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INTRODUCTION

Sometimes there's an interesting mismatch between what a case is about and what it comes to stand for. Think about the case that appears most frequently in U.S. Reports, *United States v. Detroit Lumber Co.*[1] The question presented was whether respondent's title to various timber lands should be set aside because the parties from whom it purchased the land had acquired it in violation of the Timber Act of June 3, 1878.[2] But the case gets cited for an important transsubstantive proposition: that the syllabus at the beginning of a Supreme Court decision "constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader."[3] Or, more famously, consider *United States v. Carolene Products Co.*[4] The immediate issue was the constitutionality of the Filled Milk Act of 1923.[5] But the case has legs because of its famous footnote 4,[6] which serves as a cornerstone for contemporary justifications of judicial review.[7]

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1. 200 U.S. 321 (1906). Justice Ginsburg describes *Detroit Lumber* as "the most frequent citation in all of U.S. Reports, running far ahead of Marbury v. Madison or Gibbons v. Ogden." Ruth Bader Ginsburg, *Communicating and Commenting on the Court's Work*, 83 GEO. L.J. 2119, 2120 (1995).

2. 20 Stat. 89 (1878).

3. The precise boilerplate that appears at the beginning of each syllabus states: "The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. *See* United States v. Detroit Lumber Co., 200 U.S. 321, 337." The actual statement from *Detroit Lumber* is that "the headnote is not the work of the court, nor does it state its decision—though a different rule, it is true, is prescribed by statute in some States. It is simply the work of the reporter, gives his understanding of the decision, and is prepared for the convenience of the profession in the examination of the reports." By contrast, in Ohio, only the syllabus (and not the succeeding opinion) constitutes the law of the case. *See* Ohio Supreme Court Rules for the Reporting of Opinions Rule 1(B)(1) ("The syllabus of a Supreme Court opinion states the controlling point or points of law decided in and necessarily arising from the facts of the specific case before the Court for adjudication."); Thackery v. Helfrich, 123 Ohio St. 334, 336 (1931) (stating: "This court . . . announces the law only through the syllabi of cases and through per curiam opinions. Individual opinions speak the conclusions of their writer. What useful purpose they serve is an open question."); *see also* Ginsburg, *supra* note 1, at 2120-21 (discussing the Ohio rule).

4. 304 U.S. 144 (1938).

5. 21 U.S.C. §§ 61-63 (1994).

6. 304 U.S. at 152-53 n.4. Footnote 4 identified types of legislation that might not enjoy the normal presumption of constitutionality: a statute that "appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments," a law that "restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation," or a statute that targets "discrete and

This essay's starting point is a third such case, *Railway Express Agency v. New York*.[8] That case concerned a New York City traffic regulation that forbade motor vehicles from displaying advertising on their sides unless the advertisement was for the owner's business.[9] The Court unanimously upheld the regulation against both due process and equal protection attacks.[10] The majority opinion is not particularly interesting, except as an example of just how toothless rationality review can be. The real importance of the case lies in Justice Jackson's concurrence, which advanced a powerful vision of the relationship between due process and equal protection:

> The framers of the Constitution knew, and we should not forget today, that there is no more effective practical guaranty against arbitrary and unreasonable government than to require that the principles of law which officials would impose upon a minority must be imposed generally. Conversely, nothing opens the door to arbitrary action so effectively as to allow those officials to pick and choose only a few to whom they will apply legislation and thus to escape the political retribution that might be visited upon them if larger numbers were affected. Courts can take no better measure to assure that laws will be just than to require that laws be equal in operation.[11]

In this essay, I extend Justice Jackson's observation by suggesting that the relationship between equality and liberty, and more specifically, between the equal protection and due process clauses, is in fact bi-directional. Like the two hands that emerge from the sheet of paper to draw one another in M.C. Escher's famous 1948 lithograph, *Drawing Hands*,[12] the ideas of equality and liberty expressed in the equal protection and due process clauses each emerge from and reinforce the other. More concretely, this essay suggests that sometimes looking at an issue stereoscopically—through the lenses of both the due process clause and the equal protection clause—can have synergistic effects, producing results that neither clause might reach by itself.

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insular minorities" as to whom prejudice might tend "seriously to curtail the operation of those political processes ordinarily to be relied upon. . . ."

7. *See, e.g.*, JOHN HART ELY, DEMOCRACY AND DISTRUST (1980); Robert M. Cover, *The Origins of Judicial Activism in the Protection of Minorities*, 91 YALE L.J. 1287 (1982). In contrast to *Detroit Lumber*, which has occasioned no scholarship regarding the original decision, there has been provocative scholarship about the question directly addressed in *Carolene Products*. *See* Geoffrey P. Miller, *The True Story of* Carolene Products, 1987 SUP. CT. REV. 397.

8. 336 U.S. 106 (1949).

9. *See id.* at 108 n.2. Railway Express was a nationwide trucking and delivery service. It wanted to display advertisements on the sides of its trucks for such concerns as Camel Cigarettes, Ringling Brothers and Barnum & Bailey Circus, and the United States Navy.

10. *Id.* at 109-10.

11. *Id.* at 112-13 (Jackson, J., concurring).

12. For a copy of this lithograph, see http://www.worldofescher.com/gallery/DrawingHands.html.

It is worth locating this claim within the voluminous case law and rich scholarship about due process and equal protection. The existing discussion has done a fairly comprehensive job of laying out the possible relationships between the two clauses.[13] At one end of the spectrum lies cases that seem to treat the clauses as virtually fungible—different verbal formulations that produce essentially identical results. In this vein, consider *Brown v. Board of Education*[14] and *Bolling v. Sharpe*[15] in which, on the same day, the Supreme Court located the prohibition on de jure segregation of public schools in the equal protection clause of the Fourteenth Amendment (for locally run school systems) and the due process clause of the Fifth (for the federally run school system in Washington, D.C.). Or consider *Gideon v. Wainwright*[16] and *Douglas v. California*[17] in which, also on the same day, the Supreme Court announced that the due process clause requires states to provide indigent criminal defendants with lawyers at trial and that the equal protection clause requires states to provide lawyers on criminal appeals as of right. A powerful strand of scholarship provides a theoretical underpinning for this approach. For example, both Kenneth Karst and Charles Black read the various clauses of section one of the Fourteenth Amendment to provide an integrated notion of citizenship and equal dignity before the law that embraces notions of both liberty and equality.[18] At its logical extreme, though, this approach might treat one or the other clause as surplusage, since the decisional law would look the same even in its absence. The two clauses become, rather than inform, one another.

The other strand of the existing work on due process and equal protection stresses the differences between the two clauses. In his thought-provoking article, Ira Lupu argues that the two clauses are aimed at distinct problems to begin with.[19] But even those scholars who see the clauses as serving a single overarching commitment tend, at the level of strategy or tactics, to emphasize distinctions. Thus, for example, Professor Karst echoes Justice Jackson in seeing the equal protection clause as a more dialogic approach to regulation of the political branches: "invalidating a law on an equal protection ground leaves room

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13. For examples of scholarship that I have found particularly helpful in thinking through my own position, see William N. Eskridge, Jr., *Destabilizing Due Process and Evolutive Equal Protection*, 47 UCLA L. REV. 1183 (2000); James A. Gardner, *Liberty, Community, and the Constitutional Structure of Political Influence: A Reconsideration of the Right to Vote*, 145 U. PA. L. REV. 893 (1997); Kenneth L. Karst, *Foreword: Equal Citizenship Under the Fourteenth Amendment*, 91 HARV. L. REV. 1 (1977); Ira C. Lupu, *Untangling the Strands of the Fourteenth Amendment*, 77 MICH. L. REV. 981 (1979); Cass R. Sunstein, *Sexual Orientation and the Constitution: A Note on the Relationship Between Due Process and Equal Protection*, 55 U. CHI. L. REV. 1161 (1988); David A. Strauss, *Discriminatory Intent and the Taming of* Brown, 56 U. CHI. L. REV. 935 (1989).

14. 347 U.S. 483 (1954).

15. 347 U.S. 497 (1954).

16. 372 U.S. 335 (1963).

17. 372 U.S. 353 (1963).

18. CHARLES L. BLACK, JR., STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW (1969); Karst, *supra* note 13.

19. *See* Lupu, *supra* note 13 (describing the distinctions between the two clauses).

for the legislature to maneuver," while striking it down as a violation of substantive due process may foreclose regulation altogether.[20] More recently, Cass Sunstein argues that the due process clause is backward-looking and relies on tradition to safeguard individuals "against novel developments brought about by temporary majorities who are insufficiently sensitive to the claims of history," while the equal protection clause is forward-looking and serves to "invalidate practices that were widespread at the time of its ratification and that were expected to endure."[21] And Bill Eskridge, in the course of disputing Sunstein's characterization, describes a sequential relationship between the two clauses in which the due process clause (particularly in its more procedural aspects) often serves as a better opening wedge in a campaign to obtain full equality:

> [The due process clause] offers marginalized Americans multiple points of challenge to traditional exclusionary and persecutory state practices at the retail level, which is complemented by an evolutive equal protection that offers such groups the possibility that, if traditional norms against them weaken, the judiciary will force the political process to clean up remaining exclusionary policies on a wholesale level.[22]

Although much of the existing scholarship assumes, at least as a theoretical matter, that "[t]he rhetorics of rights and equality do not pose an 'either-or' choice [and that] both are needed in the defense of constitutional values,"[23] it does not really apply that principle to concrete cases. Instead, it usually argues that a court faced with a constitutional challenge should apply one clause rather than the other, either because the claim is intrinsically better addressed under one rubric[24] or because, as a tactical matter, precedent forecloses resort to the other clause.[25]

This essay challenges the conventional approach by asking about the potential effects of bringing both clauses to bear simultaneously. I begin with two

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20. Kenneth L. Karst, *Why Equality Matters*, 17 GA. L. REV. 245, 281 (1983).

21. Sunstein, *supra* note 13, at 1163.

22. Eskridge, *supra* note 13, at 1186.

23. Karst, *supra* note 20, at 284.

24. In this vein, *compare, e.g.*, Ruth Bader Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to* Roe v. Wade, 63 N.C. L. REV. 375 (1985) (arguing that the Supreme Court should have used the equal protection clause, rather than the due process clause, to strike down restrictions on a woman's ability to obtain an abortion), *with* Lupu, *supra* note 13 (arguing that the due process clause generally provides a more appropriate basis for the cases decided by the Warren and early Burger Courts as matters of substantive equal protection).

25. This seems to be the basis for Cass Sunstein's arguments about using the equal protection clause to circumvent the Supreme Court's rejection of a substantive due process claim in *Bowers v. Hardwick*, 478 U.S. 186 (1986). *See* Sunstein, *supra* note 13; Cass R. Sunstein, *Foreword: Leaving Things Undecided*, 110 HARV. L. REV. 4, 64-66 (1996) (discussing the Court's disregard of *Bowers* in its equal protection decision in *Romer v. Evans*). More broadly, as I explain *infra*, text accompanying notes 29-35, the substantive equal protection cases of the late Warren Court are really substantive due process cases in drag; the Court chose to characterize these fundamental rights cases as equal protection cases to avoid invoking a clause that was in bad odor because of the Lochner-era decisions.

cases where the Court viewed the issue stereoscopically. *Harper v. State Board of Elections*[26] shows how this approach can trigger doctrinal development—in that case, the articulation of a heightened standard of review for cases involving restrictions on the franchise. *M.L.B. v. S.L.J.*,[27] by contrast, reflects a doctrinal area—the access of indigent litigants to the courts—in which the Court's jurisprudence remains anchored in simultaneous reliance on principles of due process and equal protection because fundamental rights analysis can provide a limiting principle for claims of equality.

I then turn to two cases where the Court failed to view the issue before it stereoscopically. In *Romer v. Evans*,[28] recognizing the liberty interests at stake would have put the Court's equal protection decision on a firmer footing, by providing a conceptual underpinning for the holding that singling out gays, lesbians, and bisexuals constituted impermissible animus, rather than a legitimate distinction.[29] By contrast, in *Bush v. Gore*,[30] the Court's failure to see the due process-based dimensions of the right to vote blinded it to two fatal flaws in its equal protection analysis of the Florida recount.

I. HARPER V. STATE BOARD OF ELECTIONS AND DOCTRINAL INNOVATION

In 1875, the Supreme Court unanimously declared that "the Constitution of the United States does not confer the right of suffrage upon any one."[31] Over the next ninety years, the Supreme Court nonetheless did strike down a number of different restrictions on the franchise,[32] but virtually all these restrictions involved intentional discrimination on the basis of race, and whether the Court specifically invoked the Fifteenth Amendment or not, that Amendment's prohibition on

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26. 383 U.S. 663 (1966).

27. 519 U.S. 102 (1996).

28. 517 U.S. 620 (1996).

29. Justice Jackson's concurrence itself explains the fundamental weakness of the Court's failure to address the equal protection claim in *Bowers v. Hardwick*, the predecessor to *Romer v. Evans*. Justice White's opinion for the Court recast the Georgia statute at issue so that it applied only to gays and lesbians before it upheld the law against a due process challenge. This suggests that the Court would have been unwilling to uphold the statute if it applied to everyone, rather than only to a minority.

30. 531 U.S. 98 (2000).

31. Minor v. Happersett, 88 U.S. 162, 178 (1875). *Minor* was a case challenging the refusal to extend the right to vote to women. The plaintiff brought her claim under the privileges and immunities clause of the Fourteenth Amendment. As I suggested earlier in discussing the tactical dimension of the choice among Fourteenth Amendment provisions, *Minor*'s foreclosure of the privileges and immunities clause may be one of the engines driving the Warren court's resort to the equal protection clause as the guarantor of voting rights. For a recent discussion of the possibility of treating the right to vote as a privilege or immunity of citizenship, see Peter M. Shane, *Disappearing Democracy: How* Bush v. Gore *Undermined the Federal Right to Vote for Presidential Electors*, 29 FL. ST. UNIV. L. REV. 535 (2001); *see also* Pamela S. Karlan, *Unduly Partial: The Supreme Court and the Fourteenth Amendment in* Bush v. Gore, 29 FL. ST. UNIV. L. REV. 587 (2001) (explaining why I disagree with Shane).

32. For discussion of those cases, see SAMUEL ISSACHAROFF, PAMELA S. KARLAN & RICHARD H. PILDES, THE LAW OF DEMOCRACY: LEGAL STRUCTURE OF THE POLITICAL PROCESS 90-129 (rev. 2d ed. 2001).

denying or abridging the right to vote on account of race heavily informed the Court's decisions.

When it came to other sorts of restrictions on the franchise, the Supreme Court upheld them when it could formulate "some relation" to a permissible governmental purpose, such as ensuring a well-informed electorate or collecting revenue.[33] But in *Harper*, the Court struck down Virginia's imposition of a poll tax as a prerequisite for voting in state elections[34] as a violation of the equal protection clause.

Although Chief Justice Warren's opinion for the Court made some feints in the direction of asserting that there was no rational basis for imposing a poll tax,[35] the Court, in fact, employed a different and more demanding level of scrutiny.[36] The opinion offered two distinct reasons for its conclusion that restrictions on the franchise should be subjected to more searching review. First, it described the right to vote as "a fundamental matter in a free and democratic society."[37] Thus, "any alleged infringement . . . must be carefully and meticulously scrutinized."[38] Second, it declared that "[l]ines drawn on the basis of wealth or property, like

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33. *See* Lassiter v. Northampton County Bd. of Elections, 360 U.S. 45, 51-52 (1959) (emphasis added) (upholding a literacy test because "[t]he ability to read and write likewise has *some relation* to standards designed to promote intelligent use of the ballot"). For other examples of this lenient approach, *see, e.g.*, Breedlove v. Suttles, 302 U.S. 277, 283 (1937) (upholding Georgia's imposition of a poll tax and observing that "[e]xaction of payment before registration undoubtedly serves to aid collection [of the tax] from electors desiring to vote" and that "use of the State's power is not prevented by the Federal Constitution"); Pope v. Williams, 193 U.S. 621, 632-34 (1904) (upholding lengthy durational residency requirements and stating that the "right of a State to legislate upon the subject of the elective franchise as to it may seem good" is "unassailable" as long as the state does not discriminate on the basis of race, color, or previous condition of servitude in violation of the Fifteenth Amendment).

34. The Twenty-fourth Amendment, ratified in 1964, forbid conditioning the right to vote in elections for federal office on payment of "any poll tax or other tax." U.S. CONST. amend. XXIV, § 1. And only a year before *Harper*, in *Harman v. Forssenius*, 380 U.S. 528 (1965), the Supreme Court struck down Virginia's attempt to circumvent the Twenty-fourth Amendment by imposing a certificate of residency requirement on citizens who sought to register without paying the commonwealth's poll tax. In the course of that decision, the Court discussed the origins of Virginia's poll tax, stating that "[t]he Virginia poll tax was born of a desire to disenfranchise the Negro." *Id.* at 543. Given that finding, the Court's decision in *Harper* never to mention the racist origins of the poll tax suggests that the Court may consciously have been using the case to announce a far broader principle.

35. *See Harper*, 383 U.S. at 666 (asserting that "[v]oter qualifications have no relation to wealth nor to paying or not paying this or any other tax").

36. Had it applied the sort of rationality review it had used seven years earlier in *Lassiter*, it surely would have upheld the poll tax. If the question is whether there is any conceivable relationship between paying taxes and qualification to vote, the answer cannot be that there is none. As observed in *Breedlove v. Suttles*, 302 U.S. 277 (1937), which *Harper* explicitly overruled, surely making the right to vote contingent on paying taxes creates some incentive for aspiring electors to pay their taxes. *See also Harper*, 383 U.S. at 674 (Black, J., dissenting) (pointing to the revenue collection rationale); *id.* at 684 (Harlan, J., dissenting) (pointing to the likely greater propensity of taxpayers to be informed about the issues to be decided by elections, the rationale the Court found persuasive in *Lassiter*).

37. *Harper*, 383 U.S. at 667.

38. *Id.* (quoting Reynolds v. Sims, 377 U.S. 533, 561-62 (1964)).

those of race, are traditionally disfavored."[39] Thus, "the requirement of fee paying causes an 'invidious' discrimination."[40]

While *Harper* is a "pure" equal protection case—the Court's opinion mentions the due process clause only in the course of observing that neither it nor the equal protection clause freezes into place "historic notions" of what the Constitution forbids or commands[41]—that seems largely an artifact of the Warren court's decision to avoid the then-discredited idea of substantive due process in favor of a substantive equal protection that carried less baggage.[42] Today, of course, the identification of a fundamental liberty interest—and that is what the Court's description of the right to vote sounds like[43]—would trigger the operation of the due process clause. Thus, *Harper* is de facto stereoscopic, even if it is not stereoscopic de jure.

Moreover, it seems plausible that the interaction of ideas of liberty and equality was a key element both of the Court's initial decision to ratchet up the level of judicial review in cases like *Harper* and *Reynolds v. Sims*,[44] and in the contours of the right to which strict scrutiny applies. In the long run, *Harper*'s first rationale—that voting involves a fundamental liberty interest—has become current black-letter law,[45] while its second rationale—that distinctions on the basis of wealth are suspect—is an evolutionary dead end, interred by the Burger Court in *San Antonio School District v. Rodriguez*.[46] But it may well be that before it petered out, the suspect-classification argument contributed to the Court's adoption of a fundamental rights perspective. That is, the importance of

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39. *Id.* at 668.

40. *Id.* In support of this proposition, the Court cited *Korematsu v. United States*, 323 U.S. 214 (1944)—not a voting case—for the point that racial classifications are disfavored, and cited *Edwards v. California*, 314 U.S. 160 (1941); *Griffin v. Illinois*, 351 U.S. 12 (1956); *Douglas v. California*, 372 U.S. 353 (1963); and *Skinner v. Oklahoma*, 316 U.S. 535 (1942)—none of them voting cases—for the point that lines drawn on the basis of wealth are disfavored.

41. *Harper*, 383 U.S. at 669. In dissent, Justice Black argued that the Court's decision "seem[ed] to be using the old "natural-law-due-process formula" while claiming to base its holding on the equal protection clause. *Id.* at 675. (Black, J., dissenting).

42. *See* Lupu, *supra* note 13, at 1068.

43. *See Harper*, 383 U.S. at 667 (stating that "[l]ong ago in *Yick Wo v. Hopkins*, 118 U.S. 356, 370, the Court referred to 'the political franchise of voting' as a 'fundamental political right, because preservative of all rights.'").

44. *See* 377 U.S. 533, 562 (1964). Ultimately in the one-person, one-vote cases, the Court fashioned a kind of hybrid heightened scrutiny requirement, drawing its means language from the strict scrutiny (any deviations from equal population must be "necessary") and its ends language from rationality review (to the achievement of a "legitimate" state purpose). *See* Pamela S. Karlan & Daryl J. Levinson, *Why Voting Is Different*, 84 CAL. L. REV. 1201, 1201 (1996).

45. *See, e.g.*, Bush v. Gore, 53 U.S. 98, 104 (2000) (per curiam) (stating that once a state has established popular elections—in that case to choose presidential electors—"the right to vote as the legislature has prescribed is fundamental; and *one* source of its fundamental nature lies in the equal weight accorded to each vote and the equal dignity owed to each voter") (emphasis added). The per curiam never identifies the other sources of the right's fundamental nature, but surely it would see the right to vote as a species of either liberty or property. For a recent discussion of this issue, see Shane, *supra* note 31, at 537-50.

46. 411 U.S. 1 (1973).

protecting the right to vote may have been driven home by the Court's sense that the distinction that kept some citizens from the polls was a particularly invidious one.

In the course of the next decade, in cases like *Kramer v. Union Free School District*[47] and *Dunn v. Blumstein*,[48] the Supreme Court articulated a formal requirement of strict scrutiny: "if a challenged statute grants the right to vote to some citizens and denies the franchise to others, 'the Court must determine whether the exclusions are necessary to promote a compelling state interest.'"[49] And yet, the Supreme Court has never applied strict scrutiny to all laws that distinguish among citizens in affording the franchise. The Court's definition of the right to vote to which strict scrutiny attaches under the equal protection clause depends on an extrinsic definition of what the liberty interest is. Consider, for example, *Holt Civic Club v. City of Tuscaloosa*.[50] In that case, the Court upheld the exclusion from the franchise of voters who lived within the city's police jurisdiction, but outside its formal municipal boundaries. The Court declined even to apply strict scrutiny, because it found that the fundamental right to vote identified in its prior cases extended only to citizens living within a jurisdiction's corporate limits. Instead, it applied garden-variety rationality review and upheld the challenged arrangement. In short, the substance of substantive equal protection must come from some place outside the clause, and one prime source is the understanding of liberty embodied in the due process clause.

II. *M.L.B. v. S.L.J.* AND DOCTRINAL CONSTRAINT

A stereoscopic approach has both liberating and limiting effects. The history of judicial review in cases involving restrictions on the franchise illustrates the former. As I suggested in Part I, the Court's nascent (and ultimately barren) concern with discrimination against the indigent may have reinforced its sense that voting constitutes a fundamental liberty interest and thereby prompted its shift from rationality review to heightened scrutiny.

In this Part, I take up an example of the limiting potential. As my colleagues John Jeffries and Daryl Levinson explain in a pair of deeply insightful articles, concerns with potential remedial costs powerfully affect the Court's delineation of rights in the first place.[51] An interactive approach to due process and equal protection may provide a technique for putting the brakes on what might otherwise become an unbounded claim to state resources. At the same time, the

47. 395 U.S. 621 (1969).

48. 405 U.S. 330 (1972).

49. *Id.* at 337 (quoting *Kramer*, 395 U.S. at 627).

50. 439 U.S. 60 (1978).

51. John C. Jeffries, Jr., *The Right-Remedy Gap in Constitutional Law*, 109 YALE L.J. 87, 98-100 (1999); Daryl J. Levinson, *Rights Essentialism and Remedial Equilibration*, 99 COLUM. L. REV. 857, 873-74, 884-89 (1999).

availability of a limiting principle may be a necessary precondition for the recognition of the right in the first place. The somewhat confusing line of cases involving indigent litigants' access to adjudication provides an illustration of this double-edged effect. On the one hand, fundamental rights analysis has constrained the list of proceedings that courts are required to equalize. On the other hand, the presence of a fundamental interest may give a positive content to the otherwise negative conception of constitutional rights.

M.L.B. v. S.L.J. is the most recent in a long line of litigation-access decisions. In the "foundation case,"[52] *Griffin v. Illinois*,[53] the Court held that an Illinois rule that conditioned a full-scale criminal appeal on the defendant's obtaining a trial transcript (which he had to pay for) violated the Fourteenth Amendment.[54] Over the next four decades, *Griffin* spawned a series of decisions following and distinguishing it.[55]

M.L.B. concerned Mississippi's termination of M.L.B.'s parental rights. After the state trial court ruled against her, M.L.B. filed a timely appeal. State law, however, conditioned her right to appeal on prepayment of record preparation fees of about $2400. Her application to proceed in forma pauperis was denied, and her appeal was dismissed.

The Supreme Court reversed. Justice Ginsburg's opinion for the Court candidly identified the conjunction of equal protection and due process values in litigation-access cases:

> [I]n the Court's *Griffin*-line cases, due process and equal protection principles converge. The equal protection concern relates to the legitimacy of fencing out would-be appellants based solely on their inability to pay core costs. The due process concern homes in on the essential fairness of the state-ordered proceedings anterior to adverse state action. A precise rationale has not been composed, because cases of this order cannot be resolved by resort to easy slogans or pigeonhole analysis. Nevertheless, most decisions in this area, we have recognized, rest on an equal protection framework, as M. L. B.'s plea heavily does,

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52. *M.L.B.*, 519 U.S. at 110.

53. 351 U.S. 12 (1956).

54. *Griffin* was clearly a stereoscopic decision: the plurality opinion always mentioned the due process and equal protection clauses together. *See Griffin*, 351 U.S. at 13, 15, 17, 18 (plurality opinion).

55. *Compare, e.g.*, Mayer v. Chicago, 404 U.S. 189 (1971) (invalidating a rule limiting the provision of transcripts for appeals in criminal cases to felony appeals only); Boddie v. Connecticut, 401 U.S. 371 (1971) (striking down a Connecticut filing fee as it applied to divorce cases); Lindsey v. Normet, 405 U.S. 56 (1972) (striking down an Oregon double-appeal bond requirement in tenant eviction cases); and Bearden v. Georgia, 461 U.S. 660 (1983) (forbidding a revocation of probation for an indigent defendant who, through no fault of his own, could not pay the fine imposed as part of his sentence), *with* United States v. Kras, 409 U.S. 434 (1973) (upholding a federal filing fee in bankruptcy cases); Ortwein v. Schwab, 410 U.S. 656 (1973) (per curiam) (upholding Oregon's twenty-five dollar filing fee for civil appeals); and Ross v. Moffitt, 417 U.S. 600 (1974) (declining to require the appointment of counsel for indigent defendants seeking discretionary review).

> for . . . due process does not independently require that the State provide a right to appeal.[56]

And yet, the due process clause, particularly in its substantive guise, was critical for determining when the equal protection clause required the state to provide free access to litigants. The Court acknowledged that generally "[s]tates are not forced by the Constitution to adjust all tolls to account for 'disparity in material circumstances;'"[57] as long as the fee they charge is uniform, the equal protection clause is satisfied. But the Court identified two exceptions to this principle. The first concerned "[t]he basic right to participate in political processes"—the right at issue in *Harper*.[58] The second involved criminal or quasi-criminal cases.

M.L.B. located parental termination proceedings within this latter category. The reason for treating parental terminations like divorce proceedings (where the state must waive access fees),[59] rather than like bankruptcies, or even appeals from denials of public benefits (where the government was free to charge a reasonable and nondiscriminatory fee),[60] was because a fundamental interest was at stake:

> Choices about marriage, family life, and the upbringing of children are among associational rights this Court has ranked as of basic importance in our society, rights sheltered by the Fourteenth Amendment against the State's unwarranted usurpation, disregard, or disrespect. M.L.B.'s case, involving the State's authority to sever permanently a parent-child bond, demands the close consideration the Court has long required when a family association so undeniably important is at stake.[61]

Precisely because this right was so important, the Court in prior cases held that the appropriate burden of proof in parental termination cases was "clear and convincing" evidence, rather than proof by a preponderance,[62] and that states might sometimes be required to provide counsel to indigent parents.[63] A parent's interest in having a continued relationship to his or her child was "commanding" and "far more precious than any property right."[64] In short, equal access was

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56. *M.L.B.*, 519 U.S. at 120-21 (internal citations and quotation marks omitted).

57. *Id.* at 123-24 (quoting *Griffin*, 351 U.S. at 23 (Frankfurter, J., concurring)).

58. *See id.* at 124 n.14 (describing *Harper* as the "pathmarking" case in this area).

59. *See* Boddie v. Connecticut, 401 U.S. 371, 382 (1971) (concluding that the due process clause of the Fourteenth Amendment requires that indigent parties also have an opportunity to obtain a divorce).

60. *See Kras*, 409 U.S. at 445-46 (holding that bankruptcy filing fees pass rationality review under the equal protection clause); *Ortwein*, 410 U.S. at 660 (appellate filing fees pass rationality review).

61. *M.L.B.*, 519 U.S. at 116-17 (internal citations and quotation marks omitted).

62. Santosky v. Kramer, 455 U.S. 745, 769-70 (1982).

63. *See* Lassiter v. Dep't of Soc. Servs., 452 U.S. 18, 31-32 (1981). The Court, however, rejected the requirement of an across-the-board provision of counsel.

64. *Santosky*, 455 U.S. at 758-59.

required because the right being adjudicated in the underlying proceeding was a fundamental one.

The equal protection required by the Court's decision requires something that falls between equal treatment and equal results. That is, equal protection forbids the state from treating M.L.B. equally by imposing on her the same prepayment requirement it imposes on everyone else. Instead, it requires giving her the same ability to appeal that other litigants enjoy as a result of their ability to pay the transcription fees and court costs. As I shall explain in more detail in Part IV,[65] *M.L.B.* required "levelling up." And that requirement can be explained only by importing due process into the equal protection inquiry.

Not only did substantive due process thus explain why the state was required to permit M.L.B. a meaningful appeal regardless of her inability to pay otherwise permissible fees,[66] but it also provided the majority with a response to the dissent's claim that the decision would open the floodgates to all sorts of litigation-access claims: the nature of the interest involved, and the severity of the state impairment of that interest "sets parental status termination decrees apart from mine run civil actions, even from other domestic relations matters such as divorce, paternity, and child custody."[67] Thus, the Court's decisions recognizing fundamental constitutional rights in these cases "have not served as precedent in other areas."[68]

III. *ROMER V. EVANS*: HOW TAKING DUE PROCESS INTO ACCOUNT REINFORCES THE COURT'S EQUAL PROTECTION DECISION

In *Bowers v. Hardwick*,[69] the Supreme Court rejected a substantive due process challenge to the application of Georgia's sodomy statute to same-sex sexual activity.[70] Against the historical background of prohibitions on same-sex activity, the Court held that "to claim that a right to engage in such conduct is 'deeply rooted in this Nation's history and tradition' or 'implicit in the concept of ordered liberty'"—the verbal formulation for the kind of interests that trigger substantive due process protection—"is, at best, facetious."[71]

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65. *See infra* text accompanying notes 105-06.

66. In *Draper v. Washington*, 372 U.S. 487, 495 (1963), the Court explained that its decision in *Griffin* did not require the state necessarily to provide indigent defendants with a complete trial transcript. It simply required the state to provide some mechanism for indigent defendants to present their claims of trial error effectively.

67. *M.L.B.*, 519 U.S. at 127.

68. *Id.* at 128.

69. 478 U.S. 186 (1986).

70. As the dissent pointed out, the statute as written prohibited the conduct regardless of whether the participants were of the same or different sexes. *See id.* at 200 (Blackmun, J., dissenting). The fact that Georgia apparently never enforced the statute in cases involving male-female couples, suggests the power of Jackson's observation from *Railway Express*.

71. *Hardwick*, 478 U.S. at 194.

While the possibility of using the due process clause to challenge procedurally unfair or wholly arbitrary decisions remained open as a tool for making molecular, if not molar, progress,[72] *Hardwick* seemed to foreclose use of the due process clause as a device for ratcheting up the level of judicial scrutiny that applied to laws which targeted gays, lesbians, and bisexuals. So, not surprisingly, in (perhaps unconscious) parallel to the Warren Court decisions substituting substantive equal protection for substantive due process, litigants and scholars turned to equal protection arguments for heightened scrutiny.[73]

That campaign hit an odd sort of pay dirt in *Romer*. The case concerned a 1992 amendment to the Colorado Constitution ("Amendment 2") that prohibited state actors from adopting or enforcing measures that prohibited discrimination against gays, lesbians, or bisexuals.[74]

Justice Kennedy's opinion for the Court declared that Amendment 2 "defie[d]" a "conventional [equal protection] inquiry" and "confound[ed]" the "normal process of judicial review."[75] Stripped of its somewhat confusing verbiage, the central element of the Court's equal protection analysis was its determination that the "sheer breadth" of Amendment 2 was so discontinuous with the reasons offered for it that the Amendment seems inexplicable by anything but animus toward the class it affects."[76] In other words, the Court concluded that the goal of Amendment 2 was simply the "bare . . . desire to harm a politically unpopular group."[77] Since that "cannot constitute a legitimate governmental interest,"[78] the Amendment failed even rationality review.

To my mind, there is a vacuum at the core of the Court's analysis that begs to be filled. All sorts of laws reflect the majority's disapproval of ("animus toward") an unpopular group, and yet are constitutional. To take just one example that

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72. For an account of the use of this strand of due process, see Eskridge, *supra* note 13.

73. For examples of post-*Hardwick* cases raising equal protection claims, see, e.g., High Tech Gays v. Def. Indus. Sec. Clearance Office, 895 F.2d 563 (9th Cir. 1990); Padula v. Webster, 822 F.2d 97 (D.C. Cir. 1987); Dean v. Dist. of Columbia, 653 A.2d 307 (D.C. App. 1995). For examples of scholarship advancing the equal protection argument, see, e.g., Nan D. Hunter, *Life After* Hardwick, 27 HARV. C.R.-C.L. L. REV. 531 (1992); Sunstein, *supra* note 13.

74. The text of the amendment read:

> Section 30b. No Protected Status Based on Homosexual, Lesbian, or Bisexual Orientation.
>
> Neither the State of Colorado, through any of its branches or departments, nor any of its agencies, political subdivisions, municipalities or school districts, shall enact, adopt or enforce any statute, regulation, ordinance or policy whereby homosexual, lesbian or bisexual orientation, conduct, practices or relationships shall constitute or otherwise be the basis of or entitle any person or class of persons to have or claim any minority status, quota preferences, protected status or claim of discrimination. This Section of the Constitution shall be in all respects self-executing.

COLO. CONST., art. II, § 30b.

75. *Romer*, 517 U.S. at 632-33.

76. *Id.*

77. *Id.* at 634-35 (quoting Department of Agriculture v. Moreno, 413 U.S. 528, 534 (1973)).

78. *Id.*

shares some features with Amendment 2, the Americans with Disabilities Act (ADA) specifically excludes "compulsive gambling, kleptomania, or pyromania" from the otherwise capacious definition of conditions that can constitute disabilities.[79] Thus, compulsive gamblers, kleptomaniacs, and pyromaniacs are excluded from the protections against discrimination in employment, public accommodations, and the provision of government services afforded to all sorts of other people who suffer from similar impairments (such as other compulsive behaviors), not to mention people who are protected from discrimination by a panoply of other federal statutes. The decision to exclude compulsive gamblers, kleptomaniacs, and pyromaniacs from the protections others enjoy surely reflects the majority's dislike of these politically unpopular groups. And yet, it is hard to imagine the Supreme Court declaring the ADA unconstitutional for underbreadth. More concretely, the Supreme Court decided in *Hardwick* that a Georgia statute that threatened individuals with twenty years' imprisonment for engaging in private, consensual same-sex behavior was rational because it reflected an expression of the majority's "moral choices."[80] Thus, it is not clear why a majority's desire to express disapproval of homosexuality is an impermissible government purpose.[81] In *Romer*, the Court did not elaborate on the distinction, if any, between expressing negative moral judgments and desiring to harm those about whom one has those judgments.

I see two ways to explain why Amendment 2 fails equal protection inquiry. Each depends on importing some due process-based notion of fundamental liberty interests into the Court's equal protection analysis. The first, which confronts head-on the continued vitality of *Hardwick*, focuses on the legitimacy of the state's ends. The second, which resembles the analysis of the Colorado Supreme Court,[82] focuses on the permissibility of the state's means.

First, a liberty-based perspective may explain why a law aimed at stripping protection from gays, lesbians, and bisexuals does not constitute a legitimate government purpose, even if a law depriving, say, thieves, does. Understanding the nature of the liberty interest in intimate association may explain why discriminating among individuals on the basis of the choices they make is impermissible. In a variety of contexts, the Supreme Court has recognized that a

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79. 42 U.S.C. § 12211(b)(2) (1994).

80. *See Hardwick*, 478 U.S. at 196 ("[R]espondent asserts that there must be a rational basis for the law and that there is none in this case other than the presumed belief of a majority of the electorate in Georgia that homosexual sodomy is immoral and unacceptable. This is said to be an inadequate rationale to support the law. The law, however, is constantly based on notions of morality, and if all laws representing essentially moral choices are to be invalidated under the Due Process Clause, the courts will be very busy indeed. Even respondent makes no such claim, but insists that majority sentiments about the morality of homosexuality should be declared inadequate. We do not agree, and are unpersuaded that the sodomy laws of some 25 States should be invalidated on this basis.").

81. I postpone for a moment the question whether, even if the expression of majoritarian moral disapproval is a permissible purpose, Amendment 2, unlike the Georgia sodomy statute, pursues that goal through impermissible means. *See infra* text accompanying notes 84-87.

82. Evans v. Romer, 854 P.2d 1270 (Colo. 1993).

person's "ability independently to define [his or her] identity . . . is central to any concept of liberty."[83] As Justice Blackmun's dissent in *Hardwick* explained, "a necessary corollary of giving individuals freedom to choose how to conduct their lives is acceptance of the fact that different individuals will make different choices."[84] If that choice is hedged about by state-sponsored or state-approved discrimination, then gays and lesbians cannot make their choices freely. As I have explained elsewhere, the regime challenged in *Romer* thus imposes an unconstitutional condition:

> [T]he state cannot demand that a person sacrifice the constitutionally protected freedom "to choose the form and nature of the intensely personal bonds" that "mak[e] individuals what they are" in order to enjoy "protections taken for granted by most people . . . against exclusion from an almost limitless number of transactions and endeavors that constitute ordinary civic life in a free society."[85]

Perhaps the best judicial articulation of an integrated understanding of how ideas of liberty can inform the understanding of equality for gays and lesbians appears in Justice Albie Sachs's concurrence in the South African Constitutional Court's 1998 decision in *National Coalition for Gay and Lesbian Equality v. Minister of Justice*:[86]

> The fact is that both from the point of view of the persons affected, as well as from that of society as a whole, equality and privacy cannot be separated, because they are both violated simultaneously by anti-sodomy laws. In the present matter, such laws deny equal respect for difference, which lies at the heart of equality, and become the basis for the invasion of privacy. At the same time, the negation by the state of different forms of intimate personal behaviour becomes the foundation for the repudiation of equality. Human rights are better approached and defended in an integrated rather than a disparate fashion. The rights must fit the people, not the people the rights. This requires looking at rights and their violations from a persons-centered rather than a formula-based position, and analysing them contextually rather than abstractly.[87]

If the activity targeted by Colorado had not implicated core liberty interests, it is hard to imagine the Supreme Court declaring that the state's aim of

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83. Roberts v. United States Jaycees, 468 U.S. 609, 619 (1984).

84. 478 U.S. at 205-06.

85. Pamela S. Karlan, *Thoughts on Autonomy and Equality in Relation to Justice Blackmun*, 26 HASTINGS CONST. L.Q. 59, 66 (1998) (quoting *Hardwick*, 478 U.S. at 205, 210 (Blackmun, J., dissenting) and *Romer*, 517 U.S. at 631).

86. 1998 (1) BCLR 1517 (CC), *available at* http://www.concourt.gov.za/judgments/1998/gayles.html.

87. *Id.* at 112 (Sachs, J., concurring).

expressing disapproval (as opposed to its means of pursuing that aim) was illegitimate. What makes the end illegitimate must be that it targets individuals who have an entitlement to differ from the majority's perspective. People do not have a liberty interest in stealing; thus, denying antidiscrimination protection to kleptomaniacs does not demand that they forego a constitutionally protected interest. But people do have a liberty interest in the forms of intimate association and assertion of identity that Amendment 2 targeted.

Second, as to the question whether Amendment 2 represents an impermissible means under the equal protection clause, it turns out that the means Amendment 2 uses trenches on another constitutionally protected liberty interest: the right to participate on equal terms in the political process. The problem with Amendment 2 was not that it deprived gays, lesbians, and bisexuals of the right to nondiscrimination in the provision of housing, access to public accommodations, government employment, or the like. Nothing in the Court's opinion suggests that the equal protection clause requires states to enact legislation barring discrimination on the basis of sexual orientation. Prior to Amendment 2, gays who lived in most parts of Colorado had no protection against discrimination by private actors, and were not constitutionally entitled to any. What Amendment 2 denied gays was "the right to *seek* specific protection from the law;"[88] it was a procedural, rather than a substantive, right. The way Amendment 2 foreclosed this procedural right was to wipe out gains that gays and their allies had already achieved through the political system, by enacting municipal antidiscrimination ordinances and persuading the governor to issue executive orders. Thus, while gays might be a politically unpopular group in Colorado, they had not been entirely politically unsuccessful.

To see why I think that the core of the injury Amendment 2 inflicted concerned the fundamental liberty interests that fit within the right to vote, compare the following two passages:

> Central both to the idea of the rule of law and to our own Constitution's guarantee of equal protection is the principle that government and each of its parts remain open on impartial terms to all who seek its assistance .... A law declaring that in general it shall be more difficult for one group of citizens than for all others to seek aid from the government is itself a denial of equal protection of the laws in the most literal sense.

> The State may no more disadvantage any particular group by making it more difficult to enact legislation in its behalf than it may dilute any person's vote or give any group a smaller representation than another of comparable size.

88. *Romer*, 517 U.S. at 633 (emphasis added).

The first, of course, is the central passage in *Romer*.[89] But the second is an excerpt from *Hunter v. Erickson*,[90] the case on which the Colorado Supreme Court had relied to hold that Amendment 2 infringed the fundamental right of gays and lesbians to participate in the political process.[91] *Hunter* involved a provision of the Akron, Ohio city charter that required fair housing ordinances to be approved by popular referendum before going into effect. All other ordinances became law simply upon passage by the city council. In explaining why the Akron provision violated the equal protection clause, the Court employed a stereoscopic approach. Not only did the provision target racial minorities—an impermissible end—but it used an impermissible means as well: it placed "special burdens on racial minorities *within the governmental process*."[92] In fleshing out how Akron's black citizens were handicapped, the Court relied primarily on malapportionment cases that had not raised claims of racial discrimination at all; these were straightforward fundamental rights cases.[93]

Even if the *Romer* court refused to rely directly on the political participation precedents, they were in the air. The fact that Amendment 2's discrimination impaired the ability of gays to participate in one of the most protected aspects of "civic life in a free society"[94]—the right to vote and to persuade elected officials to adopt advantageous policies—may have begun to awaken the Court to the invidiousness of antigay discrimination. In other words, the importance of protecting gays against invidious discrimination may be driven home by Colorado's extraordinary attempt to keep them from succeeding at the polls. Thus, a more stereoscopic reading of the Fourteenth Amendment would reinforce the Court's equal protection holding.

IV. *BUSH V. GORE*: HOW TAKING DUE PROCESS INTO ACCOUNT DISCREDITS THE COURT'S EQUAL PROTECTION DECISION

By contrast to *Romer*—where a stereoscopic approach would have strengthened the result the Supreme Court reached—*Bush v. Gore* provides an example of a decision where a stereoscopic approach lays bare a fundamental flaw with the result the Court reached.

The central question in *Bush* was the constitutionality of a manual recount ordered by the Florida Supreme Court in the aftermath of an agonizingly close presidential election. Then-Governor Bush challenged the recount on both equal

89. *Id.*

90. Hunter v. Erickson, 393 U.S. 385, 393 (1969).

91. *See* Evans v. Romer, 854 P.2d at 1279-85.

92. *Hunter*, 393 U.S. at 391 (emphasis added).

93. *See id.* at 393 (relying on Reynolds v. Sims, 377 U.S. 533 (1964), and Avery v. Midland County, 390 U.S. 474 (1968)).

94. *Romer*, 517 U.S. at 631.

protection and due process grounds,[95] and the U.S. Supreme Court ultimately concluded that there was a violation of the equal protection clause. The Court identified two key problems with the recount. First, it held that "Florida's basic command . . . to consider the 'intent of the voter'"[96] was "standardless"[97] and a violation of the equal protection clause "in the absence of specific standards to ensure its equal application."[98] Without such standards, *who* examined a ballot might determine whether that ballot was counted. Second, the Court found a problem with the different treatment accorded to "undervotes" (ballots on which machine tabulation had failed to detect a vote for President) and "overvotes" (ballots that the tabulating machines rejected because there was more than one vote cast for a presidential candidate).[99] Given these problems, which rendered the recount as ordered unconstitutional, and its view that the problems could not be cured within the available time, the Supreme Court "reverse[d] the judgment of the Supreme Court of Florida ordering a recount to proceed,"[100] effectively ending the election.

I do not propose to rehash here the question whether the Court was right to identify an equal protection problem with the recount.[101] Instead, I want to focus on the remedial issue: the Court's decision to halt the recount, rather than to remand the case to order Florida to attempt a constitutionally sound recount.[102] The failure to recognize the substantive due process angle enabled the Court to ignore the fact that its remedy left thousands of votes uncounted in order to meet a statutory deadline set far in advance of the date on which the Constitution itself would require the election to be decided.

One of the most jarring statements in the per curiam's opinion was its assertion that "[t]he individual citizen has no federal constitutional right to vote for electors for the President of the United States unless and until the state legislature chooses a statewide election as the means to implement its power to appoint members of the Electoral College."[103] Thus, the per curiam suggested that "[t]he State, of course, after granting the franchise in the special context of Article II, can take back the power to appoint electors."[104]

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95. *Bush*, 531 U.S. at 104.

96. *Id.* at 105-06.

97. *Id.* at 103.

98. *Id.* at 106.

99. *Id.* at 107-08.

100. *Id.* at 110.

101. For a more thorough discussion of that question, see PAMELA S. KARLAN, *Equal Protection:* Bush v. Gore *and the Making of a Precedent*, *in* THE UNFINISHED ELECTION OF 2000 (Jack N. Rakove ed., 2001); PAMELA S. KARLAN, *The Newest Equal Protection: Regressive Doctrine on a Changeable Court*, *in* THE VOTE: BUSH, GORE AND THE SUPREME COURT (Cass R. Sunstein & Richard A. Epstein eds., 2001); Pamela S. Karlan, *Nothing Personal: The Evolution of the Newest Equal Protection from* Shaw v. Reno *to* Bush v. Gore, 79 N.C. L. REV. 1345 (2001).

102. The discussion that follows draws on Karlan, *supra* note 31.

103. *Bush*, 531 U.S. at 104.

104. *Id.*

Of course? Not necessarily. The source for the proposition that states remain free to strip otherwise eligible voters of the right to vote in presidential elections was dicta in an 1892 decision, *McPherson v. Blacker*.[105] Since then, there has been a lot of water under the bridge. "History," as the per curiam acknowledged, "has now favored the voter,"[106] and at least since 1876, every state has used popular election to select its presidential electors.[107] As the Court has repeatedly recognized, analysis of liberty interests is deeply informed by tradition, as reflected in longstanding federal and state practices.[108] A court sensitive to our traditions of ordered liberty would have recognized that 125 years of popular election had created a substantive liberty interest in voting to elect the president. That interest, as it has evolved and solidified in the years since *McPherson*, a case decided just three election cycles after the last legislative appointment of electors, outweighs an Article II authorization that has fallen into desuetude. The Fourteenth Amendment has simply evolved beyond the point at which a state can strip citizens of their right to participate in choosing the president.

Why does this matter to the outcome in *Bush v. Gore*? Put simply, the five Justices in the majority acted as if the only constitutional question was whether the ballots that were being counted in the recount were being counted equally. Taking the substantive due process interest in voting into account would have forced the Court to also answer a different question: was Florida counting all the ballots that should have been counted?

The per curiam opinion alluded dismissively to that question in passing,[109] but never really grappled with its implications. There were literally tens of thousands of ballots statewide that machines had failed to count, many that contained votes that would be eminently recoverable by a manual recount.[110] The Court's remedy left those ballots uncounted.

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105. 146 U.S. 1 (1892).

106. *Bush*, 531 U.S. at 104.

107. Karlan, *supra* note 31, at 590.

108. The most elegant expression of this insight appears in Justice Harlan's dissent in *Poe v. Ullman*, 367 U.S. 497, 542 (1961):

> Due process has not been reduced to any formula; its content cannot be determined by reference to any code. The best that can be said is that through the course of this Court's decisions it has represented the balance which our Nation, built upon postulates of respect for the liberty of the individual, has struck between that liberty and the demands of organized society . . . having regard to what history teaches are the traditions from which it developed as well as the traditions from which it broke. That tradition is a living thing.

See also, e.g., Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 850 (1992) (opinion of O'Connor, Kennedy, and Souter, JJ.) (adopting Justice Harlan's formulation).

109. *See Bush*, 531 U.S. at 105 ("Respondents say that the very purpose of vindicating the right to vote justifies the recount procedures now at issue.").

110. For discussion of this point, see, e.g., Ford Fessenden, *Examining the Vote: The Method; How the Consortium of News Organizations Conducted the Ballot Review*, N.Y. TIMES, Nov. 12, 2001 at A17 (reporting that a National Opinion Research Center study was able to determine voters' preferences on about twenty-four thousand uncounted ballots in Florida); Shane, *supra* note 31.

The stereoscopic approach the Court has generally taken in voting cases has powerfully shaped remedial doctrine. In *Harper*, for example, the relief ordered was to invalidate the poll tax and allow all voters to participate in the electoral process, regardless of their ability to pay.[111] The Court could, of course, have assured equality by eliminating elections altogether; then, too, affluent and indigent voters would be treated identically. But, particularly because the right to vote is so fundamental, that kind of equalization would be absurd. The general approach in contemporary equal protection law is that, faced with a finding of unconstitutionality, courts will remedy the inequality by ordering the state to provide the benefit to the previously excluded group (that is, by "levelling up"), rather than by depriving the previously included group ("leveling down"). There are very few examples of levelling down, and they never involve a right that could be viewed as fundamental.[112]

Bush, with its monocular approach to equal protection, therefore flies in the face of conventional remedial practice:

> [It] is essentially a leveling down case: since Florida could not conduct a manual recount that comported with the Supreme Court's definition of equal protection within the constricted time period, the Court held essentially that *none* of the as-yet uncounted votes should be included. From the tactical perspective of candidate Bush, this was of course an acceptable solution. But which *voters* had cognizable interests that were vindicated by the Court's decision? Is there any voter who is better off than she was before in a sense that the legal system can or should recognize?[113]

Ironically, the U.S. Supreme Court's remedy left *more* presumably legal ballots uncounted than the Florida Supreme Court's ruling had and, if anything, exacerbated the equal protection problem that some citizens' votes were recorded while other citizens' votes were not.

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111. *Harper*, 383 U.S. at 670.

112. *See* Pamela S. Karlan, *Race, Rights, and Remedies in Criminal Adjudication*, 96 MICH. L. REV. 2001, 2027 (1998). As Geof Stone warned in the First Amendment context:

> There are dangers in the emphasis on equality, however, and those dangers should not be overlooked. By focusing on equality, the Court may invite government to "equalize," not by permitting more speech, but by adopting even more "suppressive" content-neutral restrictions. This result, one might argue, is hardly consistent with the first amendment. As Justice Rehnquist has observed, under the Court's approach, "the State would fare better by adopting more restrictive means, a judicial incentive I had thought this Court would hesitate to afford." Moreover, an undue emphasis on equality may lead the Court to sustain "equal" restrictions on expression without sufficient consideration of the other dangers such restrictions might pose.

Geoffrey R. Stone, *Content Regulation and the First Amendment*, 25 WM. & MARY L. REV. 189, 205 (1983).

113. SAMUEL ISSACHAROFF, PAMELA S. KARLAN & RICHARD H. PILDES, WHEN ELECTIONS GO BAD: THE LAW OF DEMOCRACY AND THE PRESIDENTIAL ELECTION OF 2000, 177 (rev. ed. 2001).

V. CONCLUSION

Our former poet laureate, Robert Pinsky, once observed that "[a] country is the things it wants to see."[114] As I hope this essay suggests, a stereoscopic approach to the Fourteenth Amendment—one in which understandings of liberty and equality inform one another—may change how courts come to see constitutional issues, and may lead to fuller and more just answers. Thinking about the Fourteenth Amendment from a stereoscopic perspective highlights the contrast between *Harper*, where the Court's simultaneous reliance on ideas of liberty and equality provided an impetus to the adoption of heightened scrutiny, and *Bush*, where the Court's monocular focus on equal protection blinded it to the mismatch between the violation it found and the remedy it ordered. At the same time, understanding the interaction of due process and equal protection concerns provides a firmer basis for the Court's decisions in *Romer* and *M.L.B.* Thus, we might revise Justice Jackson's observation in *Railway Express* to say that just as "[c]ourts can take no better measure to assure that laws will be just than to require that laws be equal in operation,"[115] so too, they often can have no better measure of how to achieve the requirements of equality than to understand the underlying claims of justice embodied in the due process clause's concept of liberty.

114. ROBERT PINSKY, AN EXPLANATION OF AMERICA 8 (1979).

115. *Railway Express*, 336 U.S. at 113 (Jackson, J., concurring).