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E PLURIBUS UNUM: LIBERALISM'S MARCH TO BE THE SINGULAR INFLUENCE ON CIVIL RIGHTS AT THE SUPREME COURT

Aaron J Shuler*

OVERVIEW

Rogers Smith writes that American political culture can best be understood as a blend of liberal, republican, and illiberal ascriptive ideologies.¹ The United States Supreme Court's constitutional jurisprudence has largely reflected this thesis. While the Court moved away from permitting laws that explicitly construct hierarchies in the twentieth century² and made tepid references to egalitarian principles during the Warren Court,³ liberalism has prevailed in the majority of the Court's decisions.⁴ Gains in civil rights through the Fourteenth Amendment's Equal Protection and Substantive Due Process Clauses were achieved primarily through liberal notions of deregulation, a market economy, and individual freedom.⁵ Conversely, State Action, both invidious and benign, has been curtailed by the Court's invalidation of illiberal practices and its neo-liberal intent over impact and color-blind doctrines that strike down remedial State programs. For explicitly constructed hierarchies, such as race, the result is an illusory equal opportunity, not equal results, approach that solidifies the vestiges of past illiberal practices, converting the neo-liberalism of the present into an ascriptive ideology that preserves the hierarchies of the past. For indiscrete minorities not subject to the same comprehensive and pervasive hierarchies, a neo-liberal approach to individual freedom uncompromised by illiberal state animosities toward groups may help to serve the promise of civil rights.

PART I: LIBERALISM

A. Introduction: Rogers Smith's Multiple Traditions

Rogers Smith writes in *Beyond Tocqueville, Myrdal and Hartz: The Multiple Traditions in America* that American politics has been frequently described as

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1. Rogers M. Smith, *Beyond Tocqueville, Myrdal, and Hartz: The Multiple Traditions in America*, 87 AM. POL. SCI. REV. 549, 549 (1993).

2. *See id.* at 550.

3. ROGERS M. SMITH, LIBERALISM AND AMERICAN CONSTITUTIONAL LAW 136 (2d ed. 1990).

4. *See* Smith, *supra* note 1, at 550.

5. *Id.* at 550, 563.

being predominately shaped and defined by liberal democratic principles.⁶ Scholars from Hector St. John Crevecoeur⁷ in the eighteenth century, Harriet Martineau⁸ in the nineteenth, Gunnar Myrdal⁹ and Louis Hartz¹⁰ in the twentieth, and up to the more recent work of legal scholars such as Kenneth Karst,¹¹ follow this basic model launched by Tocqueville's *Democracy in America*.¹² Smith's *Multiple Traditions* view, however, asserts that "American politics is best seen as expressing the interaction of multiple political traditions, including *liberalism, republicanism, and ascriptive forms of Americanism*, which have collectively comprised American political culture, without any constituting it as a whole."¹³

Smith sees this blend of disparate traditions resulting in drastic, pervasive, and persistent hierarchies that define American political culture.¹⁴ He takes issue with the narrow Tocquevillian conclusion that the United States was more egalitarian than Europe because it lacked the traditional ascriptive hierarchies of monarchy and hereditary.¹⁵ Instead, Smith highlights a United States that favored a minority of propertied white men at the country's inception and ascription based on race, sex, and religion going forward.¹⁶ Moreover, these hierarchies were not sequestered among "the poor and uneducated white people in isolated and backward rural areas of the deep South,"¹⁷ as asserted by Gunnar Myrdal; but, they were implemented and defended by "American intellectual and political elites elaborat[ing] distinctive justifications . . . including inegalitarian scriptural readings, the scientific racism of the 'American school' of ethnology, racial and sexual Darwinism, and the romantic cult of Anglo-Saxonism in American historiography."¹⁸ As a result, "for over eighty percent of U.S. history, its laws declared most of the world's population to be ineligible for full American citizenship,"¹⁹ and a firmly-entrenched hierarchy

6. *Id.* at 549.

7. *See generally* J. HECTOR ST. JOHN DE CREVECOEUR, *LETTERS FROM AN AMERICAN FARMER* (Penguin Books 1981) (1782) (a Frenchman actually predating Tocqueville struck by a radical new nation's allergy to government in favor of the individual).

8. *See generally* HARRIET MARTINEAU, *SOCIETY IN AMERICA* (Cambridge Univ. Press 2009) (1837) (an English woman expressing some of the earliest charges of hypocrisy against a sexist, racist nation purporting to be a liberal democracy).

9. *See generally* GUNNAR MYRDAL, *AN AMERICAN DILEMMA: THE NEGRO PROBLEM AND AMERICAN DEMOCRACY* (Harper & Row 1944) (another non-American detailing the exclusionary tendencies of liberal American democracy).

10. *See generally* LOUIS HARTZ, *THE LIBERAL TRADITION IN AMERICA: AN INTERPRETATION OF AMERICAN POLITICAL THOUGHT SINCE THE REVOLUTION* (Harcourt, Brace & World 1955) (the reigning postwar theorist on American political culture explaining American democracy as an unrivaled tradition in the United States born from a revolutionary liberal consensus free from having to shed the antiquated ideologies of the Old World).

11. *See generally* KENNETH KARST, *BELONGING TO AMERICA: EQUAL CITIZENSHIP AND THE CONSTITUTION* (Univ. of Chi. Press 2000) (1835) (the prolific Professor Karst detailing the history of excluding people from an ostensibly liberal American democracy).

12. Smith, *supra* note 1, at 549.

13. *Id.* at 550.

14. *See id.*

15. *Id.* at 549, 551.

16. Smith, *supra* note 1, at 553.

17. *Id.* at 551.

18. *Id.* at 549.

19. *Id.*

with white Protestant men sitting atop prevailed, justified by “credible intellectual and psychological reasons . . . [based in] nature, history, and God.”²⁰

This article seeks to apply Smith’s *Multiple Traditions* thesis to the United States Supreme Court’s treatment of the Fourteenth Amendment to uncover the influences behind its major civil rights decisions. It will argue that liberalism dominates at the Court after mostly, but not completely, shedding its illiberal tendencies. Specifically, it will discuss how tepid and mostly abandoned overtures to republicanism and egalitarianism during the Warren Court have resulted in Smith’s warning about how “the possibility that novel intellectual, political, and legal systems reinforcing racial, ethnic, and gender inequalities might be rebuilt in America in the years ahead” has come to fruition in the Supreme Court’s equal protection doctrine.²¹ This article will argue that the Court’s focus on intent over impact and its “color-blind” approach to racial classifications in the era of subterranean prejudice and indifference or ignorance to inequality solidifies and perpetuates the hierarchies created by ascriptive forms of Americanism under the Court’s liberal notions of “equal laws, not equal results.”²² In addition to Smith’s warning, the Court’s unwillingness to confront its complicity in the perpetuation of hierarchy recalls James Baldwin’s indictment of the “disavowal of domination,” an “ironic innocence” due not to “excusable ignorance but a blindness that is culpable because it is willful.”²³ It is this ironic innocence about the Court’s ascriptive past that renders intent-neutral and color-blind approaches in the present illiberal reinforcements of old ascriptive orders.²⁴

This article will also discuss how regardless of whether the Equal Protection Clause—traditionally associated with equality—or the Substantive Due Process Clause—generally identified with liberty—is invoked, liberal conceptions of rights—as opposed to egalitarian notions of equality—are the driving force behind the Court’s jurisprudence.²⁵ Under this analysis, landmark civil rights decisions appearing to vindicate principles of equality under both the Equal Protection and Substantive Due Process Clauses are better understood as a validation of individual rights in an unregulated market economy. Out of many competing traditions informing the Court’s decisions over time—liberalism, illiberal ascription based on race, sex, religion, and sexuality, and to a lesser and briefer extent republicanism and egalitarianism—one tradition emerges as dominant at the Court: liberalism.²⁶

20. *Id.* at 550.

21. *Id.*

22. *Pers. Adm’r of Mass. v. Feeney*, 442 U.S. 256, 273 (1979). *See infra* note 54.

23. JAMES BALDWIN, *THE FIRE NEXT TIME IN THE PRICE OF THE TICKET: JAMES BALDWIN COLLECTED NON-FICTION* 335–36 (1985), *reprinted in* GEORGE SHULMAN, *AMERICAN PROPHECY: RACE AND REDEMPTION IN AMERICAN POLITICAL CULTURE* 143 (2008).

24. *See, e.g.*, Smith, *supra* note 1 at 549.

25. Despite the likely great expectations that John Bingham and the framers of the Fourteenth Amendment had, and scholarly calls for long overdue recognition, the continued irrelevancy of the Privileges and Immunities Clause after the *Slaughter-House Cases*, 83 U.S. 36 (1873), means that it will be left out of this article. For an insightful, comprehensive analysis of the historical underpinnings and appropriate modern applications of the Fourteenth Amendment, *see* MICHAEL J. PERRY, *WE THE PEOPLE: THE FOURTEENTH AMENDMENT AND THE SUPREME COURT* (2001).

26. *See, e.g.*, Smith, *supra* note 1, at 549.

B. The Liberal Tradition

1. Liberalism and the State

In *Liberalism and American Constitutional Law*, Rogers Smith explains that, “[a]lthough their priorities varied, proponents of the political vision of the moderate [Lockean] Enlightenment, including most of America’s founding generation, accepted that government should be redirected away from prescribing religious, moral, or martial virtue to secular ends of peace, economic growth and prosperity, intellectual progress, and personal liberty.”²⁷ Although there was no singular conception of liberalism,

not only the founding Federalists but even the Anti-Federalists, who were influenced by the civically oriented republican tradition, still were liberals in the ‘decisive sense’ of seeing ‘the end of government as the security of individual liberty, not the promotion of virtue or the fostering of some organic common good.’²⁸

While the republican tradition of civic engagement that Smith discusses in *Liberalism and American Constitutional Law* and *The Multiple Traditions in America* provokes debates about the “‘fundamental contradiction’ of modern (if not human) existence—the impossibility of realizing . . . conflicting aspirations for both personal and communal freedom,”²⁹ American constitutional rights have been primarily defined by liberal and illiberal ascriptive tendencies.³⁰

Similarly, Mary Ann Glendon argues that the triumph of Lockean liberalism over notions of republican virtue has led to a rigid zero-sum rights discourse that demands rights be “absolute, individual, and independent of any necessary relation to responsibilities.”³¹ Glendon attributes rights discourse to the heavy influence of Anglo natural rights theorists John Locke and Thomas Hobbes,³² unleavened by the continental concern for responsibility espoused by Jean-Jacques Rousseau and Immanuel Kant.³³ Moreover, William Blackstone’s out-sized influence³⁴ on American jurisprudence, and his fixation on property as the “cardinal symbol of individual freedom and independence in the United States,”³⁵ goes a long way in

27. SMITH, *supra* note 3, at 3 (citing HENRY F. MAY, *THE ENLIGHTENMENT IN AMERICA* 88–101 (1976)).

28. *Id.* at 14 (citing MAY, *supra* note 27, at 88–90). *See also* GORDON S. WOOD, *HEROICS* 28 (1981).

29. SMITH, *supra* note 3, at 8.

30. *See* Eric J. Mitnick, *Three Models of Group-Differentiated Rights*, 35 COLUM. HUM. RTS. L. REV. 215, 238–41 (2004).

31. MARY ANN GLENDON, *RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE* 12 (1991).

32. *See, e.g.*, RICHARD PRIMUS, *THE AMERICAN LANGUAGE OF RIGHTS* 49 (1999) (discussing the four movements of liberal rights: Hobbes, Locke, Nozick, and Rawls).

33. GLENDON, *supra* note 31, at 13. *See, e.g.*, JEAN-JACQUES ROUSSEAU, *THE SOCIAL CONTRACT* (1968); IMMANUEL KANT, *IDEA FOR A UNIVERSAL HISTORY WITH A COSMOPOLITAN PURPOSE* (2d ed. 1991).

34. GLENDON, *supra* note 31, at 23 (explaining that Blackstone’s Commentaries was often the only legal source available to colonial and post-colonial lawyers in eighteenth century America before decisions of American courts became available early in the nineteenth century).

35. *Id.* at 24.

explaining the bedrock of American liberalism and its later influence on constitutional rights.

While English notions of freehold over real property “stirred [Blackstone’s] lawyerly soul,”³⁶ the principle, if not the exact form, would resonate centuries later. Although a “decline in overt legal solicitude for traditional types of property rights”³⁷ may have occurred in the twentieth century, classical liberal notions of real property’s influence on American constitutional jurisprudence have been replaced by liberal conceptions of profit and privacy as property that continue to dominate American constitutional rights jurisprudence.³⁸ “Privacy was,” Glendon argues, “quite literally, pulled from the hat of property” by Samuel Warren and Louis Brandeis;³⁹ Glendon continues to argue that property rights decisions protecting private letters and lecture notes rested on notions of “inviolable personality” contained within the writings.⁴⁰ The “right to be let alone” combined “the traditional idea of property as marking off a sphere around the individual which no one could enter without permission . . . *a fortiori* [that sphere] must surround the man [in that sphere] and his interior life.”⁴¹

The United States Supreme Court’s civil rights decisions largely reflect Smith and Glendon’s explication of liberalism’s origins and continued hold on American political and legal life.⁴² Smith’s assertions, that illiberal ascriptive policies played a prominent role in American political culture, are consistently illustrated in the Court’s thinking well into the twentieth century,⁴³ while the few victories for civil rights in the nineteenth and early twentieth century were provided by liberal conceptions of property and individualism.⁴⁴ Less persuasive is Smith’s claim that republicanism is a significant part of the multiple traditions that comprise American political culture, at least with respect to the Court’s civil rights decisions.⁴⁵ With the exception of a brief foray into tepid republican and egalitarian concerns by the Warren Court, the broader picture of the Court’s approach to civil rights is more accurately characterized by Glendon’s absolutist rights rhetoric. Moreover, regardless of whether the Court relied on the Equal Protection or Substantive Due Process Clauses, civil rights are best understood and effectively secured through the language of liberalism.⁴⁶ A survey of the Court’s major civil

36. *Id.* at 23.

37. *Id.* at 30.

38. *Id.* at 30, 32.

39. *Id.* at 51.

40. GLENDON, *supra* note 31, at 51.

41. *Id.* at 52.

42. *See generally* Smith, *supra* note 1 (arguing that while scholars have seen the nation as a liberal democratic society, American political culture can be better understood to be the product of multiple traditions). *See also* GLENDON, *supra* note 31 (tracing the particular American rights discourse back to disproportionately influential Anglo natural rights theorists such as Locke and Blackstone).

43. *See generally* Smith, *supra* note 1.

44. *See infra* notes 79–172 (discussing civil rights cases and their relation to liberal conceptions of property and individualism).

45. *See* Smith, *supra* note 1, at 551.

46. Civil rights have certainly been achieved through other constitutional clauses, not to mention statutory schemes, but the focus of this article are the Fourteenth Amendment’s Equal Protection and Substantive Due Process Clauses. The broader point, that American political culture, specifically the Court’s jurisprudence, is best

rights decisions over the past one hundred years⁴⁷ illustrates a nearly monolithic liberal approach to civil rights that promises to strike down barriers to equal opportunity in the present while preserving those of the past.

2. Liberalism and the Supreme Court

While substantive due process can arguably be found in the Fourteenth Amendment, the concept of due process in general dates back much further than its enshrining in the Constitution.⁴⁸ The doctrine's development in the United States,⁴⁹ both before and after its appearance in the Fourteenth Amendment, has led to the understanding that it consists of two parts.⁵⁰ Procedural due process ensures that an individual is afforded meaningful court processes before her life, liberty, or property is taken. The second component, substantive due process, derives from liberal principles that evolved into a doctrine that protects individual rights not specifically listed in the text of the Constitution against State encroachment,⁵¹ no matter how democratically enacted.⁵² Its name, then, is misleading, or even

viewed as a creature of liberalism, is also of course not limited to the Fourteenth Amendment or civil rights. To note just one example, *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964) persuasively demonstrates how the Civil Rights Act of 1964, an act ostensibly passed to address racially-constructed ascription, was validated by the Court, not through the Reconstruction Amendments that had been previously gutted in *The Civil Rights Cases*, 109 U.S. 3 (1883), as an endorsement of racial equality, but through the Commerce Clause as legitimate federal legislation eliminating local illiberal regulation of the national economy.

47. See, e.g., *Strauder v. West Virginia*, 100 U.S. 303 (1880); *Buchanan v. Warley*, 245 U.S. 60 (1917); *Loving v. Virginia*, 388 U.S. 1 (1967); *Meyer v. Nebraska*, 262 U.S. 390 (1923); *Pierce v. Soc'y of Sisters*, 268 U.S. 510 (1925).

48. See Kenneth L. Karst, *The Liberties of Equal Citizens: Groups and the Due Process Clause*, 55 UCLA L. REV. 99, 103 (2007) (noting that the concept of due process as "the law of the land" likely has its roots in the English Magna Carta of 1215).

49. Due process' American conception can be traced back to Lockean and Jeffersonian political theory. Davin J. Hall, *Not So Landmark After All? Lawrence v. Texas: Classical Liberalism and Due Process Jurisprudence*, 13 WM. & MARY BILL RTS. J. 617, 617 (2004) (citing THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776); JOHN LOCKE, SECOND TREATISE OF GOVERNMENT § 123 (C.B. Macpherson ed. 1980) (1690) ("Civil Society's ends are 'the mutual preservation of [citizens'] lives, liberties and estates.'")).

50. See Hall, *supra* note 49, at 617.

51. James W. Ely Jr., *The Oxymoron Reconsidered: Myth and Reality in the Origins of Substantive Due Process*, 16 CONST. COMMENT. 315, 320 (1999). While the Fourteenth Amendment prohibits states from infringing upon a person's procedural and substantive due process rights, the Fifth Amendment is directed at the Federal Government. Guarantees from both amendments date back to protection against arbitrary action from the King in the Magna Carta.

52. Rebecca Brown, *Liberty, the New Equality*, 77 N.Y.U. L. REV. 1491, 1496 (2002) (citing *Republic Natural Gas Co. v. Oklahoma*, 334 U.S. 62, 90 (1948) (Rutledge, J., dissenting) ("The basic question here is really one of substantive due process.")). The term "substantive due process" is thought to have had its first use in 1948. See Ely, *supra* note 51, at 319 (noting that the first Supreme Court justice used the term "substantive due process" in 1948). The concept under a different name—or no name at all—goes back much further, including in the infamous decision of *Dred Scott v. Sandford*, 60 U.S. 393 (1857). Chief Justice Taney held that

[a]n act of Congress which deprives a citizen of the United States of his liberty or property, merely because he came himself or brought his property into a particular Territory of the United States, and who had committed no offense against the laws, could hardly be dignified with the name of due process.

60 U.S. at 450. *But see* Ely, *supra* note 51, at 318 (noting that the use of the doctrine goes back much further than *Dred Scott*, repudiating Professor Bork's assertion that *Dred Scott* is "the fountainhead of substantive due process"). Other arguments based on substantive due process before the Civil War and the passage of the Fourteenth Amendment inverted Justice Taney's conception and argued that "slavery was a deprivation of liberty without a proper basis in law (such as conviction for crime)." KATHLEEN M. SULLIVAN & GERALD GUNTHER, CONSTITUTIONAL LAW 364 (16th ed. 2007).

contradictory, considering that no amount of process—due or otherwise—can extinguish certain rights guaranteed by liberalism.⁵³ Despite Substantive Due Process' ambiguous language, it nevertheless is thought to give the Due Process Clause a substantive component that encompasses unenumerated fundamental—or something akin⁵⁴ to fundamental—rights.⁵⁵

The notion of fundamental rights in the United States, similar to due process' long documented existence, has also been around since its inception—including appearing in the country's founding document.⁵⁶ *Calder v. Bull*⁵⁷ was the first decision of the United States Supreme Court that discussed the idea of “implied rights.”⁵⁸ Howard Gillman writes that these “implied” or unenumerated rights have always been controversial;⁵⁹ but, going all the way back to *Calder*, Justice Chase wrote about “certain vital principles in our free Republican governments that were not expressly restrained by the Constitution.”⁶⁰ Justice Chase refused to “subscribe to the omnipotence of a State Legislature,” or accept that “it is absolute and without control.”⁶¹ *Fletcher v. Peck*⁶² is another early case that considered vested rights that had not been enumerated in the Constitution. Justice Marshall alluded to these “unwritten constitutional principles as an alternative basis for his decision in *Fletcher*.”⁶³ And *Corfield v. Coryell*⁶⁴ is thought to be the first decision to explicitly use the term “fundamental rights” in the American constitutional tradition.⁶⁵ Justice Washington's opinion in *Corfield* explained that these fundamental rights belonged to citizens of free government.⁶⁶ Although

53. Compare JOHN HART ELY, *DEMOCRACY AND DISTRUST* 18 (1980) (referring to substantive due process as on par with saying “green pastel redness”), and ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* 31 (1990) (describing substantive due process as a “momentous sham”), and Ellis v. Hamilton, 669 F.2d. 510, 512 (7th Cir. 1982) (referring to substantive due process as that “ubiquitous oxymoron”) with Ely, *supra* note 51, at 320 (arguing that the notion of due process having both a procedural and substantive component goes all the way back to 1215 England).

54. The Court's experience in discerning, declaring and explaining the nature of rights—fundamental or otherwise—has been as muddled as its adventures in clarifying the substantive due process doctrine. This is unsurprising considering the two areas greatly overlap. This work will discuss many of the fundamental rights cases, but it will not specifically broach the topic in a descriptive or normative manner.

55. Ely, *supra* note 51, at 320 (citing WILLIAM HOLDSWORTH, *A HISTORY OF ENGLISH LAW* 60–63 (4th ed. 1927) (suggesting that history supports a reading that the concept of due process entails both procedure and substance); EDWARD KEYNES, *LIBERTY, PROPERTY, AND PRIVACY: TOWARD A JURISPRUDENCE OF SUBSTANTIVE DUE PROCESS* 11 (1996); FRANK R. STRONG, *SUBSTANTIVE DUE PROCESS OF LAW: A DICHOTOMY OF SENSE AND NONSENSE* 5–7 (1986).

56. The Declaration of Independence specifically mentions “unalienable rights.” *THE DECLARATION OF INDEPENDENCE* para. 2 (U.S. 1776).

57. 3 U.S. 386 (1798).

58. E.g., Howard Gillman, *Regime Politics, Jurisprudential Regimes, and Unenumerated Rights*, 9 U. PA. J. CONST. L. 107, 110 (2006) (citing *Calder*, 3 U.S. at 394).

59. See *id.* at 118.

60. See *id.* at 110.

61. *Calder*, 3 U.S. at 387–88. See also SULLIVAN, *supra* note 52, at 363.

62. 10 U.S. 87 (1810).

63. Gillman, *supra* note 58, at 110.

64. 6 F. Cas. 546, 551–52 (C.C.E.D. Pa.1823).

65. Howard J. Vogel, *The Ordered Liberty of Substantive Due Process and the Future of Constitutional Law as a Rhetorical Art: Variations on a Theme from Justice Cardozo in the United States Supreme Court*, 70 ALB. L. REV. 1473, 1479 (2007).

66. *Id.* (citing *Corfield*, 6 F. Cas. at 551–52).

unenumerated, they could be described as, amongst other things, “the enjoyment of life and liberty,” and considered to be “privileges and immunities.”⁶⁷

Despite the lack of express textual support within the document itself,⁶⁸ advocates of the preservation and protection of fundamental rights would later ground their arguments in the Constitution after the Court’s early and uncertain jurisprudence exemplified by *Calder*.⁶⁹ Initially it was thought that unenumerated rights would find refuge in the Privileges and Immunities Clause of the Fourteenth Amendment.⁷⁰ The *Slaughter-House Cases*⁷¹ rejected and effectively ended this idea over Justice Bradley’s dissent,⁷² arguably stripping the Fourteenth Amendment of one of its primary purposes.⁷³ Despite rejection of the Privileges and Immunities Clause being a home for substantive due process arguments,⁷⁴ the doctrine continued to be utilized, based in the Fourteenth Amendment generally.⁷⁵ The use of the Ninth Amendment’s catchall language,⁷⁶ that reserved rights not expressly given to the Federal Government for the people has appealed to some,⁷⁷ yet never enjoyed an abundance of support. The Substantive Due Process Clause would later stand in its place to guarantee those rights.⁷⁸

67. *Id.* at 1479. The privileges and immunities referred to in this particular opinion being from Article IV of the United States Constitution as opposed to that of the Fourteenth Amendment.

68. *Id.* at 1477.

69. 3 U.S. 386 (1798).

70. Mitchell F. Park, *Defining One’s Own Conception of Existence and the Meaning of the Universe: The Presumption of Liberty in Lawrence v. Texas*, 2006 B.Y.U. L. REV. 837, 841–43 (2006) (citing RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY 60, 61 (2003)). Representative John Bingham, author of the Fourteenth Amendment, “used the words privileges and immunities as a shorthand description of fundamental or constitutional rights that state legislatures could not abridge.” This is again in contrast to the Clause found in Article IV § 2, which reads: “The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.”

71. 83 U.S. 36 (1873).

72. *Id.* at 116. Justice Bradley argued that a citizen’s right to choose was an element of liberty that could not be arbitrarily assailed.

73. Karst, *supra* note 48, at 105–06. *See also* Park, *supra* note 70, at 843–44 (noting that the *Slaughter-House Cases* “eviscerated” Privileges and Immunities Clause).

74. *Saenz v. Roe*, 526 U.S. 489 (1999), breathed some new life into the clause but it has yet to—and likely never will—fulfill what many considered to be its equal citizenship purpose. *See* David H. Gans, *The Unitary Fourteenth Amendment*, 56 EMORY L.J. 907, 908–09 (2007).

75. *See, e.g.*, *Budd v. New York*, 143 U.S. 517, 551 (1892) (Brewer, J., dissenting) (“The paternal theory of government is to me odious. The utmost possible liberty to the individual, and the fullest possible protection to him and his property, is both the limitation and duty of government.”); *Munn v. Illinois*, 94 U.S. 113, 134 (1877) (“[In matters] in which the public has no interest, what is reasonable must be ascertained judicially”); *The Railroad Commission Cases*, 116 U.S. 307, 345–46 (1886) (power of State to regulate is limited); *Chicago v. Minn. & Warehouse Comm’n*, 134 U.S. 418, 458 (1890) (reasonableness of State action is “eminently a question for judicial investigation”); *Mugler v. Kansas*, 123 U.S. 623, 661 (1887) (Court may examine substantive reasonableness of state legislation).

76. U.S. CONST. amend. IX. (“The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people.”).

77. *See* *Griswold v. Connecticut*, 381 U.S. 479, 486–87 (1965) (Goldberg, J., concurring); *Roe v. Wade*, 410 U.S. 113 (1973) (citing but not exclusively relying on Ninth Amendment).

78. *See* Park, *supra* note 70, at 844–45.

C. Liberalism and the Fourteenth Amendment

1. Liberalism v. De Jure Discrimination

The Equal Protection Clause of the Fourteenth Amendment was never as effective and exacting as its strongest proponents may have wanted it to be, but it did enjoy qualified success after its ratification in 1868.⁷⁹ It was most successful in striking down blatant, unexplainable on any grounds other than invidious discrimination in statutory language or application by State actors.⁸⁰ It was far less capable of addressing barely subtle discrimination or outright hostility by pseudo-state actors that frequently fell outside of a scope that was quickly strangled after ratification in the *Civil Rights Cases*.⁸¹ Justice Bradley's eight-to-one majority opinion declared that, "[i]ndividual invasion of individual rights is not the subject matter of the [Fourteenth] Amendment."⁸² Denials to public inns, conveyances, or places of amusement are mere acts of individuals that would be subject, if at all, to any laws the State might make.⁸³ The victories for civil rights that it did achieve over State discrimination—notwithstanding titular assumptions about equal protection being about "equality"—came through liberalism's language of individual rights.

Thus the Equal Protection Clause was able to invalidate a facially biased statute in *West Virginia v. Strauder*⁸⁴ that prohibited blacks from serving on juries. West Virginia's law fell not because of concerns for equal representation in the jury box, nor was it a matter of blacks and whites being equal arbiters of the law.⁸⁵ The law was struck down because the Court found that a black man had a right to not have the possibility of having other blacks hear his case completely and expressly foreclosed by law.⁸⁶ *Strauder* may appear to be a tepid repudiation of de jure racial banishment from the jury box, but instead is best seen as a meek expression of the constitutional right to a jury of one's peers or at least recognition that the State cannot interfere and outright prohibit blacks from having the right to the possibility of racial peers judging them.⁸⁷ In *Yick Wo v. Hopkins*,⁸⁸ a statute ostensibly governing the safety of dry cleaning establishments was facially neutral, but had been enforced every time against Chinese Americans and not once against

79. See, e.g., Erwin Chemerinsky, *The Supreme Court and the Fourteenth Amendment: The Unfulfilled Promise*, 25 LOY. L.A. L. REV. 1143, 1155–56 (1992).

80. See, e.g., *id.*

81. *The Civil Rights Cases*, 109 U.S. 3, 24 (1883) (discussing how the Thirteenth and Fourteenth Amendments are not meant to redress "ordinary civil injuries").

82. *Id.* at 11.

83. *Id.* at 24.

84. 100 U.S. 303 (1880).

85. *Id.* See also *Swain v. Alabama*, 390 U.S. 202 (1965) (rejecting a constitutional entitlement to racial proportionality in juries).

86. 100 U.S. at 312.

87. Other interpretations argue that *Strauder* was about the right to serve on a jury regardless of race. See RICHARD PRIMUS, *THE AMERICAN LANGUAGE OF RIGHTS* 170, 171 (1999) (discussing Akhil Amar, *The Bill of Rights and the Fourteenth Amendment*, 101 YALE L. J. 1193, 1209 (1992) (characterizing jury service as a "right," despite the West Virginia statute's language)).

88. 118 U.S. 356 (1886).

eighty Caucasians.⁸⁹ The Court's ruling focused not on the equality of Chinese Americans, but on striking down dual illiberal violations of individual rights and overregulation to vindicate the right to operate a business in a free market.⁹⁰

In the twentieth century, a victory against overt state racial segregation laws, previously hampered by the State Action Doctrine from the *Civil Rights Cases*, was achieved in *Buchanan v. Warley*.⁹¹ *Buchanan* involved an ordinance seeking to maintain segregation of Louisville's neighborhoods. The ordinance was challenged by a white resident, whose attempt to sell his property was frustrated by a black man, to whom he was to sell the property, refusing to perform the contract because the ordinance forbade him from living in the home he was to purchase.⁹² The Court, in sound Blackstonian logic,⁹³ found that the ordinance interfered "with the civil right of a white man to dispose of his property,"⁹⁴ and thus was an unconstitutional interference with property rights guaranteed in the Fourteenth Amendment.⁹⁵ By bringing the Court's attention to the economic interference attendant to segregation laws, the NAACP's lawyers were able to neutralize a powerful tool of racial oppression by speaking the Court's liberal language.⁹⁶

While *Buchanan* massaged the Court's liberal economic fetish with freedom of contract language to reach public discrimination, *Shelley v. Kraemer*⁹⁷ relied on the Equal Protection Clause to make the Court—and thus the State—complicit in private discrimination.⁹⁸ Thurgood Marshall circumvented the *Civil Rights Cases*' antipathy to rooting out private acts of discrimination in real estate by noting that, while the Constitution may not have forbidden inserting racially restrictive covenants into private property contracts, enforcing those contracts, should a party not abide by the discriminatory language, would require State actors.⁹⁹ In both *Buchanan* and *Shelley*, major weapons of discrimination used to ghettoize blacks were dismantled by summoning the Fourteenth Amendment in service of ridding the real estate market of State interference and ensuring that the rights to contract and freely alienate one's property were left unmolested.¹⁰⁰

While *Shelley* was a liberal victory for the free market that allowed a measure of racial equality in through the back door, it did not overrule the *Civil Rights Cases*.¹⁰¹ The Court thus found itself stuck between vindicating two possibly

89. *Id.* at 363–64, 373–74. There were 280 permits to operate a dry cleaning business in a wood based structure (as opposed to the safer brick or stone structures) requested: the 200 denied were all requested by Chinese, the eighty granted were all requested by Caucasians (although some sources indicate that one Caucasian was denied a permit to operate in a wooden structure).

90. *Id.* at 374.

91. 245 U.S. 60 (1917).

92. *Id.*

93. See GLENDON, *supra* note 31 (noting Glendon's discussion of Blackstone's commentaries).

94. *Yick Wo*, 118 U.S. at 81.

95. *Id.*

96. See, e.g., *id.*

97. 334 U.S. 1 (1948).

98. *Id.* at 20–21 (1948).

99. *Id.* at 13.

100. See *Black v. Cutter Laboratories*, 351 U.S. 291 (1956) (no State action found in judicial enforcement of a private contract).

101. See *Shelley v. Kraemer*, 334 U.S. 1 (1948); cf. *Civil Rights Cases*, 109 U.S. 3 (1883).

conflicting pillars of liberalism: the State should not regulate individual behavior, but nor should it allow inefficiencies—illiberal animosities in this case—to interfere with the market either.¹⁰² The Court was forced to reconcile this tension—and in the process demonstrate its commitment to liberalism over illiberal animosities—in *Burton v. Wilmington Parking Authority*.¹⁰³ In order to reach private discrimination, Justice Clark's "murky opinion"¹⁰⁴ overcame the State Action Doctrine by tying a discriminating restaurant to the State through its lease of State property.¹⁰⁵ *Evans v. Newton*¹⁰⁶ stretched even further to connect the State to private illiberal actors through the Public Function Doctrine that deemed private citizens public actors if they performed duties traditionally assumed by public officials.¹⁰⁷ In a similar "novel and potentially far-reaching"¹⁰⁸ entanglement of public and private, *Reitman v. Mulkey*¹⁰⁹ was able to construe public authorization or encouragement of racial discrimination as State action.¹¹⁰

In addition to State support of private discrimination, Thurgood Marshall, Charles Hamilton Houston, and other NAACP lawyers similarly attacked the apparatus of racial segregation in education one buttress at a time in *Gaines v. Canada*,¹¹¹ *Sweatt v. Painter*,¹¹² *Mclaurin v. Oklahoma State Regents for Higher Education*,¹¹³ through the language of liberalism before *Plessy v. Ferguson*,¹¹⁴ and the collapse of "separate but equal" in *Brown v. Board of Education*.¹¹⁵ *Brown* is popularly viewed as an endorsement of racial equality, but, as Michael Klarman writes, Justice Warren's opinion appears careful not to state a racial classification rule.¹¹⁶ Instead, Justice Warren elevates education to a fundamental right.¹¹⁷ His discussion of *Brown* starts by announcing the Court's intention of considering "public education in the light of its full development and its present place in American life"¹¹⁸ because "[o]nly in this way can it be determined if segregation in public schools deprives these plaintiffs of the equal protection of the laws."¹¹⁹ Given that education is compulsory and "the foundation of good citizenship," the

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102. *The Civil Rights Cases*, 109 U.S. at 11, 17. See also *Shelley*, 334 U.S. at 13.
 103. 365 U.S. 715 (1961).
 104. Michael J. Klarman, *An Interpretive History of Modern Equal Protection*, 90 MICH. L. REV. 213, 271 (1991) (citing Philip B. Kurland, *Egalitarianism and the Warren Court*, 68 MICH. L. REV. 629, 650 (1970)).
 105. *Burton*, 365 U.S. at 723–24, 726.
 106. 382 U.S. 296 (1966).
 107. *Id.* at 302.
 108. *Reitman v. Mulkey*, 387 U.S. 369 at 375–76, 380–81 (Nov. 21, 1966) (LOC, Douglas Papers, Box 1392, case file no. 483) (Harlan, J., dissenting).
 109. 387 U.S. 369 (1967).
 110. *Id.* at 375–76, 380–81.
 111. 305 U.S. 337 (1938) (discussing the right to attend an in-state law school).
 112. 339 U.S. 629 (1950) (discussing the right to attend a "substantively equal" law school).
 113. 339 U.S. 637 (1950) (discussing the right to attend graduate school, decided on the same day as *Gaines*).
 114. 163 U.S. 537 (1896).
 115. 347 U.S. 483 (1954).
 116. Klarman, *supra* note 104, at 246–47.
 117. *Id.*
 118. *Brown*, 347 U.S. at 492.
 119. *Id.* at 493.

State must make it *available* on equal terms when it undertakes to provide it.¹²⁰ Justice Warren’s language, while at first blush seemingly indicative of egalitarian concerns, does not stray too far from liberalism’s mandates.¹²¹ *Brown* did not promise equal schools or equal education for white and black students.¹²² It instead prohibited States from treating students differently based on race after it mandated that the public avail itself to the right that the State was providing.¹²³

The Court reiterated its concern for “equal educational opportunities”¹²⁴ in its discussion of the *Sweatt* and *McLaurin* right to education cases.¹²⁵ Justice Warren’s *Brown* opinion did contain language that could be construed as egalitarian.¹²⁶ He noted a concern for feelings of inferiority attendant to racial segregation; although even this issue was quickly linked back to how separation affects opportunity.¹²⁷ *Brown* was a delicately crafted nine-to-zero decision that sewed together Northern, Southern, New Deal, and post-New Deal justices, under the guidance of a new Chief Justice sympathetic to measures of racial justice.¹²⁸ It did so through the liberal language of rights and equal opportunity.¹²⁹

Professor Klarman also argues that the Court first fully embraced a racial classification rule in *McLaughlin v. Florida*.¹³⁰ *McLaughlin* struck down a Florida law that criminalized cohabitation between unmarried interracial couples.¹³¹ The holding was applied three years later to invalidate the country’s thirteen remaining anti-miscegenation laws in *Loving v. Virginia*.¹³² *McLaughlin* and *Loving*, similar to *Brown*, both demonstrate the apex of the Court’s concern with equality and its employment of egalitarian language.¹³³ The two racial classification rulings, also like *Brown*, however, are replete, arguably dispositively so, with liberal rights language.¹³⁴ While *Brown* might not pass muster without elevating education—at most “equal opportunity to an education”—to a fundamental right, *McLaughlin* and *Loving* are better understood as rulings not affirming the equality of whites and blacks, but as defenses of the right to property and the right to marry.¹³⁵ *McLaughlin* specifically dealt with the right to cohabit.¹³⁶ In more general

120. *Id.*

121. *See Brown*, 347 U.S. 483.

122. 347 U.S. 483. Nor did the Court accept the invitation to mandate equal schools. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973).

123. 347 U.S. at 495–96.

124. *Id.* at 493.

125. *Id.* at 493–94.

126. *See Brown*, 347 U.S. 483.

127. *Id.* at 493–94.

128. Chief Justice Fred Vinson died in September of 1953 after *Brown*’s first argument, leaving newly-appointed Earl Warren to be steward of the Court’s seminal desegregation case. *See* Stephen Ellmann, *The Rule of Law and the Achievement of Unanimity in Brown*, 49 N.Y.L. SCH. L. REV. 741 (2004).

129. *Id.*

130. 379 U.S. 184 (1964).

131. *Id.*

132. 388 U.S. 1 (1967).

133. *See* Klarman, *supra* note 104, at 254–58.

134. *Id.* at 255–57.

135. 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, 263 (2010).

136. *See McLaughlin*, 379 U.S. 184 (1964).

classical liberal terms, *McLaughlin* is a vindication of the castle doctrine.¹³⁷ A man's home is his castle.¹³⁸ While *Buchanan* celebrated free alienation of property,¹³⁹ *McLaughlin* addressed absolute enjoyment of freehold.¹⁴⁰ Combined with the privacy concept conjured out of property by Warren and Brandeis years earlier that would expressly manifest to protect other behavior in the bedroom a year later in *Griswold v. Connecticut*,¹⁴¹ the State's illiberal racial animosities were overcome. *Loving* relied on both the Equal Protection and Substantive Due Process Clauses.¹⁴² Justice Warren wrote about the impermissible use of race to discriminate.¹⁴³ But in both the equal protection and substantive due process sections of the opinion, the fundamental right to marry, the *right* of an *individual* to choose, free from a State's illiberal racial restrictions, was emphasized as opposed to the equality between white and black citizens.¹⁴⁴

While cases like *Brown* and *Loving* undoubtedly provided measures of equality, the most persuasive evidence of Justice Warren's short-lived "egalitarian revolution"¹⁴⁵ is not in its approach to racial equality but its brief stint addresses income inequality.¹⁴⁶ The Court's first "wealth discrimination" ruling came in *Griffin v. Illinois* in which a divided Court held that a "State-created right of appeal against criminal convictions could be conditioned upon production of a trial transcript only if indigent defendants were provided free ones."¹⁴⁷ Justice Black's plurality opinion announced that, "[t]here can be no justice where the kind of trial a man gets depends on the amount of money he has."¹⁴⁸ Klarman notes that *Griffin* is striking because not only does the Court show an unprecedented concern for poverty, but also its egalitarian language goes beyond just prohibiting a State from proactively discriminating on the basis of income to requiring it to accommodate someone based on a lack of wealth.¹⁴⁹ The Court's concern for the indigent continued in the landmark *Gideon v. Wainwright*¹⁵⁰ ruling guaranteeing counsel for defendants facing jail time and the right to counsel at a first appeal in *Douglas v. California*.¹⁵¹

The Warren Court's concern for the poor was extended beyond a criminal rights context in *Harper v. Virginia State Board of Elections*.¹⁵² *Harper* invalidated

137. *Id.*

138. *Id.*

139. *Buchanan v. Warley*, 245 U.S. 60, 82 (1917).

140. *See McLaughlin v. Florida*, 379 U.S. 184 (1964).

141. 381 U.S. 479 (1965), (discussed *infra* pp. 26–31).

142. *See Loving v. Virginia*, 388 U.S. 1 (1967).

143. *Id.*

144. *Id.* at 7–9.

145. Klarman, *supra* note 104, at 257.

146. Racial justice and solicitude for the poor are related and overlap given the relationship between racial hierarchy and income inequality but the two classes are also separate and distinct. *See Shuler, supra* note 135, at 238 (quoting Professor Hutchinson on the Court's equality doctrine).

147. Klarman, *supra* note 104, at 265 (citing *Griffin v. Illinois*, 351 U.S. 12 (1956)).

148. *Griffin*, 351 U.S. at 19.

149. Klarman, *supra* note 104, at 266.

150. 372 U.S. 335 (1963).

151. *Id.*

152. *Harper v. Va. State Bd. Of Elections*, 383 U.S. 663, 668 (1966).

a State poll tax with the Equal Protection Clause, reasoning that “wealth, like race, creed, color, is not germane to one’s ability to participate intelligently in the electoral process.”¹⁵³ *Boddie v. Connecticut*¹⁵⁴ followed *Harper’s* rationale, but also simultaneously tried to limit just how far the Court’s concern for the poor could be extended.¹⁵⁵ While divorce filing fees applied to the indigent were struck down, Justice Harlan attempted to confine the Court’s solicitude for the poor to areas in which the State exercised a monopoly (such as the court system or education as discussed in *Brown* above).¹⁵⁶

While *Griffin* and its progeny no doubt speak to egalitarian concerns and arguably represent the height of the Supreme Court’s concern for economic equality,¹⁵⁷ Klarman rightly, but incompletely, sets this concern within the context of individual rights.¹⁵⁸ While Justices Warren and Black made explicit overtures to the equality of the poor, those platitudes were undergirded by liberal notions of constitutional rights of individuals, not the equality of the indigent as a group.¹⁵⁹ Much like how *Brown* found that the right to education could not be denied to an individual based on race, wealth discrimination was only addressed in *Griffin* because the State was threatening an individual’s Sixth Amendment right to trial and a Fourteenth Amendment right to due process.¹⁶⁰ The same is true for *Gideon*, *Douglas*, *Harper*, and *Boddie*. The indigents had no standing to bring a case before the Court because they were poor.¹⁶¹ They could not petition the Court for economic equality.¹⁶² They could only argue that the State could not infringe upon their individual rights to due process and voting because they were poor.¹⁶³

The Warren Court’s need to stretch the connection between private behavior and State action was somewhat relieved by the passage of the 1964 Civil Rights Act that expressly forbade the private discrimination that the Court had been trying to link to public accommodation.¹⁶⁴ The Commerce Clause seems a better fit to champion the liberal causes of freedom to contract and an unregulated market in a national economy than a Reconstruction Amendment ostensibly concerned with black equality. The fact that the Warren Court tried to apply the Fourteenth Amendment to income inequality and circumvent the *Civil Rights Cases’* strict State Action Doctrine to reach private acts of discrimination is highly suggestive of

153. Klarman, *supra* note 104, at 266 (citing *Harper*, 383 U.S. at 668).

154. 401 U.S. 371 (1971). While Justice Warren left the Court in 1969, the *Boddie* ruling still reflects the Warren Court’s approach to the rights of the indigent. See also *Zablocki v. Redhail*, 434 U.S. 374 (1978) (striking down a Wisconsin statute prohibiting persons with non-custodial children from marrying without first obtaining a court order showing they were financially supporting children).

155. Klarman, *supra* note 104, at 266.

156. *Id.*

157. *Id.* at 269.

158. *Id.* at 265–69.

159. *Id.* at 263–65.

160. *Id.* at 265.

161. See, e.g., *Gideon v. Wainwright*, 372 U.S. 335 (1963), *Douglas v. California*, 372 U.S. 335 (1963), *Harper v. Va. State Bd. Of Elections*, 383 U.S. 663, 668 (1966).

162. *Id.*

163. *Id.*

164. Klarman, *supra* note 104, at 273–79.

egalitarian concerns.¹⁶⁵ It bears repeating, however, that these concerns had to arrive at the Court on the backs of individual constitutional rights.¹⁶⁶ Moreover, egalitarian language usually, if not always, was accompanied by the liberal language of individual rights.¹⁶⁷ Nevertheless, cases such as *Jones v. Alfred Mayer Co.*¹⁶⁸ illustrating the “Justices’ willingness to compromise traditional legal canons in their apparent quest to eradicate private racial discrimination” demonstrate a sincere concern for equality.¹⁶⁹ Or, in the case of Justice Harlan, perhaps his begrudging assent to the Court’s constitutional jiu jitsu in order to reach the “right” result stemmed more from a sense of necessity in the wake of Martin Luther King’s assassination with “a good deal of Washington on fire as a result of race riots.”¹⁷⁰ However, as discussion of explicit illiberal animosities began to recede in the Court’s decisions, so too did an espousal of egalitarian concern, leaving a newly resurgent neo-liberalism to reign mostly unimpeded at the Court. While the Warren Court had stretched the State Action Doctrine to its breaking point, it quickly snapped back, as the Burger Court assembled.¹⁷¹

2. Two Feathers of the Same Liberal Bird

Substantive due process has been equal protection’s Fourteenth Amendment companion in many civil rights decisions.¹⁷² The differences between the two clauses, often thought to rest on a liberty versus equality distinction, are muddled, spawning a cottage industry of scholarship attempting to “untangle the strands of the Fourteenth Amendment.”¹⁷³ The distinctions, while promising academically and still often promoted jurisprudentially, are arguably moot when viewing the clauses as two feathers of the same liberal bird. Regardless of whether equal protection, or substantive due process, or both were invoked, successful civil rights decisions, consciously, or not, demonstrate liberalism’s influence on the Constitution and the Fourteenth Amendment, and employ the language and logic of liberalism to overcome illiberal State interference.¹⁷⁴

Substantive due process’s first judicial incarnation in the United States was as an explicit liberal tool used to strike down State economic regulations “in the name of liberty of contract and vested property rights.”¹⁷⁵ The maiden appearance of

165. See generally *Griffin v. Illinois*, 351 U.S. 12 (1956).

166. See generally *id.* (While Justices Warren and Black made explicit overtures to the equality of the poor, those platitudes were undergirded by liberal notions of constitutional rights of individuals, not the equality of the indigent as a group.)

167. See generally *id.*

168. 392 U.S. 409 (1968).

169. Klarman, *supra* note 104, at 278.

170. *Id.*

171. *Id.*

172. See, e.g., *Bartels v. Iowa*, 262 U.S. 404 (1923) (companion cases to *Meyer v. Nebraska*, discussed *infra* pp. 25–26).

173. Ira C. Lupu, *Untangling the Strands of the Fourteenth Amendment*, 77 MICH. L. REV. 981 (1979).

174. *Id.*

175. See generally Robert E. Riggs, *Substantive Due Process in 1791*, 1990 WIS. L. REV. 941 (1990) (citing Charles Warren, *The New “Liberty” of Contract Under the Fourteenth Amendment*, 39 HARV. L. REV. 431 (1926)), (discussing origins of substantive due process).

substantive due process in the Court's jurisprudence as a ground in and of itself to strike down interfering State legislation after a century of allusions to what the doctrine might mean¹⁷⁶ was likely found in *Allgeyer v. Louisiana*.¹⁷⁷ The Court held that an individual citizen's liberty to enter into a contract in furtherance of business invalidated a State law requiring insurance to be procured through a company that had complied with that particular State's insurance laws, thus, creating an impermissible oligopoly for the State's insurance companies.¹⁷⁸ Striking down economic regulation with the Substantive Due Process Clause reached its apex in the "Lochner era," ushered in by the era's seminal case of *Lochner v. New York*.¹⁷⁹

Lochner involved the State of New York's prohibition of bakers working more than sixty hours in a week¹⁸⁰. The Court struck the statute down as improperly interfering with an individual's right to contract as part of the liberty protected by the Substantive Due Process Clause in the Fourteenth Amendment.¹⁸¹ The following decades saw substantive due process strike down economic legislation that the Court viewed as impermissible restraints on economic liberties.¹⁸² It also, most notably in *Adkins v. Children's Hospital*,¹⁸³ hinted at substantive due process's latent capability to address civil rights matters through liberalism's distaste for interfering with individual freedom in a women's minimum wage case.¹⁸⁴

The *Lochner* era of preserving laissez-faire economics through the notion of economic liberty in the Substantive Due Process Clause ended¹⁸⁵ in the late 1930's in *West Coast Hotel Co. v. Parrish*¹⁸⁶ after the Court began to accede to President Roosevelt's New Deal.¹⁸⁷ Howard Gillman writes, that at the time, *Lochner* itself was not even considered important enough to expressly overrule.¹⁸⁸ The fallout was substantial, however, *Lochner*-type reasoning, (i.e. illegitimate judicial policy making) would be pilloried. Gillman further provides that:

176. See Brown, *supra* note 52, at 90.

177. *Allgeyer v. Louisiana*, 165 U.S. 578 (1897).

178. See *id.* at 590–93.

179. 198 U.S. 45 (1905).

180. *Id.*

181. *Allgeyer*, 165 U.S. 578.

182. See Klarman, *supra* note 104, at 221–22.

183. 261 U.S. 525 (1923) (applying Due Process Clause of the Fifth Amendment).

184. David E. Bernstein, Bolling, *Equal Protection, Due Process, and Lochnerphobia*, 93 GEO. L.J. 1253, 1261–70 (2005), citing *Buchanan*, 245 U.S. 60 (1917) (adopting Justice Harlan's *Berea College* dissent to recognized liberty interests cannot be defeated by discriminatory rationales offered by State).

185. *Lochner's* fall was presaged by *Nebbia v. New York*, 291 U.S. 502 (1934) when the Court upheld state economic legislation instead of preserving any nebulous idea of economic liberty, although it returned a few years later to make its final curtain call in *Morehead v. New York ex rel. Tiplado*, 298 U.S. 587 (1936) (striking down minimum wage laws for women). See Daniel O. Conkle, *The Second Death of Substantive Due Process*, 62 IND. L.J. 215, 217 (1987).

186. 300 U.S. 379 (1937) (upholding minimum wage laws for women, overruling *Morehead*).

187. See generally *Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935) (striking down The National Industrial Recovery Act of 1933); *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936) (striking down The Bituminous Coal Conservation Act of 1935).

188. Howard Gillman, *De-Lochnerizing Lochner*, 85 B.U. L. REV. 859 (2005).

Lochner was transformed into the normative *Lochner*—that is, into the symbol of judges usurping legislative authority by basing decisions on policy preferences rather than law. *Lochner* became that symbol, not because the case itself was an especially good example of that vice, but because [Justice] Holmes' aphoristic dissent proved politically convenient for later generations of lawyers and judges. New Dealers, intent on de-legitimizing the constitutional vision of early twentieth century judicial conservatives found cover under [Justice] Holmes' dissent. Conservatives later resurrected the ghost of *Lochner* as a way of assaulting the civil liberties opinions of the Warren and Burger Courts. *Lochner* had finally become Lochernized.¹⁸⁹

Gillman's assessment of the specific political and legal fallout after the "Lochnerization" of *Lochner* remains informative; however, it bears emphasizing that while judicial conservatives lost substantive due process as an economic weapon against regulation in the midst of a depression, the Clause would resurface shortly thereafter to continue to fight infringements on individual liberty.¹⁹⁰ A scarcely regulated economy in the country's worst economic moment may have been temporarily abandoned, but substantive due process in the service of liberalism, albeit in a slightly different form, had not. *Lochner* was not overruled because it was inappropriate for the Court to safeguard liberty or liberalism, but because the valid public welfare purpose—laissez-faire economics in the midst of a crippling depression—had changed.¹⁹¹ During the Depression, liberty could not be protected adequately *without* regulation, and "the absence of governmental interference into the economic affairs of the working public was harmful to the public good—an irony in which the application of the principle undermines the value embodied in the principle itself."¹⁹²

After its initial use in the area of economic legislation by conservatives to preserve the laissez-faire approach, but before the sully of the *Lochner* name, the substantive due process doctrine was extended beyond economic rights to civil rights as well as liberalism's preference for individual autonomy, and self-determination overcame competing illiberal animosities.¹⁹³ *Meyer v. Nebraska*¹⁹⁴ and *Pierce v. Society of Sisters*¹⁹⁵ are two cases applying the Substantive Due Process Clause to protect decisions regarding the upbringing and education of

189. *Id.* at 861.

190. See Cass R. Sunstein, *Lochner's Legacy*, 87 COLUM. L. REV. 873 (1987).

191. Gillman, *supra* note 188, at 860–62.

192. Rebecca L. Brown, *The Fragmented Liberty Clause*, 41 WM. & MARY L. REV. 65, 83–84 (1999) (citing LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 585 (2d ed. 1988)).

193. Lupu, *supra* note 173, at 986–88.

194. 262 U.S. 390 (1923).

195. 268 U.S. 510 (1925).

children.¹⁹⁶ *Meyer*¹⁹⁷ struck down a World War I-era Nebraska law that prohibited schools that taught children in German,¹⁹⁸ and *Pierce* similarly invalidated an Oregon law precluding private education.¹⁹⁹ The statutes in both instances were facially neutral; however, Germans had been targeted with the statute in *Meyer* after the war ended,²⁰⁰ while Catholic schools were the aim of the law in *Pierce*.²⁰¹ Kenneth Karst points out that both laws were examples of the Temperance Movement to maintain the superior status of Anglo-Protestants over recent Irish and German Catholic immigrants.²⁰² Both cases discussed and came to be understood as withdrawing important decisions with regard to one's children from the State in favor of parents.²⁰³ While *Meyer* and *Pierce* may have resulted in better treatment of Germans, Irish, and Catholics, the decisions were made pursuant to liberal notions of individual rights.²⁰⁴ The Court made no mention of the equality of new immigrants, and an egalitarian strategy on behalf of *Meyer* and *Pierce* emphasizing the equality of foreign Catholics in a still mostly Protestant United States would likely not have had the same traction and success that framing their cases in the language of American liberalism had.²⁰⁵

3. Privacy as Property

Most scholars mark *Griswold v. Connecticut*²⁰⁶ as the beginning of the United States Supreme Court's resuscitation of the Substantive Due Process Clause.²⁰⁷ *Griswold's* indispensable antecedent, however, came four years earlier in *Poe v. Ullman*.²⁰⁸ *Poe* did not hold binding authority over *Griswold* because *Poe's* merits were never addressed by the majority opinion, but the dissents of Justice Douglas, and in particular Justice Harlan, laid the foundation for the future use of substantive due process to secure individual rights—initially under privacy rhetoric and later through the language of individual rights.²⁰⁹ The dissents interwove—at times

196. Both *Meyer* and *Pierce* also analyzed the liberty involved through the prism of the teacher's right to teach but both cases would later be seen as ensuring parental liberty in determining the upbringing of their children.

197. *Bartels v. Iowa, Bohning v. Ohio, and Pohl v. Ohio*, 262 U.S. 404 (1923) were the companion cases decided with *Meyer*.

198. *Meyer*, 262 U.S. at 401–03.

199. *Pierce*, 268 U.S. at 532–34.

200. See *Meyer*, 262 U.S. at 396–97.

201. Karst, *supra* note 48, at 109–11.

202. *Id.* at 110–12.

203. The Court also invalidated a law from Hawaii similar to the one struck down in *Meyer* in 1927. Hawaii had yet to be granted statehood and therefore the law's prohibition of the teaching of certain foreign languages was found to be unconstitutional, pursuant to the Due Process Clause in the Fifth Amendment. See *Farrington v. Tokushige*, 273 U.S. 284 (1927) (applying *Meyer/Pierce* reasoning to the federal government through the Due Process Clause of the Fifth Amendment to strike down a law designed to shut down Japanese language schools). See also *Troxel v. Granville*, 530 U.S. 57 (2000) (overturning a state custody law in favor of parents' discretion).

204. Karst, *supra* note 48, at 111.

205. See generally *id.* (discussing the strategies employed in the *Meyer/Pierce* cases in context of nativism versus substantive due process).

206. 381 U.S. 479 (1965).

207. See e.g. *Park*, *supra* note 70, at 850.

208. 367 U.S. 497 (1961).

209. *Poe*, 367 U.S. 497 (1961) (Harlan, J. concurring).

convoluted, Justice Douglas' especially—privacy principles from the first eight amendments, most importantly the privacy concepts found in the Third and Fourth Amendments, with the Fourteenth Amendment's guarantee of liberty and autonomy.²¹⁰ In addition to that relationship, however, Justice Harlan confirmed that the guarantee of liberty as a safeguard of the most intimate and profound decisions an individual can make with regard to her personal life against State intrusion could be found in the Fourteenth Amendment²¹¹ as a separate and distinct concept from the fundamental rights expressly delineated in the first eight amendments.

What offended Justice Douglas in *Poe* most was the practical requisite in enforcing such a law.²¹² He warned that we could “reach the point where search warrants issued and officers appeared in bedrooms to find out what went on.”²¹³ Making use of contraception a crime meant the intolerable to Justice Douglas—“the State ha[d] entered the innermost sanctum of the home.”²¹⁴ Such actions by the State constituted “an invasion of the privacy that is implicit in a free society,”²¹⁵ as well as Warren and Brandeis' property concept now on the verge of being operationalized in constitutional civil rights.

Justice Harlan dissented separately, yet similarly and much more extensively, to emphasize the gravity of the matter and further elucidate Justice Douglas' substantive due process argument.²¹⁶ His opinion would profoundly influence and serve as the basis for the future of the Court's application of substantive due process.²¹⁷ He, too, wrote that the Connecticut legislation violated the Fourteenth Amendment as an invasion of the most “intimate concerns of an individual's personal life” despite there being “no explicit language [in] the Constitution” announcing it as such.²¹⁸ Nevertheless, Justice Harlan agreed with Justice Douglas that substantive due process was a broad, flexible concept that protected individuals from otherwise democratic legislation enacted by the State that deprived them of life, liberty, or property no matter the procedural fairness involved.²¹⁹ Procedural due process, with its roots in the Magna Carta's *per legem terrae*, “had in the [United States] become bulwarks also against arbitrary legislation,” thus, establishing substantive due process.²²⁰

Justice Harlan noted that “long before the adoption of [the Fourteenth Amendment, the] concepts which are considered to embrace [the] rights which are fundamental, which belong to the citizens of all free governments”²²¹ were of primary concern, a sentiment paralleling Rogers Smith's account of the visions of

210. 367 U.S. 497.

211. *Id.* at 539–50.

212. *See id.* at 509–22 (Douglas, J., dissenting).

213. *Id.* at 520.

214. *Id.* at 521.

215. *Id.* at 520–21.

216. Shuler, *supra* note 135, at 249–56 (2010).

217. *Id.*

218. *Id.* at 251 (citing Justice Harlan's dissent in *Poe*, 367 U.S. at 539).

219. *Poe*, 367 U.S. at 541.

220. *Id.* at 541 (citing *Hurtado v. California*, 110 U.S. 516 (1884)).

221. *Id.* at 541 (citing *Calder, Fletcher, and Corfield*).

both Federalists and Anti-Federalists.²²² Further, Justice Harlan argued that the Court had a history of stating that the Fourteenth Amendment did not merely serve to enforce the enumerated rights in the first eight amendments which were directed by the Federal Government against the states.²²³ Aside from making those expressly articulated rights applicable against the states, an extra component consisting of liberty, however ambiguously expressed, was enshrined.²²⁴ This ambiguity was bereft of formula or code to discern it in a precise fashion, according to Justice Harlan.²²⁵ “[T]he best that could be said [was] that through [the] Court’s decisions it represented the balance which [the United States] built upon postulates of respect for the liberty of the individual.”²²⁶

This concept of liberty, as guaranteed *vis-à-vis* substantive due process, is derived from “the imperative character of [c]onstitutional provisions,” character that “must be discerned from a particular provision’s larger context” . . . not of words, but of history and purposes.²²⁷ Liberty was not “a series of isolated points pricked out,” but instead was to be an inexhaustible “rational continuum” that protected individuals from “arbitrary impositions” and “purposeless restraints.”²²⁹ Justice Harlan was certain that the Connecticut statute deprived the plaintiffs of substantial liberty “in carrying on the most intimate of all personal relationships, and that it [did] so arbitrarily and without any rational, justifying purpose.”²³⁰ Moreover, the legislation and its enforcement offended the relationship an individual had with property and his free enjoyment thereof.²³¹

The *Poe* dissents became law four years later in *Griswold v. Connecticut*.²³² Justice Douglas gleaned privacy principles, or “emanations” forming a penumbra of protection around an individual, from the Third, Fourth, Fifth, and Tenth Amendments to strike down the Connecticut contraception law.²³³ He opted for an approach, grounded in privacy, derived from the Bill of Rights in consultation with

222. See discussion *supra* p. 5.

223. See *Slaughter-House Cases*, 83 U.S. 36 (1873); *Walker v. Sauvinet*, 92 U.S. 90 (1875); *Hurtado v. Cal.*, 110 U.S. 516 (1884); *Presser v. Illinois*, 116 U.S. 252 (1886); *In re Kimmler*, 136 U.S. 436 (1890); *Twining v. New Jersey*, 211 U.S. 78 (1908); *Palko v. Connecticut*, 302 U.S. 319 (1937).

224. *Poe*, 367 U.S. at 516.

225. *Id.* at 542.

226. *Id.* at 539.

227. See Laurence H. Tribe, *Levels of Generality in the Definition of Rights*, 57 U. CHI. L. REV. 1057, 1068–69 (1990) (expounding on Justice Harlan’s *Poe* opinion about “infer[ring] unifying principles at a higher level of abstraction, focusing at times upon rights instrumentally required if one is to enjoy those specified, and a times upon rights logically presupposed if those specified are to make sense.”).

228. *Poe*, 367 U.S. at 542–43. See also Tribe, *supra* note 227, at 1069 (discussing examples of freedom of speech and freedom of religion only making sense if connected by the broader, underlying principles of freedom of thought and conscience).

229. *Poe*, 367 U.S. at 543. The continuum is an extension of previous cases that collaboratively create a theme of preserving certain areas of liberty from State intrusion. *Allgeyer v. Louisiana*, 165 U.S. 578 (1897); *Holden v. Hardy*, 169 U.S. 366 (1898); *Booth v. Illinois*, 184 U.S. 425 (1902); *Nebbia v. New York*, 291 U.S. 502 (1934); *Skinner v. Oklahoma*, 316 U.S. 535 (1942); *Schwartz v. Bd. of Bar Examiners*, 353 U.S. 232 (1957). It further makes sense if “abstracted from the particular spheres of life they protect: free speech is an empty freedom if not possessed by a free mind.” Tribe, *supra* note 227, at 1069.

230. *Poe*, 367 U.S. at 543.

231. Shuler, *supra* note 135, at 252.

232. 381 U.S. 479 (1965).

233. Shuler, *supra* note 135, at 256–60.

Justices still wary of *Lochner's* specter,²³⁴ while Justice Harlan reiterated his substantive due process dissent from *Poe*.²³⁵ While, Justice Douglas' emanations and penumbras concept carried the majority in *Griswold*, protections for individual liberty and privacy, including *Griswold* itself, would later be subsumed under substantive due process precedents²³⁶ as opposed to Justice Douglas' short-lived metaphor.

Lest *Griswold* be considered an endorsement of marital privacy, Warren and Brandeis' newly minted general principle of privacy as property was extended to singles in *Eisenstadt v. Baird*,²³⁷ and minors in *Carey v. Population Services International*.²³⁸ Justice Brennan emphasized the right of an individual to be free from State intrusion in both cases, and upheld "certain areas or zones of privacy" where individuals had an "interest in independence."²³⁹ These zones of privacy, "pulled from the hat of property"²⁴⁰ by Warren and Brandeis decades earlier to cordon off an individual's thoughts, beliefs, and intellectual property, were extended by the Court out of the bedroom to not just birth control, but also whether to give birth.²⁴¹ *Roe v. Wade*²⁴² was decided on substantive due process grounds instead of Justice Douglas' penumbras and emanations doctrine. While Justice Douglas' inartful²⁴³ attempt to avoid *Lochner's* substantive due process taint with metaphorical allusions to the Bill of Rights was quickly abandoned, *Griswold* and its progeny still live on as precedential embodiments of the Warren-Brandeis privacy as property construct.²⁴⁴ The language has changed from "privacy" to liberalism's preferred "liberty," and the constitutional clause has shifted back to the Fourteenth Amendment's Substantive Due Process Clause after a brief stay in the penumbras of the Bill of Rights.²⁴⁵ But while the particular terms and clause briefly varied, the principle and theory being vindicated did not: liberalism's protection of individual rights and property from State intrusion and interference.²⁴⁶

234. This right to privacy approach is thought to have come at Justice Brennan's suggestion and was hoped to gain favor with Justice Black, a staunch believer since 1947 in the incorporation of the first eight amendments of the Bill of Rights against the states. See Karst, *supra* note 48, at 124. Justice Black nevertheless dissented in *Griswold* at length against what he saw as impermissible "*Lochner*" type decision making. *Griswold v. Connecticut*, 381 U.S. 479, 514–27 (1965) (Black, J., dissenting).

235. *Griswold* 381 U.S. at 499–502 (Harlan, J., concurring).

236. See *Lawrence v. Texas*, 539 U.S. 558, 564–65 (2003).

237. 405 U.S. 438 (1972).

238. 431 U.S. 678 (1977).

239. *Id.*

240. See GLENDON, *supra* note 31, at 51.

241. See generally *Roe v. Wade*, 410 U.S. 113 (1973) (Texas criminal abortion statutes prohibiting abortions were found unconstitutional).

242. 410 U.S. 113.

243. With all apologies to William Safire. William Safire, *On Language: Inartful*, N.Y. TIMES MAG., July 20, 2008, at MM14, available at http://www.nytimes.com/2008/07/20/magazine/20wwln-safire-t.html?_r=0.

244. See GLENDON, *supra* note 31, at 51.

245. See *Roe*, 410 U.S. at 164.

246. See generally *Griswold v. Connecticut*, 381 U.S. 479 (1965) (discussing the right of an individual to be free from State intrusion in the bedroom), *Roe*, 410 U.S. 113 (discussing the right of an individual to be free from State intrusion in reproductive matters.)

PART II: NEO-LIBERALISM

A. Arrested Development: Neo-Liberalism's Equal Protection of Ascription

1. Reports of the State's Demise Have Not Been Greatly Exaggerated

Political scientists, seeking to dispel the notion that the United States is “stateless,” have produced ample scholarship in the last thirty years seeking to “bring the state back in.”²⁴⁷ While it is persuasive that American statelessness relative to European democracies is exaggerated given the depth and scope of the American regulatory machine, a resurgent American neo-liberalism starting in the 1970s took the State out of the egalitarian business that it had waded into during the Warren Court.²⁴⁸ A retreat from a proactive approach to equality is perhaps most acutely visible in the Court's significant contraction of the State Action Doctrine.²⁴⁹

Michael Klarman argues that the Warren Court's willingness to circumvent the State Action Doctrine to reach arguably private discrimination augurs in favor of conjecture that it also would have addressed segregation as a result of de facto discrimination in addition to de jure mandates.²⁵⁰ Klarman points to *Green v. County School Board*²⁵¹ in addition to other evidence²⁵² to contend that the Warren Court “would have interpreted the Equal Protection Clause to require actual racial integration.”²⁵³ Klarman is a convincing scholar, but we are only left with what did happen, namely the Burger Court's announcement in *Swann v. Charlotte-Mecklenburg Board of Education*,²⁵⁴ that the Equal Protection Clause would not be in the business of solving de facto segregation.²⁵⁵ The end of Johnson's Great Society and a resurgent neo-liberalism under Nixon was soon reflected at the Court with the replacements of Justices Warren and Fortas with Justices Warren Burger and Harry Blackmun.²⁵⁶ Much has been written about the Burger Court's

247. See generally PETER B. EVANS, DIETRICH RUESCHEMEYER & THEDA SKOCPOL, BRINGING THE STATE BACK IN (1985) (political scientists explaining the State's role in social change); STEPHEN SKOWRONEK, BUILDING A NEW AMERICAN STATE: THE EXPANSION OF NATIONAL ADMINISTRATIVE CAPACITIES, 1877–1920 (1982) (tracking the expansion of national regulatory powers).

248. See Klarman, *supra* note 104, at 283.

249. *Id.* at 276.

250. *Id.* at 279–80.

251. 391 U.S. 430 (1968).

252. “[L]ower court resolutions of the de facto segregation issue, and internal evidence from the first northern school desegregation case.” Klarman, *supra* note 104, at 280 (quoting *Keyes v. Sch. Dist. No. 1*, 413 U.S. 189 (1973)).

253. *Id.* at 281.

254. 402 U.S. 1 (1971). See also *Milliken v. Bradley*, 418 U.S. 717 (1974); Charles R. Lawrence III, *Segregation Misunderstood: The Milliken Decision Revisited*, 12 U.S.F. L. REV. 15 (1977); Dayton Bd. of Educ. v. Brinkman, 433 U.S. 406 (1977); *Columbus Bd. of Educ. v. Penick*, 443 U.S. 449 (1979).

255. See Klarman, *supra* note 104, at 299–303.

256. Powell and Rehnquist arrived a short time after to make up the Burger Court. See *William H. Rehnquist, 1986–2005*, THE SUPREME COURT HISTORICAL SOCIETY, <http://www.supremecourthistory.org/history-of-the-court/chief-justices/william-rehnquist-1986-2005/> (last visited November 15, 2013); *Lewis F. Powell, Jr.*,

“revolution that wasn’t.”²⁵⁷ This thesis appears to be largely true, particularly if the Burger Court is viewed in the larger context of the history of liberalism at the Court as opposed to the more conventional understanding that Justice Burger largely failed to roll back or even halt the Warren Court’s expansion of civil liberties.²⁵⁸ What is remarkable is not that a conservative counterrevolution to combat the Warren Court’s egalitarian revolution is thought to have failed, but that the idea that a counterrevolution was needed even existed.²⁵⁹

One specific difference between the Warren and Burger Courts, however, was the Burger Court’s nearly immediate retraction of the State Action Doctrine.²⁶⁰ *Evans v. Abney*²⁶¹ was the first decision in thirty-five years that rejected an Equal Protection Clause challenge for failing to implicate the State in purposeful racial discrimination.²⁶² The Court continued to deny challenges to racial discrimination for lack of direct State involvement in *Moose Lodge No. 107 v. Irvis*,²⁶³ as well as enforcing the doctrine against challenges to racial discrimination based in other constitutional clauses.²⁶⁴ The Burger Court quickly and decisively took the State out of ostensibly private behavior.²⁶⁵ It also stepped in to thwart State attempts at confronting the hierarchies that the states themselves had constructed in the past.²⁶⁶

As the Civil Rights movement gained more traction and public sympathies turned against overt racial discrimination, the Equal Protection Clause continued to be limited but effective at removing explicit illiberal animosities.²⁶⁷ To be useful going forward, equal protection would not be needed so much to confront the fading existence of illiberal legislation that constructed hierarchies, but instead would have to be able to ferret out “sophisticated doctrines of racial inequality [that] were dominant in American public opinion”²⁶⁸ in order to dismantle them. Liberalism alone, now largely free from competing ideologies, became not the tool to eradicate the vestiges of its former illiberal competitors, but their replacement.²⁶⁹

1972–1987, THE SUPREME COURT HISTORICAL SOCIETY, <http://www.supremecourthistory.org/history-of-the-court/associate-justices/lewis-powell-jr-1972-1987/> (last visited November 15, 2013).

257. Klarman, *supra* note 104, at 283 (citing RICHARD Y. FUNSTON, CONSTITUTIONAL COUNTERREVOLUTION? 331–338 (1977); A.E. Dick Howard, *Burger Court* in ENCYCLOPEDIA OF THE AMERICAN CONSTITUTION 177 (LEONARD W. LEVY ET. AL EDS., (1989); William F. Swindler, *The Burger Court, 1969–1979: Continuity and Contrast* 28 KAN. L. REV. (1979)).

258. See Klarman, *supra* note 104, at 283.

259. *Id.*

260. *Id.* at 291–92.

261. 396 U.S. 435 (1970).

262. Klarman, *supra* note 104, at 292.

263. 407 U.S. 163 (1972).

264. See *Jackson v. Metro. Edison Co.*, 419 U.S. 345 (1974) (Due Process).

265. See *Moose Lodge No. 107*, 407 U.S. at 177.

266. See generally *id.* (a state regulatory scheme enforced by the state liquor board did not sufficiently implicate the state in the discriminatory guest policies of a club).

267. See Klarman, *supra* note 104, at 293–94.

268. Smith, *supra* note 1, at 555.

269. See generally Klarman, *supra* note 104 (a limited history of modern equal protection, highlighting important conceptual shifts that occurred).

2. Equal Protection as Entrenchment: Intent Over Impact

The Burger Court's doctrinal announcement in *Washington v. Davis*²⁷⁰ delivered anything but the tool to dismantle hierarchies.²⁷¹ *Davis* involved a test given by the District of Columbia to prospective police officers that ended up disqualifying four times as many black applicants as their white counterparts. Justice White found that tests that resulted in a disparate impact were not unconstitutional, even if the tests bore a tenuous relationship with the ability to perform the job in question, so long as the test administered was not given in pursuance of a racial animus.²⁷² While the animus may not have been as overt as Henry Cabot Lodge's literacy tests in 1896 that were ostensibly only concerned with intellectual merit, but worked to exclude "the Italians, Russians, Poles, Hungarians, Greeks, and Asiatics, thereby preserving the quality of our race and citizenship,"²⁷³ the District of Columbia's test was similarly proffered as a way to ensure strong communication skills in the police ranks.²⁷⁴ Lodge's design in 1896 barely obscured its animating illiberal purpose.²⁷⁵ While illiberal motivations cannot be discounted in the *Davis* case, the opinion's language is a testament to liberalism, championing equal opportunity over equal results, de-regulation of the job market and the free market's ability to pick the best option.²⁷⁶ Lodge's literacy test and D.C.'s communication skills exam may have intended different things, but the effect of illiberal tendencies in 1896, and those that failed in 1976 to reckon with them, were largely the same.²⁷⁷

In Rogers Smith's metaphor, although Civil Rights campaigners, some Johnson Administration legislation, and a few Supreme Court decisions "work[ed] to erode [the steep] mountains [of hierarchy] over time, broadening the valley, many of the

270. 426 U.S. 229 (1976).

271. *Davis*' precursors came five years earlier and two years after Justice Warren left the Court in *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971), when the Court limited its Equal Protection inquiries to de jure segregation instead of persistent de facto disparities. See also *Milliken v. Bradley*, 418 U.S. 717 (1974).

272. *Davis* stands in stark contrast to *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), a Title VII case invalidating employer-administered tests without any "business necessity" that disproportionately excluded black workers from promotions. In his opinion in *Davis*, Justice White expressly declines to adopt the "more rigorous standard" announced in *Griggs*. Both Title VII and the Fourteenth Amendment were ostensibly passed in response to racial hierarchy, yet Justice White was "not disposed to adopt" the more probing—and more egalitarian—judicial standard that contemplated how arguably neutral legislation in the present maintains the invidious laws of the past. The Court's convoluted distinctions between the two standards used for cases arising from the Civil Rights Act of 1964 and the Equal Protection Clause continued throughout the 1970s in cases such as *Pasadena v. Spangler*, 427 U.S. 424 (1976), and *Columbus Bd. of Educ. v. Penick*, 443 U.S. 449 (1979). The Roberts Court's decision in *Ricci v. DeStefano*, 557 U.S. 557 (2009), in which the Court ruled that the Title VII rights of nineteen whites and one Hispanic were violated when New Haven threw out tests that disqualified every black employee for a promotion for fear of facing a Title VII lawsuit...from the black employees along with its decision in *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007), and its revisit to *Grutter v. Bollinger*, 539 U.S. 309 (2003), may finally clear up the confusion in favor of neo-liberalism's preference of banning the use of race altogether. See also Richard Primus, *Equal Protection and Disparate Impact: Round Three*, 117 HARV. L. REV. 493 (2003), for an admirable attempt at clearing up the Supreme Court's muddled distinctions between its Title VII and Equal Protection doctrines.

273. Smith, *supra* note 1, at 560.

274. *Davis*, 426 U.S. at 251.

275. Smith, *supra* note 1, at 560.

276. See generally *Davis*, 426 U.S. 229.

277. See *Plessy v. Ferguson*, 163 U.S. 537, 550–52 (1896); *Davis*, 426 U.S. at 250–52.

peaks prove[d] to be volcanic, frequently responding to seismic pressures with outbursts that harden[ed] into substantial peaks once again.”²⁷⁸ The Court’s announcement in *Davis* that the impact of a law or State practice, however racially disparate it may be is subordinate to its intent, was a volcanic reaction of neo-liberalism by the Burger Court in the Nixon era against egalitarian notions espoused by the Warren Court.²⁷⁹ This shift would be continued by both Reagan’s Rehnquist Court and Bush’s Roberts Court that would prove to be a hardening of racial hierarchy.²⁸⁰

The Court’s neo-liberal approach to its equal protection doctrine continued to contract and harden in *Arlington Heights v. Metropolitan Housing Corp.*²⁸¹ *Arlington Heights* concerned a suspect denial to rezone a residential property from single detached homes to multi-unit buildings that would have housed lower to middle income families in a predominately white Chicago suburb.²⁸² Forty percent of the residents that would have been eligible to live in the multi-unit buildings were black, despite comprising only eighteen percent of the area’s population.²⁸³ The Court relied on *Davis* to deny the Equal Protection Clause challenge,²⁸⁴ finding that State action disproportionately affecting a [racial] group was not enough absent an invidious intent or purpose.²⁸⁵ A disparate impact could be “an important starting point” to prove an Equal Protection Clause violation, but egalitarian notions were not enough in light of the [race] neutral reason of protecting the property values of the individuals already living in the area in single family residences,²⁸⁶ a familiar echo from *Buchanan’s* 1917 Blackstonian property rights ruling removing a segregation ordinance that interfered with “the civil right of a white man to dispose of his property.”²⁸⁷

The Court further explicated its neo-liberal preference for intent over impact two years later in *Personnel Administrator of Massachusetts v. Feeney*.²⁸⁸ Justice Stewart explained that neutral laws with disparate impacts could only be invalidated if the impact “can be traced to a discriminatory purpose.”²⁸⁹ He acknowledged that unconstitutional purposes *could* have been at work in *Davis* and *Arlington Heights* against groups that had been historically discriminated against,

278. Smith, *supra* note 1, at 555.

279. See *Davis*, 426 U.S. at 242.

280. See Klarman, *supra* note 104, at 301; Crawford v. Marion Cnty. Election Bd., 553 U.S. 181, 204 (2008).

281. Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252 (1977).

282. *Id.* at 255–60.

283. *Id.* at 259.

284. The Court’s myopic constitutional approach in *Davis* that continued in *Arlington Heights* with its intent over impact doctrine was rejected on remand in favor of *Griggs’* more searching statutory inquiry under the Fair Housing Act that invalidated the zoning denial for the constructive violation of civil rights in housing that it was. See *Metro. Hous. Dev. Corp. v. Vill. of Arlington Heights*, 558 F.2d 1283 (7th Cir. 1977).

285. *Arlington Heights*, 429 U.S. at 265.

286. *Id.* at 266.

287. *Buchanan v. Warley*, 245 U.S. 60, 81 (1917).

288. 442 U.S. 256 (1979). There are few better examples of how well the *Davis* doctrine of intent over impact preserves hierarchy considering that Massachusetts’ automatic preference for veterans all but inevitably excluded women because ninety-eight percent of veterans were male—a well preserved vestige of gender hierarchy initially defended by elite scholarship.

289. *Id.* at 272.

as was a possibility in *Feeney*.²⁹⁰ However, the Equal Protection Clause only guaranteed “equal laws, not equal results.”²⁹¹ Justice Stewart maintained that mere intent as volition or intent as awareness of consequences was not enough to prove an equal protection violation.²⁹² State actors were free to implement policies that they knew would burden historically disadvantaged groups so long as there was no “discriminatory purpose,” as opposed to an acceptable awareness of a disparate effect.²⁹³ This required that the state actor choose a policy “because of, not merely in spite of, its adverse effects upon an identifiable group.”²⁹⁴ Justice Stewart reasoned that “discriminatory intent is simply not amenable to calibration. It either is a factor that has influenced the legislative choice or it is not.”²⁹⁵ While Justice Stewart acknowledged the possibility that ascriptive Americanism *could* be at work in the present,²⁹⁶ and that it *had* been at work in the past, he was unwilling or unable to bridge the past to the present.²⁹⁷ His demand for a discernible intent to discriminate not only failed to reckon with how unequal results reaffirm hierarchies constructed in the past, but he also gave license to the reconstituted hierarchies Smith warned about.²⁹⁸

3. Disavowal as Ironic Innocence

The Court’s fixation on the present intent betrays an unwillingness to consider Faulkner’s aphorism that “[t]he past is never dead, it’s not even the past.”²⁹⁹ It also evokes James Baldwin’s discussion of “ironic innocence.”³⁰⁰ Justices White, Powell,³⁰¹ and Stewart have knowledge of the rigid racial ascription constructed that resulted in severe and pervasive inequality in employment and housing.³⁰² A failure to acknowledge how that inequality persists in the present by disregarding the disparate impacts that manifest from ostensibly neutral state action in the present is to be complicit in the perpetuation of hierarchy.³⁰³

290. *Id.* at 273–74.

291. *Id.* at 273.

292. *Id.* at 279.

293. *See* PRIMUS, *supra* note 32, at 230 (discussing liberalism’s neutrality toward outcomes and Michael Sandel’s criticism of the same).

294. *Feeney*, 442 U.S. at 279.

295. *Id.* at 277.

296. *Feeney* is an example of the possibility of different liberal goals conflicting: Justice Stewart prevented the State from addressing gender inequality continuing to operate in the present at the expense of allowing the free market to find the best applicant regardless of preference for veteran status.

297. *See generally id.*

298. *See* Smith, *supra* note 1, at 550 (“novel . . . legal systems reinforcing racial . . . inequalities might be rebuilt in America in the years ahead.”). Smith’s warning came in 1993, likely cognizant of the Burger Court’s reconstruction *vis-à-vis* its intent focus, and the Rehnquist Courts’ color-blind approach to proactive State measures to address past discrimination discussed herein.

299. WILLIAM FAULKNER, REQUIEM FOR A NUN, Act I, § 3 (1951).

300. SHULMAN, *supra* note 23, at 143.

301. Justice Powell wrote the majority opinion in *Arlington Heights*. Metro. Hous. Dev. Corp. v. Vill. of Arlington Heights, 558 F.2d 1283 (7th Cir. 1977).

302. *See, e.g., Davis*, 426 U.S. 229, *Arlington Heights*, 429 U.S. 252.

303. *Id.*

To Baldwin, the “nation [was] founded in genocide and slavery, whose ideals have never been practiced, or have been practiced only in exclusionary ways.”³⁰⁴ It is a “tragic story in which a nightmarish racial past imprisons everyone in barren repetition.”³⁰⁵ Baldwin addresses what the Court’s equal protection jurisprudence will not: a “hear no evil, see no evil” liberal approach to legislative intent in the present ignores “the persistence of racial domination among whites who celebrate democratic ideals, and the traps that white supremacy creates for those marked as black.”³⁰⁶ Participation in this barren repetition—to ignore how education, housing, and employment inequalities constructed through ascription in the past manifest in a drastically uneven playing field in the present, even under liberalism’s promise of uniform rules—works to continue to “destroy hundreds of thousands of lives and [the Court] do[es] not know it and do[es] not want to know it.”³⁰⁷ While ostensibly serving the liberal democratic ideal of equal laws, “it is not permissible that the authors of devastation should be innocent. It is the innocence that constitutes the crime.”³⁰⁸

The Court has full knowledge of the Black Codes, Jim Crow and the “inegalitarian scriptural readings, the scientific racism of the American school of ethnology, racial Darwinism and the romantic cult of Anglo-Saxonism in American historiography”³⁰⁹ that implemented the steep racial hierarchy operating in the United States.³¹⁰ To be blind to how that hierarchy operates presently in education, employment, and all other facets of American life “is culpable because it is willful,” because what is at issue “is not a lack of knowledge but a ‘refusal to acknowledge’ the reality of others and [the Court and states’] conduct toward them.”³¹¹ This

disavowal of domination is the innocence [Baldwin] denounces as criminal. Innocence means refusing not only to acknowledge the other but to acknowledge that [the Court] enacts this denial; it is disowning ([its] connection to) social facts [it] in some sense know[s], such as the exercise of power, the practice of inequality, or their benefits.³¹²

The Court’s ironic innocence in refusing to acknowledge how neo-liberalism’s promise of neutral intent in the present ratifies the invidious intent of the past is a Court that is “professing but violating democratic norms,”³¹³ maintaining an ascriptive form of Americanism in its perfection of neo-liberalism that refuses to

304. SHULMAN, *supra* note 23, at 142.

305. *Id.*

306. *Id.*

307. *Id.* (citing BALDWIN, *supra* note 23, at 334).

308. SHULMAN, *supra* note 23, at 142.

309. Smith, *supra* note 1, at 549.

310. See Klarman, *supra* note 104, at 236.

311. SHULMAN, *supra* note 23, at 143.

312. *Id.*

313. *Id.*

acknowledge its complicity in the preservation of that ascription.³¹⁴ Justice Stewart's insistence that equal protection demands only "equal laws, not equal results," serves to "deny the existence of white supremacy, which means denying the meaning of our history, the impact of [the Court's intent over impact doctrine], the truth of [the Court and the ostensibly neutral legislators'] intentions, and the reality of those that we racialize."³¹⁵ The doctrine as expressed is an "affirmation of racial equality that nevertheless disavows the very historical conditions and contemporary practices that continue to reproduce racial stratification."³¹⁶

4. Equal Protection as Inversion: [Color] Blindness

While the Court's intent over impact doctrine entrenches and perpetuates ascription through indifference or willful ignorance, its neo-liberal color-blind companion in equal protection prohibits benign attempts by states to acknowledge and dismantle hierarchies.³¹⁷ The post-Warren Courts have met state programs seeking to proactively address acute disparities in areas of life previously foreclosed to racial minorities with increasing opposition.³¹⁸ They have done so by applying the doctrine of strict scrutiny—a heightened level of skepticism created to shield racial minorities historically discriminated against from hostile legislation³¹⁹—to any law contemplating any race regardless of an ascriptive past. Under these constructions of the equal protection doctrine, intent is relevant, but the validity of the legislation varies depending on its relationship to racial minorities: if the law is indifferent to them and the resulting disparate impact they feel, it is nevertheless valid, whereas if the law seeks to aid them it is invalid.³²⁰ Such is the inversion of a doctrine passed to protect and assist black Americans accomplished by the neo-liberalism of the Burger, Rehnquist, and Roberts Courts.³²¹

In *Wygant v. Jackson Board of Education*,³²² the Court struck down a policy of preferential protection against layoffs for minority teachers.³²³ In sustaining a white teacher's equal protection attack on the Board of Education's policy of preferring to retain minority teachers, Justice Powell emphasized that, "the level of scrutiny does not change merely because the challenged classification operates against a group that historically has not been subject to governmental discrimination."³²⁴ He cited Equal Protection Clause cases invalidating the facially ascriptive anti-

314. *See id.*

315. SHULMAN, *supra* note 23, at 143.

316. Joseph Lowndes, *The Past and Future of Race in the Tea Party Movement in STEEP* 152, 160 (Lawrence Rosenthal & Christine Trost eds., 2012) (citing LAWRIE BALFOUR, *THE EVIDENCE OF THINGS NOT SAID: JAMES BALDWIN AND THE PROMISE OF AMERICAN DEMOCRACY* (2001)).

317. *See, e.g., Metro. Hous. Dev. Corp. v. Vill. of Arlington Heights*, 558 F.2d 1283 (7th Cir. 1977).

318. *Id.*

319. *See United States v. Carolene Prods.*, 304 U.S. 144 (1938).

320. *Id.*

321. *Id.* at 466–67.

322. 476 U.S. 267 (1986).

323. *Id.* at 283–84.

324. *Id.* at 273.

miscegenation laws of Virginia (struck down to preserve the right to marriage) in *Loving* and restrictive covenant laws of Missouri (struck down to protect the freedom to alienate property) in *Shelley* enacted to maintain rigid racial hierarchies as foundational precedents to strike down a state's effort to maintain racial minorities in an educational workforce that had lacked such representation because of previously constructed ascription.³²⁵

Justice Powell rejected addressing, if not atoning for, past societal discrimination as a sufficient basis to discriminate based on race, unless the specific entity using race in the present could be shown to have specifically created the disparity in the past, which it was now seeking to alleviate.³²⁶ While Justice Powell appeared to consider addressing egalitarian concerns, he declined his own invitation to racial justice in *Wygant*.³²⁷ Instead, in reasoning again reminiscent of Baldwinian disavowal, Justice Powell asserted that “there are numerous explanations for a disparity between the percentage of minority students and minority faculty, many of them unrelated to discrimination of any kind”³²⁸—a statement betraying his knowledge that there are discriminatory factors at play in the disparity, and refusing to acknowledge those factors by doing anything about their operation.³²⁹

The Court struck down another affirmative action plan seeking to award thirty percent of sub-contracting work for contracts between a city and general contractors to minority-owned companies three years later in *City of Richmond v. J.A. Croson Co.*³³⁰ Justice O'Connor took issue with states undertaking remedial measures to address past discrimination because the Fourteenth Amendment was meant to be a constraint on state power.³³¹ Her opinion invalidated the City of Richmond's plan because it could not demonstrate to a convincing degree that it had a history of discrimination against African Americans specifically within the construction industry.³³² To consider past discrimination in general “would be to open the door to competing claims for remedial relief for every disadvantaged group.”³³³

Justice O'Connor emphasized that the Fourteenth Amendment guarantees that equal protection shall not be denied to *any person*, that “preferential programs may only reinforce common stereotypes,” and thus, “the standard of review under [the] Equal Protection [Clause] is not dependent on the race of those burdened or benefitted.”³³⁴ Justice O'Connor further reasoned that “the mere recitation of a benign, compensatory purpose is not an automatic shield which protects against

325. *Id.* (citing *Loving v. Virginia*, 388 U.S. 1 (1967); *Shelley v. Kraemer*, 334 U.S. 1 (1948)).

326. *Id.* (citing *Hazelwood Sch. Dist. v. United States*, 433 U.S. 267 (1977)).

327. He was also uninterested in the School Board's offer to establish a specific connection after finding that regardless of specific past discrimination, the preferential layoff remedy was too broad. *Id.* at 278.

328. *Wygant*, 476 U.S. at 276.

329. Using the incomplete term “many” and not the complete term “all.” *Id.*

330. *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989).

331. *Id.* at 490–91.

332. *Id.* at 505.

333. *Id.*

334. *Id.* at 494.

any inquiry.”³³⁵ Legislation with an intent to dismantle racial hierarchy would therefore be afforded the same heightened scrutiny as the ascriptive laws that created it because otherwise “race will always be relevant in American life, and the ultimate goal of eliminating entirely from governmental decision-making such irrelevant factors as a human being’s race will never be achieved.”³³⁶

Seen through neo-liberalism’s lens, Justice O’Connor’s opinion validates the ideas that the Fourteenth Amendment was passed to stop illiberal State interference with the marketplace and protect blacks’ freedom to participate in it.³³⁷ The City of Richmond’s plan was similarly invalidated because the Fourteenth Amendment prohibited the city, a state entity, from regulating the construction industry’s free market or the subcontractors’ freedom to pursue economic opportunities in the name of racial egalitarianism.³³⁸ The Equal Protection Clause did not protect groups, an egalitarian concern, but neo-liberalism’s preferred singular unit, “any person.”³³⁹ It also worked in the service of another neo-liberal goal: removing the State and eliminating governmental decision-making entirely.³⁴⁰

Justice Scalia wrote separately to concur that all racial classifications, regardless of benign or invidious intent, required strict scrutiny, which when applied to race should nearly always be fatal,³⁴¹ regardless of how well correlated a specific invidious and pervasive practice of discrimination in the past was to a remedial plan in the present.³⁴² He cited Justice Harlan’s *Plessy* dissent to highlight liberalism’s dismissal of groups, noting that “our Constitution is color-blind, and neither knows nor tolerates classes among citizens.”³⁴³ While Justice Scalia left the door open a crack for federal remedies, he agreed to curtailing States’ rights³⁴⁴ in addressing past discrimination because “the Civil War Amendments were designed to ‘take away all possibility of *oppression* by law because of race or color’ and ‘to be . . . limitations on the power of the States . . .’”³⁴⁵

Justices O’Connor and Scalia distinguished the limited power of states to address racial hierarchies relative to the federal government in *Wygant* and *Croson*.³⁴⁶ They justified their distinctions based upon the Fourteenth Amendment’s intent to curb the power of states to trample the civil rights of black Americans.³⁴⁷ However, Justice O’Connor’s majority opinion also required that the entity seeking to remediate past discrimination demonstrate a specific history of

335. *Id.* at 495.

336. *Croson*, 488 U.S. at 495.

337. *See Croson*, 488 U.S. 469.

338. *See Croson*, 488 U.S. at 493.

339. *Id.*

340. *Id.*

341. Or “strict in theory, fatal in fact.” *Croson*, 488 U.S. at 552 (Marshall, J., dissenting) (citations omitted).

342. *Id.* at 520 (Scalia, J., concurring).

343. *Id.* at 521 (Harlan, J., dissenting) (citing *Plessy v. Ferguson*, 163 U.S. 537, 539 (1896)).

344. Although not necessarily as ardent a federalism champion as his colleague Justice Rehnquist, neo-liberalism’s influence is demonstrated in its ability to overcome Justice Scalia’s preference for states’ rights. *See id.* at 520 (Scalia, J., concurring).

345. *Id.* at 522 (citing *Ex parte Virginia*, 100 U.S. 339 (1879) (emphasis added)).

346. *See id.* at 520 (Scalia, J., concurring); *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 284 (1986) (O’Connor, J., concurring).

347. *See Croson*, 488 U.S. at 520 (Scalia, J., concurring).

discrimination against a specific racial minority in a specific industry.³⁴⁸ Read together then, the Court rationalizes reducing the power of states to dismantle hierarchies in the present because the Fourteenth Amendment was ratified to stop states from constructing them in the past.³⁴⁹ Conversely, the federal government—albeit an entity certainly far from having clean hands—is given the most power in the present to remedy past discrimination because it did less discriminating in the past.³⁵⁰ With this exercise in federalism, the Court's inversion of power and privilege, and culpability and responsibility, is complete. As Darren Lenard Hutchinson writes:

[B]y design or effect, the Court equality doctrine reserves judicial solicitude primarily for historically privileged classes and commands traditionally disadvantaged groups to fend for themselves in the often hostile majoritarian branches of government. In its equal protection decisions, the Court has effectively inverted the concepts of privilege and subordination; it treats advantaged classes as if they were vulnerable and in need of heightened judicial protection, and it views socially disadvantaged classes as privileged and unworthy of judicial solicitude. This paradoxical jurisprudence reinforces and sustains social subjugation and privilege.³⁵¹

The Court reiterated its unwillingness to distinguish between hundreds of years of laws that sought to burden racial minorities and recent attempts to lessen the burdens of those ascriptive practices in *Adarand v. Peña*.³⁵² It also ended its brief flirtation³⁵³ with allowing the federal government more latitude in addressing dismantling hierarchy.³⁵⁴ Neo-liberalism reached the federal government by extending the Court's application of strict scrutiny for all races for any intent to federal programs because “the Fifth³⁵⁵ and Fourteenth Amendments to the Constitution protect *persons*, not *groups*,” and thus, the need for a “detailed judicial inquiry to ensure that the *personal* right to equal protection of the laws has not been infringed.”³⁵⁶

348. *See id.*

349. *See Wygant*, 476 U.S. 267, *Croson*, 488 U.S. 469.

350. *See Croson*, 488 U.S. at 490–91.

351. Darren Hutchinson, *Unexplainable on Grounds other than Race: The Inversion of Privilege and Subordination in Equal Protection Jurisprudence*, U. ILL. L. REV. 615, 618 (2003).

352. *Adarand Constructors, Inc., v. Peña*, 515 U.S. 200 (1995).

353. *See, e.g., Metro Broad., Inc. v. FCC*, 497 U.S. 547, 564–65 (1990) (applying intermediate scrutiny to race-conscious federal program).

354. *See generally Adarand*, 515 U.S. 200 (all racial classifications, imposed by whatever federal, state, or local governmental actor, must be analyzed under strict scrutiny).

355. *Brown's* holding—that “separate but equal” violates the Equal Protection Clause of the Fourteenth Amendment in the federal government and Washington, D.C. schools—was applied in a later case. *Brown v. Bd. of Educ.*, 347 U.S. 483, 495 (1954). *Bolling v. Sharpe* discovered a companion in the Equal Protection Clause in the Fifth Amendment to apply against federal action. 347 U.S. 497, 500 (1954).

356. *Adarand*, 515 U.S. at 227 (emphasis in original).

Adarand found that differentiating between invidious and benign classifications “does not square” with the Court’s longstanding central understanding of equal protection.³⁵⁷ This is because “a free people whose institutions are founded upon the doctrine of equality should tolerate no retreat from the principle that government may treat people differently because of their race only for the most compelling reasons.”³⁵⁸ *Adarand* served then to apply Justice O’Connor’s neo-liberal conceptions of the Fourteenth Amendment to the Fifth.³⁵⁹ Despite the histories of the two amendments being different, they are, once again, unified by classic liberal principles.³⁶⁰ Both amendments were ratified as bulwarks against State power, and each conceived their protections on an individual basis.³⁶¹ Moreover, beyond the language and motivations of the amendments, their applications are most illustrative of what really animates them. Scholars may contend that the Fourteenth Amendment was ratified to protect newly-freed African Americans³⁶²—as a class—but the language—“no person”—and the interpretation in subsequent precedents is best seen as addressing the equal protection of individual rights or the putatively equal opportunity to freely exercise those rights.³⁶³

Justice Scalia concurred again in *Adarand* to stress that the concept of “either a debtor or creditor race” is alien to “the Constitution’s focus upon the individual,” highlighting the Equal Protection Clause’s prohibition against states denying to “any person the equal protection of the laws.”³⁶⁴ The concept of “racial entitlement” found in benign state practices “preserve[s] for future mischief the way of thinking that produced race slavery, race privilege and race hatred.”³⁶⁵ It is a flawed approach because, “[i]n the eyes of government, we are just one race here. It is American.”³⁶⁶

5. Willful Blindness

The post-Warren Courts’ neo-liberal color-blind doctrine is a logical companion to its free market intent-over-impact approach within equal protection.³⁶⁷ Intent is the focal point in both doctrines, but as noted above, laws intending to aid racial minorities will be struck down, while laws without a clearly discernible intent to burden, yet nevertheless with a disparate impact, will be

357. *Id.*

358. *Id.* at 227 (citing *Hirabayashi v. United States*, 320 U.S. 81 (1943) (a case upholding the constitutionality of racial curfews)).

359. *Id.* at 215.

360. *See, e.g., id.*

361. *Id.* at 201–02.

362. *See, e.g.,* David H. Gans, *The Unitary Fourteenth Amendment*, 56 EMORY L.J. 907, 907 (2007) (citing U.S. CONST. amend. XIV).

363. *See generally Adarand*, 515 U.S. 200 (a case applying the Equal Protection Clause).

364. *Id.* at 239 (Scalia, J., concurring) (likewise, Justice Thomas stated in his concurring opinion that “benign prejudice is just as noxious as discrimination based on malicious prejudice” *Id.* at 241).

365. *Adarand*, 515 U.S. at 239.

366. *Id.*

367. *See* Keith R. Walsh, *Color-Blind Racism in Grutter and Gratz*, 24 B.C. THIRD WORLD L.J. 443, 460 (2004).

preserved.³⁶⁸ The two comprise a formidable intellectual trend within the American political and legal systems that reinforces racial inequalities.³⁶⁹ Color-blindness, for all of its irony, is nevertheless aptly named, and may exhibit Baldwin's concept of disavowal of domination through willfully blind practices even better than the Court's unwillingness to address impact.³⁷⁰ The irony is thicker, and the blindness even more willful, because while intent-over-impact results in the Court passively allowing the perpetuation of ascription, color-blind strict scrutiny requires a willful, proactive obstruction by the Court of state attempts to dismantle the hierarchies they created.³⁷¹

Not only is the color-blind doctrine a willful attack on State efforts to dismantle the hierarchies they created, but the building blocks utilized to mount the attacks and preserve ascription are the very cases that were initially used to dismantle them.³⁷² Justice Powell commandeered precedents that struck down racial segregation in marital and real estate contracts to invalidate a contract seeking to avoid continued segregation in education.³⁷³ Precedents are also stripped of context and purpose, and refashioned in not just a disavowal of history, but an inversion of it. Justice O'Connor uses a platitude about only using race for compelling purposes from a case justifying racial curfews³⁷⁴ in order to strike down efforts to address why there is a dearth of black representation in the seat of the Old Confederacy's construction industry.³⁷⁵ The absence of a specific documented history of discrimination against racial minorities in the construction industry in *Croson* to her is thus explained by a *lack* of discrimination, and not complete foreclosure to that industry based on race, which would have precluded even the chance of having a business to be discriminated against in the first place.³⁷⁶

Justice Scalia's use of Justice Harlan's *Plessy* dissent³⁷⁷ is perhaps even more illustrative of disavowal because it is comprehensively "innocent" of precedent, history, and intent.³⁷⁸ Whereas Justice Harlan dissented alone in furtherance of a color-blind Constitution against the majority's endorsement of an illusory equality that specifically contemplated the separation of two distinct races, Justice Scalia re-imagined the majority's illusion while inverting Justice Harlan's doctrine in the creation of a race that neither one conceived of: the so-called American race.³⁷⁹ Moreover, Justice Scalia disavowed a constitutional history of systematically

368. *See id.*

369. *See id.* at 459.

370. BALDWIN, *supra* note 23, at 335–36, reprinted in SHULMAN, *supra* note 23, at 143.

371. *See, e.g.,* Darren L. Hutchinson, *Unexplainable on Grounds Other Than Race: The Inversion of Privilege and Subordination in Equal Protection Jurisprudence*, 2003 U. ILL. L. REV. 615 (2003).

372. *Id.* at 639.

373. *See, e.g., id.* at 640–44 (citing *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 290–97 (1978)).

374. *See Adarand Constructors, Inc., v. Pena*, 515 U.S. at 227 (1995) (citing *Hirabayashi v. United States*, 320 U.S. 81 (1943) (a case *upholding* the constitutionality of racial curfews)).

375. *See id.*

376. *See id.* at 221–24 (citing *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989)).

377. *Plessy v. Ferguson*, 163 U.S. 537, 552–64 (1896) (Harlan, J., dissenting).

378. *City of Richmond v. J.A. Croson Co.*, 488 U.S. at 521 (1989) (citing *Plessy*, 163 U.S. at 559 (Harlan, J., dissenting)).

379. *Compare Plessy*, 163 U.S. at 521 (Harlan J., dissenting), *with Croson*, 488 U.S. at 519–28 (Scalia, J. concurring).

discrimination against racial minorities because of their status in that *group* in favor of a willfully innocent celebration of a conjured record of neo-liberal constitutional protection for individuals regardless of racial group.³⁸⁰ Along with erasing distinctions between white and black in favor of a newly recognized “American” race, he also merged benign practices and race hatred into one monolithic mischievous concept of racial entitlement that the neo-liberal Constitution would not tolerate.³⁸¹

6. The Way to Stop Discrimination

The Roberts Court’s decision in *Parents Involved in Community Schools v. Seattle School District No. 1*³⁸² was another significant nail in any so-called Warren Court egalitarian revolution. The Court announced that efforts to ameliorate drastic racial imbalances firmly in place, that replicate hierarchy over time and space, were not the way to confront discrimination.³⁸³ Instead, the solution lies in refusing to confront it at all.³⁸⁴ Justice Roberts concluded his *PICS* opinion by striking down efforts to integrate Seattle schools with the would-be dictum: “the way to stop discrimination based on race is to stop discriminating based on race.”³⁸⁵

Justice Roberts’ opinion also confirmed that imbalances concerning racial groups were not unconstitutional.³⁸⁶ Instead, “the entire gist of the *Grutter*³⁸⁷ analysis” was that the Court’s focus would be on the student or “applicant as an *individual* and not simply as a member of a particular racial *group*.”³⁸⁸ “The importance of this individualized consideration in the context of a race-conscious admission[s] programs is paramount”³⁸⁹ because “at the heart of the Constitution’s guarantee of equal protection lies the simple command that the Government must treat citizens as individuals.”³⁹⁰

Finally, Justice Roberts continued the trend of inverting and re-purposing precedent to better coincide with neo-liberal aims.³⁹¹ In 1954, Justice Warren made education akin to a fundamental right that the State had to provide to individuals with ostensibly equal access regardless of race, thus, resulting over time in some integration and improvement in opportunity for black school children.³⁹² In 2007,

380. See *Croson*, 488 U.S. at 519–28 (Scalia, J., dissenting).

381. See *id.*

382. 551 U.S. 701 (2007).

383. See *id.* at 747.

384. See *id.* at 747–48.

385. *Id.* at 748.

386. See *id.* at 721 (quoting *Milliken v. Bradley*, 433 U.S. 267, 280 (1977)). See also *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist.*, 551 U.S. 701, 723 (2007) (quoting *Grutter v. Bollinger*, 539 U.S. 306, 330 (2003) (to seek racial balances was instead “patently unconstitutional”).

387. *Grutter*, 539 U.S. 306.

388. *Parents Involved in Cmty. Sch.*, 551 U.S. at 722 (citing *Grutter*, 539 U.S. at 337) (emphasis added).

389. *Id.* at 723 (citing *Grutter*, 539 U.S. at 337).

390. *Id.* at 730 (citing *Miller v. Johnson*, 515 U.S. 900, 911 (1995) (quoting *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547, 602 (1990) (O’Connor, J., dissenting))).

391. See, e.g., *id.*

392. *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

Justice Roberts cited *Brown* to defeat a desegregation plan “because government classification and separation on grounds of race denote inferiority.”³⁹³

Justice Roberts’ preference for a restrained incrementalist approach likely led to him employing one of the Court’s few precedents that permitted the use of race as a tool to dismantle educational ascription.³⁹⁴ He did so in *PICS* to distinguish why diversity’s role was not constitutionally recognized in high schools like it had been for higher education in *Grutter v. Bollinger*.³⁹⁵ His restraint—or perhaps his inability to make Justice Kennedy the fifth vote to sink affirmative action in public higher education for good—likely led to a loss for Texas and a ratcheting up of strict scrutiny of admissions criteria yet kept affirmative action on life support in *Fisher v. University of Texas at Austin*.³⁹⁶

While Justice Kennedy has been less hostile to the use of race than Justice Roberts has been in his early Supreme Court career, Justice Kennedy’s opinion contains the same neo-liberal language likely to have anchored Justice Roberts’ opinion.³⁹⁷ Justice Kennedy’s opening discussion of precedent reiterates the core liberal color-blindness principle that “equal protection admits no artificial line of a ‘two-class theory’ that permits the recognition of special wards entitled to a degree of protection greater than that accorded others.”³⁹⁸ Instead, admissions decisions need to be based solely on an individual basis.³⁹⁹ Moreover, if *Fisher* added anything to constitutional affirmative action jurisprudence, it was emphasizing that the State carried the burden—a burden arguably increased by the Court’s decision—of establishing that the individual rights of white *persons* were not infringed by increasing the diversity of the classroom—by expanding the representation of groups of color.⁴⁰⁰

The rationale of diversity as beneficial to the classroom and its students as opposed to the groups that actually constitute the diversity appears palatable if not ideal for a neo-liberal Court that cherishes the individual and ignores the collective.⁴⁰¹ It is also consistent with the shift made in response to attacks on affirmative action, many spearheaded by neo-liberal arguments, made in the 1990s. In a description of inversion similar to that made by Professor Hutchinson,⁴⁰² Aida Hurtado details the shift from race-based affirmative action as a means to redress historical disadvantage to taking advantage of the benefits that

393. *Parents Involved in Cmty. Sch.*, 551 U.S. at 746 (citing *Brown*, 347 U.S. at 493–94). Justice Roberts expresses the same concern for the impact of integration under the force of law that Justice Warren did about segregation fifty-three years earlier in *Brown*; Justice Stevens addresses this as a “cruel irony” in his dissent. *Parents Involved in Cmty. Sch.*, 551 U.S. at 798–99 (Stevens, J., dissenting).

394. *See, e.g., Parents Involved in Cmty. Sch.*, 551 U.S. 701.

395. 539 U.S. 309 (2003).

396. 133 S. Ct. 2411 (2013).

397. *Compare Parents Involved in Cmty. Sch.*, 551 U.S. 701 (Roberts, J.), *with Fisher*, 133 S. Ct. 2411 (Kennedy, J.).

398. *Fisher*, 133 S. Ct. at 2417 (quoting *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 295 (1977)).

399. *See id.* at 2411.

400. *See id.*

401. *See id.*

402. Hutchinson, *supra* note 351, at 615.

come from a diverse classroom.⁴⁰³ In order for affirmative action to survive, its benefits had to be recast as favoring white students; and thus, the focus became emphasizing how a diverse classroom benefits not all students, but white students, who can learn something from hearing diverse viewpoints in their classrooms.⁴⁰⁴ Hurtado expresses this paradox by explaining that:

[t]he irony in the argument is that, while both [w]hite students and students of color would benefit from a more diverse education at all levels, the only diversity worthy of consideration is that which research documents as beneficial to [w]hite students. In this vein, the burden of establishing positive returns from the diversification of our campuses is placed on students of color, not on [w]hite students.⁴⁰⁵

With *Fisher*, the Court tightened this burden: in addition to the already daunting task of catching up to those already so far ahead, historically disadvantaged students must now add the task of convincing the Court that their presence in the classroom is going to help students who are already on top of the hierarchy remain there.⁴⁰⁶

Like the Gilded Age and the Progressive Era before it, “intellectual systems and political forces defending racial . . . inequalities”⁴⁰⁷ have increased in the post-Civil Rights Era with the Burger, Rehnquist, and now Roberts Courts’ use of equal protection.⁴⁰⁸ While the intent behind a system to effectuate “[c]onservative desires [to keep] blacks in their place” with “[c]omplex registration systems, poll taxes, and civics tests” was “little masked” in the “heyday of Jim Crow,”⁴⁰⁹ the post-Warren Courts’ equal protection doctrine requires intent to be surreptitious enough to not be discernible.⁴¹⁰ Facially neutral statutes can ostensibly comport with liberalism’s promise of equal laws if not equal results, while historically revisionist platitudes about free people in our nation’s equal institutions,⁴¹¹ and our one American-race scrub the past of ascription to place the blame for unequal results elsewhere.⁴¹²

Inequality is conceded by intent only, color-blind practitioners, but the nascent anti-subordination jurisprudence started by the Warren Court soon gave way to the anti-classification approach that stabilizes change, neutralizes efforts to dismantle

403. Aida Hurtado, *Toward a More Equitable Society: Moving Forward in the Struggle for Affirmative Action*, 28 THE REV. OF HIGHER EDUC. (ISSUE NO. 2) 273 (Winter 2005).

404. *Id.*

405. *Id.* at 276.

406. *Fisher v. Univ. of Texas at Austin*, 133 S. Ct. 2411 (2013).

407. Smith, *supra* note 1, at 563.

408. *See generally* Parents Involved in Cmty. Sch. v. Seattle Sch. Dist., 551 U.S. 701 (2007) (applying the Equal Protection Clause).

409. Smith, *supra* note 1, at 561.

410. *See, e.g.,* Parents Involved in Cmty. Sch., 551 U.S. at 708-48.

411. *See* Klarman, *supra* note 104, at 297-99.

412. *See id.* at 300.

hierarchy, and perpetuates ascription.⁴¹³ The Court has steadily moved away from race-conscious laws, reconstructing, if not new, systems of hierarchy, at least a doctrine that maintains them by favoring the laissez-faire approach of self-help to combat inequality.⁴¹⁴ Further, most of the Warren Court's precedents attempting to confront both de jure and de facto inequality have been eroded or outright overruled.⁴¹⁵

With the exception of attempts by the Warren Court to break the "barren repetition of a nightmarish racial past,"⁴¹⁶ the neo-liberal Burger, Rehnquist, and Roberts Supreme Courts have utilized novel conceptions of an Equal Protection Clause ratified to aid newly freed slaves to instead "reinvigorate (or at least preserve) the hierarchies [esteemed (or tolerated) by Americans] in modified form."⁴¹⁷ The Clause has largely not, as Cass Sunstein has asserted, looked forward to dismantle engrained prejudices,⁴¹⁸ but instead maintained them by enabling Justices to disavow a history based on color in order to repeat it.⁴¹⁹

B. An Island [of Which the State May Not Enter], Alone

The Substantive Due Process Clause proved to be a major, if imperfect, tool for civil rights litigators in the second half of the twentieth century. Its current status as the *bête noir* of judicial conservatives⁴²⁰ overshadows its initial use as one of their favored weapons to combat economic regulation in the first half of last century.⁴²¹ While judicial conservatives enjoyed its service in the first half of the century to preserve the Gilded Age, and judicial liberals re-purposed it for civil rights in the second half, it has been consistently faithful to liberalism's preference for an unregulated economy, property and individual rights free from State intrusion.⁴²²

In *Cleveland Board of Education v. LaFleur*⁴²³ the Court struck down illiberal State paternalism that required pregnant school teachers to take unpaid maternity leave five months before their due dates and permitted a return to work only after their children were at least three months old.⁴²⁴ The Court instead ruled in favor of an individual's freedom to choose when to leave and when to return to the

413. For a thoughtful analysis discussing the Court's preference for an anti-classification approach over an anti-subordination principle in the interest of institutional stability, see Stuart Chinn, *Race, the Supreme Court, and the Judicial-Institutional Interest in Stability*, 1 J.L. & COMMENTARY 95 (2011).

414. Smith, *supra* note 1, at 563 (referencing Richard Epstein, Thomas Sowell, Booker T. Washington, and color-blind jurist Clarence Thomas).

415. See Klarman, *supra* note 104, at 279–80, 284.

416. SHULMAN, *supra* note 23, at 142.

417. Smith, *supra* note 1, at 558.

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

419. See Hurtado, *supra* note 403.

420. See generally ROBERT BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* 31 (Robert H. Bork ed. 1990) (describing substantive due process as a "momentous sham").

421. See generally *id.* at 46–49 (referring to the *Lochner* era).

422. Compare *Lochner v. People of the State of New York*, 198 U.S. 45 (1905), with *Loving v. Virginia*, 388 U.S. 1 (1967).

423. 414 U.S. 632 (1974).

424. *Id.*

workforce.⁴²⁵ In *Moore v. City of East Cleveland*,⁴²⁶ the Court rejected zoning ordinances in favor of the free exercise of property and the protection of the “private realm of family life which the [S]tate cannot enter.”⁴²⁷ A year later the Court struck down a Wisconsin law that prohibited persons with non-custodial children from marrying without first obtaining a court order demonstrating that they were financially supporting their children, in *Zablocki v. Redhail*.⁴²⁸ Wisconsin may have had an interest in promoting and protecting the welfare of children within the State, but those concerns gave way to the personal right to enter into a marriage contract.⁴²⁹ The freedom to marry was an extension of the right to privacy,⁴³⁰ once again combining liberalism’s favored sons of contract and property.

The Court’s fidelity to neo-liberalism was severely tested in *Planned Parenthood v. Casey*,⁴³¹ a case pro-life forces had been working on for nearly two decades.⁴³² Emboldened by adding Reagan and Bush appointees to Chief Justice Rehnquist’s Court, *Roe* had been given its last rites by social conservatives, while parts of the women’s equality movement were resigned to the demise of a woman’s right to choose.⁴³³ The decision, however, written by the Republican-triumvirate of Justices O’Connor, Kennedy, and Souter, reported that the Court’s duty was to “define the liberty of all, not to mandate [its] own moral code.”⁴³⁴ Instead of bowing to the Right’s call for the state’s regulation of an individual’s reproductive health, Justice O’Connor’s opinion relied on the familiar string citation of liberal precedent elevating an individual’s right to privacy as property, developed in *Griswold*, and later styled as liberty protected under substantive due process, and found in favor of individual choice free from State intrusion.⁴³⁵ This was because, “[i]t is a promise of the Constitution that there is a personal realm of liberty which the government cannot enter,”⁴³⁶ which explained why the Court had an established history of “recogniz[ing] ‘the right of the *individual*, married or single, to be free from unwarranted government intrusion”⁴³⁷

1. Illiberal Redux: Liberalism v. Homophobia

While neo-liberal decisions have achieved a measure of equal opportunity if not equal results for traditionally discrete groups, there remain indiscrete groups

425.

Id.

426. 431 U.S. 494 (1977).

427. *Moore*, 431 U.S. at 499 (quoting *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944)).

428. 434 U.S. 374 (1978).

429. *See id.* at 388.430. *See, e.g., id.* at 397 (citing *Loving v. Virginia*, 388 U.S. 1 (1967)).

431. 505 U.S. 833 (1992).

432. Since *Roe v. Wade*, 410 U.S. 113 (1973) was decided.433. *See generally Casey*, 505 U.S. 833 (the make-up of the Court has drastically changed since *Roe*).434. *Casey*, 505 U.S. at 850.435. *Compare Casey*, 505 U.S. 833, with *Griswold v. Connecticut*, 381 U.S. 479 (1965).436. *Casey*, 505 U.S. at 847.437. *Id.* at 851 (emphasis in original).

that must still confront facially discriminatory state action.⁴³⁸ Unlike the reconstituted system of racial ascription at work in the Court's intent over impact and color-blind doctrines that Rogers Smith warns about, anti-gay state action represents not a neo-liberal entrenchment of an old ascriptive order, but the vestiges and different manifestations of illiberal animosities yet to be confronted by liberalism.⁴³⁹

Ten years after illiberal state regulation targeting homosexuals narrowly prevailed in *Bowers v. Hardwick*,⁴⁴⁰ neo-liberalism overcame the State of Colorado's naked hostility in *Romer v. Evans*.⁴⁴¹ Justice Kennedy's opening paragraph took the State to task for violating its "neutrality where the *rights of persons* are at stake."⁴⁴² His opinion does evince a concern with "a bare desire to harm . . . a group," yet *Romer* is driven not by the equality of homosexuals, but by the State's unreasonable interference with gay individuals' rights to access the market.⁴⁴³

While the State of Colorado proffered First Amendment freedom of association justifications for its exclusion of legal protection for homosexuals, Justice Kennedy's opinion traced an unregulated market and unfettered access to public goods back to a common law prohibition on "innkeepers, smiths and others who 'made a profession of public employment' [from refusing] without good reason to serve a customer."⁴⁴⁴ The State's attempt at precluding homosexuals from full participation in "housing, sale of real estate, insurance, health and welfare services, private education and employment" was a "severe consequence" that a neo-liberal Court could not abide.⁴⁴⁵

While *Romer's* neo-liberal rationale was reminiscent of a Blackstonian *Buchanan* concern for the free alienation of property, *Lawrence v. Texas*⁴⁴⁶ was a victory for the rights of gays and lesbians achieved through the Warren-Brandeis property as privacy paradigm.⁴⁴⁷ *Lawrence* relied again on the same individual-liberty⁴⁴⁸-over-state-intrusion string cite found in *Casey* to bar the government from entering a person's bedroom, straight or gay.⁴⁴⁹ Justice Kennedy's opinion revisited

438. See generally *Adarand Constructors, Inc., v. Peña*, 515 U.S. 200 (1995).

439. See Smith, *supra* note 1, at 550.

440. 478 U.S. 186 (1986) (*Bowers's* decisive fifth vote to permit Georgia's criminalization of sodomy was quickly—yet still belatedly—retracted by Justice Powell, who remarked "I think I probably made a mistake in that one." Joan Biskupic & Fred Barbash, *Retired Justice Lewis Powell Dies at 90*, THE WASHINGTON POST, Aug. 26, 1998, at A1.).

441. 517 U.S. 620 (1996).

442. *Id.* at 623 (emphasis added).

443. *Id.* at n.11.

444. *Romer*, 517 U.S. at 627 (citing *Hurley v. Irish-American Gay, Lesbian and Bisexual Grp. of Bos., Inc.*, 515 U.S. 557, 571 (1995)).

445. *Id.* at 629.

446. 539 U.S. 558 (2003).

447. See, e.g., *Romer*, 517 U.S. 620.

448. Formerly and briefly known as "privacy." See, e.g., *Lawrence*, 539 U.S. 558.

449. Justice Kennedy and the majority resisted Justice O'Connor's approach in her concurrence advocating the application of the law—and thus allowing the State into the bedroom—to both "straight" and "gay" sodomy. See generally *Lawrence*, 539 U.S. 558.

the castle doctrine, noting that, “[i]n our tradition the State is not omnipresent in the home.”⁴⁵⁰

Similarly to *Romer* where Justice Kennedy was also the author of the Court’s opinion, *Lawrence* discusses “[e]quality of treatment...[the] right to demand respect,” stigmas and how homosexuals are demeaned by anti-sodomy laws.⁴⁵¹ The crux of the opinion, however, as it was in *Lawrence*, was that, “[t]he Texas statute furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual.”⁴⁵² While *Romer* relied on the Equal Protection Clause and *Lawrence* exclusively on substantive due process, both of Justice Kennedy’s opinions made overtures to gay equality, but rested on the vindication of neo-liberal rights to liberty and real property; *viz.*, what to do with it⁴⁵³ or what can be done inside of it.⁴⁵⁴

Through the logic and language of neo-liberalism, homosexuals were afforded greater access and opportunity to housing, commerce, and education, *i.e.*, the market.⁴⁵⁵ Moreover, the discrete nature of sexuality as opposed to race could mean that legitimate equal opportunity free from illiberal animosities could translate into more equality in results and status for homosexuals. A neo-liberal equal opportunity approach, divorced from the past that continues to operate in the present, merely hits pause on the stratification of wealth and opportunity for blacks.⁴⁵⁶ However, neo-liberalism for indiscrete groups not facing steep hierarchies built easily in the past on readily identifiable characteristics, and unburdened in the present from illiberal animosity, could hasten the march toward full civil rights.

The most recent and visible example of this march to expand civil right for homosexuals can be seen in *United States v. Windsor*.⁴⁵⁷ While the Court passed for the time being on the bigger question of a federal constitutional right to same-sex marriage in *Hollingsworth v. Perry*⁴⁵⁸ allowing in effect if not intentional design for the right to marry to continue to expand on a state level,⁴⁵⁹ Justice Kennedy wrote his third opinion favorable toward rights for gay Americans in seventeen years.⁴⁶⁰ The majority opinion in *Windsor* contains even more analytical

450. *Id.* at 562.

451. Compare *Romer*, 517 U.S. 620, with *Lawrence*, 539 U.S. 558.

452. *Lawrence*, 539 U.S. at 578.

453. See generally *Romer*, 517 U.S. 620; *Lawrence*, 539 U.S. 558 (renting or buying real property was one of many liberties involved in *Romer*).

454. The torrent of scholarship that *Lawrence* provoked included a substantial portion commenting on its libertarian roots. See, *e.g.*, Davin J. Hall, *Not So Landmark After All? Lawrence v. Texas: Classical Liberalism and Due Process Jurisprudence*, 13 WM. & MARY BILL RTS. J. 617, 650 (2004) (“Classical liberalism was the ideological underpinning for the aspirations of the Constitution”); Park, *supra* note 70, at 838 (The *Lawrence* decision was “an accurate understanding of the libertarian underpinnings of American constitutionalism”); BARNETT, *supra* note 70.

455. See, *e.g.*, Hall, *supra* note 454.

456. See, *e.g.*, *id.*

457. 133 S. Ct. 2675 (2013).

458. 133 S. Ct. 2652 (2013).

459. The following states legalized same-sex marriage after the Supreme Court ruled in June: New Jersey, Hawaii, Illinois, New Mexico, and Utah.

460. See *Windsor*, 133 S. Ct. 2675.

language than *Romer* and *Lawrence*, discussing in detail the equality, dignity, and respect involved in affording the same constitutional rights to homosexuals that heterosexuals enjoy.⁴⁶¹ It is once again anchored, however, by a discussion of “the right to marry,” and notably commences by mentioning a significant \$363,053 tax bill levied by the government against Edith Windsor as a result of her being denied the right to legally marry her partner of thirty-six years.⁴⁶² Justice Kennedy’s federalism/equal protection hybrid analysis of precedent begins with *Loving v. Virginia*⁴⁶³ and liberal principle of limiting the states’ interference with individual rights, noting that “state laws defining and regulating marriage, of course, must respect the constitutional rights of persons.”⁴⁶⁴

Justice Kennedy emphasizes the unique and singular role that states have played in defining marriage to the exclusion of the federal government.⁴⁶⁵ The crux of his opinion, however, as lamented by Justice Scalia’s dissent, is that states should regulate less and defer to the individual rights of all citizens—gay or straight—in marriage contracts.⁴⁶⁶ Despite Justice Kennedy’s assertion that “[t]he State’s power in defining the marital relation is of central relevance in this case quite apart from principles of federalism,” his emphasis instead focuses on a “resulting injury and indignity (from denying marriage to same-sex couples) [that] is a deprivation of an essential part of the liberty protected by the Fifth Amendment.”⁴⁶⁷ The terms used cast the federal government as a discriminating agent against the Fifth Amendment rights of liberty guaranteed to individuals; Justice Kennedy’s analysis, however, also applies to the thirty-eight states that still defined marriage as only being valid between one man and one women, thus implicating those states as interfering with the rights of individuals to marry as a violation of the Fourteenth Amendment.⁴⁶⁸

461. Compare *Romer v. Evans*, 517 U.S. 620 (1996), and *Lawrence v. Texas*, 539 U.S. 558 (2003), with *Windsor*, 133 S. Ct. 2675.

462. See *Windsor*, 133 S. Ct. at 2683.

463. See *Loving v. Virginia*, 388 U.S. 1 (1967).

464. *Windsor*, 133 S. Ct. at 2691.

465. “Consistent with this allocation of authority, the Federal Government, through our history, has deferred to state-law policy decision with respect to domestic relations.” *Id.* “The significance of state responsibilities for the definition and regulation of marriage dates to the Nation’s beginning.” *Id.*

466. “[T]oday’s prohibition of laws excluding same-sex marriage is confined to the Federal Government (leaving the second, state-law shoe to be dropped later, maybe next Term),” a bemoaning similar to a prediction made in *Lawrence* ten years previous that invalidation of sodomy laws would beget invalidation of laws banning same-sex marriage. *Id.* at 2705.

467. *Id.* at 2692.

468. *Id.* at 2706. (Scalia, J., dissenting). Justice Scalia dissented, pointing out that,

[t]he only possible interpretation of [the majority’s opinion] is that the Equal Protection Clause, even the Equal Protection Clause as incorporated in the Due Process Clause, is not the basis for today’s holding. But the portion of the majority opinion that explains why DOMA is unconstitutional (Part IV) begins by citing *Bolling v. Sharpe*, *Department of Agriculture v. Moreno*, and *Romer v. Evans*—all of which are equal protection cases. And those three cases are the *only* authorities that the Court cites in Part IV about the Constitution’s meaning, except for its citation of *Lawrence v. Texas* (not an equal-protection case) to support its passing assertion that the Constitution protects the “moral and sexual choices” of same-sex couples.” (internal citations omitted)

Id.

Justice Kennedy acknowledges as much, repeating that “[t]he States’ interest in defining and regulating the marital relation, subject to constitutional guarantees, stems from the understanding that marriage is more than a routine classification.”⁴⁶⁹ While he mostly maintains throughout the opinion that his analysis concerns DOMA’s interference with “the States in the exercise of their sovereign power,” Justice Kennedy’s proclamations of federalism are routinely followed—in most cases immediately—by stressing the importance of the freedom of choice for same-sex couples to marry.⁴⁷⁰ The Fifth Amendment’s Due Process and Equal Protection Clauses are offered as the applicable constitutional provisions in *Windsor* and nominally, this would appear correct given that DOMA was a federal statute.⁴⁷¹ Justice Kennedy’s reasoning, however, with all of his references to the freedom to choose, the right to marriage, and dignity and respect, make *Windsor* not a state’s rights opinion but an individual rights against State regulation of marriage contracts opinion.⁴⁷² These individual—or two individuals joined as a couple—rights, stemming from the marital contract are largely financial, found with respect to healthcare benefits, bankruptcy protection, taxes, social security, financial aid, and disparate consequences in criminal law.⁴⁷³ Whether provided by the protections of liberty in the due process and equal protection guarantees of the Fifth and Fourteenth Amendments of which Justice Kennedy does not clearly specify, perhaps purposefully to the chagrin of Justice Scalia, what is discernible is once more liberalism’s preference of withdrawing State regulation—federal or state—in favor of individual rights to freely contract is vindicated.⁴⁷⁴

Further, as noted in previous cases, not only is an individual’s right to contract with another individual at stake, but also her ability to contract with the vendors, merchants, and proprietors involving goods and services attendant to formally wedded couples.⁴⁷⁵ The vast economic incentives and advantages enmeshed in the American marriage contract have unsurprisingly become the basis for some conservative support for permitting same-sex marriage.

See also id. at 2709 (citing *Lawrence v. Texas*, 539 U.S. 558, 604 (2003) (referring to the assertion that the majority’s holding is confined to those already married as “bald” and “unreasoned”)) (Scalia, J., dissenting).

469. *Windsor*, 133 S. Ct. at 2692.

470. *Id.* at 2693.

471. *Id.* at 2695.

472. *Id.*

473. *Id.* at 2694–95.

474. *Id.*

475. *See, e.g.*, Andrew Sullivan: <http://www.newrepublic.com/article/79054/here-comes-the-groom> (presciently laying the foundation for conservatives and all political persuasions in 1989 when same-sex marriage was hardly conceivable to anyone); Richard Thaler at U Chicago: <http://www.nytimes.com/2012/02/19/business/gay-marriage-debate-is-about-money-too.html> (a more recent economic argument in favor of same-sex marriage); Dr. Badgett at UCLA on Department of State: <http://fpc.state.gov/210811.htm> (conducting a macro study estimating a \$1.4 billion positive impact on U.S. economy as a result of recent legalization of same-sex marriage; See also Dr. Badgett conducting a similar study for Australia: <http://williamsinstitute.law.ucla.edu/wp-content/uploads/Badgett-Smith-Econ-Impact-Marriage-Feb-2012.pdf> (discussing the hundreds of millions of dollars impact on the Australian economy if same-sex marriage were legalized); and same-sex marriage’s positive economic impact on a micro scale <http://www.cnn.com/2009/POLITICS/03/06/same.sex.marriage.economy/>.

CONCLUSION: OUT OF MANY, ONE

Rogers Smith's *Multiple Traditions* thesis persuasively characterizes American political culture as a historical blend of liberal and illiberal ascription based on race and sex, and to a lesser extent, republican traditions.⁴⁷⁶ The Supreme Court's application of the Fourteenth Amendment to civil rights decisions has largely illustrated these competing ideologies.⁴⁷⁷ While evidence of each political theory can be found in the Court's civil rights jurisprudence—some more heavily than others depending on the period—liberalism is virtually omnipresent. While it competed against virulent strands of American ascription at the country's inception into the twentieth century, and a nominal egalitarian revolution during the Warren Court, a resurgent neo-liberalism in the wake of the Civil Rights Movement saw a near singular and dispositive preference for liberal notions of individual rights and deregulation take hold.

The Court's neo-liberal fixation on an atomized and colorblind intent-over-impact approach in the present leaves the steep hierarchies of the past intact. Discrete minorities that were once victims of illiberal animosity toward entire groups are now viewed by neo-liberalism as individuals expected to achieve the same results under the guise of an equal opportunity scrubbed of the past. While neo-liberalism dominates at the Court, vestiges of illiberal Americanism in race and sex (along with the different manifestations that the Court is beginning to grapple with) increasingly remain. Indiscrete groups—homosexuals in particular—may be able to call on the Court's inclination toward individual rights and deregulation to strike down illiberal State homophobia. While the neo-liberal American state abdicates its duty to remediate the damage its illiberal tradition has done to its discrete groups, a hands-off equal opportunity approach could be what indiscrete groups such as homosexuals need in order to move toward full equality.

476. See generally Smith, *supra* note 1.

477. See, e.g., *Washington v. Davis*, 426 U.S. 229 (1976), *Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256, 273 (1979), *Harper v. Va. State Bd. Of Elections*, 383 U.S. 663, 668 (1966).