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Reconstruction

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The U.S. Supreme Court's decisions interpreting the U.S. Constitution in general and the Reconstruction Amendments in particular substantially constrain the ability of legislative and executive actors to address a variety of hot-button political issues, including abortion, gay rights, and affirmative action. So important are the Court's decisions that the ability to appoint Justices who will shift the Court's direction has been a central issue in recent presidential campaigns. Throughout history, decisive shifts in the Court's composition have resulted in correspondingly dramatic shifts in constitutional doctrine. Yet surprisingly, these dramatic shifts have occurred with the Court rarely overturning any precedent.

Although others have identified selected instances of the Court engaging in stealth revision of precedent, this Article is both the first to provide a detailed taxonomy of the methods employed and to exhaustively consider their use in construing the Reconstruction Amendments. This stealth process, which this Article refers to as judicial reconstruction, occurs when the Court employs one or more of three different methods of transforming constitutional doctrine: selective quotation of precedent; re-characterization of precedent; and citations to "dissenting concurrences"—separate opinions in earlier cases that are concurrences in form but dissents in substance. Through the use of these methods, liberal and conservative justices alike have dramatically transformed constitutional law even when their decisions are unsupported by and at times diametrically at odds with the Court's earlier precedents.

This Article concludes that U.S. Senators and commentators, with their almost laser-like focus on fidelity to stare decisis during the confirmation process, have overlooked—and perhaps even fostered—the opaque practice of reconstructing rather than the transparent process of overruling precedent. It further concludes that those examining judicial nominees' commitment to respecting precedent should examine not merely their formal fidelity to stare decisis but instead their history of and views on reconstructing precedent.

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INTRODUCTION

In the United States today, legislative and executive discretion to address certain divisive political issues—including abortion,¹ gay rights,² gun control,³ religious freedom,⁴ and affirmative action⁵—is circumscribed by U.S. Supreme Court decisions that curtail such discretion, because it interferes with individual rights explicitly or implicitly guaranteed by various constitutional provisions, most

1. *E.g.*, *Whole Woman’s Health v. Hellerstedt*, 136 S. Ct. 2292 (2016).
2. *E.g.*, *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).
3. *E.g.*, *McDonald v. City of Chicago*, 561 U.S. 742 (2010); *District of Columbia v. Heller*, 554 U.S. 570 (2008).
4. *E.g.*, *City of Boerne v. Flores*, 521 U.S. 507 (1997).
5. *E.g.*, *Grutter v. Bollinger*, 539 U.S. 306 (2003); *Gratz v. Bollinger*, 539 U.S. 244 (2003).

notably the Reconstruction Amendments.⁶ Because the freedom to address such issues is judicially constrained, a major focus of each presidential election cycle is on the number of new U.S. Supreme Court Justices each candidate will likely be able to appoint and its probable impact on future legislative and executive discretion.⁷

Such discussions recur each time a vacancy actually arises during a President's term, with commentators asking whether the appointment will result in the newly composed Court overruling some or all of the Court's earlier decisions and legal pundits sparring on the legitimacy of the Court overruling precedent.⁸ During confirmation hearings, in which nominees rarely express an opinion on the constitutional issues themselves, nominees are instead intensively grilled on their fidelity to the doctrine of *stare decisis*, particularly where constitutional decisions are involved.⁹

Yet despite the Court's frequent lurches leftward or rightward throughout history, the Court almost never explicitly overrules any of its constitutional decisions. Decisions such as *Lawrence v. Texas*,¹⁰ which struck down a state law criminalizing consensual sodomy and in so doing explicitly overruled its earlier decision in *Bowers v. Hardwick*,¹¹ are exceedingly rare.

This is not to say that the Court's interpretation of the U.S. Constitution has remained consistent over time or that the appointment of new Justices has no impact on the trajectory of the Court's constitutional jurisprudence. Indeed, were one to compare the Court's decisions interpreting the Reconstruction Amendments in the decades immediately following their ratification with the Court's modern decisions regarding those same provisions, one might well conclude that the decisions were the products of two diametrically opposite constitutional systems. This is so despite the absence of any relevant constitutional amendments during the interim period and few explicit instances of overruling precedent.

In this Article, I identify and describe a stealth process of judicial *reconstruction* of precedent that often achieves the same end result as explicitly overruling

6. The phrase "Reconstruction Amendments" is used throughout this Article to refer to the Thirteenth, Fourteenth, and Fifteenth Amendments, which were enacted by Congress and ratified by the States in the years immediately following the Civil War.

7. See, e.g., Ari Berman, *The Supreme Court Is the Most Important Issue in the 2016 Election*, NATION (Feb. 16, 2016), <https://www.thenation.com/article/the-supreme-court-is-the-most-important-issue-in-the-2016-election/> [<https://perma.cc/ZJ8V-B2VK>].

8. See, e.g., Dylan Mathews, *America After Anthony Kennedy: What Kennedy's Departure from the Supreme Court Will Mean for Abortion, Gay Rights, and More*, VOX (last updated June 27, 2018, 2:07 PM), <https://www.vox.com/policy-and-politics/2018/6/25/17461318/anthony-kennedy-ideology-retirement-supreme-court> [<https://perma.cc/S58Q-QNU5>].

9. See, e.g., Tucker Higgins, *Supreme Court Nominee Brett Kavanaugh Says Landmark Abortion Ruling Roe v. Wade Is 'An Important Precedent'*, CNBC (last updated Sept. 5, 2018, 3:12 PM), <https://www.cnbc.com/2018/09/05/supreme-court-nominee-brett-kavanaugh-says-landmark-abortion-ruling-roe-v-wade-is-important-precedent.html> [<https://perma.cc/6FSC-SSR9>].

10. *Lawrence v. Texas*, 539 U.S. 558 (2003).

11. *Bowers v. Hardwick*, 478 U.S. 186 (1986).

precedent. This process of judicial reconstruction occurs when the Court employs one or more of three different methods of transforming constitutional doctrine. First, selective quotation of precedent, in which the Court purports to rely on earlier precedent via direct quotation but does so in a selective way that distorts, sometimes dramatically, their actual holdings. Second, re-characterization of precedent, in which the Court, without directly quoting its earlier decisions, characterizes them as standing for something quite different than the earlier decisions actually held. Third, quoting from “dissenting concurrences,” in which the Court quotes not from a majority opinion but from a separate opinion that is a concurrence in form but a dissent in substance. Through the use of these methods, Justices are able to dramatically transform constitutional law even when their decisions are unsupported by and at times diametrically at odds with the Court’s earlier precedents. These methods have been used by liberal and conservative Justices alike to either expand or contract the scope of various constitutional provisions.

Although others have identified selected instances of the Court engaging in stealth revision of precedent,¹² this is both the first article to provide a detailed taxonomy of the methods employed and to exhaustively consider their use in construing the Reconstruction Amendments. It proceeds in three parts. Part I comprehensively demonstrates how the Court has re-shaped the meaning of the Reconstruction Amendments through the process of judicial reconstruction. Part II identifies selected examples of the Court re-shaping other constitutional doctrines through a similar process. Part III identifies examples of U.S. Supreme Court decisions that are vulnerable to conservative judicial reconstruction now that President Trump’s appointments have shifted the Court’s composition in a more decidedly conservative direction, as well as examples of decisions that would be vulnerable to liberal judicial reconstruction if the Court’s composition were to shift in a decidedly liberal direction in the future.

This Article concludes that U.S. Senators and commentators, with their almost laser-like focus on fidelity to *stare decisis* during the confirmation process, have overlooked—and perhaps even fostered—the opaque practice of reconstructing rather than the transparent process of overruling precedent. It further concludes that those examining the commitment of judicial nominees to respecting precedent should examine not merely their formal fidelity to *stare decisis* but instead their history of and views on reconstructing precedent.

Such a shift in focus from formal to actual fidelity to precedent will serve two

12. See, e.g., Samuel Estreicher, *Federal Power to Regulate Private Discrimination: The Revival of the Enforcement Clauses of the Reconstruction Era Amendments*, 74 COLUM. L. REV. 449, 466–67 (1974) (asserting that *Jones v. Alfred H. Mayer Co.* silently overruled *The Civil Rights Cases*); Michael J. Klarman, *What’s So Great About Constitutionalism?*, 93 NW. U.L. REV. 145, 181 (1998) (contending that *The Slaughter-House Cases* were “functionally overruled” by *Lochner v. New York*). See generally Barry Friedman, *The Wages of Stealth Overruling*, 99 GEO. L.J. 1, 9, 12 (2010); Randy J. Kozel, *The Scope of Precedent*, 113 MICH. L. REV. 179, 202 (2014); Richard M. Re, *Narrowing Precedent in the Supreme Court*, 114 COLUM. L. REV. 1861 (2014).

important purposes. First, assuming nominees answer questions truthfully during the confirmation process, it will allow Senators, commentators, and the public to better gauge the nominee's impact on the future trajectory of constitutional law. Second, by shedding light on the process of stealth transformation of precedent and treating it as the equivalent of explicitly overruling precedent, Justices will no longer be incentivized to engage in the stealth process of reconstructing precedent without justifying their actions. Instead, when a case arises in which overruling precedent seems justifiable, they will explicitly overrule the earlier cases and explain their rationales for doing so instead of hiding behind a formal veil of fidelity to *stare decisis* that allows them to depart radically from precedent without justifying their decision to the public.

I. JUDICIAL RECONSTRUCTION OF THE RECONSTRUCTION AMENDMENTS

The U.S. Supreme Court's interpretation of the Reconstruction Amendments has undergone a seismic shift between when the Amendments were ratified and the present day. The Court's opinions in the decades immediately following the Civil War suggested that the Reconstruction Amendments were quite limited in their reach. In contrast, the Court's decisions in the 1960s and 1970s suggested that the Reconstruction Amendments were breathtakingly broad in reach. The Court's more recent decisions fall somewhere in between those two poles. But over this entire period, in which the doctrine changed dramatically, the Court rarely overturned any of its precedent.

These dramatic shifts in the Court's precedents interpreting the Reconstruction Amendments have been accomplished through a stealth process whereby the Court, instead of overturning inconvenient precedent, reconstructs the earlier precedent to conform with the direction in which the Court wishes to shift the doctrine. This process takes place when the Court employs one or more of three different methods of transforming constitutional doctrine: selective quotation of precedent, re-characterization of precedent, and quotation from "dissenting concurrences."

A. Selective Quotation of Precedent

One of the easiest ways to change the meaning of an earlier precedent to make it appear to support a new proposition is to directly quote a limited passage from the earlier decision stripped from its context. Four contemporary U.S. Supreme Court decisions interpreting the Reconstruction Amendments—*Reynolds v. Sims*,¹³ *Jones v. Alfred H. Mayer Co.*,¹⁴ *Loving v. Virginia*,¹⁵ and *Lawrence v. Texas*¹⁶—are demonstrative of this technique for transforming constitutional law.

13. *Reynolds v. Sims*, 377 U.S. 533 (1964).

14. *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968).

15. *Loving v. Virginia*, 388 U.S. 1 (1967).

16. *Lawrence v. Texas*, 539 U.S. 558 (2003).

1. *Reynolds and the Fundamental Right to Vote*

In *Reynolds*, the Court declared unconstitutional apportionment plans for legislative districts in several states on the ground that the populations in the proposed districts were unequal.¹⁷ The Court's rationale for invalidating the districting scheme was that the right to vote is a fundamental right protected by the Equal Protection Clause and that weighing the votes of different people differently by means of malapportionment was equivalent to denial of the right to vote.¹⁸

This was a rather remarkable result given that the Court had previously rejected arguments that the Fourteenth Amendment in any way protected the right to vote. Ninety years earlier, the Court in *Minor v. Happersett*¹⁹ rejected a claim that the Fourteenth Amendment's Privileges or Immunities Clause provided a basis for declaring unconstitutional state laws preventing women from voting. The *Minor* Court identified two structural aspects of the Constitution that made clear that the Fourteenth Amendment did not in any way protect the right to vote. First, the Court noted that pursuant to Section 2 of the Fourteenth Amendment, a state's representation in Congress was to be diminished to the extent it denied the right to vote to males over twenty-one years of age.²⁰ *Minor* reasoned that the existence of this penalty-in-representation provision necessarily implied that states remained free to disenfranchise people.²¹ Second, the Court noted that Congress and the States deemed it necessary to adopt the Fifteenth Amendment, which prohibited denial of the right to vote on the basis of race, color, or previous condition of servitude. *Minor* concluded that if the Fourteenth Amendment already protected the right to vote generally, the Fifteenth Amendment would have been redundant.²²

The *Reynolds* Court got around the seemingly insurmountable stumbling block of *Minor* by ignoring it altogether, not mentioning the case once in the course of its opinion and leading the dissent to charge that the majority had "disregarded" and "silently overruled" the decision.²³ Instead, the Court relied exclusively on a quote from an earlier case to support its conclusion that voting is a fundamental right protected by the Fourteenth Amendment's Equal Protection Clause: "Almost a century ago, in *Yick Wo v. Hopkins*, the Court referred to 'the political franchise of voting' as 'a fundamental political right, because preservative of all rights.'"²⁴ Stripped of its context, a reader of the *Reynolds* opinion would likely assume that the right to vote was at issue in *Yick Wo*. However, the case had nothing whatsoever to do with voting rights. Rather, *Yick Wo* involved an equal protection challenge to a

17. See *Reynolds*, 377 U.S. at 568.

18. See *id.* at 561–62.

19. *Minor v. Happersett*, 88 U.S. 162 (1874).

20. See *id.* at 174–75.

21. See *id.* at 174.

22. See *id.* at 175.

23. See *Reynolds*, 377 U.S. at 612 (Harlan, J., dissenting).

24. See *id.* at 562 (majority opinion) (citations omitted) (quoting *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886)).

statute that required laundries to be located in certain types of buildings absent a waiver.²⁵ Although the statute was facially neutral, every Chinese applicant was denied a waiver while all but one non-Chinese applicant was granted a waiver.²⁶ The Court held that the threshold requirement for making out an equal protection claim is satisfied when a facially neutral law is administered in a discriminatory manner, and it also appeared to hold that the extreme discriminatory effects of the law, standing alone, satisfy the threshold requirement of an equal protection claim.²⁷

Yick Wo's reference to voting was merely one of several examples the Court gave of ways in which the “nature and theory of our institutions of government” do not allow for the exercise of arbitrary power.²⁸ Indeed, the *Yick Wo* Court acknowledged that voting is “not regarded strictly as a natural right, but as a privilege merely conceded by society, according to its will.”²⁹ Yet, by selectively quoting from dicta in *Yick Wo*, the *Reynolds* Court effectively overruled its decision in *Minor* without so stating and created a new constitutional principle that lacked any support in precedent. The Court repeated this selective citation of *Yick Wo* in *Harper v. Virginia State Board of Elections*,³⁰ where the Court declared unconstitutional state poll taxes on the ground that they unconstitutionally denied those who failed to pay it the fundamental right to vote.³¹

Thereafter, the Court no longer cited *Yick Wo* in cases involving the fundamental right to vote. Having distorted the *Yick Wo* dicta in *Reynolds* and *Harper*, the Court subsequently cited those two cases,³² in effect laundering their distortion of precedent through them.

2. *Jones and Congressional Power to “Enforce” the Thirteenth Amendment*

The Thirteenth Amendment—enacted and ratified in the wake of the Civil War—contains two sections. Section 1 creates a blanket prohibition on slavery or involuntary servitude, while Section 2 grants Congress the power to “enforce” the Thirteenth Amendment by “appropriate legislation.” In one of the earliest decisions to interpret Section 2, the Court in *The Civil Rights Cases*³³ gave Section 2 a limited interpretation that caused the constitutional provision to lay largely dormant for nearly a century. Yet by selectively quoting from *The Civil Rights Cases*, the Court in *Jones* dramatically transformed the scope of congressional power under Section 2.

In *The Civil Rights Cases*, the U.S. Supreme Court declared unconstitutional Sections 1 and 2 of the Civil Rights Act of 1875, which prohibited discrimination

25. See *Yick Wo*, 118 U.S. at 357.

26. See *id.* at 374.

27. See *id.* at 373–74.

28. See *id.* at 369–70.

29. See *id.* at 370.

30. *Harper v. Va. State Bd. of Elections*, 383 U.S. 663 (1966).

31. *Id.* at 667–68.

32. See, e.g., *Bush v. Gore*, 531 U.S. 98, 104–05 (2000); *Dunn v. Blumstein*, 405 U.S. 330, 336 (1972).

33. *The Civil Rights Cases*, 109 U.S. 3 (1883).

on the basis of race by places of public accommodation. One argument made in the case was that Congress was empowered to enact the provisions pursuant to Section 2 of the Thirteenth Amendment. To address this argument, *The Civil Rights Cases* Court was willing to assume *arguendo* that Section 2 empowered Congress to prohibit not merely slavery itself but also the so-called “badges and incidents of slavery.”³⁴ Specifically, the Court wrote that “*it is assumed*, that the power vested in Congress to enforce the article by appropriate legislation, clothes Congress with power to pass all laws necessary and proper for abolishing all badges and incidents of slavery in the United States.”³⁵ Describing this as “the major proposition” at issue in the case, the Court went on to ask whether or not “the minor proposition [was] also true, that the denial to any person of admission to the accommodations and privileges of an inn, a public conveyance, or a theatre, does subject that person to any form of servitude, or tend to fasten upon him any badge of slavery?”³⁶ The Court went on to conclude that denial of admission to public accommodations did not constitute a “badge” or “incident” of slavery, engaging in its own analysis of the meaning of those terms without any deference to Congress.³⁷ By thus rejecting the “minor proposition,” the Court was able to avoid directly deciding whether Section 2 even empowered Congress to eradicate the badges and incidents of slavery.

Nearly a century passed before the Court revisited the scope of congressional power under Section 2. In *Jones*, the Court considered the constitutionality of a federal statute that prohibited racial discrimination in the sale or rental of real property.³⁸ The *Jones* Court concluded that Congress had the power to enact the statute pursuant to Section 2. In so holding, the *Jones* Court made three legal conclusions: that Section 2 empowered Congress not merely to enact laws regarding slavery and indentured servitude, but also the badges and incidents thereof;³⁹ that the Court would defer to Congress’s rational determination that something constituted a badge or incident of slavery;⁴⁰ and that Congress’s conclusion that racial discrimination in the sale or rental of real property was a badge or incident of slavery was a rational one.⁴¹

In support of its first legal conclusion, the *Jones* Court purported to rely directly upon *The Civil Rights Cases*:

“By its own unaided force and effect,” the Thirteenth Amendment “abolished slavery, and established universal freedom.” *Civil Rights Cases*. Whether or not the Amendment *itself* did any more than that—a question not involved in this case—it is at least clear that the Enabling Clause of that Amendment empowered Congress to do much more. For that clause

34. *Id.* at 20.

35. *Id.* (emphasis added).

36. *Id.* at 20–21.

37. *Id.* at 21–25.

38. *See Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 412–37 (1968).

39. *See id.* at 439–40.

40. *See id.* at 440.

41. *See id.* at 440–41.

clothed “Congress with power to pass *all laws necessary and proper for abolishing all badges and incidents of slavery in the United States.*” *Ibid.* (Emphasis added.)⁴²

Thus, by leaving out the prefatory phrase “it is assumed,” the *Jones* Court was able to make it appear as though *The Civil Rights Cases* provided direct support for the proposition that Section 2 empowers Congress to enact legislation designed to abolish the badges and incidents of slavery, a question actually reserved by *The Civil Rights Cases* Court.

After concluding that Congress could legislate to abolish the badges and incidents of slavery, *Jones* proceeded to make its second legal conclusion: that “Congress has the power under the Thirteenth Amendment rationally to determine what are the badges and the incidents of slavery.”⁴³ Unlike for its first conclusion, however, *Jones* did not rely on *The Civil Rights Cases* to support giving deference to Congress. In fact, *Jones* ignored the non-deferential approach undertaken in *The Civil Rights Cases* and instead based its second conclusion primarily upon remarks by key members of the Congress that enacted the Thirteenth Amendment.⁴⁴

For the *Jones* Court’s third conclusion, that it was rational to treat racial discrimination in the sale or rental of real property as a badge or incident of slavery, *Jones* switched tactics and purported once again to rely directly upon *The Civil Rights Cases*:

[T]his Court recognized long ago that, whatever else they may have encompassed, the badges and incidents of slavery—its “burdens and disabilities”—included restraints upon “those fundamental rights which are the essence of civil freedom, namely, the same right . . . to inherit, purchase, lease, sell and convey property, as is enjoyed by white citizens.” *Civil Rights Cases*.⁴⁵

The *Jones* Court again quoted directly from *The Civil Rights Cases* in an accompanying footnote:

[T]he entire Court [in *The Civil Rights Cases*] agreed upon at least one proposition: The Thirteenth Amendment authorizes Congress not only to outlaw all forms of slavery and involuntary servitude but also to eradicate the last vestiges and incidents of a society half slave and half free, by securing to all citizens, of every race and color, “the same right to make and enforce contracts, to sue, be parties, give evidence, and to inherit, purchase, lease, sell and convey property, as is enjoyed by white citizens.”⁴⁶

Together, these two quotes make it appear as though the Court in *The Civil Rights Cases* concluded that restrictions on the sale or rental of real property constituted a badge or incident of slavery. Yet a closer look at the quoted language

42. *Id.* at 439.

43. *See id.* at 440.

44. *See id.*

45. *Id.* at 441.

46. *Id.* at 441 n.78.

in context paints a starkly different story. In these two quotes, the Court in *The Civil Rights Cases* was directly quoting the language of the Civil Rights Act of 1866. Referencing this Act, the Court in *The Civil Rights Cases* went on to state:

Whether this legislation was fully authorized by the Thirteenth Amendment alone, without the support which it afterward received from the Fourteenth Amendment, after the adoption of which it was re-enacted with some additions, it is not necessary to inquire. It is referred to for the purpose of showing that at that time (in 1866) Congress did not assume, under the authority given by the Thirteenth Amendment, to adjust what may be called the social rights of men and races in the community.⁴⁷

In other words, without deciding whether Section 2 of the Thirteenth Amendment in fact authorized Congress to enact the provisions of the Civil Rights Act of 1866, the majority in *The Civil Rights Cases* assumed that the 1866 Act represented the *ceiling* on the type of legislation that fell within the scope of congressional power under Section 2 and concluded that legislation regulating racial discrimination by places of public accommodation—the subject of the provision of the Civil Rights Act of 1875 at issue in *The Civil Rights Cases*—fell outside that scope.

In sum, through the process of selective quotation, the Court in *Jones* was able to transform a precedent that narrowly interpreted congressional power under Section 2 of the Thirteenth Amendment into one that appeared to provide support for broad congressional power under that provision.

3. *Loving and the Fundamental Right to Marry*

In *Loving v. Virginia*,⁴⁸ the Court declared unconstitutional on two grounds a state law criminalizing interracial marriage. Although the Court's decision focused primarily on the fact that the statute created a race-based classification that did not satisfy strict scrutiny under the Fourteenth Amendment's Equal Protection Clause,⁴⁹ the Court alternatively held that the statute violated the Fourteenth Amendment's Due Process Clause because it interfered with the fundamental right to marry.⁵⁰

The Court has relied upon the latter holding to justify striking down a variety of laws restricting the right to marry that do not draw race-based distinctions, including restrictions on marriage by those who are in arrears of child support obligations,⁵¹ prisoners,⁵² and same-sex couples.⁵³ Accordingly, the doctrinal soundness of this entire line of cases is based on the accuracy of *Loving's* assertion

47. *The Civil Rights Cases*, 109 U.S. 3, 22 (1883) (emphasis added).

48. *Loving v. Virginia*, 388 U.S. 1 (1967).

49. *Id.* at 7–12.

50. *Id.* at 12.

51. *See Zablocki v. Redhail*, 434 U.S. 374, 384–87 (1978).

52. *See Turner v. Safley*, 482 U.S. 78, 94–95 (1987).

53. *See Obergefell v. Hodges*, 135 S. Ct. 2584, 2598–99 (2015).

that the Court had previously recognized marriage to be a freestanding fundamental right protected by the Due Process Clause.

The *Loving* Court's conclusion that marriage is such a right was based almost exclusively on the Court's 1942 decision in *Skinner v. Oklahoma*.⁵⁴ Specifically, *Loving*, quoting directly from *Skinner*, wrote that "[m]arriage is one of the 'basic civil rights of man,' fundamental to our very existence and survival."⁵⁵ Yet a close examination of *Skinner* reveals that although the word marriage was mentioned by the Court in its opinion, the reference to marriage was either dicta or recognition of marriage not as a freestanding fundamental right but rather a derivative one.

At issue in *Skinner* was the constitutionality of an Oklahoma law providing for the sterilization of those convicted for the third time of certain categories of crimes. The Court held that the law was subject to strict scrutiny because a fundamental right was involved.⁵⁶ Specifically, the *Skinner* Court wrote: "We are dealing here with legislation which involves one of the basic civil rights of man. Marriage and procreation are fundamental to the very existence and survival of the race."⁵⁷ While the reference to procreation in *Skinner* made sense given that sterilization would prevent future procreation, the reference to marriage at first glance seems puzzling because the right to marry was itself not directly involved in the case. The easiest way to make sense of the reference is to consider that, at the time *Skinner* was decided, sex outside of marriage was in most instances criminalized, and thus marriage served as the sole gateway to engaging in lawful acts of procreation.⁵⁸ Thus, because procreation is a fundamental right, marriage—to the extent states choose through their criminal laws to make it the only lawful gateway to engaging in procreative activity—is a derivative fundamental right.⁵⁹ The Court's subsequent decision in *Zablocki v. Redhail*⁶⁰ appeared to acknowledge the derivative nature of the marriage right when it cited a state law criminalizing sex outside of marriage in support of its conclusion that "if appellee's right to procreate means anything at all, it must imply some right to enter the only relationship in which the State of Wisconsin allows sexual relations legally to take place."⁶¹

Accordingly, *Skinner*'s reference to marriage was either dicta or tied directly to procreation, and did not provide clear support for the *Loving* Court's conclusion that marriage is a freestanding fundamental right.⁶² This lends credence to Chief

54. *Skinner v. Oklahoma*, 316 U.S. 535 (1942).

55. *See Loving*, 388 U.S. at 12 (quoting *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942)).

56. *See Skinner*, 316 U.S. at 539–42.

57. *Id.* at 541.

58. *See* Peter Nicolas, *Fundamental Rights in a Post-Obergefell World*, 27 YALE J.L. & FEMINISM 331, 345–47 (2016).

59. *See id.*

60. *Zablocki v. Redhail*, 434 U.S. 374 (1978).

61. *Id.* at 386 n.11.

62. Save for this isolated, offhanded reference to "marriage," it is clear from the rest of the opinion that the only right at issue in the case is procreation. *See, e.g., Skinner*, 316 U.S. at 536 (describing the deprivation at issue in the case as "the right to have offspring"); *id.* at 541 (focusing entirely on sterilization and its effects on the ability to procreate).

Justice Robert's statement in dissent in *Obergefell v. Hodges*,⁶³ that because the roots of the right to marry are grounded in the right to procreate, it is problematic to extend the right to same-sex couples without considering those couples' inability to procreate absent the assistance of third persons.⁶⁴

Yet once *Loving* broke the connection between marriage and procreation by referring only to the *Skinner* Court's reference to marriage, post-*Loving* decisions have consistently treated marriage as a freestanding fundamental right. Indeed, although *Loving* was based directly on *Skinner*'s dicta, post-*Loving* decisions describing the types of rights deemed fundamental under the Due Process Clause treat *Skinner* and *Loving* as representing two distinct lines of precedent, with *Skinner* cited for the proposition that procreation is a fundamental right and *Loving* cited for the proposition that marriage is a fundamental right.⁶⁵

4. *Lawrence and the Role of History Under the Due Process Clause*

As indicated in the introduction, *Lawrence v. Texas* is a rare example of a modern U.S. Supreme Court case explicitly overruling constitutional precedent. Yet *Lawrence* paved the way to overruling *Bowers* in part by reconstructing other precedent to suggest that *Bowers* itself was inconsistent with established doctrine.⁶⁶

A major point of contention between *Lawrence* and *Bowers* was the role that history should play in the Court's recognition of unenumerated rights under the Due Process Clause. In a series of cases decided both prior to and after *Bowers*, the Court held that its power to recognize such rights is limited to those "deeply rooted in this Nation's history and tradition."⁶⁷ Citing this precedent, the *Bowers* Court rejected the claim that a right to engage in same-sex sodomy was constitutionally protected, noting the ancient roots of laws criminalizing sodomy.⁶⁸ Yet in *Lawrence*, Justice Kennedy's majority opinion criticized the *Bowers* Court's historical focus: "In all events we think that our laws and traditions in the past half century are of most relevance here . . . [H]istory and tradition are the starting point but not in all cases the ending point of the substantive due process inquiry."⁶⁹ The *Lawrence* Court proceeded to identify more recent legal developments that provided support for treating same-sex sodomy as a constitutionally protected activity.⁷⁰

The key to the *Lawrence* Court's ability to reject *Bowers*'s focus on history is the

63. *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

64. *See id.* at 2614 (Roberts, J., dissenting).

65. *See, e.g.,* *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997); *M.L.B. v. S.L.J.*, 519 U.S. 102, 116 (1996); *Bowers v. Hardwick*, 478 U.S. 186, 190 (1986); *Carey v. Population Servs. Int'l*, 431 U.S. 678, 684–85 (1977); *Roe v. Wade*, 410 U.S. 113, 152–53 (1973).

66. *See Lawrence v. Texas*, 539 U.S. 558, 577 (2003).

67. *E.g., Glucksberg*, 521 U.S. at 721; *Moore v. City of East Cleveland*, 431 U.S. 494, 503 (1977) (plurality opinion).

68. *See Bowers*, 478 U.S. 186, 191–94 (1986).

69. *See Lawrence*, 539 U.S. at 571–72 (quoting *Cty. of Sacramento v. Lewis*, 523 U.S. 833, 857 (1998) (Kennedy, J., concurring)).

70. *See id.* at 572–73.

quoted language describing history and tradition as “the starting point but not in all cases the ending point of the substantive due process inquiry.” The quote comes from Justice Kennedy’s concurring opinion in *County of Sacramento v. Lewis*.⁷¹ In *Lewis*, all nine Justices rejected a claim that a police officer’s deliberate or reckless indifference to life while engaged in a high-speed chase in an effort to apprehend a suspect violated the substantive due process rights of those injured as a result of the chase, albeit for somewhat different reasons.⁷² In his concurring opinion in *Lewis*, Justice Kennedy first noted his agreement with Justice Scalia’s conclusion that history and tradition did not support the substantive due process right claimed by those injured as a result of the high-speed chase.⁷³ This was followed by the language quoted in *Lawrence*, which in context makes clear that the quoted language was intended to *narrow*, rather than to broaden, the scope of substantive due process:

In the instant case, the authorities cited by Justice Scalia are persuasive, indicating that we would contradict our traditions were we to sustain the claims of the respondents.

That said, it must be added that history and tradition are the starting point, but not in all cases the ending point of the substantive due process inquiry. There is room as well for an objective assessment of the necessities of law enforcement, in which the police must be given substantial latitude and discretion.⁷⁴

In other words, Justice Kennedy’s opinion in *Lewis* indicated that *even if* history and tradition provided support for the claimed right, other considerations, including the needs of law enforcement, might result in rejection of such a claim. Yet in *Lawrence*, he quotes that language out of context, using it to suggest just the opposite, namely, that the Court can recognize a substantive due process right even if it lacks support in history and tradition.

B. Re-characterization of Precedent

In each of the examples set forth in Part I.A, the Court relied on convenient language in earlier decisions stripped of its context to suggest that the earlier decisions supported the Court’s legal conclusions when they did not. Where such convenient language is not available, the Court has employed a second method of reconstructing precedent. With this second method, instead of quoting its earlier decisions, the Court simply re-characterizes them as standing for a proposition starkly different from what those earlier decisions actually held.

This method of reconstructing the Court’s decisions interpreting the Reconstruction Amendments has arisen in three different circumstances. First, in some cases, the Court re-characterizes the ground upon which an earlier case was

71. *Cty. of Sacramento v. Lewis*, 523 U.S. 833 (1998).

72. *Id.* at 836.

73. *Id.* at 857 (Kennedy, J., concurring) (citing *id.* at 860–62 (Scalia, J., concurring)).

74. *Id.*

decided, such as by citing a case formally decided on equal protection grounds as though it were instead decided on due process grounds. Second, the Court re-characterizes earlier cases that applied a lower level of scrutiny, typically rational basis review, as though they instead applied a more searching form of scrutiny. Third, the Court alters the parameters of an established constitutional doctrine or test by re-casting earlier decisions as requiring some key element even though those earlier decisions placed no weight on that element.

Using these various methods of re-characterizing precedent, the Court is often able to blaze new legal pathways or narrow the scope of constitutional provisions while making it appear as though they are simply applying binding precedent. In some instances, this process is abrupt, with a later case describing a predecessor case in starkly different terms. In other instances, this process is more gradual, with one or more intermediary cases helping to slowly transition the meaning of the root case.

1. Re-characterizing Ground: The Development of Modern Substantive Due Process Jurisprudence

Contemporary U.S. Supreme Court decisions acknowledging the Court's authority to recognize and enforce unenumerated substantive fundamental rights under the Due Process Clause often cite the same seven cases in support of this proposition: *Meyer v. Nebraska*,⁷⁵ *Pierce v. Society of Sisters*,⁷⁶ *Skinner v. Oklahoma*,⁷⁷ *Prince v. Massachusetts*,⁷⁸ *Griswold v. Connecticut*,⁷⁹ *Loving v. Virginia*,⁸⁰ and *Eisenstadt v. Baird*.⁸¹ For example, in *Carey v. Population Services International*⁸²—a case recognizing an unenumerated right to procure an abortion—the Court wrote:

[T]he Court has recognized that one aspect of the “liberty” protected by the Due Process Clause of the Fourteenth Amendment is “a right of personal privacy, or a guarantee of certain areas or zones of privacy.” *Roe v. Wade* While the outer limits of this aspect of privacy have not been marked by the Court, it is clear that among the decisions that an individual may make without unjustified government interference are personal decisions “relating to marriage, *Loving v. Virginia*; procreation, *Skinner v. Oklahoma* ex rel. *Williamson*; contraception, *Eisenstadt v. Baird*; family relationships, *Prince v. Massachusetts*, and child rearing and education, *Pierce v. Society of Sisters*; *Meyer v. Nebraska*.”⁸³

Similar citations to these cases can be found in other contemporary Supreme

75. *Meyer v. Nebraska*, 262 U.S. 390 (1923).

76. *Pierce v. Society of Sisters*, 268 U.S. 510 (1925).

77. *Skinner v. Oklahoma*, 316 U.S. 535 (1942).

78. *Prince v. Massachusetts*, 321 U.S. 158 (1944).

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

80. *Loving v. Virginia*, 388 U.S. 1 (1967).

81. *Eisenstadt v. Baird*, 405 U.S. 438 (1972).

82. *Carey v. Population Servs. Int'l*, 431 U.S. 678 (1977).

83. *Id.* at 684–85 (1977) (quoting *Roe v. Wade*, 410 U.S. 113, 152–53 (1973)) (citations omitted).

Court decisions adjudicating other claimed substantive due process rights.⁸⁴ Yet a closer look at these seven precedents will reveal that they in fact provide little direct support for the modern theory of recognizing and enforcing unenumerated substantive rights under the Due Process Clause. Two of the cases—*Skinner* and *Eisenstadt*—were formally decided on class-based equal protection grounds. Two of the other cases—*Meyer* and *Pierce*—were formally based on subsequently repudiated *Lochner*-era precedents interpreting the Due Process Clause to protect “freedom of contract.” The remaining three cases—*Prince*, *Griswold*, and *Loving*—were themselves re-characterizations of one or more of the first four cases.

a. A Shift from Equality to Liberty: The Skinner and Eisenstadt Cases

As shown in Part I.A.3, by selectively quoting from the Court’s decision in *Skinner*, the *Loving* Court was able to recognize a freestanding fundamental right to marry, even though *Skinner* was a case about procreation. As the quote above from *Carey* demonstrates, post-*Loving* the Court treated *Skinner* and *Loving* as separate lines of precedent, with *Skinner* representing the right to procreate and *Loving* representing the right to marry.⁸⁵ Yet recognition of a freestanding right to marry is not the only way in which *Loving* reconstructed *Skinner*. In addition to selectively quoting from *Skinner*, *Loving* also significantly re-characterized the ground upon which the case was decided.

As explained above, the Court’s decision in *Loving* rested on two grounds. First, that the anti-miscegenation statute created a race-based classification that did not satisfy strict scrutiny under the Equal Protection Clause.⁸⁶ And second, that the statute violated the Due Process Clause because it interfered with the fundamental right to marry.⁸⁷ It was in the second section of the Court’s opinion regarding the Due Process Clause that the Court quoted *Skinner*.⁸⁸

However, the *Skinner* decision was decided on equal protection, not due process, grounds. Recall that at issue in *Skinner* was the constitutionality of an Oklahoma law providing for the sterilization of those convicted for the third time of certain categories of crimes. *Skinner* treated the statute as presenting an equal protection problem, focusing on the fact that the statute encompassed only certain types of crimes, such as grand larceny, but not others, such as embezzlement.⁸⁹ While acknowledging that the distinction between different types of crimes would satisfy the rational basis review normally applicable in equal protection challenges,

84. See, e.g., *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997) (physician-assisted suicide); *Bowers v. Hardwick*, 478 U.S. 186, 190 (1986) (sexual autonomy); *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632, 639–40 (1974) (right of pregnant public employees to continue working).

85. *Carey v. Population Servs. Int’l*, 431 U.S. 678, 684–85 (1977) (quoting *Roe v. Wade*, 410 U.S. 113, 152–53 (1973)) (citations omitted).

86. See *Loving v. Virginia*, 388 U.S. 1, 7–12 (1967).

87. See *id.* at 12.

88. See *id.*

89. See *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 541–42 (1942).

the Court held that strict scrutiny applied where, as here, a fundamental right was involved.⁹⁰

To be sure, separate concurring opinions in *Skinner* suggested that the case presented either a substantive or a procedural due process problem rather than an equal protection one,⁹¹ but the majority opinion clearly and unmistakably decided the case on equal protection grounds.⁹² And although the *Skinner* majority recognized the right involved as a fundamental one, the Court's jurisprudence has made an important distinction between fundamental rights recognized under the Due Process Clause and those recognized under the Equal Protection Clause. If a right is recognized as fundamental under the Due Process Clause, infringement of that right is subject to heightened scrutiny even if the government even-handedly infringes upon everyone's exercise of that right.⁹³ In contrast, fundamental rights protected by the Equal Protection Clause can be infringed upon or even eliminated by the government without raising any constitutional concerns, so long as the government does so in an even-handed manner.⁹⁴ Only if it infringes upon or denies the right to some individuals but not others is the government's conduct subject to heightened scrutiny.⁹⁵ Thus, *Loving's* re-casting of *Skinner* as a due process rather than an equal protection fundamental rights case significantly alters the scope of the constitutional protection afforded by the right. Post-*Loving*, the Court has carried this re-characterization of *Skinner* forward by consistently treating it as a due process precedent rather than an equal protection one.⁹⁶

The Court's decision in *Eisenstadt*—cited in *Carey* for the proposition that the Due Process Clause protects personal decisions related to contraception—likewise provides little direct support for modern substantive due process jurisprudence. *Eisenstadt* was decided after the Court's decision in *Griswold*. In *Griswold*, the Court declared unconstitutional a Connecticut law that criminalized both the use of contraceptives by married persons and the distribution of contraceptives to such persons.⁹⁷ Although *Griswold* invalidated the law, the Justices did not coalesce on a basis for doing so. The plurality eschewed reliance on the Due Process Clause,

90. See *id.* at 539–42.

91. See *id.* at 543–45 (Stone, C.J., concurring); *id.* at 546–47 (Jackson, J., concurring).

92. *Skinner* was decided just a few years after the Court overruled its *Lochner*-era line of cases, and thus the Justices in the majority may have invoked the Equal Protection rather than the Due Process Clause to avoid accusations of a return to *Lochner*. See Kenneth L. Karst, *The Liberties of Equal Citizens: Groups and the Due Process Clause*, 55 UCLA L. REV. 99, 112, 123 (2007); G. Edward White, *The Anti-Judge: William O. Douglas and the Ambiguities of Individuality*, 74 VA. L. REV. 17, 65–72 (1988).

93. See Nicolas, *supra* note 58, at 354.

94. See *id.* at 358–59.

95. See *id.*

96. See *Obergefell v. Hodges*, 135 S. Ct. 2854, 2598 (2015); *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997); *Bowers v. Hardwick*, 478 U.S. 186, 190 (1986); *Carey v. Population Servs. Int'l*, 431 U.S. 678, 684–85 (1977); *Moore v. City of East Cleveland*, 431 U.S. 494, 499 (1977); *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632, 639–40 (1974); *Roe v. Wade*, 410 U.S. 113, 169 (1973) (Stewart, J., concurring).

97. See *Griswold v. Connecticut*, 381 U.S. 479, 480 (1965).

invoking instead what it described as the “penumbras” of the Bill of Rights to recognize a fundamental right to marital privacy,⁹⁸ while the concurring opinions invoked the Ninth Amendment⁹⁹ and the Due Process Clause.¹⁰⁰

Eisenstadt, decided seven years after *Griswold*, involved a challenge to the constitutionality of a Massachusetts law that also regulated the use and distribution of contraceptives. The Massachusetts statute permitted contraceptive use by and distribution to married persons, but it prohibited their use by and distribution to unmarried persons.¹⁰¹ Thus, the case was arguably distinguishable from *Griswold* in that no claim to *marital* privacy could be made.

Although *Eisenstadt* hinted that the fundamental right recognized in *Griswold* might logically be extended to unmarried couples—thus requiring strict scrutiny of the law at issue—the Court made it clear that it was instead deciding the case on class-based equal protection grounds.¹⁰² Indeed, the Court was so clear that it was *not* deciding the case on due process grounds that this language has been described as “well-known dictum.”¹⁰³ Purporting to apply no more than rational basis review, the *Eisenstadt* Court declared the Massachusetts law unconstitutional on the ground that it irrationally discriminated between married and unmarried persons.¹⁰⁴

Yet despite the clear basis for the Court’s decision in *Eisenstadt*, it took the Court just ten months to re-characterize its holding. In *Roe v. Wade*,¹⁰⁵ the Court considered the constitutionality of a pair of state laws restricting or regulating abortion. The Court noted that its previous cases had recognized a right to personal privacy, although it indicated that there was some uncertainty in the Court’s earlier decisions as to whether the source of that right was the penumbras of the Bill of Rights, the Ninth Amendment, or the Due Process Clause.¹⁰⁶ *Roe* ultimately resolved that uncertainty by identifying the Due Process Clause as the source of that right.¹⁰⁷ Among the list of cases that *Roe* cited in support of its conclusion was *Eisenstadt*, which it represented as recognizing a fundamental right to contraception.¹⁰⁸ The specific pinpoint cite in *Roe* directs to the section of the *Eisenstadt* opinion in which the Court, in dicta, made reference to the colorable

98. *See id.* at 484–86 (majority opinion).

99. *See id.* at 486–99 (Goldberg, J., concurring).

100. *See id.* at 499–500 (Harlan, J., concurring in the judgment); *id.* at 502–08 (White, J., concurring in the judgment).

101. *See Eisenstadt v. Baird*, 405 U.S. 438, 442 (1972).

102. *See id.* at 446–47, 447 n.7, 452–55.

103. *See Lawrence v. Texas*, 539 U.S. 558, 595 (2003) (Scalia, J., dissenting).

104. *See Eisenstadt*, 405 U.S. at 446–47, 447 n.7, 454. One may rightly be skeptical of the *Eisenstadt* Court’s claim that it was applying only rational basis scrutiny. The Court applied a far more exacting standard to the rationales proffered by the government than is the norm under traditional rational basis review, rejecting them on the ground that the means-end fit was too loose. *See Eisenstadt*, 405 U.S. at 447–52.

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

106. *See id.* at 152.

107. *See id.* at 153.

108. *See id.* at 152.

argument that *Grissold* might be extended to unmarried persons.¹⁰⁹

Post-*Roe*, the Court has consistently treated *Eisenstadt* as a due process precedent despite *Eisenstadt*'s explicit reliance on class-based equal protection principles. In some of these post-*Roe* cases, the Court has briefly mentioned the fact that *Eisenstadt* was formally decided on equal protection grounds¹¹⁰ but characterized it as explicitly or implicitly grounded as well in due process principles.¹¹¹ However, in most cases, the Court simply has cited *Eisenstadt* in support of either the general proposition that the Due Process Clause protects a right to privacy¹¹² or for the more specific proposition that it protects a right to contraception.¹¹³

In sum, two of the seven cases cited in support of the modern theory of recognizing and enforcing fundamental rights under the Due Process Clause—*Skinner* and *Eisenstadt*—are actually equal protection precedents and do not support the proposition set forth in cases such as *Carey*. Moreover, a third case cited in support of the modern theory of substantive due process—*Loving*—was itself based upon a multi-faceted reconstruction of *Skinner*, and it is likewise subject to the same taint.

b. Lochner Re-Incarnated: The Meyer and Pierce Cases

In *Lochner v. New York*,¹¹⁴ the U.S. Supreme Court held that the Due Process Clause of the Fourteenth Amendment protected “liberty of contract,” leading the Court to declare that a state labor law limiting the number of hours per day and per week bakery employees could work impermissibly interfered with the liberty of employers and employees to contract with one another.¹¹⁵ *Lochner* was part of an important line of cases that struck down hundreds of federal and state laws in the early 20th century¹¹⁶ until the line of decisions was ultimately overruled.¹¹⁷ Not only was *Lochner* overruled, but as will be demonstrated in Part I.C.1, the now-repudiated *Lochner* line of cases were themselves a result of dramatic judicial reconstruction of

109. *See id.* (citing *Eisenstadt*, 405 U.S. at 453–54).

110. *See, e.g.*, *Obergefell v. Hodges*, 135 S. Ct. 2584, 2604 (2015); *Lawrence v. Texas*, 539 U.S. 558, 565 (2003); *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 849 (1992); *Carey v. Population Servs. Int'l*, 431 U.S. 678, 686–87 (1977).

111. *See, e.g.*, *Obergefell*, 135 S. Ct. at 2604; *Lawrence*, 539 U.S. at 565; *Casey*, 505 U.S. at 851; *Carey*, 431 U.S. at 687.

112. *See, e.g.*, *M.L.B. v. S.L.J.*, 519 U.S. 102, 114 n.6 (1996); *Hodgson v. Minnesota*, 497 U.S. 417, 434 (1990); *Thornburgh v. Am. Coll. of Obstetricians and Gynecologists*, 476 U.S. 747, 772 (1986); *City of Akron v. Akron Ctr. for Reprod. Health, Inc.*, 462 U.S. 416, 427 (1983); *Runyon v. McCrary*, 427 U.S. 160, 177 (1976); *Vill. of Belle Terre v. Boraas*, 416 U.S. 1, 16 (1974); *United States v. Orito*, 413 U.S. 139, 142 (1973); *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 65 (1973); *United States v. Kras*, 409 U.S. 434, 444 (1973).

113. *See, e.g.*, *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997); *Bowers v. Hardwick*, 478 U.S. 186, 190 (1986); *Zablocki v. Redhail*, 434 U.S. 374, 385 (1978).

114. *Lochner v. New York*, 198 U.S. 45 (1905).

115. *See id.* at 45–65.

116. *See Obergefell*, 135 S. Ct. at 2617 (Roberts, J., dissenting).

117. *See West Coast Hotel Co. v. Parrish*, 300 U.S. 379, 390–97 (1937).

earlier precedent. Thus, because of both *Lochner*'s shaky foundation and its ultimate overruling, precedents grounded in *Lochner* are on an unstable footing. Yet two of the key cases forming the basis of modern substantive due process jurisprudence—*Meyer* and *Pierce*—are direct outgrowths of *Lochner*. Moreover, two additional cases—*Prince* and *Griswold*—justified their holdings by reliance on judicial reconstructions of *Meyer* and *Pierce* and are thus subject to the same taint.

In *Meyer*, the Court declared unconstitutional a Nebraska law that made it a crime to teach foreign languages to students who had not yet completed eighth grade.¹¹⁸ In *Pierce*, decided two years later, the Court struck down an Oregon law requiring children between the ages of 8 and 16 to attend public (as opposed to private) schools.¹¹⁹ The decisions, which were issued in the midst of the *Lochner* era and penned by Justice McReynolds—a staunch advocate of the view that the Due Process Clause protected “freedom of contract”¹²⁰—appeared at the time to be primarily grounded in that theory. *Meyer* cited *Lochner* and a variety of other *Lochner*-era decisions and then spoke of the rights of the foreign-language teacher to sell his services and the parents to purchase them, concluding that “[h]is right thus to teach and the right of parents to engage him so to instruct their children, we think, are within the liberty of the amendment.”¹²¹ And *Pierce* focused on the impact that the law would have on the private school litigants challenging the law, noting that its enforcement would “seriously impair, perhaps destroy, the profitable features of [their] business and greatly diminish the value of their property”¹²² and writing of the Due Process Clause “protect[ing] business enterprises against interference with the freedom of patrons or customers.”¹²³ Thus, just as in *Lochner*, the Court’s focus was on the freedom of people to purchase and sell one another’s labor free of governmental interference.

Yet both cases also had something in common with *Skinner* and *Eisenstadt* that made them prime targets for subsequent judicial reconstruction: broad dicta unnecessary to the decisions. In *Skinner*, it was a reference to marriage, while in *Eisenstadt*, it was a brief mention of the colorable claim that *Griswold*’s fundamental rights holding might extend to unmarried persons. In *Meyer*, the broad dicta involved the Court’s general discussion of the “liberty” guaranteed by the Due Process Clause:

[I]t denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as

118. See *Meyer v. Nebraska*, 262 U.S. 390, 403 (1923).

119. See *Pierce v. Soc’y of Sisters*, 268 U.S. 510, 534–35 (1925).

120. See *Griswold v. Connecticut*, 381 U.S. 479, 514–16 (1965) (Black, J., dissenting).

121. See *Meyer*, 262 U.S. at 399–400.

122. See *Pierce*, 268 U.S. at 531.

123. *Id.* at 536 (citations omitted).

essential to the orderly pursuit of happiness by free men.¹²⁴

And *Pierce* wrote more broadly that the laws at issue in both *Meyer* and *Pierce* “interfere[] with the liberty of parents and guardians to direct the upbringing and education of children under their control.”¹²⁵ This was not merely dicta but also dicta lacking any foundation in precedent: not one of the cases cited in *Meyer* made any reference—direct or indirect—to marriage, freedom of religion, or parental control over their children, and *Pierce* cited nothing but *Meyer* in support of its broad statement regarding parental control.¹²⁶

Because *Lochner* and its progeny were ultimately overruled, *Meyer* and *Pierce* could remain viable precedent only if they were severed from their roots in those decisions. The process of reconstructing *Meyer* and *Pierce* began as early as 1938—one year after *Lochner* was overruled—and has continued into the present. Indeed, the Court’s short opinions in *Meyer* and *Pierce* hold the record for the number of times a decision has been judicially reconstructed.

The first case to re-characterize the decisions was *United States v. Carolene Products*.¹²⁷ *Carolene Products* was part of a series of decisions endorsing highly deferential rational basis review of equal protection challenges,¹²⁸ a development parallel to the Court’s return to highly deferential rational basis review under the Due Process Clause in its retreat from *Lochner* the year before. At the same time, *Carolene Products* dropped a famous footnote indicating that the level of judicial scrutiny might be higher when, *inter alia*, a law targeted minority groups.¹²⁹ In so holding, *Carolene Products* invoked both *Meyer* and *Pierce*. Specifically, the Court wrote:

Nor need we enquire whether similar considerations enter into the review of statutes directed at particular religious, *Pierce v. Society of Sisters*, or national, *Meyer v. Nebraska*, or racial minorities; whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.¹³⁰

Carolene Products thus re-characterized *Pierce* and *Meyer* as equal protection (rather than due process) cases calling for heightened scrutiny where discrimination on the bases of religion and national origin are involved, despite the absence of any such characterization in the decisions themselves.

Six years after issuing its opinion in *Carolene Products*, the Court once again

124. *Meyer*, 262 U.S. at 399 (citations omitted).

125. *See Pierce*, 268 U.S. at 534–35.

126. *See id.*; *Meyer*, 262 U.S. at 399.

127. *United States v. Carolene Products*, 304 U.S. 144 (1938).

128. *See id.* at 151–54.

129. *See id.* at 152 n.4.

130. *Id.*

re-characterized *Meyer* and *Pierce*. At issue in *Prince*¹³¹ was the constitutionality of applying child labor laws to a Jehovah's Witness who claimed that doing so violated her religious convictions.¹³² In the course of considering that claim, the Court—relying on the broad, unsupported dicta in *Meyer* and *Pierce*—characterized those decisions as together having “respected the private realm of family life which the state cannot enter.”¹³³

About two decades later, the Court in *Griswold*, for the third time, re-characterized the *Meyer* and *Pierce* decisions. The *Griswold* Court addressed the constitutionality of a law punishing people who used contraceptives and those who aided and abetted people in doing the same.¹³⁴ Eschewing reliance on *Lochner*,¹³⁵ the Court plurality instead held that it was relying on the “penumbras” of the Bill of Rights that create a constitutionally protected zone of privacy.¹³⁶ To support its conclusion, the plurality re-characterized *Meyer* and *Pierce* as incorporating and applying the penumbras of the First Amendment to the states:

By *Pierce v. Society of Sisters*, the right to educate one's children as one chooses is made applicable to the States by the force of the First and Fourteenth Amendments. By *Meyer v. State of Nebraska*, the same dignity is given the right to study the German language in a private school.¹³⁷

The *Griswold* plurality's reconstruction of *Meyer* and *Pierce* was not only divorced from the actual holdings in those cases, but it was also inconsistent with the state of the law at the time of those decisions. For it was not until several decades after those cases were decided that the Court ultimately ruled that the First Amendment right was incorporated and applied against the states via the Fourteenth Amendment.¹³⁸ Thus, it is not surprising that the separate opinions in *Griswold* characterized the holdings in those cases differently. Justice Goldberg's concurring opinion followed the *Prince* Court's characterization of them as having “respected the private realm of family life which the state cannot enter.”¹³⁹ Justice White's concurring opinion relied on the broader language used in *Meyer* and *Pierce*, citing them for the specific propositions that the Fourteenth Amendment's guarantee of liberty “includes the right ‘to marry, establish a home, and bring up children’” and the right “to direct the upbringing and education of children,” respectively.¹⁴⁰ In contrast, Justice Black, in his dissenting opinion, characterized

131. *Prince v. Massachusetts*, 321 U.S. 158 (1944).

132. *See id.* at 159–64.

133. *Id.* at 166.

134. *Griswold v. Connecticut*, 381 U.S. 479, 480 (1965).

135. *See id.* at 481–82.

136. *See id.* at 484.

137. *Id.* at 482 (citations omitted).

138. *See McDonald v. City of Chicago*, 561 U.S. 742, 764 n.12 (2010) (citations omitted); *see also Griswold*, 381 U.S. at 516 (Black, J., dissenting).

139. *Griswold*, 381 U.S. at 495 (Goldberg, J., concurring) (quoting *Prince v. Massachusetts*, 321 U.S. 158, 158 (1944)).

140. *Id.* at 502 (White, J., concurring) (first quoting *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923); then quoting *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 534–35 (1925)).

the cases as being *Lochner*-era decisions grounded in liberty of contract.¹⁴¹

Given these various characterizations of the *Meyer* and *Pierce* decisions—which sometimes, as in *Griswold*, occur even within the same case—it is thus not surprising that subsequent decisions have cited the cases for a variety of different propositions. The Court’s decision in *Roe* described the pair of cases as recognizing that decisions by parents regarding “child rearing and education” are protected by the Fourteenth Amendment.¹⁴² The Court’s decisions in *Loving*, *Zablocki*, and *Obergefell*—recognizing a fundamental right to marry that includes, respectively, interracial marriage, marriage by those who have outstanding child support obligations, and same-sex marriage—each cited *Meyer* for the proposition that the right to “marry” is a fundamental one protected by the Fourteenth Amendment.¹⁴³ And the Court’s 2000 decision in *Troxel v. Granville*¹⁴⁴ described them as standing for “the [liberty] interest of parents in the care, custody, and control of their children.”¹⁴⁵

In sum, although *Meyer* and *Pierce* are part and parcel of the now discredited *Lochner* line of cases, they have been divorced from their roots in those precedents as a result of multiple instances of re-characterization. They, along with *Prince* and *Griswold*—which themselves re-characterized *Meyer* and *Pierce*—as well as *Skinner*, *Eisenstadt*, and *Loving*, are consistently presented by the Court in support of the contemporary approach to recognizing and enforcing substantive fundamental rights under the Due Process Clause. Yet as shown above, upon closer scrutiny, none of these precedents actually stood for the proposition for which they are cited in contemporary decisions.

2. Re-characterizing Level of Scrutiny: The Sex and Legitimacy Classification Cases

For approximately the first one hundred years after the Reconstruction Amendments were ratified, the U.S. Supreme Court consistently upheld laws that drew sex-based distinctions, applying only highly deferential rational basis scrutiny to such laws when they were challenged on equal protection grounds.¹⁴⁶ In 1971, the Court in *Reed v. Reed*¹⁴⁷ for the first time declared unconstitutional on equal protection grounds a law that treated men and women differently. At issue in *Reed* was the constitutionality of an Idaho statute providing that when two people are otherwise equally entitled to appointment as the administrator of an estate, a male

141. *Id.* at 514–16, 516 n.7 (Black, J., dissenting).

142. *Roe v. Wade*, 410 U.S. 113, 153 (1973).

143. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2598 (2015); *Zablocki v. Redhail*, 434 U.S. 374, 384 (1978); *Loving*, 388 U.S. 1, 7 (1967).

144. *Troxel v. Granville*, 530 U.S. 57 (2000).

145. *Id.* at 65.

146. *See, e.g.*, *Hoyt v. Florida*, 368 U.S. 57, 69 (1961); *Goesaert v. Cleary*, 335 U.S. 464, 467 (1948); *Breedlove v. Suttles*, 302 U.S. 277, 283–84 (1937); *Quong Wing v. Kirkendall*, 223 U.S. 59, 63 (1912).

147. *Reed v. Reed*, 404 U.S. 71 (1971).

applicant must be preferred to a female one.¹⁴⁸ Yet, *Reed* did not purport to apply anything higher than rational basis scrutiny, stating that the relevant test was whether the classification at issue “bears a rational relationship to a state objective”¹⁴⁹ and concluding that the law at issue failed that test.¹⁵⁰

Two years later, a plurality of the Court in *Frontiero v. Richardson*¹⁵¹ re-characterized *Reed* as having applied heightened equal protection scrutiny by focusing on what *Reed* did rather than what it explicitly held. *Frontiero* noted that the party defending the Idaho statute’s constitutionality in *Reed* sought to rationalize in its brief before the Court the sex-based distinction in the law on the ground that “men [are] as a rule are more conversant in business affairs than . . . women,” a basis similar to that upon which the Idaho Supreme Court upheld the statute’s constitutionality.¹⁵² The *Frontiero* plurality described *Reed* as having “implicitly rejected appellee’s apparently rational explanation of the statutory scheme,”¹⁵³ which the plurality described as a “departure from ‘traditional’ rational-basis analysis,”¹⁵⁴ and concluded that strict scrutiny was the appropriate standard for sex-based classifications.¹⁵⁵ Yet, just three years later, a majority of the Court in *Craig v. Boren*¹⁵⁶ announced a new standard for assessing sex-based equal protection challenges and, in so doing, again re-characterized *Reed*. The *Craig* Court declared that “previous cases establish that classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives” and cited *Reed* as an example, among others, of such a case.¹⁵⁷ This is so despite the fact that neither *Reed* nor any other case used any such language, leading the dissent to state that the newly announced intermediate scrutiny test “apparently comes out of thin air” and to note that “none of our previous cases adopt that standard.”¹⁵⁸

In the decades following *Craig*, the Court’s sex-based equal protection jurisprudence has undergone a tug-of-war between shifting majorities, with the decisions at times pulling the standard in the direction of either strict or rational basis scrutiny. In *Craig* itself, for example, Justice Powell characterized the standard differently, writing that “the relatively deferential ‘rational basis’ standard of review normally applied takes on a sharper focus when we address a gender-based classification.”¹⁵⁹ A few years after *Craig* was decided, the Court in *Personnel*

148. *Id.* at 72–73.

149. *Id.* at 76.

150. *Id.* at 76–77.

151. *Frontiero v. Richardson*, 411 U.S. 677 (1973).

152. *Id.* at 683 (footnote omitted).

153. *Id.*

154. *Id.* at 684.

155. *Id.* at 688.

156. *Craig v. Boren*, 429 U.S. 190 (1976).

157. *Id.* at 197–98 (citations omitted).

158. *Id.* at 220 (Rehnquist, J., dissenting).

159. *Id.* at 210 n.* (Powell, J., concurring).

*Administrator of Massachusetts v. Feeney*¹⁶⁰ wrote after citing the intermediate scrutiny test announced in *Craig* that any law preferring males over females would thus require an “exceedingly persuasive justification.”¹⁶¹ In context and as subsequently noted by Chief Justice Rehnquist, this phrase was used “as an observation on the difficulty of meeting the applicable test, not as a formulation of the test itself.”¹⁶² Yet soon after *Feeney* was decided, the Court, through the process of judicial reconstruction by means of selective quotation (examined above in Part I.A), attributed greater significance to this phrase, with majority opinions suggesting that a standard higher than intermediate scrutiny might be applicable to sex-based classifications. Thus, in both *Mississippi University for Women v. Hogan*¹⁶³ and *United States v. Virginia*,¹⁶⁴ the majority opinions included that phrase as part of the test itself, indicated that the language required the government to show “at least” that the classification served important governmental objectives and that the means employed are substantially related to achieving those objectives, and left open the question whether such classifications should instead be subject to strict scrutiny.¹⁶⁵ Indeed, so exacting was the scrutiny applied by the majority in *Virginia* itself that the dissent accused the majority of *de facto* applying strict scrutiny.¹⁶⁶ Although post-*Virginia* a Court majority appeared to apply a more relaxed form of review than was employed in *Virginia*,¹⁶⁷ it has since applied a heightened standard consistent with that employed in *Virginia*.¹⁶⁸

The Court followed a similar process with its cases involving classifications based on legitimacy. When the Court initially struck down laws discriminating against those born out of wedlock, it purported to apply nothing stronger than rational basis review.¹⁶⁹ Because the Court purported to apply only rational basis review, during this initial period, the Court would at times uphold laws discriminating on this basis that were justified by tenuous rationales.¹⁷⁰ The Court subsequently indicated that the standard of constitutional scrutiny for laws discriminating on the basis of legitimacy was not a “toothless one”¹⁷¹ and occasionally incorporated some intermediate scrutiny lingo when applying the

160. *Adm’r of Mass. v. Feeney*, 442 U.S. 256 (1979).

161. *Id.* at 273.

162. *See* *United States v. Virginia*, 518 U.S. 515, 559 (1996) (Rehnquist, C.J., concurring).

163. *Miss. Univ. for Women v. Hogan*, 458 U.S. 718 (1982).

164. *Virginia*, 518 U.S. 515.

165. *Id.* at 532–33, 532 n.6 (citations omitted); *Hogen*, 458 U.S. at 723–24, 724 n.9 (citations omitted).

166. *See Virginia*, 518 U.S. at 570–74 (Scalia, J., dissenting).

167. *Compare* *Nguyen v. Immigration and Naturalization Serv.*, 533 U.S. 53, 60–71 (2001), *with Virginia*, 518 U.S. at 574–94 (Scalia, J., dissenting).

168. *See Sessions v. Morales-Santana*, 137 S. Ct. 1678, 1689–90 (2017).

169. *See Weber v. Aetna Cas. & Ins. Co.*, 406 U.S. 164, 172 (1972); *Glonn v. Am. Guar. & Liab. Ins. Co.*, 391 U.S. 73, 75 (1968); *Levy v. Louisiana*, 391 U.S. 68, 71 (1968).

170. *See, e.g., Labine v. Vincent*, 401 U.S. 532, 536 n.6 (1971).

171. *Matthews v. Lucas*, 427 U.S. 495, 510 (1977).

standard.¹⁷² Subsequently, just as the Court did with sex discrimination in *Craig*, the Court in *Clark v. Jeter*¹⁷³ ultimately re-characterized these earlier cases as in fact applying intermediate scrutiny.¹⁷⁴

These two lines of cases contained key elements that made them ripe for subsequent judicial reconstruction. In both lines of cases, the cases, like the Court's decision in *Eisenstadt*, explicitly used rational basis lingo and purported to apply nothing more than rational basis scrutiny. Yet because the decisions in one or more ways departed from the deferential approach associated with rational basis review, one can re-cast them as in fact applying some higher level of scrutiny if one focuses on what the cases *did* rather than what they actually said. Indeed, a Justice bent on changing the level of scrutiny associated with a particular type of classification (but who lacks the votes to do so) could plant the seeds for later re-characterization by drafting an opinion that in form purports to apply one level of scrutiny but that in practice applies a different level of scrutiny. Later, when the Court's composition changes, that opinion can be cited for its substance rather than its form, allowing the Court to appear as though it is merely following rather than overruling precedent.

3. Re-characterizing Parameters of Constitutional Doctrine: The Reordering of the Political Process Doctrine

What has been referred to as the Court's "restructuring"¹⁷⁵ or "reordering"¹⁷⁶ of the political process doctrine has changed significantly over time as the Court has engaged more than once in the process of re-characterizing its precedents in an effort to either narrow or broaden the doctrine's scope.

The first significant case in this line of cases does not mention any such doctrine. In *Reitman v. Mulkey*,¹⁷⁷ the Court addressed the constitutionality of an amendment to California's constitution that was enacted directly by voters in that state as a response to laws enacted by the state legislature that prohibited private discrimination in the sale or lease of residential housing.¹⁷⁸ The challenge was brought under the Equal Protection Clause, alleging that the enactment of the constitutional amendment and its concomitant invalidation of state laws prohibiting private race-based discrimination in the sale or rental of residential housing constituted racial discrimination that violated the Equal Protection Clause.¹⁷⁹ Making out a claim that the constitutional amendment involved the state in

172. See, e.g., *Mills v. Habluetzel*, 456 U.S. 91, 99 (1982).

173. *Clark v. Jeter*, 486 U.S. 456 (1988).

174. See *id.* (first citing *Mills*, 456 U.S. at 99; then citing *Matthews*, 427 U.S. at 505–06).

175. See *Romer v. Evans*, 517 U.S. 620, 625 (1996); *Washington v. Seattle Sch. Dist. No. 1*, 458 U.S. 457, 485–86 n.29 (1982).

176. See *Schuette v. Coal. to Defend Affirmative Action*, 572 U.S. 291, 336 (2014) (Breyer, J., concurring in the judgment); *id.* at 357, 364–65 (Sotomayor, J., dissenting); *Washington*, 458 U.S. at 479.

177. *Reitman v. Mulkey*, 387 U.S. 369 (1967).

178. *Id.* at 370–75.

179. *Id.* at 370–81.

race-based discrimination presented a challenge because in terms the amendment was race-neutral, providing as follows:

Neither the State nor any subdivision or agency thereof shall deny, limit or abridge, directly or indirectly, the right of any person, who is willing or desires to sell, lease or rent any part or all of his real property, to decline to sell, lease or rent such property to such person or persons as he, in his absolute discretion, chooses.¹⁸⁰

Thus, while it was true that the effect of the state constitutional amendment was to repeal (and prevent the re-enactment of) laws prohibiting race-based discrimination in the sale or lease of residential property, the amendment was more general in nature and likewise prevented the enactment of a variety of non-race-based laws regulating the sale or lease of real property.

Nonetheless, *Reitman* invalidated the amendment, deeming it to be race-based discrimination by the state in violation of the Equal Protection Clause. The Court acknowledged that “mere repeal” of a law prohibiting racial discrimination would not, standing alone, violate the Equal Protection Clause.¹⁸¹ However, deferring to findings made by the California Supreme Court, the U.S. Supreme Court concluded that the amendment was unconstitutional because instead of taking a neutral position on the question of racial discrimination, the law was designed to actively encourage such acts of private racial discrimination.¹⁸² This finding that the amendment was tacitly designed to encourage private racial discrimination was critical to the Court’s decision. Under longstanding precedent, the provisions of the Fourteenth Amendment are applicable only to action attributable to the government; purely private conduct is outside the Amendment’s scope.¹⁸³ Thus, the private acts of racial discrimination by those selling or leasing real property, standing alone, could not constitute an Equal Protection claim. However, pre-*Reitman* cases made clear that governmental action designed to *encourage* private racial discrimination could be challenged on equal protection grounds.¹⁸⁴ *Reitman* relied on those precedents, coupled with the finding that such encouragement was at play in the case, to conclude that the state constitutional amendment was invalid.¹⁸⁵

Two years later, in *Hunter v. Erickson*,¹⁸⁶ the Court began to sketch out what would become the reordering of the political process doctrine. In *Hunter*, an African-American woman brought a complaint to the City of Akron’s Commission on Equal Opportunity in Housing, alleging that a real estate agent refused to show her houses because of her race and seeking enforcement of the city’s fair housing

180. *Id.* at 371 (quoting CAL. CONST. art. I, § 26).

181. *Id.* at 376–77.

182. *Id.* at 374–81.

183. *United States v. Morrison*, 529 U.S. 598, 621–23 (2000); *The Civil Rights Cases*, 109 U.S. 3, 10–14 (1883).

184. *See, e.g., Anderson v. Martin*, 375 U.S. 399 (1964).

185. *See Reitman*, 387 U.S. at 374–81.

186. *Hunter v. Erickson*, 393 U.S. 385 (1969).

ordinance.¹⁸⁷ The Commission replied that she was no longer protected by the city's fair housing ordinance because voters had amended the city's charter to provide that no existing or future law regulating real property transactions on the basis of, *inter alia*, race was effective unless first approved by the city's voters.¹⁸⁸ The aggrieved woman brought a lawsuit against the City of Akron, seeking a declaration that the charter amendment violated the Equal Protection Clause. In the lower courts¹⁸⁹ and in her brief filed in the U.S. Supreme Court,¹⁹⁰ her attorneys argued that the charter amendment was analogous to the state constitutional amendment at issue in *Reitman* and should likewise be struck down, focusing on the comparatively greater burden that racial minorities faced in re-enacting such laws.

The Court agreed that the charter amendment was unconstitutional.¹⁹¹ However, in responding to the City's claim that *Reitman* was distinguishable, the Court said that it need not rely on *Reitman's* finding of a discriminatory purpose underlying a facially neutral constitutional amendment because the charter amendment at issue in *Hunter* was *not* facially neutral; it treated racial housing matters differently from other racial and housing matters.¹⁹² According to the *Hunter* majority and the concurring opinion, the constitutional problem with the city charter amendment was that it made it comparatively more difficult for those seeking to advance housing laws targeting racial discrimination.¹⁹³ After the city charter amendment was passed, future laws addressing most housing matters would go into effect upon approval by the City Council, but those involving racial housing matters had to undergo the additional step of getting voter approval before taking effect.¹⁹⁴ Moreover, even though the charter amendment applied with equal force to laws that would protect *white* people from racial discrimination, the Court reasoned that the law was still not racially neutral:

[A]lthough the law on its face treats Negro and white, Jew and gentile in an identical manner, the reality is that the law's impact falls on the minority. The majority needs no protection against discrimination and if it did, a referendum might be bothersome but no more than that [The charter amendment] places special burdens on racial minorities within the governmental process.¹⁹⁵

The third key case in this line of decisions was the Court's 1982 decision in *Washington v. Seattle School District No. 1*.¹⁹⁶ At issue in *Seattle* was the

187. *Id.* at 387.

188. *Id.*

189. *See* State *ex rel.* Hunter v. Erickson, 233 N.E.2d 129, 131 (Ohio 1967).

190. *See* Brief for Appellant, Hunter v. Erickson, 393 U.S. 385 (1969) (No. 63), 1968 WL 1125644, at *20–24.

191. *Hunter*, 393 U.S. at 392–93.

192. *Id.* at 393.

193. *See id.* at 390–93; *id.* at 395 (Harlan, J., concurring).

194. *See Hunter*, 393 U.S. at 390.

195. *Id.* at 391.

196. *Washington v. Seattle Sch. Dist. No. 1*, 458 U.S. 457 (1982).

constitutionality of a Washington State citizen initiative that the state's voters approved in response to the City of Seattle's racially integrative school busing plan.¹⁹⁷ Like the constitutional amendment struck down in *Reitman*, the initiative in *Seattle* was facially race-neutral, providing that "no school board . . . shall directly or indirectly require any student to attend a school other than the school which is geographically nearest or next nearest the student's place of residence . . . and which offers the course of study pursued by such student."¹⁹⁸ The initiative contained a laundry list of exceptions, however, that largely left local school boards free to re-assign students for virtually any purpose other than voluntary (i.e., non-court mandated) racial integration.¹⁹⁹

Relying almost exclusively on *Hunter*—without any mention of *Reitman*—*Seattle* declared the state initiative unconstitutional on equal protection grounds. *Seattle* first brushed aside an effort to distinguish *Hunter* on the ground that the city charter amendment in *Hunter* was facially discriminatory on race while the Washington initiative was race neutral. Citing the structure of the initiative and the context of the political campaign to approve it, the Court concluded that the initiative was race-based action for equal protection purposes because it was clearly motivated by the effect it would have on racially integrative busing.²⁰⁰ Moreover, the Court rejected the argument that it was race neutral because it impacted people of all races, noting that "desegregation of the public schools, like the Akron open housing ordinance, at bottom inures primarily to the benefit of the minority, and is designed for that purpose."²⁰¹ It then concluded that the constitutional infirmity was the same in both cases: the power to address discrete minority interests was placed at a different level of government where it was harder to achieve success.²⁰² According to *Seattle*, this "comparative structural burden placed on the political achievement of minority interests" rendered the initiative unconstitutional.²⁰³

Although these three cases have much in common with one another, the decisions remained at the time of *Seattle* only loosely tied together. *Hunter* made only a brief reference to *Reitman*, and *Seattle* made no mention of *Reitman* at all. This is likely because in *Reitman* itself the Court was focused on the substantive equal protection problem present in the case—the fact that the state was allegedly encouraging private racial discrimination. Yet, also present, but not articulated, in *Reitman* was the same procedural equal protection problem found in *Hunter* and *Seattle*: racial minorities seeking to enact antidiscrimination laws now faced a "comparative structural burden" because a constitutional amendment repealed and prohibited the re-enactment of such laws. Of course, in hindsight, despite *Reitman*'s

197. *See id.* at 461–64.

198. *Id.* at 462 (quoting Washington Initiative 350).

199. *See id.* at 462–63.

200. *See id.* at 471.

201. *Id.* at 472.

202. *Id.* at 474, 483.

203. *See id.* at 474 n.17.

formal holding, the case could be judicially reconstructed as a case about comparative structural burdens, which would put it on all fours with *Hunter* and *Seattle*.

Not until the Court's 1996 decision in *Romer v. Evans*²⁰⁴ did a majority of the Court—in an opinion authored by Justice Kennedy—tie the three cases together, referring to them as “our precedents involving discriminatory restructuring of governmental decisionmaking.”²⁰⁵ In *Romer*, the Court addressed the constitutionality of a Colorado constitutional amendment that repealed state and local laws prohibiting discrimination on the basis of sexual orientation and prohibited the subsequent enactment of such laws at either the state or local levels.²⁰⁶ Although the lower court relied on the Court's reordering of the political process cases, the *Romer* Court instead held that the law was unconstitutional for a different reason, namely because it was not rationally related to furthering any legitimate governmental interest.²⁰⁷ While *Romer's* discussion of this line of cases is limited and unnecessary to the Court's decision, it did arguably reconstruct *Reitman* as being a case about erecting comparative structural burdens for the enactment of laws benefiting racial minorities.

The Court's most recent decision in this line of cases—*Schuette v. Coalition to Defend Affirmative Action*²⁰⁸—provides a much starker example of re-characterization. In *Schuette*, the Court assessed the constitutionality of Proposal 2, a voter-approved amendment to Michigan's constitution that prohibited race-conscious preferences in admissions at the state's public colleges and universities.²⁰⁹ The Sixth Circuit, sitting *en banc*, engaged in a seemingly straightforward application of *Hunter* and *Washington* to declare Proposal 2 unconstitutional.²¹⁰ Just like antidiscrimination laws in *Hunter* and racially integrative busing in *Seattle*, the Sixth Circuit concluded that race-conscious admissions programs inure primarily to the benefit of the minority.²¹¹ Moreover, just as in those two cases, the Sixth Circuit concluded that Proposal 2 placed a comparative structural burden on minorities seeking to enact race-conscious admissions programs since they could no longer seek redress at the university governing boards as others could for non-race based policies; they would instead have to first seek voter approval to reverse the constitutional amendment before getting race-conscious admissions policies enacted.²¹²

Given the Sixth Circuit's seemingly textbook application of the Court's political process doctrine, it appeared that the Court's options were either to affirm

204. *Romer v. Evans*, 517 U.S. 620 (1996).

205. *Id.* at 625.

206. *Id.* at 624.

207. *Id.* at 625–26, 635.

208. *Schuette v. Coal. to Defend Affirmative Action*, 572 U.S. 291 (2014).

209. *See id.* at 298–99.

210. *See BAMN v. Regents of the Univ. of Mich.*, 701 F.3d 466, 477 (6th Cir. 2012) (*en banc*).

211. *See id.* at 478–79.

212. *See id.* at 483–85.

the lower court—as Justice Sotomayor argued for in dissent²¹³—or to overrule the entire line of cases—as Justice Scalia argued for in a concurrence.²¹⁴ Instead, Justice Kennedy’s plurality opinion proceeded to judicially reconstruct the entire line of cases in such a remarkable manner that the diametrically opposing opinions of Justices Sotomayor and Scalia agreed on one point: that the majority had reinterpreted the precedents “beyond recognition.”²¹⁵

Justice Kennedy began his reconstruction by subtly shifting his treatment of *Reitman*. Just as he did in his opinion in *Romer*, he identified *Reitman* as the “beginning point for discussing the controlling decisions” in this line of cases.²¹⁶ But unlike *Romer*, he no longer referred to the cases as precedents involving discriminatory restructuring of governmental decisionmaking. Instead, Justice Kennedy described the constitutional infirmity in *Reitman* as the state “encourage[ing] discrimination, causing real and specific injury.”²¹⁷ This was, in fact, an accurate description of *Reitman*, and neither Justice Sotomayor nor Justice Scalia challenged it. However, Justice Kennedy then proceeded to reconstruct *Hunter* and *Seattle* to make it appear as though the constitutional problem in those cases was a similar substantive one of the government encouraging racial discrimination rather than the procedural problem of making it harder for racial minorities to enact legislation in their interest.

Justice Kennedy first turned his attention to *Hunter*. According to Justice Kennedy, “[c]entral to the Court’s reasoning in *Hunter* was that the charter amendment was enacted in circumstances where widespread racial discrimination in the sale and rental of housing led to segregated housing, forcing many to live in “unhealthful, unsafe, unsanitary and overcrowded conditions.”²¹⁸ He then tied *Hunter* back to *Reitman*, contending that in both cases “there was a demonstrated injury on the basis of race that, by reasons of state encouragement or participation, became more aggravated.”²¹⁹ By tying *Hunter* and *Reitman* together in this manner, Kennedy suggested that they were both about the government encouraging private discrimination. However, in *Hunter*, the Court explicitly disclaimed any reliance on a finding that the City of Akron was encouraging racial discrimination and made clear that its holding was based on the procedural comparative structural burden:

Akron argues that this case is unlike *Reitman v. Mulkey* in that here the city charter declares no right to discriminate in housing, authorizes and encourages no housing discrimination, and places no ban on the enactment of fair housing ordinances. But we need not rest on *Reitman* to decide this case. Here, unlike *Reitman*, there was an explicitly racial classification

213. See *Schuetz*, 572 U.S. at 357 (Sotomayor, J., dissenting).

214. See *id.* at 322 (Scalia, J., concurring in the judgment).

215. See *id.* at 320–21 (Scalia, J., concurring in the judgment); *id.* at 360 (Sotomayor, J., dissenting).

216. *Id.* at 302 (plurality opinion).

217. *Id.* at 303.

218. *Id.*

219. *Id.* at 304.

treating racial housing matters differently from other racial and housing matters.²²⁰

By failing to acknowledge this portion of *Hunter*, Justice Kennedy effectively re-wrote the opinion.

Having judicially reconstructed *Hunter* to align it with *Reitman*'s substantive equal protection holding, Justice Kennedy proceeded to do the same with *Seattle*. According to Justice Kennedy, "*Seattle* is best understood as a case in which the state action in question . . . had the serious risk, if not purpose, of causing specific injuries on account of race, just as had been the case in [*Reitman*] and *Hunter*."²²¹ To support this remarkable reconstruction of *Seattle*, Justice Kennedy cited not to the opinion itself but instead to Justice Breyer's dissent in *Parents Involved in Community Schools v. Seattle School District No. 1*²²²—a case decided twenty-five years after *Seattle*.²²³ According to Justice Kennedy, Justice Breyer's *Parents Involved* dissent showed that "school segregation in the district in the 1940's and 1950's may have been the partial result of school board policies."²²⁴ Thus, Justice Kennedy reasoned, the *Seattle* Court likely viewed the school board's desegregation program to be an appropriate remedy for *de jure* segregation.²²⁵ And given that the *Seattle* Court thought, or at least assumed, that Seattle had a history of *de jure* segregation, it supposedly "found that the State's disapproval of the school board's busing remedy was an aggravation of the very racial injury in which the State itself was complicit."²²⁶

Having thus constructed an alternative rationale for the Court's opinion in *Seattle*, Justice Kennedy proceeded to treat *Seattle*'s actual holding as dictum. Specifically, he wrote:

The broad language used in *Seattle*, however, went well beyond the analysis needed to resolve the case In essence, according to the broad reading of *Seattle*, any state action with a "racial focus" that makes it "more difficult for certain racial minorities than for other groups" to "achieve legislation that is in their interest" is subject to strict scrutiny. It is this reading of *Seattle* that the Court of Appeals found to be controlling here. And that reading must be rejected.²²⁷

Justice Kennedy concluded by providing a new description of the *Reitman-Hunter-Seattle* line of cases. According to his opinion, "[t]hose cases were ones in which the political restriction in question was designed to be used, or was

220. *Hunter v. Erickson*, 393 U.S. 385, 389 (1969).

221. *Schuette*, 572 U.S. at 305.

222. *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007).

223. *Schuette*, 572 U.S. at 305 (citing *Parents Involved in Cmty. Schs.*, 551 U.S. at 807–08 (Breyer, J., dissenting)).

224. *Id.*

225. *Id.* at 306.

226. *Id.*

227. *Id.* at 306–07.

likely to be used, to encourage infliction of injury by reason of race.”²²⁸

Justices Scalia and Sotomayor, while disagreeing on how the case should be resolved, on multiple occasions called out what they viewed as Justice Kennedy’s egregious re-characterization of *Hunter* and *Seattle*. For example, Justice Scalia described the plurality’s description of the holding in *Seattle* as “what our opinion in *Seattle* might have been, but assuredly not what it was.”²²⁹ Similarly, Justice Sotomayor remarked that “the plurality might prefer that the *Seattle* Court had said that, but it plainly did not,”²³⁰ and that “[w]e ordinarily understand our precedents to mean what they actually say, not what we later think they could or should have said.”²³¹ Indeed, in a passage of her dissent that resonates with the thesis of this Article, Justice Sotomayor explained how the plurality’s effort at stealth reconstruction of earlier precedent undermines the principle of *stare decisis*:

The plurality’s attempt to rewrite *Hunter* and *Seattle* so as to cast aside the political-process doctrine *sub silentio* is impermissible as a matter of *stare decisis*. Under the doctrine of *stare decisis*, we usually stand by our decisions, even if we disagree with them, because people rely on what we say, and they believe they can take us at our word.²³²

C. Citing “Dissenting Concurrences”

Part I.A of this Article described how Justice Kennedy’s opinion in *Lawrence* reconstructed the meaning of an earlier precedent, *Levitt*, by stripping seemingly supportive language from its context and quoting that language in a way that gave it a rather different meaning. Yet Justice Kennedy’s treatment of *Levitt* was remarkable for a second reason: he was not even quoting from the majority opinion. Rather, he was quoting a concurring opinion, one authored by Justice Kennedy himself and joined by only one other Justice.

Reliance on concurring rather than majority opinions in earlier cases represents a third method of reconstructing precedent. In some instances, a Justice in an earlier decision disagrees, sometimes strongly, with one or more aspects of the Court’s majority opinion. Indeed, the disagreement is sometimes so strong that it would be most appropriate for the Justice to pen a dissenting opinion. However, by denominating her opinion as a concurring one, the Justice is able to plant the seeds for effectively overturning the decision while appearing to follow it in a subsequent case. In some instances, the latter step is undertaken years or decades later by another Justice. But in other instances, a dramatic shift in the Court’s composition allows the same Justice who wrote a dissenting concurrence to effectuate reconstruction of the earlier decision. While there are many examples of this phenomenon, two rather significant cases involving substantive due process stand

228. *Id.* at 313–14.

229. *Id.* at 321 (Scalia, J., concurring in the judgment).

230. *Id.* at 359 (Sotomayor, J., dissenting).

231. *Id.* at 358.

232. *Id.* at 360.

out: the Court's recognition of a right to "liberty of contract" in *Lochner v. New York*,²³³ and the introduction of the "undue burden" standard for assessing the constitutionality of laws restricting abortion in *Planned Parenthood of Southeastern Pennsylvania v. Casey*.²³⁴

1. *Lochner* and "Liberty of Contract"

As noted above, in *Lochner*, the U.S. Supreme Court endorsed the theory that the Due Process Clause protected "liberty of contract."²³⁵ This theory led the Court during the early twentieth century to strike down hundreds of federal and state laws²³⁶ until the line of decisions was ultimately overruled.²³⁷ Ironically, this now-repudiated line of cases came into being through a remarkable process of judicial reconstruction of the Court's earlier precedents—which had in clear and unmistakable terms rejected the *Lochner* Court's interpretation of the Due Process Clause—through the use of a dissenting concurrence penned in a pre-*Lochner* case.

Shortly after the ratification of the Fourteenth Amendment, the U.S. Supreme Court had its first opportunity in *The Slaughter-House Cases*²³⁸ to interpret many of its clauses. In *Slaughter-House*, the Court rejected arguments made by an association of butchers that a state law that gave a private corporation a monopoly over livestock landing and slaughterhouse operations in New Orleans violated, *inter alia*, the Privileges or Immunities and Due Process Clauses, broadly rejecting the Court's authority to recognize and enforce unenumerated rights under either provision.²³⁹ In contrast, Justice Bradley's dissenting opinion contended that both clauses protect the individual right to pursue common occupations of life and that the law at issue infringed upon that right.²⁴⁰

Soon after the Court's decision in *Slaughter-House*, Louisiana adopted a new constitution that, among other things, extinguished the monopoly powers over livestock landing and slaughterhouse operations that were at issue in that case.²⁴¹ Litigation over the monopoly powers returned to the Court once again, but this time with the private corporation asserting that the constitutional provision extinguishing its contractually granted monopoly rights violated the Contracts Clause²⁴² of the U.S. Constitution.²⁴³ Writing for the majority in *Butchers' Union*

233. *Lochner v. New York*, 198 U.S. 45 (1905).

234. *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992).

235. *See Lochner*, 198 U.S. at 45–65.

236. *See Obergefell v. Hodges*, 135 S. Ct. 2584, 2617 (2015) (Roberts, J., dissenting).

237. *See West Coast Hotel Co. v. Parrish*, 300 U.S. 379, 400 (1937).

238. *The Slaughter-House Cases*, 83 U.S. 36 (1872).

239. *See generally id.* at 57–80.

240. *See id.* at 122–23 (Bradley, J., dissenting).

241. *See Butchers' Union Slaughter-house and Live-stock Landing Co. v. Crescent City Live-Stock Landing and Slaughter-house Co.*, 111 U.S. 746, 746–48 (1884).

242. *See* U.S. CONST. art. I, § 10.

243. *See Butchers' Union*, 111 U.S. at 749.

Slaughterhouse Co. v. Crescent City Live-Stock Landing Co.,²⁴⁴ Justice Miller rejected the Contracts Clause claim.²⁴⁵

Justice Bradley filed a concurring opinion that he acknowledged was for reasons “different from those stated in the opinion of the court.”²⁴⁶ Rather than addressing the Contracts Clause claim, Justice Bradley renewed his contention from his *Slaughter-House* dissent that the monopoly was void because it interfered with the right to pursue common occupations of life protected by the Fourteenth Amendment, and indeed cited directly to his dissenting opinion in that earlier case.²⁴⁷

After *Butchers’ Union*, the dissenting views in *Slaughter-House* had now made their way into a concurring opinion in a subsequent case, giving them an aura of legal authoritativeness despite the fact that in substance they represented a dissenting viewpoint. This paved the way for the Court in a series of cases to convert Justice Bradley’s concurring opinion into binding precedent.

Thirteen years after *Butchers’ Union* was decided and several years after Justice Bradley retired, the Court in *Allgeyer v. Louisiana*²⁴⁸ considered the constitutionality of a Louisiana law that restricted out-of-state companies from insuring property within the state. The *Allgeyer* Court declared the law unconstitutional, concluding that it deprived the insurers of the liberty protected by the Due Process Clause:

[T]he term [due process] is deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties, to be free to use them in all lawful ways, to live and work where he will, to earn his livelihood by any lawful calling, to pursue any livelihood or avocation, and for that purpose to enter into all contracts which may be proper, necessary and essential to his carrying out to a successful conclusion the purposes above mentioned.²⁴⁹

In support of this broad proposition—which was at odds with the Court’s earlier decision in *Slaughter-House*—the *Allgeyer* Court cited none other than Justice Bradley’s concurring opinion in *Butchers’ Union*.²⁵⁰

As a result of this multi-step process of reconstructing precedent, the dissenting views in *Slaughter-House* had made their way into a majority opinion. Thus, eight years later, when the Court issued its opinion in *Lochner*, it was able to briefly and confidently cite the majority opinion in *Allgeyer*—and solely that opinion—for the proposition that “[t]he general right to make a contract in relation to his business is part of the liberty of the individual protected by the 14th

244. *Id.*

245. *See id.* at 749–54.

246. *See id.* at 760 (Bradley, J., concurring).

247. *See id.* at 761–65.

248. *Allgeyer v. Louisiana*, 165 U.S. 578 (1897).

249. *See id.* at 589.

250. *See Allgeyer*, 165 U.S. at 589 (citing *Butchers’ Union*, 111 U.S. at 762, 764, 765 (Bradley, J., concurring)).

Amendment of the Federal Constitution.”²⁵¹ From that point onward, the Court could cite primarily to *Lochner* for that general proposition. In effect, through the use of a dissenting concurrence, Justice Bradley’s dissenting views in *Slaughter-House* had been laundered through *Butchers’ Union*, *Allgeyer*, and *Lochner* so as to become controlling constitutional law.

2. *Casey* and the “Undue Burden” Test

As demonstrated in Part I.B.1, the Court’s decisions recognizing a right to procure an abortion under the Due Process Clause—including *Roe*—are premised, in part, on judicial reconstruction of the Court’s earlier decisions. Be that as it may, in recognizing the abortion right, *Roe* clearly and explicitly described the right as fundamental and subjected restrictions on that right to strict scrutiny review.²⁵² Yet less than two decades after *Roe*, a plurality of the Court in *Casey*—while taking great pains to make clear that as a matter of *stare decisis* it would not overturn *Roe*—replaced the strict scrutiny standard with a far less exacting “undue burden” standard.²⁵³

Although references in abortion cases to “undue burdens” appeared as early as *Roe* itself, the Court did not initially use them as a distinct test for assessing the constitutionality of abortion restrictions. Instead, those references were merely a way for Justices to describe the degree to which specific abortion restrictions burdened the rights of those seeking to procure an abortion. For example, in *Roe* and its companion case, Chief Justice Burger wrote a separate concurrence in which he indicated that he would be inclined to uphold a particular aspect of Texas’s abortion law because he did not view the required procedure as “unduly burdensome.”²⁵⁴ A few years later in *Bellotti v. Baird*,²⁵⁵ the author of *Roe* wrote an opinion indicating that a parental consent provision would raise constitutional concerns only if it “unduly burden[ed]” the minor’s right to procure an abortion.²⁵⁶ References to challenged laws not being constitutional where they do not unduly burden the abortion right also appeared in two cases challenging laws prohibiting the funding of abortions, *Maher v. Roe*²⁵⁷ and *Harris v. McRae*,²⁵⁸ although in both cases even that reference was largely irrelevant because the Court made clear that the Due Process Clause was not even properly implicated in the cases.²⁵⁹

A decade after *Roe* was decided, the Court in *City of Akron v. Akron Center for*

251. See *Lochner v. New York*, 198 U.S. 45, 53 (1905) (citing *Allgeyer*, 165 U.S. 578).

252. See *Roe v. Wade*, 410 U.S. 113, 155–56, 162–64 (1973).

253. See *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 874–79 (1992).

254. See *Doe v. Bolton*, 410 U.S. 179, 208 (1973) (Burger, J., concurring).

255. *Bellotti v. Baird*, 428 U.S. 132 (1976).

256. See *id.* at 145–48.

257. *Maher v. Roe*, 432 U.S. 464, 473–74 (1977).

258. *Harris v. McRae*, 448 U.S. 297, 314 (1980).

259. *Id.* at 317–18.

*Reproductive Health, Inc.*²⁶⁰ reiterated that *Roe* required strict scrutiny of laws restricting the abortion right and applied that standard to strike down most portions of a city ordinance restricting abortion.²⁶¹ This generated a dissent by Justice O'Connor, who instead contended that the "undue burden" standard was the appropriate one for assessing restrictions on the abortion right.²⁶² According to Justice O'Connor, under this standard, the Court was first to determine whether the law at issue placed an "undue burden" on the abortion right.²⁶³ If not, the law would be sustained so long as it passed rational basis review.²⁶⁴ In support of this conclusion, she cited *Bellotti*, *Maber*, and *Harris*,²⁶⁵ all of which used the phrase in the informal way described above and none of which suggested that rational basis review would apply if the burden was not deemed undue.

The very same day that *City of Akron* was decided, the Court issued opinions in two other cases—*Planned Parenthood Ass'n of Kansas City, Mo., Inc. v. Ashcroft*²⁶⁶ and *Simopoulos v. Virginia*²⁶⁷—regarding the constitutionality of abortion restrictions. Unlike *City of Akron*, which struck down all of the challenged provisions, in these two cases, the Court upheld some or all of the challenged statutes.²⁶⁸ Justice O'Connor wrote concurring opinions in these two cases, agreeing with the result but contending that the undue burden standard applied.²⁶⁹ Justice O'Connor was thus able to almost immediately include what was in substance a dissenting view into a pair of dissenting concurrences. In the decade that followed, Justice O'Connor reiterated in concurring opinions in *Hodgson v. Minnesota*²⁷⁰ and *Webster v. Reproductive Services*²⁷¹ and in a dissenting opinion in *Thornburgh v. American College of Obstetricians and Gynecologists*²⁷² that the undue burden standard applied when assessing restrictions on abortion.

This series of separate opinions laid the foundation for the Court's 1992 decision in *Casey*. There, Justices O'Connor, Kennedy, and Souter penned the controlling "joint opinion" for the Court, which reaffirmed what it described as

260. *City of Akron v. Akron Ctr. for Reprod. Health, Inc.*, 462 U.S. 416 (1983).

261. *See id.* at 427.

262. *See id.* at 453, 461–66 (O'Connor, J., dissenting).

263. *See id.* at 453.

264. *See id.*

265. *See id.* at 453, 461 n.8.

266. *Planned Parenthood Ass'n of Kansas City, Mo., Inc. v. Ashcroft*, 462 U.S. 476 (1983).

267. *Simopoulos v. Virginia*, 462 U.S. 506 (1983).

268. *Ashcroft*, 462 U.S. at 494; *Simopoulos*, 462 U.S. at 518–19.

269. *See Ashcroft*, 462 U.S. at 505 (O'Connor, J., concurring in part in the judgment and dissenting in part); *Simopoulos*, 462 U.S. at 519–20 (O'Connor, J., concurring in part and concurring in the judgment).

270. *Hodgson v. Minnesota*, 497 U.S. 417, 459 (1990) (O'Connor, J., concurring in part and concurring in the judgment in part).

271. *Webster v. Reprod. Servs.*, 492 U.S. 490, 529–30 (1989) (O'Connor, J., concurring in part and concurring in the judgment).

272. *Thornburgh v. Am. Coll. Of Obstetricians and Gynecologists*, 476 U.S. 747, 828–29 (1986) (O'Connor, J., dissenting).

“*Roe*’s essential holding”²⁷³ but replaced *Roe*’s strict scrutiny standard with the “undue burden” standard.²⁷⁴ In support of its conclusion that the “undue burden” standard was the appropriate one, the opinion cited *Bellotti*, *Maber*, and *Harris*, as well as Justice O’Connor’s separate opinions in *Hodgson*, *Webster*, *Thornburgh*, *City of Akron*, *Asbcroft*, and *Simopoulos*.²⁷⁵ Justice O’Connor was thus able to make it appear in *Casey*’s joint opinion as though the undue burden standard was firmly established even though the cited cases were mostly dissenting concurrences written by Justice O’Connor herself—often joined by no other Justice—or were majority opinions that used the phrase in an informal way to describe the degree of burden on the abortion right in the cases before the Court.

The joint opinion in *Casey* was criticized by a majority of the Justices, liberal and conservative alike. Chief Justice Rehnquist, writing for himself and three other Justices, described it as “created largely out of whole cloth by the authors of the joint opinion,” noted that it “does not command the support of a majority of this Court,” and advocated instead for overruling *Roe* and applying no more than rational basis review to laws restricting abortion.²⁷⁶ Justice Blackmun agreed with this characterization and advocated instead for the application of strict scrutiny.²⁷⁷

Ultimately, the “undue burden” standard was ratified by a majority of the Court in *Stenberg v. Carhart*²⁷⁸ with a simple citation of *Casey*,²⁷⁹ effectively laundering Justice O’Connor’s dissenting views into a solid majority opinion.

II. JUDICIAL RECONSTRUCTION OF OTHER CONSTITUTIONAL PROVISIONS

As demonstrated in Part I, the Court has employed a variety of different methods for reconstructing its precedents interpreting the Reconstruction Amendments. These same methods can and have been used to reconstruct precedents addressing other provisions of the U.S. Constitution. Although an exhaustive examination of every Court decision engaging in judicial reconstruction of precedent is beyond the scope of this Article, this section provides two examples of such cases, both of which involve multiple reconstructions of earlier precedent.

A. *The Interstate Commerce Clause Cases*

One of Congress’s key enumerated powers is its power to regulate interstate commerce pursuant to the Commerce Clause.²⁸⁰ Indeed, when the Court in *The*

273. See *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 846 (1992).

274. See *id.* at 874.

275. See *id.* at 874–75.

276. See *id.* at 964, 966 (Rehnquist, C.J., concurring in the judgment in part and dissenting in part).

277. See *id.* at 930, 942 (Blackmun, J., concurring in part, concurring in the judgment in part, and dissenting in part).

278. *Stenberg v. Carhart*, 530 U.S. 914 (2000).

279. See *id.* at 921.

280. See U.S. CONST. art. I, § 8, cl. 3.

Civil Rights Cases declared that Congress lacked the power under the Thirteenth or Fourteenth Amendments to enact the Civil Rights Act of 1875, it hinted that such a law might be upheld if Congress enacted and justified the law on Commerce Clause grounds.²⁸¹ Nearly 80 years later, the Court upheld the constitutionality of a similar federal statute prohibiting racial discrimination in public accommodations on Commerce Clause grounds.²⁸² However, like the Court's precedents interpreting the Reconstruction Amendments, the Court's precedents governing the Commerce Clause power have likewise been the subject of extensive judicial reconstruction.

The Court's early cases interpreting the Commerce Clause power attempted to strictly demarcate what fell within and outside that power, with the line sometimes drawn between direct and indirect effects on commerce²⁸³ and at other times between harmful and harmless goods.²⁸⁴ But beginning in 1937, at the same time that the Court overruled its *Lochner*-era precedents, it also abandoned these various tests for assessing the constitutionality of congressional exercises of the Commerce Clause power and replaced them with one that required only that the regulated activity "substantially" effect commerce.²⁸⁵ This test was a highly deferential one, with the Court holding that it would give deference to a congressional finding that a regulated activity substantially effects interstate commerce so long as the finding was "rational."²⁸⁶ Indeed, so deferential was the Court's substantial effects test that even a seemingly isolated instance of commerce that was purely intrastate in character could be regulated by Congress when that activity—when combined with like conduct by others—effected interstate commerce.²⁸⁷ As a result, the only activities that were outside the reach of Congress's Commerce Clause power were those that were wholly engaged in intrastate and had no effects at all outside of the state.²⁸⁸

In these cases, the Court clarified that Congress's Commerce Clause power could be divided into three different categories:

The Commerce Clause reaches, in the main, three categories of problems. First, the use of channels of interstate or foreign commerce which Congress deems are being misused, as, for example, the shipment of stolen goods . . . or of persons who have been kidnaped Second, protection of the instrumentalities of interstate commerce, as, for example, the destruction of an aircraft . . . or persons or things in commerce, as, for

281. See *The Civil Rights Cases*, 109 U.S. 3, 19–20 (1883).

282. See *Katzenbach v. McClung*, 379 U.S. 294, 295 (1964); *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 242–43 (1964).

283. See *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 546–50 (1935).

284. See *Hammer v. Dagenhart*, 247 U.S. 251, 271–72 (1918).

285. See *Wickard v. Filburn*, 317 U.S. 111, 120 (1942); *United States v. Darby*, 312 U.S. 100, 115–17 (1941); *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 40–41 (1937).

286. See *Hodel v. Virginia Surface Mining & Reclamation Ass'n, Inc.*, 452 U.S. 264, 277 (1981); *Katzenbach*, 379 U.S. at 303–04.

287. See *Fry v. United States*, 421 U.S. 542, 547 (1975).

288. See *Katzenbach*, 379 U.S. at 302.

example, thefts from interstate shipments Third, those activities affecting commerce.²⁸⁹

The first two categories are in some sense the core of the Commerce Clause power, and in listing these three subjects of regulation, the Court frequently emphasized that the Commerce Clause power was not limited to the first two but also included the third.²⁹⁰ Moreover, it is to this third category that the deferential “substantial effects” test was applied by the Court.

For nearly sixty years, the Court followed this highly deferential test with respect to the third category and placed few limits on Congress’s Commerce Clause power. However, in 1995, after the Court’s composition had shifted in a decidedly conservative direction, the Court issued an opinion in *United States v. Lopez*²⁹¹ that drew a rigid line between what it characterized as “economic” and “non-economic” activity, with the Commerce Clause power interpreted to encompass only the former.

At issue in *Lopez* was the constitutionality of a federal statute that made it a criminal offense to possess a firearm within a school zone.²⁹² The Court began by identifying the three categories of activity that Congress can regulate pursuant to the Commerce Clause.²⁹³ Finding the first two categories inapplicable to the statute at issue, the *Lopez* Court turned its focus to the third category.²⁹⁴ It began by noting that its case law to date had not been entirely clear on what constitutes a substantial effect on interstate commerce.²⁹⁵ However, the Court reviewed its cases upholding Congress’s exercise of Commerce Clause power based on substantial effects and concluded that all of them contained a common ingredient that the Court referred to alternatively as “economic” or “commercial” activity.²⁹⁶ It listed as examples its decisions upholding laws regulating coal mining; extortionate credit transactions; restaurants using substantial interstate supplies; inns and hotels catering to interstate guests; and production and consumption of homegrown wheat.²⁹⁷ The Court contrasted these with the law at issue—regulating the possession of a gun—which the Court concluded did not constitute economic or commercial activity.²⁹⁸ The Court also noted that in addition to not regulating commercial activity, the law was not “an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were

289. *Perez v. United States*, 402 U.S. 146, 150 (1971); *accord* *F.E.R.C. v. Mississippi*, 456 U.S. 742, 754 n.18 (1982); *Hodel*, 452 U.S. at 276–77.

290. *See F.E.R.C.*, 456 U.S. at 754 n.18; *Hodel*, 452 U.S. at 276–77.

291. *United States v. Lopez*, 514 U.S. 549 (1995).

292. *See id.* at 551–52.

293. *See id.* at 558–59.

294. *See id.* at 559.

295. *See id.*

296. *See id.* at 559–61.

297. *See id.* at 559–60.

298. *See id.* at 560–61.

regulated.”²⁹⁹ The Court thus held that the law could not be upheld under its decisions “upholding regulations of activities that arise out of or are connected with a commercial transaction, which viewed in the aggregate, substantially affects interstate commerce.”³⁰⁰

While the line that the *Lopez* Court sought to draw between commercial and non-commercial activity was a plausible way to distinguish *Lopez* from the Court’s earlier decision, the nature of the regulated activity was never a relevant consideration in the Court’s earlier decisions.³⁰¹ In fact, those decisions had expressly stated that the plenary nature of Congress’s commerce power gave Congress the ability to regulate *any* type of activity so long as it substantially effected commerce.³⁰² Thus, the *Lopez* Court—which made clear in its decision that it felt the need to constrain the scope of Congress’s Commerce Clause power³⁰³—reconstructed its precedents in order to achieve its desired outcome.

Five years later, the Court once again invoked the distinction between economic and non-economic activity as a basis for striking down a federal statute grounded in the Commerce Clause power. In *United States v. Morrison*,³⁰⁴ the Court addressed the constitutionality of a federal statute that provided a civil remedy for the victims of gender-motivated violence. The Court reasoned that, just like the possession of guns near schools, “[g]ender-motivated crimes of violence are not, in any sense of the phrase, economic activity.”³⁰⁵ The Court cited *Lopez* for the proposition that its decisions to date have upheld Commerce Clause regulation of intrastate activity only when that activity is economic in nature.³⁰⁶

Not only did the *Lopez* and *Morrison* Courts create a new distinction between economic and non-economic activity, but they also appeared to make arbitrary distinctions as to whether given activities counted as economic or non-economic. For example, it was unclear why possessing a gun near a school was not considered economic activity. Possession of a gun, after all, seems no less economic than the regulated activity of racial discrimination³⁰⁷ at issue in cases such as *Heart of Atlanta Motel, Inc. v. United States*³⁰⁸ or *Katzenbach v. McClung*.³⁰⁹ Perhaps the Court’s focus instead was on where the activity was occurring; thus, non-economic activity could be regulated if it occurred at an economic establishment.³¹⁰ But if that is so, it is not

299. *See id.* at 561.

300. *See id.*

301. *See id.* at 628 (Breyer, J., dissenting).

302. *See Katzenbach v. McClung*, 379 U.S. 294, 302 (1964); *Wickard v. Filburn*, 317 U.S. 111, 124–25 (1942); *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 37 (1937).

303. *See Lopez*, 514 U.S. at 564–68.

304. *United States v. Morrison*, 529 U.S. 598 (2000).

305. *See id.* at 613.

306. *See id.* (citing *Lopez*, 514 U.S. at 559–60).

307. *See Lopez*, 514 U.S. at 628–29 (Breyer, J., dissenting).

308. *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964).

309. *Katzenbach v. McClung*, 379 U.S. 294 (1964).

310. *See Morrison*, 529 U.S. at 656–58 (Breyer, J., dissenting); *Lopez*, 514 U.S. at 625–27 (Breyer, J., dissenting).

clear why a school is any less economic than the hotels and restaurants at issue in *Heart of Atlanta* or *Katzenbach*.³¹¹

Indeed, because the line between economic and non-economic activity was non-existent prior to *Lopez* and *Morrison* and ill-defined in those cases, shifting majorities have been able to and likely in the future will further pivot this line of cases in one direction or the other by simply asserting that the regulated activity is or is not economic in nature. Thus, for example, in *Gonzales v. Raich*,³¹² the Court upheld a federal statute criminalizing the local cultivation and use of marijuana, deeming the targeted activity to be “quintessentially economic,”³¹³ while the dissent viewed it as non-economic in nature.³¹⁴

B. The Presidential Removal Power Cases

Article II of the U.S. Constitution provides in general terms that “[t]he executive Power shall be vested in a President of the United States of America.”³¹⁵ It provides the President with the power to appoint executive officers, but requires that such appointments receive the “advice and consent” of the U.S. Senate.³¹⁶ Furthermore, it empowers Congress to provide a different procedure for “inferior officers,” allowing it to vest the appointment power “as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.”³¹⁷ Finally, Article II provides that executive officers can be impeached by Congress for committing high crimes or misdemeanors.³¹⁸ However, what Article II is silent on is the procedure for removing executive officers in the absence of an impeachable offense. Is this power vested in the President alone, or is the officer’s removal, like her appointment, subject to the advice and consent of the Senate or some other sort of check by Congress?

In *Myers v. United States*,³¹⁹ the Court engaged in an exhaustive historical analysis of these various provisions of Article II and issued a sweeping opinion holding that—save for the proviso for inferior officers—the power to remove executive officers is committed solely to the President. *Myers* involved an act that prevented the President from removing a postmaster without the advice and consent of the Senate.³²⁰ Despite this limit on his authority, Woodrow Wilson removed Frank S. Myers from his position as postmaster without obtaining the Senate’s consent.³²¹ Myers brought suit, challenging his removal and demanding the

311. See *Lopez*, 514 U.S. at 628–29 (Breyer, J., dissenting).

312. *Gonzales v. Raich*, 545 U.S. 1 (2005).

313. See *id.* at 25.

314. See *id.* at 49–50 (O’Connor, J., dissenting).

315. See U.S. CONST. art. II, § 1, cl. 1.

316. See U.S. CONST. art. II, § 2, cl. 2.

317. See *id.*

318. See U.S. CONST. art. II, § 4.

319. *Myers v. United States*, 272 U.S. 52 (1926).

320. See *id.* at 107.

321. See *id.* at 106.

pay he would have received had he completed his four-year term.³²² The government argued in response that the act's limit on the President's removal authority was unconstitutional.³²³

After exhaustively surveying the history behind the enactment of Article II, the *Myers* Court identified three, sweeping principles regarding the President's removal power: Article II's vesting of "[t]he executive power" in the President coupled with the grant of power to appoint executive officers gives him the implied power to remove such executive officers;³²⁴ the Constitution's only textual limit on the President's removal authority is Congress's power to vest the appointment of inferior officers in the courts or heads of departments, which simultaneously gives Congress the ability to vest the power to remove inferior officers in those same entities;³²⁵ and in all other instances, the President possesses an "unrestricted" removal power.³²⁶

Applying these principles, the Court held that the act's limit on the President's ability to remove postmasters violated Article II.³²⁷ Furthermore, although not necessary to the decision, the *Myers* Court emphasized that its sweeping conclusions applied regardless of the nature of the removed officer's functions. It provided as an example an executive officer who exercises quasi-judicial functions.³²⁸

Less than a decade after the *Myers* decision, the question of presidential authority to remove executive officers returned once again to the U.S. Supreme Court. In *Humphrey's Executor v. United States*³²⁹ the Court reviewed President Roosevelt's decision to remove one of his predecessor's appointees from the Federal Trade Commission (FTC).³³⁰ The executor of the appointee's estate brought a suit seeking to collect his unpaid salary, contending that a congressional act prevented the President from removing members of the FTC except for specific articulated causes.³³¹

Given *Myers*' sweeping language, it would seem to follow logically that the Court in *Humphrey's Executor* would uphold the President's removal of the FTC appointee. Yet despite the *Myer* Court's conclusion that the President's removal power was "unrestricted," the *Humphrey's Executor* Court unanimously upheld the congressionally imposed limitation on the President's power to remove members of the FTC. Dismissing much of *Myers* as dicta, the *Humphrey's Executor* Court distinguished between executive officers who exercise "purely" executive powers and those who exercise quasi-legislative or quasi-judicial power, limiting *Myers* to

322. *Id.*

323. *See id.* at 108.

324. *See id.* at 115–19, 122, 126–27.

325. *See id.* at 126–29.

326. *See id.* at 130, 162, 172, 176.

327. *Id.* at 176.

328. *See id.* at 134–35.

329. *Humphrey's Ex'r v. United States*, 295 U.S. 602 (1935).

330. *See id.* at 618–19.

331. *See id.*

only the former.³³² Reasoning that the powers exercised by the FTC are partly quasi-legislative and partly quasi-judicial, the Court upheld Congress's authority to limit the President's ability to remove its members.³³³

It is hard to discern whether *Humphrey's Executor* overruled *Myers*, reconstructed it, or both. On the one hand, *Humphrey's Executor* noted that *Myers* contained statements that tend to support the President's position but indicated that such expressions were "disapproved" to the extent inconsistent with the opinion in *Humphrey's Executor*.³³⁴ On the other hand, the decision did not purport to overrule *Myers* but only to ignore its dicta.³³⁵ But by introducing a new theory at odds with the reasoning in *Myers*, it appears as though *Humphrey's Executor* viewed virtually everything in *Myers* as dicta save for its ultimate conclusion. The *Humphrey's Executor* Court characterized that conclusion as "the narrow point actually decided" therein, namely, "that the President had power to remove a postmaster of the first class, without the advice and consent of the Senate as required by act of Congress."³³⁶ In any event, whether *Humphrey's Executor* reconstructed or overruled *Myers*, it is clear that the Court has sought in subsequent cases to reconstruct this entire line of precedent on more than one occasion.

The next major case to address the President's removal power was *Wiener v. United States*.³³⁷ At issue in *Wiener* was the President's authority to remove a member of the War Claims Commission (WCC). While the Act of Congress creating the WCC gave the President the power to appoint its members with the advice and consent of the Senate and provided for a finite date when the WCC would be disbanded, it did not contain a provision for removing commissioners.³³⁸ After President Truman removed a commissioner, the commissioner filed suit seeking back pay for the remainder of the time he would have served on the WCC.³³⁹

In resolving the dispute, *Wiener* embraced *Humphrey's Executor's* distinction between "purely executive officers" and those that exercised quasi-legislative or quasi-judicial powers. While acknowledging that *Myers* contained language indicating that the President had the power to remove executive officials who exercised quasi-judicial powers, the *Wiener* Court held that *Humphrey's Executor* had modified this aspect of *Myers*.³⁴⁰ Because the *Wiener* Court concluded that the functions of the WCC were quasi-judicial in nature, it held that the President lacked the inherent constitutional authority to remove its commissioners.³⁴¹

332. *See id.* at 627–28.

333. *See id.* at 628.

334. *See id.* at 626.

335. *See id.* at 626–27.

336. *Id.* at 626.

337. *Wiener v. United States*, 357 U.S. 349 (1958).

338. *See id.* at 349–50.

339. *See id.* at 349–51.

340. *See id.* at 352 (citing *Humphrey's Ex'r*, 295 U.S. at 628).

341. *See id.* at 353–56.

Nearly three decades later, in *Bowsher v. Synar*,³⁴² the Court once again revisited this line of cases. In *Bowsher*, the Court addressed the constitutionality of an act of Congress that attempted to assign executive powers to the Comptroller General, an official who was appointed by the President but could be removed only by an act of Congress.³⁴³ Relying on *Myers*, *Humphrey's Executor*, and *Wiener*, the *Bowsher* Court declared this statutory scheme unconstitutional.

While purporting to rely on past precedent, *Bowsher* subtly shifted that precedent by re-characterizing those cases as being concerned with congressional participation in the removal of an executive officer. *Bowsher* first wrote that *Myers* declared the statute at issue in that case unconstitutional on the ground that for Congress to “draw to itself, or to either branch of it, the power to remove or the right to participate in the exercise of that power . . . would be . . . to infringe the constitutional principle of the separation of governmental powers.”³⁴⁴ Next, it made brief mention of *Humphrey's Executor* and *Wiener*, noting that the former “distinguished *Myers*, reaffirming its holding that congressional participation in the removal of executive officers is unconstitutional,” and observing that the latter “reached a similar result.”³⁴⁵ The Court then summarized the line of cases as standing for the proposition that “Congress cannot reserve for itself the power of removal of an officer charged with the execution of the laws except by impeachment.”³⁴⁶

Bowsher was followed two years later by *Morrison v. Olson*,³⁴⁷ which relied on the particular language used in *Bowsher* to further reconstruct this line of cases. In *Morrison*, the Court addressed the constitutionality of a federal statute that vested in a special division of Article III judges the power to appoint independent counsel and limited the Attorney General's ability to remove such counsel, allowing removal only for conditions, such as physical or mental incapacity, that impair the counsel's ability to carry out her duties.³⁴⁸

The *Morrison* majority first concluded that the independent counsel was not a principal but rather an “inferior officer.”³⁴⁹ As Justice Scalia noted in dissent, the majority could have stopped at that finding and held that this fact alone gave Congress the power to restrict the removal of such an officer by the executive.³⁵⁰ However, *Morrison* went further, providing a broad reconstruction of its decisions in *Myers*, *Humphrey's Executor*, *Wiener*, and *Bowsher* that replaced the line drawn between “purely executive officers” and those that exercised quasi-legislative or quasi-judicial powers with a completely different test for assessing restrictions on

342. *Bowsher v. Synar*, 478 U.S. 714 (1986).

343. *See id.* at 717–21.

344. *See id.* at 724 (quoting *Myers v. United States*, 272 U.S. 52, 161 (1926)).

345. *Id.* at 724–25.

346. *Id.* at 726.

347. *Morrison v. Olson*, 487 U.S. 654 (1988).

348. *See id.* at 661, 663.

349. *See id.* at 670–73.

350. *See id.* at 724 (Scalia, J., dissenting).

the President's removal power.

As an initial matter, the majority declared the decisions in *Myers* and *Bowsher* wholly inapplicable to the case before the Court. Seizing on both the language in *Bowsher* that "Congress cannot reserve for *itself* the power of removal of an officer charged with the execution of the laws except by impeachment" and the language in *Myers*—as quoted in *Bowsher*—indicating that the Constitution prevents Congress from "draw[ing] to *itself* . . . the power to remove" executive officers, the Court noted that those precedents did not apply because here, unlike in those cases, Congress did not give *itself* the power to remove; it merely restricted the President's flexibility to exercise the removal power.³⁵¹

Turning to *Humphrey's Executor* and *Wiener*, the *Morrison* Court—while acknowledging that it "undoubtedly did rely on the terms 'quasi-legislative' and 'quasi-judicial' to distinguish the officials involved in *Humphrey's Executor* and *Wiener* from those in *Myers*"—diminished the importance of that language.³⁵² The *Morrison* Court then re-characterized the Court's removal cases as follows:

The analysis contained in our removal cases is designed not to define rigid categories of those officials who may or may not be removed at will by the President, but to ensure that Congress does not interfere with the President's exercise of the "executive power" and his constitutionally appointed duty to "take care that the laws be faithfully executed" under Article II.³⁵³

The *Morrison* Court stated that "the real question is whether the removal restrictions are of such a nature that they impede the President's ability to perform his constitutional duty, and the functions of the officials in question must be analyzed in that light."³⁵⁴ It then identified a number of factors that led the Court to conclude that the removal restrictions were constitutional, including the fact that the independent counsel was an inferior officer; that it had a limited jurisdiction and tenure; that it lacked policymaking or significant administrative authority; and that the executive retained the authority under the statutory scheme to ensure that the independent counsel was competently performing his abilities.³⁵⁵

Justice Scalia penned a dissent in *Morrison* that both chastised the majority for reconstructing the Court's precedents and also made note of the Court's earlier reconstructions of this line of cases:

Today, however, *Humphrey's Executor* is swept into the dustbin of repudiated constitutional principles One can hardly grieve for the shoddy treatment given today to *Humphrey's Executor*, which, after all, accorded the same indignity (with much less justification) to Chief Justice Taft's opinion 10 years earlier in *Myers v. United States* It is in fact

351. *See id.* at 685–86 (majority opinion) (quoting *Bowsher v. Synar*, 478 U.S. 714, 726 (1986)).

352. *See id.* at 689.

353. *See id.* at 689–90.

354. *Id.* at 691.

355. *See id.* at 691–93.

comforting to witness the reality that he who lives by the *ipse dixit* dies by the *ipse dixit*. But one must grieve for the Constitution.³⁵⁶

The most recent case in this line of cases—*Free Enterprise Fund v. PCAOB*³⁵⁷—represents yet another reconstruction that retreats from the more fluid interpretation endorsed by the *Morrison* Court. *Free Enterprise Fund* addressed the constitutionality of what is known as a dual for-cause structure for removing members of the Public Company Accounting Oversight Board (PCAOB).³⁵⁸ Under the statute creating the Board, the Securities and Exchange Commission (SEC) appoints five members to PCAOB who serve staggered, 5-year terms.³⁵⁹ Congress provided that members of the SEC could remove members of PCAOB only for good cause.³⁶⁰ In turn, members of the SEC pursuant to statute could likewise not be removed except for limited reasons.³⁶¹

The *Free Enterprise Fund* Court issued a bright-line opinion holding that such a dual for-cause structure violates Article II's vesting of executive power in the President.³⁶² Citing to the broader principles in *Myers*,³⁶³ the majority reasoned that this structure prevented the President from holding PCAOB accountable since he could neither directly remove members nor was there anyone directly responsible to the President who possessed that power.³⁶⁴

In contrast, the *Free Enterprise Fund* dissent contended that the majority had ignored the test set forth in *Morrison*. First, the dissent described most of the Court's decision in *Myers*—which the majority had relied upon—as having been “expressly disapproved” of in *Humphrey's Executor*.³⁶⁵ Next, it cited *Morrison* for the proposition that the “essence” of *Myers* was that Congress could not aggrandize *its* power, a feature not present in the statute at issue.³⁶⁶ Third, it cited *Morrison* for the proposition that in lieu of bright line rules and categories, a fact-specific inquiry that looked at the impact of the law on the President's exercise of executive power was required.³⁶⁷

In sum, the Court's removal power cases have shifted over the last century between bright-line rules and flexible standards and between broad and narrow protection of the President's power to remove executive officials. Yet these dramatic shifts have occurred without the Court ever expressly overruling its earlier precedents, with the Justices in the shifting majorities instead opting to

356. *Id.* at 725–26 (Scalia, J., dissenting).

357. *Free Enter. Fund v. PCAOB*, 561 U.S. 477 (2010).

358. *See id.* at 492.

359. *See id.* at 484.

360. *See id.* at 486–87.

361. *See id.* at 487.

362. *See id.* at 496.

363. *See id.* at 492–93 (citing *Myers v. United States*, 272 U.S. 52, 164 (1926)).

364. *See id.* at 496–98.

365. *See id.* at 518 (Breyer, J., dissenting).

366. *See id.* (citing *Morrison v. Olson*, 487 U.S. 654, 686 (1988)).

367. *See id.* at 519–23 (citing *Olson*, 487 U.S. at 689–91).

re-characterize the Court's earlier decisions.

III. PRECEDENTS VULNERABLE TO RECONSTRUCTION

As demonstrated above, the Court has demonstrated ingenuity in reconstructing its precedents interpreting not only the Reconstruction Amendments but also other constitutional provisions, allowing the Court to maintain formal fidelity to precedent while in practice subtly overruling it. If the Court continues to engage in this process, there are several lines of precedent that are ripe for such reconstruction if the Court's composition moves more solidly in either a conservative or liberal direction. Two lines of precedents—the “gay rights” cases and the cases involving congressional power to “enforce” the Reconstruction Amendments—provide clear examples of the ways in which a future Court could reconstruct precedent.

A. The “Gay Rights” Cases

Between 1996 and 2017, the U.S. Supreme Court has issued five opinions vindicating the Fourteenth Amendment rights of gay persons. First, in 1996, the Court in *Romer v. Evans*³⁶⁸ declared unconstitutional an amendment to Colorado's constitution that repealed state and local laws prohibiting discrimination on the basis of sexual orientation and prohibited the subsequent enactment of such laws at either the state or local levels. Next, in 2003, the Court in *Lawrence v. Texas*³⁶⁹ struck down a Texas law criminalizing consensual same-sex sodomy. In 2013, the Court in *U.S. v. Windsor*³⁷⁰ declared unconstitutional a federal statute barring federal recognition of same-sex marriages lawfully entered into pursuant to state law. Then in 2015, the Court in *Obergefell v. Hodges*³⁷¹ invalidated state laws prohibiting and refusing to recognize same-sex marriages. Finally, in 2017, the Court in *Pavan v. Smith*³⁷² declared unconstitutional an Arkansas statutory scheme that automatically put a married woman's husband's name on the birth certificate if the woman gave birth to a child during their marriage but that would not put a married woman's wife's name on the birth certificate in that same circumstance.

These five cases contain a number of elements in common with the cases examined in Parts I and II of this Article that make them vulnerable to various forms of reconstruction, both expansive and contractive. As a group, these cases are ambiguous on the level of scrutiny being applied and at times even the ground for the decision. Moreover, they were all decided by narrow 5-4 or 6-3 majorities, suggesting that modest shifts in the Court's composition in one direction or the other may make them vulnerable to judicial reconstruction.

368. *Romer v. Evans*, 517 U.S. 620 (1996).
369. *Lawrence v. Texas*, 539 U.S. 558 (2003).
370. *United States v. Windsor*, 570 U.S. 744 (2013).
371. *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).
372. *Pavan v. Smith*, 137 S. Ct. 2075 (2017).

In *Romer*, the Court invoked the Equal Protection Clause to strike down Colorado's constitutional amendment but was somewhat ambiguous on the level of scrutiny that it applied. In terms, the *Romer* Court purported to apply mere rational basis review.³⁷³ But given how deferential that standard traditionally is,³⁷⁴ it seemed as though the Court in fact applied a more rigorous level of scrutiny, as some Justices acknowledged in separate opinions in both *Romer* itself and in subsequent cases.³⁷⁵ The *Romer* dissent seized on the majority's language in an effort to cabin the future reach of the decision, dropping a footnote indicating that "[t]he Court evidently agrees that 'rational basis' . . . is the governing standard."³⁷⁶

In *Lawrence*, the Court's opinion was ambiguous on both the basis for the decision and the level of scrutiny that it applied. With respect to the basis for the decision, the majority acknowledged the Equal Protection Clause as a viable ground for invalidating the sodomy statute but opted instead to rely on the Due Process Clause.³⁷⁷ However, the majority acknowledged a connection between the two clauses, declaring that "[e]quality of treatment and the due process right to demand respect for conduct protected by the substantive guarantee of liberty are linked in important respects."³⁷⁸ In addition, the *Lawrence* majority, while heavily relying on its fundamental rights cases³⁷⁹—suggesting that strict scrutiny or some other searching form of scrutiny was applicable—used the language of rational basis review, noting that the law at issue "furthers no legitimate state interest."³⁸⁰ Just as in *Romer*, despite the language used by the Court, its actions suggested that something more searching than traditional rational basis review was in play. Moreover, just as in *Romer*, the dissent seized on this ambiguity in the Court's opinion to cabin its reach, noting that the Court nowhere referred to sodomy as a fundamental right, nor did it claim to apply strict scrutiny but instead purported to apply only rational basis review.³⁸¹ Justice O'Connor wrote a separate concurrence in *Lawrence*, declining to join its due process holding but instead declaring the law unconstitutional on equal protection grounds.³⁸² According to Justice O'Connor, *Romer* had applied a "more searching form of rational basis review," which she deemed likewise applicable in *Lawrence*.³⁸³ Thus, collectively the *Lawrence* majority and concurring opinions contained ambiguities on both the constitutional basis for striking down the law as well as the level of scrutiny.

373. See *Romer*, 517 U.S. at 632–36.

374. See, e.g., *FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 320 (1993); *Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483, 491 (1955).

375. See, e.g., *Lawrence v. Texas*, 539 U.S. 558, 580 (2003) (O'Connor, J., concurring in the judgment); *Romer*, 517 U.S. at 640–43 (Scalia, J., dissenting).

376. See *Romer*, 517 U.S. at 640 n.1 (Scalia, J., dissenting).

377. See *Lawrence*, 539 U.S. at 574–75.

378. See *id.* at 575.

379. See *id.* at 564–66, 573–74.

380. See *id.* at 578.

381. See *id.* at 594 (Scalia, J., dissenting).

382. See *id.* at 579 (O'Connor, J., concurring in the judgment).

383. See *id.* at 579–80.

The next two cases, *Windsor* and *Obergefell*, together declared unconstitutional both federal and state laws denying recognition of and entry into same-sex marriages.³⁸⁴ *Pavan* then declared unconstitutional a state law that treated opposite-sex and same-sex couples differently so far as parentage rights tied to marriage are concerned.³⁸⁵ Like *Romer* and *Lawrence*, these cases are ambiguous on whether the basis for the decision is grounded in equal protection or due process, as well as the level of scrutiny being applied. *Windsor* cites both *Romer* and *Lawrence* and vacillates between discussing infringements on liberty and equal protection principles.³⁸⁶ And although the decision appears to apply something more rigorous than traditional rational basis scrutiny,³⁸⁷ it uses the language of rational basis in its analysis.³⁸⁸ In *Obergefell*, the Court explicitly cited both to due process³⁸⁹ and equal protection³⁹⁰ principles and cases, although there was some uncertainty as to whether its equal protection concerns were class-based (sexual orientation) or rights-based (marriage). Moreover, although the Court cited some of its fundamental rights cases, suggesting that strict scrutiny or some other form of heightened level of scrutiny was applicable,³⁹¹ and the Court appeared to apply something more rigorous than traditional rational basis review,³⁹² the Court never articulated a standard of review. Finally, *Pavan* was a short opinion that simply extended *Obergefell*, without discussing whether equal protection or due process principles were at play and without articulating a standard of review.

Moving forward, this line of cases could easily be reconstructed in dramatically different ways. A liberal Court majority might re-characterize this entire line of cases as having applied intermediate or strict scrutiny to laws that discriminate on the basis of sexual orientation, in the same way that the Court previously re-characterized its sex and legitimacy lines of cases. Because nearly all of these cases referenced the Equal Protection Clause, the Court could treat the entire line of cases as sounding in equal protection. Moreover, because there were plausible rational bases for the challenged laws in each of these cases, often suggested by the dissents, the Court could cite those plausible rational bases as evidence that the Court had in fact been applying a higher level of scrutiny.

If instead, as seems more likely in the near term, the Court were to turn in a more decisively conservative direction, it would be rather easy for a conservative majority to cabin the reach of these decisions so far as the rights of sexual minorities are concerned. The Court could cite the references to the lack of a “legitimate”

384. See *Obergefell v. Hodges*, 135 S. Ct. 2584, 2597–602 (2015); *United States v. Windsor*, 570 U.S. 744, 775 (2013).

385. See *Pavan v. Smith*, 137 S. Ct. 2075, 2078–79 (2017).

386. See *Windsor*, 570 U.S. at 768–75.

387. See *id.* at 793–94 (Scalia, J., dissenting).

388. See *id.* at 775 (noting that no “legitimate purpose” justifies the federal statute).

389. See *Obergefell*, 135 S. Ct. at 2597–602.

390. See *id.* at 2602–05.

391. See *id.* at 2597–602.

392. See *id.* at 2623 (Roberts, J., dissenting).

governmental interest in support of a conclusion that only rational basis review applies to sexual orientation classifications. Moreover, the Court could cabin the reach of *Lawrence*, *Windsor*, *Obergefell*, and *Pavan* by treating those cases as focused on the specific rights involved and not about classifications based on sexual orientation.

In sum, because this line of cases is controversial and because the decisions contain ambiguous language regarding both the constitutional grounds at issue and the level of scrutiny applicable, they are ripe for judicial reconstruction should the Court's composition shift decisively in one direction or the other.

B. *The Enforcement Power Cases*

Since the enactment of the Reconstruction Amendments, the Court has been sharply divided on the authority each of those amendments grants Congress to "enforce" them.³⁹³ Cases interpreting Congress's authority under these enforcement provisions have not only been the subject of multiple judicial reconstructions over the past 150 years but are vulnerable to further reconstruction by the Court, because of various ambiguities contained therein.

The Court's earliest decisions suggested that these enforcement provisions gave Congress no authority to proscribe conduct beyond that which the self-executing parts of these amendments already prohibited. Thus, for example, in *The Civil Rights Cases*,³⁹⁴ the U.S. Supreme Court rejected arguments that Congress possessed the power under either Section 5 of the Fourteenth Amendment or Section 2 of the Thirteenth Amendment to enact Sections 1 and 2 of the Civil Rights Act of 1875, which prohibited discrimination on the basis of race by places of public accommodation. With respect to Section 5 of the Fourteenth Amendment, the Court indicated that Congress's power did not extend beyond the scope of the self-executing provisions of the Fourteenth Amendment.³⁹⁵ Because those self-executing provisions apply only when state action is involved, congressional acts enacted pursuant to Section 5 likewise could target only state, not private action.³⁹⁶ As for Section 2 of the Thirteenth Amendment, the Court assumed for the sake of argument that it empowered Congress to enact legislation targeting the so-called "badges and incidents of slavery," but concluded that even if such a power existed, the denial of admission to public accommodations did not constitute a "badge" or "incident" of slavery, engaging in its own analysis of the meaning of those terms without any deference to Congress.³⁹⁷

As indicated in Part I.A.2 of this Article, the U.S. Supreme Court in *Jones v. Alfred H. Mayer Co.*³⁹⁸ engaged in judicial reconstruction of its earlier decision in

393. See U.S. CONST. amend. XIII, § 2; U.S. CONST. amend. XIV, § 5; U.S. CONST. amend. XV, § 2.

394. *The Civil Rights Cases*, 109 U.S. 3, 11–19, 20–25 (1883).

395. See *id.* at 11.

396. See *id.* at 11–19.

397. See *id.* at 20–25.

398. *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 439 (1968).

*The Civil Rights Cases*³⁹⁹ to conclude that Congress has sweeping powers to “enforce” the Thirteenth Amendment to eradicate the “badges or incidents” of slavery, with deference given to a congressional determination that something constitutes a badge or incident of slavery. The same liberal Court that decided *Jones* issued decisions in two other cases—*South Carolina v. Katzenbach*⁴⁰⁰ and *Katzenbach v. Morgan*⁴⁰¹—that construed Congress’s powers under Section 2 of the Fifteenth Amendment and Section 5 of the Fourteenth Amendment, respectively, to be similarly sweeping in scope. *South Carolina* echoed the *Jones* Court’s deferential language in describing Congress’s power under the Fifteenth Amendment,⁴⁰² while *Morgan* appeared to go further, suggesting that Congress even had the power to decide that conduct violated the Fourteenth Amendment and to legislate accordingly to prohibit that conduct.⁴⁰³

Nearly thirty years later, after the Court moved in a decidedly more conservative direction, it revisited the question of congressional power under Section 5 of the Fourteenth Amendment. At issue in *City of Boerne v. Flores*⁴⁰⁴ was the constitutionality of a federal statute that purported to “enforce” the First Amendment guarantee to the free exercise of religion—incorporated and applied to the states via the Due Process Clause of the Fourteenth Amendment—pursuant to Congress’s Section 5 powers.⁴⁰⁵ The statute prohibited all levels of government from enacting laws that substantially burdened the free exercise of religion unless the laws were found to further a compelling governmental interest.⁴⁰⁶ Congress had passed the statute in response to a U.S. Supreme Court decision holding that neutral, generally applicable laws are not subject to such a compelling governmental interest test even if they have the effect of burdening the free exercise of religion.⁴⁰⁷

In *City of Boerne*, the Court made clear that Congress lacked the power under Section 5 of the Fourteenth Amendment to *define* what constitutes a violation of the Fourteenth Amendment: “Legislation which alters the meaning of the Free Exercise Clause cannot be said to be enforcing the Clause. Congress does not enforce a constitutional right by changing what the right is. It has been given the power ‘to enforce,’ not the power to determine what constitutes a constitutional violation.”⁴⁰⁸ The *City of Boerne* Court acknowledged that there was language in *Morgan* that could be construed as giving Congress such a power but indicated that “[t]his is not a necessary interpretation, however, or even the best one.”⁴⁰⁹ It then proceeded to

399. 109 U.S. at 20–21 (1883).

400. *South Carolina v. Katzenbach*, 383 U.S. 301, 326–27 (1966).

401. *Katzenbach v. Morgan*, 384 U.S. 641, 648–51 (1966).

402. *See Katzenbach*, 383 U.S. at 326–27.

403. *See Katzenbach*, 384 U.S. at 648–51 (1966).

404. *City of Boerne v. Flores*, 521 U.S. 507, 516 (1997).

405. *See id.* at 516.

406. *See id.* at 515–16.

407. *See id.* at 512–14.

408. *See id.* at 519.

409. *See id.* at 527–28.

reconstruct its earlier decision in *Morgan* by focusing on what the Court did, rather than what it wrote.

Ultimately, *City of Boerne* did not swing the pendulum back to the extreme of *The Civil Rights Cases*. Instead, it acknowledged that Congress had remedial powers under Section 5 to prohibit a broader swath of conduct than that which is strictly forbidden by the self-executing portions of the Fourteenth Amendment, so long as there is “congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end.”⁴¹⁰ As an example of a statute that satisfied the newly minted congruence and proportionality test, the *City of Boerne* Court cited the *South Carolina* Court’s analysis of the Voting Rights Act of 1965.⁴¹¹

The *City of Boerne* test was definitely more restrictive than the *Morgan* test. Thus, although some federal statutes enacted pursuant to Section 5 of the Fourteenth Amendment were upheld post-*City of Boerne*,⁴¹² many were declared unconstitutional.⁴¹³ Given that the Court’s decisions granting Congress broad power to “enforce” the Thirteenth and Fifteenth Amendments were decided by the same liberal Court that in *Morgan* acknowledged sweeping congressional power to enforce the Fourteenth Amendment, it seemed plausible in the wake of *City of Boerne* that those precedents were likewise subject to being overruled, or at least reconstructed.

In *Northwest Austin v. Holder*,⁴¹⁴ the question arose whether *City of Boerne*’s congruence and proportionality test likewise applied to provisions of the Voting Rights Act of 1965 enacted pursuant to Section 2 of the Fifteenth Amendment that had previously been upheld in *South Carolina*. However, the Court avoided deciding the issue by resolving the challenge on narrower statutory interpretation grounds.⁴¹⁵ Writing separately, Justice Thomas invoked the Court’s post-*City of Boerne* precedents involving Section 5 of the Fourteenth Amendment to conclude that the statute at issue was unconstitutional.⁴¹⁶

Four years later, in *Shelby County v. Holder*,⁴¹⁷ the Court once again revisited the constitutionality of the Voting Rights Act of 1965, but this time declared portions of the Act previously upheld in *South Carolina* unconstitutional. *Shelby County*, however, was unclear on whether the Act was unconstitutional because it failed the deferential rationality test espoused in *South Carolina* or if instead because it was subject to and failed the congruence and proportionality test of *City of Boerne*.

410. See *id.* at 519–20; see also *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 81 (2000).

411. See *Flores*, 521 U.S. at 530–33.

412. See, e.g., *Tennessee v. Lane*, 541 U.S. 509 (2004); *Nev. Dep’t of Human Res. v. Hibbs*, 538 U.S. 721 (2003).

413. See, e.g., *Bd. of Trs. of Univ. of Ala. v. Garrett*, 531 U.S. 356 (2001); *United States v. Morrison*, 529 U.S. 598 (2000); *Kimel*, 528 U.S. at 67.

414. *Nw. Austin v. Holder*, 557 U.S. 193, 204 (2009).

415. See *id.* at 204.

416. See *id.* at 225–26 (Thomas, J., concurring in the judgment in part and dissenting in part).

417. *Shelby County v. Holder*, 570 U.S. 529, 556–57 (2013).

On the one hand, the Court used the rationality language of *South Carolina*,⁴¹⁸ which the dissent seized on to contend that the test had not changed.⁴¹⁹ On the other hand, the dissent persuasively argued that what the majority required was more than the rationality test of *South Carolina* demanded.⁴²⁰

The ambiguities in *Shelby County* have raised two related questions that lower federal courts and commentators are currently grappling with. First, did *Shelby County* adopt the congruence and proportionality test of *City of Boerne* for assessing laws enacted pursuant to Section 2 of the Fifteenth Amendment?⁴²¹ And second, if so, does that same test apply to legislation enacted pursuant to Section 2 of the Thirteenth Amendment, resulting in a modification of the rationality test espoused in *Jones*?⁴²²

Post-*Shelby County*, the three lines of cases addressing congressional power to enforce the Reconstruction Amendments are vulnerable to contractive reconstruction. A more decisively conservative Court can reconstruct this entire set of cases to conclude that congressional acts purporting to enforce any of the three Reconstruction Amendments must be subjected to the congruence and proportionality test. In so concluding, the Court can focus on what the Court in *Shelby County* did rather than what it said, relying on the dissent's arguments that the law at issue satisfied rationality review, thus supporting the conclusion that the Court implicitly endorsed a more rigorous test. Moreover, the Court could point to *City of Boerne's* citation of *South Carolina* as an example of a situation that passed muster under the congruence and proportionality test as further proof that despite the rationality language used in *South Carolina*, it in fact applied something more rigorous. This would be analogous to what the Court did in its cases ramping up scrutiny for sex-based classifications, where it focused on what the earlier cases in fact did rather than their language to conclude that something more rigorous than rational basis review was applied.

CONCLUSION

As this Article has demonstrated, in assessing the actual or likely respect for precedent of former, sitting, or prospective U.S. Supreme Court Justices, it is not enough to focus on the formal doctrine of *stare decisis* and their fidelity to it. At few points in our constitutional history has the Court formally overturned precedent, yet the underlying doctrine has nonetheless shifted dramatically over time through the process of judicially reconstructing precedent.

418. *See id.* at 556.

419. *See id.* at 568–69 (Ginsburg, J., dissenting).

420. *See id.* at 569–70.

421. *See, e.g.,* Calvin Massey, *The Effect of Shelby County on Enforcement of the Reconstruction Amendments*, 29 J.L. & POL. 397, 413 (2014); Jason Mazzone & Stephen Rushin, *From Selma to Ferguson: The Voting Rights Act As a Blueprint for Police Reform*, 105 CAL. L. REV. 263, 328–29 (2017).

422. *See* United States v. Metcalf, 881 F.3d 641, 645 (8th Cir. 2018); United States v. Cannon, 750 F.3d 492, 502–05 (5th Cir. 2014); United States v. Hatch, 722 F.3d 1193, 1203–05 (10th Cir. 2013).

Accordingly, if one is serious about fidelity to precedent, the focus of any such inquiry must shift away from questions about formal fidelity to *stare decisis* and the nominees must instead be asked their opinions about the process of judicial reconstruction. Such a shift will serve several salutary purposes. First, within the context of confirmation hearings of prospective U.S. Supreme Court Justices, asking nominees nuanced questions about their views on judicial reconstruction will better allow Senators and the public to assess the nominee's likely impact on the future trajectory of constitutional law. Second, once the process of judicial reconstruction is brought to light and treated on par with overturning precedent, the incentive for sitting Justices to engage in judicial reconstruction will disappear. This will force Justices bent on changing doctrine to be transparent about what they are doing and why they are doing it, since it will no longer be possible to hide being a veil of formal fidelity to precedent. The end result may be somewhat more instances in which doctrine is formally overturned but overall greater fidelity to precedent, coupled with transparent explanations in those instances in which the Court opts to overturn precedent. Although the Court's current approach provides a façade of stability, the approach advocated for in this Article will provide the foundation for a constitutional system that has a far greater degree of transparency and actual doctrinal stability.