The New Liberty

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But is it “due process of law”? The constitution contains no description of those processes which it was intended to allow or forbid.¹

I.

In Lawrence v. Texas, the Court tried, perhaps once and for all, to resolve the problem posed by Marbury v. Madison two hundred years earlier.² When, in 1803, Chief Justice John Marshall set forth the doctrine of judicial review—the power of the judicial department to review and, if necessary, to invalidate, the actions of the other branches of government—he did not elaborate on the circumstances under which such acts may be declared void. He left for future generations the challenge of defining when, precisely, the Constitution prohibits an act that a majority of the people (through a majority of their representatives) has found desirable. And future generations have found the problem challenging indeed.

In certain situations the problem is relatively easy, such as when the Constitution specifically prohibits a certain act.³ But it is not at all clear what the Court should do when law seems horribly oppressive or, as Justice Stewart memorably wrote in Griswold v. Connecticut, “asinine.”⁴ Does the Court have the power to invalidate a law that is not clearly proscribed in the Constitution?

The arguments for and against have been marshaled for centuries. Even before Marbury, justices of the Supreme Court sparred over this issue. In the otherwise entirely forgettable case of Calder v. Bull, two appointees of George Washington argued the point.⁵ In the view of Justice Samuel Chase:

There are certain vital principles in our free Republican governments, which will determine and over-rule an apparent and flagrant abuse of legislative power; as to authorize manifest injustice by positive law; or to take away that security for personal liberty, or private property, for the protection whereof the government was established. . . . To maintain that our Federal, or State, Legislature possesses such powers, if they had not been expressly restrained; would, in my opinion, be a political heresy, altogether inadmissible in our free republican governments.⁶

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4. 381 U.S. 479, 527 (Stewart, J., dissenting) (emphasis added).
5. 3 U.S. 386 (1798).
6. Id. at 388-89 (emphasis in original).
For Justice Chase, an “act” (for he could not call such a thing a “law”) that violated principles of natural law would be voidable whether or not it was expressly prohibited in the Constitution. His primary example was a law that takes property away from A and gives it to B.8

In response, Justice Iredell argued equally vehemently that if “the Legislature of the Union, or the Legislature of any member of the Union, shall pass a law, within the general scope of their constitutional power, the Court cannot pronounce it to be void, merely because it is, in their judgment, contrary to the principles of natural justice.” In other words, natural justice alone does not justify the exercise of judicial power; only a clear mandate from the Constitution can justify the invalidation of a properly enacted law.

Through the centuries, the question has continued to dog the court. The reason it is confounding is simple enough to see. Every so often (and it may be quite often indeed), legislatures enact laws that appear either at the time or later to be completely oppressive, either to a minority of the population, or sometimes even to the majority. Law books are replete with laws that seem to lack any reasonable foundation. Some of these are not enormously significant: a few years ago a man in Michigan was convicted of violating a century-old law when he uttered a string of profanities after falling into the Rifle River, in the presence of women and children.10 But other laws have broad and profound significance, such as laws prohibiting the use of contraceptives or laws regulating sexual intimacy between consenting adults. These laws are trickier because, while they seem to touch on very personal issues, issues that might logically seem to be beyond the regulatory jurisdiction of the state, the Constitution does not expressly prohibit them. The conscientious judge considering the validity of these laws, then, is in the same quandary that George Washington’s appointees found themselves in two centuries ago: is it “political heresy” to allow these laws to stand or is it judicial heresy to invalidate them?

The question is problematic because it pierces the heart of the enterprise of judicial review. Judicial review is justified in a democracy so long as the judges are bound to follow, as Alexander Hamilton put it in The Federalist Papers, their judgment and not their will.12 Constitutional interpretation is acceptable, the

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7. *Calder*, 3 U.S. at 388.
8. *Id.* Presumably the law would be equally offensive if it took property from A without giving it to B.
9. *Id.* at 399 (Iredell, J., concurring).
10. The conviction stood against the law insofar as it prohibited profanity in the presence of children; the judge found that the reference to women violated the Equal Protection Clause. People v. Boomer, 655 N.W.2d 255 (Mich. App. 2002).
11. Connecticut’s law prohibited the use of contraceptives only when used to prevent pregnancy; use of contraceptives to prevent disease was not so frequently outlawed. See *Griswold v. Connecticut*, 381 U.S. 479 (1965).
theory goes, because judges are required to adhere to the mandate of the Constitution, and must disavow any inclination to follow their hearts, their politics, or their whimsy. But when the exercise of constitutional interpretation becomes unbounded—when meaning is no longer tethered to words—then there are no limits on judicial discretion. And there is nothing so threatening to the legitimacy of the Court as the appearance of unbounded discretion.

It is for this reason that Justice Iredell rejected natural law as a basis of judicial authority in 1798,13 and it is for this same reason that substantive due process is so controversial today.

II.

The Due Process Clauses of the Fifth and Fourteenth Amendments may provide some comfort to those who, like Justice Chase, wish for the Court to have the power to invalidate unjust laws but who, like Justice Iredell, are unwilling to grant the Court unbridled discretion absent clear constitutional command.14 These clauses—identical for all intents and purposes and therefore amenable to characterization as a single one—have, for most of our history, been given meaning independent of both their history and their language. The phrase originates in the Magna Carta, which includes the requirement that “No free man shall be taken or imprisoned or disseised or outlawed or exiled or in any way ruined, nor will we go or send against him, except by the lawful judgement of his peers or by the law of the land” (“per leggem terrae”).15 The phrase that evolved into our Due Process Clauses did nothing more than subordinate executive fiat to judicial or legislative action; the assumption was that the taking or destruction of freemen is legitimate if done according to legislative or judicial process, but not


14. U.S. Const. amends. V and XIV. The other logical—perhaps even more logical—contender would be the Privileges and Immunities Clause of the Fourteenth Amendment (which would then have to be incorporated into the Fifth). Relying on the Privileges and Immunities Clause to prohibit a wide range of laws touching on everyday interests of the people, however, was foreclosed by the not-yet-overruled *Slaughterhouse Cases*, 83 U.S. 36 (1872).


The words, “due process of law,” were undoubtedly intended to convey the same meaning as the words, “by the law of the land,” in *Magna Charta*. [sic] Lord Coke, in his commentary on those words, (2 Inst. 50,) says they mean due process of law. The constitutions which had been adopted by the several States before the formation of the federal constitution, following the language of the great charter more closely, generally contained the words, “but by the judgment of his peers, or the law of the land.” The ordinance of congress of July 13, 1787, for the government of the territory of the United States northwest of the river Ohio, used the same words.

*Murray*, 59 U.S. at 272, 276.
if done only pursuant to executive (and therefore potentially arbitrary) will. If our Due Process Clause were confined to its root, every law would accord due process, by definition.16

Having been disconnected from its origins, the Due Process Clause was then cut loose from its language. As the Court explained in dictum in Hurtado v. California, written constitutions in general and the Due Process Clauses in particular are not measured and restricted “by the ancient customary English law, [but] they must be held to guarantee not particular forms of procedure, but the very substance of individual rights to life, liberty, and property.”17 Thus, the concept of substantive due process slipped into our jurisprudence.18 Notwithstanding the lack of historical or textual support and not even withstanding the absence of linguistic coherence,19 the concept of substantive due process, like the concept of judicial review itself, is here to stay, most likely because, also like judicial review, it fills a very important need: it allows judges to invalidate laws that are contrary to the common good.20

16. “It is manifest that it was not left to the legislative power to enact any process which might be devised. The article is a restraint on the legislative as well as on the executive and judicial powers of the government, and cannot be so construed as to leave congress free to make any process ‘due process of law,’ by its mere will.” Murray, 59 U.S. at 276.


18. The Hurtado reference to the substance of due process is not the first in the Supreme Court’s constitutional jurisprudence, but it is the one that seems to have taken root. Cases building on the concept of substantive due process refer back to Hurtado, not to Dred Scott. In the notorious Dred Scott case, Chief Justice Taney held (though possibly only in dictum) that the Missouri Compromise, which liberated slaves who were brought into certain federal territories, deprived the slave owner of due process because it took away his (slave) property. Scott v. Sanford, 60 U.S. 393, 452 (1857). The problem was in the substantive taking of the property, not in the failure to grant notice and an opportunity for a hearing prior to the taking. Id.; see also Wynehamer v. People, 13 N.Y. 378 (1856). Hurtado did not cite either of these cases.


20. It is certainly not the only candidate for this job. The Privileges and Immunities Clause might have done just as well, or even better, given that clause’s pedigree and its more easily adaptable language. See Corfield v. Coryell, 6 F. Cas. 546 (E.D. Pa. 1823). But reliance on the Privileges and Immunities Clause would no better resolve the problems of the Due Process Clauses. Courts would still have to define what the constitutionally protected privileges and immunities are, just as they now have to define what fundamental rights are under the Due Process Clauses. In addition, the Privileges and Immunities Clause would have to be incorporated back into the Fifth Amendment Due Process Clause in order for it to be applicable to the federal government. See Bolling v. Sharpe, 357 U.S. 497 (1954) (defining the Fifth Amendment Due Process Clause as including an equal protection component in order to make the Fourteenth Amendment’s Equal Protection Clause applicable to the federal government).
But if due process does not mean what it was originally intended to mean, nor what it says it means, then what does it mean? What kinds of laws does the substantive Due Process Clause forbid?

Two competing theories presented themselves early in the twentieth century. One was first articulated in the famous footnote of *United States v. Carolene Products*21 and reinvigorated in John Hart Ely’s apologia for representation-reinforcement, *Democracy and Distrust*.22 This approach was more deeply rooted in the correct ambit of judicial review than in the specific question of how to interpret the Due Process Clause. Nonetheless, the Due Process Clause may provide the textual repository for the application of this theory.

As is well known, Ely saw in the footnote a relationship—in fact, an inverse relationship—between democratic process and judicial review.23 Where democratic process works, he argued, judicial review is of limited value, and rational basis, which is the doctrinal translation for the principle of judicial restraint, is the appropriate standard.24 In other words, where people are able to repeal undesirable legislation through ordinary processes of the democratic machinery—voting, lobbying, coalition-building—then that process ought to be relied upon to fix bad laws. If people do not like a law, they can demand that it be changed through political processes. Sometimes, however, the democratic process is defective. Laws may directly fetter the political process by preventing people from voting or by burdening their engagement in political discussion and association.

Alternatively, without even directly affecting political rights, laws may be immune from political correction if they burden a group that can not adequately protect itself. A state law that taxes residents of another state, for instance, would not be amenable to correction through the political process, because the burdened taxpayers have no recourse in the taxing state’s legislature.25 In exactly the same way, a law that distinctly burdens a “discrete and insular minority,” such as for instance by preventing their children from going to good schools or forcing them to the back of the bus, is equally immune from political correction because those who are burdened lack the political resources to get the law changed. Where the political process is distorted in these ways, argued Ely, judicial intervention is justified.26 The Court, with its constitutionally guaranteed independence,27 is the most likely branch to vindicate the interests of those who can not protect themselves in the political arena. Thus, while judicial review is inherently counter-

22. ELY, supra note 19, at 85-86.
23. Id. at 86-87.
24. Id.
25. See McCulloch v. Maryland, 17 U.S. 316 (1819); and ELY, supra note 19, at 85-86.
26. ELY, supra note 19, at 85-86.
27. See U.S. CONST. art. III (guaranteeing federal judges stable salary and job protection “during good behaviour”).
majoritarian and therefore anti-democratic, it plays an indispensable role where the democratic system can not be trusted.

Ely’s theory was a prism through which different strands of judicial activism could be identified and distinguished. One kind was fully justified, found in cases like Baker v. Carr28 and Reynolds v. Sims29 (ending malapportionment) and perhaps New York Times v. Sullivan30 (expanding protection for criticism of public officials), because it corrected defects in the political process. Without the Court’s intervention, the plaintiffs in those cases simply had no way of protecting their interests; with the Court’s intervention, the political process could be trusted, and therefore would render further judicial intervention unnecessary. Cases like Roe v. Wade31, on the other hand, were incorrectly decided. The issue, as Ely saw it, was not about the value of the right, but about the effectiveness of political process.32 If enough people wanted abortion to be safe and legal, they should band together and obtain that result through a fully functioning political process; judicial intervention here was unnecessary and therefore not justified.

Ely’s exegesis on judicial review is probably the most influential explanation of when and why judicial review can be justified in a democracy. But for many years, it was influential mainly on scholars. The Court had not read the Carolene Products footnote in this way and did not see its role as being limited to merely correcting defects in the political process. Throughout the twentieth century, the Court has protected not only political interests but also certain substantive interests that bear little relationship to what would become known as a theory of representation-reinforcement.

Instead, the Court embarked on another approach to interpreting the Due Process Clause, one that relied not on the position of the claimants in the political process, but on the extent to which the right claimed was already recognized in the nation’s traditions and conscience.33 The Court’s first sustained efforts to find the substantive meaning of the Due Process Clause resulted in the doctrine of incorporation, by which the rights that are enumerated in the first eight amendments apply to the states. These rights are included in the meaning of due process because they are “so rooted in the traditions and conscience of our people as to be ranked as fundamental.”34 In many ways, these were the easy cases, because the founding generation had already identified these rights as being worthy of inclusion in the Constitution.

32. Ely, supra note 19, at 85-87.
34. Snyder v. Massachusetts, 291 U.S. 97, 105 (1934).
But the reference to “tradition”—and its equation with the “conscience of our people”—proved useful. Throughout the twentieth century, the Court relied on tradition to determine when non-enumerated rights are constitutionally protected, in large part because our traditions are assumed to reflect our moral values and hence our conscience. Tradition—sometimes expanded to refer to “[o]ur Nation’s history, legal traditions, and practices”—thus provide[s] the crucial ‘guideposts for responsible decision-making.’

In *Griswold v. Connecticut* (the first of the truly modern substantive due process cases), three justices emphasized that “the traditional relation of the family [is] a relation as old and as fundamental as our entire civilization.” In *Wisconsin v. Yoder*, the Court allowed Amish parents to control the education of their children (as against the demands of mandatory school attendance) because of a “strong tradition” of parental control founded on “the history and culture of Western civilization,” and because the parental role “is now established beyond debate as an enduring American tradition.” In *Moore v. City of East Cleveland*, the Court held that “the Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in this Nation’s history and tradition.” Throughout, the Court has “insisted not merely that the interest denominated as a ‘liberty’ be ‘fundamental’ . . . but also that it be an interest traditionally protected by our society.” Tradition has thus become the linchpin of heightened constitutional protection. In *Griswold*, tradition indicated a respect for privacy in the “sacred precinct of [the] marital bedroom.” In subsequent cases, the Court recognized (and constitutionally protected through the mechanism of strict scrutiny) the privacy of the “individual, married or single,” and the privacy of decisions concerning marriage, family, whether to beget and, once begotten, how to raise children.

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40. As the Court in *Washington* explained, “We begin, as we do in all due process cases, by examining our Nation’s history, legal traditions, and practices.” 521 U.S. 702, 710 (1997).
41. *Griswold*, 381 U.S. at 485.
Where tradition has not protected a particular interest, the Court has usually declined to find constitutional protection for that interest also. 47  In cases where the substantive due process claims have failed, it has consistently been due to the absence of the tradition. In Bowers v. Hardwick, the Court concluded that “to claim that a right to engage in such conduct [consensual sodomy] is ‘deeply rooted in this Nation’s history and tradition’ or ‘implicit in the concept of ordered liberty’ is, at best, facetious.” 48  In Michael H. v. Gerald D., the right of an unwed biological father was denied constitutional protection precisely because the relationship between the father and the daughter has not “been treated as a protected family unit under the historic practices of our society.” 49  In Washington v. Glucksberg, the Court surveyed the history of laws prohibiting suicide, from the 12th century, through Blackstone, on to the early American colonies, and into the present day, ultimately concluding that “for over 700 years, the Anglo-American common-law tradition has punished or otherwise disapproved of both suicide and assisting suicide.” 50

Thus, the Court’s modern response to the age-old question: if the Court can invalidate a law on the ground that it violates an unwritten mandate in the Constitution, how does the Court know what the Constitution actually prohibits or permits? Answer: the Constitution prohibits any law that infringes a right that has historically been protected, that offends the conscience of the people.

According to the Court itself, the appeal to tradition is appealing primarily because it prevents the justices from wandering too far afield, into the back yards of their own private whims and predilections. 51  “This approach tends to rein in the subjective elements that are necessarily present in due process judicial review,” 52  explains Chief Justice Rehnquist.

As Justice Harlan explained in his concurrence in Griswold, when he proposed using the Fourteenth Amendment to invalidate Connecticut’s prohibition on the use of birth control:

Judicial self-restraint . . . will be achieved in this area, as in other constitutional areas, only by continual insistence upon respect for the teachings of history, solid
recognition of the basic values that underlie our 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. Adherence to these principles will not, of course, obviate all constitutional differences of opinion among judges, nor should it. Their continued recognition will, however, go farther toward keeping most judges from roaming at large in the constitutional field than will the interpolation into the Constitution of an artificial and largely illusory restriction on the content of the Due Process Clause. 54

Thus, in Harlan’s view, the Due Process Clause was a legitimate fount of constitutional authority; the dangers of its unboundedness would be mitigated by judicial devotion to the teachings of history. 55 Adherence to tradition was in effect the quid pro quo for protecting unenumerated constitutional rights. As long as the Court stayed within the contours of tradition, a jurisprudence could be fashioned that was meaningful enough to protect against unreasonable usurpations of public power but constrained enough that the values of the nation, and not those of the judges, would control.

Reliance on tradition as the limiting principle of the Due Process Clause also serves to set it apart from the Equal Protection Clause, into which many have read a “normative philosophy”. 56 while the Equal Protection Clause is meant to divorce us from the evil values of our past (racism, sexism, etc.), 57 the Due Process Clause is meant to yoke us to the good values of our past (respect for individual privacy, etc.).

Notwithstanding Justice Harlan’s confidence and Chief Justice Rehnquist’s faith in the constraining power of tradition, it has never fully stood up to its promise. For one thing, reliance on tradition begs many outcome-determinative questions. How far back must the tradition be established? 58 How widespread must the tradition be? 59 Is the relevant tradition that of the conduct or that of the

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54. Griswold, 381 U.S. at 501-02 (citations omitted).
55. Id.
56. Craig v. Boren, 429 U.S. 190, 204 (1976) (Brennan, J., rejecting statistical evidence that supported the classification at issue because “proving broad sociological propositions by statistics is a dubious business, and one that inevitably is in tension with the normative philosophy that underlies the Equal Protection Clause.”).
57. This was, in some ways, the central failure of Plessy v. Ferguson, 163 U.S. 537 (1896), and the central insight of Brown v. Bd. of Educ., 347 U.S. 483 (1954). In Plessy, the Court allowed separate accommodations precisely because: “[a]ll laws permitting, and even requiring their separation . . . have been generally, if not universally, recognized as within the competency of the state legislatures in the exercise of their police power.” 163 U.S. at 544. By 1954, the Court had begun to recognize the “normative philosophy that underlies the Equal Protection Clause,” Craig, 429 U.S. at 204, and in Brown, the Court refused to “turn the clock back to 1868 when the Amendment was adopted, or even to 1896 when Plessy v. Ferguson was written.” Brown, 347 U.S. at 492.
58. Is it necessary to go back to the Stoics, as Justice Blackman did in Roe v. Wade, or to the middle ages, as Chief Justice Rehnquist did in Washington v. Glucksburg?
59. See Justice Black, dissenting in Griswold.
prohibition against the conduct.\textsuperscript{60} And famously, what is the correct level of abstraction at which the tradition must be identified? The majority in \textit{Bowers} found no traditional right to consensual homosexual sodomy, but the dissent found a long and profound traditional “right to be let alone.”\textsuperscript{61}

Moreover, an array of empirical questions attends the judicial search for tradition. In arguing against Justice Goldberg’s reliance on the Ninth Amendment in \textit{Griswold}, Justice Black rejects the justices’ confidence that “in making decisions on this basis judges will not consider ‘their personal and private notions.’ One may ask,” Justice Black responded, “how they can avoid considering them. Our Court certainly has no machinery with which to take a Gallup Poll. And the scientific miracles of this age have not yet produced a gadget which the Court can use to determine what traditions are rooted in the ‘[collective] conscience of our people.’”\textsuperscript{62} Indeed, this may be one of the principal objections to the \textit{Bowers} decision. William Eskridge has characterized Justice Kennedy’s opinion in \textit{Lawrence} in part as a rebuke to Justice White for “using history as a mechanism for writing his own moral code into the Due Process Clause.”\textsuperscript{63} There is, quite clearly, no obvious way for members of the judiciary to determine, with any degree of confidence, what exactly the traditions and conscience of the people require.

The efficacy of the Court’s commitment to tradition raises many questions, but by far, the more troubling and interesting questions concern the \textit{desirability} of the Court’s commitment to tradition. Even if all the preceding questions could be satisfactorily answered, would we \textit{want} a constitutional jurisprudence that

\textsuperscript{60} Of course one cannot be oblivious to the fact that Mr. Gallup has already published the results of a poll which he says show that 46% of the people in this country believe schools should teach about birth control. Washington Post, May 21, 1965, p. 2, col. 1. I can hardly believe, however, that Brother GOLDBERG would view 46% of the persons polled as so overwhelming a proportion that this Court may now rely on it to declare that the Connecticut law infringes “fundamental” rights, and overrule the long-standing view of the people of Connecticut expressed through their elected representatives.


\textsuperscript{62} \textit{Griswold}, 381 U.S. at 519.

\textsuperscript{63} William N. Eskridge, \textit{Lawrence’s Jurisprudence of Tolerance: Judicial Review to Lower the Stakes of Identity Politics}, 88 MINN. L. REV. 1021, 1047 (2004). Jeffrey Rosen has written about Justice Kennedy that although he “fervently believed” that abortion was the “taking of innocent life,” he voted as he did in \textit{Casey} because “he couldn’t impose his personal views on the nation.” Jeffrey Rosen, \textit{The Agonizer}, \textit{The New Yorker}, Nov. 11, 1996, at 82, 88.
protected those rights that have been traditionally protected by the body politic? Certainly, tradition bears no relation to the representation-reinforcement argument for judicial review. But as Justice Scalia has argued, tradition is in fact the best litmus test for constitutional protection precisely because it enshrines time-honored values.64 Using the Due Process Clause to protect only those rights that have been traditionally protected is not redundant, he says, because the purpose of the Due Process Clause is “to prevent future generations from lightly casting aside important traditional values—not to enable this Court to invent new ones.”65 For some, the stultifying effect of tradition is its greatest attribute; for others, it renders the Due Process Clauses virtually a dead letter.

This tension was recognized at the earliest stages of the Court’s foray into substantive due process. In the 1856 case of Murray v. Hoboken Land and Improvement Company, upon announcing that the due process restrained not just the executive but the other branches of government as well, the Court decided that in order to determine whether a law conflicted with the Due Process Clause, it would:

> look to those settled usages and modes of proceeding existing in the common and statute law of England, before the emigration of our ancestors, and which are shown not to have been unsuited to their civil and political condition by having been acted on by them after the settlement of this country.66

But the Supreme Court soon rejected this narrow reading of the Due Process Clause.67 Though a finding that a right had historically been protected would entitle it to due process protection, such a finding could not be necessary to heightened constitutional protection.

> To hold that such a characteristic is essential to due process of law, would be to deny every quality of the law but its age, and to render it incapable of progress or improvement. It would be to stamp upon our jurisprudence the unchangeableness attributed to the laws of the Medes and Persians.68

The second Justice Harlan thought he could eliminate the tension between tradition and progress by asking judges to recognize that “what history teaches are the traditions from which [the nation] developed as well as the traditions from which it broke.”69 But to acknowledge, as Harlan did, that “tradition is a living thing”70 is to nullify the value of tradition as a constraint upon the judiciary. Either the Court identifies only those interests that have consistently been

64. *Michael H.*, 491 U.S. at 122 n.2.
65. *Id.*
66. 59 U.S. 272, 277 (1856).
68. *Id.*
70. *Id.*
recognized and valued in our history, or the quest for unenumerated constitutional values is open-ended. The Court can not have it both ways.

III.

As is well known, the membership of the current Supreme Court has not changed in over a decade. And yet, it has. At around the time that the most junior justices acceded to the Court, and that the most senior justices were retiring, several of those in the middle began searching for new approaches to this central problem of judicial decisionmaking. It was in this juncture that the Court decided Planned Parenthood of Southeastern Pa. v. Casey, a case that is epic in tone, unusual in its line-up, but ultimately cryptic and disappointing in its holding.

71. 1992 was in the middle of a major transition on the Court. There were no changes on the Court that year, but the two previous years had seen the departure of Thurgood Marshall and William J. Brennan and the arrival of Clarence Thomas and David Souter; and the two following years would see the departure of Byron White and Harry Blackmun and the arrival of Ruth Bader Ginsburg and Stephen Breyer. The membership of the Court has stayed the same since 1994.


73. The joint opinion insisted that it was “reaffirming” Roe v. Wade’s constitutional protection for the right to choose to terminate a pregnancy. The opinion, however, gutted the central aspects of that case, abandoning the trimester framework and the predictable “strict scrutiny” test, which protected the right to abortion for first and second trimester pregnancies, and replacing it with the amorphous “undue burden” test which permits significant and burdensome restrictions from the outset of pregnancy and permits outright prohibition after viability (an unfixed point that moves earlier as medical technology advances). Id. In addition, Casey significantly narrowed the medical exception which protects women from pregnancies that threaten their life or health. Id. at 846.

Moreover, Casey’s effort to redefine the substantive Due Process Clause was not effective. Perhaps the effort to yank substantive due process from the shackles of tradition was so ambitious that it required two (or more) cases—it is possible that only the joint effort of Casey and Lawrence can successfully accomplish the redefinition that is required because one case was needed to introduce the concepts of destiny and dignity, and the second is necessary to confirm that the Court is serious in its commitment. But there are subtle differences between Casey and Lawrence that suggest that the latter is likely to be more successful than the former in establishing a new jurisprudence of liberty. First, the language in Casey was too lofty or too mystical to be taken seriously by many people. While Lawrence (I think unfortunately) uses language like “transcendent,” which is no better than Casey’s invocation of “destiny,” Lawrence does a better job of indicating how the new due process jurisprudence is to be conceived outside of the abortion context (which is largely sui generis) and of explaining why laws that impinge on a person’s dignity do offend constitutional values. Casey, 505 U.S. at 852; Lawrence, 539 U.S. at 562.

Finally, Lawrence, unlike Casey, indicated that it was meant to be taken seriously. Lawrence redefined liberty and then emphatically upheld the individual rights involved and definitively repudiated Bowers, vindicating the interests of the plaintiffs and of millions of people like them and, by extension, of all people who value individual dignity. Lawrence, 539 U.S. at 578. Casey, by contrast, notwithstanding its expansive vision of liberty, failed to protect even the women on
Casey marks a departure from the previous substantive due process cases in several ways, the most important of which are reaffirmed in Lawrence. The first is the emphasis on “liberty”—as distinct from “privacy.”

The joint opinion begins and ends with the word “liberty.” (Justice Kennedy’s opinion in Lawrence also begins with “liberty” and ends with “freedom.”) The focus on liberty is both hollow and full of meaning. Casey’s first line is, “Liberty finds no refuge in a jurisprudence of doubt.” This may be true, but it is sadly ironic in an opinion that replaces the certainty and predictability of the Roe regime with the inchoateness of the “undue burden” test. Nonetheless, the emphasis in the joint opinion is significant.

Both Casey and Lawrence self-consciously shift the focus of substantive due process away from privacy and back toward its textual anchor, liberty. This avoids the principal objection to the Court’s post-Griswold privacy jurisprudence—that it lacks textual support. As Justice Thomas wrote in dissent in Lawrence, “I can find [neither in the Bill of Rights nor any other part of the Constitution a] general right of privacy,” or as the Court terms it today, the ‘liberty of the person both in its spatial and more transcendent dimensions.’

He is surely right that the Constitution contains no general right of privacy, but he is surely wrong that it contains no protection for liberty. The shift away from privacy jurisprudence stands substantive due process on firmer ground. Moreover, the liberty recognized in Casey and Lawrence is more closely linked to the notion of individual dignity than to privacy interests.

whose behalf the case had been brought, let alone anyone else. Casey did not expand the dignity interests of anyone who had already been born (though it vindicated the interests of fetuses). Casey, 505 U.S. at 833. Indeed, the language in Casey should have sounded the death knell for Bowers, but it applied its vision in such a cramped way that its effect (if any) on future substantive due process was entirely uncertain—until Lawrence.

74. Casey, 505 U.S. at 844; Lawrence, 539 U.S. at 564.
75. Casey, 505 U.S. at 844, 901.
76. Lawrence, 539 U.S. at 562, 579.
77. Casey, 505 U.S. at 844.
78. Id. at 877.
79. As the Court wrote in West Coast Hotel v. Parrish, in reversing the course of the Lochner era by refusing to invalidate a state law against a claim that it violated the freedom of contract: “What is this freedom? The Constitution does not speak of freedom of contract. It speaks of liberty and prohibits the deprivation of liberty without due process of law.” West Coast Hotel v. Parrish, 300 U.S. 379, 391 (1937).
80. Lawrence, 539 U.S. at 605-6 (Thomas, J., dissenting).
81. In fact, Justice Rehnquist saw this deviation in Roe v. Wade, when the Court held that the right to privacy was broad enough to encompass a woman’s right to choose whether to terminate a pregnancy. Roe v. Wade, 410 U.S. 113, 153-54 (1973).

A transaction resulting in an operation such as this is not “private” in the ordinary usage of that word. Nor is the “privacy” that the Court finds here even a distant relative of the freedom from searches and seizures protected
These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. 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. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State.82

In effect, this conception of liberty cuts through privacy and recognizes not “the right to be let alone” but the reasons why the right to be let alone is so important. The point is not simply that each person should be allowed his or her personal space, but that in a free society, the needs of the individual must be respected even (or especially) as against the needs of organized society.83 (Indeed, this is the only meaning that “liberty” could have: in a document that creates and empowers a robust centralized government, it must mean the negative space where government may not tread.) Liberty is not absolute, but neither are the claims of the state to insist on cohesion and regularity. Although the Lawrence Court emphasizes that the conduct at issue in that case took place in the privacy of the home, one senses that this attention to the home was more of a limitation on the principle than a definition of it. The demands of individual liberty are not restricted to private places, although they may be stronger in private than in public for the simple reason that actions done in the home are more likely to be self-regarding than actions done in public. Though Lawrence identifies both a transcendent and a spatial dimension of liberty, its major contribution to our understanding of liberty is its attention to the former.

This vision of human dignity is not tied—and in some respects it is inconsistent with—tradition. As the joint opinion recognized in Casey, the pregnant woman’s interest “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.” 84 That our history and our culture have traditionally insisted on a particular (subordinate) role for women is irrelevant to the question of whether that role respects women’s liberty. Only the latter question is determinative of the constitutionality of the law under the Due Process Clause. In Lawrence as well, the fact that homophobic laws are older than the nation itself was no longer dispositive of the liberty interests of homosexuals. 85 The Lawrence Court was emphatic on this point:

It must be acknowledged . . . that for centuries there have been powerful voices to condemn homosexual conduct as immoral. . . . These considerations do not answer the question before us, however. The issue is whether the majority may use the power of the State to enforce these views on the whole society through operation of the criminal law. 86

Thus has the inflexible link between tradition and conscience been severed, and with that, the iron bond between tradition and due process. 87 Indeed, the opinions in Lawrence and Casey could not be more explicit about their wholehearted embrace of living constitutionalism. Both opinions end, heavily, with reminders that each generation can (in Lawrence) and must (in Casey) reinterpret the Constitution. “Our Constitution is a covenant running from the first generation of Americans to us and then to future generations. It is a coherent succession. Each generation must learn anew that the Constitution’s written terms embody ideas and aspirations that must survive more ages than one,” explains Casey. 88 Lawrence reminds us that “[a]s the Constitution endures,
persons in every generation can invoke its principles in their own search for greater freedom."  

Unmooring due process from privacy and tradition allows it to sway somewhat toward equality jurisprudence. The doctrinal distinction between equal protection and due process, at its most basic, is between status and conduct. The Equal Protection Clause protects society against laws that burden its members because of their status. As Justice Brennan wrote in an early gender discrimination case, since sex, like race and national origin, is an immutable characteristic determined solely by the accident of birth, the imposition of special disabilities upon the members of a particular sex because of their sex would seem to violate "the basic concept of our system that legal burdens should bear some relationship to individual responsibility. . . ." 

The Equal Protection Clause, which has historically been concerned with discrimination on the basis of immutable characteristics, prevents burdens imposed on the basis of who we are. The law should not penalize us for personal traits that we cannot change, such as race or gender, especially where those characteristics bear little relevance to our "actual capabilities." 

Due process, by contrast, is concerned with what we do, decisions that we make, and conduct in which we choose to engage, whether that conduct is acceding to a contract, teaching our children to speak German, having non-procreative sex, or having an abortion. 

In Casey and Lawrence, however, the Court holds that certain values are constitutionally protected because they are intrinsically connected to a person's dignity. Thus, Justice Kennedy proposes that "[l]iberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct." The intrinsic connection of these freedoms to human dignity renders them immune from the moral judgments of political majorities. When due process comes to protect those interests that lie at the heart of human dignity, it has become concerned not as much with our conduct but with the very definition of who we are. As the joint opinion explains in Casey, "[t]he destiny of the woman must be shaped to a large extent on her own conception of her spiritual imperatives and her place in society." Questions of personal choices—the bailiwick of the previous due process jurisprudence—are different from questions of personal imperatives. Imperatives approach class and status because they can

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89. 539 U.S. at 579.
91. Frontiero, 411 U.S. at 687.
92. Casey, 505 U.S. at 849; Lawrence, 539 U.S. at 567.
93. Lawrence, 539 U.S. at 562.
94. 505 U.S. at 852.
not be changed. Like race and gender, one does not choose one’s conscience or beliefs, or, as the Court suggests in Lawrence, one’s sexual orientation.

Thus, as Justice Kennedy writes, the most egregious aspect of Bowers was not that it limited the range of choices of conduct open to people, but that it demeaned a class of people.\footnote{Lawrence, 539 U.S. at 567.} The language he uses to describe the burden is the language of discrimination, not of deprivation.\footnote{Id. at 575.}

Equality of treatment and the due process right to demand respect for conduct protected by the substantive guarantee of liberty are linked in important respects, and a decision on the latter point advances both interests. If protected conduct is made criminal and the law which does so remains unexamined for its substantive validity, its stigma might remain even if it were not enforceable as drawn for equal protection reasons.\footnote{Id.}

The true harm is the stigma—that harm most notably associated with Brown v. Board of Education.\footnote{Id.}

This fusion of equal protection and due process accomplishes several things. First, it avoids the strategic question of whether legislation that burdens gays and lesbians is better attacked under the theory of due process or of equal protection. In Lawrence, five justices chose the due process camp, while Justice O’Connor chose equal protection. Robert Post made persuasive arguments as to why Bowers was better attacked through due process than equal protection,\footnote{Post, supra note 83, at 99-102.} but it is quite likely that the majority would have been more evenly split between due process and equal protection had Bowers not been an issue. (In fact, given Justice Kennedy’s opinion in Romer v. Evans\footnote{Romer v. Evans, 517 U.S. 620, 623 (1996).} and his language in Lawrence,\footnote{“When homosexual conduct is made criminal by the law of the State, that declaration in and of itself is an invitation to subject homosexual persons to discrimination both in the public and in the private spheres.” Lawrence, 539 U.S. at 575.} it is quite possible that Justice Kennedy himself would have used the Equal Protection Clause to attack Texas’ sodomy law were it not for the need to squarely and
unambiguously overrule Bowers.) For both the majority and Justice O’Connor’s concurrence, the question of anti-sodomy regulation is closely bound to the question of discrimination on the basis of status. As if reinforcing Justice Kennedy’s point about the stigmatic harm of anti-sodomy laws, Justice O’Connor writes: “While it is true that the law applies only to conduct, the conduct targeted by this law is conduct that is closely correlated with being homosexual. Under such circumstances, Texas’ sodomy law is targeted at more than conduct. It is instead directed toward gay persons as a class.”102 If a law burdens a class of people by prohibiting the conduct that defines the class, it simultaneously denies equal protection and deprives people of due process.

Second, fusing equal protection’s interest in status with due process’s interest in conduct obviates the nature/nurture debate that is so peculiarly confounding in the context of sexual orientation. Now, as a jurisprudential matter, it does not matter whether sexual orientation is chosen by nature or by nurture; the important thing is that it is tightly bound up with the question of human dignity. A person cannot shape her own destiny unless she can define her sexual orientation according to her own spiritual imperatives.

Linking sexual orientation to individual dignity—to the question of who a person is—while separating it from tradition, also permits the Court to distinguish among different forms of sex regulations. Adultery, incest, and fornication (to use Justice Harlan’s litany)103 are all forms of conduct in which a person engages. When a person chooses to engage in those activities and, like driving, fishing, working, and myriad of other activities, the state may choose to regulate them either in accordance with some vision of public morality or to achieve other legitimate aims. If the issue is, as the Bowers Court claimed,104 whether there is a constitutional right to engage in acts of homosexual sodomy, then clearly there is not because most forms of conduct can be regulated, and there is no reason why homosexual sodomy, viewed as nothing more than conduct, should be exempt. On the other hand, if sexual orientation is treated not as an act (that society has traditionally frowned upon) but as an incident of personal dignity, then it is in quite a different category from conduct including adultery, incest, and bestiality.105

102. Id. at 583 (O’Connor, J., concurring) (emphasis added).
103. Poe, 367 U.S. at 552.
105. William Eskridge traces how anti-sodomy laws of the type at issue in Lawrence evolved from regulating conduct to discriminating against a class of people.

The laws were originally not at odds with the anti-caste principle because they were not associated with any class of people. It was not until well into the twentieth century that sodomy became a metonym for a new category of person, the “homosexual,” and that sodomy laws were widely applied to activities between consenting adults, in increasing violation of the liberty principle.
And finally, resting liberty on dignitary interests, rather than on traditional interests, permits liberty to develop in normative ways. Just as equality jurisprudence has evolved from its historical moorings in Reconstruction to offer rights to non-citizens, religious minorities and, yes, eventually women, liberty may too be understood in evermore expansive ways. It is no accident that at exactly the same time that the Court embraces liberty as a dignitary interest, it also embraces living constitutionalism. Dignity, unlike privacy,106 is not dependent on tradition.

Many of the world’s modern constitutions explicitly and prominently protect dignitary interests.107 The draft European Constitution is typical, expressing in Article 2, that “The Union is founded on the values of respect for human dignity, freedom, democracy, equality and the rule of law and respect for human rights.”108 The Indian Constitution of 1949 dedicates itself, in its preamble, to “assuring the dignity of the individual and the unity and integrity of the Nation.” Likewise, the South African Constitution of 1996 establishes “Human dignity, the achievement of equality and the advancement of human rights and freedoms” as foundational principles. In many decisions from constitutional courts throughout the world, the term “dignity” has been held to have substantive and meaningful content. These cases reveal that the protection of human dignity is important in a formal sense to the development of modern constitutional law.109 Beyond that, it is extremely important for people throughout the world as a means of ensuring that their governments treat them with the respect that is due to individuals.

Eskridge, supra note 63, at 1055.


Many international instruments likewise protect individual dignity. See Universal Declaration of Human Rights, pmbl., available at http://www.un.org/Overview/rights.html (“Whereas recognition of the inherent dignity and of the Equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world,” pmbl.); The International Covenant on Civil and Political Rights (same) (pmbl.); and the International Covenant on Economic, Social, and Cultural Rights (same) (pmbl.).

109. See e.g., S. v. Makwanyane and Another, 1995 (3) SALR 391 (CC) (Reviewing the “second great wave of constitutionalism after World War II, “the more that life had been cheapened and the human personality disregarded, the greater the entrenchment of the right to life and dignity.”).
within a democracy. Justice Kennedy’s emphasis on dignity interests, however, brings American constitutional jurisprudence more in line with the mainstream of the world’s democracies that recognize not only the importance of individual dignity but the importance of protecting it as a judicially enforceable constitutional right. Moreover, as in Lawrence, many of the constitutional texts and the interpretations of those texts associate dignity with equality as if these are two sides of the same coin.

Many American cases have raised questions that could be characterized as either due process or equal protection questions. Anti-miscegenation laws, for example, burden us both because of who we are (by race) and because of the conduct that we choose to engage in (choosing to marry). Likewise, a law that compels sterilization for certain classes of felons burdens these individuals both because of an immutable characteristic (status as felons) and because of their conduct (desire to have children). Another example may be found in Eisenstadt, where the Court uses the Equal Protection Clause to confirm that individuals, married or single, have a fundamental right to privacy. But these cases are different from Casey and especially Lawrence because they simply look at a problem
from two different angles, seeing two distinct burdens in the operation of the law.\(^{116}\) In Lawrence, the Court actually fuses the concepts together. There is precious little distinction between a burden on our free enjoyment of equality and a burden on our equal enjoyment of freedom. In the end, it may not really matter whether laws like those at issue in these cases are treated as violations of equal protection or of due process; they are invalidated because they violate deeply held constitutional values.\(^{117}\)

There is another, perhaps ironic, shift in the way Lawrence conceives of liberty. In the older cases, liberty was deeply atomistic. It privileged the individual over the group. As the Court famously stated in Eisenstadt, “If the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.”\(^{118}\) The decisions that were constitutionally protected by the liberty clause were decisions that an individual can make without compulsion from anyone else around him or her.\(^{119}\) They were private in that they affected only the individual involved. When privacy jurisprudence began in earnest,\(^{120}\) it began in the home—a man’s
castle—where he can cut himself off from all others and reign supreme. When it expanded beyond the home, it still followed the individual. As the Lawrence Court describes Roe v. Wade,121 “Roe recognized the right of a woman to make certain fundamental decisions affecting her destiny and confirmed once more that the protection of liberty under the Due Process Clause has a substantive dimension of fundamental significance in defining the rights of the person.”122

The liberty recognized in Lawrence is not atomistic, but relational in two distinct but very important ways. The first concerns the personal relationships that are at stake. Lawrence could have overruled Bowers on its own terms. It could have simply said that homosexuals are entitled to the same constitutional privacy in their bedrooms as are heterosexuals under Griswold and Eisenstadt. But the Lawrence Court shifts the focus away from the sex acts and from the bedroom, where the sex acts occur. Rather than accord constitutional protection to the sex in the bedroom, it accords constitutional protection to the dignity of the relationship. Though the Lawrence Court finds many faults with the Bowers decision, the one it begins with is telling:

The statutes do seek to control a personal relationship that, whether or not entitled to formal recognition in the law, is within the liberty of persons to choose without being punished as criminals.

This, as a general rule, should counsel against attempts by the State, or a court, to define the meaning of the relationship or to set its boundaries absent injury to a person or abuse of an institution the law protects. It suffices for us to acknowledge that adults may choose to enter upon this relationship in the confines of their homes and their own private lives and still retain their dignity as free persons. When sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring. The liberty protected by the Constitution allows homosexual persons the right to make this choice.123

The effect of the passage is to shift the focus of the liberty inquiry from the privacy that could attend sexual acts to the dignity that attends relationships. Thus, the case—and the Court’s new liberty jurisprudence generally—is not about the privacy of the bedroom, but about the importance and dignity of human relationships. The Court bars governmental intrusion not because a man’s home is his castle but because a central incident of human dignity is the ability to choose

most pertinent beginning point is our decision in Griswold v. Connecticut, 381 U.S. 479 (1965).”.
122. Lawrence, 539 U.S. at 565 (emphasis added).
123. Lawrence, 539 U.S. at 567. In this brief passage, the Court emphasizes the significance of personal relationships and bonds through three explicit references. I leave to others the task of undertaking the feminist critique of Lawrence in which one might definitively answer which, if any, of the justices in fact speaks “in a different voice.” See Suzanna Sherry, Civic Virtue and the Feminine Voice in Constitutional Adjudication, 72 VA. L. REV. 543 (1986).
with whom we form close relationships. It is this personal relational aspect of liberty that is of greatest interest to the Court in Lawrence.

The second relational aspect of Lawrence liberty places the individual, whose dignity is protected, in a social and political context. Implicitly, Lawrence recognizes the relationship between the public harms and private harms, just as Brown v. Board of Education did before it. In Brown, the Court explained that “[t]o separate [children] . . . solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone.” In Lawrence, the Court makes the same point, in reverse: “[w]hen homosexual conduct is made criminal by the law of the State, that declaration in and of itself is an invitation to subject homosexual persons to discrimination both in the public and in the private spheres.” Public segregation generates internal feelings of inferiority, just as surely as interferences with a person’s private life diminishes their standing in society.

Thus, while the injury that Texas’ law imposes on Lawrence in his private life is significant, the Lawrence Court also appreciates the public dimension of this private injury. This recognition echoes the language in Casey in which Justices Kennedy, O’Connor and Souter make explicit the connection between the invasion of privacy resulting from the abortion restrictions and the ability of women to function in society as full citizens. “The ability of women to participate equally in the economic and social life of the Nation,” the joint opinion asserts, “has been facilitated by their ability to control their reproductive lives.” Private injuries affect public life.

Laws that impinge on a person’s dignity—including criminal laws that render him or her a presumptive outlaw or laws that reduce a person’s ability to control her reproductive life—may have the same effect of diminishing the person’s ability to participate fully in the social and economic life of the nation. If such laws, by extension, inhibit a person’s ability also to participate fully in the political life of the nation, they may be said to restrict “those political processes which can ordinarily be expected to bring about repeal of undesirable legislation . . .” and are for that reason, even if for no other, subject to the Court’s intense scrutiny. Such laws, then, may be of the same genus as the legislation about which Chief Justice Stone expressed concern in his footnote. The dictum of both Casey

125. Id. at 494.
126. Lawrence, 539 U.S. at 558. Nan Hunter also juxtaposes these excerpts to highlight both Brown’s and Lawrence’s recognition of stigmatic injury. See Nan D. Hunter, Living with Lawrence, 88 Minn. L. Rev. 1103, 1126 (2004).
128. Id.
130. Carolene Products, 304 U.S. at 152-53 n.4.
131. 505 U.S. at 833.
and *Lawrence*\(^\text{132}\) intimates a subtle shift back toward the process-oriented understanding of due process (and of judicial review in general) that was articulated in the *Carolene Products* footnote.\(^\text{133}\)

The connection among *Carolene Products* and *Casey* and *Lawrence* is strengthened by the latter Court’s reliance on *Romer v. Evans*. It is not immediately apparent—beyond the obvious but superficial point that both involve the rights of lesbians and gay men—why *Romer* is relevant to the *Lawrence* inquiry. In *Romer*,\(^\text{134}\) the Court invalidated Colorado’s Amendment 2 under the Equal Protection Clause, a basis which the *Lawrence* Court explicitly rejects.\(^\text{135}\) And yet, *Lawrence* refers to *Romer* as having “principal relevance”\(^\text{136}\) and, along with *Casey*, as seriously eroding the foundations of *Bowers*, without any explanation as to why.

The missing link might be the question of political process. *Romer* was explicitly a case about political participation. Justice Kennedy’s opinion for the Court in *Romer* excoriated the voters of Colorado for imposing a “special disability”\(^\text{137}\) on a discrete subset of the state’s polity and preventing them, except by constitutional amendment, from obtaining the same benefits that any other group of Coloradans might enjoy.\(^\text{138}\) But in Justice Kennedy’s hands, *Romer* was not simply about equal voting rights. Kennedy saw Amendment 2 as a “broad

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133. *Carolene Products*, 304 U.S. at 152-53 n.4. I have not addressed in this article the erosion of the tiers of review that is evident in many of the Court’s recent opinions, including *Lawrence*, as well as *Grutter v. Bollinger*, 539 U.S. 306 (2003); *Casey*, *supra* note 72; and possibly *Romer v. Evans*, 517 U.S. 620 (1996). Some have suggested that the Court’s apparent abandonment of the strict hierarchy of review is driven, at least in part, by the obsolescence of the idea, first articulated in the *Carolene Products* footnote, that interests and certain classes of people are entitled to strict judicial scrutiny. *Carolene Products*, 304 U.S. at 152-53 n.4. At least one reason for the collapse of the tiers of review, suggests Nan Hunter, may lie in the fact that since *United States v. Carolene Products Co.*, the central justification for countermajoritarian intervention by the courts to strike down discriminatory laws has been the lack of political power on the part of the disadvantaged minority. The complexities of political power, oppression, and resistance in contemporary U.S. society have now grown too byzantine to support the rigid rankings that emerged, particularly in equal protection law.

Hunter, *supra* note 126, at 1131. I would argue that although the rigidity of a hierarchy may be ill-suited to a complex multi-cultural society, the idea undergirding the hierarchy has lost none of its salience and in fact may be more relevant today than ever, given the many groups and interests vying for public space.

136. *Lawrence*, 539 U.S. at 574.
138. “Homosexuals are forbidden the safeguards that others enjoy or may seek without constraint. They can obtain specific protection against discrimination only by enlisting the citizenry of Colorado to amend the State Constitution or perhaps, on the State’s view, by trying to pass helpful laws of general applicability.” *Id.*
and undifferentiated disability [imposed] on a single named group.\textsuperscript{139} Amendment 2, he says, withholds protections that are “taken for granted by most people either because they already have them or do not need them; these are protections against exclusion from an almost limitless number of transactions and endeavors that constitute ordinary civic life in a free society.”\textsuperscript{140}

Thus, \textit{Romer} makes explicit what is only implicit in \textit{Casey} and \textit{Lawrence}. As Laurence Tribe has written, \textit{Lawrence}.

is a narrative in which due process and equal protection, far from having separate missions and entailing different inquiries, are profoundly interlocked in a legal double helix. It is a single, unfolding tale of equal liberty and increasingly universal dignity. This tale centers on a quest for genuine self-government of groups small and large, from the most intimate to the most impersonal.\textsuperscript{141}

Laws that infringe on a person’s intimate relationships are invalid not only because they intrude into the private lives of individuals, but because, in so doing, they diminish the individual’s standing in the community. The Court must pay special attention to laws that burden the ability of one group to participate fully in civic life. Laws that diminish a person’s sense of his or her own dignity—including, but certainly not limited to, segregation and laws that burden sexual and reproductive choices—diminish that person’s standing in society. As Nan D. Hunter has written,

\begin{quote}
[w]hatever its shortcomings, for lesbians and gay men, \textit{Lawrence} is a breakthrough. It ends our wandering in law’s wilderness, uncertain in each case whether we would be treated with respect or contempt. At bottom, \textit{Lawrence} made lesbians and gay men citizens instead of criminals. We are the newly naturalized, even if native-born, Americans.\textsuperscript{142}
\end{quote}

Neither the joint opinion in \textit{Casey}\textsuperscript{143} nor the majority opinions in \textit{Lawrence}\textsuperscript{144} referred directly to this theory nor to \textit{Carolene Products}. But the tenor of these opinions (like that in \textit{Romer}) hints at certain justices’ concern for the ability of all members of the polity to participate equally and fairly in the political process. After decades of judicial indifference to the theory underlying the \textit{Carolene Products} footnote, the Court seems finally poised to recognize that substantive due process is, fundamentally, about the constitutional protection of the individual dignity of all members of the polity, and that judicial review is, fundamentally, about

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139. \textit{Id.} at 632.  \\
140. \textit{Id.} at 631.  \\
142. Hunter, \textit{supra} note 126, at 1137. William Eskridge also contrasts \textit{Bowers}’s treatment of gays and lesbians as “outlaws” with \textit{Lawrence}’s treatment of gays and lesbians as “equal citizens.” Eskridge, \textit{supra} note 63, at 1021, 1025.  \\
143. \textit{Casey}, 505 U.S. at 845.  \\
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ensuring that all members of society have equal opportunities to participate in the social and economic, and political, life of the nation.

IV.

At the end of his opinion in *Casey*, Justice Scalia writes this lamentation:

There comes vividly to mind a portrait by Emanuel Leutze that hangs in the Harvard Law School: Roger Brooke Taney, painted in 1859, the 82d year of his life, the 24th of his Chief Justiceship, the second after his opinion in *Dred Scott*. He is all in black, sitting in a shadowed red armchair, left hand resting upon a pad of paper in his lap, right hand hanging limply, almost lifelessly, beside the inner arm of the chair. He sits facing the viewer and staring straight out. There seems to be on his face, and in his deep-set eyes, an expression of profound sadness and disillusionment. Perhaps he always looked that way, even when dwelling upon the happiest of thoughts. But those of us who know how the lustre of his great Chief Justiceship came to be eclipsed by *Dred Scott* cannot help believing that he had that case—its already apparent consequences for the Court and its soon-to-be-played-out consequences for the Nation—burning on his mind. I expect that two years earlier he, too, had thought himself “calling the contending sides of national controversy to end their national division by accepting a common mandate rooted in the Constitution.”

It is a lamentation not only for Roger Taney, but for the Court as an institution, in recognition of its extremely limited ability to quiet political debate. To Justice Scalia, Chief Justice Taney looked profoundly sad because, try as he might, he was unable to foreclose debate about legality and morality of slavery. Justice Scalia supposes that the authors of the joint opinion in *Casey* are under the same sorry disillusion: they think they have resolved the national controversy over abortion, but, Justice Scalia warns, they have not.

Whether Justices Kennedy, Souter and O’Connor in fact hoped to end the national debate over abortion by their opinion in *Casey* is not likely to be publicly known. I would suggest, though, that Justice Kennedy’s opinion in *Lawrence* has the opposite aim: not to quiet public debate, but to invigorate it. Soon after the decision in *Romer*, Justice Kennedy was quoted as saying, “[w]hat this country must begin to recognize is that it has the capacity and the responsibility to make sensible decisions based on values.” Justice Kennedy seems to have staked out a role for himself—in *Casey*, *Romer*, and now in *Lawrence*—as one who propels social debate about important issues based on shared values. Not afraid to wander into the battlefield of the *kulturkampf*, Justice Kennedy uses sweeping and grandiose language not to announce the winners and losers, but to set the terms.

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145. 505 U.S. at 1001-02 (Scalia, J., dissenting & concurring in part) (alteration in original).
146. Casey, 505 U.S. at 1001-02 (Scalia, J., dissenting & concurring in part).
147. Id.
of debate: each person has the right to determine his or her own destiny according to his or her own spiritual imperatives; no one should be subject to laws whose primary purpose is to express animus towards people in his or her group; each individual has a right to “autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct.” These pronouncements can not possibly determine the outcome of complex social issues, but they can set the parameters for their resolution. “Society has to recognize,” Kennedy continued in the 1996 interview with Jeffrey Rosen for *The New Yorker*, “that it has to confront hard decisions in neutral, rational, dispassionate debate . . . and not just leave it to the courts. . . . That’s a *weak* society that leaves it to courts.”

Justice Kennedy’s jurisprudence in these landmark cases represents a blending of judicial restraint and activism. Unlike his more conservative colleagues on the Court, he would not leave all social constructs to the ravages of majoritarian politics. But unlike his more comfortably liberal colleagues, he is unwilling to establish clear rules by which the majorities must play (which explains the absence of the slogans we have come to expect from the Court including “privacy,” “fundamental rights,” and “strict scrutiny”). Kennedy gets involved not to make the hard decisions, but to help society confront those decisions, to provide society with the neutral, rational, and dispassionate terms by which society itself might conduct the debate.

In the year since the *Lawrence* opinion was announced, it has garnered significant attention, as much for its tone as for its substance. Laurence Tribe has called it a “landmark” that will be remembered as the “*Brown v. Board* of gay and lesbian America”—apparently the highest accolade one can give a Supreme Court opinion. But Nan Hunter ups the ante by calling it even more powerful than *Brown*. Richard Mohr, on the other hand, sensibly says, “it is too early to tell whether the *Lawrence v. Texas* decision will stand on a cultural par with *Brown v. Board of Education*.”

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149. *Lawrence*, 539 U.S. at 562.
150. Rosen, *supra* note 63, at 90 (alteration in original).
Brown aside, there are those who question whether Lawrence has any staying power,155 while others believe that the opinion “leads the Court, and by extension this Nation, to a deeper understanding of the right to privacy.”156 Of course, Mohr is right: it is too early to tell what Lawrence’s legacy will be. What seems clear so far is that if Lawrence was intended to quell debate on the status of gays and lesbians in American society, it has utterly failed in its mission. But Justice Kennedy is undoubtedly smart enough to know that that would have been a quixotic ambition in a society as complex as ours, and he probably has a strong enough appreciation for the limited role of judicial review in a democratic society to know that it would have been an undesirable ambition. It is more likely that his goal was to help Americans to engage in this debate, with human dignity as the touchstone. In that, he has succeeded.

155. “Whether Lawrence has much important or lasting constitutional life is doubtful.” Mohr, supra note 154, at 366.