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Untangling the Strands of the Fourteenth Amendment

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UNTANGLING THE STRANDS OF THE FOURTEENTH AMENDMENT

Ira C. Lupu†.*

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I. INTRODUCTION

The ideals of liberty and equality have animated revolutions, both armed and otherwise. Constitutional revolutions are not immune from such forces; indeed the twentieth century's most adventurous constitutional interpretation has revolved around those sibling stars. The first section of the fourteenth amendment may be seen as a shorthand endorsement of the two ideals — the due process clause has been a textual referent for the imposition of libertarian values, and the equal protection clause has served as the textual commitment to an evolving vision of constitutional egalitarianism.¹

This fourteenth amendment companionship of liberty and equality has, however, created opportunities for misunderstanding as well as for creative linkage. In particular, the judicial selection of values for special protection against the majoritarian pro-

1. The "privileges or immunities" clause of section one of the fourteenth amendment barely survived the infanticide attempt upon it in the *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1873). Its growth has remained stunted ever since. See Benoit, *The Privileges or Immunities Clause of the Fourteenth Amendment: Can There Be Life After Death?* 11 SUFFOLK L. REV. 6 (1976); Kurland, *The Privileges or Immunities Clause: "Its Hour Come Round at Last?"* 1972 WASH. U. L.Q. 405; see also L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 415-26 (1978). *Twining v. New Jersey*, 211 U.S. 78 (1908) accepts the construction of the *Slaughter-House Cases* and represents the modern view. In contrast to the enormous volume of modern equal protection and due process litigation, "privileges or immunities" claims have become exceedingly rare. *But cf.* *James v. Valtierra*, 402 U.S. 137 (1971) (state constitutional provision requiring that low-rent housing projects proposed by state authority be approved by majority of those voting in community election held not violative of privileges and immunities clause); *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 152 (1969) (use of streets to communicate thoughts between citizens one of the privileges and immunities of citizens of United States).

cesses has wavered throughout the century between a liberty base and an equality base. In the end, the partnership of liberty and equality in the fourteenth amendment — and their parallel though textually incomplete partnership in the fifth amendment — has led the Court into a tangle. Because the Court has uncritically substituted one for the other, and because historical circumstance and the value commitments of different generations have combined in twisted patterns, liberty and equality have become blurred as constitutional ideals.

The tangling is most apparent and most serious when viewed in its relationship to the so-called “fundamental rights” developments in both equal protection and due process clause interpretation. In the sense used here, fundamental rights include all the claims of individual rights, drawn from sources outside of the first eight amendments, that the Supreme Court has elevated to preferred status (that is, rights which the government may infringe only when it demonstrates extraordinary justification). Included in this category are rights of interstate travel,² exercising the franchise,³ access to certain judicial forums,⁴ and procreative choice.⁵ The controversy over this body of doctrine has taken a variety of forms, but well-educated students of constitutional law can deliver a somniloquy containing the most frequently recurring questions: What are the sources of these rights? Are the sources adequate to overcome the presumption against insulating substantive matters from the exercise of political power? Do the rights have “principled” content? Are the rights wholly “judge-made”? If so, what legitimate authority sanctions their creation? How are judges, once cut loose from the framework of the Constitution, to know which claims of right to recognize and which to ignore? The list could be expanded, but the questions, no matter how they are recast, seem tantalizingly to elude final answers.

2. The travel right antedates the adoption of the fourteenth amendment, *see* *Crandall v. Nevada*, 73 U.S. (6 Wall.) 35 (1867), but has been carried forward behind an equal protection banner, *Shapiro v. Thompson*, 394 U.S. 618 (1969) (invalidating one-year durational residence requirement for welfare benefits). *But see* *Sosna v. Iowa*, 419 U.S. 393 (1974) (upholding Iowa's one-year residence requirement for divorce).

3. *See* *Kramer v. Union Free School Dist. No. 15*, 395 U.S. 621 (1969); *Harper v. Virginia Bd. of Elections*, 383 U.S. 663 (1966). *But see* *Salyer Land Co. v. Tulare Lake Basin Water Storage Dist.*, 410 U.S. 719 (1973) (upholding scheme limiting vote to landowners, in proportion to the assessed value of their land, in water storage district election). *See generally* *Developments in the Law — Elections*, 88 HARV. L. REV. 1111 (1975).

4. *E.g.*, *Boddie v. Connecticut*, 401 U.S. 371 (1971) (filing fee for divorce petition invalid); *Douglas v. California*, 372 U.S. 353 (1963) (right to appointed and state-paid counsel in criminal appeals of statutory right); *Griffin v. Illinois*, 351 U.S. 12 (1956).

5. *E.g.*, *Roe v. Wade*, 410 U.S. 113 (1973).

Despite this abundant supply of grist for the mill of judge or scholar, the developments of the past twenty-five years highlight a further question: Which new rights properly derive from the liberty strand, and which from the equality strand?⁶ Sometimes the Court tells us; other times it does not. Often, members of the Court agree upon the preferred status of an interest but disagree about its textual source.⁷ On occasion, members of the Court concede that an interest has no textual source, yet battle still over which strand of the fourteenth amendment protects it from state interference.⁸

Although doctrinal disagreement persists, one may still detect some general trends in the recent Supreme Court combat over fundamental rights questions. The Burger Court has not attempted to suppress, on either institutional or substantive principle, inclinations toward fourteenth amendment intervention. It has, however, significantly rechanneled the activism of its predecessors, particularly that of the Warren Court.⁹ It has resurrected substantive due process intervention (whose death certificate had supposedly been signed in 1963¹⁰) on behalf of values to which the Constitution does not explicitly refer.¹¹ Simultaneously, the

6. Compare *Roe v. Wade*, 410 U.S. 113 (1973) (due process), with *Eisenstadt v. Baird*, 405 U.S. 438 (1972) (analogous interests protected by the equal protection clause), and *Loving v. Virginia*, 388 U.S. 1 (1967) (analogous interests protected by the due process clause) (alternative ground).

7. The reference is to *Griswold v. Connecticut*, 381 U.S. 479 (1965), in which Bill of Rights' penumbras, the ninth amendment, and "pure" substantive due process compete for attention.

8. In *Shapiro v. Thompson*, 394 U.S. 618 (1969), the majority held that the equal protection clause protected the right to travel, while Justice Harlan in dissent believed that the due process clause was the relevant shield, 394 U.S. at 659. A similar doctrinal dispute split the Court in *Zablocki v. Redhail*, 434 U.S. 374 (1978), where the majority held that the equal protection clause protected the right to marry. Justice Powell, in a concurring opinion, felt the right found its source in the due process clause. 434 U.S. at 397.

9. See Ely, *The Supreme Court, 1977 Term — Foreword: On Discovering Fundamental Values*, 92 HARV. L. REV. 5, 5-15 (1978) [hereinafter cited as Ely, *Foreword*]. See generally A. BICKEL, *THE WARREN COURT AND THE IDEA OF PROGRESS* (1970); A. COX, *THE WARREN COURT* (1968). See also Ely, *Toward a Representation-Reinforcing Mode of Judicial Review*, 37 MD. L. REV. 451, 451-54 (1978).

10. See *Ferguson v. Skrupa*, 372 U.S. 726 (1963).

11. *Moore v. City of East Cleveland*, 431 U.S. 494 (1977) (plurality opinion); *Roe v. Wade*, 410 U.S. 113 (1973). This theme will be elaborated in detail throughout the remainder of this Article. I am not the only one to notice the miracle. See, e.g., G. GUNTHER, *CASES AND MATERIALS ON CONSTITUTIONAL LAW* 616-656 (9th ed. 1975); Dixon, *The "New" Substantive Due Process and Democratic Ethic: A Prolegomenon*, 1976 B.Y.U. L. REV. 43; Perry, *Substantive Due Process Revisited*, 71 NW. U. L. REV. 417 (1976); Perry, *Abortion, the Public Morals, and the Police Power: The Ethical Function of Substantive Due Process*, 23 UCLA L. REV. 689 (1975) [hereinafter cited as Perry, *Ethical Function*]; Tushnet, *The Newer Property: Suggestions for the Revival of Substantive Due Process*, 1975 SUP. CT. REV. 261.

Court has considerably curtailed its willingness to rely on the equal protection clause for the advancement of values newly recognized as constitutionally important.

This Article explores such trends in the context of several recent cases and in the broader context of established patterns of constitutional law. Section II shows how the different strains of fourteenth amendment activism over the past century have tangled the strands of the fourteenth amendment in a thick, almost impenetrable knot. Section III studies the tangle's reflection in three cases raising fundamental rights problems — *Maher v. Roe*,¹² *Moore v. City of East Cleveland*,¹³ and *Zablocki v. Red-hail*.¹⁴ Finally, Section IV offers what Sections II and III suggest is missing from fourteenth amendment case law — a theory, abstract but functional, of the separate strands. It suggests that the only proper sources for judicial discovery of fundamental libertarian values outside the constitutional text and structure are those which demonstrate that the values are “deeply embedded” within American society. Further, Section IV contends that the equality strand cannot and should not bear a substantive content — that equal protection, whether viewed in moral terms or process terms, should remain substantially rooted in the pure anti-discrimination concerns that sparked the textual embrace with equality.

The Supreme Court's interpretation of the fourteenth amendment has, at different times, recognized both its libertarian and egalitarian dimensions. Unfortunately, the Court has failed to maintain a clear distinction between them. This doctrinal imprecision has bred unpredictability, disrespect, and charges of outcome-orientation. The first of these phenomena is perhaps an inescapable fact of judicial life. The latter two may be minimized by judicial articulation of a clear and principled theory of fourteenth amendment jurisprudence. The equal protection clause and the due process clause are complementary — not interchangeable — safeguards against oppressive government; they can carry out their missions most effectively when their separate roles are respected. Whether the fourteenth amendment remains a credible source of protection for the individual depends upon the process of untangling.

12. 432 U.S. 464 (1977).

13. 431 U.S. 494 (1977) (plurality opinion).

14. 434 U.S. 374 (1978).

II. STRANDS THAT PASSED IN THE NIGHT — AN OVERVIEW OF THE SUBSTANTIVE CONTENT OF THE FOURTEENTH AMENDMENT (1879-1977)

A. 1879-1937 — *The Dominance of Due Process ("Liberty") Activism*

One need not possess an acute sense of constitutional history to realize that at the same time the Supreme Court was relying on the due process clause to actively oppose governmental regulation of economic activity,¹⁵ it characterized the equal protection clause as "the usual last resort of constitutional arguments."¹⁶ From its genesis in the *Slaughter-House Cases* dissents¹⁷ through its flowering in *Lochner v. New York*,¹⁸ substantive due process doctrine first threatened and then worked a reign of terror on attempted regulation of wages, hours of labor, and unionization.¹⁹ Rooted in laissez faire ideology, both social and economic, the doctrine confined both the objectives and the resources of the police power.²⁰ Although economic libertarian ideology found expression in other constitutional settings,²¹ the due process clauses of the fifth²² and fourteenth²³ amendments carried the brunt of the load. This judicial infusion of values of economic freedom into the due process clauses dominated the constitutional law of the first third of the twentieth century.²³

15. See generally L. TRIBE, *supra* note 1, at 427-55.

16. *Buck v. Bell*, 274 U.S. 200, 208 (1926).

17. 83 U.S. (16 Wall.) 36 (1873), at 95-96 (Field, J., dissenting), 114-16 (Bradley, J., dissenting).

18. 198 U.S. 45 (1905).

19. See P. BREST, *PROCESSES OF CONSTITUTIONAL DECISIONMAKING* 737-39 (1975).

20. *Lochner* explicitly confined police power objectives by holding that equalization of bargaining power between employees and employers is not a legitimate goal of government, and police power resources by holding that a maximum hour law was insufficiently necessary to preserve the health of bakers to justify the law's infringement on liberty of contract.

21. The scope of national power in the federal system was the most prominent. See, e.g., *United States v. Butler*, 297 U.S. 1 (1936) (invalidating taxing and spending scheme designed to control agricultural production); *Child Labor Tax Case*, 259 U.S. 20 (1922) (invalidating tax on employers who used child labor because its prohibitory effect and purpose were not within Congress's taxing power); *Hammer v. Dagenhart*, 247 U.S. 251 (1918) (invalidating prohibition on interstate shipment of goods produced with the aid of child labor); cf. *United States v. Fox*, 95 U.S. 670 (1878) (Congress exceeded its bankruptcy power). The contract clause served as a vehicle for similar expression. See, e.g., *Georgia Ry. & Power Co. v. Decatur*, 262 U.S. 432 (1923).

22. See, e.g., *Adair v. United States*, 208 U.S. 161 (1908) (federal law against "yellow dog" contracts on interstate railroads held to violate due process clause of fifth amendment).

23. Objections to that line of doctrines are, of course, quite massive: (1) The Court

It is instructive to note that the activism of the *Lochner* era might have been channeled through the equal protection clause. Given the infancy of protective labor legislation, most if not all such statutes covered limited classes of workers' hazards, and hence were underinclusive in their coverage of employment risks. Despite the apparent judicial distaste for legislative activity in this field, the Court might have invalidated labor legislation for failure to extend coverage to all similarly situated workers.²⁴ The ostensible reasons for not adopting such an approach illuminate the Court's contemporary struggle with these companion provisions.

First, and perhaps foremost, a premise of legal analysis during the *Lochner* period was the inviolability of the naturally unequal distribution of ability and fortune among persons.²⁵ Given

lacked justification for protecting liberty of *contract* by way of the due process clause, because the liberty protected by the clause is limited to freedom from physical restraint, *see, e.g.,* Shattuck, *The True Meaning of the Term "Liberty" in Those Clauses in the Federal and State Constitutions Which Protect "Life, Liberty, and Property,"* 4 HARV. L. REV. 365 (1890); (2) The Court lacked textual warrant for the *entire notion* of "substantive due process" because the concern of the due process clause is limited to "process" (*i.e.,* procedural regularity); (3) The nature of the Court's methodology required it to exercise judgments of a legislative (nonjudicial) character, thereby involving it in decisions belonging exclusively to another branch of government, *see, e.g.,* *Lochner v. New York*, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting); (4) The Court's resort to "natural law" as the source of substantive constitutional rights was vague, open-ended and inescapably subjective, and it imperiled the notion that, absent a clear mistake, the democratic process is the sole repository of power to sort out the important choices of policy and value, *see* Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129, 144 (1893). *See also* *Griswold v. Connecticut*, 381 U.S. 479, 507 (1965) (Black, J., dissenting). *See generally* Ely, *Foreword, supra* note 9; Dixon, *supra* note 11.

Interestingly enough, although each of those objections has been influential in the evolution of post-*Lochner* doctrine, *none* has systematically prevailed on the Court. Indeed, the only prevailing objection to *Lochnerism* is extraordinarily narrow; it is, simply, that liberty of contract is of insufficient constitutional significance to support the relatively stringent review standard imposed in *Lochner*. *See* Ely, *Foreword, supra* note 9, at 15. The plurality opinion in *Moore v. City of East Cleveland*, 431 U.S. 494 (1977), traces its lineage to Justice Harlan's dissent in *Poe v. Ullman*, 367 U.S. 497, 522 (1961). Justice Harlan argued that substantive due process protects against arbitrary impositions upon liberty, citing *Allgeyer v. Louisiana*, 165 U.S. 578 (1897). Because the result of *Allgeyer* has clearly been discredited, Justice Harlan's citation can only be read as approving of the flexibility and expansive coverage of substantive due process enshrined in the *Lochner* era, while disapproving of the intensity of protection given economic values at that time.

24. *Cf. Lochner v. New York*, 198 U.S. 45, 76 (1905) (Holmes, J., dissenting): Men whom I certainly could not pronounce unreasonable would uphold [the New York hours regulation for bakers] as a first installment of a general regulation of the hours of work. Whether in [that] aspect it would be open to the charge of *inequality* I think it unnecessary to discuss. (emphasis added.)

25. *See* R. HOFSTADTER, *SOCIAL DARWINISM IN AMERICAN THOUGHT* 143-56 (1944).

that premise, it would have been absurd for the Court to denounce statutes designed to remedy that inequality with a theory that the states had not gone far enough in doing so. Such a posture would have risked provoking legislation that even-handedly and systematically protected *all* wage laborers. Second, the equal protection clause had been limited by the *Slaughter-House Cases* to a particular concern with racial discrimination.²⁶ At the turn of the century, the Court did not have so much as a dissenting opinion for authority to invigorate the equal protection clause with economic libertarianism. Finally (and most instructively for students of recent developments), the Court's approach to economic regulation retained a flexibility, a capability for ad hoc assessment of competing interests, that an equality-centered doctrine could not accommodate.²⁷

Contemporaneously with the flowering of economic due process, the Court infused that clause with a noneconomic substantive content that has survived subsequent pruning.²⁸ Modern first amendment doctrine takes as given what *Gitlow v. New York*²⁹ first announced — free expression is a substantive liberty protected by the fourteenth amendment against state intrusion.³⁰ More fundamentally for this Article's purposes, parental prerogatives in childrearing found constitutional solicitude in *Meyer v. Nebraska*³¹ and *Pierce v. Society of Sisters*.³² Those cases can be, and at times have been, reralationalized as attempts to protect values derived from the first amendment,³³ rendering them of a piece with *Gitlow* as early signals of full-blown incorporation of first amendment liberties into the fourteenth. The most recent reliances on *Meyer* and *Pierce*, however, have stressed their non-textual underpinnings of protected interests in family auton-

26. "We doubt very much whether any action of a State not directed by way of discrimination against the negroes as a class, or on account of their race, will ever be held to come within the purview of the provision [equal protection clause]." *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 81 (1873).

27. If underinclusion had been the asserted vice, drawing lines between bakers and mine workers as the Court did would have been nonsense.

28. The pruning began in *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937). Its effects are discussed more fully below, *see text at notes 36-52 infra*.

29. 268 U.S. 652 (1925).

30. There is apparently little modern controversy regarding the coextensiveness of free expression guarantees against state and federal agencies of government. *But see* *Roth v. United States*, 354 U.S. 476, 503 (1957) (Harlan, J., concurring and dissenting).

31. 262 U.S. 390 (1923).

32. 268 U.S. 510 (1925).

33. *E.g.*, *Griswold v. Connecticut*, 381 U.S. 479, 481-83 (1965); *Thomas v. Collins*, 323 U.S. 516, 531 (1945).

omy.³⁴ The survival of those two cases in that form suggests that the only durable objection to the *Lochner* era's handiwork is that it generally selected the "wrong" values for protection.³⁵ Whether the chaff that stripped bakers of the protection of hours regulation can be alchemically transformed into the wheat that protects parental choice of schools or curricula was a question that would agitate the second half of the twentieth century more than the first.

B. 1937-1953 — *The Era of Qualified Passivity*

The "switch in time,"³⁶ marked in part by the Court's retreat from boundless intervention in *West Coast Hotel Co. v. Parrish*,³⁷ did more than "save the Nine." The Court, by 1937, had exhausted its interventionist capital, and had thoroughly discredited itself as a sensitive and responsible institution of government. Observers viewed the dramatic shift away from fourteenth amendment activism as a restoration of the Court's appropriately limited role in the process of government.³⁸ Throughout this period, the equal protection clause remained largely dormant, except in occasional matters of race³⁹ and the extraordinary case of

34. *E.g.*, *Moore v. City of East Cleveland*, 431 U.S. 494, 499 (1977) (plurality opinion); *Roe v. Wade*, 410 U.S. 113, 152-53 (1973); *Stanley v. Illinois*, 405 U.S. 645, 651 (1972).

35. See note 23 *supra*.

36. See B. WRIGHT, *THE GROWTH OF AMERICAN CONSTITUTIONAL LAW* 202 (1942).

37. 300 U.S. 379 (1937).

38. The heavy criticism to which the Court was subjected is outlined in L. TRIBE, *supra* note 1, § 8-6. Before the *West Coast Hotel* decision, the Court was faced not only with the possibility of Roosevelt's Court packing plan, but also with emerging criticism of the legitimacy of judicial review itself. See, *e.g.*, *Representative Maverick Says Supreme Court Must be Deprived of Power to Declare Laws Unconstitutional*, *New York Times*, Feb. 1, 1937, at 5, col. 6.

The *New York Times* editorial, *A Historic Session*, which appeared June 2, 1937, at 22, col. 1, exemplifies the public reaction to *West Coast Hotel*. The editorial applauded several recent course-changing decisions, and emphasized that the Constitution must be living law, responsive to change. It contended further that these apparently revolutionary decisions were actually *not* sharp breaks with the past (pointing to decisions by Justices Marshall and Field).

39. It was during this period that the seeds of *Brown v. Board of Educ.*, 347 U.S. 483 (1954) were sown. See *McLaurin v. Board of Regents*, 339 U.S. 637 (1950); *Sweatt v. Painter*, 339 U.S. 629 (1950); *Sipuel v. Board of Regents*, 332 U.S. 631 (1948) (*per curiam*); *Missouri ex rel. Gaines v. Canada*, 305 U.S. 337 (1938). The Court demonstrated a greater receptivity to racial claims during this period than previously. Compare *Plessy v. Ferguson*, 163 U.S. 537 (1896) (upholding "separate but equal" train accommodation law), with *Nixon v. Condon*, 286 U.S. 73 (1932), and *Nixon v. Herndon*, 273 U.S. 536 (1927) (both cases invalidating laws that either directly or indirectly denied blacks the right to vote in primary elections). It is interesting to speculate on whether the Court's passivity in substantive due process matters was in any way related to the moderate racial activism that

Skinner v. Oklahoma.⁴⁰ The substantive side of the due process clause underwent elaborate extractive dental work. The newly restrained due process required no more than judicial identification of a public good that might arguably be served by a challenged statute;⁴¹ at times, the Court hinted that economic due process was utterly fictional.⁴²

The only stirrings of judicial activism in the direction of libertarian forms of protection consisted of two related movements: one towards a "preferred position"⁴³ for expressive interests, a development that built on earlier theories of linkage between the first and fourteenth amendments,⁴⁴ and another towards partial and selective absorption in the due process clause of various Bill of Rights safeguards. Dicta in *Palko v. Connecticut*,⁴⁵ decided in the first year of the era, fused the two movements by concluding that the fourteenth amendment's due process clause imposed upon the states an irreducible minimum of individual rights safeguards, of which expressive freedom constituted the clearest example. Despite the restraint with which the Court employed *Palko's* "ordered liberty" theory, the case was a dominant force during this period, and its reasoning undergirded subsequent claims of judicial authority to imbue the due process clause with substantive values from both within and without the Bill of Rights.⁴⁶

the Court displayed — whether the Court was consciously choosing to ride elevators in opposite directions. Conscious or not, serious strand-tangling began here.

40. 316 U.S. 535 (1942). In *Skinner*, the Court struck down on equal protection grounds an Oklahoma statute prescribing sterilization for certain habitual criminal offenders.

41. "We are not concerned, however, with the wisdom, need, or appropriateness of the legislation. Differences of opinion on that score suggest a choice which 'should be left where . . . it was left by the Constitution — to the States and to Congress.'" *Olsen v. Nebraska*, 313 U.S. 236, 246 (1941). See also *Lincoln Fed. Labor Union v. Northwestern Iron & Metal Co.*, 335 U.S. 525 (1949). Nevertheless, the Court never formally abandoned the notion that legislative regulation must be in furtherance of the public interest. See L. TRIBE, *supra* note 1, at 451 n.17.

42. See, e.g., *Day-Brite Lighting, Inc. v. Missouri*, 342 U.S. 421 (1952).

43. See *Kovacs v. Cooper*, 336 U.S. 77, 88 (1949).

44. See *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938). The *Carolene Products* footnote has inspired more commentary than Chief Justice Stone's wildest dreams could have anticipated. See generally Ely, 37 Md. L. Rev., *supra* note 9, at 454-469, and sources cited at nn.18-19 (1978).

45. 302 U.S. 319 (1937).

46. Indeed, it cannot be accidental that *Palko* appeared shortly after *West Coast Hotel* and shortly before *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938). *Palko* implied a reservation of judicial right to establish a "transcendental body" of constitutional law, 304 U.S. at 79. Viewed as a piece with *West Coast Hotel's* deference to legislative judgments concerning economic freedom and *Erie's* rejection of the concept of transcendent common law, *Palko* seems strangely out of the period's positivist character. At the height, then, of

This period also laid the groundwork for subsequent expansions of the fourteenth amendment in other ways — in particular, Justice Black's eloquent rumblings about full-blown Bill of Rights incorporation,⁴⁷ Chief Justice Stone's immortal fourth footnote in *United States v. Carolene Products Co.*,⁴⁸ and Justice Jackson's perceptive hint about the relatively "restrained" quality of equal protection intervention.⁴⁹ By the yardstick of concrete results, however, the era begun by announced withdrawal from *Lochner* ideology and concluded by the appointment of Earl Warren as Chief Justice stands as the low ebb of fourteenth amendment activism in the twentieth century. The passivity of this period has often been explained as a reaction, perhaps an over-reaction, to the vices of *Lochnerism*.⁵⁰ When viewed, however, against the backdrop of the Court's narrow construction of the fourteenth amendment soon after its ratification,⁵¹ the period from 1937-1953 stands as a momentary and fragile judicial recollection that aggressively employed fourteenth amendment theories of "ordered liberty," "natural law," or fundamental rights render the Court a "perpetual censor upon all legislation of the States."⁵²

C. 1954-1969 — *The Warren Court and the Emergence of Equal Protection Activism*

The elaborate equal protection developments of the Warren Court need no lengthy recitation here. I will simply track the major features of those developments, their unifying and motivating themes, and their relationship to the continuing saga of substantive due process. The Warren Court took on the "dual society" in *Brown v. Board of Education*,⁵³ and worked at dismantling it until *Shapiro v. Thompson*⁵⁴ ended the era in style. The Court stood *Lochnerism* on its head; rather than viewing inequality as the divinely ordained and uninteruptable order of things,

federal judicial withdrawal from scrutiny of state laws and rules of decision, *Palko* is striking evidence of the persistence of expansive theories of the fourteenth amendment.

47. See, e.g., *Adamson v. California*, 332 U.S. 46, 68-92 (1947) (Black, J., dissenting).

48. 304 U.S. 144, 152 n.4 (1938). See note 44 *supra*.

49. *Railway Express Agency, Inc. v. New York*, 336 U.S. 106, 111 (1949) (Jackson, J., concurring).

50. See generally L. TRIBE, *supra* note 1, at 450-55.

51. The fourteenth amendment was ratified on July 9, 1868.

52. *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 78 (1873).

53. 347 U.S. 483 (1954).

54. 394 U.S. 618 (1969) (one year residence requirement for AFDC welfare benefits violates equal protection clause).

it saw inequalities deriving from racial and economic disadvantage as the major obstacles to domestic tranquility and a more perfect union.⁵⁵ It therefore attacked full force on the equal protection front.⁵⁶ Simultaneously, a majority of the Court remained steadfast and vigorous in its refusal to give an active, nontextual substantive content to the due process clause.⁵⁷

The Court's equality commitment, however, never quite escaped the charge that it was *Lochnerism* reincarnated.⁵⁸ Virtually none of the Court's truly controversial equal protection decisions relied solely on the nature of the classification; rather, all seemed inextricably linked with the substantive interests at stake.⁵⁹ *Brown* laid heavy emphasis on the value of education.⁶⁰ More critically, the Court's concern with the deprivations attributable to economic disadvantage was bound up with values lacking explicit constitutional protection. The linkage was evident in a series of decisions in which the Warren Court held that the equal protection clause barred the states from denying indigent criminal defendants appellate transcripts⁶¹ and appellate counsel,⁶² from denying the vote in state elections to those unable or unwill-

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

56. See generally *Developments in the Law — Equal Protection*, 82 HARV. L. REV. 1065 (1969).

57. See, e.g., *Ferguson v. Skrupa*, 372 U.S. 726, 730 (1963):

The doctrine that prevailed in *Lochner*, *Coppage*, *Adkins*, *Burns*, and like cases — that due process authorizes courts to hold laws unconstitutional when they believe the legislature has acted unwisely — has long since been discarded. We have returned to the original constitutional proposition that courts do not substitute their social and economic beliefs for the judgments of legislative bodies, who are elected to pass laws.

58. Even a devoted fan of the Court's commitment saw clearly the parallels between the *Lochner* period and the 1960s. See Karst, *Invidious Discrimination: Justice Douglas and the Return of the "Natural-Law-Due-Process" Formula*, 16 UCLA L. REV. 716, 739, 744, 745-46 (1969).

59. E.g., *Shapiro v. Thompson*, 394 U.S. 618 (1969) (right to travel); *Harper v. Virginia Bd. of Elections*, 383 U.S. 663 (1966) (voting); *Reynolds v. Sims*, 377 U.S. 533 (1964) (voting); *Douglas v. California*, 372 U.S. 353 (1963) (criminal appeal); *Griffin v. Illinois*, 351 U.S. 12 (1956) (criminal appeal).

60. 347 U.S. 483, 492-93 (1954): "We must consider public education in the light of its full development and its present place in American life throughout the Nation. Only in this way can it be determined if segregation in public schools deprives these plaintiffs of the equal protection of the laws."

Desegregation decisions subsequent to *Brown* appeared less concerned with the underlying substantive interest. See, e.g., *Gayle v. Browder*, 352 U.S. 903 (1956) (per curiam) (buses); *Holmes v. City of Atlanta*, 350 U.S. 879 (1955) (per curiam) (golf course); *Mayor of Baltimore v. Dawson*, 350 U.S. 877 (1955).

61. *Griffin v. Illinois*, 351 U.S. 12 (1956).

62. *Douglas v. California*, 372 U.S. 353 (1963).

ing to pay a poll tax,⁶³ and from “penalizing” recent migrants to the state by conditioning welfare benefits upon durational residency requirements.⁶⁴ In the criminal appeal cases, the Court acknowledged the due process clause component of its theory,⁶⁵ but the cases’ obviously procedural setting preempted serious criticism of that component.⁶⁶ On the other hand, the Court did not provide such explicit recognition of its debt to the due process clause (or, for that matter, any other constitutional provision) in those cases in which nontextual *substantive* values emerged as fundamental. Rhetorically free of any substantive due process content, cases protecting interests in ballot-casting and interstate migration became key elements of the so-called fundamental interests wing of equal protection doctrine.⁶⁷

Particularly illustrative of the Warren Court methodology was *Shapiro v. Thompson*,⁶⁸ in which the Court held that durational residency requirements for welfare benefits impermissibly burdened the right of interstate migration. *Shapiro* suggested the right had several possible textual sources — the privileges and immunities clauses of article IV and the fourteenth amendment, or the commerce clause.⁶⁹ Whatever the source of the right, the Court relied on the equal protection clause (which clearly was not its source) to invalidate the challenged durational residency requirements. That reliance echoed the integrating theme of a great bulk of the Warren Court’s work,⁷⁰ as suggested above, *Brown* and

63. *Harper v. Virginia Bd. of Elections*, 383 U.S. 663 (1966).

64. *Shapiro v. Thompson*, 394 U.S. 618 (1969).

65. “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.’” *Griffin v. Illinois*, 351 U.S. 12, 17 (1956).

66. See generally Clune, *The Supreme Court’s Treatment of Wealth Discriminations Under the Fourteenth Amendment*, 1975 SUP. CT. REV. 289, 295. Cf. Michelman, *Foreword: On Protecting the Poor Through the Fourteenth Amendment*, 83 HARV. L. REV. 7, 25-27 (1969) (due process implications of criminal procedure “equality” decisions). The procedural due process aspect of *Griffin* was virtually ignored in Willcox & Bloustein, *The Griffin Case — Poverty and The Fourteenth Amendment*, 43 CORNELL L.Q. 1 (1957).

67. E.g., the due process clause is not mentioned by the majority in *Shapiro v. Thompson*, 394 U.S. 618 (1969), or *Harper v. Virginia Bd. of Elections*, 383 U.S. 663 (1966). In his *Harper* dissent, however, Justice Black charged that *Harper* was part of a trend which employed “the old ‘natural-law-due-process’ formula to justify striking down state laws as violations of the Equal Protection Clause.” 383 U.S. at 675-77. See generally Karst, *supra* note 58.

68. 394 U.S. 618 (1969).

69. 394 U.S. at 630 n.8.

70. See generally A. Cox, *supra* note 9, at 49-50.

Shapiro are end points of a straight line measuring egalitarian progress.

*Griswold v. Connecticut*⁷¹ provided the severest test for a Court determined to advance chosen values — apparently, political access and physical mobility were prominent among them — without renewing the romance with the dreaded demon of substantive due process. Justice Douglas's famous "penumbras" and "emanations" opinion drew upon the incorporation legacy, rather than a doctrine of "naked" substantive due process, and tortured the Bill of Rights into yielding a protected zone of privacy that would not tolerate a law banning contraceptive use by married couples. Justice Goldberg's reliance upon the ninth amendment in his concurring opinion was equally disingenuous in its attempt to avoid the jaws of substantive due process.⁷² Only Justices White and Harlan⁷³ were willing to grapple directly with the fearful creature, and concluded that a law invading marital choice about contraception violated the due process clause itself, independent of links with the Bill of Rights. Shocking though that analysis may have been at the time, subsequent developments seem to have confirmed the White-Harlan view, and not the magical mystery tour of the zones of privacy, as the prevailing doctrine of *Griswold*.⁷⁴

Ultimately, the equal protection clause did for the Warren Court precisely what the due process clause did for the *Lochner*-era Court — it served as a vehicle for judicial intervention in state policy choices to promote a set of values responsive to the Justices' vision of political and social ideals. Wars on poverty and racism were at the forefront of the liberal vision of those fifteen years.⁷⁵ The Court perhaps never knew whether it was the commanding general or merely a footsoldier in the fray. Nonetheless, it was certain that the battle was raging and that failure to defend the forces of light was symbolically to embrace the forces of darkness. Throughout the struggle, however, the Court never lost sight of which strand of the fourteenth amendment was tied to the battle mast. Constitutional history and the Court's value commitment combined to unleash a species of equal protection activ-

71. 381 U.S. 479 (1965).

72. 381 U.S. 479, 490 (1965) (Goldberg, J., concurring).

73. 381 U.S. at 502 (White, J., concurring); 381 U.S. at 499 (Harlan, J., concurring).

74. See *Moore v. City of East Cleveland*, 431 U.S. 494 (1977). The Court obliquely returned to those zones in *Roe v. Wade*, 410 U.S. 113 (1973). See text at notes 84-92 *infra*.

75. See E. WARREN, *MEMOIRS OF EARL WARREN* 297 (1977); A. COX, *supra* note 9, at 5-12.

ism that seemed to suit, and sometimes even to lead, the progressive forces of the day.

All of this high spirit was not without its occasional interpretive hurdles. In particular, what was a Court advancing equal protection concepts — while at the same time soberly reminding us of the death of substantive due process — to do about restraining the federal government? Fortuitously, *Korematsu v. United States*⁷⁶ had provided a legacy from which to draw an answer. Although the fifth amendment contains a due process clause but lacks an explicit equal protection analogue to section one of the fourteenth amendment, *Korematsu* had engrafted an anti-discrimination principle onto the fifth amendment. Thus, in *Bolling v. Sharpe*,⁷⁷ and with little serious question since, the Court held that the due process clause of the fifth amendment has an “equal protection” component that restricts the national government in a manner virtually identical to the fourteenth amendment’s equal protection restrictions upon the states.⁷⁸

This development would seem to buttress an argument that the equal protection clause is constitutionally superfluous: if the due process clause of the fifth amendment can do equality’s work, the comparable fourteenth amendment strand, standing alone, might theoretically have done the same. But that suggestion confuses horses with carts. When the Warren era opened, due process

76. 323 U.S. 214 (1944).

77. 347 U.S. 497 (1954).

78. *Examining Bd. v. Flores de Otero*, 426 U.S. 572, 599-601 (1976) (unimportant whether fifth or fourteenth amendment applies as statute in question clearly violates either); *Hampton v. Mow Sun Wong*, 426 U.S. 88 (1976); *Weinberger v. Wiesenfeld*, 420 U.S. 636 (1975); *Jiminez v. Weinberger*, 417 U.S. 628 (1974); *Richardson v. Belcher*, 404 U.S. 78 (1971); *Shapiro v. Thompson*, 394 U.S. 618, 641-42 (1969); *Schneider v. Rusk*, 377 U.S. 163 (1964). Only the last two of these cases, of course, were decided during the Warren Court years. Nevertheless, the doctrine appeared to be “well-settled” by 1968. One obvious exception to the symmetry of the fifth and fourteenth amendments’ respective equality components is the exclusion of aliens from opportunities provided to citizens. The cases establish broad federal power, but limit state power, to so treat aliens. *Compare Fiallo v. Bell*, 430 U.S. 787 (1977) (Congress’s immigration power causes legitimacy classification in immigration laws to be subject to deferential scrutiny), *and Mathews v. Diaz*, 426 U.S. 67 (1976) (Congress’s immigration power causes alienage classification in Medicare program to be subjected to deferential scrutiny), *with In re Griffiths*, 413 U.S. 717 (1973) (state may not exclude aliens from law practice) *and Sugarman v. Dougall*, 413 U.S. 634 (1973) (states may not exclude aliens from competitive civil service employment). That simple division of authority between nation and state is not always controlling. *Compare Hampton v. Mow Sun Wong*, 426 U.S. 88 (1976) (Federal Civil Service Commission constitutionally forbidden from excluding aliens from federal civil service), *with Foley v. Connelie*, 435 U.S. 291 (1978) (state may exclude aliens from state police force). See generally Karst, *The Fifth Amendment’s Guarantee of Equal Protection*, 55 N.C. L. Rev. 541 (1977).

clause activism, outside of Bill of Rights concerns, was in the deepest disrepute. The language and the relatively untroubled history of the equal protection clause combined to render acceptable a species of judicial interventionism that, had it rested on the due process clause, would have been intolerable. At the very least, the Warren Court's dive into egalitarianism would have been perceived as wholly lacking legitimacy if its platform had been a provision whose use had almost destroyed earlier Courts. The subsequent leap from equal protection activism to parallel fifth amendment limits on the central government was a simple step towards symmetry — what the Constitution insulates from state regulation “surely” cannot be freely trampled by national authority.⁷⁹ The resulting parallelism of equality limits is thus the product of reverse incorporation; just as the due process clause of the fourteenth amendment imposes Bill of Rights guarantees on the states, so the analogous fifth amendment clause operates to impose fourteenth amendment guarantees on the federal government. Whether viewed as a matter of theory or as an historical phenomenon, however, the presence of the equal protection strand gave new life to both the fifth and the fourteenth amendments.

The Court's masking of judicial value choices in equal protection rhetoric, and its use of that clause to increase dramatically the burden of justification demanded of states in certain areas of regulation, did not escape critical notice, either on or off the Court. In the Warren Court's final Term, its decision in *Shapiro* provoked a dissent from Justice Harlan that echoed across seventy years of intertwining fourteenth amendment strands. He attacked what he referred to as “the compelling interest” doctrine (more commonly understood as the fundamental interest wing) of the equal protection clause:

I think this [necessities of life] branch of the “compelling interest” doctrine particularly unfortunate and unnecessary. It is unfortunate because it creates an exception which threatens to swallow the standard equal protection rule. Virtually every state statute affects important rights Rights [of economic freedom] . . . are in principle indistinguishable from those involved here, and to extend the “compelling interest” rule to all cases in which such rights are affected would go far toward making this Court a “super-

79. *Bolling v. Sharpe*, 347 U.S. 497, 500 (1954): “In view of our decision that the Constitution prohibits the states from maintaining racially segregated public schools, it would be unthinkable that the same Constitution would impose a lesser duty on the Federal Government.”

legislature." . . . When the right affected is one assured by the Federal Constitution, *any infringement can be dealt with under the Due Process Clause*. But when a statute affects only matters not mentioned in the Federal Constitution and is not arbitrary or irrational, . . . I know of nothing which entitles this Court to pick out particular human activities, characterize them as "fundamental," and give them added protection under an unusually stringent equal protection test.⁸⁰

Despite Justice Harlan's admonitions, egalitarianism remained the driving force of Warren Court activism. That force had its own momentum, reinforced by parallel commitments from other branches of government.⁸¹ But egalitarianism as a constitutional concept, particularly when it assumed the "fundamental interest" form, was broad enough to engender great expectations and simultaneously to self-destruct. Equality as a goal admitted little compromise. As change came upon the mood of the nation and the personnel of the Court, the judicial choices became (a) continued vigorous pursuit of equality, (b) outright rejection of the Warren Court heritage, or (c) a reshaping of doctrine to fit a new temperament.

D. *The Burger Decade — A Preliminary Look at the Strands Recrossing*

The Fourth Republic of fourteenth amendment jurisprudence is underway. Unlike the Second, in which the activism of the First was fairly uniformly rejected, the Fourth Republic has treated its predecessors more erratically. Yet one conclusion

80. 394 U.S. at 661-662 (Harlan, J., dissenting) (emphasis added). Commentators were similarly aware of the sleight-of-hand: "When an equal protection decision rests on this basis [fundamental interests], it may be little more than a substantive due process decision decked out in the trappings of equal protection." *Developments in the Law, supra* note 56, at 1132. The fundamental interests doctrine met with both acclaim, e.g., Michelman, *supra* note 66, and criticism, e.g., Winter, *Poverty, Economic Equality, and the Equal Protection Clause*, 1972 *Sup. Ct. Rev.* 41, 89 (arguing that the theory is open-ended, and the choice of which values are fundamental is not made on a principled basis).

81. Congressional adoption of the Civil Rights Acts of 1957, Pub. L. No. 85-315, 71 Stat. 634 (codified in scattered sections of 28, 42 U.S.C.), and 1960, Pub. L. No. 86-449, 74 Stat. 86 (codified in scattered sections of 18, 20, 42 U.S.C.), reflected a deep concern with remedying racial discrimination in voting. The Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified in scattered sections of 28, 42 U.S.C.), was more comprehensive. It included, for example, provisions dealing with desegregation of schools and public facilities. Title VII of the 1968 Act, 42 U.S.C. §§ 3601-3619 (1976), expanded Congress's egalitarian concern to include fair housing. President Johnson's declaration of a "War on Poverty" illustrated a parallel executive commitment to egalitarian ideals. Annual Message to Congress on the State of the Union, Jan. 8, 1964, 1 LYNDON B. JOHNSON PUB. PAPERS 112, 113.

emerges with startling clarity — fundamental rights activism stemming from the equal protection clause has been laid to rest, and in its stead has arisen an active doctrine of substantive due process.

The watershed year was 1973, when the Court blasted with both barrels. With only the barest obeisance to the *Griswold* privacy penumbras, it embraced a substantive due process theory in *Roe v. Wade*,⁸² holding that a woman's liberty to choose termination of her pregnancy was of a constitutionally preferred status. Only a few months later, the Court rejected in *San Antonio Independent School District v. Rodriguez*⁸³ an equal protection attack on the interdistrict disparities in per pupil expenditure resulting from property tax financing of public education.

The Court's misguided search in *Griswold* for a general zone of privacy in the penumbras of amendments I through VIII saved the *Roe* Court a great deal of trouble. Spared the awkward obligation of embracing a doctrine of substantive due process completely divorced from textual or structural values, the majority in *Roe* merely cited *Griswold* as authority for a textually rooted privacy doctrine,⁸⁴ asserted that general interests in procreation belong within the constitutional concept of privacy,⁸⁵ and concluded that the choice to terminate a pregnancy was a sufficiently significant element of procreative freedom to require extraordinary justification from any state that seeks to restrict it.⁸⁶ To what I am certain was no Justice's surprise, few seemed fooled by *Roe*'s flimsy attempt to maintain a textual cloak of legitimacy around the decision. *Griswold*'s ties to the Bill of Rights were attenuated, but at least the "home as castle" theme linked its factual setting to the third and fourth amendments.⁸⁷ *Nothing* about the abortion decision can claim even that degree of kinship to the Bill.⁸⁸

Since the *Roe* majority's suggestion that the abortion choice lies safely within a penumbra of a penumbra is so unpersuasive, the case is more accurately understood as an exercise in "naked"

82. 410 U.S. 113 (1973).

83. 411 U.S. 1 (1973).

84. 410 U.S. at 129, 152.

85. 410 U.S. at 152.

86. 410 U.S. at 153-56.

87. See Ely, 37 Md. L. Rev., *supra* note 9, at 452 n.7.

88. See Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L.J. 920, 928-933 (1973).

substantive due process.⁸⁹ The reliance on *Griswold* authority was a fiction, but while it virtuously maintained the appearance of continuity, that reliance led to a serious vice as well — an illusory exemption from the duty to explain and defend the substantive due process theory of the opinion. Moreover, the political volatility of the abortion issue has deflected scholars from emphasizing that duty. Given *Roe*'s emotional and moral context, commentators have paid most attention to the intrinsic merits of *Roe*'s calculus of interests, private and governmental. A few came to bury *Roe*,⁹⁰ others to praise it,⁹¹ but the question of a reinvigorated future for substantive due process, as a matter of theory and methodology, has received significantly less attention than the *Griswold* decision produced in response to its privacy doctrine a decade earlier.⁹²

89. Cf. *id.* at 933 (comparing *Roe* to *Lochner*, and asserting that *Roe* is a more glaring example of indefensible judicial value infusion, lacking constitutional support). See also Epstein, *Substantive Due Process By Any Other Name: The Abortion Cases*, 1973 SUP. CT. REV. 159.

90. Epstein, *supra* note 89; Destro, *Abortion and the Constitution: The Need for a Life-Protective Amendment*, 63 CALIF. L. REV. 1250 (1975).

91. See, e.g., Perry, *Ethical Function*, *supra* note 11; Tribe, *The Supreme Court, 1972 Term — Foreword: Toward a Model of Roles in the Due Process of Life and Law*, 87 HARV. L. REV. 1 (1973); Heymann & Barzelay, *The Forest and the Trees: Roe v. Wade and Its Critics*, 53 B.U. L. REV. 765 (1973); Wellington, *Common Law Rules and Constitutional Double Standards: Some Notes on Adjudication*, 83 YALE L.J. 221, 297-311 (1973). Most of those in praise of *Roe*, it should be noted, lauded its result without necessarily complimenting its system of reasoning.

92. *Griswold* produced voluminous scholarly commentary. Seen by commentators as a sharp break with the recent past and as a hint of an exciting new direction in constitutional law, each of the several opinions in *Griswold* inspired massive scholarly speculation on the future of the privacy doctrine, the ninth amendment, and substantive due process revisited. See, e.g., Kauper, *Penumbrae, Peripheries, Emanations, Things Fundamental and Things Forgotten: The Griswold Case*, 64 MICH. L. REV. 235 (1965); Emerson, *Nine Justices in Search of a Doctrine*, 64 MICH. L. REV. 219 (1965); Beaney, *The Griswold Case and the Expanding Right to Privacy*, 1966 WIS. L. REV. 979; Note, *The Uncertain Renaissance of the Ninth Amendment*, 33 U. CHI. L. REV. 814 (1966).

That *Griswold* sparked more theoretical speculation than *Roe* may have resulted from differing scholarly perceptions of the Warren and Burger Courts. Commentators probably believed that the former was aggressive enough to extend *Griswold* in a variety of fascinating directions. That judgment was for the most part erroneous. Between 1965 and 1969 the Court carefully avoided decision in cases that might have pushed outward, or clarified, the boundaries of *Griswold*. See, e.g., *Cotner v. Henry*, 394 F.2d 873 (7th Cir.), cert. denied, 393 U.S. 847 (1968) (sodomy prosecution of married couple); *Ferrell v. Dallas Indep. School Dist.*, 261 F. Supp. 545 (N.D. Tex. 1966), *affd.*, 392 F.2d 697 (5th Cir.), cert. denied, 393 U.S. 856 (1968) (public school hair length regulation). Conversely, *Roe* inspired somewhat less creativity, partly because the *Griswold* commentary had exhausted most of it. More fundamentally, perhaps, those writing after *Roe* either condemned it, and had no inclination to speculate on the future of substantive due process, or were so pleased with it that they feared undermining its legitimacy by terming it a product of pure

Several months after *Roe*, the opinion for a narrow majority in *Rodriguez* signaled a retreat from fundamental rights activism, equal-protection-style, every bit as pronounced as *Roe*'s plunge into due process intervention. In *Rodriguez*, the claimant's argument for constitutional reordering of public school financing placed its weight against the flimsiest pillars of the Warren Court edifice: the hints of presumptive invalidity of wealth-based classifications⁹³ and the fundamentality of certain "constitutionally significant" interests, a group to which "education" arguably belonged. The plaintiffs apparently hoped that at least one of these theories, or perhaps their interaction, would trigger "strict scrutiny" — a demand for extraordinary justification of the challenged inequality.⁹⁴ After rejecting the "wealth" claim as inappropriate to the case's facts, the Court announced that the manufacture of fundamental interests, for equal protection purposes, would no longer be a growth industry:

It is not the province of this Court to create substantive constitutional rights in the name of guaranteeing equal protection of the laws. Thus, the key to discovering whether education is "fundamental" is not to be found in comparisons of the relative societal significance of education as opposed to subsistence or housing. Nor is it to be found by weighing whether education is as important as the right to travel. Rather, the answer lies in assessing whether there is a right to education explicitly or implicitly guaranteed by the Constitution.⁹⁵

Dicta in *Rodriguez* left ajar the door of judicial solicitude for claims of absolute denial, rather than relative deprivation, of public education.⁹⁶ Nevertheless, the holding that, in the absence of proven use of suspect classifying criteria, claims of unequal distribution of educational opportunities would be subject only to rationality scrutiny suggested much more than a mere failure of that particular claim. Indeed, the entire discussion of the *Rodriguez* "fundamental rights" claim proceeded on the articu-

substantive due process adjudication. *But cf.* Heymann & Barzelay, *supra* note 91, at 777-79. (*Roe* relies on basic value related to widely accepted concepts of society).

93. See *McDonald v. Board of Election Commrs.*, 394 U.S. 802, 807 (1968); *Harper v. Virginia Bd. of Elections*, 383 U.S. 663, 668 (1966). By the time the *Rodriguez* suit made its way to the Supreme Court, *James v. Valtierra*, 402 U.S. 137 (1971), had firmly rejected such a constitutional stance.

94. The equal protection theory underlying the *Rodriguez* claim is handsomely elaborated in J. COONS, W. CLUNE & S. SUGARMAN, *PRIVATE WEALTH AND PUBLIC EDUCATION* (1970).

95. 411 U.S. at 33-34.

96. 411 U.S. at 37.

lated assumption that the fundamentality of a right depends on its coincidence with textual or structural values.⁹⁷

That *Roe* and *Rodriguez* were decided close in time was presumably a historical accident, but the accident dramatized a collision between the strands of the fourteenth amendment as they crossed paths once again. All would agree that neither abortion nor educational opportunity is explicitly guaranteed in the Constitution; is the implication of a guarantee truly stronger for the former than for the latter? And if the Court is unauthorized or incompetent to create substantive rights in the enforcement of equal protection, how does it acquire authorization or competence for substantive due process adjudication?

Although doctrinal conflicts over fourteenth amendment interpretation persist,⁹⁸ the Burger Court's decisions over the past five years reveal intermittent untangling of the strands. The Court's substantive fourteenth amendment adjudication reflects (1) an expansion of suspect classification doctrine, in hybrid form, to protect women,⁹⁹ aliens,¹⁰⁰ and children born out of wed-

97. See text at note 95 *supra*.

98. The dilemmas and pressures of *Rodriguez*, viewed from the level of "two-tiered" equal protection, contributed further to the process of intertwining fourteenth amendment strands. In his *Rodriguez* dissent, 411 U.S. at 98-111, Justice Marshall elaborated on his dissent in *Dandridge v. Williams*, 397 U.S. 471, 519-30 (1970), and formulated a so-called "sliding scale" of equal protection review. According to Justice Marshall, the intensity of equal protection scrutiny has been and should continue to be a function of the nature of the classification created by statute, the nature of the substantive interest affected thereby, and the impact of the classification on that interest. In his view, interests need not be fully "preferred" in order to garner judicial care; rather, the closer the interest, logically or pragmatically, to a recognized fundamental one, the more judicial attention should be paid to relative deprivations of it.

Apart from the conventionally understood drawbacks of that theory, see *The Supreme Court, 1972 Term*, 87 HARV. L. REV. 1, 105-16 (1973), Justice Marshall's view incorrectly and indefensibly tangles the strands of the fourteenth amendment. As will be elaborated in greater detail below, the equal protection strand properly speaks to the permissibility of classification bases, and to no more; substantive due process, in contrast, speaks to substantive liberties, without direct regard to the inequality of their distribution. See Barrett, *Judicial Supervision of Legislative Classifications — A More Modest Role for Equal Protection*, 1976 B.Y.U. L. REV. 89, 108-21. Of course, inequality may enter the analysis at the level of evaluating the state's justification for restricting the liberty. See, e.g., *Doe v. Bolton*, 410 U.S. 179, 200-01 (1973); but see *Police Dept. v. Mosely*, 408 U.S. 92 (1972). Although Justice Marshall's attempt to burst through the conceptual barriers of two-tier equal protection has met with some success, see *United States Dept. of Agriculture v. Moreno*, 413 U.S. 528 (1973); see generally Gunther, *The Supreme Court, 1971 Term — Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1 (1972), its tangling of fourteenth amendment ideas fosters analytical confusion, unprincipled decision and "doctrinal disorder," Monaghan, *The Constitution Goes to Harvard*, 13 HARV. C.R.-C.L. L. REV. 117 (1978).

99. See, e.g., *Califano v. Goldfarb*, 430 U.S. 199 (1977); *Craig v. Boren*, 429 U.S. 190 (1976); *Stanton v. Stanton*, 421 U.S. 7 (1975); *Weinberger v. Wiesenfeld*, 420 U.S. 636

lock¹⁰¹ against legislative discrimination; (2) a usually steadfast refusal to recognize, for purposes of intensifying equal protection review, substantive interests other than those recognized by the Warren Court;¹⁰² and (3) an invigoration of pure substantive due process theories, partly by way of the irrebuttable presumptions fiction¹⁰³ and partly with full candor,¹⁰⁴ to protect procreative choices and family autonomy.

These innovations have taken the Burger Court in the proper direction; its equality-based activism confronts what are truly classification problems and its concern with substantive rights is less often expressed through inappropriate equal protection methodology and rhetoric. But questions remain: What is the appropriate direction for the new substantive due process? Is it any more legitimate, principled, or confinable than the old? And

(1975); *Frontiero v. Richardson*, 411 U.S. 677 (1973); *Reed v. Reed*, 404 U.S. 71 (1971). *But see Geduldig v. Aiello*, 417 U.S. 484 (1974).

100. *See, e.g., Nyquist v. Mauclet*, 432 U.S. 1 (1977); *Hampton v. Mow Sun Wong*, 426 U.S. 88 (1976); *In re Griffiths*, 413 U.S. 717 (1973); *Sugarman v. Dougall*, 413 U.S. 634 (1973). *But see Foley v. Connelie*, 435 U.S. 291 (1978); *Fiallo v. Bell*, 430 U.S. 787 (1977); *Mathews v. Diaz*, 426 U.S. 67 (1976).

101. *Trimble v. Gordon*, 430 U.S. 762 (1977); *Weber v. Aetna Cas. & Sur. Co.*, 406 U.S. 164 (1972). *But see Lalli v. Lalli*, 99 S.Ct. 518 (1978); *Mathews v. Lucas*, 427 U.S. 495 (1976); *Labine v. Vincent*, 401 U.S. 532 (1971). Judicial solicitude for illegitimate children predated the Burger Court. *See Glona v. American Guar. & Liab. Ins. Co.*, 391 U.S. 73 (1968); *Levy v. Louisiana*, 391 U.S. 68 (1968).

102. *See, e.g., Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974) (no fundamental interest in nonfamilial association for residential purposes); *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1 (1973) (education not a "fundamental interest"); *Lindsey v. Normet*, 405 U.S. 56 (1972) (no "fundamental interest" in housing); *Dandridge v. Williams*, 397 U.S. 471 (1970) (no "fundamental interest" in welfare benefits). *But cf. United States Dept. of Agriculture v. Moreno*, 413 U.S. 528 (1973) (intermediate scrutiny of limitation on right to receive food stamps by unrelated member of household); *Zablocki v. Redhail*, 434 U.S. 374 (1978) ("fundamental right" to marry triggers strict equal protection review). *Zablocki* is analyzed in detail in Section III. B. *infra*.

103. *See, e.g., Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632 (1974); *Vlandis v. Kline*, 412 U.S. 441 (1973). Although I believe *LaFleur* and *Vlandis* to be substantive due process decisions in disguise, other "conclusive presumptions" cases suggest disguised equal protection review. *See United States Dept. of Agriculture v. Murry*, 413 U.S. 508 (1973). *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307 (1976), and *Weinberger v. Salfi*, 422 U.S. 749 (1975), seemed to have tolled the bell for irrebuttable presumptions methodology. The method was always a fictionalized account of the true fourteenth amendment story, and now that substantive due process talk has unabashedly reemerged, the Court's need for a fictional device in its stead has, happily, run its course. *See generally Note, Irrebuttable Presumptions: An Illusory Analysis*, 27 STAN. L. REV. 449 (1975); *Note, The Irrebuttable Presumption Doctrine in the Supreme Court*, 87 HARV. L. REV. 1534 (1974).

104. *See Moore v. City of East Cleveland*, 431 U.S. 494 (1977) (plurality opinion). 431 U.S. at 514 (Stevens, J., concurring); *see also Zablocki v. Redhail*, 434 U.S. 374, 397, 399-400 (1978) (Powell, J., concurring); 434 U.S. at 392 (Stewart, J. concurring); *Roe v. Wade*, 410 U.S. 113, 167 (1973) (Stewart, J., concurring).

what is to be done with the Warren Court's strand-tangled legacy? Must it be rejected to restore order to fourteenth amendment jurisprudence?

III. THREE SNAPSHOTS OF THE STRANDS — *Maher v. Roe*, *Moore v. City of East Cleveland*, AND *Zablocki v. Redhail*

A trio of cases from the past two years highlights recent trends and unresolved struggles in fourteenth amendment adjudication. In *Maher v. Roe*,¹⁰⁵ the liberty-equality tangle produced inadequate analysis and an unsatisfying outcome. In *Moore v. City of East Cleveland*,¹⁰⁶ the pressures generated by the tangle led to an active and controversial renewal of the romance with substantive due process adjudication. Finally, despite *Moore's* attempt to break loose from the tangle, a majority in *Zablocki v. Redhail*¹⁰⁷ dove headlong back into the morass. A review of these cases will set the stage for the effort in Section IV to identify the methods and values of distinguishing liberty claims from equality claims in constitutional adjudication.

A. *Maher v. Roe*

At issue in *Maher* was the constitutionality of Connecticut's policy permitting the use of Medicaid funds to reimburse women for the costs of childbirth and "medically necessary" abortions, but forbidding their use to reimburse women for the costs of so-called nontherapeutic abortions. In an opinion by Justice Powell, a majority of six Justices concluded that the Connecticut regulation satisfied constitutional requirements.¹⁰⁸

The key to *Maher* lies in its methodology for framing the constitutional question(s) to be resolved. The Court first asked whether the Constitution, after *Roe v. Wade*,¹⁰⁹ affirmatively requires state subsidy of abortions for women too poor to bear the cost privately. That question has both a libertarian dimension (if all women are free to choose abortion, must the state guarantee the power to effectuate that freedom) and an egalitarian dimension (if women of means can obtain abortions, is the state responsible for the "discrimination" that market pricing produces

105. 432 U.S. 464 (1977).

106. 431 U.S. 494 (1977).

107. 434 U.S. 374 (1978).

108. 432 U.S. at 474-79.

109. 410 U.S. 113 (1973).

against women without means), but the Court answered in a single conclusory assertion:

The Constitution imposes no obligation on the States to pay the pregnancy-related medical expenses of indigent women, or indeed to pay any of the medical expenses of indigents.¹¹⁰

On the facts of *Maher*, however, that question seemed unnecessarily broad. Connecticut had not simply ignored the medical expense plight of pregnant women; rather, it had paid all such expenses except those arising from so-called convenience abortions. Therefore, the Court ultimately focused its attention not on the discrimination between rich and poor women, but on the discrimination between poor women seeking one resolution of a pregnancy and those seeking another.¹¹¹ This, the Court declared, "presents a question arising under the Equal Protection Clause," the analytic framework for which "is well settled."¹¹² That "settled" framework turned out to be one wholly derived from *San Antonio Independent School District v. Rodriguez*,¹¹³ calling for a finding of disadvantage to a suspect class, or impingement "upon a fundamental right explicitly or implicitly protected by the Constitution" to trigger strict scrutiny.¹¹⁴ In choosing to rely upon *Rodriguez's* substantive equal protection formula, the Court once again became trapped in the tangled strands of the fourteenth amendment.

To answer the narrower question as framed, the Court endeavored to define the fundamental right discovered in *Roe v. Wade*.¹¹⁵ *Roe* struck down a statute criminalizing most abortions, and the *Maher* Court concluded that the right that *Roe* had vindi-

110. 432 U.S. at 469.

111. An indigent woman who desires an abortion suffers no disadvantage as a consequence of Connecticut's decision to fund childbirth; she continues as before to be dependent on private sources for the service she desires. The State may have made childbirth a more attractive alternative, thereby influencing the woman's decision, but it has imposed no restriction on access to abortion that was not already there.

432 U.S. at 474.

112. 432 U.S. at 470.

113. 411 U.S. 1 (1973).

114. 411 U.S. at 17.

115. My discussion of *Maher v. Roe* proceeds on the assumption that the *Maher* Court believed that *Roe v. Wade* was decided correctly. Surely the *Maher* opinion, on its face, offers no evidence that the Court believed otherwise. Closer analysis will indicate that the right to terminate an ongoing pregnancy should not have been held "fundamental" in *Roe v. Wade*, see text at notes 82-92 *supra* and 264-65, 313, & 335-41 *infra*, and *Maher* might thus be defensible as a simple refusal to require state subsidy of a constitutionally insignificant activity. On the Court's terms, however, *Maher* illustrates the Burger Court's continuing struggle with strand separation.

cated was a freedom from significant state-created obstacles in a woman's path to an abortion.¹¹⁶ Having thus cast *Roe* negatively — the state has duties to refrain from choice-blockage, but no affirmative duties to facilitate the choice — the Court concluded that the right was not significantly threatened by the Connecticut regulation because state subsidy for childbirth in no way blocked access to an abortion.¹¹⁷ The upshot of this analysis was the application of deferential rationality scrutiny,¹¹⁸ a standard generally appropriate for judicial review of resource allocation decisions.¹¹⁹ Under the placid gaze of that scrutiny, the Connecticut policy survived as a legitimate expression of preference for childbirth over abortion.

The Court's analysis in *Maher* deserves careful attention for several reasons. First, it confirmed and accelerated the *Rodriguez* trend toward limiting the line of cases in which the Court had seemed to indicate that "ability to pay" was not a permissible criterion for the distribution of constitutionally significant opportunities.¹²⁰ In so doing, it squarely rejected a doctrine of fourteenth amendment "affirmative duties."¹²¹ Second, it offered an unusual and instructive, but inadequately elaborated, twist on the doctrine of unconstitutional conditions. The next two subsections of this Article analyze those facets of the *Maher* opinion. Viewed most comprehensively, they reveal a partial misapprehension by the *Maher* majority of the separate and distinct functions of the strands of the fourteenth amendment.

116. "Roe did not declare an unqualified 'constitutional right to an abortion,' as the District Court seemed to think. Rather, the right protects the woman from unduly burdensome interference with her freedom to decide whether to terminate her pregnancy." 432 U.S. at 473-74.

117. "The Connecticut regulation places no obstacles — absolute or otherwise — in the pregnant woman's path to an abortion." 432 U.S. at 474.

118. 432 U.S. at 478.

119. "In *Dandridge v. Williams*, . . . despite recognition that laws and regulations allocating welfare funds involve 'the most basic economic needs of impoverished human beings,' we held that classifications survive equal protection challenge when a 'reasonable basis' for the classification is shown." 432 U.S. at 479.

120. See *Griffin v. Illinois*, 351 U.S. 12 (1956); *Harper v. Virginia Bd. of Elections*, 383 U.S. 663 (1966); *Boddie v. Connecticut*, 401 U.S. 371 (1971); text at notes 122-30 *infra*.

121. See generally Grey, *Property and Need: The Welfare State and Theories of Distributive Justice*, 28 STAN. L. REV. 877, 897-901 (1976); Michelman, *supra* note 66; Miller, *Toward a Concept of Constitutional Duty*, 1968 SUP. CT. REV. 199. See also Karst, *The Supreme Court, 1976 Term — Foreword: Equal Citizenship Under the Fourteenth Amendment*, 91 HARV. L. REV. 1, 59-64 (1977); Tribe, *Unraveling National League of Cities: The New Federalism and Affirmative Rights to Essential Government Services*, 90 HARV. L. REV. 1065 (1977).

1. *Wealth Plus Fundamental Rights —
The Flowering of "Monopoly Doctrine"*

A significant portion of the Warren Court's equal protection legacy revolved around the link between payment requirements and access to constitutionally "special" opportunities. *Griffin v. Illinois*,¹²² which required states to furnish necessary transcripts without charge to indigent appellants in criminal cases, laid the initial groundwork. *Harper v. Virginia Board of Elections*,¹²³ which invalidated Virginia's poll tax as a prerequisite to voting in state elections, followed suit. Finally, the Burger Court in *Boddie v. Connecticut*¹²⁴ held unconstitutional Connecticut's requirement that a divorce petitioner pay a \$60 filing fee, on the theory that indigency could not be allowed to block access to the only means to dissolve a marriage relationship. Several commentators interpreted this line of doctrine broadly, inferring from it that government could not limit the provision of a broad category of "just wants" to those who happened to possess adequate purchasing resources.¹²⁵

In footnotes to *Maher* the Court limited severely the sweep of the *Griffin-Harper-Boddie* precedents. Prior cases had already refused to extend the theory to "necessities," such as housing¹²⁶ and welfare benefits.¹²⁷ In *Maher*, the Court tightened the vise by characterizing *Boddie*¹²⁸ and *Griffin*¹²⁹ (and, by implication, *Harper* as well) as cases with a common feature — state *monopolies* of processes affecting constitutional fundamentals of family or liberty from confinement. Since the state did not monopolize pregnancy termination opportunities, the Court believed the *Maher* problem critically distinguishable.

122. 351 U.S. 12 (1956). See also *Douglas v. California*, 372 U.S. 353 (1963) (state must furnish and compensate counsel in appeals of right).

123. 383 U.S. 663 (1966).

124. 401 U.S. 371 (1971).

125. Professor Michelman's *Foreword*, *supra* note 66, is particularly noteworthy in this regard. See also J. RAWLS, *A THEORY OF JUSTICE* (1971); Tribe, *supra* note 91, at 47. For a powerful argument against such a constitutional stance, see Winter, *supra* note 80.

126. See *Lindsey v. Normet*, 405 U.S. 56, 74 (1972): "[T]he Constitution does not provide judicial remedies for every social and economic ill. We are unable to perceive in that document any constitutional guarantee of access to dwellings of a particular quality"

127. See *Dandridge v. Williams*, 397 U.S. 471 (1970).

128. 432 U.S. at 469 n.5.

129. 432 U.S. at 471 n.6.

The monopoly doctrine, first articulated in *Boddie* itself,¹³⁰ may have sound justification as a matter of decisional economy, accuracy, and constitutional principle. Its premise is that the state incurs special obligations to the indigent when it exercises power unique to the sovereign authority. Foreclosure of state-monopolized opportunities leaves the excluded individual with absolutely no alternative source of redress. Because individual powerlessness is a recurring and significant theme of judicial intervention,¹³¹ any state monopoly of a significant opportunity appropriately triggers heightened concern over the suffering that may be experienced by those trapped in a state of legal, political,¹³² or familial deprivation so long as they remain within the state's boundaries.

Moreover, abandonment of the monopoly concept in search of an approach more responsive to the indigent's plight would leave the Court with two unpalatable choices. The first would require that the state provide or fully subsidize all services necessary to the exercise of preferred rights. In the first amendment context, such a doctrine would produce an enormous and unmanageable allocation of state resources toward a socialized system of access to expressive media.¹³³ The problem would be compounded by the threat to first amendment values posed by government control of such a system and by the insuperable difficulty of deciding at what point the state's affirmative duty had been fully satisfied.¹³⁴

130. [G]iven the basic position of the marriage relationship in this society's hierarchy of values and the concomitant state monopolization of the means for legally dissolving this relationship, due process does prohibit a State from denying, solely because of inability to pay, access to its courts to individuals who seek judicial dissolution of their marriages.

401 U.S. at 374. That the monopoly criterion of *Boddie* carries significant weight was made clear in *United States v. Kras*, 409 U.S. 434 (1973). For general discussion of indigent access to courts, see Michelman, *The Supreme Court and Litigation Access Fees: The Right to Protect One's Rights*, (pts. I & II), 1973 DUKE L.J. 1153, 1974 DUKE L.J. 527.

131. See, e.g., *Frontiero v. Richardson*, 411 U.S. 677, 684-85 (1973) (plurality opinion); see also *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938).

132. See, e.g., *Lubin v. Panish*, 415 U.S. 709 (1974); *Bullock v. Carter*, 405 U.S. 134 (1972).

133. Justice Powell alluded to this problem in *Maher*, 432 U.S. at 475 n.9. See *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969).

134. It is conceptually impossible for anyone, indigent or otherwise, to exercise expressive (or religious) freedoms to a point of "completion." Of course, one might distinguish an individual abortion in the sense that it, unlike speech, is physiologically finite. To the extent, therefore, that the abortion claim is one for a measurable quantum of relief, it is more *justiciable* than the comparable first amendment claim, with respect to which minimum satisfaction would be difficult to define. It seems to me, nevertheless, that a

The other alternative left open by rejection of the monopoly doctrine is to explore the *adequacy* of the marketplace to provide the benefit for which the state charges a fee or which the state refuses to subsidize. Choice of that alternative would lead the Court to demand state satisfaction of a claim if the private sector were sufficiently unlikely to relieve the financial obstacles to access to a constitutional opportunity. This is precisely the inquiry that the Court avoided in *United States v. Kras*,¹³⁵ in which it upheld filing fees charged to persons seeking a personal bankruptcy discharge, on the ground that private settlement and release agreements were at least theoretically available to the claimant. The refusal to probe the adequacy of "private remedies" in *Kras* and *Maher* seems entirely correct. If the state's obligation to subsidize abortions turns on the availability in fact of private subsidy of the same activity, the refusal might be constitutional in some parts of a state but not in others or constitutional one day but not the next. Results of that sort clash with legitimate state needs to plan and budget operations, and might work as a significant disincentive to private charity — once a court found private effects insufficient and ordered a local or statewide government support of the activity, existing private efforts might disappear and new ones would rarely arise. More fundamentally, the question of the sufficiency of private services to the poor is not amenable to principled resolution. Whether, for example, the availability of three abortion clinics within twenty miles, offering half-price abortions performed by recent medical school graduates, is an "adequate" private alternative presents a

theory of affirmative duty to satisfy claims of access to "preferred" opportunities is rendered worthless, or at least horribly fractured, if it cannot move beyond the "preferred" opportunities whose needed quantity and market price are readily ascertainable. The provision of counsel to indigent criminal defendants presents analogous problems, but there, at least, the state has some control over the number of persons who wind up in a position to assert the claim.

On broader theoretical grounds, speech cannot adequately be distinguished from abortions for purposes of "wealth-plus" affirmative duty doctrine; both are "preferred liberties," and both may require expensive third-party assistance to be effective and adequate. Indeed, to the extent free expression is viewed as necessary for the health and well-being of a democratic society, the claim to full subsidization by the state of speech seems more pressing as a matter of constitutional theory than the comparable abortion claim.

This, I know, is endlessly debatable. Is subsidized speech more socially important than subsidized abortion? Both involve self-actualization opportunities, but speech, we are told, advances truth and self-government as well. On the other hand, most speech advances nothing but the speaker's breath, while all abortions have tangible results. Apples versus oranges might be easier.

135. 409 U.S. 434 (1973).

question to which courts are not capable of providing meaningful answers.¹³⁶

Thus, *Mahe*'s reliance on the monopoly doctrine is more than an outcome-oriented application of a limitation first suggested in *Boddie*. It is conceptually sound.¹³⁷ Moreover, it exposes the problems of "state action" lurking beneath the surface of *Mahe*. The "villain" of the abortion drama may not be the state at all; an economic system that renders many women and families too poor to pay the going rate and a fee-for-service system of medical care delivery that places financial barriers between patients and necessary care seem to be better cast for that role. It is thus state omission, or inaction, that triggers complaints of constitutional wrongdoing, and under prevailing state action theory, omissions generally do not violate fourteenth amendment proscriptions.¹³⁸

The sole exception to that assertion arises from the "public function" theory of state action¹³⁹ — certain functions of government cannot be liberated from constitutional limitations, regardless of who performs them. *Jackson v. Metropolitan Edison Co.*¹⁴⁰ narrowed the definition of public function to include only those functions traditionally and exclusively associated with sovereignty,¹⁴¹ and the Court's recent decision in *Flagg Brothers, Inc. v. Brooks*¹⁴² has reinforced the *Jackson* approach. The monopoly doctrine of *Boddie* and *Mahe* and the public function test of *Jackson* and *Flagg Brothers* reflect shared views of the role of

136. A doctrine that required such answers solely in the context of constitutionally fundamental opportunities might also discourage initial judicial recognition of the preferred nature of a liberty. See *The Supreme Court, 1976 Term*, 91 HARV. L. REV. 72, 141 (1977).

137. For a sharply contrary view of the monopoly doctrine, see Clune, *supra* note 66.

138. Otherwise the state would be responsible for all private conduct, or at least all that can be constitutionally regulated; such a result would effectively obliterate the public-private distinction that the text of the fourteenth amendment seems to draw.

139. See, e.g., *Jackson v. Metropolitan Edison*, 419 U.S. 345 (1974); *Evans v. Newton*, 382 U.S. 296, 301-02 (1966); *Marsh v. Alabama*, 326 U.S. 501 (1946). Cf. *Terry v. Adams*, 345 U.S. 461 (1953) (15th amendment); *Smith v. Allwright*, 321 U.S. 649 (1944) (15th amendment). The "shopping center" cases momentarily extended *Marsh*'s public function reasoning rather broadly, *Food Employees Local 590 v. Logan Valley Plaza, Inc.*, 391 U.S. 308 (1968), but the Court subsequently retreated in *Lloyd Corp. v. Tanner*, 407 U.S. 551 (1972), and finally retracted the extension altogether in *Hudgens v. NLRB*, 424 U.S. 507 (1976).

140. 419 U.S. 345 (1974).

141. 419 U.S. at 352-53.

142. 436 U.S. 149 (1978) (a warehouseman's sale of goods entrusted to him for storage, as a statutorily authorized self-help remedy for nonpayment, is not performance of a "public function").

government and a concern for the autonomy of the private sector.¹⁴³ *Jackson's* restricted view of which private activities are "public," for state action purposes, recognizes that governmental functions often possess private counterparts and refuses to constitutionalize those activities, in part from fear of injuring the private sector in the process. The monopoly doctrine reflects a parallel respect for private action and choices, since it limits judicially mandated government competition with the private sector, leaving to the legislature the decision whether to enter the market for a particular good or service. Thus, there exists a core of exclusively governmental activities, which the state can delegate to private parties only with a full coterie of constitutional restrictions and which the state itself may not administer in a way that discriminates against the poor. Outside that narrow core, however, power and efforts are appropriately shared, and private activity creatively and constructively supplements government activity. There both the demand for state subsidization and the attempt to constitutionalize private activity threaten the partnership system, albeit in different ways.¹⁴⁴

This lengthy discussion of the monopoly doctrine limitation on "wealth plus fundamental right" principles reveals that it speaks primarily to the government's role in ordering access to the means of effectuating substantive *liberties*, and only secondarily to questions of equality. Because the claims the monopoly doctrine sanctions generally involve *de facto*, and not *de jure*, classifications, the doctrine is not responsive to the concerns traditionally associated with equal protection review: invidious formal classifications and enforcement patterns. Indeed, *Boddie* and

143. The doctrines are not perfectly coincidental, however. Conceivably, the state might monopolize a function traditionally associated with the private sector. If it did, and operation of the function controlled access to a constitutionally fundamental opportunity, it presumably could not exclude the poor from participation. If, however, two years thereafter a private counterpart reemerged, its operations would not be subject to the fourteenth amendment. Moreover, its emergence would terminate the state monopoly and demand a different result on the indigent's claim for free participation.

144. The state sovereignty doctrine of *National League of Cities v. Usery*, 426 U.S. 833 (1976), holding states immune from commerce power-based regulation of labor standards for state and municipal employees is also conceptually linked with the monopoly doctrine. Both the monopoly doctrine and the *Usery* preservation of states' "freedom to structure integral operations in the area of traditional governmental functions" enable the state to allocate resources and plan operations without excessive fear of direct federal intervention. Furthermore, a forewarning that monopolization of access to critical opportunities is the automatic trigger to affirmative state responsibilities to the indigent is useful in the budgetary planning process.

145. 401 U.S. 371, 377 (1971).

Griffin, two leading “monopoly” cases in the field, rely on procedural due process notions explicitly, in the former case as a sole ground of decision¹⁴⁵ and in the latter as an alternative.¹⁴⁶ If one erroneously views the “wealth-plus” cases as resting upon the equal protection clause, to which the monopoly doctrine seems poorly tailored, *Maher* seems wrong; in my view, however, decisions concerning minimum access to constitutionally significant opportunities rest far more persuasively on libertarian justifications, a critical conclusion obscured in the overgrowth of tangled strands.

2. *Pressures on the Liberty System — Payment and Preference for Childbirth*

The monopoly limitation on a doctrine of affirmative state duty to satisfy the desire to exercise constitutional rights thus serves as a complete defense to a contention that the state must guarantee access to abortion for all who seek one. The existence of state subsidization for the costs of childbirth is generally irrelevant to such a claim, since the “impediment” to abortions created by state refusal to subsidize is not enlarged by a state decision to pay for childbirth.¹⁴⁷

Connecticut’s coverage of other pregnancy-related procedures does raise, however, substantial questions about the permissibility of government-financed forays into the liberties market. In *Maher*, Justice Powell alluded to the problem by defining the *Roe* right as freedom from “unduly burdensome interference with [a woman’s] freedom to decide whether to terminate her pregnancy,”¹⁴⁸ and by acknowledging that Connecticut’s preference “may have made childbirth a more attractive alternative, thereby influencing the woman’s decision.”¹⁴⁹ He then attempted to escape the dilemma by pointing out that the status quo of fee-for-service abortions was neither created nor altered by Connecticut’s preference.¹⁵⁰ Although Justice Powell is correct that the status quo of the abortion market was unaltered by the Connecticut policy, thorough analysis cannot terminate with that observa-

146. 351 U.S. 12, 18 (1956).

147. *Maher v. Roe*, 432 U.S. 464, 474 (1977) (“The indigency that may make it difficult — and in some cases, perhaps, impossible — for some women to have abortions is neither created nor in any way affected by the Connecticut regulation.”)

148. 432 U.S. at 474. See note 115 *supra*.

149. 432 U.S. at 474.

150. 432 U.S. at 474.

tion. The abortion market contains potential buyers as well as sellers, and the degree of state influence on the buyers — the holders of primary rights in the matter — is a crucial variable.¹⁵¹

The doctrine of unconstitutional conditions¹⁵² assumes a pivotal role in the analysis of that variable. That doctrine, applied most frequently in the setting of first amendment interests,¹⁵³ presumptively forbids¹⁵⁴ the conditioning of government largesse on the recipient's surrender of constitutional rights. Its premise is the fragility of certain special freedoms, and its specific concern is that government will use its economic clout to "buy up" rights which the Constitution protects against more direct, punitive coercion.

At first glance, the doctrine seems to fit *Maher v. Roe* rather nicely. Connecticut, forbidden to outlaw abortions, opted for the purchase of abortion rights from the poor with an offer of free care for childbirth. On closer inspection, however, the analogy assumes complicating dimensions. A pregnant woman must actively exercise one constitutional right or another — she must either bear her child or terminate her pregnancy. Each has a certain medical cost attached to it. Unlike the typical first amendment "conditions" case, in which rights are in effect surrendered for a purely economic benefit, government subsidy of childbearing costs encourages the exercise of a preferred liberty. Furthermore, the long-term financial cost of bearing the child, in both cash outlay and lost economic opportunity, heavily outweighs the financial cost of the average abortion. For a rational woman in possession of adequate short-term purchasing re-

151. As a practical matter, many indigent women will feel they have no choice but to carry their pregnancies to term because the State will pay for the associated medical services, even though they would have chosen to have abortions if the State had also provided funds for that procedure. This disparity in funding by the State clearly operates to coerce indigent pregnant women to bear children they would not otherwise choose to have, and just as clearly, this coercion can only operate upon the poor, who are uniquely the victims of this form of financial pressure.

432 U.S. at 483 (Brennan, J., dissenting).

152. See generally Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 HARV. L. REV. 1439 (1968); O'Neil, *Unconstitutional Conditions: Welfare Benefits with Strings Attached*, 54 CALIF. L. REV. 443 (1966).

153. See, e.g., *Sherbert v. Verner*, 374 U.S. 398 (1963) (free exercise); *Speiser v. Randall*, 357 U.S. 513 (1958) (freedom of political thought and association).

154. The presumption can be overcome if the state shows that the condition which limits the exercise of constitutional rights is necessary to the proper and efficient functioning of the overall benefit system. See, e.g., *Wyman v. James*, 400 U.S. 309 (1971) (fourth amendment does not bar conditioning AFDC benefits on recipient's consent to a "home visit" by a welfare caseworker); *United States Civil Serv. Commn. v. National Assn. of Letter Carriers*, 413 U.S. 548 (1973) (first amendment does not bar limitation on partisan political activity by federal civil servants).

sources, the state offer of payment for childbirth is hardly likely to be a sufficient inducement to choose childbirth over abortion.

On the other hand, the choices confronting the *indigent* pregnant woman are dramatically different. Lacking the funds to opt for abortion, given the prospect of cash to defray childbirth expenses, and trapped by the immediacy of her dilemma, she may find her judgment about long-term costs and benefits clouded or tragically irrelevant to her plight in the here-and-now. She may choose childbearing (the more expensive long-run option) over abortion simply because only the former will meet her most pressing cash flow needs.

This suggests that the state subsidy payment for childbirth places unmistakable pressure on a system of free choice in matters of procreation. In *Maher*, however, Justice Powell rejected the analogy to a classic unconstitutional conditions case, *Sherbert v. Verner*,¹⁵⁵ where the Court had held it unconstitutional to condition receipt of unemployment benefits on a person's surrender of the right to abstain for religious reasons from Saturday work. Justice Powell distinguished *Sherbert* as having arisen in "the significantly different context of a constitutionally imposed 'governmental obligation of neutrality' in religious matters."¹⁵⁶ He argued further that payment for childbirth and not abortion was indistinguishable from public funding of government-operated schools without any corresponding subsidy to private schools.¹⁵⁷ Although both points are relevant, neither responds directly to the question raised by the precise facts of *Maher*: If government must be neutral with respect to some but not all private choices of liberty exercise, is the abortion choice one that calls forth neutrality requirements?

Arguments have been maintained that abortion questions are so tied up with the views of organized religion that the religious neutrality requirements of the Constitution ought to be

155. 374 U.S. 398 (1963).

156. 432 U.S. at 475 n.8, (quoting *Sherbert v. Verner*, 374 U.S. 398, 409 (1963)).

157. 432 U.S. at 477. The establishment clause bars most forms of government financial assistance to elementary and secondary private schools with religious affiliation. *See, e.g.,* *Wolman v. Walter*, 433 U.S. 229 (1977); *Meek v. Pittenger*, 421 U.S. 349 (1975); *Committee for Pub. Educ. v. Nyquist*, 413 U.S. 756 (1973); *Lemon v. Kurtzman*, 403 U.S. 602 (1971). The establishment clause barrier surely weakens any argument that government spending for schools must be perfectly even-handed, even though it is evident that the existence of public schools 1) provides tough competition for private schools, and 2) may influence a parent's choice away from the constitutionally protected private school option.

controlling.¹⁵⁸ The Court's studious avoidance of that theory in *Roe v. Wade*, however, together with its inherent difficulties,¹⁵⁹ preclude any serious reliance upon it in criticizing *Maher*. Commentators have argued further that payment for childbirth and not abortion violates the government's obligation to remain neutral in cases where one must choose between two alternatives, each of constitutional dimension.¹⁶⁰ By that standard, Connecticut's policy is doubly damned — it generates financial pressure to forego abortion and it transmits the message that the body politic disapproves the abortion choice. The latter point is significant enough that it should have led to a contrary outcome in *Maher*. Unlike public funding of publicly controlled schools, which manifests no social or moral condemnation of those who select private education, the message delivered by the Connecticut policy is, assuming the validity of *Roe*, a constitutionally unacceptable one.¹⁶¹ And to its impoverished addressees, the dollar medium of that message can be telling indeed.

Invalidation of Connecticut's preference and payment for childbirth would not, of course, guarantee state subsidy of abortions. The state might eliminate all payment for pregnancy-related services rather than expand its coverage to include pregnancy termination, and that, I have argued above, would not violate the Constitution.¹⁶² Unhappy a concluding note as that might be, it underscores my essential point. *Maher v. Roe* was a case about the role of government in the liberty system, not about inequalities for which government can be held constitutionally responsible. The tangled strands of substantive equal protection formulations either blocked full recognition of that insight by the *Maher* majority or enabled them to avoid it while seemingly holding fast to prevailing fourteenth amendment methodology. *Maher* is glaring evidence that the elaborate linkage of liberty and equality in the Court's work of the past twenty-five years can quell revolutions as easily as it can arm them.

The *Maher* majority's devotion to equal protection clause

158. Professor Tribe once advanced that view, see L. TRIBE, *supra* note 1, at 928 & n. 54, but has since recanted. *Id.* at 928.

159. *Id.* at 928-29.

160. See *The Supreme Court, 1976 Term*, 91 HARV. L. REV. 72, 137, 145-46 (1977). See also Henkin, *Privacy and Autonomy*, 74 COLUM. L. REV. 1410, 1432 (1974).

161. See Ely, *The Centrality and Limits of Motivation Analysis*, 15 SAN DIEGO L. REV. 1155, 1157 n. 10 (1978).

162. It might, however, violate a state's statutory obligation to provide Medicaid assistance to an extent "consistent with the objectives of [Title XIX]." 42 U.S.C. § 1396(a)(17) (1976).

theory is still less defensible when that case is compared with *Moore v. City of East Cleveland*¹⁶³ and *Zablocki v. Redhail*.¹⁶⁴ In those, our next two snapshot cases, several Justices from the *Maher* majority proclaimed substantive due process theories of fundamental liberty interests to be preferred over comparable equal protection theories as grounds of fourteenth amendment decision. That apparent recrossing of strands may contain a significant hint about the direction of fourteenth amendment doctrine in the near future.

B. *Moore v. City of East Cleveland*

It is a rare and significant occasion when the Supreme Court writes self-consciously about its choices of doctrine and theory, and self-consciousness of that sort illuminates at high levels of candlepower when it is accompanied by judicial disagreement. Such was the case in *Moore v. City of East Cleveland*,¹⁶⁵ in which the Court invalidated, on pure substantive due process grounds, an East Cleveland zoning ordinance that limited dwelling unit occupancy to members of a "family."¹⁶⁶ The ordinance defined family in a way that excluded a wide variety of relatives of the head of the household. In particular, the ordinance prohibited occupancy by grandchildren of the head of the household, with an exception for the children of one (but only one) dependent child of the household head.

Inez Moore shared a household in East Cleveland with a son, his offspring, and a grandson by another of her children. After city officials gave her notice of the ordinance and she failed to comply with it or seek administrative relief from its strictures,¹⁶⁷ she was charged with and convicted of a violation. A closely divided Supreme Court reversed the conviction and invalidated the ordinance. In an opinion for a plurality of four,¹⁶⁸ Justice Powell concluded that the East Cleveland ordinance failed to satisfy the substantive requirements of the fourteenth amendment's due

163. 431 U.S. 494 (1977).

164. 434 U.S. 374 (1978).

165. 431 U.S. 494 (1977).

166. See 431 U.S. at 496 n. 2.

167. This failure to exhaust administrative remedies led Chief Justice Burger to conclude that Moore's claim should have been dismissed and the substantive constitutional merits never reached. 431 U.S. at 521 (Burger, C.J., dissenting). None of the other Justices agreed, and the case law leans strongly in their direction. See, e.g., *King v. Smith*, 392 U.S. 309 (1968); *McNeese v. Board of Educ.*, 373 U.S. 668 (1963).

168. Justices Brennan, Marshall, Blackmun, and Powell formed the plurality.

process clause. Viewing the case as implicating the liberty to structure extended family living arrangements, the plurality concluded that the East Cleveland ordinance must be "examine[d] carefully" for the "importance of the governmental interests advanced and the extent to which they are served by the challenged regulation."¹⁶⁹ That formulation of a substantive due process review standard left a bit to be desired, for nowhere does the plurality indicate *how* important the state's objectives must be nor *how* well advanced by the ordinance. Nevertheless, the latter half of this test proved fatal: the plurality concluded that the ordinance served "marginally, at best" the interests in preserving "the character of a single-family neighborhood"¹⁷⁰ proffered by East Cleveland.¹⁷¹

Three of the four dissenting Justices discussed the merits in *Moore*. Justices Stewart and Rehnquist argued that substantive due process doctrine should be limited to those interests "implicit in the concept of ordered liberty,"¹⁷² and concluded that Moore's interest in living with her children and grandchildren was not of

169. 431 U.S. at 499.

170. The phrase is Justice White's, 431 U.S. at 550 (White, J., dissenting). Although the purpose of the ordinance might be formulated in "family-neutral" terms (*e.g.*, control of population density, traffic congestion, or school-age population), Justice White's attribution of purpose seems most consistent with the precise family-splitting terms used in the ordinance. Those terms are the best evidence of the provision's dominant purpose.

171. 431 U.S. at 500. In a concurring opinion, Justice Stevens argued that the East Cleveland ordinance worked an unconstitutional property deprivation. He cited approvingly several state court opinions that, he claimed, evinced a trend in that direction. 431 U.S. at 516-21 nn.8-16. Many of those cases involved statutory interpretations of "family" in a zoning ordinance so as not to prohibit occupancy by groups, unrelated by blood or marriage, that cohabited for important and legitimate purposes. They included *City of White Plains v. Ferraioli*, 34 N.Y.2d 300, 313 N.E.2d 756, 357 N.Y.S.2d 449 (1974) (group home licensed by the state to care for abandoned and neglected children "conforms to the purpose" of an ordinance restricting occupancy to families), *cited at* 431 U.S. at 517 n.9, and *Missionaries of Our Lady v. Village of Whitefish Bay*, 267 Wis. 609, 66 N.W.2d 627 (1954) (household of six priests and two lay brothers are a "family" for purposes of the ordinance), *cited at* 431 U.S. at 519 n.13. Other cases cited by Justice Stevens involved limiting interpretations of state-wide zoning enabling statutes. *See City of Des Plaines v. Trottnier*, 34 Ill. 2d 432, 216 N.E.2d 116 (1966) (city not authorized by state law to limit occupancy to related persons), *cited at* 431 U.S. at 516 n.8. While courts in these cases were no doubt influenced by substantive due process notions of liberty interests in structuring a household and property interests in the use to which property is put, only one case from a court of last resort cited by Justice Stevens squarely held a single-family ordinance in violation of the due process clause on grounds of property deprivation. *Kirsh Holding Co. v. Borough of Manasquan*, 59 N.J. 241, 281 A.2d 513 (1971), *cited at* 431 U.S. at 517 n.10. *See generally Developments in the Law — Zoning*, 91 HARV. L. REV. 1427, 1568-78 (1978).

172. 431 U.S. at 537 (Stewart, J., dissenting) (*citing* *Roe v. Wade*, 410 U.S. 113, 152 (1973); *Palko v. Connecticut*, 302 U.S. 319, 325 (1937)).

that magnitude. Justice White, in a more elaborate dissent,¹⁷³ traced the history of substantive due process ideas, cautioned against the abuses of power likely to be engendered by uncritical employment of such theories,¹⁷⁴ and concluded that the deprivation of Moore's liberty and property worked by the East Cleveland ordinance was of the sort that any rational government justification would validate. Finding such justification in East Cleveland's objective of maintaining family-oriented neighborhoods, Justice White concluded that both the due process clause¹⁷⁵ and the equal protection clause¹⁷⁶ had been satisfied.

Moore was a remarkable decision. Its choice of rationale reversed a pattern that had endured for four decades: it was the first decision since the 1937 revolution to invalidate a statute on naked substantive due process grounds¹⁷⁷ when equal protection grounds seemed readily available. *Griswold* and *Roe*, the leading substantive due process cases of the past forty years, had not presented such alternatives; in both cases, the complained-of prohibition swept broadly across the state's entire population, and thus offered no classification readily subject to equal protection attack. In *Moore*, by contrast, the "family" definition in the ordinance seemed perfect for invalidation as an arbitrary classification: the limitation of permitted resident grandchildren to those in one and only one descendant line is rather remote from a concern to protect the character of a single-family neighborhood.¹⁷⁸ The plurality opinion stood at least thirty years of conventional wisdom on its head by adopting a substantive due process theory and proclaiming in a one-sentence footnote that the due process holding rendered it unnecessary for the Court to reach the equal protection claims made in the case.¹⁷⁹

The notion that due process clause doctrine should be preferred to equal protection clause analysis is an intriguing one.¹⁸⁰

173. 431 U.S. at 541 (White, J., dissenting).

174. 431 U.S. at 542-44.

175. 431 U.S. at 547-51.

176. 431 U.S. at 550-51.

177. Conventional wisdom was strongly to the effect that substantive due process, wholly divorced from the Bill of Rights, was dead and buried. See *Whalen v. Roe*, 429 U.S. 589, 596-97 (1977); *Day-Brite Lighting, Inc. v. Missouri*, 342 U.S. 421, 423 (1952). But see text at notes 82-89 *supra*.

178. See note 170 *supra*. The city might have been on safer *equal protection* ground if it had excluded all grandchildren, although the *Moore* plurality's due process theory would presumably have been no less hostile to such a tack.

179. 431 U.S. at 496 n.3.

180. *Moore* is also remarkable for its controversial extension of family autonomy rights. Prior family autonomy cases had only concerned relationships of parent and child.

Justice Jackson, concurring in *Railway Express Agency, Inc. v. New York*,¹⁸¹ had counseled precisely to the contrary:

The burden should rest heavily upon one who would persuade us to use the due process clause to strike down a substantive law or ordinance Invalidation of a statute or an ordinance on due process grounds leaves ungoverned and ungovernable conduct which many people find objectionable.

Invocation of the equal protection clause, on the other hand, does not disable any governmental body from dealing with the subject at hand. It merely means that the prohibition or regulation must have a broader impact.¹⁸²

It remains unclear whether the *Moore* plurality was indifferent to Justice Jackson's concern for the relative consequences of due process versus equal protection invalidation. The theories of *Moore*, which criticize only the peculiar means chosen, do not leave ungovernable the problem of population density.¹⁸³ If, however, the "objectionable" conduct that troubled East Cleveland was the practice of extending families within a household, the Jackson dictum has been ignored. It is entirely possible that the Court employed the theories of *Moore* fully aware of their sweeping consequences. If so, the Court may have been consciously opting for the broad effects that substantive due process holdings are likely to produce rather than the narrower, more restrained effects that Justice Jackson found more acceptable.

Comparing *Moore* with *Skinner v. Oklahoma*¹⁸⁴ may illustrate the different consequences of due process and equal protection intervention. *Skinner* invalidated, on equal protection grounds, an Oklahoma statute that required sterilization of certain classes of habitual criminal offenders. The Supreme Court concluded that the statute's coverage of larceny offenders such as *Skinner*, coupled with its exemption of other classes of thieves, including embezzlers, constituted an "invidious discrimination."¹⁸⁵ The Court was aided toward that conclusion by the premise that reproductive freedom is a "basic civil right"¹⁸⁶ whose

Moore's household included two grandchildren, both of whom had at least one living parent. 431 U.S. at 496-97.

181. 336 U.S. 106, 111 (1949).

182. 336 U.S. at 112 (Jackson, J., concurring).

183. Communities remain free to regulate density directly (*i.e.*, number of people per square foot of usable space), and to prohibit at least some groups of unrelated persons from sharing a household. See *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974). See generally *Developments in the Law*, *supra* note 171, at 1443-62.

184. 316 U.S. 535 (1942).

185. 316 U.S. at 541.

186. 316 U.S. at 541.

discriminatory abridgment receives unusually exacting judicial inquiry. *Skinner's* 1942 vintage helps to explain why the Court preferred a relatively narrow equal protection ground of decision to a broader preferred liberty theory that would have impugned all involuntary sterilization schemes. No matter how serious the issue, the Court presumably was unwilling to reinstate substantive activism under the due process clause only five years after its repudiation.¹⁸⁷ Nevertheless, *Skinner* has been criticized for the narrowness of its approach and for its consequent failure to protect other classes of persons, criminal offenders and otherwise, whose reproductive interests were potentially threatened by sterilization schemes.¹⁸⁸

Skinner was unrestrained in its vigorous protection of a non-textual liberty, yet cautious in its grounds that went no farther than the particular case at hand. *Moore's* reversal of the strand preference can be viewed as an inversion of the Court's restraint priorities as well. The decision is deferential toward state zoning objectives — communities remain free to control population density and neighborhood character, so long as the definition of appropriate living units does not sever family connections. Yet the due process clause theory, with its strict attention to the means used to achieve those ends, delivers the message of *Moore* in a way unlikely to give rise to further litigation on the point.¹⁸⁹ If *Moore* had chosen the equal protection route, it might have invalidated the East Cleveland ordinance while suggesting the permissibility of other, less arbitrary definitions of "family". Instead, *Moore* holds that families, defined by blood and marriage relations, cannot be carved up unless such limitations are critically necessary to achieve substantial zoning objectives. Thus, unlike the *Skinner* equal protection approach, which at the time left room for doubt whether classes of habitual criminals could be sterilized, the *Moore* due process methodology clearly marks the extended family as an institution heavily protected against direct municipal regulation.

Although *Moore's* machete leaves open fewer questions than

187. That is, the majority was unwilling. Chief Justice Stone, joined by Justice Jackson, concurred in *Skinner* on substantive due process grounds. 316 U.S. at 544 (Stone, C.J., concurring).

188. See Arthur Garfield Hays Conference, *The Proper Role of the United States Supreme Court in Civil Liberties Cases*, 10 WAYNE L. REV. 457, 471-72 (1964) (remarks of Professor Foote).

189. Cf. Dixon, *supra* note 11, at 87 (the Court decided *Roe v. Wade* in a way "designed . . . to regulate the field in such detail as to minimize future questions and litigation.").

Skinner's scalpel, that may not have been what principally motivated the *Moore* majority to choose due process methodology. A more persuasive speculation, perhaps, is that at least three of the five Justices voting to invalidate the East Cleveland ordinance wanted most to avoid manufacturing arrows for the substantive equal protection bow.¹⁹⁰ The influence of Justice Marshall's sliding scale of equal protection,¹⁹¹ which correlates the review standard with the importance of the claimed interest, would have been buttressed had the Court used the liberty to structure family living arrangements to trigger stringent equal protection review. By avoiding the equal protection ground, the majority was able to fortify the fourteenth amendment barricade without reinforcing the sliding scale or other, less flexible, theories of substantive equal protection.¹⁹²

The contrast between *Moore* and *Maher*, viewed from this perspective, is striking. In *Maher*, a Court intent on upholding the Connecticut policy chose to leave the strands tangled; in *Moore*, it preferred to untangle in order to invalidate. The Court thus continued to make substantive value choices in fourteenth amendment adjudication, but chose to make new advances in the protection of substantive rights in the name of the due process clause. It left the structure and rhetoric of substantive equal protection formally intact, however, perhaps to preserve the underpinnings of important Warren Court work, to avoid abrupt doctrinal discontinuities, or to retain judicial flexibility. Whatever the explanation, the *Maher-Moore* sequence seems a tentative but significant step in the untangling process currently underway.

190. Justices Powell, Blackmun, and Stevens supported the disarmament. Unperturbed, Justice Marshall remains an avowed proponent of substantive equal protection, see *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1, 70 (1973) (Marshall, J., dissenting), and Justice Brennan has joined in, 411 U.S. at 62, although at times he has taken pains to mask his preference in a "strict rationality" formula of some sort. See *United States Dept. of Agriculture v. Moreno*, 413 U.S. 528 (1973); *Eisenstadt v. Baird*, 405 U.S. 438 (1972). Intriguingly, Justices Brennan and Marshall also submitted a concurring opinion in *Moore*, emphasizing the role of the extended family in the cultural patterns of nonwhite minorities. 431 U.S. at 507-11. This attempted relinkage of *Moore* to equal protection seems unpersuasive in face of East Cleveland's predominantly nonwhite character. If any "racial discrimination" was operating, it was self-imposed.

191. See note 99 *supra*.

192. The *Rodriguez* formulation, see text at notes 83-97 *supra*, articulated a pure "two-tier" theory, providing strict scrutiny of all suspect classifications and all classifications impinging upon "fundamental interests." An equal protection approach in *Moore* might have held family-structuring interests to be fundamental for this purpose. See generally Gunther, *supra* note 98.

The Court's use of the substantive due process strand in *Moore* forced it to venture once again into the thicket of defining fundamental liberties.¹⁹³ The opinions in *Moore* offer a variety of approaches to determining which rights merit the active protection of substantive due process.¹⁹⁴ First, although the Justices disagreed about the governing standard by which to evaluate claims that particular liberty interests are fundamental,¹⁹⁵ not one opposed the continued employment of substantive due process to protect some liberties wholly removed from the Bill of Rights. Second, the terms of the review standard employed by the *Moore* plurality suggest that the Court is finally prepared to open formally an "intermediate wing" of substantive due process review. Third, the fight over substantive due process standards reveals two distinct but similar versions of an "ordered liberty"

193. See text at notes 2-8 *supra*.

194. The vigorous protection of the extended family in *Moore* expands the class of preferred nontextual liberties, in result if not in theory. *Moore* moves beyond *Griswold* and *Roe*, which involved procreative freedom of choice, as well as beyond *Stanley v. Illinois*, 405 U.S. 645 (1972), where the Court revived the irrebuttable presumption doctrine to strike down a statute that proscribed awarding custody of an illegitimate child to the father. *Stanley's* protection of the relationship between biological parent and child was not a particularly bold leap. The biological choice to conceive and the emotional choice to perform the parental function are hardly unrelated. In the absence of constitutional protection of the latter choice, the protection of the former in *Skinner*, *Griswold*, and *Roe* is robbed of a substantial portion of its significance. Viewed in that light, the statutory prohibition of custody can be seen as a retroactive "sterilization," and, as such, fully within the scope of the procreative freedom principle.

The family restrictions imposed by *East Cleveland*, however, did not intrude on the relationship between parent and minor child. Both the majority and the dissent in *Moore* seemed acutely aware of the extension of the family privacy notion being sought by the petitioners. In the end, the battle reduced to a disagreement about the appropriateness of judicial elevation to special status of new elements of liberty. The plurality viewed freedom to structure an extended family as a critical element of our cultural heritage, hence deserving extraordinary judicial protection:

Ours is by no means a tradition limited to respect for the bonds uniting the members of the nuclear family. The tradition of uncles, aunts, cousins, and especially grandparents sharing a household along with parents and children has roots equally venerable and equally deserving of constitutional recognition.

431 U.S. at 504. Several dissenting Justices, more deeply troubled by any new applications of substantive due process doctrine, thought the case failed to present the harm to vital interests that is necessary to overcome the heavy presumption against such new applications:

The interest that the appellant may have in permanently sharing a single kitchen and a suite of contiguous rooms with some of her relatives simply does not rise to [the] level [of preferred liberty]. To equate this interest with the fundamental decisions to marry and to bear and raise children is to extend the limited substantive contours of the Due Process Clause beyond recognition.

431 U.S. at 537 (Stewart, J., dissenting). In my view, developed at length in Section IV. A. below, those Justices seriously and inappropriately devalued *Moore's* claim.

195. See note 194 *supra*.

standard articulated in *Palko*¹⁹⁶ and elaborated in Justice Harlan's dissent in *Poe v. Ullman*.¹⁹⁷ One version — that of the *Moore* dissenters — has no apparent unifying theory. It does appear, however, to accept existing substantive due process decisions, like *Roe*, and to recognize new claims *closely* analogous to those already recognized.¹⁹⁸ The other version — that of the *Moore* plurality — seems to depend on the historical understanding of liberty:

Appropriate limits on substantive due process come not from drawing arbitrary lines but rather from careful "respect for the teachings of history [and] solid recognition of the basic values that underlie our society." Our decisions establish that the Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in this Nation's history and tradition. It is through the family that we inculcate and pass down many of our most cherished values, moral and cultural.¹⁹⁹

The problem of defining standards for ascertaining fundamental liberties is an old one. Its difficulty has led judges²⁰⁰ and commentators²⁰¹ alike to conclude that defensible standards do not exist and that substantive due process adjudication is inescapably an abuse of power. Indeed, one of the attractions of substantive equal protection, in its heyday, was the perception that notions of constitutional equality possessed an intrinsic set of standards. The recent reduction in substantive equal protection activism, coupled with the rebirth of substantive due process activism, has revived the search for standards, and the quest must be vigorously pursued. This century's constitutional law is overpowering testimony to the allure and might of substantive due process.²⁰² The Court will not abandon it, and a fabric of expectations has been woven around it; the task is to confine it and make it as amenable to defensible principle as possible. *Moore* started down that path,²⁰³ but major advances in constitu-

196. See text at notes 43-46 *supra*.

197. 367 U.S. 497, 542-43 (1961) (Harlan, J., dissenting).

198. 431 U.S. at 536 (Stewart, J., dissenting); 431 U.S. at 549 (White, J., dissenting).

199. 431 U.S. at 503-04 (citations omitted).

200. See, e.g., *Griswold v. Connecticut*, 381 U.S. 479, 511-513 (1965) (Black, J., dissenting).

201. See, e.g., Ely, *Foreword*, *supra* note 9.

202. See A. Cox, *THE ROLE OF THE SUPREME COURT IN AMERICAN GOVERNMENT* at xx (1976).

203. In Section IV, I will propose a standard of fundamentality which builds upon the foundations of *Moore* and provides a mode of analysis more subject to principled application.

tional law are often marked more by fits and starts than by graceful strides. The third snapshot in this brief album is therefore not surprising, for it pictures the strands of the fourteenth amendment rewoven in a knot twisted enough to warm a sailor's heart.

C. *Zablocki v. Redhail*

Zablocki v. Redhail,²⁰⁴ decided in January 1978, illustrates perfectly the complex interweaving of and subtle rivalry between liberty and equality themes in fourteenth amendment adjudication. The Wisconsin statute challenged in *Zablocki* provided that a person with outstanding court-ordered support obligations to minor children not in his custody could not obtain a license to marry absent permission from a state court. The court could grant the license only if the petitioner demonstrated at a hearing that 1) all prior court-ordered obligations had been satisfied, and 2) the minor child beneficiary of the obligation was not then, and was not likely to become, a public charge.²⁰⁵

Roger Redhail, plaintiff in the case, told a tale of many woes. He had fathered an infant girl out of wedlock in 1971. As a result, he faced a paternity suit in 1972 in which he admitted paternity and was ordered by the Milwaukee County Court to pay \$109 per month for child support. For the next two years Redhail was "unemployed and indigent,"²⁰⁶ and made no payments on his daughter's behalf. In the fall of 1974, Redhail sought a license to marry another woman, who was pregnant with his child. After the clerk denied the license application in light of the statute described above, Redhail and his prospective bride sought federal injunctive relief against the scheme. Redhail did not seek the hearing provided in the statute, but the state conceded that such a petition would have been futile. Redhail had an undisputed arrearage of over \$3,000, and even if he met his monthly obligation, his daughter would be, as she had been since birth, a recipient of public assistance.

In an opinion for a majority of the Court, Justice Marshall held that the Wisconsin marriage bar violated the equal protection clause. His opinion, true to the substantive emphasis of his sliding scale theories, made the nature of the right impeded more significant than the nature of the classification drawn. Proceed-

204. 434 U.S. 374 (1978).

205. The statute is set out in the Court's opinion. 434 U.S. at 375-77 n.1.

206. 434 U.S. at 378.

ing from the premise that marriage is a fundamental right, Justice Marshall invoked an active review standard, one which demanded a close relationship between the marriage prohibition and "sufficiently important state interests."²⁰⁷ The statute, not surprisingly, failed the test. Although the opinion conceded the importance of ensuring compliance with family support obligations, it found the Wisconsin scheme too heavy a burden on marriage formation and insufficiently likely to increase the rate of compliance.

Three separate concurring opinions were filed in *Zablocki*. Justice Stevens concurred on equal protection grounds,²⁰⁸ Justice Powell concurred on both equal protection and substantive due process grounds,²⁰⁹ and Justice Stewart agreed with the result solely on due process grounds.²¹⁰ Justice Stewart spoke directly and at some length about the problem of tangled strands:

In an opinion of the Court half a century ago, Justice Holmes described an equal protection claim as "the usual last resort of constitutional arguments." . . . Today equal protection doctrine has become the Court's chief instrument for invalidating state laws. Yet, in a case like this one, the doctrine is no more than substantive due process by another name.

Although the Court purports to examine the bases for legislative classifications and to compare the treatment of legislatively defined groups, it actually erects substantive limitations on what States may do. Thus, the effect of the Court's decision in this case is not to require Wisconsin to draw its legislative classifications with greater precision or to afford similar treatment to similarly situated persons. Rather, the message of the Court's opinion is that Wisconsin may not use its control over marriage to achieve the objectives of the state statute. Such restrictions on basic governmental power are at the heart of substantive due process.

The Court is understandably reluctant to rely on substantive due process But to embrace the essence of that doctrine under the guise of equal protection serves no purpose but obfuscation. . . .

To conceal this appropriate inquiry invites mechanical or thoughtless application of misfocused doctrine. To bring it into the open forces a healthy and responsible recognition of the nature and purpose of the extreme power we wield when, in invalidating a state law in the name of the Constitution, we invalidate *pro tanto*

207. 434 U.S. at 388.

208. 434 U.S. at 403.

209. 434 U.S. at 396.

210. 434 U.S. at 391.

the process of representative democracy in one of the sovereign States of the Union.²¹¹

The tangling in *Zablocki* was even worse than Justice Stewart indicated. The majority opinion, resting wholly on the equal protection clause, seems almost completely unconcerned with questions of "classification" or "discrimination." The de facto wealth classification generated by the Wisconsin scheme — the very poor were blocked from marriage regardless of their satisfaction of support obligations — received only the scantiest attention.²¹² Given the prominence of "wealth plus fundamental right" reasoning and rhetoric in Warren Court equal protection decisions,²¹³ abstinence from that approach in *Zablocki* is striking. It suggests that wealth, or lack of it, may perhaps return to the status of "constitutional irrelevance" it once apparently enjoyed.²¹⁴

Paradoxically undercutting that suggestion, however, is the failure of those who perceived the *Zablocki* majority's tangle to avoid their own. Although Justices Stewart and Powell urged a due process clause theory upon the Court, both laid controlling emphasis on the Wisconsin statute's disproportionate burden upon the indigent.²¹⁵ That an equality-centered theme of a decade past can be transformed magically into a liberty-centered theme of the moment is marvelous testimony to the staying power of arguments to protect the poor, but it simultaneously indicates that the theoretical basis of much of the Warren Court's substantive equal protection effort is sorely in need of reexamination.

The *Zablocki* plot thickens when one notices that Justices Powell and Stewart each expressed concern about the consequences of the *Zablocki* holding for other state-created barriers to marriage, such as limitations based on age or consanguinity.

211. 434 U.S. at 395-96.

212. 434 U.S. at 387.

213. See text at notes 122-25 *supra*.

214. See *Edwards v. California*, 314 U.S. 160, 185 (1941) (Jackson, J., concurring). Justice Jackson was, of course, concerned about the *de jure* discrimination against the poor challenged in *Edwards*, and, in that context, indigency was not an "irrelevance." His point, I think, was that states must *treat* it as an irrelevance, or, more accurately, cannot create sanctions and punishments which are triggered *explicitly* by indigent status. What Jackson thus intended is something like what the elder Justice Harlan intended when he said the Constitution is "color-blind," *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting), where he presumably meant to say that the Constitution color-consciously requires the *states* to be color-blind.

215. 434 U.S. at 393-95 (Stewart, J., concurring); 434 U.S. at 400-02 (Powell, J., concurring).

Both Justices warned that *Zablocki* might be read to require extraordinary state justification for such time-honored restrictions. But notwithstanding their conclusory say-sos, neither clarified how or why a substantive due process theory would be less destructive of traditional marriage impediments than a substantive equal protection theory fueled by the same sensitivity to restrictions on marriage formation.²¹⁶

Given the surprising and doctrinally unnecessary resurrection of substantive due process in *Moore*, why did the *Zablocki* Court revert to substantive equal protection labels? The family formation context of *Zablocki* made it a less controversial setting for the invocation of a substantive due process theory than *Moore* — marriage barriers had, as an alternative ground of decision in *Loving v. Virginia*,²¹⁷ been under due process clause clouds before. *Moore*, in contrast, demanded a much greater extension of prior holdings to qualify as a legitimate preferred liberty claim. Two plausible explanations for this enigmatic doctrinal flip-flop present themselves. A primary goal of several members of the Court appears to be flexibility — the avoidance of rigid formulae that might produce unpalatable results in unforeseeable cases. The disagreement about choice of strands may thus be only a dispute over which approach best preserves open discretion and the power to decide cases ad hoc. For some, that discretion is preserved by fluid notions of the substance of equal protection; for others, the erratic quality of due process clause intervention is better suited to the task. A more frightening explanation for the *Moore-Zablocki* inconsistency is that the Justices think the choice of doctrine insignificant, either because all that counts is mustering a majority for a given result or because the distinct functions of the strands have long been blurred. Either way, constitutional law is done a great disservice. Liberty against government and equality under the law are not fungible concepts, and the majesty of both is sullied by attempts to treat them as such. The strands must be untangled.

216. A due process theory might be more solicitous of such traditions, for reasons developed in Section IV.A., *infra*. The trick is to take care to define the fundamental right in a way that preserves what ought to be preserved. An equality-centered approach has trouble doing that, but I hope to show that a straightforward liberty approach, properly understood and employed, might be a sensitive enough instrument. See text at notes 324-25 *infra*.

217. 388 U.S. 1 (1967).

IV. UNTANGLING THE STRANDS

The trials and errors of history and the evolution of constitutional values are responsible in tandem for the complex modern interplay between liberty and equality in fourteenth amendment adjudication, and the interplay has at times served valuable purposes. Beyond question, certain conceptions of liberty and equality are mutually reinforcing. Equality of opportunity, unhampered by invidious discrimination, may lead to enhanced economic status and a more secure base from which to exercise liberty interests. Similarly, the unfettered exercise of various liberties may operate to enhance both equality of opportunity and the individual belief that we are a society of legal and political equals. These notions of mutual reinforcement do not, however, always require specific doctrinal embodiment. Although liberty and equality are, operationally, inextricably linked, consistency of decision, persuasiveness of judicial reasoning, and maintenance of appropriate institutional restraints would all be enhanced by their separation theoretically. The pretended death of substantive due process has long impeded any candid attempt to separate; its recent resurrection in *Moore* and the subsequent retangling in *Zablocki* suggest that the time is ripe for the effort that follows.

A. *The Multiple Meanings of Liberty*

By the turn of the century, the theory of liberty protected by the fourteenth amendment was simple yet expansive. Although liberty was viewed as negative — a right to be let alone — it embraced every important interest valued by sensible people.²¹⁸ In one oft-cited formulation, it included the “right[s] of the individual . . . to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.”²¹⁹ The Court drew no lines among those privileges; contracting to work in excess of sixty hours per week was neither a greater nor lesser exercise of liberty than studying a foreign language, marrying, or selling a product at a price the unregulated market would bear. Because the Court considered all liberties equal in their claims to due process clause protection, the Court

218. See generally Monaghan, *Of “Liberty” and “Property,”* 62 CORNELL L. REV. 405, 411-16 (1977).

219. *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923).

demanded, in theory, an unchanging degree of justification²²⁰ from a state that imposed any liberty restriction. Although history and intuition suggest that, in fact, the Court engaged in substantive due process review at different degrees of intensity, the theory upon which such review rested admitted of no "sliding scales" or tests of "fundamentality." Liberty was liberty was liberty, and it had to be protected against invasion on improper grounds.

Post-1937 developments have complicated enormously the meaning of liberty protected by the due process clause. One of the more dramatic complications has been the separation of "procedural due process" from "substantive due process" liberties. For purposes of procedural due process, the term "liberty" comprises the specifics of the Bill of Rights,²²¹ freedom from physical restraints,²²² and an ill-defined group of interests created by state laws.²²³ That, at least, is the definition of procedural due process liberty enunciated in *Paul v. Davis*²²⁴ — a definition that despite persuasive calls of "Halt!"²²⁵ seems destined to endure²²⁶ for the foreseeable future.

Although the Court has appeared unwilling to explain the

220. Although the Court presented the standard in a variety of verbal cloaks, it required essentially a "direct and substantial" relationship between the restriction and some legitimate aim of the police power. *See, e.g.,* *Lochner v. New York*, 198 U.S. 45, 64 (1905).

221. *See Paul v. Davis*, 424 U.S. 693, 710-11 n.5 (1976) (citing *Monroe v. Pape*, 365 U.S. 167 (1961)).

222. *See Ingraham v. Wright*, 430 U.S. 651, 674 (1977) (corporal punishment in public schools implicates liberty, despite neither alteration in state law status nor possible eighth amendment violation). Despite *Ingraham's* posture as a procedural due process case, its refusal to require prior hearings on whether the student committed the "offense" leading to the punishment and its reliance on state law remedies for "excessive" punishment mark it as a case protecting substantive rights as much as if not more than procedural ones. For what the Court really seemed to be holding was that states *must* provide a remedy in tort for public school students who are excessively (that is, disproportionately) punished, a requirement that can emerge only from an underlying recognition of an inviolable federal constitutional right of a student not to be so treated.

223. *Paul v. Davis*, 424 U.S. 693, 710-11 (1976). This final group of liberties seems difficult to distinguish conceptually from "property" entitlements of the sort covered by the theory of *Board of Regents v. Roth*, 408 U.S. 564 (1972). For the Court's most recent struggle with the problem of appropriate sources of "liberty," see the range of opinions in *Greenholtz v. Inmates of the Neb. Penal & Correctional Complex*, 99 S.Ct. 2100 (1979).

224. 424 U.S. 693 (1976).

225. Monaghan, *supra* note 218, at 424-34. *See also* Shapiro, *Mr. Justice Rehnquist: A Preliminary View*, 90 HARV. L. REV. 293, 322-28 (1976).

226. *See Smith v. Organization of Foster Families for Equality & Reform*, 431 U.S. 816 (1977) (assumed, without deciding, that source of foster parents' "liberty" interests is state law).

distinction, the meaning of "liberty" in the substantive due process setting springs from different roots. *Paul's* positivism is not controlling; indeed, a footnote to *Paul* explicitly distinguishes liberty for procedural due process purposes from liberty for substantive purposes.²²⁷ For the latter, liberty encompasses a far broader range of interests; it may yet, for all we know, include all those "long recognized at common law as essential to the orderly pursuit of happiness by free men."²²⁸ And the source of these interests is *federal* constitutional law; if a new state entered the Union and simultaneously criminalized the act of bearing a child, one could have no doubt that "liberty" had been endangered, even though state law entitlement to the liberty had ceased to exist.

The distinction in methodology between procedural and substantive due process is magnified at the second stage of analysis. For, unlike the all-inclusive theory of the *Lochner* era that held all liberties equally inviolable, and unlike the procedural due process theory that assesses the weight of any protected interest in a refined way for purposes of "balancing,"²²⁹ modern substan-

227. "[The Court's] discussion [of the source of liberty interests] is limited to consideration of the procedural guarantees of the Due Process Clause and is not intended to describe those substantive limitations upon state action which may be encompassed within the concept of 'liberty' expressed in the Fourteenth Amendment." 424 U.S. at 710 n.5.

The only sensible explanation for holding a positivist view of liberty for procedural due process purposes, while simultaneously maintaining an independent federal constitutional view for substantive purposes, is that of minimizing the intrusion of federal constitutional law on the day-to-day operations of state and municipal institutions. For instance, a state law may impinge upon substantive liberty but be defensible under prevailing doctrine as rationally justifiable. Thus, the law's substantive constitutionality, if ever challenged, can usually be authoritatively determined in a single proceeding. *Application* of that law to many parties, however, may give rise to countless encounters between state officials and private citizens. In turn, under a broad, nonpositivist view of procedural due process liberty, each such encounter could trigger requirements of notice and opportunities to be heard. The Court, despite the apparent "promise" of *Board of Regents v. Roth*, 408 U.S. 564 (1972), seems eager to avoid that consequence. *See, e.g., Board of Curators v. Horowitz*, 435 U.S. 78 (1978) (academic dismissal from state medical school, even if a deprivation of liberty or property, does not trigger a right to a hearing under the fourteenth amendment); *Bishop v. Wood*, 426 U.S. 341, 350 (1976).

228. *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923).

229. To determine the level of "process that is due" a liberty protected by procedural guarantees, a court assigns weights to the individual's interests and balances them against the state's interest in their summary deprivation. *See, e.g., Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 319, 334-35 (1976). *See generally* Mashaw, *The Supreme Court's Due Process Calculus for Administrative Adjudication in Mathews v. Eldridge: Three Factors in Search of a Theory of Value*, 44 U. CHI. L. REV. 28 (1976); *See also* Van Alstyne, *Cracks in "The New Property": Adjudicative Due Process in the Administrative State*, 62 CORNELL L. REV. 445 (1977). Unlike the question of liberty *vel non*, the task of weighing

tive due process theory has a distinct all-or-nothing quality to it. Most liberties lacking textual support are of the garden variety — like liberty of contract — and thus their deprivation is constitutional if rationally necessary to the achievement of a public good.²³⁰ Several select liberties, on the other hand, have attained the status of “fundamental” or “preferred,” with the consequence that the Constitution permits a state to abridge them only if it can demonstrate an extraordinary justification.²³¹ Because the review standard for ordinary liberties is so deferential, and the standard for preferred liberties so rigid, outcomes are ordained by the designation of “preferred” or not.²³² For procedural purposes, liberties may weigh anything from a gram to a ton; for substantive purposes, they must weigh either a microgram or a megaton. The volatility and, on occasion, the seemingly anti-democratic consequences of this latter mode of classifying liberties bespeak the overwhelming necessity to discover a sound theory to justify its existence and guide its application.

1. *Substantive Rights — The Sources of Preferred Liberty*

Preferred liberties in constitutional law generally, and in the substantive due process side of the fourteenth amendment specifically, have flowed from three major sources. Two of those sources derive from the Constitution itself; the parentage of the third remains in doubt.

takes place on a scale with an infinite number of gradations. Thus, in the judicial response to the question of “what process is due,” subtle and refined judgments are permitted and, quite frequently, are required. Compare *Mathews v. Eldridge*, 424 U.S. 319 (1976), with *Goldberg v. Kelly*, 397 U.S. 254 (1970).

230. See, e.g., *Williamson v. Lee Optical, Inc.*, 348 U.S. 483, 491 (1955). Some commentators, most notably Judge (then Professor) Linde in *Due Process of Lawmaking*, 55 NEB. L. REV. 197 (1976), have argued that “rationality” review is useless and senseless. Nevertheless, the rationality standard is an extremely “settled” principle, at least insofar as such principles are discoverable from the face of judicial opinions. Whether it is one of those requirements of constitutional law that courts cannot enforce, but legislatures should take seriously, is a question with which others may grapple. Judge Linde, for one, does not see the requirement as sensible even at that level. *Id.* at 222-35. See generally Sager, *Fair Measure: Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212 (1978); Brest, *The Conscientious Legislator's Guide to Constitutional Interpretation*, 27 STAN. L. REV. 585 (1975).

231. See, e.g., *Roe v. Wade*, 410 U.S. 113, 155 (1973) (restrictions on abortion justifiable only upon a showing of necessity to the accomplishment of compelling state interests). Dissenting in *Moore*, Justice White articulated precisely this dichotomy of substantive due process standards. 432 U.S. at 542-44.

232. Equal protection doctrine had, of course, its comparable period of development. See Gunther, *supra* note 98, at 10; *Developments in the Law, supra* note 56, at 1127-28.

a. *Sources within the document — text and structure.* The principal source of preferred liberties, of course, has been the Bill of Rights, incorporated in the due process clause. Although the relationship between Bill safeguards and state governmental power has sparked fascinating and seemingly endless controversy,²³³ the proposition that many provisions of the Bill impose limitations on states²³⁴ coextensive with the limitations they impose on the federal government is a settled one.²³⁵ *Duncan v. Louisiana*,²³⁶ the Court's most recent word on how to decide which Bill guarantees apply to the states, teaches that the test of incorporation is whether the guarantee is necessary "to an Anglo-American regime of ordered liberty."²³⁷

A second source of preferred liberty has been the constitutional structure and the values that structure implies. Predominantly structural concerns have animated the Court's protection of the right of interstate travel;²³⁸ the open federal union implicit in the constitutional design generates a corollary of free movement within the nation's borders. The Court's close watch over legislative apportionment and distribution of the franchise by states also may rest, at least in part, upon structural assumptions concerning the democratic process and fair opportunity to participate in that process.²³⁹ A lamentable consequence of the recent prominence of substantive equal protection is that these interests, whose creation may be defensible on structural theories, have been anchored in the equal protection clause,²⁴⁰ from which

233. I spare the reader (and myself) the usual string citation. For those obsessed with cumulative documentation, however, see the sources cited in G. GUNTHER, *supra* note 11, at 525 n.†.

234. See L. TRIBE, *supra* note 1, § 11-2.

235. There have been some serious recent objections to this unity. See, e.g., *Crist v. Bretz*, 437 U.S. 28, 52 (1978) (Powell, J., dissenting, joined by Rehnquist, J., and Burger, C.J.); *Ballew v. Georgia*, 435 U.S. 223, 246 (1978) (Powell, J., concurring, joined by Rehnquist, J., and Burger, C.J.); *Apodaca v. Oregon*, 406 U.S. 404, 369 (1972) (Powell, J., concurring). (Powell's concurrence treats several cases and so precedes the *Apodaca* majority opinion.)

236. 391 U.S. 145 (1968).

237. 391 U.S. at 149-50 n.14.

238. See the detailed discussion in text at notes 371-86 *infra*.

239. See generally C. BLACK, *STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW* (1969).

240. See cases cited in notes 76-78 *supra*. It may be that no fourteenth amendment strand is necessary to support application of structurally derived concerns to the states, and that the supremacy clause alone provides the necessary authority. That seems somewhat persuasive in the context of the travel right, given its pre-1868 antecedent in *Crandall v. Nevada*, 73 U.S. (6 Wall.) 35 (1867), although Justice Harlan, dissenting in *Shapiro v. Thompson*, 394 U.S. 618, 662 (1969), apparently perceived the relevance of the due process clause to *that* travel problem. And the cases involving reapportionment and voting

a necessary set of limiting principles does not readily spring.

b. *Moving outside the document — fundamental value discovery.* The third and most controversial source of preferred liberties has been a “non-source”: naked judicial judgment that a liberty is of special constitutional magnitude, despite a lack of persuasive linkage with structural or textually identified values. Virtually all of the decisional law meeting this description protects family relationships, actual or potential. Resort to the so-called constitutional rights of “privacy” begs the question of the source of those rights, since, despite the contrary assertion in *Griswold*, the constitutional text creates no such *general* right.²⁴¹ Furthermore, even if such a right did exist, family autonomy concerns would fit uneasily within it, and the decisions of the past fifteen years suggest that not even judges believe that a “privacy as autonomy” right exists in any generalizable form.²⁴² Privacy as a label is both infinitely useful and ultimately useless; it can take you everywhere, and consequently, cannot reliably get you anywhere.²⁴³ If the “naked” substantive due process decisions had to

rights seem impossible to defend without some fairly direct linkage with the fourteenth amendment. But despite the strong equality themes in these cases, I think they too rest so uneasily on the equal protection clause that other avenues should be pursued. See text at notes 371-86 *infra*.

241. See Ely, *supra* note 88, at 929 (right of privacy inferable only “so long as some care is taken in defining the sort of right the inference will support.”) (emphasis original). Professor Ely reads *Griswold* as a case protecting the *home* against the “most outrageous sort of governmental prying” which enforcement of the ban on contraceptive use would require. *Id.* at 930. See also Dixon, *supra* note 11, at 83-85 (*Griswold* and *Roe* are cases about “freedom of action,” not about privacy). Some commentators have argued that the privacy right is really a set of rights relating to autonomy and seclusion. See generally Wilkinson & White, *Constitutional Protection for Personal Lifestyle*, 62 CORNELL L. REV. 563 (1977); Note, *On Privacy: Constitutional Protection for Personal Liberty*, 48 N.Y.U. L. REV. 670 (1973). Autonomy as a claim moves far beyond any existing conception of constitutional privacy. Autonomy is a claim made by *every* substantive due process plaintiff, seeking to be “let alone,” whether from wage and hour regulation or a contraceptive ban. See also Fried, *Privacy*, 77 YALE L.J. 475 (1968); Henkin, *Privacy and Autonomy*, 74 COLUM. L. REV. 1410 (1974); Gerety, *Redefining Privacy*, 12 HARV. C.R.- C.L. L. REV. 233 (1977).

242. *Whalen v. Roe*, 429 U.S. 589 (1977), proffered a general discussion of the privacy right, but held that a statute under which information was stored about legitimate users of dangerous prescription drugs is subject to no more than a rationality test, albeit a fairly careful one. And both *Kelley v. Johnson*, 425 U.S. 238 (1976) (upholding a hair grooming regulation for police officers), and *Doe v. Commonwealth's Attorney*, 425 U.S. 901 (1976), *affg. mem.* 403 F. Supp. 1199 (E.D. Va. 1975) (upholding a statute proscribing homosexual relations between consenting adults), suggest that the Court is rather unreceptive to a general “autonomy” component of the privacy concept. For reasons that will appear in Section IV.A.2. below, I think such general unreceptivity is warranted.

243. See L. TRIBE, *supra* note 1, § 15-1.

be summed up in a brief capsule, rights of "familial choice"²⁴⁴ would be a far more accurate description than rights of "privacy." But rights of "familial choice" stand starkly naked, since no amount of Bill of Rights penumbra-fashioning can responsibly lead to "family rights" as a protected category.²⁴⁵ What, then, is

244. Cf. Ely, *Foreword*, *supra* note 9, at 11 & n.40 (suggesting that the Court had lumped together the distinct activities of sex, marriage, childbearing, and childrearing to form a constitutional unit.)

245. An intriguing straw man to pursue is the possibility that the free exercise clause might house the "familial choice" liberties that are currently preferred. The clause cannot be totally irrelevant to the inner-directed and (at least occasionally) spiritually influenced choices at stake in family matters. If marriage and family choices could fairly be viewed as exercises of a consensus American religion, rather than merely shifting social arrangements akin to "shifting economic arrangements," *Kovacs v. Cooper*, 336 U.S. 77, 95 (1949) (Frankfurter, J., concurring), a textually based doctrine protecting those choices might be defended, confined, and legitimized. Such a doctrine might, for administrative ease and out of concern to avoid intrusion in matters of conscience, conclusively presume that family and parental choices are constitutionally equivalent to religious choices. Both involve dimensions of the human spirit that include, but go beyond, rational judgment. Both are a function of man's deepest needs to overcome isolation and the loneliness of atomized existence, and to reach out for connections with forces that define and give meaning to life. Both require commitment, dedication, and acceptance of obligation beyond narrow sensory satisfaction. Fastening substantive due process activism to the free exercise clause would exonerate the Court from charges of looking to natural law, or personal prejudices, in marking special areas of liberty, and would refocus the debate on the contemporary meaning of religion in an increasingly secularized state.

Such a theory, though remotely plausible, cannot escape serious, perhaps insurmountable, difficulties. First, the claims are rarely *made* that way, and there are limits beyond which even the most creative reralization cannot responsibly proceed. Second, there are good reasons why family autonomy claims are rarely pressed as religion claims; the rights being sought, in the minds and hearts of the seekers, presumably bear little or no resemblance to concerns commonly understood as "religious." For the Court to seize upon this theory might well invite some very strange claims of "religious freedom."

(How seriously would we have been willing to take Margaret Lovisi's claim, if she had made one, that she had been divinely inspired to invite a fellow to join her husband and herself in a *ménage à trois*?) See *Lovisi v. Slayton*, 539 F.2d 349 (4th Cir. 1976). We would take it seriously as part of an insanity defense, but not as a free exercise defense. Lawyers are skeptical, and sometimes it is healthy. Freud might take a different view of the linkage between sex and religion. Religion (at least monotheistic forms of it), you see, involves subservience to an ultimate father figure, suggesting that, at least for males, acts of heterosexual intercourse are religious in the sense of taking the Oedipal risk — coupling with mother at the peril of patriarchal retribution. All very interesting, but all quite repressed and unconscious, thank goodness. Constitutional law would do well to limit its concern to the conscious mind.)

Finally, the most telling objection to a free exercise rationalization of substantive due process activism is that it seems too reminiscent of the vice of the *Griswold* penumbras. It redefines a specific constitutional protection at a level of generality that permits the addition of a large bloc of content that is excessively remote from the core concept of religion. An expansion of the free exercise clause to include familial choices on grounds of the sort suggested at the outset of this footnote could not, I fear, produce principled distinctions between family choices, on one hand, and achievement of sexual satisfaction in diverse ways, drug consumption choices (*but see* *People v. Woody*, 61 Cal. 2d 716, 394

the magic formula for determining who resides in this wing of the preferred-liberty mansion? As a matter of constitutional theory, it can hardly be sufficient that a majority of the nine landlords desire to let the room.

A responsible defense of judicial discovery of unenumerated fundamental values must respond to the persistent and articulate attacks upon that practice.²⁴⁶ Simply put, the standard criticism runs something like this: Judicial invalidation of the outcome of ordinary political processes is undemocratic, and hence presumptively counter to the explicit premises around which we have organized our relationship to government.²⁴⁷ Textual warrant for the invalidation partly overcomes this "usurpation" argument, because the constitutional text itself emanated from an extraordinary act of popular sovereignty.²⁴⁸ Thus, courts relying on clear and specific commands in the text to strike down a legislative act are acting as agents of the people; judicial review imposes a reflective, extraordinary majoritarian judgment against identifiable excesses of a momentary majority.²⁴⁹ However, the critics assert, courts are no longer justified in calling upon the protective mantle of the Constitution to validate their actions if 1) the text provides no warrant for intervention or 2) the warrant lacks demonstrable standards to guide its use.²⁵⁰

Those are the criticisms; whatever their merit or applicability in other areas, aggressive fourteenth amendment intervention

P.2d 813, 40 Cal. Rptr. 69 (1964) (Native American Church members are constitutionally protected in their use of peyote in bona fide religious practices)), and other so-called "autonomy" interests. Dumping all these choices in the free exercise wagon would soon break it down, a collapse that might imperil the modern trend to expand the definition of religion for free exercise purposes beyond narrowly theistic conceptions. See L. TRIBE, *supra* note 1, § 14-6.

246. The most recent and most important is Ely, *Foreword*, *supra* note 9. Professor Ely, it should be pointed out, believes that certain clauses do have a nontextual content, but that the due process clauses are not among them. *Id.* at 5 n.3. His *Foreword*, in any event, is a general rejection of all nontextual value sources other than those implicit in the theories of judicial intervention suggested by the *Carolene Products* footnote. See also R. BERGER, *GOVERNMENT BY JUDICIARY* (1978); Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1 (1971). The classic attack on judicial review pursuant to the "sweeping terms" of the fourteenth amendment is that of Learned Hand in his book, *THE BILL OF RIGHTS* (1958).

247. See, e.g., A. BICKEL, *THE LEAST DANGEROUS BRANCH* 19 (1962); Ely, *Constitutional Interpretivism: Its Allure and Impossibility*, 53 IND. L.J. 399, 404-12 (1978).

248. Ely, *supra* note 247, at 412 (citing, *inter alia*, Grey, *Do We Have an Unwritten Constitution?*, 27 STAN. L. REV. 703, 705-06 (1975)).

249. See Grey, *supra* note 248. See also A. BICKEL, *supra* note 247, at 16-23.

250. The most outspoken proponent of this view, aimed particularly at substantive due process, was Justice Black. See, e.g., *Griswold v. Connecticut*, 381 U.S. 479, 510-24 (1965) (Black, J., dissenting).

does not necessarily fall before either. The argument that the text does not warrant this sort of intervention is more easily asserted than defended. If repetition is not worthless (and the law rarely makes it so), the fourteenth amendment's longstanding service as a textual warrant must be somewhat probative.²⁵¹ Even if the due process clauses do not properly encompass substantive claims, both the ninth amendment and the privileges or immunities clause of the fourteenth amendment suggest that the constitutional framers recognized the need for relatively open-ended provisions,²⁵² and were not content to limit the protection of rights to the enumeration in amendments one through eight. Furthermore, any insistence that the fourteenth amendment imposes no substantive values upon the states leads to an unraveling of significant portions of the fabric of modern constitutional law, including the application of the first and the eighth amendments to the states.²⁵³ The less extreme idea that the Court can properly shop inside, but not outside, the Bill of Rights for values to impose upon the states by way of the fourteenth amendment has never been intellectually defensible on textual grounds alone.²⁵⁴ And even if a critic can resist the allure of partial incorporation — that is, even if he can swallow the implications of a fourteenth amendment defanged except for certain matters of race discrimination²⁵⁵ — it seems far too late for either the Court or society to pay much attention. Judicial expansion of the fourteenth amendment — including its substantive, libertarian dimensions — has proceeded for so long, and has generated such an elaborate matrix of rights, duties, values, and expectations, that sudden withdrawal from the practice would undermine established patterns of constitutional protection presently perceived as essential in a free society.²⁵⁶

The other component of the argument against fundamental value adjudication — that the process is purely and inescapably

251. *But see* R. BERGER, *supra* note 246, at 352 ("Usurpation — the exercise of power not granted — is not legitimated by repetition.")

252. *See* Ely, *Foreword*, *supra* note 9, at 5 n.3; Ely, *supra* note 247, at 424-36, 440-45.

253. *See* Monaghan, *supra* note 98, at 129-30.

254. If the fourteenth amendment does not incorporate the entire Bill of Rights but does authorize a search for values outside the amendment itself, the only objection to going outside the Bill must be that the search lacks objective reference points, not that the text fails to authorize it.

255. Raoul Berger is apparently willing to swallow them. *See* R. BERGER, *supra* note 246.

256. *See* Monaghan, *supra* note 98, at 129-30.

subjective — presents a more formidable challenge.²⁵⁷ In his recent *Foreword*, Professor Ely has unleashed a broadside attack on the fundamental value theorists, and for precisely these reasons.²⁵⁸ He argues that once the Court moves beyond the *Carolene Products* footnote conception of fostering values protective of powerless minorities,²⁵⁹ no source of adequate standards exists for the discovery of fundamental values. Concerning many of the commonly invoked criteria for discovery of fundamental values — the judge's personal values,²⁶⁰ natural law,²⁶¹ neutral principles,²⁶² "reason,"²⁶³ and the idea of progress²⁶⁴ — I agree on all significant points with Professor Ely's conclusions that the subjectivity problem remains unresolved. With respect to those two sources of value that Professor Ely has more difficulty attacking — tradition and the social consensus — I am in significant, though not complete, disagreement, for reasons that will become apparent very shortly.

I am, of course, far from alone in attempting to find non-subjective sources to invoke responsibly in fundamental-values adjudication. Several commentators who endorse such adjudication have made similar attempts, but their formulations somehow fall short of the mark, often for the same reason: a felt need to defend the indefensible result in *Roe v. Wade*. For example, Professor Perry, one of the most diligent and determined advocates of substantive due process adjudication, has argued that it has textual warrant and is justifiable as the performance of what Perry terms an "ethical function."²⁶⁵ The textual warrant is the due process clause itself,²⁶⁶ which was intended, according to Perry, to evolve over time²⁶⁷ and to require that legislation be related to the "public welfare."²⁶⁸ In order to determine what

257. Here, of course, those who stake their lot with partial incorporation and no more are on safer ground, because incorporation doctrine at least has the virtue of imposing values that the framers intended to impose on some level of government.

258. Ely, *Foreword*, *supra* note 9, at 16-55.

259. 304 U.S. at 152 n.4. *See* note 44 *supra*.

260. Ely, *Foreword*, *supra* note 9, at 19-22.

261. *Id.* at 22-32.

262. *Id.* at 32-33.

263. *Id.* at 33-39.

264. *Id.* at 52-54.

265. *See* Perry, *Ethical Function*, *supra* note 11. Professor Perry has further elaborated his views in *Substantive Due Process Revisited: Reflections on (and Beyond) Recent Cases*, *supra* note 11.

266. Perry, *Ethical Function*, *supra* note 11, at 699-706.

267. *Id.* at 699, 713-19.

268. *Id.* at 693-94.

constitutes the “public welfare” — and in particular the “public morals” portion of the “public welfare”²⁶⁹ — the court must evaluate the “conventional moral culture.”²⁷⁰ This evaluation, contends Perry, is what involves the Court in the ethical function of substantive due process adjudication, because a probe of the conventional moral culture propels the Court into deciding whether particular private moral decisions are, in light of the evolving norms of society, properly regulatable by the legal manifestations of public morality.²⁷¹ Thus, in Perry’s view, the sources for ascertaining what is within and without the “public welfare” include informed public opinion and each Justice’s own conscientious assessment of that opinion, the state of the moral culture, and the relationship of the claim to that culture.²⁷²

The major difficulty with the Perry view²⁷³ is the tension built into it, and the unacceptably high risk of “error” which that tension creates. This tension operates between Perry’s dynamic, open-ended Constitution, capable of growth to meet the needs of succeeding generations, and the rapidity of social change that stimulates the cry for constitutional dynamism. That rapidity renders exceedingly difficult any meaningful conclusions about the “conventional moral culture.” Views on abortion and homosexuality, for example, have shifted dramatically in the past decade, and continue to evolve. But the change has not proceeded uniformly, and judges can never confidently predict what the “conventional moral culture” will hold with respect to these issues ten years from today. Moreover, in a nation spanning close to five million square miles and including over two hundred million people, the “conventional moral culture” is likely to vary significantly from place to place²⁷⁴ and to vary as well among different groups within the same community. The Perry view thus puts the Court at terrible risk that it will misperceive the near future, no matter how “objective” its calculations may be

269. *Id.* at 723-33.

270. *Id.*

271. *Id.* at 719-33.

272. *Id.* at 729-31. The essence of the argument, however, turns out to be more “inner” than “outer” directed: “Ultimately, however, each individual Justice must map the relevant contours of conventional moral culture alone. Each Justice must ask whether particularized claims about that culture resonate with him or her.” *Id.* at 730.

273. The view is not his alone. *See, e.g.,* Wellington, *supra* note 91, at 284. *See also* sources cited in Ely, *Foreword, supra* note 9, at 43 nn.166-67.

274. Although Professor Perry does not provide clear signals on this point, he seems to conclude that national (not state or local) moral culture is what counts. Perry, *Ethical Function, supra* note 11, at 732 n.201.

at the moment of decision. For reasons I will explain in a moment, Perry is correct that support in conventional morality is a *necessary* condition for substantive due process activism on behalf of unenumerated rights, but he goes astray in concluding that it is also a *sufficient* condition.

In a recent essay,²⁷⁵ Professor Tushnet has espoused a view that is, on the matter of standards, yet a step closer to my own. He argues that two criteria should govern the establishment of substantive due process rights: (1) "general agreement on the social importance of that right,"²⁷⁶ and (2) "the settled weight of responsible opinion."²⁷⁷ Tushnet's first criterion turns out to be not too distant from Perry's, although Tushnet adds the Marshallian suggestion that "the relationship between the right and other constitutionally guaranteed rights"²⁷⁸ is a relevant, although apparently not controlling, consideration. Tushnet's second criterion, however, adds a useful dimension, because it offers some insurance against the unreasonable risks associated with Perry's analysis.²⁷⁹ Although Tushnet's attempt strikes me as moving in the right direction, it lacks adequate development and justification. Tushnet seems to argue that "almost any publicly disclosed standard will do"²⁸⁰ for substantive due process, so long as it does not unnecessarily stifle the opportunity for state experimentation with new policies. Given the painful history of substantive due process adjudication, Tushnet's relaxed attitude about acceptable standards seems wholly unacceptable.

Tushnet's proposal is plagued further by the uncertainty of its implications for substantive constitutional adjudication. His primary target is the erratic evolution of the notion of "property" for purposes of triggering the *procedural* safeguards of the fourteenth amendment.²⁸¹ Though his theory seems broader in scope, he purports to be doing no more than providing a substitute for the *Board of Regents v. Roth*²⁸² theory that the locus of property interests consists of expectations crystallized by the operation of

275. Tushnet, *supra* note 11.

276. *Id.* at 279.

277. *Id.*

278. *Id.* The Marshall reference is of course to the present Associate Justice and his *Rodriguez* dissent, and not to the 19th century Chief Justice. See note 98 *supra*.

279. It does not, however, offer enough assurance, unless "settled" has roots reasonably deep in time. See text at notes 304-14 *infra*. Moreover, the reference to "responsible opinion" is uncomfortably elitist. See Ely, *Foreword*, *supra* note 9, at 51.

280. Tushnet, *supra* note 11, at 279.

281. *Id.* at 261-77.

282. 408 U.S. 564 (1972).

state law.²⁸³ Tushnet may have chosen a useful weapon, but unless he defends it more carefully, his choice seems exceedingly disproportionate to his target.²⁸⁴

In my view, a single insight paves the way to an approach to unenumerated rights adjudication that maximizes its legitimacy and minimizes the risks of subjectivity and unauthorized counter-majoritarianism: the Constitution, whether or not its judicially enforceable provisions are (or were meant to be) open-ended and dynamic, is itself always open-ended. The framers saw to that in article V, which, as good schoolchildren know, explains how the document can be amended. Indeed, one of the most smugly asserted and rarely answered charges leveled periodically at fourteenth amendment activism is that it involves the Court in *amending* the Constitution.²⁸⁵ This, of course, is one of the ways in which judicial work-product is dismissed as illegitimate and usurping, because those same good schoolchildren will tell you that article V requires Congress or a state-inspired constitutional convention to propose amendments and state legislatures to ratify them. Justices of the United States Supreme Court are conspicuously omitted from any formal role in the process.

The schoolchildren have certainly learned their lessons well, but here Professor Perry and I share a common rejoinder: An extraordinary national majority may oppose a law over many decades, but for reasons that dramatize the difference between a republic and a democracy, its members may fail to enshrine their opposition in the form of a statute or constitutional amendment.²⁸⁶ On such occasions, the Court has a legitimate gap-filling

283. See generally Monaghan, *supra* note 218, at 434-43; Van Alstyne, *supra* note 229.

284. As discussed earlier, see text at notes 222-27 *supra*, analysis of both property and liberty have significantly different starting and ending places, depending on whether the constitutional claim is procedural or substantive. Professor Tushnet appears to miss this point, with the consequence that his arguments for more complete procedural protection for government-created benefits get unnecessarily bound up with, and bogged down by, his case for something he calls "substantive due process." Given his concern for the process of adjudicating claims, rather than the adequacy of the substantive ground advanced by the government to justify the deprivation, his *label* is what seems to be misplaced.

285. See, e.g., R. BERGER, *supra* note 246, at 1-3.

286. See Perry, *Ethical Function*, *supra* note 11, at 727-28. The failure to translate attitude into legal protection may stem from simple incognizance: many citizens might reasonably fail to perceive that what was once a minority position has quietly become quite popular indeed. More likely, inaction of this sort may be accounted for by a theory of political change that distinguishes between favorable attitude and self-interest. Successful agitation (and its requisite money, organization, and political representation) for change is not likely to occur until mere sentiment for a change becomes a concrete

role to play. Pieces of the nation's bedrock may lie chipped and broken in the gap, and the Court can mend them by performing a function akin to that performed in other contexts by the amending process — it can test the depth, over time, of the community's commitment to the inviolability and unique importance of certain values.²⁸⁷ This notion is hardly novel, although some of its theoretical trappings may be. It echoes ceaselessly across this century's constitutional law, from Holmes²⁸⁸ to Cardozo²⁸⁹ to Frankfurter²⁹⁰ to Harlan.²⁹¹ The words may change, but the search remains the same. It is for *values deeply embedded in the society, values treasured by both past and present, values behind which the society and its legal system have unmistakably thrown their weight*. Contemporary consensus, even if discoverable, is not enough, due to the risks canvassed above.²⁹² To protect against those risks and be confident that the value being insulated from government power is truly an "embedded" one, the Court must decide that the claim satisfies two related tests:

- 1) Historically, American institutions must have recognized the liberty claim as one of paramount stature.

"interest." Cf. D. FEHRENBACHER, *THE DRED SCOTT CASE* 28 (1978):

From time to time at the Constitutional Convention there had been confrontations between a slavery interest and an antislavery sentiment. The interest was concentrated, persistent, practical, and testily defensive. The sentiment tended to be diffuse, sporadic, moralistic and tentative

In the day-to-day operations of government . . . interest would usually have the advantage over sentiment.

Political scientists have made similar observations about modern pluralism and the process of political change. See R. DAHL, *WHO GOVERNS?* (Yale Studies in Political Science No. 4, 1961). And especially for some of the emotion-charged, value-tied claims that are presented to the Supreme Court under the substantive due process rubric, the intensity of self-interest may well be missing despite a highly favorable, long-standing national sentiment in favor of change. Sparse enforcement — such that most citizens feel safe from the law's prohibitions and penalties — often operates to undercut any development of the requisite interest. A program of vigorous investigation and prosecution of the crime of fornication between consenting unmarried adults would be a powerful incentive to eradication of the prohibition. See generally Note, *Fornication, Cohabitation, and the Constitution*, 77 MICH. L. REV. 251 (1978).

287. The time dimension suggested here distinguishes the proposed approach from the "continuing constitutional convention" image invoked and criticized by Berger. See R. BERGER, *supra* note 246, at 2-3 & n.5.

288. *Lochner v. New York*, 198 U.S. 45, 76 (1905) ("fundamental principles as they have been understood by the traditions of our people and our law") (Holmes, J., dissenting).

289. *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934) ("principles of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental").

290. *Wolf v. Colorado*, 338 U.S. 25, 28-30 (1949).

291. *Poe v. Ullman*, 367 U.S. 497, 542-43 (1961) (Harlan, J., dissenting).

292. See text at notes 273-74 *supra*.

2) Contemporary society must value the asserted liberty at a level of high priority.

If a liberty claim satisfies both prongs of the inquiry, the Court should preclude any state interference with that liberty, absent extraordinary justification for permitting it. An approach of this sort does not endeavor to define the elusive "public welfare" as does Perry's theory; nor does it attempt to project an unlimitable spectrum of human choices for protection as I think Professor Tribe's theories do.²⁹³ Rather, it is a deeply conservative and restrained theory of value discovery; it would not permit the Court to lead society's "progressive" forces against their more "reactionary" foes. Although it authorizes the Justices to do a small portion of the general citizenry's article V work, it recognizes the extraordinary countermajoritarian qualities of that authority, and it accordingly counsels the Justices to do so only when a state invades the holy core of the American sanctuary of liberties.

Professor Ely's *Foreword* attacks any such approach to the value source problem on two grounds: 1) nonascertainability and 2) general irrelevance to the task of individual rights adjudication. The latter point requires immediate response; if Ely is right on this score, no one need bother with a reply to the former. Ely's central thesis is that individual rights adjudication under the constitution exists primarily to ensure an open political process and to protect powerless minorities against abuses of that process.²⁹⁴ He concludes from that thesis that "*it simply makes no sense to employ the value judgments of the majority as the vehicle for protecting minorities from the value judgments of the ma-*

293. See L. TRIBE, *supra* note 1, at 889 ("preservation of 'those attributes of an individual which are irreducible in his selfhood'"). Professor Tribe, in a later section on "Sources of Protected Rights of Personhood," *id.* at 893-96, suggests a range of possible sources, carefully avoids coming to rest on any particular one, and ultimately seems to opt for an amalgam of approaches to the problem of judicial discovery of the human essence. He does, however, posit a vision of the protection of enduring values. ("Nothing less [than wise reflection] will yield a language and structure for creating a future continuous with and contiguous to the most humane designs of the past." *Id.* at 982-93.) Professors Wilkinson and White, in their article on *Constitutional Protection for Personal Lifestyles*, *supra* note 241, at 611-14, do not offer a governing standard at all. Rather, they suggest several reasons why "lifestyles" should be a judicial concern, including protection of "human dignity," protection of "powerless minorities," respect for pluralistic values, and partial coincidence with first amendment values. I am sympathetic to all of these ideas, yet I remain unconvinced that they offer a meaningful avenue of relief from either the countermajoritarian difficulty or the problem of subjectivity.

294. See Ely, *Foreword*, *supra* note 9, at 5-15; see generally Ely, 37 *MD. L. REV.* 451, *supra* note 9.

majority."²⁹⁵ He makes clear, moreover, his view that the value judgments of "past majorities" ("tradition") are no more useful in this regard²⁹⁶ than those of present majorities ("consensus"), a secondary premise that seems to follow quite perfectly from the initial one.

But just as Ely admits to being F.A. Hayek's "demagogue,"²⁹⁷ I am Ely's believer in nonsense. Ely is so intent on protecting minorities that he has forgotten the nature of the protective agency. For what is the Constitution itself, if not a collection of "[enduring] *value judgments of the majority*," interpreted and applied by courts so as to be "the vehicle for protecting minorities from the [monetary] value judgments of the majority"?²⁹⁸ The entire body of the Constitution, amendments and all, is a series of judgments by an extraordinary majority that limit the power of future political majorities.²⁹⁹ Requirements of political consensus are thus built in by the ratification requirements. Moreover, tradition played a vital role in the very creation of the Constitution.³⁰⁰ The "value judgments of the majority" are not only a *sensible* source of protection of minorities; those judgments turn out, in the end, to be the *only* source of protection for minorities against the hostile passions of an occasional, transient majority.

Secondly, Ely's rejection of the "value judgments of the majority" as a source of rights fails to distinguish among national, statewide, and local majorities. The ratification of the fourteenth amendment itself stands as an act by the national majority to

295. Ely, *Foreword*, *supra* note 9, at 52 (emphasis original).

296. *Id.* at 42-43.

297. The reference is to Hayek's assertion that "[o]nly a demagogue can represent as 'antidemocratic' the limitations which long term decisions and the general principles held by the people impose upon the power of temporary majorities." *Id.* at 44 (citing F. HAYEK, *THE CONSTITUTION OF LIBERTY* 181 (1960)).

298. Ely, *Foreword*, *supra* note 9, at 52.

299. Professor Ely acknowledges this problem, Ely, *Foreword*, *supra* note 9, at 42-43, but attempts to avoid it by reference to the open-endedness of the provisions under discussion. "If one wanted to freeze a tradition," he says, "the sensible course would be to write it down." True, *if one knew in advance which traditions might conceivably come under siege*. Various battles over the rights of Englishmen gave the framers some clues — hence, a Bill of Rights in reasonably specific terms. But if one had the sense that, out of a range of important traditions, some would wither and others endure, and that the enduring ones would come under occasional attack by momentary (and usually local) majorities, one might well write an open-ended provision and expect the judges interpreting it to take account of surviving traditions in doing so.

300. The Bill of Rights surely was prompted in part by a developing tradition of liberty against government, a tradition sparked by the impositions of the English Crown upon the colonists. See L. HAND, *THE BILL OF RIGHTS* (1958).

limit the power of a state or municipal majority. If one reads Ely's italics with that idea in mind, his sentence runs "it simply makes no sense to employ the value judgments of [national] majorities as the vehicle for protecting [local] minorities from the value judgments of the [local] majority." If *that* is what Professor Ely means, then he thinks that *judicial review under any substantive provision addressed to the states* makes no sense. But we know he doesn't think that at all.³⁰¹ Having focused so long on the *Carolene Products* footnote, Professor Ely's vision has gone off by a few diopters. While he correctly observes that the Constitution itself "concretizes" relatively few "value judgments"³⁰² and persuasively theorizes that those portions of the document most often invoked in individual rights adjudication were designed to protect minorities and minority viewpoints, he has forgotten that such is not the document's total design, its exclusive result, or, most importantly, its originating force.

Viewed with an eye toward the structure of the Constitution and the role its official interpreters have continuously envisioned for judges, tradition and community values *cannot* be irrelevant. We must therefore confront Professor Ely's other objection — that the values deserving of protection are not objectively ascertainable. Of course, when the values are expressed in an *amendment*, their underpinnings are usually well-understood, and the Court must do its best, in any event, to find them. Moreover, whenever the amendment process produces something, it has resolved conflicts and contradictions among traditional and contemporary values, and has done so by a politically complete expression of the popular will. By contrast, substantive due process adjudication cannot be said to share those qualities of channeled discoverability, value resolution, or national ratification. Its sources of value and legitimacy are elsewhere, and the "elsewhere" that I propose must measure up against Professor Ely's powerful criticisms.³⁰³

(i) *Historical recognition.* The *Moore* plurality embraced this element of the test,³⁰⁴ and it may be the more impor-

301. Indeed, Professor Ely is outspoken and eloquent in defense of an active judicial role of the sort suggested in the *Carolene Products* footnote. See, e.g., sources cited in note 294 *supra*.

302. Ely, *Foreword*, *supra* note 9, at 42 n.160.

303. Even Professor Ely concedes that nonascertainability can never be a completely dispositive objection on issues where close judgments must inevitably be made. *Id.* at 42 (tradition), 49 (consensus).

304. 431 U.S. at 503-06, (plurality opinion) (Powell, J.). Justice Powell's emphasis

tant of the two for circumscribing the growth of substantive due process. Far more effectively than a nebulous doctrine of privacy or autonomy that expands to include new rights every time a judge hears a claim that "resonates" within him,³⁰⁵ a doctrine controlled by history resists rapid growth. There may, of course, be many ways in which history demonstrates recognition of a liberty as fundamental: a lengthy record of common or statutory law protecting the interest,³⁰⁶ a conscious and purposeful tradition of nonregulation,³⁰⁷ or strong currents of respect for the liberty by the "progenitors and architects of American institutions."³⁰⁸ Each of these sources appears to be a tempting starting place for the search for historically embedded values. Professor Ely, however, asserts that the problems here are "obvious." The problems he mentions³⁰⁹ include those of cultural geography (whose tradition?), time (which era's tradition?), competing traditions (which one counts?), and level of generality (how big is a tradition?). The general invocation of "tradition" as a source of values *does* suggest all of these problems. A difference exists, however, between a test that entails only a vague and general scrutiny of "traditions," such as Ely discusses, and one that demands a *continuous*

on history has found expression in the opinions of other Justices as well. *See* 431 U.S. at 507-10 (Brennan, J., concurring); *Zablocki v. Redhail*, 434 U.S. 374, 383-85 (1978); *Carey v. Population Servs. Intl.*, 431 U.S. 678, 685 (1977); 431 U.S. at 708-09 (Powell, J., concurring); *Kelley v. Johnson*, 425 U.S. 238, 251-53 (1976) (Marshall, J., dissenting); *Roe v. Wade*, 410 U.S. 113, 130-41, 158 (1973); *Griswold v. Connecticut*, 381 U.S. 479, 491-95 (1965) (Goldberg, J., concurring); *Poe v. Ullman*, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting); *Pierce v. Society of Sisters*, 268 U.S. 510, 534 (1925); *Meyer v. Nebraska*, 262 U.S. 390, 400 (1923); *Lochner v. New York*, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting).

305. *Cf. Perry, Ethical Function, supra* note 265, at 730 ("each individual Justice must map the relevant contours of the conventional moral culture alone" and "ask whether particularized claims about that culture resonate with him or her.").

306. *See, e.g., Ingraham v. Wright*, 430 U.S. 651, 659-63 (1977) (lengthy history of common law protection of liberty against excessive paddling).

307. Concededly, evidence of this sort may not be so easy to discover. Nonregulation is presumably the product of indifference as often as it is the product of respect for the liberty at stake. At times, however, exemption from regulation may result from deeply held principles; for example, such a pattern might arise if some interested organization undertook to introduce, in several state legislatures, a series of bills aimed at forbidding parents from serving alcoholic beverages to their own minor children. Persistent rejection of them on grounds of family autonomy, especially if the rejections continued over time, would be useful evidence of historical recognition.

308. The phrase belongs to Sanford Kadish. Kadish, *Methodology and Criteria in Due Process Adjudication — A Survey and Criticism*, 66 *YALE L.J.* 319, 328 (1957). Professor Kadish limited his survey to problems of procedural fairness in criminal cases; concededly, the opinions of the "architects" on such matters may be easier to discover than their opinions on the substantive liberty questions with which I am concerned.

309. Ely, *Foreword, supra* note 9, at 39-40.

and continuing historical momentum in favor of a liberty interest over any competing claims in society. I advocate the latter approach, and with my position so framed, I will respond to Ely's charges.

Geography is easy — only *our* traditions are relevant. Evidence of heightened respect for some threatened freedom in other nations, English-speaking or not, is simply makeweight. Without continuous support in American legal and social traditions, any claim that a value is fundamental in the American constitutional scheme lacks merit. We can learn from others' good ideas and cherished freedoms, but we are surely not bound by them.

The question of time is only slightly more troublesome. The essence of the test of historical recognition is long-standing respect for the liberty, up to and including the time of decision (when it becomes the test of contemporary values). Long-abandoned traditions are inadequate, even if recently resurrected. Exactly how far back the historical record must go to satisfy this part of the test is difficult to pin down. The length of historical support required to support the claim might vary with the intensity with which it is held, but, in any event, no less than a generation of special respect ought to suffice. A shorter period would run the risk associated with Professor Perry's view, and any requirement much longer than a generation would generate insufficient power to protect values that have truly achieved stable and continuous support. The suggestion in *Rodriguez* that states might have a constitutional duty to provide a minimum of public education³¹⁰ — given the long-standing and deeply significant expectation that it will be provided — is consistent with the theory suggested here. Additional illustrations might ultimately emerge from the evolution of family law. A statute limiting grounds for divorce to adultery might run afoul of the "deeply embedded values" standard,³¹¹ since most states have recognized the right to dissolve marriage on no-fault grounds, and that expectation has at least begun to sink deep roots into our social soil.

Some cases will, of course, raise difficult issues of historical interpretation and value discovery. Hopefully, judges can assess the historical strength of a claimed liberty with sufficient subtlety

310. 411 U.S. 1, 36-37 (1973).

311. Cf. *Boddie v. Connecticut*, 401 U.S. 371 (1971) (violation of due process for state to deny dissolution of marriage because of inability to pay where state monopolizes means of dissolution). See generally Monograph No. 6, 4 FAM. L. REP. 4033 (1978) (as of Aug. 1, 1978, only three states retain "fault only" grounds for divorce).

to take into account the texture of historical processes, such as major events in the life of a nation, or temporary periods of setbacks for a particular value, sandwiched between lengthy periods of respect for it.

The problems of competing traditions and levels of generality raised by Professor Ely can be analyzed from a similar perspective. Within the paradigm I have espoused, the judge is free neither to select one personally favorite tradition out of many, nor to redefine the history of liberty in a way that produces a desired result. At times the common law may provide a useful reference point in resolving competing claims of tradition and in defining the level of specificity at which a claim has adequate historical support.³¹² Some claims, however, will not present precise common law analogues. A legislative prohibition, for example, of the use of "cloning" techniques for human reproduction would, if attacked on substantive due process grounds, raise the sort of problems with which Professor Ely is concerned. Is the claim supported by a "deeply embedded value" of autonomy in reproductive decisions? Or (and this would be my view), is that formulation of the value both too general, and too hostile to competing sensitivities, to cope adequately with a wholly new reproductive capability, which might well be stimulating a general social abhorrence? In light of the essentially conservative premises underlying the "embedded values" notion, care must be taken to define "preferred liberty" at a level general enough to capture all of its historical essence, yet specific enough to resist open-ended growth that is likely to outdistance the social commitment upon which the liberty rests.

Thus, as I have proposed it, the historical test rejects both a fully "closed" and a fully "dynamic" view of the substantive content of the fourteenth amendment. If applied as intended, it prevents the Court from latching on prematurely to social trends and thereby too hastily freezing the power of the political processes to respond to them. This, I fear, is an accurate description of *Roe v. Wade*, where the Court, in an effort to justify its conclusions by historical analysis, overlooked the powerful trend of the past one hundred years to proscribe most abortions.³¹³

312. Cf. *Ingraham v. Wright*, 430 U.S. 651 (1977). See note 222 *supra*.

313. See generally Destro, *supra* note 90, at 1273-82. Destro argues further that *Roe's* analysis of early English common law, construing it to recognize abortion as common law right (410 U.S. at 135-36) is flawed. *Id.* at 1267-73.

The historical test also explains, in light of persistent prohibitions on consensual adult homosexuality, the affirmance (though not necessarily the failure to justify it) in *Doe v. Commonwealth's Attorney*.³¹⁴ If, on the other hand, the great bulk of states decriminalize homosexuality, the Court might be justified *some years later* in overruling that case and adding a new component to preferred liberty. It is the deep and continuous social embrace with a value, and not its importance to the individual, that brings it special stature.

(ii) *Contemporary values*. Incorporation of contemporary values into a fundamental liberty test presents some difficulties. On the one hand, consensus is a necessary component of any theory of constitutional adjudication in support of unenumerated values.³¹⁵ Without more pointed textual warrant to support judicial intervention, some element of popular sovereignty appears essential to the legitimacy of the process.³¹⁶ In contrast, however, to the ordinary research and analysis designed to discover respect for a particular liberty by *legal* institutions, social consensus is difficult to measure, especially on a nationwide basis. Moreover, I do not differ here with Professor Ely's observation that the opinions of lawyers, judges, and "experts" alone are insufficient.³¹⁷ If the Court is "amending," substantial support in the hearts and minds of the entire populace, not only of a professional elite, is a prerequisite. The Court's handling of that inquiry in this decade's capital punishment cases³¹⁸ suggests the hazards of evaluating contemporary values in this fashion. Finally, the very

314. 425 U.S. 901 (1976); *affg. mem.* 403 F. Supp. 1199 (E.D. Va. 1975) (three-judge court).

315. The Justices have on occasion embraced this approach, but not without greater trepidation than in the case of inquiry into traditional values. If "weight of authority" counts for anything here, I am afraid my side of the scale comes up a bit light. For dicta apparently approving a consensus standard, see *Moore v. City of East Cleveland*, 431 U.S. 494, 519 (1977); *Roe v. Wade*, 410 U.S. 113, 154 (1973); 410 U.S. at 174 (1973); *Poe v. Ullman*, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting); *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459, 471 (1947) (Frankfurter, J., concurring). *But see* *Griswold v. Connecticut*, 381 U.S. 479, 501 (1965) (Harlan, J., concurring); 381 U.S. at 530 (Stewart, J., dissenting); *Muller v. Oregon*, 208 U.S. 412, 420 (1908) ("Constitutional questions . . . are not settled by even a consensus of present public opinion . . .").

316. See note 273 *supra*.

317. Ely, *Foreword, supra* note 9, at 37-39.

318. See *Furman v. Georgia*, 408 U.S. 238, 299-300 (1972) (Brennan, J., concurring); 408 U.S. at 332-33 (Marshall, J., concurring). Ironically, it is with respect to the eighth amendment that "community standards" had seemed most acceptable. See *Trop v. Dulles*, 356 U.S. 86, 99-101 (1958) ("The [Eighth] Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.").

law under attack is always at least some evidence that contemporary social values do not overwhelmingly predominate in favor of the proposed liberty interest.³¹⁹ In a nation as demographically diverse as this one, the favorite freedom of northern California may be shocking sin to those in the Bible Belt.

These obstacles do not necessarily render contemporary social values irrelevant to substantive adjudication under the due process clause. They do, however, counsel great caution and restraint in applying this portion of the test. A court should not sweep under the closest rug obvious and deep divisions of opinion on the value in question; when significant numbers stand deeply opposed on moral grounds to a particular practice, the contemporary respect for those who engage in it can hardly be called "deeply embedded."³²⁰

Acceptable sources of data on contemporary value consensus are, concededly, difficult to pinpoint. Federal legislation — if recent and closely on point — helps, since it reflects the views of a national majority³²¹ (though, admittedly, not necessarily an extraordinary one). But here too, caution is required, since Congress can readily repeal the legislation if values suddenly shift, while the Court will not likely overrule its own pronouncement of a "fundamental value." A widespread pattern of state legislation in support of the liberty is also relevant; although many legislators may be lawyers, they can still roughly reflect the perceived popular will. The work of social science may also buttress — but not replace — other indicators that a particular value possesses widespread and powerful social support.

At the extreme, isolating contemporary moral values is not overly difficult. Can a reasonable mind doubt that a general consensus exists concerning government interference with the choice of contraception by a married couple? Or, to propose a doomed case, that freedom to smoke marijuana has not even reached the threshold level of widespread social respect, much less the level of "deeply embedded values"? For the hard cases, the available data may admit of no simple conclusion. Lack of easy answers,

319. Perry, *Ethical Function*, *supra* note 11, at 724. *But cf. id.* at 727 (some laws have been "on the books for so long that [they] no longer reflect contemporary moral culture," citing the Connecticut prohibition on contraceptive use as an example).

320. For example, *Roe v. Wade* cannot possibly be justified on the basis of a deeply embedded contemporary or historical value.

321. See Sandalow, *Judicial Protection of Minorities*, 75 MICH. L. REV. 1162, 1183-93 (1977), for a refined discussion of reliance upon congressional action as a source of constitutional norms.

however, provides no excuse for failure to search for guideposts, in both legal and extralegal sources. Of course, the test does *not* require a demonstration of social unanimity; not even the official amendment process imposes such an insuperable obstacle. But serious and legitimate doubt about social values should counsel rejection of the claim or, at the least, imposition of a requirement that the historical hurdle of this steeplechase be cleared with extraordinary room to spare.

Finally, the question of judicial competence to discover contemporary values deserves a word. Professor Ely argues that legislative competence to translate existing social, moral, and political values into law substantially exceeds judicial capability to perform a similar task.³²² Once again, his failure to distinguish national from state government is crucial. If the search for fundamental values embodied in the fourteenth amendment is one for national values, can a single state legislature really uncover them as well as a supreme national court? Presumably, the national legislature is in the best position to make the required assessment, but, as a general matter, it frequently refuses to accept the assignment.³²³ Modern theories of judicial notice — that courts are free to notice “legislative facts” when it is convenient, so long as the parties are notified and given opportunities to rebut³²⁴ — provide further support for the claim of competence offered here. Ongoing public or scholarly doubts concerning competence suggest, moreover, the critical importance of full judicial disclosure of the controlling standards for this sort of adjudication. To the extent a court must passively rely on party control over and provision of data, its competence will in part be a function of the clarity with which parties can discern and address the relevant issues.

322. Ely, *Foreword*, *supra* note 9, at 49-50.

323. It might superficially appear that many of the substantive areas with which the fundamental rights cases tend to be concerned fall outside the delegation of powers in art. I, § 8 and are therefore beyond congressional reach. That view ignores, however, the broad power to *spend* on behalf of congressionally determined national priorities. Presumably, Congress might exercise such powers in favor of research, grants to states, and federal entitlements — witness, for example, the Aid to Families with Dependent Children program (42 U.S.C. §§ 601-610 (1976)) requirement that children live with specified relatives to be eligible, and the recent national concern to secure enforcement of child support by absent parents. (See Act of Jan. 4, 1975, Social Services Amendments of 1974, Pub. L. No. 93-647, § 101(c), 88 Stat. 2359 (1975) (amending 42 U.S.C. §§ 602(a), 603, 606 (1976)).

324. See K. DAVIS, *ADMINISTRATIVE LAW* 310 (3d ed. 1972); see also Kadish, *supra* note 308, at 358-61.

The test of deeply embedded values thus demands independent satisfaction of inquiries into historical and modern conceptions of the spheres of liberty from which government is presumptively excluded. Although each is at times a problematic inquiry, the difficulties of application are partially offset by the stringency of a two-level inquiry. If, for example, the relevant history was checkered with shifting or conflicting trends, the availability of the contemporary facet of the test would temper any tendency to resolve the historical question dishonestly. In that sense, a two-pronged standard offers internal checks, balances, and restraints that no single criterion can supply; a narrow survival of the claim on one inquiry cannot, by itself, tip the balance in the activist direction. Because a "no" response to either of the questions demands rejection of the claim, opinions exploring the outer boundaries of both requirements should appear only when the Court announces the discovery of a new preferred liberty.³²⁵ That form of restraint, in and of itself, should reduce some of the controversial and necessarily speculative judgments the test might otherwise demand.

Although the test would not completely answer the charge of judicial revision of the Constitution, it would place a check on fully open-ended dynamism in fourteenth amendment adjudication and simultaneously permit creative continuity in the development of substantive due process doctrine. Given the controversial history of substantive due process, the dual standard, with its built-in forces of restraint, authorizes judicial intervention in cases of extreme and aberrational departures from tradition in matters of intense moral concern, yet at the same time leaves ample room for legislatures to respond to new problems of legitimate public concern in any manner that does not threaten society's deepest values. Moreover, the proposed standard properly avoids the delicate task of justifying regulation of private morals and so-called victimless crimes; to the extent such matters have been historically and continuously regulated by American legislatures, substantive due process doctrine would leave them untouched.

325. If the Court has decided to reject the preferred liberty claim on either ground of the proposed standard, ordinary restraint concepts should operate to preclude any discussion of the other ground. *Cf.* *Board of Curators v. Horowitz*, 435 U.S. 78 (1978) (Court need not decide if academic dismissal from medical school implicates liberty or property interests because procedural due process requirements do not attach to academic determinations).

2. *The Standard Applied — Moore Reconsidered*

The conclusions reached by the plurality opinion in *Moore*³²⁶ would survive the scrutiny proposed here. In essence, the claimed interest in *Moore* — freedom to structure a household with various relatives — is freedom to seek human intimacy. To share common living space is to create the potential for both physical and emotional closeness. The opportunity to develop intimacy with others, furthermore, touches deep currents of personality. Intimacy is the means through which we invest feeling in others. Closeness permits emotional self-expression, feelings of caring and being cared for, sexual fulfillment, and the grief and sense of loss that death or other terminations of the relationship may bring. Less positive, but no less inherent in intimacy, are the darker emotions — fear, hate, envy. Of course, intimacy can be developed without cohabitation, and conversely, common living quarters do not guarantee significant emotional investment. Nevertheless, there can be little doubt that a shared household immeasurably enhances the opportunity for intimacy.

Yet the Court in *Moore* did not equate shared living space with intimacy opportunities. Rather, the opinions stressed economic necessity, the intergenerational transmission of family values,³²⁷ and the prevalence of extended family households among racial and ethnic minorities.³²⁸ Notwithstanding the discomfort and likely self-consciousness that might have accompanied more explicit discussion of the emotional needs satisfied by living partners, greater attention to emotional satisfaction would have highlighted both the problems in, and reasons for distinguishing *Moore* from, *Village of Belle Terre v. Boraas*.³²⁹ The *Belle Terre* decision upheld a zoning ordinance that prohibited groups of three or more individuals, unrelated by blood or marriage, from sharing a single-family residence. The Court's emphasis on family patterns in *Moore* (a difference from *Belle Terre*) diverted attention from the common element of the cases: potential satisfaction of deep human needs.

Families, whether extended or nuclear, do not generate "need satisfaction" in and of themselves. As a mechanism for pursuing such satisfaction, however, the social consensus prefers

326. See text at notes 154-203 *supra*.

327. 431 U.S. at 503-05 (plurality opinion).

328. 431 U.S. at 508-10 (Brennan, J., concurring).

329. 416 U.S. 1 (1974).

family groups. More significantly, in light of the historical prong of my standard for detecting preferred liberties, common and statutory law have for many years reinforced the special rights and responsibilities created by family ties. Even the most cursory consideration of this tradition calls to mind the presumption of parental fitness as a child custodian,³³⁰ obligations of financial support,³³¹ recognition of those obligations in various tax codes,³³² rights of parental control in childrearing,³³³ intrafamily tort immunity,³³⁴ the testimonial privilege of husband and wife,³³⁵ family-based statutory rights to inherit,³³⁶ and family relationship requirements in various income maintenance schemes.³³⁷ Government has not seen fit to bestow such privileged treatment upon groups of unrelated adults sharing a household. The Court in *Moore and Belle Terre* was thus not distinguishing between alternative goals of human liberty — the claimants in both cases might have sought intimacy, as well as convenience, through cohabitation. The distinction that led to a “fundamental liberty interest” in *Moore* alone lay in the methods for pursuing that goal — Inez Moore chose one long sanctioned by legal institutions, while Bruce Boraas and his friends did not.

That distinction may initially seem unappealing at best, or downright censorial and oppressive at worst. Communal living arrangements are experiments in human liberty, in the tradition of Brook Farm, and may well offer extraordinary possibilities for beneficial human development and interaction. To the extent their occupants are otherwise law-abiding, such arrangements present no threat of concrete social harm. Akin to other unconventional lifestyle choices, their only sin is that they may arouse

330. See, e.g., ILL. REV. STAT. ch. 3, § 132 (1973); MASS. ANN. LAWS ch. 119, § 1 (Michie/Law. Co-op 1975).

331. See, e.g., N.Y. DOM. REL. LAW § 32 (McKinney 1977). These duties are not necessarily restricted to nuclear family relationships. See, e.g., N.J. STAT. ANN. § 44:1-140 (West 1977); see generally 41 AM. JUR. *Parent & Child* §§ 6-7 (1938); 67 C.J.S. *Parent & Child* §§ 17, 24 (1955).

332. I.R.C. § 151 (b), (e).

333. See, e.g., *Wisconsin v. Yoder*, 406 U.S. 205, 232 (1972); see also MASS. ANN. LAWS ch. 119, § 1 (Michie/Law Co-op 1975).

334. See generally J. HENDERSON & R. PEARSON, *THE TORTS PROCESS* 519-21 (1975) (noting the immunity doctrine and discussing departures from it).

335. See generally McCORMICK'S *HANDBOOK OF THE LAW OF EVIDENCE* 161-74 (2d ed. 1972), and authorities cited therein.

336. This pattern is hardly a novel one in Anglo-American law. See Statute of Distribution, 22 & 23 Car. II, c. 10 (1670); UNIFORM PROBATE CODE §§ 2-101 to -109 (4th ed. 1975).

337. To be categorically eligible for Aid to Families with Dependent Children, a child must live with at least one specified relative. 42 U.S.C. § 606 (1976).

fantasies and fears of socially unacceptable behavior in the minds of nosy neighbors.

Nevertheless, constitutionally adequate reason exists for a community to prohibit such living arrangements when they lack the connective tissue of the family relationship. Both historical and modern social experience validate the judgment, albeit a somewhat gross one, that households composed of unrelated adults are likely to be more transitory than family units,³³⁸ extended or not. Those with family ties to children are perhaps more likely to assume responsibly the burdens of child care. Moreover, in a society where the marital relationship remains the only legally accepted outlet for sexuality, adults in a nonfamily household, freed of the incest taboo that checks intra-household sexuality in the extended family, are the more likely group to offend the common morality by their sexual practices.³³⁹

To be sure, all of the above distinctions are by no means absolutes or universal truths. More troubling still, to permit such considerations — some might say prejudices — to serve as an obstacle to significant social change is to risk social stagnation. On balance, however, I think these considerations *are* adequate, for several reasons. First, some communities will tolerate alternative lifestyles. The nation as a whole thus does not lose the benefits of experimentation. Second, for a community devoted to preserving stability and morality, there exists no palatable alternative to bright-line distinctions between families and other groups. No system of individualized hearings could adequately predict which living units present substantial risks of community harm, nor could any such system avoid outrageous intrusiveness in gathering its information. Finally, it has been a constant tenet of American constitutional tradition that, outside the realms of thought, expression, religion and conscience, the political agencies of the community may define the limits of acceptable human enterprise. *Belle Terre* is consistent with that tradition.³⁴⁰ *Moore*, then, represents a limited inroad upon it, based on a premise that the family is the historically and culturally preferred means for

338. See R. KANTER, COMMITMENT AND COMMUNITY 182 (1972) (membership in many modern communes "is rarely the same for long").

339. See *id.* at 185; see also W. KEPHART, THE FAMILY, SOCIETY, AND THE INDIVIDUAL 121-41 (1977), reprinted in J. AREEN, FAMILY LAW 713-25 (1978) (discussion of sexual practices in the Oneida Community, and public response thereto).

340. For an argument that communal life styles deserve constitutional protection against, *inter alia*, hostile zoning regulations, see Comment, *All in the "Family": Legal Problems of Communes*, 7 HARV. C.R.-C.L. L. REV. 393 (1972).

satisfying certain legitimate human needs.

Viewed in that light, *Moore* is eminently more defensible as a preferred liberty case than is *Roe v. Wade*. Freedom to structure an extended family arrives at the Court with substantially more historical and cultural support than freedom to terminate pregnancy. That the Court was more divided in *Moore* than *Roe* may reflect a judgment by some members of the Court that the liberty interest in *Moore* was not of deep significance. Such a judgment, tested against the appropriate standards, is erroneous.

This argument does not imply that Professor Ely errs when he claims that notions of consensus or enduring tradition can be manipulated to almost any conclusion.³⁴¹ Of course they can, just as any broad legal concept can be so manipulated. But that insight does not counsel wholesale rejection of broad concepts, including those particular broad concepts for which Professor Ely frequently expresses fondness.³⁴² Rather, the insight requires judges to be intellectually fit and honest, to understand the temptations to manipulate, and to appreciate the need to resist the temptations. Of course judges are only "human", but I would rather build a constitutional jurisprudence that assumes and demands their best than one that expects their worst.³⁴³

B. *The Single Meaning of Equality*

"What," asked Kenneth Karst in the opening sentence of his *Foreword to The Supreme Court, 1976 Term*, "is the substance of substantive equal protection?"³⁴⁴ His essay proceeded to develop his answer: a guarantee of "equal citizenship." I would answer rather differently. Equal protection has no "substance" in the sense in which I have employed the term. Equal protection has a singular concern, and although "equal citizenship" may follow from judicial respect for that concern, Professor Karst's intensely substantive focus tends to mislead. The strand-tangling in the fourteenth amendment led, understandably and inexorably, to the question framed by Professor Karst. In what follows, I

341. Ely, *Foreword*, *supra* note 9, at 40-41, 49.

342. Professor Ely apparently is not troubled by the breadth of the concepts of "discreteness," "insularity," and "minority," see note 348 *infra* and accompanying text, as used in the *Carolene Products* footnote. Ely, *Foreword*, *supra* note 9, at 5-15; Ely, 37 *MD. L. REV.*, *supra* note 9, at 454-56; Ely, *The Constitutionality of Reverse Racial Discrimination*, 41 *U. CHI. L. REV.* 723, 729 (1974); Ely, *supra* note 88, at 933-35.

343. Cf. Ely, *supra* note 247, at 403. ("I hope we shall always judge judges in part by their capacity to resist personal sympathy with the principle expressed.")

344. Karst, *supra* note 121.

hope to demonstrate that equal protection thinking can be altogether shorn of libertarian substance within an analytic framework that enhances clarity and comprehensibility, while avoiding all damage to the basic structure of modern constitutional law.

1. *The Limited Choice of Imperatives*

If the original purpose of a constitutional provision is neither hopelessly obscure nor irretrievably lost,³⁴⁵ judicial elaboration of it is properly limited to its framers' concerns and their twentieth-century counterparts. The fourteenth amendment's equal protection clause (and its unwritten fifth amendment analogue) has ascertainable roots. Given its motivating force and linguistic form, the clause points to judicial protection against certain limited kinds of "class legislation" and it points no further. Hence, the equality strand concerns only "suspect classifications."

But even at that level of analysis, critical choices remain. The notion of "suspect classifications" has wavered between two imperatives that reinforce one another in some instances and compete in others: the "process imperative" and the "moral imperative." A struggle between the two has marked the last decade of equal protection adjudication, and the constitutional resolution of the reverse discrimination question and many others may ride on the ultimate choice of a victor. I will explain; fortunately, my purpose in this Article does not force me to choose.

Agonizingly for anyone who must choose, both options are wholly reasonable inferences from the objective of those who wrote and ratified the clause — to constitutionalize a prohibition of state laws that explicitly disadvantage black people in the exercise of civil rights.³⁴⁶ The "equal protection" language is of

345. See *United States Steel Corp. v. Multistate Tax Commn.*, 434 U.S. 452, 463 (1978).

346. See generally Karst, *supra* note 121, at 11-21; J. TENBROEK, *THE ANTISLAVERY ORIGINS OF THE FOURTEENTH AMENDMENT* (1951). "Civil rights" are of course not self-defining, and a substantial portion of the past century's controversy has revolved around the content of the "civil rights" concept. The narrowest view is that it includes no more than the rights enumerated in the 1866 Civil Rights Act, see R. BERGER, *supra* note 246, or perhaps the 1866 statutory rights and those closely related by analogy, see *Ex parte Virginia*, 100 U.S. 339, 365-69 (1879). The infamous *Plessy v. Ferguson*, 163 U.S. 537 (1896), took a narrow view of the civil rights protected by the fourteenth amendment, while *Brown v. Board of Educ.*, 347 U.S. 483 (1954), clearly embraced the broad, modern view that any and all state-sponsored racial separation stigmatized nonwhites and, directly or indirectly, denied or impeded their exercise of civil rights. The "civil rights" concept is thus "open-ended"; its beneficiaries, however, and the purposes of constitutionally protecting them, may not be quite so open. See text at notes 347-50 *infra*.

course not so limited, and it is the uncertain import of the language chosen that has generated the difficulty. Each option seeks to reconcile the clause's historical objectives and its sweeping language, yet the two theories are, at times, antagonistic.

The "process imperative" finds much of its judicial heritage in the *Carolene Products* footnote.³⁴⁷ The footnote suggests that certain forms of prejudice may impede the operation of an otherwise fair pluralist democracy, and that the Court may be authorized by the Constitution to protect "discrete and insular minorities" against systematic operation of prejudice transformed into law. The process imperative, of course, raises its own special brand of questions — what constitutes "discreteness" or "insularity" of a minority,³⁴⁸ whether a "minority" is to be identified in purely numerical terms,³⁴⁹ whether a Court animated by the process imperative is free to probe the actual workings of the political process,³⁵⁰ and so forth. At its core, however, the imperative makes no moral judgments other than about the occasional immorality of democracy.

The "moral imperative" is concerned primarily with the qualities of the classification, not with the process that classifies. It looks back to the framers' objectives and derives from them a moral standard, such as "race should be irrelevant to governmental action," or "it is immoral to disfavor someone on the basis of immutable characteristics (or group membership, or some similar concept)."³⁵¹ The elder Justice Harlan's famous dictum about the

347. 304 U.S. at 152 n.4: "Nor need we enquire . . . whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry."

348. "It would hardly take extraordinary ingenuity for a lawyer to find 'insular and discrete' minorities at every turn in the road." *Sugarman v. Dougall*, 413 U.S. 634, 657 (1973) (Rehnquist, J., dissenting).

349. This is a problem in the gender discrimination cases. See *Frontiero v. Richardson*, 411 U.S. 677, 684-86 (1973) (plurality opinion) (arguing that, despite the numerical superiority of females over males, the former are "vastly underrepresented in this Nation's decision-making councils." 411 U.S. at 685 n.5).

350. This question has led to the interminable struggle over the extent to which courts are free to look behind facially neutral government decisions in search of impermissible animating prejudices. See, e.g., *Arlington Heights v. Metropolitan Hous. Corp.*, 429 U.S. 252 (1977). For an excellent collection of essays on the *Arlington Heights* problem, see Colloquium, *Legislative Motivation*, 15 SAN DIEGO L. REV. 925 (1978). For further discussion and refinement of the *Carolene Products* process-prejudice framework, see Ely, *supra* note 342, at 729-36. See also Kurland, *Egalitarianism and the Warren Court*, 68 MICH. L. REV. 629 (1970).

351. For presentations of this view, see Perry, *Constitutional "Fairness": Notes on Equal Protection and Due Process*, 63 VA. L. REV. 383, 401-02 (1977); Ginsburg, *Gender*

inability of the Constitution to distinguish among various hues — “Our Constitution is colorblind”³⁵² — was perhaps the earliest judicial statement of one form of the moral imperative. As one might suspect, formulating a precise and universally acceptable moral imperative is no easy task. Indeed, the qualifications that any form immediately provokes suggest that the moral approach to equal protection is as problem-laden as the process approach.³⁵³ The exact form of the moral imperative, however, is unimportant for my purpose. What *is* important is to distinguish it from the process imperative, and to realize that the process imperative speaks from democratic political theory, while the moral imperative speaks from a vision of constitutional norms of justice.

During the early years of equal protection adjudication, courts failed to perceive the gap between the imperatives. Cases involving discrimination on the basis of race³⁵⁴ and national origin³⁵⁵ provided no occasion for such perception, *because that type*

in the Supreme Court: The 1973 and 1974 Terms, 1975 SUP. CT. REV. 1; Kaplan, *Equal Justice in an Unequal World: Equality for the Negro — The Problem of Special Treatment*, 61 NW. U. L. REV. 363 (1966). Professor Karst's *Foreword*, *supra* note 121, at 22-24, argues in part from the moral imperative, but acknowledges the process imperative as well, *id.* at 24-26; Karst concludes that the equal citizenship principle, which he champions, derives from a combination of both imperatives: “[T]he degree of suspectness of a classification is chiefly determined by the degree to which the classification interferes with the interest in being treated as a person who belongs to the society as a *respected, responsible, and participating member.*” *Id.* at 26 (emphasis added).

352. *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting).

353. The game of qualifications is easy:

1) Race should be irrelevant to government actions (*except* for remedial purposes; that is, *except* when courts, or perhaps legislatures, or perhaps bureaucracies, or perhaps even local school boards, make “findings” of past racial discrimination. . . . The list of “remedial” purposes is practically endless).

2) Immutable characteristics should not form the basis of legislative classifications (*except* when *necessary*, such as strength or intelligence for job performance purposes, or even race or gender if role-modeling is important, and so forth).

3) Persons should not be singled out for disfavored treatment on the basis of characteristics over which they have no control and for which they are not responsible (*except* strength and intelligence as in proposition two above, and *except* many families in cities subject to desegregation plans, see proposition one, above. Again, the exceptions appear to engulf the rule).

Perhaps all these examples reveal is that the moral imperative is rarely an “imperative” at all. Even when a form of it suggests values we *usually* expect government to respect, the complexity of our history, society, and collective aspirations eventually transform all the moral imperatives into no more than “weights” in a complex calculus of costs and benefits. Nevertheless, the weighing process begins with a search for norms, and if describing this approach to equal protection as the “moral imperative” is a bit simplistic, it at least forces the analysis into proper normative terms.

354. See *Strauder v. West Virginia*, 100 U.S. 303 (1880).

355. See *Korematsu v. United States*, 323 U.S. 124 (1944); *Yick Wo v. Hopkins*, 118 U.S. 356 (1886).

of discrimination is "suspect" under either imperative. The general requirement of rationality of classification is similarly a function of both, although it leans toward the moral imperative.³⁵⁶ The alienage and illegitimacy cases did not seriously threaten the unspoken duality of imperatives, because they too raised respectable claims under either.³⁵⁷ Cases involving de facto wealth discrimination began to generate anxiety, because those claims fell uneasily within either imperative; the group was not so "discrete and insular" as some others for "process" purposes, and the possibility of "free will" entry into and exit from the class raised intractable dilemmas for earlier forms of the moral imperative.³⁵⁸

The real crunch arrived, however, in a pair of explosive social and political controversies — the issues of gender equality and so-called "reverse discrimination." They highlight perfectly the conflict between the imperatives. Is racial preference for nonwhites in graduate school admissions unconstitutional, since it allows

356. The requirement that classifications rationally further a legitimate state purpose helps — but not much — to shield minorities from thoroughly arbitrary impositions on their interests and is a watered-down form of the moral imperative (inequalities cannot be premised on attributes wholly irrelevant to legitimate governmental purposes). The precise relationship of the varying forms and intensities of rationality requirements to the starker outline presented in the amendment's text is beyond the scope of this Article. See generally Gunther, *supra* note 98. See also *Developments in the Law, supra* note 56; Note, *Legislative Purpose, Rationality, and Equal Protection*, 82 YALE L.J. 123 (1972). For a powerful argument that courts are poorly equipped to engage in any sort of rationality review, see Linde, *supra* note 230.

357. Both aliens and illegitimates have, as classes, been historically saddled with civil disabilities, and both groups have been the subject of prejudice and stereotyping by legislatures. For instance, aliens have historically been excluded on a de jure basis from political participation, and illegitimates are disproportionately represented among the poor and nonwhite. See, e.g., *Weber v. Aetna Cas. & Sur. Co.*, 406 U.S. 164 (1972) (illegitimates); *Graham v. Richardson*, 403 U.S. 365, 372 (1971) (aliens are a "discrete and insular minority"). Under at least some forms of the moral imperative, moreover, both aliens and children born out of wedlock are appropriate candidates for "suspect classification" treatment. In particular, both illegitimates and recently-arrived aliens fall within statuses for which their parents, if anyone, are responsible. Of late, however, the court has seemed unsure of what any of this should mean for constitutional adjudication. Compare *Lalli v. Lalli*, 99 S.Ct. 518 (1978), with *Trimble v. Gordon*, 430 U.S. 762 (1977); compare *Foley v. Connelie*, 435 U.S. 291 (1978), with *Sugarman v. Dougall*, 413 U.S. 634 (1973). See also *Fiallo v. Bell*, 430 U.S. 787 (1977) (minimal scrutiny for illegitimacy classification involving aliens). Age discrimination cases have implicitly embraced a process imperative only. See *Vance v. Bradley*, 99 S.Ct. 939 (1979); *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307 (1976). Although age is immutable, and mandatory retirement may be stigmatizing, the Court has consistently applied restrained review standards.

358. For a discussion of the problems of treating wealth as a suspect classification under either approach, see sources cited in note 66 *supra*. See also Wilkinson, *The Supreme Court, the Equal Protection Clause, and the Three Faces of Constitutional Equality*, 61 VA. L. REV. 978-84 (1975).

skin color to control access to a scarce good, thereby offending the moral imperative?³⁵⁹ Or is it acceptable, since its "victims" are well-represented in the decision-making processes?³⁶⁰ Similarly, are all gender classifications "suspect" because they violate some formulation of the moral imperative?³⁶¹ Or should classifications that disfavor males be of no judicial concern, because males are surely protected by the political processes?³⁶²

Although the Burger Court has reached no agreement on these questions,³⁶³ answers have been suggested and ably defended elsewhere,³⁶⁴ and I raise them here simply to make one point: while both imperatives are legitimate inferences from the objectives of those who framed the equal protection clause, *any movement away from the "suspect class" notion that underlies both of them lacks such inferential support.* Regrettably, the whole equal protection enterprise has been complicated by an initial insistence that the "suspect class" decision was all-or-nothing, and by a subsequent nimble retreat to a half-way house of "intermediate" review standards³⁶⁵ for classifications ap-

359. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978) (Powell, J.).

360. See Ely, *supra* note 342. The *Bakke* problem has immense complexities; the statements in the text are painted from opposite poles, and fail to do justice to the subtlety of the issues raised. Among other things, the statements in the text ignore the possibility that certain forms of "benign discrimination" might overcome the presumption of unconstitutionality that could attach under the moral imperative. For general discussion, see, in addition to Professor Ely's article, Kaplan, *supra* note 351; Posner, *The DeFunis Case and the Constitutionality of Preferential Treatment of Racial Minorities*, 1974 SUP. CT. REV. 1; Sandalow, *Racial Preferences in Higher Education: Political Responsibility and the Judicial Role*, 42 U. CHI. L. REV. 653 (1975); Greenawalt, *Judicial Scrutiny of "Benign" Racial Preference in Law School Admissions*, 75 COLUM. L. REV. 559 (1975); Karst & Horowitz, *Affirmative Action and Equal Protection*, 60 VA. L. REV. 995 (1974); O'Neil, *Racial Preference and Higher Education: The Larger Context*, 60 VA. L. REV. 925 (1974).

361. See, e.g., *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973) (plurality opinion) (sex characteristic is immutable and "frequently bears no relation to ability to perform or contribute to society").

362. See, e.g., Ely, *Foreword*, *supra* note 9, at 9, 12; *Craig v. Boren*, 429 U.S. 190, 218-21 (1976) (Rehnquist, J., dissenting).

363. *Bakke* might have done it, but in the end did not, primarily because four of the Justices (Burger, Stewart, Rehnquist, and Stevens) rested their judgment on Title VI of the 1964 Civil Rights Act, and expressly reserved judgment on whether or not Title VI swept more broadly than the Constitution. 438 U.S. at 408, 417-18. In other words, those four Justices read Title VI to embody the moral imperative, without deciding whether the fourteenth amendment does likewise.

364. On the racial preference questions, see the commentary cited in note 360 *supra*. On the gender classification problem, see generally Ginsburg, note 351 *supra*; Note, *Do We Need an Equal Rights Amendment*, 84 HARV. L. REV. 1499 (1971). See also Wasserstrom, *Racism, Sexism, and Preferential Treatment: An Approach to the Topics*, 24 UCLA L. REV. 581 (1977).

365. See, e.g., *Craig v. Boren*, 429 U.S. 190, 197 (1976) (gender classifications, to

proaching, but not quite reaching, the core of either imperative. The field remains in some disarray, and lately signs of continued uncertainty have been glowing brightly.³⁶⁶ Nevertheless, the Burger Court's overall equal protection performance, despite its substantive rhetoric,³⁶⁷ has been generally consistent with a trend of disentanglement. Equal protection advances have come at the frontier of suspect class doctrine,³⁶⁸ and even the Court's most notable equal protection "retreat," in the school finance case,³⁶⁹ marked an obvious withdrawal from the mistaken substantive equal protection methodology.

2. *Reanalyzing Substantive Equal Protection*

While recent developments may thus display tentative movement toward untangling the strands of the fourteenth amendment, it remains theoretically unsound to attribute the previous decade's substantive fourteenth amendment developments to the equality strand. It is correspondingly unsound for the Court to write of that strand as if it could legitimately lay claim to that case law. The former vice misleads as to the legitimacy and proper scope of decisional law; the latter makes promises of equality-centered activism that should not, and probably will not, be kept. Those equal protection cases that relied, in whole or in part, on factors other than the classification imposed by the challenged scheme need reanalysis. The central cases concerned rights of interstate movement and rights of political participation.³⁷⁰

a. *Durational residency requirements and the right to*

satisfy the equal protection clause, must be "substantially related to achievement of [important governmental] objectives.") Compare *Craig* with the opinions in *Frontiero v. Richardson*, 411 U.S. 677 (1973), that, taken together, formed the majority supporting invalidation.

366. See the cases cited in note 357 *supra*.

367. See the discussion of *Maher v. Roe*, text at notes 105-21 *supra*.

368. See discussion of the Burger Court era, text at notes 82-104 *supra*.

369. *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1 (1973).

370. Although those cases involving claims by indigent criminal defendants to state subsidization of the costs of pursuing appellate relief can be characterized as a portion of "substantive equal protection", their procedural setting, their open acknowledgment of due process clause roots, see, e.g., *Douglas v. California*, 372 U.S. 353, 356 (1963) and 372 U.S. at 363 (Harlan, J., dissenting), and their recent drift away from equality-centered analysis, see *Bounds v. Smith*, 430 U.S. 817 (1977); *Ross v. Moffitt*, 417 U.S. 600 (1974), differentiate them from the more tangled rights of interstate travel and political participation. The right to appellate process has become based on due process in fact and methodology.

travel. As noted earlier, *Shapiro v. Thompson*³⁷¹ was both a capstone to the Warren Court's egalitarian efforts and a glaring symbol of equal protection hyperactivity. Unable or unwilling to rest the travel right upon any explicit textual provision, the Court elected to protect the right through the equal protection clause — one provision that clearly could not have been its source.

Shapiro's progeny have thrashed about in the analytical bog of their ancestor. After *Dunn v. Blumstein*³⁷² extended *Shapiro's* teaching to durational residence requirements for voters, and *Memorial Hospital v. Maricopa County*³⁷³ reaffirmed *Shapiro's* concern with deprivation of the necessities of life, *Sosna v. Iowa*³⁷⁴ managed to distinguish and uphold durational residency requirements for divorce. Taken together, the cases seem a conceptual disaster area. It would appear to take a legal Houdini to reconcile a holding that residency requirements for "life's necessities" are never permissible with a holding that waiting periods for the exercise of constitutionally significant interests (such as marital choice) are sometimes permissible. In fact, one need not *be* a Houdini to follow his example — and untie the knots.

The uncertain course of durational residency cases is unmistakably a product of tangled strands. They have left the constitutionally unjustifiable suggestion that, except for the special case of voting,³⁷⁵ only the indigent should be free from state-created impediments to interstate movement "with intent to settle and abide."³⁷⁶ One might expect that an equality-centered view of the problem would produce such results; a more justifiable liberty-centered view, however, could produce similar (though not identi-

371. 394 U.S. 618 (1969). See the discussion in the text at notes 54 & 68-70 *supra*.

372. 405 U.S. 330 (1972).

373. 415 U.S. 250 (1974) (invalidation of one-year durational residence requirement for nonemergency hospitalization or outpatient care for indigents at county expense).

374. 419 U.S. 393 (1975).

375. *Dunn v. Blumstein*, 405 U.S. 330 (1972), rested its reasoning more upon the *Harper-Kramer* standard of regulatory precision in franchise distribution than upon the impact of the restriction upon migration. An honest assessment could hardly do otherwise — the prospect of no welfare benefits on arrival might immobilize a prospective migrant, but temporary disfranchisement is not likely even to enter the potential migrant's cost-benefit calculation.

376. The phrase is from Justice Marshall in *Maricopa County*, 415 U.S. at 255. It tells us that *Shapiro's* protection is not for transients. The privileges and immunities clause of art. IV is for transients, but the *interests* protected by art. IV appear, for strange reasons, to diverge substantially from interests *Shapiro* and its progeny protect against a comparable xenophobia. Compare *Maricopa County with Doe v. Bolton*, 410 U.S. 179, 200 (1973) (dictum that state may constitutionally maintain a "policy of preserving state-supported facilities for [bona fide state] residents"). Wander aimlessly if you will, but if you are

cal) outcomes in those cases, without the vices and distortions of substantive equal protection thinking.³⁷⁷

I suggested earlier that the travel right is one gleaned from fundamental structural assumptions derived from the Constitution, the federal union it creates, and the supremacy of national over state interests in that union.³⁷⁸ A right so derived, and so long recognized, is entitled to protection against state interferences in certain instances. As Justice Harlan so appropriately recognized in his *Shapiro* dissent,³⁷⁹ however, elevation of the travel liberty above statutory enactments is defensible only if it depends upon the values implicit in that liberty and not upon the egalitarian overtones of particular exercises of it.

Although the opinion does not fully disclose its premises and may well have reached the wrong result, *Sosna v. Iowa*³⁸⁰ has taken an important step toward untangling the strands in this corner of constitutional law. Its means-focused, interest-balancing analysis is much closer to Justice Harlan's dissent than it is to the majority opinion of *Shapiro*. That, in itself, is insufficient evidence of disentanglement, since the apparent review standard of reasonableness in *Sosna*³⁸¹ has appeared in other equal protection cases.³⁸² More persuasive is the evolution of the "penalty" theory, a theory clearly adapted to straightforward protection of the travel liberty, and not to a consistent principle of equal treatment for newcomers. As the cases from *Shapiro* through *Maricopa County* to *Sosna*³⁸³ have progressed, the notion of penalty has evolved imperfectly in the direction of "the likely infliction of irreparable harm." Thus, a year without the basic

poor, do not get sick. On the subject of the evolution of art. IV privileges and immunities doctrine, see generally L. TRIBE, *supra* note 1, at 404-12, and Supp. 1979 at 34-40.

377. For an analysis of *Shapiro* and its progeny that reaches a similar conclusion for somewhat different reasons, see Barrett, *Judicial Supervision of Legislative Classifications — A More Modest Role for Equal Protection?*, 1976 B.Y.U. L. REV. 89, 109-12, 116-20. See also McCoy, *Recent Equal Protection Decisions — Fundamental Right to Travel or "Newcomers" as a Suspect Class?*, 28 VAND. L. REV. 987 (1975); Note, *Freedom of Travel and Exclusionary Land Use Regulations*, 84 YALE L.J. 1564 (1975).

378. See text at note 238 *supra*.

379. 394 U.S. at 659-62.

380. 419 U.S. 393 (1975).

381. 419 U.S. at 406-407.

382. Compare *Craig v. Boren*, 429 U.S. 190 (1976) (expressly adopting intermediate review standard for gender discrimination cases arising under the equal protection clause), with *Sosna v. Iowa*, 419 U.S. 393 (1975) (engaging in interest-balancing comparable to that of *Craig*, but without identifying the standard as such).

383. The "penalty" theory actually originated in *Dunn*, but, in light of earlier decisions marking the vote as constitutionally special, *Dunn* quite properly viewed a deprivation of voting rights as a penalty per se.

sustenance that AFDC benefits provide and a year without access to medical care (even if only nonemergency care) are both penalties. In the former case, common sense suggests the injury is significant enough to deter some interstate migration. Whether it does so or not, the conclusion is undeniable that one year without welfare benefits results in a net, unrecoverable loss. If and when the benefits resume a year later, the hardship created by their absence is unremedied and irremediable.

Sosna stands in the curious position of having moved in the right direction without fully recognizing the shift's analytic consequences. The migrant forced to wait for a divorce is also penalized, although the loss is not quantifiable. The harm may be irreparable: potential marriage partners may not be willing or able to wait, and the year of emotional uncertainty cannot be undone. Moreover, a waiting period for divorce may be, in effect, a waiting period for marriage, and *Zablocki* indicates that marriage impediments, aside from age and consanguinity, are constitutionally dubious. Furthermore, a person deeply desirous of a quick divorce may in fact be deterred from migrating to a state that imposes a waiting period. *Sosna's* movement away from *Shapiro's* equal protection approach seems entirely correct, but its outcome is not easily squared with the migration-protecting principles for which that line of cases purports to stand.³⁸⁴

Nevertheless, this analysis reveals that the reasoning of cases involving penalties on migration rights rests more comfortably on the due process strand than on the equal protection strand of the fourteenth amendment. The penalty theory is nothing more than another variant of the unconstitutional conditions theme³⁸⁵ — a waiting period puts a potential migrant to an unacceptably harsh choice between interstate travel and essential government services.³⁸⁶ Nothing is novel or unique about careful judicial scrutiny of burdens placed by government on the exercise of rights; that scrutiny has always been focused on whether the state has interfered significantly with the private calculation of costs and benefits associated with exercising preferred rights.

Shaking *Shapiro* free from its equality moorings, moreover,

384. The state concern embraced in *Sosna*, that its courts not become "divorce mills," would evaporate if all states were forbidden from using durational residence requirements for divorce.

385. See text at notes 152-54 *supra*.

386. See also L. TRIBE, *supra* note 1, at 1005 n.18 (analogizing durational residence requirements to judicial comment to the jury on a defendant's exercise of the right to remain silent).

may make a real difference in the outcome of related controversies. The subordination of the equality theme of *Shapiro* would properly invite judicial examination of waiting periods that harm the nonpoor. A one-year durational residence requirement for a professional license, for example, might be seen to offend the constitutional freedom of interstate migration, either because it results in a quantifiable income loss to those who migrate in the face of it, or more persuasively, because it is likely to interfere significantly with the migration choice. *Shapiro*, viewed as a substantive liberty case and not as a "wealth-plus" equal protection case, thus becomes an important weapon in the Court's liberty-protecting arsenal.

b. *Rights of political participation.* In the past two decades, the Supreme Court has aggressively protected a variety of interests in political participation. These have included interests in (1) a legislature apportioned by population,³⁸⁷ (2) access to a spot on an electoral ballot,³⁸⁸ and (3) exercising the franchise.³⁸⁹ All of these developments present serious problems of tangled strands; indeed, the cases protecting interests in voting and fair apportionment may be the most difficult "substantive equal protection" decisions to rationally justify on a set of grounds that maintains strand separability.³⁹⁰ The difficulty has double-barreled dimensions: the political participation doctrines possess powerful connections with ideals of equality,³⁹¹ and some of the doctrines are the input analogues of the output concerns expressed by the process imperative.³⁹²

Funneling political participation rights through the due process clause rather than its section one companion requires, on the theories advanced herein, a showing that those rights are either

387. See, e.g., *Reynolds v. Sims*, 377 U.S. 533 (1964). The reapportionment cases present a universe of problems of their own. See generally L. TRIBE, *supra* note 1, at 738-61.

388. See, e.g., *Williams v. Rhodes*, 393 U.S. 23 (1968). See generally Wilkinson, *supra* note 358, at 956-76; L. TRIBE, *supra* note 1, at 775-84.

389. See, e.g., *Kramer v. Union Free School Dist. No. 15*, 395 U.S. 621 (1969); *Harper v. Virginia Bd. of Elections*, 383 U.S. 663 (1966); see L. TRIBE, *supra* note 1, at 763-72.

390. Professor Wilkinson strenuously argues exactly that: "[T]he realm of equality in which judicial intervention is most desirable and justifiable [is] that of political equality." Wilkinson, *supra* note 358, at 956. He refers as well, however, to a concept of "political fair play," *id.* at 957, 961, suggesting that his views and mine may not be grossly divergent, see text at notes 398-410 *infra*.

391. See *id.* at 956-67. They also possess powerful connections with libertarian and contractarian values at the heart of the first amendment, and Professor Wilkinson so acknowledges. *Id.* at 961-63.

392. See text at notes 347-50 *supra*.

1) properly inferable from the Bill of Rights or other textual guarantee, 2) properly inferable from the constitutional structure, or 3) otherwise protected by satisfaction of the "deeply embedded values" test. The cases protecting candidate access to a place on the ballot fall, the Court has said, explicitly within the first option: the first amendment protects the interests of both candidate and candidate supporters in appealing to the electorate for support.³⁹³ The reapportionment cases and the cases restricting inequalities in distribution of the franchise, however, have not rested on the first amendment and need support from elsewhere.

An initial glance at text and structure deepens the difficulty of justifying these doctrines. The creation of a national legislature composed of elected representatives who possess the law-making power, and the guaranty clause³⁹⁴ aimed at the states, suggest a broadly democratic theory of government is assumed and demanded by the Constitution.³⁹⁵ The details of franchise entitlement and regulation, however, seem quite clearly to have been textually remitted to the states primarily³⁹⁶ and the national legislature secondarily.³⁹⁷ Limitations upon state power to restrict the franchise have emerged over time chiefly from the process of constitutional amendment,³⁹⁸ implying a national understanding that only by way of amendment of this sort was state power limitable. Under this textual analysis, *Harper* seems a less defensible result than *Roe*; the framers were silent about abortion, but rather vocal about the source of authority to regulate distribution of the franchise.

Inferences of the inappropriateness of judicial intervention in support of these interests are not, however, the only ones that might be drawn from this pattern. The search for "deeply embedded values" is not limited to extra-textual analysis of history and contemporary values. Concentration on extra-textual sources of

393. *Williams v. Rhodes*, 393 U.S. 23 (1968). See generally Karst, *Equality as a Central Principle in the First Amendment*, 43 U. CHI. L. REV. 20 (1975). See also *Kusper v. Pontikes*, 414 U.S. 51 (1973).

394. U.S. CONST. art. IV, § 4. See generally Bonfield, *The Guarantee Clause of Article IV, Section 4: A Study of Congressional Desuetude*, 46 MINN. L. REV. 513 (1962).

395. Of course, one need not limit one's view to the text of the Constitution in order to reach a conclusion of this simplicity. See generally Ely, 37 MD. L. REV. 451, *supra* note 9, at 456-69.

396. U.S. CONST. art. I, § 2, amend. XVII. See Barrett, *supra* note 377, at 112. See also *Oregon v. Mitchell*, 400 U.S. 112, 123-25 (1970) (opinion of Black, J.).

397. *Oregon v. Mitchell*, 400 U.S. 112, 121-24 (1970) (opinion of Black, J.) (relying on U.S. CONST. art. I, § 4, for the proposition that Congress is thereby authorized to prescribe voter qualifications in congressional, but not state, elections).

398. U.S. CONST. amend. XV, XIX, XXIV, XXVI.

fundamental rights tends to obscure a basic point — in constitutional law, the text itself is the best, although not the exclusive, source of “deeply embedded values.” The 1789 Constitution, taken together with the series of enfranchising amendments,³⁹⁹ evinces a commitment to political participation values. The right of the “people” to elect representatives and senators is secured by article I, section 1, and the seventeenth amendment, respectively.⁴⁰⁰ History has obviously validated the movement to popular election of presidential electors.⁴⁰¹ More fundamentally, and with particular reference to state and local elections, the guaranty clause may serve as an appropriate source of political participation values.

Although the Court has held that whether a particular form of state government is “republican” or not is a nonjusticiable question,⁴⁰² subsequent decisions have weakened the reasoning which underlies that holding.⁴⁰³ Indeed, the “one person, one

399. The 15th, 19th, 24th, and 26th amendments explicitly refer to “the right of the citizens of the United States . . . to vote.” Curiously, each amendment speaks as if it were conferring some sort of preexisting federal right to vote upon a group of citizens previously without the franchise. Yet there is no explicit right to vote in the 1789 Constitution. However, a right of political participation may perhaps be structurally inferred from the guaranty clause, coupled with the overtones of representative democracy present in the presidential and congressional election provisions of articles I and II and the electoral traditions that have emanated from them, *see* notes 400-08 *infra* and accompanying text.

400. To be sure, neither art. I, § 2, nor the 17th amendment, by themselves, are capable of supporting the political participation doctrines, because the original understanding points too clearly to broad state autonomy in choosing which of “the people” possessed the franchise, and in choosing the method of legislative apportionment.

401. Presidential electors have been selected by popular election in the states for nearly two centuries. Surely, then, the right to vote in presidential elections meets the tradition-consensus test of fundamental values set forth above. *See* text at notes 304-24 *supra*.

402. *Pacific States Tel. & Tel. Co. v. Oregon*, 223 U.S. 118 (1912). In *Pacific States*, the guaranty clause was used to *attack* the constitutionality of a voter initiative as contrary to republican form of government. Thus, even though the case is often described as a barrier to judicial protection of voters’ rights through the guaranty clause, the case might just as easily be interpreted as a decision upholding a state’s use of the initiative in the law-making process. In any event, the narrow holding of the case probably should not be that “all questions arising under the guarantee clause . . . [are] nonjusticiable,” *see* Bonfield, *supra* note 394, at 554-56.

403. Even though the Court gave lip service to the *Pacific States* holding in *Baker v. Carr*, 369 U.S. 186 (1962), the result of that decision in many respects undermined the view that the guaranty clause is nonjusticiable. First of all, Justice Brennan’s majority opinion, while explicitly disclaiming reliance upon the guaranty clause, nevertheless managed to at least partially dispel the notion that the guaranty clause and the political question doctrine were precisely congruent, *see* W. WIECEK, *THE GUARANTEE CLAUSE OF THE U.S. CONSTITUTION* 279, 281, 292 (1972). Justice Brennan’s reasoning appeared to suggest that the nature of the legal issue involved — not whether it is framed in the form of a guaranty clause claim — determined whether a political question existed. *See* Bonfield,

vote" principle may be nothing more than "a Guaranty Clause claim masquerading" in equal protection garb.⁴⁰⁴ To the extent that the guaranty claims are justiciable,⁴⁰⁵ moreover, the fourteenth amendment is the appropriate and necessary vehicle for imposing values of political participation upon the states. The guaranty clause creates no individual rights; rather, it describes a relationship between the United States and the states, placing upon the federal government a duty to maintain certain conditions of stability within each state, among them a republican form of government.⁴⁰⁶ This underlying concern of the clause with the rights of the people in the several states to a republican form of government justifies the creation of derivative individual

Baker v. Carr: New Light on the Constitutional Guarantee of Republican Government, 50 CALIF. L. REV. 245, 252 (1962). Furthermore, none of the six famous tests for political questions enunciated in *Baker* necessarily bars guaranty clause claims, see W. WIECEK, *supra*; at 287-89. Finally, many commentators have persuasively argued that *Baker v. Carr* and its "one person one vote" progeny are really guaranty clause decisions which the Court has refused to label as such because of its unnecessarily broad interpretation of *Pacific States*, see notes 400 & 402 *supra*.

404. *Baker v. Carr*, 369 U.S. 186, 297 (1962) (Frankfurter, J., dissenting). Due to the nature of the state electoral processes assessed, reliance upon the fourteenth amendment in reapportionment cases must be tied implicitly to the guaranty clause:

Regardless of whether one concludes that numerical equality of representation is or is not one of the fundamental values of our system, that determination must revolve about an interpretation of the leading constitutional evidence of our values with respect to the form of state governments, article IV, section 4, of the Constitution, which guarantees to the states a "republican" form of government. It is in the light of the requirement of "republican" form of government that the essentiality of per capita equality of representation must be judged. If reasoned, non-population bases for apportioning state legislatures are considered "irrational," it is only because the concept of republican form of government, possibly as supplemented by historical practice and other parts of the Constitution, requires a representative democracy based upon complete political equality of the individual It is this argument and only this argument which will justify a standard of "practical equality" of representation or practical equality with some "rational deviations" as the standard for judging the constitutionality of legislative apportionment.

Israel, *On Charting A Course Through the Mathematical Quagmire: The Future of Baker v. Carr*, 61 MICH. L. REV. 107, 135-36 (1962). Thus a citizen's right to equality of representation under the fourteenth amendment assumes that the Constitution requires state governments to be representative democracies. The guaranty clause would seem to be the only plausible source for such an assumption. As Justice Douglas observed in his concurring opinion in *Baker*: "[T]he right to vote is inherent in the republican form of government envisaged by Article IV, Section 4 of the Constitution A 'republican form' of government is guaranteed each State by Article IV, Section 4" 369 U.S. at 242.

405. See note 403 *supra* and text at notes 409-10 *infra*.

406. The clause reads:

The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence.

rights, enforceable by way of the fourteenth amendment. Otherwise, the clause bestows a worthless promise: individual citizens of a state with an "unrepublican" form of government — and not the unrepublican government itself — are the only parties likely to hold the federal government to its guarantee.⁴⁰⁷

Moreover, once the due process clause is viewed as having any substantive content, that clause may appropriately be the source — independent of the guaranty clause — of political participation rights.⁴⁰⁸ The basic premise of such a view is that a substantive content to the clause implies judicial authority to oversee the "process" responsible for that content. Put differently, judicial concerns with legislative output justifies some concern with the process of input. Such judicial intervention is designed to enhance the openness and integrity of the political process, and to reduce (hopefully) the necessity for judicial invalidation of legislative outcome. It is an "investment model" of judicial activism — the bench may interfere once to avoid multiple subsequent interferences.⁴⁰⁹ So viewed, the judicial elaboration of rights in political participation is activism employed in a healthy search for restraint.

Just as the conventional judicial task when the clause's procedural dimensions are invoked is to scrutinize administrative and judicial processes for adequacy and meaningfulness of the hearing opportunity, so an appropriate task is to study those issues of adequacy of political process which are subject to principled resolution. The day-to-day doings of legislative or executive business — lobbying, horse-trading, information-acquisition —

407. This approach is also consistent with the trend of modern Bill of Rights incorporation doctrine, even though, of course, it is not identical in analytic derivation to traditional Bill of Rights incorporation. Incorporation of those amendments takes the form of creating state duties to match federal duties, with respect to various individual rights claims. The guaranty clause "incorporation" starts from federal duties to states (not individuals), and transposes them into state duties to individuals.

408. When political participation rights are channeled through the equal protection clause, in contrast, they are inevitably plagued by the same shortcomings of substantive equal protection elaborated earlier. See text at notes 93-97, 144-47, 177-79, & 364-69 *supra*.

Furthermore, despite the preponderance of equal protection rhetoric in reapportionment decisions, the right to political participation possesses definite due process attributes, see *L. TRIBE, supra* note 1, § 13-1 at 737; Neal, *Baker v. Carr: Politics in Search of Law*, 1962 *SUP. CT. REV.* 252, 285. In fact, the right has attained "preferred" status:

No right is more precious in a free country than that of having a choice in the election of those who make the laws under which, as good citizens, they must live.

Other rights, even the most basic, are illusory if the right to vote is undermined. *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964).

409. See *Wilkinson, Three Faces, supra* note 358.

are probably not so subject. But the formal structure of representation is subject to "judicially manageable" standards, and it is precisely that structure which is the target of the reapportionment and franchise distribution cases. Those cases demand a minimally fair structure of input into the political process. Notions of equality may play a part in the determination of what is minimally fair; the cases protecting criminal appeal access for indigents stand as clear evidence of that. At bottom, however, the Court has taught that minimally fair electoral processes mean one vote for each voter and the required distribution of the franchise to all resident adults whose interests may be substantially affected by an election. The due process clause, of course, does not mandate that a citizen has a right to vote on all governmental decisions or for all governmental officials. Rather, the clause protects the right to vote in those elections — federal, state, or local — necessary to insure minimally fair citizen representation.

The substitution of a "minimum fairness" due process clause theory of political participation for an equal protection centered theory⁴¹⁰ is more than mere rhetorical flourish. In part, the theory is a formalized recollection of the origins of judicial concern with political input — the *Carolene Products* footnote, it may be recalled, was appended to a fifth amendment *due process clause* opinion and made no mention of the equal protection clause. The proposed theory also preserves and buttresses current applications of the political participation concept, and does both to salutary ends. The preservation flows from the recognition of the input-output relationship described above. Aggressive constitutional protection of the input rights is designed to safeguard, with minimum judicial interference, the general civil rights and interests of the citizenry,⁴¹¹ whether equality-related or not. The buttressing stems from the Court's repeated rejection of any general

410. The minimum fairness theory needs a good deal more development before it can be viewed as comprehensive, either descriptively or normatively. In particular, the interest-balancing approach used in the procedural due process cases to work out the "process due" upon certain deprivations might serve as a more useful model than the "strict scrutiny" equal protection model presently employed. Professor Wilkinson, while preferring an equality-centered model, has said as much, Wilkinson, *Three Faces*, *supra* note 358, at 976. Professor Barrett has also suggested the rejection of an equality-centered approach. See Barrett, *supra* note 377, at 115-16. See also L. TRIBE, *supra* note 1, § 13-1 at 737 (rights of political participation, despite their doctrinal link to equal protection, are rights "Poised Between Procedural Due Process and the Freedoms of Expression and Association").

411. See *Kramer v. Union Free School Dist. No. 15*, 395 U.S. 621 (1969); *Harper v. Virginia Bd. of Elections*, 383 U.S. 663 (1966); *Reynolds v. Sims*, 377 U.S. 533, 562 (1964).

principle of absolute political equality on all issues and all matters.⁴¹² Instead of theories of blanket political equality, the Court has adopted the principle that political processes provide minimally fair "opportunities to be heard," a notion appropriately flowing from the due process clause.⁴¹³

C. *The Consequences of Untangling — A Broad Look*

It is virtually impossible to anticipate every analytic twist that might follow from consistent adherence to this Article's model of fourteenth amendment adjudication. The consequences of such adherence include reformulation of some existing doctrines, and the constriction and confinement of others. For the most part, adoption of such a model would produce no severe dislocations in decisional trends; untangling frequently will result in changes only at the edges of some established categories of judicial activism. Although some specific alterations have already been mentioned, it seems more fruitful here to speculate on the broader consequences of untangling — the forces, pressures, and influences such a development might unleash.

I have presented a framework derived from the untangling that comprises several distinct elements, including continued incorporation of the Bill of Rights guarantees, recognition of rights derived from structure, protection of a select group of other "preferred liberties", a somewhat canalized version of equal protection, and a doctrine of formal threshold political access. Although some of those elements are, in one sense, open-ended (the content of each element is subject to change by interpretation and socio-political evolution), the overarching framework is not. Thus, the greatest pressure to abandon or distort it will come from claims of important individual interests that are intuitively appealing but do not qualify for special constitutional protection under any of the components of the framework. Conceivably, the doctrinal order could buckle, and through tendentious, mis-

412. The Court's approval of extraordinary majority requirements in *Gordon v. Lance*, 403 U.S. 1 (1971), special referenda requirements for low-income housing in *James v. Valtierra*, 402 U.S. 137 (1971), exclusion from the municipal franchise of a group of only "partially interested" persons in *Holt Civic Club v. City of Tuscaloosa*, 99 S.Ct. 383 (1978), and huge government subsidies for presidential campaigning by, in essence, only the two major parties in *Buckley v. Valeo*, 424 U.S. 1 (1976), appear to signal a rejection of an overarching theory of blanket political equality.

413. For related attempts to link due process notions to scrutiny of political processes generally, see Sager, *Insular Majorities Unabated: Warth v. Seldin and City of Eastlake v. Forest City Enterprises, Inc.*, 91 HARV. L. REV. 1373, 1411-18 (1978); Linde, *supra* note 230.

guided, or inconsistent application, might soon resemble today's "doctrinal disorder."⁴¹⁴ To that extent, the framework, like all of the principles and rules of law of which it is ultimately composed, is only as durable as the judges who administer it. But that objection can be directed at any attempt to reorganize a vast body of judge-made law, particularly that of the constitutional variety. It cannot be a sufficient argument against what is otherwise a beneficial structure of decision to contend that the pressures to breach it will overwhelm. The doctrine can only be the engine; the judge is the engineer. A faulty engine is a menace no matter who drives the train; it is hardly prudent to avoid repairs on the grounds that the engineer may be less than perfect.

On the positive side, strand separation offers significant benefits. It may help clear up the disarray and uncertainty that presently engulf fourteenth amendment standards of review. In particular, eliminating the substantive dimension of the equal protection clause might clear the battleground on which the process imperative and the moral imperative compete. And once the Supreme Court chooses a champion in that competition, it will be on the brink of endorsing a single principle of equality — a true core principle of equal protection. Hard cases will remain, whatever shape the core principle ultimately assumes, but equal protection standards would be far more straightforward and predictable in a system of separate strands than they are under today's tangle.

The impact of strand separation upon due process clause review standards is more difficult to assess. Shifting all concern for substantive values out of the equal protection clause and into the due process clause will accomplish little if it simply preserves an uncertain methodology under a new name. For the proposed realignment to affect cases meaningfully, the methods of reconciling state interests with claims of preferred liberty must differ significantly from those under tangled strands. The new approach might spring from the principles that already govern claims traditionally recognized as libertarian rather than egalitarian.

In particular, doctrines protecting liberty of expression may serve as an abundant source of analogy. Over the years, the Court has used a battery of principles to protect this freedom, including a set of per se rules defining the content of protected expression,⁴¹⁵

414. See Monaghan, *supra* note 98.

415. See, e.g., *Miller v. California*, 413 U.S. 15 (1973) (three-part obscenity test); *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (constitutional line of privilege for speech inciting to crime).

heightened demands for specificity and fair warning,⁴¹⁶ requirements of precision in the regulation of conduct closely connected with free expression,⁴¹⁷ and insistence on adequate procedural safeguards in maintaining the liberty system.⁴¹⁸ Although nontextual liberties will not produce a set of principles as comprehensive as those generated by the first amendment,⁴¹⁹ one can surely transplant the ideal of protecting a liberty system with a core of principles that is responsive to the purpose of that system and sensitive to the foreseeable threats to it. In *Zablocki v. Redhail*, for example, the majority's recognition that less drastic alternatives to a marriage bar were available for enforcing child support obligations⁴²⁰ exhibits relevant and appropriate libertarian analysis; the Court's reflections on the "underinclusiveness" of the scheme — it failed to prohibit the incurrence of new long-term debts by the support obligor⁴²¹ — seem irrelevant and unnecessary. Furthermore, if the *Zablocki* Court had assessed the Wisconsin statute by analogy to the libertarian principles governing free expression, it would have discovered a significant threat to preferred liberty: the delegation to judges of power to authorize the marriage under the highly discretionary standard "that such children are . . . not likely thereafter to become public charges." Once the liberty to marry is recognized as fundamental, doctrines requiring clear and imminent danger to legitimate state interests⁴²² and confining the discretion to make that determination⁴²³ should play as critical a role as they traditionally do in speech cases.

Similarly, the substantive due process clause holding of

416. See, e.g., *Smith v. Goguen*, 415 U.S. 566 (1974); see generally L. TRIBE, *supra* note 1, at 718-20.

417. See L. TRIBE, *supra* note 1, at 682-93. See, e.g., *Grayned v. City of Rockford*, 408 U.S. 104 (1972).

418. See, e.g., *Freedman v. Maryland*, 380 U.S. 51 (1965); see generally Monaghan, *First Amendment "Due Process,"* 83 HARV. L. REV. 518 (1970).

419. In particular, the government's active expenditure role in social programs keyed to family relationships complicates the analogy. Government may spend its money in ways that may discourage (unintentionally) the creation of certain family ties, although comparable consequences would be intolerable in the system of free expression. Compare *Califano v. Jobst*, 434 U.S. 47 (1977), with *Speiser v. Randall*, 357 U.S. 513 (1958). That the values of the expressive liberty system may at times require different sensitivities than the values of other preferred liberty systems does not, of course, demand wholesale rejection of the analogy. It does demand thoughtfulness in drawing upon it.

420. 434 U.S. at 389-90.

421. 434 U.S. at 390.

422. See *Wood v. Georgia*, 370 U.S. 375 (1962).

423. See, e.g., *Kunz v. New York*, 340 U.S. 290 (1951).

*Cleveland Board of Education v. LaFleur*⁴²⁴ can be compared with first amendment doctrines that address state regulation of the time, place, and manner of street demonstrations. "Reasonable" regulation of such demonstrations has a specialized meaning: regulations are reasonable only if they are sensitive to both the need for the street as an occasional forum and the risks of censorial application of such regulations.⁴²⁵ Mandatory pregnancy leave provisions must, after *LaFleur*, overcome a similar burden. Although the Court has recognized a school board's interest in continuity of instruction (just as it has recognized municipal interests in peaceful and orderly thoroughfares), it has also demanded that regulations be drawn with sensitivity to procreative freedom.⁴²⁶

In the same vein, separation of the strands promises to reduce at least some of the confusion about the respective roles of "purpose" and "impact" in fourteenth amendment adjudication.⁴²⁷ Cases presenting issues of forbidden classifications — true equality cases — have made clear that discriminatory purpose is a necessary element of a constitutional violation.⁴²⁸ Disproportionate impact upon a suspect class, while potentially relevant to the issue of purpose, is not itself a violation. Since many truly neutral and socially valuable governmental decisions disproportionately harm particular groups, an impact test would unreasonably impede governmental functions and create unpleasant pressures toward race-consciousness. Furthermore, only direct and intentional government involvement in forbidden discrimination violates the moral imperative, and weakens the social forces that oppose discrimination.

In contrast, evaluation of governmental purpose is less critical, though by no means irrelevant, to protecting a system of liberty. Results are what count in the protection of liberty:⁴²⁹ a

424. 414 U.S. 632 (1974).

425. See, e.g., *Cox v. Louisiana*, 379 U.S. 537, 553-58 (1965). See generally Kalven, *The Concept of the Public Forum: Cox v. Louisiana*, 1965 SUP. CT. REV. 1.

426. But cf. *Quilloin v. Walcott*, 434 U.S. 246 (1978) (noncustodial father of illegitimate child may be denied authority to veto adoption of the child by child's stepfather).

427. The literature here is voluminous, and I can only suggest some possible implications of the thesis expressed herein. See, e.g., Clark, *Legislative Motivation and Fundamental Rights in Constitutional Law*, 15 SAN DIEGO L. REV. 953 (1978); Brest, *Palmer v. Thompson — An Approach to the Problem of Unconstitutional Legislative Motive*, 1971 SUP. CT. REV. 95; Ely, *Legislative and Administrative Motivation in Constitutional Law*, 79 YALE L.J. 1205 (1970).

428. See *Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252 (1977); *Washington v. Davis*, 426 U.S. 229 (1976); *Jefferson v. Hackney*, 406 U.S. 535 (1972).

429. See Ely, *supra* note 161, at 1160-61.

statute outlawing the distribution of leaflets in a public park may be concerned wholly with cleanliness of the grounds, but the impact on free communication is too great for the law to be sustained. In a system of liberty, the guiding principle is the maximization of liberty opportunities subject only to those restraints essential to reasonable public order. Thus, in a case like *Planned Parenthood v. Danforth*,⁴³⁰ the question of whether the legislature intended to suppress abortions need never be faced. The Court's task instead is to assess carefully the consequences of the enactment; if it unduly or unnecessarily restricts procreative choice,⁴³¹ then it fails to meet fourteenth amendment requirements, no matter how laudable its other goals.

In the equal protection area, the Court has generally been faithful to purpose analysis when facing traditional classification problems and to impact analysis when venturing into the morass of substantive equal protection. In *Harper v. Virginia Board of Elections*,⁴³² for example, the Court struck down the Virginia poll tax for restricting the voting interests of the impecunious; the Court properly never reached questions of whether the legislature acted with the invidious purpose of disenfranchising poor (and black) voters. In other cases arriving at the Court in a posture of tangled strands, however, the distinction between purpose and impact may be significant yet unperceived. A hypothetical derived from *Zablocki* illustrates the point. If the challenged Wisconsin statute had not denied a marriage license to one whose full support payments failed to remove his dependents from the welfare rolls, it would have created no absolute bar to remarriage for the indigent. Discriminatory purpose would have been much less evident, and the issue would have become one of effect on the marriage opportunities of those behind in their support payments, a group whose indigent and nonwhite membership might turn out to be disproportionately high. A methodology that maintained distinct strands could ignore the demographics of the impact and evaluate only the gravity of the law's effects on the marriage liberty. Candid acknowledgment that substantive due process theories were at work would liberate the Court from the potentially intrusive search for unconstitutional motivation and

430. 428 U.S. 52 (1976) (invalidating spousal and parental consent requirements for abortions).

431. I assume here that there will be no turning back from the mistake in *Roe v. Wade*.

432. 383 U.S. 663 (1966).

from the problematic inquiry⁴³³ into whether legislative excision of the "bad" purpose would alter the constitutional outcome.

Finally, separation of the strands may have salutary consequences for the Court's struggles with the "equal protection component" of the fifth amendment due process clause.⁴³⁴ Something about the doctrine has always seemed mildly discomfiting, even discordant. As the strands of the fourteenth amendment grew progressively more tangled and egalitarian activism gained favor over libertarian activism, pressure increased for lawyers and judges to recast fifth amendment claims against the federal government as equality claims.⁴³⁵ Paradoxically, the more substantive "equality rights" that the fifth amendment due process clause absorbs, the more textually superfluous the equal protection clause appears. Reduction of the content of "equal protection" to a unitary concern with forbidden classifications would accordingly reduce the "equal protection component" of the fifth amendment, since the latter is defined by the former. Claims of nontextual substantive right, then, would always be due process clause claims, regardless of which level of government is responsible for the challenged action,⁴³⁶ and the Court would face fewer "reverse incorporation" claims⁴³⁷ against the federal government.

V. SEPARATE STRANDS — SOME CONCLUDING OBSERVATIONS

The revival of substantive due process signifies more than a new label for old methodology and results. It demands clearly articulated standards for identifying rights. Moreover, it requires candid appreciation of the libertarian values that distinguish it from equal protection review. Foremost, it demands a profound sense of restraint. In the hands of a Justice determined to write his preferences into the fourteenth amendment, substantive due process is a dangerous weapon. But the last two decades have revealed that the equal protection clause is at least as easily abused as its companion. Its relative infancy as an activist tool

433. The inquiry is required by *Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252 (1977). See note 350 *supra*.

434. See generally Karst, *supra* note 78.

435. See, e.g., *Community-Service Broadcasting, Inc. v. FCC*, 593 F.2d 1102 (D.C. Cir. 1978) (portion of the Communications Act that requires noncommercial broadcast media receiving federal funds to retain, for 60 days, audio tapes of all broadcasts "in which any issue of public importance is discussed," but does not impose similar requirements on commercial stations, violates fifth amendment's equality component).

436. Professor Ely would solve the problem of equality claims against the federal government by invoking the ninth amendment. See Ely, *supra* note 247, at 444-45 n.158.

437. See text at note 79 *supra*.

and its textual invitation to excess in the name of equality have combined to overwhelm the forces of restraint. At the very least, strand separation has the virtue of demanding that diamonds not be palmed off as hearts, that the Court justify each and every choice of preferred liberty in its own name, rather than in the name of overall equality. In that sense, the substantive due process revival, particularly if limited by the standards suggested in this Article, promises to be more candid and more restrained than the egalitarian revolution ever was.

A substantive due process revival coupled with genuine strand disentanglement also promises to be more principled than equal protection activism. The ghost of *Lochner* will always haunt the due process clause. The history of conceded abuse may operate as a force to channel substantive due process activism into the most principled confines. *Shapiro v. Thompson* has yet to spawn a kindred specter for the equal protection clause. Indeed, Justice Marshall, a leading proponent of aggressive judicial defense of equality, has argued that his "sliding scale" is desirable precisely *because* it is not subject to the rigid confines of principle.⁴³⁸ Members of the Court would most likely be very hesitant to present a comparable argument concerning substantive due process adjudication.

Furthermore, separation of strands might reduce the overall frequency of judicial intervention into governmental choices via the fourteenth amendment. An equal protection methodology that examines substantive interests as well as classification bases invites substantial intervention with its attendant potential for abuse and unpredictability. Elusive and ever-changing review standards have been the byproduct of entanglement. Disentanglement, as proposed here, would limit the Court's equal protection intervention to suspect classifications, and its substantive due process activism to liberties protected by the Bill of Rights, reasonable inferences from constitutional structure, and the survivors of a stringent two-pronged test of deeply embedded values. Although such a channeling is not completely unresponsive to claims for protection of new groups or rights, it does not permit the fourteenth amendment to be the dynamic organ of societal reform that some Justices and commentators have hoped it might be.

Disentanglement will no doubt accelerate some trends in the values that the Supreme Court protects by way of the fourteenth

438. *Beal v. Doe*, 432 U.S. 438, 461 n.6 (1977) (Marshall, J., dissenting).

amendment. Protection of Bill of Rights freedoms and full recognition of the "antidiscrimination principle" would be unaffected,⁴³⁹ but disentanglement would reinforce the Court's unwillingness to unleash further the sweeping possibilities of substantive equal protection. Similarly, naked substantive due process adjudication would be reduced to a more conservative role. This is as it should be. Our society has undergone deep, rapid and extraordinary transformations of political and social consciousness in the past quarter-century. The parallel growth of technology and turmoil throughout the world suggests that the rate of change is not likely to decrease. Those great changes may further aggravate the tension between socio-political ideals and socio-political reality. The Court undermines its legitimacy if it attempts to impose on a society in flux any dynamic, sweeping extra-constitutional vision of social and political justice.

The phenomenon of community evolution underscores the need for the Supreme Court to perform its traditional and vital task of preserving constitutional values against the erosions that change — and fear of change — can produce. For the most part, only those values demonstrably inferable from the constitutional text and structure merit such preservation. I have suggested that substantive due process, protective of values drawn from outside the text, also has a useful, though limited, place in our constitutional jurisprudence. Its survival as an idea, despite the backlash against Lochnerism, testifies convincingly to its endurance and appeal. While substantive due process cannot and should not be employed to stifle change or shield us from all our worst impulses, it can preserve a few time-honored elements of freedom deeply cherished in modern America. Beyond these, the cultivation of ideals of community, human respect, and liberty is in the hands of the gardener we chose when we bravely opted to govern ourselves.

439. This past Term offered hints that disentanglement will allow, but does not demand, full recognition of virtually any principle at all. *Compare* *Caban v. Mohammed*, 99 S.Ct. 1760 (1979) (equal protection clause prohibits gender classification in scheme of parental consent to adoption of illegitimate child), *with* *Parham v. Hughes*, 99 S. Ct. 1742 (1979) (equal protection clause does *not* prohibit gender classification in scheme authorizing parental suit for wrongful death of illegitimate child).