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Liberty, Equality, and Privacy: Choosing a Legal Foundation for Gay Rights

Richard A. Epstein

I. SUBSTANTIVE RIGHTS VERSUS NON-DISCRIMINATION GUARANTEES

A. General Considerations

One of the central tasks of constitutional law involves the integration of substantive and antidiscrimination guarantees of two types of legal rules. On the first side, the Constitution contains a variety of rights that look to be substantive in nature. High on this list are the Constitution’s provisions that deal with the protection of contracts, property, speech, and religious freedom. The usual strategy for the explication of these rights is to figure out the scope of the protected individual interest, and then to examine the putative justifications for deciding whether limiting these rights serves some legitimate state interest. The former question normally requires some account of what is covered by the basic right: do contracts cover state issued charters? Does property cover trade secrets? Does freedom of expression cover ritual slaughter? Once the coverage question is determined, the state’s countervailing interest is evaluated under the police

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2 Consider Fletcher v Peck, 10 US 87, 128 (1810) (holding that a legislature could not repeal an act passed by bribery in order to recover a tract of land that had been sold by the governor after the land had passed into the hands of a bona fide purchaser); Trustees of Dartmouth College v Woodward, 17 (4 Wheat) US 518, 595–96 (1819) (holding that a charter granted to a private corporation was a contract).


4 Church of the Lukumi Babalu Aye, Inc v City of Hialeah, 508 US 520, 532–33 (1993) (ruling that a municipal ordinance prohibiting cruelty to animals was unconstitutional because it was targeted at preventing the sacrificial rites practiced by adherents of a particular religion) (superceded by the Religious Freedom Restoration Act as stated in Francis v Keane, 888 F Supp 568 (S D NY 1995)).
power: is the restriction reasonably calculated to protect the health, safety, morals, and general welfare of the public at large?

The strength of these substantive constitutional guarantees turns on the relative weights of the basic right and the state justification. Speech is broadly construed to cover all forms of expressive activities, and the police power is narrowly construed to cover direct incitements to violence, but not abstract advocacy of the need to use force and violence to rectify chronic social injustices. The taking of property for its part tends to be more narrowly construed, but the police power justifications for limitations on its use or disposition are often more broadly read. We thus have a strong and relatively coherent law on freedom of speech, and a system of property regulation that is commonly (and rightly) deplored for its intellectual incoherence. The tool that drives this difference tends to be the level of scrutiny: strict scrutiny yields broader basic protections and a narrower set of police power justifications; rational basis review yields a narrower basic coverage provision and broader police power justifications. The two-tiered structure of modern constitutional law dramatically shapes the outcomes of litigated cases.

The system as thus far constituted appears to leave little explicit place for the non-discrimination principle that lies at the heart of any equal protection analysis. But without exception, each and every substantive constitutional guarantee sooner or later gives rise to its own equal protection dimension. The source of this transition stems from the change in focus of legislative action. The most obvious and direct threats to any constitutional protection are legislative or executive actions that are directed toward a single person. The government shuts down one newspaper but not another; the government confiscates the property of one owner but not another; the government closes down one church but not another.

It is a sign of the success of our constitutional system that government at all levels makes few attempts to single out individuals in this way. Rather, the scope of regulation is directed towards broad classes of individuals. The transition is marked, for example, by the difference between the condemnation of a single plot of land for government use and the regulation of land

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*See Esmail v Macrane, 53 F3d 176, 180 (7th Cir 1995) (recognizing that an individual may bring an equal protection claim and noting that "[a] class of one is likely to be the most vulnerable of all"); see also Village of Willowbrook v Olech, 528 US 562 (2000) (recognizing "class of one" equal protection claims).
use in an entire neighborhood through a zoning ordinance. It is equally well marked by the difference between shutting down a single newspaper for its subversive views and imposing a tax on the operating income of all newspapers, or even all businesses.

One attitude that might be taken to these various broad statutory initiatives is to let them pass constitutional muster on the ground that general ordinances never pose any specific threat to particular persons. But the tide of the law in all substantive areas, even takings law, has run decidedly and properly in the other direction. Many statutes behave in a virtuous fashion, by which I mean that they improve the position of each and every party that is subject to the regulation. It is hard to see any strong factional undercurrent in the Statute of Frauds whose major effect is to use formality in order to advance the security of exchange. What each person loses in his ability to enforce oral promises, he more than gains in his ability to resist false claims based on supposed contracts. The formalities involved are not an attack on freedom of contract (in the sense that they do not restrict the set of terms that the written agreement can contain) but represent an effort to make contracts more efficient by reducing the uncertainties that might arise in any subsequent dispute.

In my book *Takings,* I took the position that these implicit in-kind benefits from regulation supply the just compensation required to satisfy a regulatory taking. But, frequently, the general nature of a statute does not guarantee that such benefits will be evenly distributed. A statute that prevents any new real estate construction has one set of impacts if all plots of land within the community have been developed to the same degree. It has quite a different, and more suspicious, impact if the majority of citizens who support the regulation have previously developed their property and are now determined, by “neutral” ordinance, to deny any and all development rights to the owners who for one reason or another have been left behind.

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7 Id at 195–215.

8 For one such ordinance, see *Haas v City and County of San Francisco,* 605 F2d 1117, 1121 (9th Cir 1979) (denying a just compensation claim against an anti-development ordinance brought by the only owner of an undeveloped plot of land).
In some cases, it is easy to make direct financial measures of the gains and losses imposed by these regulations to see which individuals come up short and which do not. In other cases, however, direct measurement is difficult. What is needed is some reliable proxy for the valuation that cannot be directly made. At this point the inquiry properly shifts to a non-discrimination test: did the statute have the same impact on the outsiders as it did on the dominant group?

This test has widespread use in all areas of law. It is commonly used to see whether a self-dealing transaction between a corporation and its dominant shareholders prejudices the interests of minority shareholders. It is used to see whether ostensibly neutral tests are actually devices to engage in unlawful racial discrimination. It is used to determine whether state regulations of interstate commerce pass muster under the (dormant) Commerce Clause. It is most emphatically used to determine whether speech regulations of content or forum pass muster under the First Amendment. The tell-tale sign of impermissible regulation is an implicit and illicit transfer of wealth or opportunity from one group to another through the power of the state.

Once again, levels of scrutiny matter. In those cases where the level of scrutiny is strict, as with the First Amendment protection of many forms of speech, the court has to be highly confident that no such transfer has taken place under the guise of neutral regulation before it sustains a law. In contract, where the less rigorous rational basis standard of review applies, as with the protection of private property, the court often allows regulations with strong and conscious disparate impacts to pass muster: a regulatory taking from A to B is practical politics, not a

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9 See, for example, Bayer v Beran, 49 NYS2d 2, 10 (NY 1944) (finding that equal treatment tended to negate charges of improper self-dealing with insiders).

10 Griggs v Duke Power Corp, 401 US 424, 430–31 (1971), (prohibiting an employer from using facially neutral standardized general intelligence tests that preserved the status quo of prior discriminatory employment practices).

11 See, for example, Hunt v Washington State Apple Advertising Commission, 432 US 333, 353 (1977) (striking down a facially neutral prohibition against publication of state grades of apples as impermissible discrimination).


13 See, for example, United States v O'Brien, 391 US 367, 376–77 (1968) (upholding a criminal conviction for burning a draft card); this affirmance is arguably inconsistent with the content-neutral position adopted by the Court.
constitutional violation." But in both settings, the analytical approaches are the same. The shift from individualized state action to general regulation introduces into the analysis what the "equal protection" dimension of the various substantive constitutional guarantees. Courts are bound to undertake this analysis. The only question is how they will do it.

The question then arises where all this leaves equal protection analysis under the Equal Protection Clause itself, when parity between persons is not anchored to any particular substantive right. But we should be cautious before embracing the view that the clause offers a universal guarantee against all forms of unequal treatment, which seems to be an impossibility given that all laws have to discriminate to some degree if they are to function as laws at all. Rather, the most sensible (but by no means the most practiced) way to limit the scope of the Equal Protection Clause is to recognize that its chosen domain is the "protection" of individuals from the imposition of state power. "Protection" for these purposes seems to refer to the power of the state in administering the laws that secure the blessings of liberty and property to all. The basic point is that the Equal Protection Clause should be read in harmony with the aims and objectives of the night-watchman state.

That reading imposes real limitations on the reach of the Clause so that it does not restrict the state in areas where "protection" is not involved, such as the distribution of benefits to members of different groups. On this reading, the core prohibition is that the state cannot impose heavy criminal sanctions on one group of individuals while imposing light sanctions for the same offense on another. It cannot do this by building in differential punishment schedules into the statutes, nor by consciously skewing the administration of facially neutral statutes. Equal protec-

14 See, for example, Goldblatt v Town of Hempstead, 369 US 590, 592–93 (1962) (holding that a town ordinance regulating dredging and pit excavation did not constitute a taking and was a valid exercise of police power).
15 “No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.” US Const Amend XIV, § 1.
16 Such is the opening theme on equal protection in Gerald Gunther and Kathleen M. Sullivan, Constitutional Law 628 (Foundation 13th ed 1997).
17 Robert Nozick, Anarchy, State, and Utopia (1974) (endorsing the "night-watchman state").
18 Note that the position in the text does not touch on the explosive question of whether one can increase the punishment of individuals who commit admitted criminal acts out of racial, ethnic, or religious animus. See, for discussion of that theme, Wisconsin v Mitchell, 508 US 476 (1993), and R.A.V. v City of St. Paul, 505 US at 377. The question
tion must extend to all persons, regardless of the content of the particular substantive guarantee. The Equal Protection Clause does not speak to the substantive question of whether embezzlement via the Internet should be made into a crime. Rather, it speaks to the critical question of consistency: this activity cannot be regarded a felony for one group but a misdemeanor for another.

This last point explains why there is a need for an Equal Protection Clause even in a regime that independently affords direct protection to the substantive rights to life, liberty, and property, as is explicitly done under the Due Process Clause. In many complex situations we cannot be sure whether certain legal protections should be afforded by the state. The Equal Protection Clause uses a non-discrimination principle as a backstop to substantive legal protections. For example, in *Gulf, Colorado & Santa Fe Railway Co v Ellis*, the question was whether railroads, but not other tort defendants, could be required to reimburse successful plaintiffs for their legal fees. The Court refused to allow the statute to stand. It remains an open question whether, as a general rule, defendants should have to pay legal expenses to successful plaintiffs in tort actions.

A court might not be willing to insist that there is one right answer to that question. After all, the English rule requires all losers to pay fees to winners, while the American rule generally requires each side to shoulder its own costs. In light of that uncertainty, the legislature could decide whether all defendants did (or did not) have to pay for these expenditures. But, by the same token, the legislature could not insist on two right answers by passing a statute that announced that only railroads had to compensate successful plaintiffs for their legal fees. That selection leads to the deep suspicion of class legislation. This type of equal protection analysis will not answer the question of whether legal fees in tort cases must be treated just like legal fees in mortgage

in these hate crime cases is distinct from the issue of whether one could use aggravation for members of one race, but not for members of other races.


20 165 US at 152–53.

21 Id at 166.

foreclosure cases. But within relatively compact classes, it works as an important break against favoritism and class legislation, and can be defended on just those grounds, even when no suspect classification is involved.

On this approach the Equal Protection Clause is not limited solely to those cases of suspect classification, but also applies to the full range of economic liberties that have received short shrift in recent years. To see how risky it is to ignore ad hoc treatment where no suspect classification, such as race, was involved it is instructive to look at *Railway Express Agency, Inc v New York*, where Justice Jackson took the position that New York City was entitled to prevent the owners of business delivery vehicles from posting advertisements of other firms, even though they could post advertisements of their own business. This restriction hit the Railway Express Company hard because it had 1900 trucks in New York City on which it leased out advertisement space. The City tried to make out a safety justification for its restriction, on the grounds that the advertisements would distract other drivers, but was at a loss to explain why self-advertisement posed a lesser risk than advertisements carried for others. But never mind. The Court simply decided that in equal protection cases involving economic liberties, legislative motivations were beyond its ken, so that it did not even have to entertain the possibility that this statute was a form of class legislation that protected other advertisers (perhaps of local billboards) from legitimate competition.

The result seems wrong-headed. Even the narrow view that treats the Equal Protection Clause as dealing with protection, and not just some broad form of equality, would require the state to justify its use of the police power. The proof of the pudding lies in how we would think about *Railway Express* today. Under an equal protection analysis, it would not be necessary to show that the state has no justification for keeping advertisements off the

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24 Id at 113 (Jackson concurring).
25 Id at 108 (Douglas opinion).
26 Id at 109–10 (Douglas opinion).
27 *Railway Express*, 336 US at 115 (Jackson concurring). It is well known how far subsequent decisions have strayed from earlier equal protection law. See *Williamson v Lee Optical Co*, 348 US 483 (1955) (upholding a law that permitted only an optometrist or ophthalmologist to fit eyeglass lenses); *Ferguson v Skrupa*, 372 US 726 (1963) (sustaining a law which allowed only lawyers to be debt adjusters); *Minnesota v Clover Leaf Creamery Co*, 449 US 456 (1981) (holding that a law prohibiting milk sold in plastic containers that disproportionately benefited in-state paper producers was not discriminatory).
sides of delivery trucks. It would only be necessary to point out the inconsistency of allowing delivery trucks to carry some advertisements while prohibiting the like privilege to others. It is therefore possible to strike down the statute without thinking the universal ban unjustified on substantive grounds.

More modern cases switch from the equal protection to the First Amendment analysis, for they no longer start with the earlier view that commercial speech is beyond the scope of the First Amendment. Now that a substantive interest is implicated, New York City could not cure its deficit by extending the ban to advertisements of the vehicle’s own firm. To be sure, the selective restriction will quickly fall before a First Amendment challenge, but a neutral restriction on all advertisements still has to face the challenge of explaining why it is necessary to promote some legitimate interest in public safety, which looks difficult to do.

The argument I have sketched offers a broad place for an equal protection analysis, both as an adjunct to specific substantive guarantees, and as a free-standing protection against inconsistent treatment of like cases. The scope of this program, alas, is subject to two major uncertainties. The first lies in cabining the idea of protection so as to exclude the distribution of state benefits from the list of covered activities. Here, the argument to the contrary holds that the only benefits that the state can distribute are those that it raises by taxation: to take from all groups uniformly, but to give to one group selectively could be read as a violation of the equal protection norm insofar as it relates to the imposition of the tax. Benefits thus have to be matched with burdens so that the word “protection” no longer limits the potential reach of the clause solely to the state’s night-watchman function. The state can only give what it takes, and so long as any taking is subject to an equal protection analysis, the associated giving is necessarily subjected as well. The implications of this position for the school segregation debate and the affirmative action debate are evident. The narrow view of equal protection does not chal-

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29 See, for example, Valentine v Chrestensen, 316 US 52, 54 (1942) (holding that the First Amendment imposes no restraint on government with respect to commercial speech), overruled by Virginia Board of Pharmacy v Virginia Citizens Consumer Council, 425 US 748, 761–62 (1976) (extending First Amendment commercial speech protection to advertisements of prescription drug prices); Metromedia, Inc v City of San Diego, 453 US 490, 509 (1981) (allowing a ban of commercial billboards on First Amendment grounds because it would improve aesthetics and traffic safety).

30 See, for example, City of Cincinnati v Discovery Network, Inc, 507 US 410, 430–31 (1993) (striking down over aesthetic and safety objections a selective ban on newsracks on public streets).
lengte either the use of segregated schools or affirmative action, since neither goes to the protective functions of the state. But the broader view either condemns both, or forces someone to find a norm that allows a distinction to be drawn between them.\footnote{For my treatment of this issue, see, Richard A. Epstein, A Rational Basis for Affirmative Action — Mich L Rev — (forthcoming 2002).}

The second problem is every bit as persistent. What counts as a “group” for the purposes of this guarantee? Suppose that the state wants to impose heavier sentences on all repeat offenders. Do they count as a separate group that cannot be singled out under the Equal Protection Clause? Or do they count simply as part of the general population, all of whose members have been told in advance that they will be more severely punished the second time than they were the first? I have no doubt that the latter is the preferred interpretation, at least if the statute only counts (first or second) offenses committed after its passage. But, just the ability to pose that question forces one to ask which distinctions require scrutiny under the Equal Protection Clause and which do not. Does a progressive income tax violate the Equal Protection Clause because it singles out people of greater wealth for heavier treatment? Why not? Well, one reason is that they obtain this status not by birth,\footnote{See, for example, \textit{Frontiero v Richardson}, 411 US 677, 686 (1973) (Brennan) (plurality) (determining whether women constituted a suspect class, the Court stated that immutable characteristics are “determined solely by the accident of birth”); \textit{Ristaino v Ross}, 424 US 589, 596 n 8 (1976) (“In our heterogeneous society policy as well as constitutional considerations militate against the divisive assumption—as a \textit{per se} rule—that justice in a court of law may turn upon the pigmentation of skin, the \textit{accident of birth}, or the choice of religion.”) (emphasis added).} but by effort. However, it is not clear why or how this should matter.

These few examples are enough to show what everyone already knows: the Equal Protection Clause presents massive and unavoidable interpretive difficulties of its own. We have to decide what distinctions matter so that we can determine which forms of discrimination call for a \textit{presumptive} condemnation. Why presumptive? Because the same two-stage analysis that is applied to the individual substantive guarantees has an equally critical role to play in equal protection cases. Just as rights to property and speech are not “absolute,” so too with the prohibition against non-discrimination on any ground.

Just consider this short history. In the early part of 2001, the mere thought of racial profiling was denounced on the ground that any deviation from the non-discrimination norm on the basis
of race or national origin was per se unconstitutional. After September 11, 2001, it is hard to find any voices who think that all forms of racial profiling are per se illegitimate, let alone unconstitutional. The need to prevent terrorist attacks falls within any sane person’s definition of the police power, and, in some circumstances, we are willing to exercise that power even when faced with the certain knowledge that some upstanding individuals of Arab origin will be subjected to far greater scrutiny than their non-Arab peers.

B. The Privacy Context

These general ruminations play out in explicit fashion in connection with the question of whether equal protection or privacy is the appropriate framework in which to analyze the rights of gays and lesbians. Here, my first instinct is to bridle at the way the question is formulated because it seems better to ask what rights all individuals have under the Constitution just by virtue of being citizens of the United States or persons subject to its laws. I am much more comfortable with starting from general principles and reaching a specific conclusion about a given group, than I am with starting with an affinity for particular groups and then casting about for the general principles that secure them their desired rights. Therefore, the question that I put is: how might this general approach apply when we look first to substantive protections of individual rights and then through the equal protection lens? My thesis is that, rightly understood, and in contrast to the position taken by Andrew Koppelman, the two approaches tend to converge on most (but not all) issues regardless

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32 See, for example, Wayne Washington, US Vows Suits on Racial Profiling: New rights Chief Details a Strategy, Boston Globe A3, (July 23, 2001) (quoting the Justice Department’s newly confirmed civil rights chief, as saying that the Department is determined to stamp out racial profiling: “There may be people we need to clobber over the head, and if we need to clobber people over the head, we’ll do that.”).

33 Consider James Q. Wilson and Heather R. Higgins, Profiles in Courage, Wall Street J A12 (Jan 10, 2002) (arguing that “most profiling is not racial, that some profiling (even when it involves race) is essential under some circumstances, and that it would be impossible for law enforcement to do its job without taking into account the observable features of people”). But see Deborah Ramirez and Jack Levin, Op-Ed, Profiling Terrorists Not The Answer, Boston Herald 25 (Nov 7, 2001) “Prior to the attack on America, racial profiling was considered a blatant civil rights violation. . . . In the aftermath of the Sept. 11 attack, however, thousands of Arabs and Muslims complain that they are being unfairly scrutinized and harassed. A practice that was once considered intolerable is now accepted as a necessary tactic in the war on terrorism.”).

34 See generally Andrew Koppelman, The Right to Privacy?, 2002 U Chi Legal F 105 (arguing that the right to privacy is a weak basis on which to defend gay rights).
of the best efforts to keep them apart. The dominant issue then deals with second order effects: which journey has fewer bumps along the way?

Let us start with the question of how to think about individual rights as they relate to matters of marriage, sex, and procreation. Koppelman downplays the benefits of locating the analysis of these issues in substantive guarantees and finding them instead in the Equal Protection Clause.\footnote{Id at 105.} In one sense, he is surely right. The particular provision that generates many of these liberty and privacy rights is the Due Process Clause, which provides that no state shall deny any person of life, liberty, or property without due process of law. The most obvious reading of this clause is that it deals only with the procedural issues on such matters as hearing, notice, and the opportunity to be heard—issues that are part and parcel of ordinary judicial proceedings, both criminal and civil. But, there is an extensive body of literature, which I will not attempt to summarize here, that reads the clause quite differently and concludes that it has a substantive dimension, such that “without due process” is read to mean “in accordance with the law of the land.”\footnote{See, for example, James W. Ely, The Oxymoron Reconsidered: Myth and Reality in the Origins of Substantive Due Process, 16 Const Commentary 315 (1999).} In specific contexts, this understanding becomes “without just compensation.”\footnote{See, for example, Edward S. Corwin, The “Higher Law” Background of American Constitutional Law, 42 Harv L Rev 149 & 365 (1928–29). For a recent account of the early authorities in this direction, see Ely, 16 Const Commentary at 315 (cited in note 36) (providing an historical account of how substantive due process has been used to safeguard non-economic rights). Judicially, the equation between “without just compensation,” and “without due process” was made in Lindsay v East Bay Street Commissioner, 2 Bay 38, 59 (US 1796), which held that compensation was constitutionally mandated by the due process standard.} At this point, the clause is transformed into a takings-like clause that covers not only private property, but life and liberty (and access to public property) to boot.

The extension from private property to personal liberty is quite important because the hard question is whether we can think of any interest that is worthy of protection that does not, in principle, fall within either of these two heads. Certainly, to a committed Lockean, the reach of the Due Process Clause has to be regarded as comprehensive and not selective in its ambitions. It reads as a lightly edited version of the fundamental govern-
ment guarantees to "lives, liberties, and estates," the very protection of which is the basis for government.\(^{38}\)

So how does this play out in concrete circumstances? In dealing with the question of privacy, a central question is how far back we go in constitutional discourse. One position, taken by Koppelman, starts the analysis by accepting that *Lochner v New York*\(^ {39} \) was wrongly decided, therefore suggesting that it is taboo to venture into the area of gay rights with a due process strategy that requires one to distinguish any right to privacy decision from *Lochner*.\(^ {40} \) But this argument is incorrect, I think, on both grounds. The first point is that we should regard *Lochner* not as a constitutional horror story, but as a model for sensible constitutional deliberation. Indeed, *Lochner* is properly seen as the model that is, in practice, faithfully followed in modern constitutional law dealing with the substantive guarantees raised in connection with, for example, speech, religion, and federalism. The second point is that this model carries over to the area of gay rights, where it yields results that are sometimes supportive of, and in other cases critical of, the various claims of that agenda. Let us consider these two points in order.

### C. *Lochner* Revisited

The question before the Supreme Court in *Lochner* was whether to strike down a criminal statute that limited the number of hours that certain kinds of bakers could work to sixty per week and ten per day.\(^ {41} \) For what it is worth, the original briefs in the United States Supreme Court framed the case as an equal protection challenge on the ground that there was no intelligible distinction between the bakers who were subject to the regulation and those who lay beyond its scope.\(^ {42} \) In light of the above argu-

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\(^{38}\) John Locke, *Second Treatise of Government* § 123 at 66 (Hackett 1980). The dangers and uncertainties that each person finds in a state of nature makes him "willing to join in society with others, who are already united, or have a mind to unite, for the mutual preservation of their lives, liberties and estates, which I call by the general name, property."

\(^{39}\) 198 US 45 (1905), overruled by *West Coast Hotel v Parrish*, 300 US 379 (1937).

\(^{40}\) See Andrew Koppelman, *Signs of the Times: Dale v. Boy Scouts of America and the Changing Meaning of Non-Discrimination*, 23 Cardozo L Rev 1819, 1838 n 92 (2002) (disparaging the Supreme Court's decision in *Dale* as a "Lochner-like arrogation to itself of the power to review the needfulness of legislation").

\(^{41}\) See *Lochner*, 198 US at 45–46.

\(^{42}\) See Brief for Plaintiff in Error Joseph Lochner, *Lochner v New York*, No 292, *7*–*8* (Sup Ct filed Oct 1904). Thus, the plaintiff's oral argument began:
ments, there is in principle nothing wrong with this approach, for in fact the statutory distinction was arbitrary with respect to any safety rationale that could be advanced to support the hour limits, not to mention other features of the statute. The nice point about the equal protection analysis is that it allows one to strike down the statute without having made a strong commitment as to whether regulation of this sort makes sense if enacted across the board. The great weakness of the position is that it has nothing to say if the statute were drafted so that it covered all members of the relevant class (for which read here, bakers) by the same rule. At that point the rule may be sound or unsound, but it is not discriminatory. Yet if the definition of the relevant class is expanded to cover all workers in, say, heavy industry, then the equal protection analysis once again bubbles to the surface because we could have a distinction between bakers on the one hand and other forms of workers on the other. The modern case law is, of course, four-square against this approach.

The question is what is at stake when we shift the analysis from equal protection to due process. Here the threshold question involves a dispute over the content of the term "liberty." Here one could—wrongly in my view—take the narrow reading of liberty to cover only the ability to move about without hindrance. On this view, the correlative tort to individual liberty under the Constitution is false imprisonment. But the ordinary definition of liberty surely goes much further than mere mobility and covers the rights to engage in virtually all productive labor until and unless these activities cause harm to another. Justice Peckham was correct when he said in \textit{Allgeyer v Louisiana:}\footnote{\textit{Lochner}, 198 US at 48 (quoting plaintiff's original Supreme Court brief).}

\begin{quote}
The liberty mentioned in that amendment means not only the right of the citizen to be free from the mere physical restraint of his person, as by incarceration, but the term is deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties; to be free to use them in all
\end{quote}

\footnote{165 US 578 (1897).}

The statute in question denies to certain persons in the baking trade the equal protection of the laws. The legislation must affect equally all persons engaged in the business of baking in order to conform to this provision of Article 14 of the United States Constitution. It really affects but a portion of the baking trade, namely, employees "in a biscuit, bread or cake bakery, or confectionery establishment."
lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation, and for that purpose to enter into all contracts which may be proper, necessary and essential to his carrying out to a successful conclusion the purposes above mentioned."

How could it be otherwise? If the state decided to pass a law that said no person could enter into a contract for the next six months, the natural and correct response would be to call this limitation an infringement of individual liberty, namely, liberty of contract. Once we start down this road, a prohibition that limits a particular form of contract with a particular class of persons is an infringement of liberty as well, albeit narrower than the one just mentioned.

Allgeyer raised no serious police power issue, for neither fraud nor safety were at stake under the challenged law. In Lochner, the battlefront switched to the police power, and Peckham’s next challenge was to figure out whether the restriction in question could be justified as a legitimate means for protecting the health, safety, and morals of the affected workers. At this point, the due process analysis could cut deeper than the equal protection analysis. Once contractual freedom is treated as protected, then it is no longer sufficient for the state to say that all forms of labor within some relevant class (be it bakers or industrial workers) are subject to the same kinds of restriction. That would eliminate the discrimination-based challenge, congenial to an equal protection analysis, which by assumption does not treat the underlying activity as a protected liberty. But the due process analysis does find the activity to be a protected liberty and here the state can fail in its justification even if it can show a uniform restriction across the relevant class unless that restriction has a justification in promoting the health and safety of the regulated workers. The identification of the presumptive liberty robs the state of the consistency justifications that work under equal protection.

The next question is whether the statute falls within the ambit of the police power. Here, the most aggressive line of argu-

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4 Id at 589. The Louisiana statute in Allgeyer prohibited any out-of-state firm from entering into a contract for marine insurance unless it was licensed to do business in Louisiana, even when the contract was concluded in New York. Id at 579. That statute would clearly raise issues today under the dormant commerce clause, given the explicit discrimination against out-of-state businesses.
ment against the statute was one that Peckham did not take. Health risks are part and parcel of the job so that the worker is better positioned to evaluate the benefits and burdens of an employment contract than the state, making all purported safety restrictions invalid within the industrial context. But this approach too had been ruled out by the previous case law that safety regulation within consensual contexts was allowed in such dangerous employments as the mines and the rails. Justice Pitney was to invoke the same approach in upholding the workmen's compensation statutes a decade later. Peckham's inquiry, therefore, was more particular and focused on the real possibility that what was at stake was a "labor" statute, that is, a statute which was designed to protect one class of firms and workers against open competition by a rival. In this context the uniform extension of the statute would not count as an argument in its favor. It would only signal a more blatant infringement of the liberty of workers to determine their own labor situation.

Another approach to Lochner is to argue that this particular statute should not be considered in isolation but against the backdrop of a large number of other government initiatives, some of which had worked in favor of Lochner and his workers and others against it. The point here, stressed recently by Daryl Levinson in his criticism of Takings, is that the claim of deprivation looks credible only when the particular statute is considered in "transactional" isolation from the full range of laws, some of which benefited Lochner and others which did not. Who knows what state subsidy or benefit Lochner and his crew received at the expense of other individuals. But this argument cannot work as a serious matter. No doubt Lochner was decided in a second-best universe in which many other programs were approved by government that should have been repealed. But the first best way to deal with those programs is to repeal or invalidate them. It is not to pass a second program that compounds the problem.

45 Holden v Hardy, 169 US 366, 370 (1898) (finding it was outside the legislature's power to prevent competent persons from entering into employment contracts merely because the employment is considered to be dangerous).

46 New York Central Railroad v White, 243 US 188, 205 (1917) (holding that a workmen's compensation act providing for compulsory compensation without regard to fault, except willful acts of employees to produce injury, did not violate the Fourteenth Amendment).


Thus this situation is quite different from portions of a unified program that provide parallel benefits and impose parallel restrictions on a regulated class, where there is some reason to think that the package would not have been adopted if its overall consequences were negative. The Levinson proposal of larger constitutional aggregation results in the unfortunate consequence of lumping together undesirable programs and then treating each mistake as though it were the justification for the other. It is a very dangerous business to think that the benefits a regulated party shares with the rest of the world offer compensation for the losses of particular program. No one would set off the benefits of living in a well-regulated society from the losses attributable to the direct government occupation of land. Nor should those diffuse benefits count any more as a set off in a regulatory takings or economic liberties case. The principle of average reciprocity of benefit was well-known during the *Lochner* era. It was for good reason that it was never applied to cases of labor restrictions whose dominant effect was to suppress competition, not promote safety.

The arguments in favor of Peckham's conclusion were in fact fortified by what appeared to be the situation on the ground. The full statute, of which the hours provision was a part, contained extensive requirements (which should have been challenged but

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50 Note too that Levinson's forceful claims are wrong for two other reasons. First, he insists that common law deals with interactions between strangers and thus does not face the overlap problem that comes from the continuous level of interactions between the individual and the state. But while that is true in the simplest case of suits between two individuals, it does not characterize common law as a piece. Thus any tort action brought by a corporate shareholder injured by a corporate truck has the shareholder on both sides of the transaction, but presumptively, the overlap is ignored because the shareholder bears a disproportionate share of the loss. The same argument applies in the takings context. Second, the better rule on set-offs does not allow any general social benefit (for example, roads) to be set off against particular takings, but requires a showing that the benefit provided is in some sense "unique" to the persons for whom it constitutes a set off, as is the case when new roads are built into otherwise unbuilt territories. See generally, Robert Ellickson and Daniel Tarlock, *Land Use Controls: Cases and Materials*, 718 (Little Brown 1981): "An oft-repeated maxim of special-assessment law is that a landowner may only be assessed for *special* benefits, not for any *general* benefits that also accrue to others in the community. The same distinction appears in eminent-domain law, where only the special benefits bestowed by a public project on a condemnee's undertaken land may be allowed to be set out against the condemnee's condemnation award." The authors then go on to note that this distinction has been under attack precisely for the way in which it limits government. See Charles M. Haar & Barbara Hering, *The Determination of Benefits in Land Acquisitions*, 51 Calif L Rev 833, 848–851 (1963).
were not) including sections regulating the ventilation conditions in sleeping quarters.\textsuperscript{51} It appeared that non-union bakers in certain upstate firms came to work late in the day, baked the bread, then slept on the job—hence the ventilation requirements—awoke the next day, and prepared the finished loaves for shipment. Their rival union firms worked two shifts. On this account, the entire picture starts to fit together. The hours statute had a massive disparate impact on the two types of firms. Non-union firms were paralyzed by its application; union firms could glide by largely unimpeded.\textsuperscript{52}

The result in \textit{Lochner} thus made sense within this framework because the ostensible concern with safety was little more than a pretext for doing in the other guy. On this view of the situation, we should take the "revisionist" accounts of \textit{Lochner} more seriously. Thus, Howard Gillman, who also thinks the decision was wrongly decided, at least offers an account of the late nineteenth and early twentieth century use of the police power that is fully consistent with this position:

[I]t is my contention that the decisions and opinions that emerged from state and federal courts during the \textit{Lochner}...

\textsuperscript{51} New York Labor Law § 113 read:

Wash-rooms and closets; sleeping places.—Every such bakery shall be provided with a proper wash-room and water-closet or water-closets apart from the bake-room, or rooms where the manufacture of such food product is conducted, and no water-closet, earth-closet, privy or ash-pit shall be within or connected directly with the bake-room of any bakery, hotel or public restaurant.

No person shall sleep in a room occupied as a bake-room. Sleeping places for the persons employed in the bakery shall be separate from the rooms where flour or meal food products are manufactured or stored. If the sleeping places are on the same floor where such products are manufactured, stored or sold, the factory inspector may inspect and order them put in a proper sanitary condition.

\textit{Lochner}, 198 US at 47 n 1.

\textsuperscript{52} For a further discussion, see Rebecca L. Brown, \textit{Constitutional Tragedies: The Dark Side of Judgment}, in William N. Eskridge, Jr. and Sanford Levinson, eds, \textit{Constitutional Stupidities, Constitutional Tragedies} 139, 142 (NYU 1998) ("[S]ubsequent analysts... have demonstrated that the law at issue in \textit{Lochner}, despite its guise as a health regulation, was probably a rent-seeking, competition-reducing measure supported by labor unions and large bakeries for the purpose of driving small bakeries and their large immigrant workforce out of business."); Epstein, \textit{The Erratic Takings Jurisprudence of Justice Holmes}, 86 Geo L J at 884 (cited in note 49) ("[\textit{Lochner's}] basic purpose was not to protect these workers, but rather to insulate the unionized bakeries that employed workers in two ten-hour shifts against competition from nonunion firms that deployed their workers in single twenty-hour shifts, and thus were caught by the statute.").
era represented a serious, principled effort to maintain one of the central distinctions in nineteenth-century constitutional law—the distinction between valid economic regulation, on the one hand, and invalid “class” legislation, on the other—during a period of unprecedented class conflict.\(^5\)

The term “class legislation” has in a sense the same ambiguity that exists in dealing with due process and equal protection. Legislation could be class legislation because it distinguishes between some classes of bakers and others; or it could be class legislation because it burdens one class of firms and workers solely to benefit rival firms and their workers. Stated somewhat differently, valid economic regulations, like the Statute of Frauds, are those that tend to advance the long-term interests of all those who fall within its ambit. Invalid class legislation is that which redistributes opportunities and wealth between participants in what otherwise would be a competitive market, which is just what the maximum hours statute in *Lochner* did. Unfortunately, the Supreme Court did not in 1905 resort to the full panoply of techniques that might be used today to distinguish one type of regulation from another. But, that said, the effort to distinguish between positive sum projects brought on by regulation when transaction costs are high, and negative sum transactions brought about by political faction is, and should remain, the central task of all constitutional law.

The deep constitutional logic of both equal protection and due process converge on this single objective. The difference between them is that equal protection can knock out only inconsistencies when the right answer is not known, while due process can knock out uniform limitations on liberties, so long as the right answer to the police power question is known. That is just about how the overall situation should shake out. *Lochner* is defensible not only as a period piece, but also as a matter of larger social theory.

### II. MODERN SEXUAL REGULATION

#### A. From *Griswold* to *Bowers*

At long last, the question now is how all this plays out in connection with modern regulation in what might loosely be

called the sphere of social, as opposed to economic, relations. In one sense, the key case that tested this transition was *Griswold v Connecticut*, where the Court struck down a Connecticut statute that prohibited the sale of contraceptives. The single greatest difficulty that stood in the path of a rational resolution of that case was the felt need to steer clear of the *Lochner* decision and its dreaded doctrine of substantive due process, while striking down a statute that looked both antiquated and perverse. That difficulty led Justice Douglas into his famous riff about the search for penumbras to various provisions of the Bill of Rights, which seems to be a confession of the textual illegitimacy of the result obtained. Fortunately, there is an easier way to understand the transaction which begins with the prosaic observation that the statute in *Griswold* prohibited the sale of a certain item, and thus under *Allgeyer* and *Lochner* was presumptively an impermissible limitation on freedom of contract. That said, the question then turns to the issue of the justification for the restriction in question, which it is hard to imagine today except under the old morals head of the police power.

1. The morals head of police power to regulate private conduct.

Within the nineteenth century constitutional framework, *Griswold* quickly has to address an issue that was largely absent in *Lochner* about the scope of the morals head of the police power. There is no question that the traditional view of the subject allowed for extensive regulation of sexual conduct outside marriage. For starters, it made it possible to ban prostitution and to criminalize homosexual behavior. Today the question rears its head in a variety of contexts, including the regulation of nude dancing, on which the different interpretive approaches yield very different outcomes. But for these purposes, I shall stay

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54 381 US 479 (1965) (holding that a state law forbidding the use of contraceptives unconstitutionally intruded upon the right of marital privacy).

55 Id at 485.

56 See id at 484.

57 See, for example, *Schad v Borough of Mount Ephraim*, 452 US 61, 76 (1981) (stating that nudity alone was not outside of First Amendment and holding that nude dancing was protected because the ordinance in question was too broad); *Barnes v Glen Theatre, Inc*, 501 US 560, 567–68 (1991) (upholding a state law requiring minimum clothing for nude dancers with a welter of rationales); *City of Erie v Pap's A.M.*, 529 US 277, 296 (2000) (upholding ban as a content-neutral ordinance and as satisfying the *O'Brien* test for restricting symbolic speech).
within a determined, but cautious libertarian stance, and put the question this way: how can we deconstruct the morals head of the police power so that it becomes congruent with the traditional principled reasons that justify restrictions on freedom of contract within a general libertarian framework? My purpose here is not to show that these arguments fit within the framework of current or historical understandings of the law. It is only to show that they fit within a coherent conception of the police power.

In dealing with this broad inquiry, we can quickly dismiss the idea that the morals head allows us to reach certain monopolistic practices that could not be proscribed without it. Rather, the more promising set of analogies goes to the negative external effects that certain conduct has on persons who are not party to the contracts. On this issue, Peckham was no fool. In addition to Allgeyer, he had previously written an opinion which upheld the use of the antitrust laws against monopoly precisely because of its systematic adverse effects on consumers and on social welfare generally. And the common law historically had a rule against the enforcement of contracts to use force or fraud against thirdpersons, actions that were subject to criminal punishments as well. The concern with externalities went still further, and it was well-established long before Lochner that the state could properly invoke its police powers in order to enjoin nuisances and, of course, to impose quarantines on individuals who suffered from contagious diseases.

This last category comes closest to our concerns. In an age before we had a strong knowledge of the modes of disease transmission by sexual contact, the choice was often between being safe and being sorry. Hence, the broad bans on certain forms of behavior could more easily be justified because of the lack of knowledge about how these protections could remain effective when kept more narrowly tailored. Much of the earlier morality on fornication, prostitution, and homosexual activity was stirred by the inchoate fear that high levels of sexual contact produced strongly negative social consequences—syphilis and worse. My

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58 Addyston Pipe & Steel Co v United States, 175 US 211, 247–48 (1899) (holding that the use of an internal bidding scheme and geographic market division among pipe manufacturers to determine who would submit a winning bid was a per se illegal restraint of trade in violation of the antitrust laws no matter how reasonable the fixed prices were or how necessary the restraints were to prevent financial ruin).

59 See, for example, Fertilizing Co v Hyde Park, 97 US 659, 667 (1878) (holding that the state could use its police power to stop a company from making and converting animal matter into chemical products).
argument is ultimately that moralisms take over when specific information is wanting, and that in an unconscious way this proposition helps explain much, but by no means all, of the evolution of the morals head of the police power.\textsuperscript{60}

The scientific basis and the legal position, of course, changed radically on these issues by the time of \textit{Griswold}. On the former issue, the mechanisms of sexual transmission were well established (although that knowledge was not so complete as to prevent the rapid spread of AIDS less than a generation later). More to the point, the use of contraception within marriage began primarily to serve as a device either for birth control or limiting the risk of sexual transfer of deadly diseases such as hepatitis. Put these two points together, and it becomes quite impossible to argue that invoking the morals head of the police power in \textit{Griswold} allows the state an indirect way to control risks of external harms whose etiology was not fully determined. Quite the opposite, the ban on contraceptives itself posed a health risk. In light of these considerations, the traditional \textit{Lochner} framework supports \textit{Griswold}'s outcome without its messy resort to penumbras in the desperate effort to distance itself from \textit{Lochner}. The statute imposed a limitation on freedom of contract that was not justified on grounds of health, safety, or even morals.

2. Reassessing the use of moralisms to regulate sexual conduct.

The situation, of course, shifted a bit with \textit{Eisenstadt v Baird},\textsuperscript{61} where the question was whether the \textit{Griswold} decision—which appealed so frequently to the norm of marital privacy—extended to allow the use of contraception by unmarried persons.\textsuperscript{62} In truth, under the traditional analysis of the police power, this case is actually a bit closer to the line but not by much. It is closer because unmarried persons do not usually have sexual relations with only one person but are more likely than married persons.

\textsuperscript{60} For these purposes, I hasten to add that this account will not deal with all of the many manifestations of the police power in nineteenth century law. Thus it was common to treat idleness as a moral offense, which in turn led one court to sustain a ban on bowling. \textit{See State v Haines}, 30 Me 65 (1849). For a fuller discussion of the many uses of the morals head of the police power, \textit{see William J. Novak}, \textit{The People's Welfare: Law and Regulation in Nineteenth-Century America}, 149–191 (1996).

\textsuperscript{61} 405 US 438, 454–55 (1972) (holding that a state statute permitting the sales of contraceptives to married persons, but not to single persons, violated the Equal Protection Clause).

\textsuperscript{62} Id at 453.
couples to have them with many individuals. The infection risk, therefore, of rapid sexual transmission through the general population is far greater. But how does a ban on contraception stop this problem? It might induce individuals to refrain from sexual activities for fear of the risk, or it might tempt people to engage in unprotected sex. Chances are that some individuals will embrace one alternative and some the other. In these circumstances, it hardly looks as though the ban on contraceptive use has any plausible systematic justification as an anti-infection measure. But, we do know that it strongly interferes with private sexual conduct that presumably produces gains (or at least pleasures) to its participants.

At this point, we are once again forced to ask whether the morals head of the police power actually serves as a weak proxy for the prevention of the spread of diseases, or whether it simply reflects an arguably outmoded social attitude that allows the dominant citizenry to vent its emotional offense at the sexual practices of a minority. In fact, these two impulses were weakly correlated because part of the generalized resentment toward sex outside of marriage responded to ever-weaker perceptions of generalized health risks to the population at large. But at this point, the case for the broad, prophylactic role of the police power starts to crumble. Few, if any, specific harmful externalities can be shown to flow from the use of contraception. And mere offense at the sexual practices of another is not a justification for limiting the liberty of actions of others any more in this context than in the contexts of religion, speech, or anything else.

The bottom line is that the language on morals takes a 180-degree turn. What used to be “unnatural or immoral” conduct becomes “intimate associations,” which of course receive the highest level of protection under the law. At this point, it is hard to determine whether social attitudes led to legal changes, or whether the reverse was true. What does seem clear is that once sexual conduct lost its perceived connection to the infection risk, both social attitudes and legal norms changed in response to the new information. Sexual practices that could have been banned without so much as a whimper of protest in the Lochner era become the protected conduct, or so one thinks, in the new era.

Consider Board of Directors of Rotary Intl v Rotary Club of Duarte, 481 US 537, 545 (1987) (recognizing a substantive due process right “to enter into and carry on certain intimate or private relationships”).
The course of sexual freedom has not remained untroubled since the mid-1960s. The most conspicuous cause célèbre of constitutional law during the 1980s was probably *Bowers v Hardwick,* in which the Supreme Court upheld the (somewhat tangled) application of a criminal antisodomy law in what, in retrospect, seems to have been a clear legal attack on homosexual conduct. The decision of course revealed wide fissures in the interpretation of the police power. Those justices who hewed to the traditionalist view of the police power had only one inquiry: could they find extensive documentation of laws restricting sexual liberties at the time of the Founding, to which the answer was an easy and resounding yes. But, the dissenters thought that the law could be sustained only by offering some functional justification for these restrictions, which they could not find.

B. Sodomy Laws and Same-Sex Marriages: The Privacy Argument

The drift of this discussion should make it evident that I take a quirky, functional, non-traditional view of the nature and the limits of the police power. The basic concerns with liberty and choice should be limited only to the extent that we deal with the control of external harms, of which contagion risks and monopoly surely count high. Otherwise, the change in technology and understanding should narrow the scope of the police power today just as it broadened the scope of the police power during the nineteenth century.

At this point, we are now in a position to take a look at two problems that arise in connection with this project: what is the relationship of equal protection and privacy in connection with various issues of gay rights? In dealing with these arguments, Koppelman deliberately plays down the privacy side of the picture and pushes hard on the equal protection front. In light of my earlier analysis, this seems like a dubious strategy given the overlapping nature of the two claims. To see why it makes sense to wage a two-front war, consider both gay marriage (or domestic

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64 478 US 186 (1986).
65 Id at 196.
66 Id at 192–93.
67 See id at 206 (Blackmun dissenting), 217–18 (Stevens dissenting).
68 See Section I A.
partnerships) and the antisodomy laws in Bowers. How should they be treated?

Koppelman’s initial approach is to counsel against the use of a privacy theory in part because it brings back strains of Lochner and in part because it looks a bit like Swiss cheese. Robert Bork has a new ally. Koppelman is surely correct that the resemblance among Griswold, gay marriage, and Lochner is more than skin deep. But he is wrong to think that the Swiss cheese configuration is troublesome to the analysis. To make the analysis more concrete, it seems to me that most privacy claims really involve a composite of claims that are based on the exercise of personal liberty and the protection of ordinary property. Given my prior arguments, both liberty and property enjoy presumptive protection. The only remaining issue is whether we can identify some state interest that makes sense under this limited account of the police power, which I do not think is the case.

In order to undercut that enterprise, Koppelman makes reference to Kendall Thomas’s useful tripartite classification: zonal, relational, and decisional. He concludes that none of these forms of privacy can claim absolute status. In so doing, he gives the right answer to the wrong question. The right question asks whether the state can justify its restriction on the ordinary protections of liberty or property in light of these three facets of privacy.

1. Liberty within protected “zones.”

In traditional thought, this notion allows individuals greater liberty in their protected zones than in some public space. This sounds right, for the position amounts to little more than a presumption that individuals are entitled to the exclusive possession and use of their own property, but are subject to more limitations when they share common property with others, for example, highways and parks.

But how far does the presumption go? The exclusivity requirement can surely be breached in cases of necessity, such as when a person enters your land in order to escape a lynch mob or a storm. The rights to property can also be limited to prevent the

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69 See Koppelman, 2002 U Chi Legal F at 106-08 (cited in note 34).
70 See id.
commission of nuisances against others. The situation gets more cloudy when we deal with the use of dangerous drugs or sex with a minor—Koppelman’s cases.\footnote{Andrew Koppelman, \textit{The Gay Rights Question in Contemporary American Law}, chap 2 (forthcoming 2002).} No one would claim that doing these activities on one’s own private property insulates them from government regulation if they are otherwise subject to regulation in the first place. The dangers of heroin use stem from its effects on the user, not on the location where it is injected. The point of the prohibition against sex with minors is to protect their health and welfare. The ordinary rules on the incapacity of children to contract may be suspended with contracts for necessaries, but you cannot enter into any contract you please with a minor so long as you first lure the child into your own house. Quite the opposite, operating on private property counts, for these circumstances, as an aggravating factor because the dangers of child abuse seem greater when the infant is enticed into a secluded space controlled by a would-be predator.

But how far does all this go? If the question is whether the state has a legitimate interest in preventing gay marriages, then the zonal question is neither here nor there. If the question is whether the state can regulate consensual homosexual acts in private, the property interest does become relevant. Now we are less concerned about generalized protection against seduction (which is captured in the word “consensual”), so that the performance of these acts in private cuts in their favor because no one else is forced to watch these activities in a concert hall or on a park bench. Thus far we have found no reason whatsoever to limit either homosexual conduct or gay marriages.\footnote{The question of adoption by gay and lesbian couples raises yet different questions beyond the scope of this paper. The simplest and most sensible approach is to avoid explicit decisions by judges and public authorities on how sexual orientation should be taken into account. Rather than having states decide that homosexuality is an immoral condition or a total irrelevancy, the best approach is to let the natural mother decide whether this orientation matters to her. These decentralized decisions should over the long run track popular sentiments without forcing the state to weigh in on one side or the other.}

2. Relational interests and associational rights.

These relational interests are just another variation on the principle of freedom of association. Kendall (not Justice) Thomas (and Koppelman) follow the modern trend by limiting the scope of
the principle to cases of intimate association,\(^7^4\) which strikes me as an unacceptable truncation of the more expansive view that treats freedom of association as a subspecies of the general freedom of contract.\(^7^5\) But either way, why does it not work in this case? Koppelman gives just the wrong answer: "If all associations were protected, then the prohibition of criminal conspiracy and solicitation would be unconstitutional."\(^7^6\) But that is precisely the point: those forms of association are limited because of their negative externalities. Accordingly, the state can override the presumption in favor of associational rights by showing threats to third persons that come from the combined efforts of the parties. The two situations are so distinct that we can say that any exceptions that we might wish to advance on the matter of either gay marriage or homosexual acts is faint indeed.

3. Decisional interests and interference with others' liberties.

Thomas' third head of privacy interests says that individuals are entitled to "freedom to choose how to conduct their lives."\(^7^7\) Precisely so, but again only presumptively. The argument here is that individuals may exercise their freedom to choose only as long as they do not limit the like liberties of others. But in either of these cases, just where is the threat to those liberties? No one has to approve or disapprove of homosexual behavior. Those people who approve can conduct their lives accordingly. Those who do not like gay partnerships can refuse to celebrate their consummation. No one would allow a gay person to argue that heterosexual marriages should be banned because he finds them offensive. The argument applies with equal force to heterosexual condemnation of same-sex partnerships.

4. The autonomy principle and euthanasia.

We still have other cases that are worthy of consideration. Koppelman asks whether the state ban on suicide and assisted suicide (even with respect to healthy persons) should be struck

\(^7^4\) Koppelman, 2002 U Chi Legal F at 109 (cited in note 34), citing Thomas, 92 Colum L Rev at 1443–49 (cited in note 71).


\(^7^6\) Koppelman, 2002 U Chi Legal F at 110 (cited in note 34).

\(^7^7\) Id.
down on the strength of the autonomy principle. By all means, no; but we can at least state the reason. We know that there is a high level of consensual sex, and we require therefore that the rape charge be made out on a case-by-case basis, with consent as a viable defense. But with respect to suicide, we know that the base rate of consent by healthy individuals is vanishingly low, and thus in this context, we can rule out the consent defense because we are convinced that the high rate of error in the case-by-case determination justifies the per se rule. It therefore is no surprise that much of the debate about euthanasia turns on the question of whether that presumption should survive in cases where its evidentiary foundation is far weaker. In some cases, abuse and undue influence may lead people to consent to suicide. In other cases, it is a release devoutly to be desired. Now the question is far muddier, and it is easy to see why a court does not want to preclude legislative action on the matter when the issue is so closely balanced, and the level of intermediate techniques (for example, independent boards to review cases) are available. But once again, the inquiry of choice is not whether we can find exceptions to a general norm, but rather whether we can organize those exceptions into a coherent whole. I think that coherence is possible, and thus return to my original question: what, thus far, has overridden the original presumption in favor of liberty of action in the case of gay marriage?

78 Id.
80 See, for example, State v Camara, 781 P2d 483, 485–86 (Wash 1989) (“Though the [Washington] rape statutes no longer expressly mention non-consent as an element of rape, we believe consent remains a valid defense to a rape charge.”).
81 For a somewhat more collectivist account of the matter, see Model Penal Code § 210.5(2) cmt 5 (1980) (revised commentary on the Model Penal Code as adopted in 1962) (noting that “the interests in the sanctity of life that are represented by the criminal homicide laws are threatened by one who expresses a willingness to participate in taking the life of another, even though the act may be accomplished with the consent, or at the request of the suicide victim”).
82 For an elaboration of this argument, see Epstein, Mortal Peril at 299–305 (cited in note 79).
83 See Washington v Glucksberg, 521 US 702, 751 (1997) (“Throughout the Nation, Americans are engaged in an earnest and profound debate about the morality, legality, and practicality of physician-assisted suicide. Our holding permits this debate to continue, as it should in a democratic society.”).
C. Reconciling Gay Marriage with the Morals Head of the Police Power Cases

The inquiry is not over, however, because we still have to deal with the infection issue that lay behind much of the early morals/police power decisions, which of course were squarely directed towards issues of both health and safety.\(^\text{64}\) Does the risk of contagion from AIDS justify the prohibition on gay marriages? It is very hard to see why it does. To the extent that these marriages stabilize personal relationships, they reduce the likelihood of frequent, serial sexual contacts and thus should help combat the infection risk, which I believe they do. But the regulation of homosexual behavior, like that of prostitution, is much more closely balanced. Let us not forget that AIDS was, and is, not just a social construction; it is also, indubitably, a sexually transmitted disease. We also know that AIDS is not confined to gay men and can be spread by other means, such as the use of drugs. There is a question as to whether state regulation should be directed toward homosexual activity (where the risks are higher) or be cast in more general terms. The situation is most complex. We know that persons who are HIV-positive do not have ideal incentives to prevent its spread.\(^\text{65}\) Any efforts to use government force to control against such a risk is hard to execute,\(^\text{66}\) but at least one has to address the second stage inquiry: whether the means chosen are well calibrated to deal with the harm. To take but one case, I think that the case for shutting down the bath houses before the contagion risk manifests itself is quite strong, for the danger of spread is the greatest precisely when the disease is in its latent phase. The idea that we should start intervention only when evidence of palpable harm seems to be a clear instance of the mistake of “too little too late.” This proposal is certainly a far cry from the criminalization of all homosexual activities. But it

\(^{64}\) See, for example, Ernst Freund, The Police Power, Public Policy and Constitutional Right (Callaghan & Company 1904).

\(^{65}\) For an account of its initial spread through the efforts of one man, Gaetan Dugas, see Randy Shilts, And the Band Played On: Politics, People, and the AIDS Epidemic 21–23 (St. Martin’s 1987).

\(^{66}\) Note here extreme measures such as the HIV quarantine policies of China, Cuba, Sweden, and Japan. See Melanie L. McCall, Comment, AIDS Quarantine Law in the International Community: Health and Safety Measures or Human Rights Violations? 15 Loyola-LA Intl & Comp L J 1001 (1993). See also Rosemary G. Reilly, Combating the Tuberculosis Epidemic: The Legality of Coercive Treatment Measures, 27 Colum J L & Soc Probs 101 (1993) (examining the legality of involuntary detention and directly observed therapy measures to control the tuberculosis epidemic).
does indicate that traditional concerns of the police power still have some staying power in the area of homosexual relationships, even if none of them support the result in *Bowers*.

To my mind, there is only one loose end with respect to gay marriages, and that concerns the choice of name. Here the issue is really one of "confusion," and thus worthy of the trademark lawyer. Many people may be rightly upset that the similarity in names will lead to an erosion of support for the traditional institution. So at this point, the use of the term "domestic partnership" helps eliminate the confusion while allowing gay individuals to enjoy certain status benefits (for example, joint tax returns) that they could not acquire simply by a contract arrangement between themselves. Once this is done, I think that it is hard to see why the state has an interest in banning these relationships, at least if it has an interest in preserving ordinary marriages. The case for gay rights does quite well with this analysis.

D. Whither Equal Protection?

Now, how does all this change if we move to the equal protection framework on which Koppelman relies? As best I can tell, not one whit. In light of what was said above, the equal protection analysis may be weaker, but is surely never stronger, when it is possible to identify a particular liberty interest, as is the case here. But at the same token the equal protection arguments serve as a backstop because it allows private individuals to challenge a statutory classification as inconsistent even in the absence of a clear liberty interest. Both strands of the argument are at stake here. There is no reason to abandon the strong due process claim in favor of a somewhat chancier equal protection argument.

1. The traditionalist view of equal protection.

The initial question on equal protection is whether the state makes a permissible classification when it marks gay relationships for special treatment. To the traditional lawyer, the mere fact that homosexual conduct was condemned in the Bible and was widely regarded as an unnatural abomination ends the matter.87 The Equal Protection Clause no more requires one to give

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87 See, for example, *Ex Parte H.H.*, 2002 WL 227956 at *5 (Ala) (Moore concurring) ("Homosexual conduct is, and has been, considered abhorrent, immoral, detestable, a crime against nature, and a violation of the laws of nature and of nature's God upon which
legal protection to gays than it does to adulterers, burglars and murderers. To defeat this position requires an examination of the soundness of the grounds for this distinction, which quickly gets us back to the question of the strength of the state interest. The traditionalist will argue that the state's interest is at least as strong for a rudderless equal protection claim as it is for a more specific claim that rests on privacy or liberty. No matter what clause is invoked, we do not strike down prohibitions that have been with us since the dawn of Anglo-American law.

Alternatively, let us suppose that one is able to persuade a court that the right doctrinal approach is to say that any and all distinctions should be suspect under the Equal Protection Clause. Well, there remains the question of whether a particular distinction can be justified under the police power. So, once again, we are drawn back to the question of whether the morals head of the police power permits the discriminations that the statute makes. How this doctrinal shift advances the status of gay marriage over that under a privacy analysis is not at all clear to me.

Nor is it clear on an institutional basis. Koppelman (drawing on Bork) makes much of the inability of courts to solve these boundary questions under due process, to which one answer is that they have solved them in a number of cases where they care about the outcome. And a second answer is that they are going to have to face these identical boundary questions under the equal protection clause anyhow. So the new equal protection home for gay marriages does not fare better on these institutional grounds than on any other.

2. Private discrimination.

So then is there any reason for choosing equal protection over privacy? And here I think that there is, at least at first blush. The leading edge of the equal protection doctrine is, of course, the non-discrimination principle. And one thing that Koppelman would like very much to see is the enforcement of state laws against private discrimination. Thus, at one point, he writes: "Even if private sex acts between consenting adults are not properly within the reach of the criminal law, this falls far short of equality for gays. It is entirely consistent with pervasive dis-

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this Nation and our laws are predicated. Such conduct violates both the criminal and civil laws of this State and is destructive to a basic building block of society—the family.".

At another point he stresses: "Much of what is at stake in the gay rights issue is public equality and recognition, not simply a right to conduct secret liaisons undisturbed by the law."

This, frankly, is an agenda that cannot be reached under a *Lochner*-like approach that stresses the importance of liberty and property within a police power framework. The clear implication of the freedom of contract principle is that all persons (whatever their sexual orientation) are entitled to choose their trading or social partners unless, perhaps, they occupy a monopoly position. The rule of freedom of association operates therefore as a bulwark against the application of the antidiscrimination laws to private persons in competitive markets or ordinary social interactions.

The modern insistence that the protection of this freedom extends only to "intimate" associations makes it possible to have one's cake and eat it too. Now there is perfect freedom in personal matters, and generalized protection against what might loosely be called economic discrimination, where it is left unstated whether gay businesses are under a duty to hire straight persons to work for them. The real question here is whether there is a principled case for this rule. I have argued at length against the antidiscrimination laws in private employment contexts generally, and will not do anything but repeat my conclusion here: open markets with free entry are the strongest protections that individuals have against invidious discrimination. It seems to me that the classic *Lochner* position cuts in just the right direction.

The same is true of the question of social protection and recognition. It is simply not the law's business if individuals are allowed to have freedom of thought and conscience on their own behalf. Once the civil liberties of all individuals are protected, then no person, wise or evil, has control over the levers of state power to induce certain attitudes toward other individuals. The state should work hard to preserve peace and prevent violence, and to do so for all persons against all threats. But it becomes a matter of private dialogue and debate as to which people are re-

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89 Id at 108.
spected for what activities, and it should be no part of the law to impose a uniform set of beliefs to either praise or (lest we forget) to condemn certain forms of sexual orientation.

The Lochner view of limited government thus cuts into Koppelman's agenda by insulating private discrimination from the control of the state. But the Equal Protection Clause requires the same result. Recall that the Clause requires individuals to receive equal protection of the laws. That is perfectly consistent with a legal system that protects freedom of association and contract for all persons. In order to fill in the gaps of the argument, it therefore becomes necessary to delineate the substantive grounds on which distinctions can and cannot be made. On this point, it seems clear that the Equal Protection Clause has to be read in context with a Constitution that does offer protections to liberty and property (in the adjacent Due Process Clause, no less). It would be odd, to say the least, to import two radically different philosophies of the use and scope of government power in the name of equal protection than we do in the name of due process. To the extent, therefore, that the regime of liberty and property cuts against Koppelman's program, so too does the Equal Protection Clause, which works as a barrier against state action. The creation of the public morality that he desires should be properly a subject of public debate in which he may well hold all the high cards. If so, then it is all the more important that Koppelman makes his position through argumentation rather than diminishing the legitimacy of his worldview by forcing it on a few dissenters. Equal protection or privacy is not the issue; rather, it is a clearer sense of constitutional role and function.

92 See Peter Westen, The Empty Idea of Equality, 95 Harv L Rev 537, 559–60 (1982) (arguing that there is a misconception about the notion of “rights” and “equality” based on a legal and moral misunderstanding about the role of equality in ethical discourse).