

# SUBSTANTIVE DUE PROCESS AS A TWO- WAY STREET

## HOW THE COURT CAN RECONCILE SAME- SEX MARRIAGE AND RELIGIOUS LIBERTY

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### INTRODUCTION

Last month, the potential conflict between same-sex marriage and religious liberty prompted death threats, arson threats, and the temporary closure of a small-town pizzeria in Indiana. The restaurant's owner had admitted to a reporter that she could not cater a hypothetical same-sex wedding because of her religious beliefs (even though she otherwise serves gay customers in her restaurant).<sup>1</sup> Threatened with violence over her unpopular religious belief, the owner was forced to close the restaurant, uncertain if she could ever reopen.<sup>2</sup>

Leading up to oral argument in the same-sex marriage cases, it was reasonable to wonder whether the Indiana episode was evidence of an irreconcilable conflict between same-sex marriage and religious liberty. If so, then a Supreme Court decision in favor of same-sex marriage might leave no room for religious diversity of opinion about marriage. As a result, individuals, businesses, churches, and other religious organizations could face a world in which having unpopular beliefs about marriage would trigger a range of punishments.

The argument did little to dispel that concern. When Chief Justice Roberts asked whether religious schools would be required to give same-sex couples married student housing, Solicitor General Donald Verrilli, Jr. suggested that

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1. See Alyssa Marino, *RFRA: Michiana Business Wouldn't Cater a Gay Wedding*, ABC 57 NEWS (Apr. 1, 2015, 4:37 AM PDT), <http://www.abc57.com/story/28681598/rfra-first-business-to-publicly-deny-same-sex-service>.

2. Caitlin Dewey, *A Call for Sanity in the Matter of Memories Pizza vs. the Internet*, WASH. POST INTERSECT (Apr. 2, 2015), <http://wpo.st/SKjF0>. The pizzeria has since reopened. Tom Coyne, *Northern Indiana Pizzeria That Backed Religious Law Reopens*, WASH. POST (Apr. 9, 2015), <http://wpo.st/vKjF0>.

they might.<sup>3</sup> Solicitor General Verrilli also candidly acknowledged the possibility that the Internal Revenue Service would take away tax-exempt status from religious non-profits opposed to same-sex marriage, saying “it’s certainly going to be an issue.”<sup>4</sup>

It need not be an issue, or at least not as much of an issue as the Indiana episode and the Solicitor General’s responses suggest. There is no inherent conflict between same-sex marriage and religious diversity. As with most other issues, our society remains capable of adopting a live-and-let-live approach in which same-sex marriage is recognized as a constitutional right, but religious dissenters are neither punished for their beliefs nor forced to violate them.<sup>5</sup>

Whether we follow that course may depend in part on *how* the Supreme Court recognizes same-sex marriage if it decides to do so. An Equal Protection decision that paints all opposition to same-sex marriage as anti-gay animus might fuel the notion that religious diversity on the issue is a problem for the government to eradicate.<sup>6</sup> But the Court might defuse the potential conflict if it uses its substantive due process precedents to recognize same-sex marriage as a deeply personal and important question, worthy of protection under precedents such as *Planned Parenthood v. Casey*<sup>7</sup> and *Lawrence v. Texas*.<sup>8</sup>

The key to such a ruling would be for the Court to make clear what has long been implicit in its substantive due process decisions: namely, that substantive due process is a two-way street. When the Court recognizes a right because it is deeply personal and important, governments are not free to force unwilling parties to participate in or support the exercise of that right. Rights created because they relate to deeply important issues that are “central to personal dignity”—and about which the Court believes people should be able to

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3. Transcript of Oral Argument at 36-37, *Obergefell v. Hodges*, No. 14-556 (U.S. Apr. 28, 2015), available at [http://www.supremecourt.gov/oral\\_arguments/argument\\_transcripts/14-556q1\\_7148.pdf](http://www.supremecourt.gov/oral_arguments/argument_transcripts/14-556q1_7148.pdf).

4. *Id.* at 38.

5. Indeed, this live-and-let-live approach is our constitutional norm. It is constitutional to procure an abortion, a gun, a Bible, or pornography; to engage in all manner of religious and secular ceremonies; and for the government to engage in capital punishment and wage war. Yet we generally do not force unwilling parties to participate in these legal and constitutionally protected or constitutionally permitted activities when it runs contrary to their deeply held moral or religious beliefs. See generally Mark L. Rienzi, *The Constitutional Right Not to Kill*, 62 EMORY L.J. 121, 130-52 (2012) (describing widespread conscience protections related to military service, capital punishment, assisted suicide, and abortion).

6. See, e.g., Brief of Douglas Laycock et al. as Amici Curiae in Support of Petitioners at 26-27, *Obergefell*, No. 14-556 (U.S. Mar. 6, 2015), 2015 WL 1048450 (“Religious colleges, summer camps, day care centers, retreat houses, counseling centers, meeting halls, and adoption agencies may be sued under public accommodations laws for refusing to offer their facilities or services to same-sex couples. Or they may be penalized by loss of licensing, accreditation, government contracts, access to public facilities, or tax exemption.” (footnotes omitted)).

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

8. *Lawrence v. Texas*, 539 U.S. 588 (2003).

make their own decisions without “compulsion of the State”<sup>9</sup>—necessarily also preclude government compulsion against people who choose not to participate in or support the exercise of those rights.<sup>10</sup> Articulating this even-handed understanding of substantive due process rights in the marriage context could go a long way toward helping the nation reconcile same-sex marriage and religious liberty.

## I. THE ABORTION ROADMAP

The Court’s abortion decisions have, of course, generated considerable controversy. There is, however, an uncontroversial aspect of those decisions that may be useful in the marriage context. In particular, the abortion decisions take seriously the religious and moral concerns of those who cannot participate in or support abortion. The abortion decisions *both* recognize a substantive constitutional right to abortion *and* acknowledge the diversity of opinion on the subject and the appropriateness of protecting dissenters from forced participation or support. In this respect, the abortion decisions offer a potential roadmap for a same-sex marriage decision.

*Roe v. Wade* actually begins with an acknowledgement of the “sensitive and emotional nature of the abortion controversy.”<sup>11</sup> The opinion then relies on Justice Holmes’s observation that the Constitution “is made for people of fundamentally differing views”<sup>12</sup> and later notes “the wide divergence of thinking” on the “difficult question of when life begins.”<sup>13</sup> The Court further noted its own incompetence to dictate the answer to such a question and cautioned that “by adopting one theory of life,” the State of Texas could not “override the rights” of pregnant women who disagree with the State.<sup>14</sup> And the Court expressly located the right to abortion not just with the woman seeking the abortion, but also with the physician, who remains free to exercise her own medical judgment about whether to provide it.<sup>15</sup>

In *Doe v. Bolton*,<sup>16</sup> the companion case to *Roe*, the Court spoke approvingly of Georgia’s statutory protection for individuals and organizations that did not freely choose to participate in or support abortion. For example, the Court noted the individuals who would be involved in an abortion—namely “a physi-

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

10. This argument has been set forth in more detail elsewhere in relation to abortion. See Rienzi, *supra* note 5, at 147-52. See generally Mark Rienzi, *The Constitutional Right Not to Participate in Abortions: Roe, Casey, and the Fourteenth Amendment Rights of Healthcare Providers*, 87 NOTRE DAME L. REV. 1 (2011).

11. *Roe v. Wade*, 410 U.S. 113, 116 (1973).

12. *Id.* at 117 (quoting *Lochner v. New York*, 198 U.S. 45, 76 (1905) (Holmes, J., dissenting)).

13. *Id.* at 159-60.

14. *Id.* at 162.

15. *Id.* at 163.

16. 410 U.S. 179 (1973).

cian or any other employee”—have “the right to refrain, for moral and religious reasons.”<sup>17</sup> The hospital itself is “free not to admit a patient for an abortion.”<sup>18</sup> The Court characterized these rights as “appropriate protection[s]” both for individuals and organizations asked to participate in or support abortions.<sup>19</sup>

*Casey* continues this approach by emphasizing the importance of the abortion decision *both* to the woman seeking the abortion *and* to those asked to participate. The plurality opinion emphasizes that abortion is a deeply personal choice, implicating “one’s own concept of existence, of meaning, of the universe, and of the mystery of human life.”<sup>20</sup> For this reason, being able to make one’s own decisions about abortion, whatever the conclusion, is “central to personal dignity” and helps “define the attributes of personhood.”<sup>21</sup> Such decisions must be made without “compulsion of the State.”<sup>22</sup> Abortion is “fraught with consequences”—and not simply for the woman seeking the abortion.<sup>23</sup> Rather, the Court recognized that abortion is also “fraught with consequences *for others*,” including “the persons who perform and assist in the procedure.”<sup>24</sup>

The Court’s recognition of an abortion right in *Roe*, *Doe*, and *Casey* prompted most states and the federal government to institute conscience protections for people who do not wish to participate in or support abortion.<sup>25</sup> These protections tend to be broad—protecting people not only from being forced to perform abortions, but also from being forced to assist in the performance of an abortion, from being forced to have one’s property used in the performance of an abortion, or even from being forced to refer a request for an abortion to another provider.<sup>26</sup> Perhaps because of these protections, the Court has devoted

17. *Id.* at 197-98.

18. *Id.* at 197.

19. *Id.* at 198. Several years after *Roe* and *Doe*, the Court also made clear that the abortion right does not include the ability to force an unwilling government to pay for one’s abortion. *See Harris v. McRae*, 448 U.S. 297, 316 (1980). Rather, *Roe* left even governments free to make their own “value judgment[s]” about whether to participate in or support abortions. *Id.* at 314 (quoting *Maher v. Roe*, 432 U.S. 464, 474 (1977)).

20. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 851 (1992).

21. *Id.*

22. *Id.*

23. *Id.* at 852.

24. *Id.* (emphasis added). A majority of the Court later adopted the *Casey* Court’s explication of liberty in *Lawrence v. Texas*, 539 U.S. 558, 574 (2003).

25. *See Rienzi, supra* note 10, at 31-35 (noting the “speed and near ubiquity” of conscience protections adopted at the state and federal levels in the wake of *Roe*).

26. *Id.* at 34 (“These protections extended not only to direct personal performance of an abortion, but more broadly to providers who have an objection to being forced to ‘participate,’ ‘refer,’ ‘assist,’ ‘arrange for,’ ‘admit any patient for,’ ‘allow the use of hospital facilities for,’ ‘accommodate,’ or ‘advise’ concerning abortion.”). In this sense, our experience with abortion matches our approach to other important issues over which our citizens have deep moral or religious disagreements, such as capital punishment, assisted suicide, and military combat. *Rienzi, supra* note 5, at 135-47.

very little of its abortion jurisprudence to disputes over forced participation or support for abortion.<sup>27</sup>

## II. DEFINING THE “LIBERTY OF ALL”

The abortion cases demonstrate the Court’s ability to recognize a new constitutional right under substantive due process while at the same time acknowledging the propriety of protecting dissenters from forced participation in the exercise of that right. The Court has not yet acknowledged what those cases teach about substantive due process rights: that they are two-way streets.<sup>28</sup> In other words, even if legislatures had not adopted broad statutory protections in the abortion context, the Fourteenth Amendment would forbid governments from forcing unwilling individuals and organizations to participate in or support abortion.<sup>29</sup>

The same-sex marriage cases provide an important opportunity for the Court to explicitly acknowledge this even-handed aspect of substantive due process. Where an issue is so deeply important that citizens must be able to reach their own conclusions without the “compulsion of the State,” the same Fourteenth Amendment that protects the decision to exercise the right simultaneously protects the decision not to participate in or support the exercise of the right.

Acknowledging this two-sided nature of substantive due process rights would be consistent with the Court’s view of its obligation in such cases to “define the liberty of all,” rather than to mandate a single “moral code” that all citizens must follow.<sup>30</sup> The Court should make clear that, just as neither it nor the State of Texas could dictate the answer to the question of life’s beginnings and thereby “override the rights” of dissenting pregnant women by “adopting one theory of life,” neither the Court nor the States can override the rights of religious dissenters by enforcing one theory of marriage.<sup>31</sup> As the Court explained in *Casey*, while governments are generally free to “adopt one position or the other” on a disputed question, that principle must yield where the choice treads

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27. Indeed, the closest the Court has come to the issue in the four decades since *Roe* appears to be the recent spate of cases concerning the Department of Health and Human Services (HHS) contraceptive mandate. *See, e.g.*, *Little Sisters of the Poor Home for the Aged v. Sebelius*, 134 S. Ct. 1022 (2014). Disclosure: I represent the Little Sisters of the Poor Home for the Aged and several other parties challenging the contraceptive mandate.

28. *See, e.g.*, Michael W. McConnell & Nathan Chapman, *A Step Backward for Freedom of Conscience*, HOOVER INSTITUTION (Mar. 1, 2011), <http://www.hoover.org/research/step-backward-freedom-conscience> (“[*Roe*’s] privacy rationale implies a broad freedom of conscience for relevant health care workers.”).

29. *See generally* Rienzi, *supra* note 5, at 127-30 (describing widespread and broadly agreed-upon conscience protections and explaining how the Fourteenth Amendment protects conscience rights).

30. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 850 (1992).

31. *Roe v. Wade*, 410 U.S. 113, 162 (1973).

upon a “protected liberty.”<sup>32</sup> In explaining this aspect of substantive due process, the Court invoked its First Amendment precedent in *West Virginia State Board of Education v. Barnette*: “Thus, while some people might disagree about whether or not the flag should be saluted, or disagree about the proposition that it may not be defiled, [the Court has] ruled that a State may not compel or enforce one view or the other.”<sup>33</sup>

The same is true in the marriage context. Parties on all sides emphasize the importance of marriage as, for example, “an institution of profound emotional and cultural significance”<sup>34</sup> and of “fundamental importance.”<sup>35</sup> For millions of Americans, marriage is also a matter of deep *religious* significance.<sup>36</sup> And the Court itself has recognized the importance of marriage as a “sacred” institution that “promotes a way of life” and exists “for as noble a purpose as any involved in our prior decisions.”<sup>37</sup> If the Court recognizes a constitutional right to same-sex marriage, it should acknowledge that the same characteristics of marriage that make it special to people on all sides—its importance, its relationship to life’s most profound questions, and its relationship to human dignity—prohibit government coercion on either side of the question.

#### CONCLUSION

Substantive due process has long been a controversial doctrine. Perhaps ironically, it now provides the Supreme Court’s best opportunity to reduce controversy. By emphasizing that substantive due process protects people on all sides of important questions, the Court can demonstrate that same-sex marriage and religious liberty need not conflict. And it can make clear that a Constitution “made for people of fundamentally differing views”<sup>38</sup> actually protects people of fundamentally differing views, especially on deeply important issues.<sup>39</sup>

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

33. *Id.* (citing *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943)).

34. Brief for Petitioners at 12, *Tanco v. Haslam*, No. 14-562 (U.S. Feb. 27, 2015) (companion case to *Obergefell v. Hodges*, No. 14-556 (U.S. argued Apr. 28, 2015)), 2015 WL 860739; *see also* Brief for Petitioners at 28, *Obergefell*, No. 14-556 (U.S. Feb. 27, 2015), 2015 WL 860738 (having one’s marital status recognized “has long been understood to be of fundamental importance both to the individual and to society more broadly”).

35. Brief of Respondents at 6, *Tanco*, No. 14-562 (Mar. 27, 2015), 2015 WL 1384102.

36. *See, e.g.*, Brief Amicus Curiae of United States Conference of Catholic Bishops in Support of Respondents and Supporting Affirmance at 3-5, *Obergefell*, No. 14-556 (U.S. Apr. 2, 2015), 2015 WL 1519042.

37. *Griswold v. Connecticut*, 381 U.S. 479, 486 (1965).

38. *Roe v. Wade*, 410 U.S. 113, 117 (1973) (quoting *Lochner v. New York*, 198 U.S. 45, 76 (1905) (Holmes, J., dissenting)).

39. *See W. Va. State Bd. of Ed. v. Barnette*, 319 U.S. 624, 642 (1943) (“[The] freedom to differ is not limited to things that do not matter much. That would be a mere shadow of freedom. The test of its substance is the right to differ as to things that touch the heart of the existing order.”).