THE LIBERTIES OF EQUAL CITIZENS: GROUPS AND THE DUE PROCESS CLAUSE

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When the U.S. Supreme Court, in Lawrence v. Texas, *struck down a law criminalizing homosexual sodomy, its decision was seen by the press and other political observers as a major contribution to American public life. The Court's opinion also caught the attention of commentators on constitutional law, for it drew on the theme of equal citizenship to justify a decision resting on substantive due process. This Article points out that egalitarian values have advanced the development of substantive due process from its beginning a century ago. The theme of equal liberties is visible in the* Lochner *era, in the incorporation of the Bill of Rights in the Fourteenth Amendment, and in the modern expansion of personal constitutional freedoms.*

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INTRODUCTION

The Fourteenth Amendment's guarantee of equal citizenship includes a generous measure of equal liberties. True, the right of equal citizenship usually is realized in the name of the Equal Protection Clause. But, it has also found notable expression in substantive liberties protected by the Due Process Clause. Three decades ago, it was possible to see some of the interactions between the amendment's two doctrinal strands. Fundamental interests, for equal protection purposes, were largely defined around the same vital liberties as those protected by the Due Process Clause. Some of

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those liberties (such as access to courts or the right to marry) already had found doctrinal homes in the Due Process Clause, and other liberties (such as the right to vote) had not been so situated, but were entirely deserving.[1] Shortly after the turn of the twenty-first century, Pamela Karlan compellingly demonstrated the need for courts and counsel to interpret each of those two clauses in the light of the other. She captured the idea in an arresting metaphor: "the stereoscopic Fourteenth Amendment."[2] A year later, the U.S. Supreme Court decided *Lawrence v. Texas*,[3] invalidating a law criminalizing homosexual sodomy. Justice Kennedy's opinion of the Court provided a textbook example of Karlan's thesis. Although he made much of the law's effect in stigmatizing people who were gay, he declined to ground the decision on the Equal Protection Clause, instead relying solely on the Due Process Clause of the Fourteenth Amendment: "The Texas statute furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual."[4] Justice O'Connor's concurring opinion, adopting an equal protection ground—and saying this ground was to be sharply distinguished from substantive due process—gave further confirmation that the doctrinal boundary is blurred.[5]

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1. I addressed some of these developments thirty years ago in Kenneth L. Karst, *The Supreme Court, 1976 Term—Foreword: Equal Citizenship Under the Fourteenth Amendment*, 91 HARV. L. REV. 1 (1977). I acknowledge once again the influence of the work of Charles L. Black, Jr.—in particular, his book, STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW 51–66 (1969), and two of his articles, *The Lawfulness of the Segregation Decisions*, 69 YALE L.J. 421 (1960) [hereinafter Black, *Lawfulness*], and *The Unfinished Business of the Warren Court*, 46 WASH. L. REV. 3, 8–9 (1970).

2. Pamela S. Karlan, *Equal Protection, Due Process, and the Stereoscopic Fourteenth Amendment*, 33 MCGEORGE L. REV. 473 (2002). One important case illustrating her thesis was *M.L.B. v. S.L.J.*, 519 U.S. 102 (1996), *discussed in* Karlan, *supra*, at 480–83. In that case, due process and equal protection claims each reinforced the other as the Supreme Court required a state to provide a transcript, free of charge, that would allow an appeal by an indigent mother whose maternal rights had been terminated by the trial court. *Id.*

For an early and impressive argument contrary to the "stereoscopic" thesis, urging that the Fourteenth Amendment's various doctrines should be considered and applied separately, see Ira C. Lupu, *Untangling the Strands of the Fourteenth Amendment*, 77 MICH. L. REV. 981 (1979). As Lupu's title suggests, he recognized (and lamented) that the strands had become entwined. In this Article, I applaud what Lupu called entanglement. A less pejorative label (and my own preference) would be integration—the interpretation of the Fourteenth Amendment's various clauses to further its core value of equal citizenship.

3. 539 U.S. 558 (2003).

4. *Id.* at 578. This choice of a ground did not find universal approval. For an assessment throbbing with scorn, see Nelson Lund & John O. McGinnis, Lawrence v. Texas *and Judicial Hubris*, 102 MICH. L. REV. 1555 (2004).

5. *Lawrence*, 539 U.S. at 579 (O'Connor, J., concurring). Pamela Karlan makes this point concisely in another typically enlightening (and typically graceful) article. *See* Pamela S. Karlan, *Foreword: Loving* Lawrence, 102 MICH. L. REV. 1447 (2004). Nan Hunter also reads *Lawrence* as

Robert Post, after examining the decision from many perspectives, said: "Themes of respect and stigma are at the moral center of the *Lawrence* opinion, and they are entirely new to substantive due process doctrine."[6] Giving doctrine a limited definition as the content of opinions, this remark is wholly accurate. But, ever since the time (more than a hundred years ago) when the Supreme Court gave substantive due process its first applications, egalitarian values—including concerns about respect and stigma—repeatedly have provided the background for such decisions, and sometimes have taken center stage. Stigma is a social identity, involving "a special kind of relationship between attribute and stereotype."[7] Any attribute can be said to define a group, and every claim to a legal right implicitly identifies a group.[8] But the officially created stigma that most obviously provokes constitutional protection is "the tribal stigma of race, nation, and religion"[9]—that is, a group phenomenon.[10] As Owen Fiss pointed out long ago, group subordination is a central concern of the Equal Protection Clause.[11] In contrast, the blackletter law of rights under the Due Process Clause has had little to say about group concerns. In this Article, which

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part of a "developing understanding of the interdependence of liberty and equality." Nan D. Hunter, *Living With* Lawrence, 88 MINN. L. REV. 1103, 1134 (2004).

In *Lawrence*, Professor Karlan, along with my colleague William Rubenstein, authored an amici curiae brief emphasizing the equality ground that Justice O'Connor adopted. (I was one of the amici.)

6. Robert C. Post, *The Supreme Court, 2002 Term—Foreword: Fashioning the Legal Constitution: Culture, Courts, and Law*, 117 HARV. L. REV. 4, 97 (2003).

7. ERVING GOFFMAN, STIGMA: NOTES ON THE MANAGEMENT OF SPOILED IDENTITY 4 (1963).

8. See Kenneth L. Karst, *Why Equality Matters*, 17 GA. L. REV. 245, 284 n.176 (1983), echoing Joseph Tussman and Jacobus tenBroek in their pioneering exposition of the Equal Protection Clause, Joseph Tussman & Jacobus tenBroek, *The Equal Protection of the Laws*, 37 CAL. L. REV. 341 (1949). Miranda Oshige McGowan has recently shed important new light on this territory in the context of the *Lawrence* decision, clarifying differences between "classification" (to which my sentence in the text refers) and "group" in "the Equal Protection sense" (that is, a social group recognizable by judges as entitled to constitutional protection). Miranda Oshige McGowan, *From Outlaws to Ingroup:* Romer*,* Lawrence*, and the Inevitable Normativity of Group Recognition*, 88 MINN. L. REV. 1312 (2004).

9. GOFFMAN, *supra* note 7, at 4.

10. *See* Karst, *supra* note 8, at 285 & n.180.

11. Owen M. Fiss, *Groups and the Equal Protection Clause*, 5 PHIL. & PUB. AFF. 107 (1976). Robert Post has organized a twenty-two author symposium of online commentary on Fiss's article. Symposium, *The Origins and Fate of Antisubordination Theory*, ISSUES IN LEGAL SCHOLARSHIP, issue 2, Aug. 2002, http://www.bepress.com/ils/iss2/.

Justice Powell, in his famous *Bakke* opinion, downplayed group concerns: "The guarantees of the Fourteenth Amendment extend to all persons." Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 289 (1978). No one denies this proposition. Still, at ground level, the relegation of an individual to a subordinate status typically is imposed because the individual is perceived as a member of a group defined by some characteristic such as race or alienage or sex or sexual orientation or marital status or age or disability or . . . (I have reserved this space for readers' additions).

cribs from Fiss's title, I call attention to the ways in which equal citizenship's antisubordination values have contributed to individual liberties, as those liberties are embodied in the Fourteenth Amendment's Due Process Clause.[12] The cases discussed here will be familiar to most readers. What may not seem so familiar is the cases' cumulative effect. Massed together, they make clear that, for a century, concerns about group subordination have profoundly influenced the doctrinal growth of substantive due process. This historical development is amply justified by the Fourteenth Amendment's core principle of equal citizenship, which gives every citizen a right to be treated as a respected and responsible participant in community public life. Whatever interpretations were given to the constitutional guarantee of liberty in the late nineteenth century, today it is seen to imply equal liberties. As Justice Stevens has stated, "[o]ne of the elements of liberty is the right to be respected as a human being."[13]

I. ORIGINS

On the day when the Supreme Court decided *Brown v. Board of Education*,[14] it also decided *Bolling v. Sharpe*,[15] holding that the Fifth Amendment's Due Process Clause forbids the federal government from engaging in arbitrary discrimination with respect to a significant liberty.[16] Racial segregation in District of Columbia schools was deemed unconstitutional

12. Interpreting the Equal Protection Clause, the Supreme Court often rejects antisubordination rhetoric in favor of language centered on anticlassification—the more formal principle that the government generally may not use a forbidden classification (such as race) in the assignment of burdens or benefits. But, as Jack Balkin and Reva Siegel have shown, "antisubordination values have often guided application of the anticlassification principle in practice." Jack M. Balkin & Reva B. Siegel, *The American Civil Rights Tradition: Anticlassification or Antisubordination?*, 58 U. MIAMI L. REV. 9, 28 (2003). There seems to be something basic in the American value system, something in our inheritance from the Declaration of Independence and "the law of the land," that presses our system of public values to condemn group subordination. This turn of mind will make its claims in Fourteenth Amendment decisionmaking, however we may recite our doctrinal formulas.

I shall limit my discussion of the recent revitalization of the Privileges or Immunities Clause to a footnote. *See infra* note 35. Meanwhile, I retain my high regard for the metaphor, "stereoscopic."

13. John Paul Stevens, *The Third Branch of Liberty*, 41 U. MIAMI L. REV. 277, 284 (1986).

14. 347 U.S. 483 (1954).

15. 347 U.S. 497 (1954).

16. The following discussion of *Bolling v. Sharpe* draws upon my article, *The Fifth Amendment's Guarantee of Equal Protection*, 55 N.C. L. REV. 541 (1977), for its references to Aristotle and Rousseau; to American colonists' claim of the "rights of Englishmen"; to Magna Carta; to early American views of "the law of the land"; to the *Slaughter-House Cases*; to the Japanese American cases of 1943–44; and to equal liberties, with their blended constituents of due process and equal protection, in the Fourteenth Amendment's guarantee of equal citizenship.

because it was "not reasonably related to any proper governmental objective."[17] (If you hear an echo, it comes from the *Lawrence* opinion.[18]) Given the decision in *Brown*, said Chief Justice Warren, a contrary decision in *Bolling* would be "unthinkable."[19] To some commentators, this adjective suggested that, for the Chief Justice, the anomaly was political.[20] *Brown* was certain to enrage large numbers of white southerners; imagine their fury if the federal government were somehow exempt from *Brown*'s coverage. But the *Bolling* opinion was not the Court's first articulation of the doctrinal conclusion that racial discrimination by the federal government was unconstitutional. That suggestion had come a decade earlier in the various opinions in the tragic cases of *Hirabayashi v. United States*[21] and *Korematsu v. United States*.[22] Those opinions reflected a tradition of equal liberty dating to ancient days.

And I do mean ancient. Aristotle not only specified both liberty and equality as necessary components of a democracy; he also referred to equality as "one note of liberty which all democrats affirm to be the principle of their state."[23] This linkage has had strong staying power. Fast forward to 1215 and Magna Carta, which is widely seen as the source of the idea of due process of law as "the law of the land,"[24] and also seen as contributing to the egalitarian strain in the American legal tradition.[25] Then, consider the American colonial era: The Mayflower Compact promised "just and equall

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17. *Bolling*, 347 U.S. at 500.

18. *See* Lawrence v. Texas, 539 U.S. 558, 574 (2003).

19. *Bolling*, 347 U.S. at 500.

20. One prominent critic, writing long after 1954, was Hans A. Linde, in *Judges, Critics, and the Realist Tradition*, 82 YALE L.J. 227, 232–34 (1972). Linde did not argue that *Bolling* was wrongly decided; his criticism was focused on the Court's opinion.

21. 320 U.S. 81, 100 (1943) (declaring that racial discrimination is "odious to a free people whose institutions are founded upon the doctrine of equality").

22. 323 U.S. 214, 216 (1944) (stating that race-based restrictions on civil rights are "suspect," requiring "the most rigid scrutiny" by courts considering their constitutionality); *id.* at 245 (Jackson, J., dissenting) (arguing that the racial restriction here violated the Due Process Clause); *id.* at 234–35 (Murphy, J., dissenting) (stating that the race-based restriction here was a deprivation "of the equal protection of the laws guaranteed by the Fifth Amendment"). For other pre-*Bolling* dicta assuming for argument that the Fifth Amendment's Due Process Clause included freedom from arbitrary discrimination, see Karst, *supra* note 16, at 544 n.13.

23. Here, I quote Benjamin Jowett's translation of ARISTOTLE, THE POLITICS (Benjamin Jowett trans., Clarendon Press 1885), *reprinted in* FRANCIS WILLIAM COKER, READINGS IN POLITICAL PHILOSOPHY 87 (rev. ed. 1938).

24. *See* FRANK R. STRONG, AMERICAN CONSTITUTIONAL LAW 43–49 (1950).

25. *See* A.E. DICK HOWARD, THE ROAD FROM RUNNYMEDE 307–15 (1968); *see also* CHARLES GROVE HAINES, THE REVIVAL OF NATURAL LAW CONCEPTS 104–07 (1930).

lawes . . . for the general good of the Colonie."[26] Jean Jacques Rousseau, in *The Social Contract*, echoed Aristotle's dictum about equal enjoyment of the same rights.[27] In the era of Rousseau, just before the American Revolution, one common complaint of the colonists was the refusal of the Crown and Parliament to afford Americans equal liberties—that is, "the rights of Englishmen."[28] Next, consider the founding of the Nation: When the Declaration of Independence celebrated equality, it was referring to equality of right.[29] As George Fletcher puts it, the Declaration meant that all people "are equal among themselves precisely in that they possess inalienable rights—the same inalienable rights to 'life, liberty, and the pursuit of happiness' possessed by everyone else."[30]

The most flagrant violation of the American tradition of equal liberties was slavery. When the Thirteenth Amendment abolished slavery, the amendment's most satisfactory interpretation held that the persons thus freed were equal citizens, equally entitled to all the liberties of Americans.[31] (A century later, civil rights demonstrators would march for equality under the banner of "Freedom.") After President Andrew Johnson rejected this equal citizenship interpretation in his veto of the bill that became the Civil Rights Act of 1866, the concept of national citizenship was made explicit in the Fourteenth Amendment. This concept was not new; many Americans had embraced it from the nation's earliest days, and national citizenship itself implies a considerable measure of equality.[32]

No one has enunciated this proposition better than Justice Bradley, dissenting in the *Slaughter-House Cases*[33] from a decision upholding a

26. EDWARD S. CORWIN, THE "HIGHER LAW" BACKGROUND OF AMERICAN CONSTITUTIONAL LAW 65 (Cornell Univ. Press 1955) (1929) (quoting The Mayflower Compact *in* DOCUMENTARY SOURCE BOOK OF AMERICAN HISTORY 19 (1920)).

27. JEAN JACQUES ROUSSEAU, THE SOCIAL CONTRACT, bk. II, ch. iv (1762) (Henry J. Tozer trans., 1902), *quoted in* COKER, *supra* note 23, at 646–47.

28. *See, e.g.*, BERNARD BAILYN, THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION 175–98 (1967); EDMUND CODY BURNETT, THE CONTINENTAL CONGRESS 53–54 (W.W. Norton & Co. 1964) (1941); EDMUND S. MORGAN, THE BIRTH OF THE REPUBLIC, 1763–89, at 61–76 (rev. ed. 1977); GORDON WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776–1787, at 3–45 (1969).

29. Dennis J. Mahoney, *Declaration of Independence*, *in* 2 ENCYCLOPEDIA OF THE AMERICAN CONSTITUTION 752, 753 (Leonard W. Levy & Kenneth L. Karst, eds., 2d ed. 2000).

30. GEORGE P. FLETCHER, OUR SECRET CONSTITUTION: HOW LINCOLN REDEFINED AMERICAN DEMOCRACY 46 (2001) (discussing Lincoln's use of the Declaration in the Gettysburg Address); *see also id.* at 91–111 (on equality of status).

31. *See* Arthur Kinoy, *The Constitutional Right of Negro Freedom*, 21 RUTGERS L. REV. 387 (1967).

32. The classic modern reference is BLACK, *supra* note 1, at 51–61. *See also* Kinoy, *supra* note 31. I joined this cause in 1977 in Karst, *supra* note 1.

33. 83 U.S. 36 (1872).

state-granted monopoly. He urged a significant role for the Privileges or Immunities Clause:

> A citizen of the United States has a perfect constitutional right to go to and reside in any State he chooses, and to claim citizenship therein, and an equality of rights with every other citizen . . . . If a man be denied full equality before the law, he is denied one of the essential rights of citizenship as a citizen of the United States.[34]

Bradley went on to say that, even before the Fourteenth Amendment was adopted, citizens of each state and citizens of the United States "would be entitled to certain privileges and immunities as citizens, at the hands of their own government . . . . Equality before the law is undoubtedly one of the privileges and immunities of every citizen."[35] Bradley was right to conclude that the original Constitution implied some important forms of equality

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34. *Id.* at 112–13 (Bradley, J., dissenting). For a modern treatment agreeing with Justice Bradley, see Michael Kent Curtis, *Resurrecting the Privileges or Immunities Clause and Revising the* Slaughter-House Cases *Without Exhuming* Lochner*: Individual Rights and the Fourteenth Amendment*, 38 B.C. L. REV. 1 (1996).

35. *Slaughter-House Cases*, 83 U.S. at 114, 118. Michael Curtis, *supra* note 34, agrees with Justice Bradley, as does Randy E. Barnett, *The Proper Scope of the Police Power*, 79 NOTRE DAME L. REV. 429, 456–64 (2004). These authors' conclusion that the *Slaughter-House Cases* were wrongly decided seems incontestably right, and—after a long period of denial—is the dominant view today. *See, e.g.*, 1 LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 1297–1311 (3d ed. 2000). For an early trial balloon, see Philip B. Kurland, *The Privileges or Immunities Clause: "Its Hour Come Round at Last"?*, 1972 WASH. U. L.Q. 405. (I was on the platform during this lecture, and I liked it even then.) Jack Balkin has recently suggested that the Privileges or Immunities Clause would be more suitable than the Due Process Clause as the ground for protecting personal rights such as those in *Roe v. Wade* and *Lawrence*. Jack M. Balkin, *Abortion and Original Meaning*, (Yale Law Sch., Pub. Law Working Paper No. 119, 2006), *available at* http://ssrn.com/abstract=925558 (forthcoming in Constitutional Commentary).

At the end of the twentieth century, the Supreme Court breathed life into the prostrate form of the Privileges or Immunities Clause, giving it strong egalitarian force in a limited area. In *Saenz v. Roe*, 526 U.S. 489 (1999), the Court held unconstitutional a California law limiting welfare benefits of recent arrivals, for their first year of California residence, to the amounts they would be entitled to receive in the states from which they had migrated. *Id.* The Court held that the right to migrate has two bases in the Fourteenth Amendment: the clause conferring national citizenship, and the Privileges or Immunities Clause. *Id.* at 502–03. Once a citizen migrates, he or she is a citizen of the receiving state—and that means equal citizenship. It also means equal entitlement to privileges or immunities. For an analysis of *Saenz* as resting on "a structural principle of equal citizenship more than the protection of an individual right of interstate movement," see Laurence H. Tribe, Saenz *Sans Prophecy: Does the Privileges or Immunities Revival Portend the Future—or Reveal the Structure of the Present?*, 113 HARV. L. REV. 110, 154 (1999). A few years after *Saenz*, Randy Barnett said that the Privileges or Immunities Clause "has effectively been folded into the Due Process Clause." Randy E. Barnett, *Justice Kennedy's Libertarian Revolution:* Lawrence v. Texas, 2003 CATO SUP. CT. REV. 21, 39 [hereinafter Barnett, *Revolution*]. Whether or not this statement is accurate in all respects, surely it is true that both of these clauses imply rights to equal liberties. (I leave it to the reader to work out the topology of a three-dimensional "stereoscopic" vision.)

among U.S. citizens. Given the origins of the concept of due process of law, and given that concept's embrace of substantive liberties, the Fifth Amendment is a wholly appropriate source for the right of national citizens to equal treatment by the United States as to those liberties.[36] If we were to ask what kinds of equality should be included in the federal government's obligation, surely racial equality would be at the top of the list. Chief Justice Warren did not recount all these connections, but in *Bolling*, he gave national citizenship the reach that it deserves.[37]

II. EQUAL LIBERTIES IN THE *LOCHNER* ERA

Justice Bradley's view—shared in the *Slaughter-House Cases*[38] by Justice Field[39]—came to command a majority of the Court in *Allgeyer v. Louisiana*,[40] in the name of the Due Process Clause rather than the Privileges or Immunities Clause. Again, the subject was business regulation: a state law requiring that insurance on Louisiana property be provided by a company that had fully complied with state law. The effect was to prevent a New York insurance company from insuring a shipment of goods from Louisiana, thus giving special oligopoly privileges to Louisiana insurance companies.[41] The Supreme Court held the law invalid in such an application. The Court's opinion had a procedural due process ring, highlighting the state's lack of jurisdiction to regulate a corporation beyond its borders, but at bottom, its ground was the liberty of a local citizen to enter into a contract in the course of carrying out his business. The liberty of contract thus recognized blossomed into the *Lochner* era[42] of substantive due process. But, in 1897, the Court's emphasis on the state's unequal treatment of out-of-state insurers was a reminder of the antimonopoly content of "the law of the land."[43]

36. *See* John Paul Stevens, Keynote Address, The Bill of Rights: A Century of Progress (Oct. 25, 1991), *in* 59 U. CHI. L. REV. 13, 22 (1992) (calling "the Equal Protection component of the Liberty Clause of the Fifth Amendment" doctrinally "well-settled").

37. For analyses of the due process ancestry of *Bolling* and of the drafting of the *Bolling* opinion, see David E. Bernstein, Bolling*, Equal Protection, Due Process, and* Lochner*phobia*, 93 GEO. L.J. 1253 (2005).

38. 83 U.S. 36 (1873).

39. For Justice Field's dissent, see *id.* at 83 (Field, J., dissenting).

40. 165 U.S. 578 (1897).

41. An attack on corporate privilege has been a prominent theme in American politics since the early nineteenth century. *See* RUSH WELTER, THE MIND OF AMERICA, 1820–1860, at 77–104 (1975). The attackers were famously victorious in *Charles River Bridge v. Warren Bridge*, 36 U.S. 420 (1837).

42. Referring, of course, to *Lochner v. New York*, 198 U.S. 45 (1905).

43. *See* STRONG, *supra* note 24, at 45–46. For a capsule statement of the monopoly point, comparing it to counsel's argument in the *Slaughter-House Cases*, see Frank R. Strong, *The Economic*

When the *Lochner* era was in full flower, the Supreme Court found a number of occasions to apply the Fourteenth Amendment's Due Process Clause in the service of egalitarian concerns far removed from business monopolies. As early as 1917, in *Buchanan v. Warley*[44]—a staged test case litigated by the National Association for the Advancement of Colored People (NAACP) and widely noted in the press as a "race case"[45]—the Court held a racial zoning ordinance unconstitutional.[46] Justice Day's opinion gave much weight to principles of racial equality, including this quotation from *Strauder v. West Virginia*,[47] in which the Court first articulated the racial-equality aspects of equal citizenship:

> What is this [section 1 of the Fourteenth Amendment] but declaring that the law in the States shall be the same for the black as for the white; that all persons, whether colored or white, shall stand equal before the laws of the States, and, in regard to the colored race, for whose protection the amendment was primarily designed, that no discrimination shall be made against them by law because of their color? . . . Its language is prohibitory; but every prohibition implies the existence of rights and immunities, prominent among which is an immunity from inequality of legal protection, either for life,

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Philosophy of Lochner*: Emergence, Embrasure and Emasculation*, 15 ARIZ. L. REV. 419, 423–24 (1973). Frank Strong also traces the transformation of the *Slaughter-House* dissents from claims about the privileges of citizenship into claims sounding in substantive due process eventually vindicated in *Allgeyer v. Louisiana*. *Id.* at 424–26.

Equality concerns sometimes entered into the Supreme Court's due process analysis on the side of the state. In the pre-*Lochner* case of *Munn v. Illinois*, 94 U.S. 113 (1876), the Court upheld state regulation of the rates of a public utility that had an effective monopoly. In *Muller v. Oregon*, 208 U.S. 412 (1908), the Court upheld a ten-hour limit on women's working hours in factories and laundries with an opinion emphasizing that the law was designed to compensate for women's disadvantages.

44. 245 U.S. 60 (1917).

45. *See* George C. Wright, *The NAACP and Residential Segregation in Louisville, Kentucky, 1914–1917*, 78 REG. OF KY. HIST. SOC'Y 39, 51 (1980); sources cited *infra* note 49.

46. The ordinance forbade the sale of land in a majority white block to a black buyer, or the sale of land in a majority black block to a white buyer. Behind the formal equality, everyone in town knew the ordinance was designed to preserve white neighborhoods as white. Charles Buchanan was a white real estate agent who agreed to help in constructing the case. William Warley, the black president of the local NAACP chapter, offered to buy land on a white block. His offer stated that he intended to build a house and live in it, and conditioned the offer on his having a legal right to occupy the house; Buchanan accepted. Warley refused to pay, because the Louisville ordinance would not let him move in. Buchanan sued for breach of contract. This whole scenario was worked out ahead of time by the local NAACP to create the test case. Roger L. Rice, *Residential Segregation by Law, 1910–1917*, 34 J. S. HIST. 179, 185–86, 190 (1968). On Warley's life, see Russell Wigginton, *"But He Did What He Could": William Warley Leads Louisville's Fight for Justice, 1902–1946*, 76 FILSON HIST. Q. 427 (2002).

47. 100 U.S. 303 (1880).

> liberty, or property. Any State action that denies this immunity to a colored man is in conflict with the Constitution.[48]

Justice Day went on to cite the Reconstruction civil rights laws' protection of racial equality in property relationships. Ultimately, however, a unanimous Court rested its ruling on the Due Process Clause of the Fourteenth Amendment: The law violated "the civil right of a white man to dispose of his property if he saw fit to do so to a person of color [as in *Buchanan* itself] and of a colored person to make such disposition to a white person."[49]

Six years later, the Court held in *Moore v. Dempsey*[50] that federal habeas corpus was available for six black men who had been convicted of murder in an Arkansas state court. The men alleged that virulent racial discrimination had attended the entire proceeding in the state courts. Justice Holmes, in his opinion for the Supreme Court, recited the petitioners' allegations in great detail, strongly suggesting that they were entirely believable, although the Court was only accepting the allegations as admitted by the state's demurrer. Most notably, during the trial an angry white mob had gathered outside the courthouse, announcing their intent to carry out a lynching if a conviction were not forthcoming. The court-appointed defense counsel did not confer with the defendants before trial and did not call any witnesses. The all-white jury deliberated for less than five minutes before convicting the men of first-degree murder. The ground stated in the Supreme Court's opinion was not racial discrimination. Surely, however, concerns about racial subordination played a major role in the Court's conclusion that the petitioners' case amounted to a claim "that the whole proceeding [was] a mask,"[51] depriving them of liberty

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48. *Id.* at 307–10.

49. *Buchanan*, 245 U.S. at 81. *Buchanan v. Warley*, belatedly, has become the subject of a rich literature. In addition to Rice, *supra* note 46, see A. LEON HIGGINBOTHAM, JR., SHADES OF FREEDOM: RACIAL POLITICS AND PRESUMPTIONS OF THE AMERICAN LEGAL PROCESS 123–26 (1996); David E. Bernstein, *Philip Sober Controlling Philip Drunk:* Buchanan v. Warley *in Historical Perspective*, 51 VAND. L. REV. 797 (1998); Michael J. Klarman, *Race and the Court in the Progressive Era*, 51 VAND. L. REV. 881, 934–44 (1998). As David Bernstein and Michael Klarman both note, the *Buchanan* decision did not produce much desegregation of urban housing; segregation continued because of private antiblack violence, white flight, and (until 1948) racial restrictive covenants, aided by sub rosa discriminatory administration of zoning laws and policies that were racially neutral in form. *Buchanan* did offer protection against ham-handed, explicit racial discrimination by governmental bodies, and also offered some hope for the doctrinal future. Perhaps most importantly, the decision gave new life to the NAACP at a time when the Association needed help. Bernstein, *supra*, at 858–71; Klarman, *supra*, at 941–44. In one perspective focused on constitutional doctrine, *Buchanan* was "a brake to decelerate what would have been run-away racism in the United States." HIGGINBOTHAM, *supra*, at 126.

50. 261 U.S. 86 (1923).

51. *Id.* at 91.

without due process of law, and that this claim merited review through federal habeas corpus. In a 1927 letter to Harold Laski, Holmes referred to the furor over the prosecution of Nicola Sacco and Bartolomeo Vanzetti, and said: "I cannot but ask myself why this so much greater interest in red than black. A thousand-fold worse cases of negroes come up from time to time, but the world does not worry over them."[52]

In three cases decided in the 1930s, the Supreme Court confronted southern state court convictions of black men who had been sentenced to death. In each, as in *Moore*, the conviction and sentence had followed the threat of lynching. Reversing these convictions, the Supreme Court extended the reach of the Fourteenth Amendment to require state appointment of (competent) counsel to poor defendants in capital cases,[53] to prohibit the deliberate exclusion of black citizens from juries,[54] and to invalidate a conviction based on a confession obtained through torture.[55] The jury exclusion decision was grounded on the Equal Protection Clause, but the other two were grounded on the Due Process Clause. Let it be recalled that lynching was not just an isolated event; it was a generalized instrument of group subordination.[56] Michael Klarman has provided a penetrating analysis of *Moore* and the three later decisions in their political-social settings, making clear that all of them, including the three extensions of the Due Process Clause, were reactions to Jim Crow justice.[57] He suggests that the decisions' immediate practical effects on Southern criminal trials were not great, but that their long-term, indirect effects may have been greater: providing a focus for civil rights mobilization; raising the hopes that are essential for a movement for social change; and exposing some of the worst features of Jim Crow to a national audience. As we shall see, a parallel extension of Fourteenth Amendment due process developed during the modern civil rights era, from a similar egalitarian wellspring.

In the same year as *Moore*, the Court decided *Meyer v. Nebraska*,[58] striking down a World War I era state law that forbade the teaching of

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52. 2 HOLMES-LASKI LETTERS 974 (Mark DeWolfe Howe ed., 1953).

53. Powell v. Alabama, 287 U.S. 45 (1932).

54. Norris v. Alabama, 294 U.S. 587 (1935).

55. Brown v. Mississippi, 297 U.S. 278 (1936).

56. As Charles Black said, the Jim Crow system "until yesterday kept [the black man] in line by lynching." Black, *Lawfulness*, *supra* note 1, at 426.

57. Michael J. Klarman, *The Racial Origins of Modern Criminal Procedure*, 99 MICH. L. REV. 48, 53 (2000). On the role of the NAACP in these cases, as part of a "politics of protection," see William N. Eskridge, Jr., *Some Effects of Identity-Based Social Movements on Constitutional Law in the Twentieth Century*, 100 MICH. L. REV. 2062, 2073–77 (2002).

58. 262 U.S. 390 (1923).

foreign languages to children. In the case before the Court, unsurprisingly, the language was German.[59] The case thus reflected wartime antagonism; further, it resonated against a larger political theme of nativist antipathy. One primary engine driving the Temperance Movement, for example, was the objective of Anglo-Protestants to maintain their status supremacy over more recently arrived Irish and German Catholics.[60] The Nebraska language law's hostility to an ethnic group was apparent to all, but the opinion of the Court had nothing to say on the subject. Rather, it was a hymn to individual parents' autonomy in shaping the education of their children, a liberty protected by the substantive strand of the Fourteenth Amendment's Due Process Clause.[61]

Within two years, the Court invalidated an Oregon law, enacted by popular initiative, requiring children to attend public, not private, schools. The law had been promoted by the local branches of the Ku Klux Klan in a campaign featuring anti-Catholic rhetoric. The clear purpose of the law, as everyone in Oregon understood, was to shut down parochial schools. The setting for the case thus closely resembled the nativist setting in *Meyer*. But the Supreme Court, in *Pierce v. Society of Sisters*,[62] blandly followed *Meyer*'s doctrinal lead, concluding that the law interfered with parents' substantive due process liberty. Because there were no parents before the Court, the basis for relief was the law's unconstitutional interference with the plaintiff corporation's property interests in running a business.[63] After another two

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59. Robert Meyer was a teacher in a Lutheran school, and he taught about the Bible with stories written in German. He said he was giving religious instruction. The Nebraska Supreme Court upheld the law, saying the "whole question" was whether the law invaded the freedom of religion guaranteed by the state constitution. Meyer v. Nebraska, 187 N.W. 100, 102 (Neb. 1922), *rev'd*, 262 U.S. 390 (1923). Two dissenting justices argued that the state constitution implied a right of parental control over children's education—an argument that eventually found a home in the Fourteenth Amendment. *Id.* at 104 (Letton, J., dissenting). In a companion case, the Court applied the same reasoning to invalidate similar laws in Iowa and Ohio, and a later Nebraska law. Bartels v. Iowa, 262 U.S. 404 (1923).

60. *See* JOSEPH R. GUSFIELD, SYMBOLIC CRUSADE: STATUS POLITICS AND THE AMERICAN TEMPERANCE MOVEMENT (2d ed. 1986).

61. In applying the right of substantive due process, the opinion included parental rights in a long list of "those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men." *Meyer*, 262 U.S. at 399. Astonishingly, the Court cited the *Slaughter-House Cases* for this sweeping proposition. *Id.*

62. 268 U.S. 510 (1925). In this discussion, I follow Rebecca L. Brown, *Liberty, the New Equality*, 77 N.Y.U. L. REV. 1491, 1507–08 (2002), who followed WILLIAM G. ROSS, FORGING NEW FREEDOMS: NATIVISM, EDUCATION, AND THE CONSTITUTION, 1917–1927 (1994). All of us are following Justice Stone's footnote four, discussed in the following paragraph of the text.

63. Although the facts of *Pierce v. Society of Sisters* illustrated the law's origin in anti-Catholic zeal, the law also forbade secular private schooling, and the opinion applied to a companion case involving a military school. 268 U.S. at 535–36.

years, the Court confronted a law of the Territory of Hawaii requiring the licensing of schools using languages other than English and Hawaiian, and conditioning such a license on the teaching of "Americanism." The main purpose of the law, plainly understood in the Territory and in the courts, was to prevent Japanese-language schools from giving their pupils too much emphasis on their parents' culture.[64] Once again downplaying the importance of the law's nativism, the Court's opinion strongly suggested that the law was invalid on the substantive due process ground that had been deployed in *Meyer* and *Pierce*.[65] In each of these cases, group subordination was a central motive for the law in issue, and the result in all three was to advance the cause of equal liberties.

As every law student learns, in the late 1930s, the Supreme Court announced that the *Lochner* era had ended. Justice Stone's celebrated footnote four in *United States v. Carolene Products Co.*[66] was attached to an opinion making the central point that the Court had simply stopped subjecting business regulation to any serious judicial scrutiny based on substantive due process. The footnote strongly suggested that this presumption of validity would be weaker in various situations suggesting a market failure in the world of politics. For example, judicial review might be more demanding when the Court considered "statutes directed at particular religious [citing *Pierce*], or national [citing *Meyer*, *Bartels*,[67] and *Tokushige*] or racial minorities."[68] With these words, the Supreme Court recognized that the cited cases, all decided in opinions resting on substantive due process, were decisions invalidating various forms of group subordination. Two critics of the *Lawrence* opinion have said that "[t]hese two decisions [*Meyer* and *Pierce*] do not fit into any of the three categories set out in Footnote 4."[69] As this criticism makes clear, there is a perspective in which the interpretation of a precedent is strictly limited to the earlier court's recitation of doctrine. I am suggesting here that this view, when it squeezes well-understood facts of group subordination out of a case formally

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64. The law affected 147 schools taught in Japanese, 9 in Korean, and 7 in Chinese. Farrington v. Tokushige, 273 U.S. 284, 290–91 (1927).

65. *Id.* In form, the Court merely upheld the trial court's discretion in granting a preliminary injunction to those challenging the law. But the opinion's careful recitation of facts and citations of *Meyer v. Nebraska* and *Pierce* as governing law, *see id.* at 298–99, left the Territory with little probability of success in using the trial to demonstrate a legitimate justification for the law. Westlaw reports no later published decisions in the case.

66. 304 U.S. 144 (1938).

67. The companion case to *Meyer*.

68. *Caroline Prods.*, 304 U.S. at 153 n.4.

69. Lund & McGinnis, *supra* note 4, at 1566–67.

decided on a due process ground, fails as a real-life description of the judicial process, and fails to do justice to the Fourteenth Amendment's principle of equal citizenship.

Footnote four left intact the basic rule of *Carolene Products*, which was a retreat from substantive due process. Within a few years, this basic rule influenced the Court's opinion in a case that plainly called for judicial protection of a fundamental liberty. In *Skinner v. Oklahoma*,[70] the Court struck down a state law requiring sterilization of certain three-time felons (including those who committed grand larceny or assault), but not others (such as embezzlers or those convicted of bribery). Justice Douglas, writing for the Court, called procreation "one of the basic civil rights of man . . . fundamental to the very existence and survival of the race."[71] Today, this liberty-oriented language is *Skinner*'s best-known feature. The ground for decision, however, was not substantive due process. Justice Douglas had been a pallbearer at the burial of *Lochner*, and surely wanted to avoid a resurrection. Instead, the Court held that the law violated the Equal Protection Clause. The invasion of such a "basic liberty" could be justified only if the different treatments prescribed by the law passed a test of "strict scrutiny,"[72] and in this case they did not. Two obvious alternative grounds were available: substantive due process[73] and procedural due process.[74]

70. 316 U.S. 535 (1942). Victoria Nourse has portrayed the drama of the *Skinner* case in all its facets: the lives of the imprisoned men who were threatened with sterilization; the political setting for the Oklahoma law; the work of the prisoners' "self-taught" lawyers; the bearing of the genetics movement on the law and the case (with special attention to the roles of race and gender); the competing legal theories in the case; the trial and appeals in the Oklahoma courts; and the reactions of Supreme Court Justices and their opinions in the case. VICTORIA F. NOURSE, IN RECKLESS HANDS: SKINNER V. OKLAHOMA AND THE NEAR TRIUMPH OF EUGENICS (forthcoming 2007). Her book deserves a wide audience, not only among legal scholars but more generally among thoughtful citizens.

71. *Skinner*, 316 U.S. at 541. He went on to express concerns about racism:

> The power to sterilize, if exercised, may have subtle, farreaching and devastating effects. In evil or reckless hands it can cause races or types which are inimical to the dominant group to wither and disappear. . . . [The law here] has made as invidious a discrimination as if it had selected a particular race or nationality for oppressive treatment.

Id.

72. *Id.* *Skinner* marked the first appearance of the term "strict scrutiny" in an opinion of the Court.

73. The state's interest in eugenics was, to put it bluntly, baloney. In the language of law, there was no rational basis for claiming that sterilization would serve a legitimate interest. In other words, *Buck v. Bell*, 274 U.S. 200 (1927), was already seen as a derelict that deserved to be sunk. The state did have a legitimate interest in punishing crime, but punishment by sterilization would have required consideration of whether the Fourteenth Amendment should be interpreted to prohibit cruel or unusual punishment. See the discussion of "incorporation" of the Bill of Rights in the text at the beginning of Part III.

74. Skinner had been allowed no hearing on the question of whether his "criminal traits," if any, were inheritable. *Skinner*, 316 U.S. 541.

Chief Justice Stone opted for the latter, concurring only in the result and rejecting the equal protection ground.[75] Justice Jackson agreed with both Justices Douglas and Stone, but disagreed with them insofar as each rejected the other's ground. He also hinted broadly that the law likely violated an important substantive liberty, presumably substantive due process.[76]

Outside the Court, the *Skinner* opinion was criticized for resting on an equal protection ground rather than the substantive liberty to procreate. After all, said the critics, the state could achieve equal treatment by making things worse: broadening the law to include all three-time felons.[77] But a concern for equality was precisely the point in *Skinner*. Surely, this very concern would have contributed to a ruling that the law's arbitrariness violated a substantive liberty, even if the Court's opinion had omitted any reference to the Equal Protection Clause. The law imposed sterilization for crimes typically committed by poor persons, while exempting white-collar crimes.[78] (It is possible that some Oklahoma legislators knew people who had given or accepted bribes—perhaps even three times. Should *they* be sterilized? What a thought!) Whatever might be said in other situations on the question whether the poor should be treated as a group deserving protection against subordination, in this case such a claim would have been entirely apt. Today, the theme that procreation is a basic right, deserving zealous judicial protection, sounds in both equal protection and due process doctrine.

III. THE BILL OF RIGHTS AND THE FOURTEENTH AMENDMENT: EQUAL LIBERTIES FROM CHARLES WARREN TO HUGO BLACK AND BEYOND

In 1926, just four years after his publication of *The Supreme Court in United States History*,[79] Charles Warren sounded an alarm announcing the Court's recent departures from "the principles of government believed in

75. *Id.* at 543 (Stone, C.J., concurring).

76. *Id.* at 546–47 (Jackson, J., concurring). This passage also refers to the possibility that a legislative majority might be inclined to direct its eugenic experiments at persons in a minority. *Id.* Jackson did not specify race or any other type of minority.

77. *E.g.*, Conference, *The Proper Role of the United States Supreme Court in Civil Liberties Cases*, 10 WAYNE L. REV. 457, 471–72 (1964) (remarks by Caleb Foote).

78. *See* J. Skelly Wright, *The Role of the Supreme Court in a Democratic Society—Judicial Activism or Restraint?*, 54 CORNELL L. REV. 1, 23 n.111 (1968).

79. CHARLES WARREN, THE SUPREME COURT IN UNITED STATES HISTORY (1922).

by the framers of the Constitution."[80] The event that precipitated the article seems to have been the opinion in *Gitlow v. New York*,[81] accepting (in dictum) what Warren considered a radical assumption: that the right of free speech could be enforced against the states as a liberty protected under the Due Process Clause of the Fourteenth Amendment.[82] Warren wrote at length—nearly the entire article—to demonstrate that, before *Gitlow*, the precedents all rejected any such assumption. He particularly emphasized the failure of similar arguments in the *Slaughter-House Cases*.[83] In closing, he devoted some six pages to the theme: Where will it all end? If Fourteenth Amendment liberty includes the freedom of speech, then why not the rights of assembly or jury trial, or the right to bear arms, or the freedoms from compulsory self-incrimination or cruel and unusual punishment? His flourish was an effort to reduce the *Gitlow* dictum to absurdity:

> [I]f the doctrine of the *Gitlow* case is to be carried to its logical and inevitable conclusion, every one of the rights contained in the Bill of Rights ought to be and must be included within the definition of "liberty," and must be held to be guaranteed by the Fourteenth Amendment against deprivation by a State "without due process of law."[84]

Eighty years have passed since Warren wrote, and his parade of possible horrors has long since lost any capacity to scare either Justices or other readers. A number of historians conclude that the decision in the *Slaughter-House Cases* was utterly incompatible with the intention of the framers of the Fourteenth Amendment's Privileges or Immunities Clause, which was to "protect fundamental constitutional rights, including those in the Bill of Rights, from state denial."[85] As early as 1947, Justice Black announced (in a dissent) his view that the Fourteenth Amendment's Due Process and Privileges or Immunities Clauses required a total incorporation of the rights protected by the first eight amendments of the Bill of Rights.[86] Justice Douglas enlisted in this campaign, but Justice Frankfurter held the line

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80. Charles Warren, *The New "Liberty" Under the Fourteenth Amendment*, 39 HARV. L. REV. 431 (1926).

81. 268 U.S. 652 (1925).

82. *Id.* at 666. The assumption was dictum because the Court went on to hold that Benjamin Gitlow's speech was not protected by the First Amendment. *Id.* at 672. *Gitlow v. New York* was decided just one week after *Pierce v. Society of Sisters*, 268 U.S. 510 (1925).

83. 83 U.S. 36 (1872); *see supra* text accompanying note 34.

84. Warren, *supra* note 80, at 460.

85. *See, e.g.*, Curtis, *supra* note 34, at 67–68; sources cited *supra* note 35.

86. Adamson v. California, 332 U.S. 46, 71–72 (1947) (Black, J., dissenting). For a powerful (book-length) argument that the framers of the Fourteenth Amendment intended to apply the Bill of Rights to the states, see MICHAEL KENT CURTIS, NO STATE SHALL ABRIDGE: THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS (1986).

against it for a decade and a half.[87] Starting shortly after Justice Goldberg succeeded to Frankfurter's seat in 1963, the Court proceeded briskly to apply most of the guarantees of the Bill of Rights to the states. The doctrinal basis was just what Charles Warren had anticipated four decades earlier—the liberty protected by the Fourteenth Amendment's Due Process Clause.[88]

By 1969, the Court had achieved a major expansion of constitutional guarantees of fairness in the criminal process. During this period, the Court did not give egalitarian concerns much attention in its doctrinal explanations. But, as outside observers noted at the time, "the new restrictions on state courts and policemen [were] based on egalitarian concerns as well as concerns about procedural fairness."[89] In the constitutional climate of the 1960s, it would have been strange for the Justices to ignore the themes of poverty and racial disparity—from arrest to parole—that were so conspicuous throughout American criminal justice.[90] From this perspective, much of the incorporation of the Bill of Rights into the Fourteenth Amendment, though formally founded on due process liberty, was an extension of the Warren Court's civil rights jurisprudence.[91] The indirect motivational effects of the earlier Jim Crow cases, identified by Michael Klarman,[92] were replicated in the 1960s.

One later (post-Warren Court) example in this course of events is particularly dramatic and deserves specific mention. Concerns about racial

87. Frankfurter began with an opinion in *Adamson* itself. *See* 332 U.S. at 59 (Frankfurter, J., concurring).

88. A good short list is provided in William N. Eskridge, Jr., *Destabilizing Due Process and Evolutive Equal Protection*, 47 UCLA L. REV. 1183, 1195–97 (2000). The Eskridge article, along with those of Pamela Karlan, *see* Karlan, *supra* note 2; Karlan, *supra* note 5, are "must reads" for anyone interested in the themes of this Article.

89. Here I quote myself. *See* Kenneth L. Karst, *Invidious Discrimination: Justice Douglas and the Return of the "Natural-Law-Due-Process Formula,"* 16 UCLA L. REV. 716, 729 & nn.57–63, 730 & nn.64–65, 731 & nn.66–72, 732 & 73–76 (1969). A fully detailed development of the role of the NAACP in the cases producing the "selective incorporation" of the criminal procedure portions of the Bill of Rights into the Fourteenth Amendment, and in defending access to habeas corpus in death penalty cases, is given by Eskridge, *supra* note 57, at 2204–14, 2219–26. On the parallel role of women's organizations in similar cases, see *id.* at 2214–18.

90. By referring to the 1960s, I do not mean to suggest that these shameful conditions have disappeared. For demonstrations of their currency, see, for example, DAVID COLE, NO EQUAL JUSTICE: RACE AND CLASS IN THE AMERICAN CRIMINAL JUSTICE SYSTEM (1999); RANDALL L. KENNEDY, RACE, CRIME, AND THE LAW (1997); Devon W. Carbado, *(E)racing the Fourth Amendment*, 100 MICH. L. REV. 946 (2002); *Developments in the Law—Race and the Criminal Process*, 101 HARV. L. REV. 1472 (1988).

91. On poverty and crime in the Warren Court era, see LUCAS A. POWE, JR., THE WARREN COURT AND AMERICAN POLITICS 443–46 (2000).

92. *See supra* text accompanying notes 50–57.

subordination surely animated the Burger Court's 1977 decision that the liberty protected by the Eighth Amendment's guarantee against "cruel and unusual punishment" forbade a state from imposing a death sentence for rape.[93] Justice Marshall previously had shown that among persons executed for rape from 1930 to 1968, 89 percent were black.[94] By 1977, we can hope, even the ghost of Charles Warren might have approved this application of the principle of equal liberty.

The free speech dictum in *Gitlow* has spawned thousands of cases. Today, a reference to the First Amendment calls to mind a huge body of law, the bulk of which is found in decisions applying the First Amendment to the states via the Due Process Clause of the Fourteenth Amendment. A pretense at restatement of this body of law in a single article would be silly. Here, I do no more than skim the surface of the First Amendment, as a reminder of the influence of concerns about group subordination in the law of freedom of speech and press and in the law of the religion clauses. By 1975, the principle of equal liberties was visible in decisions applying public forum analyses, decisions protecting political minorities' rights of association, decisions limiting the discretion of licensing officials, and decisions protecting citizens' access to voting and political candidacy.[95] Each of these subjects identifies an area in which one primary interest is protection against group subordination. With footnote four as a point of departure, Robert Cover suggested in 1982 that constitutional protection is most needed when the suppression of minorities presents the danger, not only "that the political society will degenerate into the party," but also that "incumbency may degenerate

93. Coker v. Georgia, 433 U.S. 584 (1977).

94. Furman v. Georgia, 408 U.S. 238, 314, 364 (1972) (Marshall, J., concurring). *Furman* was one successful result of the NAACP Inc. Fund's decades-long and frustrating campaign to abolish or limit the death penalty. For chapter and verse, see Eskridge, *supra* note 57, at 2287–99.

95. I dealt with the listed subjects in a symposium honoring the memory of Harry Kalven, Jr., who had led the way to a number of those developments. Kenneth L. Karst, *Equality as a Central Principle in the First Amendment*, 43 U. CHI. L. REV. 20 (1975). Taking as my guide a statement in the Court's opinion in *Police Department of Chicago v. Mosley*, 408 U.S. 92, 99 (1972), I uttered the overly broad suggestion that the First Amendment, properly considered, made regulations of speech content suspect, requiring tough judicial scrutiny of the proffered justifications. Not long afterward, Geoffrey Stone offered a soft-spoken correction. He pointed out that a number of forms of content regulation (prominently including regulations of subject matter) should satisfy First Amendment scrutiny; the most serious constitutional concern is raised by viewpoint discrimination. *See* Geoffrey R. Stone, *Restrictions of Speech Because of Its Content: The Peculiar Case of Subject-Matter Restrictions*, 46 U. CHI. L. REV. 81 (1978). He was right then, and he is still right. *See* Geoffrey R. Stone, *Content Regulation and the First Amendment*, 25 WM. & MARY L. REV. 189 (1983).

into 'apparatus.'"[96] More recently, taking up where Cover left off, Daniel Tokaji has undertaken a systematic exploration of First Amendment equality doctrine, centered on the problem of "the distorting effects of [official] discretion" on equal citizenship, especially on equal participation in public discourse.[97]

Of course, the First Amendment does not stand for a general prohibition against government-imposed inequality. Almost every law classifies—applying only to some transactions and not others (for example, offers of corporate and other similar securities), or even to some persons and not others (for example, restricting the vote to U.S. citizens).[98] But there are times when the First Amendment—as incorporated in the Fourteenth Amendment's Due Process Clause—can be seen as covering a broader territory than that reached by the Equal Protection Clause. The Supreme Court has been stingy in validating equal protection claims of the poor,[99] but has offered considerable protection for speech in streets and parks, "a public forum that the citizen can commandeer,"[100] fully cognizant that such venues are "the poor man's printing press."[101] Where the Court generally says that application of the Equal Protection Clause to racial discrimination requires a showing of a purpose to discriminate,[102] the First Amendment (again, the Due Process Clause) has been applied to invalidate a number of instances of state racial discrimination in which the Supreme Court has studiously avoided attributing such a purpose to

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96. Robert M. Cover, *The Origins of Judicial Activism in the Protection of Minorities*, 91 YALE L.J. 1287, 1293 (1982). In this passage, Robert Cover did not focus narrowly on the First Amendment; rather, he was concerned with protecting "the space for free, unconstrained public politics." *Id.*

97. Daniel P. Tokaji, *First Amendment Equal Protection: On Discretion, Inequality, and Participation*, 101 MICH. L. REV. 2409, 2410 (2003). This article deserves a wide audience.

98. Tussman and tenBroek pointed out the necessity of such classifications. *See* Tussman & tenBroek, *supra* note 8. For a modern analysis, see McGowan, *supra* note 8.

99. The leading cases effectively telling such claimants to "go away" are *Dandridge v. Williams*, 397 U.S. 471 (1970), and *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1 (1973). The Supreme Court has recognized a number of such claims when they involve access to the courts to secure fundamental rights. The cases are summarized, and the principle applied, in *M.L.B. v. S.L.J.*, 519 U.S. 102 (1996).

100. Harry Kalven, Jr., *The Concept of the Public Forum:* Cox v. Louisiana, 1965 SUP. CT. REV. 1, 12. Kalven's coinage of the "public forum" metaphor may be *the* most influential example of the conversion of a commentator's rhetoric into a constitutional principle.

101. *Id.* at 30.

102. Discrimination on the face of the law eliminates any need to offer other proof of purpose. *See generally* David A. Strauss, *Discriminatory Intent and the Taming of* Brown, 56 U. CHI. L. REV. 935 (1989). *But see* Daniel R. Ortiz, *The Myth of Intent in Equal Protection*, 41 STAN. L. REV. 1105 (1989).

the state.[103] In practical result, these First Amendment decisions have provided vital protection of an important body of speech against government action that not only originated in group subordination, but was designed to perpetuate group subordination.[104]

The religion clauses, like the freedom of speech clause, are the subject of an extensive literature, much of it touching on issues of discrimination.[105] In 1990, the Supreme Court virtually reduced the Free Exercise Clause to a prohibition on purposive religious discrimination.[106] Even before 1990, the Court had invalidated deliberate discrimination in favor of those who professed some religious belief,[107] or against religious

103. *See, e.g.*, NAACP v. Claiborne Hardware Co., 458 U.S. 886 (1982); Brown v. Louisiana, 383 U.S. 131 (1966); N.Y. Times v. Sullivan, 376 U.S. 254 (1964); Gibson v. Fla. Legislative Investigation Comm., 372 U.S. 539 (1963); Edwards v. South Carolina, 372 U.S. 229 (1963); NAACP v. Alabama, 357 U.S. 449 (1958). *See generally* HARRY KALVEN, JR., THE NEGRO AND THE FIRST AMENDMENT (1965). I concede that the Justices in every one of the cited cases have known full well what was going on, but the decisions were not said to rest on racial discrimination. As I have argued before, the members of subordinated groups need strong First Amendment protection. *See* Kenneth L. Karst, *Boundaries and Reasons: Freedom of Expression and the Subordination of Groups*, 1990 U. ILL. L. REV. 95. For a discussion of the role of social movements in cases such as those cited here, see Eskridge, *supra* note 57, at 2332–40. On the reluctance of judges to admit that they are influenced by changes in norms concerning social groups, see Suzanne B. Goldberg, *Constitutional Tipping Points: Civil Rights, Social Change, and Fact-Based Adjudication*, 106 COLUM. L. REV. 1955 (2006).

104. For the suggestion that the protection of nonpolitical speech (for example, artistic expression and commercial advertising) should be founded not on the First Amendment but on a generalized *Lawrence*-style personal autonomy, see Gregory P. Magarian, *Substantive Due Process as a Source of Constitutional Protection for Nonpolitical Speech*, 90 MINN. L. REV. 247 (2005).

105. Christopher Eisgruber and Lawrence Sager espouse interpretations of both religion clauses centered on equal liberty. CHRISTOPHER L. EISGRUBER & LAWRENCE G. SAGER, RELIGIOUS FREEDOM AND THE CONSTITUTION (2007). The book is sympathetically reviewed, with reservations about the capacity of equal liberty to do all the work of the religion clauses, in Thomas C. Berg, *Can Religious Liberty Be Protected as Equality?*, 85 TEX. L. REV. 1185 (2007), and in Ira C. Lupu & Robert W. Tuttle, *The Limits of Equal Liberty as a Theory of Religious Freedom*, 85 TEX. L. REV. 1247 (2007). An earlier analysis, with useful references, is Steven H. Shiffrin, *The Pluralistic Foundations of the Religion Clauses*, 90 CORNELL L. REV. 9, 27–29, 39–40, 82–95 (2004).

In these debates, no one denies that concerns for group equality have strongly influenced the doctrinal development of the religion clauses. This is an old story. On the relation of ethnic assimilation to early twentieth century judicial protections of religious equality in New York, see William E. Nelson, *The Changing Meaning of Equality in Twentieth-Century Constitutional Law*, 52 WASH. & LEE L. REV. 3 (1995).

106. Employment Div. v. Smith, 494 U.S. 872 (1990). On the dominance of "formal neutrality" in the Supreme Court's religion cases, see Daniel O. Conkle, *The Path of American Religious Liberty: From the Original Theology to Formal Neutrality and an Uncertain Future*, 75 IND. L.J. 1, 25–29 (2000), and Douglas Laycock, *Formal, Substantive and Disaggregated Neutrality Toward Religion*, 39 DEPAUL L. REV. 993 (1990).

107. Torcaso v. Watkins, 367 U.S. 488 (1961) (holding unconstitutional a state law requiring public officeholders to declare their belief in the existence of God). My favorite

officers or religious groups.[108] The leading post-1990 decision invalidating a law that targeted a religious group for restriction was *Church of the Lukumi Babalu Aye v. Hialeah*.[109] A Florida city council forbade animal sacrifice for religious purposes—with a specific religious group in mind—while allowing such practices as the kosher killing of food animals and the use of live rabbits in the training of racing dogs. Group status domination is a major goal in modern American politics,[110] and religious groups are active in legislative lobbying.[111] One frequent goal of this political activity is exemption from general laws.[112] In the *Lukumi* case, far from entertaining the idea of an exemption, the city council had set out from the beginning to stifle the practices of a local religious group that offended them. It is worth noting that the religion thus targeted had originated in Africa, and its Florida adherents were largely of Afro-Cuban descent. The council members were Cuban refugees without an "Afro" modifier.[113]

Consider also *Larson v. Valente*,[114] where legislators responded to the Roman Catholic diocese by inserting, in a law regulating solicitation of money, an exemption limited to groups that solicited more than half their funds from nonmembers. As the legislators well knew, this exemption was crafted with the purpose of retaining strict requirements on solicitation by the Unification Church. The Court held that the law violated the

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quotation on this subject is a note at the bottom of a column in the *New Yorker* that I pasted in my copy of a casebook (without recording the date or page):

HEADLINE OF THE WEEK
From the Santa Fe New Mexican
Atheist Challenges State
Rule That He Acknowledge
God to Be Notary Public

108. Larson v. Valente, 456 U.S. 228 (1982); Widmar v. Vincent, 454 U.S. 263 (1981); McDaniel v. Paty, 435 U.S. 618 (1978).

109. 508 U.S. 520 (1993).

110. *See generally* KENNETH L. KARST, LAW'S PROMISE, LAW'S EXPRESSION: VISIONS OF POWER IN THE POLITICS OF RACE, GENDER, AND RELIGION (1993); J.M. Balkin, *The Constitution of Status*, 106 YALE L.J. 2313 (1997).

111. *See* Kenneth L. Karst, *Religion, Sex, and Politics: Cultural Counterrevolution in Constitutional Perspective*, 24 U.C. DAVIS L. REV. 677 (1991).

112. The *Smith* opinion specifically invites such exemption, and this invitation seemed to minimize the likelihood of an Establishment Clause problem. Employment Div. v. Smith, 494 U.S. 872, 890 (1990). More recently, a unanimous Court upheld the facial validity of the Religious Land Use and Institutionalized Persons Act as applied to prisoners, reaffirming that "there is room for play in the joints" between the two religion clauses, allowing the state to accommodate religion. Cutter v. Wilkinson, 544 U.S. 709, 713 (2005); *see* Steven Goldberg, Cutter *and the Preferred Position of the Free Exercise Clause*, 14 WM. & MARY BILL RTS. J. 1403 (2006).

113. For further details, see Kenneth L. Karst, *Religious Freedom and Equal Citizenship: Reflections on* Lukumi, 69 TUL. L. REV. 335 (1994).

114. 456 U.S. 228 (1982).

Establishment Clause, but Jesse Choper rightly called *Larson* a free exercise case in disguise.[115] It is easy to see the problem of group subordination at the heart of many cases in which the Court deploys the Free Exercise Clause to invalidate governmental action. But in *Bob Jones University v. United States*,[116] the Court upheld a decision of the Internal Revenue Service to deny a tax exemption on the ground that the university—stating religious purposes—was prohibiting interracial dating or marriage among its students. Here, the interest in avoiding group subordination served not to invalidate a law or official practice, but to justify the government's action.[117]

For more than two decades, the Supreme Court's Establishment Clause decisions plainly have been influenced by concerns to protect against group subordination. Some Justices, led by Justice O'Connor, have identified official endorsement of religion as one principal basis for holding that a state law or practice violates the Establishment Clause.[118] This is a status-based doctrine, calling for the government to avoid conduct that tells religious "outsiders" they are "not full members of the political community," and tells "insiders" they are officially favored.[119] Such a concern for symbolic official conduct that contributes to group subordination calls to mind the Court's invalidation of school segregation.[120] Even a Justice who has no use for the endorsement approach can agree that a particular governmental embrace of symbols of religion violates the Establishment Clause. An example is Justice Kennedy, who stoutly resisted the endorsement doctrine,[121] but wrote for a 5–4 Court that held unconstitutional officially sponsored prayers at a public school graduation.[122] Such prayers, he said,

115. Jesse H. Choper, *The Free Exercise Clause: A Structural Overview and an Appraisal of Recent Developments*, 27 WM. & MARY L. REV. 943, 958–61 (1986).
116. 461 U.S. 574 (1983).
117. I discussed this case in Kenneth L. Karst, *Groups and the Free Exercise Clause*, 87 CAL. L. REV. 1093, 1100–03 (1999), and in Karst, *supra* note 113, at 365–72.
118. Justice O'Connor first made this argument in *Lynch v. Donnelly*, 465 U.S. 668, 687–89 (1984) (O'Connor, J., concurring).
119. *Id.* at 688.
120. *See, e.g.*, Alan Brownstein, *A Decent Respect for Religious Liberty and Religious Equality: Justice O'Connor's Interpretation of the Religion Clauses of the First Amendment*, 32 MCGEORGE L. REV. 837, 845–62 (2001); Alan E. Brownstein, *Harmonizing the Heavenly and Earthly Spheres: The Fragmentation and Synthesis of Religion, Equality, and Speech in the Constitution*, 51 OHIO ST. L.J. 89 *passim* (1990); Arnold H. Loewy, *Rethinking Government Neutrality Towards Religion Under the Establishment Clause: The Untapped Potential of Justice O'Connor's Insight*, 64 N.C. L. REV. 1049, 1057 (1986).
121. County of Allegheny v. ACLU, 492 U.S. 573, 668–77 (1989) (Kennedy, J., concurring in part and dissenting in part).
122. Lee v. Weisman, 505 U.S. 577 (1992).

created an undue risk of indirect coercion of a "nonbeliever or dissenter," with the state "in effect requir[ing] participation in a religious exercise."[123]

One more cluster of decisions deserves mention, because it involves both the freedom of speech and the Establishment Clause. In a typical case of this genre, governmental institutions—especially public schools—have provided speech or publication opportunities to a number of groups, but have excluded religious groups. In the last two decades, the religious groups have had striking success in obtaining access through lawsuits. The main claim here demands equal treatment, and is based on notions of viewpoint discrimination. For example, a public school offers its classrooms for after-school meetings of all manner of social, civic, and recreational groups, but prohibits the use of classrooms for religious purposes. The Supreme Court held this practice unconstitutional as a violation of free speech rights. The board could not "[deny] access to a speaker solely to suppress the point of view he espouses on an otherwise includible subject."[124] Here, the viewpoint discrimination was obvious on the face of the board's rule. Equally obvious is the reason why school boards adopted such rules. It is fair to assume that, in the great majority of such cases, the board members have not been hostile to religion, but afraid that the use of school facilities by religious groups would be seen as an unconstitutional endorsement of religion in violation of the Establishment Clause. The church groups' equality-based theory eventually

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123. *Id.* at 592, 594. Justice Kennedy also joined in the Court's opinion invalidating a public high school's policy of appointing a student to deliver an invocation before the school's football game, at which the student might choose to deliver a prayer. This practice, said the Court, had the purpose of conveying religious messages, and such messages could easily be offensive to students who were outsiders or dissenters. Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290 (2000).

These equality concerns are to be distinguished from arguments founded on "political divisiveness." For a powerful case against political divisiveness as an element of an Establishment Clause violation, see Richard W. Garnett, *Religion, Division, and the First Amendment*, 94 GEO. L.J. 1667 (2006).

124. Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384, 394 (1993). The reach of this equality principle was limited in *Locke v. Davey*, 540 U.S. 712 (2004), which upheld a provision in Washington's state constitution forbidding state spending to support religious exercises or institutions, as applied to deny an otherwise applicable state scholarship to a student who sought to study for the ministry. The decision is criticized in Thomas C. Berg & Douglas Laycock, *The Mistakes in* Locke v. Davey *and the Future of State Payments for Services Provided by Religious Institutions*, 40 TULSA L. REV. 227 (2004), and Richard F. Duncan, *Locked Out:* Locke v. Davey *and the Broken Promise of Equal Access*, 8 U. PA. J. CONST. L. 699 (2006). For an equally sharp criticism of the Supreme Court's use of equality-based arguments either to invalidate government action for "endorsing" (more generally, publicly supporting) religion or to validate government funding of religion, see Noah Feldman, *From Liberty to Equality: The Transformation of the Establishment Clause*, 90 CAL. L. REV. 673 (2002).

served to deflect such an Establishment Clause argument, provided that the school facilities were offered to a broad range of groups.[125]

The First Amendment cases I have mentioned—both speech and religion cases—illustrate the larger pattern of decisions in which the Court has given the Due Process Clause meanings that have the effect of protecting against group subordination. In some cases (such as the religion clause cases), the avoidance of group subordination seems to have been the Court's prime objective. All the cited decisions, at the very least, exemplify egalitarian impulses analogous to those that have promoted the incorporation of other provisions of the Bill of Rights into the Due Process Clause.

If constitutional equality "once loosed . . . is not easily cabined,"[126] the same can be said for due process liberties. Once recognized, they tend to spill over into territory not necessarily foreseen at the time of first recognition. William Eskridge has shown in detail how the incorporation of most of the Bill of Rights into the Fourteenth Amendment's Due Process Clause provided new opportunities for gay and lesbian Americans to resist police harassment and other governmental interferences with liberty—for instance, efforts to close gay bars.[127] A notable example was *Norton v. Macy*,[128] decided by the D.C. Circuit in 1969. Norton, a NASA budget analyst, was fired from his job for "immoral conduct," defined by the Civil Service Commission to include his public acknowledgment that he would engage in "homosexual conduct."[129] The D.C. Circuit held that NASA could not constitutionally fire Norton absent a showing that his sexual orientation affected job performance, and that no such nexus had been shown. The ground for the decision was due process, but the antidiscrimination element in the case was obvious.[130] With due process claims leading the way, the door was pried open for an important series of decisions validating equality-based claims by lesbians and gay men.[131] More broadly,

125. *E.g.*, Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819 (1995) (involving publicly financed publications). In arguments to the Supreme Court, the most influential advocate of this successful equal-access theory was Michael McConnell, then an academic and now a judge of the Tenth Circuit Court of Appeals.

126. Archibald Cox, *The Supreme Court, 1965 Term—Foreword: Constitutional Adjudication and the Promotion of Human Rights*, 80 HARV. L. REV. 91, 91 (1966).

127. William N. Eskridge, Jr., *Challenging the Apartheid of the Closet: Establishing Conditions for Lesbian and Gay Intimacy,* Nomos*, and Citizenship*, 25 HOFSTRA L. REV. 817, 830–42 (1997). For a brief summary and discussion of this development's relation to other constitutional rights, see WILLIAM N. ESKRIDGE, JR., GAYLAW: CHALLENGING THE APARTHEID OF THE CLOSET 98–137 (1999).

128. 417 F.2d 1161 (D.C. Cir. 1969).

129. *Id.* at 1167.

130. Eskridge, *supra* note 127, at 915.

131. ESKRIDGE, *supra* note 127, at 125–37.

Eskridge has shown how the expansion of rights over a wide range of due process doctrine has been "destabilizing" to various longstanding hierarchies in American society, paving the way for subordinated groups to succeed with claims of equal citizenship.[132] This form of doctrinal development—exemplifying one important feature of a stereoscopic view of the Fourteenth Amendment[133]—is highly visible in the egalitarian motivations for decisions based on due process that started with privacy and culminated in *Lawrence v. Texas*.

IV. FROM *GRISWOLD* TO *LAWRENCE*

If the *Lawrence* decision can be called the most dramatic event in the modern era of substantive due process, that era began in 1965 with *Griswold v. Connecticut*.[134] A Connecticut state law made it a crime to use birth control devices. The Supreme Court held the law unconstitutional as applied to a New Haven birth control clinic that aided married women in their violation of the law, advising them on birth control and providing contraceptive devices. (Before the clinic was organized, Connecticut women had been bussed to New York, where a Planned Parenthood clinic could lawfully give them both advice and devices.) Justice Douglas, assigned to write the Court's opinion in *Griswold*, produced a draft grounding the decision on the First Amendment freedom of association—the association in question being marriage.[135] The liberty to control the intimacies of marriage certainly could be described as fundamental, deserving protection under the Fourteenth Amendment's Due Process Clause. Justice Harlan had reached this very conclusion a few years earlier in his dissent in *Poe v. Ullman*,[136] a case that challenged the same Connecticut law but foundered on a jurisdictional shoal. In *Griswold*, however, Justice Douglas wanted to avoid an unstructured reliance on due process that would evoke the memory of *Lochner*—just as he had done in *Skinner*, two decades earlier.

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132. Eskridge, *supra* note 88, at 1184–85, taking issue with Cass Sunstein's suggestion that the Due Process Clause is "backward-looking," with a reach largely defined by tradition, while the Equal Protection Clause is "forward-looking," justifying "a critique of traditional practices" that impose unacceptable inequalities. Cass R. Sunstein, *Sexual Orientation and the Constitution: A Note on the Relationship Between Due Process and Equal Protection*, 55 U. CHI. L. REV. 1161, 1179 (1988). The Supreme Court's *Lawrence* opinion typifies the destabilizing potential of due process liberty. 539 U.S. 558 (2003).

133. Karlan, *supra* note 2.

134. 381 U.S. 479 (1965).

135. A portion of this early draft, suggesting a First Amendment freedom of association basis for *Meyer* and *Pierce*, survived into the final opinion. *Id.* at 482.

136. 367 U.S. 497, 522 (1961) (Harlan, J., dissenting).

Justice Brennan proposed a revision of the Douglas draft to rest the decision on a right of privacy.[137] Perhaps this path appealed to Justice Douglas because it would enable him to invoke several specific freedoms in the Bill of Rights. Thus, he might hope for support from Justice Black, who had been arguing since 1947 that the first eight amendments should be incorporated wholesale into the Fourteenth Amendment and applied to the states. Douglas's opinion for the Court said that several specific liberties in the Bill of Rights had "penumbras" protecting one or another sort of privacy, and that the penumbras came together to create a generalized right of marital privacy. Justice Black was not fooled,[138] and the hocus-pocus of penumbras invited further scorn outside the Court.[139] Yet, despite the haze of the opinion, *Griswold* solidly established marital privacy as a constitutional right. By 1973, however, this zone of privacy had been relocated in substantive due process,[140] and the penumbras had been sent into early retirement. Two years after *Griswold*, the Court explicitly recognized marriage itself as a fundamental due process liberty. The occasion was *Loving v. Virginia*,[141] a decision better known for its equal protection holding: A state

137. *See* BERNARD SCHWARTZ, SUPER CHIEF: EARL WARREN AND HIS SUPREME COURT 579–80 (1983).

138. *See* POWE, *supra* note 91, at 372–76.

139. *E.g.*, Hyman Gross, *The Concept of Privacy*, 42 N.Y.U. L. REV. 34, 42–46 (1967); Lupu, *supra* note 2, at 994.

140. Justice Blackmun's opinion of the Court in *Roe v. Wade*, 410 U.S. 113 (1973), noted that a "right of personal privacy" had been justified by one or another Justice by the First Amendment, the Fourth and Fifth Amendments, the penumbras of the Bill of Rights, or the liberty protected by the Fourteenth Amendment. He went on to say that the relevant right of privacy,

> whether it be *founded in the Fourteenth Amendment's concept of personal liberty . . . as we feel it is*, or, as the District Court determined, in the Ninth Amendment's reservation of rights to the people, is broad enough to encompass a woman's decision whether or not to terminate her pregnancy.

Id. at 153 (emphasis added). Justice Stewart, who had dissented in *Griswold v. Connecticut*, said in his *Roe* concurrence that he now saw *Griswold* as a substantive due process decision, and he accepted it as such. *Id.* at 167–71 (Stewart, J., concurring).

141. 388 U.S. 1 (1967). Pamela Karlan shows the kinship relation between *Loving v. Virginia* (in 1967) and *Lawrence* (in 2003) in her article. Karlan, *supra* note 5.

The Court reaffirmed the fundamental quality of the right to marry in *Zablocki v. Redhail*, 434 U.S. 374 (1978), in which eight Justices agreed that a state regulation of that right was invalid—a majority relying on the Equal Protection Clause, and Justice Stewart relying on substantive due process. William Cohen sees *Zablocki*, along with *Skinner*, *Eisenstadt v. Baird* (discussed in the text immediately following), and other decisions, to exemplify the use of equal protection as a doctrinal surrogate, allowing the Court to avoid confronting difficulties presented by other, more suitable, bases for decision—notably including substantive due process. William Cohen, *Is Equal Protection Like Oakland? Equality as a Surrogate for Other Rights*, 59 TUL. L. REV. 884 (1985). As I hope this Article shows, the "surrogate" notion often has worked in the opposite direction, as *Lawrence* emphatically illustrates. Understand, I am not asserting that all constitutional law resembles Oakland (in Gertrude Stein's sense, "there is no there there").

law prohibiting interracial marriage was unconstitutional, for its chief purpose was to promote white supremacy.

Although much of *Griswold*'s doctrinal importance lies in its stimulation of the recognition of the freedom of intimate association,[142] the decision protected substantive liberty in a setting in which strong concerns about group subordination were visible in the background.[143] In 1920, Margaret Sanger, the founder of Planned Parenthood, made a remark that helps to put *Griswold* in an egalitarian spotlight: "Birth control is woman's problem."[144] This comment bore at least two meanings. First, Sanger was saying that women must take responsibility for birth control, because they could not expect men to do so. Second, she was saying that a woman must have control over her own maternity in order to control her future: education, work, marriage, the support of other children, or any life plan she might have. Although *Griswold* was decided a few years before the modern women's movement became conspicuous, it was a "women's case" if ever there were one. An additional egalitarian concern was that the Connecticut law mainly burdened women of limited means, who did not have regular medical care. Women who were more comfortable financially could obtain advice about birth control privately from their doctors. Primarily, it was poor women who needed the clinics if they were to get professional help with birth control.[145] So, *Griswold* can also be seen as a "poverty case." Today, both of these arguments for the decision are widely recognized in commentary on the Court.[146] But, in 1965, although the

142. *See* Kenneth L. Karst, *The Freedom of Intimate Association*, 89 YALE L.J. 624 (1980).

143. On the relation of the freedom of intimate association to equality, and especially women's equality, see *id.* at 659–64.

144. MARGARET SANGER, WOMEN AND THE NEW RACE 100 (1920). The preceding year, Margaret Sanger herself had been in court, convicted of distributing contraceptive devices. When the New York Court of Appeals affirmed the conviction, she sought review in the U.S. Supreme Court, but her case was dismissed for want of a substantial federal question. *See* People v. Sanger, 118 N.E. 637 (N.Y. 1918), *appeal dismissed per curiam*, 251 U.S. 537 (1919). Sanger had contributed a social-historical appendix to her counsel's brief on appeal, making arguments about the relation of reproductive rights to women's position in society—arguments that today seem obvious. Noting my reference to Sanger in the text, William Eskridge called my attention to this prosecution. For his thorough analysis and biographical-historical sources, see Eskridge, *supra* note 57, at 2117–21.

145. Medical advice to one side, birth control devices were openly sold in Connecticut pharmacies. Prosecution of pharmacists was avoided by the fiction that the devices were sold "for prevention of disease," not the prevention of pregnancy. *Griswold*, 381 U.S. 479, 498 (1965) (Goldberg, J., concurring).

146. *E.g.*, KATHLEEN M. SULLIVAN & GERALD GUNTHER, CONSTITUTIONAL LAW 421 (16th ed. 2007); Martin Shapiro, *Fathers and Sons: The Court, the Commentators, and the Search for Values*, *in* THE BURGER COURT: THE COUNTER-REVOLUTION THAT WASN'T 218, 228 (Vincent Blasi ed., 1983).

arguments would have appealed to some Justices, surely they would not have produced a majority opinion founded on the Equal Protection Clause.

Equality in another dimension came to the doctrinal foreground in *Eisenstadt v. Baird*,[147] the case that provided a bridge between the two substantive liberty decisions in *Griswold* and *Roe v. Wade*.[148] A Massachusetts law prohibited the distribution of contraceptives to an unmarried person for purposes of preventing pregnancy.[149] A visiting lecturer at Boston University, speaking about birth control, was prosecuted for illustrating his talk by giving a package of contraceptive foam to a young woman who was not married.[150] A 6–1 Court reversed the conviction, with Justice Brennan writing the opinion of the Court for a four-Justice majority.[151] *Griswold* had held that such a distribution to a married person was constitutionally protected, and, he said, "whatever the rights of the individual to access to contraceptives may be, the rights must be the same for the unmarried and the married alike."[152] The Massachusetts prohibition thus violated the Equal Protection Clause. The language about an individual's rights should not be allowed to distract us from the main point, which is a group concern: the protection of women's right to control "the decision whether to bear or beget a child."[153] These words, of course, were the rhetorical bridge to *Roe*, as Justice Brennan no doubt intended. With this decision, the freedom in question expanded from married couples to single individuals and from the use of contraceptives to their distribution.

If *Griswold* concerned vital interests of women as a group, *Roe* did too, and for similar reasons. It is no accident that *Roe* was decided during the 1970s, the decade when the women's movement was revitalized. During this time, judges at all levels were hearing from the Women's Rights

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147. 405 U.S. 438 (1972).

148. 410 U.S. 113 (1973).

149. The law allowed doctors and pharmacists to distribute contraceptives even to the unmarried. As in Connecticut, single or married persons could lawfully obtain contraceptives for the purpose of preventing disease. *Eisenstadt*, 405 U.S. at 442.

150. Her single status was assumed.

151. The recently appointed Justices Powell and Rehnquist did not participate. Chief Justice Burger dissented. Justice White, joined by Justice Blackmun, avoided both equal protection and substantive due process grounds. They concurred because the state had failed to prove the young woman was unmarried. I cannot resist quoting Justice White's statement of the "settled constitutional doctrine" underlying his concurrence, for it is the first quadruple negative I have noticed in a Supreme Court opinion: "[A] conviction cannot stand where the record fail(s) to prove that the conviction was not founded upon a theory which could not constitutionally support a verdict." *Eisenstadt*, 405 U.S. at 460, 465 (White, J., concurring) (internal citations omitted). Got that?

152. *Id.* at 453 (majority opinion).

153. *Id.*

Project of the American Civil Liberties Union (ACLU), led by then professor Ruth Bader Ginsburg.[154] The proposed Equal Rights Amendment was very much in the news, and even Supreme Court Justices took notice.[155] Still, the *Roe* decision rested not on the ground of women's equality, but on substantive due process.[156] Justice Blackmun's fifty-five page opinion of the Court in *Roe* nodded briefly to potential harms to a woman from unwanted pregnancy and maternity, but these few sentences did not carry much of the opinion's weight. What brought *Roe* to its iconic status was the political-religious attack on the decision, and the ensuing mobilization of women's groups to its defense. From *Roe* forward, questions about women's proper roles in society have pervaded the political debate over abortion rights.[157] An individual woman's taking control over her sexuality and maternity is part of a large-scale process centered on the status of women as a group. As Catharine MacKinnon put it in 1982, "to *know* the *politics* of woman's situation is to know women's personal lives."[158] Some of the early commentary on *Roe* made clear the importance of the decision for women's control over their destinies,[159] but it took some time before that assessment became the prevailing view.[160] As Reva Siegel said, "choice in matters of motherhood implicates constitutional values of equality and liberty both."[161]

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154. *See* SUSAN M. HARTMANN, THE OTHER FEMINISTS: ACTIVISTS IN THE LIBERAL ESTABLISHMENT 81–91 (1998). On women's issues and the American Civil Liberties Union (ACLU) before the 1970 founding of the Women's Rights Project, see *id.* at 53–81.

155. The story was ably told in Reva B. Siegel, *Text in Contest: Gender and the Constitution From a Social Movement Perspective*, 150 U. PA. L. REV. 297, 308–16 (2001). On the ERA-related byplay among the Justices in *Frontiero v. Richardson*, 411 U.S. 677 (1973), see Siegel, *supra*, at 311–12. More recently she expanded on this theme in her Brennan Lecture, working it into a larger analysis of ways in which "constitutional culture enables [social] movements to negotiate the law/politics distinction . . . ." Reva B. Siegel, *Constitutional Culture, Social Movement Conflict and Constitutional Change: The Case of the De Facto ERA*, 94 CAL. L. REV. 1323, 1329 (2006).

156. Nelson Lund and John McGinnis describe the substantive due process of *Griswold* and *Roe* as "liberation jurisprudence." Lund & McGinnis, *supra* note 4, at 1570. They do not intend this label as a compliment.

157. *See generally* KRISTIN LUKER, ABORTION AND THE POLITICS OF MOTHERHOOD (1984).

158. Catharine A. MacKinnon, *Feminism, Marxism, Method, and the State: An Agenda for Theory*, *in* FEMINIST THEORY: A CRITIQUE OF IDEOLOGY 1, 21 (Nannerl O. Keohane, Michelle Z. Rosaldo & Barbara C. Gelpi eds., 1982).

159. *See* Ruth Bader Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to* Roe v. Wade, 63 N.C. L. REV. 375 (1985); Karst, *supra* note 1, at 57–59 (1977); Kenneth L. Karst, Book Review, 89 HARV. L. REV. 1028 (1976) (reviewing GERALD GUNTHER, CASES AND MATERIALS ON CONSTITUTIONAL LAW); Sylvia A. Law, *Rethinking Sex and the Constitution*, 132 U. PA. L. REV. 955 (1984).

160. The most thorough analysis I know is Reva Siegel, *Reasoning From the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection*, 44 STAN. L. REV. 261 (1992).

161. *Id.* at 378.

Those words were published in the January 1992 issue of the *Stanford Law Review*. In June of that year, the Supreme Court decided *Planned Parenthood v. Casey*,[162] in which—after a season during which *Roe* had almost been overruled—a majority of the Justices gave explicit recognition to the importance of the right of abortion choice to women's equal status in society. In this context, due process liberty is clearly seen as a right to equal liberties. Justices O'Connor, Kennedy, and Souter filed a joint opinion pronouncing that the "core" of the *Roe* decision was still good law. By this statement they meant that, up to the point of "viability" of the fetus, "the woman has a right to choose to terminate her pregnancy."[163] The drafting of the joint opinion was divided.[164] Justice Kennedy, writing on due process liberty, recited some of the burdens of pregnancy and maternity, and said that

> [a woman's] suffering is too intimate and personal for the State to insist, without more, upon its own vision of the woman's role, however dominant that vision has been in the course of our history and our culture. The destiny of the woman must be shaped to a large extent on her own conception of her spiritual imperatives and her place in society.[165]

Writing on the effects of *Roe* as precedent, Justice Souter said: "An entire generation [of women] has come of age free to assume *Roe*'s concept of liberty in defining the capacity of women to act in society, and to make reproductive decisions . . . ."[166] In Justice Souter's view, the overruling of *Roe* would, to those women, be seen as a breach of faith.

Justice O'Connor wrote to announce the holding that Pennsylvania's requirement that a married woman notify her husband of her intention to have an abortion amounted to a "substantial burden" on the right of abortion choice, and was thus unconstitutional. She detailed the district court's

162. 505 U.S. 833 (1992). More recently, Siegel has explored the theoretical bases for these equality concerns, and the ways in which they have influenced legal doctrine. Reva B. Siegel, *Sex Equality Arguments for Reproductive Rights: Their Critical Basis and Evolving Constitutional Expression*, 56 EMORY L.J. 815 (2007). She has also demonstrated the relevance of equality concerns to restrictions on reproductive choice in the name of the protection of women. Reva B. Siegel, *The New Politics of Abortion: An Equality Analysis of Woman-Protective Abortion Restrictions*, 2007 U. ILL. L. REV. 991; *see also* David H. Gans, *The Unitary Fourteenth Amendment*, 56 EMORY L.J. 907, 934–39 (2007). Along similar lines, but emphasizing the "equal sexual liberty" recognized in the *Lawrence* opinion, see Kim Shayo Buchanan, Lawrence v. Geduldig*: Regulating Women's Sexuality*, 56 EMORY L.J. 1235 (2007).

163. *Casey*, 505 U.S. at 870.

164. *See* David G. Savage, *Justice Kennedy Crosses the Rubicon in* Casey, L.A. TIMES, Dec. 13, 1992, *in* WILLIAM COHEN ET AL., CONSTITUTIONAL LAW: CIVIL LIBERTY AND INDIVIDUAL RIGHTS 950 (6th ed. 2007).

165. *Casey*, 505 U.S. at 852.

166. *Id.* at 860.

findings focused on the strong likelihood that such a compelled notification would, in a significant number of cases, result in physical abuse of the wife, or children, by the husband. This possibility, says Justice O'Connor, would let the husband "wield an effective veto over his wife's decision" to have an abortion.[167] After describing the common law's foundations for men's power over women in marriage, she wrote:

> A State may not give to a man the kind of dominion over his wife that parents exercise over their children. [The notification requirement] embodies a view of marriage consonant with the common-law status of married women but [is] repugnant to our present understanding of marriage and of the nature of rights secured by the Constitution. Women do not lose their constitutionally protected liberty when they marry.[168]

These three statements about women's roles in society were joined by a majority of the Justices,[169] and thus expressed the opinion of the Court. If *Roe* was an application of substantive due process implicitly influenced by concerns to protect women's equal status, *Casey* is an application of substantive due process in which the Court manifestly and repeatedly declares its condemnation of women's status subordination.

This story is not all sweetness and light. Even in the context of reproductive choice, the Supreme Court has consistently refused to recognize the claims of women of limited means. During the times when the *Roe* precedent was in greatest jeopardy, the Court upheld laws denying public funding for poor women's medical care for abortions, even as such funding

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167. *Id.* at 897.

168. *Id.* at 898.

169. That is to say, Justices Blackmun and Stevens joined those passages in the plurality opinion. Although Justice Blackmun at first had not seen *Roe* as a women's equality case, once *Roe* came under assault within the Court, he came to see it in exactly that egalitarian perspective. Writing for a 5–4 majority in *Thornburgh v. American College of Obstetricians & Gynecologists*, 476 U.S. 747 (1986), he wrote that the U.S. Constitution's promise of a private "sphere of individual liberty"

> extends to women as well as to men. Few decisions are more personal and intimate, more properly private, or more basic to individual dignity and autonomy, than a woman's decision—with the guidance of her physician and within the limits specified in *Roe*—whether to end her pregnancy. A woman's right to make that choice freely is fundamental. Any other result, in our view, would protect inadequately a central part of the sphere of liberty that our law guarantees equally to all.

Id. at 772. In *Casey* itself, Justice Blackmun returned to this theme in his separate opinion, recognizing the importance of women's control over their own life choices, and saying that the state's "assumption—that women can simply be forced to accept the 'natural' status and incidents of motherhood—appears to rest upon a conception of women's role that has triggered the protection of the Equal Protection Clause." 505 U.S. at 928. On the evolution of Justice Blackmun's views on *Roe* and women's rights, see LINDA GREENHOUSE, BECOMING JUSTICE BLACKMUN: HARRY BLACKMUN'S SUPREME COURT JOURNEY 72–101, 182–227 (2005).

was provided for the more expensive care required in childbirth.[170] In *Casey* itself, the Court upheld a law requiring a woman to wait for the procedure until twenty-four hours after the doctor had provided her with various specified bits of information about health risks and the gestation of the fetus. As the district court found, this provision would bear most heavily on out-of-town women who could least likely afford an overnight stay in the city, and married women who would have to explain the absence to their husbands.

These concerns about women's equality retain their currency. After *Lawrence*—and, more to the point, after Justice Alito replaced the retired Justice O'Connor—in *Gonzalez v. Carhart*,[171] a 5–4 Court upheld an act of the U.S. Congress forbidding "partial birth abortion."[172] Justice Kennedy, who had dissented fervidly in 2000 when the Court struck down a similar state law,[173] now wrote the opinion of the Court. The opinion is notable not only for its result but also for its style. Repeatedly, Justice Kennedy deploys the vocabulary favored by those who remain hostile to *Roe* and all its works.[174] More importantly, and in sharp contrast to Justice Kennedy's contribution to the opinion in *Casey*, his *Gonzalez v. Carhart* opinion entirely omits any reference to the relation of the right of abortion choice to individual women's control over their own lives and, more generally, to women's status as equal citizens.[175] He does say—remarkably—that the law protects women from possible future regret of having an intact dilation and evacuation (intact D&E) procedure performed without realizing what it meant in detail.[176] Then, in rebuffing a health-based challenge to

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170. Harris v. McRae, 448 U.S. 297 (1980); Maher v. Roe, 432 U.S. 464 (1977). This discriminatory pattern was extended from public funding to access to public hospitals in *Webster v. Reproductive Health Services*, 492 U.S. 490 (1989).

171. Gonzalez v. Carhart, 127 S. Ct. 1610 (2007).

172. This is the term coined by abortion opponents to describe intact dilation and evacuation (intact D&E), a procedure that involves killing the fetus after the entire skull is outside the woman, or, in a breech presentation, a part past the navel is outside the woman. This procedure is used infrequently, mainly in the second trimester of pregnancy. The law provides for an exception when the otherwise-banned procedure is necessary to save the woman's life, but not to protect her health.

173. Stenberg v. Carhart, 530 U.S. 914 (2000).

174. For references to samples of this rhetoric, see *Carhart*, 127 S. Ct. at 1650 (Ginsburg, J., dissenting).

175. Justice Ginsburg, dissenting, presented the case for women's autonomy with characteristic force. *Id. passim*.

176. *Id.* at 1634 (majority opinion). Speaking from the bench just after the decision was announced, Justice Ginsburg pointed out that the law does not require a doctor to provide information, but "shields women by denying them any choice in the matter. This way of protecting women recalls ancient notions about women's place in society and under the

the law on its face, Justice Kennedy suggests that such a challenge might be entertained against an application of the law in some individual case. Charles Fried, once President Reagan's solicitor general, asks: "What can that mean? . . . Does the court contemplate a surgeon pausing in the midst of an operation in which he determines the banned procedure might be less risky, and seeking a court order?"[177] On this question, the *Gonzalez v. Carhart* opinion offers no guidance at all. None.

In practical effect, *Carhart* is apt to be limited. Having rejected the claim that the law, by omitting a women's health exception, imposed an "undue burden" on a woman's reproductive choice,[178] Justice Kennedy added: "If the intact D&E procedure is truly necessary in some circumstances, it appears likely an injection that kills the fetus is an alternative under the Act that allows the doctor to perform the procedure."[179] After the decision, doctors interviewed by David Savage indicated that from now on, the lethal injection method will be used. One of them said: "'This will not stop any abortions from taking place. We physicians will make some slight changes in our practice. An injection for the fetus adds another risk to [a] woman's health, and it means added time and money. But if that's what's necessary, that's what we will do.'"[180] Let no one think that this reaction makes *Carhart* unimportant. Just as the act of Congress under review was, first and foremost, a symbol of legislators' opposition to the right of abortion choice, the Court's opinion stands as a symbol that the present majority is receptive to laws restricting that right. In tomorrow's efforts to limit a woman's right to make her own decisions about reproduction, the *Carhart* opinion is sure to be cited regularly by legislators who seek to impose limits, and by counsel and judges who share that disposition.

Constitution—ideas that have long since been discredited." Bench Announcement, Gonzalez v. Carhart, 127 S. Ct. 1610 (Apr. 18, 2007) (copy on file with the UCLA Law Review).

177. Charles Fried, Op. Ed., *Supreme Confusion*, N.Y. TIMES, Apr. 26, 2007, at A25.

178. It was enough for Justice Kennedy that there is "a contested factual question" whether a ban on intact D&E would create "significant health risks." *Carhart*, 127 S. Ct. at 1635. What he did not report was that the "contest" pits the overwhelming weight of highly informed medical authority—adopted in specific findings of fact by all three district courts in the cases before the Court—against a set of unsupported and conclusory assertions by doctors who lack either training or experience concerning intact D&E. This is not so much judicial review as rubber-stamp approval. For serious evaluation of the evidence, and citations to the district courts' findings, see *id.* at 1644–46 (Ginsburg, J., dissenting).

179. *Id.* at 1637 (majority opinion). As Justice Ginsburg pointed out, a "significant body of medical opinion" had resisted using such a lethal injection, on the ground of risk to the woman. *Id.* at 1646 n.6 (Ginsburg, J., dissenting).

180. David G. Savage, *Enigmatic Jurist Recasts the Debate on Abortion*, L.A. TIMES, Apr. 22, 2007, at A22 (quoting Nancy Stanwood, a professor of obstetrics at the University of Rochester).

In the near future, another egalitarian challenge to restrictions on abortion will involve state laws and regulations designed to force birth control clinics out of existence by means of overregulation.[181] Women who lack the means to be attended regularly by private doctors need access to clinics in order to make their due process rights, recognized on paper, into a reality. Here, as in *Griswold*, two forms of equality are at stake: women's general claim to equal access to positions in society, and the particular claim of equality for those of limited means. In the late 1990s, South Carolina adopted a set of extremely severe and nitpicking regulations of outpatient abortions in clinics and doctors' offices. The regulations were undoubtedly designed to increase the difficulty of operating a clinic and of performing abortions in a doctor's office, and also to increase the costs of abortion. A federal district judge, after six days of trial, struck down these hostile regulations as an undue burden on women's right of abortion choice. Making a painstaking examination of the record, he detailed his findings in a ninety-four page opinion showing how one after another regulation was pointlessly severe. The Fourth Circuit, by 2–1 vote, reversed without questioning a single one of the trial judge's findings. The court simply asserted that the regulations did not aim "directly" at a woman's abortion choice, but merely made such a decision more costly.[182] This bland and blinkered opinion sharply contrasts with the dissenting judge's trenchant analysis.[183] So, when the case reached the Supreme Court, that Court had in hand two exceptionally careful analyses of the details of the case, and two judges' concurrence in an opinion devoid of any reference to the facts, but featuring glib deference to administrative discretion. The Supreme Court denied certiorari, and it is hard to see why, given the huge burden on the

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181. For a careful study of this problem, see Gillian Metzger, *Abortion, Equality, and Administrative Regulation*, 56 EMORY L.J. 865 (2007).

182. Greenville Women's Clinic v. Bryant, 222 F.3d 157, 170 (4th Cir. 2000), *cert. denied*, 531 U.S. 1191 (2001). The same case generated a second rejection by the Fourth Circuit (also 2–1) of constitutional and other challenges in an opinion that was similarly assertive and dismissive. Greenville Women's Clinic v. Comm'r of S.C. Health & Envtl. Control, 317 F.3d 357 (4th Cir. 2002). I criticized the first Fourth Circuit decision in Kenneth L. Karst, *Poverty and Rights: A Pre-Millennial Triptych*, 16 NOTRE DAME J.L. ETHICS & PUB. POL'Y 399, 406 n.32 (2002).

183. For Judge Hamilton's dissent, see *Bryant*, 222 F.3d at 175. In 2004, the Ninth Circuit explicitly disagreed with the Fourth Circuit's refusal to consider that an increase in the cost of abortions could be an "undue burden" on women's rights of reproductive choice. Tucson Woman's Clinic v. Eden, 379 F.3d 531, 541 (9th Cir. 2004). For an illuminating discussion of these "TRAP laws"—the acronym aptly refers to targeted regulation of abortion providers—see Buchanan, *supra* note 162, at 1291–93.

group of women who need access to a doctor or a clinic and the utter lack of justification for the harsh restrictions. What can "undue burden" mean?

* * *

In the Fourteenth Amendment, "liberty" means equal liberty. The road from *Roe* to *Lawrence* may have been bumpy, but it was well lit. Ironically, the relevance of groups was highlighted in *Bowers v. Hardwick*[184] itself, the decision that *Lawrence* overruled. Writing for a 5–4 majority, Justice White chose to state the issue in *Hardwick* as "whether the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy."[185] Later in his opinion, when he reached the question whether Georgia's law prohibiting sodomy was rational (and thus justified against a due process claim of liberty), his answer was yes. Why? Because the state had authority to enforce moral choices, specifically, a negative view of "the morality of homosexuality."[186] As Janet Halley made clear, this justification moved the inquiry from the right of a group ("homosexuals") to engage in an act (sodomy) to an identity ("homosexuality").[187] Whatever else can be said about homosexuality, it is an identity the Court sees as being shared by a group. Justice Blackmun dissented in *Hardwick*, arguing that the law invaded the freedom of intimate association. Justice Stevens joined the Blackmun dissent, but also dissented separately, pointing out that the state had admitted at oral argument that it would not enforce the law against heterosexual sodomy; in that event, he said, the law would be unconstitutional. He invoked the Declaration of Independence: "'[A]ll men are created equal' . . . must mean every free citizen has the same interest in 'liberty' that the members of the majority share."[188] The majority sought to evade this equal liberties argument in a footnote saying Hardwick had not specified equal protection as a ground for decision. (For want of clairvoyance, he and his counsel had failed to anticipate

184. 478 U.S. 186 (1986).

185. *Id.* at 190.

186. *Id.* at 196.

187. Janet E. Halley, *Reasoning About Sodomy: Act and Identity in and After* Bowers v. Hardwick, 79 VA. L. REV. 1721 (1993).

188. *Hardwick*, 478 U.S. at 218 (Stevens, J., dissenting). In a memorandum to the Conference following oral argument, Justice Stevens said that "[o]nly prejudice supports the distinction" between married couples and gay couples. GREENHOUSE, *supra* note 169, at 150. He went on to say that Hardwick was "a liberty case for me." *Id.*

the state's admission at oral argument.[189]) On the merits of Justice Stevens's point, the majority was silent.

So far, so bad. But *Lawrence* did overrule *Hardwick*. In the interim between the two decisions, there was a considerable amount of gay rights organizing, some of which produced litigation in the lower courts. Surely, however, the most influential of all developments in this "politics of recognition" was an ever-growing wave of decisions by individual lesbians and gay men to "come out," publicly identifying their sexual orientation.[190] These avowals not only liberate individuals from lives of pretense, but also educate their friends and relations—and, in the aggregate, promote group status equality. One who has assumed he or she has never met a gay man,[191] now confronted by a live example in the person of a good friend, must redefine the meanings attached to homosexual orientation. Multiplied by the millions, these redefinitions had produced new attitudes.[192] As Jay Michaelson said three years before *Lawrence*, "*Romer* did not overrule *Bowers*, but America did."[193] Because antagonism toward lesbians and

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189. In oral argument to the Supreme Court, counsel for Michael Hardwick had opted for a strategy emphasizing liberty (a freedom protecting all persons in the bedroom), and deemphasizing the claim that sodomy laws were aimed at stigmatizing a group. 54 U.S.L.W. 3657 (1986).

190. William N. Eskridge, Jr., Lawrence*'s Jurisprudence of Tolerance: Judicial Review to Lower the Stakes of Identity Politics*, 88 MINN. L. REV. 1021, 1033–34 (2004) [hereinafter Eskridge, *Identity Politics*]. "[S]ocial movements reemerge as central [to egalitarian constitutional development], to the extent that they actually change social norms in the country." *Id.* at 1088. On the earliest efforts in the gay rights movement to connect "coming out" and gay claims to equal citizenship, see William N. Eskridge, Jr., *January 27, 1961: The Birth of Gaylegal Equality Arguments*, 58 N.Y.U. ANN. SURV. AM. L. 39 (2001) (issue dedicated to Norman Dorsen).

191. Justice Powell made just such a statement to his clerk while *Bowers v. Hardwick* was before the Court. He did not know the clerk was gay. JOHN C. JEFFERIES, JR., JUSTICE LEWIS F. POWELL, JR. 528 (1994).

192. Strong majorities had said in opinion polls that they oppose employment discrimination on the basis of sexual orientation. More than 90 percent of 319 large American companies surveyed stated in writing that they opposed such discrimination, and two-thirds of them offered health insurance benefits for domestic partners. For survey figures around 2000, see Kenneth L. Karst, *Constitutional Equality as a Cultural Form: The Courts and the Meanings of Sex and Gender*, 38 WAKE FOREST L. REV. 513, 543–44 (2003). More recent surveys show even stronger support for such antidiscrimination attitudes. *See* Mark V. Tushnet, *The Role of Courts in Social Change: Looking Forward?*, 54 DRAKE L. REV. 909, 914 n.16 (2006) (citing polls). Polls like these are useful as general indicators, but they need not be swallowed whole as pictures of public opinion. As for polls specifically inquiring about attitudes toward gay rights, Jane Schacter has suggested some reasons for reserving judgment. Jane S. Schacter, *Sexual Orientation, Social Change, and the Courts*, 54 DRAKE L. REV. 861, 865–68 (2006).

193. Jay Michaelson, *On Listening to the* Kulturkampf*, or, How America Overruled* Bowers v. Hardwick*, Even Though* Romer v. Evans *Didn't*, 49 DUKE L.J. 1559, 1607 (2000). "*Lawrence* is about harms to topical, sociological groups." McGowan, *supra* note 8, at 1344; *see also* Eskridge, *Identity Politics*, *supra* note 190, at 1062–63.

gay men tends to be correlated with one's generation, with younger people tending to be more accepting,[194] this is a form of group subordination that is headed for the ashcan.[195]

The word had reached the Supreme Court by 1996, when it decided *Romer v. Evans*.[196] Gay rights antidiscrimination laws had been adopted by a number of states and local governments, and the Christian Coalition had sponsored a national campaign to repeal those laws. In Colorado, this campaign produced a successful statewide initiative measure to amend the state constitution.[197] Amendment 2 would have repealed all laws and official policies of state and local governments forbidding discrimination on the basis of sexual orientation, and prohibited such official protections in the future. With due process liberty clearly visible in the background, the Supreme Court held Amendment 2 invalid under the Equal Protection Clause.[198] Colorado had deliberately singled out a group of the state's citizens, disqualifying them—as a group—from official protection against discrimination, unless they could go through the arduous process of amending the state constitution.[199]

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194. A 2006 Gallup Poll asked whether homosexual relations should be legal. Only 34 percent of persons sixty-five or older said yes. Among persons aged forty to forty-nine, 49 percent said yes. Among those eighteen to thirty-nine, 63 percent said yes. Similar percentages (slightly decreased) answered yes to the question whether homosexuality was an "acceptable alternative lifestyle." Responses approving official recognition of gay marriage were still lower, but were also correlated with age, from 27 percent approval in the sixty-five-plus group to 51 percent for those eighteen to thirty-nine. Gallup Brain, May 31, 2006, http://brain.gallup.com/content default.aspx?ci=23140 (last visited Oct. 11, 2006) (copy on file with the UCLA Law Review).

195. The same generational difference has been found in the armed forces—perhaps excepting the Marines. See Peter Spiegel & Joel Rubin, *Time Is Changing on Gays in Military*, L.A. TIMES, Aug. 9, 2007, at A1. I do not minimize the continuing harms of antigay attitudes. Every person is condemned to live in his or her own generation; we cannot expect a victim of discrimination to draw much comfort from the probability that, in half a century, that form of discrimination will be behind us.

196. 517 U.S. 620 (1996).

197. The measure passed with 53.4 percent of the vote. On the Christian Coalition's national campaign, see Mark L. Rubenstein, *Gay Rights and Religion: A Doctrinal Approach to the Argument That Anti-Gay Rights Initiatives Violate the Establishment Clause*, 46 HASTINGS L.J. 1585, 1588–89 (1995). On the role of Colorado for Family Values in the campaign for Amendment 2, see ANDREW KOPPELMAN, THE GAY RIGHTS QUESTION IN CONTEMPORARY AMERICA 23–24 (2002).

198. *Romer* illustrates Karlan's stereoscopic thesis. *See* Karlan, *supra* note 2, at 483–88. For a similar view, but proposing a different doctrinal approach, see Julie A. Nice, *The Emerging Third Strand in Equal Protection Jurisprudence: Recognizing the Co-Constitutive Nature of Rights and Classes*, 1999 U. ILL. L. REV. 1209. On *Romer*, see *id.* at 1226–32. On *M.L.B. v. S.L.J.*, 519 U.S. 102 (1996), see Karlan, *supra* note 2, at 1242–48.

199. The amendment process usually requires assent from the state's voters. Statewide yes or no votes tend to disfavor minority groups. This point had been made by Solicitor General Thurgood Marshall at oral argument in *Reitman v. Mulkey*, 387 U.S. 369 (1967). 35 U.S.L.W. 3339 (1967). In a legislature, on the other hand, minority groups can trade votes on many issues, building coalitions for civil rights legislation.

The state had offered no rational explanation for imposing this disadvantage, leading the Court to infer that Amendment 2 simply expressed antigay "animus." Justice Kennedy's opinion for the Court did not distinguish *Bowers v. Hardwick*—or even mention it—although much of the *Romer* opinion bore a strong resemblance to Justice Stevens's dissent in *Hardwick*. The commentary on *Romer* was extensive, with nearly all the writers searching for a reason why *Hardwick* was not cited.[200] Was *Hardwick* still good law?

Seven years later, Justice Kennedy's opinion in *Lawrence* answered that question with a resounding no; the Texas law forbidding homosexual sodomy was invalid. This time, he explicitly took Justice Stevens's equal liberties dissent in *Hardwick* as a guide. He did not adopt equal protection as the ground for *Lawrence*'s holding, but equality was very much in his mind:

> Equality of treatment and the due process right to demand respect for conduct protected by the substantive guarantee of liberty are linked in important respects, and a decision on the latter point advances both interests. If protected conduct is made criminal and the law which does so remains unexamined for its substantive validity, its stigma might remain even if it were not enforceable as drawn for equal protection reasons. When homosexual conduct is made criminal by the law of the State, that declaration in and of itself is an invitation to subject homosexual persons to discrimination both in the public and in the private spheres. The central holding of *Bowers* has been brought in question by this case, and it should be addressed. Its continuance as precedent demeans the lives of homosexual persons.[201]

Mostly, the laws prohibiting sodomy (either homosexual sodomy or all sodomy) were not being enforced by prosecutions or even arrests.[202] Yet, they stood as official state declarations about illegality.[203] Their main function was symbolic: the reinforcement of status subordination for gay men and lesbians. Seventeen years earlier, in oral argument in *Hardwick*, the state's counsel had made this very point when he argued that the Fourth Circuit's decision, invalidating Georgia's sodomy law, had created a danger of "reshuffling" or "reordering" society.[204] The official declarations

200. For an annotated list, see Karst, *supra* note 192, at 548 & nn.194–201, 549 & nn.202–08, 550 & nn.209–16. A good starting place in this large group is Daniel Farber & Suzanna Sherry, *The Pariah Principle*, 13 CONST. COMMENT 257 (1996).

201. 539 U.S. 558, 575 (2003).

202. Hardwick had been arrested; Lawrence and Garner had been prosecuted. Both incidents were unusual even in the states in which they occurred.

203. *See* Eskridge, *Identity Politics*, *supra* note 190, at 1071–72 ("[T]he [Texas] Homosexual Conduct Law was a legal signal that gay people were outlaws.").

204. 54 U.S.L.W. 3657 (1986).

embodied in these laws were not harmless noise; they encouraged discrimination ranging, on the public side, from police harassment to disqualification for adoption, and, on the private side, to discrimination by employers and landlords.[205] It is hard to disagree with Justice Kennedy's conclusion that the equality principle of *Romer* offered "a tenable argument" in *Lawrence*.[206]

The equality discussed in the *Lawrence* opinion is the same as the equality discussed in *Romer*: equality of status for a social group defined by sexual orientation.[207] Yet, the Court rested the *Lawrence* decision not on an equal protection ground, but rather on Fourteenth Amendment liberty—that is, substantive due process.[208] *Hardwick* was thus overruled on its own doctrinal terms. Although the opinion in *Lawrence* neither identified a fundamental interest nor suggested a standard of review that would require the state to offer important or compelling justification for its restriction on liberty,[209] it did insist on some significant justification beyond the moral disapproval of homosexuality that had sufficed in *Hardwick*. A prominent theme in the commentary on *Lawrence* is the Court's refusal to stick closely to categorical distinctions among strict or intermediate or mere rationality judicial scrutiny of laws invading rights or liberties.[210] Some of the commentators see *Lawrence* as part of a recent

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205. Justice Kennedy did not list these forms of discrimination in his opinion, but his concern about public and private discrimination was well founded. Kim Shayo Buchanan has shown how a similar line of argument supports application of *Lawrence*'s equal liberties analysis to laws regulating women's sexuality and maternity. Although such laws may be rationalized as protecting women, they reinforce traditional stereotypes of women's roles. Buchanan, *supra* note 162, at 1296–1301.

206. 539 U.S. at 574. It is easy to imagine that the decision would have been rested on the Equal Protection Clause were it not for the prospect that such an opinion might hasten the arrival of the issue of gay marriage on the Court's docket.

207. *See* Andrew Koppelman, Lawrence*'s Penumbra*, 88 MINN. L. REV. 1171, 1177 (2004) ("*Lawrence* is full of language that demonstrates the Court's concern with the subordination of gays as a group, rather than just the liberty of individuals.").

208. Kenji Yoshino has pointed out, in a preliminary version of a work in progress, that liberty analysis in the style of *Lawrence* has the advantage (over equality analysis) of deemphasizing the divisions among groups in an increasingly pluralized nation, and substituting an appeal to rights that we all can share. A second advantage, he said, is that liberty analysis avoids an essentialist treatment of individual and group identities. Where I have looked at *Lawrence*'s ancestry, Yoshino's persuasive arguments look to the future.

209. *See* Laurence H. Tribe, Lawrence v. Texas*: The "Fundamental Right" That Dare Not Speak Its Name*, 117 HARV. L. REV. 1893 (2004).

210. *See, e.g.*, Karlan, *supra* note 5, at 1450; Cass R. Sunstein, *What Did* Lawrence *Hold? Of Autonomy, Desuetude, Sexuality, and Marriage*, 2003 SUP. CT. REV. 27, 45–52.

trend away from such categories in the contexts of both equal protection and substantive due process.[211]

The recent trend thus identified is a matter of form. As for substance, nothing recent has made an important change in what the Court is doing. The identification of categories of judicial scrutiny, from its beginnings in the days of the Warren Court, has never controlled the Supreme Court's decisions. Mainly, it has served to offer assurance—to the public, and even to wavering Justices—that the Court was not "legislating," but merely following rules. In 1969, I suggested that despite the emerging rhetoric of categories, the actual decision of cases had resulted from an exceedingly fluid inquiry in which the level of justification demanded of the government varied with the importance of the interests invaded and the degree to which the government had imposed burdens on disadvantaged groups.[212] A few years later, Justice Marshall, dissenting in *San Antonio Independent School District v. Rodriguez*,[213] argued that the majority's recitation of categories did not accurately describe the Court's practice, which had amounted to a "spectrum" of standards of review with the intensity of judicial scrutiny depending on the importance of the constitutional interests adversely affected and the invidiousness of the classification.[214] He was right then, but the categories survived, ornamenting opinions even though decisions were reached in the manner that Marshall had described.[215]

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211. *See, e.g.*, Michael A. Scaperlanda, *Illusions of Liberty and Equality: An "Alien's" View of Tiered Scrutiny, Ad Hoc Balancing, Governmental Power, and Judicial Imperialism*, 55 CATH. U. L. REV. 5, 6 (2005). David D. Meyer, *A Privacy Right to Public Recognition of Family Relationships? The Cases of Marriage and Adoption*, 51 VILL. L. REV. 891, 913–18 (2006), suggests that the Court had been abandoning its categories of judicial scrutiny in "family privacy" cases as early as *Moore v. City of East Cleveland*, 431 U.S. 494 (1977). *See also* David D. Meyer, *The Constitutionality of "Best Interests" Parentage*, 14 WM. & MARY BILL RTS. J. 857, 875–80 (2006).

212. Karst, *supra* note 89, at 739–49 and *passim*; *see also Developments in the Law—Equal Protection*, 82 HARV. L. REV. 1065 (1969).

213. 411 U.S. 1 (1973).

214. *Id.* at 98–99 (Marshall, J., dissenting).

215. As for substantive due process, ample illustration is found in the decisions discussed at length in this Article. As for equal protection, consider *Craig v. Boren*, 429 U.S. 190 (1976). Then compare *Graham v. Richardson*, 403 U.S. 365 (1971), with *Foley v. Connelie*, 435 U.S. 291 (1978), and compare *Mills v. Habluetzel*, 456 U.S. 91 (1982), with *Clark v. Jeter*, 486 U.S. 456 (1988). An especially vivid example is *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432 (1985). Compare *Cipriano v. City of Houma*, 395 U.S. 701 (1969), with *Salyer Land Co. v. Tulare Lake Basin Water Storage District*, 410 U.S. 719 (1973). Finally, compare *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, with *Plyler v. Doe*, 457 U.S. 202 (1982).

In teaching first-year law students about the standards of review, I have often quoted the motto of my colleague, Ken Graham: "The law is not hard to understand. It's just hard to believe."

The "spectrum" is a metaphor for a truism that always characterizes the practice of judicial review: You can't take the judgment out of judging.[216]

Justice Kennedy's *Lawrence* opinion renewed the Court's support for the freedom of intimate association. Sodomy laws, he said, touched upon

> the most private human conduct, sexual behavior . . . . The statutes do seek to control a personal relationship that, whether or not entitled to formal recognition in the law, is within the liberty of persons to choose without being punished as criminals . . . . When sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring. The liberty protected by the Constitution allows homosexual persons the right to make this choice.[217]

In this passage, Justice Kennedy echoes Justice Blackmun's *Hardwick* dissent, without citing it. Justice Stevens, who joined the Kennedy opinion, later commented that in *Lawrence*, Justice Blackmun's "eloquent dissent in *Bowers v. Hardwick* . . . became law."[218] Justice O'Connor, who had joined the majority in *Hardwick*, did not vote to overrule it in *Lawrence*, but concurred on an equal protection ground because the Texas law explicitly punished only homosexual (but not heterosexual) sodomy.[219]

Another important feature of the *Lawrence* opinion is that it wrote into the law of due process a view that Justices O'Connor and Kennedy expressed in *Michael H. v. Gerald D.*[220] In *Michael H.*, Justice Scalia's plurality opinion denied a substantive due process claim and upheld California's law conclusively presuming that a child born during a couple's marriage is the child of the woman's husband.[221] In the course of his opinion, Justice Scalia elaborated at length on his view that a liberty should be held "fundamental" only when it is "an interest traditionally protected by our society."[222] In a footnote, he specified that the relevant tradition was one defined at "the most specific level" of generality—here,

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216. The same truism describes the Justices' actual assignments of weight to precedent, whatever they may say about the subject in their opinions. For a recent demonstration, see Daniel A. Farber, *The Rule of Law and the Law of Precedents*, 90 MINN. L. REV. 1173 (2006).

217. Lawrence v. Texas, 539 U.S. 558, 567 (2003).

218. John Paul Stevens, *Learning on the Job*, 74 FORDHAM L. REV. 1561, 1563 (2006).

219. Given Georgia counsel's concession at oral argument in *Hardwick* that the law would be applied only to homosexual sodomy, one might suggest that the cases were not distinguishable on an equal protection theory. But Justice O'Connor was seeking only to distinguish *Lawrence* from what the Court said in *Hardwick*.

220. 491 U.S. 110 (1989).

221. This presumption was decisive even though the claim of paternity by another man (Michael H.) was supported by a blood test that established the claim by a 98 percent probability.

222. *Michael H.*, 491 U.S. at 122.

"the rights of an adulterous natural father."[223] Justices O'Connor and Kennedy concurred in the Scalia opinion, but they specifically noted their disagreement with the standard in the quoted footnote.[224] In *Lawrence*, Justice Kennedy expressed deep skepticism about the "history" deployed in *Hardwick*, and then added the clincher: "[W]e think that our laws and traditions in the past half century are of most relevance here" and those sources show "an emerging awareness" of the importance of the liberty at stake.[225] The claim of liberty in *Lawrence* makes clear what would lie in store for the members of historically subordinated groups if the Court were to stick to Justice Scalia's view, requiring those who challenge official action to locate their claim within a longstanding tradition of liberty, defined at "the most specific level" of generality. This judicial petrification of tradition would mean that a subordinated group would be condemned to remain in its subordinate status until the dominant political majority deigned to confer status equality. If the timeworn maxim is made rigid—if "old process is due process" forever—subordinated groups are in serious trouble. Justice Kennedy's reading of due process offers them hope.[226]

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Those who endure the harms of group subordination have never bought into the cliché that asserts an inherent "tension" between liberty and equality.[227] *Lawrence* takes its place as the archetypal modern example of the relevance of equal citizenship values to due process decisionmaking. Robert Post rightly concluded that the "moral center" of the opinion was occupied by the themes of respect and stigma.[228]

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223. *Id.* at 127 n.6.

224. *Id.* at 132 (O'Connor, Kennedy, JJ., concurring).

225. Lawrence v. Texas, 539 U.S. 558, 571–72 (2003).

226. On "the growing and evolving roots of tradition," see Nancy C. Marcus, *Beyond* Romer *and* Lawrence*: The Right to Privacy Comes Out of the Closet*, 15 COLUM. J. GENDER & L. 355, 392–98 (2006). Daniel Conkle sees the *Lawrence* opinion as exemplifying a nascent "theory of evolving national values" that deserves explicit recognition as one way to identify unenumerated rights worthy of protection in the name of substantive due process. Daniel O. Conkle, *Three Theories of Substantive Due Process*, 85 N.C. L. REV. 63, 128–45 (2006). If you have limited time for reading on the subject, these two works are the ones to choose.

227. It is possible to posit a case in which an equality claim by A conflicts with a liberty claim by B, but even in such a case—hate speech regulation, for example—the interests on both sides can be described in terms of liberty or equality or both. Surely the choice of labels should not determine such a case's outcome.

228. Post, *supra* note 6, at 97.

Libertarians may be too optimistic when they find a strong and generalized "presumption of liberty" in *Lawrence*.[229] For example, there is no reason to assume that a Supreme Court majority is now prepared to give constitutional status to the concerns of poor and working class women about access to the means of reproductive choice. But surely today's substantive due process does require the government to offer persuasive justification for an invasion of liberty that stigmatizes an identifiable social group, denying its members the status of respected equal citizens.[230] Interestingly, this very point—the centrality of group subordination in the *Lawrence* opinion—suggests the sort of doctrinal "stopping place" that typically needs to be proposed in order to persuade the Supreme Court to validate any claim of equality,[231] or any claim of liberty,[232] or (perhaps especially) any claim of equal liberty.[233] I doubt that the five Justices who joined in Justice Kennedy's opinion—or, for that matter, Justice O'Connor—would

229. *See* Barnett, *Revolution*, *supra* note 35, at 35. Of course, Barnett did not define "liberty" as a wide-ranging freedom to do anything one might want to do. Instead, he stated: "Liberty is and always has been the *properly defined* exercise of freedom. Liberty is and always has been constrained by the rights of others." *Id.* at 37. And the idea that *Lawrence* opens the door for free-swinging judicial expansion of due process liberties is hard to accept. *See* Dale Carpenter, *Is* Lawrence *Libertarian?*, 88 MINN. L. REV. 1140 (2004); Eskridge, *Identity Politics*, *supra* note 190, at 1082–90. Nan Hunter has concluded that *Lawrence* even leaves open a significant number of opportunities for antigay lawmaking. Nan D. Hunter, *Sexual Orientation and the Paradox of Heightened Scrutiny*, 102 MICH. L. REV. 1528 (2004).

230. One exception to this statement deserves notice. The *Lawrence* opinion makes clear that the Court is not associating itself with the position that would extend the right to marry to lesbian and gay couples. 539 U.S. at 578. Such an extension of *Lawrence* does seem inevitable in the long run, but for the immediate future it is on hold, and the music you hear is not from *Lohengrin*.

231. *See, e.g.*, Washington v. Davis, 426 U.S. 229, 248 (1976) (giving a specific warning against a principle of equal protection that would have a reach too extensive for courts to manage).

232. *See, e.g.*, Roberts v. U.S. Jaycees, 468 U.S. 609, 618–20 (1984) (providing careful delineation of the reach of the freedom of intimate association).

233. For example, after *Lawrence*, the Eleventh Circuit upheld an Alabama law prohibiting the sale of various sex devices. Williams v. Att'y Gen. of Ala., 378 F.3d 1232 (11th Cir. 2004), *reh'g en banc denied*, 122 Fed. Appx. 988 (11th Cir. 2004). This decision was vigorously criticized in Donald H.J. Hermann, *Pulling the Fig Leaf Off the Right of Privacy: Sex and the Constitution*, 54 DEPAUL L. REV. 909, 951–69 (2005). Yet, the Supreme Court's denial of certiorari in *Williams v. King*, 543 U.S. 1152 (2005), suggests that, for now, the Court has located a doctrinal stopping place. It is (barely) conceivable that, one day, users of sex devices may find recognition as a social group that has been subjected to governmental subordination, but that day seems far away. For criticism of *Williams*, and further discussion of *Lawrence*'s varying effects in state and lower federal courts, see Buchanan, *supra* note 162, at 1250–54, 1276–80.

agree that *Lawrence* "represents the final dissolution of meaningful legal constraints on substantive due process."[234]

Undoubtedly, the decision is one of major importance, reinforcing a "regime shift" in American identity politics.[235] Even so, it is not unique. *Lawrence* stands at the pinnacle of a huge doctrinal edifice, built over the course of a century, in which concerns about group subordination have contributed to a notable development in the law of substantive due process. Today, the results of that development are plainly visible in a principle of equal liberties.

234. Lund & McGinnis, *supra* note 4, at 1614.
235. Eskridge, *Identity Politics*, *supra* note 190, at 1040–41.