BETWEEN THE PESSIMISM OF STATE ACTION AND THE OPTIMISM OF SSOGIE EQUALITY

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INTRODUCTION

Antonio Gramsci once wrote, "The challenge of modernity is to live without illusions and without becoming disillusioned."[1] Even though Gramsci's aphorism refers to Europe's secularization,[2] his words epitomize my relationship as a Crit scholar with the Law. As a member of various marginalized groups and a law operator, I find it a constant challenge to live without the illusion of the Law without becoming disillusioned. Like religion, Law is both ideology and comfort.[3] Insofar as the Law maintains

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1. ZYGMUNT BAUMAN & EZIO MAURO, BABEL 61 (Nicolò Crisafi trans., Polity Press 2016) (2015).

2. Lukas Slothuu, *Antonio Gramsci and the Problem of Fatalism*, *in* REVOLUTIONARY HOPE IN A TIME OF CRISIS POLITICAL DISILLUSION, DEMOCRACY, AND UTOPIA 12 (Maša Mrovlje & Alex Zamalin, eds., 2024).

3. *See id.* ("While the 'illusions' of religion function as ideology, insofar as they maintain dominant social structures and institutions, they also bring comfort and meaning to a world characterized by domination and exploitation . . . .").

social inequities, it also brings comfort and the hope of being free from discrimination and domination.

One of the greatest illusions in our legal system is that of the private and public divide. Widely criticized, among others, by feminists[4] and queer scholars,[5] this divide remains entrenched in our constitutional scheme in ways that continue to foster the alienation of minority groups such as women and LBGTQ+ folks.

A "crucial ingredient" to the illusion of the private and public divide, "as described by Marx, is that [this] split entails a tripartite structure[:] the self, the State, and the other."[6] That implies that "[o]ther private individuals are experienced, not in direct relationship, but rather by reference to [the] [S]tate . . . ."[7] As the most recent jurisprudence in sex, sexual orientation, and gender identity and expression ("SSOGIE") equality from the Supreme Court exemplifies, this phenomenon of experiencing the other by reference to the State limits the promise of rights in producing an egalitarian society.[8]

Traditionally, the State has been conceptualized as the greatest foe against civil liberties and, in turn, a stone in the road to building an egalitarian society.[9] However, the State merely reflects social or hegemonic norms held

4. Howard Schweber, *Legal Epistemologies*, 75 MD. L. REV. 210, 212 (2015); Ronnie Cohen & Shannon O'Byrne, *"Can You Hear Me Now . . . Good!"® Feminism(s), the Public/Private Divide, and* Citizens United v. FEC, 20 UCLA WOMEN'S L.J. 39, 39 (2013); *see also* Melissa Murray, *Children of Men: The Roberts Court's Jurisprudence of Masculinity*, 60 HOUS. L. REV. 799, 827-28 (2023); Moshe Cohen-Eliya, *The Public-Private Divide in the Age of Identity Politics*, 18 L. & ETHICS HUM. RTS. 79, 80, 82 (2024); Suzanne A. Kim, *Reconstructing Family Privacy*, 57 HASTINGS L.J. 557, 559, 567 (2006).

5. Larry Catá Backer, *Toleration, Suppression and the Public/Private Divide: "Homosexuals" Through Military Eyes*, 34 TULSA L.J. 537, 537-39, 542-45 (1999); *see* Ali Murat Gali, *Crawling Out of Fear and the Ruins of an Empire: Queer, Black, and Native Intimacies, Laws of Creation and Futures of Care*, 34 YALE J.L. & FEMINISM 176, 198-201 (2023); Richard Collier, *Masculinities, Law, and Personal Life: Towards a New Framework for Understanding Men, Law, and Gender*, 33 HARV. J.L. & GENDER 431, 433-35 (2010); Robert S. Chang, *Will LGBT Antidiscrimination Law Follow the Course of Race Antidiscrimination Law?*, 100 MINN. L. REV. 2103, 2142-43, 2145-46 (2016).

6. Alan Freeman & Elizabeth Mensch, *The Public-Private Distinction in American Law and Life*, 36 BUFF. L. REV. 237, 242 (1987).

7. *Id.*

8. See discussion in *infra* Part II for the following cases: Nat'l Inst. of Fam. & Life Advocs. v. Becerra, 585 U.S. 755 (2018); Masterpiece Cakeshop v. Colo. C.R. Comm'n, 584 U.S. 617 (2018); and 303 Creative LLC v. Elenis, 600 U.S. 570 (2023).

9. Donald P. Kommers, *American Civil Liberties and Constitutional Change*, 21 JAHRBUCH DES ÖFFENTLICHEN RECHTS DER GEGENWART [YEARBOOK OF CONTEMPORARY PUBLIC LAW] 603, 604 (1972) (analyzing the factors affecting civil liberties in the United States and discussing how the 18th-century belief that life's purpose laid in the full expression of human creativity and that any force, whether governmental or ideological, that stifled personal fulfillment should be resisted shaped the American political system, leading to a deliberate effort to limit governmental

by individuals and groups in power. Moreover, private actors have the same or even more power to stall equality than the State.[10]

For that reason, even after women and LGBTQ+ groups have fought for the recognition of their rights and opposed actions and policies from the State imbued in patriarchy, heteronormativity, and gender binarism,[11] today, we are experiencing a halt and an imminent regress in some of those victories.[12] To a large extent, in the last decade, this crisis in the rights of women and LGBTQ+ folks and SSOGIE equality is not being driven by lawmakers but by private individuals, companies, and organizations (civil society, in general) who challenge legislative efforts to prohibit discrimination and promote SSOGIE equality. For example, these private actors include web designers who oppose accommodation laws that require them to serve same-sex couples[13] and pregnancy crisis centers who challenge regulations to provide accurate information about their work and professionals to people coming to their facilities.[14] This crisis in SSOGIE equality can partly be attributed to the private-public divide drawn in Constitutional Law by the state action doctrine.

Under the state action doctrine developed by the Supreme Court of the United States, our constitutional rights are only actionable against the government and not against private actors.[15] When a clash in rights between

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power, which has characterized also the Court's preoccupation with delineating the limits of state power to protect individual rights).

10. Willmai Rivera-Pérez, International Human Rights Law and the Horizontal Effect of Constitutional Rights in Latin America: A Look at the Direct Application of Constitutional Rights in Argentina, Colombia and Puerto Rico 5 (2010) (S.J.D. dissertation, University of California, Los Angeles) (on file with author).

11. Some of the relevant victories include: the recognition of the right to abortion, Roe v. Wade, 410 U.S. 113, 153 (1973) *overruled by* Dobbs v. Jackson Women's Health Org., 597 U.S. 215 (2022); the protection of women as a quasi-suspect class under the equal protection clause, Craig v. Boren, 429 U.S. 190, 191-92 (1976); the decriminalization of birth control methods, Griswold v. Connecticut, 381 U.S. 479, 480, 485 (1965); Eisenstadt v. Baird, 405 U.S. 438, 440-41, 453 (1972); the derogation of sodomy laws, Lawrence v. Texas, 539 U.S. 558, 562, 564, 578 (2003); the recognition of trans rights, Bostock v. Clayton Cnty., 590 U.S. 644, 680-81 (2020); the acceptance of LGBTQ+ individuals in the military, Don't Ask, Don't Tell Repeal Act of 2010, H.R. 2965, 111th Cong. (2010); and same-sex marriage, Obergefell v. Hodges, 576 U.S. 644, 680-81 (2015).

12. *Dobbs*, 597 U.S. at 231(holding that there is no federal constitutional right to terminate a pregnancy); *303 Creative LLC*, 600 U.S. at 577-80, 603 (holding that a company can deny services to gay couples based on the Free Speech Clause).

13. *E.g.*, *303 Creative LLC*, 600 U.S. at 570.

14. *E.g.*, Nat'l Inst. of Fam. & Life Advocs. v. Becerra, 585 U.S. 755 (2018).

15. Virginia v. Rives, 100 U.S. 313, 318 (1879) ("The provisions of the Fourteenth Amendment of the Constitution we have quoted all have reference to State action exclusively, and not to any action of private individuals."); United States v. Cruikshank, 92 U.S. 542, 554-55 (1875) ("The fourteenth amendment prohibits a State from denying to any person within its jurisdiction the equal protection of the laws; but the provision does not . . . add anything to the rights which one

two private holders occurs, this doctrine causes the controversy to get funneled into the tripartite structure of the self, the State, and the other that Marx alluded to. This tri-fold separation forces the Court to analyze the clash of rights not directly between the self and the other but by reference to the State, generating substantial detriment to SSOGIE equality.

The doctrine of state action has created three main harms to SSOGIE equality that have alienated our system from its purported goals of creating a more perfect union and Justice.[16] First, the state action doctrine has allowed the weaponization of civil liberties against women and LGBTQ+ folks, halting the exercise of their liberties. The second harm is the corresponding obscuring of the balancing of rights between the actual parties involved in cases in which the source of the right infringement is not the State. Last, the state action doctrine has permitted the expansion in scope and subjects of constitutional rights, advancing the interests of nonminority groups and shielding them from liability for violating rights.

As Professors Chemerinsky[17] and Rivera Pérez[18] have argued, this anachronistic premise of the state action doctrine made sense when the common law protected individuals from right infringements by private actors. However, it does not hold today when we possess many other rights without common law protection[19] and is incoherent with our current understanding of rights and their protection.[20] Beyond these theoretical concerns, this article will focus on the prejudicial effects of the state action doctrine on SSOGIE equality and how they can be counteracted in the current political climate.

Though these effects can make us disillusioned as to the future of SSOGIE equality, comfort can still be found in the Law. This article advocates for abolishing the state action doctrine, expanding the content and scope of state civil rights, and having states adopt the horizontal effect of fundamental rights to strengthen SSOGIE equality.

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citizen has under the Constitution against another."); Shelley v. Kraemer, 334 U.S. 1, 4, 13-15, 23 (1948) (holding that racially restrictive housing covenants cannot legally be enforced because, although they do not violate the Fourteenth Amendment, judicial enforcement of them is state action).

16. U.S. CONST. pmbl.

17. Erwin Chemerinsky, *Rethinking State Action*, 80 NW. U. L. REV 503, 505-06 (1985).

18. Rivera-Pérez, *supra* note 10, at 8-9.

19. Chemerinsky, *supra* note 17, at 506.

20. *Id.* "The idea of the Constitution 'was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts.'" Obergefell v. Hodges, 576 U.S. 644, 677 (quoting W. Va. Bd. of Ed. v. Barnette, 319 U.S. 624, 638 (1943)).

II. THE PESSIMISM OF STATE ACTION

A. The Weaponization of Civil Liberties & Obscuring of Rights Balancing

The weaponization of rights is not a new phenomenon. This strategy was used during the *Lochner* era to halt regulations designed to promote economic equality and protect low-income and working people.[21] However, as Justice Kagan predicted in her Dissent in *Janus*,[22] the use of the First Amendment to counter reproductive and LGBTQ+ rights is becoming ubiquitous.[23] The state action doctrine facilitates the strategy of using civil rights to the detriment of women and LGBTQ+ folks. It does so by obscuring a case's real issue: a rights clash between two equal right holders. In some cases, it even renders invisible the rights of the party the State is trying to protect from a rights violation.

In this new set of cases, the State, through legislative action (anti-discrimination law or other sort of protection), seeks to promote SSOGIE equality by preventing a private party (an individual or else) from encroaching on the rights of women and LGBTQ+ folks and the private party raises as a defense for their discriminatory actions a constitutional violation from the State.[24] In this way, the rights analysis that should be conducted for

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21. Jeremy K. Kessler, *The Early Years of First Amendment Lochnerism*, 116 COLUM. L. REV. 1915, 1918, 1920, 1925 (2016); Adam Liptak, *How Conservatives Weaponized the First Amendment*, N.Y. TIMES (June 30, 2018) https://www.nytimes.com/2018/06/30/us/politics/first-amendment-conservatives-supreme-court.html; *see* Lee Epstein, Andrew D. Martin & Kevin Quinn, *6+ Decades of Freedom of Expression in the U.S. Supreme Court*, WASH. UNIV. L. (June 30, 2018), https://epstein.wustl.edu/s/FreedomOfExpression.pdf.

22. Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., Council 31, 585 U.S. 878 (2018) (holding that labor unions' fees collected from non-union members in the public sector violate the First Amendment right to free speech).

23. Kagan posited that:

maybe most alarming, the majority has chosen the winners by turning the First Amendment into a sword, and using it against workaday economic and regulatory policy. Today is not the first time the Court has wielded the First Amendment in such an aggressive way. See, e.g., National Institute of Family and Life Advocates v. Becerra . . . (invalidating a law requiring medical and counseling facilities to provide relevant information to users); Sorrell v. IMS Health Inc., . . . (striking down a law that restricted pharmacies from selling various data). And it threatens not to be the last. Speech is everywhere—a part of every human activity (employment, health care, securities trading, you name it). For that reason, almost all economic and regulatory policy affects or touches on speech. So the majority's road runs long.

Id. at 956. (Kagan, J., dissenting) (citations omitted).

24. *See e.g.*, 303 Creative LLC v. Elenis, 600 U.S. 570 (2023) (business owner claiming right to free speech to refuse to create wedding websites for same-sex couples, despite a state anti-discrimination law); Vlaming v. W. Point Sch. Bd., 895 S.E.2d 705 (Va. 2023) (teacher challenging dismissal for refusing to use a transgender student's pronouns on First Amendment grounds); Telescope Media Grp. v. Lindsey, 271 F. Supp. 3d 1090 (D. Minn. 2017), *aff'd in part*, *rev'd in part* and *remanded*, Telescope Media Grp. v. Lucero, 963 F.3d 740 (8th Cir. 2019) (Christian video

the underlying problem gets distorted, and the private actors violating the rights of minorities are shielded in their actions. The analysis forced upon the courts is whether the measures taken to protect SSOGIE equality are compelling enough and narrowly tailored to override the constitutional rights of the private actor instead of whether the private actor, in the use of their constitutional rights, has violated the rights of a citizen. Under this distorted analysis, as the constitutional tests are conceptualized from the perspective of the State being the greatest foe, the interest of the party affected in the first place gets diluted against the interest of the private actor challenging the state intervention. The final result usually shields the right violation against women or LGBTQ+ folks.

We can see this distortion in the analysis in *National Institute of Family and Life Advocates v. Becerra* ("*NIFLA*"),[25] one of the cases that Justice Kagan in *Janus* mentioned followed the weaponization of civil liberties. In *NIFLA*, the Supreme Court held that pro-life pregnancy centers, known as pregnancy crisis centers, were likely to succeed in their claim that the California Reproductive Freedom, Accountability, Comprehensive Care, and Transparency Act ("FACT Act") violated the First Amendment.[26] The FACT Act required any licensed healthcare facility that provided pregnancy care to post a notice stating that "California has public programs that provide immediate free or low-cost access to comprehensive family planning services (including all FDA-approved methods of contraception), prenatal care, and abortion for eligible women."[27] In addition, it also required that unlicensed facilities that offered certain pregnancy-related services post a notice stating the following: "This facility is not licensed as a medical facility by the State of California and has no licensed medical provider who provides or directly supervises the provision of services."[28]

California enacted the law to protect the right of pregnant persons to terminate their pregnancies. As noted by the author of the FACT Act, "crisis pregnancy centers 'are commonly affiliated with, or run by organizations whose stated goal' is to oppose abortion."[29] Reproductive justice organizations have discussed how pregnant people are often misled because of the names and advertisements of these pregnancy crisis centers, and they

production company refusing to produce wedding videos for same-sex couples citing First Amendment rights); Arlene's Flowers, Inc. v. Washington, 585 U.S. 1013 (2018) (florist refusing to provide flowers for a same-sex wedding against antidiscrimination statute based on free speech).

25. 585 U.S. 755 (2018).

26. *Id.* at 779.

27. CAL. HEALTH & SAFETY Code § 123472 (West 2018) *invalidated by* Nat'l Inst. of Fam. & Life Advocs. v. Becerra, 585 U.S. 755 (2018).

28. *Id.*

29. *Nat'l Inst. of Fam. & Life Advocs.*, 585 U.S. at 761.

are given biased, inaccurate information that might coerce them into staying pregnant.[30] The State, thus, was dealing with a problem in which the speech of a private actor was preventing people from exercising effectively what, at the time, was their fundamental right to make reproductive decisions, including terminating their pregnancy.

However, a pregnant person affected by these actions does not possess a direct cause of action against the crisis pregnancy centers. Attempting to fill this gap in direct causes of actions caused by the state action doctrine and protect the constitutional right of making reproductive decisions, the State of California enacted the FACT Act. Ironically, once the law was passed, the pregnancy crisis centers violating the right to make reproductive decisions had the requisite state action to challenge the actions of the State in preserving the right to abortion. Furthermore, through the weaponization of the First Amendment, the crisis pregnancy centers shield themselves from liability and continue to violate the rights of pregnant people. The ensuing recoil in reproductive rights is a direct consequence of the distortion in the actual analysis needed to resolve the underlying conflict, which is a clash between the rights of two parties, as the controversy is shifted from the pregnant persons and the crisis pregnancy centers to the State and the crisis pregnancy centers.

In deciding the case, the Majority emphasized in its rationale the alleged state imposition of content-based regulations instead of the right of speech of the pregnancy crisis centers vis-à-vis the right of pregnant people to terminate their pregnancies without undue interference from a private actor or the right to make reproductive decisions freely. Focused on content regulation, the Court then used California's stated purpose of providing low-income women with information about the state-sponsored health services at issue to decide the constitutional question.[31] This stated interest is a diluted version of the actual interest of the State, which is to prevent pregnant people seeking abortions, especially low-income women, from being entrapped by pregnancy crisis centers and coerced into remaining pregnant.

Under the state action doctrine, it is challenging for the State to declare its interests in ways that are not diluted. Afraid that drafting stronger versions of their interests might trigger constitutional challenges more easily based on equal protection or the animus doctrine or could make the law more susceptible to interpretation as religiously targeted or content-based

30. "Ninety-one percent of CPCs investigated in California falsely stated that abortions are linked to suicide, cancer, and/or future reproductive complications." *California's Reproductive FACT Act: A Step in the Right Direction*, NAT'L WOMEN'S L. CTR. (Jan. 20, 2016), https://nwlc.org/californias-reproductive-fact-act-a-step-in-the-right-direction/.

31. *Nat'l Inst. of Fam. & Life Advocs*., 585 U.S. at 774-75.

regulation, lawmakers settle for weak versions of the actual state interests (*i.e.*, to protect a particular minority group from a right violation from a private actor). For instance, in the case of the FACT Act, the Legislative Counsel's Digest introduces the bill by recognizing the fundamental right of privacy regarding reproductive decisions and the limited State prerogatives to interfere with or deny the right to an abortion.[32] However, in the stated purpose in section 1 of the law, the interest is diluted from the constitutional right to make reproductive choices to a state interest in increasing health education and counseling and awareness of services available to women.[33]

This dilution of interest, in turn, inevitably makes the case stronger for the infringing private party. For instance, the diluted California interest in *NIFLA* strengthens the case for the pregnancy crisis centers. The Court decided the case by focusing on the State as the greatest foe and the

32. "Existing law, the Reproductive Privacy Act, provides that every individual possesses a fundamental right of privacy with respect to reproductive decisions. Existing law provides that the state shall not deny or interfere with a woman's right to choose or obtain an abortion prior to viability of the fetus, as defined, or when necessary to protect her life or health." Assemb. B. 775, 2015-2016 Leg., Reg. Sess. (Cal. 2015).

33. Section 1 declares that:

(a) All California women, regardless of income, should have access to reproductive health services. The state provides insurance coverage of reproductive health care and counseling to eligible, low-income women. Some of these programs have been recently established or expanded as a result of the federal Patient Protection and Affordable Care Act.

(b) Millions of California women are in need of publicly funded family planning services, contraception services and education, abortion services, and prenatal care and delivery. In 2012, more than 2.6 million California women were in need of publicly funded family planning services. More than 700,000 California women become pregnant every year and one-half of these pregnancies are unintended. In 2010, 64.3 percent of unplanned births in California were publicly funded. Yet, at the moment they learn that they are pregnant, thousands of women remain unaware of the public programs available to provide them with contraception, health education and counseling, family planning, prenatal care, abortion, or delivery.

(c) Because pregnancy decisions are time sensitive, and care early in pregnancy is important, California must supplement its own efforts to advise women of its reproductive health programs. In California, low-income women can receive immediate access to free or low-cost comprehensive family planning services and pregnancy-related care through the Medi-Cal and the Family PACT programs. However, only Medi-Cal providers who are enrolled in the Family PACT program are authorized to enroll patients immediately at their health centers.

(d) The most effective way to ensure that women quickly obtain the information and services they need to make and implement timely reproductive decisions is to require licensed health care facilities that are unable to immediately enroll patients into the Family PACT or Presumptive Eligibility for Pregnant Women Medi-Cal programs to advise each patient at the time of her visit of the various publicly funded family planning and pregnancy-related resources available in California, and the manner in which to directly and efficiently access those resources.

(e) It is also vital that pregnant women in California know when they are getting medical care from licensed professionals. Unlicensed facilities that advertise and provide pregnancy testing and care must advise clients, at the time they are seeking or obtaining care, that these facilities are not licensed to provide medical care.

A.B. 775.

pregnancy crisis centers as neutral parties committing no harm. In doing so, the Majority centered the discussion on how the State was imposing regulation on professional speech, creating the risk of imposing an orthodoxy and suppressing unpopular ideas such as anti-abortion.[34] Following that analysis, the Court found that the policy regarding licensed facilities did not advance legitimate regulatory objectives.[35] Further, it held that the licensed notice would not have survived even intermediate scrutiny because it was underinclusive in light of the State's interest in educating low-income women about its services.[36]

Regarding the unlicensed notice, the Majority held that the regulation also unduly burdened protected speech.[37] Without deciding whether disclosure of factual, noncontroversial information applied to the professionals in the case, the Majority stated that such disclosures were not justified in cases of hypothetical harm, as the Justices deemed it was the case of the crisis pregnancy centers regarding pregnant people.[38] The interference with the right to make reproductive decisions is not taken into account as harm, even less as an important one. Moreover, the Majority went further and held that even if the State could prove actual harm, the unlicensed notice was still unduly burdensome because it "impose[d] a government-scripted, speaker-based disclosure requirement that [wa]s wholly disconnected from the State's informational interest."[39] This result could have probably been different if the analysis was to balance the free speech of the crisis pregnancy centers against the actual interest of the other affected party, the interference with the right to terminate a pregnancy or to make reproductive decisions. And even if the result were not different, the Court's rationale would be a more transparent and honest analysis of the power relationships at play.

The dissenters in *NIFLA* are aware of the actual underlying controversy (*i.e.*, the clash between the rights of two private actors) and the power systems at issue. However, they are constrained by the state action doctrine and make no efforts to subvert it. For that reason, their arguments could be countered with some ease and are not necessarily as impactful as they should be or as compelling as those of the Majority.

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34. *See Nat'l Inst. of Fam. & Life Advocs.*, 585 U.S. at 768-72.

35. *Id.* at 771, 773.

36. *Id.* at 766-72.

37. *Id.* at 776-79.

38. *Id.* at 776 (The Court states that, "California has not demonstrated any justification for the unlicensed notice that is more than 'purely hypothetical.' The only justification that the California Legislature put forward was ensuring that 'pregnant women in California know when they are getting medical care from licensed professionals.'" (citations omitted)).

39. *Id.* at 777.

As a way to steer away from the strict scrutiny that converts the State into the greatest foe and the almost certain protection of the private actors infringing the right of privacy of the people whom the FACT Act tries to protect, the Dissent begins by arguing that the regulations are not content-based as they require the disclosure of factual, uncontroversial information and not to prescribe any orthodoxy.[40] Then, it discusses how the First Amendment has been weaponized against social and economic legislation to point out that even during the *Lochner* era, unlike today, the Court was deferential to "state legislative judgments concerning the medical profession."[41] After attempting to point out how the weaponization of civil liberties has gone too far, the Dissent, subtly and unsuccessfully, embarks on inserting the real controversy into the Court's analysis.

The Dissent's first attempt is to point out that the Court in the past confronting similar requirements held that they "did not violate either the Constitution's protection of free speech or its protection of a woman's right to choose to have an abortion."[42] However, the cases the Dissent relies upon to point out the real interests at risk here (*Akron I*[43] and *Thornburgh*[44]) are more of a vertical application of rights (State v. citizen) than the case in *NIFLA*, which is a horizontal one (private actor v. private actor). Even though in all of them the Court is considering legislative action, in the cases the Dissent cites, the State directly interferes with the right to make reproductive decisions (even if in some instances it does through third parties), whereas, in NIFLA, the State prevents private actors from doing so on their own volition. This difference makes the dissenters' argument a weak analogy.

It remains a weak analogy even when the Dissent recognizes that *Akron* and *Thornburgh* were no longer the controlling law in light of *Casey*,[45] which was the leading precedent at the time of *NIFLA*. Thus, when, following *Casey*, the dissenters ask, "If a State can require a doctor to tell a woman seeking an abortion about adoption services, why should it not be able, as here, to require a medical counselor to tell a woman seeking prenatal care or other reproductive healthcare about childbirth and abortion services?"[46]—the

40. *Id.* at 782-83, 795 (Breyer, J., dissenting).

41. *Id.* at 785-86 (Breyer, J., dissenting).

42. *Id.* at 789-90 (Breyer, J., dissenting).

43. Akron v. Akron Ctr. for Reprod. Health, Inc., 462 U.S. 416, 426-29 (1983).

44. Thornburgh v. Am. Coll. of Obstetricians and Gynecologists, 476 U.S. 747, 759 (1986).

45. Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833 (1992) *overruled by* Dobbs v. Jackson Women's Health Org., 597 U.S. 215 (2022). *See Nat'l Inst. of Fam. & Life Advocs.*, 585 U.S. at 787-91, 794 (Breyer, J., dissenting).

46. *Nat'l Inst. of Fam. & Life Advocs.*, 585 U.S. at 790 (Breyer, J., dissenting).

issue of trying to apply a precedent built on the verticality of the relationships to a controversy that is horizontal reappears.

NIFLA shows how the state action doctrine forces the State to intervene legislatively in controversies between two right holders in light of the absence of a horizontal effect and how when the State does that could mean that the rise of a minority group such as the right to make reproductive decisions gets diluted in the state action analysis. The same holds for LGBTQ+ rights. The cases challenging public accommodation laws protecting from discrimination members of the LGBTQ+ community[47] and other cases protecting the rights of queer people, such as regulation in education centers penalizing teachers and professors for misgendering students,[48] show the same type of weaponization of civil liberties and the obscuring of rights balancing of the actual controversy in the cases.

For example, in *Masterpiece Cakeshop v. Colorado Civil Rights Commission*, one of the first cases challenging a state intervention protecting members of the LGBTQ+ community, even when the Court was not yet ready to redefine commissioned commercial conduct/activity as expressive and hold that, under the free speech clause, a private actor could refuse to provide a service to an individual, the Court diluted the underlying controversy and it put great emphasis in the vertical relationship born out of the Colorado Civil Rights Commission (*i.e.*, State v. private actors discriminating).[49] Because of its procedural history, the transformation and dilution of those relations and interests are more salient in the case.

In 2012, the owner of Masterpiece Cakeshop refused to design and prepare a wedding cake for a gay couple in Colorado because of his religious beliefs.[50] The couple filed charges of discrimination with the Colorado Civil Rights Division under the Colorado Anti-Discrimination Act ("CADA"), which protects against discrimination in public accommodations based on sexual orientation.[51] After following the procedure set in the law, an administrative law judge issued an order in favor of the gay couple, which

47. *See, e.g.*, Masterpiece Cakeshop v. Colo. Civ. Rts. Comm'n, 584 U.S. 617, 621-22, 627 (2018); Washington v. Arlene's Flowers, Inc., 389 P.3d 543, 548 (Wash. 2017), *cert. granted, judgment vacated*, 585 U.S. 1013 (2018); Telescope Media Grp. v. Lucero, 936 F.3d 740, 747-49 (8th Cir. 2019); 303 Creative LLC v. Elenis, 600 U.S. 570, 577-80 (2023).

48. Meriwether v. Hartop, 992 F.3d 492, 498-502 (6th Cir. 2021); Vlaming v. W. Point Sch. Bd., 895 S.E.2d 705, 712-15 (Va. 2023); Notice of Court Ruling at 2-5, Figliola v. Sch. Bd. of Harrisonburg, No. CL22-1304 (Va. Cir. Ct. Dec. 2, 2022), https://adfmedialegalfiles.blob.core.windows.net/files/FigliolaOpinion.pdf.

49. *See* 584 U.S. 638-40.

50. *Id.* at 621.

51. *Id.* at 627-28.

the Colorado Civil Rights Commission affirmed.[52] The owner of Masterpiece Cakeshop then appealed to the Colorado Court of Appeals, who subsequently affirmed the Commission's ruling, rejecting the compelled speech argument and affirming that CADA was a neutral religious law that did not violate the free exercise clause.[53]

Even when the controversy started as a pseudo-horizontal one because CADA grants a cause of action to a party who experiences an infringement from a private party, as it moved to the appeal process, due to the state action, the owner of the cakeshop was able to convert it to a vertical one in which him, the infringing actor, now becomes the infringed party by the State. As the discriminated party (the gay couple) cannot bring a suit against the private actor (the cakeshop owner) unless the State provides for such a cause of action, the private actor discriminating, through the state action doctrine, can transform the controversy from one between the clash of rights of two private actors to one in which the State is oppressing the cakeshop owner by requiring to respect the rights of the gay couple. This transformation was so salient in this case that the Court put aside the questions about free speech and free exercise raised by the cakeshop owner and did not answer them.

Instead, it found that the Commission acted with animus against the cakeshop owner because of religious bias when commissioners made historically correct comments about freedom of religion being used to justify discrimination and accurate statements of the law applicable at the moment that a business or person could not use their religion to refuse to comply with a religious neutral law.[54] For that reason, it reversed the decision from the Court of Appeals.[55] Two members of the liberal wing of the Court, Kagan and Breyer, joined in the decision to reverse because of the alleged violation of religious neutrality from the Commission,[56] even though, as Sotomayor and Ginsburg pointed out in their Dissent, the cakeshop owner's case was "thus far removed from the only precedent upon which the Court relies, *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, . . . where the government action that violated a principle of religious neutrality implicated a sole decisionmaking body . . . [,]"[57] which was not the case in *Masterpiece Cakeshop* as two other bodies found a violation of CADA without any allegation of animus.

52. *Id.* at 629-30.
53. *Id.* at 630-31.
54. *Id.* at 634-35.
55. *Id*. at 640.
56. *Id.* at 640 (Kagan, J., concurring).
57. *Id.* at 673-74 (Sotomayor, J., dissenting).

The decision's rationale shows the power of the state action doctrine in erasing the infringement of rights between private actors. The discriminated gay couple does not feature in Kagan and Breyer's concurring opinion and is only in the background of the Majority.

B. Broadening of Constitutional Protections to the Detriment of SSOGIE Equality

When the horizontal violation of rights gets transformed into a vertical one involving the State and the infringing private actor, it allows for the overprotection of the latter. This overprotection results from the State still being conceptualized as the greatest foe when the State is doing the opposite in these cases by trying to create a more egalitarian society. The overprotection of the private actor violating the rights of women and LGBTQ+ folks manifests itself as a broadening of the constitutional protections that the infringing private actor is trying to revindicate to shield their discriminatory conduct. For example, in *Masterpiece Cakeshop*, the Dissent discussed how the Court expanded the understanding of the animus doctrine by broadly interpreting the principle of religious neutrality.[58]

The animus doctrine is probably best exemplified in *Romer v. Evans*, in which the Court held that an amendment to the Colorado Constitution prohibiting the protection of LGB folks by any branch of government violated equal protection as the State showed an animus toward these groups.[59] In its rationale, the Court stated that if "the constitutional conception of 'equal protection of the laws' means anything, it must at the very least mean that a bare . . . desire to *harm a politically unpopular group* cannot constitute a legitimate governmental interest."[60] However, in *Masterpiece Cakeshop*, contrary to what was established and done in *Romer*, the Court used the animus doctrine to permit harm to a politically unpopular group just because a private individual committed the harm and not the State. Furthermore, it used the animus doctrine to shield the discriminatory conduct of a private actor from state intervention by expanding the scope of the animus doctrine. The Court protected under the animus doctrine a member of a group that is not politically unpopular (*i.e.*, Christians) because, as Professor Melissa Murray has argued, the Court "suppress[ed] the

58. *See id*.

59. 517 U.S. 620, 635 (1996).

60. *Id.* at 634-35 (citing Dep't of Agric. v. Moreno, 413 U.S. 528, 534 (1973)).

antisubordination vision of antidiscrimination law, in favor of a more individualized, less contextual, anticlassification frame."[61]

The suppression of antidiscrimination law can only be effectively executed through a more robust interpretation of civil rights that would outweigh and subvert the anti-subordination interests of the State. This expansion in the scope of the right is precisely what happened in *Masterpiece Cakeshop* when Gorsuch characterized the cakeshop owner's refusal as ideological.[62] It was also what the Court subtly did in *NIFLA* when it shielded professional speech from state regulation in ways that it has not done in the past. Conservative groups have sought to achieve this mainly by broadening the First Amendment.

In 2023, they successfully did so when the Supreme Court expanded the scope of the free speech clause in *303 Creative LLC v. Elenis*.[63] The Court, faced with a pre-enforcement challenge to CADA, held that the commissioned speech of a graphic designer company constitutes expressive conduct and that the company can deny services to same-sex couples who seek to create websites for their weddings if the owner of the company opposed it as it would constitute compelled speech for the State to require the provision of such services.[64] Justices Sotomayor, Kagan, and Jackson, in the Dissent, conclude that the Majority reached the wrong decision in this case because the Court asked the wrong questions (*i.e.*, "whether the company's products include 'elements of speech'" and "whether CADA would require the company to create and sell speech, notwithstanding the owner's sincere objection to doing so, if the company chooses to offer 'such speech' to the public")[65] instead of focusing "on the character of state action and its relationship to expression."[66] But, as discussed, the state action doctrine allows the discriminating party to change the nature of the dispute and opens the door for the Court to ask these wrong questions and "for the first time in its history, grant a business open to the public a constitutional right to refuse to serve members of a protected class."[67] By obscuring the

61. Melissa Murray, *Inverting Animus:* Masterpiece Cakeshop *and the New Minorities*, 2018 SUP. CT. REV. 257, 296 (2018) [hereinafter *Inverting Animus*].

62. *Masterpiece Cakeshop*, 584 U.S. at 646-47 (Gorsuch, J., concurring).

63. 600 U.S. 570, 602-03 (2023).

64. *Id.* at 587-92.

65. *Id.* at 631 (Sotomayor, J., dissenting).

66. *Id.*

67. *Id.* at 603 (Sotomayor, J., dissenting). The Court's expansive interpretation of free speech rights in *303 Creative LLC* may have nefarious effects beyond SSOGIE equality. This shift may undermine existing frameworks governing digital platforms and online content that could subvert efforts in enforcing regulations designed to curb harmful or discriminatory practices in the tech industry, as companies might invoke free speech defenses to resist compliance. Rebecca Aviel et al., *From Gods to Google*, 134 YALE L.J. 1269, 1274, 1296, 1334 (2025).

actual controversy in the case, the state action promotes this individualized, less contextual, anti-classification framework that weaponizes civil liberties by expanding its scope and shielding rights infringers from liability.

This expansion of civil liberties to permit private actors is probably only in its inception and does not only depend on the Court's interpretation. Lawmakers have also expanded these protections statutorily by augmenting the scope of civil liberties through legislative action. The enactment of the Religious Freedom Restoration Acts ("RFRAs")[68] is one way legislators have done so. With RFRAs, lawmakers gave more teeth to the free exercise clause by requiring, contrary to *Employment Division v. Smith*,[69] strict scrutiny in cases where a neutral law burdens religious freedom.[70] However, RFRAs have changed not only the scope of the constitutional provision but also its subjects. In *Burwell v. Hobby Lobby Stores*,[71] we witnessed the extension of free exercise protections through the federal RFRA to corporations. The Court held that, based on Congress's intention, RFRA applied to corporations since they are organizations of individuals created to achieve desired goals.[72]

This statutory strengthening of the free exercise is soon to be followed by a jurisprudential one. Even though the Court refused to revisit the holding in *Smith*, establishing that generally applicable laws not targeting specific religious practices do not violate the free exercise,[73] five of the current Justices have expressed that *Smith* should be overruled.[74] Alito, Thomas, and Gorsuch would replace the *Smith* rule with the RFRA, which states that any law that burdens religious exercise must be subject to strict scrutiny.[75] Meanwhile, Barrett and Kavanaugh are uncertain what to replace it with.[76] In any case, it would be a version that would limit the ability of the State to prohibit private actors from encroaching on the rights of minorities such as

68. Religious Freedom Restoration Acts (RFRAs) are statutes enacted at both the federal and state levels to protect individuals' and organizations' free exercise of religion. The federal RFRA was passed in 1993 in response to *Employment Division v. Smith*, 494 U.S. 872 (1990). It reinstated the strict scrutiny standard for laws for any law that burdens religious freedom, even if it is neutral and of general applicability. While the Supreme Court in *City of Boerne v. Flores*, 521 U.S. 507 (1997), *superseded by statute*, limited RFRA's applicability to federal actions, many states have since enacted their own RFRAs to apply similar protections against state and local government actions.

69. 494 U.S. at 885-86.

70. Religious Freedom Restoration Act (RFRA) of 1993, 42 U.S.C.A. § 2000bb(a)(2), *held unconstitutional by* City of Boerne v. Flores, 521 U.S. 507 (1997).

71. 573 U.S. 682, 692 (2014).

72. *Id.* at 706.

73. 494 U.S. at 882-883.

74. Fulton v. City of Phila., 593 U.S. 522, 545-46 (2021) (Alito, J., concurring); *Id.* at 543 (Barrett, J., concurring).

75. *Id.* at 614 (Alito, J., concurring).

76. *Id.* at 543-44 (Barrett, J., concurring).

women and LGBTQ+ folks. These expressions from the conservative Justices are crucial as the Court has already stated that protections such as Title VII are susceptible to challenges based on the free exercise clause.[77] Gorsuch hinted in *Bostock*, albeit recognizing that discrimination based on sexual orientation or transgender status falls under the anti-discrimination protections on the basis of sex of Title VII, that the door was open for challenges of anti-discrimination protections predicated on the free exercise clause.[78] On the other hand, Thomas, citing Alito in *Obergefell*, in his concurrence in part in *Masterpiece Cakeshop*, characterized a similar protection of LGBTQ+ folks to the one in *Bostock* as such as the ones the free exercise should be used as a shield to protect the *nascent minorities* from being forced to assent to "the new orthodoxy."[79] Thus, the regress in SSOGIE equality is only in its inception.

III. THE OPTIMISM OF SSOGIE EQUALITY

A. Horizontal Effect as a Shield Against the Weaponization of Civil Liberties

Understanding the risks to SSOGIE equality that the weaponization of civil rights represents and that the forecast is for its increased use, scholars have proposed frameworks to recede from it. However, as the dissenters in the decisions discussed, their proposals still depart from the *State v. individual framework*. For instance, Professor Luke Boso has argued, mainly in the context of free speech, for an "antisubordination approach in mediating competing claims of equality and liberty," which would be "attentive to historical and contemporary modes of group-based oppression."[80] Such an approach would counteract the "more individualized, less contextual, anticlassification frame"[81] that the state action doctrine has allowed conservatives to incorporate into the constitutional canon. Similarly, Professor Kyle Velte has advocated for recovering the race analogy in LGBTQ+ religious exemption cases as "the Court [has] considered and rejected claims for religious exemptions from public accommodation laws before, in contexts that are analogous to the claims asserted by today's

77. Bostock v. Clayton Cnty., 590 U.S. 644, 682 (2020).

78. *Id.*

79. Masterpiece Cakeshop v. Colo. Civ. Rts. Comm'n, 584 U.S. 617, 667 (2018) (Thomas, J., concurring).

80. Luke A. Boso, *Anti-LGBT Free Speech and Group Subordination*, 63 ARIZ. L. REV. 341, 341 (2021).

81. *Inverting Animus*, *supra* note 61, at 296.

exemption seekers."[82] That approach would also subvert the weaponizing of rights in terms of SSOGIE equality, including even the right to enjoyment of property that has not yet been weaponized in SSOGIE equality litigation.[83] Others, like Nick Wolfram, have gone even further and argued that "the Court could apply the 'evolving standards of decency' test to determine fundamental rights under the Fourteenth Amendment's Due Process Clause and provide more robust constitutional protections for LGBTQ+ folks."[84]

Although these approaches are promising interventions to prevent a halt in SSOGIE equality, if we understand that at the center of the inner workings of the weaponization of civil liberties lies the state action doctrine, the more suitable solution seems to abolish this doctrine and replace it with an approach that would bring to the surface the actual controversies of a clash of rights between private actors. Moreover, such an approach would be adaptable to counteract the weaponizing of other civil liberties beyond the First Amendment's free exercise and free speech that might be in the pipeline, as we have started seeing with the animus doctrine. Such an approach would be the horizontal effect of constitutional rights, once labeled by Professor Chemerinsky as the "next major expansion in the protection of rights."[85]

The horizontal effect means that constitutional rights between private actors are actionable.[86] It indicates the geography of the controversies with respect to the parties involved.[87] Instead of the vertical approach of the state action doctrine in which the parties are conceptualized in two different hierarchical places, which gives an upper hand to the aggravated party as the State is conceptualized as the greatest foe who sits at the top, the horizontal effect locates the controversy between two equals, removing from the equation the possibility of giving preferential treatment ex-ante to one of the parties. This approach also dismantles the illusion of the public and private divide, recognizing that private actors could have the same influence in promoting or halting equality as the State.

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82. Kyle C. Velte, *Recovering the Race Analogy in LGBTQ Religious Exemption Cases*, 42 CARDOZO L. REV. 67, 141 (2020).

83. *Cf.* Corte Constitucional [C.C] [Constitutional Court, Sept. 28, 2001, Sentencia T-1042/01 (Colom.) (holding that prohibiting the use of the elevators of an apartment building to housemaids violated their dignity right).

84. Nick Wolfram, *Rethinking the Fundamentals: Applying the Evolving Standards of Decency Test to the Court's Evaluation of Fundamental Rights*, 51 U.C. L. CONST. Q. 135, 135 (2024).

85. Chemerinsky, *supra* note 17, at 507.

86. Rivera-Pérez, *supra* note 10, at 4.

87. *Id.*; Aharon Barak, *Constitutional Human Rights and Private Law*, 3 REV. CONST. STUD. 218, 243 (1996) (explaining that rights operate horizontally when applying between private actors and vertically when applying between the State and a private actor).

Implementing the horizontal effect can take many forms. It can be a programmatic clause in the Constitution that requires legislative action to enact the causes of action that would make them enforceable. That means that antidiscrimination statutes would still need to be enacted but would foreclose a vertical challenge from the infringing party as, constitutionally, it will be required to conduct a balancing between the rights of women and LGBTQ+ folks and the rights of the discriminating actor. It can also apply *ex proprio vigore*, not requiring a special law for its enforceability and leaving the mechanism through which the violation could be redressed to the judiciary. Or it could be the designation of an extraordinary writ in the Constitution.

B. Recasting the Analysis Under the Horizontal Effect

No matter its implementation, the result is the same. The controversies discussed in *NIFLA*, *Masterpiece Cakeshop*, and *303 Creative* should be conceptualized and analyzed differently. The controversies are now between two equally footed parties. Thus, the State would be removed from the equation, changing the questions about the balance of interests. In turn, the horizontal effect should stop the dilution of the rights and interests of minority groups, and it should safeguard better SSOGIE equality.

For example, in *NIFLA*, the question would be whether the free speech right of the pregnancy crisis centers should override the right of a person to make reproductive decisions freely without undue interference. Similarly, in the cases of the web designer and the cake shop owner, the question is whether their exercise of religion or speech should override the right not to be discriminated against or the dignity of same-sex couples. With this reconceptualization of the controversies, the analysis from the court should change as the weights on the scales to balance the rights have been shifted. With no state action, courts must decide whether there is sufficient justification to impinge on the right of a similarly-situated actor. That opens the door to conducting a more contextual analysis that is "attentive to historical and contemporary modes of group-based oppression."[88]

These differences in analysis are apparent when we consider decisions from jurisdictions that follow the horizontal effect. For example, in a case before the Constitutional Court of Colombia in which a priest denied communion to a minor with cerebral paralysis,[89] the Court was forced to

88. Boso, *supra* note 80, at 341.

89. Corte Constitucional [C.C] [Constitutional Court], Dec. 5, 2002, Sentencia T‐1083/02 (Colom.).

engage in a contextual, anti-subordination analysis. Professor Rivera Peréz elegantly explains the analysis of the Court.:

> The petitioner alleged that at mass the priest expressed that the reason for denying the communion to the child was that the minor was "like a small animal." The priest opposed the tutela [writ used in Columbia for right violations between private actors] claiming that the State can not make determinations regarding religious sacraments. The Court while concurring with this defense determined that the priest violated the human dignity of the minor by calling him "small animal." In its constitutional analysis the Court estimated that while Article 19 of the Constitution did not establish limits to the freedom of religion, two international treaties, qualified by the Court as "normative texts", set up limits to this freedom. Article 12 of the American Convention on Human Rights and Article 18 of the International Covenant on Civil and Political Rights establish that the freedom of religion "may be subject only to the limitations prescribed by law that are necessary to protect public safety, order, health, or morals, or the rights or freedoms of others." For the Court these limits signify that under no circumstances the exercise of one's religious belief can de-humanize a person. The Court again underscored the importance of the social preeminence of the priests and concluded that expressions that de-humanize a person because of a disability can have as a result that the religious community as a whole comes to the conclusion that disabled persons are less than a human and, therefore "diminishing their intrinsic value."[90]

By no means does this approach imply that the private actors asserting their First Amendment rights might not prevail but that it would not be as easy as if their claims were weighed against the State, which is not asserting a right but a compelling interest and whose intentions are held highly suspicious in civil liberty cases. For instance, in Puerto Rico, a jurisdiction that also recognizes to a limited extent the horizontal effect,[91] its Supreme Court decided in favor of a religious organization in a controversy that centered around the free exercise of the organization vis a vis the privacy right of one of its employees.[92]

The Catholic University of Puerto Rico dismissed a professor who remarried without previously annulling her first marriage by an ecclesiastical court as per university norms that established that "[t]he faculty member shall conduct himself in accordance with the values and ethical principles of the Catholic Church (both within and without [sic] the University) and be loyal

90. Rivera-Pérez, *supra* note 10, at 54-55 (citations omitted).

91. The Supreme Court of Puerto Rico has recognized that the right to privacy and the right to honor and reputation explicitly recognized in the Constitution of the United States' colony apply *ex proprio vigore* and between private parties. *Id.* at 188-90.

92. Mercado Rivera v. Universidad Católica, 143 D.P.R. 610, 648-49 (1997).

to the Institution, thus contributing in an efficient and positive manner to the achievement of its goals and objectives."[93] The professor argued that norms were unconstitutional as they impinge on her privacy rights.[94]

The Court went into a detailed analysis and recognized that at the bottom, what the professor was asking was for the Church to recognize a marriage that fell outside its dogma.[95] Intervening in favor of the professor would mean a value judgment on the part of the State.[96] Not allowing the Church to decide who is part of their organization would mean that the Church could not fulfill its mission with the university.[97] Furthermore, it stressed that the professor entered voluntarily into the contract, accepting the faith and dogmas of the Catholic Church.[98] Finally, it distinguished the case from another one[99] in which the free exercise of religion of a church was faced against the privacy rights of its neighbors who wished to be free from the noise the church was producing, and in which the Court decided that the privacy right shall prevail and the church had to take measures to avoid the sound of its services to reach its neighbors.[100]

The decision of the Supreme Court of Puerto Rico shows how the horizontal effect is a better conduit to preserve the rights of everyone and a more honest method to analyze and reflect power relationships in society while preserving the promise of a more perfect union. The reformulation of the controversies as a clash of rights demands an individualized, contextual, and preconception-free analysis. Each case is a new opportunity to conceptualize the scope of rights in a specific context, building a robust understanding of how the competing rights of private actors should be reconciled and slowly increasing SSOGIE equality.

C. Adopting the Horizontal Effect in United States Constitutional Law

Incorporating a horizontal effect might seem odd to the United States American constitutional law, as the jurisprudence is so entrenched in the state action doctrine. However, accepting that constitutional rights "impose constitutional duties only on governmental and not on private actors" has not stopped other jurisdictions "that have accepted some form of horizontal

93. *Id.* at 616-18.
94. *Id.* at 620.
95. *Id.* at 648.
96. *Id.*
97. *Id.* at 648-49.
98. *Id.* at 650.
99. Sucn. de Victoria v. Iglesia Pentecostal, 102 D.P.R. 20 (1974).
100. *Id.* at 29-30.

effect of sindividual rights."[101] Moreover, since the 80s, Professor Chemerinsky has advocated rethinking the state action doctrine and stopping tolerating right infringements just because the violator is a private actor.[102] In his article, he articulates that state action doctrine is unjustified under any rights theory (*i.e.*, natural law, positivism, or consensus).[103] Chemerinsky further discusses how individual liberties extend today beyond the ones recognized in the common law; thus, maintaining the state action doctrine is anachronistic.[104] Finally, he demonstrates how state action is unnecessary and even counterproductive to protecting a zone of private autonomy and safeguarding state sovereignty on which the doctrine is predicated.[105]

Moreover, as discussed, a territory of the United States, Puerto Rico applies a limited version of the horizontal effect.[106] However, Puerto Rico is not the only jurisdiction within the United States that does so. California, in a more limited way, does too. The California Supreme Court, in *Hill v. NCAA*, held that the state constitutional right to privacy may be enforced against private parties, as it was the intention of the voters in 1972 that, as an initiative measure, through Proposition 11 added the right of privacy to the California Constitution.[107] The Court underscored "the efforts of the Privacy Initiative's framers to create enforceable privacy rights against both government agencies and private entities."[108] The Court confined this horizontal action to the right of privacy and no other one under the California Constitution.[109]

Notwithstanding these limited instances and Professor Chemerinsky's compelling article, incorporating a horizontal effect in the United States legal system requires a more thoughtful exercise as the conditions surrounding

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101. Stephen Gardbaum, *The "Horizontal Effect" of Constitutional Rights*, 102 MICH. L. REV. 387, 388 (2003).

102. Chemerinsky, *supra* note 17, at 505.

103. *Id.* at 506. Before Chemerinsky, Professors Black, Karst, and Horowitz made arguments to the same extent in the 1950s and 1960s. *Id.* at 556.

104. *Id.* at 506.

105. *Id.*

106. Rivera-Pérez, *supra* note 10, at 224.

107. 865 P.2d 633, 640-45(1994) (holding that the right to privacy under the California Constitution may be enforced against private entities such as the National Collegiate Athletic Association (NCAA), which had a drug testing program for student-athletes). *See also* Porten v. Univ. of S.F., 134 Cal. Rptr. 839 (Ct. App. 1976) (holding that a private university could be liable for violating a student's state constitutional right to privacy by disclosing his academic transcript without permission); Luck v. S. Pac. Transp. Co., 267 Cal. Rptr. 618 (1990) (affirming a judgment in favor of an employee, holding that her termination for refusing an unannounced drug test implicated her privacy rights under the California Constitution, which protects against invasions by private employers).

108. *Hill*, 865 P.2d at 642.

109. *Id.* at 644.

those precedents and the judicial environment differ significantly from the 80s. As the Colombian and Puerto Rican case discussion shows, a horizontal effect requires a strong recognition of rights as those courts did regarding privacy and dignity. Today, those rights in the federal jurisdiction seem to be weaker and susceptible to being rolled back after the decision in *Dobbs v. Jackson Women's Health Organization* holding that there is no right to terminate a pregnancy under the United States Constitution as such right did not exist at the time of the enactment of the Constitution.[110] It seems more difficult today to recognize some of those inalienable rights that more recent constitutions recognize explicitly[111] under the fundamental rights test elaborated by the Supreme Court.[112] Moreover, the ideas of Justice Douglas to find rights in the penumbras of the Constitution,[113] Justice Goldberg to recognize the unenumerated rights listed in the Ninth Amendment,[114] and

110. 597 U.S. 215, 231 (2022).

111. David S. Law & Mila Versteeg, *The Declining Influence of the United States Constitution*, 87 N.Y.U. L. REV. 762, 762 (2012) (showing "empirically that other countries have, in recent decades, become increasingly unlikely to model either the rights-related provisions or the basic structural provisions of their own constitutions upon those found in the U.S. Constitution.").

112. In his concurring opinion in *Dobbs*, Justice Thomas questioned the broader constitutional foundation of substantive due process, which has been used to recognize important rights in SSOGIE equality. 597 U.S. at 331. He explicitly called for the Court to reconsider past decisions based on substantive due process, such as *Griswold v. Connecticut*, 381 U.S. 479 (1965) (right to contraceptive access), *Lawrence v. Texas*, 539 U.S. 558 (2003) (right to engage in private, consensual sexual acts), and *Obergefell v. Hodges*, 576 U.S. 644, (2015) (right to same-sex marriage), because, in his view, they were wrongly decided as he believes that the Due Process Clause does not protect substantive rights. *Dobbs*, 597 U.S. at 332.

113. J. Christopher Rideout, *Penumbral Thinking Revisited: Metaphor in Legal Argumentation*, 7 J. ASS'N LEGAL WRITING DIRS. 155, 188 (2010) (explaining how Douglas' penumbra metaphor in *Griswold* should have been successful, but for many, it failed); Helen Hershkoff, *Horizontality and the "Spooky" Doctrines of American Law*, 59 BUFF. L. REV. 455, 489 (2011) (arguing how Douglas' penumbral analysis could be used to rethink the state action and be used to bring the horizontal effect into United States constitutional analysis); Glenn H. Reynolds, *Penumbral Reasoning on the Right*, 140 U. PA. L. REV. 1333, 1333–34 (1992) (arguing that the right have used Douglas' penumbral analysis to obtain conservative results with less criticism when it has been used for progressive outcomes).

114. Cameron S. Matheson, *The Once and Future Ninth Amendment*, 38 B.C. L. REV. 179, 204 (1996) (noting how the Ninth Amendment went unnoticed for one hundred seventy-four years until Justice Goldberg brought it out of obscurity and how even though Justice Breyer was his clerk, it has slowly faded back into obscurity); Joseph F. Kadlec, *Employing the Ninth Amendment to Supplement Substantive Due Process: Recognizing the History of the Ninth Amendment and the Existence of Nonfundamental Unenumerated Rights*, 48 B.C. L. REV. 387, 387 (2007) (arguing that the Supreme Court should examine the Ninth Amendment's history and traditions to supplement its substantive due process jurisprudence); Kimberly L. Wehle, *The Ninth Amendment Post*-Dobbs*: Could Federalism Swallow Unenumerated Rights?*, 83 MD. L. REV. 867, 867 (2024) (asserting "that, from the federalism vantage point outlined in dissenting opinions in *Griswold v. Connecticut*, the Ninth Amendment, considered alongside *Dobbs*, may be positioned to justify reversion of other unenumerated rights to state legislatures within a generation's time.").

Justice Kennedy to pencil human dignity as a constitutional value[115] seem far from being accepted and developed by the current Supreme Court. In addition, the Court has not recognized sexual orientation, even less gender identity and expression, as a suspect or quasi-suspect class.

A horizontal effect would be of no benefit without a substantial expansion of individual rights besides the ones listed in the Amendments. Attorneys can try to bring cases to overrule the state action doctrine at the federal level, but SSOGIE equality cannot be attained without rights to balance against the First Amendment. A constitutional amendment to recognize the rights needed is even less plausible.[116]

After writing "The challenge of modernity is to live without illusions and without becoming disillusioned,"[117] Antonio Gramsci, perhaps taking from Romain Rolland, added, "I'm a pessimist because of intelligence but an optimist because of will."[118] This intellectual exercise leads to the pessimism of a road blockage to SSOGIE rights that somehow keeps the door shut for abolishing the state action doctrine and using a horizontal effect that can take us to a more egalitarian society. However, the will of the people can be more powerful and can help us find new routes toward the horizontality of rights. California's expansion of the right to privacy shows that.

Moreover, the recent ballot initiatives that during the past elections succeeded in including in state constitutions the right of abortion–even in states where the party curtailing the right to terminate a pregnancy won[119]–can lead the way from the pessimism of the state action doctrine to the optimism of SSOGIE equality. Perhaps the focus should be shifted from the federal jurisdiction to abolishing the state action doctrine at the state level while at the same time recognizing more individual liberties in their respective constitutions. Conservatives have done something similar to

115. Adeno Addis, *Justice Kennedy on Dignity*, 60 HOUS. L. REV 519, 520 (2023) (arguing "that Justice Kennedy's jurisprudence treats dignity as an existential value"); Charles Lane, *There Was One Unifying Theme of Anthony Kennedy's Jurisprudence*, WASH. POST (June 28, 2018) https://www.washingtonpost.com/opinions/there-was-one-unifying-theme-of-anthony-kennedys-jurisprudence/2018/06/28/650aa740-7adf-11e8-80be-6d32e182a3bc_story.html (noting that Justice Kennedy penciled dignity in the Constitution).

116. For instance, the Equal Rights Amendment (ERA) to recognize sex equality failed. Sarah M. Stephens, *At the End of Our Article III Rope: Why We Still Need the Equal Rights Amendment*, 80 BROOK. L. REV. 397, 399 (2015) ("[T]he ERA failed to gain the necessary votes for ratification and feminists were left with only the litigation strategy.").

117. BAUMAN & MAURO, *supra* note 1, at 61.

118. Luis Martínez Andrade, *Marxismo e indigenismo según José Carlos Mariátegui* [*Marxism and Indigenism According to José Carlos Mariátegui*], *in* CONTRA SÓCRATES [AGAINST SOCRATES] 103, 103 (Lúcio Álvaro Marques ed., 2019).

119. Chantelle Lee, *Why Abortion Rights Won in Three States That Voted for Trump*, TIME (Nov. 11, 2024, 12:19 PM), https://time.com/7174962/abortion-rights-won-states-voted-trump/.

secure the weaponization of the free exercise with the adoption of state RFRAs; progressive movements should step up the game and seek to constitutionalize the right of dignity, among others, and make them actionable between private actors.

The People of New York, during the most recent electoral cycle, started to move in this direction by the passing of Proposal Number One to amend section11 of article 1 of the state Constitution, the equal protection clause to constitutionally recognize as suspect classes "ethnicity, national origin, age, disability, . . . or sex, including sexual orientation, gender identity, gender expression, pregnancy, pregnancy outcomes."[120] Even though the text of section 11 establishes that "No person shall, because [of any of the aforementioned suspect classifications] be subjected to any discrimination their civil rights by any other person or by any firm, corporation, or institution, or by the state or any agency or subdivision of the state, pursuant to law," suggests that it can operate directly between private parties, the case law does not seem to recognize that.[121] New York only recognizes that "[p]rivate discrimination may violate equal protection of the law when accompanied by state participation in, facilitation of, and, in some cases, acquiescence in the discrimination."[122]

The next step should be making equal protection actionable between private actors, such as in California. Yet, to stop the weaponization of civil liberties executed through state action, more rights like dignity and privacy should be constitutionally recognized and made actionable horizontally. The end goal should be that all individual liberties be actionable between private actors, except the ones that can only be exercised because of their nature against the state, such as the protections for criminal defendants. In the meantime, we should strive for constitutional amendments that begin recognizing the panoply of rights we recognize today and apply them to both the state and private actors.

IV. CONCLUSION

Perhaps, in the next quarter of a century, if more progressive states begin this trend of recognizing new constitutional rights and making them along the ones in their constitutions actionable between private actors, as it happened when states led the way to marriage equality by recognizing a

120. Grace Ashford, *New Yorkers Pass an Equal Rights Amendment Tied to Abortion Access*, N.Y. TIMES (Nov. 5, 2024), https://www.nytimes.com/2024/11/05/nyregion/new-york-proposition-1-abortion.html.

121. N.Y. CONST. art. I, § 11.

122. *In re* Estate of Wilson, 452 N.E.2d 1228, 1235 (N.Y. 1983).

constitutional right to same-sex marriage,[123] the weaponization of civil liberties to halt SSOGIE equality would be stopped. In doing so, as Alan Freeman and Elizabeth Mensch argued, we would have put an end to the alienation from us and from our values that the triadic structure of the self/state/other of the state action doctrine creates and be in a better path to fulfill the promise of a more perfect union.[124]

123. *Obergefell*, 576 U.S. 644, 681-86 (2015); Christine L. Nemacheck, *The Path to Obergefell: Saying "I Do" to New Judicial Federalism?*, 54 WASH. U. J.L. & POL'Y 149 (2017) (examining how the state judicial decisions, grounded in state constitutions, contributed to the recognition of the federal constitutional right to same-sex marriage, reflecting the emergence of a *new judicial federalism*).

124. Freeman & Mensch, *supra* note 6, at 253.