
SEXUALITY, GENDER, AND THE LAW

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Constitutional Rights

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PREFACE ON CONSTITUTIONAL RIGHTS

The Framers of the Constitution of 1789 believed that the main protection for the rights of the individual citizen were to be found in the Constitution's relentless division of powers among the states and federal government, the three branches of the federal government, and even within the legislative branch (the branch most feared) itself. But in 1791, as one of the deals made to get the Constitution ratified, they adopted a Bill of Rights that enumerated protections against federal intrusion into the lives of citizens. The Bill of Rights and other pertinent constitutional amendments are reproduced in Appendix 1 to this casebook. The due process clause of the Fourteenth Amendment has been interpreted to apply most of the individual rights of the first ten amendments to state governments as well.

The states have their own separate constitutions, which create individual rights against the states. This layer-cake arrangement tends to multiply rights.^a On the one hand, if the U.S. Supreme Court declines to recognize a right under the U.S. Constitution, state high courts might still recognize a right under their state constitutions. (Note, too, that the federal or state legislatures can also enforce that right through ordinary legislation, as Congress sought to do with the Religious Freedom Restoration Act [Chapter 8, Section 1].) On the other hand, if the U.S. Supreme Court does recognize a federal constitutional right, state courts cannot derogate from that right, because of the supremacy clause (Article VI of the U.S. Constitution). Similarly, most of the time neither Congress nor the state legislatures can override individual rights recognized by the U.S. Supreme Court.

Constitutional law courses that cover issues of due process, equal protection, and free expression provide the student of *Sexuality, Gender, and the Law* with enough constitutional background to handle all the cases and issues in our book. This preface is written especially for students who have not studied the Constitution's individual rights jurisprudence or for students who are studying this book as their introduction to constitutional rights. We attempt to lay out the overall analytical framework for the three main areas relevant to our subject matter (due process, equal protection, free expression), explain the particular doctrines, and provide cross-references for these areas and doctrines in this casebook.^b

^a See William N. Eskridge, Jr. & John Ferejohn, "Virtual Logrolling: How the Court, Congress, and the States Multiply Rights," 68 *S. Cal. L. Rev.* 1545 (1995).

^b Due process ideas, especially the right of privacy, are developed in Chapter 1, Sections 1 and 2; the due process right to marry is the focus of Chapter 9, Section 2. Equal protection

SECTION 1. DUE PROCESS

The Fifth and Fourteenth Amendments, the former applicable to the federal government and the latter to the states, protect citizens against deprivation of life, liberty, and property without "due process of law." The Supreme Court once said that the due process clause does not assure all procedural or substantive rights that seem fair, but only invalidates laws that violate "a principle of justice so rooted in the tradition and conscience of our people as to be ranked as fundamental." Palko v. Connecticut, 302 U.S. 319 (1937). Since the Warren Court (1954-69), however, the due process clause has been read in light of the general policy it embodies, that individual life, liberty, and property should not be at the mercy of arbitrary state intrusion. For our purposes, those protections have been particularly important in cases where the state is invoking the criminal law against people who violate America's sexual mores, including women desiring contraceptives or abortions, sodomites and homosexuals, prostitutes and other people soliciting sex, unmarried pregnant women, cross-dressers and transvestites, pornographers and purveyors of indecent materials, people who love those of another race or the same sex, polygamists, and so on.

A. Procedural Protections. At the most general level, the due process clause requires that the state cannot deprive anyone of liberty or property without giving that person prior notice, a meaningful right to be heard (usually before the deprivation occurs), and an impartial decisionmaker. See Goldberg v. Kelly, 397 U.S. 254 (1970) (welfare benefits); Board of Regents v. Roth, 408 U.S. 564 (1972) (state job). When a fundamental individual interest is involved, the state has to provide more procedural protections. For example, the state cannot preclude poor people from marrying or divorcing simply because they cannot afford the state filing fees, Boddie v. Connecticut, 401 U.S. 371 (1970), and cannot deprive a parent of her children without proof of the necessary grounds by "clear and convincing evidence," Santosky v. Kramer, 455 U.S. 745 (1982), or foreclose that parent's appeal of an order terminating parental rights because she cannot afford to pay for a transcript. M.L.B. v. S.L.J., 117 S.Ct. 555 (1996). For these reasons, the state usually is not able to invoke traditional morality as the basis for breaking up homes of sexual nonconformists, although these protections do not prevent the state from siding with sexual conformists against nonconformists when two parents battle for child custody (Chapter 9, Section 3[A]).

doctrine is developed in Chapter 1, Section 3; Chapter 4's case study of the armed forces' construction of manhood compares and contrasts the doctrines of race (Section 1), sex (Section 2), and sexual orientation (Section 3) discrimination. First Amendment doctrines are developed in Chapters 5 and 6, starting with first principles (Chapter 5, Section 1) and exploring issues of association, identity speech, libel, hate speech and fighting words, and obscenity. Chapter 7 treats speech in the special forum of schools, and Chapter 8. Section 1 briefly examines the religion clauses of the First Amendment.

This Preface is not a comprehensive analysis of constitutional law or even the Bill of Rights. It borrows intellectually from Daniel A. Farber et al., Cases and Materials on Constitutional Law: Themes for the Constitution's Third Century (1993), to which the student is referred for more detailed treatment.

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In Anglo-American society, deprivation of physical liberty is considered the greatest deprivation (short of a death sentence), and the procedural protections are correspondingly greater. By 1970, the Supreme Court had nationalized the rights of criminal defendants, by "incorporating" most of the criminal procedure protections of the Bill of Rights into the due process clause, which rendered them directly applicable to the states. Among the rights of criminal defendants that were so nationalized are the following:

- the right to be free of unreasonable searches and seizures (Fourth Amendment),^c
- the right to be free of cruel and unusual punishment (Eighth Amendment),^d
- the right not to incriminate oneself (Fifth Amendment),^e
- the right to counsel provided by the state if the defendant cannot afford one (Sixth Amendment),^f
- the right not to be tried twice for the same offense (Fifth Amendment),^g and
- the right to confront one's accusers (Sixth Amendment).^h

These rights inure to the benefit of defendants charged with sex or gender crimes. For example, the state cannot search the apartment of suspected child molesters or rapists without probable cause and usually cannot convict without providing an opportunity for the accused to confront witnesses against him (see Chapter 11, Section 2[C]). Note that the same criminal procedure protections apply to sex crimes that have victims (rape, child molestation) as to those that are essentially victimless (consensual sodomy, prostitution).

Another important protection teased out of the due process clause in criminal cases has no analogue in the Bill of Rights: the entrapment defense. Enforcement of laws against prostitution, homosexual solicitation, and public lewdness (all of which are still on the books in many states) have usually been by "decoy police," undercover officers who lure defendants into committing a crime (Chapter 2, Section 2[A]). The U.S. Supreme Court has held that entrapment cannot be the basis for a criminal conviction if the defendant did not otherwise have a "predisposition" to commit the crime. Some states follow a more liberal rule, which invalidates any conviction where the police induce a "law-abiding" citizen to commit a crime. *E.g.*, *People v. Barazza*, 591 P.2d 947 (Cal. 1979). Today, undercover operations

^c *Wolf v. Colorado*, 338 U.S. 25 (1949).

^d *Robinson v. California*, 370 U.S. 660 (1962), which held that people could not be punished simply for their "status," in that case being an alcoholic.

^e *Malloy v. Hogan*, 378 U.S. 1 (1964); *cf. Miranda v. Arizona*, 384 U.S. 436 (1965) (police must inform defendant of his or her right not to incriminate him or herself).

^f *Gideon v. Wainwright*, 372 U.S. 335 (1963); *cf. Argersinger v. Hamlin*, U.S. (1974) (right to counsel applies even to misdemeanors resulting in incarceration of just a single day).

^g *Benton v. Maryland*, 395 U.S. 784 (1969), overruling *Palko*.

^h *California v. Green*, 399 U.S. 149 (1970).

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tend to be more sophisticated "stings" against child pornographers, rings of prostitutes, and customers. *Jacobson v. United States*, 503 U.S. 540 (1992) (Chapter 11, Section 2[C]).

B. Vagueness. The Supreme Court has repeatedly invalidated, on due process "vagueness" grounds, statutes that are not sufficiently clear for citizens and police to know precisely what conduct is criminal.ⁱ In addition to the obvious constitutional policy of fair notice, the doctrine also implements two subtler constitutional policies. One is the policy against arbitrary enforcement of broad criminal laws against disfavored status groups. A vice of vague criminal laws is the large discretion they vest in law enforcement officials, and the concomitant danger that the discretion will not be applied neutrally. The most subtle policy underlying the vagueness doctrine lies in a need to weed out obsolescent crimes. Statutory commands, clear once upon a time, might grow muddier as time passes and the meaning conveyed to the original audience is lost upon new audiences. At some point, judges have an obligation to sweep such statutes off the books and insist that the legislature update their commands into something more intelligible to the average citizen.^j A good many of the once-clear commands that grew muddier over time were statutory crimes targeting people or conduct considered deviant or even dangerous in the nineteenth century but not today.

All of these policies were important to the Court in *Papachristou v. Florida*, 405 U.S. 156 (1972), which invalidated a Jacksonville, Florida vagrancy ordinance making it a crime to be "vagabonds, or dissolute persons who go about begging, * * * lewd, wanton, and lascivious persons, * * * persons wandering or strolling around from place to place without any lawful purpose or object, habitual loafers, disorderly persons," and so forth. *Papachristou*-like arguments have been invoked by people challenging abortion statutes and sodomy laws (Chapter 1, Section 2); federal guidelines restricting "indecent" sexual speech in grants by the National Endowment for the Arts (Chapter 6, Section 3[B]), radio broadcasts (Chapter 6, Section 3[C]), and AIDS programs (Chapter 7, Section 3[C]); and laws criminalizing public appearance in attire not of one's own sex (Chapter 12, Section 3).

A corollary of the due process rule against vague criminal statutes is the rule of lenity, which requires that ambiguous criminal laws be interpreted narrowly (against the government and in favor of the accused).^k White collar crime statutes, for example, regularly receive lenient constructions from federal and state courts. Interpreting or applying statutes targeting

ⁱ *United States v. Harriss*, 347 U.S. 612, 617 (1954) (due process requires that criminal laws "give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute"); *Lanzetta v. New Jersey*, 306 U.S. 451 (1939); see Anthony Amsterdam, "The Void-For-Vagueness Doctrine in the Supreme Court," 109 *U. Pa. L. Rev.* 67 (1960) (student note).

^j See Alexander Bickel, *The Least Dangerous Branch* (1962); Guido Calabresi, *The Common Law in the Age of Statutes* (1982).

^k An exploration of the rule of lenity can be found in William N. Eskridge, Jr. & Philip P. Frickey, *Cases and Materials on Legislation: Statutes and the Creation of Public Policy* 652-75 (2d ed. 1995).

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gender-benders, fornicators, and homosexuals, however, courts have usually ignored or slighted the rule of lenity. See *Caminetti v. United States*, 242 U.S. 470 (1917) (fornicators) (Chapter 2, Section 2[A][1]); *Boutilier v. INS*, 387 U.S. 117 (1967) (bisexuals) (Chapter 2, Section 2[B][3]); *Beller v. Middendorf*, 632 F.2d 788 (9th Cir. 1980) (occasional sodomite) (Chapter 3, Section 3[B]); *Steffan v. Perry*, 41 F.3d 677 (D.C. Cir. 1995) (gays in the military) (Chapter 4, Section 3[B][2]); *FCC v. Pacifica Found.*, 438 U.S. 726 (1978) (dirty words) (Chapter 6, Section 3[C]); *Regina v. Brown*, [1994] 1 AC 212, [1993] 2 All ER 75, [1993] 2 WLR 556 (U.K. House of Lords, 1993) (consensual sado-masochists) (Chapter 11, Section 1[C]). For an example where lenity has been shown, see *Mienhold v. Department of the Navy*, 34 F.2d 1469 (9th Cir. 1994) (gays in the military) (discussed in Chapter 4, Section 3[B][2]).

C. Substantive Due Process and the Right of Privacy. The Supreme Court has historically held that there is a "substantive" feature to the due process clause that empowers courts to strike down laws that are purely arbitrary or that unduly trench on people's "fundamental" rights. The nonarbitrariness requirement of the due process clause was the basis for judicial scrutiny of civil service exclusions of lesbian and gay employees, for example. See *Norton v. Macy*, 417 F.2d 1161 (D.C. Cir. 1969) (Chapter 10, Section 1[B]).

The right of privacy is the most relevant exemplar of the fundamental rights component of the due process jurisprudence. The right of privacy is the right people have to be free of state interference in the most fundamental decisions of human life and intimacy. Although ten states have explicit right of privacy clauses in their state constitutions,¹ it is not explicitly recognized in the U.S. Constitution. Nonetheless, early Supreme Court cases held that decisions about family and child-rearing involve fundamental rights protected by the due process clause.^m

Connecticut prohibited the use of birth control devices in 1879 and, with Massachusetts, remained the last bastion of such statutes in 1961. In that year, the Supreme Court used a procedural dodge to avoid a constitutional challenge to the law, but over a powerful dissent by Justice Harlan. *Poe v. Ullman*, 367 U.S. 497 (1961) (Harlan, J., dissenting) (Chapter 1, Section 1[A]). Harlan found in the due process clause's "principle of liberty" constitutional protection for the "most intimate details of the marital relation," including use of contraception. Four years later, the Supreme Court

¹ Article I, § 22 of the Alaska Constitution; Article II, § 8 of the Arizona Constitution; Article I, § 1 of the California Constitution; Article I, § 23 of the Florida Constitution; Article I, § 6 of the Hawaii Constitution; Article I, § 12 of the Illinois Constitution; Article I, § 5 of the Louisiana Constitution; Article II, § 10 of the Montana Constitution; Article I, § 10 of the South Carolina Constitution; and Article I, § 7 of the Washington Constitution.

^m In *Meyer v. Nebraska*, 262 U.S. 390 (1923), the Court ruled that the "liberty" protected by the due process clause includes "not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, to establish a home and bring up children." See also *Pierce v. Society of Sisters*, 268 U.S. 510 (1925) (state could not require children to attend public school).

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struck down the Connecticut law in *Griswold v. Connecticut*, 381 U.S. 479 (1965) (Chapter 1, Section 1[A]). Speaking of the freedom of married couples to choose the terms of their sexual intimacy, Justice Douglas' majority opinion found a right to privacy in the shadows ("penumbras") of the First, Fourth, Fifth, and Ninth Amendments.

Subsequent moves by the Supreme Court applied *Griswold* in ways that expanded the breadth of the precedent. The Court's decision overturning abortion statutes in *Roe v. Wade*, 410 U.S. 113 (1973) (Chapter 1, Section 1[C]) confirmed that the right of privacy was not limited to married couples and suggested that this right entailed a freedom for women to control not just their bodies, but to enjoy sexual liberty previously unheard of. *Roe* also authoritatively established the right of privacy in the due process clause and formally abandoned *Griswold's* experiment in penumbral reasoning. See also *Planned Parenthood v. Casey*, 112 S. Ct. 2791 (1992) (reaffirming the central holding of *Roe* and adopting the rationale of Harlan's *Poe* dissent). *Roe* has spawned a complicated jurisprudence evaluating various kinds of state laws placing various burdens on a woman's right to choose an abortion. *E.g.*, *Hodgson v. Minnesota*, 497 U.S. 417 (1990) (Chapter 2, Section 2[C]) (allowing statutory requirement that minor female notify both parents or receive judicial approval before she can choose an abortion), followed in *Casey*.

In *Loving v. Virginia*, 388 U.S. 1 (1967) (Chapter 9, Section 2[A]), the Court recognized a fundamental right to marry as one ground for invalidating Virginia's law criminalizing miscegenation, or different-race marriages. The leading right to marry case is *Zablocki v. Redhail*, 434 U.S. 374 (1978) (Chapter 9, Section 2[A]), which struck down a Wisconsin law preventing remarriage by people in arrears on outstanding child and spouse support obligations. Notwithstanding the worthy state goal, the Court held that there were other ways of meeting it that did not deprive people of a fundamental constitutional right. Does the right to marry apply to same-sex couples (Chapter 9, Section 2[B])? Incestophiles and polygamists (Chapter 9, Section 2[C])?

In *Moore v. City of East Cleveland*, 431 U.S. 494 (1977), the Court struck down an ordinance limiting occupancy of any dwelling unit to members of the same "family," defined to include only "related" persons. Justice Powell's plurality opinion applied heightened scrutiny because the ordinance regulated "choices concerning family living arrangements," which in *Moore* involved a household consisting of a grandmother, son, and two grandsons from another child. "The Constitution prevents East Cleveland from standardizing its children—and its adults—by forcing all to live in certain narrowly defined family patterns." (A fifth Justice concurred in the result on the odd ground that the ordinance was a "taking" of property without just compensation.)

The right of privacy has also been a basis for challenging laws criminalizing consensual sodomy. New York struck down its consensual sodomy law in *People v. Onofre*, 415 N.E.2d 936 (N.Y. 1980) (Chapter 1, Section 2). The state court of appeals held that the right of privacy is not limited to marriage and pro-

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creation-based activities and is "a right of independence in making certain kinds of important decisions, with a concomitant right to conduct oneself in accordance with those decisions, undeterred by governmental restraint." The U.S. Supreme Court reached the opposite result in *Bowers v. Hardwick*, 478 U.S. 186 (1986) (Chapter 1, Section 2), which held that *Griswold*, *Roe*, and *Loving* were limited to situations of sexual intimacy involving marriage and possible pregnancy. Hence, their constitutional protections had no relevance for "homosexual sodomy," even if consensual. Some state courts after *Bowers* have interpreted their state constitutions to protect consensual homosexual as well as heterosexual intimacy,⁸ and certain international tribunals have insisted that a meaningful right to privacy is inconsistent with criminalizing consensual homosexual sodomy (Chapter 8, Section 3[B]).

The most recent privacy issue to bedevil the courts involves the "right to die." The Court in *Cruzan v. Director, Missouri Dep't of Health*, 497 U.S. 261 (1990), assumed that a person has a due process liberty interest in refusing unwanted medical treatment but upheld state regulation in a case where the person was in a coma and therefore unable to make the choice herself. Only Justice Scalia, concurring in the judgment, challenged such a right. As this casebook goes to press, the Supreme Court is deliberating a pair of cases squarely presenting right to die issues where the persons desiring suicide are capable of choice. See *Washington v. Glucksberg*, No. 96-110; *Vacco v. Quill*, No. 95-1858, both argued January 8, 1997.

SECTION 2. EQUAL PROTECTION

The Fourteenth Amendment also provides: "nor shall any State * * * deny to any person within its jurisdiction the equal protection of the laws." In the first case interpreting the equal protection clause, the Supreme Court "doubt[ed] very much whether any action of a state not directed by way of discrimination against the negroes as a class, or on account of their race, will ever be held to come within the purview of this provision." *Slaughter House Cases*, 83 U.S. 36 (1872).⁹ Consistent with this dictum, the Supreme Court has regularly upheld state policies that rely on classifications such as income, height, emissions levels, public conduct and appearance, and the like upon a showing that the classifications have a *rational basis*: they are plausibly related to a legitimate state goal. The big question in equal protection law is when the Court should demand something more than a rational basis to support statutory classifications. An ancillary question is when a law does not even have a rational basis.

⁸ See *Wasson v. Commonwealth*, 847 S.W.2d 487 (Ky. 1992); *Campbell v. Sundquist*, 926 S.W.2d 250 (Tenn. App. 1996). State constitutional arguments were also successful at the intermediate appellate level in challenging the Texas sodomy law in *City of Dallas v. England*, 846 S.W. 2d 957 (Tex. App. 1993) and *State v. Morales*, 826 S.W.2d 201 (Tex. App. 1992), reversed on other grounds, 869 S.W.2d 94 (Tex. 1994).

⁹ Nonetheless, the Court applied the equal protection clause to invalidate local policies discriminating against Chinese Americans in *Yick Wo v. Hopkins*, 118 U.S. 376 (1886), and stated in *Strauder v. West Virginia*, 100 U.S. 303 (1879) that discrimination on the basis of ethnicity would also be scrutinized skeptically under the clause.

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A. The Carolene Products Formulation: Strict Scrutiny for Classifications Aimed at Marginalized Groups (Race, Illegitimacy, Alienage). The modern Court's classic equal protection analysis came in a case involving the constitutionality of a federal law prohibiting the interstate transportation of "filled milk." In *United States v. Carolene Products Co.*, 304 U.S. 144 (1938), the Court deferred to the legislative health rationale for the filled milk classification, even though the statute reeked of special interest (the milk lobby). Justice Stone's opinion famously suggested limits to such deference, stating in footnote 4 that the "presumption of constitutionality" might be rebutted in cases where statutes (1) violate the plain meaning of a specific constitutional prohibition such as those in the Bill of Rights; (2) close off the political process, as by restricting the right to vote, to organize politically, or to assemble; or (3) are "directed at particular religious * * * or national * * * or racial minorities" or reflect "prejudice against discrete or insular minorities * * * which tends seriously to curtail the operation of the political processes ordinarily to be relied upon to protect minorities."

Consistent with both the original focus of the Fourteenth Amendment and the *Carolene* formulation, the Supreme Court has departed from the rational basis test when evaluating race-based classifications. In *Korematsu v. United States*, 323 U.S. 214 (1944), where the Supreme Court notoriously upheld federal internment of Japanese Americans during World War II, the Court stated that "all legal restrictions which curtail the civil rights of a single racial group are immediately suspect" and "courts must subject them to the most rigid scrutiny." This idea was key in the post-World War II legal assault on racial apartheid. The first major apartheid-based policy to fall was the U.S. armed services' segregation of African Americans and other persons of color, which President Truman ended by executive order in 1948 (Chapter 4, Section 1).

Brown v. Board of Education, 347 U.S. 483 (1954), held that racial segregation of public schools violates the equal protection clause. In a companion case, *Bolling v. Sharpe*, 347 U.S. 497 (1954), the Court held for the first time that the federal government is also subject to equal protection limits, teased (or tortured, depending on your constitutional theory) out of the due process clause of the Fifth Amendment. *Loving v. Virginia*, 388 U.S. 1 (1967) (Chapter 9, Section 2[A]), noted above as the first due process right to marry case, ruled as its primary holding that the Virginia anti-miscegenation law violated the equal protection clause because it deployed an unsupported race-based classification: a black-white couple could not marry, whereas a similarly situated black-black or white-white couple could.

Cases involving race-based classifications have been the most dramatic occasions for judicial application of the equal protection clause to strike down state and federal laws, but *Carolene's* concern with laws reflecting "prejudice against discrete or insular minorities" has been interpreted to subject other classifications to strict scrutiny. See *Graham v. Richardson*, 403 U.S. 365 (1971), which held that state (but not necessarily federal) rules based on alienage would be subjected to heightened scrutiny for *Carolene*

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reasons. In *Levy v. Louisiana*, 391 U.S. 68 (1968), the Court held that illegitimacy is also a *suspect classification*. Although the Court has been willing to uphold some illegitimacy classifications, heightened scrutiny and changing social mores have basically eliminated illegitimacy as a legal classification. Children born outside of marriage are now treated the same by the law as those born within marriage (Chapter 9, Section 1).

The large majority of classifications, of course, fall under the default rule of the rational basis approach. For example, the Court in *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307 (1976), held that age-based classifications such as mandatory retirement ages do not justify heightened scrutiny because old people have not been a discrete and insular minority disadvantaged in the political process. Similarly, the Court has held that neither wealth, *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1 (1973), nor personal disability, *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432 (1985) (Chapter 1, Section 3[B][1]), is a classification that triggers heightened scrutiny. *Cleburne* is significant, however, in the Court's invalidating a law discriminating against the disabled because its underlying animus against the disabled flunked even the rational basis test.

B. The New Equal Protection Model: Intermediate Scrutiny of Sex—and Sexual Orientation?—Classifications. Because women are not a "discrete and insular minority" but have been objects of legislation based on gender- or sex-based stereotypes, classifications based on sex posed a difficult problem for the *Carolene Products* formulation. The Supreme Court routinely upheld sex-based classifications as rational until *Reed v. Reed*, 404 U.S. 71 (1971). Apparently applying the rational basis test, the Court invalidated an Idaho statute preferring men over women as executors of estates. The next year Congress passed the Equal Rights Amendment, which would have made sex a suspect classification. While the ERA was in the process of state ratification, four Justices on the Court argued for strict scrutiny under the equal protection clause in *Frontiero v. Richardson*, 311 U.S. 677 (1973) (Chapter 1, Section 3[A] and Chapter 4, Section 2[B]).

The ERA was never ratified, but seventeen states have added ERAs to their state constitutions,^p and the U.S. Supreme Court has inched toward making sex a suspect classification. In *Craig v. Boren*, 429 U.S. 190 (1976), the Court struck down a state law allowing 18 year old girls to buy low-alco-

^p "Sex" is inserted into a broader equal protection clause in the Alaska Constitution, article I, § 3 ("sex" added 1972); Connecticut Constitution, article I, § 20 (added 1974); Hawaii Constitution, article I, § 5; Illinois Constitution, article I, § 17 (1970 revised constitution); Massachusetts Declaration of Rights, part I, article I (added 1976); Montana Constitution, article II, § 4 (1972 revised constitution); New Hampshire Constitution, part I, article 2 (added 1974); Texas Constitution, article I, § 3a (added 1972); Virginia Constitution, article I, § 11 (added 1970); Wyoming Constitution, article I, § 3 (1889 constitution). Following the ERA, other states have clauses specially protecting against sex discrimination, namely, Colorado Constitution, article II, § 29 (equal rights amendment added 1972); Illinois Constitution, article I, § 8 (1970 revised constitution); Maryland Declaration of Rights, article 46 (added 1972); New Mexico Constitution, article II, § 18 (added 1972); Pennsylvania Constitution, article I, § 28 (added 1971); Utah Constitution, article IV, § 1 (1896 constitution); Washington Constitution, article 31, § 1 (added 1972).

hol beer but requiring boys to be 21 years old. Writing for six members of the Court, Justice Brennan's opinion held that "classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives." This verbal formulation is not as demanding as that the Court uses to scrutinize race-based classifications, and so it is considered "heightened" or "intermediate" rather than "strict" scrutiny. In *United States v. Virginia*, 116 S. Ct. 2264 (1996) (Chapter 1, Section 3[A]), Justice Ginsburg's opinion for six Justices held that sex-based classifications must be supported by a justification that is "exceedingly persuasive." Also, the "justification must be genuine, not hypothesized or invented post hoc in response to litigation. And it must not rely on overbroad generalizations about the different talents, capacities, or preferences of males and females."

The Supreme Court has applied, sometimes rather weakly sometimes quite strongly, *Craig's* heightened scrutiny to sex-based classifications in military service (Chapter 4, Section 2), education (Chapter 7, Section 2), workplace rules (Chapter 10, Section 1[A]), and statutory rape law (Chapter 11, Section 2[A]), to name just a few areas covered in this book. A specific doctrinal issue bears emphasis at this point. Heightened equal protection scrutiny applies only to statutes or regulations that openly discriminate on the basis of sex or that can be shown to be motivated by a discriminatory purpose. Thus, the Supreme Court has not strictly scrutinized employment policies that disproportionately hurt women in the workforce. See *Geduldig v. Aiello*, 417 U.S. 484 (1974) (Chapter 10, Section 1[C]) (discrimination on the basis of pregnancy); *Personnel Administrator v. Feeney*, 442 U.S. 256 (1979) (Chapter 10, Section 1[A]) (discrimination in favor of military veterans). The rule is different, however, when one leaves the realm of protection under the Constitution. Congress has made both kinds of sex discrimination unlawful in Title VII of the Civil Rights Act of 1964, as amended (Chapter 10, Section 2).

In the most interesting application of a state ERA, the Hawaii Supreme Court held in *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993) (Chapter 9, Section 2[B]) that it is sex discrimination for the state to deny a marriage license to two women when a similarly situated man and woman would receive one. The analogy to *Loving* is striking (see Chapter 1, Section 3[B][3]): where *Loving* subjected laws prohibiting different-race marriage to heightened scrutiny because they denied marriage licenses based on the race of one of the partners, *Baehr* subjected laws prohibiting same-sex marriage to heightened scrutiny because they deny marriage licenses based on the sex of one of the partners. Contrast federal court decisions refusing to interpret Title VII's protection against workplace sex discrimination to protect gay people (Chapter 10, Section 2[B]) or to protect transsexuals (Chapter 12, Section 2) or transvestites (Chapter 12, Section 3).

Should sexual orientation itself be a classification that triggers heightened scrutiny? Judge Norris's opinion in *Watkins v. U.S. Army*, 847 F.2d 1329 (9th Cir. 1988), *vacated*, 872 F.2d 699 (9th Cir. en banc 1989) (Chapter 1, Section 3[B][2]), remains the leading analytical defense of that proposi-

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tion along the lines of *Carolene Products* or *Frontiero*. The U.S. Supreme Court's opinion in *Romer v. Evans*, 116 S. Ct. 1620 (1996) (Chapter 1, Section 3[B][1]) invalidated an anti-gay initiative under the rational basis test. One question is whether *Evans*, like *Reed v. Reed*, might be a harbinger for future Courts to apply some kind of heightened scrutiny to sexual orientation classifications. The irrationality of these classifications is explored through the materials in Chapter 2, Section 2(B) and Section 3, and Chapter 10, Section 1(B). Are policies that discriminate on the basis of cross-dressing or gender dysphoria (a disconnect between biological sex and gender identity) irrational?

Classifications based upon sexual orientation remain common. They include state sodomy or solicitation laws that apply only to homosexual and not heterosexual sodomy or solicitation (Chapter 1, Section 2); the federal government's exclusion of bisexuals, lesbians, and gay men from the armed forces (Chapter 4, Section 3); local policies against allowing openly lesbian, gay, or bisexual people to be teachers (Chapter 5, Section 1[B]) or allowing gay clubs or informational publications in the public school system (Chapter 7, Sections 1 and 2[A]); state laws prohibiting the promulgation of positive information about homosexuality or requiring the inculcation of anti-homosexual viewpoints (Chapter 7, Section 3[A]); federal and state policies requiring that AIDS education be anti-homosexual (Chapter 7, Section 3[C]); state law exclusions of lesbian and gay couples from marriage, typically by implication but sometimes explicitly, as well as state statutes requiring state courts not to give full faith and credit to same-sex marriages recognized in other states (Chapter 9, Section 2); and state presumptions against adoption or child custody by lesbian, gay, or bisexual parents or putative parents (Chapter 9, Section 3[A]). Will these policies be suspect under *Romer v. Evans*?

C. Fundamental Rights and Equal Protection. Another gap in the *Carolene Products* formulation is that classifications affecting the state's distribution of "fundamental rights" are also susceptible to heightened scrutiny under the equal protection clause. This is the literal reading of the Court's opinion in *Brown v. Board of Education*, for example. The Supreme Court held segregated public schools unconstitutional, not because they were founded on a suspect classification (the typical reading of the opinion in retrospect), but because they affected children's access to the fundamental right to public education (an understanding of *Brown* inconsistent with *San Antonio Indep. School Dist. v. Rodriguez*). Compare also *Plyler v. Doe*, 457 U.S. 202 (1982), where the Court invalidated a state policy closing off public schools to the children of illegal immigrants.

The earliest Supreme Court procreation cases were equal protection rather than substantive due process cases. In *Buck v. Bell*, 274 U.S. 200 (1927) the Court upheld Virginia's policy of sterilizing mentally disabled citizens, a shocking result implicitly overruled in *Skinner v. Oklahoma*, 316 U.S. 535 (1942). The state law struck down in *Skinner* required sterilization of habitual criminals committing crimes of "moral turpitude" but not white collar crimes such as embezzlement. The Supreme Court held the

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legislative classification to a higher standard because the law dealt with one of "the basic civil rights of man," the right to marry and procreate. In *Eisenstadt v. Baird*, 405 U.S. 438 (1973) (Chapter 1, Section 1[B]), the Court struck down a Massachusetts law which criminalized the distribution of contraceptives to unmarried people. Justice Brennan's opinion held that *Griswold's* fundamental right of privacy justified heightened equal protection scrutiny. *Zablocki v. Redhail*, a leading right to marry precedent, was treated by the Court as an equal protection case.

SECTION 3. FREEDOM OF EXPRESSION

The First Amendment on its face protects (1) free speech; (2) freedom of the press; (3) peaceful assembly; (4) the right to petition the government; (5) free exercise of religion; and (6) the right not to have a state-established religion. Although the First Amendment limits only Congress' power, the Supreme Court has held it to be one of the rights "incorporated" in the Fourteenth Amendment's due process clause and therefore applicable to the states as well. The Court has also recognized as instinct in the First Amendment a right of association, *NAACP v. Alabama*, 357 U.S. 449 (1958), which has been applied to protect the rights of gay men and lesbians to congregate in bars, to form clubs at public universities, and to form organizations (Chapter 5, Section 1[A]). Also the Court has extended the First Amendment's protection to "expressive conduct" such as draft card and flagburning, marches, and erotic dancing (Chapter 5, Section 1 and Chapter 6, Section 1).

The Supreme Court has applied the religion clauses with ambivalence (Chapter 8, Section 1) but has forcefully applied the speech, press, assembly, petition, and association rights to protect unpopular persons and groups, including sexual orientation minorities. Generally, it is unconstitutional for the state to censor individual or group expressive communications unless the state can prove that the speech regulation is the "least restrictive means" necessary to advance a compelling governmental interest.⁹ Fatal to First Amendment inquiry is the state's regulation of speech because it offends others; the so-called heckler's veto is not allowed as a defense. Exemplary is *Cohen v. California*, 403 U.S. 15 (1971), where the Court disallowed state regulation of a young man whose bomber jacket bore the words "Fuck the draft." "If there is a bedrock principle underlying the First Amendment, it is that the Government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." *Texas v. Johnson*, 491 U.S. 397 (1989) (the flagburning case).

⁹ In "expressive conduct" or symbolic speech cases, such as flagburning or nude dancing, the applicable test is that of *United States v. O'Brien*, 391 U.S. 367 (1968), which allowed state regulation of draft card burning. When pure speech is mixed with nonspeech, "a government regulation is sufficiently justified if it * * * furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest."

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