ARTICLES

WHY LIBERTY JUDICIAL REVIEW IS AS LEGITIMATE AS EQUALITY REVIEW: THE CASE OF GAY RIGHTS JURISPRUDENCE

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Although legal commentators these days rarely question the legitimacy of judges engaging in judicial review based on equality grounds, judicial review on substantive due process grounds remains highly controversial. One of the principal reasons for this legitimacy disparity is the view that substantive due process calls on judges to incorporate their personal views and moral values into the constitutional analysis in ways that equality review does not. This Article introduces the concept of "equality's dependence" to explain how value judgments that fall outside of egalitarian considerations must be incorporated into the analysis to give the concept of equality its normative bite. The Article also uses gay rights constitutional cases to question the legitimacy disparity between liberty and equality review by showing how judges make normative judgments in equality gay rights cases that are surprisingly similar to the ones they make while engaging in substantive due process review. These similarities undermine the view that equality is a more neutral or "self-contained" constitutional norm than liberty, one that allows judges to decide cases without bringing to bear their normative values regarding the underlying moral and policy issues raised by the litigation.

The Article also uses gay rights cases to explain why judicial review on liberty grounds can play a role in reinforcing democratic processes that is as salutary as that played by equal protection review. In addition, the Article points to examples from gay rights constitutional litigation to question the widely held view that the striking down of legislation on substantive due process grounds inevitably imposes greater limitations on legislative discretion than does the voiding of laws on equality grounds. The Article's ultimate claim is that if judges and legal commentators are generally comfortable with the idea of courts measuring state action against constitutional principles of equality, then they should also be generally comfortable with courts doing the same with constitutional principles of liberty.

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INTRODUCTION

There is a widely held view in American legal circles that if a law must be struck down on constitutional grounds, it is better to do it under equal protection principles than under the substantive component of the Due Process Clause.\(^1\) Indeed, it sometimes seems that judicial review on liberty grounds will never overcome the specter of \textit{Lochner v. New York} and its progeny.\(^2\) Almost everyone agrees that the Supreme Court in those cases improperly relied on substantive due process considerations to strike down economic and labor reforms.

\(^1\) As Rebecca Brown explains, 
[\textit{\text{[f]} or many decades, the Supreme Court has appeared more confident in its own legitimacy when protecting equality rather than liberty. When it has addressed issues of unequal treatment on the basis of race or other group characteristics— even when judicial intervention meant the dismantling of entrenched local policy—the Court has not expressed the severe disquiet with its institutional role that we have come to expect when it addresses issues arising under the Liberty Clause.}]

Rebecca L. Brown, \textit{Liberty, The New Equality}, 77 N.Y.U. L. REV. 1491, 1500 (2002); see also Peter Westen, \textit{The Empty Idea of Equality}, 95 HARV. L. REV. 537, 538 (1982) (“Fifty years ago equality was dismissed as a legal argument of ‘last resort,’ one to be eschewed until all available ‘rights’ had been tried and rejected; today equality is becoming the argument of first choice, one that threatens to swallow ‘rights’ that once ranked far above it.” (footnotes omitted)).

\(^2\) See \textit{Lochner v. New York}, 198 U.S. 45, 57 (1905) (striking law prohibiting bakers from working more than sixty hours a week on the ground that it violated the freedom to contract as a protected liberty right under the Fourteenth Amendment).
instituted during the Progressive and New Deal eras.\textsuperscript{5} And the Court’s ruling in \textit{Roe v. Wade},\textsuperscript{1} in which it used substantive due process to hold that the Constitution affords women the right to terminate pregnancies, remains its most controversial decision of the contemporary era.\textsuperscript{7}

While the legitimacy of substantive due process review has been controversial for most of the last century, there is not these days much disagreement among legal commentators (and judges) about the legitimacy of judicial review based on equality principles—though there are continued reservations expressed about judicial review in general\textsuperscript{7} as well as frequent disagreements about how equality principles should be applied in individual cases.\textsuperscript{8}

\begin{itemize}
\item \textsuperscript{4} 410 U.S. 113 (1973).
\item \textsuperscript{5} See Laurence H. Tribe, \textit{The Treadstone Power}, 8 Green Bag 291, 296 (2005) (noting that in deciding \textit{Roe}, “the Court reached the most controversial result of the past half-century”); see also Lund & McGinnis, supra note 3, at 1556 (“Millions of Americans regard \textit{Roe} as judicial authorization for mass murder, and understandably continue to oppose the Court’s approach to abortion.”).
\item \textsuperscript{6} As Rebecca Brown notes, “[o]ver the past century . . . both judges and scholars have increasingly endorsed judicial review of equality claims . . . . By contrast, countermajoritarian concerns have led courts to refrain from judicial review of liberty claims.”). Brown, supra note 1, at 1491 (footnotes omitted).
\begin{itemize}
\item It should be noted that politicians and members of the public do not usually distinguish between judicial review that is grounded on equality grounds and one that is grounded in liberty doctrine. For example, many who question the legitimacy of courts deciding the constitutionality of gay marriage bans seem to care little whether judges strike down those bans on equal protection or due process grounds. For a discussion of the legitimacy of judicial review in the context of same-sex marriage, see Shannon Price Minter, \textit{The Great Divorce: The Separation of Equality and Democracy in Contemporary Marriage Jurisprudence}, 19 S. Cal. Rev. L. & Soc. Just. 89 (2010).
\item \textsuperscript{8} See, e.g., Parents Involved in Cnty. Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. 701 (2007) (striking down, by a 5–4 vote, student assignment plan that relied on racial classifications
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There are several reasons for the legitimacy disparity between equality and liberty review. One is the way in which courts used equality principles to end decades of de jure racial segregation. If *Roe* is the most controversial Supreme Court ruling of the last fifty years, the equality case of *Brown v. Board of Education* remains the most celebrated in its history. To question the general legitimacy of judges striking down legislation under the Equal Protection Clause is in some sense to question the legitimacy of the judiciary’s contribution to ending the system of racial caste in America. In short, “*Brown* [is] a paradigm of the courts doing something right, just as *Lochner* [is] a paradigm of the courts doing something wrong.”

Another reason for the legitimacy disparity between judicial review grounded in equality and one grounded in the substantive component of the Due Process Clause is the unique institutional function that judges are thought to play when interpreting the Equal Protection Clause. From this perspective, rulings under the latter provision are more legitimate than those under the former because they require judges to engage in what has come to be understood as a quintessential judicial function, that is, the policing of the legislative branch to make sure that it sufficiently accounts for the interests of all groups when enacting legislation. This understanding of equality review, which owes much to the influential scholarship of John Hart Ely, views it as reinforcing rather than undermining representative democracy.

In contrast to the important institutional function that courts play when reviewing legislation under the Equal Protection Clause, the substantive component of the Due Process Clause, it is argued, calls for the exercise of a different type of judicial function, one that requires judges essentially to legislate by taking sides in contested moral

9 See *Jeremy Waldron*, supra note 7, at 1350 (noting that “the fiftieth anniversary of *Brown v. Board of Education* provided a timely reminder of the service that the nation’s courts performed in the mid-twentieth century by spearheading the attack on segregation and other racist laws”).


11 See *infra* notes 110–13, 238–42 and accompanying text.
and policy disputes. As a result, liberty review is viewed by many as antidemocratic because it is thought to undermine rather than strengthen representative democracy.

In addition to greater institutional legitimacy, equality review also has a greater perceived remedial legitimacy. The striking down of legislation under substantive due process principles is commonly thought to constitute a more intrusive form of judicial action because, in the words of Justice Robert Jackson, it “leaves ungoverned

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14 See Daniel O. Conkle, *Three Theories of Substantive Due Process*, 85 N.C.L. REV. 63, 78 (2006) (“Needless to say, the identification and protection of unenumerated, nonoriginalist constitutional rights by the unelected Supreme Court—with the Court nullifying legislative judgments on fundamental questions of political morality—is a highly controversial practice.”); Lund & McGinnis, *supra* note 3, at 1557 (“It is a commonplace observation—often repeated by members of the Court itself—that substantive due process makes judges into unelected and unremovable superlegislators.”); id. at 1604 (noting that substantive due process, unlike John Hart Ely’s procedural theory of judicial review, “has no . . . limiting principle, and there is no apparent reason to expect that its results will be systematically better than those produced by American democracy”).

15 See Cass R. Sunstein, *Liberty After Lawrence*, 65 OHIO ST. L.J. 1059, 1063 (2004) (“A . . . substantive due process holding is legitimately challenged on democratic grounds. It overrules the views of citizens and their elected representatives, carving out a domain of liberty into which government may not enter.”). Professor Brown notes that “in contrast to the new attitude about equality, the judicial guarantee of individual liberty has been branded antithetical to democracy. Accordingly, claims of liberty are often understood as assertions of ‘trumps’ against majority decisions and thus in tension with democratic rule. Courts have been wary.” Brown, *supra* note 1, at 1494 (footnote omitted); see also id. at 1501–02 (“Equality cases have not recently triggered an institutional alarm warning of antidemocratic judicial tyranny. But repeatedly, against constitutional claims of liberty, that bell tolls.”).

The Supreme Court’s discomfort with liberty-based substantive rights may account for the oddity of decisions such as *Skinner v. Oklahoma*, 316 U.S. 535 (1942), in which the Court addressed the constitutionality of a statute requiring the sterilization of some convicted felons. Despite the statute’s seemingly clear liberty implications, the Court struck it down on equal protection grounds because the sterilization was mandated for those who committed certain crimes but not others. For a critique of *Skinner* on this point, see Brown, *supra* note 1, at 1506–07. For a defense of the Court’s decision to view the sterilization statute as an impermissible form of class legislation, see Kenneth L. Karst, *Why Equality Matters*, 17 GA. L. REV. 245, 283 (1983).

The Court’s predilection for equality claims over liberty ones also likely accounts for the conceptually odd “fundamental rights” component of the Equal Protection Clause, which the Court has applied in cases implicating the right to vote and to travel. As Professor Brown puts it,

[t]his often inscrutable variation on the equality principle has perplexed and concerned many commentators, primarily because it depends upon a blending of liberty and equality concepts. It emerged when the Court began to identify certain liberties that, although unspecified in the Constitution, should receive special protection from legislative infringement. Curiously, however, it grounded the special protection for unenumerated liberties in the Equal Protection Clause.

Brown, *supra* note 1, at 1508–09 (footnote omitted); see also Westen, *supra* note 1, at 561–64 (criticizing the “fundamental rights” equality cases for focusing on equality considerations rather than on the relevant underlying substantive rights).
and ungovernable conduct which many people find objectionable."\(^{16}\) Successful liberty-based challenges, in other words, deprive the State of the authority to regulate in certain areas. In contrast, the striking down of legislation under equal protection principles is generally understood to be less intrusive of the legislature’s prerogatives because it remains free to continue to regulate in the area in question, albeit by using constitutionally appropriate classifications.\(^{17}\)

Later in this Article, I return to the institutional and remedial arguments in support of the view that equality review is more legitimate than liberty review.\(^{18}\) Most of this Article, however, addresses an additional reason for the widely shared skepticism about liberty review, namely, that it encourages (or allows) judges to assess the constitutionality of legislation based on their personal values and moral views.\(^{19}\) Although this criticism, grounded in concerns about greater


\(^{17}\) See infra notes 269–79 and accompanying text.

\(^{18}\) See infra Part III.

\(^{19}\) I recognize that some of the perceived illegitimacy of liberty review is due to textual considerations. The Due Process Clause of the Fourteenth Amendment, in providing that no state “shall . . . deprive any person of life, liberty, or property, without due process of law,” U.S. CONST. amend. XIV, § 1, seems to prohibit only procedurally improper deprivations of liberty without explicitly recognizing any substantive protections. See Conkle, supra note 14, at 69 (“By its terms, the language suggests no limitation on procedurally proper deprivations, nor does it authorize the recognition of substantive constitutional rights.”). (The same is true of the almost identically phrased Due Process Clause of the Fifth Amendment. See U.S. CONST. amend. V.) “[D]espite the strength of this textual argument, the Supreme Court has repeatedly rejected it.” Conkle, supra note 14, at 69. In fact, since “substantive due process has become an entrenched part of constitutional law,” Sunstein, supra note 15, at 1062, it is appropriate to look beyond purely textual considerations to assess the overall legitimacy of liberty review. See Ryan C. Williams, The One and Only Substantive Due Process Clause, 120 YALE L.J. 408, 411 (2010) (“[E]ven the most ardent textualists acknowledge that constitutional provisions may sometimes reflect specialized ‘term-of-art’ meanings that are not readily apparent from the meanings of the individual words comprised therein.”).

Another reason why some question the legitimacy of substantive due process review is because of its supposed inconsistency with the intent of those who drafted the Fifth and Fourteenth Amendments. See, e.g., Steven G. Calabresi, Substantive Due Process After Gonzales v. Carhart, 106 Mich. L. Rev. 1517, 1532 (2008) (“Under an originalist reading of the Due Process Clauses, . . . there is no requirement that legislation be ‘reasonable’ in the eyes of federal and state judges.”); see also McDonald v. City of Chicago, 130 S. Ct. 3020, 3062 (2010) (Thomas, J., concurring) (“This Court’s substantive due process framework fails to account for both the text of the Fourteenth Amendment and the history that led to its adoption . . . .”). Although I do not in this Article address the critique of liberty review that is grounded in considerations of original intent, it is worth noting that there is a rich literature that questions the historical accuracy of that critique. See, e.g., James W. Elt, Jr., The Oxymoron Reconsidered: Myth and Reality in the Origins of Substantive Due Process, 16 CONST. COMMENT. 315 (1999); Frederick Mark Gedicks, An Originalist Defense of Substantive Due Process: Magna Carta, Higher-Law Constitutionalism, and the Fifth Amendment, 58 EMORY L.J. 585 (2009); Robert E. Riggs, Substantive Due Process in 1791,
judicial subjectivity, follows to some extent the institutional critique already noted, it is a conceptually distinct criticism. That is, the institutional critique is based on the idea that the striking down of legislation on liberty grounds undermines rather than reinforces representative democracy. In contrast, the subjectivity critique is based on the notion that liberty review impermissibly calls on judges to rely on their personal values and preferences in assessing the constitutionality of state action. Interestingly, that same criticism is not usually raised against equality review.

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20 See J. Skelley Wright, Judicial Review and the Equal Protection Clause, 15 HARV. C.R.-C.L. L. REV. 1, 14 (1980) (noting that the Court’s rulings during the Lockner era “were not only merely undemocratic . . . . Precisely because they were informed [by the Justices’] view of right policy, rather than a legal principle, the decisions were [also] primarily in one direction”).

21 See supra notes 14–15 and accompanying text.

22 See, e.g., ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 31 (1990) (asserting that substantive due process has been used “countless times . . . by judges who want to write their personal beliefs into a document that, most inconveniently, does not contain those beliefs”); Lund & McGinnis, supra note 3, at 1560 (“[D]ue process has continued to provide a textual thunderbolt that Olympian judges can hurl at any law that offends them.”); id. at 1603 (“[S]ome Justices have simply assumed that the Constitution must include a provision that gives them the discretionary power to impose their personal visions of justice and what they think of as the more transcendent dimensions of liberty.”); see also Washington v. Glucksberg, 521 U.S. 702, 720 (1997) (noting that great care must be taken “lest the liberty protected by the Due Process Clause be subtly transformed into the policy preferences of the Members of this Court” (citation omitted) (internal quotation marks omitted)); Gumz v. Murrissette, 772 F.2d 1395, 1406 (7th Cir. 1985) (Easterbrook, J., concurring) (“Substantive due process is a shorthand for a judicial privilege to condemn things the judges do not like or cannot understand.”), overruled on other grounds by Lester v. Chicago, 830 F.2d 706 (7th Cir. 1987).

23 Andrew Koppelman, for example, has noted that while there is some “indeterminacy” in equality claims that leave room for judicial discretion, see Andrew Koppelman, The Right to Privacy?, 2002 U. CHI. LEGAL F. 105, 116, the degree of such is much greater in substantive due process cases because “[t]he privacy doctrine inappropriately requires judges to decide what is important in life.” Id. at 106; see also Watkins v. U.S. Army, 837 F.2d. 1428, 1440 (“[T]he practical difficulties of defining the requirements imposed by equal protection, while not insignificant, do not involve the judiciary in the same degree of value-based line-drawing that the Supreme Court in Hardwick found so troublesome in defining the contours of substantive due process.”), amended by 847 F.2d 1329 (9th Cir. 1988); William D. Araiza, Foreign and International Law in Constitutional Gay Rights Litigation: What Claims, What Use, and Whose Law?, 32 WM. MITCHELL L. REV. 455, 457 (2006) (noting that the Supreme Court’s decision in Lawrence v. Texas “was aggressive, in that it explicitly went out of its way to rely on a broader and more value-laden grounding—substantive due process, rather than equal protection—to reach its result”). The perception of substantive due process as calling (or allowing) for a greater degree of judicial subjectivity (or activism) than equal protection has not been consistent in
The crux of the complaint behind the subjectivity criticism of liberty review goes to the nature of the normative assessments that judges must make in adjudicating constitutional claims. When viewed in comparative terms, the subjectivity criticism holds that the Equal Protection Clause calls for a type of judicial review that is neutral in ways that the application of substantive due process principles is not. This is why the perceived danger of judges “legislating from the bench” seems to be more acute in the context of liberty cases than in equality ones.

Kenneth Karst has taken issue with the notion that the Equal Protection Clause lacks substantive content:

The search for a “central guiding principle” [in equality cases] seems to have been inhibited by a widely shared assumption that the equal protection clause lacks substantive content. That assumption is mistaken. Equality, as an abstraction, may be value-neutral, but the fourteenth amendment is not. The substantive core of the amendment, and of the equal protection clause in particular, is a principle of equal citizenship, which presumptively guarantees to each individual the right to be treated by the organized society as a respected, responsible, and participating member.


One commentator has recently explained that

for the general purpose of protecting individual freedom . . . an equal protection approach is preferable to a substantive due process approach, which has exposed the Court to charges of “legislating from the bench.” Whereas an equal protection approach just involves courts in a comparative analysis of statutes that might burden groups of individuals differently, a substantive due process approach often requires that courts “identify unenumerated constitutional rights.”

Patrick M. Garry, _An Equal Protection View of the First Amendment_, 28 Quinnipiac L. Rev. 787, 798–99 (2010) (footnote omitted); see also Conkle, _supra_ note 14, at 66 ("The Su-
In this Article, I use gay rights cases to question the notion that equality review restrains or cabins judges’ subjective views about the underlying moral and policy issues raised by constitutional litigation in ways that liberty review does not. In particular, I highlight the crucial role that judges’ normative assessments—regarding questions such as the relevancy of sexual orientation in public policy matters, the purpose of the institution of marriage, and the capability of same-sex couples to form committed and loving relationships—play in both equality and liberty gay rights cases.

My objective in this Article is not to question the legitimacy of equality review but is instead to bring greater respectability to liberty review. If there is little reason to question the appropriateness of judges making normative assessments in applying constitutional equality principles when deciding gay rights cases, and if those assessments are frequently similar to the ones that judges make in considering gay rights claims raising liberty questions, then there is less of a reason to question the appropriateness of judges making normative judgments in applying substantive due process principles when deciding gay rights cases.

There are two points that I make in the prior sentence that need elaboration. First, notice that I am speaking generally about types (or categories) of judgments, not about any particular judgment. It is important to distinguish between, on the one hand, the legitimacy of judges making normative assessments about moral or policy questions as part of their equality and liberty constitutional analyses, and, on the other, the appropriateness or correctness of particular judgments in any given case. In this Article, I am interested in the former issue and not in the latter.

26 This Article does not address the question of whether the constitutional review of legislation by judges is something to be praised or criticized. (For recent elaborations on that issue, see Richard H. Fallon, Jr., The Core of an Uneasy Case for Judicial Review, 121 HARV. L. REV. 1693 (2008); Waldron, supra note 7.) Instead, the question I address here is the extent to which, assuming that the judicial review of legislation is proper, equality review is more legitimate than liberty review.

In addition, while this Article discusses equality and liberty issues in gay rights cases, it does not address how questions of judicial review and institutional competence impact the interests of sexual minorities. For scholarship on those issues, see, e.g., Darren Leonard Hutchinson, The Majoritarian Difficulty: Affirmative Action, Sodomy, and Supreme Court Politics, 23 LAW & INEQ. 1 (2005); Nancy J. Knauer, The Recognition of Same-Sex Relationships: Comparative Institutional Analysis, Contested Social Goals, and Strategic Institutional Choice, 28 U. HAW. L. REV. 25 (2005); Ruthann Robson, Judicial Review and Sexual Freedom, 30 U. HAW. L. REV. 1 (2007).
Second, because I limit my discussion in this Article to gay rights cases, I cannot claim conclusively that the similarities in the equality- and liberty-based normative assessments that judges make in deciding constitutional claims raised in gay rights litigation are also found in lawsuits raising other issues. But if I am correct that many of the normative assessments judges make in deciding equality gay rights cases are similar to those they make in adjudicating liberty gay rights claims, that renders suspect the notion that substantive due process intrinsically calls on judges to make subjective assessments based on their personal views that can be largely avoided in equality cases.

The question may be asked why this Article focuses on gay rights cases as opposed to other constitutional disputes. In my estimation, gay rights constitutional litigation is a particularly helpful vehicle for comparing equality and liberty analyses because that litigation frequently raises claims under both theories. This has been the case in lawsuits involving a wide variety of issues, including sodomy laws, same-sex marriage bans, gay adoption bans, and the military’s former “Don’t Ask, Don’t Tell” policy. The dual equality and liberty claims raised in many gay rights constitutional cases allows for a fruit-

27 A quarter of a century ago, Supreme Court Justice Paul John Stevens noted a link between liberty and equality in gay rights cases when he wrote that

[a]lthough the meaning of the principle that “all men are created equal” is not always clear, it surely must mean that every free citizen has the same interest in "liberty" that the members of the majority share. From the standpoint of the individual, the homosexual and the heterosexual have the same interest in deciding how he will live his own life, and, more narrowly, how he will conduct himself in his personal and voluntary associations with his companions. State intrusion into the private conduct of either is equally burdensome.


30 See, e.g., Lofton v. Sec’y of Dep’t of Children & Family Servs., 358 F.3d 804 (11th Cir. 2004) (adjudicating constitutional challenge to gay adoption ban that raised both equality and liberty claims); In re Matter of Adoption of X.X.G. and N.R.G., 54 So. 3d 79 (Fla. Dist. Ct. App. 2010) (same).

31 See, e.g., Cook v. Gates, 528 F.3d 42 (1st Cir. 2008) (adjudicating constitutional challenge to “Don’t Ask, Don’t Tell” policy that raised both equality and liberty claims); Witt v. Dep’t of the Air Force, 327 F.3d 806 (9th Cir. 2008) (same).
ful comparison of the ways in which judges make normative judgments under both theories.

The fact that gay people are seeking judicial recognition of liberty interests in matters related to sexuality and relationships already enjoyed by heterosexuals explains why so many gay rights constitutional cases raise both equality and liberty claims. This has meant, in turn, that commentators have paid significant attention to the interplay of equality and liberty in gay rights constitutional litigation.

Pamela S. Karlan, “is a case about liberty that has important implications for the jurisprudence of equality”;
Pamela S. Karlan, Equal Protection, Due Process, and the Stereoscopic Fourteenth Amendment, 35 McGeorge L. Rev. 473, 474 (2002) [hereinafter Karlan, The Stereoscopic Fourteenth Amendment] (using Romer v. Evans, 517 U.S. 620 (1996), among others, to show that “the ideas of equality and liberty expressed in the equal protection and due process clauses each emerge from and reinforce the other”); Pamela S. Karlan, Some Thoughts on Autonomy and Equality in Relation to Justice Blackmun, 26 Hastings Const. L.Q. 59, 63 (1998) [hereinafter Karlan, Some Thoughts on Autonomy and Equality] (pointing to gay rights cases to show how “liberty can serve to backstop equality. That is, liberty arguments can explain why
rature, however, has focused mostly on what the authors believe are the proper interpretations or applications of the two constitutional principles rather than, as this Article does, on the ways in which both principles call on judges to make similar normative judgments in adjudicating the underlying claims.

This Article will proceed as follows. In Part I, I explain why judges are required, under different theories of substantive due process, to make normative judgments in controversial matters of morality and policy to determine whether the legislation in question impermissibly violates constitutionally protected liberty. Although what I here call “liberty’s subjectivity” has been recognized by others before—in fact,
as we have seen, it is one of the principal criticisms of substantive due process doctrine—what has not been recognized is that that subjectivity is analogous to what I here call "equality’s dependence."

In order to explain what I mean by equality’s dependence, Part I builds on an article by Professor Peter Westen\textsuperscript{37} to explore why normative assessments that fall outside of egalitarian considerations must be incorporated into the constitutional analysis in order to decide whether equality principles are applicable in any given case.\textsuperscript{38} This means that judicial determinations of what equality demands can be as dependent on normative judgments regarding the moral and policy issues raised by a particular controversy as are judicial determinations of what constitutionally protected liberty requires.\textsuperscript{39} As a result, equality, as a constitutional principle, is not necessarily any more self-contained or neutral than is liberty.

In Part II, I explore the normative assessments that judges have made in deciding liberty claims in sodomy and same-sex marriage cases.\textsuperscript{40} I then look at the normative assessments that different state supreme courts have made in analyzing same-sex marriage bans under equality principles and that the Supreme Court made in deciding \textit{Romer v. Evans}.\textsuperscript{41} In doing so, I will show that judges adjudicating liberty and equality gay rights cases make surprisingly similar types of normative assessments—neither the discretion that is part of those assessments nor the scope of the normative inquiry varies in any significant way depending on whether the gay rights claim is based on liberty or on equality considerations.

Finally, in Part III, I return to the institutional and remedial bases for the greater perceived legitimacy of equality judicial review over liberty review already noted\textsuperscript{42} and find them generally wanting, at least in the context of gay rights jurisprudence. Specifically, regarding institutional legitimacy, I argue that judges, in assessing liberty claims in gay rights cases can reinforce democratic processes in ways that are similar to what is expected of them when they engage in equality review.\textsuperscript{43} In addition, regarding remedial legitimacy, I claim

\textsuperscript{36} See supra notes 19–25 and accompanying text.
\textsuperscript{37} Westen, supra note 1.
\textsuperscript{38} See infra notes 85–98 and accompanying text.
\textsuperscript{39} See infra notes 99–107 and accompanying text.
\textsuperscript{40} See infra notes 112–66 and accompanying text.
\textsuperscript{41} 517 U.S. 620 (1996) (assessing constitutionality of a state constitutional provision prohibiting state and local governments from providing antidiscrimination protection to lesbians, gay men, and bisexuals); see infra notes 167–223 and accompanying text.
\textsuperscript{42} See supra notes 12–17 and accompanying text.
\textsuperscript{43} See infra notes 238–65 and accompanying text.
that the striking down of legislation under liberty review in gay rights constitutional cases does not restrict the authority of the legislature to regulate in matters of sexuality and intimate relationships to a significantly greater degree than does the invalidation of laws under equality review.\textsuperscript{44}

Three last points need addressing before proceeding. First, it is important to distinguish the types of normative assessments, based on considerations of morality and policy, that I believe judges must make in deciding both equality and liberty gay rights claims from the judgments of political morality that Ronald Dworkin has argued judges must rely on to decide constitutional disputes.\textsuperscript{45} As is well known, Dworkin has defended what he calls a moral understanding of the Constitution, one that requires judges to “interpret and apply the[] [Constitution’s] abstract clauses [like those pertaining to equal protection and due process] on the understanding that they invoke moral principles about political decency and justice.”\textsuperscript{46} My focus in this Article is not on the deeper principles of political philosophy that Dworkin references but is instead on narrower (and less ambitious) moral and policy judgments on questions such as the relevancy of sexual orientation for the distribution of rights and benefits, the core purposes of the institution of marriage, and the capability of lesbians and gay men to participate in committed and loving relationships. It may very well be that the normative assessments that judges must make in both the equality and liberty gay rights cases that I discuss in Part II are themselves dependent on the types of judgments of political morality that Dworkin emphasizes in his work, but that is an issue I do not explore here.\textsuperscript{47}

Second, in contending that constitutional principles of equality and liberty call on judges to make similar normative assessments in gay rights cases, I do not mean to suggest that there are no important

\textsuperscript{44} See infra notes 266–96 and accompanying text. I also question the notion that successful equality-based challenges, and the resulting incentives to broaden the impact of legislation, always serve to protect against arbitrary and unreasonable government actions. See infra notes 297–315 and accompanying text.


\textsuperscript{46} Id. at 2.

\textsuperscript{47} In some of my other writings, I have explored the intersection of gay rights and questions of political morality, but I have done so from the perspective of political, rather than constitutional, theory. See, e.g., CARLOS A. BALL, THE MORALITY OF GAY RIGHTS: AN EXPLORATION IN POLITICAL PHILOSOPHY (2003) [hereinafter BALL, THE MORALITY OF GAY RIGHTS]; Carlos A. Ball, Communitarianism and Gay Rights, 85 CORNELL L. REV. 443 (2000); Carlos A. Ball, Moral Foundations for a Discourse on Same-Sex Marriage: Looking Beyond Political Liberalism, 85 GEO. L.J. 1871 (1997).
differences between the adjudication of equality and liberty claims. Those differences clearly exist, as is reflected in legal doctrine. For example, the Court’s tiered form of equality review, which calls for heightened scrutiny under some circumstances, requires the asking of questions (such as whether the group alleging improper differential treatment has suffered a history of discrimination\footnote{See, e.g., United States v. Virginia, 518 U.S. 515, 531–32 (1996); Mass. Bd. of Retirement v. Murgia, 427 U.S. 307, 313 (1976).} and whether the trait in question affects the ability of individuals to contribute to society)\footnote{See, e.g., Cleburne v. City of Cleburne Living Ctr., 473 U.S. 432, 441 (1985); Frontiero v. Richardson, 411 U.S. 677, 686 (1973) (plurality opinion).} that are not constitutionally relevant when judges grapple with substantive due process issues.

There are also deeper, more conceptual differences between constitutionally protected equality and liberty. For example, the equality analysis is intrinsically relational in ways that the liberty one is not. That is, equality requires an assessment of how some groups have been treated under the law in relation to others in ways that the liberty analysis, which focuses on questions of governmental interference with certain choices made by individuals, does not.\footnote{Peter Westen explains this point through the following examples:

[T]he right of a person to the privacy of his home is a noncomparative right because it can be ascertained without reference to the relative status of other persons. In contrast, the right of black children to attend the public schools on the same basis as white children is a comparative right because the rights of black children are determined by reference to the privileges enjoyed by white children.}

Despite these differences, I believe there are crucial similarities in the types of normative assessments required of judges under both constitutional principles, similarities that do not allow for easy generalizations regarding the degree of subjectivity that accompanies the two forms of analysis.

Finally, I do not in this Article argue that liberty review is preferable to equality review in matters related to gay rights (or to any other issue),\footnote{For an argument that progressives in general, and gay rights supporters in particular, should emphasize liberty over equality claims, see Yoshino, supra note 34, at 793–97.} nor do I argue for a particular understanding (whether broad or narrow) of substantive due process protections. Instead, my objective is to question the widely held view that judicial review based on liberty considerations is less legitimate than equality review.

\[49\] See, e.g., Cleburne v. City of Cleburne Living Ctr., 473 U.S. 432, 441 (1985); Frontiero v. Richardson, 411 U.S. 677, 686 (1973) (plurality opinion).
\[50\] Peter Westen explains this point through the following examples:

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\[51\] For an argument that progressives in general, and gay rights supporters in particular, should emphasize liberty over equality claims, see Yoshino, supra note 34, at 793–97.
I. NORMATIVE ASSESSMENTS IN LIBERTY AND EQUALITY REVIEW

One of the frequent criticisms of substantive due process doctrine is that it encourages (or allows) judges to incorporate into the constitutional analysis their personal views about the moral and policy positions behind the legislation that is subject to challenge. In contrast, this objection is not usually raised against equality review. In this section of the Article, I explore the nature of the normative assessments that seems to inhere in liberty cases regardless of which theory of substantive due process a court applies. I then explain why it is that, as a conceptual matter, equality review can be as dependent on judges’ normative assessments regarding the moral and policy issues raised by the controversies in question as is liberty review.

A. Liberty’s Subjectivity

In a recent article, Professor Daniel Conkle explores three different theories of substantive due process. Under the first theory, judges determine whether the claimed right is consistent with the nation’s history and traditions. This was the approach the Supreme Court took in Bowers v. Hardwick when it relied on the country’s long history of sodomy regulations to hold that consensual and private same-sex sexual conduct was not constitutionally protected. The Court more recently also embraced a strong historical approach to substantive due process in Washington v. Glucksberg, a case in which it rejected the argument that the Constitution recognized a fundamental right to assisted suicide because of what it argued was the “consistent and almost universal tradition [in this country] that has long rejected [such a] right.” The Court added that, as a methodological matter, “[o]ur Nation’s history, legal traditions, and practices . . . provide the crucial ‘guideposts for responsible decisionmaking’ that direct and restrain our exposition of the Due Process Clause.”

A second substantive due process theory, which also finds support in some of the Court’s decisions, is what Professor Conkle calls that of
“reasoned judgment.” Under this approach, “the Supreme Court . . . evaluate[s] the liberty interest of the individual and weigh[s] it against competing governmental concerns, determining on this basis whether the liberty interest deserves protection as a constitutional right.” Conkle argues that the Court implicitly adopted this theory in first recognizing a woman’s constitutional right to terminate a pregnancy in *Roe v. Wade* and then more explicitly embraced it in reaffirming such a right almost twenty years later in *Planned Parenthood of Southeastern Pennsylvania v. Casey*. In this latter case, Conkle notes, the Court relied on “reason” and “fairness” to defend the notion, first embraced in *Roe*, that viability outside the womb is the crucial moment at which the State’s interest in protecting the fetus outweighs the privacy and autonomy based rights of the pregnant woman.

Conkle also argues that when the Court in *Lawrence v. Texas* struck down a sodomy statute partly because of an “emerging awareness” that considerations of liberty protect the sexual choices of individuals, it was following a third substantive due process theory, one that looks to evolving national values to assess the constitutionality of legislation. Conkle claims that this third approach, properly understood, best balances the need for some objectivity in the Court’s due process analysis—assured through a requirement that its rulings be grounded in values that “command widespread contemporary sup-

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62 Id. at 99–100.
63 410 U.S. 113 (1973).
65 Conkle, *supra* note 14, at 104–05.
67 Conkle, *supra* note 14, at 121–23. Conkle notes that the “evolving national values” approach was suggested by Justice John Harlan in his dissent in *Poe v. Ullman*:

Declaring that due process reflects “the balance struck by this country,” Harlan mentioned not only “the traditions from which it developed” but also “the traditions from which it broke,” because “tradition is a living thing.” Exactly what Harlan meant is unclear, but this language suggests that substantive due process should protect not only historical rights but also rights that have emerged over time, gaining sufficient support in our contemporary law and culture that the Supreme Court can properly recognize their existence without engaging in “un-guided speculation.”

Conkle, *supra* note 14, at 124 (footnote omitted). I explore Justice Harlan’s dissent in *Poe* below when discussing the normative assessments that some Supreme Court Justices have reached when considering the constitutionality of sodomy laws. See *infra* notes 115–27 and accompanying text.
— with the need for interpretative flexibility and dynamism given that the nation’s values change over time.\(^{69}\)

For our purposes, the important point to note is that all three theories of substantive due process require judges to make normative assessments in establishing the appropriate baseline with which to determine whether the legislation subject to challenge impermissibly violates constitutionally protected liberty. This point is perhaps clearest in the context of the reasoned judgment approach, which Conkle argues comes close to Ronald Dworkin’s view that judges must make judgments of political morality in deciding difficult constitutional questions.\(^{70}\) But the same is true of the other two substantive due process theories. Under the “evolving values” approach, the Court must apply its reasoned judgment to determine whether a particular value, which may be widely but not uniformly shared across the nation, constitutes a proper basis for the recognition of a fundamental right under the Liberty Clause. As Conkle explains,

> [t]he Court must decide, as an independent normative judgment, whether the asserted right deserves national constitutional protection, thereby protecting the right even in states that choose not to follow the general national pattern. In resolving this question, the Court inevitably must employ a methodology analogous to that required by the theory of reasoned judgment. It must determine, in essence, whether the claim of right supported by the national culture is a claim that warrants recognition as a matter of political-moral reasoning.\(^{71}\)

Defenders of the historical approach contend that it, unlike the other ways of determining the scope of substantive due process rights, significantly cabins the discretion of judges.\(^{72}\) Supporters of this approach contend that a “restrained methodology” which relies on the

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68 Conkle, supra note 14, at 68.
69 Id. at 128.
70 Id. at 98 (citing Dworkin, supra note 45, at 3–4, 11); see also supra notes 45–48 and accompanying text.
71 Conkle, supra note 14, at 98–99.
72 See, e.g., McDonald v. City of Chicago, 130 S. Ct. 3020, 3063 (2010) (Scalia, J., concurring) (noting that the “effort to cabin the exercise of judicial discretion under the Due Process Clause by focusing its inquiry on those rights deeply rooted in American history and tradition invites less opportunity for abuse than the alternatives”); Andrew T. Hyman, The Little Word “Due,” 38 Akron L. Rev. 1, 29 (2005) (“The obvious way for the Court to prevent recurrent legislation from the bench would be by hewing to the objectivistic interpretation of ‘due’ process that is supported by the historical record underlying the Bill of Rights, and is mandated by the very structure of the Constitution.”); Lund & McGinnis, supra note 3, at 1608 (praising the historical approach “because it does not collapse constitutional law into a matter of mere political preference, undermining the judicial function”); see also Cass R. Sunstein, The Right to Marry, 26 Cardozo L. Rev. 2081, 2105 (2005) (“A decision to root substantive due process in traditions, narrowly understood, might be the best way of reducing judicial mistakes and judicial burdens . . . .”).
“guideposts” of history and tradition allows for the “rein[ing] in [of] the subjective elements that are necessarily present in due process judicial review.”

It is not clear, however, why historical assessments of which values qualify as proper normative bases for reviewing legislation under substantive due process principles are necessarily more objective than the types of assessments called for by the other two approaches. One only need look at the starkly different ways in which the Court used the history of sodomy regulations in *Bowers v. Hardwick* and *Lawrence v. Texas* to see that history, in fact, fails to provide objective guidance to judges.

The *Hardwick* Court viewed the history of sodomy statutes exclusively through the prism of homosexuality, not once mentioning that those statutes traditionally did not make *any* distinctions based on the sex (or sexual orientation) of the parties. Without any explanation, the Court deemed *that part* of the historical record to be constitutionally irrelevant. The Court also conveniently ignored the seemingly relevant historical fact that it was not until decades after the Fourteenth Amendment was adopted that some jurisdictions began to criminalize the particular sexual act (oral sex) that Michael Hardwick was arrested for, a fact that undermined its contention that the prohibition of that conduct had “ancient roots.”

In contrast, the *Lawrence* Court viewed the historical record quite differently because it refused to view sodomy laws as representing long-standing and specific condemnations of same-sex sexual intimacy. Instead, the Court understood those laws to be part of a broader

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73 Washington v. Glucksberg, 521 U.S. 702, 721–22 (1997); see also id. at 720–21 (“[W]e have regularly observed that the Due Process Clause specially protects those fundamental rights and liberties which are, objectively, ‘deeply rooted in this Nation’s history and tradition.’” (emphasis added) (citations omitted)).


75 See Carlos A. Ball, From the Closet to the Courtroom: Five LGBT Rights Lawsuits That Have Changed Our Nation 207–08 (2010).

76 See William B. Rubenstein, Carlos A. Ball & Jane S. Schacter, *Cases and Materials on Sexual Orientation and the Law* 165 (3d ed. 2008) (“[O]ral sex was not prohibited until states, at the end of the nineteenth century and early part of the twentieth century, expanded the scope of their sodomy statutes.”); Anne B. Goldstein, *History, Homosexuality, and Political Values: Searching for the Hidden Determinants of Bowers v. Hardwick*, 97 Yale L.J. 1073, 1085–86 (1988) (“[I]n both 1791 and 1868 statutes proscribing ‘sodomy,’ ‘buggery,’ and the ‘crime against nature,’ were interpreted to proscribe anal intercourse only—not fellatio, the act for which Hardwick was arrested.”).

77 *Hardwick*, 478 U.S. at 192.

78 *Lawrence*, 539 U.S. at 568 (“[I]t should be noted that there is no longstanding history in this country of laws directed at homosexual conduct as a distinct matter.”); id. at 570 (“[F]ar from possessing ‘ancient roots,’ American laws targeting same-sex couples did not develop until the last third of the 20th century.” (quoting *Hardwick*, 478 U.S. at 192)).
regulatory regime aimed at nonprocreative sexual activity, one that applied regardless of the sex (or sexual orientation) of the parties involved.  

The subjectivity of the historical approach is only deepened by the analytical effect of a crucial antecedent question to its application, namely, what is the right that might be deeply rooted in the nation’s history? For the Hardwick Court, the antecedent question (antecedent, that is, to the historical review) was whether there was a fundamental right to engage in a particular class of sexual acts (anal and oral sex) by a particular class of individuals (lesbians and gay men). But as the Lawrence Court saw it, this was an inappropriately narrow way of framing the issue. For that Court, the crucial normative question was whether all individuals (regardless of sexual orientation) have a widely recognized liberty interest in choosing sexual partners without interference by the State.

Even assuming, then, that history teaches us “objective” lessons about which values are most important, what history teaches surely depends on the questions that we ask of it. The historical record does not by itself tell us which questions to ask. The amount of discretion that seems to accompany the framing of the issue in fundamental rights cases, including those in which judges follow the historical approach, belies the contention of the approach’s supporters that it is a significantly more objective way of proceeding than the alternatives.

79 Id. at 568 (“[E]arly American sodomy laws were not directed at homosexuals as such but instead sought to prohibit nonprocreative sexual activity more generally.”); id. at 570 (“The longstanding criminal prohibition of homosexual sodomy upon which the [Hardwick] decision placed such reliance is as consistent with a general condemnation of nonprocreative sex as it is with an established tradition of prosecuting acts because of their homosexual character.”).

80 Hardwick, 478 U.S. at 190 (“The issue presented is whether the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy . . . .”); see also id. (“We . . . register our disagreement . . . that the Court’s prior cases have construed the Constitution to confer a right of privacy that extends to homosexual sodomy . . . .” (emphasis added)).

81 Lawrence, 539 U.S. at 567 (noting that the Hardwick Court “fail[ed] to appreciate the extent of the liberty at stake. To say that the issue . . . was simply the right to engage in certain sexual conduct demeans the claim the individual put forward, just as it would demean a married couple were it to be said marriage is simply about the right to have sexual intercourse.”).

82 Id. (noting that sodomy “statutes . . . seek to control a personal relationship that . . . is within the liberty of persons to choose without being punished as criminals”).

In short, the substantive due process analysis calls for a considerable degree of judicial subjectivity regardless of a court’s analytical methodology (that is, regardless of whether it emphasizes reasoned judgment, evolving values, or history and tradition). It is precisely this subjectivity, as we have seen, which contributes in powerful ways to the perceived illegitimacy of liberty review. What is not usually recognized, however, is that equality review also requires judges to make crucial normative assessments, driven by the underlying moral and policy issues raised by the litigation, in establishing the appropriate baseline with which to determine whether the legislation subject to challenge impermissibly violates equal protection principles. It is to that issue that I turn to next.

B. Equality’s Dependence

Almost thirty years ago, Professor Peter Westen published an article in the *Harvard Law Review* titled “The Empty Idea of Equality.” The article, which sent shockwaves through some segments of the legal academy, contended that the concept of equality—defined by Westen as the “proposition in law and morals that ‘people who are alike should be treated alike’ and its correlative, that ‘people who are unalike should be treated unalike’”—is normatively meaningless. Westen explained that before we can determine whether individuals *ought* to be treated alike, we need to establish whether they *are* alike. But since human beings have an almost infinite number of similarities and differences, independent standards and rules are required to

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84 See supra notes 19–25 and accompanying text.


86 *Westen*, supra note 1, at 539–40 (footnote omitted).

87 As Westen explained it, “[t]he formula ‘people who are alike should be treated alike’ involves two components: (1) a determination that two people are alike; and (2) a moral judgment that they ought to be treated alike. The determinative component is the first. Once one determines that two people are alike for purposes of the equality principle, one knows how they ought to be treated.” *Id.* at 543.
determine ex ante which similarities and differences are relevant given a particular moral or legal question.  

It is the substantive component of those standards and rules, rather than the concept of equality itself, that determines whether any two individuals should be treated alike. Westen explained that

[...]
just as no categories of “like” people exist in nature, neither do categories of “like” treatment exist; treatments can be alike only in reference to some moral rule. Thus, to say that people who are morally alike in a certain respect “should be treated alike” means that they should be treated in accord with the moral rule by which they are determined to be alike. Hence “likes should be treated alike” means that people for whom a certain treatment is prescribed by a standard should all be given the treatment prescribed by the standard. Or, more simply, people who by a rule should be treated alike should by the rule be treated alike.

In Westen’s view, equality is “an empty vessel with no substantive moral content of its own. Without moral standards, equality remains meaningless, a formula that can have nothing to say about how we should act. With such standards, equality becomes superfluous, a formula that can do nothing but repeat what we already know.”

As Westen saw it, equality is a derivative value, secondary to the standard or rule that specifies which similarities and differences are relevant. Statements of equality (or inequality) entail comparisons of two things or persons by reference to some external criterion that specifies the relevant respect in which they are the same or different. To say that an apple is “like” or “equal to” an orange means that, despite their many differences, they each possess the feature or features that are relevant to an external criterion, whether those features be weight, surface area, or sugar content; to say that they are “unequal” means that they do not share the relevant feature, whether it be color, taste, or juice content. This analysis also holds for ethical and legal statements of equality, the only difference being that, instead of testing the persons or things by a descriptive standard for determining which of them are the same, one tests them by a moral or legal standard for deciding which of them should be treated the same. In each case, however, the comparison for purposes of equality

**Notes:**

88 See id. at 544–47.

89 Id. at 546–47. H.L.A. Hart made a similar point when he observed that though “Treat like cases alike and different cases differently” is a central element in the idea of justice, it is by itself incomplete and, until supplemented, cannot afford any determinate guide to conduct. This is so because any set of human beings will resemble each other in some respects and differ from each other in others and, until it is established what resemblances and differences are relevant, “Treat like cases alike” must remain an empty form. To fill it we must know when, for the purposes in hand, cases are to be regarded as alike and what differences are relevant.


90 Westen, supra note 1, at 547 (footnote omitted).
simply spells out what it means to have tested both subjects by the controlling standard of relevance.  

For Westen, to focus on equality when addressing moral and legal questions confuses matters because equality masquerades itself as an independent norm and thus hides the nature of the underlying substantive standards and rules that he believed should be the primary focus of moral and legal analyses. In addition, because the proposition that likes should be treated alike is unquestionably true, it gives an aura of revealed truth to whatever substantive values it happens to incorporate by reference. As a consequence, values asserted in the form of equality tend to carry greater moral and legal weight than they deserve on their merits. In Westen’s view, the distortions created by the incorporation of equality into moral and legal analyses outweigh the rhetorical benefits gained from its deployment.

To come out against the concept of equality in the United States is akin to criticizing motherhood and apple pie. Not surprisingly, therefore, it did not take long for other academics to take issue with many of the points that Westen made in his article. For example, Professor Erwin Chemerinsky criticized Westen for not distinguishing between insufficiency and unnecessariness—even if the concept of equality is insufficient to resolve legal and moral controversies, Chemerinsky pointed out, that does not mean that it is also, as Westen contended, unnecessary.

Specifically, Chemerinsky complained that Westen failed to appreciate the many ways in which equality is necessary: It is morally necessary because it requires us to care about how people are treated in relation to one another; it is analytically necessary because it supports a presumption in favor of equal treatment, placing the burden on those who wish to make distinctions among groups or individuals; and it is “rhetorically necessary because it is a powerful symbol that

91 Id. at 552–53 (footnote omitted). Westen added that “equality analysis logically collapses into rights analysis and . . . analyzing legal problems in terms of equality is essentially redundant.” Id. at 560.
92 Id. at 593 (footnote omitted).
93 Id. at 542. In responding to some of the critics of his Harvard Law Review article, Westen explained that he agreed that equality has a “rhetorical force,” but he disagreed that it was a salutary one because “it comes not from focusing our attention on the considerations that we believe should govern the resolution of normative disputes, but by concealing, obscuring, and confounding them.” Peter Westen, The Meaning of Equality in Law, Science, Math, and Morals: A Reply, 81 Mich. L. Rev. 604, 656–67 (1983). A few years later, however, Westen conceded that the rhetorical value of equality could be significant. See Westen, supra note 50, at 262–80.
helps to persuade decisionmakers to safeguard rights that otherwise would go unprotected.95

Professor Kenneth Karst also took exception to Westen’s contention that there is little of value in the concept of equality. Drawing on the specifics of American history, including those related to religious dissent and racial subordination, Karst elaborated on the “emotional pull” of equality.96 He explained that

[i]n American society the idea of equality means much more than the formal principle that likes should be treated alike. The inequality that is on the defensive in America is the idea of caste, of rigid social hierarchy. When we see people trapped in a system that treats them as inferiors, our emotions are aroused.97

Karst added that equality is also analytically useful because it “helps lawyers and judges to ask the right questions and reach the right solutions.”98

Although I agree with Chemerinsky and Karst on the analytical and rhetorical value of equality, they are not my main concern in this Article. Instead, my interest here is in what I call “equality’s dependence,” that is, in the way in which judgments that fall outside of egalitarian considerations must be incorporated into the analysis to give the concept of equality its normative bite. Westen’s article is enlightening in this regard because it is the most comprehensive and persuasive explanation of equality’s dependence in the legal literature.

To further explain what I mean by “equality’s dependence,” it is helpful to draw on an essay by Professor Kent Greenawalt that was—like Chemerinsky’s and Karst’s—quite critical of Westen’s article. Greenawalt took Westen to task for clinging to an unduly formalistic and narrow understanding of equality. Arguing that the “idea of equality is much richer than [Westen] acknowledges[,]” Greenawalt pointed to what he called “substantive principles of equality” that go beyond the simple mantra that those who are alike ought to be treated alike.99

Before turning to one (for our purposes) crucial substantive principle of equality that Greenawalt discusses in his essay, it is important

95 Id. at 576 (emphasis omitted); see also Jeremy Waldron, The Substance of Equality, 89 Mich. L. Rev. 1350, 1363–64 (1991) (noting, in a review of Professor Westen’s book, that “[E]quality is a useful term . . . , rebutting as it does from the outset any suggestion that what matters in politics is the ranking or differentiation of human knowledge and intelligence.”).
96 Karst, supra note 15, at 250.
97 Id. at 251.
98 Id. at 250.
to note a key concession that Greenawalt makes regarding Westen’s elaboration of what I am calling “equality’s dependence.” “Westen powerfully reminds us,” Greenawalt wrote, “of a point often made, rarely challenged directly, but often forgotten: namely, that in the absence of substantive criteria indicating which people are equal for particular purposes and what constitutes equal treatment, the formal principle of equality provides no guidance for how people should be treated.”

In this sentence, Greenawalt acknowledges the notion of equality’s dependence, at least as it applies to formal equality. The reason why equality’s dependency is, as Greenawalt puts it, “often forgotten”—and I think this is where there is a kernel of truth behind Westen’s skepticism about the normative force of equality—is that we often get so caught up in the seemingly firm moral demands of equality, that we fail to recognize that it is not a “free-standing” concept, that is, one that is independent of antecedent normative judgments. In emphasizing this point, my objective is not, as it appears to have been Professor Westen’s, to push equality off of its normative perch; instead, it is to emphasize that equality’s normative bite is dependent on other (nonegalitarian) values and judgments.

Equality’s dependence is not limited to formal equality principles; instead, that dependency is also present in more substantive equality norms that go beyond the idea that those who are alike should be treated alike. In his essay, Greenawalt discusses one of those norms, namely, that certain characteristics (such as race and ethnic origin) should be deemed irrelevant for purposes of distributing rights and benefits.

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100 Id. at 1169; see also Waldron, supra note 95, at 1352 (noting that “Westen’s argument that we should always look below the surface of ‘equality’ rhetoric to the substantial claims of principle that are doing the real work in moral and political debate . . . is an important argument . . . that . . . helps to clarify much of what is going on in the modern discussion of discrimination”).

101 See Larry Alexander & Larry Kress, Against Legal Principles, 82 IOWA L. REV. 739, 755 (1997) (“If ‘equality’ is a value, it is not a free-standing one.”).

102 See Larry Alexander, Bad Beginnings, 145 U. PA. L. REV. 57, 85 (1996) (“One does not abandon correct moral principles to honor the demands of equality. Rather, one must refer to correct moral principles to know what equality demands.”); Brown, supra note 1, at 1495 (“Unanchored to a source of substantive values, a call for equality does not necessarily guarantee any particular freedoms or opportunities.” (footnote omitted)); Chemerinsky, supra note 94, at 578–79 (“[E]quality depends on other concepts to decide which differences to strike down and which to uphold.”); Karst, supra note 15, at 249–50 (“The ideal [of equality] . . . has [a] substantive content; it is a cluster of substantive values, with moral underpinnings solidly based in a particular society’s religious and philosophical traditions.” (footnote omitted)); Simons, supra note 50, at 482 (“The idea of equality is a lens through which we project fundamental social visions.”).
Oddly, Westen in his article rejects the notion that nondiscrimination norms of this kind are egalitarian in nature. But Greenawalt persuasively argues that

[i]f it is a claim of equality that people similarly subject to an established standard should be treated the same way (Westen’s version of the formal principle of equality), surely claims that people should be treated the same way with regard to one or many benefits or burdens because they share relevant characteristics, and claims that people should not be denied the same treatment on the basis of irrelevant differences (such as race or gender), are also claims of equality.

In my view, Greenawalt is undoubtedly correct that nondiscrimination norms are properly labeled ones of equality, but the important point for our purposes is not the lexical one of how to categorize certain norms (e.g., as egalitarian or not); instead, the crucial point is that the nondiscrimination norm, like that of formal equality, depends on prior judgments regarding the moral (ir)relevance of the characteristics at issue.

Another way of explaining this is that if we return to Greenawalt’s excerpt quoted above, the crucial judgment in determining whether a particular set of individuals should be protected by the norm of nondiscrimination is whether they “share relevant characteristics” given the benefit or burden that is subject to distribution. The crucial point to keep in mind is that that assessment is antecedent to the question of whether the egalitarian norm of nondiscrimination applies.

So, for example, before we can conclude that race should not be taken into account in the distribution of benefits and burdens, we need to reach a moral judgment that racial differences are irrelevant.

103 Westen explained his position as follows:

It would be a mistake . . . to think that . . . notions of racial justice have anything in particular to do with the idea that likes should be treated alike. They are independent rights, identical in their logic to first amendment rights of speech and religion. Like rights of speech and religion, rights of race and sex can be stated without reference to “likes” or “equals.”

Westen, supra note 1, at 565. In his later work, Westen modified his view on this point, acknowledging that “antidiscrimination rights are commonly, and appropriately, referred to as ‘equality rights.’” WESTEN, supra note 50, at 134. Westen elaborated on his new position as follows:

[Although all rights result in equality, and all such equalities possess the same basic features, antidiscrimination rights are designed to achieve equality in ways that other rights are not, because unlike other rights, which require single and specified relationships of equality, antidiscrimination rights aim toward, and are satisfied by, any relationship of equality between rightsholders and the persons of whose treatment their rights are a function.

Id. (footnote omitted) (internal quotation marks omitted).

104 Greenawalt, supra note 99, at 1180 (footnote omitted).
for most or all purposes. More specifically, it is only after we reach the judgment that race, for example, does not impact the abilities, character, or potential of human beings that we then proceed, as a matter of morality and law, to discourage the use of race in the distribution of benefits and burdens.

The same analytical framework applies to sexual orientation. The crucial judgment that must be made when addressing gay rights issues from a nondiscrimination perspective is whether those with a same-sex sexual orientation differ in abilities, character, or potential from those with a different-sex sexual orientation (who presumably have greater access to the benefit, or suffer less from the burden, in question). And to make that judgment, we must grapple with complicated normative questions regarding human sexuality and intimate relationships.\footnote{Shannon Minter has expressed a similar view, noting that [i]n the context of gay rights, courts and others must make normative judgments . . . about whether sexual orientation is a permissible basis for unequal treatment . . . . To make those substantive determinations, courts and legislators, as well as voters, ultimately must rely on substantive norms. There is no shortcut around those normative judgments based on purportedly neutral principles, self-evident facts or . . . a purely procedural account of fairness. \cite{Minter, supra note 6, at 115–16 (footnote omitted)}.}

Take, for example, the issue of same-sex relationships and their legal recognition. It may seem at first glance that the question of whether the State should treat same-sex relationships in the same way that it treats different-sex ones is primarily (or even entirely) one of equality. But before we can establish what equality demands, we must first determine whether it applies. And in answering that antecedent question, we must look outside of equality considerations. In the specific context of the legal recognition of intimate relationships, we need to determine the relevant characteristics for deciding whether same-sex relationships are sufficiently similar to their heterosexual counterparts so as to render appropriate the application of equality principles.\footnote{I return to this issue below in exploring how courts have applied equality principles in determining the constitutionality of same-sex marriage bans. \cite{infra notes 167–99 and accompanying text}.}

There will be disagreements, of course, on which characteristics should be deemed relevant. Some may argue that it is the degree of commitment among gay couples that should matter, while others may point to their willingness to abide by monogamy precepts while yet others may emphasize parenting attributes. (And some may want to emphasize all—or none of—these factors.) But the key point is that the choice of the relevant criteria is not driven by egalitarian consid-
erations. Those considerations come into the analysis only if and when we are persuaded that there are no relevant differences between gay and straight couples for purposes of state recognition of sexually intimate relationships. Equality considerations do not help us determine which similarities (or differences) are relevant.

In short, to reach the normative conclusion that lesbians and gay men ought to be treated like heterosexuals (or to put it differently, that sexual orientation should be an irrelevant criterion in the distribution of particular benefits and burdens), we need to make antecedent normative assessments that fall outside of equality’s domain.

Equality’s dependence belies the notion that equality is a more “self-contained” constitutional norm than liberty, that is, a norm that allows judges to decide cases without bringing to bear their normative assessments regarding disputed moral and policy issues. As I noted in the Introduction, it seems to be widely assumed that substantive due process doctrine encourages (or allows) judges to rely on their personal values in ways that equality principles do not. It is thought, in other words, that the norm of equality constrains judges’ discretion in ways that the norm of liberty does not. I do not believe that this is the case. In the next section, I provide specific examples of the similar normative judgments that courts have reached while engaging in both liberty and equality reviews of gay rights claims to support my view.

II. NORMATIVE ASSESSMENTS IN GAY RIGHTS CONSTITUTIONAL CASES

It is in some ways not surprising that equality review is thought to be more neutral (or less normatively substantive) than liberty review. The latter, after all, has revolved around the notion of fundamental rights, that is, of those rights that (however defined and determined) represent historical (or evolving or enduring) values that serve as a normative baseline through which to assess the constitutionality of legislation that impacts on considerations of privacy and autonomy. In contrast, equal protection review is thought to avoid similar value choices because the crucial issue in equality cases is not whether the government can regulate in a certain area but how it does so. This

107 See supra notes 19–25 and accompanying text.
108 See generally Conkle, supra note 14.
109 See Minter, supra note 6, at 106 (“Deeming certain rights ‘fundamental’ in effect says to the people or the legislature, ‘You may not go beyond these substantive boundaries.’ In contrast, the principle of equal protection says, ‘You may set the boundaries where you like, but you must set them equally for everyone.’” (footnote omitted)).
analytical framework provides equality review with an aura of proceduralism that immunizes it against some of the strongest and fiercest criticisms aimed at liberty review.

That aura of proceduralism has only been made brighter by John Hart Ely’s widely discussed ideas regarding how judicial review can be understood in ways that are consistent with democratic theory. Ely’s key contribution was to conceive of judicial review, properly understood, as interested not in “the substantive merits” for or against the challenged legislation but in “questions of participation,” that is, in the extent to which the courts are confident that legislators accounted for the interests of all citizens in enacting the legislation in question.110

Ely believed that the Equal Protection Clause was particularly well suited for this type of procedural and representation-reinforcing understanding of judicial review.111 As Professor Jane Schacter puts it, “Ely’s theory of ‘representation reinforcement’. . . . has been offered as an appealing way to operationalize equal protection guarantees without dragging courts into endlessly contested debates about substantive values and ideas.”112 What Ely failed to account for, however,

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110 ELY, supra note 12, at 181. Ely elaborated on this point as follows:
[C]ontrary to the standard characterization of the Constitution as “an enduring but evolving statement of general values,” . . . the selection and accommodation of substantive values is left almost entirely to the political process and instead the document is overwhelmingly concerned, on the one hand, with procedural fairness in the resolution of individual disputes (process writ small), and on the other, with what might capaciously be designated process writ large—with ensuring broad participation in the processes and distributions of government.

Id. at 87 (footnotes omitted); see also id. at 100–01 (“The general strategy has . . . not been to root in the document a set of substantive rights entitled to permanent protection. The Constitution has instead proceeded from the quite reasonable assumption that an effective majority will not inordinately threaten its own rights, and has sought to assure that such a majority not systematically treat others less well than it treats itself . . . .”).

111 Id. at 82 (arguing that the “Equal Protection Clause is obviously our Constitution’s most dramatic embodiment of th[e] ideal” that elected officials should represent the interests of the entire community and not only of a few). Professor Jane Schacter has summarized Ely’s understanding of the role of equal protection in achieving the objectives of judicial review as follows:

Ely recast constitutional equality protections as consistent—not in tension—with democracy by identifying inequality born of social “prejudice” as democracy’s nemesis. Positioning that “prejudice is a lens that distorts reality,” Ely enlisted judges in the enterprise of political process perfection—that is, in self-consciously correcting for the ways that prejudice compromises the democratic process . . . . Seen in these terms, equality-enhancing judicial review enables democracy rather than applies a brake on it.


was the extent to which the application of the principle of equality is itself dependent on the types of substantive normative judgments that he thought was best to keep outside of judicial review’s domain.  

Now that we have an idea, from the previous section, of what equality’s dependence is all about, we can turn our attention to specific examples, in the context of gay rights constitutional litigation, of the similar ways in which judges rely on normative assessments to decide both liberty and equality claims. My objective here is not just to show that both liberty and equality review call for the making of normative judgments; instead, my aim is to also illustrate how the nature of those judgments in the two categories of cases is quite similar.

A. Gay Rights Liberty Cases

Over the last few decades, the most persistent question related to the liberty rights of gay people under the Constitution has arisen in the context of the State’s authority to criminalize consensual same-sex sexual intimacy. For that reason, I begin below with an exploration of how different Supreme Court Justices have normatively tackled that question at different times. I then proceed to consider the types of normative judgments that judges have made in determining whether same-sex marriage bans are consistent with considerations of constitutional liberty.

Ely was animated by a desire to avoid constitutional rules that placed judges in what he regarded as the democratically dangerous position of making contested choices based on the open-textured language in the Constitution. Thus, he offered up his principles as matters of neutral process that could be employed without the need to adjudicate controversial normative debates.  

Several commentators, in critiquing Ely’s process theory of constitutional law, have noted the extent to which the Constitution inescapably calls for the application of substantive values. See Daniel R. Ortiz, Pursuing a Perfect Politics, The Allure and Failure of Process Theory, 77 VA. L. REV. 721, 722 (1991) (“At some level in any constitutional theory, the substantive judgments Ely purports to eschew must enter into the analysis.”); Laurence H. Tribe, The Puzzling Persistence of Process-Based Constitutional Theories, 89 YALE L.J. 1063, 1064 (1980) (“The process theme by itself determines almost nothing unless its presuppositions are specified, and its content supplemented, by a full theory of substantive rights and values—the very sort of theory the process-perfecters are at such pains to avoid.”) (I discuss Tribe’s critique of process-based theories of constitutional law in infra notes 214–21 and accompanying text.); see also Paul Brest, The Substance of Process, 42 OHIO ST. L.J. 131, 131 (1981) (“[M]ost instances of representation-reinforcing review demand value judgments not different in kind or scope from the fundamental values sort.”).
1. Sodomy Cases

Although contemporary substantive due process rights are usually traced back to a couple of parenting cases from the 1920s, the constitutional right to privacy and personal autonomy in matters related to sexual intimacy was first articulated by Justice John Harlan in his 1961 dissent in Poe v. Ullman. At issue in Poe was the constitutionality of a Connecticut statute that criminalized the use of contraceptives. The Court refused to reach the merits of the case on the ground that, since it was unlikely that the statute would be enforced against the plaintiffs, which included a married couple, the lawsuit did not raise a justiciable controversy. Justice Harlan, after disagreeing with the Court on the justiciability issue, proceeded to address the merits of the plaintiffs’ constitutional claim, one grounded in substantive due process.

In concluding that the statute was unconstitutional, Harlan emphasized two points. The first was the degree of governmental intrusion into the intimate decisions of couples—including married ones—that was required in order to successfully investigate and prosecute the crime. The enforcement of the contraception statute, Harlan noted, “is an intolerable and unjustifiable invasion of privacy in the conduct of the most intimate concerns of an individual’s personal life.”

Harlan’s second concern was that the statute intruded into the home, a site that he believed was protected not only by the Fourth Amendment right against unreasonable searches and seizures, but also by the Fourteenth Amendment’s Liberty Clause. As Harlan put it, “the enactment involves what, by common understanding throughout the English-speaking world, must be granted to be a most fundamental aspect of ‘liberty,’ the privacy of the home in its most basic sense,

114 Pierce v. Soc’y of Sisters, 268 U.S. 510 (1925) (invalidating a law requiring children to attend public schools based on parents’ liberty right to make important decisions about their welfare); Meyer v. Nebraska, 262 U.S. 390 (1923) (striking down a law prohibiting teaching foreign languages to children based on parents’ liberty right to control their education).
116 Also at issue in the case was a second statute that prohibited the giving of medical advice about the use of contraceptives. Id. at 498.
117 Id.
118 Id. at 507–08.
119 Id. at 522 (Harlan, J., dissenting).
120 Id. at 539.
and it is this which requires that the statute be subjected to ‘strict scrutiny.’”

Notice that both of Harlan’s concerns about the contraception law could have been used to question the constitutionality of sodomy statutes, which, at the time the Poe lawsuit was brought, were in place in every state of the union. None of those statutes made distinctions based on either the marital status or gender of the parties. None of those statutes made distinctions based on either the marital status or gender of the parties. What they did do was authorize the State to bring to bear its investigatory and prosecutorial powers on the intimate relationships of individuals, including married couples. Sodomy laws were, in this sense, no different from the contraception statute at issue in Poe. In addition, it is reasonable to believe that sodomy statutes were most frequently violated in private homes, the site that, according to Harlan, was entitled to special constitutional protection.

Despite the fact that sodomy statutes raised constitutional concerns that were similar to those raised by Connecticut’s contraception statute, Harlan left little doubt that his understanding of constitutional liberty did not immunize consensual same-sex sexual conduct from criminal prosecution, even when such conduct took place in the otherwise constitutionally privileged site of the home. Harlan did not explain why he believed that consensual gay sex was different from heterosexual sex by married couples, except to make the descriptive observation that society’s legal rules and moral norms discouraged the former and encouraged the latter. But Harlan did feel it necessary to explain that "not to discriminate between what is involved in this case and . . . the traditional offenses against good mor-

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121 Id. at 548 (citation omitted).
122 Illinois in 1961 became the first state to repeal its sodomy statute. BALL, supra note 75, at 208.
123 See id.
124 See supra note 121 and accompanying text.
125 Poe, 367 U.S. at 552 (Harlan, J., dissenting) (“I would not suggest that adultery, homosexuality, fornication and incest are immune from criminal enquiry, however privately practiced.”).
126 Harlan explained that, [t]he laws regarding marriage which provide both when the sexual powers may be used and the legal and societal context in which children are born and brought up, as well as laws forbidding adultery, fornication and homosexual practices which express the negative of the proposition, confining sexuality to lawful marriage, form a pattern so deeply pressed into the substance of our social life that any Constitutional doctrine in this area must build upon that basis. Id. at 546 (citation omitted); see also id. at 553 (“Adultery, homosexuality and the like are sexual intimacies which the State forbids altogether, but the intimacy of husband and wife is necessarily an essential and accepted feature of the institution of marriage, an institution which the State not only must allow, but which always and in every age it has fostered and protected.”).
als or crimes [including homosexuality] which . . . may . . . happen to have been committed or concealed in the home, would entirely misconceive the argument that is being made.”

The Supreme Court, of course, eventually disagreed with Harlan’s position on the constitutionality of sodomy statutes, but for our present purposes what is important is that Harlan believed that the sexual orientation of individuals was a relevant consideration in determining the scope and applicability of the Liberty Clause in matters related to sexual intimacy.

Although Harlan did not elaborate on his view regarding the relevancy of sexual orientation for substantive due process purposes, the same cannot be said of the Supreme Court’s decision in Bowers v. Hardwick. In the twenty-five years between Poe and Hardwick, the Supreme Court struck down the same Connecticut statute at issue in the former case as applied to married couples, held that unmarried couples have a constitutional right to use contraceptives, and constitutionally protected a woman’s decision to terminate a pregnancy. But according to the Hardwick Court, whatever constitutional protection applied to the choices of heterosexuals in exercising their sexuality, it was unavailable to lesbians and gay men.

It is clear, for several reasons, that the Hardwick Court found the sexual orientation of individuals to be constitutionally relevant when interpreting the meaning of the Liberty Clause. First, even though the Georgia statute at issue did not distinguish between same-sex and different-sex sodomy, the Court viewed the case exclusively through the prism of homosexuality without once addressing how the statute might impact heterosexuals. Second, as noted earlier, the Court framed the issue narrowly by asking whether one category of individuals (i.e., gay people) have a fundamental right to engage in particular sexual acts rather than by inquiring whether all individuals, regardless of sexual orientation, have the right to make decisions related to sexual intimacy without state interference. And finally,

127 Id. at 553 (emphasis added).
133 Bowers v. Hardwick, 478 U.S. 186, 194 (1986) (claiming that a fundamental right to engage in gay sex "is, at best, facetious").
134 Id. at 188 n.1.
135 See supra note 80 and accompanying text. Professor Laurence Tribe has noted that "Georgia’s brief . . . encouraged the Court’s recasting of the right at issue, denouncing
while the Court viewed heterosexuals as individuals who marry, form families, and procreate, it saw gay people as defined solely through their interest in engaging in sodomous acts. As the Court put it, “we think it evident that none of the rights announced in [the Court’s prior substantive due process cases] bears any resemblance to the claimed constitutional right of homosexuals to engage in acts of sodomy that is asserted in this case.”

In sharp contrast, Justice Harry Blackmun in his dissent concluded that the sexual orientation of Michael Hardwick—the gay man arrested in his Atlanta apartment for having consensual sex with another man—was wholly irrelevant to the constitutional analysis. Blackmun criticized the majority for “its almost obsessive focus on homosexual activity.” After noting that the sodomy statute in question applied to everyone regardless of sexual orientation, Blackmun explained that “[u]nlike the Court, the Georgia Legislature has not proceeded on the assumption that homosexuals are so different from other citizens that their lives may be controlled in a way that would not be tolerated if it limited the choices of those other citizens.”

As Blackmun saw it, the Georgia sodomy statute violated the Liberty Clause because it interfered with the ability of all individuals—regardless of sexual orientation—to define themselves in important ways through their choices regarding sexually intimate relationships. “In a Nation as diverse as ours,” Blackmun explained, “there may be many ‘right’ ways of conducting those relationships, and . . . much of the richness of a relationship will come from the freedom an individual has to choose the form and nature of these intensely personal bonds.”


Hardwick, 478 U.S. at 191 (concluding that there was “[n]o connection between family, marriage, or procreation on the one hand and homosexual activity on the other”).

137 Id. at 190–91. The Lawrence Court castigated the Hardwick majority for its unduly narrow view of gay people: “To say that the issue in [Hardwick] was simply the right to engage in certain sexual conduct demeans the claim the individual put forward, just as it would demean a married couple were it to be said marriage is simply about the right to have sexual intercourse.” Lawrence v. Texas, 539 U.S. 558, 567 (2003).

138 On the events leading up to Hardwick’s arrest, see BALL, supra note 75, at 12–13.

139 Hardwick, 478 U.S. at 200 (Blackmun, J., dissenting).

140 Id. (citation omitted).

141 Id. at 205 (“[S]exual intimacy is a sensitive, key relationship of human existence, central to family life, community welfare, and the development of human personality . . . . [I]ndividuals define themselves in a significant way through their intimate sexual relationships . . . .”) (citations omitted)).

142 Id. (citations omitted).
constitutional claim involving his rights of privacy and autonomy were “not depend[ent] in any way on his sexual orientation.”

Seventeen years after Hardwick, the Supreme Court, in Lawrence v. Texas, came around to adopting Justice Blackmun’s view that a claimant’s same-sex sexual orientation should be irrelevant in determining the scope and applicability of the Liberty Clause. For the Hardwick majority, the decision to engage in gay sexual intimacy was constitutionally unprotected even if the conduct took place within the private confines of the home. But for the Lawrence Court, the sexual orientation of adults who choose to have sexual relationships in private was irrelevant. What now mattered constitutionally was that sodomy statutes “touch . . . upon the most private human conduct, sexual behavior, and in the most private of places, the home. The statutes . . . seek to control a personal relationship that . . . is within the liberty of persons to choose without being punished as criminals.”

Rather than focusing on the parties’ sexual orientation, the Lawrence Court focused on the autonomy- and dignity-based interests that all individuals share when making the exceedingly personal decision of choosing sexual partners. Indeed, the Lawrence Court, unlike the Hardwick Court, drew a normative connection between same-sex sexual conduct and the committed relationships that can accompany it. Justice Anthony Kennedy, writing for the majority in Lawrence, recognized that the criminalization of particular kinds of sexual intimacy not only limits the ability of individuals to decide which kinds of sexual acts to engage in and with whom; it also restricts their ability to build relationships that are based, in part, upon that sexual intimacy.

Thus, Kennedy noted that “[w]hen sexuality finds overt expression in intimate conduct with another person, the conduct can be but

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143 Id. at 201; see also id. at 206 (“The Court claims that its decision today merely refuses to recognize a fundamental right to engage in homosexual sodomy; what the Court really has refused to recognize is the fundamental interest all individuals have in controlling the nature of their intimate associations with others.”).
146 Lawrence, 539 U.S. at 567.
147 The rights protected by the Liberty Clause, the Court explained, “involv[e] the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy . . . . Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State.” Id. at 574 (quoting Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 851 (1992)). The Court then added that “[p]ersons in a homosexual relationship may seek autonomy for these purposes, just as heterosexual persons do.” Lawrence, 539 U.S. at 574.
148 Lawrence, 539 U.S. at 567.
one element in a personal bond that is more enduring.\footnote{Id.} In short, while the Hardwick Court was unwilling to see gay people as more than the sum total of their interests in engaging in particular sexual acts, the Lawrence Court saw gay people as fuller human beings.\footnote{I further explore the way in which the Lawrence Court understood gay people and their relationships in Carlos A. Ball, The Positive in the Fundamental Right to Marry: Same-Sex Marriage in the Aftermath of Lawrence v. Texas, 88 MINN. L. REV. 1184, 1212–15 (2004).}

We are not here interested in whether the Hardwick Court and Justice Harlan in his Poe dissent on the one hand or the Lawrence Court and Justice Blackmun in his Hardwick dissent on the other had the better arguments regarding the proper understanding of substantive due process in matters related to sexual conduct. Instead, our interest is in the crucial role that the Justices’ normative assessments regarding the (ir)relevancy of sexual orientation for purposes of determining the scope of liberty rights, and regarding the connection between having a same-sex sexuality and the ability to enter into important and dignity-conferring relationships, played in their respective interpretations of the proper scope of the Liberty Clause.

It can be argued that it is precisely these types of normative assessments that help make the doctrine of substantive due process so problematic. This is because it may seem that judges, in determining the meaning of the Liberty Clause, bring to bear their personal views about the very moral and policy issues that are in play when the State considers whether to criminalize consensual sodomy. Indeed, none of the four decisions discussed in this section—the majority opinions in Hardwick and Lawrence, as well as Harlan’s dissent in Poe and Blackmun’s in Hardwick—pointed to any specific evidence (in the record or otherwise) to support or justify their normative assessments regarding the relevancy of sexual orientation in determining the scope of the State’s constitutional authority to criminalize consensual sexual conduct. This may suggest that those assessments were in some sense “extra-judicial,” that is, based on the judges’ personal views—perhaps grounded in their general knowledge about (homo)sexuality as well as in their particular knowledge (or lack thereof) of specific gay people—about sexual orientation.

As I will attempt to show in Part II.B, however, judges deciding gay rights cases under equal protection principles reach similar normative assessments, sometimes in the same seemingly “extra-judicial” manner.\footnote{See infra notes 172–74 and accompanying text.} This suggests that there may be nothing particularly unique or troubling about the kinds of normative assessments that
judges make while engaging in liberty review. But before grappling with questions of equality, it is helpful to first explore how courts have assessed the constitutionality of another crucial gay rights issue, that of same-sex marriage bans, under liberty principles.

2. Same-Sex Marriage

Like sodomy statutes, same-sex marriage bans have been challenged on substantive due process grounds. The threshold question in these cases, as in the sodomy ones, has been how to define the fundamental right that may be at issue. The plaintiffs in the marriage cases have argued that the fundamental right to marry is broad enough to include same-sex couples. In particular, they have claimed that the right, at its core, is about protecting the interests of all individuals to choose the person whom they want to marry. For their part, the states have contended that while there is a fundamental right to marry, it is not available to same-sex couples.

In order for courts to decide whether same-sex couples enjoy a constitutional right to marry, they must first make normative assessments about what are the principal purposes of marriage. If those purposes are correlated in some appreciable ways to the uniqueness of heterosexual unions (however that uniqueness is defined), then it makes sense to understand the fundamental right at issue not as a general right of everyone (regardless of sexual orientation) to marry

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153 See, e.g., Conaway v. Deane, 932 A.2d 571, 619 (Md. 2007) (“Appellees argue that we should not be concerned with whether the Court should recognize a new fundamental right to same-sex marriage, but instead should focus on whether the existing fundamental right to marriage should be extended to include same-sex couples.”).

154 See, e.g., Lewis, 908 A.2d at 296 (“Plaintiffs contend that the right to marry a person of the same sex is a fundamental right [and] . . . . that the liberty interest at stake is ‘the right of every adult to choose whom to marry without intervention of government.’”); Andersen v. King Cnty., 138 P.3d 963, 976 (Wash. 2006) (“Plaintiffs maintain they have the fundamental right to marry the person of their choice.”).

155 The most important Supreme Court cases on the fundamental right to marry are Turner v. Safley, 482 U.S. 78 (1987) (invalidating regulation prohibiting prisoners from marrying), and Loving v. Virginia, 388 U.S. 1 (1967) (striking down antimiscegenation statute on equal protection and due process grounds). The Court also discussed the fundamental right to marry in Zablocki v. Redhail, 434 U.S. 374 (1978), but it decided that case—which involved a statute prohibiting individuals who owed child support from marrying—on equal protection, rather than on substantive due process, grounds.

156 See, e.g., Andersen, 138 P.3d at 976 (“While the State agrees that marriage is a fundamental right, it says that it does not include same-sex marriage.”).

157 See infra notes 158–62 and accompanying text.
the person of their choice but instead as the right of heterosexuals to have their (unique) relationships validated and supported through the institution of marriage.

It can be argued that when courts conclude that same-sex couples do not enjoy a fundamental right to marry because the right to marry is limited to heterosexual couples, they engage in conclusory reasoning. But the reasoning is not conclusory if it is accompanied by normative assessments regarding the principal purposes of marriages. If those assessments lead courts to conclude, for example, that the principal purposes of marriage are to promote procreation and to encourage the raising of children by dual-gender couples, then an understanding of the fundamental right to marry as limited to different-sex couples is a defensible position to take. It is noteworthy in this regard that some state supreme courts, in rejecting the idea that the fundamental right to marry applies to same-sex couples, have pointed to the fact that the Supreme Court has only spoken of the right to marry in cases involving different-sex couples.158

A key normative assessment that is part of the constitutional analysis of same-sex marriage bans under liberty review (as it is under equality review, as we will see in the next section), then, is a determination of what are the essential purposes of marriage. It is no coincidence that the California Supreme Court, the only appellate court which has held that the fundamental right to marry (in this case, under the state constitution) is sufficiently capacious to include same-sex couples, is also the only appellate court that, as part of its liberty analysis, has explicitly concluded that marriage is not primarily

158 See, e.g., Conaway, 932 A.2d at 619 (noting that all of the Supreme Court’s marriage "cases infer that the right to marry enjoys its fundamental status due to the male-female nature of the relationship and/or the attendant link to fostering procreation of our species"); Hernandez v. Robles, 855 N.E.2d 1, 14 (NY. 2006) ("While many U.S. Supreme Court decisions recognize marriage as a fundamental right protected under the Due Process Clause, all of these cases understood the marriage right as involving a union of one woman and one man." (citations omitted)). Several courts have also concluded that the absence of same-sex marriages in American history means that lesbian and gay couples do not have a constitutional right to marry. See, e.g., Standhardt v. Superior Court ex rel. County of Maricopa, 77 P.3d 451, 459 (Ariz. Ct. App. 2003) ("Same-sex marriages are neither deeply rooted in the legal and social history of our Nation or state nor are they implicit in the concept of ordered liberty."); Lewis, 908 A.2d at 208, 211 (noting that "the liberty interest at stake is not some undifferentiated, abstract right to marry, but rather the right of people of the same sex to marry," and then concluding that "a right to same-sex marriage is [not] so deeply rooted in the traditions, history, and conscience of the people of this State that it ranks as a fundamental right"); Andersen, 138 P.3d at 978 (noting that there is not "a tradition or history of same-sex marriage in this state").

159 See infra notes 181–86 and accompanying text.
about procreation and dual-gender parenting. Instead, the court in \textit{In Re Marriage Cases} \footnote{160} ruled that the core purpose of marriage is to provide public recognition of the life-long commitment that individuals choose to make with another as part of an intimate relationship. As the court put it, “the right to marry represents the right of an individual to establish a legally recognized family with the person of one’s choice, and, as such, is of fundamental significance both to society and to the individual.” \footnote{161}

But the California court’s liberty analysis in \textit{In re Marriage Cases} did not (and could not) end with the making of a normative judgment about the principal purpose of marriage. This is because it still had to grapple with the (again) normative question of whether sexual orientation was relevant to the scope and applicability of the fundamental right to marry. That is, once the court concluded that the principal purpose of marriage is to provide social support for the de-

\footnote{160} Other appellate courts have reached similar conclusions, but they have done so as part of their equality (as opposed to liberty) review of same-sex marriage bans. See Kerrigan v. Comm’r of Pub. Health, 957 A.2d 407, 424–25 n.19 (Conn. 2008) (“[E]ven though procreative conduct plays an important role in many marriages, we do not believe that such conduct so defines the institution of marriage that the inability to engage in that conduct is determinative of whether same sex and opposite sex couples are similarly situated for equal protection purposes . . . .”); Varnum v. Brien, 763 N.W.2d 862, 883 (Iowa 2009) (“[O]ur marriage laws are rooted in the necessity of providing an institutional basis for defining the fundamental relational rights and responsibilities of persons in organized society . . . . [They] also serve to recognize the status of the parties’ committed relationship.”) (citations omitted) (internal quotation marks omitted)).

\footnote{161} 183 P.3d 384 (Cal. 2008). A few months after the California high court issued its opinion, state voters approved Proposition 8, a constitutional amendment banning same-sex marriages. The following year, the same court upheld that amendment on state constitutional grounds. See Strauss v. Horton, 207 P.3d 48 (Cal. 2009). But a year after that, a federal district court struck down Proposition 8 on federal constitutional grounds. Perry v. Schwarzenegger, 704 F. Supp. 2d 921 (N.D. Cal. 2010).

\footnote{162} In re Marriage Cases, 183 P.3d at 423 (footnote omitted). The California Supreme Court’s opinion in \textit{In Re Marriage Cases} is particularly helpful for our purposes because it distinguished the due process analysis from the equality one. In contrast, the Massachusetts Supreme Judicial Court’s ruling in \textit{Goodridge v. Dept’l of Pub. Health}, 798 N.E.2d 941, 968 (Mass. 2003), which also struck down the state’s same-sex marriage ban, is less helpful for our purposes because it provided a unitary analysis—that is, one that did not separate liberty considerations from equality ones—after concluding that the liberty and equality concerns raised by the ban overlapped. See id. at 953 (“In matters implicating marriage, family life, and the upbringing of children, the two constitutional concepts [of liberty and equality] frequently overlap, as they do here.”). It bears noting, however, that the Massachusetts court, like the California one, staked out a clearly normative position on the central purpose of marriage. As the Massachusetts court saw it, “it is the exclusive and permanent commitment of the marriage partners to one another, not the begetting of children, that is the sine qua non of civil marriage.” Id. at 961 (footnote omitted); see also id. at 955 (“Because it fulfills yearnings for security, safe haven, and connection that express our common humanity, civil marriage is an esteemed institution, and the decision whether and whom to marry is among life’s momentous acts of self-definition.”).
cision of an individual to enter into a committed and loving relationship with another, it then had to determine whether gay people in particular are capable of entering and remaining in those relationships. The California court answered that key question in the affirmative after concluding that “[t]he capability of gay individuals to enter into loving and enduring relationships [is] comparable to those entered into by heterosexuals.”¹⁶³ The court added that “an individual’s homosexual orientation is not a constitutionally legitimate basis for withholding or restricting the individual’s legal rights.”¹⁶⁴ In reaching this conclusion, the court embraced the normative view that “homosexuality [is] simply one of the numerous variables of our common and diverse humanity.”¹⁶⁵

We are not here interested in the merits of the California court’s normative assessments. Instead, we are interested in the nature of those assessments in order to compare them with the types of judgments that courts make in gay rights constitutional cases when engaging in equality review. As we will see in the next section, there are significant similarities between the two.

B. Gay Rights Equality Cases

My discussion so far of how judges rely on normative assessments in determining the scope and applicability of the Liberty Clause in gay rights cases might seem to support the view that substantive due process is a less legitimate basis for striking down legislation than are principles of equality. After all, as we have seen, a critical part of the constitutional analysis in those cases is predicated on judges’ normative assessments of questions such as the relevancy of sexual orientation in public policy matters, the purpose of the institution of marriage, and the capabilities of gay people to form committed

¹⁶³ In re Marriage Cases, 183 P.3d at 428. It is worth noting that the California court in In re Marriage Cases relied heavily on the actions of the legislature—including its enactment of sexual orientation antidiscrimination laws and of a comprehensive domestic partnership law—to reach its normative conclusion about the relationship-related capabilities of lesbians and gay men. As the court explained,

[t]his state’s current policies and conduct regarding homosexuality recognize that gay individuals are entitled to the same legal rights and the same respect and dignity afforded all other individuals and are protected from discrimination on the basis of their sexual orientation, and, more specifically, recognize that gay individuals are fully capable of entering into the kind of loving and enduring committed relationships that may serve as the foundation of a family and of responsibly caring for and raising children.

Id. (footnotes omitted).

¹⁶⁴ Id. at 429 (citations omitted).

¹⁶⁵ Id. at 428.
relationships. However, as I explain in this section of the Article, which discusses same-sex marriage (from an equality perspective) and the Supreme Court’s opinion in *Romer v. Evans*, equality review in gay rights cases requires judges to make similar normative assessments.

1. Same-Sex Marriage

Most of the state supreme courts that have struck down same-sex marriage bans have done so not on the basis of substantive due process but on that of equality. In doing so, they have made normative assessments that are strikingly similar to those reached by the California court in *In re Marriage Cases* when it determined the validity of same-sex marriage bans through the lens of constitutional liberty.

In the Connecticut same-sex marriage litigation, for example, the government took the position that the state constitution’s equal protection provision could not grant relief to the plaintiffs because same-sex couples and different-sex ones are not similarly situated. Specifically, the government contended that “the conduct that the[] [plaintiffs] seek to engage in—marrying someone of the same sex—is fundamentally different from the conduct in which opposite sex couples seek to engage.”

This argument proved untenable to the Connecticut Supreme Court because, in its view, “[t]he plaintiffs . . . share the same interest in a committed and loving relationship as heterosexual persons who wish to marry, and they share the same interest in having a family and

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167 See *Kerrigan v. Comm’r of Pub. Health*, 957 A.2d 407 (Conn. 2008) (holding that state’s same-sex marriage ban violates equal protection considerations while not reaching the due process claim); *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993) (rejecting due process challenge to same-sex marriage ban but holding that it classified individuals according to their sex and thus requiring the application of heightened scrutiny under equal protection principles); *Varnum v. Brien*, 763 N.W.2d 862 (Iowa 2009) (striking down same-sex marriage ban on equal protection grounds while not reaching liberty claim); *Lewis v. Harris*, 908 A.2d 196, 211 (N.J. 2006) (rejecting plaintiffs’ due process challenge to same-sex marriage ban but holding that equal protection considerations require the state to provide the same rights and benefits to same-sex couples that it provides to heterosexual, married couples); *Baker v. State*, 744 A.2d 864, 887 (Vt. 1999) (holding that equality provision of state constitution requires the government to offer same-sex couples the same rights and benefits afforded to married heterosexual couples, but not reaching plaintiffs’ other claims). The other two state supreme courts that have sided with the plaintiffs in challenges to same-sex marriage bans have accepted their liberty and equality claims. See *In re Marriage Cases*, 183 P.3d at 384; *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941 (Mass. 2003).
168 *Kerrigan*, 957 A.2d at 424.
raising their children in a loving and supportive environment.\textsuperscript{169} The court added that same-sex couples share with opposite sex ones “fundamental and overriding similarities . . . both with regard to matters relating to family and in all other respects.”\textsuperscript{170} As we have seen, this was the same understanding of gay people and their relationships articulated by the California court in \textit{In re Marriage Cases} as it grappled with substantive due process doctrine in the context of the state’s same-sex marriage ban.\textsuperscript{171}

Interestingly, although the Connecticut court, a little later in its opinion, repeated that same-sex and different-sex couples have “a multitude of characteristics . . . in common,” it did not elaborate on the nature of those characteristics beyond its earlier conclusion that the two groups shared similar interests in having committed and loving relationships and families.\textsuperscript{172} Indeed, the court did not say much about the bases for its assessment regarding the characteristics and attributes of gay people and their relationships, other than to note that the Connecticut legislature had enacted a civil unions law recognizing their committed relationships.\textsuperscript{173} In this sense, it can be argued that the court’s normative assessments of gay people and their relationships were “extra-judicial” in the same way that U.S. Supreme Court Justices seemingly reached normative assessments about gay people in the sodomy cases (discussed in Part II.A.1) without explaining how and why they did so.\textsuperscript{174}

It might be reasonable to expect a court like the Connecticut Supreme Court to be more forthcoming about its reasons for reaching certain conclusions regarding the capabilities and attributes of the group raising an equality claim in court. On the other hand, we

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{169} Id. Like the state in the Connecticut same-sex marriage case, one of the defendants in the California case argued that the equal protection claim should be rejected because same-sex couples and different-sex ones are not similarly situated. The California Supreme Court disagreed by noting that the two sets of couples sought marriage for the same reasons. The court explained that[b]oth groups at issue consist of pairs of individuals who wish to enter into a formal, legally binding and officially recognized, long-term family relationship that affords the same rights and privileges and imposes the same obligations and responsibilities. Under these circumstances, there is no question but that these two categories of individuals are sufficiently similar to bring into play equal protection principles that require a court to determine whether distinctions between the two groups justify the unequal treatment. In \textit{Re Marriage Cases}, 183 P.3d at 435 n.54 (citations omitted).
\item \textsuperscript{170} Kerrigan, 957 A.2d at 424 n.19.
\item \textsuperscript{171} See supra notes 162–64 and accompanying text.
\item \textsuperscript{172} Kerrigan, 957 A.2d at 424.
\item \textsuperscript{173} See id.
\item \textsuperscript{174} See supra note 151 and accompanying text.
\end{enumerate}
\end{footnotesize}
would not necessarily expect courts that might be called upon, for example, to assess the capabilities of racial minorities—or of men or women generally—to enter into loving and committed relationships to provide extensive explanations and support for the proposition that the group raising the equality claim is similarly situated to other groups when it comes to their reasons for seeking marriage licenses. It may be that assessments regarding the (ir)relevancy of sexual orientation for many (if not all) public policy purposes may be no different (and do not require more justification) than assessments regarding the (ir)relevancy of race and gender.

Of course, the fact that a judge’s views about the relevancy of sexual orientation for public policy purposes might impact her willingness to accept (or not) a constitutional challenge to a law that treats individuals differently according to that characteristic is hardly surprising, in the same way that a judge’s views on racial subordination and gender relations likely affect her assessment of race- and gender-based discrimination claims. My point is simply that the types of so-called subjective views on sexual orientation that judges bring to bear in liberty and equality gay rights constitutional cases are quite similar. Indeed, what is crucial for our purposes is to note the similarity between the normative assessment about gay people and their relationships reached by the Connecticut Supreme Court while engaged in equality review of its state’s same-sex marriage ban and that made by the California Supreme Court while engaged in its liberty review of the same kind of ban.

The similarities in the types of normative judgments brought to bear under both forms of judicial review is due in large part to equality’s dependence, that is, to the fact that judgments which fall outside of egalitarian considerations must be incorporated into the analysis to give the concept of equality its normative bite. In the end, those judgments are not terribly different from the types of “subjective” assessments regarding considerations of morals and policy called for by liberty review.

To help explain this point, we can turn to the Iowa Supreme Court’s decision in *Varnum v. Brien*, a ruling that relied on equal protection considerations to strike down the state’s same-sex marriage ban. The government in *Varnum* argued that the ability of differ-

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175 See supra notes 169–74 and accompanying text.
176 See supra notes 163–65 and accompanying text.
177 See supra notes 98–107 and accompanying text.
178 See supra notes 157–65 and accompanying text.
179 763 N.W.2d 862 (Iowa 2009).
ent-sex couples “to procreate naturally,” and the inability of same-sex couples to do the same, constituted a valid justification for denying the latter the opportunity to marry. 180

In addressing this contention, the state supreme court began by noting that the issue was not whether there were differences between same-sex and opposite-sex couples but was instead whether those differences were constitutionally relevant given the purposes of the law being challenged. 181 As the court explained, echoing the claim made by Professor Westen in his article on equality discussed in Part I.B, 182 “the purposes of the law must be referenced in order to meaningfully evaluate whether the law equally protects all people similarly situated with respect to those purposes.” 183

What the court did not explain—a fact that is hardly surprising since courts and legal commentators rarely do—is that the normative assessment regarding a law’s purposes does not call for the application of egalitarian principles. In order to decide the equality issue, in other words, the court had to consider moral and policy issues that went beyond considerations of equality. This shows that the application of equality doctrine is not any more self-contained—nor does it cabin judicial discretion to a greater extent—than liberty review.

The Iowa Supreme Court, after looking at its precedents, concluded that there were two purposes behind the state’s legal recognition of marriage. First, the court noted that “our marriage laws are rooted in the necessity of providing an institutional basis for defining the fundamental relational rights and responsibilities of persons in organized society.” 184 And second, the court explained “[t]hese laws . . . serve to recognize the status of the parties’ committed relationship.” 185

180 Id. at 882. As in the same-sex marriage litigation in Connecticut, see supra notes 167–73 and accompanying text, and California, see supra note 168, the issue of whether same- and different-sex couples were similarly situated arose in the Iowa appeal as a threshold issue. Varnum, 763 N.W.2d at 883.

181 The court explained that “[n]o two people or groups of people are the same in every way [and that] nearly every equal protection claim could be run aground onto the shoals of a threshold analysis if the two groups needed to be a mirror image of one another.” Varnum, 763 N.W.2d at 883.

182 See supra notes 89–91 and accompanying text.

183 Varnum, 763 N.W.2d at 883; see also Giovanna Shay, Similarly Situated, 18 GEO. MASON L. REV. 581, 623 (2011) (“In a properly conducted, integrated equal protection analysis, the front lines of litigation will move . . . from whether group or persons are ‘similarly situated’ in relation to one another to the definition of the statutory purpose, and more fundamentally, of the social institution itself. These inquiries can raise big questions, which may touch on deeply held beliefs.” (footnotes omitted)).

184 Varnum, 763 N.W.2d at 883 (citation omitted).

185 Id.
Notice that neither the court’s process for determining the marriage law’s purposes nor the substantive content of those purposes were driven or determined by egalitarian considerations. Instead, the court looked outside of equality norms—by determining the purposes of marriage—in order to begin to establish whether the constitutional mandate of equality applied in the case.

Also notice that determining the law’s purposes was precisely what the California Supreme Court did in its same-sex marriage case when it applied substantive due process doctrine.\textsuperscript{186} Although the objectives behind the courts’ liberty and equality analyses were different—in the case of the California court’s liberty review, the goal was to define the fundamental right that might be at issue, while in that of the Iowa court’s equality review, it was to determine whether same-sex couples were similarly situated to different-sex ones—the nature of the analyses was not, with each focused, as an initial matter, on the purposes of marriage.

In same-sex marriage equality cases, then, the first normative question that is antecedent to the application of equality principles relates to the purposes of marriage. But, as under the liberty analysis,\textsuperscript{187} a court cannot limit itself to that antecedent question because, once it concludes that the main purpose of marriage is to encourage and promote committed relationships (regardless of procreative capabilities), it must then grapple with the additional normative inquiry of whether gay people are capable of entering into those relationships. The Iowa court, in conducting its equality review, like the California court in its due process analysis,\textsuperscript{188} answered that question in the affirmative: “[W]e find that the plaintiffs are similarly situated compared to heterosexual persons. Plaintiffs are in committed and loving relationships, many raising families, just like heterosexual couples.”\textsuperscript{189}

It may be argued that the assessment that lesbians and gay men are as capable as straight people of entering into committed and loving relationships is in fact one that is internal to equality, that is, one that is arrived at through the application of egalitarian norms and concerns. But this is not the case. For a judge to be able to conclude that gay people are \textit{like} straight people for purposes of marriage, she must first determine what gay people are like. That assessment requires her to consider the role that sexual orientation, and specifical-

\textsuperscript{186} See supra notes 157–62 and accompanying text.
\textsuperscript{187} See supra notes 163–65 and accompanying text.
\textsuperscript{188} See id.
\textsuperscript{189} Varnum, 763 N.W.2d at 883.
ly attraction to others of the same sex, plays in the capability of individuals to enter into committed and loving relationships. She must first determine, in effect, that sexual orientation is irrelevant given what she has already established are the principal purposes of marriage. It is only then that the judge will find the constitutional principle of equality applicable to the dispute.\footnote{190}

All of this suggests, as noted earlier,\footnote{191} that the crucial question in same-sex marriage cases is not so much what equality demands, but is instead whether equality applies. It is only after a judge determines (1) that the purpose of marriage is to encourage committed intimate relationships (regardless of procreative considerations) and (2) that gay people are capable of entering into and remaining in those relationships, that she will conclude that equality considerations are relevant to the dispute.

It can also be argued that equality concerns play a role in what I am here describing as antecedent normative questions because of a presumption, reasonably applied in same-sex marriage cases, that most individuals are similar in fundamental matters, such as in how they construct and depend on relationships of intimacy. I concede that this kind of presumption likely plays a role in answering the antecedent question of whether gay people are capable of forming committed and loving relationships.\footnote{192} I also believe (although I can-

\footnote{190} I have argued elsewhere that, in deciding which types of relationships to recognize, the government cannot be expected to remain neutral as to their moral worth. See Carlos A. Ball, Against Neutrality in the Legal Recognition of Intimate Relationships, 9 GEO. J. GENDER & L. 321 (2008). A slightly different version of the same essay can be found in MORAL ARGUMENT, SEXUAL MINORITIES, AND THE PUBLIC GOOD: ADVANCING THE DEBATE 75 (Gordon Babst et al. eds., 2009).

\footnote{191} See supra note 105 and accompanying text.

\footnote{192} Westen argued in his \textit{Harvard Law Review} article that equality presumptions are meaningless because "[t]he idea of equality . . . expresses no preference for 'like' treatment as opposed to 'unlike' treatment. In requiring that likes be treated alike, it necessarily also requires that unlike be treated unalike." Westen, \textit{supra} note 1, at 572 (footnote omitted). He added that "[b]ecause the principle that 'likes should be treated alike' does not itself entail the idea that people are alike in more morally significant respects than they are unlike, any presumption of the latter kind must derive its substance from outside the idea of equality." \textit{Id.} at 574.

Some commentators criticized Westen for not sufficiently appreciating the role that a presumption of equality can play in placing the burden of proof on those who would defend unequal treatment. See Chemerinsky, \textit{supra} note 94, at 587–90; Greenawalt, \textit{supra} note 99, at 1175–78. This presumption can be crucial because, as Professor Chemerinsky put it, "[h]istory unequivocally demonstrates that what we most have to fear is government treating differently people who deserve like treatment." Chemerinsky, \textit{supra} note 94, at 588.

In his later work, Westen conceded that a presumption in favor of equal treatment could be valuable in "help[ing] an actor decide which rule to adopt when he is norma-
not defend the view here) that such a presumption is normatively appropriate. Nonetheless, by its very nature, a presumption is not dispositive, which means that a judge who relies on the presumption to help decide a same-sex marriage case must still make an equality-independent assessment regarding the nature and attributes of same-sex relationships.

It may very well be, for example, that a judge who believes that same-sex relationships can be as normatively good as different-sex ones—as measured, for example, by the capability of the parties to enter and remain in committed relationships—would not feel the same way about incestuous or polygamous relationships. There are limits, in other words, to how far a generalized presumption that most individuals are similar in how they construct and depend on intimate relationships can go in helping judges make assessments about the normative value of the relationships at issue when engaging in equality review of marriage restrictions.

It is also important to note that it is not just judges who endorse the equality challenges to same-sex marriage bans that must make antecedent normative assessments prior to applying egalitarian considerations; those who uphold the bans must do the same. Not surprisingly, the latter have reached different normative conclusions about the main purposes of marriage laws than the former, usually by reasoning that those laws are primarily about promoting procreation. For example, a majority of the justices on the Washington Supreme Court, in upholding the constitutionality of the state’s same-sex marriage ban, concluded that “marriage is traditionally linked to procreation and survival of the human race. Heterosexual couples are the only couples who can produce biological offspring of the couple.”

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[194] See BUCK v. P.3d 963, 982–83 (Wash. 2006); see also id. at 1002 (“The binary character of marriage exists first because there are two sexes. A society mindful of the biologically unique nature of the marital relationship and its special capacity for procreation has ample justification for safeguarding this institution to promote procreation...
For their part, a majority of the judges on the Maryland Court of Appeals, in also rejecting the challenge to the state’s same-sex marriage ban, concluded that “[t]he ‘inextricable link’ between marriage and procreation reasonably could support the definition of marriage as between a man and a woman only, because it is that relationship that is capable of producing biological offspring of both members (advances in reproductive technologies notwithstanding).” Given that these judges concluded that procreation was an essential component of marriage, the difference in the reproductive capabilities of same-sex couples and different-sex ones became relevant to their equality analysis, at least when applying the highly deferential rational basis test.

Although judges deciding the constitutionality of same-sex marriage bans have disagreed on the essential purposes or functions of marriage, there has been little disagreement among them on the capacity and attributes of gay people as they relate to the entering into and remaining in committed and loving relationships. If anything, it seems as of late that courts upholding the marriage bans in the face and a stable environment for raising children.” (Johnson, J., concurring) (footnote omitted)).

195 Conaway v. Deane, 932 A.2d 571, 630–31 (Md. 2007); see also Kerrigan v. Comm’r of Pub. Health, 957 A.2d 407, 519 (Conn. 2008) (Zarella, J., dissenting) (“[A] couple that is incapable of engaging in the type of sexual conduct that can result in children is not similarly situated to a couple that is capable of engaging in such conduct with respect to legislation that is intended to privilege and regulate that conduct.”); Morrison v. Sadler, 821 N.E.2d 15, 31 (Ind. Ct. App. 2005) (“The differentiation between opposite-sex and same-sex couples in Indiana marriage law is based on inherent differences reasonably and rationally distinguishing the two classes: the ability to procreate ‘naturally.’”); Hernandez v. Robles, 855 N.E.2d 1, 21 (N.Y. 2006) (“Marriage was instituted to address the fact that sexual contact between a man and a woman naturally can result in pregnancy and childbirth.”).

196 Andersen, 138 P.3d at 983 (“Under the highly deferential rational basis inquiry, encouraging procreation between opposite-sex individuals within the framework of marriage is a legitimate government interest furthered by limiting marriage to opposite-sex couples.”). Given the deferential nature of the rational basis test, it is not particularly surprising that courts which apply that standard usually end up upholding the constitutionality of the marriage bans. See, e.g., Conaway, 932 A.2d at 630–31; Hernandez, 855 N.E.2d at 21–22; Andersen, 138 P.3d at 982–83. Not every court that has applied the rational basis test, however, has concluded that procreation is an essential aspect of the meaning of marriage. The Supreme Judicial Court of Massachusetts struck down the state’s ban against same-sex marriage applying the rational basis test after concluding that commitment and affection, rather than procreation, were the constitutive elements of marriage. See Goodridge v. Dep’t of Pub. Health, 798 N.E.2d 941, 961 (Mass. 2003) (“[I]t is the exclusive and permanent commitment of the marriage partners to one another, not the begetting of children, that is the sine qua non of civil marriage.” (footnote omitted)).

197 For example, even though the Washington Supreme Court upheld the constitutionality of the state’s ban on same-sex marriage, it nonetheless recognized “that same-sex couples enter significant, committed relationships . . . .” Andersen, 138 P.3d at 983.
of equality challenges are reaching the opposite normative judgments on the differences between same-sex couples and different-sex ones than might be expected given the cases’ outcomes.

I say this because of the seeming popularity among some judges of the so-called “responsible procreation” argument. This argument holds that while same-sex couples must engage in considerable planning to have children (either through adoption or with the assistance of reproductive technology), most heterosexuals can reproduce without having to think much about either the process or consequences of having children.\(^{198}\) As a result, straights need the stability and benefits provided by marriage more than lesbians and gay men, and therefore, it is argued, it is rational for the State to make marriage available only to the former.\(^{199}\)

Judges who accept this argument are relying on the different ways in which gays and (most) straights become parents to reach normative conclusions about the degree of stability and commitment that accompanies the personal and familial relationships of lesbians and gay men. Far from concluding that those with a same-sex sexual orientation are incapable of forming committed and loving relationships built partly around the raising of children, these courts reason that gay people are, in effect, too capable (at least when compared to some heterosexuals). In the end, courts who accept the “responsible procreation” argument rely on this normative judgment to hold that same-sex couples and (at least some) different-sex couples are not similarly situated when it comes to mutual commitment and the rais-

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\(^{198}\) *Hernandez*, 855 N.E.2d at 7 (“The Legislature could . . . find that [male-female] relationships are all too often casual or temporary . . . [and that] same-sex couples . . . can become parents by adoption, or by artificial insemination or other technological marvels, but they do not become parents as a result of accident or impulse.”); see also *Morrison*, 821 N.E.2d at 26 (“Members of a same-sex couple who wish to have a child . . . have already demonstrated their commitment to child-rearing by virtue of the difficulty of obtaining a child through adoption or assisted reproduction . . . . Conversely, the ‘casual’ intimate acts of a same-sex couple will never result in a child, but those of an opposite-sex couple can and frequently do.”).

\(^{199}\) *Hernandez*, 855 N.E.2d at 7 (“The Legislature could find that unstable relationships between people of the opposite sex present a greater danger that children will be born into or grow up in unstable homes than is the case with same-sex couples, and thus that promoting stability in opposite-sex relationships will help children more.”); see also *Morrison*, 821 N.E.2d at 25 (“One of the State’s key interests in supporting opposite-sex marriage is [to] . . . encourage[] opposite-sex couples who, by definition, are the only type of couples that can reproduce on their own by engaging in sex with little or no contemplation of the consequences that might result, i.e. a child, to procreate responsibly.”). For a critique of the responsible procreation argument as a basis for upholding same-sex marriage bans, see Edward Stein, *The "Accidental Procreation" Argument for Withholding Legal Recognition of Same-Sex Relationships*, 84 CHI.-KENT. L. REV. 403 (2009).
ing of children, and that therefore their differential treatment under the marriage laws is justified.

Putting aside the merits of these differing arguments and positions, it should be clear by now that regardless of how a court rules on the validity of an equality-based challenge to a same-sex marriage ban, normative assessments that are independent of egalitarian concerns must be incorporated into the analysis. Neither the discretion that is part of making those assessments, nor the scope of the normative inquiry, is significantly different from what is required of judges in assessing the validity of liberty-based challenges to gay marriage bans.

2. Romer v. Evans

The types of normative assessments that judges make in deciding gay rights equality cases, as we have seen in several same-sex marriage rulings, can be quite explicit. But, as the Supreme Court’s decision in Romer v. Evans suggests, the assessments can also be implicit. The Court in Romer struck down a voter-approved amendment to the Colorado Constitution that would have prohibited state and local governments from adopting measures protecting lesbians, gay men, and bisexuals from discrimination. The fact that the amendment broadly deprived the government of the authority to regulate in many areas of law, when combined with the fact that it only targeted gay people for differential treatment, led the Court to conclude that it was motivated by animus toward them and was therefore unconstitutional.

Unlike the same-sex marriage cases decided on equality grounds discussed in the previous section, the Court’s Romer opinion does not contain explicit normative assessments about the capabilities and attributes of gay people. Nonetheless, it is reasonable to conclude that those assessments played an implicit role in the Court’s understanding of the controversy before it.

200 See supra notes 167–99 and accompanying text.
202 Id. at 624.
203 Id. (“Amendment 2, in explicit terms, . . . prohibits all legislative, executive or judicial action at any level of state or local government designed to protect the named class [i.e., lesbians, gay men, and bisexuals].”).
204 Id. at 632 (“[T]he amendment has the peculiar property of imposing a broad and undifferentiated disability on a single named group, an exceptional and . . . invalid form of legislation.”).
205 Id. at 634 (“[L]aws of the kind now before us raise the inevitable inference that the disadvantage imposed is born of animosity toward the class of persons affected.”).
The following hypothetical helps explain why this is the case: Suppose that a municipality enacts an ordinance that prohibits employment discrimination against kleptomaniacs. This local legislative action leads to a backlash among state wide voters who, disapproving of kleptomaniacs, quickly endorse a constitutional amendment depriving state and local governments of the authority to provide discrimination protection to kleptomaniacs. Would the Supreme Court hold that such an amendment violates the Equal Protection Clause?

The answer is likely no. As Professor Pamela Karlan has noted, “[a]ll sorts of laws reflect the majority’s disapproval of (‘animus toward’) an unpopular group, and yet are constitutional.” An example of such a statute is the Americans with Disabilities Act (“ADA”), which specifically excludes kleptomaniacs (and a select group of others including gamblers, pyromaniacs, transvestites and even gay people) from discrimination protection in employment, public accommodations, and the provision of government services. As Karlan explains, “[t]he decision to exclude [these individuals] from the protections others enjoy surely reflects the majority’s dislike of these politically unpopular groups. And yet, it is hard to imagine the Supreme Court declaring the ADA unconstitutional for underbreadth.”

If disapproval of the group in question is by itself not enough to explain the result in Romer, then we need to look elsewhere for an explanation of its holding. One possibility might be that, as Professor Karlan posits, the Court’s equality analysis in Romer was influenced by liberty considerations. That is, it might be that a majority of the Court’s members was troubled by the Colorado antigay amendment because of its impact on the ability of gay people to make intimacy-related choices.

The problem with this explanation is that it is inconsistent with Bowers v. Hardwick, a case that was not mentioned in, much less explicitly overruled by, Romer.

206 Karlan, The Stereoscopic Fourteenth Amendment, supra note 34, at 484.


208 Karlan, The Stereoscopic Fourteenth Amendment, supra note 34, at 485.

209 As Professor Karlan explains, “[A] liberty-based perspective may explain why a law aimed at stripping protection from gays, lesbians, and bisexuals does not constitute a legitimate government purpose, even if a law depriving, say, thieves, does. Understanding the nature of the liberty interest in intimate association may explain why discriminating among individuals on the basis of the choices they make is impermissible.”

210 478 U.S. 186 (1986). Karlan, writing before the Supreme Court overruled Hardwick in Lawrence, acknowledged that her interpretation of Romer “confronts head-on the contin-
It seems to me that a more plausible explanation for the outcome in *Romer* is that by the time the Court decided the case, a majority of its members had reached normative conclusions about the sexuality of gay people—and of how its expression should not impose on them certain legal disabilities—that were quite different from the normative assessments reached by the *Hardwick* Court. This does not necessarily mean, as Professor Karlan suggests, that a majority of the Court in 1996 relied on liberty considerations to determine the equality rights of gay people. But it does likely mean that a majority of the Court’s members was by then prepared to view the engaging in same-sex sexual conduct as normatively irrelevant, at least for purposes of whether lesbians, gay men, and bisexuals should have the opportunity to seek antidiscrimination protection under the law.

In contrast, the Court would probably not find the conduct engaged in by kleptomaniacs to be normatively irrelevant in the same way, thus likely leading it to conclude that depriving them of antidiscrimination protection would pass constitutional muster (perhaps in a way that is analogous to depriving felons of the opportunity to

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211 Professor Karlan believes that liberty and equality analyses inform and reinforce each other. Karlan, *Some Thoughts on Autonomy and Equality*, *supra* note 34, at 63 ("[J]ust as equality can “backstop” liberty, so too liberty can serve to backstop equality. That is, liberty arguments can explain why two classes of individuals cannot be treated unequally."); Karlan, *The Stereoscopic Fourteenth Amendment*, *supra* note 34, at 474 ("[T]he ideas of equality and liberty expressed in the equal protection and due process clauses each emerge from and reinforce the other."). Tribe makes a similar point when he reasons that "due process and equal protection, far from having separate missions and entailing different inquiries, are profoundly interlocked in a legal double helix." *See* Tribe, *supra* note 34, at 1898. As does Kenji Yoshino when he notes that "[t]oo much emphasis has been placed on the formal distinction between the equality claims made under the equal protection guarantees and the liberty claims made under the due process or other guarantees. In practice, the Court does not abide by this distinction." Yoshino, *supra* note 34, at 749. The Supreme Court in *Lawrence* seemed to endorse the notion that there are mutually reinforcing aspects to liberty and equality protections. *See* *Lawrence*, 539 U.S. at 575 ("Equality of treatment and the due process right to demand respect for conduct protected by the substantive guarantee of liberty are linked in important respects, and a decision on the latter point advances both interests.").

Although I do not address the issue here, the apparent hybrid nature of many liberty and equality constitutional claims provides an additional reason to question the presumption that equality review is a more legitimate judicial enterprise than liberty review. This is because if courts (actually and appropriately) rely on equality principles to interpret the meaning of constitutionally protected liberty (and vice versa), it undermines the notion that liberty review is different from equality review in fundamental ways.  

212 I discuss the normative assessments related to sexual orientation contained in *Hardwick* in *supra* notes 129–37 and accompanying text.

213 *See* Karlan, *The Stereoscopic Fourteenth Amendment*, *supra* note 34, at 485–86.
vote). The different way in which the Court would likely deal with the hypothetical constitutional provision involving kleptomaniacs, when compared with how it dealt with the amendment at issue in Romer, suggests the extent to which the majority in that case brought to bear positive normative judgments about gay people into its analysis.

Over thirty years ago, Professor Laurence Tribe wrote an article in which he criticized constitutional theories, such as that of John Hart Ely, which viewed the document primarily in procedural terms. In doing so, Tribe asserted that the Constitution is saturated with substantive norms, ones that are not only reflected in provisions like the First Amendment (with its defense of values based on freedom of speech and religion), but also in the Equal Protection Clause. Tribe noted that, in order to determine whether particular groups have been discriminated against in constitutionally improper ways, judges must determine whether the classifications chosen by the legislature reflect prejudicial stereotypes, a determination that is substantive in nature because it requires judges to agree or disagree with “the judgments that lie behind the stereotype.”

What truly matters in showing a violation of constitutional equality principles, Tribe argued, is not a question of process. Nor is it the mere existence of prejudice (since laws, for example, aimed at curtailling burglary are based on prejudice against burglars). Instead, the key issue is one of substantive values as determined by the courts. This means, as Kathleen Sullivan has put it in summarizing

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214 See supra notes 110–11 and accompanying text.
215 Tribe, supra note 113.
216 As Tribe put it, [o]ne difficulty that immediately confronts process theories is the stubbornly substantive character of so many of the Constitution’s most crucial commitments: commitments defining the values that we as a society, acting politically, must respect. Plainly, the First Amendment’s guarantee of religious liberty and its prohibition of religious establishment are substantive in this sense. Id. at 1065 (footnote omitted).
217 Id. at 1075 (emphasis omitted).
218 See id.
219 See id. Ely pointed to laws aimed at burglars, “a group toward which there is widespread social hostility,” ELy, supra note 12, at 154, as examples of laws that should survive judicial scrutiny. Id. at 162.
220 Tribe explained that [t]he crux of any determination that a law unjustly discriminates against a group . . . is not that the law emerges from a flawed process, or that the burden it imposes affects an independently fundamental right, but that the law is part of a pattern that denies those subject to it a meaningful opportunity to realize their humanity. Necessarily, such an approach must look beyond process to identify and proclaim fundamental substantive rights. Whatever difficulties this may entail, it seems plain that important aspects of constitutional law, including the determi-
Tribe’s thesis, that the application of the constitutional norm of equality “always require[s] irreducibly substantive normative judgments, without which we cannot distinguish the equal protection rights of gay people from those of burglars.”

Admittedly, the normative assessments about gay people and their sexuality that the Romer Court likely reached are not as evident as those that are part of the recent state supreme court rulings striking down same-sex marriage bans. Nonetheless, it is reasonable to conclude that such positive normative assessments—based on “what it means to be a person, and to have a sexual identity”—played an important role in the Romer Court’s equality review given both the outcome of the case and the likelihood that it would have ruled differently had the state constitutional amendment at issue targeted a group whose identity or conduct, from the Court’s perspective, deserved less normative respect.

C. Liberty’s Subjectivity vs. Equality’s Dependence: A Reprise

As noted in the Introduction, one crucial reason for the perceived reduced legitimacy of liberty review, when compared to equality review, is the belief that the former calls for a degree of judicial subjectivity that the latter does not. This view holds that judges are more likely to stray beyond their proper judicial role when they strike down a law under substantive due process grounds than when they do so under equality ones. I have here sought to challenge this perspective by showing how the normative assessments that judges make when reviewing laws in gay rights cases under equality principles are quite similar to those they reach when engaging in liberty review. As we have seen, those assessments—regarding questions such as the relevancy of sexual orientation in public policy matters, the purpose of the institution of marriage, and the capabilities of gay people to form committed and loving relationships—have played crucial roles in the courts’ analyses irrespective of whether the constitutional claim at issue is grounded in equality or liberty principles.

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222 See supra notes 167–99 and accompanying text.
223 See supra note 113, at 1076.
224 See supra notes 19–25 and accompanying text.
225 See id.
226 See supra Parts II.A and II.B.
Someone who is skeptical of my argument that equality review does not cabin a judge’s discretion to a significantly greater extent than does liberty review may argue that when a judge engages in equality review of legislation, the substantive right at issue has already been determined through the legislative process, limiting the judicial function to the question of how the right can be distributed without offending the Constitution. In contrast, the fundamental rights analysis under substantive due process calls on judges to search for (or find) constitutional entitlements that are, by their very nature, judge-created. This means, for example, that in assessing liberty-based challenges brought against same-sex marriage bans, courts must determine whether there is a fundamental right to marry, and if there is, whether it is broad enough to include same-sex couples. In contrast, in assessing equality-based challenges to those same bans, courts do not need to determine whether there is (or should be) a right to marry, but must concern themselves only with how that right is distributed.

I concede that when the two forms of judicial review are looked at from this perspective, it appears that liberty review encourages greater judicial subjectivity because it requires judges to decide whether there is a legal entitlement to begin with. But as I have sought to illustrate here, when one compares how judges actually go about the process of weighing constitutional equality with how they weigh constitutional liberty, there is no longer a clear difference in the degree of judicial subjectivity that is part of the constitutional analysis.

What I believe explains the (mis)perception that liberty review allows for significantly greater judicial normative discretion than equality review is the fact that liberty’s subjectivity is more obvious than equality’s dependence. That is, it is not as readily apparent that judges must rely on normative assessments when deciding whether and how to apply equality principles when compared to how they grapple with liberty considerations. But when one digs a little deeper, as I have sought to do here, one finds that judges entertaining equality claims routinely make normative judgments that are quite similar to the ones they make when entertaining liberty claims.

I thank my colleague Adil Haque for raising this possible objection to my argument.

See Conkle, supra note 14, at 69 (noting that the Supreme Court, in interpreting the Liberty Clause, “has declared for itself the power to define otherwise unenumerated constitutional rights”).

The Supreme Court, of course, has already determined that there is a fundamental right to marry. See Turner v. Sailey, 482 U.S. 78 (1987); Loving v. Virginia, 388 U.S. 1 (1967).

For a discussion of equality’s dependence, see supra Part I.B.
It also bears noting that, although in this Article I emphasize judicial normative assessments in liberty and equality gay rights cases that are similar in nature, there are some normative assessments that are distinctive to equality review. For example, in deciding whether to apply heightened scrutiny to particular classifications, courts must determine if the classifying trait “bears [any] relation to the individual’s ability to participate in and contribute to society.” It seems clear that this type of analysis, when applied to gay rights cases, invites judges to bring to bear their views on the impact that sexual orientation has on the character and capabilities of individuals, an assessment that is intrinsically normative. While engaging in equality review of its state’s same-sex marriage ban, for example, the Connecticut Supreme Court concluded that the “characteristic that defines the members of this group—atraction to persons of the same sex—bears no logical relationship to their ability to perform in society, either in familial relations or otherwise as productive citizens.”

Normative assessments are also part of another determination that some courts have made in deciding whether sexual orientation classifications merit heightened scrutiny, namely, whether sexual orientation, as the Iowa Supreme Court put it, “forms a significant part of a person’s identity.” The court answered that question in the affirmative when it concluded that “[s]exual orientation influences the formation of personal relationships between all people—heterosexual, gay, or lesbian—to fulfill each person’s fundamental needs for love and attachment.” The Connecticut Supreme Court reasoned similarly when it noted that “because sexual orientation is such an essential component of personhood, even if there is some possibility that a person’s sexual preference can be altered, it would be wholly unacceptable for the state to require anyone to do so.”

As these examples illustrate, judicial review of gay rights cases on equality grounds is infused with normative assessments about the meaning, relevance, and impact of having a same-sex sexual orientation. These assessments, unique to equality review, also undermine the notion that equality review is more neutral or self-contained than is liberty review.

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232 Kerrigan v. Comm’r of Pub. Health, 957 A.2d 407, 432 (Conn. 2008); see also Conaway v. Deane, 932 A.2d 571, 609 (Md. 2007) (“Gay, lesbian, and bisexual persons likewise have been subject to unique disabilities not truly indicative of their abilities to contribute meaningfully to society.”).
234 Id.
235 Kerrigan, 957 A.2d at 432 (emphasis added).
III. THE LEGITIMACY OF EQUALITY AND LIBERTY REVIEW: INSTITUTIONAL AND REMEDIAL CONSIDERATIONS

There are other reasons—beyond the supposed greater subjectivity that is part of liberty review—that account for the greater perceived legitimacy of equality review. In this last section of the Article, I explore two additional arguments that are frequently raised on behalf of that greater legitimacy. The first is based on the notion of institutional legitimacy, that is, on the idea that when courts engage in equality review, they reinforce representative democracy in ways that they do not when they engage in liberty review. The second is based on the idea of remedial legitimacy, that is, the view that when courts strike down legislation under due process principles, they restrict the legislature’s ability to regulate in ways that are significantly more intrusive than when they void a law under equal protection principles. As I did in Part II, I will here use gay rights constitutional litigation to question both of these generally accepted explanations for the greater legitimacy of equality review.

A. Institutional Legitimacy

The judicial review of legislation on equality grounds gains considerable legitimacy from the widely held view that it reinforces rather than undermines democratic rule. The Constitution does not guarantee any group (whether racial, social, ideological or otherwise) particular legislative results. But the Equal Protection Clause has been viewed, largely as the result of John Hart Ely’s influential scholarship, as the principal constitutional provision which helps guarantee that elected officials will represent all of their constituents—by accounting for the interests of everyone—when legislating. As Ely explained it, this theory of representation, which is a central component of republican government, does not mean that groups that constitute minorities of the population can never be treated less favorably than the rest, but it does preclude a refusal to represent them, the denial to minorities of what Professor [Ronald] Dworkin has called ‘equal concern and respect in the design and administration of the political institutions that govern them.’ The Fourteenth

236 See infra notes 238–65 and accompanying text.
237 See infra notes 266–96 and accompanying text. I also in this Part question the notion that successful equality-based challenges, and the resulting incentives to broaden the impact of legislation, always serve to protect against arbitrary and unreasonable government actions. See infra notes 297–317 and accompanying text.
Amendment’s Equal Protection Clause is obviously our Constitution’s most dramatic embodiment of this ideal.238

From this perspective, the principal function of judicial review is to determine when the democratic process has malfunctioned.239 The crucial point for Ely was that, in contrast to the “judicial imposition of ‘fundamental values,’” “a “representation-reinforcing” understanding of the Constitution “is not inconsistent with, but on the contrary is entirely supportive of, the American system of representational democracy.”240 While Ely, therefore, was dismissive of substantive due process doctrine,241 he viewed the Equal Protection Clause as the Constitution’s key provision guaranteeing that legislatures account for the interests of all when enacting laws.242

But as Rebecca Brown has persuasively argued, it is not clear why the representation-reinforcing value of judicial review should end with equality claims. It is true that when legislation classifies individuals—by, for example, providing a benefit to (or imposing a burden on) some that it does not provide to (or impose on) others—it is usually clear who has gained and who has lost in the political and legislative battles leading up to enactment, and it is therefore possible to apply the Equal Protection Clause in ways that seek to determine whether the interests of the losers were sufficiently taken into account.243

238 ELY, supra note 12, at 82 (footnotes omitted).
239 Ely explained that
    [m]alfunction occurs . . . [when] (1) the ins are choking off the channels of polit-
ical change to ensure that they will stay in and the outs will stay out, or (2) though
no one is actually denied a voice or a vote, representatives beholden to an effective
majority are systematically disadvantaging some minority out of simple hostility or
a prejudiced refusal to recognize commonalities of interest, and thereby denying
that minority the protection afforded other groups by a representative system.
Id. at 103 (footnote omitted).
240 Id. at 101–02.
241 Ely famously referred to substantive due process as “a contradiction in terms—sort of like ‘green pastel redness.’” Id. at 18 (footnote omitted).
242 Id. at 82; see also id. at 100 (noting that several of the Constitution’s provisions—“centrally but not exclusively the Equal Protection Clause—reflect a realization that access [to the
decision making process] will not always be sufficient”). A process-based understanding of judicial review in equality cases was endorsed by the U.S. Court of Appeals for the Ninth Circuit in a case involving the constitutionality of the military’s exclusion of lesbian and gay service members. See Watkins v. U.S. Army, 837 F.2d. 1428, 1440 (“[E]qual protection doctrine does not prevent the majority from enacting laws based on its substantive value choices. Equal protection simply requires that the majority apply its values even-handedly. Indeed, equal protection doctrine plays an important role in perfecting, rather than frustrating, the democratic process.”), amended by 847 F.2d 1329 (9th Cir. 1988).
243 This determination, of course, is driven by the level of judicial review required by the classification in question. “The general rule is that legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legiti-
But, as Brown notes, laws that restrict liberty can also leave losers in their wake because they almost always have a greater impact on some than on others.246 This is true even if the law in question does not, on its face, draw classifications among individuals.245 Those whose liberty interests are burdened by facially neutral laws can be thought to have lost in political and legislative processes in the same way that groups lose when they are, for example, denied a benefit that is legislatively conferred on others.246 Courts, therefore, should also make themselves available to assess the validity of legislation that impacts on liberty considerations to make sure that legislators accounted for the interests of everyone when enacting the law in question.247 As Brown puts it,

if courts are to ensure that legislators have satisfied their obligation to represent, they must be available to look at the reasons for which liberty-imparing legislation has been passed. Only by engaging in that initial examination can a court ascertain that the interests of those bearing the burden have not been valued negatively or at zero, a breach of the representatives’ obligation under the Constitution. Thus, there is no theoretical warrant for limiting the reach of a representation-reinforcing judiciary to claims expressly invoking equality.

Sodomy laws are a good example of what Professor Brown has in mind. Although a handful of jurisdictions, beginning in the late...
1960s, amended their sodomy statutes by making them gender-specific (that is, by decriminalizing different-sex sodomy and, for the first time, specifically criminalizing the same-sex variety), the vast majority of sodomy statutes in American history were facially neutral. In theory, these laws applied to everyone, yet the word “sodomy” in the twentieth century came to be associated almost exclusively with gay male sex. As a practical matter, therefore, gay people were burdened to a much greater extent than straight people by facially neutral sodomy laws.

This greater burden was manifested in three different ways. First, although arrests for consensual sodomy in private during the second half of the twentieth century were rare, they were not completely unheard of, and, not surprisingly, it was gay men who sometimes found themselves at the wrong end of those arrests. Second, law enforcement agencies have traditionally been quite aggressive in prosecuting gay men for solicitation of consensual (and unremunerated) sodomy, while ignoring heterosexuals who solicit other straight people with the intent to engage in the same. And third, and most perniciously

249 Ball, supra note 75. The first state to enact a gender-specific sodomy statute was Kansas in 1969. Id. at 208. Texas did the same four years later. Id. Eventually, “Arkansas, Kentucky, Missouri, Montana, Nevada, and Tennessee also decriminalized different-sex sodomy while, for the first time, explicitly prohibiting the same-sex variety.” Id.

250 Id. at 207. A dictionary published in 1996 defined sodomy as “carnal copulation between male persons or with beasts.” The New International Webster’s Comprehensive Dictionary of the English Language 1193 (1996); see also Tribe, supra note 34, at 1905 (“[A]lthough ‘sodomy’ is by no means a ‘gays only’ act, the term has come to carry a strong cultural association with gay male, and to a much lesser extent lesbian, sexual activities . . . .”).

251 See infra notes 252–54 and accompanying text.


253 There is considerable evidence that law enforcement officials frequently target consensual and uncompensated male on male sexual solicitation and conduct in public places—frequently by conducting extensive and expensive investigations—while paying little attention to the same when the sexual actors in question are of different sexes. See Christopher R. Leslie, Standing in the Way of Equality: How States Use Standing Doctrine to Insulate Sodomy Laws from Constitutional Attack, 2001 Wis. L. Rev. 29, 84 (noting that “[m]any police departments employ undercover operations designed to entrap gay men into offering or requesting oral sex . . . . Although most sodomy laws apply equally to heterosexual and homosexual sodomy, police departments do not expend resources in search of heterosexuals willing to give or receive oral sex (or other forms of sodomy).”); see also Martinez v. Port Auth. of N.Y. & N.J., 2005 WL 2143333 (S.D.N.Y. Sept. 2, 2005), aff’d, 445 F.3d 158 (2d Cir. 2006) (ordering defendants to pay $464,000 to compensate plaintiff for police policy of arresting men for public lewdness at a subway station without probable cause); Baluyut v. Superior Court, 911 P.2d 1, 4 (Cal. 1996) (presenting evidence of ten solicitation arrests over a two year period which led the trial court to conclude “that the operation was focused solely on persons who had a proclivity to engage in homosexual conduct”).
of all, the mere existence of sodomy laws contributed to the perception that all gay people—and not just those who were prosecuted under those laws—were criminals and second-class citizens.\footnote{254}

Despite the greater burden imposed on gay people by facially neutral sodomy statutes, their neutrality made equal protection challenges difficult.\footnote{255} As a result, the Equal Protection Clause never played much of a role in challenging facially neutral sodomy laws.\footnote{256}

\footnote{254}Pamela Karlan has noted that "[t]he real problems with prohibitions on same-sex intimacy... come from the collateral consequences of such laws: the way in which they undergird 'discrimination both in the public and in the private spheres' and tell gay people that their choices about how to live their lives are unworthy of respect." Karlan, \textit{Loving Lawrence}, supra note 34, at 1453 (quoting \textit{Lawrence}, 539 U.S. at 575). Justice O'Connor made a similar point in her \textit{Lawrence} concurrence:

Texas' sodomy law brands all homosexuals as criminals, thereby making it more difficult for homosexuals to be treated in the same manner as everyone else. Indeed, Texas itself has previously acknowledged the collateral effects of the law, stipulating in a prior challenge to this action that the law "legally sanctions discrimination against [homosexuals] in a variety of ways unrelated to the criminal law," including in the areas of "employment, family issues, and housing." \textit{Lawrence}, 539 U.S. at 581–82 (O'Connor, J., concurring) (citing State v. Morales, 826 S.W.2d 201, 203 (Tex. Ct. App. 1992)); \textit{see also id.} at 584 ("The State has admitted that because of the sodomy law, being homosexual carries the presumption of being a criminal." (citing Morales, 826 S.W.2d at 202-03)).

\footnote{255}Successful equal protection challenges of facially neutral laws grounded in disparate treatment, such as the one brought in \textit{Yick Wo v. Hopkins}, 118 U.S. 356 (1886), are rare. \textit{See McClesky v. Kemp}, 481 U.S. 279, 293 n.12 (1987) (noting that \textit{Yick Wo} is one of those "examples of... rare cases in which a statistical pattern of discriminatory impact demonstrated a constitutional violation"). As Kenji Yoshino has noted, [i]n the vast run of cases [in the last thirty years], only facial discrimination has drawn heightened scrutiny under the equal protection guarantees. If legislators have the wit—which they generally do—to avoid words like "race" or the name of a particular racial group in the text of their legislation, the courts will generally apply ordinary rational basis review. This tendency is true even if the state action has an egregiously negative impact on a protected group.


Professor Laurence Tribe, who represented Michael Hardwick in his challenge to Georgia’s sodomy law before the Supreme Court, has explained his reasoning for not pursuing an equal protection claim in that case:

I was obviously aware of how even facially gender-neutral antisodomy laws like Georgia’s were used principally to harass— and to justify refusals to employ, promote, or extend benefits to gay men (and to a lesser but still troublesome extent, lesbians). I also knew that many of my gay friends and many gay rights advocates saw Michael Hardwick’s lawsuit as an ideal opportunity to topple a major source of
This meant that the representation-reinforcing features of that provision were generally unavailable to individuals interested in challenging the constitutionality of those laws.

If the facial neutrality of most sodomy laws provided significant constitutional immunity to challenges under the Equal Protection Clause, there was still the question of whether they violated the Liberty Clause. But when a gay man in *Bowers v. Hardwick* challenged Georgia’s facially neutral sodomy statute under that theory, the Court fell back on considerations of judicial restraint to reject it. As far as the *Hardwick* Court was concerned, the decision of whether to criminalize sodomy was a legislative rather than a judicial one. The problem, as Professor Brown explains, is that the Court’s conclusion in cases like *Hardwick* that

most liberty claims [are] best left to the “democratic process” begs the question whether the democratic process, including the representative obligation to give equal concern and respect to all constituents, has malfunctioned. If it has, then the Court does no favors to democracy by looking the other way. Rather, it has an obligation to reinforce the representation that is the core of democracy.

It may be that, if *Lawrence v. Texas* is any indication, the Court is beginning to take this obligation more seriously. Rather than accept the state’s argument, as it had in *Hardwick*, a majority of citizens are entitled to express their disapproval of same-sex sexual con-

257 *Hardwick*, 478 U.S. at 195 (“There should be . . . great resistance to expand the substantive reach of the [Due Process Clause], particularly if it requires redefining the category of rights deemed to be fundamental. Otherwise, the Judiciary necessarily takes to itself further authority to govern the country without express constitutional authority.”). Justice Scalia made a similar point in his dissent in *Lawrence* when he noted that Texas’s decision to criminalize same-sex sodomy was “well within the range of traditional democratic action, and its hand should not be stayed through the invention of a brand-new ‘constitutional right’ by a Court that is impatient of democratic change.” *Lawrence*, 539 U.S. at 605 (Scalia, J., dissenting).

258 See *Hardwick*, 478 U.S. at 194–95.

259 See *Hardwick*, 478 U.S. at 196 (noting that “the presumed belief of a majority of the electorate in Georgia that homosexual sodomy is immoral and unacceptable” constituted a sufficient justification for the sodomy law).

250 See *Hardwick*, 478 U.S. at 196 (noting that “the presumed belief of a majority of the electorate in Georgia that homosexual sodomy is immoral and unacceptable” constituted a sufficient justification for the sodomy law).
duct through the criminal law, the Lawrence Court instead protected the liberty interests of gay people from a statute that, as it acknowledged, stigmatized them through its mere existence.

The fact that the Texas sodomy statute was not facially neutral meant that the Lawrence Court had the option of striking it on Equal Protection grounds, one that some commentators have argued the Court should have pursued. But from an institutional legitimacy perspective, it does not make sense to suggest that the Court had a representation-reinforcing obligation to strike down the provisions of the four states that had gender-specific sodomy laws at the time of Lawrence, while leaving in place the facially neutral statutes that were on the books in nine other jurisdictions. Gay people living in those nine states were as much the victims of a legislative process that failed to sufficiently account for their interests as were gay people living in the four states that had gender-specific sodomy laws.

Equality judicial review theorists have been effective in conditioning us to look for possible malfunctions in the democratic process as reflected in how legislation classifies individuals. But this conditioning has unfortunately occluded the important representation-reinforcing potential of judicial review based on liberty principles. The example of sodomy laws illustrates how the question of whether

261 Morality was the principal state interest relied on by Texas to justify the enactment of its sodomy statute. Lawrence, 539 U.S. at 582 (O’Connor, J., concurring) (“Texas attempts to justify its law, and the effects of the law, by arguing that the statute satisfies rational basis review because it furthers the legitimate governmental interest of the promotion of morality.”). The Lawrence Court quoted from Justice Stevens’s dissent in Hardwick to reject the notion that considerations of majority morality were sufficient to justify a law that criminalized consensual sexual conduct among adults. Id. at 577–78.

262 Id. at 575 (“When homosexual conduct is made criminal by the law of the State, that declaration in and of itself is an invitation to subject homosexual persons to discrimination both in the public and in the private spheres.”).

263 See Cass R. Sunstein, What Did Lawrence Hold? Of Autonomy, Desuetude, Sexuality, and Marriage, 55 SUP. CT. REV. 27, 32 (2003) (“Rather than invalidating the Texas statute on grounds of substantive due process, the Court should have invoked the Equal Protection Clause to strike down, as irrational, the state’s decision to ban homosexual sodomy but not heterosexual sodomy.”); see also Catharine A. MacKinnon, The Road Not Taken: Sex Equality in Lawrence v. Texas, 65 OHIO ST. L.J. 1081 (2004) (arguing that the Lawrence Court should have struck statute down on substantive sex equality grounds rather than substantive due process ones).

264 At the time Lawrence was decided, thirteen states still criminalized consensual sodomy, “of which 4 enforce[d] their laws only against homosexual conduct.” Lawrence, 539 U.S. at 573. The four states with gender specific sodomy statutes were Kansas, Missouri, Oklahoma, and Texas. Linda Greenhouse, Justices, 6–3, Legalize Gay Sexual Conduct in Sweeping Reversal of Court’s ’86 Ruling, N.Y. TIMES, June 27, 2003, at A1. The nine states with gender neutral sodomy laws were Alabama, Florida, Idaho, Louisiana, Mississippi, North Carolina, South Carolina, Utah, and Virginia. Id.

265 See supra notes 238–42 and accompanying text.
courts can help achieve the goals of representational government is not as closely correlated to the nature of the constitutional claim (that is, whether it sounds in equality or in liberty) as some believe. Instead, a proper understanding of the role of judicial review should include a recognition that liberty-depriving measures, even when facially neutral, rarely impact everyone equally and that, as a result, there is a legitimate role for courts to play, in substantive due process cases, in making sure that legislators abide by minimum standards of representational government when enacting laws.

B. Remedial Legitimacy

In 1949, the Supreme Court had before it the seemingly prosaic issue of whether a New York City traffic ordinance, which prohibited the placement of advertisement materials on a vehicle unless they were related to the vehicle owner’s business, passed constitutional muster under due process and equal protection principles.\(^{266}\) The Court ruled without much difficulty that the ordinance was constitutional.\(^{267}\) But what the case is today mostly remembered for is a concurring opinion written by Justice Robert Jackson in which he articulated his reasons for preferring to strike down legislation under equal protection principles rather than under due process ones.\(^{268}\)

When a court relies on substantive due process review to void legislation, Jackson explained, it deprives the government of the authority to legislate in a particular area, thus “leav[ing] ungoverned and ungovernable conduct which many people find objectionable.”\(^{269}\) In contrast, when a court relies on equal protection principles to strike down a law, it does not, as a remedial matter, deprive the State of the authority to regulate in a certain area; instead, it merely renders invalid the classification that the legislature used to achieve its ends.\(^{270}\) Rather than precluding legislation, the striking down of a law on equality grounds may induce legislators to go back and draft new laws that “have a broader impact.”\(^{271}\)

According to Justice Jackson, the impact of equality review is salutary because it requires elected representatives to test the appropriateness of their policy objectives against the views and preferences

\(^{267}\) Id. at 109–110
\(^{268}\) Id. at 111–12 (Jackson, J., concurring).
\(^{269}\) Id. at 112.
\(^{270}\) Id. (“Invocation of the equal protection clause . . . does not disable any governmental body from dealing with the subject at hand.”).
\(^{271}\) Id.
of a larger (perhaps even a majority) segment of the voting public. In a passage that has become particularly famous, he explained that

[1]he framers of the Constitution knew, and we should not forget today, that there is no more effective practical guaranty against arbitrary and unreasonable government than to require that the principles of law which officials would impose upon a minority must be imposed generally. Conversely, nothing opens the door to arbitrary action so effectively as to allow those officials to pick and choose only a few to whom they will apply legislation and thus to escape the political retribution that might be visited upon them if larger numbers were affected. Courts can take no better measure to assure that laws will be just than to require that laws be equal in operation.

Justice Jackson, then, made two distinct points in supporting his preference for equality review over liberty review. First, he argued that when the latter leads to the striking down of laws, it limits legislative discretion to a significantly greater extent than the former because it makes certain areas of human conduct “ungoverned and un-governable.” Second, and in contrast, the striking down of legislation on equality grounds simply encourages legislators to draft laws with “a broader impact.” (This, in turn, protects citizens against “arbitrary and unreasonable government” because it makes legislators vulnerable to the disapproval of a larger block of voters.) In this last section of the Article, I use gay rights issues to explain why neither of these points is always correct.

1. Liberty Review and Limitations on Legislative Discretion

The issue of same-sex marriage may, at first blush, seem to support Justice Jackson’s first point. A successful due process challenge to same-sex marriage bans seems more intrusive of legislative prerogatives because it appears to leave the government with little choice but to make marriage available to same-sex couples. In contrast, when a court strikes down a same-sex marriage ban on equality grounds, the government retains the option of ending the institution

\[272\] Id. at 112–13; see also Ely, supra note 12, at 170 (“The function of the Equal Protection Clause . . . is largely to protect against substantive outrages by requiring that those who would harm others must at the same time harm themselves—or at least widespread elements of the constituency on which they depend for reelection . . . .”); Karst, supra note 15, at 281 (“[W]hen the legislators decide on their response [to the striking down of legislation on equal protection grounds], they must confront the fairness of the proposed regulation in the knowledge that an effective constituency is looking over their shoulders.”).

\[273\] See Tebbe & Widiss, supra note 34, at 1405–06 (“[I]f a liberty interest in civil marriage . . . were guaranteed by substantive due process, a proposal to abolish it would seem to raise serious constitutional concerns.”).
of marriage altogether as a way of curing the constitutional violation. This is because if everyone is denied the opportunity to marry, there can be no equal protection violation.

The apparent greater legislative flexibility that would follow an equality-based same-sex marriage ruling, however, is of little practical significance since it is exceedingly unlikely, at least in the near future, that legislators would get rid of marriage altogether. This means, as a practical (as opposed to a theoretical) matter, that there is no initial remedial difference between striking down same-sex marriage bans on liberty grounds as opposed to equality ones. The actual effect of both types of rulings on the ability of the legislature to continue to use the sex of prospective spouses as an exclusionary criterion in distributing marriage licenses would be exactly the same.

It may also be argued that when courts strike down same-sex marriage bans on equality principles, they allow for greater legislative flexibility by making it possible for the State to abide by its constitutional obligations without having to make marriage available to same-sex couples. Indeed, some state supreme courts, after concluding that withholding the rights and benefits that accompany marriage from same-sex couples violates equality principles under their state constitutions, have sent the issue back to the legislature, giving it the opportunity to cure the constitutional violation by creating comprehensive but distinct relationship-regulation mechanisms such as civil unions. This type of remedial flexibility has an "obvious attraction [because] it throws the political initiative back to officials who are elected."

274 See Sunstein, supra note 72, at 2084 (noting that if the right to marry falls under the “fundamental rights” branch of equal protection doctrine, “states may abolish marriage without offending the Constitution”).

275 See Tebbe & Widiss, supra note 34, at 1406 ("[A] state could constitutionally abolish its civil marriage system without offending the Constitution so long as it denied access to marriage for everyone.").

276 See Lewis v. Harris, 908 A.2d 196, 221–22 (N.J. 2006); Baker v. State, 744 A.2d 864, 887 (Vt. 1999). Other courts have rejected the notion that the constitutional infirmities of same-sex marriage bans can be addressed through a separate regulatory mechanism such as that of civil unions. See Kerrigan v. Comm’r of Pub. Health, 957 A.2d 407, 412 (Conn. 2008) (“We conclude that . . . because the institution of marriage carries with it a status and significance that the newly created classification of civil unions does not embody, the segregation of heterosexual and homosexual couples into separate institutions constitutes a cognizable harm.”); Opinions of the Justices to the Senate, 802 N.E.2d 565, 570 (Mass. 2004) (“The dissimilitude between the terms ‘civil marriage’ and ‘civil union’ is not innocuous; it is a considered choice of language that reflects a demonstrable assigning of same-sex, largely homosexual, couples to second-class status.”).

277 Karst, supra note 15, at 282. Karst here was referring to the general appeal of the Equal Protection Clause as a source of constitutional review rather than to the merits of institut-
In contrast, it may seem that the Due Process Clause allows for reduced legislative flexibility because what is at issue in liberty challenges to same-sex marriage bans is whether same-sex couples have a fundamental right to marry. This reasoning can be questioned, however, because the fundamental right at issue in the marriage cases, properly understood, is not the right to have one’s relationship recognized using a particular label such as that of “marriage” as opposed to “civil union” or “domestic partnership.” It is hardly surprising, of course, that the substantive due process cases involving the relationships of both heterosexual and same-sex couples have centered around the institution of marriage given that, until very recently, it was the only way through which the government provided recognition for committed and intimate relationships. But if there is an affirmative constitutional right grounded in liberty to have those relationships recognized—an issue that I have explored elsewhere and cannot fully address here\(^\text{278}\)—it must be because the recognition itself—indeed of questions of labels or of the particular package of rights and obligations that accompany it—is an important means through which individuals exercise their autonomy or liberty interests.\(^\text{279}\) If I am correct about this, the State should be able meet its constitutional obligations under liberty principles in this area by providing meaningful recognition of committed and intimate same-sex relationships. The fact that that recognition might take different forms depending on the couples’ sexual orientation undoubtedly raises constitutional questions, but they are ones of equality and not of liberty because they go to the issue of differential treatment.

It is also important to keep in mind that even if a court were to hold that same-sex marriage bans are unconstitutional because they violate substantive due process principles, it would not impact the

\(^{278}\) See Ball, supra note 150, at 1191–1207.

\(^{279}\) See Pamela S. Karlan, Can States Abolish the Institution of Marriage?, 98 CALIF. L. REV. 697, 699 (2010) (“The Supreme Court’s substantive due process cases involving marriage . . . suggest that the freedom to marry—or at least the right of individuals to some form of official recognition for their family relationships—may be a liberty too fundamental to eliminate.” (emphasis added)); see also Strauss v. Horton, 207 P.3d 48, 74 (Cal. 2009) (stating that the fundamental right at issue in assessing the state’s same-sex marriage ban was not the “constitutional right to marry” but was “the constitutional right to establish an officially recognized family relationship with the person of one’s choice.”).
many other ways in which the government regulates marriage. The State, for example, would still be able to require certain blood tests and a minimum age for those who wish to marry. And, more importantly, the government would still be free to decide which rights and obligations accompany the institution of marriage. In other words, if the Supreme Court were to hold that the fundamental right to marry applies to same-sex couples, it would not render marriage, in Justice Jackson’s words, “ungoverned and ungovernable.”

Interestingly, it may be that rulings upholding equality challenges to same-sex marriage bans place greater restrictions—again, as a practical matter—on the ability of the government to legislate in areas related to sexuality and relationships than liberty-based rulings. To see why this may be the case, it is helpful to think through what the impact of Lawrence might have been on the constitutionality of gay marriage bans had the Court decided that case on equality as opposed to liberty grounds. In his majority opinion in Lawrence striking down Texas’s sodomy statute on due process grounds, Justice Anthony Kennedy sought to distinguish between the constitutional authority of the State to criminalize same-gender sexual conduct and its obligation to recognize same-gender relationships. Kennedy noted that sodomy “statutes . . . seek to control a personal relationship that,  

280 See Martha Nussbaum, A Right to Marry?, 98 CALIF. L. REV. 667, 686 (2010) (“It is . . . pretty clear that the ‘right to marry’ does not obligate the state to offer any particular package of civil benefits to people who marry.”); see also In re Marriage Cases, 183 P.3d 384, 426 (Cal. 2008) (noting that “the constitutional right to marry clearly does not obligate the state to afford specific tax or other governmental benefits on the basis of a couple’s family relationship”).

281 Ry. Express Agency, Inc. v. New York, 336 U.S. 106, 112 (1949) (Jackson, J., concurring). A similar type of limited impact would have followed a Supreme Court ruling striking down, on due process grounds, the (now repealed) “Don’t Ask, Don’t Tell” military personnel policy. Even if the Court had done so, the military would have still retained wide discretion to regulate the personal conduct of its service members. See United States v. Marcum, 60 M.J. 198, 207 (C.A.A.F. 2004) (holding that military’s prohibition against consensual sodomy was not facially unconstitutional under Lawrence given that there are “additional factors relevant solely in the military environment that affect the nature and reach of the Lawrence liberty interest”).

There is also little reason to believe that a ruling striking down a same-sex marriage ban on due process grounds would be any more likely to limit the ability of the government to prohibit incestuous or polygamous marriages than a decision based on equal protection considerations. Indeed, it might be easier for those in incestuous or polygamous relationships to persuade courts that they have an equality-based right to the privileges and benefits afforded to others through the institution of marriage than that they enjoy a liberty-based right to have their relationships recognized by the State. This has been true of gay plaintiffs challenging same-sex marriage bans—they have more frequently succeeded with equality claims than with liberty ones, see supra note 167—and there is little reason to believe that it would be different for members of other groups.
whether or not entitled to formal recognition in the law, is within the liberty of persons to choose without being punished as criminals.”

He then added that the case before the Court did “not involve whether the government must give formal recognition to any relationships that homosexual persons seek to enter.”

Despite Justice Kennedy’s efforts to distinguish between the issues of sodomy and marriage, I have argued elsewhere that the Court’s marriage cases, along with *Lawrence v. Texas*, may be understood as imposing an affirmative, due process-based obligation on the State to recognize same-sex relationships. This type of argument, however, is controversial—it has been accepted by only one appellate court and explicitly rejected by several others. Some commentators have also contended that it makes no sense to think of same-sex marriage bans as raising substantive due process issues and that, as a result, courts should only look to equal protection considerations when assessing their constitutionality. This view is based, in part, on the belief that the Due Process Clause prohibits the government from interfering with certain negative liberty rights of individuals but does not...

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283 *Id.* at 578.
284 See generally *Ball*, *supra* note 150.
285 *In re Marriage Cases*, 183 P.3d at 426 (“[I]t is apparent under the California Constitution that the right to marry—like the right to establish a home and raise children—has independent substantive content, and cannot properly be understood as simply the right to enter into such a relationship if (but only if) the Legislature chooses to establish and retain it.”); *id.* (“[T]he constitutional right to marry . . . goes beyond what is sometimes characterized as simply a ‘negative’ right insulating the couple’s relationship from overreaching governmental intrusion or interference, and includes a ‘positive’ right to have the state take at least some affirmative action to acknowledge and support the family unit.”).
286 See *Standhardt v. Superior Court*, 77 P.3d 451, 457 (Ariz. Ct. App. 2003) (“We view [*Lawrence*] as acknowledging a homosexual person’s right to define his or her own existence, and achieve the type of individual fulfillment that is a hallmark of a free society, by entering into a homosexual relationship. We do not view [*Lawrence*] as stating that such a right includes the choice to enter a state-sanctioned, same-sex marriage.”); *Hernandez v. Robles*, 855 N.E.2d 1, 10 (N.Y. 2006) (“Plaintiffs here do not, as the petitioners in [*Lawrence*] did, seek protection against state intrusion on intimate, private activity. They [instead] seek from the courts access to a state-conferred benefit that the Legislature has rationally limited to opposite-sex couples.”).
287 See, e.g., *Sunstein, supra note 72*, at 2111 (“In specifying the scope of the right to marry, the real question is the legitimacy of the lines that states draw. If that is the question, it is appropriate to consult not the Due Process Clause, but the antidiscrimination principles of the Equal Protection Clause . . . .”); *Tebbe & Widiss, supra note 34*, at 1406 (arguing that “the right to civil marriage is primarily grounded in the Equal Protection Clause rather than the Due Process Clause”); see also *id.* at 1395 (“Liberty alone is probably the wrong framework for thinking about the right to marry. Civil marriage, after all, is a government created and government regulated status.”).
impose on it affirmative obligations, including any related to relationship recognition. 288

All of this means that the Lawrence Court’s choice to strike down Texas’s sodomy statute on due process grounds has not had much of an impact on the constitutional validity of same-sex marriage bans. As one commentator puts it,

one can readily observe that the litigation in support of same-sex marriage has not changed much since June of 2003 when Lawrence was handed down. That is, such litigation has not been more or less successful, nor has it met a markedly more or less receptive audience. For all of its sweeping language and in spite of its ecstatic reception by so many, Lawrence has had virtually no discernable impact on the on-going wave of litigation around same-sex marriage. 289

It is not clear, however, that the same would have been true had the Court decided Lawrence on equal protection grounds. An equality-based ruling in Lawrence would have allowed proponents of same-sex marriage to rely on it as a precedent without having to grapple with the question, already noted, of whether substantive due process provides individuals with affirmative rights. 290 In addition, if the Lawrence Court had decided the case on equal protection grounds, it would have had to determine the role that considerations of majoritarian morality can play, under equality principles, in establishing

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288 Cass Sunstein has argued that

[s]ubstantive due process rights . . . , such as the right to freedom from governmental interference in the domain of consensual sex . . . involve a right to freedom from government intrusion, rather than a right of access to a state-created practice. And this very point suggests that the Court has erred insofar as it has treated the right to marry as part of substantive due process rather than as part of the fundamental rights branch of equal protection doctrine. Sunstein, supra note 72, at 2096; see also Tebbe & Widiss, supra note 34, at 1378 (arguing that “civil marriage is a government program that provides certain benefits and imposes certain obligations. In this respect, it differs from other family-related liberties, [ones that] exist independent of government involvement, and . . . enjoy protection against state interference under substantive due process doctrine.”).

289 Justin Reinhemer, What Lawrence Should Have Said: Reconstructing an Equality Approach, 96 Calif. L. Rev. 505, 519 (2008). The one appellate court that, in striking down a same-sex marriage ban, made significant references to Lawrence was the Massachusetts Supreme Judicial Court in Goodridge v. Department of Public Health. The Massachusetts court noted that the Lawrence Court affirmed that the core concept of common human dignity protected by the Fourteenth Amendment to the United States Constitution precludes government intrusion into the deeply personal realms of consensual adult expressions of intimacy and one’s choice of an intimate partner. The Court also reaffirmed the central role that decisions whether to marry or have children bear in shaping one’s identity.


290 See supra notes 284–88 and accompanying text.
how the State regulates the relationships of gay people.\footnote{291} If the Court had held that such considerations constituted an impermissible basis upon which to treat gay people differently from straight people, then it is not clear that the long history and tradition of limiting marriage to heterosexuals could serve as a justification for denying gay people the opportunity to marry when such a choice is made available to heterosexuals. As Justice Antonin Scalia accurately noted in his \textit{Lawrence} dissent, “preserving the traditional institution of marriage” is just a kinder way of describing the State’s moral disapproval of same-sex couples.\footnote{292}

All of this suggests that had the Court decided \textit{Lawrence} on equal protection grounds, it likely would have limited the ability of the government to legislate in matters related to sexuality and relationships to a greater extent than it actually did by deciding the case on due process grounds.\footnote{293} Indeed, although we may never know for sure, it is reasonable to surmise that the \textit{Lawrence} majority decided the case on due process grounds in part because it understood that the government’s discretion to regulate in other sexuality-related matters—including not only marriage, but also those involving issues such as the now repealed “Don’t Ask, Don’t Tell” policy and whether lesbians

\footnote{291} As already noted, Texas relied on considerations of morality to defend the constitutional legitimacy of its sodomy law. \textit{See supra} note 261 and accompanying text. Although the \textit{Lawrence} Court held, as a matter of due process, that the State cannot rely on morality considerations to prohibit “a particular practice,” see \textit{Lawrence} v. \textit{Texas}, 539 U.S. 558, 577 (2003) (quoting \textit{Bowers v. Hardwick}, 478 U.S. 186, 216 (1986) (Stevens, J., dissenting)), it did not address the question of morality from an equal protection perspective. \textit{See id.} at 574–75 (explaining that it was deciding the case under due process, and not equality, principles). For a discussion of the role that morality played in \textit{Lawrence}, see Carlos A. Ball, \textit{The Proper Role of Morality in State Policies on Sexual Orientation and Intimate Relationships}, 35 N.Y.U. REV. L. & SOC. CHANGE 81, 88–93 (2011).

\footnote{292} \textit{Lawrence}, 539 U.S. at 601 (Scalia, J., dissenting). Justice Scalia here was specifically responding to Justice O’Connor’s suggestion that while sodomy laws are unconstitutional, same-sex marriage bans are not because “unlike the moral disapproval of same-sex relations—the asserted state interest in this case—other reasons exist to promote the institution of marriage beyond mere moral disapproval of an excluded group.” \textit{Id.} at 585 (O’Connor, J., concurring). She added that one of those reasons might be the need to “preserv[e] the traditional institution of marriage.” \textit{Id.}

\footnote{293} I want to emphasize that my argument here does not go to the question of whether the Court was correct in deciding \textit{Lawrence} on liberty as opposed to on equality grounds. I also want to make it clear that I am not suggesting that it would have been problematic if the Court had decided \textit{Lawrence} on equal protection grounds because of the extent to which it would have restricted the government’s ability to regulate in matters related to sexuality and relationships. Indeed, I generally support restricting the ability of the government to regulate in these matters. My point is simply that the widely accepted view that the striking down of legislation on liberty grounds imposes greater restrictions on the ability of the government to regulate than does the voiding of legislation under equality review is not always correct.
and gay men should be permitted to adopt children—would be more extensively curtailed if it relied on equal protection principles to strike down Texas’s sodomy statute.\textsuperscript{294}

As we have seen, a perceived remedial benefit of equality review over liberty review is that the former is thought to be more respectful and less intrusive of the political process and of the legislature’s prerogatives.\textsuperscript{295} But, as I have explained here, it is not always clear that the remedy that follows a successful due process challenge is any more restrictive of the government’s authority to regulate than is a successful equality challenge.\textsuperscript{296} In fact, it may very well be that rulings upholding challenges on equality grounds are, in some instances, more restrictive of the government’s authority to determine whether and how to regulate than ones based on substantive due process considerations.\textsuperscript{297}

\textbf{2. Equality Review and Broader Impact Legislation}

As noted earlier,\textsuperscript{298} Justice Jackson’s famous concurring opinion explaining his preference for equality review over liberty review emphasized that a successful equal protection challenge encourages legislators to go back and enact laws that have “a broader impact” in order to address the constitutional violation.\textsuperscript{299} This, in turn, helps protect against “arbitrary and unreasonable government” because legislators are less likely to impose unreasonable burdens on a larger group of citizens (read: voters) than on a smaller one.\textsuperscript{300} This point is one that continues to be emphasized in more contemporary times by those who argue on behalf of the greater legitimacy of equality judicial review over liberty review. For example, Justice Scalia, in criticizing the notion of liberty-based limitations on the State’s constitutional authority to regulate, has contended that what places “reasonable and humane” limits on the ability of the government to interfere with the important decisions of individuals “is the Equal Protection

\textsuperscript{294}See Karlan, \textit{Loving Lawrence}, supra note 34, at 1460 (“The Court may have feared that if it struck down Texas’s statute on the ground that it violated the Equal Protection Clause to treat gay people differently from straight people, this would require it to invalidate all laws that treat gay and straight couples differently, the most obvious of which are laws restricting the right to marry.”).

\textsuperscript{295}See supra notes 265–79 and accompanying text.

\textsuperscript{296}See supra notes 273–81 and accompanying text.

\textsuperscript{297}See supra notes 282–94 and accompanying text.

\textsuperscript{298}See supra notes 167–69 and accompanying text.


\textsuperscript{300}Id.
Clause, which requires the democratic majority to accept for themselves and their loved ones what they impose on you and me.\[^{301}\]

Justice Sandra Day O’Connor expressed a similar sentiment in her concurrence in *Lawrence v. Texas* when she took issue with the Court’s decision to strike down the sodomy statute on due process grounds.\[^{302}\] A better alternative, O’Connor contended, would have been to do so on equal protection principles.\[^{303}\] This was not only because the statute explicitly targeted gay people for differential treatment on the constitutionally impermissible basis of moral disapproval,\[^{304}\] but also because the striking down of gender-specific sodomy laws like Texas’s under the Equal Protection Clause would render facially neutral statutes vulnerable to repeal through the democratic process. As O’Connor put it (immediately before quoting Justice Jackson’s famous passage),\[^{305}\] “I am confident . . . that so long as the Equal Protection Clause requires a sodomy law to apply equally to the private consensual conduct of homosexuals and heterosexuals alike, such a law would not long stand in our democratic society.”\[^{306}\]

Yet, there is reason to be skeptical of the notion that legislation which has a broader impact (and which therefore addresses equal protection concerns) is enough to protect the interests of minorities, including sexual ones. It should be noted, for example, that most sodomy statutes in American history were of the “broad impact” variety—the vast majority of sodomy laws enacted by state legislatures over the last two centuries made no distinctions based on the gender of the sexual actors and thus, on their face, applied to everyone.\[^{307}\] Far from being intolerant of sodomy laws with a broad impact, however, our democratic system let them stand for a very long time indeed.

It is true that, starting in 1961, several state legislatures repealed their facially neutral sodomy laws, but they did so largely as part of a wholesale adoption of the American Law Institute’s Model Penal Code rather than as a result of any discernable political pressure from

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301 Cruzan v. Dir., Mo. Dep’t of Health, 497 U.S. 261, 300 (1990) (Scalia, J., concurring). *Cruzan* involved the question of whether states can require terminally ill individuals to accept life-prolonging treatment. See *id.* at 269.


303 See *id.*

304 *Id.* at 580 (“We have consistently held . . . that some objectives, such as ‘a bare . . . desire to harm a politically unpopular group,’ are not legitimate state interests.” (citations omitted)).

305 See *supra* note 272 and accompanying text.

306 *Lawrence*, 539 U.S. at 584-85.

307 See *BALL*, *supra* note 75, at 207.
sexually active heterosexuals concerned about their potential criminal liability under those laws. This lack of majoritarian pressure is hardly surprising since, as already noted, facially neutral sodomy laws in the middle of the twentieth century were widely understood as aimed primarily at same-sex sexual conduct (in particular that between men). Heterosexuals rarely think of themselves as individuals who engage in sodomy, even if many sexually active ones seem to participate in that conduct with some regularity. There is no reason to believe, therefore, that had the Lawrence Court struck down the Texas sodomy statute on equal protection grounds, it would have led political majorities in states that had facially neutral sodomy laws to demand that their legislatures repeal them. Indeed, if Alabama voters, for example, fifty years after Brown v. Board of Education, refused to approve a ballot measure that would have removed from the state constitution a provision requiring racially segregated schools, it is not clear that they would have ever demanded repeal of their state’s gender-neutral sodomy law. The case of sodomy legislation,

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309 See supra note 250 and accompanying text.

310 See Tribe, supra note 34, at 1905 (“Many heterosexuals, even those who regularly engage in one or another form of opposite-sex sodomy, no doubt associate ‘sodomy’ with acts that strike them as perverse and alien.”).

311 A comprehensive study of Americans’ sexual practices conducted by University of Chicago researchers found that 79% of all men and 73% of all women engage in oral sex, while 26% of all men and 20% of all women engage in anal sex. EDWARD O. LAUMANN ET AL., THE SOCIAL ORGANIZATION OF SEXUALITY 98–99 (1994).

312 As Laurence Tribe has noted, “[l]ike the fabled Sword of Damocles that does its awful work not by beheading its victim but simply by dangling above its victim’s neck, even a sex-neutral ban on sodomy, especially one blessed by the Court, demeans intimate homosexual relationships at the same time that its virtually complete nonenforcement greatly reduces the incentive of heterosexuals, who are not demeaned by such a ban, to agitate for its repeal. Tribe, supra note 34, at 1910 (footnote omitted).


314 “The constitutional amendment would have struck language from the Alabama constitution saying that ‘separate schools shall be provided for white and colored children, and no child of either race shall be permitted to attend a school of the other race.’” Susan Pace Hammill, Book Review, A Tale of Two Alabamas, 38 ALA. L. REV. 1103, 1142 (2007) (citations omitted).
then, suggests that the Equal Protection Clause is not necessarily (as Justice Scalia has put it) our “salvation” when it comes to legislation that overreaches by limiting the ability of individuals to make important decisions about their intimate and personal lives.

As I have sought to explain in this part of the Article, gay rights cases raise important questions about the widely accepted idea that successful liberty-based challenges to legislation impose greater limitations on legislative discretion than do equality-based lawsuits. They also raise questions about the notion that successful equality-based challenges, and the resulting incentives to broaden the impact of legislation, always serve to protect against “arbitrary and unreasonable government” actions, reducing the necessity for courts to engage in meaningful liberty review.

CONCLUSION

When the New Jersey Supreme Court was asked in 2006 to rule on the constitutionality of the state’s ban on same-sex marriage, it expressed serious reservations about the legitimacy of doing so on liberty grounds. As the court explained,

[i]n searching for the meaning of “liber-

[i]tation of seeing in the majesty of that word only a mirror image of our own

[i] strongly felt opinions and beliefs. Under the guise of newly found rights,

[i] must be careful not to impose our personal value system on eight-and-

[i] half million people, thus bypassing the democratic process as the

[i] primary means of effecting social change in this State.

And yet, when it came to reviewing the same legislation under equality principles, the court a few pages later expressed complete confidence in the legitimacy of its judicial role, noting at one point that “[u]ltimately, we have the responsibility of ensuring that every New Jersey citizen receives the full protection of our State Constitution.” The disparity in the court’s understanding of its own legiti-

316 See supra notes 265–96 and accompanying text.
see supra notes 297–315 and accompanying text.
318 Lewis v. Harris, 908 A.2d 196, 211 (N.J. 2006).
319 Id. at 220 (emphasis added); see also Kerrigan v. Comm’r of Pub. Health, 957 A.2d 407, 481 (Conn. 2008) (“[W]e do not exceed our authority by mandating equal treatment for gay persons; in fact, any other action would be an abdication of our responsibility.”).

The Lewis court proceeded to hold that same-sex couples were constitutionally entitled to the same rights and benefits afforded under state law to different-sex married couples, but that that entitlement did not include the right to have their relationships recognized as marital. See Lewis, 908 A.2d. at 221–22.
macy based on the underlying constitutional claim is striking, especially considering that while the New Jersey Constitution expressly protects the “unalienable rights” of citizens to “liberty,” it does not mention a right to the equal protection of the laws.\(^{320}\)

The New Jersey court’s view that judicial review on equality grounds is more legitimate than review on liberty principles is widely shared in legal circles. An important reason for this legitimacy disparity is the view that there is an intrinsic subjectivity that accompanies liberty review that is absent from equality review. I have tried in this Article to show why this belief is neither conceptually correct\(^{321}\) nor reflective of what happens in practice, at least in gay rights constitutional litigation.\(^{322}\) I have also used gay rights cases to question the widely shared perception that the degree of institutional and remedial legitimacy of equality review is significantly greater than that of liberty review.\(^{323}\)

If I am correct that the legitimacy of judicial review grounded in liberty principles is comparable to that of equality review, then we should question the skepticism (and lessen the hand-wringing) that usually accompanies it. This does not mean, of course, that there is less of a reason to question the particular decisions that courts make in applying substantive due process principles in particular cases. But it does mean that if we are generally comfortable with the idea of judges measuring state action against constitutional principles of equality, then we should also be generally comfortable with judges doing the same with constitutional principles of liberty.

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\(^{320}\) See N.J. CONST., art. 1, para. 1. (The state supreme court had previously concluded that the right to equal protection is implicit in the constitution’s “unalienable rights” provision, the same one that mentions liberty specifically. Lewis, 908 A.2d at 211–12.) Given the general skepticism of substantive due process review, it is interesting, but not particularly surprising, that the court failed to mention the stronger textual basis for liberty review over equality review under the state constitution.

\(^{321}\) See infra Part I.

\(^{322}\) See infra Part II.

\(^{323}\) See infra Part III.