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FROM IMMUTABLE TO EXISTENTIAL: PROTECTING WHO WE ARE AND WHO WE WANT TO BE WITH THE “EQUALERTY” OF THE SUBSTANTIVE DUE PROCESS CLAUSE

AARON J. SHULER

INTRODUCTION

Liberty and equality are the two cornerstones of democracy in a free republic. The concepts are interrelated and often work together, although they are distinct in certain aspects and not mutually inclusive. The United States Supreme Court has employed the two ideas, both based in clauses of the Fourteenth Amendment to the United States Constitution, to protect its minority populations from a majority’s capability to oppress minorities in a democracy. Scholars have written about the duality of the doctrines and


2 While majorities can effectuate their will through the legislature, “it is the particular role of courts to hear [marginalized] voices, for the Constitution declares that the majoritarian chorus may not alone dictate the conditions of social life. The Court thus fulfills, rather than disrupts, the scheme of separation of powers.” McCleskey v. Kemp, 481 U.S. 279 (1987) (Brennan, J., dissenting), citing Stone, Harlan Fiske, The Common Law in the United States, 50 Harv. L. Rev. 4, 25 (1936). But see Commager, Henry Steele, Majority Rule and Minority Rights 80 (1943) (Arguing that legislatures are more protective of minority rights than Courts) and Corwin, Edward S., Constitutional Revolution, Ltd., 115 (1941) (Rights are better fully realized in legislatures as opposed to Court interventions).

3 Both equal protection and substantive due process “play a central role in protecting marginalized social groups from the tyranny of local majorities.” Gans, David H., The Unitary
described how they have worked in tandem, although many academics have focused on, or outright called for, a preference for the use of the equal protection clause.\(^4\)

Another contingent of the academic community, however, has discussed the favored use of substantive due process in the last fifty years in providing equal treatment for all groups\(^5\) by ferreting out discrimination against marginalized minorities. Scholars have also separately alluded to substantive due process’ ability to protect the most existential of liberties. This work seeks to combine the two observations and further illuminate substantive due process’ use in both equality and liberty matters under an “equalerty” approach. It will trace the use of substantive due process from its modern roots of protecting personal rights for minorities to the present application as a doctrinal basis that has shown to be superior to equal protection. This work will attempt to demonstrate that the substantive due process clause has worked to ensure equal treatment for what we already are: black, woman, gay, and further, that it has the capacity to preserve the liberty to define who we want to be: mother, wife, Catholic.

Part I will briefly discuss the origin and foundations for the idea that citizens enjoy certain rights that cannot be infringed upon by the government. It will review the struggle to define those rights and the difficulty in mooring them to a textual basis in the Constitution, concluding by arguing that the substantive due process clause has emerged as the most effective doctrine in protecting liberty and equality. Part II will trace the development of the substantive due process clause from pre-New Deal economic liberties to the early protection of personal liberty and equality, specifically with respect to Catholics in the 1920’s. It will attempt to demonstrate that liberty and equality have been wedded in substantive due process analyses dating back to the doctrine’s initial demise. Part III will survey and analyze the major cases in the second half of the twentieth century that have resuscitated substantive due process while contracting equal protection. Highlighting the use of substantive due process in the cases of women and blacks in the 1960’s and 1970’s, and homosexuals in the present decade, Part III will conclude by illustrating how an ambiguous and historically troubled doctrine once thought to have been repudiated to

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\(^5\) “The rule of law, evenly applied to minorities as well as majorities, to the poor as well as the rich, is the great mucilage that holds society together.” Papachristou v. City of Jacksonville, 405 U.S. 156, 171 (1972) (Douglas, J.).
the point of constitutional illegitimacy, has come to provide liberty and equality for the most vulnerable in life’s most intimate and profound matters.

I. ORIGINS OF THE IDEA: IMPLIED, UNENUMERATED AND OXYMORONIC

The Fourteenth Amendment to the United States Constitution, ratified on July 9, 1868, in the wake of the American Civil War, declares that no State shall “deprive any person of life, liberty, or property, without due process of law.” Recent scholarship has declared that it was designed to protect “certain fundamental rights stemming from federal citizenship against encroachment by all branches of state governments.” Specifically, its main aim at the time of passage was to ensure that recently freed slaves enjoyed the same privileges as their fellow citizens. The Amendment was to protect the immutability of their race by affording them the same rights (the equality), as well as to unshackle them from slavery, enabling them to determine the course of their own lives (the existential). In the last half-century the utility and scope of the Fourteenth Amendment has greatly expanded beyond newly freed blacks, to touch on equality and existential matters for a host of different minority groups.

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8 As well as already free but nevertheless oppressed blacks throughout the country.
9 The Fourteenth Amendment was to work in concert with the Thirteenth Amendment, which formally abolished slavery, as well as the Fifteenth Amendment, which provided for voting rights. Collectively, the 13th, 14th and 15th Amendments are known as the Reconstruction Amendments.
10 See Gans, The Unitary Fourteenth at 932-33 (“slavery dictated the roles slaves could serve...while the Fourteenth Amendment [gave] them all the rights inherent in citizenship and empower[ed] them to make decisions about the roles they would play in a reconstructed nation.”) (emphasis added)
11 See again Id. at 914-15, praising Framers of the Fourteenth Amendment for leaving the Amendment free from enumeration or exceptions to enable it to endure and adapt to future ages.
The concept of due process dates back much further, however, than its enshrinement in the Constitution. The doctrine’s development in the United States, both before and after its appearance in the Fourteenth Amendment, has led to the understanding that it consists of two parts: procedural and substantive. Procedural due process ensures that an individual is afforded meaningful court processes before her life, liberty or property is taken. Substantive due process has evolved into a doctrine that protects individual rights not specifically listed in the text of the Constitution against State encroachment, no matter how democratically enacted. The name "substantive due process" then is misleading, or even contradictory, considering that no amount of process—due or otherwise—can extinguish certain rights. Moreover, the concept can work against...


15 While the 14th Amendment prohibits States from infringing upon a person’s procedural and substantive due process rights, the 5th Amendment is directed at the Federal Government. Guarantees from both date back to protection against arbitrary action from the King in the Magna Carta. Ely, James W., Jr., The Oxymoron Reconsidered: Myth and Reality in the Origins of Substantive Due Process, 16 Const. Commentary 315 (1999).

16 The term “substantive due process” is thought to have been first used in 1948. Brown, Rebecca, Liberty, the New Equality, 77 N.Y.U. L. Rev. 1491 (2002) (Footnote 22) (emphasis added), citing Republic Natural Gas Co. v. Oklahoma, 334 U.S. 62, 90 (1948) (Rutledge, J., dissenting) (“The basic question here is really one of substantive due process.”); See also again generally Ely, James, Oxymoron. The concept under a different name—or no name at all—goes back much further, including in the infamous decision of Dred Scott v. Sandford, 60 U.S. 393 (1857) (Chief Justice Taney holding that “[a]n act of Congress which deprives a citizen of the United States of his liberty or property, merely because he came himself or brought his property into a particular Territory of the United States, and who had committed no offense against the laws, could hardly be dignified with the name of due process”). But see Ely, James, Oxymoron at 318 (use of doctrine goes back much further than Dred Scott, repudiating Professor Bork’s assertion that Dred Scott is “the fountainhead of substantive due process”). Other arguments based in substantive due process before the Civil War and the passage of the Fourteenth Amendment inverted Justice Taney’s conception and argued that “slavery was a deprivation of liberty without a proper basis in law (such as conviction for crime).” Sullivan, Kathleen M. and Gunther, Gerald, Constitutional Law, Sixteenth Edition at 364). Thomson West (2007).

17 See generally Ely, John Hart, Democracy and Distrust 18 (1980) (referring to substantive due process as on par with saying “green pastel redness”); Bork, Robert H., The Tempting of America: The Political Seduction of the Law 31 (Free Press, 1990) (describing substantive due process as a “momentous sham”); Posner, Richard A., Ellis v. Hamilton, 669 F.2d. 510 (7th Cir. 1982) (referring to substantive due process as that “ubiquitous oxymoron”). And contrast again with Ely, James, Oxymoron at 320, arguing that the notion of due process having both a procedural and
processes, including democratic ones, to ensure equal treatment and root out democratically enacted biases—intentional or not—as well as to carve out areas of existential determination for individuals beyond the reach of government. It can further work to ensure that those areas are afforded all citizens regardless of how insular or marginalized those citizens may be due to a particular trait or characteristic. Despite substantive due process’ ambiguous language, it nevertheless is thought to give the due process clause a substantive component that encompasses unenumerated—fundamental or something akin to fundamental—rights.

The notion of fundamental rights in the United States, like due process, has been around since the country’s inception, including appearing in the nation’s founding document. Calder v. Bull was the first decision of the United States Supreme Court that discussed the idea of “implied rights.” Howard Gillman writes that these “implied” or unenumerated rights have always been controversial, but even as early as Calder, Justice Chase wrote about “certain vital principles in our free Republican governments that were not expressly restrained by the Constitution.” Justice Chase refused to “subscribe to the omnipotence of a State Legislature,” or accept that “it is absolute and without control.” In Fletcher v. Peck, another early case that considered vested rights not enumerated in the Constitution, Justice Marshall alluded to these substantive component goes all the way back to 1215 England.

18 The idea that the due process clause—a doctrine primarily associated with liberty—has an equality component has been written about by, amongst others, Hannis Taylor, who argues that “the generality and equality of laws, as a necessary part of due process, is purely an American creation...that existed long before the adoption of the Fourteenth Amendment.” Due Process of Law and the Equal Protection of the Laws 297 (1917).

19 The Court’s experience in discerning, declaring and explaining the nature of rights—fundamental or otherwise—has been as muddled as its adventures in clarifying the substantive due process doctrine, unsurprising considering the two areas overlap greatly. This work will discuss many of the fundamental rights cases but it will not specifically broach the topic in a descriptive or normative manner.


21 The Declaration of Independence specifically mentions “inalienable rights.”

22 3 U.S. 386 (1798).


24 Calder at 4-6. See also Sullivan at 363.

25 10 U.S. 87 (1810).
“unwritten constitutional principles.”26 Finally, Corfield v. Coryell 27 is thought to be the first decision to explicitly use the term “fundamental rights” in the American constitutional tradition.28 Justice Washington’s Corfield opinion explained that these fundamental rights belonged to citizens of free government; although unenumerated, they could be described as, among other things, “the enjoyment of life and liberty” and considered to be “privileges and immunities.”29

After the Court’s early and uncertain substantive due process jurisprudence exemplified by Calder, advocates of the preservation and protection of fundamental rights sought to ground their arguments in the Constitution, despite the lack of express textual support within the document itself. Initially it was thought that unenumerated rights would find refuge in the Privileges and Immunities Clause of the Fourteenth Amendment.30 However, the The Slaughterhouse Cases31 decision rejected and effectively ended this idea over Justice Bradley’s dissent,32 arguably stripping the Fourteenth Amendment of one of its primary purposes.33 Despite rejection of the Privileges and Immunities Clause as a home for substantive due process arguments,34 the doctrine continued to be utilized, based in the Fourteenth Amendment generally.35 The use of the Ninth

26 Gillman, Regime Politics at 110.
27 6 F.Cas. 546, 551-52 (C.C.E.D.Pa.1823).
29 Vogel, Rhetorical Art at 1479. The privileges and immunities referred to in this particular opinion being from Article IV of the Constitution as opposed to that of the Fourteenth Amendment.
30 “No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States.” See Park, Defining One’s Own Concept at 841-43 (Representative John Bingham, author of the Fourteenth Amendment, “used the words privileges and immunities as a shorthand description of fundamental or constitutional rights that state legislatures could not abridge,” citing Barnett, Randy E., Restoring the Lost Constitution: The Presumption of Liberty 60 (2003). This is again in contrast to the Clause found in Article IV §2, which reads: “The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.”
31 83 U.S. 36 (1873).
32 Justice Bradley argued that a citizen’s right to choose was an element of liberty that could not be arbitrarily assailed.
33 Karst, Liberties of Equal Citizens at 105-07. See also Park, Defining One’s Own Concept at 843-44 (Slaughter-House Cases “eviscerated” Privileges and Immunities Clause).
34 Saenz v. Roe, 526 U.S. 489 (1999) breathed some new life into the clause but it has yet to—and likely never will—fulfill what many considered to be its equal citizenship purpose. See Gans, David H., The Unitary Fourteenth at 908-09.
35 See e.g. Budd v. New York, 143 U.S. 517 (1892) (“The paternal theory of government is to me odious. The utmost possible liberty to the individual, and the fullest possible protection to him
Amendment’s catchall language reserving rights not expressly given to the Federal Government for the people appealed to some but never enjoyed an abundance of support. The substantive due process clause of the Fourteenth Amendment, the clause immediately following the Privileges and Immunities Clause, however, would later stand in its place to guarantee those rights. It would do so despite initially being used to preserve the status quo of laissez-faire economics, (most notably in *Lochner v. New York*, a theory and use later repudiated during the New Deal, which cast doubt over the clause’s future legitimacy.

The use of substantive due process has been highly controversial for many reasons. Debates started in *Calder* continue today over a variety of issues: whether there are unenumerated rights—fundamental or something tantamount—guaranteed by the Constitution; if so, how to discern what is fundamental and protected as opposed to what can be regulated by the State; whether these rights evolve or are fixed in a particular time; how to define the scope of the right; where exactly Constitutional support can be found within the document for these rights; and the role of the Court in managing this ambiguous concept. As a general, if still unsatisfying answer for many scholars, substantive due process seeks to protect those rights of persons from the government that are so important as to “rank as fundamental without which neither liberty nor justice could exist.”

Moreover, laws that ostensibly promote dubious State interests that are vastly outweighed by individual interests will be deemed “arbitrary and unreasonable, purposeless restraints” and struck down accordingly.

In the later half of the twentieth century, the substantive due process
clause would take on another important, though more discrete use. Beyond
the recognition of unenumerated rights, the clause would shore up equal
protection, another indispensable doctrine for protecting minority rights
found in the Fourteenth Amendment, but severely weakened by the Court
in the 1970’s and 1980’s. This was due to the Court giving the clause a
deontological focus, most notably in Washington v. Davis,\(^42\) that was
unable to address laws that resulted in minorities suffering a disparate
impact whether discrimination was intentional or not. Unless a statute was
facially discriminatory or an invidious intent could be readily discerned,
equal protection could not address disparate effects from State legislation,
leaving already marginalized minorities without recourse. Darren Lenard
Hutchinson writes that this interpretative limitation has “by design or
effect” inverted the concepts of privilege and subordination to strip
minorities of a major tool in the pursuit to level the playing field.\(^43\)

Starting with Meyer v. Nebraska\(^44\) in 1923, during the initial heyday
of substantive due process in the area of economic liberty, the Court struck
down laws discretely targeting minorities under the guise of protecting a
fundamental right through the substantive due process clause. This practice
would resume after substantive due process was rehabilitated from an
initial stigma associated with judicial highhandedness in economic cases
and was used to protect personal rights when a newly weakened equal
protection could not act. A revitalized substantive due process clause,
working in the place of a weakened equal protection clause in the second
half of the twentieth century, was the inverse of what had transpired in the
first half of that century. Substantive due process, freshly repudiated and
tainted with Lochner’s invalidation, made judges reluctant to employ the
document. Instead, they resorted to the equal protection clause in cases
arguably calling for a liberty analysis.\(^45\) Before addressing substantive due
process’ history, however, a brief look at the equal protection clause is
necessary. Equal protection is not tainted with the same historical stigma
as substantive due process, nor is it as textually ambiguous, yet the modern
Court has weakened it while emboldening the much more oblique
substantive due process clause.

\(^{42}\) 426 U.S. 229 (1976).
\(^{43}\) Hutchinson, Darren Lenard, Unexplainable on Grounds other than Race: The Inversion of
\(^{44}\) 262 U.S. 390.
\(^{45}\) See e.g. infra, Skinner, sterilization laws for certain types of criminals being struck down in
1942 under equal protection grounds instead of a fundamental right to procreate guaranteed by
substantive due process.
A. Why Equal Protection is Not Enough for Equality

Although there has been an increase in scholarship about the relationship between the liberty of substantive due process and the equality of equal protection, particularly after Lawrence v. Texas, the relationship is hardly new. Kenneth Karst notes that the interplay between liberty and equality goes back at least to Aristotle, who asserted that both values were essential components in a democracy, equality being “one note of liberty which all democrats affirm to be the principle of their state.”

Rousseau’s Social Contract, articulated shortly before the American Revolution, continued the emphasis of equal enjoyment of the same rights, inspiring a demand by the Colonists that the Crown provide them the “rights of Englishmen.” The Declaration of Independence may have enshrined this demand, but after achieving the “rights of Englishmen” for themselves, the Colonists were as obstinate and even more exclusionary than King George in denying the same enjoyment of rights to those outside circles of power, viz., anyone who was not white, male, property holding and, to a great extent, Protestant.

It is not such a complicated idea that, if you are going to establish something as an inviolable liberty, equality demands that you allow everyone to enjoy it. Justice Jackson had a simple in theory but unrealistic in practice idea about enforcing the concept. He wrote:

“[T]here is no more effective practical guaranty against arbitrary and unreasonable government than to require that the principles of law which officials would impose upon a minority be imposed generally. Conversely, nothing opens the door to arbitrary action so effectively as to allow those officials to pick and choose only a few to whom they will apply legislation and thus to escape the political retribution that might be visited upon them if larger numbers were affected.”

Justice Jackson preferred the use of equal protection to pursue this goal. He noted in Railway that the Court has used two clauses of the Fourteenth Amendment to invalidate legislation but that equal protection was more judicious because, unlike substantive due process, it did not completely withdraw the matter from the legislature. Equal protection “does not disable any governmental body from dealing with the subject at

Comment [BL1]: First instance of citation requires full-cite.
hand." 51 It simply requires that the legislature provide "a reasonable differentiation fairly related to the object of the regulation." 52

Cass Sunstein also favors such an incremental approach to the equal protection clause. 53 He describes the substantive due process clause as a backward looking device that defends long protected rights against momentary, aberrant majorities straying from tradition. It "restrict[s] short-term or shortsighted deviations from widely held norms, protecting tradition against passionate majorities" and "provid[es] a sober second thought." 54 The equal protection clause, in contrast, is forward looking, dismantling engrained prejudices. The two clauses are related, but “operate along different tracks.”

Given the difficulties in expanding and protecting both liberty and equality, Rebecca Brown has advocated a modern version of what James Madison termed a “communion of interests.” 56 Madison’s phrase signifies “[government representatives] accord[ing] positive value to the interests of all constituents and by subjecting themselves to the burdens they impose on others,” a sentiment later echoed by, among others, Justices Jackson, 57 Stevens 58 and Kennedy. 59 Simply put, Professor Brown describes the principle as an admonition to legislatures: “Make any rules you want, as long as they apply to everyone.” 60 She further cites Justice Jackson’s explanation as to why equal protection is the more appropriate doctrine to accomplish this, noting that “[i]nvalidation of a statute or an ordinance on due process grounds leaves ungoverned and ungovernable conduct which many people find objectionable. Invocation of the equal protection clause,

51 Id. at 112.
52 Id.
54 Id. at 1171-74.
55 Id. at 1163.
57 Railway Express Agency, Inc. (Jackson, J., concurring).
58 Bowers, (Stevens, J., dissenting).
59 Lawrence.
60 Brown, Liberty, the New Equality at 1493. Justice Scalia, in his exhortations in favor of equal protection instead of substantive due process, has written that “[o]ur salvation is not the due process clause, but the equal protection clause, which requires the democratic majority to accept for themselves and their loved ones what they impose on you and me.” Cruzan v. Dir., Missouri Department of Health, 497 U.S. 261, 300 (1990) (Scalia, J., concurring). Justice Scalia, as will be discussed below, takes a very narrow, literal view of “the same impositions” that neglects to consider the heterogeneous nature of American society.
on the other hand, does not disable any governmental body from dealing with the subject at hand. Foreclosing regulation altogether through the Court, as opposed to insisting it is equally administered, raises more problems, specifically charges of being antithetical to democracy. This has led to what Professor Brown explains as liberty assertions being construed as “trumps” against majority decisions. The Court has been wary about these countermajoritarian charges, particularly in the wake of the *Lochner* backlash, as well as during substantive due process’ revival in the second half of the twentieth century.

These “trumps” against the democratic will can be understood as the inviolable or fundamental rights discussed in the *Calder*, *Fletcher* and *Corfield* cases, later developed in existential matters in cases such as *Meyer*, *Pierce*, *Roe v. Wade* and *Planned Parenthood v. Casey*. The equalery of substantive due process, the component resembling Madison’s communion of interests and Justice Jackson’s version of the Golden Rule, has not been as controversial when expressed through the equal protection clause as opposed to cases relying on substantive due process that completely foreclose certain existential matters from State regulation. That does not mean, however, that invalidating discriminatory laws through the equal protection clause or through the equalery component of substantive due process is not without controversy as Professor Brown

61 *Railway* (Jackson, J., concurring)
63 But see again Hutchinson, *The Majoritarian Difficulty*, infra.
64 Griswold (“It would be most irksome to be ruled by a bevy of Platonic Guardians, even if I knew how to chose them, which I assuredly do not.”) (Black, J., dissenting), citing Hand, Learned, *The Bill of Rights; Casey*, (Scalia, J., dissenting, accusing an Imperial, Nietzschean Judiciary of supplanting the will of the majority with its own moral and value judgments).
65 10 U.S. 87 (1810).
66 10 U.S. 87 (1810).
67 6 F.Cas. 546 (C.C.E.D.Pa.1823).
68 262 U.S. 390 (1923).
69 268 U.S. 510 (1925).
70 410 U.S. 113 (1973).
suggests\(^{73}\) when she notes that “\textit{Brown [v. Board of Education]} became a paradigm of the courts doing something right, just as \textit{Lochner} was a paradigm of the courts doing something wrong.”\(^{74}\) \textit{Brown} was far from universally accepted despite its 9-0 vote. Chief Justice Rehnquist was one of many who thought \textit{Brown} was wrongly decided, articulating as to why in a memorandum written while serving as a law clerk for Justice Jackson of all people. The then clerk Rehnquist wrote:

“I realize that it is an unpopular and unhumanitarian position, for which I have been excoriated by 'liberal' colleagues but I think \textit{Plessy v. Ferguson}\(^{75}\) was right and should be reaffirmed.... To the argument ... that a majority may not deprive a minority of its constitutional right, the answer must be made that while this is sound in theory, in the long run it is the majority who will determine what the constitutional rights of the minority are.”\(^{76}\)

Despite calls for equal protection’s use in place of substantive due process for both equality and existential matters, equal protection began to make way for substantive due process after equal protection’s apex during the Warren Court.\(^{77}\) This fade began as the Burger Court confronted the civil rights activism of the 1950’s and 1960’s.

\(^{73}\) While suggesting that equal protection analysis is accused of being antithetical to democracy less frequently than substantive due process and that \textit{Brown} is universally acclaimed now, Professor Brown does make a reference in a footnote to how contentious \textit{Brown} was at the time it was decided, \textit{citing} Hand, Learned, \textit{The Bill of Rights} 54-55 (1958) (criticizing the Court for reappraising values at stake in segregation policy and thus inappropriately overruling legislative judgments of states); Bickel, Alexander M., \textit{The Original Understanding and the Segregation Decision}, 69 Harv. L. Rev. 1, 58-59 (1955) (discussing how Court confronted history of Fourteenth Amendment that showed clear congressional purpose to permit segregation); Black, Charles L., \textit{The Lawfulness of the Segregation Decisions}, 69 Yale L.J. 421, 424 (1960) (defending the Court on ground that state segregation laws were intentionally and inevitably discriminatory). (citations omitted)


\(^{75}\) 163 U.S. 537 (1896) (Separating people solely on account of race [in public accommodation] does not violate the equal protection clause of the Fourteenth Amendment).

\(^{76}\) Rehnquist, William, \textit{A Random Thought on the Segregation Cases}, S. Hrg. 99-1067, Hearings Before the Senate Committee on the Judiciary on the Nomination of Justice William Hubbs Rehnquist to be Chief Justice of the United States (July 29, 30, 31, and August 1, 1986).

\(^{77}\) See Lupu, Ira C., \textit{Untangling the Strands of the Fourteenth Amendment}, 77 Mich. L. Rev. 981, 991-97 (discussing the “emergence of equal protection activism”).
B. The Gutting of the Equal Protection Clause

The Equal Protection Clause of the United States Constitution, also found in the Fourteenth Amendment, provides that “no state shall deny to any person equal protection of the laws.” While the general impetus behind the passage of the clause was the need to protect black Americans against discriminatory State action in the wake of the Civil War, what specifically constitutes a violation has a variety of interpretations. Some scholars have advocated for the equal protection doctrine to extend to “imposing upon governments an affirmative obligation to undo material inequality caused by subordination.” \(^{78}\) Others have called for “antisubordination,” \(^{79}\) “antisubjugation,” \(^{80}\) “anticaste” \(^{81}\) and “antidomination” \(^{82}\) approaches. These desired uses have been ignored, and the reach of equal protection has been severely curtailed by the Court’s deontological, as opposed to consequentialist, approach to equal protection jurisprudence in the last forty years.

In *Palmer v. Thompson* \(^{83}\) the Court refused to find an equal protection violation after the city of Jackson, Mississippi closed down its public swimming pools instead of integrating them after a Federal desegregation order. Justice Black’s opinion reasoned that both whites and blacks were deprived of the pools equally, and the Court had never held that “a legislative act may violate equal protection solely because of the motivations of the men who voted for it.” \(^{84}\)

After withdrawing the intentions of State lawmakers from equal protection analysis, the Court further withdrew equal protection’s bite from the results of State action. In the watershed case of *Washington v. Davis* \(^{85}\)


80 Tribe, Laurence H., American Constitutional Law §§16-21 at 1515 (2d ed. 1988) (Articulating “antisubjugation principle to break down legally created or re-enforced structures).


82 MacKinnon, Catharine A., Differences and Dominance: On Sex Discrimination, in Feminism Unmodified 32 (1987) (Urging a switch from focus on sameness v. difference to dominance approach to undo sex hierarchy).


84 *Palmer* at 224.

the Court reviewed the constitutionality of a police department qualifying test administered by the District of Columbia. There, the plaintiffs alleged discrimination on the basis of the test disproportionately excluding black applicants. While no intent to discriminate was asserted, the plaintiffs argued that a disparate impact resulted from the test and that the test bore no relationship to the ability to perform the job of police officer. The Court rejected the equal protection claim despite the disparate impact. Justice White wrote that although the equal protection clause prevents State officials from discriminating on the basis of race, it does not prohibit laws with racially disproportionate impacts if they do not also reflect a discriminatory purpose.

Justice White further held that the discriminatory purpose need not be express or appear on the face of the statute, and that neutral statutes may not be applied invidiously. However, if disproportionate exclusion can be explained on nondiscriminatory grounds as well as an inappropriate animus, the disparate impact will not be held to violate equal protection. Justice White and the majority elected to adopt this limited equal protection analysis instead of Title VII’s more skeptical standard. Under the 1964 law, Congress provided that legislation and State action with respect to employment would be struck down if it had a pronounced disparate impact, irrespective of a plausible benign motive. Further, the employment practice could be invalidated if the qualification did not have a correlation with job performance. Despite the rejection of this more critical standard articulated by Congress, Justice White advocated for further direction from the legislative branch to extend equal protection’s reach, just as Justice Stewart had done in Palmer.

The Davis reasoning was further confirmed in Village of Arlington Heights v. Metropolitan Housing Development Corporation. In Arlington Heights, the Court analyzed a suspect denial to rezone a residential property from single detached homes to multi-unit buildings that would have housed lower to middle income families in a predominantly white Chicago suburb. Forty percent of the residents that would have been eligible to live in the multi-unit buildings were black, despite comprising only eighteen percent of the area’s population.

The Court relied on Davis to deny the equal protection challenge, finding that State action disproportionately affecting a [racial] group was

\[86\] Davis at 239.
\[87\] Id. at 241.
\[88\] Id. at 247-48.
not enough absent an invidious intent or purpose. A disparate impact could be “an important starting point” to prove an equal protection violation, but it was not enough in light of the [race] neutral reason of protecting the property values of those already living in the area in single family residences.

The scope of equal protection was further limited in Personnel Administrator of Massachusetts v. Feeney. Feeney involved a Massachusetts law giving veterans an automatic preference for civil service jobs. The law’s facial motivations were acknowledged as legitimate, but the statute’s inevitable operation excluded women from civil service posts considering that women had historically been excluded from military service. Justice Stewart’s opinion continued the Court’s trend of deferring to State legislatures. He noted that States were permitted to make certain classifications, and when there was no reason to infer antipathy based on those classifications, “it is presumed that even improvident decisions will eventually be rectified by the democratic process.”

Certain classifications, most specifically based upon race, are presumptively invalid, and ostensibly neutral statutes will be invalidated if an obvious pretext exists. However, citing Davis, the Court held that neutral laws with disparate impacts could only be invalidated if the impact “can be traced to a discriminatory purpose.” Justice Stewart acknowledged that unconstitutional purposes could have been at work in Davis and Arlington Heights against groups that had been historically discriminated against, as was a possibility in Feeney. However, equal protection only guaranteed “equal laws, not equal results.” This rational acknowledged historical and systematic discrimination against blacks and women, yet failed to meaningfully consider this discrimination, despite being confronted once again with its results. Justice Stewart went on to require “purposeful discrimination,” yet what he required was that purposeful discrimination be demonstrated in the specific law considered. Systematic discrimination against a group and the effects that lingered in

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90 Arlington Heights at 265.
91 Id. at 266.
93 At the time Feeney was decided, 98% of veterans were male in no small part because of long-practiced systematic exclusion of women from the military.
94 Feeney at 272.
96 Feeney at 272,
97 Id. at 273.
perpetuity would not suffice, and laws or State action that disregarded the effects or even cemented them, such as those in Davis and Feeney, would escape the Court’s scrutiny.

Moreover, the burden of proof obstacle was raised even higher by the Court in Feeney when Justice Stewart wrote that mere intent as volition or intent as awareness of consequences was not enough to prove an equal protection violation. State actors were free to implement policies that they knew would burden historically disadvantaged groups so long as there was no “discriminatory purpose,” as opposed to an acceptable awareness of a disparate effect. This required that the State actor chose a policy “because of, not merely in spite of, its adverse effects upon an identifiable group.”99 At the time of the Feeney decision, the drastic limitation imposed upon equal protection was detected by Justices Marshall and Brennan. The unwillingness to address how subconscious biases affect us is particularly troublesome in light of internal cognitive biases, acted upon most prominently by white actors. However, there was something even more noteworthy and alarming for those who wished to see the Court as an institution sympathetic to the Civil Rights movement. It was the Court’s unwillingness to address, not just the possibility of subconscious biases that are difficult to decipher, but its refusal to consider the outright indifference of State actors to the disparate impacts their policies have on groups that have already suffered, by design and effect, for the better part of the United States’ existence.

Justice Stewart had stated the matter of discriminatory intent in a black and white manner devoid of nuance. He wrote that “[d]iscriminatory intent is simply not amenable to calibration. It either is a factor that has influenced the legislative choice or it is not.”100 This zero-sum game, coupled with the requirement of an active intent to discriminate, signaled the Court’s election to err on the side of optimism that an American history littered with hundreds of years of both discrete and indiscrete discrimination did not buttress. Certainly discrimination was not present in every situation where a disparate impact appeared. However, with respect to the gray areas—unacknowledged by Justice Stewart—limiting equal protection violations to only those instances in which a clear, intentional and present discriminatory action was at work once again deferred to the majority class. This refusal to attempt to make the difficult call or grapple with how the past influences the present at least in part obviated Carolene

99 Feeney at 279.
100 Feeney at 277.
Products\textsuperscript{101} attempt to give insular minorities a voice in the face of the majority chorus. It was the Court, full of members of the majority class, working in concert with the mouthpieces of the majority, the legislatures.

The Court chipped away at equal protection still further in \textit{McKleskey v. Kemp}.\textsuperscript{102} The Georgia law in \textit{McKleskey} did not involve invidious discrimination on its face. There was no circumspect pretext in its creation by the State as there was in \textit{Palmer} and \textit{Arlington Heights}. Nor was there an inevitable resulting disparate impact due to previous discrimination as was the case in \textit{Feeney}. Georgia’s statutory scheme was facially neutral, and the Court accepted the State’s interest in creating such a design, the Eighth Amendment’s Cruel and Unusual arguments notwithstanding. The issue, however, was the application of the facially neutral statutes, likely influenced by past and present prejudices immersed in myriad other sentencing factors attendant to the complexity of murder trials. A study measuring the application of the facially neutral death penalty to convicted black murderers of black victims, black murderers of white victims, white murderers of black victims and white murderers of white victims, discovered that defendants found guilty of killing whites were 4.3 times more likely to be sentenced to die than defendants who had killed a black victim.\textsuperscript{103} Further, the study found that black defendants were more likely to be sentenced to die than white defendants.

In spite of this race-based asymmetrical application of the death penalty in Georgia, the Court insisted upon the existence of purposeful discrimination.\textsuperscript{104} Additionally, in the criminal law context, the Court required that any purposeful discrimination must have a discriminatory effect on the defendant.\textsuperscript{105} McKleskey thus lost his equal protection claim because—despite the persuasive evidence that race played a role in deciding who would die in Georgia—he could not prove a specific racial animus against him.

In its continued reliance on proof of deliberate intent, the Court went on to cite \textit{Feeney}, stating that McKleskey would have had to have proved that the Georgia Legislature enacted or maintained the death penalty statute because of an anticipated racially discriminatory effect. The equal protection clause was thus powerless to stop age-old prejudices, so long as

\begin{footnotesize}
\begin{enumerate}
\item U.S. v. Carolene Products Co., 304 U.S. 144 (1938) (footnote 4), discussed below.
\item 481 U.S. 279 (1987).
\item The Baldus study took into account 230 variables that could have explained the disparities on nonracial grounds.
\item Citing Whitus v. Georgia, 385 U.S. 545 (1967) (defendants who alleged equal protection violation has burden of proving “the existence of purposeful discrimination”).
\end{enumerate}
\end{footnotesize}
they were not open and brazen, from influencing who would die in the State of Georgia.

The retraction of equal protection’s scope is evident in the preceding cases. Scholars such as Darren Lenard Hutchinson have argued that it has not merely been reduced, however, but that its purpose has in fact been inverted.\textsuperscript{106} The Court’s \textit{Lochner} decision had facilitated a torrent of criticism about judicial activism and overreach. Discussions of the countermajoritarian dilemma led the Court to reevaluate its role and act more cautiously.\textsuperscript{107} One such shift was increasingly invoking deference to the legislatures and limiting the most exacting scrutiny to suspect classes, most typically in the area of race. Heightened scrutiny was initially used to invalidate laws with a racial animus implemented by majorities against politically marginalized minorities.\textsuperscript{108}

However, because it has come to be defined in general and neutral terms, i.e. using heightened scrutiny in all matters involving race– instead of following the \textit{Carolene Products} instruction to use strict scrutiny for those who actually need it, i.e. “insular minorities”—equal protection analysis has worked the other way as well. It has been applied to strike down laws aiming to help historically disadvantaged minorities because of the Court’s adoption of a “colorblind” policy and an unwillingness to see the United States as having a “debtor race” and a “creditor race.”\textsuperscript{109}

The result of this freezing of the status quo, writes Professor Hutchinson, is that:

“[B]y design or effect, the Court’s equality doctrine reserves


\textsuperscript{107} See specifically Bickel, Alexander M., \textit{The Least Dangerous Branch: The Supreme Court at the Bar of Politics} (1962), a work taking its title from Alexander Hamilton’s reference to the Judiciary, discussing what Professor Bickel dubbed “The Majoritarian Difficulty. See also Friedman, Barry, and his five part series on the subject, e.g., \textit{The History of the Countermajoritarian Difficulty, Part One: The Road to Judicial Supremacy}, 73 N.Y.U. L. Rev. 333 (1998).

\textsuperscript{108} See e.g. Shelley v. Kraemer, 334 U.S. 1 (1948) (enforcing racially-biased real property covenants would violate equal protection); \textit{Brown v. Board; McLaughlin v. Florida}, 379 U.S. 184 (1964) (Striking down cohabitation law based upon racial classifications); \textit{Loving v. Virginia}, discussed infra.

judicial solicitude primarily for historically privileged classes and commands traditionally disadvantaged groups to fend for themselves in the often-hostile majoritarian branches of government. In its equal protection decisions, the Court has effectively inverted the concepts of privilege and subordination; it treats advantaged classes as if they were vulnerable and in need of heightened judicial protection, and it views socially disadvantaged classes as privileged and unworthy of judicial solicitude. This paradoxical jurisprudence reinforces and sustains social subjugation and privilege.”

The Court’s equal protection jurisprudence has taken away from Civil Rights advocates a potentially major weapon against the vestiges of hundreds of years of discrimination. The argument has been, in Justice Stewart’s words, that the equal protection clause was not meant to guarantee equal results, only equal laws. It would not be a device to level the playing field, nor prevent unequal application or disparate results from laws so long as the discrimination was somewhat discrete. This is despite the fact that the framers of the Fourteenth Amendment were not so concerned with equality in general. Those who enjoyed political power were not the target of the Fourteenth Amendment, rather it was the post-Civil War black population within the United States that the Amendment sought to address.

Moreover, *Carolene Products*,111 specific concern for insular minorities casts doubt on the Court’s logic of applying the same level of scrutiny to both a case involving a benign effect on a privileged class and a case resulting from animosity against an insular class. The two cases are not the same if viewed within even the slightest historical context. To be sure, an inclination against any type of favoritism for one class over another is troublesome, and the Court has been correct in asserting the bevy of difficulties in ameliorating past discrimination by implementing it in its benign form. However, the distinction between improper motives against insular classes and benevolent motives in favor of insular classes is even broader when considering that recent affirmative action laws were still made by the majority privileged class.

Nevertheless, despite the weakening of equal protection’s reach, constitutional protection has been available for politically marginalized classes. In addition to substantive due process’ more easily observed role as protector of existential matters, it has also served at times to cover areas in

110 Hutchinson, *Unexplainable* at 618.
111 304 U.S. 144 (1938), *discussed infra*. 
which equal protection could not reach. This phenomenon occurred before equal protection was gutted in *Davis* and its progeny, and before substantive due process was really understood to be the force that it would become. At times both doctrines would be invoked to invalidate a law, such as in *Loving v. Virginia*. In other instances, substantive due process would stand alone to protect insular minorities where equal protection could not reach.

### II. ORIGINS OF THE CLAUSE: CONSERVATIVES MAKE A HOME FOR ECONOMIC FREEDOM

Substantive due process in its initial judicial conception in the United States was used to strike down state economic regulations “in the name of liberty of contract and vested property rights.” The maiden appearance of substantive due process in the Court’s jurisprudence as a grounds in and of itself to strike down legislation after a century of allusions as to what the doctrine might mean, was likely in *Allgeyer v. Louisiana*. The Court held that an individual citizen’s liberty to enter into a contract in furtherance of business invalidated a State law requiring insurance to be procured through a company that had complied with that particular’s State’s insurance laws, thus creating an impermissible oligopoly for that State’s insurance companies. Striking down economic regulation with the substantive due process clause reached its summit in the “*Lochner* era,” ushered in by the era’s seminal case of *Lochner v. New York*.

*Lochner* involved the State of New York’s prohibition of working more than sixty hours in a week. The Court struck down the statute as improperly interfering with an individual’s right to contract, which it considered a part of the liberty protected by the substantive due process clause in the Fourteenth Amendment. Justice Peckham’s majority opinion held that the State, through its general police powers, did have an interest in regulating the manner in which individuals contracted. However, that power was limited—primarily to instances in which there was an identifiable State interest at issue—and had to be considered in light of an

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112 388 U.S. 1 (1967).
114 165 U.S. 578 (1897).
115 198 U.S. 45 (1905).
116 *Citing Allgeyer*. 
individual’s freedom to make decisions regarding how he wished to contract. Specifically, the Court deferred to a baker’s capacity to determine for himself how many hours per week he wished to work in lieu of the State’s generalized estimation of sixty hours being appropriate. Justice Peckham’s inability to find a valid State interest in regulating bakeries in pursuance of a State health interest led him to conclude that the New York law unreasonably interfered with a liberty interest. *Lochner’s* famous dissent was supplied by Justice Holmes, who argued that the Constitution had no preferred economic ideology, but that the State arguably did have a legitimate public health interest. Since there was no laissez-faire economic liberty to be found in the Fourteenth Amendment or anywhere else in the Constitution, but there possibly was a State interest involved, the Court had no business interfering.

The following decades saw substantive due process strike down economic legislation that the Court viewed as impermissible restrains on economic liberties. It also, most notably in *Adkins v. Children’s Hospital*, 261 U.S. 525 (1923) (applying due process clause of Fifth Amendment), hinted at substantive due process’ latent capability to address equality matters beyond liberty concerns in a women’s minimum wage case. Some scholars have argued that this dual liberty/equality function in substantive due process was even present in *Lochner*. 119

The *Lochner* era of preserving laissez-faire economics through the notion of economic liberty in the substantive due process clause ended in the late 1930’s in *West Coast Hotel Co. v. Parrish* after the Court began to accede to President Roosevelt’s New Deal. 122 Howard Gillman writes

117 Or, perhaps more accurately, how many hours Mr. Lochner told the baker to work.
118 261 U.S. 525 (1923) (applying due process clause of Fifth Amendment).
119 Bernstein, *Bolling Essay* at 1261, also citing *Buchanan v. Warley*, 245 U.S. 60 (1917) (adopting Justice Harlan’s Berea College dissent to recognized liberty interests cannot be defeated by discriminatory rationales offered by State). Id. at 1270.
120 See Mayer-Schonberger, Viktor, *Substantive Due Process and Equal Protection in the Fundamental Rights Realm*, 33 How. L.J. 287 (1990) at footnote 5, arguing that “*Lochner* itself incorporated some equal protection language.” It is uncertain as to whom the Court would have been protecting with that language [not identified by Mayer-Schonberger] since the opinion ruled in favor of the bakery owner and not the baker that would have been in need of economic protection.
122 300 U.S. 379 (1937) (upholding minimum wage laws for women, overruling *Morehead*).
123 The rejection of President Roosevelt’s New Deal policies by the Court’s economic conservatives (see generally *Schechter Poultry Corp. v. U.S.*, 295 U.S. 495 (1935) (striking down The National Industrial Recovery Act of 1933); *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936)
that at the time, *Lochner* itself was not even considered important enough to expressly overrule. The fallout was substantial, however. *Lochner*-type reasoning, i.e. illegitimate judicial policy making, would be pilloried, most notably by Justice Frankfurter, who would commence the trend of citing Justice Holmes’ dissent in *Lochner*. Professor Gillman further provides:

“*Lochner* was transformed into the normative *Lochner*—that is, into the symbol of judges usurping legislative authority by basing decisions on policy preferences rather than law. *Lochner* became that symbol, not because the case itself was an especially good example of that vice, but because [Justice] Holmes’ aphoristic dissent proved politically convenient for later generations of lawyers and judges. New Dealers, intent on de-legitimating the constitutional vision of early twentieth century judicial conservatives found cover under [Justice] Holmes’ dissent. Conservatives later resurrected the ghost of *Lochner* as a way of assaulting the civil liberties opinions of the Warren and Burger Courts. *Lochner* had finally become Lochernized.”

Rebecca Brown has also written about what she calls the “fragmented liberty clause” and its relationship with equal protection. She warns that the inability to properly, or at least satisfactorily, define substantive due process could “banish [it] to oblivion with a pronouncement of illegitimacy across the board.” Professor Brown’s focus is not on a list of inalienable rights, but an inquiry into the State’s motivation for curtailing the liberty of an individual. It is not a strictly libertarian approach to what the individual can do, but a scrutiny of the “exercise of legislative powers,” only being valid if they “could [be] reasonably

*(striking down The Bituminous Coal Conservation Act of 1935) led to the Court-packing plan, thereafter prompting the Court’s “switch in time to save nine,” that began acceding to the New Deal.*

125 Id.
126 Brown, Rebecca L., *The Fragmented Liberty Clause*, 41 Wm. and Mary L. Rev. 65.
128 Brown, Fragmented at 65, (comparing the gift of substantive due process’ existence to a Trojan Horse with the “menacing challenge” of defining it hidden deep within), citing Meese, Alan J., *Will, Judgment, and Economic Liberty: Mr. Justice Souter and the Mistranslation of the Due Process Clause*, 41 Wm. & Mary L. Rev. 3, 8 (1999) (arguing that absence of distinction between economic and personal rights may reveal that legitimacy of substantive due process is an illusion).
justified as contributing to the general welfare.” 130 This shift in focus “embodie[s] a variant of the equality principle, that one of the protections a free people enjoy is the guarantee that laws always will be passed for the good of all, and not the private benefit or emolument of a particular, favored individuals or interests.” 131

Lochner then, was not overruled because it was inappropriate for the Court to safeguard liberty, but because the valid public welfare purpose—laissez-faire economics in the midst of a crippling depression—had changed. 132 During the Depression, liberty could not be protected adequately without regulation, and “the absence of governmental interference into the economic affairs of the working public was harmful to the public good—an irony in which the application of the principle undermines the value embodied in the principle itself.” 133

After its initial use in the area of economic legislation by conservatives to preserve the laissez-faire approach but before the dismantling of Lochner, the substantive due process doctrine was extended beyond economic rights to personal rights as well, most notably by Justice McReynolds. Meyer v. Nebraska 134 and Pierce v. Society of Sisters 135 were two cases applying the substantive due process clause to protect decisions regarding the upbringing and education of children. 136 Meyer 137 struck down a World War I-era Nebraska law that prohibited schools from teaching children in German, and Pierce similarly invalidated an Oregon law precluding private education. The statutes in both instances were facially neutral; however, Germans had been targeted by the statute in Meyer after the war ended, while Catholic schools were the aim of the law in Pierce. 138 Kenneth Karst points out that both laws were examples of the Temperance Movement to maintain the superior status of Anglo-Protestants over recent Irish and German Catholic immigrants. 139 Despite these protections applying specifically to the immutable nature of national

130 Brown, Fragmented at 78.
131 Id.
132 Id. at 80-82.
133 Id. at 83-84, citing Tribe, Laurence H., American Constitutional Law at 585.
134 262 U.S. 390 (1923).
135 268 U.S. 510 (1925).
136 Both Meyer and Pierce also analyzed the liberty involved through the prism of the teachers’ right to teach but both cases would later be seen as ensuring parental liberty in determining the upbringing of their children.
137 Bartells v. Iowa, 262 U.S. 404 (1923), Bohning v. Ohio and Pohl v. Ohio were the companion cases decided with Meyer.
139 Karst, Liberties of Equal Citizens at 110-12.
origin and the existential nature of one’s chosen faith, both cases discussed and came to be understood as withdrawing important decisions with regard to one’s children from the State in favor of parents. The concerns for respecting groups and preventing social stigmas are not explicit, as they would later become, but the substantive due process clause’s concern for marginalized groups began with Meyer and Pierce.

With respect to Meyer, this liberty based in the substantive due process clause provided a parent the opportunity to determine the existential matters of how her child would be educated and in which language she would think. The Nebraska law was neutral on its face, proscribing the teaching of all languages other than English before a student successfully passed the eighth grade. Justice McReynolds found its proffered aim of ensuring that English became the mother tongue of the children of foreigners to reasonably come within the State’s police powers. However, the importance of a parent’s right to direct something as personal and important as a child’s education was determined to outweigh the State’s desire to improve the quality of its citizenry.

The timing and application of the law also demonstrate the component of substantive due process that can be used as equalery, beyond its securing of liberty in existential matters. The Nebraska statute was passed in 1919, a year after World War I had concluded, and applied in 1920 against the teaching of German. Despite the statute’s facial neutrality and its ostensibly pure motivation to further the promotion of American citizenship, the circumstances of its use suggest that patriotism could have been a pretext for discrimination against Germans.

140 The Court also invalidated a law from Hawaii similar to the one struck down in Meyer in 1927. Hawaii had not been granted statehood yet, and therefore the law’s prohibition of the teaching of certain foreign languages was found to be unconstitutional pursuant to the substantive due process clause in the 5th Amendment. See Farrington v. Tokushige, 273 U.S. 284 (1927) (applying Meyer/Pierce reasoning to Federal Government through the due process clause of the 5th Amendment to strike down law designed to shut down Japanese language schools).

141 Karst, Liberties of Equal Citizens at 101-02, remarking that while themes of respect and stigma from cases such as Lawrence, infra discussed expressly are relatively new for the substantive due process clause, the clause’s concern with egalitarian values goes back at least one hundred years. Citing and responding to Post, Robert, The Supreme Court, 2002 Term—Foreword: Fashioning the Legal Constitution: Culture, Courts, and Law, 117 Harv. L. Rev. 4, 97 (2003). See also Gans, The Unitary Fourteenth at 910 (“virtually every statute invalidated in the Court’s privacy jurisprudence involves a twin constitutional harm—an invasion of liberty and a denial of equality.”)

142 The law’s passing was motivated by “nativist hysteria” according to Professor Bernstein. Bolling Essay at 1273.

143 The so-called “dead languages” of Latin, and curiously enough, Greek and Hebrew, were determined by the Supreme Court of Nebraska to not be within the spirit or purpose of the statute and thus were not prohibited like German, French, Spanish and Italian.
Catholics] in a particularly sensitive time.

Justice McReynold’s opinion scantly alluded to this pretext, instead choosing to emphasize the importance of parents being able to exercise liberty in determining the nature of their children. The opinion’s practical result, nevertheless, had the effect of arming justices with a doctrine that could confront undetected, or at least unaddressed, pretextual discrimination. *Meyer* did not discuss an equal protection argument, and it undoubtedly would have failed considering the statute’s facial neutrality and its ostensibly valid State interest. *Davis* would later illustrate this limitation of the equal protection clause in rooting out discrimination. Substantive due process would be available to pick up that slack, as it did in *Meyer*. Along with de-fanging dormant laws, invalidating facially neutral laws applied malignantly would be another prong in the substantive due process clause’s equality capabilities. In *Meyer*, the result was paradoxically to use the American idea of liberty to enable the preservation of foreign languages and customs.

Similar in concept, language and time period, *Pierce* chiefly differed from *Meyer* in that it replaced national origin with religion. The Court’s general theme sounded again in the existential right of parents to shape their children’s future by directing their upbringing, holding that “those who nurture [the child] and direct his destiny have the right, coupled with the high duty, to recognize and prepare him...” (emphasis added) However, once again, the specific effect of *Pierce* was to treat people equally. In this particular instance, it was to accord them equal treatment irrespective of their faith. The equal protection clause was not used in this instance either, again likely due to the Oregon statute’s facial neutrality. Further, the State once again had a strong interest in a well-educated citizenry maintained pursuant to its supervisory powers.

However, similar to *Meyer*, a facially neutral statute—requiring all children between the ages of eight and sixteen to attend public schools—had the potential of skillfully concealing an ulterior motive. Anti-Catholic sentiment from the Protestant majority was undeniable, even including support for the Oregon law “by the local branches of the Ku Klux Klan in a campaign featuring anti-Catholic rhetoric.” *Pierce* was decided on the grounds of a general parental right of liberty to direct the upbringing of

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144 “Unfortunate experiences during the late war and aversion toward every character of truculent adversaries were certainly enough to [foster a homogeneous people with American ideals].” *Meyer* at 402.
145 The Court did not address *Pierce* as a Free Exercise case.
146 *Pierce* at 534-35.
one’s children, its tacit and specific effect was to protect Catholics from discrimination. Further, the Pierce Court extended its equal liberty treatment to minorities that chose their minority status, as opposed to the minority in Meyer whose national origin or descent was immutable. The extension was not a terrible stretch, considering how profound and meaningful religious faith is to many. This personal importance and definitional character of religion resembles that of national origin, and fits well within the Court’s greater theme of granting existential autonomy to the individual through the liberty protected in the substantive due process clause.

In addition to Meyer and Pierce, the idea of protecting minorities from majority oppression gained substantial legal footing in United States v. Carolene Products.\(^\text{148}\) The case was a further repudiation of the use of the economic liberty component of the substantive due process clause to strike down economic legislation. However, Carolene Products is most remembered for the fourth footnote in Justice Stone’s majority opinion.

Justice Stone wrote that going forward there would be a presumption of validity for economic legislation after the abandoning of Lochner. However, the presumption would be weaker and judicial scrutiny would be heightened with respect to personal rights such as those articulated and protected in Meyer and Pierce, “particularly for discrete and insular minorities who are not protected within the political process.” (emphasis added)\(^\text{149}\) If a law were to target a marginalized group, especially with respect to a fundamental right, courts were to elevate their scrutiny in analyzing the legislative act.\(^\text{150}\) Justice Stone announced this principle “not because he believed such discrimination was intrinsically evil, nor because the structure of the Constitution marks discrete and insular minorities as special,” but because prior case law—specifically referring to Meyer and

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\(^{148}\) 304 U.S. 144 (1938).

\(^{149}\) Id. at 849, discussing Footnote 4.

\(^{150}\) While many laud this attempt to consider those isolated from the democratic process, others take a more cynical view. See e.g. the erstwhile Supreme Court nominee Robert Bork, regarding Justice Stone’s footnote as a tool for judges to “read into the Constitution their own subjective sympathies and social preferences.” Bork, Robert H. The Tempting of America 61 (Macmillan, 1990), cited in Tribe, Levels of Generality at 1060 (agreeing generally with Professor Bork that human beings cannot possibly divorce themselves from their own sympathies, an issue once again being discussed in relation to President Obama’s nominee, Sonia Sotomayor. See e.g. Savage, Charlie, A Judge’s View of Judging Is on the Record, The New York Times, May 14, 2009 (although President Obama used “empathy”). Professor Bork’s dim view of personal rights is also in contrast to the purpose of the Ninth Amendment according to Bruce Ackerman. See Robert Bork’s Grand Inquisition (Book Review), 99 Yale L.J. 1419, 1430 (1990) (noting that “the Ninth Amendment seems, almost preternaturally, to be written with Bork in mind), cited in Tribe, Levels of Generality at note 161.
Pierce—had already developed this practice.\footnote{151}

While it was agreed that the Lochner era was dead and substantive due process would not be applied to economic legislation, its future use in the area of personal rights cases was left unclear. Meyer and Pierce had not been overruled like the Lochner-line of cases,\footnote{152} and arguably had been preserved, if not reaffirmed and perhaps even emboldened, by Footnote Four in Carolene Products, but the doctrine in which their fate rested had been criticized and invalidated, at least with respect to economic rights.\footnote{153} Two subsequent cases suggested that they retained viability.

\textit{Skinner v. Oklahoma}\footnote{154} invalidated an Oklahoma law that sought to sterilize criminals.\footnote{155} The opinion contained language that sounded in the liberty parlance of substantive due process,\footnote{156} referring to procreation as “one of the basic civil rights of man . . . fundamental to the very existence and survival of the race.”\footnote{157} However, the opinion stated that its justification for striking down the law rested in equal protection, most likely to avoid the stigma that substantive due process carried from \textit{Lochner}.\footnote{158} This reluctance had a considerable shelf-life; it likely extended all the way to 1965’s \textit{Griswold}\footnote{159} decision, prompting the majority to rely on “penumbras and emanations” from the Bill of Rights instead of the still-tainted substantive due process doctrine. Ironically, the \textit{Lochner} stigma and the resulting reluctance to use substantive due process would exemplify the

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\footnotetext[151]{151} Tribe, \textit{Levels of Generality} at 1064.\footnote{Tribe, \textit{Levels of Generality} at 1064.}
\footnotetext[152]{152} \textit{Lochner} itself, as noted by Professor Gillman, was not considered important enough to immediately expressly overrule. It was not formerly done so until 1992 in \textit{Planned Parenthood v. Casey}, 505 U.S. 833 (1992).\footnote{Lochner itself, as noted by Professor Gillman, was not considered important enough to immediately expressly overrule. It was not formerly done so until 1992 in \textit{Planned Parenthood v. Casey}, 505 U.S. 833 (1992).}
\footnotetext[153]{153} Professor Conkle suggests that there was no distinction made between the economic rights of \textit{Lochner} and the personal rights of \textit{Meyer/Pierce}, meaning as \textit{Lochner} fell, so too would \textit{Meyer/Pierce}. He asserts that they were resurrected tacitly in \textit{Griswold}, failing to take account of \textit{Skinner} and \textit{Prince}.\footnote{Professor Conkle suggests that there was no distinction made between the economic rights of \textit{Lochner} and the personal rights of \textit{Meyer/Pierce}, meaning as \textit{Lochner} fell, so too would \textit{Meyer/Pierce}. He asserts that they were resurrected tacitly in \textit{Griswold}, failing to take account of \textit{Skinner} and \textit{Prince}.}
\footnotetext[154]{154} 316 U.S. 535 (1942).\footnote{316 U.S. 535 (1942).}
\footnotetext[155]{155} \textit{Skinner} overturned \textit{Buck v. Bell}, 274 U.S. 200, 205-07 (1927), perhaps Justice Holmes’ most infamous opinion, upholding a Virginia law seeking to sterilize an eighteen-year-old “feeble minded white woman,” “daughter of a feeble minded mother” and “mother of an illegitimate feeble minded child” for the “health of the patient and the welfare of society…because [t]hree generations of imbeciles are enough.” Justice Holmes also curiously remarked twenty-two years after his skeptical substantive due process \textit{Lochner} dissent that equal protection was “the usual last resort of constitutional arguments.” \textit{Buck} at 208.\footnote{\textit{Skinner} overturned \textit{Buck v. Bell}, 274 U.S. 200, 205-07 (1927), perhaps Justice Holmes’ most infamous opinion, upholding a Virginia law seeking to sterilize an eighteen-year-old “feeble minded white woman,” “daughter of a feeble minded mother” and “mother of an illegitimate feeble minded child” for the “health of the patient and the welfare of society…because [t]hree generations of imbeciles are enough.” Justice Holmes also curiously remarked twenty-two years after his skeptical substantive due process \textit{Lochner} dissent that equal protection was “the usual last resort of constitutional arguments.” \textit{Buck} at 208.}
\footnotetext[156]{156} In fact, Justice Stone’s concurrence stated that “the real question is not one of equal protection, but whether it satisfies the demands of due process,” \textit{Skinner} at 543.\footnote{In fact, Justice Stone’s concurrence stated that “the real question is not one of equal protection, but whether it satisfies the demands of due process,” \textit{Skinner} at 543.}
\footnotetext[157]{157} \textit{Skinner} at 541.\footnote{\textit{Skinner} at 541.}
\footnotetext[158]{158} Another example of a liberty analysis clothed in equal protection to avoid \textit{Lochner’s} stigma is \textit{Bolling v. Sharpe}, in which Justice Warren abandoned a substantive due process opinion citing \textit{Meyer, Pierce} and \textit{Tokushige} in favor of a transparent equal protection analysis in order to “avoid antagonizing his colleagues, especially Justice Black.” Bernstein, \textit{Bolling Essay} at 1276.\footnote{Another example of a liberty analysis clothed in equal protection to avoid \textit{Lochner’s} stigma is \textit{Bolling v. Sharpe}, in which Justice Warren abandoned a substantive due process opinion citing \textit{Meyer, Pierce} and \textit{Tokushige} in favor of a transparent equal protection analysis in order to “avoid antagonizing his colleagues, especially Justice Black.” Bernstein, \textit{Bolling Essay} at 1276.}
flexibility, duality and at times interchangeability of the doctrine and its Fourteenth Amendment companion, equal protection.

What was protected in *Skinner* was the actual right for one’s children to exist. This right as a matter of an existential nature is axiomatic, and would enjoy extensive discussion in later procreation cases. However, the Court, still shy in 1942 about using substantive due process after the Lochnerization of *Lochner*, utilized an equal protection analysis in lieu of substantive due process’ equalerty against a statute that was not facially neutral but instead singled out convicts. The Court’s equal protection analysis protected a right described in substantive due process language, discussing the rights of criminals, persons in most cases both formally and practically stripped of political power. Moreover, further reducing the political power of criminals *vis a vis* their status as convicts was the reality that a disproportionate amount were persons of color, additionally curtailing their political clout drastically. The fact that most inmates consisted of the impoverished added an additional minority contemplated by *Skinner*.

*Prince v. Massachusetts* \(^{160}\) came two years later and further suggested, in addition to Footnote Four in *Carolene Products*, that *Meyer* and *Pierce* had been spared *Lochner’s* fate. The Court cited *Meyer* as specifically standing for a parental right to direct the upbringing of her child being a liberty protected by the substantive due process clause of the Fourteenth Amendment. It also referenced *Pierce*, stating that “it is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the State can neither supply nor hinder.”\(^{161}\) Ultimately the Court ruled against a Jehovah’s Witness’ claim that her right to direct her child’s upbringing\(^ {162}\) included the specific act of directing the child to sell religious literature on the street in violation of a Massachusetts law. It was not that the parent did not have a cognizable liberty interest. It was that the State had an interest—preventing child labor—sufficiently strong to tip the balance between liberty of the individual and the interest of the State in favor of Massachusetts. *Meyer, Pierce*, and the liberty interest of parents directing the upbringing of their children were still good law. The Court simply distinguished them from *Prince* because of the competing State interest involved.\(^ {163}\)

\(^{160}\) 321 U.S. 158 (1944).  
\(^{161}\) *Prince* at 166.  
\(^{162}\) The Court similarly rejected her First Amendment freedom of religious exercise and Fourteenth Amendment equal protection arguments.  
\(^{163}\) While the State’s interest was stronger in *Prince, Meyer* and *Pierce* also involved Germans
Prince also involved a religious minority, although the Massachusetts child labor law under consideration did not conceal a possibly discriminatory pretext against minorities akin to Meyer and Pierce. First Amendment Free Exercise concerns were addressed as well as the Meyer/Pierce existential theme of directing the upbringing of children. The presence of a legitimate State interest in protecting the welfare of children is likely the explanation for why the substantive due process liberty arguments failed in Prince after carrying the day in Meyer and Pierce.  

While the Court specifically found the State’s interest in Prince strong enough to override a parent’s personal liberty, its discussion of Meyer, Pierce and substantive due process as applied to personal rights suggested that the doctrine and its cases remained viable. Carolene Products added sharper scrutiny to a budding concern for discriminatory laws against minorities, as evidenced by Meyer and Pierce. Confirmation of substantive due process’ reinvention from an economic tool used by conservatives to further entrench the gilded class, to a libertarian tool used by moderates and liberals to protect minorities, would come later after the clause lay mostly dormant for two decades.

III. MODERN APPLICATION: PURPOSIVISTS RESURRECT LOCHNER’S SPIRIT WHILE ORIGINALISTS SUMMON ITS GHOST.

Most scholars mark Griswold v. Connecticut as the beginning of the United States Supreme Court’s resuscitation of substantive due process. Griswold’s indispensable antecedent, however, came four years earlier in Poe v. Ullman. Poe did not hold binding authority over

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164 Although the solicitude for Jehovah’s Witnesses was likely lower than it was for Catholics.
165 The transition from economic to personal rights lies in substantive due process’ general use to combat discrimination inherent in class legislation. Bernstein, Bolling at 1261, citing Vanzant v. Waddell, 10 Tenn. 260, 269-70 (1829); Mott, Rodney L., Due Process of Law (1926); Barbier v. Connolly, 113 U.S. 27, 33 (1884); State v. Hogan, 58 N.E. 572, 573 (1900); Florida Central & Peninsular Railroad Co. v. Reynolds, 183 U.S. 471, 478 (1902). (citations omitted)
167 381 U.S. 479 (1965).
168 See e.g. Park, Defining One’s Own Concept.
Griswold because Poe’s merits were never addressed by the majority opinion, but the dissents of Justice Douglas, and in particular Justice Harlan, laid the foundation for the future use of substantive due process. The dissents interwove privacy principles from the first eight amendments (most importantly the privacy concepts found in the Third and Fourth Amendments) with the Fourteenth Amendment guarantees of liberty and autonomy while also discussing the application of those principles to the States through the Fourteenth Amendment. Finally, Justice Harlan confirmed that the guarantee of liberty, as a safeguard of the most intimate and profound personal decisions against government intrusion, would forever be found in the Fourteenth Amendment as a separate and distinct concept from the fundamental rights expressly delineated in the first eight amendments.

**POE v. ULLMAN: A REVIVAL STARTS**

The Poe decision, handed down in 1961, involved consolidated declaratory actions that were brought in state court in Connecticut challenging statutes that prohibited giving advice with regard to contraception and its use. The statutes were attacked by different married couples, one of which consisted of a wife who had had three consecutive pregnancies terminate with the child dying shortly after birth due to congenital abnormalities. Additional plaintiffs in the declaratory suits included another married couple that had faced egregious physical, psychological and emotional trauma due to complicated pregnancies, and a doctor that sought to counsel the use of contraception.

The challenged Connecticut law had been in effect since 1879, yet prosecutions pursuant to the law were unknown but for one instance that was adjudicated as a test case in 1940. The State of Connecticut dismissed the complaint and no criminal prosecution had been undertaken since. Seizing on what the Court referred to as “the unreality of these lawsuits,” Justice Frankfurter refused to address the merits of Poe and instead dismissed the suits based on lack of justiciability. A majority of the Court agreed that there was no “case or controversy” within the meaning of

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170 This discussion was leftover from the incorporation debates of the first half of the twentieth century that resembled but did not mirror the impending debate over the interpretation and scope of substantive due process. The incorporation debate, whether the Bill of Rights was enforceable against the States through the due process clause of the Fourteenth Amendment was all but settled with a few exceptions in the affirmative in *Duncan v. California*, 391 U.S. 145 (1968). See also generally *Cantwell v. Connecticut*, 310 U.S. 296 (1940) (First Amendment); Mapp v. Ohio, 367 U.S. 643 (1961) (Fourth Amendment). For a discussion as to whether incorporation was intended by the Framers of the Fourteenth Amendment, see Aynes, Richard L., *On Misreading John Bingham and the Fourteenth Amendment*, 103 Yale L.J. 57 (1993).
Article III of the Constitution due to the implausibility of anyone actually being prosecuted in Connecticut for using contraception or recommending its use.

Justice Douglas, however, felt that the implausibility of prosecution was not as strong as the majority indicated, and the subject matter and attendant consequences were too grave to require the plaintiffs to break the law to challenge its legitimacy. He used his dissenting opinion to articulate that there was indeed a justiciable question, and it concerned the Connecticut law depriving plaintiffs of "liberty without due process of law, as [the] concept is used in the Fourteenth Amendment." More importantly, Justice Douglas announced what would become a variation of one of the standards used to determine whether an unenumerated right concerning liberty as guaranteed by substantive due process exists. Justice Douglas' was a broad, organic, conceptual standard. He stated that substantive due process removed from state regulation those matters "implicit in the concept of ordered liberty." Further, this concept was "a living one that guaranteed basic rights, not because they had become petrified as of any one time, but because due process follows the advancing standards of a free society as to what is deemed reasonable and right." It is to be applied, according to this view, "to facts and circumstances as they arise, the cases falling on one side of the line or the other as a majority of nine justices appraise conduct as either implicit in the concept or ordered liberty or as lying within the confines of that vague concept."

Applying this standard that he himself considered to be vague, Justice Douglas noted that the Connecticut law’s aim at use of contraception as opposed to mere sale or manufacture of it implicated the intrusion into the relationship between man and wife. Further, "it reached the intimacies of the marriage relationship." What offended Justice Douglas most was the practical requisite in enforcing such a law. He warned that we could “reach the point where search warrants issued and officers appeared in bedrooms to find out what went on.” Making use a crime meant the intolerable to Justice Douglas: that “the State ha[d] entered

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171 Such concerns are vindicated in cases such as Bowers v. Hardwick, 478 U.S. 186 (1986), infra.
172 A substantial portion of the Poe opinion is dedicated to the competing conceptions of the judicial tool of the declaratory action and whether it should have been utilized in Poe.
173 Poe at 515.
174 Id. at Footnote 9, (Douglas, J., dissenting).
175 Id.
176 Id.
177 Id. at 519.
178 Id. at 520.
the innermost sanctum of the home,” and “[i]f it could make the law, it could enforce it,” because proof of its violation necessarily involved an inquiry into the relations between man and wife.” Such actions by the State constituted “an invasion of the privacy that is implicit in a free society.”

Justice Harlan dissented separately yet similarly and much more extensively to emphasize the gravity of the matter and further elucidate Justice Douglas’ substantive due process argument. His opinion would profoundly influence and serve as the Court’s basis for future substantive due process application, particularly for the Purposivist justices. If his Poe dissent was not directly cited, it was at least alluded to. He too wrote that the Connecticut legislation violated the Fourteenth Amendment as an invasion of the most “intimate concerns of an individual’s personal life” (emphasis added) despite there being “no explicit language [in] the Constitution” announcing as such. Nevertheless, Justice Harlan agreed with Justice Douglas that substantive due process was a broad, flexible concept that protected individuals from otherwise democratic legislation that deprived them of life, liberty or property no matter the procedural fairness involved. Procedural due process, with its roots in the Magna Carta’s per legem terrae, “had in the [United States] become bulwarks also against arbitrary legislation,” thus establishing substantive due process.

Justice Harlan continued to expand the notion that substantive due process in the Fourteenth Amendment is related to the rights found in the first eight amendments. Further, Justice Harlan argued that the Court had a history of stating that the Fourteenth Amendment did not merely enforce the enumerated rights in the first eight amendments against the States. Aside from making those expressly articulated rights applicable against the States, an extra component consisting of liberty, however ambiguously expressed, was enshrined. According to Justice Harlan, this ambiguity was bereft of formula or code to discern it in a precise fashion. “[T]he best that could be said [was] that through [the] Court’s decisions it represented the balance which [the United States], built upon postulates of respect for the liberty of the individual, has struck between that liberty and the demands of organized society.”

The scope of this balance was not unlimited. Justice Harlan instructed

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179 Id. at 520-21.
180 Id. at 539.
181 Id. at 541, citing Hurtado v. California, 110 U.S. 516 (1884).
183 Poe at 542.
that judges could not roam where unguided speculation would take them but instead would be confined to the traditions from which the United States came, as well as the traditions from which it broke. This tradition was to Justice Harlan, quite notably, a living thing. Decisions radically departing from the history of the United States would not survive. However, decisions would be built upon what had survived.

This concept of liberty as guaranteed vis a vis substantive due process derived from “the imperative character of Constitutional provisions,” character that “must be discerned from a particular provision’s larger context”184…but not of words, but of history and purposes.”185 (emphasis added) Liberty was not “a series of isolated points pricked out” but instead was to be an inexhaustible “rational continuum” that protected individuals from “arbitrary impositions” and “purposeless restraints.”186 It was also a “compendious notion,” one that elevated the purpose of words over simply the text alone and the “reasons for [the Framers’] statements and not the statement itself” that was embodied in the Fourteenth Amendment’s concept of substantive due process.187

Justice Harlan remained mindful throughout his dissent that his Purposivist approach to guaranteeing liberty was wrought with vagueness and imprecision. He did not, however, consider it to be an arbitrary approach amenable to abuse, idealistically or otherwise. He wrote in anticipation of charges of countenancing judicial fiat that “[t]he vague contours of the [substantive] Due Process Clause do not leave judges at large. We may not draw on our merely personal and private notions and disregard the limits that bind judges in their judicial function.”188 Instead, while substantive due process was not a “final and fixed concept,” it

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184 See again Tribe, *Levels of Generality* at 1068-1069, expounding on Justice Harlan’s Poe opinion about “infer[ring] unifying principles at a higher level of abstraction, focusing at times upon rights instrumentally required if one is to enjoy those specified, and a times upon rights logically presupposed if those specified are to make sense.”
185 Poe at 542-43. See also Tribe, *Levels of Generality* at 1069, discussing example of freedom of speech and freedom of religion only making sense if connected by the broader, underlying principles of freedom of thought and conscience.
187 Poe at 544.
188 Id. at 544-45.
required being “deeply rooted in reason and in the compelling traditions of the legal profession.”

Justice Harlan then turned to the merits of Poe to apply what was to become the broad Purposivist approach to addressing modern substantive due process claims that he had just illustrated. He was certain that the Connecticut statute deprived the plaintiffs of substantial liberty “in carrying on the most intimate of all personal relationships, and that it [did] so arbitrarily and without any rational, justifying purpose.” 190 (emphasis added) His analysis continued to distinguish the “ordered liberty” component in the Fourteenth Amendment independent of the Bill of Rights that would be used in the Court’s substantive due process jurisprudence for the next forty-plus years. Justice Harlan regarded the home as something more than the property of a homeowner. Instead, the home “derived its pre-eminenve as the seat of family life, 191 and that life [was] something so fundamental that it [was] found to draw to its protection the principles of more than one explicitly granted Constitutional right.” 192 (emphasis added) Justice Harlan acknowledged that the protection of intimacy in the home was not absolute. His examples of permissable regulation, however, (listing adultery, homosexuality, fornication and incest as areas where the State could regulate conduct no matter how privately practiced) were to become victim to his own evolving conception of which specific examples of protected liberty would later be protected by substantive due process. 193

Justice Harlan argued that contraception had become an essential and accepted feature of the institution of marriage whereas crimes such as adultery and homosexuality had “always been forbidden and which [could] have no claim to social protection.” 194 His implicit argument then seemed to suggest that the nature of what should be protected as a liberty interest under the substantive due process clause was in part contingent upon public

189 Id. at 545.
190 Id.
191 The first twenty years of the Court’s modern substantive due process jurisprudence expressly yet not exclusively dealt with the intimate realm of the family as discussed below.
192 Poe at 551-52.
193 In the least, the physical expression of homosexuality and the act of fornication would later enjoy implicit constitutional protection under the expanding canopy (not to be confused with the Bill of Rights’ “penumbra”) of substantive due process as guaranteed by the Fourteenth Amendment. See Eisenstadt v. Baird, 405 U.S. 438 (1972) (Decided eleven years after Poe, striking down laws prohibiting distribution of contraception to unmarried persons); Carey v. Population Services International, 431 U.S. 678 (1977) (Applying right to contraception to minors); Lawrence v. Texas, 539 U.S. 558 (2003) (striking down sodomy laws after reviewing homosexual sodomy law).
194 Poe at 553.
acceptance of the behavior that sought protection. Justice Harlan felt that contraception had reached the point of being contemporarily approved and thus deserved the protection of historically guaranteed principles, viz., the concept of ordered liberty as implicitly enshrined in the substantive due process clause of the Fourteenth Amendment. However, adultery and homosexuality, long forbidden and disapproved of, and still devoid of the societal approval that Justice Harlan had gleaned with respect to contraception, did not. Justice Harlan addressed the concern of judges working with concepts as ambiguous as substantive due process. He explained that a keen sense of history and tradition and sound legal reasoning would consort against the meddling of a particular judge’s idiosyncrasies.

Justice Harlan’s disapproval of the statute in Poe either stemmed from his own personal distaste for it—which is an impermissible reason for him to strike the law down as he would admit—or it was an assumption Justice Harlan made about where the law stood on the rational continuum. If it really did lag that far behind so as to be considered arbitrary and purposeless, why had it not been removed? The reason is likely in its lack of enforcement, which stems from a tacit awareness on part of those capable of enforcing the law of the public’s likely disapproval of the law (as divined by Justice Harlan). The lack of enforcement causes a lack of awareness as to the law’s existence, leading to a lack of urgency to change a law out of step with evolving notions of liberty.

These laws that lay dormant--largely unenforced yet still legitimate--have the potential for, and a history of, being used to oppress minorities and the politically marginalized. If the law is applied to someone in the majority class or the politically represented, the discontent necessary to abandon the law manifests in the democratic process. However, when used against a minority or the politically marginalized, the law can oppress with democratic legitimacy. Justice Harlan, consciously or not, attempted to de-fang one such law in Poe. He did so with the substantive due process clause, a clause based in the generalized notion of liberty that applied to the most important, intimate aspects of life. Those aspects of life considered to be important and intimate evolved as society changed. And where the democratic process was negligent in updating contemporary notions of liberty, the substantive due process clause could speak in the stead of the “discrete and insular minorities who are not protected within the political process.”

The difference between this “de-fanging” of dormant statutes and the

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195 Carolene Products at Footnote Four.
invalidation of facially valid statutes possibly concealing pretexts as discussed in Meyer and Pierce is intent and application. The pretextual statutes are passed with the ulterior motive in mind at the time of their creation. To conceal the discriminatory intent, the statute is written as facially neutral but then is applied selectively to the targeted group. When the statute concerns a protected liberty interest, the equalery component of substantive due process can invalidate a statute with a discriminatory pretext.

The dormant statutes differ in that, at the time of their creation, they were not only facially neutral but there was an absence of any concealed motive against a particular minority. The Connecticut statute in Poe and Griswold was likely aimed at everyone in the state. The animus-laden use of the statute only comes into play once it has mostly lost its relevance for the greater majority. Applied against the politically endowed, it is quickly repealed through the democratic process. However, since it is still a legitimate law, it can be enforced against a politically marginalized group as a tool of oppression and continued discrimination. The seminal example of this phenomenon is Bowers, discussed infra. The Georgia sodomy statute had lost its relevance and support from the majority. It had not been applied in the last forty or fifty years. But it was still available to use against a minority. And it was indeed used against a minority.

**GRISWOLD v. CONNECTICUT: IN THE BEDROOM**

While Poe laid the groundwork for the second half of the twentieth century’s revival of substantive due process, Griswold actually began to give it force beyond spirited dissents (although it was still short of a majority vote in Griswold and thus not necessarily controlling law). In 1965, only four years after Poe, the same issue from the same state reached the Court. This time the Court found jurisdiction after the plaintiffs violated

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196 See Bowers, Stevens, J., dissenting, footnote 11.
197 There seems to be no way of avoiding the necessity of harassment of minorities under an outdated law until it can be removed given the requirements of standing as demonstrated in Poe. One cannot necessarily sue until one has been injured. However, Justice Harlan may have sensed how adhering to form over substance can leave ostensibly harmless laws available to be dusted off to oppress, thus allowing a challenge to an unconstitutional law before it can be used to cause injury as opposed to requiring the injury to first manifest.
198 The majority opinion by Justice Douglas did not thoroughly discuss substantive due process because of Lochner’s remaining stigma, and instead relied upon what were termed “penumbras of privacy” emanating from the Bill of Rights to strike down Connecticut’s contraception law. Justice Harlan’s concurring opinion—and to a lesser extent Justice White’s—was where substantive due process continued its modern development. Later opinions would alternate between citing Griswold on substantive due process grounds and asserting that its holding was rooted in a notion of privacy emanating from the Bill of Rights.
Connecticut law prohibiting dissemination of information concerning contraception and its use, and after the parties were prosecuted and sentenced pursuant to the law.

Justice Douglas found himself in the majority in *Griswold* and wrote the landmark opinion. He did not, however, explicitly rely on substantive due process despite his approval of the doctrine in *Poe*. He had had a change of heart since *Poe* and 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.”

His opinion opened with an unsuccessful attempt at assuaging Originalist fears about judicial fiat. He stated that “[j]udges do not sit as a super-legislature to determine the wisdom, need, and propriety of laws that touch…social conditions. [The Connecticut] law, however, operated directly on an intimate relation of husband and wife...” Justice Douglas continued on this path of analysis and ultimately appeared to strike down the Connecticut legislation based upon emanations of privacy from the Bill of Rights and not pursuant to substantive due process.

This right to privacy approach is thought to have come at Justice Brennan’s suggestion and was hoped to gain favor with Justice Black, a staunch believer since 1947 in the incorporation of the first eight amendments of the Bill of Rights against the states.

Justice Goldberg’s concurring opinion noted that constitutionally guaranteed liberty had been enshrined outside of the Bill of Rights but his focus concentrated on emphasizing that many of these liberties were unenumerated and were intentionally created as such. Specifically, Justice Goldberg explained that the Ninth Amendment as drafted by James Madison explicitly instructed that not all liberties would be expressly listed because “no language is so copious as to supply words and phrases for every complex idea.” Madison feared that exclusion of rights would

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199 Karst, *Liberties of Equal Citizens* at 123.

200 *Griswold* at 482.

201 This ostensibly new doctrinal approach was thought at the time to have a promising future. See e.g. Kauper, Paul G., *Penumbras, Peripheries, Emanations, Things Fundamental and Things Forgotten: The Griswold Case*, 64 Mich. L. Rev. 235, 248 (1965) (“[T]he right to privacy may well be an opening wedge for extension of that right in new directions”). *Griswold* has of course survived, and the “privacy” and “privacy cases” vernacular has periodically although not consistently reappeared, but the liberty language of substantive due process has found more favor than the privacy of penumbras styling in the Court’s jurisprudence.


203 The use of the Ninth Amendment to protect unenumerated rights has, like the Fourteenth Amendment’s Privileges and Immunities Clause, failed to engender significant support.

204 *Griswold* at Footnote 3, Goldberg, J., concurring, citing James Madison in *The Federalist*, No. 37.
follow from a simple lack of express inclusion despite an exhaustive list of liberties being implausible. He in fact acknowledged that it was the most credible argument against creating a Bill of Rights. In response, he added the Ninth Amendment\textsuperscript{205} (along with the Tenth)\textsuperscript{206} to the originally planned eight to ensure that all those rights not expressly articulated in the first eight amendments were not foreclosed and instead would surface with the aid of an appreciation of the Nation’s history and core principles.

The remaining portion of Justice Goldberg’s concurring opinion did not address substantive due process in great detail. It did, however, further contribute to the rationale behind using substantive due process in the Purposivist fashion. Justice Goldberg explicated on the Ninth Amendment and the nature of how unenumerated or latent rights deriving from the principle of liberty would manifest themselves in the substantive due process clause of the Fourteenth Amendment. This exposition served to further build the basis for understanding the role that the substantive due process clause would play in the coming decades. It would be an evolving, amorphous concept that applied historical principles, most specifically liberty, to contemporary issues involving an individual’s most personal decisions with regard to family and self.

Justice Harlan and Justice White’s concurring opinions were the only opinions that solely relied on substantive due process to strike down the Connecticut legislation. Justice Harlan devoted his opinion to continuing his dissent in \textit{Poe} by articulating how substantive due process stood on its own apart from the Bill of Rights to guarantee liberties embodied in the spirit of the Constitution, the United States’ traditions and its ideals. In his view, the Connecticut statute violated “basic values implicit in the concept of ordered liberty.”\textsuperscript{207} Justice Harlan also addressed the dissenters in \textit{Griswold} by stating that the application of substantive due process would be undertaken with a “respect for the teachings of history, solid recognition of the basic values that underlie society, and wise appreciation of the great roles that the doctrines of federalism and separation of powers have played in establishing and preserving American freedoms.”\textsuperscript{208}

Justice White did not consider the use of substantive due process to be a novel concept. Rather, he believed that it had an established history. Justice White’s reliance upon these cases to buttress his opinion in

\textsuperscript{205} The Ninth Amendment reads: “The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people.”

\textsuperscript{206} “The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”


\textsuperscript{208} \textit{Griswold} at 501, citing \textit{Adamson v. California}, 332 U.S. 46 (1947).
Griswold is not the only thing of note. Also notable is how he framed the holdings of those cases, which proved to be significant in the pervasive battle that unfolded between the Originalist camp and the Purposivist justices. In Meyer, the specific issue was whether parents could send their child to a German-speaking school. Pierce similarly involved the right to send children to a private Catholic school. In Skinner it was the right to procreate (by striking down sterilization laws) and Prince considered whether a parent could instruct a child to distribute religious literature in spite of child labor laws.

Justice White’s concurring opinion in Griswold, however, cited reliance on the doctrine in Meyer to guarantee the liberty to marry, establish a home and bring up children, Pierce to direct the upbringing of children, Skinner to protect the basic rights of man (procreation specifically) and Prince for the proposition that there is a familial realm in which the State may not enter. It is here that the broad, Purposivist approach to applying the spirit of the Constitution and its history was being applied to specific issues. The holdings were not limited in their scopes, just as the Constitution was not limited to only provide for the rights expressly enumerated as Justice Goldberg had stated while relying on the Ninth, and to an extent, the Tenth Amendment.

The historical traditions of liberty and autonomy, along with the Constitution and the Ninth Amendment, provided that there were unenumerated rights. These rights found shelter and expression in the Fourteenth Amendment. They were later applied to the specific cases of Meyer, Pierce, Skinner and Prince. Those cases would later serve as a continuation—or as part of the rational continuum—of the general spirit and purpose of constitutional rights applied to similar, though not identical, situations. As their holdings came from general concepts of liberty and autonomy, so too could their precedential values be broad instead of being confined to the exact fact patterns found in their specific cases. Such an extrapolation from general to specific and then from specific to general again is the nature of the common law.

209 Skinner was an equal protection case as noted but became subsumed into the substantive due process cases after Poe’s dissents and Griswold’s concurring opinions chipped away at the Lochner taint, similar to Justice Douglas’ Griswold majority opinion itself that later became incorporated into the substantive due process cases.

210 Griswold at 502-03.

211 This Purposivist practice of applying a general principle for a broad holding was practiced sporadically by Justice White depending on the subject matter of the case being considered.

212 They date back further in amendment form to the Fifth Amendment but their specific application to the States came with the passage of the Fourteenth Amendment.
That is, at least to some judges. Others would disagree, preferring to confine the holdings in *Meyer, Pierce, Skinner, Prince* and the rest to the specific questions at hand.\(^{213}\) *Meyer* and *Pierce* therefore, under the narrow approach, would stand for, at the very most, the right to send a child to private school, not a broader right to direct the upbringing of a child. What this narrowing of holdings might fail to take account of, however, is that *Meyer* et. al. derive from expansions of principles themselves. Every case is going to be different in some respect. If only the literal words of a constitution or case can be used, then previous decisions give little to no guidance whatsoever and the common law system is effectively abandoned. The difficulty on the other end of the spectrum of the development and use of common law is knowing when a precedent is too inapposite to use.

Turning back specifically to *Griswold* and applying the principles gleaned from *Meyer, Pierce, Skinner and Prince*, Justice White wrote that the constitutionally sanctioned protection of the intimacy of family matters was offended by the Connecticut statute. The nature of the intimacy involved called for strict scrutiny. Such a “significant encroachment upon personal liberty” could only be justified by a compelling state interest, which Justice White failed to find with regard to Connecticut’s statutory scheme.\(^{214}\)

The dissents in *Griswold* articulated what was to become the other side of the modern interpretation debate. Justice Black’s dissenting opinion appeared first, outlining the narrower, Originalist approach that many of the Court’s more conservative members would take in the future of substantive due process jurisprudence. This approach was mindful of the separation of powers and highly skeptical of an activist court that would seek to supplant the role of the legislature. Justice Black noted that he felt the Connecticut law was offensive\(^{215}\) but that its evil qualities were no basis to constitutionally overturn it. He attacked the majority opinion’s reliance on what he considered to be the judicially-created right to privacy, but also addressed substantive due process. Justice Black disagreed with Justice Harlan’s articulated conception of substantive due process as a doctrine capable of striking down arbitrary, capricious, unreasonable or

\(^{213}\) Justice White himself would later join this camp and author the test for its initial use in modern substantive due process jurisprudence. See *Bowers*, infra.

\(^{214}\) *Griswold* at 504.

\(^{215}\) Equally disdainful of Connecticut’s law was Justice Stewart, who called it “an uncommonly silly law” in his dissent. Justice Stewart, as Justice Black, however, would not have stricken the law down as unconstitutional as the majority ultimately ended up doing because of the narrower approach they conceived for themselves as justices as well as an unwillingness to revive substantive due process.
oppressive state legislation. He considered this approach to be impermissible “natural justice,” the very same that was improperly used in Meyer and Pierce.

The broad, evolving approach to the Constitution was also unacceptable to Justice Black. He stated that the Constitution was to be updated through the amending process as articulated in Article V as opposed to justices discerning the changes of the times and applying historical principles accordingly. Justice Black felt that the affirmative approach to changing the Constitution and updating the body of constitutional law in general was superior to relying on the substantive due process clause “or any mysterious and uncertain natural law concept.”

For Justice Black, the use of the substantive due process clause to strike down arbitrary and capricious (or “shocking to the conscience”) legislation was dead and buried along with the economic cases it was used against but were later overturned. He did not seek to resuscitate substantive due process for use in the area of personal liberty and privacy. The clearer demarcations of a restrained and narrow Originalist approach were superior to a subjective natural law approach undertaken by and at the whim of as few as five justices. Justice Black, citing Justice Learned Hand, felt that “[i]t would be most irksome to be ruled by a bevy of Platonic Guardians, even if I knew how to choose them, which I assuredly do not.”

Justice Stewart articulated the same concerns in his dissent. Additionally, he challenged Justice Goldberg’s interpretation of James Madison’s intentions with the Ninth Amendment and the Court’s role with respect to unenumerated rights in general. He wrote that “the Ninth Amendment, like its companion the Tenth, was framed by James Madison and adopted by the States simply to make clear that the adoption of the Bill of Rights did not alter the plan that the Federal Government was to be a government of express and limited powers. All rights and powers not delegated to it were retained by the people and the individual States.” Conversely, “the idea that a federal court could ever use the Ninth Amendment to annul a law passed by the elected representatives of the

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216 Griswold at 522.
218 While natural law purports to rest in objectively true principles, Justice Black either did not agree that such a concept was possible or alternatively that it was a concept that was appropriate for the Court to use. He did not explicitly state the nature of his disagreement with its use in the Court’s jurisprudence.
220 Id. at 529-30.
people of the State of Connecticut would have caused James Madison no little wonder.”

The disagreement, it seems, involved whether those rights not given to the Federal government were reserved to the State governments or to the people themselves, free from State government encroachment, and assured by a Federal Court, namely the United States Supreme Court. That debate engaged in by Justices Douglas, Black and Stewart was most pertinent in terms of the rights considered by the Bill of Rights. With respect to the Fourteenth Amendment, and the substantive due process clause specifically, considering that the amendment was aimed at preventing State governments from infringing upon liberties, it would suggest that those liberties contemplated by the Fourteenth Amendment fell within the province of rights secured for the people and against State action. The doubt then, is not necessarily whether the rights were withdrawn from the Federal government’s police powers and given to citizens, but instead the scope and nature of those rights since the Fourteenth Amendment’s immediate concern was racial discrimination. With the effective discrediting of the Privileges and Immunities Clause as a constitutional force for protecting the unenumerated rights of minorities, judges looked elsewhere. Justice Goldberg utilized the Ninth Amendment, whereas Justice Harlan consulted the Fourteenth.

Rebecca Brown has written thoughtfully about the struggle to define and apply the Court’s liberty jurisprudence. She argues that the mistake was not made in *Lochner* but in *Griswold*. The error was made when the Court moved away from asking whether the State could justify its regulation of a liberty with a valid public reason to instead concentrating on the nature of the liberty itself. This not only retracted the scope of liberty by asking the Court to list the individual liberties that existed instead of making the State justify its actions, but it also opened up a torrent of criticism about the personal predilections of judges from Justice Black in *Griswold* to Justice Scalia in *Casey* and *Lawrence*. Shifting

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221 Id. at 530.
222 See also Gans, *The Unitary Fourteenth* at 924, discussing vagueness doctrine that requires legislatures to enact laws that clearly articulate what is prohibited to avoid doubt potentially chilling the exercise of liberties.
223 Brown, *Fragmented Liberty* at 89-91.
224 As James Madison pointed out two hundred years earlier in acknowledging the best argument against a Bill of Rights, when you enumerate a specified list, it can be inferred that if not listed, the right does not exist, thus explaining the utility of the Ninth Amendment.
225 See also Bickel, Alexander M., *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* 16-23 (2d ed. 1986).
226 Brown, *Fragmented Liberty* at 90-92, citing *Planned Parenthood v. Casey, Lawrence v. Texas,*
to a laundry list of rights instead of a balancing scale ignored Madison’s warning against the express enumeration of all rights that were to be enjoyed, as well as Justice Harlan’s admonition against reducing liberties to a series of “isolated pinpricks.”

Despite the misgivings of Justices Black and Stewart, *Griswold* did indeed mark the beginning of substantive due process’ reemergence, specifically in the area of personal rights. Its invocation increased steadily and, more often than not, it courted enough backers to find itself in the majority opinions.

**LOVING v. VIRGINIA: VIRGINIA IS [ALSO] FOR LOVERS [OF DIFFERENT RACES]**

Two years after *Griswold*, *Loving v. Virginia* was decided by the Court in 1967. *Loving* involved a Virginia statute that prohibited interracial marriage. The bulk of the *Loving* opinion relied on equal protection to strike down the anti-miscegenation law, however Chief Justice Warren’s opinion also briefly--but explicitly--relied upon the Fourteenth Amendment’s substantive due process clause.

In addressing the substantive due process issue, Justice Warren initially took a broad approach similar to Justice Harlan in *Poe* and *Griswold*. He did not frame the issue as whether a white man may wed a black woman as was the case in *Loving*. Nor did he state the question as whether there was a fundamental or constitutional right to interracial marriage. Instead, Justice Warren cited *Skinner* for its proposition that marriage was “one of the basic civil rights of man fundamental to our very existence and survival” that “[had] long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men.”

To deny such a right would be to “deprive all citizens of liberty without due process of law.” Justice Warren further stated that the Fourteenth Amendment required that “the freedom of choice to marry not be restricted by invidious racial discriminations.”

The word ‘marriage’ does not appear in the Constitution, let alone in

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*discussed infra.*

227 *Poe* at 543.

228 *388 U.S. 1 (1967).*

229 Although *Skinner* specifically dealt with the right to procreate, the right to marriage was mentioned as being in the same class of “basic civil rights of man fundamental to our very existence and survival” that procreation belonged.

230 *Loving* at 12.

231 *Id.*

232 *Id.*
an explicit enumeration of a fundamental right to marriage. That the Court found one in Loving is attributable to a common law creation from previous case law, specifically Skinner, and historical and traditional sentiments about marriage in the United States. Justice Warren’s holding in Loving would then seem to be yet another example of the broad, Purposivist approach taken by Justice Harlan in Poe and Griswold that was rejected by Justices Black and Stewart in Griswold in favor of a narrow, Originalist approach to the Judiciary. Nevertheless, Loving did not produce a dissent or a meaningful concurring opinion. Justice Black remained silent and Justice Stewart only added a fleeting one-paragraph concurrence stating that criminality could never be contingent upon the race of the actor.²³³

The silence of the Originalist justices can only leave speculation but it is noteworthy that Loving did not produce the same attack on the revival of substantive due process. To be sure, the silence was in large part due to Loving primarily being an equal protection opinion. However, substantive due process was explicitly used as an independent ground for striking down the democratically-produced law from the Virginia legislature and not one justice weighed in to decry the use of judicial fiat or the violation of the separation of powers. With the exception of Justice Stewart, they all joined the majority opinion containing the substantive due process analysis. Yet under the Originalist approach to the Constitution, it is difficult to ascertain why the anti-miscegenation law should not escape a substantive due process attack despite it likely being construed by most as “arbitrary,” “capricious” or “conscience-shocking” legislation.²³⁴ The law was passed democratically by a state with the power to legislate in the area of marriage and there is no explicit language in the Federal Constitution guaranteeing interracial marriage, or any marriage for that matter. Moreover, while marriage had been traditionally protected at common law, interracial marriage had been comprehensively prohibited.

Professor Brown argues that in “Skinner and in Loving—by cloaking the liberty analysis in the garb of inequality, even though the inequality may have been in some sense contrived, [the Court] managed to construct a whole ‘strand’ of equal protection.”²³⁵ Pamela Karlan also saw the Warren Court in Loving using a “substantive equal protection” analysis, or “substantive due process in drag” to “avoid invoking a clause that was in bad odor because of the Lochner-era decisions.”²³⁶

²³⁴See Justice Black’s dissenting opinion in Griswold.
²³⁵Brown, Liberty, the New Equality at 1511.
²³⁶Karlan, Pamela, Equal Protection, Due Process, and the Stereoscopic Fourteenth Amendment at Footnote 25.
However, *Loving* could have stood solely on equal protection grounds. Moreover, Justice Warren did not cloak his substantive due process analysis to avoid the ghost of *Lochner*. He did the opposite, expressly holding that the Virginia law “deprive[d] all citizens of liberty without due process of law.”\(^{237}\) In fact, considering that the *Davis/Feeney* precedent hollowed equal protection analysis into a deontological review, it is equal protection analysis—not due process—which would need to be cloaked under a veil of "liberty." This practice goes back at least as far as *Meyer*.

**EISENSTADT v. BAIRD: A SINGLE RULE**

*Eisenstadt v. Baird*\(^{238}\) was decided by the Court in 1972 and involved issues similar to those decided in *Griswold*. It concerned a Massachusetts statute that prohibited the distribution of contraception by anyone other than a doctor or pharmacist acting pursuant to a prescription. It also prohibited all single persons from receiving contraception to prevent pregnancy but it did permit both married and single persons to receive contraception to prevent the spread of disease (but again, not pregnancy).

Justice Brennan’s majority opinion relied on *Griswold*\(^{239}\) and equal protection to strike down a law that impossibly withheld a right from single persons that was guaranteed to married persons. His equal protection analysis is expressly stated but he also alludes to substantive due process. The opinion refers to *Griswold*’s privacy discussion, which relied in most part on emanations from the Bill of Rights; however, it also contains language associated with substantive due process. Specifically, Justice Brennan wrote that individuals, married or single, enjoy a right to "be free from governmental intrusion into matters so fundamentally affecting a person as to the decision whether to bear or beget a child."\(^{240}\) (emphasis added) He then cited *Skinner* and *Stanley v. Illinois*,\(^{241}\) cases with explicit\(^{242}\) and implicit\(^{243}\) substantive due process analyses.

Justice Burger’s dissenting opinion sensed substantive due process’ presence in the majority opinion under the surface of the *Griswold*-equal protection analysis. He lamented that the majority opinion in *Eisenstadt*

\(^{237}\) *Loving* at 12.

\(^{238}\) 405 U.S. 438 (1972).

\(^{239}\) Justice Brennan’s reliance on *Griswold* appeared to be with respect to its Bill of Rights privacy argument and not necessarily substantive due process, although he would later cite *Griswold* in substantive due process analyses.

\(^{240}\) *Eisenstadt* at 453.

\(^{241}\) 405 U.S. 645 (1972), discussed below.

\(^{242}\) *Stanley*.

\(^{243}\) *Skinner*. 
“regrettably hark[ened] back to the heyday of substantive due process.” Justice Burger’s suspicions were to come to fruition. Not more than two weeks after Eisenstadt was decided, Stanley v. Illinois became the second opinion in the Court’s modern substantive due process jurisprudence, alongside Loving, to strike down intrusive state legislation with substantive due process as an independent reason in the majority opinion. The Court had moved from conducting a tacit liberty analysis under the garb of substantive equal protection in Skinner to trying to invent the emanations and penumbras doctrine in Griswold. In Stanley, substantive due process and equal protection would sit together as they did in Loving before substantive due process would complete its comeback.

**STANLEY v. ILLINOIS: FATHERS AND SONS**

Stanley v. Illinois involved an Illinois statute that automatically made the children of unwed fathers wards of the state upon death of the mother regardless of the fitness of the father to take care of his children. Justice White’s majority opinion addressed an Illinois father’s equal protection claim as well as the law’s procedural and substantive due process issues. He framed the issue as whether a presumption that distinguishes and burdens all unwed fathers was constitutionally repugnant. Justice White’s conclusion writing for a majority of the Court held that the Illinois law violated the equal protection clause of the Fourteenth Amendment, as well as its procedural and substantive due process components.

The majority opinion first addressed the substantive due process element. Justice White began the analysis by reaffirming that the Court had “frequently emphasized the importance of the family” and that “[t]he rights to conceive and to raise one’s children have been deemed essential,” were “basic civil rights of man” and that the custody, care and nurture of [a] child reside[s] first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder.” He further emphasized that “[t]he integrity of the family unit has found protection in the [substantive] due process clause of the Fourteenth Amendment.” Justice White’s citation of Griswold in the Stanley majority opinion stands for the proposition that family unit integrity finds protection in the substantive due process clause, and

244 Eisenstadt at 467.
245 Citing Meyer.
246 Citing Skinner.
247 Stanley at 651, citing Prince.
248 Stanley at 651, citing Meyer, Skinner and Griswold.
arguably elevated the concurring opinion written by Justice Goldberg from a discussion of the revival of doctrine to controlling law. Such would be the case later for Eisenstadt. Griswold, and in particular Eisenstadt, were both seemingly decided on grounds other than substantive due process. However, those cases soon became beginning reference points for the new bases of modern substantive due process.

After articulating the importance of familial interests protected by substantive due process in broad Purposivist fashion, Justice White conceded that the State also had an important interest in ensuring that children were left in adequate custody. It was at this point that Justice White began his analysis of the procedural due process issue. While the State had a strong interest in the child’s welfare, the constitutionally protected area of familial association was implicated. To deprive an individual of this familial association, the State was required to provide constitutionally sound procedures. Here the State had failed.

Both Justices Burger and Blackmun dissented in Stanley. Part of Justice Burger’s disagreement stemmed from the majority’s sua sponte consideration of substantive due process; his misgivings with procedural due process consuming a substantial portion of the dissent. The rest of the dissent addressed only the equal protection issue, although he did reserve the last sentence of his opinion to bemoan that the Court had once again “embark[ed] on a novel concept of the natural law for unwed fathers that could well have strange boundaries as yet undiscernible (sic).” Whether the boundaries were strange was a matter of interpretation. Where those boundaries were to be extended not more than a year later were historical.

**ROE v. WADE: RAW EDGES OF HUMAN EXISTENCE**

The Court’s first decade of the revival of substantive due process took place primarily in the context of familial decisions; whether to form a family (marriage), increase one (contraception), the happenings within one (interference in the marital bedroom) and maintaining a

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249 It was Justice Harlan’s concurring opinion in Griswold that relied exclusively on substantive due process to attack the Connecticut statute but Justice White nevertheless cited Justice Goldberg’s opinion for the idea that Griswold was determined, at least in part, on substantive due process grounds.

250 Stanley at 668.

251 Eisenstadt extended Griswold’s holding to unmarried persons and therefore did not necessarily deal with established families, despite contraception involving whether to have a family.

252 Loving.

253 Poe and Griswold.

254 Poe and Griswold.
family (child custodial rights). The language used in explicating these rights primarily described the family unit as an intimate place to be defined by the individuals within the family. A state could not intrude to dictate, regulate or interfere with these intimate matters absent compelling justification. *Roe v. Wade* continued this theme of determining the nature of family but also further expanded the existential concept, relying more on the idea of liberty in addition to privacy. Abstract, theoretical and existential language was employed in *Roe* to focus not only on how or if a family would exist and how its members could interact with one another, but also what it would mean for the individual’s existence itself, apart from the family unit. The very first point made by Justice Blackmun in the majority opinion referenced “one’s ‘philosophy, one’s experiences [and] one’s exposure to the raw edges of human existence.’”

Justice Blackmun framed the issue as whether there was a “personal liberty embodied in the Fourteenth Amendment’s [substantive] Due Process Clause; or in personal marital, familial, and sexual privacy said to be protected by the Bill of Rights or its penumbras,” or among those rights reserved to the people by the Ninth Amendment. He rested the majority’s decision to acknowledge the right in substantive due process alone. He stated that the concept of liberty is guaranteed in the first section of the Fourteenth Amendment and that “only personal rights that can be deemed fundamental or implicit in the concept of ordered liberty are included in this guarantee of personal privacy.” The list of these personal rights included: “marriage; procreation; contraception; family relationships; and child rearing and education.” These rights,

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255 Stanley.
256 410 U.S. 113 (1973).
257 Doe v. Bolton, 410 U.S. 179 (1973) was *Roe’s* companion case.
258 Roe at 116.
259 *Citing Griswold and Eisenstadt.*
260 Roe at 129, *citing* Justice Goldberg’s concurring opinion in *Griswold.*
261 *Citing Meyer.*
262 *Citing Palko.*
263 Roe at 152.
264 *Loving.*
265 *Skinner.*
266 *Eisenstadt.*
267 *Prince.*
268 *Roe at 152, citing Meyer and Pierce.*
269 Justice Blackmun omitted *Griswold* in his string citation of rights the Court had previously found. This omission could have been made to stress that the majority’s holding was based in the substantive due process clause of the Fourteenth Amendment while *Griswold* was decided pursuant to the penumbra emanations of privacy from the Bill of Rights. This rational does not,
according to Justice Blackmun, derived from the substantive due process clause of the Fourteenth Amendment, as opposed to the Ninth Amendment as had been found by the District Court, and it “[w]as broad enough to encompass a woman’s decision whether or not to terminate her pregnancy.”

It included the woman’s right to choose because that choice involved the most intimate and personal aspects of her present and future life, including the physical and mental health issues attendant to pregnancy, its responsibilities, and the stigmas that come along with being an unwed mother.

Justice Stewart, who had dissented in *Griswold*, concurred separately in the *Roe* decision. He did so, at least at the outset of his opinion, seemingly to decry the established resuscitation of substantive due process, noting perhaps wistfully that in 1963 the Court had “purported to sound the death knell for the doctrine of substantive due process” by returning to “the original constitutional proposition that courts do not substitute their social and economic beliefs for the judgment of legislative bodies, who are elected to pass laws.” He quickly changed gears, however, and began his analysis by stating that while he originally believed that *Griswold* was not decided on substantive due process grounds, he now accepted that that was indeed the case. Justice Stewart’s change of heart was in part due to his insistence that the contraception statute in *Griswold* did not violate an amendment in the Bill of Rights and, therefore, by inference it had to have been due to the Court’s rekindled preoccupation with liberty as found in the Fourteenth Amendment.

Justice Stewart then continued to demonstrate his acceptance of substantive due process’ new role by stating that the meaning of liberty had to be broad in a Constitution for free people, and although nothing is explicitly mentioned about personal choice with respect to marriage and family life, liberty did indeed cover more matters than are expressly enumerated. He cited Justice Harlan’s *Poe* dissent (explaining liberty as a rational continuum which extends to freedom from substantial arbitrary imposition), as well as Justice Frankfurter, (stating that “[g]reat concepts like liberty were purposely left to gather meaning from experience, [f]or they relate to the whole domain of social and economic fact, and the

however, necessarily account for why Justice Blackmun cited *Eisenstadt*, a case, albeit with substantive due process language, with an equal protection holding to extend *Griswold’s* privacy rights.

270 *Roe* at 153.
271 Although *Roe* was of course not limited to unwed mothers.
272 *Roe* at 167, citing *Ferguson v. Skupra*.
273 *Roe* at 167.
statesman who founded [the United States] knew too well that only a stagnant society remains unchanged”). The concept of extending liberty to “matters so fundamentally affecting a person as the decision whether to bear or beget a child…includes the right of a woman to decide whether or not to terminate her pregnancy.” After all, concluded Justice Stewart, the “[effects] throughout a woman’s life [from] the birth and raising of a child are of a far greater degree of significance and personal intimacy than the right to send a child to private school [as] protected in Pierce or the right to teach a foreign language protected in Meyer.” Roe marked the first time that the substantive due process clause had been the exclusive basis for a holding striking down State legislation after its modern revival in Poe. In just eleven years, it had gone from appearances in two dissents to the legal crux in one of the most famous—or infamous—decisions in American legal history. The battle over whether substantive due process would be resuscitated to guarantee personal rights after being buried in the context of economic rights was now over.

Professor Sunstein argues that equal protection was invoked in Roe, a case in which many believe sex discrimination was involved, thus creating a viable equal protection challenge to abortion laws. Roe does indeed have an equal protection component; abortion laws are made primarily by men and fall squarely on the shoulders of women. While men can and should be affected, regretfully, they can readily shirk their responsibilities, whereas women are inescapably responsible, whatever their choice. After Davis and its progeny, sex discrimination in abortion laws—although profound—is not facially apparent, nor even necessarily intentional—the key requirement from Davis. Roe was decided before Davis gutted equal protection; however, Professor Sunstein was writing Due Process and Equal Protection in 1988, well after the damage to equal protection had been apparent.

Moreover, while the disparate impact of abortion laws on women is insufficient to prevail in an equal protection analysis for the immutable, equal protection also lacks the existential element of a woman deciding if she would like to be a mother. While equal protection fails to protect

275 Roe at 169-170, citing Eisenstadt.
276 Roe at 170.
women on both the immutable and existential fronts, substantive due process ensures that women can make the inherent existential choices of being a woman, free from State intrusion.

**CLEVELAND BOARD OF EDUCATION v. LA FLEUR: WORKING GIRL**

The Court’s next foray into substantive due process jurisprudence came a year later, in 1974, and while set in a less controversial context, continued the tension between the Purposivists and the Originalists. *Cleveland Board of Education v. LaFleur* 278 concerned school board rules that required teachers that became pregnant to take maternity leave without pay five months before the expected birth of a child. The school board’s rules further mandated that a teacher could not return to work until her child was at least three months old.

Justice Stewart’s majority opinion started where the previous substantive due process analyses began. He referenced the Court’s long history of recognizing freedom of personal choice with respect to marriage and family life as protected by the substantive due process clause and cited *Roe, Loving, Griswold, Pierce, Meyer, Prince* and *Skinner*. He also singled out *Eisenstadt* to note that there was a right “to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.”

LaFleur involved such a right; the school board’s rules worked to affect both the right to have a child and the way in which a parent interacted with her child. Teachers were, in effect, penalized in their careers for deciding to beget children, and they were thereafter coerced into staying at home after having children for as long as the board deemed appropriate.

These procedures concerning pregnant teachers were arbitrary and overly broad. Further, Justice Stewart stated that permanent irrebuttable presumptions were disfavored by the due process clause. Such was the case in *Stanley*. When a liberty interest was at stake, substantive due process mandated thorough procedural due processes before that right could be tampered with. The school board’s presumption against the fitness and desirability of having pregnant teachers at its schools without making an inquiry as to the specific teachers’ capabilities impermissibly affected a protected right (the decision to bear a child), much as it had in *Stanley* with respect to depriving fathers of custody without a determination as to their parental fitness.

279 640.

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279 *LaFleur* at 640.
As in Stanley, LaFleur also involved an impermissible irrefutable presumption, only the politically marginalized majority (women) were easier to identify. The case protected not only the decision to procreate free from professional sanctions, but also a mother’s determination of how to balance and define her roles as caregiver and professional. This utilization of equalery to invalidate male-centric notions of the proper roles of females enables women to continue to expand their growing presence in the workforce.

MOORE v. CITY OF EAST CLEVELAND: LET’S STAY TOGETHER

The Court’s protection of decisions affecting the family continued to expand with Moore v. City of East Cleveland,280 decided in 1977. Moore involved a city zoning ordinance that restricted use of certain dwellings to a single family. Family was narrowly defined under the ordinance to mean only a few categories of related individuals. Moore was living with her son and two grandsons. Pursuant to the restrictive definition of family under the ordinance, one of Moore’s grandsons was declared an illegal occupant and Moore was directed to expel her grandson from her home. She was convicted of violating the city ordinance and appealed.

Writing for a majority of the Court, Justice Powell struck down the ordinance for being an overly intrusive regulation of the family. He based his decision solely in the substantive due process clause, holding that the gravity of the violation into the long recognized “freedom of personal choice in matters of marriage and family life” counseled in favor of foregoing the normal judicial deference to the legislature.281 For this proposition, Justice Powell traced his line of reasoning from the recently decided LaFleur to Meyer. Justice Powell also referenced the protection of the “private realm of family life which the state cannot enter”282 citing a host of substantive due process clause cases, including Pierce, Prince, Roe, Stanley, Griswold, Poe, Loving and Skinner.283

Aside from the customary string cite commencing with Meyer,

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280 431 U.S. 494.
281 Moore at 499.
282 Justice Powell also cited Wisconsin v. Yoder, 406 U.S. 205 (1972) (State compulsory attendance education law struck down primarily based on Free Exercise Clause of First Amendment but also pursuant to substantive due process clause following Meyer and Pierce cases ensuring parental right to direct child’s education); Ginsberg v. New York, 390 U.S. 629 (1968) (“Custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparations for obligations the state can neither supply nor hinder,” citing Prince).
283 Moore at 499.
Justice Powell added to substantive due process jurisprudence by extending its realm beyond simply permitting families to live together. The Court had dealt with the family relationship before with respect to child bearing, custody rights and child rearing. However, once again illustrating the importance of Poe, Justice Powell extensively quoted Justice Harlan’s dissent to repeat that substantive due process could not be determined by a formula or a code. Instead, it would be determined by weighing the balance between the liberty of the individual and the order of an organized society. History and tradition would guide this balance as a living concept that evolved on a rational continuum rather than specific examples of past permitted behaviors, or, in the parlance of Justice Harlan, “isolated pinpricks.”

Justice Powell’s excursion into the interpretation debate came with an admission that approaching substantive due process, particularly in a variation of the Purposivist fashion, provided a “treacherous field for [the] Court.” He acknowledged that its troubled history required caution and restraint, however, the difficult nature did not counsel its abandonment. While Justice Powell felt that the Court had to tread especially careful in using an amorphous concept to strike down democratically enacted legislation, he also found a burden on state legislatures imposed by substantive due process to “respect the teachings of history and [recognize] the basic values that underlie our society.” One such basic value that the Court had recognized was that of respect for the individual to determine the nature of her family because the sanctity of the family “was deeply rooted in [the Nation’s] history and tradition.”

Turning back to Moore, Justice Powell wrote that the respect for family he found in the United States’ history and tradition extended beyond the immediate nuclear family. Therefore, substantive due process protection would not be limited to exclude grandparents, aunts, and uncles. Just as a State could not determine if a child would be had or where she would be educated, a State was also prohibited from seeking to determine “certain narrowly defined family patterns.”

Justice Brennan, joined by Justice Marshall, concurred and wrote separately. While citing LaFleur for its legal holding that “freedom of

284 LaFleur, Roe and Griswold.
285 Stanley.
286 Pierce and Meyer.
287 Moore at 502.
288 Moore at 503.
289 Id.
290 Moore at 506.
personal choice in matters of family life is one of the liberties protected by the substantive due process clause of the Fourteenth Amendment,” Justice Brennan immediately declared that he wrote separately for an express purpose; to emphasize explicitly that “the Constitution [was] not powerless to prevent East Cleveland from prosecuting as a criminal and jail a 63-year-old grandmother for refusing to expel from her home her [then] 10-year-old grandson who [had] lived with her and been brought up by her since his mother’s death when he was less than a year old.”

Such an openly passionate and consequence-laden statement was exactly the kind of judicial crusading that Originalist judges feared would be emboldened by the resuscitation of flexible concepts amenable to manipulation such as substantive due process.

Justice Brennan’s opinion was rich in social justice and attacked the perceived ethnocentrism of the ruling majority white class. He did invoke the Constitution, but in such a generalized fashion that Justice Harlan would have hardly recognized substantive due process as something that refused “to tolerate the imposition by government upon the rest of us of white suburbia’s preference in patterns of family living.”

The Originalist justices had been relatively silent in the decade previous to Moore after losing the Poe revival debate. Perhaps provoked by Justice Brennan’s suggestive social justice opinion, they were anything but quiet in their Moore dissents. Chief Justice Burger’s dissent was first only took issue with a perceived procedural defect in failing to litigate in an administrative court.

Justice Stewart, joined by Justice Rehnquist, reached both the merits of Moore as well as the interpretation debate. With the exception of Griswold, Justice Stewart had previously helped to expand the notion of unenumerated rights, particularly those based in substantive due process. He acknowledged Justice Powell’s statement of the law as developed by the Meyer line of cases and that “[s]everal decisions of the Court [had] identified specific aspects of what might broadly be termed private family life that [were] constitutionally protected against state interference.”

Justice Stewart also conceded that the interest in Moore involved the “private family life.” It did not, however, in his estimation, equate to the rights established in the Meyer line of cases because wanting to live together did not involve the choice to have or not have children, did not

291 Moore at 506.
292 Id. at 508.
293 Moore at 536.
294 Id.
dictate how children were to be nurtured or reared, and did not prevent parents from living with their children.\footnote{Id.}

Justice Stewart’s distinction appeared to hinge in part on the rights announced in the \textit{Meyer} line of cases regarding the immediate relationship between parent and child and not extending rights as far as the relationship between a grandparent and a grandchild. To Justice Stewart, substantive due process clause limitations on a state—with respect to personal matters implicit in the concept of ordered liberty\footnote{Roe, citing Palko.}—simply did not include relatives wanting to live together. This distinction, however pertinent, was more persuasive than his initial attempt to distinguish \textit{Moore} from cases such as \textit{Meyer} and \textit{Pierce} with respect to nurturing and rearing children. If determining where and how a child is educated is important enough to protect with respect to an existential liberty, certainly the influence where a child actually lives and is raised is equally, if not likely more, influential.

Justice Stewart had not disputed the current state of the law, which he had helped create as recently as his majority opinion in \textit{LaFleur}. He was not, however, willing to continue to expand the use of substantive due process outside of the nuclear family, which would, in his estimation, “extend the limited substantive contours of the [substantive] due process clause beyond recognition.”\footnote{Moore at 537.} His dissent in \textit{Moore} further illustrated the difficulty in deciphering any clear parameters within the Purposivist approach. Justice Stewart had joined the camp after initially holding out, however his disagreement in \textit{Moore} did not stem from another change of heart in terms of the validity of the doctrine, but rather, the extent of the substantive due process clause’s reach, or, as would reoccur with Justice Powell and Justice White in particular, the subject matter involved.

Similarly, Justice White also weighed in on the debate and wrote another one of the more influential declarations of the Court’s present and future substantive due process jurisprudence. While also skeptical of its scope, he was careful to note that he did not suggest overruling the Court’s “reinterpretation” of the Constitution that led to the rights announced in \textit{Meyer, Pierce, Roe, Loving, Griswold and Eisenstadt}. However, wary of where he believed the Court to be heading, Justice White sought to remind the Court that the rights that had been created were “nothing more than the accumulated product of judicial interpretation of the Fourteenth Amendment” and that “the Court ha[d] no license to invalidate legislation
which it thinks is merely arbitrary or unreasonable.\textsuperscript{298} Moreover, the architect of substantive due process’ revival himself was most cognizant and worried about judges “roaming at large in the constitutional field.”\textsuperscript{299}

Justice White then made his own declaration which has become a favored citation in the interpretation debate: “[t]he Judiciary, including this Court is the most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or even the design of the Constitution.”\textsuperscript{300} In order to avoid the usurpation of the legislature’s role, Justice White believed that the Court “should be extremely reluctant to breathe still further substantive content into the [substantive] due process clause so as to strike down legislation adopted by a State or city to promote its welfare.”\textsuperscript{301}

Even more contentious than the Court’s proper function in the United States’ system of separation of powers, however, was again the interpretation and application of “liberty.” Justice White cited Justice Douglas’ dissenting opinion in \textit{Poe} for a change to highlight that the tension within the Court centered not on the definition of liberty “but in its definition of the protections guaranteed to that liberty.”\textsuperscript{302} Both Justice Powell in the majority and Justice White in the dissent of \textit{Moore} had found a liberty interest at stake. The issue was how that liberty stake would be defined; the scope it was given beyond whether it was liberty \textit{vel non}. This would determine whether it was entitled to substantive protection pursuant to the Fourteenth Amendment.

In terms of \textit{Moore} specifically, Justice White agreed with Justice Stewart that the liberty interest in living with one’s grandchildren did not rise to the level of a right that “was implicit in ordered liberty.”\textsuperscript{303} To claim otherwise would, as Justice Stewart had written, “extend the limited substantive contours of the [clause] beyond recognition.”\textsuperscript{304} Adding to the “ordered liberty” standard that would be applied to future opinions,\textsuperscript{305} Justice White stated that the loss of the right as he conceived it in \textit{Moore}

\begin{footnotesize}

\textsuperscript{298} Id. at 543-44, \textit{citing} Justice Black while arguably contradicting the rights he had found in the majority opinion he penned in \textit{Stanley}.

\textsuperscript{299} Id. at 544, misconstruing Justice Harlan writing in \textit{Griswold}, who had stated that disciplined application of substantive due process would not result in “judges roaming at large in the constitutional field.”

\textsuperscript{300} Id.

\textsuperscript{301} Id.

\textsuperscript{302} Id. at 546.

\textsuperscript{303} Although a son living with his father was implicit in the concept of ordered liberty per Justice White’s majority opinion in \textit{Stanley}.

\textsuperscript{304} \textit{Moore} at 549.

\textsuperscript{305} By Justice White himself a decade later in \textit{Bowers v. Hardwick, infra}.  

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would not result in liberty or justice failing to exist.

The second substantive due process test announced by White was whether the right contemplated was “deeply rooted in the country’s traditions.” What would be even more precarious to discern, with, of all things, the aide of history, was which of those traditions would deserve the protection of the substantive due process clause.

Justice White’s Moore dissent arguably did more to define the substantive due process debate than any other opinion after Justice Harlan’s in Poe. It would enjoy particular importance for the Originalists. Whereas justices had been uncertain and vague in their discussions of what substantive due process had meant and would mean in relation to liberty interests, Justice White was able to identify and explicate some of the major components of the debate. Specifically, he effectively characterized the argument as not whether a liberty interest was involved but whether it rose to the level of a substantive one that should be afforded constitutional protection. While the debate was certainly far from over, the standards used and the main arguments proffered were taking a more concrete shape.

Moore involved more than simply the right to define what constitutes a family; Moore also utilized the equality feature to disable the disparate effect of East Cleveland’s facially neutral statute. Justice Brennan pointed out in his concurring opinion that 13% of black families (compared to 3% of white families) included relatives under eighteen in addition to the couple’s own children, 48% of black households (compared to 10% of white households) included related minor children who were not offspring of the head of the household, and 26% of black children lived in households other than man-wife families. Despite these contrasting figures, Justice Brennan noted that he did not wish to imply that the statute was motivated by a racial bias, nor was an equal protection analysis undertaken in the case. The statute in Moore appeared neutral, and its motivation of remodeling housing congestion also seemed to be a legitimate State interest. The statute’s neutrality, however, served to conceal, or at least justify, its disparate impact on blacks in East Cleveland. Blacks, as the paradigm example of a class worthy of analysis under the equal protection clause, could still not benefit from it because of the lack of a direct and obvious connection between the statute and its likely unintended consequences. The existential nature of family life, specifically living together, covered this subject to address the specific reality of East Cleveland’s law. This is the

Comment [NU8]: is this the term Brennan used? it is a bit unclear, would be better to say 26% of black children lived in unmarried households, if that’s what is meant here.

306 Justice Brennan would later expand on this Originalist admission in response to the their criticism that the Purposivist approach was arbitrary and amenable to manipulation. See infra, Michael H.
crucial point in the wake of Davis: without a provable racial animus, relief is not available no matter how disparately a statute affects a group. Substantive due process, once again, acted as a catch-all for ostensibly benign motivations that clearly resulted in disparate effects.

**CAREY v. POPULATION SERVICES INTERNATIONAL: NO MINOR THREAT**

Carey v. Population Services International\(^{307}\) was issued nine days after Moore facilitated some of the longest and most thorough expositions on substantive due process. In Carey, the Court once again revisited birth control, this time analyzing a New York statute that sought to regulate the use of contraception amongst minors. Specifically, the statute banned the distribution of contraception to all persons under the age of sixteen and to those over the age of sixteen by anyone other than a licensed pharmacist.

Justice Brennan wrote the majority opinion for the Court and began by emphasizing the Court’s previous jurisprudence securing the right of an individual to make the decisions most personal to oneself without State intrusion. He specifically mentioned the existence of “certain areas or zones of privacy,”\(^{308}\) and stated that there was a recognized “interest in independence in making certain kinds of important decisions.”\(^{309}\) This zone of privacy had not been clearly delineated but included marriage,\(^{310}\) procreation,\(^{311}\) contraception,\(^{312}\) family relationships\(^{313}\) and child rearing/education.\(^{314}\) Within this zone of privacy, the decision whether to accomplish or prevent conception was among the most private and sensitive, and Justice Brennan’s Carey opinion went on to hold that this constitutional protection of individual autonomy in matters of childbearing was guaranteed to minors,\(^{315}\) just as the Eisenstadt opinion had guaranteed Griswold’s protection for the use of contraception to unmarried individuals.

Justice Brennan sought to make clear the right at stake in Carey and to make a distinction as clear as possible in what was one of the Court’s most

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\(^{308}\) Citing Roe.


\(^{310}\) Loving.

\(^{311}\) Skinner.

\(^{312}\) Eisenstadt.

\(^{313}\) Prince.

\(^{314}\) Pierce, Meyer, Roe and LaFleur.

\(^{315}\) See also Planned Parenthood of Central Missouri v. Danforth, 428 U.S. 52 (1976) (State could not circumvent constitutional rights that applied equally to minors by imposing a requirement to consult a third party before exercising the right).
murky areas. In true Purposivist form, he specified that the issue was not one of birth control, because there was no “independent fundamental right of access to contraceptives.” Moreover, the issue certainly was not as narrow as whether a fifteen-year-old had a constitutional right as guaranteed by substantive due process to a condom. Instead, the specific facts of Carey, as in Griswold and Eisenstadt, involved access to contraception, which unavoidably invoked the broader constitutionally protected individual right of whether to bear a child. An individual’s decision concerning procreation was, the Court’s jurisprudence made clear, a right accepted by even the justices most hesitant to revive substantive due process. What remained unclear, and what the Court had to determine, were the specific scenarios fitting under the canopy of the right. Carey reaffirmed with Danforth that minors also stood under that canopy.

Justice Brennan did acknowledge that these rights to privacy were not absolute and could be regulated by the State with a compelling justification implemented through narrow means. However, the New York statute’s proffered intentions, including the regulation of the sexual activities of minors, did not meet that burden. Further, just as a blanket prohibition of abortions for minors in Danforth was unconstitutional, so too was an outright prohibition of contraception for minors. Carey and Danforth both involved the constitutionally protected right of determining whether to bear or beget a child. If an abortion could not be prohibited to an individual simply because she was a minor, then it was axiomatic that neither could the state ban a contraceptive device.

Justice Rehnquist dissented briefly but vociferously. He initially stated his misgivings as an objection to the modern interpretation of the Bill of Rights and Fourteenth Amendment, utilizing colorful, if not maudlin, language to suggest that the drafters of the Constitution would be appalled to see how far the traditional meanings of their amendments had been taken. To Justice Rehnquist, this was an example of the often-repeated Originalist charge of unwarranted Lochnerian judicial second-guessing. It did not involve the fait accompli of pregnancy or the decision of how to deal with it or any previously recognized constitutional rights, specifically whether to bear or beget a child. For Justice Rehnquist, Carey was about

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316 This right’s origins in common law are arguably Skinner, although as already noted, modern substantive due process generally points to Griswold as the beginning.
317 Again, much like the penumbra described in Griswold involving the emanations of privacy from the Bill of Rights, the substantive due process clause of the Fourteenth Amendment is a broad concept that can be seen as covering more specific situations.
318 The State’s argument that availability of contraception would increase sexual activity amongst minors was rejected by Justice Brennan.
regulating the sexual activity of minors. And that was an area that he believed was firmly within the province of state legislatures.

**ZABLOCKI v. REDHAIL: FOR RICHER OR POORER**

Six months later the Court yet again dealt with an issue that would seem to invoke substantive due process in *Zablocki v. Redhail*\(^ {319}\), although Justice Marshall employed a substantive equal protection analysis (the inversion of substantive due process with an equal protection component).\(^ {320}\) The opinion is another example of how liberty and equality analyses can be blended, although Justice Marshall’s version—liberty under the cover of equal protection—was employed less frequently than the equality under cover of liberty analyses of the second half of the twentieth century.

*Zablocki* addressed a Wisconsin statute prohibiting persons with non-custodial children from marrying without first obtaining a court order showing they were financially supporting these children. Justice Marshall’s opinion stated that marriage was one of the “basic civil rights of man, fundamental to our very existence and survival,”\(^ {321}\) and was “the most important relation in life...without which there would be neither civilization nor progress.”\(^ {322}\) Constitutionally, Justice Marshall noted that the right to “marry, establish a home and bring up children is a central part of the liberty protected by the [substantive] due process clause.”\(^ {323}\) Further, Justice Marshall noted that the Court’s recent jurisprudence established that “the right to marry is part of the fundamental right of privacy implicit in the Fourteenth Amendment’s [substantive] due process clause.”\(^ {324}\) He also reiterated the Court’s stance, recently articulated by Justice Brennan in *Carey*, that the right to privacy encompasses the right to make personal decisions, including decisions about marriage. Marriage deserved the same level of protection as procreation, child rearing and family relationships, all areas that the Court had recently found to be under the protection of substantive due process because “it would make little sense to recognize a


\(^{320}\) For a thoughtful discussion on Justice Marshall’s attempts to embed this in the Court’s jurisprudence, particularly during the Warren Court, see again Lupu, *Untangling the Strands* at 1023. See also Nolan, Laurence C., *The Meaning of Loving: Marriage, Due Process and Equal Protection as Equality and Marriage*, from *Loving to Zablocki*, 41 How. L.J. 245 (1998), discussing amongst other things Justice Marshall’s “indirect vindicat[ion] [of] the substantive meaning of the equal protection clause.”

\(^{321}\) *Skinner.*


\(^{323}\) *Zablocki* at 383-84, *citing Meyer.*

\(^{324}\) *Zablocki* at 384.
right to privacy with respect to other matters of family life and not with respect to the decision to enter the relationship that is the foundation of the family in our society.”

Given the importance of marriage, Justice Marshall wrote that to burden such a fundamental right, strict scrutiny would have to be met through a compelling state interest implemented in a narrowly tailored fashion. The Wisconsin law did not meet this burden. While enforcing child support obligations and the overall welfare of out-of-custody children were valid state interests, Justice Marshall pointed out that the statute was unlikely to meet its goals, and instead “merely prevent[ed] the applicant from getting married, without delivering any money at all into the hands of the applicant’s prior children.” Moreover, he noted that permitting someone to marry was more likely to increase one’s ability to pay child support, considering that marriage resulted in the combining of incomes. To the extent that they so thoroughly infringed a constitutional right on the basis of socioeconomic status and did not necessarily achieve anything in the process, the statute failed to meet the strict scrutiny standard.

Justice Stewart concurred in the Zablocki judgment on the basis of a substantive due process analysis despite the Court’s declaration that the case rested on equal protection grounds. He asserted that “the State’s legitimate concern with the financial soundness of prospective marriages must stop short of telling people they may not marry because they are too poor or because they might persist in their financial irresponsibility.” The invasion of constitutionally protected liberty and the chance of erroneous prediction were simply too great. A legislative judgment so alien to our traditions and so offensive to our shared notions of fairness offends the substantive due process clause of the Fourteenth Amendment.”

Zablocki continued the Court’s emphasis on marriage as a “vital personal right essential to the orderly pursuit of happiness by free men” as announced in Skinner, Meyer and Loving. Zablocki did not contain the

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325 Id. at 386.
326 Zablocki at 389.
327 Seven years earlier the Court invalidated the State of Connecticut’s court fees for divorce proceedings for an impoverished couple who could not pay, finding a violation of due process to deny citizens access to the State’s monopoly on divorce proceedings with respect to one of society’s most basic interests solely because they could not pay. Boddie v. Connecticut, 401 U.S. 371 (1971) (a procedural due process violation with respect to a substantive due process right).
328 The Court expressly extended Zablocki to prison inmates nine years later in Turner v. Safley, 482 U.S. 78, 94 (1987).
329 Zablocki at 395.
330 Justice Marshall also cited Maynard v. Hill, 125 U.S. 190 (1888) (characterizing marriage as “the most important relation in life”).
incendiary issue of race like *Loving*, but the Wisconsin statute disproportionately burdened the poor. Justice Marshall employed both substantive due process and equal protection analyses to strike down the State statute as had been done in *Loving*. The language he used, and the cases he cited, however, almost exclusively sounded in substantive due process, whereas the bulk of *Loving* had relied on equal protection analysis. This common mixing of the two doctrines largely escaped comment outside of Justice Stewart’s *Zablocki* concurrence. While he joined the Court’s judgment, Justice Stewart wrote that concluding that the Wisconsin statute “create[d] classifications in the equal protection sense [struck him] as little short of fantasy,” and the proper inquiry was “not one of discriminatory classifications but of unwarranted encroachment upon a constitutionally protected freedom.”

This orthodox approach to equal protection—even emphasizing the doctrine’s paradigm violation of race—opens the door for substantive due process to pick up where equal protection has left off. Equal protection may function well in instances where deliberate discriminatory intent has been manifested and declared in statutes. However, restricting equal protection’s scope to this specific and increasingly less common situation would permit hidden biases and unintentional biases to work undisturbed. Equal protection plus as an additional component to substantive due process, i.e. where fundamental liberties are concerned, address the limitations countenanced by, among others, Justice Stewart.

Wisconsin’s statute may not have had any ill motive toward the poor. In fact, its motivations likely stemmed primarily from concerns about the welfare of its underprivileged children. If the inquiry ended here, Justice Stewart’s dismissal of any unequal treatment would be warranted. In reality, however, the statute’s effect did little to better the children’s situation, but rather notably impinged on an existential right considered to be fundamental by the Court. And this impingement overwhelmingly burdened the poor, a severely underrepresented class. Moreover, given the vast income inequality experienced by marginalized groups in the United States, the statute’s burden would once again disproportionately fall on the shoulders of minorities.

The Justices had agreed by a 7-2 margin in *Griswold* that the Connecticut birth control law attempted to impermissibly regulate an

331 *Zablocki* at 391-392.

332 The poor are not necessarily recognized as a protected class by the Court (see e.g. *Lindsey v. Normet*, 405 U.S. 56, 74 (1972) (“the Constitution does not provide judicial remedies for every social and economic ill”)), but when an important right is involved, the Court will consider how laws affect the exercising of the right in light of socioeconomic status.
intimate behavior that was protected by the Federal Constitution. The disagreement was over whether to articulate a doctrine through penumbras and emanations that sounded new but protected old concepts, or to resuscitate a possibly discredited doctrine to protect those same concepts. Justice Marshall and Justice Stewart were similarly protecting the same thing. Marriage had been announced as, if not a fundamental right, at least a constitutionally protected privilege. Wisconsin infringed upon the right without proper justification. Justice Stewart would have simply used substantive due process to strike it down. Justice Marshall used a hybrid. The result was the same. Justice Stewart’s unwillingness to acknowledge the disparate effect of the Wisconsin statute concealed the utility of substantive due process. When left alone and apart from equal protection, more often than not, substantive due process worked to ensure that an existential right that had been limited by a State statute was restored to a marginalized group, whether that group was expressly recognized by the Court or not. The same had occurred between Griswold, Eisenstadt and Carey. While equal protection was used in Eisenstadt to extend Griswold’s right, equality did the job in Carey.

Starting with Griswold and up to Zablocki, the Purposivists had largely commanded a majority of the Court over the Originalists to apply the concept of substantive due process broadly.\(^{333}\) They announced fundamental rights concerning marriage,\(^ {334}\) the decision to bear or beget a child\(^ {335}\) and custody of children.\(^ {336}\) The Court had carved out a wide zone of privately expressed liberty underneath substantive due process in which an individual could determine her own existential matters through her most intimate and personal decisions. While this zone included issues as varied as custodial rights to birth control, the unifying theme was undoubtedly family: whether to start one, increase one, or keep one in tact. The Court had given broad discretion to the individual in place of State legislation.

Family, however, was not the only theme involved in the Court’s jurisprudence. Eisenstadt, Roe and Carey certainly were related to the issue of family, viz., whether to have one. However, those cases also contemplated something perhaps related but definitely distinct from marriage: sexual freedom. Implicit in the birth control cases was an individual’s choice concerning her sex life, another intimate and deeply personal area of her life that was logically implicated before the issue of

\(^{333}\) Although Justice Stewart had joined the Originalists in Moore and Justice White joined them in Roe and Moore.  
\(^{334}\) Loving, Zablocki.  
\(^{335}\) Griswold, Eisenstadt, Roe, LaFleur and Carey.  
\(^{336}\) Stanley and Moore.
family arose. The Court’s jurisprudence explicitly discussed the family realm as being protected by substantive due process against State intrusion because of its deeply personal and private nature. The sanctity and imperative to protect family was undoubtedly a more palatable topic than the sexual freedom of unmarried adults. This sentiment was evidenced by remarks such as those of Justice Harlan, the chief architect of the revival of substantive due process himself, that fornication laws were still entirely permissible despite substantive due process protections. 337

Allusions were made, however, throughout the Court’s jurisprudence to an individual’s right to make decisions with regard to oneself and oneself alone apart from how the decision related to another part of her family. Justice Blackmun’s majority opinion in Roe, relying exclusively on substantive due process, began by noting that the issue involved “one’s philosophy, one’s experiences [and] one’s exposure to the raw edges of human existence,” and explicitly referenced the “personal liberty embodied in the Fourteenth Amendment’s [substantive] Due Process Clause.” 338 (emphasis added) Justice Stewart, in his concurring opinion, also emphasized the personal consequences for the individual woman and her life alone that were attendant to her decision.

The Court seemed to hold that there was a right to sexual freedom that was protected by substantive due process in Roe, Eisenstadt, and in particular, Carey. However, the next major case involving substantive due process that the Court agreed to hear took a step back from declaring sexual freedom constitutionally protected. The context of that decision, however, provided for a ruling that went in an entirely different direction and shrouded the Court’s liberty jurisprudence in more doubt. It arose in another one of the United States’ most controversial topics: homosexuality. It would prove to be one of the very few times since substantive due process’ revival that the Originalists—or at least the Originalist method—would court enough supporters to halt the expanding protections afforded under the Fourteenth Amendment’s clause protecting liberty.

**BOWERS v. HARDWICK: REMEMBRANCE OF THINGS PAST**

In 1986 the Court reviewed an anti-sodomy statute from Georgia in Bowers v. Hardwick. 339 The statute made no distinction between heterosexual and homosexual sodomy and instead generally prohibited “perform[ing] or submit[ting] to any sexual act involving the sex organs of

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337 See again Justice Harlan’s seminal Poe dissent.
338 See again Roe at 115, 129.
one person and the mouth or anus of another.” Justice White wrote the majority opinion and began by noting that the Court’s job was not to determine whether the Georgia statute was “wise or desirable,” a caveat reminiscent of Justices Black and Stewart in their Griswold dissents. Instead, Justice White wrote that the issue was “whether the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy and hence invalidate the laws of the many States that still make such conduct illegal and have done so for a very long time.” He further stressed the importance of yielding to the mandates of federalism by emphasizing that the case also called for “some judgment about the limits of the Court’s role in carrying out its constitutional mandate.”

Justice White’s framing of the issue in such a narrow fashion instantly set the tone for the Bowers opinion. While the previous substantive due process cases had spoken of the Fourteenth Amendment’s purpose and protections in the areas of an individual’s most intimate matters, Bowers asked specifically whether there was a constitutional right to engage in the exact behavior at issue. Even more noteworthy than narrowing the scope of the issue from intimate, personal matters to the more specific conduct was Justice White’s splicing of the statute to seemingly only address homosexual sodomy, a point specifically raised by Justices Blackmun and Stevens in their dissents. The Georgia statute criminalized all sodomy without respect to sexual orientation or the specific parties involved. Justice White, however, only asked whether there was a constitutional right to homosexual sodomy. Moreover, in Griswold he had not asked whether the Federal Constitution confers a fundamental right upon heterosexuals to purchase and use birth control, nor did he appear to be dissuaded from conferring such a right out of concern for the State of Connecticut’s sovereignty or improper encroachment by a federal

340 Bowers at 188.
341 See infra Griswold, Stewart, J., dissenting, referring to the Connecticut anti-contraception statute as “uncommonly silly,” although Justice White stopped far short of personally condemning the anti-gay sodomy statute that he created and instead referred to the legislative authority to enact a millennia of moral teaching. Bowers at 197.
342 Bowers at 190.
343 Id.
344 Justice White had voted with the Purposivists in Griswold, writing in his concurring opinion about “significant encroachments” upon “sensitive areas of liberty.”
345 The “radical reductionism” of the Bowers issue stands in stark contrast to Purposivist opinions such as Justice Harlan’s Poe, which sought to find unifying principles that [would] push constitutional law toward rationality” instead of reducing liberties to “isolated pinpricks” standing alone and unethered to historical principles. Tribe, Levels of Generality at 1071.
346 See again Griswold, (White, J., concurring).
court.

Justice White’s analysis began with a rejection of the lower court’s finding that the right of privacy as developed in Carey, Pierce, Meyer, Prince, Skinner, Griswold, Eisenstadt and Roe included a right to homosexual sodomy (again, as opposed to sodomy in general as proscribed by the Georgia statute). He took issue with the holdings of the privacy cases as standing for anything other than the specific issues involved in those particular cases\(^{347}\) and reasoned that the holdings concerning family, marriage and procreation in the familial context had no resemblance or relationship to a right to homosexual sodomy.

Justice White did acknowledge that the Fourteenth Amendment had substantive content of which is immune from State regulation despite an absence of textual support in the Constitution, and once again cited Meyer, Pierce, Prince and the reproduction cases from Griswold to Carey as demonstrating such. He would not, however, acknowledge that homosexual sodomy was included within that substantive content. Further, in the absence of textual support in the Constitution or the Court’s previous holdings, the justices could not merely rely on their own choices of values for the States and Federal Government in determining fundamental rights worthy of such elevated protection. Instead, the test for heightened judicial protection of a fundamental right was whether it was “implicit in the concept of ordered liberty such that neither liberty nor justice would exist if [it] was sacrificed,” as announced in Palko or was “deeply rooted in [the United States’] history and tradition,”\(^{348}\) as declared in Justice Powell’s concurring opinion in Moore.

The language in this disjunctive test that Justice White utilized in Bowers had a pedigree in the Court’s jurisprudence. The “implicit concept of ordered liberty” language dated back to Justice Cardozo’s 1937 Palko opinion as well as Twining in 1908. However, the language had not been part of the Court’s modern substantive due process cases, nor had the test to determine whether a substantive due process right existed hinged so predominately, if not exclusively, on whether the specific act had enjoyed protection at common law.\(^{349}\) It was a distinct departure from Justice

\(^{347}\) This narrowing of holdings stands in stark contrast to the Purposivist approaches taken by Justice Harlan in Poe and Griswold. See also Justice Brennan in Carey.

\(^{348}\) Bowers at 191-92.

\(^{349}\) This suffocating approach to liberties led to Professor Conkle to erroneously yet understandably predict the second death of substantive due process, drawing parallels with the Roosevelt and Reagan political movements, one economically progressive, the other socially restrictive. Conkel, Second Death at 237. But see Id. at 241 (Professor Conkel hedging his bet with an alternative suggestion that Bowers could be an “aberrational precedent”).
Harlan’s “rational continuum” language from Poe--restated and relied upon throughout the substantive due process revival--suggesting that the classical notion of liberty would be applied to contemporary issues. It was, instead, applying specific historical mores and notions to contemporary debates. Under Justice White’s formulation of the substantive due process test, homosexual sodomy, of course, did not enjoy the protection of United States tradition. In fact, the opposite was true to such an extent that to claim otherwise would have been, according to Justice White, “at best facetious.”

Justice White concluded the majority opinion by again cautioning against “discover[ing] new fundamental rights imbedded in the [substantive] due process clause” because “[t]he Court is most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or design of the Constitution.” This deference to the separation of powers counseled “great resistance to expand the substantive reach of [the substantive due process] clause.” Given the lack of fundamental nature of the issue involved in Bowers, Justice White then used a rational basis test to conclude that the Georgia law permissibly used popular notions of morality to criminalize private, consensual sodomy.

Justices Burger and Powell concurred to support Justice White’s axiomatic conclusion that the history and traditions of the United States did not reveal a specific, storied protection of private, consensual homosexual sodomy; “an offense of deeper malignity than rape.” But it was the Purposivists, specifically Justice Blackmun (who had written the Roe opinion) and Justice Stevens, whose opinions made the most noise and were to become more influential in the greater picture of substantive due process. Finding themselves in the rare position of being in the minority, the Purposivists took their turn issuing vitriolic dissents about how misguided they thought the Court’s different, more narrow, direction was.

The very first sentence of Justice Blackmun’s Bowers dissent attacked Justice White’s departure from the previous broad framing of substantive due process issues. Justice Blackmun wrote that Bowers was not about something so narrow as the fundamental right to sodomy but...
instead about “the most comprehensive of rights and the right most valued by civilized men, namely the right to be let alone.” Not only did Justice Blackmun object to the narrowing of the issue as if the behavior took place in a vacuum, he also objected to the exclusive reliance on specific traditions of the past. Citing Justice Holmes, Justice Blackmun stated that “it is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past.” Justice Blackmun sought instead to utilize the test that the Court had developed over the previous twenty-five years: whether the Georgia statute impermissibly intruded upon an individual’s decisions regarding the most “intimate associations” of life.

Adding to this much discussed yet still somewhat amorphous standard, Justice Blackmun asserted that the Constitution protected a privacy interest with respect to certain decisions as well as certain places, both of which were implicated in Bowers. He continued on in the existential tone he struck in Roe to state that these privacy interests “form so central a part of an individual’s life” and “embod[y] the moral fact that a person belongs to himself and not others nor to society as a whole.” Intimate personal decisions such as whether to marry are constitutionally protected because “marriage is an association that promotes a way of life not causes; a harmony in living, not political faiths; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects.” Further, the decision whether to bear a child is protected because “parenthood alters so dramatically an individual’s self-definition, not because of demographic considerations or the Bible’s command to be fruitful and multiply.” (emphasis added) And with regard again to the family, the Constitution protects it “because it contributes so powerful to the happiness of individuals, not because of a preference for stereotypical

Katz v. U.S., 389 U.S. 347 (1967) with Bowers in stating that Stanley was not about the right to view obscene movies but the right to be left alone in one’s home while Katz was also not narrowly confined to a constitutional right to placing interstate bets from a telephone booth but instead the privacy to be free from supervision while one thinks one is alone.


See Holmes, Oliver Wendell, The Path of the Law, 10 Harv.L.Rev. 457, 469 (1897).

Bowers at 199.

Bowers at 206.


Bowers at 204-05, citing Griswold.

Bowers at 205, citing Thornburgh.
households.\textsuperscript{362}

Justice Blackmun concluded by attempting to wed the notion of liberty (an inherently individual concept) to its relation to others, stating that “the ability [to] independently define one’s identity that is central to any concept of liberty cannot truly be exercised in a vacuum; we all depend on the emotional enrichment from close ties with others.”\textsuperscript{363}

Sexual intimacy is paramount to realizing this union of the personal autonomy to choose from whom one seeks emotional enrichment in such a “sensitive, key relationship of human existence” that helps define a person.\textsuperscript{364} Affording an individual this right to choose with whom one associates with intimately for personal enrichment and self-definition and expression is therefore integral to sustaining the concept of liberty, even when an individual’s choice may offend the sensibilities of the majority. This specific affirmation of the validity of the rights of minorities under the Constitution (specifically the Bill of Rights and the Fourteenth Amendment) had a history in the Court’s jurisprudence. Justice Blackmun reminded the Court that it had been done so expressly not more than a decade earlier by none other than Justice Burger when he wrote in Millian fashion that “[a] way of life that is odd or even erratic but interferes with no rights or interests of other is not to be condemned because it is different.”\textsuperscript{365}

Justice Blackmun wrote that, in framing the issue as narrowly as Justice White had, the majority claimed they were “merely refus[ing] to recognize a fundamental right to engage in homosexual sodomy” when in reality the Court had “refused to recognize the fundamental interest individuals have in controlling the nature of their intimate associations with others.”\textsuperscript{366} Further, once again addressing Justice White’s “deeply rooted in the United States’ history and traditions” test, as well as separation of powers, Justice Blackmun asserted that neither the length of time a majority has held its convictions nor the ferocity with which they hold them insulates the majority from Supreme Court scrutiny. Justice Blackmun cited two of the Court’s best examples of the folly of such an idea, \textit{Loving} and \textit{Brown v. Board of Education},\textsuperscript{367} two cases that finally

\begin{footnotesize}
\begin{enumerate}
\item[\textsuperscript{362}] \textit{Bowers} at 205, citing \textit{Moore}.
\item[\textsuperscript{364}] \textit{Bowers} at 205.
\item[\textsuperscript{365}] \textit{Bowers} at 206, citing \textit{Yoder}, (Justice Burger absolving the Amish from ignoring Wisconsin’s compulsory education law on 1\textsuperscript{st} Amendment and 14\textsuperscript{th} Amendment substantive due process grounds).
\item[\textsuperscript{366}] \textit{Bowers} at 206.
\item[\textsuperscript{367}] 347 U.S. 483 (1954) (Separate schools based on race were not equal schools and no amount of
\end{enumerate}
\end{footnotesize}
found protection in the Constitution for minorities oppressed from racist majorities wielding a democratic shield against calls for equality. He closed with a hope that the Court would reconsider its analysis and “conclude that depriving individuals of the right to choose for themselves how to conduct their intimate private relationships poses a far greater threat to the values most deeply rooted in [the United States’] history than tolerance of nonconformity could ever do.”

Justice Stevens’ dissent, joined by both Justices Brennan and Marshall, was more logical and mechanical than Justice Blackmun’s more impassioned rhetoric. Justice Stevens noted from the outset that he would address the entire Georgia statute rather than ignore its application to heterosexuals, as had done the majority. His first point reiterated Justice Blackmun’s attack on the majority’s new substantive due process test; asserting that “the fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice.” Secondly, “individual decisions by married persons, concerning the intimacies of their physical relationship, even if not intended to produce offspring, are a form of liberty protected by the [substantive] due process clause of the Fourteenth Amendment.”

This protection of non-procreative behavior was extended to unmarried persons in Eisenstadt and Carey. Therefore, the Court’s previous holdings would make a complete prohibition of sodomy impermissible.

Finally, Justice Stevens returned to the interpretation debates by consulting history in addition to the Court’s substantive due process jurisprudence over the previous twenty years. He buttressed those prior decisions with the history and tradition of the United States (albeit in the broader sense of the purpose of liberty as opposed to the historical tradition of a specific behavior). He wrote that the decisions implicating basic values, fundamental to one’s own destiny or the destiny of one’s family, had a history of protection under “individual liberty that makes certain state

history willfully ignoring this finding changed the fact that it was unconstitutional to carry on under such a pretense).

Seventeen years later Justice Blackmun’s hope was realized when the Court, without Justice Blackmun who had since passed away, expressly overruled Bowers in its 2003 Lawrence decision, declaring that Bowers was “wrong now and it was wrong then.”

The type of flowery rhetoric that often courted Originalist derision for attempting to conceal personal predilections and political choices. See generally, Justice Scalia, Casey, infra, (dissenting).

Bowers at 216, citing Loving.

Bowers at 216, citing Griswold.
intrusions on the citizen’s right to decide how he will live his own life intolerable.” (emphasis added) Further, “guided by history, our tradition of respect for the dignity of individual choice in matters of conscience and the restraints implicit in the federal system, federal judges have accepted the responsibility for recognition and protection of these rights in appropriate cases.”

The nature of the responsibility that judges had was still under dispute, as was the role of history and tradition in a substantive due process analysis. What changed in Bowers were not necessarily the disputes, but the nature of the parties that brought them. Justice Powell had been with the Purposivists since Roe and had in general joined the broad, purpose-driven approach to liberty in Moore (writing the majority opinion), Carey (concurring in judgment) and Zablocki (concurring in judgment). However, he joined the Originalists in Bowers because “there [was] no fundamental right, i.e. no substantive right under the Due Process Clause such as that claimed.” Moreover, he had signed on to Roe’s intimate and existential opinion without regard to marital or familial status based solely in substantive due process with a clear absence of the right to an abortion at common law. However, when the matter involved a homosexual respondent, he appeared to embrace the Originalist approach of evaluating rights in the specific historical context (although not joining the majority opinion) when he wrote in a footnote to his concurring opinion: “I cannot say that conduct [that has been] condemned for hundreds of years has now become a fundamental right.”

Justice White’s about face was arguably less drastic than Justice Powell’s, who had spent time in both ideological camps throughout substantive due process’ revival. The narrow test he applied and the certainty with which he applied it--labeling Hardwick’s request for privacy in his bedroom as “facetious at best”--contradict his concerns in Griswold about the state of Connecticut invading the privacy of the bedroom. Moreover, Justice White, in suggesting use of the substantive due process clause on his own volition while the majority relied upon emanations from

373 Bowers at 217.
375 This stands in contrast to Justice White who had joined the Purposivists in Griswold and wrote their opinion in Stanley but dissented with the Originalists in Roe.
376 Bowers at 197.
377 Classifying Bowers as a “homosexual case,” even under the narrow rubric of the Originalists is misleading considering that the Georgia statute prohibited all sodomy and made no distinction with respect to sexuality as noted above.
378 Bowers at 198.
the Bill of Rights, did not frame the issue in *Griswold* as to whether there was a constitutional right for married heterosexual couples to use contraceptive devices. Instead he wrote of general conceptions of liberty and, at his most specific, privacy concerns attendant to intimate conduct in one’s bedroom. The difference, for Justice White, was the type of conduct and in whose bedroom it took place.

*Bowers*’ statutory language is arguably neutral considering it made no distinction between heterosexuals and homosexuals. Its impact in the abstract is also neutral until its enforcement is considered. Moreover, the neutrality of the statute is belied by Justice White’s consideration of it only with respect to homosexuals. Homosexuals were not a protected class eligible for equal protection in 1986. Nor did they engender enough support to even warrant equal protection plus analysis, coming up one vote, or one year short, considering Justice Powell’s recant.

Professor Sunstein sees *Bowers* as demonstrative of the limitations on the reach of substantive due process, arguing that because in his opinion substantive due process looks backward to preserve tradition, Michael Hardwick was bound to lose given the history of sodomy laws and social mores. Professor Sunstein, echoing Justice Jackson, suggests that an equal protection analysis would have required the heterosexual majority to burden itself under the same sodomy laws in *Bowers*, thus likely spelling the end for such laws considering that the practice of sodomy is not confined to homosexuals. This ignores the fact that the Georgia law did in fact ostensibly burden both heterosexuals and homosexuals. The law prohibited all sodomy, not just same-sex sodomy as was the case in *Lawrence* under the Texas law. The Georgia law survived because it was not enforced against the majority and it did not stigmatize the people responsible for creating the law by making the way in which they naturally expressed themselves intimately a crime.

Professor Brown seeks to remedy this problem by calling “all citizens to have their interests valued equally with those of all other citizens.” In order to accomplish this, the we/they thinking of a system only looking for formal inequality must be changed in favor of a judicial review that sees

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379 Sunstein, *Due Process and Equal Protection* at 1170. This point was also made by Justice O’Connor in her *Lawrence* concurrence, discussed infra.
380 Discussed below.
381 See further discussion below
382 Brown, *Liberty, the New Equality* at 1497.
383 “[A] majestic equality of the laws forbids rich and poor alike to sleep upon the bridges, to beg in the streets, and to steal their bread.” *Id.* at 1499, citing France, Anatole, *The Red Lily*, 95 (Winifred Stephens trans. 1908) (1894).
society as the heterogeneous reality that it is. The burdens placed on marginalized minorities must be seen generally in order to be appreciated, a sentiment echoing Professor Tribe’s essay on the levels of generality in defining rights. Therefore, in Bowers, a majority could not discharge its burden by making sodomy laws applicable to them as well as homosexuals because the burdens are considerably disproportionate. However, when sodomy is viewed as intimate conduct between consenting adults, the burden is better appreciated and the law is highly unlikely to survive.

Professor Brown’s call for the eradication of we/they thinking and legislation could do a lot to protect insular minorities. She counsels for the use of “equality as a protector of liberty” to do so, admitting that it is an “optimistic move.” And given substantive due process’ troubled and muddled history as well as its ostensible zero-sum game, it is understandable. However, given the limitations of Davis and its progeny and the flexibility of substantive due process, liberty and equality have been better served in liberty claims post Poe.

William Eskridge has noticed the utility of substantive due process utility. He writes that in contrast to Professor Sunstein’s “backward-looking” conception of substantive due process, particularly in the case of homosexuals, the doctrine has been a destabilizing force for marginalized Americans to “challenge traditional exclusionary and persecutory state practice at the retail level.” Professor Eskridge is from Professor Karst’s school of full citizenship, thereby seeing substantive due process and equal protection as working together with the need to precisely separate the two being not nearly as important as the normative justice the two can

384 Brown, Liberty, the New Equality. at 1558.
385 See again Justice Jackson’s discussion of equal protection being preferred so as to not completely foreclose legislation in a given area.
provide together. While noting that the Warren Court tended to rely on equal protection for “transformative cases,” the substantive due process clause fulfilled that role to a much greater extent in the Burger and Rehnquist years.

Specifically with respect to homosexuals, Professor Eskridge argues that “[t]he gay experience can be generalized to support an inversion of the Carolene Products-inspired theory of equal protection: When a minority group is truly marginalized in the political process because of the overwhelming power of social prejudice, the Supreme Court will not aggressively deploy the equal protection clause to protect the group. The most that powerless minorities can expect is that the Court will wield the libertarian features of the Constitution—the due process clause—to destabilize some of the more extreme or vicious policies that persecute or disadvantage the group.”

Justice White’s Bowers opinion is illustrative of this point, demonstrating the lack of legal recognition that homosexuals could claim in 1986. Substantive due process could not even work at that point, falling one vote short until seventeen years later in Lawrence.

The Court’s decision in Bowers was 5-4 in favor of the Originalist approach. Justice Powell’s switch to the Originalist side was to be short-lived, however. He retired one year after Bowers was decided. There were other changes on the Court before the Court’s next major encounter with substantive due process in an altogether different context, leaving the direction it would take and the test it would apply in doubt. Before that was to happen, however, the Originalists, although perhaps not with their test, would gain another victory.

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388 Eskridge, Destabilizing at 1186.
389 Professor Eskridge also included the First Amendment along with the due process clause as a key libertarian feature of the Constitution.
390 Eskridge, Destabilizing at 1214.
391 Not only was Justice Powell’s time in the Originalist camp short-lived, he specifically repudiated his vote with the Bowers majority in 1990 shortly after retiring from the Court, stating “I think I made a mistake in the [Bowers] case.” See Joan Biskupic and Fred Barbash, Retired Justice Lewis Powell Dies at 90, The Washington Post, August 26, 1998, at A1. Justice Powell explained his vote in Bowers to one of his clerks in part by speculating that he had never met a gay person. The clerk whom he made the comment to was in fact gay. Karst, Liberties of Equal Citizens at Footnote 191, citing Jefferies, John C. Jr., Justice Lewis F. Powell, Jr. 528 (1994).
392 Cruzan v. Missouri, 497 U.S. 261 (1990), arguably another 5-4 victory for the Originalists, followed shortly after Bowers but will not be discussed in depth. Cruzan involved the acknowledged substantive due process rights of a woman in a coma to refuse medical attention as exercised by her parents and focused heavily on the appropriate standard of proof in acting in accordance with her proffered liberty interests.
Before returning to its Roe decision, the Court heard another case involving parental rights and irrebuttable presumptions similar to the statute reviewed in Stanley. The law in Michael H. v. Gerald D. came from California, and provided that a child born to a married woman living with her husband was presumed to be a child of that marriage. The facts of the case proved otherwise, however. The result was that the State of California recognized the wrong man, Gerald, a wealthy “top executive in a French oil company,” as the father of a child that resulted from an on-again, off-again affair between Gerald’s wife, Carole, the international model, and Michael, their neighbor. The presumption was challenged by Michael, the biological father, as being a violation of his substantive due process right, as his paternity had been scientifically proven yet denied by law.

Justice Scalia’s plurality opinion continued the use of the new, narrow, and prohibitively specific Bowers test. He wrote that in order to be recognized and protected, a liberty interest had to be fundamental and traditionally protected by society; one “so rooted in the traditions and conscience of our people as to be ranked as fundamental.” He considered Michael’s reliance upon Stanley—standing for the proposition that biological fatherhood creates a liberty interest—as “distorted.” He construed Stanley to instead stand for the idea that (certain) relationships that develop within the unitary family enjoy historic sanctity. Michael H.’s situation was not one of those relationships because his putative right stemmed from an adulterous relationship—not at all viewed as historically sacred—and therefore Stanley was inapposite. Instead, the issue was construed by Justice Scalia as being “whether the relationship between persons in the situation of Michael and Victoria has been treated as a protected family unit under the historical practices of our society.” Of course they had

394 In addition to going from Michael to Gerald and back, Carole also conducted an affair with a third man during the time period in question, a fact in part likely prompting Justice Scalia to state that he hoped that the facts of the case were “extraordinary.”
395 Blood tests indicated a 98.07% probability that Michael was the father, and the affair was admitted by both Carole and Michael.
396 Citing Snyder.
397 Justice Scalia also noted that Michael had relied upon Quilfoil v. Walcott, 434 U.S. 246 (1978); Cahan v. Mohammed, 441 U.S. 380 (1979) and Lehr v. Robertson, 463 U.S. 248 (1983) in addition to Stanley.
398 Victoria was the name of Michael and Carole’s daughter.
399 Michael H. at 124.
not, not least because the science required to prove such a relationship had not been available at common law. The answer to the issue was contained in how it was framed, and Justice Scalia confirmed as much by answering quite certainly that it would be impossible to say that the relationship between Michael and Victoria had been traditionally protected. History had only addressed the marital, or “unitary” family.

Justices O’Connor and Kennedy concurred but took issue with Justice Scalia’s “most specific level” of relevant traditions available in substantive due process inquiries. They noted that Justice Scalia’s method was not supported by the Court’s jurisprudence, specifically citing *Griswold, Eisenstadt, Loving, Turner v. Safley, Stanley* and *Poe.* Justice Stevens also wrote separately to reject Justice Scalia’s foreclosure of the idea that a natural father might have a constitutionally protected right with respect to his child, citing *Stanley.*

Justice Brennan supplied the dissent in *Michael H.* for Justices Marshall and Blackmun. He noted at the outset his misgivings not only with the Court’s fissured ruling, but Justice Scalia’s methodology as well. Justice Brennan pointed out that a majority of the Court would not hold that a natural father did not have a constitutionally protected right with respect to his child despite that child’s mother cohabiting with another man. Moreover, only one other member of the Court agreed with Justice Scalia’s views on the nature and use of tradition in the Court’s substantive due process jurisprudence. Specifically, Justice Brennan chastened Justice Scalia for “being oblivious to the fact that [the concept of tradition] can be as malleable and as elusive as liberty itself” even though Justice Scalia “pretends that tradition places a discernible border around the Constitution.” The pretense struck Justice Brennan as “seductive” and “comforting” despite the reality of searching for tradition being more than “poring through dusty volumes on American history.” The practice was no more precise or immune from manipulation under the guise of judicial discretion than determining what liberty is and if it is constitutionally

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400 As it was in *Bowers* when Justice White answered the question through the way in which he posed it.
401 For a further discussion as to why the Ninth Amendment also condemns this approach, see again Tribe, *Levels of Generality* at 1100-01, discussing necessity of amendment’s logical prescriptive role as articulated in Justice Harlan’s *Poe* dissent in tandem with its prescriptive language. Citing Black, Charles, *On Reading and Using the Ninth Amendment* in *The Humane Imagination* 194 (Ox Bow, 1986) (discussing how a body of human rights will always be growing just like the common law).
402 *Michael H.* at 137. See again Tribe, *Levels of Generality* at 1087, “historical traditions are susceptible to even greater manipulation than are legal precedents.” (emphasis in original)
403 *Michael H.* at 137.
protected.

Moreover, Justice Brennan found it ironic that “an approach so utterly dependent on tradition [was] so indifferent to [the Court’s] precedents.” He found it odd that Justice Scalia relied upon English legal treatises and American Law Reports—not binding law—in lieu of the Court’s precedents. Further, Justice Brennan echoed the Purposivists before him, reiterating that “liberty was left to gather meaning from experience” and the “statesmen who founded this Nation knew too well that only a stagnant society remains unchanged.” Tradition certainly had its place, but it was with respect to more generalized interests as opposed to a specificity so narrow as to conceal certain greater truths. Justice Scalia’s approach in Michael H. was one such example. By asking whether history has specifically protected fathers who had had children with women married to another, Justice Scalia failed to consider whether the Nation had a general reverence for parenthood in general, a question beyond dispute.

Justice Brennan further wrote that Justice Scalia’s prohibitive specificity “ignores the good reasons for limiting the role of tradition in interpreting the Constitution’s deliberately capacious language.” Such a restrictive approach bound by the past would preclude an emphasis on analyzing the reasons for a policy, as opposed to just the policy, which have at times been obviated by modern developments. In Michael H. specifically, modern science that “can prove virtually beyond a shadow of a doubt who sired a particular child,” and contemporary mores that “make the fact of illegitimacy no longer the burdensome and stigmatizing role it once was,” leave Justice Scalia’s analysis without reason. Moreover, asking what as been “traditionally protected by our society rather than [what] society [has] traditionally thought important (with or without protecting it)…acts as if the only purpose of the Due Process Clause is to confirm the importance of interests already protected by a majority of the States. Transforming the protection afforded by the Due Process Clause into a redundancy mocks those who, with care and purpose, wrote the Fourteenth Amendment.” (emphasis in original) Justice Brennan

404 Id. at 138.
406 It does so under the guise of eliminating values from judicial decision making, an impossible quest facilitated by vanity and “arrogance cloaked as humility.” Id. at 1095-96, citing Justice Brennan, The Constitution of the United States: Contemporary Ratifications, 19 UC Davis L. Rev. 2, 4 (1985).
407 Michael H. at 140.
408 Id. at 140.
409 Michael H. at 141.
concluded his interpretation analysis by writing that he did not recognize Justice Scalia’s “stagnant, archaic, hidebound [Constitution] steeped in the prejudices and superstitions of a time long past.”

Justice Brennan’s specific analysis of Michael H. led him to find that the Court’s previous decisions in Stanley, Quilloin, Caban and Lehr constitutionally protected unwed fathers’ interests in their children. Nevertheless, Justice Scalia had construed those cases to protect the “unitary family,” of which Gerald, and not Michael, was a part of with Carole. Moreover, Justice Brennan noted that Justice Scalia stressed not only the significance of marriage in his reasoning despite the fact that the unwed fathers in the Stanley line of cases all disrupted unitary families, he also referred to Michael as the “adulterous natural father” no fewer than six times in his majority opinion. (emphasis in original) Justice Brennan’s unmasking of tradition’s malleability equal to liberty’s, along with his insinuation that Justice Scalia was injecting his own personal predilections into his opinion is noteworthy. It would be the very charge levied by Justice Scalia against the Purposivists not more than three years later.

PLANNED PARENTHOOD v. CASEY: THE MEANING OF THE UNIVERSE

The right to an abortion resting solely in substantive due process as found in Roe was revisited nearly twenty years later in Planned Parenthood v. Casey. The composition of the Court was drastically different than it was in Roe and the issue produced one of the most fractured results in the Court’s substantive due process jurisprudence. Only three judges--Justice O’Connor, Justice Kennedy and Justice Souter--joined the majority opinion in full; however, Justices Stevens and Blackmun also voted to uphold the bulk of Roe’s guarantee to an abortion.

In Casey, Justice O’Connor reaffirmed that the concept of liberty as announced in the Fourteenth Amendment had a substantive component going all the way to 1887 that “barr[ed] certain government actions regardless of the procedures used to implement them.” This substantive component of liberty was “protected by the Federal Constitution from

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410 Id.
411 Michael H. at 144.
413 Justices Stevens and Blackmun wrote separately in part to disagree with the Court’s upholding of restrictions on abortion such as waiting periods.
invasion by the States.”

Further, these protections extended beyond those specifically enumerated in the Bill of Rights and elsewhere in the Constitution, as had been demonstrated repeatedly and consistently throughout the Court’s jurisprudence. Justice O’Connor then cited Justice Harlan’s Poe dissent and reiterated that “a person’s most basic decisions about family and parenthood” were protected against State interference. (emphasis added) They were not limited to the familial context. These decisions extended to “the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy,” because “at the heart of liberty is “the right to define one’s own concept of existence, of meaning, of the universe, and of the mystery of human life.” (emphasis added) In matters as contentious as abortion, where reasonable and well-intentioned people will disagree, the gravity of such a subject inheres toward an individual making the decision for herself as opposed to a State that does not know her or the particulars of her life. The Court’s obligation “is to define the liberty of all, not to mandate [its] own moral code.”

The profound weight of a decision such as abortion speaks to the heart of what liberty protects. Perhaps no other decision affects an individual as greatly and implicates the core of one’s existence as much as whether one will give life and thereafter care for it. 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.” (emphasis added)

Justice O’Connor, relatively new to the Court in 1992, also took her turn in addressing the interpretation debate. Taking her cue from Justice Harlan, she admitted that decisions pertaining to substantive due process with regard to unenumerated rights were not “susceptible of expression as a

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417 Citing Loving; Turner v. Safley, 482 U.S. 78, 94-99 (1987); Carey; Griswold, Pierce and Meyer.
418 Justice O’Connor also believed that Justice Harlan’s Poe dissent was adopted four terms later in Griswold.
419 Casey at 849, citing Carey; Moore; Eisenstadt; Loving; Griswold; Skinner; Pierce; Meyer; Washington v. Harper, 494 U.S. 210 (1990); Winston v. Lee,470 U.S. 753 (1990); Rochin v. California, 342 U.S. 165 (1952).
420 Casey at 851.
421 Casey at 850.
422 Casey at 852.
simple rule,” but were still made in a manner most familiar to judges: through the use of reasoned judgment. Judges were not free to invalidate State policies that they did not like, but were to work within the confines of balancing liberty and order, guided by a living tradition. Justice O’Connor, like many justices before her, acknowledged that this Purposivist approach was difficult to articulate precisely, particularly in deciphering how it evolved. However, in what sounded to be a direct rebuttal to the Originalists, she wrote that “to believe that this judicial exercise of judgment could be avoided by freezing [substantive] due process of law at some fixed stage of time or thought is to suggest that the most important aspect of constitutional adjudication is a function for inanimate machines and not for judges.”

Justice Stevens wrote in support of the core of the majority’s opinion discussing liberty as protected by substantive due process, and agreed that “a woman’s decision to terminate her pregnancy is nothing less than a matter of conscience,” and “a right to control one’s person.” (emphasis added) The uniqueness of such a personal decision had to be respected and be free from what the State thought was best. Justice Blackmun, Roe’s author, further emphasized the very personal nature of pregnancy’s anxieties, physical constraints and pain that only a woman must bear. Continuing his analysis of the particular and direct impact pregnancy has on a woman, he emphasized that any constitutional inquiry must focus on “the group for whom the law is a restriction, not the group for whom the law is irrelevant.” Further, echoing Justice Stewart’s concurring opinion in Roe, Justice Blackmun stressed that the Court had consistently protected an individual’s choices with regard to family planning,” and no other decision more than abortion so profoundly and immediately affected an individual’s personal and family life than the

423 Casey at 849.
424 Once again citing Justice Harlan’s Poe dissent.
425 Justice O’Connor’s opinion was also noteworthy for its return to Justice Harlan’s “rational continuum” approach as opposed to the “isolated pinpricks” of deciding which rights to anoint as “fundamental.” See again Professor Brown’s criticism of this tactical error in Roe. Brown, Fragmented at 70. See also Park, Defining One’s Own Concept at 858-59, discussing Casey.
426 Casey at 850, citing Rochin, (Frankfurter, J., writing for the Court).
427 Casey at 916.
428 Id. at 915, citing Rochin and Skinner.
429 Casey at 925. Referring to the concerns of the well intentioned who oppose abortion as “irrelevant” may seem cavalier. However, often the Court’s construction of liberty resembled a Millian, individualistic approach that made the connection between a general disapproval of abortion and a specific instance of an abortion by an unknown stranger to be too attenuated in relation to the impact it would have on the particular individual involved.
430 See again e.g. Griswold, Eisenstadt and Carey.
decision whether to carry a pregnancy to term.

After reaffirming his understanding of the Court’s substantial support for protecting the most intimate choices an individual can make, Justice Blackmun set his sights on the interpretation debate, specifically, Justice Rehnquist’s “stunted conception of individual liberty.”431 Justice Blackmun objected to the Originalist “laundry list of particular rights”432 approach as opposed to “a principled account of how these particular rights are grounded in a more general right of privacy.”433 Further, attending to Justice Rehnquist and the Originalists’ concerns for the separation of powers, Justice Blackmun wrote: “While there is much to be praised about our democracy, our country since its founding has recognized that there are certain fundamental liberties that are not to be left to the whims of an election.”434

The Purposivist dissents in Bowers had been animated, even bitter. Finding themselves back in that role in Casey, the Originalists issued some of their longest and most detailed attacks on the Purposivist approach to substantive due process. Chief Justice Rehnquist first reiterated his commitment to the “implicit . . . in the concept of ordered liberty” or “principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental” test as announced and used by Justice White in Bowers. He also acknowledged the rights announced in Pierce, Meyer, Loving, Skinner, Griswold and Eisenstadt, but disagreed that they “endorse[d] any all-encompassing right to privacy.”435 Justice Rehnquist went even further to assert that Roe itself had been wrongly decided because the Meyer-Pierce line of cases had been read too broadly. Unlike the Pierce cases, abortion “involves the purposeful termination of a potential life.”436 According to Justice Rehnquist, abortion was, therefore, sui generis: “different in kind from the other [rights] that the Court has protected under the rubric of personal or family privacy and autonomy.”437

Applying the narrower “historical traditions” test with regard to the

431 Casey at 941.
432 Justice Harlan’s “isolated pinpricks.”
433 Casey at 940.
434 Casey at 943. See also Webster v. Reproductive Health Services, 492 U.S. 490 (1989) (“The very purpose of the Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One’s right to life, liberty and property may not be submitted to a vote; they depend on the outcome of no elections.”), citing West Virginia Board of Education v. Barnette, 319 U.S. 624 (1943).
435 Casey at 951.
436 Casey at 952, citing Harris v. McRae, 448 U.S. 297 (1980).
437 Casey at 952.
specific action of abortion, Justice Rehnquist found that terminating a pregnancy could not be said to be a fundamental right. He also repeated the admonition from Bowers regarding expansionist approaches to substantive due process, warning that “[t]he Court is most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or design of the Constitution.” The Roe majority had reached too far, as did the Casey plurality when it “analogized the right to abort a fetus to the rights involved in Meyer, Pierce, Loving and Griswold.” Abortion as a fundamental right under the substantive due process clause was reaching too far from the text and traditions for Justice Rehnquist. He did not, however, explain why Meyer, Pierce, Loving and Griswold were nevertheless permissible extensions of the concept of liberty to specific personal decisions in the Purposivist fashion. This omission was in spite of there being no textual support or historical tradition demonstrating an approval of interracial marriage or contraception.

Justice Scalia followed Justice Rehnquist in dissent and continued to announce his presence as the leading Originalist. His first point addressed the Originalist concern with the separation of powers, noting that the issue of abortion should be “resolved like most important questions in our democracy: by citizens trying to persuade one another and then voting.” With regard to a woman’s right to choose, Justice Scalia acknowledged that it was certainly a liberty but the question for the Court was whether that liberty was protected by the Constitution. Answering his own question, he stated: “I am sure it is not.” Moreover, Justice Scalia’s answer was not made with anything “so exalted as [his] views concerning the concept of existence, of meaning, of the universe, and the mystery of human life.” For him, it was simply a matter of consulting Justice White’s Bowers test. Upon doing so, Justice Scalia found that the Constitution said nothing about abortion, and “the longstanding traditions of American society have permitted it to be legally proscribed.” Those traditions must be discerned from both “relevant tradition protecting, [and] denying protection to, the asserted right,” neither of which suggested that abortion could not be

438 Casey at 953.
439 Id.
440 Casey at 979.
441 Id. at 980.
442 Id.
443 Id. Unlike Justice Rehnquist, Justice Scalia did not address the weight of the Court’s previous cases such as Pierce as to whether the right to choose was a liberty protected by constitutional precedent as opposed to only the text or nation’s traditions.
criminalized.\textsuperscript{444}

Justice Scalia also had something to say about the Purposivist approach in general. Mocking the requisite “reasoned judgment” needed to guide the determination of a broad, classical concept such as liberty in its application to modern issues, he dismissed the Purposivist approach as nothing more than “rattling off a collection of adjectives that simply decorate a value judgment and conceal a political choice.”\textsuperscript{445} In place of concealing personal choice with elaborate diction, Justice Scalia advocated for “a strict interpretation of the Constitution, according to the fixed rules which govern the interpretation of laws,”\textsuperscript{446} otherwise a system of rule by man instead of rule by law would exist. This system of rule by man would be presided over by a “Nietzschean,” “Imperial Judiciary,” inviting citizens to resent the Court for making its value judgments for them instead of objectively interpreting historical texts.\textsuperscript{447}

Justice Scalia went beyond suggestion of judicial fiat in his \textit{Casey} dissent and explicitly accused the Purposivists of “philosophical predilection and moral intuition,” and scolded the majority for making value judgments in place of the democratic process. He neglected to offer his own opinion on the issue, as Justices Stewart and Black had done in \textit{Griswold} before subordinating it to their respect for the separation of powers and the democratic process. Justice Scalia certainly did not withhold his opinion with respect to what many of the Originalists before him had only suggested the nature of the Purposivist approach was: Lochnerian judicial highhandedness masquerading behind an ambiguous concept. An adherence to express text and discernible, \textit{specific}, tradition would be more transparent and curtail discretion, as well as, arguably, the power of judges, preventing judicial activism.

\textit{Roe} and \textit{Casey} best embody the existential nature of substantive due process liberty demonstrated by both the subject of abortion and the language employed to constitutionally adjudicate the issue. There are few, if any, decisions that contemplate existence itself in whether to carry a child to term while simultaneously drastically altering the nature of one’s own existence by transforming oneself into a mother. In these matters, there are no rivals with respect to the interest of personal liberty, nor the

\textsuperscript{444} \textit{Casey} at 982.

\textsuperscript{445} \textit{Casey} at 983-84. Justice Scalia specifically singled out Justice Blackmun to note that his “parade of adjectives [was] similarly empty.” \textit{Casey} at footnote 2, (Scalia, J., dissenting).

\textsuperscript{446} \textit{Casey} at 984, citing Justice Curtis in \textit{Dred Scott v. Sandford}, 19 How. 393 (1857), an opinion that relied heavily on the idea of tradition and history to find that a black man was not a citizen and therefore enjoyed no constitutional rights.

\textsuperscript{447} \textit{Casey} at 1000.
State’s interest in public welfare. Where the abortion decisions lose a considerable amount of certainty as to the imperative to protect a mother’s personal liberty in decisions so profoundly and exclusively affecting her, is when the idea of another person—and therefore someone else’s personal liberty—is considered. If a fetus were to have a liberty interest, that interest would transcend that of the mother considering what is being contemplated is not just an alteration to the mother’s existence, but the fetus’ existence in and of itself. Neither side could demonstrate a fetus’ constitutional rights, however, and therefore what is left to balance is the mother’s liberty interest, unimaginably heavy, with that of the State’s general concerns. Roe and Casey, as well as their progeny, sought to determine when and how that interest vested.

The impact that male-legislated abortion statutes have on women is discussed to an extent in Roe and even more so in Casey. Justice Blackmun continued a point he started in Roe to note that the proper focus for the inquiry was to identify who would be affected by the statute. As briefly discussed above, men can be affected by a woman’s pregnancy to varying degrees. However, they also have the power to determine the level of the effect. Women, in contrast, will be affected by the pregnancy, and there is no way to avoid or lessen its impact. Placing the decision of whether to bring a child to term in a woman’s hands puts her back on equal footing with men with respect to this aspect of procreation in that it enables them to reclaim the power to determine the course of their lives.

Regardless of whether criminal abortion statutes seek to impermissibly burden women, or are sex-neutral statutes that protect the unborn, removing them has the effect of leveling the playing field of self-determination with respect to procreation.

448 “[N]o case could be cited that holds that a fetus is a person within the meaning of the Fourteenth Amendment.” Roe at 157.
450 Roe/Casey empower women as such instead of “forc[ing] women into the maternal role long seen as women’s destiny.” Gans, The Unitary Fourteenth at 911, citing equal protection arguments focusing on sex discrimination in abortion laws. To the argument that no one has forced a woman into sex and therefore her choice to have sex implicitly signals that she chooses to be a mother, situations of rape negate this already tenuous implication. Moreover, choosing to have a recreational sex life in this day and age hardly equates to signaling a desire to be a parent. For further discussion of this point see Tribe, Laurence H., Reorienting the Mirror Justice: Gender, Economics, and the Illusion of the “Natural,” from Constitutional Choices 238, 240 (1985).
451 See further Tribe, Dare Not Speak at footnote 12 (“male dominance has been preserved largely through restrictions on the reproductive freedom of women”).

Comment [BL14]: Passage deleted here either needs to be removed or re-worked. Many found it confusing and re-writes proved difficult.
Comment [BL15]: Not sure what you mean by this. Requires further elaboration.
Roe and Casey also contain an equalerty component for the poor. Not only do abortion statutes disproportionately affect women, they also more profoundly affect the poor who either do not have the same educational and contraceptive resources available to prevent pregnancy, or the adequate financial situation to provide for children. This relationship between socioeconomic status and abortion statutes is not as apparent as a situation such as Zablocki. The consequences are not self-apparent, nor do they necessarily immediately manifest. However, the additional economic difficulties posed by caring for a child when a mother, often times on her own, increase steadily as more time passes. Some results are even more remotely connected yet plausible. Steven D. Levitt and Stephen J. Dubner posited that Roe led to a reduction in crime. The link between the two manifested two decades after the 1973 decision enabled the most common demographic to have an abortion: poor, single mothers, resulting in decreased crime in the 1990s. The two-decade time span is related to the age in which the majority of criminals commit their crimes. This hypothesis, although certainly not bullet proof and maybe too attenuated to be significant, is buttressed by the fact that two states, New York and California, that legalized abortion before it was nationally mandated, saw their crime rates begin to drop before the national average began its descent.

WASHINGTON v. GLUCKSBERG: THE ORIGINALISTS STRIKE BACK

With Washington v. Glucksberg in 1997, the Court revisited a debate it had partially addressed seven years earlier in Cruzan. Cruzan involved the substantive due process right to be free from unwanted life-sustaining medical treatment. The Court acknowledged the right, but affirmed the state of Missouri’s clear and convincing standard to establish that the incapacitated person would not have wanted the treatment after the State had refused to accept the attestations of the parents as sufficient proof. Glucksberg similarly involved a variation of the so-called “right to die,” this time in the context of physician-assisted suicide. The Court’s decision was unanimous, although the case produced five concurring opinions. The disagreement once again centered around the proper scope and use of substantive due process.

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453 Id.
Justice Rehnquist wrote the majority opinion in *Glucksberg*. His opinion started with a nod to *Bowers* by stating that the Court began “as [it did] in all [substantive] due process cases, by examining our Nation’s history, legal traditions, and practices.” He continued, however, to then cite *Casey* and *Moore*, two cases that utilized the Purposivist approach and found Justice Rehnquist in the dissent. His analysis of the traditions of the United States found a consistent criminalization of the specific act of suicide, assisted or otherwise. Justice Rehnquist once again acknowledged the existence and did not challenge the validity of unenumerated rights protected by substantive due process, and specifically cited *Loving* (right to marry), *Skinner* (right to have children), *Meyer* and *Pierce* (right to direct upbringing of children), *Griswold* (right to marital privacy), *Eisenstadt* (right to use contraception) and *Casey* (right to abortion).

Before reiterating his concern for the separation of powers, noting that the Court “must exercise the utmost care whenever [it] is asked to break new ground in this field lest the liberty protected by the substantive due process clause be subtly transformed into the policy preferences of the Members of this Court,” he expressly applied the *Bowers* test. In addition to the “implicit in the concept of ordered liberty” or “deeply rooted in this Nation’s history and tradition” tests, Justice Rehnquist added that substantive due process cases “required a careful description of the asserted fundamental liberty interest” that a government could not infringe upon unless the infringement was “narrowly tailored to serve a compelling state interest.” The “careful description” addition was not necessarily a new element to the *Bowers* test, but it did more to formalize the narrow Originalist requirement that a right had to have been enjoyed at common law if it was to be enjoyed in the present. As far as the “narrowly tailored to serve a compelling state interest” language, the Court had intermittently mentioned this strict scrutiny language in previous cases, but had not applied it consistently.

Justice Rehnquist then addressed the Purposivists, specifically

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455 *Glucksberg* at 710.
456 Even though Justice Rehnquist had previously stated that there was no fundamental right to marriage, *Zablocki*, infra.
457 Justice Rehnquist wrote in *Casey* that *Roe* was wrong and the majority in *Casey* was wrong to include the right to choose whether to have an abortion in the list of liberties protected under substantive due process.
458 Scalia lite criticism, *Glucksberg* at 720.
460 *Glucksberg* at 720-21.
461 *Carolene Products*, Poe, Roe, Carey and *Zablocki*. 

Comment [BL16]: unclear. Existence of what?
Justice Souter’s concurring opinion taking exception to Justice Rehnquist’s cramped approach, to reject Justice Souter’s reliance on, among other things, Justice Harlan’s Poe dissent. Justice Rehnquist hailed the Originalist approach to substantive due process as “restrained,” as opposed to Justice Harlan’s conception that left liberty “never fully clarified,” nor the possibility of ever accomplishing the task. Justice Rehnquist preferred a method “carefully refined by concrete examples involving fundamental rights found to be deeply rooted in [the] legal tradition” that would “rein in the subjective elements that are necessarily present in substantive due process judicial review.”

Considering this continued preference for a narrow approach guided by specific history, Justice Rehnquist framed the issue in Glucksberg as “whether the liberty specially protected by the [substantive] due process clause includes the right to commit suicide which itself includes a right to assistance in doing so.” He considered arguments that a general survey of the history of the United States as well as specific case law reflected a “tradition of self-sovereignty” and “basic and intimate exercises of personal autonomy.” There was not, of course, a tradition at common law of specifically protecting the right to die with medical assistance, and he therefore rejected the idea that such a practice was protected by the substantive due process clause.

The petitioner patients, seeking to die with the assistance of physicians, passed away before the Court heard their case but Justice Souter wrote a concurring opinion to analyze the claims made by the doctors seeking to hasten their patients’ deaths. Justice Souter agreed that they did not present an interest that was protected by the substantive due process clause. However, he employed the Purposivist approach as influenced by Justice Harlan’s Poe dissent, specifically whether the Washington statute set up an “arbitrary imposition” or “purposeless restraint” on an individual, instead of the majority’s Originalist method.

The majority of Justice Souter’s opinion served as an analysis and defense of the Purposivist approach as revived by Justice Harlan, a method Justice Souter defended against descriptions that it was “unduly vague” or an “oxymoronic warrant for judicial review of substantive state law.” His opinion served as a summary and an explanation of where substantive due process had been and how it had developed. It did not instruct as much

462 Glucksberg at 721-22.
463 Id. at 722.
464 Citing Casey.
465 Glucksberg at 756.
as it edified, although his analysis of the common law’s unique role in supporting the Purposivist approach illuminated the doctrine in a way not seen since Justice Harlan’s seminal *Poe* opinion.

Justice Souter started where so many other Purposivists had: by conceding a lack of undisputed, definitive guidelines to point to for the approach. He nevertheless cited the persistence of substantive due process as attesting to its legitimacy. He traced the roots of its philosophy, and noted that while its use against economic legislation had been abandoned after the *Lochner* era, cases from that time involving personal rights had survived, starting with *Meyer*. After *Pierce* similar in nature to *Meyer*, the Court had announced *Skinner* and *Griswold* based in *Poe*. Justice Souter wrote that Justice Harlan’s approach in *Poe* was indeed faithful to tradition.

However, it was not necessarily the specific tradition of one simple act. It was the tradition of substantive due process review itself and the “Judiciary’s obligation to carry it on.” 466 For over two hundred years, “American courts have thought it necessary to provide some degree of review over the substantive content of legislation under constitutional standards of textual breadth.” 467 The obligation “was understood before *Dred Scott* and has continued after the repudiation of *Lochner*.” Moreover, this adherence to and respect for tradition has manifested itself specifically in the Court’s jurisprudence to apply to specific rights. 468 “This enduring tradition of American constitutional practice is,” in Justice Harlan’s view, “nothing more than what is required by the judicial authority and obligation to construe constitutional text and review legislation for conformity to that text.” 469

The Purposivist approach does not seek to legislate because “constitutional review, not judicial lawmakers, is [the] Court’s business.” 470 The Court should not merely identify and weigh values, but when a legislature’s justifying principle is “so far from being commensurate with the individual interest as to be arbitrarily or pointlessly applied, that statute must give way.” 471 This process, as repeatedly acknowledged going back to Justice Harlan, defies general formula; however, the process “is like any other instance of judgment dependent on common law method, being more or less persuasive according to the usual

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466 Glucksberg at 762.
467 Id. at 763.
468 Citing e.g. Loving, Carey, Griswold, Casey, Roe, Cruzan.
469 Glucksberg at 763, citing Marbury.
470 Glucksberg at 768.
471 Id.
The common law system is also particularly amendable to hosting such a practice because it is “suspicious of the all-or-nothing analysis that tends to produce legal petrification instead of an evolving boundary between the domains of old principles. Common law method tends to pay respect instead to detail, seeking to understand old principles afresh by new examples and new counter examples.” (emphasis added) A fresh look at timeless and traditional principles can remove the stain of past prejudices on revered concepts that should have always been enduring for everyone.

With respect to *Glucksberg* specifically, Justice Souter did find an important liberty interest concerning “bodily integrity.” Further, analogizing *Glucksberg* with the Court’s abortion cases, he found that the assistance of a physician to exercise the protected right was legitimate. However, Justice Souter joined the decision of the majority in *Glucksberg* because he did not find the state of Washington’s proffered statutory justifications to be “arbitrary or purposeless.” Instead, he saw a real danger in “patients mistakenly or voluntarily deciding to end their lives,” which the State had an interest in preventing. He did not foreclose the possibility of nevertheless finding a substantive due process right in determining when an individual would die in the future. However, in light of his current belief that the legislature enjoyed superior competence in addressing the State’s interest, Justice Souter opted to defer to the legislature.

**TROXEL v. GRANVILLE: MOTHER KNOWS BEST**

The Supreme Court’s substantive due process cases involving familial relationships had survived from the *Lochner* era and were often used as the bedrocks in the revival of the doctrine. The Court returned to the child-rearing area in *Troxel v. Granville.* *Troxel* concerned the balance between a parent’s right to make decisions for her child and the State’s role in ensuring that the best interests of the child are maintained. Specifically, the state of Washington had a grandparent visitation statute that the parent objected to as impermissibly usurping her authority as a parent to direct the upbringing of her child.

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472 Id. at 769, citing *Casey*.
473 *Glucksberg* at 770, citing again Justice Harlan’s Poe dissent for the notion that “tradition is a living thing.”
474 Id. at 782.
Justice O’Connor wrote the majority opinion for yet another fractured court. The opinion produced an unlikely lineup of staunch Originalists like Justice Thomas concurring with the Purposivists (although for different reasons, of course) and Justice Scalia dissenting with Purposivists such as Justice Stevens. Justice O’Connor’s opinion adhered to the Court’s previous child-upbringing cases derived from the Purposivist approach. Pursuant to these cases, Justice O’Connor held that “so long as a parent adequately cares for his or her children, there will normally be no reason for the State to inject itself into the private realm of the family to further question the ability of that parent to make the best decisions concerning the rearing of that parent’s children.”

Justice Souter briefly wrote to concur and reassert his faith in the Court’s Meyer/Pierce cases. Justice Thomas, who had a practice of consistently ignoring the Court’s precedent if he did not feel it was based in explicit constitutional text, concurred with Justice O’Connor’s plurality opinion. He agreed with “[the] Court’s recognition of a fundamental right of parents to direct the upbringing of their children” and believed that the Court’s previous jurisprudence in the matter was dispositive in Troxel. He went on to cite Pierce expressly and further wrote that he would have applied strict scrutiny because fundamental rights were involved.

Justice Scalia seized on the array of different (and arguably inconsistent) opinions of the Court in Troxel. He suggested that the diversity buttressed the idea that the substantive due process cases such as Meyer and Pierce from a repudiated era lacked stare decisis merit. He also used the lack of consensus exhibited in Troxel to once again censure the idea of unenumerated rights given life by judicial vindication. In this particular case those rights could usher in an oppressive new regime of federally prescribed family law.

Troxel did little to clarify a doctrine that seemed to be in a perpetual state of uncertainty to varying degrees. Its lack of cohesion and consistency also did not provide stability after the Purposivist to Originalist seesaw of Bowers to Casey back to Glucksberg and finally back to Troxel. Moreover, it bolstered the insinuation or outright assertion that the Court members’

477 Controlling were the previously discussed cases in the child-upbringing area such as Meyer, Pierce, Prince, Stanley and Yoder as well as cases such as Quillioin v. Walcott, 434 U.S. 246 (1978) (relationship between parent and child is constitutionally protected); Parham v. J.R., 442 U.S. 584 (1979) (Court’s jurisprudence in adherence to Western concepts of family has given broad authority to parents over minor children); Santosky v. Kramer, 455 U.S. 745 (1982) (natural parents have fundamental liberty in care, custody and management of their children).
479 Troxel at 80.
personal predilections determined the outcome as opposed to consistent
target of one standard. While the Purposivist approach had been
criticized for leaving too much discretion for judges to roam substantively,
it was the particular test being used to determine that substance that had
been seemingly contingent upon the judges' personal feelings about the
case. Justice Powell had been a moderate Purposivist until
homosexuality\textsuperscript{480} was involved in Bowers. Justice Thomas had been a
wooden Originalist until the issue of parental authority of children in
Troxel caused him to embrace Purposivist-created case law.\textsuperscript{481} Justice
Rehnquist had inexplicably adhered to the Court's Purposivist-driven
precedents in Lewis in lieu of the test he voted for in Bowers and helped
develop in his opinion in Glucksberg.\textsuperscript{482} But there was probably no greater
enigma than Justice White in this area. He voted with the Purposivists in
Griswold, Eisenstadt, Carey and Stanley in the issues of contraception and
custodial rights but with the Originalists in Roe, Moore, Bowers and Casey.
Those decisions involved abortion, custodial rights and homosexuality.\textsuperscript{483}

While the doctrine was far from settled or predictable, it had
nevertheless been an effective tool for preserving intimate matters for the
individual to decide, rather than the State. This was primarily accomplished
through the Purposivist approach that utilized the elevated status of certain
rights out of the reach of majorities to ensure protection of minority groups
and ideas. Where the Court would go next was to one of the most
vulnerable and vilified minorities in the United States. The Court had
declined in Bowers to expressly extend the benefit of substantive due
process protection to private, consensual sexual behavior despite the
Griswold, Eisenstadt and Carey decisions, because the Originalist approach
to framing the issue was only concerned with homosexuality. It had also
recently announced the importance of \textit{stare decisis} in Casey while
upholding Roe. It was not clear then, how the Court would approach its
next case, which called for another look at Bowers.

\textsuperscript{480} See again Biskupic and Barbash for Justice Powell's mistaken belief of living his entire ninety
years without knowing a gay person despite his law clerk being a homosexual.
\textsuperscript{481} \textit{Pierce} came from the \textit{Lochner} era and was indisputably created in the Purposivist fashion of
applying spirit to practice without any discernable textual support.
\textsuperscript{482} The most profound switch, however, was that of Justice Stewart who had dissented in
Griswold but eventually consistently embraced substantive due process review starting in Roe
with the exception of LaFleur in which he would have used an equal protection analysis to strike
down the offending State law.
\textsuperscript{483} The case was seen as a "homosexual case" by Justice White's own design as noted, \textit{infra}. 
In *Lawrence v. Texas* the Court faced a similar statute to the Georgia law in *Bowers* with the exception that the Texas statute only criminalized sodomy between homosexuals whereas the *Bowers* law made no distinction based on sexual orientation. Nonetheless, Justice White only addressed the statute’s implications for homosexuals. In *Lawrence*, Justice Kennedy, writing for the 5-3 majority, addressed the broader issue—and not just the statute’s specific scope—of regulating private, consensual sexual behavior between adults without regard to sexual orientation.

Justice Kennedy set the tone for his philosophy-drenched opinion by immediately noting that “[l]iberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct.” The existential nature of the opinion had roots in *Roe* and *Casey*. However, Justice Kennedy would also finally combine the self-conception and determination concepts of those cases with the implicit sexual privacy protections of *Griswold*, *Eisenstadt* and *Carey* and concerns for equal respect and dignity to hold expressly that the substantive due process clause covered intimate sexual conduct. He cited *Eisenstadt* and *Carey* in particular to emphasize that the protections extended beyond the marital relationship. He would also continue the Court’s return to Justice Harlan’s rational continuum approach in *Poe* as opposed to attempting to enumerate the isolated pinpricks of fundamental rights as was undertaken in *Roe*.

The Court, including and perhaps most crucially Justice Kennedy himself, had suggested that *stare decisis* had played a noteworthy role in reaffirming the *Roe* decision in *Casey*. *Lawrence* came just seventeen years...
after Bowers and little had changed in the Court’s jurisprudence to suggest that Bowers had been undermined\textsuperscript{489} notwithstanding the continuous struggle over which substantive due process test to apply. This disagreement with regard to the correct standard to apply was Justice Kennedy’s launching point in overruling Bowers. He stated that Bowers was incorrectly asserted to be only about certain sexual conduct just as it would be incorrect to claim that marriage was solely about the right to sexual intercourse.\textsuperscript{490} Justice Kennedy built on the Purposivist theme in invalidating Bowers by writing that the issue then as it was in Lawrence was about the liberty of persons to choose how to conduct their most intimate personal relationships in the most private of places without being punished as criminals and not something so narrow as a simple physical act of sodomy. The profundity of this choice “counsel[s] against attempts by the State, or a court, to define the meaning of the relationship or to set its boundaries.”\textsuperscript{491} (emphasis added)

While writing in the Purposivist tone and relying on the Court’s precedents, Justice Kennedy also addressed the Originalist approach. As he had stated in Lewis,\textsuperscript{492} “history and tradition are the starting point but not in all cases the ending point of the substantive due process inquiry.”\textsuperscript{493} Even if history were to be consulted, while the fifty states had at one time prohibited sodomy, only thirteen states criminalized the act in 2003, including only four exclusively against homosexuals. The recent state of the laws throughout the United States was more persuasive to Justice Kennedy than the state of the common law two hundred years ago, demonstrating his preference for tradition as an evolving concept as opposed to being frozen in time. Also compelling was the continuing emphasis in the Court’s jurisprudence in protecting “the right to define one’s own concept of existence, of meaning, of the universe, and of the mystery of human life” which could not be “attributes of personhood were they formed under compulsion of the State.”\textsuperscript{494} (emphasis added)

The states had migrated away from anti-sodomy statutes since Bowers, and there was also a continuing emphasis in protecting intimate acts and decisions. Even before these developments, however, Justice

\textsuperscript{489} Bowers had not been overruled, although even Justice Scalia considered it to have been undermined somewhat by Romer’s holding that a bare desire to harm a marginalized group is not a constitutionally permissible goal. See Lawrence at 588 (Scalia, J., dissenting).

\textsuperscript{490} Lawrence at 567.

\textsuperscript{491} Lawrence at 567.


\textsuperscript{493} Lawrence at 572.

\textsuperscript{494} Id. at 574.
Kennedy wrote that the Court’s decision in Bowers “was not correct when it was decided, and it is not correct today.” Further, as Justice Harlan’s Poe dissent eventually found itself in the majority, Justice Kennedy asserted that Justice Stevens’ dissent in Bowers “should have been controlling [then] and should control here.”

The Court’s change of heart was an example of the superiority of the Purposivist approach to an enduring Constitution. Justice Harlan’s rational continuum theory had been vindicated. Justice Kennedy wrote that the authors of the Fourteenth Amendment did not presume to have the insight to “name all of the components of liberty in its manifold possibilities” because “[t]hey knew times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress.” Even if it came late, it was most important to understand evolving notions of liberty to eventually correctly apply them. To rely exclusively on the wooden notions of the past would be to countenance injustice in perpetuity.

Justice Kennedy’s opinion was not the methodical meditation on disciplined application of a doctrine already wrought with ambiguity that Justice Harlan had accomplished in Poe and Griswold. The post-Poe Purposivist opinions ranged from restrained to seemingly results-orientated. Justice Kennedy primarily wrote in the Purposivist tone while also dabbling in historical tradition. He suggested that the issue in Lawrence was fundamental but only asked whether Texas had a legitimate state interest in curtailing the behavior as opposed to a compelling one required by strict scrutiny if fundamental rights were involved. His dalliances into Justice Blackmun’s existential theme also arguably teetered from Purposivism run amok to junior high poetry.

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495 Id. at 578.
496 “[I]ndividual decisions by married persons, concerning the intimacies of their physical relationship, even when not intended to produce offspring, are a form of liberty protected by the [substantive] due process clause of the Fourteenth Amendment. Moreover, this protection extends to intimate choices by unmarried as well as married persons.” Lawrence at 577, citing Bowers at 216.
497 Lawrence at 578.
498 Lawrence at 578-79. See also Fool’s Errand, Tourgee, Albion. New York: Fords, Howard, & Hulbert *1879): “[T]he same individual is often both a fool and a genius...a fool to one century and a genius to the next.” The Supreme Court’s jurisprudence is littered with examples, such as Dred Scott v. Sandford, 60 U.S. 393 (1857), Bradwell v. Illinois, 83 U.S. 130 (1872) and Plessy v. Ferguson, 163 U.S. 537 (1896), to name but a few.
499 See again Justice Brennan’s Moore concurrence at 506-509.
500 See specifically: “At the heart of liberty is the right to define one’s own concept of existence, of meaning, of the universe, and of the mystery of human life,” (emphasis added) (citing Casey, O’Connor, J., writing for the Court, although many attribute the quote to Justice Kennedy (see
Justice Scalia took exception to a bevy of things in Justice Kennedy’s opinion, not least of which was his perception that the Court was in a “seventeen-year crusade to overrule Bowers.” He further objected to Justice Kennedy’s lackadaisical conception of the right at stake in Lawrence, although he undoubtedly considered it akin to the “judicially invented abortion right” that was upheld in Casey but that the Court declined to follow Bowers.

While critical of the majority’s opinion in the traditional Originalist vein, Justice Scalia set himself apart by asserting that “there is no right to liberty under the [substantive] due process clause,” a claim that not even the most ardent Originalist would necessarily make. He then asserted that the Bowers/Glucksberg “deeply rooted” test was being ignored by the majority, as it had not yet been overruled. Justice Scalia’s preference for this test led his analysis to once again focus on whether homosexual sodomy was a fundamental right as opposed to whether liberty guaranteed a zone of protection from State intrusion in an individual’s most intimate decisions. The bulk of his argument was addressed at his conclusion that homosexual sodomy is not a fundamental right, a conclusion that the majority failed to “have the boldness to reverse.” As for the Court’s significant list of cases since Poe using substantive due process, Justice Scalia either dismissed them as inaccurately being described as substantive due process cases or invalid since they did not comport with the “deeply-rooted” test announced in Bowers.

Lawrence provoked a torrent of scholarship, a significant portion of which Carpenter, Dale, Gay Rights After Lawrence v. Texas: Is Lawrence Libertarian?, 88 Minn. L. Rev. 1140 at footnote 52 (2004), citing Rosen, Jeffrey, The Agonizer, The New Yorker, Nov. 11, 1996 at 87-88) who was one of the few justices to join Justice O’Connor’s Casey opinion) a line Justice Scalia characterized as the “famed sweet-mystery-of-life-passage.” Lawrence at 588.

Lawrence at 586.

Lawrence at 592.

As noted infra, with respect to Griswold and Eisenstadt, Justice Scalia is perhaps technically correct, although the kind of rights protected under the different names of privacy and liberty were essentially the same, making the distinction more semantic than legal in nature.

which discussed the liberty/equality analysis Justice Kennedy conducted under the substantive due process rubric. Commentators finally noticed the breadth of the fully resurrected and now roaring doctrine, protecting the immutability of homosexuality by providing “[e]quality of treatment and the due process right to demand respect,” and ensuring the exercise of the existential by allowing persons to “choose to enter upon [a] relationship” and “define the meaning of [that] relationship.” This duality, as noted several times infra, goes back a millennium. Examples of it can be seen in other Supreme Court cases well before Lawrence, specifically starting in Meyer, as noted by Professor Karst while discussing his equal citizenship doctrine.

Pamela Karlan sees Loving as the “crystallization” of the liberty/equality duality, begun in Brown and climaxing in Lawrence. These two principles came together in the Court’s analysis of States attempting to limit the enjoyment of rights based on certain classifications. Professor Karlan argues that the Loving Court could have reached the Virginia anti-miscegeny law’s racial subordination without discussing the importance of marriage. It fused them, however, just as the Lawrence Court discussed the liberty interest of private sexual expression without regard to sexual orientation.


506 Lawrence at 575.
507 Lawrence at 567.
508 See again Karst, Liberties of Equal Citizens.
509 Brown was an equal protection case, perhaps a “substantive equal protection” case, handed down in 1954 during substantive due process’ hiatus.
Loving, along with Lawrence and Zablocki, is most illustrative of the interaction between existential liberty and equal protection. Both considered defining acts of personhood, and both confronted limitations on classes that could enjoy the act. Loving followed Skinner’s declaration that marriage was an (unenumerated) fundamental right. It was a right that helped define who a person was and the nature of the family she wished to create. Equal protection featured prominently in Justice Warren’s opinion due to the lack of neutrality in the Virginia statute. However, substantive due process was also used—for the first time in the doctrine’s modern use in the majority as a basis in and of itself to strike down State legislation—to highlight the liberty interest importance in something as personal as marriage.

Loving and Lawrence also demonstrate the distinct contrast in outcomes resulting from using the Purposivist test or the Originalist test. If Justice Warren had taken a narrow approach and framed the issue as to whether there was a history and tradition of interracial marriage in the United States he would have come to a negative conclusion. In its absence then, the tenets of democracy and federalism would have inured to support Virginia’s decision to prohibit interracial marriage. However, Justice Warren took a wider scope. That approach permitted him to extend a right to marry regardless of race. A broadening of the issue from a right to interracial marriage to a right to choose whom one marries opened the door to escape the racial prejudices of the past that would have been used if the Originalist approach was taken. The Purposivist approach enabled the safeguard of liberty as a concept found in the substantive due process clause to be utilized against a tyrannical, racist majority—the very idea intended with the creation of the Bill of Rights and the Fourteenth Amendment. If the issue had been narrower, Loving could have served as democratically countenanced racism entrenched by federalism, enabling bigotry in perpetuity.

Loving is also consequential for its rejection of the equal application argument. The State of Virginia argued that its law was facially neutral in that it equally prohibited both blacks from marrying whites and whites from marrying blacks. Justice Scalia attempted a similar argument in Lawrence, arguing that homosexuals were not discriminated against because they were still free to engage in sexual relations with a person of

511 Referenced in Lawrence at 574.
512 The equal protection argument notwithstanding.
513 See e.g. Bowers, infra.
the opposite sex. Justice Warren’s analysis involved impermissible racial distinctions regardless of equal application, but its rationale extended further. Justice Scalia’s argument was a false choice that ignored the import of Loving: those rights that are so intimate, private and profound are to be exercised pursuant to that individual’s discretion, not the State’s.

Also noteworthy about Lawrence in this respect according to Professor Karlan is Justice Kennedy’s approach. The Court had previously framed, although somewhat inconsistently, its substantive due process issues around whether a fundamental right was at stake that deserved strict scrutiny. Justice Kennedy rejected this approach and instead labeled the Texas law as class-based animosity with respect to personal liberties, a sentiment sounding in equal protection of substantive rights. The Court had previously spoke of the importance of existential matters, including those relating to sexual intimacy in Griswold, Eisenstadt, Carey, Roe and Casey, albeit mostly tacitly. Lawrence ensured that those matters could also be determined by homosexuals free from State intrusion. Justice Kennedy may have expressly written that he was avoiding an equal protection analysis like Justice O’Connor’s so as to foreclose the possibility of a State continuing to regulate behavior that Justice Kennedy thought was beyond its reach. What Justice Kennedy really accomplished was to destigmatize a group whose identity was in part defined by its conduct. Engaging in the conduct may not have had criminal repercussions very often, but maintaining the laws, however unenforced, served a purpose of not deterring the conduct but instead establishing a condemnation of a group by virtue of singling out a major definitional facet for criminalization.

This blurred distinction between targeting conduct, invoking a liberty interest, and targeting groups, involving equality, is perhaps most emblematic of the potential duality of substantive due process and equal protection. Professor Karlan, citing Kathleen M. Sullivan, refers to these

514 Lawrence at 600-01 (Scalia, J., dissenting).
515 This strategy suggests that Justice Kennedy was moving away from the isolated pinpricks approach to rights that started in Griswold that Professor Brown criticized as retracting the scope of rights instead of using a balancing scale.
516 This difference between the reaches of substantive due process and equal protection that give Justice Kennedy pause in using equal protection was further explained by Professors Karlan and Karst, stating that “invalidating a law on equal protection grounds leaves room for the legislature to maneuver, while striking it down as a violation of substantive due process may foreclose regulation altogether.” Karlan, Pamela, Equal Protection, Due Process, and the Stereoscopic Fourteenth Amendment, 33 McGeorge L. Rev. 473, 75-76 (2002), citing Karst, Kenneth, Why Equality Matters, 17 Ga. L. Rev. 245, 281 (1983).
517 Sullivan, Kathleen M., Post-Liberal Judging: The Roles of Categorization and Balancing, 63
intermingling constitutional doctrines as an “analogical crises.”\(^{518}\) In addition to giving courts difficulties in discerning what the proper analysis is or articulating a clearly bifurcated analysis, the lack of an omnipresent barrier between conduct and status poses problems for states that seek to discriminate. \(^{519}\)

Professor Karlan’s example explains that “the Eighth Amendment prohibits states from criminalizing a particular status in the absence of any antisocial behavior. \(^{520}\) So a state that wants to express its disapproval of gay people must instead craft a law that makes it a crime to engage in behaviors connected in some way with being gay.” Such indirect ways to stigmatize and marginalize classes of people were undertaken in states such as Mississippi and Alabama at the end of the 19th Century. The states could not pass legislation specifically aimed against blacks. Instead they resorted to designing laws that would disproportionately affect them. Professor Karlan’s specific example pertains to voting eligibility laws. Constrained by the 15th Amendment’s declaration that all persons regardless of color were entitled to vote, the Mississippi Supreme Court found that “blacks possessed peculiarities of habit, of temperament, and of character, which clearly distinguished them from whites, ranging from moving more frequently to committing certain crimes. Thus, the state constitutional convention set eligibility standards for voting that relied on these distinctions.” \(^{521}\)

Nan D. Hunter has also explored what she has termed the “weav[ing] together [of] substantive due process and equal protection doctrine into a holistic analysis of the cultural weight of the individual rights involved.” \(^{522}\) Professor Hunter sees the \textit{Lawrence} opinion as sounding in two chords, liberty as the majority chord, and equality as the minor to extend an intimate liberty to a group that practiced it in a different way. Justice Kennedy spoke of the “what” involved, relating to substantive due process, but also the “who,” invoking equal protection.

Professor Hunter traces \textit{Lawrence}’s roots unsurprisingly to the dissents in \textit{Bowers}, specifically to Justice Stevens’ liberty approach. While

\(^{518}\) Karlan, \textit{Boundaries of Liberty} at 1457.

\(^{519}\) Id.


\(^{521}\) Citing Ratliff v. Beale, 20 So. 865 (Miss. 1896), basing such distinctions on “crude sociological speculation that black lawbreakers were given rather to furtive offenses than to the robust crimes of the whites.” Karlan, \textit{Loving Lawrence} at footnote 62.

she finds Justice Blackmun’s dissent to reject majoritarian moralism as a sufficient basis for criminalization similar to Justice Stevens, the two dissents diverge when analyzing the reason for doing so. While Justice Stevens utilized principles of liberty, Professor Hunter argues that Justice Blackmun employed privacy concepts in establishing the right to be left alone. However, he went further to argue that the right to be left alone permitted an individual to determine one’s own identity, a concept reminiscent of his opinion in Roe. Professor Hunter argues that by stressing how the law in Bowers “touch[ed] on acts that are central to identity and self-definition,” curiously enough, Justice Blackmun may be guilty of the very thing he accused the majority in Bowers of doing, namely making Bowers a “gay case,” or the right to privately define oneself as gay.

Justice Stevens on the other hand, made no mention of existential matters, and instead used a liberty plus an equal protection argument by noting that sodomy could not be prohibited for married persons (a liberty), nor for unmarried persons (an equal protection), nor against another group without good reason (further equal protection). Whether being free from the State telling one how to conduct one’s sex life is a privacy interest or a liberty interest or a private exercise of liberty may be a semantic distinction as previously noted. However, an operative difference between the two Bowers dissents rests on the existential component.

Professor Hunter calls attention specifically to Eisenstadt for the genesis of Justice Stevens’ method later adopted by Justice Kennedy in Lawrence. It is in Justice Brennan’s Eisenstadt opinion, an equal protection opinion affirming a liberty for another class of persons, that Professor Hunter can see another example of arguing that if a liberty/privacy right exists, it must exist for all regardless of identity. Specifically, Justice Brennan stated that “if the right to privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion,” making “equal treatment under the law the logical fulcrum.”

This is the main difference between Justices Brennan, Stevens and Kennedy and Justice’s Blackmun’s opinion. It is not the use of liberty versus privacy, but the removal of the existential component. When a right is recognized, it is recognized for all if equality is to mean anything. The right is important regardless of who you are, irrespective

523 Hunter, Living with Lawrence at 1107.
524 Id. at 1108.
525 This distinction is likely only in semantics given that the right to privacy in Griswold is largely just a doctrinal basis invoked to avoid using the still then out of vogue substantive due process.
526 Professor Hunter calls this liberty/equal protection hybrid “one of the most brilliant political moves in the Court’s history” given that Justice Brennan’s combination of the two doctrines
of whether exercising it in part defines you. Justice Blackmun’s existential opinion in this context was earnest, but made unnecessary distinctions between people that invited unequal treatment is what seems to be Professor Hunter’s point.

Professor Hunter’s analysis may uncover a cogent distinction between the two dissents in Bowers, but her point about Justice Blackmun’s opinion following Justice White’s splicing of the Georgia statute into a “gay sodomy” law after chiding the majority for doing it, may mischaracterize Justice Blackmun’s idea. There is no need to drop the existential idea in order to focus on just the immutable. They can work together, as cases from Meyer to Lawrence exhibit. Lawrence and Bowers, especially with respect to homosexuals, illustrate how the immutability of identity is so intertwined with existential acts. An individual may be born gay, but her decision to engage in a homosexual relationship is at her discretion. However, while a homosexual relationship is discretionary, desiring that type of relationship is immutable. A woman’s right to determine whether she wishes to be a mother as protected in Roe and Casey is similar, yet distinct. She is immutably a woman, but her decision to become a mother is something for her to determine. Both the immutable and the existential are inextricably linked and vitally personal and important, calling for protection, although the connection between one’s sexuality and the expression thereof is likely more immediate given how important intimacy is for human beings.

Professor Tribe has written about both the “double legal helix” of liberty and equality in Lawrence and of substantive due process’ existential capabilities. He calls Lawrence the Brown v. Board for homosexuals, “bringing to maturity the Constitution’s elusive but unquestionably central protections of liberty, equality, and-underlying both-respect for human dignity.” With respect to the existential component, Professor Tribe writes about how Lawrence invalidated a law that ostracized a

enabled the Court to extend protection of non-procreative sex outside of marriage without having to expressly rule that “marital relations” extended to the unmarried. Adding this laconic sentence to the Court’s holdings supporting the right whether to “bear or beget” a child paved the way to legalize abortion shortly thereafter. To some it would be a logical result pursuant to the “rational continuum.” To detractors it would be a slippery slope come true, or, given the speed with which it all transpired, a steep cliff.

529 Id. at 1895.
misunderstood identity. Further, the acts in Lawrence were “reflections of a deeper pattern involving the allocation of decision making roles” as opposed to a bill of particulars for rights to be protected. (emphasis added)

Not only were liberty and equality fused into the substantive due process clause analysis in Lawrence, but the immutable and the existential components combined by Justice Kennedy when he declared that statutes could no longer prohibit the conduct between both same-sex and different-sex participants because doing so “would demean the existence and control the destiny of adults who engage in sexual practices common to a homosexual lifestyle.” No longer would the State be able to determine what a meaningful relationship is for an individual (existential), nor would be able to stigmatize an act—while commonly practiced by many, if not most, sexually active individuals—inextricably associated with homosexuals (immutable).

In contrast to Professor Sunstein and Justice O’Connor and other advocates of equal protection, Professor Tribe recognizes its shortcomings, specifically in the Lawrence context. Using equal protection would have permitted “the culturally dominant group’s determination of how liberty within [homosexual] relationships should, in all decency, be exercised.” This idea not only violates a level of generality sufficient enough to recognize the act at issue’s meaning to the persons involved as described by Professor Brown, it also “[l]ike the fabled Sword of Damocles that does its awful work not by beheading its victim but simply by dangling above its victim’s neck, demeans intimate homosexual relationships at the same time that its virtually complete non enforcement greatly reduces the incentive of heterosexuals, who are not demeaned by such a ban, to agitate for its repeal.”

Roe and Casey are arguably unrivaled with respect to what is at stake for an individual’s life in one concrete circumstance. Bowers and

530 Id. at 1896.
531 Id. at 1899, reminiscent of Madison’s concern about an enumerated Bill of Rights as well as Professor Brown’s criticism of the Court’s shift in focus from the State interest in curbing a right to the whether the right was protected in the first place.
532 Id. at 1902, citing Lawrence at 2484.
533 See also Parshall, Lisa K., Redefining Due Process Analysis: Justice Anthony M. Kennedy and the Concept of Emergent Rights, 69 Alb. L. Rev. 237 (2005) (discussing Lawrence as a guarantor of equal dignity and equal respect in lieu of the equal protection doctrine, as well as a repudiation of bare desires to harm a politically unpopular group as being a constitutionally permissive legislative goal).
534 Tribe, Dare not Speak at 1908.
535 Id. at 1910, further demonstrating substantive due process’ de-fanging capabilities.
Lawrence, however, are unparalleled in demonstrating the force with which equality operates. The existential interest is clear and was best articulated by Justice Blackmun in Bowers. With whom one associates with sexually and intimately is one of the most personal decisions a person can make. Romantic love constitutes one of the most profound aspects of an individual’s life, and therefore there is a “fundamental interest in controlling the nature of [one’s] intimate associations with others,” 536

The Bowers majority did not acknowledge this right; but in reality they refused to acknowledge it for homosexuals alone despite the facially neutral Georgia statute’s inclusion of heterosexuals. They did not even ask whether there was a constitutional right to commit sodomy, which at least would have been symmetrical given the language of the statute. The State itself had not applied the statute to anyone, regardless of sexual orientation for forty to fifty years. The statute thus lay dormant yet with all of the force necessary to arrest pursuant to discretion. 537 And it was upheld because of a transparently myopic issue statement by Justice White.

While Justice White cut the Georgia statute in half, Justice Kennedy doubled the Texas law in Lawrence. The Texas statute specifically singled out homosexuals 538 for criminal prosecution. Justice Kennedy noted the law’s specificity in contrast to the Georgia law in Bowers but expressly passed on a conventional equal protection analysis in order to leave no doubt that there was a guaranteed right to private, intimate conduct protected by the substantive due process clause. 539 His opinion spends considerable time addressing the oppressive and discriminatory nature of anti-sodomy statutes during his declaration of a right to sexual freedom with respect to sexual orientation. Although he passed on an express equal protection analysis in order to avoid any confusion as to what the deficient aspect of the Texas law was—interfering in the any bedroom, regardless of sexual orientation—so as to foreclose any future tailoring of State statutes,

536 Bowers at 206.
537 Michael Hardwick discovered the reality of this possibility when a police officer crept into his bedroom to watch him violate Georgia’s anti sodomy law. See Curtis, Michael Kent, Parker, J. Wilson, Douglas, Davison M., Finkelman, Paul, Constitutional Law in Context, Second Edition, Volume One (Carolina Academic Press, 2006) at 888-89
538 Counsel for the State of Texas at oral argument asserted that the statute only criminalized homosexual sodomy without regard to sexuality, not sodomy engaged in by homosexuals. The distinction, although real, had little impact on the Court’s analysis, although Justice Scalia noted similarly that homosexuals were free to have sex with members of the opposite sex, thus sparing the law from an equal protection violation.
539 Justice O’Connor took the more conventional approach. She did not advocate overruling Bowers but found an equal protection violation in Texas’ decision to single out homosexuals for criminal prosecution. This focus on the statute’s unequal treatment of groups as opposed to the wisdom of the statute itself resembled Justice Stewart’s approach in LaFleur.
his opinion nevertheless had the effect. Thirty-seven states had abandoned anti-sodomy laws before Lawrence struck down the remaining thirteen. While Lawrence unambiguously announced that “liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct,” sexual freedom was already all but guaranteed to heterosexuals, even in the thirteen states that had anti-sodomy statutes. Justice Kennedy’s concern may have been expressly protecting this right for everyone, but its real impact was to finally issue it to homosexuals, a group that could hardly be said to have any real political power.

A lack of political power, as well as the lack of enforcement of both homosexual and sex neutral sodomy statutes, meant that the statutes lay dormant yet still available for harassment. Their existence also maintained a stigma for a whole class of people, as noted above. Lawrence’s equality invalidated these statutes because “they demean gay people and create stigma for a group that deserve respect for the choices made in their private lives.” Justice Kennedy essentially acknowledges the equal protection component of substantive due process when he writes that “[e]quality of treatment and due process right[s] are linked in important respects, and a decision on the latter point advances both interests.”

Sexual freedom had been mostly permitted in the second half of the twentieth century. It had been constitutionally recognized incrementally to different minorities in the order of their acceptance within society. Society’s particular level of recognition of a group—Catholics in the 1920’s, blacks and women in the 1960’s and 1970’s and homosexuals in the 2000’s—instructed the Court on whether to use a conventional equal protection analysis or substantive due process’ tacit equalirty component. Unmarried persons were palatable, and the ramifications of anti-contraception laws were clear enough to win them a class designation and thus an equal protection analysis that extended the substantive due process doppelganger analysis. Class protection was withheld from minors, perhaps

540 Another common conservative refrain is that substantive due process impermissibly treads on state sovereignty. While federalism is undoubtedly a fundamental characteristic of the American government’s structure, one should bear in mind that the country’s name is the United States of America, and not simply the States of America, emphasizing that there are a core set of rights that are to be uniform across the country and not subject to local prejudices that conflict with those rights. See generally Martin v. Hunter’s Lessee, 14 U.S. 304 (1816).

541 Justice Scalia and his laments against the “homosexual agenda” would certainly take issue with this assertion. However, considering how many openly gay politicians serve in the federal government and lingering animosity toward homosexuals, it can hardly be said that homosexuals shape the greater political agenda.

542 Hunter, Living with Lawrence at 1124, citing Lawrence.

543 Id. at 1125.
due to the understanding that while minors are protected by the Constitution, those protections were more amenable to State regulation as noted by Justice Brennan in Carey, citing Meyer. The lack of class protection did not ultimately deny the right—minors were afforded Griswold/Eisenstadt protection—but it was left to equalery.

Similarly, granting homosexuals classification for equal protection analysis has lagged as the Court struggled to determine their nature, specifically whether it was a question of choice or an immutable characteristic. The issue arose despite religion enjoying not only a classification status for equal protection analysis, but strict scrutiny on top of it. The heightened scrutiny for religious classifications lies in historical support for the protection of religion as further evinced in the First Amendment. In contrast, the Court’s reluctance and indecisiveness with respect to sexual orientation stems from a lack of historical treatment of the subject or outright hostility.

Substantive due process’ equalery component is most crucial in instances in which a statute was facially discriminatory or at least facially suspect with direct ramification for a minority group. Skinner, Loving, Eisenstadt and Stanley, all involving palatable minority groups that were easily identifiable, invalidated facially discriminatory statutes with conventional equal protection analyses. In the cases of Loving and Stanley, the equal protection analysis was used in addition to substantive due process. Equal protection was foremost with respect to Loving, and in addition to substantive due process concerning Stanley.

However, in LaFleur, Carey, Lawrence, Meyer, Pierce, Zablocki, Bowers and Moore, facially discriminatory or at least facially suspect statutes were left unmolested by a conventional equal protection analysis, and were only struck down because of substantive due process’ equalery. LaFleur, Carey and Lawrence involved express statutory discrimination yet depended upon equalery to be removed. Justice Stewart would have utilized equal protection in LaFleur. Minors are understood to enjoy something less than the constitutional guarantees than those of a majority age, perhaps explaining Carey. And Justice Kennedy was certainly mindful of the discrimination at hand in Lawrence. Nevertheless, in these extreme cases of direct discrimination from facially discriminatory language, it took equalery to remedy the situation.

The statutory language and obviousness of intent in Meyer, Pierce, Zablocki, Bowers and Moore are less drastic yet still demonstrate equalery’s importance working in the stead of the conventional doctrine considering the impact of the statutes. It was not certain that Nebraska aimed to discriminate against Germans, nor Oregon against Catholics, but
understood in reality, that was the impact and likely the intent. National origin and religious faith did not trigger an equal protection analysis. The doctrine existed at the time of *Meyer* and *Pierce*, but it had not been developed significantly. It was still a decade short of the birth of heightened scrutiny for insular minorities announced in *Carolene Products*. Equalery had to be utilized within the general existential right based in liberty to direct the upbringing of one’s children to invalidate the States’ statutes.

*Zablocki* featured at best a facially neutral statute with a noble motive, but in its short-sightedness, Wisconsin failed to consider the law’s burden on the poor. Because the poor are not a recognized class for equal protection analysis, once again general existential themes (marriage this time) were used to neutralize the specific effects of the statute on the impoverished.

**SUMMARY: THE EQUALERTY OF SUBSTANTIVE DUE PROCESS**

That substantive due process has worked better than equal protection to protect existential and equal rights is ultimately a result of the interpretations of the nine judges on the Court at any particular time. There is ample evidence to persuasively argue that far from fidelity to established law divined through rigorous legal reasoning, the justices merely use the legal doctrines they create as vessels to submerge their personal political and moral predilections.

For commentary on a persuasive book articulating this theory, see Gillman, Howard, *What’s Law Got to Do With it? Judicial Behavioralists Test the ‘Legal Model’ of Judicial Decision Making*, 26 LSINQ 465 (2001), reviewing Spaeth, Howard J. and Segal, Jeffrey A., *Majority Rule or Minority Will: Adherence to Precedent on the U.S. Supreme Court*, New York: Cambridge University Press (1999). Messers. Spaeth and Segal are especially vindicated in instances such as Justice White in *Bowers*. Moreover, not only are decisions such as these suggestive of more specific, and arguably less legitimate as a manner of judicial interpretation, factors at play—i.e. political ideology over constitutional methodology—but in examples such as *Bowers*, Justice White’s rationale may have been even more personally idiosyncratic than political. Instead, it may have been something that resembled Justice Scalia’s disingenuous admonition against not just personal politics but personal predilections. Professor Gilman himself argues that “the nature of unenumerated rights in constitutional law is largely determined by the interests and ideologies of the prevailing national governing coalition.” Gilman, *Regime Politics* at 113.
bidding of those who wish to expand personal rights. That Originalists have resisted its use—or even its existence—does not at all absolve them from injecting their own personal persuasions into their decisions. Their wish to subdue or even destroy substantive due process speaks volumes as to how they regard the subjects that the doctrine has been applied to in the last fifty years. Moreover, the justices responsible for the second half of the twentieth century’s biggest decisions were far from radicals. *Brown* was written by Eisenhower’s appointee Earl Warren, *Roe* by Nixon appointee Harry Blackmun, *Casey* by the Republican trio of Sandra Day O’Connor, Anthony Kennedy and David Souter and *Lawrence* again by Reagan appointee Kennedy. These major liberty and equality decisions cemented rather than implemented social change, contradicting Professor Bickel’s countermajoritarian thesis.

The inability to divorce one’s inherent subjectivity from one’s judicial task to ostensibly judge in an objective fashion is a topic for another article. The primary focus of this work is to comment on how minorities have been provided refuge in immutable and existential matters. The emphasis is not so much on the constitutional legitimacy or soundness of legal reasoning, but rather the empirical reality of the decisions for the lives of the marginalized. That the Court’s decisions mostly followed and reinforced social movements for Catholics in the 1920’s, women and blacks in the 1960’s and 1970’s to homosexuals in the 2000’s, does not diminish the Court’s role in providing safe haven for minorities. In fact, it emphasizes the imperative nature of the Court’s work. Once American society—following the rational continuum—has deemed an individual liberty of greater importance than a state’s interest in curtailing it, it is the Court’s duty to ensure that all Americans—regardless of immutable characteristics or federalism concerns—enjoy it. In 2003, thirty-seven states had abolished anti-sodomy laws, but that provided little solace to John Lawrence, just as the fact that in 1967 thirty-four states permitted interracial marriage did little for Richard and Mildred Loving who lived in

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547 State sovereignty to recognize, preserve and cherish their own particular histories and traditions is one thing, but not when it comes at the expense of liberties based in hostility or indifference to the politically marginalized in immutable and existential matters. The Constitution is the supreme law of the land, and, as noted infra, it is the United States of America, not simply the States of America that can honor constitutional liberties as if they were in a cafeteria. See again *Martin v. Hunter’s Lessee*, 14 U.S. 304 (1816) (discussing importance of a uniformity of certain laws among the states in order to cultivate a shared American fabric).
one of the sixteen states that maintained anti-miscegenation laws.

As this work has attempted to demonstrate, the substantive due process clause, particularly after its rehabilitation post-\textit{Poe} but also starting in \textit{Meyer} and \textit{Pierce}, has been the most effective doctrine for immutable and existential matters. In \textit{LaFleur}, substantive due process worked to combat a facially discriminatory statute that limited a woman’s existential choices about motherhood and her career based on the immutability of her sex. Equal protection was not used despite the statute clearing classifying based on sex. \textit{Davis} was still two years away, yet the seeds for the Court’s requirement that a deliberate intent to discriminate be shown rather than discriminatory impact, no matter how disparate and foreseeable, had already been planted in \textit{Davis}’ antecedent in 1971’s \textit{Palmer} decision.

\textit{Loving}, \textit{Lawrence} and \textit{Carey} also aided marginalized groups affected by facially discriminatory State legislation. \textit{Loving} and \textit{Lawrence} being especially poignant examples of an equality analysis. Perhaps more crucial for minorities, however, are the instances of facially suspect and, even more importantly, facially neutral laws. These situations showcase substantive due process’ flexibility, illustrating why it is superior to the Court’s restrictive conception of a shallow-reaching equal protection.

In \textit{Meyer}, the state of Nebraska, spurred by the Temperance Movement, was as concerned (if not more so) about classifications based on national origin than it was about restricting liberties. Yet a clause based in and interpreted through the prism of liberty acted to root out the post-World War One, post heavy Catholic immigration wave discrimination against Germans that sat underneath a facially neutral statute with an ostensibly legitimate goal of fostering common civic goals and American solidarity. Equal protection did not work, nor likely could it given a lack clear target for classification.\textsuperscript{548} Post-\textit{Davis} jurisprudence would have made it even more difficult given the State’s proffered motive. Instead, it was substantive due process that protected the immutability of national origin and the existential determination of how to educate one’s children.

Similarly, the state of Oregon had an arguably legitimate state interest to cultivate shared community values and a facially neutral law to implement it. Such a guise is an ideal pretext for hostility. In this case once again, it was the Temperance Movement and the Ku Klux Klan that were

\textsuperscript{548} One could point to \textit{Yick Wo v. Hopkins}, 118 U.S. 356 (1886) as an example of equal protection working to invalidate a facially neutral statute (law denying licenses to dry cleaners working in wooden buildings only enforced against Chinese and not Caucasians, invalidated by Court). The disparate enforcement against the Chinese in \textit{Yick Wo} was so overwhelmingly lopsided (all Chinese petitioners were denied permits while only one out of eighty Caucasians were denied) that intent to discriminate was all but tacitly proved.
able to conceal their hostility toward Catholics by submerging it in patriotism. Substantive due process, *viz.*, the profound reach that liberty can have to not only unshackle an act, but also the group to which that act is associated (in *Pierce*, going to private religious schools with Catholics, in *Lawrence*, expressions of intimate conduct through sodomy with homosexuals), worked in *Pierce* to unveil illegitimate motives to harm a marginalized group.

Hostility may not have been the impetus behind the statutes in *Moore* and *Casey*, yet indifference as opposed to animus is little consolation for minorities bearing the brunt of a statute that acutely affects them. The *Moore* and *Casey* laws can even be seen as having been made with good intentions. Reducing inner-city congestion in East Cleveland and protecting the unborn in Pennsylvania are goals with merit. Those goals, however, sought by the politically endowed yet affecting negatively so much more profoundly the politically marginalized, had to give way under Professor Brown’s balancing of State interests versus individual liberty. What is at stake for the individual—the imperative of raising an orphaned grandson and the inevitability of becoming a mother—bear too heavy on the individuals involved to be sacrificed for urban planning and metaphysical uncertainties.

**CONCLUSION**

Ambiguous, vague and prone to manipulation, the substantive due process has its many detractors. Many of the charges against it are valid. However, what it has been used for is nothing short of the most intimate, personal and profound matters of human existence. While equal protection has had its moments, *Brown v. Board* certainly coming to mind, substantive due process has achieved more in the areas of equality and liberty for more people in the last fifty years. It has protected the immutability of who we innately are, paramount if any semblance of justice is to be suggested as existing. Moreover, it has undertaken to protect some of the most vulnerable for what is beyond their control in the face of well-concealed hostility.

Additionally, substantive due process has fulfilled the more orthodox role of guarantor of liberty. It assures that our most important matters, the decisions that come to define us, will not be made by anyone other than the person whom shall have to live with the decision made, least of all a transient group of strangers that may not have the interests of the politically marginalized that will bear the impact of their laws in mind.