender-affirming healthcare for minors, allows parents *who have the necessary financial resources and access to healthcare* to purchase the medical services in question without the type of governmental interference engendered by the recent slew of state laws banning transgender healthcare for minors.[395] But that negative right by itself does not permit parents of transgender minors who lack the requisite financial resources and access to health insurance to make decisions about what is best for *their* children's welfare.[396] Even in states that have not enacted transgender medical bans for minors, parents who lack adequate access to healthcare services are not able to choose gender-affirming healthcare for their children even if they believe that such care is essential to the children's well-being.[397]

questions of government's moral and constitutional obligations to act and to provide for the well-being of pregnant women and families. Robin West, *From Choice to Reproductive Justice: De-Constitutionalizing Abortion Rights*, 118 YALE L.J. 1394, 1425 (2009).

393. *See Outlawing Trans Youth: State Legislatures and the Battle Over Gender-Affirming Healthcare for Minors*, 134 HARV. L. REV. 2163, 2183–84 (2021) ("Prohibiting parents from authorizing medically necessary treatment for their children when they believe this care is in their children's best interests is just the kind of intrusive government conduct that parental due process rights guard against.").

394. *See supra* notes 50–68 and accompanying text.

395. A federal district court in 2023 struck down Arkansas's law prohibiting doctors from providing gender-affirming healthcare to minors partly on the ground that it interfered with the substantive due process right of parents to make important decisions about how best to promote and protect their children's welfare. Brandt v. Rutledge, No. 4:21CV00450 JM, 2023 WL 4073727, at *36 (E.D. Ark. June 20, 2023); *but see* L.W. v. Skremetti, 73 F.4th 408, 416–18 (6th Cir. 2023) (concluding that parents challenging a law prohibiting gender-affirming healthcare for minors were unlikely to succeed in their constitutional parental autonomy claim); Eknes-Tucker v. Gov. of Ala., 80 F.4th 1205, 1224 (11th Cir. 2023) (same).

396. *Cf.* Alsott, *supra* note 17, at 31 ("The Federal Constitution . . . paints parenthood in neoliberal colors: parents may rear their children (mostly) as they like but must support them out of their own earnings and have no claim to state support.").

397. Jennifer M. Haley et al., *Parents with Low Incomes Faced Greater Health Challenges and Problems Accessing and Affording Needed Health Care in Spring 2021*, URBAN INST. 1, 13 (2022) https://www.urban.org/sites/default/files/2022-05/Low%20Income%20Parents%20Faced%20Greater%20Health%20Care%20Challenges%20and%20Problems%20Accessing%20and%20Affording%20Health%20Care.pdf [https://perma.cc/V96M-V6TY] ("Parents with family incomes at or below 138 percent of the poverty level were more than three times as likely as those with incomes at or above 400 percent . . . to report delayed or forgone health care . . . for each of these reasons:

For the parents of transgender minors who do not have the private resources to access adequate healthcare, a state's ban on transgender care leaves them in the same position that they would be if the state eschewed the ban but refused to provide or subsidize the actual care. What would make it possible for these parents to make the choices they believe are in their children's best interests—or, to put it differently, what would make it possible for them to actually exercise the constitutionally-recognized right of parental liberty in ways that make a tangible difference in the lives of their children—is not only the absence of state coercion, but is also the type of affirmative regulatory steps taken by the government needed to make sure that everyone, regardless of financial means, has access to adequate healthcare.

When morally and constitutionally assessing how the government treats transgender individuals, we should not only focus, as the libertarian ethos encourages to do, on whether it has enacted coercive regulations such as laws banning gender-affirming healthcare for minors. Instead, we should also focus on *what the government refuses to do*, such as guaranteeing access to adequate healthcare, including transgender healthcare, to all individuals who cannot afford it. The government, under the libertarian ethos, has few moral and constitutional duties to act other than by protecting property rights and enforcing contracts.[398] This is why libertarians are almost never troubled by state *omissions*. But for progressives, the government's failure to act, when it has moral or constitutional obligations to do so, should matter as much as when it acts in coercive ways. This is because *a state's failure to regulate in ways that provide for human flourishing can lead to precisely the same harmful outcomes as its decision to regulate in coercive ways*. As Professor Robin West succinctly puts it, "[g]overnmental nonfeasance can be as lethal as governmental misfeasance."[399]

An exclusive focus on the negative right of noninterference and on the state as a threat rather than a provider serves to challenge and undermine the very same "democratic processes that might generate positive law that could better respond to our vulnerabilities and meet our needs; and they truncate our

cost concerns, difficulties taking time off work, difficulties taking time away from child care or family obligations, difficulties with transportation."); WestHealth, *Benchmarking Healthcare Affordability and Perceived Value*, GALLUP 1, 7 (2022), https://s8637.pcdn.co/wp-content/uploads/2022/05/Benchmarking-Healthcare-Affordability-and-Perceived-Value-4.19.22.pdf [https://perma.cc/973X-5U4Z] (designating individuals who are routinely unable to afford needed healthcare as falling under a "Cost Desperate" category and noting that "[o]ne out of seven (14%) people classified as Cost Desperate know a friend or family member who has died" from an inability to seek the treatment they needed and "[o]ne-third (35%) report they have cut back on [paying for] utilities" and food in order to pay for healthcare).

398. *See supra* note 2 and accompanying text.

399. West, *supra* note 370, at 255.

collective visions of law's moral possibilities."[400] An exclusive emphasis on negative rights and on the government as an impediment to liberty and equality rather than as an aide in the provision of both serves to engender a deep skepticism of the state *qua* state.[401] And such skepticism inevitably works to the detriment of progressive objectives.[402] In promoting a generalized skepticism of state action, a progressive constitutionalism that embraces (or fails to question) the libertarian ethos of limited government and exclusively negative rights might help protect against some of the worst forms of state coercion, but it does little to help build a progressive society constructed around the promotion of distributive justice and the attainment of egalitarian objectives.

There is a crucial difference, then, between theoretical and meaningful exercises of liberty rights. For the parents of transgender minors who cannot afford medically suggested treatments for their children, a constitutionally protected right to choose those treatments exists in theory, but not in practice. For the liberty right to be meaningful, that is for it to matter in the lives of those who lack the necessary private resources, the government must do more than just refrain from banning the treatments—it must also provide or guarantee adequate healthcare for all.

Similarly, a number of states limit the ability of transgender *adults* to access gender-affirming healthcare.[403] As with the bans on gender-affirming healthcare for minors, it is possible to critique these regulations from a negative liberty perspective. Under current constitutional doctrine, competent adults have a

400. West, *supra* note 392, at 1398.

401. *See* Carlos A. Ball, *We Are All Constitutional Libertarians Now*, BALKANIZATION, https://balkin.blogspot.com/2022/10/we-are-all-constitutional-libertarians.html [https://perma.cc/YP3V-WB83] ("Under the relentless scrutiny of constant constitutional litigation, government action, implicating almost every conceivable policy area, is frequently seen as suspect or illegitimate, regardless of whether the state seeks to achieve paternalistic or egalitarian or redistributive or educational or health or safety (or fill-in-the-blank) objectives.").

402. In the reproductive justice context, Professor Robin West, back in the day when *Roe v. Wade* was still good law, argued that progressives should aim to protect the ability of pregnant women to choose abortions without undermining the idea that government has moral and constitutional obligations to act affirmatively by redistributing resources in ways that support both women who choose to parent and women who choose to terminate their pregnancies. *See generally* West, *supra* note 392. *See also* Alsott, *supra* note 17, at 30 ("The absence of positive rights to income or to sustenance impose de facto limits on citizens' access to marriage and family life, but these limitations are invisible in federal constitutional law."); Appleton, *supra* note 129, at 931 (noting that "liberty limits government intrusion in private domains, but it does not compel government to do anything").

403. *See, e.g.*, ARIZ. AMIN. CODE § 9-22-205 (2023); FLA. STAT. ANN. § 286.311(2) (2023). *See also* Azeen Ghorayshi, *Many States Are Trying to Restrict Gender Treatments for Adults, Too*, N.Y. TIMES (Apr. 22, 2023), https://www,nytimes.com/2023/04/22/health/transgender-adults-treatment-bans.html [https://perma.cc/86P9-XDXH].

liberty right to decide which medical treatments are best for them.[404] It is possible, therefore, to argue that restrictions on healthcare for transgender adults interferes with their negative liberty right to choose among available medical treatments. But enforcing the individual right of adults to choose the medical treatments that they believe are best for them only imposes obligations of omission or restraint on the state. As a result, the right's limitations are similar to those that inhere in the negative right to parental autonomy because it leaves transgender adults who do not have access to adequate healthcare unable to meaningfully exercise the liberty interests at issue. The meaningful exercise of liberty in this area by *all* affected individuals, and not just by those who currently benefit from private funds or public subsidies, can exist only if the government, in addition to not prohibiting the medically-approved treatments, takes the necessary regulatory steps to make sure that the treatments are available to everyone who cannot afford them.[405]

As a result, LGBTQ rights supporters should link relevant transgender liberty and equality claims to the broader question of the government's moral obligation to make sure that everyone in society has the ability to access adequate healthcare. The claims should be grounded in the question of what the government *must do* to promote liberty and equality rather than, as the libertarian ethos asks, only on what the government *must not do* to accomplish the same.

Reframing the question so that it accounts not only for rights of non-interference but also for affirmative governmental duties helps to universalize and destigmatize the issue of gender-affirming healthcare.[406] Broadening the normative lens to explore and advocate on behalf of government obligations to guarantee adequate access to healthcare for all makes the issue relevant to everyone and not just to transgender individuals. To put it differently, the

404. *See* Cruzan v. Dir., Mo. Dep't of Health, 497 U.S. 261, 279 (1990) ("[A]ssum[ing] that the United States Constitution would grant a competent person a constitutionally protected right to refuse lifesaving hydration and nutrition.").

405. *See, e.g.*, Rachel C. Kurzweil, *Justice is What Love Looks Like in Public: How the Affordable Care Act Falls Short on Transgender Health Care Access*, 21 WASH. & LEE J. CIV. RTS. & SOC. JUST. 196, 209, 257 (2014) (noting that "[a]ccess to basic health care such as physician services impacts overall physical, social, and mental health status, the prevention of diseases and disability, quality of life, preventable death, life expectancy, and the detection and treatment of health conditions," and arguing for the promotion of non-discrimination provisions "with an LGBT focus").

406. Reframing the issue as one of access to medical care more broadly also helps challenge the myth that the medical needs of transgender individuals are limited to a narrow category of gender-related medical treatments. *See* Chase Strangio, *Can Reproductive Trans Bodies Exist?*, 19 CUNY L. REV. 223, 223–26 (2016) (noting that transgender individuals, like other individuals, have a wide spectrum of medical needs, including preventive care).

question becomes one of basic or fundamental human rights and not just of transgender rights.[407]

The libertarian ethos of negative rights and limited government also has little to offer LGBTQ individuals in matters related to education, which, like healthcare issues, have been the subject of much complaining and contestation by opponents of LGBTQ equality.[408] The fact that public school systems educate the majority of children in the U.S. means that the libertarian mantra of "get the government off our backs and we will be free" is wholly inadequate to help LGBTQ students in public schools.[409] (The same is true of other settings that are likely to remain under firm government control and management, such as prisons and homeless shelters.)[410] Such assistance can only result from affirmative and inclusionary public education policies that purposefully seek to avoid making LGBTQ students choose between receiving an adequate education, on the one hand, and living openly according to their gender and sexual identities, on the other. At a minimum, these affirmative governmental steps should guarantee that parts of school curricula reflect the very existence of LGBTQ people.[411] Public schools should also institute the type of inclusionary policies that make sure that LGBTQ students are not excluded from facilities

407. *See, e.g.*, James M. Grant et al., *Injustice at Every Turn: A Report of the National Transgender Discrimination Survey*, WASH. NAT'L CTR. FOR TRANSGENDER EQUA. & NAT'L GAY & LESBIAN TASK FORCE 72 (2011) https://www.hivlawandpolicy.org/sites/default/files/Injustice%20at%20Every%20Turn.pdf [https://perma.cc/9SZA-6M7T] ("Access to health care is a fundamental human right that is regularly denied to transgender and gender non-conforming people."); Mariah McGill & Gillian MacNaughton, *The Struggle to Achieve the Human Right to Healthcare in the United States*, 25 S. CAL. INTERDIS. L. J. 625, 639, 643 (2016) (arguing that healthcare is a human right under international law and that the Patient Protection and Affordable Care Act does not ensure that all individuals living in the United States receive healthcare as a basic human right).

408. *See, e.g.*, Katie Glueck and Patricia Mazzei, *Red States Push L.G.B.T.Q. Restrictions as Education Battles Intensify*, N.Y. TIMES (Apr. 14, 2022) [https://perma.cc/3L9W-7HP6].

409. In 2019, there were a little more than 49 million students enrolled in public schools and fewer than five million pupils enrolled in private schools. *See* National Center for Education Statistics, *Fast Facts: Public and Private School Comparison*, https://nces.ed.gov/fastfacts/display.asp?id=55 [https://perma.cc/D7TX-AMXE].

410. I thank Professor Kyle Velte for making this point during the 2023 Childress Symposium. On transgender prisoners, *see, e.g.*, Sarah Ortlip-Sommers, Note, *Living Freely Behind Bars: Reframing the Due Process Rights of Transgender Prisoners*, 40 COLUM. J. GENDER & L. 355, 355 (2021). For a discussion of the discrimination faced by transgender individuals in homeless shelters, see Alaina Richert, *Sexual Orientation, Gender Identity, and Homelessness Post*-Bostock, 56 U. MICH. J. L. REF. 217, 221 (2022).

411. *See, e.g.*, American Psychological Association, *LGBTQ+ Inclusive Curricula*, https://www.apa.org/topics/lgbtq/lgbtq-inclusive-curricula [https://perma.cc/X9PU-KWYN]; Laura Moorhead, *LGBTQ+ Visibility in the K-12 Curriculum*, KAPPAN (Sept. 24, 2018), https://kappanonline.org/moorhead-lgbtq-visibility-k-12-curriculum/ [https://perma.cc/5QL6-8CZH].

(like bathrooms and changing rooms) and activities (such as sports) that are part of educational institutions.[412]

As these examples illustrate, the ability of LGBTQ individuals to attain meaningful liberty and equality depends on asking more of the government than that it cease regulating in coercive ways. The conditions for meaningful liberty and equality for LGBTQ people cannot be created simply by getting the government out of our private lives and decision-making. This is because there is a crucial *public component* to living and experiencing one's gender identity and sexuality, an observation that, I suspect, would be obvious to every cisgender heterosexual living in the U.S. if *their* gender and sexual identities were subject to constant moral, social, and legal disapprobation and contestation along the lines of what LGBTQ people routinely experience. To be free to live and love in the closet is no freedom at all. What progressivism fundamentally asks of government on behalf of LGBTQ people is not that it leave us alone by getting out of our lives, but is instead that it help create the necessary conditions—including, but not limited to, in the spheres of healthcare and education—that make it possible for us to lead free, full, and equal lives without having to hide or compromise our sexual and gender identities.

A progressive push for LGBTQ rights should aim to persuade Americans that the menu of moral, policy, and constitutional choices is not limited to those offered by a repressive, transphobic, and homophobic state, on the one hand, and those provided by a libertarian state that does little more than leave LGBTQ people alone, on the other. While, from an LGBTQ rights perspective, a libertarian understanding of state authority is obviously better than a repressive one, there is a third alternative that is more consistent with broader progressive values and objectives: an understanding of state authority that is defined in crucial ways by positive moral and constitutional obligations on the government to create the social and economic conditions needed to promote the full flourishing of all of society's members, including, but not limited to, LGBTQ individuals.

There are some progressives who criticize so-called identity politics that prioritize questions of personal identity over structural class and economic inequalities.[413] It is perhaps easy to assume that issues related to LGBTQ rights

412. *See, e.g.*, Comment, Alanna M. Jereb, *The Bathroom Right for Transgender Students and How the Entire LGBT Community Can Align to Guarantee This*, 7 WAKE FOREST J.L. & POL'Y 585, 587 (2017); Note, Michael J. Lenzi, *The Trans Athlete Dilemma, A Constitutional Analysis of High School Transgender Student-Athlete Policies*, 67 AM. UNIV. L. REV. 841, 842 (2018).

413. *See, e.g.*, Wilfred Reilly, *I Saw Identity Politics Tear the Occupy Movement Apart. Economic Leftists Must Ditch Wokeness*, USA TODAY (Nov. 24, 2020, 4:00 AM), https://www.usatoday.com/story/opinion/voices/2020/11/24/woke-identity-politics-progressive-economic-bernie-sanders-column/6386871002/ [https://perma.cc/LK5E-8VSR]. For an influential critique of identity politics from a progressive perspective, *see* Nancy Fraser, *Feminism, Capitalism and the Cunning of History*, 56 NEW LEFT REV. 97, 97–98 (2009).

are primarily about identity politics disconnected to broader distributive questions. But, as I have noted, many current LGBTQ controversies implicate distributive questions in crucial spheres of social policy, including those of healthcare and education.[414] Issues of LGBTQ rights do not stand apart from distributive questions; instead, they are almost always embedded in them.[415] Understanding the distributive implications of LGBTQ equality claims, and the links between that equality and the moral and constitutional obligations of government to provide for the human flourishing of all, can help bridge the gap between "identity politics progressives" and "economic justice progressives." In contrast, the use of libertarian principles to promote LGBTQ rights, grounded as they are in atomistic conceptions of the self and on exclusively negative rights, while offering some discrete benefits to LGBTQ communities, has little to offer progressives in matters related to distributive and economic justice.

Relying on libertarian principles to set the contours of moral and constitutional claims in the context of LGBTQ rights presents at least three overarching drawbacks for progressives. First, it reifies and reinforces pre-existing inequalities by allowing gains made in the economic sphere to spill over onto that of constitutionally protected individual rights. In our capitalist society, wealth comes with innumerable privileges. Wealthier people in the U.S., for example, have greater educational and professional opportunities, while enjoying access to better healthcare allowing them to live longer lives than poor people.[416] To the long list of benefits that accompany the accumulation of property, income, and wealth in our society, we unfortunately need to add the ability to meaningfully exercise crucial constitutional rights: a libertarian understanding of the Constitution, for example, protects the ability of adults with the requisite economic means to choose the healthcare treatments that work best for them.[417] Similarly, such an understanding provides financially secure parents with the protected right to choose to purchase education and healthcare for their children in private markets free from undue governmental interference.[418] But

414. *See supra* notes 393–412 and accompanying text.

415. *See generally* SUSAN J. FERGUSON, RACE, GENDER, SEXUALITY, AND SOCIAL CLASS: DIMENSIONS OF INEQUALITY AND IDENTITY (3d ed. 2019) (exploring how social statuses shape identities and produce inequalities).

416. *See, e.g.*, Breno Braga et al., *Wealth Inequality Is a Barrier to Education and Social Mobility*, URBAN INST. 6 (Apr. 2017), https://www.urban.org/sites/default/files/publication/89976/wealth_and_education_4.pdf [https://perma.cc/QWD4-96U3] ("Family wealth is strongly associated with both higher educational attainment and upward educational mobility . . . ."); Heather Murphy, *Rich People Don't Just Live Longer. They Also Get More Healthy Years*, N.Y. TIMES (Jan. 16, 2020), https://www.nytimes.com/2020/01/16/science/rich-people-longer-life-study.html [https://perma.cc/TQC5-ZHRR] (reporting on data showing that wealthy individuals live around 31 disability-free years after 50, which is eight to nine more years more than poor people).

417. *See supra* note 395 and accompanying text.

418. *See supra* notes 51–55 and 395 and accompanying text.

the libertarian ethos offers few protected rights to adults and parents of limited economic means in crucial spheres of social policy such as healthcare and education.

Second, the same libertarian arguments that can, in some contexts, advance LGBTQ rights can also, in other contexts, serve to undermine them. For example, the same considerations of parental autonomy that can be used to challenge gender-affirming healthcare bans have been deployed by social conservatives to attempt to justify a slew of anti-LGBTQ laws and regulations.[419] In particular, conservative activists have claimed that in order to protect the ability of parents opposed to transgender rights to determine what is best for *their* children, the law should prohibit public schools from making LGBTQ books available to students,[420] teachers from addressing LGBTQ issues in the classroom,[421] school employees from using names and pronouns for students that do not match the sex they were assigned at birth,[422] and drag artists from performing in front of minors.[423] Conservatives have also used so-called parental freedom claims to seek to prohibit schools from addressing issues of structural racism in the classroom,[424] to remove explorations of racism from

419. *See, e.g.*, David D. Kirkpatrick, *The Next Targets for the Group that Overturned* Roe, NEW YORKER (Oct. 2, 2023), https://www.newyorker.com/magazine/2023/10/09/alliance-defending-freedoms-legal-crusade [https://perma.cc/8YZG-TWLD] (discussing efforts by conservative advocacy groups to oppose transgender inclusive policies in public schools on the ground that they violate parental autonomy rights).

420. *See, e.g.*, Alexandra Alter & Elizabeth A. Harris, *Booksellers Move to the Front Lines of the Fight Against Book Bans in Texas*, N.Y. TIMES (July 25, 2023), https://www.nytimes.com/2023/07/25/books/book-banning-texas-lawsuit.html [https://perma.cc/VX4H-ZXE9]; Elizabeth A. Harris & Alexandra Alter, *A Fast-Growing Network of Conservative Groups Is Fueling a Surge in Book Bans*, N.Y. TIMES (Jan. 10, 2023), https://www.nytimes.com/2022/12/12/books/book-bans-libraries.html [https://perma.cc/ZX5T-8Q8W].

421. *See, e.g.*, Jo Yurcaba, *Over 30 New LGBTQ Education Laws are In Effect as Students Go Back to School*, NBC NEWS (Aug. 30, 2023, 2:04 PM), https://www.nbcnews.com/nbc-out/out-politics-and-policy/30-new-lgbtq-education-laws-are-effect-students-go-back-school-rcna101897 [https://perma.cc/EK8E-74D4].

422. *See, e.g.*, Andrew Atterbury, *Florida Lawmakers Restrict Pronouns and Tackle Book Objections in Sweeping Education Bill*, POLITICO (May 3, 2023, 2:24 PM), https://www.politico.com/news/2023/05/03/florida-lawmakers-restrict-pronouns-and-tackle-book-objections-0009 5084 [https://perma.cc/LB79-B7SY]; Eesha Pendharkar, *Pronouns for Trans, Nonbinary Students: The States With Laws That Restrict Them in Schools*, EDUCATIONWEEK (June 14, 2023), https://www.edweek.org/leadership/pronouns-for-trans-nonbinary-students-the-states-with-laws-that-restrict-them-in-schools/2023/06 [https://perma.cc/8SZV-T8AT].

423. *See, e.g.*, Solcyré Burga, *Tennessee Passed the Nation's First Law Limiting Drag Shows. Here's the Status of Anti-Drag Bills Across the U.S.*, TIME (Apr. 3, 2023, 2:43 PM), https://time.com/6260421/tennessee-limiting-drag-shows-status-of-anti-drag-bills-u-s/ [https://perma.cc/QZX7-8JET].

424. *See, e.g.*, Makayla Richards & Jesse Horne, *Cobb County Educator Faces Termination Over Controversial Book: Georgia's 'Divisive Concepts Law,'* 11ALIVE.COM (June 26, 2023, 5:37 PM), https://www.11alive.com/article/news/politics/cobb-county-educator-termination-book-geor

school textbooks,[425] and to restrict the ability of schools to require the use of face masks as a public health measure during the Covid-19 pandemic.[426]

Finally, and perhaps most importantly, relying on the libertarian ethos to promote LGBTQ rights encourages the public to be skeptical of government writ large. On its face, this skepticism appears well-founded when states, for example, target transgender and gender nonconforming individuals with repressive laws.[427] But since it is not possible to construct a progressive society in the absence of significant governmental involvement, progressives should be careful, as Professor West warns, not to contribute to or "feed[] a distrust of the machinations of public deliberation—including processes of government, of democracy, and collective action—the use of which is essential to any sort of genuinely progressive political movement against private injustice."[428] Framing normative questions related to LGBTQ rights in ways that challenge rather than strengthen the libertarian ethos by, among other things, emphasizing the government's affirmative obligations to provide basic goods like healthcare, as well as its essential and positive role in creating the social and economic conditions that make liberty and equality achievable for everyone, can help counteract and respond to the libertarian insistence that government action is almost always a source of harm and rarely a source of good.

By emphasizing the extent to which meaningful liberty and equality often depends on state action, LGBTQ rights supporters can help reduce the type of skepticism of government that libertarians have been so effective in promoting

gias-divisive-concepts-law-katherine-rinderle-my-shadow-is-purple/85-b167e2ad-9530-4180-8f39-a72370296cc2 [https://perma.cc/9HLM-88TS]; Paige Williams, *The Right-Wing Mothers Fuelling the School Board Wars*, NEW YORKER (Oct. 31, 2022), https://www.newyorker.com/magazine/2022/11/07/the-right-wing-mothers-fuelling-the-school-board-wars [https://perma.cc/9F2E-9WAF].

425. *See, e.g.*, Sarah Mervosh, *Florida Scoured Math Textbooks for 'Prohibited Topics.' Next Up: Social Studies*, N.Y. TIMES (Mar. 20, 2023), https://www.nytimes.com/2023/03/16/us/florida-textbooks-african-american-history.html [https://perma.cc/Z3G2-MNFP].

426. *See, e.g.*, Sarah Mervosh, *Florida's Governor Gives Parents Final Say on Masks for Children in School*, N.Y. TIMES (Aug. 27, 2021), https://www.nytimes.com/2021/07/30/us/florida-desantis-masks-schools.html [https://perma.cc/2X7T-YUMT]; Katie Reilly, *School Masking Mandates are Going to Court. Here's Why the Issue Is So Complicated*, TIME (Oct. 1, 2021, 9:40 AM), https://time.com/6103134/parents-fight-school-mask-mandates/ [https://perma.cc/8D6S-DYRY]. For detailed explorations of the ways in which notions of parental autonomy have been used to undermine progressive objectives and priorities, see generally Naomi Cahn, *The Political Language of Parental Rights: Abortion, Gender-Affirming Care, and Critical Race Theory*, 53 SETON HALL L. REV. 1443 (2023) (exploring the rhetoric of parental rights as used to restrict abortions, ban gender-affirming healthcare, prevent the teaching of critical race theory, and limit drag shows); Maxine Eichner, *Free-Market Family Policy and the New Parental Rights Laws*, 101 N.C. L. REV. 1305 (2023) (exploring recent laws and proposals grounded in parental rights to promote conservative social policies).

427. *See supra* notes 385–91 and 420–423 and accompanying text.

428. West, *supra* note 392, at 1414.

since the 1980s.[429] Unless progressives, on LGBTQ issues and many others, challenge the notion that the government invariably is the problem and not the solution, with the same vehemence and consistency that libertarians use to defend it, we will have little chance of truly transforming the American society by making it a more just and equal one. The judicial and policy outcomes that flow from the libertarian ethos's succesful calls for the disempowerment and diminishment of the state make the attainment of most progressive objectives impossible. Progressives, therefore, should be careful before embracing positions, on LGBTQ issues and other matters, that make it easier for libertarians to render the actions of the state *qua* state suspect.

CONCLUSION

As long as the normative framework for promoting LGBTQ rights fuels or strengthens, however unintentionally, a libertarian ethos centered around a free-wheeling skepticism of government accompanied by an understanding of liberty that is strictly limited to its negative components, that framework will be working at cross-purposes with the attainment of broader progressive objectives, both inside and outside of the sphere of LGBTQ rights.

Progressivism's embrace of the libertarian ethos in matters related to personal, sexual, intimate, reproductive, and gender-identity freedoms has contributed to the strengthening of the libertarian view that the government is almost always the source of problems and almost never the font of their solutions. It has also contributed to strengthening the view that the state's moral and constitutional obligations, as reflected in exclusively negative understandings of liberty rights, are limited to duties of non-intervention. If this is the accepted or assumed normative framework for individual rights, including LGBTQ rights, then it becomes difficult, if not impossible, to make viable political and constitutional claims based on the notion that the government, in many important areas of economic and social policy, has moral and constitutional duties to act and intervene in order to attain distributive and egalitarian objectives.

I fully recognize that persuading Americans (to say nothing of federal judges) that the government has affirmative moral and constitutional obligations to promote human flourishing and advance liberty and equality for all, a process that will require them to put considerable faith in government intervention and regulation, will not be easy.[430] Accomplishing this feat will require multi-prong approaches and strategies, and will likely be a multi-decade effort. But unless progressives consistently and unabashedly highlight the benefits of active

429. *See* Rosen & Schmidt, *supra* note 31, at 129–30.

430. For detailed explorations of how earlier generations of Americans had significantly more trust on the need for robust governmental interventions to achieve distributive and egalitarian objectives, see generally FISHKIN & FORBATH, *supra* note 14; PAUL, *supra* note 11.

governmental involvement in the attainment of distributive and egalitarian objectives, the libertarian ethos will remain unchallenged and firmly in place.

There are different reasons why the pressure on activists to embrace the libertarian ethos in the U.S. is so strong, including the pervasive influence of powerful and well-financed ideological and business groups that relentlessly push libertarian agendas.[431] It is also the case that libertarian arguments regarding smaller government and the need to protect individual freedom from state coercion often resonate with many Americans from across the political spectrum.[432] Important examples of this resonance are the ways in which progressives, as I have shown in this Article, have adopted crucial parts of the libertarian ethos to advance LGBTQ rights.[433] Furthermore, as I have also explored in this Article through an examination of Justice Kennedy's constitutional jurisprudence, it has been difficult to prevail before the Supreme Court in recent decades without embracing the libertarian ethos.[434] For these reasons, it will not be easy to effectively promote LGBTQ rights without strengthening the libertarian ethos; but I believe that, for progressives, it is essential that we try.

431. *See generally* JANE MAYER, DARK MONEY: THE HIDDEN HISTORY OF THE BILLIONAIRES BEHIND THE RISE OF THE RADICAL RIGHT (2016) (detailing the ways in which a network of wealthy libertarians has bankrolled free market fundamentalism); NAOMI ORESKES & ERIK M. CONWAY, THE BIG MYTH: HOW AMERICAN BUSINESS TAUGHT US TO LOATHE GOVERNMENT AND LOVE THE FREE MARKET (2023) (detailing corporate efforts to promote free market fundamentalism). *See also* Edward A. Purcell, Jr., *What Changes in American Constitutional Law and What Does Not?*, 102 IOWA L. REV. 64, 124 (2017) (noting "the rapid growth of an energetic libertarian support network of wealthy donors, corporate sponsors, pro-business foundations, and well-organized right-wing think tanks, and a newly vibrant libertarian-oriented scholarship").

432. *See generally* GARY WILLS, A NECESSARY EVIL: A HISTORY OF AMERICAN DISTRUST OF GOVERNMENT (1999) (historical exploration of Americans' skepticism of government).

433. *See supra* Part I.

434. *See supra* Part II.