

Infrastructures of Provision
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Public expenditure on social welfare, as a share of the economy, is much lower in the United States than in other affluent Western democracies. For generations, political scientists have taken for granted that this means Americans spend less than others on social welfare. But in recent years, a growing number of scholars have begun to challenge this premise.¹ If we take into account *all* forms of spending on social welfare, they note—not just direct expenditures, but also indirect forms of spending such as tax expenditures, regulations, and credit subsidies—the spending gap disappears. As it turns out, the exceptional thing about the United States is not how much we spend on social welfare, but the mechanisms we use to do it.

The United States' outsized reliance on a middle layer of regulated and subsidized private actors in the provision of social welfare obviously has implications for perennial debates over what counts as “the state.” It also has political and distributional causes and consequences: forms of social provision that are unrecognizable as such disproportionately benefit the middle class and attract little of the opprobrium often directed at government programs designed to help the poor.² This Article, however, is not about either of those subjects. It is about the implications of the United States' distinctive method of social provisioning for a less obviously-related topic: how we understand constitutional rights.

The United States Constitution is often described as “a charter of negative rather than positive liberties,”³ meaning that it restrains what government can do to individuals but does not entitle individuals to anything from government. Put differently: “Negative rights ban and exclude government; positive ones invite and demand government. The former require the hobbling of public officials, while the latter require their affirmative intervention.”⁴ The notion that the United States Constitution protects only negative rights—that it hobbles rather than facilitates government—has become deeply ingrained in mainstream understandings of American constitutionalism, and indeed, in the American ethos more generally. We are a liberty-loving, government-fearing people, the story goes, and these attitudes are powerfully encoded in our founding document.⁵

Scholars have, of course, challenged these notions. Some have argued that the United States Constitution does protect some positive rights—such as the right to vote, which is difficult

¹ See Jacob Hacker, Christopher Howard, Suzanne Mettler, etc.

² SUZANNE METTLER, *THE SUBMERGED STATE* (2011).

³ *Jackson v. City of Joliet*, 715 F.2d 1200, 1203 (7th Cir. 1983) (Posner, J.).

⁴ STEPHEN HOLMES & CASS SUNSTEIN, *THE COST OF RIGHTS* (1999).

⁵ Judge Richard Posner's oft-quoted observation that “[t]he men who wrote the Bill of Rights were not concerned that government might do too little for the people but that it might do too much to them” encapsulates this conventional wisdom. *Jackson v. City of Joliet*, 715 F.2d 1200, 1203 (7th Cir. 1983) (Posner, J.).

to conceptualize as a right to ban and exclude government. Others, most notably Stephen Holmes and Cass Sunstein, have argued that all rights are positive because all rights impose enforcement costs on the state. Even classic negative rights, such as the right to make private contracts without state interference, in practice require the state to expend significant financial resources; for a start, the state must maintain a judicial system able to penalize those in breach. It goes far beyond that, Holmes and Sunstein argue. When one tallies up what the government spends on the judicial system, systems of law enforcement, and the vast network of administrative agencies that aid in rights enforcement, the total annual cost of rights runs into the billions.

This Article argues that enforcement cost is not the only phenomenon that is obscured by the widespread presumption that negative rights, and thus American constitutional rights in general, function exclusively as a check on the state. Some rights require, for their realization, specific infrastructures of provision (beyond the general infrastructure of courts and law enforcement agencies that all rights require for their realization). In some cases, courts have held that the government is constitutionally obligated to build and maintain such infrastructures. *Gideon v. Wainwright*⁶ is a good example. The Court held in *Gideon* that the Constitution protects the right of indigent criminal defendants to legal representation; in so doing, it effectively required the state to build a massive infrastructure of public defenders. Such cases are the exception to the rule, however. As a general matter, American courts have been wary of interpreting rights in such a way as to impose affirmative obligations on the state to spend money.

Courts' reticence to impose such obligations on the government has led many scholars to argue that all constitutional rights do is "keep the state off our backs and out of our lives."⁷ This is insufficient, these critics argue, to enable people to actually effectuate their rights in circumstances where simply hobbling the state is not enough. As this Article shows, however, requiring public expenditure is not the only means of facilitating the development of infrastructures of provision necessary to the realization of rights. Many of these infrastructures are not public in the first place. Indeed, this Article argues, non-governmental infrastructures play a significant role in enabling Americans to exercise their constitutional rights—and the recognition and enforcement of constitutional rights play a significant role in creating and maintaining such infrastructures. To observe this phenomenon, we will have to get past the idea that the sole function of constitutional rights is to constrain the power of the state.

To illustrate the phenomenon described above, this Article focuses on what should be a particularly difficult context in which to argue that constitutional rights do anything more than protect people's right to be left alone. In 1965, the Court held in *Griswold v. Connecticut*⁸ that the Constitution protects a right to privacy; it reaffirmed that holding eight years later in *Roe v. Wade*.⁹ The constitutional legitimacy of the right to privacy remains a subject of considerable debate. But commentators of all ideological stripes agree that the right the Court recognized

⁶ 372 U.S. 335 (1963).

⁷ Robin West, *From Choice to Reproductive Justice: Deconstitutionalizing Abortion Rights*, 118 YALE L.J. 1394, 1398 (2009).

⁸ 381 U.S. 479 (1965).

⁹ 410 U.S. 113 (1973).

was, at base, a right to keep the state at bay. Richard Epstein and Randy Barnett praise *Griswold* for what they perceive as its *Lochner*-like curtailment of the regulatory state. For Robert Bork, this comparison cuts in the opposite direction; he argues that the Court had no constitutional authority—privacy and liberty of contract not being mentioned in the Constitution—to thwart the will of the legislature. Catharine MacKinnon and Mary Ann Glendon, for different reasons, criticize the Court’s reliance on the concept of privacy, as it seems to promote the idea that all women require from the state is to be left alone. There is very little on which this disparate group of thinkers agree, but they all agree that the right to privacy acts as a shield against the state.

And so it does. *Griswold* and *Roe* protected individuals’ autonomy to make certain decisions for themselves and limited the state’s ability to force women into motherhood. But these decisions also did something else—something scholars rarely note, in part because it is almost completely obscured by the privacy framework. *Griswold* and *Roe* facilitated the creation of a massive infrastructure of largely non-governmental clinics that made it possible for women to exercise their new constitutional rights to birth control and abortion. In both contexts, the effect of state bans had not been to render these forms of reproductive health care completely unavailable, but to create a stratified system of access, in which women with financial resources could at least some of the time obtain the care they sought by visiting private doctors willing to bend the rules or by traveling out-of-state or overseas. What the bans completely prevented was the development of any form of publicly accessible infrastructure of provision that would enable all women to obtain birth control or terminate a pregnancy. The primary and most tangible effect of the Court’s invalidation of laws prohibiting birth control and abortion was the development of a burgeoning infrastructure of clinics essential to the realization of women’s newfound constitutional rights.

Contemporary commentary on *Griswold* often focuses on Justice Douglas’s invocation of the “sacred precincts of the marital bedroom”¹⁰ and his evident horror at the thought of Connecticut police storming into people’s homes in search of birth control. As Part I shows, however, it was very clear to all interested parties at the time that this was not the real concern. No one had ever been arrested in Connecticut for using birth control in the eighty-plus years the birth control ban had been on the books, and it was a virtual certainty that no one ever would be. That is not to say, however, that the law was a dead letter. For decades, it had been enforced, swiftly and consistently, against anyone who tried to open a birth control clinic. The defendants in *Griswold* had gotten themselves arrested for doing exactly that. Both they and the state—and the Justices themselves¹¹—viewed the case in part as a referendum on the question of whether birth control advocates were constitutionally entitled to open the “chain of clinics”¹² they envisioned, or whether the state could continue to suppress the development of such an infrastructure.

¹⁰ *Griswold*, 485.

¹¹ Justice Brennan asserted on numerous occasions, including in concurring opinion in a case leading up to *Griswold* that it was “the operation of clinics [that was] what’s at stake here really.” Brennan in *Poe*, Garrow 180. See also Brennan in *London*; Frankfurter, Garrow, 183; Bork; Additional cites from multiple oral arguments on the topic of Connecticut’s birth control law.

¹² Margaret Sanger, a leader in the birth control movement, asserted that the movement’s primary goal was to open “a chain of clinics” across the country that would make birth control available to all women.

Roe presented a similar question. It was the early 1970s, and the plaintiff in the case was poor and pregnant and living in Texas, with no way of getting to Mexico or to another state to obtain the abortion she sought. As the Court in *Roe* noted, state laws banning abortion had given rise to “illegal abortion mills”; these laws also drove many women to attempt self-abortions, sometimes with terrible consequences. The plaintiff in *Roe* sought “a legal abortion under safe conditions.”¹³ She wanted Texas to stop preventing clinics from opening within its borders.

Thus, when her lawyers turned around and argued that the right to privacy is absolute and that the Constitution entitles women to terminate pregnancies “in whatever way” they choose, the Court rejected the argument. It explained that “[t]he prevalence of high mortality rates at illegal ‘abortion mills’” was one of the problems its ruling was intended to combat. The “pregnant woman cannot be isolated in her privacy,” the Court asserted. Somehow, an infrastructure of safe, legal, and regulated abortion provision would need to be created. Feminist critics have often faulted the Court for focusing so intently in *Roe* on abortion providers, rather than women themselves. It is true that the opinion gives short shrift to women’s interests and agency. But Part II argues that to dismiss *Roe*’s discussion of abortion providers as a distraction from what was really at stake in the case is to miss one of the animating themes of the opinion: the importance of constructing a safe and legal infrastructure of abortion provision. To this end, the Court in *Roe* contemplated an array of areas of state regulation: doctors’ qualifications and licensing, the type of facility in which abortions would be performed, “whether it must be a hospital or may be a clinic or some other place of less-than-hospital status.” Conservative critics of *Roe* have long accused the Court of venturing into legislative territory with all its rules and regulations about how and where abortion was to be performed. In fact, by creating a kind of blueprint for a new infrastructure of abortion provision, the Court was trying to assert that women’s actual ability to exercise the right to abortion was a matter of constitutional concern.

The infrastructural effects of *Roe* were even more dramatic than those of *Griswold*. In the years after *Roe*, the number of abortion clinics in the United States increased exponentially, from approximately 350 in 1973 to 1,500 a decade later.¹⁴ Part II argues that these effects were not externalities of the Court’s decision, but were part of its constitutional logic. Much has changed in the past forty years in the context of abortion law, but one thing that has not is that constitutional doctrine continues to protect the infrastructure of abortion provision *Roe* summoned into being. In *Whole Women’s Health v. Hellerstedt*,¹⁵ the most important abortion decision in a generation, the Court recently renewed its commitment to enabling women’s access to abortion by protecting the largely non-governmental infrastructure through which women exercise their rights.

There is an obvious objection to any argument that focuses on the role of constitutional rights in facilitating access to abortion: The Court in the late 1970s explicitly rejected the notion that the state is constitutionally obligated to fund such access by providing the procedure in public hospitals or covering it under Medicaid. Thus, progressive scholars assert, by the late 1970s, the right protected in *Roe* had “devolve[d] into a bare negative contract right to buy a particular medical service—abortion—free of moralistic intrusion by state legislators who would

¹³ *Roe*, 120.

¹⁴ GERALD ROSENBERG, *THE HOLLOW HOPE* (1991).

¹⁵ 579 U.S. __ (2016)

paternalistically intervene into that—or any other—consensual purchase.”¹⁶ Courts and scholars often treat the Court’s abortion funding decisions as a (perhaps *the*) paradigmatic illustration of a more general precept: constitutional rights have nothing to do with social provision; their sole purpose and function is to constrain government and limit its interference in individuals’ lives.

But to say that government is not constitutionally obligated to fund abortions through public hospitals and Medicaid programs does not automatically or inevitably mean that the sole function of this (or any) constitutional right is to get government off people’s backs. The latter proposition arises not from constitutional doctrine but from a set of ideas that became highly influential in law and politics at around the time the funding cases were decided. This set of ideas, variously described by supporters and opponents as a new libertarianism or neoliberalism, centered on antipathy toward the regulatory state, a preference for private market orderings, and a sharp conceptual dividing line between the two. It has had profound effects on American political economy and also on American law—including on our understanding of the nature of constitutional rights.

Opponents of “big government” did not invent the distinction between positive and negative rights in the 1970s. It had a longer life in political philosophy, and even in law. But the ascendancy of anti-regulatory attitudes in this period sharpened the distinction and rendered it highly salient in legal contexts—much more salient than it had been in the past. By the 1980s, courts and scholars had begun frequently to invoke the distinction between positive and negative rights and to treat this distinction as a fundamental organizing principle in American law. Negative rights, deemed the core of our constitutional tradition, were conceptualized exclusively as restraints on government. They were tools of deregulation; they thwarted the state and granted individuals the freedom that comes with being left alone.

This new insistence on the exclusively negative character of American constitutional rights was in substantial part a reaction against the suggestion by prominent legal commentators, and perhaps the Court itself, in the 1960s that the state might be constitutionally obligated to furnish individuals with certain basic goods. The Court in the 1970s and 1980s rejected this suggestion; it held that individuals were not constitutionally entitled to welfare benefits, state-funded abortion, or state protection against assault by non-state actors. But proponents of “small government” often pushed the point a step further, asserting in legal commentary, and sometimes in dicta, that these holdings established that concerns about poverty and social provision are almost always extraconstitutional and that all constitutional rights do is limit the reach of the state. This Article contests that further step.

Like the right to vote and the right to counsel in criminal cases, the right to birth control and the right to abortion require for their realization an infrastructure of provision. In the context of voting and criminal procedure, the Court has mandated that the state ensure access to the relevant infrastructure by directly funding it. In the context of reproductive rights, the Court has protected access to infrastructure indirectly: by building concerns about access into the undue burden test it uses to analyze the constitutionality of abortion regulation. But this is not the only context in which the Court has relied on indirect mechanisms for protecting individuals’ access to infrastructures necessary to the realization of constitutional rights. Part III of this Article

¹⁶ *Id.*

widens the lens, bringing into view some other contexts in which the Court has deployed constitutional doctrine with the purpose and effect of expanding and protecting access to such infrastructure. This Part focuses first on the right to travel; then, more broadly, on antidiscrimination law and the bureaucracies of enforcement, compliance, and human resources it creates; and finally, still more broadly, on civil rights law generally and the litigation infrastructure—including the civil rights bar—that enables it to function. In each of these areas, the Court has shaped constitutional doctrine, and interpreted statutes with the Constitution in the background, in ways that expand or protect infrastructures essential to the realization of rights. Such indirect mechanisms have played an important role in enabling individuals actually to exercise their constitutional rights. And, this Article argues, they could do more.

I.

Justice Potter Stewart famously described the birth control ban at issue in *Griswold* as “an uncommonly silly law.”¹⁷ The notion that Connecticut’s law was “silly” has become a recurrent theme in commentary on the case. By 1965, Connecticut was the only state in the union that continued to bar the use of birth control. A large majority of Americans believed birth control ought to be legal. Even most Catholics in Connecticut felt this way—which helps to explain why, although many Connecticut residents used birth control, no one was ever arrested for doing so. In fact, the state’s long history of failing to enforce the ban against users of birth control has led many legal scholars—most prominently, Robert Bork and Cass Sunstein—to suggest the Court could or should have invalidated Connecticut’s law on the ground of desuetude.¹⁸ These scholars argue the law was hopelessly out of touch with contemporary community standards and never or almost never enforced—that it had fallen into such disuse that any prosecution under its auspices would have been inherently arbitrary and unreasonable.

This way of thinking about Connecticut’s birth control ban has helped to cement the perception of *Griswold* as a “test case.” When commentators describe *Griswold* in this way, they sometimes mean only that the individuals whose arrest precipitated the Supreme Court case were happy to be arrested because they wanted to challenge the constitutionality of the law. This much is true. But frequently, the characterization of *Griswold* as a test case incorporates the additional suggestion that the defendants in the case had to manufacture a set of artificial circumstances in order to get arrested, because in the normal course of events, police simply did not enforce the statute. Commentators inclined toward this view observe that Connecticut’s failure to enforce its birth control ban had presented real difficulties to those who wished to challenge its constitutionality. On two prior occasions prior to *Griswold*, birth control advocates had challenged the constitutionality of the ban, only to have the Court dispose of these challenges on justiciability grounds. In one case, the Court found the plaintiff lacked standing; in the other, it cited concerns about ripeness, as neither the doctor who wished to prescribe birth control nor his patients, who wished to use it, could show they faced any real threat of prosecution. In light of this history, scholars often treat the arrests that precipitated *Griswold* as

¹⁷ *Griswold*, 527 (Stewart, J., dissenting).

¹⁸ See also Alexander Bickel, *The Least Dangerous Branch*, 154-56 (1962) (characterizing Connecticut’s birth control ban as having fallen into desuetude, as it was “disused yet unrepealed” and allowed for “the unhindered practice of birth control” by those without any moral objections to it).

at best a jurisdictional hook, or maybe even a kind of trick, that enabled the Court to consider the constitutionality of a law that was in practice a dead letter.

Given the long-standing conception of *Griswold* as a test case, it is no wonder scholars often disattend to the facts in the case. Even those who write about *Griswold* are often unclear about basic details—including who *Griswold* was. Often, commentators assume *Griswold* was a doctor (and, concomitantly, a “he”). Sometimes, they imagine he/she was part of a married couple, barred by law from using birth control. Other times, *Griswold* is described as the “wife of a Yale University Professor.” Or even “a very prim and proper elderly lady from New Haven and widow of the former president of Yale University.”

Of course, some details are just details, and collective memories of the facts in cases half-a-century-old—even cases as monumental as *Griswold*—understandably grow dim. But some amnesia about the facts in *Griswold* stems from the widespread perception that the Court’s invalidation of Connecticut’s birth control ban “was insignificant in itself but momentous for the future of constitutional law.” In other words: What matters about *Griswold* is not that it expunged from the lawbooks a silly and toothless statute left over from Victorian times, but that the Court used this opportunity to identify in the shadows of various constitutional provisions a powerful limitation on the state’s power to interfere in the intimate lives of its citizens.

What follows is a revisionist history of *Griswold*. It suggests that, in this case, facts matter—not because they are important in and of themselves but because they help to capture more fully what was at stake in the battle over Connecticut’s birth control ban and what its invalidation accomplished. *Griswold* obviously reinvigorated substantive due process and identified privacy as a critical Fourteenth Amendment value. But, this Part argues, viewing *Griswold* as a decision solely about protecting the “right to be let alone” obscures much that is important about the decision. Turning our attention to the facts in the case—to who Estelle *Griswold* was, why she was arrested, and the very substantial effects Connecticut’s birth control ban had in one highly salient set of circumstances—will help us to see that, in a very real sense, women being left alone was precisely the problem to which *Griswold* responded.

A.

During his 1987 confirmation hearings, Supreme Court nominee Robert Bork argued before the Senate Judiciary Committee what he had often asserted in print: *Griswold* was “a wholly bizarre and imaginary case.” The Court in *Griswold* had expressed horror at the thought of Connecticut police invading “the sacred precincts of the marital bedroom in search of telltale signs of the use of contraceptives.” But, Bork insisted, this had never happened and would never happen: “Nobody is going to get a warrant” to search anyone’s bedroom for contraceptives, he argued, “and no prosecution is going to be upheld for that.”

Defenders of *Griswold*, such as Senator Joseph Biden, initially contested Bork’s characterization of the situation in Connecticut, suggesting that police might very well have obtained warrants to enter married couples’ bedrooms in search of contraceptives. But when Bork seemed to have the better of this argument, Biden quickly retreated to the position that, even if the law was never enforced, its mere presence on the books justified judicial intervention.

This was a perfectly reasonable position; criminal law need not actually be enforced by police to constrain people's behavior and degrade their social standing. But what Biden's colloquy with Bork—and most commentary on *Griswold* since that time—overlooks, and thus obscures, is that police in Connecticut *did* enforce the birth control ban. Numerous residents of Connecticut had been arrested and successfully prosecuted for violating the ban. The law was not a dead letter in the early 1960s and it never had been—at least, not with respect to those who attempted to provide birth control to the public.

Birth control advocates in Connecticut had been working for decades prior to *Griswold* to create some kind of publicly accessible infrastructure through which women—particularly poor women—could access birth control. They were heartened in 1936 when the United States Court of Appeals for the Second Circuit held that federal birth control regulation could not be applied in ways that obstructed public health. Margaret Sanger, leader of the national campaign for birth control, had orchestrated the challenge that led to this decision precisely because the ambiguous status of federal birth control regulation was impeding advocates' ability to enlist government support in the dissemination of birth control and incorporate contraceptive services into public health programs. Sanger and many of her colleagues interpreted the Second Circuit's decision to mean that the way was clear for the construction of a nationwide infrastructure of birth control provision. Even before the Second Circuit issued its ruling, birth control advocates in Connecticut had begun to open clinics; by 1937, they had opened nine. Yet when Connecticut police began to arrest clinic personnel under state law, the Second Circuit's ruling was of little avail. The defendants in the Connecticut case, *State v. Nelson*, argued that the state's birth control ban was injurious to public health, but the Connecticut Supreme Court upheld it.

All nine clinics in the state closed immediately, leaving Connecticut women once again without any publicly accessible infrastructure through which to obtain birth control. For the next twenty years, nobody in the state dared to open another clinic. This did not mean that no women in Connecticut could obtain birth control. Those with access to private doctors willing to dispense it and those who could afford to travel to out-of-state clinics often obtained it. But in the absence of nearby clinics, poor women's access was much more constricted. This was the problem Estelle Griswold was trying to solve when she opened a birth control clinic in New Haven in the fall of 1961. As executive director of Connecticut Planned Parenthood, Griswold had made the accessibility of birth control to poor women her top priority. In 1956, she launched a service through which poor women in Connecticut who wished to obtain birth control could obtain free referrals and transportation to a Planned Parenthood clinic in Port Chester, New York, just across the state line. In 1961, she decided to challenge the constitutionality of the birth control ban directly by opening a clinic within state lines that offered its services for free to the poor.

Griswold did not anticipate her clinic would stay open for long. In fact, it was not open more than ten days before Griswold and Dr. Lee Buxton, an obstetrician and Yale professor who treated patients at the clinic, were arrested and their operation shut down. Yet to call this an “imaginary” case is to obscure the fact that the threat to any institution that attempted to make birth control for women publicly available was entirely real. This is precisely what Griswold sought to demonstrate by opening her clinic: that the central function of Connecticut's law was to keep birth control out of the hands of poor women. When reporters interviewed Griswold

about her legal challenge to the ban, she informed them: “It is the woman of the lower socio-economic group who does not know she can space her children, who cannot afford to go to a private doctor, who is being discriminated against by the Connecticut law.” Her colleague, Dr. Buxton, echoed this view, as did many other medical professionals interviewed in the early 1960s about the effects of the state’s prohibition of birth control. It was poor women who were hardest hit by the state’s suppression of a publicly accessible infrastructure of birth control provision.

Unfortunately for Planned Parenthood, it was precisely the building of such an infrastructure that the law’s proponents wished to forestall. James Morris, a concerned citizen of Connecticut who launched a very vocal campaign to shut down the clinic and goad reluctant police into adopting a hard line against its operators, was willing to concede that “[b]irth control is a private thing, and people do have a right to believe in birth control.” But, Morris informed the reporters who descended on New Haven to cover his campaign, he drew the line at birth control clinics or any other institution that sought to disseminate birth control to the public. “A Planned Parenthood Center is like a house of prostitution,” he argued: It takes something that should be private and makes it publicly available, which was, in his view, exactly what the state’s ban on birth control was supposed to prevent.

James Morris was not the only person who viewed contestation over the Connecticut law as having substantially to do with institutions that sought to make birth control accessible to the public. When pressed by the Justices at oral argument, the lawyer representing the plaintiffs in one of the earlier challenges to the law’s constitutionality had conceded that his clients—Dr. Buxton and several patients in his private practice—faced little threat of prosecution. But, he observed, the state did apply the law against clinics, with the result that “no public or private clinic for the purpose of advising on contraception” had existed in the state for twenty years. Thus, he argued, “[t]he people in Connecticut who need contraceptive advice from doctors most—the people in the lower income brackets and lower educational brackets—the people who need it most, do not get it, because there are no clinics available.” This caused Justice Felix Frankfurter to complain, during the Justices’ post-argument conference, that what the plaintiffs actually sought was not the right they were ostensibly asking for—the right to use birth control in the privacy of their homes, or prescribe it in private practice—but rather, authorization to open clinics that would make birth control accessible to the public. Justice Brennan, who did not necessarily see eye-to-eye with Frankfurter on the issue of birth control, repeatedly said the same thing. Just after *Poe v. Ullman*¹⁹ came down, dismissing the plaintiffs’ challenge on justiciability grounds, Brennan informed an audience of British barristers that the plaintiffs “actually were seeking invalidation of the Connecticut statute in the interest of opening birth control clinics.” Indeed, he had written as much in his concurring opinion in the case. “The true controversy in this case is over the opening of birth control clinics on a large scale,” he wrote, as “it is that which the State has prevented in the past, not the use of contraceptives by isolated and individual married couples.”

There is certainly reason to be skeptical of the Court’s justiciability determination in *Poe*. As the dissenting Justices argued, the fact that the law rendered the doctor and his patients outlaws and threatened them, to an unknown extent, with criminal prosecution would seem

¹⁹ 367 U.S. 497 (1961).

sufficient to grant them standing to challenge the law. Yet even if there is reason to question the Court's reasoning with respect to justiciability, there is little reason to doubt the genuineness of the Justices' repeated observations that the suppression of clinics was central to understanding the constitutional controversy over the Connecticut law. Both sides of the debate inside the Court understood the issue in this way. The same was true in the debate outside the Court: those challenging the constitutionality of the law emphasized its effects on clinics, and those defending the law did as well. Even Robert Bork viewed *Griswold* in large part as a case about clinics. He likened Connecticut's birth control ban to an anti-gambling statute, the point of which was not to stop "the priest at the church bingo party or friends having their monthly poker game at home," but rather to suppress the establishment of "commercial gambling" houses. In other words, Bork contended, *Griswold* was not really a case about "privacy," as we generally understand that term. One of the central questions it posed was whether a state was obligated under the Fourteenth Amendment to permit within its borders the construction of a publicly accessible infrastructure of birth control provision.

B.

The battle over birth control clinics in Connecticut in the early 1960s did not transpire in a vacuum. Contestation over the Connecticut law was part of a broader nationwide discussion in this period about the infrastructure through which birth control was provided. In 1959, President Eisenhower had declared that he could not "imagine anything more emphatically . . . not a proper political or governmental activity or function or responsibility" than birth control. Within a few years, a "revolution in federal family planning had occurred." President Kennedy took a few small steps in this regard, but it was President Johnson who oversaw the incorporation of birth control into the American public health system. Under his direction, in 1964, the newly-created Office of Economic Opportunity began to dispense grants to family planning organizations with the goal of building a national infrastructure of birth control provision. In 1965, Johnson emphasized the importance of birth control availability in his State of the Union address—the first time that topic had ever been mentioned in that forum. In 1967, Congress passed a major amendment to the Social Security Act that earmarked a certain percentage of funds for the provision of family planning services, required states to make family planning services available to adult recipients, and allowed federal and state governments to grant public funds to non-profit organizations such as Planned Parenthood. Even President Eisenhower became a convert. In 1964, he agreed to serve as honorary co-chair, with President Truman, of the Planned Parenthood Federation and to help raise funds to support its growing network of birth control clinics.

This was the context in which *Griswold* occurred, and lawyers challenging Connecticut's ban called attention to these developments. They noted that the government was now devoting "significant federal funds and federal effort to aiding Americans . . . to secure the contraceptive services forbidden in Connecticut." They pointed out that two former Presidents were now volunteering for Planned Parenthood and that President Johnson had recently emphasized the importance of access to birth control in his State of the Union address (perhaps an unnecessary reminder given that most of the Justices were in attendance). Planned Parenthood appended to its brief a massive appendix describing all of the federal, state, and local efforts then underway to build an infrastructure of birth control provision in the United States. They argued that making

birth control available to women—particularly those who could not afford it on their own—had become a national priority.

By 1971, when the Court heard *Eisenstadt v. Baird*,²⁰ a challenge to Massachusetts’ ban on the sale and distribution of birth control to unmarried individuals, this line of reasoning had blossomed into a full-blown Supremacy Clause argument. By that point, Congress had enacted Title X of the 1970 Public Health Service Act, which established a comprehensive, nationwide program of family planning administered through public and non-profit agencies. The statute explicitly declared that making birth control accessible to all Americans was a key aim of federal healthcare policy. Lawyers in *Eisenstadt* argued that the state’s ban on the sale and distribution of contraception to a significant portion of state residents directly contravened the purposes of federal law.²¹

Griswold took place a number of years earlier, however, before the passage of Title X. Lawyers in *Griswold* marshaled evidence about all the new forms of governmental involvement in the provision of birth control in order to underscore a different point: that access to birth control necessitated an infrastructure of provision. The right to birth control was not a right people could realize on their own, lawyers attacking Connecticut’s law argued. People needed some way to obtain birth control, and for poor people, that generally meant clinics, or some other publicly accessible infrastructure of provision.

Had John Hart Ely, who was then clerking for Chief Justice Earl Warren, had his way, Connecticut’s interference with the development of a clinical infrastructure of birth control provision would have been the central focus of *Griswold*. Ely wrote a series of memoranda for the Chief Justice in which he observed that it was poor women in Connecticut who wanted most for birth control. “Clinics are of course the answer,” Ely asserted, “and [y]et it is only against the clinics that the law is enforced. . . . Thus those who need birth control most are the only ones who are denied it.” Ely argued this amounted to discrimination of the sort the Court had deemed unconstitutional in *Yick Wo v. Hopkins*,²² a late-nineteenth-century decision that invalidated a law that was neutral on its face but administered in a discriminatory way.

²⁰ 405 U.S. 438 (1972).

²¹ Although the Supreme Court did not reach the Supremacy Clause issue in *Eisenstadt*, courts have subsequently held that Title X prohibits state laws that have restrictive subrecipient eligibility criteria. See *Planned Parenthood of Houston & Se. Tex. v. Sanchez*, 403 F.3d 324, 337 (5th Cir. 2005) (“[A] state eligibility standard that altogether excludes entities that might otherwise be eligible for federal funds is invalid under the Supremacy Clause.”); *Planned Parenthood Fed’n of Am. v. Heckler*, 712 F.2d 650, 663 (D.C. Cir. 1983) (“Although Congress is free to permit the states to establish eligibility requirements for recipients of Title X funds, Congress has not delegated that power to the states. Title X does not provide, or suggest, that states are permitted to determine eligibility criteria for participants in Title X programs.” (internal quotation marks and citation omitted)); see also *Planned Parenthood of Cent. N. Carolina v. Cansler*, 877 F. Supp. 2d 310, 331-32 (M.D.N.C. 2012) (“Therefore, the Court concludes once again that the fact that Plaintiff may, at some point in the future, be able to apply directly for Title X funding does not mean that the state may now or in the future impose additional eligibility criteria or exclusions with respect to the Title X funding administered by the state.”); *Planned Parenthood of Billings, Inc. v. State of Mont.*, 648 F. Supp. 47, 50 (D. Mont. 1986) (“Based on the foregoing, the Court concludes the co-location proviso contained in the Montana General Appropriations Act of 1985 adds an impermissible condition of eligibility for federal funding under the Public Health Service Act, in violation of the Supremacy clause.”).

²² 118 U.S. 356 (1886).

Very little of this made it into *Griswold*. In a passage that attracted more attention at the time than it does today, Justice White observed that “the clear effect of these statutes, as enforced, is to deny disadvantaged citizens of Connecticut, those without either adequate knowledge or resources to obtain private counseling, access to medical assistance and up-to-date information in respect to proper methods of birth control.” White then asserted that “a statute with these effects bears a substantial burden of justification when attacked under the Fourteenth Amendment.” There was some discussion of this passage among the Justices; Chief Justice Warren asked his colleague to add a citation to *Yick Wo* here to drive home the point, which White did. But equal protection was obviously not the focus of the Court’s opinion in *Griswold*: privacy was.

The word privacy conjures up a sense of isolation, a walling off of the public, a respite from the prying eyes of parents, neighbors, and government. There is a whole branch of scholarship critiquing the Court’s deployment of the concept of privacy to invalidate laws under the Fourteenth Amendment, particularly in the context of reproductive rights law. Many scholars have argued that there is no legitimate constitutional basis for protecting the right to privacy as a matter of due process. Others have argued that privacy is the wrong word for the constitutional values *Griswold* protected—that the Court was really protecting something closer to liberty or autonomy when it invalidated Connecticut’s ban on birth control. Feminist scholars have often criticized the privacy framework on the ground that it “reaffirms and reinforces what the feminist critique of sexuality criticizes: the public/private split.”²³ Privacy, on this view, serves to perpetuate the notion that a man’s home is his castle and that the state has no business interfering with the various kinds of social hierarchy and forms of abuse that flourish and transpire with its walls.

The purpose of this Article is not to critique privacy or to defend it against these charges. Nor is it to suggest that protecting certain aspects of people’s intimate lives from state control was not a major part of what the Court did in *Griswold*. Justice Douglas, who authored the majority opinion in the case, was a committed civil libertarian; there is no reason to doubt that he was genuinely offended by the notion that Connecticut’s ban on birth control at least ostensibly authorized police to invade people’s bedrooms in search of contraceptives. Numerous scholars have noted that *Griswold* took place during the Cold War, at a time when the Court frequently and favorably contrasted the operation of American law enforcement, subject to a web of constitutional constraints, with the relatively unconstrained operation of police in the totalitarian regimes of Eastern Europe. Jed Rubenfeld makes a compelling argument that we ought to interpret *Griswold* as articulating an anti-totalitarian principle, one that prohibits the state from “too substantially or too rigidly direct[ing]” the lives of its citizens.²⁴

All of this seems right. But, this Article argues, protecting privacy was not the only constitutional project in which the Court was engaged in *Griswold*. The Court in the 1960s had multiple constitutional preoccupations. It was not concerned only with issues of state overreach. It was also deeply committed to protecting the constitutional rights of the poor, and in particular to ensuring that poor people had access to various infrastructures of provision essential to the realization of those rights. In *Griffin v. Illinois*, the Court held that in cases involving indigent

²³ CATHARINE MACKINNON, *FEMINISM UNMODIFIED*, 93.

²⁴ Jed Rubenfeld, *The Right of Privacy*, 102 HARV. L. REV. 737 (1989).

defendants states were required to waive the fee for trial transcripts necessary to appeal criminal convictions. In *Gideon v. Wainwright* and *Douglas v. California*, the Court held that states were obligated to provide indigent criminal defendants with legal representation. In *Harper v. Virginia Board of Elections*, the Court invalidated the poll tax. A few years later, the Court invalidated statutes that required residents of a state to live in-state for a year before becoming eligible for welfare benefits, or in-county for a year before they could receive nonemergency medical care at the county's expense. In *Boddie v. Connecticut*, the Court held that, for indigent applicants, states were required to waive the fee associated with filing for divorce.

Today, we do not think of *Griswold* as having much, if anything, to do with these cases. There are certainly differences—most notably the fact *Griswold* did not impose any direct funding obligations on the state and many of these other cases did. We will return to the issue of state funding later in this Article. Here, I simply want to argue that we should not allow the source of the funding contemplated by the Court—tax dollars or private funds—to obscure the fact that all of these decisions, including *Griswold*, either facilitated access to or helped to create infrastructures of provision necessary for the exercise of constitutional rights. Like the right to a fair trial or the right to vote, the right to use birth control is not one women can exercise on their own. In the case of many of the most effective forms of birth control, they need access to a medical or public health infrastructure. *Griswold* suggested that it was a matter of constitutional concern when the state thwarts the development of such an infrastructure or blocks individuals' access to it.

Some fifty years after *Griswold* was decided, we recognize the case as part of the project of limiting the state's authority over the individual, but not as part of the project of facilitating access to infrastructures of provision essential to the realization of constitutional rights. At the time the decision came down, its relevance to the latter project was far more apparent. In one of the first scholarly commentaries on *Griswold*, constitutional law professor and future Assistant Attorney General Robert Dixon observed that the Court's invalidation of Connecticut's birth control ban was at least as much about "making privacy effective" as it was about "a right to be let alone." "[B]oth elements [are] unavoidably present in the decision," Dixon argued. "Clearly," he asserted, "the 'rights of husband and wife' which Mr. Justice Douglas had in mind did not consist merely of an interest in having the statute nullified so that the couple could use contraceptives without fear of police invasion of their bedroom." *Griswold* also concerned the couple's interest in accessing birth control—a point driven home by the fact that this case did not simply involve "fictional police invading a fictional bedchamber of a fictional couple." It also involved an actual birth control clinic that had been shut down by actual police. The Court's intervention protected that clinic as much as it protected the imaginary couple in their bedroom. In fact, Dixon argued presciently, the outcome in *Griswold* would not have been any different if Connecticut had permitted the use of birth control and barred only its sale and distribution. The outcome would have been the same because *Griswold* did not protect only the private use of birth control. It also blocked the state from cutting off people's means of obtaining it.

One reason this may have been more apparent fifty years ago than it is today is that *Griswold*'s most tangible effect was the immediate development in Connecticut of a publicly accessible infrastructure of birth control provision. As soon as the Court issued its decision, Planned Parenthood began to open clinics in cities throughout the state. *Griswold* also allowed

federal and state money to flow to the provision of birth control in Connecticut, as elsewhere. It enabled public hospitals in the state to begin providing birth control to their patients, many of whom could not afford it on their own. Even leaders in the Catholic Church, who had supported the ban and continued to oppose the use of government funds in the dissemination of birth control, agreed that the Court had extended constitutional protection to the public provision of birth control by private clinics. One prominent Catholic spokesman on the issue testified before Congress in 1966 that although the Church opposed government involvement in birth control, *Griswold* had clearly protected “[t]he actions of privately supported agencies in the promoting of education in birth control, the setting up by them of clinics, and their furnishing of contraceptive materials.”

Legal scholars often describe *Griswold* as an “outlier.” It concerned sexual privacy and maybe tangentially women’s rights—issues that became very prominent in the 1970s but that barely registered on the Warren Court’s agenda. Scholars observe that “the doctrinal themes with which the Warren Court is most closely associated—such as the protection of racial . . . minorities, refashioning the law of democracy, and solicitude for First Amendment values and for the rights of the criminally accused and the poor—played either no role or only a tangential role” in the case. On this view, “*Griswold*, which involved a criminal prosecution of two upper middle class white defendants,” was simply out of step with its time.

But there is greater continuity between *Griswold* and other landmark Warren Court decisions than this conventional wisdom suggests. *Griswold* was part of a concerted judicial effort in the 1960s to facilitate the development of, and increase access to, infrastructures of provision necessary to the realization of constitutional rights. In some cases, such as *Gideon*, the Court essentially ordered the government to create such an infrastructure. *Gideon* resulted in the creation of public defenders’ offices and other systems for providing legal representation to indigent criminal defendants. The Court did not impose any such affirmative funding obligation on the state in *Griswold*. But its decision had similar effects. Birth control clinics open to the public (and in fact supported in part by public funds) sprang up all over the state of Connecticut. Viewed through a lens that sharply divides public from private, and positive rights from negative ones, there is only a superficial similarity between these cases. The infrastructure building that followed in the wake of *Gideon* was constitutionally compelled and entirely funded by public money. The infrastructure building *Griswold* prompted appears to have nothing to do with the Constitution: it was simply a case of private actors capitalizing on an opening in the market.

This is precisely how political scientist Gerald Rosenberg characterizes the massive expansion of abortion clinics in the United States in the wake of *Roe*.²⁵ Rosenberg cites the critical role of private market actors in ensuring that women could actually exercise their right to abortion as evidence for his thesis that judicial decisions do little work in changing circumstances on the ground or expanding people’s rights in the real world. Part II disputes this characterization. It argues that the construction of a legal and regulated infrastructure of abortion provision, much of which would be run by non-governmental organizations, was part of *Roe*’s constitutional design. This Part suggests a similar dynamic was at work in *Griswold*. The Court in *Griswold* invalidated Connecticut’s prohibition of birth control in part because that prohibition was preventing the development of a publicly accessible infrastructure of birth control provision.

²⁵ GERALD ROSENBERG, *THE HOLLOW HOPE*, 173-201.

By doing so, the Court facilitated the building of such an infrastructure. The network of birth control clinics that opened in Connecticut in the wake of *Griswold* was not an externality or a second-order effect of the Court's holding. It was part of the point.

That can be hard to see if we think in terms of sharp dichotomies, between public and private and between positive and negative rights. Thinking in these terms leaves us with two possibilities: either the government is constitutionally obligated to furnish individuals with certain goods and services or the Constitution simply constrains the state, leaving people out of luck when they lack the funds to realize their rights in the marketplace. But *Griswold* shows that requiring the government affirmatively to provide access to certain goods and services is not the only judicial mechanism for facilitating people's ability to exercise their constitutional rights. *Griswold* did not require the state to provide people with birth control the way *Gideon* required it to provide indigent criminal defendants with lawyers. But neither did it simply leave Connecticut residents on their own, without any means of accessing birth control. That was what the state had done, and in 1965, the Court held that this violated the Fourteenth Amendment.

Part II

In 1969, Frank Michelman published his famous *Foreword* to the *Harvard Law Review*, entitled *On Protecting the Poor Through the Fourteenth Amendment*. Michelman argued that the function of many of the Warren Court's landmark Fourteenth Amendment rulings was to "directly shield[] poor persons from the most elemental consequence of poverty: lack of funds to exchange for needed goods, services, or privileges of access." Often, the Court framed such rulings in equal protection terms, but, Michelman contended, it made more sense to read them as vindicating, not "equality, but . . . a quite different sort of value or claim which might better be called "minimum welfare." In protecting minimum welfare under the Fourteenth Amendment, Michelman argued, the Court had implicitly determined that the government is constitutionally obligated "to protect against certain hazards which are endemic in an unequal society."

However plausible this may have seemed in the late 1960s as a positive account of the law, within just a few years, it had come to seem quite implausible. In 1968, Richard Nixon was elected President, and he appointed four new Justices in quick succession. The new Court had a lot on its agenda, but repudiating the notion that the Constitution granted individuals a right to certain minimal entitlements was high on its list. The Burger Court made clear that it was not going to use equal protection, as the Court had the 1960s, to require the state to provide people with various goods and services. Nor was it prepared "[t]o translate the limitation on governmental power implicit in the Due Process Clause into an affirmative funding obligation."²⁶

That, in a nutshell, is how we tell the story of the rise and fall of judicial recognition of positive rights under the Constitution in the Warren and Burger Court eras. But, this Part argues, it is not the whole story. By starting with Michelman's argument in favor of minimal entitlements and ending with the Burger Court's rejection of that notion, conventional accounts of this critical period in constitutional history reinforce a simple dichotomy. Either constitutional

²⁶ Harris v. McRae (1980).

law is concerned with individuals' ability to exercise their rights, in which case it requires the state to fund such rights in contexts where poor people cannot do so themselves, or else the law is not concerned with people's ability actually to exercise their rights, only with "keep[ing] the state off our backs and out of our lives." This Part seeks to reveal what this binary formulation obscures: requiring government to pay is not the only means our Constitution provides for facilitating and protecting individuals' ability to exercise their rights.

To explore this point more fully, this Part considers the right to abortion. Scholars often treat the right to abortion as a paradigm case for demonstrating the strictly negative character of American constitutional rights. In the early 1970s, the Court held in *Roe v. Wade* that the Fourteenth Amendment protects women's right to abortion. Then, in a series of decisions a few years later, it held that the government was under no constitutional obligation to pay for the procedure for those who could not otherwise afford it. Many scholars interpret this line of cases to mean that all constitutional law does is (sometimes) bar the imposition of criminal sanctions for abortion, and more broadly, limit government intervention in the private sphere. "When the alternative is jail," Catharine MacKinnon has written, "there is much to be said for this argument."²⁷ But, MacKinnon and many others have argued, the Court's funding decisions demonstrate the poverty of privacy doctrine and of constitutional protection of negative rights more generally. The Constitution, as it has been interpreted, is completely unequipped to do anything about problems relating to access, which means "women are guaranteed by the public no more than [they] can get in private."²⁸ As far as the Fourteenth Amendment is concerned, "[w]omen with privileges get rights,"²⁹ women without privileges get nothing more than protection against incarceration in some circumstances.

This Part argues there is more to the story.

A.

Rarely has a few years mattered as much in constitutional adjudication as it did in the case of *Roe*. The Court heard *Roe* in 1971 and decided it at the start of 1973, just before the wave of cases that dramatically altered the constitutional landscape by extending heightened scrutiny to sex-based state action. Reproductive rights law today has incorporated concerns about women's equal standing in society. But such concerns were not an established part of Fourteenth Amendment doctrine when *Roe* reached the Court. At that time, *Griswold* was the key precedent, and privacy the most obvious frame, for thinking about whether the Constitution protects the decision to terminate a pregnancy.

One of the most striking features of *Roe* is the enormous role that doctors play in the Court's conception of the abortion right. In *Griswold*, the Court conceived of a married couple as the object of the Constitution's privacy protections. In *Roe*, it conceives of the woman and her doctor as the unit in need of protection. The Court concludes in *Roe* that the possible consequences of not having an abortion and the potential distress occasioned by the birth of an unwanted child "are factors the woman and her responsible physician necessarily will consider in

²⁷ MACKINNON, FEMINISM UNMODIFIED.

²⁸ *Id.*

²⁹ *Id.*

consultation.” When discussing the parameters of the protected right, the Court asserts that “a physician and his pregnant patient might decide that she should have an abortion in the early stages of pregnancy.” Sometimes, the pregnant woman seems to drop out of the equation almost entirely, as when the Court suggests that, prior to viability, “[t]he attending physician, in consultation with his patient, is free to determine, without regulation by the State, that, in his medical judgment, the patient’s pregnancy should be terminated.” At the end of its opinion, the Court explicitly declares that *Roe* “vindicates the right of the physician to administer medical treatment according to his professional judgment” because “[t]he abortion decision in all its aspects is inherently, and primarily, a medical decision.”

Feminist scholars have long criticized *Roe*’s physician-centered rhetoric and reasoning. They have argued that the Court’s framing of abortion primarily as a medical issue obscures women’s interests and women’s agency—a point that is hard to dispute in light of the Court’s conclusion that because abortion is a medical procedure, “the basic responsibility for it must rest with the physician” rather than the state. There is a long history in this country of medical control over women’s bodies, and *Roe*’s seeming assignment of decision-making authority to doctors can be read as perpetuating that history. The medical focus of the opinion indisputably privileges medical ways of thinking about abortion over “social questions of gender”—a mode of reasoning that tends to “obscure[] the possibility that [abortion] regulation may be animated by constitutionally illicit judgments about women.”

Yet if *Roe*’s focus on abortion as a medical procedure obscures some important aspects of its regulation, it underscores others. Most notably, it underscores the idea that exercising the right to abortion requires an infrastructure of medical provision. It is not something women can do entirely on their own. Indeed, this was a core argument of those challenging the constitutionality of Texas’s prohibition of abortion in *Roe*. Laws outlawing abortion were criminal laws, but the central problem women in Texas were facing was not the threat of prosecution—Texas did not prosecute women who obtained abortions any more than Connecticut had prosecuted women who used birth control—but rather the lack of an infrastructure of abortion provision. As in *Griswold*, the most tangible effect of prohibitory regulation was to suppress the development of networks of medical institutions and practitioners necessary to the realization of reproductive rights. And as in Connecticut, pre-1965, the lack of such an infrastructure took its greatest toll on poor women—like the woman who challenged Texas’s abortion law in *Roe*. *Roe* was poor and unemployed; she’d had a rough life. She lacked access to the private practices in which doctors in Texas sometimes performed abortions in contravention of the law and she did not have the funds to travel to a clinic in Mexico or to one of the coastal states where abortion was legal.

The Court vindicated *Roe*’s right to an abortion. But what did that mean? Critics of *Roe* argue that it simply decriminalized the procedure—it freed women who sought abortions from the threat of arrest. *Roe*, however, never mentioned this threat. The plaintiff in the case was not challenging a criminal conviction. She was not arguing that she had been arrested or prosecuted under an unconstitutional law. The Court in *Roe* did not even conjure up an image of fictional police invading a fictional clinic and arresting a fictional woman for obtaining an abortion. *Roe*’s complaint was that Texas had made it impossible for her to obtain an abortion because it

had effectively blocked her access to the procedure. The Court agreed that this was a constitutional problem.

Commentary on *Roe* frequently notes that Justice Harry Blackmun conceived of his majority opinion in the case at the Mayo Clinic, to which he retreated in the summer of 1971 for precisely that purpose. In the decade before he became a judge, Blackmun served as general counsel at the Mayo Clinic, and scholars often cite that association by way of explaining *Roe*'s focus on physicians. Feminist scholars suggest that Blackmun's deep and abiding respect for doctors blinded him to issues, such as women's equality, that were not visible through the medical lens he adopted. But if Blackmun's affiliation with the Mayo Clinic contributed to his failure to appreciate the sex equality dimensions of the abortion question, it also made him more keenly aware of issues relating to medical infrastructure.

Mortality and morbidity statistics relating to illegal abortion in this period were grim. As the plaintiffs in *Roe* emphasized, poor women in particular suffered from the ill effects of such abortions. Large municipal hospitals in the 1950s and 1960s had dedicated "septic abortion wards." Treatment for the complications of "incomplete abortion" was a leading cause of hospital admission for obstetric and gynecological services.³⁰ Against this backdrop, Blackmun and his colleagues were not persuaded by the argument, put forward at one point in the litigation by *Roe*'s lawyers, that women are constitutionally entitled to terminate their pregnancies "in whatever way" they choose. The Court observed that what the plaintiff in *Roe* actually sought was not the right to a back-alley abortion, but the right to "a legal abortion under safe conditions." That right, the Court held, could not be fulfilled simply through deregulation.

Alexander Bickel, Archibald Cox, John Hart Ely, and numerous other constitutional theorists in the 1970s, harshly criticized *Roe* on the ground that it "read like a set of hospital rules and regulations" rather than an articulation of principled legal doctrine. Bickel referred to the Court's opinion, derisively, as a "model statute," suggesting the Justices were more concerned with devising specific guidelines for the provision of abortion than engaging in any kind of constitutional reasoning. These critics were right: The Court expended a remarkable amount of energy in *Roe*, and even more in its companion case, *Doe v. Bolton*, articulating rules regarding the new institutions and practitioners that would make abortion available to women. *Roe* held that states could require that the procedure be performed by doctors. It also held that state could regulate the type of facility in which second and third trimester abortions would be performed, "whether it must be a hospital or may be a clinic or some other place of less-than-hospital status." *Doe v. Bolton* was even more strongly focused on questions regarding the institutions in which abortion would be performed. *Doe* held that the Fourteenth Amendment barred states from requiring that abortions be performed in hospitals accredited by the Joint Commission on Accreditation of Hospitals. It also invalidated Georgia's practice of requiring that the procedure be pre-approved by a special hospital abortion committee and that the performing physician's judgment be confirmed by independent examinations of the patient by two other licensed physicians.

The Court's articulation of these guidelines had a transformative effect on the landscape of abortion provision in the United States. *Roe* overturned laws banning abortions in a solid

³⁰ David A. Grimes, *Every Third Woman in America* (2014).

majority of states. But the Court's 1973 abortion rulings did more than that. They also invalidated numerous other state laws, like the one deemed unconstitutional in *Doe*, that limited women's access to abortion without cutting it off entirely. Thus the combined effect of *Roe* and *Doe* was to vastly increase the availability of abortion. The Court strongly suggested in *Roe* and *Doe*—and later confirmed in *City of Akron v. Akron Center for Reproductive Health* and *Ashcroft v. Planned Parenthood of Kansas City*—that, except in rare circumstances, laws requiring that abortions be performed in hospitals are unconstitutional. This holding alone radically expanded the infrastructure of abortion provision in the United States. In 1973, the vast majority of hospitals, even in states that permitted abortion, opted not to perform the procedure. Thus, the Court's determination that states could not restrict the provision of abortion to hospitals, but must allow non-hospital facilities to perform it, was critical to enabling women to exercise their constitutional right to abortion. Between 1973 and 1976, the number of non-hospital providers of abortion grew overall by 152%; in non-metropolitan areas, that number grew by a whopping 304%—a rate of growth many times that of hospital providers. Within a year or two of *Roe* and *Doe*, most abortions in the United States were being performed in the new ecosystem of clinics these decisions had envisioned and enabled.

In his dissenting opinion in *Roe*, Justice William Rehnquist argued that the concept of privacy was inadequate to capture the form of constitutional protection the Court had extended to the practice of abortion. Rehnquist observed that Texas's law had barred “the performance of a medical abortion by a licensed physician,” and that “a transaction resulting in an operation such as this is not ‘private’ in the ordinary usage of that word.” He had a point. For a pair of opinions ostensibly about the “right to be let alone,” *Roe* and *Doe* devote an inordinate amount of attention to abortion providers—the medical institutions and doctors with whom women interact when they seek to terminate a pregnancy. *Roe*'s overwhelming focus on abortion providers has been treated as an oddity, an aberration, and an indication of the Court's failure to appreciate the connection between reproductive rights and equal citizenship status for women. But *Roe*'s focus on hospitals, clinics, and physicians was not a quirk or an aberration. It was a reflection of the fact that, like the right to vote and the right to a fair trial, the right to abortion is not one individuals can exercise simply by being left alone.

Thus, the observation of Bickel, Cox, and others that the Court's decision in *Roe* “read like a set of hospital rules and regulations” seems simultaneously to grasp and to miss the point. It is true that the Court's focus on medical infrastructure is a defining feature of its opinion. But it is only by interpreting *Roe* as a decision solely about privacy, in the ordinary usage of that word, that concerns about medical infrastructure appear extra-constitutional. *Roe* certainly protected some form of decisional autonomy. In 1973, the Court used the word privacy to describe this idea; today, it tends to use the word liberty. But the Court was quite explicit in *Roe* that the “pregnant woman cannot be isolated in her privacy.” The Court's decision was not simply about getting the state off women's backs. Indeed, in some ways the problem in *Roe* was not too much regulation, but too little. By criminalizing abortion, Texas had relegated the procedure to a kind of wild west in which women who became desperate enough sought out “illegal abortion mills” and attempted to self-abort, sometimes to disastrous effect. By invalidating Texas's prohibition of abortion, *Roe* summoned into being a new infrastructure of abortion provision—one that was safe, legal, and regulated. From this perspective, the blueprint for abortion-related infrastructure the Court unveiled in its foundational 1973 decisions looks

less like a foray into legislative territory and more like a judicial recognition that access to such infrastructure is a matter of constitutional concern.

B.

Opponents of abortion have long called for the overruling of *Roe*. But they are not the only ones who have imagined a better future without *Roe*. Numerous progressive scholars over the past few decades have urged the left to abandon *Roe*, to stop defending it and even allow it to be overruled. Much of the impetus for this argument stems from the erroneous notion that *Roe* instigated rather than responded to cultural conflict over abortion—that the Court’s decision “fanned into life an issue that has inflamed our national politics” rather than intervening in an existing conflict that almost certainly would have intensified even if the Court had remained on the sidelines. But this argument is also motivated by a conviction among some on the left that *Roe* is not worth it—that the costs of defending the decision outweigh the minimal protections it offers most women. After all, these left-leaning skeptics ask, what did *Roe* do? It did not guarantee women the right to an abortion. It simply limited the state’s ability to bring the criminal justice system to bear on women who seek abortions—which is not something the state ever did much of anyway.

Such arguments are a response not simply to *Roe*, of course, but to subsequent developments in reproductive rights law. In the decade after *Roe*, the Court issued a series of decisions—*Maher v. Roe*, *Poelker v. Doe*, and *Harris v. McRae*—in which it held that the government was not constitutionally obligated to provide abortion in public hospitals or to cover the procedure under Medicaid. These decisions have become synonymous with the idea that abortion is a purely negative right, in the conventional sense of that term: The state cannot prohibit a pregnant woman, at least early in her pregnancy, from purchasing an abortion, but if she lacks sufficient funds to do so, the state is under no obligation to provide her with one. This has led some feminist scholars, most notably Robin West, to advocate “deconstitutionalizing” the right to abortion. West argues that in a legal regime governed by *Maher*, *Poelker*, and *McRae*, proponents of reproductive justice ought to stop devoting so much time and energy to constitutional litigation and direct their efforts instead to state legislatures, which are at least institutionally competent to enact measures aimed at facilitating women’s access to abortion.

At bottom, this critique of constitutional reproductive rights law is a critique of a species of libertarianism—a critique of the general idea that deregulation is the answer to most political and economic problems and that individuals do best when the state refrains or is barred from interfering in their lives. Critics of the Court’s funding decisions view them—and much of contemporary Fourteenth Amendment doctrine for that matter—as instantiations of these libertarian ideals. They argue that this philosophy, as it has been incorporated into law, has little to offer those who lack sufficient resources to fulfill their needs, or exercise their rights, on their own.

Of course, poor women often do struggle to obtain abortions; some of the obstacles they face would undoubtedly be smaller if the funding cases had come out the other way. It is also obviously true that constitutional law took a more conservative and libertarian turn in the mid-1970s, and that rulings dating from that period continue to shape Fourteenth Amendment

doctrine today. One idea that became important in these years, and that continues to shape our thinking, is the idea that we face a binaristic choice: either we interpret due process and equal protection to impose affirmative funding obligations on the state or we interpret these provisions as a shield against the state, leaving individuals free to exercise their rights unburdened by governmental interference. This dichotomous way of framing the possibilities presented by the Fourteenth Amendment has certainly been influential. Even the feminist critique of reproductive rights law outlined in the preceding paragraphs recapitulates it. But, this section argues, it is not the only way of thinking about the rights-protecting function of the Fourteenth Amendment. Indeed, even *Maher*, *Poelker*, and *McRae*—which very clearly rejected the notion that the Constitution, in the normal course of things, obligates the state to fund the right to abortion—do not fit neatly into either of these rigid conceptual boxes.

Nearly forty years on from the funding decisions, we are accustomed to the notion that the state is not constitutionally obligated to cover abortion under Medicaid or provide it in public hospitals. Yet in the years immediately following *Roe*, virtually all of the courts that considered the question reached the opposite conclusion. These early funding decisions followed the pattern Frank Michelman described. Courts often framed their rulings in equal protection terms, holding that the government could not refuse to pay for abortion if it covered the cost of childbirth. Some judges reasoned even more broadly in this vein, holding that requiring the government to fund abortion was necessary in order to ensure that the right to abortion did not become a privilege enjoyed only by those with financial means. These courts did not explicitly declare abortion to be a positive right, entitling individuals to government provision, but they came pretty close—in the same way the Warren Court’s equality-based poverty decisions had come pretty close to protecting certain minimal entitlements.

The Court declined to follow this approach in *Maher*, *Poelker*, and *McRae*. By the time these cases reached the Court, it had already issued numerous decisions repudiating the Warren Court’s methods of protecting the poor through the Fourteenth Amendment. These decisions were indicative not simply of a change in Court personnel, but also of the ascendance of a powerful new libertarian school of thought. This new libertarianism was not predominantly or even primarily a *legal* school of thought. Its bible, Robert Nozick’s *Anarchy, State, and Utopia*, was not a work of constitutional theory; its most famous and influential proponents were not law professors but political philosophers and economists. Nonetheless, the new advocacy of a minimal state, “limited to the narrow functions of protection against force, theft, fraud, enforcement of contracts, and so on,” had powerful implications for constitutional law. Numerous legal scholars, Robert Bork and Charles Fried among them, published books and articles in this period arguing that the United States Constitution was simply and exclusively a charter of negative liberties. These scholars condemned the Warren Court’s approach to constitutional conflicts involving economic inequality and forcefully rejected the suggestion that the Fourteenth Amendment could be interpreted to guarantee certain minimal entitlements.

In part because the new libertarians drew a sharp conceptual dividing line between the state and the market, they conceived of possible constitutional responses to economic deprivation in starkly dichotomous terms. *Either* the Fourteenth Amendment worked as Michelman had suggested, and entitled individuals to certain goods and services, to be provided by government. *Or* it was a purely libertarian provision that limited state interference in individual’s lives and

provided them with nothing beyond that, not even the basic tools necessary to exercise fundamental rights. By the 1980s, it had become clear that the Court was repudiating the former approach. By then, the new libertarianism had become sufficiently influential that legal commentators across the ideological spectrum interpreted the Court's rejection of the former approach as a firm embrace of the latter one.

Scholars frequently characterize *Maher*, *Poelker*, and *McRae* as having placed the question of poor women's access to abortion beyond the scope of constitutional concern and defined the right recognized in *Roe* as a purely negative right—a right to contract to purchase an abortion using private funds without being punished by the state. This characterization in turn leads some on the left to advocate giving up on constitutional law as a means of pursuing equal citizenship for women, at least in the reproductive context. “To be a meaningful support for women's equality or liberty,” Robin West argues

a right to legal abortion must mean much more than a right to be free of moralistic legislation that interferes with a contractual right to purchase one. It must guarantee access to one. And, for a right to legal abortion to guarantee that a woman who needs an abortion will have access to one, whether or not she can pay for it, the state must be required to provide considerable support. But the Court has consistently read the Constitution as not including positive rights to much of anything from the state, and certainly not to abortion procedures.

West goes on to suggest that there is no meaningful possibility that the Court will commence a jurisprudence of positive constitutional rights, and practically no chance it will do so in the contested terrain of public funding for abortion.

West's prediction has every chance of being right. It is difficult to imagine the Court, at least in the foreseeable future, holding that the Fourteenth Amendment imposes an affirmative funding obligation on the state in the context of abortion. But we should not be so quick to assume that mandating state funding is the only judicial means available under the Fourteenth Amendment of facilitating and protecting access to abortion—or to conclude that the Court's failure to impose such a mandate is tantamount to declaring that due process and equal protection safeguard only women's right to be let alone. Such a conclusion obscures the fact that, even in the funding decisions, the Court drew a sharp distinction between the withdrawal of public funding for abortion and state action that interferes with women's ability to access the procedure. The former was constitutionally acceptable, the Court held, the latter constitutionally suspect.

The Burger Court did not invent this distinction; it was already present in the opinions of the judges who dissented in the early funding cases in the first half of the 1970s. Dissenting judges in those early cases—the judges who would have held, as the Court later did, that funding was not constitutionally required—readily agreed with their colleagues in the majority that the Fourteenth Amendment constrained the state from destroying, or denying women access to, the new infrastructure of abortion provision *Roe* had helped to create. But, they argued, withdrawing state funding for abortion did neither of those things. In cases involving public hospitals, dissenting judges observed that “many public and private clinics . . . perform abortions in accordance with the decisions in *Doe* and *Roe*”; thus, they argued, prohibiting abortion in this

one category of medical institutions did not “significantly dampen[]” women’s ability to exercise their constitutional rights. One dissenting judge explained that “[i]t is crucial” to the constitutional evaluation of prohibitions of abortion in public hospitals “that the State has no monopoly on performing abortions and in fact is not in the business to any significant degree.” Similarly, in the context of Medicaid, the state was not the only actor in the field: one judge noted that the Court’s 1973 abortion decisions had spurred the development of “various non-profit organizations” and “private charitable funds” that now played a significant role in enabling women to exercise the abortion right.

By the late 1970s, these arguments had migrated from the losing side to the winning side in legal battles over the constitutionality of the state’s withdrawal of funding for abortion. In *Poelker v. Doe*, which involved a challenge to a mayoral directive in St. Louis, Missouri barring the city’s two public hospitals from performing abortions, the city’s lawyer pointed out that the policy had not prevented the plaintiff from obtaining an abortion. It had simply required her to visit a Planned Parenthood clinic—which she did. Dissenting judges in the early funding cases had adduced evidence of this sort to argue there was a crucial distinction between a state’s withdrawal of public funding for abortion and state action that blocked women’s access to the new (legal and regulated) infrastructure of abortion provision in the United States. A few years later, this distinction carried the day at the Supreme Court. *Maher*, *Poelker*, and *McRae* all rested on the notion that requiring the state to pay for abortion was conceptually and constitutionally different from limiting its ability to interfere with the new network of abortion providers in this country—many of which were non-profit organizations.

Of course, one could conceive of the termination of public funding for abortion as a form of interference in its provision. The dissenting Justices in *Maher*, *Poelker*, and *McRae* conceived of bans on abortion in public hospitals and exclusion of the procedure from Medicaid coverage in just this way. Academic commentary on the funding cases often focuses on the differing conceptual baselines from which the Justices started and how these different baselines shaped their divergent perceptions of what constitutes interference. But there were also points of consensus between the majority and dissenting opinions in these cases, and one in particular is worth noting: both sides in the funding cases agreed the Fourteenth Amendment protects women’s access to the infrastructure of abortion provision the Court’s foundational 1973 abortion decisions had summoned into being.

Feminist critics have long argued that the outcome in the funding cases followed inexorably from *Roe*’s privacy framework. Privacy is the promise of governmental non-interference, critics argue; its primary objective, in the context of reproductive rights, is to wall off domestic spaces from the prying eyes of the state, to guarantee individuals some measure of autonomy, to enable their seclusion. Framing the abortion right in these terms makes it difficult³¹ to argue that the Constitution compels the government to pay for abortion. Indeed, Catharine MacKinnon observed in the wake of the funding cases, “[i]t is apparently a very short step from that which the government has a duty *not* to intervene in to that which it has *no* duty to intervene in.”³² On this view, the die was cast in the funding cases years earlier, when the Court

³¹ Although certainly not impossible: see Anita Allen; Linda McClain.

³² MacKinnon.

elected to protect women’s right to abortion as a matter of privacy rather than as a matter of equality—a rationale that would have lent itself more easily to claims on the public fisc.

The aim of this section is not to defend (or critique) the privacy rationale. Rather, its aim is to show that by the time of the funding cases, reproductive rights law had moved far beyond simply protecting “the sacred precincts of the marital bedroom.” *Roe* and *Doe* had implicitly held that the Fourteenth Amendment limits the state’s ability to suppress the development of an infrastructure of abortion provision. By the late 1970s, constitutional doctrine was explicitly oriented toward protecting this infrastructure. That does not mean, of course, that courts have always pushed back against state regulation that diminished this infrastructure as forcefully as abortion-rights advocates would have liked. But it is a mistake to conclude that because the Court refused to recognize abortion as a positive right, to be paid for by the state, constitutional doctrine is intrinsically incapable of facilitating women’s access to the procedure. As the next section shows, requiring the state to spend public funds on abortion is not the only judicial means of expanding the infrastructure through which women access the procedure and enabling individuals to exercise their rights.

C.

In 2013, David Dewhurst, then-Lieutenant Governor of Texas, posted on Twitter a map of Texas nearly denuded of abortion clinics, beneath which he jubilantly declared, “We fought to pass S.B. 2 thru the Senate last night, & this is why!” The law to which Dewhurst was referring, which eventually became known as H.B. 2, required doctors who perform abortions to obtain admitting privileges at nearby hospitals and clinics that provide abortions to outfit themselves as ambulatory surgical centers. Very few abortion providers in Texas (or anywhere else) are able to comply with such requirements, and so the legislation had its intended effect. The admitting-privileges requirement closed down roughly half of the forty-one clinics in the state; the surgical-center requirement threatened to half the remaining number, leaving Texas—a state with a population of 25 million—with only seven or eight clinics.

A lawsuit ensued. The plaintiff in the case, as in so many other reproductive rights cases, was a clinic, or more accurately, a private organization named Whole Women’s Health that operated a chain of women’s health clinics, some of which were closed by the Texas law. The identity of the plaintiff did not go unnoticed by the dissenting Justices at the Supreme Court, who vigorously disputed that Whole Women’s Health had standing to challenge the law. Justice Thomas argued that, given that Texas was not facing any shortage of abortion-seeking women, there was no justification for permitting a clinic to assert rights that actually belonged to its clients. Justice Alito suggested that the majority’s decision to allow the suit to proceed was yet another example of the favoritism the Court has exhibited toward advocates of abortion rights dating all the way back to *Doe*, in which the Court found that a group of doctors who treated pregnant women had standing to challenge their state’s abortion regulations. Thomas argued that the Court’s “creat[ion] [of] special rules that cede [the] enforcement” of the abortion right to providers was particularly galling in light of the fact that the Court had characterized that right as “involv[ing] the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy.”

Favoritism is one possible explanation for the Court’s perennial willingness to permit clinics to bring constitutional challenges to abortion regulations. But another explanation—one borne out by myriad judicial opinions—is that the right to abortion has never simply entailed a right to privacy, in the conventional sense of that term. It has always encompassed concerns about the infrastructure through which abortion is provided, both because that is what regulation has traditionally sought to inhibit, and because abortion is not something one (safely) does on one’s own. Abortion rights are inextricably bound up with questions regarding the infrastructure that facilitates their exercise—a fact that is reflected in the prevalence of providers among the ranks of those challenging the constitutionality of abortion regulation. As Judge Posner observed in a 2013 case, in which Planned Parenthood successfully challenged the constitutionality of Wisconsin’s admitting-privileges law, this is not a context in which “[t]he principal objection to third-party standing[,] . . . that it wrests control of the lawsuit from the person or persons primarily concerned in it,” comes into play.³³ Women who wish to have abortions are “seeking the same thing the clinics are seeking (with greater resources): invalidating . . . statutes” that interfere with infrastructures of abortion provision.³⁴

The Court in *Whole Women’s Health* vindicated the clinic’s claim and held that Texas’s admitting-privileges and surgical-center requirements unduly burdened the right to abortion. The undue burden test, which the Court adopted a generation earlier in *Planned Parenthood v. Casey*, bars restrictions on abortion that have “the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus.” *Whole Women’s Health* makes clear that the determination of whether a regulation constitutes an undue burden is a matter of balancing, in which courts must “consider the burdens a law imposes on abortion access together with the benefits those laws confer.” Commentary on *Whole Women’s Health* has focused primarily on the Court’s analysis of the health benefits purportedly conferred by Texas’s law. The Fifth Circuit essentially held in this case that courts must simply accept legislative assurances that abortion restrictions passed in the name of protecting women’s health actually serve that purpose. The Court rejected this deferential approach, holding that judges must scrutinize abortion restrictions framed as protective of maternal health to see if they actually produce any health benefits. After applying such scrutiny, the Court concluded that neither of the requirements H.B. 2 imposed benefitted women’s health.

It is on the other side of the scale where the Court’s concerns about infrastructure become most apparent. In evaluating the burden H.B. 2 places on women’s access to abortion, the Court observes that its enforcement would reduce the number of clinics in the state by more than 75%. Other federal courts evaluating similar requirements in other states have also focused on their deleterious effects on clinical infrastructures. The Seventh Circuit affirmed a district court’s decision enjoining Wisconsin’s admitting-privileges law in part because it would have halved the number of clinics in the state, from four to two. The Fifth Circuit itself concluded that Mississippi’s admitting-privileges law constituted an undue burden because it would have closed

³³ *Planned Parenthood of Wisconsin v. Van Hollen*, 738 F.3d 786, 794 (7th Cir. 2013).

³⁴ *Id.* Courts have sometimes held that abortion providers have third-party standing to challenge restrictions on abortion, and sometimes—typically where penalties for violation of the law are visited on providers—held that providers have first-party standing. My aim here is not to investigate the question of standing in any depth, but to observe that among the reasons almost all abortion cases involve clinics and/or doctors is that the right to abortion is wholly bound up with the health of the infrastructure through which it is provided.

the only clinic remaining in the state. Judge Myron Thompson ruled that Alabama’s admitting-privileges law was unconstitutional in large part because it would have forced three of the state’s five abortion clinics to stop performing the procedure. The Court noted in *Whole Women’s Health* that the closure of significant numbers of clinics would mean “fewer doctors, longer waiting times, and increased crowding” at the clinics that remained.

These were not abstract generalities to the Court—the Court found persuasive, and cited, specific evidence about the extent of Texas’s infrastructure of abortion provision in relation to the state’s population and geographic size. The Court noted specifically that after the admitting-privileges requirement took effect in Texas, “the number of women of reproductive age living in a county . . . more than 150 miles from a provider increased from approximately 86,000 to 400,000 . . . and the number of women living in a county more than 200 miles from a provider from approximately 10,000 to 290,000.” In other words, the Court explained,

Texas seeks to force women to travel long distances to get abortions in crammed-to-capacity superfacilities. Patients seeking these services are less likely to get the kind of individualized attention, serious conversation, and emotional support that doctors at less taxed facilities may have offered. Healthcare facilities and medical professionals are not fungible commodities. Surgical centers attempting to accommodate sudden, vastly increased demand may find that quality of care declines.

Here too, the Court was echoing other federal courts that had cited, as a reason for invalidating regulations targeting abortion clinics, the range of practical difficulties women—particularly poor women—encounter when states constrict the clinical infrastructure through which abortion is provided.

Judicial concerns about women’s access to a reliable infrastructure of abortion provision stretch all the way back to 1973, when the Court first suggested that laws restricting abortion are constitutionally suspect when they leave pregnant women stranded and alone, with no practical way of accessing the procedure. In *Roe*, Justice Blackmun cited the prevalence of “illegal abortion mills,” and the need to protect their potential clientele, as a reason for limiting the extent to which the government could suppress the development of a safe and legal infrastructure of abortion provision. In *Whole Women’s Health*, Justice Ginsburg expressed similar concerns, observing that “[w]hen a State severely limits access to safe and legal procedures, women in desperate circumstances may resort to unlicensed rogue practitioners, *faute de mieux*, at great risk to their health and safety.”

Whole Women’s Health does not explicitly hold that targeted regulation of abortion providers that drives significant numbers of them out of business is automatically unconstitutional. But if the state seeks to defend such regulation on the ground that it protects women’s health, it is hard to imagine, in the wake of the decision, how such regulation could survive constitutional review.³⁵ The Court’s opinion makes clear that women have a compelling

³⁵ Justice Ginsburg asserts that no such regulation can survive constitutional review after *Whole Women’s Health*. See *Whole Women’s Health*, 136 S.Ct. 2292, *2321 (Ginsburg, J., concurring) (“Targeted Regulation of Abortion Providers laws like H.B. 2 that ‘do little or nothing for health, but rather strew impediments to abortion,’ cannot survive judicial inspection.”).

interest in the preservation of legal infrastructures of abortion provision and that abortion, when practiced within such infrastructures, is one of the safest medical procedures in the United States. Given the infinitesimally small rate of medical complications associated with abortion in twenty-first century America, it is difficult to see how health-based restrictions that significantly impinge on the infrastructure through which abortion is provided could yield benefits of sufficient magnitude to override women's strong constitutional interest in accessing the procedure.

The chief effect of the Court's decision in *Whole Women's Health* was to protect the infrastructure of abortion provision in Texas and thus the availability of the procedure to Texas women. It reduced the distances women have to drive to reach a clinic and how long they have to wait once they get there; it cut back on the overcrowding about which the Court was concerned and may have increased the quality of care abortion providers are able to offer their patients. There are certainly differences between the infrastructure of criminal defense lawyers *Gideon* created and the infrastructure of abortion clinics that resulted from *Roe* and *Doe*—for one thing, the government is constitutionally obligated to fund the former and not the latter. But there are also similarities—similarities that are hard to see within existing conceptual frameworks in constitutional law. Both of these infrastructures are essential to enabling individuals to exercise fundamental constitutional rights. And each, in its own way, is substantially a product of, or at least very significantly bound up with, the implementation of the Fourteenth Amendment.

Descriptions of abortion as a purely negative contractual right to purchase an abortion on the free market capture an important facet of the right. The Court has not held that the state is obligated to fund the procedure, even for poor women. But this conventional negative rights frame obscures other important facets of the right—in particular, the extent to which the market in which abortion contracts are made is itself a creature of constitutional law. *Roe* and *Doe* did not simply legalize abortion; they created a new, non-black market for the procedure and issued an initial set of guidelines for the operation of that market. Some of those guidelines were directed at abortion providers; they concerned who could perform the procedure, when and where. Others were directed at legislatures; they began to define the parameters of permissible state regulation in the marketplace for abortion. *Roe* and *Doe*, and the decisions that followed in their wake, also created guidelines for courts. These guidelines require judges to scrutinize regulation that interferes with women's ability to access abortion, and, when such regulation makes abortion too hard to obtain, to invalidate it.

This kind of protective monitoring of the infrastructure through which women access abortion is not the same thing as requiring the state to pay for the procedure through Medicaid and public hospitals. But both are means of facilitating women's access to abortion—and it may be that the former is nearly as effective as the latter. As Justice Thomas suggests in *Whole Women's Health*, the Court's decision imperils the constitutionality of a range of consequential abortion restrictions. Thomas notes that, in the late 1990s, the Court upheld “a Montana law authorizing only physicians to perform abortions—even though no legislative findings supported the law, and the challengers claimed that “all health evidence contradict[ed] the claim that there

is any health basis for the law.”³⁶ Were the Court to scrutinize such a law today, it would find that all medical evidence indicates that first-trimester abortions are just as safe when performed by trained nurse practitioners, physician assistants and certified nurse midwives as when performed by physicians.³⁷ Nearly a third of states already allow such practitioners to perform medical abortions, and some states allow them to perform surgical abortions as well. There is scant evidence to suggest that barring licensed and medically trained non-physicians from performing abortions yields any health benefits for women.

Nor is there any evidence to suggest that barring the use of telemedicine as a method of administering abortion makes women safer. More than thirty states already permit this practice and medical research shows it to be exceedingly safe—no more prone to complications than other medical protocols states allow to be implemented through telemedicine and often less so.³⁸ As the Iowa Supreme Court recently observed in a decision invalidating that state’s ban on telemedical abortions: there are no documented health benefits that stem from requiring a physician to be physically, as opposed to virtually, present in the room when the patient takes the first of the two pills that are part of the medical abortion protocol (the second pill the patient takes at home regardless of the circumstances under which she took the first pill).

If the health benefits of banning telemedical abortions are “very limited,”³⁹ the interests on the other side of the scale are profound. This same imbalance is present in the context of physician-only laws. These laws, particularly when they operate together, have a devastating effect on access to abortion, particularly among the “poor, rural, or disadvantaged” women about whom *Whole Women’s Health* was especially concerned.

Of course, law is not just science. It remains to be seen whether *Whole Women’s Health* will in practice spell the end of what Justice Ginsberg refers to as the targeted regulation of abortion providers. What is certainly true, however, is that invalidating such laws would greatly expand the infrastructure of abortion provision in the United States and significantly broaden women’s access to abortion. It would increase the number of providers, alleviate waiting times, shorten driving distances, reduce the cost, and lessen the burden on the currently overtaxed medical professionals who currently perform abortions. It may be that overturning the funding cases, and requiring states and public hospitals that do not already subsidize abortions for poor women to do so, would expand access to an even greater degree than invalidating the targeted regulation of abortion providers—although, in truth, it is hard to judge. The aim of this section is not to weigh the relative impact of these two forms of judicial intervention. It is to point out that styling the right to abortion as a negative right, as American courts have done since the late

³⁶ (Thomas, J., dissenting) (noting that the Court’s decision to uphold Montana’s physician-only law rested on the notion, seemingly contradicted by *Whole Women’s Health*, that “the Constitution gives the States broad latitude to decide that particular functions may be performed only by licensed professionals, even if an objective assessment might suggest that those same tasks could be performed by others”).

³⁷ See *Armstrong v. State*, 989 P.2d 364, 386 (Mont. 1999) (collecting studies and concluding that they required invalidation of a physician-only law); see also Tracy A. Weitz, *Safety of Aspiration Abortion Performed by Nurse Practitioners, Certified Nurse Midwives, and Physician Assistants Under a California Legal Waiver*, 103 Am. J. of Pub. Health 454 (2013) (finding no differences between different categories of providers).

³⁸ The rate of clinically significant adverse events from medication abortion is 0.16 percent, comparable to those of commonly prescribed antibiotics.

³⁹ *Planned Parenthood of the Heartland v. Iowa Bd. of Medicine* 268 (Iowa) (2015).

1970s, does not tell us most of what we need to know about the law’s potential to facilitate women’s access to the procedure. As *Whole Women’s Health* demonstrates, judicial enforcement of negative rights can be a powerful tool for facilitating people’s—particularly poor people’s—access to infrastructures of provision essential to the realization of constitutional rights.

Part III

The massive increase in abortion regulation over the past few years,⁴⁰ especially of the sort that restricts access to the procedure, has prompted courts to examine more closely than they have in the past the toll such regulation takes on poor women in particular. In the middle of its opinion striking down Wisconsin’s admitting-privileges law, the Seventh Circuit inserted a map illustrating how the closure of half of the state’s clinics would affect access to abortion. The court noted that 60% of the clinics’ patients have incomes below the federal poverty line, and found that increased driving times were “a nontrivial burden on the financially strapped and others who have difficulty traveling long distances to obtain an abortion, such as those who already have children.” Judge Myron Thompson expanded on this point in his opinion invalidating Alabama’s admitting-privileges law. He observed that, “[a]s a preliminary matter,” when evaluating the constitutionality of abortion restrictions, “it is essential to understand that the large majority of abortion patients, particularly in Alabama, survive on very low incomes.”⁴¹ Thompson then described the challenges the Alabama law would present for poor women:

For these women, going to another city to procure an abortion is particularly expensive and difficult. Poor women are less likely to own their own cars and are instead dependent on public transportation, asking friends and relatives for rides, or borrowing cars; they are less likely to have internet access; many already have children, but are unlikely to have regular sources of child care; and they are more likely to work on an hourly basis with an inflexible schedule and without any paid time off or to receive public benefits which require regular attendance at meetings or classes. A woman who does not own her own car may need to buy two inter-city bus tickets (one for the woman procuring the abortion, and one for a companion) in order to travel to another city. Without regular internet access, it is more difficult to locate an abortion clinic in another city or find an affordable hotel room. The additional time for travel to the city requires her to find and pay for child care or to miss one or several days of work.

He found, as numerous other courts have, that such factors are critical to determining whether a law restricting abortion violates the Fourteenth Amendment.

The Fifth Circuit, however, disagreed. It held in a series of key decisions that obstacles that arise from unfortunate circumstances in women’s private lives—such as a lack of

⁴⁰ The 334 abortion restrictions enacted by states between January 2011 and July 2016 account for 30% of all abortion restrictions since *Roe v. Wade*. Guttmacher Institute.

⁴¹ For example, the Judge noted that more than 70% of the patients at Planned Parenthood’s clinics in Mobile and Birmingham live at or below 150% of the poverty line, and that the administrator of the Mobile clinic testified that 90% of that clinic’s patients live in poverty.

transportation or inability to afford childcare—are irrelevant to the determination of whether a law restricting access to abortion qualifies as an undue burden. The Fifth Circuit noted that the Court had explained in the funding cases that “[t]he financial constraints that restrict an indigent woman’s ability to enjoy the full range of constitutionally protected freedom of choice are the product not of governmental restrictions on access to abortions, but rather of her indigency.”⁴² Indeed, the Fifth Circuit observed, the Court had explicitly stated in those cases that “[t]he indigency that may make it difficult—and in some cases, perhaps, impossible—for some women to have abortions is neither created nor in any way affected by the state’s regulation,”⁴³ and thus is not a matter of constitutional concern. Applying this reading of the funding cases in *Whole Women’s Health*, the Fifth Circuit found that because the challenges associated with being poor were not created by the government, those challenges have no bearing on whether Texas’s admitting-privileges and surgical-center requirements constitute substantial obstacles.⁴⁴

The Court rejected this interpretation. It made clear in *Whole Women’s Health* that the undue burden calculus considers the interaction between the life circumstances of women—including those who are “poor, rural, [and] disadvantaged”—and the restriction imposed by the state in determining whether that restriction constitutes a substantial obstacle. The Fifth Circuit erred when it interpreted the funding decisions to mean that concerns about poor women’s access to abortion were categorically irrelevant under the Fourteenth Amendment. What those decisions actually held was that the state was not constitutionally obligated to devote public funds to the project of helping women overcome financial barriers it had no part in creating. As we have seen, those decisions drew a sharp line between the state’s unwillingness to pay for abortion and its imposition of barriers to abortion. The Court in no way suggested that concerns about poor women’s access to abortion were irrelevant to the constitutional evaluation of laws that actively impeded that access; indeed, it suggested the opposite.

The Fifth Circuit’s misreading of the funding cases was not a random error. It was the product of a certain dichotomous way of thinking about constitutional rights. Abortion is not a positive right, the court reasoned; it is a purely negative one. Negative rights are intended to thwart the state and enable “private individuals to mind their own business, to breathe and act freely in unregulated social realms.” Disregarding the fact that everything about the market for abortion in this country—including its accessibility—is a product of state regulation, the Fifth Circuit conceived of poor women as free-market actors and viewed their diminished capacity to exercise the right to abortion solely as a product of their own impecuniness. Constitutional law does not guarantee or even facilitate people’s ability to exercise their rights, the court reasoned: it merely places some restrictions on what the state may do and leaves people free to take advantage of their rights to whatever extent their inclination and resources permit.

Parts I and II of this Article examined what this conception of constitutional rights obscures in the reproductive context. The Burger Court’s repeated rejection of positive rights claims—claims to affirmative financial support from the government—did not signal the end of all judicial concern about people’s practical ability to exercise their rights. The individual and the state are not the only actors in constitutional law. Courts may have rejected the notion that

⁴² Abbott (quoting *Harris v. McRae*).

⁴³ Abbott (quoting *Maher v. Roe*).

⁴⁴ *Whole Women’s Health v. Cole* (5th Cir. 2015) (citing *Maher and McRae*).

the Fourteenth Amendment requires the state to pay for abortion through Medicaid and public hospitals. But its decisions helped to create a largely non-governmental set of institutions responsible for the provision of abortion in this country. One of the central aims of constitutional doctrine in the context of reproductive rights is to protect this set of institutions from state action that significantly inhibits its important role in enabling women to realize their constitutional rights. As *Whole Women's Health* indicates, this doctrine is particularly skeptical of forms of regulation that make clinics difficult to access, in part because this type of regulation may abrogate poor women's ability to exercise their rights altogether.

This phenomenon—in which the law creates and maintains largely non-governmental infrastructures of provision essential to the realization of rights—is not limited to the reproductive context. It is a regular feature of American law. Indeed, it may be a defining feature of American law, given the relative dearth of explicit positive rights guarantees in United States Constitution and the distinctive American method of social provision with which this Article began. As Part III shows, overlooking this practice may lead not only to doctrinal misinterpretations of the kind made by the Fifth Circuit, but to widespread mischaracterizations of the way rights work in this country.

A.

Consider the right to travel. The Court has held the right to travel to be a fundamental right—part of the ‘liberty’ of which individuals may not be deprived without due process of law. In the late 1960s and early 1970s, the Court decided a pair of cases involving the right to travel that we might think of as the last of the Michelman cases. In *Shapiro v. Thompson*, the Court invalidated statutory provisions in several states that denied welfare assistance to otherwise-qualified applicants who had resided in-state for less than a year. In *Memorial Hospital v. Maricopa County*, the Court invalidated an Arizona statute that required individuals to live in-county for a year before they became eligible to receive non-emergency hospitalization or medical care at the county's expense. As it tended to do in these cases, the Court framed the problem in terms of equal protection: it held that these statutes unjustly discriminated between newcomers and long-time residents in a particular locale and that this unequal treatment newcomers received impinged on their right to travel. Michelman made mincemeat of the Court's equality reasoning in *Shapiro* (*Maricopa County* had not yet been decided) in his *Foreword*. He viewed the case as a vivid illustration of the precept “that a state's duty to the poor respecting their inner-circle interests is not to avoid unequal treatment at all, but rather to provide assurances against certain hazards associated with impecuniousness which even a society strongly committed to competition and incentives would have to find unjust.”⁴⁵

The Burger Court, of course, rejected the notion that the state was constitutionally obligated to spend public money to protect Americans from the hazards associated with impecuniousness. Ever since then, constitutional law casebooks have cited the right to travel as a classic example of a negative right. The state cannot prevent poor people from taking a bus from Connecticut to California, the books say, but it is under no obligation to buy them tickets. This statement is true, as far as it goes, but it is too facile. Compelling the state to buy bus tickets—or hotel rooms, or roadside meals—for people is not the only means at courts' disposal

⁴⁵ Michelman, 42.

of facilitating the right to travel. As this section shows, it only looks that way if we exclude non-governmental actors from our conception of how constitutional rights work.

For much of the twentieth century, statutes limiting welfare or medical services to longtime residents of an area would have been the least of the limitations African Americans faced when they sought to travel. In many parts of the country, hotels and motels would not rent them rooms, and roadside restaurants and gas stations would not serve them. The Constitution may theoretically have afforded them a right to travel, but in practice, that right was all too often hollow. In 1964, Congress stepped in to address this problem. Title II of the 1964 Civil Rights Act prohibited discrimination on the basis of race by “any inn, hotel, motel, or other establishment which provides lodging to transient guests,” and “any restaurant, cafeteria, lunchroom, lunch counter, soda fountain, or other facility principally engaged in selling food for consumption on the premises, including . . . any gasoline station.” The problem, however, was figuring out what part of the Constitution gave Congress the authority to pass such a statute. Section Five of the Fourteenth Amendment, which gave Congress the power to pass legislation enforcing the Due Process and Equal Protection Clauses was in some ways the most obvious candidate, but those Clauses had been interpreted to bar offensive behavior by the government, not by private actors.

In two landmark decisions, *Heart of Atlanta Motel v. United States*⁴⁶ and *Katzenbach v. McClung*,⁴⁷ the Court upheld the statute as an expression of Congress’s power to regulate interstate commerce. In explaining why Congress had enacted Title II, the Court noted “that Negroes in particular have been the subject of discrimination in transient accommodations, having to travel great distances to secure the same; that often they have been unable to obtain accommodations, and have had to call upon friends to put them up overnight.”⁴⁸ The Court observed that “these conditions had become so acute as to require the listing of available lodging for Negroes in a special guidebook which was itself ‘dramatic testimony to the difficulties’ Negroes encounter in travel.”⁴⁹

In a narrow doctrinal sense, all of this discussion relates to the Commerce Clause question: the nationwide scale and scope of the discrimination black travelers faced certainly underscored Title II’s close connection with interstate commerce. But the Court plainly had more than that in mind. In a classic synthesis of the New Deal and Civil Rights paradigms,⁵⁰ the Court in these cases used a relatively expansive conception of interstate commerce to effectuate a civil right to travel the country freely.

The Negro Motorist Green Book, to which the Court refers directly (although not by name) in the lines quoted above, was a literal catalogue of the infrastructure of travel: hotels, motels, “tourist homes” in private houses, and restaurants.⁵¹ These institutions may have been referred to as public accommodations, but they were very much closed to certain members of the

⁴⁶ 379 U.S. 241 (1964).

⁴⁷ 379 US 294 (1964).

⁴⁸ *Heart of Atlanta*, at 252-3.

⁴⁹ *Id.* at 253.

⁵⁰ See Ackerman, *We The People* vol. 3: The Civil Rights Revolution.

⁵¹ The Green Book was published from the 1930s through 1966. The 1956 edition is available online here: <http://digital.tcl.sc.edu/cdm/compoundobject/collection/greenbook/id/88>

public, and the Court in *Heart of Atlanta* and *McClung* opened them up. We should not allow the term public accommodations to distract us, however, from the fact that nearly every *public* accommodation in the Green Book was a *private* business or home.

Travel requires infrastructure of various kinds. It requires public investment in highways and roads; it requires some combination of public and private investment in rail lines and trains; it requires countless numbers of private businesses that spring up to cater to travelers' needs. The law of public accommodations can only do its work if it is able to take in this entire infrastructure, private as well as public, and make it accessible to travelers of all races.

There are, of course, significant differences between the infrastructure that enables individuals to travel and the infrastructure that enables women to exercise the right to abortion. *Heart of Atlanta* and *McClung* did not summon hotels and restaurants into being the way *Roe* and *Doe* summoned abortion clinics; the infrastructure that supports travel was already up and running, the Court just made it more widely accessible. In the public accommodations context, the threat to access was coming from a combination of public and private sources—state laws, but also the independent decisions of private owners of commercial institutions. In this context, Congress was the first mover: the Court upheld congressional legislation expanding individuals' access to forms of infrastructure essential to the realization of constitutional rights rather than, as in the context of abortion, developing legal doctrine that does the work without legislation. The central continuity between these contexts is this: the Court finds a way to facilitate access to essential forms of infrastructure without mandating that the state supply disadvantaged people with such access directly, using taxpayer dollars. Constitutional law, as the Court has articulated it in both of these contexts, facilitates access to infrastructures of provision indirectly, through its regulation of non-governmental actors (or its authorization of such regulation by Congress, in the public accommodations context).

Fair housing is another context—again quite different in many ways from the abortion context—in which this phenomenon occurs. The Court has not created any general positive right to government action aimed at building racially integrated housing.⁵² The vast majority of the nation's housing infrastructure, and therefore its fair housing infrastructure, is built, maintained, leased, and sold by private market actors rather than the state. In order to make this largely private housing infrastructure into a racially integrated, fair housing infrastructure, the Court creatively extended the state action doctrine. It held, in *Shelley v. Kraemer*,⁵³ that state courts violate the Fourteenth Amendment when they enforce racially restrictive covenants—thereby rendering such covenants unenforceable.

The aim of *Shelley*, the Court wrote, was to achieve “equality in the enjoyment of basic civil and political rights and the preservation of those rights from discriminatory action on the part of the States.”⁵⁴ This is a double-barreled formula whose two parts differ in an instructive way. The second, protection against “discriminatory action on the part of the states,” is couched in straightforward negative rights terms. However, the Court recognizes that the actual

⁵² Although a limited form of this does exist, through the Spending Clause, in the form of the government's obligation to affirmatively further fair housing under the Fair Housing Act.

⁵³ 334 U.S. 1 (1948).

⁵⁴ *Id.* at 23.

“enjoyment” of a civil right to racially unrestricted housing requires something more than simply the state’s forbearance—or at a minimum, it requires a creative reinterpretation of that forbearance—in order to restructure the entire private housing market to make it equally accessible to people of all races. Again, the Court found a way to help disadvantaged people realize their rights not by requiring the state to pay but by enlisting non-governmental actors in the project of expanding access to forms of infrastructure necessary to the realization of those rights. The next section discusses another, quite significant, context in which courts have relied on non-governmental actors to help ensure that individuals can actually exercise their rights.

B.

Rights against discrimination are, in some sense, negative rights: antidiscrimination law protects a right not to be discriminated against.⁵⁵ As in the context of abortion, however, the effectuation of these rights requires a substantial infrastructure. Part of that infrastructure is visible and public. It consists of judges and courts, as well as the many federal, state and local agencies charged with the enforcement of antidiscrimination protections. These institutions are funded directly through public expenditures—the mechanism at the center of Stephen Holmes’s and Cass Sunstein’s account of how even seemingly negative rights entail positive acts by government. But that is just the beginning. Antidiscrimination law as we have built in the United States also requires, as a form of necessary infrastructure, a private bar of lawyers willing and able to bring claims. But perhaps the largest component of the infrastructure is the least visible and least explicitly legal: the human resources bureaucracies *within private firms* (as well as similar bureaucracies within units of government). These bureaucracies are charged with the task of making compliance with the law occur; and more than that, they provide the main avenue by which disputes about discrimination in this country are resolved. Most of the time, these private bureaucracies are the key actors who actually give people access to their right not to be discriminated against.

Modern human resources (HR) departments and antidiscrimination law evolved in an intertwined way beginning in the 1960s and 1970s. As Frank Dobbin recounts in *Inventing Equal Opportunity*, his sociological and historical account of this process, the nascent HR profession saw antidiscrimination law as a powerful mandate to expand its role within American firms.⁵⁶ Indeed, it was exactly that. The open-ended demands of both statutory and court-made antidiscrimination law could only be made effective through the development of new corporate processes and infrastructures. The legal mandate to avoid engaging in discrimination would require, among other things, rationalizing and centralizing hiring and promotion processes; posting job opportunities; creating new grievance procedures; and hiring a phalanx of HR professionals to work within firms to ensure they fulfilled all of the legal responsibilities that arose from law’s bestowal of new rights on their employees.

⁵⁵ It is difficult to allow even this simple observation to pass without noting that important substantive dimensions of antidiscrimination law put pressure on the distinction between positive and negative rights. Federal antidiscrimination law, for instance, defines the failure to reasonably accommodate religion or disability as “discrimination.” In other words, the state must forbear from failing to do this. But another way to say this, perhaps a more natural way, is that antidiscrimination law imposes a positive obligation on the state *to* accommodate. For more on this, *see generally* Sam Bagenstos.

⁵⁶ FRANK DOBBIN, *INVENTING EQUAL OPPORTUNITY* (2009).

This is a massive story of infrastructural expansion, and telling it in full would take us beyond the scope of my argument here. But let us briefly consider just one corner of the story as a synecdoche for the rest. In the 1980s, as a result of feminist advocacy, cultural change, efforts by the EEOC, and work by HR professionals themselves, antidiscrimination law came to include protections against sexual harassment.⁵⁷ This was an important new right (or a new dimension of a preexisting right) whose process of coming into existence is evidence of the robustness of a norm-creating process that operates in large part outside the scope of the state itself, yet in its shadow. Dobbin argues that the “great paradox” of our constitutional system is that the comparatively limited reach of official government bodies, such as those charged with combating discrimination, “contributes to a powerful collective culture” in which many different types of actors outside of government play important roles in constructing our understanding of a phenomenon like discrimination.⁵⁸ Rarely has that been clearer than it was in the development of sexual harassment law.

Courts, however, did not simply take definitions of sexual harassment crafted by actors outside the courts and incorporate them into the meaning of discrimination “because of sex” under Title VII. They also focused on the infrastructure that would make the new legal protections against sexual harassment effective. Of course, courts themselves would play a role in enforcing these new protections. But they recognized that firms’ own internal anti-harassment policies, complaint procedures, investigational resources, and internal remedies—components not of a legal infrastructure, but of an HR infrastructure—would be more crucial in providing workers with a means of stopping harassment and preventing it in the future. Lacking confidence that every firm would construct such an infrastructure, either at all or in the right way, without specific guidance, courts set out to provide such guidance.

The most important guidance of this nature came in the form of a pair of 1998 Supreme Court decisions concerning sexual harassment, which crafted a new affirmative defense for employers.⁵⁹ The Court held in these cases that companies seeking to avoid liability for harassment by lower-level supervisors in violation of company policy would have the burden of proving they took reasonable steps to prevent and promptly correct harassment. Firms could satisfy this burden, the Court held, by implementing an adequate anti-harassment policy with an adequate complaint procedure, promptly and thoroughly investigating any allegations made through that procedure, and taking timely action in response to allegations that are substantiated.⁶⁰

This is a striking example of common-law decisionmaking in what is ostensibly a purely statutory context. Title VII describes various burden-shifting provisions in considerable detail⁶¹ but does not even hint at the new affirmative defense the Court devised in the wake of its recognition of sexual harassment as a form of sex discrimination. That affirmative defense quite self-consciously aimed to build an infrastructure, largely within private firms, that would enable

⁵⁷ MacKinnon, *Sexual Harassment of Working Women* (1979); EEOC Interim Guidelines 1980; *Meritor Savings Bank v. Vinson* 1986.

⁵⁸ Dobbin, 19.

⁵⁹ *Faragher v. Boca Raton*; *Burlington Industries v. Ellerth*.

⁶⁰ Ellerth, 765. Companies who asserted this affirmative defense would also have to show that the employee unreasonably failed to take advantage of this complaint procedure.

⁶¹ *See, e.g.*, the disparate impact burden-shifting system, which was incorporated into the text of the statute in 1991.

potential victims of sexual harassment to effectuate their rights. Courts continue to monitor and maintain this infrastructure every time they decide sexual harassment cases⁶²—seeking to ensure that the right against sexual harassment is not simply a right in theory, but one employees can effectuate in practice.

C.

Antidiscrimination law is just one piece—arguably the centerpiece, but not the whole—of civil rights law. If we extend our focus to that entire broad domain, the infrastructure that comes most readily into view is the one that is in some ways the most familiar: the infrastructure of the legal system itself. Enforcing civil rights law requires judges and courts, but it also requires an ecosystem of private lawyers who have the means and the incentive to bring civil rights cases. Indeed, this too is just a special case of a broader point: the same public and private elements make up the necessary infrastructure for enforcing a variety of private law rights as well, such as tort claims. But for the purposes of this Article, I will focus on civil rights.

A healthy ecosystem of private civil rights lawyers willing and able to bring cases is essential if people are to have access to most of the rights guaranteed by either the Constitution or statute or both. This point is most familiar in the criminal context where, as a result of *Gideon* and its progeny, the state actually does pay for (whether or not it employs) a large portion of the defense lawyers who enable indigent criminal defendants’ to exercise their constitutional rights. Because we are familiar with the idea of a right to an attorney, it is reasonably easy to see that the state’s failure to provide an adequate system of criminal defense attorneys, through whatever public or public-private mechanism, is a violation of both the state’s obligations and defendants’ rights. This has led to some important recent system-wide litigation over whether states are paying for a sufficient public defense infrastructure.⁶³

But this infrastructure of direct public provision is the exception rather than the rule. In most civil rights arenas outside the criminal context, it is the private bar that makes up the essential infrastructure. And in these arenas, courts have engaged very self-consciously in work aimed at creating the right incentives and conditions to maintain this infrastructure.

Consider, for instance, courts’ interpretation of fee-shifting provisions in civil rights statutes.⁶⁴ Congress, in enacting such fee-shifting provisions, is itself aiming to create the right balance of incentives to ensure a healthy legal ecosystem, writ large. But most of these statutory provisions are quite terse and uninformative. They typically say things like: courts “may allow the prevailing party, other than the United States, a reasonable attorney’s fee.”⁶⁵ This statutory text, which is fairly typical, is entirely neutral on its face as between plaintiffs and defendants (other than the United States). From the text alone, with no more information than it provides,

⁶² Subsequent cases in the lower courts have spelled out further details about how an internal complaint procedure must work, how employees must be notified about it, what kinds of investigation are required, and so on.

⁶³ See, e.g., Pub. Def., Eleventh Judicial Circuit of Fla. v. State, 115 So. 3d 261 (Fla. 2013) (approving public defenders’ decision to withdraw from representing certain clients due to excessive caseload); Yaris v. Bunton (current ACLU lawsuit alleging inadequacy of Louisiana’s public defender system).

⁶⁴ See, e.g. Civil Rights Attorney’s Fees Award Act of 1976, 42 U.S.C. § 1988 (applying to claims under §1981, §1983, etc.); Title VII’s fee-shifting provision at 42 U.S.C. § 2000e-5(k).

⁶⁵ 42 U.S.C. § 1988(b).

one would expect that fee awards in either direction would be equally common—or, rather, that they would track the rates at which each side prevails. This outcome, however, would likely result in a very small and cautious universe of plaintiff-side civil rights attorneys.

Courts have long understood this.⁶⁶ To sustain a larger and more robust ecosystem of more risk-tolerant civil rights attorneys, courts have systematically read these statutory provisions in a dramatically asymmetrical way. They have defined the concept of a “prevailing” plaintiff broadly, to include one who prevails on only some issues.⁶⁷ They have systematically rejected defendants’ arguments that courts ought to be symmetrically willing to award fees to prevailing parties in either direction, holding instead that a defendant should get fees awarded “not routinely, not simply because he succeeds, but only where the action brought is found to be unreasonable, frivolous, meritless or vexatious.”⁶⁸ In a 2011 case, the Court walked this standard back a couple of steps, holding that when a plaintiff brings a case with some reasonable (non-frivolous) elements and some frivolous ones, the defendant can recover attorneys’ fees for the costs “the defendant would not have incurred but for the frivolous claims.”⁶⁹ But this clarification, and small retreat, mainly underscores the highly (and appropriately) asymmetric aspect of the underlying standard. The purpose of the asymmetry is clear: to create and sustain an ecosystem of attorneys who are willing and financially able to act as “private attorneys general,” representing civil rights plaintiffs, often on a contingent fee basis, and thereby giving those plaintiffs access to an infrastructure essential to the vindication of their rights.

As with the infrastructure of clinics whose vitality is at the heart of the undue burden analysis, this infrastructure of lawyers is particularly important for people of modest means. Historically, wealthy women could often find private doctors who were willing to dispense birth control; today, they can frequently travel to another state if need be to obtain an abortion; they can retain a private lawyer and pay that lawyer by the hour rather than on a contingent fee basis to vindicate their civil rights. But in order to make it practically possible for people with less money to vindicate their constitutional or statutory rights, courts often need to shape the law in ways that deliberately sustain private infrastructures of provision. This Article has examined just a few—but a number of important—ways in which they do that.

⁶⁶ See e.g., *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400 (1968) (“If successful plaintiffs were routinely forced to bear their own attorneys’ fees, few aggrieved parties would be in a position to advance the public interest by invoking the injunctive powers of the federal courts.”)

⁶⁷ *Hensley v. Eckerhart*, 461 U.S. 424 (1983) (“any significant issue”).

⁶⁸ *Christiansberg Garment Co. v. EEOC*, 434 U.S. 412 (1978).

⁶⁹ *Fox v. Vice* (2011).