

THE EPISTEMIC FUNCTION OF FUSING EQUAL PROTECTION AND DUE PROCESS

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ABSTRACT

The fusion of equal protection and due process has attracted significant attention with scholars offering varied accounts of its purpose and function. Some see the combination as productive, creating a constitutional violation that neither clause would generate alone. Others see the combination as merely strategic, offered to make a claim acceptable at a particular historical moment but not genuinely necessary. This Article offers a third alternative. Judges have and should bring both equal protection and due process together to learn what each clause independently requires. On this Epistemic vision of constitutional fusion, a focus on equality helps judges learn what rights are truly fundamental, and a focus on who lacks fundamental liberties helps judges learn which groups need the special protection of heightened review under the Equal Protection Clause.

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INTRODUCTION

Sometimes two or more clauses of the Constitution are brought together in the analysis of a constitutional claim. Among examples of this phenomenon, the fusion

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of equal protection and due process is perhaps the most common, fertile and influential.¹ Think *Obergefell v. Hodges* and *Lawrence v. Texas* for fairly recent examples.² But what exactly is going on when these two clauses are brought together? Theories abound. While there are many ways to divide up the theoretical terrain, one fruitful way is to divide it between those views that see constitutional fusion as productive and those that do not. In the first camp are those who think the relationship produces a constitutional violation that each clause on its own would not; this approach includes (at least) two variants. First, the combination may work via straight addition—a partial equal protection claim combined with a partial due process claim may yield a full Fourteenth Amendment violation.³ The second variant sees the more appropriate mathematical metaphor as multiplication rather than addition. The combination itself may be dynamic such that the fusion leads to a synergy between the clauses producing a constitutional wrong that is larger than the sum of its equality-based and liberty-based parts.⁴ Alternatively, perhaps the combination of clauses is strategic rather

¹ See generally *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015); *Lawrence v. Texas*, 539 U.S. 558 (2003).

² *Obergefell*, 135 S. Ct. 2584; *Lawrence*, 539 U.S. 558.

³ See, e.g., Michael Coenen, *Combining Constitutional Clauses*, 164 U. PA. L. REV. 1067, 1092 (2016) (providing an account of the several ways in which constitutional clauses can be combined including “mathematically”); David L. Faigman, *Measuring Constitutionality Transactionally*, 45 HASTINGS L.J. 753, 772–78 (1994) (arguing in favor of aggregating constitutional rights). This additive conception of the manner in which the clauses can be combined is explicitly rejected by Kerry Abrams and Brandon L. Garrett. See Kerry Abrams & Brandon L. Garrett, *Cumulative Constitutional Rights*, 97 B.U. L. REV. 1309, 1314 (2017) (arguing that so-called “hybrid rights” in which there is no intersectional synergy should be denied because “two half violations do not make a whole”).

⁴ See, e.g., Abrams & Garrett, *supra* note 3, at 1314 (describing three ways in which constitutional clauses can be brought together including what they term “aggregate,” “hybrid” and “intersectional” where the “intersectional” version describes a synergy between the clauses); Pamela S. Karlan, *Equal Protection, Due Process, and the Stereoscopic Fourteenth Amendment*, 33 MCGEORGE L. REV. 473, 474 (2002) (“[T]his essay suggests that sometimes looking at an issue stereoscopically—through the lenses of both the due process clause and the equal protection clause—can have synergistic effects, producing results that neither clause might reach by itself.”); Kenneth L. Karst, *The Liberties of Equal Citizens: Groups and the Due Process Clause*, 55 UCLA L. REV. 99, 103–06 (2007) (arguing that the fusion of liberty and equality values in Fourteenth Amendment cases is longstanding); Laurence H. Tribe, *Equal Dignity: Speaking Its Name*, 129 HARV. L. REV. F. 16, 17 (2015) [hereinafter Tribe, *Equal Dignity*] (describing *Obergefell* as creating a doctrine of equal dignity in which Justice Kennedy combined due process and equal protection); Laurence H. Tribe, *Lawrence v. Texas: The “Fundamental Right” That Dare Not Speak Its Name*, 117 HARV. L. REV. 1894, 1898 (2004) [hereinafter Tribe, *The Fundamental Right*] (describing the history of Fourteenth Amendment cases as “a narrative in which due process and equal protection, far from having separate missions and entailing different inquiries, are profoundly interlocked in a legal double helix”); Kenji Yoshino, *A New Birth of Freedom?: Obergefell v. Hodges*, 129 HARV. L. REV. 147, 148 (2015) (arguing that *Obergefell v. Hodges* was a “game changer for substantive due process jurisprudence”); Timothy Zick, *Rights Dynamism*, 19 U. PA. J.

than genuine. In an era when a particular due process–based right is not, or not yet, recognized, equal protection may be useful. Or, in an era when discrimination against a marginalized group is not, or not yet, recognized as requiring heightened review, due process can be useful.⁵ On this view, we bring equal protection–based and due process–based claims together for pragmatic reasons only; this practice constitutes a way station to a time when courts recognize what equal protection or due process really or fully protect.⁶

I will call these two ways of understanding the relationship between the clauses “Authentic” and “Pragmatic” which capture these two ideas. Each of these ways of understanding the relationship between equal protection and due process has been recognized and elaborated on by other scholars. In fact, the combining of constitutional clauses more generally has attracted significant attention of late with different scholars giving different names to this phenomenon,⁷ and dividing the phenomenon in varied ways.⁸ My goal in this Article is not to add to this already crowded field with yet another term for the phenomenon of bringing two or more constitutional clauses to bear (though I do think “fusion” is an apt term), nor to contribute yet another topography of subtypes (though I do provide something along these lines). Rather, this Article contributes to this field by identifying and describing a heretofore unrecognized *reason* for fusing constitutional clauses. When judges are uncertain about what each individual clause actually requires, they can—and perhaps should—use the perspective of another clause to gain insight about what the first clause genuinely requires.

CONST. L. 791, 811–17 (2017) (using the example of the synergy between equal protection and due process as one of the examples of the rights dynamism he describes).

⁵ See Rebecca L. Brown, *Liberty, The New Equality*, 77 N.Y.U. L. REV. 1491, 1556–58 (2002) (describing how a recognition of a liberty interest can be used to protect the equality of some groups); Cass R. Sunstein, *Sexual Orientation and the Constitution: A Note on the Relationship Between Due Process and Equal Protection*, 55 U. CHI. L. REV. 1161, 1176–78 (1988); Cass R. Sunstein, *What Did Lawrence Hold? Of Autonomy, Desuetude, Sexuality, and Marriage*, 2003 SUP. CT. REV. 27, 30 (“*Lawrence*’s words sound in due process, but much of its music involves equal protection.”).

⁶ See Brown, *supra* note 5, at 1556–58.

⁷ See, e.g., Abrams & Garrett, *supra* note 3, at 1331 (“intersectional rights”); Coenen, *supra* note 3, at 1075–76 (“combination arguments”); Nelson Tebbe & Robert L. Tsai, *Constitutional Borrowing*, 108 MICH. L. REV. 459, 463 (2010) (“constitutional borrowing” (emphasis omitted)); Zick, *supra* note 4, at 802 (“Rights Dynamism”).

⁸ See, e.g., Abrams & Garrett, *supra* note 3, at 1354 (describing three different ways that constitutional clauses can be brought together: “aggregate harm” cases, “hybrid rights” cases and “intersectional rights” cases); Coenen, *supra* note 3, at 1077–91 (describing types of “combination analysis” as “right/right,” “right/no-power,” “power/power” or “subclausal”); Tebbe & Tsai, *supra* note 7, at 463 (describing an example of “constitutional borrowing” as “when a court is faced with two arguments—say, a due process claim and an equal protection claim—and chooses to endorse the former while drawing language from decisions associated with the latter” (emphasis omitted)); Zick, *supra* note 4, at 811–17 (describing different types of dynamic connections between due process and equal protection).

The *Epistemic* vision of constitutional fusion is distinct from both the *Authentic* view and the *Pragmatic* view. According to the *Authentic* view, combining the clauses produces real results—via addition, multiplication or some other operation—that each clause on its own would not.⁹ According to the *Pragmatic* view, only one clause is needed to establish a constitutional violation on the best understanding of what each clause entails.¹⁰ Nonetheless, the combination is rhetorically or practically useful in getting actual judges or Justices to see the constitutionally correct result.¹¹ The *Epistemic* account is located on a different vector. It sees the combination not in terms of whether the product is genuine or strategic but instead in terms of whether it helps us to better understand what the Constitution requires. According to the *Epistemic* view, when we are unsure whether each clause on its own would ground a constitutional violation, combining the clauses provides insight. For this reason, and distinctively, the *Epistemic* view is a vision of constitutional fusion that is grounded in humility.

This Article begins in Parts I and II by describing and providing examples of both the *Authentic* and *Pragmatic* visions of the fusion of equal protection and due process. Part III is the heart of the Article and provides my contribution to this literature. There I describe and illustrate the *Epistemic* vision of constitutional fusion. I explore the history from which this approach emerges and describe passages from Justice Kennedy’s opinion in *Obergefell v. Hodges* in which this vision is clearest.¹² I then turn from the descriptive to the normative and sketch, albeit briefly, an argument for how each clause might teach us what the other entails.

I. THE AUTHENTIC VISION OF CONSTITUTIONAL FUSION

The *Authentic* vision of the fusion of equal protection and due process rests on the claim that bringing two constitutional clauses together produces rights violations that each clause alone could not.¹³ This approach has (at least) two variants. According to the additive variant, a partial equal protection claim combined with a partial due process claim yield a complete Fourteenth Amendment claim.¹⁴ One-half plus one-half equals one. Alternatively, some scholars see the relationship as one of synergy—the two constitutional clauses interrelate in a manner that produces a Fourteenth Amendment violation that is more than the sum of its parts.¹⁵

⁹ See *supra* notes 3–4 and accompanying text.

¹⁰ See *supra* notes 5–6 and accompanying text.

¹¹ See *supra* note 6 and accompanying text.

¹² See generally *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

¹³ See *supra* note 3 and accompanying text.

¹⁴ Coenen, *supra* note 3, at 1092 (arguing that “[c]ombination arguments can be modeled mathematically”); Nelson Tebbe & Deborah A. Widiss, *Equal Access and the Right to Marry*, 158 U. PA. L. REV. 1375, 1425–29 (2010) (defending the right of same-sex couples to marry on the ground that the combination of liberty and equal rights found in the fundamental interest strand of equal protection doctrine requires equal access to important governmental benefits).

¹⁵ Karlan, *supra* note 4, at 474 (describing the “stereoscopic” vision that looking with both

Consider first the additive approach. While it has a mathematical appeal, it also seems problematic. How could it be, one might wonder, that “two losers equals one winner”?¹⁶ Isn’t *bupkis plus bupkis still bupkis*—as my grandfather would say?¹⁷ Michael Coenen defends the additive approach against this charge.¹⁸ In his view, there is a better analogy: “Just as my limited desire to see a movie and my limited desire to buy clothes might together yield an overwhelming desire to go to the mall, so too might clauses providing limited individual support for a judicial result operate together to generate strong collective support for that result.”¹⁹

I do not aim to adjudicate whether Coenen is right that the interests protected by equal protection and due process can be summed in the manner he suggests to produce a genuine constitutionally protected right or not. Rather the point is to illustrate why one might bring two constitutional clauses to bear. The additive approach is one way in which this fusion produces an authentic result.

The second and more prevalent way of understanding why courts fuse equal protection and due process is that the fusion produces a synergy.²⁰ This view has several defenders using different terms to capture the productive combination. Pamela Karlan’s “stereoscopic vision,”²¹ Laurence Tribe’s “equal dignity,”²² Kenji Yoshino’s “antisubordination liberty,”²³ and Kerry Abrams and Brandon Garrett’s “intersectionality”²⁴ each refer to a combination that yields a constitutional violation through the dynamic combination of constitutional values.²⁵ Karlan’s metaphor is perhaps the most vivid:

Like the two hands that emerge from the sheet of paper to draw one another in M.C. Escher’s famous 1948 lithograph, *Drawing Hands*, the ideas of equality and liberty expressed in the equal protection and due process clauses each emerge from and reinforce the other. [And thus] . . . sometimes looking at an issue

clauses produces). Abrams and Garrett’s concept of “intersectional rights” is analogous. Abrams & Garrett, *supra* note 3, at 1332; see also Tebbe & Widiss, *supra* note 14, at 1424 (acknowledging that synergy between equal protection and due process may provide further grounds for the right to equal access to civil marriage that they identify).

¹⁶ William L. Esser IV, Note, *Religious Hybrids in the Lower Courts: Free Exercise Plus or Constitutional Smoke Screen?*, 74 NOTRE DAME L. REV. 211, 219 (1998).

¹⁷ Bupkis means “absolutely nothing.” *Bupkis*, OXFORD ENGLISH DICTIONARY (3d ed. 2009).

¹⁸ Coenen, *supra* note 3, at 1092.

¹⁹ *Id.*

²⁰ See *supra* note 4 and accompanying text.

²¹ Karlan, *supra* note 4, at 474.

²² Tribe, *Equal Dignity*, *supra* note 4, at 17.

²³ Yoshino, *supra* note 4, at 174 (“What emerges from *Lawrence* and *Obergefell* is a vision of liberty that I will call ‘antisubordination liberty.’”).

²⁴ Abrams & Garrett, *supra* note 3, at 1330.

²⁵ See *supra* notes 21–24 and accompanying text.

stereoscopically—through the lenses of both the due process clause and the equal protection clause—can have synergistic effects, producing results that neither clause might reach by itself.²⁶

The two areas of case law that best illustrate this synergistic fusion are the fundamental interests strand of equal protection doctrine²⁷ and the more recent gay rights cases.²⁸ Consider, for example, *M.L.B. v. S.L.J.*²⁹ There the Supreme Court held that a person facing termination of parental rights is entitled to a waiver of the fees required to obtain the trial transcript necessary to mount an appeal to a denial of parental rights.³⁰ This is a case where constitutional fusion is productive because there is both no right to appeal a parental termination decision and no equal protection problem with fees to access judicial process more generally.³¹ Rather, the lack of a waiver of fees for poor parents faced with termination of parental rights is constitutionally problematic due to the synergy between the lack of equal access and the presence of a very important interest.³²

If the fundamental interest strand of equal protection doctrine is the traditional exemplar of the synergistic Fourteenth Amendment, the protection of *dignity* is the more modern data point. Modern substantive due process is marked by an evolution in the way in which the interest at stake is characterized; it morphs from privacy (*Griswold v. Connecticut*,³³ *Roe v. Wade*³⁴) to autonomy (*Cruzan v. Director, Missouri Dept. of Health*,³⁵ *Planned Parenthood v. Casey*³⁶) to dignity (*Lawrence v. Texas*,³⁷

²⁶ Karlan, *supra* note 4, at 474.

²⁷ *See, e.g.*, *M.L.B. v. S.L.J.*, 519 U.S. 102 (1996); *Boddie v. Connecticut*, 401 U.S. 371 (1971).

²⁸ *See, e.g.*, *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015); *United States v. Windsor*, 570 U.S. 744 (2013); *Lawrence v. Texas*, 539 U.S. 558 (2003).

²⁹ 519 U.S. 102.

³⁰ *Id.* at 123–24.

³¹ *See id.* at 108–09, 124–25.

³² Karlan, *supra* note 4, at 482–83 (contending that “equal access was required because the right being adjudicated in the underlying proceeding was a fundamental one”).

³³ 381 U.S. 479, 484–85 (1965) (protecting the “zone of privacy” implicated by a Connecticut law forbidding the use of contraceptives by married couples even in the “sacred precincts of marital bedrooms”).

³⁴ 410 U.S. 113, 153 (1973) (holding that the “right of privacy . . . founded in the Fourteenth Amendment’s concept of personal liberty . . . is broad enough to encompass a woman’s decision whether or not to terminate her pregnancy”).

³⁵ 497 U.S. 261, 278 (1990) (recognizing that “a competent person has a constitutionally protected liberty interest in refusing unwanted medical treatment”).

³⁶ 505 U.S. 833, 851 (1992) (describing the Court’s prior due process cases in the following way: “At the heart of liberty is the right to define one’s own concept of existence, of meaning, of the universe, and of the mystery of human life”).

³⁷ 539 U.S. 558, 567 (2003) (holding that “adults may choose to enter upon this [same-sex]

*Obergefell v. Hodges*³⁸). Autonomy is a liberty-based interest and thus is quite naturally at home in the Due Process Clause.³⁹ What distinguishes dignity from its predecessor autonomy is precisely the addition of an equality-based concern.⁴⁰ Writing for the Court in *Lawrence*, Justice Kennedy asserts that the Texas law which makes non-coital sex a crime violates the dignity of gay men and lesbians, explaining “[t]he state cannot demean their existence or control their destiny by making their private sexual conduct a crime.”⁴¹ While the claim that gay people have a right to “control their destiny” sounds in the value of autonomy and thus rests on the Due Process Clause, the right to be free from demeaning state action sounds in equality and rests on the Equal Protection Clause.⁴² Also noteworthy is the way that the Court intertwines these concerns—fusing them here in a single sentence.⁴³ The concept of dignity captures both ideas. A dignified person is a person of high status or rank whose autonomy is to be respected.⁴⁴ In addition, treating another with dignity rules out making the person unequal or subservient and thus requires treating her as an equal.⁴⁵

One can read Justice Kennedy’s opinion in *Obergefell* as also adopting the synergistic approach to fusing equal protection and due process.⁴⁶ He uses the word “synergy” itself when discussing the relevance of *Zablocki v. Redhail*.⁴⁷ And, Justice Kennedy explains why the restriction of marriage to opposite-sex couples violates the Fourteenth Amendment in the following way: “The imposition of this disability on gays and lesbians serves to disrespect and subordinate them.”⁴⁸ In this passage,

relationship in the confines of their homes and their own private lives and still retain their dignity as free persons”).

³⁸ 135 S. Ct. 2584, 2597 (2015) (upholding right of same-sex couples to marry on the grounds that fundamental “liberties extend to certain personal choices central to individual dignity and autonomy, including intimate choices that define personal identity and beliefs”).

³⁹ *See id.*

⁴⁰ *See Lawrence*, 539 U.S. at 575–76.

⁴¹ *Id.* at 578.

⁴² DEBORAH HELLMAN, WHEN IS DISCRIMINATION WRONG? 29–31, 36 (2008) (discussing the concept of “demeaning” in discrimination); Deborah Hellman, *Two Concepts of Discrimination*, 102 VA. L. REV. 895, 942–44 (2016).

⁴³ *Lawrence*, 539 U.S. at 578.

⁴⁴ JEREMY WALDRON, *Dignity and Rank*, in DIGNITY, RANK, AND RIGHTS 13, 30–34 (Meir Dan-Cohen ed., 2012); *see also* Leslie Meltzer Henry, *The Jurisprudence of Dignity*, 160 U. PA. L. REV. 169, 189–229 (2011) (discussing five concepts of dignity).

⁴⁵ *See* MARTHA C. NUSSBAUM, FROM DISGUST TO HUMANITY: SEXUAL ORIENTATION AND CONSTITUTIONAL LAW 150 (2010) (asserting that “[t]he argument in favor of same-sex marriage is straightforward: if two people want to make a commitment of the marital sort, they should be permitted to do so, and excluding one class of citizens from the benefits and dignity of that commitment demeans them and insults their dignity”).

⁴⁶ *See generally* *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

⁴⁷ *Id.* at 2603 (citing *Zablocki v. Redhail*, 434 U.S. 374 (1978)).

⁴⁸ *Id.* at 2604.

the two rights combine in a way that is dynamic, producing a violation of both due process and equal protection together.⁴⁹

To recap, according to the *Authentic* vision of constitutional fusion, bringing both equal protection and due process together produces real results. This can be accomplished via straight addition, as a partial equal protection claim and a partial due process claim produce a complete Fourteenth Amendment violation.⁵⁰ Alternatively, some “synergy,” Karlan’s term, or “intersectionality,” Abrams and Garrett’s term, is required to produce the desired effect.⁵¹ On this view, the combination is productive and interactive such that at least in some instances the fusion of the clauses produces new constitutional values that laws might infringe. The protection of “dignity”—a word that appears three times in Justice Kennedy’s opinion in *Lawrence*⁵² and nine times in his opinion in *Obergefell*⁵³—exemplifies this fusion. To be treated with dignity requires both that a person is free to make important self-defining decisions and that a person be treated as equal in status to others.⁵⁴

II. THE PRAGMATIC VISION OF CONSTITUTIONAL FUSION

The *Pragmatic* vision sees the fusion of equal protection and due process as strategic rather than genuine.⁵⁵ On this view, claims rest either in due process *or* in equal protection, thus in liberty or in equality.⁵⁶ The reason to bring both clauses together is *merely* pragmatic.⁵⁷

A good example of this phenomenon is *Skinner v. Oklahoma*.⁵⁸ In *Skinner*, the Court struck down a law that provided that criminal defendants convicted of three offenses of “moral turpitude” could be sterilized.⁵⁹ Because this case came before the

⁴⁹ *See id.*

⁵⁰ *Id.*

⁵¹ Abrams & Garrett, *supra* note 3, at 1330; Karlan, *supra* note 4, at 474.

⁵² *Lawrence v. Texas*, 539 U.S. 558, 567, 574–75 (2003).

⁵³ *Obergefell*, 135 S. Ct. at 2594–97, 2599, 2603, 2606, 2608.

⁵⁴ *See supra* note 44 and accompanying text.

⁵⁵ *See supra* note 6 and accompanying text.

⁵⁶ *See supra* notes 5–6 and accompanying text.

⁵⁷ My view of the pragmatic fusion of equal protection and due process is meaningfully different from what Nelson Tebbe and Robert Tsai identify as “corrupt” constitutional borrowing. *See* Tebbe & Tsai, *supra* note 7, at 482–84. In their view, borrowing from one constitutional domain and importing terms, values or ideas into another is corrupt when it “occur[s] not for the sake of prompting a good faith reconsideration of the trajectory of the law, but instead for the purpose of confusing observers, insulating a matter from accountability, or rendering a doctrine unusable by practitioners.” *Id.* at 482. The proponent of pragmatic fusion adopts that approach to move the law in the direction he or she believes is best while accommodating doctrinal or practical limitations. *Id.*

⁵⁸ 316 U.S. 535 (1942).

⁵⁹ *Id.* at 536.

Court so soon after the rejection of the *Lochner* era, the Court was reluctant to recognize a due process–based right to procreative liberty.⁶⁰ More palatable at the time, most likely, was the claim that the law was constitutionally infirm because the way it distinguished between crimes that could subject a person to sterilization and those that could not tracked crimes that poor people were more likely to commit as compared to more wealthy people.⁶¹ The Court thus punted, if you will, on the issue of whether everyone would have a right not to be sterilized and rested the invalidation of the law on the fact that there was no good reason to treat people convicted of embezzlement (a white-collar theft offense) differently than people convicted of simple theft.⁶²

One can read *Obergefell v. Hodges* as a *Pragmatic* case as well. In my view, laws that permit only opposite sex couples to marry fail to treat gays and lesbians as equals because they express denigration for their unions. These laws thus violate equal protection, in my view, and should be invalidated for this reason. Like many others, I do not believe that there is a fundamental right to marry.⁶³ If a state had never adopted marriage laws at all and instead had merely allowed all couples to register for domestic partnerships of some kind, this would, in my view, have worked no constitutional violation. Whether a state that had previously had marriage (a status infused with state approbation and not merely recognition), could afterward revert to domestic partnership for all raises a different question as this change carries meaning of its own. Nonetheless, one might think that given that a right to marry had some case support prior to *Obergefell*⁶⁴ and that the Court has thus far been unwilling to recognize gays

⁶⁰ See Karst, *supra* note 4, at 112 (explaining that “Justice Douglas had been a pallbearer at the burial of *Lochner*, and surely wanted to avoid a resurrection”). Nonetheless, Karst believes that *Skinner* is a good example of the “integration” of equality and liberty that he argues is longstanding. *Id.* at 112–13.

⁶¹ See *Skinner*, 316 U.S. at 541–42.

⁶² *Id.* at 542.

⁶³ See, e.g., Patricia A. Cain, *Imagine There’s No Marriage*, 16 QUINNIPIAC L. REV. 27, 42–43 (1996) (“I conclude that protection of ‘good’ intimacy, of family integrity, of close personal relationships is at the core of the negative liberties that have been recognized by the Court in its marriage and family privacy cases. The state need not recognize marriage to protect these values. Rather, intimacy can be protected in those cases in which the parties demonstrate personal commitment to a shared life. This means that substantive due process is not violated if marriage is abolished.”). *But see* Gregg Strauss, *The Positive Right to Marry*, 102 VA. L. REV. 1691, 1741 (2016) (describing and defending a special type of positive right that provides the power to form intimate relationships on the grounds that it is needed to safeguard the vulnerability of intimacy).

⁶⁴ *Turner v. Safley*, 482 U.S. 78, 91, 94–98 (1987) (invalidating a prison regulation that provided that prisoners could marry only with the approval of the warden); *Zablocki v. Redhail*, 434 U.S. 374, 375, 382–84 (1978) (invalidating a law that prohibited people owing child support payments from marrying by relying on the fundamental interests strand of equal protection doctrine); *Loving v. Virginia*, 388 U.S. 1, 12 (1967) (invalidating a Virginia law that forbade

and lesbians as a suspect class,⁶⁵ that it would make pragmatic sense to bring the clauses together.

On this view, the fusion of equal protection and due process is a nonideal second best. *Skinner* is really a due process case and *Obergefell* is really an equal protection case. But if the idiosyncrasies of our constitutional doctrine and history demand a bit of fudging, so be it.

On the surface the *Authentic* and *Pragmatic* accounts of the fusion of equal protection and due process look remarkably similar. Where they differ is at the level of justification. For the *Authentic* view, some rights actually depend on the overlap between liberty and equality concerns.⁶⁶ For the *Pragmatic* view, the fusion is instrumental only; rights are grounded either in a deprivation of liberty or a violation of equality.⁶⁷ While it is true that the state could take away both in a single act, fusing the claims is not needed to produce a new and integrated interest.

III. THE EPISTEMIC VISION OF CONSTITUTIONAL FUSION

There is a third and underappreciated way to think about the fusion of equal protection and due process. Perhaps the intertwining of equal protection and due process rests in judicial humility. Don't laugh. Or perhaps more plausibly, it *should* rest in judicial humility. The justification for fusion of equal protection and due process on this view is *Epistemic* in nature. Due process claims assert that a *fundamental* right has been infringed, and in order to adjudicate these claims, we need to know what rights are truly fundamental.⁶⁸ Perhaps equality-based notions can help. Similarly, claims that assert a violation of equal protection require courts to determine if the law distinguishes among people on the basis of a suspect trait.⁶⁹ But what traits should be treated as suspect? Perhaps paying attention to who can and cannot exercise fundamental liberties will be informative. The basic idea underlying the *Epistemic* rationale for fusing equal protection and due process is that the values of equality and liberty are related in a manner that allows each to guide us as to the meaning of the other.

marriage between whites and people of other races largely on equal protection grounds but also noting that “[t]hese statutes also deprive the Lovings of liberty without due process of law in violation of the Due Process Clause of the Fourteenth Amendment”).

⁶⁵ *Romer v. Evans*, 517 U.S. 620, 632 (1996) (invalidating an amendment to the Colorado Constitution that forbade the provision of antidiscrimination protection for gays and lesbians by any level of state or local government because it was not rationally related to a legitimate governmental interest).

⁶⁶ See *supra* note 3 and accompanying text.

⁶⁷ See *supra* note 6 and accompanying text.

⁶⁸ See *Obergefell v. Hodges*, 135 S. Ct. 2584, 2597–98 (2015).

⁶⁹ See *Loving*, 388 U.S. at 11.

A. The “Tradition” from Which It Emerges

The problem of delineating what rights are protected by the Due Process Clause has a long history, and going back to the incorporation debate from the first half of the twentieth century,⁷⁰ we find two views. A judge worried about unconstrained judicial intuitions about what rights are fundamental could conclude that the Due Process Clause protects only those liberties listed in the Bill of Rights.⁷¹ Alternatively, a judge or Justice could consult our history and traditions.⁷² These traditions might matter because only those rights that others previously viewed as fundamental really should be protected constitutionally. Or alternatively, the judge might treat history as a repository of wisdom, much like the way that common law judges see precedent.⁷³ On this view, the judge or Justice tries to ascertain what liberties are truly fundamental, using history and tradition merely as helpful guides. When Justices assert that the “Due Process Clause . . . stands . . . on its own bottom,” they see history and tradition in this merely advisory role.⁷⁴

⁷⁰ The incorporation controversy was about whether the Due Process Clause of the Fourteenth Amendment incorporated the first eight amendments of the Bill of Rights against the states or instead whether it required that states respect liberties that are “fundamental to . . . ordered liberty.” *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3034 (2010) (citation omitted) (inquiring, in incorporation cases, “whether a particular Bill of Rights guarantee is fundamental to *our* scheme of ordered liberty”); NOAH FELDMAN & KATHLEEN M. SULLIVAN, *CONSTITUTIONAL LAW* 465 (20th ed. 2019) (describing the “incorporation debate” as focused on “the question of precisely which rights were incorporated, and how a court could identify them”).

⁷¹ *See, e.g., Adamson v. California*, 332 U.S. 46, 74–75 (1947) (Black, J., dissenting) (arguing that “history conclusively demonstrates that the language of the first section of the Fourteenth Amendment, taken as a whole, was thought by those responsible for its submission to the people, and by those who opposed its submission, sufficiently explicit to guarantee that thereafter no state could deprive its citizens of the privileges and protections of the Bill of Rights”).

⁷² *See, e.g., Palko v. Connecticut*, 302 U.S. 319, 325 (1937) (discussing *Snyder v. Massachusetts* in which Justice Cardozo argued that in order to determine whether particular procedural protections were required by the Due Process Clause, one should ask whether they are required by a “principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental” (quoting *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934))).

⁷³ In my view, the doctrine of *stare decisis* can be defended on epistemic grounds. *See generally* Deborah Hellman, *An Epistemic Defense of Precedent*, in *PRECEDENT IN THE UNITED STATES SUPREME COURT* 63 (Christopher J. Peters ed., 2013).

⁷⁴ *See McDonald*, 561 U.S. at 883 (Stevens, J., concurring in judgment) (asserting that the question of the case “is not whether the Second Amendment right to keep and bear arms (whatever that right’s precise contours) applies to the States because the Amendment has been incorporated into the Fourteenth Amendment [but] rather, is whether the particular right asserted by petitioners applies to the States because of the Fourteenth Amendment itself, standing on its own bottom”); *Griswold v. Connecticut*, 381 U.S. 479, 500 (1964) (Harlan, J., concurring in judgment).

There are pros and cons to each of these approaches. On the one hand, limiting fundamental liberties to those listed in the Bill of Rights constrains judicial discretion and limits the role that differences in judicial judgment plays in constitutional law.⁷⁵ On the other hand, perhaps the original list does not contain all truly fundamental liberties.⁷⁶ This is, after all, precisely the worry the Ninth Amendment appears designed to address.⁷⁷

The incorporation debate of the early part of the twentieth century was an argument between those who favored total incorporation of the Bill of Rights and those who favored what is often termed “selective incorporation”—the view that Justices determine what rights to incorporate by asking whether the right at issue is fundamental.⁷⁸ The reasons for each view mirror the familiar virtues and vices associated with the choice between rules and standards. As Frederick Schauer explains, neither a rule nor a standard works perfectly.⁷⁹ The relevant question is whether you believe you will get fewer errors by giving less discretion to the decision maker on the ground (here, Justices) to determine whether a right really is fundamental, or, fewer errors by constraining judicial discretion through a rule (here, the Bill of Rights).⁸⁰ If one thinks fundamental liberties can be listed and/or distrusts the ability of judges to discern what these liberties are, the rule-like formulation is likely to be best.⁸¹ If one thinks fundamental liberties cannot be listed (or that it is difficult to do so), and/or trusts the ability of judges to do a reasonable job in determining what they are, the standard-like formulation is likely to be best.⁸²

This iteration of the debate has been largely settled: selective incorporation won out.⁸³ When Justice Alito, writing for the Court in *McDonald v. City of Chicago* addressed the question whether the right to keep and bear arms acts as a limit on state governments as well as the federal government, he did not simply refer to the Second Amendment.⁸⁴ Rather, he said that the Court “must decide whether the right

⁷⁵ See, e.g., *Adamson*, 332 U.S. at 70 (Black, J., dissenting) (“I think that decision [Twining v. New Jersey, 211 U.S. 78 (1908)] and the ‘natural law’ theory of the Constitution upon which it relies degrade the constitutional safeguards of the Bill of Rights and simultaneously appropriate for this Court a broad power which we are not authorized by the Constitution to exercise.”).

⁷⁶ Justice Frankfurter, concurring in *Adamson v. California* makes precisely this point. *Id.* at 67 (Frankfurter, J., concurring) (questioning why one “would assume that no other abuses would reveal themselves in the course of time than those which had become manifest in 1791”).

⁷⁷ The Ninth Amendment to the Constitution provides that “[t]he enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.” U.S. CONST. amend. IX.

⁷⁸ FELDMAN & SULLIVAN, *supra* note 70, at 465–67.

⁷⁹ FREDERICK SCHAUER, PLAYING BY THE RULES: A PHILOSOPHICAL EXAMINATION OF RULE-BASED DECISION-MAKING IN LAW AND IN LIFE 149–55 (1991).

⁸⁰ *Id.*

⁸¹ See *id.* at 152.

⁸² See *id.*

⁸³ See *infra* notes 84–85 and accompanying text.

⁸⁴ *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3036 (2010).

to keep and bear arms is fundamental to *our* scheme of ordered liberty . . . or . . . whether this right is ‘deeply rooted in this Nation’s history and tradition.’”⁸⁵

While due process jurisprudence has abandoned the total incorporation approach, it has not relinquished the antinomy between the virtues and vices of judicial constraint in defining fundamental liberties. Instead that debate has been transposed to a new contrast: the two ways of assessing whether a liberty is fundamental that Justice Alito referenced in the passage from *McDonald* quoted above.⁸⁶ The Court can ascertain whether the liberty is protected by the Due Process Clause either by focusing on whether it is fundamental—pure and simple—or instead by asking whether it is “deeply rooted in this Nation’s history and tradition.”⁸⁷ The first approach is that of the Fourteenth Amendment resting “on its own bottom” and requires judges to ask directly whether the right is really, truly, as a matter of actual moral fact, *fundamental*.⁸⁸ The second, the history-inflected version of selective incorporation, asks whether the right is rooted in our history and tradition.⁸⁹ These two approaches replay the trade-offs between selective incorporation and total incorporation, albeit in a slightly smaller space. The true morality approach would allow judges to identify rights that really are fundamental, even if our history has missed them previously. After all, our history and tradition, like all histories and traditions, may well be limited in its understanding of human needs and human flourishing. In addition, the true morality approach allows judges to reject, as non-fundamental rights, what our history has previously protected. The right to own guns provides a possible example here. But this approach has problems as well. How can judges be sure that the rights they think are fundamental are, really and truly, fundamental? We might worry that this method of decision making offers too little judicial constraint.⁹⁰ The history-inflected version of assessing fundamental liberties purports to offer such constraint.

The point of this brief history is to show the enduring nature of the competing values of flexibility and constraint. Fundamental liberties are not self-defining and need elaboration, yet in a way that is guided.⁹¹ The *Epistemic* approach to fusing equal protection and due process offers another method of mediating these competing

⁸⁵ *Id.* (quoting *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997)) (citing *Duncan v. Louisiana*, 391 U.S. 145, 149 (1968)).

⁸⁶ *Id.*

⁸⁷ *Id.* (quoting *Glucksberg*, 521 U.S. at 721).

⁸⁸ *See Griswold v. Connecticut*, 381 U.S. 479, 500 (1964) (Harlan, J., concurring in judgment).

⁸⁹ Justice Alito’s opinion in *McDonald* makes a change to prior formulations of the history and tradition approach by emphasizing “this Nation’s history and tradition,” *McDonald*, 130 S. Ct. at 3036 (quoting *Glucksberg*, 521 U.S. at 721), rather than the history and tradition of “English-speaking peoples,” *Malinski v. New York*, 324 U.S. 401, 417 (1945) (opinion of Frankfurter, J.).

⁹⁰ *See* SCHAUER, *supra* note 79, at 149–55.

⁹¹ *See id.* at 152.

values. The idea is that the fusion of equal protection and due process provides an underappreciated method to guide judges and Justices tasked with determining what rights are truly fundamental. They can follow a list articulated in 1791 (the total incorporation approach).⁹² They can be guided by our history and tradition (the history-inflected version of selective incorporation).⁹³ Or, I argue, they can use the value of equality to help them better understand which liberties are fundamental. This is (one side of) the *Epistemic* reason for fusing equal protection and due process.

B. The New Epistemic Rationale

As far as I can tell, the *Epistemic* rationale for fusing equal protection and due process is new in *Obergefell v. Hodges*.⁹⁴ And, thus far, it seems to have gone unnoticed.⁹⁵ The fusion of the clauses appears in the early cases, especially the fundamental interests strand of equal protection doctrine, as described above.⁹⁶ And it resurfaces with added oomph in *Lawrence v. Texas*.⁹⁷ But it isn't until *Obergefell* that we see the Court *justifying* the fusion in epistemic terms.⁹⁸ As *Obergefell* was written by Justice Kennedy, who is no longer on the Court, perhaps the epistemic strand of constitution fusion will be a blip—something that appears, recedes and never recurs. Perhaps. But as the epistemic cast of the language is so striking—once you notice it—and the reasons that ground it quite persuasive, it is a justification for constitutional fusion that deserves our attention.

In this section, I will highlight the language from Justice Kennedy's opinion in *Obergefell v. Hodges* that explicitly appeals to this justification. I do not intend to suggest that this is the only rationale for fusion offered in that opinion. Indeed, I

⁹² FELDMAN & SULLIVAN, *supra* note 70, at 466–67.

⁹³ See *Glucksberg*, 521 U.S. at 720–21.

⁹⁴ *Obergefell v. Hodges*, 135 S. Ct. 2584, 2594–602 (2015).

⁹⁵ See, e.g., *Planned Parenthood of the Heartland v. Reynolds ex rel. Iowa*, 915 N.W.2d 206 (Iowa 2018) (invalidating an Iowa law that required a 72-hour waiting period after the initial consultation in order to obtain an abortion as in conflict with the Iowa Constitution's due process and equal protection clauses). In *Reynolds*, the Iowa Supreme Court first held that the law violated the Iowa Constitution's Due Process Clause (which that court understood as protecting the fundamental right to chose to abort via strict scrutiny rather than the undue burden standard). *Id.* at 212. That court then went on to consider the Iowa Constitution's Equal Protection Clause was also violated. *Id.* at 213. In doing so, the Iowa Supreme Court said the following: "Although not required, [equal protection] can serve to cast a greater light of understanding on a divisive issue in society." *Id.* at 244 (citing *Obergefell*, 135 S. Ct. at 2602–05). While the analysis uses epistemic language—equal protection can "cast a greater light of understanding"—the Court does not do anything with this approach in its actual analysis. *Id.*

⁹⁶ See, e.g., *M.L.B. v. S.L.J.*, 519 U.S. 102, 110–14, 120–28 (1996); *Skinner v. Oklahoma*, 316 U.S. 535, 539–42 (1942).

⁹⁷ See 539 U.S. 558, 564–67 (2003).

⁹⁸ *Obergefell*, 135 S. Ct. at 2598, 2600–04.

earlier described the ways in which this opinion offers support for both the *Authentic* and *Pragmatic* rationales. My point is that there is a thus-far unnoticed third reason to combine these clauses. The passages I quote below are familiar ones. Indeed, they are ones I have quoted before in prior work but not previously fully appreciated.⁹⁹

Consider first this passage from *Obergefell*: “Rights implicit in liberty and rights secured by equal protection may rest on different precepts and are not always coextensive, yet in some instances *each may be instructive as to the meaning and reach of the other.*”¹⁰⁰ Here, Justice Kennedy asserts that liberty-based rights and equality-based rights are grounded in different values.¹⁰¹ Sometimes they overlap (like the two lenses of Karlan’s stereoscopic vision)¹⁰² and sometimes they do not. Justice Kennedy doesn’t make clear whether he believes that protection for same-sex marriage resides in the area of overlap or not.¹⁰³ Instead, and here’s the key point, he asserts: each is “instructive” of what the other means and protects.¹⁰⁴ Each right helps to teach judges about what the other entails.¹⁰⁵

Consider another passage: “Each concept—liberty and equal protection—leads to a stronger *understanding* of the other.”¹⁰⁶ The emphasis in this passage, as in the prior one, is on learning and understanding, on what equality teaches us about liberty and vice versa.¹⁰⁷

I had read these passages before and not noticed their epistemic emphasis. Yet now, it seems so obviously present that I am amazed I missed it before. For that, I thank Professor Tim Zick and William & Mary Law School for inviting me and offering me the opportunity to think more deeply about the nature of the relationship between these two clauses.

C. How Equality Helps Us Learn Which Rights Are Fundamental

In this Section and the next, I explore *why* one might think that fusing equal protection and due process has epistemic benefits. In this Section, I explore why we might lean on equality to learn about what rights are fundamental. In the next section, I consider how a focus on fundamental liberties helps us determine what groups need the special solicitude that heightened review provides.

⁹⁹ Hellman, *supra* note 42, at 949.

¹⁰⁰ *Obergefell*, 135 S. Ct. at 2603 (emphasis added).

¹⁰¹ *Id.*

¹⁰² Karlan, *supra* note 4, at 474.

¹⁰³ *Obergefell*, 135 S. Ct. at 2602–04.

¹⁰⁴ *Id.* at 2603.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* (emphasis added) Justice Kennedy also says the following: “This interrelation of the two principles furthers our understanding of what freedom is and must become.” *Id.*

¹⁰⁷ *Id.*

The arc of the argument is familiar. It has its roots in the moral intuition that underlies the Golden Rule,¹⁰⁸ Kant's "categorical imperative,"¹⁰⁹ and Rawls' "veil of ignorance."¹¹⁰ When we are unsure whether there is a fundamental right to X, whatever X is, we can test out the hypothesis that there is no such right by denying to everyone the freedom to X. If we would balk at the idea, then perhaps such a right really is fundamental. This is also the idea that animates Justice Jackson's concurrence in *Railway Express Agency v. New York*.¹¹¹ There he writes: "[T]here is no more effective practical guaranty against arbitrary and unreasonable government than to require that the principles of law which officials would impose upon the minority must be imposed generally."¹¹² Justice O'Connor, drawing on Jackson's approach, makes a similar argument in her concurring opinion in *Lawrence*.¹¹³ She favored invalidating the law at issue on equal protection rather than due process grounds because the Texas law at issue—unlike the law in *Bowers v. Hardwick*¹¹⁴—applied only to same-sex couples.¹¹⁵ In Justice O'Connor's view, equal application would protect freedom of action for all because a law that prohibited non-coital sex between both opposite sex and same sex couples would "not long stand."¹¹⁶

Justice O'Connor's approach in *Lawrence* has been criticized; if a sex-neutral law were unenforced, it would stigmatize gays and lesbians while not affecting straight couples.¹¹⁷ And, if it were enforced, it would affect gays and lesbians in a more significant manner than heterosexuals.¹¹⁸ I agree with both of these critiques.

¹⁰⁸ The so-called "Golden Rule" instructs that we should do unto others as we would have them do unto us. *Matthew* 7:12.

¹⁰⁹ There are several formulations of Kant's categorical imperative but the basic idea is this: To act morally, one should act in ways that one can generalize. *See, e.g.,* IMMANUEL KANT, *GROUNDING FOR THE METAPHYSICS OF MORALS: ON A SUPPOSED RIGHT TO LIE BECAUSE OF PHILANTHROPIC CONCERNS* 30 (James W. Ellington trans., 3d ed. 1993) (1785) (explaining that "there is only one categorical imperative and it is this: Act only according to that maxim whereby you can at the same time will that it should become a universal law").

¹¹⁰ *See, e.g.,* JOHN RAWLS, *A THEORY OF JUSTICE* 136–42 (1971) (explaining that those principles that people would adopt in the hypothetical situation in which they do not know who they are in society—rich or poor, male or female, sick or healthy, etc.—are those that are just).

¹¹¹ 336 U.S. 106, 111–17 (1949) (Jackson, J., concurring).

¹¹² *Id.* at 112.

¹¹³ 539 U.S. 558, 584–85 (2003) (O'Connor, J., concurring in judgment).

¹¹⁴ *Bowers v. Hardwick*, 478 U.S. 186, 187–88, 190–91 (1986) (upholding a Georgia law that prohibited non-coital sex between any two adults).

¹¹⁵ *Lawrence*, 539 U.S. at 579–85 (O'Connor, J., concurring in judgment).

¹¹⁶ *Id.* at 584–85.

¹¹⁷ Tribe, *The Fundamental Right*, *supra* note 4, at 1910 (explaining that "[l]ike the fabled Sword of Damocles that does its awful work not by beheading its victim but simply by dangling above its victim's neck, even a sex-neutral ban on sodomy, especially one blessed by the Court, demeans intimate homosexual relationships at the same time that its virtually complete nonenforcement greatly reduces the incentive of heterosexuals, who are *not* demeaned by such a ban, to agitate for its repeal").

¹¹⁸ Brown, *supra* note 5, at 1498 (emphasizing that "laws that provide that 'no one may

My point here is to emphasize *how* the equality orientation operates when called upon to inform liberty. It operates like this description of such fusion in *Loving v. Virginia* by Justice Kennedy: “The reasons why marriage is a fundamental right became more clear and compelling from a full awareness and understanding of the hurt that resulted from laws barring interracial unions.”¹¹⁹ Justice O’Connor herself did not adopt the *Epistemic* approach to constitutional fusion that I am describing.¹²⁰ Nonetheless, the use she hoped to put equality to has its roots in the dynamic I emphasize here—with one important difference¹²¹

Both Justices Jackson and O’Connor want to use equality in a very practical manner.¹²² They want to insist that the law apply to all.¹²³ For the philosophers (Kant and Rawls), the method is hypothetical.¹²⁴ We imagine living without the liberty at issue. How would that feel? There is good reason for this move. In the real world, people are affected by things in different ways due to differences among them. The imaginative exercise helps to bridge these divides by inviting us to put ourselves in another’s shoes. If we do not know whether we are gay or straight, would we find the right to engage in non-coital sex to be a fundamental liberty? It is this imaginative, hypothetical exercise that the *Epistemic* approach draws upon. In this way, equality helps to show us what liberty entails.

D. How Liberty Helps Us Learn Which Traits Require Heightened Review

In an analogous fashion, liberty can show us what equality demands. There are two steps to this argument. First, I argue that we need help knowing what equal treatment requires in much the same way that we need help knowing what rights are truly fundamental. Second, I show how attention to who lacks access to fundamental liberties in the real world can show us which groups require the special solicitation provided by heightened review under the Equal Protection Clause.

The Equal Protection Clause demands that “[n]o state shall . . . deny to any person . . . the equal protection of the laws.”¹²⁵ This text creates an enduring puzzle.

[blank]’ can exploit difference as effectively as a classification, when the blank is an activity that ‘we,’ the political ins, have no wish to do, but that ‘they,’ the outs, claim a profound need to do in pursuit of personal fulfillment”).

¹¹⁹ *Obergefell v. Hodges*, 135 S. Ct. 2584, 2603 (2015).

¹²⁰ *Lawrence*, 539 U.S. at 584–85 (O’Connor, J. concurring in judgment).

¹²¹ *Id.*

¹²² *See id.* at 585 (“The framers of the Constitution knew, and we should not forget today, that there is no more effective practical guaranty against arbitrary and unreasonable government than to require that the principles of law which officials would impose upon a minority be imposed generally.” (quoting *Ry. Express Agency, Inc. v. New York*, 336 U.S. 106, 112 (1949) (Jackson, J., concurring))).

¹²³ *Id.*

¹²⁴ *See generally* KANT, *supra* note 109; RAWLS, *supra* note 110.

¹²⁵ U.S. CONST. amend. XIV, § 1.

Laws and policies distinguish among people all the time, on the basis of all sorts of traits. When does such distinction-drawing violate equal protection? There is no easy answer to this question. The historical circumstance of the adoption of the Fourteenth Amendment suggests that distinctions that disadvantage African Americans are especially constitutionally problematic, but beyond this fixed point, neither the text nor the history provide much guidance.¹²⁶ In addition, laws that ostensibly treat everyone the same affect people in different ways. Does this disparate impact also violate equal protection? These are difficult questions, made pressing by the fact that it is implausible to suggest that all laws that distinguish among people conflict with equal protection. To operationalize the Clause, the Court has created doctrine. According to current equal protection doctrine, some of these laws are subject to heightened judicial review. Which ones depends on whether the trait used to distinguish between people is a “suspect trait” like race, sex, and a few others, or, in cases where the law affects groups of people defined by these suspect traits in a disparate way, whether this impact is specifically intended.

We might wonder if this doctrine does a good job of capturing which laws fail to treat people as equals. But let’s take the doctrine we have as given. Still, new questions will arise. Should another trait be added to the list of suspect or quasi-suspect traits? Suppose judges and Justices, inspired by the humility that animates the *Epistemic* vision of the fusion of equal protection and due process, were to use that approach to better understand what the Equal Protection Clause requires. In order to do so, they would use the perspective of due process to better understand the demands of equal protection—just as one can use equality to better understand what liberties due process protects.

What would such an approach look like in practice? The judge would look out at our society and see if there are people who cannot, for whatever reasons, consistently and comfortably exercise their fundamental rights. If so, these groups are the ones in need of the protection of the Equal Protection Clause. That is the basic idea.

Let me illustrate. The Court has recognized fundamental rights to speech¹²⁷ and to procreative liberty,¹²⁸ among others. And the Court has elaborated on the scope of these rights. The First Amendment right to “freedom of speech” includes the right to spend an unlimited amount of money to advocate for a candidate or cause and includes the right to make contributions to a political candidate within a specified limit.¹²⁹ The Fourteenth Amendment’s Due Process Clause includes the right to abort a previable fetus.¹³⁰ In the case of both these rights, and likely others, differences

¹²⁶ See, e.g., *Brown v. Bd. of Educ.*, 347 U.S. 483, 489 (1954).

¹²⁷ See, e.g., *Gitlow v. New York*, 268 U.S. 652 (1925).

¹²⁸ See, e.g., *Roe v. Wade*, 410 U.S. 113, 152–53 (1973).

¹²⁹ *Buckley v. Valeo*, 424 U.S. 1, 39 (1976) (holding that giving and spending money in connection with elections is protected speech under the First Amendment).

¹³⁰ *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 860 (1992) (upholding the “central holding” of *Roe*); *Roe*, 410 U.S. at 153 (holding that a woman has a constitutionally protected liberty interest in deciding whether to terminate her pregnancy).

in wealth affect a person's ability to exercise these rights. Poor people are likely to be unable to make political donations. Poor people are likely to be unable to pay for abortions. While the poor have these rights in the abstract, they lack the ability to exercise these rights in any meaningful sense.

Is this of constitutional concern? In the case of the right to choose abortion, the Court has specifically addressed the question whether poor people must be given funds to access abortion, at least when the government is funding childbirth, and has answered that question with an emphatic "no."¹³¹

But this is not the only relevant question. The epistemic approach uses liberty to better understand what equal protection requires. It thus inverts the question that the Court considered in the abortion funding cases. The abortion-funding cases ask whether the fact that something is a fundamental right entails that the government must provide the means to exercise it.¹³² I envision the Court asking whether the fact that people can be too poor to exercise those liberties that are already recognized as fundamental suggests that poverty (or extreme poverty) ought to be viewed as a suspect class. I think there is a good argument for concluding "yes." If one is too poor to exercise fundamental liberties, then one is not a person of equal status within the community.¹³³ In truth, what could be clearer than that.¹³⁴

Of course, designating the extreme poor as a suspect class might not be that meaningful or valuable. There are few—perhaps no—laws and policies that explicitly treat people differently on the basis of the status of being poor. But the line between disparate treatment and disparate impact is especially porous when applied to poverty. Indeed, in many cases in which the Court examined whether it is permissible

¹³¹ *Harris v. McRae*, 448 U.S. 297, 302, 318 (1980) (upholding regulations forbidding federal payment for medically necessary abortions); *Maher v. Roe*, 432 U.S. 464, 474 (1977) (upholding a regulation providing Medicaid benefits for childbirth but not for medically unnecessary abortion).

¹³² In the context of some fundamental rights, the Supreme Court has answered that question in the affirmative. See *Gideon v. Wainwright*, 372 U.S. 335, 342 (1963) (holding that the Sixth Amendment right to counsel includes the right to state funded counsel in a criminal case if a person is too poor to pay for a lawyer himself). Interestingly, some constitutionally protected rights include within their ambit protection for the right to spend one's own money to exercise them and some do not. See Deborah Hellman, *Money and Rights*, 35 N.Y.U. REV. L. & SOC. CHANGE 527, 528 (2011) (describing which rights include the right to spend money in connection with their exercise and which do not and offering a potential explanatory rationale).

¹³³ My claim is substantially more modest than the claim of G. A. Cohen who argues that people who are too poor to exercise rights lack those rights, not merely the ability to exercise them. See G.A. Cohen, *Freedom and Money*, in *ON THE CURRENCY OF EGALITARIAN JUSTICE, AND OTHER ESSAYS IN POLITICAL PHILOSOPHY* 166–67 (Michael Otsuka ed., 2011).

¹³⁴ Tarunabh Khaitan argues that discrimination law—in the U.S. and in several other jurisdictions—protects those groups whose systematic and pervasive disadvantage limits their freedom. See generally TARUNABH KHAITAN, *A THEORY OF DISCRIMINATION LAW* (2015). His account provides support for the view that we should see who lacks basic freedoms and provide heightened review to those groups. *Id.*

to charge fees for various things, like access to judicial process and voting, the Court assessed these fees as if the statute at issue actually explicitly differentiated between the poor and the nonpoor.¹³⁵ For example, in *Griffin v. Illinois*, which held that a state must provide a trial transcript to an indigent criminal defendant appealing a conviction on nonfederal grounds, Justice Black's plurality opinion emphasized that "[i]n criminal trials a State can no more discriminate on account of poverty than on account of religion, race, or color."¹³⁶ Justice Black here treats the existence of the fee as equivalent to disparate treatment on the basis of poverty.¹³⁷ The requirement of a fee for a trial transcript does not explicitly differentiate on the basis of wealth.¹³⁸ Rather, fee requirements have a disparate impact on poor people who cannot afford the fees.¹³⁹ It is thus striking that Justice Black analogizes the disparate impact of a fee to disparate treatment on the basis of religion, race, or color.¹⁴⁰

This tendency to elide the distinction between disparate treatment and disparate impact is common in the context of laws and regulations that establish fees.¹⁴¹ Justice Douglas's opinion in *Douglas v. California*, which held that an indigent criminal defendant has a right to state provided counsel for the first appeal where the state provides an appeal as of right, is similar.¹⁴² Justice Douglas explained that "where the merits of the one and only appeal an indigent has as a right are decided without benefit of counsel, we think an unconstitutional line has been drawn between rich and poor."¹⁴³ This is also the approach of Justice Douglas in *Harper v. Virginia Board of Elections*.¹⁴⁴ The Court invalidated Virginia's poll tax because "[l]ines drawn on the basis of wealth or property, like those of race . . . are traditionally disfavored."¹⁴⁵ The fact that the statute at issue did not draw a line on the basis of wealth but instead had a disparate impact on the basis of wealth is absent from the Court's analysis.¹⁴⁶

¹³⁵ See, e.g., *Harper v. Va. Bd. of Elections*, 383 U.S. 663, 668 (1966); *Griffin v. Illinois*, 351 U.S. 12, 17 (1956).

¹³⁶ *Griffin*, 351 U.S. at 17.

¹³⁷ *Id.*

¹³⁸ *Id.* at 14.

¹³⁹ *Id.* at 18–19.

¹⁴⁰ *Id.* at 17.

¹⁴¹ E.g., *Harper v. Va. Bd. of Elections*, 383 U.S. 663, 668 (1966); *Douglas v. California*, 372 U.S. 353, 357 (1963).

¹⁴² 372 U.S. at 357.

¹⁴³ *Id.*

¹⁴⁴ 383 U.S. at 668 (striking down Virginia's poll tax as violating the Equal Protection Clause).

¹⁴⁵ *Id.* (citation omitted).

¹⁴⁶ See also *Lindsey v. Normet*, 405 U.S. 56, 79 (1972) (invalidating an Oregon requirement that tenants post a bond of twice the rent in order to appeal an eviction and emphasizing that "[t]he discrimination against the poor, who could pay their rent pending an appeal but cannot post the double bond, is particularly obvious"); *Williams v. Illinois*, 399 U.S. 235, 242 (1970) (striking down a state court judgment that required Williams to stay in jail beyond the statutory maximum for his crime because he could not pay the fines and court costs on

Perhaps the reason for the conflation of disparate treatment and disparate impact in these cases dealing with fees can be explained by the fact that they are decided prior to 1976, when the Court decided *Washington v. Davis*, the case that made the distinction between disparate treatment and disparate impact constitutionally significant.¹⁴⁷ In *Washington v. Davis*, the Court held that strict scrutiny does not apply to a facially neutral law that produces a disparate impact on a protected group absent a showing that the disparate impact was specifically intended.¹⁴⁸ It is surely true that prior to *Washington v. Davis*, the distinction between disparate treatment and disparate impact was less important and this likely explains, at least in part, why the fees cases treat these laws as if they contained wealth-based classifications. But, interestingly, the 1996 case *M.L.B. v. S.L.J.*, discussed earlier, continues that approach.¹⁴⁹ There the Court invalidates a Mississippi statute that requires payment of the costs of producing a record in order for a person to challenge the termination of parental rights.¹⁵⁰ Justice Ginsburg, writing for the Court, does address the fact that this law has a disparate impact form.¹⁵¹ Nonetheless, she asserts that laws like this one “are not merely *disproportionate* in impact . . . they are wholly contingent on one’s ability to pay”¹⁵² Thus, fees to access something may well be treated *as if* the statute at issue differentiates on the basis of wealth.¹⁵³

Let me recap. Using liberty to learn what groups should be afforded heightened review, we look at the world to see who is *actually* unable to exercise fundamental liberties. One group that stands out is poor people.¹⁵⁴ This analysis suggests that poor people should get special solicitude from equal protection doctrine. In addition, perhaps this solicitude should operate when laws take both a disparate impact and a disparate treatment form.¹⁵⁵

One caveat before proceeding. I am not saying that if we imagine limiting who may exercise a fundamental right and find that such a thing is deeply troubling, that tells us whether differentiation on the basis of the trait that defines that group should be problematic on equal protection grounds. If we did that, some odd results would follow. For example, suppose only blue-eyed people were permitted to vote. That

the grounds that “a law nondiscriminatory on its face may be grossly discriminatory in its operation” (quoting *Griffin v. Illinois*, 351 U.S. 12, 17 n.11 (1956))).

¹⁴⁷ *Washington v. Davis*, 426 U.S. 229, 239 (1976).

¹⁴⁸ *Id.* at 242 (explaining that “[d]isproportionate impact is not irrelevant, but it is not the sole touchstone of an invidious racial discrimination forbidden by the Constitution. Standing alone, it does not trigger the rule . . . that racial classifications are to be subjected to the strictest scrutiny and are justifiable only by the weightiest of considerations”) (citation omitted).

¹⁴⁹ *See generally* *M.L.B. v. S.L.J.*, 519 U.S. 102 (1996).

¹⁵⁰ *Id.* at 107.

¹⁵¹ *Id.* at 127.

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ *See supra* note 133 and accompanying text.

¹⁵⁵ *See supra* notes 135–41 and accompanying text.

would surely be problematic. But this does not mean that differentiation on the basis of eye color should be subject to heightened review. Rather, the argument begins with an observation about our world as it is. We look out at the world and ask: who is not *in fact* able to exercise fundamental rights? We then use that insight to give rise to a conjecture that such a group should be protected by our equal protection jurisprudence.

The reader may have noticed an interesting asymmetry between the way that equality informs liberty as compared with how liberty informs equality. Equality informs liberty by way of a hypothetical construct.¹⁵⁶ We envision ourselves in another's shoes and ask how it might feel to have the rule at issue—the liberty deprivation—applied to us.¹⁵⁷ Equality brings us together constructively and thereby helps us to learn what liberties are fundamental. It starts in the imagination and projects onto the world. The way that liberty informs equality works in the other direction.¹⁵⁸ It begins with an observation about the facts on the ground and asks what groups *in our society* are often unable to exercise fundamental liberties.¹⁵⁹ From these observations, we learn which traits or groups should be given heightened review under the equal protection clause.¹⁶⁰ This approach starts in the world and uses observations about our actual society to inform legal doctrine. In this way, the fusing of equal protection and due process, in a method analogous to Rawls “reflective equilibrium,” moves back and forth between the real world and the theory to form judgments informed by both.¹⁶¹

CONCLUSION

The two most common ways of understanding the fusion of equal protection and due process are aptly described as *Authentic* and *Pragmatic*. I hope I have given you a clear sense of what each of these are. I offer a third, conceptually distinct, rationale for the fusion of equal protection and due process, which I term *Epistemic*. The basic idea is this: we intertwine the clauses to help us uncover or learn about what both due process and equal protection do (or should) protect. The more familiar version of this phenomenon is the use of equality to learn about liberty. In order to get a better grasp of what liberties are indeed fundamental, we imagine the scenario in which no

¹⁵⁶ See discussion *supra* Section III.C.

¹⁵⁷ See discussion *supra* Section III.C.

¹⁵⁸ See discussion *supra* Section III.D.

¹⁵⁹ See discussion *supra* Section III.D.

¹⁶⁰ See discussion *supra* Section III.D.

¹⁶¹ RAWLS, *supra* note 110, at 20 (explaining how “reflective equilibrium” works by alternating between the level of theory, which posits principles for the hypothetical original position, and the level on considered judgments about what outcomes are just and that “[b]y going back and forth, sometimes altering the conditions of the contractual circumstances, at others withdrawing our judgments and conforming them to principle, I assume that eventually we shall find a description of the initial situation that both expresses reasonable conditions and yields principles which match our considered judgments duly pruned and adjusted”).

one has the freedom at issue. If this would be intolerable, then perhaps the liberty is fundamental. I suggest that this move has its roots in familiar moral ideas about generalizability, following Kant and Rawls.¹⁶² I then propose an inverse relation: perhaps we can learn about what equal protection requires with the help of some observations about fundamental liberties protected by the Due Process Clause. One of the central puzzles of equal protection jurisprudence is to determine which traits require heightened review: race, sex and some others. But which ones? I propose that we might look at our society and observe which categories of people are unable to exercise rights recognized as fundamental for insight into who might need the special protection of equal protection jurisprudence.

This *Epistemic* rationale for fusing equal protection and due process is new in *Obergefell v. Hodges*¹⁶³ and not yet recognized by scholars as a distinct reason to bring these clauses together. Yet, the guidance that equality provides about what liberties are fundamental has long been recognized.¹⁶⁴ As a focus on who lacks fundamental liberties can similarly inform us about what groups need the special solicitude of equal protection's heightened review, the *Epistemic* rationale for fusing these clauses looks worth exploring further.

¹⁶² See discussion *supra* Section III.C.

¹⁶³ *Obergefell v. Hodges*, 135 S. Ct. 2584, 2603 (2015).

¹⁶⁴ See discussion *supra* Section III.D.