

The Modernizing Mission of Judicial Review

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Constitutional interpretation looks to the past. It looks to an old text, to old precedents, to the views of the Founding generations, to tradition. Judicial review is a matter of articulating principles rooted in these sources, as a limit on the power of current popular majorities. That is the conventional wisdom.¹ But over the last generation or so, a very different form of judicial review has quietly emerged—an approach that, more or less consciously, looks to the future, not the past; that tries to bring laws up to date, rather than deferring to tradition; and that anticipates and accommodates, rather than limits, developments in popular opinion.

This approach, which might be called modernization, has not been fully avowed by the Supreme Court, and it does not characterize every area of constitutional law. But it is the dominant approach in many important areas—notably the highly controversial area of so-called substantive due process; the interpretation of the Eighth Amendment’s prohibition on cruel and unusual punishment; and the limits on gender discrimination derived from the Equal

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¹ People who disagree on practically everything else about how to interpret the Constitution agree on some version of this. See, e.g., 1 Bruce Ackerman, *We the People: Foundations* 34-162 (1991); *id.* at 98 (“Think of the American Republic as a railroad train, with the judges . . . sitting in the caboose, looking backward.”); Alexander M. Bickel, *The Least Dangerous Branch* 27 (1962); Ronald M. Dworkin, *Freedom’s Law*; Antonin Scalia, *A Matter of Interpretation*.

Protection Clause. In many other areas—the Commerce Clause, the religion clauses, and perhaps other aspects of the Equal Protection Clause—modernization, although not as dominant, is at least an important part of the story.

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

Modernization, as an approach to judicial review, has two components. The first component is that the courts will strike down a statute if it no longer reflects popular opinion or if the trends in popular opinion are running against it. Modernization tries to anticipate developments in the law, invalidating laws that would not be enacted today or that will soon lose popular support. Second, as an important corollary, a modernizing court must be prepared to change course—and uphold a statute that the court previously struck down—if it becomes apparent that popular sentiment has moved in a different direction from what the court anticipated. The courts do not, of course, assert a general power to

modernize; there must be some basis in the text of the Constitution or, since the text contains provisions that allow a great deal of latitude, in the precedents interpreting the text. That is, modernization, like other approaches to judicial review, is a way of giving content to vaguely-worded constitutional provisions and of shaping requirements drawn from precedent.

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

I will begin by sketching the modernizing approach briefly, and then showing it in action in some of the areas I mentioned—the Eighth Amendment, the constitutional law on gender discrimination, and, most impressively I believe, substantive due process. Then I will try to assess modernization as an approach to judicial review: is it a role that courts are institutionally suited to play, and is it the role that courts ought to play? Notwithstanding the obvious objection—that it is absurd for unelected, life-tenured judges to second-guess elected politicians' views about current trends in public opinion—my answer to the first question, about institutional capacity, is a qualified yes. My answer to the second

question—whether this is the best role for judges to play in a democracy—is more skeptical. I will try to support that skepticism with two concluding examples of arguable instances of modernization—the two most famous decisions of the last fifty years, *Brown v. Board of Education* and *Roe v. Wade*.

I. The Elements of Modernization

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

The second component of modernization is that the Court, having decided that a statute is unconstitutional because it is out of step with current popular

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

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

In either event, however, it would be a mistake to suppose that modernization can be done without making judgments of value, morality, or social policy. The decision whether a law is out of keeping with popular sentiment is not simply a factual judgment. No one thinks that that a court should strike down a law if, for

example, more than fifty percent (or any other number) of those who responded to a public opinion poll disapproved of it. A court cannot say that a law is out of keeping with popular sentiment without tacitly invoking some conception of democracy—some idea about how much legislative inertia is warranted, or about the influence that intensely interested groups should have, for example, or about what kinds of legislative compromises should be allowed and how popular views should be aggregated.

Similarly, the modernization approach is, to a degree, selective. The courts will endorse some future trends but not others; they will suppress some outliers but not others. Those decisions will reflect views about the desirability of different policies as a matter of morality and social policy. In some modernizing cases, the Supreme Court has been explicit about this.² But it is unavoidable—certainly in practice, and probably in theory—that a court trying to identify laws that are losing popular support will be influenced by its own views of what laws *ought* to lose popular support; and that a court’s willingness to retreat in the face of an adverse popular reaction to its decisions will be influenced by whether that reaction is, in its view, reasonable or wholly misguided. Modernization is distinctive not because it can avoid judgments of morality and policy—no approach to constitutional law can—but because it requires that such judgments be supported not by the past, not by traditions or original understandings, but by (what the courts perceive as) emerging trends and future developments.

² See, e.g., *Roper*, 125 S. Ct. at 1191-92 (citing cases).

II. Modernization in Action

1. Cruel and Unusual Punishment

Probably the most overt adoption of the modernization approach has occurred in cases interpreting the Cruel and Unusual Punishment Clause of the Eighth Amendment. There are several strands in this body of law, but one of them holds that that Clause “is not fastened to the obsolete but may acquire meaning as public opinion becomes enlightened by a humane justice”³ and that the Clause should be interpreted to enforce “the evolving standards of decency that mark the progress of a maturing society.”⁴ These formulations, with their emphasis on evolution, enlightenment, and progress, are almost an explicit statement of the modernizing approach. The text of the Clause does not compel such an approach; the term “unusual” certainly can be read to suggest modernization, and particularly the suppression of outliers, but the Supreme Court has not attached great significance to that word, mostly treating it as just elaborating on the term “cruel.”⁵ Modernization is one among many plausible ways to interpret the text. This is typical of the modernization approach: the courts interpret an open-ended text to provide for some form of modernization, and the approach then takes root in the precedents.

In keeping with the modernization paradigm, the Supreme Court has, in many (although not all) Eighth Amendment cases, first tried to determine whether the challenged form of punishment was losing support in popular opinion. The

³ *Weems v. United States*, 217 U.S. 349, 378 (1910).

⁴ *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (opinion of Warren, C.J.).

⁵ See, e.g., *id.* at 100 n.32.

Court has considered whether the punishment was a relative outlier, whether it had fallen into disuse, and whether the trend was to disapprove of it.

Most recently, in *Roper v. Simmons*,⁶ the Court ruled that the Eighth Amendment forbade the execution of individuals who were younger than 18 when they committed the crime. The Court said that the “beginning point is a review of the objective indicia of consensus.”⁷ These indicia were “the rejection of the juvenile death penalty in the majority of States; the infrequency of its use even where it remains on the books; and the consistency in the trend toward abolition of the practice.”⁸ The Court noted that thirty states rejected the juvenile death penalty, including eighteen that allowed the death penalty in other circumstances.⁹ In those states that formally permitted the juvenile death penalty, “the practice is infrequent”;¹⁰ only three states had executed juveniles in the previous ten years.¹¹ The Court commented that while the pace of abolition of the juvenile death penalty was not “dramatic,” the “direction of the change” was consistent,¹² something that the Court considered especially notable in view of “the particular trend in recent years toward cracking down on juvenile crime in

⁶ 125 S. Ct. 1183 (2005).

⁷ Id. at 1192.

⁸ Id. at 1194.

⁹ Id. at 1192.

¹⁰ Ibid.

¹¹ Ibid.

¹² Id. at 1193.

other respects.”¹³ The Court also noted the international consensus against the juvenile death penalty¹⁴ (and has of course been much attacked for so noting). In all of these ways, the Court showed an intense concern with public opinion, and in particular with the trends in popular opinion.

The Supreme Court, to its credit, made no pretense of formalism; it was explicit in saying that it was also making its own judgment about the acceptability of the juvenile death penalty.¹⁵ But the holding that the juvenile death penalty was unconstitutional did not rest on that judgment alone; the Court’s analysis leaves no doubt that it would not have invalidated the juvenile death penalty without the “indicia of consensus” and of the trends in opinion. The Court’s own views were adduced to support and confirm views about capital punishment that were derived from national and (to a small degree) international opinion. This is a clear example of modernization: the effort to identify, and promote, an already-existing trend that the Court believes is a good one.

The Court’s approach in *Roper* paralleled its opinion in *Atkins v. Virginia*,¹⁶ which held that a state may not execute a mentally retarded person. Both *Atkins* and *Roper* overruled relatively recent precedents,¹⁷ explicitly on the ground that, after those earlier cases were decided, the challenged uses of capital punishment became less accepted in society generally. This is, again, an explicitly

¹³ Ibid.

¹⁴ Id. at 1198-1200.

¹⁵ Id. at 1194-98.

¹⁶ 536 U.S. 1304 (2002).

¹⁷ *Penry v. Lynaugh*, 492 U.S. 302 (1989) and *Stanford v. Kentucky*, 492 U.S. 361 (1989), respectively.

modernizing approach—one that looks to current trends, not tradition or even precedent. The plurality opinion in *Thompson v. Oklahoma*,¹⁸ which held capital punishment unconstitutional for offenders who were under the age of 16 at the time of the crime, took essentially the same approach. Indeed *Stanford v. Kentucky*,¹⁹ the case that *Roper* overruled, examined many of the same data, although it reached the opposite conclusion at what *Roper* characterized as an earlier stage in the evolution of the national consensus.

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

Just that scenario played out a generation ago. In 1972, in *Furman v. Georgia*,²⁰ the Court declared that capital punishment, as then practiced in the United States, was “cruel and unusual” and therefore unconstitutional under the

¹⁸ 487 U.S. 815 (1988).

¹⁹ 492 U.S. 361 (1989).

²⁰ 408 U.S. 238 (1972).

Eighth Amendment.²¹ Only two Justices, however, concluded that the death penalty was cruel and unusual in all circumstances. The other members of the majority emphasized, in varying ways, that the death penalty was applied in an unpredictable and arbitrary fashion.

At the time, the Court had reason to believe that popular support for capital punishment in the United States was diminishing; that view was reflected in the opinions and, even more explicitly, in the private papers of some of the Justices.²² Between 1960 and 1966, an average of 15 people were executed each year, compared with an average of 166 in the 1930s, 128 in the 1940s, and 72 in the 1950s.²³ Four states abolished the death penalty in the 1960s; in the early 1970s, the California and New Jersey Supreme Courts held that capital punishment violated their states' constitutions.²⁴ The constitutional flaw that the Court identified—the arbitrary and unpredictable enforcement of the death penalty—could be attributed to the increasingly outmoded nature of the death penalty; capital punishment had so little support that its imposition was basically a matter of happenstance. That state of affairs, the key Justices said, violated the Constitution.

Within four years, thirty-five states had reenacted death penalty statutes. The new statutes were drafted specifically to address the concern about excessive

²¹ 408 U.S. at 238-39.

²² See the discussion in Michael J. Klarman, [Backlash book].

²³ See 408 U.S. at 291 (Brennan, J. concurring) (citation omitted).

²⁴ *People v. Anderson*, 493 P.2d 880 (Cal. 1972). The U.S. Supreme Court itself, in 1968, had made a small move in the same direction, holding that states could not disqualify potential jurors who had reservations about the death penalty, unless they were unequivocally unwilling to impose it. *Witherspoon v. Illinois*, 391 U.S. 510 (1968).

discretion and arbitrariness that had led the decisive members of the Court to vote as they did in *Furman*.²⁵ In 1976, the Court upheld some of these statutes, effectively reinstating capital punishment in the United States.²⁶ The Court did not explicitly say that it was modernizing. But it invalidated capital punishment on grounds that both reflected the judgment that capital punishment no longer had popular support and left a way open for the courts to uphold capital punishment if that perception proved false. People who think the Court should have done more than modernize—for example, that the Court should simply have concluded that capital punishment is cruel and unusual in most or all circumstances—will not hold such a favorable view of this episode. But it is a clear illustration of both aspects of the modernizing approach to judicial review.

2. Sex-Based Classifications and the Equal Protection Clause

Modernization has also become the governing approach to laws that discriminate on the basis of sex. The courts' embrace of modernization in this area is not quite as clear as it is in the capital punishment cases, but there is still plenty of explicit evidence in the opinions that, whatever the official doctrinal formula, modernization is what's actually going on. At first glance sex discrimination and capital punishment might seem like an odd couple. What the two subjects have in common, though, is that at the time of the key decisions in both it at least appeared that public attitudes were rapidly changing. That turned

²⁵ See *Gregg v. Georgia*, 428 U.S. 153, 179 (1976) (Stewart, J., concurring).

²⁶ See, e.g., *Gregg v. Georgia*, 428 U.S. 153 (1976).

out to be true for sex discrimination; the Supreme Court did not have to back down the way it did in the capital punishment cases.

The black-letter standard for judging sex classifications under the Equal Protection Clause is, of course, “intermediate scrutiny,” which requires that such a classification be “substantially related” to “important governmental objectives.”²⁷ But the Supreme Court has routinely invalidated sex classifications that do seem to have a substantial relationship to an important objective, because the classifications are based on statistically valid generalizations—such as the generalization that women are more likely to be interested in becoming nurses than men,²⁸ or that women are more likely than men to be economically dependent on their spouses.²⁹ The more plausible reason for the unconstitutionality of these sex-based classifications is suggested by some of the other things that the Court has said—that the statutes rest on “archaic,” “traditional,” or “stereotyped” views about men’s and women’s roles, or on “old notions” that are inconsistent with “contemporary reality.”³⁰

These are the terms that suggest that what’s actually going on is modernization. The problem with the sex-based classifications that the Court struck down was that they were the product of a bygone era and were no longer in keeping with current views about sex roles. The Justices knew that there were significant changes in popular attitudes about, among other things, women’s

²⁷ See, e.g., *Mississippi University for Women v. Hogan*, 458 U.S. 718, 724 (1982).

²⁸ See *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 726-29 (1982).

²⁹ See, e.g., *Califano v. Goldfarb*, 430 U.S. 199, 205-06 (1977).

³⁰ See *Goldfarb*, 430 U.S. at 207 (1977); *Stanton v. Stanton*, 421 U.S. 7, 14 (1975); *Schlesinger v. Ballard*, 419 U.S. 498, 508 (1975); *Weinberger v. Wiesenfeld*, 420 U.S. 636, 645 (1975).

participation in the workforce, which increased sharply in the United States beginning in the late 1960s. There were concomitant changes in the law, such as the enactment of antidiscrimination laws and the elimination of many gender classifications. All of the “archaic” statutes that the Court invalidated were enacted before that time, and most of them reflected “old notions” about women’s role in the economy.

By the same token, when the Supreme Court has upheld sex classifications, it has sometimes suggested that it was doing so because it had confidence that the classification was the product of a present-day decision. In *Califano v. Webster*,³¹ for example, the Court upheld a provision of the Social Security Act that seemed very similar to a provision it had invalidated just a few months earlier in *Califano v. Goldfarb*.³² Part of the Court’s explanation was that the legislative history of the *Webster* provision showed that it, unlike the *Goldfarb* provision, was “not ‘the accidental byproduct of a traditional way of thinking about females,’ but rather was deliberately enacted to compensate for particular economic disabilities suffered by women.”³³ This suggests that the constitutionality of a classification would depend not on its content but on whether it was enacted in an earlier era, before attitudes about women’s role changed, or in circumstances that reflected the influence of present-day thinking about sex roles.

³¹ 430 U.S. 313 (1977).

³² 430 U.S. 199.

³³ *Webster*, 430 U.S. at 320 (quoting *Goldfarb*, 430 U.S. at 223 (Stevens, J., concurring)) (citation omitted).

In perhaps its most important sex discrimination case—*United States v. Virginia*,³⁴ which declared unconstitutional the Virginia Military Institute’s exclusion of women—the Court emphasized that VMI’s single-sex policy had been adopted at a time when women were routinely considered unfit for many occupations.³⁵ At first glance, it is not clear why that mattered. The people who thought women were unfit to be lawyers were wrong; but it does not follow that the people who thought that women could not be accommodated in a certain kind of military training were also wrong. But the modernization approach makes sense of the Court’s emphasis on this point: the problem with the exclusion of women from VMI was not that it was based on mistaken factual claims about the effect that the admission of women would have on military education—the courts, in reality, are not well equipped to evaluate those claims—but rather that the decision to exclude women from VMI was made in an era when attitudes were so different from what they are today.

The Court in *Virginia* also established, as a principle, that sex-based classifications cannot be justified by “post hoc rationalizations” that did not reflect the reasons that the classifications were actually adopted.³⁶ This principle is not always applied even when constitutional rights are at stake; the Court has ruled that it does not apply to measures restricting commercial speech, for

³⁴ 518 U.S. 515 (1996).

³⁵ *Id.* at 536-38, 542-45.

³⁶ 518 U.S. at 533, 535-36, 539.

example.³⁷ Again the reason for the principle is not entirely clear; one might have thought that the question should be whether a classification is in fact justified, not whether the people who adopted it had good reasons. But again the Court's concern was not with the justifiability of sex-segregated education in general, but with whether a policy of sex-segregated education was modernized—whether it was the product of current ways of thinking and not a holdover from earlier times. The Court carefully left open the possibility that it would allow sex segregation in education in certain circumstances.

The Court in *Virginia* explicitly referred to “[w]omen’s successful entry into the federal military academies”³⁸ as a reason to invalidate VMI’s policy. The Court was aware that VMI was an outlier; at the time, only VMI and the Citadel, among public institutions, excluded women. Justice Scalia’s dissent argued that VMI’s outlier status was in fact a reason to uphold VMI’s policy. But the Court thought otherwise. It thought that VMI’s outlier status just confirmed that VMI belonged to a bygone era.

3. Substantive Due Process

“Substantive due process” is the name given to the use of the Due Process Clause to invalidate statutes on the ground that they infringe fundamental rights, even though those rights are not enumerated in the Constitution. It seems fair to say that, over the last 100 years, substantive due process has been the most

³⁷ See *Bolger v. Youngs Drug Corp.*, 463 U.S. 60, 71 (1982). See also *Doe v. Bolton*, 410 U.S. 179, 190-91 (1973).

³⁸ 518 U.S. at 544.

controversial doctrine in constitutional law. In the first third of the twentieth century, the Due Process Clause was used to protect the freedom of contract, notably in now-repudiated cases like *Lochner v. New York*.³⁹ Since the late 1960s, substantive due process has been identified with rights involving reproduction, bodily integrity, sex, and the family: the right to contraceptives, the right to an abortion, and, recently, the right to be free from prohibitions on same-sex sodomy.

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

Modernization provides an answer to these questions. The Court did not in fact revive the pre-New Deal doctrine, because the pre-New Deal cases were not modernizing; the late-20th and early-21st century cases are modernizing decisions, and for that reason, they are, contrary to much received wisdom, fundamentally unlike the pre-New Deal cases. Present-day substantive due process has focused on issues like contraception, abortion, and homosexuality for the same reason that modernization became the dominant approach in the gender discrimination cases: these are subjects on which attitudes have undergone a quite rapid change over the last few decades. And modernization is,

³⁹ 198 U.S. 45 (1905).

I believe, the central unifying theme of the substantive due process cases that have been decided in the last 40 years. I will consider those cases in the order they were decided, except for the abortion decisions, which of course have dominated the debate over modern substantive due process. The abortion cases demonstrate, with particular clarity, some of the risks of the modernization approach, so I will discuss them later, in connection with an overall evaluation of the virtues and demerits of modernization.

a. *Griswold v. Connecticut*

Griswold v. Connecticut,⁴⁰ the first of the modern substantive due process decisions, declared unconstitutional a Connecticut statute that made it unlawful for any person, including married people, to use any contraceptive drug or device. All of the Justices in the majority concluded, on one basis or another, that the Connecticut statute infringed on an implied fundamental right to privacy in the marital relationship. Justice Black, in dissent, accused the Court of reviving *Lochner* by inventing rights not found in the Constitution.

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

⁴⁰ 381 U.S. 479 (1965).

strong normative case to be made that the Connecticut statute was ill-advised, or worse, as a matter of policy and morality.

But modernization may provide the best basis for the fundamental right that the Court established in *Griswold*. The Connecticut statute was a conspicuous outlier; only one other state had a statute like Connecticut's. Justice Harlan, in a concurring opinion, referred explicitly to this fact: "[C]onclusive, in my view, is the utter novelty of this enactment. Although the Federal Government and many States have at one time or another had on their books statutes forbidding or regulating the distribution of contraceptives, none, so far as I can find, has made the use of contraceptives a crime."⁴¹ By the time the case was brought, the statute was not enforced against married couples—suggesting that it in fact lacked political support (just as the nonenforcement of capital punishment laws later suggested, misleadingly, that those laws lacked political support). Justice Harlan made this point as well: by its lack of enforcement, he said, the state “either . . . does not consider the policy of the statute a very important one, or . . . it does not regard the [statute] . . . as [an] appropriate or necessary” means of furthering that policy.⁴² The statute was, in any event, easily evaded, because Connecticut permitted the use of contraceptive devices for purposes other than contraception, such as the prevention of disease—further evidence that the state was not serious about the law. And the trend in other jurisdictions was toward the liberalization, or the nonenforcement, of laws regulating contraceptives generally.

⁴¹ *Poe v. Ullman*, 367 U.S. 497, 554-55 (1960) (Harlan, J., dissenting).

⁴² *Id.* at 554.

This defense of *Griswold* is different from—in a sense broader than—the argument that the holding in *Griswold* (and *Lawrence v. Texas*, the most recent substantive due process decision) can be reached just on the ground that the statute was not enforced—that is, on a constitutional counterpart to the common law doctrine of desuetude.⁴³ Desuetude, or the infrequent enforcement of a statute, can be good evidence that a statute is the product of an earlier era—that it is out of keeping with current sentiment and in need of modernization. But a lack of enforcement is neither a necessary nor a sufficient condition of the need for modernization. Some statutes are infrequently enforced for other reasons besides their lack of popular support; in fact, some restrictions may be unenforced because they are so universally accepted that they are hardly ever violated, such as laws forbidding slavery or cannibalism.

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

⁴³ On *Griswold*, see Alexander M. Bickel, *The Least Dangerous Branch* 143-56 (1962). On *Lawrence*, see Cass R. Sunstein, *What Did Lawrence Hold? Of Autonomy, Desuetude, Sexuality, and Marriage*, 2003 *Sup. Ct. Rev.* 27.

vigorously enforced; to the extent the modernization approach should suppress outliers, it therefore cannot depend solely on a lack of enforcement.

In *Griswold*, however, all of these elements—the lack of enforcement, the trend away from regulation, and the law’s status as an outlier—coincided. That explains why *Griswold* can comfortably be seen as a modernizing decision. It also explains why the Court did not have to be concerned with the other component of modernization, leaving itself room to retreat if the political branches pushed back. In view of the narrow holding in *Griswold*—confined explicitly to the use of contraceptives by married couples—the chance of an adverse reaction from state governments was essentially nonexistent.

If *Griswold* can be justified as a modernizing decision, then the assertion that *Griswold* recapitulates *Lochner*—which was the standard criticism of *Griswold*, and a concern acknowledged even by its defenders—seems almost bizarrely wide of the mark. The pre-New Deal Court used substantive due process to resist what it saw as a pernicious trend—on one plausible account, a trend toward interest-group legislation that betrayed both the public interest and the principle of “free labor” that inspired the antislavery movement.⁴⁴ The trend was pernicious, in that Court’s eyes, precisely because it was widespread, because laws regulating the employment relationship were so popular, and because those laws had an extensive and profound effect on labor markets.

⁴⁴ See, e.g., Howard Gillman, *The Constitution Beseiged: The Rise and Demise of Lochner Era Police Powers Jurisprudence* (1993); William E. Nelson, *The Impact of the Antislavery Movement upon Styles of Judicial Reasoning in Nineteenth Century America*, 87 *Harv. L. Rev.* 513 (1974). See generally Barry Cushman, *Some Varieties and Vicissitudes of Lochnerism*, 85 *B.U. L. Rev.* 881 (2005).

The *Griswold* Court, by contrast, was following, not resisting, a trend. The law it invalidated was a wholly isolated outlier that was not enforced even in Connecticut. No one suggested that that statute was popular; even the dissenters in *Griswold* (in notable contrast to some of the dissenters in the pre-New Deal cases) did not have a good word to say for the Connecticut statute as a matter of policy. The idea that the repudiation of *Lochner* shows the error of *Griswold* should be turned inside out: What *Griswold* shows is that if the *Lochner* Court had confined itself to regulatory measures that were isolated, unpopular outliers that were essentially indefensible on policy grounds, its approach might never have been repudiated.

b. *Eisenstadt v. Baird*

Eisenstadt v. Baird,⁴⁵ decided seven years after *Griswold*, invalidated a Massachusetts statute that forbade the distribution of contraceptives to any unmarried person. The Massachusetts law therefore differed from *Griswold*'s Connecticut statute in two ways: it applied to distribution, not to use; and it applied to unmarried individuals. *Eisenstadt* has come to be understood as extending the substantive due process right established by *Griswold* in these two ways—an extension that, in view of the reasoning of *Griswold*, is quite substantial.

In some respects, the modernizing character of *Eisenstadt* is obvious. The trend toward the liberalization of the regulation of contraceptives had continued in the years since *Griswold*. The Massachusetts statute also did not apply to the

⁴⁵ 405 U.S. 821 (1972).

distribution of contraceptives for the purpose of preventing the spread of disease and, as the Court noted, that meant that the statute was easily evaded. There was evidence that it was hardly enforced, in any event.

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

Why did the Court choose the implausible equal protection basis for *Eisenstadt*? No doubt part of the reason was the old concern about *Lochner*: the Court was reluctant to be seen as inventing, or expanding, a right that had no clear textual basis. One way to understand the concern about *Lochner*, though, is that the equal protection approach gave the Court a chance to retreat if there had been a hostile political reaction. An important lesson of the *Lochner* era was that the Equal Protection Clause, unlike the substantive use of the Due Process Clause, does not wholly prevent the political branches from regulating an activity but just requires that they go about the regulation in a different way.⁴⁶ By relying on the Equal Protection Clause, *Eisenstadt* left the door open for a state

⁴⁶ See *Railway Express Agency, Inc. v. New York*, 336 U.S. 106, 1xx-xx (1949) (Jackson, J., concurring).

legislature to reassert its power to regulate the distribution of contraceptives to minors, provided it did so in the right way.

Specifically, the Court in *Eisenstadt* gave two reasons for its conclusion that the Massachusetts statute was not rationally related to the objective of deterring premarital sex. First, the Court said, the fact that contraceptive devices could be distributed for purposes of disease prevention meant that the statute was “so riddled with exceptions” that it had “at best a marginal relation” to that objective.⁴⁷ Second, since fornication was only a misdemeanor, the state could not possibly have meant to “prescribe[] pregnancy and the birth of an unwanted child as punishment for fornication.”⁴⁸ These rationales provided the political branches with a way to strike back, and provided the Court a way to acquiesce had the legislature done so. If the legislature had forbidden the distribution of contraceptives outright, eliminating the loophole for health-related use, that would have made the statute constitutional, on the Court’s own reasoning. And the legislature also had the option of increasing the penalty for fornication, which would have undermined—and permitted the Court to retreat from—its second argument.

It seems unlikely that the Court actually contemplated an adverse legislative reaction; probably by the time of *Eisenstadt* it was clear enough that the Massachusetts law was an anachronism and that its invalidation would be accepted. But still, the exceedingly questionable use of the Equal Protection Clause probably did evince a desire to mute the confrontation with the political

⁴⁷ 405 U.S. at 449, 448.

⁴⁸ *Id.* at 448.

branches by portraying the unconstitutionality of the statute as the product of the legislature's own choices, and therefore remediable by the legislature. In that respect, *Eisenstadt* displayed the amenability to legislative revision that is characteristic of modernization. More important, *Eisenstadt*, like *Griswold*, was surely influenced by the perception that attitudes toward contraception had changed and that the Massachusetts law no longer enjoyed substantial political support.

c. Moore v. City of East Cleveland

*Moore v. City of East Cleveland*⁴⁹ invalidated a municipal single-family zoning ordinance that had the effect of sometimes preventing grandparents from living in the same home as their grandchildren when the parents did not also live there. There was no majority opinion, but Justice Powell's plurality opinion has been treated as if it were an opinion of the Court and has come to be regarded as a significant substantive due process holding.

The East Cleveland ordinance was an outlier. Single-family zoning laws are ubiquitous, but East Cleveland was apparently unique, in the nation, in applying such an ordinance to prevent a grandparent from living with grandchildren. Justice Stevens, in a separate concurrence, reached that conclusion after exhaustively examining cases from other jurisdictions,⁵⁰ and he urged that the ordinance violated the Due Process and Takings Clauses principally for that reason. The plurality opinion did not emphasize the fact that the East Cleveland

⁴⁹ 431 U.S. 494 (1977).

⁵⁰ *Id.* at 521 (Stevens, J., concurring).

ordinance was an outlier, but it did note that the ordinance was “unusual,”⁵¹ and it repeatedly referred to the anomalies that the ordinance would produce: for example, large numbers of adults might, in some circumstances, constitute a permitted “single family,” and a grandparent could live with grandchildren who were siblings but not grandchildren who were, like those in *Moore*, cousins.

For the most part, the plurality followed Justice Harlan’s *Griswold* concurrence in emphasizing tradition: “Our decisions establish that the Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in this Nation’s history and tradition.”⁵² The plurality obtained precise lessons from tradition, which, it said, did not merely support the “sanctity” of the nuclear family: “The tradition of uncles, aunts, cousins, and especially grandparents sharing a household along with parents has roots equally venerable and equally deserving of constitutional recognition.”⁵³ But it is hard to believe that tradition alone, or the Court’s precedents alone, would produce such a fine-grained result. It looks as if “tradition” here was standing for the Justices’ belief—manifest from the opinion—that the East Cleveland ordinance was simply unreasonable—that it was an excessive, heartless measure that was not needed to solve any real problems.

In this connection, the striking feature of *Moore*—the feature that relates it to modernization—was how the Court viewed the fact that the East Cleveland ordinance was an outlier. That fact might have caused the Court to hesitate before

⁵¹ Id. at 496 (plurality opinion)

⁵² Id. at 500.

⁵³ Id. at 504.

concluding that the ordinance was a gratuitous and unreasonable interference with the family. If a law is unique, it might be a carefully designed response to specific local problems, and in any event it will be relatively easy for individuals to escape its reach by going elsewhere. East Cleveland had made such an argument in defense of its ordinance, saying that the ordinance addressed specific and pressing problems that the City faced. The City was a predominantly African-American working class suburb of Cleveland that was, it said, trying to maintain the stability of its neighborhoods in the face of an influx of disorganized poor families from Cleveland.⁵⁴

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

d. *Washington v. Glucksberg*

*Washington v. Glucksberg*⁵⁵ rejected a claim that there is a substantive due process right to assisted suicide; it upheld a Washington statute forbidding

⁵⁴ See Robert Burt, *The Constitution of the Family*, 1979 Sup. Ct. Rev. 329, 391.

⁵⁵ 521 U.S. 702 (1997).

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

The Court in *Glucksberg*, as in other modern substantive due process decisions, emphasized that the courts should recognize only “fundamental rights found to be deeply rooted in our legal tradition.”⁵⁶ And the Court asserted that there was “a consistent and almost universal tradition that has long rejected the asserted right”⁵⁷ to assisted suicide. But that was not really an adequate answer to the claim that was being made in the case. The claim was that individuals who are nearing the end of their lives are entitled to determine the manner and time of their own deaths. To refer to this simply as “assisted suicide” is obviously too crude a characterization. Indeed, it is not clear that a majority of the Court accepted the characterization; five Justices indicated their willingness to accept a qualified right to physician-assisted suicide in certain circumstances, notwithstanding the traditional prohibitions that the majority opinion stressed.⁵⁸

Moreover, ancient prohibitions on assisted suicide, as applied to end-of-life situations, seem to be prime candidates for modernization. The problem that

⁵⁶ *Glucksberg*, 521 U.S. at 722.

⁵⁷ *Id.* at 723.

⁵⁸ See *id.* at 736-38 (O'Connor, J., concurring); *id.* at 738-52 (Stevens, J., concurring); *id.* at 752-89 (Souter, J., concurring); *id.* at 789 (Ginsburg, J., concurring); *ibid.* (Breyer, J., concurring)

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

The Court, to its credit, seemed to realize as much. It did not stop with the irrefutable but too-simple claim that it has long been illegal to assist a suicide. The Court emphasized, at several points in its opinion, that state legislatures, including Washington's, had reconsidered the old statutory prohibition against assisted suicide and had reaffirmed its application to the new end-of-life situations. At the outset of its opinion, the Court noted that Washington had addressed the issue by legislation enacted in 1979; that the voters in Washington had rejected an initiative that would have permitted physician-assisted suicide, in 1991; and that the law had been amended in the following year to make even more explicit the prohibition on assisted suicide.⁵⁹ And the Court gave a lengthy explanation of why modernization was not needed:

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

Thus, the States are currently engaged in serious, thoughtful

⁵⁹ Id. at 707, 717.

examinations of physician-assisted suicide and other similar issues.⁶⁰

In a companion case to *Glucksberg*, *Vacco v. Quill*,⁶¹ the Court, in the course of rejecting an Equal Protection Clause challenge to a New York statute forbidding physician assisted suicide, emphasized that “the overwhelming majority of state legislatures have drawn a clear line between assisting suicide and withdrawing or permitting the withdrawal of unwanted lifesaving medical treatment by prohibiting the former and permitting the latter.” That is, the laws forbidding physician assisted suicide were the opposite of outliers. The Court in *Vacco* also noted that New York had repeatedly reexamined its statutes and reaffirmed the ban on physician assisted suicide. On modernization grounds, the case for upholding the Washington and New York laws was very strong.

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

⁶⁰ Id. at 716, 719 (citations omitted).

⁶¹ 521 U.S. 793 (1997).

e. *Lawrence v. Texas*

Lawrence v. Texas,⁶² the most recent substantive due process case, struck down a Texas statute that made consensual same-sex sodomy a crime. Much of the opinion is devoted to elaborating the contours of the term “liberty” in the Due Process Clause. But in deciding what “liberty” meant, the Court used, among other things, a more or less explicitly modernizing approach. In addition, the Court’s definition of “liberty” left many things undecided—significantly, for modernization purposes.

In *Bowers v. Hardwick*—the decision, overruled by *Lawrence*, that had upheld a Georgia sodomy statute—the Court had emphasized its view that homosexual sodomy, far from being a traditional right, had traditionally been condemned.⁶³ The Court in *Lawrence* took issue with the *Bowers* Court’s account of tradition. In the end, though, *Lawrence* could assert only that “the historical grounds relied upon in *Bowers* are more complex” than the *Bowers* Court had suggested.⁶⁴ In other words, the Court in *Lawrence* essentially conceded that tradition, while not foreclosing the conclusion that the Texas statute was unconstitutional, did not really support that conclusion.

The *Lawrence* Court then shifted the focus from tradition to current understandings: “In all events,” the Court said, “our laws and traditions in the past half century”—rather than those of previous centuries—“are of most

⁶² 539 U.S. 558 (2003).

⁶³ 478 U.S. 186, 190-94 (1986).

⁶⁴ *Lawrence*, 539 U.S. at 571.

relevance here.”⁶⁵ Those more recent developments, according to the Court, “show an emerging awareness that liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex.”⁶⁶ The Court then reviewed a variety of sources that supported its claim about the “emerging awareness”: the Model Penal Code; the Report of Britain’s Wolfenden Commission, which called for the repeal of laws punishing homosexual conduct; Parliament’s favorable response to that Commission; a decision of the European Court of Human Rights holding that laws forbidding homosexual conduct were a violation of the European Convention on Human Rights; and, in the United States, the fact that, according to the Court, of the twenty-five states that criminalized sodomy at the time of *Bowers*, only thirteen still had such prohibitions, and just four “enforce their laws only against homosexual conduct.”⁶⁷

The *Lawrence* Court’s emphasis on an “emerging awareness” is an explicit commitment to modernization. The problem with the Texas statute was not that it deprived people of a right “deeply rooted in this Nation’s history and tradition.”⁶⁸ Rather, the Texas statute was, if anything, too much the product of old ways of thinking; it was something of an outlier that had, in the Court’s estimation, little support in current sentiment. It was barely enforced, and current trends in the law were against it. In all of these respects, *Lawrence*

⁶⁵ Id. at 571-72.

⁶⁶ Id. at 572.

⁶⁷ Id. at 573; see id. at 572-73.

⁶⁸ *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997) (quoting *Moore v. City of East Cleveland*, 431 U.S. 494, 502 (1977) (plurality opinion)).

adopted a modernizing approach in defining the rights protected by substantive due process, perhaps more explicitly than any other substantive due process decision.

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

The only thing that seems clear after *Lawrence* is that it is unconstitutional to impose criminal penalties for sodomy. The elements of “emerging awareness” that the Court identified—the outlier status of Texas’s law, the relative lack of enforcement, the trend away from outlawing homosexual sodomy—all suggest that there will be no effort to revive laws forbidding same-sex sodomy. On all other issues, the *Lawrence* opinion resolves little or nothing. The Court went out of its way to insist that it was not deciding whether there is a constitutional right to same-sex marriage, and it did not decide whether states could discriminate against homosexuals in other ways.⁶⁹ Two Terms ago, the Court denied certiorari in a case that challenged a Florida statute (itself unique in the nation) that forbade gays to adopt—thus arguably confirming that the Court does not believe

⁶⁹ See Mary Anne Case, *Of “This” and “That” in Lawrence v. Texas*, 2003 Sup. Ct. Rev. 75.

that *Lawrence* has decisively settled anything beyond the unconstitutionality of laws that criminalize same-sex sodomy.

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

4. Decentralizing modernization?

In each of these areas—capital punishment, gender discrimination, and each of the substantive due process cases that invalidated legislation—the Court’s decisions were centralizing. The decisions imposed a national norm on state and local jurisdictions. In fact, when a local law deviated from the national norm, the Court took that as a reason to declare the law unconstitutional.

Modernization does not have to have this kind of nationalizing effect, however. Two prominent developments in constitutional law in recent decades—in the interpretation of the Commerce Clause and the Establishment Clause—can be seen as modernizing, although the opinions are not written in those terms. Those developments are not nationalizing; the Commerce Clause decisions explicitly have the opposite effect, and the religion cases are likely to as

well.

In *United States v. Lopez*⁷⁰ and *United States v. Morrison*,⁷¹ the Supreme Court, for the first time in sixty years, ruled that Congress had exceeded its power under the Interstate Commerce Clause. *Lopez* struck down an Act of Congress that prohibited the possession of firearms near a school; *Morrison* declared unconstitutional central features of the Violence Against Women Act.

Two features of the cases, at least, are consistent with the modernization paradigm. The opinions establish only a vague standard for determining when legislation is unauthorized by the Commerce Clause; indeed in *Lopez* the Court conceded as much. This left the door open for the Court to retreat—as the Court arguably did, in *Gonzales v. Raich*,⁷² when it upheld a federal law forbidding the cultivation of marijuana, as applied to an individual who grew it at her own home, for her own use, as authorized by state law. The second feature of these cases that suggests the modernization approach is that they occurred at a time when public sentiment had swung against federal regulation. A succession of Presidents of both parties had made deregulation a legislative priority, for example. President Clinton, a Democrat, declared that “the era of big government is over.” *Lopez* and *Morrison* are of a piece with the pronounced trend.

Raich was not an instance of the Court retreating in the face of public opinion, as it did in the capital punishment cases. But it may be seen as an effort by the Court to calibrate the degree of federal regulatory power that would be

⁷⁰ 514 U.S. 549 (1995).

⁷¹ 529 U.S. 598 (2000).

⁷² 545 U.S. 1 (2005).

tolerated—or, perhaps, insisted upon—by the public and other political actors. The possibility that *Lopez* and *Morrison* might undermine federal criminal law enforcement, particularly of the drug laws, was not tolerable. The otherwise-unprincipled nature of the decisions; the responsiveness to perceived political, or at least policy, imperatives; and the congruence between the decisions and broad political currents—all of these things suggest that these cases have an affinity to the modernization approach.

A similar claim might be made about decisions, in the last two decades or so, that have reduced Establishment Clause barriers to government aid to religion. Those decisions, too, follow a broad trend toward more involvement of religious groups, as such, in politics. The decisions are also framed in a flexible way, to allow for a retreat should one be needed. The point should not be overstated; these decisions follow the modernization paradigm much less closely than the others I described. But these decisions (along with others that might be plausibly imagined, such as decisions invalidating gun control laws or environmental regulations), at least show the potential for the modernization approach to be used in ways that are not centralizing—that do not involve the imposition of a national norm, but rather allow for local variation. The opinions in these cases could have been written in modernizing terms—emphasizing the “emerging awareness” (the term used in *Lawrence*) of the problems with extensive federal regulation, and of the role of religion in public life, and through the use of flexible standards (in the Commerce Clause cases) and deference to legislative judgments (in the religion cases) allowing for the Court to yield to pushback from the other branches. These decisions will also strike many supporters of the other

modernizing decisions as politically retrograde, showing that a modernizing approach has no necessary political tendency.

III. Modernization: An Assessment

A. Representation reinforcement

Modernization, as an approach to constitutional interpretation, belongs to the same family as the famous *Carolene Products* footnote. *Carolene Products* approach calls for the courts to intervene when, and only when, the democratic political process is not working as it should—either because a law has blocked avenues of change, by manipulating the franchise or limiting dissent, or because the law disadvantages a group that does not have its fair share of political power (a “discrete and insular minority,” in the perhaps mistaken terms of the *Carolene Products* footnote).

The *Carolene Products* approach was an effort to inter substantive due process while maintaining a role for the courts, and substantive due process was the bête noire of John Hart Ely, the best defender of the *Carolene Products* approach. So it might seem odd to associate *Carolene Products* with an approach, like modernization, that seeks to justify the present-day substantive due process cases. But the pre-New Deal cases were not justified on modernizing grounds; they were justified as a way of holding back pernicious trends in politics and popular sentiment. Modernization belongs to the same family as *Carolene Products* because the ambition of both approaches is to reconcile judicial review with democracy by limiting the courts’ interventions to instances in which the courts can perfect, rather than override, the workings of the democratic political process.

The *Carolene Products* approach aspires to formalism—to a kind of constitutional law that does not require the courts to make any judgments of morality or social policy. But it is a familiar criticism that *Carolene Products* requires such judgments. Otherwise an impermissible blockage of the democratic process cannot be distinguished from a legitimate political victory, and an unfairly disadvantaged “discrete and insular minority” cannot be distinguished from a group that consistently loses out in the political process because it deserves to lose out. The need to make disputable normative judgments is equally characteristic of the modernizing approach’s judgment that a law is out of keeping with popular will.

In this sense, there is much to be said for modernization: it is a democracy-reinforcing approach to constitutional interpretation and therefore defines, for the courts, a role that is consistent with basic democratic principles. It does involve judgments of morality and policy, but that is inevitable.

B. The Question of Competence

Most obviously, however, the modernization approach raises questions of institutional competence. It seems absurd to suppose that courts should try to anticipate developments in popular opinion—and then, on that basis, invalidate the actions of elected officials. In addition, modernization is a way in which a certain kind of elite opinion—the opinions of the people who end up on the Supreme Court—helps shape constitutional principles. These opinions do not *determine* the principles, because the principles have to be squared with the evolving trends of popular opinion. But it seems reasonably clear that part of what is going on in the areas where the Supreme Court is modernizing—capital

punishment, the role of women, homosexuality—is that the justices are hastening along developments that are occurring anyway but that the justices would like to see move faster.

But all of this may not be as troublesome as it sounds. It is, arguably, not materially different from what a common law court does. Roughly speaking, a modernizing court chooses among the trends it sees developing in the same way that a common law court might choose among precedents. In some instances, the popular trend (or the precedents) are clear. In others they are not, and the choice, although bounded by the precedents or the popular trends, will ultimately rest on normative grounds. One standard distinction between a court engaging in constitutional interpretation and a common law court, of course, is that a common law court can be reversed by the legislature. But a court taking the modernizing approach to the Constitution in effect shares this feature of a common law court, at least to a degree, because it is prepared to change course if the political branches push back. And while it does seem anomalous for courts to be doing what is quintessentially politicians' work—gauging how the political winds are blowing—that is also a plausible account of what common law courts do: while the common law of course involves the interpretation of precedents, it is a recognized function of common law courts to try to predict future trends and align the law accordingly.

We might be better off leaving modernization to the legislature, just as we might be better off leaving all constitutional issues to the legislature and forswearing judicial review entirely. For that matter, we might be better off without common law courts, leaving all the questions they address to the

legislature as well. The resolution of those matters depends on unanswered and possibly unanswerable empirical and normative questions. The analogy to the common law does suggest, though, that modernization is at least roughly consistent with the kinds of tasks that we have historically trusted courts to perform.

As this analogy indicates, the idea that courts should bring the law up to date is not new. It has also been argued, controversially, that the interpretation of statutes should, sometimes, self-consciously bring them up to date.⁷³ Judge Calabresi is equally explicit in urging that courts should assert a non-constitutional power to declare statutes obsolete on the ground that they were lacking popular support and otherwise inconsistent with the larger fabric of the law.⁷⁴ The lineage of this argument extends back to earlier accounts, closer to the dawn of the regulatory age, that called for “a unified system of judge-made and statute law woven into a seamless whole by the processes of adjudication.”⁷⁵ This is the tradition from which the modernization approach is drawn.

Superficially, the modernization approach might seem to resemble most closely Alexander Bickel’s argument that the Supreme Court should use the “passive virtues” (a denial of certiorari, prosaically, or a more questionable manipulation of a rule of justiciability, or a deliberately narrow holding) to delay the enforcement of constitutional principles until popular support developed

⁷³ See, e.g., William Eskridge, *Dynamic Statutory Interpretation* (1994).

⁷⁴ Guido Calabresi, *A Common Law for the Age of Statutes* (1982).

⁷⁵ Harlan Fiske Stone, *The Common Law in the United States*, 50 *Harv. L. Rev.* 4, 12 (1936), quoted in Peter L. Strauss, *On Resegregating the Worlds of Statute and Common Law*, 1994 *S. Ct. Rev.* 429, 431.

behind them. But the resemblance is only superficial, and the difference ultimately may reveal the most troubling aspect of modernization.

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

The modernization approach, one might say, makes a virtue out of what Bickel, and others like him, viewed as an unfortunate necessity. For Bickel, there is a potential tension, sometimes severe, between the principles that the courts propound, on the one hand, and popular opinion, on the other. On the modernization approach, there is no such tension: the principles themselves are rooted in an estimation of how popular opinion is developing. They do not have a source in tradition or something of that kind, as they do for Bickel.

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

The difference between the Bickel view and modernization can be seen in something that Justice Felix Frankfurter, one of Bickel's heroes, said at oral argument in the *Brown* case, and that Bickel cited repeatedly: "Nothing could be worse from my point of view than for this Court to make an abstract declaration that segregation is bad and then have it evaded by tricks."⁷⁶ Bickel added: "There is much that could be worse than one such declaration, but nothing indeed could be worse than many."⁷⁷ Obviously it would be a bad thing for segregation to be maintained by "tricks," but Frankfurter's and Bickel's concern was not so much with that as with the spectacle of having the Court back down in the face of popular opposition-- "nothing could be worse." That idea is antithetical to modernization. For a modernizer, for the Court to learn that its decisions do not have sufficient support is not the worst thing that can happen; it is more like business as usual.

C. The Problem of Judicial Abdication

The deeper problems of modernization may be not questions of judicial competence—of the courts' presuming to do the political branches' job—but something like the opposite. The two most famous decisions of the last century, *Roe v. Wade* and *Brown v. Board of Education*, illustrate the point.

1. Abortion

Abortion is, of course, by far the most controversial area of modern substantive due process. It illustrates the strengths—at least the potential

⁷⁶ See, e.g., Alexander M. Bickel, *The Supreme Court and the Idea of Progress* 6 (1976), quoting 21 U.S.L.W. 3164 (1952); *id.* at 95.

⁷⁷Bickel, *supra* note [Idea] at 95.

strengths—of the modernizing approach, as well as arguably the greatest weaknesses. At the time of *Roe v. Wade*, there was a trend toward liberalizing abortion laws in the United States. A few states had recently legalized abortion generally; others had relaxed restrictions, enacting laws that allowed abortions in cases where the physical or mental health of the mother was in jeopardy—a standard that, depending on how it was enforced, could allow abortion relatively freely. The Texas statute that was invalidated in *Roe v. Wade* permitted abortions only to save the life of the mother. It was, therefore, arguably both extreme and something of an outlier—not to the extent that the statute in *Griswold* was, but and the trends in the law were against Texas’s abortion law.

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

Such a result in *Roe* would have been far less controversial, and it could have been the first step toward a gradual expansion of the right to an abortion. Over time that gradual expansion of the judicially-created constitutional right might have evolved together with the legislative liberalization of the laws, to produce a result something like what *Roe* tried to produce all at once. This alternative approach would have taken longer, but it would have been more democratic and

therefore potentially more stable, and it would have produced a less polarized and religiously-inflected politics on a variety of issues. Or at least so it has been argued, by a number of people who support the right to abortion in general terms but criticize the Court for not taking this more gradual approach in *Roe*⁷⁸—an approach that would have been more consistent with the modernization paradigm.

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

⁷⁸ See, e.g., Ruth Bader Ginsburg, Some Thoughts on Autonomy and Equality in Relation to *Roe v. Wade*, 63 N.C. L. Rev. 375, 382 (1985).

Roe v. Wade did not appear to leave an opening for the legislature to revitalize abortion laws, as the modernization approach would require. But that appearance was misleading: the final confirmation that the abortion decisions were modernizing decisions lies in the Supreme Court's response to the determined and protracted political campaign against *Roe*. In *Planned Parenthood v. Casey*,⁷⁹ the Court reaffirmed what it characterized as “the essential holding of *Roe v. Wade*,” which it described as the right to have a pre-viability abortion free of any “undue burden” imposed by the state. But the “undue burden” standard is obviously vague, and in a series of decisions, including *Casey* itself, the Court accommodated the political reaction to *Roe v. Wade* by accepting a number of restrictions on the abortion right. The Court allowed the states to impose a 24-hour waiting period; to require women seeking abortions to undergo mandatory pre-abortion counseling, which could be explicitly designed to discourage them from having an abortion; to require minors to obtain parental consent, unless there were special reasons justifying an exception; and to impose relatively burdensome recordkeeping requirements on abortion providers. Perhaps most important, the Court upheld statutes that forbade the use of Medicaid funds for most abortions. The net effect was to make it significantly more difficult for many women to obtain abortions.

If one were to judge the Court's abortion rulings as an exercise in modernization, one might say that, overall, the Court was successful, even though it made things unnecessarily difficult for itself along the way. Had the Court

⁷⁹ 505 U.S. 833 (1992).

begun with a narrower holding in *Roe*, it might have succeeded in bringing about the modernization of many states' abortion laws. The landscape might look much the same as it does today, without all the storm and stress and political fallout that accompanied the battles over *Roe*. But if the Court's objective was to broker a political compromise about abortion that more or less reflected national sentiment, then a plausible case can be made that the Court has, at this point, succeeded in doing so.

But that conclusion, if it is right, reveals one of the great weaknesses of the modernization approach—that it makes the courts too willing to accede to political pressure. Of course this view will be held by someone who believes that the Court should have unequivocally vindicated the right to abortion in all respects. But even on a more modest view of the judicial role in constitutional cases, modernization, in this setting, arguably turned out wrong. It led the Supreme Court to do essentially the opposite of what it should have done.

Specifically, both *Roe v. Wade* and the Medicaid abortion cases—according to this line of criticism—should have come out the other way. The overall effect of the Court's abortion decisions has been to make abortion relatively freely available to relatively advantaged women, but much less freely available to women who are already disadvantaged—women who are poor, young, undereducated, and living outside of urban areas. Because many relatively powerful groups in society have an effective right to abortion, the pressure to expand the right further has been muted. At the same time, abortion opponents have been appeased at the expense of the relatively powerless.

What the Court should have done, on this account, is to allow the political process to make the decision about the degree to which abortion laws would be liberalized. For that reason, it might be argued, *Roe v. Wade* was wrongly decided. But the Court should have insisted that any such reform make abortion equally available, or equally unavailable, to the rich and poor alike—directly contrary to the Medicaid abortion cases. That way, the political pressure that relatively well-off individuals would have exerted to reform the abortion laws would have benefited the disadvantaged as well.

Had the Court taken this route, it would not have been modernizing. It would have been adopting a different role—a role suggested by Justice Jackson’s celebrated concurring opinion in *Railway Express Agency v. New York*⁸⁰ and also by the theory, associated with *Carolene Products*, that the courts should intervene to protect those groups who are undeservedly powerless in the democratic arena. On this account, modernization is best left to the political branches; they will eventually be able to modernize statutes without the courts’ help. The courts should do things that the political branches cannot do, such as protecting the politically powerless. There are, of course, problems with this conception of judicial review as well. But what this criticism of modernization does suggest is that the problem with the today’s modernizing substantive due process is, in a sense, the opposite of the problem with pre-New Deal substantive

⁸⁰ 336 U.S. 106 (1949). Justice Jackson argued that “[t]here is no more effective practical guaranty against arbitrary and unreasonable government than to require that the principles of law which officials would impose upon a minority must be imposed generally. Conversely, nothing opens the door to arbitrary action so effectively as to allow those officials to pick and choose only a few to whom they will apply legislation and thus to escape the political retribution that might be visited upon them if larger numbers were affected.”

due process. Where the *Lochner* era courts were too rigid and unforgiving in their confrontations with the political branches, modern substantive due process—that is, modernizing substantive due process—is too flexible and too willing to accommodate.

3. *Brown*

Perhaps the merits and demerits of modernization are best illustrated by the most celebrated modernizing decision of all, *Brown v. Board of Education*. *Brown* was not explicitly a modernizing decision, and the leading justifications of *Brown* do not portray it as modernizing. Rather they refer to principles of equality and to the courts' role in protecting minorities. But there is evidence that the Justices were strongly affected by the view—common among elites at the time—that segregation was an anachronism. A national consensus against segregation had been building for a generation.⁸¹ Other decisions that were not explicitly about race—the line of cases that constitutionalized, and reformed, criminal procedure in the states, for example—were in significant part efforts to modernize racist and backward state criminal justice systems. And, of course—the other aspect of modernization—the Court at the time was intensely aware of the political reaction to *Brown* and tailored its subsequent decisions accordingly, most famously by allowing desegregation to be undertaken with “all deliberate speed” and by evading a decision on the constitutionality of anti-miscegenation laws until 1967.

⁸¹ The definitive account of the background and aftermath of *Brown*, and particularly of the tension between distinctively legal and more “political” considerations, is Michael J. Klarman, *From Jim Crow to Civil Rights: The Supreme Court and the Struggle for Racial Equality* 290-343 (2004).

The various views that critics and admirers have expressed about *Brown* can be seen as comments on modernization as an approach to judicial review more generally. Did the Court, astutely deciding not to overplay its hand, accomplish as much as was politically possible at the time? Or did the Court, too sensitive to political currents and not determined enough to enforce principle, give too much ground? Or, a third possibility, was the Court—selectively modernizing—too much in the grip of elite opinion, so that failed to see that the better course would have been not to declare segregation unconstitutional but to allow “separate but equal” and insist on genuine equality?

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

But it does not follow that judges and justices should self-consciously seek to anticipate the movement of public opinion and align their decisions accordingly. Many of the political forces that limit the courts will operate without the judges’ conscious cooperation: only certain kinds of people will be appointed to the courts; only certain legal outcomes will present themselves as realistic possibilities; the pressure of public opinion will make certain arguments more persuasive even if judges do not consciously decide to defer to public opinion.

The conventional understanding of judicial review is that the courts should identify and enforce principles that are derived from the text of the Constitution,

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

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

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

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

A modernizing approach to judicial review can co-exist with the enforcement of principles that have a source outside of democratic politics. In fact the two co-exist in our system today. In some areas, the courts do not play a modernizing role; the First Amendment seems to be a relatively clear example. In that area, the courts have identified a role for themselves and a set of principles that they will enforce. But in the substantive due process cases, and in other areas as well, the courts do not seem to have identified a role, or a set of principles, that

separates them from the political processes. The result is doctrine built around modernization, with the advantages and disadvantages of that approach.

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