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THE NEW FORMALISM: REQUIEM FOR TIERED SCRUTINY?

*Calvin Massey**

INTRODUCTION

Tiered scrutiny developed during the twentieth century to solve the problem of how to mediate the presumed validity of government action and the presumptive primacy of individual rights guaranteed by the Constitution. As the pace and scope of government regulation of daily life increased during that century, the occasions for conflict between these principles became more frequent. Perhaps for that reason, tiered scrutiny assumed ever-increasing complexity. Intermediate scrutiny joined strict scrutiny and the default level, minimal scrutiny. Debate ensued concerning whether courts should assess the legislature's hypothetical purposes, stated purposes, or engage in a judicial quest for its actual purposes. Rarefied discussion of the relative importance of governmental objectives became a staple of tiered scrutiny, as did fine distinctions concerning the closeness of the fit between the challenged means and the government's objectives. Inevitably, the discussion broadened to include the appropriate method for locating those liberties deemed so fundamental that their invasion by government ought to be treated as presumptively unlawful.

Tiered scrutiny was held together by the idea that courts could detect which legislative or executive actions were presumptively void, and subject them to searching inquiry with the burden of justification placed squarely on the government. The central idea began to be undermined as intermediate scrutiny was developed because intermediate scrutiny injected the idea that some presumptively unlawful actions were more easily justifiable than others. As courts then began to experiment with invalidating some government actions under minimal scrutiny, the coherence of minimal scrutiny was further undermined, for it was not clear whether the minimal scrutiny that was employed in striking down some presumptively valid classifications was the same minimal scrutiny that had been used to uphold most such classifications.

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With the U.S. Supreme Court's decisions in *Lawrence v. Texas*¹ and *Grutter v. Bollinger*,² the time has come for an examination of the continued vitality of tiered scrutiny. If this were medicine, the prognosis would be guarded and the prudent physician would be recommending a change in the patient's lifestyle. But constitutional law is surely not medicine and any prognosis of tiered scrutiny must be cautious indeed. Nevertheless, it is not too soon to declare that the combined effect of the methods employed by the Court in *Lawrence* and *Grutter* has done serious damage to the health of tiered scrutiny. Taken together, *Lawrence* and *Grutter* display a Court that has embraced the form of tiered scrutiny but snubbed its substance. The flaccidity of the strict scrutiny employed in *Grutter*, coupled with the robust skepticism of the minimal scrutiny employed in *Lawrence*, suggests that the neat compartments of tiered scrutiny are beginning to collapse. Whether the Court's new formalism will prove to be the beginning of the end of tiered scrutiny, or merely the end of the beginning of the development of some new methodology that mediates between government power and individual liberties, remains to be seen.

In Part I of this Article, I chart the basics of the development and use of tiered scrutiny in order to bring into focus the terrain upon which the Court operated in *Lawrence* and *Grutter*. Part II focuses on *Lawrence* and the instability it has produced and will continue to produce in the application of minimal scrutiny. Part III engages in a similar inquiry with respect to *Grutter*. Part IV examines the future of tiered scrutiny in light of the destabilizing effects of *Lawrence* and *Grutter*.

The Court is faced with inescapable choices. The first reality of choice is that the Court must continually make hard decisions about constitutional values, a task that has predated tiered scrutiny, accompanied its development and application, and will continue no matter what comes next. The issue at hand is the nature of the method by which the Court will make those choices. It might choose to reinvigorate tiered scrutiny by paying greater heed to its doctrinal postulates and making the hard choices of constitutional value selection at the outset of examination, as a threshold matter to channel the level of judicial review that should apply to the contested government action. The Court might choose to abandon tiered scrutiny and to embrace the more fluid scrutiny championed by Justice Thurgood Marshall in equal protection cases, a scrutiny that admitted frankly that all cases lay along a spectrum of constitutional values that must be ac-

¹ 123 S. Ct. 2472 (2003).

² 123 S. Ct. 2325 (2003).

counted for in a somewhat ad hoc fashion.³ The Court might embark upon some more radical departure from tiered scrutiny, such as the libertarian ideal of presuming that all government action is void until the government has offered an adequate justification for its use of power.⁴ Or, the Court might delight those who see little harm in wielding government power at every opportunity and revert to a more deferential posture with respect to government action by adopting a highly textual and historically rigid view of the pantheon of individual liberties. Finally, it may be that the present slide of tiered scrutiny into incoherence is but the harbinger of some new way for courts to mediate the clash between government power and individual liberties. If so, that new vision is not yet conceived, and thus its shape and content cannot yet be described. All we can know for certain is that the challenge to tiered scrutiny presently exists and that the Court must make choices about the method by which it will identify the values that receive the protection of the Constitution. This Article is an attempt to aid in that process by clarifying where we are and what is at stake.⁵

I. THE DEVELOPMENT AND APPLICATION OF TIERED SCRUTINY

Tiered scrutiny was the solution devised by twentieth century legal imagination to the problem of when to reverse the usual presumption that legislation and executive action authorized by legislation is valid. In the century and a half prior to the economic, political, and legal crisis that brought into being the New Deal, American constitutional thinkers were largely preoccupied with issues we today lump together under the rubric of federalism. From John Jay's tenure as

³ In his dissent to *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1 (1973), Justice Marshall expressed this view:

I must once more voice my disagreement with the Court's rigidified approach to equal protection analysis. . . . A principled reading of what this Court has done reveals that it has applied a spectrum of standards . . . [that] comprehends variations in the degree of [scrutiny] . . . depending . . . on the constitutional and societal importance of the interest adversely affected and the recognized invidiousness of the basis upon which the particular classification is drawn.

Id. at 98–99 (Marshall, J., dissenting) (citations omitted).

⁴ See generally RANDY E. BARNETT, *RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY* 253–69 (2003).

⁵ Given the highly politically and emotionally charged content of the matters at issue in *Lawrence* and *Grutter*, and the fact that this Article is critical of the method employed in each case, I wish to state at the outset that I applaud the result in each case. The tendency in legal academia today is to go straight to the result, dismiss those who disagree with you, embrace those who agree, and stop reading and thinking at that point. This is, of course, a deplorable state of affairs and, fortunately, not universal. I trust that readers will understand that this is an article about methodology, and not about whether *Lawrence* or *Grutter* was right or wrong in its outcome. I thus direct my Article to that portion of the academy that is still interested in legal method and has not entirely conflated law and politics.

Chief Justice, to well after the Civil War, the Court was concerned primarily with the nature of the federal union and the scope of federal and state authority. Issues of personal liberty were rarely addressed squarely, partly because the Bill of Rights was not applicable to the states,⁶ and partly because the eighteenth and nineteenth century legal consciousness conceived of liberty as the absence of governmental power. That consciousness necessarily faded as the complexity of the industrial age mandated a larger scope for governmental power, and as technological advancements in transportation and communication created a truly national economy. No longer could it be assumed that liberty inhered merely in the absence of authority for government to act; now it was necessary to think more often of liberty as residing in the veto power of individual liberties, a power to be invoked by litigants and exercised by judges. Of course, this power has existed since *Marbury v. Madison* (and, somewhat less securely, existed even before *Marbury*), but it had been largely a latent power primarily in the first century of our constitutional experience. With the vastly changed social, economic, and political conditions of a no-longer-juvenile industrial age, however, the veto power of individual liberties could not remain dormant. Thus it was that the twentieth century became the historical moment in which the constitutional law of individual liberties, like the cosmos, seemed to be an ever-expanding universe. No longer did individual rights begin where governmental power ended; now the playing cards of governmental power were always susceptible to check by the trump cards of individual liberties.

Although judicial review may have acquired an occasionally jaundiced eye as early as *Marbury*, at least since *United States v. Carolene Products Co.*,⁸ the courts have attempted to fashion a modern doctrine of tiered scrutiny. The iconic Footnote Four,⁹ planted to suggest appropriate indicators of presumptive unconstitutionality, was only the beginning of the venture. If constitutional liberties are indeed to function as judicially enforceable vetoes upon democratic outcomes,

⁶ See, e.g., *Barron v. Mayor of Baltimore*, 32 U.S. (7 Pet.) 243, 250–51 (1833). In *Barron*, the Court held:

[T]he provision in the fifth amendment to the constitution, declaring that private property shall not be taken for public use, without just compensation, is intended solely as a limitation on the exercise of power by the government of the United States, and is not applicable to the legislation of the states.

Id.

⁷ 5 U.S. (1 Cranch) 137 (1803) (establishing judicial review).

⁸ 304 U.S. 144 (1938) (holding that a statute prohibiting the shipment of filled milk in interstate commerce is not unconstitutional on its face, and thus is presumptively within the power of interstate commerce and consistent with due process).

⁹ *Id.* at 152 n.4 (“[P]rejudice against discrete and insular minorities . . . may call for a correspondingly more searching inquiry.”).

there must be some system by which we can identify which sausages that emerge from the legislative factory are suspected to be tainted. Only then can we toss them into the judicial hopper for close scrutiny with a skeptical eye. The tools are familiar, though they range across the panorama of constitutional law. Classifications by race or national origin are deeply suspicious, and can only be upheld if the government overcomes "strict scrutiny" by proving that the suspect classification is necessary to the accomplishment of a compelling governmental objective. This is not easy to do. One of the few racial classifications that survived such scrutiny is the now near universally discredited *Korematsu v. United States*,¹⁰ in which the Court upheld the mass incarceration of Japanese nationals and Americans of Japanese ancestry during World War II on the belief that it was a "military imperative" to do so.¹¹ Classifications that materially infringe on fundamental constitutional liberties (for equal protection purposes, those that are explicit or implicit in the Constitution,¹² an unhelpfully open-ended definition; for due process purposes, those that are deeply rooted in our history and tradition¹³ and implicit in the concept of ordered liberty,¹⁴ a no-more-helpful definition) are also presumed to be void, and may be upheld only if such infringements can be justified under strict scrutiny. Regulations of speech that turn on the content of the speech,¹⁵ or the viewpoint of the speaker,¹⁶ are also presumptively invalid and subject to strict scrutiny, except when the Supreme Court decides that an entire category of speech (defined by its content) is so removed from the central purposes for protecting freedom of speech that it can be suppressed wholesale¹⁷ (but not if

¹⁰ 323 U.S. 214 (1944).

¹¹ *Id.* at 219.

¹² See *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 33–34 (1973) ("[T]he key to discovering whether [a right] is 'fundamental' . . . lies in assessing whether [the claimed right is] explicitly or implicitly guaranteed by the Constitution.").

¹³ See *Washington v. Glucksberg*, 521 U.S. 702, 720–21 (1997) ("[T]he Due Process Clause specially protects those fundamental rights and liberties which are, objectively, 'deeply rooted in this Nation's history and tradition . . .'" (quoting *Moore v. City of E. Cleveland*, 431 U.S. 494, 503 (1977))).

¹⁴ See *id.* at 721 ("[T]he Due Process Clause specially protects those fundamental rights and liberties which are . . . 'implicit in the concept of ordered liberty . . .'" (quoting *Palko v. Connecticut*, 302 U.S. 319, 326 (1937))).

¹⁵ See, e.g., *United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803, 813 (2000) ("[Content-based regulations] must be narrowly tailored to promote a compelling Government interest. If a less restrictive alternative would serve the Government's purpose, the legislature must use that alternative.").

¹⁶ See, e.g., *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829–30 (1995) ("[This court has] observed a distinction between, on the one hand, content discrimination, which may be permissible if it preserves the purposes of that limited forum, and, on the other hand, viewpoint discrimination, which is presumed impermissible when directed against speech otherwise within the forum's limitations.").

¹⁷ CALVIN MASSEY, *AMERICAN CONSTITUTIONAL LAW: POWERS AND LIBERTIES* 855–56 (2001).

the mechanism of suppression is for a reason other than the reason the entire category is exiled from the pantheon of constitutional liberties).¹⁸ Regulations that impinge upon religious belief, or have particularized impact upon religious conduct, are presumed to violate the Free Exercise Clause unless the government can justify the infringement under strict scrutiny.¹⁹

More controversially, classifications by sex or illegitimate birth are thought, at least by the Court, to be more frequently germane to legitimate social and political goals. Such classifications should be regarded as only mildly suspicious, but still suspicious enough that for them to be valid, the government must prove that its actual objective is important (but not compelling), and that the classification is substantially related (but not necessary) to the accomplishment of the important objective. This level of judicial scrutiny is politely termed intermediate scrutiny, though Justice Scalia derides it as a standard with "no established criterion"²⁰ for its use and, thus, as being applied "when it seems like a good idea to load the dice."²¹

Variations on the theme of intermediate scrutiny are also to be found in the vast bog of free speech jurisprudence. Content-neutral regulations of the time, place, or manner of speech are valid if "they are narrowly tailored to serve a significant governmental interest, and . . . leave open ample alternative channels for communication."²² Such a regulation is "narrowly tailored" if the government's interest would be less effectively achieved without the regulation, and if the regulation does not "burden substantially more speech than is necessary to further the government's legitimate interests."²³ Under the virtually identical *O'Brien* test,²⁴ otherwise lawful regulations of behavior that impinge on expressive conduct are valid if they further an "important or substantial governmental interest" that is "unrelated to

¹⁸ See *R.A.V. v. City of St. Paul*, 505 U.S. 377, 383–84 (1992) (explaining that certain categories of speech may validly "be regulated *because of their constitutionally proscribable content* (obscenity, defamation, etc.)—[but] they are [not] categories of speech entirely invisible to the Constitution, so that they may be made the vehicles for content discrimination unrelated to their distinctively proscribable content").

¹⁹ See, e.g., *Employment Div. v. Smith*, 494 U.S. 872 (1990) (applying strict scrutiny to enforcement of Oregon drug laws against ceremonial ingestion of peyote).

²⁰ *United States v. Virginia*, 518 U.S. 515, 568 (1996) (Scalia, J., dissenting).

²¹ *Id.*

²² *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 (1984).

²³ *Ward v. Rock Against Racism*, 491 U.S. 781, 799 (1989). In *Ward*, the Court specifically rejected the idea that "narrow tailoring," in the context of content-neutral time, place, and manner speech regulations, requires the government to use the least speech restrictive means of accomplishing its objectives. *Id.* at 800.

²⁴ The *O'Brien* test, derived from *United States v. O'Brien*, 391 U.S. 367 (1968), has been characterized by the Court in *Clark*, 468 U.S. at 298 (footnote omitted), as "little, if any, different from the standard applied to time, place, or manner restrictions." See also *Ward*, 491 U.S. at 797–98 (citing the characterization of the *O'Brien* test in *Clark*).

the suppression of free expression" and the "incidental restriction on [free expression] is no greater than is essential to the furtherance of that interest."²⁵ Whatever may have been the original intent of the Court in crafting the final element of the *O'Brien* test, it is now clear that because *O'Brien* only applies to "a content-neutral restriction, least restrictive means analysis is not required."²⁶ Intermediate scrutiny also applies to commercial speech, at least at the moment, under the *Central Hudson* test, which validates those regulations of advertising that "directly advance"²⁷ a substantial governmental interest and that are "not more extensive than is necessary to serve that interest."²⁸

The default level of scrutiny is, of course, so-called "rational basis" review, or minimal scrutiny. In theory, government actions that are not subject to some higher level of judicial scrutiny are presumed to be valid and may only be set aside when the challenger of the action can prove by a preponderance of the evidence that either the government has no legitimate purpose for its action or that the action is not rationally related to the accomplishment of any legitimate purpose. However, even this default level of scrutiny is not monolithic. The justices argue over whether the search for legitimate purposes should be confined to the purposes stated by the legislature, or to the actual purposes of the legislation, or extended to any conceivable purpose, however outlandish or hypothetical.²⁹ The application of

²⁵ *O'Brien*, 391 U.S. at 377.

²⁶ *City of Erie v. Pap's A.M.*, 529 U.S. 277, 301–02 (2000) (citing *Ward*, 491 U.S. at 798–99 & n.6).

²⁷ *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557, 564 (1980).

²⁸ *Id.* at 566. Judicial unhappiness with *Central Hudson* is, however, well-known and its continued vitality is in some doubt. In *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484 (1996) (plurality opinion), the Court voided Rhode Island's ban on price advertising of liquor in order to promote temperance, though no majority could coalesce on the rationale. Justice Stevens, joined by Justices Kennedy and Ginsburg, noted that "when a State entirely prohibits the dissemination of truthful, nonmisleading commercial messages for reasons unrelated to the preservation of a fair bargaining process, there is far less reason to depart from the rigorous review that the First Amendment generally demands." *Id.* at 501. Justice Scalia registered his "discomfort" with *Central Hudson* but concurred in its application. *Id.* at 517–18 (Scalia, J., concurring in part and concurring in the judgment). Justice Thomas thought that *Central Hudson* should not apply to "cases such as this, in which the government's asserted interest is to keep legal users of a product or service ignorant in order to manipulate their choices in the marketplace." *Id.* at 518 (Thomas, J., concurring in part and concurring in the judgment). In any case, the final prong of *Central Hudson*, under which the government must prove that its advertising speech restrictions are "not more extensive than is necessary to serve [its] interest[s]," means that "if the Government could achieve its interests in a manner that does not restrict [commercial] speech, or that restricts less speech, the Government must do so." *Thompson v. W. States Med. Ctr.*, 535 U.S. 357, 367, 371 (2002) (citing *Central Hudson*, 477 U.S. at 556).

²⁹ Compare the various opinions in *United States R.R. Ret. Bd. v. Fritz*, 449 U.S. 166 (1980). Justice Rehnquist (as he then was) argued that where there exist "plausible reasons" for legislative action, even if those reasons are not articulated anywhere in the legislative record, the search for a conceivable, hypothetical purpose is at an end. *Id.* at 179. To be sure, Rehnquist was criticized by Justices Stevens and Brennan in their respective dissents for declaring tauto-

minimal scrutiny is rendered even more opaque by the Court's reluctance to identify any general principles that determine when a government's purpose, whether stated, actual, or hypothetical, is illegitimate. Perhaps the best that can be done is to note, as did the Court in *United States Department of Agriculture v. Moreno*, that "a bare . . . desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest."³⁰ Of course, to identify when governments have such baseness as their objective is no mean feat, especially if courts are willing to rely on any conceivable or hypothetical objective as the defining purpose of the legislation. As a result, in those few cases in which the Supreme Court has concluded that legislation subject to minimal scrutiny lacks a legitimate purpose, it has generally eschewed the search for any conceivable hypothetical purpose and focused on what the Court views as the government's actual purpose. In *Moreno*, the Court brushed aside government contentions that a statutory ban on receipt of food stamps by households composed of unrelated persons was rationally related to the asserted purpose of minimizing fraud. Writing for the Court, Justice Brennan first contended that the ban was "clearly irrelevant to the stated purposes" of the food stamp program, which was declared by Congress to be alleviating hunger and malnutrition, and also strengthening the agricultural economy.³¹ As Justice Brennan held the view that stated purposes govern in minimal scrutiny unless those purposes are irrelevant or contrary to the classification, he was intellectually free to examine the actual purpose of Congress in enacting the ban,³² which he deduced from the legislative history to be "to prevent so-called 'hippies' and 'hippie communes' from participating in the food stamp program."³³

logically that the "plain language of [the statute] marks the beginning and the end of our inquiry"; but the import of Rehnquist's tautology was simply that if plausible, conceivable (albeit hypothetical) purposes support a legislative classification, that is the end of judicial review under minimal scrutiny. *Id.* at 186 (Brennan, J., dissenting) (quoting *id.* at 176 (Rehnquist, J., writing for the Court)). Justice Brennan argued that courts should start with the legislatively stated purpose, not any conceivable purpose, and uphold classifications that rationally further such purposes. *Id.* But when challenged classifications are "either irrelevant to or counter to that purpose," Brennan contended that courts may uphold such classifications only if they are "rationally related to achievement of an *actual* legitimate governmental purpose." *Id.* at 188. In his usual idiosyncratic fashion, Justice Stevens argued for a judicial quest of discovery of "a correlation between the classification and either the actual purpose of the statute or a legitimate purpose that we may reasonably presume to have motivated an impartial legislature." *Id.* at 181 (Stevens, J., concurring in the judgment).

³⁰ 413 U.S. 528, 534 (1973).

³¹ *Id.*

³² See *supra* note 29.

³³ *Moreno*, 413 U.S. at 534.

A similar process was undertaken in *Romer v. Evans*,³⁴ in which the Court invalidated Colorado's Amendment 2 to its constitution. The provision at issue sought to prevent any unit of Colorado government from recognizing sexual orientation as a basis for asserting any "protected status or claim of discrimination."³⁵ The Court dismissed two conceivable and hypothetical purposes for the proposed amendment: preservation of associational freedom and conservation of scarce resources to combat more inimical forms of discrimination.³⁶ The Court found these purposes not to be credible given the extraordinary breadth of disability imposed on homosexuals: the loss "even of the protection of general laws and policies that prohibit arbitrary discrimination."³⁷ Although it is a familiar principle of minimal scrutiny in equal protection jurisprudence that neither overinclusion nor underinclusion will, by itself, be sufficient to invalidate a challenged classification,³⁸ the Court in *Romer* relied on the overinclusion of Amendment 2 in terms of its putative purposes to abandon reliance on conceivable and hypothetical purposes. Instead, the Court treated overinclusion as a condition enabling it to engage in a search for Colorado's *actual* purpose in enacting Amendment 2. No matter how formidable the obstacles may be to determining the collective intent of a deliberative body, those obstacles become child's play when compared to the difficulties of ascertaining the actual purpose of the entire Colorado electorate.³⁹ Undaunted, the Court concluded that Colorado's purpose was animosity toward homosexuals—the desire to "deem a class of persons a stranger to its laws"⁴⁰—and reached that conclusion mostly by reasoning from the likely effect of the text of the provision. Thus, in *Romer*, the search for actual purposes was merged into then-Justice Rehnquist's declaration in *Fritz*, that the "plain language" of the contested provision "marks the beginning and end of our inquiry."⁴¹

³⁴ 517 U.S. 620 (1996).

³⁵ See *id.* at 624 (quoting COLO. CONST. art. II, amend. 2, § 30b).

³⁶ *Id.* at 630.

³⁷ *Id.* The effect of Amendment 2 was to prevent any assertion of a claim that discrimination on the basis of sexual orientation might be arbitrary and, thus, lawless. Putting aside the question of whether and in what contexts such discrimination might in fact be arbitrary, Amendment 2 had the effect of forbidding even the assertion of such claims, much less their resolution in favor of the aggrieved claimant.

³⁸ See *id.*; see also, e.g., *New York City Transit Auth. v. Beazer*, 440 U.S. 568 (1979) (finding overinclusion); *Mass. Bd. of Ret. v. Murgia*, 427 U.S. 307 (1976) (finding overinclusion and underinclusion); *Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483 (1955) (finding underinclusion); *Ry. Express Agency, Inc. v. New York*, 336 U.S. 106 (1949) (finding underinclusion).

³⁹ Cf. *Edwards v. Aguillard*, 482 U.S. 578, 619 (1987) (Scalia, J., dissenting) (analyzing the difficulties attendant to ascertaining the actual purposes of a legislature in enacting legislation).

⁴⁰ *Romer*, 517 U.S. at 635.

⁴¹ *United States R.R. Ret. Bd. v. Fritz*, 449 U.S. 166, 186 (1980); see *supra* note 29.

An impartial observer might be pardoned for pausing a moment to ponder the somewhat ineffable question of when a court engaged in minimal scrutiny should look to any conceivable, hypothetical purpose and when it should focus only on actual purpose. Such a bystander might conclude that any conceivable purpose suffices unless the classification serves all of those conceivable purposes very badly indeed. Then, the actual purpose is to be divined from the effects of the classification, insofar as the effects can be inferred from the text. But, can that be the operative principle? If it is, how does one account for *Railway Express Agency, Inc. v. New York*⁴² or *New Orleans v. Dukes*?⁴³ Ostensibly to ensure traffic safety, New York City barred Railway Express from advertising others' wares on its delivery vans while permitting thousands of virtually identical delivery vans to advertise their owners' wares. Surely the purpose of traffic safety was very badly served by such a pointed and narrow ban on delivery van advertising, and the effect of the ban was to deprive common carrier vans from earning advertising revenue. That revealed actual purpose may have been a legitimate purpose (or it might have been illegitimate if it amounted to a naked desire to harm such businesses), but the Court in *Railway Express* did not survey that issue; it was enough for the Court to declare: "It is no requirement of equal protection that all evils of the same genus be eradicated or none at all."⁴⁴ Similarly, in *Dukes* the Court upheld New Orleans's refusal to permit pushcart vendors to operate in the French Quarter while exempting those vendors who had operated there for eight years prior to the ban. The Court was satisfied that the ban "rationally furthers the purpose . . . '[of preserving] the appearance and custom valued by the Quarter's residents and attractive to tourists,'"⁴⁵ although one can readily imagine a wide variety of less arbitrary and more even-handed ways by which New Orleans could have catered to the subjective tastes of residents and tourists in its French Quarter.

If further confusion is needed, let it be supplied by a sampling from the cases that apply an enhanced brand of minimal scrutiny. A standard number in this repertoire is *City of Cleburne v. Cleburne Living Center, Inc.*⁴⁶ in which Cleburne, Texas, refused to allow a group home for the mentally retarded, but permitted virtually every other sort of group care and multiple-dwelling facility to locate within its borders. The Court rejected two conceivable government interests as

⁴² 336 U.S. 106 (1949).

⁴³ 427 U.S. 297 (1976).

⁴⁴ *Ry. Express Agency, Inc.*, 336 U.S. at 110.

⁴⁵ See *Dukes*, 427 U.S. at 304 (quoting *Dukes v. New Orleans*, 501 F.2d 706, 709 (5th Cir. 1974)).

⁴⁶ 473 U.S. 432 (1985).

illegitimate: the unsubstantiated “negative attitudes” of nearby property owners⁴⁷ and the equally “vague, undifferentiated fears” of criminal harassment of the residents by neighborhood juveniles.⁴⁸ The Court, then, concluded that the remaining objectives (i.e. concern about the number of occupants and that the facility would be located within a flood plain) were legitimate but that the city’s refusal to permit the group home was not rationally related to those legitimate concerns.⁴⁹ Without much discussion of the point, the Court simply concluded that the city’s refusal “appears to us to rest on an irrational prejudice against the mentally retarded.”⁵⁰ In effect, the Court implied that the extraordinarily underinclusive nature of the classification so poorly served the ostensible purposes of concern about the number of residents and the home’s location on a flood plain that it freed the Court from reliance on such hypothetical purposes. When the Court stated that it “appears to us” that the city’s refusal “rest[s] on an irrational prejudice against the mentally retarded,” it was essentially stating that the Court saw the actual purpose of the city to be infliction of harm upon the mentally retarded.

Somewhat more dramatic is the familiar case of *Plyler v. Doe*,⁵¹ in which the Court invalidated Texas’s attempt to deprive unlawful resident children of the free public education that the state provided to citizens and lawful resident alien children. The Court conceded that education was not a fundamental right for purposes of equal protection, and that a classification based on illegal residence within the United States is not a suspect classification, but the level of scrutiny it applied was hardly the standard-brand minimal scrutiny.⁵² To be sure, the Court did not fully embrace minimal scrutiny as its standard; rather, it cryptically observed that “certain forms of legislative classification, while not facially invidious, nonetheless give rise to recurring constitutional difficulties; in these limited circumstances we have [inquired whether the classification] . . . may fairly be viewed as furthering a *substantial interest* of the State.”⁵³ Texas’s classification proved to be one such classification and the Court shifted the burden onto Texas of proving the existence of a substantial government interest. The Court concluded that the free schooling ban was “ludicrously ineffectual” to accomplish Texas’s goal of protecting “itself from an influx of illegal immigrants.”⁵⁴ Nor was there sufficient proof

⁴⁷ *Id.* at 448–49.

⁴⁸ *Id.* at 449.

⁴⁹ *Id.* at 450.

⁵⁰ *Id.*

⁵¹ 457 U.S. 202 (1982).

⁵² *Id.* at 221.

⁵³ *Id.* at 217–18 (emphasis added).

⁵⁴ *Id.* at 228.

that illegally present schoolchildren imposed unique burdens "on the State's ability to provide high-quality public education."⁵⁵ Finally, the Court found that Texas's desire to deliver public education to those children that are, by virtue of American citizenship or lawful residence, likely to contribute to American society was an insufficiently substantial interest because "whatever savings might be achieved by denying [unlawful resident] children an education, they are wholly insubstantial in light of the costs involved to these children, the State, and the Nation."⁵⁶

Cleburne applied minimal scrutiny in a fashion similar to *Romer*, while *Plyler* applied a facially enhanced version of minimal scrutiny. As in *Romer*, the Court in *Cleburne* scrutinized the efficacy of the classification to its conceivable purposes and, having determined that the classification was ill-suited to the government's purposes, reasoned from its effects to conclude that the government's actual purpose was illegitimate. The only difference was that in *Romer* the classification was severely overbroad in terms of the purported objectives, while in *Cleburne* the classification was wildly underinclusive. But these flaws did not disturb judicial deference to conceivable, even if dubious, governmental purposes in such cases as *Railway Express*⁵⁷ or *United States Railroad Retirement Board v. Fritz*.⁵⁸ In *Plyler*, the Court applied a unique brand of minimal scrutiny, one ridiculed by the dissent as "a theory custom-tailored to the facts," and applicable "only when illegal alien children are deprived of a public education."⁵⁹ Whether or not the criticism is fair, the fact remains that *Plyler* applied a facially heightened brand of minimal scrutiny to a circumstance that the Court admitted would normally be subject to the sort of rational means-to-ends inquiry that is associated with *Railway Express*, *Dukes*, or *Williamson v. Lee Optical of Oklahoma, Inc.*⁶⁰

Thus, even cursory reflection upon the state of minimal scrutiny proves to be troubling and unsettling. What seems like a standard of extreme deference to legislatures turns out to be less deferential in its application. This is not altogether problematic, however, once one realizes that at some level of underinclusion or overinclusion, albeit a level difficult to detect with precision, the Court is apt to shift from deferential consideration of conceivable purposes to a skeptical search for actual purposes. The black art of the constitutional lawyer,

⁵⁵ *Id.* at 229.

⁵⁶ *Id.* at 230.

⁵⁷ 336 U.S. 106 (1949); *see also supra* text accompanying note 43.

⁵⁸ 449 U.S. 166 (1980); *see also supra* note 28.

⁵⁹ *Plyler v. Doe*, 457 U.S. 202, 244 (1982) (Burger, C.J., dissenting).

⁶⁰ 348 U.S. 483 (1955) (using minimal scrutiny analysis to an Oklahoma law making it illegal for an optician to fit or duplicate lenses without a prescription from an ophthalmologist or optometrist).

of course, is the ability to recognize in advance what will trigger that subtle, but terribly important, shift in the Court's consideration of governmental purposes in its application of minimal scrutiny. So long as the triggers for that shift were extreme underinclusion or overinclusion embedded in facts that produce, at least, a detectable odor of governmental desire to harm the people affected by the government's action, constitutional lawyers could understand the rheostat of minimal scrutiny. If, however, the degree of deference courts pay to legislatures under minimal scrutiny should be permitted to vary significantly, the problems of identification and prediction of the de facto level of scrutiny that courts will actually apply would increase dramatically. That issue might be worrisome enough, but if the degree of judicial skepticism brought to bear under strict scrutiny should also be permitted to vary considerably, tiered scrutiny would become almost Delphic. That is exactly what the jurisprudential couplet of *Lawrence v. Texas*⁶¹ and *Grutter v. Bollinger*⁶² has done to tiered scrutiny.

II. *LAWRENCE* AND ITS IMPLICATIONS FOR MINIMAL SCRUTINY

Lawrence has been justly hailed as a victory for civil libertarians, but few who cheer its result have tarried to consider its longer-term consequences to constitutional analysis. While *Lawrence* was a welcome recognition of the equal dignity to be accorded same-sex relationships, its rationale may prove to further destabilize the already leaning tower of tiered scrutiny.

At issue in *Lawrence* was the validity of a Texas statute that made it a crime for two people of the same sex to engage in "deviate sexual intercourse," defined as "any contact between any part of the genitals of one person and the mouth or anus of another person [or] the penetration of the genitals or the anus of another person with an object."⁶³ The adult petitioners, convicted of violating this law by their private and consensual conduct, asserted that the law deprived them of equal protection of the laws and was an impermissible infringement of a liberty protected by the substantive component of due process.⁶⁴ While the Court acknowledged that the equal protection claim was "tenable,"⁶⁵ it rested its decision on the petitioners' substantive due process argument. Most of the Court's effort in this direction was devoted to a demonstration of the reasons why *Bowers v.*

⁶¹ 123 S. Ct. 2472 (2003).

⁶² 123 S. Ct. 2325 (2003).

⁶³ TEX. PENAL CODE ANN. §§ 21.06(a), 21.01(1) (Vernon 2003).

⁶⁴ *Lawrence*, 123 S. Ct. at 2476.

⁶⁵ *Id.* at 2482.

*Hardwick*⁶⁶ was wrongly decided and should be overruled. The *Lawrence* majority thought that *Bowers* had expressed the liberty interest at issue in that case in an unduly cramped fashion. Rather than focus upon "the right to engage in certain sexual conduct,"⁶⁷ as did the Court in *Bowers*, the *Lawrence* majority framed the issue as whether laws that "seek to control a personal relationship . . . [offend] the liberty of persons to choose [to enter such relationships] without being punished as criminals" where there is no "injury to a person or abuse of an institution the law protects."⁶⁸

With this revised conception of the affected liberty interest in place, the Court examined the arguments from history relied upon by *Bowers* and found them wanting. First, "there is no longstanding history in this country of laws directed at homosexual conduct as a distinct matter."⁶⁹ Second, even general "[l]aws prohibiting sodomy do not seem to have been enforced against consenting adults acting in private."⁷⁰ Third, the trend of legal regulation of homosexual conduct and relationships has been clearly headed in the direction of greater tolerance and acceptance of such matters, and that trend should have been (but was not) recognized and acknowledged by the Court in *Bowers*.⁷¹ Accordingly, "*Bowers* was not correct when it was decided and it is not correct today. It ought not to remain binding precedent. *Bowers v. Hardwick* should be and now is overruled."⁷²

A key conclusion of the now-discredited *Bowers* opinion was that there was no "fundamental right to engage in homosexual sodomy."⁷³ That conclusion was crucial to the Court's analysis in *Bowers*, for without a constitutionally fundamental right at issue, Georgia's sodomy ban needed only to survive minimal scrutiny. To the *Bowers* majority, this was easily demonstrated; the prohibition was rationally related to the accomplishment of the legitimate state objective of proclaiming the "belief of a majority of the electorate in Georgia that homosexual sodomy is immoral and unacceptable."⁷⁴

What is surprising about *Lawrence* is that the Court did not find that the claimed liberty interests asserted were constitutionally

⁶⁶ 478 U.S. 186 (1986) (upholding, under minimal scrutiny, Georgia's criminal sodomy statute as applied to two adult men engaged in private consensual sexual intimacies and concluding that no fundamental liberty interest was implicated).

⁶⁷ *Lawrence*, 123 S. Ct. at 2478.

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.* at 2479.

⁷¹ See *id.* at 2480 ("[O]ur laws and traditions in the past half century . . . show an emerging awareness that liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex.").

⁷² *Id.* at 2484.

⁷³ *Bowers*, 478 U.S. at 191.

⁷⁴ *Id.* at 196.

fundamental. Despite the Court's eloquent endorsement of the presumptive liberty of competent adults voluntarily to enter into personal relationships that involve sexual intimacy without criminal punishment,⁷⁵ the Court did not apply strict scrutiny. Instead, it concluded that the Texas statute was unconstitutional because it "furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual."⁷⁶ Although the Court did not specify what interests Texas advanced in support of its statute, at oral argument, counsel for Texas asserted that the state's interest in proclaiming and enforcing a majority vision of morality was sufficient,⁷⁷ as it was in *Bowers*.⁷⁸ Given the repudiation of *Bowers* by *Lawrence*, it is beyond dispute that the Court in *Lawrence* treated as illegitimate a state's interest in using the criminal law to preserve a vision of moral behavior, at least when that interest is asserted in opposition to the liberty interest of consenting adults to engage in private sexual intimacies as a part of a larger personal relationship.⁷⁹ Thus, *Lawrence* presently stands as the lone instance in the modern era of substantive due process in which the Court has struck down a law on the grounds that it failed even minimal scrutiny.

To be sure, there are textual morsels in the Court's opinion in *Lawrence* that hint that there is something more than minimal scrutiny at work in its decision. Justice Kennedy, writing for the Court, declared:

[A]dults may choose to enter upon [a homosexual] relationship in the confines of their homes and their own private lives and still retain their

⁷⁵ See *Lawrence*, 123 S. Ct. at 2478 ("[The Texas statutes] seek to control a personal relationship that, whether or not entitled to formal recognition in the law, is within the liberty of persons to choose without being punished as criminals.").

⁷⁶ *Id.* at 2484.

⁷⁷ See *Justices Hear Oral Argument on Texas Homosexual Sodomy Law*, 71 U.S. L. Wk. 3617, 3618 (Apr. 1, 2003) (counsel for Texas asserted that "morality is the basis for the law"). In her concurring opinion in *Lawrence*, Justice O'Connor noted that Texas argued "that the statute satisfies rational basis review because it furthers the legitimate governmental interest of the promotion of morality." *Lawrence*, 123 S. Ct. at 2486 (O'Connor, J., concurring in the judgment).

⁷⁸ In *Bowers*, 478 U.S. 186 (1986), the Court held:

[T]he presumed belief of a majority of the electorate in Georgia that homosexual sodomy is immoral and unacceptable . . . is said to be an inadequate rationale to support the law. The law, however, is constantly based on notions of morality . . . We do not agree, and are unpersuaded that . . . sodomy laws . . . should be invalidated on this basis.

Id. at 196.

⁷⁹ The Court approved of the analysis of Justice Stevens, who dissented in *Bowers*:

"First, the 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 . . . Second, individual decisions by married persons, concerning the intimacies of their physical relationship . . . are a form of 'liberty' protected by the Due Process Clause . . . Moreover, this protection extends to intimate choices by unmarried as well as married persons."

Lawrence, 123 S. Ct. at 2483–84 (quoting *Bowers*, 478 U.S. at 216 (Stevens, J., dissenting)).

dignity as free persons. When sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring. *The liberty protected by the Constitution allows homosexual persons the right to make this choice.*⁸⁰

In a later passage, Justice Kennedy elaborated on this theme:

[T]wo adults who, with full and mutual consent from each other, engage[] in sexual practices common to a homosexual lifestyle . . . are entitled to respect for their private lives. The State cannot demean their existence or control their destiny by making their private sexual conduct a crime. Their right to liberty under the Due Process Clause gives them the *full right to engage in their conduct without intervention of the government.*⁸¹

When taken out of the context of the entire opinion, one would think these passages declarative of a constitutionally fundamental liberty interest, the trigger for strict scrutiny under conventional substantive due process analysis. Yet, two sentences later, Justice Kennedy punctures this balloon by stating that the Texas law “further[s] no legitimate state interest which can justify its intrusion into the personal and private life of the individual,”⁸² and, after a lofty paragraph devoted to uniting the usually antagonistic interpretational philosophies of original intent and the nontextual search for contemporary values that might inform the “living Constitution,” winds up reversing the convictions.⁸³

Let us examine the possibilities. If, despite the Court’s resort to a lack of a *legitimate* state interest as the reason for reversal of the convictions, it was actually covertly declaring a fundamental liberty interest, it is a remarkably limited liberty interest, for it presumably does not extend to “minors,” nor to “persons who might be injured or coerced or who are situated in relationships where consent might not easily be refused.”⁸⁴ Nor does it extend to freely consenting adults in relationships that “involve public conduct or prostitution,” and it surely does not compel “the government [to] give formal recognition to any relationship that homosexual persons seek to enter.”⁸⁵ This narrow but arguably fundamental liberty interest—the right of competent adults to engage in mutually consensual private sexual conduct as part of a larger personal relationship without criminal liability

⁸⁰ *Id.* at 2478 (emphasis added).

⁸¹ *Id.* at 2484 (emphasis added).

⁸² *Id.*

⁸³ *Id.* Justice Kennedy’s opinion stated:

[T]hose who drew and ratified the Due Process Clauses . . . knew times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress. As the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom.

Id.

⁸⁴ *Id.*

⁸⁵ *Id.*

attaching to the conduct⁸⁶—is immune from all state regulation save that which is necessary to the accomplishment of a compelling governmental interest. However, to reach the conclusion that this interest is constitutionally fundamental, we must ignore or dismiss the Court's branding as illegitimate Texas's interest in the preservation of morality; the Court must have been stupid, or deliberately misleading, or sloppy, or analytically confused when it chose to fasten upon illegitimacy of the state's purpose as the final nail in the statute's coffin. This will not do; the Court is not readily susceptible to any of these charges.

If we assume, instead, that the Court meant that the narrow liberty it described was a nonfundamental liberty, we must first wonder whether this liberty is different from other nonfundamental liberties, such as smoking tobacco or marijuana, eating excessive amounts of fast food, driving a Hummer, cross-dressing, wearing a baseball cap backwards, or failing to shave one's face or legs. If all such nonfundamental liberty interests are alike, they may be freely invaded by any rational means to advance a legitimate state purpose. In *Lawrence*, Texas's interest in preserving its sense of morality was not legitimate; would the same be true if this interest were asserted to justify infringement of other nonfundamental interests? Suppose a state declared that its sole reason for criminalizing the possession and use of marijuana or tobacco was its belief that it is immoral to use these substances. Would the Court declare this to be an illegitimate purpose, or would it fasten upon the unexpressed but hypothetical purpose of preserving the health of the citizenry as a sufficiently legitimate state objective? Would the Court find illegitimate a state's ban on the use of Hummers on the public highways for the sole reason that the state has declared such vehicles to be immoral, or would it hasten to add that the state could surely have been motivated by the desire to increase fuel economy, or traffic safety, or to reduce pollution? To be sure, it would be an uncommonly obtuse government that would not advance these alternative interests. Suppose, however, that a state forbade men and women to dress as members of the opposite sex and defended the statute on the ground that it preserved the majority's sense of moral and appropriate behavior. If the libertarian note struck by the Court in *Lawrence* is to be sustained, surely the governmental objective is illegitimate. But might it be the case that, absent some larger personal relationship of which cross-dressing is a part, the Court would find that the government's interest is legitimate? If

⁸⁶ See generally *Washington v. Glucksberg*, 521 U.S. 702, 720–21 (1997) (declaring that the Court's "established method of substantive-due-process analysis" requires "a 'careful description' of the asserted fundamental liberty interest" (quoting *Cruzan v. Dir., Mo. Dep't of Health*, 497 U.S. 261, 277–78 (1990))).

the latter is the case, can we be certain that the liberty interest vindicated in *Lawrence* is an undifferentiated nonfundamental liberty interest? If it is not, and the *Lawrence* interest is different from other nonfundamental liberty interests, but is still not fundamental, what enables us to detect which claimed liberties are a bit more than run-of-the-mill liberties?

Consider whether the *Lawrence* nonfundamental but special liberty, even if squeezed to its essence, would insulate from state attack a mutually consensual continuing sexual relationship between an adult son and his mother, or a mutually consensual polygamous or polyandrous marriage? *Lawrence* tells us that “[w]hen sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring,”⁸⁷ a formulation that is not limited to the homosexual union at issue in *Lawrence*. In the next sentence, however, the Court tells us that the “liberty protected by the Constitution allows homosexual persons the right to make this choice.”⁸⁸ While *Lawrence* expressly protects “this choice” for homosexual couples, its rationale surely extends much further.

On the other hand, even if the nonfundamental, but still special, liberty protected by *Lawrence* is strictly limited to matters of adult, mutually consensual sexual choice as part of a close and continuing personal relationship, is it possible that Texas could enforce its sodomy law against two men, strangers to one another, engaged in casual sex? Texas might argue that such casual sex forms no part of a larger and enduring personal relationship, and that the sanctity of such relationships was the liberty that *Lawrence* protected. If this argument failed, and Texas could not enforce its sodomy law against two men engaged in casual, anonymous sexual intimacies, then the *Lawrence* liberty cannot be so closely confined, and it becomes imperative to restate the scope and effect of the nonfundamental but exceptionally powerful liberty vindicated in *Lawrence*.

In the end, it is unlikely that the *Lawrence* liberty can be kept tightly confined; thus, we must speculate about the effects on minimal scrutiny of the existence of nonfundamental liberties to which no legitimate state regulatory interests may be directed. We need not overstate the case; after all, *Lawrence* held only that the preservation of majority moral sensibility was not a legitimate state interest, not that there are no conceivable legitimate state interests that could justify infringement of the nonfundamental liberty at stake in *Lawrence*.

Consider, however, some of the consequences of concluding that governments have no legitimate interest in promoting morality.

⁸⁷ *Lawrence*, 123 S.Ct. at 2478.

⁸⁸ *Id.*

Obscenity is a category of expression that receives no constitutional protection. Initially this was because obscenity was “utterly without redeeming social importance,”⁸⁹ but in time the rationale swerved to recognize a legitimate “social interest in order and morality”⁹⁰ as the basis for exiling obscenity from the usual constitutional protections afforded to expression.⁹¹ But if there is no longer any legitimate governmental interest in promoting a majoritarian vision of morality, it is difficult to maintain that obscenity may be denied constitutional protection simply because its exhibition or consumption degrades morality. To be sure, the Court in *Paris Adult Theatre I v. Slaton*,⁹² the companion case to *Miller v. California*,⁹³ in which the current constitutional definition of obscenity was announced, suggested that government interests other than the preservation of morality might justify obscenity’s constitutional exile.⁹⁴ Some of these interests, however, are so vague or dubious that there is reason to think that they may be nothing other than euphemisms for morality. “[T]he interest of the public in the quality of life and the total community environment,”⁹⁵ while no doubt real, is pitched at such a high level of generality that it is impossible to avoid the suspicion that this interest is, at bottom, little different than the community’s interest in preserving its intuitive sense of decency and morality. If that is so, the interest is not legitimate if we take *Lawrence* at face value. Without some other

⁸⁹ *Roth v. United States*, 354 U.S. 476, 484 (1957).

⁹⁰ *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 61 (1973) (quoting *Roth*, 354 U.S. at 485 (quoting *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942)) (alteration in original)); see also *Jacobellis v. Ohio*, 378 U.S. 184, 199 (1964) (Warren, C.J., dissenting) (explaining that obscenity may be banned because there is a “right of the Nation and of the States to maintain a decent society”).

⁹¹ In *Miller v. California*, 413 U.S. 15 (1973), the Court redefined obscenity to include sexually explicit, prurient, and patently offensive material that, “taken as a whole, lacks serious literary, artistic, political, or scientific value.” *Id.* at 24 (emphasis added). As Justice Brennan pointed out in his dissent to the companion case, *Paris Adult Theatre I*, the reason obscenity was denied constitutional protection in *Roth* was because it utterly lacked any redeeming social value. See 413 U.S. at 97 (Brennan, J., dissenting). A necessary corollary to the Court’s approach to obscenity in *Miller* was the creation of a new rationale for obscenity’s devalued constitutional status. The majority in *Paris Adult Theatre I* offered several possibilities, some utilitarian, see *id.* at 58 (suggesting the interest of “the tone of commerce in the great city centers”), some based on moral notions, see *id.* at 61 (“[A] legislature could legitimately act . . . to protect ‘the social interest in order and morality.’” (quoting *Roth*, 354 U.S. at 485 (quoting *Chaplinsky*, 315 U.S. at 572) (alteration in original))), and some based on a combination of morals and utilitarianism, see *Paris Adult Theatre I*, 413 U.S. at 63 (noting that a legislature may validly assume “that commerce in obscene books, or public exhibitions focused on obscene conduct, have a tendency to exert a corrupting and debasing impact leading to antisocial behavior”).

⁹² 413 U.S. 49 (1973).

⁹³ 413 U.S. 15 (1973).

⁹⁴ *Paris Adult Theatre I*, 413 U.S. at 58, 61 (agreeing with the justification that “there is at least an arguable correlation between obscene material and crime” and that “the legislature of Georgia could quite reasonably determine that such a connection does or might exist”).

⁹⁵ *Id.* at 58.

governmental interest, ungrounded in morality, there is no reason to continue denying constitutional protection to obscenity. Whether this is cause for celebration or lamentation depends on whether you view obscenity, as did Justice Douglas, as a constitutionally protected matter of “taste” that “at most is the expression of offensive ideas,”⁹⁶ or whether you regard obscenity as a danger to “public safety”⁹⁷ or inimical to the “right of the Nation and of the States to maintain a decent society.”⁹⁸

Prohibitions against sexual intercourse outside of marriage, such as laws forbidding fornication or adultery, while not commonly enforced, are still in existence. Assuming that there is no constitutionally fundamental right to engage in sexual relations without the blessing of marriage, the liberty interest asserted to block enforcement of such laws is the *Lawrence* interest—the liberty of adults to engage in mutually consensual private sexual conduct as part of a larger personal relationship without criminal liability attaching to the conduct. Surely *Lawrence* must support the proposition that a state could not defend its fornication or adultery ban, as applied to a couple engaged in a relationship that includes but extends beyond sexual conduct, on the ground that the state’s interest is morality. Consider, however, Justice Kennedy’s cautionary note in *Lawrence* that the liberty interest there asserted “should counsel against attempts . . . to define the meaning of the relationship or set its boundaries absent injury to a person or abuse of an institution the law protects.”⁹⁹ Does this permit a state to assert that its interest in enforcing a ban on fornication or adultery is to protect the institution of marriage, an institution that the law most definitely protects? In the context of the homosexual relationship at issue in *Lawrence*, it is not tenable to offer the protection of marriage as a governmental interest sufficient to support criminalization of homosexual conduct because Texas does not offer marriage (or even its civil union substitute) to persons in homosexual relationships. While it is unlikely (but not impossible) that a state would permit same-sex marriage and also criminalize all sexual conduct (heterosexual or homosexual) occurring outside of marriage, it is surely plausible to read *Lawrence* as permitting such a scheme.

Those who decry *Lawrence* often assert that its effect will be to void “[s]tate laws against bigamy, same-sex marriage, adult incest, prostitution, masturbation, adultery, fornication, bestiality, and

⁹⁶ *Id.* at 70–71 (Douglas, J., dissenting).

⁹⁷ *Id.* at 69.

⁹⁸ *Jacobellis v. Ohio*, 378 U.S. 184, 199 (1964) (Warren, C.J., dissenting), *quoted in Paris Adult Theatre I*, 413 U.S. at 59–60.

⁹⁹ *Lawrence v. Texas*, 123 S. Ct. 2472, 2478 (2003).

obscenity.”¹⁰⁰ This may be so, if *Lawrence* ultimately stands for the idea that moral disapproval is insufficient to infringe upon the liberty to enter into a mutually consensual enduring relationship of which sexual conduct forms but a part. But it will not be so if the liberty interest in *Lawrence* is not weighty enough to void morals legislation that is calculated to reach “public conduct or prostitution,”¹⁰¹ to protect minors¹⁰² or persons who are in relationships in which they are vulnerable or “might be . . . coerced,”¹⁰³ or to prevent “injury to a person”¹⁰⁴ or “abuse of an institution the law protects.”¹⁰⁵ Depending on the evidence of vulnerability or coercion, these caveats might permit valid enforcement of laws prohibiting bigamy, adult incest, adultery, and fornication. As discussed above, laws against fornication and adultery, as well as bigamy, might also be enforced as preventing abuse of the institution of marriage. Laws prohibiting masturbation (are there any?) and bestiality would seem to be doomed unless the concept of preventing “injury to a person” is read to include injury to the actor. Even then, it is hard to make out a credible case for injury that may result from masturbation. Bestiality, however, may present a different matter, as it is possible that venereal diseases may be transmitted from animals to humans. But such is the result of *Lawrence*: we are now required to parse either the utilitarian reasons for morals legislation or to subject the nonfundamental liberty interest that *Lawrence* protects to a microscopic examination of its boundaries.

Thus, we are left with a mildly disconcerting set of possibilities. Some liberty interests are fundamental and are, therefore, immune from governmental regulation unless the government can prove the necessity of invading the interest to accomplish a compelling objective. Access to contraceptive devices is said to be such an interest, but a careful reading of the holdings suggests that this right is actually grounded in a mixture of equal protection¹⁰⁶ and the shadow cast by various provisions of the Bill of Rights other than due process.¹⁰⁷ In any case, this right is commonly regarded as a constitutionally fundamental liberty interest, however dubious its doctrinal pedigree may be. Some liberty interests are apparently not fundamental, in that governmental regulation of them need not survive strict scrutiny, but

¹⁰⁰ *Id.* at 2490 (Scalia, J., dissenting).

¹⁰¹ *Id.* at 2484 (Kennedy, J., delivering the opinion of the Court).

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *Id.* at 2478.

¹⁰⁵ *Id.*

¹⁰⁶ See *Eisenstadt v. Baird*, 405 U.S. 438 (1972) (striking down conviction for distribution of contraceptives to unmarried persons on equal protection grounds).

¹⁰⁷ See *Griswold v. Connecticut*, 381 U.S. 479, 484 (1965) (grounding the right to privacy in the “penumbra” of the Bill of Rights).

still produce a heightened level of review. The principal example is, of course, abortion in the wake of *Planned Parenthood v. Casey*.¹⁰⁸ Prior to *Casey*, a woman's right to terminate her pregnancy was a constitutionally fundamental liberty interest; the trimester framework of *Roe v. Wade*¹⁰⁹ was the Court's way of assessing whether governmental interests at any point during gestation might be sufficiently compelling to justify infringement of the abortion right. After *Casey*, the nature of the inquiry completely shifted; rather than asking whether any given regulation of abortion survived strict scrutiny, the question became whether, prior to fetal viability, the regulation imposed an "undue burden" on the exercise of the abortion right.¹¹⁰ The existence of an "undue burden" turns on whether the "regulation has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus."¹¹¹ After *Lawrence*, some nonfundamental liberty interests that trigger only minimal scrutiny will, nevertheless, escape regulation for want of a legitimate government interest in regulating them. We remain uncertain whether this is a distinct category consisting of nonfundamental liberties that are so unique and potent that no legitimate government interest in regulating them can be imagined. In any case, there remain the run-of-the-mill liberty interests that may presumptively be regulated so long as the government has a conceivably legitimate objective and its regulation is a rational means of accomplishing that objective. In this category lie all our petty (but often cherished) liberties that governments freely invade in the name of some legitimate interest.

Sorting out these liberties is not easy. *Washington v. Glucksberg*¹¹² confidently asserted that the "established method of substantive-due-process analysis" has regularly confined "fundamental rights and liberties [to those] which are, objectively, 'deeply rooted in this Nation's history and tradition,' and 'implicit in the concept of ordered liberty,' such that 'neither liberty nor justice would exist if they were sacrificed.'"¹¹³ Application of that method is not simple. First, it requires selecting the appropriate level of generality with which to express the right at issue. Extremely general formulations of a claimed

¹⁰⁸ 505 U.S. 833 (1992) (plurality opinion).

¹⁰⁹ 410 U.S. 113 (1973).

¹¹⁰ *Casey*, 505 U.S. at 874 (opinion of O'Connor, Kennedy, and Souter, JJ.) ("Only where state regulation imposes an undue burden on a woman's ability to make [the] decision [to abort] does the power of the State reach into the heart of the liberty protected by the Due Process Clause."). This is, of course, a plurality opinion, but in *Stenberg v. Carhart*, 530 U.S. 914, 921 (2000), a majority of the Court explicitly adopted *Casey*'s undue burden test as the operative standard for assessing the validity of abortion regulations.

¹¹¹ *Casey*, 505 U.S. at 877 (1992) (opinion of O'Connor, Kennedy, and Souter, JJ.).

¹¹² 521 U.S. 702 (1997).

¹¹³ *Id.* at 720–21 (quoting *Moore v. City of E. Cleveland*, 431 U.S. 494, 503 (1997), and *Palko v. Connecticut*, 302 U.S. 319, 326 (1937) (citations omitted)).

liberty interest garner nearly universal assent, but are so abstract that they are useless in application. Speaking of a right of self-determination will win nods of praise, but once that “right” is applied in a prosecution for refusing to submit to military conscription, or a minor’s refusal to attend school, or possession of marijuana or obscene literature, unanimity quickly dissolves.

Justices Brennan and Scalia famously divided on this matter in *Michael H. v. Gerald D.*¹¹⁴ At issue was the validity of a California statute that conclusively presumed that a child born into an extant marriage was fathered by the husband. In the case, an adulterous natural father claimed that the statute deprived him of his fundamental liberty to maintain a relationship with his child. In his dissent, Justice Brennan characterized the relevant liberty interest as parenthood, while Justice Scalia maintained that the interest at issue was “the power of the natural father to assert parental rights over a child born into a woman’s existing marriage with another man.”¹¹⁵ Justice Scalia charged that the level of generality chosen by Justice Brennan—parenthood—was not derived from any constant principle but was free-floating.¹¹⁶ By contrast, Justice Scalia contended that the level of generality at which to frame an asserted liberty interest should be by reference “to the most specific level at which a relevant tradition protecting, or denying protection to, the asserted right can be identified.”¹¹⁷ Reference to the most specific tradition available, however, heightens the risk that the Constitution becomes “a stagnant, archaic, hidebound document steeped in the prejudices and superstitions of a time long past.”¹¹⁸

Second, no matter how specific or general the traditions to which one refers, there is the problem of dealing with the dynamic nature of historical tradition. As the second Justice Harlan put it in *Poe v. Ullman*,¹¹⁹ the liberties protected by substantive due process represent:

[T]he balance which our Nation . . . has struck between . . . liberty [of the individual] and the demands of organized society . . . having regard

¹¹⁴ 491 U.S. 110 (1989).

¹¹⁵ *Id.* at 125.

¹¹⁶ *Id.* at 127 n.6. Justice Scalia challenged Justice Brennan’s characterization of the relevant liberty:

We do not understand why, having rejected our focus upon the societal tradition regarding the natural father’s rights vis-à-vis a child whose mother is married to another man, Justice Brennan would choose to focus instead upon “parenthood.” Why should the relevant category not be even more general—perhaps “family relationships”; or “personal relationships”; or even “emotional attachments in general”?

Id.
¹¹⁷ *Id.*

¹¹⁸ *Id.* at 141 (Brennan, J., dissenting).

¹¹⁹ 367 U.S. 497 (1961).

to . . . the traditions from which it developed as well as the traditions from which it broke. That tradition is a living thing.

. . . [The liberty protected by due process] is not a series of isolated points pricked out in terms of the [Bill of Rights]. It is a rational continuum which . . . includes a freedom from all substantial arbitrary impositions and purposeless restraints and which also recognizes . . . that certain interests require particularly careful scrutiny of the state needs asserted to justify their abridgement.¹²⁰

However, even if we accept Justice Harlan's invitation to conceptualize our historical tradition as a constantly changing, continually updated video record rather than as faded snapshots in a dusty national photo album, we are confronted with the problem of assessing the propriety of judicial initiative in identifying which claimed liberty interests are the "certain interests" that "require particularly careful scrutiny of the state's needs asserted to justify their abridgement."¹²¹ Again, Justice Harlan expounds: "No formula could serve as a substitute, in this area, for judgment and restraint."¹²²

Although this task is exceedingly difficult, recall that this is what is required to identify constitutionally fundamental liberty interests, those that are presumptively beyond governmental regulation. However abstract Justice Harlan's formulation of the job may be, and however general the doctrinal formula established by *Washington v. Glucksberg*,¹²³ identifying fundamental liberties is not the most challenging analytical task. The difficulty of identifying fundamental liberties pales in comparison to that of identifying those nonfundamental liberties that, nonetheless, demand heightened judicial scrutiny, and of determining when there are no conceivable legitimate governmental interests which interfere with nonfundamental liberties that do not trigger any heightened scrutiny. It may be that the liberty interest at issue in *Lawrence*¹²⁴ is really a nonfundamental liberty, like abortion, that triggers heightened scrutiny, but the Court surely did not tell us what level of scrutiny should be delivered or the nature of that scrutiny. Or, it may be that the nonfundamental liberty at issue in *Lawrence* is preparing for future launch as a full-fledged fundamental liberty interest. If so, that design is carefully concealed from public view. Even if *Lawrence* is the substantive due process equivalent of *Moreno*, in which the Court declared that "a bare . . . desire to harm a politically unpopular group cannot constitute a *legitimate*

¹²⁰ *Id.* at 542–43 (Harlan, J., dissenting) (citations omitted).

¹²¹ *Id.* at 543.

¹²² *Id.* at 542.

¹²³ 521 U.S. 702 (1997) (declaring that substantive due process analysis requires a specific assertion of the fundamental liberty interest at issue).

¹²⁴ 123 S.Ct. 2472 (2003).

governmental interest”¹²⁵ for equal protection purposes, the problem remains that a legislative desire to back morality by law is not axiomatically a bare desire to harm a politically unpopular group. A link is missing in the *Lawrence* rationale: there is no demonstration that Texas’s desire to express moral disapproval by criminal sanctions was motivated by a desire to harm gays and lesbians. The Court assumed that this was so, and I am quite willing to make the same assumption, but the Court should at least articulate its basis for making that assumption. It would not be difficult to do. Texas formerly criminalized all forms of oral and anal sexual intimacies; its selective criminalization of these practices when engaged in only by partners of the same sex is of recent vintage.¹²⁶ Just as with cases of disparate impact, which invite us to probe legislative motivation by examining the circumstantial evidence surrounding the government decision that has produced a disparate racial or sexual impact,¹²⁷ the Court should have openly engaged in this weighing of the circumstantial evidence of legislative motive.

Finally, it is possible that Justice Kennedy’s approach in *Lawrence* is a diluted version of the approach taken by Randy Barnett. Professor Barnett urges that a government should always be required to bear the burden of proving an adequate justification for its regulations that inhibit people’s liberties, whether those liberties are characterized as trivial, minor, major, fundamental, or something else.¹²⁸ This is, of course, a departure from our traditional presumption that governmental action is lawful. Professor Barnett is quite right to assert that the federal government, as a government of limited and enumerated powers, ought to be required to demonstrate the source of its authority each time it exercises power that interferes with the people’s liberties. Though that proposition would seem to flow almost ineluctably from the constitutional structure, it is in fact regarded as a bit radical. On the other hand, states are presumed to have a general police power—the power to act for the public welfare—unless the

¹²⁵ *United States Dep’t of Agric. v. Moreno*, 413 U.S. 528, 534 (1973).

¹²⁶ *See Lawrence v. State*, 41 S.W.3d 349, 353 (Tex. App. 2001) (“For most of its history, Texas has deemed deviate sexual intercourse, i.e., sodomy, to be unlawful whether performed by persons of the same or different sex.”); *see also* TEX. PENAL CODE ANN. § 21.06(a) (Vernon 1943) (“A person commits an offense if he engages in deviant sexual intercourse with another individual of the same sex.”); 1925 VERNON’S ANN. PEN. CODE, art. 524 (outlawing sodomy); TEX. PEN. CODE, tit. 10, art. 507 (1911) (prohibiting sodomy committed with “mankind” in general). In 1973, the Texas legislature amended its penal code to eliminate the criminal sanctions attached to heterosexual sodomy between consenting adults. *Lawrence*, 41 S.W.3d at 353.

¹²⁷ *See, e.g., Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252 (1977) (identifying relevant factors to consider in assessing government motive in taking action that produces a racially disparate impact); *Pers. Adm’r v. Feeney*, 442 U.S. 256 (1979) (adopting the same approach as *Arlington* in reviewing government action that produces a sexually disparate impact).

¹²⁸ BARNETT, *supra* note 4, at 253–69.

specific exercise of that power contravenes federal law (including the Constitution) or is denied under the state's own law (including its constitution). Barnett argues that any exercise of state or federal power should be presumed to interfere with the liberty of citizens and, thus, must be justified by the government. In a highly diluted form, Justice Kennedy and the Court may have adopted a variation on Barnett's theme. If it turns out that a government's interest in morality is sufficient to uphold some regulations of sexual or other behavior under minimal scrutiny (perhaps a law prohibiting cruelty to animals is one such possibility), we are left speculating even more about the nature and scope of the liberty interest protected in *Lawrence*.

At bottom, *Lawrence* raises many questions about the nature of tiered scrutiny in substantive due process, and provides a discrete and welcome answer to one particular issue. We know that states may not criminalize intimate sexual behavior between mutually consenting adults in some (but perhaps not all) circumstances, and that it cannot legitimately regulate such behavior for the simple reason that it wishes to use criminal law as the vehicle to deliver its message of moral disapproval. Beyond that, we are now uncertain about the utility (and, to some extent, even the effect) of identifying any given liberty as fundamental, quasi-fundamental, nonfundamental but still special, or just plain old nonfundamental, to say nothing of the uncertainty of the process by which we classify liberties. Not only do we lack a Linnaeus to devise a coherent system of classification, the results of any classification we do make are unstable, uncertain, and unpredictable.

III. *GRUTTER* AND ITS IMPLICATIONS FOR STRICT SCRUTINY

In *Grutter v. Bollinger*,¹²⁹ the Court revealed its ambivalence about racial preferences. In doing so, it distorted and weakened the force of strict scrutiny in equal protection and, by implication, in other areas of constitutional law in which strict scrutiny is applicable. At issue was the validity of the University of Michigan Law School's admission policy that sought to enroll a "critical mass" of "students from groups which have been historically discriminated against, like African-Americans, Hispanics and Native Americans"¹³⁰ in order to reap "the educational benefits that diversity is designed to produce."¹³¹ The Court reiterated that the equal protection guarantee protects

¹²⁹ 123 S. Ct. 2325 (2003).

¹³⁰ *Id.* at 2332 (quoting the law school's admissions policy).

¹³¹ *Id.* at 2339.

“‘persons, not groups’”¹³² and that “all governmental uses of race are subject to strict scrutiny.”¹³³ Applying that familiar principle, the Court concluded that Michigan’s use of race was narrowly tailored to further the law school’s compelling objective of “attaining a diverse student body.”¹³⁴ If that was all that the *Grutter* Court did, it would be subject to criticism for engaging in the crudest of tautologies: While governmental use of race is presumptively void, governments may use race to further their compelling objective of parceling out government benefits by reference to race, the very practice that is presumptively void. In *Grutter*, however, the Court recognized that Michigan’s use of race to achieve racial diversity was compelling only because attaining a critical mass of Michigan law students from historically disadvantaged minority groups was “at the heart of the Law School’s proper institutional mission.”¹³⁵ The Court deferred to the “Law School’s educational judgment that such diversity is essential to its educational mission.”¹³⁶ While the Court claimed that its “scrutiny of the interest asserted by the Law School is no less strict for taking into account complex educational judgments in an area that lies primarily within the expertise of the university,”¹³⁷ it proceeded to accept at face value the contention that student body racial diversity “promotes learning outcomes,”¹³⁸ acquisition of “the skills needed in today’s increasingly global marketplace,”¹³⁹ and the cultivation of “leaders with legitimacy in the eyes of the citizenry”¹⁴⁰ through “path[s] to leadership [that are] visibly open to talented and qualified individuals of every race and ethnicity.”¹⁴¹ While the Court may well be correct in thinking that these effects are produced by race-based admissions policies that favor historically disadvantaged minorities, the cost of these policies is surely relevant to any serious discussion of the compelling nature of the government objective in adopting racially preferential admissions policies. The Court failed to discuss the possibility that racial preferences in admissions to public universities will perpetuate racial consciousness, engender new racial resentments and inflame old ones, undermine the very legitimacy it thinks such admissions policies will produce, and deprive some individuals of public benefits on the basis of their race. On balance, these costs

¹³² *Id.* at 2337 (quoting *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995)).

¹³³ *Id.* at 2338.

¹³⁴ *Id.* at 2339.

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ *Id.* at 2340.

¹³⁹ *Id.*

¹⁴⁰ *Id.* at 2341.

¹⁴¹ *Id.*

may not be enough to disturb the Court's conclusion that a racially diverse student body in public universities is a compelling interest of government, but they are surely deserving of discussion when judges attempt to grapple with the slippery and explosive question of when governmental use of race might be justified by some compelling interest.

To place the *Grutter* brand of strict scrutiny in context, consider *Korematsu v. United States*,¹⁴² the most famous (and, to most contemporary observers, infamous) case in which the Court upheld a racial classification under the precursor to today's strict scrutiny.¹⁴³ It is familiar, if uncomfortable, history that in 1942 the United States Army ordered the exclusion of all persons of Japanese ancestry from the West Coast. This forcible relocation and incarceration of thousands of innocent civilians was upheld as constitutionally valid in *Korematsu*. The Court's opinion is hardly a model of analytical clarity, a failing that makes it difficult to supply a conscientious and accurate reading of its rationale. Justice Black began the majority opinion with his now-familiar declaration 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,"¹⁴⁴ but he did not press this implicit equal protection inquiry any further. Instead, the Court's apparent concern was with the scope of the war power; accordingly, the Court concluded that "we are unable to conclude that it was beyond the war power . . . to exclude those of Japanese ancestry from the West Coast war area [in 1942]."¹⁴⁵ The Court obscured the crucial point, however, for nobody was seriously claiming that the issue was the scope of the war power without taking into consideration other constitutional rights that trump governmental powers. In dissent, Justice Murphy expressed the problem clearly:

[L]ike other claims conflicting with the asserted constitutional rights of the individual, the military claim must subject itself to the judicial process of having its reasonableness determined and its conflicts with other interests reconciled. . . .

¹⁴² 323 U.S. 214 (1944).

¹⁴³ A few commentators (and judges) defend *Korematsu*. See, e.g., WILLIAM H. REHNQUIST, ALL THE LAWS BUT ONE: CIVIL LIBERTIES IN WARTIME 203–11 (1998) (arguing that certain distinctions mitigate in favor of treating enemy aliens differently in times of war); Pamela Karlan & Richard Posner, *The Triumph of Expedience*, HARPER'S MAG., May 2001, at 31, 37, 39 (reporting Posner's characterization of the result as "defensible" and Karlan's characterization of *Korematsu* as "disastrous law"). At least one commentator critical of *Korematsu* makes the claim that *Korematsu* did not "apply heightened judicial review," much less strict scrutiny. See Neil Gotanda, *The Story of Korematsu: The Japanese-American Cases*, in CONSTITUTIONAL LAW STORIES 249, 271 (Michael Dorf ed., 2003). As will be made plain from the text following this note, I disagree with Professor Gotanda's reading of *Korematsu*.

¹⁴⁴ *Korematsu*, 323 U.S. at 216.

¹⁴⁵ *Id.* at 217–18.

The judicial test of whether the Government, on a plea of military necessity, can validly deprive an individual of any of his constitutional rights is whether the deprivation is reasonably related to a public danger that is so "immediate, imminent, and impending" as not to admit of delay . . . of ordinary constitutional processes to alleviate the danger.¹⁴⁶

To Justice Murphy, the specific constitutional liberty at stake was no less clear: "Being an obvious racial discrimination, the order deprives all those within its scope of the equal protection of the laws as guaranteed by the Fifth Amendment."¹⁴⁷

However much Justice Black and his colleagues in the majority may have wished to avoid addressing the equal protection problem, it was unavoidable. While the Court chose not to discuss the elephant in the room in its opinion, Justice Murphy's dissent exposed it, and the Court's decision that the exclusion order was a valid exercise of the war power suggests the conclusion that the Court found the equal protection elephant insufficiently weighty to disturb the military order. Of course, the Court did not discuss the precise standard of review it applied to this matter, which is, therefore, debatable; its outlines, however, can be picked from Justice Black's opinion. First, the Court required the government to establish its compelling reason for the exclusion: "Nothing short of . . . the gravest imminent danger to the public safety can constitutionally justify [the exclusion]."¹⁴⁸ Second, the Court approved the exclusion as necessary to the accomplishment of the compelling reason of public safety by noting that "exclusion of those of Japanese origin was deemed necessary because of the presence of an unascertained number of disloyal members of the group, most of whom we have no doubt were loyal to this country."¹⁴⁹ The reason *Korematsu* horrifies us, and caused Justice Jackson to characterize it as a "loaded weapon,"¹⁵⁰ is not that the Court chose to apply minimal scrutiny to a wretched instance of governmental racial discrimination, but that the Court applied an early version of strict scrutiny to validate what has been exposed by time as a mammoth wrong. How did it do this? The unpleasant answer is that it employed much the same method as the *Grutter* majority. In both *Korematsu* and *Grutter*, the Court deferred to the relevant government decision makers' judgment as to the compelling nature of the government's objective. A repeated theme in *Korematsu* is the Court's

¹⁴⁶ *Id.* at 234 (Murphy, J., dissenting) (quoting *United States v. Russell*, 80 U.S. (13 Wall.) 623, 628 (1871)).

¹⁴⁷ *Id.* at 234–35. Justice Murphy thus anticipated doctrine that would proclaim ten years later in *Bolling v. Sharpe*, 347 U.S. 497 (1954), which held that discrimination may violate due process under the Fifth Amendment.

¹⁴⁸ *Korematsu*, 323 U.S. at 218 (majority opinion).

¹⁴⁹ *Id.* at 218–19.

¹⁵⁰ *Id.* at 246 (Jackson, J., dissenting).

refusal to second-guess the military's judgment: "[t]he military . . . ordered exclusion,"¹⁵¹ and "we cannot reject as unfounded [that] judgment."¹⁵² The Court then rationalized that "[t]he judgment that exclusion . . . was . . . a military imperative answers the contention that the exclusion was in the nature of group punishment based on antagonism to those of Japanese origin."¹⁵³ The Court in *Korematsu* concluded: "[T]he military authorities considered that the need for action was great, and time was short. We cannot—by availing ourselves of the calm perspective of hindsight—now say that at that time these actions were unjustified."¹⁵⁴

So, too, did the Court in *Grutter* repeatedly sound the theme of deference:

The Law School's educational judgment . . . is one to which we defer. . . . Our holding today is in keeping with our tradition of giving a degree of deference to a university's academic decisions

. . . [U]niversities occupy a special niche in our constitutional tradition Our conclusion that the Law School has a compelling interest in a diverse student body is informed by our view . . . that "good faith" on the part of a university is "presumed" absent "a showing to the contrary."¹⁵⁵

The Court in *Korematsu* was apparently as confident as the Court in *Grutter* that good faith on the part of the government could be presumed: "Congress, reposing its confidence in this time of war in our military leaders—as inevitably it must—determined that they should have the power to [incarcerate those of Japanese ancestry]."¹⁵⁶ That confidence was horribly misplaced in *Korematsu*. Although the consequences of misplacing confidence in the racially motivated decisions of university admissions officers are probably far less significant than the consequences of misplacing confidence in the racially motivated decisions of military leaders, it ought to be of concern that the Court in *Grutter* revived the *Korematsu* brand of strict scrutiny.¹⁵⁷ If

¹⁵¹ *Id.* at 218 (majority opinion).

¹⁵² *Id.* (quoting *Hirabayashi v. United States*, 320 U.S. 81, 99 (1943)).

¹⁵³ *Id.* at 219.

¹⁵⁴ *Id.* at 223–24.

¹⁵⁵ *Grutter v. Bollinger*, 123 S. Ct. 2325, 2339 (2003) (quoting *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 318–19 (1978) (plurality opinion)).

¹⁵⁶ *Korematsu*, 323 U.S. at 223 (emphasis added).

¹⁵⁷ While it should go without saying that any wrongful act of racial discrimination by a government is reprehensible and produces consequences of grave significance to the affected victim, the point needs to be repeated because the wrongful discrimination that would result from less-than-good-faith admissions decisions is likely to be largely obscured from public view. Justice Ginsburg more-or-less acknowledged as much in her dissent to *Gratz v. Bollinger*, 123 S. Ct. 2411 (2003), the companion case to *Grutter*: "Michigan's [openly racial] College affirmative action program is preferable to achieving similar numbers through winks, nods, and disguises." *Id.* at 2446 (Ginsburg, J., dissenting). Further, she stated, "Among constitutionally permissible options, those that candidly disclose their consideration of race seem to me preferable to those

Korematsu's legacy was the creation of a loaded weapon lying about for ready use by any unscrupulous wielder of power and manipulator of public sentiment, *Grutter* offers the disquieting promise of another loaded weapon, albeit one of smaller caliber, lying about in the constitutional closet.

Paradoxically, none of this is to say that the result in *Grutter* was wrong. There can be legitimate debate on the policy wisdom of the result in *Grutter*, but that debate is not the focus of this Article. The problem with *Grutter* is its formalistic method. The Court sought to serve two mutually inconsistent ends: On one hand, it renewed its firm commitment to the unyielding principle that all uses of race by government are subject to strict scrutiny; on the other hand, it implicitly recognized (but refused to expressly acknowledge) that some uses of race are considerably more invidious than others, and explicitly recognized that some uses of race are not wrongful at all.

This dichotomy results from a larger dichotomy in equal protection with respect to race. At times, we subscribe to the notion that “[o]ur Constitution is color-blind,”¹⁵⁸ and that the cardinal principle of equal protection with respect to race is eradication of racial consciousness. Yet with equal fervor, we endorse the notion: “There is no caste here. Our Constitution . . . neither knows nor tolerates classes among citizens.”¹⁵⁹ This notion leads us ineluctably to the conclusion that the first command of equal protection, with respect to race, is to eliminate the subordination and oppression that came with our racial caste system. Sometimes, as with the first Justice Harlan’s dissent in *Plessy v. Ferguson*,¹⁶⁰ or with the Court’s decision in *Brown v. Board of Education*,¹⁶¹ these two aims coincide. Other times, however, as in race-based affirmative action, the two aims diverge. The Court in *Grutter* tried to bridge the chasm created by that divergence, but its methodology may prove to be as flawed as the first Tacoma Narrows bridge.¹⁶²

that conceal it.” *Id.* at n.11. Of course, “Michigan’s [openly racial] College affirmative action program” turned out not to be a constitutionally permissible option, thus raising the specter that constitutionally impermissible racial discrimination might occur via “winks, nods, and disguises.”

¹⁵⁸ *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting).

¹⁵⁹ *Id.*

¹⁶⁰ *Id.* at 552–64 (disputing the Court’s holding that a state statute mandating separate public accommodations for different races did not violate the Equal Protection Clause).

¹⁶¹ 347 U.S. 483 (1954) (prohibiting racial segregation in public education by holding that the doctrine of “separate but equal” violates the Equal Protection Clause).

¹⁶² Between November 1938 and July 1940, the third longest suspension bridge in the world and the world’s longest center span suspension bridge (at the time) was constructed spanning the Tacoma Narrows, a body of water dividing Tacoma from the Olympic Peninsula. Opened to traffic on July 1, 1940, the bridge immediately began to sway and vibrate. On November 7, 1940, these wind-induced vibrations became so severe that the bridge began to twist radically.

Rather than justify race-based admissions to public universities under the rubric that such racial policies serve a compelling interest, the *Grutter* Court would have been more forthright had it revived Justice Brennan's view that "benign" racial classifications trigger intermediate scrutiny, but malignant ones should trigger strict scrutiny. This approach, first voiced in *Bakke*¹⁶³ and later briefly adopted by the Court in *Metro Broadcasting, Inc. v. FCC*¹⁶⁴ as the standard for evaluating racial classifications used by the federal government, openly tilts toward the anti-subordination principle. The Court's recognition of racial diversity in public universities as a compelling state government interest also embraces the anti-subordination principle. However, the mechanism of the embrace—facial employment of strict scrutiny coupled with frank deference to the government decision makers who use race as a classifying device—imposes costs that might be avoided if the Court were to overtly declare its acceptance of a two-tiered level of review for racial classifications. To be sure, the underlying problem does not disappear. Under the Brennan formula, the pivotal debate occurs at the point at which courts must determine whether the governmental use of race at issue is benign or malignant. The resolution of that issue depends on the degree to which the racial classification reinforces or undermines the vestiges of our racial caste system. The conceptual paradigm of the Brennan approach is unadulterated anti-subordination. By contrast, the *Grutter* formula depends on a showing that the government has some paramount, overwhelmingly important reason for using race. But the *Grutter* Court's deference to the decision maker's presumed good faith makes that showing a relatively easy task for the government, at least in the university admissions context.

With the acid sting of *Korematsu* in its memory, will the Court be so quick to defer to the judgment of the President's national security advisors when racial, religious, or ethnic classifications are employed in the defense of the nation against terror attacks? Is prevention of another catastrophe of World Trade Center proportion less compelling than the laudable but diffuse goal of racial justice? If university admissions officers can be trusted to exercise good faith in their racially tinged decisions, can the beat cop or the city manager be

Within a few minutes, the center span broke apart and collapsed. An illustrated history of the bridge may be found at <http://www.lib.washington.edu/specialcoll/tnb> (last modified Oct. 25, 2002). Other photos, including an MPEG file containing video imagery of the collapse, may be found at http://www.civeng.carleton.ca/Exhibits/Tacoma_Narrows (last visited Apr. 9, 2004).

¹⁶³ *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 359 (1978) (advocating the use of intermediate scrutiny to evaluate "racial classifications designed to further remedial purposes").

¹⁶⁴ 497 U.S. 547 (1990) (applying intermediate scrutiny to uphold "benign" classifications based on race, which endeavored to enhance diversity in broadcasting by treating minority-controlled applicants for broadcast licenses with preference).

similarly trusted? Perhaps the answers to these questions, after *Grutter*, are “yes,” “no,” and “yes.” But, it is at least equally likely that the answers are “no,” “yes,” and “no.” There is now a plasticity to the method of strict scrutiny that invites these and a host of other difficult-to-answer questions. The Court has created a ritual as empty of substance as many liturgies: In *Grutter*, we are asked to recite the creed of color-blindness by murmuring the mantra of strict scrutiny, but then to profess our faith in the righteousness of the academic mandarins that will act to overcome racial subordination and, in so doing, eviscerate the mantra we just uttered. Put more generally, as we chant the mantra of strict scrutiny even as we profess our faith in those whose decisions we have recited, we must scrutinize with the utmost care and skepticism. What is to prevent this loaded weapon of the new liturgy of strict scrutiny from being employed in any context in which prior doctrine has insisted upon strict scrutiny?

Of course, strict scrutiny is not only about the presence of compelling government interests and the method by which we determine their presence or absence. The other half of the stereoscopic glare that comprises strict scrutiny probes the necessity of using a suspect classification to achieve the government’s compelling interest, a task that the Court usually describes as determinative of whether the classification is narrowly tailored to fit the compelling interest.¹⁶⁵ *Grutter*, along with its companion case, *Gratz v. Bollinger*,¹⁶⁶ paid even more attention to this aspect of strict scrutiny than to the question of whether racial diversity in public universities constituted a compelling interest of governments. In *Grutter*, the essence of narrow tailoring, in the context of achieving the goal of diversity in public university admissions, was *individualized* consideration of each applicant. Such individualized consideration involves a process in which race is “used in a flexible, nonmechanical way” but not to “establish quotas” or to create “separate admissions tracks.”¹⁶⁷ Of “paramount” concern to the Court was “individualized consideration” of each applicant; the totality of each applicant’s life must be evaluated, “and not in a way

¹⁶⁵ In *Shaw v. Hunt*, the Court described narrow tailoring as the use of means that are “‘specifically and narrowly framed to accomplish [the government’s compelling] purpose.’” 517 U.S. 899, 908 (1996) (holding that congressional redistricting which allegedly gerrymandered along racial lines violated the Equal Protection Clause because it was not narrowly tailored to serve compelling state interests) (quoting *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 280 (1986)). The purpose of narrow tailoring has been described as ensuring “that there is little or no possibility that the motive for the classification was illegitimate racial prejudice or stereotype.” *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989) (plurality opinion) (reviewing a policy of awarding contracts to minority businesses under strict scrutiny, and holding record evidence of specific past discrimination sufficient, but finding that the plan was not narrowly tailored to remedy the effects of past discrimination).

¹⁶⁶ 123 S. Ct. 2411 (2003).

¹⁶⁷ *Grutter*, 123 S. Ct. 2325, 2342 (2003).

that makes an applicant's race or ethnicity the defining feature of his or her application."¹⁶⁸ *Gratz* reinforced this notion by striking down the undergraduate admissions policy of the University of Michigan, which sought to achieve diversity by awarding "mechanical, predetermined diversity 'bonuses' based on race or ethnicity."¹⁶⁹ So long as diversity (a compelling objective of public universities) includes racial diversity (which it does), there can surely be little quarrel with this formulation of the narrow tailoring requirement.

The problem, however, lies in the application of the formula. First, the Court in *Grutter* largely ignored statistical data that impeached the law school's assertion that race was only one among many factors in assembling a diverse student body.¹⁷⁰ Second, while the Court stated that narrow tailoring "require[s] serious, good faith consideration of workable, race-neutral alternatives that will achieve the diversity the university seeks,"¹⁷¹ it rejected the notion that narrow tailoring "require[s] exhaustion of every conceivable race-neutral alternative."¹⁷² To the extent this means only that a government need not burden itself with fanciful and unworkable race-neutral alternatives, it is surely unremarkable. But, if this means that a government need only consider (but not necessarily adopt) workable, race-neutral alternatives, the standard articulated for narrow tailoring has assumed a surprisingly deferential posture toward government decision makers. However, given the deference to government decision makers the Court displayed in *Grutter* with respect to evaluating claimed compelling government interests, it should not come as a surprise to learn that similar deference informs judicial assessment of the tailoring of means to ends. Nor is there any doubt concerning the degree

¹⁶⁸ *Id.* at 2343.

¹⁶⁹ *Id.* Michigan's undergraduate admissions system was based on a point system in which 20 points were awarded to applicants who were members of an "underrepresented minority" group, as defined by the University." *Gratz*, 123 S. Ct. at 2428. This "automatic distribution of 20 points has the effect of making 'the factor of race . . . decisive' for virtually every minimally qualified underrepresented minority applicant," *id.* (quoting *Bakke*, 438 U.S. 265, 317 (1978) (plurality opinion) (alteration in original)), and thus established that it failed the narrow tailoring prong of strict scrutiny. *Id.* at 2430.

¹⁷⁰ Tables 1 through 3 of Chief Justice Rehnquist's dissenting opinion displayed an uncommonly precise correlation between the percentage of applicants of any given underrepresented ethnicity and the percentage of admitted applicants of that ethnicity. See *Grutter*, 123 S. Ct. at 2368–69 (Rehnquist, C.J., dissenting). The inference Chief Justice Rehnquist drew was that this "must result from careful race based planning by the Law School" to ensure "that the proportion of each group admitted should be the same as the proportion of that group in the applicant pool." *Id.* at 2369. Similarly, Justice Kennedy argued in his dissent that the percentage of matriculated students who were members of the law school's desired racial groups was consistent with "an inference that the Law School's pursuit of critical mass mutated into the equivalent of a quota." *Id.* at 2371 (Kennedy, J., dissenting); see also *id.* at 2372 (displaying data from which Justice Kennedy drew his inference).

¹⁷¹ *Grutter*, 123 S. Ct. at 2345 (majority opinion).

¹⁷² *Id.* at 2344.

of deference *Grutter* displayed to government decision makers in assessing this tailoring: "We take the Law School at its word that it would 'like nothing better than to find a race-neutral admissions formula' and will terminate its race-conscious admissions program as soon as practicable."¹⁷³ The asserted consequences of such deference are discussed by Justice Kennedy and reflected in his summary of the trial testimony of the law school's former admissions director: "He testified that faculty members were 'breathhtakingly cynical' in deciding who would qualify as underrepresented minorities. An example he offered was faculty debate as to whether Cubans should be counted as Hispanics: One professor objected on the grounds that Cubans were Republicans."¹⁷⁴ This will not surprise any honest legal academician; it is virtually mandatory that any law professor profess his or her faith in the necessity of racial diversity. Dissenters are shunned at best and labeled racists at worst. If there can be no dispassionate consideration of the matter among American law professors, how believable is the law school's profession that it would like nothing better than to use a race-neutral admissions formula to achieve diversity?

By even raising this question I risk being perceived as hostile to diversity, blind to the claims of racial justice, ignorant of the continued effects of our racially oppressive history, and possibly a closet racist. I am acquitted of those charges by those who know me, and I raise the issue because I do not wish to be misunderstood: The harm wrought by *Grutter* lies in its pretense that it applied strict scrutiny, not in its validation of the use of race in admissions to public universities. *Grutter*, unmasked, stands for the forthright proposition that government uses of race which do not reinforce the lingering effects of past racial oppression are entitled to less skeptical review than those uses of race that perpetuate the effects of our past racial injustices. That was the proposition which Justice Brennan championed in *Metro Broadcasting*.¹⁷⁵ Perhaps, at bottom, *Grutter* is little more than a judicial compromise; five votes could not be mustered for overt endorsement of the Brennan view, but could be assembled for an ersatz

¹⁷³ *Id.* at 2346 (quoting Brief for Respondents at 34).

¹⁷⁴ *Id.* at 2373 (Kennedy, J., dissenting).

¹⁷⁵ In *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547 (1990), the Court held:

[B]enign race-conscious measures mandated by Congress—even if those measures are not "remedial" in the sense of being designed to compensate victims of past governmental or societal discrimination—are constitutionally permissible to the extent that they serve important governmental objectives within the power of Congress and are substantially related to achievement of those objectives.

Id. at 564–65 (footnote omitted); see also *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 359 (1978) (Brennan, White, Marshall, Blackmun, JJ., concurring in the judgment in part and dissenting in part) (advocating the use of intermediate scrutiny to evaluate "racial classifications designed to further remedial purposes").

version. But ersatz versions of anything are rarely satisfying and never enduring. In the end, *Grutter* is a Pyrrhic victory if ever there was one, for the lingering costs of adherence to a formulaic facade will, in time, manifest themselves in the collapse of the structure behind the facade.

IV. FRUIT OF THE FORMALISTIC TREE: WHITHER TIERED SCRUTINY?

The premise of tiered scrutiny has been that the judiciary can identify those government actions which do not merit the usual presumption of constitutional validity. The ways of doing so have been varied but have primarily included identification of suspicious classifications and fundamental liberties. Tiered scrutiny has been refined by subdividing suspicious classifications into suspect ones (that receive strict scrutiny),¹⁷⁶ and semi-suspect ones (that receive so-called intermediate scrutiny),¹⁷⁷ and by parsing the lexicon of liberties into fundamental ones (that receive strict scrutiny),¹⁷⁸ and quasi-fundamental ones (that receive, in each instance, a sui generis form of heightened, but not strict, scrutiny).¹⁷⁹ Tiered scrutiny has always had a somewhat artificial air of precision to it, because the criteria for sorting classifications and liberties into the appropriate bins has been flexible (to put it charitably), or so amorphous as to approach the illusory (to phrase it cynically). In any case, the supposed criteria have never been applied consistently. Yet, tiered scrutiny has survived. Perhaps tiered scrutiny resembles Winston Churchill's characterization of democracy as the worst form of government except for all the others,¹⁸⁰ but neither democracy nor tiered scrutiny is invulnerable to attack from without or to collapse from within.

The challenge posed to tiered scrutiny by *Lawrence* and *Grutter* is whether the Court's embrace of formalism will eventually rot the form. The minimal scrutiny that *Lawrence* formally applied was hardly

¹⁷⁶ See *supra* text accompanying notes 8–11, 15–19.

¹⁷⁷ See *supra* text accompanying notes 20–28.

¹⁷⁸ See *supra* text accompanying notes 12–14.

¹⁷⁹ *Id.* “Quasi-fundamental liberties” are an amorphous category that includes the right at issue in *Lawrence* as well as such “enhanced minimal scrutiny” cases as *Plyler v. Doe*, 457 U.S. 202, 204 (1982) (holding that even though undocumented aliens are not a suspect class and education is not a fundamental right, a Texas statute that restricted state funds from funding children who were not legally admitted to the United States violated the Equal Protection Clause because it did not further a “substantial goal of the State”); see *supra* text accompanying notes 51–56.

¹⁸⁰ See THE OXFORD DICTIONARY OF QUOTATIONS 150 (3d ed. 1979). On November 11, 1947, Winston Churchill remarked to the House of Commons:

Many forms of Government have been tried, and will be tried in this world of sin and woe. No one pretends that democracy is perfect or all-wise. Indeed, it has been said that democracy is the worst form of government except all those other forms that have been tried from time to time.

Id.

deferential to governments, and the strict scrutiny that *Grutter* formally applied was remarkably deferential.¹⁸¹ The lack of connection between the form of the scrutiny employed and its application invites speculation as to the underlying, unarticulated nature of the method of review that may be evolving behind the formal facade of tiered scrutiny.

Lawrence might be explained as a triumph of value skepticism. The Court was unwilling to declare that adults have a constitutionally fundamental right to engage privately in consensual sexual intimacies that are a part of their larger personal relationship. The most the *Lawrence* Court would do was acknowledge that this was a plain-vanilla liberty,¹⁸² presumably on par with the liberty to smoke tobacco in your own living room, to lounge around your bedroom in an ugly dressing gown, or to choose to have toast or a bagel with your morning coffee. At first glance, one might think that this is a Court unwilling to declare the existence of any enduring values, and that first impression would initially be strengthened by the Court's conclusion that popular moral disapproval is not a legitimate state interest for purposes of minimal scrutiny. Surely this Court must think that value choices are inherently unstable, malleable, and undeserving of any presumptive deference. That cannot suffice as an answer, however, for the result of *Lawrence* is to stake out a value position in highly contested territory. By employing the appearance of value neutrality, the Court made a value choice, but it simultaneously demeaned and blunted the impact of that choice by refusing to identify strongly the value it chose to protect.

Lest there be doubt on the point, consider the immediate aftermath of *Lawrence*. In the same term in which *Lawrence* was decided, the Court remanded *Limon v. Kansas*¹⁸³ to the Court of Appeals of Kansas for further consideration in light of *Lawrence*. Matthew Limon, an eighteen-year-old adult, had been convicted of criminal sodomy for engaging in oral sex with a fourteen-year-old boy. Although the Kansas criminal sodomy statute makes no distinction between heterosexual and homosexual sodomy,¹⁸⁴ another Kansas statute carves out an exception to the criminal sodomy statute for heterosexual sodomy involving a young adult and a fourteen- or fifteen-year-old child, and punishes the latter conduct far less severely than criminal sodomy.¹⁸⁵ On remand, the Court of Appeals of Kansas upheld

¹⁸¹ See discussion *supra* Parts III, IV.

¹⁸² See *supra* text accompanying notes 76–77.

¹⁸³ 123 S. Ct. 2638 (2003).

¹⁸⁴ See KAN. STAT. ANN. § 21-3505(a)(2) (1995) ("Criminal sodomy is . . . sodomy with a child who is 14 or more years of age but less than 16 years of age . . .").

¹⁸⁵ See KAN. STAT. ANN. § 21-3522(a)(2) (2002 Supp.). In pertinent part, this statute defines:

(a) Unlawful voluntary sexual relations is engaging in voluntary:

Limon's conviction and a greater-than-seventeen year prison sentence imposed under the criminal statute.¹⁸⁶ Following *Lawrence*, the Kansas court applied minimal scrutiny and upheld the statutes.¹⁸⁷ Matthew Limon's reliance on *Lawrence* was dismissed because the *Lawrence* liberty interest was confined to adults. According to the Kansas court:

[T]he legislature could have reasonably determined that to prevent the gradual deterioration of the sexual morality approved by a majority of Kansans, it would encourage and preserve the traditional sexual mores of society. Moreover, traditional sexual mores have played a significant role in the sexual development of children. During early adolescence, children are in the process of trying to figure out who they are. A part of that process is learning and developing their sexual identity. As a result, the legislature could well have concluded that homosexual sodomy between children and young adults could disturb the traditional sexual development of children.¹⁸⁸

While the Kansas court also offered the legislature's hypothetical interest in deterring the spread of disease through homosexual sexual conduct as a legitimate interest to which the differential statutory scheme was rationally related,¹⁸⁹ let us dwell on the first asserted interest. Is encouragement of "traditional sexual mores" a different and more legitimate interest than expressing moral disapproval? If not, is moral disapproval illegitimate only when used to criminalize private consensual sexual intimacies between adults? If neither of the above questions can be answered affirmatively, the Kansas court seems doomed to suffer a reversal of its judgment. In that event, note once again how apparent value skepticism operates to reinforce and flesh out the Court's value choices. It is not legitimate for a democratic community to write into law its moral judgments; only some utilitarian harm-avoiding interest will suffice to establish legitimacy. That, in itself, is a value judgment. Some value judgments (e.g., majoritarian morality) are not legitimate but other value judgments are legitimate (e.g., utilitarian harm avoidance). Moreover, the disqualification of majoritarian morality as a legitimate interest of

....

(2) sodomy . . . with a child who is 14 years of age but less than 16 years of age and the offender is less than 19 years of age and less than four years of age older than the child and the child and the offender are the only parties involved and are members of the opposite sex.

Id.

¹⁸⁶ *State v. Limon*, No. 85,898, 2004 Kan. App. LEXIS 110, at *32-33 (Kan. Ct. App. Jan. 30, 2004). The severity of the sentence was partly attributable to the fact that Limon had two prior convictions of "aggravated criminal sodomy." *Id.* at *4.

¹⁸⁷ *Id.* at *9 ("[T]he question to be answered is whether the challenged classification has a rational basis.").

¹⁸⁸ *Id.* at *18.

¹⁸⁹ *Id.* at *21-22.

government implicitly privileges other values (e.g., the liberty interest of people to engage in private consensual sexual intimacies), and that privileging constitutes an important value choice. Yet the latter value is debased, even as it is protected, by the Court's refusal to recognize it as fundamental and apply strict scrutiny to regulations that impinge upon its exercise.

While these may be appropriate value judgments, there remain several troubling questions about the process that produces these judgments. What confers authority upon judicial judgment of the legitimacy of majoritarian morality? If such judicial judgment is valid, perhaps it is due to our tradition of judicial review that requires we accept it as such when judges are called upon to adjudicate claims of individual constitutional rights. Even if this is the case, however, why is it that some nonfundamental liberties are effectively immune from regulation while some quasi-fundamental liberties (e.g., abortion) are subject to regulations (as long as the regulations do not create an "undue burden")?¹⁹⁰ Further, effective access to some fundamental liberties (e.g., the assumed right to die) are subject to considerable regulation because the access method itself is not deemed to be fundamental and the government's interest in regulating that access method is rooted in utilitarian goals of harm avoidance?¹⁹¹ If these questions cannot be readily answered in a plausible, coherent, reasonably succinct fashion, there is a strong likelihood that something is radically amiss in the methodology that is producing these outcomes. Substantive due process was under enough intellectual pressure when it was a two-track system of fundamental rights coupled with strict scrutiny, and nonfundamental rights coupled with minimal scrutiny. Now that it seems to be resolving into a free-form system, it may begin to bear uncomfortable resemblance to a shell game. It will take some time, but perhaps less time than we think, for the judicial methodology to be regarded as illegitimate, an unexplained choice of values made by judges who claim to be agnostic as to values.

The irony of *Lawrence* is that the language of the opinion is wholly inconsistent with value skepticism. Justice Kennedy repeatedly emphasized the "respect the Constitution demands for the autonomy of the person,"¹⁹² the need to eradicate the "stigma" of criminal penalties attached to private consensual sex by adult homosexuals,¹⁹³ the

¹⁹⁰ See, e.g., *Planned Parenthood v. Casey*, 505 U.S. 833, 878 (1992) (plurality opinion) (holding that the state may not place an undue burden on a woman's attempt to obtain an abortion before a fetus reaches viability).

¹⁹¹ See *Washington v. Glucksberg*, 521 U.S. 702, 728 (1997) (holding that "the asserted 'right' to [doctor] assistance in committing suicide is not a fundamental liberty interest protected by the Due Process Clause").

¹⁹² *Lawrence v. Texas*, 123 S. Ct. 2472, 2481 (2003).

¹⁹³ *Id.* at 2482.

importance of avoiding any "invitation to subject homosexual persons to discrimination both in the public and in the private spheres,"¹⁹⁴ and the necessity of eliminating "precedent [that] demeans the lives of homosexual persons."¹⁹⁵ With that build-up, one would expect Justice Kennedy to conclude that the liberty interest that was the object of such solicitude was fundamental. *Lawrence* is a judicial soufflé with a puffy crown that collapsed upon removal from the oven.

Further evidence of the unstable nature of *Lawrence* is provided by the use to which it was put by the Massachusetts Supreme Judicial Court in *Goodridge v. Department of Public Health*.¹⁹⁶ In *Goodridge I*, the court held that statutory barriers to same-sex marriage violated the due process and equality guarantees of the Massachusetts Constitution.¹⁹⁷ In doing so, the court noted that in *Lawrence* the United States Supreme Court had ruled that the Federal Constitution "prohibits a State from wielding its formidable power to regulate conduct in a manner that demeans basic human dignity, even though that statutory discrimination may enjoy broad public support."¹⁹⁸ In another passage, the court pointed out that in *Lawrence* the Supreme Court had also "affirmed that the core concept of common human dignity protected by the . . . United States Constitution precludes government intrusion into the deeply personal realms of consensual adult expressions of intimacy and one's choice of an intimate partner."¹⁹⁹ While the court did not ground its decision on federal law, it used *Lawrence* to stand for a broader proposition than it would appear *Lawrence* can support. Given that *Lawrence* found the interests quoted by the *Goodridge I* majority not to be fundamental, it is an overstatement to assert flatly that *Lawrence* held that the Constitution simply forbids government action that "demeans basic human dignity" or that impinges upon "consensual adult expressions of intimacy and one's choice of an intimate partner." Indeed, if we take *Lawrence* at face value, these interests may presumptively be validly regulated by

¹⁹⁴ *Id.*

¹⁹⁵ *Id.*

¹⁹⁶ 798 N.E.2d 941 (Mass. 2003) ("*Goodridge I*"). In *Goodridge I*, the Massachusetts Supreme Judicial Court ruled that barring same-sex couples from civil marriage violated the equality and due process provisions of the Massachusetts Constitution, but stayed the effectiveness of its decision for 180 days to permit the legislature to cure the constitutional defect. *Id.* at 970. Following that decision, the legislature used Massachusetts's certification procedure to ask the court whether civil unions for same-sex couples would comply with the equality guarantee. Civil unions would confer upon same-sex couples joined in civil union all the status benefits of marriage but not the name. In *Opinions of the Justices to the Senate*, No. SJC-09163, 2004 Mass. LEXIS 35 (Mass. Feb. 3, 2004) ("*Goodridge II*"), the court said that only marriage, not a clone with a different name, would satisfy the Massachusetts Constitution.

¹⁹⁷ 798 N.E.2d at 948.

¹⁹⁸ *Id.* at 958 n.17.

¹⁹⁹ *Id.* at 948.

governments. The problem in *Lawrence* was that the only interest asserted by Texas to support its sodomy law was moral disapproval, an illegitimate government interest.

In *Goodridge I*, as in *Lawrence*, the court applied minimal scrutiny and proceeded to reject three interests asserted by Massachusetts to support limiting marriage to the union of a man and a woman.²⁰⁰ It is hardly clear whether the first interest, “providing a ‘favorable setting for procreation,’”²⁰¹ was insufficient because it was illegitimate or because the marriage limitation was not rationally related to its accomplishment. We learn that procreation is not “a *necessary* component of civil marriage,”²⁰² that “a narrow focus [on procreation] is *inappropriate*,”²⁰³ and that “[t]he ‘marriage is procreation’ argument singles out the one unbridgeable difference between same-sex and opposite-sex couples . . . [and thus] confers an official stamp of approval on the destructive stereotype that same-sex relationships are inherently unstable and inferior to opposite-sex relationships and are not worthy of respect.”²⁰⁴ From this, one might guess that the government interest is illegitimate, for the court cannot quite bring itself to state outright that the interest is not rationally related to the marriage limitation at issue. The second claimed government interest, “ensuring the optimal setting for child rearing,”²⁰⁵ was acknowledged to be legitimate,²⁰⁶ but limiting “marriage to opposite-sex couples . . . cannot plausibly further this policy”²⁰⁷ because of the wide differences that exist in the composition of families engaged in raising children.²⁰⁸ The third asserted interest, “conserving scarce State and private financial resources,”²⁰⁹ while legitimate, was not rationally served by the marriage limitation because there was neither empirical nor legal evidence to support the contention that “same-sex couples are more financially independent than married couples and thus less needy of public marital benefits.”²¹⁰ As in *Lawrence*, the form of the scrutiny was minimal, but its substance was something else. If there is no presumptive invalidity to Massachusetts’s statutory limitation of marriage to heterosexual unions, and if any “conceivable, rational basis” will

²⁰⁰ *Id.* at 961.

²⁰¹ *Id.*

²⁰² *Id.* at 962 (emphasis added).

²⁰³ *Id.* (emphasis added).

²⁰⁴ *Id.*

²⁰⁵ *Id.* at 961.

²⁰⁶ *Id.* at 962 (“Protecting the welfare of children is a paramount State policy.”).

²⁰⁷ *Id.*

²⁰⁸ *Id.* at 962–64 (discussing the varying circumstances and composition of the American family over time).

²⁰⁹ *Id.* at 964.

²¹⁰ *Id.*

suffice to validate a law challenged under minimal scrutiny,²¹¹ surely it is rational (even if dubious) for a state government to think that it might wish to limit marriage to heterosexual unions in order to encourage the raising of children in the traditional family structure. Many other family structures exist, of course, and there are plenty of heterosexual traditional families that do a lousy job of raising children, but if courts really believe in minimal scrutiny, it is for legislatures to make this judgment, so long as there is a smidgen of rationality in it. Now, lest I be misunderstood as yet another reflexive opponent of same-sex unions, I will clearly state that I think that denial of the status benefits of marriage to same-sex couples is demeaning to their relationships and maintains a structural inequality that is hurtful, financially damaging, and invites other wrongful abuse. But if the Massachusetts Supreme Judicial Court in *Goodridge I* truly believed this, why is it that these relationships are not presumptively insulated from government attack, rather than presumptively vulnerable to regulation? If the Supreme Court in *Lawrence* truly believed that criminal prohibition of adult private, consensual sexual intimacies conducted in the context of a larger personal relationship “de-mean[s the very] existence” of the sexual partners,²¹² how can it be that such criminal prohibitions are, nevertheless, presumptively valid?

Either the Supreme Court in *Lawrence* and the Massachusetts Supreme Judicial Court in *Goodridge I* do not believe that the liberties they describe are as significant as they claim, or they do not believe in the level of scrutiny they purport to apply. Neither possibility is attractive; each is disquieting. The former proposition is not plausible, because the government action at issue would presumably have been upheld if the courts secretly devalued the liberties they espoused. Thus, the latter proposition is more likely. It may be that the courts in *Lawrence* and *Goodridge I* were testing public opinion by floating a “weak” liberty, but that seems unlikely in the case of *Goodridge I*, given the aroused reaction it produced.²¹³ It is a more plausible

²¹¹ See *Fine v. Contributory Ret. Appeal Bd.*, 518 N.E.2d 1151, 1152 (Mass. 1988) (“In analyzing equal protection claims, this court has held that statutes which do not involve either a suspect group or a fundamental right only need to be supported by a conceivable, rational basis.”).

²¹² *Lawrence v. Texas*, 123 S. Ct. 2472, 2484 (2003).

²¹³ See, for example, the text of the constitutional amendment proposed by the House of Representatives, which reads:

Marriage in the United States shall consist only of the union of a man and a woman. Neither this Constitution or the constitution of any State, nor state or federal law, shall be construed to require that marital status or the legal incidents thereof be conferred upon unmarried couples or groups.

H.R.J. Res. 56, 108th Cong. (2003); see also Press Release, Office of the President Calls for Constitutional Amendment Protecting Marriage (Feb. 24, 2004) (endorsing a constitutional amendment), available at <http://www.whitehouse.gov/news/releases/2004/02/20040224-2.html>.

explanation of *Lawrence*. The Court in *Lawrence* might have thought that a ringing endorsement of a “weak” liberty would bring the judicial and legislative pots to a boil on the larger issue of recognizing the equal legal dignity of homosexuals and heterosexuals. If so, they were right in their calculation, but at the cost of tossing the diffuse and barely coherent doctrine of substantive due process into a judicial magician’s black hat. The Court will continue to select the values that it will protect, but there can no longer even be the assurance of vague appeals to history, tradition, conscience, and “ordered liberty” to confine the value selection process.

Grutter reinforces the methodology of *Lawrence*. By attempting to adhere to both prongs of the equal protection dilemma—a commitment to color-blindness and also to the principle of eradicating racial subordination—it damaged the vessel of tiered scrutiny. The Court was forced to make hard choices in *Grutter*, and so it proved again the adage that hard cases make bad law. More accurately, it is bad choices that make bad law. The obvious choice was to decide whether racially based admission policies in public universities were consistent with the equal protection guarantee. The somewhat veiled choice was to decide whether color-blindness or anti-subordination would be the reigning paradigm of equal protection with respect to race, or whether the two could be fused in a weld that would last. The apparently not-so-obvious issue was the effect on tiered scrutiny of the Court’s choice between color-blindness, anti-subordination, or a fusion of the two.

Given the result—upholding the validity of racially based admissions—the Court could have done one of three things: (1) continue to hold that all racial classifications by governments are subject to strict scrutiny and justify this classification as narrowly tailored to the achievement of diversity; (2) adopt the rejected Brennan formula that “benign” racial classifications are subject to intermediate scrutiny;²¹⁴ conclude that racially based admissions formulae are benign, and uphold their use under intermediate scrutiny; or (3) rule that

²¹⁴ See, e.g., *Metro Broadcasting Inc. v. FCC*, 497 U.S. 547, 564–65 (1990). The Court summarized its holding:

We hold that benign race-conscious measures mandated by Congress—even if those measures are not “remedial” in the sense of being designed to compensate victims of past governmental or societal discrimination—are constitutionally permissible to the extent that they serve important governmental objectives within the power of Congress and are substantially related to achievement of those objectives.

Id. (footnote omitted); *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 359 (1978) (Brennan, White, Marshall, Blackmun, JJ., concurring in the judgment in part and dissenting in part) (“[R]acial classifications designed to further remedial purposes “must serve important governmental objectives and must be substantially related to achievement of those objectives,”” (quoting *Califano v. Webster*, 430 U.S. 313, 317 (1977) (per curiam) (quoting *Craig v. Boren*, 429 U.S. 190, 197 (1976))))).

this racial classification is subject to some lesser degree of scrutiny (but not because it is “benign”) and articulate a principle that justifies a lesser degree of scrutiny without embracing the benign-malign distinction endorsed by Justice Brennan. Of course, the Court adopted the first course of action.²¹⁵ No doubt it rejected the second choice because there was no majority for the open acceptance of anti-subordination as the primary principle informing equal protection and race. But, if the Court intended to craft a fusion of color-blindness and anti-subordination (which surely seems to be the intended result of its actual decision), it is unclear why it did not explore the third option.

The first option sacrificed the essence of strict scrutiny—stern judicial skepticism of government action—to forge an accommodation between color-blindness and anti-subordination. The concession to color-blindness was in the continued formal adherence to strict scrutiny;²¹⁶ the embrace of anti-subordination was in the Court’s deferential acceptance of both the government’s claimed compelling interest for using race and the necessity for using race to accomplish that interest.²¹⁷ Of course, the cost of this union of principles was paid by diluting strict scrutiny to the point of possible disutility.

The second option would have preserved the form and substance of strict scrutiny, but would have required the Court to overtly acknowledge the central importance of anti-subordination to equal protection. As important as the anti-subordination principle may be, it is still an open question whether in America’s increasingly pluralistic society of kaleidoscopic ethnicity, with each group’s varied historical experiences, the anti-subordination principle should be the primary theoretical focus of equal protection. Resolution of that vexed question will not be attempted here; it suffices to say that the Court was obviously unwilling to make this leap.

²¹⁵ See *Grutter v. Bollinger*, 123 S. Ct. 2325, 2347 (2003) (applying strict scrutiny, but finding that Michigan Law School’s narrowly tailored use of race furthered a compelling state interest in obtaining a diverse student body).

²¹⁶ Strict scrutiny presumes that any use of race is presumptively void, which is but another way of saying that governments must not use race as a decisional factor; that is, governments must be color-blind in their actions. See *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J. dissenting).

²¹⁷ The educational value of racial diversity inheres in the presumption that different identity groups have different cultural and social experiences and that the experiences of historically disadvantaged minorities are of particular value in helping students of all backgrounds appreciate the multiplicity of viewpoints and experiences that compose America. In addition, the *Grutter* Court accepted the idea that an ethnically diverse nation must use ethnicity to ensure that the portals of education are open to every ethnic group, which is simply another way of saying that it is imperative to respond to the effects of past subordination by taking ethnicity into account in government decisions. See *supra* text accompanying notes 129–36.

Because the Court did not choose the third option, its nature is speculative; however, the Court's opinion in *Grutter* leaves some clues from which we may speculate. The Court might have emphasized education in a somewhat different manner. Even if the Court was unwilling to declare education a fundamental constitutional value (and thus overturn *San Antonio Independent School District v. Rodriguez*²¹⁸), it might have emphasized the pivotal role of education in informing equal protection values, from *Brown v. Board of Education*²¹⁹ to *Plyler v. Doe*.²²⁰ In the context of racially based admissions, the argument would have drawn frankly upon the anti-subordination theory of equal protection, but would have confined its applicability to education because of education's unique power to effect powerful social and economic transformation. Stitched into that argument would have been the Court's contention in *Grutter* that some judicial deference to university administrators in the performance of their duties is appropriate in order to maintain a climate of free academic inquiry.²²¹ While this argument, as applied to public university admissions decisions, is an extension of prior judicial deference to universities in the name of academic freedom,²²² it would have been more plausible if it were offered as a reason to depart from strict scrutiny (perhaps to intermediate or some other lesser degree of heightened scrutiny) rather than as a reason to defer to the accused government while strictly scrutinizing its actions. The thrust of the imaginary argument would have been roughly as follows: (1) all governmental uses of race are presumptively invalid and almost all are subject to strict scrutiny; (2) very few governmental uses of race, while presumptively invalid, should be subjected to intermediate scrutiny or some other form of heightened scrutiny; (3) the categories to which reduced scrutiny applies should be limited to the unusual moments when i) governments act as gatekeepers to public institutions that promise to transform the lives of those who enter, ii) there are

²¹⁸ 411 U.S. 1 (1973) (refusing to declare education a fundamental right, and applying minimal scrutiny to uphold Texas's property tax-based public school funding system that favored more affluent communities).

²¹⁹ 347 U.S. 483 (1954) (striking down race segregation in public schools as a violation of the Equal Protection Clause).

²²⁰ 457 U.S. 202 (1982) (using enhanced minimal scrutiny, which asked whether the state had a "substantial interest," to strike down a Texas law that deprived illegal immigrant children of a public education).

²²¹ See *Grutter v. Bollinger*, 123 S. Ct. 2325, 2339 (2003) (recognizing the "complex educational judgments [administrators must make] in an area that lies primarily within the expertise of the university").

²²² See, e.g., *id.* at 2356–57 (Thomas, J., dissenting) ("The Court bases its unprecedented deference to the Law School—a deference antithetical to strict scrutiny—on an idea of 'educational autonomy' grounded in the First Amendment. . . . [T]here is no basis for a right of public universities to do what would otherwise violate the Equal Protection Clause.").

independent constitutional reasons to defer (in part) to the judgment of the government gatekeepers, and iii) the challenged use of race strongly appears not to be motivated by racial bias, prejudice, or stereotype; (4) the use of race as one factor in an individualized assessment of candidates for admission to public universities is, at least at this moment in our history, a use of race that qualifies for intermediate scrutiny. The rest of the imaginary opinion would proceed along familiar lines, probing the importance of the objective and the substantiality of the use of race to the accomplishment of the objective.

The hypothesized opinion would have preserved tiered scrutiny far better than did the Court's chosen method. While it must be conceded that the imaginary opinion would open the door to further litigation about which other uses of race might be suitable for reduced scrutiny, at least the imaginary approach would confine the debate within a familiar crucible. The Court's approach in *Grutter* may prove to result in much the same end as the imaginary opinion, but the collateral cost to tiered scrutiny is likely to be much higher.

When *Lawrence* and *Grutter* are taken together, they display a doctrine in disarray. *Lawrence* makes a shambles of the search for non-textual liberties by trivializing the difference between fundamental and nonfundamental liberties. *Grutter* transforms strict scrutiny from an implacable skepticism that places upon the government the highest burden of justification for its presumptively wrongful acts to a modified version of minimal scrutiny, in which rhetorical homage is paid to the form of traditional strict scrutiny but the substance of the inquiry is almost as deferential as traditional minimal scrutiny. When one includes the so-called "enhanced minimal scrutiny" cases,²²³ in which classifications have been struck down for want of a legitimate purpose or lack of a rational relationship to some legitimate purpose, the neat categories of tiered scrutiny are seen to be like an ancient and neglected barn—sagging toward an inevitable collapse.

²²³ See, e.g., *Romer v. Evans*, 517 U.S. 620 (1996) (invalidating a Colorado constitutional amendment enacted to restrict legal protection for homosexuals as unrelated to legitimate state interests, thus violating the Equal Protection Clause); *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432 (1985) (applying minimal scrutiny to invalidate on equal protection grounds the city's zoning ordinance as applied to a home for the mentally retarded, because the exclusion of the group home was not rationally related to the city's legitimate interests); *Plyler v. Doe*, 457 U.S. 202 (1982) (holding that even though undocumented aliens are not a suspect class and education is not a fundamental right, a Texas statute that restricted state funds from funding the education of children who were not legally admitted to the United States violated the Equal Protection Clause because it did not further a "substantial goal of the state"); *United States Dep't of Agric. v. Moreno*, 413 U.S. 528 (1973) (invalidating the denial of food stamp benefits to a group of "unrelated persons" as not rationally related to furthering any government interest under the Due Process Clause of the Fifth Amendment).

While it is premature to pronounce tiered scrutiny dead, or even to be administering last rites, it is not too early to speculate about the future of tiered scrutiny or its possible replacements. Perhaps the Court will return to the categorical approach that constitutes the heart of tiered scrutiny, take the doctrine seriously once again, and inject new vitality into what now seems to be a decrepit and ailing patient. Failing that triumph of will, the odds are that tiered scrutiny will be transformed into one of two variant modes of scrutiny.

The first, and more obvious, mode is a version of the flexible, or "sliding-scale" scrutiny that Justice Thurgood Marshall long advocated. In *San Antonio Independent School District v. Rodriguez*,²²⁴ Justice Marshall dissented from the Court's refusal to recognize a public elementary and secondary school education as a constitutionally fundamental right or to treat classifications on the basis of wealth as constitutionally suspicious. He argued that the Court's equal protection decisions "defy . . . easy categorization" into the pigeonholes of tiered scrutiny.²²⁵ Marshall contended:

[The Court] applied a spectrum of standards This spectrum clearly comprehends variations in the degree of care with which the Court will scrutinize particular classifications, depending . . . on the constitutional and societal importance of the interest adversely affected and the recognized invidiousness of the basis upon which the particular classification is drawn.²²⁶

Application of this principle requires recognition that courts do not "act in a social vacuum. . . . [C]onstitutional principles of equality . . . evolve over time; what once was a 'natural' and 'self-evident' ordering later comes to be seen as an artificial and invidious constraint on human potential and freedom."²²⁷

Marshall's alternative to tiered scrutiny might perfectly explain the reasoning in *Lawrence*, except for the fact that the Court in *Lawrence* did not ground its decision in equality principles. Putting that minor detail aside, one reading of *Lawrence* is that it represents an implicit triumph of Marshall's spectrum-of-values methodology. At bottom, *Lawrence* is grounded in the recognition that laws that once maintained a natural order or which were self-evidently valid have now come to be regarded as "artificial and invidious constraint[s] on human potential and freedom."²²⁸ *Grutter* fits somewhat less easily into this explanation, but the fit is not terribly awkward, particularly if we regard *Grutter* as covertly acknowledging the power of the anti-

²²⁴ 411 U.S. 1 (1973).

²²⁵ *Id.* at 98 (Marshall, J., dissenting).

²²⁶ *Id.* at 98–99.

²²⁷ *City of Cleburne*, 473 U.S. at 466 (Marshall, J., concurring in the judgment in part and dissenting in part).

²²⁸ *Id.*

subordination conception of the equal protection guarantee. In a sense, *Grutter* can be seen as rooted in the notion that, while all racial classifications are inherently suspect, those uses of race that in good faith are designed to move the culture beyond race ought not be automatically condemned, for they have the promise of promoting the elimination of "artificial and invidious constraint[s] on human potential and freedom."²²⁹

The second, and perhaps less likely, mode of scrutiny that might develop in the wake of tiered scrutiny is open adoption of judicial value selection. It is hardly novel to observe that courts have for some time been engaged in selecting the values that they regard as protected by the Constitution,²³⁰ but the devices by which this value selection has occurred have been obscured by the trappings of tiered scrutiny. In free speech, for example, courts select the categories of speech that receive little or no constitutional protection by assessing both the governmental interest in regulating such speech and the degree of connection between the category of speech and the underlying reasons for protecting free speech.²³¹ That process results in judicial value selection, and the values chosen are hardly constant over time, as brief examination of obscene,²³² defamatory,²³³ or commercial

²²⁹ *Id.*

²³⁰ See, e.g., LAURENCE H. TRIBE, *CONSTITUTIONAL CHOICES* (1985) (offering a classic collection of essays arranged around this theme).

²³¹ Compare Melville B. Nimmer, *The Right To Speak from Times to Time: First Amendment Theory Applied to Libel and Misapplied to Privacy*, 56 CAL. L. REV. 935, 942 (1968) (describing the process of "definitional balancing" or "categorical balancing," by which the Court balances competing policy considerations for "the purpose of defining which forms of speech are to be regarded as 'speech' within the meaning of the first amendment"), with T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. 943 (1987) (criticizing definitional or categorical balancing).

²³² The definition of obscene speech has morphed from speech that tends "to deprave and corrupt those whose minds are open to such immoral influences," *Regina v. Hicklin*, (1868) 3 L.R.-Q.B. 360 (U.K.), to speech that "deals with sex in a manner appealing to prurient interest," *Roth v. United States*, 354 U.S. 476, 487 (1957), and which is "utterly without redeeming social importance," *id.* at 484, to sexually explicit speech that the "average person, applying contemporary community standards," would find patently offensive and which lacks "serious literary, artistic, political, or scientific value." *Miller v. California*, 413 U.S. 15, 24 (1973) (quoting *Roth*, 354 U.S. at 489). The test used in *Hicklin*, rejected in *Roth*, was commonly accepted by American courts prior to *Roth*. See, e.g., *Commonwealth v. Friede*, 171 N.E. 472, 474 (Mass. 1930) (finding Theodore Dreiser's *An American Tragedy* "obscene, indecent and manifestly tending to corrupt the morals of youth"); *Commonwealth v. DeLacey*, 171 N.E. 455 (Mass. 1930) (finding D. H. Lawrence's *Lady Chatterley's Lover* obscene under the standard that it tended to corrupt the morals of youth).

²³³ Until *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), which held that defamation against a public official is protected speech unless such statements are false or are made with reckless disregard for whether it was false or not, defamation enjoyed no constitutional protection whatever. Since then, a modestly complex body of constitutional law has developed defining the scope and nature of the constitutional protection extended to defamatory speech. See, e.g., *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974) (declining to extend the *Sullivan* rule to

speech²³⁴ (to cite only three such categories) will confirm. Much the same process has occurred with equal protection, where the Court has chosen to protect such extratextual values as proportional representation and elimination of property qualifications for voting in such special elections as bond elections.²³⁵ Of course, the process of value selection has stood at its zenith in substantive due process, where the Court has parsed history, tradition, conscience, and the demands of ordered liberty to locate unwritten fundamental liberties.²³⁶ All of these choices, however, have been conducted within the rubric of strict scrutiny. Only fundamental liberties are supposed to trigger strict scrutiny of regulations that invade their domain; only material infringements of fundamental rights (such as voting) or the use of suspect classifications are supposed to be subject to strict scrutiny in equal protection. Yet, as the levels of tiered scrutiny become ever more elastic—as strict scrutiny becomes deferential and minimal scrutiny becomes hard-eyed—the defining role of judicial value selection becomes ever clearer. The challenge will be to justify naked judicial value selection.

A recurring issue in constitutional theory is the legitimacy of judicial review. That issue is considered passé in many quarters, partly because we have such a vibrant and lengthy tradition of judicial review and partly because it is so obvious that we must have judicial review to fulfill the Constitution's promise of preservation of individual

private figures, although holding that liability for defamation in such cases must be predicated on at least a finding of negligence); *Curtis Publ'g Co. v. Butts*, 388 U.S. 130 (1967) (extending to public figures the *Sullivan* rule that defamation of public officials is constitutionally protected unless it is uttered with knowledge of its falsity or reckless disregard for its falsity).

²³⁴ Until *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council Inc.*, 425 U.S. 748 (1976), which held that commercial advertising of prescription drug information is protected speech under the First Amendment, commercial advertising enjoyed no constitutional protection. See, e.g., *Valentine v. Chrestensen*, 316 U.S. 52 (1942) (upholding prohibition of any handbill or other advertising matter on the streets). After *Virginia Pharmacy*, the degree of protection afforded commercial advertising has increased, to the point that, following 44 *Liquormart, Inc. v. Rhode Island*, 517 U.S. 484 (1996), in which the Court struck down Rhode Island's ban on price advertising of alcoholic beverages, it is debatable whether or not the Court is prepared to treat restrictions upon truthful commercial speech with the same degree of heightened scrutiny it applies to other content-based restrictions on speech. See, e.g., Kathleen M. Sullivan, *Cheap Spirits, Cigarettes, and Free Speech: The Implications of 44 Liquormart*, 1996 SUP. CT. REV. 123 (discussing the division on the Court regarding the proper standard to apply to restrictions on commercial speech).

²³⁵ See, e.g., *City of Phoenix v. Kolodziejcki*, 399 U.S. 204 (1970) (striking down a rule limiting voting on general obligation bonds to property owners); *Cipriano v. City of Houma*, 395 U.S. 701 (1969) (voiding a restriction of the vote to property owners in elections for issuance of revenue bonds); *Kramer v. Union Free Sch. Dist. No. 15*, 395 U.S. 621 (1969) (voiding a rule limiting voting in school district elections to property owners or lessees or those with enrolled schoolchildren); *Reynolds v. Sims*, 377 U.S. 533 (1964) (invalidating disproportionate representation and creating the "one person, one vote" rule).

²³⁶ See *supra* notes 13–14.

liberties. While it is not my purpose to challenge judicial review as illegitimate, it is appropriate to ponder the effect on judicial review of unvarnished judicial value selection. The Court's legitimacy stems from many sources: our tradition of accepting its decisions, its practice of delivering written reasons for its decisions, the insulation of judges from ordinary politics, and a judicial tradition of arguing about constitutional meaning within a limited range of modalities (e.g., text, precedent, history, prudence, and structure). Tiered scrutiny has fit within this veil of legitimacy because the triggers for heightened scrutiny have been identified for the most part by reference to history, text, precedent, and constitutional structure.²³⁷ But if tiered scrutiny should collapse, to be replaced by unconcealed judicial selection of constitutional values that are privileged against governmental invasion, public deference to the Court may well erode. No matter which side of the legal and cultural divide created by the issue of same-sex marriage you may be on, consider the furor over the decision by the Massachusetts Supreme Judicial Court to compel issuance of same-sex marriage licenses.²³⁸ Perhaps this will die down, and the court's decision will be accepted, but we have some reason to doubt that such hotly contested issues are likely to achieve widespread public acquiescence. Just as *Roe v. Wade*²³⁹ and its successor, *Planned Parenthood v. Casey*,²⁴⁰ have not quelled a significant minority of Americans from challenging the legitimacy of abortion as a constitutional liberty, and just as *Dred Scott v. Sanford*²⁴¹ hardly put the constitutional and moral issue of slavery to rest, it is likely that naked judicial selection of constitutional values will increase the rate at which the Court's judgments are openly challenged.

Perhaps for this reason it is unlikely that the Court will openly embrace naked value selection as a decisional methodology. If not, it faces yet another choice. It can revive tiered scrutiny, abandon it for a neo-Marshallian version of flexible, "sliding-scale" scrutiny, or devise some new procedural tools for application of various degrees of judicial scrutiny to alleged constitutional violations. To revive tiered

²³⁷ See generally PHILIP BOBBITT, *CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION* (2d ed. 1984) (presenting a general theory of judicial review and constitutional decision making, evoking historical, textual, and doctrinal arguments, among others).

²³⁸ See *supra* note 213.

²³⁹ 410 U.S. 113 (1973) (using a trimester framework to assess whether governmental interests at any point during gestation might be sufficiently compelling to justify infringement of the constitutionally fundamental abortion right).

²⁴⁰ 505 U.S. 833 (1992) (plurality opinion) (holding that, where a state regulation imposes an undue burden on a woman's choice to abort, such a regulation violates her due process rights).

²⁴¹ 60 U.S. (19 How.) 393 (1857) (holding that a former slave was not "free" by virtue of being in Missouri because Congress's power to regulate the territories only applied to those territories that were part of the United States when the Constitution was drafted).

scrutiny, the Court must respect its own doctrine; strict scrutiny must really be strict and, if not “fatal in fact,”²⁴² it must at least never be deferential; minimal scrutiny must be deferential, but perhaps not so devoid of scrutiny as to be “virtually none in fact.”²⁴³ A revival of tiered scrutiny would require the Court to make its value selections the old-fashioned way, by characterizing the liberties or classifications at issue as, respectively, fundamental or suspect (and justifying that characterization), before applying the requisite level of scrutiny. The present form of tiered scrutiny pushes the value selection process further along in the process, to the point where it mocks the level of scrutiny the Court has chosen to apply. A choice of neo-Marshallian spectrum scrutiny more nearly comports with the present actual practice but would force the Court to articulate the reasons for protecting any given liberty (or not), or validating (or voiding) any given classification, on an ad hoc basis. To the extent that such a spectrum-based approach would produce predictable and consistent results, it would probably not look much different from traditional tiered scrutiny; to the extent that the ad hoc method of spectrum scrutiny would produce seemingly haphazard results, it would invite the same sort of criticism that is likely to attend naked value selection. Some new form of scrutiny, as yet unknown, might cut this Gordian knot, but what form would it take?

I am unwilling to speculate at any length about unknown and imaginary forms of scrutiny but a few observations may be in order. It is possible that the Court could simply reverse the usual presumption that all governmental action is constitutionally valid, and indulge in a presumption that all governmental action is presumptively void, placing the burden of justification for any government action on the government. This libertarian’s delight would still necessitate selection of the evidentiary burden that the government must bear in order to justify its action and, in all likelihood, there would inevitably be created varying levels of proof that would mimic tiered scrutiny. In any case, the starting point would be that all government action is presumptively void, and that seems to be an unduly skeptical starting position. At the other extreme, the Court might continue to presume the validity of government action and depart from that presumption only when an indisputably textual constitutional liberty is placed at issue. This would represent a marked retreat from the present posture such that, even if existing precedent were left undisturbed, new and evolving claims of liberty would go unheeded. The paucity of satisfactory new approaches might simply represent a

²⁴² Gerald Gunther, *The Supreme Court, 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972).

²⁴³ *Id.*

failure of imagination, but might also suggest that we would do better to honor that which has served us reasonably well for most of the twentieth century.

CONCLUSION

The venerable institution of tiered scrutiny is threatened with collapse. As its structure has become ever more complicated, its application has become increasingly unwieldy and uncertain. This process of change (or, perhaps, decay) has been accelerated by the Court's decisions in *Lawrence v. Texas* and *Grutter v. Bollinger*. Although widely hailed for their results, the decisions, taken together, seriously undermine the structural postulates upon which tiered scrutiny is founded. Deference to government judgment, once the exclusive hallmark of minimal scrutiny, now is an aspect of strict scrutiny, while minimal scrutiny sometimes lacks any deference to governmental judgment. While the ultimate result is uncertain, tiered scrutiny is at a crossroads.

Tiered scrutiny may resolve itself into an ad hoc form of review in which the Court validates or voids each challenged act of government on the basis of a fluid assessment of the importance of the right asserted, the perceived invidiousness of the alleged infringement, the relative importance of the government interests at stake, and the linkage between those ends and the challenged actions. Such scrutiny is indistinguishable from that which Justice Thurgood Marshall advocated for many years in applying the Equal Protection Clause.

The present posture of tiered scrutiny may prove to be aberrational; the Court may abandon its present tendencies and revert to the earlier form of strict scrutiny, in which levels of scrutiny had distinct meaning and the tiered categories were policed by more hard-edged doctrine. The Court shows little inclination to adopt this approach. The present position of tiered scrutiny did not occur overnight, as by an earthquake knocking a great structure off its foundations. Rather, tiered scrutiny has been undergoing continuing change, and the direction of that change has been inexorably toward applying different de facto levels of scrutiny within each nominal tier.

Some new form of judicial review may ultimately replace tiered scrutiny. While the nature of this new form is entirely speculative, it may well be that any such development will rely heavily upon overt judicial selection of values to be given presumptive constitutional protection. Of course, such judicial value selection has long been a staple of our constitutional law; the only new wrinkle in this speculative development would be open reliance on judicial value selection as a method of identifying constitutional norms that are immune from infringement by ordinary politics. That choice, should it occur, may be problematic, for it inserts the Court more obviously and

clearly into the arena of unvarnished political passion. Perhaps the Court is already there and open choice of constitutional values is simply the way the Court will recognize its present posture.

In the end, tiered scrutiny may be like the mythical Phoenix. Every five hundred years the one and only Phoenix would build a nest, settle in, and ignite it to become its funeral pyre. Once consumed in the flames, a new Phoenix would rise out of the ashes to begin the cycle anew. While it is too soon to declare the death of tiered scrutiny, the Court may well be building its funeral pyre. We can only await the new Phoenix.