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Whither Sexual Orientation Analysis?: The Proper Methodology When Due Process and Equal Protection Intersect

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WHITHER SEXUAL ORIENTATION ANALYSIS?: THE PROPER METHODOLOGY WHEN DUE PROCESS AND EQUAL PROTECTION INTERSECT

Sharon E. Rush*

ABSTRACT

This Article suggests that there is Proper Methodology that courts apply when reviewing cases at the intersection of due process and equal protection. Briefly, courts operate under a rule that heightened review applies if either a fundamental right or a suspect class is involved in a case, and that rational basis review applies if neither is involved (the “Rule”). Two primary exceptions to the Rule exist, and this Article identifies them as the “Logical” and “Ill Motives” Exceptions. The Logical Exception applies when a court need not apply heightened review because a law fails rational basis review. The Ill Motives Exception applies when a law fails rational basis review because the sole purpose behind a law is an ill motive. The Rule and the Exceptions provide the Proper Methodology to be applied in intersection cases.

The genesis for the Article arose in the context of analyzing the constitutionality of laws that ban marriage between persons of the same sex, popularly called “gay marriage.” Notwithstanding the fact that the right to marry is a fundamental right, confusion exists as to whether gay marriage bans are subject to rational basis review or heightened scrutiny. Some of the confusion exists because the Supreme Court has not decided where sexual orientation fits in the equal protection paradigm. But this void is responsible for only part of the confusion. This Article exposes another dangerous source of confusion—a tendency to allow popular discourse to shape the legal analysis in sexual orientation discrimination cases, resulting in what this Article calls the “Collapsible Error.” Courts commit the Collapsible Error when they conflate the equal protection question (“Are gays a suspect class?”) into the due process question (“Is there an underlying fundamental right?”) by defining the underlying right by the group targeted by the law—gay marriage—and then limiting the analysis to substantive due process (“Is there a fundamental right to gay marriage?”). This Article

* Irving Cypen Professor of Law, University of Florida Levin College of Law. Copyright 2008. All rights reserved. I want to thank Dean Robert Jerry for generously supporting this project with a summer research grant. I also deeply appreciate the comments of my colleagues, Diane Mazur, Berta Hernandez-Truyol, and the Faculty at Georgia State College of Law. Yelizaveta Batres, Nina Lacevic, and especially Lauren Marks, Jessica Furst, and Megan Saillant provided invaluable research assistance, and I am grateful for their devotion.

explores why committing the Collapsible Error is a denial of the due process and equal protection rights of gays because it results in an unjustifiable deviation from the Proper Methodology that is applied in cases involving other types of discrimination. Understanding and applying the Proper Methodology is not only a matter of judicial integrity, but it also is an opportunity to bring gays into the Constitution's fold.

INTRODUCTION	687
I. THE EVOLUTION OF THE PROPER METHODOLOGY	693
A. <i>From Rational Basis Review to Footnote Four</i>	693
B. <i>The Rule</i>	696
1. Laying the Foundation	696
2. The <i>Obvious</i> Intersection Case	698
3. The <i>Non-Obvious</i> Intersection Case	701
C. <i>Exceptions to the Rule</i>	702
1. The Logical Exception	702
2. The Ill Motives Exception	704
a. Early Lessons from Race Discrimination	704
b. From Racial Hostility to Prejudice	707
3. The Importance of the Ill Motives Exception	708
a. Why the Distinction Matters	708
b. From Prejudice to Political Unpopularity	712
c. From <i>Cleburne</i> to <i>Garrett</i> and <i>Lane</i>	714
d. From <i>Cleburne</i> to <i>Romer</i>	718
i. Justice Scalia's Dissent	719
ii. On Animosity	719
iii. On Political Unpopularity/Power	721
II. CRITICAL CHOICES: DUE PROCESS AND/OR EQUAL PROTECTION?	723
A. <i>Lessons from Skinner, Loving, and Zablocki</i>	724
B. <i>More Lessons from Bowers and Lawrence</i>	731
1. The "Collapsible Error"	731
2. Maintaining Judicial Integrity	733
3. <i>Lawrence's</i> Attempt to "Right" <i>Bowers</i>	734
4. <i>Lawrence</i> : A Missed Opportunity	738
SUMMARY	743
THE RULE	744
THE EXCEPTIONS	745
THE COLLAPSIBLE ERROR PROBLEM	745

INTRODUCTION

Why does the question of the constitutionality of a state ban on marriage between persons of the same sex (the “Ban Case”)¹ cause intellectual disarray with respect to the analysis that should apply to evaluate it? After all, the Supreme Court has held that laws that infringe on fundamental rights, including the choice to marry,² must pass heightened scrutiny.³ This observation reflects a methodological rule that requires courts to apply heightened scrutiny if *either* a fundamental right *or* a suspect class is targeted by the underlying law and apply rational basis review if *neither* is involved (the “Rule”).⁴ Under the Rule, no one who takes the Court seriously would doubt that the question of the constitutionality of a law that prohibited gays from voting would be subject to heightened scrutiny.⁵ A law that prohibited gays from using contraceptives,⁶ from procreating,⁷ or from directing the upbringing of their children⁸ also presumably would have to pass heightened scrutiny to be constitutional.⁹ The Rule explains why many people might agree that heightened scrutiny would apply in these examples even though the Court has not ruled specifically on those issues. Because all of those rights are fundamental, the cases would call for heightened scrutiny.

¹ Some states have marriage laws that are neutral on their face but have been interpreted to mean marriage between a man and a woman. *See, e.g.*, *Baker v. Vermont*, 744 A.2d 864, 869 (Vt. 1999) (“These statutes . . . reflect the common understanding that marriage under Vermont law consists of a union between a man and a woman.”). Some states have passed initiatives to define marriage as between a man and a woman. *See, e.g.*, CAL. FAM. CODE § 300 (West 2007); MINN. STAT. § 517.01 (2007); NEV. REV. STAT. ANN. § 122.020 (2007). Other states have passed laws that explicitly prohibit same sex marriages. *See, e.g.*, GA. CODE ANN. § 19-3-3.1 (2002); IND. CODE § 31-11-1-1 (2007); VA. CODE ANN. § 20-45.2 (2007). For a thorough discussion of the status of this movement at the state level as of early 2007, see Mark Strasser, *State Marriage Amendments and Overreaching: On Plain Meaning, Good Public Policy, and Constitutional Limitations*, 25 LAW. & INEQ. 59 (2007).

² *Zablocki v. Redhail*, 434 U.S. 374 (1978) (applying heightened scrutiny to strike down a law requiring residents who had not paid non-custodial child support to obtain court approval to marry).

³ The important point in this Article focuses on the difference between rational basis review and heightened scrutiny, whether intermediate or strict. Accordingly, I use the term “heightened scrutiny” to include intermediate and strict scrutiny unless otherwise noted. Similarly, the term “suspect class” includes quasi-suspect classes unless otherwise noted.

⁴ Occasionally, the Court articulates the Rule. *See, e.g.*, *Romer v. Evans*, 517 U.S. 620, 631 (1996) (“[I]f a law neither burdens a fundamental right nor targets a suspect class, we will uphold the legislative classification so long as it bears a rational relation to some legitimate end.”).

⁵ *See Reynolds v. Sims*, 377 U.S. 533 (1964).

⁶ *See Griswold v. Connecticut*, 381 U.S. 479 (1965).

⁷ *See Skinner v. Oklahoma*, 316 U.S. 535 (1942).

⁸ *See Meyer v. Nebraska*, 262 U.S. 390 (1923).

⁹ Arguably, such laws would fall into the Ill Motives Exception, discussed *infra* Part I.C.2.

Some of the confusion with respect to the Ban Case is caused by the lack of a clear holding by the Court on whether sexual orientation is or is not a suspect or quasi-suspect classification. Some people read *Romer v. Evans*¹⁰ and *Lawrence v. Texas*¹¹ to stand for the proposition that sexual orientation is neither, and that therefore sexual orientation classifications are merely subject to rational basis review under the Rule.¹² Other readers of *Romer* and *Lawrence*, including myself, question these conclusions.¹³ Also contributing to the confusion is an uncertainty under substantive due process analysis about whether to define the underlying right broadly (marriage) or narrowly (gay marriage).¹⁴ A broad definition of the right presents a greater intellectual challenge for most people, while a narrower definition enables many to dismiss the question as silly.¹⁵

¹⁰ 517 U.S. 620 (1996). The *Romer* Court struck down, under rational basis review, Colorado's Amendment 2, which prohibited enactment of laws protecting gays from sexual orientation discrimination. *Id.*; see *infra* Part I.C.3.

¹¹ 539 U.S. 558 (2003). The *Lawrence* Court struck down, under rational basis review, a Texas law that criminalized consensual sodomy between adults of the same sex in the privacy of the home. *Id.*; see *infra* Part I.C.1.

¹² See, e.g., *Seymour v. Holcomb*, 790 N.Y.S.2d 858 (2005), *aff'd*, 811 N.Y.S.2d 134 (App. Div. 2006) (analyzing a challenge to the prohibition on same-sex marriage, the court cited *Lawrence* and *Romer* for the proposition that sexual orientation discrimination is subject to rational basis review).

¹³ See, e.g., Laurence H. Tribe, *Lawrence v. Texas: The "Fundamental Right" That Dare Not Speak Its Name*, 117 HARV. L. REV. 1893, 1916–17 (2004) (describing the Court's standard of review as "mysterious"); see also Suzanne B. Goldberg, *Equality Without Tiers*, 77 S. CAL. L. REV. 481 (2004); Recent Case, *Equal Protection—Sexual Orientation—Kansas Supreme Court Invalidates Unequal Punishments for Homosexual and Heterosexual Teenage Sex Offenders*, 119 HARV. L. REV. 2276 (2006) (exploring confusion over what level of review to apply in sexual orientation discrimination cases because of *Lawrence*). Moreover, the law in *Romer* was unconstitutional because it was enacted with animus toward gays, and the Court has held that harming an unpopular group for the sake of hurting them is never justification for a law. *U.S. Dept. of Agric. v. Moreno*, 413 U.S. 528, 534 (1973). Similarly, if a law cannot pass rational basis review, there is no reason to ask whether it would pass a higher standard of review, even if one theoretically applies. Justices Stevens and Rehnquist articulate the Rule in their *Cleburne* concurrence. See *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 452–53 (1985) (Stevens, J., concurring).

¹⁴ Compare WILLIAM N. ESKRIDGE, JR., *THE CASE FOR SAME-SEX MARRIAGE: FROM SEXUAL LIBERTY TO CIVILIZED COMMITMENT* 123–52 (1996) (defining the right broadly) with Lynn D. Wardle, *A Critical Analysis of Constitutional Claims for Same-Sex Marriage*, 1996 BYUL. REV. 1, 28–39 (defining the right narrowly). This Article uses the term "gay" to include gay men, lesbians, and bisexuals.

¹⁵ See, e.g., *Lawrence*, 539 U.S. at 605 (Thomas, J., dissenting) ("[T]he law before the Court today 'is . . . uncommonly silly.'" (quoting *Griswold v. Connecticut*, 381 U.S. 479, 527 (1965) (Stewart, J., dissenting))). The Court is split over the question of how broadly or narrowly rights should be defined under substantive due process. See *Michael H. v. Gerald D.*, 491 U.S. 110, 127 n.6 (1981) (referring to Brennan's dissent, Justice Scalia noted that "Justice Brennan criticizes our methodology in using historical traditions specifically relating to the

Significantly, this Article suggests that much of the confusion stems from a deeper problem lurking in the analysis: the possibility of committing the Collapsible Error. This error is made when the underlying right at issue is defined by the group targeted by the law: gay marriage, for example. In popular discourse, everyone understands what is meant by gay marriage. But in legal discourse, this tendency to reduce a group to an adjective that is then used to describe a right, has proven to be dangerous. This happened in *Bowers v. Hardwick*, in which the Court ostensibly skipped the equal protection analysis by conflating it into the due process analysis and holding that there is no fundamental right to engage in *homosexual sodomy*.¹⁶ Surprisingly, although the *Lawrence* Court avoided the Collapsible Error and even overruled *Bowers*,¹⁷ the potential to collapse substantive due process and equal protection analyses into one analysis lingers in sexual orientation discrimination cases. Is it any wonder that the popular description of marriage between two people of the same sex as “same-sex marriage” or “gay marriage” has contributed to the conflation of the legal concepts of rights (marriage) versus people (gays) and the associated analytical frameworks for analyzing them—substantive due process and equal protection, respectively?¹⁸

Unraveling the reasons for the present confusion over the methodology to apply in the Ban Case leads to an alarming observation: there is no prescribed methodology for analyzing sexual orientation discrimination cases. For mysterious reasons, many people think the Rule does not apply, and the level of review that would apply in sexual orientation discrimination cases remains unknown. It is as if gays are extra-constitutional. In a society that values equal citizenship,¹⁹ how did gays become vulnerable to such methodological uncertainty about their constitutional status?

This Article offers a path toward greater intellectual clarity to understand the Proper Methodology that should be applied to cases at the intersection of due process and equal protection, particularly those involving sexual orientation discrimination.²⁰

rights of an adulterous natural father, rather than inquiring more generally ‘whether parenthood is an interest that historically has received our attention and protection’’).

¹⁶ 478 U.S. 186 (1986), *overruled by* *Lawrence v. Texas*, 539 U.S. 558 (2003).

¹⁷ *Lawrence*, 539 U.S. at 578.

¹⁸ This might be one way to interpret Professor Robert Post’s observation that the *Lawrence* Court departed from its “sharp bifurcation between ‘fundamental’ liberty interests and other liberty interests.” Robert C. Post, *Foreword: Fashioning the Legal Constitution: Culture, Courts, and Law*, 117 HARV. L. REV. 4, 96 (2003). Nor is he alone in trying to figure out the analytical rule that derives from *Lawrence*. See, e.g., Tribe, *supra* note 13, at 1917 (“[T]he strictness of the Court’s standard in *Lawrence* . . . could hardly have been more obvious.”). Clearly, I respectfully disagree with Professor Tribe and think *Lawrence* fails rational basis review.

¹⁹ See generally KENNETH L. KARST, *BELONGING TO AMERICA: EQUAL CITIZENSHIP AND THE CONSTITUTION* (1989) (exploring the importance of equal citizenship for everyone).

²⁰ Perhaps it is easy to think that equal protection and due process intersect in relatively few cases that are easily discernible and, consequently, present little doubt about what standard

Part I analyzes a variety of Supreme Court cases at the intersection of due process and equal protection to demonstrate how the Rule evolved. The Rule is at the core of the Proper Methodology, and application of it is the relatively easy part of the methodology, particularly in *obvious* intersection cases. An obvious case is one in which the standard of review is established under the Rule. In contrast, a *non-obvious* case is one in which the Court has not established whether the underlying right is fundamental *and* also has not decided whether the targeted group is a suspect class. Naturally, a court can revisit a settled issue and treat the case as a non-obvious one. Because many people are confused about whether the Ban Case is an obvious or a non-obvious case, it invites deeper probing.

Thus, to completely understand the source of confusion in some intersection cases, like the Ban Case, one must also understand additional aspects of the Proper Methodology. One aspect involves two primary exceptions to the Rule, which I also lay out in Part I.²¹ The first exception arises in obvious cases in which heightened review theoretically applies, or in a non-obvious case might theoretically apply, but the laws are struck down because they lack a legitimate state interest. I call this the “Logical Exception,” because when a court finds a law cannot pass rational basis review, logically, it is unnecessary for the court to evaluate the law under a higher level of review even though one theoretically applies or might apply. The Court relies on this Exception, although it has not couched it this way. For example, this Exception is consistent with the Court’s fundamental principle that it generally will not unnecessarily decide constitutional questions (the “Principle”).²²

of review to apply. In reality, equal protection and due process are inextricably intertwined in many cases. Professor Laurence Tribe suggests they are “profoundly interlocked in a legal double helix.” Tribe, *supra* note 13, at 1898. Consequently, it is important to keep the analyses separate. Even rights that derive from state or congressional law—non-fundamental rights—must meet equal protection requirements. A state law that allows only women to drive cars would have to be justified under intermediate scrutiny. It is especially important not to fall into the trap that non-fundamental rights are within the domain of states’ sovereignty and therefore beyond equal protection strictures. The probability of falling into this trap increases if the underlying classification involves neither suspect nor quasi-suspect classes, because rational basis review applies under both due process and equal protection. Even in such cases, however, it is important to consider whether an Exception to the Rule applies, both of which are explored *infra* at Part I.C.

²¹ One other exception also exists: cases in which the Court applies a higher standard than called for given the underlying right and the class affected. *Plyler v. Doe*, is the classic example of this because the Court applied heightened review (under the guise of rational basis review) to strike down a state law that prohibited children of illegal immigrants from attending public school. 457 U.S. 202 (1982). Litigants who receive the benefit of the application of a higher standard than called for under the Rule have no cause for alleging a denial of their due process or equal protection rights.

²² See, e.g., *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 501 (1985) (holding that the Ninth Circuit erred in invalidating a law in its entirety instead of only partially, and stating that the Circuit Court had “formulate[d] a rule of constitutional law broader than is required by the

The second exception to the Rule arises in cases where the underlying law is ill-motivated; I call this the “Ill Motives Exception.” Prejudice and hostility by government officials are illegitimate motives, but there is a difference between a judicial finding that a law lacks a legitimate interest and a judicial finding that a law is ill-motivated. I suggest that the difference is relevant and that the Court, on occasion, has embraced this Exception. For example, under the Dormant Commerce Clause, the Court has explicitly held that a state law that intends to discriminate against interstate commerce in favor of its own interests is essentially *per se* unconstitutional.²³ Under equal protection analysis, the significance of a judicial finding of an ill motive is ambiguous. Although the Court has not articulated a “*per se* unconstitutional” rule under equal protection, it clearly denounces ill motives.²⁴

Part II focuses primarily on understanding how the Proper Methodology—the Rule, the Exceptions, the Principle, and the Collapsible Error—applies and should be followed in non-obvious cases. Courts deciding such cases have critical analytical choices to make. Assuming one of the Exceptions does not apply, a court must ascertain whether a case falls within the “either/or” or the “neither/nor” part of the Rule to know what level of review to apply. For example, if a court asks whether the underlying right is fundamental and answers the question “yes,” then heightened review would apply under the Proper Methodology, and under the Principle, there would be no need to address the suspect classification issue. If it answers the question “no,” however, then the Rule would require it to ask the equal protection question to decide whether a suspect classification is involved because if so, then heightened review would be required.

Conversely, if a court asks the equal protection question first and finds a suspect classification, then heightened review would apply and obviate the need to explore the fundamental rights question. If it does not find a suspect classification, however, the Rule would require the court to proceed to analyze the fundamental rights question, because heightened review would apply if a fundamental right were involved. Realize, it is possible for a court to proceed down both paths and find neither a fundamental right nor a suspect classification, which would place the case under the “neither/nor” part of the Rule. Clearly, whether a court proceeds down the

precise facts to which it is to be applied”). The Principle also is relevant under doctrines such as the “Adequate and Independent State Grounds” rule. *See, e.g.,* Fox Film Corp. v. Muller, 296 U.S. 207, 210 (1935) (“[W]here the judgment of a state court rests upon two grounds, one of which is federal and the other non-federal in character, our jurisdiction fails if the non-federal ground is independent of the federal ground and adequate to support the judgment.”).

²³ *See, e.g.,* City of Philadelphia v. New Jersey, 437 U.S. 617, 624 (1978) (“[W]here simple economic protectionism is effected by state legislation, a virtually *per se* rule of invalidity has been erected.” (citing a list of cases)).

²⁴ The existence of an ill-motive will trigger heightened scrutiny in an otherwise facially neutral law. *See* Pers. Adm’r v. Feeney, 442 U.S. 256 (1979) (sex); Washington v. Davis, 426 U.S. 229 (1976) (race).

substantive due process or the equal protection path first—or proceeds down only one of those paths when it should explore both under the Proper Methodology—can affect the general development of equal protection and substantive due process jurisprudence. Figures are attached to assist in understanding how the different parts of the Proper Methodology relate to each other. Figure 1 illustrates the Rule,²⁵ Figure 2 illustrates the Exceptions,²⁶ and Figure 3 illustrates the Collapsible Error problem.²⁷

Unless the Proper Methodology in all of its aspects is understood and applied correctly in intersection cases, it is likely that lower courts will replicate some of the Court's prior "improper" methodologies.²⁸ The Ban Case illustrates how terribly unjust the application of an improper methodology can be in particular contexts, raising concerns about judicial integrity. By "judicial integrity" I mean exploring and exposing possible biases judges might have toward particular groups that result in deviations from the Proper Methodology. In some instances, perhaps most, the biases can be the result of reflexive or unreflective responses to ingrained lessons.²⁹ The lessons fall on a continuum, with stereotypical thinking about particular groups on one end and actual beliefs in the superiority of some groups and the inferiority of others at the opposite end.³⁰ For purposes of this Article, I will refer to the ingrained lessons as the "normalization of differences."³¹ By disrupting old thought patterns, perhaps greater understanding can be obtained, and in turn, the normalization of

²⁵ See Figure 1 *infra* p. 744.

²⁶ See Figure 2 *infra* p. 745.

²⁷ See Figure 3 *infra* p. 745.

²⁸ This Article does not explore the possibilities of improving upon the current methodology. See Goldberg, *supra* note 13, at 484 (suggesting one standard of review); Toni M. Massaro, *Gay Rights, Thick and Thin*, 49 STAN. L. REV. 45 (1996) (arguing for application of rational basis review to evaluate anti-gay legislation for the purpose of avoiding confusion and getting to the crux of the matter: "What is wrong with homosexuality?").

²⁹ See, e.g., LESLIE HOUTS PICCA & JOE R. FEAGIN, *TWO-FACED RACISM: WHITES IN THE BACKSTAGE AND FRONTSTAGE* (2007) (describing extensive social science study documenting how whites are more likely to express racist sentiments behind closed doors—backstage). Naturally, judges—like legislators, commentators, and all people—evaluate cases from non-neutral views, although the biases inherent in this are not always made evident. See MARTHA MINOW, *MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION, AND AMERICAN LAW* (1990); Suzanne B. Goldberg, *Constitutional Tipping Points: Civil Rights, Social Change, and Fact-Based Adjudication*, 106 COLUM. L. REV. 1955 (2006).

³⁰ The idea of a continuum also forms the basis for John H. Ely's exploration of the role of prejudice in political process theory. See JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 135–79 (1980) (proposing that first-degree prejudice consists of hostility and second-degree prejudice consists of stereotyping). The purpose of my Article is not to suggest what is or is not meritorious about any particular theory. Rather, my purpose is to explore where the Court deviates from its own methodology.

³¹ See, e.g., Devon W. Carbado, *Black Rights, Gay Rights, Civil Rights*, 47 UCLA L. REV. 1467 (2000) (exploring how heterosexuality is normalized in such a way that it marginalizes the experiences of gays who are black).

differences among people will be less likely to unfairly influence judges' decision-making, particularly in ways that promote the biases.³² Understanding the Proper Methodology in intersection cases is important, and in the context of the Ban Case, it is time to bring gays, at a minimum, into the Constitution's analytical fold.³³

I. THE EVOLUTION OF THE PROPER METHODOLOGY

A. *From Rational Basis Review to Footnote Four*³⁴

Chief Justice John Marshall established the concept of rational basis review quite poignantly in *McCulloch v. Maryland*: "Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist [sic] with the letter and spirit of the constitution, are constitutional."³⁵ Although an Article I case, the concept of rational basis review—the idea that all legislation *at a minimum* must be rationally related to a legitimate government purpose—generally is not controversial. Minimum judicial review to evaluate the constitutionality of laws is consistent with preserving

³² Judges, including Supreme Court Justices, have shown significantly greater understanding over time about the role sexist stereotyping has played in the oppression of both women and men. Compare *Muller v. Oregon*, 208 U.S. 412 (1908) (holding that it is lawful to restrict the hours women could work in laundries because of their sex) with *Nevada Dep't of Human Res. v. Hibbs*, 538 U.S. 721 (2003) (holding that the Family Medical Leave Act successfully abrogates the state's sovereign immunity because the record established that employers continue to discriminate against men and women based on stereotypes). This is not to say the stereotypes do not win out on occasion, as they arguably did in *Nguyen v. INS*, 533 U.S. 53 (2001) (holding that children born out-of-wedlock are automatically given citizenship if the mother is a citizen, but the father must establish citizenship).

³³ Professor Cass R. Sunstein supports the Court's decision in *Romer* to strike down Amendment 2 for failing to pass rational basis review under his view that sometimes it is better to leave things undecided. See Cass R. Sunstein, *Foreword: Leaving Things Undecided*, 110 HARV. L. REV. 4 (1996). His analysis of *Romer* fits closely with my suggestion that *Romer*—as well as *U.S. Department of Agriculture v. Moreno*, 413 U.S. 528 (1973) and *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432 (1985)—belongs in the Ill Motives Exception, explored *infra* at Part I.C.2. Specifically, he states that the *Romer* Court's "rationality review, traditionally little more than a rubber stamp, is used to invalidate badly motivated laws without refining a new kind of scrutiny." Sunstein, *supra* at 61. If *Romer* stood for the proposition that discrimination based on animus toward gays is per se unconstitutional, then the status of gays under the Constitution would not be undecided. In fact, it would be a profound statement by the Court on the equal citizenship status of gays. Unfortunately, as this Article explores, it is not clear that *Romer* stands for this; therefore I argue that leaving the question of gays' analytical status under the Constitution undecided is itself a denial of due process and equal protection.

³⁴ *United States v. Carolene Prod. Co.*, 304 U.S. 144, 152 n.4 (1938).

³⁵ 17 U.S. (4 Wheat) 316, 421 (1819).

the supremacy of federal law, particularly the Constitution, a principle also at the heart of *McCulloch*.³⁶

In contrast, the *application* of minimum review has always been somewhat controversial, raising such questions as: What is a legitimate end? How closely does the fit between the law and the end need to be? Is a conceivable purpose sufficient or must the purpose be actual?³⁷ What is rational basis with “teeth”? Even Chief Justice Marshall acknowledged that laws enacted under pretexts would be unconstitutional.³⁸

Moreover, aside from pretextual laws, and even before the incorporation of the Bill of Rights and the expansion of substantive due process to include implied fundamental rights, the Court, under the rubric of rational basis review, “strictly scrutinized” cases that touched on especially important substantive rights. For example, in 1887 in *Mugler v. Kansas*, the Court upheld a state law that banned alcohol, presumably a legitimate end of the state’s police power.³⁹ *Mugler* is significant because it was a harbinger of things to come in *Lochner v. New York*,⁴⁰ as articulated by the first Justice Harlan who admonished that it is the duty of the courts to adjudge a state’s exercise of its police powers that “has no real or substantial relation to [the public morals, health or safety],” or is a “palpable invasion of rights secured by the fundamental law.”⁴¹

Similarly, before creation of the concept of suspect classifications, the Court “strictly scrutinized” laws that burdened racial minorities. The 1879 case of *Strauder v. West Virginia* illustrates this.⁴² In *Strauder*, the Court struck down a state law that prohibited black men from serving on juries in criminal trials.⁴³ Significantly, the decision challenged the reality of a white society that condoned racial discrimination and preferred that the races live separately, a preference the Court would constitutionalize less than twenty years later in *Plessy v. Ferguson*.⁴⁴ Separation of the races was quite rational to white society at the time. Thus, *Strauder* is a remarkable judicial stand against racism at a time when rational basis review was the only articulated methodology.

In addition to finding an implied fundamental right to contract in *Lochner* at the turn of the twentieth century,⁴⁵ the Court at that time also began to incorporate some of the Bill of Rights into the concept of “liberty” under the due process clause of the

³⁶ *Id.* at 327.

³⁷ The Court has held that any conceivable purpose will suffice. *See Williamson v. Lee Optical Inc.*, 348 U.S. 483, 487 (1955).

³⁸ *McCulloch*, 17 U.S. (4 Wheat) at 324.

³⁹ 123 U.S. 623 (1887).

⁴⁰ 198 U.S. 45 (1905).

⁴¹ *Id.* at 68 (Harlan, J., dissenting) (quoting *Mugler*, 123 U.S. at 661) (upholding a law that prohibited intoxicating beverages).

⁴² 100 U.S. 303 (1879).

⁴³ *Id.* at 310.

⁴⁴ 163 U.S. 537 (1896).

⁴⁵ *Lochner*, 198 U.S. at 53.

Fourteenth Amendment.⁴⁶ The growing judicial acknowledgment that some rights, ultimately termed “fundamental rights,” are more important than others understandably demanded that the Court use a procedural methodology to give greater judicial scrutiny when evaluating the constitutionality of laws that burdened those especially important rights. Justice Stone’s insights in footnote four in *United States v. Carolene Products* in 1938 expressed this need for heightened scrutiny when laws infringe on certain rights.⁴⁷ Moreover, Justice Stone’s insights also extended to equal protection and the need for heightened scrutiny when laws target discrete and insular minorities as they did in *Strauder*.⁴⁸ His famous footnote four captures his insights:

It is unnecessary to consider now whether legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation, is to be subjected to more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment than are most other types of legislation. . . . Nor need we enquire whether similar considerations enter into the review of statutes directed at particular religious, or national, or racial minorities, whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.⁴⁹

Footnote four generally is recognized as the source of the Rule; that is, that heightened scrutiny should apply in cases where a law infringes on a fundamental right or burdens a suspect class.⁵⁰

⁴⁶ See, e.g., *Gitlow v. New York*, 268 U.S. 652 (1925) (holding that the First Amendment right to freedom of speech and press is incorporated through the Due Process Clause of the Fourteenth Amendment); *Powell v. Alabama*, 287 U.S. 45 (1932) (holding that the Sixth Amendment right to counsel in capital cases is incorporated through the Due Process Clause of the Fourteenth Amendment).

⁴⁷ 304 U.S. 144, 152 n.4 (1938).

⁴⁸ Professor Michael Klarman demonstrates that the Court initially failed to rely on Justice Stone’s insights in the equal protection area to avoid creating a “presumptive rule against racial classifications,” something white society was unprepared to do before *Brown* and *Loving*. See Michael J. Klarman, *An Interpretive History of Modern Equal Protection*, 90 MICH. L. REV. 213, 226–41 (1991).

⁴⁹ *Carolene Products*, 304 U.S. at 152 n.4 (citations omitted).

⁵⁰ See ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 539–40 (3d ed. 2006); LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 582, 769 (2d ed. 1988). Renowned scholars have written about the limited utility of relying on the methodology suggested in footnote four to attain the ultimate goal to secure the “fairness of pluralist process,” including a commitment to equal citizenship of discrete and insular minorities. See, e.g., Bruce

B. The Rule

1. Laying the Foundation

Within a short time, the Court moved the suggestion in Justice Stone's footnote into the text of constitutional jurisprudence. For example, in *Skinner v. Oklahoma* the Court explicitly said it should apply strict scrutiny to evaluate the constitutionality of a state law that mandated sterilization of repeated larcenists but not repeated embezzlers.⁵¹ Although presented as an equal protection challenge,⁵² the *Skinner* Court did not defer to the state legislature and simply apply rational basis review, which presumably would have applied under equal protection because criminals are not a "discrete and insular" minority within the spirit of footnote four.⁵³ Rather, the Court emphasized, and seemed to be heavily influenced by, the importance of the right at stake—procreation—which the Court noted is "one of the basic civil rights of man."⁵⁴ Moreover, the Court went further and stated that "[m]arriage and procreation are fundamental to the very existence and survival of the race."⁵⁵ Notwithstanding these observations, however, it rightfully held that the law created an irrational distinction between repeated larcenists and repeated embezzlers.⁵⁶ Once the Court decided the law was irrational under equal protection, if it had followed the Principle, it would not have decided the fundamental rights question. In this way, *Skinner* truly is an equal protection case, but it is often cited, *even by the Court*, as the case in

A. Ackerman, *Beyond Carolene Products*, 98 HARV. L. REV. 713, 718 (1985). Most notably, a critique of footnote four is at the heart of John Ely's book. ELY, *supra* note 30. This is relevant to the discussion of what it means for a group to be "politically powerful," *infra* at Part I.C., a concept that remains ambiguous and whose deeper analysis is saved for another paper. In many ways, Professor Ackerman's prediction has come true. Specifically, he opined that if footnote four is read to suggest that discrimination against discrete and insular minorities would be justified as long as they eventually attain sufficient voting strength, then persistent prejudice against them could still be tolerated. See Ackerman, *supra* at 717. This bolsters the argument that ill motives, much of the time, are the crux of the problem. See *infra* Part I.C.

⁵¹ 316 U.S. 535, 541 (1942).

⁵² Chief Justice Stone, the author of footnote four, concurred in *Skinner* and would have placed the decision on a combination of procedural and substantive due process. Specifically, because of the importance of the right at stake, he believed that a criminal defendant was entitled to a hearing to show why he should not be sterilized. *Id.* at 544–45 (Stone, C.J., concurring).

⁵³ In *Turner v. Safley*, 482 U.S. 78 (1987), the Court held that all fundamental rights of prisoners will be subject to rational basis review for administrative purposes. See also *Lewis v. Casey*, 518 U.S. 343, 361 (1995) (relying on *Turner* for the same proposition); *infra* at Part II.A.

⁵⁴ *Skinner*, 316 U.S. at 541 (majority opinion).

⁵⁵ *Id.*

⁵⁶ *Id.* at 542 ("The equal protection clause would indeed be a formula of empty words if such conspicuously artificial lines could be drawn.").

which the Court theoretically upped the judicial review ante because of the importance of the substantive due process right at stake.⁵⁷

Only a few years later, the Court applied heightened scrutiny to an equal protection classification based on race.⁵⁸ In *Korematsu v. United States*, the Court explicitly held that “all legal restrictions which curtail the civil rights of a single racial group are immediately suspect. . . . [C]ourts must subject them to the most rigid scrutiny.”⁵⁹ *Korematsu* was an especially compelling case for the application of strict scrutiny because it was a “wash” case at the highest level. By this, I mean that strict scrutiny was bound to apply in the spirit of footnote four, because the law requiring the exclusion of anyone of Japanese ancestry from certain geographical areas burdened both a suspect class based on race and their fundamental right to liberty. It was necessary for the Court to analyze the case under equal protection because the only reason for denying members of the group of their liberty was their Japanese ancestry. Notwithstanding that this was one of the most difficult cases for the government to meet its burden of proof, the Court upheld the law. With hindsight, of course, the government acknowledged its mistake.⁶⁰

Notably, neither the *Skinner* nor the *Korematsu* Courts explicitly articulated the Rule, but this was the effect of the methodologies applied in those cases. Together, they mark the Court’s implicit adoption of the rule that in cases where due process and equal protection intersect, courts apply heightened review if *either* a fundamental right *or* a suspect class is involved.⁶¹ Outside of such cases, courts generally require that legislation merely pass rational basis review.⁶²

⁵⁷ Justice Stone explicitly opined that the correct inquiry was one of due process. *Id.* at 544 (Stone, J., concurring); *see, e.g.*, TRIBE, *supra* note 50, at 1464 (suggesting that the Court applied strict scrutiny because of fear that the sterilization law could be used to promote genocide).

⁵⁸ Professor Michael Klarman notes that the Court first created a presumption against racial classifications in *McLaughlin v. Florida*, 379 U.S. 184 (1964) (holding that a state law prohibiting cohabitation when the man and woman are of different races violates the Fourteenth Amendment under strict scrutiny); *see* Klarman, *supra* note 48, at 255. Interestingly, the *McLaughlin* Court cited to *Korematsu* to hold that racial classifications are subjected to the “most rigid scrutiny.” *McLaughlin*, 379 U.S. at 192 (citing *Korematsu v. United States*, 323 U.S. 214, 216 (1944)).

⁵⁹ *Korematsu*, 323 U.S. at 216. Notwithstanding this language by the Court, some scholars assert that the Court applied rational basis review. *See, e.g.*, Klarman, *supra* note 48, at 232 (“[N]otwithstanding the grandiose rhetoric, the Court actually applied its most deferential brand of rationality review [in *Korematsu*].”).

⁶⁰ *See* Sharon Elizabeth Rush, *The Heart of Equal Protection: Education and Race*, 23 N.Y.U. REV. L. & SOC. CHANGE 1, 53 (1997) (detailing the steps taken by the government).

⁶¹ *See, e.g.*, Michael J. Klarman, *The Puzzling Resistance to Political Process Theory*, 77 VA. L. REV. 747, 749 (1991) (calling Justice Stone’s footnote “the seminal statement of political process theory”).

⁶² A notable exception is *Plyler v. Doe*, a case in which the Court applied heightened scrutiny to strike down a state law that excluded undocumented children from its public schools.

2. The *Obvious* Intersection Case

Obvious intersection cases are easy to identify. They involve an established fundamental right and/or a suspect class, or they do not, as decided by the Court. Consider some classic examples of obvious intersection cases involving fundamental rights and economic legislation. Ordinarily, economic legislation is subject to rational basis review under equal protection. When economic legislation intersects with clearly established fundamental rights, however, the Court has applied heightened scrutiny. Specific examples include cases where the economic legislation infringes on the right to travel,⁶³ to marry,⁶⁴ to parental custody,⁶⁵ to access to courts in divorce proceedings,⁶⁶ and to vote.⁶⁷ Outside of economic legislation, other laws that classify non-suspect groups also generally must meet heightened scrutiny when the laws intersect with a fundamental right.⁶⁸ For example, the Court has held that a state law that limits voting rights to property owners or to parents must meet strict scrutiny.⁶⁹

457 U.S. 202 (1982). But even this case arguably comports with the Rule because alienage classifications are suspect. *See* *Graham v. Richardson*, 403 U.S. 365 (1971).

⁶³ *See* *Shapiro v. Thompson*, 394 U.S. 618, 629 (1969) (using strict scrutiny to strike down a state residency requirement for the receipt of welfare benefits by noting that the state law implicated the right to interstate travel, although the Court did not feel it necessary to say what provision of the Constitution guaranteed this right).

⁶⁴ *See* *Zablocki v. Redhail*, 434 U.S. 374 (1978) (invalidating a state law that required payment of past child support before a person could remarry).

⁶⁵ *See* *M.L.B. v. S.L.J.*, 519 U.S. 102, 124 (1996) (applying heightened scrutiny in a case where a mother could not afford the fee to file an appeal and risked losing custody of her children).

⁶⁶ *See* *Boddie v. Connecticut*, 401 U.S. 371, 377 (1971) (“[A]bsent a countervailing state interest of overriding significance, persons forced to settle their claims of right and duty through the judicial process must be given a meaningful opportunity to be heard.”) The Court did not extend this right generally but only because marriage/divorce was at stake. *Id.* at 376–77.

⁶⁷ *Harper v. Va. State Bd. of Elections*, 383 U.S. 663, 670 (1966) (applying an ambiguous standard, saying the poll tax was irrelevant to voter qualification, invidious discrimination was unconstitutional, and whenever a fundamental right was involved, “classifications which might invade or restrain them must be closely scrutinized and carefully confined”).

⁶⁸ A notable exception to this is the case of prisoners. In *Turner v. Safley*, the Court held that laws that burden the fundamental rights of prisoners need only be rationally related to a legitimate penological interest. 482 U.S. 78, 89 (1987); *see infra* Part II.A.

⁶⁹ *Kramer v. Union Free Sch. Dist. No. 15*, 395 U.S. 621 (1969). Interestingly, and in a different but related context, the Court held that Congress’s section 5 enforcement power is greater in situations where disability discrimination involves a fundamental right. *See, e.g., Bd. of Tr. of Univ. of Ala. v. Garrett*, 531 U.S. 356 (2001) (striking down Title I of the Americans with Disabilities Act (ADA) in a suit brought by a woman who was demoted following a leave to heal from breast cancer); *cf. Tennessee v. Lane*, 541 U.S. 509, 529 (2004) (upholding Title II of the ADA in a suit brought by a paraplegic who was unable to attend a criminal hearing on the second floor of the courthouse because there was no elevator, stating that “Title II is aimed at the enforcement of a variety of basic rights, including the right of access to the courts

Correlatively, when a suspect class is *obviously* targeted by a law, heightened review applies *even if* no fundamental right is involved. Restricting alcohol privileges (clearly not a fundamental right) to men or women calls for heightened review under equal protection.⁷⁰ Considering race⁷¹ or sex⁷² in public school admissions processes provides further examples where heightened review is utilized even though education is not a fundamental right.⁷³

Conversely, in obvious cases where *neither* a fundamental right *nor* a suspect class is involved, rational basis review clearly is the operative rule. The standard of review issue has been particularly focused in the area of economic legislation, which, as mentioned, generally is subject to rational basis review following the demise of *Lochner*. Perhaps the cases in which economic legislation and education intersect illustrate the Court's insistence on the application of rational basis review to evaluate laws that do not involve a fundamental right or suspect class. This was poignantly raised in *San Antonio Independent School District v. Rodriguez*, in which a class action suit was brought on behalf of poor Mexican-American children who argued that the Texas public education financing scheme violated equal protection.⁷⁴ The Court held that the state scheme was not subject to heightened scrutiny because it involved neither a fundamental right nor a suspect class.⁷⁵ Moreover, even though the Court acknowledged the importance of education to children, citing *Brown v. Board of Education*, it was unmoved to subject the law to a higher standard of review.⁷⁶ Under rational basis review, the Court upheld the tax scheme.⁷⁷

It is not easy for a law to fail rational basis review under the Rule, especially since the Court has held that any conceivable legitimate purpose will sustain a law.⁷⁸ *City*

at issue in this case, that call for a standard of judicial review at least as searching, and in some cases more searching, than the standard that applies to sex-based classifications").

⁷⁰ See *Craig v. Boren*, 429 U.S. 190 (1976).

⁷¹ See *Grutter v. Bollinger*, 539 U.S. 306 (2003).

⁷² See *United States v. Virginia*, 518 U.S. 515 (1996).

⁷³ See *San Antonio Ind. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 18 (1973).

⁷⁴ *Rodriguez*, 411 U.S. at 4–5.

⁷⁵ See *id.* at 28–30.

⁷⁶ *Id.* at 20 (citing *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954)) (“[E]ducation is perhaps the most important function of state and local governments.”).

⁷⁷ *Id.* at 54. In *Plyler v. Doe*, the Court applied a form of heightened review, mixed with rational basis review language, to strike down a law that prohibited undocumented children from attending public schools in Texas unless they paid tuition, even though the Court reiterated that education is not a fundamental right and did not base its standard of review on suspect classification grounds. 457 U.S. 202 (1982). Justice Brennan concluded that “the discrimination contained in [the law] can hardly be considered rational unless it furthers some substantial goal of the State.” *Id.* at 224.

⁷⁸ See, e.g., *Lindsley v. Natural Carbonic Gas Co.*, 220 U.S. 61, 78 (1911) (“When the classification . . . is called in question, if any state of facts reasonably can be conceived that would sustain it, the existence of that state of facts at the time the law was enacted must be assumed.”); see also *FCC v. Beach Commc’ns, Inc.*, 508 U.S. 307 (1993).

of *Cleburne v. Cleburne Living Center* is often used to illustrate a law that actually lacks a legitimate state interest.⁷⁹ At issue in *Cleburne* was the constitutionality of the city's denial of a special use permit needed to operate a group home for persons with "mental retardation."⁸⁰ The city ordinance did not require a special use permit for "apartment houses, multiple dwellings, boarding and lodging houses, fraternity or sorority houses, dormitories, apartment hotels, hospitals, sanitariums, nursing homes for convalescents or the aged (other than for the insane or feeble-minded or alcoholics or drug addicts), private clubs or fraternal orders, and other specified uses."⁸¹

The Court rightfully acknowledged that it is generally legitimate for the state to take into account real differences in the abilities and needs of persons with mental retardation compared to other groups.⁸² However, the Court was persuaded that the city's denial of the permit, as applied, served no legitimate purpose and was actually motivated by an irrational prejudice against persons with "mental disabilities."⁸³ It made no sense to require a special use permit for the group home for persons with "mental retardation" and not for any of the other groups.⁸⁴

The Court's methodology was partly proper in *Cleburne*, although this is less than clear.⁸⁵ This Article, of course, would place it in the Ill Motives Exception, and the implications of this are discussed more fully below.⁸⁶ Holding that analysis, because

⁷⁹ 473 U.S. 432 (1985).

⁸⁰ *Id.* at 436–37.

⁸¹ *Id.* at 447.

⁸² *Id.* at 444. More generally, this principle is embodied in all laws pertaining to disability discrimination. For a recent exploration of critical issues in this area, see Ruth Colker, *The Disability Integration Presumption: Thirty Years Later*, 154 U. PA. L. REV. 789 (2006); Michael Ashley Stein & Michael E. Waterstone, *Disability, Disparate Impact, and Class Actions*, 56 DUKE L.J. 861 (2006); Symposium, *The Americans with Disabilities Act at 15—Past, Present, & Future*, 75 MISS. L.J. 917 (2006).

⁸³ *Cleburne*, 473 U.S. at 450. Because of this, *Cleburne* would fit better in the Ill Motives Exception. See *infra* Part I.C.3.

⁸⁴ See *Cleburne*, 473 U.S. at 432.

⁸⁵ Justices Stevens and Rehnquist concur in *Cleburne*, making it clear that they do not think the three standards of review (strict scrutiny, intermediate scrutiny, and rational basis) are sharply defined. *Id.* at 451 (Stevens, J., concurring). They also explicitly articulated the Logical Exception to the Rule:

The rational-basis test, properly understood, adequately explains why a law that deprives a person of the right to vote because his skin has a different pigmentation than that of other voters violates the Equal Protection Clause. It would be utterly irrational to limit the franchise on the basis of height or weight; it is equally invalid to limit it on the basis of skin color. None of these attributes has any bearing at all on the citizen's willingness or ability to exercise that civil right. We do not need to apply a special standard, or to apply "strict scrutiny," or even "heightened scrutiny," to decide such cases.

Id. at 452–53.

⁸⁶ See *infra* Part I.C.3.b.

the Court held the City Council's decision failed rational basis review, under the Principle, one would not expect the Court to analyze the fundamental rights question or the suspect classification question. However, the Fifth Circuit Court of Appeals applied intermediate scrutiny to the city's decision to deny the permit because the right at stake (housing), although not fundamental,⁸⁷ was important,⁸⁸ and because persons with "mental retardation" constituted a quasi-suspect class.⁸⁹ The *Cleburne* Court reversed the holding of the Court of Appeals on the quasi-suspect classification issue⁹⁰ and, perhaps curiously, did not address the fundamental rights question. But the Court could have disposed of this quite easily, because it had already decided that there is no fundamental right to housing in *Lindsey v. Normet*,⁹¹ a case decided thirteen years before *Cleburne*. In *Lindsey*, the Court explicitly noted "the importance of decent, safe, and sanitary housing" but nevertheless applied rational basis review to the equal protection challenge in that case.⁹²

In a nutshell, then, *Cleburne* represents a case in which the law failed rational basis review under the Rule. Under the terminology used in this Article, it belongs in the III Motives Exception. The Court evaluated the suspect classification question to correct the lower court's error and did not need to ask whether there is a fundamental right to housing because that had already been decided. The *Cleburne* Court's methodology was partly proper, but the important point to highlight is that *Cleburne* is often used to illustrate how a law can fail rational basis review under the Rule.

3. The *Non-Obvious* Intersection Case

Recall that non-obvious cases involve rights that are not clearly fundamental or clearly non-fundamental and groups that are not clearly suspect or clearly not suspect. In other words, the non-obvious cases involve questions that the Court has not yet decided. The *initial* challenge for a court in non-obvious cases is *not* to figure out what level of review to apply but rather to figure out whether the case involves a fundamental right *or* a suspect class or fits within the Logical or III Motives Exception.

⁸⁷ See *Lindsey v. Normet*, 405 U.S. 56, 74 (1972).

⁸⁸ *Cleburne Living Ctr., Inc. v. City of Cleburne*, 726 F.2d 191, 199 (5th Cir. 1984), *aff'd in part, vacated in part*, 473 U.S. 432 (1985).

⁸⁹ *Id.* at 193.

⁹⁰ *Cleburne*, 473 U.S. at 442. The Fifth Circuit also applied the Proper Methodology by asking the "either/or" question, but it erred, according to the Supreme Court, in the conclusions it reached. *Id.* Interestingly, the Court of Appeals found that the mentally retarded fit all three criteria for suspect classification—immutability, political powerlessness, and history of discrimination—but held they were only a quasi-suspect class because sometimes it is necessary to pass legislation that discriminates against them. *Cleburne*, 726 F.2d at 198. The Appeals Court also held that heightened scrutiny was appropriate because the right at stake, although not fundamental, was important. *Id.* at 199.

⁹¹ 405 U.S. 56 (1972).

⁹² *Id.* at 74.

C. Exceptions to the Rule

1. The Logical Exception

Sometimes it is obvious that a fundamental right or a suspect class is targeted by a law, normally triggering heightened review under the Rule, but the Court nevertheless strikes down the law because it lacks a legitimate state interest. Cases in this category fall within the Logical Exception. Logically, it is unnecessary for a court to apply heightened scrutiny, even though it is theoretically the correct standard, if a law cannot meet rational basis review.⁹³ For example, imagine a state law that prohibited Capricorns from marrying Leos or a state law that said only vegetarians can vote in the election for President. Under the Rule, strict scrutiny normally would apply because the rights to marry and to vote are fundamental, but the cases should fall into the Logical Exception. Obviously, they cannot pass strict scrutiny because they cannot even pass rational basis review.

Notice that this Exception does not apply to cases like *Cleburne*, in which neither a fundamental right nor a suspect class was targeted by the law, thus requiring rational basis review to apply under the Rule, which the law failed.⁹⁴ Those cases simply lack a legitimate state interest under the Rule.⁹⁵ Particular care must be taken not to confuse the two types of cases, because it would be erroneous to subsume a Logical Exceptions case under the Rule. In obvious cases, like the hypothetical ones above, the error is of less import, because it is established that heightened review normally applies and presumably would apply in future cases involving the right to marry or to vote. No one would suppose, for example, that because a court invoked the Logical Exception that it also was holding that the underlying right was no longer fundamental⁹⁶ or that the class was no longer suspect. One would expect departures from precedent of that magnitude to be explicit. And the opposite also holds true. In an obvious case in which there is no fundamental right or suspect class and the Court chooses to revisit the issue, it is possible for the case to fit within an Exception and/or for the Court to hold that, on reconsideration, there is a fundamental right or suspect class involved. Such cases should be treated like non-obvious cases.

⁹³ See, e.g., *Hooper v. Bernalillo County Assessor*, 472 U.S. 612, 618 (1985) (holding that a residency requirement failed rational basis review so there was no need to apply heightened review). The Court also has applied this principle to cases that fail intermediate scrutiny. See, e.g., *Miss. Univ. for Women v. Hogan*, 458 U.S. 718 (1982) (holding that it was unnecessary to evaluate whether a law that excluded men from nursing school violated strict scrutiny when it failed intermediate scrutiny).

⁹⁴ See *Cleburne*, 473 U.S. 432.

⁹⁵ See *infra* Part I.C.3 for a discussion of the role of ill motives in *Cleburne*.

⁹⁶ In fact, the *Skinner* Court struck down the sterilization law because it irrationally treated embezzlers and larcenists unequally, and in violation of the Principle, the Court explicitly found a fundamental right to procreation and marriage. See *Skinner v. Oklahoma*, 316 U.S. 535 (1942); see also *infra* Part II.A.

This cautionary light shines bright in *Lawrence v. Texas*, in which the Court held unconstitutional a state law that criminalized sodomy between persons of the same sex because the law served no legitimate state interest.⁹⁷ On the one hand, *Lawrence* might seem like an obvious case because the Court held in *Bowers* that there is no fundamental right to engage in homosexual sodomy.⁹⁸ But *Lawrence* actually is a non-obvious case because the *Bowers* Court failed to follow the Proper Methodology and ask the equal protection question: are gays a suspect class? This failure is attributable to the Collapsible Error, and I analyze this in detail below.⁹⁹ Additionally, the *Lawrence* Court reconsidered the due process issue in *Bowers* and overruled it.¹⁰⁰ On reconsideration, treating it as a non-obvious case, *Lawrence* belongs in the Logical Exception.¹⁰¹ Significantly, the Court did not hold that there was no fundamental right involved, an interpretation Justice Scalia suggests in his dissenting opinion partly because the Court applied rational basis review and not strict scrutiny.¹⁰² Admittedly, it is difficult to articulate exactly what fundamental right is involved in *Lawrence*,¹⁰³ but it is clear that the Court placed the interest at stake within the sphere of “liberty” protected by the Due Process Clause.¹⁰⁴ As such, Justice Scalia is correct that laws

⁹⁷ 539 U.S. 558, 578 (2003).

⁹⁸ *Bowers v. Hardwick*, 478 U.S. 186 (1986).

⁹⁹ See *infra* Part II.B.1.

¹⁰⁰ *Lawrence*, 539 U.S. at 578.

¹⁰¹ To be more exact, I believe *Lawrence* falls into the Ill Motives Exception, although the Court down-played the degree of hostility behind the law and focused on the stigma associated with criminalizing sodomy between persons of the same sex. However, stigma is different from animus, the motivation behind Colorado’s Amendment 2. I explore the importance of this distinction *infra* at Part I.C.3.

¹⁰² *Lawrence*, 539 U.S. at 586 (Scalia, J., dissenting) (“Nor does [the majority] subject the Texas law to the standard of review that would be appropriate (strict scrutiny) if homosexual sodomy were a ‘fundamental right.’”).

¹⁰³ The Court held that “liberty” protects the “right to define one’s own concept of existence, of meaning, of the universe, and of the mystery of human life.” *Id.* at 574 (majority opinion) (quoting *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 851 (1992)). The *Lawrence* Court also speaks of dignity, autonomy, and personhood. *Id.*; see Marc Spindelman, *Surviving Lawrence v. Texas*, 102 MICH. L. REV. 1615 (2004) (providing an excellent analysis of the possible bases for the decision); see also Nan D. Hunter, *Living with Lawrence*, 88 MINN. L. REV. 1103 (2004) (suggesting the opinion lacked clarity); Andrew Koppelman, *Lawrence’s Penumra*, 88 MINN. L. REV. 1171, 1180 (2004) (proposing that the opinion suffers from “poor judicial craftsmanship”); Post, *supra* note 18, at 106 (acknowledging that the Court offered different bases for its decision but committed to neither).

¹⁰⁴ *Lawrence*, 539 U.S. at 562. But see Randy E. Barnett, *Justice Kennedy’s Libertarian Revolution: Lawrence v. Texas*, 2003 CATO SUP. CT. REV. 21 (suggesting that not all liberty interests are necessarily fundamental and persuasively arguing that *Lawrence* is a liberty case that required the state to carry the burden of justifying the law). Professor Barnett suggests that the Court did not find a fundamental right, but his concomitant suggestion that the law needed to be subjected to heightened review by shifting the burden to the state is the procedure used to analyze fundamental rights. *Id.* Some scholars place *Lawrence* under the “privacy”

that infringe on liberty interests normally must pass heightened scrutiny pursuant to the Rule. The Court did not need to engage in that analysis, however, because the Logical Exception applied. The Court held that morality could not be a legitimate reason for the law,¹⁰⁵ and there was no other legitimate reason, either.¹⁰⁶ It would be erroneous to conclude that *because* the *Lawrence* Court applied rational basis review, no fundamental right was involved. Clearly, it held the law interfered with the “liberty” rights of the couple.¹⁰⁷ Similarly, it would be erroneous to conclude that the Court held that sexual orientation is not a suspect classification, a question it did not need to answer consistent with the Principle.¹⁰⁸ In other words, placing a non-obvious case in the Logical Exception should not be interpreted as a judicial finding that the case does not involve a fundamental right or a suspect class. Reliance on *Lawrence* to support either proposition in that case is misplaced.

2. The Ill Motives Exception

a. Early Lessons from Race Discrimination

Early in our history, the Court acknowledged that racial prejudice is an illegitimate state interest. This was the *Strauder* Court’s primary rationale for striking down the law that prohibited blacks from serving on juries.¹⁰⁹ The dictionary defines “prejudice” to mean a “preconceived opinion that is not based on reason or actual experience.”¹¹⁰ Today, perhaps a synonym for “prejudice” might be “stereotype,” which means “a widely held but fixed and oversimplified image or idea of a particular type of person.”¹¹¹ Increasingly, the Court rejects stereotyping as a legitimate basis for discriminating, particularly in the area of gender equality.¹¹² The word “prejudice”

umbrella. *See, e.g.,* Jamal Greene, *Beyond Lawrence: Metaprivacy and Punishment*, 115 YALE L.J. 862 (2006). One might argue that the Court violated the Principle because it found a fundamental right. I disagree and suggest the *Lawrence* Court was correcting what it saw as an error in *Bowers v. Hardwick*, where the Court held there was no fundamental right to engage in homosexual sodomy. 478 U.S. 186 (1986). By correcting its mistake in *Bowers*, the *Lawrence* Court, to a large extent, withdrew its participation in the denial of gays’ due process and equal protection rights brought on by that case. *See infra* Part II.B.3.

¹⁰⁵ *Lawrence*, 539 U.S. at 577.

¹⁰⁶ *Id.* at 578.

¹⁰⁷ *See id.*

¹⁰⁸ This is far more complicated than presented at this point. *See infra* Part II.

¹⁰⁹ *Strauder v. West Virginia*, 100 U.S. 303, 310 (1879).

¹¹⁰ THE NEW OXFORD DICTIONARY 1344 (2d ed. 2005).

¹¹¹ *Id.* at 1670.

¹¹² *See, e.g.,* Nev. Dep’t of Human Res. v. Hibbs, 538 U.S. 721, 727 (2003) (upholding Congress’s power to abrogate states’ sovereign immunity in the Family Medical Leave Act to counter the discriminatory effects of gender stereotypes); *United States v. Virginia*, 518 U.S. 515, 541 (1996) (holding that the male-only admission policy at Virginia Military Institute was

at the time of *Strauder*, of course, carried the full import of white society's belief in white superiority and the inferiority of people of color, in particular blacks, in ways that denied their full humanity.¹¹³ In this way, racial prejudice resembled more the concept of "hostility," which means "unfriendliness or opposition."¹¹⁴ It would be inaccurate and an injustice to describe racial hostility as merely a matter of prejudice. This became evident only six years later in *Yick Wo v. Hopkins*, which is a clear articulation of the principle that racial hostility is an illegitimate motive under equal protection.¹¹⁵ Recall that in *Yick Wo*, a city ordinance required that laundries be operated only in brick or stone buildings.¹¹⁶ Almost one hundred percent of the non-Chinese applicants who sought exemption from the requirement were allowed to operate their laundries in wooden buildings.¹¹⁷ In contrast, none of the roughly 200 Chinese applicants was given an exemption from the requirement under the ordinance.¹¹⁸ *Yick Wo* was imprisoned for violating the ordinance and challenged the administration of the otherwise neutral law.¹¹⁹ The Court could not find a legitimate reason for the law and held that the only reason for the discrimination against the Chinese applicants in the administration of the law was "hostility to the race and nationality to which [they] belong, and which in the eye of the law is not justified."¹²⁰

Notably, the Rule had not been developed when *Strauder* and *Yick Wo* were decided. Significantly then, the notion that prejudice, particularly racial hostility, is illegitimate came into being under the only articulated standard of review that existed: rational basis. More significantly, history teaches that racial discrimination, which clearly was motivated by hostility, was "rational" in the eyes of white society for a long time and certainly at the time of *Strauder* and *Yick Wo*. It was not long until *Plessy v. Ferguson* and the separate but equal doctrine constitutionalized racial discrimination.¹²¹ Had the analytical rule been that a rational reason for a law could save it even though it was motivated by racial hostility, *Strauder* and *Yick Wo* presumably would have gone the other way. Accordingly, a fair reading of those cases is that racial hostility makes a law per se unconstitutional even if a "legitimate" (at

invalid because it was based on stereotypes); *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 725 (1982) (holding a female-only admission policy to state nursing school invalid because it was based on stereotypes).

¹¹³ See generally W.E.B. DUBOIS, *THE SOULS OF BLACK FOLKS* (1903) (presenting the meaning of being black in the twentieth century); Cheryl I. Harris, *The Whiteness of Property*, 106 HARV. L. REV. 1709 (1993) (discussing the relationship between racial identity and property ownership).

¹¹⁴ THE NEW OXFORD DICTIONARY 823 (2d ed. 2005).

¹¹⁵ 118 U.S. 356, 373 (1886).

¹¹⁶ *Id.* at 368.

¹¹⁷ *Id.* at 374.

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ 163 U.S. 537 (1896).

the time) reason could otherwise support it. The *Strauder* and *Yick Wo* Courts, by exposing the unfair bias behind the laws and applying a methodology that did not condone the bias, enhanced their integrity.

With hindsight, of course, modern society has a much deeper understanding of racism, and most whites would never conclude that laws like those enacted under the separate but equal doctrine are rational or motivated by anything but racial hostility. The methodology in *Strauder* and *Yick Wo*, as exceptional as those cases were, reflected the spirit and purpose of the Fourteenth Amendment as articulated in the *Slaughter-House Cases*¹²² in 1873 and as now accepted by society.

Significantly, the genesis for recognizing that ill-motivated laws are different from other laws can be found in Justice Stone's famous footnote four.¹²³ Recall that he suggested that heightened scrutiny might be appropriate when laws are motivated by prejudice against discrete and insular minorities.¹²⁴ Moreover, the logic and importance of this concept, particularly in the context of racial discrimination, endures under the now existing Rule. For example, in *Loving v. Virginia*, the Court struck down Virginia's anti-miscegenation statute because it found the law was intended to promote "White Supremacy" (which was even capitalized in the opinion) and served no other legitimate purpose.¹²⁵ Despite the Court's holding in *Brown v. Board of Education*, denouncing racial segregation in public education and setting the stage for the end of the separate but equal doctrine throughout society,¹²⁶ many whites clung to out-dated negative stereotypes about blacks and other people of color that reflected much deeper racial hostility. For many whites, their thinking about race relations was entirely rational. The *Loving* Court, like the *Strauder* and *Yick Wo* Courts, however, did not succumb to the ostensible "rationality" behind the racial hostility that shaped the ideology of white supremacy. Instead, it implicitly applied the Ill Motives Exception to strike down the law.¹²⁷

One might wonder, then, why the *Loving* Court explicitly held that strict scrutiny was the proper standard of review to apply because the law classified on the basis of race.¹²⁸ Further, why did the Court also hold that the statute deprived the Lovings of their fundamental right to marry under substantive due process?¹²⁹ Because *Loving* is an obvious intersection case, strict scrutiny presumptively was bound to apply because it was a "wash" case at the highest level, just like in *Korematsu*.¹³⁰ Perhaps

¹²² 83 U.S. (16 Wall.) 36 (1873).

¹²³ *United States v. Carolene Prod. Co.*, 304 U.S. 144, 152 n.4 (1938).

¹²⁴ *Id.*

¹²⁵ 388 U.S. 1, 11 (1967).

¹²⁶ 347 U.S. 483 (1954).

¹²⁷ See Figure 2 *infra* p. 745.

¹²⁸ *Loving*, 388 U.S. at 11.

¹²⁹ *Id.* at 12. Professor Pamela Karlan suggests *Loving* "marked the rebirth of substantive due process." Pamela S. Karlan, *Foreword: Loving* Lawrence, 102 MICH. L. REV. 1447, 1448 (2004).

¹³⁰ See *supra* notes 58–60 and accompanying text.

the Court's unnecessary (as a matter of procedure) invocation of the rhetoric of strict scrutiny, coupled with its acknowledgment that White Supremacy motivated the law, were meant to emphasize how odious the law was, a particularly compelling message coming from the Court in the late 1960s. Perhaps the Court felt it was a matter of judicial integrity to acknowledge the racism behind the law and follow a methodology that emphasized the inequality, and therefore unconstitutionality, of the law. As a matter of judicial integrity, the *Loving* Court refused to participate in and sanction the racial hostility. Certainly, the Court's invocation of strict scrutiny and its decision to strike down the law under equal protection and due process analyses did not violate its Principle to refrain from unnecessarily deciding constitutional questions. It merely reiterated established law.¹³¹ In this way, the Court's emphasis on the hatred behind the law reinforces the idea that racial hostility itself is reason enough to invalidate a law, although the Court has never explicitly held this.

b. From Racial Hostility to Prejudice

Many people might be surprised to learn that a law can be ill-motivated and still possibly pass constitutional muster. The seeds for this possibility were planted in 1973 in *U.S. Department of Agriculture v. Moreno*.¹³² In *Moreno*, the Court held unconstitutional a provision of the federal food stamp program that limited assistance to "related" persons living in the household.¹³³ A stated purpose of the limitation was "to prevent so-called 'hippies' and 'hippie communes' from participating in the food stamp program."¹³⁴ The Court held the limitation was an unconstitutional denial of equal protection, and its reasoning remains a central part of modern jurisprudence:

[I]f the constitutional conception of "equal protection of the laws" means anything, it must at the very least mean that a bare . . . desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest. As a result, "[a] purpose to discriminate against hippies cannot, in and of itself and without reference to [some independent] considerations in the public interest, justify the [law]."¹³⁵

Interestingly, the *Cleburne* Court cited this quotation in *Moreno* and ultimately struck down the city's denial of a special use permit for a home for persons with

¹³¹ See *infra* Part II.A (analyzing how shaky this holding truly was).

¹³² 413 U.S. 528 (1973).

¹³³ *Id.* at 529.

¹³⁴ *Id.* at 534 (citing H.R. REP. NO 91-1793, at 8 (1970) (Conf. Rep)).

¹³⁵ *Id.* at 534–35 (quoting the lower court at 345 F. Supp. 310, 314 n. 11 (D.D.C. 1974)). In *Bolling v. Sharpe*, the Court held that the standards for evaluating constitutional claims under the Fifth and Fourteenth Amendments are the same. 347 U.S. 497 (1954).

“mental retardation” because “[t]he short of it is that requiring the permit in this case appears to us to rest on an *irrational prejudice* against the mentally retarded.”¹³⁶ This is different from saying the law merely lacks a legitimate state interest and therefore fails rational basis review under the Rule. Laws can lack legitimate state interests under the Rule without being motivated by prejudice and therefore fall more appropriately within the Ill Motives Exception. For example, in *Allegheny Pittsburgh Coal v. Webster County*, the Court unanimously struck down a property taxing scheme that resulted in unfair disparities in assessed property values over a period of time.¹³⁷ The Court rejected the state’s proffered justification that the scheme was rationally related to its interest in “assessing properties at true current value.”¹³⁸

Here it is important to highlight the word “bare” in the *Moreno* quote.¹³⁹ The government’s “desire to harm” the hippies was not the reason for striking down the law.¹⁴⁰ Rather, it was the *only* reason for the law, which otherwise lacked a legitimate government interest. If a legitimate interest had supported the law, then the desire to harm the hippies would not have invalidated it. Similarly, what made the City of Cleburne’s denial of the permit unconstitutional? It was not the city officials’ prejudice against persons with “mental retardation”; it was their lack of a legitimate state interest in requiring the permit. Stated alternatively, under the *Moreno/Cleburne* rule, it is possible for a law to be ill-motivated and be constitutional *as long as* the government adequately justifies the law. The Ill Motives Exception does not reflect a *per se* rule.

3. The Importance of the Ill Motives Exception

a. Why the Distinction Matters

So why create a separate Ill Motives Exception, especially since fitting into it does not mean that the law is necessarily unconstitutional? In some cases, like *Moreno* and *Cleburne*, it is irrelevant to the outcome. Still, the *Moreno* and *Cleburne* Courts’ denouncement of the irrational prejudice against hippies and persons with “mental retardation,” respectively, marked a significant difference between striking down a law because it lacks a legitimate state interest (either under the Rule or the Logical Exception) and placing a case within the Ill Motives Exception. Thus, a more reflective answer suggests at least four possible ways in which a judicial acknowledgment of ill motives, and not just illegitimacy, *does* matter.

¹³⁶ *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 450 (1985) (emphasis added).

¹³⁷ 488 U.S. 336 (1989).

¹³⁸ *Id.* at 343.

¹³⁹ See *supra* text accompanying note 135.

¹⁴⁰ *Moreno*, 413 U.S. at 534.

First, the presence and intensity of ill motives matter under equal protection. It is disingenuous to approach equal protection analysis from the premise that the struggle for equality for all groups is the same or meets the same resistance. How much groups are feared or hated is directly related to how hard their struggle has been and continues to be. The different levels of review under equal protection rightfully reflect this by taking into consideration the history of discrimination against a group and their concomitant political powerlessness. Even a facially neutral law that disparately impacts members of a racial group generally will be subject to rational basis review *unless* it has a discriminatory purpose, thereby triggering heightened scrutiny.¹⁴¹

Lessons from the history of race discrimination cases teach us that not all ill motives are the same, and exposing them for what they are reduces the chances that an extreme ill motive toward a group can be masked behind a more benign sentiment that insulates the law from a more critical analysis and also possibly misrepresents the degree of prejudice or hostility toward a group. This happened in *Cleburne*. The sentiment expressed in the *Moreno* quotation—"a bare . . . desire to harm"¹⁴²—bespeaks more of hostility than of prejudice. Unfortunately, this harsher sentiment perhaps was tempered by the fact that the targeted group in *Moreno* was hippies. With all due respect to hippies, it is impossible to take seriously a suggestion that the two groups are "identical" with respect to the ill motives society feels toward them.

If the *Cleburne* Court had acknowledged that the denial of the special use permit was motivated by "a desire to harm," that is, hostility, or even a deep-seeded historical "prejudice" different in kind from the prejudice against hippies, that might have brought to mind cases like *Strauder*, *Yick Wo*, *Korematsu*, and *Loving*. For example, Justice Marshall, dissenting in *Cleburne*, clearly saw the difference between the ill motives of prejudice and hostility and felt more searching judicial review was called for when hostility might have been the governing ill motive.¹⁴³ He analogized the discrimination against people with "mental retardation" to the lengthy history of the unequal treatment of women and racial minorities.¹⁴⁴ Justice Marshall took exception to the majority's holding that people with "mental retardation" are not a quasi-suspect class because he believed that heightened review was called for, just as it is with respect to classifications based on sex and race, to make sure "the hostility or thoughtlessness with which there is reason to be concerned has not carried the day."¹⁴⁵

¹⁴¹ See, e.g., *Washington v. Davis*, 426 U.S. 229, 241 (1976) ("A statute, otherwise neutral on its face, must not be applied so as invidiously to discriminate on the basis of race.").

¹⁴² *Moreno*, 413 U.S. at 534.

¹⁴³ See *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 464 (1985) (Marshall, J., dissenting).

¹⁴⁴ *Id.* at 462.

¹⁴⁵ *Id.* at 472. Equally troubling to Justice Marshall was the majority's holding that an illegitimate purpose does not invalidate a law as long as some legitimate purpose supports it. *Id.* at 474. He cited the Court's precedent for striking down laws that are enacted with a

Second, acknowledging ill motives is symbolically important. Because officially sanctioned prejudice and hostility are inconsistent with equality principles, many people will be surprised to learn that a law can be ill-motivated and still possibly pass constitutional muster. Ill motives strike at the heart of the very value of equal protection. Moreover, society functions on the premise that government officials carry out their duties in good faith. In fact, their good faith generally immunizes them from suits for money damages in the event they violate an individual's rights.¹⁴⁶ It assaults our collective sense of fairness to think that government officials can, and sometimes do, act in their official capacities on their prejudices and hostilities toward certain groups, and it is unacceptable to think they might get away with it. The *Moreno* and *Cleburne* Courts' denouncement of the irrational prejudice against hippies and persons with "mental retardation," respectively, did not affect the outcomes in those cases, but it had important symbolic significance. The Court enhanced its integrity by acknowledging the difference between irrational laws and irrational prejudice against a group.

Third, not only is it important for government officials, including judges, who see government prejudice and hostility to expose it, but they also cannot participate in it.¹⁴⁷ Many people who harbor ill feelings or thoughts about particular groups might not recognize or characterize their thoughts as biased because many differences among people have been normalized.¹⁴⁸ To the extent this is true in a given situation, an

discriminatory purpose even if legitimate reasons might exist in support of them. *Id.* at 476 n.25 ("If a discriminatory purpose infects a legislative Act, the Act itself is inconsistent with the Equal Protection Clause and cannot validly be applied to anyone."). In the final analysis, it seems Justice Marshall was advocating for the Ill Motives Exception, which would have mooted the analysis under the Rule.

¹⁴⁶ See *Harlow v. Fitzgerald*, 457 U.S. 800 (1982).

¹⁴⁷ Perhaps this was most poignantly illustrated by *Shelley v. Kraemer*, in which the Court held that a court's enforcement of a private contract that promoted race discrimination constituted "state action." 334 U.S. 1, 14 (1948). By suggesting that judges cannot participate in the denial of rights, I mean this not only in the controversial *Shelley* sense, but also in the larger sense of the need for judges to maintain their integrity.

¹⁴⁸ Recent literature is exposing gaps in the evidence about the causal relationship, if any, between subconscious prejudice and concomitant prejudicial behavior by individuals. See, e.g., Gregory Mitchell & Philip E. Tetlock, *Antidiscrimination Law and the Perils of Mindreading*, 67 OHIO ST. L.J. 1023 (2006). At the center of the discussion seems to be the Implicit Association Test (IAT), designed to measure how a person thinks or feels about certain groups without asking them explicitly. This is explained in an article by Anthony G. Greenwald et al., *Measuring Individual Differences in Implicit Cognition: The Implicit Association Test*, 74 J. PERSONALITY & SOC. PSYCHOL. 1464, 1474 (1998). This growing debate is in response to a body of literature that builds on the presumption that there is a causal relationship, which began with the seminal piece by Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987). See also Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161 (1995). For

equality-minded person can unwittingly contribute to inequality dynamics.¹⁴⁹ Stated alternatively, a person who has normalized differences cannot be certain to avoid participating in the dynamics of inequality even though he or she would not consciously behave in such ways. In fact, many people self-identify as equality-minded and yet do not understand the complex dynamics of discrimination, including how individually ingrained thought patterns *and* institutional biases contribute to the inequality of some groups.¹⁵⁰

Naturally, from the “outsider’s” perspective, it is difficult to conclude that dominant groups do not “know” on some level of consciousness that they have biased beliefs and that those beliefs undoubtedly influence their behavior and judgment.¹⁵¹ At some point, equality-minded people must assume responsibility for educating themselves about the dynamics of inequality.¹⁵² For an equality-minded person, what one does not know about the dynamics of inequality can hurt the person’s cause. For government leaders, including judges, what one does not know about the dynamics can hurt society’s cause—to achieve equality for everyone.¹⁵³

This possibility lurking in *Cleburne* might explain why the Court did not stop its analysis with its inability to find a legitimate purpose for the permit requirement and consequently tried to establish that the mentally retarded are *not* the target of prejudice. The Court might have thought that would be so mean-spirited that it just could not have been the motivation of the city council members, presumably people of goodwill, who voted three to one to deny the permit.¹⁵⁴ In the final analysis, however, this conclusion was unavoidable.

compelling evidence of a causal relationship between the existence of ill motives and the tendency to act on them, see PICCA & FEAGIN, *supra* note 29.

¹⁴⁹ See, e.g., SHARON E. RUSH, *LOVING ACROSS THE COLOR LINE: A WHITE ADOPTIVE MOTHER LEARNS ABOUT RACE* (2002). In this book, I explore how my own lack of understanding about race discrimination dynamics impeded my ability to more effectively and consciously avoid participating in the dynamics of inequality.

¹⁵⁰ See JOE R. FEAGIN ET AL., *WHITE RACISM: THE BASICS* (2d ed. 2001); Barbara J. Flagg, “*Was Blind, But Now I See*”: *White Race Consciousness and the Requirement of Discriminatory Intent*, 91 MICH. L. REV. 953 (1993).

¹⁵¹ See generally PICCA & FEAGIN, *supra* note 29 (documenting how whites act in non-racist ways in public (front stage) but behave in racist ways in private (back stage), indicating they know the difference).

¹⁵² See Sharon Elizabeth Rush, *Sharing Space: Why Racial Goodwill Isn’t Enough*, 32 CONN. L. REV. 1 (1999).

¹⁵³ See Jon Hanson & Kathleen Hanson, *The Blame Frame: Justifying (Racial) Injustice in America*, 41 HARV. C.R.-C.L. L. REV. 413, 480 (2006) (“Blackness, badness, violence, and criminality are closely linked in the minds of most Americans. The easy association usually operates outside our conscious awareness; our stereotypes and prejudices do not feel chosen. But the effects are real, and the absence of conscious ‘choice’ does not imply an absence of responsibility. Our commitment, after all, is to freedom and justice for all, not to some illusion.” (footnote omitted)).

¹⁵⁴ *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 437 (1985).

If an individual is truly equality-minded, he or she presumably would appreciate learning about those dynamics in order to guard against protecting government ill motives. Judges who uncover ill motives serve the public's best interest by exposing them, because exposure informs the democratic process; it provides information for the day-to-day discussions among people, and it invites more formal efforts to gain greater understanding of the dynamics of discrimination with an eye toward eliminating it. Exposure of prejudice and hostility is an enormously important first step in a journey of a thousand miles toward equality.¹⁵⁵

b. From Prejudice to Political Unpopularity

Yet, the fourth reason to acknowledge the difference between a finding of illegitimacy and invoking the Ill Motives Exception is to avoid perpetuation of the inequality. Again, the *Cleburne* Court's analysis is informative of what happens when an ill motive behind a law is down-played. Specifically, the *Cleburne* Court not only shifted the focus away from the "desire to harm" language (hostility) to "prejudice," but it further shifted the focus to the question of whether persons with "mental retardation" are a "politically unpopular group."¹⁵⁶ Most of the *Cleburne* Court's opinion is devoted to searching for *some* rational reason for the permit requirement, which would have saved it under *Moreno*, while simultaneously disputing its own ultimate conclusion that people with "mental retardation" are the target of prejudice. As the Court observed in a footnote, citing to John Ely, Dean of Stanford Law School and former Professor at Harvard and Yale, "[s]urely one has to feel sorry for a person disabled by something he or she can't do anything about, but I'm not aware of any reason to suppose that elected officials are unusually unlikely to share that feeling."¹⁵⁷

Accordingly, the Court focused on the "politically unpopular" language of *Moreno*¹⁵⁸ and explored how people with "mental retardation" are unlikely to be the target of prejudice *because* they are not politically unpopular as evidenced by the positive body of law enacted on their behalf.¹⁵⁹ The Court noted that both the federal and many state governments, including the state of Texas, had enacted laws against disability discrimination, indicating "that the lawmakers have been addressing [the mentally retarded's] difficulties in a manner that belies a continuing antipathy or

¹⁵⁵ Lao-tzu, a Chinese philosopher, said, "The journey of a thousand miles begins beneath one's feet." LAOZI, *TAO TE CHING: THE BOOK OF THE WAY* 458 (Moss Roberts ed. 2001). This is popularly phrased, "The journey of a thousand miles begins with a single step." The Quotations Page, <http://www.quotationspage.com/quote/24004.html> (last visited Nov. 25, 2007).

¹⁵⁶ *Cleburne*, 473 U.S. at 447.

¹⁵⁷ *Id.* at 442 n.10 (quoting ELY, *supra* note 30, at 150).

¹⁵⁸ *U.S. Dep't of Agric. v. Moreno*, 413 U.S. 528, 534 (1973).

¹⁵⁹ *Cleburne*, 473 U.S. at 442-46.

prejudice.”¹⁶⁰ Such legislative effort, “which could hardly have occurred and survived without public support, negates any claim that the mentally retarded are politically powerless in the sense that they have no ability to attract the attention of the lawmakers.”¹⁶¹

The *Cleburne* Court’s conception of what it means for a group to be politically popular, as measured by legislative victories, is somewhat understandable. Favorable legislation is evidence that a particular law is not ill-motivated. But the Court’s conception also is dangerously flawed. Notice the huge leap the *Cleburne* Court made, extrapolating from its observation that because some anti-discrimination laws exist to protect people with “mental retardation,” that means they are not the target of prejudice or hostility. This belies the Court’s own finding in the case.

Significantly, the struggle for equal protection is not about political *popularity*; it is about political *power*. The *Cleburne* Court uses both words,¹⁶² and there is some relationship between them. It bears emphasizing that how much a group is feared or hated generally is related to how much or how little political power they have. But political power is different from political popularity. Political power is about gaining equal citizenship on an enduring basis. Sometimes people, perhaps as a matter of principle, use their political power to support even very politically unpopular groups that are the target of prejudice or hostility. The Americans with Disabilities Act (ADA) provides an example.¹⁶³ Progress toward equality for politically powerless groups necessarily relies on the goodwill, understanding, and ultimately the integrity of the politically powerful. Sometimes this will manifest itself in the ordinary democratic process (majority wins), as it did with the ADA. Other times it must manifest itself in decisions by politically powerful figures—like judges—who are called upon in the democratic process to protect “constitutional values in our scheme of government even more fundamental than perfected pluralism—most notably, those that bar prejudice against [discrete and insular minorities].”¹⁶⁴

By juxtaposing “political power” against “political popularity,” as the Court did in *Cleburne*, the Court undermined both concepts and reduced the chances that people with “mental retardation” would be classified as a quasi-suspect or a suspect class even though they are politically powerless *as a group*, which in turn, results from the widespread prejudice and fear of them. Recall that “political powerlessness” is a

¹⁶⁰ *Id.* at 443.

¹⁶¹ *Id.* at 445. Moreover, adding to the Court’s apparent confusion, it rightfully acknowledged that it can be rational to legislate in ways that account for the reality that people with “mental retardation” have differences that lawfully can and should be taken into account.

¹⁶² *Id.* at 438, 447.

¹⁶³ 42 U.S.C. § 12101 (2000).

¹⁶⁴ Ackerman, *supra* note 50, at 746. I substituted the broader category “discrete and insular minorities” for “racial and religious minorities” in the spirit of Ackerman’s critique of footnote four.

major criterion the Court uses to classify groups as suspect.¹⁶⁵ In turn, under the Proper Methodology, any equal protection claims of discrimination against them would merely have to be rational to withstand constitutional scrutiny.

c. From *Cleburne* to *Garrett* and *Lane*

This misguided focus highlights the importance of understanding the Proper Methodology, because the *Cleburne* Court's analysis has had enormous consequences *twenty years later*¹⁶⁶ with respect to Congress's section 5 power to enact the ADA.¹⁶⁷ In *Board of Trustees of the University of Alabama v. Garrett*, the Court held that state employees are barred by the Eleventh Amendment from seeking money damages against the state for alleged violations of Title I of the ADA, which prohibits discrimination against persons with disabilities in employment.¹⁶⁸ Patricia Garrett was effectively demoted from the position of Director of Nursing at the University of Alabama upon her return to work following treatment for cancer.¹⁶⁹ Only four years later, in *Tennessee v. Lane*, the Court upheld the right of private litigants to sue the state for money damages for violations of Title II of the ADA, which prohibits discrimination against persons with disabilities in "the provision or operation of public services, programs, or activities."¹⁷⁰ George Lane and Beverly Jones, paraplegics, alleged they were unable to attend court hearings because the courthouse facilities were not handicap accessible.¹⁷¹

It is worth examining what the *Garrett* and *Lane* Courts extracted from the reasoning in *Cleburne* about the importance of finding that a group faces widespread discrimination. First and foremost, supporting the need for the ADA was an extensive

¹⁶⁵ See *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 28 (1973).

¹⁶⁶ This time span brings to mind Justice O'Connor's admonishment in *Grutter v. Bollinger*, that the need to take race into account in public school admissions should be unnecessary twenty-five years hence. 539 U.S. 306, 343 (2003). If such was not the case in the disability context, there is reason to be skeptical that it will be any different in the race or sexual orientation contexts.

¹⁶⁷ See generally Ruth Colker, *The Section Five Quagmire*, 47 UCLA L. REV. 653 (2000) (providing an excellent discussion of the scope of Congress's section 5 power with respect to disability discrimination).

¹⁶⁸ 531 U.S. 356, 360 (2001).

¹⁶⁹ *Id.* at 362.

¹⁷⁰ 541 U.S. 509, 517 (2004).

¹⁷¹ *Id.* at 513. Both cases addressed the scope of Congress's section 5 enforcement power under the Fourteenth Amendment; their holdings turned on answers to the question of whether the provisions of the ADA intended to abrogate state immunity were "congruent and proportional" to the injuries suffered due to alleged disability discrimination. *Lane*, 541 U.S. at 531; *Garrett*, 531 U.S. at 374. The intricacies surrounding abrogation are beyond the purpose of this Article, but the cases inform the analysis and emphasize why it is critical to understand how the Rule and the Exceptions function.

congressional record compiled after decades of investigation, including congressional hearings and the establishment of a special task force.¹⁷² The Court in both cases cited favorably to the report, in which Congress concluded that “disabled” persons face widespread discrimination.

The *Garrett* Court:

Congress made a general finding in the ADA that “historically, society has tended to isolate and segregate individuals with disabilities, and, despite some improvements, such forms of discrimination against individuals with disabilities continue to be a serious and pervasive social problem.” The record assembled by Congress includes many instances to support such a finding. But the great majority of these incidents do not deal with the activities of States.¹⁷³

The *Lane* Court:

[I]ndividuals with disabilities are a discrete and insular minority who have been faced with restrictions and limitations, subjected to a history of purposeful unequal treatment, and relegated to a position of political powerlessness in our society, based on characteristics that are beyond the control of such individuals and resulting from stereotypic assumptions not truly indicative of the individual ability of such individuals to participate in, and contribute to, society.¹⁷⁴

Unlike the *Cleburne* Court, neither the *Garrett* nor the *Lane* Courts accepted the premise that the existence of the ADA evidenced the absence of discrimination against persons with disabilities.¹⁷⁵ In fact, and this is far more logical, the existence of the

¹⁷² See *Lane*, 541 U.S. at 516.

¹⁷³ *Garrett*, 531 U.S. at 369 (quoting 42 U.S.C. § 12101(a)(2) (2000)).

¹⁷⁴ *Lane*, 541 U.S. at 516 (quoting 42 U.S.C. § 12101(a)(7) (2000)).

¹⁷⁵ Given the congressional findings and the Court’s acknowledgment of them, why did the Court rule against *Garrett* under Title I and for *Lane* under Title II? Significantly, the different outcomes did *not* result from a finding that the disabled are not discriminated against. Rather, in *Garrett*, the record failed to persuade the Court that there was a history and pattern of discrimination *by the state* against disabled persons in employment, and therefore, Title I of the ADA failed the “congruent and proportional” test. *Garrett*, 531 U.S. at 374. In contrast, the *Lane* Court upheld Title II because it was persuaded that the “congruent and proportional” standard was met with respect to discrimination against the disabled in public services, programs, and activities. *Lane*, 541 U.S. at 531. It is interesting that Congress and the Court found little prejudice by the state against the disabled in public employment, but they found it bordered on hostility toward them in public services. Moreover, as the Court noted, it is easier

ADA is an acknowledgment that persons with disabilities need to be protected from discrimination.

Garrett and *Lane* highlight several important points about the role of ill motives in constitutional analysis. Both Courts struggled with the question of how widespread the discrimination is against people with disabilities. The discussions focused, to a large extent, on the existence of ill motives by state actors across the country. This is different from searching for a legitimate reason for a law, although that inquiry also is relevant under *Cleburne/Moreno*. For example, the *Garrett* Court emphasized that even if there were prejudice against the disabled, that would not invalidate the law as long as there was a rational reason to support it.¹⁷⁶ Quoting the Court, “[a]lthough such biases may often accompany irrational (and therefore unconstitutional) discrimination, their presence alone does not a constitutional violation make.”¹⁷⁷ The *Lane* Court got much closer to the “hostility” line in its analysis of the history of discrimination against the disabled in public services.¹⁷⁸ It even relied on some of Justice Marshall’s observations in his dissenting opinion in *Cleburne*.¹⁷⁹

Justice Kennedy’s concurrence in *Garrett*, joined by Justice O’Connor,¹⁸⁰ deserves special attention because it confirms that a finding of “hostility” toward the disabled is less likely to be acknowledged by the Court, even if it exists, because discrimination under equal protection generally is perceived as merely a matter of prejudice.¹⁸¹ Justice Kennedy’s language must be highlighted because it is so telling on this point:

Prejudice, we are beginning to understand, rises not from malice or hostile animus alone. It may result as well from insensitivity caused by simple want of careful, rational reflection or from some instinctive mechanism to guard against people who appear to be different in some respects from ourselves. Quite apart from any

for Congress to meet the “congruent and proportional” standard in abrogation cases where the Rule is answered positively thereby necessitating heightened review. *Garrett*, 531 U.S. at 365, 368. This acknowledgment that the Court would require less in the record if a quasi-suspect class was targeted by the law came in *Nevada Department of Human Resources v. Hibbs*, 538 U.S. 721 (2003) (upholding the Family Medical Leave Act as a valid abrogation of state’s immunity). In *Lane*, the fundamental right of access to the courts was in play. *Lane*, 541 U.S. at 538 (Rehnquist, C.J., dissenting).

¹⁷⁶ *Garrett*, 531 U.S. at 367.

¹⁷⁷ *Id.* The Court then quoted from *Cleburne*, “mere negative attitudes, or fear, unsubstantiated by factors which are properly cognizable in a zoning proceeding, are not permissible bases for treating a home for the mentally retarded differently.” *Id.* (quoting *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 448 (1985)).

¹⁷⁸ *Lane*, 541 U.S. at 524 n.5.

¹⁷⁹ *Id.*

¹⁸⁰ But Justice O’Connor in *Lawrence* suggests that law is born of animus. *Lawrence v. Texas*, 539 U.S. 558, 583 (2003) (O’Connor, J., concurring); see *infra* Part II.B.4.

¹⁸¹ *Garrett*, 531 U.S. at 374–76 (Kennedy, J., concurring).

historical documentation, knowledge of our own human instincts teaches that persons who find it difficult to perform routine functions by reason of some mental or physical impairment might at first seem unsettling to us, unless we are guided by the better angels of our nature. There can be little doubt, then, that persons with mental or physical impairments are confronted with prejudice which can stem from indifference or insecurity as well as from malicious ill will.¹⁸²

Justice Kennedy acknowledges that some people harbor no ill will toward particular groups; they just do not care about them, or they feel insecure around them. While this might accurately reflect the sentiments of some people, it also is true that studies support findings that many people harbor ill will toward particular groups without being fully aware of their feelings because differences among people often have been normalized throughout society. This is the predominant message in Justice Kennedy's quote. Factoring in the possibility that state actors, including judges, might make decisions that are rooted in the normalization of differences can be quite important. For example, the distinction between indifference and insecurity on the one hand and malice on the other, is irrelevant in *Garrett*, unless Justice Kennedy is suggesting, as he seems to be, that malice (hostility), as opposed to mere prejudice, ups the judicial review ante.¹⁸³ This notwithstanding, Justice Kennedy was unwilling to attribute "misconceived or malicious perceptions of some of [the state's] citizens" to the state itself.¹⁸⁴ Like the majority, he focused only on the level of involvement of the state qua state in employment discrimination cases and not on that of private citizens and state actors more generally.¹⁸⁵

Thus, even though anti-discrimination laws occasionally respond favorably to a group, the group nevertheless can continue to be the target of discrimination and also remain largely politically powerless. For example, notwithstanding many pieces of progressive legislation, the struggle for racial equality illustrates how long and enduring the journey is. Anti-discrimination laws cannot and should not be evidence, in and of themselves, that the targeted groups are "politically popular," let alone politically powerful. Such victories certainly should not be taken as evidence that targeted groups are no longer the victims of official ill motives. The dynamics of discrimination are far more complex than reflected in *Cleburne's* analysis.

¹⁸² *Id.* at 374–75.

¹⁸³ Because the case would fall into the Ill Motives Exception, heightened scrutiny would not be called for. Justice Kennedy arguably adopts the rationale consistent with the Ill Motives Exception. *Romer v. Evans*, 517 U.S. 620, 632 (1996) ("[The Amendment's] sheer breadth is so discontinuous with the reasons offered for it that the amendment seems inexplicable by anything but animus toward the class it affects; it lacks a rational relationship to legitimate state interests.").

¹⁸⁴ *Garrett*, 531 U.S. at 375.

¹⁸⁵ *See id.*

d. From *Cleburne* to *Romer*

The red flags raised by the Court's analysis in *Cleburne* also surface in the context of sexual orientation discrimination as an examination of *Romer v. Evans* illustrates.¹⁸⁶ In *Romer*, the voters of Colorado amended their Constitution to prohibit the enactment of laws that provided "protected status based on homosexual, lesbian, or bisexual orientation."¹⁸⁷ The Court held that Amendment 2, as it is more commonly known, "withdraws from homosexuals, but no others, specific legal protection from the injuries caused by discrimination, and it forbids reinstatement of these laws and policies."¹⁸⁸ "[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."¹⁸⁹ "Animus" means "hostility or ill feeling."¹⁹⁰

The Court's invocation of the word animus is quite remarkable; according to my research, it is the *only time* the Court has used that word to invalidate a law under equal protection. Thus, is *Romer* the case that announces that animus makes a law per se unconstitutional and thereby makes the Ill Motives Exception "officially" sanctioned by the Court? Unfortunately, it does not. Immediately after using the word "animus," the Court cites to *Moreno's* "bare . . . desire to harm" language and then evaluates the state's proffered justifications for the law before rejecting them as illegitimate.¹⁹¹ This puts *Romer* squarely within *Moreno* and *Cleburne*. Amendment 2 was struck down, not because it was motivated by animus, but because no other legitimate purpose could justify it.

Accordingly, because Amendment 2 failed rational basis review, consistent with the Principle, the Court did not need to answer whether a fundamental right or suspect class was involved in the case. It is treated by the Court as a Logical Exception case.¹⁹² In fact, the Court explicitly decided to avoid the fundamental rights question even though the state court applied strict scrutiny, because it held the fundamental right to participate in the political process was violated.¹⁹³

Significantly, this Article puts *Romer* squarely in the Ill Motives Exception. Notice how the Court treated animus as if it were analytically just like prejudice toward hippies and persons with "mental retardation." Significantly, the discrimination in all three cases was irrational, and so the Court was correct to equate them on that

¹⁸⁶ 517 U.S. 620 (1996).

¹⁸⁷ *Id.* at 624.

¹⁸⁸ *Id.* at 627.

¹⁸⁹ *Id.* at 634.

¹⁹⁰ THE NEW OXFORD AMERICAN DICTIONARY 61 (2d ed. 2005).

¹⁹¹ *Romer*, 517 U.S. at 634–35. The state argued it had legitimate interests in protecting citizens' freedom of association and conserving resources to fight other discrimination cases. *Id.* at 635.

¹⁹² See Figure 2 *infra* p. 745.

¹⁹³ *Romer*, 517 U.S. at 625–26.

note. But animosity is different in quality from prejudice. Generally, people do not “hate” hippies or persons with “mental disabilities.” But many people, including government officials, do express hateful sentiments toward gays. Members of the Court have expressed their contempt for gays. For example, Chief Justice Burger concurred in *Bowers*, choosing a quote from Blackstone to articulate his position: “Blackstone described ‘the infamous *crime against nature*’ as an offense of ‘deeper malignity’ than rape, an heinous act ‘the very mention of which is a disgrace to human nature,’ and ‘a crime not fit to be named.’”¹⁹⁴ According to Chief Justice Burger, consenting adults of the same sex engaging in sodomy are more disgraceful and vile than is a rapist, that is, a violent misogynist.¹⁹⁵ Still, it is worth emphasizing that under *Cleburne* and *Moreno*, animus would not have invalidated Amendment 2 if a legitimate reason had justified it.

i. Justice Scalia’s Dissent

Given the difficulty persons with disabilities have had and continue to have to overcome discrimination, as illustrated by *Cleburne*, *Garrett*, and *Lane*, it is not surprising that gays also have struggled to overcome discrimination. Justice Scalia’s dissent in *Romer*, joined by Chief Justice Rehnquist and Justice Thomas, is important to explore because it probably resonates with many equality-minded people who nevertheless harbor unreflective animosity toward gays. Justice Scalia’s opinion is a classic representation of how homophobia, the product of the normalization of heterosexuality,¹⁹⁶ functions to promote inequality in the name of equality, because he rants and raves about the immorality of homosexuality and simultaneously reiterates the “moral” principle “that one should not hate any human being or class of human beings.”¹⁹⁷ Moreover, his dissent falters on the same issues that surfaced with the *Cleburne* Court: animosity and political popularity.

ii. On Animosity

Quite telling about Justice Scalia’s contempt for gays is his bottom line, announced at the beginning of his dissenting opinion: “This Court has no business imposing upon all Americans the resolution favored by the elite class from which the Members

¹⁹⁴ *Bowers v. Hardwick*, 478 U.S. 186, 197 (1986) (Burger, C.J., concurring) (quoting WILLIAM BLACKSTONE, 4 COMMENTARIES *215); see Anne B. Goldstein, Comment, *History, Homosexuality, and Political Values: Searching for the Hidden Determinants of Bowers v. Hardwick*, 97 YALE L.J. 1073 (1988).

¹⁹⁵ *Bowers*, 478 U.S. at 197.

¹⁹⁶ See generally Carbado, *supra* note 31 (discussing the normalization of heterosexuality and its marginalization of other identities).

¹⁹⁷ *Romer*, 517 U.S. at 644 (Scalia, J., dissenting).

of this institution are selected, pronouncing that ‘animosity’ toward homosexuality is evil. I *vigorously* dissent.”¹⁹⁸

The lead-in phrase reads like an entirely legitimate criticism of the *Romer* majority and one that is often leveled at the Court. That is, the Court is an anti-majoritarian institution, and it lacks the power to impose its values on a majority of the people who do not feel the same way as the Justices.

The second phrase, however, is a startling observation, particularly emanating from a Supreme Court Justice. Is he saying that voters have the democratic authority to enact a discriminatory law—a constitutional amendment even—that is borne of animosity toward homosexuality (gays) and is otherwise unjustifiable? Later in his dissent, he affirms that “Coloradans are . . . *entitled* to be hostile toward homosexual conduct.”¹⁹⁹ At one point, Justice Scalia even suggests that animosity toward homosexuality is an “all-American” sentiment: “The Court’s opinion contains grim, disapproving hints that Coloradans have been guilty of ‘animus’ or ‘animosity’ toward homosexuality, as though that has been established as un-American.”²⁰⁰

Justice Scalia is careful to distinguish homosexuality from homosexuals, of course. Phrased more popularly, Justice Scalia espouses the view that one should love the sinner and hate the sin. Some equality-minded people adopt this viewpoint, perhaps because they do not fully understand how inextricably intertwined sexual orientation is with a person’s expression of his or her sexuality. On reflection, most heterosexuals see this point quite clearly with respect to their own choice of intimate partners but seem unable to grasp this concept with respect to gays, because it is difficult for many heterosexuals to break out of the thought pattern that normalizes heterosexuality and leaves them to confront their own homophobia. The status/conduct distinction ostensibly resolves the dissonance, which is the approach Justice Scalia takes in his dissent. Because it is homosexuality and not homosexuals that the voters of Colorado condemn, they can remain equality-minded people.²⁰¹

However, Justice Scalia’s opinion adds a dangerous twist that should give all equality-minded people pause. He tries to mask the voters’ animosity toward gays—the sole motivation behind Amendment 2—by focusing on the democratic principle that people have a right to condemn homosexuality. It is hard to disagree with this.

¹⁹⁸ *Id.* at 636 (emphasis added).

¹⁹⁹ *Id.* at 644.

²⁰⁰ *Id.*

²⁰¹ Understandably, people who self-identify as equality-minded resent suggestions that they are prejudiced or biased. One area where this is dramatically illustrated is in the area of race relations. It is unthinkable for whites who are equality-minded that they could be considered racist. One way to ensure they can never fall into that category is to define racism in dramatic ways to include slave owners, lynchers, or white supremacists, for example. If racism is narrowly defined, then someone who believes in stereotypes about people of color cannot be racist. This resolves the dissonance for the equality-minded person. The psychology of this is artfully explained in Hanson & Hanson, *supra* note 153.

People have a right to condemn any behavior. But passing a constitutional amendment to sanction discrimination against gays—at every level of government—is very different from condemning homosexuality.

Moreover, and significantly, the more socially heinous the behavior, the greater the contempt one usually has for it. For many people, the level of contempt for the behavior correlates to some degree with the level of prejudice or hostility they feel toward the people who engage in the behavior. The intensity of their feelings, in turn, also motivates them to enact laws burdening the people who are the target of their unpleasant feelings. My point here is that it is disingenuous to pretend that how a person judges a behavior is wholly unrelated to how that person judges people who engage in the behavior.

This is an especially unfair and unrealistic dichotomy to impose on “identity” characteristics—that is, race, gender, and sexual orientation, to list a few—that form part of a person’s identity. Enactment of Amendment 2 illustrates this; it was targeted at gays, not at homosexuality, and sanctioned discrimination against them at every level of government.²⁰² Imagine any other group (from murderers to hippies to chocolate lovers to heterosexuals) being the target of Amendment 2 and the animosity toward the people, not their choices to engage in certain conduct, is crystal clear. Once pierced, the import behind Justice Scalia’s dissent leads to this conclusion. From his view, not only is animosity toward homosexuality (gays) *not* the basis for finding a law per se unconstitutional, but it is the basis for finding it per se constitutional. This evidences a severe hostility toward gays, yet it is all couched in the appeal to “democratic theory.” This sleight-of-hand is difficult to catch, but it must be exposed.

Consistent with *Moreno* and *Cleburne*, a *bare* desire to harm a particular group is unconstitutional. Beyond *Moreno* and *Cleburne*, a law motivated by animosity—an extreme ill motive—should be per se unconstitutional. This Article places such a case in the Ill Motives Exception.²⁰³

iii. On Political Unpopularity/Power

Second, and also supporting the first point, Justice Scalia’s opinion rejects as “preposterous” the idea that gays are a politically unpopular group and concludes that they “enjoy[] enormous influence in American media and politics.”²⁰⁴ Notice the subtle but powerful equating of “political popularity” with “political power,” the same mistake the *Cleburne* Court made.²⁰⁵ Justice Scalia diligently notes that “those who engage in homosexual conduct tend to reside in disproportionate numbers in certain

²⁰² See *Romer*, 517 U.S. at 624 (majority opinion).

²⁰³ See Figure 2 *infra* p. 745.

²⁰⁴ *Romer*, 517 U.S. at 652 (Scalia, J., dissenting).

²⁰⁵ See *supra* Part I.C.3.b.

communities, have high disposable income, . . . [and] possess political power much greater than their numbers, both locally and statewide.”²⁰⁶ Voters in Aspen, Boulder, and Denver had enacted favorable legislation prohibiting discrimination based on sexual orientation.²⁰⁷ Justice Scalia draws on this last observation to justify enactment of Amendment 2, stating that “[i]t sought to counter both the geographic concentration and the disproportionate political power of homosexuals.”²⁰⁸

Justice Scalia’s observations raise interesting and unanswered questions that need to be examined. Central among them is the question about how political power is to be measured.²⁰⁹ Certainly, both the *Cleburne* Court and Justice Scalia are correct to think that political popularity and political power are related. Recall that the *Cleburne* Court in 1985 opined that the passage of some favorable legislation was evidence that persons with mental disabilities were not politically unpopular—even though the zoning permit denial in that case was based on irrational prejudice.²¹⁰ And twenty years later the Court struggled with the same issue in the context of Congress’s section 5 enforcement power under the ADA in *Garrett and Lane*, in which the Court cited with approval Congress’s findings that persons with disabilities do face widespread discrimination.²¹¹ Similarly, the fact that voters in several Colorado cities passed favorable legislation on behalf of gays should not be taken as evidence per se of gays’ political power or popularity. If anything, the logical conclusion in *Romer* is that any popularity or power gays might have enjoyed in limited geographical areas was trumped by the politically powerful voters throughout the state because of animosity. It seems disingenuous to insist, as Justice Scalia does, that gays are politically popular and powerful in some kind of absolute way, meaning they can protect themselves from discrimination in the ordinary democratic process, when their modest geographical victories in a few cities in Colorado were quashed with a vengeance merely by expanding the geographical scope of the voter base.

Such a narrow focus or definition of “political power” allows the forest to get lost among the trees. It certainly diminishes the significance and importance of acknowledging the political reality of the widespread animosity toward gays.²¹² Indeed, one logically could conclude that passage of the Defense of Marriage Act (DOMA),²¹³

²⁰⁶ *Romer*, 517 U.S. at 645–46 (citing the Record, Exh. MMM, and affidavit of Prof. James Hunter).

²⁰⁷ *Id.* at 646.

²⁰⁸ *Id.*

²⁰⁹ Gary J. Simson, *Beyond Interstate Recognition in the Same-Sex Marriage Debate*, 40 U.C. DAVIS L. REV. 313, 371 (2006) (making this observation and illustrating the complexity in this analysis by noting the lobbying power of physicians).

²¹⁰ *See City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432 (1985).

²¹¹ *See Tennessee v. Lane*, 541 U.S. 509 (2004); *Alabama v. Garrett*, 531 U.S. 356 (2001).

²¹² Ackerman, *supra* note 50, *passim*.

²¹³ *See* Pub. L. No. 104-199; 110 Stat. 2419 (1996) (codified at 28 U.S.C. § 1738C (2000)). The Act provides that states are not required to give “full faith and credit” to marriages entered

defining marriage as between a man and a woman, and the efforts of many states to pass laws limiting marriage to a man and a woman,²¹⁴ are the ultimate evidence of just how politically powerless gays are *throughout the country*.

To summarize thus far, and looking at the attached Figures, the Rule requires courts to apply heightened review in cases where either a fundamental right or a suspect class is involved, and it requires them to apply rational basis review if neither is involved.²¹⁵ Following the Proper Methodology, courts deviate from the Rule when an Exception applies. The Logical Exception applies when heightened review normally would apply because the case involves an established fundamental right or an acknowledged suspect class (an obvious case), or because heightened review might theoretically apply in a case where the fundamental rights question and the equal protection question are unanswered (non-obvious cases). Logically, it is unnecessary to apply heightened review in such cases because the laws cannot pass rational basis review. *Lawrence*, *Romer*, and *Skinner* all could be Logical Exceptions cases.²¹⁶ The Ill Motives Exception applies in cases where there is no other justification for the law, the *Moreno/Cleburne* standard, thus causing it to fail rational basis review even if heightened review might normally apply. This Article suggests the Ill Motives Exception is independently important and should make a law per se unconstitutional. This position is especially compelling in cases where the ill motives are extreme, like hostility or animus. *Yick Wo*, *Strauder*, *Loving*, *Korematsu*, *Skinner*, *Lawrence*, and *Romer* fit within this understanding of the Exception.²¹⁷

II. CRITICAL CHOICES: DUE PROCESS AND/OR EQUAL PROTECTION?

One of the toughest analytical challenges for a court in a non-obvious intersection case, then, is to figure out whether its decision will rest on due process and/or equal protection. It does matter which path the Court chooses to follow in intersection cases, although there seem to be no clear guidelines for predicting which path a court should follow in the first instance. If it heads down the due process route and finds a new fundamental right that presumptively applies to everyone, then the equal protection question becomes superfluous because heightened review generally would

into by persons of the same sex in another state. 28 U.S.C. § 1738C. The word “marriage” is defined to include one man and one woman. 1 U.S.C. § 7 (2000). For an excellent analysis of *Lawrence*’s effect on DOMA, see Mark D. Rosen, *Why the Defense of Marriage Act Is Not (Yet?) Unconstitutional: Lawrence, Full Faith and Credit, and the Many Societal Actors that Determine What the Constitution Requires*, 90 MINN. L. REV. 915 (2006).

²¹⁴ See, e.g., Alabama Marriage Protection Act, ALA. CODE § 30-1-19 (1975); Marriages Between Persons of the Same Sex, FLA. STAT. § 741.212 (2005); Prohibited Marriages, 750 ILL. COMP. STAT. 5/212 (1993). See generally Strasser, *supra* note 1 (discussing state constitutional amendments limiting the definition of marriage).

²¹⁵ See Figure 1 *infra* p. 744.

²¹⁶ See Figure 2 *infra* p. 745.

²¹⁷ See Figure 2 *infra* p. 745.

apply (absent an Exception). The Court would have little, if any, incentive under the Principle to decide the unnecessary question of the group's equal protection status,²¹⁸ which would have to wait for an answer in another case, leaving members of the group vulnerable to possible discrimination under other laws.

Conversely, if a court asks the equal protection question first and finds the targeted group is entitled to heightened protection, then the court need not ask the fundamental rights question. For example, suppose the Court were to decide that laws that classify on the basis of sexual orientation are suspect. Significantly, unlike the situation where a case is decided on substantive due process, classifying a group as suspect under equal protection maximizes the group's protection, because the state's burden of justification would be at its highest. Naturally, this does not mean that laws could not meet the higher burden.

Importantly, placing a decision on equal protection is less intrusive on state sovereignty. In those cases, where the Court has not placed a right into the fundamental rights sphere, states have greater leeway to regulate the right because rational basis review applies. Such regulation, however, would be subject to equal protection standards and would have to meet a higher burden of justification if the law targeted a suspect class.

A. *Lessons from Skinner, Loving, and Zablocki*

The "right to marry" cases²¹⁹ highlight some of the challenges and concomitant confusion that can result from analyzing intersection cases. I begin by focusing on *Skinner*, which might be surprising because generally it is not thought of as a "right to marry" case. Recall that the *Skinner* Court announced in the same breath that "marriage and procreation" are fundamental rights, but the case involved only the question of procreation.²²⁰ Moreover, under the Principle, it was unnecessary for the Court to hold that procreation is a fundamental right because the law that mandated the sterilization of repeated larcenists but not embezzlers failed rational basis review.²²¹ In the context of this Article, the law falls into the Logical Exception, and perhaps even the Ill Motives Exception,²²² but of course, this terminology would

²¹⁸ An exception would be if the Court finds that the fundamental right is subject to intermediate scrutiny but an equal protection analysis would require to strict scrutiny. For example, a law that prohibited women of a particular race from getting an abortion would have to meet strict scrutiny.

²¹⁹ In *Meyer v. Nebraska*, the Court articulated for the first time that aspects of family autonomy, including the right to marry, are within the meaning of "liberty" in the due process clause. 262 U.S. 390 (1923). However, *Meyer* generally is not held out as *the* case that established that marriage is a fundamental right.

²²⁰ *Skinner v. Oklahoma*, 316 U.S. 535 (1942).

²²¹ *See id.*

²²² *See* Figure 2 *infra* p. 745. Professor Tribe suggests that the Court applied strict scrutiny to avoid the inequality between treating blue-collar criminals (larcenists) and white-collar

have made no sense at the time of *Skinner* because *Skinner* was instrumental in the establishment of the Rule itself.²²³ Realize this observation does not mean that procreation should not be a fundamental right. It merely means that part of the *Skinner* decision was unnecessary to the result. In light of this, the Court's decision to throw marriage into the fundamental rights pot was entirely gratuitous.

Accordingly, and rightfully so, *Skinner* generally is not cited as the case that decided that marriage is a fundamental right. Oddly, this distinction typically goes to two cases—*Loving* and *Zablocki*—as if they both are required to establish the point. I suggest this pairing of *Loving* and *Zablocki* illustrates why a court's choice to analyze an intersection case under due process and/or equal protection is important and can have far-reaching implications.

Return to the anti-miscegenation statute in *Loving*, which this Article places in the III Motives Exception because the Court held the law's only purpose was to support White Supremacy.²²⁴ The Court held that the law was a racial classification subject to the most rigid scrutiny under equal protection, which it failed.²²⁵ But the Court also held, relying on a broad reading of *Skinner*, that the law violated the Lovings' substantive due process rights to choose each other as marriage partners.²²⁶ Perhaps because this part of the opinion clearly was superfluous to the *Loving* Court's ultimate conclusion, it would take a more clearly substantive due process case to firmly establish that the choice of a marriage partner is a fundamental right. *Zablocki* seems to be that place holder.

Recall that in *Zablocki* a Wisconsin state law required that any resident responsible for supporting a child not in his or her custody first get permission from the court before marrying.²²⁷ *Zablocki* appears to be an obvious case under the Rule: the fundamental right to marry is involved so apply heightened scrutiny.²²⁸ In fact, it looked awfully similar to the situation in *Skinner* where there also was a fundamental right (procreation) and a non-suspect class (criminals).²²⁹ Moreover, *Loving* was also precedent. Under the Rule, which was implicitly invoked in *Skinner* and applied with emphasis in *Loving*, the *Zablocki* Court correctly applied heightened scrutiny and struck down the law. Today, of course, *Zablocki* is an obvious intersection case, but it also is cited as *the* case that *really* held that marriage is a fundamental right.²³⁰ In

criminals (embezzlers) in ways that reflected a fear that sterilization laws might be used in genocidal ways by the political majority against the political minority. See *TRIBE*, *supra* note 50, at 1464.

²²³ See Figure 1 *infra* p. 744.

²²⁴ See *Loving v. Virginia*, 388 U.S. 1 (1967).

²²⁵ *Id.* at 11.

²²⁶ *Id.* at 12.

²²⁷ *Zablocki v. Redhail*, 434 U.S. 374, 375 (1978).

²²⁸ See Figure 1 *infra* p. 744.

²²⁹ See *Skinner v. Oklahoma*, 316 U.S. 535 (1942).

²³⁰ See, e.g., *Smelt v. County of Orange*, 447 F.3d 673, 680 (9th Cir.), *cert. denied*, 127

this way, *Zablocki* was a non-obvious case or at least a less-obvious case—even though *Skinner* and *Loving* had already held as much, albeit unnecessarily.

Zablocki illustrates some of the analytical challenges involved in intersection cases, because its analysis merely compounded any confusion stemming from its relationship to *Skinner* and *Loving*. Importantly, the *Zablocki* Court evaluated the law explicitly under equal protection.²³¹ Theoretically, if the case truly were only an equal protection case, rational basis review would have applied because wealth is not a suspect classification.²³² This was the position taken by Justice Rehnquist in his dissenting opinion.²³³ Moreover, under rational basis review, the law might have been upheld, although Justices Stewart²³⁴ and Stevens thought it was irrational, particularly as applied to indigents.²³⁵

Assuming the law could have passed rational basis review under equal protection, the Rule would have required the Court to analyze the interest at stake to determine if it was important enough to trigger heightened scrutiny. Unlike the *Skinner* Court, which held that the sterilization law was irrational²³⁶—which should have ended the analysis—the *Zablocki* Court was correct to ask the fundamental rights question. The *Zablocki* Court, citing to *Loving*, emphasized that marriage is a fundamental right under the Fourteenth Amendment.²³⁷ Accordingly, the Court “critically”²³⁸ scrutinized the law and held it unconstitutional. Strangely though, the Court placed its holding on equal protection and not due process *even though* the due process analysis drove the decision.

This misplaced rationale upset Justice Stewart and caused him to concur in *Zablocki*. He believed it was important for the Court to get the difference between equal protection and substantive due process correct. He articulated his concern:

To hold . . . that the [state law] violates the Equal Protection Clause seems to me to misconceive the meaning of that constitutional guarantee. The Equal Protection Clause deals not with substantive

S.Ct. 396 (2006); *Alma Soc. Inc. v. Mellon*, 601 F.2d 1225, 1232 (2d Cir.), *cert. denied*, 444 U.S. 995 (1979).

²³¹ See *Zablocki*, 434 U.S. at 383.

²³² See *Dandridge v. Williams*, 397 U.S. 471 (1970) (holding that rational basis review applies to welfare legislation); see also *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973) (holding that poverty is not a suspect classification).

²³³ *Zablocki*, 434 U.S. at 407 (Rehnquist, J., dissenting). Justice Rehnquist also would have applied rational basis review under due process. *Id.*

²³⁴ *Id.* at 394 (Stewart, J., concurring) (holding that the law was irrational as applied to the indigent).

²³⁵ *Id.* at 406 (Stevens, J., concurring).

²³⁶ See *Skinner v. Oklahoma*, 316 U.S. 535 (1942).

²³⁷ See *Zablocki*, 434 U.S. at 383–84 (majority opinion).

²³⁸ *Id.* at 383. It is not clear whether the Court applied intermediate or strict scrutiny, but it was heightened review.

rights or freedoms but with invidiously discriminatory classifications. . . . I think that the [state law] is unconstitutional because it exceeds the bounds of permissible state regulation of marriage, and invades the sphere of liberty protected by the Due Process Clause of the Fourteenth Amendment.²³⁹

The Court is understandably reluctant to rely on substantive due process. But to embrace the essence of that doctrine under the guise of equal protection serves no purpose but obfuscation.²⁴⁰

But what is there to obfuscate? The Rule requires that heightened scrutiny apply if either a fundamental right or a suspect class is burdened by the underlying law, and the Court correctly applied heightened review. But this is precisely why it is important to understand that the question of whether there is a fundamental right or a suspect class drives the “level-of-review” analysis and not the other way around. As it turns out, Justice Stewart was concerned that deciding the case under equal protection—even if only nominally—apparently

shifts the focus of the judicial inquiry away from its proper concerns, which include, “the nature of the individual interest affected, the extent to which it is affected, the rationality of the connection between legislative means and purpose, the existence of alternative means for effectuating the purpose, and the degree of confidence we may have that the statute reflects the legislative concern for the purpose that would legitimately support the means chosen.”²⁴¹

Justice Stewart’s point seems somewhat misplaced with respect to the Court’s actual analysis in *Zablocki*, which *did* focus on the underlying right: the right to marry. However, a possible key to understanding Justice Stewart’s objection is to understand that he “[did] not agree with the Court that there is a ‘right to marry’ in the constitutional sense. That right, or more accurately that privilege is under our federal system peculiarly one to be defined and limited by state law.”²⁴² But Justice Stewart also emphasized that the Court had held in prior cases (citing to *Loving* and *Skinner*,

²³⁹ *Id.* at 391–92 (Stewart, J., concurring). Justice Stewart went on to state that he did not think the “right to marry” was in the Constitution but recognized that it is part of a liberty protected by the Due Process Clause. *Id.* at 392.

²⁴⁰ *Id.* at 395–96 (citing *Roe v. Wade*, 410 U.S. 113, 167–68 (1973) (Stewart, J., concurring)).

²⁴¹ *Id.* at 396 (quoting *Williams v. Illinois*, 399 U.S. 235, 260 (1970) (Harlan, J., concurring)).

²⁴² *Id.* at 392 (footnote omitted).

among others) that the “freedom of personal choice in matters of marriage and family life”²⁴³ is protected by the Due Process Clause, and he “conceded” that the Wisconsin state law “invaded” that protected sphere.²⁴⁴ Given Justice Stewart’s concession, the Proper Methodology puts the analysis under the Rule, heightened review still would have applied, and the outcome would have been the same.

Legitimately, then, one might wonder what Justice Stewart’s real objection was to the Court’s ostensible placement of the decision on equal protection grounds. Another hint comes later in his concurrence:

To conceal this appropriate inquiry [whether a case involves equal protection or due process] invites mechanical or thoughtless application of misfocused doctrine. To bring it into the open forces a healthy and responsible recognition of the nature and purpose of the extreme power we wield when, in invalidating a state law in the name of the Constitution, we invalidate *pro tanto* the process of representative democracy in one of the sovereign States of the Union.²⁴⁵

The Court’s focus on equal protection, in his view, distracted from the substantive due process analysis. Perhaps, and obviously this is speculation, Justice Stewart thought that if the Court had focused explicitly on substantive due process, the majority would have paid closer attention to the “nature of the individual interest affected” by the law *and, by implication*, thereby would have avoided finding a fundamental right to marry. At a minimum, he seemed to think that placing a substantive due process decision on substantive due process grounds was important, because that rationale, more than equal protection, threatens state sovereignty and needs to be exposed for what it is. From this view, Justice Stewart wanted to protect the Court’s integrity by ensuring that it followed the Proper Methodology.

Justice Powell’s concurrence offered some insights on this point:

Thus, it is fair to say that there is a right of marital and familial privacy which places some substantive limits on the regulatory power of government. But the Court has yet to hold that all regulation touching upon marriage implicates a “fundamental right” triggering the most exacting judicial scrutiny.²⁴⁶

²⁴³ *Id.* at 393.

²⁴⁴ *Id.* at 392.

²⁴⁵ *Id.* at 396.

²⁴⁶ *Id.* at 397 (Powell, J., concurring).

Moreover, Justice Powell explicitly, and I believe correctly, identified *Loving* as an equal protection case.²⁴⁷ As such, “[*Loving*] does not speak to the level of judicial scrutiny of, or governmental justification for, ‘supportable’ restrictions on the ‘fundamental freedom’ of individuals to marry or divorce.”²⁴⁸ He highlights several state-imposed restrictions on marriage, including bans on homosexuality, and concludes that “[a] ‘compelling state purpose’ inquiry would cast doubt on the network of restrictions that the States have fashioned to govern marriage and divorce.”²⁴⁹ But even if marriage was not a fundamental right, when equal protection methodology calls for heightened review to ensure a marriage regulation does not unjustifiably discriminate, courts presumably would apply that higher standard (absent an Exception). It would be a matter of judicial integrity to follow the Proper Methodology.

This last observation is both good and bad news, depending on whether one supports or opposes marriage between partners of the same sex. On the one hand, Justice Powell suggests that a ban could not pass strict scrutiny.²⁵⁰ On the other hand, he suggests that it could pass rational basis review and that is all that would be required.²⁵¹ But under the Proper Methodology, even if marriage fell out of protected status as a fundamental right, equal protection would still be in place to protect people from marriage restrictions that unfairly discriminate.

How much weight should be given to Justices Stewart’s and Powell’s concerns, then, about whether marriage should be a fundamental right? Notably, a close reading of *Zablocki* leaves some doubt about the general applicability of the Rule in cases involving marriage regulation. Justice Marshall, writing for the majority, opined that “[b]y reaffirming the fundamental character of the right to marry, we do not mean to suggest that every state regulation which relates in any way to the incidents of or prerequisites for marriage must be subjected to rigorous scrutiny.”²⁵² Given the observations of several Justices, one must ask if the Court might use these “cracks” in the precedent to diminish the fundamental nature of the right to marry in the Ban Case.

Less than ten years later, however, the Court decided *Turner v. Safley*, a case involving prisoners’ rights in which the Court evaluated the constitutionality of a regulation that prohibited prisoners from marrying without prior approval of the prison superintendent.²⁵³ Proceeding on the assumption that heightened review applies, consistent with the Rule, the Court used *Turner* to establish that “when a prison regulation impinges on inmates’ constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests.”²⁵⁴ The *Turner* Court lowered

²⁴⁷ *Id.* at 398.

²⁴⁸ *Id.*

²⁴⁹ *Id.* at 399.

²⁵⁰ *See id.* at 396–97.

²⁵¹ *See id.* at 398–400.

²⁵² *Id.* at 386 (majority opinion). Justice Powell’s concurrence makes this same point. *Id.* at 397 (Powell, J., concurring).

²⁵³ 482 U.S. 78, 82 (1987).

²⁵⁴ *Id.* at 89.

the level of review that normally applies to fundamental rights cases because “[s]ubjecting the day-to-day judgments of prison officials to an inflexible strict scrutiny analysis would seriously hamper their ability to anticipate security problems and to adopt innovative solutions to the intractable problems of prison administration.”²⁵⁵ In other words, the *Turner* Court created its own exception to the Rule in prisoners’ rights cases. Thus it is fair to read *Turner* as a case that supports the Rule that heightened review applies in cases involving the fundamental right to marry *except* in the prison context where there are justifiable administrative reasons for applying rational basis review.

Clearly, the prison context is a unique situation, and the Court lowered the level of review with respect to *all* fundamental rights in the prison context. Importantly, however, prison regulations that discriminate on the basis of race in an effort to regulate marriage undoubtedly would have to pass strict scrutiny. The equal protection concerns do not disappear merely because a right is not fundamental. Ironically, equal protection analysis becomes most important when rights are not fundamental, especially when a suspect class is burdened by the regulation. This is why it is important for courts, pursuant to the Rule, to follow the Proper Methodology as a matter of judicial integrity.

All of this notwithstanding, it is worth emphasizing that the *Turner* Court reaffirmed that marriage is a fundamental right, citing to *Zablocki*, and explicitly emphasized that *Zablocki* applies to prisoners.²⁵⁶ Moreover, the Court also struck down the regulation even under rational basis review.²⁵⁷ The Court carefully explained that “[m]any important attributes of marriage remain . . . after taking into account the limitations imposed by prison life.”²⁵⁸ Those incidents of marriage, including emotional support and other legal rights, “are unaffected by the fact of confinement or the pursuit of legitimate corrections goals.”²⁵⁹

In light of the Court’s reasoning and holding, *Turner* diminishes the potential significance of Justices Stewart’s and Powell’s concerns about whether marriage should be a fundamental right. It also diminishes Justice Marshall’s suggestion in *Zablocki* that some marriage regulations do not need to be subjected to heightened review. *Turner* is an exception to the Rule that admittedly fits into Justice Marshall’s observation, but it is still just that—an exception. It is inconceivable that the Court in the Ban Case would use *Turner* as precedent for lowering the level of review in intersection cases involving fundamental rights and gays. If that were to happen, it would reflect the Court responding to a widespread animosity toward gays,

²⁵⁵ *Id.*

²⁵⁶ *See id.* at 95 (holding that the lower court erred in finding *Zablocki* does not apply to prisoners).

²⁵⁷ *Id.* at 97.

²⁵⁸ *Id.* at 95.

²⁵⁹ *Id.* at 96.

undoubtedly the result of the normalization of heterosexuality. That result should call into question the Court's integrity.

B. More Lessons from Bowers and Lawrence

This, of course, is a focus of the current debate in the Ban Case: should the analysis follow the Rule and the Exceptions? Moreover, the (perhaps fading) echoes of Justices Stewart's and Powell's admonitions in *Zablocki* about creating fundamental rights were a primary concern of the *Bowers* Court: "The Court is most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or design of the Constitution."²⁶⁰ This concern also surfaced with resounding vibrance in *Lawrence*. Recall that in *Lawrence*, the majority held that the ban on sodomy between persons of the same sex violated the right of privacy under substantive due process.²⁶¹ Justice O'Connor concurred in the Court's holding to strike down the state law, but she would have based the decision on equal protection grounds and left open the question of whether a sodomy law that criminalized all sodomy violates substantive due process.²⁶² In the dissent, Justice Scalia, joined by Chief Justice Rehnquist and Justice Thomas, opined that the case did not involve a fundamental right or violate equal protection.²⁶³ Justice Thomas dissented separately to clarify that he, like Justice Stewart, did not think that there is a general right of privacy in the Constitution.²⁶⁴

The *Lawrence* Justices at least called the substantive due process and equal protection analyses by their correct names. Nevertheless, they, like some of the Justices in *Zablocki*, disagreed on the question of whether to place their holding on one or the other. In my opinion, the confusion stems from two primary sources. First, the *Bowers* Court committed the "Collapsible Error," and second, although the *Lawrence* Court avoided making that mistake, it did so in a way that indicated it did not even fully understand what the Collapsible Error is. Consequently, the *Lawrence* Court missed an opportunity to clarify how the Proper Methodology should work in an intersection case, particularly one involving sexual orientation.

1. The "Collapsible Error"

Regardless of one's view on the intellectual exploration about defining rights under substantive due process narrowly (Does one have a right to commit suicide?²⁶⁵)

²⁶⁰ *Bowers v. Hardwick*, 478 U.S. 186, 194 (1986).

²⁶¹ *See Lawrence v. Texas*, 539 U.S. 558 (2003).

²⁶² *See id.* at 584 (O'Connor, J., concurring).

²⁶³ *See id.* at 586–605 (Scalia, J., dissenting).

²⁶⁴ *Id.* at 605–06 (Thomas, J., dissenting) (referring to *Griswold v. Connecticut*, 381 U.S. 479, 527 (1965) (Black, J., dissenting)).

²⁶⁵ *See Washington v. Glucksberg*, 521 U.S. 702, 723 (1997) (upholding a physician-assisted suicide ban). For an excellent comparative analysis of *Glucksberg* and *Lawrence*, see Brian

or broadly (Does one have a right to die with dignity?²⁶⁶), one point seems clear: the right cannot be defined in a way that subsumes the equal protection issue into the substantive due process analysis. Stated alternatively, the right cannot be defined by the class of persons adversely affected by the underlying law. I call this mistake the “Collapsible Error.”

The existence of the Collapsible Error problem itself might be the result of the way issues are popularly phrased. Specifically, it is much easier to talk about same-sex marriage, gay marriage, gay adoption, homosexual sodomy, or the black vote, for example, than it is to phrase discussions in a discourse that separates the person from the activity. Imagine talking about “white sodomy,” which hardly makes any sense even in popular discourse, but it seems bizarre in legal discourse. Nevertheless, if the constitutionality of a ban on “white sodomy” were ever to become an issue, it is unimaginable that “white” would be considered merely an adjective to describe a possible right. Without a doubt, “white” in this context would be acknowledged as a facial racial classification because “white” represents people. A court would no more ask if the “right to engage in white sodomy” is fundamental, than it would ask if the “right to engage in black voting” is. Thus, it is far more likely that such laws would be judged irrational and motivated by animus toward gays and blacks, respectively.

Committing the Collapsible Error was the primary methodological mistake of the *Bowers* Court, which held that there is no fundamental right to engage in *homosexual* (class of persons) sodomy (underlying right).²⁶⁷ Compounding the error, the District Court dismissed a heterosexual couple who wanted to challenge the law but was held to lack standing because the law was not enforced against heterosexual couples.²⁶⁸ This holding was not challenged on appeal, and therefore, the issue before the Court was whether the law as applied to homosexuals was constitutional.²⁶⁹

Notwithstanding the obvious equal protection element the Court built into the definition of the right, the Court ignored the Rule and analyzed the case as only a substantive due process one.²⁷⁰ Because the Court held there is no such fundamental right, as some Justices on the *Lawrence* Court opined,²⁷¹ the law merely had to meet rational basis review as a matter of due process methodology. Under that standard, the law was upheld, because the Court held that the fact that the majority of the state legislature found homosexual sodomy to be immoral was a legitimate reason to

Hawkins, Note, *The Glucksberg Renaissance: Substantive Due Process Since Lawrence v. Texas*, 105 MICH. L. REV. 409 (2006).

²⁶⁶ *Glucksberg*, 521 U.S. at 722.

²⁶⁷ *Bowers v. Hardwick*, 478 U.S. 186 (1986).

²⁶⁸ *Id.* at 188 n.2.

²⁶⁹ *Id.* (“The only claim properly before the Court, therefore, is Hardwick’s challenge to the Georgia statute as applied to consensual homosexual sodomy.”).

²⁷⁰ *Id.* at 190.

²⁷¹ See *Lawrence v. Texas*, 539 U.S. 558, 586 (2003) (Scalia, J., dissenting).

outlaw it.²⁷² The way the *Bowers* Court phrased the issue unfairly and unconstitutionally collapsed the equal protection analysis into the substantive due process analysis. This deviation from the Proper Methodology—committing the Collapsible Error—grossly undermined the *Bowers* Court’s integrity.

2. Maintaining Judicial Integrity

It is important for judges, particularly Supreme Court Justices, to apply the Proper Methodology in intersection cases to protect their judicial integrity, among other reasons. Toward this goal, it is essential for judges to avoid participating in the denial of due process and equal protection, which they do when they commit the Collapsible Error. Admittedly, because it is the Court’s role to say what the law is,²⁷³ it is impossible as a matter of constitutionality for it to render decisions that violate due process or equal protection. As equality-minded people, however, it is all the more important to explore and demonstrate how committing the Collapsible Error can deny due process and equal protection as a practical matter.

When the equal protection analysis is collapsed into the substantive due process analysis, the result arguably is a judicial denial of both due process and equal protection, because the Rule and the Exceptions provide the Proper Methodology. Under the Rule, a court should apply heightened review if either a suspect class or a fundamental right is targeted by a law, unless one of the Exceptions applies. The Rule presumes that a law must be justified under the highest level of review that is involved in the case.

Thus, in a non-obvious intersection case, a group burdened by a law has a due process right to have a court apply equal protection analysis if the answer to the fundamental rights question is negative. This is particularly true if the case involves an established suspect or quasi-suspect class, but it also is true in non-obvious cases where the targeted group might be a suspect or quasi-suspect class if only the court analyzed the issue. Otherwise, equal protection is meaningless to the targeted group with respect to laws that discriminate against it. Moreover, the targeted group also has an equal protection right to have a court apply due process analysis. Otherwise, the group’s members lose an opportunity to have a higher level of review apply, which would be the case if the right were already established as fundamental or would be placed in that category if the Court considered the question. The only reason to deviate from the Rule is because one of the Exceptions applies. The targeted group also has

²⁷² *Bowers*, 478 U.S. at 196 (“The law, however, is constantly based on notions of morality, and if all laws representing essentially moral choices are to be invalidated under the Due Process Clause, the courts will be very busy indeed.”).

²⁷³ *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803); see Richard H. Fallon, Jr., *Marbury and the Constitutional Mind: A Bicentennial Essay on the Wages of Doctrinal Tension*, 91 CAL. L. REV. 1 (2003).

due process and equal protection rights to have the Exceptions considered, because the Exceptions are important in and of themselves. For a law to fail rational basis review under an Exception is quite remarkable and symbolically noteworthy.

When a case fits into the Ill Motives Exception, it is even more important to highlight this reality for the reasons discussed above.²⁷⁴ Moreover, the Ill Motives Exception is more likely to be relevant under equal protection because that analysis is focused on *who* should enjoy the underlying right. If equal protection is not a central concern of a court in such cases, then any legislative animosity or prejudice behind a law is less likely to be considered or be an integral concern by the reviewing court. If the animus comes from the court itself, even as a result of a tendency to normalize differences, it is impossible for it to be adequately exposed and avoided. But arguably an ill motive—from prejudice to hostility—is the motivation (legislative and/or judicial) for defining the right by the targeted group.

3. *Lawrence*'s Attempt to "Right" *Bowers*

The *Lawrence* Court deserves credit for correcting the Collapsible Error committed by the *Bowers* Court, although it probably was not even aware of what it had done. Specifically, the *Lawrence* Court understood that the right at issue in the case should not be defined as "a right to engage in homosexual sodomy."²⁷⁵ Rather the Court chose to define the right without reference to the group targeted by the law and thereby avoided committing the Collapsible Error. This is important because the *Lawrence* Court avoided building an inequality into the analysis *ab initio*. This step alone stopped some of the judicial due process and equal protection harms that *Bowers* had imposed on gays. In turn, the *Lawrence* Court restored some of the judicial integrity that was lost by the *Bowers* Court because of that Court's deviation from the Proper Methodology.

Moreover, the *Lawrence* Court promoted the equal protection and due process rights of gays when it defined the right at stake in a neutral way. In other words, by defining the right as one of "liberty"—an established fundamental right²⁷⁶—the *Lawrence* Court created a presumption that gays (and everyone) have the right. Similarly, if the Court had defined the right as "sodomy," it also would have created a presumption that everyone either has or does not have the right depending on state laws. The extent that the right could be regulated or denied to certain groups would depend on rebutting the presumption under equal protection principles consistent with the Proper Methodology. The state would have to justify the burden or denial under the applicable standard of review. If the right is placed in the fundamental rights realm—however the Court defines it—laws burdening the right must pass

²⁷⁴ See *supra* Part II.C.3.

²⁷⁵ *Lawrence*, 539 U.S. at 566–67 (majority opinion).

²⁷⁶ See *id.* at 574.

heightened review.²⁷⁷ If the right is not deemed fundamental, ordinarily subjecting the law to rational basis review,²⁷⁸ it cannot burden certain groups without meeting whatever standard of review is required under equal protection.

Quite significantly, the state's proffered justification for the law cannot be based upon a rationale that reverts the analysis to the Collapsible Error problem. This is true regardless of what level of review applies to a case. It ought to be unconstitutional for a court to uphold a law—under any standard of review—by using a methodology that itself denies due process and equal protection.

Significantly, when courts commit the Collapsible Error, they leave themselves vulnerable to accusations that their methodology stems from a *judicial* prejudice or hostility toward the group burdened by the law. Because, in effect, the Collapsible Error creates an (unconstitutional) irrebuttable presumption that the underlying right (homosexual sodomy) is *not* fundamental, and therefore laws infringing on it only have to meet rational basis review. Otherwise, there would not be a need to define the right by the targeted group. This is especially true in cases where the status of the group under equal protection is subject only to rational basis review as decided by the Court.

Committing the Collapsible Error when the status of the group is unknown under equal protection, as it is with gays, is especially pernicious because a court is able to avoid deciding the group's status under equal protection. To leave a group's status in abeyance makes sense under the umbrella of the Principle, but even then only to a point. Certainly when a court deviates from the Proper Methodology in order to avoid deciding the group's status under equal protection analysis, the court's integrity rightfully should be called into question.

On returning to *Bowers* and *Lawrence*, assume the right to engage in sodomy is a fundamental right. This is "easier" to accept if the right is defined more broadly as one of liberty, and perhaps this is why the *Lawrence* Court chose to define it that way.²⁷⁹ Nevertheless, the point is the same. The state cannot meet strict scrutiny by relying on a tautological rationale that defines the right by the group. For example, the state cannot argue that an anti-sodomy law is necessary to limit a fundamental right (sodomy) to certain people (heterosexuals) because the right, although ostensibly neutrally defined (sodomy), *by definition* includes only the people (heterosexuals) who fall within the definition of the right (heterosexual sodomy). Under due process analysis, if the state can proffer some other necessary or compelling justification for the anti-sodomy law, *neutrally defined*, then it would be constitutional.

Recall that the statute in *Lawrence* targeted homosexual sodomy on its face, but the Court explicitly avoided the equal protection analysis.²⁸⁰ Significantly and ironically,

²⁷⁷ See, e.g., *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997).

²⁷⁸ See, e.g., *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439–41 (1985).

²⁷⁹ See *Lawrence*, 539 U.S. at 566–67.

²⁸⁰ See *id.*

the Court also could not analyze the law without “dealing with” and thereby acknowledging the sexual orientation discrimination inherent in the law. Under substantive due process, the Court held that protecting morality was an inadequate justification for the law.²⁸¹ In fact, the *Lawrence* Court could find no other justification for the law, which is why the Court’s rationale puts it in the Logical Exception; it failed rational basis review. Without a neutral justification for the law, it is irrational even if a fundamental right is involved.

This Article pushes the analysis one step further, and this is why the Ill Motives Exception is independently important. If a state or court cannot justify the law without committing the Collapsible Error, then it must be unconstitutional. Moreover, if the *only* way to justify a law is by relying on the Collapsible Error, then it seems clear the law is ill-motivated; it is targeted at a particular group and the right is defined by the group. This is true even if the law only implicitly targets the disfavored group by defining the right to include only the favorable group—“heterosexual marriage.” Accordingly, it is within the Ill Motives Exception. In the final analysis, this is exactly where *Lawrence* belongs. The *Lawrence* Court avoided the Collapsible Error that was committed by the Texas legislature, but only because the Court held there was no rational reason for the law and acknowledged, if not emphatically but by reference to *Romer*, that prejudice and hostility against gays does exist.²⁸²

A word of caution. By pointing this out, I am not suggesting the motivation to hurt the targeted group is necessarily the result of reflection, although on some level of consciousness most people are aware of their biases. Most of the time, a person’s biases result in non-reflective prejudicial behavior because the biases result from ingrained lessons about the meaning and significance of differences among people.²⁸³ Recall Justice Kennedy’s admonition in *Garrett* about unreflective or reflexive prejudice against persons with disabilities.²⁸⁴ He acknowledged this phenomenon and then, ironically, concluded that was not what was happening throughout the country (at least with respect to states qua states), notwithstanding the congressional record supporting the opposite conclusion.²⁸⁵ The irony highlights the phenomenon.

Respectfully, another example presents itself with Justice O’Connor’s concurrence in *Lawrence*. In *Lawrence* she starts the analysis with equal protection. Significantly, her analysis relies heavily on the rationales in *Moreno* (involving hippies)²⁸⁶ and *Cleburne* (involving persons with “mental retardation”),²⁸⁷ the cases that support the

²⁸¹ See *id.* at 577 (“[T]he fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice . . .”).

²⁸² See *id.* at 574–75.

²⁸³ See *supra* note 29 and accompanying text.

²⁸⁴ See Bd. of Tr. of the Univ. of Ala. v. *Garrett*, 531 U.S. 356, 374–75 (Kennedy, J., concurring); see also *supra* Part I.C.3.c.

²⁸⁵ *Garrett*, 531 U.S. at 375–76.

²⁸⁶ See *Lawrence*, 539 U.S. at 579–80 (O’Connor, J., concurring).

²⁸⁷ See *id.*

proposition that “a bare . . . desire to harm a politically unpopular group” is never sufficient justification for a law.²⁸⁸ Her analysis culminates with the conclusion that the sodomy law seems to be “born of animosity,” the primary reason Colorado’s Amendment 2 was struck down in *Romer*.²⁸⁹ The Amendment prohibited “all laws or policies providing specific protection for gays or lesbians from discrimination by every level of Colorado government.”²⁹⁰ In short, under the terminology of this Article, Justice O’Connor’s rationale puts *Lawrence* into the Ill Motives Exception and that ends the analysis. Cutting off the analysis for this reason is a dramatic and symbolic judicial condemnation of discrimination.

By starting with equal protection, Justice O’Connor quickly realized the law was motivated by animus toward gays and held the law unconstitutional. Moreover, this resolution allowed Justice O’Connor to avoid the need to engage in a substantive due process analysis. This approach provides the greatest respect to state sovereignty as Justices Stewart and Powell highlighted in *Zablocki*.²⁹¹ Correlatively, by avoiding the substantive due process analysis, Justice O’Connor would have spared the Court the criticism that attaches to creating substantive due process rights, especially when it is unnecessary for it to do so. Moreover, she also avoided the need to engage in the endless and intractable debate about whether to define rights narrowly or broadly. Admittedly, states could enact laws criminalizing all sodomy, arguably invading the broadly defined fundamental right of privacy of consenting adults. Justice O’Connor is correct to point out that states could outlaw all sodomy (like the *Bowers* statute), but “so long as the Equal Protection Clause [not part of the *Bowers* Court’s separate and explicit reasoning] 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.”²⁹²

Justice O’Connor’s concurrence seemed to hit the nail on the head, except for parts of her opinion that contribute to the intellectual confusion in the area of sexual orientation discrimination. Consider that even as Justice O’Connor exposed the animosity behind the statute in *Lawrence*, she hinted that discrimination based on sexual orientation might be rational for the purpose of protecting the traditional institution of marriage.²⁹³ Her use of the word “rational” implies that she would not consider sexual orientation a suspect classification. But this implication is questionable in

²⁸⁸ *Id.*

²⁸⁹ *Id.* at 583 (citing *Romer v. Evans*, 517 U.S. 620 (1996)).

²⁹⁰ *Romer*, 517 U.S. at 629.

²⁹¹ See *Zablocki v. Redhail*, 434 U.S. 374 (1978).

²⁹² *Lawrence*, 539 U.S. at 584–85. Theoretically, Justice O’Connor is correct, but unfortunately, the reality is that a facially neutral law can be and is applied unfairly only to gays. This is the *Bowers* case. Given that laws like those in *Romer* and *Lawrence* are motivated by animosity, it is illogical to think that the dominant group will think it needs to vote to protect itself from invasions of privacy even if, or especially if, the secondary effect of supporting their own protective legislation results in the protection of gays.

²⁹³ *Id.* at 585 (suggesting that it might be rational to protect national security).

light of a statement elsewhere in her opinion that the sodomy law could not pass “any standard of review,”²⁹⁴ implying that sexual orientation might be a suspect classification requiring heightened scrutiny. She might also have been suggesting that a higher level of review would apply in the Ban Case because under the Rule marriage is a fundamental right. Because Justice O’Connor did not analyze equal protection separately, one can only speculate about where gays would end up in her equal protection analysis.

Justice O’Connor seemed to be laying a foundation for distinguishing *Lawrence* from the future Ban Case that might be decided by the Court. The fact that she felt she needed to do this raises an inference that she—clearly an equality-minded Justice—is open to concluding that such bans are constitutional. The normalization of heterosexuality, in reality, underlies the need to protect the traditional institution of marriage that defines it as between a man and a woman.

Preserving the “traditional institution of marriage” cannot justify limiting marriage to heterosexuals because the “traditional institution of marriage” is tautologically defined by heterosexuality. Justice O’Connor’s suggestion in *Lawrence*, the very case in which she quickly pointed out the animosity toward gays behind the anti-homosexual sodomy law, indicates she is unaware of the built-in inequality and denial of due process that attaches to committing the Collapsible Error in the marriage context. But if the Court defines marriage as “heterosexual marriage” to justify bans on “gay marriages,” then it is committing the Collapsible Error. One who commits the Collapsible Error in the analysis perhaps cannot even see the prejudice (or more extreme motives) behind the methodological mistake.

4. *Lawrence*: A Missed Opportunity

Notwithstanding the *Lawrence* Court’s courage in overruling *Bowers* and thereby correcting the *Bowers* Court’s Collapsible Error, from a different perspective the *Lawrence* Court also applied an improper methodology.²⁹⁵ First, because *Lawrence* is a Logical (or Ill Motives) Exception case, it was unnecessary under the Principle to analyze whether a fundamental right was involved. But *Lawrence* itself is a unique case because the Court used it to overrule *Bowers*, a case that was premised on the Collapsible Error. Without realizing the importance of correcting that, the *Lawrence* Court nevertheless knew *Bowers* was wrong, and by defining the right neutrally as

²⁹⁴ *Id.*

²⁹⁵ See Cass R. Sunstein, *What Did Lawrence Hold: Of Autonomy, Desuetude, Sexuality, and Marriage*, 2003 SUP. CT. REV. 27, 30 (“*Lawrence*’s words sound in due process, but much of its music involves equal protection.”). Aside from the procedural “mistakes” in *Lawrence*, its holding is limited in other ways as well. See, e.g., Katherine M. Franke, *The Domesticated Liberty of Lawrence v. Texas*, 104 COLUM. L. REV. 1399 (2004) (centering the opinion in heterosexism); Berta E. Hernandez-Truyol, *Querying Lawrence*, 65 OHIO ST. L.J. 1151 (2004) (same).

liberty, which is an established fundamental right, the *Lawrence* Court was doing its best to “right” *Bowers*.

Perhaps if the Court had understood the nature of the Collapsible Error, it could have exposed the error for what it is and used *Lawrence* to clarify that the Proper Methodology applies in intersection cases involving sexual orientation. Instead, the *Lawrence* Court’s approach arguably enables the ongoing discrimination against gays, because they remain subject to a case-by-case analysis of their rights under substantive due process, and they do not enjoy even knowing whether they are entitled to heightened review under equal protection. Moreover, the possibility or probability of committing the Collapsible Error in sexual orientation discrimination cases is high. It is worth highlighting that the *Lawrence* Court avoided the Error, but only because it held the law was irrational. In this way, the *Lawrence* Court also participated in the denial of gays’ due process and equal protection rights.

Because the *Lawrence* Court wanted to reconsider *Bowers*, it really was approaching the case as a non-obvious one, and thus the Court could have proceeded on due process or equal protection analyses. The Proper Methodology intuitively called for the *Lawrence* Court to engage in an equal protection analysis because the law in *Lawrence* criminalized sodomy only between persons of the same sex. It was a facial classification based on sexual orientation.

The *Lawrence* Court had an opportunity to finally decide where sexual orientation fits in the equal protection paradigm. Interestingly, Professor Suzanne Goldberg notes that the Court has not added a suspect or quasi-suspect class to the list since 1976.²⁹⁶ Yet strong arguments can be made that gays meet all three criteria—immutability, history of discrimination, and political powerlessness—that the Court traditionally uses to evaluate suspectness.²⁹⁷ It is unclear how these criteria are weighted or what combination triggers heightened scrutiny. Logically, meeting all three criteria makes for the strongest case, meeting two a stronger case, and meeting only one the weakest. But the cases increasingly tend to be all over the map. *Cleburne* provides an example at one extreme because people with “mental retardation” arguably meet all three criteria, as even Congress noted in amassing its record to support the ADA, but the *Cleburne* Court actually overruled the Fifth Circuit on this issue and held they were not even a quasi-suspect class.²⁹⁸ At the other extreme, laws that classify on the basis of race and discriminate against whites are still subject to strict scrutiny.²⁹⁹ In those cases, the only criteria present is “immutability,” because whites are not politically powerless and historically have not been discriminated against.³⁰⁰

²⁹⁶ Goldberg, *supra* note 13, at 485 (noting that the addition of sex/gender as a quasi-suspect classification was the last addition to the category).

²⁹⁷ See *United States v. Carolene Prod. Co.*, 304 U.S. 144 (1938); see also Simson, *supra* note 209, at 368–75.

²⁹⁸ See *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432 (1985).

²⁹⁹ See *Grutter v. Bollinger*, 539 U.S. 306 (2003).

³⁰⁰ See Suzanna Sherry, *Selective Judicial Activism in the Equal Protection Context: Democracy, Distrust, and Deconstruction*, 73 GEO. L.J. 89, 118–19 (1984) (suggesting that

As an observation, it must be pointed out how unfair it is that persons with disabilities are denied heightened review status but whites are entitled to it. Stated alternatively, a group that is the target of widespread discrimination and prejudice, so much so that Congress invoked its section 5 power to enact the ADA on their behalf years after *Cleburne*, still could not persuade the Court of a need to give it suspect classification status *even though* the group meets all three traditional criteria. Moreover, no member of the *Cleburne*, *Garrett*, or *Lane* Courts expressed anything but compassion for persons with disabilities.³⁰¹ Justice Kennedy astutely acknowledged that some people can harbor unreflective prejudice toward others.³⁰²

In contrast, with absolutely no history of prejudice or discrimination against whites, the Court readily gave suspect classification status to them.³⁰³ Admittedly, race is immutable. It seems of the three traditional criteria, "immutability" is the weakest because the Constitution protects all kinds of choices. Choosing to belong to a non-Christian religion, for example, nevertheless might put one in a group with a history of discrimination and concomitant lack of political power. The latter two criteria seem much more important because they directly tap into one of the roles the Court is called upon to serve: to protect a political minority from political majority oppression. This is an especially important and essential function of the Court with respect to individual liberties under due process and equal protection.³⁰⁴ It is a matter of judicial integrity. This is poignantly illustrated in an intersection case in which no fundamental right is involved but the state-created right targets a suspect class such as a religious group. For example, a state law that prohibited members of the religious group from driving would have to pass strict scrutiny to be constitutional. More likely, the Court would put it into one of the Exceptions, and the Ill Motives would seem most apt.

It is curious that the Court is reluctant to tackle the equal protection status question with respect to gays. Its reluctance seems unrelated to the Principle because both *Bowers* and *Lawrence* intuitively called for an equal protection analysis. Ironically, the *Lawrence* Court explicitly chose to avoid equal protection because it held that substantive due process would provide greater protection for gays.³⁰⁵ Is

political process theory is inapplicable in affirmative action context); *see also* Klarman, *supra* note 48, at 314 (same).

³⁰¹ *See* *Tennessee v. Lane*, 541 U.S. 509 (2004); *Bd. of Tr. of Univ. of Ala. v. Garrett*, 531 U.S. 356 (2001); *Cleburne*, 473 U.S. at 432.

³⁰² *Garrett*, 531 U.S. at 375 (Kennedy, J., concurring).

³⁰³ *See Grutter*, 539 U.S. at 306.

³⁰⁴ *See* Ackerman, *supra* note 50, at 742 ("At the same time that we enrich the capacity of constitutional law to perfect pluralist democracy, we must also reaffirm a second fundamental mission for judicial review: to expound the ultimate limits imposed on pluralist bargaining by the American constitutional system.").

³⁰⁵ *Lawrence v. Texas*, 539 U.S. 558, 575 (2003). Justice Kennedy opined:

Equality of treatment and the due process right to demand respect for conduct protected by the substantive guarantee of liberty are linked in

the Court hesitant to answer the equal protection question because, looking at the traditional criteria, gays would seem to be entitled to be a suspect class?³⁰⁶ Even if immutability is left out of the equation because of the conflicting scientific studies,³⁰⁷ the two strongest criteria are clearly present. Moreover, unlike “persons with disabilities,” some of the Justices on the Court are openly hostile toward gays.³⁰⁸ Congress generally eschews any legislation that would prohibit sexual orientation discrimination.³⁰⁹ Without some ruling from the Court on this issue, in fact, it might be that Congress has virtually no enforcement power under section 5 to protect gays from widespread discrimination *even if it wanted to*.³¹⁰

important respects, and a decision on the latter point advances both interests. If protected conduct is made criminal and the law which does so remains unexamined for its substantive validity, its stigma might remain even if it were not enforceable as drawn for equal protection reasons.

Id.

³⁰⁶ Professor Pamela Karlan suggests the *Lawrence* Court was concerned with the implications of an equal protection analysis, particularly in the marriage context. See Karlan, *supra* note 129, at 1458–59.

³⁰⁷ Professor Janet Halley recognized over ten years ago how a limited focus on immutability misses the bigger picture about securing equality for gays. See Janet E. Halley, *Sexual Orientation and the Politics of Biology: A Critique of the Argument from Immutability*, 46 STAN. L. REV. 503, 506 (1994). On the relevance of immutability or characteristics beyond the individual’s control to change, see *Clark v. Jetter*, 486 U.S. 456 (1988) (holding that intermediate scrutiny is the proper standard to apply in cases involving children born out of wedlock because laws should not burden children for choices their parents made); *Frontiero v. Richardson*, 411 U.S. 677, 682–88 (1973) (plurality opinion) (holding that gender is an immutable characteristic; thus heightened review should apply).

³⁰⁸ See *Romer v. Evans*, 517 U.S. 620, 644–45 (1996) (Scalia, J., dissenting) (stating that Coloradans are “entitled to be hostile toward homosexual conduct” and relating moral disapproval of murder to moral disapproval of homosexuals).

³⁰⁹ But see the proposed Employment Non-Discrimination Act of 2001 (ENDA), S. 1284, 107th Cong. (2001), which failed to pass the Senate in 1996 and has not been addressed since it was put on the Senate Legislative Calendar in 2002. If ENDA were to become law, it would be subject to challenge under the “congruence and proportionality” test of *Flores*. See *City of Boerne v. Flores*, 521 U.S. 507, 508 (1997) (requiring “congruence and proportionality” between an injury Congress seeks to prevent or remedy and the means it adopts).

³¹⁰ Interestingly, many due process and equal protection decisions were decided years before the Court started to develop an understanding of the scope of Congress’s section 5 enforcement power, which began in 1997 in *City of Boerne v. Flores*. In *Flores*, the Court held that Congress lacked power under the Fourteenth Amendment to require that, pursuant to the Religious Freedom of Restoration Act (RFRA), strict scrutiny apply to evaluate laws of neutral and general applicability that allegedly violate the Free Exercise Clause. *Flores*, 521 U.S. at 507. The *Flores* Court admonished Congress that it lacked power to create substantive rights under the Fourteenth Amendment, which was the effect of the RFRA because it required a higher level of review than the Court said was called for in *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990), where the Court upheld Oregon’s denial

These observations highlight why the Ill Motives Exception is so important. Why cases that involve sexual orientation discrimination do not presumptively fall with the Proper Methodology is mysterious. It is as if their claims are not worthy of inclusion. It is reasonable to conclude that the confusion over the analysis that should apply results from prejudice or hostility toward gays.

The observations in this Article also highlight why it is important to reject Justice Scalia's suggestion that local legislative successes, like those of the voters in Aspen, Denver, and Boulder, make gays politically powerful.³¹¹ The widespread political movements across the country to limit marriage to a man and a woman belie any suggestion that gays are a politically powerful group.³¹² Significantly, even when they seek judicial protection, if anything, the Collapsible Error analysis above suggests how widespread the prejudice and animosity against gays can be in some contexts.³¹³ It reflects a reality that even some members of the Court, like many other equality-minded people, probably think within the paradigm that normalizes heterosexuality, reflecting a prejudice or even hostility toward gays. It is important to unmask and explore this possibility as a matter of judicial integrity.

of unemployment benefits to Al Smith, who was dismissed from his job for ingesting peyote during a religious ceremony in violation of the state's criminal laws. *Flores*, 521 U.S. at 532–36. For an excellent narrative of the case, see Mark Tushnet, *The Story of City of Boerne v. Flores: Federalism, Rights, and Judicial Supremacy*, in CONSTITUTIONAL LAW STORIES 505 (MICHAEL C. DORF ed., 2004).

Since *Flores*, the Court has decided a number of section 5 cases as it goes head-to-head with Congress, consistent with separation of powers principles, to delineate the proper boundaries between legislative and judicial power under the Fourteenth Amendment. One boundary that is being delineated in the section 5 area relates to how much deference the Court will give to Congress's findings that federal legislation is necessary to enforce the substantive provisions, as decided by the Court, of the Fourteenth Amendment. *See, e.g.*, *Tennessee v. Lane*, 541 U.S. 509, 528–29 (2004) (suggesting that the Court is more willing to accept Congress's findings of a pattern of disability discrimination where a fundamental right is involved); *Nev. Dep't of Human Res. v. Hibbs*, 538 U.S. 721, 722 (2003) (pointing to congressional findings in upholding that the Family Medical Leave Act meets the "congruence and proportionality" test and may successfully abrogate a state's sovereign immunity); *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 82–83, 89–91 (2000) (discounting congressional findings in striking down the Age Discrimination in Employment Act because it failed the "congruence and proportionality" test of *Flores*). *But see* *United States v. Morrison*, 529 U.S. 598, 599 (2000) (discounting congressional findings in holding Congress lacks Commerce Clause power to enact the Violence Against Women Act, which also fails the "congruence and proportionality" test under *Flores*).

³¹¹ *Romer*, 517 U.S. at 645–46 (Scalia, J., dissenting).

³¹² *See supra* Part I.C.3.d.iii.

³¹³ *See supra* Part II.B.1.

SUMMARY

The Ban Case provides an opportunity to explore the Proper Methodology that should be applied to evaluate the constitutionality of cases at the intersection of substantive due process and equal protection. While the Court functions on the general Rule that it will apply heightened scrutiny if either a fundamental right or a suspect class is involved in a case and apply rational basis review if neither is involved, it properly deviates from the Rule in at least two situations.³¹⁴ The Logical Exception displaces the Rule in those cases in which the law fails rational basis review, even if heightened review might otherwise apply.³¹⁵ The Ill Motives Exception occupies a unique place in the analysis and captures cases where the motive behind the law stems from prejudice or animosity.³¹⁶ This Exception is not only important symbolically, but also because it challenges government officials, including judges, to be on guard against ill motives that influence decisions that actually perpetuate inequality.³¹⁷

Special care should be taken by courts to avoid committing the Collapsible Error, which happens when the underlying right is defined by the group targeted by the law.³¹⁸ This Error has the potential to happen in the Ban Case, which is popularly known as the gay marriage case. Injecting the popular discourse into legal analysis, however, can result in judicial denial of due process and equal protection. This would be the result of conflating the substantive due process question with the equal protection question. The injustice that comes from committing this error is aptly illustrated by the *Bowers* Court's holding that there is no "fundamental right to engage in homosexual sodomy."³¹⁹ The *Lawrence* Court acknowledged the injustice that emanated from *Bowers* and promoted the due process and equal protection of gays by holding that intimate relationships between consenting adult gays are protected by the "liberty" of the Due Process Clause.³²⁰ Nevertheless, even the *Lawrence* Court left gaping holes in the area of gay rights, largely stemming from its failure to follow the Proper Methodology and address the question of whether classifications on the basis of sexual orientation deserve heightened scrutiny.³²¹ As long as issues about gay rights are framed in ways that result in committing the Collapsible Error, the equal protection question will be avoided even as it remains central to the definition of the right. Applying the Proper Methodology is a matter of judicial integrity.

³¹⁴ See *supra* Part I.C.

³¹⁵ See *supra* Part I.C.1.

³¹⁶ See *supra* Part I.C.2.

³¹⁷ See *supra* Part I.C.3.a–b.

³¹⁸ See *supra* Part II.B.1–2.

³¹⁹ *Bowers v. Hardwick*, 478 U.S. 186, 191 (1985).

³²⁰ *Lawrence v. Texas*, 539 U.S. 558, 564 (2003).

³²¹ See *supra* Part II.B.4.



