CONSTITUTIONAL LAW AS "NORMAL SCIENCE"

*Toni M. Massaro**

An enduring feature of equal protection and substantive due process review of government action is being lost in much contemporary discourse: these challenges usually *fail.* Claims that the current Court is exceptionally activist are belied by its track record in this arena. The Justices interpret substantive due process and equal protection rights very narrowly, and protect citizens only from exceptionally egregious, biased, intrusive, or irrational government action.[1] Most government follies *easily* withstand equal protection and substantive due process review. Although the Court plainly does intervene in important contexts, actual cases are unusual, emerge slowly, and hew to settled principles as far as possible.

The 2002 Term displayed this pattern beautifully. The Court decided several substantive due process and equal protection cases and—characteristically—upheld the government's action in most of them, despite impressive evidence of irrationality.[2] In two of the decisions, it did so unanimously and unceremoniously.[3] It allowed doctrine to evolve with the times in three other

* Dean and Milton O. Riepe Chair in Constitutional Law, University of Arizona James E. Rogers College of Law, Tucson. Warm thanks go to David Adelman, Graeme Austin, Barbara Babcock, Jim Chen, Tom Grey, Bernard Harcourt, and Genevieve Leavitt, for feedback on this essay, and to Christopher Goodman for his able research assistance. As usual, they are to be thanked, not blamed. Special thanks go to the members of the Dean's Council, who provide generous support for academic research at the College.

1. I say this well aware of the civil rights remedy limitations that such narrow constructions imply after City of Boerne v. Flores, 521 U.S. 507 (1997). *See, e.g.*, Kimel v. Fla. Bd. of Regents, 528 U.S. 62 (2000); Board of Trustees of Univ. of Ala. v. Garrett, 531 U.S. 356 (2001). *But see* Nevada Dep't of Human Res. v. Hibbs, 123 S. Ct. 1972, 1984 (2003) (upholding congressional power to enact the Family Medical Leave Act, 29 U.S.C. 2612(a)(1)(c)(2000)).

2. *See* Gratz v. Bollinger, 539 U.S. 244(2003); Fitzgerald v. Racing Ass'n of Cent. Iowa, 123 S. Ct. 2156 (2003); City of Cuyahoga Falls, Ohio v. Buckeye Cmty. Hope Found., 123 S. Ct. 1389 (2003).

3. *See Buckeye*, 123 S. Ct. at 1391; *Racing Ass'n*, 123 S. Ct. at 2161.

decisions, but these modifications were predictable and within the plausible reach of settled principles.

The Court decided the equal protection and substantive due process cases through a hybrid mixture of formulas and pragmatism—not with pure formulas or pure pragmatism. The method is formulaic at its core and cautiously dynamic and non-formulaic on its periphery. The doctrine moves incrementally with evolving social, political, and philosophical shifts in American culture, and contains very few surprises. Although the Court occasionally reaches decisions that effect a significant change in the application of fundamental principles, the Court makes no quantum leaps and rarely modifies the fundamental principles themselves. As Dan Farber has observed, constitutional law is "normal science,"[4] not radical science. Simulating the common law process of decision-making, the Justices invoke available doctrinal support for shifts. They seek to cabin the impact of any changes, and they emphasize the limited role that the Court realistically can, and constitutionally should, play in shaping public policy. When a Court decision proves to be a tipping point for a new cultural trend, this is because the conditions for such change are ripe, not because the Court alone effects, in parthenogenetic bursts, extreme cultural reforms.

When outrage erupts over Court decisions—as it did in 2003 over the same-sex sodomy and affirmative action cases– it is because the issues are vigorously contested, have great emotional content, and could go either way under applicable doctrinal standards. It is not because the Court forges doctrine willy nilly. A Court run so amuck, mindful of no doctrinal tethers, would inspire impeachment efforts or demands that we pitch judicial review altogether—steps that very few serious commentators believe are justified. In sum, the sky is *not* falling over our democratic institutions; nor are the heavens opening for individual liberty.

The 2002 term offered a perfect illustration of how this modest, incrementalist approach to doctrinal evolution can spark angry howls of judicial activism. In *Grutter v. Bollinger*[5] and

4. *See* Daniel A. Farber, *The Case Against Brilliance*, 70 MINN. L. REV. 917 (1986) (citing Thomas Kuhn's famous definition of normal science as "research firmly based upon one or more past scientific achievements, achievements that some particular community acknowledges for a time as supplying the foundation for its future practice." THOMAS KUHN, THE NATURE OF SCIENTIFIC REVOLUTIONS 10 (2d ed. 1970)).

5. 539 U.S. 306(2003).

Gratz v. Bollinger,[6] the Court reviewed two race-conscious university admissions policies.[7] The Court upheld one of them and struck down the other, sparking acid reactions in some corridors and jubilation in others.

The split outcomes, though, were both predictable and reasonably supportable as a matter of precedent and public policy. The Court had suggested, before *Grutter* and *Gratz* that only very narrowly tailored remedial measures or "social emergencies" justify race-conscious measures. The Court had been particularly hostile to racial "quotas" or "set-asides,"[8] but it also had insisted that strict scrutiny is not necessarily fatal.[9] Moreover, the case law denouncing quotas had always been tempered by other official practices—including practices of the federal government—that continued to underscore the significance of race-conscious goals, to stress the importance of diversity, and to use race-sensitive statistics to achieve these goals.[10] In *Grutter* and *Gratz,* the Court ended some of the uncertainty about the validity of these enduring practices by agreeing that achieving diversity among students within a university is a compelling goal that can be advanced through narrowly tailored race-conscious measures.[11]

In doing so, the Court also reinforced core principles of Justice Powell's opinion in *University of California Regents v. Bakke*,[12] on which countless educational institutions have relied since 1978. *Grutter* and *Gratz* allowed these practices to continue, but only within specific guidelines. The Court in *Grutter* likewise pointed to the briefs filed by business and military leaders, who maintained that race-conscious diversity remains essential in their domains.[13] At the same time, the Court warned that diversity measures must be carefully crafted to advance their

---

6. 539 U.S. 244(2003).

7. *Id.* at 252; *Grutter*, 539 U.S. at 310.

8. *See* Adarand Constructors v. Pena, 515 U.S. 200 (1995); City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989); Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978).

9. *See Adarand*, 515 U.S. at 237.

10. *See, e.g.*, 34 C.F.R. Pt. 100.3 ("In administering a program regarding which the recipient has previously discriminated against persons on the ground of race, color, or national origin, the recipient must take affirmative action to overcome the effects of prior discrimination"); 29 C.F.R. § 1608.4 (encouraging and protecting voluntary affirmative action to improve opportunities for women and minorities, and accepts "goals and timetables" if reasonably related to listed outcomes).

11. *Grutter*, 539 U.S. at 326.

12. *Bakke*, 438 U.S. at 265 (Powell, J.).

13. *Grutter*, 539 U.S. at 330-31.

goals and may not reach farther in time or scope than necessary.[14]

In sum, the Court juggled complex doctrinal and practical concerns and sought to create as little disruption as possible. It deferred to educator, military, and business leaders' opinions about real-world consequences. It preserved fractured judicial precedent, insofar as possible. It placed substantial limits on the future use of race conscious measure. And it settled an issue that had split the nation, and the lower courts, in ways that demanded Supreme Court attention. The Court nevertheless took a scolding from many critics, both for the approach and for the results.

The Justices straddled a similar set of concerns in *Lawrence v. Texas*.[15] Five Justices held that a Texas law that prohibited same-sex sodomy violated substantive due process.[16] This decision *Lawrence* clearly represented a significant doctrinal progression. The majority noted the evolution of public mores about homosexuality, both nationally and internationally,[17] and invoked case law reaching back to the 1960s to support the result.[18] The sixth vote to strike down the statute—cast by Court centrist Justice O'Connor—relied on equal protection reasoning from *Romer v. Evans*.[19] Again, however, the case was hardly radical in terms of the Judicial method or doctrinal progression. It nevertheless has become an emotional focal point for political conservatives and for those who condemn dynamic interpretations of the Constitution.

Significantly, the Court easily upheld government actions against equal protection and substantive due process challenges in two other cases during the 2002 term, both of which escaped media attention entirely.[20] Yet these unnoticed cases offer important evidence that the Justices have not abandoned the traditional, weighty presumption against overturning government action. On the contrary, they continue to exercise this power very sparingly. The absence of bright lines on the doctrinal margins and the transgression of lines in isolated cases do not obliterate

14. *Id.* at 333-34.
15. 123 S. Ct. 2472 (2003).
16. *Id.* at 2476.
17. *Id.* at 2481.
18. *See, e.g.*, Griswold v. Connecticut, 381 U.S. 479 (1965).
19. *Lawrence*, 123 S. Ct. at 2486 (O'Connor, J., concurring) (citing Romer v. Evans, 517 U.S. 620 (1996)).
20. Fitzgerald v. Racing Ass'n of Cent. Iowa, 123 S. Ct. 2156 (2003); City of Cuyahoga Falls, Ohio v. Buckeye Cmty. Hope Found., 123 S. Ct. 1389 (2003).

all meaningful lines. They mean that the Court eschews *both* hidebound formalism and free-form activism, much to the chagrin of critics from the political right *and* the political left.

This Essay takes aim at critics who argue for more formalism from the Court and who insist that the Justices disregard the limits of the Constitution and of judicial authority when they extend equal protection or substantive due process protections to new terrains. The Court's limited version of interpretive dynamism is consistent with past practices and necessary to prevent "legal petrification."[21] In practice, this dynamism is greatly tempered by the many practical and constitutional limits on judicial review and by the centrist-to-very conservative composition of the federal judiciary. The increasingly popular indictment of the Court as a group of "wide-eyed activists" is terribly misleading, if not dangerous for judicial independence.

I limit my inquiry here to only two constitutional rights and to October Term 2002, because the treatment of these rights during that Term offers a useful barometer of the Court's alleged judicial activism in exceptionally charged areas of constitutional law.I begin with the unremarkable decisions, where the Court used its customary, blunt-lined rational basis test. I follow with a summary of the provocative cases, where the Court's dynamism becomes apparent and doctrinal lines and formalist methods blur. If one looks across the whole spectrum of cases, one sees that the Court uses both formalism and dynamism, but that formalism plainly is the rule, not the exception.The combination allows the Court to occasionally adopt new perspectives on traditional constitutional principles without having to abandon the principles themselves.

I. UNDER THE MEDIA RADAR: *RACING ASSOCIATION* AND *BUCKEYE*

Although the affirmative action and sodomy cases dominated the 2002 Term and riveted a national audience, their doctrinal impact was softened by cases that received scant or no public attention. I highlight two of these sleepers. Such cases prove that equal protection and substantive due process doctrine remain unaltered at their cores.

21. Washington v. Glucksberg, 521 U.S. 702, 770 (1997) (Souter, J., concurring).

A. *RACING ASSOCIATION*

The first example of judicial business as usual was *Fitzgerald v. Racing Association of Central Iowa*.[22] *Racing Association* involved a challenge to Iowa's disparate tax treatment of slot machines on excursion riverboats, relative to vis-à-vis slot machines at racetracks.[23] Iowa taxed the adjusted revenues from slots on riverboats at a maximum rate of 20 percent. In contrast, under a 1994 amendment to its laws, Iowa allowed racetracks to operate slot machines, but taxed adjusted revenues from those racetrack slots at a maximum rate of 36 percent.[24] The racetrack owners brought suit, challenging the higher maximum tax rates as a violation of equal protection.[25]

The Supreme Court of Iowa concluded that the differential was irrational because the higher maximum rate for racetrack slots defeated the alleged purpose of the 1994 law: to help racetracks recover from economic distress.[26] It thus struck down the measure on equal protection grounds. The Supreme Court of the United States disagreed. In a brief and unanimous opinion for the Court, Justice Breyer rehearsed the most familiar version of rational basis analysis,[27] in which tremendous deference is accorded government action. First, there must be a plausible policy reason for a classification. Second, the legislative facts on which the classification appears to be based rationally may have been considered to be true by the governmental decision-maker. Third and finally, the relationship of the classification to its goal must not be so attenuated as to render the distinction arbitrary or irrational.[28]

Classifications *rarely* flunk this traditional version of the rational basis test. They surely do *not* flunk the test, the Court noted, when the classification advances one goal but also serves another desirable (perhaps even *contrary*) end. As Justice Breyer stated, "if every subsidiary provision in a law designed to help racetracks had to help those racetracks and nothing more, then (since any tax rate hurts the racetracks when compared

22. 123 S. Ct. at 2156.
23. *Id.*
24. *Id.* at 2158.
25. *Id.*
26. *Id.*
27. *See, e.g.*, F.C.C. v. Beach Communications, Inc., 508 U.S. 307, 313 (1993); Heller v. Doe, 509 U.S. 312, 319-20 (1993).
28. *Racing Ass'n*, 123 S. Ct. at 2159.

with a lower rate) there could be no taxation of the racetracks at all."[29]

Justice Breyer then contrasted the tax differential in *Racing Association* with tax differentials based upon race, gender, in-state versus out-of-state status, or length of residency. All of these, he noted, would have triggered elevated scrutiny.[30]

B. *BUCKEYE*

In *City of Cuyahoga Falls v. Buckeye Community Hope Foundation*,[31] the Court likewise used the conventional rational basis approach, though on a set of facts less obviously suited for uncritical deference to government. The issue in *Buckeye* was whether the Sixth Circuit erred in ruling that a race discrimination suit against the City could proceed to trial.[32] The primary evidence of discrimination was that the City had submitted a facially neutral referendum petition to the voters that called for repeal of an ordinance authorizing construction of low-income housing, after public opposition to the housing project arose.[33] A nonprofit corporation dedicated to developing affordable low-income housing challenged the City's action on the ground that it gave effect to racial bias reflected in public opposition to the housing project. By submitting the petition to voters and refusing to issue building permits while the petition was pending, the City allegedly violated the Equal Protection Clause.[34]

The Court—again unanimously—rejected this equal protection argument. Justice O'Connor noted that there must be proof of government intent to discriminate.[35] The official act at issue—the referendum petitioning process—reflected no intent to discriminate. That process was consistent with the City charter, which was facially neutral.[36] The referendum itself was placed on the ballot by the City, but not enacted by it.[37] The City engineer's refusal to issue building permits while the petition was pending was a nondiscretionary, ministerial act.[38] There was no

29. *Id.*
30. *Id.*
31. 123 S. Ct. 1389 (2003).
32. *Id.* at 1394.
33. *Id.* at 1393.
34. *Id.*
35. *Id.* at 1394; *see* Washington v. Davis, 426 U.S. 229 (1976).
36. *Buckeye*, 123 S. Ct. at 1395.
37. *Id.*
38. *Id.* at 1396.

evidence that any of these official acts was motivated by racial animus or constituted selective enforcement of charter procedures.[39]

Although private citizens expressed racial animus, and although some voters may have acted on racial animus, this did not of itself constitute "state action" sufficient to trigger equal protection review. Nor was there evidence that the City officials and private citizens had acted in concert, or that the former somehow exercised coercive power over the latter's decisions.[40]

The Court in *Buckeye* likewise rejected the argument that the City's actions violated substantive due process.[41] The corporation argued that because the City had already approved site plans for the low-income housing project, the corporation had a property interest in those permits. According to the corporation, the City arbitrarily denied the corporation the benefit of its site plan, and the submission of an administrative, land-use determination to the charter's referendum process was *per se* arbitrary conduct.[42]

The Court never reached the question of whether the respondents had a property interest in the building permits. It concluded instead that the City engineer did not act arbitrarily in deciding not to issue the petitions while the referendum was pending.[43] Only the most egregious government action violates substantive due process. Given the language of the City charter that no ordinance challenged by a petition could go into effect until approved by a majority of those voting thereon, the refusal to issue the permit in the interim was deemed sensible.[44]

Finally, the Court rejected the argument that administrative matters could not be submitted to the referendum process.[45] Under *City of Eastlake v. Forest City Enterprises*, voters retain the power to govern through referendum with respect to any matter—legislative or administrative—within the realm of local affairs.[46]

---

39. *Id.* at 1395-96.
40. *Id.* at 1395.
41. *Id.* at 1396.
42. *Id.*
43. *Id.*
44. *Id.*
45. *Id.*
46. 426 U.S. 668, 676 (1976).

Justice Scalia, joined by Justice Thomas, concurred.[47] His concurrence was focused on the substantive due process portion of the majority opinion. Justice Scalia has long opposed any expansion of substantive due process. Short of abolishing the doctrine—his clearly preferred outcome—he favors cabining it. He thus admires *Graham v. Connor*,[48] which held that substantive due process analysis is precluded whenever a "more specific" constitutional provision governs the same case. According to Justice Scalia, a more specific test in *Buckeye* did govern the corporation's claim of an arbitrary deprivation of its nonfundamental liberty interest—the equal protection clause.[49] Thus, *no* substantive due process claim should have been available, let alone successful.

This part of Justice Scalia's concurrence is worth highlighting for two reasons. First, Justice Scalia is quite correct that *Graham* poses a logical block to a substantive due process claim. But, as I have stated elsewhere, *Graham* itself is an illogical departure from the Court's customary method of interpreting overlapping constitutional provisions.[50] Given that only one Justice joined Justice Scalia's concurrence in *Buckeye*, and none of the others even responded to his *Graham*-based argument, the Court evidently does not apply *Graham* outside of the narrow criminal procedure context in which it arose. I regard this as excellent news.

Justice Scalia's concurrence also indicates that he was aware of *Graham* during the 2002 Term. Yet even he made no mention of *Graham* in any other case last term. In particular, Justice Scalia made no reference to *Graham* in *Lawrence*, though *Lawrence* was decided only months after *Buckeye*.[51] Justice O'Connor's concurrence in *Lawrence* relied expressly upon equal protection rather than substantive due process,[52] and Justice Kennedy noted in his majority opinion that equal protection and substantive due process are "linked in important respects, and a decision on the latter point advances both interests."[53] If they are so interrelated, one wonders, what happens to the *Gra-*

47. *Buckeye*, 123 S. Ct. at 1397 (Scalia, J., concurring).
48. 490 U.S. 386 (1989).
49. *Buckeye*, 123 S. Ct. at 1397 (Scalia, J., concurring).
50. *See* Toni M. Massaro, *Reviving Hugo Black? The Court's "Jot for Jot" Account of Substantive Due Process*, 73 N.Y.U. L. REV. 1086, 1110-21 (1998).
51. *Lawrence*, 123 S. Ct. at 2472 (decided June 26, 2003); *Buckeye*, 123 S. Ct. at 1389 (decided March 25, 2003).
52. *Lawrence*, 123 S. Ct. at 2484 (O'Connor, J., concurring).
53. *Id.* at 2472.

ham principle invoked by Justice Scalia in *Buckeye*? Why did *Graham* catch Justice Scalia's attention in one case but not the other?

The answer, I submit, is that *context matters*—context affects not only *how* substantive due process and equal protection principles are applied, but even *whether* they are applied. One need not look forward or backward to see how context affects the way the Justices shape doctrine, including a Justice who is *acutely* aware of and committed to avoiding such analytical discontinuities. In practice, the kind of strong doctrinal consistency and formalism that Justice Scalia desires cannot be observed across opinions within a single Term, or even across the opinions of one Justice—let alone across opinions written across a span of decades, which entail changing Justices, times, and events. To insist upon consistency of this order is to insist upon a chimera. Formalism is especially unhelpful on the margins of doctrine, where the influence of social, political, technological and cultural changes is most visible and powerful.

IMPLICATIONS

Taken together, *Racing Association* and *Buckeye* suggest that even relatively easy equal protection and substantive due process cases occasionally earn Supreme Court attention. When they do, the Court—to a Justice—treats the cases summarily, with standard formulations of rational basis review. They also indicate that although judicial *oversight* of routine government acts may occur with some frequency, judicial *overturns* occur rarely—even in cases that raise the specter of racial bias. *Racing Association* and *Buckeye* are the norm, not the exception. They reinforce the doctrinal order and rigorous restraint that the traditional rational basis test represents.

Rational basis review can produce upsets—as the 2002 Term also proves. But this is not because rational basis, traditionally understood, has withered on the vine. The upsets tend to occur in cases where the Court refuses to identify a new classification as "suspect" or name a new "fundamental" right, but nevertheless is disturbed by the parallels to such categories. The result is a handful of cases—not a torrent—in which evidence of irrationality persuades the Court to intervene while refusing to adopt an across-the-board new category for elevated scrutiny. The Court stretches "rational basis" beyond the typical—some would say plausible—limits, and reaches results that suggest that

a more searching standard of review actually has been conducted.[54] These "stretch" cases, though, are aberrations; the baseline, a powerful presumption against judicial overturn of government action, still holds.

The most interesting cases, of course, are the aberrations. Consequently, these capture media and scholarly attention. The Court does on occasion abandon formalism in favor of methods that are far more susceptible to nondoctrinal influences, more disruptive of expectations, and less deferential to government actors. When this happens, fur flies.

II. HIGH-PROFILE CASES

The Court decided three cases in the 2002 Term that attracted wide public and media attention and caused considerable political uproar. It struck down Texas's same-sex sodomy law,[55] upheld one University of Michigan affirmative action policy,[56] and struck down another.[57] According to the harshest critics, this trio of cases betrays an arrogant and elitist Court that disrespects democracy and needs to be cabined.

Such accusations are baseless. None of these cases unduly compromised democratic will or represented a power-drunk judiciary. All were reasonably consistent with precedent and reached predictable and sane results. Moreover, these cases do not stand alone, as the above discussion of *Racing Association* and *Buckeye* shows. As a whole, the 2002 Term revealed neither excessive "activism" nor excessive "passivity."

A. *LAWRENCE V. TEXAS*

I begin with the case that triggered the most ferocious and sustained outcry from conservatives and Court critics: *Lawrence v. Texas*. In *Lawrence*, the Court struck down a Texas law that forbade same-sex sodomy, but not sodomy between male and female partners.[58] Although all sophisticated Court watchers expected the Court to strike down the statute, most did not expect

54. *See, e.g.*, *Lawrence*, 123 S. Ct. at 2472; State Farm Mut. Auto. Ins. Co. v. Campbell, 123 S. Ct. 1513 (2003); Romer v. Evans, 517 U.S. 620 (1996); City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432 (1985); United States Dept. of Agric. v. Moreno, 413 U.S. 528 (1973).

55. *Lawrence*, 123 S. Ct. at 2472.

56. Grutter v. Bollinger, 539 U.S. 306(2003).

57. Gratz v. Bollinger, 539 U.S. 244(2003).

58. *Lawrence*, 123 S. Ct. at 2475.

the majority to rely on substantive due process. Fewer still anticipated that it would overrule *Bowers v. Hardwick*. Thus, the case was the biggest surprise of the Term. Yet the facts of the case actually were well suited to all of these responses, and the judicial tools were in place to support them.

From a civil libertarian perspective, the case was a particularly compelling one for judicial intervention. Acting on a false report of a weapons disturbance, police officers entered the private residence of John Lawrence. After the baseline entry, the officers observed Lawrence and another adult male engaged in a consensual sexual act.[59] Both were arrested and convicted of "deviate sexual intercourse with another individual of the same sex" in violation of a Texas statute that prohibited same-sex sodomy.[60] Lawrence challenged the prosecution on equal protection and substantive due process grounds.[61]

The Supreme Court ruled in favor of Lawrence and remanded for further proceedings consistent with the Court's holding.[62] Justice Kennedy wrote the majority opinion, joined by Justices Breyer, Ginsburg, Stevens, and Souter. Justice Kennedy concluded that the statute violated the petitioner's liberty interests under substantive due process.[63] Summarizing the case as one that involved "two adults who, with full and mutual consent from each other, engaged in sexual practices common to homosexual lifestyle,"[64] he insisted that the men were "entitled to respect for their private lives."[65]

The most significant feature of the opinion, for purposes of this Essay, was that it openly embraced a dynamic approach to interpreting the Constitution: "history and tradition are the starting point but not in all cases the ending point, of the substantive due process inquiry."[66] Invoking established principles of liberty and the protection of human dignity, Kennedy noted that the past half century "showed growing awareness that liberty protects adult persons in deciding how to conduct their private lives in matters pertaining to sex."[67] The Court's abortion

59. *Id.* at 2476.
60. *Id.*
61. *Id.*
62. *Id.* at 2484.
63. *Id.*
64. *Id.*
65. *Id.*
66. *Id.* at 2480, (quoting County of Sacramento v. Lewis, 523 U.S. 833, 857 (1998) (Kennedy, J., concurring)).
67. *Id.* at 2478.

cases, as well earlier cases involving access to contraceptives, protect the right to be free from governmental control over "the most private human conduct, sexual behavior, . . . in the most private of places, the home."[68] Even if same-sex relations are not given formal recognition in the law, Justice Kennedy concluded, it is within the liberty of persons to choose that relationship without being punished as criminals.[69]

Justice Kennedy rejected the argument that the "right" at stake in *Lawrence* was the narrow right to engage in same-sex sodomy or in any other, specifically defined sexual conduct. To so claim, he said, "demeaned the [petitioner's] claim, just as it would demean a married couple were it to be said marriage is simply about the right to have sexual intercourse."[70] Rather, the right at stake was the liberty interest of adult citizens—that is, the right to be left alone in a private domain to engage in private human conduct.[71]

Justice Kennedy denounced outright the Court's 1986 ruling in *Bowers v. Hardwick*,[72] which permitted Georgia to criminalize "homosexual sodomy" on several grounds. *Bowers* gave "liberty" an unduly narrow construction.[73] It did a poor job of canvassing the relevant history of criminal prosecution of same-sex relations.[74] It placed excessive emphasis on historical practices and tradition.[75] It wrongly used the "moral disapproval" of a majority of citizens as a primary basis for enforcing these views on the whole society through its criminal laws.[76] Its doctrinal basis had been eroded by later cases such as *Casey*[77] and *Romer*.[78] Finally, it ignored competing moral and ethical standards, includ-

68. *Id.* (citing Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833 (1992); Carey v. Population Services Int'l, 431 U.S. 678 (1977); Roe v. Wade, 410 U.S. 113 (1973); Eisenstadt v. Baird, 405 U.S. 438 (1972); Griswold v. Connecticut, 381 U.S. 479 (1965)).

69. *Id.*

70. *Id.*

71. *Id.*

72. Bowers v. Hardwick, 478 U.S. 176 (1986); *Lawrence*, 123 S. Ct. at 2484 ("*Bowers* was not correct when it was decided, and it is not correct today. It ought not to remain binding precedent. *Bowers v. Hardwick* should be and now is overruled.").

73. *Lawrence*, 123 S. Ct. at 2478.

74. *Id.* at 2480 ("[T]he historical grounds relied upon in *Bowers* are more complex than the majority opinion and the concurring opinion by Chief Justice Burger indicate.").

75. *Id.*

76. *Id.*

77. Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833 (1992).

78. *Romer*, 517 U.S. at 620 (1996); *Lawrence*, 123 S. Ct. at 2482 ("The foundations of *Bowers* have sustained serious erosion from our recent decisions in *Casey* and *Romer*. When our precedent has been thus weakened, criticism from other sources is of greater significance").

ing laws in the international community.[79] These competing standards belie the sweeping claim in *Bowers* that "the history of Western civilization" and "Judeo Christian moral and ethical standards" uniformly negate the liberty interests of consenting same-sex adult partners acting in private.[80] In any event, constitutional notions of liberty favor protection of such conduct, not its criminalization.

Justice O'Connor concurred in the judgment but did not join the Court in overruling *Bowers*, a case in which she formed part of the majority.[81] She concluded that the Texas ban on same-sex sodomy, but not on opposite-sex sodomy, likely was inspired by animus against a politically unpopular group, not by any neutral assessment of the state's best interests. Consequently, the ban violated even rational basis review under the equal protection clause.[82] Reviewing several equal protection cases that apply what has been called "rational basis with bite,"[83] Justice O'Connor noted that these cases tend to involve discriminatory regulations that inhibit important personal relationships. A state plainly can regulate a wide range of personal conduct, but it cannot criminalize that conduct solely for some citizens and not others, where the reason for that distinction is baseless animus against the burdened citizens.[84] This did not mean that all laws that distinguish between heterosexuals and homosexuals necessarily flunk the rational basis test of equal protection. If a state can cite other legitimate government interests, "such as national security or preserving the traditional institution of marriage," then the rational basis requirement may be met.[85]

Justice Scalia wrote a scalding dissent, joined by Chief Justice Rehnquist and Justice Thomas.[86] He first condemned the majority for describing the petitioner's conduct as "an exercise of liberty" without articulating what, if any, fundamental right it entailed.[87] The majority opinion engaged in "an unheard-of form

79. *Lawrence*, 123 S. Ct. at 2483.
80. *Id.* at 2480-81.
81. *Id.* at 2484 (O'Connor, J., concurring).
82. *Id.* at 2488.
83. Gerald Gunther, *The Supreme Court's 1971 Term; Foreword: In Search of Evolving Doctrine on a Changing Court*, 86 HARV. L. REV. 1, 18-22 (1972).
84. *Lawrence*, 123 S. Ct. at 2487 (O'Connor, J., concurring) (citing Romer v. Evans, 517 U.S. 620 (1996); City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432 (1985); United States Dept. of Agric. v. Moreno, 413 U.S. 528 (1973)).
85. *Id.* at 2488 (O'Connor, J., concurring).
86. *Id.* (Scalia, J., dissenting).
87. *Id.*

of rational-basis review" that Justice Scalia warned would "have far-reaching implications beyond this case."[88] *Bowers* was only seventeen years old. Although he agreed that *stare decisis* is not an inexorable command, he objected to its inconsistent application.[89] In *Planned Parenthood of Southeastern Pennsylvania v. Casey*,[90] the Court cited popular condemnations of its precedent as a reason to *uphold* the central holding of *Roe v. Wade*.[91] In *Lawrence,* the majority pointed to condemnations of *Bowers* as a reason to *overrule* the case. Which way, Justice Scalia grumbled, will it be?[92]

Justice Scalia was especially critical of the majority's disregard of *Washington v. Glucksberg*,[93] which he interprets to require that "*only* fundamental rights which are 'deeply rooted in this Nation's history and tradition' qualify for anything other than rational basis scrutiny under the doctrine of 'substantive due process.'"[94] The majority in *Lawrence* nowhere described same-sex sodomy *per se* as a fundamental right. Justice Scalia argued that the opinion thus could only be based on the "rational basis" test and a conclusion that the Texas law furthered *no* legitimate state interest.[95]

Echoing Lord Patrick Devlin,[96] Justice Scalia intoned that a "governing majority's belief that certain sexual behavior is 'immoral and unacceptable' constitutes a rational basis for regulation."[97] Otherwise, laws against bigamy, same-sex marriage, and incest, too, would be of suspect constitutionality.[98] Due process does not prevent the states from curtailing nonfundamental liberties, provided these measures satisfy the very forgiving "rational basis" test.[99] In Justice Scalia's view, *Lawrence* calls into question countless laws that are based on moral intuitions of the

88. *Id.*
89. *Id.*
90. 505 U.S. 833 (1992).
91. 410 U.S. 113 (1973).
92. *Lawrence*, 123 S. Ct. at 2489 (Scalia, J., dissenting).
93. *Id.* at 2491-92.
94. *Id.* at 2489 (quoting Washington v. Glucksberg, 521 U.S. 702, 721 (1997)) (emphasis in original).
95. *Id.* at 2492.
96. *See generally* PATRICK DEVLIN, THE ENFORCEMENT OF MORALS 86-101, (Oxford University Press 1965) (arguing for a conception of "common morality" that justifies legislation).
97. *Lawrence*, 123 S. Ct. at 2490 (Scalia, J., dissenting).
98. *Id.*
99. *Id.* at 2493-96.

regulators and may constitute a "massive disruption of the current social order."[100]

Finally, Scalia attacked both the majority's and Justice O'Connor's reasoning more pointedly. He described the opinions as "the product of a Court, which is the product of law-profession culture, that has largely signed on to the so-called homosexual agenda, by which I mean the agenda promoted by some homosexual activists directed at eliminating the moral opprobrium that has traditionally attached to homosexual conduct."[101] He scolded the Court for taking "sides in the culture war, departing from its role of assuring, as neutral observer, that the democratic rules of engagement are observed."[102] Justice Scalia closed with the observation that he respects homosexuals' right to promote their "agenda" through "normal democratic means," but he believed that resolving this question is simply not the Court's job.[103]

Justice Thomas wrote a very brief dissent in which he described the Texas law as "uncommonly silly," but not unconstitutional.[104] Overturning silly laws is the job of the legislature. Were he a Texas legislator, Justice Thomas made clear, he would vote to repeal this particular law.[105] Thus, seven Justices thought the Texas law was irrational, but only six believed it should be overturned on constitutional grounds.

B. *GRUTTER* AND *GRATZ*

Less than a week before *Lawrence* was decided, the Court handed down two other cases that likewise inspired heated criticisms from many conservatives and Court critics. The Court upheld "diversity" as a compelling reason for universities and graduate schools to take race and ethnicity into account in admissions, as one factor among many.[106] All but Justices Thomas

100. *Id.* at 2491.
101. *Id.* at 2496.
102. *Id.* at 2497.
103. *Id.* (Justice Scalia has continued his attack on the majority opinion outside the courtroom. In a speech before the members of the Intercollegiate Studies Institute on October 23, 2003, he told the audience that the majority's decision ignores the Constitution in favor of "the latest academic understanding of liberal political theory." Anne Gearan, *Justice Scalia Excoriates Court's Gay Sex Ruling*, (Oct. 24, 2003), *available at* http://www.twincities.com/mld/pioneerpress/news/nation/7090205.htm (last visited Jan. 19, 2004)).
104. *Id.* at 2498 (Thomas, J., dissenting).
105. *Id.*
106. *Grutter*, 539 U.S. at 324-25.

and Scalia endorsed this diversity justification for race-conscious measures.[107] The Court split sharply, however, on whether the University of Michigan admissions policies in question were sufficiently "narrowly tailored" to survive strict scrutiny. In *Grutter*, five Justices concluded that the law school admissions policy was narrowly tailored.[108] In *Gratz*, six Justices concluded that undergraduate admission policy was not narrowly tailored.[109] Quite narrow factual distinctions between the two policies drove the split outcomes.

A redeeming feature of the law school admissions policy was that it allowed officials to review each application individually. The law school officials took into account ways in which each applicant might add to class diversity, including racial and ethnic diversity, and sought to enroll a "critical mass" of members of underrepresented minorities.[110] In her majority opinion upholding the policy, Justice O'Connor she cited the following additional factors in support of the policy:

> The policy did not define diversity *solely* in terms of race and ethnicity.[111]
>
> The "critical mass" concept used by the law school was not a fixed quota whereby the school set aside "seats" for minority students only.[112]
>
> A "race-blind" admissions program would have had a very dramatic impact on underrepresented minority admissions.[113]
>
> Countless educational institutions since 1978 had modeled their admissions policies on Justice Powell's opinion in *Bakke*.[114]

Justice O'Connor emphasized that "not every decision influenced by race is equally objectionable."[115] She deferred to the law school's judgment that diversity is essential to its educational mission and commented that the context of universities is a spe-

---

107. *Id.* at 315.
108. *Id.* at 334.
109. *Gratz*, 539 U.S. at 275.
110. *Grutter*, 539 U.S. at 329.
111. *Id.* at 338.
112. *Id.* at 335.
113. *Id.* at 319.
114. *Id.* at 322-23.
115. *Id.* at 327.

cial one in our constitutional tradition.[116] Courts should assume good faith by higher education officials, absent a showing to the contrary.[117] She also touted the demonstrable benefits of diversity—citing in particular briefs filed by American businesses and the United States military.[118] In a passage quoted in countless reports of the opinion, Justice O'Connor also noted that "effective participation by members of all racial and ethnic groups in the civic life of our Nation is essential if the dream of one Nation, indivisible, is to be realized."[119]

In characteristic fashion, Justice O'Connor then sought to contain the impact of the opinion by citing its many limitations. Specifically, the use of race or ethnicity must be "narrowly tailored."[120] Universities cannot adopt a quota system; rather, race or ethnicity must be only *one* part of an individualized, flexible consideration of each applicant that assesses *all* of the ways in which an applicant might contribute to a diverse educational environment.[121] The process cannot insulate applicants who belong to certain racial or ethnic groups from competition with other applicants and must give substantial weight to qualities apart from race.[122]

She then countered this list of limitations with still more caveats. A university need *not* exhaust *every* conceivable race-neutral measure before adopting a race-conscious policy,[123] and it need not choose between maintaining a reputation for excellence or fulfilling a commitment to provide educational opportunities to members of all groups.[124] She wrapped up with a prediction that may become the most cited dictum from the Court in many years: she forecast that affirmative action will one day be unnecessary, and expressed hope that in twenty-five years, it will have completed its role in educational reform.[125]

Justices Ginsburg and Breyer wrote concurring opinions in which they cautioned that while one can hope, one cannot not firmly forecast, when it will be safe to "sunset" affirmative ac-

116. *Id.* at 329.
117. *Id.* at 348.
118. *Id.* at 330-31.
119. *Id.* at 332.
120. *Id.* at 333.
121. *Id.* at 334.
122. *Id.*
123. *Id.* at 339.
124. *Id.*
125. *Id.* at 343.

tion.[126] They emphasized the differences between measures designed to burden racial minorities and those designed to boost opportunities.[127] Given the American history of race discrimination and its lingering effects, the contrasting measures often may not deserve the same constitutional fate.

As expected, Chief Justice Rehnquist and Justices Kennedy, Scalia, and Thomas found entirely unpersuasive the majority's razor thin distinctions between the undergraduate and law school policies.[128] They viewed the concept of seating a "critical mass" of minority students as a mere smokescreen for quotas,[129] under which race operated as an automatic admissions factor in most instances.

Justice Thomas' most powerful objection to the affirmative action policy was that the policies do far more harm than good for the intended beneficiaries. He invoked passages from a Frederick Douglass speech to abolitionists, in which Douglass insisted on justice for African Americans, but *nothing more*, adding that greater "interference is doing . . .positive injury."[130] Justice Thomas bitterly denounced the law school's affirmative action policy as a form of "racial aesthetics" that seduces under prepared minority law applicants to matriculate at an elite institution, where they continue to receive affirmative action benefits, are then hired by employers with similar "aesthetic" goals, and finally are expelled from elite sectors when the system is through with them.[131] Eventually, Justice Thomas implied, minority graduates disappear from elite professional ranks because they are unable to perform adequately in these settings without the false buoying of affirmative action.[132] He castigated the majority for upholding the law school policy "not by interpreting the people's Constitution, but by responding to a faddish slogan of the cognoscenti."[133]

Justice Scalia too sharply condemned the majority. He argued that it disregarded the prevailing standard for strict scrutiny, and hewed to political influences, rather than to constitutional dictates.[134] He objected to the majority's deference to

126. *Id.* at 346 (Ginsburg, J., concurring).
127. *Id.* at 345.
128. *Id.* at 379 (Rehnquist, J., dissenting).
129. *Id.* at 385.
130. *Id.* at 350 (Thomas, J., dissenting).
131. *Id.* at 372.
132. *Id.*
133. *Id.* at 350.
134. *Id.* at 346 (Scalia, J., dissenting).

university judgments about the educational values of diversity and scoffed that the law school's "mystical 'critical mass' justification for its discrimination by race challenge[d] even the most gullible mind."[135] He continued: "the allegedly 'compelling state interest' at issue here is not the incremental 'educational benefit' that emanates from the fabled 'critical mass' of minority students, but rather Michigan's interest in maintaining a 'prestige' law school whose normal admissions standards disproportionately exclude blacks and other minorities. If that is a compelling state interest, everything is."[136] He also noted acidly that if diversity were such an important vehicle for promoting tolerance, it would be equally important in the civil service system of the State of Michigan, as well as in private employment settings, so that such employers should "not be criticized –indeed, should be praised—if they also 'teach' good citizenship to their adult employees through a patriotic, all-American system of racial discrimination in hiring."[137] He concluded: "the nonminority individuals who are deprived of a legal education, a civil service job, or any job at all by reason of their skin color will surely understand."[138]

In *Gratz v. Bollinger*[139] the tide turned against the University of Michigan. The undergraduate admissions policy awarded twenty of the one hundred points needed for admission to the undergraduate program to any applicant from an "underrepresented minority group" [140] Unlike the law school admissions program, the undergraduate admissions program involved no individualized, "holistic" consideration of each application.[141] Moreover, the twenty points it awarded to under represented minority group members had the practical effect of making race a decisive factor in the admission of any otherwise qualified minority applicant.[142] As such, six justices concluded that the policy was not narrowly tailored within the meaning of *Grutter*.

Writing for the Court, Chief Justice Rehnquist rejected the university's argument that the administrative burden of reviewing each applicant's file justified a set "points" approach.[143] Ad-

135. *Id.* at 346-47.
136. *Id.* at 347.
137. *Id.* at 348.
138. *Id.*
139. 539 U.S. at 244.
140. *Id.* at 277.
141. *Id.* at 274.
142. *Id.* at 272.
143. *Id.* at 275.

ministrative convenience and expense, the Chief Justice countered, were not adequate reasons to uphold a constitutionally suspect policy.[144]

Justice O'Connor wrote a separate concurrence in which she identified the flawed parts of the Michigan policy and suggested that Michigan could modify its admissions system to rescue its mission of seating a diverse class.[145] Justice Breyer concurred in the judgment of the Court and joined in Justice O'Connor's opinion except insofar as it endorsed the majority's rationale.[146] Contrasting "benign" discrimination with invidious discrimination, he argued that the former can survive strict scrutiny in some situations where the latter cannot.[147] Justice Breyer nevertheless voted to strike down the undergraduate policy, presumably because he believed it went too far to advance these benign goals.

Justices Ginsburg, Stevens, and Souter dissented.[148] In their view, the undergraduate program's "points" method of acknowledging race was no more objectionably race-conscious than the law school's holistic "critical mass" policy was.[149] Moreover, it was commendably transparent and properly tailored to ensure diversity in the undergraduate population.[150]

Taken together, the two cases endorsed diversity as a worthy goal, but in very significant contextual and temporal brackets. The Court treated student body diversity as a means of enriching the classroom environment for *all* students, not only those who receive the admissions preferences. Yet it demanded a thicker version of diversity than any simple racial or ethnic goal implies.

All eyes now will turn to the particulars of admissions programs across the country. Defenders of these policies will be expected to explain how they work, to what extent they are individualized and "holistic," and whether (and how) they place weight on race and ethnicity. Race-conscious recruitment and admissions policies must be justified and *individualized*, which will be an expensive proposition for large public universities that receive thousands of applications each year. The Michigan cases

144. *Id.*
145. *Id.* at 279 (O'Connor, J., concurring).
146. *Id.* (Breyer, J., concurring).
147. *Id.* at 283.
148. *Id.* at 298 (Ginsburg, J., dissenting).
149. *Id.* (Souter, J., dissenting).
150. *Id.* at 296.

do not oblige public universities to take race and ethnicity into account; they merely allow schools to do so, within limits. Consequently, states still may pass laws, and citizens may continue to propose referendums, that prohibit use of race in university admissions,[151] and universities can voluntarily abandon race-conscious measures.

The many caveats built into both cases and the thin factual distinctions between them make them difficult to synthesize. In *Grutter*, Justice Scalia predicted a flurry of fact-specific lawsuits in the aftermath of *Grutter* and *Gratz*,[152] because their context-sensitive results, he argued, are open invitations to free-form litigation over other schools' admissions policies, over race-conscious scholarship programs, and over race-conscious policies in many other domains.[153] "I do not look forward to any of these cases," he grimly predicted.[154]

Justice Scalia's dread is somewhat difficult to understand, however, given standard Supreme Court fare. Whether a holiday display violates the Establishment Clause,[155] whether a government subsidy scheme imposes an undue burden on free speech or religion,[156] whether substantive due process is violated by laws that burden reproductive freedom,[157] whether government regulation of land use "goes too far" and constitutes a "taking,"[158] or whether a federal civil rights statute is "proportional" to the harms it seeks to remedy[159]—to take but a few thorny examples - can hinge on similarly narrow factual and doctrinal distinctions. The affirmative action cases are hardly unique in this respect.

Nevertheless, Justice Scalia is clearly correct, that many issues related to affirmative action remain unresolved. For exam-

151. In Michigan, a "Michigan Civil Rights Initiative" has been drafted to amend the state Constitution to prohibit the universities, the state, and all other state entities "from discriminating or granting preferential treatment based on race, sex, color, ethnicity, or national origin." Michigan Civil Rights Initiative, http:www.mcri2004.org/. It remains to be seen whether this proposed amendment will secure the necessary signatures to be adopted. Of course, California (Prop. 209) and Washington (Initiative 200) already have state measures that prohibit race-conscious admissions policies.

152. *Grutter*, 539 U.S. at 346-47 (Scalia, J., dissenting).

153. *Id.* at 347-48.

154. *Id.* at 349.

155. County of Allegheny v. Am. Civil Liberties Union, 492 U.S. 573 (1989).

156. Legal Services Corp. v. Velazquez, 521 U.S. 533 (2001); Rust v. Sullivan, 500 U.S. 173 (1991); Davey v. Locke, 299 F.3d 738 (2002).

157. Hodgson v. Minnesota, 497 U.S. 417 (1990); Webster v. Reprod. Health Services, 492 U.S. 490 (1989).

158. Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302 (2002); Lucas v. S.C. Coastal Council, 505 U.S. 1003 (1992).

159. City of Boerne v. Flores, 521 U.S. 507 (1997).

ple, current federal government policy permits the use of race as one factor in student financial aid, under narrow conditions based primarily on a remedy theory.[160] Whether race-conscious scholarships created for diversity purposes are constitutional is an issue that almost certainly with inspire litigation.

Another, looming question is whether educational outreach programs can be targeted solely toward racial and ethnic minorities. For example, if an engineering school tends to under enroll or retain minority students, may it offer a pre-enrollment or post-enrollment academic support program for minority students only? The recent cases cast doubt on the "minority only" aspect of such a program, but also suggest that such a program might be a sensible, time-limited measure that advances diversity without displacing innocent third parties from enrolling in the engineering school.

Finally, the cases do not settle whether achieving "diversity" now is a compelling reason for race-conscious measures in other contexts, especially employment. Justice Scalia is quite right to expect these litigation scenarios, if not dread them. No one should expect, however, that strict scrutiny is now a flaccid test, any more than one should expect, after *Lawrence*, that the rational basis test has grown large teeth.

III. THE SKY IS NOT FALLING—THE HEAVENS ARE NOT OPENING

The current Court has *not* abandoned its traditional "hands off" approach to review of most government action, as much as some people fear—or as others may hope. *Racing Association* and *Buckeye* prove there still is a rational basis "there there," under which successful challenges of governmental action remain very rare. When the Court is more interventionist, it is responding to multiple, powerful forces that may include changes in social practices and attitudes, community and judicial experience with traditional rules and their impact on citizens, empathic shifts, and a host of other factors that inform judicial and popu-

160. *See* Department of Education: Nondiscrimination in Federally Assisted Programs; Title VI of the Civil rights Act of 1964 59 Fed. Reg. 87,56, 87,61 (Feb. 23, 1994) (the regulations also allow schools to consider race or national origin, *among other factors*, as a condition of eligibility for aid to promote diversity, but only if the measures are "narrowly tailored"); *see also* Podberesky v. Kirwan, 38 F.3d 147 (4th Cir. 1994) (en banc).

lar distinctions between merely foolish and absurdly irrational policies.

These shifts in judicial thinking begin slowly and episodically. When new claims for intervention first emerge, they usually are denied—occasionally over an impassioned dissent and public ripples of consternation. When the new claims begin to prevail, they often involve attacks on the most coercive forms of government power—such as criminal punishment. These early successes appear aberrational—doctrinal footnotes, or "cf." material. Slowly, however, the rulings may be extended to less coercive forms of government action, until a generally accepted presumption emerges that the classification (e.g. homosexuality, gender, race) is an "irrational" basis for any government action.

Lawrence, *Grutter*, and aspects of *Gratz* reflect such doctrinal evolution. *Lawrence* involved parties—gay men—who barely elided the Court's traditional indicia of a "suspect classification."[161] Classifications based upon sexual orientation do, in some ways, operate as "suspect" classifications do: they look past a person's actual character and seize upon a perceived status as a proxy for characteristics that might otherwise justify legislative burdens. These classifications also are often used to deny or burden basic opportunities—like employment or sexual autonomy—that do not fall within accepted categories of "fundamental rights,"[162] but that share some of the characteristics of fundamental rights because they are central to one's ability to fully participate in public arenas, or to enjoy customary levels of liberty in private arenas. When a sexual orientation classification impinges *directly* upon the right to engage in sexual intimacy, as it did in *Lawrence*, it strikes a zone that the state rarely enters without a compelling reason, let alone to criminalize conduct by consenting adults. Of course, the state does intrude into this realm on occasion, and the notion that it cannot do so as a matter of constitutional law has never sat easily with all of the Justices. But the latter proposition itself is controversial, especially to strong libertarians who would first require substantial evidence of tangible harm to others before allowing government to intrude. In sum, the facts of *Lawrence* closely resembled, yet departed from, classic strict scrutiny cases.

---

161. Laurence Tribe has called this the "covert" use of a higher standard of scrutiny. *See* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 1445 (2d ed. 1988).

162. The doctrinal concept of "fundamental rights" in this arena evolved from Skinner v. Oklahoma, 316 U.S. 535 (1942) and Lovell v. Griffin, 303 U.S. 444, 450 (1938).

The admissions policy in *Grutter* likewise elided existing formal categories. The policy deployed race as a criterion but did so to assist, not burden, racial minorities. The intent and the generally accepted meaning of the racial classification in *Grutter* thus were distinguishable from the racial classifications deployed before *Brown v. Board of Education*.[163] Although the Court in recent years has insisted that all racial classifications trigger strict scrutiny, even if motivated by benign instincts,[164] this has been analytically, politically, and practically fraught. Consequently, a majority of the Court has consistently maintained that strict scrutiny *can* be satisfied, even in cases that involve race. That is, some of the Justices –like many citizens—do not believe that all race classifications are equally "irrational," given our cultural backdrop of de jure and de factoracism.

The policy in *Gratz* matched most of the features of the policy in *Grutter*, but with one crucial difference: the *Gratz* policy overtly used a "rigid" number of "points" in a way that *Bakke* condemned.[165] This slight—critics might say functionally immaterial—in the structure of the racial preference was enough to tip the policy into an existing judicial category and trigger its demise.

Both of the University of Michigan cases were distinguishable from *Racing Association* because they involved a traditional suspect classification—race. Consequently, both admissions policies ostensibly received "strict" judicial scrutiny, not mere rational basis review. Significantly, however, only one of the policies was overturned, despite this closer review.

Lawrence too was distinguishable from *Racing Association*, even though it arguably relied upon "rational basis" in overturning the Texas sodomy law. Again, *Lawrence* entailed two important interests—protection of adults' privacy in their own homes[166] *and* rejection of "mere animus" as a basis for legislative distinctions.[167] *Lawrence's* significant doctrinal contribution consisted of enabling a majority of the Court to extend this privacy zone to embrace all consenting adults, without regard to sex of

163. 347 U.S. 483 (1954). *See, e.g.*, Korematsu v. United States, 323 U.S. 214 (1944) (upholding racial classification as warranted by national security).

164. *See, e.g.*, Adarand Constructors v. Pena, 515 U.S. 200 (1995).

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

166. *See, e.g.*, Stanley v. Georgia 2394 U.S. 557 (1969).

167. *See, e.g.*, Romer v. Evans, 517 U.S. 620 (1996); City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432 (1985); United States Dep't of Agric. v. Moreno, 413 U.S. 528 (1973).

the partner. The state could not cast its gaze on heterosexual relationships before *Lawrence*; now it also cannot cast its gaze on homosexual relationships. The constitutional norm at stake remains essentially the same: government should not intrude into this most private of adult realms, absent a convincing reason, such as the prevention of significant concrete harm to *others*. *Lawrence* thus did not shift established principles or renounce traditional majoritarian power, as Justice Scalia warned. Rather, *Lawrence* applied established principles to new choices by the same adult or—viewed another way—to other adults long thought to be beyond majoritarian dictates. *Lawrence* also represented, of course, a shift in judicial thinking about the harms of homosexuality to the wider community and thus of the rationality of official decisions to condemn, criminalize, or otherwise punish it.

Indeed, the Court showed remarkable judicial restraint during the 2002 Term. It upheld the Iowa tax law differential. It upheld an apparently race-skewed referendum in *Buckeye*. It allowed one race-conscious admissions policy to stand *despite* strict scrutiny and struck down another on very narrow factual grounds while offering suggestions about how the policy might be redrafted. In its sole display of activism, *Lawrence*, the Court relied upon precedent and took great pains to narrow its holding to the regulation of adult consensual sexual practices within the most intimate of spaces, the home.

Although critics complain that cases like *Lawrence* hike traditional rational basis review onto stilts and that cases like *Grutter* transform traditional strict scrutiny into a meager version of itself, the cases actually do neither. Though tested on the margins, the traditional formulations remain intact.

Such marginal stress is inevitable and healthy. There always have been and always will be cases that defy judicially crafted boundaries and that resist easy analogy to familiar fact patterns. These cases require the Court to reconsider the traditional boundaries and to take a deeper look at the principles that first inspired those boundaries.[168] The methodology is inherently nonformulaic because the cases lie on the margins of formulas.

168. The interplay within constitutional doctrine between fixed categories and intercategory "float" is perpetual. Deductive logic is of limited use in these cases, given the opacity of the text, history, traditions, and the policy factors that inform these decisions. This is so despite the many good works detailing the perils of "balancing tests." *See, e.g.*, T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. 943 (1987).

These cases require the Court to look beyond doctrine in assessing whether to extend doctrine to new terrain. The majority's consideration of the social real world developments in *Lawrence* and in the affirmative action cases,[169] and its recognition that cultural changes may influence constitutional outcomes, thus were entirely sensible means of resolving difficult cases.

Of course, there are other ways. The Court could refuse to ever apply equal protection or substantive due process protection beyond the categories already established in settled case law. This certainly would offer greater doctrinal clarity and quiet critics of the Court's alleged activism. A "no growth" approach is absurd, however, if one considers how *much* terrain modern government covers, how *few* "suspect classifications" and fundamental rights already have been identified, and how *many* ways government can test the limits of substantive "reason." Allowing for doctrinal migration –despite its difficulties—is vastly preferable to doctrinal stagnation. It is also a very familiar process in American law. As Justice Souter has said, "it is here that the value of common law method becomes apparent, for the usual thinking of the common law is suspicious of the all-or-nothing analysis that tends to produce legal petrification."[170]

To reject "legal petrification" does not mean a wholehearted embrace of open-ended formulations of rationality. Our Court is unlikely to ever adopt a fluid, "We know it when we see it" standard of rational basis review. Such an open-ended approach would be rejected by most –if not all —of the sitting Justices. Indeed, Justice Scalia has made very clear that he believes *any* "common law" approach to constitutional interpretation—even the quite moderate one the Court actually follows—is an unprincipled overturning of democratic will,[171] a charge that all should find worrisome.

Yet despite Justice Scalia's thoughtful and persistent objections to the Court's present approach, and a more generally shared resistance to judicial activism, the Court continues to review and occasionally overturns government acts under equal protection and substantive due process even in the absence of

169. *See Grutter*, 539 U.S. at 306 (recognizing the expertise of a university in making "complex educational judgments").

170. Washington v. Glucksberg, 521 U.S. 702, 770 (1997) (Souter, J., concurring).

171. ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 37-41 (1997); *see also* Antonin Scalia, *The Rule of Law as the Law of Rules*, 56 U. CHI. L. REV. 1175, 1186-87 (1989) (acknowledging that balancing modes of analysis are inevitable, but should be avoided where possible).

plain text, uninterrupted historical practices, or other reasonably steadfast anchors of interpretation. *Lawrence* can be read as a substantive due process case that fell outside of all established categories of fundamental rights or suspect classes, yet overturned government policy. Earlier cases such as *Romer v. Evans*[172] also relied on the traditional rational basis test of equal protection, yet overturned government action. Can this practice of doctrinal modification without resort to text, history, or even the judicially established categories of elevated scrutiny be justified?

The answer, I believe, is yes. Dynamic play in the doctrinal joints is justified by past judicial practice, by the imperfect nature of government, by the shortcomings of existing categories, and by the Court's special role. I will highlight here only the most powerful features of each argument, as they apply to cases from 2002.[173]

1. *Past Judicial Practice*

Constitutional doctrine is and has always been a human creation, not a divine emanation arising from the text or framers' intent. Equal protection and substantive due process doctrine are no exception. The cases depend upon human judgment as informed by human experience, both of which are malleable in ways that defy formalism. For example, the cases that first identified "suspect classes" or "fundamental rights" entailed a dynamic and fluid approach to rights, under which the Court accommodated changed perspectives on government power, on affected private interests, and on the delicate balance between them. The Court attached these analytically significant labels only *after* it considered a complex set of factors, including sociopolitical phenomena external to text and doctrine.

The so-called "selective incorporation" of rights into the Fourteenth Amendment likewise occurred over time and entailed judgment calls not dictated by text. The Court deemed freedom of speech to be incorporated into fourteenth amendment due process in 1925,[174] though the fourteenth amendment nowhere mentions freedom of speech. "Due process" is hardly an obvious or uncontroversial signal that the framers of the four-

172. 517 U.S. at 620.

173. A fuller account of my views about dynamism at the margins of judicial categories can be found in Massaro, *supra* note 50.

174. Gitlow v. New York, 268 U.S. 652 (1925).

teenth amendment intended to incorporate any specific part of the Bill of Rights, including freedom of speech. Moreover, even after the Court deemed freedom of speech to be fundamental to ordered liberty and thus part of substantive due process, it used "reasonableness" as the test of state-imposed burdens on expression.[175] "Strict scrutiny" of state action in this arena is a quite recent judicial invention.[176] In any event, whether the Court analyzes freedom of expression under a flaccid "rational basis" test, the most demanding version of "strict scrutiny" test, or "intermediate" scrutiny, the Court weighs multiple factors that might plausibly be better weighed by legislators or other nonjudicial actors. The burden on speech, potential harms or "secondary effects" of speech, the comparative value of speech, and whether reasonable alternative methods of expression exist- none of these factors is susceptible to wholly objective measurements, and all entail policy determinations. Yet few people, including Justice Scalia, would claim that the Court usurps democratic will when it makes first amendment decisions.

First amendment law may be iconic, but it is not unique. In countless other areas of constitutional law the Court engages in a common law-like process of doctrinal development. In each area, the Court accommodates changes on the margins of accepted law because the Court finds it impossible—as well it should—to uphold government acts that defy constitutional "reason," as this notion has been and is informed by logical extensions of the underlying constitutional principles, by analogy to the accepted elevated scrutiny cases, by the Justices' practical experiences, and by evolving cultural norms of "reason. "

Here again, *Lawrence* is an excellent if controversial example of dynamic constitutional interpretation. The majority could not stand idle in the face of legislation that struck it as intolerable, given precedent regarding the scope of sexual autonomy, changed attitudes about the alleged social harms of homosexuality, and a growing sense that criminalizing this behavior was illiberal, even cruel. Missing from the opinion, of course, were key phrases—especially "fundamental right"—that the Court in recent decades has linked to outcomes that struck down government acts otherwise well within its regulatory powers. But the basic task was a familiar one. The Court reviewed government action in light of precedent, and responded to what some citizens

175. *Id.* at 670.
176. Brandenburg v. Ohio, 395 U.S. 444 (1969).

view as an arbitrary imposition and purposeless restraint.[177] It spoke of liberty, privacy, and human dignity, and it chose to act to protect them, despite the political firestorm it surely knew would follow.

If *Lawrence* is condemned over time as poorly crafted or analytically shaky, but correctly decided as a matter of policy and justice, it will be in superb constitutional company, as *Brown v. Board of Education* proves. Breakthrough decisions *typically* are analytically imperfect because they rearrange relationships between and among the existing categories, and because the categories themselves are analytically imperfect.

In any event, analytical purity is hardly the sole judicial goal here. Moreover, it is virtually unattainable in the highly abstract realm of constitutional law. Unless constitutional doctrine today has achieved perfection—a ludicrous notion for any generation of judges to embrace—then occasional analytical fissures may signal healthy growth, not doctrinal chaos or dissolution. Recognizing this, a majority of the Court has never favored the death of doctrinal development—even in the highly contested arena of substantive due process—and has continued to apply doctrine to new terrain. The modern Court therefore is preserving tradition rather than disrupting it.

2. *Imperfect Government and the Shortcomings of Existing Categories*

Another reason to support evolutionary dynamism within equal protection and substantive due process doctrine is that government action can confound "reason" in remarkably extensive ways that cannot be fully captured by any one set of principles or by current categories.[178] Indeed, a single act might be irrational in multiple ways, though people may disagree about *which* types of reason it violates and why. Consequently, for the Court to draft an eternal set of doctrinal principles and a finite set of factors for all potential applications of these principles, would be astoundingly complex. The "common law" method

177. *Lawrence*, 123 S. Ct. at 2487 (O'Connor, J., concurring).

178. *Cf.* H.L.A. HART, THE CONCEPT OF LAW 128 (1994) (noting that flexibility in rules is necessary because lawmakers cannot anticipate all consequences or contexts in advance); Robert C. Post, *Foreword: Fashioning the Legal Constitution: Culture, Courts, and Law*, 117 HARV. L. REV. 4, 8 (2003) (The Supreme Court 2002 Term concluding that "constitutional law and culture are locked in a dialectical relationship, so that constitutional law both arises from and in turn regulates culture").

that Justice Scalia rejects thus is actually well-suited to the task of deciding these "rational basis" cases.

A simple series of examples shows just how complex assessments of rationality can become. Assume, for example, that the Congress or a state legislature adopts measure *A*, to promote end *E*. How might this act be irrational (though not necessarily unconstitutional)? A *non*-exhaustive list of logical flaws might include the following:

1. *A* does not actually serve *E*.

2. Government officials did not reasonably believe *A* served *E* when they enacted the measure, but it does in fact further that end. *E* is a good end.

3. *A* does serve *E*, but *E* is not a good end.

4. *A* serves *E*, a good end, but is trumped by weightier good end *F*, which is substantially thwarted by *A*.

5. *A* serves *E*, a good end, but also promotes *F*, a bad end (corollary of 4).

6. *A* does serve good end *E*, but far less well than other means that serve *E* better.

7. *A* does serve good end *E*, but government officials actually sought to promote *E* only in order to promote good end *F*, and *A* does not promote *F*.

8. Government adopted *A* in order to serve *E*, a bad end, which *A* does serve, but it turns out to also serve end *F*, a good end.

9. Government adopted A in order to serve E, a good end, but it did so knowing it would have a much harsher impact on a minority of citizens than others, but did it anyway.

10. Government adopted *A* in order to serve *E*, but defined the class of individuals regulated by *A* in a manner that exempts some citizens but not others, with no "rational" basis for doing so.

11. Same as 10, but government acted out of "animus" toward the burdened class of citizens, where burden on them is disproportionate to any harm to others that the regulation seeks to prevent.

12. Government followed a non-democratic process to determine whether to do E, though E is a good end, and the process does serve E.

This series is obviously and intentionally incomplete—for example, it does not address the many process flaws that might render government action "irrational" under either equal protection or substantive due process.[179] Nor does this list describe how to evaluate government rationality in the many cases where reliable evidence relevant to the regulatory inquiry is unavailable or inconclusive.

Again, the five cases from the 2002 Term are exceptionally instructive. They show how difficult it would be for the Court to frame one test for "irrationality" that would capture all of the nuances raised by even a quite small number of cases.

Where did each case from last term fall, within the above typography of "irrational" acts?

The Texas statute in *Lawrence* arguably fell under 1, 3, 4, 5, 6, 7, 8, 9, *and* 10.

The Michigan admissions policies in *Grutter* and *Gratz* arguably fell under 1, 2, 3, 4, 5, 6, 7, 8, 9, and 10.

The differential tax scheme in *Racing Association*, however, arguably fell under 6 and 10, and the referendum process in *Buckeye* arguably fell under 4, 5, and 11.

One might infer that the greater the number of possible "irrationalities," the more likely it is that the Court will overturn a measure. In some cases, this assumption likely would hold—a government act that suffers from so *many* flaws may be harder to stomach. But this is not necessarily so: *Grutter upheld* the law school's policy, whereas *Gratz* struck the University's policy down, though both arguably were susceptible to the same, high number of characterizations as "irrational." (This is why the split results were so troublesome to many Court observers and policymakers.) *Racing Association*, in contrast, fit very few of the "irrationality" scenarios, yet would have come out differently if only *one* factor changed: if the citizens treated less well under

179. In general, the Court has decided that a legislative act that serves a good end should be upheld, even if it was adopted for bad reasons. But this is *not* always, or even so literally, so. "Purpose" matters to constitutional analysis in many ways, and a *very* bad purpose may well influence a court's estimation of the gravity of the harms it produces. *See, e.g.*, United States v. O'Brien, 391 U.S. 367, 383 (1968) ("It is a familiar principle of constitutional law that this Court will not strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motivation.")

the measure had been defined by race, gender, or state citizenship—"type 10" irrationality."

Buckeye was an alleged "political process" defect with a "state action" kicker. The outcome turned on the Court's reluctance to ascribe alleged racial animus of *voters* to the City officials, where the officials' actions were apparently nondiscretionary, were procedurally regular, and did not otherwise add an official boost to private animus. One can argue, of course, that the City's failure to modify its process to avoid giving private bias an official outlet was "irrational," in the same way that discriminatory action by the City itself would have been irrational (Type 9). The Court over time has decided to treat these bias scenarios differently, both as a function of the state action doctrine, and through its *Washington v. Davis*[180] line of cases, which requires a showing of government's intent to discriminate against a protected class. But these limits on the meaning of discrimination were not inevitable: they were judicial constructions of equality.

In sum, regardless of doctrinal garb, all substantive due process and equal protection cases entail balancing. The Court in every decision must distinguish garden-variety government "irrationality" (and uphold it), from government "irrationality" *on stilts* (and strike it down).Whatever categories the Court develops to capture the process will defy easy summary given the variety of government acts that are subject to judicial review. The Court's "three tier" approach crudely separates cases into "close review"—"some review"—"little or no review" categories, but its actual and ongoing process of funneling cases into these categories is analytically imperfect, and a matter of balance, pragmatism, and judicial judgment. If this is judicial "activism," then activism is inescapable.

3. *The Special Role of the Court*

Of course, to say that government may act irrationally, in multiple ways, or to point out recent examples of such acts, still does not prove that the Court should be given broad discretion to correct for these abuses as it sees fit. Instead, the wide variety of potential government errors may lead one to conclude that judicial flexibility should be curtailed, not expanded.

---

180. 426 U.S. 239 (1976). *See also* Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252 (1977); *see generally* David A. Strauss, *Discriminatory Intent and the Taming of* Brown, 56 U. CHI. L. REV. 935 (1989).

Justice Scalia, for one, surely would point to the foregoing list of potential government follies as an excellent argument *against* overturning government action, absent very explicit textual or historical indications that the action is improper. Thought he might concede that these decisions entail complex judgment calls, he would argue that they nevertheless should be made through the political process as far as possible. As imperfect and illogical as the political process might be, it surely beats the judicial process every time—*not* because the government, acting through the people, acts rationally in any self-proving sense, but because "rationality" is *never* self-proving and may not even be the point of legislation. Consequently, all of these policy decisions should be left to the wider democratic process, and certainly should not be made by a "law trained elite."[181] That is, the Court should talk the formalist talk *and* walk the formalist walk—all the way to doctrine's edge.

Once again, however, I disagree about Justice Scalia's assumptions about the current application of the worthy general principle of judicial restraint. To be sure, intervention by unelected federal judges is not a proper vehicle for bottom up policy formulation. But, the Court intervenes only *after* government officials have acted, and their actions have been challenged by citizens as cruel, captured, clueless, or corrupt. This intervention is not necessarily a disruption of "democracy," and may even be described as a vehicle for perfecting it. A much worse alternative, as I see it, would be for judges to so align themselves with government officials that they refused to ever act on their power of review, even in cases brought by citizens who insist they have been seriously mistreated.[182] Such robust, horizontal, and vertical

181. *See* United States v. Virginia, 518 U.S. 515, 567 (1996) (Scalia, J., dissenting). *Cf.* John F. Manning, *The Absurdity Doctrine*, 116 HARV. L. REV. 2387, 2395 (2003) (noting that " a statute's apparently odd contours may reflect unknowable compromises or legislators' behind-the-scenes strategic maneuvers" so that "a legislative classification can seem absurd (in a policy sense) but still be rational (in a process sense) as a means of assuring the passage of the overall legislation")). That is, close examination of how laws actually are made undermine notions of "rational legislation" in ways that may point against judicial interventions. Of course, the "irrationality" of the process may prompt others to argue that judicial interventions are necessary.

182. Many commentators, of course, have already made similar observations, with varying degrees of force and sophistication. Among the most famous of these is the late John Hart Ely's account of judicial review, which too anticipates a modest corrective role for the judiciary to play in assuring that the democratic process remains participation-oriented and representation-reinforcing. Countless others have critiqued or expanded upon Ely's theory, and many have focused on the complexities of defining a process defect, or of identifying the type of "democracy" one hopes to protect through constitutional law. JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL

deference to government processes and officials—who range from members of Congress, to state legislators, state attorneys general, to university faculty committees, police officers, public librarians, park officials, municipal planning boards, border patrol agents, to city council members, to prison guards, to parole officers, to child protective services investigators—would be contrary to our experience, our history, and our common sense.

Moreover, there is no *cross*-contextual reason to assume that all or even most government action—whether at the state, local, or federal level—necessarily reflects any true "majority's" will. In many contexts, the opposite assumption is warranted.[183] In what sense, then, are the foregoing government officials part of a "democratic" process? Many likely are not, and thus do not see themselves as such, or as constrained by democratic principles when they execute their duties.

There also is no reason to condemn a decision simply because it emerges from a body composed of legally trained people. Many government bodies besides the Supreme Court likewise are composed of "law trained elites," and the Supreme Court and the lower courts are hardly immune from cultural or political influences that affect government decisionmakers in other realms. Judges in several states are elected,[184] and the process of appointing federal and state court judges is far from apolitical. Few if any judges operate unaware of or heedless of politics, despite respect for the limiting principles of judicial independence, textual constraint, and *stare decisis*, among other powerful curbs on judicial excess.

There likewise is no reason to assume that the *absence* of "legal elites" in constitutional decisionmaking, in particular, would promote better substantive outcomes. Legally trained

---

REVIEW (1980). *See also* ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 16 (1962) (describing the "counter-majoritarian" difficulty); CHRISTOPHER L. EISGRUBER, CONSTITUTIONAL SELF-GOVERNMENT 78 (2001) (arguing that judicial review is not inconsistent with self-governance); JED RUBENFELD, FREEDOM AND TIME: A THEORY OF CONSTITUTIONAL SELF-GOVERNMENT 168, 172 (2002) (arguing that "constitutionalism is not *counter* to democracy," that constitutionalism "is *required* by democracy" and a written Constitution demands judicial review); MARK V. TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS 129-53 (1999) (questioning the courts' capabilities); JEREMY WALDRON, LAW AND DISAGREEMENT 296-98 (1999) (arguing that the judiciary supplants popular values).

183. *See* EISGRUBER, *supra* note 182, at 78.

184. *See* Daniel Isaacs & Sandra Newman, *Historical Overview of the Judicial Selection Process in the United States: Is the Electoral System in Pennsylvania Unjustified?*, 49 VILL. L. REV. 1 (2004).

people have profession-specific experiences that may be directly relevant to constitutional law. For one thing, they have received an education that typically includes instruction in constitutional decisionmaking over time, discussion of alternative methods of constitutional interpretation, and the cautionary tales of *Lochner v. New York*, *Korematsu v. United States*, *Dred Scott v. Sandford*, and *Plessy v. Ferguson*. For another, judges and lawyers get a close look at the actual impact of government policy on the governed. Granting judges authority to mitigate the harshest, cruelest, or most unintended consequences of these laws –especially when the consequences are felt only by a small minority of citizens—seems a sensible, reasonably efficient, even democracy-enhancing corrective to a sometimes wooden and unfeeling legislative process. Recall that this nullification power is exercised infrequently, is subject to further review, proceeds on the basis of analogies to past decisions, and is conducted in public.[185] This modest check on public officials is especially important as applied to policies that are adopted by the countless low-visibility decisionmakers whose actions otherwise would *never* pass through a public, deliberative body.

Once again, the 2002 term speaks volumes. In *Lawrence*, the Court addressed the culturally riveting issue of gay rights—or, as Justice Scalia put it, "the homosexual agenda."[186] In his view, legal "elites" may have effected a "massive disruption of the current social order." Here, as in *Romer*, Justice Scalia condemned the Court for taking a stand in the culture wars.[187] Yet this particular culture war –if it deserves this name—erupted due to social activism, the AIDS crisis, modern films and theater, television, talk shows, religious and political responses to activism, and other nonlegal contributors to cultural foment over the issues, not from a court decision.

The Court in *Lawrence* did step into a cultural fray, to be sure. But no matter how the Court resolved *Lawrence*, it would have been engaged in that fray, and properly so: this cultural war has become an intense battle over the reach of our Constitution and over the proper balance between individual rights and majoritarian morality. If the Court refused to enter this battle on the ground that it is not its place, then it ought to beat a hasty re-

185. For a particularly compelling development of this argument, with which I concur, see EISGRUBER, *supra* note 182.

186. *Lawrence*, 123 S. Ct. at 2496 (Scalia, J., dissenting).

187. *Romer*, 518 U.S. at 652 (Scalia, J., dissenting).

treat in many other realms where it traditionally has played a prominent role.[188]

In any event, legally trained elites actually may be quite well situated to examine the rationality of theories that are commonly advanced in support of criminalization of sexual relations between same sex partners. As Justice Scalia notes –though with sarcasm—sanctions against homosexual, bisexual, and transgendered people have been lifted in law schools as a matter of AALS policy.[189] Consequently, law students may be more open about their sexuality. Law graduates thus may have impressions of homosexuality that depart from dire predictions about what would happen if taboos against same-sex relations were lifted. Their attitudes may *not* be the product of "political correctness" or any "group think" foisted upon students by liberal law professors; rather, they may be based on their direct experiences with their openly gay or lesbian colleagues.[190] These experiences may affect their evaluation of the professional and personal consequences of criminalizing sexual relations between same-sex partners. That is, "judicial notice" of how the world works—not professional proselytizing or elitism—may have change some judges' views about sodomy laws.[191]

I am not arguing—it would be absurd to do so—that legal professionals are inherently better than nonprofessionals at making policy decisions for the country. Rather, I am arguing that they may play an important role in constitutional assessments of the *reasons* underlying policy decisions that burden individual liberties, in part because of the training they receive and

188. *Cf.* Post, *supra* note 178, at 81 (noting that courts simply cannot apply constitutional doctrine without drawing upon their understandings of cultural practices).

189. *See Lawrence*, 123 S. Ct. at 2472 (Scalia, J., dissenting) (arguing that AALS rules require member schools to ban from job interview facilities a law firm that does not wish to hire openly gay or lesbian lawyers); Bylaws of the Association of American Law Schools, Inc., § 6-4 (prohibiting discrimination based upon sexual orientation).

190. In similar ways, the American businesses, the United States military, and the hundreds of educational institutions that weighed in on the value of "diversity" in last term's affirmative action cases may not have been speaking on the basis of any "elitist" privilege or out of "political correctness," but on the basis of their own direct, democratizing experiences with students, workers, and soldiers from diverse backgrounds. If anything, the diversity principles and practices they endorsed would displace privilege and undercut elitism; it is quite difficult to view affirmative action that benefits racial minorities as a "capture" problem that reserves benefits solely for the already most prosperous, social, and political "elites."

191. *Cf.* Dean v. District of Columbia, 653 A.2d 307, 330 (D.C. 1995) (discussing why a legislative hearing may not be better suited than a court hearing when determining factual claims about the nature and causes of homosexuality, given the political ramifications of appearing to endorse homosexuality).

their professional commitments. In any event, to argue that the "elitism" inherent in professional training makes judicial decisions inherently antidemocratic strikes me as flat-out wrong. If it were true, it would be difficult to justify judicial review in nearly any form.

Similarly unpersuasive is Justice Scalia's occasional indictment of the Court for relying on "personal predilection" in resolving substantive due process and equal protection cases.[192] If the Court leaves *this* scene of constitutional decisionmaking solely on the basis that the Justices' personal predilections might influence how they interpret facts and apply the principles, then it should leave most of them, given the nature of the beast. Justices are not potted plants and inevitably must draw on experience when deciding tough cases. It is mystifying that Justice Scalia in particular would complain that judges may act—in part—on their "personal predilections," given his legal realist statements about judges. For example, in *Republican Party of Minnesota v. White*,[193] he viewed as obvious and unproblematic that any well-qualified judicial candidate will have "predilections," and concluded a candidate should be allowed to talk about these views when running for an elected judicial post, even though he or she also must act "impartially" if elected.[194] Justice Scalia must believe, as I do, that bending *to* facts, as one perceives them through the lens of one's life experiences, is not the same as *bending* facts. If so, he might consider the wider implications of this insight for constitutional doctrine, rhetoric, and interpretation.

Perhaps Justice Scalia would respond that the primary problem with a flexible, evolutionary approach to substantive due process and equal protection doctrine is not that the Court lacks special insights, but that flexibility destabilizes doctrine and makes context matter too much. This kind of unpredictability seems to be the crux of his gripe that *Grutter* and *Gratz* will spawn new litigation. Again, however, the objection is unconvincing. Some unpredictability about future applications of constitutional principles announced by the Court comes with the territory, as any observer of constitutional law well knows. The text is vague, the principles are general, the doctrine is composed

192. Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 1002 (1992) (Scalia, J., dissenting).

193. 536 U.S. 765 (2002).

194. *Id.* at 784.

by multiple authors, not one univocal author, and the result can be maddeningly obscure.

Consider the following criticisms of constitutional doctrine, across many fields, and in general:

> Unless the Court modifies or attempts to clarify its approach, standing doctrine will likely remain a mystery to litigants and lower courts.[195]

> The [political question] doctrine has always proven to be an enigma to commentators. Not only have they disagreed about its wisdom and validity. . .but they also have differed significantly over the doctrine's scope and rationale.[196]

> A persistently disturbing aspect of constitutional law is its lack of theory, a lack which is manifest not merely in the work of the courts but in the public, professional, and even scholarly discussion of the topic.[197]

> The past, particularly the aspects that the interpretivists care about, is in its essence indeterminate; the interpretivist project cannot be carried to its conclusion.[198]

The "rational basis" test is thus hardly the only constitutional doctrine vulnerable to the critique of "incoherence," "subjectivity," or "contextualism." Even within the category of strict scrutiny, many doctrinal permutations have emerged that hinge on context. "Government classifications sometimes require "important" government reasons, "compelling government reasons" or "exceedingly persuasive" government reasons. In *United States v. Virginia*, for example, the Court demanded "exceedingly persuasive" justifications for gender-based classifications—placing these classifications in a grey zone above "intermediate" and just below "strict" scrutiny terminology.[199]

In the free speech area, where explicit text protects the right in question, the Court has created a doctrinal morass. The gen-

---

195. TRIBE, *supra* note 161, at 111, § 3-15.

196. Martin Redish, *Judicial Review and the Political Question*, 79 NW. U. L. REV. 1031 (1985). Indeed, one might simply read the title of Louis Henkin's well-known piece, *Is There a Political Question Doctrine?*, 85 YALE L.J. 597 (1976), to see the level of confusion that the Supreme Court decisions in this area can generate.

197. Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1 (1971).

198. Mark V. Tushnet, *Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles*, 96 HARV. L. REV. 781, 800 (1983).

199. 518 U.S. 515, 525 (1996).

eral claim that content-based government regulations of speech trigger "strict scrutiny" is subject to so many exceptions that the statement is extremely misleading. In a recent case involving congressional conditions on federal funds for public libraries, Justice Breyer suggested that the Court use "heightened, but not 'strict scrutiny.'" It supplements the latter with an approach that is more flexible but nonetheless provides the legislature with less than ordinary leeway in light of the fact that constitutionally protected expression is at issue.

Were Justice Breyer's suggestion one's first encounter with constitutional law, one might leave the field in despair, especially if one came to it expecting doctrinal lines to be stark, driven by pages of history, and warranted by the "plain meaning" of the text. After multiple exposures to constitutional law, however, the passage seems unremarkable, even wise, given the multiple forces a court must juggle in imposing first amendment limits on government funding power. Why, then, would a Supreme Court Justice, of all people, express shock and dismay *over and over again* at judicial interpretive practices that demand balancing of interests, or which change with the times or in context? The practice is well ingrained, inescapable, and deeply embedded in the very process of interpreting and apply imperfectly drafted laws to fact patterns often not anticipated by the rule makers.

That said, the indeterminacy of constitutional law can easily be overstated. Despite the murkiness, there are remarkably *few* surprises. Once again, the decisions of the 2002 term are instructive. Although Justice Scalia lamented the open-ended implications of *Grutter* and *Gratz*, he seemed truly outraged about what he saw as the inevitable effects of *Lawrence*.[200] Yet if predictability were a primary goal, and if Scalia reads *Lawrence's* future impact correctly, then why is the case so worrisome? Moreover, all of the cases last term actually *were* quite predictable –many Court observers anticipated that O'Connor would be cast the deciding vote in the affirmative action cases and might well "split the difference." Nearly everyone expected the Court to overturn the Texas statute, once it agreed to hear the case. And all could have predicted the outcomes in *Buckeye* and *Racing Association*. Unpredictability thus was not a major problem last year.

In any event, predictability alone hardly marks an unerring path to sound constitutional decisions. A Justice could *always* uphold racial classifications, or *never* uphold them. Likewise, a

200. 123 S. Ct. at 2491 (Scalia, J., dissenting).

Justice could *always* uphold sexual orientation classifications, or *never* do so. As the race and sexual orientation cases demonstrate, however, the real world is simply not that easy, and neither is the constitutional doctrine that grapples with real-world problems in an ever-changing environment.

Given the Court's actual interpretive practices, and given the departures these practices occasionally produce, one might argue that the Court should at least do a better job of matching its words with its deeds. The Court should openly state that it follows one dynamic, pragmatic, and context-driven approach to substantive due process and equal protection, and jettison talk of categories or tiers of review.[201] It should simply ask in each case whether government has convincing reasons for acts that significantly burden liberty, property or life, and identify a nonexhaustive cluster of concerns for lower courts to consider that go beyond *stare decisis* and text- for example, the significance of the interest affected, the democratic and deliberative nature of the body that produced the rule, the nature of the group burdened, the nature of the harm the rule produces, alternative avenues for overcoming the rule's harsh consequences, the nature of the harm to others if the rule is voided, and the role of empirical unknowns.

It could assert a strong presumption against disruption of truly democratic procedures that allow for meaningful participation by the citizens most affected by the rule in question, but insist that other rules—especially ones that single out a minority of citizens with respect to important interests that are enjoyed by others with no comparable government restraints—be examined more closely. Or, it might abandon formalism altogether, in favor of a Posnerian approach that pays closer attention to consequences, and less to abstract principles.[202] Finally, it might begin all constitutional cases with the following reminder of the Court's anti-majoritarian virtues: "*[s]o long as the Court exercises the power of judicial review . . ., it should not only protect 'safe' or orthodox views which rarely need its protection.*"[203] This

201. This is essentially the approach favored by Justice Stevens and by Justice Thurgood Marshall. *See* Craig v. Boren, 429 U.S. 190, 212 (1976) (Stevens, J. concurring) ("the two-tiered analysis. . .actually appl[ies] a single standard"); San Antonio Indep. School Dist. V. Rodriguez, 411 U.S. 1, 110 (1973) (Marshall, J., dissenting) (arguing for a method that considers the "invidiousness" of the classification and the "importance of the interest adversely affected by it").

202. *See* RICHARD A. POSNER, LAW, PRAGMATISM AND DEMOCRACY *passim* (2003).

203. Dennis v. United States, 341 U.S. 494, 580 (1951) (Black, J., dissenting).

incantation would reinforce that the Court properly corrects for government excesses and preserves substantive and procedure values, as a matter of institutional design and purpose. Under this open-ended, legal realist approach, existing equal protection and substantive due process case law would continue to frame the Court's analysis of future cases in much the same way it now does, but under a "tier free," nonformulaic rubric.

The primary advantage of this approach would be its transparency: it would better describe what the Supreme Court actually does when it develops doctrine. I believe the approach—which I have called "the thin, 'constitutional law unplugged'" strategy[204]—has considerable other virtues, especially in the arena of so-called "gay rights."

The considerable and overpowering drawbacks of this approach across the spectrum of cases, however, are at least threefold. First, the work of the lower courts is *not* the same as the work of the Supreme Court. Lower courts likely are better guided and constrained by blunt categories than by fluid, multifactored tests. Second, the "unplugged" strategy is misleading. The Court itself relies on the blunt categories in many cases; abandoning the tiers might mask how many cases these formulas actually do resolve, with very little judicial reflection and virtually no dissent.

Finally, an open and unapologetic embrace of judicial flexibility could damage the Court's public credibility at a particularly inopportune moment. As the 2002 Term shows, the Court actually does exercise restraint –and lots of it—but nevertheless is disparaged as unduly activist by critics from multiple perspectives. If the Court were to now justify its power in more openly realist terms, this could further obscure its inherent conservatism in the minds of its many detractors, lower court judges might engage in more activism. There is something to be said for judicial rhetoric that understates the judiciary's power rather than language that captures it fully. There is little good to be said, though, for rhetoric that overstates its powers in a moment when the Court's independence is being attacked vigorously, even from within. Now may not be the time for the Supreme Court to deliver a public lecture on legal realism, or even to offer a homily on the practical and enduring wisdom of a constitutional system that gives the Court power to occasionally upend official acts.

---

204. Massaro, *supra* note 50, at 109.

CONCLUSION

The 2002 Term surely was a term to remember. Some of us soared when we read the high-profile equal protection and substantive due process decisions; others already are rallying political forces and even drafting constitutional amendments to undermine them.[205] To assess the Court's performance fairly, however, we must look beyond the front page of newspapers, and beyond our own ideologies.

The full equal protection and substantive due process docket revealed a Court exercising balance and prudence. It was neither excessively activist nor excessively passive. It acted cautiously, predictably, and sanely. It invoked prevalent social practices, its own precedent, and well-established constitutional values in reaching its decisions. It clung to traditional categories while grappling with the inevitable slippage between them. This was a centrist-to conservative Court acting sensibly—even sensitively.

In a moment when the academic and public fashion is to bury the judiciary, not to praise it, these redeeming features should not go unnoticed. At the very least, we should recognize that the sky above our democratic institutions is *not* falling—despite clamors to the contrary. Nor have angels of liberty landed in America. Lawmaking will continue after *Lawrence*, *Grutter*, and *Gratz,* and—I predict—will continue to occasionally challenge, if not utterly defy, reason.

Unlike Justice Scalia, I do look forward to litigation that questions the rationality of official lawmaking, both in well traveled and in unfamiliar realms. Together, equal protection and substantive due process doctrine demonstrate that a baseline expectation of rational government endures, and that passes for reason inevitably will evolve in an unelected judiciary's hands. More formalism here is not warranted, as some would have us believe. Indeed, any *less* dynamism would ill serve democracy, and notions of liberty, as both have been traditionally understood.

These simple lessons are worth underscoring, lest they be drowned out by the far more riveting, impassioned descriptions

---

205. *See* Jeffrey Rosen, *How to Reignite the Culture Wars*, N.Y. TIMES, Sept. 7, 2003, at § 6, 48 (predicting the backlash against "gay rights"); *see also* Michigan Civil Rights Initiative, *supra* note 151 (discussing the political movement in Michigan to prevent any use of race in admissions).

of a "runaway judiciary." Hyperbolism makes great copy and rallies political coalitions, but it obscures truth and may lead serious observers afield. The 2002 Term offers a corrective to these exaggerated images and a reminder that existing doctrine often grants considerable deference to democratic processes. From this more accurate starting point, we might better engage in debates about how that doctrine might be improved, and to what ends.