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Response to Professor Dinner

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*by: Martha Albertson Fineman**

I want to thank the *Texas A&M Law Review* for including my work in this special Issue and express my appreciation to Professor Dinner for her thoughtful comments concerning the evolution of my scholarship. Professor Dinner raises the question of whether that earlier work is relevant to the *Dobbs v. Jackson Women's Health Organization* opinion,[1] specifically, and to broader issues of reproductive justice, more generally. For me, *Dobbs* illustrates—once again—how our American obsession with both individual rights and Supreme Court jurisprudence can distort our sense of the possibilities for achieving social (or reproductive) justice. I see my work as an attempt to argue for a different perspective, one that might have the ability to alter or redirect that obsession. I also believe that the universal vulnerability approach has the potential to expand, and perhaps even refine, debates about reproductive justice.

In introducing vulnerability theory, I often begin by explaining that I see it as an alternative to both a rights-based and a social contract paradigm for thinking about state responsibility.[2] In my opinion, both approaches inevitably rely on an idealized and abstracted (and totally inappropriate) liberal conception of the human condition in which the individual is extracted from the actual circumstances and conditions of everyday existence. Such theoretical isolation and decontextualization of the individual reinforces the idea that principles deemed supreme, such as "liberty," "equality," and "independence," need vigilant safeguarding from the threats inherent in an assumed abusive and interventionist state.[3] This anti-interventionist stance forms the ideological framework for the United States Constitution, in which

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1. *See* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022).

2. Martha Albertson Fineman, THE AUTONOMY MYTH: A THEORY OF DEPENDENCY, at xiv–xv (2004).

3. I put these grand principles in quotations marks to denote the instability of these concepts. The meanings of terms like "equality" are not always clear or generally shared and can evolve over time. This has implications for the way we shape and respond to policy and legal regulation. This was the lesson I learned in my early work on equality. *See* MARTHA ALBERTSON FINEMAN, THE ILLUSION OF EQUALITY: THE RHETORIC AND REALITY OF DIVORCE REFORM (1991). It also underlies my recent work. *See* Martha Albertson Fineman, *Vulnerability and Inevitable Inequality*, 4 OSLO L. REV. 133, 133–34 (2017).

the appropriate role for the state is crafted around an unauthentic conception of both the abilities and needs of the individual to be governed and the very fundamental purpose of government and law.[4] It also functions to substantially limit our ability to imagine an appropriately active state, one charged with the regulatory or governing responsibility to fashion a society duly responsive to collective concerns or attentive to general well-being.

Of course, the idea that the constitutional formulation of individual rights can offer protection for the individual against state overreach certainly explains why some commentators believe it is possible to imagine an eventual reversal or revision of *Dobbs*. It may also reassure some that *Griswold*'s recognition of a right to "privacy"[5] is relatively secure and that it may even be possible to imagine jurisprudential developments that usher in a more refined idea of individual rights. "Dignity," or some substantive reinterpretation of "equality," could, after all, be recognized as a federal safeguard against an aggressive state's restrictions of reproductive or sexual choice. Given the history of doctrinal manipulation of our federal constitutional regime,[6] I am not so optimistic.

Our Constitution was written in 1787, ratified in 1788, and came into effect in 1789. It incorporates both understandings of aspirational foundational principles, such as equality and liberty, and appropriate structural arrangements allocating power across different governmental organizations. It also incorporates a limited or constrained notion

4. *See* R. J. Rushdoony, *Non-Interventionism as a Constitutional Principle*, CHALCEDON (Oct. 1, 1999), https://chalcedon.edu/magazine/non-interventionism-as-a-constitutional-principle [https://perma.cc/CD38-73JG]. Vulnerability theory argues for the replacement of the impoverished and specious liberal legal version of the individual subject of law with the "vulnerable subject." Martha Albertson Fineman, *The Vulnerable Subject and the Responsive State*, 60 EMORY L.J. 251, 263–64, 266 (2010) [hereinafter Fineman, *Responsive State*]. The liberal subject is deemed inherently independent, autonomous, a liberty-seeking holder of rights against governmental interference. Martha Albertson Fineman, *The Vulnerable Subject: Anchoring Equality in the Human Condition*, 20 YALE J.L. & FEMINISM 1, 10 (2008) [hereinafter Fineman, *Anchoring Equality*]. This articulation of the relationship between the individual and the state is found in our Constitutional framework. *See* Fineman, *Responsive State*, *supra*, at 251. It fails to reflect the realities of the human condition, and this was the case even when the Constitution was drafted. *See* Fineman, *supra* note 3, at 148. The organization of society at the time, particularly the hierarchical and subordinating relationships within the family and labor or master/servant relationships, actually functioned to shield the Framers from the day-to-day manifestations of their own vulnerability and dependency on societal arrangements. *See id.* The labor performed by subordinated and sequestered others within these institutional structures allowed the Framers to focus on extracting themselves from what they saw as a repressive political regime and imagine themselves as free and equal citizens, rather than dependent subjects. *See* Jeffrey S. Kahana, *Master and Servant in the Early Republic, 1780-1830*, 20 J. EARLY REPUBLIC 27, 28 (2000).

5. *See* Griswold v. Connecticut, 381 U.S. 479, 486 (1965).

6. Fineman, *supra* note 3, at 137 (providing how "a legal regime of equality" was manipulated to ignore social and economic differences between males and females).

of federal power, as well as a limited conception of the rights conferred by national citizenship.

Equality is understood as mandating equal treatment, rather than supporting redistributive policies at the federal level, and the states are positioned as the primary guardians of individual well-being and public welfare.[7] Amendment of this governing document to facilitate different, more expansive understandings of federal power would be exceedingly difficult. Of the many thousands of proposed amendments, only 33 have passed the two-thirds barrier of congressional approval, and of those, only 27 have made it through the process of state ratification.[8] The first ten of those successful amendments are the Bill of Rights, passed in 1791.[9] *Dobbs* is an illustration of the inevitably ephemeral (and therefore unreliable) nature of more progressive concepts of federal constitutional "rights" if they are unenumerated and merely based on precedent. The idea that there are certain distinct and superior rights associated with national citizenship is unstable when such rights can revolve out of fashion through application of different theories of constitutional interpretation, such as the current emphasis on originalism or textualism by the Court's current majority.[10]

Dobbs also suggests there may be additional structural limits for a constitutional rights-based approach in our federal system.[11] Consistent with the Tenth Amendment,[12] as well as general principles of

7. *See* Martha Albertson Fineman, *Equality and Difference—The Restrained State*, 66 ALA. L. REV. 609, 609–10, 613 (2015). *See generally* Transcript of Oral Argument, Students for Fair Admissions, Inc. v. President of Harvard Coll., No. 20-1199 (U.S. argued Oct. 31, 2022); Transcript of Oral Argument, Students for Fair Admissions, Inc. v. Univ. of N.C., No. 21-707 (U.S. argued Oct. 31, 2022).

8. Drew Desilver, *Proposed Amendments to the U.S. Constitution Seldom Go Anywhere*, PEW RSCH. CTR. (Apr. 12, 2018), https://www.pewresearch.org/fact-tank/2018/04/12/a-look-at-proposed-constitutional-amendments-and-how-seldom-they-go-anywhere/ [https://perma.cc/W78B-3G52]. The last Amendment was ratified in 1992. 2 MARK GROSSMAN, CONSTITUTIONAL AMENDMENTS: AN ENCYCLOPEDIA OF THE PEOPLE, PROCEDURES, POLITICS, PRIMARY DOCUMENTS, CAMPAIGNS FOR THE 27 AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES, NINETEENTH AMENDMENT TO TWENTY-SEVENTH AMENDMENT 1029 (2012). A great deal has happened since then, both in the evolution of technology and in the transformations in ideas of how equality and responsibility should be manifested in relationships among individuals within institutional arrangements, such as the family or workplace. Threats to individual and collective welfare are now elusive for individual states to address, such as the pandemic and climate change, and also present challenges to the historic federal constitutional regime.

9. U.S. CONST. amends. I–X.

10. *See, e.g.*, Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2304 (2022) (Thomas, J., concurring).

11. *See id.* at 2259 (Breyer, J., dissenting) (discussing the failure of *Roe* and *Casey* supporters to show that the Supreme Court possesses the power to determine the states' regulation of abortion).

12. U.S. CONST. amend. X. ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.").

"subsidiarity,"[13] even if a basis for the exercise of federal authority existed, the Court might nonetheless defer to the states. This would seemingly argue that reproductive justice advocacy should be directed to the states, exploring the possibilities of state constitutional provisions, as well as crafting arguments to persuade state legislatures.

If my suggestions about the limited nature of the Constitution are accurate, one might wonder why so much energy and effort regarding reproductive justice continues to focus on constitutional rights, rather than developing arguments anchored in robust conceptions of governmental responsibility (and on developing approaches to legislation rather than litigation). This is where I see vulnerability theory having a role to play. It represents both a more broadly ambitious objective and a more focused motivation than the typical rights-based arguments. The more ambitious objective is to fundamentally alter the way we think about both (1) the legal subject (substituting the vulnerable and socially dependent subject for the individualistic autonomous, liberty-seeking liberal subject) and (2) collective responsibility (arguing for a care-based or dependency-centered analyis in which the state is seen as having an inescapable responsibity to shape and monitor the essential institutions that form the infrastructure of everyday life in ways that respond to the needs of the vulnerable—as contrasted with the independent, autonomous—legal subject.[14] The more focused motivation is to expand how we conceptualize reproduction away from an *individual* rights-based paradigm and toward one that incorporates notions of inclusive and comprehensive *social* justice.

Professor Dinner raises a concern about vulnerability theory:

> [V]ulnerability theory also holds political and legal risks for advocates of reproductive justice.
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> . . .
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> The . . . question is whether vulnerability theory, which offers a universal account of the human condition, is sufficient to realize reproductive justice. Is it possible to challenge *Dobbs* without a feminist account of the way in which state-imposed restrictions on abortion access subordinate women?[15]

I don't see this as only (or even mostly) a risk, but rather as an opportunity. Reproductive justice would seem to require a perspective on justice that moves us beyond an absolutist sense of individual rights—

13. The principle of subsidiarity states that matters should be decided at the lowest or least centralized level of government that is competent to handle a problem. Steven G. Calabresi & Lucy D. Bickford, *Federalism and Subsidiarity: Perspectives from U.S. Constitutional Law* 5 (Nw. Univ. Sch. of L. Faculty Working Papers, Paper No. 215, 2011), https://scholarlycommons.law.northwestern.edu/cgi/.?&context=facultyworkingpapers [https://perma.cc/8GRZ-C44D].

14. *See* Martha Albertson Fineman, *Vulnerability and Social Justice*, 53 VALPARAISO U. L. REV. 341 (2019).

15. Deborah Dinner, *Fineman Speaks to* Dobbs, 10 Tex. A&M L. Rev. 729, 739–40 (2023).

one that also takes the complexity of the collective interest in reproduction into account. It is in this regard that vulnerability theory's concept of "inevitable inequality" may come into play.[16] Individuals are not in equal positions when it comes to reproduction in either its biological or social form.[17] Vulnerability theory emphasizes that different, often inherently unequal, social or institutional roles are necessary for a functioning society.[18] Biological and social reproduction are essential, society-preserving tasks.[19] Performance of these tasks carry differing physical, social, cultural, economic, institutional, and political consequences for the individuals involved at each juncture of the process.[20] Significantly, wide-spread societal consequences are shaped by legal rules that also allocate responsibility asymmetrically both between individuals acting in roles defining family, workplace, finance, healthcare and so on, and between the individual and the state and its institutions.[21]

At a minimum, reproductive justice mandates broad societal support for the individuals and institutions engaged in both biological and social reproduction, including accommodation and subsidy from the entire organized society. The existence of such institutional resources and a sense of shared responsibility might not finally determine who should make the initial decision about whether to carry forward a pregnancy or not, but it would alter the conditions and contexts in which such a decision must be made.

16. *See* Fineman, *supra* note 3, at 143.

17. Deborah Dinner, *The Costs of Reproduction: History and the Legal Construction of Sex Equality*, 46 HARV. C.R.-C.L. L. REV. 415, 421 (2011).

18. Fineman, *Anchoring Equality*, *supra* note 4, at 17.

19. *See* Fineman, *Responsive State*, *supra* note 4, at 265.

20. *See id.* at 266–69 (discussing the physical, economic, social, and cultural dimensions of the vulnerable subject).

21. *See id.*