South Carolina Law Review

Volume 63 | Issue 2 Article 3

Winter 2011

Taking the Substance out of Substantive Due Process to the Federal and State Legislatures

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TAKING THE "SUBSTANCE" OUT OF SUBSTANTIVE DUE PROCESS AND RETURNING LAWMAKING POWER TO THE FEDERAL AND STATE LEGISLATURES

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"Substantive due process is under attack. Judicially, politically, academically, and even socially, a coalition of forces threatens substantive due process arguing against what it sees as 'social legislation' from the bench."[1]

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; **nor shall any State deprive any person of life, liberty, or property, without due process of law**; nor deny to any person within its jurisdiction the equal protection of the laws.[2]

I. INTRODUCTION

The Fourteenth Amendment's text is clear and unambiguous in stating that no individual shall be deprived of "life, liberty, or property without *due process* of law."[3] There is only one possible interpretation of this language, and that is to protect procedural, not "substantive" rights.

As such, the concept of substantive due process is the most intellectually dishonest doctrine in the history of the United State Supreme Court's jurisprudence. In fact, there exists only one case in which the Court has focused upon the procedural aspect of the Due Process Clause. In *Mathews v. Eldridge*,[4] which concerned an individual whose disability payments had been terminated,[5] the Court held that to comport with the constitutional mandate of the Due Process Clause three factors must be considered before an individual is deprived of a liberty or property interest: (1) "the private interest that will be affected by the official action," (2) "the risk of an erroneous deprivation of such interest through the procedures used," and (3) "the probable value, if any, of additional or substitute procedural safeguards."[6] Finally, the Court found relevant "the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail."[7] Therefore, in *Mathews*, the Court effectively defined and gave

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1. Brandon R. Johnson, Note, *"Emerging Awareness" After the Emergence of Roberts: Reasonable Societal Reliance in Substantive Due Process Inquiry*, 71 BROOK. L. REV. 1587, 1587–88 (2006) (footnotes omitted) (citation omitted).
2. U.S. CONST. amend. XIV, § 1 (emphasis added).
3. *Id.* (emphasis added).
4. 424 U.S. 319 (1976).
5. *Id.* at 323–24.
6. *Id.* at 334–35.
7. *Id.*

meaning to the Fourteenth Amendment's language concerning what constitutes "due process of law."[8]

Unfortunately, however, in what is perhaps the greatest example of judicial overreaching in the history of modern jurisprudence, the Court later found that the Due Process Clause had a substantive component.[9] The purpose of the Court's invention was, as some have opined, to protect "individual rights not specifically listed in the text of the Constitution against State encroachment, no matter how democratically enacted."[10] Additionally, at least one scholar has asserted that the doctrine was designed to ensure "equal treatment,"[11] while acknowledging that "the concept can work against processes, including democratic ones."[12] It has also been asserted that substantive due process is intended to protect "all citizens regardless of how insular or marginalized those citizens may be,"[13] and is an "indispensable doctrine for protecting minority rights."[14] Ultimately, though, the most important purpose of this judicially created doctrine—and the most troubling—is to recognize new "fundamental rights" that cannot be found in the text of the Constitution.[15] The Court has justified its self-appointed lawmaking power by asserting, *inter alia*, that these rights are "so implicit in the concept of ordered liberty," that "neither liberty nor justice would exist if [that interest] were sacrificed."[16]

However, there is one glaring problem with the Court's jurisprudence from which it cannot escape. The doctrine of substantive due process and the recognition of fundamental rights has occurred "despite the lack of express textual support within the [Constitution]."[17] This fact, however, has not

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8. *See id.*

9. *See, e.g.*, Griswold v. Connecticut, 381 U.S. 479, 486 (1965) (Goldberg, J., concurring) (describing how the Court's majority believed that the Due Process Clause can be interpreted in correlation with the Bill of Rights as a means of protecting certain rights).

10. Aaron J. Shuler, *From Immutable to Existential: Protecting Who We Are and Who We Want to Be with the "Equalerty" of the Substantive Due Process Clause*, 12 J.L. & SOC. CHALLENGES 220, 223 (2010) (footnotes omitted).

11. *Id.* at 224.

12. *Id.* at 223–24.

13. *Id.* at 224.

14. *Id.* at 227.

15. *Id.* at 225 (noting that "advocates of the preservation and protection of fundamental rights sought to ground their arguments in the Constitution, despite the lack of express textual support within the document itself").

16. Lawrence v. Texas, 539 U.S. 558, 593 n.3 (2003) (Scalia, J., dissenting) (quoting Washington v. Glucksberg, 521 U.S. 702, 721 (1997)) (internal quotation marks omitted).

17. Shuler, *supra* note 10, at 225; *see also* Erwin Chemerinsky, *Substantive Due Process*, 15 TOURO L. REV. 1501, 1502–08 (1999) (discussing the evolution of substantive due process); Johnson, *supra* note 1, at 1593–94 ("[T]hose opposed to such a method of constitutional interpretation retort that too much power then rests with the 'subjective considerations' of the individual Justices. Complaints about the elitist, anti-democratic nature of the interpretation follow . . . . Other criticisms of a broad substantive due process include that the Court disrespects the Constitution when it reads too much into it . . . and the Court, in moving too far beyond the text

appeared to influence the Court whatsoever. Amazingly, the Court has used the Due Process Clause to hold that a woman has a fundamental right to abort a pregnancy prior to viability.[18] The Court has also recognized that homosexuals, and implicitly heterosexuals, have the right to engage in sodomy.[19] Furthermore, some lower courts have relied on the Due Process Clause to recognize a right to gay marriage.[20] In so doing, the Court, as well as some lower courts, has unilaterally found that there are substantive liberty and privacy interests in the Due Process Clause, which effectively act as an umbrella to include certain types of rights.[21] In other words, in what is essentially a de facto revision of the Fourteenth Amendment, the Court has tried to justify its reasoning by stating that "specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance."[22] In other words, the Due Process Clause protects substantive rights because the Court thinks it should.

Substantive Due Process has been and continues to be a very dangerous enterprise. First, it requires the Court to engage in a subjective, unanchored theory of constitutional interpretation that is likely to give way to individual predilection. This was underscored in *Lawrence*, where Justice Kennedy relied upon an "emerging awareness that liberty gives substantial protection to adult persons in deciding how to conduct their private lives."[23] To support his "emerging awareness" approach, Justice Kennedy relied upon a case from the European Court of Human Rights that invalidated a statute banning consensual homosexual conduct.[24] The problem with Justice Kennedy's interpretive paradigm and use of the substantive due process doctrine is that the decision itself seems more like a policy discussion than a legal determination.[25]

This underscores the second, and closely related, problem with this jurisprudence—it allows the Court to act as a legislative body and removes from public debate, and the democratic process, important issues concerning values, morality, and equality.[26] It is not the Court's job to act as an anti-majoritarian

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of the Constitution, has become too unstable." (footnotes omitted) (quoting Griswold v. Connecticut, 381 U.S. 479, 522 (1965) (Black, J., dissenting))).

18. *See* Roe v. Wade, 410 U.S. 113, 164 (1973).

19. *See Lawrence*, 539 U.S. at 578.

20. *See, e.g.*, Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 959 (Mass. 2003) (stating that deciding whether and whom to marry is a basic Due Process right regardless of sexual orientation).

21. *See, e.g.*, *Lawrence*, 539 U.S. at 564–65 (citations omitted) (discussing numerous cases in which the Court has found that "the protection of liberty under the Due Process Clause has a substantive dimension" that allows for the recognition of certain rights).

22. *Griswold*, 381 U.S. at 484.

23. *Lawrence*, 539 U.S. at 572.

24. *Id.* at 573 (citing Dudgeon v. United Kingdom, 45 Eur. Ct. H.R. 149, 151, 168 (1981)).

25. *See id.* at 578 (explaining the rationale behind Justice Kennedy's decision).

26. *See* RAOUL BERGER, GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT 249 (1977) (noting that the Court, through substantive due process, "substitute[s] [its] own views of policy for those of [the] legislat[ure]").

entity.[27] Likewise, it is not the Court's role to ensure equality of result.[28] It is also not the Court's responsibility to decide social issues.[29] Quite simply, the issue of whether policies are fair or unfair, prudent or improvident, is best left to the voters and their respective representatives, not nine unelected and far removed jurists.

The Court has made a mistake of such moment that it has threatened its institutional legitimacy. Its role is neither to make law nor to create new rights that not only are without constitutional foundation, but that also usurp the legislature's function to engage in important policy debates on critical social issues.[30] The Court's duty is far more limited; it should invalidate legislation only when it violates a specific provision in the Constitution. When performing this function, if a challenged law implicates a particular provision, and that provision is ambiguous, then the Court should look to the Founders' intent and expectations, history and tradition, and prior decisional law.

This Article offers a three-part solution, reflecting the modest role within which the Court should act. First, the Court should reject the doctrine of substantive due process and refuse to create new rights that simply cannot be divined from the text. Second, the Court should increasingly use the Equal Protection Clause to invalidate legislation that either discriminates, differentiates, or both, among various groups absent meaningful and justifiable reasons. The Equal Protection Clause was designed to address precisely this type of discrimination, inequality, and rights-infringement that offends our core notions of liberty.[31]

Part two of this Article's solution proposes a new standard for Equal Protection Clause analysis. Currently, the Court uses a three-tiered approach.[32] If a law infringes upon what the Court has deemed a "suspect class," namely, race, alienage, or national origin, then it applies "strict scrutiny,"[33] which upholds legislation only if it is narrowly tailored to further a compelling state interest.[34] The second tier of review is "intermediate scrutiny," which is less

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27. *See id.* at 249–50.

28. *See* MICHEL ROSENFELD, AFFIRMATIVE ACTION AND JUSTICE: A PHILOSOPHICAL AND CONSTITUTIONAL INQUIRY 158 (1991).

29. *See* Dwight G. Duncan, *How* Brown *Is* Goodridge*? The Appropriation of a Legal Icon*, 14 B.U. PUB. INT. L.J. 27, 39 (2004).

30. *See* Edwin Meese III, *A Return to Constitutional Interpretation from Judicial Law-Making*, 40 N.Y.L. SCH. L. REV. 925, 925 (1996) (noting that the Court's proper role is to act as a "judicial institution" and not as a "political caucus" or "super-legislature").

31. *See* Sunday Lake Iron Co. v. Wakefield Twp., 247 U.S. 350, 352 (1918).

32. *See* Ashutosh Bhagwat, *Purpose Scrutiny in Constitutional Analysis*, 85 CALIF. L. REV. 297, 303 (1997).

33. Brian C. Crook, Crawford v. Marion County Election Board: *A Picture Is Worth a Thousand Words and Exactly One Vote*, 9 U. MD. L.J. RACE, RELIGION, GENDER & CLASS 373, 378 n.47 (2009) (citing City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 440 (1985)).

34. *See, e.g.*, Grutter v. Bollinger, 539 U.S. 306, 326 (2003) (quoting Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 227 (1995)) (explaining the process for reviewing government imposed racial classifications).

stringent and applied to laws that discriminate on the basis of gender.[35] This standard requires that the legislation be "substantially related to a legitimate state interest."[36] Finally, if a law does not infringe upon race, national origin, or gender, even though it may infringe on age or disability, then it is subject to the highly deferential "rational basis" standard,[37] which finds nearly all legislation constitutional provided that there is some reasonable basis underlying the enactment.[38] This Article argues that the three-tiered approach is inherently unequal because differential treatment among different groups should not translate into discriminatory treatment of those groups by the Court. Rather, legislation that discriminates against a group should be subject to the same standard, with a consideration of the following factors: (1) whether there is a specific and necessary basis justifying the differential treatment; (2) why the relevant differentiation is needed and cannot be achieved by granting equal rights to all; (3) what prior efforts, if any, to address a particular problem were undertaken; (4) why such efforts have failed or would fail; (5) whether there remain untried alternatives; and (6) why the challenged legislation is reasonably likely to succeed in achieving the statute's stated objectives. This standard will ensure equality of treatment without reading into the Constitution rights that do not exist.

Finally, the third part of this Article's proposed solution is that, if the Court does, in very narrow circumstances, recognize a new right or invalidate legislation that impermissibly restricts an already recognized right, then the Court should use the Fourteenth Amendment's Privileges or Immunities Clause[39] as its justificatory basis. This clause, not the Due Process Clause, should be used only in those narrow circumstances where our Nation's history and traditions counsel in favor of recognizing a new right. In doing so, however, the Court must overrule the *Slaughter-House Cases*,[40] which construed the Privileges and Immunities Clause in a constitutionally unjustifiable manner.[41]

Part II discusses the Court's analytical framework governing substantive due process and then focuses on the history and application of the Equal Protection Clause, along with a discussion of the Privileges and Immunities Clause. Part III examines the most important substantive due process decisions in the modern era, and explains that some of these decisions were wrong because they have no textual support whatsoever in the Due Process Clause. Those cases that were correctly decided, however, find justification in the Equal Protection Clause and,

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35. Crook, *supra* note 33, at 378 n.47 (citing *City of Cleburne*, 473 U.S. at 440).

36. *Id.* at 441 (quoting Mills v. Habluetzel, 456 U.S. 91, 99 (1982)) (internal quotation marks omitted).

37. *Id.* at 378 n.47 (citing *City of Cleburne*, 473 U.S. at 440–41).

38. *See* Michelle Adams, *Is Integration a Discriminatory Purpose?*, 96 IOWA L. REV. 837, 849 (2011).

39. U.S. CONST. amend. XIV, § 1.

40. 83 U.S. (16 Wall.) 36 (1873).

41. *See* A. Christopher Bryant, *What* McDonald *Means for Unenumerated Rights*, 45 GA. L. REV. 1073, 1076 (2011) (citing *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36).

to an extent, the Privileges and Immunities Clause. The discussion of these cases is designed to provide a guide to how future cases of this type might be interpreted by state and federal courts. Part IV sets forth a particular example that may come before the Court, the gay rights cases, and examines lower court decisions that have confronted the issue. Based on these decisions, this Article proposes how the Supreme Court should rule if the issue of gay marriage were to come before the Court.

II. SUBSTANTIVE DUE PROCESS AND EQUAL PROTECTION: A JUDICIAL INVENTION VERSUS A COMMITMENT TO EQUALITY

A. Substantive Due Process

The Court's substantive due process jurisprudence is consistent in an important respect—not one case in this area, and there are many, interprets the text of the Due Process Clause itself.[42] The reason is not surprising. The text not only fails to support the Court's decisions, but is inconsistent with, and contrary to, every case in which the Court has found substantive "rights" where none can possibly be divined from the Clause's plain language.[43] The Court's convenient, self-serving method to circumvent this obstacle was to invent various "standards" or "criteria" by which it would declare certain rights fundamental and worthy of enhanced constitutional protection.[44]

For example, in *Griswold v. Connecticut*, the Court applied the Due Process Clause to invalidate a statute that prohibited the use of contraception.[45] What was more important than the decision itself was the Court's dicta concerning the scope and nature of rights guaranteed by the Constitution. In its majority opinion, the Court held that "specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance."[46] In addition, the Court found that there were "zones of privacy"[47] in the Constitution that prohibited the state from interfering in the

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42. *See* John Tuskey, *And They Became One Flesh: One Catholic's Response to Victor Romero's "Other" Christian Perspective on* Lawrence v. Texas, 35 S.U. L. REV. 631, 657 & n.169 (2008) (citing John Tuskey, *What's a Lower Court to Do? Limiting* Lawrence v. Texas *and the Right to Sexual Autonomy*, 21 TOURO L. REV. 597, 611 (2005)).

43. *See* Moore v. City of E. Cleveland, 431 U.S. 494, 543 (1977) (White, J., dissenting) (noting that substantive due process is "suggested neither by [the Due Process Clause's] language nor by preconstitutional history").

44. *See* Anne Lawton, *The Frankenstein Controversy: The Constitutionality of a Federal Ban on Cloning*, 87 KY. L.J. 277, 337 (1998) (citing Bowers v. Hardwick, 478 U.S. 186, 191–92 (1986)).

45. 381 U.S. 479, 485 (1965) (citing NAACP v. Alabama *ex rel.* Flowers, 377 U.S. 288, 307 (1964)).

46. *Id.* at 484.

47. *Id.*

marital relationship.[48] Consequently, *Griswold* is a monumental case because it created an independent right to privacy within the Due Process Clause.[49]

After *Griswold,* the Court proceeded to invent various standards by which it assessed whether a right was entitled to protection under its substantive due process jurisprudence. In *Eisenstadt v. Baird,*[50] for example, the Court further defined its privacy doctrine by explaining, in the marital context, that "[i]f the right of privacy means anything, it is the right of the *individual,* married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child."[51]

The Court's formulations did not stop there, and have given way to additional standards that expand upon the concepts of privacy and liberty that it transposed on the Due Process Clause. To begin with, when determining whether to recognize a new right under the Due Process Clause, which it also calls a "fundamental" right,[52] the Court begins its analysis "by examining our Nation's history, legal traditions, and practices."[53] Indeed, fundamental liberty rights must be "so rooted in the traditions and conscience of our people as to be ranked as fundamental."[54]

In other words, it must "be an interest traditionally protected by our society"[55] and among "those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men."[56] However, Justice Kennedy, with the support of at least two other Justices, has stated that "[h]istory and tradition are the starting point but not in all cases the ending point of the substantive due process inquiry."[57] For example, the Court has held that the privacy interest protected by the Due Process Clause could be expanded based upon an "emerging awareness"[58] of contemporary practices, which could include a discussion of foreign precedent.[59]

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48. *Id.* at 485–86 (citing *Flowers*, 377 U.S. at 307).

49. *See* Lackland H. Bloom, Jr., *The Legacy of* Griswold, 16 OHIO N.U. L. REV. 511, 512 (1989).

50. 405 U.S. 438 (1972).

51. *Id.* at 453.

52. *See* Washington v. Glucksberg, 521 U.S. 702, 727 (1997).

53. *Id.* at 710.

54. Reno v. Flores, 507 U.S. 292, 303 (1993) (quoting United States v. Salerno, 481 U.S. 739, 751 (1987)) (internal quotation marks omitted).

55. Michael H. v. Gerald D., 491 U.S. 110, 122 (1989).

56. Meyer v. Nebraska, 262 U.S. 390, 399 (1923) (citations omitted).

57. Lawrence v. Texas, 539 U.S. 558, 572 (2003) (Kennedy, J., concurring) (quoting County of Sacramento v. Lewis, 523 U.S. 833, 857 (1998) (internal quotation marks omitted).

58. *Id.*

59. *See, e.g., id.* at 573 (citing Dudgeon v. United Kingdom, 45 Eur. Ct. H.R. 149, 151, 168 (1981)) (discussing foreign precedent and its relation to the *Lawrence* case).

Importantly, those rights that are deemed fundamental qualify for strict scrutiny.[60] Thus, any legislation infringing upon such rights must be "narrowly tailored to serve a compelling state interest."[61] Otherwise, legislation that does not infringe on a fundamental right is generally subject to "rational basis review,"[62] and "will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest."[63] By applying this precedent, the Court has recognized many fundamental rights through the right to privacy and liberty concepts that the Court has somehow managed to read into the Due Process Clause.[64] As stated, however, whatever standards the Court uses to justify creating these interests, the Court cannot escape from one fact: "[t]he Constitution does not explicitly mention any right of privacy"[65] and the Due Process Clause speaks only of fair procedures.[66]

Importantly, although they do not represent the majority, other Justices on the Court have arguably taken the correct approach by acting with restraint and caution regarding the substantive due process doctrine. In *Glucksberg*, for example, Justice Scalia explained that "we 'ha[ve] always been reluctant to expand the concept of substantive due process because guideposts for responsible decision making in this unchartered area are scarce and open-ended.'"[67] Scalia explained that "[b]y extending constitutional protection to an asserted right or liberty interest, we, to a great extent, place the matter outside the arena of public debate and legislative action."[68] As a result, the Court must "'exercise the utmost care whenever [it is] asked to break new ground in this field,' . . . lest the liberty protected by the Due Process Clause be subtly transformed into the policy preferences of the Members of [the] Court."[69] Furthermore, Justice Scalia explained that "[the Court has] required in substantive-due-process cases a 'careful description' of the asserted fundamental

60. *Id.* at 593 (Scalia, J., dissenting) (citing Washington v. Glucksberg, 521 U.S. 702, 721 (1997)).

61. *Id.* (citing *Glucksberg*, 521 U.S. at 721).

62. *See, e.g., id.* at 579 (O'Connor, J., concurring) (stating that review of general economic or tax legislation is subject to the rational basis test).

63. *Id.* (quoting City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 440 (1985)) (internal quotation marks omitted).

64. *See, e.g., Lawrence*, 539 U.S. at 578 (holding that a homosexual's right to liberty under the Due Process Clause "gives them the full right to engage in [sodomy]" within the confines of their home "without intervention of the government"); Roe v. Wade, 410 U.S. 113, 164 (1973) (holding that a woman has the right to have an abortion up to a certain point in the pregnancy).

65. *Roe*, 410 U.S. at 152.

66. *See* U.S. CONST. amend. XIV, § 1.

67. 521 U.S. 702, 720 (1997) (quoting Collins v. City of Harker Heights, 503 U.S. 115, 125 (1992)).

68. *Id.*

69. *Id.* (quoting *Collins*, 503 U.S. at 125) (citing Moore v. City of E. Cleveland, 431 U.S. 494, 502 (1977)).

liberty interest."[70] These principles "direct and restrain [the Court's] exposition of the Due Process Clause."[71]

Justice Scalia got it right, except for the fact that he could have gone further and advocated for the abolition, rightly so, of substantive due process. The Court's substantive due process jurisprudence is fatally flawed because it has nothing whatsoever to do with the language of the clause itself. The text is clear and unambiguous; before an individual is deprived of life, liberty, or property, there must be adequate procedures for the purpose of ensuring fairness and justice.[72] The Court has not only invented specific rights under this clause,[73] but it has, de facto, re-written this entire section.

Nothing could be more anathema to a society that relies upon democratic policies, not an activist court, to resolve important social issues. In the area of substantive due process, the Court has acted more like a legislative body than a judicial institution. In so doing, it has deprived the people and their representatives from resolving important social policy issues. It has diminished the power of the voting process to effectuate change because, due to its prior holdings, many now mistakenly look to the Court, not the election process, as the means by which to decide important political issues.[74] That is not, and has never been, the Court's role.[75] As set forth below, this has lead to some of the worst constitutional law decisions in history.

B. Equal Protection

Contrary to the Due Process Clause, the Equal Protection Clause provides a principled basis upon which to protect liberties that lie at the core of a free, fair, equal, and just society. As evidenced in the text itself, the Equal Protection Clause is designed to scrutinize legislative enactments that discriminate or differentiate between or among groups in an unjustifiable manner.[76] The Equal Protection Clause is the method by which to protect substantive rights against arbitrary, purposeless, or otherwise improper state action.

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70. *Id.* at 721 (quoting Reno v. Flores, 507 U.S. 292, 302 (1993)) (citing *Collins*, 503 U.S. at 125; Cruzan v. Dir., Mo. Dep't of Health, 497 U.S. 261, 277–78 (1990)).

71. *Id.*

72. *See* U.S. CONST. amend. XIV, § 1.

73. *See* James Bopp Jr. & Richard E. Coleson, Roe v. Wade *and the Euthanasia Debate*, 12 ISSUES L. & MED. 343 n.1 (1997) (noting that the Court's substantive due process analysis has permitted the Court "to create new constitutional rights by reading them into the 'liberty' guaranteed by the due process clause" of the Fourteenth Amendment).

74. *See, e.g.*, Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 979 (1992) (Scalia, J., dissenting).

75. *See* Jeffrey D. Jackson, *Putting Rationality Back into the Rational Basis Test: Saving Substantive Due Process and Redeeming the Promise of the Ninth Amendment*, 45 U. RICH. L. REV. 491, 535 (2011) ("[C]ourts should keep to the areas in which they have competence, and leave the wisdom of policy to the legislature.").

76. *See* U.S. CONST. amend. XIV, § 1.

As discussed below, instead of using the Due Process Clause to find or protect substantive rights, the Court should use the Equal Protection Clause. However, the only problem with the Court's Equal Protection analysis is the three-tiered approach that it has used in analyzing legislation that differentiates among various groups. This is inherently unequal because all areas of discrimination, regardless of classification, demand an equal and exacting level of scrutiny. As discussed in Part II.B.3, that scrutiny should take the form of a six-part test to govern all cases involving the application of the Equal Protection Clause.

1. The Equal Protection Clause—History and Purpose

The Equal Protection Clause, and the entirety of the Fourteenth Amendment was written "to ensure that recently freed slaves enjoyed the same privileges as their fellow citizens."[77] As Professor Shuler explains, the Equal Protection Clause "was to protect the immutability of their race by affording them the same rights (the equality), as well as to unshackle them from slavery, enabling them to determine the course of their own lives (the existential)."[78] Indeed, "the principal aim of the drafters and ratifiers . . . was to eradicate official antebellum discrimination against blacks, particularly the so-called 'Black Codes,' pursuant to which blacks were treated as a lower or second-class caste."[79] Indeed, in the Thirty-Ninth Congress, one senator criticized the Codes for "depriv[ing] [some] citizen[s] of civil rights which are secured to other citizens."[80] As Professor Saunders explains, the Founders "recognized, and most certainly intended, that this provision would . . . invalidate most state laws subjecting African Americans to special disadvantage because of their race."[81]

Importantly, however, "the rule they adopted was not confined to that narrow purpose, and the vice at which it struck was not the consideration of race per se but rather the use of governmental power to single out certain classes of persons for special benefits or burdens."[82] In the record of the Thirty-Ninth Congress, particularly concerning the Black Codes, senators criticized them as impermissible "class legislation,"[83] and even President Andrew Johnson stated that "'there is no room for favored classes or monopolies,' for 'the principle of our Government is that of equal laws,' which 'accord "equal and exact justice to

77. Shuler, *supra* note 10, at 222.

78. *Id.* (footnotes omitted).

79. Timothy Zick, *Angry White Males: The Equal Protection Clause and "Classes of One,"* 89 KY. L.J. 69, 71 (2000).

80. Melissa L. Saunders, *Equal Protection, Class Legislation, and Colorblindness*, 96 MICH. L. REV. 245, 272 (1997) (alteration in original) (quoting CONG. GLOBE, 39TH CONG., 1ST SESS. 474 (1866)) (internal quotation marks omitted).

81. *Id.* at 269.

82. *Id.*

83. CONG. GLOBE, 39TH CONG., 1ST SESS. 704 (1866) (internal quotation marks omitted).

all men," special privileges to none.'"[84] In essence, therefore, the Equal Protection Clause was not simply designed to address discrimination on the basis of race, but rather to "require[] the state to justify any difference in procedural or substantive treatment of one person [or group] vis-à-vis another."[85]

However, early Supreme Court jurisprudence still focused on race, although it would soon be broadened. In *Strauder v. West Virginia*,[86] the Court was confronted with the issue of whether African Americans could be excluded from serving on juries.[87] In answering this question in the negative, the Court held as follows:

> [African Americans] especially needed protection against unfriendly action in the States where they were resident[s]. It was in view of these considerations [that] the Fourteenth Amendment was framed and adopted. It was designed to assure to the colored race the enjoyment of all the civil rights that under the law are enjoyed by white persons, and to give to that race the protection of the general government, in that enjoyment, whenever it should be denied by the States.[88]

As the majority explained, the Equal Protection Clause "not only gave citizenship and the privileges of citizenship to persons of color, but it denied to any State the power to withhold from them the equal protection of the laws, and authorized Congress to enforce its provisions by appropriate legislation."[89]

The Court expanded its application of the Equal Protection Clause in *Yick Wo v. Hopkins*,[90] where it held that any unjustifiable discrimination was constitutionally impermissible:

> [T]he Fourteenth Amendment . . . intended not only that there should be no arbitrary deprivation of life or liberty, or arbitrary spoliation of property, but that equal protection and security should be given to all under like circumstances in the enjoyment of their personal and civil rights; that all persons should be equally entitled to pursue their happiness and acquire and enjoy property[,] . . . have like access to the

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84. Saunders, *supra* note 80, at 273 (quoting 6 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS, 1789–1897, at 361–62 (James D. Richardson ed., 1897)).

85. William N. Eskridge, Jr., *Destabilizing Due Process and Evolutive Equal Protection*, 47 UCLA L. REV. 1183, 1188 (2000).

86. 100 U.S. 303 (1879), *abrogated by* Taylor v. Louisiana, 419 U.S. 522 (1975).

87. *Id.* at 305.

88. *Id.* at 306.

89. *Id.* at 306–07. This decision was in stark contrast to *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1856), *superseded by constitutional amendment*, U.S. CONST. amend. XIV, which sanctioned overt discrimination against African Americans.

90. 118 U.S. 356 (1886). Also see *The Civil Rights Cases*, 109 U.S. 3 (1883), which promulgated the "state action" doctrine. Specifically, the Court held that the Equal Protection Clause only applied to conduct done or otherwise sanctioned by the state. *Id.* at 11.

> courts of the country for the protection of their persons and property, the prevention and redress of wrongs . . . [and that] [c]lass legislation, discriminating against some and favoring others, is prohibited, but legislation which, in carrying out a public purpose, is limited in its application, if within the sphere of its operation it affects alike all persons similarly situated, is not within the amendment.[91]

Accordingly, the majority held that "[t]hese provisions [of the Equal Protection Clause] are universal in their application, to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or of nationality; and the equal protection of the laws is a pledge of the protection of equal laws."[92]

2. *Contemporary Application*

a. *Different Levels of Scrutiny*

Modern jurisprudence interpreting and applying the Equal Protection Clause reflects earlier precedent in that it continues to scrutinize legislation that differentiates among various groups. However, the Court's analytical framework has changed, arguably causing the application of the Clause itself to be inconsistent with its commitment to equality.[93]

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91. *Yick Wo*, 118 U.S. at 367–68 (internal quotation marks omitted).

92. *Id.* at 369.

93. While not necessarily included in the modern era jurisprudence, *Plessy v. Ferguson*, 163 U.S. 537 (1896), *overruled by* Brown v. Bd. of Educ., 347 U.S. 483 (1954), and *Brown v. Board of Education*, 347 U.S. 483 (1954), are landmark cases dealing with segregation between blacks and whites. In *Plessy*, the Court found constitutional a statute requiring that railroads carrying passengers provide separate but equal accommodations for blacks and whites. 163 U.S. at 550–51. In so holding, the Court stated that "we think the enforced separation of the races, as applied to the internal commerce of the state, neither abridges the privileges or immunities of the colored man, deprives him of his property without due process of law, nor denies him the equal protection of the laws, within the meaning of the Fourteenth Amendment." *Id.* at 548. Before *Brown*, the Court decided several cases that signaled a move away from the separate-but-equal doctrine. In *Smith v. Allwright*, 321 U.S. 649 (1944), the Court held that a democratic primary, which restricted voting to whites, was unconstitutional. *See id.* at 662, 666. In *Shelly v. Kraemer*, 334 U.S. 1 (1948), the Court held that judicial enforcement of a restrictive covenant that denied individuals ownership or occupation on the basis of race constituted an equal protection violation. *Id.* at 20–21. In *Sweatt v. Painter*, 339 U.S. 629 (1950), the Court held that separate law schools for blacks and whites, where the school for blacks was inferior, was a violation of the Equal Protection Clause. *Id.* at 633–35. In *McLaurin v. Oklahoma State Regents for Higher Education*, 339 U.S. 637 (1950), the Court held that, while the State of Oklahoma admitted McLaurin to its doctorate program, the restrictions imposed upon him, such as not commingling with white students, was unconstitutional. *Id.* at 641–42. In *Brown*, the Court held that separate schools for whites and blacks, even if of equal quality, were inherently unequal and thus violative of the Equal Protection Clause. 347 U.S. at 495. After *Brown*, in *Green v. County School Board of New Kent County*, 391 U.S. 430 (1968), the Court held that a "'freedom-of-choice' plan," where whites could choose to attend traditionally black schools and vice-versa, did not meet the desegregation mandate. *Id.* at 441–42 (footnote omitted). In

The seminal case creating the Court's modern paradigm was *United States v. Carolene Products Co.*,[94] where it was suggested that discrimination, or differential treatment, of different classes may warrant varying levels of judicial scrutiny.[95] In *Carolene*, the Court stated in dicta that "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."[96] The Court was more explicit in *Korematsu v. United States*,[97] where it held that "all legal restrictions which curtail the civil rights of a single racial group are immediately suspect . . . [and while] all such restrictions are [not] unconstitutional . . . courts must subject them to the most rigid scrutiny."[98] Importantly, in *Loving v. Virginia*,[99] the Court applied the strict scrutiny standard to invalidate a ban on interracial marriage.[100] In applying strict scrutiny, the Court stated:

> At the very least, the Equal Protection Clause demands that racial classifications . . . be subjected to the "most rigid scrutiny," . . . and, if they are ever to be upheld, they must be shown to be necessary to the accomplishment of some permissible state objective, independent of the racial discrimination . . . [that] the Fourteenth Amendment [was designed] to eliminate.[101]

In *Craig v. Boren*,[102] the Court applied a separate standard of review when confronting gender discrimination—intermediate scrutiny.[103] This standard required the state to demonstrate that the statute served "important governmental

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Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1 (1971), the Court held that the pairing and grouping of "noncontiguous school zones" was permissible as a tool to achieve desegregation. *Id.* at 28. Finally, in *Milliken v. Bradley*, 418 U.S. 717 (1974), the Court found improper the district court's remedy of ordering busing between rather than within districts. *Id.* at 744–45.

94. 304 U.S. 144 (1938).

95. *See id.* at 152–53 n.4.

96. *Id.* at 153 n.4 (citing Nixon v. Condon, 286 U.S. 73, 89 (1932)); *see also* Hirabayashi v. United States, 320 U.S. 81, 100 (1943) (intimating that a heightened level of scrutiny would be applied to distinctions based on ancestry because they are "by their very nature odious to a free people whose institutions are founded upon the doctrine of equality").

97. 323 U.S. 214 (1944).

98. *Id.* at 216.

99. 388 U.S. 1 (1967).

100. *Id.* at 11–12.

101. *Id.* at 11 (quoting *Korematsu*, 323 U.S. at 216).

102. 429 U.S. 190 (1976).

103. *Id.* at 197 (The statute at issue in *Craig* prohibited the sale of "nonintoxicating" 3.2% beer to males under the age of 21 and to females under the age of 18. Craig, a male 18–20 years of age, and a vendor of 3.2% beer challenged the statute on the basis of gender discrimination.).

objectives" and was "substantially related to [the] achievement of those objectives."[104]

Finally, in *City of Cleburne v. Cleburne Living Center*,[105] the Court discussed its highly deferential rational basis standard as opposed to strict scrutiny, explaining that "legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest."[106] Importantly, however, "[t]he general rule gives way . . . when a statute [is] classified by race, alienage, or national origin."[107] These "factors are so seldom relevant to the achievement of any legitimate state interest that laws grounded in such considerations are deemed to reflect prejudice and antipathy—a view that those in the burdened class are not as worthy or deserving as others."[108] Thus, "because such discrimination is unlikely to be soon rectified by legislative means, these laws are subject[] to strict scrutiny and will be sustained only if they are suitably tailored to serve a compelling state interest."[109]

Now, with regard to specific classes, as stated above, gender is subject to intermediate scrutiny.[110] This heightened standard is due to the fact that "statutes distributing benefits and burdens between the sexes in different ways very likely reflect outmoded notions of the relative capabilities of men and women."[111] Similarly, because "illegitimacy is beyond the individual's control and bears 'no relation to the individual's ability to participate in and contribute to society,' . . . official discriminations resting on that characteristic are also subject to [a] heightened [standard of] review."[112]

Significantly, however, the Court has applied rational basis review to nearly every other class upon which legislation differentiates. For example, in *City of Cleburne*, the Court, in addition to noting that physical disability and age are not subject to heightened review, held that mental retardation was not entitled to a heightened standard of review.[113] As one commentator explained, "classifications based on physical disability and intelligence are typically accepted as legitimate, even by judges and commentators who assert that

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104. *Id.*

105. 473 U.S. 432 (1985).

106. *Id.* at 440 (citing Schweiker v. Wilson, 450 U.S. 221, 230 (1981); U.S. R.R. Ret. Bd. v. Fritz, 449 U.S. 166, 174–75 (1980); Vance v. Bradley, 440 U.S. 93, 97 (1979); City of New Orleans v. Dukes, 427 U.S. 297, 303 (1976) (per curiam)).

107. *Id.*

108. *Id.*

109. *Id.* (citing McLaughlin v. Florida, 379 U.S. 184, 192 (1964); Graham v. Richardson, 403 U.S. 365, 372 (1971)).

110. Derrick Darby & Richard E. Levy, *Slaying the Inequality Villain in School Finance: Is the Right to Education the Silver Bullet?*, 20 KAN. J.L. & PUB. POL'Y 351, 357 n.23 (2011).

111. *City of Cleburne*, 473 U.S. at 441.

112. *Id.* (quoting Mathews v. Lucas, 427 U.S. 495, 505 (1976)).

113. *See id.* at 441–42 (citing Mass. Bd. of Ret. v. Murgia, 427 U.S. 307, 313 (1976)).

immutability is relevant."[114] Specifically, "*those* characteristics . . . are often relevant to legitimate purposes."[115] Additionally, "[w]hen social or economic legislation is at issue, the Equal Protection Clause allows the States wide latitude . . . and the Constitution presumes that even improvident decisions will eventually be rectified by the democratic processes."[116]

b. Disparate Intent v. Disparate Impact

The Equal Protection Clause also protects against laws that, while not differentiating among groups, evince discriminatory intent.[117] An important related issue is whether the clause is violated when there is no evidence of discriminatory intent, but the law nonetheless leads to unequal results or disparate impact. In two landmark cases, the Court answered this question in the negative. In *Washington v. Davis*,[118] the Court stated that "[its] cases have not embraced the proposition that a law or other official act, without regard to whether it reflects a racially discriminatory purpose, is unconstitutional *solely* because it has a racially disproportionate impact."[119] For example, with respect to the exclusion of African Americans on juries, "[a] purpose to discriminate must be present which may be proven by systematic exclusion of eligible jurymen of the proscribed race or by unequal application of the law to such an extent as to show intentional discrimination."[120] However, "[t]his is not to say that the necessary discriminatory racial purpose must be express or appear on the face of the statute, or that the law's disproportionate impact is irrelevant in cases involving Constitution-based claims of racial discrimination."[121] Thus, "[a] statute, otherwise neutral on its face, must not be applied so as invidiously to

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114. *Id.* at 442–43 n.10 (quoting JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 150 (1980)).

115. *Id.* (quoting ELY, *supra* note 114). It could be argued that, in select cases, the Supreme Court has applied a fourth standard of review, although it has never been formally adopted by the Court. *See, e.g.*, United States v. Virginia, 518 U.S. 515, 531 (1996) (holding that to justify sex-based discrimination, the defendants must set forth "exceedingly persuasive" reasons for the differential treatment).

116. *City of Cleburne*, 473 U.S. at 440 (citing U.S. R.R. Ret. Bd. v. Fritz, 449 U.S. 166, 174 (1980); City of New Orleans v. Dukes, 427 U.S. 297, 303 (1976) (per curiam)).

117. *See* Nirej S. Sekhon, *Equality & Identity Hierarchy*, 3 N.Y.U. J. L. & LIBERTY 349, 412 (2008).

118. 426 U.S. 229 (1976).

119. *Id.* at 239. In its analysis, the Court distinguished between the constitutional rule, equal protection, and that governing Title VII cases. As the Court explained, "employees or applicants proceeding under [Title VII] need not concern themselves with the employer's possibly discriminatory purpose but instead may focus solely on the racially differential impact of the challenged hiring or promotion practices." *Id.* at 238–39; *see also* Griggs v. Duke Power Co., 401 U.S. 424, 432 (1971) (noting that Congress directed "the thrust of [Title VII] to the *consequences* of employment practices, not simply the motivation").

120. Akins v. Texas, 325 U.S. 398, 403–04 (1945).

121. *Washington*, 426 U.S. at 241.

discriminate on the basis of race."[122] In this way, "an invidious discriminatory purpose may often be inferred from the totality of the relevant facts, including the fact, if it is true, that the law bears more heavily on one race than another."[123]

Critically, however, the Court has not held that a law, "neutral on its face and serving ends otherwise within the power of government to pursue, is invalid under the Equal Protection Clause simply because it may affect a greater proportion of one race than of another."[124] As stated above, while disproportionate impact is a consideration, "it is not the sole touchstone of . . . invidious racial discrimination forbidden by the Constitution,"[125] and by itself, "does not trigger the rule . . . that racial classifications are to be subjected to the strictest scrutiny and are justifiable only by the weightiest of considerations."[126]

3. *A New Approach—Adoption of a Unitary Standard*

While the Supreme Court's Equal Protection jurisprudence is comprehensive, it is, in many ways, discriminatory in both theory and application. Specifically, it differentiates between various groups of people with no apparent justification, and on very sensitive grounds, such as race, gender, disability, age, sexual orientation, and mental retardation.[127] The Court's decisional law does not offer sufficient reasons to justify its own discrimination when analyzing a constitutional provision that was designed for the purpose of preventing discrimination. Perhaps the most deleterious consequence of these non-justifiable classifications is the extraordinarily deferential treatment, via the rational basis test,[128] that the Court gives to states when passing laws that differentiate between classes that should, at the very least, warrant more exacting scrutiny. Surprisingly, state legislation that discriminates on age, disability, retardation, and homosexuality "is presumed to be valid and will be sustained if

122. *Id.* (citing Yick Wo v. Hopkins, 118 U.S. 356, 373–74 (1886)).

123. *Id.* at 242.

124. *Id.*

125. *Id.*

126. *Id.* (citing McLaughlin v. Florida, 379 U.S. 184 (1964)); *see also* Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 264–65 (1977) (noting that "official action will not be held unconstitutional solely because it results in a racially disproportionate impact").

127. *See* City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 439–42 (1985) (citations omitted) (describing the various levels of review used by the Supreme Court to determine whether classifications based on race, gender, age, or socioeconomic status violate the Equal Protection Clause of the Fourteenth Amendment).

128. *See, e.g., id.* at 440, 442 (citations omitted) (noting that under the rational basis test state laws are presumed to be valid so long as they are rationally related to a legitimate governmental interest and that, in particular, statutory classifications based on mental retardation are only subject to rational basis review).

the classification drawn by the statute is rationally related to a legitimate state interest."[129]

The Equal Protection Clause requires much more. Its promise of equal treatment should not lead to unequal adjudication. Discrimination in all forms should be justified on both a principled and pragmatic basis, with the state having at least the burden of showing something more than merely a presumed rational basis underlying its enactment. Of course, the state can certainly be justified in treating different people differently, but it needs to demonstrate before a court that its reasons justify the ill that the Equal Protection Clause sought to eradicate. Thus, this Article proposes that the Court conduct a more stringent analysis by employing the following factors: (1) a specific and necessary basis justifying the differential treatment of a certain group, (2) why the relevant group differentiation is needed and cannot be achieved by granting equal rights to all, (3) what prior efforts, if any, to address a particular problem were undertaken, (4) why such efforts have failed, (5) whether there remain untried alternatives, and (6) why the challenged legislation is reasonably likely to succeed in achieving the statute's objectives. The Court's application of these factors will allow it to probe the practical and policy reasons justifying and motivating a particular statutory scheme in greater detail and with much more specificity. As a result, this set of factors, or something akin to it, should be adopted to serve an important protective function. In addition, as set forth below, the Privileges and Immunities Clause can play an important, albeit incremental role in the Court's jurisprudence.

C. The Privileges and Immunities Clause

The Privileges and Immunities Clause of the Fourteenth Amendment provides that "[*n*]*o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States.*"[130] Arguably, this clause, in stark contrast to the Due Process Clause, could provide the Court with some basis upon which to recognize fundamental rights that are "deeply rooted in [our] Nation's history and tradition[s]."[131] However, the Court's application of this clause, unlike its substantive due process jurisprudence, must be modest and incremental, reflecting deference for the state legislatures on important policy issues.

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129. *Id.* at 440 (citing Schweiker v. Wilson, 450 U.S. 221, 230 (1981); U.S. R.R. Ret. Bd. v. Fritz, 449 U.S. 166, 174–75 (1980); Vance v. Bradley, 440 U.S. 93, 97 (1979); City of New Orleans v. Dukes, 427 U.S. 297, 303 (1976) (per curiam)).

130. U.S. CONST. amend. XIV, § 1 (emphasis added).

131. Lawrence v. Texas, 539 U.S. 558, 593 (2003) (Scalia, J., dissenting) (quoting *Washington*, 521 U.S. at 721) (internal quotation marks omitted).

1. The Slaughter-House Cases

To use the Privileges and Immunities Clause to recognize fundamental rights, the Court must first overrule the *Slaughter-House Cases*.[132] In these cases, the issue before the Court was whether the Privileges and Immunities Clause protected citizens not only from the infringement of liberties guaranteed by the federal government, but also by state governments.[133] In a much-criticized opinion,[134] the Court held that the Privileges and Immunities Clause did *not*, apart from the most basic fundamental rights, grant the citizens any rights, unless they were specifically conferred upon them by the state.[135] In other words, the Fourteenth Amendment's Privileges and Immunities Clause was not intended "to transfer the security and protection"[136] of fundamental freedoms to the Federal government.[137] As a result, the Court "consigned the fundamental freedoms that Americans rightfully regard as their birthright to the dubious protection of the States."[138]

The Court's ruling was predicated on its interpretation of a part of the clause which states that "[a]ll persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the States wherein they reside."[139] In construing this language, the Court held that "persons may be citizens of the United States without regard to their citizenship of a particular State."[140] In other words, "the distinction between citizenship of the United States and citizenship of a State is clearly recognized and established,"[141] and "a man [may] be a citizen of the United States without being a citizen of a State."[142] As result, "there is a citizenship of the United States, and a citizenship of a State, which are distinct from each other, and which depend upon different characteristics or circumstances in the individual."[143] Accordingly, with its exceedingly narrow interpretation of the Privileges and Immunities Clause and expansive version of state police power, the Court held that "the several States . . . as [they] grant or establish [rights] to [their] own citizens, or as [they] limit or qualify, or impose restrictions on their

132. 83 U.S. (16 Wall.) 36 (1873).

133. *Id.* at 55.

134. *See, e.g.*, Wilson R. Huhn, *The Legacy of* Slaughterhouse, Bradwell, *and* Cruikshank *in Constitutional Interpretation*, 42 AKRON L. REV. 1051, 1053–54 (2009) (noting that "legal scholars almost unanimously agree with the four dissenters that the Court answered [the Privileges or Immunities Clause] question wrong").

135. *Slaughter-House Cases*, 83 U.S. at 77–79.

136. *Id.* at 77.

137. *See id.* at 77–79.

138. Huhn, *supra* note 134, at 1054.

139. U.S. CONST. amend. XIV, § 1.

140. *Slaughter-House Cases*, 83 U.S. at 73.

141. *Id.*

142. *Id.* at 74.

143. *Id.*

exercise, . . . shall be the measure of the rights of citizens of other States within [that State's] jurisdiction."[144]

The *Slaughter-House Cases* effectively nullified the federal government's power to use the Privileges and Immunities Clause to invalidate state laws that infringed upon basic rights, or to grant rights that are critical to the exercise of liberty, freedom, and equality. The case was a mistake. The Privileges and Immunities Clause, unlike the concept of substantive due process, grants textual support for the Court to, in a modest and restrained manner, invalidate State laws that violate specific provisions of the Constitution because these provisions are a source of particular rights for the people. It also gives the Court authority to recognize basic rights that are deeply rooted in our nation's history and traditions.[145]

Accordingly, as the end nears for the progressive substantive due process doctrine, so should it mark the beginning for a more robust Privileges and Immunities Clause. Importantly, while the clause can serve to protect and safeguard constitutional rights, it should nonetheless be deferential to state legislatures, their lawmaking authority, and the democratic process. This is particularly true when the Court is confronted with social matters and the legislature has not yet passed laws concerning a particular issue. In taking a more cautious yet protective role under the Privileges and Immunities Clause, the Court will be tasked with interpreting the Constitution's text and, in some cases, the Framers' original intentions and expectations. Necessarily, this will implicate various methods of constitutional interpretation, and the method or framework adopted by the Court will have a direct influence on the scope and breadth of the Court's decisional law. As such, the following section provides a discussion of the different and most relevant types of interpretation and concludes by promulgating the method of interpretation that would work best in deciding important Privileges and Immunity Clause issues that will ultimately come before the Court.

2. *Methods of Constitutional Interpretation*

The primary methods of interpretation that have relevance to constitutional adjudication in this context are: (1) textualism, (2) originalism, (3) pragmatism, (4) minimalism, and (5) pluralism.[146] Each of these theories will be discussed in turn.

Textualism is a method of interpretation advocated and implemented by Justice Scalia, who believes that when judges are deciding legal questions, they

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144. *Id.* at 77.

145. *See* Huhn, *supra* note 134, at 1054.

146. *See* Adam Lamparello, *Incorporating the Supreme Court's Eighth Amendment Framework into Substantive Due Process Jurisprudence Through the Introduction of a Contingent-Based and Legislatively-Driven Constitutional Theory*, 88 NEB. L. REV. 692, 701 (2010).

are engaged in the interpretation of a text.[147] In essence, a proper decision is one that results from adhering to the text of the document being interpreted.[148] In so doing, a court should not interpret a text narrowly or broadly, but reasonably, so that it may give a proper construction to the terms being construed.[149] Where statutory language is ambiguous, Justice Scalia does not believe that legislative history should serve as a resource because, in his view, the words' "objective indication" constitutes law.[150]

Originalism is also an interpretive paradigm for which Justice Scalia has long been a supporter and advocate. For the originalist, the text of the Constitution should often dictate the outcome in matters involving constitutional law.[151] Importantly, to ascertain the meaning of the Constitution's text, Scalia "suggests that we look to the practices and interpretations of the Founding generation(s), implying that what counts most are the . . . understandings of those reasonably educated men who were around when the relevant provisions were adopted."[152] Accordingly, originalism counsels in favor of an objective inquiry that emphasizes "original understanding, not original intent,"[153] and reads "texts reasonably and naturally for all that they fairly contain."[154]

The pragmatic interpretation theory differs starkly from originalism, and strives to decide cases based upon the implications that such decisions will have as a matter of public policy.[155] Simply stated, the pragmatic theory maintains that courts should try to reach the best, that is, the most just and fair, result in each case.[156] Indeed, Justice Breyer emphasizes that courts need to pay "attention to practical consequences of government decisions,"[157] which suggests a broader, and perhaps more activist, type of judicial review.

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147. Richard B. Saphire, *Constitutional Predispositions,* 23 U. DAYTON L. REV. 277, 281 (1998) (quoting Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws, in* A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 3, 13 (Amy Gutmann ed., 1997)).

148. *See id.* (quoting Scalia, *supra* note 147, at 22).

149. *Id.* at 281 (quoting Scalia, *supra* note 147, at 23).

150. *Id.* at 281–82 (quoting Scalia, *supra* note 147, at 29) (internal quotation marks omitted).

151. *See* James E. Ryan, *Book Review: Does It Take a Theory? Originalism, Active Liberty, and Minimalism,* 58 STAN. L. REV. 1623, 1628 (2006). As Ryan explains, originalists believe that courts "should . . . determine how the [Constitution's] provisions were understood at the time they were ratified, and that understanding should guide decisions." *Id.* at 1624 (citing Scalia, *supra* note 147, at 38).

152. *Id.* at 1628–29 (citing Scalia, *supra* note 147, at 38; Antonin Scalia, *Response, in* A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW, *supra* note 147, at 135–36; Antonin Scalia, *Originalism: The Lesser Evil,* 57 U. CIN. L. REV. 849, 856–63 (1989)).

153. Stephanos Bibas, *Originalism and Formalism in Criminal Procedure: The Triumph of Justice Scalia, the Unlikely Friend of Criminal Defendants?,* 94 GEO. L.J. 183, 186 (2005).

154. *Id.* (citing Scalia, *supra* note 147, at 38).

155. *See* Ryan, *supra* note 151, at 1626 (citing STEPHEN BREYER, ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION 3–34 (2005)).

156. *See id.* (citing BREYER, *supra* note 155).

157. *Id.* (citing BREYER, *supra* note 155).

Importantly, however, Justice Breyer does not reject originalism—or any other theory—as an interpretive paradigm.[158] Instead, he neither advocates nor relies upon a single theory to guide constitutional decision making.[159] This is due in significant part to the fact that "some of [the Constitution's] provisions are open-ended and do not provide clear directions for rules of action, and one cannot easily ascertain a precisely defined purpose behind the provisions."[160]

Ultimately, the pragmatic theory of interpretation is viewed as "creating a form of government in which all citizens share the government's authority, participating in the creation of public policy."[161] In essence, Justice Breyer "believes that reference to this purpose, along with attention to the practical consequences of judicial decisions, can lead the Court to better results."[162] In so doing, the Court "will yield better law—law that helps a community of individuals democratically find practical solutions to important contemporary social problems."[163]

Minimalism, an approach endorsed and advocated by Cass Sunstein,[164] does not favor any specific theory of interpretation.[165] Instead, minimalism advocates a more modest form of judicial review, and does not "want any more than [to] decide one case at a time."[166] In essence, minimalists "want to 'avoid taking stands on the biggest and most contested questions of constitutional law,' and instead believe that more modest answers can be achieved through 'incompletely theorized agreements.'"[167] To be sure, "[t]hese agreements leave fundamental questions undecided and consist of a consensus forged around reasonable outcomes that can 'attract support from people holding many different theoretical positions.'"[168] In others words, "minimalists support reasonable public policies, and they favor the Court acting in as gingerly a fashion as possible to foster those policies."[169]

Finally, pluralistic methods of interpretation are inherently self-defining, as they "hold that there are multiple legitimate methods of interpreting the Constitution."[170] Indeed, because the Constitution "is a complex document consisting of many clauses, each of varying degrees of generality and

158. *See id.* at 1642.

159. *See id.* (citing BREYER, *supra* note 155, at 7).

160. *Id.* (citing BREYER, *supra* note 155, at 18–19).

161. *Id.* (quoting BREYER, *supra* note 155, at 33) (internal quotation marks omitted).

162. *Id.*

163. *Id.* (quoting BREYER, *supra* note 155, at 6) (internal quotation marks omitted).

164. *Id.* at 1648.

165. *Id.* (citing CASS R. SUNSTEIN, RADICALS IN ROBES: WHY EXTREME RIGHT-WING COURTS ARE WRONG FOR AMERICA 27 (2005)).

166. *Id.* (citing SUNSTEIN, *supra* note 165).

167. *Id.* (quoting SUNSTEIN, *supra* note 165, at 27–28).

168. *Id.* (quoting SUNSTEIN, *supra* note 165, at 28).

169. *Id.* at 1653.

170. Stephen M. Griffin, *Pluralism in Constitutional Interpretation*, 72 TEX. L. REV. 1753, 1753 (1994).

ambiguity,"[171] it seems logical to employ "a variety of principles or interpretive methods . . . when interpreting a complex document such as the Constitution."[172] Those advocating a pluralist theory of interpretation assert that "close scrutiny of the text of the Constitution, determination of the intent of the Framers, application of precedent, examination of the structure of the Constitution, and appeals to a national ethos or tradition,"[173] are all relevant considerations.

Given these methods, the question then becomes: What interpretive framework will be most effective in effectuating a model of restraint while simultaneously safeguarding the basic rights to which all citizens are entitled? More specifically, it is important to determine what method or methods will best promote judicial restraint under the Fourteenth Amendment while ensuring equal treatment and liberty under the Equal Protection and Privileges and Immunities Clauses. Before answering this question, however, the Court should abolish the substantive due process doctrine so that the doctrine no longer plays a part in the Court's jurisprudence.

Second, the Equal Protection Clause, which is designed to address legislation that differentiates or discriminates among various groups,[174] should command two standards of review. First, the three-tiered analysis must be abandoned.

Next, because discrimination is so anathema to the Constitution, this is the area where the Court should take its most active role. This dimension is where the Court will undertake to protect equal rights, not invent or create "new" rights. Thus, the proper method of interpretation would be pragmatism and pluralism. Here, the Court must employ searching scrutiny in assessing the purpose underlying particular legislation, and decide whether the differentiation is necessary and justifiable using the six-part standard advocated in this Article. In so doing, it must also determine whether other, less restrictive remedies would have been appropriate and whether the state has considered such measures. Finally, the state should have the burden of demonstrating whether the legislation, even if facially neutral, is likely to lead to a substantially disparate impact. Importantly, though, when the legislature passes a social or economic issue that is applicable to *all* citizens, the Court should act with restraint, adopting a minimalist policy that is highly deferential to the legislature.

Finally, when applying and interpreting the Privileges and Immunities Clause, the Court must be careful not to transform the clause into another substantive due process doctrine by simply switching its activist role to another

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171. *Id.* at 1756.

172. *Id.*

173. *Id.* at 1768. Griffin does acknowledge that "these methods can point in different directions in any given case, but resolving this problem is not an appropriate task for a general theory of constitutional interpretation." *Id.*

174. *See, e.g.*, Washington v. Davis, 426 U.S. 229, 239 (1976) ("The central purpose of the Equal Protection Clause of the Fourteenth Amendment is the prevention of official conduct discriminating on the basis of race.").

part of the Fourteenth Amendment. Here, the Court should be extraordinarily careful not to create new rights, or declare certain rights fundamental that have no basis in the Constitution. Instead, the Court should adopt a minimalist approach, and show great deference to state legislatures and the democratic process, as these are the fora by which policies should be debated, instituted, and changed. This is especially true when the Court considers an issue that a legislature has not yet acted upon or considered. In such a case, the Court should either not grant certiorari or proceed with a minimalist approach that leaves the issue open to the voters, public debate, and the electorate's representatives.

As set forth below, the Court has failed to perform this function in some of the most important cases of the twentieth century, and has instead acted according to its policy predilections. In other words, on some of the most critical social issues in this country's history, the Court, and not the individual state legislatures, has decided the issue.[175] A review of some of the most seminal cases illustrates this misguided approach. After a review of these cases, an example of a current issue—gay rights—that applies this Article's proposal will be provided to illustrate how the Court should reach more modest and institutionally justifiable decisions.

III. THE SUBSTANTIVE DUE PROCESS DOCTRINE: THE RIGHT DECISIONS, THE WRONG DECISIONS, AND ABOLISHING THE INTERPRETIVE FRAMEWORK

Perhaps the most profound mistake in the Court's modern day jurisprudence was its creation of the substantive due process doctrine. The Court invented new rights, stripped the legislature of its lawmaking power, and compromised the democratic process. As set forth below, the Court held, among other things, that the Due Process Clause contained substantive privacy and liberty interests that emanated from the clause, even though they emanated more from the Justices' thinking than the language of the clause itself. An examination of some of the most important cases in the Court's substantive due process jurisprudence is set forth below.

1. Griswold v. Connecticut

In *Griswold v. Connecticut*,[176] Connecticut enacted a statute prohibiting the use of contraceptives by any person, whether married or single.[177] In applying

175. *See generally* Roe v. Wade, 410 U.S. 113, 154, 163–64 (1973) (a woman's right to terminate a pregnancy during the first trimester); Eisenstadt v. Baird, 405 U.S. 438, 443 (1972) (right of unmarried person to use contraceptives); Griswold v. Connecticut, 381 U.S. 479, 485–86 (1965) (right to marital privacy).

176. 381 U.S. 479 (1965). Importantly, both *Meyer v. Nebraska*, 262 U.S. 390 (1923), and *Pierce v. Society of Sisters*, 268 U.S. 510 (1925), arguably represent the beginning of the Court's substantive due process jurisprudence. However, their holdings do not contain the type of far-reaching and unprecedented readings of the Due Process Clause that later cases set forth. In *Meyer*,

the Due Process Clause of the Fourteenth Amendment, the Court found the statute unconstitutional.[178] The Court held that there is a right of personal privacy recognized under the Due Process Clause of the Fourteenth Amendment.[179] In finding a substantive right of privacy in the Due Process Clause, the Court stated that there are "specific guarantees in the Bill of Rights [that] have penumbras, formed by emanations from those guarantees that help give them life and substance."[180]

Griswold was wrongly decided and had no legal basis whatsoever. First, the Court was wrong when it discovered a right to privacy under the Due Process Clause. There is nothing in the language of the Due Process Clause that could possibly be construed to confer such a right, as it only strives to create fair

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the state enacted a law prohibiting the teaching of any language other than English in primary school. 262 U.S. at 396–97. The Plaintiff schoolteacher taught a course in German and was convicted under this law. *Id.* The Court reversed the conviction, holding that:

> [While it] has not attempted to define with exactness the liberty thus guaranteed, . . . it denotes not merely freedom from bodily restraint but . . . the right of the individual to contract, . . . to acquire useful knowledge, to marry, establish a home and bring up children . . . and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.

Id. at 399 (citations omitted). In *Pierce*, the State of Oregon enacted a criminal statute requiring parents to send their children to public school in the district in which the child resided. 268 U.S. at 530. The plaintiff–appellees, private educational institutions, sought to enjoin the act in order to protect their enrollment. *Id.* at 531–33. The Court found the statute unconstitutional, holding that it "interferes with the liberty of parents and guardians to direct the upbringing . . . of children under their control." *Id.* at 534–35. In addition, the Court held that the concept of liberty "excludes any general power of the State to standardize its children by forcing them to accept instruction from public teachers only." *Id.* at 535. While these cases were critical in discussing the liberty interests that lie within the Constitution, they did not specifically connect them to the Due Process Clause, and thus are somewhat attenuated from the Court's core substantive due process jurisprudence. *See also* Skinner v. Oklahoma *ex rel.* Williamson, 316 U.S. 535, 541 (1942) (holding that a statute authorizing the sterilization of males convicted of two or more felonies involving moral turpitude was unconstitutional largely because marriage and procreation were basic liberties secured by the Constitution).

177. *Griswold*, 381 U.S. at 480 (citing CONN. GEN. STAT. § 53–32 (West 1963) *invalidated by Griswold*, 381 U.S. 479).

178. *Id.* at 485–86.

179. *Id.* at 481, 485.

180. *Id.* at 484. The Court's conclusion was also buttressed by way of analogy to the First Amendment:

> The association of people is not mentioned in the Constitution nor in the Bill of Rights. The right to educate a child in a school of the parents' choice—whether public or private or parochial—is also not mentioned. Nor is the right to study any particular subject or any foreign language. Yet the First Amendment has been construed to include certain of those rights.
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> . . . The right of freedom of speech and press includes not only the right to utter or to print, but the right to distribute, the right to receive, to right to read, and freedom of inquiry, freedom of thought, and freedom to teach . . . . Without those peripheral rights the specific rights would be less secure.

Id. at 482–83 (citations omitted).

procedures before a person is deprived of life, liberty, or property.[181] Of course, this does not mean that there is no right to privacy in the Constitution; certainly, that right inheres in the Fourth Amendment, where individuals generally cannot be subject to a search or seizure without probable cause.[182] However, a privacy right cannot possibly be construed in the Due Process Clause. Furthermore, the Court's statement that there exist "penumbras" and "emanations"[183] in the Constitution may, at best, be a reasonable statement where a provision is ambiguous or overly general. The Due Process Clause, however, is anything but ambiguous—it protects procedural, not substantive rights. Ultimately, while the statute in question in *Griswold* was quite strange and imprudent, it was for the voters, not the Court, to effectuate change.

2. Eisenstadt v. Baird

In *Eisenstadt v. Baird*,[184] Massachusetts enacted a statute prohibiting non-married couples from obtaining contraception.[185] The Court found that the statute violated the Equal Protection Clause,[186] thereby extending *Griswold's* right to privacy to unmarried couples. Specifically, the Court explained that "[i]f the right of privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child."[187] The Court also rejected morality as a sufficient basis for the legislation because it would mean that "persons must risk for themselves an unwanted pregnancy" and, such a policy would conflict "with fundamental human rights."[188]

The Court correctly invalidated the statute on Equal Protection grounds, although the expansion of *Griswold's* privacy interest had no constitutional basis whatsoever. Massachusetts's statute discriminated, or differentiated, between married and unmarried couples.[189] The underlying reason for allowing married couples to use contraception was so that they could avoid unwanted pregnancies.[190] Ironically, by prohibiting contraceptives to unmarried couples, the statute would likely create what it sought to prevent, because the risk of

181. *See* U.S. CONST. amend. XIV, § 1.

182. *See* U.S. CONST. amend. IV; Safford Unified Sch. Dist. No. 1 v. Redding, 129 S. Ct. 2633, 2639 (2009).

183. *Griswold*, 381 U.S. at 484.

184. 405 U.S. 438 (1972).

185. *Id.* at 440–41 (citing MASS. GEN. LAWS ch. 272, §§ 21 and 21A (West 1966), *invalidated by Eisenstadt*, 405 U.S. 438).

186. *Id.* at 454–55.

187. *Id.* at 453.

188. *Id.* at 452–53 (quoting Baird v. Eisenstadt, 429 F.2d 1398, 1402 (1st Cir. 1970)) (internal quotation marks omitted).

189. *See id.* at 442.

190. *See id.*

unwanted pregnancy for unmarried couples would be substantially increased. While the state attempted to put forth a justification based on morality,[191] it was simply unrealistic, because the effects of the law would lead precisely to what it believed was immoral conduct. The statute was correctly struck down on Equal Protection grounds.

3. Roe v. Wade

In what might be the worst decision in recent history, the Court, in *Roe v. Wade*,[192] invalidated a Texas statute which criminalized all abortions except those necessary to save the life of the mother.[193] The Court found the statute unconstitutional, holding that the privacy interest in the Due Process Clause encompassed a woman's right to terminate a pregnancy during the first trimester.[194] Thus, in the first trimester, a woman could terminate a life, or a potential life, entirely free from state interference.[195] Significantly, the Court expanded on the right of privacy by stating that it was based also on a substantive notion of "liberty" contained in the Due Process Clause.[196]

In essence, the Court held, without any justification, that the right of privacy "is broad enough to encompass a woman's decision whether or not to terminate her pregnancy."[197] Next, the Court unilaterally abandoned any pretension of legal analysis and opted to legislate from the bench by determining when a state may properly enact restrictions limiting a woman's right to an abortion.[198] It singlehandedly determined, without any legal basis, that a woman's right to terminate a pregnancy during the first trimester, which the Court declared to be the point of viability,[199] outweighed the state's interest in prenatal life and the health of the mother.[200] For the Court, the state's enactment of regulations beyond the point of viability, such as the qualifications and licensure of the person performing the abortion, were proper because "the fetus then presumably has the capability of meaningful life outside the mother's womb."[201] Thus, concerns about the preservation of maternal and fetal health only came into existence once the state had a "logical and biological justification[]."[202]

This is one of the worst decisions in Supreme Court history and an example of judicial overreaching and lack of restraint. If ever there was a sensitive social

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191. *See id.* at 452–53.
192. 410 U.S. 113 (1973).
193. *Id.* at 164.
194. *See id.* at 154, 163–64.
195. *See id.* at 164.
196. *See id.* at 152–53.
197. *Id.* at 153.
198. *See id.* at 155, 163–64.
199. *Id.* at 163.
200. *See id.*
201. *Id.*
202. *Id.*

issue that was within the purview of the states' legislative authority, this was the textbook example. The voters of Texas, through their representatives, made decisions concerning their moral beliefs in terms of when life begins, the value and respect for life, and the respect that is to be given to unborn children. With such a sensitive issue, its resolution, and the secondary issues related thereto, should have been left to the various state legislatures and resolved through public debate and the democratic process. The Court's complete usurpation of, and disregard for, the separation of powers was startling. Not only did the Court again rely on a privacy interest that is nowhere to be found in the Due Process Clause, but it compounded this problem by arbitrarily deciding when it was proper for the state to intervene. The Court declared that viability occurs at "the compelling point" because it was only at that time that the child was capable, in the Court's view, of meaningful life.[203] Nothing could be more incredulous—it is the states' prerogative to determine the meaning and value of life, not nine unelected and unaccountable judges. *Roe* was a highly questionable decision and set a dangerous precedent. Hopefully, the use of the Privileges and Immunities Clause as part of the three-part solution will avoid the mistakes of cases like *Roe*, and counsel in favor of restraint.

4. Bowers v. Hardwick

In *Bowers v. Hardwick*,[204] the petitioners, a homosexual couple, mounted an as-applied challenge to a law that criminalized consensual sodomy.[205] The Court found the statute constitutional,[206] and in this instance, framed the due process inquiry differently. Instead of relying upon privacy and liberty interests, the Court framed the issue as whether the Constitution "confers a fundamental right upon homosexuals to engage in sodomy" and thus "invalidates the laws of the many States that still make such conduct illegal and have done so for a very long time."[207] The Court held that the Due Process Clause did not encompass a right to homosexual sodomy, explaining that, while it protects the right to child rearing, procreation, marriage, contraception, and abortion, homosexuality was far too attenuated from the rights previously recognized.[208] The Court also rejected the concept that any kind of private, consensual sexual conduct between adults was free from state regulation.[209] Finally, the Court held that a right to homosexual sodomy could not be held to fall under those rights considered

203. *Id.*
204. 478 U.S. 186 (1986), *overruled by* Lawrence v. Texas, 539 U.S. 558 (2003).
205. *Bowers*, 478 U.S. at 188.
206. *Id.* at 189.
207. *Id.* at 190.
208. *See id.* at 190–91 (citations omitted).
209. *Id.* at 191.

"'implicit in the concept of ordered liberty,' such that 'neither liberty nor justice would exist if [they] were sacrificed.'"[210]

Bowers was correctly decided. The Court rightly held that the Due Process Clause did not encompass a right to homosexual sodomy. There is nothing in the language of the Fourteenth Amendment that could even remotely support this proposition. Furthermore, the Court exercised restraint and modesty in refusing to find, within the judicially created privacy and liberty interests, a fundamental right to consensual sodomy. As the Court held, neither the history nor traditions of this country supported recognition of such a right, and any such recognition would risk placing judicial predilection above the unambiguous mandate of the Constitution.[211] Perhaps more importantly, it would have taken important matters of social policy outside of the legislative arena and democratic processes where the Constitution envisioned that they be debated and, ultimately, the source of positive law. The Court's decision was correct as a matter of law and consistent with its role in constitutional decision making.

5. Cruzan v. Director, Missouri Department of Health

In *Cruzan v. Director, Missouri Department of Health*,[212] the parents of co-petitioner, Nancy Cruzan, who sustained severe injuries in an automobile accident and was in a persistent vegetative state, sought to terminate her artificial nutrition and hydration in order to end her life.[213] The Supreme Court of Missouri rejected this request because, pursuant to a state statute governing the withdrawal of medical treatment, there was not clear and convincing evidence from Cruzan herself that, if ever in a vegetative state, she would wish to discontinue such treatment.[214] The issue presented was whether an individual "has a right under the United States Constitution which would require the hospital to withdraw life-sustaining treatment from her under these circumstances."[215]

The Court upheld the constitutionality of the Missouri statute requiring that certain procedural requirements be met before a party could withdraw the life-sustaining treatment of a patient in a vegetative state.[216] It began its analysis by acknowledging that "[i]t cannot be disputed that the Due Process Clause protects an interest . . . in refusing life-sustaining medical treatment."[217] However, the determination that a person "has a 'liberty interest' under the Due Process Clause

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210. *Id.* at 191–92 (quoting Palko v. Connecticut, 302 U.S. 319, 325–26 (1937)).

211. *See Bowers*, 478 U.S. at 192–95.

212. 497 U.S. 261 (1990).

213. *Id.* at 265–68.

214. *See id.* at 268–69 (citing Cruzan v. Harmon, 760 S.W.2d 408, 424–26 (Mo. 1988) (en banc)).

215. *Id.* at 269.

216. *See id.* at 280.

217. *Id.* at 281.

does not end the inquiry; 'whether respondent's constitutional rights have been violated must be determined by balancing his liberty interests against the relevant state interests.'"[218]

In finding in favor of the State, the Court did so upon grounds that arguably did not infringe on the right to refuse unwanted medical treatment. The Court stated that the "United States Constitution would grant a *competent* person a constitutionally protected right to refuse lifesaving hydration and nutrition."[219] However, because Cruzan was in a vegetative state, she was not able to "make an informed and voluntary choice" to exercise her constitutional right to refuse medical treatment.[220] As a result, "[s]uch a 'right' must be exercised for her, if at all, by some sort of surrogate," which, in this case, was her parents.[221]

Thus, because Cruzan was unable to express her own wishes, the Court held that Missouri's statute, which required Cruzan's parents to demonstrate by clear and convincing evidence that she would have wanted to refuse the lifesaving medical treatment, was constitutionally permissible.[222] The Court found that Missouri had an important interest in "the protection and preservation of human life," and was not required "to remain neutral in the face of an informed and voluntary decision by a physically able adult to starve to death."[223] Indeed, because "[t]he choice between life and death is a deeply personal decision of obvious and overwhelming finality," the state "may legitimately seek to safeguard the personal element of this choice through the imposition of heightened evidentiary requirements."[224]

Cruzan was correctly decided, and remains an important case in providing states with the authority to make decisions concerning life, its quality, and its termination. While the Court erred in finding that the right to refuse medical treatment could somehow be divined from the Due Process Clause, the Court was correct in holding in this case that the state's interest in life itself was paramount to the individual's interest in its termination. Stated differently, the

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218. *Id.* at 279 (quoting Youngberg v. Romeo, 457 U.S. 307, 321 (1982)) (footnote omitted).

219. *Id.* (emphasis added).

220. *Id.* at 280.

221. *Id.* In finding Missouri's statute constitutional, the Court held as follows:

> An incompetent person is not able to make an informed and voluntary choice to exercise a hypothetical right to refuse treatment or any other right . . . . Here, Missouri has in effect recognized that under certain circumstances a surrogate may act for the patient in electing to have hydration and nutrition withdrawn in such a way as to cause death, but it has established a procedural safeguard to assure that the action of the surrogate conforms as best it may to the wishes expressed by the patient while competent. Missouri requires that evidence of the incompetent's wishes as to the withdrawal of treatment be proved by clear and convincing evidence. The question, then, is whether the United States Constitution forbids the establishment of this procedural requirement by the State. We hold that it does not.

Id.

222. *See id.*

223. *Id.*

224. *Id.* at 281.

decision was correct because the Court adopted a minimalist approach and gave due deference to the state's interest in the preservation of life.[225] This interest is, and should be, a matter of state governance, not judicial lawmaking. Thus, *Cruzan*, while not necessarily analogous to *Roe*, at least provided the states with a small degree of deference concerning decisions that arguably could be regarded as within the province of individual autonomy.

6. Planned Parenthood of Southeastern Pennsylvania v. Casey

In *Planned Parenthood of Southeastern Pennsylvania v. Casey*,[226] the Court returned to applying the Due Process Clause's liberty and privacy interests to a case involving, at the very least, potential life.[227] The petitioners challenged several provisions of a state statute, which placed various limitations and regulations on the ability to obtain an abortion.[228] Specifically, the statute (1) required a woman to give informed consent prior to the procedure, (2) mandated the informed consent of a parent in the event that a minor was seeking an abortion, although there was a judicial bypass procedure, (3) required a married woman seeking an abortion to obtain the consent of her husband, (4) provided a "medical emergency" exception that exempted a woman from any of the foregoing requirements, and (5) imposed certain reporting requirements on facilities providing abortion services.[229]

In rendering its decision, the Court upheld the core holding of *Roe*, as well as the privacy and liberty interests that underscored its decision.[230] The Court recognized "the right of the woman to choose to have an abortion before viability and to obtain it without undue interference from the State."[231] In support of this holding, the Court explained that "protection of the woman's decision to terminate her pregnancy derives from the Due Process Clause of the Fourteenth Amendment . . . . The controlling word . . . is 'liberty.'"[232] The concept of liberty means, at its very core, "a promise of the Constitution that there is a realm of personal liberty which the government may not enter," and the "substantive liberties protected by the Fourteenth Amendment" are not limited to "those recognized by the Bill of Rights," or to those that "were protected against government[al] interference . . . when the Fourteenth Amendment was ratified."[233] In other words, the liberty and privacy interests guaranteed by the

225. *See* Cass R. Sunstein, *Foreword: Leaving Things Undecided*, 110 HARV. L. REV. 4, 94 (1996).

226. 505 U.S. 833 (1992).

227. *See id.* at 846.

228. *Id.* at 844–45 (citing 18 PA. CONS. STAT. §§ 3205, 3206, 3209, 3207(b), 3214(a), 3214(f) (1990)).

229. *Id.* at 844 (citing §§ 3205, 3206, 3209, 3207(b), 3214(a), 3214(f)).

230. *See id.* at 846.

231. *Id.*

232. *Id.*

233. *Id.* at 847.

Fourteenth Amendment were not limited to "those rights already guaranteed to the individual against federal interference"[234] or in the "precise terms of the specific guarantees elsewhere provided in the Constitution."[235]

Therefore, the liberty protected by the Due Process Clause "is not a series of isolated points pricked out in terms of the taking of property; the freedom of speech, press, and religion . . . and so on," but rather, it is a "rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints."[236] Ultimately, due process "has not been reduced to any formula,"[237] and instead reflects the "traditions from which it developed as well as the traditions from which it broke."[238] Under all circumstances, that tradition "is a living thing."[239]

Casey was wrongly decided and nearly as destructive as *Roe*. Perhaps most troubling is that the Court again relied upon its abstract notion of liberty and privacy to extract the right to terminate a pregnancy from a clause that seeks merely to ensure fair processes. *Casey* represents a ruling that has strayed so far from the text and meaning of the Due Process Clause that the Court is no longer just legislating from the bench, but is now also not following the language of the Constitution in its rulings.[240] Instead, it is importing its contemporary policy notions into a document that is simply not designed for that type of change, policy-making, and evolution that the Court arguably seeks. Indeed, unlike *Cruzan*, the Court's expansive and wide-ranging dicta suggest its willingness to find more rights under the Due Process Clause without any deference to the legislative process.

The Constitution is designed to provide a structural framework to serve as the basis upon which to guarantee certain basic rights, and then leave to the legislature the task of expanding these rights as the people see fit through their elected representatives. For the Court to admit that the Constitution is a "living thing"[241] that contains "substantive liberties protected by the Fourteenth Amendment"[242] is to acknowledge that it is departing from the very document to which it claims fidelity.

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234. *Id.*

235. *Id.* at 848 (quoting Poe v. Ullman, 367 U.S. 497, 543 (1961) (Harlan, J., dissenting)) (internal quotation marks omitted).

236. *Id.* (quoting *Poe*, 367 U.S. at 543 (Harlan, J., dissenting)) (internal quotation marks omitted).

237. *Id.* at 849 (quoting *Poe*, 367 U.S. at 542 (Harlan, J., dissenting)) (internal quotation marks omitted).

238. *Id.* at 850 (quoting *Poe*, 367 U.S. at 542 (Harlan, J., dissenting)) (internal quotation marks omitted).

239. *Id.* (quoting *Poe*, 367 U.S. at 542 (Harlan, J., dissenting)) (internal quotation marks omitted).

240. *See id.* at 980 (Scalia, J., dissenting) (noting that the Constitution says "absolutely nothing" about a woman's right to terminate a pregnancy).

241. *Casey*, 505 U.S. at 850 (quoting *Poe*, 367 U.S. at 542) (internal quotation marks omitted).

242. *Id.* at 847.

7. Washington v. Glucksberg

In *Washington v. Glucksberg*,[243] the Court confronted the issue of whether the liberty interest under the Due Process Clause protects the right of assisted suicide for, among others, terminally ill patients.[244] The State of Washington enacted a statute providing that "[a] person is guilty of promoting a suicide attempt when he knowingly causes or aids another person to attempt suicide."[245] However, the statute did provide that the "withholding or withdrawal of life-sustaining treatment . . . shall not, for any purpose, constitute a suicide."[246]

In upholding the statute, the Court held that the Due Process Clause does not encompass a fundamental right to assisted suicide.[247] The Court's analysis focused on the notion that the Due Process Clause "specially protects those fundamental rights and liberties which are, objectively, 'deeply rooted in this Nation's history and tradition.'"[248] Using this standard, the Court explained that "[i]n almost every State—indeed, in almost every western democracy—it is a crime to assist a suicide. . . . [, and] assisted-suicide bans are . . . . longstanding expressions of the States' commitment to the protection and preservation of all human life."[249]

In fact, "opposition to and condemnation of suicide—and, therefore, of assisting suicide—are consistent and enduring themes of our philosophical, legal, and cultural heritages."[250] Furthermore, "for over 700 years, the Anglo-American common-law tradition has punished or otherwise disapproved of both suicide and assisting suicide."[251] Simply stated, "[t]he history of the law's treatment of assisted suicide in this country has been and continues to be one of the rejection of nearly all efforts to permit it."[252] Accordingly, in part due to the "consistent and almost universal tradition"[253] against permitting assisted suicide, the Court concluded that assisted suicide was "not a fundamental liberty interest protected by the Due Process Clause."[254]

Glucksberg was correctly decided, and was more in line with the modest role that the Court should assume and the interpretive model—minimalism—to which it should subscribe. There is nothing whatsoever in the Constitution that

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243. 521 U.S. 702 (1997).

244. *See id.* at 705–06, 708 (quoting Compassion in Dying v. Washington, 850 F. Supp. 1454, 1459 (W.D. Wash. 1994)).

245. *Id.* at 707 (quoting WASH. REV. CODE § 9A.36.060(1) (1994)) (internal quotation marks omitted).

246. *Id.* at 717 (quoting WASH. REV. CODE § 70.122.070(1) (1994)).

247. *Id.* at 728.

248. *Id.* at 720–21 (quoting Moore v. City of E. Cleveland, 431 U.S. 494, 503 (1977)).

249. *Id.* at 710 (footnote omitted) (citing Cruzan v. Dir., Mo. Dep't of Health, 497 U.S. 261, 280 (1990)).

250. *Id.* at 711.

251. *Id.* (citing *Cruzan*, 497 U.S. at 294–95 (Scalia, J., concurring)).

252. *Id.* at 728.

253. *Id.* at 723.

254. *Id.* at 728.

could possibly sanction a right to assisted suicide. While the Court relied upon history and tradition, it could have also used this case to eviscerate the substantive due process doctrine. Certainly, based upon *Roe* and *Casey*, it could be argued that physician-assisted suicide for the terminally ill would constitute a proper exercise of the Due Process Clause's liberty and privacy interests. This case, therefore, would have been an ideal opportunity to cast doubt upon those concepts and return constitutional decision making to its proper role—interpreting the text and the intentions of the Framers and, in most cases, making incremental decisions that leave critical policy issues to the legislature.

8. Lawrence v. Texas

In *Lawrence v. Texas*,[255] the Court was again faced with an issue concerning the constitutionality of a Texas statute criminalizing homosexual sodomy between consenting adults.[256] In *Lawrence*, the Court not only took the extraordinary step of invalidating the statute and overturning *Bowers*, but it also fundamentally re-framed its substantive due process analysis.[257] First, the Court held that the *Bowers* majority erred when it formulated the due process inquiry as whether the Constitution "confers a fundamental right upon homosexuals to engage in sodomy."[258] Specifically, the Court explained that "[t]he laws involved in *Bowers* and here are . . . statutes that purport to do no more than prohibit a particular sexual act," but their "penalties and purposes . . . have more far-reaching consequences, touching upon the most private human conduct, sexual behavior, and in the most private of places, the home."[259] The Court found this constitutionally impermissible, stating that "[w]hen sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring. The liberty protected by the Constitution allows homosexual persons the right to make this choice."[260]

Importantly, the Court's holding also re-shaped the due process inquiry when determining whether newly asserted rights are entitled to constitutional protection. Specifically, while the Court did examine the nation's history and tradition with respect to homosexual conduct,[261] it stated that "[h]istory and tradition are the starting point but not in all cases the ending point of the substantive due process inquiry."[262] In so doing, the Court held that "our laws

255. 539 U.S. 558 (2003).

256. *Id.* at 562–63.

257. *See id.* at 577–79.

258. *Id.* at 566 (quoting Bowers v. Hardwick, 478 U.S. 186, 190 (1986)) (internal quotation marks omitted).

259. *Id.* at 567.

260. *Id.*

261. *Id.* at 568–72 (citations omitted).

262. *Id.* at 572 (quoting Cnty. of Sacramento v. Lewis, 523 U.S. 833, 857 (1998) (Kennedy, J., concurring)) (internal quotation marks omitted).

and traditions in the past half century are of most relevance here."[263] Using this framework, the Court stated that "[t]hese references show an emerging awareness that liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex."[264] In fact, the Court relied upon the language in *Casey* to hold that matters "central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment."[265] Indeed, "[a]t the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life."[266]

The Court's holding, however, went further. It stated that the recognition of new fundamental rights that reflect greater and more contemporary notions of freedom would continue to be part of the Court's jurisprudence.[267] As the majority stated, "Had those who drew and ratified the Due Process Clauses of the Fifth Amendment or the Fourteenth Amendment known the components of liberty in its manifold possibilities, they might have been more specific."[268] However, the Founders "did not presume to have this insight," and were aware that "times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress. As the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom."[269]

Lawrence was correctly decided, but for the wrong reason, as the Court again incorrectly relied on the Due Process Clause in reaching its holding. Instead of employing this ghastly approach, the Court should have based its ruling upon the Equal Protection Clause, as the statute was clearly unconstitutional on Equal Protection grounds. It again discriminated against homosexuals by criminalizing homosexual sodomy, while permitting heterosexuals to engage in precisely the same act.[270] This is intentional discrimination, and the statute should have been declared unconstitutional on this basis. Of course, had it outlawed sodomy to both heterosexuals and homosexuals, the result may have been different.[271] Ultimately, as much as it should not, the Court will continue to adjudicate cases involving fundamental rights, social issues, and important matters related to liberty and privacy.

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263. *Id.* at 571–72.

264. *Id.* at 572.

265. *Id.* at 574 (quoting Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 851 (1992)) (internal quotation marks omitted).

266. *Id.* (quoting *Casey*, 505 U.S. at 851) (internal quotation marks omitted).

267. *See id.* at 578–79.

268. *Id.* at 578.

269. *Id.* at 578–79.

270. *Id.* at 581 (O'Connor, J., concurring).

271. *See id.* at 584.

For example, the issue of gay rights is currently a very divisive and contentious matter in public debate[272] and continues to be litigated in the courts.[273] Therefore, the Court may eventually be confronted with the issue of whether gay marriage is a fundamental right under the Constitution. Using the three-part solution proposed in this Article, it will be shown how the Court, as well as lower courts, should approach and decide this issue, as well as other rights-based cases. By analyzing those decisions that have already been decided concerning gay rights, the three-part solution can provide a proper foundation for the Court.

IV. GAY RIGHTS, SUBSTANTIVE DUE PROCESS, EQUAL PROTECTION, AND THE PRIVILEGES AND IMMUNITIES CLAUSE: APPLICATION OF THE THREE-PART PROPOSAL

The contentious issue of gay rights, particularly gay marriage, has been the subject of passionate and divisive litigation in both the state and federal courts.[274] Apart from the issue of whether this matter should be resolved through the democratic process rather than the courts, several cases highlight the constitutional bases upon which gay marriage has been recognized or rejected. These decisions provide a basis upon which to distinguish between improvident decisions and those where the courts maintain restraint and fidelity to their judicial function.

A. Baker v. State

In *Baker v. State*, same sex couples instituted a suit for declaratory judgment, alleging that the refusal to issue them marriage licenses violated Vermont's state constitution.[275] Specifically, the plaintiffs alleged that the State violated the common benefits clause of Vermont's constitution,[276] which provides in relevant part as follows: "That government is, or ought to be, instituted for the common benefit, protection and security of the people, nation

272. *See* Carlos E. González, *The 2006 David J. Stouffer Lecture: Statutory Interpretation: Looking Back. Looking Forward.*, 58 RUTGERS L. REV. 703, 706–07 (2006) ("Even today and even in the blue states, granting homosexual life partners the same bundle of legal rights granted to heterosexual married couples is a contentious subject.").

273. *See, e.g.*, Perry v. Schwarzenegger, 704 F. Supp. 2d 921 (N.D. Cal. 2010) (whether a state constitutional amendment limiting valid marriage as one between a man and a woman was permitted under the Federal Constitution).

274. *See, e.g.*, Citizens for Equal Prot. v. Bruning, 455 F.3d 859 (8th Cir. 2006) (examining the constitutionality of a state prohibition on same-sex marriage); *Perry*, 704 F. Supp. 2d 921 (same); Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941 (Mass. 2003) (same); Lewis v. Harris, 908 A.2d 196 (N.J. 2006) (same); Baker v. State, 744 A.2d 864 (Vt. 1999) (same).

275. *Baker*, 744 A.2d. at 867–68.

276. *Id.* at 869–70 (citing VT. CONST. ch. I, art. 7 (1786)).

or community, and not for the particular emolument or advantage of any single person, family, or set of persons, who are a part only of that community . . . ."[277]

In essence, Vermont's common benefits clause is equivalent to, yet somewhat broader than, the federal Equal Protection Clause.[278] In challenging the ban on same-sex marriage, the plaintiffs argued that the law deprived them of many legal benefits, including, *inter alia*, access to a spouse's life, medical, and disability insurance, hospital visitation, spousal support, and intestate succession.[279]

The court began its analysis by recognizing that, while the Equal Protection Clause was its federal counterpart, it was free to "provide more generous protection to rights under the Vermont Constitution."[280] The court then explained that for cases involving the common benefits clause of the Vermont constitution, the "legislative classifications must 'reasonably relate to a legitimate public purpose.'"[281] In addition, "the justifications demanded of the State may depend upon the nature and importance of the benefits and protections affected by the legislation; indeed, this is implicit in the weighing process."[282] Put differently, the common benefits clause "require[s] a 'more stringent' reasonableness inquiry than was generally associated with rational basis review under the federal constitution."[283] While noting that "our task is to distill the essence, motivating ideal of the framers," the court also would address "contemporary issues that the framers undoubtedly could never have imagined."[284]

Against this backdrop, the court found that Vermont's ban on same-sex marriage contravened the common benefits clause and was therefore unconstitutional.[285] First, the court was not persuaded by the State's justification that "excluding same-sex couples from the legal benefits of marriage" advances the interest in "further[ing] the link between procreation and child rearing."[286] The State claimed that it had an interest in "promoting a permanent commitment between couples who have children to ensure that their offspring are considered legitimate and receive ongoing parental support."[287] In other words, the State sought to support marriage through sending "a public message that procreation and child rearing are intertwined."[288]

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277. VT. CONST. ch. I, art. 7 (1786).

278. *See Baker*, 744 A.2d at 870.

279. *Id.*

280. *Id.* (quoting State v. Badger, 450 A.2d 336, 347 (Vt. 1982)) (internal quotation marks omitted).

281. *Id.* at 871 (quoting Choquette v. Perrault, 569 A.2d 455, 459 (Vt. 1989)).

282. *Id.*

283. *Id.* (quoting State v. Brunelle, 534 A.2d 198, 201–02 (Vt. 1987)).

284. *Id.* at 874.

285. *Id.* at 889.

286. *Id.* at 881 (internal quotation marks omitted).

287. *Id.*

288. *Id.* (internal quotation marks omitted).

In rejecting this argument, the court stated that "many *opposite*-sex couples marry for reasons unrelated to procreation, that some of these couples never intend to have children, and that others are incapable of having children."[289] Accordingly, if the State's purpose is to promote procreation and child rearing, then the law "is significantly underinclusive."[290] In other words, "[t]he law extends the benefits and protections of marriage to many persons with no logical connection to the stated governmental goal."[291] Furthermore, "[T]here is no dispute that a significant number of children . . . are actually being raised by same-sex parents, and that increasing numbers of children are being conceived by such parents through a variety of assisted-reproductive techniques."[292]

Thus, "[W]ith or without the marriage sanction, the reality today is that increasing numbers of same-sex couples are employing increasingly efficient assisted-reproductive techniques to conceive and raise children."[293] Accordingly, to the extent that the State's interest was to provide security for children, the State excludes "many same-sex couples who are no different from opposite-sex couples with respect to these objectives."[294]

The State's next argument was that "because same-sex couples cannot conceive a child on their own, their exclusion promotes a 'perception of the link between procreation and child rearing.'"[295] In rejecting this claim, the court explained that "most of those who utilize nontraditional means of conception are infertile *married* couples . . . and that many assisted-reproductive techniques involve only one of the married partner's genetic material, the other being supplied by a third party through sperm, egg, or embryo donation."[296] Indeed, "The State does not suggest that the use of these technologies undermines a married couple's sense of parental responsibility . . . [and it does not] even remotely suggest that access to such techniques ought to be restricted . . . ."[297] By finding the State's claims unavailing, the court held that "[t]he legal benefits and protections flowing from a marriage license are of such significance that any statutory exclusion must necessarily be grounded on public concerns of sufficient weight, cogency, and authority that the justice of the deprivation cannot seriously be questioned."[298] Ultimately, due to the "extreme logical disjunction between the classification and the stated purposes of the law—protecting children and 'furthering the link between procreation and child rearing'—the exclusion falls substantially short of this standard."[299] In finding a

289. *Id.*
290. *Id.*
291. *Id.*
292. *Id.*
293. *Id.* at 882.
294. *Id.*
295. *Id.*
296. *Id.*
297. *Id.*
298. *Id.* at 884.
299. *Id.*

violation of the common benefits clause, the court left to the legislature whether to amend the statute or create a domestic partnership statute providing the benefits attendant to marriage.[300]

Baker was rightly decided. The court was correct because it did not create new rights or unjustifiably expand on already recognized rights. Instead, it examined the issue of discriminatory treatment under what is analogous to, albeit broader than, the Equal Protection Clause.[301] In so doing, the court correctly found that the state's objectives could not justify the differential treatment as the evidence did not support the notion that the ban would achieve the purported governmental objective.[302] Additionally, in finding the ban constitutionally infirm, the court acted with restraint—it did not require the legislature to issue marriage licenses to same-sex couples, but instead left it to the legislature to determine whether it could enact a civil union law that would provide the same benefits and privileges as marriage itself.[303] By intimating that such a law would survive constitutional scrutiny,[304] the court acted modestly while preserving the plaintiff's constitutional rights.

B. Perry v. Schwarzenegger

In *Perry v. Schwarzenegger*,[305] the plaintiffs challenged the constitutionality of a voter-enacted constitutional amendment that defined marriage as between one man and one woman.[306] In determining whether the statute passed constitutional muster, the court focused upon the Due Process and Equal Protection Clauses.[307]

To begin with, the court held that the amendment violated the plaintiffs' fundamental right to marriage.[308] As the court explained, "The freedom to marry is recognized as a fundamental right protected by the Due Process Clause."[309] The court then stated that "[t]he question presented here is whether plaintiffs seek to exercise the fundamental right to marry; or, because they are couples of the same sex, whether they seek recognition of a new right."[310]

The court started this analysis by recognizing that "[t]o determine whether a right is fundamental under the Due Process Clause, the court inquires into whether the right is rooted 'in our Nation's history, legal traditions, and

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300. *See id.* at 886.
301. *See id.* at 870.
302. *See id.*
303. *See id.*
304. *See id.*
305. 704 F. Supp. 2d 921 (N.D. Cal. 2010).
306. *Id.* at 927 (citing CAL. CONST. art. I, § 7.5 (West 2002), *invalidated by Perry*, 704 F. Supp. 2d 921).
307. *See id.* at 991, 995.
308. *See id.* at 991.
309. *Id.*
310. *Id.* at 992.

practices.'"[311] Based on this framework, the court noted that "[m]arriage has retained certain characteristics throughout the history of the United States. [It] requires two parties to give their free consent to form a relationship, which then forms the foundation of a household."[312] Additionally, "spouses must consent to support each other and any dependents [and t]he state regulates marriage because marriage creates stable households, which in turn form the basis of a stable, governable populace."[313] Furthermore, "Never has the state inquired into procreative capacity or intent before issuing a marriage license; indeed, a marriage license is more than a license to have procreative sexual intercourse."[314] Rather, "wholly apart from procreation, choice and privacy play a pivotal role in the marital relationship."[315] Thus, the essence of marriage "has been historically and remains the right to choose a spouse and, with mutual consent, join together and form a household."[316] On this basis, the court held that the plaintiffs "do not seek recognition of a new right," instead, "plaintiffs ask California to recognize their relationships for what they are: marriages."[317]

Accordingly, "Because plaintiffs seek to exercise their fundamental right to marry, their claim is subject to strict scrutiny."[318] Thus, the State had the burden of demonstrating that the amendment was "narrowly tailored to a compelling government interest."[319] The court held that the State had not proffered any reasons that could justify a ban on same-sex marriages.[320] For example, it rejected the State's argument that marriage was traditionally understood to be between a man and a woman.[321] The court also found unpersuasive the State's argument that, on sensitive social issues such as this, the court should proceed incrementally to decrease "the probability of the potential adverse consequences of same-sex marriage."[322] In response, the court held that there was no credible evidence that same-sex marriage would have deleterious effects on marriage or society itself.[323]

In addition, the court found meritless the State's assertion that it had an interest in promoting opposite-sex parenting over raising children by same-sex couples.[324] Specifically, the court replied by holding that "the evidence shows beyond any doubt that parents' genders are irrelevant to children's

311. *Id.* (quoting Washington v. Glucksberg, 521 U.S. 702, 710 (1997)).
312. *Id.* (citation omitted).
313. *Id.* (citation omitted).
314. *Id.*
315. *Id.*
316. *Id.* at 993.
317. *Id.*
318. *Id.* at 994 (citing Zablocki v. Redhail, 434 U.S. 374, 388 (1978)).
319. *Id.* at 995 (citing Carey v. Population Servs. Int'l, 431 U.S. 678, 686 (1977)).
320. *See id.* at 998–1002.
321. *Id.* at 998.
322. *Id.* 998–99.
323. *See id.* at 999.
324. *See id.* at 1000.

developmental outcomes."[325] The court also noted that the amendment "prevents same-sex couples from marrying," not from adopting or raising children.[326] Moreover, when same-sex couples "can have (or adopt) and raise children . . . they are treated identically to opposite-sex parents under California law."[327]

The State's next asserted interest was to protect the First Amendment freedom of those individuals who disagree with allowing same-sex couples to marry.[328] The court quickly dismissed this argument, finding that the amendment "does not affect any First Amendment right or responsibility of parents to educate their children."[329] Furthermore, the court averred that an individual's "moral views" could not be a sufficient justification upon which to sustain the amendment.[330] Finally, the State asserted what the court called a "catchall interest," which was "[a]ny other conceivable legitimate interests identified by the parties, amici, or the court at any stage of the proceedings."[331] Not surprisingly, the court rejected this broad assertion, holding that "[m]any of the purported interests identified by proponents are nothing more than a fear or unarticulated dislike of same-sex couples."[332]

Ultimately, in finding that the amendment violated the plaintiffs' fundamental right to marriage, the court stated that "what remains of the proponents' case is an inference, amply supported by evidence in the record, that Proposition 8 was premised on the belief that same-sex couples simply are not as good as opposite-sex couples."[333] Also, the court applied the Equal Protection Clause in its constitutional analysis, and unlike under federal law, determined that homosexuals could possibly constitute a suspect class.[334] This was based upon the fact that homosexuals were singled out for differential treatment, denied the right to marry, despite the fact that there were no "real and undeniable differences" between them and heterosexuals.[335] In its analysis, the court found the amendment unconstitutional for the same reason that it found the amendment violative of substantive due process, as the State advanced the same interests in

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325. *Id.*

326. *Id.*

327. *Id.* (citation omitted).

328. *Id.*

329. *Id.*

330. *Id.* at 1001.

331. *Id.* (quoting Defendant–Intervenors' Trial Memorandum at 8, Perry v. Schwarzenegger, 704 F. Supp. 2d 921 (N.D. Cal. 2010) (No. 09-CV-2292 VRW)) (internal quotation marks omitted).

332. *Id.* at 1002.

333. *Id.*

334. *See id.* at 997 (noting that "the court need not address the question whether laws classifying on the basis of sexual orientation should be subject to a heightened standard of review," but that "[a]ll classifications based on sexual orientation appear suspect . . . [and] California would rarely, if ever, have a reason to categorize individuals based on their sexual orientation").

335. *Id.* (quoting City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 444 (1985)) (internal quotation marks omitted).

light of both challenges.[336] Critically, the court did not approve of California's domestic partnership law, and required that same-sex couples be given the right to marriage licenses.[337]

Perry was substantially incorrect and yet partially reasonable. The court made a serious mistake when it determined that the amendment violated the Due Process Clause. In fact, the court's own analysis undermined its reasoning. To be sure, the court claimed that history and tradition would be the framework under which it would assess the alleged constitutional right to same-sex marriage.[338] History and tradition, however, renders the plaintiffs' claim unavailing, if not outright meritless. To begin with, the court was correct in finding that history and tradition overwhelmingly support a right to marriage.[339] However, that same tradition and history supports a right to *heterosexual*, not homosexual marriage.[340] There is nothing whatsoever that can be discerned from our nation's history that could even implicitly support a right to same-sex marriage.[341] Consequently, the court was forced to generalize the right to marriage so that the court could conveniently apply the right to same-sex couples.[342] One must wonder whether the court would rule the same way if there was an amendment banning polygamous marriages. The court's ruling leaves that question open. In other words, due process, even substantive due process, could not even remotely support this decision.

However, the court was correct in striking down the amendment on Equal Protection grounds. The amendment intentionally discriminated against same-sex couples even though there were no reasons, rational or otherwise, to support the differential treatment.[343] Each interest advanced by the State was either implicitly motivated by prejudice or unlikely to be achieved simply by a ban on same-sex marriage.[344] For example, the promotion of opposite-sex over same-sex parenting could not possibly be furthered by the amendment because the ban did not affect California's adoption laws.[345] Obviously, the State's interests were not served by the amendment's purpose.[346] The decision was correct on equal protection grounds.

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336. *See id.* at 995, 997.

337. *See id.* at 994, 1003.

338. *See id.* at 992 (quoting Washington v. Glucksberg, 521 U.S. 702, 710 (1997)).

339. *See id.* at 991 ("[F]reedom to marry has long been recognized as one of the vital rights essential to the orderly pursuit of happiness by free men." (quoting Loving v. Virginia, 388 U.S. 1, 12 (1967)) (internal quotation marks omitted)).

340. *See generally* Andersen v. King Cty., 138 P.3d 963, 977–79 (Wash. 2006) (citations omitted) (conducting a detailed analysis of the right to marriage in the United States and concluding that even though "marriage has evolved, it has not included a history and tradition of same-sex marriage in this nation").

341. *See id.*

342. *See Perry*, 704 F. Supp. 2d at 993.

343. *See id.* at 1003.

344. *See id.* at 1002.

345. *See id.* at 1000.

346. *See id.* at 1003.

Finally, if the Privileges and Immunities Clause were applicable in the way proposed by this Article, the court would have substantially overreached. The court should proceed incrementally and recognize rights under this clause only if they are deeply rooted in our nation's history and tradition. Otherwise, issues such as this should be resolved through public debate and the democratic process. For example, it would have been proper for the court to declare that same-sex couples should have the same rights and benefits as married couples. The court, however, should have left the option of enacting a law providing for civil unions or marriage itself to the legislature. As a result of its overreaching, the court left itself open for criticism that it was legislating from the bench.

C. Goodridge v. Department of Public Health

In *Goodridge v. Department of Public Health*,[347] the plaintiffs instituted an action against the Department and Commissioner of Public Health because they were denied marriage licenses.[348] The Massachusetts Supreme Judicial Court analyzed whether the prohibition was constitutional in light of the state's due process and equal protection principles.[349]

The court began its analysis by noting that "[t]he benefits accessible only by way of a marriage license are enormous, touching nearly every aspect of life and death. . . . [Indeed,] 'hundreds of statutes' are related to marriage and marital benefits."[350] It is for these reasons, "as well as for its intimately personal significance, that civil marriage has long been termed a 'civil right.'"[351] In fact, "The United States Supreme Court has described the right to marry as 'of fundamental importance for all individuals' and as 'part of the fundamental "right of privacy" implicit in the Fourteenth Amendment's Due Process Clause.'"[352] As a result, "Without the right to marry—or more properly, the right to choose to marry—one is excluded from the full range of human experience and denied full protection of the laws for one's 'avowed commitment to an intimate and lasting human relationship.'"[353]

The court then turned to the Massachusetts Constitution, which "protects matters of personal liberty against government incursion as zealously, and often more so, than does the Federal Constitution, even where both Constitutions

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347. 798 N.E.2d 941 (Mass. 2003).

348. *Id.* at 950.

349. *See id.* at 953.

350. *Id.* at 955.

351. *Id.* at 957.

352. *Id.* (quoting Zablocki v. Redhail, 434 U.S. 374, 384 (1978)).

353. *Id.* (quoting Baker v. State, 744 A.2d 864, 889 (Vt. 1999)). The court also discussed the long history during which African Americans were denied the right to marriage and noted that the denial was first held unconstitutional by California in *Perez v. Lippold*, 198 P.2d 17 (Cal. 1948). *Id.* (citing Loving v. Virginia, 388 U.S. 1 (1967); *Perez*, 198 P.2d 17) (although the court cites to "Perez v. Sharpe," the official reported case name is "Perez v. Lippold").

employ essentially the same language."[354] Indeed, "The individual liberty and equality safeguards of the Massachusetts Constitution protect both 'freedom from' unwarranted government intrusion into protected spheres of life and 'freedom to' partake in benefits created by the State for the common good."[355] In holding that "[b]oth freedoms are involved here," the court averred "[w]hether and whom to marry, how to express sexual intimacy, and whether to establish a family—these are among the most basic of every individual's liberty and due process rights."[356] As a result, "The Massachusetts Constitution requires, at a minimum, that the exercise of the State's regulatory authority not be 'arbitrary or capricious.'"[357] Rather, "Under both the equality and liberty guarantees, regulatory authority must, at very least, serve 'a legitimate purpose in a rational way'; a statute must 'bear a reasonable relation to a permissible legislative objective.'"[358]

In this case, the plaintiffs challenged the marriage law on due process and equal protection grounds.[359] In determining that it would apply a rational basis inquiry for the due process claim, the court stated that the law must "bear[] a real and substantial relation to the public health, safety, morals, or some other phases of the general welfare."[360] With respect to the equal protection claim, the court required that "an impartial lawmaker could logically believe that the classification would serve a legitimate public purpose that transcends the harm to the members of the disadvantaged class."[361]

Based on both due process and equal protection grounds, the court found the statute unconstitutional.[362] The court rejected the State's first justification—that the primary purpose of marriage is for procreation.[363] As the court explained, the state's "laws of civil marriage do not privilege procreative heterosexual intercourse between married people above every other form of adult intimacy and every other means of creating a family."[364] Indeed, the marriage laws "contain[] no requirement that the applicants for a marriage license attest to their ability or intention to conceive children by coitus."[365] Put differently, "Fertility is not a condition of marriage, nor is it grounds for divorce," as those individuals

354. *Id.* at 959.

355. *Id.* (footnote omitted).

356. *Id.*

357. *Id.* (quoting Commonwealth v. Henry's Drywall Co., 320 N.E.2d 911, 914 (Mass. 1974)).

358. *Id.* at 960 (quoting Rushworth v. Registrar of Motor Vehicles, 596 N.E.2d 340, 343–44 (Mass. 1992)).

359. *Id.*

360. *Id.* (alteration in original) (quoting Coffee–Rich, Inc. v. Comm'r of Pub. Health, 204 N.E.2d 281, 287 (Mass. 1965)).

361. *Id.* (quoting English v. New England Med. Ctr., Inc., 541 N.E.2d 329, 333 (Mass. 1989)) (internal quotation marks omitted).

362. *See id.* at 961.

363. *See id.*

364. *Id.* (citing MASS. GEN. LAWS ANN. ch. 207 (West 2007)).

365. *Id.*

"who have never consummated their marriage, and never plan to, may be and stay married."[366]

The court also rejected the State's second argument, that confining marriage to opposite-sex couples ensures that children are raised in an "'optimal' setting."[367] In holding that the ban on same-sex marriage "cannot plausibly further this policy,"[368] the court stated that "[t]he demographic changes of the past century make it difficult to speak of an average American family [and t]he composition of families varies greatly from household to household."[369] Furthermore, "Massachusetts has responded supportively to 'the changing realities of the American family,' and has moved vigorously to strengthen the modern family in its many variations."[370] Also, "The 'best interests of the child' standard does not turn on a parent's sexual orientation . . . ."[371] Ultimately, based on these and other reasons, like the State's concession that same-sex couples could be excellent parents, the Court held that the State "has offered no evidence that forbidding marriage to people of the same sex will increase the number of couples choosing to enter into opposite-sex marriages in order to have and raise children."[372]

The final reason advanced by the State was that "limiting marriage to opposite-sex couples furthers the Legislature's interest in conserving scarce State and private financial resources."[373] The State contended that the court "logically could assume that same-sex couples are more financially independent than married couples and thus less needy of public marital benefits, such as tax advantages, or private marital benefits, such as employer-financed health plans that include spouses in their coverage."[374]

The court found this last argument meritless.[375] In so doing, it averred that the State's "conclusory generalization—that same-sex couples are less financially dependent on each other than opposite-sex couples—ignores that many same-sex couples, such as many of the plaintiffs in this case, have children and other dependents . . . in their care."[376] Furthermore, "Massachusetts marriage laws do not condition receipt of public and private financial benefits to married individuals on a demonstration of financial dependence on each other; the benefits are available to married couples regardless of whether they mingle

366. *Id.*
367. *See id.* at 962.
368. *Id.*
369. *Id.* at 962–63 (quoting Troxel v. Granville, 530 U.S. 57, 63 (2000)) (internal quotation marks omitted).
370. *Id.* (quoting *Troxel*, 530 U.S. at 64).
371. *Id.*
372. *Id.*
373. *Id.* at 964.
374. *Id.*
375. *See id.*
376. *Id.*

their finances or actually depend on each other for support."[377] Based on these reasons, as well as those stated above, the statute was found unconstitutional.[378]

The court's decision is a classic example of an unjustifiable exercise of judicial power. First, while the court claimed that it was adjudicating this matter under both the Due Process and Equal Protection Clauses of its constitution, the court never engaged in a separate analysis of either clause.[379] Moreover, the court seemed to simply merge each clause into a single discussion, despite stating that there are independent standards for each clause.[380] Second, the court simply took for granted the fact that there are substantive liberty and privacy interests embedded in the Due Process Clause that are focused upon process.[381] It is as if the court could not even conceive a situation where the judiciary would act with restraint and not read rights into the Due Process Clause that have no basis whatsoever. The court's respect for legislative authority was non-existent.

This usurpation was evident in the fact that the court did not even give the legislature the opportunity to decide whether to provide same-sex couples with the benefits and protections of marriage through civil unions or by amending the marriage statute.[382] The court simply decided that same-sex couples were entitled to marriage itself,[383] even though the entire opinion did not focus on a deprivation of marriage, but instead upon the denial of benefits and protections attendant to marriage.[384] If, under the three-part proposal advocated in this Article, the court applied the Privileges and Immunities Clause, it would have been an unprecedented and unwarranted exercise of judicial power.

D. Citizens for Equal Protection v. Bruning

In *Citizens for Equal Protection v. Bruning*,[385] gay and lesbian advocate groups sued the State of Nebraska challenging that a state constitutional amendment restricting marriage only to opposite-sex couples violated, *inter alia*, the federal Equal Protection Clause.[386] The district court found the amendment unconstitutional[387] and the State appealed to the Eighth Circuit. The plaintiffs relied on *Romer v. Evans*,[388] where the Supreme Court invalidated an

377. *Id.*

378. *See id.* at 968.

379. *See id.* at 953–68 (citations omitted).

380. *See id.*

381. *See id.* at 957 n.15 ("The rights implicated in this case are at the core of individual privacy and autonomy.").

382. *See id.* at 969.

383. *See id.*

384. *Id.* at 953–69.

385. 455 F.3d 859 (8th Cir. 2006).

386. *Id.* at 863.

387. *Id.* (citing Citizens for Equal Prot., Inc. v. Bruning, 368 F. Supp. 2d 980 (D. Neb. 2005), *rev'd*, 455 F.3d 859 (8th Cir. 2006)).

388. 517 U.S. 620 (1996).

amendment to the Colorado constitution which "barr[ed] all state and local governments from allowing homosexual, lesbian or bisexual . . . conduct . . . to be the basis for a claim of . . . protected status or claim of discrimination."[389] In finding the amendment unconstitutional, the *Romer* Court held that the amendment "withdraws from homosexuals, but no others, specific legal protection from the injuries caused by discrimination, and it forbids reinstatement of these laws and policies."[390] Further,

> The Court reasoned that the amendment "fails, indeed defies," conventional equal protection analysis because it "impos[es] a broad and undifferentiated disability on a single named group . . . [and] its sheer breadth is so discontinuous with the reasons offered for it that the amendment seems inexplicable by anything but animus toward the class it affects."[391]

Consequently, in applying the normally deferential rational basis review, the *Romer* Court found the amendment unconstitutional.[392]

The plaintiffs also argued before the Eighth Circuit that the amendment raised "an insurmountable political barrier to same-sex couples obtaining the many governmental and private sector benefits that are based upon a legally valid marriage relationship."[393] While the plaintiffs did not assert a "right to marriage or same-sex unions," they did "seek 'a level playing field, an equal opportunity to convince the people's elected representatives that same-sex relationships deserve legal protection.'"[394]

The Eighth Circuit rejected the plaintiffs' claim, and reversed the district court's ruling.[395] The court began its analysis by determining the proper level of scrutiny that should be applied to the plaintiffs' claim.[396] After examining relevant decisional law, the court found that the amendment "should receive rational-basis review under the Equal Protection Clause, rather than a heightened level of judicial scrutiny."[397] In so holding, the court referred to Justice Scalia's discussion of anti-polygamy statutes, stating that "chaos . . . would result if all enactments that allegedly deprive a group of 'equal' political access must survive the rigors of strict judicial scrutiny."[398] Indeed, while *Romer* did

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389. *Citizens for Equal Prot.*, 455 F.3d at 864 (quoting *Romer*, 517 U.S. at 624) (internal quotation marks omitted).

390. *Id.* at 865 (quoting *Romer*, 517 U.S. at 627) (internal quotation marks omitted).

391. *Id.* (alteration in original) (quoting *Romer*, 517 U.S. at 632).

392. *Romer*, 517 U.S. at 635–36.

393. *Citizens for Equal Prot.*, 455 F.3d at 865.

394. *Id.* (quoting Citizens for Equal Prot., Inc. v. Bruning, 368 F. Supp. 2d 980, 985 n.1 (D. Neb. 2005), *rev'd*, 455 F.3d 859 (8th Cir. 2006)).

395. *See id.* at 871.

396. *See id.* at 866.

397. *Id.*

398. *Id.* (citing Romer v. Evans, 517 U.S. 620, 648–51 (1996) (Scalia, J., dissenting)).

invalidate the Colorado amendment, its "conclusion was that the enactment 'lacks a rational relationship to legitimate state interests[,]' [which] is the core standard of rational-basis review."[399]

In applying rational basis review, the court explained that it is "highly deferential to the legislature or, in this case, to the electorate that directly adopted [the amendment] by the initiative process."[400] Specifically, "In areas of social and economic policy, a statutory classification that neither proceeds along suspect lines nor infringes fundamental constitutional rights must be upheld against [an] equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational-basis for the classification."[401] Importantly, "[L]aws defining marriage as the union between one man and one woman [are] afforded a 'strong presumption of validity.'"[402] Additionally, "The Equal Protection Clause 'is not a license for courts to judge the wisdom, fairness, or logic of [the voters'] choices.'"[403]

Against this backdrop, the court upheld the amendment.[404] Applying history and tradition, the court noted that "the institution of marriage has always been, in our federal system, the predominant concern of state government."[405] In fact, "The Supreme Court long ago declared, and recently reaffirmed, that a State 'has [an] absolute right to prescribe the conditions upon which the marriage relation between its own citizens shall be created, and the causes for which it may be dissolved.'"[406] As such, the court determined that "[t]his necessarily includes the power to classify those persons who may validly marry."[407] Thus, "In this constitutional environment, rational-basis review must be particularly deferential."[408]

The court then examined and found rational the State's interests in restricting marriage to opposite-sex couples.[409] The State's first interest was that "defining marriage as the union of one man and one woman and extending a variety of benefits to married couples are rationally related to the government interest in 'steering procreation into marriage.'"[410] Indeed, by affording such benefits and protections, "such laws 'encourage procreation to take place within the socially recognized unit that is best suited for raising children.'"[411] The

399. *Id.* (citation omitted) (citing *Romer*, 517 U.S. at 632).

400. *Id.* at 867.

401. *Id.* (quoting FCC v. Beach Commc'ns, Inc., 508 U.S. 307, 313 (1993)) (internal quotation marks omitted).

402. *Id.* (quoting Heller v. Doe, 509 U.S. 312, 319 (1993)).

403. *Id.* (alteration in original) (quoting *Beach Commc'ns, Inc.*, 508 U.S. at 313).

404. *Id.* at 871.

405. *Id.* at 867.

406. *Id.* (quoting Pennoyer v. Neff, 95 U.S. 714, 734–35 (1877), *overruled in part by* Shaffer v. Heitner, 433 U.S. 186 (1977)).

407. *Id.*

408. *Id.*

409. *Id.* at 967–68 (quoting Romer v. Evans, 517 U.S. 620, 632 (1996)).

410. *Id.* at 867.

411. *Id.*

State's argument was predicated "on the traditional notion that two committed heterosexuals are the optimal partnership for raising children, which modern-day homosexual parents understandably decry."[412] Ultimately, the court, without conducting any analysis, accepted the State's claim, holding that "[w]hatever our personal views regarding this political and sociological debate, we cannot conclude that the State's justification 'lacks a rational relationship to legitimate state interests.'"[413] Consequently, the "expressed intent of traditional marriage laws—to encourage heterosexual couples to bear and raise children" was found to satisfy the rational basis inquiry.[414]

The court's decision is less important than the reasoning it used to arrive at its result. Certainly the court was correct in finding that same-sex marriage did not qualify as a fundamental right.[415] The court was also correct in holding that the state retained wide latitude in regulating marriage and setting conditions concerning the marital relationship.[416] Where the court went wrong, however, was in its equal protection analysis. Simply stated, there was no equal protection analysis. The court was arguably correct in determining that same-sex couples did not warrant strict scrutiny.[417] However, the court's rational basis review was far too deferential. It simply set forth the State's main reasons for restricting marriage to opposite-sex couples, and proceeded to accept them without any analysis whatsoever.[418] The court did not discuss why same-sex marriage would undermine the State's interest in procreation, or why opposite-sex couples somehow provide a more stable home environment than same-sex couples. The court's decision was devoid of substance and lacked the kind of reasoning that even rational basis review requires.

E. Lewis v. Harris

Finally, in *Lewis v. Harris*,[419] plaintiffs, same-sex couples, instituted an action against New Jersey State officials due to their failure to issue the plaintiffs' marriage licenses.[420] The plaintiffs alleged that the state's domestic partnership law violated the constitutional right to liberty, due process, and equal protection.[421] The court was, therefore, confronted with the issues of whether

412. *Id.*
413. *Id.* at 867–68 (quoting *Romer*, 517 U.S. at 632).
414. *Id.* at 868–69.
415. *See id.* at 867 (noting that the prohibition on same-sex marriage was only entitled to rational basis scrutiny).
416. *See id.*
417. *See id.*
418. *See id.*
419. 908 A.2d 196 (N.J. 2006).
420. *Id.* at 200–01.
421. *See id.* at 200.

the plaintiffs had (1) a fundamental right to marriage, and (2) suffered unconstitutional discrimination under the Equal Protection Clause.[422]

The court began its analysis with a discussion of whether there was a fundamental right to same-sex marriage.[423] In assessing their "liberty claim," the court focused on "whether the right of a person to marry someone of the same sex is so deeply rooted in the traditions and collective conscience of our people that it must be deemed fundamental."[424] The court explained that "[w]e 'look to the traditions and [collective] conscience of our people to determine whether a principle is so rooted [there] . . . as to be ranked as fundamental.'"[425] The court then stated that its substantive due process analysis ultimately involved a two-step inquiry.[426] In addition to examining history and tradition, the court stated that "the asserted fundamental liberty interest must be clearly identified."[427]

The court explained that the right to marry, at both the federal and state level, is a fundamental right.[428] Importantly, however, "the liberty interest at stake is not some undifferentiated, abstract right to marriage, but rather the right of people of the same sex to marry."[429] Thus, the court stated that "we are concerned only with the question of whether the right to same-sex marriage is deeply rooted in this State's history and its people's collective conscience."[430] Based on this framework, the court found that "New Jersey's civil marriage statutes, . . . which were first enacted in 1912, limit marriage to heterosexual couples."[431] Furthermore, "in passing the Domestic Partnership Act[,] . . . the Legislature explicitly acknowledged that same-sex couples cannot marry."[432]

Perhaps most importantly, "'[d]espite winds of change,' there was almost a universal recognition that 'a lawful marriage requires the performance of a ceremonial marriage of two persons of the opposite sex, a male and a female.'"[433] The court provided further justification:

> Although today there is a nationwide public debate raging over whether same-sex marriage should be authorized under the laws or constitutions of the various states, the framers of the 1947 New Jersey Constitution, much less the drafters of our marriage statutes, could not

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422. *See id.* at 200.

423. *Id.* at 206–11 (citations omitted).

424. *Id.* at 206.

425. *Id.* at 207 (alteration in original) (quoting King v. S. Jersey Nat'l Bank, 330 A.2d 1, 10 (N.J. 1974)) (internal quotation marks omitted).

426. *Id.*

427. *Id.*

428. *Id.*

429. *Id.* at 208.

430. *Id.*

431. *Id.*

432. *Id.*

433. *Id.* (alteration in original) (quoting M.T. v. J.T., 355 A.2d. 204, 207 (N.J. Super. Ct. App. Div. 1976)).

> have imagined that the liberty right protected by [the New Jersey Constitution] embraced the right of a person to marry someone of his or her own sex.[434]
>
> [Accordingly,] despite the rich diversity of this State, the tolerance and goodness of its people, and the many recent advances made by gays and lesbians toward achieving social acceptance and equality under the law, we cannot find that a right to same-sex marriage is so deeply rooted in the traditions, history, and conscience of the people of this State that it ranks as a fundamental right.[435]

This, however, did not end the inquiry. The next issue was whether New Jersey's statute violated the Equal Protection Clause.[436] The court began by stating that "[w]hen a statute is challenged on the ground that it does not apply evenhandedly to similarly situated people, our equal protection jurisprudence requires that the legislation, in distinguishing between two classes of people, bear a substantial relationship to a legitimate governmental purpose."[437] Moreover, "The test that we have applied to such equal protection claims involves the weighing of three factors: the nature of the right at stake, the extent to which the challenged statutory scheme restricts that right, and the public need for the statutory restriction."[438] Indeed, "The test is a flexible one, measuring the importance of the right against the need for the governmental restriction."[439] Furthermore, "Under that approach, each claim is examined 'on a continuum that reflects the nature of the burdened right and the importance of the governmental restriction.'"[440] As a result, "The more personal the right, the greater the public need must be to justify governmental interference with the exercise of that right."[441] Ultimately, therefore, "[u]nless the public need justifies statutorily limiting the exercise of a claimed right, the State's action is deemed arbitrary."[442]

In applying this test, the court found that the law violated the Equal Protection Clause.[443] First, the court examined the substantial number of benefits that were provided to heterosexual couples, such as tax deductions and survivor benefits, yet denied to same sex couples.[444] Also, the court noted that the Domestic Partnership Act "provides no comparable presumption of dual

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434. *Id.* at 209.

435. *Id.* at 211.

436. *See id.*

437. *Id.* at 212 (citing Caviglia v. Royal Tours of Am., 842 A.2d 125, 132 (N.J. 2004)).

438. *Id.* (citing Greenberg v. Kimmelman, 494 A.2d 294, 302 (N.J. 1985)).

439. *Id.*

440. *Id.* (quoting Sojourner A. v. N.J. Dep't of Human Servs., 828 A.2d 306, 315 (N.J. 2003)).

441. *Id.* (quoting George Harms Constr. Co. v. N.J. Turnpike Auth., 644 A.2d 76, 87 (N.J. 1994)) (internal quotation marks omitted).

442. *Id.*

443. *Id.* at 220–21.

444. *Id.* at 215 (citing N.J. STAT. ANN § 34:15-13 (West 2011); § 54A:3-3(a) (West 2002)).

parentage to the non-biological parent of a child born to a domestic partner."[445] Accordingly, "partners must [have] rel[ied] on costly and time-consuming second-parent adoption procedures."[446] Moreover, the Act was "silent on critical issues relating to custody, visitation, and partner and child support in the event a domestic partnership terminates."[447] Based on these and other factors, the court found that "the economic and financial inequities that are borne by same-sex domestic partners are borne by their children too . . . [because they] are disadvantaged in a way that children in married households are not."[448] Consequently, it was without question that "same-sex couples and their children are not afforded the benefits and protections available to similar heterosexual households."[449]

The court then assessed the State's justification for these distinctions, and found them insufficient. Specifically, the court held that the legislature had not "articulated any legitimate public need for depriving same-sex couples of the host of benefits and privileges" provided to married couples.[450] The differential treatment, to be sure, was contrary to "the public policy of this State, [which was] to eliminate sexual orientation discrimination and support legally sanctioned domestic partnerships."[451] In fact, the court found it inconsistent that the legislature had previously enacted a law prohibiting discriminating against individuals on the basis of sexual orientation, yet simultaneously deprived them of benefits when they were together as couples.[452]

The court also continued to focus on the fact that, by depriving domestic partners of the benefits attendant to marriage, children also suffer adverse consequences.[453] For example, the court saw no "purpose in not affording the child of a same-sex parent, who is a volunteer firefighter or first-aid responder, tuition assistance when the child of married parents, receive such assistance."[454] In addition, the court found it "distinctly unfair about the State recognizing the right of same-sex couples to raise natural and adopted children and placing foster children with those couples, and yet denying those children the financial and social benefits and privileges available to children in heterosexual households."[455] For these reasons, there was no "rational basis for visiting on those children a flawed and unfair scheme directed at their parents."[456] Put differently, "To the extent that families are strengthened by encouraging

445. *Id.* at 216 (citing N.J. STAT. ANN § 9:17-43-44 (West 2002)).
446. *Id.*
447. *Id.*
448. *Id.*
449. *Id.* at 217.
450. *Id.*
451. *Id.*
452. *See id.*
453. *Id.* at 218.
454. *Id.*
455. *Id.*
456. *Id.*

monogamous relationships, whether heterosexual or homosexual, we cannot discern any public need that would justify the legal disabilities that now afflict same-sex domestic partnerships."[457] Consequently, the court held in favor of the plaintiffs, and gave the legislature 180 days to either amend its marriage laws or revise the Domestic Partnership Act to provide homosexuals with the same rights, benefits, and protections that are afforded to married couples.[458]

The New Jersey Supreme Court's decision represents the best application of the three-part proposal. First, the court could have, and should have, repudiated the substantive due process doctrine. However, they did the next best thing, the court interpreted the doctrine in a narrow fashion, where it recognized as fundamental only those rights that were deeply rooted in our nation's history and tradition.[459] Second, the court required that fundamental rights be asserted with specificity, that is, it correctly declined to find as fundamental a right to same-sex marriage under the generalized notion of the right to marry.[460] This was a perfect example of judicial restraint, modesty, and deference to the legislature. Furthermore, by considering the specific nature of the right, the court did not risk future uncertainty for other groups to assert violations of respective marriage statutes, for example, polygamists, under the broad notion of a right to marry. The only problem is that the court should have used the Privileges and Immunities Clause in denying, based on history and tradition, a fundamental right to gay marriage.

Third, the court's equal protection inquiry was exacting, balanced, and thorough. Here, the court was not making new law, usurping the legislature's lawmaking function, or interfering with the democratic process. Instead, the court was safeguarding the plaintiffs' rights to equal protection under the law, namely, the right of same-sex couples to enjoy the same benefits and protections as opposite-sex couples. In making this determination, the court properly assessed the legislature's reasons for the discriminatory treatment by applying a reasonable standard of review, and its decision was based both upon legal and practical principles. There was nothing in its equal protection analysis that evinced judicial overreaching.

The U.S. Supreme Court's use of the three-tiered paradigm suggested in this Article should contain a mixture of the analyses explained in the previous cases. First, although no cases have addressed the issue, the Supreme Court needs to abandon the substantive due process doctrine. It was, and continues to be, a mistake. As such, the Court needs to overrule, at a minimum, *Griswold* and *Roe*. The subject of abortion was and remains a highly divisive issue, and it should be the prerogative of each state, through the democratic process, to enact laws that express its moral and social views on this issue. It is not for the Court to force

457. *Id.*
458. *See id.* at 224.
459. *See id.* at 208.
460. *See id.* at 209.

policy upon fifty states. Second, using the six factors enunciated in this Article, the Court should take a more active approach under the Equal Protection Clause. Finally, the Court should repudiate the *Slaughter-House Cases*, and revive the Privileges and Immunities Clause. In doing so, however, the Court should take a modest and incremental approach toward recognizing new rights as fundamental. Like the New Jersey Supreme Court, it should require that such rights be deeply rooted in our nation's history and tradition, and described with specificity so that the true nature of the right can be analyzed against constitutional standards. This framework will ensure a proper balance because the legislature will retain lawmaking power, while the courts will ensure that such laws do not transgress constitutional safeguards.

V. CONCLUSION

It would be a great moment in our nation's history if same-sex couples were afforded the right to marry in every state. It is also important that women have reproductive freedom, and that we not go back to the days where women were having illegal abortions and putting their health and well-being at great risk. These, and other policies, are important for our country, and based on the principles of freedom, liberty, and equality. The problem, however, is how we got there—the Court, through an unprecedented and unconstitutional use of its judicial power, improperly withdrew these issues from public debate and legislative action. The Court acted in a manner that compromised the power of the people to make law through the process that the Constitution envisioned. In other words, process matters. The means we use are just as important as the end we achieve, and the means need to change. It is time for a realignment of our federal structure, so that current and future issues can be decided in a manner where the courts serve a protective rather than activist function. The courts should safeguard rights through the Equal Protection Clause, not rewrite the Constitution through substantive due process. If we respect this idea, then the laws we make will truly be the law of the people, and not of unelected and unaccountable judges.