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Anti-Liberal Rights Retrenchment as a Threat to the Rule of Law

Paul Gowder

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ANTI-LIBERAL RIGHTS RETRENCHMENT AS A THREAT TO THE RULE OF LAW

Paul Gowder*

ABSTRACT

The Supreme Court's 2022 decision in Dobbs v. Jackson Women's Health Organization, overturning the half-century old constitutional right to reproductive choice, is only the most prominent example of a global series of attacks on rights of personal, sexual, and family autonomy. The attacks on LGBTQ+ rights by the Christian nationalist governments of Hungary and Poland are another important example. A cadre of anti-liberal scholars and public intellectuals such as Patrick Deneen, Sohrab Ahmari, and Adrian Vermeule serve as the intelligentsia within this global reactionary movement, advocating for the direct importation of far-right values into the law of western states on the basis of a religious, anti-liberal conception of community and public identity.

In common parlance, the victims of this attack on egalitarian legal rights sometimes say that they are excluded or erased or treated as sub-human. That response is intuitively plausible—it is easy to think, for example, that taking away gay rights excludes LGBTQ+ individuals from the political community by communicating that they lack the support of their societies for their personal relationships and individual identities. But this idea is somewhat undertheorized in the scholarly literature.

This Essay contributes to the theoretical development of the idea of rights-retrenchment as exclusion. Reading together Patricia Williams and G.W.F. Hegel, it offers an account of how liberal legal rights support the individual and social identities of those who enjoy them, and how those rights are particularly critical to members of socially subordinated groups. It is concluded that one reason to value the rule of law, in its facet as a demand for the stable protection of individual rights, is to protect this identity-supporting function. This Essay is thus both a critique of the modern anti-liberal movement and an updating of the

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critical race theory defense of rights for the present era of reaction and retrenchment.

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INTRODUCTION

In 1987, in the early days of the intellectual enterprise that came to be known as critical race theory (CRT), Patricia Williams wrote a landmark article staking out a surprising position on behalf of one wing of the movement.¹ In contrast to the critical legal studies and Marxist scholars who had largely dismissed the secure legal protection of individual rights (that is, the rule of law) as an impediment to broader leftist aims,² Williams defended the enterprise of upholding individual legal rights. In doing so, she carved out a space for critical race theorists to be less skeptical of the ambitions of legal rights claims than other left-leaning legal scholarly schools.³

In the course of the argument, Williams offered a particularly provocative observation on the function of rights in the Black American experience—she described herself as “looking for freedom through the establishment of identity, the *form*-ation of an autonomous social self.”⁴ This Essay starts where Williams left off. I argue that she was right to see rights that way. I further fill out the connection between the rule of law and an “autonomous social self” through the lens of the political philosophy of G.W.F. Hegel. The practical purpose of all this theoretical work is to lay the groundwork for a rule-of-law-based opposition to contemporary anti-liberal movements, such as the religion-based challenges to individual rights in the United States and Eastern Europe, which purport to support established civic and individual identities but, in actuality, undermine them by attacking the legal rights at the foundation of those identities.

While this Essay draws its core examples from the United States, its implications are global. On the intellectual side, the rule of law is widely associated with liberal political philosophy.⁵ The chief intellectual opponent to

¹ Patricia J. Williams, *Alchemical Notes: Reconstructing Ideals from Deconstructed Rights*, 22 HARV. C.R.-C.L. L. REV. 401, 405–06 (1987).

² See, e.g., Morton J. Horwitz, *The Rule of Law: An Unqualified Human Good?*, 86 YALE L.J. 561, 561, 566 (1977) (first reviewing DOUGLAS HAY ET AL., *ALBION’S FATAL TREE CRIME AND SOCIETY IN EIGHTEENTH-CENTURY ENGLAND* (1975); and then reviewing E.P. THOMPSON, *WHIGS AND HUNTERS: THE ORIGIN OF THE BLACK ACT* (1975)) (criticizing E.P. Thompson’s Marxist defense of the rule of law).

³ That relative reduction of skepticism was, to be sure, not shared by all her fellows in CRT. For a summary of the ambivalent views within CRT on the rule of law, see Khiara M. Bridges, *Critical Race Theory and the Rule of Law*, in *THE CAMBRIDGE COMPANION TO THE RULE OF LAW* 357 (Jens Meierhenrich & Martin Loughlin eds., 2021).

⁴ Williams, *supra* note 1, at 409 (emphasis and hyphenation in original).

⁵ For a positive account of the connection between those two ideas, see Jeremy Waldron, *The Rule of Law in Contemporary Liberal Theory*, 2 *RATIO JURIS* 79 (1989). For a more skeptical account, see Brian Z.

liberalism in the modern era is a kind of communitarianism or even nationalism with which both Hegel and conservative religious/political movements such as that of Hungary's Viktor Orbán are associated.⁶ By revealing how Hegel's weak communitarianism, with a little help from Williams, supplies us with a basis to defend the rule of law and liberal individual rights, this Essay aims to unsettle the supposition that anti-liberals both in the United States and abroad seem to share, to wit, that their appeals to the common identity of their people also justify an attack on the rights to individual intimate, reproductive, and gender liberty which their people enjoy.⁷

On the practical side, the United States' own anti-liberal challengers are inextricably linked with global challenges to the rule of law. The challenge to liberalism is itself globally integrated, as evidenced, for example, by the fact that American anti-liberal scholars routinely meet with Orbán.⁸ Much of the appeal of the likes of Orbán to American anti-liberals is attributable to his embrace of traditional cultural values, exemplified by a kind of conservative Christian social morality they share.⁹ Unsurprisingly, the same challenges to sexual, reproductive, and gender autonomy that this Essay discusses in the United States

Tamanaha, *The Dark Side of the Relationship Between the Rule of Law and Liberalism*, 3 N.Y.U. J.L. & LIBERTY 516 (2008).

⁶ On the common supposition that Hegel is a communitarian or nationalist. See, e.g., Tony Burns, *Hegel and Global Politics: Communitarianism or Cosmopolitanism?*, 10 J. INT'L POL. THEORY 325, 329 (2014) (reviewing scholarly attributions of communitarianism to Hegel); Shlomo Avineri, *Hegel and Nationalism*, 24 REV. POL. 461, 463–64 (1962) (reviewing attributions of nationalism to Hegel). On the common association between communitarianism and nationalism, see John O'Neill, *Should Communitarians be Nationalists?*, 11 J. APPLIED PHIL. 135 (1994) (discussing the relationship between the ideas). The canonical source on the opposition between communitarianism and liberalism is Michael Walzer, *The Communitarian Critique of Liberalism*, 18 POL. THEORY 6 (1990).

⁷ See, e.g., Monika Pronczuk & Benjamin Novak, *European Union Tries to Counter Anti-L.G.B.T.Q. Wave in Hungary and Poland*, N.Y. TIMES, <https://www.nytimes.com/2020/11/12/world/europe/hungary-poland-lgbt-rights-eu.html> (Apr. 24, 2021) (quoting Polish leader characterizing gay people as “threat to Polish identity, to our nation, to its existence and thus to the Polish state”).

⁸ Blake Hounshell, *Why American Conservatives Love Viktor Orban*, N.Y. TIMES (Aug. 4, 2022), <https://www.nytimes.com/2022/08/04/us/politics/viktor-orban-cpac-republicans.html>; Elisabeth Zerofsky, *How the American Right Fell in Love with Hungary*, N.Y. TIMES MAG. (Oct. 19, 2021), <https://www.nytimes.com/2021/10/19/magazine/viktor-orban-rod-dreher.html>.

⁹ For example, anti-liberal scholars Patrick Deneen and Gladden Pappin praised Orbán for his opposition to non-Christian European immigration. Patrick J. Deneen & Gladden Pappin, *Dispatch from Budapest*, POSTLIBERAL ORDER (Aug. 5, 2022), <https://www.postliberalorder.com/p/dispatch-from-budapest>. A Hungarian pro-government outlet, reporting on an earlier meeting between Deneen and Orbán, focused on Deneen's praise of Hungary's “family policy measures . . . based on national and family values rather than on liberalism,” and added that Deneen promoted the idea that “nations should be subordinated to God.” *Orbán Meets Conservative US Political Scientist Deneen*, HUNG. TODAY (Nov. 15, 2019), <https://hungarytoday.hu/orban-meets-conservative-us-political-scientist-deneen/>.

have appeared in Hungary and Poland, the two leading countries of the anti-liberal backlash abroad.¹⁰ Accordingly, we ought to understand American challenges to these rights as part of a *global* anti-liberal movement—and we ought to understand American antiliberals to be engaged not only in a domestic backlash but also a kind of rogue foreign policy in which they promote the agenda of leaders like Orbán and Poland’s Andrzej Duda and Jarosław Kaczyński against the more inclusive liberal rule of law agenda typically associated with the United States—or, at least, the most hopeful version of that agenda envisioned by progressive foreign policy.¹¹

This Essay thus takes as its targets not only cases like *Dobbs* and international leaders like Orbán but also the scholarly movement that links the U.S. right and the global right. Particularly prominent in the United States is Harvard Law Professor Adrian Vermeule, who has argued that his “common-good constitutionalism” rooted in Catholic natural law theory entails that abortion rights should be “not only rejected but stamped as abominable, beyond the realm of the acceptable forever after,” and that if “common good constitutionalism were accepted” “the state will enjoy authority to curb the social and economic pretensions of the urban-gentry liberals who so often place their own satisfactions (financial and sexual) and the good of their class or social milieu above the common good.”¹² In a book-length expansion on that “common good constitutionalism” idea, he has suggested that a prohibition on pornography would be “a form of environmentalism for morals”¹³ and hinted at an argument not merely for the reversal of *Roe* but for the constitutional prohibition of abortion,¹⁴ as well as the idea that “it would be arbitrary and contrary to natural law for a state to *allow* same-sex civil marriage.”¹⁵

¹⁰ See Pronczuk & Novak, *supra* note 7 (describing anti-abortion and anti-LGBT initiatives by governments of Poland and Hungary).

¹¹ See, e.g., DEP’T OF STATE, INTERAGENCY REPORT ON THE IMPLEMENTATION OF THE PRESIDENTIAL MEMORANDUM ON ADVANCING THE HUMAN RIGHTS OF LGBTQI+ PERSONS AROUND THE WORLD (2022) 26, 41 (2022), <https://www.state.gov/wp-content/uploads/2022/04/Interagency-Report-on-the-Implementation-of-the-Presidential-Memorandum-on-Advancing-the-Human-Rights-of-Lesbian-Gay-Bisexual-Transgender-Queer-and-Intersex-Persons-Around-the-World-2022.pdf>.

¹² Adrian Vermeule, *Beyond Originalism*, THE ATLANTIC (Mar. 31, 2020), <https://www.theatlantic.com/ideas/archive/2020/03/common-good-constitutionalism/609037/>.

¹³ ADRIAN VERMEULE, COMMON GOOD CONSTITUTIONALISM: RECOVERING THE CLASSICAL LEGAL TRADITION 171 (2022).

¹⁴ *Id.* at 199 n.103.

¹⁵ *Id.* at 218 n.346 (emphasis in original).

Many of the intellectual anti-liberals condemn liberalism for the harm it allegedly does to socially rooted identities.¹⁶ This Essay argues that the anti-liberal intellectuals have it exactly backwards: it is their program that threatens socially rooted identities. Anti-liberals make the mistake of imagining that they can impose their religiously rooted morals legislation on a social blank slate, as if ordinary people have not built their lives and their social commitments on the basis of things like being able to get married to the person they love or being able to decide for themselves how to reconcile childbearing and career.

Part I will develop the intellectual background for these arguments. It first summarizes Hegel's account of the social self and then reads Williams as offering an application of these Hegelian ideas to explain why legal rights matter for the socially subordinated. Part II will connect those ideas to the contemporary theory of the rule of law, arguing that Williams's insights apply beyond the particular case of Black Americans on which she focuses: the rule of law provides a social identity for individuals as well as a collective identity for states. Finally, Part III will argue from that account of the rule of law's identity-generating function to a critique of the global anti-liberal movement and a defense of existing liberal legal rights, particularly to intimate, reproductive, and gender autonomy. At the theoretical level, this amounts to a critique of Adrian Vermeule's so-called "common-good constitutionalism"¹⁷ and Viktor Orbán's Christian Nationalist "illiberal democracy."¹⁸ At the legal level, it amounts to a critique of the U.S. Supreme Court's misguided abandonment of the right to reproductive choice (on which Part III focuses).¹⁹

I. WILLIAMS AND HEGEL ON RIGHTS AND IDENTITY

The goal of this Part is to make sense of the claim from Patricia Williams quoted at the beginning of the introduction. Recall that the claim is that legal rights (and hence the rule of law) have something to do with "the *form*-ation of

¹⁶ See, e.g., Sohrab Ahmari et al., *Against the Dead Consensus*, FIRST THINGS (Mar. 21, 2019), <https://www.firstthings.com/web-exclusives/2019/03/against-the-dead-consensus> (condemning liberalism for prioritizing "individual autonomy" over "authentic human attachments: family, faith, and the political community" and "the human need for a common life" in a nationalistic community).

¹⁷ See VERMEULE, *supra* note 13.

¹⁸ Notably, Orbán did not use that particular two-word construction in the speech from which the idea comes. Kim Lane Scheppele, *The Opportunism of Populists and the Defense of Constitutional Liberalism*, 20 GERMAN L.J. 314, 321–22 (2019).

¹⁹ *Dobbs v. Jackson Women's Health Org.*, 597 U.S. __ (2022).

an autonomous social self.”²⁰ I propose to interpret Williams’s argument as an application of G.W.F. Hegel’s ideas about the social bases of identity.

The Williams-Hegel hybrid that this Part develops (which is not meant to be fully faithful to either, but to serve as a springboard for the rest of the argument) will later become the basis for the argument that links the rule of law requirement that preexisting legal rights be stable²¹ to the capacity for individuals (particularly from subordinated groups) to maintain robust social identities. That argument, in turn, will ground the Part III critique of the present assault on such rights, focused as a case study on the Supreme Court’s recent *Dobbs* decision, but applicable to the broader context discussed in the introduction, such as the initiatives of antiliberal politicians in Hungary and Poland and the integralist challenge to liberal constitutionalism associated with scholars like Vermeule.²²

I will begin by summarizing the relevant parts of Hegel’s theory of identity and freedom and their relationship to his broader political philosophy.²³

A. *Hegel on Identity and Freedom*

For the Enlightenment philosophical tradition of which Hegel is a part, the notions of “identity” and “freedom” are closely related, as a person can be said to be free if their choices originate from themselves, as opposed to from external determination.²⁴ Thus, we can read Hegel in part as offering a story about the

²⁰ Williams, *supra* note 1, at 409.

²¹ See, e.g., Joseph Raz, *The Rule of Law and Its Virtue*, in *THE AUTHORITY OF LAW: ESSAYS ON LAW AND MORALITY* 208, 213 (1979) (associating the rule of law with stability); LON L. FULLER, *THE MORALITY OF LAW* 37 (rev. ed. 1969) (describing failure of hypothetical unstable legal system).

²² See generally Scheppele, *supra* note 18 (describing Hungarian anti-liberalism); Tímea Drinóczi & Agnieszka Bień-Kacała, *Illiberal Constitutionalism: The Case of Hungary and Poland*, 20 *GERMAN L.J.* 1140 (2019) (describing Hungarian and Polish anti-liberal turns). For Vermeule’s main scholarly statement of antiliberalism, see VERMEULE, *supra* note 13.

²³ Unfortunately, the reader should be aware that Hegel is notoriously impenetrable, even by the standards of already typically impenetrable German philosophers. Fortunately, the objective of this essay is not to expound the philosophy of Hegel as such, but to draw on Hegel to understand the role of the rule of law in identity formation at both the individual and the public levels, as well as to deploy some of Patricia Williams’s insights in that domain. Accordingly, we can do Hegel on easy mode, with limited references to his text and primarily relying on several major English language interpreters in recent years, primarily (in alphabetical order) Michael Hardimon, Lydia Moland, Charles Taylor, and Allen Wood. This Essay draws fairly extensively on each of those scholars and limits its direct citation to Hegel’s texts to a handful of particularly important passages.

²⁴ In metaphysical terms, Hegel expresses a paradox in section 35 of the *Philosophy of Right*:

It is inherent in *personality* that, as *this* person, I am completely determined in all respects (in my inner arbitrary will, drive, and desire, as well as in relation to my immediate external existence []),

possibility of human freedom in the context of the constraints imposed by society and the state—a story that explains how freedom is possible by giving an account of the role of social forces in the construction of an individual's identity, and thus how those forces are necessary for that freedom rather than impediments to it.²⁵ In the context of Hegel's broader goals, this is all in pursuit of *reconciliation*—discussed further in a few paragraphs—the idea that a key task of political philosophy is to alleviate a mistaken sense of alienation, which modern societies tend to generate.²⁶

The starting point for the dimension of Hegel's social thought that matters for this Essay is that an individual's identity is constructed out of their choices and shaped by their broader social context.²⁷ This idea will become clear by contrasting it to two strawperson opponents. The first is what we might think of as a stereotypical classical liberal political philosophy, which represents humans as fully autonomous and independent of all others.²⁸ A person shapes their identity by making their own decisions and deciding for themselves what a life that goes well looks like. The role of everyone else is to stay out of their way, at least to the extent consistent with this staying-out-of-the-way being mutual. This view tends to generate a conception of freedom as negative liberty and, with it, libertarian political positions, in which the role of the state is just limited to

and that I am finite, yet totally pure self-reference, and thus know myself in my finitude as *infinite*, *universal*, and *free*.

G.W.F. HEGEL, ELEMENTS OF THE PHILOSOPHY OF RIGHT 67–68 (Allen W. Wood ed., H.B. Nisbet trans., 1991) (emphasis in original). Hegel explicitly embraces this contradiction in the comment to this section, suggesting that managing it is the aim of personality. I read Hegel's political philosophy as carrying through this same metaphysical problem of freedom into the political state: we somehow have to be free as individuals yet also constrained by our societies—and, the rest of this Part explains—we do so by integrating individual-identity and social-identity together. This is perhaps expressed most clearly in sections 149 and 187 of the Philosophy of Right, *id.* at 192–93, 224–26, albeit in a bunch of extremely technical Hegelian terms, the upshot of which (on my reading) is that one's society allows one to detach from immediate inclination and reason about one's choices (in something like Kantian terms, to act autonomously).

²⁵ See, e.g., LYDIA L. MOLAND, HEGEL ON POLITICAL IDENTITY: PATRIOTISM, NATIONALITY, COSMOPOLITANISM 7 (2012) (describing Hegelian challenge of freedom within the state); see also ALLEN W. WOOD, HEGEL'S ETHICAL THOUGHT 50 (1990) (similar). We can compare this to classic accounts of the rule of law's relationship to freedom which emphasize that legal rules—rather than making freedom impossible because they represent the state telling one what to do—are necessary for freedom because they create the social support for making choices in the context of other choice-makers. See, e.g., PAUL GOWDER, THE RULE OF LAW IN THE REAL WORLD 68–70 (2016) (surveying accounts in this vein).

²⁶ See generally Michael O. Hardimon, *The Project of Reconciliation: Hegel's Social Philosophy*, 21 PHIL. & PUB. AFFS. 165 (1992) (summarizing and defending a reconciliation-based account of Hegel's political philosophy).

²⁷ WOOD, *supra* note 25, at 18–19.

²⁸ An example would be the caricature of the liberal in Walzer, *supra* note 6, at 7–8.

enforcing universal stay-out-of-my-way.²⁹ Against such a view, the Hegelian objection is twofold. First, this version of liberalism tends to pay inadequate attention to the external influences on a person's behavior and self-conception—the fact that none of us spring fully-grown from Zeus's head but are the products of our families, cultures, environments, and economic circumstances.³⁰

Second, the naive view neglects the intersubjective aspect of self-definition: for Hegel, an agent comes to know oneself and develop one's personality in part through interaction with others whom one recognizes as agents whose goals must be respected and who, in turn, treat one as an agent and adopt evaluative attitudes toward one's identity as reflected in one's behavior, goals, and commitments.³¹ This is the critical concept of "recognition." As Taylor explains, recognition captures the notion that the conceptual apparatus of self-definition is formed in interaction with others.³² Recognition is a kind of two-way process—one's identity is formed both by recognition from others and by recognizing others, and certain famous discussions in Hegel's corpus suggest that the latter is more important.³³ However, key elements of the legal order—particularly property rights—seem most plausibly important for identity and

²⁹ See, e.g., ROBERT NOZICK, *ANARCHY, STATE, AND UTOPIA* ix (1974) (describing the libertarian ideal of "minimal state").

³⁰ MICHAEL O. HARDIMON, *HEGEL'S SOCIAL PHILOSOPHY: THE PROJECT OF RECONCILIATION* 48 (1994).

³¹ See *id.* at 167–68 (explaining Hegel's view that a person develops their sense of self in part through their participation in civil society).

³² Charles Taylor, *The Politics of Recognition*, in CHARLES TAYLOR ET AL., *MULTICULTURALISM: EXAMINING THE POLITICS OF RECOGNITION* 32–34 (Amy Gutmann ed., 1994). Another helpful description of the problem of recognition in relatively plain language is in Avishai Margalit's exposition in his dialogue with Axel Honneth on the subject. See Axel Honneth & Avishai Margalit, *Recognition*, 75 *PROC. ARISTOTELIAN SOC'Y, SUPPLEMENTARY VOLUMES* 111, 128–29 (2001).

³³ I refer to the master-slave dialectic in Hegel's *Phenomenology of Spirit*, with his suggestion, in sections 193 through 195 of the same, that "[t]he truth of the self-sufficient consciousness is thus the servile consciousness" because in laboring for another, the servant comes to distinguish between his will and his desire and thereby "comes to an intuition of self-sufficient being as its own self." GEORG WILHELM FRIEDRICH HEGEL, *THE PHENOMENOLOGY OF SPIRIT* 114–15 (Terry Pinkard ed. & trans., 2018) (emphasis removed). There are many different interpretations of this somewhat arcane yet critically important passage. For several relatively lucid (although distinct) readings of it and accounts of why the master, unlike the slave, does not achieve the ends of recognition through the totally subordinated other, see Stefan Bird-Pollan, *Hegel's Grounding of Intersubjectivity in the Master–Slave Dialectic*, 38 *PHIL. & SOC. CRITICISM* 237, 247–48 (2012); Charles Villet, *Hegel and Fanon on the Question of Mutual Recognition: A Comparative Analysis*, 4 *J. PAN AFR. STUD.* 39, 41 (2011); and Guyora Binder, *Mastery, Slavery, and Emancipation*, 10 *CARDOZO L. REV.* 1435, 1437–40 (1989). For a straightforward summary of the relationship between recognition and freedom in Hegel, see MOLAND, *supra* note 25, at 14–15. And for an explanation of the importance of "rational institutions" in enabling people to form wills apart from bare desire "through layers of mutual recognition," see *id.* at 29.

autonomy-formation by requiring others to recognize oneself.³⁴ (Please keep that last point in mind, it is central to this Essay's argument.)

The second contrast is between Hegel and what we might think of as a kind of extreme communitarianism or disregard of the individual. Consider the proposition that a person's identity is *solely* the product of their context or of some preexisting social or divine order giving them a role to occupy. The conception of freedom such a view entails, if any, must be limited to something like political freedom or even just the successful carrying out of one's social role. For Hegel, this was the ancient Greek approach to political identity and freedom.³⁵ Some readers assimilate Hegel's views to this kind of stereotypical communitarianism by attributing to him a relativistic critique of liberalism that denies a universal moral perspective from which to criticize a specific political community (and hence, implicitly attributing to Hegel the denial of a notion of freedom outside that community and by which that community sometimes might be evaluated).³⁶

By contrast, modern scholars of Hegel have identified that his view represents a sort of midpoint or a synthesis between the liberal and communitarian views: individual identity is self-created insofar as it is composed of an individual's choices, but those choices in turn are composed out of material provided by the social environment.³⁷ Taylor, for example, has compared this to a language, with the idea being that a person's social environment provides them with the language through which they can make their choices and the commitments that shape their identity.³⁸

This notion of identity as constructed out of an agent's previous actions and commitments—which, in turn, are constructed out of the building blocks provided by one's community—ought to strike the reader as plausible. I claim that it corresponds closely to modern scholarly insights about both individuals

³⁴ For thoughtful discussions on the relationship between property and recognition in Hegel, see generally Renato Cristi, *Hegel on Property and Recognition*, 51 LAVAL THÉOLOGIQUE ET PHILOSOPHIQUE 335 (1995); Peter G. Stillman, *Hegel's Analysis of Property in the Philosophy of Right*, 10 CARDOZO L. REV. 1031 (1989); and HARDIMON, *supra* note 30, at 100. In particular, see Stillman, *supra*, at 1035–36, and Dudley Knowles, *Hegel on Property and Personality*, 33 PHIL. Q. 45, 56–57 (1983), for concise descriptions of the way in which property serves as a foundation for recognition in Hegel's theory.

³⁵ WOOD, *supra* note 25, at 56–57; HARDIMON, *supra* note 30, at 32–33.

³⁶ See WOOD, *supra* note 25, at 202–06, 208 (explaining the common notion that Hegel endorses “cultural pluralism and relativism”).

³⁷ *Id.* at 19; HARDIMON, *supra* note 30.

³⁸ Taylor, *supra* note 32, at 32.

and democratic states. On the individual level, the view coheres nicely with the insights and approaches of modern psychology and economics. Psychology teaches us that our self-understanding and our reasoning process is often rooted in our preexisting behavior and in a drive for consistency with that behavior. In the words of Dan McAdams, describing the theory of “narrative identity”: “Narrative identities reconstruct the autobiographical past and anticipate the imagined future to provide the self with temporal coherence and some semblance of psychosocial unity and purpose.”³⁹ Similarly, economics identifies that human choices create path dependencies that affect the future choices available for an individual, with one obvious example being human capital investment.⁴⁰

At the same time, psychology reflects the importance of social context. Consider the infamous “WEIRD” (“Western, Educated, Industrialized, Rich, and Democratic”) problem: researchers have noted that people from such cultures are vastly over represented in psychological research even though their behavior is visibly different in ways that reflect core variations in value, such as the value of equal division of resources and even the understanding of physical space.⁴¹ The fact of that variation, of course, reflects the deep influence of culture on basic human cognition. The same is again true of economics: the investments which we can make are inherently constrained by the investments of others, once again bringing together individual initiative and social context. On the political level, we can all observe the way in which citizens are trained to identify with the great deeds of the past as the acts of a continuous polity of which they are members—the way in which the citizens of countries on the right side of World War II collectively describe the shared effort to defeat Nazism, for example.⁴²

³⁹ Dan P. McAdams, “*First We Invented Stories, Then They Changed Us*”: *The Evolution of Narrative Identity*, 3 *EVOLUTIONARY STUD. IMAGINATIVE CULTURE* 1, 2 (2019).

⁴⁰ See, e.g., Carolina Cañibano & Jason Potts, *Toward an Evolutionary Theory of Human Capital*, 29 *J. EVOLUTIONARY ECON.* 1017, 1027–28 (2019) (giving theory of individual careers and human capital development as path-dependent discovery process).

⁴¹ Joseph Henrich et al., *The Weirdest People in The World?*, 33 *BEHAV. & BRAIN SCIS.* 61, 63, 65, 68–69 (2010).

⁴² For one particularly vivid recent example, the Ukrainian foreign minister concluded a call for people of other countries to take up arms in its defense with, “Together we defeated Hitler, and we will defeat Putin, too.” Dmytro Kuleba (@DmytroKuleba), X [formerly TWITTER] (Feb. 27, 2022, 2:46 AM), <https://twitter.com/DmytroKuleba/status/1497840669066502145>; see also Annabelle Timsit et al., *Ukraine Is Asking Foreigners to Help Fight Russia. Some Are Heeding the Call, Despite Enormous Risks.*, WASH. POST, <https://www.washingtonpost.com/world/2022/03/01/ukraine-visa-volunteer-fighters-russia/> (Mar. 1, 2022 12:36 PM). Kuleba’s claim only makes sense to the extent there is a collective “we” among the citizens of the allied nations extending across 80 years of history.

For Hegel, this conception of identity helps resolve the core paradox with which Enlightenment philosophy wrestled, namely, how is it that human beings can be free when we're surrounded by so many constraints? At the metaphysical level, this is captured by the tension between the view of humans as embedded in natural causal processes, and the idea that people nonetheless have free will.⁴³ At the political level, the same worry is captured by Rousseau's famous aphorism that "[m]an is born free, and everywhere he is in chains"⁴⁴—in other words, that our efforts to achieve individual as well as political freedom inevitably but paradoxically involve a bunch of people ordering us around. In the rule of law literature, this problem persists to this day, as theorists who claim that the rule of law promotes individual freedom must wrestle with the fact that the modality of the law is coercion.⁴⁵ How can it be that a set of social practices that reduce to people with guns ordering us about—that is, law—really makes us free?⁴⁶

Modern views about the rule of law and freedom often emphasize a variety of pragmatic arguments about their relationship. For example, some theorists argue that the rule of law gives people more actual day-to-day freedom because it allows them to predict where coercion will be used (and, hence, guarantees their options in the space where coercion will not be used).⁴⁷ Others argue that by requiring officials to apply the law to themselves, the rule of law reduces the incentive to make oppressive law.⁴⁸ Other scholars have observed more broadly that some constraints actually promote an agent's freedom by permitting that agent to make binding long-term commitments.⁴⁹ To make sense of Hegel, we

⁴³ See generally CHARLES TAYLOR, *HEGEL* 29–32, (1975) (describing apparent conflict between freedom and causation among Hegel's intellectual predecessors, and Kant's development of theory of autonomy in response); *id.* at 77–78 (describing "opposition between nature and freedom" which drove Hegel's thought).

⁴⁴ JEAN JACQUES ROUSSEAU, *THE SOCIAL CONTRACT AND OTHER LATER POLITICAL WRITINGS* 43 (Victor Gourevitch ed. & trans., 2d ed. 2019).

⁴⁵ See, e.g., FRIEDRICH A. HAYEK, *THE CONSTITUTION OF LIBERTY* 153 (1960) (arguing that the rule of law is compatible with freedom because "general abstract rules" do not subject rule-follower to rule-maker's will).

⁴⁶ See generally Robert M. Cover, *Essay, Violence and the Word*, 95 *YALE L.J.* 1601 (1986) (forcing the reader to confront the fact that every act of legal interpretation wields violence).

⁴⁷ See generally GOWDER, *supra* note 25 (describing the variety of such "planning"-based theories of the rule of law and liberty).

⁴⁸ See generally Paul Gowder, *Why Majority Religions Should Not Be Accommodated*, 108 *IOWA L. REV.* 2153, 2156–59 (2023) (reconstructing such self-application arguments).

⁴⁹ See generally JON ELSTER, *ULYSSES UNBOUND: STUDIES IN RATIONALITY, PRECOMMITMENT, AND CONSTRAINTS* (2000) (providing a canonical book-length treatment of idea of precommitment). This is a core element in our understanding of contract law. See, e.g., CHARLES FRIED, *CONTRACT AS PROMISE: A THEORY OF CONTRACTUAL OBLIGATION* 13–14 (2d ed. 2015) (explaining why capacity to bind oneself by contractual promises actually increases an agent's "options in the long run").

can take that last category of argument and add the further question: “how do we characterize the agent who is said to have or lack freedom in the first place?” That is, on a Hegelian theory, the role of constraints is not merely to permit an agent to make long-term plans but to make sense of the idea of an agent in the first place.⁵⁰

As a first pass, we might say with Hegel’s predecessors in the romantics that freedom is the pursuit of one’s authentic goals,⁵¹ but this just pushes the problem back a step: how do we determine one’s authentic goals? For Hegel, the answer is that we make our identity in response to our social world. The family, civil society, and the state give us both the conceptual language out of which our agency is built as well as the constraints through which our agency interactively develops.⁵² They also provide us with the intersubjective validation necessary to understand our own goals and commitments and choices—we participate in socially sanctioned networks of interpersonal acknowledgment and respect (that is, recognition) mediated through social technologies such as property rights. Thus, we can be free by developing and pursuing a coherent set of commitments chosen by us out of the materials provided by the social context in which we find ourselves. The social context allows us to shape an identity, and acting from our identity makes us free.

I’ll say more about the rule of law in relationship to these ideas in Part II, but for the purposes of introducing the reader to Hegelian political philosophy, what has been said so far will be sufficient to lead into the second idea, namely how these insights can show us that we can be reconciled to our social and political worlds. Rather than being an alien imposition which restrains our agency, that external world is the stuff out of which our agency is made; the task of philosophy as reconciliation is to teach us that and, in doing so, allow us to experience ourselves as at home in the world.⁵³

⁵⁰ A different version of this idea will be familiar to students of Immanuel Kant, in the form of the claim that individuals are not free if they merely act on their natural desires (this is the problem of humanity’s nature as caused again), but only if they act from reason, i.e., morality. *See generally* TAYLOR, *supra* note 43, at 31–32 (summarizing Kantian morality). Practically speaking, it will also be familiar to anyone who struggles with addiction or anything resembling addiction—is your social media doomscrolling really an expression of freedom? Mine sure isn’t.

⁵¹ *See generally id.* at 15, 24 (describing conception of freedom associated with the “expressivist theory” of the romantics).

⁵² WOOD, *supra* note 25, at 201–02, 239–41; TAYLOR, *supra* note 43, at 78.

⁵³ For an explication of Hegel’s notion of being at home in the world, see HARDIMON, *supra* note 30, at 95–96.

Hegel explained that reconciling ourselves to the social environments in which we find ourselves was a key goal of his philosophy.⁵⁴ In the modern world, with its apparent separation between our individual identities and the social context, we are at risk of alienation—of understanding the social world as a threat to our identities and our freedom. Hegel’s task is to show people that they ought not to understand themselves as alienated, because our social worlds actually support our autonomy.⁵⁵ Michael Hardimon, the leading scholar of Hegel’s account of reconciliation, expresses the problem of alienation as one of being “split” both from one’s social world and from oneself by “the conflicting aims of realizing their individuality and being members of the community.”⁵⁶ Hegelian reconciliation is the philosophical cure for that alienated condition.

But there’s a catch. The project of philosophical reconciliation must be honest: the social world has to *actually* support a person’s autonomy.⁵⁷ For example, the Hegelian account cannot supply a way to understand the poor as having a place in the modern society.⁵⁸ Under such circumstances, philosophical reconciliation fails; to tell the poor that their social world is a home would just be lying to them.

Another way to think about this is that a person can be alienated either for what we might call *epistemic* reasons—they don’t understand that their social world provides them with a home—in which case the task of Hegelian social philosophy is to teach them why it does. Or a person can be alienated for what we might call *ontological* reasons: their society does not in fact provide them a home; it does not provide them with the social supports for a robust personal and civic identity.⁵⁹ In the latter case, Hegelian social philosophy has a critical bite, grounding a demand for social reform. The ontological side of alienation will play a central role in the remainder of this Essay, as it is this form of alienation which I contend the retrenchment of liberal rights inflicts on individuals.

⁵⁴ HEGEL, *supra* note 24, at xxix.

⁵⁵ In Hardimon’s words, “the social world is a home if and only if it makes it possible for people to actualize themselves as individuals and as social members.” HARDIMON, *supra* note 30, at 99.

⁵⁶ *Id.* at 1.

⁵⁷ See *id.* at 120 (explaining the possibility of “objective” alienation in which the world is not a home, so one cannot be reconciled to it).

⁵⁸ WOOD, *supra* note 25, at 248–49.

⁵⁹ This tracks the distinction between “pure subjective” alienation and “pure objective” alienation in HARDIMON, *supra* note 30, at 120–21.

B. Williams on the Importance of Legal Identity for the Subordinated

This sub-part offers a close reading of several passages from Patricia Williams to draw out the connection between Williams's argument and Hegel's ideas. I ask the reader's indulgence for a few extended quotations to permit the full force of her argument to come through.

We begin a few paragraphs after the passage quoted in the introduction, in which Williams contrasts the critical legal studies and Marxist view of rights as a capitalist tool to resist social solidarity (the first paragraph of the below) to the Black experience (second paragraph):

In the face of such a vision, "token bourgeoisification" of blacks is probably the best—and the worst—that can ever be imagined. From such a vantage point, the structure of rights is akin to that of racism in its power to constrict thought, to channel broad human experience into narrowly referenced and reified stereotypes. Breaking through such stereotypes would naturally entail some "unnaming" process.

For most blacks, on the other hand, running the risk—as well as having the power—of "stereo-typing" (a misuse of the naming process; a reduction of considered dimension rather than an expansion) is a lesser historical evil than having been unnamed altogether. The black experience of anonymity, the estrangement of being without a name, has been one of living in the oblivion of society's inverse, beyond the dimension of any consideration at all. Thus, the experience of rights-assertion has been one of both solidarity and freedom, of empowerment of an internal and very personal sort; it has been a process of finding the self.⁶⁰

Slightly further on, Williams develops her account of the difficulty that those who lack rights experience in "finding the self" by contextualizing it in all the other ways that the enslaved experienced a forced loss of the self, in terms reminiscent of Orlando Patterson's theory of slavery as "natal alienation":⁶¹

Blacks, however, may symbolize the King Lear who was pushed to the point of madness, who did not find his essential humanity while retaining some reference point to an identity as social being temporarily lost in the wilderness, but who ultimately lost everything, including a sense of self. The black slave experience was that of lost languages, cultures, tribal ties, kinship bonds, and even of the power

⁶⁰ Williams, *supra* note 1, at 414 (emphasis removed).

⁶¹ ORLANDO PATTERSON, SLAVERY AND SOCIAL DEATH: A COMPARATIVE STUDY 5 (1982).

to procreate in the image of oneself and not that of an alien master. . . . [F]or slaves, sharecroppers, prisoners and mental patients—the experience of poverty and need is fraught with the realization that they are dependent “on the uncertain and fitful protection of a world conscience” which has forgotten them as individuals, a collective mind which considers them (if it considers them at all) “examples of the universal abstraction Man.” For the historically disempowered, the conferring of rights is symbolic of all the denied aspects of humanity: rights imply a respect which places one within the referential range of self and others, which elevates one’s status from human body to social being.⁶²

Observe how in that passage the notion of being “within the referential range of self and others” appears to be a fairly direct allusion to Hegelian ideas about recognition.

Somewhat later in the same article, after quoting Carl Jung’s assertion that “[h]uman nature has an invincible dread of becoming more conscious of itself,”⁶³ Williams goes on to say that:

This underscores my sense of the importance of rights: rights are to law what conscious commitments are to the psyche. This country’s worst historical moments have not been attributable to rights-assertion, but to a failure of rights-commitment.⁶⁴

In essence, Williams’s argument is that Black Americans could not be honestly reconciled to American society—American society does not support the identity and freedom of Black Americans—except insofar as the legal system fills in for the failures of social and economic life.⁶⁵ Thus, she emphasizes the role of legal rights as one of the kinds of building-blocks provided by one’s community for the foundation of one’s individual identity as a member of society.⁶⁶ While, for Hegel, there are other social sources of identity (such as the family and economic civil society),⁶⁷ Williams identifies that for the subordinated, the social

⁶² Williams, *supra* note 1, at 415–16.

⁶³ *Id.* at 424 (quoting C. G. JUNG, PSYCHE AND SYMBOL 214 (Violet de Laszlo ed., R. F. C. Hull trans., 1958)).

⁶⁴ *Id.* (emphasis omitted).

⁶⁵ *See id.* at 423–24.

⁶⁶ *See id.* at 416.

⁶⁷ MOLAND, *supra* note 25, at 15.

foundations of identity outside of legal rights are undermined by social and economic oppression.⁶⁸

Legal rights can fill this supports-for-identity-gap for several reasons. First, as Williams notes elsewhere in her article, legal rights and their associated formalities enable Black Americans to establish a foundation of interpersonal trust through making their own commitments.⁶⁹ Second, and more significantly, legal rights confer on Black Americans the capacity to demand recognition from others as autonomous deciders. In contrast to the pre-rights state in which Black Americans are “living in the oblivion of society’s inverse, beyond the dimension of any consideration at all,”⁷⁰ to have rights is to have claims to the consideration of others and the attention of society, to be entitled to make an impact on the world on one’s own account, to be “within the referential range of self and others.”⁷¹ In effect, Williams turns Hegel’s master-slave dialectic on its head: while for Hegel the point of the dialectic is that the master is unable to achieve the recognition he craves from a slave who, in virtue of slavery, lacks the capacity to confer that recognition,⁷² Williams draws our attention to the parallel problem for the slave—and ultimately for the disenfranchised and oppressed of all kinds—who, lacking rights, lack the social support to make demands on the behavior of others and, hence, lack the capacity to compel those others to acknowledge their needs or goals.⁷³

The analogy in the last passage between state commitment to rights and individual commitments to goals and life-plans is of particular interest for the rule of law. As I have argued elsewhere, commitment is a key mechanism of the state’s maintenance of the rule of law.⁷⁴ Since, as discussed above, commitment is a key element of individual identity, Williams seems to be suggesting that a state’s legal rights can make up some element of a *public* identity in addition to supplying the foundation for *individual* identity within a state. In the next Part,

⁶⁸ Williams, *supra* note 1, at 414, 416. Against Williams one might object that surely the social relationships *within* subordinated communities can provide some of the same goods. But such goods are to some degree impaired relative to those who are not subordinated and who enjoy such relations with everyone. Compare the discussion of so-called “life-style enclaves” as an insufficient basis for the social supports for identity in HARDIMON, *supra* note 30, at 103.

⁶⁹ Williams, *supra* note 1, at 407–08 (“I am still engaged in a struggle to set up transactions at arms’ length, as legitimately commercial, and to portray myself as a bargainer of separate worth, distinct power, sufficient rights to manipulate commerce, rather than to be manipulated as the object of commerce.”).

⁷⁰ *Id.* at 414.

⁷¹ *Id.* at 416.

⁷² See *supra* note 33 and accompanying text.

⁷³ See Williams, *supra* note 1, at 413, 416, 423–24.

⁷⁴ GOWDER, *supra* note 25, at 144–45, 161.

I will defend just such a claim, and elaborate on the relationship between individual identity, civic identity, and legal rights.

II. IDENTITY AND THE RULE OF LAW

Having established the intellectual background, I propose to derive from Williams and Hegel some propositions about the relationship between the rule of law and identity. The essence of this Part is that legal rights are at the foundation of both individual identities and the identities of the societies in which individuals are embedded. Unsettling established legal rights poses a normatively meaningful threat to those identities—in effect depriving individuals, especially socially subordinated individuals—of needed social support to live full lives and shattering the connection between their individual identities and their social identities. In other words, it inflicts Hegelian alienation on the subordinated. This Part amounts to a case for protecting individual legal rights against retrenchment in order to protect people from alienation.

Consider first the individual level. I claim the following:

- 1) *The Extended Hayekian Claim*: The legal framework of a state, if it is reasonably consistent over time, provides individuals with some sense of the sorts of life plans that are available to them, the commitments that it might make sense for them to pursue, and the conceptions of the good that their society supports.⁷⁵ I call this “the extended Hayekian claim” because it takes Hayek’s proposition that the rule of law makes it possible for people to make long-term plans and commitments and combines it with the idea that those plans and commitments are constitutive of identity.⁷⁶
- 2) *The Legal Recognition Claim*: The rule of law supports the mutual recognition of law’s subjects by defining the ways in which the plans and commitments of each must take into account the plans and commitments of others. For Hegel, this is particularly visible in the analysis of property, where a person’s plans and their claims

⁷⁵ In Gerald Postema’s landmark recent book on the rule of law, he expresses the rule of law’s support for Hegelian identity in terms of a political value of “membership.” GERALD J. POSTEMA, *LAW’S RULE: THE NATURE, VALUE, AND VIABILITY OF THE RULE OF LAW* 93 (2022). In his words, “the framework of a community that seeks to follow the membership model must take account of and provide resources for the temporally extended coherence of the community and its role in providing the statuses and scripts used by its members as they navigate through their social world.” *Id.*

⁷⁶ See HAYEK, *supra* note 45, at 153, 157–58 (connecting rule of law to possibility of planning).

to resources to carry them out become immediately visible and demand intersubjective respect.⁷⁷

To a substantial extent, the foregoing Part amounts to a defense of those two claims. However, a few additional words by way of illustration and elaboration may be in order.

To reemphasize: Williams identifies that for the subordinated the rule of law can serve as a substitute for non-legal, non-state forms of recognition denied to a person. In Hegel's broader theory of the development of ethical life, the state is the third step in a series of developments beginning with the family and with civil society.⁷⁸ Forms of recognition other than legal rights are available in these other contexts.⁷⁹ For example, the family or the craft guild can provide a person with a defined social role and intersubjective support for a set of individual goals within that social role. But a person in an oppressed group can be denied broader social respect for their other attachments. For example, oppression often entails the disregard or destruction of the family attachments of the oppressed.⁸⁰ Likewise, oppression often entails economic subordination in which the economic role of the oppressed is represented in broader social consciousness not as independent and equal agency but as being mere servants or tools for others' ends, as was obviously the case under slavery. For that reason, as Williams persuasively argues, theories of social standing such as the one implicitly held by CLS theorists, that presupposed that individuals can have their commitments and agency in the world recognized by others in nonlegal spheres, must wrestle with the fact that for some, the legal sphere is the only sphere available.⁸¹ Moreover, as I will emphasize in Part III of this Essay, sometimes

⁷⁷ See generally *supra* note 34 and accompanying text. For a general account of the Hegelian role of law in recognition, see Costas Douzinas, *Identity, Recognition, Rights or What Can Hegel Teach Us About Human Rights?*, 29 J.L. & SOC'Y 379 (2002).

⁷⁸ MOLAND, *supra* note 25, at 35–45.

⁷⁹ See *id.* at 45.

⁸⁰ The disregard of the Black family began in slavery, when families were causally broken up by enslavers who sold husbands away from wives and children away from parents. See, e.g., JAMES W. C. PENNINGTON, *THE FUGITIVE BLACKSMITH; OR, EVENTS IN THE HISTORY OF JAMES W. C. PENNINGTON* xii (2d ed. 1849) (explaining, in preface to slave narrative, that one of the evils of ownership in persons is the capacity to break up families by sale). This has continued toward the present in, for example, family, income support, and child protection legal regimes which systematically disregard Black familial choices. See generally Dorothy Roberts, *Complicating the Triangle of Race, Class and State: The Insights of Black Feminists*, 37 ETHNIC & RACIAL STUD. 1776 (2014) (reviewing a variety of anti-Black legal regimes in the sphere of family and home life).

⁸¹ It should be unsurprising, in light of the role of property in recognition (see *supra* note 34 and accompanying text) that a key claim of freed people immediately after emancipation was to property. See generally PAUL GOWDER, *THE RULE OF LAW IN THE UNITED STATES: AN UNFINISHED PROJECT OF BLACK LIBERATION* 65–66 (2021) (describing post-emancipation demand for land redistribution).

the legal sphere can either support or undermine sources of recognition or identity in other spheres. For example, marriage can only provide a secure familial foundation for the social identities of a couple to the extent that the law is willing to recognize their marriage.

A. From Individual to Political Identity

On the political level, I claim that it is highly plausible to think that a state's legal rules, and in particular the rights to which a state has committed, are a key component of the identity of a state.⁸² In other words, Williams was right to say that "rights are to law what conscious commitments are to the psyche."⁸³ Examples of this connection between rights and political identity abound. Consider the way in which something like income support benefits represents a country's self-image of the sort of political and economic community that it wants to be—a country that has a robust package of old age benefits expresses something about its commitment to its elders; one that has a robust package of unemployment benefits expresses something about its commitment to workers rather than investors. It is no coincidence that Lyndon Johnson called his expansion of welfare benefits and other kinds of economic programs the "Great Society"—a name that represents the proposition that something important about the society and its commitments could be derived from the sorts of rights to economic support it offers.

This claim should be particularly plausible in the context of *constitutional* rights. Empirical comparative constitutional law scholars have identified distinctive cross-national similarities in constitutional rights guarantees, suggesting that there is a significant amount of copying as well as a recognizable ideological spectrum within constitutions.⁸⁴ It is easy to interpret this kind of result as representing countries choosing which sorts of countries, among the available country-types, they wish to be—do they wish to identify as socialist, with robust positive economic rights? Do they wish to identify as libertarian and capitalist, focused on negative liberties and the protection of property? On what

⁸² Elsewhere, I have argued that corporate entities such as social media platforms can similarly instantiate a kind of collective identity through their systems of rules and the enforcement thereof. PAUL GOWDER, *THE NETWORKED LEVIATHAN: FOR DEMOCRATIC PLATFORMS* 154–66 (2023).

⁸³ Williams, *supra* note 1, at 424.

⁸⁴ See Benedikt Goderis & Mila Versteeg, *The Diffusion of Constitutional Rights*, 39 INT'L REV. L. & ECON. 1 (2014) (identifying a pattern of constitutional copying influenced by factors such as similar colonial and religious heritage and similar legal systems); David S. Law & Mila Versteeg, *The Evolution and Ideology of Global Constitutionalism*, 99 CALIF. L. REV. 1163 (2011) (identifying ideological spectrum).

vision of the relative importance of social and economic rights are they founded? With which other countries do they wish to affiliate? For example, David Law empirically distinguishes three distinct normative “archetypes” into which constitutions fall and argues that this is inherent to the process of constitution-making; in his words, the intrinsic connection between constitutional text and normative ideas entails that “[t]o adopt a constitution is therefore nothing less than to adopt an ideology of the state in authoritative form.”⁸⁵

In the human rights literature, some scholars have suggested that the ratification of human rights treaties may be a consequence of civic identification: “part and parcel of affirming norms that reflect their identity as liberal democracies.”⁸⁶ Of course, the origin of legal rights in any given polity is almost certainly the result of numerous factors, not merely a country’s civic identity or aspirations. Nonetheless, it is plausible to conclude that civic identity is a significant feature of constitutional and human rights enactment in a causal sense.

Regardless of the *causal* relationship between identity and rights, however, there is clearly a *constitutive* relationship. By this I mean that there is an important sense in which the answer to the question “what is a country’s political identity” incorporates by reference the answer to the question “what legal rights does that country guarantee its people?” One key example would be the way that a country’s conception of membership, of who counts as a citizen (and hence of who makes up the body politic whose agency is aggregated into the collective agency, and hence identity, of the state) is itself constituted by their status as rights-holders.⁸⁷ This is not merely true of obviously political rights—though it is quite intuitive that who is entitled to free speech and who is entitled to vote make out a conception of whom the polity comprises. When the Dawes Act purported to extend citizenship to Native Americans on the condition of their accepting private property rights to land previously owned by their nations,⁸⁸ this represented a public view about the connection between landownership and citizenship that was consistent with a wide variety of other legal acts in the

⁸⁵ David S. Law, *Constitutional Archetypes*, 95 TEX. L. REV. 153, 156, 161 (2016).

⁸⁶ Kevin L. Cope et al., *Empirical Studies of Human Rights Law*, 15 ANN. REV. L. & SOC. SCI. 155, 162 (2019).

⁸⁷ In other words, there’s a conventional kind of approach to the relationship between citizenship and rights that has them going from the former to the latter: “because I am a citizen, I have certain rights” (quintessentially voting). But in this paragraph, I mean to suggest that the other direction (“because I have certain rights, I count as a citizen”) also has a certain verisimilitude.

⁸⁸ See GOWDER, *supra* note 81, at 142–44.

United States up to that point, including, for example, legal restrictions on non-citizen ownership of land,⁸⁹ as well as underlying republican ideas that connected economic independence through property-holding to good citizenship.⁹⁰

B. From Political Identity Back to Individual Identity

The commitments of the state can easily become the commitments of the individual through, for example, processes of socialization. One visible example can be seen in the leakage of American constitutional law on free speech into numerous contexts outside the state. For a prominent example, numerous ordinary Americans seem to routinely experience themselves as wronged by internet platform content moderation in virtue of their free speech rights, to the point that this has even appeared in state legislation attempting to forbid such platforms from “censorship.”⁹¹

Those commitments, in turn, become implicated in processes of recognition as they form the basis of interpersonal and political demands. Among states, for example, the language of human rights serves as a basis of affiliation, as states make claims against one another on the basis of commitments in human rights treaties and also form counterpublics to express different conceptions within the same language of value and commitment.⁹² Individuals within states, likewise, use their legal rights or their perceptions thereof to make claims on one another—even, as the example of social media “free speech” above illustrates, beyond the scope of those rights. Our shared perception of the domain of legitimate claims-making among individuals appears to be partly constructed by those rights, as, for example, when American social media users criticize one another for alleged censorship in a way that would be less coherent in other countries with less vigorous free speech traditions.

Bringing together the extended Hayekian claim and the legal recognition claim suggests the importance of established legal rights for individual and collective identity, especially for the socially subordinated. The set of legal

⁸⁹ *Id.* at 24–25, 143–44.

⁹⁰ *Id.* at 22–29.

⁹¹ *See, e.g.*, TEX. CIV. PRAC. & REM. CODE ANN. § 143A.002(a) (West 2021) (“A social media platform may not censor a user, a user’s expression, or a user’s ability to receive the expression of another person based on: [] the viewpoint of the user or another person[.]”).

⁹² For an example of a counterpublic response to conventional human rights instruments, see U.N. World Conference on Human Rights, Apr. 19–May 7, 1993, *The Cairo Declaration on Human Rights in Islam*, U.N. Doc A/CONF.157/PC/62/Add.18 (June 9, 1993).

rights that a person has becomes the material out of which they shape key life choices constitutive of their identities; it also provides the cognitive material for their understanding of the values and commitments of their broader society and their own relationship to those values and commitments.

This, in turn, suggests that the compromise or destruction of legal rights can be experienced by those whose rights are compromised as Hegelian alienation, in which they are rejected as members of the political community. Imagine that you have been raised to think that you have some right guaranteed by your government. The state produces significant amounts of propaganda about its commitment to liberty and equality and you are raised from childhood to be proud of these rights and to trust in their protection. Moreover, you make significant life decisions (for example, where you work, whether you start a business, where you live, who—or if—you marry)—decisions that form the foundation of how you understand yourself, your values, and your commitments—in part based on that trust in the ongoing protection of those rights. And now those rights go away—what are you supposed to make of the situation? It is natural to experience oneself as disregarded—to see that, to the state, one’s significant life choices lack value and one’s membership, partly defined by rights, is not fully respected.

The concept of alienation, as elaborated by contemporary Hegel scholar Michael Hardimon, captures this idea. To reprise Hardimon’s expression of it:

Many people feel ‘split’ from its [the modern social world’s] institutions, regarding them as foreign, bifurcating, and hostile or indifferent to their needs. Many people also feel split within themselves, divided by the conflicting aims of realizing their individuality and being members of the community.⁹³

This Part thus concludes that the compromise of people’s legal rights has the quality of causing this experience of alienation—of communicating that their social worlds (and particularly their states) are “hostile or indifferent to their needs,” as well as experiencing the loss of social supports for “realizing their individuality” (that is, identity).

In the final Part, I will suggest that we are witnessing just such a forced alienation in the contemporary United States.

⁹³ HARDIMON, *supra* note 30, at 1.

III. THE RETRENCHMENT OF MODERN LIBERAL RIGHTS IN AMERICA

This Part turns from the theoretical to the concrete. I first argue that the former U.S. constitutional right to abortion fits within the Williams/Hegel argument of the previous Parts. Then, I suggest that the American constitutional instantiation of the rule of law reflects the importance of preexisting rights endowments but inappropriately does so primarily in the domain of economic rights rather than personal rights like abortion. Finally, having established with the example of abortion that the relationship between legal rights and identity is real and relevant to present-day law, I address a critical objection to the argument that is also rooted in the concrete implications of the theory within U.S. law: could not the same argument be raised by those who cling to inegalitarian legal privileges, such as the “right” to segregate or discriminate?

The most significant expansion of rights in American law since the end of the Civil Rights Movement is doubtless the advent, by the Supreme Court, of individual rights to sexual, sexuality, reproductive, and gender liberty, as carried out in a line of cases beginning with the right to contraception,⁹⁴ the (former) right to abortion,⁹⁵ the striking down of laws criminalizing same-sex sexuality,⁹⁶ the constitutional protection of gay marriage,⁹⁷ and, most recently (albeit in the statutory rather than constitutional domain), the interpretation of the prohibition against sex discrimination in employment under Title VII of the Civil Rights Act of 1964 to forbid discrimination against employees on the basis of their sexual orientation or gender identity.⁹⁸ Considering that rights-expansive line of cases extending back over half a century, one would be forgiven for thinking that our law recognized a protected right of individual autonomy within the domain of human sexuality, relationships, and reproduction. Because of the centrality of sexuality, relationships, and reproduction to human life, and the way in which other life choices, such as employment and education, depend on family relationships, such rights are immensely consequential to those who hold them.⁹⁹

⁹⁴ *Griswold v. Connecticut*, 381 U.S. 479 (1965).

⁹⁵ *Roe v. Wade*, 410 U.S. 113 (1973), *overruled by* *Dobbs v. Jackson Women’s Health Org.*, 597 U.S. __ (2022).

⁹⁶ *Lawrence v. Texas*, 539 U.S. 558 (2003).

⁹⁷ *United States v. Windsor*, 570 U.S. 744 (2013); *Obergefell v. Hodges*, 576 U.S. 644 (2015).

⁹⁸ *Bostock v. Clayton County*, 590 U.S. __ (2020).

⁹⁹ *See, e.g., Obergefell*, 576 U.S. at 670 (explaining economic significance of marriage via network of state benefits for married couples).

But there is a judicial backlash against those rights. The right to abortion has recently been overruled.¹⁰⁰ Notwithstanding its Title VII ruling and state law explicitly forbidding discrimination against LGBTQ+ individuals in other market contexts, the Supreme Court has consistently allowed religiously motivated discrimination against LGBTQ+ individuals to evade antidiscrimination rights.¹⁰¹ Efforts to effectuate access to contraception through federal subsidy have struggled in the face of efforts by those with religious objections to specific forms of contraception to resist participating in mechanisms like employer-provided health insurance.¹⁰² Lower courts have gone even further. For example, in 2023, a District Court in Texas ruled that employers could not be required to provide health insurance that covered HIV drug PrEP on the grounds that the employers believed their religion forbade them from being “complicit in facilitating homosexual behavior, drug use, and sexual activity outside of marriage between one man and one woman.”¹⁰³

While there are conflicting rights claims at issue in many of these cases—those who claim that their religions require them to resist the rights of others call upon traditional rights to religious liberty—the disparity in scale and impact between the two sides of the rights claims in conflict here is striking. Those who have claimed rights to reproductive, sexual, and family liberty face questions like whether they will be allowed to become married, whether they will have affordable access to lifesaving medication, or whether they will be forced to spend the next eighteen years of their lives and countless thousands upon thousands of dollars raising a child. Those who claim religious rights to resist reproductive, sexual, and gender rights face questions as small as whether they will be obliged to fill out a form which they believe is sinful.¹⁰⁴

¹⁰⁰ *Dobbs*, 597 U.S. ____.

¹⁰¹ *Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm’n*, 584 U.S. ____ (2018); *303 Creative LLC v. Elenis*, 600 U.S. ____ (2023). While neither case formally relied on religious exceptions (the former rested on the claim that the state’s enforcement agency manifested religious bias; the latter on a free speech claim), both cases concerned religiously motivated discrimination and clearly fit into a broader trend of the Roberts Court carving out exemptions for religious belief to laws that protect third parties. For general discussion, see Gowder, *supra* note 48 (describing the trend); *see also* *Fulton v. Philadelphia*, 593 U.S. ____ (2021) (requiring City of Philadelphia to permit religious group to certify prospective foster families notwithstanding group’s engaging in discrimination against gay couples).

¹⁰² *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014).

¹⁰³ *Braidwood Management Inc. v. Becerra*, 666 F. Supp. 3d 613, 617, 619 (N.D. Tex. 2023).

¹⁰⁴ *Zubik v. Burwell*, 578 U.S. ____ (2016) (per curiam).

A. *Casey's Reliance Doctrine as Guard Against Alienation*

There are many potential consequences to the rollback of rights that the U.S. Supreme Court (like authorities in Hungary and Poland—albeit with the latter presently in question after setbacks the far-right party experienced in 2023) is carrying out and that anti-liberal scholars are defending. The individual rightsholder may suffer substantial economic and even physical harms, most obviously, to the extent they may suddenly find themselves, for example, excluded from the economy because of their sexual orientation, forced to raise an unwanted child, or even deprived of medical care to protect them from a deadly disease like HIV. But this Part suggests that there are also consequences for the integrity of the legal system's Hegelian identity-supporting function—and, for that reason, the rule of law.

In American constitutional law, these consequences can come described in the language of “reliance,” and the concept of reliance makes a suitable entry point for this discussion because of the famous reliance argument about the constitutional right to abortion in the joint opinion in *Planned Parenthood v. Casey*.¹⁰⁵ The Court in *Dobbs* rejected this reliance argument in its entirety,¹⁰⁶ but the framework of the previous two Parts suggests that there is substantial merit to it.

Here's how the *Casey* joint opinion explained the theory of reliance:

[F]or two decades of economic and social developments, people have organized intimate relationships and made choices that define their views of themselves and their places in society, in reliance on the availability of abortion in the event that contraception should fail. The ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives. The Constitution serves human values, and while the effect of reliance on *Roe* cannot be exactly measured, neither can the certain cost of overruling *Roe* for people who have ordered their thinking and living around that case be dismissed.¹⁰⁷

There are at least two ways to read this passage. The first is about economic reliance. Scholars have identified that reproductive choice has promoted the economic independence and equality of women because pregnancy and childrearing impose immense economic burdens on women, such as the raw

¹⁰⁵ *Planned Parenthood v. Casey*, 505 U.S. 833, 855–56 (1992), *overruled by Dobbs*, 597 U.S. ____.

¹⁰⁶ *Dobbs*, No. 19-1391, slip op. at 66–66.

¹⁰⁷ *Casey*, 505 U.S. at 856 (internal citation omitted).

costs of bearing a child, unjust disparities in the cost of raising children, the incompatibility of the physical limitations of pregnancy and the time limitations of childrearing (the latter again unjustly imposed predominantly on women) with many employment choices, and outright discrimination.¹⁰⁸ We might read the passage as suggesting that many women have made economic choices, such as to pursue highly demanding careers, in anticipation of the possibility of abortion as a backstop to protect those choices in case of unwanted pregnancy. Such a reading would see the abortion right as similar to a career insurance policy that makes it less risky to, for example, take out student loans to go to law school and pursue a job in a big corporate law firm, because it gives a woman options to prevent her career from being derailed by an unintended pregnancy.

While this account seems plausible, it does not fully capture the idea expressed by the quoted passage. The opinion speaks not only of “economic” but also of “social developments,” and that women (and men) “have organized intimate relationships and made choices that define their views of themselves and their places in society.”¹⁰⁹ We can give content to that language by reading it in a Hegelian vein, as identifying that people have made commitments (and hence shaped their own identities) in contexts that go far beyond the economic, in light of their capacity to mitigate the risk of unwanted pregnancy.¹¹⁰

¹⁰⁸ The literature on such matters is immense. For a systematic literature review concluding that access to abortion increases women’s educational attainment and employment and reduces their poverty rate and need for public assistance, see Yana van der Meulen Rodgers et al., *The Macroeconomics of Abortion: A Scoping Review and Analysis of the Costs and Outcomes*, 16 PLoS ONE 1, 10–11 (2021). For the opposite side of the equation, a literature review of the economic harms women face from childbearing concluded that in high-income countries (such as the United States), there remains a “motherhood penalty” in employment related to leaving the workforce. Jocelyn E. Finlay, *Women’s Reproductive Health and Economic Activity: A Narrative Review*, 139 WORLD DEV. 1, 8–9 (2021). Even in countries with policies aimed to support the compatibility of parenting and work, such as childcare support, underlying “gender norms” about caretaking remain and undermine women’s capacity to participate in the economy. *Id.* at 9. Accordingly, women make long-run career choices in anticipation of the possibility of children: “Different occupations are more compatible with childrearing, and women will select into these occupations well before they make any actionable fertility decisions, with the intention of building a family in the future. These occupations are more flexible and lower paid, and thus the motherhood penalty is taken even before the woman’s first pregnancy.” *Id.* at 8; *see also id.* at 2–3 (describing additional literature on gender disparities in childrearing, reproduction, and women’s education).

¹⁰⁹ *Casey*, 505 U.S. at 856.

¹¹⁰ The *Dobbs* court, by contrast, dismissed non-economic ideas as “generalized assertions about the national psyche” and as a “novel and intangible form of reliance.” *Dobbs*, No. 19-1391, slip op at 64–65. This is contrasted with “very concrete reliance interests, like those that develop in ‘cases involving property and contract rights.’” *Id.* at 64 (quoting *Payne v. Tennessee*, 501 U.S. 808, 828 (1991)). The problem with such non-economic reliance interests, in the *Dobbs* majority’s telling, is that it “depends on an empirical question that is hard for anyone—and in particular, for a court—to assess, namely, the effect of the abortion right on society and in particular on the lives of women.” *Id.* at 65. Attempting to assess them, the *Dobbs* court concludes, would amount to attempting to “substitute [the Court’s] social and economic beliefs for the judgment of legislative

Consider, for example, that intimate relationships involve risk—if one enters into a romantic relationship, one subjects oneself to a variety of interpersonal needs and requests and pressures from the other, including needs and requests and pressures involving sexual activity; the interpersonal ties one chooses, such as whom to date or marry (and whether one should date or marry at all), depend on one's understanding of the risks of those needs and requests and pressures.¹¹¹

To illustrate that point, this Essay will review some evidence on one particularly significant example, to wit, that the risk of unintended pregnancy and childrearing affects a rational woman's calculus about the prospect of being victimized by domestic abuse; that calculus in turn affects a rational woman's willingness to enter committed relationships such as marriage. Drawing on a concrete example from a case shortly before *Dobbs*, this Essay will show how the abortion right permitted women to manage, and, when desired, escape their relationships with dangerous men, and thus carved out for them a greater sphere of autonomy in their interpersonal commitments. The example will also illustrate how the legal recognition of the abortion right conferred on women the capacity to demand social acknowledgment of their capacity as autonomous determiners of their own lives.

bodies.” *Id.* (That implies that even some property and contract interests could be beyond the judicial ambit as “economic beliefs”)

The problem with that argument is that it dismisses all aggregate reliance interests. If we believe the *Dobbs* majority, the only reliance interests the Court could credit would be those of *particular individuals* who had entered into economic transactions in reliance on some right which would then be frustrated if the right were overturned. (To see this, observe that the economic interpretation of *Casey* noted above, which the *Dobbs* court dismissed, clearly describes economic interests, but those interests are expressed in the aggregate, like the increased ability of women *as a class* to make risky human capital investments and pursue demanding careers.) But this is a stark mismatch with the position of a Supreme Court considering questions of *stare decisis*, where the Court is proposing to change legal rules that apply at the population level. It is irrational to declare that the Court cannot consider aggregate reliance when it is considering changing a legal doctrine that applies to the whole country *en masse*.

¹¹¹ In response to an early draft of this paper, Andy Koppelman suggested to me that while the *Casey* reliance interest can be understood in Hegelian terms, the same is true of any constitutional right. This is to some extent true—this is why the argument in Parts I and II is about rights in the abstract. But, of course, some rights are more plausibly tied to an individual's social identity than others: the excerpts from the *Casey* joint opinion noted above suggest that the abortion right is particularly closely entangled with core identity-forming commitments of the individual in the ways described in this section. This is not obviously true of, for example, the 7th Amendment jury trial right in civil cases. See U.S. CONST. amend. VII. Who makes foundational life commitments in reliance on having twelve laypeople decide whether they breached a contract?

B. How the Abortion Right Supported Women's Place in Society: The Risks of Abuse

Women in relationships with men suffer a well-known risk of having their children used as a method of coercive control.¹¹² Escaping an abusive relationship is more difficult when pregnant or with children, because pregnancy and childrearing give abusers both a stick—the physical vulnerabilities of pregnancy and the emotional vulnerabilities of threats of harm to a child give abusers more leverage over their victims—and a carrot—because pregnant women and parents have greater needs for interpersonal and economic support relative to the childless, which support might be provided even by an abusive partner.¹¹³ That abusive men are well aware of the increased difficulty their victims have in leaving them during pregnancy and childrearing is suggested by the fact that some abusive men attempt to coerce their partners into childbearing as a strategy to maintain the relationship.¹¹⁴ Pregnancy also can make abusive relationships worse, such as by providing an abuser an excuse to start or resume violence.¹¹⁵

Now imagine that you are a woman considering marriage (and in light of the fact that a man might not display their abusive tendencies until after the wedding). The right to an abortion means that marriage is safer because it protects against all those risks just described. Simple rational choice reasoning

¹¹² See, e.g., Laura Monk & Erica Bowen, *Coercive Control of Women as Mothers via Strategic Mother–Child Separation*, 5 J. GENDER-BASED VIOLENCE 23 (2021) (categorizing various coercive strategies used by abusers).

¹¹³ See Kristin F. Lutz, *Abuse Experiences, Perceptions, and Associated Decisions During the Childbearing Cycle*, 27 W.J. NURSING RSCH. 802, 809–11 (2005) (describing factors leading pregnant abuse victims to experience themselves as “trapped” in the relationship); Kerstin E. Edin et al., “*Keeping Up A Front*”: *Narratives About Intimate Partner Violence, Pregnancy, and Antenatal Care*, 16 VIOLENCE AGAINST WOMEN 189, 190 (2010) (citing evidence supporting pregnancy as “both a motivation . . . and a brake in deciding to make a change in a violent relationship” (internal citations omitted)); *id.* at 195–96 (describing ways in which pregnancy can make an abused woman more vulnerable to continued abuse and inflict greater impediments to leaving); Deborah Tuerkheimer, *Conceptualizing Violence Against Pregnant Women*, 81 IND. L.J. 667, 680–84 (2006) (same).

¹¹⁴ Ann M. Moore et al., *Male Reproductive Control of Women Who Have Experienced Intimate Partner Violence in the United States*, 70 SOC. SCI. & MED. 1737, 1739–40 (2010); A. Rachel Camp, *Coercing Pregnancy*, 21 WM. & MARY J. WOMEN & L. 275, 287–88 (2015).

¹¹⁵ See Edin et al., *supra* note 113, at 192 (describing cases); Heidi Stöckl & Frances Gardner, *Women's Perceptions on How Pregnancy Influences the Context of Intimate Partner Violence*, 15 CULTURE, HEALTH & SEXUALITY 1206, 1214–15 (2013) (describing experiences of women with violence triggered by increased vulnerability while pregnant); Camp, *supra* note 114, at 291–92 (describing observed pattern of initiating or exacerbating violence “during pregnancy or immediately following the birth of a child”).

suggests that, on the margins, there are women who entered heterosexual marriages pre-*Dobbs* that they would not have chosen post-*Dobbs*.

From the Hegelian framework, choices about marriage—about this most vulnerable relationship to another person—are primary examples of the kind of commitment that the joint opinion called “choices that define their views of themselves and their places in society,”¹¹⁶ in other words, identity and agency.

Nor are careers and marriage the only choices that are affected by reliance on an abortion right. A person’s relationship to sexuality and the idea of sexual pleasure itself—which have also been reflected in the political domain, in the context of social movements such as the development of “third wave feminism” (or “sex-positive feminism”), which has understood women’s liberation to also entail an equal capacity to pursue sexual pleasure¹¹⁷—is obviously affected by the abortion right, as the pursuit of sexual pleasure for women carries with it the risk of unwanted pregnancy. While integralists like Vermeule doubtless understand third wave feminism to be nothing more than a kind of individualistic licentiousness,¹¹⁸ the fact that sexual pleasure has in fact been integrated into a normative approach to politics that recognizes and seeks to remedy gender-based inequalities indicates its genuine significance within the bridge between civic and individual identity.

I propose to also read the *Dobbs* joint dissent’s defense of the *Casey* reliance argument through a Hegelian lens, this time more focused on the recognitional aspect of the relationship between law and identity:

Finally, the expectation of reproductive control is integral to many women’s identity and their place in the Nation. That expectation helps define a woman as an “equal citizen[,]” with all the rights, privileges, and obligations that status entails. It reflects that she is an autonomous person, and that society and the law recognize her as such. Like many constitutional rights, the right to choose situates a woman in relationship to others and to the government. It helps define a sphere of freedom, in which a person has the capacity to make choices free of government control. As *Casey* recognized, the right “order[s]” her “thinking” as well as her “living.” Beyond any individual choice about

¹¹⁶ *Planned Parenthood v. Casey*, 505 U.S. 833, 856 (1992), *overruled by Dobbs v. Jackson Women’s Health Org.*, 597 U.S. ___ (2022).

¹¹⁷ See generally R. Claire Snyder-Hall, *Third-Wave Feminism and the Defense of “Choice”*, 8 PERSPS. ON POL. 255 (2010) (explaining third-wave feminism); R. Claire Snyder, *What Is Third-Wave Feminism? A New Directions Essay*, 34 SIGNS: J. WOMEN IN CULTURE & SOC’Y 175 (2008) (same).

¹¹⁸ See Vermeule, *supra* note 12 (scorning sexual motivations).

residence, or education, or career, her whole life reflects the control and authority that the right grants.

Withdrawing a woman's right to choose whether to continue a pregnancy does not mean that no choice is being made. It means that a majority of today's Court has wrenched this choice from women and given it to the States. To allow a State to exert control over one of "the most intimate and personal choices" a woman may make is not only to affect the course of her life, monumental as those effects might be. It is to alter her "views of [herself]" and her understanding of her "place[] in society" as someone with the recognized dignity and authority to make these choices. Women have relied on *Roe* and *Casey* in this way for 50 years. Many have never known anything else. When *Roe* and *Casey* disappear, the loss of power, control, and dignity will be immense.¹¹⁹

This argument is also quite plausible from the Hegelian framework, as well as Williams's gloss on it. The fact that others are obliged to defer to a woman's reproductive choices reinforces that women *have* those choices.

Even when there was an abortion right, this choice was oft-contested in nonlegal realms (as well as the legal realm), and often in a fairly unsettling way, as when men complained about their lack of a say in the abortions of their partners.¹²⁰ The abortion right forced those men to acknowledge women as autonomous deciders with control over their own bodies. And at least sometimes, that legal recognition substituted for a social recognition that was not extended to women otherwise, much as Williams would expect.

One Arizona lawsuit from the pre-*Dobbs* period can illustrate this substitute recognition-forcing feature of the abortion right. As reported by the press, a woman's ex-husband filed suit on behalf of the aborted fetus against the doctor who performed his ex-wife's abortion.¹²¹ Part (though not all) of the legal theory of the case was that, while it was not disputed that the woman knowingly sought

¹¹⁹ *Dobbs*, No. 19-1391, slip op. at 51–52 (Breyer, Sotomayor, & Kagan, JJ., dissenting) (alteration in original) (internal citations removed).

¹²⁰ See, e.g., John Tierney, *Men's Abortion Rights*, N.Y. TIMES (Jan. 10, 2006), <https://www.nytimes.com/2006/01/10/opinion/mens-abortion-rights.html> (expressing some of those complaints).

¹²¹ Tessa Stuart, *She Wanted an Abortion. Now The Embryo Is Suing Her Doctors*, ROLLING STONE (Sept. 23, 2022), <https://www.rollingstone.com/politics/politics-features/abortion-arizona-personhood-roe-wade-1234598516/>. This case does not appear to be unique. See, e.g., Adam Liptak, *Ex-Boyfriend Loses Bid to Halt an Abortion*, N.Y. TIMES (Aug. 6, 2002), <https://www.nytimes.com/2002/08/06/us/ex-boyfriend-loses-bid-to-halt-an-abortion.html> (reporting on similar 2002 case).

an abortion, she did not provide informed consent because the doctor failed to use the phrase “unborn child” for the fetus.¹²² While the formal framing of the case was that these defects in disclosure vitiated her consent as a matter of law (because the statute required specific disclosures for informed consent),¹²³ its expressive effect was that her ex-husband took the insulting legal position that she could not have really known whether she wanted the abortion unless the clinic first used language aimed at persuading her away from her view as to the character of the act she was undertaking.

The facts as she described them (albeit filtered through press reports) make clear that she knew perfectly well what she was doing, but her (apparently abusive) husband refused to acknowledge that:

In sworn testimony she was compelled to give in the case, however, Villegas’ ex-wife is crystal clear about her desire to have the abortion. She describes an unhappy and ill-conceived five-year marriage that ultimately ended with her seeking an order of protection against her ex-husband, who has a previous conviction of aggravated assault with a deadly weapon. The pregnancy came toward the end of their relationship and, she said, as a surprise, since Villegas had a vasectomy before they were married. (Villegas’ lawyer insists she was aware of her then-husband’s vasectomy reversal.) She puts it very plainly in the deposition: “I never wanted children and he knew that.”¹²⁴

¹²² Stuart, *supra* note 121. Not every document from the case is readily available, but this theory appears on the face of the pleadings. See Second Amended Complaint at 5, *Villegas v. Jackrabbit Family Medicine Inc.*, No. 202200007 (Ariz. Super. Ct. Feb. 3, 2023) (“The printed form changed the statutory term ‘the probable gestational age of the unborn child’ [in statutory required disclosures] to ‘the probable gestational age of the pregnancy,’ which misstates Arizona’s legislative determination that every pregnant woman is carrying a human child.”); see also Plaintiff’s Response to Defendant’s Motion for Summary Judgment at 10, *Villegas v. Jackrabbit Family Medicine Inc.*, No. 202200007 (Ariz. Super. Ct. July 11, 2022) (observing same change from “unborn child” to “pregnancy”). That response alleges that this linguistic difference is “confusing.”

It is hard to see how the difference between “pregnancy” and “unborn child” is “confusing,” as Villegas alleged, unless the pregnant woman was assumed somehow to not know that pregnancy involved the production of children. Another transparently insulting allegation in the case is that when informing her of the “medical risks associated with the [abortion] procedure,” the doctor was obliged to discuss “the loss of the ‘maternal-fetal’ attachment bond that is inherent in birthing a child.” *Id.* at 8. In other words, the doctor was dinged for not telling a pregnant person that if she kept the fetus, she might grow to like it. Some “medical risk.”

¹²³ See *id.* at 2 (explaining theory of the case).

¹²⁴ Stuart, *supra* note 121; see also Nicole Santa Cruz, *Her Ex-Husband Is Suing a Clinic Over the Abortion She Had Four Years Ago*, PROPUBLICA (July 15, 2022, 5:00 AM), <https://www.propublica.org/article/arizona-abortion-father-lawsuit-wrongful-death> (“The woman alleged that Villegas made fake social media profiles, hacked into her social media accounts and threatened to ‘blackmail’ her if she left him during his failed campaign to be a justice of the peace in Gila County, outside of Phoenix.”).

This fits so nicely into the recognition framework that it almost seems rigged for the purposes of this Essay.¹²⁵ Her ex-husband's legal position amounts to the refusal to recognize that her reproductive choices were made autonomously—effectively a denial of her own claims to agency.¹²⁶ The constitutional right to abortion (while it existed) offered her not only the capacity to protect herself from being tied down into an abusive relationship, but also enabled her to claim formal, public recognition of the fact that she had made that choice and a public defense of her having done so.¹²⁷

While the law still permitted her ex-husband's challenge to go forward, I contend that the fact that there was a constitutional right to abortion effectively set the social default so that her husband stood relatively alone in attempting to control her choices. That right, for example, permitted it to be the case that there were abortion clinics available to her where the doctors would listen to what she wanted and carry out her medical wishes, rather than consulting her husband. Thus, it forced her husband to directly challenge that right in the legal domain after the fact, and thereby thrust the dispute into the public forum of the courts, where she could publicly and formally insist on her own capacity to make decisions for herself. The abortion right also supported her in a more subtle way: by forcing the State of Arizona to attempt to enact restrictions on abortion as restrictions on what counted as a woman's consent to a medical procedure, it framed the entire legal dispute around her autonomy and capacity to give consent.

Observe how the case also fits into Williams's account of legal rights as a substitute for social recognition. As feminist scholars have long recognized, one key aspect of patriarchy is the unjust denigration of women's autonomy as well as their knowledge of themselves and their social worlds.¹²⁸ Villegas exhibits precisely this tendency, denying, in unreconstructed patriarchal style, not only his ex-wife's ability to make decisions about reproduction but even her mental capacity to know how reproduction works. After all, his position only makes sense if one supposes that in the absence of specific messaging about “unborn

¹²⁵ See also Camp, *supra* note 114, at 288–89 (reviewing literature suggesting that control over pregnancy is particularly significant to women's senses of self).

¹²⁶ The allegedly secret vasectomy reversal, in the context of the end of a relationship that evidently (judging by the protective order) became abusive, also fits eerily well into the account of the relationship between forced pregnancy and abuse noted *supra* notes 112–15 and accompanying text.

¹²⁷ Cruz, *supra* note 124.

¹²⁸ See generally Rachel McKinnon, *Epistemic Injustice*, 11 PHIL. COMPASS 437, 437 (2016) (reviewing literature on epistemic injustice).

children” she would not have been aware that children are the ultimate output of a pregnant womb—or maybe, I guess, if he thought her so weak-willed that describing the fetus as an “unborn child” rather than as a “fetus” would have changed her decision. By declaring the termination of her pregnancy to be her choice alone, and hence necessitating that any challenge to it amounted to a challenge to her choice-making capacity, the constitutional right to abortion forced this claim (already latent in opposition to abortion which denies the agency of women to decide for themselves) into the open—effectively making her ex-husband expose his desire to control her and his rejection of her autonomy through the gaslighting character of his legal claims—and gave her a forum in which she could reject it.

At this point, the idea should be clear. Contra the Court in *Dobbs*, there was quite a lot of reliance, which we can understand in Williams/Hegel terms, on the right to an abortion. In the post-*Dobbs* universe, we can understand those who made decisions that depended on a right to abortion to experience a significant degree of alienation, and the same goes for all who might become pregnant, who are now made more vulnerable across all domains of social life, including to the kinds of legal gaslighting exhibited by Villegas’s claims in the case just described. The state not only no longer takes their interests into account but also undermines the central life commitments, such as to marriage and career, which they have made and around which their identities have been framed. Moreover, it subjects them to the kind of infantilizing contempt for their ability to make their own reproductive choices demonstrated in the *Villegas* case but without the backstop of the law to give them voice to stand up for themselves. These are serious wrongs done by *Dobbs* to all who might become pregnant.

C. How Did the Court in Dobbs Forget About Reliance?

It is widely believed that legal stability is a requirement of the rule of law.¹²⁹ In this light, it ought to be surprising that the *Dobbs* court was unwilling or unable to see the interest in stable abortion rights which that decision cast aside. After all, the Supreme Court—even its conservative justices—have readily seen it in other contexts. For example, the doctrine of regulatory takings, long a

¹²⁹ See, e.g., Raz, *supra* note 21, at 213 (associating the rule of law with stability); FULLER, *supra* note 21 (describing failure of hypothetical unstable legal system).

favorite of the right, explicitly incorporates reliance interests in determining the scope of a property right.¹³⁰

In order to understand what went wrong here, I will briefly review the more conventional case for why legal stability matters. The crux of the standard idea is that if legal rules change a lot, it is hard for people to make long-term plans that depend on existing legal rules—you might find that something you intended to do turns out to be illegal, and lose the efforts you made to pursue that thing; a state that persistently takes away people's investments in their preexisting plans this way might undermine their willingness to make such plans at all.¹³¹ Such reasoning obviously applies to the abortion right for the reasons noted above: if the Supreme Court can suddenly take away the legal right of women to protect themselves from having the child of an abusive spouse, this undermines their capacities to make long-term plans around marriage and family.

In defense of the *Dobbs* court, one might suggest that in the context of the precedential judicial interpretation of legal rights, matters are complicated somewhat by the fact that rule of law principles also require that officials, including judges, adhere to the law—and hence overrule erroneous precedents in order to fulfill that obligation.¹³² This potentially conflicts with the rule of law interest in legal stability which supports precedent-following.¹³³

However, this does not explain the contemptuous dismissal with which the *Dobbs* court treated the *Casey* reliance argument when the Court ought to have been familiar with the general acceptance of an interest in legal stability. And indeed, the Court was—but only in the context of very “concrete reliance interests like those that develop in ‘cases involving property and contract rights.’”¹³⁴

It seems to me—although I confess that I cannot fully defend this conclusion here—that the *Dobbs* decision was a symptom of a broader pathology in the American conception of the rule of law, reflected in a disparity between the

¹³⁰ See *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1034–36 (1992) (Kennedy, J., concurring) (explaining relationship of owner's “investment-backed expectations” to finding of regulatory taking).

¹³¹ See generally GOWDER, *supra* note 25 (describing the variety of such “planning”-based theories of the rule of law and liberty).

¹³² Daniel A. Farber, *The Rule of Law and the Law of Precedents*, 90 MINN. L. REV. 1173, 1173–74 (2006).

¹³³ Raz, *supra* note 21, at 213; FULLER, *supra* note 21, at 57. There are other, more conceptual, accounts of the rule of law reasons to follow precedent that rely on ideas such as the responsibility of judges to follow general law. Jeremy Waldron, *Stare Decisis and the Rule of Law: A Layered Approach*, 111 MICH. L. REV. 1, 23 (2012).

¹³⁴ *Dobbs v. Jackson Women's Health Org.*, No. 19-1391, slip op. at 6 (2022).

willingness of American constitutional law to respect people's preexisting expectations in economic domains, like regulatory takings law, and the unwillingness to respect them in personal domains, like abortion. I have repeatedly diagnosed the general case of this pathology elsewhere, in the form of a preference for economic conceptions of the rights protected by the rule of law over other rights, and, with it, a preference for protecting the powerful and advantaged over the powerless and disadvantaged who are actually vulnerable to arbitrary power wielded by others.¹³⁵

The undersigned has previously articulated an egalitarian theory of the rule of law.¹³⁶ For an egalitarian, legal stability is a particularly problematic value, as real-world rule of law states (like all real world states) tend to contain unjust inequalities, and I have previously argued that such states will have a virtuous tendency to some degree of legal instability, insofar as the set of people enjoying full legal rights ought to expand over time.¹³⁷ But reflecting on what went wrong in *Dobbs* and on the argument of this Part suggests that egalitarian skepticism about legal stability is a one-way ratchet: while there may be egalitarian reasons for legal instability in the sense of *expanding* rights, there are also strong egalitarian reasons to promote legal stability in the sense of *resisting the contraction* of rights, insofar as that contraction will tend to risk alienating those who lack social and economic sources of civic identity, or whose social and economic sources of identity are vulnerable (that is, the socially subordinated).

D. But What About Intolerant Identities and Conflicting Rights-Claims?

The argument as articulated above is subject to an important objection, which requires an answer: not all collective or individual identities are consistent with the equal treatment of others within a political community; if the foregoing amounts just to a general case against upsetting individually important legal rules, it can also impede egalitarian movements in a troubling way.¹³⁸ Consider the position of the United States at the time of *Brown v. Board of Education*: a white person who had invested their identity into the system of racial privilege

¹³⁵ GOWDER, *supra* note 81, at 3–5; GOWDER, *supra* note 25, at 169–71; Paul Gowder, *The Dangers to the American Rule of Law Will Outlast The Next Election*, 2020 CARDOZO L. REV. DE NOVO 126, 145–48 (2020); Paul Gowder, 31 LAW & POL. BOOK REV. 12, 39–41 (2021) (reviewing CASS R. SUNSTEIN & ADRIAN VERMEULE, *LAW AND LEVIATHAN: REDEEMING THE ADMINISTRATIVE STATE* (2020)).

¹³⁶ Paul Gowder, *Equal Law in an Unequal World*, 99 IOWA L. REV. 1021, 1027 (2014); Paul Gowder, *The Rule of Law and Equality*, 32 LAW & PHIL. 565, 611 (2013); GOWDER, *supra* note 25, at 147.

¹³⁷ GOWDER, *supra* note 25, at 145–54.

¹³⁸ I thank Andy Koppelman for raising this objection.

may experience a drastic change in their experience of the political community—indeed, might see that community as no longer welcoming them. But surely something is wrong with the argument in this Essay if it generates objections to desegregation on the basis of white supremacist political identities. For sake of convenience, I shall call this the “problem of intolerant identities.”

In the contemporary legal landscape, we can see similar problems in the conflict between conservative Christians and advocates for LGBTQ+ inclusion. This conflict is more difficult to handle than the conflict over *Brown* because it features competing claims to rights which are, in the abstract, legitimate.¹³⁹ LGBTQ+ people, of course, claim the right, guaranteed by many state laws and in at least one domain under federal law,¹⁴⁰ to be free from discrimination in various economic contexts. Arrayed against them are claims to free exercise of religion and free speech rights by those who wish to not provide services to LGBTQ+ persons, notably wedding services.¹⁴¹

I think there are several answers to this objection. The first is rooted in the original dialectical context of Williams’s argument. Recall that the critical legal studies scholars to whom Williams was responding were often focused at least in part on the notion that legal rights reify or legitimate preexisting unjust inequalities in the background society.¹⁴² Accordingly, her response identified the role of legal rights in protecting those who suffer subordinated positions in

¹³⁹ By contrast, the notion of a “right to segregate” in *Brown* would be frivolous, at least from the contemporary standpoint—although, of course, white supremacists have nonetheless traditionally appealed to their democratic rights to justify the exclusion of Black Americans from many areas of civic rights. See, e.g., GOWDER, *supra* note 81, at 166–68 (describing abuse of democratic notion of consent of the governed to resist Black—and later birthright—citizenship).

¹⁴⁰ See, e.g., COLO. REV. STAT. ANN. § 24–34–601 (West 2021) (prohibiting discrimination on the basis of, *inter alia*, sexual orientation and gender identity in public accommodations); *Bostock v. Clayton County*, 590 U.S. ____ (2020) (interpreting federal employment discrimination law to cover sexual orientation).

¹⁴¹ See, e.g., *Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm’n*, 584 U.S. ____ (2018) (religiously motivated refusal to bake cake for gay wedding); *303 Creative LLC v. Elenis*, 600 U.S. ____ (2023) (religiously motivated refusal to make website for gay wedding).

Dobbs too arguably involved conflicting rights-claims, in the sense that anti-abortion advocates have argued that the prohibition of abortion protects the fetus’s right to life. See, e.g., *Roe v. Wade*, 410 U.S. 113, 156–62 (1973) (considering and rejecting argument that fetus is a person in the meaning of the 14th Amendment’s Due Process Clause guaranteeing right to life). However, even if one accepts that the fetus has a constitutional right to life, the fetus is obviously not able to experience alienation or non-recognition—not being conscious or aware of the existence of a legal system at all, a fetus cannot rely on its legal rights to form an identity until well after birth.

¹⁴² See, e.g., Alan David Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, 62 MINN. L. REV. 1049, 1075 (1978) (arguing that antidiscrimination law served function of legitimating racial discrimination).

the background society. This is why (as I have noted several times) Williams emphasizes that legal rights are so important because they substitute for the lack of social and economic recognition associated with subordinated racial status. This immediately disposes of the problem of intolerant identities as to *Brown*. After all, white supremacists in the 1950's would have seen their privileged position reflected across essentially all social and economic contexts. They simply didn't need their preexisting legal expectations to be supported to anything near the same degree as would be needed by members of a subordinated group to avoid alienation.

However, the applicability of this response to the contemporary example of conflict between conservative Christians and LGBTQ+ persons is more contestable. While there is undoubtedly still a significant amount of social discrimination against LGBTQ+ persons, many Christians *also* claim that their identities are subject to pervasive social disvalue, for example through allegedly "woke" media promoting ways of life that, to some conservative Christians, represent the rejection of their core values and place in society. This is obviously a subject of some debate, and I personally disagree with this claim.¹⁴³ Nonetheless, the principle of charity recommends at least assuming that this sort of claim is sincere and made in good faith. And if we grant it provisional credit, it rules out the "well, you can get your recognition from the wider society"

¹⁴³ It has always seemed bizarre to me that some conservatives seem to have thought, for example, that the acceptance and celebration of gay marriages somehow entails the denigration of straight marriages. For example, the law which was struck down in *United States v. Windsor*, 570 U.S. 744 (2013) was entitled "The Defense of Marriage Act." "Defense" implies some kind of threat, and, indeed, the House of Representatives Report on its enactment quite clearly illustrates the perception of threat. H.R. REP. NO. 104-664, at 12-16 (1996).

This makes no sense. Marriage is not an exclusive social club that becomes less appealing when you let the rabble in; there is not some kind of a maximum quota on the number of marriages that can be recognized. So how does letting gay people get married do any damage to straight people's marriages? At most, the "threat" to opposite-sex marriage seems to comprise something about incentives for childrearing. Yet why should marriage, understood as a subsidy for childrearing for straight people, be undermined by extending the same subsidy to gay people? It is not like straight people are going to suddenly change sexual orientations. Maybe it is just simple moral disapproval of gay sexuality? Again, though, this is not a threat to straight marriages unless one supposes that, in the absence of such moral disapproval, a bunch of straight people will suddenly switch teams—or, I guess, if one imagines that the marriages of straight people would be enhanced by forcing gay people into unhappy straight marriages and by extension into the closet. This nonsensical claim also seems to be prominent abroad. See, e.g., Pronczuk & Novak, *supra* note 7 (quoting Polish leader characterizing gay people as "threat to Polish identity, to our nation, to its existence and thus to the Polish state"). As far as can be discerned, all this dialogue about "threat" seems to serve the function primarily of convincing anti-gay politicians that their desire to take away rights from some third party is actually an effort to protect themselves and people like them from some kind of amorphous harm. See *United States v. Windsor*, 570 U.S. 744, 769-74 (2013) (interpreting Defense of Marriage Act as naked effort to injure gay people).

response to the problem of intolerant identities as to the conservative Christian-LGBTQ+ conflict. We must work a little harder.

A second response to the problem of intolerant identities identifies that some social identities might be ruled out simply because they entail the subordination of others. The white supremacist example is again an easy case: as W.E.B. Du Bois most famously explained, the denigration of Blacks is inherent in white supremacist social identity.¹⁴⁴ We might simply say, drawing on some of the post-Rawlsian literature in political philosophy on “tolerating the intolerant” or “unreasonable” political views,¹⁴⁵ that nobody is entitled to say “I’m being alienated from my society because I don’t get to inflict alienation on others!” To give this a more directly Hegelian cast, we might go so far as to draw on his famous master-slave dialogue¹⁴⁶ to suggest that social identities rooted in the subordination of others are inherently unstable for psychological reasons—a view not too different from some remarks of James Baldwin’s, expressing a certain degree of pity for whites clinging to identities rooted in supremacist ideology.¹⁴⁷ I think this response to the problem of intolerant identities also applies, albeit with some more caution, to the conflict between conservative Christians and LGBTQ+ individuals. In doing so, it more or less translates into the commonplace “your religion makes rules for you, not for me”—that is, the rejection of claims to religious freedom for one person which entail the deprivation of other freedoms for others.¹⁴⁸

¹⁴⁴ W. E. B. DU BOIS, *BLACK RECONSTRUCTION: AN ESSAY TOWARD A HISTORY OF THE PART WHICH BLACK FOLK PLAYED IN THE ATTEMPT TO RECONSTRUCT DEMOCRACY IN AMERICA, 1860-1880*, at 700–01 (1st ed. 1935) (“It must be remembered that the white group of laborers, while they received a low wage, were compensated in part by a sort of public and psychological wage. They were given public deference and titles of courtesy because they were white. . . . One can see for these reasons why labor organizers and labor agitators made such small headway in the South. They were, for the most part, appealing to laborers who would rather have low wages upon which they could eke out an existence than see colored labor with a decent wage. White labor saw in every advance of Negroes a threat to their racial prerogatives, so that in many districts Negroes were afraid to build decent homes or dress well, or own carriages, bicycles or automobiles, because of possible retaliation on the part of the whites.”).

¹⁴⁵ See, e.g., John Rawls, *Constitutional Liberty and the Concept of Justice*, in *NOMOS VI: JUSTICE* 98, 121–22 (Carl J. Friedrich & John W. Chapman eds., 1963) (describing the problem of tolerating the intolerant).

¹⁴⁶ See HEGEL, *supra* note 33, at 114–16.

¹⁴⁷ JAMES BALDWIN, *NO NAME IN THE STREET* 194–95 (2007). Du Bois would, I take it, suggest that such identities are also unstable on economic grounds, insofar as social hierarchy, at least in the case of white supremacy, primarily served as a substitute for economic inclusion among poor whites. DU BOIS, *supra* note 144.

¹⁴⁸ Of course, many conservative Christians claim that they are not depriving others of their freedoms by, for example, refusing to serve LGBTQ+ persons or provide forbidden forms of contraception to their employees—they are merely using their own property in ways consistent with their religious commitments. But this argument neglects the fact that economic power gives a person the capacity to coerce others. See generally

CONCLUSION: TOWARD THE PHILOSOPHY OF LEGAL HISTORY?

This Essay concludes with a final—and rather more robust—Hegelian response to the problem of intolerant identities, rooted in Hegel’s theory of history. Taking into account that theory, and notwithstanding the importance of the existing social world in supporting an individual’s social identity, there is nonetheless a dynamic and progressive element in Hegel’s social thought.

I cannot elucidate the entire Hegelian philosophy of history in this Essay, but will at least note here that the overall theory accommodates fairly drastic social change.¹⁴⁹ The catch is that such changes are tied to the development of reason and freedom—in essence, an existing social order can self-destruct and make way for a new order that retains the insights discovered in the previous stage, but also represents a further step in the progress of reason in history.

For present purposes, there is no need to endorse Hegel’s whole teleological version of history—instead, we can just note that certain extreme social/legal disruptions, such as Reconstruction and the Civil Rights Movement, seem to make way for everyone—including those previously understood as *advantaged*—to more fully understand themselves to be at home in the overall social world. Consider, for example, the possibility that the decline (although, alas, certainly not yet fall) of white supremacy since the Civil Rights Movement has made it possible that at least some whites no longer experience themselves as under constant status threat due to the risk of falling out of whiteness—a more egalitarian status has the capacity to be more fully enjoyed, just because it doesn’t require fending off those below to remain on top of the hill.¹⁵⁰

Robert L. Hale, *Force and the State: A Comparison of “Political” and “Economic” Compulsion*, 35 COLUM. L. REV. 149, 178–79 (1935) (explaining coercive character of property). And, as I have argued elsewhere, when combined with legal protections for religious exercise, economic power like social and political power can actually promote the subordination of those outside dominant religious groups. Gowder, *supra* note 48, at 2173–75.

For the sake of clarity, note that the argument of this Essay is limited to considering the extent to which various individuals might reasonably offer identity-based objections to resist legal change. This Essay does not evaluate the *overall* conflict between conservative Christians and LGBTQ+ persons. Accordingly, it is compatible with at least some circumstances where the former might legitimately prevail—presumably, for example, one would not want the State of Colorado to require a minister to solemnize a marriage they do not endorse—although on the whole, for reasons I have described elsewhere, I think that they typically ought to not prevail. See generally Gowder, *supra* note 48, at 2174 (giving an argument against religious exemptions to general laws—including antidiscrimination laws—for powerful majority religious groups).

¹⁴⁹ See WOOD, *supra* note 25, at 221–28 (describing Hegel’s account of historical change).

¹⁵⁰ Under conditions of white supremacy, marginal whites who are uncertain of their access to the privileges of white supremacy experience themselves as forced to replicate those relations to shore up their status, even to their own detriment. See generally Angela Onwuachi-Willig, *Policing the Boundaries of Whiteness: The*

Baldwin is again instructive. In *No Name in the Street*, he denies that there is a composite American identity, implicitly because of the lack of a core civic unity between the races.¹⁵¹ There is a paradox there, since for Baldwin the Civil Rights Movement is based on the belief in such a unity.¹⁵² Yet the Movement, and the conflict it represents, is ultimately responsible, he says, for *creating* that unity, or at least the potential for it:

The black and white confrontation, whether it be hostile, as in the cities and the labor unions, or with the intention of forming a common front and creating the foundations of a new society, as with the students and the radicals, is obviously crucial, containing the shape of the American future and the only potential of a truly valid American identity. No one knows precisely how identities are forged, but it is safe to say that identities are not invented: an identity would seem to be arrived at by the way in which the person faces and uses his experience. It is a long drawn-out and somewhat bewildering and awkward process.¹⁵³

This is all very dialectical in a way that would have been familiar to Hegel. In Hegelian terms, we can read Baldwin as saying that the state of history at which the U.S. existed prior to the Civil Rights Movement (and arguably still exists) represented an incomplete fulfillment of the capacity of the United States and its people to have fully fleshed-out civic and individual identities. The conflict—in part generated by the prior situation, with its hypocritical assertions of universal rights—represented an effort by the leaders of Civil Rights to move to the next stage in America’s historical progress, one in which new civic and individual identities that are more genuinely free and more genuinely shared across lines of racial difference could be forged out of the old. Through the conflict over American identity across generations, Baldwin seems to be saying, those elements of the American identity which make it possible for members of particular racial groups to experience themselves as at home in America could

Tragedy of Being “Out of Place” from Emmett Till to Trayvon Martin, 102 IOWA L. REV. 1113, 1140, 1171 (2017) (giving an account of killings of Emmett Till and Trayvon Martin in those terms). By contrast, scholars such as Jeremy Waldron have argued that properly organized legal order protects the dignity of all, understood as universal high status. Jeremy Waldron, *How Law Protects Dignity*, 71 CAMBRIDGE L.J. 200, 213–15 (2012). In a world like that which Waldron describes the sort of self-destructive boundary-maintenance at the margins of status which Onwuachi-Willig analyzes ought not to be necessary. Of course, the fact that Martin was murdered quite recently illustrates that violently insecure whiteness has not yet been purged from the polity.

¹⁵¹ BALDWIN, *supra* note 147, at 10.

¹⁵² *See id.*

¹⁵³ *Id.* at 189. For further discussion of these passages, see Paul Gowder, *Reconstituting We the People: Frederick Douglass and Jürgen Habermas in Conversation*, 114 N.W. U. L. REV. 335, 397–98 (2019).

develop into an identity in which members of different groups might just be able to experience themselves as at home in America *together*.

I propose to read the expansion of individual rights through the demands of social movements, whether they be those of Black Americans, women, or LGBTQ+ people, in such terms. On such a story the progressive expansion of rights renders the state capable of better providing a home for *all* its people, and the retraction of those rights destroys it.¹⁵⁴

The internal logic of the law itself begins with the proposition that law must be general, but that proposition inevitably breaks down into the proposition that the law must be equal.¹⁵⁵ We can see the expansion of legal rights to previously subordinated classes in accordance with the rule of law's teleology of equality¹⁵⁶ to be the unfolding of legal reason in history.¹⁵⁷ The conferral of equal rights on more and more people should be celebrated and defended. It is a tragedy of the rule of law, at home and abroad, that in so many ways the law is becoming less general, less equal, and less protective of the oppressed.

¹⁵⁴ It is striking that the Court's opinion in *Obergefell v. Hodges* so often seems to sound in a Hegelian vein, conceptualizing the United States as a country that learns about its own constitution through historical change. For example, the following passage from *Obergefell* almost sounds like it was ripped straight out of Hegel (notwithstanding the absence of any world-historical individual to bring about the change): "The nature of injustice is that we may not always see it in our own times. The generations that wrote and ratified the Bill of Rights and the Fourteenth Amendment did not presume to know the extent of freedom in all of its dimensions, and so they entrusted to future generations a charter protecting the right of all persons to enjoy liberty as we learn its meaning. When new insight reveals discord between the Constitution's central protections and a received legal stricture, a claim to liberty must be addressed." *Obergefell v. Hodges*, 576 U.S. 644, 664 (2015).

¹⁵⁵ Gowder, *Equal Law in an Unequal World*, *supra* note 136.

¹⁵⁶ GOWDER, *supra* note 25, 145–54.

¹⁵⁷ Cf. TAYLOR, *supra* note 43, at 389–91 (describing Hegelian notion of the historical development of Spirit's self-knowledge in history).