DESTABILIZING DUE PROCESS AND EVOLUTIVE EQUAL PROTECTION

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One way to think about the relationship between the Due Process and Equal Protection Clauses of the Fourteenth Amendment is to view due process as backward-looking (evaluating a law in light of its historical precedents), and equal protection as forward-looking (evaluating a law in light of its utility for future social projects). Professor Eskridge challenges this contrast. He shows that such a contrast is supported by neither the text and history of the Fourteenth Amendment nor by the Supreme Court's precedents applying the Due Process and Equal Protection Clauses. Due process is just as often destabilizing as equal protection, which like due process often defers to past practices.

Notwithstanding the analytical vacuity of the backward-looking/forward-looking contrast, the two clauses display potentially different roles for minority groups: The Due Process Clause secures libertarian protections at the retail (individual) level that are important when the group is socially despised, while the Equal Protection Clause potentially offers minorities wholesale (group) level protections when (or if) the Court recognizes their legitimacy as partners in American pluralist democracy.

Kenneth Karst argues that the Constitution prohibits the state from treating members of socially stigmatized groups as outsiders to the law or from

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denying them "full inclusion in the public life of the community."[1] Elaborating on this principle, Karst has been the legal academy's most articulate critic of laws denying full inclusion to lesbians, gay men, and bisexuals. He has criticized laws criminalizing consensual sodomy, such as the one upheld by the Supreme Court in *Bowers v. Hardwick*,[2] and the rule excluding bisexual and gay persons from the armed forces that was tolerated in the U.S. Court of Appeals for the Ninth Circuit's en banc opinion in *Watkins v. United States Army*[3] and upheld in subsequent courts of appeals decisions.[4] Most of his work is an exegesis of the Equal Protection Clause, the basis for the *Watkins* challenge to the armed forces exclusion. Yet Karst also sees due process, the basis for the *Hardwick* challenge to sodomy laws, as an integral part of the constitutional regulation of the legislature's "tendency to coerce conformity," which courts should criticize as part of their mission "to maintain our sense of belonging to a network of connection that includes the whole nation."[5] Under Karst's theory, *Hardwick* was wrong.[6]

But if *Hardwick* is governing precedent for the proposition that the Constitution allows the state to criminalize consensual sodomy, does that mean that the Constitution also allows the state to exclude gay people from the armed forces and elsewhere? Starting from a similar inclusionary baseline as Karst, Cass Sunstein in 1988 argued against the latter proposition, for a narrow reason and a broad one. The narrow reason was that *Hardwick* formally did not present an equal protection issue, which is analytically separate from due process. The military, Sunstein maintained, might prohibit consensual sodomy and yet still be barred from excluding people it thinks

1. KENNETH L. KARST, LAW'S PROMISE, LAW'S EXPRESSION: VISIONS OF POWER IN THE POLITICS OF RACE, GENDER, AND RELIGION 193–94 (1993) (analyzing *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), a due process abortion case).

2. 478 U.S. 186 (1986), *criticized in* KENNETH L. KARST, BELONGING TO AMERICA: EQUAL CITIZENSHIP AND THE CONSTITUTION 201–06, 227 (1989).

3. 875 F.2d 699 (9th Cir. 1989) (en banc), *withdrawing* 847 F.2d 1329 (9th Cir. 1988). The concurting opinion in *Watkins*, by Judge William A. Norris, would have invalidated the exclusion, notwithstanding *Hardwick*. *See id.* at 711–31 (Norris, J., concurring). The en banc decision left the policy in place but ruled it could not be applied to Sgt. Perry J. Watkins for estoppel reasons. *See id.* at 710–11.

4. The U. S. Court of Appeals for the Ninth Circuit has subsequently joined other courts of appeals, for example, *Thomasson v. Perry*, 80 F.3d 915 (4th Cir. 1996) (en banc), in upholding the current version of the exclusionary policy. *See* Holmes v. California Army Nat'l Guard, 124 F.3d 1126 (9th Cir. 1997) (upholding the military's "don't ask/don't tell" policy), *cert. denied*, 525 U.S. 1067 (1999). The best critique of this antigay exclusion is Kenneth L. Karst, *The Pursuit of Manhood and the Desegregation of the Armed Forces*, 38 UCLA L. REV. 499 (1991).

5. KARST, *supra* note 2, at 226.

6. *See id.* at 227.

likely to violate that prohibition,[7] the position that Judge William A. Norris had earlier staked out in *Watkins*.[8] The broad reason was that due process and equal protection serve different constitutional roles.

> The Due Process Clause often looks backward; it is highly relevant to the Due Process issue whether an existing or time-honored convention, described at the appropriate level of generality, is violated by the practice under attack. By contrast, the Equal Protection Clause looks forward, serving to invalidate practices that were . . . expected to endure.[9]

This thesis has the virtue not only of confining the constitutional damage of *Hardwick*, but also of defending the Court's subsequent decision in *Romer v. Evans*,[10] which invalidated a state antigay initiative on equal protection grounds.[11] From a Karstian perspective, however, the thesis has the vice of allowing *Hardwick* to survive *Evans* and, more broadly, of divorcing the Due Process Clause from the Fourteenth Amendment's core principle of equal citizenship.

Setting aside the narrow issue of whether *Hardwick* and *Evans* can ultimately be reconciled,[12] consider Sunstein's broader claim. The idea that the Due Process Clause as applied by the judiciary is generally backward-looking, while the Equal Protection Clause is generally forward-looking, is an important thesis. Is it right?

As an abstract matter it is hard to see why there should be this kind of difference between the methodologies for applying due process and equal protection guarantees, as both clauses strike me as being strongly *present-looking*, with backward- as well as forward-looking arguments being relevant to each clause. Sunstein argues that the Supreme Court's constructions of the Fourteenth Amendment support the distinction between backward-looking due process and forward-looking equal protection. At first glance, though, the Court's precedents do not support this distinction. While due process cases emphasize the nation's traditions, they also emphasize the critical bite tradition-inspired principles can have for longstanding as well as novel legal

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7. *See* Cass R. Sunstein, *Sexual Orientation and the Constitution: A Note on the Relationship Between Due Process and Equal Protection*, 55 U. CHI. L. REV. 1161, 1164–70 (1988).

8. *See Watkins*, 875 F.2d at 711–31 (Norris, J., concurring in the judgment).

9. Sunstein, *supra* note 7, at 1163. For the explication of this proposition, see *id.* at 1170–78.

10. 517 U.S. 620 (1996).

11. *See id.* at 635. *Evans* did not mention, much less distinguish, *Hardwick*. For critique, see *id.* at 641 (Scalia, J., dissenting).

12. Although *Evans* does not overrule *Hardwick*, even implicitly, the two decisions are, in my view, ultimately irreconcilable. *See* WILLIAM N. ESKRIDGE, JR., GAYLAW: CHALLENGING THE APARTHEID OF THE CLOSET 150–51, 209–11 (1999).

practices. While the equal protection cases sometimes unsettle traditional baselines, they usually defer to them. Most interestingly, the constitutional experience of lesbian and gay litigants—the occasion for Sunstein's generalization—has been contrary to the thesis and supports a different understanding: a frequently *destabilizing due process* that offers marginalized Americans multiple points of challenge to traditional exclusionary and persecutory state practices at the retail level, which is complemented by an *evolutive equal protection* that offers such groups the possibility that, if traditional norms against them weaken, the judiciary will force the political process to clean up remaining exclusionary policies on a wholesale level.

I. THE RELATIONSHIP BETWEEN DUE PROCESS AND EQUAL PROTECTION METHODOLOGIES

Academics and judges who believe that constitutional interpretation must be faithful to the original meaning of constitutional texts are unlikely to distinguish the Due Process and Equal Protection Clauses; such thinkers will generally emphasize backward-looking considerations for both.[13] For such *traditionalists*, the Fourteenth Amendment assures us that legal innovations will not diminish the liberties and equalities our people have traditionally enjoyed, but it has lirtle critical bite for longstanding practices that current skeptics consider unjust. Academics and judges who believe that constitutional interpretation must be faithful to normative visions of justice and citizenship are also unlikely to distinguish between the clauses; such thinkers will generally emphasize forward-looking considerations in both due process and equal protection cases.[14] For such *progressives*, the Fourteenth Amendment authorizes judges to be critics of longstanding as well as novel legal rules and practices and to set new baselines grounded in current concep-

13. *See, e.g.*, Rutan v. Republican Party, 497 U.S. 62, 95–96, 96 n.1, 102–03 (1990) (Scalia, J., dissenting); Padula v. Webster, 822 F.2d 97 (D.C. Cir. 1987) (upholding federal job discrimination against gay people on the authority of *Hardwick*); ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 75–77, 143–45, 154–55 (1990); EARL M. MALTZ, RETHINKING CONSTITUTIONAL LAW: ORIGINALISM, INTERVENTIONISM, AND THE POLITICS OF JUDICIAL REVIEW (1994); ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW (1997).

14. In addition to KARST, *supra* note 1, see, for example, *Michael H. v. Gerald D.*, 491 U.S. 110, 137–41 (1989) (Brennan, J., dissenting); RONALD DWORKIN, FREEDOM'S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION (1996); ROBIN WEST, PROGRESSIVE CONSTITUTIONALISM: RECONSTRUCTING THE FOURTEENTH AMENDMENT (1994); William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977); and Lawrence Lessig, *Fidelity in Translation*, 71 TEX. L. REV. 1165 (1993).

tions of justice that can trump tradition and history. The distinction between backward-looking due process and forward-looking equal protection is unlikely to be persuasive for either traditionalists or progressives, who are driven by their methodological commitments to reject the idea, at least rhetorically.

The thesis is most relevant to centrist professors and judges who consider both tradition and justice pertinent to constitutional theory, and who emphasize that the rule of law includes the Court's precedents and the principles they contain.[15] For such *pragmatists*, the Fourteenth Amendment requires judges to examine novel as well as traditional legal rules and practices to determine whether they are consistent with precedent and the ongoing normative enterprise of judicial review. Pragmatic thinkers ought to be open to the argument that the Due Process and Equal Protection Clauses serve different preservative and critical functions, respectively, and that those different functions are reflected in the Court's precedents. The remainder of this essay will suggest reasons why precedent-emphasizing centrists, too, ought to be skeptical of the thesis.

A. The General Structure and Construction of the Fourteenth Amendment

Section one of the Fourteenth Amendment announces that "[a]ll persons born or naturalized in the United States . . . are citizens" of this country and the state in which they live.[16] Section one then says that states cannot "deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."[17] On the face of it, neither of these latter clauses seems more forward- or backward-looking than the other; both clauses seem present-looking. Each contemplates a current norm to which the state should presumptively conform when it deprives any particular person of his or her rights. The Due Process Clause announces a procedural norm. If the state is doing something that triggers my rights under the clause, then it has an obligation to give me the normal process appropriate to my situation and deprivation. Courts have long construed the clause to carry with it some substantive norms as

15. *See generally* PHILIP BOBBITT, CONSTITUTIONAL INTERPRETATION (1991); DENNIS PATTERSON, LAW AND TRUTH (1996); RICHARD A. POSNER, THE PROBLEMS OF JURISPRUDENCE (1990); Daniel A. Farber & Philip P. Frickey, *Practical Reason and the First Amendment*, 34 UCLA L. REV. 1615 (1987); Barry Friedman & Scott B. Smith, *The Sedimentary Constitution*, 147 U. PA. L. REV. 1 (1998); David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877 (1996). A judicial exemplar is *Planned Parenthood v. Casey*, 505 U.S. 833 (1992) (joint opinion of O'Connor, Kennedy & Souter, JJ.).

16. U.S. CONST. amend. XIV, § 1.

17. *Id.*

well, thereby demanding a fit between the reasonableness of the deprivation (whatever the process) and the "law of the land."[18] The Equal Protection Clause requires the state to justify any difference in procedural or substantive treatment of one person vis-à-vis another. In short, the Due Process Clause demands a reasonable process and basis for state action that hurts my interests, while the Equal Protection Clause demands a reasonable basis for state action that hurts my interests but not yours. Karst has argued that both clauses subserve the goal of the first sentence of the Fourteenth Amendment—to guarantee citizenship.[19]

That both provisions look immediately to the present law of the land does not mean that neither looks backward or forward—only that there is no inherent reason to think that one is predominantly backward-looking and the other predominantly forward-looking. Backward-looking considerations—traditional legal values and practices—are relevant to both clauses.[20] A long-standing history of state practice supports claims that a state rule is both nonarbitrary (due process) and nondiscriminatory (equal protection). That support is attenuated if the challengers have a cogent normative indictment of the past practices, such as a showing that they have produced or are producing unjustified bad consequences. Thus, forward-looking considerations—critical arguments—are also relevant to arguments under both clauses.

Suppose the state deprives anyone arrested for sodomy of his or her right to vote. Such a rule might be challenged as an arbitrary deprivation of an important due process liberry, or as a violation of equal protection, or as both. Whatever the basis for challenge, both backward- and forward-looking arguments will be relevant. Surely it is pertinent to know, for equal protection as well as due process purposes, whether such laws have been common in the Anglo-American tradition, what motivated legislatures to adopt them, and how they have worked.[21] Longstanding enforcement of such laws contributes something to their validiry under either clause. It is also pertinent

18. *See* Mugler v. Kansas, 123 U.S. 623 (1887); Edwin S. Corwin, *The Doctrine of Due Process of Law Before the Civil War*, 24 HARV. L. REV. 366, 368 (1911).

19. *See* Kenneth L. Karst, *The Supreme Court, 1976 Term—Foreword: Equal Citizenship Under the Fourteenth Amendment*, 91 HARV. L. REV. 1, 5–11 (1977) (drawing from CHARLES BLACK, JR., STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW 51–66 (1969)).

20. Similarly, both clauses reflect American traditions. Cass R. Sunstein recognizes that due process fairness has deep resonance in our history, but he neglects our equally deep historical tradition of equal treatment. *See* Kenneth L. Karst, *Why Equality Matters*, 17 GA. L. REV. 245 (1983).

21. Such laws were common earlier in American history, but they required conviction, not just arrest, for sodomy. *See, e.g.*, Hunter v. Underwood, 471 U.S. 222 (1985) (deciding the constitutionaliry of a statute disenfranchising anyone convicted of a crime involving moral turpitude, including sodomy).

to consider, for due process as well as equal protection purposes, the effect of such a law on the future operation of the democracy and the justice of applying such a law to exclude people who have been objects of police attention because of their gender or sexual orientation.[22] A persuasive argument that such laws are counterproductive or unjust contributes something to their invalidity under either clause. The precise weighing of the various backward- and forward-looking factors would be influenced by present-looking ones—prevailing social and political norms or consensus about the matter within the polity,[23] as well as the agenda(s) and perspective(s) of the particular judges weighing the various considerations.[24]

The foregoing analysis is illustrated by the Supreme Court's cases holding that the Due Process Clause "incorporates" most of the protections of the Bill of Rights to protect individuals against state invasions of individual liberties. *Palko v. Connecticut*,[25] which considered whether the Fifth Amendment's protection against double jeopardy is applicable to the states, posed the inquity in both forward- and backward-looking ways: ls protection against double jeopardy "of the very essence of a scheme of ordered liberty" (forward-looking)?[26] Would ttying someone twice for the same crime "violate a 'principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental'" (backward-looking)?[27] The Court has waffled between the two kinds of formulations. Considering both historical practice and abstract principle, *Palko* held that the states may constitutionally tty a defendant twice. Reexamining the issue a generation later, the Court held that double jeopardy is a key feature of ordered liberty.[28] The incorporation doctrine has been applied in ways that are both forward- and backward-looking; the sharpness of the doctrine's critical edge has been driven by

22. *See* James E. Fleming, *Constructing the Substantive Constitution*, 72 TEX. L. REV. 211, 267–68, 273–75 (1993) (discussing the similarity between the due process antitotalitarian principle and the anticaste principle of equal protection).

23. Thus, if the statute were being evaluated in the homophobic 1950s, both due process and equal protection challenges would likely fail. lf evaluated in 2000, now that the movement to ostracize gay people has been largely abandoned, the law would probably be invalidated under either equal protection or due process (lack of procedural safeguards). *See* Dunn v. Blumstein, 405 U.S. 330 (1972) (finding discrimination in the fundamental right to vote); *cf.* Kansas v. Hendricks, 521 U.S. 346, 368–71 (1997) (upholding a civil commitment law because of the many procedural safeguards to assure that only guilty people were penalized).

24. This latter factor will typically be decisive only when there is no stable social or political equilibrium on the matter, or if the equilibrium is shifting. *See infra* Part III.

25. 302 U.S. 319 (1937), *overruled by* Benton v. Maryland, 395 U.S. 784 (1969).

26. *Id.* at 325.

27. *Id.* (quoting Snyder v. Massachusetts, 291 U.S. 97, 105 (1934)).

28. *See* Benton v. Maryland, 395 U.S. 784, 794 (1969). The Warren Court deployed the incorporation doctrine with a much greater critical edge than prior or subsequent Courts have done. *See* Jerold H. Israel, *Selective Incorporation Revisited*, 71 GEO. L.J. 253 (1982).

present-oriented agendas as much as by anything inherent in either the Due Process Clause or the Court's precedents.

The contingent balance of backward- and forward-looking considerations is also apparent in the Supreme Court's segregation cases decided under the Equal Protection Clause. *Plessy v. Ferguson*[29] upheld a state segregation law, reasoning in part that the legislature "is at liberty to act with reference to the established usages, customs, and traditions of the people" in imposing race-based rules.[30] *Brown v. Board of Education*[31] was a more progressive approach to equal protection, but it took the Court two generations to reject *Plessy*, and only after apartheid had become a national embarrassment to whites and the national government.[32] And *Brown*'s potentially revolutionary antiapartheid rule was moderated by the Court's hesitance in implementing the mandate to desegregate.[33] Although the Court was pretty aggressive in enforcing the *Brown* mandate in the 1960s and early 1970s, the Justices, after 1973, frequently curtailed the authority of the lower courts to transform school districts into a unitary school system, in deference to the idea that "[n]o single tradition in public education is more deeply rooted than local control over the operation of schools."[34] The current Court strongly emphasizes tradition-based limits on courts' powers to remedy segregation in public schools.[35]

B. The Due Process Clause of the Fifth Amendment: The Link Between Arbitrary and Discriminatory Federal Action

The Fifth Amendment, which applies to the federal government, has a due process but not an equal protection clause. The early antidiscrimination cases against the federal government emphasized this contrast with the

29. 163 U.S. 537 (1896), *overruled by* Brown v. Board of Educ., 347 U.S. 483 (1954).

30. *Plessy*, 163 U.S. at 550. Justice John M. Harlan took a more forward-looking approach to the equal protection guarantee, but his views were expressed in lonely dissent. *See id.* at 559–61 (Harlan, J., dissenting).

31. 347 U.S. 483 (1954) (invalidating racial segregation in public schools and relying on progressive social science criticisms of apartheid).

32. *See* Mary L. Dudziak, *The Little Rock Crisis and Foreign Affairs: Race, Resistance, and the Image of American Democracy*, 70 S. CAL. L. REV. 1641 (1997); Derrick A. Bell, Jr., Comment, Brown v. Board of Education *and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518 (1980).

33. *See* Brown v. Board of Educ., 349 U.S. 294, 301 (1955) (ordering that implementation should occur "with all deliberate speed," a mandate the Court did little to enforce until the 1960s).

34. Milliken v. Bradley, 418 U.S. 717, 741 (1974).

35. *See, e.g.*, Freeman v. Pitts, 503 U.S. 467, 489–90 (1992) (curtailing the court-imposed restructuring as inconsistent with the old remedial precept that "the nature of the violation determines the scope of the remedy" and with our "vital national tradition" favoring "local autonomy of school districts").

Fourteenth Amendment, which of course has an equal protection clause as well. Upholding a wartime curfew applicable only to people of Japanese descent, *Hirabayashi v. United States*[36] reasoned that the Fifth Amendment "restrains only such discriminatory legislation by Congress as amounts to a denial of due process" and found the national defense justifications for the legislation sufficient to constitute a "rational basis" for the law,[37] notwithstanding its novelty. The Court applied the *Hirabayashi* approach to a more severe—and virtually unprecedented—deprivation (forced internment) in *Korematsu v. United States*.[38]

The Court dramatically narrowed the distinction between arbitrariness (due process) and discrimination (equal protection) in *Bolling v. Sharpe*.[39] *Bolling* held that federal racial segregation of the public schools in the District of Columbia violated the Fifth Amendment's Due Process Clause[40] on the same day that the Court held in *Brown* that state segregation violated the Fourteenth Amendment's Equal Protection Clause.[41] *Bolling*'s reasoning is inconsistent with the idea that due process is a backward-looking contrast to equal protection. As the Court put it, "the concepts of equal protection and due process, both stemming from our American ideal of fairness, are not mutually exclusive."[42] Thus, because racial segregation "is not reasonably related to any proper governmental objective," it imposed on black children an "arbitrary deprivation of their liberty," in violation of the Due Process Clause as traditionally understood.[43] The Court also noted that the Due Process Clause ought not bear an interpretation that allowed the federal government to maintain segregated schools at the same time that the states were prohibited from doing so.[44]

As Karst first pointed out, the Supreme Court after *Bolling* regularly treated the precedents applying the Fifth Amendment's Due Process Clause to police arbitrary race-based policies as interchangeable with the precedents construing the Equal Protection Clause of the Fourteenth Amendment to

36. 320 U.S. 81 (1943).
37. *Id.* at 100, 102 (citing and following Detroit Bank v. United States, 317 U.S. 329 (1943)).
38. 323 U.S. 214 (1944).
39. 347 U.S. 497 (1954).
40. *See id.* at 500.
41. *See* Brown v. Board of Educ., 347 U.S. 483, 495 (1954).
42. *Bolling*, 347 U.S. at 499. One of the few decisions rejecting a segregationist law during the *Plessy* regime was *Buchanan v. Warley*, 245 U.S. 60 (1917), which relied on the Due Process Clause.
43. *Bolling*, 347 U.S. at 500.
44. *See id.*

police race-based discriminations.[45] *Adarand Constructors, Inc. v. Peña*[46] officially recognized this practice and held that the Fifth Amendment's Due Process Clause prohibits the same discriminatory activities engaged in by the federal government as would be barred by the Fourteenth Amendment's Equal Protection Clause.[47] Although *Adarand* addressed the fractious issue of affirmative action, the dissenters did not challenge the majority's insistence that Fifth Amendment due process and Fourteenth Amendment equal protection exhibit the same forward-looking goal of ending racial discrimination.[48]

In short, the Fifth Amendment cases deploy the Due Process Clause's protection against *arbitrary* federal action to regulate what the Equal Protection Clause would consider *discriminatory* action if taken at the state level. The leading post-*Korematsu* cases are forward-looking: They not only invoke critical considerations, such as theories about how state policies contribute to prejudice, but also subject to strict scrutiny federal policies that had been followed since the 1860s—segregation of public schools (*Bolling*) and race-based remedial policies to benefit people of color (*Adarand*). Although the idea suggested by these cases is subversive of the Sunstein thesis, the cases might be rationalized as responding to a strong desire for coherence in the antidiscrimination requirements imposed by the Constitution on government at the federal and the state levels. An examination of the Fourteenth Amendment cases is therefore useful. Do those cases rehabilitate the thesis of a backward-looking Due Process Clause working with a forward-looking Equal Protection Clause?

C. The Fourteenth Amendment: Forward-Looking Due Process and Backward-Looking Equal Protection Cases

The individual rights provisions of the Fourteenth Amendment have helped transform the state regulatory baselines for many marginalized Americans. Under the Sunstein thesis, one would expect a large majority of the transformative cases to have been decided under the Equal Protec-

45. *See* Kenneth L. Karst, *The Fifth Amendment's Guarantee of Equal Protection*, 55 N.C. L. REV. 541, 554 (1977).

46. 515 U.S. 200 (1995) (overruling Metro Broad., Inc. v. FCC, 497 U.S. 547 (1990)).

47. *See Adarand*, 515 U.S. at 226–27.

48. Dissenters conceded that "'both Amendments require the same type of analysis,'" but argued that "'there may be overriding national interests which justify selective federal legislation that would be unacceptable for an individual State.'" *Id.* at 253 n.8 (Stevens, J., dissenting) (quoting Hampton v. Mow Sun Wong, 426 U.S. 88, 100 (1976) (overturning a federal civil service discrimination decision against noncitizens on due process grounds)).

tion Clause. Many such cases, such as the Warren Court's desegregation and one-person, one-vote decisions, were usually decided under that clause. However, just as many transformative cases, such as the Warren Court's criminal procedure cases and the Burger and Rehnquist Court's abortion cases, were usually decided under the Due Process Clause. Many were decided under both clauses. The following survey of six constitutional transformations suggests that the antiarbitrariness and ordered liberty due process ideas have been just as tradition shattering as equal protection's nondiscrimination theme.

1. *The Sexual Privacy Cases.* The Court's most lenient sexual privacy case, *Buck v. Bell*,[49] upheld a state law requiring sterilization of people with mental disabilities. The Court rejected the due process challenge, notwithstanding the novelty of the statute and its inconsistency with our traditions, for the forward-looking reason that the law was, in the Court's view, a farsighted response to a social problem.[50] The Court in *Buck* similarly rejected an equal protection challenge, dismissing it as "the usual last resort of constitutional arguments,"[51] but in *Skinner v. Oklahoma*[52] struck down an Oklahoma sterilization law on the equal protection ground that the law deprived people committing certain crimes of a "basic liberty," while exempting white-collar criminals.[53]

For the most part, the right of sexual privacy has been recognized under the Due Process Clause. Its leading articulation is Justice John M. Harlan's dissent in *Poe v. Ullman*,[54] which argued that a law prohibiting the distribution of birth control devices violates the Due Process Clause. This dissent illustrates the difficulty of pigeonholing the Due Process Clause as either backward-looking or forward-looking. The substantive commands of due process are derived from the balance between "liberty and the demands of organized society,"[55] a relatively abstract concept. The balance is informed by tradition—but tradition as a "living thing"[56] rather than an alienated past. Citing *Skinner* and *Bolling*, the dissent recognized that liberty in an ordered polity requires "freedom from all substantial arbitrary impositions

49. 274 U.S. 200 (1927).

50. "It is better for all the world, if instead of waiting to execute degenerate offspring for crime, or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind." *Id.* at 207.

51. *Id.* at 208.

52. 316 U.S. 535 (1942).

53. *See id.* at 541.

54. 367 U.S. 497, 541–45 (1961) (Harlan, J., dissenting).

55. *Id.* at 542.

56. *Id.*

and purposeless restraints."[57] Throughout his opinion, Justice Harlan emphasized both backward-looking features guiding judicial judgment, namely, practices traditionally forbidden in American jurisprudence, and forward-looking features, namely, the libertarian purposes of having government in the first place.

In subsequent cases, Court majorities found a constitutional right of privacy, first teased out of the penumbras of the Bill of Rights,[58] then briefly enforced under the Equal Protection Clause,[59] and finally rerooted in the Due Process Clause by *Roe v. Wade*.[60] The last decision, which finally gave the right of privacy a constitutional home in *Palko* and in the *Poe* dissent, was also the most radical. *Roe* overturned the abortion laws that existed in all but a handful of states—and about half of which had first been enacted before 1868, when the Fourteenth Amendment was adopted.[61] Although the Court defended its sweeping decision historically as well as philosophically, there has been little dispute from either defenders or critics that *Roe* was a highly forward-looking decision. The Court's reaffirmation of a diluted version of *Roe* in *Planned Parenthood v. Casey*[62] returned to the Harlan justification of a right of privacy and came up with a fresh synergy of living history, current values, and abstract justice to support a right to choose an abortion.

2. *The Marriage Cases*. Since the nineteenth century, the Supreme Court has recognized marriage as fundamental to people living in a polity committed to ordered liberty. That due process idea has been deployed aggressively in the last generation. The most radical case was *Loving v. Virginia*,[63] which invalidated a state law prohibiting different-race marriage. Virginia had never allowed such marriages, nor had most states until the post–World War II era. The Court relied on both the Equal Protection and the Due Process Clauses to invalidate the law, which was an invidious racial discrimination and invaded a fundamental substantive due process right.[64] As to the latter ground, a unanimous Court said this: "To deny this fundamental freedom on so unsupportable a basis as the racial classifications embodied in these statutes, classifications so directly subversive of the principle of equality at the heart of the Fourteenth

57. *Id.* at 543.
58. *See* Griswold v. Connecticut, 381 U.S. 479 (1965).
59. *See* Eisenstadt v. Baird, 405 U.S. 438 (1972).
60. 410 U.S. 113 (1973).
61. *See id.* at 175 n.1, 176 n.2 (Rehnquist, J., dissenting).
62. 505 U.S. 833 (1992) (joint opinion of O'Connor, Kennedy & Souter, JJ.).
63. 388 U.S. 1 (1967).
64. *See id.* at 12.

Amendment, is surely to deprive all the State's citizens of liberty without due process of law."[65] This kind of reasoning strongly recalls the *Bolling* line of cases.

The Court has applied the right to marry with attention to the Fourteenth Amendment's overall goals and without regard to the particular constitutional provision invoked.[66] In *Zablocki v. Redhail*,[67] the Court acted under the Equal Protection Clause to invalidate a law requiring deadbeat dads to satisfy their outstanding support obligations before they could remarry. Apparently applying the Due Process Clause, the Court in *Turner v. Safley*[68] struck down a regulation limiting the rights of state prisoners to marry. Restrictions on prisoner marriages have a much better historical pedigree than those on remarriages by deadbeat dads, but the Court ignored historical justifications and focused only on whether limiting this important right was needed for present or future penological objectives.

3. *The Criminal Procedure Cases.* In 1945, the constitutional rights afforded criminal defendants varied widely among the several states, in part because most of the criminal procedural assurances of the federal Bill of Rights had not been applied by the Supreme Coutt to the states, as in *Palko*. Criminal defendants who were latino or black, poor, or homosexual could expect rough treatment from the police in the 1950s, and an alarming number of such defendants were innocent or disproportionately punished for their crimes. This discriminatory system was attacked under the aegis of the Due Process and not the Equal Protection Clause.

Between 1949 and 1971, the Supreme Court nationalized the rights of criminal defendants, by incorporating most of the Bill of Rights into the Due Process Clause, rendering those rights directly applicable to the states. Among defendants' rights so nationalized were:

(1) the right to be free from unreasonable searches and seizures (Fourth Amendment);[69]

(2) the right not to incriminate oneself (Fifth Amendment);[70]

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65. *Id.* Recall the Fifth Amendment cases. *Loving* suggests that the connection between the due process antiarbitrariness idea and the equal protection antidiscrimination idea is not driven only by the textual omission in the Fifth Amendment. *See* Fleming, *supra* note 22, at 270.

66. *See* Kenneth L. Karst, *The Freedom of Intimate Association*, 89 YALE L.J. 624, 653 (1980).

67. 434 U.S. 374 (1978).

68. 482 U.S. 78 (1987). The Court did not specify what constitutional provision was violated but did emphasize the prison context of the marriage restriction. The lenient test in the prison cases is derived from the Eighth Amendment, as incorporated by the Due Process Clause.

69. *See* Wolf v. Colorado, 338 U.S. 25 (1949), *overruled on other grounds by* Mapp v. Ohio, 367 U.S. 643 (1961).

70. *See* Malloy v. Hogan, 378 U.S. 1, 8 (1964).

(3) the right not to be tried twice for the same offense (Fifth Amendment);[71]
(4) the right to counsel provided by the state if the defendant cannot afford one (Sixth Amendment);[72]
(5) the right to a speedy and public trial (Sixth Amendment);[73]
(6) the right to confront one's accusers (Sixth Amendment);[74]
(7) the right to a jury trial in criminal cases (Sixth Amendment);[75]
(8) the right to be free of cruel and unusual punishment (Eighth Amendment);[76]
(9) the right to nonexcessive bail (Eighth Amendment).[77]

The Warren Court also gave existing protections greater legal bite. For example, in *Mapp v. Ohio*,[78] the Court interpreted the Due Process Clause as requiring the exclusion of evidence seized in violation of the Fourth Amendment.[79] *Miranda v. Arizona*[80] required the police to apprise the accused that anything he said could be used against him and that he had a right to counsel.[81] The Court also construed due process to prohibit the state from entrapping defendants not otherwise disposed to committing crimes.[82]

The reasoning in these decisions combined backward-looking and forward-looking arguments, but their cumulative impact was critical and progressive. There is legitimate debate as to how much beneficent difference these decisions made in the real world of police-citizen interaction,[83] but there is scant ground for denying that they reset the baselines for police conduct in many jurisdictions and were inspired by the forward-looking antiracism agenda that also inspired *Brown*. Just as the Fifth Amendment's due process

71. *See* Benton v. Maryland, 395 U.S. 784 (1969) (overruling Palko v. Connecticut, 302 U.S. 319 (1937)).
72. *See* Gideon v. Wainwright, 372 U.S. 335, 343–45 (1963); *cf.* Argersinger v. Hamlin, 407 U.S. 25, 30–31 (1972) (holding that the right to counsel applies even to misdemeanors resulting in incarceration of just a single day).
73. *See* Klopfer v. North Carolina, 386 U.S. 213, 223 (1967).
74. *See* Pointer v. Texas, 380 U.S. 400, 406 (1965).
75. *See* Duncan v. Louisiana, 391 U.S. 145, 149 (1968).
76. *See* Robinson v. California, 370 U.S. 660, 666 (1962).
77. *See* Schilb v. Kuebel, 404 U.S. 357, 365 (1971).
78. 367 U.S. 643 (1961) (overruling Wolf v. Colorado, 338 U.S. 25 (1949)).
79. *See id.* at 655–57.
80. 384 U.S. 436 (1966).
81. *See id.* at 478–79.
82. *See* Sherman v. United States, 356 U.S. 369, 373 (1958); Sorrells v. United States, 287 U.S. 435, 451 (1932).
83. *See, e.g.*, Paul G. Cassell & Richard Fowles, *Handcuffing the Cops? A Thirty-Year Perspective on* Miranda's *Harmful Effects on Law Enforcement*, 50 STAN. L. REV. 1055 (1998) (criticizing *Miranda*); Louis Michael Seidman, Brown *and* Miranda, 80 CAL. L. REV. 673 (1992) (same).

guarantee against arbitrary state action could enforce the antidiscrimination norm directly, the Fourteenth Amendment's due process assurance of ordered liberty could enforce the norm indirectly, by empowering marginalized people in their interactions with the police.

4. *The Rights of Poor People.* The 1960s witnessed the birth of a welfare rights movement, whereby liberal reformers engaged in political and legal activism to reform the welfare system and to obtain better benefits for recipients.[84] The legal activism included lawsuits invoking constitutional arguments. The Supreme Court rejected most of the equal protection arguments but accepted some of the due process arguments supporting rights for poor people. The biggest constitutional victory was *Goldberg v. Kelly*,[85] which ruled that the state must afford welfare beneficiaries an adjudicatory hearing before it can terminate their benefits.[86] Justice Brennan's opinion for the Court emphasized the dignitary and legitimacy interests that society has in treating its poor as fairly as it treats its more fortunate citizens and held welfare benefits to be an "entitlement," and therefore "property," rather than a privilege or gratuity that the state could revoke at its pleasure.[87]

Goldberg did not hold that the Constitution guarantees poor people public support, and subsequent equal protection opinions by the Court rejected challenges to wealth-based classifications disadvantaging poor people.[88] The Court has given the Fourteenth Amendment more critical bite against statutes excluding the poor from use of the judicial process through filing fees, but the bite has just as often come under the Due Process as the Equal Protection Clause.[89] In *Boddie v. Connecticut*,[90] for example, the Court invoked

84. *See generally* MARTHA F. DAVIS, BRUTAL NEED: LAWYERS AND THE WELFARE RIGHTS MOVEMENT, 1960–1973 (1993).

85. 397 U.S. 254 (1970).

86. *See id.* at 264.

87. *See id.* at 262 n.8, 264–65; *see also* Connecticut v. Doehr, 501 U.S. 1 (1991); Fuentes v. Shevin, 407 U.S. 67 (1972); Sniadach v. Family Fin. Corp., 395 U.S. 337 (1969); Charles A. Reich, *The New Property*, 73 YALE L.J. 733 (1964). Although the Court has not applied *Goldberg* liberally, it reaffirmed the holding that states cannot assure people of puhlic benefits and then choose any kind of process to take them away. *See* Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 542–44 (1985).

88. *See* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1 (1973); Dandridge v. Williams, 397 U.S. 471 (1970). The Equal Protection Clause showed little critical edge, a point made by Justice Thurgood Marshall's dissenting opinions in both cases. *Rodriguez*, 411 U.S. at 98–100 (Marshall, J., dissenting); *Dandridge*, 397 U.S. at 520–21 (Marshall, J., dissenting).

89. *See generally* Karst, *supra* note 19, at 29–31; Frank I. Michelman, *The Supreme Court and Litigation Access Fees: The Right to Protect One's Rights (Part 2)*, 1974 DUKE L.J. 527.

90. 401 U.S. 371 (1971).

the due process protection of marriage to strike down filing fees for divorces when the fees barred access for poor people.[91]

The leading case is *Griffin v. Illinois*,[92] which invoked the two clauses in tandem to rule it unconstitutional for the state to charge poor defendants for assembling the record on appeal if that precluded them from seeking review of their felony convictions. "Both equal protection and due process emphasize the central aim of our entire judicial system—all people charged with crime must, so far as the law is concerned, 'stand on an equality before the bar of justice in every American court.'"[93] The Court recently reaffirmed *Griffin* in *M.L.B. v. S.L.J.*,[94] which held that the state must waive filing fees for poor people seeking to adjudicate their parental rights on appeal. As in *Griffin*, *M.L.B.* noted concerns with the filing fees under both the Equal Protection Clause ("the legitimacy of fencing out would-be appellants based solely on their inability to pay court costs") and the Due Process Clause ("the essential fairness of the state-ordered proceedings anterior to adverse state action").[95]

5. *Women's Rights*. Since colonial times, the American states have discriminated against women, and those discriminations have been challenged ever since the Fourteenth Amendment was adopted. One would reasonably expect that the Equal Protection Clause would have been the chief venue for challenge and reform, but the early challenges rested on several parts of the amendment—the Privileges and Immunities Clause,[96] the Due Process Clause,[97] and the Equal Protection Clause.[98] What united the challenges was not their constitutional source, but their constitutional result. In all of the cases cited in the margin, the Court upheld exclusions

91. Several concurring Justices treated the bar as a violation of equal protection. *See id.* at 383–86 (Douglas, J., concurring in the judgment); *id.* at 386–89 (Brennan, J., concurring in part). The Court in *United States v. Kras*, 409 U.S. 434 (1973), rejected an equal protection challenge to filing fees in bankruptcy proceedings. *Ortwein v. Schwab*, 410 U.S. 656, 660 (1973) (per curiam), refused to create a due process right for poor people to have appellate fees waived.

92. 351 U.S. 12 (1956).

93. *Id.* at 17 (plurality opinion) (quoting Chambers v. Florida, 309 U.S. 227, 241 (1940)); *see id.* at 21–26 (Frankfurter, J., concurring in the judgment) (emphasizing both clauses as well).

94. 519 U.S. 102 (1996).

95. *Id.* at 120. The Court gave greater emphasis to the equal protection feature. *See id.* Concurring Justice Anthony M. Kennedy rested his judgment solely on the Due Process Clause. *See id.* at 128–29 (Kennedy, J., concurring). Dissenters argued the inconsistency between any extension of *Boddie* and *Griffin* and the nation's longstanding constitutional traditions. *See id.* at 129–44 (Thomas, J., dissenting).

96. *See* Bradwell v. Illinois, 83 U.S. 130 (1872).

97. *See* Radice v. New York, 264 U.S. 292 (1924); Bosley v. McLaughlin, 236 U.S. 385, 392–94 (1915) (finding restrictions on student nurses' hours not to be a due process violation by restriction of contract freedom).

98. *See* Goesaert v. Cleary, 335 U.S. 464 (1948), *overruled by* Craig v. Boren, 429 U.S. 190, 210 n.24 (1976).

of and discriminations against women, usually in opinions laced with paternalistic rhetoric.[99]

The modern women's liberation movement changed the landscape in which the Court decided the cases, and official discriminations against women have diminished in the last generation. Many of the discriminations did not survive the intermediate equal protection scrutiny the Court adopted for sex-based classifications. Some feminist scholars maintain, however, that the abstract equality recognized in those decisions has done women little concrete good, in part because many of the fallen discriminations disadvantaged men rather than women, and in part because heightened scrutiny of sex-based classifications also imperils policies that meet women's special needs or remedy historic discriminations against women.[100] Moreover, some state policies most harmful to women have survived equal protection scrutiny in backward-looking or deferential opinions.[101]

State rules disadvantaging pregnant women or impeding women in making their own choices about when to have children are fundamental discriminations against women. Many of these discriminations have been invalidated—almost always under the Due Process Clause. *Griswold v. Connecticut*[102] was the death knell for the few remaining laws restricting women's access to birth control materials, and *Roe* was a massive judicial housecleaning of laws preventing women from obtaining abortions.[103] Laws penalizing pregnant women were challenged under the Equal Protection Clause—but *Geduldig v. Aiello*[104] ruled that it is not even sex discrimination,

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99. *See, e.g., id.* at 465–66 (allowing the state to prohibit women from bartending except in bars owned by their husbands or fathers; recalling "the alewife, sprightly and ribald, in Shakespeare"); *Bradwell*, 83 U.S. at 141 (Bradley, J., concurring) (allowing a state to deny women the right to be lawyers, as tradition has "always recognized a wide difference in the respective spheres and destinies of man and woman," with men as "woman's protector and defender").

100. *See* Mary E. Becker, *Obscuring the Struggle: Sex Discrimination, Social Security, and Stone, Seidman, Sunstein & Tushnet's* Constitutional Law, 89 COLUM. L. REV. 264 (1989); Sylvia A. Law, *Rethinking Sex and the Constitution*, 132 U. PA. L. REV. 955, 1007 (1984); Catharine A. MacKinnon, *Reflections on Sex Equality Under Law*, 100 YALE L.J. 1281 (1991).

101. *See, e.g.*, Rostker v. Goldberg, 453 U.S. 57 (1981) (finding constitutional a statute authorizing men but not women to be registered for the draft); Michael M. v. Superior Court, 450 U.S. 464 (1981) (holding that statutory rape laws can apply just to men having sex with underage women); Personnel Adm'r v. Feeney, 442 U.S. 256 (1979) (holding that strong preference for veterans for state civil service promotion is constitutional even though less than 1.8 percent of its beneficiaries were women). For a counterpoint to these and other sex discrimination decisions, see Kenneth L. Karst, *Woman's Constitution*, 1984 DUKE L.J. 447.

102. 381 U.S. 479 (1965).

103. There is support for the idea that *Roe* should have been decided on equal protection grounds. *See, e.g.*, Ruth Bader Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to* Roe v. Wade, 63 N.C. L. REV. 375 (1985); Karst, *supra* note 19, at 57–59. This idea makes the Court's reliance on supposedly backward-looking due process even more remarkable.

104. 417 U.S. 484 (1974).

and therefore not an equal protection violation, for a state employer to discriminate on the basis of pregnancy.[105] In contrast, *Cleveland Board of Education v. LaFleur*[106] struck down inflexible employment bars for pregnant women, on the ground that they created an irrebuttable presumption inconsistent with the Due Process Clause.[107] Ironically, in this area of presumed equal protection dominance, the opinions departing most radically from traditionalist baselines and actually giving women increased choices were due process decisions like *Roe* and *LaFleur*.

6. *Gay Rights*. My original uneasiness with the distinction between backward-looking due process and forward-looking equal protection grew into profound disagreement when I assembled a history of gay rights litigation in the period after 1961.[108] Lesbians, gay men, and bisexuals have been subject to pervasive and sometimes violent state discrimination and persecution, yet the "forward-looking" equal protection clause had no critical bite for those groups until the 1990s. I was not surprised to find that the First Amendment (applicable to the states through the Due Process Clause) sometimes protected gay expression from the 1950s onward, but I was astounded at how frequently the "backward-looking" Due Process Clause came to the aid of gay people, and to the aid of cross-dressers and transsexuals who remain absent in the Supreme Court's equal protection jurisprudence. Gay-legal history suggests that the distinction between backward-looking due process and forward-looking equal protection is not only unsupportable, but also that the Due Process Clause is more potentially destabilizing than constitutional scholars generally think, and the Equal Protection Clause as it has been interpreted by the Supreme Court (especially since 1973) is more evolutionary than revolutionary.

II. DESTABILIZING DUE PROCESS

The principles for which the Court invokes the Due Process Clause are rhetorically rooted in western legal tradition, but "tradition" is neither a

105. *See id.* at 497. The Court's reasoning was that pregnancy-based discrimination divides the world up into pregnant women versus men and nonpregnant women, whereas sex discrimination divides the world up into women versus men. *See id.* at 496 n.20; *see also* Bray v. Alexandria Women's Health Clinic, 506 U.S. 263, 269 (1993) (following *Geduldig* to interpret antidiscriminatory violence law to exclude women allegedly attacked by antiabortion activists).

106. 414 U.S. 632 (1974).

107. *See id.* at 651.

108. *See* William N. Eskridge, Jr., *Challenging the Apartheid of the Closet: Establishing Conditions for Lesbian and Gay Intimacy, Nomos, and Citizenship, 1961–1981*, 25 HOFSTRA L. REV. 817 (1997). For the shorter version, see ESKRIDGE, *supra* note 12, at 98–137.

stable nor an entirely backward-looking concept.[109] Also, whatever their source, the principles themselves make the Due Process Clause potentially quite *destabilizing*. By destabilizing, I mean that judges sometimes deploy due process to criticize previously acceptable legal rules, including some longstanding rules supported in varying degrees by Anglo-American tradition. *Roe v. Wade* was emphatically destabilizing in this sense—just as destabilizing as *Brown v. Board of Education* and *Loving v. Virginia* and much more so than *Zablocki v. Rednail* and *Romer v. Evans*, which invalidated novel and rather unusual statutory discriminations. The gay rights cases, most of which were brought after 1950, invoked the principles judicially recognized in the Due Process Clause. Although most judges were loathe to give homosexuals the slightest legal break, the more thoughtful judges reasoned from due process principles to challenge or overturn unfair antihomosexual policies that were justified by centuries-old sodomy prohibitions and longstanding rules against expressions of same-sex attraction or intimacy. Consider the principles that destabilizing due process wielded to contribute to a shift in public baselines—from outright state persecution to greater state neutrality toward gay people.

1. *The Principle of Procedural Fairness and the Integrity of State Processes.* A principle suggested by the procedural due process precedents like *Goldberg v. Kelly*, the entrapment cases, the exclusionary rule, and the criminal procedure incorporation decisions is that state process must be procedurally fair to accused persons. A fair process is one in which state actors neither break the law themselves nor encourage lawbreaking, the accused person is apprised of the charges against him and of his constitutional rights, the person has full opportunity to confront evidence against him, and any state penalty must be imposed by a neutral decisionmaker providing reasons that are factually based. The state cannot benefit ftom sordid practices and cannot bend the law to persecute socially despised outcasts.

A good many gay people were disciplined by corrupt state actors acting under questionable procedures, and the political culture was happy to tolerate this state of affairs for most of the twentieth century. Some judges stood against such shenanigans even during the height of the antihomosexual Kulturkampf of the 1950s and early 1960s. For example, in *Kelly v. United States*,[110] Judge E. Barrett Prettyman of the U.S. Court of Appeals for the District of Columbia Circuit disapproved of police entrapment of gay men

109. *See* Rebecca L. Brown, *Tradition and Insight*, 103 YALE L.J. 177 (1993). Justice Harlan in *Poe v. Ullman*, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting), referred to tradition as a "living thing." *See also* Michael H. v. Gerald D., 491 U.S. 110, 132 (1989) (O'Connor, J., concurring in part).

110. 194 F.2d 150 (D.C. Cir. 1952).

and set forth prophylactic evidentiary rules to minimize the risk of abusive police tactics.[111] Not only were trial judges instructed to exercise "great caution" when a charge of sexual solicitation was based on the testimony of the police officer alone, but a conviction required at least circumstantial corroboration of the officer's testimony.[112] In another example, the California Supreme Court in *Bielicki v. Superior Court*[113] interpreted the Due Process Clause and the state constitution to prohibit the police from spying on men having oral sex within enclosed stalls in public restrooms. Such spying invaded the "personal right of privacy of the person occupying the stall" and was an abusive practice.[114] With indirect Supreme Court encouragement, other states followed California's lead.[115] While such decisions by no means ended police stakeouts of public restrooms, they did raise the costs of that long-standing practice. More importantly, decisions like *Bielicki* became rallying points once gay people organized themselves politically in the big cities and contributed progay baselines in the bargaining process between gay people and the police.[116]

Most of the integriry of process cases involved criminal prosecutions, but an increasing number involved discharges from the armed forces, which had since 1921 prohibited sexual "degenerates" from serving, and for at least as long had taken many procedural shortcuts to enforce that rule. Like hundreds of other women in the 1950s, Corporal Fannie Mae Clackum was drummed out of military service on unsubstantiated charges that she was a lesbian. Unlike almost all of the others, she refused to go quietly. Clackum insisted upon a court-martial hearing so that she could confront the evidence against her, but all the government was willing to provide was an administrative hearing, in which the examiner deferred to the judgment of the still-unnamed accusers. The Court of Claims in *Clackum v. United States*[117] held the discharge unlawful under the Due Process Clause, because it was rendered "without any semblance of an opportunity to know what the evidence against her was, or to face her accusers in a trial or hearing."[118]

The next decade saw more gay people follow Clackum's lead, frequently with success. In the 1950s, the armed forces were usually able to purge

111. *See id.* at 154–55.
112. *See id.*
113. 371 P.2d 288 (Cal. 1962).
114. *Id.* at 292.
115. *See, e.g.*, People v. Dezek, 308 N.W.2d 652, 655 (Mich. Ct. App. 1981); *see also* Buchanan v. State, 471 S.W.2d 401, 404 (Tex. Crim. App. 1971). California extended its protection to open stalls in *People v. Triggs*, 506 P.2d 232 (Cal. 1973).
116. *See* Eskridge, *supra* note 108, at 836–42.
117. 296 F.2d 226 (Ct. Cl. 1960).
118. *Id.* at 229.

suspected lesbians by coercing their friends to turn against them. Their friends would be threatened with expulsion from the military if they did not cooperate. This tactic came under fire in the 1960s. In 1968, the Mattachine Society of Washington (MSW) learned that the army was preparing a purge of alleged lesbians at two bases in the D.C. area. The organization went into action—notifying the commanding officers that MSW and the press were monitoring the situation, leafletting the bases with pamphlets detailing one's procedural rights during a federal investigation, and representing two women ultimately accused. Insisting on every iota of due process, the women were cleared for lack of evidence; only women who cooperated with the investigators were expelled.[119]

2. *Ordered Liberty and the Privacy Principle. Palko v. Connecticut*'s idea of ordered liberty insists that the state not adopt policies that restrict people's freedoms, especially when only a minority's freedoms are restricted, unless justified by genuinely important public needs. *Griswold v. Connecticut* was heir to this idea and contributed to the destabilization of longstanding state laws criminalizing sodomy between consenting adults. To begin with, *Griswold* was the occasion for a new ally to join the homophile cause: the national ACLU, which in 1957 had publicly acquiesced in the constitutionality of consensual sodomy laws.[120] After *Griswold*, the ACLU adopted the position that private consensual behavior between two people of the same sex ought not be illegal.

Griswold also gave gay people and their allies freshly credible constitutional arguments that required judicial attention be directed toward consensual sodomy laws. Although the Supreme Court was unreceptive to privacy arguments protecting same-sex sodomy, some federal judges found them persuasive,[121] as have an increasing number of state judges. The New York Court of Appeals invalidated its state consensual sodomy law in *People v. Onofre*,[122] holding that the due process right to privacy is not limited to marriage and procreation-based activities but rather is "a right of independence in making certain kinds of important decisions, with a concomitant right to conduct oneself in accordance with those decisions, undeterred by governmental

119. *See* Franklin Kameny, *WAC's Prevail Over Army*, LADDER, Aug.–Sept. 1969, at 7.

120. *See* JOHN D'EMILIO, SEXUAL POLITICS, SEXUAL COMMUNITIES: THE MAKING OF A HOMOSEXUAL MINORITY IN THE UNITED STATES 1940–1970, at 212–13 (1983).

121. *See* Doe v. Commonwealth's Attorney, 403 F. Supp. 1199 (E.D. Va. 1975) (three-judge court) (upholding Virginia's sodomy law, over dissent by Judge Merhige), *aff'd*, 425 U.S. 901 (1976) (mem.); Buchanan v. Batchelor, 308 F. Supp. 729 (N.D. Tex. 1970) (three-judge court) (striking down Texas sodomy law), *vacated sub nom.* Buchanan v. Wade, 401 U.S. 989 (1971) (mem.). *Doe* was criticized in Karst, *supra* note 19, at 65.

122. 415 N.E.2d 936, 939 (N.Y. 1980).

restraint."[123] Although the Supreme Court rejected this reading of the privacy right in *Bowers v. Hardwick*, the *Onofre* reading has arguably been more influential. Not only have most states decriminalized sodomy between consenting adults, but an increasing number of states are doing so by judicial invocation of a state constitutional right of privacy—including the Georgia Supreme Court, which in 1998 struck down the sodomy law that the U.S. Supreme Court had found sufficiently justified.[124]

To be sure, the virtual unanimity of courts on this matter in recent years might be viewed as a judicial cleaning-up operation, ridding states of laws that had become embarrassments, rather than as any kind of policy revolution. Nonetheless, the privacy decisions listed in the margin have destabilized longstanding policies in traditionalist states whose legislatures would not have acted on their own. Privacy has also had critical bite in more liberal states. The New York Court of Appeals, for example, extended *Onofre* to invalidate the law prohibiting anyone from loitering in a public place for the purpose of soliciting another person for "deviate sexual intercourse,"[125] a pretty bold deployment of due process given widespread agreement that the state has authority to regulate public displays of sexuality.

3. *Vagueness and the Antiobsolescence Principle*. The Due Process Clause makes it unconstitutional for the state to hold people accountable for violating laws that do not articulate precisely what conduct is allowed and what is forbidden. The Supreme Court's most interesting application of the vagueness doctrine, *Papachristou v. City of Jacksonville*,[126] invalidated a municipal vagrancy law of the sort that were common since the colonial era and whose precise language had originated in mid–nineteenth century ordinances. The opinion of the Court bristled with forward-looking analysis, for the ordinance was being deployed by the police to harass people of color, interracial couples such as the defendants in *Papachristou*, and other "nonconformists."[127] The vice of vague laws under *Papachristou* was not just their failure to give notice to citizens of what the law required, but also the excessive discretion they vested in police officers. I would draw a further principle from the case: Many of the laws with the deepest roots in tradition have become obsolescent as

123. *Id.* at 939.

124. *See* Powell v. State, 510 S.E.2d 18 (Ga. 1998). For other decisions invalidating state sodomy laws on privacy grounds, see *Kentucky v. Wasson*, 842 S.W.2d 487 (Ky. 1992) (relying on equal protection); *Louisiana v. Smith*, 729 So. 2d 648 (La. Ct. App. 1999); *Gryczan v. Montana*, 942 P.2d 112 (Mont. 1997); and *Campbell v. Sundquist*, 926 S.W.2d 250 (Tenn. Ct. App. 1996).

125. People v. Uplinger, 447 N.E.2d 62 (N.Y. 1983).

126. 405 U.S. 156 (1972).

127. *See id.* at 164, 169–70.

times have changed, and the Due Process Clause is a vehicle to weed out obsolescent laws or at least force the legislature to update them. This last idea animated vagueness challenges made by gay, bisexual, and transgendered people.

Many state sodomy laws were prime candidates for similar challenges, as they were adopted in the nineteenth century, criminalized only the highly open-ended "crime against nature," and were enforced in arbitrary and resource-wasting ways. The first major decision accepting this argument was *Harris v. State*.[128] The Alaska Supreme Court held that the phrase "crime against nature" had little meaning to the typical citizen and reflected the statute's endorsement of an obsolescent natural law rather than a secular basis for regulating sexuality.[129] The court also relied on current attitudes, which were more libertarian that those of bygone years. "[T]he widening gap between our formal statutory law and the actual attitudes and behavior of vast segments of our society can only sow the seeds of increasing disrespect for our legal institutions."[130] Several other states applied this kind of due process reasoning to strike down their "crime against nature,"[131] "unnatural and lascivious acts,"[132] "solicitation for deviate sexual intercourse,"[133] "lewd or indecent acts,"[134] and "public indecency" laws.[135]

The most dramatic invocation of the vagueness doctrine came in the lawsuits challenging laws criminalizing cross-dressing. Beginning in the middle of the nineteenth century, many cities and a few states adopted laws making it a crime for a person to appear in public "in a dress not belonging to his or her sex."[136] Almost from the beginning, these laws were deployed to harass gender, and then sexual, nonconformists—men-renouncing women, male "fairies" who paraded in women's attire, working class "butch" lesbians, drag

128. 457 P.2d 638, 647 (Alaska 1969).

129. *See id.* at 645.

130. *Id.*

131. *See* Franklin v. State, 257 So. 2d 21 (Fla. 1971) (per curiam). *But cf.* Thomas v. State, 326 So. 2d 413 (Fla. 1975) (retaining the misdemeanor for "unnatural and lascivious acts").

132. *See* Commonwealth v. Balthazar, 318 N.E.2d 478, 481 (Mass. 1974) (construing the law narrowly under the due process rule of lenity).

133. *See* City of Columbus v. Scott, 353 N.E.2d 858 (Ohio Ct. App. 1975); State v. Sharpe, 205 N.E.2d 113 (Ohio Ct. App. 1965); *cf.* State v. Phipps, 389 N.E.2d 1128 (Ohio 1979) (construing a new state antisolicitation law narrowly).

134. *See* District of Columbia v. Walters, 319 A.2d 332 (D.C. 1974).

135. *See In re* Davis, 51 Cal. Rptr. 702 (Cal. Ct. App. 1966).

136. ESKRIDGE, *supra* note 12, at 27–29 (quoting the Chicago ordinance). On these laws and their application, see generally ESKRIDGE, *supra* note 12, at 27–29, 338–41 app. A2 (cataloguing cities with such laws); *id.* at 378–80 app. C4 (listing arrests in one city, St. Louis).

queens, and (most recently) transsexuals. *Papachristou* gave gender-benders and their ACLU allies winning arguments against police harassment. Representative was the Ohio Supreme Court's decision in *City of Columbus v. Rogers*,[137] which overturned the conviction of a male cross-dresser on the ground that the ordinance was vague. The court's opinion stressed that dress is a particularly malleable social convention, indeed one that was more sexually indeterminate than ever before.[138] Because the ordinance rested upon outmoded assumptions, its antiquity proved its undoing, rather than its salvation, under a rather forward-looking and critical reading of the Due Process Clause. Judges invoked *Rogers*-type reasoning to strike down cross-dressing ordinances in Chicago, St. Louis, and a number of other cities.[139] After about a decade of litigation, virtually all of the nation's laws criminalizing cross-dressing had been swept away by the Due Process Clause.

4. *Structural Due Process and Principles of Nondelegation and Institutional Competence*. The Due Process Clause has a structural dimension that justifies judicial review that monitors policies to ensure they are made by the most legitimate decisionmaker in a procedurally accountable way.[140] One feature of structural due process is the nondelegation principle: the idea that important policy decisions should be made by the most democratically appropriate institutions. The nondelegation principle is the best justification for the rule of lenity which courts sometimes deploy to construe ambiguous penal statutes in favor of those penalized. Although the rule of lenity is traditionally associated with the antivagueness feature of due process, it might be better conceptualized as a judicial refusal to update criminal statutes and an insistence that the legislature alone has the capacity to make those moral judgments.[141]

At the height of antihomosexual sentiment in this country, the rule of lenity was one of the few constitutional protections gay people (sporadically) enjoyed. For example, New York City magistrates engaged in a campaign in the 1950s to rebuff police entrapment of gay and bisexual men by inter-

137. 324 N.E.2d 563 (Ohio 1975).

138. *See id.* at 565.

139. *See* D.C. v. City of St. Louis, 795 F.2d 652 (8th Cir. 1986); City of Chicago v. Wilson, 389 N.E.2d 522 (Ill. 1978); ESKRIDGE, *supra* note 12, at 412 nn.41–42 (listing other cases).

140. *See* WILLIAM N. ESKRIDGE, JR. & PHILIP P. FRICKEY, CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY 485–506 (2d ed. 1995); Hans A. Linde, *Due Process of Lawmaking*, 55 NEB. L. REV. 197 (1976); Laurence H. Tribe, *Structural Due Process*, 10 HARV. C.R.-C.L. L. REV. 269 (1975). For a related idea, see Rebecca L. Brown, *Separated Powers and Ordered Liberty*, 139 U. PA. L. REV. 1513 (1991).

141. *See* Dan M. Kahan, *Lenity and Federal Common Law Crimes*, 1994 SUP. CT. REV. 345.

preting the state disorderly conduct law to require officers to show an actual breach of the peace rather than just a conversation suggesting sexual interest in an undercover decoy.[142] The most dramatic example of the rule of lenity came a generation later in *Pryor v. Municipal Court.*[143] The defendant was arrested for soliciting a decoy cop to engage in oral intercourse and charged with "lewd vagrancy," a misdemeanor that had been the chief ground for arresting gay and bisexual men in California for three generations. Notwithstanding the law's roots in state tradition, its narrowing by the legislature in 1961, and efforts by lower courts to define its ambit, the court ruled the law was impermissibly vague.[144] Having faulted the law's vagueness, the court declined to strike it from the books, but instead limited the law to the solicitation of sexual conduct that would occur in a public place, or to sexual touching if the actor knows or should know of the presence of persons who would probably be offended by that kind of conduct.[145]

A related feature of structural due process is the institutional competence principle: In a government of complex and overlapping responsibilities, the courts can prevent incapable institutions from implementing sweeping and unjust policies. The rule of lenity can be justified under this principle as well as the principle of nondelegation. Judges do not have the moral training or the democratic legitimacy to make important punitive decisions for the country. The principles of nondelegation and of institutional competence proved highly destabilizing in one of the areas of law most impervious to equal protection challenge—immigration and naturalization policy. For most of the twentieth century, the federal government discriminated against gender-bending and so-called degenerate aliens seeking to enter and stay in this country and, after 1940, seeking citizenship here.[146] In the wake of *Griswold*, Judge Walter Mansfield leniently interpreted the "good moral character" requirement in law governing naturalization to be no bar to admitted homosexuals,[147] a remarkable opinion in which the Immigration and Naturalization Service (INS) later acquiesced.[148]

142. *See, e.g.*, People v. Feliciano, 173 N.Y.S.2d 123 (N.Y. Magis. Ct. 1958); People v. Strauss, 114 N.Y.S.2d 322 (N.Y. Magis. Ct. 1952).

143. 599 P.2d 636 (Cal. 1979).

144. *See id.* at 641. The law left gay men at the mercy of police, at odds with *Papachristou's* warning against laws applied only to minorities. *See* Papachristou v. City of Jacksonville, 405 U.S. 156, 171 (1972) ("The rule of law, evenly applied to minorities as well as majorities . . . is the great mucilage that holds society together.").

145. *See Pryor*, 599 P.2d at 646.

146. *See* ESKRIDGE, *supra* note 12, at 35–36, 69–70, 132–34.

147. *See In re* Labady, 326 F. Supp. 924, 927–28 (S.D.N.Y. 1971).

148. *See Immigration Department Relaxes Gay Policy*, ADVOCATE, Sept. 22, 1976, at 10 (quoting Immigration and Naturalization Service memorandum).

Judge Mansfield's opinion had no effect on the separate statute that governed entry into this country. The latter had been interpreted by the Supreme Court in *Boutilier v. INS*[149] to include bisexual and gay people as "persons afflicted with psychopathic personality" who were barred from entry. The nondelegation principle was not available as a limiting rule, because the Court found that Congress—and not just the Public Health Service (PHS) and the INS that jointly administered the law—had made the policy choices that were the basis for the exclusion.[150] Over the next half-generation, however, the institutional competence principle destabilized this exclusion as well. The key development was the reversal of the psychiatric profession, which in the 1960s designated bisexual and gay people as mentally diseased, but which rejected that stance in the mid-1970s. Once that happened, the medical professionals in the PHS refused to cooperate in certifying gay and bisexual people as "psychopathic"—a development that threw the scheme into turmoil, because the law assumed the psychopathic personality exclusion would be based upon a medical examination.[151] The Ninth Circuit construed the statute to bar the INS—acting without the cooperation of the PHS—from excluding gay and bisexual people on the ground that it was not competent to make a medical decision.[152] Although the INS continued to give lip service to the antigay exclusion, it was effectively dead, and Congress repealed it without controversy in 1990.[153] At the end of the day, the twin principles of structural due process—nondelegation and institutional competence—had destabilized and ultimately felled two discriminations that had been part of American immigration and naturalization policies since their statutory incipiencies.

5. *The Antiarbitrariness Principle*. Gay men and lesbians were barred from state and federal civil service employment and from the armed forces for most of the twentieth century. Due to the pressures of the closet, it was not until the 1960s that lesbians, bisexuals, and gay men challenged these exclusions on their merits. Ironically, all of the early cases in which plaintiffs won were decided under the due process antiarbitrariness principle, whereby government decisions must be rationally related to public-regarding goals.

The leading decision was Chief Judge David L. Bazelon's opinion for the District of Columbia Circuit in *Norton v. Macy*,[154] involving the dis-

149. 387 U.S. 118 (1967).

150. *See id.* at 120–23 (arguing that these were in fact Congress's decisions).

151. *See* Eskridge, *supra* note 108, at 934–39 (describing the bizarre bureaucratic maneuvering that followed the Public Health Service's abandonment of its role).

152. *See* Hill v. INS, 714 F.2d 1470, 1478 (9th Cir. 1983).

153. *See* Immigration Act of 1990 § 601(a), 8 U.S.C. § 1182(a) (1994).

154. 417 F.2d 1161 (D.C. Cir. 1969).

charge of a NASA budget analyst for "immoral conduct" because he admitted to police officers that he was gay. The court found no obvious relationship between Clifford L. Norton's sexual orientation and his ability to do his job[155] and ruled, further, that the Civil Service Commission's abstract vision of morality was too broad and beyond its competence and was inconsistent with the statutory mandate, the efficiency of the service.[156] Explicitly invoking *Griswold*,[157] *Norton* all but held that private conduct and homosexual orientation are irrelevant to federal employment.[158] Subsequent litigation impelled the Commission to rethink its exclusion of lesbian and gay government employees. Soon after a district court issued an injunction upon finding that such a blanket exclusion was arbitrary under the Due Process Clause,[159] the Commission rescinded the policy, first in a 1973 bulletin and then in a formal tule barring federal agencies from disciplining gay people for their private conduct, unless the conduct "'affects job fitness.'"[160]

Norton's "nexus" requirement destabilized not only the longstanding federal civil service exclusion of gay people, but similar exclusions elsewhere. Gay people denied security clearances because of their sexual orientation sued under *Norton* and sometimes won some kind of relief.[161] State employees also invoked the nexus requirement in challenging their discharge. Following *Norton*, the California Supreme Court led the way in deploying due process to challenge state employment exclusions.[162] Perhaps most surprisingly, the longstanding military exclusion of lesbians, gay men, and bisexuals came under due process fire. Applying the nexus requirement in the military setting, the District of Columbia Circuit held in *Matlovich v. Secretary of the Air Force*[163] that the Air Force was required to give reasons for separating a gay sergeant who concededly had an exemplary service record, while not separating many others who were gay or had engaged in prohibited conduct.[164] Unlike the civil service exclusion, however, the military exclusion

155. *See id.* at 1167.

156. *See id.* at 1167 & n.28. Note the debt the argument in the text owes to the structural due process idea of institutional competence.

157. *See id.* at 1164 n.10.

158. *See id.* at 1168.

159. *See* Society for Individual Rights, Inc. v. Hampton, 63 F.R.D. 399, 400 (N.D. Cal. 1973) (following *Norton*), *aff'd on other grounds*, 528 F.2d 905 (9th Cir. 1975).

160. *See* Singer v. United States Civil Serv. Comm'n, 530 F.2d 247, 255 n.14, 256 n.15 (9th Cir. 1976) (explaining the process of the Commission's shift and quoting the bulletin and the rule).

161. *See, e.g.*, Gayer v. Schlesinger, 490 F.2d 740 (D.C. Cir. 1973); *see also Gayer Gets Clearance*, ADVOCATE, Oct. 8, 1975, at 9. The security clearance exclusion was revoked in 1995.

162. *See* Board of Educ. v. Jack M., 566 P.2d 602 (Cal. 1977) (en banc); Morrison v. State Bd. of Educ., 461 P.2d 375 (Cal. 1969) (en banc).

163. 591 F.2d 852 (D.C. Cir. 1978).

164. *See id.* at 860; *see also* Berg v. Claytor, 591 F.2d 849 (D.C. Cir. 1978) (reaching a similar result in a lawsuit against the Navy).

did not collapse under judicial scrutiny. The Carter Administration reformulated the exclusion, limiting discretion to retain any gay person within the military and insisting that the exclusion was needed to maintain discipline and good order in the armed forces. Starting with *Beller v. Middendorf*,[165] the courts of appeals rejected broad challenges to the policy arguments that litigants brought under the Fifth Amendment, including the equal protection component.

6. *The Principle of Dignity*. Perhaps the most fundamental value found in the Due Process Clause is the idea that the state is obligated to treat every person as a presumptively worthwhile human being who is entitled to respect and humane treatment.[166] This principle is a key reason *Buck v. Bell* and *Korematsu v. United States* were wrongly decided: The state was implementing policies that gave no regard to either the humanity or the actual context of the persons who were its objects. The state's demonization of "degenerates," "homosexuals and sex perverts," cross-dressers, lesbians, and gay men in the last century similarly denied dignity to its objects. The gay rights movement recognized this in 1961 when it publicly declared as its twin goals "[t]o equalize the status and position of the homosexual with those of the heterosexual" and "[t]o secure for the homosexual the right, as a human being, to develop and achieve his full potential and dignity, and the right as a citizen, to make his maximum contribution to the society in which he lives."[167]

The principle of dignity has been implicit in some American cases. Lesbians, gay men, and bisexuals have children, often in the context of a marriage to someone of a different sex. Such marriages typically dissolve at some point, which often raises issues of child custody and visitation. Traditionally, American states presumed against custody by lesbian, gay, or bisexual parents and imposed stringent limitations on their visitation rights.[168] This policy lacked any kind of fact-based foundation, as studies have found that lesbian and gay parents are just as good at raising children as straight parents, and it was largely based on social prejudice against bisexual and gay people.[169] State

165. 632 F.2d 788 (9th Cir. 1980).

166. *See* Karst, *supra* note 19, at 5–11; Jed Rubenfeld, *The Right of Privacy*, 102 HARV. L. REV. 737, 752–54 (1989).

167. Constitution of the Mattachine Society of Washington, art. II, § 1(b)–(c).

168. *See, e.g.*, Immerman v. Immerman, 1 Cal. Rptr. 298 (Cal. Ct. App. 1959); Bennett v. Clemens, 196 S.E.2d 842 (Ga. 1973). *See generally* Rhonda R. Rivera, *Our Straight-Laced Judges: The Legal Position of Homosexual Persons in the United States*, 30 HASTINGS L.J. 799, 889–90 (1979).

169. *See* Carlos A. Ball & Janice Farrell Pea, *Warring with Wardle: Morality, Social Science, and Gay and Lesbian Parents*, 1998 U. ILL. L. REV. 253 (responding to Lynn D. Wardle, *The Potential Impact of Homosexual Parenting on Children*, 1997 U. ILL. L. REV. 833); *see also* ESKRIDGE, *supra* note 12, at 211–15.

courts have been rethinking the antigay presumptions for the last generation. Their decisions have generally not been justified by reference to constitutional norms, but such norms are surely relevant and are probably a key reason state high courts have, one by one, been renouncing the old presumptions and insisting that the only criterion is the best interest of the child.[170] The constitutional underpinnings of a gay-neutral approach could be expressed in either equal protection (antidiscrimination) or due process (antiarbitrariness) terms, but the core idea is respect for human dignity. The opportunity to care for children ought not cavalierly be denied to gay people, because this would both deprive the child of a loving caretaker and deprive the parent of a unique mode of human flourishing.

The principle of dignity has been more explicit in other countries. For example, it was the focus of the decision of the Constitutional Court to invalidate South Africa's laws prohibiting sodomy and unnatural acts between men.[171] The challengers emphasized equality-based arguments, but the Justices chided them for not giving the same emphasis to the liberty-based arguments under the constitutional rights to dignity and privacy in that nation's constitution.

> The fact is that both from the point of view of the persons affected, as well as from that of society as a whole, equality and privacy cannot be separated, because they are both violated simultaneously by antisodomy laws. In the present matter, such laws deny equal respect for difference, which lies at the heart of equality, and becomes the basis for the invasion of privacy. At the same time, the negation by the state of different forms of intimate personal behaviour becomes the foundation for the repudiation of equality. Human rights are better approached and defended in an integrated rather than a disparate fashion. The rights must fit the people, not the people the rights. This requires looking at rights and their violations from a persons-centered rather than a formula-based position, and analysing them contextually rather than abstractly.[172]

This kind of thinking, which epitomizes Ken Karst's constitutional philosophy, is fatal to a scholastic distinction between backward-looking due process (privacy and dignity) and fotward-looking equal protection.

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170. *See, e.g., In re* Marriage of R.S. and S.S., 677 N.E.2d 1297 (Ill. App. Ct. 1996); Boswell v. Boswell, 721 A.2d 662 (Md. 1998); Bezio v. Patenaude, 410 N.E.2d 1207 (Mass. 1980).

171. *See* National Coalition for Gay & Lesbian Equal. v. Minister of Justice, *Wits Law School* (visited May 28, 2000) <http://www.law.wits.ac.za/lawreps.html>, *reported in* 1998 (1) BCLR 1517 (CC).

172. *Id.* at ¶ 112 (separate opinion of Sachs, J.).

III. THE DYNAMIC RELATIONSHIP BETWEEN DESTABILIZING DUE PROCESS AND EVOLUTIVE EQUAL PROTECTION FOR MINORITY GROUPS

The gay rights cases illustrate the richness of the due process tradition and its multifarious potential for destabilizing legal rules and practices, including longstanding and even once-entrenched rules and practices. One is even tempted to agree with Justice Frankfurter's claim that "'[d]ue process' is, perhaps, the least frozen concept of our law—the least confined to history and the most absorptive of powerful social standards of a progressive society."[173] The gay experience with constitutional litigation also tempts one to ask what the Equal Protection Clause adds to the many doctrinal and conceptual protections of the Due Process Clause. Here are some possibilities.

1. *The Unnecessary Equal Protection Clause?* Recall the Fifth Amendment cases, which suggest that the antiarbitrariness principle of the Due Process Clause can "incorporate" the antidiscrimination principle of the Equal Protection Clause. Gaylegal history, especially the successful challenges to exclusions from federal and state employment, lends support to this intuition: Due process's requirement that state policies not be arbitrary can have substantial bite for a despised minority. The gay rights cases could also support the proposition that the Equal Protection Clause has traditionally had no bite for this minority.

There remain many federal, state, and local rules that explicitly discriminate on the basis of sexual orientation, and many others that effectively do so.[174] Most of these rules were originally justified on the basis of either hatred of "homosexuals" or erroneous stereotypes about gay people, and they are now justified on the basis of factually weak pretexts or a symbolic stance that removing discriminations will "promote homosexuality."[175] Yet, as of Januaty 2000, we can count on one hand the number of explicit sexual-orientation discriminations that have been invalidated by an appellate court on the basis of federal or state equal protection provisions alone,[176] and we would need lots of hands to count the decisions rejecting equal protection challenges brought by lesbian, gay, and bisexual litigants against openly discriminatory policies. The latter include decisions upholding against equal protection

173. Griffin v. Illinois, 351 U.S. 12, 20–21 (1956) (Frankfurter, J., concurring).

174. *See* ESKRIDGE, *supra* note 12, at 139–48, 362–71 app. B3 (listing current rules).

175. *See* William N. Eskridge, Jr., *No Promo Homo: Judicial Review, Social Norms, and the Politics of Preservation*, 76 N.Y.U. L. REV. (forthcoming Nov. 2000).

176. *See* Romer v. Evans, 517 U.S. 620 (1996); Baehr v. Lewin, 852 P.2d 44 (Haw. 1993); Tanner v. Oregon Health Sciences Univ., 971 P.2d 435 (Or. Ct. App. 1998); Baker v. State, 744 A.2d 864 (Vt. 1999). I am tempted also to include *Nabozny v. Podlesny*, 92 F.3d 446 (7th Cir. 1996).

attack the federal government's exclusion of lesbians, bisexuals, and gay men from the armed forces,[177] federal and state discrimination against gay and bisexual people in employment,[178] federal discrimination in issuing security clearances,[179] state and federal toleration of violent antigay harassment by government co-workers,[180] state bars to same-sex marriages,[181] state bars to adoption of children by gay people,[182] state sodomy laws that criminalize only same-sex sodomy,[183] and local and state intiatives revoking laws protecting gay men, bisexuals, and lesbians from violence and discrimination.[184] Some antigay policies—such as state statutes requiring public schools to teach that homosexuality is disapproved[185] or prohibiting educators from "suggest[ing]" that "some methods of sex are safe methods of homosexual sex"[186]—have not even yielded an equal protection challenge at the appellate level.

Not only have courts failed to give the Equal Protection Clause forward-looking application to gay rights claims in the twentieth century, but the Supreme Court has gone out of its way to discriminate against lesbian, gay, and bisexual rights. *Bowers v. Hardwick* is the most famous example. The Burger Court upheld a gay-neutral sodomy law by focusing only on its regulation of "homosexual sodomy."[187] A more striking discrimination was the Warren Court's decision in *Boutilier v. INS*, whose reasoning rested on three discriminatory leaps of logic: the statutory term "psychopathic personality" (1) included a person whose doctors swore without rebuttal was not psychopathic, (2) simply because that person was a "homosexual," (3) a term the

177. *See, e.g.*, cases cited *supra* note 4; *see also* Able v. United States, 155 F.3d 628 (2d Cir. 1999); *Assessment of the Plan to Lift the Ban on Homosexuals in the Military: Hearings Before the Subcomm. on Military Forces and Personnel of the House Comm. on Armed Servs.*, 103d Cong. 322 (1993) (statement of Cass R. Sunstein) (noting that the Court will apply the Equal Protection Clause and the First Amendment deferentially, to allow Congress to exclude openly gay people from the armed forces).

178. *See, e.g.*, Shahar v. Bowers, 114 F.3d 1097 (11th Cir. 1997); Padula v. Webster, 822 F.2d 97 (D.C. Cir. 1987); Rowland v. Mad River Local Sch. Dist., 730 F.2d 444 (6th Cir. 1984).

179. *See, e.g.*, High Tech Gays v. DISCO, 895 F.2d 563 (9th Cir. 1990).

180. *See, e.g.*, Dillon v. Frank, 952 F.2d 403 (6th Cir. 1992) (mem.) (opinion reproduced at Dillon v. Frank, No. 90-2290, 1992 WL 5436 (6th Cir. Jan. 5, 1992)).

181. *See, e.g.*, Dean v. District of Columbia, 653 A.2d 307 (D.C. 1995); Singer v. Hara, 522 P.2d 1187 (Wash. Ct. App. 1974).

182. *See* State Dep't of Health and Rehabilitative Servs. v. Cox, 627 So. 2d 1210 (Fla. Dist. Ct. App. 1993), *vacated in part*, 656 So. 2d 902 (Fla. 1995) (per curiam); *In re* Opinion of the Justices, 530 A.2d 21 (N.H. 1987).

183. *See* Topeka v. Movsovitz, No. 77,372 (Kan. Ct. App. 1998). State decisions striking down sodomy laws have done so exclusively or mainly on the basis of the privacy right.

184. *See* Equality Found. v. City of Cincinnati, 128 F.3d 289 (6th Cir. 1997) (distinguishing *Evans*), *cert. denied*, 525 U.S. 943 (1998).

185. *See, e.g.*, ALA. CODE § 16-40A-2(c)(8) (Supp. 1992).

186. ARIZ. REV. STAT. § 15-716(C)(3) (Supp. 1991).

187. Bowers v. Hardwick, 478 U.S. 186, 190–91 (1988). The Burger Court gave antigay spins in its obscenity cases, for example, *Ward v. Illinois*, 431 U.S. 767 (1977), and in its vagueness cases, for example, *Rose v. Locke*, 423 U.S. 48 (1975), as well.

Court assumed to include apparent bisexuals such as Clive Michael Boutilier.[188] Although the Rehnquist Court has not yet handed down a decision as openly discriminatory as either *Boutilier* or *Hardwick*, its constitutional jurisprudence has deployed the First Amendment vigorously to thwart state antidiscrimination legislation when it protects gay people,[189] but anemically when federal censorship of lesbian and gay art[190] or gay deployment of the "Olympics" terminology[191] were in issue.

The gay experience can be generalized to support an inversion of the *Carolene Products*-inspired theory of equal protection:[192] When a minority group is truly marginalized in the political process because of the overwhelming power of social prejudice, the Supreme Court will *not* aggressively deploy the Equal Protection Clause to protect the group. The most that powerless minorities can expect is that the Court will wield the libertarian features of the Constitution—the Due Process Clause and the First Amendment—to destabilize some of the more extreme or vicious policies that persecute or disadvantage the group. Recall that the Equal Protection Clause was no great friend to women, people from Asia, and the freed slaves and their descendants so long as there was a national consensus that women belonged at home rearing children, Asians were an alien race, and blacks were morally and intellectually inferior to whites.

2. *The Wholesale Equal Protection Clause and Group Rights*. While the hypothesis of an unnecessary Equal Protection Clause explains the first two generations of gay rights cases relatively well, more recent litigation suggests that it, like the Sunstein hypothesis, is too simple. The Equal Protection Clause showed some bite in *Romer v. Evans* and in two recent state same-sex marriage decisions: *Baehr v. Lewin*,[193] in which the Hawaii Supreme Court ruled the exclusion of same-sex couples to be sex discrimination but remanded for trial to determine the validity of the state's justifications, and *Baker v.*

188. See William N. Eskridge, Jr., *Gadamer/Statutory Interpretation*, 90 COLUM. L. REV. 609 (1990), for a detailed analysis of *Boutilier*.

189. *Compare* Hurley v. Irish-American Gay, Lesbian & Bisexual Group, 515 U.S. 557 (1995) (holding that the state cannot require a private parade to allow openly gay members), *with* Roberts v. Jaycees, 468 U.S. 609 (1984) (holding that the state can require a private club to admit female members).

190. *See* NEA v. Finley, 524 U.S. 569 (1998).

191. *See* San Francisco Arts & Athletics, Inc. v. United States Olympic Comm., 483 U.S. 522 (1987).

192. For an explication of the *Carolene Products* theory, see JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 75–77 (1980) (drawing from *United States v. Carolene Prods. Co.*, 304 U.S. 144, 153 n.4 (1938)). The inversion of *Carolene Products* was first suggested in William N. Eskridge, Jr. & Philip P. Frickey, *The Supreme Court, 1993 Term—Foreword: Law as Equilibrium*, 108 HARV. L. REV. 26, 53–56 (1994).

193. 852 P.2d 44 (Haw. 1993).

State,[194] in which the Vermont Supreme Court ruled the exclusion to be sexual-orientation discrimination that failed *Evans*-style rational basis, but remanded to the legislature to equalize benefits and obligations through a same-sex partnership or marriage law. Like *Loving v. Virginia*, all of these cases could have been decided under the Due Process Clause of the federal or (for the latter two decisions) state constitutions.[195] But, like *Brown v. Board of Education*,[196] they were not. There are good reasons for that.

One kind of reason is backward-looking. At its birth, the Equal Protection Clause was aimed specifically at protecting the rights of the freed slaves and their descendants but was also aimed, more generally, at discouraging "class legislation."[197] Some of the early cases objected to laws and legal practices that treated groups of citizens unequally because of social prejudices against them.[198] The original goal and these early cases suggest a group focus for equal protection that is largely absent in the due process tradition. The equal protection tradition has evolved into one in which people lumped together for purposes of legal exclusion and discrimination have come to see themselves as a "minority group." This is also a forward-looking reason supporting a special role for the Equal Protection Clause: It distinctively reflects the polity's aspiration that people will be treated as individuals and not as part of a pariah class, and it distinctively captures the aspirations of minority group people themselves.

Gaylegal history offers a perfect mise-en-scène for this idea. Dr. Franklin Kameny was fired from his federal government job in 1957 because he was a suspected "homosexual," and he sued to get his job back. His lawyers challenged the discharge on due process grounds and lost. Kameny wrote his own petition for certiorari, which emphasized the denial of equal protection. This was a heartfelt argument from a man who felt his treatment was not only an affront to himself, but also to a whole group of people unfairly stigmatized by the government as well as by society. The Supreme Court denied certiorari, but immediately thereafter Kameny founded the Mattachine Society of Washington, emphasizing the group as well as the individual

194. 744 A.2d 864, 883–86 (Vt. 1999).

195. Because they applied an equal protection rational basis standard with some bite, both *Evans* and *Baker* could have rested on the antiarbitrariness principle of the Due Process Clause. Both *Baehr* and *Baker* could have rested upon the due process right to marry—which would have been broader grounds for the decision than the equal protection grounds invoked by those courts.

196. 347 U.S. 483 (1954). *Brown*'s emphasis on a fundamental right to a decent education could have justified invalidation of public school segregation on due process grounds.

197. *See* Karst, *supra* note 19, at 11–17; Melissa L. Saunders, *Equal Protection, Class Legislation, and Colorblindness*, 96 MICH. L. REV. 245 (1997).

198. *See* Yick Wo. v. Hopkins, 118 U.S. 356 (1886); Strauder v. West Virginia, 100 U.S. 303 (1879); William N. Eskridge, Jr., Prejudice, Normative Equilibrium, and Equal Protection of the Law (Jan. 2000) (unpublished manuscript, on file with the *UCLA Law Review*).

discriminatory impact of antigay rules and policies.[199] The lesson is that once a collection of similarly situated people see themselves as a minority group, they will not be satisfied making just due process arguments, which chip away at isolated policies denying individuals important rights. The stigmatized people will want to make equal protection arguments as part of an effort to form a group consciousness.[200]

The Supreme Court rhetorically minimizes the group-based origins and history of the Equal Protection Clause, but its practice has only reinforced the determination of minorities to see their group-based rights as bound up more with equal protection. This is because the Court's apparent classification-based approach offers a tremendous reward for groups that can persuade judges that the classification legally defining their group is suspect, like race or ethnicity, or quasi-suspect, like sex or illegitimacy. If the group can make that case to the Court, the Equal Protection Clause potentially empowers the group to challenge discriminatory policies across the board. Any policy—including the apportionment of benefits as well as penalties—that differentiates is subject to challenge. Thus it is that regular equal protection and due process scrutiny might be either interchangeable or interdependent at the *retail level*, that is, in challenges to particular discriminations, especially penalty-based ones. But the Equal Protection Clause alone offers a minority group a potential constitutional jackpot at the *wholesale level*, that is, in challenges to an array of interconnected discriminations in state benefits as well as burdens. For people of color, that interconnected array is called apartheid; for women, separate spheres; for gay people, don't ask, don't tell—an apartheid of the closet.

3. *Evolutive Equal Protection.* Just as the first hypothesis made the Equal Protection Clause seem too marginal, so the second may represent it as too radical. While minority groups would like the Court to lead the way in wholesale invalidation or revision of legal disabilities disadvantaging them, the Court's incentives are different. Consistent with my inversion of *Carolene Products*, the present Court tends to stick to the retail level (under either the Due Process or the Equal Protection Clause) and is reluctant to strike down particular discriminations so long as the minority group is totally marginalized and powerless. As gaylaw illustrates, the Court may even add to the

199. *See* David K. Johnson, *"Homosexual Citizens": Washington's Gay Community Confronts the Civil Service*, WASH. HIST., Fall–Winter 1994–95, at 55–56 (discussing Kameny v. Brucker, 365 U.S. 843 (1961), *denying cert. to* 282 F.2d 823 (D.C. Cir. 1960)). The Mattachine Society of Washington's principles are quoted above. *See supra* note 167 and accompanying text.

200. *See* Owen M. Fiss, *Groups and the Equal Protection Clause*, 5 PHIL. & PUB. AFF. 107, 175–77 (1976). Due process arguments can also serve this purpose, especially in the context of class actions, but the connection between the group and the constitutional assurance is closer with the Equal Protection Clause.

formal discriminations by rewriting ambiguous legal texts to make them consistent with the perceived national consensus. Once an historically excluded group shows political clout and cultural and economic resonance, however, the Court becomes sensitive to discriminations against the group and increasingly willing to nullify some such discriminations at the retail level, but remains unenthusiastic about insisting on radical, or wholesale, revisions. Such revisions would be risky for the Court, because people whose status or values depend on discriminating against the minority group will be riled by any big constitutional entitlement for the group. The Court's current strategy is to send up trial balloons and to see what happens.

The undertheorized opinion in *Evans* was such a trial balloon, an invitation but not an insistence that lower courts and the political process rethink some antigay discriminations. *Baker*, the same-sex marriage case, was the Vermont Supreme Court's trial balloon. The court did not insist on same-sex marriage but did require the legislature to find a way to end the pervasive discrimination against same-sex couples that the marriage bar creates. Note the key role that the political background assumes. It is not apparent that the Rehnquist Court would be willing to impose *Baker* on a national level, notwithstanding the Vermont court's cogent reliance on *Evans*. One reason is that even as our national political equilibrium in favor of jailing gay people has collapsed, there is still a consensus against recognizing same-sex unions. In contrast, the latter consensus has collapsed in many of the nation's large cities and perhaps also in Vermont, a progressive and tolerant state. Hence, the same principles of equal protection will mean something different in Vermont than they do in Virginia and, for the time being, in One First Street, Northeast, Washington, D.C.

But that, too, might change. Ten years ago, state recognition of same-sex unions was unthinkable; today it is thinkable, and Vermont has just recognized such unions.[201] What will the political consensus be in 2010? If it continues to move in a progay direction, *Evans* might turn out to be for lesbians, gay men, and bisexuals what *Missouri ex rel. Gaines v. Canada*[202] was for people of color and *Reed v. Reed*[203] was for women—a cautious and imprecise equal protection trial balloon followed by bolder rulings. If the political consensus remains stable or even turns in an antigay direction, *Evans* could be a gaylegal equivalent of *Goldberg v. Kelly*[204]—a trial balloon

201. *See* An Act Relating to Civil Unions, H. 847, 1999-2000 Legis. (Vt. 2000).

202. 305 U.S. 337 (1938) (striking down a state refusal to allow a black person to attend a state law school).

203. 404 U.S. 71 (1971) (striking down a state law preferring men over women to administer estates).

204. 397 U.S. 254 (1970).

followed by judicial retreat. Although I am optimistic that the obvious productivity of gay and bisexual people and the factual and moral weaknesses of antigay claims will undermine the legitimacy of state discrimination against this group, it is surely too early to say how robust the Equal Protection Clause will be for sexual minorities.

At a general level, the interconnection between the *destabilizing Due Process Clause*, an *evolutive Equal Protection Clause*, and a *shifting political consensus* looks something like this:

	Due Process	**Equal Protection**	**Illustrations**
Consensus Stigmatizing the Minority Group as Disgusting or Threatening	Individuals in the minority group are occasionally protected against unfair state action and punitive policies that go "too far."	A similar role, policing particularly harsh discriminations but generally deferring to social norms.	Compare *Yick Wo* with *Korematsu* (ethnicity); *Plessy* with *Buchanan* (race); *Boutilier* with *Clackum* (sexuality).
Stigmatizing Consensus Eroded, Politics Moving Toward Toleration or Accommodation	More aggressive review of particular policies (especially punitive ones) under due process principles and deferring less to traditional norms.	A similar role, with judicial trial balloons to consider whether more wholesale review should be attempted.	*Powell* and *Gaines* (race); *Griswold* (sex and sexuality); *Reed* (sex); *Evans* and *Baker* (sexual orientation).
Consensus Recognizing the Minority Group as Normal or at Least a Partner in Pluralism	Aggressive, often highly destabilizing review of arbitrary policies and outmoded practices (especially punitive policies and practices).	Wholesale scrutiny of express discriminations (including those affecting state benefits as well as penalties), but less searching review of discriminations that reflect closeted animus or indifference.	Compare *Brown* with *Pitts* (race); *Roe* and *Craig* with *Feeney* (sex).

The above table merely formalizes the intuition at the beginning of this essay. How the courts deploy either the Due Process or the Equal Protection Clause will be informed by a comparable mix of backward-looking, forward-looking, and present-minded considerations.

The table also provides a caution against making too much of my main distinction between the two clauses, namely, the relatively greater potential the Equal Protection Clause has to destabilize state policies discriminating in benefits as well as burdens, and the role this possibility assumes in the cultural formation of a minority group consciousness. There may be no deep theoretical or even historical reason why the Due Process Clause's principles of fairness, antiarbitrariness, and dignity could not be applied on the wholesale level, as I am using the term. Indeed, a great contribution Ken Karst has made to constitutional theory is to insist that both the Due Process and the Equal Protection Clauses be read as guarantees fulfilling the promise of citizenship made in the first sentence of the Fourteenth Amendment. In the spirit of Karstian constitutionalism, the focus should be on principles of both freedom and equality, not scholastic doctrinal distinctions.

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