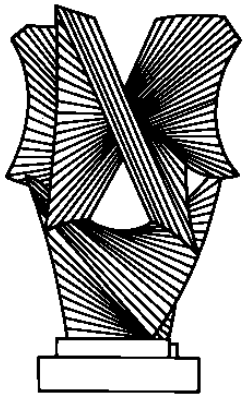

THE MODERNIZING MISSION OF JUDICIAL REVIEW

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Constitutional interpretation, as it is usually conceived, looks to the past—to an old text, to history, to precedent, to tradition—in an effort to limit political majorities. But over the last generation or so, a different approach to the Constitution has emerged. That approach, which might be called modernization, tries to anticipate trends in public opinion instead of taking lessons from the past; and a modernizing court, instead of facing down popular majorities, yields when it finds out that it has misgauged public opinion. This modernizing approach has characterized the Supreme Court's recent work in many disparate areas, including, among others, the Cruel and Unusual Punishment Clause of the Eighth Amendment and the limits on sex discrimination imposed by the Equal Protection Clause. Perhaps most interesting, the substantive due process decisions of the last forty years are modernizing decisions, unlike the pre–New Deal substantive due process decisions to which they are often, mistakenly, compared.

Modernization is an appealing approach in many ways. Among other things, it holds out the hope of more easily reconciling judicial review with democracy. But modernization also raises serious questions. There are questions of institutional competence—anticipating trends in public opinion sounds like a politician's job, not a court's—although there may be less to this objection than meets the eye. Perhaps the more important objections are that modernization may distort the political process, and it may cause courts to be too willing to accommodate what they perceive as the demands of popular opinion, at the expense of a principled judicial role.

INTRODUCTION

Constitutional interpretation looks to the past. It looks to an old text, to old precedents, to the views of the founding generations, to tradition. Judicial review is a matter of articulating principles rooted in these sources to limit the power of current popular majorities. That is the conventional wisdom.[1] But over the last generation or so, a very different

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1 People who disagree on practically everything else about how to interpret the Constitution agree on some version of this. See, for example, Antonin Scalia, *A Matter of Interpretation: Federal Courts and the Law* 37–47 (Princeton 1997) (asserting that a constitution's "whole purpose is to prevent change—to embed certain rights in such a manner that future generations cannot readily take them away"); Ronald Dworkin, *Freedom's Law: The Moral Reading of the American Constitu-*

form of judicial review has quietly emerged—an approach that, more or less consciously, looks to the future, not the past; that tries to bring laws up to date, rather than deferring to tradition; and that anticipates and accommodates, rather than limits, developments in popular opinion.

This approach, which might be called modernization, has not been fully avowed by the Supreme Court, and it does not characterize every area of constitutional law. But it is the dominant approach in many important areas—notably the highly controversial area of so-called substantive due process, the interpretation of the Eighth Amendment's prohibition on cruel and unusual punishment, and the limits on gender discrimination derived from the Equal Protection Clause. In many other areas—the Commerce Clause, the religion clauses, constitutional criminal procedure, and other aspects of the Equal Protection Clause—modernization seems to be an important part of the story.

Modernization is, I believe, an instinctive response by the courts to the persistent criticism that judicial review cannot be reconciled with the core principles of democratic government.[2] That criticism has led some people, today as in the past, to call for the more or less complete abolition of judicial review.[3] Modernization, to a greater degree than any other theory that preserves a substantial place for judicial review, provides an answer to that criticism. Whether it is a good answer is unclear. It is also unclear, in my view, whether modernization goes too far in accommodating popular majorities at the expense of other principles that the courts should enforce. But whatever its faults,

tion 1–12 (Harvard 1996) (suggesting that the courts should look to "the broad story of America's historical record" and there search for a moral meaning underlying certain phrases in the Constitution); Bruce Ackerman, 1 *We the People: Foundations* 34–162 (Harvard 1991); id at 98 ("Think of the American Republic as a railroad train, with the judges . . . sitting in the caboose, looking backward."); Alexander M. Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* 27 (Bobbs-Merrill 1962) (noting that the courts are charged with the "creative function of discerning afresh and of articulating and developing impersonal and durable principles" and arguing that the courts are better equipped to handle this task than elected institutions).

2 For a celebrated example of the criticism, see Bickel, *The Least Dangerous Branch* at 16–23 (cited in note 1) (arguing that judicial review is "counter-majoritarian" and works against the representative bodies by putting power in the hands of judges). For an account of how the criticism became commonplace, see Barry Friedman, *The Birth of an Academic Obsession: The History of the Countermajoritarian Difficulty, Part Five*, 112 Yale L J 153, 157–62 (2002) (tracking the history of criticism of judicial review from the 1800s through the present).

3 See Adrian Vermeule, *Judging under Uncertainty: An Institutional Theory of Legal Interpretation* 230–89 (Harvard 2006) (suggesting a modified version of judicial review in which the courts "should enforce the Constitution only where, as the nineteenth-century legal scholar James Bradley Thayer suggested, no reasonable basis for interpretive dispute exists"); Jeremy Waldron, *The Core of the Case against Judicial Review*, 115 Yale L J 1346, 1353, 1369–1406 (2006); Larry D. Kramer, *The People Themselves: Popular Constitutionalism and Judicial Review*, 128–44, 249–53 (Oxford 2004); Mark V. Tushnet, *Taking the Constitution away from the Courts*, 6–31, 163–72 (Princeton 1999).

there is reason to believe that the modernizing approach to judicial review is, today, a central theme in constitutional law.

Modernization, as an approach to judicial review, has two components. The first component is that the courts will strike down a statute if it no longer reflects popular opinion or if the trends in popular opinion are running against it. Modernization tries to anticipate developments in the law, invalidating laws that would not be enacted today or that will soon lose popular support. Second, as an important corollary, a modernizing court must be prepared to change course—and uphold a statute that the court previously struck down—if it becomes apparent that popular sentiment has moved in a different direction from what the court anticipated. The courts do not, of course, assert a general power to modernize; there must be some basis in the text of the Constitution or, since the text contains provisions that allow a great deal of latitude, in the precedents interpreting the text. That is, modernization, like other approaches to judicial review, is a way of giving content to vaguely worded constitutional provisions and of shaping requirements drawn from precedent.

In fact, I believe modernization has become a kind of default posture for the courts when they cannot identify other principles that should define their role. Perhaps in response to the relentless criticism of judicial review as antidemocratic, the courts have, both consciously and unconsciously, shaped constitutional law so as to reduce the degree of confrontation between the judiciary and the elected branches. If the courts are doing no more than bringing statutes up to date, and anticipating changes that have majority support—and if they are prepared to retreat if the majority turns out not to support them—then judicial review has, in principle, a more comfortable place in democratic government.

I will begin by sketching the modernizing approach briefly, and then showing it in action in some of the areas I mentioned—the Eighth Amendment, the constitutional law on gender discrimination, and substantive due process. The modernization account is, I think, most impressive in its ability to explain recurrent puzzles about substantive due process: why the courts seem to have revived a doctrine that was so thoroughly discredited at the end of the New Deal era; why the modern cases deal with matters relating to family and intimate relationships; what principle underlies these cases; and how the courts' activity in this area can possibly be reconciled with a commitment to majoritarian democracy.

Then I will try to assess modernization as an approach to judicial review. Perhaps contrary to appearances, modernization is neither necessarily a centralizing approach nor necessarily a "progressive"

approach, either in the sense that it is aligned with a certain political tendency or in the sense that it leads to progress; some notorious and universally repudiated decisions in the Supreme Court's history can be understood as modernizing. Finally, I will ask whether modernization is a role that courts are institutionally suited to play and whether it is the role that courts ought to play. Notwithstanding the obvious objection—that it is absurd for unelected, life-tenured judges to second-guess elected politicians' views about current trends in public opinion—my answer to the first question, about institutional capacity, is a qualified yes. My answer to the second question—whether this is the best role for judges to play in a democracy—is more skeptical. I will try to support that skepticism with two concluding examples of arguable instances of modernization: the two most famous decisions of the last fifty years, *Brown v Board of Education*[4] and *Roe v Wade*.[5]

I. THE ELEMENTS OF MODERNIZATION

The first component of modernization is that the constitutionality of a statute depends in large part on whether the statute, although still on the books, is a product of a bygone era and is no longer supported by a political consensus. For a modernizing court, several kinds of evidence bear on this question. Since the statute was enacted, have attitudes changed in a way that suggests that the measure no longer enjoys political support? Does legislation in related areas suggest that the views reflected in the challenged statute are no longer widely held? Is the statute still enforced, and, if not, does the nonenforcement suggest a lack of popular support? Is there a national trend that has left this statute an outlier, not found in other jurisdictions—thus suggesting that even if the statute enjoys local support, it is out of touch with sentiment in the society at large, on a subject on which local variation is not likely to persist? The Supreme Court's opinions in a number of areas of constitutional law show great sensitivity to questions like these—sometimes characterizing them as evidence of "tradition," even though they are concerned with the present and the future, rather than the past.

The second component of modernization is that the Court, having decided that a statute is unconstitutional because it is out of step with current popular sentiment, will change course if it turns out that the Court's judgment was mistaken and the statute had popular support

4 347 US 483 (1954).

5 410 US 113 (1973).

after all—that is, if the political process pushes back against the Court's decision. The point is not so much that the Court announces, in advance and in so many words, that it will reverse itself if it encounters popular resistance. Rather, the Court structures the principles it announces so that they incorporate a sensitivity to the political reaction. Perhaps the clearest example, which I will discuss in more detail shortly, is the cases in which the Court initially held that capital punishment, as then practiced in the United States, violated the Eighth Amendment just because it was imposed so infrequently and erratically.[6] When states responded by enacting laws that provided for the more frequent and systematic use of capital punishment, the Court could—quite consistently with the principle of its earlier decisions—allow capital punishment to be reinstated.[7]

Modernizing decisions do not always (or even generally) acknowledge that they are doing these things. Modernization is, as I suggested, a sort of reflex at this point, which is to say that courts do it with varying degrees of awareness. Sometimes the doctrine is more explicit in stating that the courts are modernizing and in leaving the door open to an adverse reaction from the political branches; sometimes the doctrine is not explicit but nonetheless operates that way in practice.

In either event, however, it would be a mistake to suppose that modernization can be done without making judgments of value, morality, or social policy. The decision whether a law is out of keeping with popular sentiment is not simply a factual judgment. No one thinks that a court should strike down a law if, for example, more than 50 percent (or any other number) of those who responded to a public opinion poll disapproved of it. A court cannot say that a law is out of keeping with popular sentiment without tacitly invoking some conception of democracy—some idea about how much legislative inertia is warranted, or about the influence that intensely interested groups should have, for example, or about what kinds of legislative compromises should be allowed and how popular views should be aggregated.

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6 See *Furman v Georgia*, 408 US 238, 291 (1972) (Brennan concurring) (citing to the decline in the imposition of the death penalty since the 1930s and concluding that "[t]he outstanding characteristic of our present practice of punishing criminals by death is the infrequency with which we resort to it").

7 See *Gregg v Georgia*, 428 US 153, 194–96 (1976) (noting that minimal guidelines on mitigating and aggravating factors were sufficient to overcome the *Furman* Court's problem with the "freakish" application of the death penalty); *Proffitt v Florida*, 428 US 242, 252–53 (1976) (holding that allowing a judge to consider mitigating and aggravating factors when sentencing a defendant to death, along with state supreme court review, was not unconstitutional); *Jurek v Texas*, 428 US 262, 268 (1976) (holding that the death penalty is not per se cruel and unusual).

Similarly, the modernization approach is, to a degree, selective. The courts will endorse some future trends but not others; they will suppress some outliers but not others. Those decisions will reflect views about the desirability of different policies as a matter of morality and social policy. In some modernizing cases, the Supreme Court has been explicit about this.[8] But it is unavoidable—certainly in practice, and probably in theory—that a court trying to identify laws that are losing popular support will be influenced by its own views of what laws *ought* to lose popular support and that a court's willingness to retreat in the face of an adverse popular reaction to its decisions will be influenced by whether that reaction is, in its view, reasonable or wholly misguided. Modernization is distinctive not because it can avoid judgments of morality and policy—no approach to constitutional law can—but because it requires that such judgments be supported not by the past, not by traditions or original understandings, but by (what the courts perceive as) emerging trends and future developments.

II. MODERNIZATION IN ACTION

A. Cruel and Unusual Punishment

Probably the most overt adoption of the modernization approach has occurred in cases interpreting the Cruel and Unusual Punishment Clause of the Eighth Amendment.[9] Almost a century ago, the Supreme Court declared that that Clause "is not fastened to the obsolete, but may acquire meaning as public opinion becomes enlightened by a humane justice"[10] and that the Clause should be interpreted to enforce "the evolving standards of decency that mark the progress of a maturing society."[11] These formulations, with their emphasis on evolution, enlightenment, and progress, are almost an explicit statement of the modernizing approach. The text of the Clause does not compel such an approach. The term "unusual" might be read to suggest modernization—particularly the hostility to outliers that is a feature of modernization—but the Supreme Court has not attached great significance to that word, mostly treating it as just an elaboration of the term

8 See, for example, *Roper v Simmons*, 543 US 551, 563 (2005). See also id at 574–75 (stating that the Court will "bring its independent judgment to bear" on the question whether a punishment is cruel and unusual in violation of the Eighth Amendment).

9 US Const Amend VIII ("[N]or cruel and unusual punishment [shall be] inflicted.").

10 *Weems v United States*, 217 US 349, 378 (1910).

11 *Kennedy v Louisiana*, 128 S Ct 2641, 2649 (2008), quoting *Trop v Dulles*, 356 US 86, 101 (1958) (plurality).

"cruel."[12] Modernization is one among many plausible ways to interpret the text. This is typical of how modernization works: the courts interpret an open-ended text to provide for some form of modernization, and the approach then takes root in the precedents.

In keeping with the modernization paradigm, the Supreme Court has, in many Eighth Amendment cases, first tried to determine whether the challenged form of punishment was losing support in popular opinion. The Court has considered whether the punishment was a relative outlier, whether it had fallen into disuse, and whether the trend was to disapprove of it.

The Supreme Court's most recent cases interpreting the Eighth Amendment illustrate this approach. Last term, in *Kennedy v Louisiana*,[13] the Court held that the Eighth Amendment forbids the execution of a person convicted of the crime of raping a child, when the crime did not result in the child's death.[14] The Court began its analysis by surveying the laws of various states and concluding that "44 States have not made child rape a capital offense."[15] Then the Court considered whether there was "a consistent direction of change in support of the death penalty for child rape" because "[c]onsistent change might counterbalance an otherwise weak demonstration of consensus."[16] The Court's conclusion on this point was that "in the last 13 years there has been change towards making child rape a capital offense . . . [as] evidenced by six new death penalty statutes, three enacted in the last two years."[17] But the Court concluded that this trend was insufficiently strong, in view of the Court's precedents, to sustain the constitutionality of the practice.[18] Finally, the Court said that "[t]here are measures of consensus other than legislation," such as "[s]tatistics about the number of executions," which "may inform the consideration whether capital punishment for the crime of child rape is regarded as unacceptable in our society."[19] The Court noted that no one had been executed for child rape, or any other "nonhomicide offense," since 1964, and that

12 See, for example, *Trop*, 356 US at 100 n 32.

13 128 S Ct 2641 (2008).

14 Id at 2646.

15 Id at 2652.

16 Id at 2656.

17 *Kennedy*, 128 S Ct at 2656.

18 See id at 2656–57 (noting that the data in *Atkins v Virginia*, 536 US 304 (2002), revealed a much more significant indication of change regarding the execution of mentally retarded criminals).

19 *Kennedy*, 128 S Ct at 2657.

only two defendants, both in Louisiana, had been sentenced to death in that period.[20]

After considering this evidence, the Court explicitly stated—again consistent with the modernization approach—that these data about the existence of trends in public opinion, while "entitled to great weight," do not "end [the] inquiry" into whether a law violates the Eighth Amendment.[21] The Court's own judgments—about "decency" and "respect for the individual," and about whether the death penalty for child rape served the legitimate purposes of capital punishment[22] or created "systemic concerns," such as a heightened risk of executing an innocent person[23]—also played a role.

The Court took a similar approach when it held, in *Roper v Simmons*,[24] that the Eighth Amendment forbids the execution of individuals who were younger than eighteen years old when they committed the crime.[25] The Court said that the "beginning point" in interpreting the Eighth Amendment "is a review of objective indicia of consensus."[26] These indicia were "the rejection of the juvenile death penalty in the majority of States; the infrequency of its use even where it remains on the books; and the consistency in the trend toward abolition of the practice."[27] The Court noted that thirty states rejected the juvenile death penalty, including eighteen that allowed the death penalty in other circumstances.[28] In those states that formally permitted the juvenile death penalty, "the practice is infrequent";[29] only three states had executed juveniles in the previous ten years.[30] The Court commented that while the pace of abolition of the juvenile death penalty was not "dramatic," the "direction of the change" was consistent,[31] something that the Court considered especially notable in view of "the particular trend in recent years toward cracking down on juvenile crime in other

20 Id.

21 Id at 2658.

22 Id.

23 *Kennedy*, 128 S Ct at 2663 (citing evidence that children are especially vulnerable to suggestive questioning techniques and easily coerced about issues related to "body touch" and other abuse, leading to inaccurate testimony).

24 543 US 551 (2005).

25 See id at 581.

26 Id at 564.

27 Id at 567.

28 See *Roper*, 543 US at 559–60.

29 Id at 564 (drawing a parallel between the evidence of national consensus against the juvenile death penalty and that against the death penalty for mentally retarded criminals).

30 Id at 565.

31 Id at 565–66.

respects."[32] The Court also noted the international consensus against the juvenile death penalty[33] (and was much attacked for so noting[34]). In all of these ways, the Court showed an intense concern with public opinion, and in particular with the trends in popular opinion.

The Court, to its credit, made no pretense of formalism; it was explicit in saying in *Roper*, as it did in *Kennedy*, that it was also making its own judgment about the acceptability of the juvenile death penalty.[35] But the holding that the juvenile death penalty was unconstitutional, like the holding about child rape, did not rest on that judgment alone; the Court's analysis leaves no doubt that it would not have invalidated the death penalty in these cases without the "indicia of consensus" and evidence of the trends in opinion. The Court's own views were adduced to support and confirm views about capital punishment that were derived from national and (to a small degree, in *Roper*) international opinion. This is a clear example of modernization: the effort to identify, and promote, an already existing trend that the Court believes is a good one.

The Court's approach in *Kennedy* and *Roper* paralleled its opinion in *Atkins v Virginia*,[36] which held that a state may not execute a mentally retarded person.[37] In *Atkins*, the Court noted the relatively small number of states that permitted the execution of mentally retarded people and the infrequency with which even those states executed such individuals.[38] The Court concluded that the execution of mentally retarded offenders "has become truly unusual, and it is fair to say that a national consensus has developed against it."[39] Only then did the *Atkins* Court, like the *Kennedy* and *Roper* Courts, bring its "own judgment . . . to bear on the question of the acceptability of the death penalty."[40] Both *Atkins* and *Roper* overruled relatively recent

32 *Roper*, 543 US at 566.

33 See id at 575–78.

34 See, for example, Ernest A. Young, Comment, *Foreign Law and the Denominator Problem*, 119 Harv L Rev 148, 148–49 (2005). See also Roger P. Alford, *Agora: The United States Constitution and International Law: Misusing International Sources to Interpret the Constitution*, 98 Am J Intl L 57, 61 n 30 (2004) (predicting the influence of international opinion in the Court's consideration of the juvenile death penalty).

35 See id at 564 (noting the importance of an independent assessment of disproportionality of punishment).

36 536 US 304 (2002).

37 See id at 318–21.

38 Id at 314–15.

39 Id at 316.

40 See *Atkins*, 536 US at 312.

precedents,[41] explicitly on the ground that, after those earlier cases were decided, the challenged uses of capital punishment became less accepted in society generally.[42] This is, again, an explicitly modernizing approach—one that looks to current trends, not tradition or even precedent. The plurality opinion in *Thompson v Oklahoma*,[43] which held capital punishment unconstitutional for offenders who were under the age of sixteen at the time of the crime, took essentially the same approach, emphasizing that no state that had explicitly addressed the issue had set an age lower than sixteen, that juries very seldom imposed the death penalty on offenders of that age, and that the last execution of such a young person had been carried out forty years earlier.[44] Indeed *Stanford v Kentucky*,[45] the case that *Roper* overruled, examined many of the same data as *Roper* but reached the opposite conclusion at what *Roper* viewed as an earlier stage in the evolution of the national consensus.[46]

These Eighth Amendment opinions—*Kennedy*, *Roper*, *Atkins*, and *Thompson*—did not explicitly leave open the possibility that the Court might retreat if the trend it perceived reversed itself and more and more states began adopting the forms of capital punishment of which the Court disapproved. But that element of modernization is clearly implied by the logic of the opinions; if there were to be a large-scale movement toward executing juveniles or the insane, the Court, if it were faithful to the approach it took in *Roper* and *Atkins*, would have to acquiesce—not, to repeat, as a matter of abandoning principle in the face of irresistible popular pressure, but because the Court's own principle would require such a retreat.

41 See id at 321 (overruling *Penry v Lynaugh*, 492 US 302 (1989), which held that the execution of mentally retarded criminals does not violate the Eighth Amendment); *Roper*, 543 US at 574 (overruling *Stanford v Kentucky*, 492 US 361 (1989), which held that the execution of a juvenile does not violate the Eighth Amendment).

42 See *Atkins*, 536 US at 314–16 (stating that many state legislatures began to prohibit the death penalty for mentally retarded criminals after the *Penry* decision); *Roper*, 543 US at 574 (asserting that "[t]o the extent *Stanford* was based on review of the objective indicia of consensus that obtained in 1989, it suffices to note that those indicia have changed").

43 487 US 815 (1988).

44 See id at 826–33 (plurality).

45 492 US 361 (1989).

46 Compare id at 370–71 (noting that the empirical data did not sufficiently indicate a trend away from executing juveniles), with *Roper*, 543 US at 565–66 (pointing to the trend away from executing juveniles since *Stanford* and noting that even the governor of Kentucky commuted Stanford's sentence).

Just that scenario played out a generation ago.[47] In 1972, in *Furman v Georgia*,[48] the Court declared that capital punishment, as then practiced in the United States, was "cruel and unusual" and therefore unconstitutional under the Eighth Amendment.[49] Only two justices, however, concluded that the death penalty was cruel and unusual in all circumstances.[50] The other members of the majority emphasized, in varying ways, that the death penalty was applied in an unpredictable and arbitrary fashion.[51]

At the time, the Court had reason to believe that popular support for capital punishment in the United States was diminishing; that view was reflected in the opinions and, even more explicitly, in the private papers of some of the justices.[52] Between 1960 and 1972, an average of 15 people were executed each year, compared with an average of 167 in the 1930s, 128 in the 1940s, and 72 in the 1950s.[53] Four states abolished the death penalty in the 1960s;[54] in the early 1970s, the California and New Jersey Supreme Courts held that capital punishment violated their states' constitutions.[55] The constitutional flaw that the

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47 For a comprehensive account, see generally James S. Liebman, *Slow Dancing with Death: The Supreme Court and Capital Punishment, 1963–2006*, 107 Colum L Rev 1 (2007).

48 408 US 238 (1972) (per curiam).

49 Id at 239–40 (reversing the death penalty sentences of the defendants).

50 See id at 305–06 (Brennan concurring) (suggesting that, because the majority of criminals are punished sufficiently by imprisonment, there is no justification for the death penalty in a few instances); id at 358–60 (Marshall concurring) (asserting that the American people find the death penalty to be "morally unacceptable").

51 See id at 253 (Douglas concurring) (asserting that under current laws, no standards govern the imposition of death, where people are sentenced "under the whim of one man or of 12"); id at 309–10 (Stewart concurring) (noting that application of the death penalty is so unusual that it can be said to be "wantonly" and "freakishly" imposed); id at 313 (White concurring) (noting that the death penalty is imposed too infrequently to be "of substantial service to criminal justice").

52 See *Furman*, 408 US at 299 (Brennan concurring) ("[T]he history of this punishment is one of successive restriction."); id at 313 (White concurring) (asserting that capital punishment had "for all practical purposes run its course"); Del Dickson, ed, *The Supreme Court in Conference (1940–1985): The Private Discussions behind Nearly 300 Supreme Court Decisions* 617–18 (Oxford 2001) (describing a conference among the justices, where Brennan and White noted that public opinion against the death penalty had been growing).

53 See *Furman*, 408 US at 291 (Brennan concurring).

54 In the 1960s four states completely abolished capital punishment: Michigan in 1963, Oregon in 1964, and Iowa and West Virginia in 1965. An additional three states significantly reduced their use of capital punishment: New York and Vermont in 1965, and New Mexico in 1969. See id at 372 appendix 1 (Marshall concurring).

55 See *People v Anderson*, 493 P2d 880 (Cal 1972); *State v Funicello*, 286 A2d 55 (NJ 1972). The US Supreme Court itself, in 1968, had made a small move in the same direction, holding that states could not disqualify potential jurors who had reservations about the death penalty, unless they were unequivocally unwilling to impose it. See *Witherspoon v Illinois*, 391 US 510, 521–22 & n 21 (1968).

Court identified—the arbitrary and unpredictable enforcement of the death penalty—could be attributed to the increasing unpopularity of the death penalty; capital punishment had so little support that its imposition was basically a matter of happenstance. That state of affairs, the key justices said, violated the Constitution.[56]

Within four years of *Furman*, thirty-five states had reenacted death penalty statutes.[57] The new statutes were drafted specifically to address the concern about excessive discretion and arbitrariness that had led the decisive members of the Court to vote as they did in *Furman*.[58] In 1976, the Court upheld some of these statutes, effectively reinstating capital punishment in the United States.[59]

The Court did not explicitly say that it was modernizing, but the Court's treatment of capital punishment conforms almost exactly to the modernization paradigm. In *Furman*, the Court invalidated capital punishment on grounds that reflected the judgment that capital punishment no longer had popular support. Indeed, that judgment was central to the Court's approach in *Furman*. But *Furman* left a way for a subsequent court to uphold capital punishment if that perception proved false and the states reaffirmed their belief in the death penalty—which, the Court concluded in 1976, they did. People who think the Court should have done more than modernize—for example, that the Court should simply have concluded that capital punishment is cruel and unusual in most or all circumstances—will not hold such a favorable view of this episode. But it is a clear illustration of both aspects of the modernizing approach to judicial review.

B. Sex-based Classifications and the Equal Protection Clause

Modernization has also become the governing approach to laws that discriminate on the basis of sex. The courts' embrace of modernization in this area is not quite as clear as it is in the capital punishment cases. But there is still plenty of explicit evidence in the opinions that, whatever the official doctrinal formula, modernization is what's actually going on.

At first glance sex discrimination and capital punishment might seem like an odd couple. What the two subjects have in common, though, is that at the time of the key decisions in both areas it seemed

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56 See *Furman*, 408 US at 239–40 (per curiam).

57 See *Gregg v Georgia*, 428 US 153, 179–80 & n 23 (1976).

58 See id at 179–80.

59 See, for example, *Jurek v Texas*, 428 US 262, 276 (1976) (upholding a capital punishment statute in Texas); *Proffitt v Florida*, 428 US 242, 252–53 (1976) (upholding a capital punishment statute in Florida); *Gregg*, 428 US at 194–96 (upholding a capital punishment statute in Georgia).

that public attitudes were rapidly changing. That turned out to be true for sex discrimination; the Supreme Court did not have to back down the way it did in the capital punishment cases.

The black-letter standard for judging sex classifications under the Equal Protection Clause[60] is, of course, "intermediate scrutiny," which requires that such a classification be "substantially related" to "important governmental objectives."[61] But it is something of an open secret that sex classifications are sometimes unconstitutional even if they do seem to have a substantial relationship to an important objective.[62] Some sex classifications are based on statistically valid generalizations—such as the generalization that women are more likely to be interested in becoming nurses than men,[63] or that women are more likely than men to be economically dependent on their spouses.[64] The Supreme Court has, for example, twice invalidated statutes that presumed that widows, but not widowers, were dependent on the earnings of their deceased spouses, even though that classification seems obviously to have a substantial relationship to an important objective—the objective of protecting dependent surviving spouses without either incurring large administrative costs or spending money on spouses who were not dependent.[65]

The more plausible reason for the unconstitutionality of these sex-based classifications is suggested by some of the other things that the Court has said—that the statutes rest on generalizations that, while they may be statistically true, embody "archaic," "traditional," or "stereotyped" views about men's and women's roles, or on "old notions" that are

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60 US Const Amend XIV ("No state shall . . . deny to any person within its jurisdiction the equal protection of the laws.").

61 See *Mississippi University for Women v Hogan*, 458 US 718, 724 (1982) (noting that the burden is on the party seeking to uphold a policy that discriminates on the basis of gender). See also, for example, *Nguyen v Immigration and Naturalization Service*, 533 US 53, 60–61 (2001) (concluding that the statute in question met the intermediate scrutiny standard); *United States v Virginia*, 518 US 515, 533 (1996).

62 See, for example, *Nguyen*, 533 US at 76 (O'Connor dissenting) ("[O]verbroad sex-based generalizations are impermissible even when they enjoy empirical support."); *J.E.B. v T.B.*, 511 US 127, 139 n 11 (1994) (noting that, even with statistical support, some stereotypes may violate the Equal Protection Clause); *Craig v Boren*, 429 US 190, 199 (1976); *Weinberger v Wiesenfeld*, 420 US 636, 645 (1975) (noting that although the idea that men are the primary breadwinners enjoys empirical support, it is insufficient as the basis of an irrefutable presumption).

63 See *Hogan*, 458 US at 726–29 (noting that 98 percent of all registered nurses were women, according to a 1981 statistic issued by the US Census Bureau).

64 See, for example, *Califano v Goldfarb*, 430 US 199, 205–06 (1977); *Weinberger*, 420 US at 645.

65 See *Goldfarb*, 430 US at 201–02 (invalidating a statute providing survivors' benefits, where a widower could recover only if he was receiving at least half his income from his deceased wife, but where a widow could recover without any showing of support); *Weinberger*, 420 US at 638–39.

inconsistent with "contemporary reality."[66] These are the terms that suggest that what is actually going on is modernization. The problem with the sex-based classifications that the Court struck down was not that they failed to promote important objectives; the problem was that those classifications reflected "archaic," "traditional" views, or "old notions." Those statutes were the product of a bygone era and were no longer in keeping with current views—"contemporary reality"—about sex roles.

The justices knew that there were significant changes in popular attitudes about, among other things, women's participation in the workforce, which increased sharply in the United States beginning in the late 1960s.[67] There were concomitant changes in the law, such as the enactment of antidiscrimination laws and the elimination of many gender classifications.[68] All of the "archaic" statutes that the Court invalidated had been enacted before these developments, and most of them reflected traditional views about women's role in the economy.

By the same token, when the Supreme Court has upheld sex classifications, it has sometimes suggested that it was doing so because it had confidence that the classification was the product of a present-day decision. In *Califano v Webster*,[69] for example, the Court upheld a provision of the Social Security Act that seemed very similar to a provision it had invalidated just a few months earlier in *Califano v Goldfarb*.[70] Part of the Court's explanation was that the legislative history of the *Webster* provision showed that it, unlike the *Goldfarb* provision, was "not 'the accidental byproduct of a traditional way of thinking about females,' but rather was deliberately enacted to compensate for par-

66 See *Goldfarb*, 430 US at 207; *Stanton v Stanton*, 421 US 7, 14 (1975); *Weinberger*, 420 US at 645; *Schlesinger v Ballard*, 419 US 498, 508 (1975).

67 See, for example, *Frontiero*, 411 US at 685 n 15, 689 n 23 (citing statistics about women's increased presence in the workforce); Stephanie Seymour, *Women As Constitutional Equals: The Burger Court's Overdue Evolution*, 33 Tulsa L J 23, 26–28 (1997) (discussing the societal changes that occurred between 1961 and 1971); Ruth Bader Ginsburg, *Gender and the Constitution*, 44 U Cin L Rev 1, 3–15 (1975) (noting that in 1971, the courts first began to carefully examine "sex lines" drawn by legislation); US Department of Labor, Bureau of Labor Statistics, *Work Experience of the Population, 1969* 45 (1971); Sophie C. Travis, *The U.S. Labor Force: Projections to 1985*, 93 Monthly Lab Rev 3, 3 (1970) (noting that the pace of women entering the workforce began to pick up in about 1965).

68 See, for example, Title IX of the Education Amendments of 1972, Pub L No 92-318, 86 Stat 373, codified at 20 USC § 1681 (making gender discrimination unlawful in many instances in the education context); Title VII of the Civil Rights Act of 1964, Pub L No 88-352, 78 Stat 253, codified in relevant part at 42 USC § 2000e-2 (making gender discrimination unlawful in the employment context); Equal Pay Act of 1963, Pub L No 88-38, 77 Stat 56, codified at 29 USC § 206(d) (making differences in wages due to gender unlawful).

69 430 US 313 (1977).

70 430 US 199 (1977).

ticular economic disabilities suffered by women."[71] In other words, the constitutionality of a sex classification would depend on whether it was enacted in an earlier era, before attitudes about women's role changed, or in circumstances that reflected the influence of present-day thinking about sex roles.

In its most important sex discrimination case—*United States v Virginia*,[72] which declared unconstitutional Virginia Military Institute's exclusion of women—the Court emphasized that VMI's single-sex policy had been adopted at a time when women were routinely considered unfit for many occupations.[73] At first glance, it is not clear why that mattered. The people who thought women were unfit to be lawyers, for example, were wrong; but it does not follow that the people who thought that women could not be accommodated in a certain kind of military training were also wrong. The Court's emphasis on the contemporaneity of these different kinds of sex discrimination seems, superficially, to be an exercise in something like guilt by association. But modernization makes sense of the Court's approach. The problem with the exclusion of women from VMI was not that it was based on mistaken factual claims about the effect that the admission of women would have on military education. The courts, in reality, are not well equipped to evaluate those claims. Rather, the point is that the decision to exclude women from VMI was made in an era when attitudes were so different from what they are today.[74]

The Court in *Virginia* also established, as a principle, that sex-based classifications cannot be justified by post hoc rationalizations that did not reflect the reasons that the classifications were actually adopted.[75] This principle is not always applied even when constitutional rights are at stake; the Court has ruled that it does not apply to measures restricting commercial speech or abortion, for example.[76]

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71 *Webster*, 430 US at 320, quoting *Goldfarb*, 430 US at 223 (Stevens concurring).

72 518 US 515 (1996).

73 See id at 536–38, 542–45 (noting that the legal and medical professions once were thought to be inappropriate for women).

74 In fact, Virginia had appointed a commission to reexamine state higher education policy, and VMI itself undertook such a reexamination. But the Court concluded that neither of those reexaminations established a modern, acceptable justification for excluding women from VMI. See id at 539.

75 See id at 533, 535–36, 539 (noting that the justification must be genuine and not merely in response to litigation).

76 See *Bolger v Youngs Drug Corp*, 463 US 60, 70–71 (1982) (stating that the government may advance new justifications for prohibiting contraceptive mail advertisements, even though those justifications were not asserted during the original enactment of the statute). See also *Doe v Bolton*,

Again the reason for the principle is not entirely clear; one might have thought that the question should be whether a classification is in fact justified, not whether the people who adopted it had good reasons. But the ban on post hoc rationalizations does make sense if the governing principle is modernization. Under the modernization approach, the objective is to ensure that a policy truly reflects a present-day political decision, made according to present-day ideas about women's role in society and the economy. By prohibiting post hoc rationalizations, the Court makes it less likely that a sex-based classification will be upheld solely on the basis of a present-day rationalization of a decision made in an earlier era for "archaic" reasons.

The Court's opinion in *Virginia* also carefully left open the possibility that it would allow sex segregation in education in certain circumstances.[77] This, too, is characteristic of the modernization approach; it reflects a similarity between the sex discrimination cases and the Eighth Amendment cases. The Court's willingness to consider whether sex-segregated education might be constitutional demonstrates that its concern was not with the justifiability of sex-segregated education in general, but with whether a policy of sex-segregated education was modernized—whether it was the product of current ways of thinking and not a holdover from earlier times.

All-male colleges providing a form of military education were once common, but by the time VMI's status was challenged, VMI was one of only two such institutions[78]—suggesting, again, that VMI could be characterized as a relic from an earlier time. The Court's opinion suggested this point, too. The Court cited "[w]omen's successful entry into the federal military academies"[79] as a reason to believe that VMI could successfully adapt to the admission of women. The Court also noted that the opponents of admitting women to VMI echoed predictions about the destructive effects of women on the culture of the institution that had been made by the opponents of admitting women to the military academies and that, according to the Court, turned out to be false.[80] Justice Scalia's dissent urged that VMI's outlier status was in fact a reason to uphold VMI's policy; private institutions in Virginia offered single-sex education to women, but only VMI offered such an

410 US 179, 190–91 (1973) (noting that the state could attempt to justify an abortion statute as protecting fetal life, even though the historical justification for the statute focused on the woman's safety).

77 See *Virginia*, 518 US at 533 n 7.

78 The other was The Citadel, in South Carolina. See id at 569 (Scalia dissenting).

79 Id at 544.

80 Id at 542 n 11.

option to men.[81] But the Court thought that VMI's outlier status just confirmed that VMI belonged to a bygone era.

C. Substantive Due Process

"Substantive due process" is the name given to the use of the Due Process Clause[82] to invalidate statutes on the ground that they infringe fundamental rights, even though those rights are not enumerated in the Constitution. It seems fair to say that, over the last one hundred years, substantive due process has been the most controversial doctrine in constitutional law. In the first third of the twentieth century, the Due Process Clause was used to protect the freedom of contract, notably in now-repudiated cases like *Lochner v New York*.[83] Since the late 1960s, substantive due process has been identified with rights involving reproduction, bodily integrity, sex, and the family: the right to contraceptives,[84] the right to an abortion,[85] and, recently, the right to be free from prohibitions on same-sex sodomy.[86]

The modern substantive due process cases are puzzling in several ways. Why did the Court revive a doctrine that the post–New Deal generation repudiated more thoroughly than any other doctrine in constitutional law? Why is modern substantive due process preoccupied with a set of issues that have in common only a general connection to sex and family life? And what principle, if any, is guiding the law in this area?

Modernization provides an answer to these questions. The Court did not in fact revive the pre–New Deal doctrine, because the pre–New Deal cases were not modernizing; the late twentieth- and early twenty-first-century cases are modernizing decisions, and for that reason, they are, contrary to much received wisdom, fundamentally unlike the pre–New Deal cases.[87] Present-day substantive due process has focused on issues like contraception, abortion, and homosexuality for the

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81 See *Virginia*, 518 US at 579 (Scalia dissenting).

82 US Const Amend XIV ("[N]or shall any state deprive any person of life, liberty, or property, without due process of law . . .").

83 198 US 45 (1905) (striking down a New York law that set the maximum number of hours bakers could work).

84 See *Griswold v Connecticut*, 381 US 479, 485–86 (1965) (holding that Connecticut anti-birth-control laws violate the constitutional right to "marital privacy").

85 See *Roe*, 410 US at 164–67 (holding that failure to make allowances for different stages of pregnancy is sufficient to render a state law outlawing abortion unconstitutional).

86 See *Lawrence v Texas*, 539 US 558, 578–79 (2003) (overruling *Bowers v Hardwick,* 478 US 186 (1996), which held that prohibitions on same-sex sodomy did not violate the Constitution).

87 For perhaps the best-known example of the received wisdom that modern substantive due process cases, like *Roe v Wade*, are essentially indistinguishable from the pre–New Deal cases, see John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* 14–15 (Harvard 1980).

same reason that modernization became the dominant approach in the gender discrimination cases: these are subjects on which attitudes have undergone a rapid change over the last few decades. And modernization is, I believe, the central unifying theme of the substantive due process cases that have been decided in the last forty years. Of course, attitudes have changed on many subjects; a change in popular attitudes alone is not sufficient to produce modernizing decisions in constitutional law. But the law has for a long time protected interests in bodily integrity and in the composition of the family, so legal materials were available to support constitutional principles that invalidated statutes that were outliers or that seemed archaic. And, it appears, these were modernizing changes of which the justices generally approved as a moral matter.

I will consider the substantive due process cases in the order they were decided, except for the abortion decisions, which of course have dominated the debate over modern substantive due process. The abortion cases demonstrate, with particular clarity, some of the risks of the modernization approach, so I will discuss them later, in connection with an overall evaluation of the virtues and demerits of modernization.

1. *Griswold v Connecticut*.

Griswold v Connecticut,[88] the first of the modern substantive due process decisions, declared unconstitutional a Connecticut statute that made it unlawful for any person, including married people, to use any contraceptive drug or device.[89] All of the justices in the majority concluded, on one basis or another, that the Connecticut statute infringed on an implied fundamental right to privacy in the marital relationship.[90] Justice Black, in dissent, accused the Court of reviving *Lochner* by inventing rights not found in the Constitution.[91]

Griswold, once intensely controversial, seems to have become generally accepted. Modernization aside, there was some basis for the Court's conclusion that the Connecticut statute infringed on a constitutional right associated with marriage. The textual support for that right was weak, but there were precedents suggesting that the Constitution protected an individual's, or a family's, autonomy in matters of

88 381 US 479 (1965).

89 Id at 485–86.

90 See id at 485 (Douglas); id at 486–87 (Goldberg, Warren, and Brennan concurring); id at 500 (Harlan concurring); id at 502–03 (White concurring).

91 Id at 515–16 (Black dissenting) (arguing that the Court relies on the same "natural law due process philosophy" found in *Lochner*, which many later decisions have repudiated).

reproduction and the raising of children.[92] There was also a strong normative case to be made that the Connecticut statute was ill-advised, or worse, as a matter of policy.

But modernization provides the best basis for the fundamental right that the Court established in *Griswold*. The Connecticut statute was a conspicuous outlier; apparently no other state had a statute like Connecticut's. Justice Harlan, who concurred with the result in *Griswold*, said that for him this fact—"the utter novelty of" the Connecticut statute—was "conclusive. . . . Although the Federal Government and many States have at one time or another had on their books statutes forbidding or regulating the distribution of contraceptives, none, so far as I can find, has made the *use* of contraceptives a crime."[93] By the time the case was brought, the statute was not enforced against married couples—suggesting that it in fact lacked political support (just as the nonenforcement of capital punishment laws later suggested, misleadingly, that those laws lacked political support).[94] Justice Harlan made this point as well: the lack of enforcement, he said, shows that the state "either . . . does not consider the policy of the statute a very important one, or . . . does not regard the [statute] . . . as [an] appropriate or necessary" means of furthering that policy.[95] The statute was relatively easily evaded by individuals, because Connecticut permitted the use of contraceptive devices for purposes other than contraception, such as the prevention of disease—further evidence that the state was not serious about the law, or at least so some justices thought.[96] And the

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92 On reproduction, see *Skinner v Oklahoma*, 316 US 535, 541–43 (1942) (holding that the compulsory sterilization of larcenists, but not embezzlers, violated the Equal Protection Clause). On children, see *Pierce v Society of the Sisters*, 268 US 510, 530–35 (1925) (holding unconstitutional an Oregon statute requiring public—as opposed to private—education for children between the ages of eight and sixteen); *Meyer v Nebraska*, 262 US 390, 400–03 (1923) (holding unconstitutional a state statute that prohibited teaching students in a language other than English).

93 *Poe v Ullman*, 367 US 497, 554–55 (1960) (Harlan dissenting) (citing also international evidence of the unusual nature of the statute in question). In his concurring opinion in *Griswold*, Justice Harlan said that the Connecticut statute was unconstitutional "[f]or reasons stated at length in my dissenting opinion in *Poe v. Ullman*." 381 US at 500.

94 The statute did, however, force a number of family planning clinics to close down; *Griswold* itself was a prosecution of officials of such a clinic. See Mary L. Dudziak, *Just Say No: Birth Control in the Connecticut Supreme Court before* Griswold v. Connecticut, 75 Iowa L Rev 915, 917–20 (1990) (discussing the political climate surrounding birth control before, during, and after *Griswold*).

95 *Poe*, 367 US at 554 (Harlan dissenting). See also *Griswold*, 381 US at 506 (White concurring in the judgment) (referring to the "total nonenforcement . . . and apparent nonenforcibility" of the statute against married couples).

96 *Griswold*, 381 US at 506–07 (White concurring).

trend in other jurisdictions was toward the liberalization, or the non-enforcement, of laws regulating contraceptives generally.[97]

This defense of *Griswold* is different from—in a sense broader than—the argument that the holding in *Griswold* (and *Lawrence v Texas*,[98] the most recent substantive due process decision) can be reached just on the ground that the statute was not enforced—that is, on a constitutional counterpart to the common law doctrine of desuetude.[99] Desuetude, or the infrequent enforcement of a statute, can be good evidence that a statute is the product of an earlier era—that it is out of keeping with current sentiment and in need of modernization. But a lack of enforcement is neither a necessary nor a sufficient condition of the need for modernization. Some statutes are infrequently enforced for reasons besides their lack of popular support; in fact, some restrictions may be unenforced because they are so universally accepted that they are hardly ever violated, such as laws forbidding slavery or cannibalism.

At the same time, the fact that a restriction is enforced does not mean that modernization is unwarranted. An enforcing agency's decisions may not reflect popular sentiment, just as the legislature's failure to repeal a measure might not reflect popular sentiment. Especially if the stakes are low, both may be just a product of inertia. If laws do not impose criminal penalties or other severe burdens, or if they affect only a small class of people, vigorous enforcement may be tolerated even if the laws are quite unpopular. A law might continue to be supported, and enforced, just because it has not become salient and been reexamined; that may have been true of many sex classifications, for example. And a locally popular measure, condemned by national sentiment, might be vigorously enforced. To the extent the modernization approach should suppress outliers, it therefore cannot depend solely on a lack of enforcement.

In *Griswold*, however, all of these elements—the lack of enforcement, the trend away from regulation, and the law's status as an outlier—coincided. That explains why *Griswold* can comfortably be seen as a modernizing decision. It also explains why the Court did not

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97 See Peter Smith, Comment, *The History and Future of the Legal Battle over Birth Control*, 49 Cornell L Q 275, 277–79 (1964) (noting the variety of legislative tools employed in US jurisdictions other than Connecticut).

98 539 US 558 (2003).

99 On *Griswold*, see Bickel, *The Least Dangerous Branch* at 143–56 (cited in note 1). On *Lawrence*, see Cass R. Sunstein, *What Did* Lawrence *Hold? Of Autonomy, Desuetude, Sexuality, and Marriage*, 2003 S Ct Rev 27, 29–30, 48–52, 54–60 (finding three primary strands of reasoning in *Lawrence*, one of which was desuetude).

have to be concerned with the other component of modernization, leaving itself room to retreat if the political branches pushed back. In view of the narrow holding in *Griswold*—confined explicitly to the use of contraceptives by married couples—the chance of an adverse reaction from state governments was minimal.

If *Griswold* can be justified as a modernizing decision, then the assertion that *Griswold* recapitulates *Lochner*—which was the standard criticism of *Griswold*, and a concern acknowledged even by its defenders[100]—seems almost bizarrely wide of the mark. The pre–New Deal Court used substantive due process to resist what it saw as a pernicious trend—on one account, a trend toward what that Court saw as interest group legislation that betrayed both the public interest and the principle of "free labor" that inspired the antislavery movement.[101] The trend was pernicious, in that Court's eyes, precisely because it was widespread, because laws regulating the employment relationship were so popular, and because those laws had an extensive and profound effect on labor markets.[102]

The *Griswold* Court, by contrast, was following, not resisting, a trend. The law it invalidated was an isolated outlier that was enforced only in a limited way even in Connecticut. No one suggested that that statute was popular; even the dissenters in *Griswold* (in notable contrast to some of the dissenters in the pre–New Deal cases) did not have a good word to say for the Connecticut statute as a matter of policy.[103] The idea that the repudiation of *Lochner* shows the error of *Griswold* should be turned inside out: what *Griswold* shows is that if the *Lochner* Court had confined itself to regulatory measures that

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100 See, for example, Ely, *Democracy and Distrust* at 73, 221 n 4 (cited in note 87).

101 See generally, for example, Howard Gillman, *The Constitution Besieged: The Rise and Demise of* Lochner *Era Police Powers Jurisprudence* (Duke 1993); William E. Nelson, *The Impact of the Antislavery Movement upon Styles of Judicial Reasoning in Nineteenth Century America*, 87 Harv L Rev 513 (1974). See also Barry Cushman, *Some Varieties and Vicissitudes of Lochnerism*, 85 BU L Rev 881, 999 & n 655 (2005).

102 See, for example, Gillman, *The Constitution Besieged* at 127–29 (cited in note 101) (describing the *Lochner* Court's concern that legislatures would enact extensive legislation favoring employees over employers).

103 See *Griswold*, 381 US at 527 (Stewart dissenting):

> I think this is an uncommonly silly law. As a practical matter, the law is obviously unenforceable, except in the oblique context of the present case. As a philosophical matter, I believe the use of contraceptives in the relationship of marriage should be left to personal and private choice, based upon each individual's moral, ethical, and religious beliefs. As a matter of social policy, I think professional counsel about methods of birth control should be available to all, so that each individual's choice can be meaningfully made. But we are not asked in this case to say whether we think this law is unwise, or even asinine.

were isolated, unpopular outliers that were essentially indefensible on policy grounds, its approach might never have been repudiated.[104]

2. *Eisenstadt v Baird*.

Eisenstadt v Baird,[105] decided seven years after *Griswold*, invalidated a Massachusetts statute that forbade the distribution of contraceptives to any unmarried person. The Massachusetts law therefore differed from *Griswold*'s Connecticut statute in two ways: it applied to distribution, not to use; and it applied to unmarried individuals. *Eisenstadt* has come to be understood as extending the substantive due process right established by *Griswold* in these two ways[106]—an extension that, in view of the reasoning of *Griswold*, is quite substantial.

In some respects, the modernizing character of *Eisenstadt* is obvious. The trend toward the liberalization of the regulation of contraceptives had continued in the years since *Griswold*. The Massachusetts statute also did not apply to the distribution of contraceptives for the purpose of preventing the spread of disease and, as the Court noted, that meant that the statute was easily evaded.[107] There was evidence that it was hardly enforced, in any event.[108]

Eisenstadt, however, was not written as a substantive due process decision. The Court purported to rely on the Equal Protection Clause. Specifically, it purported to hold that there was no rational basis for the statute's distinction between married and unmarried couples.[109] In fact, it was utterly implausible to say that the statute failed the extremely lenient rational basis requirement as that requirement is usually applied under the Equal Protection Clause. As I noted, *Eisenstadt* quickly came to be treated not as an equal protection case but as a decision expanding the substantive due process right.

Why did the Court choose the implausible equal protection basis for *Eisenstadt*? No doubt part of the reason was the old concern about *Lochner*: the Court was reluctant to be seen as inventing, or expanding, a right that had no clear textual basis. But perhaps equally important, the equal protection approach gave the Court a chance to retreat

104 See David A. Strauss, *Why Was* Lochner *Wrong?*, 70 U Chi L Rev 373, 382–86 (2003).

105 405 US 438 (1972).

106 See, for example, *Lawrence*, 539 US at 565; *Vacco v Quill*, 521 US 793, 809–10 (1997) (Souter concurring in the judgment); *Washington v Glucksberg*, 521 US 702, 720 (1997); *Bowers*, 478 US at 190–91; *Planned Parenthood of Southeastern Pennsylvania v Casey*, 505 US 833, 851 (1992).

107 *Eisenstadt*, 405 US at 448–49.

108 See Smith, Comment, 49 Cornell L Q at 286–87 (cited in note 97).

109 See *Eisenstadt*, 405 US at 448–49 (noting that the state's supposed goal of creating "virtuous" and sexually healthy men and women did not justify differential treatment of single people).

if there had been a hostile political reaction. An important lesson of the *Lochner* era was that the Equal Protection Clause, unlike the substantive use of the Due Process Clause, does not wholly prevent the political branches from regulating an activity but just requires that they go about the regulation in a different way.[110] By relying on the Equal Protection Clause, *Eisenstadt* left the door open for a state legislature to reassert its power to regulate the distribution of contraceptives to minors, provided it did so in the right way.

Specifically, the Court in *Eisenstadt* gave two reasons for its conclusion that the Massachusetts statute was not rationally related to the objective of deterring premarital sex. First, the Court said, the fact that contraceptive devices could be distributed for purposes of disease prevention meant that the statute was "so riddled with exceptions" that it had "at best a marginal relation" to deterring premarital sex.[111] Second, since fornication was only a misdemeanor, the state could not possibly have meant to "prescribe[] pregnancy and the birth of an unwanted child as punishment for fornication."[112] These rationales provided the political branches with a way to strike back and provided the Court a way to acquiesce had the legislature done so. If the legislature had forbidden the distribution of contraceptives outright, eliminating the loophole for health-related use, that would have made the statute constitutional, on the Court's own reasoning. And the legislature also had the option of increasing the penalty for fornication, which would have undermined—and permitted the Court to retreat from—its second argument.

It seems unlikely that the Court actually contemplated an adverse legislative reaction; probably by the time of *Eisenstadt* it was clear enough that the Massachusetts law was an anachronism and that its invalidation would be accepted. But still, the exceedingly questionable use of the Equal Protection Clause evinced a desire to mute the confrontation with the political branches by portraying the unconstitutionality of the statute as the product of the legislature's own choices, and therefore remediable by the legislature. In that respect, *Eisenstadt* displayed the amenability to legislative revision that is characteristic of modernization. More important, *Eisenstadt*, like *Griswold*, was surely influenced by the perception that attitudes toward contraception had changed and that the Massachusetts law no longer enjoyed substantial political support.

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110 See *Railway Express Agency, Inc v New York*, 336 US 106, 112–13 (1949) (Jackson concurring).

111 *Eisenstadt*, 405 US at 448–49.

112 Id at 448 (asserting that such a legislative assumption was "plainly unreasonable").

3. *Moore v City of East Cleveland*.

Moore v City of East Cleveland[113] invalidated a municipal single-family zoning ordinance that had the effect of sometimes preventing grandparents from living in the same home as their grandchildren when the parents did not also live there. There was no majority opinion, but Justice Powell's plurality opinion has been treated as if it were an opinion of the Court and has come to be regarded as a significant substantive due process holding.[114]

The East Cleveland ordinance was an outlier. Single-family zoning laws are ubiquitous, but East Cleveland was apparently unique in the nation in applying such an ordinance to prevent a grandparent from living with grandchildren. Justice Stevens, in a separate concurrence, reached that conclusion after exhaustively examining cases from other jurisdictions,[115] and he urged that the ordinance violated the Due Process and Takings Clauses principally for that reason. The plurality opinion did not emphasize the fact that the East Cleveland ordinance was an outlier, but it did note that the ordinance was "unusual"[116] and repeatedly referred to the anomalies that the ordinance would produce: for example, large numbers of adults might, in some circumstances, constitute a permitted "single family," and a grandparent could live with grandchildren who were siblings but not grandchildren who were, like those in *Moore*, cousins.[117]

For the most part, the plurality followed Justice Harlan's *Griswold* concurrence and *Poe v Ullman*[118] dissent in emphasizing tradition: "Our decisions establish that the Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in this Nation's history and tradition."[119] The plurality obtained precise lessons from tradition, which, it said, did not merely support the "sanctity" of the nuclear family: "The tradition of uncles, aunts,

113 431 US 494 (1977) (plurality).

114 See, for example, *Lawrence*, 539 US at 593 (Scalia dissenting); *Glucksberg*, 521 US at 727 n 19; *Michael H. v Gerald D.*, 491 US 110, 121–24 (1989); Pala Hersey, Moore v. City of East Cleveland*: The Supreme Court's Fractured Paean to the Extended Family*, 14 J Contemp Legal Issues 57, 62 (2004) ("[T]he *Moore* plurality's position has played a prominent role in some of the Court's most important decisions on Substantive Due Process.").

115 *Moore*, 431 US at 516–521 (Stevens concurring) (concluding that there is no precedent for applying an ordinance to exclude an owner's relatives from residing on his property).

116 Id at 495 (plurality) (noting the odd and complex section of the statute at issue, in which it defines "family" as only including certain related individuals).

117 Id at 520 (Stevens concurring).

118 367 US 497 (1960).

119 See id at 503 (plurality).

cousins, and especially grandparents sharing a household along with parents and children has roots equally venerable and equally deserving of constitutional recognition."[120] But it is hard to believe that tradition alone, or the Court's precedents alone, would produce such a fine-grained result. How can one establish that a "venerable" tradition—let alone one "equally venerable" to the tradition of the nuclear family—supports a family arrangement like the one in *Moore*? The Court does not appear to have collected, for example, survey data on the prevalence of such family arrangements; and even such data would not establish that there was a "venerable" tradition "deserving of constitutional recognition" as opposed to, for example, a common but widely disapproved practice.

It looks as if "tradition" here was standing for the justices' belief, manifest in the opinion, that the East Cleveland ordinance was simply unreasonable—that it was an excessive, heartless measure that was not needed to solve any real problems. In this connection, the striking feature of *Moore*—the feature that relates it to modernization—was how the Court viewed the fact that the East Cleveland ordinance was an outlier. That fact might have caused the Court to hesitate before concluding that the ordinance was a gratuitous and unreasonable interference with the family. If a law is unique, it might be a carefully designed response to specific local problems, and in any event it will be relatively easy for individuals to escape its reach by going elsewhere. For example, according to one observer's account, East Cleveland was a predominantly African-American working class suburb of Cleveland that was trying to maintain the stability of its neighborhoods in the face of an influx of disorganized poor families from Cleveland, and the restrictive zoning law served that purpose.[121]

The Court, however, took the opposite view of the ordinance's outlier status: it regarded the ordinance's outlier status, including its apparent anomalies and peculiar definitions, as a reason to invalidate the ordinance. This is consistent with the way the Court treated outliers in *Griswold* and *United States v Virginia* (and *Lawrence*, which I discuss below.) The Court is comfortable invalidating laws on substantive due process grounds when it thinks it is acting consistently with the general trend of popular sentiment and that popular opposition to its decision will be limited. The ordinance's outlier status confirmed the

120 Id at 504.

121 See Robert Burt, *The Constitution of the Family*, 1979 S Ct Rev 329, 389–91.

Court's judgment that the ordinance was unreasonable, rather than calling that judgment into question.

4. *Washington v Glucksberg*.

Washington v Glucksberg[122] rejected a claim that there is a substantive due process right to physician-assisted suicide; it upheld a Washington statute forbidding assisted suicide against a challenge raised on behalf of a terminally ill patient. *Glucksberg* did not modernize the law, but it demonstrates the modernizing function of today's substantive due process: there is good reason to think that the case came out the way it did because the justices were convinced that the Washington statute, and other state statutes like it, actually did reflect current sentiment—not a bygone era—and did not need to be modernized.

The Court in *Glucksberg*, as in other modern substantive due process decisions, emphasized that the courts should recognize only "fundamental rights found to be deeply rooted in our legal tradition."[123] And the Court asserted that there was "a consistent and almost universal tradition that has long rejected the asserted right"[124] to assisted suicide. But that was not really an adequate answer to the claim that was being made in the case. The claim was that individuals who are nearing the end of their lives are entitled to determine the manner and time of their own deaths. To refer to this simply as "assisted suicide" is obviously too crude a characterization. Indeed, it is not clear that a majority of the Court accepted the characterization; five justices indicated their willingness to accept a qualified right to physician-assisted suicide in certain circumstances, notwithstanding the traditional prohibitions that the majority opinion stressed.[125]

Moreover, ancient prohibitions on assisted suicide, as applied to end-of-life situations, seem to be prime candidates for modernization. The problem that gives rise to the claim of a right to die is a product

122 521 US 702 (1997).

123 See id at 722.

124 Id at 723.

125 See id at 736–38 (O'Connor concurring) (declining to reach the "narrower question" of whether a dying person has a constitutional interest in controlling his death); id at 738–52 (Stevens concurring in the judgment) (encouraging further debate about the appropriateness of punishment for attempted suicide); id at 752–89 (Souter concurring in the judgment) (finding "merciful termination" to be consistent with a physician's ethical obligations); id at 789 (Ginsburg concurring in the judgment) (agreeing with O'Connor); id at 789–90 (Breyer concurring in the judgment) (seeing the question as whether a terminally ill patient has the right to die a dignified death and finding more support for an affirmative answer to this question than to the one asked by the majority, whether a terminally ill patient has a right to physician-assisted suicide).

of modern medicine; the problem simply did not exist, in anything remotely like the same form, until relatively recently. This could easily be an area where the laws on the books do not reflect current, considered judgments on the disputed issue.

The Court, to its credit, seemed to realize as much. It did not stop with the irrefutable but too-simple claim that it has long been illegal to assist a suicide. The Court emphasized, at several points in its opinion, that state legislatures, including Washington's, had reconsidered the old statutory prohibition against assisted suicide and had reaffirmed its application to the new end-of-life situations. At the outset of its opinion, the Court noted that Washington had addressed the issue by legislation enacted in 1979; that the voters in Washington had rejected an initiative in 1991 that would have permitted physician-assisted suicide; and that the law had been amended in the following year to make even more explicit the prohibition on assisted suicide.[126] And the Court gave a lengthy explanation of why modernization was not needed:

> Though deeply rooted, the States' assisted-suicide bans have in recent years been reexamined and, generally, reaffirmed. Because of advances in medicine and technology, Americans today are increasingly likely to die in institutions, from chronic illnesses. Public concern and democratic action are therefore sharply focused on how best to protect dignity and independence at the end of life, with the result that there have been many significant changes in state laws and in the attitudes these laws reflect. . . . At the same time, however, voters and legislators continue for the most part to reaffirm their States' prohibitions on assisting suicide.
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> . . .
>
> Thus, the States are currently engaged in serious, thoughtful examinations of physician-assisted suicide and other similar issues.[127]

In a companion case to *Glucksberg*, *Vacco v Quill*,[128] the Court, in the course of rejecting an Equal Protection Clause challenge to a New York statute forbidding physician-assisted suicide, emphasized that "the overwhelming majority of state legislatures have drawn a clear line between assisting suicide and withdrawing or permitting the refusal of unwanted lifesaving medical treatment by prohibiting the former and

126 See *Glucksberg*, 521 US at 706–07, 716–17.
127 Id at 716, 719.
128 521 US 793 (1997).

permitting the latter."[129] That is, the laws forbidding physician-assisted suicide were the opposite of outliers. The Court in *Vacco* also noted that New York had repeatedly reexamined its statutes and reaffirmed the ban on physician-assisted suicide.[130] On modernization grounds, the case for upholding the Washington and New York laws was very strong.

The Court did not say that it would have established a right to die if there were no evidence of modernization. But by the same token, the Court was plainly influenced by the fact that this was an issue that the political branches were seriously addressing. The Court thus invited arguments in future cases that might distinguish *Glucksberg*, and urge that statutes be invalidated, on the ground that circumstances and attitudes have changed in a way that makes the old statutes, whatever their traditional pedigree, outmoded. In all of these ways, *Glucksberg* fits squarely into the modernization paradigm.

5. *Lawrence v Texas*.

Lawrence v Texas, the most recent substantive due process case, struck down a Texas statute that made consensual same-sex sodomy a crime. Much of the opinion is devoted to elaborating the contours of the term "liberty" in the Due Process Clause. But in deciding what "liberty" meant, the Court used, among other things, a more or less explicit modernizing approach. In addition, the Court's definition of "liberty" left many things undecided—significantly, for modernization purposes.

In *Bowers v Hardwick*[131]—the decision, overruled by *Lawrence*, that had upheld a Georgia sodomy statute—the Court had emphasized its view that homosexual sodomy, far from being a traditional right, had traditionally been condemned.[132] The Court in *Lawrence* took issue with the *Bowers* Court's account of tradition.[133] In the end, though, *Lawrence* could assert only that "the historical grounds relied upon in *Bowers* are more complex" than the *Bowers* Court had suggested.[134] In other words, the Court in *Lawrence* essentially conceded that tradition, while not foreclosing the conclusion that the Texas statute was unconstitutional, did not really support that conclusion.

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129 Id at 804–05.

130 Id at 806–07.

131 478 US 186 (1986).

132 See id at 190–94.

133 See *Lawrence*, 539 US at 568–71 (asserting that laws targeting same-sex couples, far from having "ancient roots," only emerged in the last third of the twentieth century).

134 Id at 571.

The *Lawrence* Court then shifted the focus from tradition to current understandings: "In all events," the Court said, "our laws and traditions in the past half century"—rather than those of previous centuries—"are of most relevance here."[135] Those more recent developments, according to the Court, "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."[136] The Court then reviewed a variety of sources that supported its claim about the "emerging awareness": the Model Penal Code; the Report of Britain's Wolfenden Commission, which called for the repeal of laws punishing homosexual conduct; Parliament's favorable response to that Commission; a decision of the European Court of Human Rights holding that laws forbidding homosexual conduct were a violation of the European Convention on Human Rights; and, in the United States, the fact that, according to the Court, of the twenty-five states that criminalized sodomy at the time of *Bowers*, only thirteen still had such prohibitions, and just four "enforce their laws only against homosexual conduct."[137]

The *Lawrence* Court's emphasis on an "emerging awareness" is an explicit commitment to modernization. The problem with the Texas statute was not that it deprived people of a right "deeply rooted in this Nation's history and tradition."[138] Rather, the Texas statute was, if anything, too much the product of old ways of thinking; it was something of an outlier that had, in the Court's estimation, little support in current sentiment. It was barely enforced, and current trends in the law were against it. In all of these respects, *Lawrence* adopted a modernizing approach in defining the rights protected by substantive due process, perhaps more explicitly than any other substantive due process decision.

As far as the other aspect of modernization is concerned—the susceptibility to a reaction from the political branches—the *Lawrence* Court's definition of liberty quite clearly did not leave open the possibility that the legislature might modify the sodomy law in a way that would make it constitutional. In that sense, *Lawrence* was not like *Eisenstadt* or the capital punishment cases. But in its own way, the *Lawrence* Court did unquestionably invite a response from the political branches, by writing an opinion that committed the Court only to a narrow principle.

The only thing that seems clear after *Lawrence* is that it is unconstitutional to impose criminal penalties for sodomy. The elements

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135 Id at 571–72.

136 Id at 572.

137 *Lawrence*, 539 US at 572–73.

138 *Glucksberg*, 521 US at 721, quoting *Moore*, 431 US at 503.

of "emerging awareness" that the Court identified—the outlier status of Texas's law, the relative lack of enforcement, the trend away from outlawing homosexual sodomy—all suggest that there will be no effort to revive laws forbidding same-sex sodomy. On all other issues, the *Lawrence* opinion resolves little or nothing. The Court went out of its way to insist that it was not deciding whether there is a constitutional right to same-sex marriage, and it did not decide whether states could discriminate against homosexuals in other ways.[139] In the term after *Lawrence* was decided, the Court denied certiorari in a case that challenged a Florida statute (itself unique in the nation) that forbade gays to adopt[140]—thus arguably confirming that the Court does not believe that *Lawrence* has decisively settled anything beyond the unconstitutionality of laws that criminalize same-sex sodomy.

In this way, the Court has very much left the door open for the political branches to tell it that popular sentiment will not support any extension of *Lawrence*. *Lawrence* may become the basis for a substantial extension of the rights of gays and lesbians; or it may become relatively insignificant, a largely symbolic invalidation of a seldom-enforced statute. The Court left all of that undecided, thus allowing itself the opportunity to see the political reaction. In this respect, too, *Lawrence* is a modernizing decision, of a piece with modern substantive due process and far removed from the pre–New Deal era. The criticism of *Lawrence* is more likely to be not that it is antidemocratic in an important way, but that it does not go far enough.

III. WHAT MODERNIZATION IS NOT

All of these examples of modernization from recent decades might seem to have two things in common. First, they seem insensitive to values of federalism. The idea that modernization involves the suppression of outliers suggests that modernization is, by nature, a centralizing approach, one that limits local or regional diversity in favor of a nationally uniform trend that, in the courts' view, is ascendant. The second apparent feature of these cases is that the decisions that engaged in modernization are all "liberal" in the sense in which that term is commonly used to describe Supreme Court decisions. The abolition of capital punishment, limits on sex discrimination, and the

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139 See *Lawrence*, 539 US at 585 (stating that "other reasons exist to promote the institution of marriage beyond mere disapproval of an excluded group"). See also Mary Anne Case, *Of "This" and "That" in* Lawrence v. Texas, 2003 S Ct Rev 75, 80–83, 133–37.

140 See *Lofton v Department of Children and Family Services*, 358 F3d 804, 811–12 (11th Cir 2004), cert denied, 125 S Ct 869 (2005).

various substantive due process decisions all are commonly characterized in that way. More generally, the term "modernization" might be taken to suggest progress, as if the decisions necessarily move the law to a more "modern," and therefore better, state of the world.

Modernization does have centralizing tendencies. The courts will treat a statute's outlier status as evidence that it is archaic, and that creates a bias toward centralization. This is, as I will discuss in my assessment of modernization, a problem with the modernizing approach; it will sometimes not give enough weight to local variations that justify unusual laws, or laws that seem outmoded. Modernization will also tend to be centralizing because it will usually be more difficult to declare that a federal statute is out of touch with popular sentiment than it will be to say that about a state statute.

But it is not impossible to say that an act of Congress is a relic of an earlier time; several of the Supreme Court's sex discrimination cases involved federal statutes.[141] Beyond that, while modernization tends to be centralizing, it will not inevitably lead to centralizing results. If the trend is toward limiting federal power and restoring power to the states, modernization might be decentralizing. There are some arguable examples of this, in recent and not-so-recent history.

More unequivocally, there is certainly nothing about modernization that leads to "liberal" results. Nor is there anything about modernization that necessarily leads to results that are more advanced or "modern" as judged by some normative standard. Modernization means that the *Court* is anticipating what it believes to be trends, and in particular what it believes to be salutary trends. Those trends may be decentralizing, rather than centralizing. And those trends certainly need not be liberal, or progressive, or good as judged by any standard other than, perhaps, the justices'.

Two sets of cases illustrate these points; these cases are definitely not centralizing and not "liberal," and while they are not as clear examples of modernization as the ones I have already described, they do follow the modernization approach quite closely. In any event, they show that modernization does not have to be centralizing, or "liberal," or, for that matter, good in any sense.

One example is the Supreme Court's recent decisions about the scope of congressional power under the Commerce Clause.[142] In *United*

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[141] See, for example, *Goldfarb*, 430 US at 201–02 (holding that certain provisions of the Social Security Act violated due process and equal protection); *Weinberger v Wiesenfeld*, 420 US 636, 637–39 (1975) (same).

[142] US Const Art I, § 8, cl 3 ("Congress shall have the power . . . [t]o regulate commerce. . .").

States v Lopez[143] and *United States v Morrison*,[144] the Supreme Court, for the first time in sixty years, ruled that Congress had exceeded its power under the Commerce Clause. *Lopez* struck down an act of Congress that prohibited the possession of firearms near a school;[145] *Morrison* declared unconstitutional central features of the Violence Against Women Act.[146] The opinions in these cases were not explicitly written in modernizing terms, but two features of the cases, at least, are consistent with the modernization paradigm.

First, these cases were decided at a time when public sentiment had swung against federal regulation. Arguments against federal regulation of the economy began to gain credence in the late 1970s, essentially for the first time since the New Deal.[147] The Carter Administration deregulated the airline industry and began to deregulate the trucking and oil industries.[148] The Reagan Administration made it a priority to reduce federal regulation of the economy,[149] and President

143 514 US 549 (1995).

144 529 US 598 (2000).

145 514 US at 551 (holding that the Gun-free School Zones Act exceeded congressional authority because possession of a gun near a school was not economic activity that substantially affected interstate commerce).

146 529 US at 601–02 (holding that Congress lacked Commerce Clause authority to enact a statute that provided a federal civil remedy for victims of gender-motivated violence).

147 See, for example, Alfred E. Kahn, *The Political Feasibility of Regulatory Reform: How Did We Do It?*, in Leroy Graymer and Frederick Thompson, eds, *Reforming Social Regulation: Alternative Public Policy Strategies* 247, 249–50 (Sage 1982) (noting the emergence of "revisionist scholarship" from approximately 1956 to 1981, which viewed regulation as mostly in opposition to the public interest).

148 On airline deregulation, see Air Cargo Deregulation Act, Pub L No 95-163, 91 Stat 1278 (1977), codified as amended at 49 USC § 40101 et seq; Jimmy Carter, *Remarks on Signing S. 717 and H.R. 6010 into Law*, 13 Weekly Comp Pres Doc 1741, 1742–43 (Nov 9, 1977) (stating that airlines exclusively hauling cargo could now operate according to the "workings of the market"); Airline Deregulation Act, Pub L No 95-504, 92 Stat 1705 (1978), codified as amended at 49 USC § 40101 et seq; Jimmy Carter, *Remarks on Signing S. 2493 into Law*, 14 Weekly Comp Pres Doc 1837, 1837–39 (October 24, 1978) (stating that the Airline Deregulation Act would fight inflation and lead to low-price air transportation). For Carter's plan to deregulate oil, see Jimmy Carter, *Energy Address to the Nation*, 15 Weekly Comp Pres Doc 609, 609–14 (Apr 15, 1979). On the deregulation of trucking, see Motor Carrier Act, Pub L No 96-296, 94 Stat 793 (1980), codified as amended at 49 USC § 13101 et seq (adjusting the regulatory scheme for motor carriers); Jimmy Carter, *Remarks on Signing S. 2245 into Law*, 16 Weekly Comp Pres Doc 1261, 1261–65 (July 1, 1980) ("This act will bring the trucking industry into the free market system where it belongs.").

149 See *Economic Report of the President* 4–5, 7–8 (GPO 1982) (noting the administration's goal of drastically reducing federal government intervention, other than that of closely reviewing all regulatory activity); Gregory B. Christiansen and Robert H. Haveman, *The Reagan Administration's Regulatory Relief Effort: A Mid-term Assessment*, in George C. Eads and Michael Fix, eds, *The Reagan Regulatory Strategy: An Assessment* 49, 67 (Urban Institute 1984) (noting that President Reagan wanted to deregulate the economy in light of empirical data in the *Economic Report of the President* of 1982, which suggested that regulation had been detrimental to the economy during the 1970s).

William Clinton famously declared, "The era of big Government is over."[150] In these circumstances, the Court might reasonably have thought that an extensive federal regulation of the economy was an anachronism, and that a narrower interpretation of the Commerce Clause would help move the nation toward the new consensus.

Consistent with the modernization approach, the opinions in *Lopez* and *Morrison* establish only a vague standard for determining when legislation is unauthorized by the Commerce Clause; indeed in *Lopez* the Court conceded as much.[151] In this way those decisions resemble *Lawrence*: the decisions could either be the first step in a major constitutional development or relatively minor decisions that had little effect. The vagueness of the standard left the door open for the Court to retreat—as it arguably did, in *Gonzales v Raich*,[152] when it upheld a federal law forbidding the cultivation of marijuana, as applied to an individual who grew it at her own home, for her own use, as authorized by state law.[153] *Raich* was not an instance of the Court retreating in the face of public opinion, as it did in the capital punishment cases. But it may be seen as an effort by the Court to calibrate the degree of federal regulatory power that would be tolerated—or, perhaps, insisted upon—by the public and other political actors. The possibility that *Lopez* and *Morrison* might undermine federal criminal law enforcement, particularly of the drug laws, was not acceptable. But it is hard to identify a principled distinction between *Raich* and the earlier cases; the difference is one of practical or, perhaps, political acceptability.

The otherwise unprincipled nature of these Commerce Clause decisions; the responsiveness to perceived political, or at least policy, imperatives; and the congruence between the decisions and broad political currents—all of these things suggest that these cases have an affinity to the modernization approach. Yet they are decentralizing, not centralizing, and they would not ordinarily be called "liberal." It seems too much to say that these cases are examples of modernization comparable to the others I have canvassed, but they come close enough to show that modernization need not be centralizing.

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150 William J. Clinton, *Address before a Joint Session of the Congress on the State of the Union*, 32 Weekly Comp Pres Doc 90, 90 (Jan 23, 1996) ("We know, and we have worked to give the American people a smaller, less bureaucratic Government in Washington. And we have to give the American people one that lives within its means. The era of big Government is over.").

151 See *Lopez*, 514 US at 565.

152 545 US 1 (2005).

153 See id at 32–33 (citing the "undisputed magnitude of the commercial market for marijuana" as a reason to uphold the federal law).

A second example, from more than a century ago, should clinch the point that there need be nothing progressive or admirable, or centralizing, about the modernization approach. In *The Civil Rights Cases*,[154] the Supreme Court declared unconstitutional the Civil Rights Act of 1875.[155] That statute forbade discrimination on the basis of race in public accommodations and public transportation.[156] The Court held that Congress did not have the power to enact the statute, because the Fourteenth Amendment did not reach private conduct[157] and discriminations in public accommodations and transportation were not "badges" of slavery.[158]

The Civil Rights Act of 1875 was the most far-reaching of the post–Civil War statutes protecting the rights of African-Americans.[159] But it became law when popular support for protecting the rights of the recently freed ex-slaves had just crested and was about to recede.[160] In fact, it was enacted by a lame-duck Congress, dominated by Radical Republicans whose views on race had been thoroughly repudiated in the election of 1874, and who barely managed to maneuver the legislation through Congress before they left office in March of 1875.[161] By the time *The Civil Rights Cases* were decided in 1883, national sentiment had decisively shifted, and Reconstruction had been aban-

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154 109 US 3 (1883).

155 See id at 24–26 (stating that Congress had no authority to pass such a law under the Thirteenth or Fourteenth Amendment). I am indebted to Barry Cushman and Michael Klarman for the idea that *The Civil Rights Cases* are an example of modernization.

156 Civil Rights Act of 1875, 18 Stat 335, 336 (requiring that all "citizens of every race and color" shall not be deprived of "full and equal enjoyment of the accommodations . . . of inns [and] public conveyances").

157 See *The Civil Rights Cases*, 109 US at 11 ("Individual invasion of individual rights is not the subject-matter of the [Fourteenth] amendment.").

158 See id at 25 ("Mere discriminations on account of race or color were not regarded as badges of slavery."). In 1964, the Court upheld the similar public accommodations provisions of the Civil Rights Act of 1964 as a valid exercise of Congress's power under the Commerce Clause. See *Katzenbach v McClung*, 379 US 294, 304–05 (1964) (holding that Congress could proscribe racial discrimination in restaurants that profited from interstate business); *Heart of Atlanta Motel, Inc v United States*, 379 US 241, 261–62 (1964) (upholding public accommodations provisions that applied to a motel serving interstate travelers). But that expansive interpretation of the Commerce Clause was, of course, not accepted until after the New Deal. See, for example, *NLRB v Jones & Laughlin Steel Corp*, 301 US 1, 46–47 (1937) (holding that Congress has authority to protect the right of employees to organize, as labor disputes can disrupt interstate commerce).

159 See, for example, Eric Foner, *Reconstruction: America's Unfinished Revolution, 1863–1877* 556 (Harper & Row 1988) ("[T]he law represented an unprecedented exercise of national authority, and breached traditional federalist principles more fully than any previous Reconstruction legislation.").

160 See Michael J. Klarman, *From Jim Crow to Civil Rights: The Supreme Court and the Struggle for Racial Equality* 49 (Oxford 2004) (noting that the Civil Rights Act of 1875 was passed "when Republican commitment to racial equality was near its zenith").

161 See Foner, *Reconstruction* at 553–56 (cited in note 159).

doned.[162] A modernizing Court would have been entitled to conclude that the nation's experiment with far-reaching federal intervention to protect civil rights had come and gone, and that the 1875 Act reflected views that were no longer widely held.

Similarly, the Civil Rights Act of 1875 was, in a pattern typical of modernization, essentially unenforced by 1883. The Act could be enforced only through private litigation by the victims of discrimination; African-Americans lacked the organizational and financial resources to sue, and by 1883 they were subject to intimidation, often violent intimidation. As a result, by the time of *The Civil Rights Cases*, the statute was "a dead letter."[163] What was said in *Griswold* and *Lawrence* about the "total nonenforcement . . . and apparent nonenforcibility" of the statute[164] could have been said in *The Civil Rights Cases* as well. *The Civil Rights Cases* did not explicitly leave room for the Court to retreat, but, of course, the Court did ultimately change course—shifting its interpretation of the Thirteenth Amendment in 1968,[165] and, in 1964, using the Commerce Clause to uphold legislation similar to the 1875 Act.[166] In all of these respects *The Civil Rights Cases* conform closely to the modernization paradigm.

Lopez, *Morrison*, and *The Civil Rights Cases* could have been written as modernizing decisions, much like the substantive due process or Eighth Amendment or sex discrimination cases. That is, the Court in *Lopez*, *Morrison*, and *The Civil Rights Cases* could have relied on an "emerging awareness" of the undesirability of extensive federal regulation, as revealed in a pattern of legislation. *The Civil Rights Cases* could have emphasized the lack of enforcement of the statute that the Court was invalidating along with other indications of the lack of a national consensus behind the legislation. The opinions were not explicitly written in those terms, but the support those cases get from the modernization approach demonstrates that that approach is not always or necessarily centralizing, and that there is no reason to think that modernization produces results that are either politically "liberal" or "modern" in the sense of being morally better.

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162 On the end of Reconstruction, see id at 587–601 (discussing generally the economic and social reasons behind the abandonment of Reconstruction and that abandonment's societal impact).

163 See id at 556; Klarman, *From Jim Crow to Civil Rights* at 49 (cited in note 160).

164 See *Griswold*, 381 US at 506 (White concurring in the judgment).

165 See, for example, *Jones v Alfred H. Mayer Co*, 392 US 409, 412–13 (1968) (holding that a statute requiring equal treatment in the conveyance of real property is a valid exercise of Congress's power under the Thirteenth Amendment).

166 See note 158.

IV. MODERNIZATION: AN ASSESSMENT

On the surface, the modernization approach seems vulnerable to fundamental objections. In a word, why shouldn't modernization be the job of officials who must face the electorate periodically and who are periodically replaced, rather than the job of politically insulated, long-tenured judges? More precisely, there are problems of both legitimacy and institutional competence. The competence problem is that it is not obvious why judges are any good at deciding when statutes have become anachronistic, especially compared to elected politicians whose job depends on their ability to stay in touch with society. The legitimacy problem is that even if judges were good at making that decision, it is not clear why they should be the ones who make it, when that entails giving them the power to invalidate laws adopted by representatives with much better democratic credentials.

There are problems with the modernization approach, but these difficulties of competence and legitimacy are less severe than they seem at first. The actual problems of modernization, I believe, are different and more subtle. As far as legitimacy and competence are concerned, modernization of the kind practiced by the Supreme Court has an affinity with respectable legal traditions—the common law, the so-called *Carolene Products* justification of judicial review, some well-known theories of statutory interpretation, and the approach to constitutional adjudication that is associated with the term "passive virtues."

The real problem with modernization may be not so much that it leads to judicial overreaching as that it leads to a kind of abdication. It can cause the courts to back away from playing a role for which courts are relatively well suited and the elected branches are not well suited—and that some institution should play in a democracy. I will try to illustrate that last point by discussing the two most famous decisions of the last half century, *Brown* and *Roe*, both of which are, in an important sense, modernizing cases.

A. Legitimacy and Competence

Modernization, perhaps surprisingly, resembles several approaches or legal traditions that, if not fully accepted, are at least plausible and familiar. To begin with, modernization belongs to the same family as the famous *United States v Carolene Products, Co*[167] footnote. The *Carolene Products* approach calls for the courts to give less deference to statutes

[167] 304 US 144 (1938).

when, among other things, the democratic political process is not working as it should—either because a law has blocked avenues of change, for example by manipulating the franchise or limiting dissent, or because the law disadvantages a group that does not have its fair share of political power (a "discrete and insular minorit[y]").[168]

Modernization can be defended as legitimate in the same way that the *Carolene Products* approach can be defended. The ambition of both approaches is to reconcile judicial review with democracy by limiting the courts' interventions to instances in which the courts can perfect, rather than override, the workings of the democratic political process. Both approaches, if they work as they should, bring about the state of affairs that the democratic process would have produced if it were functioning well. In principle, then, there is no tension between judicial review and well-functioning democratic government under either approach. *Carolene Products* addresses, and is limited to, certain kinds of deficiencies in the democratic process—blockages in the deliberative or electoral process, or the victimization of minorities that lack their fair share of political power. The modernization approach is less clear about the specific deficiencies it is remedying, but, like *Carolene Products*, modernization is based on the idea that the courts will strike down only laws that a well-functioning democratic process would already have gotten rid of.

It might seem odd to associate *Carolene Products* with an approach like modernization that justifies substantive due process decisions. The *Carolene Products* footnote was an effort to bury substantive due process while maintaining a role for the courts, and substantive due process is the *bête noire* of the leading defenders of the *Carolene*

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168 The footnote reads, in part:

> It is unnecessary to consider now whether legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation, is to be subjected to more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment than are most other types of legislation. [Citing cases involving "restrictions upon the right to vote," "restraints upon the dissemination of information," "interferences with political organizations," and "prohibition of peaceable assembly"] . . . Nor need we enquire whether similar considerations enter into the review of statutes directed at particular religious, or national, or racial minorities; [or] whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.

See id at 152 n 4. For an argument that the term "discrete and insular" misdescribes the kinds of groups that are at a disadvantage in the political process, see generally Bruce A. Ackerman, *Beyond* Carolene Products, 98 Harv L Rev 713 (1985).

Products approach.[169] But the substantive due process cases that the *Carolene Products* decision rejected were not justified on modernizing grounds, or on other grounds that could be reconciled with the theory that the role of courts is to perfect the workings of the democratic process. Rather, the pre–New Deal substantive due process cases were seen, by their proponents, as a way of holding back pernicious trends in politics and popular sentiment.[170] The modern substantive due process cases—decided by judges who are, of course, aware of those cases' repudiated antecedents—have a different, modernizing justification, one that emphasizes how consistent they are with trends in popular opinion. That justification is in principle similar to *Carolene Products*.

It might also be objected that modernization, as I have described it, explicitly permits judges to take into account their own views about the desirability or undesirability of trends. The *Carolene Products* approach, by contrast, purports to avoid any such judgments.[171] But it is a familiar criticism of *Carolene Products* that its approach in fact requires such judgments.[172] Otherwise, an impermissible blockage of the democratic process cannot be distinguished from a legitimate political victory, and an unfairly disadvantaged "discrete and insular minority" cannot be distinguished from a group that consistently loses out in the political process because it deserves to lose out.[173] The need to make disputable normative judgments is equally characteristic of the modernizing approach's judgment that a law should be invalidated because it is out of keeping with popular will.

For this reason, there may be less than meets the eye to the argument that modernization is an illegitimate role for the courts to play because it amounts to a usurpation of the role of the political branches. In principle, modernization, like the *Carolene Products* view,

169 Most notably, see Ely, *Democracy and Distrust* at 75–77 (cited in note 87).

170 See text accompanying notes 87, 101–04.

171 This is the central theme of Ely, *Democracy and Distrust* at 75–77 (cited in note 87) (noting that the *Carolene Products* footnote gives a clear indication of how judges should examine the constitutionality of legislation, which does not include yielding to any personal moral judgments).

172 See, for example, Lewis F. Powell, Carolene Products *Revisited*, 82 Colum L Rev 1087, 1090 (1982) (noting the subjective flexibility of "discrete and insular"); Paul Brest, *The Substance of Process*, 42 Ohio St L J 131, 140–42 (1981).

173 See Brest, 42 Ohio St L J at 136–37 (cited in note 172) (pointing out, as an example, that under Ely's approach there would be no justification for applying a relaxed scrutiny test for regulations targeting burglars, while applying a strict scrutiny test for regulations aimed at homosexuals); Laurence Tribe, *The Puzzling Persistence of Process-based Constitutional Theories*, 89 Yale L J 1063, 1073–74 (1980) (noting the confusion over which minority groups are sufficiently "discrete and insular").

is a democracy-reinforcing approach to constitutional interpretation. It defines a role for the courts that is consistent with basic democratic principles. It does involve judgments of morality and policy, but that is inevitable; the same thing is true of *Carolene Products*.

This does raise, however, the question of institutional competence. Modernization, it might plausibly be said, requires judges to be amateur political scientists. It seems absurd to suppose that courts are good at anticipating developments in popular opinion—much less that they are better at that than elected representatives are. Similar objections might be made to *Carolene Products*—that that decision, too, requires a kind of amateur political science, to diagnose defects in the political process and prescribe a cure. But at least *Carolene Products* is directed to specific defects—things that elected officials do not do well. Modernization seems to be directed at the core of an elected official's mission: staying in tune with developments in popular sentiment.

In addition, modernization is a way in which a certain kind of elite opinion—the opinions of the people who end up on the Supreme Court—helps shape constitutional principles. These opinions do not *determine* the principles, because the principles have to be squared with the evolving trends of popular opinion. But it seems reasonably clear that part of what is going on in the areas where the Supreme Court is modernizing—capital punishment, the role of women, homosexuality—is that the justices are hastening along developments that are occurring anyway but that the justices would like to see move faster.

But all of this again may not be as troublesome as it sounds. Here the important analogy is not so much to *Carolene Products* as to the common law: modernization, in these respects, resembles the traditional role of common law courts. Roughly speaking, a modernizing court chooses among the trends it sees developing in the same way that a common law court might choose among precedents. In some instances, the popular trend (or the precedents) is clear. In others the trend (or the precedents) does not point in one direction, and the judges' choice, although bounded by the precedents or the popular trends, will ultimately rest on normative grounds. Indeed, one classic understanding of the role of a common law judge is that he or she is, to the extent possible, supposed to identify trends, on the basis of related legislation and legislation in other jurisdictions, and anticipate the direction in which the law is moving.[174] That role is similar to what

[174] For a classic use of this approach, see the opinion of Justice John M. Harlan in *Moragne v States Marine Lines*, 398 US 375, 379–93 (1970) (relying on the trend that every state had enacted a wrongful-death statute to create a wrongful-death cause of action in the maritime

modernization requires. In fact, in this respect modernization seems superior to the *Carolene Products* approach: *Carolene Products* defines a new role for courts, one that does not have such a clear connection to the common law tradition.

One important distinction between a court engaging in constitutional interpretation and a common law court, of course, is that a common law court can be reversed by the legislature; ordinarily a court that decides a constitutional issue cannot be overruled by a simple legislative majority. But this distinction matters much less when a court is interpreting the Constitution by modernizing. A modernizing court is more like a common law court because it is prepared to change course if the political branches push back. To that extent, the decisions of a modernizing court, like those of a common law court, can be overturned by the legislature. And while it does seem anomalous for courts to be doing what is quintessentially politicians' work—gauging how the political winds are blowing—that is also a plausible account of what common law courts do. While the common law of course involves the interpretation of precedents, it is a recognized function of common law courts to try to predict future trends and align the law accordingly.

Of course it does not follow that modernization is a fully justified approach—only that it is more plausible than it seems. Modernization is not that different from what courts traditionally do. We might still be better off leaving modernization to the legislature. For that matter, we might be better off leaving all constitutional issues to the legislature and forswearing judicial review entirely. The resolution of those questions depends on unanswered and possibly unanswerable empirical and normative questions. The analogy to the common law does suggest, though, that modernization is at least roughly consistent with the kinds of tasks that we have historically trusted courts to perform.

Modernization also resembles other, somewhat more controversial—but plausible—proposals. There is a tradition, in the literature on statutory construction, that urges that courts should self-consciously bring statutes up to date, either through creative interpretation or (more controversially still) through provisional invalidation.[175] These

context). See also the discussion in Guido Calabresi, *A Common Law for the Age of Statutes* 151–52 (Harvard 1982) (providing two examples of courts that examined the overall "topography" of current legislation and dealt with the specific laws at issue accordingly).

[175] See, in particular, William N. Eskridge, Jr, *Dynamic Statutory Interpretation* 52–55 (Harvard 1994) (arguing that statutes should be interpreted in a way that takes account of changed circumstances); Calabresi, *A Common Law* at 163–66 (cited in note 174) (arguing that courts should occasionally exercise a nonconstitutional power to invalidate statutes provisionally—

arguments, while controversial today, have a very respectable lineage in the view that the statutes should, if possible, be interpreted in a way that harmonizes them with the common law—that there should be "a unified system of judge-made and statute law woven into a seamless whole by the processes of adjudication."[176] This is the tradition from which the modernization approach is drawn.

B. Ought Implies Can

Superficially, the modernization approach might seem to resemble most closely Alexander Bickel's argument that the Supreme Court should use the "passive virtues" (a denial of certiorari, prosaically, or a more questionable manipulation of a rule of justiciability, or a deliberately narrow holding) to delay the enforcement of constitutional principles until popular support develops behind them.[177] But the resemblance is only superficial, and the difference ultimately may reveal the most troubling aspect of modernization.

The use of "passive virtues" shares with modernization, obviously, a sensitivity to the risk that the political branches will resist the courts' decisions and a willingness by the Court to modify its actions in response to that resistance. But for Bickel, the principles that the Court develops have their source in tradition; the Court must then, as a matter of practical necessity, retreat from those principles (not in name but in fact) in order to fight another day.[178]

The modernization approach, one might say, makes a virtue out of what Bickel, and others like him,[179] viewed as an unfortunate necessity. For Bickel, there is a potential tension, sometimes severe, between the principles that the courts propound, on the one hand, and popular opinion, on the other.[180] On the modernization approach, there is no such tension: the principles themselves are rooted in an estimation of

subject to legislative reenactment—if the court believes the statute is lacking in popular support or is otherwise inconsistent with the larger fabric of the law).

176 Harlan F. Stone, *The Common Law in the United States*, 50 Harv L Rev 4, 12–13 (1936) (suggesting that a statute should not always be treated as a command to be obeyed literally, but rather as a "recognition of policy" to be regarded by the courts as "a social datum or as a point of departure for the process of judicial reasoning"), quoted in Peter L. Strauss, *On Resegregating the Worlds of Statute and Common Law*, 1994 S Ct Rev 429, 431 (discussing the cooperation between the courts and administrative agencies in the New Deal era).

177 See Bickel, *The Least Dangerous Branch* at 111–98 (cited in note 1).

178 See id at 127–28.

179 See, for example, Philip P. Frickey, *Getting from Joe to Gene (McCarthy): The Avoidance Canon, Legal Process Theory, and Narrowing Statutory Interpretation in the Early Warren Court*, 93 Cal L Rev 397, 401–03 (2005).

180 See Bickel, *The Least Dangerous Branch* at 27–28 (cited in note 1).

how popular opinion is developing. They do not have a source in tradition or something of that kind, as they do for Bickel.

For that reason, under the modernization approach, the accommodation to popular resistance is not—as it is for Bickel—an essentially unprincipled, *sub rosa* retreat from the optimal, principled regime: for a modernizer, the accommodation *is* the principled regime. The governing idea of the modernization view is that statutes are unconstitutional just because, and to the extent that, they do not reflect true popular sentiment. If it turns out that the Court has miscalculated, and the statutes do reflect popular sentiment, then the principled thing to do is to change course.

The difference between the Bickel view and modernization can be seen in something that Justice Felix Frankfurter, one of Bickel's heroes, said at oral argument in the *Brown* case, and that Bickel cited repeatedly: "Nothing could be worse from my point of view than for this Court to make an abstract declaration that segregation is bad and then have it evaded by tricks."[181] Bickel added: "There is much that could be worse than one such declaration, but nothing indeed could be worse than many."[182] Obviously it would be a bad thing for segregation to be maintained by "tricks," but Frankfurter's and Bickel's concern was not so much with that as with the spectacle of having the Court back down in the face of popular opposition—"nothing could be worse." That idea is antithetical to modernization. For a modernizer, for the Court to learn that its decisions do not have sufficient support is not the worst thing that can happen; it is more like business as usual.

C. Self-validation, Self-nullification, and the Problem of Judicial Abdication

Even if a modernizing approach reflects a plausible conception of the judicial role, there are good reasons to criticize it. A Supreme Court decision invalidating a statute can itself have an effect on the political process. For that reason, a modernizing decision might be, to a degree, either self-validating or self-nullifying.

It can be self-validating by giving one side in a political debate—the side favored by the Court—an advantage. The advantage might be the ability to claim that an attack on its position is an attack on the

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181 See, for example, Alexander M. Bickel, *The Supreme Court and the Idea of Progress* 6, 95 (Yale 1978), quoting *Arguments before the Court: Racial Segregation*, 21 US L Wk 3161, 3164 (BNA 1952).

182 Bickel, *The Supreme Court* at 95 (cited in note 181) ("[The Court] can better suffer the kind of withdrawal that consists of not going forward than the kind that consists of visibly retreating.").

legitimacy of the courts or, indeed, an attack on the Constitution. *Brown* may have given such an advantage to the civil rights movement; after *Brown*, the supporters of school desegregation and of civil rights laws generally were able to claim that the Constitution was on their side. In that way, a decision that tries to anticipate trends in legislation might end up producing those trends. Alternatively, or in addition, a "modernizing" decision might give one side to a political debate the advantage of holding an entitlement that must be taken away, instead of just an aspiration for change. This may have happened in the case of *Roe* and the right to an abortion. After *Roe*, the debate was cast not as whether women should have the right to abortion but as whether they can be deprived of that right. Such a reframing of the political debate can confer an important advantage on the side that is now defending the status quo.

On the other hand, a modernizing decision might be self-nullifying. That can happen because a judicial decision might make an issue more salient than it otherwise would be. Legislative modernization might take place quietly, in a way that does not arouse much opposition. But a judicial decision that tries to accelerate the trend may be more visible. The decision will then serve as a rallying point for political opposition, which has the additional advantage of being able to say that it is attacking an undemocratic decision by judges. This also seemed to happen after *Roe*, and indeed there is a much-debated question whether *Roe* advanced or hindered the cause of reproductive rights.

Self-validation and self-nullification are defects in the modernizing approach in the sense that they can lead to decisions that are erroneous when judged by the standard of modernization itself. Courts may succeed in striking down laws that were in fact not obsolete, if the decision validates itself. Alternatively, if the modernizing decision produces a backlash, the decision may cause a law to be revived when it might have died out of its own accord had the courts stayed out of the picture. Moreover, and partly because a decision can have these effects on the political process, the modernizing approach is subject to manipulation. Opponents of a certain kind of law might adopt a strategy of seeking to make the law seem obsolete. This may have been part of the strategy of death penalty opponents in the years leading up to the decision in *Furman*. Knowing that they could not get most capital punishment statutes repealed, they concentrated their efforts on

obtaining stays of executions,[183] so that they could then argue (among other things) that popular support for capital punishment in practice was waning—thus inducing a modernizing decision—when in fact popular support was not. That is, at least, a possible scenario, and it suggests a way in which the modernizing approach might distort political debate, in addition to being defective in its own terms.

But there is, I believe, a much deeper problem of modernization that is, in a sense, the opposite of the seemingly more obvious problem of judicial competence—of the courts' presuming to do the political branches' job. The problem is that the courts may be too ready to yield to the political process and may therefore fail to vindicate principles that courts, and courts alone, are well suited to enforce. The two most famous decisions of the last century, *Roe v Wade* and *Brown v Board of Education*, illustrate the point.

1. Abortion.

Abortion is, of course, by far the most controversial area of modern substantive due process. It illustrates the strengths—at least the potential strengths—of the modernizing approach, as well as arguably the greatest weaknesses. At the time of *Roe*, there was a trend toward liberalizing abortion laws in the United States. A few states had recently legalized abortion generally; others had relaxed restrictions, enacting laws that allowed abortions in cases where the physical or mental health of the mother was in jeopardy—a standard that, depending on how it was enforced, could allow abortion relatively freely.[184] The Texas statute that was invalidated in *Roe* permitted abortions only to save the life of the mother.[185] It was, therefore, arguably inconsistent with an "emerging awareness"—not to the extent that the statute in *Lawrence* was, but still to some degree.

In these circumstances, the Court in *Roe* could have written a relatively narrow, modernizing opinion, as it did in *Lawrence*. That is, it could have invalidated the Texas statute as excessively restrictive, basing its decision in part on the general trend toward liberalization. That approach would have left intact the abortion laws of many states. Such an approach would have been roughly congruent with what the Court did in *Griswold*, and with what it subsequently did in *Moore*, as well as

183 See Franklin E. Zimring and Gordon Hawkins, *Capital Punishment and the American Agenda* 33–34 (CUP Archive 1989).

184 *Roe*, 410 US at 140 & n 37 (pointing to fourteen states that had liberalized their abortion statutes).

185 Id at 119.

in *Lawrence*—significantly more intrusive than those decisions, but in degree rather than in kind.

Such a result in *Roe* would have been less controversial, and it could have been the first step toward a gradual expansion of the right to an abortion. Over time that gradual expansion of the judicially created constitutional right might have evolved together with the legislative liberalization of the laws to produce a result something like what *Roe* tried to produce all at once. This alternative approach would have taken longer, but it would have been more democratic and therefore potentially more stable, and it would have produced a less polarized and religiously inflected politics on a variety of issues. Or at least so it has been argued, by a number of people who support the right to abortion in general terms but criticize the Court for not taking this more gradual approach in *Roe*[186]—an approach that would have been more consistent with the modernization paradigm.

The opinion the Court did write—which, of course, invalidated abortion laws much more sweepingly—is still best seen as an exercise in modernization. Indeed that may be one of the most satisfactory justifications for *Roe*. It is difficult to make a case that there was a traditional right to obtain an abortion. The right to control one's bodily integrity, reproductive capacity, and family composition do have some basis in tradition and the common law, and in constitutional precedents like *Griswold*, *Eisenstadt*, and (now) *Moore* and *Lawrence*. The problem comes in explaining why the state's interest in protecting fetal life did not override those rights; tradition (and, for that matter, moral reasoning) seems to be of little help on this point. But the core idea of modernization—that the trend in the nation as a whole was toward allowing the abortion decision to be made by individual women—would have provided some basis for the decision in *Roe*, and that trend undoubtedly influenced the Court. The more general trend toward a change in the status of women, which underlay the modernizing decisions about sex classifications, also must have played some role in the decision.

Roe did not appear to leave an opening for the legislature to revitalize abortion laws, as the modernization approach would require. But that appearance was misleading: the final confirmation that the abortion decisions were modernizing decisions lies in the Supreme Court's response to the determined and protracted political campaign

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186 See, for example, Ruth Bader Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to* Roe v. Wade, 63 NC L Rev 375, 382 (1985).

against *Roe*. In *Planned Parenthood of Southeastern Pennsylvania v Casey*,[187] the Court reaffirmed what it characterized as "the essential holding of *Roe v. Wade*," which it described as the right to have a previability abortion free of any "undue burden" imposed by the state.[188] But the "undue burden" standard is obviously vague, and in a series of decisions, including *Casey* itself, the Court accommodated the political reaction to *Roe* by accepting a number of restrictions on the abortion right. The Court allowed the states to impose a twenty-four hour waiting period; to require women seeking abortions to undergo mandatory pre-abortion counseling, which could be explicitly designed to discourage them from having an abortion; to require minors to obtain parental consent, unless there were special reasons justifying an exception; and to impose relatively burdensome recordkeeping requirements on abortion providers.[189] Perhaps most important, the Court upheld statutes that forbade the use of Medicaid funds for most abortions.[190] The net effect was to make it significantly more difficult for many women to obtain abortions.[191]

If one were to judge the Court's abortion rulings as an exercise in modernization, one might say that, overall, the Court was successful, even though it made things unnecessarily difficult for itself along the way. Had the Court begun with a narrower holding in *Roe*, it might have succeeded in bringing about the modernization of many states' abortion laws. The landscape might look much the same as it does today, without all the storm and stress and political fallout that accompanied the battles over *Roe*. But if the Court's objective was to broker a political compromise about abortion that more or less reflected national sentiment, then a plausible case can be made that the Court has, at this point, succeeded in doing so.

But that conclusion, if it is right, reveals what is arguably one of the great weaknesses of the modernization approach—that it makes the courts too willing to accede to political pressure. Of course this view will be held by someone who believes that the Court should have

187 505 US 833 (1992).

188 Id at 845–46, 876.

189 See id at 881–901. See also *Webster v Reproductive Health Services*, 492 US 490, 509–10 (1989) (holding that a ban on certain abortions in public facilities did not violate the Constitution); *Gonzales v Carhart*, 127 S Ct 1610, 1619 (2007) (upholding an act proscribing certain abortion methods).

190 See *Harris v McRae*, 448 US 297, 326 (1980); *Maher v Roe*, 432 US 464, 480 (1977).

191 See Gerald N. Rosenberg, *The Hollow Hope: Can Courts Bring about Social Change?* 173–267 (Chicago 2d ed 2008) (describing the limited effect of the Supreme Court's abortion decisions on the increased availability of abortion).

unequivocally vindicated the right to abortion in all respects. But even on a more modest view of the judicial role in constitutional cases, modernization, in this setting, may have turned out wrong. It led the Supreme Court to do essentially the opposite of what it should have done.

Specifically, the combination of *Roe* and the Medicaid abortion cases—according to this line of criticism—had the overall effect of making abortion more freely available to relatively well-off women, without making it available to many women who are already disadvantaged—women who are poor, young, undereducated, and living outside of urban areas. Because relatively powerful groups in society have an effective right to abortion, the pressure to expand the right further has been muted. At the same time, abortion opponents have been appeased at the expense of the relatively powerless.

What the Court should have done, on this account, is to allow the political process to make the decision about the degree to which abortion laws would be liberalized; but the Court should have insisted that any such reform make abortion equally available, or equally unavailable, to the rich and poor alike. That way, the political pressure that relatively well-off individuals would have exerted to reform the abortion laws would have benefited the disadvantaged as well. According to this line of argument, the Court should have made abortion not a "fundamental right," as it did, but instead a "fundamental interest" in the sense in which that term was used in a series of decisions, principally in the 1960s. In those cases, a "fundamental interest" was a benefit that a state did not have to provide at all (such as the right to vote in certain elections, or a right to appeal in a criminal case); but if a state did provide that benefit, it had to provide it equally to all, unless it could show an extraordinary justification for making a distinction.[192]

Had the Court taken that route with the abortion cases, it would not have been modernizing. It would have been adopting a different role—a role suggested by Justice Robert Jackson's celebrated concurring opinion in *Railway Express Agency v New York*[193] and also by the theory,

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192 For an overview, see Geoffrey R. Stone, et al, *Constitutional Law* 768–844 (Aspen 5th ed 2005). On voting, see, for example, *Kramer v Union Free School District No 15*, 395 US 621, 622 (1969) (holding that a New York education law violated equal protection where it only granted certain groups of individuals the right to vote in a school district election). On criminal appeals, see, for example, *Douglas v California*, 372 US 353, 357–58 (1963) ("[W]here the merits of the one and only appeal an indigent has as of right are decided without benefit of counsel, we think an unconstitutional line has been drawn between rich and poor.").

193 See 336 US 106, 112–13 (1949) (Jackson concurring):

> [T]here is no more effective practical guaranty against arbitrary and unreasonable government than to require that the principles of law which officials would impose upon a minori-

associated with *Carolene Products*, that the courts should intervene to protect those groups who are undeservedly powerless in the democratic arena. On this account, modernization is best left to the political branches; they will eventually be able to modernize statutes without the courts' help. The courts should do things that the political branches cannot do, such as protecting the politically powerless. There are, of course, problems with this conception of judicial review as well. But what this criticism of modernization does suggest is that the problem with today's modernizing substantive due process is, in a sense, the opposite of the problem with pre–New Deal substantive due process. Where the *Lochner*-era courts were too rigid and unforgiving in their confrontations with the political branches, modern substantive due process—that is, modernizing substantive due process—may be too flexible and too willing to accommodate.

2. School Desegregation.

Perhaps the merits and demerits of modernization are best illustrated by the most celebrated modernizing decision of all, *Brown v Board of Education*. *Brown* was not explicitly a modernizing decision, and the leading justifications of *Brown* do not portray it as modernizing. Rather they refer to principles of equality and to the courts' role in protecting minorities. But there is evidence that the justices were strongly affected by the view—common among elites at the time—that segregation was an anachronism. A national consensus against segregation had been building for a generation.[194] Other decisions that were not explicitly about race—the line of cases that constitutionalized, and reformed, criminal procedure in the states, for example—were in significant part efforts to modernize biased and backward state criminal justice systems. The most famous criminal procedure decision, *Miranda v Arizona*,[195] self-consciously chose what the Court considered a more advanced interrogation protocol—modeled on the one used by the FBI—and also, following the modernization paradigm, invited a legislative response. And, of course, that aspect of modernization—a sensi-

ty must be imposed generally. Conversely, nothing opens the door to arbitrary action so effectively as to allow those officials to pick and choose only a few to whom they will apply legislation and thus to escape the political retribution that might be visited upon them if larger numbers were affected.

194 The definitive account of the background and aftermath of *Brown*, and particularly of the tension between distinctively legal and more "political" considerations, is Klarman, *From Jim Crow to Civil Rights* at 290–343 (cited in note 160).

195 384 US 436 (1966).

tivity to the political reaction—was part of *Brown* as well. The Court at the time was intensely aware of the political reaction to *Brown* and tailored its subsequent decisions accordingly. Most famously, the second *Brown* decision allowed desegregation to be undertaken with "all deliberate speed,"[196] and the Court evaded a decision on the constitutionality of antimiscegenation laws until 1967.[197]

The various views that critics and admirers have expressed about *Brown* can be seen as comments on modernization as an approach to judicial review more generally. Did the Court, astutely deciding not to overplay its hand, accomplish as much as was politically possible at the time? Or did the Court, too sensitive to political currents and not determined enough to enforce principle, back off too quickly? The question whether the Court gave too much ground in the second *Brown* decision identifies the unobvious problem with modernization: that a court, too eager to anticipate public opinion, may overestimate the extent to which it needs to retreat, and that judicial decisions will become too attuned to politics instead of implementing principles that courts are better suited to enforce, compared to the political branches.

The issue posed by modernization is not whether the courts can operate in isolation from larger political currents. In some sense they obviously cannot in the long run. This finding is a staple of political scientists' analysis of the Supreme Court.[198] Modernization has the virtue of not requiring something from the courts—such as prolonged resistance to strongly and widely held views—that the courts are unlikely ever to be able to deliver.

But it does not follow that judges and justices should anticipate the movement of public opinion and align their decisions accordingly. Many of the political forces that limit the courts will operate without the judges' conscious cooperation: only certain kinds of people will be appointed to the courts; only certain legal outcomes will present themselves as realistic possibilities; the pressure of public opinion will make certain arguments more persuasive even if judges do not deliberately defer to public opinion. The fact that the courts will inevitably conform to public opinion to a substantial degree might even be a reason for judges consciously to resist the tendency to do so. Otherwise they may

196 See *Brown*, 349 US at 301.

197 See *Naim v Naim*, 350 US 891, 891 (1956) (per curiam); *Loving v Virginia*, 388 US 1, 12 (1967).

198 For the classic statement, see Robert A. Dahl, *Decision-making in a Democracy: The Supreme Court As a National Policy-maker*, 6 J Pub L 279, 279–81 (1957). See also, for example, Barry Friedman, *Dialogue and Judicial Review*, 91 Mich L Rev 577, 578–648 (1993) ("Like all the other segments of society, courts simply are, *and will remain*, participants in American political life.").

not be able to play an important role that no other branch is as well equipped to play. In the end, that risk of judicial abdication of the proper role—rather than judicial overreaching into the political realm—is the greater danger of modernization.

CONCLUSION

The conventional understanding of judicial review is that the courts should identify and enforce principles that are derived from the text of the Constitution, interpreted in light of tradition, or history, or moral philosophy, or the enduring values of American civilization or the deep wisdom of the People—sources outside of, and above, ordinary politics. Courts do this because the ordinary political processes fail in some systematic ways that the courts can correct—they fail to protect certain kinds of minorities, for example—and the courts can overcome these failures to a degree by insisting on principles that resist the decisions made by the political branches. At times these principles may have to be compromised because political realities make it impossible to enforce them, but that is an aberrational and temporary state of affairs.

The modernizing approach to judicial review is at a far remove from this theory. On a modernizing approach, the principles that the courts enforce come from, or at least must be reconciled with, the outcomes of ordinary political processes. Those principles must be defended as an anticipation of the direction in which the political process is moving. Constitutional doctrine, according to the modernization paradigm, should be accommodated to political realities not as a matter of unfortunate necessity and unprincipled expediency but because that is precisely how constitutional doctrine should develop.

Seen in this light, modernization is a relatively restrained and modest approach to judicial review. It acknowledges the ultimate supremacy of the democratic process and does not claim that there are supervening principles of law derived from some other source. It minimizes the risk that a judge will, in Justice Benjamin Cardozo's phrase, act like a knight-errant, alone on a misguided mission to attack injustice;[199] anything a court does, on the modernizing view, must eventually be connected back to the democratic process.

The modernization approach also has a plausible answer to the question of why the attitudes of the demographically exceptional elites who occupy seats on the courts should play such a large role in resolving important social issues—perhaps a better answer than any

[199] See Benjamin N. Cardozo, *The Nature of the Judicial Process* 141 (Yale 1921).

other theory that authorizes judicial review. The modernization approach does allow an elite to move the law in the direction it considers better—against capital punishment, in favor of women's equality and abortion rights, in favor of rights for gays and lesbians. But, on the modernization approach, any effort to move the law in that direction must be justified as an anticipation of how democratic politics is evolving. If it cannot be so justified, it is not a legitimate movement. And then the courts must be prepared to retreat if they turn out to be wrong in their estimate of how popular sentiment is evolving. It is, of course, not obvious that elite opinion should play this kind of role in a democracy; a modernizing court, by shifting the burden of legislative inertia, will often change the outcomes that would otherwise have been produced. But the underlying premise of the modernization approach to judicial review is that many political outcomes are (and, arguably, should be) the result of a combination of popular sentiment and elite opinion.

A modernizing approach to judicial review can coexist with the enforcement of principles that have a source outside of democratic politics. In fact the two coexist in our system today. In some areas, the courts do not play a modernizing role; the First Amendment seems to be a relatively clear example. In that area, the courts have identified a role for themselves and a set of principles that they will enforce. But in the substantive due process cases, and in other areas as well, the courts do not seem to have identified a role, or a set of principles, that separates them from the political processes. The result is a doctrine built around modernization, with the advantages and disadvantages of that approach.

But the progression of the abortion cases after *Roe*, and perhaps of the desegregation cases after *Brown*, raises a basic question about modernization. Perhaps modernization prescribes a too-quick, or at least too-complete, judicial acquiescence in the democratic process. There may be ways for the courts to shape political outcomes, without assuming the implausible role of the heroic judge who holds out against prolonged public outrage. Something closer to the *Carolene Products* approach—which, unlike modernization, identifies the protection of certain minorities as a central feature of the judicial role—would be a path of greater resistance for the courts. But it would also provide a satisfactory way of reconciling judicial review with democracy; it would better explain why the courts are in that business at all; and it would address a genuine problem, which the modernization approach, quite possibly, does not. The real question about modernization is whether the proper function of judicial review is to try to correct, rather than simply to facilitate, the operations of democracy.

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