1990

Education and Contraception Make Strange Bedfellows: *Brown, Griswold, Lochner,* and the Putative Dilemma of Liberalism

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EDUCATION AND CONTRACEPTION MAKE STRANGE BEDFELLOWS: *BROWN*, *GRISWOLD*, *LOCHNER*, AND THE PUTATIVE DILEMMA OF LIBERALISM

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I. THE DILEMMA

Future historians may contend that the Supreme Court decisions in *Brown v. Board of Education*[1] and *Griswold v. Connecticut*[2] represent the apex of liberal legal and political thought. Thirty-five years after *Brown*, however, the attempt to clarify and implement the jurisprudence of equal protection represented by that case remains incomplete. Programs designed to effectuate the equal protection mandate of *Brown* through methods such as busing, hiring quotas or goals, preferential treatment, and affirmative action continue to incite controversy. The Supreme Court's recent ruling in *City of Richmond v. Croson Co.*[3] demonstrates that the justices remain deeply divided regarding the appropriate role and scope of affirmative action programs involving race-based classification or "reverse discrimination."[4]

The long and difficult road toward practical implementation of *Brown* and the jurisprudence of equal protection can be attributed to many factors. These include the long history of segregation in the United States, the economic and political costs of some remedies, and many realistic and unrealistic fears associated with segregation and integration. It is reasonable to suggest, however, that the *Brown* Court may have unwittingly contributed to this extended controversy by failing to fully articulate a principled foundation for its decision. Indeed, even Herbert Wechsler, who supports the *Brown* decision,

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1. 347 U.S. 483 (1954). *See infra* notes 16-21 & 77-80 for further discussion of *Brown*.

2. 381 U.S. 479 (1965). *See infra* notes 35-66 for further discussion of *Griswold*.

3. 488 U.S. ___, 109 S.Ct. 706 (1989). *See infra* note 96 and accompanying text for further discussion of *Croson Co.*.

4. *Id.* Justice O'Connor wrote the *Croson Co.* majority opinion. Justices Stevens, Kennedy, and Scalia concurred in the judgment, but differed with at least part of Justice O'Connor's analysis. Justice Marshall wrote an extensive and emphatic dissent in which Justices Brennan and Blackmun joined. At least three law reviews have recently wrestled with the problem of affirmative action in symposia. *See* 21 GA. L. REV. 1007-67 (1987), 72 IOWA L. REV. 255-85 (1987), and 26 WAYNE L. REV. 1199-1411 (1980).

is troubled by the Court's failure to clearly ground its opinion in established legal principles.[5]

Some critics of liberal legal and political thought would argue that the Court did not provide a principled basis for the decision because it could not. Such critics deny that liberalism stands on any consistent foundation of principle, and they view the series of cases from *Brown* through *Croson Co.* as evidence of liberalism's inadequacy. Morton Horwitz,[6] for example, argues that *Brown* and *Lochner v. New York*[7] constitute two horns of a dilemma created for liberals by their attitudes toward these two decisions. He claims that since *Lochner* liberals have generally opposed active court review of social and economic legislation as unjustified judicial activism that substitutes the judgment of the court for that of the elected legislature. He contends that since *Lochner* liberals have advocated judicial restraint and deference to the legislature.[8]

Most liberals support *Brown*, however, even though the *Brown* Court closely scrutinized and overturned state legislation regarding segregation in public education. In Horwitz's view, liberals encounter their dilemma because they oppose *Lochner* on the ground that courts should not actively review social or economic legislation, while they support *Brown* in which the Court actively reviewed and overturned social legislation.[9] Horwitz argues that liberals encounter this problem because they attend primarily to individuals rather than to social groups or classes, and because they accept equality of opportunity but reject equality of condition as legitimate goals of government. He contends that analysis focusing on the individual overlooks historical burdens and injustices which create inequalities of condition. According to Horwitz, these inequalities of condition preclude effective equality of opportunity.[10]

Horwitz is not alone in alleging that liberals face a dilemma created by *Lochner* on the one hand and more recent Supreme Court decisions on the other. Justice Black's dissent in *Griswold* presents an analogous challenge. Justice Black interpreted the *Griswold* majority opinion as a return to Lochnerism because he understood the majority to be striking down social legislation on the basis of appeal to personal preference and natural law.[11]

While *Brown* troubles some commentators because it fails to provide a thorough explanation of its constitutional basis, the *Griswold* opinion provides an explanation in terms such as "penumbras," "emanations," and "zones of privacy" that Justice Black objected to as foreign to the Constitution.[12] *Griswold*, like *Brown*, has generated a series of cases in which the Court has struggled to articulate the nature, source, and scope of the right identified in the opinion. Most recently, Justice Blackmun's dissenting opinion in *Webster v.*

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5. Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959). *See infra* notes 16-17 and accompanying text for an account of Wechsler's concerns.

6. Horwitz, *The Jurisprudence of* Brown *and the Dilemmas of Liberalism*, 14 HARV. C.R.-C.L. L. REV. 599 (1979).

7. 198 U.S. 45 (1905). The Court invalidated regulations restricting bakers to sixty-hour work weeks in a decision sometimes thought of as an illegitimate intrusion into the legislature's role. *See infra* notes 86-91 and accompanying text for further discussion of *Lochner*.

8. Horwitz, *supra* note 6, at 599-602.

9. *Id.* at 602-03.

10. *Id.* at 604-10.

11. *Griswold*, 381 U.S. at 515, 522-24 (Black, J., concurring).

12. *See infra* notes 35-66 and accompanying text for further discussion of *Griswold*.

Reproductive Services[13] sharply criticizes the plurality for failing to justify the judgment by addressing the underlying right to privacy. Thus, the privacy cases from *Griswold* to *Webster*, like the equal protection cases from *Brown* to *Croson Co.*, remain highly controversial both within the Court and among the general population.

If one interprets the liberal position on these cases as requiring a commitment to either judicial restraint or judicial activism, then liberals seem to face a binary choice. The court can either: (1) practice judicial restraint by measuring statutes directly against explicit constitutional provisions, or (2) resort to unrestrained judicial activism by substituting personal preference and appeals to natural law or justice for the judgment of the legislature. On this view, *Lochner*, *Brown*, and *Griswold* all exemplify judicial activism. Thus, if one endorses judicial restraint, one rejects *Lochner*, *Brown*, and *Griswold*. On the other hand, one who endorses judicial activism supports all three decisions. Since the liberal must endorse either judicial restraint or judicial activism, and reject the other, he cannot consistently reject *Lochner* but endorse *Griswold* and *Brown*.

Horwitz attributes this simple dichotomy of activism versus restraint to liberals, but he rejects it as misguided. He contends that a more satisfactory analysis requires that one abandon the traditional liberal framework in favor of an approach emphasizing social groups or classes. In this paper, I shall accept the following claims advanced by the critics of liberalism: (1) liberals cannot consistently reject *Lochner* but accept *Brown* and *Griswold* on the basis of a categorical rejection or endorsement of judicial restraint or activism, and (2) this dichotomy of restraint versus activism is misguided. I shall deny, however, that accepting these claims creates any dilemma for liberalism. Rather, liberals can consistently reject *Lochner* while endorsing *Brown* and *Griswold* on the basis of a principled approach to judicial decisionmaking that remains fundamentally liberal. *Griswold* reveals this approach more clearly than does *Brown*. The roots of this approach are present in the dissenting opinions in *Plessy v. Ferguson*[14] and *Lochner*.

This article pursues two projects. First, it advances interpretations of *Griswold* and of *Brown* and its immediate progeny, grounding these cases in traditional liberal thought.[15] Second, it refutes the putative dilemma of liberalism by describing a principled approach to constitutional interpretation that allows liberals to support *Griswold* and *Brown* while rejecting *Lochner*. This account of a principled foundation of *Griswold* and *Brown* and the approach to constitutional interpretation that these cases reveal should prove useful to those who continue to struggle with difficult issues such as those presented in *Croson Co.* and *Webster*. It does not purport to provide easy answers to these cases, however, because hard cases usually involve conflicts among principles or

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13. Webster v. Reproductive Health Services, 109 S.Ct. 3040, 3072 (1989) (Blackmun, J., concurring in part and dissenting in part).

14. 163 U.S. 537 (1896).

15. The term "immediate progeny" refers to the series of *per curiam* opinions that followed shortly after *Brown* and struck down segregation in public facilities other than schools. *See, e.g.*, Mayor of Baltimore v. Dawson, 350 U.S. 877 (1955) (beaches); Holmes v. Atlanta, 350 U.S. 879 (1955) (public golf courses); Gayle v. Browder, 352 U.S. 903 (1956) (city buses); New Orleans City Park Improvement Association v. Detiege, 358 U.S. 54 (1958) (public parks). *See infra* text accompanying note 79.

interests that require balancing and interpretation about which reasonable people may honestly differ.

Neither does this article pretend to advance a new or comprehensive theory of constitutional adjudication. Rather, it attempts to demonstrate that both *Griswold* and *Brown* can be understood in the context of a principled foundation that is consistent both with liberalism and with mainstream approaches to constitutional interpretation. This approach illuminates the ongoing issues represented by *Croson Co.* and *Webster.*

The argument proceeds in the following manner. Section II identifies the apparent problem in a series of civil rights cases starting with *Plessy* and culminating in *Brown* and its immediate progeny. Section III clarifies the concept of liberalism, while section IV interprets *Griswold* as revealing a principled approach to constitutional decisionmaking that is consistent with liberalism. Finally, sections V and VI demonstrate that this approach provides a principled foundation for *Brown* and allows the liberal to consistently endorse both *Brown* and *Griswold* while rejecting *Lochner.*

II. *BROWN* AND THE DILEMMA

Wechsler argues that legislative and judicial decisionmaking differ in that a court's discretion is limited by the requirement that it support its ruling with broad principles transcending the immediate result in generality and neutrality.[16] He found *Brown* and its immediate progeny troubling because the Court failed to provide such a principled explanation for this series of cases. Wechsler noted that the *Brown* Court did not overrule the "separate but equal" policy of *Plessy,* but rather held that in the specific area of public education, separate is not equal. The Court then issued a series of *per curiam* opinions apparently overruling *Plessy* without explanation. Wechsler concluded that these opinions required a principled explanation justifying the decision to overrule *Plessy* in principles of sufficient generality and neutrality.

Wechsler does not completely elucidate his conceptions of generality and neutrality. When he calls for general principles, he apparently means reasons applying to a broad class of cases rather than ones which address only the instant case. By "neutrality" he apparently intends to preclude preferences regarding a particular outcome in a particular case as an appropriate type of reason for judicial decisionmaking.[17] To satisfy Wechsler's requirements, then, one would have to justify the *Brown* decision by appeal to broad principles that extend beyond school desegregation cases and which do not depend on the belief that schools ought to be desegregated.

The concerns raised by *Brown* and its immediate progeny go beyond the lack of explicit explanation for overriding *Plessy* to the standard of review the Court applied in *Brown.* In *Lochner* and other cases of that era, the Court closely scrutinized both the ends and means of social and economic legislation.[18] Critics sharply criticized this practice as improper, contending that the Court violated democratic principles by substituting its judgment for that of the

16. Wechsler, *supra* note 5, at 10-20.
17. *Id.* at 31-35.
18. *Lochner,* 198 U.S. at 52-65. *See also* J. NOWAK, R. ROTUNDA & J. YOUNG, CONSTITUTIONAL LAW 436-40 (2d. ed. 1983) [hereinafter CONSTITUTIONAL LAW].

democratically elected legislature.[19] The Court repudiated such close scrutiny well before the *Brown* decision, and continued to reject Lochnerism after *Brown*. Eleven years after *Brown* Justice Douglas wrote, "[w]e do not sit as a super-legislature to determine the wisdom, need and propriety of laws that touch economic problems, business affairs, or social conditions."[20] In *Brown*, however, the Court subjected the social practice of segregation in public education to careful scrutiny and overturned the legislation that supported it.[21]

In summary, *Brown* and its immediate progeny raise two concerns for those who support it. First, the Court discards the *Plessy* precedent without explicitly overruling it or providing any principled explanation. Second, the Court seemed to return to Lochnerism by subjecting social legislation to close scrutiny. Thus, the Court might appear to some critics to have enacted its preferences into law. In the eyes of a critic who makes such an interpretation, liberals who support *Brown* face Horwitz's dilemma of liberalism. On this interpretation, the *Brown* Court engaged in the practices that liberals criticized in *Lochner*, and it did so without providing a principled explanation for distinguishing the two cases.

III. LIBERALISM

Horwitz gives no clear conception of liberalism, but he provides two characteristics. Liberals support *Brown* but reject *Lochner*, and they prefer to analyze issues from the perspective of the individual rather than in terms of social classes or groups.[22]

John Stuart Mill articulated a principle of government that many people accept as the classic statement of English liberalism. He asserted as an absolute principle governing the relationship between the individual and the society:

> [T]he sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number is self-protection. . . . [T]he only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others. . . . Over himself, over his own body and mind, the individual is sovereign.[23]

Joel Feinberg offers a contemporary formulation of liberalism in his current work on the moral limits of the criminal law.[24] Feinberg contends that limitations on the individual liberty of competent adults require justification ac-

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19. *Lochner*, 198 U.S. at 68-69 (Harlan, J., dissenting); CONSTITUTIONAL LAW, *supra* note 18, at 443-51.

20. *Griswold*, 381 U.S. at 482. *See generally* CONSTITUTIONAL LAW, *supra* note 18, at 443-51.

21. *See generally Brown*, 347 U.S. 483.

22. Horwitz, *supra* note 6, at 599-607.

23. J. MILL, ON LIBERTY 68-69 (G. Himmelfarb ed. 1974) (1859).

24. J. FEINBERG, HARM TO OTHERS: THE MORAL LIMITS OF CRIMINAL LAW 14-15 (1984). Feinberg provides a brief definition of liberalism at this point. His larger project of presenting and defending a liberal theory of the criminal law extends across the entire four-volume work, and his conception of liberalism develops in all four. The other three volumes are: OFFENSE TO OTHERS: THE MORAL LIMITS OF CRIMINAL LAW (1985), HARM TO SELF: THE MORAL LIMITS OF CRIMINAL LAW (1986), and HARMLESS WRONGDOING: THE MORAL LIMITS OF CRIMINAL LAW (1988).

cording to liberty-limiting principles. He argues further that only the liberty-limiting principles directed at preventing harm or serious offense to others justify state coercion through the criminal law.[25]

Feinberg distinguishes among four senses of "autonomy" and focuses attention on autonomy as a right to self-determination or personal sovereignty.[26] When a person possesses autonomy as a right, he has authority to choose for himself over primarily self-regarding matters, especially central life decisions regarding such issues as those involving person, privacy and property.[27] In Feinberg's view, self-determination and the actor's best interests usually correspond, but when they do not, personal sovereignty takes priority. Government may not interfere in voluntary, self-regarding choices by a competent person for that person's own good because the value of autonomy is morally basic, not derivative.[28]

Liberalism, as developed and refined by Feinberg, is the political theory that vests a nonderivative value in autonomy as personal sovereignty and recognizes a presumption in favor of individual liberty that can be overridden only to protect the legitimate interests of others.[29] Clearly, the liberal cannot support the individual's liberty to do whatever he wants. Even the minimalist state that forbids murder and theft limits liberty to an extent. A meaningful statement of liberalism requires a relatively well-defined formulation of the nature and scope of the individual liberty it advocates.

Ronald Dworkin has distinguished two senses of "liberty." The first is liberty as license ($liberty_L$), or the freedom to do what one pleases. The second is liberty as independence ($liberty_I$), or the status of the person as independent and equal rather than subservient. While a right to $liberty_L$ protects specific acts in which the actor may engage, $liberty_I$ is a more abstract concept addressing a person's status as one who is capable of directing his own life according to his own values.

All laws requiring or proscribing any acts at all limit, to some extent, $liberty_L$. Only laws that treat a person as incompetent or subservient limit his liberty as independence. For example, zoning laws that prohibit a property owner in a residential zone from running a commercial enterprise limit the owner's $liberty_L$ to use his property as he wishes, but such laws do not limit $liberty_I$. Laws precluding persons of certain racial or ethnic groups from residing in those residential zones, in contrast, would limit both their $liberty_L$ and their $liberty_I$. Such laws would prevent members of those groups from doing as they wished in such a manner as to impute to them a subservient status as citizens. Dworkin attributes this abstract concept of $liberty_I$ to Mill and argues that such liberty is properly understood as a dimension of equality.

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25. J. FEINBERG, HARM TO OTHERS: THE MORAL LIMITS OF CRIMINAL LAW 9-15 (1984).

26. J. FEINBERG, HARM TO SELF: THE MORAL LIMITS OF CRIMINAL LAW 28-56 (1986).

27. *Id.* at 47-57.

28. *Id.* at 58-62.

29. This paper makes no attempt to provide a complete liberal theory. Such a task would be well beyond the scope of this project. The account of liberalism presented here is only intended to provide the minimal sketch required to pursue the central questions regarding the liberal foundations of *Brown* and *Griswold* and the putative dilemma of liberalism.

According to Dworkin, government recognizes the $liberty_I$ of its citizens when it treats them with equal respect.[30]

Dworkin argues that governments must treat persons with equal concern and respect.[31] Respect is of particular significance here. To treat persons with equal respect is to treat them as equally capable of forming and acting on intelligent conceptions of how their lives should be lived. An individual's right to equal respect is violated when his $liberty_I$ is limited on the grounds that his conception of the good is less worthy than that of others, or when he is not treated as an equal, that is, when his concerns and wishes are not accorded equal weight with those of others in political decisions.

Dworkin identifies the right to be treated with equal concern and respect as the liberal conception of equality.[32] At this abstract level, the apparent tension between liberty and equality dissolves. According to this liberal conception of equality, citizens are equal in that they all share an equal right to $liberty_I$. Conversely, all share $liberty_I$ insofar as they hold equal standing as citizens, and any particular person's $liberty_I$ is limited when he is treated with less than equal respect.[33]

When the liberal conception of equality is understood in terms of liberty, it gives rise to the less abstract right to liberty as independence; when it is viewed in terms of equality, it generates the right to be treated as an equal. Although the rights to $liberty_I$ and to treatment as an equal are less abstract than the liberal conception of equality, they are more abstract than the specific concrete rights to individual $liberty_L$ and to equal shares of societal benefits and burdens that actual persons experience directly in their lives. Specific rights to certain $liberties_L$ and to equal shares of certain societal benefits and burdens give effective content to the more abstract rights to $liberty_I$ and to treatment as an equal.

Dworkin denies, however, that these abstract rights require $liberty_L$ with respect to all actions or absolute equality in all spheres of life. Rather, he argues that the liberal is committed to equal treatment regarding specific societal benefits and burdens, as well as to specific $liberties_L$, only when the liberal conception of equality requires such treatment and $liberties_L$.[34] That is, the liberal conception of equality provides the fundamental principle that grounds specific concrete rights and $liberties_L$.

Interpreted collectively, Mill, Feinberg and Dworkin reveal a picture of liberalism as a political theory that vests a nonderivative value in the autonomy of the individual. This fundamental value for personal sovereignty gives rise to individual rights at three levels of abstraction. At the most abstract level, the liberal conception of equality requires that government treat its citizens with equal concern and respect. Government meets this responsibility by recognizing the somewhat less abstract rights to liberty as independence and to treatment as an equal. Finally, at the least abstract level, there are rights to specific

30. R. DWORKIN, TAKING RIGHTS SERIOUSLY 262-63 (1977).
31. *Id.* at 272-74.
32. *Id.*
33. *Id.* at 273.
34. *Id.* at 272-74.

liberties$_L$ and to equal treatment regarding societal resources, that are required to give effect to the more abstract rights.

Do liberals, such as Mill, Feinberg and Dworkin, face the dilemma that Horwitz attributes to them, or can one identify a principled approach to constitutional decisionmaking that is consistent with this conception of liberalism and will allow liberals to accept *Brown* but reject *Lochner*? The brevity of the *Brown* opinion and the *per curiam* opinions that followed render difficult the task of analyzing the underlying reasoning of these cases. The next section of this paper will interpret the *Griswold* opinion in order to identify an approach to constitutional analysis that is consistent with liberalism.

IV. *GRISWOLD* AND LIBERALISM

The dispute between the majority and the dissenting opinions in *Griswold* involves both the existence of the controversial right to privacy and the form of review the court performed. Justice Douglas, in his majority opinion, found that the first, third, fourth, and fifth amendments create zones of privacy into which the government cannot intrude. Furthermore, he concluded that decisions regarding contraception in the marital relationship fall within the scope of these zones of privacy.[35] The dissenting opinions reasoned that no constitutional provision grants a right to privacy, and further, that the majority's arguments based on the ninth amendment and such concepts as "fundamental liberties" or "traditions and collective conscience" allow judges to rule on the basis of personal preferences or appeals to natural law. The dissent asserted that this reasoning marked a return to Lochnerism.[36]

One alternative interpretation, however, is that the majority recognized a right to privacy justified by a broad underlying right to liberty$_I$. These rights to privacy and liberty$_I$ are revealed by a principled approach to constitutional interpretation that is consistent with liberalism, but does not revert to Lochnerism. This paper does not assert that the *Griswold* majority explicitly articulated this approach, or that it is the only accurate interpretation of the opinion. Rather, this analysis demonstrates that there is at least one principled foundation for the *Griswold* decision that the liberal can endorse without returning to Lochnerism.

The dispute between the majority and the dissent regarding the substantive right to privacy appears to be somewhat confounded by the failure to distinguish two senses of "privacy." Justice Black, in his dissenting opinion, contrasts having one's property seized privately by stealth with having it seized openly.[37] He apparently understands "privacy" in the sense of "[a]bsence or avoidance of publicity or display; a condition approaching to secrecy or concealment."[38]

While this is one correct use of the term "privacy," there is also a sense in which private matters are "[w]ithdrawn or separated from the public body. . .

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35. *Griswold*, 381 U.S. at 482-86.

36. *Id.* at 507-31 (Black, J., and Stewart, J., dissenting). For the sake of brevity, I will refer to the dissenting opinions of Black and Stewart collectively as the dissent. Similarly, I will refer to the opinions of Douglas, Goldberg, Harlan, and White collectively as the majority.

37. *Id.* at 509 (Black, J., dissenting).

38. OXFORD ENGLISH DICTIONARY 1388 (1978).

[o]f, pertaining, or relating to, or affecting a person, or a small intimate body or group of persons apart from the general community; individual, personal."[39] A personal matter is one which is "[o]f, pertaining to, concerning, or affecting the individual person or self (as opposed, variously, to other persons, the general community. . .)."[40] In this sense, a private matter is one that affects the individual and has no effect (or at least no direct, substantial effect) on others. Thus, a private matter is one that is appropriately removed from the public concern or control, and left to the discretion of that individual. This second interpretation of privacy emphasizes personal control rather than secrecy or lack of publicity. A zone of privacy in this sense is a sphere of personal sovereignty, within which the individual is free from government intrusion.

The reasoning of the majority is consistent with the second notion of "privacy." Douglas described zones of privacy surrounding the first, third, fourth and fifth amendments. The first protects freedom to associate, to attend meetings, and to express attitudes by association or membership. The third protects the individual's right to control his own home by refusing to quarter soldiers in it. The fourth secures the individual's control of his person, home, papers, and effects by protecting him from unreasonable searches and seizures. The self-incrimination clause of the fifth amendment protects the individual's control of his own testimony.[41] All four of these zones of privacy identified by Douglas protect more than mere secrecy; they provide the individual with a sphere of personal control from which he may exclude government intrusion.

This interpretation of privacy as a sphere of personal control beyond the reach of government intervention is also evident in the concurring opinions. Justice Goldberg described the right to privacy as the right, as against the government, to be let alone.[42] Justice White included in the right to privacy a series of personal decisions regarding family life into which the state cannot enter.[43]

The majority opinions emphasize that the right to privacy, as opposed to a right to secrecy, is a right to exclusive personal control over certain areas of life. The boundaries of this sphere of personal control are not clearly delineated, but they are at least broad enough to include central family decisions regarding marriage, contraception, and the rearing and education of children. This right to a sphere of personal control calls to mind the liberal value of personal autonomy.

Feinberg's conception of liberalism would recognize a sphere of personal sovereignty encompassing at least those central life decisions that do not adversely affect the legitimate interests of others.[44] Dworkin developed this theme in terms of the liberal conception of equality that gives rise to the abstract right to liberty as independence, and he argued that this broad general

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39. *Id.* at 1388-89.
40. *Id.* at 726.
41. *Griswold*, 381 U.S. at 484.
42. *Id.* at 494 (Goldberg, J., concurring) (quoting Brandeis, J., dissenting in Olmstead v. United States, 277 U.S. 438, 478 (1927)).
43. *Id.* at 502 (White, J., concurring).
44. *See supra* notes 27-28 and accompanying text.

right includes the right to those specific $liberties_L$ that are required to give the general right effect.[45]

On this interpretation, the *Griswold* majority gave content to the liberal ideal of respect for personal autonomy by identifying the broad underlying right of a person to be treated as independent and equal. The Court articulated this right as a right to privacy.[46] This right to privacy (like Dworkin's $right\ to\ liberty_I$) is not a concrete right to specific freedoms or benefits. Rather, it is a right to be treated with respect as an independent, equal person who can direct his own life through autonomous choice. This broad general right is given effect by recognizing specific zones of privacy within which the individual is allowed to decide for himself. In short, the right to privacy can be understood as analogous to Dworkin's $right\ to\ liberty_I$, while the individual zones of privacy the Court identified protect those specific $liberties_L$ that are necessary to give effect to the general underlying $right\ to\ liberty_I$.

There is no indication in *Griswold* that the Court identified a right to privacy broad enough to cover all primarily self-regarding decisions, as Mill and Feinberg advocate. Indeed, subsequent decisions have made it clear that the right recognized by the Court is not that broad.[47] The *Griswold* Court made no attempt to define the contours of this right to privacy except to include within it the right to make one's own decisions regarding contraception in the marital relationship.

While this interpretation of the right to privacy grounds the right in liberal political theory, it does not address the dissent's objections regarding the form of Court review. Justice Black argued in his dissent that no provision of the Constitution explicitly grants such a right to privacy. He criticized the majority's arguments justifying the right to privacy by reference to the ninth amendment, "fundamental liberties," and "traditions and collective conscience" because he asserts that these arguments allow individual judges to rule on the basis of personal preferences or appeals to natural law. Justice Black views *Griswold*, therefore, as a return to Lochnerism in that the Court substitutes its own judgment regarding social and economic issues for that of the legislature.[48] Black's objection to the reasoning of the *Griswold* majority presents liberals with an alleged dilemma defined by the *Lochner* and *Griswold* decisions that is analogous to the dilemma identified by Horwitz in terms of the *Lochner* and *Brown* decisions.

The dissenting opinions in *Griswold* approached constitutional interpretation in a fundamentally different manner than the majority opinions. The dissent interpreted the constitutional provisions serially, while the majority interpreted the Constitution, or at least the Bill of Rights, as an integrated document.

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45. *See supra* notes 30-34 and accompanying text.

46. I am not endorsing the majority's conception of privacy as that which best represents the common usage of the term. It is probably unfortunate that the majority chose the term "privacy," rather than a term such as "personal sovereignty" or "self- determination," for the right they articulated in this case. Such alternative phrases might have avoided some confusion. It is important to recognize, however, that the nature of "privacy" as that term is used by the majority differs from the understanding of it that the dissent seems to have.

47. J. FEINBERG, *supra* note 26, at 87-94. Feinberg reviews later privacy cases that draw the boundaries of the constitutional right to privacy more narrowly than the Millian principle would call for.

The dissenting opinions argued that no particular provision in the Constitution grants a right to privacy.[49] The majority, however, did not claim to find this right in any individual provision. Rather, they supported their opinions with broader Constitutional principles underlying the entire document or a series of related provisions.

On first reading, Douglas' opinion seems to identify several different rights to privacy which occur in the penumbras of different amendments:

> [S]pecific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance. . . . The Ninth Amendment provides: '[t]he enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.'. . . The present case, then, concerns a relationship lying within the zone of privacy created by several fundamental constitutional guarantees.[50]

On one reading, these passages suggest that each of several specific provisions independently creates a penumbral right to privacy that is ancillary to that specific guarantee.

An alternative reading, however, would cast the right to privacy articulated by Douglas as a broad, abstract right underlying several specific constitutional provisions and providing those specific guarantees with a common foundation in principle. This abstract right to privacy calls to mind the abstract right to liberty_I described above[51] insofar as it defines a conception of the proper relationship between the individual and the government. This abstract right to privacy, like the right to liberty_I, calls for a sphere of personal control within which the individual exercises sovereignty. The abstract right to liberty_I requires certain specific liberties_L to give it effect.

Similarly, when Douglas enumerated several specific zones of privacy into which the government may not intrude, he identified specific constitutional guarantees that give effect to the broader, more abstract right to privacy revealed by the Constitution as an integrated whole. That is, Douglas interpreted the Bill of Rights as protecting a broad underlying right to privacy that is closely analogous to, if not interchangeable with, liberty_I. That broad abstract right is manifested by the protection of individual sovereignty provided by the first eight amendments, and it requires the additional liberty_L to make one's own decisions regarding marital and family issues, including the decision to buy and use contraception.

When the Constitution is approached in this manner, explicit constitutional guarantees serve two purposes. First, they protect specific concrete rights, and second, they provide evidence from which the Court can infer the underlying political principles regarding the proper relation between the individual and the state that are contemplated by the Constitution. The ninth and

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48. *Griswold*, 381 U.S. at 511-24 (Black, J., dissenting).
49. *Id.* at 508, 510, 520-21 (Black, J., dissenting), 528, 530 (Stewart, J., dissenting).
50. *Id.* at 484-85.
51. *See supra* notes 30-33 and accompanying text.

fourteenth amendments, then, allow the Court to protect additional specific rights that are necessary to give effect to those underlying principles.

Douglas describes the right to privacy as "older than our Bill of Rights."[52] Some critics might understand this phrase as an attempt to ground the right in natural law. On the interpretation suggested here, however, the phrase is an appeal to the underlying principles of the Constitution. These principles are older than the Constitution, but they are not beyond it. Rather, they are the principles of political philosophy that are embodied in the Constitution. The founding fathers did not create a Constitution from whole cloth. Rather, they included in it the principles of political philosophy and the structure of government that they were familiar with and endorsed. Thus, most of the ideas included in the Constitution predated it, but they became part of it when the Constitution was written and adopted.

On this view of constitutional analysis, *Griswold* is not a return to the repudiated Lochnerism because the Court is not free to enact its preferences into law, or to substitute its judgment about social and economic matters for that of the legislature. The Court is charged with the task of identifying the principles embodied in the Constitution, and protecting the specific liberties$_L$ implied by those principles. Reasonable people may differ regarding which rights are so implied, but they must do so by presenting a coherent interpretation of the integrated document that supports their position. One can then evaluate these competing interpretations by analyzing their ability to accommodate the entire document and those cases that are widely accepted as clear cases.[53]

The approach to constitutional analysis attributed here to Douglas is consistent with the concurring opinions. Justice Goldberg reasoned that the fifth and fourteenth amendments protect fundamental rights from infringement by the federal or state governments, and that the ninth amendment provides for fundamental rights that are not listed in the first eight. He specifically rejected personal preference or private notions as appropriate criteria for identifying fundamental rights. Fundamental rights are those which are rooted in the

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52. *Griswold*, 381 U.S. at 486.

53. Justice Black's dissent in *Griswold* contended that the majority in that case returned to *Lochner* in that they claimed the authority to overrule legislative action on the basis of their personal preferences or appeals to natural law. 381 U.S. at 507-27. *See also supra* notes 11-12, 36 and accompanying text. The interpretation presented here demonstrates that the majority position does not claim this authority. Rather, it contends that justices ought to pursue an integrated interpretation of the Constitution and interpret the specific provisions in light of the underlying political philosophy derived from the integrated interpretation.

There is no reason to assume that this response would bring Justice Black into harmonious agreement with the majority. He might object, for example, that the integrated approach tends to produce Constitutional theories that are too abstract to sufficiently constrain the latitude of individual judges. That contention, however, raises a separate issue regarding the relative merits of the serial and integrated approaches. It does not support Justice Black's actual claims regarding personal preferences or natural law, and it does not support the putative dilemma of liberalism. Rather, this contention asserts a position in the ongoing debate regarding competing models of Constitutional interpretation. An interesting formulation of this criticism would present some principled argument purporting to show that the serial approach, or some alternative, provides more effective constraint on judicial latitude while fulfilling the other requirements of an acceptable method of Constitutional adjudication. *See infra* notes 97-98 and accompanying text for further discussion of various issues that critics might want to join with the theses advanced in this article.

"traditions and [collective] conscience of our people."[54] In his dissent, Justice Black questioned the availability of scientific methods of ascertaining which rights are so rooted.[55] Justice Goldberg, however, did not describe a scientific enterprise; rather, he inferred the fundamental nature of the rights in question from "[t]he entire fabric of the Constitution and the purposes that clearly underlie its specific guarantees."[56]

The Douglas and Goldberg analyses suggest that the Court should interpret the entire Constitution and its purposes in order to identify those fundamental rights which are necessary to give effect to the basic principles of government it represents. This paper contends that both Justice Goldberg and Justice Douglas concluded that the Constitution contemplates a relationship between the individual and the state that reflects the basic principles of liberalism. This relationship requires respect for liberty in the broad general sense of the right to be treated as independent and equal. The specific guarantees of the first eight amendments serve both to identify this broad underlying right and to protect it. The ninth and fourteenth amendments serve to protect any additional specific rights that are necessary to effectuate this underlying principle.

Justice Harlan adopted a similar pattern of analysis in his concurring opinion. According to Justice Harlan, the fourteenth amendment protects the "basic values implicit in the concept of ordered liberty."[57] Judicial restraint is enforced by "respect for the teachings of history, [and] solid recognition of the basic values that underlie our society."[58] That is, the Court protects fundamental rights and enforces judicial restraint by interpreting the entire Constitution in order to identify the basic values revealed by the structure of our society as defined by the Constitution.

Justice Harlan's reference to "the concept of ordered liberty" as the principle protected by the fourteenth amendment is consistent with Dworkin's conception of liberty as independence. Dworkin argues that the broad abstract right to liberty_I implies those specific liberties_L that are necessary to give it effect.[59] Similarly, Justice Harlan reasoned that the fourteenth amendment provides those specific protections that are necessary to protect values implicit in the concept of ordered liberty. Justice Harlan took exception with the reasoning in Justice Douglas' opinion because he interpreted Justice Douglas as asserting that the fourteenth amendment protects only those rights specifically identified by the first eight amendments or their radiations.[60] On the interpretation of Justice Douglas suggested above, however, both he and Justice Harlan analyze the entire Constitution, including the first eight amendments, in order to identify the basic principles of government that underlie it. Both

54. 381 U.S. at 493 (Goldberg, J., concurring).
55. *Id.* at 519 (Black, J., dissenting).
56. *Id.* at 495 (Goldberg, J., concurring).
57. *Id.* at 500 (Harlan, J., concurring).
58. *Id.* at 501.
59. *See supra* notes 30-33 and accompanying text.
60. *Griswold*, 381 U.S. at 499-500 (Harlan, J., concurring).

Justices then extend protection to those specific rights implied by the underlying principles.[61]

Justice White's concurring opinion reveals a pattern of analysis consistent with that of Justices Douglas, Goldberg, and Harlan. He concentrated specifically on marital and family issues where he found that prior cases identified a "realm of family life which the state cannot enter."[62] Clearly, Justice White did not purport to find this language in any specific provision of the Constitution. Rather, he described such rights regarding family life as among "the basic civil rights of man."[63]

Some critics might interpret this claim as an appeal to natural law without foundation in the Constitution. On the interpretation advanced here, however, Justice White appealed to the basic principles underlying the specific guarantees in the Constitution when that document is interpreted as an integrated whole. Like the other Justices in the majority, White found that the broad general right to liberty as independence supports many specific Constitutional guarantees, and he concluded that it implies a right to personal sovereignty over marital and family decisions.

In summary, the *Griswold* majority and dissent differ regarding both the substantive right to privacy and the acceptable form of Constitutional analysis. The majority found a substantive right to privacy as a right to individual control of certain spheres of life without government interference. While the scope of this right is not clear, it is at least broad enough to include decisions about basic marital and family issues. The dissent apparently interpreted privacy as confidentiality rather than control, and it found no constitutional right to privacy.

This substantive dispute reflects a corresponding formal dispute. The dissent reviewed the provisions of the Constitution serially, finding no right to privacy in any single provision, and therefore concluded that there is no such right. The majority interpreted the Constitution as an integrated whole, identified broader underlying principles revealed by the entire text, and protected both the specific guarantees explicit in the document and additional rights required to give content to those principles. In this approach, explicit guarantees, such as the first eight amendments, serve two purposes. First, they protect specific liberties$_L$. Second, they provide grounds for inferring the underlying principles of government embodied in the Constitution. These principles, in turn, give rise to additional individual rights required to give them effect, and the ninth amendment recognizes these additional rights as legitimate.

The majority's approach does not give the Court unbridled discretion to appeal to personal preference or natural law. The majority's method of analysis constrains the Justices by a standard very similar to Dworkin's doctrine of political responsibility. This doctrine limits political officials to those political decisions that they can justify with a comprehensive political theory that will

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61. *Compare id.* at 499-502 (Harlan, J., concurring) with *supra* notes 41-47 and accompanying text. Both Douglas and Harlan can be understood as interpreting principles underlying the entire Constitution, rather than separate provisions.

62. *Griswold*, 381 U.S. at 502 (White, J., concurring).

63. *Id.*

also justify all other decisions that they propose to make.[64] Dworkin applies this doctrine to judicial decisionmaking by requiring that his mythical judge, "Hercules," decide hard cases by applying the theory of political morality that best justifies the entire system of law and political institutions in his jurisdiction.[65]

The approach of the *Griswold* majority is less comprehensive than Hercules' task in that it involves only an interpretation of the Constitution as an integrated document, not a justification of the entire legal and political system. It also differs from Dworkin's theory in that it does not assume that there is a single correct theory that best explains the legal system. Individual justices can interpret the Constitution as an integrated document without supposing that they have formulated the single theory that best explains it. They are required, however, to apply a consistent theory of the Constitution and to commit themselves to applying that theory to all relevant cases. In this manner, the constitutional theory of each justice provides the foundation in general and the neutral principles required by Wechsler.[66]

Assuming that the right to privacy articulated by the *Griswold* majority is consistent with liberalism and grounded in a principled approach to constitutional analysis, does this interpretation of *Griswold* resolve the putative dilemma of liberalism? The remaining sections of this paper will apply this interpretation to *Brown*, and argue that *Griswold* and *Brown* are distinguishable from *Lochner* in a manner that enables the liberal to endorse *Griswold* and *Brown* while rejecting *Lochner*.

V. RESOLVING THE DILEMMA

A. Foundations in the Plessy *Dissent*

Brown was the cornerstone of a series of civil-rights cases undermining the rule of "separate but equal" promulgated by *Plessy* in 1896. *Plessy* upheld a state statute requiring separate accommodations for the white and colored races on railroad coaches.[67] The plaintiff challenged the statute under the thirteenth and fourteenth amendments. The Court quickly dismissed the thirteenth amendment challenge, reasoning that this provision only abolishes slavery and involuntary servitude.[68]

The Court asserted that the fourteenth amendment was intended to insure legal equality for the recently emancipated slaves. According to the Court, the purpose of the amendment was to protect black persons from special legal burdens or disabilities that would infringe legal rights, but it was not intended to insure social equality. The Court reasoned that laws requiring separate but equal accommodations do not imply legal inferiority or impose special legal

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64. R. DWORKIN, *supra* note 30, at 87.

65. *Id.* at 81-130. I am not defending Dworkin's theory of adjudication as the ultimately correct one. The point is that the formal approach attributed here to the *Griswold* majority is consistent with at least one mainstream theory of adjudication which limits the discretion of judges.

66. *See supra* notes 16-17 and accompanying text.

67. *Plessy*, 163 U.S. 537.

68. *Id.* at 542. The Court reasoned that these practices involved bondage, ownership, or at least control over labor, none of which were present in this case.

burdens, and it concluded that such laws are not contrary to the fourteenth amendment.[69]

Justice Harlan dissented in a manner foreshadowing both the form and the substance of *Griswold*. The majority applied the thirteenth and fourteenth amendments to the facts of the case sequentially. Justice Harlan, in contrast, interpreted the thirteenth, fourteenth, and fifteenth amendments as an integrated set. He concluded that the collective purpose of these three post-Civil War amendments was to secure all the civil rights of full citizenship for the recently emancipated blacks. He reasoned that in order to accomplish this purpose, these amendments must include a positive immunity from legislation implying inferiority or decreasing their security in the enforcement of their rights.[70]

The difference between Justice Harlan's formal approach and the majority's is not that he rejected judicial restraint while the majority endorsed it. Justice Harlan actually advocated a more stringent standard of judicial deference than did the majority. The majority applied a reasonableness standard to the statute in question and concluded that this law constituted an exercise of the state's police power that fell within the scope of the legislature's authority.[71] Justice Harlan rejected the reasonableness standard, reasoning that it is the Court's responsibility to respect the legislative will, even if it is unreasonable, providing that it is Constitutionally valid.[72]

The primary formal difference between the majority and Justice Harlan was that the majority (like the *Griswold* dissent) applied each provision to the facts serially, while Justice Harlan (like the *Griswold* majority) sought the purpose underlying the integrated set of post-Civil War amendments. This formal approach led Justice Harlan to conclude that these three provisions established a right to equality before the law. He reasoned that this right required protection from unfriendly legislation that would lessen the black citizen's security in enforcement of his rights.[73]

As discussed previously, the liberal conception of equality gives rise to less abstract rights to treatment as an equal and to liberty_I.[74] The substantive right to equality before the law that Justice Harlan found in the post-Civil War amendments is strikingly similar to the right to treatment as an equal. Similarly, the *Griswold* majority found a right to privacy regarding marital decisions about contraception. That right protects certain liberties_L which are

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69. *Id.* at 542-48.
70. *Id.* at 555-56 (Harlan, J., dissenting).
71. *Id.* at 550.
72. *Id.* at 558-59 (Harlan, J., dissenting). The majority and Harlan may not have used the term "reasonable" in the same sense. The majority opinion states that the Court can only ask whether the statute constituted a reasonable regulation, and that the Court must grant broad discretion to the legislature on that question. *Id.* at 550-51. Harlan reasoned that the Court must uphold the statute, even if it is unreasonable, providing that it is valid. He asserted that a statute may be unreasonable merely because it is contrary to sound public policy.

If the majority construed "reasonable" in the same sense that Harlan did, then Harlan called for more judicial restraint than did the majority. If, however, the majority intended "reasonable" to be understood as requiring only that the statute pass the constitutional standard of validity by manifesting some rational relation between the regulation and its purpose, then Harlan and the majority apparently endorsed the same standard of judicial restraint. In neither case, however, did Harlan advocate less judicial restraint than did the majority.
73. *Id.* at 555-56 (Harlan, J., dissenting).
74. *See supra* notes 30-34 and accompanying text.

necessary to give effect to the abstract right to liberty$_I$. In short, both the *Griswold* majority and Justice Harlan's *Plessy* dissent adopted the integrated formal approach to constitutional adjudication, and both articulated substantive rights consistent with the view that the liberal conception of equality underlies the Constitution.[75]

B. The Liberal Foundation for Brown

The *Plessy* "separate but equal" doctrine remained in force for approximately sixty years until a series of Supreme Court cases, including *Brown*, effectively overruled *Plessy*. In the earlier cases in this series, the Court ruled that separate graduate programs for blacks failed under the *Plessy* standard because they lacked the tangible or intangible resources of the corresponding programs for white students.[76] These cases did not directly threaten the *Plessy* rule because the separate facilities were not equal.

Brown was pivotal because, for the first time, the Court confronted a case in which the lower courts had found that the separate systems were equal or in the process of becoming equal. The Court directly addressed the status of segregation in public education. It concluded that segregation in public education is inherently unequal, and therefore violates the equal protection clause of the fourteenth amendment. The decision did not overtly overrule *Plessy*, but it did explicitly reject any language in *Plessy* that would be inconsistent with the finding that segregation in public education adversely affects black children.[77]

The unanimous opinion of the Court discussed very little legal doctrine, concentrating instead on the importance of education and on the adverse effects of segregation on black children. The Court reasoned that education is central to an individual's capacity to fulfill his responsibilities as a citizen and to his ability to succeed in life. The opinion cited evidence to support the assertion that segregation in education generates feelings of inferiority on the part of minority children as to their status in the community, adversely affecting them in a manner that is likely to be permanent. It reasoned that segregation would impair these children's motivation to learn, and thus, their educational and mental development. The Court concluded that segregation in education, even in equal facilities, deprives minority children of equal educational opportunity, and therefore violates the equal protection clause of the fourteenth amendment.[78]

The holding in *Brown* is relatively narrow in that it prohibits segregation only in public education, and arguably in other social institutions that are important to the citizen's capacity to fulfill his duty as a citizen and to succeed in life. *Brown*'s immediate progeny, however, struck down segregation regarding public beaches, golf courses, buses, and parks.[79] This entire series of cases collectively abolished segregation in public facilities. Unfortunately, the

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75. *See supra* notes 31-34 and accompanying text regarding the liberal conception of equality.

76. Missouri *ex rel.* Gaines v. Canada, 305 U.S. 337 (1938); Sipuel v. Oklahoma, 332 U.S. 631 (1948); Sweatt v. Painter, 339 U.S. 629 (1950); McLaurin v. Oklahoma State Regents, 339 U.S. 637 (1950).

77. *Brown*, 347 U.S. at 492-95.

78. *Id.* at 493-95.

79. *See* cases cited *supra* note 15.

principled justification for this result is unclear due to the specific focus of the *Brown* opinion on the harmful effects of segregated education and the *per curiam* nature of the opinions that followed *Brown*.

This series of civil rights cases, when viewed in sequence, suggests a progression toward a principled foundation that is consistent with Justice Harlan's *Plessy* dissent and with the liberal conception of equality. The early graduate education cases held that separate is not equal in public education when the tangible or intangible factors that weigh heavily in the value of graduate education are not equal.[80] *Brown* held that separate cannot be equal when the process of segregation implies inferior status regarding a resource of central importance in the society. The cases immediately following *Brown* extended the holding to virtually any community resource. If these cases also represent an extension of the *Brown* rationale, then *Brown* and its progeny stand for the proposition that segregation violates a right protected by the fourteenth amendment whenever it implies inferior status regarding any public resource.

The focus in this progression of cases gradually shifts from the practical value of the resource to the imputation of inferior status to the minority group. That is, *Brown* and its immediate progeny stand for the proposition that racial segregation involving any public resource is unconstitutional because it imputes an inferior status as citizens to the members of the minority group. Even if the separate facilities were equal in their tangible qualities, legally enforced separation would relegate the minority groups to a position of lesser standing. This emphasis on the minority group members' right to be treated as equals calls to mind the liberal conception of equality.

The liberal conception of equality generates the less abstract rights to be treated as an equal and to liberty as independence.[81] The abstract right to $liberty_I$ implies the right to those specific $liberties_L$ that are necessary to give it effect. The *Griswold* majority held that the fourteenth amendment protects the individual's right to make decisions regarding contraception in the marital relationship despite the fact that no specific provision identifies such a right. On the interpretation advanced here, the Court implied this specific right in order to give content to the abstract right to $liberty_I$ that emerged when the Court interpreted the Constitution as an integrated whole.[82]

Similarly, the abstract right to be treated as an equal requires equal shares of social resources in those matters in which such concrete equality is necessary to render effective one's status as a citizen equal to that of others.[83] According to the analysis advanced in section (V)(A), Justice Harlan's dissent in *Plessy* exemplified a pattern analogous to that of the *Griswold* majority. Justice

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80. *See* cases cited *supra* note 76.

81. *See supra* notes 30-34 and accompanying text.

82. *See supra* notes 35-66 and accompanying text. Some might argue that no single $liberty_L$ is literally necessary for $liberty_I$ in the strong sense that a person could not posses $liberty_I$ without that particular $liberty_L$, regardless of what other $liberties_L$ he had. Others might argue that certain $liberties_L$ are necessary to $liberty_I$ in this strong sense. This paper takes no position on this question. It is sufficient for the purpose of this paper to interpret "necessary" in the weaker sense in which the Court has previously interpreted it. "To employ the means necessary to an end, is generally understood as employing any means calculated to produce the end, and not as being confined to those single means, without which the end would be entirely unattainable." McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 413-14 (1819).

83. *See supra* notes 31-34 and accompanying text.

Harlan interpreted the post-Civil War amendments as an integrated set, and he concluded that their purpose was to establish equal status as citizens for the black minority. He derived a right to equal treatment in public accommodations as necessary to protect this broader right to equal status.[84]

Although *Brown* and its immediate progeny do not provide a detailed foundation in general principles, the approach to interpretation attributed above to the *Griswold* majority and the *Plessy* dissent would also apply to *Brown*. Had the *Brown* Court interpreted the entire Constitution as embodying the liberal conception of equality as one of its underlying principles, and the fourteenth amendment as protecting any specific rights necessary to give effect to those principles, it could reasonably have concluded that the equal protection clause implied a right not to be subjected to segregation that would suggest inferior status in relation to any public resource. The claim here is not that the *Brown* Court actually articulated such a rationale; it did not. Rather, the point is that such an approach would provide a coherent foundation in the liberal conception of equality for *Brown* and its immediate progeny, and it would provide the foundation in principles of sufficient generality and neutrality as required by Wechsler.[85]

In summary, the *Griswold* majority and the *Plessy* dissent exemplify the following approach to adjudication, and this approach also provides a plausible foundation for *Brown*. In each case, the Justices analyzed the specific guarantees in the Constitution (or a series of relevant provisions) in order to derive broad underlying principles that provide a common foundation for these provisions. They understood the fourteenth amendment as protecting the specific rights necessary to give effect to the fundamental principles embodied in the Constitution. Thus the individual provisions serve both to protect specific liberties and to reveal the underlying principles, which, in turn, provide the foundation for additional specific rights.

In these three cases, the Justices derived the liberal conception of equality, or some aspect of it, as a broad principle underlying the Constitution. In *Griswold*, the Court found the abstract right to liberty as independence underlying the Constitution. The Court articulated this abstract right as a right to privacy, and concluded that the due process clause of the fourteenth amendment protected the specific liberty_L to decide for oneself whether to purchase and use contraception in the marital relationship as an implied correlate of this abstract right to liberty_I. In the *Plessy* dissent, as well as in *Brown* and its immediate progeny, the justices derived the right to treatment as an equal from the specific guarantees. They then concluded that the equal protection clause of the fourteenth amendment protected the specific right to be free of segregation that implies inferior status.

This construction of these three cases provides the liberal with a consistent, principled foundation for all three opinions. Does it do so, however, without falling prey to the dilemma of liberalism asserted by Horwitz and Justice Black? Specifically, does this analysis of *Griswold* and *Brown* commit the liberal to endorsing *Lochner*?

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84. *See supra* notes 70-75 and accompanying text.
85. *See supra* notes 16-17 and accompanying text.

The *Lochner* Court overturned a New York statute limiting bakers to a sixty-hour work week. In doing so, the Court reasoned that its role was to review police power regulations in order to determine whether they constituted a fair and reasonable exercise of the police power or an unnecessary and arbitrary intrusion into the liberty of the individual. The Court referred to a general right to liberty as well as to the right to enter into contracts and sell one's labor as an aspect of that general liberty.[86] The Court did not make a distinction between liberty as independence and liberty as license. Rather, it asserted its responsibility to review any legislation that limited liberty in general in order to determine whether it constituted a legitimate police power regulation.

This general liberty is not the equivalent of liberty as independence, which is an abstraction that must be given content through the enforcement of certain specific liberties_L. It appears to be a general form of liberty_L; that is, a broad right to do what one wants. Such a general liberty would be limited by virtually any law. According to the majority view, therefore, the Court would have the duty to closely scrutinize the reasonableness of virtually any legislation.

The Court recognized the legitimacy of statutory regulation in the interest of the public health, safety, welfare, or morals. Although the majority denied that it substituted its own judgment for that of the legislature, it reviewed possible arguments in support of the challenged statute as a reasonable health or welfare regulation and found them wanting. The majority concluded that the statute constituted an unwarranted intrusion into individual liberty rather than a legitimate exercise of police power.[87]

Both dissenting opinions, in contrast, distinguished fundamental liberties from the general category of liberty. Justice Holmes explicitly rejected the idea of a general liberty to do whatever one wants. He reasoned that the fourteenth amendment prohibits only legislation that would "infringe fundamental principles as they have been understood by the traditions of our people and our law."[88]

Justice Harlan wrote that the state may not interfere with the citizen's right to "enter into contracts that may be necessary and essential in the enjoyment of the inherent rights belonging to everyone. . . ."[89] He included, among these inherent rights, the rights to use one's faculties in all lawful ways and to earn one's livelihood by any lawful calling.[90] He reasoned, however, that the legislature may regulate liberty of contract, and that the court may not invalidate such regulation unless it is "beyond question, plainly and palpably in excess of legislative power."[91]

These dissenting opinions did not describe a detailed approach to adjudication such as the one attributed in this paper to the *Griswold* majority, the *Plessy* dissent, and *Brown* and its immediate progeny. These opinions at-

86. *Lochner*, 198 U.S. at 53-56.
87. *Id.* at 57-62.
88. *Id.* at 75-76 (Holmes, J., dissenting).
89. *Id.* at 65 (Harlan, J., dissenting).
90. *Id.*
91. *Id.* at 68.

tempted to identify fundamental principles and inherent rights, however, and they reasoned that the Constitution protects these principles and rights rather than a general liberty to do as one wishes. The majority, however, treated any legislative limitation of general individual liberty as subject to Court review for reasonableness. Since most, if not all, social legislation would have some effect on the general liberty of the individual, the Court was asserting its duty to review virtually all social legislation in order to evaluate the reasonableness of the legislature's judgment.

Had the *Lochner* Court adopted the approach attributed in this paper to the *Griswold* and *Brown* Courts, it would have interpreted the Constitution as an integrated whole in order to identify the underlying principles of political philosophy that best support the entire document. Reasonable people will differ regarding which principles best support the Constitution. The liberal would argue, however, that the broad principles underlying the Constitution include the liberal conception of equality and, hence, the less abstract rights to liberty_I and to treatment as an equal. On this interpretation, the Court would ask whether the regulations at issue in *Lochner* violated a liberty_L that is required to give effect to liberty_I.

The abstract right to liberty_I addresses the individual's status as an independent person who is capable of directing his own life according to his own values. Laws that treat the individual as incompetent or subservient violate this right.[92] Laws that prohibit individuals from working, or from pursuing an occupation for which they are otherwise qualified, would reasonably be interpreted as a deprivation of a liberty_L that infringes on liberty_I. Therefore, the Court would subject such laws to close scrutiny. Thus, the liberal would support close scrutiny of the regulations at issue in *Lochner* only if the liberty_L to work as a baker for more than sixty hours a week is necessary to give content to liberty_I.

The liberal would argue that the liberty_L limited by the regulations at issue in *Lochner* is not required to give effect to the individual's abstract right to liberty_I, and therefore, that the Court should not subject these regulations to close scrutiny. The liberal would contend that this distinguishes *Lochner* from *Griswold* and *Brown*, both of which protect rights required by the liberal conception of equality underlying the Constitution. *Griswold* protects the liberty_L to make one's own decisions regarding contraception and family planning which is a central aspect of an individual's life-plan and, thus, of liberty_I. Similarly, *Brown* protects each person's right to equal treatment regarding social resources, thus supporting each individual's claim to treatment as a citizen with equal status.

Some critics might argue that regulations preventing bakers from working more than sixty hours a week violate a liberty_L that is necessary to give effect to liberty_I. This argument could take two forms: first, the critic could contend that limitation of any liberty_L violates liberty_I, or second, he could claim that this specific liberty_L is necessary to give content to liberty_I. The former strategy encounters the problems of defending a general liberty to do

92. *See supra* note 30 and accompanying text.

whatever one wants; such general liberty is limited by virtually any law, including those that proscribe murder or theft.

The second strategy seems more plausible, but it requires substantive argument to show that the right to work as a baker for more than sixty hours a week is necessary to one's status as an independent person who is competent to run his own life according to his own values. Perhaps the most plausible variation on this claim would assert that a law preventing one from working more than sixty hours a week as a baker arbitrarily limits one's right to contract for his own labor, and that this right to determine how one will use his own labor is a liberty_L required by liberty_I.

Many liberals would agree that the right to determine how one will use his own labor is essential to liberty_I. Liberals in the tradition of Mill or Feinberg defend the individual's right to liberty_L in all essentially self-regarding decisions. Liberals limit this contention, however, to fully voluntary choices. The liberal defense of liberty_I reflects the liberal value of autonomy. Only voluntary choices involve the individual's autonomy, and therefore, liberty_I demands respect only for voluntary, self-regarding decisions.[93]

Such liberals would argue that the contracts proscribed by the regulations in dispute in *Lochner* either were not self-regarding, or were not voluntary. If the regulations were intended to maintain the purity of the bread, and thus protect the public health, by preventing bakers from working beyond the point of fatigue, then the proscribed contracts were not entirely self-regarding because they would have increased the danger to others. Ideally, such an argument would cite some evidence that bakers who worked beyond sixty hours a week tended to make more errors as they became fatigued. Regulations limiting liberty_L in order to avoid acts that raise a serious risk of harm to others do not infringe on liberty_I, and hence the liberal can endorse them.

Alternatively, the regulations may have been motivated by the belief that the proscribed contracts were not voluntary because the individual baker was negotiating under coercive circumstances. If the conditions in the industry were such that the individual had to work as many hours as the employer demanded in order to maintain employment, then the decision to work more than sixty hours a week was coerced, and the regulations limited the effect of this coercion. If the regulations limited the effect of coercion rather than a fully voluntary choice, it did not infringe liberty_I.

In summary, if the regulations were intended either to protect the public from contaminated products or to protect the baker from coercive conditions, then these laws were not an arbitrary limitation of the individual's right to determine how he would use his own labor and, therefore, were not a violation of liberty_I. In either case, the critic's argument fails. The liberal can reject *Lochner* because the regulations overturned in that case did not violate liberty_I. The regulations constrained individual decisions that were not self-regarding or not fully voluntary. The liberal would argue that the Court should not have subjected these regulations to close scrutiny because the liberty_L that was limited

93. Feinberg provides a detailed account of the role of voluntariness in the liberal defense of individual autonomy. *See generally* J. FEINBERG, *supra* note 26.

was not required by $liberty_I$. The Court should have accepted, therefore, any reasonable rationale advanced by the legislature.

Suppose, however, that regulations such as those in dispute in *Lochner* were advanced with absolutely no rationale, and that there was no plausible foundation for them. Suppose, for example, that all parties agreed that working more than sixty hours a week created no health hazards for anyone, and that bakers enjoyed a bargaining position such that they were completely free to work as many or as few hours as they chose. In such a case the regulations would constitute an arbitrary limitation of the individual's right to determine how he would use his own labor, and these regulations would interfere with an entirely voluntary, self-regarding choice. Had this been the case in *Lochner*, then the liberal would be committed to endorsing the decision in *Lochner*. Had these conditions actually obtained, however, endorsing *Lochner* would cause no embarrassment.

VI. CONCLUSION

The purposes of this paper have been to advance principled liberal justifications for *Griswold* and *Brown* and to demonstrate that liberals are not faced with a dilemma by their desire to reject *Lochner* while endorsing *Griswold* and *Brown*. Neither of the latter decisions commits one to a return to Lochnerism. One can advance a principled approach to constitutional adjudication that interprets the Constitution as an integrated whole and supports the core of liberalism. On this approach, the liberal conception of equality is a broad underlying principle that one can derive from the Constitution as a whole. This abstract principle generates less abstract rights to liberty as independence and to treatment as an equal. At the most concrete level, there are rights to specific $liberties_L$ and to equal treatment regarding societal resources that are necessary to give effect to the more abstract rights.

Specific constitutional guarantees serve both to protect certain $liberties_L$ and to identify the broader underlying principles. The fourteenth amendment protects all specific rights that are implied by these fundamental principles. The equal protection clause protects the right to equal treatment regarding societal benefits and burdens when such treatment is required to give effect to the abstract right to treatment as an equal. The due process clause protects specific $liberties_L$ that are necessary to give content to the abstract right to $liberty_I$.

Horwitz contends that liberals' concern for individuals prevents them from addressing historical inequalities of condition that deprive the members of certain classes of effective equality of opportunity.[94] The liberal interpretation of the Constitution described in this article, however, contends that the equal protection clause of the fourteenth amendment provides for those concrete protections necessary to give effect to the underlying right to treatment as an equal. When members of a certain group suffer inequalities of condition that prevent effective exercise of the more abstract rights, liberalism not only allows the court to address the actual conditions of inequality, it requires the corrective action needed to give effect to those abstract rights.

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94. *See supra* text accompanying note 10.

This interpretation is consistent with at least some judicially approved affirmative action programs. These programs provide certain advantages to members of minority groups because previous discrimination created inequality of condition which currently precludes effective equality of opportunity.[95] Cases such as *Croson Co.*[96] remain hard cases, but this interpretation suggests a principled framework within which these controversial programs can be evaluated. In each case, the Court must ask whether members of the disadvantaged group suffer such inequality of condition as to prevent them from exercising the abstract right to be treated as an equal. If the answer is yes, then the Court can justifiably intervene in order to render that abstract right effective. Affirmative action plans that provide certain advantages to the disadvantaged groups without undermining the right of others to be treated as equals would constitute one plausible way to achieve this goal.

The most problematic cases are those in which the only efficacious method of vindicating the disadvantaged group's right to be treated as equals disadvantages members of other groups in a manner that undermines their right to be treated as equals. In such a situation, adopting the program in question will violate one party's right to be treated as an equal, while rejecting it will allow the corresponding right for the other party to remain unrealized. Thus, neither option will be fully satisfactory.

Unfortunately, courts sometimes encounter circumstances in which they must chose between two unjust results, and some innocent party must suffer. Sometimes, courts are forced to compare unfair outcomes and to attempt to craft remedies that minimize the severity or duration of injustice. In these cases, courts interpreting the Constitution in the manner advocated in this article would attempt to balance the relative infringements of the abstract right to treatment as equals for each party. These courts would devise a plan intended to maximize effective realization of that right for all. They would recognize, however, that at least one party, and possibly both, would suffer some injustice as a result.

In short, some cases remain hard cases because they require decisions under circumstances in which no course of action is fully fair to all parties. In these cases, all approaches to constitutional adjudication and all substantive political theories, including liberalism, will fail to fully satisfy either the parties or our ideal principles of justice. Contrary to Horwitz's claim, however, the liberal approach to constitutional interpretation described in this paper can take historical inequalities of condition into account when such factors prevent the members of disadvantaged groups from effectively exercising the underlying abstract rights.

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95. *See, e.g.*, United States v. Paradise, 480 U.S. 149 (1987) and Fullilove v. Klutznick, 448 U.S. 448 (1980) (Both cases upheld affirmative action plans designed to compensate for historical patterns of discrimination which had resulted in actual conditions precluding effective equality of opportunity.).

96. 488 U.S. ___, 109 S.Ct. 706 (1989). *See supra* notes 3-4 and accompanying text. The Court affirmed a ruling by the court of appeals that overturned Richmond's affirmative action plan requiring that contractors sub-contract at least thirty percent of awarded city contracts to "minority business enterprises." The Court found that the plan lacked the evidence of prior discrimination required to establish a compelling state interest and that the plan was not narrowly tailored to accomplish a remedial purpose.

Just as *Croson Co.* addresses problematic issues derived from *Brown* and the jurisprudence of equal protection, *Webster* involves controversial state regulation of a liberty_L that creates tension in the law of due process derived from *Griswold*, the right to privacy and liberty_I. As with equal protection, this analysis provides a principled framework within which these issues can be addressed, although it does not supply quick and easy answers. It may, however, provide some assistance in containing the debate within the bounds set by Wechsler's requirement of principled justification.

This paper does not argue that this is the approach that the Court always uses, or that it is the ultimately correct theory of adjudication. Rather, the point is to demonstrate that there is at least one plausible interpretation of the foundations of pivotal cases such as *Griswold* and *Brown* on which the liberal can avoid the putative dilemma of liberalism. Recall that critics such as Horwitz and Justice Black contend that this dilemma arises because liberals reject judicial activism in *Lochner* but support it in *Brown* and *Griswold*.[97]

This article offers a defense of *Brown* and *Griswold* that does not commit liberals to endorsing either *Lochner* or any categorical position regarding judicial activism. This defense involves both a methodological thesis and a substantive one. Methodologically, it endorses the integrated approach to constitutional interpretation rather than the serial one. Substantively, it advances a conception of liberalism that identifies individual rights at three levels of abstraction, and it contends that the *Brown* and *Griswold* majority opinions are consistent with an interpretation of the Constitution as a document embodying this conception of liberalism.

While this article rejects the putative dilemma of liberalism, it does not purport to resolve the ongoing debates regarding constitutional adjudication in general or fourteenth amendment jurisprudence in particular. The methodological thesis demonstrates that the opinions generally supported by liberals[98] take the integrated formal approach rather than the serial one. Critics might attack the methodological thesis by demonstrating that liberals could not consistently endorse the integrated approach or by showing that this approach is problematic in other ways. Mere assertions that the *Brown* and *Griswold* majorities "really" just enacted their preferences into law, however, do not constitute serious criticism. An interesting attack on the methodological thesis might take the form, for example, of an argument supporting the contention that some available alternative approach would provide a more satisfactory constraint on judicial latitude while fulfilling the other requirements of a principled approach to Constitutional adjudication.

Alternately, critics might accept the methodological thesis but contest the substantive one. They might contend that the Constitution represents some political theory other than liberalism more accurately than it does liberalism. Still other critics might argue that the Constitution embodies a different formulation of liberalism than the one advanced here or that the *Brown* and *Griswold* opinion are not consistent with a more fully articulated conception of liberalism.

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97. *See supra* notes 6-14 and accompanying text.

98. That is, the majority opinions in *Brown* and *Griswold* and the dissenting opinions in *Plessy* and *Lochner*.

Many plausible criticisms of *Brown*, *Griswold*, liberalism, and the integrated approach to constitutional adjudication remain. In this article I have tried to demonstrate, however, that profitable pursuit of these issues cannot take the form of the putative dilemma of liberalism or of assertions that these Courts were "really" enacting their personal preferences into law. Rather, helpful discussion requires careful analysis of the political philosophy embodied in the Constitution and examination of competing models of constitutional adjudication in light of that political philosophy.