

# THE IMPACT OF JUSTICE SCALIA'S REPLACEMENT ON GENDER EQUALITY ISSUES

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## I. INTRODUCTION

### *A. A Constitutional Referendum*

Every Presidential election is, in effect, a national referendum on the meaning of the Constitution. The people of the United States are largely united in their dedication to the general constitutional principles of liberty, equality, fundamental fairness, democracy, and limited government. We are, however, divided as to the proper application of those principles to our laws and public institutions. Elections for the Presidency and (to a much lesser degree) the Senate of the United States afford each citizen the opportunity to vote on how the Constitution should be interpreted.

As a result of presidential elections, Republican presidents nominated all ten of the Justices appointed to the United States Supreme Court between 1969 and 1991.<sup>1</sup> As a result, Republicans have controlled the Supreme Court since 1970.<sup>2</sup> For three years during this period (1991 to 1994), eight of the Justices on the Supreme Court were Republican appointees.<sup>3</sup> The last forty-six years may be accurately described as the era of the modern Republican Supreme Court. During this period the right to gender equality was recognized<sup>4</sup> and the right to marriage equality was

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1. See Supreme Court of the United States, *Members of the Supreme Court of the United States*, [https://www.supremecourt.gov/about/members\\_text.aspx](https://www.supremecourt.gov/about/members_text.aspx) (last accessed October 19, 2016) (listing justices by date of judicial oath).

2. See WebLineNews, *Supreme Court Justice Charts, History of Appointments Has Favored Republicans* (February 17, 2016) (featuring chart of *Supreme Court Justices, members over time from 1857 to 2015*), at <http://www.weblinews.com/supreme-court-justice-charts/> (last accessed October 19, 2016).

3. *Id.*

4. See *Reed v. Reed*, 404 U.S. 71, 77 (1971) (striking down state law that discriminated on the basis of gender as a violation of Equal Protection).

realized.<sup>5</sup> However, also during this period many Republican Justices staunchly opposed gender equality, and far more remains to be accomplished.

Since Justice Scalia's death, the Supreme Court has been deadlocked on a number of Constitutional questions. Accordingly, his replacement on the Supreme Court, dictated by the 2016 presidential election, will have a dramatic effect on the interpretation of the Constitution, including a number of issues relating to gender equality.

President Barack Obama nominated U.S. Court of Appeals Judge Merrick Garland to replace Justice Scalia on the Court, but Senate Republicans, fearing loss of control of the Court for perhaps both political<sup>6</sup> and economic reasons,<sup>7</sup> refused to consider Judge Garland's

5. See *United States v. Windsor*, 133 S.Ct. 2675, 2696 (2013) (striking down the federal Defense of Marriage Act); See also *Obergefell v. Hodges*, 135 S.Ct. 2584, 2607 (2015) (striking down state laws banning same-sex marriage).

6. Loss of control of the Supreme Court would be catastrophic for the political aspirations of the Republican Party. In recent years the Supreme Court has issued a number of decisions on election law aiding the Republican Party, either striking down legal protections for voters or upholding discriminatory laws that have tilted the scales towards Republican candidates for office. See e.g. *Shelby County v. Holder*, 133 S. Ct. 2612 (2013) (striking down preclearance provision of Voting Rights Act); *Citizens United v. FEC*, 558 U.S. 310 (2010) (striking down prohibition on corporate expenditures for political candidates); *Crawford v. Marion County Election Bd.*, 553 U.S. 181 (2010) (upholding restrictive voter identification law); *League of United Latin American Citizens v. Pery*, 548 U.S. 999 (2003) (upholding political gerrymandering plan for Texas congressional districts). All of these decisions would likely be overruled by a Democratic majority on the Supreme Court. Moreover, in 2016 the Court split 4-4 in a case considering the constitutionality of "fair share fees" for public unions. *Friedrichs v. California Teachers Ass'n*, 135 S.Ct. 2933 (2016) (summarily affirming the decision of the Ninth Circuit Court of Appeals upholding the constitutionality of fair share fees for public unions). A conservative Supreme Court would tip the balance on that issue, making it impossible for public employees to bargain collectively, thereby destroying one of the most powerful constituencies of the Democratic Party.

7. A lot of money is also riding on control of the Supreme Court, in terms of the interpretation of federal banking, antitrust, and environmental laws, as well as laws governing arbitration claims, class action suits, and punitive damage awards. For example, in one single pro-business decision, the Supreme Court reduced a punitive damages award against Exxon for the *Exxon Valdez* disaster from \$2.5 billion to \$507 million – an amount that exceeds the amount of money spent by the candidates in a presidential election. *Exxon Shipping Co. v. Baker*, 554 U.S. 471 (2003). See also James B. Stewart, *Republicans Have a Stake in Making a Deal on a Supreme Court Justice*, NEW YORK TIMES (March 3, 2016), at <http://www.nytimes.com/2016/03/04/business/a-way-to-a-deal-on-a-supreme-court-nomination.html>. Stewart quotes Professor Lee Epstein:

And when it comes to business and economic issues, what's at stake is nearly every pro-business Supreme Court ruling since the Reagan era and the emergence of a reliable 5-to-4 pro-business majority on the court. 'To see the number of cases that could change with this appointee is stunning,' since so many of the most important cases were decided by 5-to-4 votes, said Lee Epstein, who teaches constitutional law and legal institutions at Washington University in St. Louis.

See generally Victoria Bassetti, *Behind the Merrick Garland Blockade*, Brennan Center for Justice (May 5, 2016), <https://www.brennancenter.org/blog/behind-merrick-garland-blockade>. Bassetti

candidacy or to even hold hearings on his nomination. Newly-elected President Donald Trump has nominated U.S. Court of Appeals Judge Neil Gorsuch to fill Scalia's position on the Court.

### *B. The Swing Justice and the Author of the Majority Opinion*

Since 2006, the "swing justice" on the Supreme Court has been Justice Anthony Kennedy.<sup>8</sup> If a conservative justice like Judge Gorsuch is appointed to replace Justice Scalia, Justice Kennedy will remain the swing justice. If a liberal justice is somehow appointed to that vacancy, the new swing justice will be Justice Stephen Breyer, the most conservative member of the liberal wing of the Court.<sup>9</sup> If President Trump is given the opportunity to fill more than one vacancy on the Supreme Court, the balance will tip even further; the swing justice might be Chief Justice Roberts for the conservatives<sup>10</sup> or Justice Elena Kagan for the liberals.<sup>11</sup>

Even in cases where changing the ideological balance of the Supreme Court would have no effect on the outcome of a case, it could have a dramatic effect on the Court's reasoning, because it might change which justice would author the majority opinion.<sup>12</sup> For example, in the marriage equality cases, if the vote had been 6-3 instead of 5-4, the author of the opinion might have been Ruth Bader Ginsburg instead of Anthony

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describes Republican efforts to create a "business friendly" court. *See also* Lee Epstein, William M. Landes, and Richard A. Posner, *How Business Fares in the Supreme Court*, 97 MINN. L. REV. 1431 (2013), (also available online in University of Chicago Law School, Chicago Unbound (2013) [http://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=5011&context=journal\\_articles](http://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=5011&context=journal_articles)). In a painstakingly careful data-driven analysis, the authors determined that the five Republican justices serving on the Court at the time of Justice Scalia's death all ranked among the ten most-business friendly judges to have served on the Court since 1946, and that all five of the present justices appointed by Republican Presidents were more friendly to business than the existing Democratic justices. *Id.* at 1472.

8. *See* Andrew D. Martin and Kevin M. Quinn, *Dynamic Ideal Point Estimation via Markov Chain Monte Carlo for the U.S. Supreme Court, 1953-1999* (2014) <http://mqscores.berkeley.edu/measures.php> (2014 Court Data Files, Martin Quinn Scores identifying Justice Kennedy as the swing justice from the time of Justice O'Connor's retirement through 2014); 2014 Justice Data Files, *Id.* (showing Justice Kennedy with a posterior mean location of 0.15, the median score among the justices for 2014).

9. *See Id.* (showing Justice Breyer with a posterior mean location of -1.729 for 2014, the "highest" (that is, most conservative) of the four liberal justices).

10. *Id.* (showing Chief Justice Roberts with a posterior mean location of 0.869, the "lowest" (that is, most liberal) of the four conservative justices other than Justice Kennedy).

11. *Id.* (showing Justice Kagan with a posterior mean location of -1.913 for 2014, next highest score among the liberal justices).

12. *See* Washington University Law, *The Supreme Court Writing Database: The Opinion-Writing Process*, <http://supremecourttopinions.wustl.edu/> (last accessed October 3, 2016) (describing how the author of a Supreme Court opinion is selected).

Kennedy, and the Court might have recognized sexual orientation as a suspect classification and declared that laws that intentionally disadvantage this group are subject to heightened scrutiny.

### *C. The Constitutional Provisions Affected*

The most fundamental constitutional bulwark protecting gender equality is the Equal Protection Clause, and there are many Supreme Court decisions on gender discrimination from this Republican era of 1970 forward that are ripe for overruling. However, the constitutional law of gender equality is not limited to questions involving the Equal Protection Clause of the Constitution. Many other provisions of the Constitution also play a critical role in the determination of gender equality, including the Establishment Clause, the Free Exercise Clause, the right to Freedom of Expression under the First Amendment; the Right to Privacy, which is one aspect of the right to “liberty” under the Due Process Clause of the Fifth and Fourteenth Amendments; Congress’ power to enact legislation under the Commerce Clause, the General Welfare Clause, and the Enforcement Clause of the Fourteenth Amendment; the State Action doctrine; and the unenumerated principle of “state sovereignty”, which is derived from the 11<sup>th</sup> Amendment. Furthermore, the Supreme Court is also divided on questions of statutory interpretation that relate to gender equality.

This paper discusses the impact that Justice Scalia’s replacement will have on these aspects of constitutional law and statutory interpretation that relate to gender equality.

## II. EQUAL PROTECTION

### *A. Standard of Review*

The Supreme Court has recognized Equal Protection claims based on gender discrimination for forty-five years, but the standard of review employed by the Court during that period to evaluate such claims has wavered from rational basis to strict scrutiny to intermediate scrutiny to a strong form of intermediate scrutiny. At first, in *Reed v. Reed* the Court employed a low level of review, the rational basis test.<sup>13</sup> Three years later in *Frontiero v. Richardson* a plurality of the Court adopted strict scrutiny

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13. See *Reed*, 404 U.S. at 761 (stating that the issue in the case was “whether a difference in the sex of competing applicants for letters of administration bears a rational relationship to a state objective that is sought to be advanced” by the Idaho statute).

as the proper standard of review.<sup>14</sup> In 1976 in *Craig v. Boren* the Court applied an “intermediate scrutiny” standard.<sup>15</sup> In 1996, in what remains the most significant gender discrimination case under the Equal Protection Clause, the Court once again strengthened the applicable standard. Writing for the majority in *United States v. Virginia*, Justice Ruth Bader Ginsburg held that to pass constitutional muster a law discriminating on the basis of gender must be supported by an “exceedingly persuasive justification.”<sup>16</sup> While Justice Kennedy joined that opinion, Justices Scalia and Thomas dissented,<sup>17</sup> and Chief Justice Rehnquist concurred in the judgment only, writing separately to express his opposition to the “exceedingly persuasive justification” standard.<sup>18</sup> Justice Ginsburg most recently invoked this standard in her dissenting opinion in *Coleman v. Court of Appeals of Maryland*, and was joined by the other three liberal members of the Court.<sup>19</sup> The addition of a liberal justice to the Court would install a majority who support the “exceedingly persuasive justification” standard for laws that discriminate on the basis of gender, while the addition of two more conservative members of the Court would probably spell its demise.

### *B. Intent to Discriminate*

One of the great, yet almost invisible, constitutional principles is the doctrine of “governmental intent.”<sup>20</sup> Governmental intent is a theme that

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14. See *Frontiero v. Richardson*, 411 U.S. 677, 682 (1973) (stating, “classifications based upon sex, like classifications based upon race, alienage, and national origin, are inherently suspect and must therefore be subjected to close judicial scrutiny” (footnotes omitted)).

15. See *Craig v. Boren*, 429 U.S. 190, 197 (1976) (stating, “classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives”).

16. See *United States v. Virginia*, 518 U.S. 515, 531 (1996) (Ginsburg, J.) (ordering that women be admitted to the Virginia Military Institute on the same basis as men, and stating, “Parties who seek to defend gender-based government action must demonstrate an exceedingly persuasive justification for that action.”).

17. See *id.* at 566 (Scalia, J., dissenting) (invoking a “tradition” approach to interpreting the Equal Protection Clause). Justice Scalia commenced his opinion by equating coeducation with the closure: “Today the Court shuts down an institution that has served the people of the Commonwealth of Virginia with pride and distinction for over a century and a half.”

18. See *id.* at 559 (Rehnquist, C.J., concurring in the judgment) (“While terms like “important governmental objective” and “substantially related” are hardly models of precision, they have more content and specificity than does the phrase “exceedingly persuasive justification.”).

19. See *Coleman v. Court of Appeals of Maryland*, 132 S.Ct. 1327, 1348 (2012) (Ginsburg, J., dissenting) (applying the “exceedingly persuasive justification” standard from *United States v. Virginia*).

20. See generally Stephen E. Gottlieb, *MORALITY IMPOSED: THE REHNQUIST COURT AND LIBERTY IN AMERICA* 54 (2000) (“The role of intent in law may seem quite arcane but, in fact, it has had a shattering effect on large areas of law and once again it reflects the substitution of a conservative

pervades Constitutional Law. In several other areas of Constitutional Law the government's intent determines the standard of review that the law is subject to. For example, in freedom of expression cases, the Supreme Court has stated that "The government's purpose is the controlling consideration"<sup>21</sup> in determining whether the law is content neutral, content based, or viewpoint based.<sup>22</sup>

In Equal Protection cases, the doctrine of governmental intent is known as the requirement of "purposeful discrimination," and it has an even greater significance than in other areas of constitutional law. No matter how great of a disproportionate impact that a law has upon a particular group, if the law was not adopted for the purpose of having that effect upon that particular group, then the members of that group have no valid claim of discrimination under the Equal Protection Clause against that law.<sup>23</sup>

The most egregious example illustrating the principle of discriminatory intent in gender equality cases is *Geduldig v. Aiello*.<sup>24</sup> In that 1974 case, the Supreme Court considered the constitutionality of a California state disability insurance program that did not cover disabilities resulting from complications of pregnancy.<sup>25</sup> The Court found that the law did not discriminate between women and men, but rather it discriminated between "pregnant women and nonpregnant persons."<sup>26</sup> Refusing to treat this as a case of gender discrimination,<sup>27</sup> the Court upheld the law on the ground that it would save money, which is of course a legitimate governmental purpose.<sup>28</sup> Justice Ginsburg has eloquently argued that it is

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moral view for a liberal / utilitarian view.").

21. *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989).

22. *See id.* (finding that a municipal sound amplification guideline was content neutral).

23. *See, e.g., Washington v. Davis*, 426 U.S. 229, 239 (1976) ("our cases have not embraced the proposition that a law or other official act, without regard to whether it reflects a racially discriminatory purpose, is unconstitutional solely because it has a racially disproportionate impact."). *See also* *Gottlieb*, *supra* note 20, at 57 ("In the speech and racial areas, . . . the conservatives have used the intent standard to substitute conservative notions of morality for an instrumental standard, which would have judged actions by their often predictable result.").

24. *Geduldig v. Aiello*, 417 U.S. 484, 497 (1974) (upholding state disability insurance program excluding coverage for disability resulting from normal pregnancy).

25. *See id.* at 489 (quoting the statutory provision excluding coverage for "any injury or illness caused by or arising in connection with pregnancy up to the termination of such pregnancy and for a period of 28 days thereafter.").

26. *Id.* at 496 n. 20.

27. *See id.* The Court stated:

[T]his case is a far cry from cases like *Reed v. Reed* and *Frontiero v. Richardson*, involving discrimination based on gender as such. The California insurance program does not exclude anyone from benefit eligibility because of gender but merely removes one a physical condition – pregnancy – from the list of compensable disabilities.

28. *See id.* at 498 (stating, "The State has a legitimate interest in maintaining the self-

time for the Court to overrule *Aiello* and to recognize that under the Constitution, discrimination on the basis of pregnancy is discrimination on the basis of gender.<sup>29</sup>

Another extreme case decided during the Republican era involving the application of the requirement of discriminatory intent is *Personnel Administrator v. Feeney*.<sup>30</sup> In that case, the Court ruled that a state law granting an employment preference to veterans did not purposefully discriminate against women, even though 98% of the veterans at time were men, and the law had the effect of virtually locking women out of eligibility for civil service positions in the State of Massachusetts.<sup>31</sup> In *Feeney*, as in *Aiello*, everybody knew that the law would have a devastating effect on women, but women were prohibited from challenging the law under Equal Protection because they could not prove that lawmakers had a conscious intent to discriminate against them; they could not prove that the law was adopted for the purpose of imposing a burden upon them.<sup>32</sup>

Another recent example of the Court's blindness to the gender impact of its decisions is its ruling in *Harris v. Quinn* (2014),<sup>33</sup> which overruled decades-old precedent in striking down fair share fees for a public union of home health care workers, and with it the viability of those workers to unionize. As Eileen Boris and Jennifer Klein state in their essay *Reducing*

supporting nature of its insurance program.”).

29. See *Coleman v. Court of Appeals of Maryland*, 132 S.Ct. 1327, 1346 (2012) (Ginsburg J., dissenting). Justice Ginsburg stated:

In sum, childbearing is not only a biological function unique to women. It is also inextricably intertwined with employers' "stereotypical views about women's commitment to work and their value as employees." Because pregnancy discrimination is inevitably sex discrimination, and because discrimination against women is tightly interwoven with society's beliefs about pregnancy and motherhood, I would hold that *Aiello* was egregiously wrong to declare that discrimination on the basis of pregnancy is not discrimination on the basis of sex. (citation omitted)

30. *Personnel Admin. v. Feeney*, 422 U.S. 256, 281 (1979) (upholding Massachusetts law granting absolute preference to veterans in civil service appointments).

31. See *id.* at 271 n. 21 (“In 1972, women still constituted less than 2% of the enlisted strength.”); *Id.* at 265 (stating that Feeney “eventually concluded that further competition for civil service positions of interest to veterans would be futile.”).

32. See *id.* at 279. The court stated:

“Discriminatory purpose,” however, implies more than intent as volition or intent as awareness of consequences. It implies that the decisionmaker, in this case a state legislature, selected or reaffirmed a particular course of action at least in part “because of,” not merely “in spite of,” its adverse effects upon an identifiable group. Yet, nothing in the record demonstrates that this preference for veterans was originally devised or subsequently re-enacted because it would accomplish the collateral goal of keeping women in a stereotypic and predefined place in the Massachusetts Civil Service.

33. *Harris v. Quinn*, 134 U.S. 2618, 2644 (2014) (striking down state law requiring home health aides to pay fair-share fees to union that represented them in collective bargaining).

*Labor to Love*, “*Harris v. Quinn* shows as little respect for history as it does for women’s work.”<sup>34</sup>

The reality, of course, is that there is a deeply entrenched unconscious bias that accepts double standards and fosters indifference to gender discrimination. In *Aiello*, the California legislature was indifferent to the impact of denying disability benefits to women who suffered complications from pregnancy, and in *Feeney*, the Massachusetts legislature was indifferent to the gender implications of granting an absolute preference to veterans in civil service employment. In both cases, the Supreme Court was indifferent to the evident and predictable disproportionate impact of these laws. The entire concept of “discriminatory intent” must be reexamined to account for unconscious bias. A liberal majority would certainly be more receptive to this argument.

### C. The “Real Differences” Test

In his concurring opinion in *Railway Express Agency v. New York*, Justice Robert Jackson proposed an insightful standard for equal protection cases: the “real differences” test.<sup>35</sup> Jackson suggested that the law may not treat groups of people differently unless there are “real differences” between them and other persons.<sup>36</sup> Furthermore, to justify disparate treatment under the law, those differences must be “fairly related to the object of the legislation.”<sup>37</sup>

During the modern Republican era, the Supreme Court repeatedly misapplied the “real differences” test in gender discrimination cases. For example, in *Rostker v. Goldberg*, the Court ruled that it was constitutional for the law to require men but not women to register for the draft because women were not legally eligible for combat,<sup>38</sup> and in *Michael M. v. Sonoma County Superior Court*, the Court decided that it was constitutional to hold male but not female juveniles liable for statutory rape, because (the court found) the law was intended to prevent teen

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34. Eileen Boris, Jennifer Klein, Joel Rogers, Joshua Freeman, and Jane McAlvey, *After ‘Harris v. Quinn’: The State of Our Unions*, *The Nation* (July 2, 2014), at <https://www.thenation.com/article/after-harris-v-quinn-state-our-unions/>.

35. See *Railway Express Agency v. N.Y.*, 336 U.S. 106, 112 (1949) (Jackson, J., concurring) (stating, “I regard it as a salutary doctrine that cities, states and the Federal Government must exercise their powers so as not to discriminate between their inhabitants except upon some reasonable differentiation fairly related to the object of regulation.”).

36. *Id.*

37. *Id.*

38. See *Rostker v. Goldberg*, 453 U.S. 57, 83 (1981) (upholding provisions of Military Selective Service Act requiring men, but not women, to register for the draft).



pregnancy and only women can become pregnant.<sup>39</sup>

There is of course, no valid reason for the law to exempt women from the military draft. Nor is there a valid reason to hold them immune from prosecution for statutory rape. In *Rostker*, the difference between men and women – eligibility for combat – was not a “real difference”, but rather one that was imposed by federal statute and military regulation.<sup>40</sup> In *Michael M.*, the difference between men and women – the possibility of pregnancy – was not “fairly related to the object of the legislation,” which was to protect children from sexual contact.<sup>41</sup>

Is it not remarkable that the same Court – with almost the same set of justices – could decide both *Rostker* and *Feeney*, *Michael M.* and *Aiello*? In *Rostker* the Court was supremely aware that women were not eligible for combat, but that awareness disappeared in *Feeney* when veterans were awarded an absolute preference for government jobs. And in *Michael M.* the Court determined that the case turned on the fact that only women can become pregnant, but that signal fact was of no significance in *Aiello*.

A more liberal court will overrule both *Rostker* and *Michael M.*, and will rightfully acknowledge that the real differences between men and women are only seldom “fairly related” to the purposes of the law.

### III. LGBTQ RIGHTS

#### A. Marriage Equality

The Supreme Court's decisions in *United States v. Windsor*<sup>42</sup> and

39. See *Michael M. v. Superior Ct. of Sonoma County*, 450 U.S. 464, 476 (1981) (upholding state law punishing underage male, but not underage female, for engaging in sexual intercourse).

40. See *Rostker*, *supra* note 38, at 76-77. The Court stated:

Women as a group, however, unlike men as a group, are not eligible for combat. The restrictions on the participation of women in combat in the Navy and Air Force are statutory. Under 10 U.S.C. § 6015, “women may not be assigned to duty on vessels or in aircraft that are engaged in combat missions,” and under 10 U.S.C. § 8549 female members of the Air Force “may not be assigned to duty in aircraft engaged in combat missions.” The Army and Marine Corps preclude the use of women in combat as a matter of established policy. Congress specifically recognized and endorsed the exclusion of women from combat in exempting women from registration. (citations omitted)

41. See *Michael M.*, *supra* note 39, at 471-472. The Court stated:

We need not be medical doctors to discern that young men and young women are not similarly situated with respect to the problems and the risks of sexual intercourse. Only women may become pregnant, and they suffer disproportionately the profound physical, emotional and psychological consequences of sexual activity. The statute at issue here protects women from sexual intercourse at an age when those consequences are particularly severe. (footnote omitted)

42. *Windsor*, 133 S.Ct. at 2696 (striking down provision of federal Defense of Marriage Act

*Obergefell v. Hodges*<sup>43</sup> were each rendered by a 5-4 majority.<sup>44</sup> The addition of two conservative justices would reverse those results. On the other hand, as noted above, the addition of a liberal justice might expand the reasoning of the Court. In *Windsor* and *Obergefell*, Justice Kennedy struck down the restrictive marriage laws on the ground that they failed to serve any legitimate governmental interest.<sup>45</sup> In neither of the marriage cases does Justice Kennedy discuss whether sexual orientation is a suspect classification, or whether legislation directed against gays and lesbians is presumptively unconstitutional and subject to heightened scrutiny.<sup>46</sup>

### B. Sexual Freedom

*Lawrence v. Texas*<sup>47</sup> was authored by Justice Kennedy. In striking down a Texas law that made same-sex intercourse a crime, he reasoned that the law infringed upon the liberty rights of gays and lesbians.<sup>48</sup> Unlike Justice Kennedy, in her concurring opinion in *Lawrence* Justice Sandra Day O'Connor based her decision on Equal Protection, finding that it was unconstitutional for the law to permit opposite sex couples to engage in oral and anal sex but to punish same-sex couples for the same behavior.<sup>49</sup> However, Justice O'Connor, like Justice Kennedy in his later opinions in *Windsor* and *Obergefell*, declined to conduct a "suspect class" analysis; instead she reasoned that moral disapproval, without more, is an illegitimate basis for discriminating against a discrete group of people.<sup>50</sup> As in the marriage cases, the addition of a single liberal justice might enable the Court to find that gays and lesbians are a suspect class deserving of heightened judicial protection from hostile legislation.

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prohibiting the federal government from recognizing same-sex marriages).

43. *Obergefell*, 135 S.Ct. 2584 (striking down state laws prohibiting same-sex marriage).

44. *See id.*

45. *See Windsor*, 133 S.Ct., at 2696 (stating, "The federal statute is invalid, for no legitimate purpose overcomes the purpose and effect to disparage and to injure those whom the State, by its marriage laws, sought to protect in personhood and dignity."); *see also Obergefell*, 135 S.Ct., at 2608 (stating, "there is no lawful basis for a State to refuse to recognize a lawful same-sex marriage performed in another State on the ground of its same-sex character").

46. *See Windsor*, 133 S.Ct. 2675; *Obergefell*, 135 S. Ct. 1039.

47. *Lawrence v. Texas*, 539 U.S. 558, 578 (2003) (striking down state law making same-sex intercourse a crime).

48. *Id.* at 562. (stating in the first line of the opinion, "Liberty protects the person from unwarranted government intrusions into a dwelling or other private places.")

49. *Id.* at 579 (O'Connor, J. concurring in the judgment) (stating, "Rather than relying on the substantive component of the Fourteenth Amendment's Due Process Clause, as the Court does, I base my conclusion on the Fourteenth Amendment's Equal Protection Clause.")

50. *Id.* at 583 (O'Connor, J., concurring in the judgment) (stating, "Moral disapproval of a group cannot be a legitimate governmental interest under the Equal Protection Clause because legal classifications must not be "drawn for the purpose of disadvantaging the group burdened by the law.").

Justice Scalia famously dissented in *Lawrence*<sup>51</sup> and never retreated from his position that the government may make homosexuality a crime.<sup>52</sup> With the addition of two conservative justices the Supreme Court might adopt his position, overrule *Lawrence*, and authorize the states to once again criminalize same-sex intercourse.

### C. Distortion of the Political Process

In *Romer v. Evans*,<sup>53</sup> the Supreme Court struck down a state constitutional amendment that purported to strip the power from state and local governments to adopt laws that prohibited discrimination on the basis of sexual orientation.<sup>54</sup> The Court reasoned that it was unconstitutional for the government to make it more difficult for one group of people to obtain the passage of protection from acts of discrimination than it is for other groups.<sup>55</sup> In the wake of the Supreme Court decisions recognizing marriage equality, a number of states have enacted or proposed laws that would similarly prohibit governmental units from outlawing discrimination against gays, lesbians, and transgender persons.<sup>56</sup> These laws distort the political process, just like the state constitutional amendment struck down in *Romer*. With two additional conservative justices, the Supreme Court might uphold these laws by overruling *Romer* or finding justification to distinguish it, as the Court did in *Schuette v. Coalition to Defend Affirmative Action*.<sup>57</sup>

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51. See *id.* at 586-605 (Scalia, J., dissenting); *Id.* at 594 (“*Bowers* was right”).

52. See Associated Press Salon, *Scalia: It's “effective” to draw parallels between murder and sodomy*, (Dec. 11, 2012) (quoting Justice Scalia as stating, “If we cannot have moral feelings against homosexuality, can we have it against murder?”), [http://www.salon.com/2012/12/11/scalia\\_its\\_effective\\_to\\_draw\\_parallels\\_between\\_murder\\_and\\_sodomy/](http://www.salon.com/2012/12/11/scalia_its_effective_to_draw_parallels_between_murder_and_sodomy/). (last accessed October 20, 2016).

53. *Romer v. Evans*, 517 U.S. 620, 634 (1996) (striking down state constitutional amendment prohibiting the state or any of its agencies or subdivisions from adopting laws prohibiting discrimination on the basis of sexual orientation).

54. *Id.*

55. See *id.* at 633 (stating, “A law declaring that in general it shall be more difficult for one group of citizens than for all others to seek aid from the government is itself a denial of equal protection of the laws in the most literal sense.”).

56. See e.g., N.C. Public Facilities Privacy & Security Act, 2016 N.C. Sess. Laws 3, commonly known as House Bill 2 (“HB2”). This aspect of HB2 is discussed in the text accompanying notes 99-101 *infra*.

57. *Schuette v. Coalition to Defend Affirmative Action*, 134 Ct. 1623, 1638 (2014) (distinguishing *Romer* and upholding state constitutional amendment prohibiting the state, state agencies, state universities, and political subdivisions from adopting race-conscious affirmative action programs).

#### IV. REPRODUCTIVE FREEDOM

##### A. Abortion

Justice Kennedy has stood by the commitment that he, Justice Sandra Day O'Connor, and Justice David Souter made in 1992 in *Planned Parenthood of Southeastern Pennsylvania v. Casey*<sup>58</sup> when they reaffirmed *Roe v. Wade*<sup>59</sup> and preserved a woman's right to terminate a pregnancy. For example, in 2016 in *Whole Women's Health v. Hellerstedt*,<sup>60</sup> Justice Kennedy voted with the four liberal justices to strike down the "admitting privileges" and "surgical center requirements" provisions of the Texas TRAP law.<sup>61</sup> As with so many other constitutional issues, the replacement of Justice Scalia with a conservative justice would simply preserve the status quo. The addition of two conservative justices would likely be sufficient to overturn *Roe v. Wade* and all of the attendant rights. The addition of a liberal justice would likely result in expanded protection of the right to an abortion, principally because the Court might replace the "undue burden" test with "strict scrutiny."

Normally when a law "infringes" or "affects" a constitutional right, the Supreme Court presumes that the law is unconstitutional and applies strict scrutiny to determine its constitutionality.<sup>62</sup> But when a law restricts a woman's right to terminate a pregnancy, the Supreme Court evaluates its constitutionality by asking whether the law imposes an "undue burden" on the woman's right.<sup>63</sup> In applying the "undue burden" test, the Court has not presumed that the law is unconstitutional as it does with strict

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58. *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 846 (1992) (reaffirming *Roe v. Wade*).

59. *Roe v. Wade*, 410 U.S. 113 (1973) (establishing the right of a woman to terminate a pregnancy prior to viability).

60. *Whole Women's Health v. Hellerstedt*, 136 S.Ct. 2292, 2300 (2016) (striking down provisions of Texas law requiring abortion providers to have admitting privileges at a nearby hospitals and requiring abortion facilities to satisfy the standards of surgical centers).

61. *See id.*

62. *See, e.g., Griswold v. Connecticut*, 381 U.S. 479, 496 (1965) (Goldberg, J., concurring). Justice Goldberg stated:

In a long series of cases this Court has held that where fundamental personal liberties are involved, they may not be abridged by the States simply on a showing that a regulatory statute has some rational relationship to the effectuation of a proper state purpose. 'Where there is a significant encroachment upon personal liberty, the State may prevail only upon showing a subordinating interest which is compelling.' The law must be shown 'necessary, and not merely rationally related to, the accomplishment of a permissible state policy.' (citation omitted).

63. *See, e.g., Casey*, 505 U.S., at 874 (stating, "Only where state regulation imposes an undue burden on a woman's ability to make this decision does the power of the State reach into the heart of the liberty protected by the Due Process Clause.").

scrutiny. Instead, in effect, the persons challenging the law in effect bear the burden of proving that the law “unduly” inhibits a woman’s rights. The undue burden standard has been used to uphold numerous restrictions on the right to an abortion, including laws banning government funding of abortions,<sup>64</sup> prohibiting abortion advice or referrals,<sup>65</sup> imposing waiting periods,<sup>66</sup> mandating patients to be subjected to “counseling” against abortions,<sup>67</sup> and requiring parental consent.<sup>68</sup>

Moreover the modern Republican Supreme Court has at times been reluctant to protect women from acts of private interference with reproductive freedom. While the Court has acknowledged that laws preserving access to clinics are “content neutral,”<sup>69</sup> the Court has, as often as not, struck down these laws because they were not “narrowly tailored” enough.<sup>70</sup> Most recently in *McCullen v. Coakley*,<sup>71</sup> the Court unanimously struck down a statute requiring protesters to stay 35 feet away from reproductive clinic entrances. Sixteen years ago in *Hill v. Colorado*,<sup>72</sup> the Court upheld a statute prohibiting protesters from approaching within eight feet of another person near a health care facility without that person’s consent.<sup>73</sup> In his dissenting opinion in *Hill*, Justice Kennedy fired a shot across the bow, stating:

The Court now strikes at the heart of the reasoned, careful balance I had believed was the basis for the opinion in *Casey*.

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So committed is the Court to its course that it denies these protesters, in the face of what they consider to be one of life’s gravest moral crises, even the opportunity to try to offer a fellow citizen a little pamphlet, a

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64. See, e.g., *Maher v. Roe*, 432 U.S. 464, 499 (1977) (upholding Connecticut regulation prohibiting funding of abortions that were not medically necessary).

65. See *Rust v. Sullivan*, 500 U.S. 173 (1991) (upholding regulations prohibiting recipients of funding under Title X from abortion counseling and referrals).

66. See *Casey*, 505 U.S., at 878 (1992) (upholding state law imposing various restrictions on abortions).

67. See *id.*

68. See *id.*

69. See, e.g., *Madsen v. Women’s Health Center*, 512 U.S. 753, 770 (1994) (finding injunction ordering protestors to stay 36 feet away from the clinic to be content neutral).

70. See *id.* at 773 (upholding the 36-foot buffer zone but striking down other portions of the injunction).

71. *McCullen v. Coakley*, 134 S. Ct. 2518, (2014) (striking down a statute requiring protesters to stay 35 feet away from clinic entrances).

72. *Hill v. Colorado*, 530 U.S. 703, 735 (2000) (upholding statute requiring clinic protesters to not approach within eight feet of persons entering the clinic).

73. See *id.*

handheld paper seeking to reach a higher law.<sup>74</sup>

Justice Kennedy signaled in *Hill* that he might rescind his reaffirmance of *Roe* if the Court was unwilling to acknowledge what he considered to be the legal rights and moral prerogatives of abortion protestors. I believe that his message was heard in *McCullen v. Coakley*;<sup>75</sup> none of the liberal justices dissented or even wrote a concurring opinion. The addition of a fifth liberal justice would strengthen the hand of those who wish to protect clinic patients and staff from obstruction and harassment.

### B. Contraception

The entire modern understanding of the Right to Privacy may be at stake in this election. Like Justice Scalia, Justice Alito has never acknowledged the correctness of *Griswold v. Connecticut* or the central principle of the Right to Privacy. In *Planned Parenthood v. Casey*, the Court framed the Right to Privacy in these terms:

Our law affords constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education. Our cases recognize “the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.” Our precedents “have respected the private realm of family life which the state cannot enter.” These 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. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State.<sup>76</sup>

The Court repeated and reaffirmed this statement of the Right to Privacy in *Lawrence*<sup>77</sup> and *Obergefell*.<sup>78</sup> Dissenting in *Obergefell*, Chief Justice Roberts took the position that the only unenumerated constitutional rights Americans possess are those that are rooted in tradition.<sup>79</sup> Justice Alito

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74. *Id.* at 791-792.

75. *McCullen*, 134 S. Ct. 2518 (2014).

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

77. *See Lawrence*, 539 U.S., at 574 (quoting this passage from *Casey*).

78. *See Obergefell*, 135 S.Ct., at 2597 (stating, “these liberties extend to certain personal choices central to individual dignity and autonomy, including intimate choices that define personal identity and beliefs.”).

79. *See id.*, at 2616 (Roberts, C.J., dissenting) (stating, “The theory is that some liberties are

gave the same reason for rejecting marriage equality in *Windsor*.<sup>80</sup> Justice Scalia had the same truncated vision of our fundamental rights.<sup>81</sup> If a majority of like-minded conservative justices were appointed to the Supreme Court, they might reject the principle that the American people have a constitutional right to make intimate and personal choices regarding “marriage, procreation, contraception, family relationships, child rearing, and education” and opt instead for the “specific tradition” test favored by Justice Scalia; and they might find that the right to use contraception is not “deeply rooted in the nation’s tradition” and therefore not a constitutional right.

## V. THE VALIDITY AND INTERPRETATION OF “RELIGIOUS LIBERTY” LEGISLATION

### A. *Federal RFRA*

In *Burwell v. Hobby Lobby Stores Inc.*,<sup>82</sup> the Supreme Court construed the Federal Religious Freedom Restoration Act as invalidating a provision of the Affordable Care Act requiring employer-funded health insurance to cover all FDA-approved forms of birth control.<sup>83</sup> In a decision of “startling breadth,”<sup>84</sup> the majority of the Court expanded the concept of “religious liberty” beyond all previous bounds. Echoing its ruling in *Citizens United* that recognized the right of corporations to participate in the political process,<sup>85</sup> in *Hobby Lobby* the Court for the first time declared that for-profit corporations have the capacity and the right

“so rooted in the traditions and conscience of our people as to be ranked as fundamental,” and therefore cannot be deprived without compelling justification,” *quoting* *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934)).

80. *See Windsor*, 133 S.Ct., at 2717 (Alito, J., dissenting) (stating, “What *Windsor* and the United States seek . . . is not the protection of a deeply rooted right but the recognition of a very new right.”).

81. *See Michael H. v. Gerald D.*, 491 U.S. 110, 127 fn. 6 (Scalia, J.) (writing for three members of the Court and contending that fundamental rights must be based upon “specific traditions” “continuing to the present day”).

82. *Burwell v. Hobby Lobby Stores Inc.* 134 S.Ct. 2751, 2777 (2014).

83. *See id.*

84. *Id.* at 2787 (Ginsburg, J., dissenting) (stating, “In a decision of startling breadth, the Court holds that commercial enterprises, including corporations, along with partnerships and sole proprietorships, can opt out of any law (saving only tax laws) they judge incompatible with their sincerely held religious beliefs.”).

85. *Citizens United v. Federal Election Commission*, 558 U.S. 310, (2010) (ruling that corporations have a constitutional right to spend money to support candidates for public office; *id.* at 354 (stating, “By suppressing the speech of manifold corporations, both for-profit and nonprofit, the Government prevents their voices and viewpoints from reaching the public and advising voters on which persons or entities are hostile to their interests.”).

to exercise religion.<sup>86</sup> In an even more extreme and unprecedented ruling, for the first time in its history the Supreme Court declared that in exercising religion, one person has the right to deprive another person of their legal rights.<sup>87</sup>

Justice Ginsburg's powerful dissent in *Hobby Lobby* rejects these and the other constitutional innovations of Justice Alito's majority opinion.<sup>88</sup> With the addition of one additional liberal justice, her dissenting opinion will become the majority.

### B. State RFRA's

In the wake of the Court's rulings in *Windsor* and *Obergefell*, several states have enacted or considered enacting legislation permitting discrimination against LGBTQ individuals and couples. For example, Mississippi H.B. 1523 authorizes both private persons and government employees to act upon three specific religious beliefs involving gender, marriage, and sexual conduct,<sup>89</sup> while North Carolina H.B. 2 mandates discrimination against transgender persons.<sup>90</sup>

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86. See *Hobby Lobby*, 134 S.Ct., at 2769-2770 (majority extends religious exercise rights under RFRA to for-profit corporations). Nor had the Supreme Court previously permitted persons engaged in commercial activities to disregard laws they had religious objections to. For example, in *United States v. Lee*, 455 U.S. 252, 261 (1982), the Court stated:

Congress and the courts have been sensitive to the needs flowing from the Free Exercise Clause, but every person cannot be shielded from all the burdens incident to exercising every aspect of the right to practice religious beliefs. When followers of a particular sect enter into commercial activity as a matter of choice, the limits they accept on their own conduct as a matter of conscience and faith are not to be superimposed on the statutory schemes, which are binding on others in that activity. Granting an exemption from social security taxes to an employer operates to impose the employer's religious faith on the employees.

87. *Hobby Lobby* at 2790-2791 (Ginsburg, J., dissenting). Justice Ginsburg stated: The exemption sought by Hobby Lobby and Conestoga would override significant interests of the corporations' employees and covered dependents. It would deny legions of women who do not hold their employers' beliefs access to contraceptive coverage that the ACA would otherwise secure. See *Catholic Charities of Sacramento, Inc. v. Superior Court*, 32 Cal.4<sup>th</sup> 527, 565 (2004) ("We are unaware of any decision in which . . . [the U.S. Supreme Court] has exempted a religious objector from the operation of a neutral, generally applicable law despite the recognition that the requested exemption would detrimentally affect the rights of third parties."). In sum, with respect to free exercise claims no less than free speech claims, "[y]our right to swing your arms ends just where the other man's nose begins." "Chafee, Freedom of Speech in War Time, 32 Harv. L. Rev. 932, 957 (1919).

88. See *id.* at 2787 (Ginsburg, J., dissenting) (stating, "The Court does not pretend that the First Amendment's Free Exercise Clause demands religion-based accommodations so extreme, for our decisions leave no doubt on that score.").

89. Miss. Laws 2016, H.R. 1523 § 2 (eff. July 1, 2016).

90. N.C. Public Facilities Privacy & Security Act, 2016 N.C. Sess. Laws 3, commonly known



In evaluating the constitutionality of these and similar laws, the Court must not only revisit its ruling in *Hobby Lobby* and determine the level of scrutiny these laws deserve under Equal Protection, but the Court will also have to revisit its recent interpretations of the Establishment Clause and the State Action Doctrine. Does the government have an obligation under the Constitution to remain neutral in religious matters? Is the government prohibited from encouraging acts of discrimination?

For example, Mississippi H.B. 1523 authorizes persons to refuse service to others based upon their beliefs that marriage is limited to a man and a woman and that sex should be confined to marriage.<sup>91</sup> In *Barber v. Bryant*,<sup>92</sup> the district court ruled that this law violates the Establishment Clause because it violates the principle that the government must remain neutral in matters of religion.<sup>93</sup> However, in 2014 in *Greece v. Galloway*,<sup>94</sup> the Supreme Court abandoned the notion that the government is prohibited from endorsing religion, and noticeably failed to mention the longstanding principle that government must be neutral towards religion.<sup>95</sup> Will the Supreme Court affirm the district court's decision in *Barber* or will it hold that the government may endorse specific religious beliefs, not only by permitting religious displays and official prayers, but by permitting persons to discriminate on the basis of those beliefs?

Similarly, North Carolina H.B. 2 prohibits individuals from using any bathroom in a public facility except for bathrooms designated for use by that person's biological sex at birth.<sup>96</sup> In other words, a transgender person must use a public bathroom for the sex they were born with, not the sex they have become. Does this provision of the law constitute gender discrimination? The district court in *Carcano v. McCrory*<sup>97</sup> ruled that the

as House Bill 2 ("HB2").

91. See Miss. Laws 2016, H.R. 1523 § 2 (eff. July 1, 2016).

92. *Barber v. Bryant*, 2016 U.S. Dist. LEXIS 86120 at 75, (833 F.3d 510, 2016) (striking down Mississippi H.B. 1523 under Establishment Clause and Equal Protection Clause).

93. *Id.* at \*4 (stating, "HB 1523 grants special rights to citizens who hold one of three 'sincerely held religious beliefs or moral convictions' reflecting disapproval of lesbian, gay, transgender, and unmarried persons. Miss. Laws 2016, H.R. 1523 § 2 (eff. July 1, 2016). That violates both the guarantee of religious neutrality and the promise of equal protection of the laws.>").

94. *Town of Greece v. Galloway*, 134 S.Ct. 1811 (2014) (upholding town board's practice of opening monthly meetings with a prayer delivered by invited clergy).

95. See *id.* at 1821 (abrogating *Allegheny County v. Greater Pittsburgh A.C.L.U.*, 492 U.S. 573 (1989) and abandoning the "no endorsement" test for Establishment Clause cases).

96. See H.B. 2, Part I, which provides in part:

Local boards of education shall require every multiple occupancy bathroom or changing facility that is designated for student use to be designated for and used only by students based on their biological sex.

97. *Carcano v. McCrory*, 2016 U.S. Dist. LEXIS 114605 at \*97 (315 F.R.D. 176, 2016), (striking down "bathroom bill" portion of law under Title IX).

provision of the statute governing access to public bathrooms and locker rooms constitutes gender discrimination under both Title IX and the Equal Protection Clause; however, while the Court found that H.B. 2 violates Title IX, it also ruled that the law does not violate the Equal Protection Clause.<sup>98</sup>

H.B. 2 also prohibits political subdivisions from outlawing discrimination on the basis of gender identity.<sup>99</sup> Is this “state action” in violation of Equal Protection? Is the State of North Carolina encouraging acts of private discrimination in violation of the *Hunter v. Erickson* line of cases?<sup>100</sup> In *Schuette v. Coalition to Defend Affirmative Action*,<sup>101</sup> the Supreme Court retreated from one aspect of its *Hunter* precedent in upholding a Michigan constitutional amendment that prohibited governmental entities from adopting affirmative action programs.<sup>102</sup> As noted earlier, a more conservative Supreme Court might completely eviscerate the constitutional prohibition against distortion of the political process.<sup>103</sup>

## VI. CONGRESS’ POWER TO ENACT CIVIL RIGHTS LEGISLATION

### A. Congress’ power under Section 5 of the Fourteenth Amendment

In *Boerne v. Flores*,<sup>104</sup> the Supreme Court imposed a substantial restriction on Congress’ power to enforce the provisions of the Fourteenth

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98. *See id.*

99. *See* H.B. 2, Part III, Protection of Rights in Employment and Public Accommodations, which states:

The General Assembly declares that the regulation of discriminatory practices in employment is properly an issue of general, statewide concern, such that this Article and other applicable provisions of the General Statutes supersede and preempt any ordinance, regulation, resolution, or policy adopted or imposed by a unit of local government or other political subdivision of the State that regulates or imposes any requirement upon an employer pertaining to the regulation of discriminatory practices in employment, except such regulations applicable to personnel employed by that body that are not otherwise in conflict with State law.

100. *See* *Reitman v. Mulkey*, 387 U.S. 369, 381 (1967), (striking down state constitutional amendment that sought to protect the right of individuals to decline to sell or rent real property to any person in their absolute discretion significantly involved the state in acts of private discrimination); *Hunter v. Erickson*, 393 U.S. 385, 391 (1969) (striking down amendment to city charter that required a referendum before city council could enact a fair housing ordinance).

101. *Schuette*, 134 S.Ct. at 1638 (2014) (upholding state constitutional amendment prohibiting the state or political subdivisions from adopting race-conscious affirmative action programs).

102. *See id.*

103. *See* notes 53-57 *supra* and accompanying text for a discussion of the concept of “distortion of the political process.”

104. *Boerne v. Flores*, 521 U.S. 507, 536 (1997) (striking down federal Religious Freedom Restoration Act as applied to state laws).

Amendment.<sup>105</sup> In that case, the Court ruled that while Congress may enact laws protecting civil rights, it may not go too far; instead, those protective laws must be “congruent with” and “proportionate to” the Court’s interpretation of people’s rights under Section 1 of the Fourteenth Amendment.<sup>106</sup> A more liberal court would probably reject the “congruence and proportionality” standard of *Boerne v. Flores*, as Justice Ginsburg recently suggested in her dissent in *Coleman v. Maryland Court of Appeals*.<sup>107</sup> In that case, the Court might then return to the salutary doctrine that Section 5 of the Fourteenth Amendment authorizes Congress to enact laws that it has a rational basis for believing are “necessary and proper” for the protection of civil rights.<sup>108</sup>

### *B. Congress’ power under the Commerce Clause*

Article I, Section 8, Clause 3 of the Constitution grants Congress the power to enact laws regulating interstate commerce, and under the Affection Doctrine, the Commerce Clause has long been interpreted to mean that Congress has the power to enact laws regulating economic activity that, in the aggregate, substantially affects interstate commerce.<sup>109</sup> Many of this nation’s most significant civil rights laws have been adopted and upheld pursuant to this power.<sup>110</sup> In recent years, the Supreme Court has narrowly construed Congress’ power under the Commerce Clause by adopting a constricted understanding of what constitutes “economic activity.”<sup>111</sup> The Court has struck down laws regulating conduct that

105. *See id.*

106. *Id.* at 533 (stating, “The stringent test RFRA demands of state laws reflects a lack of proportionality or congruence between the means adopted and the legitimate end to be achieved.”).

107. *See Coleman v. Maryland Court of Appeals*, 132 S.Ct. 1327, 1334 (2012) (striking down “self-care” provision of Family Medical Leave Act to the extent that it allowed recovery of money damages against the state); *id.* at fn. 1 (Ginsburg, J., dissenting). Justice Ginsburg stated:

I remain of the view that Congress can abrogate state sovereign immunity pursuant to its Article I Commerce Clause power. *See Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 100 (1996) (Souter, J., dissenting). Beyond debate, 29 U.S.C. § 2612(a)(1)(D) is valid Commerce Clause legislation. I also share the view that Congress can abrogate state immunity pursuant to § 5 of the Fourteenth Amendment where Congress could reasonably conclude that legislation “constitutes an appropriate way to enforce [a] basic equal protection requirement.” *Board of Trustees of University of Alabama v. Garrett*, 531 U.S. 356, 377 (2001) (Breyer, J., dissenting).

108. *See id.*

109. *See, e.g. Gonzales v. Raich*, 545 U.S. 1, 17 (2005) (stating, “Congress has the power to regulate activities that substantially affect interstate commerce.”).

110. *See, e.g., Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 261-62 (1964) (upholding public accommodations provision of 1964 Civil Rights Act as validly enacted pursuant to the Commerce Clause).

111. *See Lopez v. United States*, 514 U.S. 549, 561 (1995) (striking down provision of federal

unambiguously has a substantial effect on interstate commerce on the ground that the conduct being regulated did not constitute “economic activity.”<sup>112</sup> A more liberal court would reject this constricted approach, and would, of course, reject Justice Thomas’s proposal to overrule the Affectation Doctrine in its entirety.<sup>113</sup>

### C. The State Sovereignty Doctrine

Less than twenty years ago, the Supreme Court revived the long-discredited doctrine of “state sovereignty,”<sup>114</sup> a concept that was a foundation principle of the Articles of Confederation,<sup>115</sup> but which was prominently omitted from the Constitution of the United States, which ordained and established “a more perfect union.”<sup>116</sup> In *Shelby County v. Holder*<sup>117</sup> this unenumerated principle of “state sovereignty” was invoked to invalidate a key enforcement provision of the Voting Rights Act,<sup>118</sup> and in *Coleman v. Maryland* it was used to strike down a provision of the Family Medical Leave Act.<sup>119</sup> Justice Ginsburg dissented in *Shelby County* and *Coleman*, and she made clear in those cases that the principle of “state sovereignty” may not be used to overcome the will of the people, as represented in Congress, in the adoption of civil rights legislation.<sup>120</sup> With the addition of one additional liberal justice, her position will become the law of the land.

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Guns Free School Zone Act on the ground that possession of a firearm is not “economic activity”); *United States v. Morrison*, 529 U.S. 598, 627 (2000) (striking down civil suit provision of Violence Against Women Act on the ground that acts of sexual assault are not “economic activity”); *NFIB v. Sebelius*, 132 S.Ct. 2566, 2591 (2012) (ruling that individual mandate of Affordable Care Act did not regulate “economic activity”).

112. *Id.*

113. *See, e.g., Raich*, 545 U.S., at 44-45 (Thomas, J., dissenting) (rejecting Affectation Doctrine).

114. *See Alden v. Maine*, 527 U.S. 706, 716 (1999) (reviving the concept of state sovereign immunity and citing *Hans v. Louisiana*, 134 U.S. 1 (1890)).

115. *See Art. of Conf., Art. II* (providing, “Each state retains its sovereignty, freedom, and independence, and every Power, Jurisdiction, and right, which is not by this confederation expressly delegated to the United States, in Congress assembled.”).

116. U.S. Const., pmb.

117. *Shelby County v. Holder*, 133 S.Ct. 2612, 2631 (2013) (striking down preclearance provision of federal Voting Rights Act as violating the “equal sovereignty” of the states).

118. *See id.* at 2623 (stating, “Not only do States retain sovereignty under the Constitution, there is also a “fundamental principle of *equal* sovereignty” among the States.”).

119. *Coleman*, 132 S.Ct., at 1333 (stating, “A foundational premise of the federal system is that States, as sovereigns, are immune from suits for damages, save as they elect to waive that defense.”).

120. *See Holder*, 133 S.Ct., at 2648-2650 (Ginsburg, J., dissenting) (explaining that the doctrine of “equal sovereignty” has no application outside the domain of the admission of new states); *Coleman*, 132 S.Ct., at 1339 (Ginsburg, J., dissenting) (stating, “I remain of the view that Congress can abrogate state sovereign immunity pursuant to its Article I Commerce Clause power.”).

## VII. INTERPRETATION OF CIVIL RIGHTS LEGISLATION

### A. *The Canon of Constitutional Avoidance*

Judicial respect for the legislative branch requires that if a statute is ambiguous, and one interpretation of the statute would be constitutional and the other interpretation of the statute would be unconstitutional, then the court is bound to adopt the interpretation that is constitutional so that it may uphold the legislative act.<sup>121</sup> The modern Republican Supreme Court takes the canon of “constitutional avoidance” one step further. The conservative court has chosen to narrowly interpret civil rights laws such as Title VII and the Voting Rights Act in order to avoid deciding whether those provisions are constitutional.<sup>122</sup> Essentially, if the Court harbors a constricted understanding of a congressional power or a constitutional right, it will translate that understanding into a narrow construction of civil rights statutes. A liberal majority with a broader understanding of congressional power and individual rights would be less likely to find that civil rights statutes were going too far in protecting the rights of individuals.

### B. *The Use of Legislative History*

Justice Scalia abhorred legislative history, and refused to consider legislative reports or debates in construing the meaning of legislation.<sup>123</sup> This left Justice Scalia free to interpret the words of a statute unencumbered by evidence of what its authors meant to accomplish.<sup>124</sup>

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121. See *NFIB v. Sebelius*, 132 S.Ct. 2566, 2593 (2012) (quoting Justice Oliver Wendell Holmes in *Blodgett v. Holden*, 275 U.S. 142, 148 (1927): “[T]he rule is settled that as between two possible interpretations of a statute, by one of which it would be unconstitutional and by the other valid, our plain duty is to adopt that which will save the Act.”).

122. See, e.g., *Ricci v. DeStefano*, 557 U.S. 557, 563 (2009) (interpreting Title VII to mean that before an employer can voluntarily adopt a race-conscious affirmative action program it must have a strong basis in evidence to believe it will be subject to liability if it fails to take race-conscious action, congruent with the interpretation of cases under the Equal Protection Clause); *Id.* at 582 (“Our cases discussing constitutional principles can provide helpful guidance in this statutory context.”); *Northwest Austin Municipal Utility District No. One v. Holder*, 557 U.S. 193, 211 (2009) (interpreting the Voting Rights Act to permit all political units within a state to apply for a “bailout” from the preclearance provisions of the Voting Rights Act, in light of concerns about the constitutionality of the VRA).

123. See, e.g., *Graham County Soil and Water Conservation Dist. v. U.S. ex rel. Wilson*, 559 U.S. 280, 302 (2010) (Scalia, J., concurring in part and dissenting in part) (stating, “it is utterly impossible to discern what the Members of Congress intended except to the extent that intent is manifested in the *only* remnant of ‘history’ that bears the unanimous endorsement of the majority in each House: the text of the enrolled bill that became law.”).

124. See Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts*

Similarly, when Justice Alito interpreted the meaning of the Religious Freedom Restoration Act in *Hobby Lobby*, he did obvious violence to the clear bipartisan purpose of Congress to “restore” the pre-*Smith* meaning and effect of the Free Exercise Clause.<sup>125</sup> As Justice Ginsburg noted in her dissenting opinion in *Shelby County*, “The Court makes no genuine attempt to engage with the massive legislative record that Congress assembled.”<sup>126</sup> Additional conservative justices are likely to follow the lead of Justices Scalia and Alito, while a liberal justice is likely to give due regard to the importance of legislative history in statutory interpretation, and to be more faithful to congressional intent.

### C. Using Bad Constitutional Law to Interpret Statutes Badly

In his dissenting opinion in *Young v. United Parcel Service*,<sup>127</sup> Justice Scalia invoked *Geduldig v. Aiello* to justify a narrow interpretation of the Pregnancy Discrimination Act.<sup>128</sup> If like-minded justices are appointed to the Supreme Court, the Court would construe this and similar statutes in accordance with their narrow understanding of what constitutes equal treatment of women and men. A liberal justice, in contrast, would reject cases like *Aiello* as shedding light on the true meaning of civil rights statutes.

## VIII. SUMMARY

Myriad provisions of Constitutional Law bear upon gender equality. Standards under the Equal Protection Clause, the Right to Privacy, the First Amendment, the Establishment Clause, the Free Exercise Clause, the Commerce Clause, the Enforcement Clause of the Fourteenth Amendment, the State Action Doctrine, and the unenumerated principle of State Sovereignty all bear upon the legal rights of women and men,

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16-17 (2012) (contending that in statutory interpretation the role of judges is to determine the meaning of the words of the statute, not to determine the meaning ascribed to those words by the members of the legislature); see also Rachel Kenigsberg, *Convenient Textualism: Justice Scalia’s Legacy in Environmental Law*, 17 VT. J. ENVTL. L. 418 (2016) (contending that Justice Scalia abandoned textualism in order to narrowly construe environmental legislation).

125. See *Hobby Lobby*, 134 S.Ct., at 2796 (Ginsburg, J., dissenting) (stating, “Had Congress intended RFRA to initiate a change so huge, a clarion statement to that effect likely would have been made in the legislation. See *Whitman v. American Trucking Assns., Inc.*, 531 U.S. 457, 468 (2001) (Congress does not ‘hide elephants in mouseholes’)).

126. *Holder*, 133 S.Ct., at 2644 (Ginsburg, J., dissenting).

127. *Young v. United Parcel Service*, 135 S.Ct. 1338, 1343 (2015) (construing the federal Pregnancy Discrimination Act, codified at 42 U.S.C. § 2000e(k)).

128. *Id.* at 1363 (Scalia, J., dissenting) (invoking *Aiello* for the proposition that the language of the Pregnancy Discrimination Act serves merely a clarifying function).

LGBTQ and straight individuals. The Supreme Court is evenly and sharply divided in its approach to interpreting all of these constitutional provisions, and these interpretive differences also affect the validity and application of civil rights statutes. The recent presidential election will have a major impact on our legal rights to gender equality.