The Court, the Constitution, and the Culture of Freedom

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It is not controversial to contend that in the United States, constitutional law serves as a decisive battleground in the struggle over freedom's moral and political meaning. It is another matter to assess the impact of the battleground on the battle, to clarify the current balance of power, and to anticipate the battles to come.

By design, the American Constitution is the supreme law of the land. Because it is a liberal constitution, one whose first purpose is to protect individual freedom, the supreme law of the land avoids taking a stand on the supreme issues. It does not aim to instruct people on the virtues, or the content of happiness, or the path to salvation. That's not because it supposes that virtue is irrelevant, happiness has no content, or salvation is a delusion. Rather, the Constitution presupposes that the people, as individuals and through the various associations and groups they form, will pursue these goods. And it lays down a framework within which we, as a people, can maintain a society where each has the liberty to pursue, consistent with a like liberty for others, virtue, happiness, and salvation in the way each regards as fitting. This constitutional framework consists of the enumeration of government powers and the elaboration of individual rights. It establishes minimum requirements and imposes outer boundaries on state action and personal conduct while largely leaving substantive judgments about morals and policy to individuals and democratic politics.

Accordingly, as Alexander Bickel dryly observed more than forty years ago in The Least Dangerous Branch, to say of some law or action or institution that it is constitutional is not to offer very high praise. For the Constitution permits much — from those in as well as out of office — that is foolish, vulgar, and degrading. Yet the enshrinement in the supreme law of the land of a large latitude for the exercise of individual freedom has consequences. It cannot but give direction to our moral life, incite and inspire habits and hopes, inform our sense of what is possible and of what is necessary, and instruct our understanding of what we owe others and what we owe ourselves.

To recognize the role of constitutional law in establishing a culture of freedom takes nothing away from the formative role played by economic life, popular entertainment and the arts, friendship and family, love and war, religious faith and faith in reason. Our opinions about freedom, as well as our capacities to enjoy its blessings and maintain its material and moral preconditions, are formed by many forces. The supreme law of the land, however, is of special interest. By establishing authoritative limits, by proclaiming, with the backing of the coercive power of the state, what is forbidden, what is permitted, and what is required, it creates comprehensive background conditions for, and sets a tone that reverberates throughout, all spheres of our lives.

Between progress and preservation

By and large, since Marbury v. Madison (1803), when it settled the matter, the Supreme Court has been understood to have principal — though in our separation of powers system not exclusive or ultimate — responsibility under the Constitution for saying authoritatively what the supreme law of the land is. Yet most of the 80 to 90 formal written opinions the Court delivers each year involve technical issues which, when they are noticed at all by the public at large, do not excite much enthusiasm or cause much consternation beyond the confines of the parties involved. Nor do they have much discernible impact on how we experience or think about freedom.

Of those cases that, because of the morally and politically fraught issues at stake, do capture the public's attention, a preponderance arise under the Fourteenth Amendment. And the most morally and politically fraught of these concern abortion, which involves a contest over the interpretation of the Fourteenth Amendment's due process clause, and affirmative action, which involves a contest over the interpretation of the Fourteenth Amendment's equal protection clause. In the not too distant future, same-sex marriage may come before the Court and could involve a contest over the interpretation of both clauses.

Its Reconstruction-era drafters and ratifiers could not have intended it, but it is understandable that the grandest clauses of the Fourteenth Amendment would in time provide the vehicle for transforming the meaning of freedom under the Constitution — or, if you prefer, accommodating under the Constitution the transformation of freedom's social and political meaning among the people. The due process clause provides that no state "shall deprive any person of life, liberty, or property, without due process of law." The equal protection clause declares that no state shall "deny to any person within its jurisdiction the equal protection of the laws." The overriding purpose of both was to make the federal government responsible for protecting the rights of blacks against infringement by state governments. (For historical reasons, the privileges and immunities clause — "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States" — which is part of the same sentence from Section 1 of the Fourteenth Amendment, has largely become a dead letter but under different circumstances could have played roles similar to those played by the due process clause and the equal protection clause.) Unlike the other two Reconstruction-era amendments — the Thirteenth Amendment (1865) outlawed slavery, and the Fifteenth Amendment (1870) secured the right to vote for blacks — the Fourteenth Amendment's (1868) grandest clauses did not refer to the historical injustice that provoked them or to the race of those individuals whose protection was their primary goal. Instead, it dealt with the challenge of making ex-slaves and all blacks full citizens by reaffirming universal guarantees implicit in the original Constitution and by making the federal government responsible for ensuring compliance by the states with those universal guarantees.

On their face, the universal guarantees embodied in the promise of due process and the promise of equal protection are strictly formal. They do no more than affirm that everywhere in the United States the ideal of the rule of law will apply equally to all. So under the Fourteenth Amendment states may deprive persons of life, liberty, or property, but only on the condition that they do so consistent with the appropriate legal process. And under the Fourteenth Amendment states may, consistently with the rest of the Constitution, confer a variety of benefits or impose a range of liabilities so long as they apply equally to all persons.

Notwithstanding the evident formality of their promise, there are plausible arguments for deriving substance, or particular rights, from the due process and equal protection clauses. Indeed, the Supreme Court has embraced those arguments. Initially, in the Slaughter-House Cases (1872), dealing with the claims by Louisiana butchers that they were denied a fair opportunity to compete for state business, a closely divided Supreme Court held that the legal force of the universal guarantees embodied in the Fourteenth Amendment's privileges and immunities clause was restricted to the protection of the interests of African-Americans and so could not be called upon to provide relief for any other class of litigants.

Barely 30 years later, in 1905, an again closely divided Court ushered in the notorious Lochner era, striking down a limitation imposed by the New York state legislature on the maximum hours per week that bakers could work. The core of the Court's holding was that the due process clause gave heightened protection to one specific aspect of liberty, economic liberty, because it was fundamental to the Constitution's understanding of a free life and no process could be due that, without very strong reasons, infringed it. Because of this substantive promise implicit in the due process clause, the Court concluded that New York could not limit bakers who might wish to contract to work longer hours to 60 hours of work per week, even if the state's reason for doing so was to protect workers from unhealthy working conditions. Under the pressure first of the Progressive movement, then the Great Depression and the advent of New Deal liberalism, the Court gradually retreated from the view that the due process clause gave heightened protection to economic liberty. In 1954, in Williamson v. Lee Optical, the Court returned to a more formal reading of the due process clause, holding that in regard to social and economic matters, legislatures were free to regulate so long as the laws they passed had a rational relationship to a legitimate state interest. In practice, this meant that almost any law that did not violate a clear provision of the Constitution would likely withstand due process scrutiny.

And then the Supreme Court changed its mind again and revived the doctrine of substantive due process, ushering in the present era, the Roe era. But the liberty that the Roe-era Court found essential to the Constitution and to which it therefore gave heightened protection differed from the economic liberty which the Lochner-era Court found essential to the Constitution and to which it gave heightened protection. This time autonomy in intimate relations was singled out as the especially important form of liberty. In Griswold v. Connecticut (1965), Justice Douglas's confusing opinion — which drew on, among many other parts of the Constitution, the due process clause of the Fourteenth Amendment —

paved the way by finding in the Constitution a "zone of privacy." States may not prohibit married couples from using contraceptives, Douglas held, because to do so would trample on marriage, which the Court held under the Constitution involved a great good and protected freedom. But what of nonmarried couples, proliferating as a result of the 60s cultural revolution, who wished to avoid pregnancy? In Eisenstadt v. Baird (1972), the Court clarified its intentions by extending, on equal protection grounds, the protection of privacy to cover unmarried persons using contraceptives: The protections afforded to married couples, the Court held, should be understood as granted to them in the first place as individuals. Despite the disagreement about the nature of the liberty the Constitution regarded as fundamental, in both the Lochner and Roe eras the argument for deriving substance from form was largely the same: No process could be due, in the sense of appropriate or fair, which denied individual liberties the Court regarded as fundamental, or essential to the very idea of freedom under law.

The Court has also found substance in the equal protection clause. Its landmark decision in Brown v. Board of Education (1954) was strictly formal, holding that separate schools for whites and blacks involved inherently unequal treatment of the minority race. But beginning with Bakke in 1978 and culminating with Grutter in 2003, the Court has read unequal treatment based on race into the promise of equal protection, holding that a compelling state interest, such as overcoming the present consequences of past discrimination or promoting diversity in higher education, can justify preferential treatment for blacks and other minorities. The argument for deriving unequal treatment from the promise of equal protection is that in a society scarred by slavery, Jim Crow, and a slew of strategies by which the majority race inscribed disadvantages to minority races in law, it is sometimes necessary to treat individuals who belong to disadvantaged racial and ethnic groups, and even women (who actually constitute a majority), unequally to bring about a condition in which all can enjoy the equal protection of the laws.

An extended review of the voluminous debate over whether and to what extent substance can be derived from the formal promises of the due process clause and the equal protection clause only confirms what a brief inspection of the clauses' language and logic suggests: The derivation of substance from form is invited by the clauses themselves. Perhaps it is an invitation that cuts against the original intention of the legislators and is better declined. But appeals to constitutional text, history, and structure will not alone decide the issue; they provide ample evidence and argument for both choices. Because strictly legal materials do not settle the matter, in deciding whether and to what extent substance can be derived from the promise of due process and equal protection, justices of the Supreme Court have no alternative but to fall back on their opinions, both considered and inarticulate, about the meaning of freedom and equality under law. And thus, through the opinions of the Supreme Court, the supreme law of the land takes sides on some of the great moral questions of the day.

No controversies that arise under the Fourteenth Amendment create greater opportunities for introducing moral judgments about freedom and equality into constitutional law than abortion, affirmative action, and soon, perhaps, same-sex marriage. Nor do any other constitutional controversies provide larger lessons concerning the culture of freedom established by the Constitution.

Four lessons stand out. First, equality in freedom is the coin of the constitutional realm. The central debates over the constitutionality of abortion and affirmative action are hard cases because they do not for the most part pit liberal principles and goods on one side against some other kinds of principles and goods on the other, but rather involve a confrontation between conservative and progressive interpretations of the practical demands of constitutionally protected freedoms. Because it is more difficult to translate arguments against same-sex marriage into the language of freedom, there is a good chance that should the issue come before the Supreme Court, some majority of justices will hold that the Constitution requires it. Second, the Constitution is not neutral between conservative and progressive interpretations of freedom but favors the progressive interpretation, according to which government is responsible for enlarging the sphere of individual freedom and promoting an expansive view of equality. Third, the freedom secured by the Constitution is inherently unstable because there is no fixed stopping point to the demand for it: Progress in enlarging freedom's realm provides new desires and reasons for further enlargement. Fourth, progress in enlarging freedom's realm creates new threats — including the temptation to adopt illiberal and antidemocratic measures — to the preservation of the order that the peaceful enjoyment and wise exercise of freedom requires. These lessons and the cases that bring them into focus show that understanding freedom's progress is critical to freedom's preservation.

Abortion and due process

Since the supreme court's landmark 1973 decision in Roe v. Wade, the public debate over abortion has been full of sound and fury. Movement leaders on both sides present their own positions as morally unassailable and accuse their opponents of sanctioning terrible crimes. No other issue excites as much controversy in the Senate's consideration of presidential nominees to the federal bench.

Yet even as partisan debate rages, the nation seems quietly to have reached a settlement. Public opinion appears to have stabilized in solid majorities not widely divergent from the principles articulated in the Court's key decisions. Early on in a pregnancy, the morally fraught choice whether to terminate her pregnancy is best left to the woman. Subsequently, as pregnancy advances, the choice is increasingly a matter for state regulation in order to protect the life of the fetus or unborn child. Late in the pregnancy, in the interest of

protecting developing human life, states may prohibit abortion. In seeking to draw lines and balance the claims of pregnant women's freedom and developing human life, the settlement reflects conflicting imperatives arising from our ideas about freedom.

Conservative ambivalence about national policy on abortion reflects the conflict. Since 1980, the Republican Party platform has featured a pro-life plank. Nevertheless, no Republican candidate for president since 1980 has made opposition to abortion central to his campaign. This was undoubtedly driven in some measure by a pragmatic recognition that a majority of the nation believes that abortion, in what became the Clinton administration formula, should be "safe, legal, and rare." But another likely reason for conservative candidates' reticence, despite their party's formal opposition to abortion, is their appreciation of the force of the arguments on the other side of the question. And this is because they share the premise from which those arguments proceed, which is the moral and political primacy of individual freedom.

To be sure, we refer to conservatives on the abortion question as pro-life and progressives as pro-choice, yet both camps are pro–personal freedom. Proponents of a woman's right to terminate her pregnancy defend the personal freedom of women in the form of their interest in maintaining control over their bodies and their lives. Woman can enjoy neither freedom to live their lives as they see fit nor equality in politics and the marketplace, pro-choicers argue, if they must unwillingly carry a fetus to term and bear the burden of an unwanted pregnancy.

But conservative opponents of abortion also invoke personal freedom. They emphasize the rights of the unborn child — who, they contend, is a living person in the morally relevant sense. While they do not reject a woman's right to control her body and determine the shape of her future, they do maintain that the unborn child's right to life supersedes it. Alternatively, conservatives invoke the freedom connected to federalism and self-government, arguing that justices of the United States Supreme Court, with no foundation in the Constitution, have invented abortion rights, thereby imperiously deciding a moral question that the Constitution leaves to the free choice of the people through their democratically elected state legislatures. Powerful conservative voices do oppose abortion on religious grounds, out of belief that the unborn child is an embodied soul, that is, even in the earliest stages of development, a unique human being. But when they participate in the public debate, the pronounced tendency of conservative opponents of abortion is to make their case in the language of freedom. This is certainly true when they sit on the United States Supreme Court.

Contrary to Professor Laurence Tribe, who famously argued that it presented a clash of absolutes, the public debate over abortion reveals a clash of competing interpretations of freedom. Or rather, it presents a tendency on the part of partisans to absolutize competing imperatives that arise out of a shared belief in the fundamental importance of freedom. The principle of choice, for example, is not, never has been, and never can be absolute under a liberal constitution. Put most austerely, the law hems in choice to prevent physical harm to

others. Mothers are not free to terminate the lives of their young children even if they conclude on reflection that the children severely interfere with their autonomy. Similarly, the right to life is not, never has been, and never can be absolute, and our law also recognizes this. The punishment for premeditated, cold-blooded murder is death, and self-defense is recognized as a valid ground for taking the life of another.

Moreover, both parties to the debate show that in practice, at least when it comes to other issues, they not only respect the other side's imperative but embrace it as their own. In their opposition to the death penalty, for example, many pro-choicers proclaim their bedrock respect for human life and their unwillingness to permit the state, even in response to monstrous crimes, to extinguish it. And pro-lifers demonstrate their abiding commitment to the principle of choice in their devotion to the idea of limited government, which revolves around protecting individuals from government interference in the decisions about the matters that mean most to them. Indeed, the tendencies to cherish choice and to respect human life are part of the same liberal thought: The essence of a well-lived life is choosing freely, but without a life that is reasonably safe and secure there can be no meaningful choice.

Despite its failings — by now even many of those who back its result follow then-Justice Rehnquist's dissenting opinion that Roe's holding, breaking pregnancy into three distinct terms, represents a clear-cut case of legislating from the bench — the Court's decision in Roe v. Wade captured a good portion of the moral challenge posed by abortion in a liberal constitutional order. It held that in the first trimester, a woman's right to terminate her pregnancy is up to her and the medical judgment of her doctor. Subsequent to the first trimester but before the fetus or unborn child becomes viable outside the mother's womb, the state may regulate abortion in the interest of women's health. After viability, the state's interest in protecting unborn human life can take precedence over the mother's wish to end her pregnancy, except where abortion is necessary to protect the mother's life or health. The Court's holding aimed to give proper weight to the two critical rights — the right of women to control their bodies and the right to life of the fetus or unborn child — which the question of abortion, when posed within a liberal framework, pits against each other.

The Court, however, sought to accomplish this balancing act without specifying the criteria that determine when the developing life within a mother's womb becomes a person, endowed with rights. To be sure, the Court recognized that the legal question turned on whether the fetus or unborn child is a person within the meaning of the Fourteenth Amendment ("no state shall deny to any person life, liberty, or property without due process of law"), if a reasonable answer were available, and on the question of whether life begins at conception. For if the fetus or unborn child is a person in the constitutionally relevant sense, then he or she is entitled to constitutional protection, and if life begins at conception, how could one deny that the fetus is an unborn child and a person in the morally relevant sense?

In his opinion for the majority, however, Justice Blackmun tried to dodge the critical issue. Rather peremptorily, he concluded that "the word 'person,' as used in the Fourteenth Amendment, does not include the unborn." Concerning the beginning of life, however, Justice Blackmun found it impossible to reach a conclusion: "When those trained [in] medicine, philosophy, and theology are unable to arrive at any consensus, the judiciary, at this point in the development of man's knowledge, is not in a position to speculate as to the answer." Consequently, argued Blackmun, judges had no choice but to set aside the question of when life begins and find a ruling that did not depend on an answer to it.

In claiming that this could be done, however, Blackmun betrayed something of a misunderstanding of the logic of his holding. For the trimester framework was based on the idea of viability, an idea that did not so much replace or render irrelevant an analysis of life's beginning (and, for that matter, a definition of a person under the Fourteenth Amendment) to the constitutional question as provide a proxy answer to it. The more the fetus or unborn child possesses the ability to survive outside the mother's womb, Roe's reasoning suggested, the stronger is its claim to Fourteenth Amendment protection, which is to say the more it is alive — a he or a she — and a person in the constitutionally relevant sense.

The Court's equivocal definition of the beginning of life and, in effect, of personhood in terms of viability, or the capacity of the unborn to survive outside a mother's womb, is unstable. As Justice O'Connor pointed out ten years after Roe in Akron Center for Reproductive Health, viability is in part a function of technology, and technological developments continually push the point of viability back toward conception. Yet its flaws as a basis for constitutional compromise do not change the importance of viability as an expression of powerful and competing moral intuitions about freedom: that in a crucial respect the fetus or unborn child is a member of the human family and so endowed with rights; that the fetus or unborn child is at the same time different in morally relevant ways, so that early in its development the right of the mother to control her body should prevail; and that the further the fetus or unborn child develops, the more the morally relevant differences between the fetus or unborn child and a person fade, and the greater the state's interest in stepping in to protect developing human life.

While it has been subject to devastating criticism and modified by subsequent decisions, the Roe sensibility and the ambivalence regarding freedom to which it gives expression still define the constitutional settlement. The late 70s and 80s witnessed the imposition, at both the state and federal levels, of restrictions on abortion. In Maher v. Roe (1977), the Court held 6–3 that Connecticut could provide Medicaid benefits for childbirth while withholding benefits from women who wished to have medically nonnecessary abortions. In Harris v. McRae (1980), by a 5–4, margin, the Court upheld the Hyde Amendment, which banned federal funding of medically necessary abortions. And in Rust v. Sullivan (1991), again by a 5–4 margin, the Court upheld federal regulations that barred health care professionals who received federal funding from offering counseling about abortion. In holding that government was free to refuse to fully fund the exercise of a right that the Constitution

protected, the Court did nothing to change the core resolution enshrined by Roe in the supreme law of the land: The more we conceive of the fetus or unborn child as a person, the greater weight law must give to the fetus's or unborn child's right to life in balancing it against the mother's right to liberty.

Nor did Planned Parenthood v. Casey (1992), the Court's most important abortion decision since Roe, change what Roe enshrined. In a plurality opinion, Justices Kennedy, O'Connor, and Souter did away with Roe's trimester framework while insisting that they preserved Roe's essential holding. And so they did. Viability remained the touchstone. Before viability, the state may not impose an "undue burden" on a woman's right to terminate her pregnancy. After viability, "the State in promoting its interest in the potentiality of human life may, if it chooses, regulate, and even proscribe, abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother."

The Court's application of the "undue burden standard" in Casey reflected competing imperatives of freedom. A burden was undue if it "substantially interfered" with a woman's right to terminate her pregnancy. But what sorts of burdens would be regarded by the Court as substantial? The Court was clear: It would consider a burden a substantial interference if it had "the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus." To be lawful, state regulations "must be calculated to inform the woman's free choice, not hinder it." States could impose regulations before viability designed to insure that a woman's choice was "thoughtful and informed," because a reasoned choice is an expression of or enhancement of autonomy. But they were prohibited from impairing autonomy by making an adult woman's choice dependent on another human being, even her husband. So under the undue burden test, the Court upheld Pennsylvania laws requiring minors to obtain either the consent of a parent for an abortion or a waiver of the requirement by a judge because minors could not be presumed capable of achieving thoughtful and informed choice on their own; an informed-consent requirement for an adult woman involving the provision by her physician of information concerning the nature and health risks of abortion and a 24-hour waiting period from the time she received the information to the performance of an abortion; consultation with caregivers about alternatives to abortion; and state-imposed record-keeping requirements. But the Court struck down a spousal-notification requirement.

Even as the Court's holding in Casey reaffirmed the compromise of principles embodied in Roe, dicta in the plurality opinion pushed for an ambitious expansion in the boundaries of the realms protected by the principle of choice. "At the heart of liberty," the opinion declared, "is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life." It would be a mistake to confuse these metaphysical musings with the familiar and indispensable notion of liberty of thought and discussion. For what the Court appeared to be saying was not only that each individual had a right to determine for himself or herself what constituted personhood and the meaning of life, but also that the supreme law of the land had an obligation to give legal effect to each individual's

determination. Yet were this to become accepted doctrine, then abortion would have to be permitted whenever individual women concluded for themselves, whatever the stage of pregnancy, that the life within their wombs did not count as a rights-bearing human being. That such a notion received expression at all suggests the direction in which the justices' thinking about autonomy is headed.

Justice Scalia penned a vitriolic dissent. He contended that an undue burden standard had no stable meaning and merely gave expression to the subjective judgment of a majority of the Court. This was incorrect. In fact the Court was extending a form of constitutional reasoning — call it autonomy-enhancing judicial review — set in motion by Griswold and Eisenstadt and propelled forward by Roe.

Scalia also attacked the majority for usurping the right of the people of each state to determine whether and under what terms abortion would be permitted. Strikingly, even though his personal moral judgment is that abortion is wrong, Scalia's constitutional objection was grounded not in morality but in a claim about freedom: In his view, the Constitution was silent about the question of abortion and therefore left it to the people to decide through their states' democratic processes. In other words, Scalia met the majority's claims about freedom's imperatives under the Constitution with a counterclaim about what those imperatives required.

The most recent controversy over abortion rights concerns so-called partial-birth abortion and represents an effort by the Court to build a fence around women's autonomy. In 2003, President Bush signed a law prohibiting partial-birth abortion, whose constitutionality is now under challenge in the courts. The law was a response to Stenberg v. Carhart (2001), in which six members of the Court concluded that Nebraska's ban on a midterm abortion procedure that involved partially removing the fetus or unborn child from the womb, puncturing the skull, vacuuming out the brain, and then removing and disposing of the remains, was unconstitutional. The Court reasoned that the ban imposed an undue burden on some women for whom the procedure was the only medically appropriate one. Yet evidence in the record suggested that it was doubtful whether any woman, otherwise eligible, would have been unable to secure a safe abortion had the Court upheld Nebraska's ban on the gruesome procedure. The Court's grasping to find a reason to invalidate the Nebraska ban revealed the extent to which, in the majority's judgment, a woman's freedom must be fortified against the right to life of the fetus or unborn child.

It would be a mistake to see the Court's autonomy-enhancing abortion jurisprudence as a clear-cut victory for the culture of freedom, either because of the restrictions on abortion that remain in place or in view of the remote prospect that President Bush or his successors will appoint to the Supreme Court justices who will form a majority for overturning Roe and Casey. The restrictions on abortion that remain in place encourage choices that are more deliberate. And in the unlikely event that, somewhere down the road ,the Court were to overturn Roe and thereby return the decision to the states, polling data suggest that a

substantial majority of states would maintain a regime governing abortion much like the one now in place, and consequently no woman would be more than a bus ride away from a legal abortion.

The problem is rather that the culture of freedom gives rise to a tension between the sanctity of individual choice and the sanctity of human life. And there is reason to worry that the more we elevate choice, the more we weaken our ability to maintain a moral climate that respects human life, which underlies the respect for individual choice. To the extent that the supreme law of the land enshrines arguments and attitudes that deny personhood and life to the fetus or unborn child, and which make the determination of personhood a function of the private judgment of individuals, the Court's abortion decisions encourage a belief in the violability of human life. Respect for individual choice is rooted in the idea of a common and inviolable humanity. The more we treat humanity as negotiable, and the more respect for it is subject to individuals' subjective and varying judgments, the more precarious become the grounds for respecting humanity in ourselves and in others, which is a precondition for respecting the choices individuals make.

In this way the Court's abortion jurisprudence demonstrates that progress in freedom, in the sense of expanding the domain of protected choices, can erode the conditions for preserving freedom. In this abortion is not unique. A similar dynamic marks the constitutional jurisprudence of affirmative action.

Affirmative action and equal protection

In June 2003, the Supreme Court struck down the University of Michigan's undergraduate affirmative action program in Gratz v. Bollinger while upholding in Grutter v. Bollinger its law school's affirmative action program. Progressive proponents of affirmative action could be pleased that the Court ruled that the promotion of diversity was a goal of such overriding educational importance that it justified a university's taking race into account, as one among a variety of other relevant considerations, in admitting students. Conservative opponents of affirmative action could take solace in the Court's reaffirmation that quotas were unconstitutional. In striking the balance, the Court tilted notably in favor of the progressive interpretation of liberalism.

The cases provoked little outrage. To be sure, taken together they amounted to a victory for proponents of racial preferences. So long as universities were prepared to invest the time and energy that more individualized review of applicants — or, as critics would stress, the creation of the appearance of individualized review — would require, few schools would be prevented by the Court's ruling from achieving the kind of diversity in admissions they

sought. That explains the sense of satisfaction on the left. It requires more effort to explain why a conservative president whose party controls Congress and whose solicitor general argued the cases let the Court's judgment pass with scarcely a murmur.

As with the president's reluctance to weigh in on abortion, his reticence on affirmative action was no doubt partly born of the pragmatic recognition that the public is closely divided on the question. It was also likely a response to the particular character of the public divide, which involves a division not only between opponents and proponents, but also within the hearts and minds of opponents and proponents.

His reticence was a reasonable response to the reasonableness of both divides. In fact, many opponents of affirmative action accept the argument that the massive injustices inflicted against blacks in this country — slavery, Jim Crow, private racial animus — created some sort of public obligation to remedy the present effects of past discrimination, if only through the scrupulous enforcement of civil rights law. At the same time, many proponents of affirmative action recognize the virtue of a color-blind Constitution and the potential for race-based policies to polarize the public and perpetuate racial stereotypes.

The reason for this mutual recognition, as in the case of abortion, is that both the key alternatives in the debate flow easily from liberalism's fundamental premise: equality in freedom. When proponents of affirmative action argue that the state must take race into account in admissions to create a university community that reaps the benefits of diversity, they can draw upon the powerful conviction that equality in freedom depends in practice upon the state's lifting up those who have been trampled down by discriminatory state action or who, owing to poverty, accident, or illness, have fallen so far behind that they cannot catch up without benevolent state action. And when critics argue that university admissions should be color-blind, they can appeal to the venerable belief that equality in freedom means that one should be judged as an individual and not as a member of a group defined by such immutable and morally irrelevant features as skin color.

Indeed, the tension between these two respectable liberal opinions is at the crux of Regents of the University of California v. Bakke (1978), which set the terms of the legal debate. In the process, it reflected the terms of debate set by our shared liberalism. To honor the claims of equality, the four more progressive justices in Bakke would have permitted the University of California at Davis Medical School to set strict quotas (16 places in an entering class of 100) in order to enroll a substantial number of black students. At the same time, and also in the name of equality, the four more conservative justices would have forbidden all use of race in admissions. In an opinion that many came to think of as the holding of Bakke but whose most influential passage was joined by no other member of the Court, Justice Powell sought a compromise. In agreement with the conservative justices, he argued that quotas were unconstitutional while insisting, in accord with the views of the more progressive justices, that universities could use race as one factor among many in evaluating candidates for admission. But Powell rejected several justifications proffered by the University of California

at Davis for the use of race in admissions, including increasing the number of "disfavored minorities" in medicine; "countering the effects of societal discrimination"; and increasing the number of doctors practicing medicine in minority communities. The only constitutionally compelling justification for the use of race, according to Powell, was for the purpose of "obtaining the educational benefits that flow from an ethnically diverse student body." Justice Powell's reasoning suggested that the proper legal resolution of the question must honor both the liberal imperative to treat individuals equally without regard to race and the liberal imperative to take action to achieve equality for members of a race denied it by prior law and custom. It also launched the discordant argument that racial preferences for blacks are good because they create a more educationally sound environment for whites.

Justice Powell's compromise also gave rise to difficult questions of application. These concerned ends — what legislative goals appropriately justified classifications based on the deeply suspect category of race — and means: how to distinguish legitimate from illegitimate uses of race by government.

In the 80s and 90s, in cases dealing with state and national set-asides of construction work for minority contractors, the Court provided some answers. A majority composed of the more conservative members of the Court concluded that state action that classifies on the basis of race must be subject to strict scrutiny, the most severe test. In Richmond v. J.A. Croson Company (1989), which dealt with federal set-asides of funds for minority contractors, and which held that it was constitutional for the government to classify by race to remedy the effects of past discrimination, Justice O'Connor explained for the Court why "strict scrutiny" was appropriate:

> Absent searching judicial inquiry into the justification for such race-based measures, there is simply no way of determining what classifications are "benign" or "remedial" and what classifications are in fact motivated by illegitimate notions of racial inferiority or simple racial politics. Indeed, the purpose of strict scrutiny is to "smoke out" illegitimate uses of race by assuring that the legislative body is pursuing a goal important enough to warrant use of a highly suspect tool. The test also ensures that the means chosen "fit" this compelling goal so closely that there is little or no possibility that the motive for the classification was illegitimate racial prejudice or stereotype.

The Court emphasized the role of strict scrutiny in guarding against unintended injuries that arise out of racial classifications: "Classifications based on race carry a danger of stigmatic harm. Unless they are strictly reserved for remedial settings, they may in fact promote notions of racial inferiority and lead to a politics of racial hostility."

This concern with laws that connected skin color to particular ways of thinking and behaving also informed the Court's decision in Shaw v. Reno (1993), which, under the Equal Protection Clause, struck down a bizarrely shaped North Carolina voting district that appeared to have no other justification than creating a black majority that would elect to Congress a black

representative. Writing for the majority again, Justice O'Connor emphasized that the Court would strictly scrutinize policies that presuppose and reinforce the "perception that members of the same racial group — regardless of their age, education, economic status, or community in which they live — think alike, share the same political interests, and will prefer the same candidates at the polls."

It is not only conservatives, however, who have voiced concerns about the unconstitutionality of classifications that cause harm by perpetuating invidious stereotypes. In cases concerning classifications based on sex, it is the more progressive justices who have sounded the warning. In Craig v. Boren (1976), which struck down an Oklahoma statute setting the drinking age for beer for men at 21 and for women at 18, Justice Brennan established the principle that classifications based on sex were presumptively invalid, though not subject to quite as rigorous a test as classifications based on race. And in United States v. Virginia (1996), which held that it was unconstitutional for Virginia to maintain a military academy exclusively for men, Justice Ginsburg, writing for a left-leaning majority, reaffirmed the constitutional prohibition on laws based on conventional opinions about women's inclinations and abilities: "equal protection principles, as applied to gender classifications, mean state actors may not rely on 'overbroad' generalizations to make 'judgments about people that are likely to . . . perpetuate historical patterns of discrimination.'"

Despite these solemn warnings from conservative as well as progressive justices about classifications that perpetuate stereotypes by teaching that individuals who belong to the same race or sex think and behave alike, Grutter gave constitutional protection to just such classifications. Indeed, while pretending to apply its precedents and established principles faithfully, the Court, in an opinion authored by O'Connor and signed by Ginsburg, deviated dramatically from its precedents and principles to protect practices that rely upon, indeed celebrate, racial stereotypes.

To reach its result, the Court eviscerated its strict scrutiny test. Without searching inquiry, indeed without any inquiry whatsoever — and thus without addressing evidence to the contrary examined in the dissenting opinions — Justice O'Connor's majority opinion accepted at face value the University of Michigan Law School's representation that it did not use race as an overriding factor in admissions and that the school did not effectively employ a quota. Moreover, in the process of sanctioning the promotion of diversity in education as a compelling state interest, the Court all but set aside its concern about suspect classifications that reinforce stereotypes. By accepting racial and ethnic diversity as proxies for the critical form, intellectual diversity, the Court went well beyond ignoring the danger of racial stereotyping. The Court gave heightened protection to it. For the Court said it was urgent and proper for universities to treat black skin or Hispanic ethnicity as a sign of a certain set of experiences and a distinctive set of opinions. At the same time, the Court also belied its commitment to applying strict scrutiny and upholding diversity as a compelling state interest by failing to explore what viewpoints, if any, other than the black viewpoint and the

viewpoints of other historically discriminated against minorities the University of Michigan Law School sought to secure to achieve the educational benefits that flow from a diverse student body.

Strained reasoning suggests the suppression of subterranean tensions. And the legal reasoning in Grutter, like the legal reasoning in Roe, is embarrassingly strained. Nothing in the Constitution or in previous case law required the Court to pretend to apply the most demanding constitutional test to the University of Michigan Law School's account of its affirmative action program while more or less taking the truth of that account on faith. Indeed, nothing in the Constitution required the Court to prefer the more progressive interpretation of liberal principles, which calls for government measures to promote a more inclusive society where more have the opportunity to enjoy their freedom to the fullest, over the more conservative interpretation of liberal principles, which focuses on keeping down the social costs of classifying by race. That a Court on which sit seven justices appointed by conservative presidents made these choices is testimony to the power of the progressive interpretation of liberalism.

Same-sex marriage

More evidence of that power is provided by the revolutionary speed with which attitudes in the United States about same-sex marriage have changed. Just 15 years ago, very few gay men or lesbians, whatever other grievances they harbored, thought or felt themselves to be deprived of civil rights because the law restricted marriage to a man and woman. Nor did it occur to their fellow citizens that such a right existed. Yet today a substantial and growing minority of the public supports same-sex marriage, and even more favor civil unions, or the enshrinement in law of social and financial benefits for same-sex couples similar to those received by married couples. The Fourteenth Amendment may well be the vehicle through which the law comes to recognize same-sex marriage as a constitutionally protected right. The engine driving the change is the imperative of equality in freedom. And, in contrast to the debates over abortion and affirmative action, the difficulty that opponents of same-sex marriage face in translating their objections into the language of freedom is likely to ease recognition of the revolutionary new right under the Constitution.

The legal turning point in the debate over same-sex marriage came with the Supreme Court's 2003 decision in Lawrence v. Texas. Like its opinion in the affirmative action cases that year, the Court's opinion in Lawrence, invalidating on due-process grounds a Texas law that criminalized homosexual sodomy, provoked relatively little outrage from the Bush administration. Understandably, conservatives were not spoiling for a fight to defend the right of states to regulate the private, intimate conduct of consenting adults. Here their preference for limited government outweighed what moral disapproval they felt for

homosexuality. And yet, as Justice Scalia angrily pointed out in dissent, the reasoning adopted by the Court undermined the basis for any future regulations that the majorities might wish to impose on moral grounds.

Reminiscent of the sleight of hand performed by Justice O'Connor that same season in Grutter, Justice Kennedy's majority opinion in Lawrence, in the guise of applying well-accepted tests to changing social circumstances, managed to effect a transformation of the Court's doctrine. Justice Kennedy was obliged to subject the Texas statute to the lowest level of judicial scrutiny. Social and economic regulations that are reviewed under so-called rational basis scrutiny almost always pass. That is because the test requires the Court to ask whether there is any conceivable basis for the regulation in question. In other words, the question before the Court was not whether the law at issue was wise or just or represented sound public policy, but whether it embodied manifestly irrational thinking and indefensible public policy. Of course, if you believe that respecting people's choices about what matters most to them, particularly when those choices do not cause physical injury to another, is the essence of liberty under law, then criminalizing homosexual sodomy is irrational and indefensible. But then again, the Constitution does not enact Mr. John Stuart Mill's liberty principle, and it is not irrational and indefensible to disagree with it.

A narrower ground was available than the one the Court embraced. In her concurrence, Justice O'Connor argued that it would have been preferable for the Court to invalidate the Texas statute on equal protection grounds, holding that it was constitutionally impermissible for a state to criminalize homosexual sodomy while permitting heterosexual sodomy, thus proscribing a behavior for one group of people that it allowed for another. This approach would have left considerably more latitude toward states and would have avoided enshrining a strong moral judgment in the supreme law of the land. By adopting the broader justification, the Court went a long way toward declaring that any laws suggesting that homosexuality was morally different from heterosexuality were unconstitutional.

Justice Scalia was right that it is a short step from the enshrinement of this moral judgment in the fundamental law of the land to a constitutional right to same-sex marriage. He is probably wrong to think that it was avoidable under the Court's Fourteenth Amendment jurisprudence.

A preview of things to come was offered just four months later by the Supreme Judicial Court of Massachusetts. In Goodridge v. Department of Public Health, the sjc declared a state constitutional right to same-sex marriage. While the Massachusetts court's decision upheld the right on equal protection grounds derived from the state constitution, the parallel to Lawrence's due process argument was plain: There are no rational grounds, the court argued, for denying two men or two women who love each other the opportunity to enjoy the legal benefits that a state offers to a man and a woman who love each other.

Here many conservatives drew the line. In particular, social conservatives vehemently objected on moral and religious grounds. But some who drew the line did so halfheartedly. President Bush, for example, embraced an amendment to the Constitution in 2004 defining marriage as a union of one man and one woman. It is notable, though, that during that campaign year he spoke rarely and briefly about the issue and since reelection has done very little to rally support in Congress. And this from a president who knows how to pursue policies that provoke intense opposition. To be sure, in November 2004, eleven states passed laws in special referenda banning same-sex marriage. Still, the vast majority of states did not take action. Perhaps one reason for the president's restraint is that the most compelling case conservatives make against same-sex marriage is not compelling enough to justify changing the Constitution to ban it.

By separating matrimony from parenting, the most powerful conservative argument against it runs, and by implicitly rejecting the idea of the natural complementarity of the sexes, same-sex marriage will further undermine marriage, which has long been at risk and is the most vital institution in society for the formation of character in children. Conservatives may well be right about the consequences of same-sex marriage — but, as they hardly need to be reminded, there are always countervailing considerations.

One such is the mistake of treating the Constitution, the supreme law of the land, as an instrument of social policy. Another is the natural momentum in a free society of the arguments — rooted in the freedom to choose and equality before the law — for conferring upon same-sex couples, as the Massachusetts court put it, "the protections, benefits, and obligations of civil marriage." But there is another, closely related but less obvious consideration: The law generally does not prohibit practices on the grounds that they harm marriage, especially if the practice can be seen as enhancing equality in freedom. Just consider the variety of practices that conservatives have argued, persuasively, do harm to marriage but which they by and large, and properly, do not seek to prohibit.

There are good conservative reasons to believe that the invention of a cheap and reliable birth control pill, which hit the market in the mid-1960s, has weakened marriage. The pill greatly reduces a key cost associated with premarital sex: unwanted pregnancy. It thus removes a powerful inducement to marriage — the promise of regularly available sex — by making sex more readily available, because much less risky, before marriage. Yet nobody wants the state to take action to curb use of the pill.

Cohabitation before marriage, conservatives argue, also weakens marriage. Living together, especially attractive to the young, mobile, and ambitious, normalizes the idea that marriage is one lifestyle option among many, an expression of personal commitment rather than a sacred obligation. While lamenting this development, conservatives do not wish to pass laws to restrict it.

No-fault divorce also appears, from a conservative perspective, to diminish respect for the sanctity of marriage. It lends support to the idea that marriage is optional, a contract like all other contracts, which one can break at will, incurring only the liability, as in all breaches of contracts, for court-awarded monetary damages. But most conservatives agree that it is too late in the day to return to a more demanding regime.

The abolition of the civil action for alienation of affection also contributes to the devaluation of marriage. Conducting an affair with another person's spouse no longer represents an injury cognizable by law. It is more akin to stealing another person's best friend. Neither society as a whole, nor any significant subset of conservatives, clamors for changes in the law of torts to make seducers of spouses legally liable for coming between man and wife.

Finally, and not least, the traditional foundation of marriage has been shaken by the movement over the past 40 years of women out of the home and into the workplace. Success in professional life makes women less financially dependent on men, so less in need of marriage as a source of economic security. It also provides women with more opportunity to experiment romantically — which, whatever the intentions of the experimenters, delays marriage and children and may, as the years pass, because of the hardening of sentiments and the realities of biology, reduce the likelihood of both. Yet conservatives these days are more likely to defend the choice of those women who decide to stay at home than to argue against women who choose to work. Thus, they affirm, and indeed expand the meaning of, the liberal principle of choice.

Now, if you believe that the birth control pill, cohabitation before marriage, no-fault divorce, laxness concerning adultery, and the movement of women out of the home and into the workplace undermine marriage — as do many conservatives — and yet you are unwilling to support legislation to prohibit these practices because of the cost to individual freedom — an unwillingness many conservatives share — how in good faith can you single out same-sex marriage for legal prohibition?

One answer is that, in contrast to same-sex marriage, the aforementioned practices do not involve formal state approval, either symbolically or through the conferring of financial benefits. They call only for the state to mind its own business. In contrast, proponents of same-sex marriage seek both the financial benefits and the symbolic legitimation that the law confers through marriage.

In fact, in minding its own business with respect to all other aspects of intimate relations, the state makes a powerful statement of moral and political principle: The organization of intimate relations is a matter of personal choice. Now that bigotry against homosexuality is on the run, express legal liabilities have been lifted (with the notable exception of the military's "don't ask, don't tell" policy), popular culture has increasingly embraced gays and lesbians, and the question of same-sex marriage has been brought out into the open and into focus by vigorous public debate, the speculative harms critics associate with same-sex

marriage will, in more and more people's minds, be outweighed by the commitment to toleration of choices that differ from one's own — particularly in matters relating to love and the family, especially between consenting adults where physical harm is not an issue. While majorities in the United States may not yet be ready for same-sex marriage, larger majorities will oppose legislation that smacks of anti-same-sex animus.

This is not to approve of the 4–3 decision by the Supreme Judicial Court of Massachusetts. The sjc imperiously denied any rational basis whatsoever for legislation restricting marriage to a man and a woman. Unlike the prohibitions on interracial marriage properly struck down by the U.S. Supreme Court in 1967 in Loving v. Virginia, the prohibition on same-sex marriage, as the Massachusetts dissenters argued, is connected to valid policy questions. The color of one's skin has no bearing on the essential purpose of marriage, but same-sex marriage raises concerns about parenting, child rearing, and the structure of the family, which lie at the very heart of marriage's purpose.

And yet opponents of same-sex marriage must reckon with the fact that over the past 40 years the very meaning of marriage has undergone a substantial change. The sexual and cultural revolutions of the 1960s have pushed the bearing and rearing of children from the core of marriage's social meaning. Ask twentysomethings and thirtysomethings what they hope for from marriage. They will, of course, tell you that they want love and that they definitely want companionship — indeed, that they expect their spouse to be their best friend. And obviously they want to share the pleasures of sex. Then ask them about children. Many will pause and say well, yes, certainly, they are thinking about children, and eventually, somewhere down the line, they expect to have one or two. But children, once at the center of marriage, have now become negotiable, and what used to be negotiable — love, companionship, sex — has moved to the center. Under these circumstances, legal recognition of same-sex marriage will not represent a change in the meaning of a venerable social institution through law, but rather an adaptation of law to a profound change in social meaning.

To be sure, the fundamental importance of marriage to a free society is recognized in a line of cases running from Meyer v. Nebraska (1923) and Pierce v. Society of Sisters (1925), which affirmed the right of parents to control the upbringing and education of their children, to Loving, where Chief Justice Warren affirmed that "the freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men." But it is difficult to formulate in the language of freedom an argument for preserving in law a meaning of marriage that it has lost in practice. That is why, although it reflects a more radical social step than abortion or affirmative action, same-sex marriage will encounter less powerful opposition than have abortion and affirmative action from the supreme law of the land.

In fact, it is quite possible that a constitutional showdown will be averted. Momentum for a constitutional amendment has dwindled. Because of the force of arguments about individual freedom and equality before the law in a free society, other state legislatures will likely do on their own in the coming years what the Massachusetts legislature is doing under the compulsion of its highest court — vote to grant same-sex couples the protections, benefits, and obligations of civil marriage. But should the issue find its way to the Supreme Court, the ability of proponents of same-sex marriage to make their case straightforwardly in the language of freedom and the inability of opponents to frame their legitimate concerns in that language will likely result in same-sex marriage's being enshrined in the supreme law of the land.

Progress v. preservation

he American constitutional order speaks the language of freedom. All of the great moral questions of the day eventually get translated into that language, and partisans must turn it to their advantage or almost certainly see their cause go down to defeat. The Fourteenth Amendment's due process clause and equal protection clause provide an all but irresistible invitation from the Constitution to inscribe resolutions to controversies about equality in freedom in the supreme law of the land.

A distinct pattern has emerged. On the touchstone issues, the Court has given a substance to equality in freedom that has extended the protected sphere of individual choice and has expanded the privileged range of individuals who enjoy it. This in turn has prepared the way for further extension and expansion. The Court has done so in the face of respectable alternative interpretations of the substance of equality in freedom, which stress the social costs of expanding choice, particularly the damage done to the material and moral preconditions for maintaining a society of free individuals. Both interpretations of the substance of equality in freedom — that which focuses on releasing individuals from fetters and that which concentrates on the need to restrain individuals and prepare them for the responsibilities of freedom — belong to the liberal tradition. Yet in the contest between them, the liberal spirit naturally prefers measures that enlarge the realm of individual autonomy or promote a more egalitarian society over those that seek to contain the social costs of those measures and to conserve the background conditions that keep autonomy from deteriorating into anarchy.

This progressive proclivity is rooted in the nature of the liberal spirit and sown into the fabric of human nature. The rights in terms of which the liberal tradition defines freedom are essentially expansive in nature, steadily eroding the limits on individual choice established by law and custom. Of course, the constraints imposed by the state, religion, tradition, custom, public opinion, and taboo do not immediately vanish with the advent of the liberal state. As Tocqueville observed of America in the 1830s, religious belief prevented Americans from

entertaining thoughts and pursuing fancies formally permitted to them by their freedom. But with each new victory won by freedom, religious beliefs slacken, morals relax, and institutions once regarded as sacred or permanent appear more artificial and alterable. The previously unthinkable becomes routine, and restraints that had seemed indispensable to civilized life fall to legal challenge. Over the centuries this dynamic has served justice, bringing the reality of American life more in line with the promise of American life. Yet the liberal antipathy toward the restraint of freedom doesn't abolish society's need to conserve freedom's material and moral preconditions. It just makes it extremely difficult to defend that need as a legal requirement.

The Supreme Court's interpretation of the requirements of due process and equal protection illustrates the dilemma. The respect for equality in freedom that underlies the abortion right is compromised by the determination to deny the moral status of developing human life. The respect for equality in freedom that informs the constitutional right to conduct affirmative action programs on campuses is weakened by the university's routine reduction of individuals to the groups they are brought to campus to represent. And the respect for equality in freedom that will justify striking down as unconstitutional laws that keep individuals of the same sex from marrying will further shake the ideal of marriage, whose promise of permanence was bound up with the biological realities of parenthood and recognition of obligations across the generations.

More than ever, it is useful to recall Alexander Bickel: To proclaim a practice or institution constitutional is not to confer upon it very high praise. Some of what our Constitution permits is right and proper. Some is neither wise nor beneficial. Much is a matter of justice and accompanied by a complex array of benefits and burdens. It is one of our Constitution's great achievements to have established a sturdy framework that encourages progress in freedom. It is no small part of the wisdom of the Constitution to also give wide scope to the examination of the social costs of freedom's progress, for the blessings of freedom cannot be preserved without attending to them.