ABORTION, GAY EQUALITY, AND THE NORMATIVE POWER OF THE ACTUAL*

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Walter Dellinger's scholarship, litigation, and popular writing were marked by a distinctive combination of doctrinal sophistication, strategic sagacity, and deep humanity. One theme that informed his work was the "normative power of the actual": the idea that "what is already in place, seems right." Dellinger saw that while that concept can produce unthinking acceptance of an existing, and unfair, legal order, it need not always be so. Sometimes, the normative power of the actual can bend the legal order to accommodate social change that has already occurred. Dellinger's work on abortion rights and on gay equality illustrates this point. Dellinger offered a powerful critique of abortion laws that rested on blinkered accounts of history and present-day conditions. And his embrace of the normative power of the actual anticipated the nation's reaction to the Supreme Court's decision in Dobbs v. Jackson Women's Health Organization. *Similarly, Dellinger harnessed the normative power of the actual to help achieve marriage equality for same-sex couples.*

INTRODUCTION

The poet laureate Robert Pinsky wrote that "[a] country is the things it wants to see."[1] But a country is also the things it refuses to see. One of the many gifts that made Walter Dellinger so special was his commitment to foregrounding things that the country *ought* to see about the way law operates. Along with James Baldwin, Walter understood that "[n]ot everything that is faced can be changed; but nothing can be changed until it is faced."[2] Walter devoted much of his career to challenging the status quo. But he also understood

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1. ROBERT PINSKY, AN EXPLANATION OF AMERICA 8 (1979).
2. James Baldwin, *As Much Truth as One Can Bear*, N.Y. TIMES, Jan. 14, 1962, at BR11, BR38.

the "normative power of the actual"—the idea that "what is already in place, seems right."[3] While that idea can produce unthinking acceptance of an existing, and unfair, legal order, Walter saw that the normative power of the actual can also hold out the possibility of shaping the legal order to accommodate social change that has already occurred.

Nowhere was Walter's distinctive combination of close attention to facts with trenchant commentary about legal rules more evident than in his treatment of abortion rights and gay equality—two contemporary issues that lie at the intersection of the Due Process and Equal Protection Clauses of the Fourteenth Amendment. In his scholarly work, briefs, and contributions to *Slate*'s annual "Breakfast Table" discussions at the end of each Supreme Court Term, Walter showed why he was such an inspiration to a generation of constitutional litigators. This Essay discusses Walter's contributions. Part I focuses on abortion rights. Walter's work, with its careful attention to doctrine and social reality, offers a powerful response to the Supreme Court's recent decision holding that the Constitution provides no protection to a woman's decision whether to terminate a pregnancy. Part II then turns to gay rights litigation. Here, Walter's attention to the normative power of the actual played out in a striking fashion, as the marriages that occurred across the nation during the ongoing litigation contributed to the Court's recognition of marriage equality.

I. ABORTION RIGHTS

Walter died shortly before the Supreme Court issued its opinion in *Dobbs v. Jackson Women's Health Organization*.[4] But Walter had long recognized, and resisted, the possibility that the Supreme Court would repudiate its decision in *Roe v. Wade*.[5]

More than thirty years before *Dobbs* was decided, Walter had identified "three basic paths" that "a Court set on honestly reconsidering *Roe v. Wade*" might take.[6] First, a Court eager to reverse *Roe* might reject the "underlying source of the abortion right"—namely, the substantive due process principle

3. Walter Dellinger, *No Harm, No Standing*, SLATE (Dec. 11, 2012, 5:24 PM), https://slate.com/news-and-politics/2012/12/the-california-gay-marriage-case-no-one-has-standing-to-appeal.html [https://perma.cc/WR35-VCRE]. Walter found this idea in the work of another great southern liberal, Professor Charles Black, Jr. *See, e.g.*, Charles L. Black, Jr., *The Death Penalty Now*, 51 TUL. L. REV. 429, 434 (1977). The phrase was first introduced into American jurisprudence in Morris R. Cohen, *The Basis of Contract*, 46 HARV. L. REV. 553, 582 (1933), who attributed the idea to the nineteenth-century German legal scholar Georg Jellinek. *See also* Paul J. Mishkin, *Foreword: The High Court, the Great Writ, and the Due Process of Time and Law*, 79 HARV. L. REV. 56, 71 (1965) (attributing the idea to Felix Cohen—who, like Walter, mixed foundational scholarship with service as a high-level executive branch official).

4. 142 S. Ct. 2228 (2022).

5. 410 U.S. 113 (1973), *overruled by Dobbs*, 142 S. Ct. 2228.

6. Walter Dellinger & Gene B. Sperling, *Abortion and the Supreme Court: The Retreat from* Roe v. Wade, 138 U. PA. L. REV. 83, 88–89 (1989).

that the Constitution protects "a fundamental right to procreative liberty and privacy."[7] Second, that Court might accept some form of the underlying right to procreative liberty but hold that such a right is distinguishable from, and does not encompass, the right to terminate a pregnancy.[8] Finally, that Court might agree that women have a fundamental liberty interest in deciding whether to terminate a pregnancy, but hold, after applying heightened scrutiny, that a state can "override the right by asserting a compelling interest in all fetal life."[9]

The Court's opinion in *Dobbs* conflates these three paths. With respect to the first path, the Court's discussion started from a deep distrust of substantive due process: courts should be "'reluctant' to recognize rights that are not mentioned in the Constitution,"[10] and "[t]he Constitution makes no reference to abortion."[11] With respect to unenumerated rights, the Court asserted that only those rights that are "deeply rooted in [our] history and tradition" and "essential to our Nation's 'scheme of ordered liberty'" can qualify.[12] The Court insisted that abortion cannot satisfy that standard because "an unbroken tradition of prohibiting abortion on pain of criminal punishment persisted from the earliest days of the common law until 1973."[13] Then, in a single paragraph, the Court rejected the Equal Protection Clause as an additional (or alternative or supplementary) "home for the abortion right."[14] The Court saw no problem in the decision to ban "a medical procedure that only one sex can undergo,"[15] perhaps because it did not see the "goal of preventing abortion" as reflecting any "'invidiously discriminatory animus' against women."[16]

One might think, as Justice Clarence Thomas clearly did,[17] that the Court's due process analysis should doom the Court's substantive due process jurisprudence more generally: after all, the words "contraception," "birth control," "consensual sex," and "marriage" don't appear in the document either. And there is, for example, far more evidence of a history and tradition of

7. *Id.* at 89.

8. *Id.*

9. *Id.*

10. *Dobbs*, 142 S. Ct. at 2247 (quoting Collins v. City of Harker Heights, 503 U.S. 115, 125 (1992)).

11. *Id.* at 2242.

12. *Id.* at 2246 (alteration in original) (citations omitted).

13. *Id.* at 2253–54. For Walter's very different take on the history, see *infra* text accompanying notes 29–35.

14. *Dobbs*, 142 S. Ct. at 2245–46.

15. *Id.* at 2445.

16. *Id.* at 2246 (quoting Bray v. Alexandria Women's Health Clinic, 506 U.S. 263, 274 (1993)).

17. *See id.* at 2300–04 (Thomas, J., concurring).

individuals in the United States obtaining early-term abortions without facing any legal sanction than of same-sex couples getting legally married.[18]

But the Court was unwilling to go that far. Instead, it switched gears, taking a step along the second path—distinguishing the abortion right from all other forms of substantive due process. The Court acknowledged that its previous decisions in *Roe* and *Planned Parenthood of Southeastern Pennsylvania v. Casey*[19] had relied on substantive due process cases involving things like the right to procreate, the right to obtain contraceptives, the right to make parental decisions, and various rights to bodily integrity, each of which has a clear connection to the right not to be required to carry a pregnancy to term.[20] Yet the Court saw the abortion right as "sharply distinguish[able]."[21] It emphasized that "[n]one of the other decisions cited by *Roe* or *Casey*" involved the destruction of "what those decisions call 'potential life' and what the law at issue in this case regards as the life of an 'unborn human being.'"[22]

But *why* is that a distinction that matters? Presumably because the State's interests in protecting potential life (or unborn human beings) are greater than its interests in regulating the lives of the actual human beings who wanted to enter into interracial marriages[23] or to prevent the State from pumping their stomachs.[24] And because a woman has no fundamental right to terminate a pregnancy (note the switch back to the first path), the balance tilts decisively in the State's favor. A State's interest in preventing the destruction of potential

18. The most comprehensive history of abortion regulation in the United States suggests that during the mid-nineteenth century—prior to the widespread criminalization of abortion—there might well have been roughly one abortion for every four live births. JAMES C. MOHR, ABORTION IN AMERICA: THE ORIGINS AND EVOLUTION OF NATIONAL POLICY, 1800–1900, at 76–80 (1978). By contrast, "[i]n this country, no State permitted same-sex marriage" before 2003. United States v. Windsor, 570 U.S. 744, 808 (2013) (Alito, J., dissenting) (citing Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941 (Mass. 2003)).

19. 505 U.S. 833 (1992), *overruled by Dobbs*, 142 S. Ct. 2228.

20. *Dobbs*, 142 S. Ct. at 2257–58 (referring to *Roe* and *Casey*'s reliance on, inter alia, Skinner v. Oklahoma, 316 U.S. 535 (1942) (right to procreate), Griswold v. Connecticut, 381 U.S. 479 (1965) (right for married couples to obtain contraceptives), Eisenstadt v. Baird, 405 U.S. 438 (1972) (right for unmarried people to obtain contraceptives), Pierce v. Soc'y of Sisters, 268 U.S. 510 (1925) (right to make parental decisions), Meyer v. Nebraska, 262 U.S. 390 (1923) (right to make parental decisions), Winston v. Lee, 470 U.S. 753 (1985) (right to bodily integrity), and Rochin v. California, 342 U.S. 165 (1952) (right to bodily integrity)). *Roe* and *Casey* also relied on a number of other cases, including *Loving v. Virginia*, 388 U.S. 1 (1967), which struck down Virginia's ban on interracial marriage as violative of both substantive due process and equal protection. *See* Roe v. Wade, 410 U.S. 113, 152 (1973), *overruled by Dobbs*, 142 S. Ct. 2228; *Casey*, 505 U.S. at 848. Walter advanced a similarly stereoscopic view of the abortion right. *See infra* text accompanying notes 29–31; *see also* Pamela S. Karlan, *Foreword: Loving* Lawrence, 102 MICH. L. REV. 1447, 1450–58 (2004) (discussing the "stereoscopic" character of gay rights claims).

21. *Dobbs*, 142 S. Ct. at 2258.

22. *Id.*

23. *Loving*, 388 U.S. at 11–12.

24. *Rochin*, 342 U.S. 165 at 170–74.

life can override whatever interest the woman may have in not bringing a pregnancy to term, even if it cannot override her interest in using contraceptives to avoid pregnancy in the first place.[25] Accordingly, the Court held that a law regulating abortion "must be sustained if there is a rational basis on which the legislature could have thought that it would serve legitimate state interests."[26] Any one of a host of rationales, even if offered post hoc, can justify a state's restriction on abortion. In the *Dobbs* case itself, the Court found that Mississippi's ban on virtually all abortions after the fifteenth week of gestation was rationally related to the State's "legitimate" interests in "protecting the life of the unborn," and its conclusion that such a ban would prevent danger to "the maternal patient" and avoid "demeaning" the medical profession.[27] But the Court's rationale, as it made clear, would apply to virtually *any* restriction of abortions.[28]

Walter's work anticipated, and powerfully rebutted, each of these moves. And his embrace of the normative power of the actual anticipated the nation's reaction to *Dobbs*.

First, with respect to the history, Walter challenged both the methodology and the bottom line offered in *Dobbs*. He explained that "the proper role of historical tradition in fundamental rights interpretation" was to implement "a general principle that individuals should be free of unwarranted state interference," rather than to ask whether the law had long recognized the asserted right at a high level of specificity.[29] Walter offered a telling counterexample to the proposition that would underlie the *Dobbs* Court's analysis:

> The framers said nothing specific about hysterectomies and did not even contemplate the issue when drafting the fourteenth amendment, but concentrating on their opinion of reproductive surgery would be

25. *Compare Dobbs*, 142 S. Ct. at 2242 (overriding a woman's interest in not bringing a pregnancy to term), *with Griswold*, 381 U.S. at 485 (recognizing a right to contraception).

26. *Dobbs*, 142 S. Ct. at 2284.

27. *Id.*

28. A state's "legitimate" interests are capacious indeed and can "include respect for and preservation of prenatal life at all stages of development." *Id.* Under that standard, it is hard to see the general restriction on abortion that would fail judicial review—save, perhaps, for a law denying a woman access to an abortion necessary to save her life.

29. Dellinger & Sperling, *supra* note 6, at 90. In this article, Walter argued that "there is no area of Constitutional law in which the key doctrinal elements come from 'the text of the Constitution.'" *Id.* at 86. Rather, they all come from an accretion of caselaw. Even the Court's Second Amendment jurisprudence, which is perhaps the most avowedly textual constitutional doctrine, *see, e.g.*, New York State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111 (2022); District of Columbia v. Heller, 554 U.S. 570 (2008) (which Walter argued for the petitioner), takes much of its substance not from the text of the Constitution itself, but from the other interpretive modalities the Court has recognized, including historical practice and consequentialism. *See* Pamela S. Karlan, *Founding Firearms*, BOS. REV. (May 22, 2013), https://www.bostonreview.net/articles/pamela-karlan-founding-firearms/ [https://perma.cc/H743-AMUN] (describing the Court's use of multiple interpretive methods in *Heller*).

> inappropriate when assessing a statute that unjustly compelled unnecessary hysterectomies or prohibited necessary hysterectomies. A court that invalidated such a law would not be "creating a new constitutional right to hysterectomy-choice," but merely applying the established constitutional rule that deeply intrusive laws restricting liberty must be justified by a compelling governmental reason.[30]

Moreover, Walter explained that the actual history of abortion in the United States is nowhere near as categorical as the *Dobbs* Court would later claim. For one thing, abortion was common[31] and nowhere expressly prohibited "when the framers adopted the ninth amendment and the rest of the Bill of Rights."[32] In addition, the history of abortion restrictions showed that "the moral value of a fetus"—the concern that the *Dobbs* Court used to distinguish the abortion right from other procreative rights that retained their fundamental status—had never been "the primary motivation for abortion laws."[33] Rather, these laws were prompted by "factors that are either now medically outmoded or recognized as discriminatory," such as concerns about the danger abortion techniques posed to an individual's health, "restrictive views about women's sexuality and proper role," or the desire of "the medical profession to secure its hegemony over reproductive medical procedures."[34]

For Walter, "'tradition' and 'heritage' come to nothing unless you can show that there is a valuable tradition or heritage worth defending."[35] And Walter, with his deeply historical sensibility, knew that traditional restrictions on abortion incorporated no longer defensible values.

In place of the deracinated historicism of the *Dobbs* Court, Walter offered a more "stereoscopic" view of the Fourteenth Amendment, one in which the values of liberty and equality should reinforce each other.[36] To be sure, "the

30. Dellinger & Sperling, *supra* note 6, at 91.

31. *See supra* note 18.

32. Dellinger & Sperling, *supra* note 6, at 109; *see also Dobbs*, 142 S. Ct. at 2324 (Breyer, Sotomayor & Kagan, JJ., dissenting) (explaining that the criminal law, at the time of the founding, "might be taken as roughly consonant with *Roe*'s and *Casey*'s different treatment of early and late abortions" because early American law followed the common-law rule that abortion was not treated as a crime before "quickening"—which occurs somewhere in the mid- to later part of the second trimester).

33. Dellinger & Sperling, *supra* note 6, at 110–11.

34. *Id.* at 109–10.

35. Walter Dellinger, *Supreme Court* Obergefell *Ruling: The Judicial Opponents of Gay Marriage Were Not Content To Go Gently into That Good Night*, SLATE (June 28, 2015, 4:29 PM), https://slate.com/news-and-politics/2015/06/supreme-court-obergefell-ruling-the-judicial-opponents-of-gay-marriage-were-not-content-to-go-gently-into-that-good-night.html [https://perma.cc/W5FW-XZDL] [hereinafter Dellinger, *Not Content To Go Gently*].

36. As I have explained elsewhere, the relationship between the Due Process and Equal Protection Clauses is "bi-directional": their normative commitments "each emerge from and reinforce the other. More concretely, . . . looking at an issue stereoscopically—through the lenses of both the due process

right to control one's reproductive capacity may not have appeared to be liberty-denying by generations that maintained archaic stereotypes about women's roles."[37] But fundamental equality is "necessary for meaningful liberty," and experience has shown that a woman's control over her fertility must form "a protected element of the more general fundamental interest at stake."[38] As the joint opinion of Justices O'Connor, Kennedy, and Souter in *Planned Parenthood v. Casey* phrased it, "The ability of women to participate equally in the economic and social life of the Nation" is directly connected to "their ability to control their reproductive lives."[39]

Walter foresaw the pivot the *Dobbs* Court would make in moving from the first to the second path for overruling *Roe*. In *Webster v. Reproductive Health Services*,[40] the case to which Walter's 1989 article most directly responded,[41] the Solicitor General made precisely the argument the Court later adopted in *Dobbs*—that the right to terminate a pregnancy is "inherently different" from other closely related areas of privacy because it "involves the purposeful termination of potential life."[42] Walter offered a sharp reply:

> Whatever the merits of this argument, it is not an argument about whether there is a fundamental right involved, but about whether the state's asserted interest in protecting human life should constrain or override that right. It is difficult to justify concluding that there is a fundamental liberty interest in purchasing a condom, but no constitutional interest of similar magnitude in resisting government compulsion to bear a child.[43]

And here we come to another central feature of Walter's analysis of abortion rights: his attention to the details of individual women's lives. In contrast to the *Dobbs* majority—which hardly noticed, let alone grappled with, the costs that being forced to continue a pregnancy can impose—Walter consistently emphasized the costs that women face both during pregnancy and thereafter. During the era of the "undue burden" standard, when state

clause and the equal protection clause—can have synergistic effects, producing results that neither clause might reach by itself." Pamela S. Karlan, *Equal Protection, Due Process, and the Stereoscopic Fourteenth Amendment*, 33 MCGEORGE L. REV. 473, 474 (2002).

37. Dellinger & Sperling, *supra* note 6, at 91.

38. *Id.*

39. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 856 (1992), *overruled by* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022).

40. 492 U.S. 490 (1989).

41. Dellinger & Sperling, *supra* note 6, at 84–88.

42. *Compare* Brief for the United States as Amicus Curiae Supporting Appellants at 14, Webster v. Reprod. Health Servs., 492 U.S. 490 (1989) (No. 88-605) (quoting Harris v. McRae, 448 U.S. 297, 325 (1980)), *with Dobbs*, 142 S. Ct. at 2280 (stating that "rights regarding contraception and same-sex relationships are inherently different from the right to abortion because the latter (as we have stressed) uniquely involves what *Roe* and *Casey* termed 'potential life'").

43. Dellinger & Sperling, *supra* note 6, at 94.

regulations were permissible so long as they did not unduly interfere with the ultimate decision whether to terminate a pre-viability pregnancy,[44] Walter focused on the practical burdens various state regimes imposed. He described how Texas's law requiring abortions to be performed in surgical centers by doctors who had admitting privileges at a local hospital would result in the closure of clinics, leaving one in five women more than 150 miles from an available provider.[45] And he excoriated Justice Alito for claiming, in the face of this fact, that "virtually no woman" faced any burden.[46]

Walter well knew the sorts of burdens actual women in the actual world faced. He saw this in the work his beloved wife Anne did with pregnant teenagers in North Carolina. After an already distinguished and varied career, Anne turned her focus to the rights and interests of pregnant and parenting adolescents.[47] She recognized that this group was especially vulnerable because of its lack of access to information and resources.[48] Her "animating principle was that girls should be presumed to be capable moral decisionmakers about the issues that fundamentally affect their lives."[49]

Walter used Anne's insights and experience in his own work. He emphasized that "[t]he pattern of exemptions and non-enforcement that characterized abortion regulation before *Roe* and determined which women could obtain abortions created a regime of manifest economic discrimination."[50] Walter worried that contemporary regulations were reinstating that regime.

44. For an articulation of that standard, see *Casey*, 505 U.S. at 878.

45. Walter Dellinger, *The Conservative Abortion Dissents Were a Sad Sight*, SLATE (June 27, 2016, 7:46 PM), https://slate.com/news-and-politics/2016/06/the-conservative-abortion-dissents-were-a-sad-sight.html [https://perma.cc/2L28-HJ3B] [hereinafter Dellinger, *Conservative Abortion Dissents*].

46. *Id.*

47. *See Longtime Faculty Member Anne Dellinger Passes Away at 80*, UNIV. OF N.C. SCH. OF GOV'T (Apr. 29, 2021), https://www.sog.unc.edu/about/news/longtime-faculty-member-anne-dellinger-passes-away-80 [https://perma.cc/RQU6-BLXF].

48. Anne Dellinger "was a fierce advocate for fairer treatment of vulnerable communities and young women in particular." *Id.* To respond to the lack of information to help them with decision-making, she "produced a series of legal guides for educators, medical personnel, and social services professionals to provide to pregnant and parenting minors." *Id.*

49. Walter Dellinger, Anne Maxwell Dellinger: 1940–2021, at 4 (unpublished manuscript) (on file with the North Carolina Law Review). For Anne Dellinger's work, see generally, ANNE DELLINGER & ARLENE M. DAVIS, HEALTH CARE FOR PREGNANT ADOLESCENTS: A LEGAL GUIDE (2002) (legal guidebook for healthcare providers); ANNE DELLINGER, SOCIAL SERVICES FOR PREGNANT AND PARENTING ADOLESCENTS: A LEGAL GUIDE (2002) (legal guidebook for departments of social services); ANNE DELLINGER, PUBLIC SCHOOLS AND PREGNANT AND PARENTING ADOLESCENTS: A LEGAL GUIDE (2004) (legal guidebook for public school workers and administrators); ANNE DELLINGER, ANITA BROWN-GRAHAM, ARLENE M. DAVIS, FAITH LOCKWOOD, JANET MASON & JILL MOORE, PREGNANCY AND PARENTING: A LEGAL GUIDE FOR ADOLESCENTS: WITH SPECIAL INFORMATION FOR THEIR PARENTS (2d ed. 2006) (legal guidebook for pregnant and parenting adolescents); *Adolescent Pregnancy Project*, UNIV. OF N.C. SCH. OF GOV'T, https://www.sog.unc.edu/resources/microsites/adolescent-pregnancy-project/ [https://perma.cc/YZ3Q-A5K9] (project co-authored by Anne Dellinger).

50. Dellinger & Sperling, *supra* note 6, at 108.

Many restrictions might not seriously impede the ability of "an affluent professional woman" to obtain an abortion.[51] "But for an 18-year-old girl in the rural South, unmarried, pregnant, hoping to finish school and build a decent life," those burdens "would be absolute."[52] And they would resonate throughout her life.[53] Thus, Walter would hardly have been reassured by Justice Kavanaugh's assertion in *Dobbs* that women would remain free to travel to another state to obtain an abortion.[54] While that might be true in theory—and a number of jurisdictions are prepared to challenge that proposition[55]—as a practical matter, for many individuals, their state's ban, or serious restriction, will be the end of their ability to terminate their pregnancy.[56]

Walter went beyond describing, in powerful detail, the various burdens that unwanted pregnancies imposed on women, emphasizing that many of those burdens fell *only* on women.[57] He also took apart the State's purported countervailing argument, showing that, with the exception of restricting or trying to prohibit abortions, states did precious little to protect "potential human life."[58] Thus, although Walter did not doubt that many advocates of restricting abortion based their views on the value of prenatal life, he saw contrary signs that "these arguments mask the influence of restrictive notions of women's sexual and gender roles in the abortion debate."[59] Moreover, the

51. *Id.* at 102.

52. *Id.* For additional discussion of the class dimension issue, see Walter Dellinger, *Should We Compromise on Abortion?*, AM. PROSPECT (June 1, 1990), https://prospect.org/features/compromise-abortion/ [https://perma.cc/AA6L-6EHV] [hereinafter Dellinger, *Should We Compromise*].

53. Dellinger & Sperling, *supra* note 6, at 102.

54. *See* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2309 (2022) (Kavanaugh, J., concurring).

55. *See, e.g.*, Caroline Kitchener, *Highways Are the Next Antiabortion Target. One Texas Town Is Resisting.*, WASH. POST (Sept. 1, 2023, 6:00 AM), https://www.washingtonpost.com/politics/2023/09/01/texas-abortion-highways/ [https://perma.cc/SG3K-R79T (dark archive)] (reporting that a number of localities in Texas have passed laws prohibiting using their roads to drive someone out of state for the purpose of getting an abortion); Andy Rose, *Alabama Attorney General Says He Has Right To Prosecute People Who Facilitate Travel for Out-of-State Abortions*, CNN (Aug. 31, 2023, 7:39 AM), https://www.cnn.com/2023/08/31/politics/alabama-attorney-general-abortion-prosecute/index.html [https://perma.cc/UJ68-YQR2] (reporting state attorney general's assertion that out-of-state abortion travel can constitute "criminal conspiracy" and could be prosecuted).

56. *See* Benjamin Rader, Ushma D. Upadhyay, Neil K.R. Seghal, Ben Y. Reis, John S. Brownstein & Yulin Hswen, *Estimated Travel Time and Spatial Access to Abortion Facilities in the US Before and After the* Dobbs v Jackson Women's Health *Decision*, 328 J. AM. MED. ASS'N 2041, 2041 (2022) (describing how the dramatic increase in travel times to obtain abortions out of state decreased women's access to abortion).

57. *See, e.g.*, Dellinger, *Should We Compromise*, *supra* note 52.

58. *See* Dellinger & Sperling, *supra* note 6, at 106–08. Similarly, although states sometimes sought to justify pre-*Dobbs* restrictions as being designed to protect the health of women, Walter showed that the laws in question actually failed to serve that purpose. *See* Brief for Social Science Researchers as Amici Curiae in Support of Petitioners at 25–34, Whole Women's Health v. Cole, 579 U.S. 582 (2016) (No. 15-274) (Cole was Hellerstedt's predecessor in office).

59. Dellinger & Sperling, *supra* note 6, at 111.

belief that life begins at conception has hardly been "stable over times and across boundaries"; at most, it has been "pursued only by some states in some decades, and even then in an inconsistent and economically discriminatory fashion."[60] Such an interest would of course not be sufficiently compelling to justify state restrictions were some form of heightened scrutiny required. But because the *Dobbs* Court seemed to deny that terminating a pregnancy involves any liberty at all—a squarely indefensible proposition[61]—it never actually balanced the State's interest against the woman's.[62] For the *Dobbs* Court, there was essentially nothing on the challengers' side of the ledger. Nor, because it was applying only rationality review, did the Court ask what the legislature's *actual* reason was for enacting the challenged restriction or even whether the proffered reasons in fact advanced the State's interests.[63] Instead, it applied a totally toothless standard.

60. *Id.* at 118.

61. In *Lawrence v. Texas*, 539 U.S. 558 (2003), for example, Justice Scalia dissented from the Court's holding that gay people have a fundamental liberty interest in engaging in consensual same-sex sexual intimacy. But he agreed that their sexual activity was nonetheless "undoubtedly" an "exercise of their liberty." *Id.* at 586 (Scalia, J., dissenting).

62. Walter thought that in liberty cases, balancing was inevitable. In discussing the dissenting opinions in *Whole Woman's Health v. Hellerstedt*, 579 U.S. 582 (2016), he highlighted Justice Thomas's complaint that "today's decision requires courts to 'consider the burdens a law imposes on abortion access together with the benefits those laws confer.'" Dellinger, *Conservative Abortion Dissents*, *supra* note 45 (quoting *Whole Woman's Health*, 579 U.S. at 633 (Thomas, J., dissenting)). "You probably stopped to re-read that sentence. But you were right the first time. Thomas is actually complaining that the court's majority considers the burdens and the benefits together. And he believes that is a bad thing." *Id.* For Walter, that was precisely how Fourteenth Amendment liberty claims *should* be analyzed.

63. For example, when heightened scrutiny applies, a reviewing court must first determine the legislature's *actual* reason for enacting the challenged law. *See, e.g.*, United States v. Virginia, 518 U.S. 515, 535–36 (1996) (explaining that "a tenable justification must describe actual state purposes, not rationalizations for actions in fact differently grounded"). But even if the State's proffered justification *is* tenable, a court does not ask only whether a legislature could *believe* that the law served that purpose; it asks whether the evidence presented at trial actually supports that rationale. So in *Whole Woman's Health*, the Supreme Court struck down a Texas law that required abortion providers to have admitting privileges at a local hospital located no more than thirty miles from their abortion facility and that required facilities providing abortions to meet the standards for ambulatory surgical centers. 579 U.S. at 627. The Court recognized that states have a weighty interest in ensuring that abortions are "performed under circumstances that insure maximum safety for the patient." *Id.* at 607 (quoting Roe v. Wade, 410 U.S. 113, 150 (1973), *overruled by* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022)). But it emphasized that reviewing courts have "*an independent constitutional duty to review factual findings where constitutional rights are at stake*." *Id.* at 608 (quoting Gonzales v. Carhart, 550 U.S. 124, 165 (2007)). Thus, the Texas statute failed because the evidence at trial showed that the challenged provisions did not benefit patients. *See id.* at 617. For Walter's view of the Texas statute, see Brief of Constitutional Law Scholars Ashutosh Bhagwat et al. as Amici Curiae Supporting Petitioners at 29–31, *Whole Woman's Health*, 579 U.S. 582 (No. 15-274), and see generally Brief for Social Science Researchers as Amici Curiae in Support of Petitioners, *supra* note 58 (offering a rigorous discussion of scientific research showing that the provisions in Texas' statute would "not only fail to improve health and safety, but also actively harm women"). Or as Walter phrased it more succinctly, "The Texas law was a sham, pure and simple." Walter Dellinger, *The Supreme Court Saves Its Credibility, Abortion*, SLATE (June 27, 2016, 11:37 AM), https://slate.com/news-and-politics/2016/06/the-supreme-court-saves-its-credibility-abortion.html [https://perma.cc/G35G-KD4T].

The reaction to *Dobbs* has been exactly what Walter would have predicted. The normative power of the actual here means that regardless of how the right to abortion was understood when the Constitution or the Fourteenth Amendment was ratified, or even when *Roe* was decided, generations of Americans have exercised that right and have come to view the decision whether to end a pregnancy as "a central part of the sphere of liberty that our law guarantees equally to all."[64] Tens of millions of Americans were unprepared to abandon that right, whatever a five-member bloc of the Supreme Court might think. As future Justice Holmes observed long ago, "A thing which you have enjoyed and used as your own for a long time, whether property or an opinion, takes root in your being and cannot be torn away without your resenting the act and trying to defend yourself, however you came by it."[65] So it is no surprise that the Court's decision in *Dobbs* prompted voters, legislators, and even some state courts to reaffirm the principles advanced in *Roe* and *Casey* and to become more skeptical about the Supreme Court more generally.[66]

And Walter also left us with guidance about how to approach the question of proposals to enact constitutionally permissible restrictions on abortion. In his essay *Should We Compromise on Abortion?*, Walter answered that question with a resounding "No."[67] He saw that the kinds of restrictions states might impose would "fail to take into account the social and economic reality of abortion in America" because many of the proposals were "disguised trades that would enable those who are affluent to retain access to abortion (for now at least) in exchange for 'moderate' restrictions that place abortion out of the reach of less fortunate women."[68] For Walter, this was "a devil's bargain, and it must be rejected."[69] So in his work, Walter not only offered a challenge to the Court; he gave one to us as well.

II. GAY RIGHTS

One of my favorite memories of Walter involves the oral argument in *Lawrence v. Texas*,[70] the case in which the Supreme Court struck down Texas's law criminalizing several forms of same-sex sexual intimacy.[71]

64. Thornburgh v. Am. Coll. of Obstetricians & Gynecologists, 476 U.S. 747, 772 (1986).

65. Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 477 (1897).

66. *See, e.g.*, Kelly Baden & Jennifer Driver, *The State Abortion Policy Landscape One Year Post-Roe*, GUTTMACHER INST., https://www.guttmacher.org/2023/06/state-abortion-policy-landscape-one-year-post-roe [https://perma.cc/33V4-N5V7] (last updated June 16, 2023); Emily Bazelon, *The Surprising Places Where Abortion Rights Are on the Ballot, and Winning*, N.Y. TIMES (Sept. 12, 2023), https://www.nytimes.com/2023/09/12/magazine/abortion-laws-states.html [https://perma.cc/H56A-32H4 (staff-uploaded, dark archive)].

67. Dellinger, *Should We Compromise*, *supra* note 52.

68. *Id.*

69. *Id.*

70. 539 U.S. 558 (2003).

71. *Id.* at 578–79.

Walter filed a very powerful amicus brief on behalf of several national and state-level organizations that either represented gay men, lesbians, bisexuals, and their loved ones or shared a commitment to combatting invidious discrimination more broadly. A centerpiece of that brief was its insistence that laws "brand[ing] gay people as criminally deviant do not operate on some abstract 'class.' They harm real men and women."[72] The brief offered a series of facts and figures about those men and women:

> Gay men and lesbians serve their country in both civilian and military capacities. There are three openly gay members of Congress (two Democrats and one Republican) and 42 openly gay legislators in 20 different states. Gay men and lesbians serve the current Administration in positions ranging from ambassador to arms control advisor to Environmental Protection Agency official. And gay men and lesbians are generally as likely to have served in the military as non-gay Americans—a service record made more remarkable by the fact that gay service-members must negotiate the military's long-standing regulations regarding homosexuality.[73]

Harnessing a version of the normative power of the actual, the brief turned to two specific examples from a tragedy then very much in the forefront of the national mind: the events of 9/11. Mark Bingham was a gay man who had "called his mother from United Airlines Flight 93 and then helped to save countless American lives by fighting against the terrorists aboard his plane. To his country, Mr. Bingham is a hero; in Texas, he is a criminal."[74] The Reverend Mychal F. Judge was a chaplain to the New York City Fire Department who "was killed by falling debris in the lobby of the World Trade Center shortly after administering last rites to a dying firefighter."[75] He too was gay, and was the person after whom Congress named the statute that allowed federal benefits to flow to the same-sex partners of public safety officers killed in the line of duty.[76] That section of the brief drew from its examples this lesson:

> There is nothing about gay men and women in America that justifies treating them as criminally deviant under laws like Texas' Homosexual Conduct Law. Gay men and lesbians are partners and parents, neighbors

72. Brief of Amici Curiae Human Rights Campaign et al. in Support of Petitioners at 16, *Lawrence*, 539 U.S. 558 (No. 02-102).

73. *Id.* at 18–19.

74. *Id.* at 20.

75. *Id.*

76. Mychal Judge Police and Fire Chaplains Public Safety Officers' Benefit Act of 2002, Pub. L. No. 107-196, 116 Stat. 719 (2002) (codified in scattered sections of 34 U.S.C.).

> and coworkers, occasional heroes. There is no legitimate and rational basis for singling out this group for branding as criminal.[77]

Lawrence illustrates Walter's point about the normative power of the actual in a second way as well. After the argument, Walter and I were standing together in the courtroom when we were approached by Linda Greenhouse, then the *New York Times*'s Supreme Court correspondent. Walter asked Linda what she had thought was the most interesting part of the argument. Without missing a beat, Linda replied, "The Bar section." What she meant was that the seats in the front of the courtroom had been occupied by former clerks to the Justices and other frequent participants in the Court's business who were openly gay, lesbian, or bisexual. I remarked that one could see Justice O'Connor, as she scanned the courtroom, taking notice of this fact. "And when she came to you, Walter, well, she was pretty surprised!," I joked. "No, no," Walter laughed. But the fact that so many people the Justices knew had come out had changed the dynamic from the era of *Bowers v. Hardwick*,[78] when Justice Lewis F. Powell, the pivotal vote on the Court, could claim that he had never met a person who was gay.[79]

> To paraphrase former Secretary of Defense Donald Rumsfeld, in the seventeen years between *Hardwick* and *Lawrence*, gay people had moved from being unknown unknowns to being known unknowns to being known knowns. The Justices had always known people who were gay, but now they knew it. These were people who had worked for them, people they respected, people who had become in some cases virtually a part of their families. Two decades of gay people coming out meant that the Justices, like the rest of the American people, now understood that LGBT people were their children, their friends, their colleagues, their employees.[80]

Perhaps the best example of Walter's understanding of the normative power of the actual—it was one of the places where he used the phrase in his own writing—involves the question of marriage equality. Walter was, no surprise, a strong supporter of gay couples' right to marry. But he was also a master tactician. And in a *Breakfast Club* contribution in 2009, he found an important lesson in an unlikely place—a dissent Justice David Souter wrote, shortly before he left the Court, in a case involving the question of whether

77. Brief of Amici Curiae Human Rights Campaign et al., *supra* note 72, at 20. It is a measure of Walter's generosity that when he quoted this passage, he credited it to his junior colleague Pam Harris. *See* Walter Dellinger, *How Far We've Come*, SLATE (June 26, 2003, 8:59 AM), https://slate.com/news-and-politics/2003/06/how-far-we-ve-come.html [https://perma.cc/ZW3V-HCXE].

78. 478 U.S. 186 (1986).

79. JOHN C. JEFFRIES, JR., JUSTICE LEWIS F. POWELL, JR. 521–22 (1994).

80. Pamela S. Karlan, *Just Desserts?: Public Accommodations, Religious Accommodations, Racial Equality, and Gay Rights*, 2018 SUP. CT. REV. 145, 155 (2018).

individuals convicted of a crime have a constitutional right to obtain postconviction access to the State's evidence in order to conduct DNA testing.[81] There, citing inter alia the Court's decisions in *Lawrence*, *Roe*, and *Casey*, Justice Souter offered this account of substantive due process:

> [W]idely shared understandings within the national society can change as interests claimed under the rubric of liberty evolve into recognition or are recast in light of experience and accumulated knowledge.
>
> Changes in societal understanding of the fundamental reasonableness of government actions work out in much the same way that individuals reconsider issues of fundamental belief. We can change our own inherited views just so fast, and a person is not labeled a stick-in-the-mud for refusing to endorse a new moral claim without having some time to work through it intellectually and emotionally. Just as attachment to the familiar and the limits of experience affect the capacity of an individual to see the potential legitimacy of a moral position, the broader society needs the chance to take part in the dialectic of public and political back and forth about a new liberty claim before it makes sense to declare unsympathetic state or national laws arbitrary to the point of being unconstitutional.[82]

Walter saw in this passage a "caution[] against a premature quest for national judicial rules" with respect to marriage equality.[83] Too early a demand for the Court to recognize marriage equality as a Fourteenth Amendment right might backfire if the country was not yet ready to accept the Court's resolution. He saw a parallel in the road to *Brown v. Board of Education*.[84] The "legal" and "logical" work necessary to sustain the Court's 1954 decision had been completed by 1938[85]—presumably because the combination of *Missouri ex rel. Gaines v. Canada*[86] and *Carolene Products*[87] doomed de jure racial segregation of public education.[88] But as Walter wrote, "a judicial decision actually ending

81. Walter Dellinger, *Souter: A Last Lecture on Gay Marriage?*, SLATE (June 29, 2009, 8:20 AM), https://slate.com/human-interest/2009/06/souter-a-last-lecture-on-gay-marriage.html [https://perma.cc/3BPW-CNAL] [hereinafter Dellinger, *Souter on Gay Marriage?*].

82. Dist. Att'y's Off. for Third Jud. Dist. v. Osborne, 557 U.S. 52, 105 (2009) (Souter, J., dissenting) (internal citations omitted).

83. Dellinger, *Souter on Gay Marriage?*, *supra* note 81.

84. 347 U.S. 483 (1954).

85. Dellinger, *Souter on Gay Marriage?*, *supra* note 81.

86. 305 U.S. 337 (1938).

87. 304 U.S. 144 (1938).

88. *See Gaines*, 305 U.S. at 352 (holding that Missouri's refusal to admit Gaines to its law school because he was Black violated the Equal Protection Clause); *Carolene Products*, 304 U.S. at 152 n.4 (suggesting a "narrower scope for operation of the presumption of constitutionality" with respect to laws "directed at particular . . . racial minorities" and raising the possibility that "prejudice against discrete and insular minorities may be a special condition" that would "call for a correspondingly more searching judicial inquiry" (internal citations omitted)).

segregation in the South would have been impossible in 1938. Such a holding could have ended judicial review—not Jim Crow."[89] Only after a decade and a half of dramatic social change—everything from World War II to Jackie Robinson's entry into major league baseball—was the Court in a position to act, and even then, there was, well, Massive Resistance. Walter remarked on the change that had occurred between *Bowers* and *Lawrence*, particularly the sharp decline in the number of states that were still criminalizing private consensual same-sex sexual acts by 2003 (a number that "was about the same as the number of states that still had de jure school segregation when *Brown* was decided").[90] Implicit in Walter's comparison was the suggestion that the Court was unlikely to recognize marriage equality as a national matter until there had been movement in the states and social change.

In 2010, the year after Walter's *Breakfast Club* piece, Judge Vaughn Walker showed that he too understood the strategic benefits of slowing down any race to the Supreme Court. He therefore held a full-blown trial that squarely showed the lack of factual support for many opponents' arguments before issuing an opinion striking down the California Constitution's ban on same-sex marriage as a violation of both due process and equal protection.[91]

The State declined to appeal the ruling, but the proponents of the ballot initiative that had produced the challenged constitutional provision sought to do so. Walter became a strong and early exponent of the position that the ballot proponents lacked standing.[92] His insights were later incorporated into an influential brief on the question of standing when the question reached the Supreme Court.[93] The Court agreed with Walter's position and declined to reach the merits in the California case, postponing a national judicial resolution on the question of marriage equality for another two years.

Walter's view on standing was, as positions on standing so often are, tied to his views on the merits: the reason the ballot proponents lacked standing to defend the ban on same-sex marriage was in part that "no one has a legal interest in denying someone else's happiness."[94]

89. Dellinger, *Souter on Gay Marriage?*, *supra* note 81.

90. *Id.*

91. *See* Perry v. Schwarzenegger, 704 F. Supp. 2d 921, 1003 (N.D. Cal. 2010).

92. *See* Walter Dellinger, *Standing on Its Head: Why the Technical "Standing" Issue Properly Decides the Gay Marriage Appeal*, SLATE (Dec. 6, 2010, 8:00 PM), https://slate.com/news-and-politics/2010/12/why-the-technical-standing-issue-properly-decides-the-gay-marriage-appeal.html [https://perma.cc/Y94D-Z5AZ] [hereinafter Dellinger, *Standing*].

93. Both Justice Breyer at oral argument and the Chief Justice in his opinion for the Court referred to Walter's brief. *See* Transcript of Oral Argument at 10–11, Hollingsworth v. Perry, 570 U.S. 693 (2013) (No. 12-144) (referring to the "strong argument" made in "the Dellinger brief"); *Perry*, 570 U.S. at 713 (using the "Brief for Walter Dellinger" to "explain[]" why the ballot proponents could not be treated as agents of the state).

94. Dellinger, *Standing*, *supra* note 92.

To be sure, Walter understood that the inability to obtain a precedential ruling on the California law left the issue in play. As he explained, the district court's decision, standing alone, could not "irrevocably bind the future"; if a higher court were later to rule against marriage equality in a case from any other state, a future California administration could seek to reopen the judgment.[95] But Walter was confident that, as a practical matter, this simply would not happen:

> What would protect the future of gay marriage in California is not so much a single judge's decision but a powerful social rule: *the normative power of the actual*. That is, what *is* seems right. If Judge Walker's decision were held to be final and unappealable, the 18,000 gay and lesbian[] [couples] who are now married in California (as a result of the months when gay marriage was legal there) will be joined by thousands and thousands more over the next few years. And at that point, as a matter of social and political reality, there would be no turning back.[96]

Once again, Walter was prescient. At the time of *Lawrence*, the Court was unprepared to decide "whether the government must give formal recognition to any relationship that homosexual persons seek to enter."[97] But a dozen years later—only slightly fewer years than had elapsed between 1938 and *Brown*—the facts on the ground had changed dramatically. As the result of court rulings, legislation, or direct democracy in the interim, a majority of the states allowed same-sex couples to marry, and a major nationwide poll had "put[] support for marriage equality at 55 percent—an astonishing 15 point increase" in just five years.[98] This time around, Walter was fully on board with asking the Court to reach the merits, joining an amicus brief in support of the challengers in *Obergefell v. Hodges*.[99] And when the Court decided in favor of marriage equality, Walter celebrated with these words:

> As Justice John Paul Stevens once wrote, quoting Justice Felix Frankfurter, "Wise adjudication has its own time for ripening." The thousands of marriages by couples of men and couples of women over the past two years had the moral force (to use a phrase of the late Charles L. Black) of "the normative power of the actual." The way was cleared for a complete victory, and that is what *Obergefell* delivered.[100]

95. *Id.*

96. *Id.*

97. Lawrence v. Texas, 539 U.S. 558, 578 (2003).

98. Press Release, Hum. Rts. Campaign, Supreme Court Clears the Way for Marriage Equality THREE Times (Oct. 17, 2014), https://www.hrc.org/press-releases/supreme-court-clears-the-way-for-marriage-equality-three-times [https://perma.cc/CP3D-Y5FG].

99. *See* Brief of Constitutional Law Scholars Ashutosh Bhagwat et al. as Amici Curiae in Support of Petitioners at 1, Obergefell v. Hodges, 576 U.S. 644 (2015) (Nos. 14-556, 14-562, 14-571, 14-574).

100. Dellinger, *Not Content To Go Gently*, *supra* note 35.

Walter titled this entry in the *Slate Breakfast Club*, "*The judicial opponents of gay marriage were not content to go gently into that good night*," an allusion to Dylan Thomas's wonderful poem.[101] As I said in a tribute to Walter several years ago, Walter had a poetic sensibility that informed his legal thinking. He often repeated the passage from Walt Whitman's Civil War poem *The Wound-Dresser* that was carved into the stone at the top of the entrance to the Metro stop near his Washington apartment: "I sit by the restless all the dark night, some are so young, / Some suffer so much, I recall the experience sweet and sad."[102] Walter spent his life, inside the government and out, trying to give meaning to the promises coming out of that terrible war, and trying to bring our Constitution into alignment with the better angels of our nature. His work on abortion rights and gay rights was a central part of that endeavor of trying to dress, and address, the wounds that scar our nation. And he inspired my generation of constitutional lawyers to continue that struggle.

101. *Id.*; DYLAN THOMAS, *Do Not Go Gentle Into That Good Night*, *in* THE POEMS OF DYLAN THOMAS 207, 207–08 (Daniel Jones ed., 1971).

102. WALT WHITMAN, *The Wound-Dresser*, *in* POEMS FROM LEAVES OF GRASS 173, 174 (1913).