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INTEGRITY AND UNIVERSALITY: A COMMENT ON RONALD DWORKIN'S *FREEDOM'S LAW*

Robin West

INTRODUCTION

RONALD Dworkin has done more than any other constitutional lawyer, past or present, to impress upon us the importance of integrity to constitutional law, and hence to our shared public life. Far from being merely a private virtue, Dworkin has shown that integrity imposes constraints upon and provides guidance to the work of judges in constitutional cases: Every constitutional case that comes before a court must be decided by recourse to the same moral principles that have dictated results in relevant similar cases in the past. Any group or individual challenging the constitutionality of legislation which adversely affects his or her interests is entitled—morally and legally—to a reasoned decision illustrating why moral principles held constitutionally dispositive in earlier cases regarding similarly situated groups should not be equally dispositive for him or her.¹ When done well, the result of this method is what Dworkin has called an “integrity of principle,”² which, in turn, is a necessary, albeit not sufficient, condition for the moral justification of the constraints of constitutional law in a democratic state. Stated differently, if constitutional law is to be a part of a morally justified form of democratic self-governance, then the moral principles at its core must be applied even-handedly, and they must be applied even-handedly no matter how difficult, inexpedient, inefficient, or simply politically unpopular it may be, from time to time, to do so. Finally, commitment to such a view defines membership in the “party of principle,”³ intended as a contrast to the membership of the “party of history,”⁴ who defends and locates rights not by reference to general principles even-handedly applied, but rather, by reference to whether the argued right respects distinctions honed and honored by tradition.

Dworkin has found the authority for his argument that constitutional fidelity is largely a matter of “integrity of principle” in a number of constitutional points of reference. He has found it, for example, in the language of the Equal Protection Clause;⁵ he has found

1. Ronald Dworkin, *Freedom's Law: The Moral Reading of the American Constitution* 7-8, 10-11, 81-83 (1996) [hereinafter Dworkin, *Freedom's Law*].

2. *Id.* at 103; Ronald Dworkin, *Sex, Death, and the Courts*, N.Y. Rev. Books, Aug. 8, 1996, at 44, 50. [hereinafter Dworkin, *Sex, Death*].

3. Dworkin, *Sex, Death*, *supra* note 2, at 50.

4. *Id.* at 44.

5. *See* Dworkin, *Freedom's Law*, *supra* note 1, at 7-10, 47-48.

it in the body of case law decided under the Due Process Clause of the Fourteenth Amendment;⁶ he has found it in the logic of constitutional democracy;⁷ and he has found it, somewhat paradoxically, in the intent of the Framers of the Constitution themselves.⁸ I have no reservation about the strength of any of these claims, but one limit on all of them should be noted: Although they forge a consistency between the Constitution and the constraint of integrity, thus keeping at bay the danger of a conflict between principle and constitutional authority, they also relativize the constraint itself. Integrity, in these arguments, turns out to constrain constitutional decision making only because this Constitution—or at least, this Constitution as it has been more or less consistently interpreted to date—so happens to require it.

In my view this relativism is unfortunate. It holds “integrity” and “principle” hostage to precedential and constitutional history, which may or may not constitute a “moral sail” in which we should put our trust. After all, even the most optimistic constitutional scholar in America must at some point countenance the possibility that some day, if not today, the Court will embark on a disastrously wrong-headed path, such that eventually, over time, the only precedential stories that possibly could be told would betray the project of integrity that Dworkin identifies as central to the constitutional mission. At that point, on Dworkin’s own account, I think it is clear that the “party of principle” must in principle be committed to the best fit, and not to the moral project. Thus, to take an example, although the Court has not gone down this route, we could certainly imagine a potential line of precedent stemming from *Bowers v. Hardwick*,⁹ in which the Court might identify protection of marriage and the family—not protection of individual autonomy—as the core tradition protected by the substantive Due Process Clause, because it is the family, not individual autonomy, that lies at the heart of our historically honored traditions, and it is tradition, not integrity, which the Court must honor. Following a string of cases establishing such a principle, the Court might one day decide, as did the citizens of Colorado,¹⁰ that antidiscrimination laws protecting gays and lesbians are an unconstitutional infringement of substantive due process—the liberty of the individual to participate in the time-honored traditional institution of marriage and the family simply cannot be threatened with state or federal laws that undermine its cultural and social standing. Supported by a solid enough body of precedent, such a decision may well emerge, in this counterfactual story I am telling, as the “best fit.” At that point, the party of principle, as I read Dworkin, would have to

6. *Id.* at 50-54.

7. *Id.* at 11, 32-38.

8. *Id.* at 8-12.

9. 478 U.S. 186 (1986).

10. Colo. Const. art. II, § 30b (commonly referred to as Amendment 2).

declare its allegiance to just such an illiberal ruling. Perhaps this would not be such a terrible thing—it would still be open to the liberal member of the party of principle to urge a constitutional amendment, or to use tools of persuasion entirely outside the constitutional realm as a vehicle for changing hearts and minds. But there would be one cost. The “party of humanity”—whatever may be the case regarding the party of principle—would lose not only the voice of the Constitution, but also would lose the voice of Ronald Dworkin, who has to date been a powerful advocate not just of constitutional integrity, but also of a generous and open liberalism. Should judge-made constitutional doctrine evolve consistently over time in an illiberal direction, foregoing integrity for historical allegiance, such that Dworkin’s passion for fidelity to the moral sail that is our interpreted Constitution would come into an undeniable conflict with his liberal instincts, Dworkin would simply have to choose, and whichever way he chose, either our constitutional or our liberal traditions would unquestionably suffer a loss.

In these comments, I want first to suggest a non-relativist argument for the necessity of integrity to constitutionalism, intended, frankly, to resolve the above noted tension, and to do so by identifying the grounds for integrity and principle in neither the interpreted constitution nor in liberalism, but in a substantive value that is deeper and broader than both, and hence both informs and constrains both. The constraint of integrity, I will argue, arises not from the “sail” of constitutional precedent itself, which goes wherever the wind blows it, nor from liberalism per se, but from a source external to both, which accordingly constrains the direction which constitutional authority might take. The argument that I will suggest is by no means inconsistent with Dworkin’s arguments and indeed is strongly suggested in much of his earlier writing, particularly *Law’s Empire*.¹¹ In the second part of my comments, I will suggest some limitations on this conception of integrity. Finally, I will offer a friendly amendment to Dworkin’s account of integrity.

I. INTEGRITY AND UNIVERSALISM

The additional argument that I want to suggest for the necessity of an “integrity of principle” to constitutional decision making is simply this: Constitutional law is a branch of law, and constitutional adjudication is a type of adjudication. The moral “point” of all adjudication, to use one of Dworkin’s many helpful aphorisms,¹² is a specific type of justice, namely legal justice. When courts adjudicate cases by crafting and applying law, what they aim to achieve is legal justice. When they decide constitutional cases, things are no different: They accordingly

11. Ronald Dworkin, *Law’s Empire* (1986) [hereinafter Dworkin, *Law’s Empire*].

12. See *id.* at 87-88.

aim for legal justice in constitutional cases as well. What legal justice requires, in turn, is that like cases be decided alike. The mandate that similar cases be decided similarly is quite explicitly at the heart of the common law's rule of precedent, or *stare decisis*, it is the essence of the idea of the "Rule of Law," it is arguably at the heart of the idea of Law itself, and, to personalize the matter somewhat, it is at the heart of the judicial vow to faithfully "uphold the law."

The mandate that like cases be decided alike intersects with the requirement of "integrity" in two distinct ways. First, and as Dworkin has argued in this book and at greater length in *Law's Empire*, a legal system—a pattern of results—has "integrity" when cases are decided consistently, and lacks integrity when the pattern is marred by unexplained inconsistencies.¹³ But second, if, as I suggested above, the requirement of consistency is imposed upon constitutional adjudication not only by the Constitution, but also by the demands of justice, then it follows that constitutional cases that lack integrity—that are inconsistent—are simply unjust. Thus, one might argue, the result in *Romer v. Evans*¹⁴ is fundamentally unjust because it fails the test of integrity: The citizens of Colorado were entitled to a decision consistent with past precedent, namely *Bowers*,¹⁵ and the failure of the Court to meet that legitimate expectation was an act of injustice. "Integrity of principle" is therefore necessary to constitutional adjudication, because it is required by justice.

Of what value, precisely, is integrity, understood as the consistency in results to which the exercise of that virtue leads? Why is it so important to treat like cases alike, in constitutional cases or elsewhere? A common, but I think incomplete, answer is that consistency or integrity in the application of public force renders that force more predictable, and hence manageable, than would be the case if state force was to be applied arbitrarily or inconsistently. Integrity in the administration of justice accordingly strengthens our individual liberty by giving us some degree of protection against unwarranted or, at any rate, unpredictable state intrusion. This is surely true, but also, I think, not the entire picture. Our revulsion when faced with glaring examples of legal injustice strongly suggests that more than our needs or desires to control our own future, or even more broadly our individual liberty, is compromised when legal integrity is sacrificed for some other noble or ignoble end.

Let me quickly bring to mind a few examples of flagrant injustice, in the non-constitutional context, just to suggest what else may be at stake. In the mid-sixties, Bob Dylan immortalized a wealthy and well-connected murderer from Maryland's eastern shore by the name of William Zanzinger. At a "Baltimore Hotel Society gathering,"

13. *Id.* at 227-28.

14. 116 S. Ct. 1620 (1996).

15. *Bowers v. Hardwick*, 478 U.S. 186 (1986).

Zanzinger, as reported in the newspapers, struck, in a fit of pique with his walking cane, an African American woman named Hattie Carroll, a mother of ten children, who was employed as a maid at the gathering he was attending, and caused her death. This was a grotesque crime, but not the subject of Dylan's song. Rather, Dylan's "social protest" focused not on the crime but the legal injustice of the sentence: The well-connected and well-heeled Zanzinger received for his crime from a sympathetic Baltimore City judge a sentence of six months jailtime. Similarly, and more recently, Maryland residents may recall a defendant by the name of Peacock, who, like Zanzinger, had also committed a horribly brutal murder, but who, again like Zanzinger, also received notoriety not because of the crime he committed—which was a commonplace act of fatal domestic violence—but rather, because he was the beneficiary of legal injustice. Peacock received from a Baltimore County judge a sentence of eighteen months in a work-release program for killing his wife in anger, three hours after finding her engaged in an act of adultery. He received his sentence after first listening to the judge deliver a colloquia at the hearing, in which he, the judge, professed his belief in the defendant's moral innocence, his lack of criminality, and the judge's sympathetic identification with the defendant's state of mind and deed. Anyone, the judge opined, would be hard pressed to refrain from acting as Peacock had acted. Just as it was Zanzinger's unjust sentence—not his crime—which sparked Dylan's protest, so it was Peacock's sentence—not the crime—which prompted the public uproar and, eventually, the public hearing levelled against the judge, after the judge's comments were made public.¹⁶ To cite just one further example, it is still a fresh wound for many of us that a defendant named O.J. Simpson, with the help of seemingly endless wealth, hired lawyers who cynically manipulated a jury toward a false verdict of innocence. Again, the crime was horrible enough, but it was the injustice of the verdict, and the process used to produce it, that continues to rankle the legal conscience. It is the unjust verdict, not the violent crime, that violates the demands of an integrity of principle.

The feelings of disgust and disbelief coupled with a sense of betrayal and hollow emptiness that these cases and others like them engender—even in those of us disenchanted with the punitive premises of even a well functioning criminal justice system—suggest, I think, that legal injustice—the failure to treat likes alike—touches in us something elemental, and something which is seemingly unrelated to our understandable desire for predictability and rationality in state actions. Cases of legal injustice—of the system's refusal or inability to render decisions that effectively treat like cases alike—are so offen-

16. *Judge Cahill's Grievous Failure*, Baltimore Sun, Oct. 19, 1994, at 16A; Tamar Lewin, *What Penalty for a Killing in Passion*, N.Y. Times, Oct. 21, 1994, at 18; *She Strays, He Shoots, Judge Winks*, N.Y. Times, Oct. 22, 1994, at 22.

sive, I believe, because they fly in the face of our experiential sense that all of us, as human beings, share a common, universal nature. Indeed, it is by virtue of that shared nature that we know that these particular acts, whatever their individuating circumstances, are horrendously wrong. Our moral conviction that the singular important implication of that universal, shared nature is that it, in turn, demands similar treatment by those empowered to act upon us in life-altering ways. Legal injustice violates our fraternal conviction that, in spite of our many differences, we are alike in very critical fundamental ways. That conviction is shattered when radically different norms are applied to some individuals, but not applied to the rest of us.

The result of legal injustice is not, then, just a diminution in personal liberty. It is also a violation of our fraternal feelings of kinship, and our conviction that because of that kinship we can each lay claim to a measure of equality in our individual worth. By virtue of the violation of that pact, legal injustice is a rending of the bonds of community, no less than a diminution of the scope of individual liberty. Acts of legal injustice—blatant failures to decide similar cases similarly—excommunicate some part of us, because they create differences in treatment at precisely the point and moment where such treatment matters most—the intersection of state power and individual action—and hence at precisely the point where our universality should be most respected and honored. The three cases cited above and others like them create a difference, where there should be universality, between those three defendants and those of us who, if charged with similar crimes would be dealt with much more harshly. Perhaps even more importantly, albeit less noticed, it creates differences between *their* victims—poor, black, female, married, adulterous, or some combination of these disenfranchising characteristics—and other potential or real victims without these disenfranchising characteristics who can rationally expect both greater state protection of their safety and rationally expect, when that guarantee of protection fails them, to see their torturers or killers receive their due. Grotesque miscarriages of justice—failures of the mandate of legal integrity—are accordingly not only unduly constrictive of our liberty, but they are also violative of both the basic moral equality of worth which our shared human nature grounds, and the community of equals that shared worth facilitates.

Before turning to constitutional cases and constitutional integrity, and more specifically to *Romer*, let me turn to politics for a moment to illustrate the positive connections among formal justice, universality, and fraternity. When Walter Mondale named Geraldine Ferraro as his running mate, if memory serves, a good many women, myself included, were left dumbstruck with powerful, unexpected, and even childlike feelings. That he actually did this simple thing—acted on his belief that a woman could be President—to my amazement, elicited in

me sudden and strong feelings of inclusion, of belonging, of community, and even of gratitude. I did not know until that moment how very excluded I had been, and felt, from the fraternal community of national politics. That Ferraro could be nominated for national office did indeed mean that gender—*my* gender—made no difference. All of us shared this potential for national office, or at least for all of us, gender was not a disqualifier, and I had not realized in the slightest until that moment that no other presidential candidate had ever inspired such a feeling—or rather, that each had inspired very much the opposite. That feeling of sudden and dramatic inclusion in a community of political equals was, in a word, wondrous—it was wonderful to be acknowledged and included, to have one's commonality and shared humanity so publicly recognized, and at the same time it was surprising to realize how deep and unacknowledged had been the longing for precisely that sort of recognition, for that sort of inclusion in the political and public life we really do all share.

These wondrous moments, these sudden and dramatic and inclusive acts, which simultaneously expand the reach of the political community by acknowledging the commonality of the human community, are rare, but they do occur, and when they occur, they are precious. The importance, the beauty, and the wonder of the Supreme Court's decision in *Romer*, lie in the fact that it was just such a moment. It should come as no surprise to anyone that the opinion was met with tears, celebrations, and shouts of exhilaration even in those who are deeply skeptical of the liberatory potential of liberal constitutionalism;¹⁷ even in those who hold little but distrust for the Supreme Court and its machinations; and even in those who have turned their backs on both politics and law as vehicles for the expression of bonds of civic connection. The feeling, I would venture to guess, was for many, similar in quality, intensity, and unexpectedness, as those described above: It was a feeling of relief, of surprise, and of sudden and dramatic inclusion in community. It was, perhaps foremost, a feeling that one has surprisingly reclaimed a forgotten and, for many, a forsworn ideal of fraternity.

Now it is certainly true that the decision in *Romer* acts an apparent legal injustice: It is inconsistent with *Bowers*, as everyone seems to insist, concede, acknowledge, or celebrate, and consequently it upset an expectation of the citizenry of Colorado to a decision consistent with past precedent. Nevertheless, it bears emphasizing that *Bowers* was wrong, because it was unjust, and there simply is no legitimate expectation to a decision in accordance with bad law. Justice Kennedy participated in, at worst, a legal injustice; he created inconsistent precedent by not explicitly overruling a case clearly inconsistent with

17. Joan Biskupic, *A Court Bent on Erasing Lines of Distinction*, Wash. Post, July 7, 1997, at A6; *Gay Justice*, The Nation, June 10, 1996; *Upholding Equality*, Boston Globe, May 24, 1996, at 22.

the case at hand. He did so, however, to correct an injustice of constitutional magnitude—an inconsistency in the Colorado Constitution between its protection of classes of citizens. But it is of far greater consequence that his departure from precedent in order to do so effected, to use an overused term, a paradigm-shifting act of justice. It sought to bring historical, long-standing, and widespread patterns of legal and social thought and behavior—behavior and thought differentiating two classes of people—into sharp and critical focus. It did so by highlighting the essential and natural sameness of the two groups in question, against which those historically sanctioned, honed, and honored discriminatory patterns of thought and behavior are acts of moral and political violence.

To its credit, the opinion rests explicitly on an inclusive, embracing ideal of fraternal community, which none of us have heard or entertained in a very long time, and which gay and lesbian citizens had little reason to hope would ever be applied equally *to them*. As such, it was an act of legal, political, and constitutional integrity of a very tall order. It was one which was all the more surprising by virtue of its intellectual as well as political context: A political society increasingly hostile toward sexual outsiders, and an intellectual society both fractured by claims of differentiating identity, and not only uncommitted to but scornful of the moral claims upon us by virtue of our shared universal, natural, human traits. Justice Kennedy's declaration, in the course of ruling unconstitutional an amendment to the Colorado Constitution that would disable gay and lesbian citizens from employing the machinery of state law and politics to protect them against discrimination, that "[a] State cannot so deem a class of persons a stranger to its laws"¹⁸ really is a wonder to behold and an event to celebrate—a great act of judicial integrity.

This particular and utterly constructed legal difference between homosexual and heterosexual citizens, Justice Kennedy can be understood as saying, whether it is grounded in animus or traditional morality, and whether it originated in a Kulturkampf or a fit of spite (and surely the argument for judicial invalidation is stronger not weaker, if the former, Scalia's utterly bizarre statement to the contrary notwithstanding)¹⁹ simply will not stand. What heterosexual and homosexual citizens are universally—what we naturally share, and what we have in common—swamps in importance and magnitude this difference of sexual preference, orientation, or tilt. Legal justice, then, and the constitutional integrity that is its counterpart, demand that we treat these two subcommunities similarly. That it requires a departure from precedent, and that it also highlights the immorality, as well as the unconstitutionality, of the constructed social and legal

18. *Romer*, 116 S. Ct. at 1629.

19. *Id.* at 1629 (Scalia, J., dissenting).

distinctions are facts worth noting. The grounds of justice on which it stands constitute an Archimedean critique of both law and culture. That it is such a departure, however, and that it is indeed a critique, hardly weighs against the aspirational aim to which the case gives voice.

II. INTEGRITY'S LIMITS

Whether grounded in the constitutional tradition itself, or in the more quintessentially liberal identification of our universality, a number of serious problems remain with Dworkin's conception of integrity as the heart of constitutional fidelity. I will mention here the two major problems only to put them to one side, as they are the subject of tomorrow's papers, and because I have written on them elsewhere. The admonition that like constitutional cases be decided alike—that is by reference to the same guiding moral principle—provides no protection whatsoever against the danger that the moral principle that forms the major premise is unwise, misguided, or downright evil, and, in fact, will go a considerable distance in the direction of obscuring that danger. The second problem is that the moral principles our Court has found and then applied in fourteenth amendment jurisprudence—primarily principles requiring of states a measure of legislative rationality and granting to citizens a sphere of negative liberty against state action—may have been wrongly constrained by the jurisprudential demands placed upon the judicial, court-centered context in which they have been crafted—a context, it should be noted, itself inconsistent with the express language of Section Five of that amendment, which requires legislative, not judicial, enforcement—and have resulted in interpretations of those clauses which, if not flatly wrong, are at least at right angles to the meaning seemingly required by their express language. The Equal Protection Clause, after all, appears to require *protection* from states, rather than rationality, and the entire amendment seems to prohibit state *inaction*—as in, no state shall *deny*—not state action, as it has been interpreted. As noted, however, I have written at length on both problems elsewhere, as have other members of this Symposium, and I will not belabor those claims here.

In this Article, I want to look at two other limits, or potential dangers, of this conception of constitutional integrity, each of which, I think, is independent of the problems noted above. Both problems go instead to the more general assumption that like cases in the constitutional realm must be decided alike. The first problem is simply that this construction of the project of doing formal constitutional justice—of deciding constitutional cases by reference to moral principles drawn analogically from earlier similar cases—albeit toward the admirable end of acknowledging our universal nature and the equality of respect and treatment that universality demands—perhaps precisely

because it is so motivated—inclines the decision maker toward eliding very real and salient, whether or not natural, differences between groups, situations, persons, and cases. Let me put it this way: The risk run by the “party of history” is excessive deference to the particular discriminations and differences that have been carved out by our traditions, while the risk run by the “party of principle” is the opposite: It is the risk that a search for natural universals will run roughshod over very real differences. The risk we run when we commit ourselves to the profoundly liberal project of constitutional integrity is that we sometimes—I think often—wind up saying things about who we are and what we are like, and then, given the methods of adjudication, repeating them over and over, and they are simply false—sometimes laughably and trivially false, but sometimes they are tragically and even disastrously false. Saying things over and over again about who we are and what we are like that are not true, and more or less suppressing the knowledge of their falsehood is also, of course, a failure of integrity, even when motivated by the commendable attempt to act in accordance with that virtue.

The second danger posed by the party of principle that I want to identify goes to the quality of our moral discourse, particularly our critical moral practices. A moral language which is exhausted by the language of similarity and the equality of treatment it demands is a stunted one. That the moral language of liberalism is indeed stunted in just this way is the common thread in critiques of liberalism that otherwise have no common points of origin, from the bitter complaints of Edmund Burke, to the more friendly urgings of liberal communitarians such as Michael Sandel or William Galston in our own time. I think that criticism is basically sound, and all I want to add to it here are some illustrations of the ways in which it has stunted liberal critical discourses regarding constitutional principles as well.

Let me look first at some of the falsehoods that swirl around our modern substantive due process, and then turn to those made in equal protection cases. In both sorts of cases I argue that while it has been largely a healthy respect for the constraint of integrity that moved the Court to decide these cases in the ways that it did, the same respect has also pushed the Court to assert untrue ways in which a case at hand is analogous to an earlier case. In the due process area, the assertions of sameness are put toward the end of showing that a challenged liberty is like a liberty protected in the past, and that therefore a law abridging it is unconstitutional. In the equal protection cases, more directly, these assertions are put toward the end of showing that a burdened group is sufficiently like an unburdened group so as to render the law that adversely affects the first group irrational and hence unconstitutional. In both sorts of cases the asserted sameness is belied by a nature which is in fact considerably more complex.

Look first at *Griswold v. Connecticut*²⁰ and *Eisenstadt v. Baird*,²¹ the two contraception cases from the sixties that in turn are the cornerstone of subsequent abortion rights cases, as well as the cornerstone of modern substantive due process more generally. The challenge for the Court in both *Griswold* and *Eisenstadt* was to analogize the personal decision to take contraception to personal decisions protected in past cases—decisions involving who and whether to marry, what sort of education to provide for one's children, what sorts of languages they should be learning, the number of years they should attend school, etc. The aim of the analogy was to show that the decision to use contraception is “like” decisions made regarding family life, because it was by then fairly well established that family life—and more generally the institution of the family—is to some degree protected against state intrusion. If the decision to use contraception could be successfully analogized to these individual decisions regarding the family, and if the latter are constitutionally protected, then so should be the former.

To fortify the analogy, the Court, as well as liberal celebrants of these decisions, past and present, have been led to almost ludicrously false descriptions of the typical individual's decision to use or not use contraception. If we take at face value the language of those decisions as well as the language of their celebrants, what emerges is a view of the social reality of sex and reproduction that is simply bizarre for two reasons. The first oddity, which I will not dwell on, is that the decision whether to take birth control pills is portrayed in both cases, as well as in all of the literature celebrating both cases, as a decision whether to reproduce. This oddly implies that the heterosexual sex act itself is simply inevitable: The decision to use contraception is a decision about reproduction, because the sex is going to happen regardless. Sex is just a natural certainty, the autonomous individual choice, then, comes in at the point of deciding whether to reproduce. What you are deciding, when you decide to use birth control, is whether you are going to risk getting pregnant. It is a given, apparently, that you are going to have sex. But let me put that to one side. Second, and the point I want to stress here, is that the individual's decision to use contraception—by this point equated with a decision whether to reproduce—is then routinely characterized, both in the cases themselves and repeatedly in the literature about them, as a deeply moral, personal, often religious, or at least extremely serious act of introspection. The potential user apparently conducts his or her own personal family planning session, and determines, in the course of this highly serious dialogue with her own conscience, when and whether to undertake the momentous challenge of starting or expanding a family. The use of contraception, on this *Griswold-Eisenstadt* depiction, is a

20. 381 U.S. 479 (1965).

21. 405 U.S. 438 (1972).

rite of passage into the mysteries, intricacies, and responsibilities of family life.

Surely everyone with even glancing familiarity with the sexual revolution of the second half of this century, which was in turn occasioned, largely, by the availability of cheap or free, safe, and generally hassle-free contraception—a demographic cohort which includes most liberal celebrants of the Supreme Court's privacy jurisprudence—realizes that this description is nonsense.²² First of all, of course, sex is not or should not be regarded as a natural inevitability, although the availability of reliable and cheap birth control might have made it seem to be. More to the point, here, however, what many users of contraception intended then and intend now was precisely to *avoid* initiation into family life, and to *sever*—not fortify—the connection between heterosexuality and reproduction. The sudden availability, in other words, of cheap and reliable birth control occasioned a *disruption* in the natural rhythms of heterosexuality and reproduction—a disruption so profound as to require a massive, now forty years-on and continuing, individual and societal reexamination of sexual mores. Indeed, I think it is fair to say that the technological and social revolution occasioned by the invention of safe, available, and reliable birth control—and make no mistake about it, before the pill and the IUD there was not any—brought about a transformation in our sexual nature, and certainly in the “nature” of heterosexual intercourse, the meaning of which we have still not confidently ascertained. Because of that, there is just not much in our past—and most certainly in our past history of familial authority and familial autonomy—to which the decision to use birth control can successfully be analogized. It is just *sui generis*. That fact alone, if acknowledged, would present an awesome challenge to those of us who are committed to the project of finding the roots of justice in our shared nature, and of bringing legislation regarding birth control within the ambit of justice. Birth control is one of those rare technological innovations which signal a generational break in the continuity of our nature. Our sexuality has been altered by this social event. Heterosexuality will never again be like it was before this revolution. The search for like cases across this divide is going to come up short.

In one sense, of course, it is true that *Griswold* and *Eisenstadt* are exactly what their liberal celebrants have always claimed them to be: cornerstones of a quite general right of decisional autonomy. *Griswold* and *Eisenstadt* did indeed essentially lower a constitutional cloak of privacy around the individual's right to engage in that reexamination of sexual mores and to engage in it unimpeded by the burden of the contrary deliberations of the collectivity, and then to act accord-

22. See Barbara Ehrenreich, *The Hearts of Men: American Dreams and the Flight from Commitment* (1983); David J. Garrow, *Liberty and Sexuality* (1994).

ingly on those decisions. But this individually autonomous decision constitutes a severe departure from—not a logical outgrowth of—the familial decisional autonomy at stake in the earlier, pre-contraception cases. The typical unmarried and heterosexually-active teen, twenty-something, or thirty-something user of contraception does not intend to embark upon an internal dialogue regarding the deepest questions regarding family, reproduction, and the meaning of life. The user intends almost precisely the opposite, namely to have affective, recreational, or fun heterosexual intercourse *freed* of the burden of precisely those questions—freed, that is, of the worry of pregnancy. What was at stake in both cases, but most clearly in *Eisenstadt*, was not in any sense whatsoever the autonomy of family life and family decisions from intrusion by the state. What *Griswold* and *Eisenstadt* protected for both married and unmarried individuals was the freedom to engage in heterosexual intercourse without fear of familial and reproductive consequences.

That the Court achieved this end through analogizing the decision to engage in non-reproductive sex to decisions made within and concerning families and intended largely to bolster the family's strength by bolstering its independence from state control, is not just one of life's little ironies. It is a falsehood that matters, for at least two reasons. First, the conflation of individual sexual liberty with the familial authority and autonomy with which it is in fact profoundly in conflict, and the creation of a right to the former from the mortar of rhetoric and passion drawn from the struggle to secure the latter, has obscured what would otherwise be meritorious implications of the only true principle behind *Griswold* and *Eisenstadt*—the principle that married and single people have a constitutionally protected right to engage in affectionate non-reproductive sex. Surely if heterosexuals have such a right then homosexuals do as well, for the simple reason that the most credible moral arguments against homosexuality also target contracepted, non-reproductive heterosexuality, and if there exists a constitutional liberty that trumps moral arguments against the latter—or, more accurately, a constitutional liberty that protects the individual's right to engage or disengage these arguments free of the collectivity in the latter case—it surely exists for the former group as well. In other words, if we had been forthright from the outset about the true meaning of *Griswold* and *Eisenstadt*, then it would have been much clearer and would have been much clearer long ago that *Bowers* is wrong, and that integrity demands no less.

But second, the conflation of individual sexual liberty with familial privacy and autonomy on which the stated rationales of *Griswold* and *Eisenstadt* rest, shields their real basis, and their real social meaning, which concerns sexual liberty, not family autonomy or privacy, from meaningful scrutiny, and accordingly obscures the *weaknesses*, as well as potential strengths, of both opinions. For even given that it would

sharpen the case against *Bowers*, it is nevertheless not at all clear that a principled constitutional right to engage in non-reproductive sex would be a desirable thing. If openly acknowledged and embraced, it would protect, presumably, not only the individual's right to engage in homosexual acts free of state interference, but might also protect, for example, the individual's right to engage in commercial sex for profit, and to organize and advertise around the resulting legalized sex trade. Such a decision would almost certainly accelerate the process of commodifying sex itself, and would almost certainly underscore the legitimation of the strikingly unequal bargaining power between offerors and offerees of sexual bargains—an inequality that already adversely permeates sexual relations, and that works almost exclusively to the detriment of women. Although I am not sure, I do not think it would be a good thing to constitutionally insulate and more thoroughly privatize the decision to engage in affective or recreational sex. It strikes me as an example of what Professor Corea, in a different context, has called “junk liberty”²³—that which is to real liberty what junk food is to real nutrition. But I realize there are important arguments that might be made to the contrary. I *do* feel sure, though, that it would not be a good thing to smuggle in such an industry and the liberty to exploit it, Trojan-horse style, in the guise of protecting marriage and the traditional nuclear family against overly intrusive or paternalistic state legislation.

I do not mean to single out *Eisenstadt*, *Griswold*, birth control, or sexual liberty. I want to make, again, the general point that the search for universality—for shared traits, for a shared nature—so as to do the project of justice runs a serious risk of false generality; of asserting sameness in the face of difference. In *Eisenstadt* and *Griswold*, the assertion of a natural sameness flew in the face of a sexual nature that had in fact been profoundly changed by an event: the invention of safe and reliable birth control. But other substantive due process cases—and substantive due process rights—clearly pose a similar dilemma. Let me quickly mention just one.

The so-called “right to die,” for example, as developed several years ago in *Cruzan v. Missouri Department of Health*²⁴ and now expanded in the Ninth Circuit's opinion in *Compassion in Dying v. Washington*,²⁵ and as celebrated in Dworkin's recent essay on the topic,²⁶ rests squarely on the assertion that each individual is the best judge of the value of his or her own life, at least when faced with imminent death accompanied by massive and incurable physical suffering. The claim

23. Gena Corea, *Junk Liberty*, in *Applications of Feminist Legal Theory to Women's Lives: Sex, Violence, Work and Reproduction*, at 1112, 1112-14 (D. Kelly Weisberg, ed., 1996).

24. 497 U.S. 261 (1990).

25. 79 F.3d 790 (9th Cir.), cert. granted, 117 S. Ct. 37 (1996).

26. Dworkin, *Sex, Death*, *supra* note 2, at 50.

of individual decisional competence is necessary to the argument, because the decision to end one's own life must somehow be brought within the ambit of the sphere of negative liberty within which one has more or less the right to do, think, or be as one pleases, the protection of which is in turn grounded, in part, in the general claim that that sphere simply is the sphere of unimpeachable reflective authority. Whatever else I may know or not know, I and no one else knows my own self-interest with respect to self-regarding matters of an intimate and personal matter. For that reason, no one, certainly not the state, should interfere with those decisions. If the decision to die is within that sphere, then justice demands that the decision be protected—even if our traditions, both legal and social are to the contrary. If the decision to die is within that sphere, then justice demands that it be treated accordingly even if the decision to do so would work a departure from (and hence an implicit criticism of) traditions, beliefs, and laws to the contrary.

But whatever may be the case regarding these anti-paternalistic sentiments generally, the claim of unimpeachable, self-regarding individual authority in this particular instance is suspect at best, as all of us with suicidal relatives, friends, spouses, or lovers who suffer from clinical depression quite well know. Depression occasions a disruption in the reliability of our self-regarding claims of knowledge which is as total as the disruption of our sexual natures occasioned by birth control, and because of it, analogies between the self-regarding decisional authority of the ill and the healthy are as fraught with difficulty as are analogies between familial autonomy and sexual liberty. For those of us who worry mightily over the suicidal inclinations of depressed and sick intimates, the suggestion that we ought to constitutionally protect the right of depressed individuals who are in serious pain to act on their self-destructive inclinations not only threatens to legitimate a status quo in which positive rights to health care and community support are lacking, but also rests squarely on an empirical claim about our nature that is baldly false: that these patients are the best judge of their self interest. Celebrants of these decisions are positing the existence of a junk liberty which, if actualized, would be, for many of us, both terrorizing and terrifying. It is a posited liberty the promise of which does little but hasten the day of our worst nightmare.

III. MODERN EQUAL PROTECTION JURISPRUDENCE

Let me turn now to an example from equal protection jurisprudence: The *Romer* case itself rests on assertions of sameness that are belied by both experience and observation. First, and most obviously, the case rests squarely on the proposition that antipathy toward gays and lesbians is “like” racist antipathy toward blacks or misogynist ha-

tred of women,²⁷ despite the repeated requests of conservative activists and theorists to have their moral arguments at least heard and taken seriously, whatever might be the judgment regarding their merit. But more importantly, both *Romer* itself and the rights movement of which it is a part rest implicitly or explicitly on the claim that distinctions drawn between straight and gay citizens, by state criminal codes, by landlords and employers, by voting citizens, or by state constitutions simply cannot be sustained because they are irrational, and they are irrational because of the lack of any salient difference between gay and straight sex, and gay or straight so-called "life styles." Thus, one prominent gay rights advocate argues quite explicitly for the "virtual normality"²⁸ of gay life: that if similarly treated, the essential and overriding sameness of homosexuality and heterosexuality would manifest itself, and would quickly come to be seen as overriding the obvious differences. A second argues that given the similarities of straight and gay men on all counts other than the object of desire, the availability of marriage to the latter would provide the same incentives for monogamy, and with the same rates of success, as it presently provides for the former.²⁹ A third argues for the moral equivalencies of gay sex with contracepted marital or non-marital sex, anal or oral heterosexual practices, post-menopausal heterosexuality, and sex between sterile heterosexual couples.³⁰ All of these arguments from sameness are deployed toward the end of achieving equal treatment: equal access to the protections of marriage, equal protection against discrimination based on sexual orientation, and equal rights against the overreaching arm of the state's criminal law.

But all of these arguments—none of which, I want to stress, I believe are necessary to establish either the correctness of the result in *Romer* or the desirability of gay marriage—clearly run the risk of false generality. There are moral arguments, held firmly by many and more vaguely by many more, against homosexuality that have simply no relevance whatsoever to race or gender relations. Gay and lesbian sexual practices are significantly different from heterosexual practices, and they are different in ways which would most likely be reflected in the type and degree of social coherence marriage would lend to those unions: Gay men are significantly more promiscuous than all women and than straight men, (and more simply engage in more sex), and lesbians are significantly more monogamous than all men and straight women. And homosexual acts are indeed different as well. Heterosexual penetration even between sterile or post-menopausal heterosexuals is a "reproductive-type" sexual act, to use the unappealing

27. *Romer v. Evans*, 116 S. Ct. 1620, 1623 (1996).

28. Andrew Sullivan, *Virtually Normal* (1995).

29. William Eskridge, *The Case for Same-Sex Marriage* (1996).

30. Stephen Macedo, *Homosexuality and the Conservative Mind*, 84 *Geo. L.J.* 261 (1995).

term coined by Robert P. George and Gerard V. Bradley, two of the most thoughtful and prominent of the new natural lawyers,³¹ while homosexual acts are not.

Surely there are many costs to this by now quite general practice of claiming a bland natural sameness, in all but the object of desire, across the divide of sexual orientation. One is simply a matter of integrity. A second is strategic: One might sensibly worry that these assertions of sameness and demands for strict formal or legal equality might backfire against gays and lesbians in ways that will parallel some of the adverse consequences of comparable claims in the areas of race and gender justice. I want to focus here, however, on a third cost, and that is a lost opportunity cost. When we fail to acknowledge salient differences between lesbianism and heterosexuality and between gay life and straight life, we entirely lose on the opportunity to glean moral insights from the experiences of the former. With these insights we might criticize and hence improve upon the latter. Critics of gay and lesbian life focus obsessively on the sexual practices which, to their eyes, render homosexual life both deviant and immoral—promiscuous, impersonal, compulsive, and repetitive bathhouse sex. Defenders and advocates focus just as obsessively on the need to descriptively contain the excesses and relegate them to the margins, and claim for the “center” of gay life a set of practices that appear homogenous with the heterosexual norm: monogamous, affective sex within long-term and ideally life-long relationships. The debate between those two positions more or less fills the airspace. There is little room—logical or otherwise—for even an articulation of the ways in which an embrace of gay and lesbian sexual practices may prompt a re-invigorated critical examination of—and hence improvement upon—heterosexual norms, institutions, and practices, and the moral sense to which those experiences arguably give rise.

Let me conclude by suggesting two ways in which at least lesbian sexual practices and experiences might be not only different from but an improvement over heterosexual practice, and hence reasons that an embrace and integration of, rather than tolerance for or intolerance of, those practices might improve our understanding of the marital ideal, and hence improve the quality of both our private and public lives. First, lesbian sexual practices do not occur within an institutional framework which has for a millennia defined the partners in such a way that one partner is fully entitled to forcibly demand sex and the other fully required to give it, regardless of consent or desire. Heterosexuality within marriage—*particularly*, paradigmatically, quintessentially, *within marriage*—for most of our history has been through and through non-consensual. Until only very recently, rape

31. Robert P. George & Gerard V. Bradley, *Marriage and the Liberal Imagination*, 84 Geo. L.J. 301 (1995).

has been something which *by definition* could only occur outside of marriage—forced sex within marriage was not “rape,” it was “marital sex.” Another way to put it is that within marriage, for most of our history, there has truly been no difference, even in theory, between rape and sex. Marital heterosexuality has never been, in practice, and until only very recently never in theory, a set of experiences, of practices, of pleasures, and, of expectations for the same, between consensual, equally autonomous adults. We still do not have and desperately need in this culture, a model of what marital sexuality should look like within a familial institution consisting of truly autonomous, consensual, sexual partners, rather than within an institution consisting of one dominant, autonomous partner and one subordinate, unfree, and non-autonomous partner. To borrow a metaphor from another context within feminist practice and theory, we will not get such a model by simply taking our existing marital sexual practices, adding a requirement of consent, and stirring. Our existing practices, our understanding of ourselves, the social roles we have constructed for ourselves and each other, the structures of public life themselves, are all through and through permeated with a conception of gender and gender inequality that has, at its heart, the legitimacy and the legality of nonconsensual intercourse forced upon women within marriage. An embrace of lesbian marriage *as marriage* at least raises the possibility of integrating into our marital ideals—and through those ideals, our conception of gender inequality and hence of public life—a conception of true sexual equality—and hence an equal respect for autonomy—between sexual intimates.

In the debate over gay marriage, much has been made of the greater promiscuity of gay men and the incompatibility of promiscuous, impersonal sex with a moral and good life. Marriage is celebrated by both the advocates of gay marriage and those who fear it as an institution which can curb promiscuity, and hence improve the morality and quality of life for all of us. But the “all of us” in that formulation is surely disingenuous. Promiscuity is not the greatest threat to the good life posed by heterosexuality *for women*: rather, rape is. Marriage, as it is presently constituted, may very well be a constraint upon promiscuity, but it is *no constraint whatsoever* upon the danger of rape. Rather, marriage, as traditionally understood, far from protecting women from rape, protects the right to rape from female entitlement or empowerment: It is precisely by *entering* marriage that women are disempowered from the right to resist sexual assault. For marriage to stand as an institution that could conceivably promise *women* that it will improve the quality of life over a random and chaotic sexual state of nature, it must be reconstrued as an institution that recognizes, respects, and protects their sexual autonomy and equality, rather than strips them of it. Reconceiving long-term, affectionate, lesbian relationships—in which sexuality, whatever else it is or is not is

understood as by rights consensual—as *marriages*, would go some distance toward effectuating such a reconstruction.

Second, an embrace of the defining differences between lesbian and heterosexual female sexual experience might move us toward a better understanding of what I would call the generative moral power of non-reproductive sexuality—whether it be contracepted marital or non-marital heterosexual intercourse, or any other sexual act which fits this description—within loving marriages. It is, of course, this larger class of sexual acts, not homosexual acts per se, that the more discriminating and, at any rate, internally consistent conservative arguments against gay marriage or gay life in general have been at pains to condemn. For my purposes here, let me isolate just one aspect of those arguments. Conservative arguments against such acts typically rest on the descriptive claim that these forms of sexuality are at their best affective; they are vehicles for the expression of affection. But this misdescribes and short changes them. Such sex, at its best, is not just a vehicle for the *expression* of affection, it is a means for the *giving* of affection, and giving affection (unlike simply expressing it) is a moral, and not just emotional, act. It is an act of “caring for,” to borrow from Nel Noddings work on feminine ethics, and not just an act of “caring about.”³² It is an instance of caring for, or taking care of, the needs and well-being of another person. It is not simply a behavioral rather than verbal way of expressing an internal affectionate state of being.

Do these acts of “caring-for” have any significance beyond the parties directly affected? I think they do and for two reasons. The first of which I think I can best illuminate by explicitly contrasting them with the reproductive-type acts of heterosexuality lauded by conservative critics of gay marriage. Reproductive, traditional, heterosexual marital intercourse, according to the conservative argument, is or should be valued intrinsically, because it is by definition a unitary “coming together in one flesh” of two otherwise autonomous individuals in a reproductive-type sexual act. It is, according to its celebrants, a union which is the type of act that serves the teleological reproductive end of the species and the spiritual and emotional ends of the individuals for union, and does so simultaneously. The intrinsic value of these acts, for their natural law defenders, is quite directly tied to their biological type. They are of intrinsic value precisely because they are the reproductive, biological, unifying act typical of the species.

A non-reproductive sexual act within a loving marriage, I think it might be argued, is of moral value precisely because it is a coming together in one flesh—a unifying act—that does not serve the reproductive ends of the species. Because it does not, its intrinsic moral

32. Nel Noddings, *Caring: A Feminine Approach to Ethics & Moral Education* (1984).

potential and meaning, if it has one, must be located elsewhere, but in deciding whether it has one, we should not make the apparently erroneous assumption that the only relevant natural end of the species is to reproduce. Rather, precisely because it *is* freed from reproductive consequences, the moral point of non-reproductive sex within a loving marriage might be construed as serving *social*, rather than reproductive, but nevertheless species-specific ends: the end, for example, of physically nurturing, protecting, loving, or caring for members of the community who are *not* natally or genetically connected to oneself. If care for the community, no less than reproduction of the species, is a natural mandate as a number of evolutionary biologists now contend, then surely the non-reproductive sexual “coming together in one flesh” acts of persons of the same sex who love one another might have a natural and moral point, even if that natural and hence moral point is decidedly not reproductive.

Finally, and relatedly, the embrace of long-term, affectionate, and physically intimate relationships between women, as well as between men, and the reconceptualization of those relationships as marital, would suggest a foundation in our lived, intimate, human relationships for a more expansive “circle of care,” and a circle of care decidedly not confined by or defined by natally or genetic ties. This might in turn reform not only the institution of marriage itself in such a way as to be independent of reproductive and ultimately egoistic genetic goals, whether of the species or of the individual, but also might spark a reformation of the “ethic of care” and the caring practices that ethic commends, which is less confined by, and less defined by, our genetic ties. During the last twenty years, the “ethic of care” has been celebrated by its proponents, feminist and otherwise, for its open acknowledgement of the role of particularity and relationship to public and even constitutional morality. It is important to remember, however, that it has been *criticized* for precisely the same quality: The individual whose moral compass is defined by care is less likely to acknowledge or respect the moral demands of those least like him and farthest from him, than of those who are closer. It is for precisely that reason that the ethic of care has been traditionally and stereotypically confined to the sphere of the family. It is the ethic that is nurtured in and appropriate for the relations between persons whose egoistic and altruistic ends are aligned, and those relationships are quintessentially familial. For biological as well as social reasons, we care intensely for those particular persons who are related to us. The marriage at the heart of such a family is then a paradigm for the nurturance and development of the moral character necessary to sustain such an ethic. We learn to care within families, and we do so largely because of and to the degree that we perceive such care being exercised by and bestowed upon our parents as marital partners.

By contrast, the care each of those partners gives each other and gives each child, in turn, is powerfully informed by the blend of egoism and altruism that constitutes the emotional engine of parenthood. The care exercised by and bestowed upon partners in a marriage which may or may not yield children, but which is behaviorally defined by non-reproductive sexual acts, is of a different sort: It is a care that is potentially and ideally altruistic, but not egoistically driven by reproductive instincts. For that reason alone, an acknowledgement, an acceptance, and an integration of these profoundly non-reproductive, but nevertheless intimate and nurturant unions, could potentially constitute an advance and expansion in our practices, as well as our understanding of our capacity for care.

CONCLUSION

What does it mean, at the end of the day, to treat like cases alike, to treat people in a principled way, or to behave toward them with integrity? We might, of course, give content to this formal requirement by reference solely to constitutional history, and then cross our fingers and hope that such history yields answers consistent with justice. But we surely can do more: We can give content to it by giving content to the demands of justice. That project in turn, I believe, properly understood, will lead us to an examination of what we universally share. Such an inquiry, in my view, and *only* such an inquiry, might in turn constitute a moral sail which we all might justifiably follow.

Such an inquiry, however, is also fraught with difficulty. If we were all truly "alike" in basic particulars, then there would be no problems of justice, legal, distributive, or otherwise. When we discover a "likeness"—a universality, a shared trait—we are also, I think, perforce, discovering, or at least acknowledging, a difference, and we cannot simply ignore the difference. Should we one day determine that mammalian animals are enough "like us," for example, to be included in our political and legal sphere of equal concern, then we would have to reckon with their non-linguistic nature—we would have to not just tolerate it or accommodate it, we would have to embrace it as part of "our own" nature. When we accept women as enough like us to be included in the political and legal sphere of equal concern, it means we must not simply tolerate or accommodate women's differences, but embrace those differences as part of our shared human nature. As we expand our political community, we cannot simply include those previously excluded in our conception of who we are, as though we had simply made some inexplicable and ridiculously simple minded cognitive mistake. Our account of our own "human nature," which guides our choice of governing principles, must change as we expand this community of equal concern and respect. The governing principles are accordingly going to change as well.

When we accept gays and lesbians likewise, we must do more than tolerate or even accommodate difference: Their nature is our nature, and our goals, aspirations, as well as the moral codes we live by, must perforce reflect that inclusion. That is the reason, ultimately, for the deep incompatibility of *Romer* and *Bowers*: If *Romer* demands the inclusion in the community of equal respect of gay and lesbian citizens, then the natural inclination of those citizens to engage in precisely the behavior condemned by the criminal code upheld in *Bowers* is a part of *our* intimate, sexual nature. Accordingly, to whatever degree our moral codes reflect, originate in, or are grounded in values that are in some way an outgrowth of our intimate natures—and it may be considerable—our moral codes must change to reflect that inclusion. If integrity requires a recognition that we cannot render these citizens strangers to the law, then integrity also demands a reformation of the moral codes that condemn their defining behavior. There is nothing unnatural about that behavior. There is something very unnatural, and very unprincipled, about a culture unreceptive to the moral and political implications that these private, intimate, loving, natural, and non-reproductive acts may carry.