SUBSTANTIVE DUE PROCESS FOR NONCITIZENS: LESSONS FROM *OBERGEFELL*

Anthony O'Rourke[*]

The state of Texas denies birth certificates to children born in the United States—and thus citizens under the Fourteenth Amendment—if their parents are undocumented immigrants with identification provided by their home countries' consulates. What does this have to do with same-sex marriage? In a previous article, I demonstrated that the Supreme Court's substantive due process analysis in United States v. Windsor *is particularly relevant to the state's regulation of undocumented immigrants. This Essay builds on my earlier analysis by examining* United States v. Obergefell*'s applications outside the context of same-sex marriage.* Obergefell*'s due process holding, I argue, can serve to clarify the constitutional harms that result from policies, like those in Texas, that selectively target noncitizens and their children.*

INTRODUCTION

It is strange to say that the Supreme Court's decision in *Obergefell v. Hodges*[1] took commentators by surprise. The outcome of the case was a foregone conclusion after the Court, in *United States v. Windsor*, signaled its views regarding the constitutional importance of same-sex marriage rights.[2] Somewhat startling, however, is the relative doctrinal clarity of Justice Kennedy's majority opinion.

To be sure, Justice Roberts's dissenting opinion fairly characterizes Justice Kennedy's reasoning as a departure from "anything resembling [the] usual framework for deciding equal protection cases,"[3] and the same could be said about Justice Kennedy's due process analysis. But there is a difference between orthodoxy and coherence. While the majority opinion is unortho-

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* Associate Professor of Law, SUNY Buffalo Law School. Thanks to Anya Bernstein, Michael Boucai, Anjana Malhotra, and Brian Soucek for their helpful comments and suggestions. Thanks also to Andrew Xue and the *First Impressions* staff for their excellent editorial work.

1. 135 S. Ct. 2584 (2015).

2. 133 S. Ct. 2675, 2695–96 (2013). In his *Windsor* dissent, Justice Scalia made this point powerfully clear by offering a redline version of the majority opinion substituting mentions of the Defense of Marriage Act (DOMA) with references to a state law barring same-sex marriage. *See id.* at 2709–10 (Scalia, J., dissenting).

3. *Obergefell*, 135 S. Ct. at 2623 (Roberts, C.J., dissenting).

dox, it does present a clear vision of how substantive due process can expose constitutional harms that a traditional equal protection analysis might fail to detect. In short, the *Obergefell* opinion does not merely *say* that the Fourteenth Amendment's Equal Protection and Due Process Clauses "may converge in the identification and definition" of a previously unrecognized constitutional right.[4] It also *shows* how this convergence happens.

In this regard, one can usefully contrast the clarity of *Obergefell* with the puzzling rhetoric of *Windsor*.[5] At the very least, it requires some deciphering to translate *Windsor*'s language concerning the "equal dignity of same-sex marriages"[6] into a tractable set of doctrinal propositions.[7] In a previous article, I argued that a substantive due process reading of *Windsor* makes it possible to extend the case's doctrinal reach beyond the same-sex marriage context.[8] Specifically, I showed how *Windsor*'s substantive due process principles could be applied to bolster the claims of groups, including undocumented immigrants, whose interests have suffered under the Court's contemporary equal protection jurisprudence.[9]

With *Obergefell*, Justice Kennedy has moved *Windsor*'s substantive due process subtext to the text. This doctrinal candor creates a significant opportunity for those whose claims have failed to gain traction under the "usual framework for deciding equal protection cases."[10] For noncitizens especially, the *Obergefell* opinion fuses substantive due process and antisubordination principles in a way that holds significant promise.[11] In recent years, there has been an explosion of state activity regulating the activities of noncitizens.[12]

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4. *Id.* at 2603.

5. *See, e.g.*, Heather K. Gerken, Windsor*'s Mad Genius: The Interlocking Gears of Rights and Structure*, 95 B.U. L. REV. 587, 592 & n.25 (2015) (citing commentators who "dismissed" Kennedy's opinion in *Windsor* as "muddle-headed").

6. *Windsor*, 133 S. Ct. at 2681, 2693.

7. *See* Gerken, *supra* note 5, at 592–93 & nn.26–27 (citing contributions to debate over whether *Windsor* was a liberty, equality, or federalism opinion.).

8. Anthony O'Rourke, Windsor *Beyond Marriage: Due Process, Equality & Undocumented Immigration*, 55 WM & MARY L. REV. 2171 (2014).

9. *Id.* at 2173–78.

10. Obergefell v. Hodges, 135 S. Ct. 2584, 2623 (2015) (Roberts, C.J., dissenting).

11. Of course, *Obergefell* is also of immediate practical importance to noncitizens who wish to marry their U.S. citizen partners and had been barred from doing so. *See* Geoffrey A. Hoffman, *The Immigration Consequences of* Obergefell v. Hodges, IMMIGRATIONPROF BLOG (June 30, 2015), http://lawprofessors.typepad.com/immigration/2015/06/the-immigration-consequences-of-obergefell-v-hodges.html [http://perma.cc/PXX2-E8ZJ].

12. *See* Rick Su, *The States of Immigration*, 54 WM. & MARY L. REV. 1339 (2013) (documenting this state-level activity and analyzing the political incentives that gave rise to it); *see also* Catherine Y. Kim, *Immigration Separation of Powers and the President's Power to Preempt*,

As Professor Johnson argues, the federal preemption arguments that are often used to challenge these laws can obscure the civil rights harms they inflict on noncitizens.[13] At the same time, the equal protection doctrine governing discrimination against noncitizens is so confused and undertheorized that one commentator has recently described it as a "black letter punchline."[14] Using *Obergefell*, however, advocates can craft substantive due process arguments that foreground these civil rights dimensions and, to paraphrase Justice Kennedy, reveal the constitutional harm of discriminatory laws "in a more accurate and comprehensive way."[15]

This three-part Essay highlights *Obergefell*'s relevance outside the same-sex marriage context and develops an account of how courts might apply *Obergefell*'s substantive due process holding to state laws regulating noncitizens. Part I examines the ways in which the Court's substantive due process holdings in *Windsor* and *Obergefell* rely on antisubordination principles that had traditionally been within the purview of the Court's equal protection jurisprudence. This exposition is brief because others have identified the links between antisubordination and substantive due process in *Obergefell*,[16] and I identified these links in *Windsor* in a previous article.[17] Part II identifies two features of *Obergefell*'s analysis that are significant with respect to substantive due process claims outside the same-sex marriage context. Specifically, this Part describes how *Obergefell* elevates historical evidence of a group's subordination to new importance with respect to that group's substantive due process claims. It further demonstrates that *Obergefell* provides a roadmap for articulating due process claims that are not barred under the

90 NOTRE DAME L. REV. 691, 692 n.2 (2014) (citing articles discussing "immigration federalism" and state regulation of noncitizens).

13. Kevin R. Johnson, *Immigration and Civil Rights: State and Local Efforts to Regulate Immigration*, 46 GA. L. REV. 609, 611–12 (2012).

14. Brian Soucek, *The Return of Noncongruent Equal Protection*, 83 FORDHAM L. REV. 155, 159–160 (2014).

15. *Obergefell*, 135 S. Ct. at 2603.

16. *E.g.*, Jack Balkin, Obergefell *and Equality*, BALKINIZATION (June 28, 2015, 1:58 PM), http://balkin.blogspot.com/2015/06/obergefell-and-equality.html [http://perma.cc/UZS7-UEMR] (examining the antisubordination dimensions of Justice Kennedy's analysis in *Obergefell*); Michael Dorf, *Symposium: In Defense of Justice Kennedy's Soaring Language*, SCOTUSBLOG (June 27, 2015, 5:08 PM), http://www.scotusblog.com/2015/06/symposium-in-defense-of-justice-kennedys-soaring-language/ [http://perma.cc/N5GD-NSHY] (arguing that the *Obergefell* majority sees the historical subordination of homosexuality as "a special reason to be skeptical of the reasons advanced for excluding same-sex couples from the institution of marriage"); Laurence H. Tribe, *The Constitution Writ Large, Part Two,* BALKINIZATION (July 14, 2015, 9:00 AM), http://balkin.blogspot.com/2015/07/the-constitution-writ-large-part-two.html [http://perma.cc/CVU9-JA3H] (arguing that Justice Kennedy's opinion in *Obergefell* reflects a " 'golden rule' view of the Fourteenth Amendment [which] forbids the government from telling certain Americans that they are essentially second-class citizens").

17. O'Rourke, *supra* note 8, at 2186–90.

Court's restrictive holding in *Washington v. Glucksberg*.[18] Part III highlights *Obergefell*'s particular relevance to noncitizens, and shows how the case could be applied in a pending lawsuit challenging the state of Texas's refusal to issue birth certificates to citizens born in the United States whose parents are undocumented immigrants.

I. SUBSTANTIVE DUE PROCESS IN *WINDSOR* AND *OBERGEFELL*

Although Justice Scalia dismissed the *Obergefell* majority's reasoning as "profoundly incoherent,"[19] the charge does not stick. The substantive due process holding of *Obergefell* is in fact easy to summarize. Simply stated, the *Obergefell* majority reaffirmed that "the right to marry is fundamental under the Due Process Clause,"[20] and determined that "the reasons marriage is fundamental under the Constitution apply with equal force to same-sex couples."[21] The majority then asserted that same-sex marriage bans violate the Equal Protection Clause and linked this conclusion to its substantive due process holding by showing that the unequal treatment of gay men and lesbians also infringes their liberty interests.[22] Specifically, Justice Kennedy wrote that laws banning same-sex marriage "are in essence unequal" and thus "serve[] to disrespect and subordinate" gay men and lesbians.[23] Later in the opinion, the majority summarily rejected the validity of some of the governmental interests that the respondents offered on behalf of these laws.[24] Thus having identified a fundamental right that the government has no interest in infringing, the majority held that "under the Due Process and Equal Protection Clauses of the Fourteenth Amendment couples of the same-sex may not be deprived" of the right to marry.[25]

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18. 521 U.S. 702 (1997) (holding that the right to physician-assisted suicide was not protected under the Due Process Clauses).

19. *Obergefell*, 135 S. Ct. at 2630 (Scalia, J., dissenting).

20. *Id.* at 2598.

21. *Id.* at 2599.

22. *See id.* at 2602–05.

23. *Id.* at 2604.

24. *Id.* at 2606–07. As Marty Lederman observes, however, neither the majority nor the dissenting opinions did more than "barely . . . allude to the states' asserted interests and whether they are sufficient to satisfy rational basis review[.]" Marty Lederman, *Supreme Court Breakfast Table: The Biggest Surprises of this Term*, SLATE (July 2, 2015, 2:05 PM), http://www.slate.com/articles/news_and_politics/the_breakfast_table/features/2015/scotus_roundup/supreme_court_surprises_obamacare_marriage_jerusalem_passport_arizona_judicial.html [http://perma.cc/8QG8-3M7D].

25. *Obergefell*, 135 S. Ct. at 2604.

Justice Kennedy's due process analysis in *Obergefell* thus displayed a relatively high degree of analytical clarity. A considerable amount of work still must be done, however, to determine how best to apply *Obergefell*'s substantive due process holding to issues beyond same-sex marriage. A promising first step in this process is to consider how the holding relates to Justice Kennedy's analysis in *Windsor*. I have argued elsewhere that Justice Kennedy's *Windsor* opinion departs from conventional due process doctrine in two ways that could benefit undocumented immigrants and other subordinated groups. First, the opinion suggests that a law is likely to violate due process if it selectively imposes a historically novel burden on a subordinated group.[26] Specifically, courts should be skeptical of the government justifications offered for laws that specifically target the liberty interest of a politically unpopular constituency.[27] Second, and relatedly, the *Windsor* opinion indicates that if a law selectively targets a subordinated group, courts should assign significant weight to evidence in the legislative record suggesting that the law was motivated by a constitutionally impermissible purpose.[28] Applying these two principles, I showed how *Windsor* could be used to demonstrate the unconstitutionality of an Arizona law that categorically denied bail to undocumented immigrants who were arrested for certain offenses.[29]

With *Obergefell*, Justice Kennedy has made clear that this fusion of substantive due process with antisubordination principles should be taken seriously. According to the *Obergefell* majority, the reason why same-sex marriage bans harm a liberty interest is because they serve to "disrespect and subordinate" same-sex couples.[30] As I will show in the next Part of this Essay, this analysis both reaffirms the substantive due process doctrinal principles that one can extract from *Windsor* and offers new guidance as to how best to invoke those principles.

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26. O'Rourke, *supra* note 8, 2176, 2186–90.

27. *Id.* at 2176.

28. *Id.* at 2176, 2190–95.

29. *Id.* at 2195–214. Shortly after my article's publication, the Ninth Circuit sitting en banc invalidated the Arizona law, Lopez-Valenzuela v. Arpaio, 770 F.3d 772 (2014), and the Supreme Court denied certiorari with three Justices dissenting, County of Maricopa v. Lopez-Valenzuela, 135 S. Ct. 2046 (2015). In the interest of disclosure: I authored an amicus brief on behalf of a number of academics urging en banc review of a panel decision upholding the Arizona law. Years before the case arose, I clerked for Judge Fisher, who authored the Ninth Circuit's subsequent en banc opinion.

30. *Obergefell*, 135 S. Ct. at 2604; *see also id.* at 2602 (arguing that same-sex marriage bans are "an exclusion that . . . demeans or stigmatizes" same-sex couples).

II. *OBERGEFELL* BEYOND SAME-SEX MARRIAGE

Two notable—and notably clear—features of the *Obergefell* opinion are particularly relevant to substantive due process questions outside the marriage context. First, the majority opinion reaffirms that the strength of a due process claim increases if there is a historical record demonstrating that the law in question selectively targets a subordinated group. Traditionally, a history of social subordination was necessary to prove most equal protection claims but sometimes fatal to due process claims.[31] In *Obergefell*, however, historical evidence of subordination informs two aspects of Justice Kennedy's analysis. First, Justice Kennedy used this evidence to identify why same-sex marriage claims implicate a constitutionally protected right to marry. The majority opinion began by invoking history (including the writings of Cicero and Confucius) to establish the "centrality of marriage to the human condition."[32] Using secondary history and an amicus brief submitted by marriage historians, the opinion goes on to establish the dynamic nature of the marital institution by examining how it evolved as societies came to acknowledge the "equal dignity" of women.[33] Thus, the *Obergefell* opinion identifies the right to marry as a constitutional protection that is capable of transforming over time to accommodate the interests of same-sex couples.

In addition, the *Obergefell* opinion used history to determine why laws prohibiting same-sex marriage bans inflict a constitutionally relevant harm. The opinion held that the constitutional harm of same-sex marriage bans lies in part on their stigmatizing effect, and uses historical evidence to arrive at this conclusion. Specifically, Justice Kennedy addressed the historical subordination of homosexuality, and the gradual recognition that both sodomy laws and same-sex marriage bans serve to reinforce this subordination.[34] This historical analysis informed the *Obergefell* majority's conclusion that, "against a long history of disapproval of their relationships, th[e] denial to same-sex couples of the right to marry works a grave and continuing harm."[35] Thus, Justice Kennedy was able to conclude that irrespective of whether same-sex marriage bans are motivated by animus, their historical pedigree guarantees that they reinforce the unequal status of gay men and

31. *See infra* notes 39–43 and accompanying text.

32. *Obergefell*, 135 S. Ct. at 2594.

33. *Id.* at 2595–96.

34. *Id.* at 2596.

35. *Id.* at 2604.

lesbians.[36] This social function of the laws, he concluded, is an infringement on the liberty interests of same-sex couples.[37]

The second major implication of *Obergefell* outside the marriage context concerns Justice Kennedy's analysis of *Washington v. Glucksberg*.[38] Prior to the Court's *Obergefell* decision, opponents of same-sex marriage could plausibly argue that *Glucksberg* forbid courts creating a "new" fundamental right to same-sex marriage.[39] Under *Glucksberg*, a successful due process claim requires a "careful description" of a historically recognized right.[40] According to same-sex marriage opponents, this obligates courts to characterize an asserted right "in its narrowest terms,"[41] and to deny protection to that right if it lacks a historical pedigree. Therefore, in the same-sex marriage context, the relevant question is not whether same-sex couples may participate in the marital institution that is open to opposite-sex couples. Instead, the question becomes whether courts may recognize a new fundamental right to *same-sex* marriage—they could not.[42] Under this reading of *Glucksberg*, a long historical practice of denying a right to a subordinated group would prevent members of that group from later raising a due process claim asserting that right.[43]

In *Windsor* and *Lawrence v. Texas*,[44] Justice Kennedy dealt with *Glucksberg*'s hurdles by ignoring them. In *Obergefell*, however, he expressly rejected a reading of *Glucksberg* that would allow a long history of subordination to count against a litigant seeking to assert a new right. Specifically, Justice Kennedy cautions against reading *Glucksberg* to allow "received practices" of denying rights to a subordinated group to "serve as their own continued justification" for continuing to do so.[45] Under Justice Kennedy's analysis, *Glucksberg* does not control the question of whether a new group should be permitted access to a historically recognized right. As he acknowledged,

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36. *See id.* at 2601–02.

37. *Id.* at 2602.

38. 521 U.S. 702 (1997). The Court's analysis of this issue—and hence my recapitulation of the Court's analysis—closely tracks an amicus brief that Professors Tribe and Dorf submitted in *Obergefell*. *Compare Obergefell*, 135 S. Ct. at 2602, *with* Brief of *Amici Curiae* Professors Laurence H. Tribe and Michael C. Dorf in Support of Petitioners, *Obergefell*, 135 S. Ct. 2584 (2015) (Nos. 14-556, 14-562, 14-571, 14-574) [hereinafter Amicus Brief of Professors Tribe & Dorf].

39. *See* Bostic v. Schaefer, 760 F.3d 352, 389–93 (4th Cir. 2014) (Niemeyer, J., dissenting) (presenting this argument).

40. *Glucksberg*, 521 U.S. at 721 (quotation marks omitted).

41. *Bostic*, 760 F.3d at 389 (Niemeyer, J., dissenting) (emphasis omitted).

42. *Id.* at 390.

43. *See* Kenji Yoshino, *The New Equal Protection*, 124 HARV. L. REV. 747, 781 (2011).

44. 539 U.S. 558 (2003).

45. Obergefell v. Hodges, 135 S. Ct. 2584, 2602 (2015).

"*Glucksberg* did insist that liberty under the Due Process Clause must be defined in a most circumscribed manner, with central reference to specific historical practices."[46] However, this inquiry only applies to the question whether there has *generally* existed a right that has been enjoyed by some members of a society. Thus, *Glucksberg* involved the question of whether there generally exists a right to commit suicide, and the long history of societies condemning suicide led the Court to answer this question in the negative.[47] By contrast, *Obergefell* involved the question of whether *same-sex couples* should enjoy access to a right that has generally existed—the right to marriage. According to the majority opinion, *Glucksberg*'s historical inquiry is not an appropriate method for resolving such a question.[48] As the Court's earlier right-to-marry cases[49] make clear, the correct inquiry is simply whether "there [is] sufficient justification for excluding the relevant class from the right."[50] For courts evaluating due process claims outside the same-sex marriage context, this analysis provides a valuable roadmap concerning the level of generality at which they should frame the right at issue.

Obergefell thus opens a doctrinal space for extending well-recognized due process rights to new groups, and applying those rights in new contexts. If a litigant cannot persuasively frame her due process claim in terms of a well-recognized right, then *Glucksberg* may be fatal to the claim. But if the litigant establishes a historically-grounded liberty interest, then a society's past refusal to extend that right into a particular context no longer serves to justify a continued failure to do so. In other words, once a liberty claim is established, history is, at worst, irrelevant to whether the right should extend to a new context. Indeed, if social subordination explains why the right had not previously applied in the new context, then the history would bolster the litigant's due process claim.

III. APPLYING *OBERGEFELL*: THE TEXAS BIRTH CERTIFICATE POLICY

This reading suggests that *Obergefell*'s relevance to the regulation of noncitizens is deeper than it first appears. Many promising constitutional challenges to such regulation are substantively motivated by the unequal treatment of noncitizens, but are not doctrinally rooted in the Equal Protec-

46. *Id.*

47. *See* Washington v. Glucksberg, 521 U.S. 702, 710–19 (1997); *see also* Amicus Brief of Professors Tribe & Dorf, *supra* note 38, at 9–10.

48. *Obergefell*, 135 S. Ct. at 2602.

49. Turner v. Safley, 482 U.S. 78 (1987); Zablocki v. Redhail, 434 U.S. 374 (1978); Loving v. Virginia, 388 U.S. 1 (1967).

50. *Obergefell*, 135 S. Ct. at 2602.

tion Clause.[51] Indeed, the Supreme Court's equal protection doctrine governing noncitizens is particularly confused and under-theorized.[52] Using *Obergefell*, it is possible to sidestep this confusion and raise substantive due process arguments that expose the constitutional harm of laws selectively targeting noncitizens for unequal treatment.

The two features of *Obergefell*'s due process analysis discussed in Part II are particularly relevant to immigration questions. First, noncitizens can point to a long and well-documented history of political and social subordination that shapes how they are currently regulated.[53] The Supreme Court has observed that "[a]liens as a class are a prime example of a 'discrete and insular' minority."[54] This recognition has not translated into the consistent application of heightened scrutiny in equal protection cases involving noncitizens.[55] But this equal protection anomaly would not prevent advocates from making substantive due process arguments that use historical evidence of subordination to (1) identify the ways in which a right can evolve to accommodate the interests of noncitizens and (2) describe the harms noncitizens suffer when they are denied access to that right. Additionally, the majority opinion in *Windsor* suggested that historical evidence of subordination may also give courts greater license in substantive due process cases to scrutinize the legislative record of a statute to determine whether it was motivated by a constitutionally prohibited purpose.[56] Thus, as developed in *Windsor* and *Obergefell*, Justice Kennedy's substantive due process jurisprudence points to a way in which immigrants' rights advocates may use substantive due process to compensate for the shortcomings of contemporary equal protection doctrine.

Second, state laws regulating noncitizens often implicate due process rights that are not barred under Justice Kennedy's analysis of *Glucksberg*. This year, for example, the Ninth Circuit held that an Arizona law categorically denying bail to undocumented immigrants violated the fundamental

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51. *See* O'Rourke, *supra* note 8, at 2197–99.

52. *Id.*

53. *See, e.g.*, Adam B. Cox, *Immigration Law's Organizing Principles*, 157 U. PA. L. REV. 341, 381 (2008) ("Concerns about second-class status are pervasive in immigration scholarship and crop up from time to time in immigration jurisprudence.").

54. Graham v. Richardson, 403 U.S. 365, 372 (1971) (quoting United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938)).

55. The Court applies heightened scrutiny to many state classifications based on alienage, *id.* at 371–72, but does not do so for classifications that serve a "political function," Cabell v. Chavez-Salido, 454 U.S. 432, 439 (1982). The Court has also declined to apply heightened scrutiny to federal classifications based on alienage. *See* Mathews v. Diaz, 426 U.S. 67 (1976).

56. *See supra* note 29 and accompanying text.

right to liberty.[57] This holding did not require the court to recognize the existence of a new, generally applicable liberty interest. Instead, it involved the question of whether noncitizens should benefit from the application of well-established rights. With respect to such due process questions, *Obergefell* makes clear courts should not frame the right in a "circumscribed manner, with central reference to historical practices."[58] Instead, courts may engage in a normative inquiry as to, (1) whether the "principles and traditions" that underpin the right suggest that it should be applied in a new context,[59] and, if so, (2) whether there is "a sufficient justification for excluding" noncitizens "from the right."[60] Thus, noncitizens need not overcome *Glucksberg*'s hurdles to raise a number of significant due process claims.

Consider how *Obergefell* could be used to clarify the due process stakes of other controversies in immigration law. For example, the State of Texas recently adopted a policy of refusing to grant birth certificates to children born in the United States whose parents' only form of identification is a *matricula* card issued by a Mexican or Central American consulate.[61] In *Perales v. Texas Department of State Health Services*, a group of noncitizen parents filed a lawsuit on behalf of their citizen children challenging this policy.[62] The *Perales* plaintiffs' cause of action invokes the historically toothless Privileges and Immunities Clause of the Fourteenth Amendment.[63] But their grievances are particularly amendable to the sort of due process analysis that Justice Kennedy advanced in *Obergefell*. First, one can use *Obergefell* to define the liberty interest at stake when one is denied a birth certificate. Like marriage licenses, birth certificates are traditionally issued by states. As a le-

57. *See* Lopez-Valenzuela v. Arpaio, 770 F.3d 772, 780–81 (2014); *see also supra* note 30 and accompanying text.

58. Obergefell v. Hodges, 135 S. Ct. 2584, 2602 (2015).

59. *Id*. at 2599.

60. *Id*. at 2602.

61. *See, e.g.*, *Dallas County Clerk: Birth Certificates*, DALLAS COUNTY, http://www.dallascounty.org/department/countyclerk/birthcertificates.php [http://perma.cc/FQ9C-3KJ9] (last visited Sept. 1, 2015) ("Effective June 1, 2015 the Dallas County Clerk's Offices will no longer accept the Matricula Consular Card as verification of identity for purchase of birth certificates."); *see also* Molly Hennessy-Fiske, *Immigrants Sue Texas Over State's Denial of Birth Certificates for U.S.-Born Children*, L.A. TIMES (July 18, 2015, 3:30 AM), http://www.latimes.com/nation/immigration/la-na-texas-immigrant-birth-20150718-story.html [http://perma.cc/KZP4-6QTR].

62. First Amended Complaint, Perales v. Tex. Dep't. of State Health Servs., No 1:15-cv-00446 (W.D. Tex. June 11, 2015). I am grateful to Anya Bernstein for this example.

63. *Id.* at 29–30. The plaintiffs are also challenging the case on equal protection and preemption grounds. *Id.* at 30–35.

gal matter, however, birth certificates are evidence of national citizenship.[64] Moreover, as a social matter, birth certificates are sometimes regarded as constitutive of citizenship and even identity.[65] To an even greater degree than entering marriage, the receipt of a birth certificate appears to be the sort of "keystone of our social order" that, under *Obergefell*, should be accorded constitutional protection.[66]

Moreover, *Obergefell* can help clarify the harm that children of noncitizens suffer from the denial of a birth certificate. Many of these harms are concrete; for example, some of the *Perales* plaintiffs allege that they have had difficulty enrolling their children in Medicaid, Head Start, or grade school.[67] But by selectively targeting the children of undocumented immigrants, the Texas policy also creates a constitutionally significant stigma harm. Even if the Texas Department of State Health Services did not intend to target this class of people, its effect is to single them out for exclusion from a legally and socially significant institution.[68] In other words, the Texas policy, when viewed "against a long history of disapproval" of undocumented immigrants, "serves to disrespect and subordinate them" in a manner that is impermissible under *Obergefell*.[69]

Thus, *Obergefell* can clear away some of the doctrinal and normative confusion that might otherwise attend to the question of whether Texas can use an ostensibly neutral administrative policy to deny birth certificates to noncitizens. Without *Obergefell*, one could easily see courts and advocates getting caught up in questions such as whether the denial of a birth certificate is legally equivalent to the denial of citizenship, or whether the noncitizen plaintiffs can actually demonstrate that they were unable to obtain certain benefits for their children. Using *Obergefell*, one can sidestep these questions and cut to the heart of why the Texas policy violates due process: it selectively excludes a marginalized group from a socially meaningful institution.

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64. *E.g.*, *I Am a U.S. Citizen: How Do I Get Proof of My U.S. Citizenship?*, U.S. CITIZENSHIP AND IMMIGRATION SERVICES 1 (Oct. 2013), http://www.uscis.gov/sites/default/files/USCIS/Resources/A4en.pdf [http://perma.cc/LVM8-MQBG] ("If you were born in the United States, ... [y]our birth certificate issued where you were born is proof of your citizenship.").

65. *See* Carol Sanger, *"The Birth of Death": Stillborn Birth Certificates and the Problem for Law*, 100 CAL. L. REV. 269, 287 (2012).

66. *Cf.* Obergefell v. Hodges, 135 S. Ct. 2584, 2601 (describing marriage).

67. First Amended Complaint, *supra* note 64, at 11–12, 14, 16, 18.

68. *Cf. Obergefell*, 135 S. Ct. at 2602 ("[W]hen . . . sincere, personal opposition becomes enacted law and public policy, the necessary consequence is to put the imprimatur of the State itself on an exclusion that soon demeans or stigmatizes those whose own liberty is then denied.").

69. *Cf. id.* at 2604.

CONCLUSION

Justice Kennedy's vision of substantive due process does not merit an uncritical embrace. As others will doubtless argue, *Obergefell* entrenches a problematic vision of autonomy that links it to an institution—marriage—which many choose to reject.[70] But *Obergefell* also holds considerable promise for groups whose interests have suffered under the Court's contemporary equal protection jurisprudence. By taking *Obergefell*'s substantive due process analysis seriously, one can appreciate that its relevance extends far beyond the question of who is permitted to marry whom.

70. *See id.* at 2608 (equating exclusion from the marital institution with being "condemned to live in loneliness"); Tribe, *supra* note 16 (arguing that some of Kennedy's language in *Obergefell* "unwittingly sends a signal of inferiority to the many whose loving relationships thrive outside the institution of marriage"). For an especially erudite critique of both the right to marry and the choice to do so, see Katherine M. Franke, *Longing for* Loving, 76 FORDHAM L. REV. 2685 (2008). For a fascinating historical exploration of the radical origins of the same-sex marriage movement, see Michael Boucai, *Glorious Precedents: When Gay Marriage Was Radical*, 27 YALE J.L. & HUMAN. 1 (2015).