EARNED RIGHTS

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ABSTRACT

The latest round of abortion restrictions often relies on a reconceptualization of rights: the idea that constitutional protections apply only when they are deserved or earned. State and federal courts have expanded rights for those they deem to be deserving, including unwed fathers, intended and functional parents, and same-sex couples seeking marriage. This Article develops a theory of "equal earned rights," tracing their development over the course of these decisions. By chronicling the recent history of earned-rights claims, this Article offers a more complete view of how earned rights can function as a tool in constitutional interpretation. This history shows that the concept of "deserving" right-holders can be applied either to constrict or expand liberty, with repercussions that are particularly significant for those who do not conform to popular norms. To approach earned-rights logic in a more principled way, this Article recommends that courts shift their focus from interrogating behaviors and motives to questioning whether a claimant differs in salient ways from those whose rights have already been recognized.

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I.
INTRODUCTION

In the fall of 2018, the Commissioner of the Indiana State Department of Health asked the U.S. Supreme Court to weigh in on the constitutionality of its so-called anti-eugenics abortion law.[1] The state prohibited selective abortions at any point in pregnancy, performed because of the sex of a fetus; non-lethal fetal abnormalities; or the race, color, national origin, or ancestry of the fetus.[2] "*Roe* specifically disavows 'that the woman [. . .] is entitled to terminate her pregnancy at whatever time, in whatever way, and *for whatever reason*, she chooses,'" the Commissioner explained.[3]

The Court's holding reflects a broader trend in constitutional law: the conditioning of constitutional rights on the motive or behavior of a rights claimant. This concept, which this Article calls "earned rights," has some history. In the First Amendment context, for example, those engaged in certain categories of "low value" speech traditionally have lost protection based on the message that they speak.[4] More recently, in substantive due process cases involving same-sex marriage[5] and parental rights,[6] the Court has in part recognized constitutional rights

1. *See* Petition for Writ of Certiorari at 1, 3–4, Box v. Planned Parenthood of Ind. & Ky, Inc., 139 S. Ct. 1780 (2019), https://www.supremecourt.gov/DocketPDF/18/18-483/66684/20181012122049316_Petition%20for%20Writ%20of%20Certiorari.pdf [https://perma.cc/D2DS-NCDU] (quoting Roe v. Wade, 410 U.S. 113, 153 (1973)).

2. *See* IND. CODE §§ 16-23-3-1, 16-34-4-5, 16-34-4-6, 16-34-4-7, 16-34-4-8 (2016).

3. Petition, *supra* note 1, at 28 (citing Roe v. Wade, 410 U.S. 113, 153 (1973)).

4. For more on the history and status of low-value speech doctrine, see Genevieve Lakier, *The Invention of Low-Value Speech*, 128 HARV. L. REV. 2166, 2197–2207 (2015).

5. *See, e.g.*, Windsor v. United States, 570 U.S. 744, 775 (2013) ("DOMA singles out a class of persons deemed by a State entitled to recognition and protection to enhance their own liberty."); Obergefell v. Hodges, 135 S. Ct. 2584 (2015).

6. *See, e.g.*, Elisa B. v. Super. Ct., 117 P.3d 660 (Cal. 2005); K.M. v. E.G., 117 P.3d 673 (Cal. 2005); *In re* LaPiana, 2010 WL 3042394 (Ohio App. Aug. 5, 2010); Mullins v. Picklesimer, 317 S.W.3d 569, 580 (Ky. 2010) (noting that both parents cared for the child from birth, and that the biological mother had "encouraged, fostered, and facilitated an emotional and psychological bond" between the child and non-biological parent); C.E.W. v. D.E.W., 845 A.2d 1146, 1147–50, 1152 (2004) (noting that a former same-sex partner who had lived with the biological mother, agreed to

on the basis that certain behaviors or motives deserve recognition by the state. Commentators have praised this approach, which has been used to expand constitutional rights, as progressive and egalitarian.[7] This model of earned rights ostensibly offers a tool for marginalized groups to seek constitutional rights without having to assimilate.

In the late 1980s and early 1990s, as the Supreme Court narrowed or abandoned certain categories of low-value speech,[8] antiabortion advocates argued that analysis of abortion rights should consider the motives or behaviors of rights claimants.[9] This argument ran through cases involving whether putative fathers had a right to block their partners' abortions[10] and whether statutes may ban abortions except in cases of rape, incest, fetal abnormality, or when a woman's health is at risk.[11] An earned rights analysis also shaped *Planned Parenthood of Southeastern Pennsylvania v. Casey*, where the Court emphasized the many sound reasons to end a pregnancy.[12] In the decades that followed, progressive social movements looked partly to *Casey* in seeking to expand constitutional protections for those said to have deserving intentions or behaviors.[13] Yet when the Court embraces a new right under an earned rights analysis, that right remains intensely fragile, available only to certain right-holders or only when the Court agrees that a particular claimant has good reasons for exercising her right. As a result, earned rights are often contingent on a claimant's conformity to majoritarian expectations.

This Article does not question that earned rights have the capacity to

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conceive a child, and signed two parenting agreements stating the parents' intentions to have equal rights and responsibilities was found to be a de facto parent).

7. *See, e.g.*, Douglas NeJaime, *The Nature of Parenthood*, 126 YALE L.J. 2260 (2017); Douglas NeJaime, *Marriage Equality and the New Parenthood*, 129 HARV. L. REV. 1185 (2016); Linda D. Elrod, *A Child's Perspective of Defining a Parent: The Case for Intended Parenthood*, 25 BYU J. PUB. L. 245 (2011).

8. *See, e.g.*, R.A.V. v. City of St. Paul, 505 U.S. 377 (1992); 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484 (1996); Denver Area Educational Telecommunications Consortium, Inc. v. FCC, 518 U.S. 727 (1996); Reno v. ACLU, 521 U.S. 844 (1997).

9. *See, e.g.*, Petition for Writ of Certiorari at 8–30, Conn v. Conn, 488 U.S. 955 (1988) (No. 88-347), 1988 WL 1093818; *Father's Rights at Issue in Abortion Case*, CHI. TRIB., Apr. 15, 1988, at 3 [hereinafter *Father's Rights at Issue*]; Tamar Lewin, *Woman Has Abortion, Violating Court's Order on Paternal Rights*, N.Y. TIMES (Apr. 14, 1988), https://timesmachine.nytimes.com/timesmachine/1988/04/14/597388.html?pageNumber=26 (last visited Mar. 20, 2020) (discussing men using the legal system to try to stop their partners' abortions); David G. Savage, *Fathers' Appeals to Justices Ask Equal Rights to Children, Even Unborn*, L.A. TIMES (Sept. 25, 1988), http://articles.latimes.com/1988-09-25/news/mn-3861_1_equal-rights [https://perma.cc/LK3Y-XVKA] (noting the argument that husbands and wives have competing interests in a fetus in a divorce dispute).

10. *See, e.g.*, Lewin, *supra* note 9.

11. *See, e.g.*, Dan Balz, *Idaho Votes a Virtual Ban*, WASH. POST, Mar. 3, 1990, at A1; Tamar Lewin, *Strict Anti-abortion Law Signed in Utah*, N.Y. TIMES, Jan. 26, 1991, at A10.

12. *See* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 852–53 (1992) (plurality decision).

13. *See generally infra* Part II.

transform the regulation of the family or reproductive health for the better. However, the meaning and power of earned rights remain contested: this theory could lead away from a more pluralistic constitutional and family law, rather than toward it. As history shows, earned-rights arguments have always cut both ways. Earned-rights constitutionalism can also generate arbitrary and inconsistent results. Judges may hold deeply disparate views of what counts as deserving decisions or behaviors, and earned-rights reasoning does little to limit judicial discretion.

To develop a more principled approach to earned-rights constitutionalism, this Article proposes a theory of equal earned rights. Other legal scholars have highlighted the downsides of specific examples of earned-rights strategies, especially in the context of same-sex marriage. This Article breaks new ground by (1) exposing the dark side of earned-rights jurisprudence—illuminating how social movements have used earned-rights reasoning not only to expand constitutional protections, but also to narrow them—and (2) proposing a theory of *equal* earned rights. Under this theory, the Court would focus on whether a claimant resembles someone who already possesses constitutional rights without weighing the merits of either's motives or conduct. By zeroing in on equal earned rights, courts can better ensure that laws rely on real differences between recognized right-holders and right-claimants, rather than on impermissible biases.

Part II develops a history of the transformation of arguments that conform to an earned rights framework, highlighting how that concept has evolved over time. This Part traces the recent spread of these arguments and the decisive role they played in the law and politics of abortion in the lead-up to *Casey.* Part II then explores how *Casey*'s vision of liberty influenced theories advanced by recent cases involving everything from same-sex marriage to parental rights. Part III studies ways that social movements have used earned-rights claims like those in *Casey* to expand rights. Part IV explores the recent return of earned-rights arguments as a tool for narrowing constitutional rights. Part V contemplates the unpredictability of earned-rights arguments as currently applied and offers a proposed path forward. Finally, Part VI briefly concludes.

II.
A HISTORY OF RIGHTS LOST

There is nothing novel about the idea of conditional constitutional rights. In criminal law, defendants could (and still may) waive many key constitutional protections. *Miranda v. Arizona*, a landmark case, established the basis for a knowing and intelligent waiver of the right against self-incrimination.[14] Defendants may also waive the rights to counsel,[15] to a jury trial,[16] or to an appeal.[17] Another well-

14. *See* Miranda v. Arizona, 384 U.S. 436, 498–99 (1966).
15. *See, e.g.*, Faretta v. California, 422 U.S. 806, 820, 835 (1975).
16. *See, e.g.*, Patton v. United States, 281 U.S. 276, 312–13 (1930).
17. *See, e.g.*, Robert K. Calhoun, *Waiver of the Right to Appeal*, 23 HASTINGS CONST. L.Q.

known example of conditional constitutional rights involves the First Amendment freedom of speech. Low-value speech jurisprudence conditions the level of scrutiny, and thereby the degree of First Amendment protection granted, on the content of a message.[18]

In recent decades, both social movements and the courts have expanded on and profoundly changed the idea of "earned" constitutional rights in ways that we have failed to fully appreciate. By the late 1980s, the Court had narrowed its application of earned rights to freedom of speech, but antiabortion advocates sought to borrow and radicalize the idea of conditional constitutional rights. Suing on behalf of putative fathers seeking to block abortions, antiabortion attorneys argued that the Court had recognized abortion rights only for those women[19] who had good justification for ending their pregnancies.

This Part begins by exploring the different strategies the Court uses to identify constitutional rights, tracing the background of "earned" constitutional rights. Next, this Part studies efforts to use earned-rights logic to limit constitutional protections. It illustrates how these earned-rights arguments informed campaigns to advocate for men seeking to stop abortions and to create model laws outlawing abortions in all but a handful of circumstances. Finally, this Part shows how earned rights analysis played a crucial role in the reasoning and outcome of *Casey*, and therefore encouraged both conservative and progressive social movements to weave the idea of earned constitutional rights into their argument strategies.

A. Identifying Constitutional Rights

Controversy has consistently surrounded the methods used to identify implied constitutional rights.[20] Questions about the legitimacy of early substantive due process doctrine helped to spark this debate. In the first third of the twentieth century, the Court intervened to protect economic freedoms from government interference.[21] In *Lochner v. New York*, the Court invalidated a law regulating the maximum number of hours a baker could work.[22] The Court held that the law violated

127, 128–31 (1995).

18. *See, e.g.*, Lakier, *supra* note 4, at 2170–73.

19. The terms "women" and "woman" are used in this Article to describe individuals who are affected by abortion regulations. However, it should be recognized that not all women are capable of pregnancy and that not only women may become pregnant. As such, other groups, such as transgender and gender nonconforming people, are also affected by these policies and may experience unique challenges in accessing abortions based on their identities.

20. *See, e.g.*, Richard H. Fallon, Jr., *Some Confusions About Due Process, Judicial Review, and Constitutional Remedies*, 93 COLUM. L. REV. 309, 314 (1993).

21. For more on the history of the *Lochner* era, see, for example, David E. Bernstein, *Lochner Era Revisionism, Revised:* Lochner *and the Origins of Fundamental Rights Constitutionalism*, 92 GEO. L.J. 1 (2003); HOWARD GILLMAN, THE CONSTITUTION BESIEGED: THE RISE AND DEMISE OF *LOCHNER* ERA POLICE POWERS JURISPRUDENCE (1995).

22. Lochner v. New York, 198 U.S. 45, 64 (1905).

a fundamental right to freedom of contract.[23] But the majority did very little to explain how it had identified this right or how future judges could identify any other liberty.[24]

By the late 1930s, the Court had repudiated economic substantive due process,[25] and *Lochner* became a prominent part of the constitutional anticanon.[26] In later decades, the Court grappled with how to identify rights while limiting its own discretion. Conservatives on the Court have favored an approach based on a particular vision of history and tradition.[27] History and tradition, in turn, are thought to be fixed and readily recognizable.[28] In this way, some jurists see tradition and history as a limit on judicial discretion.[29] *Bowers v. Hardwick* offers a powerful example of this vision.[30] There, the Court upheld a Georgia law criminalizing sodomy, emphasizing that many states had similar laws at the time of the ratification of both the Bill of Rights and the Fourteenth Amendment.[31] Under this narrow reading of history and tradition, Justice Byron White described the petitioners' proposal that there was a right to engage in such conduct as "at best, facetious."[32]

Washington v. Glucksberg elaborated on this approach. *Glucksberg* addressed a Washington law banning assisted suicide.[33] In its decision upholding the ban, the Court offered a method of recognizing fundamental rights.[34] First, the majority reserved special protection for rights that were "objectively, 'deeply rooted in this Nation's history and tradition.'"[35] In identifying a tradition, the majority demanded "a 'careful description' of the asserted fundamental liberty interest."[36] The Court set about defining the right at issue in the case.[37] While right-to-die

23. *Id.* at 53.

24. *Id.*

25. *See generally* BARRY CUSHMAN, RETHINKING THE NEW DEAL COURT (1998); Mark Tushnet, *The New Deal Constitutional Revolution: Law, Politics, or What?*, 66 U. CHI. L. REV. 1061, 1062–63 (1999).

26. *See, e.g.*, Jamal Greene, *The Anticanon*, 125 HARV. L. REV. 379, 417–22 (2011); Jack M. Balkin, *"Wrong the Day It Was Decided":* Lochner *and Constitutional Historicism*, 85 B.U. L. REV. 677, 681–84 (2005) (noting that although *Lochner* has been considered part of the anticanon for many years, "it has slowly lost its anti-canonical status for a significant number of legal scholars").

27. *See, e.g.*, Katharine T. Bartlett, *Tradition as Past and Present in Substantive Due Process Analysis*, 62 DUKE L.J. 535, 540–45 (2012).

28. *See id.* at 540.

29. *See, e.g.*, United States v. Virginia, 518 U.S. 515, 568 (1996) (Scalia, J., dissenting) (stating that the Court's function in terms of identifying suspect classes and fundamental rights is only to "prevent backsliding from the degree of restriction the Constitution imposed upon democratic government, not to prescribe, on [its] own authority, progressively higher degrees").

30. 478 U.S. 186 (1986), *overruled by* Lawrence v. Texas, 539 U.S. 558 (2003).

31. Bowers v. Hardwick, 478 U.S. at 192–96.

32. *Id.* at 194.

33. *See* WASH. REV. CODE § 9A.36.060(1) (1994).

34. *See* Washington v. Glucksberg, 521 U.S. 702, 720–21 (1997).

35. *Id.*

36. *Id.*

37. *Id.* at 721–28.

attorneys described a right to control the circumstances of one's passing, the majority instead saw a far narrower right to commit suicide with the aid of a third party.[38] "The history of the law's treatment of assisted suicide in this country has been and continues to be one of the rejection of nearly all efforts to permit it," the majority explained.[39]

As the *Glucksberg* Court suggested, tradition-and history-based approaches often serve to limit both the number and kind of rights recognized. This narrowness is no accident.[40] As Justice Antonin Scalia explained in *McDonald v. Chicago*, a case about the individual right to bear arms, champions of a tradition- and history- based approach believe that it "is much less subjective, and intrudes much less upon the democratic process," than the alternative, "vague ethico-political First Principles whose combined conclusion can be found to point in any direction the judges favor."[41]

To be sure, tradition-based arguments do not always work this way. *Obergefell v. Hodges* showcases the multiple possible meanings of tradition. There, the Court took up constitutional challenges to several state bans on same-sex marriage.[42] Those defending the state statutes invoked history and tradition in support of their claims, reasoning that state laws had always limited marriage to different-sex couples.[43] Writing in dissent, Chief Justice Roberts accepted these arguments.[44] "For all those millennia, across all those civilizations, 'marriage' referred to only one relationship: the union of a man and a woman," Roberts reasoned.[45]

In holding that the Constitution did recognize a right to same-sex marriage, however, the majority also invoked history and tradition.[46] *Obergefell* emphasized that the "history of marriage is one of both continuity and change."[47] In the majority's view, the very fact that the definition of marriage has changed formed an integral part of the tradition defining marriage.[48] *Obergefell* looked at evolving attitudes toward same-sex marriage to elucidate the boundaries of the right to marry.[49] "The right to marry is fundamental as a matter of history and tradition, but rights come not from ancient sources alone," the Court explained.[50] "They rise, too, from a better informed understanding of how constitutional imperatives

38. *See id.*
39. *Id.* at 728.
40. *See* Bartlett, *supra* note 27, at 540–45.
41. McDonald v. City of Chicago, 130 S. Ct. 3020, 3058 (2010) (Scalia, J., concurring).
42. Obergefell v. Hodges, 135 S. Ct. 2584 (2015).
43. *See id.* at 2594.
44. *Id.* at 2612 (Roberts, J., dissenting).
45. *Id.*
46. *Id.* at 2595–605 (majority opinion).
47. *Id.* at 2595.
48. *See id.* at 2595–96.
49. *See id.* at 2602.
50. *Id.*

define a liberty that remains urgent in our own era."[51] From this history, the Court determined that the principles supporting the view that marriage is a fundamental right apply with equal force to same-sex couples, including the principle that "the right to personal choice regarding marriage is inherent in the concept of individual autonomy."[52]

As *Obergefell* shows, the Court sometimes treats traditions as varied, fluid, and capable of change. The Court has detailed the effect of evolving traditions on rights recognition in other contexts, including protections for sexual intimacy and against cruel and unusual punishment.[53] Nevertheless, some social movements have declined to rely on tradition and history in their advocacy for rights recognition, even after *Obergefell.* There are several likely reasons for this.

First, Justice Kennedy played a central role in forging a vision of evolving traditions, and his departure calls into question whether the Court will expand on *Obergefell*'s approach in the future.[54] Second, even an expansive idea of tradition would not accommodate all social movement demands. Consider some of the limitations inherent in the *Obergefell* decision. The Court described gradual changes to marriage as an institution and shifts in attitudes about gay and lesbian individuals.[55] This evolution was, by definition, slow—a subtle shift that unfolded over the course of decades.[56] Social movements seeking more rapid changes will struggle to document the kind of evolving tradition that the Court might respect. Third, proof of an evolving tradition is difficult to produce. *Obergefell* emphasized the many state and federal decisions recognizing a right of same-sex couples to marry.[57] State laws permitting the same result also captured the Court's attention.[58] New demands for social change are unlikely to produce widespread, favorable judicial decisions. If a group is marginalized or poorly known, a state will rarely introduce statutes protecting its members.

Because those on opposing sides of an issue can so easily contest what counts as a tradition, movements may look for additional—or alternative—ways of establishing rights. Some Justices, prominently Brennan and Blackmun, have urged the Court to identify rights based on reasoned judgment and contemporary norms.[59] In recent decades, however, as the popularity of originalism has

51. *Id.*

52. *Id.* at 2599.

53. *See* Corinna Barrett Lain, *The Unexceptionalism of "Evolving Standards,"* 57 UCLA L. REV. 365, 372–73 (2009).

54. *See, e.g.*, Liam Stack & Elisabeth Dias, *Supreme Court Opening Could Affect Gay Marriage as Much as Abortion, Activists Say*, THE INDEPENDENT (July 4, 2018), https:// www.independent.co.uk/news/world/americas/supreme-court-gay-marriage-abortion-trump-justice-kennedy-roe-v-wade-a8431246.html [https://perma.cc/ED9M-J7LW].

55. Obergefell v. Hodges, 135 S. Ct. at 2595–602.

56. *See id.*

57. *Id.* at 2597.

58. *See id.*

59. *See, e.g.*, *Michael H. v. Gerald D.*, 491 U.S. 110, 142 (1989) (Brennan, J., dissenting)

increased, these approaches have lost influence.[60] Moreover, given the current composition of the Court, tradition-based approaches are poised to gain more influence—and to more narrowly define rights.[61]

Earned-rights strategies represent one alternative for movements seeking to expand rights. The next subpart looks at the origins and function of this approach.

B. Defining Earned Constitutional Rights

It is worth noting that what this Article calls "earned rights" are distinguishable from other kinds of conditional rights. The Court has long treated some rights as waivable.[62] In the context of criminal procedure, the Court has developed rules for recognizing a constitutionally permissible waiver of rights. For example, *Miranda* governs the circumstances in which defendants may waive their right to remain silent.[63] The Court relies on well-developed precedents in the criminal context involving waiver of the right to counsel[64] or a jury trial.[65] In these cases, the Court assumes that defendants possess a valid constitutional protection and lose it only by taking certain actions. Earned rights, by contrast, do not attach in the first place unless a right-holder exhibits certain behaviors, motives, or intentions.

The consequences in either case may be similar: a purported or potential right-holder may have no protection. A woman seeking abortion for a so-called unacceptable reason may find that she has no protected capacity to make that decision;

(arguing that the Court should not ask whether an interest is one that society traditionally protects, but whether the circumstances are close enough to interests that have already been protected to be deemed an aspect of liberty); United States v. Virginia, 518 U.S. 515, 531–32 (1996) (quoting Frontiero v. Richardson, 411 U.S. 677, 684 (1973)) (discussing the country's history of sex discrimination and evolution to contemporary norms); Bowers v. Hardwick, 478 U.S. 186, 210 (1986) (Blackmun, J., dissenting) (arguing that mere tradition, or the length of time that a conviction has been held, is not determinative).

60. *See, e.g.*, Ryan Lovelace, *Poll: Majority of Americans Want Supreme Court to Interpret the Constitution as "Originally Written*," WASH. EXAMINER (Jan. 9, 2017), https:// www.washingtonexaminer.com/poll-majority-of-americans-want-supreme-court-to-interpret-the-constitution-as-originally-written [https://perma.cc/4UXV-ZV4S] (reporting that a Marist poll found that 52% of Americans want the Constitution to be interpreted as it was originally written); Jamal Greene, Nathaniel Persily, & Stephen Ansolabehere, *Profiling Originalism*, 111 COLUM. L. REV. 356, 362–70 (2011) (citing to data indicating that between 37 and 49% of Americans support strict originalism and a majority support originalism in some form).

61. *See, e.g.*, Rick Hasen, *Liberals Must Embrace a Bankrupt Judicial Philosophy to Have Any Chance of Winning in the Supreme Court*, SLATE (Oct. 18, 2018), https://slate.com/news-and-politics/2018/10/originalism-textualism-supreme-court-liberal-strategy.html [https://perma.cc/5KW8-4MX2].

62. *See, e.g.*, Joseph Blocher, *Rights To and Not To*, 100 CAL. L. REV. 761, 784–85 (2012) (explaining the logic of waivable rights).

63. Miranda v. Arizona, 384 U.S. 436, 476–79 (1966).

64. *See* Faretta v. California, 422 U.S. 806, 835 (1975) (quoting Adams v. United States *ex rel.* McCann, 327 U.S. 270, 279 (1942)).

65. *See* Patton v. United States, 281 U.S. 276, 296–304 (1930).

a defendant said to waive *Miranda* rights may be equally without recourse. But describing a right as earned has symbolic consequences. Earned rights are, by definition, unequal and conditional—available only to those with certain motives or behaviors. Thus, earned rights are hierarchical in two independent ways. Treating a right as conditional suggests that it is in some way less fundamental and protected than a variety of other constitutional protections. And earned rights create a hierarchy of right-holders, with only those perceived as deserving having any concrete protection.

Until recent decades, the Court has treated rights as earned primarily in the context of low-value speech. As legal historian Genevieve Lakier has shown, the Court created a category of earned rights during the New Deal as the justices first began meaningfully enforcing the Free Speech Clause.[66] In the eighteenth and nineteenth centuries, state and federal courts often stated that the Constitution prohibited prior restraints on speech, but almost always validated after-the-fact punishments.[67] As a result, in the period, courts usually employed expansive definitions of protected speech while allowing for broad regulation of expression.[68]

The New Deal Court, by contrast, created far more robust protections for freedom of speech.[69] But because the justices wanted to carve out an area in which the government had more regulatory power, the New Deal Court adopted a theory to explain when First Amendment protections applied.[70] The justices reasoned that as a matter of history and tradition, the government had more power to regulate certain forms of low-value speech, such as fighting words,[71] true threats,[72] and obscene speech.[73] Speakers earn First Amendment rights by virtue of what they say. Permissible messages give rise to protection while other forms of expression do not.

Fighting words, for instance, do not have protection because they play "no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality."[74] In other cases, speech loses protection because of its tendency to silence a target. True threats, for example, require proof of a "serious expression of an intent to commit an act of unlawful violence

66. Lakier, *supra* note 4, at 2198.

67. *See* Lakier, *supra* note 4, at 2179–82.

68. *See* Lakier, *supra* note 4, at 2197–2207.

69. *See* Lakier, *supra* note 4, at 2168, 2198.

70. *See* Lakier, *supra* note 4, at 2197–2207, 2232.

71. *See, e.g.*, Michael J. Mannheimer, *The Fighting Words Doctrine*, 93 COLUM. L. REV. 1527, 1527–35 (1993).

72. *See, e.g.*, Paul T. Crane, *"True Threats" and the Issue of Intent*, 92 VA. L. REV. 1225, 1229–32 (2006).

73. *See, e.g.*, John M. Finnis, *"Reason and Passion": The Constitutional Dialectic of Free Speech and Obscenity*, 116 U. PA. L. REV. 222 (1967).

74. Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942).

to a particular individual or group of individuals"—speech that in itself is a disruption and creates a fear of violence.[75]

From the beginning, however, the idea of low-value speech was neither stable nor perfectly coherent. Since so much turned on the classification of different kinds of speech, the boundaries of each category of protected speech remained hotly contested.[76] Moreover, as time went on, the Court committed more and more to a principle of content neutrality.[77] Content-based restrictions, the Court found, offended the principle that the government may not proscribe speech "because of disapproval of the ideas expressed."[78] If content- or viewpoint-based regulations are constitutionally suspect, it is hard to reconcile the idea that certain speakers systematically fall outside of First Amendment protection because their message is determined to be undeserving.

In the context of low-value speech, earned rights—as opposed to those that are merely waivable—allowed the Court to reconcile an emerging commitment to sweeping protections for speech with an ongoing willingness to allow for regulations of some forms of unpopular expression. But because value judgments are intrinsic to earned rights, low-value speech doctrine invited individual justices to inject their own opinions when distinguishing protected from unprotected speech. This was especially problematic given that the Court categorized low-value speech by its content. Rather than constraining judicial discretion, earned-rights arguments allowed the Court to pick winners and losers by tweaking the categories of low-value speech. And low-value speech was hard to reconcile with the idea of content neutrality.

The Court had scaled back on the idea of low-value speech before the late 1980s, protecting some forms of commercial speech and narrowing the definition of unprotected incitement[79] or libel.[80] The Rehnquist Court accelerated this trend.[81] Although the doctrine of low-value speech was on the decline, the idea of earned rights captured the attention of the antiabortion movement. Just as the New Deal Court seemed ready to reconceptualize First Amendment doctrine, the Rehnquist Court was poised to transform abortion law. But antiabortion lawyers did not know whether the Court was prepared to entirely undo *Roe v. Wade*. In the hopes of laying the groundwork for it to do so, antiabortion attorneys revived and reframed the idea that constitutional rights could be earned.

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75. Virginia v. Black, 538 U.S. 343, 359–60 (2003).

76. *See* Lakier, *supra* note 4, at 2203–07.

77. *See, e.g.*, Police Dep't of Chicago v. Moseley, 408 U.S. 92, 95 (1972) ("[A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.").

78. R.A.V. v. City of St. Paul, 505 U.S. 377, 382 (1992).

79. *See* Brandenburg v. Ohio, 395 U.S. 444, 447–48 (1969) (per curiam).

80. *See, e.g.*, Michael Kent Curtis, *Monkey Trials: Science, Defamation, and the Suppression of Dissent*, 4 WM. & MARY BILL OF RIGHTS J. 507, 548–52 (1995).

81. *See supra* note 8 and accompanying text (Rehnquist Court citations).

C. Inventing Earned Abortion Rights

Roe v. Wade predicated abortion rights on the constitutional right to privacy.[82] The Court drew similarities between the abortion right and existing protected rights, including the right to marry, the right to procreate, and the right to use contraception.[83] *Roe* also emphasized the potentially devastating consequences of forcing a woman to carry a pregnancy to term, including the "stigma of unwed motherhood," medical risks, and the prospect of a "distressful life and future."[84]

In the early 1970s, in fighting for a constitutional amendment that would establish fetal personhood, abortion foes argued that there was irrefutable biological proof that personhood began at conception.[85] Crisis pregnancy centers worked to convince women that unwanted pregnancies would not be as difficult or stigmatizing as the Supreme Court had suggested.[86] Antiabortion groups like American Citizens Concerned for Life, a group of antiabortion advocates who favored the expansion of welfare and family-planning programs, fought the stigma surrounding unwed motherhood.[87] Larger antiabortion groups—including National Right to Life Committee (NRLC), the largest such group in the nation—sponsored mandatory-counseling laws which suggested that abortion caused rather than averted mental and physical harms.[88]

In the late 1980s, antiabortion lawyers seeking action by the Rehnquist Court no longer disputed "[t]he detriment that the State would impose upon the pregnant woman by denying this choice."[89] Abortion-rights lawyers had used this framing neither as the sole rationale for abortion rights nor to describe the limits of constitutional protections, but rather as one part of a broader constitutional case for abortion. However, antiabortion attorneys spun this dictum a different way: the Court awarded women abortion rights only because—and only when—it believed that access to the procedure benefitted them.

This strategy gained currency with abortion foes who believed that the Court would undo *Roe*, but only gradually. By 1988, Ronald Reagan, a candidate who had pledged to have *Roe* overturned, had nominated two new justices to the Court, consolidating what seemed to be a majority willing to reverse *Roe*.[90] However,

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

83. *See id.* at 152–53.

84. *Id.*

85. *See* MARY ZIEGLER, AFTER *ROE*: THE LOST HISTORY OF THE ABORTION DEBATE 45 (2015); *see also* Mary Ziegler, *Originalism Talk*, 2014 BYU L. REV. 869, 898–902 (2014).

86. *See, e.g.*, KARISSA HAUGEBERG, WOMAN AGAINST ABORTION: INSIDE THE LARGEST REFORM MOVEMENT OF THE TWENTIETH CENTURY 17–34 (2016).

87. *See* Mary Ziegler, *The Possibility of Compromise: Antiabortion Moderates After* Roe v. Wade, 87 CHI.-KENT L. REV. 571, 578–79 (2012).

88. *See* ZIEGLER, *supra* note 85 at 46–52. For an example of these counseling laws, see *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52, 66 (1976).

89. Roe v. Wade, 410 U.S. at 153.

90. *See, e.g.*, Jed Handelsman Shugerman, *A Six-Three Rule: Reviving Consensus and*

antiabortion advocates still had reason for caution. The Court's two most recent abortion decisions protected the abortion right, perhaps even more expansively than *Roe.*[91] The Court's newest members did not have long paper trails when it came to their stances on abortion. Asking the Court to overturn *Roe* in a single decision seemed unrealistic. Nevertheless, abortion foes wanted to move beyond the "go-slow" approach they had taken for decades. Rather than just arguing that specific regulations were unconstitutional, abortion foes hoped to force the Court to reconceptualize—and fundamentally narrow—abortion rights.

Abortion foes had experimented with different strategies for achieving their goal. One tactic stemmed from Sandra Day O'Connor's dissent in *City of Akron v. Akron Center for Reproductive Health*.[92] There, in 1983, the Court struck down an Akron antiabortion ordinance,[93] but O'Connor penned a dissent questioning the validity of the trimester framework.[94] She reasoned that the Court had already deviated from the framework by striking down only those laws "involving absolute obstacles or severe limitations on the abortion decision."[95] O'Connor's approach, if adopted, would clearly lead the Court to uphold many more restrictions on abortion than would the trimester framework, but antiabortion advocates wanted more. Especially when there seemed to be five votes to overturn *Roe* outright, abortion foes searched for an opinion clearly narrowing abortion rights.

Antiabortion attorneys found a potential solution in the framework of earned rights. If antiabortion advocates could convince the Court that abortion rights applied only to certain women or only in certain scenarios—that they must, in effect, be earned—then the justices might break with strongly protecting *Roe.* To make the case that abortion was an earned right, abortion foes looked to the language of *Roe* itself. The Court's decision had highlighted the consequences of forcing a woman to continue a pregnancy to term, including threats to a woman's mental health and physical wellbeing. Antiabortion advocates used this language to contend that *Roe* recognized abortion rights *only* because and *only* when an abortion would be detrimental to a person's welfare or health. As abortion foes argued, only women who had deserving reasons for ending their pregnancies had a protected constitutional right to do so. Otherwise, countervailing interests could outweigh their reasons.

Deference on the Supreme Court, 37 GA. L. REV. 893, 936 n.282 (2003); *see also* Bruce Fein, *The Court Is Ready to Overturn "Roe,"* N.Y. TIMES (July 5, 1989), https://www.nytimes.com/1989/07/05/opinion/the-court-is-ready-to-overturn-roe.html [https://perma.cc/4PZ9-NWC6].

91. *See* City of Akron v. Akron Ctr. for Reproductive Health, 462 U.S. 416 (1983); Thornburgh v. Am. Coll. of Obstetricians & Gynecologists, 476 U.S. 747 (1986).

92. *Akron*, 476 U.S. at 452 (O'Connor, J., dissenting).

93. *Id.* at 431–52 (majority opinion).

94. *Id.* at 453–59 (O'Connor, J., dissenting).

95. *Id.* at 464.

D. Balancing Earned Rights

NRLC attorneys James Bopp Jr. and Richard Coleson elaborated on the idea of an "earned" abortion right while representing men who sought to block their sexual partners, past or present, from having abortions.[96] In the late 1980s, NRLC was a heavyweight in the antiabortion movement, with an annual budget of nearly $12 million by 1990 (twenty-four times its budget of just a decade before).[97] Not only did the organization have a powerful PAC, but its general counsel, James Bopp Jr., played an integral role in shaping the legal strategy of the broader antiabortion movement, especially when it came to fathers' rights.[98] It was not surprising that the issue of men's reproductive rights resurfaced in the late 1980s. Fathers'-rights litigation had escalated in recent decades.[99] Starting in the 1970s, a fathers'-rights movement had sought to reform laws governing alimony and child support.[100] This movement raised complex questions about substantive sex equality. Rising divorce rates and an increasingly vocal feminist movement had undermined the patriarchal norms to which fathers'-rights activists had subscribed.[101] At the same time, a recession made alimony and child support payments more painful.[102] Fathers'-rights activists relied on the idea of formal equality to insist that women should support themselves after divorce.[103] The fathers'-rights movement energized men who felt that abortion laws, just like divorce statutes,[104] discriminated on the basis of sex.

Antiabortion lawyers also took note of relatively recent cases involving the parental rights of nonmarital fathers.[105] The Supreme Court automatically treated married men as possessing constitutional rights to parent children born in their marriage.[106] For decades, however, nonmarital fathers had far more limited rights.[107] Indeed, common law treated children born out of wedlock as *filius nullius*, quite literally the children of no one, stripped of any inheritance rights or

96. *See* Lewin, *supra* note 9.

97. *See* SARAH SLAVIN, U.S. WOMEN'S INTEREST GROUPS: INSTITUTIONAL PROFILES 419 (1995).

98. *See* ZIEGLER, *supra* note 85 at 58–78; *see also* Lewin, *supra* note 9.

99. *See, e.g.*, Deborah Dinner, *The Divorce Bargain: The Fathers' Rights Movement and Family Inequalities*, 102 VA. L. REV. 79, 80–87 (2016); Serena Mayeri, *Foundling Fathers: (Non-)Marriage and Parental Rights in the Age of Equality*, 125 YALE L.J. 2292, 2295–2302 (2016).

100. *See* Dinner, *supra* note 99, at 105–16.

101. *See* Dinner, *supra* note 99, at 81–84, 93–94.

102. *See* Dinner, *supra* note 99, at 105.

103. *See* Dinner, *supra* note 99, at 110–11.

104. *See* Dinner, *supra* note 99, at 110–11.

105. *See generally* Mayeri, *supra* note 99, at 2295–2302.

106. *See generally* Freda Jane Lippert, *The Need for a Clarification of the Putative Father's Legal Rights*, 8 J. FAM. L. 398, 403–14 (1968) (discussing the rights of unmarried fathers and contrasting them with the rights of married fathers).

107. *See* Mayeri, *supra* note 99, at 2303–05.

child support.[108] In the nineteenth century, legal reforms granted mothers a presumptive claim to their young.[109] Gradually, financial pressures pushed states to enact laws mandating that "natural" fathers pay child support.[110] But unmarried fathers still had extremely limited parental rights.[111]

In 1972, the Court changed this landscape by concluding that at least some unmarried men had parental rights. In *Stanley v. Illinois*, the Court struck down an Illinois law mandating that children born out of wedlock be treated as wards of the state after the death of their mother.[112] The Court held that Illinois denied Stanley, an unwed father, procedural due process by stripping him of custody without giving him the opportunity to prove his fitness.[113] The Court explained that men like Stanley had a private interest in their children that was worthy of deference and protection, as their "familial bonds . . . [were] as warm, enduring, and important as those arising within a more formally organized family unit."[114] While as a general matter, Illinois could deny rights to unwed fathers, some men, like Stanley, earned rights by virtue of their conduct and the relationships they established with their children, and the state had to provide unwed fathers with an opportunity to show that they had stepped up.[115]

In *Stanley* and a series of cases following it, the interests of fathers, mothers, and children generally aligned. Feminists came to support the parenting interests of men in cases like *Fiallo v. Bell*, in which nonmarital fathers challenged a law that denied citizenship and certain immigration privileges to unmarried fathers and their children, but not to unmarried mothers and their children.[116] In cases like *Fiallo* and *Stanley*, unmarried fathers' quest for rights dovetailed with feminists' desire to challenge stereotypes about gendered parenting and to encourage a more equitable share of caretaking responsibilities.[117]

In other cases, however, fathers and mothers had diametrically opposed concerns, and the consequences of fathers'-rights litigation seemed more severe. These cases arose when multiple parties were in tension over whose potential parental rights should take precedence. The Court held in favor of an unwed father in one of these cases, *Caban v. Mohammed*,[118] but rejected similar claims in

108. *See* Mayeri, *supra* note 99, at 2303–05.

109. *See* MICHAEL GROSSBERG, GOVERNING THE HEARTH: LAW AND THE FAMILY IN NINETEENTH-CENTURY AMERICA 248–49 (1985).

110. *See generally* Drew D. Hansen, *The American Invention of Child Support: Dependency and Punishment in Early American Child Support Law*, 108 YALE L.J. 1123 (1999) (discussing the factors which influenced the development of child support laws in the United States).

111. *See* Mayeri, *supra* note 99, at 2303–05.

112. Stanley v. Illinois, 405 U.S. 645, 648–52 (1972).

113. *See id.* at 650.

114. *Id.* at 652 (citing Levy v. Louisiana, 391 U.S. 68, 71–72 (1968)).

115. *See id.*

116. Fiallo v. Bell, 430 U.S. 787, 788–89 (1977).

117. *See* Mayeri, *supra* note 99, at 2330.

118. Caban v. Mohammed, 441 U.S. 380, 394 (1979).

Quilloin v. Walcott[119] and *Parham v. Hughes*.[120] In *Lehr v. Robertson*, the Court developed a generalizable approach to these cases.[121] *Lehr* reasoned that the genetic connection between unwed fathers and their offspring gave men an opportunity to form a relationship.[122] However, men still had to "earn" parental rights by forming father-child relationships that demonstrated their commitment to their children.[123] *Lehr* offered a new perspective on earned rights. In the First Amendment context, speakers lost rights because of the content of their message. *Lehr* suggested that a person could "earn" rights that would not otherwise be recognized on the basis of their meritorious motives or conduct.

Antiabortion attorneys argued that the converse could be true in another setting where prospective fathers and mothers stood in tension with one another. If the "deserving" could gain rights, then surely the "undeserving" could lose those rights. The unwed-father cases also confirmed for abortion foes that the Court would sometimes side with unwed fathers in parenting cases, even when the rights involved seemed to be a zero-sum game.

James Bopp Jr. and Richard Coleson tried to build on cases like *Lehr* to establish rights for men seeking to block abortions. In their first such case, their client tried to stop his "young" ex-girlfriend from having an abortion.[124] An earlier case, *Planned Parenthood of Central Missouri v. Danforth*, had dealt with the related issue of laws that mandated spousal involvement in abortion.[125] There, the Court had struck down a law requiring a husband's consent for any married woman's abortion.[126] While reasoning that spousal agreement was ideal, the Court recognized that consensus would be impossible in some cases.[127] When spouses could not find common ground, the Court reasoned that women, who were more impacted by pregnancy, should have the power to break the tie.[128]

Bopp and Coleson argued that *Danforth* was a narrow case. First, the case dealt only with the rights of married men as husbands but said nothing about biological fathers, whether inside or outside of marriage.[129] Cases like *Lehr* suggested that a man's biological connection was constitutionally significant.[130] Moreover, in *Danforth*, the Court had rejected arguments based on a husband's

119. Quilloin v. Walcott, 434 U.S. 246, 255–56 (1978).

120. Parham v. Hughes, 441 U.S. 347, 358–59 (1979) (plurality opinion).

121. *See generally* Lehr v. Robertson, 463 U.S. 248 (1983).

122. *See id.* at 261–62.

123. *See id.*

124. *See Abortion Dispute Sent to Indiana Lower Court*, CHI. TRIB., Apr. 15, 1988, at 1.

125. Planned Parenthood of Cent. Mo. v. Danforth, 428 U.S. 52, 69 (1976) ("We now hold that the State may not constitutionally require the consent of the spouse . . . as a condition for abortion during the first 12 weeks of pregnancy.").

126. *Id.*

127. *See id.* at 71.

128. *See id.*

129. *See id.* at 69–71.

130. Lehr v. Robertson, 463 U.S. 248, 262 (1983).

marital prerogatives but had not fully addressed men's interest in parenting.[131] Further, *Danforth* addressed a statute giving all husbands the right to veto an abortion regardless of their reasons for doing so.[132] Bopp and Coleson argued that the Court could—and should—reach a different result by considering an individual's reasons for seeking or avoiding parenthood in specific cases.[133]

Within this framing, *Roe* had made abortion an "earned right." Bopp and Coleson asserted that women got the final decision to terminate a pregnancy under *Roe* only when they had good reasons for ending a pregnancy—and perhaps not even then.[134] Conversely, Bopp and Coleson contended that when a woman ended her pregnancy for what they framed as trivial or unjustifiable reasons, abortion rights could be outweighed by other interests.[135] The two argued that men had countervailing constitutional interests in procreation or parenthood, and, in Bopp and Coleson's view, *Roe* created an opening for some men who wanted to force women to carry their pregnancies to term.[136] According to the two abortion opponents, *Roe* made abortion rights conditional on a person's motives and behaviors.

With Bopp and Coleson's help, a man under the pseudonym John Smith pursued a court order mandating that his ex-girlfriend continue her pregnancy.[137] At a paternity proceeding, John Smith's former sexual partner, called Jane Doe, argued that *Roe* stripped the judge of jurisdiction and refused to participate beyond merely attending.[138] John Smith presented evidence suggesting that Jane Doe had not earned her abortion rights.[139] While John Smith claimed that he stood ready to marry Jane Doe and support her financially, Jane Doe supposedly prioritized concerns about how pregnancy would change her physical appearance and her romantic relationships.[140] While maintaining that Jane Doe did not feel strongly about ending the pregnancy, John Smith emphasized that he had already bonded

131. Planned Parenthood of Cent. Mo. v. Danforth, 428 U.S. 52, 69 (1976) (emphasizing "the importance of the marital relationship in our society" and noting the "deep and proper concern and interest" that a husband has in his wife's pregnancy).

132. *Id.* ("Clearly, since the State cannot regulate or proscribe abortion during the first stage, when the physician and his patient make that decision, the State cannot delegate authority to any particular person, even the spouse, to prevent abortion during that same period.").

133. *See* Lewin, *supra* note 9 (reporting that a court was willing to evaluate a woman's reasons for choosing an abortion); Savage, *supra* note 9 (reporting that although Bopp recognized that a husband does not have an "absolute veto" on the abortion decision, he believes the husband has a right to the birth of biological offspring).

134. *See* Lewin, *supra* note 9; Savage, *supra* note 9 (reporting Bopp's argument that in weighing the competing interest of husband and wife, the "husband has a steady job and desperately wants to be a father").

135. *See* Lewin, *supra* note 9; Savage, *supra* note 9.

136. *See* Lewin, *supra* note 9; Savage, *supra* note 9.

137. *Abortion Dispute Sent to Indiana Lower Court*, *supra* note 124, at 1; Petition for Writ of Certiorari at 3, Smith v. Doe, 492 U.S. 919 (1988) (No. 88-1837).

138. Petition for Writ of Certiorari at 3, Smith v. Doe, 492 U.S. 919 (1989) (No. 88-1837).

139. *Id.* at 8–17.

140. *Id.* at 15–17.

with the fetus Jane Doe carried.[141]

John Smith argued that many of the issues raised by *Roe*—the stigma of unwed motherhood, the loss of education or a career, the struggles of childrearing—either did not apply to Jane Doe or did not have to.[142] He reasoned that under circumstances in which women did not deserve abortion rights, the state's interests in protecting a man's interest in fatherhood could be compelling.[143] Smith contended, therefore, that just as only certain unwed fathers deserved parental rights, only certain women earned the right to end a pregnancy. When women had undeserving motivations such as "the gender selection of her child, revenge or blackmail against the father, or some immature and near-frivolous reason," absolute abortion rights should not apply.[144]

Bopp and Coleson had developed their earned abortion rights strategy via focus groups and polls.[145] They discovered that while most Americans approved of the idea of legal abortion, many more opposed certain abortion procedures—such as those premised on financial hardship or a desire to pursue a career or education.[146] By focusing on earned rights, antiabortion groups capitalized on public distaste for women whose motives were deemed "undeserving," rallied supporters who felt that men had been disenfranchised, and drew in those who approved of only some abortions. Bopp and Coleson applied this narrative so successfully that they persuaded an Indiana trial judge that Jane Doe had not earned the right to end her pregnancy.[147] Bopp and Coleson lost in the Indiana Court of Appeals and Jane Doe had an abortion.[148] After the Indiana Supreme Court denied expedited review, the U.S. Supreme Court denied certiorari.[149] All the same, the case made national headlines, and Bopp and Coleson continued advocating for men seeking to stop women from having abortions.[150] The attorneys repackaged abortion rights as one of several reproductive rights that either men or women could earn by virtue of their motives and decisions.[151]

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141. *Id.* at 15.

142. *Id.* at 16–17.

143. *Id.* at 17.

144. *Id.* at 6, 14.

145. For an example of this development, see Deanna Silberman, *Americans United for Life*, CHI. TRIB. (Aug. 1, 1991), https://www.chicagoreader.com/chicago/americans-united-for-life/Content?oid=878008 [https://perma.cc/A28K-AVYF].

146. *See* Tamar Lewin, *States Testing the Limits on Abortion*, N.Y. TIMES, Apr. 2, 1990, at A14. For current polling on this question, see *In Depth: Abortion*, GALLUP, https://news.gallup.com/poll/1576/abortion.aspx [https://perma.cc/9UFV-PA9S] (last visited Jan. 23, 2019).

147. *See* Lewin, *supra* note 9.

148. *See* Respondent's Brief in Opposition at 5, Smith v. Doe, 492 U.S. 919 (1988) (No. 88-1837).

149. *See* Smith v. Doe, 492 U.S. 919 (1989) (denying certiorari); Petition for Writ of Certiorari at 4–5, Smith v. Doe, 492 U.S. 919 (1988) (No. 88-1837).

150. *See* Martha Brannigan, *Suits Argue Fathers' Rights in Abortion: One Plaintiff Has Petitioned Supreme Court*, WALL ST. J., Aug. 23, 1988, at 29.

151. *See, e.g.*, *id.*; Lewin, *supra* note 9.

The two refined their vision of earned rights in *Conn v. Conn*.[152] Erin and Jennifer Conn had an infant daughter and a disintegrating marriage when Jennifer became pregnant again.[153] Erin managed a toy store and sought to present himself as an ideal breadwinner and deserving parent.[154] Nonetheless, the record suggested that Jennifer no longer wanted to remain married or parent a second child with a man she no longer loved.[155] Jennifer's reasons for seeking an abortion raised a new set of challenges to the antiabortion advocates.[156] After taking Erin Conn's case, Bopp and Coleson tweaked their argument to stress that putative fathers could earn the right to block an abortion *even if* women had acceptable reasons for ending their pregnancies.[157] That is, even if women had abortion rights (a point that Bopp and Coleson did not concede), some unwed putative fathers earned the "right to care, custody, control, and companionship" of an unborn child—or even a right "inherent in his status as a husband in the family unit."[158]

Just as they had in *Smith*, Bopp and Coleson lost in the state's highest court, and the U.S. Supreme Court turned away every one of Bopp and Coleson's certiorari petitions.[159] Undeterred, antiabortion litigators remained captivated by the idea of earned abortion rights. Some hoped to use this idea to help build a case for fetal personhood. For decades, abortion foes presented what they saw as biological evidence that the unborn child deserved legal personhood.[160] But *Roe* had rejected these arguments, reasoning that the U.S. Constitution used the word "person" to refer only to those who had already been born.[161] In the 1980s and 1990s, antiabortion advocates instead tried to build support for personhood by changing criminal statutes and tort rules regarding fetal life.[162]

As part of this campaign, antiabortion attorneys like Bopp and Coleson reasoned that the state's interest in fetal personhood should trump when women made supposedly poor decisions about their pregnancies. Americans United for Life (AUL), a prominent antiabortion public interest law firm, endorsed the

152. *See* Conn v. Conn, 525 N.E.2d 612 (Ind. Ct. App. 1988), *aff'd*, 526 N.E.2d 958 (Ind. 1988), *cert. denied*, 488 U.S. 955 (1988).

153. *See id.*

154. Petition, *supra* note 9, at 4.

155. Petition, *supra* note 9, at 4.

156. *See generally* Henry J. Reske, *Court Rejects Man's Abortion Appeal*, UPI (Nov. 14, 1988), https://www.upi.com/Archives/1988/11/14/Court-rejects-mans-abortion-appeal/5840615958570 [https://perma.cc/2LF5-RS6W].

157. *See generally* Petition, *supra* note 9, at 8–30.

158. Petition, *supra* note 9, at 5, 20.

159. Petition, *supra* note 9, at 3.

160. *See* Ziegler, *supra* note 85, at 895–902.

161. Roe v. Wade, 410 U.S. 113, 157–59 (1973).

162. *See, e.g.*, Nina Liss-Schultz, *She Was Desperate. She Tried to End Her Own Pregnancy. She Was Thrown in Jail*, MOTHER JONES (May/June 2017), https://www.motherjones.com/politics/2017/05/fetal-homicide-abortion-rights-restrictions/ [https://perma.cc/BKA3-997K].

prosecution of pregnant drug users.[163] Starting in the mid-1980s, the media promulgated stories about how the use of crack cocaine, a relatively inexpensive and smokable form of the drug, during pregnancy could cause birth defects.[164] AUL capitalized on media coverage of the crack epidemic by endorsing the prosecution of pregnant drug users.[165] "'A clear, high standard should be placed on the prosecutor to determine willful, malicious child abuse before any woman is charged,'" explained AUL staff counsel Clarke Forsythe.[166] "'That would exclude misconduct like smoking and nutrition, which is not willful and malicious misconduct.'"[167]

Constitutionally, applying an earned rights model may heavily undermine the protections set forth in *Roe*. AUL has sought to do exactly that. In defending a court-ordered caesarean section of a terminally ill pregnant person, the organization sought to take advantage of "yet another opportunity for AUL to defend the state's compelling interest to protect viable fetal life, a critical element in the strategy to reverse *Roe*."[168] Equally importantly, AUL's support for the prosecution of pregnant drug users suggested that women who abuse substances do not deserve the right to make decisions during pregnancy.[169] The implication is that pregnant drug users, like those who chose abortion for discriminatory or frivolous reasons, should lose protection.[170]

After the Supreme Court decided *Webster v. Reproductive Health Services* (1989),[171] NRLC revitalized the argument that abortion was an earned right.[172] The *Webster* Court addressed several parts of a Missouri abortion restriction—including a preamble stating that life begins at conception, a measure requiring physicians who believed that a pregnancy had advanced past the twentieth week

163. *See, e.g.*, Andrew Patner, *Handful of Prosecutors Start Treating Pregnant Drug Users as Child Abusers*, WALL ST. J., May 12, 1989, at B8A (reporting that Paige Cunningham of AUL believed that drug use constituted child abuse and that the state had "an obligation to protect children born with these problems"); *see also* Marney Rich, *A Question of Rights: Birth and Death Decisions Put Women in the Middle of Legal Conflict*, CHI. TRIB. (Sept. 18, 1988), https://www.chicagotribune.com/news/ct-xpm-1988-09-18-8802010917-story.html [https://perma.cc/8H4J-RYDK].

164. For coverage of the crack epidemic, see DOROTHY ROBERTS, KILLING THE BLACK BODY: RACE, REPRODUCTION, AND THE MEANING OF LIBERTY 154 (2d ed. 2017); IBRAM X. KENDI, STAMPED FROM THE BEGINNING: THE DEFINITIVE HISTORY OF RACIST IDEAS IN AMERICA 434–41 (2016); DORIS MARIE PROVINE, UNEQUAL UNDER LAW: RACE IN THE WAR ON DRUGS 192 (2007).

165. *See* Rich, *supra* note 163; Andrew Patner, *Handful of Prosecutors Start Treating Pregnant Drug Users as Child Abusers*, WALL ST. J., May 12, 1989, at B8A.

166. Rich, *supra* note 163.

167. Rich, *supra* note 163.

168. Americans United for Life*, ACLU Contests C-Section Delivery of Viable Fetus,* LIFE DOCKET, Aug. 1988, at 2 (on file with Southern Baptist Historical Library and Archives (The Southern Baptist for Life Papers, Box 1, File 5)).

169. *See* Rich, *supra* note 163 (highlighting the case of a pregnant woman who was addicted to heroin, found guilty of child abuse, and detained in a drug rehabilitation center).

170. *See* Rich, *supra* note 163.

171. Webster v. Reproductive Health Servs., 492 U.S. 490 (1989).

172. *See generally* Lewin, *supra* note 9, at A14.

to perform tests for fetal viability, and a ban on the public funding of abortion.[173] The majority upheld the law, although Chief Justice Rehnquist, in an opinion joined by two justices, recognized that the viability provision contradicted *Roe*.[174] As Justice Rehnquist explained, this tension was the result of *Roe*'s trimester framework, which he characterized as "unsound in principle and unworkable in practice."[175]

Some NRLC attorneys concluded that *Webster* effectively overturned *Roe*, or at least adopted O'Connor's version of the undue-burden test.[176] To further chip away at *Roe*, antiabortion lawyers reiterated the idea that only certain women deserved abortion rights.[177] The group promoted model laws banning abortions except in cases of rape, incest, fetal abnormality, or a threat to a woman's life or health.[178] Burke Balch of NRLC explained that one of the "anti-abortion movement's central goals [was] to condition a woman's right to abortion on her reasons for having it."[179] In other cases, NRLC believed that Americans would support restrictions short of an outright ban.[180] Of course, few women fell into the categories covered by the statute, and for the rest, the law would put abortion completely out of reach.[181] Nevertheless, Bopp, Coleson, and their colleagues sought to justify the law by contending that the state's interests should prevail when women could not defend their desire to attain an abortion under statutorily-approved terms.

As will be discussed at length below, the Court ultimately agreed to hear a challenge to a different law, a multi-restriction Pennsylvania statute.[182] Surprisingly, abortion-rights supporters in that case themselves highlighted the idea of earned rights. Whereas abortion foes reasoned that *Roe* had deformed political dialogue, abortion-rights attorneys stressed the justifiable reasons that women had abortions—and the important post-*Roe* gains they had made.

E. Earned Rights in the Lead-Up to Casey

For some time, antiabortion attorneys in groups like AUL and NRLC chipped

173. *See* MO. REV. STAT. §§ 1.205.1, 1.205.2, 188.029, 188.205, 188.210, 188.215.

174. *Webster*, 492 U.S. at 515–22.

175. *Id.* at 518 (quoting Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 546 (1985)).

176. James Bopp, Jr. & Richard Coleson, *What Does* Webster *Mean?* 138 U. PA. L. REV. 157, 159–61 (1989); James Bopp, Jr. & Richard Coleson, Webster *and the Future of Substantive Due Process*, 28 DUQUESNE L. REV. 271, 278 (1990).

177. *See* Lewin, *supra* note 9, at A14.

178. *See* Lewin, *supra* note 9, at A14.

179. *See* E.J. Dionne Jr., *Foes of Abortion Prepare Measures for State Action*, N.Y. TIMES, July 5, 1989, at A16.

180. *See* E.J. Dionne Jr., *Abortion Rights Backers Adopt Tactics of Politics*, N.Y. TIMES, July 20, 1989, at A6.

181. *See* Lewin, *supra* note 9, at A14.

182. *See* Abortion Control Act, 18 PA. CONS. STAT. §§ 3203–3220 (1990).

away at *Roe* by claiming that only certain persons may earn abortion rights. In an apparent attempt to leverage an earned rights framework, abortion-rights attorneys working with groups like the American Civil Liberties Union (ACLU) and the Women's Law Project highlighted the ways in which legal abortion benefits women.[183] Litigators worked to convince the Court to preserve *Roe* by underscoring abortion's under-appreciated and overlooked benefits to women. Attorneys had experimented with different arguments over time.[184] Some emphasized the similarities between *Roe* and other established precedents involving marriage, childrearing, procreation, and contraceptive choices.[185] Others reframed abortion as an equality-based interest, explaining that restrictions reinforced pernicious sex stereotypes.[186]

Abortion-rights attorneys Kathryn Kolbert and Linda Wharton, the lawyers primarily responsible for the challenge in *Casey*, emphasized both the meritorious reasons that women had abortions and the opportunities they gained as a result.[187] The petitioners reasoned that women had legal abortions for non-trivial reasons—for example so they could "continue their education, enter the workforce, and otherwise make meaningful decisions consistent with their own moral choices."[188] Far from having abortions for spurious reasons, women did so to make "significant economic and social gains."[189] Amicus briefs made the same point. One submitted by pro-choice states contended that women are entitled to the right to an abortion so they can "participate as equals in the social and economic life of this country."[190]

These arguments seemed to leave a mark on the Court. *Casey* framed abortion partly as an earned right. The Court began by acknowledging that many held deeply different opinions about abortion.[191] But partly because of the meritorious reasons that women had abortions, the Court concluded that the State could not "insist, without more, upon its own vision of the woman's role."[192] The Court presented abortion rights as earned partly because of the intimate "suffering" that

183. *See, e.g.*, Brief for Petitioners-Cross Respondents at 33–34, Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992) (Nos. 91-744, 91-902).

184. *See, e.g.*, Reva B. Siegel, *Sex Equality Arguments for Reproductive Rights: Their Critical Basis and Evolving Constitutional Expression*, 56 EMORY L.J. 815 (2007); Neil S. Siegel & Reva B. Siegel, *Equality Arguments for Abortion Rights*, 60 UCLA L. REV. DISC. 160 (2013).

185. *See, e.g.*, Brief for Petitioners-Cross Respondents, *supra* note 183, at 23.

186. *See supra* note 184 and accompanying text.

187. *See* Brief for Petitioners-Cross Respondents, *supra* note 183, at 32–34.

188. *See* Brief for Petitioners-Cross Respondents, *supra* note 183, at 33.

189. *See* Brief for Petitioners-Cross Respondents, *supra* note 183, at 33.

190. Brief of the States of New York, Connecticut, Delaware, Hawaii, Illinois, Iowa, Maine, Maryland, Massachusetts, Nevada, New Jersey, New Mexico, North Carolina, Rhode Island, Texas and Vermont & the District of Columbia, Joined by 13 Governors, 12 Lieutenant Governors & 995 State Legislators from Fifty States as Amicus Curiae in Support of Petitioners, at 12, Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992) (Nos. 91-744, 91-902).

191. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 852 (1992) (plurality opinion).

192. *Id.*

pregnancy created for women.[193] Because a woman who carried a child to term was "subject to anxieties, to physical constraints, to pain that only she must bear," the government could not force women to continue a pregnancy if she did not want to do so.[194]

Earned-rights analysis also played a central role in the Court's application of *stare decisis*.[195] The Court asked, among other things, whether *Roe* was unworkable and whether reversing the decision would upset settled reliance interests.[196] Conventionally, the Court recognized reliance interests when parties planned a business arrangement or contract in advance.[197] According to the Court, abortions, by contrast, were often unplanned.[198] In any case, the Court found that women relied on abortion for understandable reasons.[199] "The ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives," the Court explained.[200] Beyond economic and educational attainment, the ability to have an abortion shaped the way that women ordered their lives, and impacted how they might "define their views of themselves and their places in society."[201]

Casey illuminated different uses of earned-rights reasoning. Since the 1970s, the Court had recognized rights for unwed fathers who "stepped up" to develop a relationship with their children. But some of the Court's precedents ignored this approach,[202] undermining its relevance. Reinvigorating earned rights logic, *Casey*, by contrast, rejected an attempt to overturn *Roe* partly by explaining how and why women deserved abortion rights. *Casey* inspired various progressive social movements seeking the recognition of new constitutional rights or the expansion of existing ones.[203] Some drew on the opinion's broad language about identity and autonomy.[204] Others built on the idea that deserving motives and behaviors could be the foundation of new constitutional rights.[205] These groups demonstrated the untapped potential of earned rights. Nevertheless, the possibilities recognized by abortion foes remained open. Courts could use earned rights to undo constitutional protections as well as create them.

193. *Id.*
194. *Id.*
195. *See id.* at 855–57.
196. *See id.*
197. *See id.* at 855–56.
198. *Id.*
199. *Id.*
200. *Id.* at 856.
201. *Id.*
202. *See, e.g.*, Michael H. v. Gerald D., 491 U.S. 110 (1989).
203. *See generally infra* Part III.
204. *See infra* Part III.
205. *See infra* Part III.

III.
RECOGNIZING NEW EARNED RIGHTS

Some progressive social movements argued that *Casey* revived a different approach to the Constitution. Applying the frame of earned rights to the *Casey* decision, this Article argues that the Court preserved abortion rights in part because of the "deserving" reasons it identified behind women's reproductive decisions.[206] In other contexts, a focus on tradition and history guided the Court's analysis of new rights.[207] To be sure, a reliance on tradition and history does little to constrain judges, who can read historical evidence in radically different ways.[208] Nevertheless, an approach centered on tradition and history tended to exclude marginalized communities who have not enjoyed popular support or recognition.[209] *Casey*'s mode of analysis, one reminiscent of the approach taken in *Lehr* and other parental-rights cases, seemed more inclusive. Petitioners might have to cater to the Court's views of what counts as meritorious intentions or behaviors. But, in showing how they adhered to majority norms, members of marginalized groups could attempt to unsettle constitutional doctrine.

One such effort began in the mid-1990s when right-to-die groups renewed a challenge to bans on physician-assisted suicide. In the 1980s, groups that advocated for the right to die, like Concern for Dying (CFD) and Society for the Right to Die (SRD), successfully fought for living-will legislation.[210] In 1990, the Supreme Court decided *Cruzan v. Missouri Department of Public Health*, rejecting a challenge to a law that required clear and convincing evidence of the patient's wishes before physicians could take a person in a persistent comatose state off of life support.[211] While sustaining the clear-and-convincing-evidence requirement, the Court did recognize a constitutional interest in refusing unwanted medical treatment that applied at the end of life.[212]

Cruzan emboldened right-to-die advocates.[213] In the short term, activists in groups like SRD and CFD focused on living-will legislation similar to the kind referenced by Sandra Day O'Connor in *Cruzan*.[214] By the mid-1990s, however, right-to-die groups took a fresh interest in physician-assisted suicide.[215] Some movement members contended that the status quo discriminated against those who

206. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 853, 856 (1992).

207. *See generally supra* Part II.

208. *See generally supra* Part II.

209. *See, e.g.*, NeJaime, *supra* note 7, at 2266 ("The common law's organization of parentage through marriage reflected and enforced a gender-hierarchical, heterosexual order.").

210. *See* MARY ZIEGLER, BEYOND ABORTION: *ROE V. WADE* AND THE FIGHT FOR PRIVACY 182–85 (2018).

211. Cruzan v. Mo. Dep't of Pub. Health, 497 U.S. 261, 286–87 (1990).

212. *Id.* at 279.

213. *See* ZIEGLER, *supra* note 210, at 184.

214. *See* ZIEGLER, *supra* note 210, at 184.

215. *See* ZIEGLER, *supra* note 210, at 186–89.

could not end their own lives.[216] But most states criminalized physician-assisted suicide, and legislative progress was slow, even in states that seemed relatively friendly to the right-to-die movement.[217] For this reason, right-to-die activists relied on constitutional litigation. They applied *Casey* as the foundation for a new earned-rights claim.[218]

For these activists, focusing on tradition and history obviously seemed unwise. Many states had longstanding criminal laws against suicide—hardly the foundation for a new right under a tradition-based framework.[219] By drawing on *Casey*, however, right-to-die groups hoped to advance their cause.[220] In cases like *Vacco v. Quill*, a challenge to New York's ban on physician-assisted suicide, advocates supporting a right to die could draw on *Casey*'s expansive language about autonomy and bodily integrity.[221] Lawyers reasoned that just as women had the right to define themselves as they wished when it came to parenthood and pregnancy, dying patients could take ownership of their illnesses and independence.[222] However, the idea of earned rights also captured the attention of right-to-die lawyers.

Casey had explained that the abortion right was legitimated partly by the meritorious considerations that persons calculated into their decisions about pregnancy, including the pain and suffering it entails.[223] Right-to-die lawyers argued that the same was true of dying patients. "[T]he deeply personal interest in freedom from pain and suffering, even apart from the interest in personal autonomy, is implicated here as well," argued the plaintiff in *Vacco v. Quill*, one of the physician-assisted-suicide cases, in referencing *Casey*.[224] The respondents in *Washington v. Glucksberg* likewise contended that dying patients deserved to make end-of-life decisions because of the meritorious reasons that they pursued physician-assisted suicide, including a desire to avoid "unrelieved misery or torture" or to define a concept of themselves by making a decision of "special, symbolic importance [in conformance] with their own values."[225]

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216. *See* ZIEGLER, *supra* note 210, at 186.

217. *See* ZIEGLER, *supra* note 210, at 187–89. On the current state of the law on assisted suicide, see *Assisted Suicide Laws in the United States*, PATIENTS RIGHTS COUNCIL, http://www.patientsrightscouncil.org/site/assisted-suicide-state-laws/ [https://perma.cc/HK78-YE5G] (last updated Jan. 6, 2017).

218. *See* ZIEGLER, *supra* note 210, at 189–91.

219. *See* Washington v. Glucksberg, 521 U.S. 702, 712–16 (1997).

220. *See, e.g.*, Brief for Respondents at 2, Vacco v. Quill, 521 U.S. 293 (1997) (No. 95-1858); Brief for Ronald Dworkin, Thomas Nagel, Robert Nozick, John Rawls, Thomas Scanlon, & Judith Jarvis Thompson, at 8–9, *Glucksberg*, 521 U.S. 702 (No. 96-110); Brief Amicus Curiae for Americans for Death with Dignity & Death with Dignity Education Center at 3–6, *Glucksberg*, 521 U.S. 702 (No. 96-110).

221. *See supra* note 220 and accompanying text.

222. *See supra* note 220 and accompanying text.

223. *See* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 852, 855–57 (1992).

224. *See* Brief for Respondents, *supra* note 220, at 25.

225. Brief of Respondents, 13–15, Washington v. Glucksberg, 521 U.S. 702 (1997) (No. 96-

This argument failed. *Glucksberg* did not even fully take up the earned-rights arguments made by right-to-die supporters, much less endorse them.[226] The Court announced that history and tradition guided its analysis of constitutional due process rights.[227] The majority surveyed the Court's common-law tradition and recent precedents to conclude that the nation had a longstanding policy against assisting suicide.[228] *Glucksberg* then addressed the claim that *Casey* had devised a new mode of constitutional analysis.[229] The Court acknowledged that *Casey* used broad autonomy language.[230] Nevertheless, the Court suggested that the subset of autonomy interests recognized in *Casey* was deeply rooted in tradition.[231] The Court did not address claims that the suffering of the dying entitled them to expanded protection.[232]

Glucksberg did not put an end to efforts to use an earned rights analysis to expand constitutional protections, even in the right-to-die context.[233] Organizations like Compassion and Choices continued waging a campaign to legalize physician-assisted suicide in the states, and the movement scored some victories, including in California.[234]

A. Earned Parental Rights

1. Surrogate Parents

Earned-rights arguments more successfully reshaped the law of parental rights. Surrogacy had set off national debate following the 1986 *Baby M.* case.[235] In this case, a married couple, the Sterns, wanted to have a child but feared that a pregnancy might endanger the health of Elizabeth Stern, who suffered from multiple sclerosis.[236] The couple entered into a surrogacy contract with Mary Beth Whitehead, a woman with far less income, in which they agreed to compensate her for her surrogacy.[237] After the birth of the child, Whitehead had a change of heart and fought to keep the child.[238] Although the New Jersey Supreme Court ultimately awarded custody to Mr. Stern, the biological father, it also restored

110).

226. *Glucksberg*, 521 U.S. at 724–30.

227. *Id.* at 710.

228. *Id.* at 716–19.

229. *Id.* at 724–30.

230. *Id.*

231. *Id.*

232. *See id.* at 729.

233. *See* ZIEGLER, *supra* note 210, at 199–201.

234. *See* ZIEGLER, *supra* note 210, at 199–201.

235. *See, e.g.*, SUSAN MARKENS, SURROGATE MOTHERHOOD AND THE POLITICS OF REPRODUCTION 22–27 (2007).

236. *In re* Baby M., 537 A.2d 1227, 1235 (N.J. 1988).

237. *Id.* at 1234–36, 1249.

238. *Id.* at 1236–37.

Whitehead's parental rights with the possibility of visitation and described surrogacy as "illegal, perhaps criminal, and potentially degrading to women."[239]

Some states responded to the national furor sparked by the case by banning the practice of surrogacy, at least when a surrogate was also the genetic mother of a child.[240] Many feminist scholars agreed that surrogacy wrongly commodified both children and women's reproductive capacity.[241] Other scholars highlighted the psychological harm to potential surrogates, the societal pressures that might undermine women's capacity to make free choices, and the harm to children that could result from surrogacy arrangements.[242] While a few states have banned surrogacy outright, some expressly allow it, and many others do not clearly address the topic through legislation at all.[243]

Given the legal uncertainty surrounding the practice, those using surrogacy hoped to establish that they had constitutional parental rights. Genetic parents could find some foothold in cases involving nonmarital fathers. After all, in cases such as *Lehr*, the Court had recognized a genetic tie as an important ingredient in rights for unmarried fathers who stepped up.[244] But not all of those using assisted reproductive technologies had a genetic tie to a child, and *Lehr*'s validity was not clear. In *Michael H. v. Gerald D.*, the Court rejected a nonmarital, biological father's claim that cited *Lehr* for the proposition that while a natural father's biological connection may afford an opportunity for a unique connection to the child, it was by no means absolute. Justice Scalia reasoned that in situations where a child is born into an existing marriage, states may give preference to the husband rather than the biological father.[245]

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239. *Id.* at 1234.

240. *See* ALEX FINKELSTEIN, SARAH MAC DOUGALL, ANGELA KINTOMINAS & ANYA OLSEN, SURROGACY LAW AND POLICY IN THE UNITED STATES: A NATIONAL CONVERSATION INFORMED BY GLOBAL LAWMAKING 9 (May 2016), https://web.law.columbia.edu/sites/default/files/microsites/gender-sexuality/files/columbia_sexuality_and_gender_law_clinic_-_surrogacy_law_and_policy_report_-_june_2016.pdf [https://perma.cc/3GUP-MAQJ].

241. *See, e.g.*, A.M. Capron & M.J. Radin, *Choosing Family Law over Contract Law as a Paradigm for Surrogate Motherhood*, 16 L. MED. & HEALTH CARE 34, 37 (1988); Carolyn McLeod, *For Dignity or Money: Feminists on the Commodification of Women's Reproductive Labour*, *in* THE OXFORD HANDBOOK OF BIOETHICS 258, 261–62 (Bonnie Steinbock ed., 2009); Margaret Jane Radin, *Market-Inalienability*, 100 HARV. L. REV. 1849, 1932–33 (1987); Lori B. Andrews, *Surrogate Motherhood: The Challenge for Feminists*, 16 L. MED. & HEALTH CARE 72, 73–74 (1988).

242. *See* FINKELSTEIN, MAC DOUGALL, KINTOMINAS & OLSEN, *supra* note 240, at 18–37 (summarizing the arguments and issues regarding the rights, well-being, and best interests of the child, the rights and interests of the surrogate, and the systematic objectivization and exploitation of disadvantaged women).

243. *See* FINKELSTEIN, MAC DOUGALL, KINTOMINAS & OLSEN, *supra* note 240, at 8–11 (providing an overview of diverging U.S. state laws on surrogacy as of May 2016).

244. Lehr v. Robertson, 463 U.S. 248, 261–62 (1983).

245. Michael H. v. Gerald D., 491 U.S. 110, 128–29 (1989) (plurality opinion) (holding that whether "the presumed parenthood of a couple desiring to retain a child conceived within and born into their marriage [can] be rebutted" was a "question of legislative policy and not constitutional law").

To successfully establish themselves as rights-holding, parents began to apply a framework of earned rights. As previously established, *Casey* had justified abortion rights partly by emphasizing the meritorious reasons that women chose abortion.[246] Those seeking access to surrogacy attempted to draw a parallel to the case by highlighting their intentions and behaviors that "deserved" constitutional protection.

Early examples of this type of earned-rights litigation began in California, which had passed a version of the Uniform Parentage Act (UPA), a model law designed to govern paternity and other parenting disputes.[247] In 1993, in *Johnson v. Calvert*, the California Supreme Court took up a case pitting biological parents, Mark and Crispina Calvert, against Anna Johnson, a gestational carrier.[248] The UPA did little to settle the dispute.[249] The statute recognized either a genetic connection or gestational role as evidence of motherhood; as a result, each woman could provide acceptable proof of maternity to demonstrate that she was the legal mother.[250] Yet the court did not want to recognize more than two rightful parents.[251] Instead, it responded favorably to the argument that the parties' intentions and behaviors should determine who had protected parental rights.[252] "[S]he who intended to procreate the child—that is, she who intended to bring about the birth of a child that she intended to raise as her own—is the natural mother under California law," the court explained.[253] Drawing on the view that women's meritorious reasons for choosing abortion justified abortion cases, *Johnson* looked at the parties' intentions in sorting out parental rights.[254]

How, exactly, the court would determine intent was less clear. In *Casey*, the Court simply took judicial notice of the reasons women ended pregnancies and the gains that they made as a result.[255] In *Johnson*, by contrast, the court looked at the very fact of the surrogacy arrangement to hold that Mark and Crispina had intended to be parents and had prepared to do so.[256] As was the case in *Johnson*, surrogacy arrangements at times involved contracts that embodied the parties'

246. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 858–59 (1992) (describing a woman's unique liberty interests regarding abortion as encompassing those "important decisions . . . relating to marriage, procreation, contraception, family relationships, and child reading and education") (citation omitted).

247. *See* CAL. FAM. CODE §§ 7600–730.

248. Johnson v. Calvert, 851 P. 2d 776 (Cal. 1993).

249. *Id.* at 781 (finding that the "presumptions contained in the Civil [sic] Code section [] do not apply here" because they pertained to disputed paternity, but "for any child California law recognizes only one natural mother").

250. *Id.* (finding that the there was "no clear legislative preference . . . between blood testing and proof of having given birth").

251. *Id.* at 781–82.

252. *Id.* at 782.

253. *Id.*

254. *Id.*

255. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 858–59 (1992).

256. Johnson v. Calvert, 851 P. 2d 776, 782–85 (Cal. 1993).

intentions.[257] The court suggested that intention to parent might even predict desirable behavior.[258] To the court, the fact that Mark and Crispina had taken so many preparatory steps indicated that they would do a better job raising their genetic child.[259]

In California, intentions and behaviors soon served as a basis for parental rights even for those who had no genetic connection to a child. During divorce proceedings, Luanne Buzzanca claimed that she and her former husband were the parents of Jaycee, a daughter conceived using donor sperm and eggs and a gestational surrogate.[260] John, the former husband, disclaimed any parental responsibilities because he lacked a genetic connection to the child.[261] However, the court again recognized "intentions as the best rule to promote certainty and stability for the child."[262] The court looked at both the party's surrogacy agreement and the very fact of their marriage to reason that, despite the lack of any genetic connection to the child, both John and Luanne had intended to parent Jaycee.[263]

The idea of rights based on the parties' intent or behavior borrowed from the same constitutional logic as *Casey.* There, the Court had defended abortion rights partly by referencing the sound reasons that women made reproductive decisions.[264] *Johnson* and *Buzzanca* did not focus on whether commissioning parents had good reasons for seeking parenthood.[265] Nevertheless, the court conditioned parental rights on the varying intentions and behaviors of the parties.[266] The

257. *See id.*

258. *Id.* at 783 (explaining that the "interests of children . . . are '[un]likely to run contrary to those of adults who choose to bring them into being [and thus] honoring the plans and expectations of adults who will be responsible for a child's welfare is likely to correlate significantly with positive outcomes for parents and children alike") (quoting Shultz, *Reproductive Technology and Intent-Based Parenthood: An Opportunity for Gender Neutrality*, WIS. L. REV. 297, 397 (1990)).

259. *Id.*

260. *In re* Marriage of Buzzanca, 72 Cal. Rptr. 2d 280, 282–84 (Cal. App. 4th Dist. 1998).

261. *Id.* at 289 ("The legal paradigm . . . urged upon us by John, is one where all forms of artificial reproduction in which intended parents have no biological relationship with the child result in legal parentlessness.").

262. *Id.* at 291 (holding that intentions-based parentage was extended to "any situation where a child would not have been born but for the efforts of the intended parents").

263. *Id.* at 289–91.

264. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 858–59 (1992).

265. *Buzzanca*, 72 Cal. Rptr. 2d at 289–91 (applying *Johnson* and explaining that the purpose of "the *Johnson* language [was] to emphasize the intelligence and utility of a rule that looks to intentions"). The *Johnson* court positively referenced two commentators stating that the strength of the intentions is what matters without evaluating the moral quality of those intentions: first, "'intentions that are voluntarily chosen, deliberate, express and bargained-for ought presumptively to determine legal parenthood'" (*Johnson*, 831 P.2d at 783, quoting Shultz, *Reproductive Technology and Intent–Based Parenthood: An Opportunity for Gender Neutrality*, WIS. L. REV. 297, 323 (1990)); second, the "'mental concept of the child is a controlling factor of its creation.'" (*Johnson*, 831 P.2d at 783, quoting Stumpf, *Redefining Mother: A Legal Matrix for New Reproductive Technologies*, 96 YALE L. J. 187, 196 (1986)).

266. *See Buzzanca*, 72 Cal. Rptr. 2d at 289–91; Johnson v. Calvert, 851 P. 2d 776, 780–85 (Cal. 1993).

Calverts and Buzzancas received parental rights because of their initial intention to parent.[267]

2. LGBTQ Parents

As legal scholar Douglas NeJaime has shown, LGBTQ lawyers in California relied on this idea of earned rights to establish parental rights for same-sex couples.[268] For decades, the law in California and elsewhere prevented same-sex couples from marrying,[269] and both *Johnson* and *Buzzanca* involved married couples. Nevertheless, same-sex couples used an earned-rights framework to win protections. Leveraging the "intent" standard applied to heterosexual couples, advocates argued that homosexual couples could establish parentage through their actions and behaviors.[270]

Over the course of several decades, these claims made headway. In *K.M. v. E.G.*, the court held that a lesbian woman had parental rights notwithstanding the fact that she had signed an egg-donation form during the in vitro fertilization process.[271] In reaching this result, the court highlighted K.M.'s behaviors and intentions, including that she had donated her eggs with the intention of starting a family with her lesbian partner.[272] *K.M.* stressed that "both the couple in *Johnson* and the couple in the present case intended to produce a child that would be raised in their own home."[273] K.M.'s behavior also justified awarding her parental rights.[274] Given that K.M. and E.G. actually raised a child together, the court felt that K.M. deserved parental rights.[275] A child-support case, *In re Elisa B.*, reached a similar conclusion,[276] and arguments of this nature began to spread across the nation.[277] Courts in states from Iowa to Florida recognized intentions and actions as a basis for awarding parental rights to those in same-sex relationships and those using gestational surrogacy.[278]

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267. *See Buzzanca*, 72 Cal. Rptr. 2d at 289–91; *Johnson*, 851 P.2d at 780–85.

268. *See* NeJaime, *supra* note 7, at 1189–99.

269. *See* NeJaime, *supra* note 7, at 1189–99.

270. *See generally* K.M. v. E.G., 117 P.3d 675 (Cal. 2005) (applying the same intent standard for heterosexual couples to homosexual couples); Elisa B. v. Super. Court, 117 P.3d 660 (Cal. 2005) (applying the same intent standard to homosexual couples); D.M.T. v. T.M.H., 129 So. 3d 320 (Fl. 2013) (implying that homosexual couples can have the same intent in this context as heterosexual couples); Miller-Jenkins v. Miller-Jenkins, 912 A.2d 951 (Vt. 2006) (comparing and highlighting the similarities between a heterosexual couple and a homosexual couple).

271. *K.M.*, 117 P.3d at 676–77.

272. *Id.* at 678.

273. *Id.* at 679.

274. *See id.* at 678–80.

275. *See id.*

276. Elisa B. v. Super. Court, 117 P.3d 660, 662 (Cal. 2005)

277. *See* P.M. v. T.B., 907 N.W.2d 522 (Iowa 2018).

278. *See, e.g.*, *K.M.*, 117 P.3d 675; *Elisa B.*, 117 P.3d 660; *D.M.T.*, 129 So. 3d 320; *Miller-Jenkins*, 912 A.2d 951.

3. Other Non-Traditional Parents

Other non-traditional parents have successfully applied an earned-rights framework to win protections. Consider the example of artificial insemination. States introducing regulations of sperm and egg donations often deem donors not to be legal parents.[279] These laws were generally designed to reassure reproductive technology users that their rights would be secure and guarantee that donors would not inadvertently take on undesired financial and caretaking responsibilities.[280] But some donors wanted parental responsibilities. In some instances, petitioners had intimate relationships with the intended mother; elsewhere, petitioners themselves planned on parenting a child conceived by artificial insemination.[281] Donors used their intentions and behaviors to demand constitutional rights.[282] Though courts have been receptive to these arguments, they have adopted varying standards for measuring when someone intended to be a parent or acted like one.[283]

In *In re K.M.H.*, for example, an unmarried female attorney asked her friend to be a sperm donor.[284] After she gave birth to twins, the donor sought to establish parental rights.[285] The Kansas Supreme Court compared D.H., the putative father, to the nonmarital fathers in cases like *Lehr* to find that donors could step up to establish parental rights.[286] In D.H.'s case, however, putative fathers had to signal their interest in a specific way: by signing a written agreement accepting parental rights.[287] Because D.H. had not behaved in the way required by statute, he had not established parental rights.[288]

In *L.F. v. Breit*, the court took a similar approach to earned rights. Beverley Mason and William Breit, an unmarried couple in a long-term relationship, wanted

279. *See* Christina M. Eastman, *Statutory Regulation of Legal Parentage in Cases of Artificial Insemination by Donor: A New Frontier of Gender Discrimination*, 41 MCGEORGE L. REV. 371, 378–88 (2010).

280. *See, e.g.*, McIntyre v. Crouch, 780 P.2d 239, 243–44 (Or. App. 1989); *In re* Interest of R.C., 775 P.2d 27, 30 (Colo. 1989); *In re* K.M.H., 169 P.3d 1025, 1039 (Kan. 2007).

281. *See generally* Lauren Gill, *Who's Your Daddy? Defining Paternity Rights in the Context of Free, Private Sperm Donation*, 54 WM. & MARY L. REV. 1715, 1740–42 (2013) (providing an example of a sperm donor who wanted a relationship with the child).

282. *See, e.g.*, L.F. v. Breit, 736 S.E.2d 711, 720 (Va. 2013) (discussing donor's relationship with the mother and his behavior supporting child as support for parental rights); Thomas S. v. Robin Y., 618 N.Y.S.2d 356, 363–64 (N.Y. Sup. Ct. 1994) (discussing donor's lack of involvement as support for not finding parental rights); Jason P. v. Danielle S., 171 Cal. Rptr. 3d 789, 792 (Cal. App. 2d Dist. 2014) (discussing donor's written intent and behavior after the birth of the child); *In re* Parentage of J.M.K., 119 P.3d 840, 843 (Wash. 2005) (contrasting donor's claim that he did not intend to be the parent with his behavior after the child's birth).

283. For case-law examples, see *supra* note 270.

284. *In re* K.M.H., 169 P.3d at 1029.

285. *Id.* at 1029–30.

286. *Id.* at 1036–39.

287. *Id.*

288. *See id.* at 1036–40.

to have a child through in vitro fertilization.[289] The two entered into a joint agreement regarding parental rights and responsibilities, and Breit acknowledged his paternity both under oath and on the child's birth certificate.[290] Breit successfully argued that he had stepped up by securing a written agreement on parental rights and by assuming caretaking responsibilities.[291]

B. Earned Marital Rights

1. Same-Sex Marriage

Those challenging bans on same-sex marriage similarly drew on the idea that a protection may be earned. Attorneys emphasized the ways that same-sex couples' intentions and behaviors resembled those of different-sex couples whom the law allowed to marry.[292] Reasoning that same-sex and different-sex couples had equally strong families, movement attorneys contended that same-sex couples deserved the rights available to everyone else.[293] These claims played a crucial role in marriage equality advocacy.[294] As early as 2004, the Human Rights Campaign, an organization that works for rights for LGBTQ+ individuals, argued that "[u]ntil all states grant equal marriage to same-sex couples, the children in these families will continue to be deprived of the security of being recognized as a 'legal' family."[295] Similarly, in a 2005 amicus brief, the American Psychological Association contended that same-sex marriage would "benefit the children of gay and lesbian couples by reducing the stigma currently associated with those children's status."[296] In *Obergefell v. Hodges*, both the petitioners and the amicus curiae emphasized the personal stories of those seeking marriage equality, placing emphasis on the ways in which they resembled heterosexual couples.[297]

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289. L.F. v. Breit, 736 S.E.2d 711, 715 (Va. 2013).

290. *Id.* at 720–24.

291. *See id.*

292. *See, e.g.*, Ruth Butterfield Isaacson, *"Teachable Moments:" The Use of Child-Centered Arguments in The Same-Sex Marriage Debate*, 98 CAL. L. REV. 121, 139–45 (2010).

293. *See id.*

294. *See* Katherine M. Franke, *The Politics of Same-Sex Marriage Politics*, 15 COLUM. J. L. & GENDER 236, 239–41 (2006) (noting that this type of advocacy comes with a price, and that such "enfranchisement swerves dangerously in the direction of a kind of franchise").

295. LISA BENNETT & GARY J. GATES, THE COST OF MARRIAGE INEQUALITY TO CHILDREN AND THEIR SAME-SEX PARENTS: A HUMAN RIGHTS CAMPAIGN FOUNDATION REPORT 13 (2004), https://assets2.hrc.org/files/assets/resources/costkids.pdf [https://perma.cc/E78A-3GXZ].

296. Brief for American Psychological Ass'n and New Jersey Psychological Ass'n as Amici Curiae in Support of Plaintiffs-Appellants at 51–52, Lewis v. Harris, 875 A.2d 259 (N.J. Super. Ct. 2005) (No. A-2244-03T5), https://www.apa.org/about/offices/ogc/amicus/lewis.pdf [https://perma.cc/TV2F-NE2Q].

297. *See* Reply Brief for Petitioners at 4, Obergefell v. Hodges, 135 S. Ct. 2584 (2015) (Nos. 14-1556, 14-562, 14-571, 14-574) ("Ohio Petitioners James Obergefell and David Michener deserve respect for the marriages they lawfully entered with their departed spouses, not the added grief of their State's insult to the integrity of their families."); Brief of the American Psychological Ass'n, Kentucky Psychological Ass'n, Ohio Psychological Ass'n, American Psychiatric Ass'n, American

In *Obergefell* and the cases leading up to it, the Court emphasized that same-sex couples deserved constitutional recognition. *Windsor v. United States* addressed the federal Defense of Marriage Act (DOMA), a law that excluded same-sex couples from recognition in any federal law.[298] After her death, Thea Spyer left her estate to her wife, Edith Windsor, whose relationship to her was recognized by law in her state of residence.[299] However, because of DOMA, Windsor did not qualify for a marital-tax exemption and faced a $363,000 tax burden.[300] The Court held that DOMA violated the Due Process Clause of the Fifth Amendment.[301] Particularly when they raise children, couples like Windsor and Spyer earned equal treatment.[302] "The law in question makes it even more difficult for the children to understand the integrity and closeness of their own family and its concord with other families in their community and in their daily lives," the Court explained.[303]

Particularly in areas connected to reproduction and family, movement lawyers have argued that certain individuals and choices deserve protection now regardless of whether individuals may root their claims in a history of constitutional recognition. In *Obergefell*, the Court heard a constitutional challenge to state laws prohibiting same-sex marriage.[304] In determining that same-sex couples did deserve a right to marry, the Court emphasized the deserving conduct and intentions of same-sex couples.[305] Justice Kennedy's majority opinion highlighted the fact that "many same-sex couples provide loving and nurturing homes to their children, whether biological or adopted."[306] The Court repeatedly explained that laws that excluded same-sex couples "disrespect[ed] and subordinate[d] them" without justification.[307] The "loving, supportive families" they built and the deserving intentions they espoused demonstrated that same-sex couples were entitled to "equal

Acad. of Pediatrics, American Ass'n for Marriage & Family Therapy, Michigan Ass'n for Marriage & Family Therapy, National Ass'n of Social Workers, National Ass'n of Social Workers Tennessee Chapter, National Ass'n of Social Workers Michigan Chapter, National Ass'n of Social Workers Kentucky Chapter, National Ass'n of Social Workers Ohio Chapter, American Psychoanalytic Ass'n, American Acad. of Family Physicians, & American Medical Ass'n as Amici Curiae in Support of Petitioners at 18–22, *Obergefell*, 135 S. Ct. 2584 (Nos. 14-1556, 14-562, 14-571, 14-574); Brief of Amici Curiae Family Equality Council, Colage, & Kinsey Morrison in Support of Petitioners, Addressing the Merits & Supporting Reversal, 9–19, *Obergefell*, 135 S. Ct. 2584 (Nos. 14-1556, 14-562, 14-571, 14-574).

298. Windsor v. United States, 570 U.S. 744 (2013).
299. *Id.* at 749–53.
300. *Id.*
301. *Id.* at 768–74.
302. *See id.*
303. *Id.* at 772.
304. Obergefell v. Hodges, 135 S. Ct. 2584, 2593 (2015).
305. *Id.* at 2600.
306. *Id.*
307. *Id.* at 2604.

dignity."[308]

2. The Promise and Perils of Earned Rights in the Marriage Context

The Court has often relied on tradition and history to draw boundaries and in effect keep marginalized groups' rights circumscribed. At the same time, it has also used the concept to recognize new constitutional rights. This is because arguments based on tradition and history are inherently malleable; even movement attorneys have successfully leveraged a relevant tradition to secure a favorable result, simply by describing it more abstractly. Yet as this Part has illustrated, attorneys advocating for abortion rights would be hard-pressed to build successful arguments on history and tradition alone. Advocates for the right to die and advocates for parenting rights in assisted reproductive technology or same-sex relationship contexts would be similarly handicapped.

Earned rights arguments have held some promise for these groups, because anyone with what the court deems to be "deserving" intentions or behaviors may theoretically gain protections. Just as social-movement attorneys have done in other contexts, those in less traditional families have used the idea of earned rights to expand constitutional protections, and earned-rights claims have in fact expanded protections for those whose positions might not enjoy popular support. Yet advocates seeking to deploy this framework must proceed with caution, as the recent trend towards the expansive application of earned-rights strategies has obscured ways in which similar arguments can *narrow* constitutional rights.

IV.
THE RETURN OF "EARNED" ABORTION RIGHTS

This Part examines the recent revival of earned-rights arguments against abortion rights. These developments, like the history developed earlier in this Article, caution that for all their promise, earned-rights arguments can also justify the erosion of existing constitutional protections.

With the retirement of Justice Kennedy, many have expected the Court to revisit its decisions in *Roe* and *Casey*.[309] Abortion foes have experimented with a variety of plans of attack. Absolutists push test cases and support stringent laws that would force the Court to confront the validity of *Roe* and *Casey* immediately. For example, some have pushed for laws banning abortion at the point when a physician can detect a fetal heartbeat, in clear violation of *Roe* and *Casey*.[310]

308. *Id.* at 2600–04, 2608.

309. *See, e.g.*, Julie Hirschfeld Davis, *Departure of Kennedy, "Firewall for Abortion Rights," Could End* Roe v. Wade, N.Y. TIMES (June 27, 2018), https://www.nytimes.com/2018/06/27/us/politics/kennedy-abortion-roe-v-wade.html [https://perma.cc/FXP3-6VTY].

310. *See, e.g.*, Sasha Ingber, *Iowa Bans Most Abortions as Governor Signs 'Heartbeat' Bill*, NPR (May 5, 2018), https://www.npr.org/sections/thetwo-way/2018/05/05/608738116/iowa-bans-most-abortions-as-governor-signs-heartbeat-bill [https://perma.cc/YM3M-XCC8]; Kristine

Doctors may detect a heartbeat as early as in the sixth week of pregnancy, well before fetal viability.[311] Larger antiabortion groups, by contrast, still primarily emphasize an incremental approach.[312]

Antiabortion activists have used earned-rights arguments to undermine *Roe* and *Casey* in two primary ways. First, larger antiabortion groups contend that because of their undeserving motives or intentions, certain women should not have abortion rights. Second, these groups emphasize that the Court has justified abortion rights as a whole by pointing to the meritorious reasons women end pregnancies. By claiming that abortion does not help women, abortion foes hope to show that the Court's earned-rights logic is incoherent. This Part traces the reemergence and evolution of each of these strategies. Understanding these uses of earned-rights claims makes clear how they can lead away from a more pluralistic approach to constitutional and family law.

A. Selective Abortion and Earned Rights

Abortion foes have sought to narrow the class of women whom the Court views as deserving by championing laws against selective abortion. The issue recently captured national attention after Indiana asked the Supreme Court to weigh in on the constitutionality of a law that required the cremation of fetal remains and outlawed abortions motivated solely by disability, race, or sex.[313] The kind of law at issue in *Box v. Planned Parenthood of Indiana and Kansas* has a long history,[314] but in recent decades, abortion foes have reframed selective-abortion laws using earned-rights logic.

Antiabortion groups like Alliance Defending Freedom (ADF) contend that women seeking abortions for less deserving reasons, including those detailed in the Indiana law challenged in *Box*, have no abortion rights.[315] This strategy echoes

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Phillips, *Iowa Governor Signs 'Heartbeat' Bill Banning Abortion After Six Weeks*, WASH. POST (May 4, 2018), https://www.washingtonpost.com/news/to-your-health/wp/2018/05/02/iowa-lawmakers-just-passed-one-of-the-most-restrictive-abortion-bills-in-the-u-s/?utm_term=.dd56e427b7e9 [https: //perma.cc/FEC3-T5CB]. On the status of other heartbeat bills, see *Heartbeat Bans*, REWIRE LEGISLATIVE TRACKER (May 30, 2019), https://rewire.news/legislative-tracker/law-topic/heartbeat-bans/ [https://perma.cc/LR9U-DTQG].

311. *See* Phillips, *supra* note 310.

312. *See, e.g.*, Mary Ziegler, *What Does the Future of Abortion Rights Look Like?*, ATLANTIC (July 2, 2018), https://www.theatlantic.com/politics/archive/2018/07/kennedy-abortion-supreme-court/564191/ [https://perma.cc/6Z7E-C6QQ].

313. *See* Petition, *supra* note 1, at 3–5.

314. *See* Mary Ziegler, *The Disability Politics of Abortion*, 2017 UTAH L. REV. 587, 590–603 (2017).

315. *See* Brief Amici Curiae of Alliance Defending Freedom & the Radiance Foundation at 3–6, *Box*, 139 S. Ct. 1780 (2019) (No. 18-483), https://www.supremecourt.gov/DocketPDF/18/18-483/72200/20181115131743955_FINAL%20-%2018-483%20Brief%20of%20Amici%20Curiae%20Alliance%20Defending%20Freedom%20et%20al%20in%20Support%20of%20Petittioners.pdf [https://perma.cc/J87N-AEDZ].

one used in the late 1980s and early 1990s to challenge *Roe*.[316] Leaders of organizations like AUL believe that the Court—especially under Chief Justice Roberts—does not want to imminently address the validity of *Roe*.[317] Nevertheless, abortion foes seem to believe that the Court will almost inevitably scale back abortion rights, especially if they pursue a wise strategy.[318] These antiabortion lawyers reason that *Roe* and *Casey* protect the right to have *some* abortions.[319] Specifically, *Roe* and *Casey* recognize a right to have an abortion only for certain, deserving reasons. By targeting controversial or unpopular reasons for choosing abortion, earned-rights arguments seek to build popular support for eroding *Roe*.

Antiabortion activists have long invoked disability discrimination as an argument against legal abortion.[320] Groups like AUL and NRLC argued that legalizing abortion would increase discrimination against vulnerable groups, including those with mental or physical disabilities.[321] Arguing that legal abortion would encourage disrespect for the dying and disabled, NRLC argued in 1975: "The questions we must ask ourselves are these: if we allow the killing of the unborn now, where does it end?"[322] AUL claimed to defend "the innocent, the incompetent, the impaired, the impoverished, the aged, and all those otherwise weak and disadvantaged."[323] For the most part, however, these arguments simply served as a justification for preserving or restoring criminal bans on abortion.[324]

As the disability rights movement reshaped public debate, abortion rights supporters grappled with how to discuss selective abortions. Through the mid-2000s, abortion rights supporters increasingly invoked severe disabilities as a reason that states should preserve abortion access, especially in later abortions.[325] For example, in the 1980s and 1990s, the National Abortion Rights Action League (NARAL, now NARAL Pro-Choice America), a leading pro-choice lobby, described "'the horror of bringing a deformed child into the world with half a head,

316. *See generally supra* Part II.

317. *See* AMERICANS UNITED FOR LIFE, DEFENDING LIFE: FROM CONCEPTION TO NATURAL DEATH 14 (2019), https://aul.org/wp-content/uploads/2019/04/Defending-Life-2019.pdf [https://perma.cc/89EJ-M8RF].

318. *See, e.g.*, *id.* at 12–15.

319. *See* Brief Amici Curiae of the American Center for Law & Justice, *infra* note 337, at 7; Brief Amicus Curiae of the Susan B. Anthony List, *infra* note 338 at 12–15; Brief Amici Curiae of the Alliance Defending Freedom & the Radiance Foundation, *infra* note 341 at 3–6.

320. *See* Ziegler, *supra* note 314, at 597–605.

321. *See* Ziegler, *supra* note 314, at 601–06.

322. *See* Ziegler, *supra* note 314, at 601 (quoting Pamphlet, National Right to Life Committee, "Abortion: Where Does It End?" (1975), *in* The National Right to Life Committee Papers, Box 8, 1975 NRLC File, Gerald Ford Memorial Library, University of Michigan).

323. *See* Ziegler, *supra* note 314, at 601 (quoting Americans United for Life, "Statement of Purpose" (n.d., ca. 1973), *in* The Americans United for Life Papers, Executive File, Concordia Seminary, Lutheran Church-Missouri Synod).

324. *See* Ziegler, *supra* note 314, at 597–605.

325. *See* Ziegler, *supra* note 314, at 595–611.

no arms, etc.'" to justify a woman's right to proceed with an abortion.[326]

Abortion foes, for their part, seized on what seemed to be a promising new approach—one also shaped by earned-rights logic. In 2013, North Dakota passed a statute outlawing abortions when a woman sought to prevent the birth of a child with Down Syndrome or another disability.[327] By September 2019, nine states had introduced statutes outlawing abortions based on fetal sex.[328] In the political arena, champions of selective-abortion bans have emphasized the harm caused by disability discrimination. "Choosing to end a person's life simply because of this diagnosis is discrimination, period," argued Representative Sarah LaTourette, one of the chief sponsors of an Ohio selective-abortion ban.[329] The Bioethics Defense Fund, a pro-life group, reasoned: "Aborting children with disabilities is a form of discrimination that threatens to devalue the lives of people born and living with disabilities."[330]

Earned-rights arguments in *Box* allow antiabortion advocates a chance to narrow abortion rights without forcing the Court to confront the validity of *Roe*. *Box* involved two regulations: first, a sex-, race-, and disability-selection ban, and second, a regulation governing the disposal of fetal remains.[331] In a brief per curiam, the Court upheld that fetal-disposal provision.[332] Noting that the parties had not claimed that the law imposed an undue burden on a woman's right to obtain an abortion, the Court applied rational basis and reasoned that the law was constitutional.[333] Addressing Indiana's so-called eugenic abortion ban, a majority chose to let the lower courts weigh the constitutionality of such laws further before the Supreme Court had its say.[334]

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326. *See* Ziegler, *supra* note 314, at 599.

327. *See, e.g.*, James MacPherson, *North Dakota Lawmakers OK Strictest Abortion Ban*, ASSOCIATED PRESS (Mar. 15, 2013), https://www.usatoday.com/story/news/politics/2013/03/15/north-dakota-abortions/1991223/ [https://perma.cc/7C59-4TE9] (discussing anti-abortion procedures that prohibit women from having an abortion because a fetus has a genetic defect); James MacPherson, *Antiabortion Measures in North Dakota Spur Protests*, BOS. GLOBE (Mar. 26, 2013), https://www.bostonglobe.com/news/nation/2013/03/25/rallies-held-protest-antiabortion-measures/JCK3POsep7SzhHupq2a7vI/story.html [https://perma.cc/PB3B-RJCN] (discussing measures passed by the legislature that ban abortions based on disabilities such as Down syndrome).

328. *Abortion Bans in Cases of Sex or Race Selection or Genetic Anomaly*, GUTTMACHER INST. (Sept. 1, 2019), https://www.guttmacher.org/state-policy/explore/abortion-bans-cases-sex-or-race-selection-or-genetic-anomaly [https://perma.cc/Q68V-7FCT].

329. Marc Kovac, *Ohio Bill Would Ban Down Syndrome Abortions*, CINCINNATI ENQUIRER, May 8, 2015, at A22.

330. *BDF Amendment Prohibits Disability-Selection Abortion Discrimination in State-Sponsored Down Syndrome Materials*, BIOETHICS DEFENSE FUND (May 30, 2014), http://bdfund.org/disabilityamendment/ [https://perma.cc/NS4G-JPTS] (quoting Brief of Amici Curiae Jérôme Lejeune Foundation USA, Saving Downs, & The International Down Syndrome Coalition in Support Of Petitioners at 5, Horne v. Isaacson, 571 U.S. 1127 (2014) (No. 13-402)).

331. Box v. Planned Parenthood of Ind. & Ky., Inc., 139 S. Ct. 1780, 1781 (2019).

332. *Id.* at 1781–82.

333. *Id.* at 1782.

334. *Id.*

In its certiorari petition, Indiana argued that its law does not conflict with *Roe* or *Casey*.[335] Indiana claimed that these decisions protect abortion only to effectuate the binary choice of "whether to bear or beget a child."[336] Amici made the case that even if *Roe* and *Casey* were good law, the Constitution does not protect abortions opted into for invidious reasons. The American Center for Law and Justice, a conservative Christian public interest litigation firm, asserted:

> There are plenty of things a person has a 'right' to do (e.g., hiring or firing employees, refusing to sell property or goods, ignoring student questions), but not when that right is exercised in an invidiously discriminatory manner. . . . States have a valid interest in combating such discrimination, especially where, as here, it has lethal consequences.[337]

The Susan B. Anthony List (SBAL), a group that works to elect antiabortion candidates, similarly applied an earned-rights framework to argue that abortion is a right that is not uniform, but contingent.[338] SBAL's amicus brief contends that *Roe* and its progeny allow states to ban abortion earlier in pregnancy when the state invokes a compelling enough interest.[339] It further contends that states should have more latitude to stop women seeking to engage in the "eugenic practice of Down syndrome discrimination."[340] The ADF, a major backer of religious-liberty litigation and challenges to *Roe*, echoes this logic in its amicus brief.[341] "'[I]t is important to make the distinction between a pregnant woman who chooses to terminate the pregnancy because she doesn't want to be pregnant, versus a pregnant woman who wanted to be pregnant, but rejects a particular fetus."[342]

As *Box* shows, earned-rights arguments have played a central role in the constitutional case for selective-abortion bans. Earned-rights arguments allow courts to pay lip service to precedent while substantially overhauling constitutional

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335. Petition, *supra* note 1, at 27–30.

336. Petition, *supra* note 1, at 27 (quoting Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 871 (1992) (quoting Eisenstadt v. Baird, 405 U.S. 438, 453 (1972)).

337. Brief Amici Curiae of the American Center for Law & Justice at 7, Box v. Planned Parenthood of Ind. & Ky., Inc., 139 S. Ct. 1780 (2019) (No. 18-483), https://www.supremecourt.gov/DocketPDF/18/18-483/72704/20181120121624424_Box%20v.%20PPINK%20ACLJ%20amicus%20brief%20redacted.pdf [https://perma.cc/27GT-JCVS].

338. Brief for Amicus Curiae Susan B. Anthony List, 12–15, Box v. Planned Parenthood of Ind. & Ky, Inc., 139 S. Ct. 1780 (2019) (No. 18-483), https://www.supremecourt.gov/DocketPDF/18/18-483/72199/20181115131408012_18-483%20Amicus%20Brief—PDFA.pdf [https://perma.cc/7ZLY-Q7PQ].

339. *Id.* (arguing that "different durational rules attach to different government interests").

340. *Id.* at 15.

341. *See* Brief Amici Curiae of Alliance Defending Freedom & the Radiance Foundation at 3–6, *Box*, 139 S. Ct. 1780 (2019) (No. 18-483), https://www.supremecourt.gov/DocketPDF/18/18-483/72200/20181115131743955_FINAL%20-%2018-483%20Brief%20of%20Amici%20Curiae%20Alliance%20Defending%20Freedom%20et%20al%20in%20Support%20of%20Petittioners.pdf [https://perma.cc/J87N-AEDZ].

342. *Id.* at 5.

rights. As important, as the petitioners in *Box* recognize, earned-rights arguments undermine abortion rights as a whole. By portraying women choosing abortion in an unflattering light, earned-rights claims implicitly undercut the rationale underlying *Roe* and *Casey*. In arguing that abortion rights are conditional, antiabortion attorneys hope to hollow out the protections in *Casey* at a time when the Court might not want to reverse the decision directly. And because earned rights are inherently conditional, abortion foes recognize that courts might willingly scale back the rights of marginalized or unpopular groups. The price of earned rights may be a kind of conformity of which not everyone is capable or finds desirable.

The power of these arguments was on display in Justice Clarence Thomas's 2019 concurrence in *Box*. In it, Justice Thomas explained that while he agreed with the Court's approach to allow the issue of first impression to further percolate, he had serious misgivings with the perceived eugenic implications of the law.[343] Thomas adopted a widely criticized historical narrative of the relationship between the eugenics movement, the population-control movement, and the modern abortion-rights movement.[344] By denying that *Casey* would categorically ban such a law, thereby allowing space for the right to an abortion to be conditioned on a person's motives, his concurrence reflects an earned-rights rationale. On the merits, this historical narrative was deeply problematic, oversimplifying the relationship between eugenics, population control, and abortion to the point of incoherence.[345] Nevertheless, Thomas' concurrence showed the importance of earned-rights logic to future attacks on legal abortion.[346] Thomas warned that if the Court explicitly condoned abortions obtained for what Thomas saw as racist reasons, then the Court would "constitutionalize the views of the 20th-century eugenics movement."[347]

B. Earned Rights and Reliance

Abortion foes in groups like AUL and NRLC have enlisted earned-rights logic in yet another way: claiming that even if women have abortions for meritorious reasons, the Court should reconsider *Roe* because women have misjudged the real-world effects of the procedure. This subpart turns to this strategy.

In *Casey*, the Court preserved *Roe* partly because women relied on the availability of abortion in ordering their careers, educations, and senses of self.[348] As

343. Box v. Planned Parenthood of Ind. & Ky, Inc., 139 S. Ct. 1780, 1782–93 (2019) (Thomas., J., concurring).

344. *See id.*

345. *See, e.g.*, Mary Ziegler, *What Clarence Thomas Gets Wrong About the Ties Between Abortion and Eugenics*, WASH. POST (May 30, 2019), https://www.washingtonpost.com/outlook/2019/05/30/what-clarence-thomas-gets-wrong-about-ties-between-abortion-eugenics/ [https://perma.cc/9SR9-6ZNR].

346. *See Box*, 139 S. Ct. at 1782–93.

347. *Id.* at 1792.

348. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 855–59 (1992).

the plurality framed it, overruling *Roe* would lead to a "special hardship" for those who relied on it, as the right to an abortion had a significant impact on how real people had "ordered their thinking and living," which in turn shaped economic and social opportunities.[349] Rather than questioning the importance of an opportunity to pursue a career or an education,[350] antiabortion attorneys attacking *Casey* instead have an opportunity to contend that there can be no earned right to abortion if women base an abortion decision on false or erroneous information. In this way, abortion foes are able to argue that the motive for exercising a right can justify its loss when a right-holder is misguided as well as undeserving.

This strategy emerged in the aftermath of *Casey*. *Casey* had explicitly stated that women relied on abortion to achieve equal status in society.[351] AUL framed this conclusion as utterly unsupported by the facts.[352] But AUL attorneys saw a way to benefit from the framing of abortion as an earned right. If the Court had justified abortion rights based on the sound reasons women might decide to seek an abortion, then abortion foes could make progress by proving that women simply had misunderstood the effects of the procedure.[353] AUL insisted that antiabortion advocates could "start reducing abortion now by passing and enforcing laws relating to the woman."[354] In this way, abortion foes could also undermine the rationale of *Casey* by showing that women did not have sound reasons for ending a pregnancy after all.[355]

For this reason, antiabortion advocates have prioritized advancing laws that claim to protect women's health from the risks of abortion. By asserting that abortion harms women, antiabortion lawyers hope to show that abortion undermines rather than creates opportunities for women. They reason that if women do not rely on abortion for sound reasons, the logic of *Casey* cannot stand. This effort began in the 1990s when AUL and other groups promoted informed-consent laws similar to the one upheld in *Casey*.[356] Over time, abortion foes expanded on this

349. *Id.* at 854–56.

350. *See id.*

351. *See, e.g.*, Clarke Forsythe, *Why* Roe/Casey *Is Still Unsettled*, HUMAN LIFE REV. (Sept. 28, 2014), https://humanlifereview.com/roecasey-still-unsettled/ [https://perma.cc/M7Y8-B4XR] ("That women rely on abortion was assumed in *Casey*. That such reliance on abortion was good for women was also assumed, not documented. In fact, there's growing data that it is harmful."); Catherine Glenn Foster, *How Overturning* Roe v. Wade *Would Empower Women Beyond Their Wildest Dreams*, THE FEDERALIST (Sept. 19, 2018), https://thefederalist.com/2018/09/19/overturning-roe-v-wade-empower-women-beyond-wildest-dreams/ [https://perma.cc/G9FD-QP33] ("In 1992, the Supreme Court staked its abortion doctrine on the notion that women require abortion in order to vie for equal opportunity. But in the years since, that notion has been proven wrong time and time again.").

352. *See supra* note 351 and accompanying text.

353. Mary Ziegler, *Liberty and the Politics of Balance: The Undue-Burden Test After Casey/Hellerstedt*, 52 HARV. C.R.-C.L. REV. 421, 450 (2017).

354. *Id.* at 451.

355. *See id.* at 450–51.

356. *See id.*

model, mandating that women hear information that was contested or dubious, such as an assertion that abortion causes breast cancer.[357] And groups like AUL invoked putative harms to women in justifying entirely new categories of restriction, such as laws requiring clinics to comply with the rules governing ambulatory surgical centers.[358]

Abortion foes' commitment to making earned-rights arguments is especially noteworthy given that the Court recently cast doubt on the constitutionality of this kind of woman-protective law. In *Whole Woman's Health v. Hellerstedt*, the Court struck down two portions of a Texas law. [359] One required physicians to have admitting privileges at a hospital within thirty miles of an abortion clinic.[360] A second mandated that abortions comply with onerous regulations governing ambulatory surgical centers.[361] The Court invalidated both provisions.[362] *Whole Woman's Health* reasoned that the undue-burden test required courts to weigh the benefits and burdens of a challenged law.[363] And at least when dealing with laws said to protect women's health, the Court demanded proof that a law addressed a real problem and added some kind of concrete value when compared to earlier policies.[364]

At least after the Court first decided it, some abortion foes took *Whole Woman's Health* as a sign that woman-protective laws were not worth the trouble.[365] Nevertheless, antiabortion activists continue to argue that women should not have an abortion because it is harmful to their health. Indeed, in 2019, AUL argued that "laws predicated on the state's interest in safeguarding maternal health still maintain the strongest potential both to protect women and withstand potential judicial review."[366] Notwithstanding the result in *Whole Woman's Health*, AUL advises legislative allies "to underscore the harmful impact of abortion on women and raise understanding of abortion's risks to women."[367]

In the aftermath of Justice Kennedy's retirement, AUL has primarily advocated for legislation banning abortions at or after twenty weeks of pregnancy, emphasizing that "[a]bortion can cause serious physical and psychological (both short- and long-term) complications for women," and that "[a]bortion has a higher

357. *See, e.g.*, Clarke Forsythe, *Abortion Laws: A Report from the States*, WALL ST. J., Aug. 9, 1995, at A9.

358. *See supra* note 351 and accompanying text.

359. Whole Women's Health v. Hellerstedt, 136 S. Ct. 2292 (2016).

360. *Id.* at 2296.

361. *Id.*

362. *Id.* at 2310–18.

363. *See id.* at 2309.

364. *See id.* at 2309–18.

365. *See, e.g.*, Erik Eckholm, *Anti-Abortion Group Presses Ahead Despite Supreme Court Ruling*, N.Y. TIMES (July 10, 2016), https://www.nytimes.com/2016/07/10/us/anti-abortion-group-supreme-court-ruling.html [https://perma.cc/AS8N-BBET].

366. AMERICANS UNITED FOR LIFE, DEFENDING LIFE, *supra* note 317, at 352.

367. AMERICANS UNITED FOR LIFE, DEFENDING LIFE, *supra* note 317, at 16.

medical risk when the procedure is performed later in pregnancy."[368] It employs a similar justification in promoting statutes that require abortion clinics to report certain data;[369] put in place stringent, informed-consent rules;[370] and in other ways heavily regulate abortion clinics.[371] Through these arguments, AUL stresses what it calls "the 20 years of medical studies demonstrating that the Court erred in arguing that women's reliance on abortion has been beneficial."[372] It seeks to show that *Casey*'s reliance reasoning—and the entire logic of earned abortion rights—is wrong.[373]

Antiabortion lawyers prioritize laws ostensibly protecting women's health because doing so allows them to whittle away the foundation of *Casey.* If abortion rights depend on the meritorious reasons that women choose the procedure, then antiabortion attorneys plan to show that these reasons do not add up. And if women's logic for choosing abortion is not sound, the Court would have reason to reconsider whether to treat abortion as an earned right—or any kind of right at all.

V.
NARROWING RIGHTS

In specific contexts, commentators have zeroed in on downsides of earned rights. Historians and legal scholars have shown that by reinforcing the importance of certain majoritarian behaviors, earned-rights claims can inadvertently marginalize those who cannot or do not wish to imitate them. For the most part, however, these criticisms speak to the evolution of certain doctrinal areas, such as the right to marry or to parent. By illustrating how earned-rights claims work across different doctrinal areas, and by examining the history of earned-rights strategies to scale back constitutional protections, this Part illuminates a broader problem with earned rights as a strategy for expanding constitutional protections. These claims explicitly describe constitutional rights as inherently conditional. By establishing that the preconditions for a right do not apply, counter-movements can use earned-rights framing to erode constitutional protections that are already in place.

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368. AMERICANS UNITED FOR LIFE, DEFENDING LIFE, *supra* note 317, at 354.

369. *See* AMERICANS UNITED FOR LIFE, DEFENDING LIFE, *supra* note 317, at 382–91.

370. *See* AMERICANS UNITED FOR LIFE, DEFENDING LIFE, *supra* note 317, at 392–401 (stating that "'[t]he medical, emotional, and psychological consequences of an abortion are serious and can be lasting'") (quoting H.L. v. Matheson, 450 U.S. 398, 411 (1981)).

371. *See* AMERICANS UNITED FOR LIFE, DEFENDING LIFE, *supra* note 317, at 362–73.

372. Americans United for Life, *Twenty Years After* Casey*, AUL Hosts Legal Symposium* (May 21, 2012), https://aul.org/2012/05/21/media-advisory-20-years-after-casey-decision-aul-hosts-legal-symposium/ [https://perma.cc/6F4G-YXU4].

373. *See Conversation with Catherine Glenn Foster '16, President and CEO of Americans United for Life*, JAMES WILSON INST. (July 12, 2017), http://commentary.jameswilsoninstitute.org/2017/07/cgf/ [https://perma.cc/Z5CJ-KP4H] ("Each piece of model legislation featured [by AUL] has been specifically drafted to counter the myths that legal abortion is safe for women and that women must rely on abortion to secure their places in society.").

A. Majoritarian Rights

Particularly in the context of marriage equality, scholars have expressed skepticism about claims that certain same-sex couples (or families) deserve constitutional protection. Nancy Polikoff has observed that in explaining why same-sex couples deserve constitutional protection of the right to marry, the marriage-equality movement has strengthened the privileged position of marriage and validated the discrimination faced by those with different behaviors or family forms, including "single-parent and divorced families, extended families, and other stigmatized childrearing units."[374] Katherine Franke has further noted that the marriage equality movement troublingly reinforced the message that only recognition earned from the state is worth pursuing.[375] Other commentators claimed that by focusing on marriage and same-sex couples who chose to marry, the movement sidelined potentially worthier causes.[376]

As these commentators recognize, earned-rights arguments imply that certain behaviors, decisions, and choices hold more value than others. In this way, earned-rights claims for marriage equality validate what Serena Mayeri has called marital supremacy.[377] The marriage-equality movement may suggest that marriage is superior to other family arrangements—and that excluding same-sex couples from it was extremely harmful. Something similar is arguably true of all earned-rights claims. When courts base parental rights on certain behaviors or intentions, their decisions implicitly elevate some styles of parenting over others. In assisted-reproduction cases, courts have created a kind of common law parenthood, much as courts once forged a law of common law marriage, for those whose decisions

374. Nancy D. Polikoff, *For the Sake of All Children: Opponents and Supporters of Same-Sex Marriage Both Miss the Mark*, 8 N.Y. CITY L. REV. 573, 590 (2005); *see also* Nancy D. Polikoff, *We Will Get What We Ask For: Why Legalizing Gay and Lesbian Marriage Will Not "Dismantle the Legal Structure of Gender in Every Marriage,"* 79 VA. L. REV. 1535 (1993); Nancy D. Polikoff, *Ending Marriage as We Know It*, 32 HOFSTRA L. REV. 201 (2003); Nancy D. Polikoff, *Making Marriage Matter Less: The ALI Domestic Partner Principles Are One Step In The Right Direction*, 2004 U. CHI. LEGAL F. 353 (2004).

375. *See* Franke, *supra* note 294, at 239–45 ("What I lament is a failure of the movement's leaders to appreciate the creative political possibilities that the middle ground between criminalization and assimilation might have offered up.").

376. *See, e.g.*, AGAINST EQUALITY: QUEER REVOLUTION, NOT MERE INCLUSION (Ryan Conrad ed., 2014); NANCY D. POLIKOFF, BEYOND (STRAIGHT AND GAY) MARRIAGE: VALUING ALL FAMILIES UNDER THE LAW 98 (2008) ("The civil rights victory of marriage for those gay and lesbian couples who seek it may become the expense of law reforms benefiting a wider range of families."); MICHAEL WARNER, THE TROUBLE WITH NORMAL: SEX, POLITICS, AND THE ETHICS OF QUEER LIFE 86–97 (1999) (arguing that marriage is not "an unconstrained individual option," but rather "a social system" with a "privileged relation to legitimacy" that comes at a cost to those who do not conform to it); Katherine M. Franke, *Longing for* Loving, 76 FORDHAM L. REV. 2685, 2686 (2008) (arguing that "efforts to secure marriage equality for same-sex couples must be undertaken, at a minimum, in a way that is compatible with efforts to dislodge marriage from its normatively superior status as compared with other forms of human attachment, commitment, and desire").

377. *See generally* Serena Mayeri, *Marital Supremacy and the Constitution of the Nonmarital Family*, 103 CAL. L. REV. 1277 (2015).

conform to majority norms. Even in abortion cases, the Court highlights conformity to norms held by educated, upper- or middle-class women regarding education, career, or parenting.[378] In some cases, commentators have rightly worried about strategies that reinforce existing norms—or that punish those who refuse to or cannot accept them.

B. Shrinking Rights

The history of earned-rights claims for abortion suggests a broader issue: earned-rights arguments, like claims based on tradition or history, do not always or even often lead to a more pluralistic or inclusive approach to constitutional law. First, counter-movements can frame earned rights as entirely dependent on the identity of a right-holder. The logic of earned rights requires courts to weigh the motives and behaviors of each individual claimant. For example, in parental-rights cases, courts will delve into the details of a person's reproductive planning, parenting skills, and level of commitment.[379] Abortion foes have tried to use similar reasoning to narrow abortion rights by denying protection to women who may only claim "undeserving" reasons, such as pregnant drug users or women having abortions for supposedly trivial reasons.

Moreover, earned-rights analysis tends to advantage those who conform to the expectations of judges. Women who share the same or similar educational experiences or socioeconomic class as those who judge them may more often appear to have sound reasons or deserving behaviors than those who do not. Claimants who make unpopular decisions may lose out on earned rights, as may those with fewer resources or members of minority religious or ethnic groups. For example, in the abortion context, abortion foes have over time singled out women who have abortions for economic reasons, while often not focusing on women who end pregnancies for more widely accepted reasons, such as in cases of rape or incest.[380] Earned rights may never apply equally and may leave out those most desperately in need of protection.

Second, counter-movements can use earned-rights logic to undermine the coherence of a constitutional protection, setting the stage for a possible reversal of precedent down the road. Earned rights can depend either on the facts of specific cases (as in the context of assisted reproduction and parental rights) or on the accuracy of certain factual assertions (as in the context of abortion). As a result, lower courts could easily come to different conclusions about the same set of motives and behaviors and generate different conclusions. If asked to weigh in on the truth of contested statements about the costs and benefits of exercising a right,

378. *See, e.g.*, Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 856 (1992) (noting the importance of the availability of abortion to the "ability of women to participate equally in the economic and social life of the Nation").

379. *See generally supra* Part III(A).

380. *See generally supra* Part II(D).

judges with varying ideological predispositions or experiences may not arrive at the same result.

This variability poses a risk, because counter-movements routinely use inconsistent interpretations of a precedent as a signal of its unworkability. Unworkability, in turn, figures centrally in the Court's analysis of *stare decisis*.[381] The Court has never fully clarified what makes a precedent unworkable.[382] Prior decisions have treated a rule as unworkable when it is inherently incoherent or undermined by later doctrinal developments.[383] Recently, however, the Court has treated inconsistent results in the lower courts as a signal of unworkability, theorizing that contradictory outcomes prove that judges have struggled to make sense of a prior ruling.[384] In reality, courts may interpret a rule inconsistently for a variety of reasons.[385] Fact-intensive, subjective, empirically driven earned-rights analysis encourages the kind of inconsistent outcomes that help make a case for unworkability.[386] Moreover, inconsistent results can make a right seem less solid, inviting further challenges in court.

Earned-rights claims do not always or even naturally lead to a more inclusive constitutional law. Counter-movements have used such arguments to call into doubt the rationale for longstanding constitutional protections and to lay a foundation for efforts to undermine longstanding constitutional precedent. Similar to tradition-based arguments, earned-rights logic can point to or away from a more pluralistic constitutional law. For this reason, earned-rights claims do little to constrain judicial discretion. The next subpart takes up the question of how the Court may take a more principled approach to earned-rights reasoning.

C. Equal Earned Rights

The Court often uses deserving behaviors or motives as an entry point for those seeking rights—and as a justification for taking rights away from others. This practice makes rights unstable and too often emphasizes conformity to majority preferences. But underlying most earned-rights claims for expanded rights is a demand for equal treatment. For example, same-sex couples seeking access to marriage at times underline their deserving behavior to establish that they do not differ in any salient way from different-sex couples seeking to marry.[387] Same-sex or different-sex couples using assisted reproductive technologies (ART)

381. *See, e.g.*, Mary Ziegler, *Taming Unworkability Doctrine: Rethinking Stare Decisis*, 50 ARIZ. ST. L.J. 1215, 1218 (2018).

382. *See id.* at 1218–19; *see also* Lauren Vicki Stark, *The Unworkable Unworkability Test*, 80 N.Y.U. L. REV. 1665 (2005).

383. *See* Ziegler, *supra* note 381, at 1217.

384. *See* Ziegler, *supra* note 381, at 1249–54.

385. *See* Ziegler, *supra* note 381, at 1249–54.

386. *See* Ziegler, *supra* note 381, at 1249–54.

387. *See generally supra* Part III(B).

emphasize their resemblance to other parents to protest discriminatory treatment.[388] Even women seeking abortion rights justify control over pregnancy as a way for women to achieve more equal status.[389]

Equal treatment claims need not involve analysis of whether a specific behavior is deserving. Indeed, skeptics of equality claims often complain that they justify a race to the bottom: formal equal treatment allows the government to treat everyone poorly.[390] But in the context of earned rights, this logic functions similarly to strict scrutiny based on access to a fundamental right rather than on membership in a suspect classification. Those seeking a right to marry suggest that since that right is fundamental, there is no principled reason to treat same-sex couples differently from heterosexual couples. Emphasizing the similar behaviors and motives of same-sex couples and any relevant comparator would matter—not to validate a specific behavior or motive, but to explain how the parties are similarly situated and how the government cannot use putative differences between them to justify discriminatory treatment.

Similar arguments have been made elsewhere, such as in disputes over the right to parent. Those using reproductive technologies may underscore how they are similar in salient ways to those who use in vivo reproduction. Those in same-sex relationships may stress their resemblance to those in heterosexual relationships. Men may highlight their similarities to female parents. Equality-based claims in this context do not require the Court to determine who or what is deserving. Nor do these claims require courts to make open-ended factual assertions about whether exercise of a right benefits or harms someone. Instead, by focusing on whether earned rights are equal, courts can zero in on irrational distinctions between groups of people. This kind of line-drawing is particularly consequential when constitutional rights are at stake.

How might this idea of equal earned rights function in practice? If a court has recognized a right, such as the right to parent, a court would ask not whether a party had stepped up in deserving ways, but simply if she resembled an existing right-holder. Rather than primarily considering whether unwed fathers performed a parental role to the court's satisfaction, judges would ask instead whether the differences between unwed mothers and fathers were great enough to justify an unequal distribution of rights. Transmen and women can both give birth, undermining a gestation-based distinction. And in an era in which DNA testing is broadly available[391]—and gestational surrogacy is on the rise[392]—it may not be

388. *See generally supra* Part III(A).

389. *See generally supra* Part II(E).

390. *See, e.g.*, Deborah L. Brake, *When Equality Leaves Everyone Worse Off: The Problem of Leveling Down in Equality Law*, 46 WM. & MARY L. REV. 513, 515 (2004).

391. *See, e.g.*, Antonio Regalado, *2017 Was the Year that Consumer DNA Testing Blew Up*, MIT TECH. REV. (Feb. 12, 2018), https://www.technologyreview.com/s/610233/2017-was-the-year-consumer-dna-testing-blew-up/ [https://perma.cc/33YY-YDDB].

392. *ART and Gestational Carriers: Key Findings—Use of Gestational Carriers in the United*

much harder for a court to identify a father than it would be a mother. When it comes to those using ART, courts could simply acknowledge that those achieving parenthood through in vitro fertilization resemble those using in vivo fertilization in their intentions or caretaking habits. In this way, courts can prevent one another and other decisionmakers from drawing distinctions based on stereotypes or biases rather than on real differences between the parties—without having to spell out which behaviors or decisions are ideal. And courts can ensure that a claimant truly is similarly situated to someone who already holds constitutional rights.

Earned-rights logic has a longstanding place in American constitutionalism, and recent decades have only made it more visible. By emphasizing the similarities between existing right-holders and those seeking new protections, courts can better smoke out discriminatory laws.

VI.
CONCLUSION

In recent decades, social movements have looked for new ways to achieve constitutional protections. Given the current composition of the Supreme Court, arguments based on tradition and history often attract the most attention. But at least conventionally, these claims lead courts to a narrow view of constitutional protections. Even when courts view tradition as evolving and dynamic, judges often require proof of an emerging legal consensus, often one produced over the course of decades.

Earned-rights claims have emerged as an alternative for movements seeking expanded protections. These claims hold out the promise of protection for those who display what the courts view as deserving behaviors or motives, regardless of their membership in a stigmatized group. Nevertheless, as the history of earned-rights claims shows, these arguments are not only indeterminate and often abused, but also likely to exclude those who cannot or do not wish to conform to majoritarian norms. How, if at all, earned-rights claims will expand meaningful constitutional protection to the marginalized in future cases remains to be seen. By advancing a theory premised on *equal* earned rights, advocates can position themselves well in their pursuit of more expansive constitutional rights.

States, CTRS. FOR DISEASE CONTROL & PREVENTION, https://www.cdc.gov/art/key-findings/gestational-carriers.html [https://perma.cc/B9G5-5EAU] (last updated Aug. 5, 2016).