Inside the Civil Rights Ring: Statutory Jabs and Constitutional Haymakers

Aaron J Shuler, University of Oregon

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INTRODUCTION

The struggle to advance the cause of civil rights has been fought in a number of disparate arenas, from lunch counters to admissions offices to the marble halls of the Supreme Court. Civil rights litigation in American courts has primarily utilized two related but separate legal sources: statutes—federal, state and local ordinances—and the United States Constitution. Each track has its own advantages and limitations, and over time each route has shown itself to be more suitable than the other depending on the nature of discrimination being faced. This paper seeks to briefly trace the development of modern civil rights litigation, highlighting decisions that shaped the character of statutory and constitutional arguments and how their attributes are illustrated in successes and failures in court.

Civil rights litigation will be viewed through a boxing metaphor, comparing smaller-scale but effective statutory decisions with a precise jab punch that is easier to throw and land and incrementally wears an opponent down but not out, and big, powerful but risky constitutional decisions with a haymaker that have broad, overwhelming impacts if landed but leave civil rights fighters vulnerable if they miss their mark. It is an

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1 Ph.D. student and Graduate Teaching Fellow, University of Oregon Department of Political Science.
imperfect metaphor to be sure, but nevertheless a useful device to analyze and better understand the fight to secure civil rights against the foe of inequality.

AN EARLY LOW BLOW: THE CIVIL RIGHTS CASES

The nature of modern civil rights litigation was profoundly shaped by the Civil Rights Cases of 1883. Justice Bradley’s near-unanimous opinion severely curtailed the reach of the Civil Rights Act of 1875, an act grounded in the Reconstruction Amendments. The Act was passed by a Northerner-dominated Congress seeking to extend the day-to-day protections of equal citizenship to newly-freed slaves in the “enjoyment of accommodations, advantages, facilities, and privileges of inns, public conveyances on land or water, theaters and other places of public amusement.” Justice Bradley’s opinion focused on a public/private distinction to narrowly construe the language of the Reconstruction Amendments to only pertain to actual slavery and overt State action as opposed to private actors discriminating in public accommodations. Without the constitutional authority to regulate the conduct in question, Justice Bradley found the Act to be an unconstitutional assertion of federal power attempting to redress “ordinary civil injur[ies]” that fell within the province of state regulation. The result of the decision not only subverted the likely purpose of the Reconstruction Amendments to give the federal government the power to stamp out the “badges and incidents of

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2 109 U.S. 3.
3 If you can’t beat them, join them in pulling the teeth out of the Fourteenth Amendment, may have been Justice Bradley’s mentality after dissenting in the Slaughter House Cases, 83 U.S. 36 (1873), an opinion that arguably stripped the Privileges and Immunities Clause in the Fourteenth Amendment of its intended purpose if not protected class. Or perhaps it was because the Civil Rights Cases concerned black people, the very people contemplated by the Fourteenth Amendment as acknowledged by the majority in the Slaughter House Cases, as opposed to white butchers.
4 18 Stat. 335, §1 (1875).
5 Authority was not argued pursuant to the Commerce Clause of Article I, §8.
6 Civil Rights Cases at 24.
slavery”\textsuperscript{7} in every day life nationwide\textsuperscript{8} but it also had the practical and long lasting effect of leaving private acts of discrimination—even with respect to the use of public accommodations—in the hands of states that just fought a war over maintaining slavery.

While the discrimination of private actors, no matter how extensive their entanglement with the general public, would remain largely out of reach for civil rights advocates for over eighty years, the Constitution was still invoked to strike down invidious legislation. \textit{Buchanan v. Warley}\textsuperscript{9} is but one example of the Fourteenth Amendment’s deep reach into State-mandated discrimination. \textit{Buchanan} involved a Louisville ordinance seeking to maintain segregation of the city’s neighborhoods. The ordinance was challenged by a white resident whose attempt to sell his property was frustrated by a black man to whom he was to sell the property refusing to perform the contract because the ordinance forbid him from living in the home he was to purchase. The Court found that the ordinance interfered “with the civil right of a white man to dispose of his property”\textsuperscript{10} and thus was an unconstitutional interference with property rights guaranteed in the Fourteenth Amendment.\textsuperscript{11} A ringing endorsement of racial equality it was not. Still, by bringing the Court’s attention to the economic interference attendant to segregation laws—a concern the 1917 Court surely had more solicitude for than civil rights in housing—the NAACP’s lawyers were able to neutralize a powerful tool of racial oppression with the Constitution by speaking the Court’s language.

\textsuperscript{7} See Harlan, J., dissenting, \textit{Civil Rights Cases}.
\textsuperscript{8} Justice Bradley’s oppressive construction appeared to give little to no effect to §§2 and 5 of the Thirteenth and Fourteenth Amendments (“The Congress shall have power to enforce, by appropriate legislation, the provisions in this article’’).
\textsuperscript{9} 245 U.S. 60 1917.
\textsuperscript{10} \textit{Id.} at 81.
\textsuperscript{11} \textit{Id.} at 81.
While *Buchanan* massaged the Court’s economic fetish with freedom of contract language to reach public discrimination, *Shelley v. Kraemer*\(^\text{12}\) relied on the Equal Protection Clause of the Fourteenth Amendment to make the Court complicit in private discrimination. Thurgood Marshall ingeniously circumvented the *Civil Rights Cases*’ antipathy to rooting out private acts of discrimination in real estate by noting that while the Constitution may not have forbidden inserting racially restrictive covenants into private property contracts, enforcing those contracts should a party not abide the discriminatory language would require state actors. In both *Buchanan* and *Shelley*, major weapons of discrimination used to ghettoize blacks were dismantled by the Fourteenth Amendment. *Shelley* in particular struck a major initial blow to an insidious practice that had been used to exclude blacks from white neighborhoods and all the attendant advantages that came with what were on average higher property values. Moreover, the shrewd constitutional analysis and resulting Supreme Court opinion forced the states to disable an extremely useful private practice of maintaining racial dominance, an area seemingly impenetrable after the *Civil Rights Cases*.

Notwithstanding the success of *Shelley*, a constitutional attack on private discrimination mostly missed the mark. Private acts of discrimination on the retail level, more numerous, subtle and on a smaller scale, had a devastating cumulative effect on minorities that could not be reached by a sweeping constitutional blow. To strike inside societal inequality on the local level against single private acts of discrimination, civil rights advocates would need to tailor their attack with more precision. This precise, more adaptable punch would come in the form of the Civil Rights Act of 1964. While the *Civil Rights Cases* turned the constitutional attack into a haymaker incapable of landing inside

\(^{12}\) 334 U.S. 1 (1948).
on smaller, precise targets, the Civil Rights Act would be specifically tailored to infiltrate the world of day-to-day discrimination at the intersection of the public and private realms.

The legitimacy of the Civil Rights Act, constitutionally and operationally, was validated in *Heart of Atlanta v. U.S.* Specifically, Justice Clark’s opinion discussed Title II’s reach into private acts of discrimination in public accommodation. Discriminatory actors could not longer duck accountability by asserting a lack of official public status. After *Heart of Atlanta*, civil rights litigators could hit internal targets that create and perpetuate inequality. Discrimination in “goods, services, privileges, advantages, and accommodations of any place of public accommodation” could now be sought out and struck with a statutory jab, unlike the powerful constitutional haymaker that misses the mark after the *Civil Rights Cases*.

**A SUCKER PUNCH WITH A DEEP [AND DISPARATE] IMPACT: WASHINTON v. DAVIS**

While civil rights fighters gained a major statutory punch in the Civil Rights Act and its validation in *Heart of Atlanta* to fight private discrimination, the effectiveness of its constitutional power punch against State biases was weakened yet again a decade later. The damage started in *Palmer v. Thompson*. In *Palmer*, Justice Black let the city of Jackson, Mississippi, off the hook for closing a public pool rather than integrate it because the Court had never held that a “legislative act may violate equal protection

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13 Civil rights advocates learned their lesson in the *Civil Rights Cases* and stuffed the Civil Rights Act of 1964 full of language that explained how businesses relate to public accommodations, see e.g. §201 (b), discussed in *Heart of Atlanta* at 247, and language that would trigger Article I, §8’s Commerce Clause. *See again Heart of Atlanta* at 248 (noting that the goods offered moved through interstate commerce and were offered to consumers traveling across state lines).


15 *Id.* at 247 (emphasis added).

solely because of the motivations of the men who voted for it.”

This “see no evil, hear no evil” approach was extended in *Washington v. Davis* when the Court construed the Equal Protection Clause of the Fourteenth Amendment to only land on laws with a discriminatory intent as opposed to a disparate impact. *Davis* involved a test given by the District of Columbia to prospective police officers that ended up disqualifying a disproportionate amount of black applicants. Justice White found that laws and practices that resulted in a disparate impact were not unconstitutional even if (as in this case) the test administered bore a tenuous relationship with ability to perform the job in question so long as the test administered was not given in pursuance of a racial animus.

*Davis* severely limited the effectiveness of the Equal Protection Clause’s ability to strike at subtle but damaging state discrimination. The ruling was particularly devastating in a time when legislators were becoming more aware that they needed to bury their animosities in ostensibly neutral legislation. Justice White’s opinion gave them cover and license to continue enforcing inequality on the sly. Even if legislators did not consciously act with a surreptitious intent to discriminate, failing to strike down laws with drastically disparate impacts would countenance legislative indifference to the plight of historically discriminated against minorities and serve to perpetuate deeply-ingrained inequality built up and solidified over hundreds of years.

Similar to *Heart of Atlanta’s* interpretation of the Civil Rights Act of 1964 that pulled back ground lost in the *Civil Rights Cases*, *Davis* also has a positive private analog

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17 *Id.* at 224.
19 It was the District of Columbia’s test that was in question, thus triggering the 5th Amendment’s Equal Protection Clause, identical to the Fourteenth’s application to the states. *See Bolling v. Sharpe*, 347 U.S. 497 (1954) (Justice Warren finding a corresponding Equal Protection Clause in the Fifth Amendment in order to justify applying *Brown v. Board’s* desegregation command to D.C.).
20 Four times as many black applicants. *Davis* at 237.
interpreting the Act. *Griggs v. Duke Power Co.* is illustrative of a statutory attack filling in where a constitutional one has failed, albeit addressing private discrimination in employment as opposed to public. Similar to the employer in *Davis*, a power company in *Griggs* began to administer tests for employees that wished to work in higher-paying departments. The tests were shown to have a disparate impact on the company’s black workers that had been historically discriminated against. Further, those tests were deemed to bear no demonstrable relationship to the jobs that were sought. Justice Burger’s opinion found that disparate impacts from tests without any “business necessity” violated Title VII of the Civil Rights Act. The Act “proscribe[d] not only overt discrimination, but also practices that are fair in form, but discriminatory in action.”

*Griggs* was decided on March 8, 1971. *Palmer* was handed down three months later on June 14. The composition of the Court had not changed and hardly any time had passed to explain a change of heart. The severe operational difference between a statutory analysis that scrutinizes impact and a constitutional attack that only questions intent demonstrates a major advantage that statutes can have in addressing the practical realities of sub-surface discrimination, indifference and unintended consequences. *Palmer* is distinguishable from *Griggs*, and it may be the case that the employer in *Griggs* would have been given a pass had it refused to hire or promote anyone in order to avoid including African Americans.

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22 *Griggs* at 431.
23 *But see Ricci v. DeStefano*, 129 S.Ct. 2658 (2009), in which the Court ruled that the Title VII rights of 19 whites and 1 Hispanic were violated when New Haven threw out test results that disqualified every black employee for promotions for fear of facing a Title VII lawsuit…from the black employees. The Court stopped after its Title VII inquiry and thus did not have to revisit *Palmer* in an equal protection analysis.
The same cannot be said for Davis, where Justice White effectively averted his eyes from a test that perpetuated the discrimination of the past without establishing that the employer’s mission in the present would be served.\footnote{The lower courts split on the issue and Justice White offered a tepid analysis about police officers needing communication skills. Davis at 250.} What won the day for the statutory attack was its specificity, just as it was dispositive in Heart of Atlanta as opposed to the Civil Rights Cases. Justice White’s Davis opinion expressly acknowledged that Title VII required a more probing judicial standard and less deference to officials than a constitutional inquiry, a “more rigorous standard” that he was “not disposed to adopt”\footnote{Davis at 247. Justice White also declined to apply Title VII itself to D.C.’s practice because of a perceived procedural defect in the appeals process, to the chagrin of Justices Brennan and Marshall. Id. at 257.} in the constitutional realm. Legislators likely knew the objections they were to face from opponents and skeptical judges. Justice Black, ordinarily an ally in the civil rights fight,\footnote{Perhaps to atone for his Klan past, similar to the first Justice Harlan in the Civil Rights Cases and Plessy v. Ferguson, 163 U.S. 537 (1896).} could not point to any precedent that contemplated a legislator’s intentions in inquires about constitutionality in Palmer. Conversely, Justice Burger, a justice far less associated with sympathetic views toward civil rights,\footnote{Justice White, a Kennedy appointee, was also at times somewhat sympathetic to civil rights, see e.g. Frontiero v. Richardson, 411 U.S. 677 (1973); Regents of the University of California v. Bakke, 438 U.S. 265 (1978), at least when it came to sex and race and not sexual orientation. See e.g. Bowers v. Hardwick, 478 U.S. 186 (1986).} was able to point to, or perhaps was confined by, express language issued by the Equal Employment Opportunity Commission about solely permitting tests that are job-related. The Commission’s interpretation, in addition to its authority to enforce the Act, was buttressed by the language of the Act and its legislative history.

While the public/private distinction often determines the punch to be used, there are situations in which both can be thrown. These situations in particular highlight the
differences and relative advantages and drawbacks of the two approaches. *Arlington Heights v. Metropolitan Housing Corp.*\(^{28}\) is instructive. *Arlington Heights* concerned 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 predominately 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.\(^{29}\) The Court relied on *Davis* to deny the Equal Protection Challenge, finding that state action disproportionately affecting a [racial] group was not enough absent an invidious intent or purpose.\(^{30}\) 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.\(^{31}\)

While the limited constitutional approach failed in *Arlington Heights* to address invidious or indifferent legislation, a statutory attack proved successful on remand. Unhampered by the *Davis* intent versus impact distinction, the Fair Housing Act\(^{32}\) was used to focus on the practical reality of zoning denials regardless of intent. The 7th Circuit rejected the limited *Davis* approach in favor of *Griggs*’ more searching inquiry. While *Griggs* was decided pursuant to Title VII of the 1964 Act as an employment discrimination case, the 7th Circuit in *Arlington Heights* followed its practice of focusing on effect to establish a constructive denial of civil rights in housing as opposed to a narrow fixation on intent to actually deny jobs and housing. The Court’s election of a

\(^{29}\) Id. at 259.
\(^{30}\) Id. at 265.
\(^{31}\) Id. at 266.
\(^{32}\) Title VIII of the Civil Rights Act of 1968. *See specifically* §§3604 and 3617.
more meaningful inquiry for the statutory track was again tied to the corresponding Congressional Record for the Civil Rights legislation it was interpreting.\textsuperscript{33} Legislators did not have to be prescient to realize that padding the record with statements making clauses amenable to favorable interpretations and heading off attacks to weaken the punches they were creating would make it all the more likely that the punches would land. This type of fine-tuning and precision is mostly unavailable to the constitutional approach that is not amenable to crafting the rule you prefer, not to mention the hurdles of standing and certiorari.\textsuperscript{34}

Two years after \textit{Arlington Heights}, the Court decided \textit{Personnel Administrator of Massachusetts v. Feeney}.\textsuperscript{35} \textit{Feeney} considered a Massachusetts law that gave veterans automatic preference for civil service jobs. The intent appeared laudable but its practical effect excluded women from employment considering that 98\% of veterans were male, a percentage stemming from the intentional systemic exclusion of women from the military. That policy of sex discrimination may not have been contemplated by Massachusetts, but it was given license to operate in perpetuity under the \textit{Davis} approach.

Instances of unintended consequences, while possible and extant in the statutory approach, are more prevalent in the constitutional realm in part because of the lack of precision and ability to tailor constitutional precedents. This ambiguity and lack of precision avails itself to the inversion of intent. \textit{United Steelworkers v. Weber}\textsuperscript{36} and \textit{Regents of the University of California v. Bakke}\textsuperscript{37} shed light on this phenomenon. \textit{Weber}

\begin{itemize}
\item \textsuperscript{33} See \textit{e.g. Arlington Heights}, 558 F.2d at 1289-91; \textit{Griggs} at 434-436.
\item \textsuperscript{34} \textit{But see} Nan D. Hunter, \textit{Symposium: Gay Rights After Lawrence v. Texas, Living With Lawrence}, 88 MINN. L. REV. 1103 (2004), discussing Justice Brennan planting “to bear or beget a child” dicta into his \textit{Eisenstadt v. Baird}, 405 U.S. 438 (1972) opinion knowing that \textit{Roe v. Wade} was in the pipeline.
\item \textsuperscript{35} 442 U.S. 256 (1979).
\item \textsuperscript{36} 443 U.S. 193 (1979).
\item \textsuperscript{37} 438 U.S. 265 (1978).
\end{itemize}
involved a Title VII challenge by a white employee to an affirmative action plan instituted to aid black workers that were historically discriminated against by the employer that had implemented the plan. The white employee sought to invalidate the affirmative action plan by advocating a literal reading of Title VII’s prohibition on the use of race in employment. He almost succeeded, too, but for the efforts of Justice Brennan pointing out that it would be a cruel irony indeed for a law passed to begin to atone for the egregious treatment of black Americans to be used to stamp out a program created by a company that had a specific and established role in that discrimination, all by reading the Civil Rights Act with a literal construction in a vacuum.  

The intent of remedial action has had less success on the constitutional side, ironically enough given the Court’s fixation on intent. Cases such as Bakke, Wygant, and Croson have employed the language and doctrine of strict scrutiny that was created for those most in need of a searching inquiry and insulation by the Court from hostile majorities across the board. Included in this generous judicial solicitude are the privileged élite white males that have controlled the political process since the country’s inception. While Bakke at least left the door open for diversity to clear strict scrutiny, the opportunity to address entrenched vestiges of pervasive societal discrimination was foreclosed, because by the year 1989, it was no longer “appropriate [to] view [society] as

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38 Weber at 204.
41 Albeit in dicta from a case about condensed milk. See the “Footnote Four” case, U.S. v. Carolene Products, 304 U.S. 144 (1938).
42 Although this compelling government interest is not exactly on terra firma. See Fisher v. University of Texas at Austin, 631 F.3d 213 (2011) (upholding Grutter v. Bollinger, 539 U.S. 309 (2003), but possibly heading to the Supreme Court).
being divided into races.\textsuperscript{43} Similar to the \textit{Davis/Arlington Heights/Feeney} unwillingness to confront how a benign motive in the present perpetuates the damage from an invidious intent from the past, a “color-blind”\textsuperscript{44} construction of judicial scrutiny called for in \textit{Croson} and \textit{Wygant} inverts privilege and subordination, subverts the purpose behind strict scrutiny and solidifies deeply-ingrained inequality as a result.\textsuperscript{45} \textit{Weber} avoided this subversion likely in part\textsuperscript{46} because Justice Brennan was able to point to the text of a specifically written statute to demonstrate that affirmative action was not forbidden, and the legislative history articulating its purpose emphasized that the Civil Rights Act sought to help historically discriminated against black Americans.\textsuperscript{47} \textit{Weber} even managed to uphold racial quotas, a practice rejected as unconstitutional in public plans going back to \textit{Bakke}.

\textbf{A HAYMAKER WITH REACH: THE SUBSTANTIVE DUE PROCESS CLAUSE}

While Equal Protection has been significantly gutted, and statutory attacks have their advantages, other constitutional attacks, particularly the employment of the Substantive Due Process Clause, have served the cause of civil rights very well. Starting as far back as 1923, well before the Equal Protection Clause was contracted, the Substantive Due Process Clause has been used to move minorities away from the margins

\textsuperscript{43} \textit{Croson} at 528 (Scalia, J., concurring).
\textsuperscript{44} Justice Scalia’s hijacking of Justice Harlan’s \textit{Plessy} dissent. \textit{See again Croson} at 521 (Scalia, J., concurring), compared to \textit{Plessy v. Ferguson}, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting).
\textsuperscript{45} For a more extensive and articulate explanation, \textit{see} Darren Lenard Hutchinson, \textit{Unexplainable on Grounds other than Race: The Inversion of Privilege and Subordination in Equal Protection Jurisprudence}, U. ILL. L. REV. 615 (2003).
\textsuperscript{46} Although part of the explanation could lie in the composition of the Court shifting right after Reagan appointees O’Connor, Kennedy and of course Scalia joined. The continued shift right with George W. Bush’s appointees resulted in Title VII’s concern for black Americans being inverted in \textit{Ricci} very similarly to the inversion of Footnote 4 and the Fourteenth Amendment in \textit{Wygant} and \textit{Croson}. \textit{See ante} at Note 23.
\textsuperscript{47} Of course this begs the question why the majorities in \textit{Davis}, \textit{Wygant} and \textit{Croson} failed to remember that the 14\textsuperscript{th} Amendment was passed with the purpose of aiding newly-freed slaves and not white firefighters, teachers and construction workers.
of society *vis a vis* a liberties approach as opposed to litigating pursuant to membership in a group.

In *Meyer v. Nebraska*[^48], the State sought to prohibit teaching children in German. Similarly, an Oregon law in *Pierce v. Society of Sisters*[^49] proscribed private schools. Both laws were facially neutral and cited the promotion of citizenship and cohesion as justifications for their enactments. The intent, however, borne out by the impacts of the laws on newly arrived Catholics[^50], was to maintain Protestant superiority in furtherance of the Temperance Movement[^51]. The pre- and certainly post-*Davis* Equal Protection Clause would not have been able to reach the 1920s’ decisions because the hostile intent was cloaked in post-war patriotism, but a Substantive Due Process Clause analysis focusing on the right to direct the upbringing of children secured major victories for Catholics under the auspices of the fundamental rights of parents to direct the upbringing of their children[^52].

The rights approach through the Substantive Due Process Clause continued to prove successful in a number of different areas for varying groups when an Equal Protection challenge would fail for lack of explicit discriminatory intent. Women were unshackled from a biologically-determined path in Substantive Due Process victories that brought rights to control their bodies in *Roe v Wade*[^53] and *Planned Parenthood v. Casey*[^54].

[^48]: 262 U.S. 390 (1923).
[^49]: 268 U.S. 510 (1925).
[^51]: Id.
[^54]: 505 U.S. 833 (1992). *See also* Griswold v. Connecticut, 381 U.S. 479 (1965) (a birth control case decided on *Lochner*-avoiding “penumbras and emanations” grounds now commonly thought to be or at
and their careers in *Cleveland Board of Education v. LaFleur*.\(^{55}\) Calls for Equal Protection in these areas have been made by notable scholars such as Ruth Bader Ginsburg,\(^ {56}\) and Cass Sunstein\(^ {57}\) but *Davis* would require a showing that anti-abortion laws are made with *intent* to discriminate against women, a burden far more onerous than focusing on the *impact* the laws have on a woman’s right to determine if and when she wants to be a mother. This crucial difference between Equal Protection’s focus on intent toward groups and Substantive Due Process’ attention to impact on rights\(^ {58}\) demonstrates the superior flexibility that Substantive Due Process has.

Substantive Due Process has also aided black Americans. While African Americans are the paradigm case for Equal Protection solicitude, that clause post-*Davis* (as well as in *Davis* itself) could not reach an ordinance in *Moore v. City of East Cleveland*\(^ {59}\) that would have jailed a 63-year-old black grandmother for allowing her motherless 10-year-old grandson to live with her because the city did not legislate with an improper intent. Substantive Due Process, however, recognized “the freedom of personal choice in matters of marriage and family life”\(^ {60}\) and rejected “the imposition by government upon the rest of us white suburbia’s preference in patterns of family living.”\(^ {61}\)

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55 *414 U.S. 632 (1974).*
56 *Ruth Bader Ginsburg, Some Thoughts on Autonomy and Equality in Relation to Roe v. Wade, 63 NCLR 375 (1985).*
58 For a thoughtful analysis on the balance between individual rights and State interests, see Rebecca L. Brown, *The Fragmented Liberty Clause*, 41 Wm. And Mary L.Rev. 65 (1999).
59 *431 U.S. 494 (1977).*
60 *Id.* at 499.
61 *Id.* at 508 (Brennan, J., concurring).
While able to achieve powerful and historic advancements for civil rights, constitutional attacks leave a fighter vulnerable when they do not land, as resoundingly illustrated by Davis. Substantive Due Process is no exception. In Bowers v. Hardwick, gay equality advocates narrowly missed inflicting a serious blow to homophobic legislation when a 5-4 majority held that there is no constitutional right to gay sodomy. As a result of the miss, the fledgling practice of criminalizing sodomy that more and more states were abandoning on their own accord was condoned and engraved with the precedential imprimatur of the United States Supreme Court.

While a rights-focused Substantive Due Process challenge helped Catholics in education, women in reproduction and employment and blacks in marriage and housing, the Bowers miss left the gay equality movement exposed. Seventeen years later, however, an admittedly muddled Substantive Due Process analysis was able to eventually land a haymaker responsible for one of the most significant victories for homosexuals while Equal Protection remained mostly punchless. Lawrence v. Texas struck down an anti-sodomy law specifically targeting homosexuals. While there were enough votes for an Equal Protection victory, Justice Kennedy knew that leaving the possibility of sex-neutral anti-sodomy laws open to satisfy Equal Protection would in reality preserve the opportunity to apply a facially neutral statute with disparate treatment solely against

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63 So narrow in fact that Lewis Powell recanted his fifth and deciding vote a few years later, speculating that perhaps he joined the majority because he didn’t know anyone that was gay, when, in fact, the clerk he was speculating to was gay. See Karst, infra note 50, citing John C. Jeffries Jr., Justice Lewis F. Powell, Jr. 528 (1994).
64 Starting with Illinois in 1962, 25 states repealed their sodomy statutes by 1986.
65 Equal Protection was admittedly much more prominent in Loving v. Virginia, 388 U.S. 1 (1967).
67 Romer v. Evans, 517 U.S. 620 (1996) was undoubtedly important but the likelihood that another state would be so brazen in its animus is decreasing steadily, making the decision, and the doctrine it relied upon, equal protection, relevant but limited to overt discrimination while substantive due process is capable of reaching tacit and unintended discrimination.
gays, all the more insulting and stigmatizing given the relationship between sodomy and intimacy between homosexuals.

Substantive Due Process victories such as *Roe, Moore* and *Lawrence* raise another significant advantage of constitutional attacks: they keep people out of jail. Moreover, they remove the stigma that comes with the criminalization of conduct that often relates to immutable and existential characteristics. *Meyer* deals with nothing less than shaping the destiny of a child; *Roe* with the immutability of sex and the existential question of motherhood; *Moore* the shaping of children; and *Lawrence* contemplates the all but certain immutability of sexual orientation and the right to define and pursue intimate relationships pursuant to that immutable trait. Not only does a constitutional attack remove the threat of incarceration from exercising who you are and who you want to be, it lends the approval, support and power of the State to be let alone to do so.

Statutory approaches are effective in ferreting out discrimination in our lives with other non-state actors, which is an indisputably large portion of civil rights. Class action lawsuits that combat thinly-veiled and at times pervasive discrimination practiced by ubiquitous companies in areas as common as dining, retail and banking play a crucial role in curbing prejudice. Settlements and consent decrees can institute a host of

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69 The last time Georgia prosecuted a private act of consensual sodomy was “back in the 1930’s or ‘40s” according to its Attorney General. See *Bowers* at 220-21. (Stevens, J., dissenting).

70 See generally Aaron J Shuler, *From Immutable to Existential: Protecting Who We Are and Who We Want to Be with the ‘Equalerty’ of the Substantive Due Process Clause*, 12 JLSC 220 (2010).

71 See *Bowers* at 199 (Blackmun, J., dissenting, citing *Olmstead v. U.S.* 277 U.S. 438 (1928) (Brandeis, J., dissenting).


73 See *e.g. Gonzalez v. Abercrombie and Fitch Co.*, Case Nos. 03-2817 SI, 04-4730, 04-4731 (N.D.Ca.2005) (consent decree addressing discriminatory practices at Abercrombie and Fitch stores).

74 See *e.g. U.S. v. Chevy Chase*, No. 94-CV-1824-JG (D.C.1994) (consent decree addressing discriminatory practices in banking and lending).
remedies to dismantle discriminatory apparatuses and implement proactive diversity projects that incrementally foster tolerance.

Further, statutory attacks are often better suited to address unprotected classes and unrecognized rights, particularly when the two are combined in cases such as In re Adoption of RBF and RCF\textsuperscript{75} (homosexuals, adoption) and especially when there is a double order of unprotected class with a side of unrecognized right in cases like Neithamer v. Brenneman Property Services\textsuperscript{76} (homosexual, disabled, housing).\textsuperscript{77} Instead of waiting for a right to be recognized or a class to be protected constitutionally, statutes can move quicker and land with more precision on a specifically identified area. Case in point is RBF. The Pennsylvania legislature’s amendment to its adoption statute in order to prevent the very absurdity identified by the appellate court was dispositive in the court’s recognition of same-sex parentage. The action was relatively quick, it addressed a foreseeable problem and it related to a specific area outside of constitutional contemplation, but it was also limited to Pennsylvania.

RBF and Neithamer demonstrate how statutory attacks are suited to and adept at confronting private acts of discrimination, particularly for unprotected classes seeking unrecognized rights as noted above. However, the difference between harnessing the state’s collective powers to persecute a minority in a democracy compared to applying those powers to ensure her rights exemplifies the more profound effect that constitutional victories have on the eradication of discrimination in general. Non-state actors, their passions and prejudices, influence equality. Legislators channeling and representing

\textsuperscript{75} 803 A.2d. 1195 (Pa.2002).
\textsuperscript{76} 81 F.Supp.2d 1 (D.D.C.1999).
\textsuperscript{77} See also Glenmont Hill v. Montgomery County, 936 A.2d 325 (2003) (Maryland ordinance prohibiting source of income discrimination); Kelly v. HUD, 3 F.3d 951 (3d.Cir.1993) (Fair Housing Act (42 U.S.C. §3601 et seq. (1988) prohibiting familial status discrimination.)
those persuasions in statutes through the democratic process shape to a great extent the 
arc of equality. But it is the constitutional protections for the matters deemed too 
important to be subject to the whims of the public that serve and shield minorities best 
from majorities in a democracy.\textsuperscript{78} Statutory-based decisions simply do not carry the 
weight of a constitutional decision given the reverence for and the omnipresence of the 
document in American society. The exalted nature of the document, coupled with the 
Supreme Court being consistently the most respected and trusted branch of government, 
gives constitutional decisions not only a powerful and persuasive pan-U.S. impact on the 
American zeitgeist but an extensive one as well. It is true that the same qualities that 
make a constitutional ruling so powerful also fuel and flame hostility and backlash in 
controversial matters,\textsuperscript{79} but that only counsels the use of it judiciously, not its 
abandonment. Moreover, while setbacks do occur in constitutional litigation,\textsuperscript{80} the arc of 
the constitutional universe eventually bends toward justice.\textsuperscript{81}

CONCLUSION: THROWING COMBINATIONS IN UPCOMING BOUTS

The \textit{Civil Rights Cases} withdrew most acts of private discrimination from 
constitutional reach. \textit{Davis} further hampered the range of a constitutional punch by

\textsuperscript{78} “The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political 
controversy, to place them beyond the reach of majorities and official 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.” \textit{Webster v. Reproductive Health Services}, 492 U.S. 

\textsuperscript{79} \textit{Roe v. Wade}, 410 U.S. 113 (1973) giving birth to the so-called “pro-life” movement likely the best 
example.

\textsuperscript{80} Compare e.g. \textit{Plessy} and \textit{Brown} and \textit{Bowers} and \textit{Lawrence} with \textit{Roe} and \textit{Casey} and \textit{Bakke} and \textit{Grutter v. Bollinger}, 539 U.S. 306 (2003) (\textit{But see again ante} at Note 41). The Court eventually makes the right 
decision. It just takes awhile sometimes. And after they do, they rarely overturn progress. Affirmative 
action is one arguable exception; however, that issue is sui generis because it is not borne from an animus 
or retreat on racial progress but instead more likely a misunderstanding of how much racial progress has 
been made.

\textsuperscript{81} “Let us realize the arc of the universe is long but it bends toward justice,” Martin Luther King, Jr., \textit{Where 
do We Go from Here?}, Address to the Southern Christian Leadership Conference (August 16, 1967).
foreclosing nearly all but facially discriminatory and grossly disparate impacts\textsuperscript{82} from its range. Those decisions were major setbacks for civil rights litigators that, given the nature of common law constitutional jurisprudence: slow, resistant to change and preemptive, shut down areas of attack for considerable periods. Statutory litigation, however, while still anything but fast, moves quicker and is more adaptable than constitutional law. Civil rights litigators are able to learn from past setbacks and craft new approaches that close the holes that have been exposed in the past as demonstrated in cases like \textit{Heart of Atlanta}’s interpretation of the Civil Rights Act of 1964 to overcome the \textit{Civil Rights Cases}’ damaging ruling.

Scholars like R. Shep Melnick note that moving a bill through committees and both chambers of Congress may be painstaking, arduous and full of compromise, but it is still more practical and possible than obtaining a constitutional blow made to your specifications delivered at a reasonable time after requesting it.\textsuperscript{83} Simply put, civil rights advocates were and are able to craft the kind of punch they want to be able to have in their repertoire to fight inequality and discrimination with specific language that straitjackets justices like Burger in \textit{Griggs}. On the other hand, ambiguous constitutional precedent often either provides little guidance for Justice Black in \textit{Palmer} or easily ignored or inverted material for Justice Scalia in \textit{Croson}. Civil rights litigators are at the mercy of the members of Congress, certainly, but access to the legislature and the ability

\textsuperscript{82} \textit{See e.g. Yick Wo v. Hopkins}, 118 U.S. 356 (1886). A facially neutral statute with ostensible safety concerns was belied by a disparate treatment so lopsided (law denying dry cleaning licenses to businesses operating in wooden buildings was enforced every single time against Chinese applicants and only once out of eighty Caucasians) that it was found to be unconstitutional given that discrimination was all but indisputably proven.

\textsuperscript{83} R. Shep Melnick, Between the Lines: Interpreting Welfare Rights, (The Brookings Institute 1994). Professor Melnick argues that the abundance of compromise results in vague, ambiguous statutes left for courts to eventually and inevitably construe. While true, statutes are still more likely to be tailored with a purpose in mind to address specific problems, whereas precedents can only resolve cases or controversies with the relevant law and facts that come with them, dicta notwithstanding.
to choose your own language is greater than achieving certiorari, and infinitely easier than directing the Court to use your preferred language. Moreover, while Professor Melnick emphasizes the compromise-ridden nature of vague statutory language, the amount of fine-tuning, tweaking and appeasing of pedantry that goes into garnering five votes often results in the very same type of ambiguity and incoherence raised by Melnick.84

Nevertheless, constitutional attacks, specifically Substantive Due Process85 challenges, are still preferred to address adverse State legislation. Cases such as Meyer and Pierce demonstrate Substantive Due Process’ ability to shield minorities from ostensibly neutral laws with invidious motivations through a liberties/rights approach. Roe, LaFleur, Moore and Casey illustrate the doctrine’s effectiveness to combat indifference to disparate impacts and unintended consequences, crucially important in the wake of Davis, and Lawrence reveals the clause’s potency in burying tools of oppression as opposed to allowing states to recalibrate them for future surreptitious use.86

Going forward, civil rights litigators should be cognizant of the advantages and limitations of the statutory jab and the constitutional haymaker in pursuing equality. If the goal is to knock out discrimination as a whole in all facets of life, the strategy should

84 See e.g. the Court’s convoluted Establishment Clause jurisprudence.
85 Substantive due process is a prime example of an ambiguous doctrine resulting in a lot of amorphous precedents. Ambiguity in constitutional law cuts both ways depending on the judges hearing the case. Substantive due process itself was once a tool for economic conservatives in the first half of the 20th century before being enlisted for civil rights by progressives in the second.
86 “The invalidation of a statute or an ordinance on [substantive] due process grounds leaves ungoverned and ungovernable conduct which many find objectionable. Invocation of the equal protection clause, on the other hand, does not disable any governmental body from dealing with the subject at hand.” Railway Express Agency, Inc., 336 U.S. 106, 112 (1949 (Jackson, J., concurring). The distinction is vital considering that even when sodomy statutes where sex-neutral, they were almost uniformly enforced only against homosexuals. This explains why they remained on the books at all; if they were enforced against heterosexuals they almost certainly would have faced repeal, but a lack of enforcement resulted in a lack of urgency to remove them. They remained on the books then not as a democratic expression of criminal law to be equally applied but rather a tool of stigmatization, harassment and oppression.
not be to forsake one punch for another but to throw both in order to knock discrimination, public and private, formal and casual, criminal and [un]civil, down and out. Private acts of discrimination should be primarily met with statutory jabs in social and business affairs, weakening the body of bigotry. When the time is right, when discrimination has been sufficiently weakened and the right case presents itself with the right Court to hear it on the bench, the headpiece of discrimination—State-mandated inequality—should be attacked with a haymaker to knock out the more visible, prominent and powerful head of discrimination’s apparatus.

With specific respect to the timely example of gay equality, throwing statutory jabs at anti-gay discrimination is likely to provide numerous small scale victories that could add up over time to weaken homophobia while providing local relief for populations fortunate to live in more progressive parts of the country. Cases such as Neithamer, Murray v. Oceanside Unified School District and Gonzalez v. School Board of Okeechobee County are recent examples of limited but welcome relief. Throwing meager jabs at one of the more pervasive and powerful areas of discrimination may not be adequate, however. While victories in state court could modestly improve the lives of gays in certain parts of the country, the relative weakness and limited power of statutory jabs leaves homosexuals in most states with hostile majorities languishing without help.

A timely-thrown constitutional haymaker could be the solution to the statutory jab’s limitations. Specifically, the Court’s composition would still seem to be receptive

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to a 10th Amendment states-rights challenge\textsuperscript{90} to the Defense of Marriage Act in \textit{Massachusetts v. HHS}\.\textsuperscript{91} Less certain is how it would deal with a truly monumental blow to marriage inequality in \textit{Perry v. Schwarzenegger}.\textsuperscript{92} To throw such a punch is fraught with peril, of course, as many gay equality commentators have noted after learning of David Boies and Ted Olson’s plans to throw the constitutional haymaker. If the punch does not land, the gay equality movement leaves itself exposed to absorbing the devastating counterpunch of a bad precedent á la \textit{Bowers}, knocking back, if not down, the movement to the canvas, likely for decades. While the statutory jab rarely knocks down an opponent, at least it makes incremental progress largely unbeknownst to the adversary at large. A few statutory victories in state court here, a win in a federal circuit there and gay discrimination is still relatively unalarmed and not compelled to counter-attack. Throwing the haymaker and missing, however, jars an opponent into action after realizing that it is under imminent and perhaps existential attack. While \textit{Perry} is in a standing-issue holding pattern out West, two more ballot initiatives in 2012 seeking to define marriage as being between one man and one woman in North Carolina and Minnesota are but a few examples.\textsuperscript{93}

Despite all the risks of prematurely bringing a case like \textit{Perry} to the Court, it bears repeating that a favorable decision would establish marriage equality in the entire country instead of a single state. With one solid blow, State-mandated discrimination in one of the bedrocks of civilization would be defeated, serving as a not only a strong rebuke to an invidious bias, but also an endorsement of gays as a whole to participate in

\textsuperscript{90} Even after losing federalism champion William Rehnquist in 2005.
\textsuperscript{92} 704 F.Supp.2d 921 (N.D.Ca.2010).
\textsuperscript{93} Similar ballot measures are a perfect 29 for 29.
an institution as profound as marriage. Such a development would likely result in paving the way to further integrate gays into society and achieve wholesale acceptance. If they get their title shot, civil rights advocates may take heart in knowing that George W. Bush’s lawyer may know best when to throw this haymaker.