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Oxford Handbook of the United States Constitution

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I. Introduction

"To secure the blessings of liberty," the Preamble to the US Constitution proclaims, "We the People . . . ordain and establish this Constitution." The Constitution is said to protect liberty through three principal strategies. First, the design of the Constitution as a whole protects liberty. As Alexander Hamilton famously put it in *The Federalist* No. 84, in arguing that a Bill of Rights enumerating specific liberties would be unnecessary: "the Constitution is itself, in every rational sense, and to every useful purpose, A BILL OF RIGHTS."[1] He contended that the Constitution, "founded upon the power of the people, and executed by their immediate representatives and servants," was "a better recognition of popular rights" than bills of rights, which were "in their origin, stipulations between kings and their subjects." [2]

Second, the Constitution through its structural arrangements, most notably separation of powers and federalism, ostensibly protects liberty. James Madison argued in *The Federalist* No. 51 that avoiding "a gradual concentration of the several powers in the same department" – what we today call "separation of powers" – is "essential to the preservation of liberty."[3] Similarly, Justice Kennedy recently wrote: "Federalism secures the freedom of the individual . . . by ensuring that laws enacted in excess of delegated governmental power cannot direct or control [persons'] actions." He contended: "By denying any one government complete jurisdiction over all the concerns of public life, federalism protects the liberty of the individual from arbitrary power. . . ."[4] There are two radically conflicting traditions concerning federalism in relation to

liberties. One tradition contends that "states' rights" protect the basic liberties of the individual against encroachment by the national government. The other tradition argues that a strong national government is necessary to protect the basic liberties of the individual against encroachment by the state governments.[5]

Finally, the Constitution protects liberty directly by securing rights. In this chapter, we will focus on such protection of liberty, in particular, through the Fifth and Fourteenth Amendments. The Due Process Clause of the Fifth Amendment, binding upon the national government, provides: "nor [shall any person] be deprived of life, liberty, or property, without due process of law." The Due Process Clause of the Fourteenth Amendment, binding upon the state governments, similarly provides: "nor shall any State deprive any person of life, liberty, or property, without due process of law."

At the outset, we should distinguish two conceptions of liberty: positive and negative. On the first, the Constitution imposes affirmative obligations upon government to secure the blessings of liberty. It is an instrument for pursuing the general welfare along with the other ends proclaimed in the Preamble. Thus, the Constitution is a "charter of positive benefits."[6] On the second, the Constitution protects people from the government, but does not impose affirmative obligations upon government to provide even basic services or benefits. The Constitution instead is a "charter of negative liberties."

The Rehnquist Court, in a 5-4 decision, championed the negative liberties view in DeShaney v. Winnebago County (1989), holding that the Fourteenth Amendment Due Process Clause did not obligate state officials to protect a child from violence in the home at the hands of his father.[7] Another well-known articulation of this view came in Jackson v. City of Joliet (1983), where Judge Richard Posner for the Seventh Circuit Court of Appeals held that the

Fourteenth Amendment did not require a state to provide police protection.[8]

Many have criticized this "negative liberties" conception as not true to the constitutional document and its design or to our actual constitutional practice in the 21st Century – with vast federal and state governments providing many services necessary to secure the blessings of liberty. In any case, some have argued that, even if the US Constitution is a charter of negative liberties, state constitutions by contrast are charters of positive benefits imposing affirmative obligations upon state governments – for example, through the police power – to secure the blessings of liberty.[9] The affirmative right to an education, recognized by all state constitutions, is a familiar illustration. Two prominent state supreme court decisions concerning same-sex marriage are also illustrative. In Baker v. State (1999), the Vermont Supreme Court interpreted its state constitution as affording an "affirmative right to the 'common benefits and protections' of government." In Goodridge v. Department of Public Health (2003), the Massachusetts Supreme Judicial Court held that the "individual liberty and equality safeguards of the Massachusetts Constitution protect both 'freedom from' unwarranted government intrusion into protected spheres of life and 'freedom to' partake in benefits created by the State for the common good."[10]

We also should distinguish two components of liberty. First, incorporation of certain basic liberties "enumerated" in the Bill of Rights as against the federal government to apply to the state governments. Here we shall consider the Fourteenth Amendment doctrine of "incorporation." Second, protection of "unenumerated" substantive liberties against encroachment by either the federal government or the state governments. Here we shall take up the Fifth and Fourteenth Amendment doctrine of "substantive due process" – protecting substantive liberties through the Due Process Clauses. Other clauses protect other liberties, for

example, the First Amendment protects freedom of speech and freedom of the press as well as religious liberty, the Second Amendment the right to bear arms. For discussion of those liberties, see Chapters V.I., V.H., and V.N. And some cases implicate both substantive liberties under the Due Process Clauses, such as parental liberty, and freedom of speech or religious liberty. We discuss some of these cases below. But our focus in this chapter will be on substantive liberties protected through the Due Process Clauses.

The Fourteenth Amendment includes three clauses that might serve as textual bases for protecting fundamental rights or liberties: the Privileges or Immunities Clause, the Due Process Clause, and the Equal Protection Clause, respectively:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The Privileges or Immunities Clause might seem to be the most promising textual basis for protecting fundamental rights or liberties. After all, it speaks of "privileges or immunities" of citizenship, which might appear to include such freedoms. The Due Process Clause speaks of "due process of law," which might seem to be limited to guaranteeing that the government must follow processes established under existing law, whatever the law is. That is, it might permit the government to deprive anyone of liberty, provided that it follows prescribed processes for doing so. Finally, the Equal Protection Clause speaks of "equal protection of the laws," which might appear to be limited to assuring equal protection under existing laws, whatever they are. That is, it might permit the government to treat everyone equally badly.

Yet in The Slaughter-House Cases (1873), the first judicial interpretation of the Fourteenth Amendment given five years after its ratification, the Supreme Court gutted the

Privileges or Immunities Clause. Although the dissenters interpreted the Fourteenth Amendment as "a new Magna Charta" and the Privileges or Immunities Clause in particular as protecting "natural and inalienable rights," "those which of right belong to the citizens of all free governments,[11] the majority limited the Clause to protecting only those rights "which owe their existence to the Federal Government, its National character, its Constitution, or its laws."[12] According to Justice Field in dissent, this interpretation reduced the Fourteenth Amendment to a "vain and idle enactment, which accomplished nothing, and most unnecessarily excited Congress and the people on its passage."[13]

Thus, to interpret the Fourteenth Amendment to secure fundamental rights or liberties, the Court had to overrule much of *Slaughter-House*, find another clause to bear the burden, or look beyond the constitutional document for justification. Despite recurring protests, the justices have opted to use the other clauses – the Due Process Clause doctrines of "incorporation" and "substantive due process" and the "fundamental rights or interests" strand of Equal Protection Clause doctrine – to protect fundamental rights or liberties. Judicial protection of such liberties is our present focus, but many scholars (ourselves included) and judges reject the idea that only courts protect rights. They argue for taking seriously the idea of "the Constitution outside the courts," and for recognizing that the Constitution imposes obligations upon legislatures and executives as well as courts to secure liberties.[14]

II. Incorporation

We now turn to the first component of liberty: "Incorporation" of certain basic liberties "enumerated" in the Bill of Rights to apply to the state governments. The protections of the Bill of Rights of their own force apply only to the federal government. Before adoption of the Fourteenth Amendment, the Court held that they did not limit the state governments.[15] Despite

recurring calls to revive use of the Privileges or Immunities Clause, the justices have used the Due Process Clause as the instrument of incorporation.

There have been at least four approaches to incorporation:

1. Due process incorporates all of the liberties expressly listed in the Bill of Rights (at least the first eight amendments), nothing more and nothing less—Justice Black argued for this position;[16]
2. Due process incorporates all of the Bill of Rights plus some other "fundamental" rights or liberties not listed there—Justice Douglas took this approach;[17]
3. Due process "selectively" incorporates only those parts of the Bill of Rights that are "of the very essence of a scheme of ordered liberty"—Justice Cardozo famously propounded this view in Palko v. Connecticut (1937);[18]
4. Due process "incorporates" none of the Bill of Rights as such; rather, as Justice Harlan put it, "The Due Process Clause stands . . . on its own bottom." Thus, even if it turns out that liberty encompasses rights enumerated in the Bill of Rights, it may not have the same content. Harlan elaborated this approach in dissent in Poe v. Ullman (1961) and in concurrence in Griswold v. Connecticut (1965).[19]

Officially, the Supreme Court has taken the selective incorporation route. Over time, the Court has held that the Due Process Clause incorporates almost all of the specific rights listed in the Bill of Rights. The only provisions not included have been the Fifth Amendment's right to indictment by grand jury[20] and the Seventh's right to a jury trial in civil cases where the amount

in controversy exceeds $20.[21] There has been no specific ruling on the Third Amendment's protection against nonconsensual quartering of troops in civilian homes in time of peace, though *Griswold*, a case involving state action, cited this guarantee as part of the general right to privacy.[22] The Court has also not specifically held that the Eighth Amendment's bans against excessive bail or excessive fines bind the states.[23]

III. Substantive Due Process

Next, we turn to the second component of liberty: the protection of "unenumerated" substantive fundamental rights or liberties against encroachment by the state governments or the federal government. Here we will focus on "substantive due process," but we will briefly mention the "fundamental rights or interests" strand of Equal Protection doctrine. We put "unenumerated" in quotation marks because some scholars (most notably, Ronald Dworkin and Charles Black) have argued that our constitutional commitments, for example, to liberty, equal protection, and freedom of speech, are abstract and do not "enumerate" their specific contents. On this view, it is "spurious" to object to protecting a basic liberty on the ground that it is not "enumerated" in the word "liberty," just as it would be "bogus" to object to protecting the right to burn flags on the ground that it is not "enumerated" in the words "freedom of speech."[24]

As noted above, the texts of these two clauses might make them seem problematic bases for protecting substantive fundamental rights or interests. The joint opinion of Justices O'Connor, Kennedy, and Souter in Planned Parenthood v. Casey (1992) begins: "Although a literal reading of the [Due Process] Clause might suggest that it governs only the procedures by which a State may deprive persons of liberty . . . ." On that reading, the controlling word in the Clause is "process." But, *Casey* continued: "at least since Mugler v. Kansas (1887), the Clause has been understood to contain a substantive component as well." On that reading, as *Casey* put

it, "[t]he controlling word in the case before us is 'liberty.'"[25]

We shall distinguish three phases in judicial protection of fundamental rights or liberties: (1) from 1887 to 1937; (2) from 1937 to 1973; and (3) from 1973 to the present.

A. 1887 to 1937

During the first phase, the era of Lochner v. New York (1905), the conventional understanding is that the Court aggressively protected economic liberties – such as liberty to contract – along with personal liberties – such as the liberty of parents to direct the upbringing and education of their children – without distinguishing between the two. Both were seen as essential liberties to be protected under the Due Process Clauses. Meyer v. Nebraska (1923) gave a classic formulation concerning liberty during the *Lochner* era:

> While this Court has not attempted to define with exactness the liberty thus guaranteed, the term has received much consideration and some of the included things have been definitely stated. Without doubt, it denotes 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, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men. Slaughter-House Cases [1873]; Yick Wo v. Hopkins [1886]; Minnesota v. Barber [1890]; Allgeyer v. Louisiana [1897]; Lochner v. New York [1905]; Twining v. New Jersey [1908]; Truax v. Raich [1915]; Adams v. Tanner [1917]; Truax v. Corrigan [1921]; Adkins v. Children's Hospital [1923].[26]

Note that most of these liberties that have been "definitely stated" in the precedents are not "enumerated" in the text of the Constitution. Those that are – freedom of speech and freedom of religion – are enumerated only as against the federal government. They have been incorporated through the Due Process Clause of the Fourteenth Amendment and made applicable to the state governments.

But *Meyer* conceived liberty more generally as including not only the things that have

been enumerated in the Constitution or "definitely stated" in the precedents, but also "those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men."[27] Here the Court prefigures later formulations of the due process inquiry such as those in *Palko* ("implicit in the concept of ordered liberty") and Loving v. Virginia (1967) ("essential to the orderly pursuit of happiness by free men").[28] Still more abstractly, *Meyer* intimates a fundamental theory of liberty – of "the relation between the individual and the state" – as prohibiting the state from "submerg[ing] the individual and develop[ing] ideal citizens."[29] Two years later, Pierce v. Society of Sisters (1925) articulated this theory of liberty as forbidding the state to "standardize" its children by treating them as "the mere creature[s] of the state" to be crafted into its vision of ideal citizens.[30] Here the Court anticipates what has come to be known as the "level of generality problem" in the formulation of rights recognized in traditions or precedents. The Court clearly conceives liberty as an abstract principle, not a concrete historical practice or a specific original meaning.

Meyer and *Pierce* upheld the right of parents to direct the upbringing and education of their children by striking down, respectively, a state statute prohibiting the teaching of any modern language other than English in any public or private grammar school and a state statute requiring parents to send their children between the ages of eight and sixteen, with limited exceptions, to public schools rather than private schools.

The most famous, or infamous, decision of this era was its namesake, *Lochner* (1905). The case involved a challenge to a New York maximum hours law, which required that "no employee shall be required or permitted to work" more than sixty hours in one week. The law was ostensibly an exercise of the state's police power. Stringently protecting liberty of contract against governmental regulation, the Court invalidated the law. The Court viewed the state's

professed police power concern to protect the health of bakers or the welfare of the public as a "mere pretext" for "other motives": "simply to regulate the hours of labor between the master and his employees." The Court seemed to fear that upholding such legislation under the police power would put us on a slippery slope leading to the end of all constitutional limitations upon governmental power: "the supreme sovereignty of the State to be exercised free from constitutional restraint."[31]

During the *Lochner* era, the Court struck down a number of state and federal economic regulations on the ground that they denied liberty of contract. During that period and since then, *Lochner* has become a symbol of illegitimate judicial review. Yet just what was so wrong about *Lochner* is a matter of perennial controversy. We return to these matters below.

In West Coast Hotel v. Parrish (1937), at the height of the confrontation between President Franklin Roosevelt and the Supreme Court concerning the constitutionality of the New Deal, the Court repudiated the *Lochner* era and therewith aggressive judicial protection of economic liberties under the Due Process Clauses. The Court instead began to apply what has come to be known as "deferential rational basis scrutiny" in deciding the constitutionality of economic regulations: "regulation which is reasonable in relation to its subject and is adopted in the interests of the community is due process."[32] Applying this deferential standard, the Court upheld a state minimum wage law against the challenge that it violated liberty of contract. In justifying this shift, the Court took judicial notice of "recent economic experience" during the depression. It stated that "the liberty safeguarded [by the Constitution] is liberty in a social organization which requires the protection of law against the evils which menace the health, safety, morals and welfare of the people" and concluded that "[e]ven if the wisdom of [legislative] policy be regarded as debatable and its effects uncertain, still the Legislature is

entitled to its judgment."[33]

Although it may not have been clear in 1937, it turned out that the Court left undisturbed the cases from the *Lochner* era protecting personal liberties (such as the right to direct the upbringing and education of children in *Meyer* and *Pierce*) as distinguished from economic liberties (such as liberty to contract in *Lochner*). Ultimately the Court built upon the former cases from 1965 to the present in protecting substantive personal liberties.

B. 1937 to 1973

During the second phase, from 1937 to 1973, the Court eschewed protecting fundamental rights or liberties on the basis of the Due Process Clauses alone. In Skinner v. Oklahoma (1942), the Court considered the constitutionality of an Oklahoma statute requiring sterilization of "habitual criminals" – persons convicted two or more times for some felonies involving "moral turpitude." The statute excepted certain "white collar" crimes: "offenses arising out of the violation of the prohibitory laws, revenue acts, embezzlement, or political offenses."[34] Jack Skinner, who had been convicted of stealing chickens and of robbery with firearms, challenged the proceedings to order his sterilization.

The Court opened the opinion by waxing eloquent about "important . . . human rights," speaking of "the right to have offspring" or of procreation as a "fundamental" or "basic civil right."[35] But it did not hold that the state may not sterilize anyone on the ground that there is a fundamental right to procreate rooted in the Due Process Clause. The ghost of *Lochner* foreclosed that straightforward option so soon after *West Coast Hotel*. Instead, the Court protected that right by establishing what came to be known as the "fundamental rights or interests" strand of Equal Protection doctrine (as distinguished from the "suspect classifications" strand). The Court held the Oklahoma statute unconstitutional on the ground that equal

protection requires that the state must either (1) sterilize embezzlers along with larceners or (2) sterilize neither class of "habitual criminals." All or none. Retrospectively, though, the Court has sometimes cited *Skinner* as if it were a substantive due process case involving the fundamental right to procreate – which the state may not deny to anyone – rather than an equal protection case merely holding that the state must treat everyone equally.[36]

Over the next three decades, the Court developed the fundamental rights and interests strand of Equal Protection doctrine – sometimes called "substantive equal protection" – and largely eschewed protecting substantive liberties under the Due Process Clause alone. The two most illustrious cases that might seem to be counter-examples, but which in fact confirm the point, are *Griswold* (1965) (protecting a right of privacy through invalidating a law prohibiting the use of contraceptives by married couples), and *Loving* (1967) (protecting a right to marry by invalidating a law prohibiting interracial marriage).

Writing for the Court in *Griswold*, Justice Douglas, a veteran of the New Deal critique of *Lochner*, officially avoided reviving substantive due process as the basis for protecting the right of privacy. Rather than deriving "unenumerated" rights from the word "liberty,"[37] he grounded the right in the language and the "penumbras" or "emanations" of "specific guarantees in the Bill of Rights," namely, the First, Third, Fourth, and Fifth Amendments.[38] Douglas invoked the command of the Ninth Amendment – "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." – to justify going beyond the bare enumeration of the foregoing rights so as not to exclude the protection of the penumbras or emanations that were not explicitly enumerated.[39] Finally, connecting the dots of the letters and penumbras, Douglas stated that this case "concerns a relationship lying within the zone of privacy created by several fundamental constitutional guarantees."[40]

Loving held that Virginia's miscegenation statute prohibiting and punishing interracial marriage violated both the Equal Protection and Due Process Clauses. First, it held that the law reflected invidious racial discrimination that denied equal protection.[41] Second, Chief Justice Warren's opinion of the Court added that the law denied the fundamental right to marry in violation of the Due Process Clause. Warren began by saying: "The freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men." He continued:

> To deny this fundamental freedom on so unsupportable a basis as the racial classifications embodied in these statutes, classifications so directly subversive of the principle of equality at the heart of the Fourteenth Amendment, is surely to deprive all the State's citizens of liberty without due process of law. The Fourteenth Amendment requires that the freedom of choice to marry not be restricted by invidious racial discriminations.[42]

This passage demonstrates the thoroughgoing overlap between the Court's due process holding and its equal protection holding concerning invidious racial discrimination.

Bruce Ackerman reports that Warren's first draft of the opinion in *Loving* cited *Meyer*, the substantive due process precedent from the era of *Lochner*, but that Justice Black, an adamant opponent of substantive due process, objected.[43] Warren deleted the specific citation to *Meyer*, and instead intertwined the due process holding with the equal protection holding concerning invidious racial discrimination. But Warren still managed to insert into *Loving* a formulation straight out of *Meyer* – characterizing the fundamental right to marry as "essential to the orderly pursuit of happiness by free men."[44]

In San Antonio v. Rodriguez (1973), the Supreme Court shut down further expansion of the fundamental rights or interests strand of Equal Protection Doctrine, holding that there was no judicially enforceable right to an equal education. (The Court upheld a state system of financing

public education based in part on property taxes that resulted in the amount of school expenditures varying widely from district to district.)[45] The Court took a "this far and no further" approach, declining to recognize "new" fundamental rights or interests (or "new" suspect classifications such as wealth). It did not overrule the fundamental rights or interests equal protection cases. It simply stopped further developing that line of doctrine, proclaiming that "[i]t is not the province of this Court to create substantive constitutional rights in the name of guaranteeing equal protection of the laws."[46]

Just two months earlier, though, in Roe v. Wade (1973), the Supreme Court officially revived substantive due process: protecting a substantive liberty – the right of a woman to decide whether to terminate a pregnancy – under the Due Process Clause alone.[47] Rarely is history so tidy: the Court shut down use of the Equal Protection Clause to protect fundamental rights at the very moment that it revived use of the Due Process Clause to do so. A common understanding is that the early Burger Court was wary of and wanted to curb what it saw as the Warren Court's egalitarian revolution, but was comfortable with protecting basic liberties developed in a line of decisions through common law constitutional interpretation.

C. 1973 to the present

In *Roe*, the Court stated generally that the Due Process Clause's guarantee of "personal privacy" protects "personal rights" "implicit in the concept of ordered liberty," citing *Palko*.[48] The Court has recognized at least the following substantive liberties under the categories of privacy, autonomy, or substantive due process:

1. liberty of conscience and freedom of thought;
2. freedom of association, including both expressive association and intimate association, whatever one's sexual orientation;

3. the right to live with one's family, whether nuclear or extended;
4. the right to travel or relocate;
5. the right to marry;
6. the right to decide whether to bear or beget children, including the rights to procreate, to use contraceptives, and to terminate a pregnancy;
7. the right to direct the education and rearing of children, including the right to make decisions concerning their care, custody, and control; and
8. the right to exercise dominion over one's body, including the right to bodily integrity and ultimately the right to die (at least to the extent of the right to refuse unwanted medical treatment).[49]

There are two radically different views concerning this list of substantive fundamental rights or liberties. One view is that it is a subjective, lawless product of judicial fiat and that the whole enterprise is indefensibly indeterminate and irredeemably undemocratic.[50] The other view is that the list represents a "rational continuum" of basic liberties stemming from "the individual's right to make certain unusually important decisions that will affect his own, or his family's, destiny."[51] It has been developed through common law constitutional interpretation: reasoning by analogy through the line of decisions and making judgments about what basic liberties are significant for personal self-government.[52]

IV. Three Competing Understandings of Liberty and Tradition in the Due Process Inquiry

Officially, the criterion for deciding cases involving both components of liberty – (1) what liberties enumerated in the Bill of Rights are incorporated through the Due Process Clause against the states and (2) what "unenumerated" substantive liberties are protected against encroachment by either the federal government or the state governments – is the same: whether

the asserted liberty is "implicit in the concept of ordered liberty," *Palko*.

In some cases since *Roe*, the Supreme Court has applied an alternative formulation in the latter context of substantive due process: whether the asserted liberty is "deeply rooted in this Nation's history and tradition," Moore v. City of East Cleveland (1977). In some cases before *Roe*, the Court had offered this formulation: whether the asserted liberty comes within a "principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental," Snyder v. Massachusetts (1934). Yet another well-known formulation was: "fundamental principles of liberty and justice which lie at the base of all our civil and political institutions," Hebert v. Louisiana (1926).[53] These several formulations raise the question of what constitutes a tradition and therefore the baseline for what liberties are protected by the Due Process Clauses.

Tracing the substantive due process inquiry from *Roe* (1973) to Lawrence v. Texas (2003) reveals how the Court and individual justices have waged a contentious battle among three available conceptions of what constitutes a tradition:[54]

1. *abstract aspirational principles* (for example, Justice Cardozo's opinions of the Court in *Palko* and *Snyder*, and Justice Brennan's dissenting opinion in Michael H. v. Gerald D. (1989)) – abstract principles to which we as a people aspire, and for which we as a people stand, whether or not we have always realized them in our historical practices, statute books, or common law;[55]
2. *concrete historical practices* (for example, Justice Scalia's plurality opinion in *Michael H.*) – liberty includes whatever liberties were protected specifically in the statute books or recognized concretely in the common

law when the Fourteenth Amendment was adopted in 1868;[56] and

3. a *"rational continuum"* and a *"living thing"* or evolving consensus (for example, Justice Harlan's dissenting opinion in *Poe*) – liberty is a "rational continuum," a "balance struck by this country, having regard to what history teaches are the traditions from which it developed as well as the traditions from which it broke. That tradition is a living thing."[57]

The third conception for all practical purposes is similar to the first, although the first seems to contemplate a more philosophical inquiry in elaborating abstract principles, the third a more historical inquiry in articulating evolving consensus.

Between *Roe* and Bowers v. Hardwick (1986), an important change occurred in the Supreme Court's conception of the due process inquiry. The Court moved from (1) considering whether an asserted "unenumerated" fundamental right is "of the very essence of a scheme of ordered liberty," or is required by a "principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental," to (2) considering only whether it historically has been protected against governmental interference. The former formulations call for an inquiry into traditions conceived as *abstract aspirational principles,* while the latter makes an inquiry into traditions understood as *concrete historical practices*.

Roe conceived due process as encompassing the basic liberties implicit in a scheme of ordered liberty embodied in our Constitution – or again, the fundamental principles of justice to which we as a people aspire and for which we as a people stand – whether or not we actually have realized them in our historical practices, common law, and statute books. On this view, our aspirational principles may be critical of our historical practices, and our basic liberties and traditions are not merely the Burkean deposit of those practices. Cases such as *Griswold* and

Roe, as well as *Loving,* broke from historical practices in pursuit of due process and traditions in the sense of aspirational principles.

In *Bowers* (1986), by contrast, the Court per Justice White narrowly conceived the due process inquiry as a backward-looking question concerning historical practices, stripped of virtually any aspirational force or critical bite with respect to the status quo. White simply recounted our nation's historical practices disapproving homosexual sodomy and dismissed the claim that the Due Process Clause protects "a fundamental right of homosexuals to engage in acts of consensual sodomy" as, "at best, facetious."[58]

Justice Scalia's plurality opinion in *Michael H.* (1989) was an attempt to narrow the *Bowers* due process inquiry even further, limiting substantive due process to include only those rights that actually have been protected through historical practices, common law, and statutes. Scalia argued against conceiving protected rights abstractly, insisting on framing them at "the most specific level [of generality] at which a relevant tradition protecting, or denying protection to, the asserted right can be identified."[59] For example, in *Michael H.*, in rejecting an unwed biological father's assertion of parental visitation rights, Scalia framed the right at issue not in abstract terms of rights of parenthood (as Justice Brennan did in dissent), but in highly specific terms as the right of "the natural father to assert parental rights over a child born into a woman's existing marriage with another man," or the right to have a state "award substantive parental rights to the natural father of a child conceived within, and born into, an extant marital union that wishes to embrace the child."[60] That same year, concurring in Cruzan v. Director, Missouri Dept. of Health (1989), Scalia warned that if the Court used the Due Process Clause to try to protect the citizenry from "irrationality and oppression" through recognizing substantive liberties, "it will destroy itself."[61] For the ghost of *Lochner* lurks. We should note, however, that in *Cruzan,*

the majority took a broader view of liberty than did Scalia, "assum[ing]" that the Due Process Clause protected the right to refuse unwanted medical treatment.[62]

In *Casey* (1992), affirming the central holding of *Roe* (with qualifications noted below), the joint opinion rejected Scalia's *Michael H.* jurisprudence as "inconsistent with our law," namely, the line of decisions protecting substantive liberties under the Due Process Clause.[63] *Casey* instead accepted the third approach identified above: Justice Harlan's approach in dissent in *Poe*. We shall distill four characteristics of Harlan's substantive due process jurisprudence.

First, Harlan conceived the liberty guaranteed by the Due Process Clause as a "rational continuum" of ordered liberty, not a "series of isolated points pricked out" in the constitutional document. It is an abstract concept (as *Casey* put it, "ideas and aspirations"), not a list of concrete, enumerated rights. Second, he conceived interpretation of abstract commitments like liberty as a "rational process" of "reasoned judgment," not a quest for a formula, code, or bright-line rule framework to avoid judgment. Third, interpreting liberty requires judgment about the balance between liberty and order ("ordered liberty") and uses common law constitutionalist reasoning by analogy from one case to the next. Finally, while Harlan agreed with Scalia that judgments about liberties must be grounded in history and tradition, Harlan unlike Scalia conceived tradition as a "living thing" or evolving contemporary consensus, not historical practices as of the time the Due Process Clause was ratified (in 1868).[64]

In sum, the joint opinion in *Casey* conceived the due process inquiry as requiring "reasoned judgment" in interpreting the Constitution, understood as a "covenant" or "coherent succession" whose "written terms embody ideas and aspirations that must survive more ages than one" and guarantee "the promise of liberty." It concluded: "We accept our responsibility not to retreat from interpreting the full meaning of the covenant in light of all of our precedents."[65]

Casey clearly conceived liberty as an abstract aspirational principle, not a concrete historical practice.

In Washington v. Glucksberg (1997), in which the Court declined to extend the right to refuse unwanted medical treatment to include the right to physician-assisted suicide, Chief Justice Rehnquist sought to rein in the *Poe-Casey* formulation of the due process inquiry. Rehnquist wrote that the Court's "established method of substantive due process analysis has two primary features": "First, we have regularly observed that the Due Process Clause specially protects those fundamental rights and liberties which are, objectively, 'deeply rooted in this Nation's history and tradition,' . . . and 'implicit in the concept of ordered liberty.' . . . Second, we have required . . . a 'careful description' of the asserted fundamental liberty interest."[66] In calling for a "careful description" of the asserted right and an "objective[]" inquiry into "[o]ur Nation's history, legal traditions, and practices," Rehnquist called to mind Scalia's formulation of the due process inquiry in his plurality opinion in *Michael H.* and in his concurring opinion in *Cruzan.*

In *Lawrence* (2003), however, Justice Kennedy's opinion of the Court repudiated the framework of *Glucksberg* in favor of an understanding like that in *Casey.* (*Lawrence* overruled *Bowers*, holding that the Due Process Clause protects "homosexual persons'" right to privacy regarding consensual sexual conduct.) It signaled a return to a conception of tradition as a rational continuum or evolving consensus of aspirational principles. In fact, one reason Scalia was so indignant in dissent in *Lawrence* is his belief that *Glucksberg* had "'eroded'" *Casey*'s conception of the due process inquiry.[67] Kennedy wrote in *Lawrence:*

> Had those who drew and ratified the Due Process Clauses of the Fifth Amendment or the Fourteenth Amendment known the components of liberty in its manifold possibilities, they might have been more specific. They did not presume

> to have this insight. They knew times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress. As the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom.[68]

This passage underscores that the Court conceived the Constitution as an abstract scheme of principles such as liberty to be elaborated over time – in a "search for greater freedom" – not as a specific code of historical practices and enumerated rights (or an expression of the founders' intentions, understandings, and meanings to be discovered and preserved).

If Kennedy did not claim to ground the right to privacy or autonomy in original understanding or concrete historical practices, where did he ground it? The answer is in the line of privacy or autonomy cases beginning with *Griswold* and running through *Roe* and *Casey* and in an understanding of tradition as an evolving consensus of aspirational principles.[69] Kennedy conceived tradition not as a positivist, historicist, or traditionalist deposit of "millennia of moral teaching" (to quote Chief Justice Burger's concurrence in *Bowers*),[70] but as an evolving consensus about how best to realize liberty (and by implication equality) as an aspirational principle.

Since 2003, the Supreme Court has not retreated from *Lawrence*. In fact, in United States v. Windsor (2013), the Court drew upon *Lawrence*'s understanding of liberty together with Romer v. Evans's understanding of equality in striking down Section 3 of the Defense of Marriage Act, which had defined marriage for purposes of federal law as "only a legal union between one man and one woman."[71] Yet there is no reason to expect that *Lawrence* will be the last word concerning the due process inquiry. The pendulum likely will continue to swing back and forth among these competing understandings of what liberties are embodied in our traditions.

V. The "Double Standard" Concerning Economic Liberties Versus Personal Liberties: "The

Ghost of *Lochner*"

A recurring issue surrounding judicial protection of substantive liberties is that of the so-called double standard concerning economic liberties as distinguished from personal liberties. The question is whether the Supreme Court can justify aggressively protecting personal liberties while deferring to legislative regulation of economic liberties. Put more concretely, can the Court simultaneously justify its repudiation of *Lochner*'s aggressive judicial protection for economic liberties and its embrace of *Roe*'s aggressive judicial protection for personal liberties?[72]

To get at this issue, we must ask, why is *Lochner* infamous? What does it mean to summon the ghost of *Lochner*? Our response is that it means to charge someone with doing whatever it was that the Supreme Court did in *Lochner* that was so horrible! The response may seem vacuous, but it is not. The point is that, at least since the New Deal, constitutional scholars and judges have used *Lochner* as a rhetorical club to criticize their opponents. It is part of what Jamal Greene has called the "anticanon" of constitutional law.[73] Each theory of constitutional interpretation and judicial review has different implications for what, if anything, was wrong with *Lochner* (as well as for the relationship between *Lochner*, on the one hand, and *Roe*, on the other).

We shall sketch several theories' views concerning *Lochner* in relation to *Roe*.

- *Deferring to the Representative Processes*: for those who believe that courts should defer to legislatures in all types of cases, *Lochner* was wrong simply because the Court did *not defer* to the legislature's interpretation of the Constitution as permitting the regulation of weekly working hours as a valid exercise of the police power. The first Justice Harlan's dissent reflects this theory, as does Justice Holmes's dissent.[74] On this view, what was wrong with *Lochner* is also wrong with *Roe*.

- *Originalism*: for those who profess the version of originalism that entails that courts should enforce only the rights enumerated in the text of the Constitution, *Lochner* was wrong because the Court protected *"unenumerated"* fundamental rights through the Due Process Clause. Justice Scalia espouses this view, as did Robert Bork in his book, *The Tempting of America*.[75] From this standpoint, what was wrong with *Lochner* is also wrong with *Roe*.
- *Reinforcing the Representative Process*: for those who believe that the Constitution protects only process-oriented rights, what was wrong with *Lochner* is not that the Court protected "unenumerated" fundamental rights through the Due Process Clause, but that it protected "unenumerated" *substantive* fundamental rights, rights that are not essential to the *processes* of representative democracy. Justice (later Chief Justice) Stone's footnote four in United States v. Carolene Products Co. (1938) – as articulated by John Hart Ely's influential book, *Democracy and Distrust* – reflects this vision.[76] On this view, what was wrong with *Lochner* is also wrong with *Roe*.
- *Protecting Fundamental Rights: Personal Liberties*: for those who believe that the Constitution protects not only process-oriented rights, but also substantive fundamental rights essential to personal autonomy, the problem with *Lochner* is that the Court protected the *wrong* substantive fundamental rights, that is, economic liberties as distinguished from personal liberties. Justices Douglas and Brennan took this view.[77] From this standpoint, the Court was wrong to protect substantive *economic* liberties in *Lochner*, but right to protect substantive *personal* liberties in *Roe*. Here we see the most common version of the "double standard."

- *A Variation on Protecting Fundamental Rights: Personal Liberties*: On this variation, economic liberties and property rights, like personal liberties, are fundamental liberties secured by the Constitution. In fact, economic liberties and property rights are so fundamental in the constitutional scheme, and so sacred in the constitutional culture, that there is no need and no good argument for aggressive judicial protection of them. Rather, such liberties are understood properly as "judicially underenforced norms." Their fuller enforcement and protection is secure with legislatures and executives in "the Constitution outside the courts." On this view, the Court was wrong to protect substantive *economic* liberties in *Lochner*, but right to protect substantive *personal* liberties in *Roe*.[78]
- *Reinforcing Deliberative Democracy*: for those who believe that the Constitution establishes a scheme of "deliberative democracy," what was wrong with *Lochner* has nothing to do with protecting "unenumerated" substantive fundamental rights: it was *status quo neutrality*, that the Court took the status quo of existing distributions of wealth and political power as neutral and presumptively justified, such that any governmental regulation of them was presumptively partisan and unconstitutional. Cass Sunstein has articulated the best-known version of this view.[79] From this viewpoint, what was wrong with *Lochner* is unrelated to *Roe* because, far from evincing status quo neutrality, the latter case is justified on the basis of an anti-caste principle of equality that is critical of the status quo. Indeed, *Roe* is tantamount to a Brown v. Board of Education (1954) for women, vital to securing the status of equal citizenship. Here we see another version of the "double standard."

Notwithstanding the criticisms directed at *Lochner* all these years, some have argued in recent years that *Lochner*, properly understood and reconstructed, was rightly decided after all.[80]

Here we see a split between the "new right" originalist conservatives like Justice Scalia (who criticize *Lochner*) and the "old right" libertarian conservatives (who defend or reconstruct it).[81]

- Some of the latter argue that *Lochner* was decided rightly, and the Court should revive aggressive judicial protection of economic liberties as well as personal liberties through the Due Process Clause. In short, the Court should abandon the "double standard." This view entails that *Lochner* and *Roe* were both decided rightly – both involved judicial protection of basic liberties that are fundamental or integral to personhood, liberty, or autonomy.[82]

- Others argue that *Lochner* was decided rightly, and the Court should revive aggressive judicial protection of economic liberties, but should abandon aggressive judicial protection of personal liberties. In other words, the Court should invert the "double standard." On one version of this view, *Lochner* should have been decided on the basis of the Takings Clause of the Fifth Amendment and/or the Contracts Clause of Article I, Section 10, not the Due Process Clause. That is, the Court should aggressively protect "enumerated" economic liberties; but it should not aggressively protect "unenumerated" personal liberties.[83] On such views, *Lochner* was decided rightly, but *Roe* was decided wrongly.

VI. The Stringency of the Protection of Liberty under the Due Process Clauses

We come next to the question of the stringency of the protection of liberties under the Due Process Clauses. In constitutional law, it is commonplace to say that the Supreme Court applies absolutist "strict scrutiny" in protecting fundamental rights or liberties under the Due Process Clauses. Dissenting in *Lawrence*, Justice Scalia stated that, under the Due Process Clauses, if an asserted liberty is a "fundamental right," it triggers "strict scrutiny" that almost

automatically invalidates any statute restricting it. For strict scrutiny requires that the challenged statute, to be upheld, (1) must further a "compelling governmental interest" and (2) must be "necessary" or "narrowly tailored" to doing so. Scalia also wrote that if an asserted liberty is not a fundamental right, it is merely a "liberty interest" that triggers rational basis scrutiny that is so deferential that the Court all but automatically upholds the statute in question. For deferential rational basis scrutiny requires merely that the challenged statute, to be valid, (1) must further a "legitimate governmental interest" and (2) need only be "rationally related" to doing so.[84] In attempting to limit the protection of substantive liberties under the Due Process Clauses, Scalia argued for a narrow approach to what constitutes a "fundamental right" and a broad approach to what constitutes a mere "liberty interest."

Lawrence deviated from this regime. The Court did not hold that gays' and lesbians' right to autonomy was a fundamental right requiring strict scrutiny. Nor did it hold that their right was merely a liberty interest calling for highly deferential rational basis scrutiny. Instead, the Court applied an intermediate standard – what we will call "rational basis scrutiny with bite" – and struck down the statute forbidding same-sex sexual conduct. Instead of deferring to the state's proffered "legitimate governmental interest" in preserving traditional sexual morality, the Court (explicitly in Romer v. Evans (1996) and implicitly in *Lawrence*) put some bite into its scrutiny of the legitimacy of the end and found illegitimate "animosity" toward and a "bare desire to harm" a "politically unpopular group."[85]

Justice Scalia chastised the Court for not following the rigid two-tier framework that all but automatically decides rights questions one way or the other.[86] Many scholars and judges have questioned whether the Court's actual practice has followed or should follow this framework.[87] Indeed, the only substantive due process case ever to recognize a "fundamental right"

implicating "strict scrutiny" – requiring that the statute further a compelling governmental interest and be necessary to doing so – was *Roe*.[88] And those aspects of *Roe* were overruled in *Casey*, which avoided calling the right of a woman to decide whether to terminate a pregnancy a "fundamental right" and substituted an "undue burden" standard for strict scrutiny. Under this less stringent test, the Court instead inquires whether a state regulation "has the purpose or effect of placing a substantial obstacle" to or undue burden upon a woman's exercise of the right to make the "ultimate decision" whether to have an abortion.[89]

Moreover, the leading due process cases *protecting* liberty and autonomy – from *Meyer* (1923) through *Moore* (1977) on up through *Casey* (1992) and *Lawrence* (2003) – have not applied the framework that Scalia propounds: the Court has not recognized two rigidly-policed tiers of scrutiny, with strict scrutiny automatically invalidating laws and deferential rational basis scrutiny automatically upholding them. Instead, actual practice in the leading cases protecting liberties maps onto a continuum of ordered liberty, with several intermediate levels of review.[90] These tiers include the undue burden standard exemplified in *Casey* and the rational basis scrutiny "with bite" illustrated by *Lawrence*. Early cases like *Meyer* and *Pierce* reflect a form of review resembling that in *Lawrence*.

We also see a form of intermediate scrutiny exemplified by *Moore*. *Moore* protected the right of an extended family to live together in invalidating an ordinance limiting occupancy of each dwelling unit to members of a single family, with "family" defined essentially as the nuclear family of parents and their children. *Moore* did not officially articulate intermediate scrutiny as the framework for Due Process analysis. Still, it formulated the test as: "[W]hen the government intrudes on choices concerning family living arrangements, this Court must examine carefully the importance of the governmental interests advanced and the extent to which they are

served by the challenged regulation."[91] Justice Powell added: "Of course, the family is not beyond regulation."[92] Like *Moore*, many cases surrounding the legal regulation of the family (*e.g.*, Prince v. Massachusetts (1944) and Troxel v. Granville (2000)) demonstrate the following two-step framework that amounts to a form of intermediate scrutiny:

1. Determine that the right in question – for example, the right to marry, the right to decide one's family living arrangements, or the right to parental liberty – is fundamental.
2. Conclude that even though the right is fundamental, it does not entail that reasonable regulations are unconstitutional.[93]

Thus, the cases *protecting* substantive liberties reflect a continuum of judgmental responses, not a framework with two rigidly-policed tiers.[94]

The cases that have applied Scalia's framework have been the cases *refusing to recognize* asserted rights: *Bowers*, *Michael H.*, and *Glucksberg*. In these cases, the Court was attempting to narrow the protection of substantive liberties under the Due Process Clauses.

VII. Criticisms of Constitutional Protection of Liberty

Finally, we come to criticisms of constitutional protection of liberty. We distinguish two general types of criticism, one substantive and the other institutional. The substantive line of criticism, simply put, is that the protection of liberty is bad. For example, some feminist scholars argue that the protection of liberty, and more generally the conception of the Constitution as a charter of negative liberties, imperils equality and licenses harm. When the state stays out of "private life," Catharine MacKinnon argues, the right of privacy is, in effect, a "right of men 'to be let alone' to oppress women."[95] Progressive scholar Robin West similarly argues that liberty often protects the rights of the powerful to oppress or harm the less powerful or vulnerable, and

that we need to reconstruct liberty so as not to license harm.[96] In general, the worry is that the protection of liberty prevents government from pursuing other important constitutional values, including but not limited to securing the status of equal citizenship for all and protecting the vulnerable against harm. Dorothy Roberts, a scholar of race, gender, and class, argues that the right of privacy or liberty is an illusion or meaningless for women – especially poor women – if the Constitution is interpreted as a "charter of negative liberties" rather than of positive benefits.[97] Another criticism, made by civic republican Michael Sandel, is that courts should protect liberty, not simply to respect the choices of "unencumbered selves," without regard for the good of what is chosen, but to promote substantive moral goods.[98]

The institutional line of criticism, simply put, is that the protection of liberty *by courts* is bad. One expression of this view is that the Constitution, rightly understood, is overwhelmingly concerned with protecting procedural rights rather than substantive rights or liberties. On this view, judicial protection of substantive liberties is (a) anomalous in such a procedural scheme and (b) a fabrication by judges who are reading their own substantive values into the Constitution under the guise of interpreting the word liberty. Proponents of this view typically argue that protection of substantive liberties should be left to legislatures. (Indeed, some progressives like West have urged "de-constitutionalizing" rights like abortion and turning from courts to "ordinary politics."[99]) They argue, furthermore, that whenever courts have protected substantive liberties, the results have been disastrous.[100]

For example, some critics say that *Lochner*, by stringently protecting liberty of contract, stood in the way of much-needed progressive legislation to protect people from the harsh consequences of unregulated markets, culminating in the clash between President Roosevelt and the Court concerning the constitutionality of the New Deal.[101] To take another example, some

critics say that *Roe*, by stringently protecting the right of a woman to decide whether to terminate a pregnancy, fostered "hollow hopes" that courts can bring about social change – thus undermining the legislative process – and provoked backlash against such change through judicial decisions.[102] Some versions of this criticism stress the objection that judicial protection of liberty is "undemocratic."[103] Yet some defenders respond that whether it is anomalous in a democracy or integral to it depends upon what conception of democracy is embodied in the Constitution. On their view, the Constitution establishes a form of constitutional democracy in which substantive fundamental rights essential to personal autonomy are no less integral than rights to participate in the political processes.[104] Other versions of this criticism emphasize the objection that liberty is "indeterminate." Some defenders, however, argue that the constitutional commitment to liberty is not significantly less determinate than other abstract constitutional commitments like freedom of speech, freedom of religion, unreasonable searches and seizures, or equal protection of the laws. Interpretation of all of these commitments will require complex judgments that are likely to be controversial.[105]

Defenders of protection of substantive liberties by courts typically argue that fidelity to our Constitution requires protecting substantive liberties, that courts should be a forum of principle (rather than of prudential statesmanship concerned to avoid backlash), and that in any event courts rarely get too far out in front where social change is concerned. Moreover, they argue that it is not just judicial decisions protecting substantive liberties that provoke backlash, but rather progressive change itself, whether through judicial decisions or legislative decisions, and whether through protecting substantive liberties or procedural liberties.[106]

VIII. Conclusion

Though it has always been and likely will continue to be controversial, and though it

requires complex judgments, judicial interpretation of the Constitution to protect substantive liberties has proven to be a durable feature of American constitutional practice.

ENDNOTES

1. *The Federalist* No. 84 (Hamilton), ed. Clinton Rossiter (New York: Signet Classics, 2003), 514.
2. Ibid., 512.
3. *The Federalist* No. 51 (Madison), 318-19.
4. Bond v. United States, 131 S.Ct. 2355, 2364 (2011).
5. For works growing out of the former tradition, see Ilya Somin, *Democracy and Political Ignorance: Why Smaller Government is Smarter* (Stanford, CA: Stanford University Press, 2013), and Michael S. Greve, *The Upside-Down Constitution* (Cambridge, MA: Harvard University Press, 2012). For the latter tradition, see Sotirios A. Barber, *The Fallacies of States' Rights* (Cambridge, MA: Harvard University Press, 2013).
6. Sotirios A. Barber, *Welfare and the Constitution* (Princeton, NJ: Princeton University Press, 2003).
7. 489 U.S. 189 (1989).
8. 715 F.2d 1200 (7th Cir. 1983).
9. Emily Zackin, *Looking for Rights in All the Wrong Places: Why State Constitutions Contain America's Positive Rights* (Princeton, NJ: Princeton University Press, 2013).
10. Baker v. State, 744 A.2d 864, 875 (Vt. 1999); Goodridge v. Department of Public Health, 798 N.E.2d 941, 959 (Mass. 2003).
11. 83 U.S. 36, 125 (1873) (Swayne, J., dissenting); 83 U.S. at 92, 97-98 (Field, J., dissenting).
12. 83 U.S. 36, 79 (1873).
13. 83 U.S. 36, 96 (1873) (Field, J., dissenting).
14. *See, e.g.*, Jack M. Balkin, *Living Originalism* (Cambridge, MA: Harvard University Press, 2011); Sanford Levinson, *Constitutional Faith* (Princeton, NJ: Princeton University Press, 1988); Lawrence G. Sager, *Justice in Plainclothes* (New Haven, CT: Yale University Press, 2004); Cass R. Sunstein, *The Partial Constitution* (Cambridge, MA: Harvard University Press, 1993); Mark Tushnet, *Taking the Constitution Away from the Courts* (Princeton, NJ: Princeton University Press, 1999) Robin West, *Progressive Constitutionalism* (Durham, NC: Duke University Press, 1994).
15. Barron v. Baltimore, 32 U.S. 243 (1833).
16. Adamson v. California, 332 U.S. 46, 68-92 (1947) (Black, J., dissenting).
17. Poe v. Ullman, 367 U.S. 497, 515-17 (1961) (Douglas, J., dissenting).
18. 302 U.S. 319, 325 (1937).
19. *Poe*, 367 U.S. at 542-43 (Harlan, J., dissenting); Griswold v. Connecticut, 381 U.S. 479, 500 (1965) (Harlan, J., concurring).
20. Hurtado v. California, 110 U.S. 516 (1884).
21. Minneapolis & St. Louis R. Co. v. Bombolis, 241 U.S. 211 (1916).
22. 381 U.S. 479.
23. The Supreme Court has listed the excessive bail clause, but not the excessive fines clause, as having been incorporated. McDonald v. City of Chicago, 130 S.Ct. 3020, 3034-35 n.12 & n.13

(2010).
24. Ronald Dworkin, *Life's Dominion* 129-131, 143-44 (New York: Knopf, 1993); Charles L. Black, Jr., *Decision According to Law* 41-54 (New York: Norton, 1981).
25. 505 U.S. 833, 846 (1992).
26. 262 U.S. 390, 399 (1923).
27. Ibid., 399.
28. *Palko*, 302 U.S. at 325; Loving v. Virginia, 388 U.S. 1, 12 (1967).
29. 262 U.S. at 401-02.
30. 268 U.S. 510, 534-35 (1925).
31. 198 U.S. 45, 56, 64 (1905).
32. 300 U.S. 379, 391-92 (1937).
33. Ibid., 391, 399.
34. 316 U.S. 535, 537 (1942).
35. Ibid., 536, 541.
36. *See, e.g.*, *Loving*, 388 U.S. at 12; Roe v. Wade, 410 U.S. 113, 152 (1973).
37. 381 U.S. at 481-82.
38. Ibid., 482-85.
39. Ibid., 484.
40. Ibid., 485.
41. 388 U.S. at 12.
42. Ibid.
43. Bruce Ackerman, *We the People: The Civil Rights Revolution* 305 (Cambridge, MA: Harvard University Press, 2014).
44. 388 U.S. at 12.
45. 411 U.S. 1 (1973). Many have observed that Justice Powell's opinion of the Court seemed to imply that the Constitution might protect a right to a minimally adequate education. 411 U.S. at 37. And some state courts interpreting their state constitutions have recognized rights to an equal education or at least an adequate education.
46. Ibid., 33.
47. 410 U.S. at 152-53.
48. Ibid., 152.
49. See, e.g., West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 630, 642 (1943) (liberty of conscience, freedom of thought, and right to self-determination); Roberts v. United States Jaycees, 468 U.S. 609, 617-18 (1984) (freedom of association, including both expressive association and intimate association); Lawrence v. Texas, 539 U.S. 558, 574-75 (2003) (right to privacy or autonomy to engage in homosexual intimate association); Moore v. City of E. Cleveland, 431 U.S. 494, 503-4 (1977) (right to live with one's family, whether nuclear or extended); Crandall v. Nevada, 73 U.S. (6 Wall.) 35, 49 (1868) (right to travel); Shapiro v. Thompson, 394 U.S. 618, 629-30 (1969) (right to travel or relocate); Turner v. Safley, 482 U.S. 78, 95-96 (1987) (right to marry); Loving v. Virginia, 388 U.S. 1, 12 (1967) (right to marry); Skinner v. Oklahoma, 316 U.S. 535, 541 (1942) (right to procreate); Griswold v. Connecticut, 381 U.S. 479, 485-86 (1965) (right within marital association to use contraceptives); Eisenstadt v. Baird, 405 U.S. 438, 453 (1972) (right of individual, married or single, to use contraceptives); Carey v. Population Servs. Int'l, 431 U.S. 678, 694 (1977) (right to distribute contraceptives);

Roe v. Wade, 410 U.S. 113, 153 (1973) (right of a woman to decide whether to terminate a pregnancy); Planned Parenthood v. Casey, 505 U.S. 833, 846, 857 (1992) (reaffirming "central holding" of *Roe* and emphasizing decisional autonomy and bodily integrity); Meyer v. Nebraska, 262 U.S. 390, 400 (1923) (right to direct the education of children); Pierce v. Society of Sisters, 268 U.S. 510, 534-35 (1925) (right to direct the upbringing and education of children); Troxel v. Granville, 530 U.S. 57, 66 (2000) (right of parents to make decisions concerning the care, custody, and control of children);Washington v. Harper, 494 U.S. 210, 221-22 (1990) (right to bodily integrity, in particular, to avoid unwanted administration of antipsychotic drugs); Rochin v. California, 342 U.S. 165, 172-73 (1952) (right to bodily integrity, in particular, to be protected against the extraction of evidence obtained by "breaking into the privacy" of a person's mouth or stomach); Cruzan v. Director, Mo. Dep't of Health, 497 U.S. 261, 279 (1990) (assuming for purposes of the case a "right to die" that includes the "right to refuse lifesaving hydration and nutrition"); Stanley v. Georgia, 394 U.S. 557, 564 (1969) (right to receive ideas and to be free from unwanted governmental intrusions into the privacy of one's home). For a discussion of this list of substantive liberties, see James E. Fleming, *Securing Constitutional Democracy: The Case of Autonomy* 92-98 (Chicago, IL: University of Chicago Press, 2006).
50. *See, e.g.*, *Casey*, 505 U.S. at 979-80, 982-84 (Scalia, J., dissenting); John Hart Ely, *Democracy and Distrust* 43-72 (Cambridge, MA: Harvard University Press, 1980).
51. *Poe*, 367 U.S. at 543 (Harlan, J., dissenting); Bowers v. Hardwick, 478 U.S. 186, 217 (1986) (Stevens, J., dissenting). *See also Casey*, 505 U.S. at 848, 851 (joint opinion).
52. For a defense of the latter position, see Fleming, *Securing Constitutional Democracy*, 89-111. For a defense of *Roe* as a product of common law constitutional interpretation, see David A. Strauss, *The Living Constitution* 92-97 (New York: Oxford University Press, 2010).
53. *Moore*, 431 U.S. at 503; Snyder v. Massachusetts, 291 U.S. 97, 105 (1934); Hebert v. Louisiana, 272 U.S. 312, 316 (1926).
54. For fuller analysis, see Fleming, *Securing Constitutional Democracy*, 112-27.
55. 491 U.S. 110, 141 (1989) (Brennan, J., dissenting).
56. 491 U.S. 110, 127 n.6 (1989) (Scalia, J., plurality).
57. 367 U.S. at 542-43 (Harlan, J., dissenting).
58. 478 U.S. at 192-94.
59. 491 U.S. at 123-27 & 127 n.6. Only Chief Justice Rehnquist joined the quoted formulation from n.6 of Justice Scalia's plurality opinion.
60. Ibid., 125, 127.
61. 497 U.S. 261, 300-01 (1989) (Scalia, J., concurring).
62. 497 U.S. at 279.
63. 505 U.S. at 847-48.
64. Ibid., 848-50, 901; *Poe*, 367 U.S. at 542-43 (Harlan, J., dissenting). For fuller discussion, see James E. Fleming and Linda C. McClain, *Ordered Liberty: Rights, Responsibilities, and Virtues* 241-43 (Cambridge, MA: Harvard University Press, 2013).
65. 505 U.S. at 849, 901.
66. 521 U.S. 702, 720-21 (1997).
67. 539 U.S. 558, 588 (2003) (Scalia, J., dissenting).
68. 539 U.S. 558, 578-79 (2003).
69. Ibid., 564-66, 573-76.

70. 478 U.S. at 197 (Burger, C.J., concurring).
71. 133 S.Ct. 2675, 2692, 2694, 2695-96 (2013) (citing *Lawrence* and Romer v. Evans, 517 U.S. 620, 633 (1996)).
72. In this chapter, we are speaking on protection of economic liberties such as liberty of contract under the Due Process Clauses, as distinguished from protection of property rights more generally, for example, under the Takings Clause of the Fifth Amendment. For the latter, see Chapter V.C.
73. Jamal Greene, "The Anticanon," 125 *Harvard Law Review* 379 (2011).
74. *Lochner*, 198 U.S. at 68-70 (Harlan, J., dissenting); ibid., 198 U.S. at 75-76 (Holmes, J., dissenting).
75. *See, e.g.*, *Casey*, 505 U.S. at 998 (Scalia, J., dissenting); Robert H. Bork, *The Tempting of America* 32, 111-16, 158, 209 (New York: Free Press, 1990).
76. 304 U.S. 144, 152 n.4 (1938). Ely fully developed this understanding of a *Carolene Products* jurisprudence in *Democracy and Distrust*, 73-104. Some scholars, however, have developed a footnote four equal protection argument that protecting the right to abortion is necessary to secure the status of equal citizenship for women. *See, e.g.*, Sunstein, *The Partial Constitution*, 270-85.
77. *See, e.g.*, *Poe*, 367 U.S. at 517-18 (Douglas, J., dissenting); *Griswold*, 381 U.S. at 482 (Douglas, J., opinion of the Court); William J. Brennan, J., "The Constitution of the United States: Contemporary Ratification," 27 *South Texas Law Journal* 433 (1986) (contrasting contemporary understanding of what rights human dignity requires with a nineteenth century understanding that had emphasized economic liberties).
78. Fleming, *Securing Constitutional Democracy*, 135-36.
79. Sunstein, *The Partial Constitution*, 40-67.
80. *See, e.g.*, David E. Bernstein, *Rehabilitating* Lochner*: Defending Individual Rights Against Progressive Reform* (Chicago, IL: University of Chicago Press, 2011).
81. *See* Stephen Macedo, *The New Right v. the Constitution* (Washington, DC: Cato Institute, 1986).
82. *See, e.g.*, Bernard Siegan, *Economic Liberties and the Constitution* (Chicago, IL: University of Chicago Press, 1980).
83. Richard Epstein, *Takings: Private Property and the Power of Eminent Domain* (Cambridge, MA: Harvard University Press, 1985); Richard Epstein, "Toward a Revitalization of the Contract Clause, 51 *University of Chicago Law Review* 703 (1984); Richard Epstein, "Substantive Due Process by Any Other Name," 1973 *Supreme Court Review* 159.
84. 539 U.S. at 593-94 (Scalia, J., dissenting).
85. *Romer*, 517 U.S. at 632-34; *Lawrence*, 539 U.S. at 574; 539 U.S. at 580, 582-83 (O'Connor, J., concurring).
86. 539 U.S. at 593-94 (Scalia, J., dissenting).
87. Adam Winkler, "Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts," 59 *Vanderbilt Law Review* 793 (2006); Richard H. Fallon, J., "Strict Judicial Scrutiny," 54 *UCLA Law Review* 1267 (2007). We argue along these lines in Fleming and McClain, *Ordered Liberty*, 237-72.
88. 410 U.S. at 155-56.
89. 505 U.S. at 851-53, 877.

90. We develop this argument in Fleming and McClain, *Ordered Liberty*, 243-72.
91. 431 U.S. 494, 499 (1977) (Powell, J., plurality opinion).
92. Ibid.
93. We develop this analysis in Fleming and McClain, *Ordered Liberty*, 247-50, 254-57, 263-65. This form of analysis bears some resemblance to "proportionality" analysis as articulated by European scholars and judges. *See, e.g.*, Aharon Barak, *Proportionality: Constitutional Rights and their Limitations* (New York: Cambridge University Press, 2012).
94. Compare Justice Stevens's and Justice Marshall's well-known analyses of actual practice under the Equal Protection Clause. *See* City of Cleburne v. Cleburne Living Center, 473 U.S. 432, 451 (1985) (Stevens, J., concurring) ("continuum of judgmental responses"); San Antonio v. Rodriguez, 411 U.S. 1, 98 (1973) (Marshall, J., dissenting) ("spectrum of standards").
95. Catharine A. MacKinnon, "Reflections on Sex Equality under Law," 100 *Yale Law Journal* 1281, 1311 (1991); Catharine A. MacKinnon, *Toward a Feminist Theory of the State* 193-94 (Cambridge, MA: Harvard University Press, 1989).
96. Robin West, "Reconstructing Liberty," 59 *Tennessee Law Review* 441 (1992).
97. Dorothy Roberts, *Killing the Black Body: Race, Reproduction, and the Meaning of Liberty* (New York: Vintage Books, 1997). *See generally* Linda C. McClain, *The Place of Families: Fostering Capacity, Equality, and Responsibility* 25-27, 242-48 (Cambridge, MA: Harvard University Press, 2006) (discussing critiques by Roberts and others).
98. Michael J. Sandel, *Democracy's Discontent: America in Search of a Public Philosophy* 97-100, 103-08 (Cambridge, MA: Harvard University Press, 1996).
99. Robin West, "From Choice to Reproductive Justice: De-Constitutionalizing Abortion Rights," 118 *Yale Law Journal* 1394 (2009).
100. *See, e.g.*, Ely, *Democracy and Distrust*, 14-21, 73-104.
101. *See, e.g.*, Sunstein, *The Partial Constitution*, 40-67.
102. *See, e.g.*, Gerald Rosenberg, *The Hollow Hope: Can Courts Bring About Social Change?* (Chicago, IL: University of Chicago Press, 2d ed. 2008); Michael J. Klarman, *From the Closet to the Altar: Courts, Backlash, and the Struggle for Same-Sex Marriage* (New York: Oxford University Press, 2012).
103. *See, e.g.*, Ely. *Democracy and Distrust*, 43-72.
104. *See, e.g.*, Ronald Dworkin, *Freedom's Law: The Moral Reading of the American Constitution* (Cambridge, MA: Harvard University Press, 1996), 1-38; Fleming, *Securing Constitutional Democracy*, 1-4, 9-10, 61-85.
105. *See, e.g.*, Dworkin, *Freedom's Law*, 72-83; Fleming, *Securing Constitutional Democracy*, 112-40.
106. *See, e.g.*, Fleming & McClain, *Ordered Liberty*, 228-35.