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REMAKING THE CONSTITUTION: A CRITICAL REEXAMINATION OF THE BOWERS v. HARDWICK DISSENT

Gerard V. Bradley*

INTRODUCTION

Not only in folklore do historical watersheds spring from trickles. We all have heard that Mrs. O'Leary's cow kicked over a lamp to start the Chicago fire, and even sober history texts tell us that one Gavrilo Princip started World War I. Princip was a politically overactive Serbian nationalist destined to die of tuberculosis in an Austrian prison, but not before immortalizing himself on June 28, 1914. That day the nineteen-year-old Princip shot and killed Austrian Archduke Francis Ferdinand and his wife as they rode in an open car through Sarajevo, Yugoslavia. The occasion, or excuse, for release of smoldering political tensions and blunted ambitions to remake the world order had arrived. The "war to end all wars"—The Great War—was on.¹

A constitutional Armageddon called Bowers v. Hardwick² was detonated even more inconspicuously. Playing the role of Princip was twenty-nine-year-old Atlantan Michael Hardwick. In mid-1982 he was ticketed for carrying an open bottle of booze. He did not answer the summons, and a bench warrant was issued. The ticketing police officer went to Hardwick's home and was let in by an unknown male resident. Where was Hardwick? The man gestured toward a bedroom down a long hallway.³

The term coitus interruptus was about to acquire new meaning as causus bellis. Through a partly opened door the officer observed Hardwick and another man fellating, "sodomy" under a Georgia statute⁴ that apparently had not been enforced for several decades.⁵ Hardwick was ar-

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3. Telephone interview with Michael Hobbs, state's attorney (May 22, 1990). Mr. Hobbs argued the case for Georgia in the Supreme Court. I thank him for his help, especially his best recollection of the events leading up to the arrest of Michael Hardwick. I have read all the briefs and opinions in the case, as well as the transcript of oral argument, and have yet to find any account of those events, save for the strong impression that the reason for the police presence was not to investigate sodomy.
4. The relevant part of the statute is reprinted at 478 U.S. 188 n.1.
5. See 478 U.S. at 198 n.2 (Powell, J., concurring).
rested on the warrant and charged with sodomy.  

The Fulton County prosecutor declined to proceed to the grand jury, pending development of "further evidence." Since "further evidence" of the crime was neither imaginable nor necessary, the matter was closed. The disposition of the original citation is unknown.

A singular opportunity to reorder society through constitutional lawmaking had arrived, and accumulated tension would not be denied its release. America's political morality could now be authoritatively settled. Unlike adultery, incest, prostitution, drug use, abortion, even pornography—all of which present colorable issues of nonconsent or harm to third parties—private homosexual relations between consenting adults perfectly framed the question of liberal political morality: must the state remain completely neutral on questions of the human good, and sheath the sword of law until harm to innocent bystanders is demonstrated?  

That question has simmered, with occasional boilovers, for over a generation. When Britain's Wolfenden Commission Report proposed in 1958 to decriminalize homosexual acts, it touched off the single most celebrated legal theoretical debate of the post-war era. The Commission succinctly stated its reason for the recommendation: "It is not the duty of the law to concern itself with immorality as such." Legal enforcement of morals was reduced to distinguishing immoralities which implicate "public" interests from those which do not. Against laws prohibiting, for example, consensual adult homosexual activities, the Wolfenden Commission Report urged that "there must remain a realm of private morality and immorality which is, in brief and crude terms, not the law's business."  

The initial and still best-known counterargument was offered by Patrick Devlin, then a High Court judge. Devlin argued: "It is wrong to talk of private morality or of the law not being concerned with immorality as such or to try to set rigid bounds to the part which the law may play in the suppression of vice . . . . [T]here can be no theoretical limits to legislation against immorality."  

Devlin, as Robert George so cogently points out, does not stand within the tradition which produces such laws. Devlin's justification for them is not the tradition's justification. George argues that the tradition produced several grounds on which morals laws could be justified. These grounds include a "paternalistic concern for the moral character of per-

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6. Tribe, who argued on behalf of Hardwick before the United States Supreme Court, describes his client's ignominious treatment during his day in custody following arrest in L. TRIBE, AMERICAN CONSTITUTIONAL LAW 1424 n.32 (1988).
7. There are many accounts of liberal political morality by authors like John Rawls, Ronald Dworkin, Bruce Ackerman, and D.A.J. Richards. For a masterful, sympathetic account, see J. RAZ, THE MORALITY OF FREEDOM, 110-64 (1986).
9. Id.
11. See R. George, supra note 8, passim.
sons who desire to perform immoral acts, and a quasi-paternalistic concern for the moral character of persons whose desires and choices are likely to be affected by the moral quality of the social milieu which morals laws may help to maintain.\textsuperscript{12} George notes that virtuous character is a basic aspect of the genuine good of every member of the community, especially those prone to vice. The common interest in achieving and maintaining such a character can be advanced by common endeavor, including community action to protect the moral integrity of the cultural milieu in which people form their characters.\textsuperscript{13} For traditionalists, morals laws encourage individuals to form and help them to maintain a virtuous character. The contested issue of legal theory is simply put: Does the law rightly concern itself with the moral perfection of individuals, and act legitimately for that end, even where there is no "harm" to others or to society, and where "harm" is not defined without regard to the perfection of individuals?

This theoretical issue cuts to the heart of a society's self-understanding and influences its entire legal practice. The agitation over gay rights—one of many areas of law dependent upon resolution of this question—has shown itself able to mobilize great numbers of Americans. However, debates over legal theory, no matter how interesting, lack a socially authoritative arbiter.

Constitutional debates do not lack an arbiter. With expert legal assistance, Hardwick brought a section 1983 action and transformed the theoretical donnybrook into a constitutional conflagration. There was little room for genuine neutrality, and some curious alliances were formed. Joining chief counsel Laurence Tribe as amici for Hardwick\textsuperscript{14} were obvious allies (like the Lesbian Rights Project and the National Gay Rights Advocates) and some predictable others (like the National Organization for Women) receiving dividends from the divorce of law from traditional morality. More unlikely comrades were the American Psychological and American Public Health Associations and a bevy of religious groups led by the Presbyterian Church U.S.A. In addition, the American Jewish Congress joined the argument against the law and its enforcement, as did (most surprisingly) the Attorneys General of New York and California. The legal arguments of these groups centered upon the conviction of liberal morality: government should not enforce "private morality." The lovemaking practices of mature adults were beyond the law's ken because anyone's views of the action's moral quality, apart from the view of the participant, is constitutionally forbidden ground for lawmaking.

Briefs in support of the law presented the perfect counterpoint. One brief linked sodomy prohibition to physical survival in the AIDS era. The other briefs cleaved to traditional morality and its proper nurturing by the state. Much of the argument was "pro-family," restating the major premise: "family" was the institutional form of traditional morality,

\textsuperscript{12} Id. at n.29 and accompanying text.
\textsuperscript{13} See id. at nn.48-49.
\textsuperscript{14} For the line-up of amici, see 478 U.S. at 187 n.*.
whose relationship to the law was at issue. “Pro-family” signifies the traditional view that law properly nurtures true principles of morality, especially concerning sexual relations, and that it wisely discourages, even to the point of prohibiting, some deviant sexual practice. Hardwick argued for legal tolerance notwithstanding traditional morality, because liberal political morality required it.

Hardwick had his way with the Eleventh Circuit, but with only a minority of the Supreme Court. Reaction to the decision was commensurate with the stakes. The homosexual community blasted it. “It’s a major disaster from our point of view,” said Thomas Stoddard, executive director of the Lambda Legal Defense and Education Group, a Hardwick amicus. The Reverend Jerry Falwell rebutted: “I applaud the decision . . . [because] [t]he highest court has recognized the right of a state to determine its own moral guidelines, and it has issued a clear statement that perverted moral behavior is not accepted practice in this country.”

The disappointed Tribe exhaustively reargued the case in his treatise. Scholarly commentary has surpassed that for any case since Roe v. Wade.

Bowers v. Hardwick came as advertised: a landmark decision. It decisively stymied not only the movement for federal constitutional protection of gay rights, but probably halted further development of the entire “privacy” corpus. Cruzan v. Director Missouri Dep’t of Health is the most recent example; the expected rollback of Roe the most notorious. Still the case needs a rationale. I propose one in this article. The truly unprecedented nature of Hardwick’s argument, adopted by four members of the Court, is a noteworthy event. It is a bombshell, nothing less than a complete reconstruction of society so that a “new Constitution”—really liberal political morality—can be sold as the concomitant of a new society. Put differently, I propose to show that the only genuine argument proposed on behalf of Hardwick’s claim—the flagship claim of liberal political morality—is this startling syllogism: if we redefine the nature of human existence, this is the Constitution that follows.

This article is divided into three parts. Part I will clear away some of

15. I adopt the following artificial but highly useful signals for purpose of this article, “Hardwick,” as in the instant text without underscoring, refers, unless otherwise clearly indicated, to the position urged upon the Supreme Court by Tribe, et al., on behalf of Michael Hardwick. “Hardwick,” with underscoring, refers to the Supreme Court decision itself.


17. Hardwick was on the losing side of a 5-4 decision.


19. Id.

20. See L. Tribe, supra note 6, at 1421-35.


the rhetorical clutter in the opinions and briefs to expose the decisive issue in the case: liberal political morality and its constitutional enforcement. Part II sketches in summary form why the Constitution is demonstrably agnostic on that question: The Constitution neither requires nor prohibits enforcement of traditional morality, or of liberal political morality. Part III details the revolution effected by those who would constitutionalize liberal political morality.

The analysis here relies upon Blackmun’s dissent (joined by Stevens, Brennan, and Marshall) and Tribe’s brief, oral argument, and reargument in *American Constitutional Law*. These sources reflect the legal arguments of the other briefs and most commentators, and include sufficient reference to other authorities to warrant treating them as the prototypical argument.

**PART I**

*Hardwick* is a depressing scene from the *Constitution After Babel*. This cacophony owes nothing to divine intervention. In so characterizing the various opinions I relate the lamentations of the Justices themselves. They are not just chagrined but amazed at their colleagues’ views. Surely, it signals analytical desperation when a majority derides the central dissent argument as “facetious.”23 Worse, the dissent dispatched that comic note as an imbecilic observation about an irrelevant issue.24 The opinions of White and Blackmun contain even more than the usual ration of flip remarks, advocacy history, *revisionus decisis*, and intellectual ecumenism relaxed among discordant, even contradictory premises, sometimes in the same paragraph.

Tribe evinced a particularly brazen indifference to contradiction, one that surprised even the justices. He steadfastly maintained that he facially attacked the statute in order to prevent focus upon “gay” sex. Yet, Tribe consistently argued that the real issue was privacy of the home. Hardwick was arrested at home, but the statute cares nothing for the location of the prohibited acts. The following exchange then took place:

> Question: “Well, then it is really not a facial attack on the statute I don’t think.”
> Mr. Tribe: “If you want to call it something else that is not a problem.”25

The Court, not unwittingly, reached the right result in *Hardwick*. Through all the turgid, disingenuous advocacy and opining, the central question was recognized, articulated, and determined. However, Tribe is almost right about one thing. When “spin controlling” the case in *Ameri-

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23. 478 U.S. at 194.
24. See 478 U.S. at 202 (Blackmun, J., dissenting).
25. Transcript of Oral Argument at 32 (University Publications of America) (available from author) [hereinafter Transcript].
can Constitutional Law, he brands it an unprincipled holding. More precisely, both the question and the rationale for the Court's answer are covered over with the weeds of good advocacy, among other things.

Effective appellate advocacy presses for "fit" with extant law by manipulation of reinforcing contrary pressures. It narrows (as much as reasonable, and perhaps then some) the question presented, then expands (as much as reasonable, and perhaps then some) the reach of prior cases to meet the instant one. In reconstructing the "mere facts" of past cases, the articulated holding and rationale can all be discarded in favor of the broad principle implicit in the decision. This is Tribe's jargon, what the Court must have meant, in spite of what it said. Ingestion of the instant case then hardly causes a burp.

However, today's decision is tomorrow's precedent. Its implicit principle will lead the next charge. Simply and provocatively put: The object in Hardwick was a result which inescapably presumed the constitutionalization of liberal political morality, without the Court (or at least some members) knowing it. That may be good advocacy but it is a poor way to make law. This part explores the selling of Hardwick's claim. Its primary purpose is not to prove that the Court was (or was not) duped, but to convince the reader that this was indeed a referendum on the constitutional enforcement of liberal political morality.

Blackmun deploys a belligerent Holmesianism to do the dirtiest obfuscatory work.

"It is revolting to have no better reason for a rule of law than that it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past."

A greater critical distance from the issue, not to mention any sense of irony, would have prompted parenthetical note of the remarkable majoritarianism in which Holmes' skepticism culminated. Holmes could not rationally account for a person's basic convictions—they were just "can't helps," as in "I can't help (but don't know why and certainly cannot provide compelling reasons why I) believe such and such." There was little else to justified lawmaking than that enough folks happen to have the same "can't helps." Holmes' Lochner v. New York dissent earns him praise for its support of progressive labor laws. But its rationale was that a majority can, will, and all but should embody their opinions in the law, notwithstanding the Millsian "shibboleth" (which Holmes himself probably shared) that the citizen is at liberty "to do as he likes so long as he does not interfere with the liberty of others to do the same." Nor was the "individual" and his dignity a resolute barrier against this patent majoritarianism. Forced sterilization, Holmes wrote, is justified by society's

27. 478 U.S. at 199 (Blackmun, J., dissenting).
impatience: “Three generations of imbeciles are enough.”

Whether or not Holmes is dubious authority, his redirected sarcasm surely misses the mark. The point of the majority opinion and of the respondents’ briefs in *Hardwick* is not that the Georgia law is justified by or the product of some automatic process, as if somnambulant legislators rubberstamped a dusty ancient scroll. That is Blackmun’s and Holmes’ caricature. The Georgia legislature, presumably awake and attentive, enacted the statute in 1968 as a conscious response to judicial decisions limiting the predecessor proscription to misplaced penises: neither lesbian activity nor cunnilingus were “sodomy” as then defined. In fact, Blackmun presupposes contemporary “majority disapproval” in his main argument, which is all about the relationship between moral consensus, majoritarian political processes, constitutional lawmaking by the judiciary, and individual autonomy. Tribe made much of the state’s “tautological” justification: the majority passed the law because it so desired. What follows from this is anyone’s guess. Is it better that “majorities” pass laws they don’t want?

I shall shortly revisit Tribe’s argument and the various rhetorical assignments given the term “majority.” If the Holmesianism misfires, what is the point of White’s extensive reference to the long history of sodomy’s legal condemnation? There are actually two points, neither resembling Blackmun’s strawman. The first rebuts the central dissent argument that there is a “fundamental right” to engage in Hardwick’s preferred sexual practice. Any account of our cultural, legal, and constitutional traditions negates such a claim, and the evidence adduced is, indeed, historical. That corresponds to the featured test of such claims. It inspects the “traditions and collective consciences” of our people. That inspection reveals a nightmare of conventional morality, more or less what one would expect from a society determined by Christian moral principles. The Holmesianism then is quite inapposite. According to this account, even the repudiation of conventional morality by wide-awake contemporary legislatures—the antithesis of his caricature—would not alter the verdict of tradition.

It may seem that an important preliminary skirmish has been predetermined here: the subject of this historical investigation. If “X” (some activity) is a “fundamental right” only if verified as such by “the traditions and collective conscience of the people,” what is “X”? Is it fellatio, fellatio in the dark, or same-sex fellatio? Is “X” “intimate association” or, most commodiously, a “right to be let alone”? This call can well be decisive and subject to honest difference of opinion. But the cause is not hopeless. Such unbounded propositions as a “right to be let alone” may serve well as rhetorical tropes where debating points are prized or in writ-

30. For a discussion of Georgia’s definition of “sodomy,” see 478 U.S. at 200 n.1 (Blackmun, J., dissenting).
32. For a discussion of Tribe’s argument, see *infra* notes 39-41 and accompanying text.
ing a Greta Garbo biography. But they are analytically useless. We might as well simply give over to the courts the entire problem of government as to charge them with conclusively detailing the specifications of an indeterminacy like the "right to be let alone." The only response to such a proclamation can be, well, what do you mean by a "right to be let alone"? It is clear that in Hardwick something quite specific is intended.

The problem of further limning "X" is not "indeterminate," as in susceptible of multiple, equally plausible renderings. Meaning, here as elsewhere, comes from context. Our context includes the "tradition" to which authoritative appeal is made, and the reasons the "tradition" is authoritative. It is the appellate authority because of the universal conviction of Supreme Court Justices, past and present, that constitutional lawmaking by the judiciary is not the same thing as discerning the best or truest political morality. This is no positivism, but a theoretically dictated allowance that any political theory requires, in addition to a political morality, an account of institutional authority which will necessarily parcel out authority to realize the true political morality. We usually call this parceling a matter of jurisdiction—power to act.

For example, only with great difficulty and much unhappy experience have political liberals succeeded in redefining police conduct as the antithesis of a street-corner sheriff dispensing "justice," as if he were a despot seated under a palm tree. Now these government officers are beseeched to simply follow the established rules. After much unhappy experience with Richard Nixon, in both domestic and foreign policy, political liberals also convinced us that presidents, like cops, ought not "just do the right thing" regardless of the rules laid down. These concerns imply not that institutional authority determines political morality, but that institutional authority determines competence to pursue authoritatively political morality. No doubt liberalism would have courts control all authoritative expression of political morality. That is a claim not about political morality, but institutional authority, which is to say, at least in our society, a claim about constitutional law. It is true that liberalism smuggles in an institutional prescriptive along with its political morality, that the latter implicitly determines the former. That illicit scheme is exposed below.

Again consider Holmes, tradition, and judicial identification of fundamental rights. Any appeal to tradition is belied whenever the issue is effectively resolved before the "authority" is allowed to give evidence. I suggest that "tradition" not only can but must decisively shape the initial characterization. If so, one will look in vain through the history of our legal order—constitution, statute, common law, state, and federal—for a right to "intimate association" or any cognate term. That is because what we know pre-analytically to be true is in fact true: that this type of "functional" conception of individual "relationships" is contemporary. Our

33. See the fascinating, contentious exchange between Justice Scalia (who defends a view much like that in the text) and Justice Brennan (who does not) in Michael H. v. Gerald D., 109 S. Ct. 2333 (1989).
predecessors, for better or worse, thought in terms of concrete institutions (like marriage and family) and specific acts (heterosexual genital intercourse) whose form and substance were determined by the traditional morality which the transposition into psychological terms is meant to evade. Let us not pretend that centuries of culture and law can be effaced by word play.

I am now ready to identify the second main purpose of the historical material. It demonstrates not Holmes' unthinking ancestor worship, but that something called "public morality" has always been a legitimate aspect of state police power. Until quite recently no one doubted the comportment of state police power with the federal Constitution. Even in Griswold v. Connecticut, supra, which is touted as precedent for Hardwick, Justice Harlan scotched the argument that banning contraceptives was an "irrational," "moral" judgment, and therefore the couple was subject to the "arbitrary whim" of the legislature for "no good purpose." Justice Harlan stated:

Yet the very inclusion of the category of morality among state concerns indicates that society is not limited in its objects only to the physical well-being of the community, but has traditionally concerned itself with the moral soundness of its people as well. Indeed to attempt a line between public behavior and that which is purely consensual or solitary would be to withdraw from community concern a range of subjects with which every society in civilized times has found it necessary to deal.\[35\]

The impeccable historical credentials of anti-sodomy laws both rebut the fundamental rights claim and make the case for "public morality" in the traditional sense. Fundamental rights and public morality are almost, but not quite, opposite sides of the same coin. If one has a "fundamental right" to do "X," that does not mean that "X" is free of all legal regulation. All manner of "free speech," for instance, may be regulated quite extensively. What is "free" about speech is not graspable in any material sense, but in the formal sense that regulation must be "content neutral," i.e., government must remain indifferent to what you say, though not to how you say it. Hardwick would admit that if a legitimate state purpose, say public health, really required intrusion upon intimate association, his "right" would be subordinated. What he insists upon is that no regulation in the interest of his own moral welfare—as defined by a "majority"—may be sustained. Thus, fundamental rights have a negative impact. They remove the "prejudice" against the acts that are protected from the legitimate governmental purposes.

Abortion has tested this thesis. Does the Roe right require government to treat childbirth and abortion as equally legitimate alternatives so that one may not be encouraged over the other? A majority of the Su-

34. 381 U.S. 479 (1965).
35. Id. at 500 (1965) (Harlan, J., concurring) (quoting Poe v. Ullman, 367 U.S. 497, 545-46 (1961) (Harlan, J., dissenting)).
preme Court in *Maher v. Roe* said not. Childbirth may be encouraged, but Brennan, Marshall, and Blackmun—all dissenters in *Hardwick*—held otherwise. Tribe was asked if Hardwick’s claim implied that the state may not encourage heterosexual marriage. He stammered. This had been the precise ground in the decision in *Doe v. Commonwealth’s Attorney,* summarily affirmed by the Supreme Court. Claiming that marriage stood on an equal footing with Hardwick’s liaison was not going to attract swing votes. I submit that the deeper logic of liberal political morality hankers after a “marketplace of lifestyles” in which a night watchman state stands by to prevent force and fraud in transactions among mature citizens, to maintain sanitary conditions, and to provide legal forms for whatever arrangements ensue. Heterosexual monogamy would be just one option among many others.

At times Tribe so refracted this central message that his reasoning became almost opaque. He opened oral argument with the simple statement that the case was all about “the limits of governmental power.” He nevertheless stressed a much more modest claim stemming from his asserted “tautology:” Before government may exercise its power over Hardwick’s sexual act of choice, it must give a reason. That is not about limits on governmental power but a prerequisite to the exercise of any and all governmental power, even under a rational basis test. Tribe’s formulation is disingenuous. First, if he really wanted a “reason” for the laws he would write a Georgia legislator who voted for the bill and ask why. He might read the legislative history or a newspaper account of the law’s enactment. Second, Tribe is not just asking for a “reason,” for he knows that Georgia’s attorneys have several of them, including the maintenance of a decent and “moral society.” Actually, Tribe is seeking judicial evaluation of the reasons given by Georgia’s legal representatives. Third, he is asking for a particular type of evaluation: “heightened scrutiny.” He allows that under a rational basis test, the Court might well sustain the law as protective of marriage, itself the ground for decision in *Griswold.* Fourth, and most fundamentally, Tribe must eliminate that reason which would sustain the law under heightened scrutiny: his “tautology,” which is really that Georgia deems sodomy immoral, bad for those who do it, and destructive of that virtue which the law rightly inculcates. Now we are back to the preceding section’s two-front assault. For as yet unarticulated reasons, judgment of immorality may not underwrite law. We need to know why not.

Getting to those reasons requires real detective work, for the landscape is scattered with beached herrings, all of them red, all contributing

40. Transcript, supra note 25, at 17.
41. Id. at 20, 25-26.
42. Id. at 25.
to the rhetorical cause by airbrushing over the fundamental reordering at issue. A common refrain: the law cannot, or should not, enforce morality. But, as Justice White said, the law is constantly based upon moral choices. The amici briefs actually speak of “private morality” and its immunity from state interference. It may be that in the order imagined by Hardwick “morality” is reduced to purely personal affairs, almost entirely those relating to sexual relationships and activities. In that scenario, public life would still operate according to norms, but the norms would evidently be derived entirely from premises by a method not fairly called “moral.” Thus “morality” would join “religion” in a private sphere populated by “value judgments.” This conception resembles one standard account of law and morals, usually denoted “liberal,” in which public life is carried on according to rules the reasons for which are accessible to each and every person, at least to those with the proper formation. To most people today that rules out “religion,” which is not only controversial but assertedly non-rational. For skeptics like Holmes, it rules out morality, too.

Hardwick proposes to settle definitively the relationship between law and morality. But we already have had to provide a specialized definition of “morality,” one hardly self-evident and which actually is rooted in liberalism itself. Introduction of the similar-sounding but analytically unrelated concept of public decency further muddies the waters. There is no necessary connection between acts condemned as offenses to public decency and “immorality,” even where each is a creature of majority convictions. Many morally neutral acts, like defecating and disrobing, are generally prohibited in public. Some moral duties, like marital lovemaking, are relegated to “private” settings and would offend public decency were they performed elsewhere.

Tribe readily admitted the legitimacy of rules governing public decorum, even if they were rooted entirely in majority sensibilities. This confuses Tribe’s argument. How would an ordinance banning homosexual kissing in public or, more likely, a pattern of enforcing a generic ban on public displays of affection which amounted to the same thing be consistent with the contempt deployed for majority sensibilities? Blackmun says “mere knowledge,” apparently as opposed to actual observation, that immoral acts are taking place is no reason for law. But this construction hides implicit reliance upon liberal privacy precepts. The acts may be private, but the institutions and laws governing them are not. In any event, personal integrity is equally at stake, in or out of doors.

Meticulous work is necessary to dissolve the most emphasized smokescreen. The argument goes like this. There is heightened constitu-

44. I refer to the concept of “private morality.”
45. See Transcript, supra note 25, at 42.
46. 478 U.S. at 213.
47. See the penetrating discussion in Selznick, Dworkin’s Unfinished Task, 77 CALIF. L. REV. 505-13 (1989).
tional protection for Hardwick’s behavior because it stands at the confluence of two powerful currents of constitutional privacy: that surrounding “intimate association,” and that patrolling the doorstep of the “home.” We have heard much about the former. Of the latter, Tribe noted in oral argument, “a private home . . . represents the repository of constitutional traditions under the third and fourth amendments.”6 Neither tradition can bear the entire justifactory load. Hardwick conceded that not all intimate sexual relations in a home are privileged, as the examples of adultery and incest make clear.4 But the sum is a single constitutional right, the argument being that any deficiency in the “privacy” of intimate association is remedied by the addition of whatever “privacy” inheres in the “home is a man’s castle” tradition. Put differently, even if there is no fourth amendment violation—and there was not in this case—that provision can jump start a faltering claim to free sexual expression, a claim not quite within the pantheon of constitutional rights. The arithmetic goes something like this: First amendment satisfied plus fourth amendment satisfied equals Constitution unsatisfied. You cannot add apples and oranges and get more apples than you started with, even in constitutional law. Are such incommensurables being computed? At first glance they are not, but indeed they are. The problem of “incommensurability” may seemingly be overcome along the lines of Harlan’s analysis in Griswold. We might conclude that no constitutional protection attaches to sodomy. It therefore may be criminalized. But other matters which do enjoy a kind of constitutional protection and which almost always occur in the home—marital lovemaking, family intimacy—would be damaged by the usual means of enforcing laws against the prohibited conduct. Were the pun not so pathetic, Harlan might have concluded not that contraceptive use was a constitutional right, but a prophylactic safeguard of something that was—marital lovemaking. Just as the miranda warnings are a fence around the “core” guarantee against involuntary confession, the term “right”—as in “read him his rights”—is a common parlance hiding an important difference.

I am sure that calculation is more a legislative than a judicial operation. However, Hardwick does not avail himself of the argument, nor could he. It is worth highlighting something you would never learn from his entire argument, despite its extraordinary discourses on the “home:” The breach here had nothing to do with criminal investigation of any kind, much less for sodomy. That is, Harlan’s calculation presupposes that which cannot be presupposed here: Criminalized “sodomy” will prompt more police penetration of the home than otherwise. That will not be the case.

In addition, Hardwick does not want to grant the premise that sodomy is no subject of constitutional solicitude. That is his objective. The “home” security argument serves the premise, not the other way around.

48. Transcript, supra note 25, at 19.
49. See id. at 18-24.
There is no way of avoiding the constitutional status of Hardwick’s conduct. True, Tribe wants to track Griswold by pressing his “facial” attack: “[T]he power invoked here,” he says, is “to dictate in the most intimate and . . . embarrassing detail how every adult, married or unmarried, in every bedroom in Georgia will behave . . . .” But this “facial attack” is nonsense: The statute on its face says nothing about “place” at all, as Tribe’s later concession confirms. The move introduces yet another incommensurability: public decorum. Tribe implicitly suggests that Georgia’s law serves no interest in protecting third-party sensibilities, as public decency laws do. Maybe so, but the sodomy law is not a public decency law. It serves an entirely separate purpose. Tribe’s argument then reduces to the conduct involved, and whether its immorality may occasion corrective lawmaking.

The fourth amendment discussion is purely diversionary. As Justice Stewart said in Katz v. United States, the fourth amendment protects persons, not places, not even the home. Only the legitimate expectations of privacy persons possess in the home, and not the physical plant, is the Constitution’s care. While a warrant is ordinarily required to cross its threshold, the home is, as a matter of fourteenth amendment law, transparent for conduct within. Put differently, wherever the fourth amendment permits home entry, it is presumed that “intimate association” is disrupted. Sex, including fellatio, is a specification of that generic “privacy” which the fourth amendment protects. For fourth amendment purposes then, Hardwick wins his argument: his actions at home, whatever they may be, are constitutionally protected to the extent of imposing constraints upon police entry. Had Hardwick been playing Scrabble with his friend or even if he was building a nuclear bomb, the fourth amendment would still impose the same requisites to police entry and they would still be met. The “home” booster is doubly inapposite: Fourth amendment law implies nothing about morals legislation, and it implies even less about distinguishing particular intimate activities (e.g., sodomy) for constitutional super-protection.

Apart from Harlan’s Griswold argument, there really is nothing else the “home” analytically contributes, save its misuse in the misunderstood Stanley v. Georgia case. Hardwick makes much of this misuse, as well he should. Stanley is indistinguishable from this case, but it had nothing to do with the fourth amendment. The similarities between the two cases are uncanny. In Stanley, Georgia also prosecuted Mr. Stanley for sexual indulgence in his home. Police officers acting within the fourth amend-

50. Id. at 18 (emphasis added).
52. Id. at 351.
53. For a discussion of the Griswold argument, see supra note 34 and accompanying text.
55. The account in the text is drawn entirely from the Supreme Court opinion in Stanley. Specific cites are for quotations only.
ment, but for reasons unrelated to the "sexual" offense for which Stanley was arrested, found dirty movies in Stanley's bedroom. He was arrested under a statute which prohibited possession of "obscene" materials. This statute did not, as the one in Hardwick did not, attend to any particular place. Therefore, the statute was not a public decency law. Obviously, the same concern for the moral well-being of Georgians explained both laws.

Prior to Stanley there had been a category of printed and other materials entirely outside the protections of the first amendment. In common legal parlance, "obscene" materials enjoyed no constitutional protection; their regulation presented no constitutional question. The cases have been all about defining "obscenity," and thus distinguishing it from the protected class of materials. The parties to Stanley stipulated, and the Court assumed, that the movies were "obscene" as the term was then defined. The case made no effort to redefine "obscenity." Yet Stanley's prosecution was invalidated due to some constitutional right relating to "obscene" materials. This much suggests that the "right" was not a first amendment right, at least as previously defined. One might therefore conclude, as did the Hardwick majority, that Stanley "protect[ed] conduct that would not have been protected outside the home...." This argument resembles Tribe's fourth amendment jump starter. Accordingly, Hardwick might argue that his conduct, while prohibited outside the home, was constitutionally protected inside.

Stanley cannot be distinguished as a first amendment case. It will not do to say, as does Justice White, that "[t]he right pressed upon us here has no similar support in the text of the Constitution, and it does not qualify for recognition under the prevailing principles of construing the fourteenth amendment." The first amendment text says nothing about possession of obscene materials and the fourteenth amendment's interpretation is the subject of the instant debate. In a system of "free expression," which is precisely what the Court has construed the first amendment to construct, there is no categorical distinction between watching obscene movies or doing "obscene" things, if done in "private." That is Hardwick's point, and a good one. Once the text is effaced to make way for a "system" of "free expression," the law obviously is determined by some encompassing philosophical principle which is not limited to a particular text, but which will guide interpretation of many. The reasons which explain Stanley's interpretation of the first amendment warrant a favorable rule for Hardwick, regardless of which particular constitutional provision is invoked. Hardwick is right: Stanley presents the same issue as Hardwick.

Take a closer look then at Stanley, particularly its reasoning. The uncanny resemblances here to Hardwick's argument are deeper than even he or his lawyers imagined. One can imaginatively reconstruct the cases so that they are factually identical, and change no fact of analytical sig-

57. Id.
nificance. Make Stanley invite over a friend to watch an “obscene” movie, or have Hardwick watch such a movie alone. As Georgia’s attorney clearly saw, the common issue is whether sexual faculties are tools for simple self-gratification.

Conclusion: per Stanley, the conduct “cannot constitutionally be made a crime.” Why not? Stanley “is asserting the right to read or observe what he pleases—the right to satisfy his intellectual and emotional needs in the privacy of his own home.” This “traditional notion of individual liberty” is embedded in the philosophy of the first amendment:

The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man’s spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the Government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized man.

Against this juggernaut, a mere centuries old constitutional category like “obscene” dissolves. It is true, Justice Marshall admitted, “that Roth [v United States, 354 U.S. 476 (1957)] does declare, seemingly without qualification, that obscenity is not protected by the first amendment.” But no case, including Roth, has dealt with “mere private possession.” Stanley is not, Marshall now says, “decided simply by citing to Roth.”

If Roth only “seemingly” declared obscenity outside the first amendment, what did it really declare? In what I submit is the first shot in a genuine constitutional revolution by enthusiasts of liberal political morality (not Griswold, which is distinguishable, and not the later Roe), Marshall asserted that Roth and subsequent cases actually stand for the individual autonomy suggested by the “right to be let alone,” save for regulation justified by “important interests.” What are those interests? “Georgia asserts the right to protect the individual’s mind from the effects of obscenity.” Marshall well understood this argument, even as he scoffed at it. He realized it was the traditional commitment to nurturing the moral well-being of individual citizens. “To some, this may be a noble purpose, but it is wholly inconsistent with the philosophy of the first amendment.” The Bastille has just fallen.

Stanley is all about limits on governmental power. Legitimate gov-

58. Stanley, 394 U.S. at 559.
59. Id.
60. Id. at 565.
61. Id. at 564 (citing Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting)).
62. Id. at 560.
63. Id. at 561.
64. Id. at 563.
65. Id. at 565.
66. Id. at 565-66.
ernmental interests reduce protection of harm to third parties. Georgia asserted that exposure to obscene materials may lead to deviant sexual behavior or crimes of sexual violence. Marshall’s response: There is little empirical evidence for that assertion.67 Roth had rejected the idea that a connection with anti-social conduct need be shown. But Roth, which dealt with public distribution, inhabited the ancient regime. In the new world of Stanley, regulation of public distribution is appropriate not because persons should not have it—they should, if they want—but solely because children might get them, or they “might intrude upon the sensibilities or privacy of the general public.”68

The reader has no doubt detected the profound pre-analytical commitment to autonomy propelling Stanley. The “home” setting was accidental. Clearly, any place shielded from uninvited view is all the premises require. Once that is appreciated, “home” is an indicator, almost an irrebuttable one, that what takes place there is privileged because the legitimate government interests are not implicated. “Home” will then be a legal term of art carrying out that sorting function. But it would be analytically transparent if the interests Harlan championed, without announced dissent, just six years earlier in Griswold, were still legitimate ones.

A final troubled concept needs analysis for its precise meaning and role in Hardwick’s convoluted argument. That concept is “majority,” as in (for examples) a “majority” cannot impose its “morality” on minorities or dissenting individuals and “moral sentiments” cannot legitimate law. “Majoritarianism” figures prominently in most constitutional theory these days, ranging from the speculation of a professed liberal like Ronald Dworkin, who would identify majoritarianism with collective interests and legislation and rights with judicial protection of the individual,69 to the “conservative” Robert Bork, who considers it the central dilemma of constitutional law.70 In the middle might be John Ely,71 and other “process” models grounded in the famous Caroline Products footnote. These models all harbor the same central conviction: Majorities in our democracy are the ordinary guardians of public life but they are the problem of constitutional law. The endangered species of constitutional law is “minority,” or, in Bork’s recent book, the apparently fungible term “individual.”72 The predatory beast is some kind of “majority.” Part II argues that this entire construction is the constitutionalism of the recent past, that the Constitution and the tradition of its interpretation are fundamentally misrepresented by this construction.

There is more to say about this overburdened but rarely explicated concept. First, “majoritarianism” is an inherently unstable notion.

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67. Id. at 566.
68. Id. at 567.
72. See R. Bork, supra note 70.
G.E.M. Anscombe has shown how a majority can be in the minority on a majority of occasions. On any particular occasion, an enacted law may actually express the will of a minority. Some laws pass by overwhelming majorities, near unanimity. Even then, various considerations of party loyalty, logrolling, and perhaps legislator indifference condition any attempt to extract from the legislative process some moral verdict upon the matter at issue.

As an empirical fact, majoritarianism is fairly unremarkable. To make decisions, there is either unanimity or something else. That something else, in most settings affecting common life, ought to be a majority. Obviously, "majorities" of judges determine constitutional issues, so that it is neither consensus nor unanimity that is decisive; rather, redefinition of the relevant pool of decisionmakers. Indeed, sometimes minorities of judges do. Even in Hardwick, if one totals up the positions of each federal judge ruling on the case, from district through appellate to Supreme Court, it comes out dead even. Second, majorities remain the ordinary channel of political decisionmaking, so that one needs critical additional premises, like the constitutional text, to identify that which is problematic and that which is not about majority outcomes. Third, we still agree that a "super-majority" can, by amending the Constitution, work its will upon minorities, and that courts would uphold the constitutionality of an explicit constitutional norm. Fourth, according to the featured methodology of both sides in Hardwick, a "majority" or consensus of the dead—"tradition"—gets to identify the constitutional rights which judges are supposed to protect against living majorities.

What is this chameleon's job in Hardwick? "Majoritarianism" functions to define a problem and to weight it toward a particular resolution, rather than to describe any empirical reality. It traffics in a submerged but still influential construct, in which "majority v. minority" indicates a "lack of consensus," which through appeal to still further submerged premises, yields a conclusion that individuals should therefore be free to choose the view that they like free of "imposed" morality. Abortion regulation is a good example of this sequence at work. The law professors' "pro-choice" brief in Webster v. Reproductive Health Services states:

The root idea of limited, constitutional government is that such essentially contested, divisive, and speculative matters as the moral or metaphysical status of fetuses from the moment of conception are not to be mandatorily resolved for us all, at the cost of fundamental liberties of personal self-direction, by "accommodation" among any number of "factions" in a "political process."

74. The Supreme Court ruled 5-4, and the single district court judge ruled in Georgia's favor. The Eleventh Circuit was split 2 1/2 to 1/2 for Hardwick, for a standoff of 6 1/2 - 6 1/2. The "half" represents the partial concurrence and partial dissent of Circuit Judge Kravitch.
75. Law professors' brief for respondent at 31, Webster v. Reproductive Health Servs.
“Majoritarian”-centered constitutional law actually cut both ways in Hardwick. Hardwick, or likely his legal advisors, recruited a married couple desirous of performing prohibited acts to join the attack. The district court dismissed their complaint for lack of standing. They did not allege that they were threatened with prosecution or that other couples had been so threatened. Had the married couple remained, Hardwick’s case might have “piggy-backed” upon a marital privacy argument. But it might have been diminished as well. Note the double-edged nature of the majoritarian pivot. Ely’s process version would validate this law since its affected class was no “minority” of homosexuals but a much broader range of persons, including married heterosexuals. It is hard to believe that a majority of Georgians wanted to criminalize such a range of actions. As it was, the state helped frame the majority/minority conflict by expressly conceding that the statute could not be constitutionally enforced against a married couple. Tribe argued that there was no “consensus” against even the conduct proscribed by the statute, and religious amici seconded that observation. In this view, Hardwick profited by dismissal of the joined plaintiffs, and by the state’s limitation of the statute to unmarried persons. But is there a consensus, or a majority, in favor of enforcement?

These comments warrant at least the provisional conclusion that “majoritarianism” is not an analytical construct, but an attractive rhetorical flag for an analysis yet to be brought into view, an analysis rooted in additional unrelated premises replete with a “sociology” which in turn controls the choice of banners. That construct is elaborated in Part III.

A final postscript on the incense that wafts so pungently through Blackmun’s analysis is necessary. Blackmun is very concerned with attributing the anti-sodomy law to “religious intolerance,” which he considers akin to a four-letter word. Blackmun may even presume that nothing more needs to be said to conclude that the law is unconstitutional. At most, though, Blackmun truly relates a modest empirical observation: Some persons in favor of the law condemn sodomy due to religious precepts. On the basis of the briefs submitted, it actually seems that believers more often opposed the law. Lots of believers doubtlessly have no view on the subject; others may think sodomy wrong, but enjoy it anyway. Still more may think it wrong but no subject for legal regulation. It is certainly untrue that one must be “religious” to think sodomy immoral. Does Blackmun mean by this charge anything other than that the traditional dedication to inculcating virtue—a view held in our time by many who are not religious—is itself “intolerant”? Well, whatever it is called, I am still looking for an argument showing why this virtue inculcation, or “in-

76. The brief, unreported district court order is reprinted as Appendix II to petitioner’s Supreme Court brief.
77. See Transcript, supra note 25, at 7-8.
tolerance,” is unconstitutional. Liberal political morality can answer that question. Any law proposing that one sexual lifestyle is morally better than another violates the equal respect due the choices of self-defining, autonomous persons. But where is the argument that liberal morality is constitutionally enforceable?

I think Blackmun’s dependence upon “religious intolerance” signals more clearly than any other of his or Tribe’s themes that Hardwick would have us assume the constitutionalization of liberalism. True, Burger's brief concurrence typifies a portion of the state's argument. The Chief Justice writes that “[c]ondemnation of those practices is firmly rooted in Judeo-Christian moral and ethical standards.” Burger was trying to distinguish this law's province from “mere irrational prejudice,” or majority whimsy. Revealingly, Blackmun views the attempt as further proof of the law’s irrationality. He takes this unfavorable comparison along two routes, all the way to an equation with race discrimination. “A State can no more punish private behavior because of religious intolerance than it can punish such behavior because of racial animus.” Blackmun pronounces, “The Constitution cannot control such prejudices, but neither can it tolerate them.” Moral insights in some way drawn from religion have the same social value as race discrimination. So much for the Christian insight that we are all, regardless of race, color, or ethnicity, equally God’s children, a religious precept so powerfully preached by Martin Luther King, Jr.

The second avenue likens moral condemnation of sodomy from an understanding of religion to little more than blind adherence to the inscrutable, arbitrary product of divine commands. Blackmun again used race discrimination to illustrate:

The parallel between Loving and this case is almost uncanny. There, too, the State relied on a religious justification of its law. Compare 388 U.S., at 3 (quoting trial court’s statement that “Almighty God created the races white, black, yellow, malay and red, and he placed them on separate continents . . . . The fact that he separated the races shows that he did not intend for the races to mix”), with Brief for Petitioner 20-21 (relying on the Old and New Testaments and the writings of St. Thomas Aquinas to show that “traditional Judeo-Christian values prescribe such conduct”).

Aquinas is becoming the bête noir of American constitutional law. In July 1987, Justice Stevens relied upon what he incorrectly described as Thomas’ teaching to conclude that abortion restrictions were an establishment of religion. Stevens’ misportrayal has the same purpose as Blackmun’s: to carry liberalism’s historical and theoretical brief against

79. Id. at 196 (Burger, J., concurring).
80. Id. at 211-12 (Blackmun, J., dissenting).
81. Id. at 212.
82. Id. at 210 n.5.
83. See Webster v. Reproductive Health Servs., 109 S. Ct. 3040, 3083 (Stevens, J., concurring in part, dissenting in part).
religion in public life to religiously grounded moral claims. The tactic is the one seen in Hardwick: paint moral principles with the same brush of irrationality as that used on religion, and they too can be banished from common life. The result is the peculiar construction of Edwards v. Aguilard\textsuperscript{84} in which moral norms proposed by religious persons are the forbidden fruit of politics.

Liberalism purports to reverse tradition and to banish religion from political activity and reflection. In Ronald Dworkin’s words, “political decisions must be, so far as is possible, independent of any particular conception of the good life, or of what gives value to life.”\textsuperscript{85} Since religion is typically thought to bear a fleshy account of the good life—a supposition that is now at best, only plausible—religion is thus “privatized.” Why privatization? Jeffrey Stout answers for the entire liberal tradition in Lockean tones: “What made the creation of liberal institutions necessary . . . was the manifest failure of religious groups of various sorts to establish rational agreement on their competing detailed visions of the good.”\textsuperscript{86} Leading liberal theorists such as John Rawls\textsuperscript{87} and D.A.J. Richards\textsuperscript{88} argue that they are simply completing Locke’s work.

**PART II**

I maintain that the fundamental question of legal theory and political morality is not resolvable as a matter of constitutional law. Presently I defend that view, but first I need to clarify what I mean. I have no doubt that the founding generation, indeed the overwhelming bulk of all Americans until sometime deep into the twentieth century: (a) believed that the law ought to enforce objective moral norms like those against homosexual relations, (b) worked to embody that conviction in law, and (c) succeeded in doing so. Until very recently—into the 1960’s and including Griswold—the Constitution, as judicially construed, interposed no objection to their so doing. All along very few, if any, of those people believed that the Constitution itself required state “enforcement of morals,” or even that the Constitution addressed the subject.

Abortion is a contemporary example of this constitutional agnosticism. The Supreme Court has been caustically criticized for finding a right to abortion-on-demand in the Constitution. But Roe’s critics, including everyday “pro-lifers,” do not assert the precisely opposite conclusion that the Constitution itself prohibits abortion by designating the fetus a “person.” Along with the claim of reproductive autonomy, that option was urged upon the Roe court. My view is that neither claim was persuasively supported by the appropriate sources—constitutional text, structure, and precedent. So, the Constitution is indifferent on the sub-

\begin{itemize}
\item \textsuperscript{84} 482 U.S. 578 (1987).
\item \textsuperscript{85} R. DWORKIN, A MATTER OF PRINCIPLE 191 (1985).
\item \textsuperscript{86} J. STOUT, ETHICS AFTER BABEL 212 (1988).
\item \textsuperscript{87} See J. RAWLS, A THEORY OF JUSTICE 195-257. (1971).
\item \textsuperscript{88} See D.A.J. RICHARDS, TOLERATION AND THE CONSTITUTION (1986).
\end{itemize}
Upon the fundamental question of political morality raised by *Hardwick*, the Constitution is just as nonplussed. That was the common view of Americans at least into the Gilded Age when, for reasons still awaiting definitive elaboration by scholars, a profound revulsion at popular lawmaking by both business and cultural elites began the *Lochner* revolution. That occurred within an overall transfer from popular governance to the administrative state. I sketch in four parts a brief argument for constitutional equipoise, really just enough to warrant the conclusion plausibly. Part III remains the strongest evidence for the conclusion urged now: the argument for liberal political morality, as in *Hardwick*, does not appeal at all to the Constitution or any common aids—history, structure, or precedent—for its exposition.

The sequence proceeds as follows:

(A) the parameters of the Constitution, the matter(s) addressed
(B) its basic institutional commitments
(C) the special case of the Bill of Rights; its content and institutional commitments, especially its support (if any) for judicial enforcement of a particular political morality
(D) the fourteenth amendment, its content and institutional commitments, especially its support (if any) for a particular political morality.

The method is simple, even obvious, but I insist not naive. I propose to read the text. After all, only the text is the Constitution, that which the sovereign people have made law.

A. Our Agnostic Constitution

The Constitution is essentially agnostic because it establishes a government of limited, enumerated powers. It is not a government of "general" or "plenary" governmental power as were and are the states. The federal Constitution grants no explicit power over religion and (as the founders saw the matter) religion's practical adjuncts: morality and education. Nor does the national government enjoy power over public decency, domestic relations, or public health. The federal government has no authority to maintain basic civil peace; its limited criminal jurisdiction stems from its express powers, save for an implied right to defend its existence against seditious conspiracy. From this alone we can conclude that a constitutional verdict on the legal enforcement of morals would be unexpected.

"Morals legislation" and its constitutionality could not be entirely sidestepped. Sunday mail delivery, an exercise of the enumerated postal power, issued in the first major engagement of the national polity with vexing questions of religion and law that were common fare of state polit-
ics. Revealingly, it engendered no judicial controversy. Near the turn of the twentieth century, commercial regulation suppressed other vices, including gambling and prostitution. Judicial declarations of their constitutionality were obtained. The judicial verdict relied upon the traditional view that suppression of vice was a legitimate ingredient of the police power. The *Lottery Case,* for instance, leaves no doubt that gambling was thought harmful not only to society but to willing participants, and for that reason came within Congress' "plenary power" over interstate commerce.

These precedents, just a few years before the *Pierce v. Society of Sisters* and *Meyer v. Nebraska* cases which Hardwick praised as precedent for unregulated "private morality," affirm that "plenary" governmental power included the option to pass morals laws. But "interstate commerce" is a slender, ephemeral empirical hold for such a powerful theoretical point. Fortunately, there were vast expanses in which the national government enjoyed plenary governmental power: the territories. What did the founders do there?

On the same day that it debated the establishment clause, the House of Representatives, without noticeable opposition, passed an ordinance of governance for the Western Territory. Previously passed by the Senate, the ordinance became law with the President's signature on August 7, 1987. The act effectively continued arrangements ordained by the Northwest Ordinance of 1787, passed by the Confederation Congress on July 13, 1787. The importance of the 1789 provision goes beyond the frequently noted provision that "[r]eligion, morality and knowledge, being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged." This belief was shared by the entire founding generation and it confirms the previously mentioned verdict. It makes clear that "plenary" governmental power most certainly encompassed more than both interstitial federal power in the states, and the contemporary liberal conception of proper governmental ends.

After ratification of the Bill of Rights, Congress again did not hesitate to endorse the 1787 action in its entirety. During the incumbencies of Adams and Jefferson, the Indiana (1800) Michigan (1805), and Illinois

90. See *Hoke v. United States,* 227 U.S. 308 (1913) (upholding Mann Act and approving earlier congressional prohibition of contested transportation of obscene material).
91. 188 U.S. 321 (1903).
92. 268 U.S. 510 (1925).
93. 262 U.S. 390 (1923).
94. 1 ANNALS OF CONGRESS 685 (J. Gales, ed.). For a more detailed discussion of the territorial regime, see G. BRADLEY, *CHURCH-STATE RELATIONSHIPS IN AMERICA* 97-104 (1987).
95. Northwest Territory Ordinance and Act, ch. VIII, 1 Stat. 50 (1787).
96. Id. at 51-53.
97. Id. at 52.
(1809) territories were organized by simple application of the Northwest Ordinance. President Madison signed the bill organizing the Missouri territory on basically the same footing, an act that explicitly incorporated the religion and morality clause of 1787.

Central to the significance of the 1789 reenactment is the reality, undoubtedly known to Congress, that the territories were beginning to look like Puritan, moralistic New England. James M. Varnum, formerly Rhode Island’s representative to the Confederation Congress and by 1788 a supreme judge of the Northwest Territory, boasted in an Independence Day address at Marietta, Ohio, that, mindful of “our” dependence on the “Supreme Will,” territory residents “have not neglected the great principles and institutions of religion.” Indeed they had not. In addition to the public lots on which their churches stood, profane swearing, blasphemy, and Sunday labor were already prohibited. Governor General Arthur St. Clair, along with Varnum and Samuel Parsons, also a supreme judge, spoke most forcefully to the former issue:

Whereas idle, vain and obscene conversation, profane cursing and swearing, and more especially the irreverently mentioning, calling upon, or invoking the sacred and supreme being, by any of the divine characters in which he hath graciously condescended to reveal his infinitely beneficial purposes to mankind, are repugnant to every moral sentiment, subversive of every civil obligation, inconsistent with the ornaments of polished life, and abhorrent to the principles of the most benevolent religion.

Congress in 1800 carved Indiana Territory out of the Northwest, leaving behind what became the state of Ohio, and until 1809 the territory comprised the present states of Indiana and Illinois. The now-distinct Indiana legislature immediately imitated its predecessor. In 1807, while Jefferson was president, Indiana prohibited blasphemy, profanity, and worldly behavior on Sunday, with precisely the same $2.00 or two-days penalty. Note that, in anticipation of subsection C: These actions were subject to the constraints of the Bill of Rights, and many of them were undertaken by members of early congresses who, in the very first Congress, drafted, debated, and proposed those amendments to the states for ratification.

Let me repeat the central point: Morals laws were an option under our Constitution for governments of plenary power. Though almost inva-

102. Massachusetts Centinel, July 1, 1789, at 1.
103. 2 Collections of the Illinois State Historical Library 21 (Law Series, T. Pease ed. 1930).
104. Id.
107. Id. at 367.
riably exercised, no one to my knowledge suggests they are mandatory, that Congress must pass such laws. A few people may think they have a “right” to live in a decent society, one in which morals laws are passed and enforced. But this is the “mandatory” claim rephrased, and it is still wrong. The precise meaning of “agnostic”: The question of morals laws is subsumed by the characteristic feature of our Constitution. It is up to the people, and their representatives—in other words, collective self-government.

B. Institutional Commitments

If a prominent feature of the federal Constitution is its enumeration of powers, a featured sub-theme is the composition of institutions to exercise those powers. A glance at the document leaves no doubt where the powerhouse is: on Capitol Hill, in a carefully crafted, bicameral legislature. This is our, or at least the founders’, profound commitment to collective self-government. The obvious procedural mechanism is majoritarianism. Is it so unthinkable to us that the founders might have achieved their goal of composing a legislative branch and tethering it sufficiently to the people to yield a vigorous yet restrained government? Why can’t Madison be right, that (as he argued in the Federalist) the process can check itself, especially since Madison identified as his nemesis the current villain: majoritarianism.

Madison allowed that, in a republic majorities were the chief threats to what he called “private rights.” So much followed from the definition of republics as “popular governments”: since the majority possesses ultimate political power, it may do wrong with intrasystemic impunity. Yet it does not occur to Madison that this gives rise to a “dilemma” which the Constitution, judicially interpreted, might solve. Not even a bill of rights suggested to Madison a—much less the decisive—constitutional role for judges. He well understood that exactly because in a republic the people had final power to do wrong they—and not judges—need to be persuaded to do right. Madison wrote to Jefferson in 1788, before proposing amendments to Congress:

What use, then, it may be asked, can a bill of rights serve in popular Governments? I answer, the two following, which though less essential than in other Governments, sufficiently recommend the precaution: 1. The political truths declared in that solemn manner acquire by degrees the character of fundamental maxims of free Government, and as they become incorporated with the National sentiment, counteract the impulses of interest and passion. 2. Although it be generally true, as above stated, that the danger of oppression lies in the interested majorities of the people rather than in usurped acts of the Government, yet there may be occasions on which the evil may spring from the latter source; and on such, a bill of rights will be a good ground for an appeal to the sense of the community.

Madison’s “illiberalism” can be distilled from Federalist 10 and 51. There, Madison commits the mortal sin of entrusting even religious conflict to majoritarian organs, not to an independent judiciary. In Federalist 10, he argues that the “variety of [religious] sects dispersed over the entire face of [the United States], must secure the national Councils against any danger from that source.”\textsuperscript{110} The same enlarged sphere—the “extent and proper structure of the Union”—secured against “a rage for paper money, for an abolition of debts, for the equal division of property, or for any other improper or wicked project.”\textsuperscript{111} Security for all kinds of rights “consists in the greater obstacles opposed [by the extended republic] to the concert and accomplishment of the secret wishes of an unjust and interested majority.”\textsuperscript{112}

Madison thought Congress was the constitutionally appropriate branch to define and secure civil rights. “In a free government, the security for civil rights must be the same as for religious rights. It consists in the one case in the multiplicity of interests, and in the other, in the multiplicity of sects.”\textsuperscript{113} As Gary Glenn so forcefully points out, Madison’s argument makes no sense except on the assumption that Congress is to secure civil rights through “a coalition of a majority of the whole society [which] could seldom take place on any other principles than those of justice and the general good.”\textsuperscript{114}

The suggestion is that the Constitution represents a massive institutional commitment to collective self-government. The first part of the argument is already made: legislative supremacy.\textsuperscript{115} The second part recovers some forgotten facts about our “independent” judiciary; facts which demolish the implicit constitution of liberalism. It is not only the affirmative case so far made, that government seems almost entirely committed to Congress. Nor is it only that, as subsections C and D show, the Bill of Rights and the fourteenth amendment reinforce rather than undercut this commitment. Here the spotlight is on the negative implication; specifically, the constitutionally impossible role liberalism defends for the independent judiciary.

The historical record reveals that ratification was accomplished more in spite of, than because of, an independent federal judiciary.\textsuperscript{116} Popular opinion suspected an alien force intruding upon that local self-government carried on by the county court. More prosaically, many feared en-

\textsuperscript{109} 1 Writings of Madison 426 (1865).
\textsuperscript{110} The Federalist No. 10, at 84 (J. Madison) (Mentor ed. 1961).
\textsuperscript{111} Id.
\textsuperscript{112} Id.
\textsuperscript{113} Id. at 324.
\textsuperscript{114} G. Glenn (unpublished manuscript available from the author). The discussion in the text is indebted to Glenn’s fine work.
\textsuperscript{115} For a discussion of legislative supremacy, see Bradley, Law Enforcement and the Separation of Powers, 30 Ariz. L. Rev. 801 (1988).
\textsuperscript{116} See G. Bradley, supra note 94, at 72.
forcement of debts they might escape locally.\textsuperscript{117} Theoretically, a powerful current of thought articulated by Jefferson carried separation of powers thinking to its conclusion: frequent, popular election of judges.\textsuperscript{118} As it was, federal judicial power was limited to "national" issues and to cases plausibly threatened by local interests.\textsuperscript{119} In this light, the national judiciary was an aspect of the problem of federalism, \textit{not} rights versus collective interests or any recognizable prototype of that construction.

Were this independent judiciary expected to play such a role, the Constitution would have to have said more about judicial review itself. Certainly its existence could not have been left to implication. More important, the critical questions of constitutional lawmaking—\textit{not} the existence of judicial review, but its scope, the authoritativeness and finality of Supreme Court decisions, and the role of Congress in constitutional determinations—would have been resolved. To say in defense of the liberal construction that judicial review was then in its infancy does not help the case. Its future growth was not foreseeable, and no theory of government or political morality predicated upon its mature shape can therefore be attributed to the founders. In any event, Congress played the role of patriarch in some societies: It had authority to abandon the child at any time.

Congress could have limited Supreme Court jurisdiction to the insignificant Article III grants of original jurisdiction.\textsuperscript{120} Indeed, Congress need not have created lower federal courts at all. Combined, the Constitution contemplates Congress choosing to leave all questions of substantive federal constitutional law for final resolution by state courts. Those courts were often staffed by elected officials. In any event, there was \textit{no} constitutional insurance that state judges be "independent" in any sense at all. As it was, Congress created federal courts but generally provided for concurrent state and federal jurisdiction over constitutional questions. Even then, only in 1816\textsuperscript{121} did the Supreme Court conclusively (and correctly) affirm its power to review state court decisions on constitutional law. The point remains: The profound disagreements about the nature and extent of \textit{all} national power which make up the history of our constitutional law until the verge of this century preclude the pivotal role for the federal judiciary posited by liberalism. The \textit{entire} national government, including Congress, could not until recently be imagined superintending political life coast-to-coast in the way Hardwick would have the Supreme Court.

\textbf{C. The Bill of Rights}

It is useful to begin here by taking a look at the text. Despite much recent turgid talk of its devotion to individual dignity and autonomy, the

\begin{itemize}
  \item \textsuperscript{117} \textit{Id.}
  \item \textsuperscript{118} \textit{See} Bradley, \textit{supra} note 115, at 820-21.
  \item \textsuperscript{119} \textit{See} U.S. Const., art III, § 2, cl. 1.
  \item \textsuperscript{120} \textit{See} \textit{id.} at cl. 2.
  \item \textsuperscript{121} Martin v. Hunter's Lessee, 14 U.S. 1 (1 Wheat) 304 (1816).
\end{itemize}
Bill of Rights actually talks of "the people's" rights much more than the rights of persons. To the founders, "the people" was a conventional formulation, and was no synonym for an aggregate of individuals. Ronald Peters argues (in specific reference to the Massachusetts Constitution of 1780) that the term "the people" was used consciously, and that it denoted an entity distinct from any individual, group of individuals, or even all individuals. Peters concludes that this conception was central to the thinking of Massachusetts residents and that their political thinking cannot be understood apart from it. Our Bill of Rights is also incomprehensible without aid of this concept.

This concept of popular rights stems from the theoretical situation in which the founders found themselves after the Revolution. The Revolution was basically fought over the principle of self-rule, the right of the people to make the laws by which they were to be governed. "Autonomy" it was, but to the founders that meant freedom of the political community to chart its own course—in short, collective self-government. It is also fair to say that the predominant connotation of "freedom" or "liberty" was this popular sovereignty. "We, the People" delegate governmental authority to the governors but do not transfer sovereignty. Indeed, "when in the course of human events" the people deem it necessary to do so, they may exercise their residual sovereign authority to dissolve a government and establish another in its stead. This is our theoretical wake up call: The political community exists independently of the government, and (in a sense) continually monitors it. Not only intrasystemically will the community, inevitably acting through a majority, have its way.

Historian Gordon Wood probably goes too far in suggesting that the more contemporary connotation of "autonomy" hardly existed in the Revolutionary era. But, surprisingly, the Bill of Rights is scarcely devoted to what we now call "autonomy"—the freedom of individuals to be governed by certain laws, especially by "liberal" ones, notwithstanding the community's contrary disposition. The only explicit mention of "individual" guarantees at all are in the fifth and sixth amendments.

123. Id.
124. Id.
126. The fifth amendment states:
   No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.
   U.S. Const. amend. V.
127. The sixth amendment states:
which are important but nevertheless procedural guarantees. Even so, grand jury indictment and jury trial in the vicinage partake more of the dominant connotation of "autonomy," collective self-government. They protect individuals by placing persons at the mercy of the people, or at least a cross-section of them. Of course, the community was then thought a protection against government oppression, not an accomplice to it. The seventh amendment\(^{128}\) guarantee of civil jury trial shares this purpose.

These are no idle protections. I for one doubt very much that every member of a twelve-person jury drawn would have convicted Michael Hardwick, even if a majority of twenty-three grand jurors returned a true bill. Indeed, much of Tribe's argument would make a great closing argument for the defense to such a jury. Allen Steinberg's recent work on criminal justice in Philadelphia, circa 1800-1880, indicates just how profoundly "political," as in conducive to popular self-government, the criminal trial was for much of our history.\(^{129}\) It still is.

Almost the entire balance of the Bill of Rights specifies "rights of the people." The third amendment\(^{130}\) implicitly reveals the theoretical dynamic. Protecting against forced quartering of soldiers during peacetime does resonate with modern notions of individual privacy. Even so, this "substantive" guarantee of privacy is penultimate, for quartering is permissible "in a manner prescribed by law." In other words, so long as expressed regularly through the lawmaking process, the "right" of the people to make laws overrides here another putative "right" of individuals to be governed in accord with certain norms. The first amendment\(^{131}\) is only somewhat different. It speaks explicitly of the people's right to assemble and petition, which are adjuncts of self-government. Freedom of speech and of the press were also then, if not now, likely understood as instruments more of popular sovereignty than of individual expression. That leaves the religious guarantees for further examination. I have ar-

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In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process of obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

U.S. Const. amend. VI.

128. The seventh amendment states:
In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

U.S. Const. amend. VII.


130. The third amendment states: "No Soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law." U.S. Const. amend. III.

131. The first amendment states: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. Const. amend. I.
gued at length elsewhere that nonestablishment is a structural adjustment whose purpose and effect was to insure full political participation by all sects, so that the political process could protect those sects from unfriendly legislation. It was grease for the machinery of Federalist 10. And notwithstanding the admitted individualistic appearance of free exercise, its province was, in my opinion, communal.

The right of the people specified by the fourth amendment was not apprehended by its ratifiers to refer to an individual’s entitlement to particular laws. That is what we think. But the plain meaning, historically recovered, is this: the people’s right to govern search and seizure through laws of their choosing. That is the “right of the people,” and individuals have no claim to be governed by particular laws other than the ban on general warrants.

D. The Fourteenth Amendment

The text of the fourteenth amendment appears in the footnotes and I doubt that many constitutional law professors could pass a quiz on

133. See Bradley, Commentary on West and Garvey, 4 NOTRE DAME J. OF L., ETHICS, AND PUB. POL'y 639 (1990).
134. The fourth amendment states:
The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST. amend. IV.
136. The fourteenth amendment states:
SECTION 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

SECTION 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

SECTION 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an
it. The vast bulk of the enactment—sections two through four—do present little direction for contemporary problems. But on the face they carry the fundamental message of the entire amendment: re-construction of the southern states on a footing of collective self-government, with federal insurance that all persons, including blacks, are members of the body politic. Looked at this way, the amendment is a remarkable ode to America’s then continuing confidence in self-governance.

This fundamental message must influence us even as we attend the exposition of discrete clauses like “due process” and “equal protection.” This is not the occasion to rehash the judicial operation whereby “due process” was disfigured into “due substance.” Sufficient for present purposes is the observation that everyone agrees the due process clause’s predominant understanding prior to the Lochner revolution was in accord with extant (positive) law of the land.” It is true that the privileges and immunities clause was—and should still be—“substantive” in an important sense which firmly distinguishes it from “process.” I must leave full discussion of the issues thereby raised to a forthcoming book. Now I simply assert that even the privileges and immunities clause, so rendered, does not get us to where substantive due process has taken us.

It will help to read the equal protection clause in its straightforward sense, which reveals that the only word usually cited—“equal”—is the one word which is practically redundant. “All persons,” that is, every single human being, are to enjoy the “protection” of the state’s law. What this means is simple enough. Laws against rape, for instance, are for the protection of blacks as well as whites. More pointedly, laws against murder, which includes lynching by citizen mobs, are for the protection of both blacks and whites. No one at all is to be permitted by selective or lax enforcement to remain outside the legal community in a virtual state of nature. This intention is supplemented by the due process clause which effectively prohibits the converse: no extralegal enforcement action oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may be a vote of two-thirds of each House, remove such disability.

SECTION 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss of emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

SECTION 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

U.S. Const. amend. XIV.

to the detriment of the life, liberty, and property interest of any person. Neither of these clauses directly relates to "state laws" to be reviewed by federal courts. The ad-hoc, extra-legal quality of the prohibited acts suggests an extremely limited remedial (e.g., habeas corpus, mandamus, prohibition) role for federal courts. Presumably, prophylactic legislation would be necessary to redeem these pledges.

This account of equal protection and due process highlights the continuity between it and the founding commitment to collective self-government. The founders fought for and established the autonomy of the American people, their freedom from political domination, so that the laws by which they were governed were their own. The fourteenth amendment says, in effect: It is by those laws, and not by extra-legal action or inaction of state officials, that we all shall be governed.

Historical recovery reinforces that interpretation. It counsels legislative activism. Fortunately, the only explicit textual reference to "enforcement" of these guarantees is to congress. Any judicial involvement at all is implied. Indeed, the intuitively plausible role for courts would be to vindicate, by adjudication and issuance of remedies, what Congress thinks equality entails. The federal insurer is popular—indeed, majoritarian—not judicial.

Legal historian William Nelson relates the "embryonic form" of the fourteenth amendment: Congress shall have "power to make all laws necessary and proper to secure to all persons in every State within this Union equal protection in their rights of life, liberty and property." It provides no role for the judiciary at all! This is in accordance with the sentiment which produced the amendment. Nelson writes that the fourteenth amendment was "understood less as a legal instrument to be elaborated on in the Courts than as a peace treaty to be administered by Congress." While some "self-executing" effect was intended, there remained no doubt that this was primarily an empowerment of Congress. Putting together these pieces—non-technical generality, Congressional power—yields a sum by which almost all contemporary jurisprudence could not be more at odds with the original understanding. It seems that even the Civil War amendments and their framers still believed the people, via effective politics, would reconstruct the South, redeem Lincoln's pledges to the emancipated slaves, and re-establish the Republic sundered by secession and bloodied by war.

PART III

Part I argued that Hardwick presents for constitutional resolution the fault line of contemporary political morality, more or less the fundamental alternatives in contemporary legal philosophy. Part II warranted the provisional conclusion that the Constitution does not arbitrate the dispute. The Hardwick majority assumed this position. They are respect-

139. Id. at 110.
ful of the Constitution and faithful to the traditional judicial interpretation of it. Under normal conditions, this faithfulness and questions pertaining to its execution will appear operationally as a reflection about methodology: how to go about adjudication in constitutional cases with "legitimacy," consistent with the initial commitment to collective self-government. Any acceptable methodology will cleave closely to textualism which, by being historically grounded, will protect against erosion of that commitment. Whether this amounts to genuine or spurious "objectivity" in any other sense is unimportant. This method is certainly not "objective," as in neutral among world views or individual aspirations, redolent of a Rawlsian "original position." Additions to the text, like "substantive due process" ought, if ventured at all, to be undertaken with both hands firmly holding tradition. Such adventures will then be a fairly modest enterprise, typified not by *Lochner* but by *Pierce* and *Meyer*: staying the course during periods of destabilization.

However, the *Hardwick* dissent (Blackmun, joined by Marshall, Stevens, and Brennan) and Tribe (in his brief, oral argument, and treatise in *American Constitutional Law*) claim the judicial tradition as their own. Is this dispute similarly inarbitrable? Fortunately it is not. The dissenters are the heretics. Inquire beyond assertions of orthodoxy to the decisive question: How do they prove their orthodox, that is, what reasons are given, what texts are cited, what propositions are offered?

There is no reasonable doubt that their argument does not rely upon the constitutional text. What Phillip Kurland once said about the Court's church-state decisions is here apopros: The Constitution has been an excuse, not a reason, for the opinions. That is easily proved by meditating upon the text "interpreted" by *Hardwick*: "No state . . . shall . . . deprive any person of life, liberty or property without due process of law." It is no more suggestive of decision if the effects of "incorporation" are brought into view. Then we are supposed to resolve the issue as one of—or all of—"free speech" or protection against "unreasonable search and seizure" or quartering soldiers in the home. This is still a long way from warranting an answer to the contested question: Is the moral soundness of individuals a legitimate purpose for the exercise of state police power? The happy coincidence, until quite recently, of laws so predicated and all these constitutional provisions, suggests that no historically-grounded account of constitutional lawmaking by the judiciary, including a "due substance" clause stuffed by the traditions of the people, may justify the claim. From the nineteenth century until 1960, all fifty states had laws like Georgia's. A wave of repeal has since eliminated twenty-six.

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143. U.S. Const. amend. XIV, § 1.
145. *Id.*
but only in 1980 was the first judicial declaration of constitutional invalidity obtained.146

It is not so much that the constitutional text is clay in the black-robed potters’ hands. At least then the materials—the clay—limit the possibilities for design. No, we are talking here about creation ex nihilo. There is only some pretense to the contrary. The first signs of concession are easily ascertained. An undifferentiated “first amendment,” rather than the collection actually strung together there by the first Congress, is paraded. Then, “privacy” or “autonomy” or some other shorthand is substituted for the more motley collection making up the Bill of Rights. Griswold147 trafficked in this runaway conflation. I call its methodology the “in-de-ductive” method of constitutional lawmaking. “Induction” refers to a general analytical technique which first investigates all relevant phenomena, and seeks in them a common principle. “Deduction” starts from an intuited or self-evident principle, and proceeds to derive implications. Griswold did both: It surveyed the entire Constitution, particularly the Bill of Rights, and decided that “privacy” was a common element. A “general” right to privacy was christened an autonomous principle. From it, desired conclusions—like contraceptive use or abortion-on-demand—are confidently drawn. The trick, or the pay-off, is that neither conclusion could persuasively be drawn from any single constitutional clause. Once this equation of the Constitution with regard to “privacy” is made, the willing judge is relieved of anchorage in the now transcended text to pursue pre-analytical commitments.

The above is suggestive. One can easily make the case for atextualism by looking at Blackmun’s method in Hardwick. Blackmun states: “I believe we must analyze respondent Hardwick’s claim in the light of the values that underlie the constitutional right to privacy. If that right means anything, it means that, before Georgia can prosecute [Hardwick], it must . . . .”148 Note the progression away from the text until it is completely out of sight. Start now with a bulk right called “privacy,” itself tethered to the Constitution most tenuously. Then determine (how is unspecified, but one suspects further recourse to a preferred, nonconstitutional vision) its underlying values. Top all of this off with flat assertion: “If this means anything, it means . . . .” and you have, I submit, completely removed the Constitution from constitutional law. We may not yet know where we are going, but we are certainly on our way.

Genuine “authority,” in Blackmun’s hands, is precedent, and consists almost entirely of citation to post-Griswold “privacy” cases. I return to those precedents shortly but, should they turn out to be the sole “authorities,” the argument would indisputably be a judicial construction of the last twenty or so years. The purpose here is to examine the claims of authority by Blackmun—and by Tribe—to a handful of earlier cases. (I take up Griswold separately). Tribe refers to “principles of private liberty

147. 381 U.S. 479 (1965).
endorsed by the Court since the 1920’s," and to *Meyer v. Nebraska* and *Skinner v. Oklahoma*.

Blackmun notes the third case usually included in this pedigree, *Pierce v. Society of Sisters*.

Observe what they stand for, and gauge their “authority” for the constitutional law defended by Hardwick.

The doctrinal pigeon-holing of these cases is disputed. Tribe considers *Pierce* a free exercise case as does Robert Bork.

Bork at one time saw it as I would and as Blackmun seems to see it: a substantive due process decision. Part of this dispute owes to *Pierce’s* timing. It invalidated a state law before the free exercise clause was incorporated; as far as the self-understanding of the *Pierce* court went, it could only be a fourteenth amendment case. *Meyer* might now be seen as a free speech case—Bork so classifies it—and it was decided after incorporation. Still, the opinion itself seems oblivious to that judicial coup. *Skinner* dealt with forced sterilization of habitual criminals and appears to be a direct ancestor of the reproductive rights of *Roe v. Wade*, *Eisenstadt v. Baird*, and cohort. In any event, let us assume what I take to be the claim about the cases by Blackmun and Tribe: they all defeated state legislation in favor of some “private liberty” or “right” that is not persuasively linked to the text, but which nevertheless resembles that argued for in *Hardwick*. What follows that is relevant to *Hardwick*? Answer: nothing important, and almost nothing at all. Of course, if one asked the *Pierce* and *Meyer* Courts whether they were saying anything that warranted Hardwick’s claim, their answer would be no. As mentioned, only a few years earlier they affirmed congressional vice laws. Anyway, these cases do share a certain methodological latitude. They articulate some extratextual principle of decision, which might have been called “privacy” (but was not), even if it does not articulate a “right” to oral sex. This much the cases share not only with *Hardwick* and *Roe* but also with *Lochner v. New York*, *Plessy v. Ferguson*, and *Scott v. Sandford*, none of which are cited as authority by either Tribe or Blackmun. But *all* are extratextual. *Scott* and *Lochner* are commonly seen as “substantive due process” cases. *Plessy’s* “separate but equal” rule, in my opinion, has no basis in either constitutional text or history, and is a “substantive” equal
protection case. *Plessy* self-consciously articulated a right of association (social, not intimate) that could not be overridden by state laws.

No wonder those extratextuals are slighted in favor of "good" cases like *Pierce*, *Meyer*, and *Skinner*. But insofar as the major similarity—that of a methodology which escapes the text to articulate "rights"—*Lochner* is just as relevant. Indeed, the *Pierce* and *Meyer* Courts proclaimed themselves within the *Lochner* tradition: The *Meyer* Court cited *Lochner*,\(^{162}\) and the *Pierce* Court said it followed *Meyer*.\(^{163}\) All are not only substantive due process cases, they are all liberty of contract cases. If there is a "fundamental right" articulated or at work in *Meyer* and *Pierce*, it is the right of parents and teachers to economic freedom, the latter to pursue a lawful calling without unreasonable interference from the state; the former to engage teachers so employed to educate their children without hindrance by such regulations. Indeed, *Pierce* is not even a proto-free exercise case. A co-plaintiff in that case was a private, non-sectarian school, both plaintiffs were corporations, and the Court expressly recognized that deprivation of property, due to the effective closure of the schools for lack of students, was at issue.

There are genuine *Lochner* cases, and so it is to *Lochner* and progeny that we are supposed to appeal for authority in *Hardwick*. This irony is compounded by Holmes’ dissent in *Meyer*.\(^{164}\) The difficulty is heightened by what little the cases say about state power over the moral soundness of individuals. Despite some talk of fundamental rights, including a laundry list familiar from the *Slaughterhouse Cases*,\(^{165}\) the precise holding in each case is the same: The state has needlessly interfered with the liberty to pursue a lawful calling and, much less prominently, some right of family autonomy. That is, the statutes were *not* reasonably related to a legitimate governmental end. They were arbitrary. To really stand for something like *Hardwick*’s claim, that "end" would have to be virtue inculcation or a cognate, and the Court would have to pronounce it illegitimate. In fact, the end pursued in *Pierce* and *Meyer* is something like social solidarity. At least, the "parochialism" of insular ethnic and religious communities seems at odds with the end in view. This is not the same as concern for individual moral well-being. However, the posited ends *are* legitimate, and the opinions each make clear, if only in passing, that the moral quality of individual citizens is a legitimate state concern.\(^{166}\) The critical jurisprudential move is the Court’s independent judgment that, contrary to the state’s assertions, instruction in foreign language or private schools are *not* harmful, and do not endanger the state interest in social solidarity.

These cases constitutionalized "rights" that were already established by legislative tradition. "Parochial education" (to use a broad term en-

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\(^{162}\) *Meyer*, 262 U.S. at 399.
\(^{163}\) *Pierce*, 268 U.S. at 534-35.
\(^{164}\) *Meyer*, 262 U.S. at 412 (Holmes, J., dissenting).
\(^{165}\) *Slaughterhouse Cases*.
\(^{166}\) *See id.* at 399; *Pierce*, 268 U.S. at 534.
compassing both private sectarian education and the kind of public school instruction in Meyer) had, despite great opposition, secured a firm foothold in the nineteenth century. If the tradition is as strong as its constitutionalizing proponents claim, most jurisdictions will honor that tradition. Those that do not are probably temporarily deranged. The nativism which produced the laws struck down in Pierce and Meyers did indeed pass. I doubt very much whether those laws would have long survived. I say that not in the least because either nativism or anti-Catholicism (the social forces behind the legislation in Pierce and Meyer) have been transitory fascinations to the American people. Quite the contrary—Catholic schools have survived much greater perils than those present in the 1920's, and have survived because of countervailing political commitments to them not only by Catholics but by others in political coalitions, specifically, the Democratic Party.

Judicial “rescues” in the 1920’s—such as they were—do not compensate for the difficulties wrought by the Supreme Court upon Catholic schools. The analysis in parts I and III of this article suggests that the type of “extra-constitutional” judicial ordering for which these cases offer authority is no friend of ethnic and religious minorities hugging traditional ways. Those parts specify a public morality of “autonomy” at war with the moral and spiritual heteronomy of Roman Catholicism.

Skinner presents a still more unusual situation. It is not a “due substance” case at all. It is really about equal protection, with a subtext on procedural due process. Oklahoma had provided by statute for proceedings to be instituted against those thrice convicted of “felonies involving moral turpitude.” Notice, opportunity to be heard, and a jury trial were provided to resolve two issues: (1) was the defendant a “habitual criminal,” and (2) could the sterilization be performed safely? The statute conclusively presumed that habitual criminality was genetically transmitted. That this issue was not rebuttable by the defendant formed the basis of Chief Justice Stone’s concurrence. The majority found an equal protection violation. All were doubtlessly animated in their concern for one of the “basic civil rights of man. Marriage and procreation are fundamental to the very existence and survival of the race.” This elaboration smacks of social utility and resonates with what the Court expressly allowed: constitutional involuntary sterilization of “habitual criminals.” Only Justice Jackson doubted, in dictum, that a “majority” might be able to have its way with an individual on such a matter.

The reason for the decision was the almost whimsical categorization of crimes involving moral turpitude. Apparently arbitrary classifications were at work. “When the law lays an unequal hand on those who have committed intrinsically the same quality of offense and sterilizes one and

168. Id. at 537.
169. Id. at 543-45.
170. Id. at 543.
171. See id. at 546.
not the other, it has made as invidious a discrimination as if it had selected a particular race or nationality for oppressive treatment."

In other words, this scheme has no reasonable relation whatsoever to the presumed end of the legislation, public safety. This conclusion is simply inapposite to the Hardwick question.

Griswold is almost invariably cited first in the string of contemporary “privacy” cases, and the link has been recently tightened by enthusiasts of Roe to put abortion rights in the same constitutional basket with contraceptive rights. Griswold does share some of the methodological heterodoxy of Lochner and Roe, but that says little. Griswold simply cannot support Hardwick for the simple reason that, as the Eisenstadt Court admitted as it was about to turn Griswold on its head, Griswold struck down “an unconstitutional infringement of the right of marital privacy.”

Eisenstadt simply redefined marriage—hence, “marital privacy”—by reducing it to its individual, constituent parts.

How then is the revolution supported? Essentially by flat assertion. Here, in order, are the central “justificatory” passages for the three bedrock cases, Stanley, Eisenstadt, and Roe:

**Stanley:** “If the First Amendment means anything, it means that [Stanley can watch what he pleases at home].”

**Eisenstadt:** “If the right of privacy means anything, it is the right of the individual, married or single, to [make his or her own procreation decisions].”

**Roe:** “This right of privacy [wherever it is in the Constitution] is broad enough to encompass [the right to abortion-on-demand].”

Now, Justice Blackmun, in Hardwick: “If that right [of privacy] means anything, it means [that Georgia must justify to the judiciary its proscription of sodomy].”

There is more to Blackmun’s argument, but this is the climax of the story. The question remains: how to persuade that liberal political morality in the Constitution is the socially authoritative, architectonic principle. Which is to say, that it is the constitutional master principle. The answer recognizes that the contested issue is one of legal theory. Legal theory, as John Finnis notes, is part of social theory, and a methodologically critical social theory is determined by moral and political theory. Even from the perspective of critical thought, a particular legal theory depends for its validity upon an encompassing account of little less than human being and reality. In that sense, legal philosophy is “contingent” upon a broader account of human experience. A legal theory also depends

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172. Id. at 541.
175. Eisenstadt, 405 U.S. at 438 (emphasis in original).
177. Hardwick, 478 U.S. at 199.
for its intelligibility and attractiveness (in an everyday sense) upon the extant web of social relations, propositions, and institutions. That is, before even a “true” (i.e., verified by critical reason) political philosophy can be “enculturated”—adopted by persons in a concrete society organized for action in history as a reason for authoritative political action—it needs a hospitable cultural environment. It must “fit” with prevailing customs and laws as well as existing political institutions.

The obvious way to “reconstitute,” or constitute anew, a society is by direct appeal to an entirely different paradigm of social and individual life. From that may be derived a legal philosophy with which the Constitution can be retooled. This is precisely what the Hardwick dissent proposed. Its direct, unmediated appeal to a reconstituted social reality is unprecedented. Its audacity suggests why.

Part I chipped away at some of the covering gloss. That task needs now to be completed before the horizon is brought into view. In legal theoretical terms, liberal political morality and its campaign against religious and moral (i.e., perfectionist) incursions upon public life can work only for as long as strategic devices. Practically, liberalism will not long be able to do both of the following: keep the loyalty of a society comprising religious believers and prevent their religious conceptions of social life from turning the polity illiberal.179 The problem is especially acute, if not unsolvable, when the controlling document—our Constitution—creates a government for, by, and of the people. What must eventually happen, historically if not logically, is replacement of traditional personalities, customs, and mores with “liberal” personalities, customs, and mores. Transported to the world of judicial opinion writing, liberal political morality will be justified, or “sold,” by redefining who we are and what a human being is. That is precisely what Hardwick attempts.

How much of contemporary “living Constitution” talk is captured by the following two samples of the new “conspeak”? One is a 1985 Brennan speech widely regarded as the manifesto of liberal constitutionalism. Justice Brennan praised the “transformative purpose of the text.”180 What text? What was being “transformed”? The Constitution was intended to make a new society.181 The Civil War amendments were designed to “make over the world.”182 This is not a constitution but a blueprint for the ideal society. “For the Constitution is a sublime oration on the dignity of man”;183 it “embodies the aspiration to social justice, brotherhood and human dignity that brought this nation into being.”184 The amended Constitution is no less than “the lodestar for our aspirations.”185

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181. Id.
182. Id.
183. Id.
184. Id. at 1.
185. Id.
tion here of collective self-government, but lots about the ideals that any government (as Brennan sees it) should abide. The text (which might reframe those ideals through allocation of institutional competences) is effaced. "We read the Constitution in the only way we can: as Twentieth Century Americans."188

Tribe is more brazen. He confesses that the Constitution contains "no discussion of the right to be a human being."187 The judiciary will fill in the gap. Judges have "reached into the Constitution's spirit and structure, and [have] elaborated from the spare text an idea of the 'human' and a conception of 'being' not merely contemplated but required."188 Evidently this was done by "humane" constitutional law, which is now frankly equated with a philosophy of "human beingness."

Blackmun is no less philosophically inebriated. In what now conclusively appears to be the justificatory paragraph, he wrote in Hardwick:

We protect those rights not because they contribute, in some direct and material way, to the general public welfare, but because they form so central a part of an individual's life. "[T]he concept of privacy embodies the 'moral fact that a person belongs to himself and not others nor to society as a whole.'" Thornburgh v. American College of Obstetricians & Gynecologists, 476 U.S. at 777, n.5 (Stevens, J., concurring), quoting Fried, Correspondence, 6 Phil. & Pub. Affairs 288-289 (1977).

And so we protect the decision whether to marry precisely because marriage "is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects." Griswold v. Connecticut, 381 U.S., at 486. We protect the decision whether to have a child because parenthood alters so dramatically an individual's self-definition, not because of demographic considerations or the Bible's command to be fruitful and multiply. Cf. Thornburgh v. American College of Obstetricians & Gynecologists, supra, at 777, n.6 (Stevens, J., concurring). And we protect the family because it contributes so powerfully to the happiness of individuals, not because of a preference for stereotypical households. Cf. Moore v. East Cleveland, 431 U.S. at 500-506 (plurality opinion). The Court recognized in Roberts, 468 U.S., at 619, that the "ability independently to define one's identity that is central to any concept of liberty" cannot truly be exercised in a vacuum; we all depend on the "emotional enrichment from close ties with others."189

Therein resides the terminus of all arguments on Hardwick's behalf. Note first the caliber of "authority" Blackmun trades in. That entire paragraph contains but two statements of "law," in the sense of ratified by a majority of Justices. One, the Griswold periscope, actually runs contrary to Hardwick's argument. The other, from Roberts, contributes something but is clearly doing menial work. The rest of the paragraph contains scattered judicial statements, not authority. The critical passage is from a

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186. Id. at 7 (emphasis added).
187. L. Tribe, supra note 6, at 1308.
188. Id.
189. Hardwick, 478 U.S. at 204-05.
scholar, Charles Fried. For that matter, the paragraph is densely overpopulated. The "right to intimate association," for example, is reducible to a more fundamental right to define oneself, to be (in Tribe's formulation) "master of the identity [I] create in the world." So do the remaining statements about marriage, family and the Jaycees (Roberts). Therefore, Blackmun observes:

[That] individuals define themselves in a significant way through their intimate sexual relationships with others suggests, in a Nation as diverse as ours, that there may be many 'right' ways of conducting those relationships, and that much of the richness of a relationship will come from the freedom one individual has to choose the form and nature of these intensely personal bonds.¹⁹¹

As Russell Hittinger has summarized, legal uses of "autonomy," "expression," and self-determination are "various modalities" of a right to be self-defining. "Privacy" and "conscience" are two more commodious shorthands.¹⁹² The expressive self is the new colossus of constitutional law. In Hittinger's apt phrase, "[a]rt... has become the central analogue for what is to be valued in human agency."¹⁹³

This is quite new, quite culturally specific, and forms a cult of subjectivity. That the uniqueness "of each persons should lead to a conception of life in which the goal is the formation and expression of one's own personality is an idea foreign to ancient or medieval thought."¹⁹⁴ Any society, past or present, determined by Eastern religion and spirituality would find the cult idolatrous, worshipping an illusion.¹⁹⁵ But the notion of a self-defining individual, creating an identity through successive choices which are themselves no subject of moral evolution save for harmful effects upon others, also could not be sustained—if thinkable at all—until recently in Western societies. The apex of the moral life until recently was attunement to an order of being not of one's making, and the medium was freely willed acts. Indeed, the apex of that spiritual tradition was kenosis, self-emptying so that, as Paul said, "it is not I who live but He who lives in me."¹⁹⁶ Until the 1960's, no Supreme Court case could talk of the "moral" fact that we belong to ourselves for the simple reason that in a culture of traditional believers and regardless of rights against government, "morally," people thought they belonged to God. That is why Blackmun pointedly pits Biblical morality against self-definition.¹⁹⁷ The two are just plain incompatible. All of which suggests that

¹⁹⁰. L. Tribe, supra note 6, at 1304.
¹⁹¹. Hardwick, 478 U.S. at 205.
¹⁹². R. Hittinger, Privacy and Liberal Legal Culture 3 (unpublished manuscript available from the author).
¹⁹³. Id.
¹⁹⁷. Hardwick, 478 U.S. at 205.
the “expressive self” has gone from the fringe of society to morally paradigmatic to determinative of constitutional law in little more than a generation. Make no mistake about it: This is the tidal wave that sweeps away the traditional devotion to legal fostering of moral soundness. The Constitution is decimated by its wake.

This revolution, like earthquakes, has aftershocks. The god of individual definition creates the rest of human reality. From this epicenter rippling outwards is nothing less than the reconceptualization of morality, personal relations, community, society, politics, and constitutional law. Start with what I call the “inarguable orgasm.” Sex is inevitable and its object is satisfaction, psychological and physical. “Physical intimacy,” it seems from Blackmun’s opinion and the logic of the new expressivism, is a constitutional entitlement. Homosexuality is at least in part an irresistible attraction, rooted in the “fiber of an individual’s personality.” The Eighth Amendment may therefore “pose a constitutional barrier to sending an individual to prison for acting on that attraction regardless of the circumstances.”

The “moral” governance of sexual relations becomes a matter of consent and survival. Homosexual conduct used to be considered wrong. Now Blackmun blesses it, because there is no evidence that sodomy is “physically dangerous, either to persons engaged in it or to others.” Other “sexual crimes,” Blackmun states, are not wrong either. We have already seen how the master principle redefines marriage into a mutually beneficial expression of selves, ontologically indistinguishable from exploring the Grand Canyon in a canoe in the company of someone you like. But not necessarily the company of one: Polygamy cannot be ruled out in the new dispensation, and the Justices quizzed Tribe on precisely that issue. Where is the harm to non-consenting participants? No-fault divorce and the new reproductive technology already have demonstrated the “safety” of multiple parents. Ozzie and Harriet have been replaced by Bob and Carol and Ted and Alice and . . .

From these premises, adultery is no longer “wrong.” Neither is incest. Indeed, Blackmun’s pathetic attempt to pour the old wine—that there is something troubling about them—into the new wineskins of erotic selfhood proves it. The combined effect is to replace “sin” with

198. See id. 478 U.S. at 202-03 n.2.
199. Id.
200. Id.
201. Id. at 209.
202. Id. at 209 n.4.
203. See Transcript, supra note 25, at 22-23.
204. As Justice Blackmun states in Hardwick:

Although I do not think it necessary to decide today’s issues that are not even remotely before us, it does seem to me that a court could find simple, analytically sound distinctions between certain private, consensual sexual conduct, on the one hand, and adultery and incest (the only two vaguely specific “sexual crimes” to which the majority points, ante, at 196), on the other. For example, marriage, in addition to its spiritual aspects, is a civil contract that entitles the
two consumer advisories: caveat emptor, and wear your condom. By now it is obvious that all interpersonal relations are problematic in a characteristic, new sense. All relations are essentially manipulative. The sum-mum bonnum is individual mastery. But marriage and family life are inevitably heteronomous; part of me becomes part of a “we.” Is that not the dread loss of autonomy? How, now, about religious community? Tribe discusses religious community.

There is some “hope of solving the persistent problem of autonomy and community,”205 which Tribe decisively joins to (equates with?) the “dilemma of contemporary individuals—isolated and made vulnerable to the state’s distant majorities at the very moment they are liberated from domination by those closes [sic] to them.”206

[A] rebirth of religious community [is not] a realistic prospect for more than a handful of moderns. However much power we delegate to church hierarchies or congregations under doctrines precluding judicial interference in ecclesiastical disputes, it seems accordingly unlikely that the social and cultural cohesion that family provided in our national mythology will be supplied by worship or sacrament.207

If there is any answer, it is to be found in “facilitating the emergence of relationships that meet the human need for closeness, trust and love in ways that may jar some conventional sensibilities . . . .”208 Of course, now that “family” and “religious community” are effectively irrelevant to the modern individual’s “dilemma,” conventional sensibilities—rooted in devotion to family and church—are our democratic Constitution’s nemesis. They cannot be sanctioned or fostered over against an individual’s unconventional decision to seek “closeness, trust, and love.” The paradigm of religious liberty is no longer the autonomy of a worshipping community—now recast as a bunch of people in the same place sharing the same warm blanket from MEANING MILLS or aesthetic appreciation for liturgy—but the solitary “conscience” freely choosing whatever spiri-

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205. L. Tribe, supra note 6, at 1418.
206. Id.
207. Id.
208. Id.

Hardwick, 478 U.S. at 209-10 n.4.
tual values he or she desires. 209

Marriage, family, and church may seem a bit sterile in the new world, but they are still, as tradition held, relative havens in a heartless world. At least those relations are chosen. We have a right to control over such intimate access to us. But we cannot choose those who live in our society (though by abortion we may discourage some of them from reproducing themselves). "Society" is then a terrifying behemoth. Upon this fear terms like "the state" and "majority" feed for rhetorical energy. Let me explain, briefly, what society and political life are like in the new world, and how they relate to the primordial reality of individual expression.

Venturing into society in the best case scenario is like going to a suburban mall. The worst case is like stepping onto a subway car in the wee hours with no cop in sight. Gone in either event is the security borne of control over relations in the private life of family and friends. We are now among strangers whose "expression" cannot be predicted and who are essentially subject to no internal moral restraint. That is, we all live in a world of "autonomy" and "domination." We can only hope that we encounter few persons who express themselves by dominating others. Sure, we may have internalized the "harm" principle, but the "harm" principle is intrinsically like the Nazi-Soviet pact. Everyone sees it as a statement of present intention produced by prevailing strategic considerations. Everyone also sees that the "obligation" to continued adherence is a function of perceived self-interest. No one takes it as a solemn promise. Like commercial contracts in this new order, we do not promise to do "X." Rather we agree that, if ordered by a court, we will pay the value of "X" in dollars if, at the time of performance, we find it advantageous to do "Y" rather than "X."

People go to a mall seeking some item or service which will satisfy the desire or need that prompted the trip. The "good" of being there, despite the MUZAK and plastic smiles of sales people, is wholly internal to us. Its denizens—the merchants—are there to satisfy their desire or need for money at our expense. The exchange need not be unpleasant, but no one doubts that the exchanges are rooted in perceived self-interest. We go to malls (instead of downtown) these days primarily because there we encounter folks like us. (I, at least, am a thirty-six year old middle class male. I rarely wear "colors" or carry a copy of Easy Rider). We are decent people.

The late night subway ride differs in only one respect: We might encounter folks with rough edges, "them." They are just like us, except "they" are not yuppies. Our "great deal" or "bargain" is their "mugging." After all, are not all relations in a field of power? Have we not convinced ourselves that crime is a function of legitimate needs and desires (for example, needs for money or power) that are denied legitimate satisfaction. If we are real liberals, we confess that "we" have constructed the "sys-

tem” to our advantage. That is because the rules have no moral or ontological ground save facilitation of self-expression and gratification.

Justice Brennan produced the definitive view of “society” in *Michael H. v. Gerald D.*:

[In] construing the Fourteenth Amendment to offer shelter only to those interests specifically protected by historical practice, moreover, the plurality ignores the kind of society in which our Constitution exists. We are not an assimilative, homogeneous society, but a facilitative, pluralistic one, in which we must be willing to abide someone else’s unfamiliar or even repellent practice because the same tolerant impulse protects our own idiosyncrasies.210

In other words, we are a society of strangers.211 Brennan says our society is “facilitative.” Hittinger remarks that this means “that social goods are recognized only insofar as the [sic] serve the choices of individuals.”212 Society has no intrinsic existence. “If we look at social realities as the products of individual choices, then it is a short step of logic to assert that society has anything other than a ‘facilitative’ value, since that is presumably what individuals endowed it with in the first place.”213 One might have hoped that “society” might be defined by some deeper bond and commitment, by some shared moral substance or solidaristic spirit. Tradition carried on such an enterprise, in part, by the “enforcement of morals.” That project is now barely understandable to Blackmun. He translates it as simple “intolerance.” But “tolerance,” we can now say, has some daunting costs.

The nature and purpose of politics are now set. Like society, politics is a recurring necessary evil. Its source and nature are determined by our philosophy of “human being.” “Private” life, given what man “is” and wants, is the specifically human life. Men determine for themselves what ends they will pursue; their realization and enjoyment are intrinsically private activities. As Barbara Lenk writes, politics is not constitutive of happiness or an aspect of human existence.214 “It is not ‘natural’ to man in the sense that it is necessary to the fulfillment of his proper end, nor in the sense that some men are made to rule by nature or commissioned by divine appointment.”215

A more fulfilling conception of politics is ruled out by liberalism at the outset. Liberalism is largely defined as the negation of those alternatives. Politics cannot have as its end the promotion of human excellence nor the service of God. Politics maintains enough order to keep the trains running on time while we live our private lives with a maximum possible degree of happiness and autonomy. Politics is the “precondition for the maintenance of life—its betterment and its enjoyment—in the private

212. *Id.* at 25.
213. *Id.*
215. *Id.*
Law and custom—the product of political and social life—are now necessarily experienced as brute restraint, like the weather or the fact that I will never be Michael Jordan. Such rules are wholly external to the self and its good. They are inimical to the unrestricted expression of individuality which is the good of persons. Like the weather, one attends to it, its prediction, and its probable effect upon one’s plans. But it means nothing.

We can bring into final view just how constitutional law, its substance and its form, is determined by the construction of reality emanating from the “artistic” self. “Law” is the lasso of that posse of strangers, the “majority.” The only available way to grasp their motives is “intolerance.” “They” find some need satisfied by forcing others to conform to their own values. Anyway, all Blackmun can muster is a dyspeptic metaphor when staring at a law attempting to inculcate virtue. Evidently, some individuals make choices that upset the majority. Instead of reaching for Alka-Seltzer to make the pain go away, they arrest somebody like Mr. Hardwick.

“Tradition,” then, does look like Holmes’ vision of it. It is but another expression for “majority,” this time with cobwebs. Both represent “intolerance,” which itself means nothing other than unwarranted, i.e., more than facilitative, law. “Facilitative” is a shorthand for liberal political morality. In all events, heteronomy is the bad guy. Any rule laid down from without the individual violates the good of expressive self-hood. The substance of constitutional law is apparent. I have chosen as my summation the critical argument of the new clerisy, 885 law professors, in the Webster case:

> The right of personal privacy stands against state domination over matters crucial to self-possession: self-definition in matters of value and conscience, and self-determination regarding ways and walks of life. By its force, government’s hand is stayed from the diverse choices by which persons define their values, form and maintain communities of belief and practice, and bring up children whose lives in turn will be their own and not the State’s. Accordingly, the Court’s privacy doctrine has placed decisions regarding procreation, parenthood, and family formation at the core of those from which a non-totalitarian government must ordinarily be excluded.

> The right of personal privacy is the right of self-possession against the State, and the self begins with the body. “[To say] that my body can be used is [to say] that I can be used . . . .” Moreover, “the sense of possession of oneself . . . extends to possession of one’s function. And this extends quite naturally to reproduction.”

To adapt George Bush’s campaign theme, the ideal society would consist of some 240 million points of regretfully flickering light, of so many “cells” striving to master their identities, and to journey into the

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216. Id.
217. Law professors’ brief, supra note 75, at 6.
nether-reaches of self-expression. Rightfully, they would serve as their own generators. Conditions of interdependence prevent that. So these flickers convey their “juice” to the constitutionalist. He then redistributes it in like amounts to everyone. This is facilitative constitutional law; it has need of but one doctrine variously known as “privacy,” “autonomy,” and conscience. Constitutional law is thus the legalitarian utility; the constitutionalist, the master electrician.