2014

Intellectual Origins of (Modern) Substantive Due Process, The

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Articles

The Intellectual Origins of (Modern) Substantive Due Process

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Almost fifty years after the Supreme Court revived the doctrine, substantive due process remains a puzzle. Detractors insist it is nothing more than judicial policy making. Defenders say it accords with the deepest values of the Constitution. But on all sides, the present scholarly debate suffers from an impoverished understanding of modern substantive due process's intellectual history, which has led to an impoverished understanding of the doctrine's core normative content. It is time for a revisionist turn. This Article supplies that turn by excavating the intellectual origins of modern substantive due process and relating that history to the doctrine's development. Ultimately, the Article offers a thoroughly revised account of the modern doctrine's beginnings, development, and meaning. The core of the story is this: modern substantive due process depends on a coherent and thoroughly modern notion of liberty, grounded in the ideas of personal authenticity and self-development. The modern doctrine's history begins in the Lochner *era, but its debt to* Lochner *is not the one critics usually claim. Rather, modern substantive due process is rooted in the critique of the police powers jurisprudence developed by the opponents of* Lochner. *This critique rejected the central elements of an older view of liberty, including natural rights and the distinction between the public and private spheres. In the decades that followed* Lochner*'s demise, liberal theorists connected this modernist outlook to a venerable ethic of individual authenticity to fashion a new understanding of human rights and political liberty. This new concept of liberty emphasized personal moral choice and autonomy rather than private property and the right to contract. By the early 1960s, this view of liberty had achieved widespread support among opinion makers and by the end of that decade, became the basis for a new reading of due process. The revised account developed here challenges a good deal of conventional wisdom, including the claims of the recent* Lochner *revisionists like David Bernstein and Randy Barnett who argue that modern substantive due process*

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* Associate Professor of Law, University of Missouri School of Law. My thanks to Michael McConnell, John Inazu, Nathan Chapman, Jeff Pojanowski, Chad Flanders, Will Baude, and Erin Morrow Hawley for their helpful comments, criticisms, and input at various stages of this project. Thanks also to Eric Segall and to participants at the Southeastern Association of Law Schools New Scholars Colloquium. Finally, thanks to Brian Lipshutz and also to Daniel Coffman, Andrew Crane, Kirsten Dunham, and Samuel Hill for excellent research assistance.

is in one way or another an intellectual extension of the Lochner *era. It also challenges the claims of those, like Jack Balkin, who contend that the modern doctrine can be linked directly to the Constitution's original meaning. Instead, this Article shows modern substantive due process for what it is: an original, modern, and controversial reading of liberty.*

Introduction

Substantive due process remains a puzzle. Nearly fifty years after the Supreme Court revived the doctrine,[1] its historical origins and precise meaning—to say nothing of its relationship to the constitutional text—remain as obscure as ever. This is not from want of attention on the part of legal scholars. Over the last five decades, scholars have expended prodigious efforts theorizing substantive due process and its affiliated cases, with results that are by now entirely familiar. Detractors insist substantive due process is sheer invention, a matter of Justices reading their preferred social theories

1. The key sequence of cases is *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Eisenstadt v. Baird*, 405 U.S. 438 (1972); and *Roe v. Wade*, 410 U.S. 113 (1973).

into the Constitution.[2] Defenders claim the doctrine faithfully captures the Constitution's commitment to privacy and personal autonomy, though perhaps not for the reasons the Court usually gives.[3]

This conversation, however, has resolved few of the core puzzles concerning the doctrine's origins and meaning. Indeed, if it reveals anything, the protracted scholarly impasse reveals that our understanding of substantive due process is due for a revisionist turn. This Article is an effort to make that turn, to set aside the predictable, competing accounts of substantive due process—which often turn out to be mythologies upon closer inspection, as we shall see[4]—and recover the doctrine's core content and meaning. I propose to do that by uncovering the doctrine's intellectual origins, which is to say, by reconstructing its intellectual history.[5] This is a project few if any

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2. *See, e.g.*, RAOUL BERGER, GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT 273–74 (2d ed. 1997) (criticizing courts for substituting their own views of policy for those of legislatures); ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 31–32 (1990) (criticizing the Supreme Court for inventing "substantive" due process); Frank H. Easterbrook, *Substance and Due Process*, 1982 SUP. CT. REV. 85, 125 (concluding that the Supreme Court bases its due process judgments on the Justices' policy views); Michael Stokes Paulsen, *Does the Constitution Prescribe Rules for Its Own Interpretation?*, 103 NW. U. L. REV. 857, 897 (2009) (arguing that modern substantive due process depends on the "subjective, shifting judgment" of judges). *See generally* Richard A. Epstein, *Substantive Due Process by Any Other Name: The Abortion Cases*, 1973 SUP. CT. REV. 159 (criticizing the rationale of *Roe v. Wade*); John Harrison, *Substantive Due Process and the Constitutional Text*, 83 VA. L. REV. 493 (1997) (presenting and then refuting common arguments for a textual basis of substantive due process).

3. *See, e.g.*, Frederick Mark Gedicks, *An Originalist Defense of Substantive Due Process: Magna Carta, Higher-Law Constitutionalism, and the Fifth Amendment*, 58 EMORY L.J. 585, 594 (2009) (arguing that the Framers of the Constitution would have understood "due process of law" to include specific, yet unenumerated rights); Robert E. Riggs, *Substantive Due Process in 1791*, 1990 WIS. L. REV. 941, 999 (concluding that the Due Process Clause probably had substantive as well as procedural components in 1791). *See generally* Thomas C. Grey, *Origins of the Unwritten Constitution: Fundamental Law in American Revolutionary Thought*, 30 STAN. L. REV. 843, 850–59 (1978) (examining the concept of "fundamental law" in English common law); David A.J. Richards, *Unnatural Acts and the Constitutional Right to Privacy: A Moral Theory*, 45 FORDHAM L. REV. 1281 (1977) (arguing that the Constitution vouchsafes broad protections for personal privacy).

4. *See infra* Part V.

5. That makes this Article a work of constitutional historicism, as ably defined by the recent work of Sanford Levinson and Jack Balkin. Jack M. Balkin & Sanford Levinson, *Legal Historicism and Legal Academics: The Roles of Law Professors in the Wake of* Bush v. Gore, 90 GEO. L.J. 173, 181 (2001); Jack M. Balkin, *"Wrong the Day It Was Decided":* Lochner *and Constitutional Historicism*, 85 B.U. L. REV. 677, 679 (2005). My approach to intellectual history and the history of ideas has been significantly shaped by the theory and methodology of Quentin Skinner. *See e.g.*, QUENTIN SKINNER, 1 THE FOUNDATIONS OF MODERN POLITICAL THOUGHT: THE RENAISSANCE, at ix–xv (1978) (describing his approach as a "history of ideologies" and comparing that to a more traditional textual approach); Quentin Skinner, *Meaning and Understanding in the History of Ideas*, 8 HIST. & THEORY 3–4 (1969) [hereinafter Skinner, *Meaning and Understanding*] (critiquing approaches that analyze "text" or "context" to understand a historical work). *See generally* MEANING AND CONTEXT: QUENTIN SKINNER AND HIS CRITICS (James Tully ed., 1988) (providing an overview of Skinner's approach, selected critical responses, and Skinner's reply to those critiques).

scholars have attempted,[6] and when we pursue it, we find this: that modern substantive due process depends on a coherent, robust, and thoroughly modern account of liberty, one that turns on an idea of personal authenticity and self-development. This notion of liberty has roots deep in the Western past but is, in the end, distinctly the product of the twentieth century.[7] My aim is to tell the story of this idea's ascendance and how it came to be incorporated into constitutional law. Ultimately, I offer a fully revised account of modern substantive due process's intellectual origins and development, from the apparent demise of substantive due process at the close of the *Lochner* era to its revival in the 1960s.

This revised account challenges a good deal of current thinking, not least the claims of the recent *Lochner* revisionist—or perhaps, revivalist—

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6. Though the literature on substantive due process is vast, I am aware of no legal scholar who has systematically investigated the intellectual origins of the modern doctrine. To be sure, many scholars have constructed theories of the doctrine's meaning, including theories as to the appropriate uses of historical evidence and tradition. *E.g.*, Daniel O. Conkle, *Three Theories of Substantive Due Process*, 85 N.C. L. REV. 63, 66–68 (2006) (discussing two preexisting theories of substantive due process and arguing for the superiority of a third emerging "theory of evolving national values"); James E. Fleming, *Constructing the Substantive Constitution*, 72 TEXAS L. REV. 211, 290–97 (1993) (proposing an interpretative theory of "constitutional constructivism" that goes beyond analyzing only constitutional text or the "intentions of the framers and ratifiers"); Ronald J. Krotoszynski, Jr., *Dumbo's Feather: An Examination and Critique of the Supreme Court's Use, Misuse, and Abuse of Tradition in Protecting Fundamental Rights*, 48 WM. & MARY L. REV. 923, 998–1007 (2006) (proposing that tradition, determined by analyzing the states' consensus on a law, can provide an objective limitation on substantive due process); Robert C. Post, *The Supreme Court, 2002 Term—Foreword: Fashioning the Legal Constitution: Culture, Courts, and Law*, 117 HARV. L. REV. 4, 8–11 (2003) (arguing that the Supreme Court "defines the substance of constitutional law in the context of the beliefs and values of nonjudicial actors"); Mattei Ion Radu, *Incompatible Theories: Natural Law and Substantive Due Process*, 54 VILL. L. REV. 247, 286–89 (2009) (arguing that judges should consider the "strict text of the Constitution" rather than natural law when making decisions). But only two scholars have attempted something approaching intellectual history. G. Edward White has explored the progressive critique of the *Lochner* doctrine. G. Edward White, *Revisiting Substantive Due Process and Holmes's* Lochner *Dissent*, 63 BROOK. L. REV. 87, 125–28 (1997) [hereinafter White, *Revisiting Due Process*]. And Rogers Smith has written about the difference between the ideal of autonomy and earlier understandings of liberty. Rogers M. Smith, *The Constitution and Autonomy*, 60 TEXAS L. REV. 175, 175–76 (1982). But White does not follow the story forward, and Smith is not interested in the historical development of the ideas he mentions nor does he focus on due process. Howard Gillman has offered a brief account of the rise of what he calls "modern civil liberties jurisprudence." Howard Gillman, *Preferred Freedoms: The Progressive Expansion of State Power and the Rise of Modern Civil Liberties Jurisprudence*, 47 POL. RES. Q. 623, 624–26 (1994). This account is focused entirely on doctrine, however, not the history of ideas, and is in any event highly tendentious.

7. *See infra* Parts II–III.

school sponsored by scholars like David Bernstein[8] and Randy Barnett.[9] These scholars want to resurrect *Lochner v. New York*[10] and the police powers jurisprudence,[11] or at least rehabilitate its legacy.[12] But the description of the Supreme Court's modern due process doctrine they offer is seriously distorted and their interpretation of the *Lochner* era deeply anachronistic.[13] They fail to account for the twentieth-century intellectual revolution that transformed the Court's understanding of liberty and drove the creation of modern substantive due process. The account I develop here also challenges the claims of other scholars, like Jack Balkin, who contend that the Court's abortion jurisprudence can be linked directly to the Constitution's original meaning.[14] This argument too depends on a dehistoricized reading of modern due process's origins and development.[15]

When we attend seriously to the intellectual history of modern substantive due process, a new and different picture emerges. The modern, post-*Griswold* and *Roe* version of substantive due process does owe a good deal to the *Lochner* era, as critics have often charged, but not the debt usually alleged. Modern substantive due process is not simply an update of *Lochner*'s doctrine of fundamental rights.[16] The *Lochner* era police powers jurisprudence was in fact not a doctrine of fundamental rights at all, and moreover, the doctrinal shape of modern substantive due process is quite distinct from its police powers predecessor. Instead, the modern doctrine's debt to the *Lochner* era consists partly of the generality-shifting reading of

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8. *See generally* DAVID E. BERNSTEIN, REHABILITATING *LOCHNER*: DEFENDING INDIVIDUAL RIGHTS AGAINST PROGRESSIVE REFORM (2011) [hereinafter BERNSTEIN, REHABILITATING *LOCHNER*] (reassessing *Lochner* and the history of the liberty of contract doctrine); David E. Bernstein, Lochner *Era Revisionism, Revised:* Lochner *and the Origins of Fundamental Rights Constitutionalism*, 92 GEO. L.J. 1 (2003) [hereinafter Bernstein, Lochner *Era Revisionism*] (critiquing modern interpretations of *Lochner* and arguing that later substantive due process cases were in part based on *Lochner*'s fundamental rights analysis).

9. *See generally* RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY 253–69, 319–53 (2004) [hereinafter BARNETT, RESTORING THE LOST CONSTITUTION]; Randy E. Barnett, *The Proper Scope of the Police Power*, 79 NOTRE DAME L. REV. 429 (2004) [hereinafter Barnett, *The Proper Scope of the Police Power*].

10. 198 U.S. 45 (1905).

11. *See* BARNETT, RESTORING THE LOST CONSTITUTION, *supra* note 9, at 263–64, 268–69 (arguing for close judicial scrutiny of government regulations on "liberty").

12. *See* BERNSTEIN, REHABILITATING *LOCHNER*, *supra* note 8, at 3, 6–7 (arguing that prevailing historical accounts of *Lochner* are inaccurate and fail to appreciate its merits or true significance).

13. *See infra* subpart V(A).

14. Jack M. Balkin, *Abortion and Original Meaning*, 24 CONST. COMMENT. 291, 292 (2007) [hereinafter Balkin, *Abortion and Original Meaning*]; *see also* JACK M. BALKIN, LIVING ORIGINALISM 214–16 (2011) [hereinafter BALKIN, LIVING ORIGINALISM] (arguing the right to an abortion is rooted in the Constitution's original meaning).

15. *See infra* subpart V(B).

16. This is contrary to the argument advanced by David Bernstein. *See* BERNSTEIN, REHABILITATING *LOCHNER*, *supra* note 8, at 6 (arguing that much of today's fundamental rights jurisprudence is traceable to *Lochner*).

the Fourteenth Amendment's Due Process Clause that the police powers jurisprudence legitimized.[17] But perhaps more deeply still, modern substantive due process is indebted to the *critique* of the police powers doctrine *Lochner* helped inspire.

Contemporary due process emerges from that critique, famously articulated by Justice Oliver Wendell Holmes in dissent in *Lochner*[18] and taken up by the progressives and legal realists in the years after.[19] The critique sounded in a thoroughly modern intellectual outlook—one rejecting natural rights, natural law, and the possibility of permanent moral truths.[20] This modernist viewpoint led the opponents of the police powers doctrine to reject not merely its practical applications but crucially, its view of political liberty.[21] Yet while the Supreme Court ultimately abandoned the *Lochner* line of cases in the late 1930s, it never repudiated the notion that the Due Process Clause empowered the courts to protect "liberty" as a general matter.[22] In time, the very elements of the case against the police powers doctrine would form the basis of a new account of liberty. In the waning years of the *Lochner* period and in the decades that followed, liberal theorists like John Dewey and Isaiah Berlin would connect modernist moral skepticism and ethical pragmatism with a venerable ethic of individual authenticity to fashion a new understanding of human rights and political freedom.[23] This new concept emphasized personal moral choice rather than private property, autonomy, and self-development rather than the right to contract. By the early 1960s, it had achieved widespread consensus among intellectual opinion makers and would become by the end of that decade the basis for a new reading of due process.[24]

As we shall see, this modernist notion of liberty owed relatively little to the constitutional text, and it stood in considerable tension with earlier interpretations of constitutional liberty.[25] Instead, this interpretation of liberty was something the Court would bring *to* the text, not because it was compelled by tradition or precedent to do so, but because the Justices found this idea of liberty compelling and its explanatory potential powerful.[26] That tenuous relationship to the written text in turn helps explain the particular doctrinal shape modern substantive due process took: the Court would

17. *See infra* Part I.
18. Lochner v. New York, 198 U.S. 45, 74–76 (1905) (Holmes, J., dissenting).
19. *See infra* subpart I(B).
20. *See infra* subpart I(B).
21. *See infra* subpart I(B).
22. *See infra* Part II.
23. *See infra* Part III.
24. *See infra* subparts IV(A)–(B).
25. *See infra* subparts IV(A)–(B).
26. *See infra* subparts IV(A)–(B).

conceptualize it as a doctrine of unenumerated rights to be discovered beyond the written Constitution and derived from the nature of liberty.[27]

To unfold this story, I begin in Part I with the critique of the police powers jurisprudence from which the modern doctrine emerges. Part II explains the Court's reinterpretation of the Due Process Clause as focused on fundamental rights following its rejection of *Lochner*, a doctrinal move initially motivated by the police powers critique and which the Court would put to new use once armed with a new understanding of liberty. Part III then turns to analyze the development of the idea of liberty at the center of the modern due process doctrine, tracing its emergence from the confluence of the older ethic of authenticity and more contemporary commitments to value relativism. Part IV shows how this notion of liberty informed the Court's revival—and reimagining—of substantive due process, beginning with *Griswold v. Connecticut*,[28] *Eisenstadt v. Baird*,[29] and *Roe v. Wade*[30] and continuing through *Planned Parenthood v. Casey*[31] and *Lawrence v. Texas*.[32] Finally, Part V explores the implications of this revised account of the modern doctrine's origins and development for the claims of the pro-*Lochner* revisionists and the "living originalism" of Jack Balkin.

Substantive due process is the keystone constitutional doctrine for our era because it sums up and embodies a prevailing interpretation of political liberty. In the end, the most important question we can ask is just this: Is this concept of liberty truly compelling? The critical history I offer here is, I hope, a first step toward an answer.

I. Some Other Beginning's End: The Fall of the Police Powers Jurisprudence

The story of the modern version of substantive due process begins with the demise of its predecessor, the police powers doctrine. Even at this historical remove, after extensive scholarly discussion of both the police powers jurisprudence and modern substantive due process, the relationship between the two is widely misunderstood, in no small part because the police powers doctrine remains widely mischaracterized. Contrary to what many have claimed,[33] that doctrine was not a form of fundamental rights

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27. *See infra* subparts IV(A)–(B).

28. 381 U.S. 479 (1965).

29. 405 U.S. 438 (1972).

30. 410 U.S. 113 (1973).

31. 505 U.S. 833 (1992).

32. 539 U.S. 558 (2003).

33. *See, e.g.*, 1 LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 1370–71 (3d ed. 2000) (arguing that the "ultimate point [of *Lochner*] was the preservation of *some* realm as presumptively beyond the reach of state power"); LAURENCE H. TRIBE, THE INVISIBLE CONSTITUTION 140–41 (2008) (connecting the fundamental underlying principle of *Lochner* with that in *Griswold* and beyond); Jack M. Balkin, *Judgment of the Court*, *in* WHAT *ROE V. WADE* SHOULD HAVE SAID 31,

jurisprudence. Instead, it functioned as a type of structural restraint on government regulation, premised on a set of interlocking ideas: that property was a natural, prepolitical right before any state or society; that government existed to safeguard such property; and that only limited governmental interference in the sphere of private life these property rights protected could ever be justified, and then only if pursued for the general good.[34] These premises generated a robust vision of democratic liberty, at once individualistic and social, focused on rights but above all on the social space where rights were exercised. Getting the police powers doctrine right matters because modern substantive due process owes a good deal to this precursor. Or more exactly, it owes a good deal to the *critique* of the police powers doctrine's vision of liberty.

That critique was offered in its definitive form by Justice Oliver Wendell Holmes Jr.[35] and premised on a form of positivist skepticism. In time, this positivism would inform the Supreme Court's watershed rejection of the police powers line in *West Coast Hotel v. Parrish*.[36] And yet the Holmesian critique turned out not to be the end of substantive due process but the predicate for a new beginning.[37] Meanwhile, even as he derided the notion of inherent limits on government power, Justice Holmes held out the possibility that laws that traduced certain "fundamental principles" might offend due process of law.[38] Those two elements together, positivist skepticism and the possibility of fundamental rights, supplied the grounds for a new sort of substantive due process. Both emerged from the Holmesian critique of the old.

A. The Liberty of Police Powers Due Process

If the last three decades of scholarship on the *Lochner* Court have made anything clear, it is that the caricature of *Lochner*-era jurisprudence as a noxious concoction of laissez-faire economics, Spencerian social darwinism,

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37–38 (Jack M. Balkin ed., 2005) (asserting that *Lochner* focused on protecting certain fundamental rights, albeit the wrong ones); Bernstein, Lochner *Era Revisionism*, *supra* note 8, at 31–38 (discussing the "fundamental liberties" involved in the *Lochner* decision).

34. *See infra* subpart I(A).

35. White, *Revisiting Due Process*, *supra* note 6, at 103–04, 110–13; *see* G. EDWARD WHITE, THE AMERICAN JUDICIAL TRADITION: PROFILES OF LEADING AMERICAN JUDGES 133–35 (3d ed. 2007) [hereinafter WHITE, AMERICAN JUDICIAL TRADITION] (describing Justice Holmes's opposition to the police powers doctrine); G. EDWARD WHITE, JUSTICE OLIVER WENDELL HOLMES: LAW AND THE INNER SELF 323–30 (1993) [hereinafter WHITE, JUSTICE HOLMES] (discussing opinions by Justice Holmes that laid the groundwork for a critique of the police powers doctrine); *cf.* G. Edward White, *The Canonization of Holmes and Brandeis: Epistemology and Judicial Reputations*, 70 N.Y.U. L. REV. 576, 578–85 (1995) [hereinafter White, *Canonization of Holmes*] (discussing how Holmes's early critique of the police powers doctrine made him a significant figure to progressives and legal realists).

36. 300 U.S. 379 (1937).

37. *See infra* Parts III–IV.

38. Lochner v. New York, 198 U.S. 45, 76 (1905) (Holmes, J., dissenting).

and John Stuart Mill's night-watchman state bears little connection to reality.[39] The truth is substantially more complicated and more interesting. The police powers doctrine that informed the decision in *Lochner* was a response to the most pressing problem of American constitutional theory: how to protect the rights of the people against a government the people controlled.[40] The police powers jurisprudence answered that question by reference to an account of democratic liberty. And here another caricature must be dispensed with. The vision of liberty at back of the police powers jurisprudence was not the sharply libertarian individualism even contemporary scholars so often assume,[41] but instead a form of social liberty. The aim of the police powers jurisprudence was to protect the private social sphere where nineteenth-century theory taught that liberty existed.[42]

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39. *See, e.g.*, MARK WARREN BAILEY, GUARDIANS OF THE MORAL ORDER: THE LEGAL PHILOSOPHY OF THE SUPREME COURT, 1860–1910, at 169–71 (2004) (arguing that the Court's *Lochner* jurisprudence was rooted in a well-developed moral philosophy and worldview, not economic conservatism); HOWARD GILLMAN, THE CONSTITUTION BESIEGED: THE RISE AND DEMISE OF *LOCHNER* ERA POLICE POWERS JURISPRUDENCE 45–60 (1993) (discussing the police power judicial precedents that informed the *Lochner*-era Supreme Court decisions); MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW 1870–1960: THE CRISIS OF LEGAL ORTHODOXY 16 (1992) (contending that *Lochner*-era jurisprudence reflects an effort by the Supreme Court to create a system of nonpartisan legal reasoning rather than economic conservatism); MICHAEL J. PHILLIPS, THE *LOCHNER* COURT, MYTH AND REALITY 92 (2001) (asserting that the "standard picture of *Lochner*-era [jurisprudence] bears [little] resemblance to the real thing"); Michael Les Benedict, *Laissez-Faire and Liberty: A Re-Evaluation of the Meaning and Origins of Laissez-Faire Constitutionalism*, 3 L. & HIST. REV. 293, 298 (1985) (arguing that the "laissez-faire constitutionalism" did not derive from "widely adhered-to economic principles" or "economic privilege," but from being "congruent with a well-established and accepted principle of American liberty" during the late-nineteenth century); Alan Jones, *Thomas M. Cooley and "Laissez-Faire Constitutionalism": A Reconsideration*, 53 J. AM. HIST. 751, 752 (1967) (arguing that applying the concept of laissez-faire to constitutionalism, a phenomena that is not strictly economic, is an oversimplification and ignores the complexity of history); Charles W. McCurdy, *Justice Field and the Jurisprudence of Government-Business Relations: Some Parameters of Laissez-Faire Constitutionalism, 1863–1897*, 61 J. AM. HIST. 970, 973 (1975) (asserting that Justice Field's jurisprudence is neither closely aligned with Social Darwinism nor a product of the Gilded Age); William E. Nelson, *The Impact of the Antislavery Movement upon Styles of Judicial Reasoning in Nineteenth Century America*, 87 HARV. L. REV. 513, 550–60 (1974) (tracing the influence of abolitionist thought on judicial reasoning and argumentation); White, *Revisiting Due Process*, *supra* note 6, at 107–10 (arguing that the negative association between *Lochner*-era cases and laissez-faire economics resulted from an "oversimplification" of Justice Holmes's critique of police power jurisprudence). *See generally* William E. Forbath, *The Ambiguities of Free Labor: Labor and the Law in the Gilded Age*, 1985 WIS. L. REV. 767 (limning the intellectual influence of the free labor movement on the development of the police powers doctrine).

40. For a discussion of this problem's origin and significance, see GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC 1776–1787, at 403–13 (1998) and Gordon S. Wood, *The Origins of Vested Rights in the Early Republic*, 85 VA. L. REV. 1421, 1434–35 (1999) [hereinafter Wood, *Origins of Vested Rights*].

41. *See, e.g.*, BARNETT, RESTORING THE LOST CONSTITUTION, *supra* note 9, at 53–63 (discussing natural rights derived from the Constitution as "liberty rights").

42. *See* HORWITZ, *supra* note 39, at 10–11 (summarizing the nineteenth-century thinking of an independent realm of private law made up of private transactions between private individuals that ought to be free from the dangers of state interference); White, *Revisiting Due Process*, *supra* note 6,

The doctrine's account of liberty animated and helped legitimize a particular reading of the Fourteenth Amendment's Due Process Clause, one that found in the text a general principle of liberty and a mandate for courts to defend it.[43] This is the sense in which the police powers jurisprudence was a form of substantive due process. The label itself is anachronistic; the Supreme Court would not begin to speak of "substantive" as opposed to "procedural" aspects of due process until the 1940s.[44] But to the extent the police powers doctrine involved courts in reviewing the substantive reasonableness of legislation in order to protect a general value of liberty, all in the name of due process of law, the doctrine gave the Due Process Clause substantive content.

The basic rules of the police powers doctrine were firmly in place by the time of *Lochner v. New York*.[45] As that case described them: "The right to purchase or to sell labor is part of the liberty protected by [the Fourteenth] [A]mendment, unless there are circumstances which exclude the right."[46] As to those circumstances, the state was forbidden from interfering with the general right to labor and contract unless regulation was necessary "to the safety, health, morals [or] general welfare of the public."[47] Governmental regulation was permissible, then, but only in certain circumstances; it was to be the exception, not the rule. State interference with the private realm had to be justified by a truly public need, and it had to benefit the public as a whole.[48]

The working language of the doctrine gives a telling clue as to the vision of liberty it endorsed. From the time it was first suggested by judge and treatise-writer Thomas Cooley in the 1860s to the Supreme Court's rehearsal of it in *Lochner*, the doctrinal formula of police powers invariably referred to

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at 106 (noting that the doctrine of "liberty of contract" in the police powers cases served to maintain a private sphere outside the realm of state regulation).

43. *See infra* notes 99–104 and accompanying text.

44. White, *Revisiting Due Process*, *supra* note 6, at 107–10.

45. 198 U.S. 45, 53 (1905).

46. *Id.*

47. *Id.*

48. That last criterion—that legislation benefit the public as a whole—reflected the influence of a long anticlass tradition in American politics that originated in the revolutionary ideal that government power in a democracy ought always to be used for the public good, not for the benefit of private interests or parties. *See* Wood, *Origins of Vested Rights*, *supra* note 40, at 1432 (explaining the early American conviction that the new republic should not permit "exploit[ation] of the public's authority for private gain"). In the 1820s and 1830s, the Jacksonian movement gave this principle a new reading, arguing that no law should benefit any one *class* over another. *See* GILLMAN, *supra* note 39, at 47–49 (chronicling the reciprocal relationship between the Jacksonians' opposition to "class legislation" and judicial decisions demanding legislation further the "general welfare" only); HORWITZ, *supra* note 39, at 23–24 (explaining Jacksonian anticlass ideology). For a useful summary of the anticlass principle, see generally White, *Revisiting Due Process*, *supra* note 6, at 91–100.

government action as government *interference*.[49] Cooley spoke of interference with the individual's property;[50] the Supreme Court in *Mugler v. Kansas*[51] in 1887 of interference with vested rights;[52] and *Lochner v. New York* of interference with the right to labor and make contracts.[53] One particularly illuminating rehearsal of this theme came in 1893 in the Supreme Court's opinion in *Lawton v. Steele*,[54] in which the Court referred to any government regulation for the "interests of the public" as a type of "interference."[55]

This consistency was not by chance. Interference was central to the doctrine of police powers because of the way its proponents pictured the polity. They saw it as composed of two distinct spheres.[56] On the one side was a realm of private life and activity—the social sphere—and on the other, government—the sphere of the state. These two spheres had distinct characters. The private realm was marked by individual choice, private ordering, and voluntary transactions.[57] The public realm was defined by the coercive power of the state.[58] The two could not be assimilated. The basic aim of the police powers doctrine was to restrain government activity—"interference"—in the private sphere.[59] The courts usually referred to the sort of interference the police powers doctrine sought to restrain as interference with *property*,[60] and that reveals something more: in the late-nineteenth-century mind, property and the private sphere were indissolubly linked. More exactly, property generated the private sphere, which was in turn the home of liberty.

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49. *Lochner*, 198 U.S. at 56; *see* HORWITZ, *supra* note 39, at 28–30 (indicating that the central question in cases involving the state's police power was whether government regulation interfered with the private sphere); Benedict, *supra* note 39, at 300–05 (distinguishing permitted types of government interference from prohibited kinds of interference, with the key factor whether the interference benefitted one group or society as a whole).

50. THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 505–08 (7th ed. 1903).

51. 123 U.S. 623 (1887).

52. *Id.* at 659.

53. 198 U.S. 45, 53 (1905).

54. 152 U.S. 133 (1894).

55. *Id.* at 137.

56. McCurdy, *supra* note 39, at 973; White, *Revisiting Due Process*, *supra* note 6, at 105; *see also* HORWITZ, *supra* note 39, at 10–11 (explaining the distinction between the public and private realms in nineteenth-century theory).

57. *See* HORWITZ, *supra* note 39, at 11 (noting that the private realm was characterized by "non-coercive and non-political transactions free from . . . state interference").

58. *Id.* at 10–11.

59. White, *Revisiting Due Process*, *supra* note 6, at 93–96; *see also* McCurdy, *supra* note 39, at 973–74 (stating that Justice Field's jurisprudence was guided by a quest to determine what role government should play in the private sphere).

60. For a thorough summary, see James L. Kainen, *Nineteenth Century Interpretations of the Federal Contract Clause: The Transformation from Vested to Substantive Rights Against the State*, 31 BUFF. L. REV. 381, 404–37 (1982).

This link between property and liberty had its origins deep in the Anglo-American past.[61] Property had played a central role in American understandings of liberty from the first. Every lettered American of the founding era knew from John Locke that property was the touchstone of the social contract; it was to protect their property that individuals left the state of nature.[62] According to Locke, human labor was the source of all wealth in the world and property was the product of that labor.[63] Property was therefore the key to personal independence, personal advancement, and, by extension, personal liberty.[64] Building on this tradition, James Madison claimed in the *Federalist* that persons acquired different amounts of property according to their diverse "faculties" and that it was "the first object of government" to protect them in doing so.[65]

On the Lockean view ubiquitous at the founding, property was a prepolitical right, a right that belonged to individuals apart from any action by the state.[66] That is, individuals had a right to property by nature. This was not to say that American constitutionalists believed all property rights recognized by the law were somehow self-originating. Jurists as early as John Marshall made quite clear that property rules were creatures of convention and of the civil law.[67] The point was that individuals had a right by nature to acquire and hold property, and consequently, they had a right to a system of legal rules that permitted them to do so.[68] Indeed, it was a commonplace of treatise writers from the early 1800s forward that the natural

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61. *See* GILLMAN, *supra* note 39, at 19–33 (proposing that *Lochner*-era jurists inherited from the founding period a preference for market liberty and opposition to class legislation). Gillman's insistence on the continuity of the Founders' concern for property and the later police powers doctrine is, however, seriously overdrawn. For a corrective view, see ROGERS M. SMITH, LIBERALISM AND AMERICAN CONSTITUTIONAL LAW 75–76 (1985).

62. JOHN LOCKE, *Second Treatise of Government*, *in* TWO TREATISES OF GOVERNMENT § 95, at 348–49 (Peter Laslett ed., Cambridge Univ. Press 1964) (1690); *accord* SMITH, *supra* note 61, at 22–24 (summarizing Locke's philosophy).

63. LOCKE, *supra* note 62, §§ 27–32, 40, at 305–38, 314; *see also* SMITH, *supra* note 61, at 22 (explaining Locke's belief that the labor of man turns virtual wasteland into profitable property).

64. *See* SMITH, *supra* note 61, at 22–23 (stating Locke's view that property is a means to economic growth and a necessary component of liberty).

65. THE FEDERALIST NO. 10, at 73 (James Madison) (Clinton Rossiter ed., 1961).

66. *See* HORWITZ, *supra* note 39, at 145–50 (examining the development of property rights and the changing conceptions of property in the late nineteenth century); Robert Brauneis, *"The Foundation of Our 'Regulatory Takings' Jurisprudence": The Myth and Meaning of Justice Holmes's Opinion in* Pennsylvania Coal Co. v. Mahon, 106 YALE L.J. 613, 624–31 (1996) (tracing the theory of vested rights); Forbath, *supra* note 39, at 773–79 (asserting that the right of "free labor," or the rights of individuals to the fruits of their own labor, developed out of the American conceptions of freedom inherited from the American Revolution).

67. Kainen, *supra* note 60, at 413–14.

68. *See* HORWITZ, *supra* note 39, at 145–50 (discussing the law's transition, in the late nineteenth century, from a physicalist conception of property to a more abstract and generalized one focused on market value); Forbath, *supra* note 39, at 774–75, 778–79 (discussing the importance of property ownership under the free labor ideology that flourished among Northern Republicans during the Civil War).

right to property generated a system of private law that protected individuals in their work and possessions and generally facilitated their life together.[69] "Public wrongs, crimes and punishments, depend on the legislative will for their existence as such," one early American treatise author, John Milton Goodenow, explained in 1819.[70] But "private rights and private wrongs are founded in and measured by the immutable principles of natural law and abstract justice."[71]

Early American courts expressed this conviction in the doctrine of vested rights.[72] That doctrine prevented legislative interference with property rights acquired by an individual under existing law.[73] Attempts to alter such already-vested property interests amounted to a species of retroactive lawmaking, or so the doctrine held.[74] The classic example was offered by Justice Samuel Chase in 1798 in the case of *Calder v. Bull*.[75] "[A] law that takes *property* from A[] and gives it to B," Justice Chase wrote, was arbitrary and not "a rightful exercise of legislative authority."[76] In 1810, in *Fletcher v. Peck*[77] the Marshall Court identified this rule as a command of the Article I, Section 10 Contracts Clause and therefore fully enforceable against the states.[78] In 1819, the Court dramatically expanded the doctrine's reach by holding that "contracts" included the charter rights of corporations.[79] Meanwhile, state courts enforced the vested rights rule as a component of the "law of the land" or "due process" clauses of state constitutions on the theory that (following Justice Chase's hint), the rule against undue interference with property rights was a rule against arbitrary lawmaking.[80] Under the rubric of vested rights, early American courts carved out a private sphere, populated by private rights and protected by private law, all generated and defined (in theory, anyway) by the right to property.[81]

By the close of the Civil War, prominent legal thinkers had come to read the prepolitical right to property to include the right to sell one's labor for a

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69. *See* HORWITZ, *supra* note 39, at 11 (describing the view that property rights themselves developed and perpetuated a regime of private law).

70. J. M. GOODENOW, HISTORICAL SKETCHES OF THE PRINCIPLES AND MAXIMS OF AMERICAN JURISPRUDENCE (1819), *reprinted in* 17 CLASSICS IN LEGAL HISTORY 37 (Roy M. Mersky & J. Myron Jacobstein eds., 1972).

71. *Id.*

72. See Kainen, *supra* note 60, at 404–25.

73. *Id.* at 405.

74. *Id.* at 407–08.

75. 3 U.S. (3 Dall.) 386 (1798).

76. *Id.* at 388 (emphasis omitted).

77. 10 U.S. (6 Cranch) 87 (1810).

78. *See id.* at 139 (holding that a state may not interfere with vested contract rights via legislation).

79. Trs. of Dartmouth Coll. v. Woodward, 17 U.S. (4 Wheat.) 518, 641, 650 (1819).

80. Ryan C. Williams, *The One and Only Substantive Due Process Clause*, 120 YALE L.J. 408, 464–67 (2010).

81. HORWITZ, *supra* note 39, at 10–11.

fair return.[82] Thomas Cooley, chief judge of the Michigan Supreme Court and perhaps the most influential treatise writer of the nineteenth century, voiced this perspective in his 1868 treatise on the Constitution. Property, Cooley said, meant more than land or productive assets: property was anything of value, including a person's labor.[83] To deny a person the right to sell his labor in the market would be to deprive him of "liberty" and his stake in the "pursuit of happiness."[84]

Just five years after Cooley published his *Constitutional Limitations*, Justice Stephen Field invoked the same logic in dissent in the *Slaughter-House Cases*,[85] arguing that if liberty meant anything, it meant the ability "to pursue the ordinary avocations of life without other restraint than such as affects all others, and to enjoy equally with them the fruits of [one's] labor."[86] Justice Field cited Adam Smith for the proposition that property necessarily included the right to contract.[87] Field's opinion was controversial because of his reading of the Fourteenth Amendment, but no Justice disagreed with his basic description of liberty or with the link between liberty, labor, contract, and property.[88]

But counting intangible things with prospective content as property, like the right to contract, threatened to make the vested rights doctrine unworkable. If courts treated prospective interests as "vested," the doctrine would prevent virtually any change in any law touching current or future property rights. So state courts converted the vested rights framework into a doctrine prohibiting only *unreasonable* interference with property rights. As to what counted as "reasonable," courts looked to the ancient doctrine of nuisance.[89] The common law had long held that the state had the authority as part of its "police power" to penalize or enjoin uses of private property that posed a health or safety hazard to the public, including uses that undermined public morals.[90] (Liquor distilleries, for example, were commonly deemed nuisances under the common law.)[91] In the late 1850s, state courts began fashioning these nuisance categories into an affirmative doctrine of state

82. *See* Benedict, *supra* note 39, at 298–305 (explaining the laissez-faire doctrine); Forbath, *supra* note 39, at 779–82 (asserting that the freedom to sell one's own labor was at the heart of the free labor doctrine).

83. COOLEY, *supra* note 50, at 561; Forbath, *supra* note 39, at 793–94.

84. COOLEY, *supra* note 50, at 561.

85. 83 U.S. (16 Wall.) 36 (1872).

86. *Id.* at 90 (Field, J., dissenting).

87. *Id.* at 110 n.*; *see also* Forbath, *supra* note 39, at 779–82 (commenting on Justice Field's cite to Adam Smith).

88. *See* GILLMAN, *supra* note 39, at 65–68 (describing Justice Field's interpretation of the Fourteenth Amendment and the other Justices' understanding of the Amendment's scope).

89. HORWITZ, *supra* note 39, at 27–29.

90. *Id.* at 27.

91. *Id.* at 28 (noting bars and stills were widely considered per se nuisances in the nineteenth century).

power.[92] The state could do more with its police power than abate certain private uses, the theory went; it could regulate private property prospectively, so long as that regulation advanced the state's traditional interests in public health, safety, and morals.[93] This was reasonable regulation. Many state courts had long since characterized the vested rights doctrine as a matter of "law of the land" or "due process."[94] In the decade preceding the Civil War, state courts cast their reworking of the vested rights rule into a doctrine of the police power as a matter of due process too.[95] Eventually the Supreme Court followed suit.[96]

The police powers doctrine as it coalesced in the final quarter of the nineteenth century reflected, in nearly all its particulars, a robust notion of democratic liberty. Freedom belonged to the private sphere created by the natural right to property. This right guaranteed its holders the ability to labor, to sell their labor, to acquire wealth and goods, and to improve their standing in life. The liberty the police powers doctrine protected was a social liberty because the natural right to property, though held by individuals, was a social right. It guaranteed its holders social access. The right to participate in the market economy, to share in productive labor, to buy and exchange goods—these were rights that gave their holders a stake in society and its major projects.[97] All these privileges were in turn protected by a network of private law, itself generated by and organized around the right to property.[98] That private sphere, that network of law, those social rights of access—this was the liberty of the police powers doctrine.

The distinctive vision of liberty helped prompt a distinctive reading of due process and a theory of judicial review to go with it. The text of the Fourteenth Amendment's Due Process Clause does not forbid deprivations of life, liberty, and property *simpliciter*, of course.[99] It prohibits deprivation

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92. *Id.* at 27.

93. *Id.* at 27–29.

94. Williams, *supra* note 80, at 460–67.

95. *Id.* at 468 n.277.

96. The first hints of this approach came as early as *Davidson v. New Orleans*, 96 U.S. 97, 102 (1877), in which Justice Miller suggested that to satisfy due process, the legislature would be obliged to offer an acceptable substantive reason for depriving a person of property. *See also* Mugler v. Kansas, 123 U.S. 623, 661–63 (1887) (stating that the Court has a duty to adjudge whether a statute has any "real or substantial relation" to the state's police powers or invades "rights secured by fundamental law"); Soon Hing v. Crowley, 113 U.S. 703, 708 (1885) (stating that courts will only interfere with municipal regulations if the regulations "invad[e] the substantial rights of persons"); Head v. Amoskeag Mfg. Co., 113 U.S. 9, 26 (1885) ("[The statute] has not deprived him of his property without due process of law . . . .").

97. *See* DREW R. MCCOY, THE ELUSIVE REPUBLIC: POLITICAL ECONOMY IN JEFFERSONIAN AMERICA 112–19 (1980) (discussing the increased social opportunity created by the development of the manufacturing industry in America); Forbath, *supra* note 39, at 774–75 (analyzing the societal benefits of the "free labor system").

98. *See supra* note 81 and accompanying text.

99. U.S. CONST. amend. XIV, § 1.

without appropriate process.[100] The Clause says nothing about reasonable police power regulation. Yet by the 1860s, the vested rights tradition had conditioned courts to think of "due process of law" as coterminous with rules against unreasonable interference with property.[101] And prevailing nineteenth-century views on the connection between property and liberty made it a natural further step to cast those rules against unreasonable property interference as rules protecting liberty. By the middle 1880s, the Supreme Court was reading the Due Process Clause in just this fashion, not as a guarantee of process—or not only as that—but as a more general restraint on arbitrary interferences with liberty.[102] In short, the Court read the Clause to protect a general value of liberty.[103]

Reading the Clause in this way produced a new role for the Court.[104] If due process was a command to protect liberty, if the Due Process Clause embodied a general value of liberty, then the Clause obliged the Court to define that liberty and simultaneously authorized it to enforce this definition with the powers of judicial review. This was a role the Court had never before claimed, and its assumption carried fairly dramatic structural consequences. It was these consequences, and their political implications, that spurred the backlash against the Court's police powers jurisprudence in

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100. U.S. CONST. amend. XIV, § 1. The same is true of the Fifth Amendment version. U.S. CONST. amend. V.

101. Harrison, *supra* note 2, at 498–99. *See generally* JOHN V. ORTH, DUE PROCESS OF LAW: A BRIEF HISTORY 9–11, 51–72 (2003) (tracing, from the 1870s to 1930s, the effect of incorporating property interference into due process).

102. *See* DAVID P. CURRIE, THE CONSTITUTION IN THE SUPREME COURT: THE FIRST HUNDRED YEARS, 1789–1888, at 375–82 (1985).

103. For a discussion and critique of "generality shifting," the practice of reading a specific piece of legal text to stand for a more general value or principle, see generally John F. Manning, *Federalism and the Generality Problem in Constitutional Interpretation*, 122 HARV. L. REV. 2003 (2009).

104. Nathan Chapman and Michael McConnell have recently emphasized the separation of powers concerns at the nerve of antebellum due process doctrine, both in the states and at the U.S. Supreme Court. Nathan S. Chapman & Michael W. McConnell, *Due Process as Separation of Powers*, 121 YALE L.J. 1672 (2012). Chapman and McConnell mount a persuasive case that the doctrine that prevented legislatures from "taking from *A* to give to *B*" had much to do with the separation-of-powers idea that of vested property rights could come only by order of a *court*, following a fair hearing and pursuant to neutral and generally applicable law. *Id.* at 1726–40, 1762. But Chapman and McConnell have notably little to say about the evolution of the vested rights tradition or the changing notions of property that went with it. And they give no attention to the emergence of the police powers construct as both a theory of the state's sovereignty and a limit on the (evolving) vested rights doctrine. Consequently, their account treats the emergence of police powers due process, with its review of legislation for substantive reasonableness, as a legal novelty, even a shock. *Id.* at 1677–81, 1726–27. In fact, as this Part has elaborated, the conceptual and doctrinal antecedents for substantive reasonableness review were in place at least as early as the middle 1800s. This is not to say that police powers due process was entirely consonant with the earlier vested rights tradition; on the contrary, as I have tried to explain, police powers due process was something new. But to characterize it as a sudden intrusion of "natural law" thinking, *id.* at 1677–79, is somewhat misleading.

the early years of the 1900s and provoked the modernist critique of the doctrine articulated definitively by Justice Oliver Wendell Holmes.

B. The Holmesian Critique

Justice Holmes rejected both the notion of liberty that animated the police powers doctrine and the uses of judicial review the doctrine recommended. Holmes was a positivist—perhaps the first legal positivist in American history[105]—and his positivism told him that property rights were the creation of legal rules and customs, not prepolitical artifacts that defined the boundaries of the state. Holmes rejected the idea of prepolitical rights altogether, just as he rejected the notion of objective moral truth.[106] And with those twin convictions, Holmes repudiated the very foundations of the police powers doctrine. Precisely because he thought no set of preexisting natural rights marked a clear boundary between public and private, state and citizen, Holmes regarded all questions about government power and its uses as value choices.[107] And given this, he saw no reason why, in a democracy, the courts should make such choices rather than the representatives elected by the people.[108] He was never willing to believe that the Due Process Clause inscribed a general concept of "liberty" that gave the judiciary license to make what were, for him, political judgments.[109] The only backstop Holmes permitted his account of majoritarian democracy was an elusive reference to "fundamental principles."[110] That small reservation would turn out to be quite important, but almost certainly not in the manner Holmes intended and not until Holmesian positivism had carried the day.

Justice Holmes's critique of police powers due process began with his sharply divergent understanding of property. Holmes rejected the Lockean account of property rights as natural possessions that instigated and then defined the social contract.[111] According to Holmes, what the law called property was nothing other than a historically contingent collection of legal rules and conventional practices.[112] Which is to say, what the law called "property" was nothing other than what the law *made* "property."[113]

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105. Morton J. Horwitz, *The Place of Justice Holmes in American Legal Thought*, *in* THE LEGACY OF OLIVER WENDELL HOLMES, JR. 31, 67–68 (Robert W. Gordon ed., 1992). For a general assessment of Justice Holmes's thought, see HORWITZ, *supra* note 39, at 109–13, 116, 123–42 and WHITE, AMERICAN JUDICIAL TRADITION, *supra* note 35, at 131–35.

106. Brauneis, *supra* note 66, at 636–37.

107. *See* White, *Revisiting Due Process*, *supra* note 6, at 89–90 (explaining Justice Holmes's skepticism of the public–private distinction and the rule against class legislation).

108. *Id.* at 89.

109. *Id.* at 91–92.

110. Lochner v. New York, 198 U.S. 45, 76 (1905) (Holmes, J., dissenting).

111. *See* Brauneis, *supra* note 66, at 639 (explaining that Holmes rejected the idea of a human *telos* as the basis for property rights).

112. *Id.* at 631.

113. Int'l News Serv. v. Associated Press, 248 U.S. 215, 246 (1918) (Holmes, J., dissenting).

"Property, a creation of law, does not arise from value," Justice Holmes wrote in 1918.[114] More broadly, Holmes doubted that there were any such things as prepolitical, natural rights.[115] This conviction placed him squarely in conflict with the most foundational assumption of the police powers jurisprudence. Believers in natural rights claimed that individuals had certain privileges prior to the state and society that defined the powers of the political sphere.[116] Holmes by contrast claimed that "[l]egal duties are logically antecedent to legal rights."[117] There were no rights apart from political life, that is, apart from social custom and political command.[118]

Behind Holmes's dismissal of natural rights stood a profound—and profoundly modern—skepticism at the very possibility of knowing anything permanent or true about the reality of things.[119] As Holmes famously explained in 1915: "When I say that a thing is true, I mean that I cannot help believing it."[120] He later elaborated to a private correspondent: "I have no grounds for assuming that my can't helps are cosmic can't helps . . . . Absolute truth is a mirage."[121] As for human nature, Holmes similarly doubted there was anything permanent to disclose. Like his fellow pragmatists, Holmes concluded that human behavior, beliefs, and ideals were historically conditioned.[122] It made no sense, then, to talk of deriving rights from human nature or from larger truth claims about the shape of reality. None of that was possible.[123]

These convictions led Holmes to question the basic story the police powers doctrine told. That doctrine pictured society divided between a private sphere of liberty and a public realm of state action.[124] Holmes

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114. *Id.*

115. White, *Canonization of Holmes*, *supra* note 35, at 580.

116. *See supra* notes 66–68 and accompanying text.

117. OLIVER WENDELL HOLMES, JR., THE COMMON LAW 148 (Am. Bar Ass'n 2009) (1881).

118. *See* WHITE, AMERICAN JUDICIAL TRADITION, *supra* note 35, at 133–34 (describing Justice Holmes's commitment to majoritarian democracy).

119. *See* Brauneis, *supra* note 66, at 636–42 (discussing Holmes's rejection of the idea that the law can be organized around or deduced from a preexisting moral order).

120. Oliver Wendell Holmes, *Ideals and Doubts*, 10 ILL. L. REV. 1, 2 (1915).

121. Letter from Oliver Wendell Holmes, Jr. to Harold Laski (Jan. 11, 1929), *in* THE ESSENTIAL HOLMES: SELECTION FROM THE LETTERS, SPEECHES, JUDICIAL OPINIONS, AND OTHER WRITINGS OF OLIVER WENDELL HOLMES, JR. 107, 107 (Richard A. Posner ed., 1992).

122. *See* JAMES T. KLOPPENBERG, UNCERTAIN VICTORY: SOCIAL DEMOCRACY AND PROGRESSIVISM IN EUROPEAN AND AMERICAN THOUGHT, 1870-1920, at 107–14 (1986) (explaining the progressive rejection of permanent moral truths in favor of moral historicism).

123. *See* HORWITZ, *supra* note 39, at 53–55 (explaining legal philosophers' rejection of the idea of objective causation); Brauneis, *supra* note 66, at 631–37 (describing Justice Holmes's anti-telic, historicist jurisprudence); White, *Canonization of Holmes*, *supra* note 35, at 580–83 (explaining modernists' endorsement of human will, rather than a permanent moral order, as the major factor in shaping the law).

124. *See supra* notes 56–60 and accompanying text.

doubted these spheres could be so neatly separated.[125] Moreover, because Holmes did not believe the private sphere was created by natural property rights, he saw no reason to associate it uniquely with liberty.[126] Indeed, Holmes thought that in some cases government action might promote, rather than diminish, personal freedom, at least if that freedom had any connection to one's conditions of life.[127] "[A]s a fact[,] freedom may disappear . . . through the power of aggregated money or men," Holmes wrote in 1914—that is, at the hands of actors in the private market.[128] Government intervention to counteract this aggregation might actually bolster what Justice Holmes called "practical freedom."[129]

All this led Holmes to reject the use of judicial review the police powers doctrine recommended. If law was not a question of permanent rights but of weighing competing policy interests, then the policy balance struck by the legislature should, in a democracy, be respected absent some extraordinary circumstance.[130] Yet the police powers doctrine made courts the arbiters of policy by asking them to determine whether the legislature's conclusions were "reasonable."[131] Holmes thought this threatened the basic order of democratic government as adopted by the American people.[132] "I think that the word liberty in the Fourteenth Amendment is perverted when it is held to prevent the natural outcome of a dominant opinion," Holmes wrote in his *Lochner* dissent.[133]

The Holmesian critique rejected nearly every aspect of police powers due process. Indeed, the very totality of the rejection implied that Holmes was willing to abandon altogether the effort to find limits on the lawmaking power. But in fact, he was not willing to go quite that far.[134] Holmes was prepared to enforce "specific provisions of the Constitution," as he said some years later in *Adkins v. Children's Hospital*.[135] He added an additional qualifier: Courts could legitimately brake the "dominant opinion" of the legislature if "a rational and fair man necessarily would admit that the statute

125. *See* White, *Revisiting Due Process*, *supra* note 6, at 106 (identifying Justice Holmes as the sole Justice on the *Lochner* Court to reject strict boundaries between the public and private spheres).

126. *Id.* at 110–12.

127. *Id.* at 111.

128. ALEXANDER M. BICKEL & BENNO C. SCHMIDT, JR., 9 THE OLIVER WENDELL HOLMES DEVISE: HISTORY OF THE SUPREME COURT OF THE UNITED STATES 298 (Paul A. Freund & Stanley N. Katz eds., 1984) (quoting from an opinion draft of Keokee Consol. Coke Co. v. Taylor, 234 U.S. 224 (1914)).

129. *Id.*

130. Horwitz, *supra* note 105, at 55.

131. White, *Revisiting Due Process*, *supra* note 6, at 101; *see also* White, *Canonization of Holmes*, *supra* note 35, at 584 (noting that judicial invalidation of such laws revolved around whether they were deemed rational or arbitrary).

132. Horwitz, *supra* note 105, at 70.

133. Lochner v. New York, 198 U.S. 45, 76 (1905) (Holmes, J., dissenting).

134. White, *Revisiting Due Process*, *supra* note 6, at 126.

135. 261 U.S. 525, 568 (1923) (Holmes, J., dissenting).

proposed would infringe fundamental principles as they have been understood by the traditions of our people and our law."[136]

Holmes did not pause to elaborate what he had in mind. Perhaps, in view of his subsequent statements in *Adkins*[137] and his later jurisprudence of free speech,[138] he was thinking of the specific provisions of the Bill of Rights. Or perhaps he was referring to naked transfers of property from one person to another without process or compensation.[139] He did not say. And in one sense, it hardly mattered. Holmes's point was that the police powers doctrine did not count as fundamental, and its reading of the Due Process Clause was not deeply rooted in American jurisprudence.[140] Still, the reservation constituted an implicit admission that the project of finding limits on democratic lawmaking power could not be abandoned entirely. What those limits might be, Holmes left to another day.

For now, Holmes was content to demolish the police powers jurisprudence. And though he stood alone in *Lochner*, his dissent signaled a sea change. In the decade and a half following *Lochner*, the Court steadily broadened the types of interests it said would support the police power's use.[141] The end came finally in 1937 in *West Coast Hotel v. Parrish*,[142] after Justice Holmes had left the Court.[143] The case concerned a minimum wage law for women.[144] Chief Justice Charles Evans Hughes wrote for the majority. His opinion assembled several precedents from the Court's collage of police power cases to support the result.[145] But the centerpiece of the decision was his meditation on liberty.

"The Constitution," he wrote, "does not speak of freedom of contract. It speaks of liberty and prohibits the deprivation of liberty without due process of law."[146] And liberty, Hughes hastened to add, bore no fixed meaning but necessarily took on the color of the time: "Liberty in each of its phases has its history and connotation."[147] Which is to say, it changed, based

136. *Lochner*, 198 U.S. at 76.

137. *Adkins*, 261 U.S. at 568 (Holmes, J., dissenting) (addressing the Fifth Amendment).

138. Gitlow v. New York, 268 U.S. 652, 672–73 (1925) (Holmes, J., dissenting); Abrams v. United States, 250 U.S. 616, 626–27 (1919) (Holmes, J., dissenting). For an analysis of Justice Holmes's free speech decisions, see WHITE, AMERICAN JUDICIAL TRADITION, *supra* note 35, at 144–48.

139. White, *Revisiting Due Process*, *supra* note 6, at 89.

140. *Id.* at 125–26.

141. In 1917, for example, the Court announced the police power included an "interest in the prevention of pauperism, with its concomitants of vice and crime." N.Y. Cent. R.R. v. White, 243 U.S. 188, 207 (1917).

142. 300 U.S. 379 (1937).

143. Justice Holmes left the Court in 1932. WHITE, JUSTICE HOLMES, *supra* note 35, at 467.

144. *Parrish*, 300 U.S. at 386.

145. *Id.* at 397–98.

146. *Id.* at 391.

147. *Id.*

on social circumstances. Freedom of contract and the understanding of labor, property, and rights it reflected was one "connotation," good for its day. But its day was gone. Though he invoked the traditional police power categories, the thrust of Hughes's reasoning denied them salience.[148] If liberty no longer meant most fundamentally the right to labor and to sell one's labor, if it no longer inhered in property of exchangeable value, then the rules fashioned to protect those things no longer constrained. And indeed, Hughes concluded, government regulation need only be "reasonable in relation to its subject" and "adopted in the interests of the community" to be valid.[149]

The Court had lost faith in the constitutional vision of the police powers doctrine—in that doctrine's account of liberty, in the definition of governmental power it implied, and in the uses of judicial review it prescribed for the courts. With *Parrish*, the project of protecting liberty by limiting government intrusion in the private realm had come to a close.

Still, even as it abandoned exacting scrutiny of economic regulation, the Court continued to embrace the idea that the Due Process Clause enacted a general value of liberty and gave the judiciary the power to enforce it. Indeed, the very premise of Chief Justice Hughes's opinion in *Parrish* was that the Due Process Clause embraced a substantive liberty value—"[l]iberty . . . has its . . . connotation," he said[150]—it was simply that this value changed with time. This generality-shifting interpretation of the Clause was the culmination of police powers reasoning and perhaps the most enduring legacy of the police powers era. The Court never rejected it. And as a consequence, the generalized reading would survive to inform the revival of substantive due process in the late 1960s.[151]

In the meantime, the force of the positivist critique drove the Court away, not from the liberty value of the Fourteenth Amendment but from speculative reasoning about what that value might mean. In the face of Holmesian moral skepticism, grand theorizing about "liberty" seemed implausible. Hughes rejected the definition of liberty at back of the police powers doctrine but declined to offer a philosophical alternative. Instead, the Justices turned to the text of the Constitution.[152] Not coincidentally, just a year after *Parrish* the Court decided *Erie Railroad Co. v. Tompkins*,[153] abandoning federal common law with all its background natural law norms.[154] It was the beginning of a positivist retrenchment. For the next thirty years, the Court labored to refound its due process jurisprudence in the

148. *See id.* (referencing the "evils which menace the health, safety, morals and welfare of the people").

149. *Id.*

150. *Id.*

151. *See infra* subparts IV(A)–(B).

152. *See infra* Part II.

153. 304 U.S. 64 (1938).

154. *Id.* at 78.

positive law of the Constitution and to jettison the doctrine's "substantive," nontextual aspects.[155] This marked a major departure from the police powers era, even as it carried over and revised that era's general reading of the Due Process Clause. The result was the creation of a key component of modern substantive due process: the doctrine of fundamental rights.

II. Discovering Fundamental Rights

One of the most persistent misconceptions regarding the origins of modern substantive due process is the idea that the modern doctrine perpetuated a fundamental rights jurisprudence begun by *Lochner*.[156] In fact, the doctrine of fundamental rights arose only after the demise of the police powers jurisprudence and was, in its inception, a doctrine keyed to the text of the Constitution.

In the aftermath of its rejection of police powers due process, the Court developed an alternative doctrinal framework for protecting liberty under the Fourteenth Amendment, one that took on board the central premises of the positivist critique.[157] The Court would no longer speculate about inherent rights or the "nature of our free Republican governments."[158] Instead, retrieving Justice Holmes's suggestion in *Lochner* that the Fourteenth Amendment might prevent the government from infringing certain "fundamental principles,"[159] the Court would deploy the power of judicial review to guard those rights specifically enumerated in the Constitution that it designated as "fundamental."[160]

What made some rights fundamental and others not became, in the years following *Parrish*, the central question of the Court's due process jurisprudence. Different Justices offered different theories. Justice Felix Frankfurter argued that those rights specially connected to the political process were the fundamental ones.[161] Chief Justice Harlan Stone contended

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155. *See infra* Part II.

156. *See supra* note 16 and accompanying text.

157. *See* Kurt T. Lash, *The Constitutional Convention of 1937: The Original Meaning of the New Jurisprudential Deal*, 70 FORDHAM L. REV. 459, 478–79 (2001) (discussing Chief Justice Hughes's reference to the Fourteenth Amendment in *Parrish* and how that case marked the beginnings of a new method of judicial review).

158. Calder v. Bull, 3 U.S. (3 Dall.) 386, 388 (1798) (emphasis omitted).

159. Lochner v. New York, 198 U.S. 45, 76 (1905) (Holmes, J., dissenting).

160. *See* United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938) ("There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments, which are deemed equally specific when held to be embraced within the Fourteenth.").

161. *See, e.g.*, Minersville Sch. Dist. v. Gobitis, 310 U.S. 586, 599 (1940) ("Except where the transgression of constitutional liberty is too plain for argument, personal freedom is best maintained—so long as the remedial channels of the democratic process remain open and unobstructed . . . ."); *cf.* FELIX FRANKFURTER, *Twenty Years of Mr. Justice Holmes's Constitutional Opinions*, *in* FELIX FRANKFURTER ON THE SUPREME COURT 112, 117–20 (Philip B. Kurland ed., 1970) (warning of the dangers posed by the "unrestrained" language of the Due Process Clause).

that it was the "preferred freedoms" of speech, press, assembly, and religion.[162] Justice Hugo Black meanwhile pressed for "total incorporation" of all rights listed in the first eight Amendments.[163] But whatever the catalogue of rights they deemed fundamental, each of these Justices looked to the textual provisions of the Bill of Rights to define the universe of possible candidates. The positivist critique had taken hold. While the Court continued to read the Fourteenth Amendment's Due Process Clause to inscribe a general value of liberty, it now worked to fill out that liberty value by reference to the Constitution's specific rights guarantees.[164] This produced a different sort of due process. Whereas the police powers doctrine protected liberty by enforcing general limits on the government's power to intervene in the private sphere, the post-*Parrish* framework selected particular rights for protection. This doctrine of fundamental rights at once distanced the Court from the *Lochner* era and prepared the ground for the arrival of modern substantive due process.

The Court's newly positivist approach to due process was on display at the very moment it laid the police powers doctrine to rest. In *Palko v. Connecticut*[165]—decided the same term as *West Coast Hotel v. Parrish*—the Court held that the Fourteenth Amendment did not prohibit criminal appeals by state prosecutors, despite the fact such appeals were barred at the federal level by the Fifth Amendment's Due Process Clause.[166] Writing for the majority, Justice Benjamin Cardozo reiterated the Court's position since the *Slaughter-House Cases*[167] that the Fourteenth Amendment did not make the Bill of Rights generally applicable against the states.[168] Still, Cardozo reasoned, some of the "specific pledges of particular amendments [were] . . . implicit in the concept of ordered liberty" and, for that reason, binding on state governments.[169] Here was the generalized reading of due process fostered by the police powers doctrine put to new use. The Fourteenth Amendment protected a "scheme of ordered liberty," Cardozo wrote[170]—a

162. The classic statement comes in Chief Justice Stone's dissent in *Jones v. Opelika*, 316 U.S. 584, 608 (1942) (Stone, C.J., dissenting) ("The First Amendment is not confined to safeguarding freedom of speech and freedom of religion against discriminatory attempts to wipe them out. On the contrary, the Constitution, by virtue of the First and the Fourteenth Amendments, has put those freedoms in a preferred position.").

163. *See* Adamson v. California, 332 U.S. 46, 89 (1947) (Black, J., dissenting) ("I would follow what I believe was the original purpose of the Fourteenth Amendment—to extend to all people of the nation the complete protection of the Bill of Rights.").

164. *See* Lash, *supra* note 157, at 514 (noting that the post-New Deal Court started to limit due process rights to those "specifically expressed" in the Constitution).

165. 302 U.S. 319 (1937).

166. *Id.* at 328–29.

167. 83 U.S. (16 Wall.) 36 (1872).

168. *Palko*, 302 U.S. at 323–24.

169. *Id.* at 324–25 (footnote omitted).

170. *Id.* at 325.

liberty value. Or as the Court said the same term in *De Jonge v. Oregon*[171]: "[F]undamental principles of liberty and justice . . . lie at the base of all civil and political institutions,—principles which the Fourteenth Amendment embodies in the general terms of its due process clause."[172] But this liberty value was now to be defined not by the natural right to property and the private sphere it created, but by "the specific pledges of particular amendments."[173]

Justice Cardozo was careful to note that not every right protected by constitutional amendment was essential to the scheme of ordered liberty. *Palko* held that the Fifth Amendment bar on criminal appeals by the government was not.[174] It was up to the courts to ask whether the textual right at issue was "so rooted in the traditions and conscience of our people as to be ranked as fundamental."[175]

Palko was not the first time the Court had referred to "fundamental principles"[176] in the context of the Fourteenth Amendment. As early as *Hurtado v. California*[177] in 1884, the Court had held that while historical practice generally indicated the range of legal procedures that were constitutionally acceptable, only those procedures that were truly "fundamental" were affirmatively required by the Due Process Clause.[178] The Court pursued this same line of thought in *Twining v. New Jersey*,[179] decided in 1908. The question there was whether the Fifth Amendment right against self-incrimination applied to the states.[180] The Court held it did not, but not before announcing that Fourteenth Amendment due process protects "immutable principle[s] of justice."[181] On that basis, the Court suggested in dicta that "it is possible that some of the personal rights safeguarded by the first eight Amendments against National action may also be safeguarded against state action, because a denial of them would be a denial of due process of law."[182]

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171. 299 U.S. 353 (1937).

172. *Id.* at 364.

173. *Palko*, 302 U.S. at 324–25.

174. *Id.* at 328–29.

175. *Id.* at 325 (quoting Snyder v. Massachusetts, 291 U.S. 97, 105 (1934)) (internal quotations omitted).

176. *Id.* at 328 (quoting Hebert v. Louisiana, 272 U.S. 312, 316 (1926)).

177. 110 U.S. 516 (1884).

178. DAVID P. CURRIE, THE CONSTITUTION IN THE SUPREME COURT: THE SECOND CENTURY, 1888–1986, at 245–46 (1990); *see also Hurtado*, 110 U.S. at 534–35 (reasoning that "the institution and procedure of a grand jury" was not included in the Fourteenth Amendment's Due Process Clause because of differences in the language of the Fifth and Fourteenth Amendments).

179. 211 U.S. 78 (1908).

180. *Id.* at 90–91.

181. *Id.* at 113–14.

182. *Id.* at 99.

Hurtado and *Twining* were process cases, but in *Chicago, Burlington & Quincy Railroad Co. v. Chicago*[183] in 1897 the Court had held that the Fifth Amendment right to just compensation—something more than a process guarantee—applied against state governments because it was essential to the "substance" of due process of law.[184] And in *Gitlow v. New York*,[185] a majority of the Court "assume[d]" for sake of argument that "freedom of speech and of the press . . . are among the fundamental personal rights and 'liberties' protected by the due process clause,"[186] and for that reason applicable against the states.[187]

These earlier cases invoking "fundamental rights" or "principles" bore only a tenuous relationship to the police powers framework. The Court justified them initially on the theory that the Due Process Clause safeguarded only that legal process that was fundamental and later on the basis that certain personal rights might be constitutionally protected because they were central to maintaining the private sphere of liberty.[188] *Palko* drew these cases together and supplied a doctrinal frame oriented toward the constitutional text.[189] The fundamental rights protected by the Fourteenth Amendment Due Process Clause were those enumerated rights so essential to the "concept of ordered liberty" that "neither liberty nor justice would exist if they were sacrificed."[190] These rights, by virtue of their fundamentality, were drawn "by a process of absorption" into the Clause[191]: they defined the meaning of the liberty value.

Using this analysis, the *Palko* Court rechristened various cases decided under the police powers rubric as "incorporation" cases about the Bill of Rights. In *Pierce v. Society of Sisters*,[192] for instance, decided in 1925, the

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183. 166 U.S. 226 (1897).

184. *Id.* at 235, 241.

185. 268 U.S. 652 (1925).

186. *Id.* at 666.

187. *Id.* Because the Court concluded the defendant's First Amendment rights had not been violated, the Court's "assumption" was not binding. *Id.* at 670–72. Justices Holmes and Brandeis dissented and would have held explicitly that the First Amendment right to speech applied against the states. *Id.* at 672–73 (Holmes, J., dissenting).

188. Twining v. New Jersey, 211 U.S. 78, 101 (1908). Writing for the Court, Justice William Moody observed:

> [C]onsistently with the requirements of due process, no change in ancient procedure can be made which disregards those fundamental principles, to be ascertained from time to time by judicial action, which have relation to process of law and protect the citizen in his private right, and guard him against the arbitrary action of government.

Id.; *see also* CURRIE, *supra* note 102, at 367 (quoting Hurtado v. California, 110 U.S. 516, 532, 535 (1884)) (noting that due process must limit state law from infringing on substantive rights, not merely procedural rights).

189. Lash, *supra* note 157, at 483–85.

190. Palko v. Connecticut, 302 U.S. 319, 325–26 (1937).

191. *Id.* at 326–27.

192. 268 U.S. 510 (1925).

Court had concluded that a state law requiring children to attend public elementary and secondary schools unreasonably infringed both private schools' contractual rights and parents' right to direct the upbringing of their children by contracting with private schools for their education.[193] The Court's holding was squarely within the police powers frame: its conclusion was that state law trenched on the sphere of private liberty without adequate justification.[194] *Palko*, however, treated *Pierce* as a free exercise case.[195] Then-Justice Harlan Stone (later Chief Justice) performed a similar maneuver in *United States v. Carolene Products*,[196] decided the same term as *Palko*. In his famed footnote four, Justice Stone casually referred to another *Lochner*-era case involving a teacher's contractual rights, *Meyer v. Nebraska*,[197] as turning on ethnic discrimination—and therefore, presumably, on the rights to equal protection—rather than on the state's ability to regulate "liberty" using its police powers.[198]

Palko represented a new turn in the Court's due process jurisprudence. Whether a particular governmental regulation was "reasonable" would no longer bear the weight of the due process inquiry.[199] Instead, the Court would focus on whether the government action touched an *enumerated* right understood as "fundamental."[200] As Justice Stone wrote in *Carolene Products*, the Court would treat "regulatory legislation affecting ordinary commercial transactions" as presumptively constitutional from now on, but not when the "legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments, which are deemed equally specific when held to be embraced within the

193. *Id.* at 534–36.

194. *Id.*

195. *Palko*, 302 U.S. at 324.

196. 304 U.S. 144 (1938).

197. 262 U.S. 390, 400, 403 (1923) (holding that state regulations restricting foreign-language education infringed teachers' contract rights and parents' right to direct their children's education).

198. *Carolene Prods.*, 304 U.S. at 152 n.4.

199. The Hughes Court continued to hold out the prospect, rather half-heartedly, that *some* legislation might be struck down for lack of "reasonableness," though on what theory and in what circumstances it never quite said. *See, e.g.*, *id.* at 153. Writing for the Court, then-Justice Stone explained:

> Where the existence of a rational basis for legislation whose constitutionality is attacked depends upon facts beyond the sphere of judicial notice, such facts may properly be made the subject of judicial inquiry, and the constitutionality of a statute predicated upon the existence of a particular state of facts may be challenged by showing to the court that those facts have ceased to exist.

Id. (citation omitted). In any event, the Court was no longer much interested in the question. It would not invalidate legislation on reasonableness grounds for almost fifty years, and when it did, its holding had nothing to do with the police powers doctrine. *See* City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 447–48 (1985) (invalidating a housing ordinance requiring a special permit for "a facility for the mentally retarded" because the ordinance failed the rational basis test).

200. *Palko*, 302 U.S. at 324–25; Lash, *supra* note 157, at 483–84.

Fourteenth."[201] In this way, by binding the due process liberty value to the text of the Constitution, the Court sought to avoid the sort of speculation about liberty that the positivist critique said invited judicial policy making.[202]

If the *Palko* approach was positivist, it was also circular. It defined the "liberty" of the Fourteenth Amendment by reference to "fundamental" rights guarantees, but defined "fundamental" by reference to "the concept of ordered liberty."[203] This circularity rendered the *Palko* method deeply ambiguous. On the one hand, it might be an essentially historical inquiry as to whether the right at issue was "so rooted in the traditions and conscience of our people as to be ranked as fundamental."[204] But in other passages in *Palko*, Justice Cardozo suggested a far more open-ended test that could hardly help but call for philosophical reasoning. Rights were fundamental if "neither liberty nor justice would exist if they were sacrificed," he offered.[205] Or this: fundamental rights were those without which "a fair and enlightened system of justice would be impossible."[206] This second version of the inquiry depended critically on what liberty meant: it required some reference to a metanorm or ideal. After all, one could not decide whether "liberty" would cease to exist unless one had some idea what liberty was in the first place.

Cardozo, however, was anxious to avoid such theorizing. As he applied the test in *Palko*, the historical inquiry got the accent. On the question before the Court, he concluded that the right against self-incrimination did not "lie at the base of all our civil and political institutions"[207] and therefore did not bind the states. Still, the circularity problem remained. Unless the Due Process Clause "absorbed" the Bill of Rights whole, or at least the personal rights of the first eight Amendments, it was hard to see how the Court could ultimately avoid relying on some metanorm of liberty to give meaning to the concept of "fundamental."

No one appreciated the ambivalence at the heart of *Palko* better than Justice Hugo Black, who attempted to resolve it by doubling down on the Court's positivist turn with his theory of "total incorporation."[208] But Black's

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201. *Carolene Prods.*, 304 U.S. at 152 & n.4; Lash, *supra* note 157, at 484–85.

202. Lash, *supra* note 157, at 485–87.

203. *Palko*, 302 U.S. at 324–25, 327.

204. *Id.* at 325 (quoting Snyder v. Massachusetts, 291 U.S. 97, 105 (1934)) (internal quotation marks omitted).

205. *Id.* at 326.

206. *Id.* at 325.

207. *Id.* at 328 (quoting Hebert v. Louisiana, 272 U.S. 312, 316 (1926)) (internal quotation marks omitted).

208. For the fullest judicial statement of Justice Black's views, see Adamson v. California, 332 U.S. 46, 68–92 (1947) (Black, J., dissenting). For assessments of Justice Black's views, see AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION 174–80 (1998); Lash, *supra* note 157, at 509–12.

position would never command a majority.[209] And in one sense, the failure of his argument made little difference. The Court eventually incorporated nearly all of the Bill of Rights, including the right against self-incrimination at issue in *Twining* and *Palko*.[210] But in another way, Black's defeat was a watershed. In rejecting Black's claim that fundamental rights meant all of those personal rights enumerated in the constitutional text, the Court made more distinct the possibility that "fundamental rights" might include some rights not in the Constitution at all. At the end of the day, the Constitution was not the test of what "fundamental" meant. Rather, the meaning of liberty was the test. For the years following *Palko* until the middle 1960s,[211] the Court ventured no further definition of the Due Process Clause's liberty value—or at least, no systematic one. It was content to expand protections for speech, press, religion, and criminal defendants (to name a few) interstitially, on a case-by-case basis, and without elaborate theoretical justification.[212] Developments in the world of ideas, however, would shortly supply a new concept of liberty and with it, the catalyst for a new reading of the Due Process Clause.

III. The Ethic of Authenticity

The collapse of the police powers doctrine represented more than the demise of a discrete line of cases. It represented the eclipse of an entire intellectual world. The police powers jurisprudence was bound up with an integrated way of thinking about rights, liberty, democracy, and even human nature—a worldview—that came apart in the early twentieth century.[213] This collapse produced a severe sense of dislocation in the law no less than in

209. For much of Justice Black's tenure on the Court, the principal opposition came from Justice Felix Frankfurter, a disciple of Justice Holmes who was as devoted to judicial restraint as Black, but who feared total incorporation would empower the federal judiciary too far by authorizing it to sit in perpetual judgment on state legislation. *See Adamson*, 332 U.S. at 62 (Frankfurter, J., concurring) (asserting that to apply the Bill of Rights to the states in full would "fasten[] upon the States procedural arrangements which, in the language of Mr. Justice Cardozo, only those who are 'narrow or provincial' would deem essential to 'a fair and enlightened system of justice'" (quoting *Palko*, 302 U.S. at 325)).

210. McDonald v. City of Chicago, 561 U.S. 742, 764–65 (2010).

211. *See* Griswold v. Connecticut, 381 U.S. 479, 484–86 (1965) (emphasizing individuals' right to privacy).

212. *See, e.g.*, New York Times Co. v. Sullivan, 376 U.S. 254, 256, 279–80 (1964) (establishing a stringent "actual malice" standard for damages for public defamation); Gideon v. Wainwright, 372 U.S. 335, 342 (1963) (announcing that the right to counsel in a criminal trial is a fundamental right); Yates v. United States, 354 U.S. 298, 318, 322–25 (1957) (tightening the "clear and present danger" standard to protect advocacy of government overthrow, without further action, as free speech); Cantwell v. Connecticut, 310 U.S. 296, 303 (1940) (applying the First Amendment's Free Exercise Clause to the states).

213. GILLMAN, *supra* note 39, at 192–93; *see also* BAILEY, *supra* note 39, at 208–09 (describing the breakdown of traditional jurisprudential frameworks).

philosophy,[214] but it also touched off a period of intense intellectual creativity. In the opening decades of the twentieth century, democratic theorists worked to forge a new understanding of the liberal project, one premised on the progressive critique of the old order so forcefully articulated by Justice Holmes. Perhaps the most important early contributor to this effort was John Dewey.

Drawing on a vein of romantic individualism present in Western thought since at least Jean-Jacques Rousseau,[215] Dewey suggested that the true value of liberal democracy inhered in its ability to stimulate individual "growth," by which he meant the development and realization of the individual's potentialities—what one might call the individual's authenticity.[216] Dewey replaced the natural-rights emphasis characteristic of earlier liberal thought with a nonteleological, relativist ethic, centered on the individual.[217] The crisis of the Second World War pressed liberal thinkers to translate Dewey's relativist, romantic liberalism into a full-scale defense of democracy and also of human rights.[218] The final yield was a new explanation of liberty, grounded on a thoroughgoing moral and intellectual relativism joined to an account of the individual's need—and ultimately the individual's right—to personal authenticity and self-development.[219] This is the ethic that would underwrite the rebirth of substantive due process.

A. John Dewey's Romantic Liberalism

John Dewey was a social scientist and philosopher who began his scholarly career writing about psychology before migrating to ethics, political philosophy, and educational theory.[220] A contemporary of Justice Oliver Wendell Holmes, Jr., Dewey belonged to the pragmatist set of thinkers and theorists that exercised prodigious influence on the intellectual agenda of the progressive period and, besides Justice Holmes, included such

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214. *See* GILLMAN, *supra* note 39, at 193, 205 (describing the Court's loss of its previous jurisprudential basis and the need to develop "new constitutional foundations"); KLOPPENBERG, *supra* note 122, at 39–41 (discussing the philosophical change that accompanied the abandonment of the police powers doctrine).

215. *See infra* section III(A)(1).

216. *See, e.g.*, JOHN DEWEY, INDIVIDUALISM: OLD AND NEW 157–60 (Capricorn Books 1962) (1930) (discussing the potential for and importance of human growth within a society); John J. Stuhr, *Dewey's Social and Political Philosophy*, *in* READING DEWEY: INTERPRETATIONS FOR A POSTMODERN GENERATION 82, 95 (Larry A. Hickman ed., 1998) (explaining Dewey's suggestion was that a "society . . . is not fully free unless it makes available to its members the prerequisites of their growth").

217. *See infra* section III(A)(2).

218. *See infra* subpart III(B).

219. *See infra* subpart III(C).

220. KLOPPENBERG, *supra* note 122, at 41–45; *see also* 8 FREDERICK COPLESTON, A HISTORY OF PHILOSOPHY 352–53 (1985) (listing Dewey's published works for different periods of his life).

prominent figures as William James and Charles Peirce.[221] This was an influential cohort and Dewey was no exception: by the 1920s, he was the most recognized liberal theorist in America.[222]

Dewey's political philosophy was defined by his foundational commitment to pragmatism, which he described as a commitment to identifying ethical principles through a process of trial and error—problem solving—rather than by finding out preexisting moral truths.[223] Indeed, like Justice Holmes, Dewey was a moral skeptic.[224] He doubted that there were such things as moral facts that existed in the universe apart from particular human communities and particular human wants.[225] Truth, ideals, norms—these were constructed in response to felt needs.[226] No norm or ideal could be called permanent. On the contrary, all social values were subject to revision as human circumstances changed.[227] "The hypothesis that *works*," Dewey said, "is the *true* one."[228]

The symmetry between Dewey and Holmes in their basic posture of skepticism and rejection of moral absolutes—an attitude I will shorthand, for these purposes, as their "relativism"[229]—is striking. But while Holmes was content to leave it at that, privately describing democracy as nothing more

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221. KLOPPENBERG, *supra* note 122, at 41–42. For a popular account of those intellectual thinkers and their ideas, see generally LOUIS MENAND, THE METAPHYSICAL CLUB (2001).

222. *See* KLOPPENBERG, *supra* note 122, at 43–46 (noting Dewey's importance in political philosophy); ROBERT B. WESTBROOK, JOHN DEWEY AND AMERICAN DEMOCRACY, at ix–x (1991) (describing Dewey as the "most important philosopher in modern American history").

223. KLOPPENBERG, *supra* note 122, at 45–46; WESTBROOK, *supra* note 222, at 126–30.

224. *See* EDWARD A. PURCELL, JR., THE CRISIS OF DEMOCRATIC THEORY: SCIENTIFIC NATURALISM AND THE PROBLEM OF VALUE 42 (1973) (describing Dewey as a "whole-hearted antagonist of all absolutism"); WESTBROOK, *supra* note 222, at 130–31 (noting that in Dewey's view, truth "was not found but 'made'"); Gregory F. Pappas, *Dewey's Ethics: Morality as Experience*, *in* READING DEWEY: INTERPRETATIONS FOR A POSTMODERN GENERATION, *supra* note 216, at 100, 102–12 (describing "Dewey's opposition to rules, fixed ends, and universal standards"). For broad overviews of Dewey's thought on this and related points, see generally THOMAS M. ALEXANDER, JOHN DEWEY'S THEORY OF ART, EXPERIENCE, AND NATURE (1987), as well as Richard Rorty's famous (if famously tendentious) account of Dewey's antirealism in RICHARD RORTY, PHILOSOPHY AND THE MIRROR OF NATURE 5–13 (1979).

225. *See* KLOPPENBERG, *supra* note 122, at 43 ("Truth, Dewey insisted, is not revealed once and for all but created in time by individuals participating in a community dedicated to and fired by religious ideas. Truth is created on earth by man's thought, reason, and activity.").

226. *Id.*; *see also* John Dewey, *Social Science and Social Control*, 67 NEW REPUBLIC 276, 276 (1931) (arguing that social science, unlike physical fact finding, is inexorably connected to human purposes, values, and desires).

227. COPLESTON, *supra* note 220, at 356–57.

228. JOHN DEWEY, RECONSTRUCTION IN PHILOSOPHY 156 (Beacon Press 1972) (1920) (first emphasis added); *see also* PURCELL, *supra* note 224, at 29 (discussing Dewey's commitment to scientific analysis as a way of "understanding the social universe").

229. This term is of course a controversial one with many and varied meanings. I use it in the same sense as PURCELL, *supra* note 224, at 41–46, merely as shorthand and without implying any position in the broader theoretical debate about relativism's meaning and import.

than rule of the majority by force,[230] Dewey sought to convert his relativist convictions into a reformed and positive account of the liberal project. Clearing away the talk about natural rights and permanent truths brought to the fore, Dewey believed, what made political liberty truly worthwhile: the ability of citizens to impart meaning to their experience through self-development.[231] Liberty in Dewey's reckoning was profoundly connected with the individual's ability to be truly herself: to be or become *authentic*.[232]

Dewey placed this notion of authenticity at the center of his reformed liberalism.[233] But it was hardly a new idea. On the contrary, it was precisely because authenticity was such a resonant concept in the Western tradition that it could animate Dewey's thought as it did. Dewey's contribution was to connect this ethic to progressive liberalism, giving it—and liberalism—a new turn.

1. The Genealogy of Authenticity.—The constitutive elements of the idea of authenticity emerged in the Western tradition very early on. Augustine of Hippo may have been the first expositor.[234] The second-century Christian bishop and philosopher contended that knowledge of the Good and of God comes not primarily from the external world, but from within.[235] "Do not go abroad," Augustine famously taught, "Return within yourself. In the inward man dwells truth."[236] The way to encounter God, he instructed, was to contemplate the divine pattern of one's soul and to listen for God's voice within. "[T]his light by which [outer things] become manifest is certainly within the soul," Augustine said.[237] This was something new. Augustine

230. *Cf.* WHITE, JUSTICE HOLMES, *supra* note 35, at 60 (mentioning Holmes's support for economic freedom and his disinterest in redistributive legislation or "social assimilation").

231. *See* COPLESTON, *supra* note 220, at 367–73 (discussing Dewey's theory that social progress depends on "promoting the fullest possible development in desirable ways of the capacities of individuals"); Stuhr, *supra* note 216, at 91–97 (explaining Dewey's commitment to independent thought and self-realization); *cf.* DEWEY, *supra* note 216, at 184 (emphasizing education as an instrumentality to independence and fulfillment).

232. Stuhr, *supra* note 216, at 94.

233. *See infra* section II(A)(2).

234. *See* H. MARK ROELOFS, THE TENSION OF CITIZENSHIP: PRIVATE MAN AND PUBLIC DUTY 142–54 (1957) (connecting Augustine's commitment to the pursuit of truth to an ethic of citizenship); CHARLES TAYLOR, SOURCES OF THE SELF: THE MAKING OF MODERN IDENTITY 127–39 (1989) (discussing Augustine's spirituality, focusing on self-reflection and inner truth).

235. TAYLOR, *supra* note 234, at 129. For discussion of this point and Augustine's dependence on Platonic anthropology, see generally GEORGE TAVARD, LES JARDINS DE SAINT AUGUSTIN: LECTURE DES *CONFESSIONS* 25–39 (1988); *see also* Rowan Williams, *The Paradoxes of Self-Knowledge in the* De Trinitate, *in* AUGUSTINE 121 (J. Lienhard et al eds., 1993).

236. AUGUSTINE, OF TRUE RELIGION 69 (J.H.S. Burleigh trans., 1959).

237. TAYLOR, *supra* note 234, at 129–30.

suggested for the first time in western philosophy that the good life depended on a realm of individual interiority.[238]

But it was Jean-Jacques Rousseau who gave authenticity as such its first thorough articulation.[239] Rousseau absorbed Augustine's claim that the Good, and with it the ends of human life, were discovered within.[240] But he described the voice the individual heard in that innermost place differently. For Rousseau, the turn inward was a turn not to God, but to the unique, subjective voice of the individual.[241] There was no one "truth of nature" because there was no one "nature of man," only the natures of each person for him or herself.[242] "I know my own heart and understand my fellow man," Rousseau explained.[243] "I may be no better, but at least I am different."[244] The Good was an inherently subjective thing, to be found by each person—and this by connecting to her deepest and truest self.[245]

The tragedy, according to Rousseau, was that this self was hard to find.[246] The desire to please others and appear as worthwhile in their estimation induced the individual to follow social prescriptions rather than her true personhood.[247] Social dependence closed the individual off to herself, separating her from the wellspring of her individuality; it made her shallow, false, and morally disoriented.[248] Moral salvation came from authenticity. To overcome alienation and meaninglessness, the person

238. *See id.* at 133 (suggesting that Augustine was "the first to make the first-person standpoint fundamental to our search for the truth").

239. *See* MARSHALL BERMAN, THE POLITICS OF AUTHENTICITY: RADICAL INDIVIDUALISM AND THE EMERGENCE OF MODERN SOCIETY 75–88 (1970) (discussing the originality of Rousseau's conception of the "search for authenticity"); CHARLES TAYLOR, THE ETHICS OF AUTHENTICITY 26–27 (1991) (noting that Rousseau revived and extended Augustine's ideas on reflexive self-awareness).

240. *See* TAYLOR, *supra* note 239, at 26–27 (surveying Rousseau's ideological extensions of and variations on Augustine's theory of self-awareness).

241. TAYLOR, *supra* note 234, at 357–58.

242. *See* JEAN-JACQUES ROUSSEAU, CONFESSIONS 17 (J.M. Cohen trans., Penguin Books 1954) (1781) ("My purpose is to display to my kind a portrait in every way true to nature, and the man I shall portray will be myself.").

243. *Id.*

244. *Id.*

245. *See* BERMAN, *supra* note 239, at 86 ("The process of confessing, for Rousseau, was a process of unmasking, of differentiating, of integrating, of *bringing his authentic self into being.*"); TAYLOR, *supra* note 234, at 362 (noting that, for Rousseau, "the inner voice of my true sentiments *define* what is the good").

246. *See* BERMAN, *supra* note 239, at 83–85 (elaborating on Rousseau's belief that men constantly try to hide who they are, but to know a man's true nature "it [is] necessary to tear men's veils and costumes and masks away"); TAYLOR, *supra* note 234, at 27 (noting that the discovery of such self requires breaking free from the influence of all "external impositions").

247. TAYLOR, *supra* note 239, at 27.

248. *Id.*

needed to reestablish contact with her authentic self, the self that stood apart from and prior to any moral system or social obligation.[249]

Recovering this contact was not as easy as identifying a divine pattern already written in the depths of one's being, however.[250] Unlike Augustine, Rousseau did not believe that the individual's true self existed, already made, in the mind of God, to be disclosed in a moment of revelation.[251] Rather, the self had to be formed.[252] The process of self-reflection was also, and fundamentally, a process of self-discovery, synthesis, even creation.[253] It was not enough for the person to know herself. She had to *become* herself by constructing an identity in accord with her deepest desires and aspirations. She could become a true individual only by becoming truly authentic.[254]

By the time Dewey encountered this constellation of ideas about authenticity, they had been further refracted by the Romantic movement. Romantic thinkers like Johann Gottfried Herder, the German poet and philosopher, championed the idea of cultural and personal originality.[255] Persons and people groups, Herder said, each had their own unique way of being—their own "measure."[256] No person could say to another what life should mean for her.[257] One became an individual by living one's *own* way in one's distinctiveness.[258] To imitate someone else meant to miss the essence of what it meant for you to be you, and thus what it meant to be human.[259] Authenticity was for Herder, as for the Romantics more generally, a matter of self-expression.[260] The person could only be truly human if he embraced his distinctiveness, and that included making his own moral choices.[261] The values, beliefs, and practices that gave shape to one's life had

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249. *See* BERMAN, *supra* note 239, at 83–84 (explaining Rousseau's contention that to know the true nature of a man, his social "veil" must be stripped away); TAYLOR, *supra* note 234, at 357–59 (stating Rousseau's idea that recovering contact with one's nature was seen as an escape from dependence on others).

250. *See* TAYLOR, *supra* note 234, at 357–59 (excerpting a portion of Rousseau's work where Rousseau notes that apart from "Conscience," Rousseau could "find nothing in [himself] to raise [him] above the beasts").

251. BERMAN, *supra* note 239, at 85–86.

252. *Id.*

253. *Id.*

254. *Id.*; *see also* TAYLOR, *supra* note 239, at 27 (explaining that, for Rousseau, moral salvation depends on "recovering authentic moral contact with ourselves").

255. *See* TAYLOR, *supra* note 239, at 28–29 (noting Herder's proposal that each person "has an original way of being human").

256. JOHANN GOTTFRIED VON HERDER, *This Too a Philosophy of History for the Creation of Humanity*, *in* PHILOSOPHICAL WRITINGS 272, 273–74 (Michael N. Forster ed. & trans., 2002); TAYLOR, *supra* note 239, at 28.

257. TAYLOR, *supra* note 239, at 28–29.

258. *Id.* at 28.

259. *Id.* at 29.

260. *Id.*

261. *Id.*

to be chosen by oneself, or they could not be meaningful.[262] Moral choice was central to selfhood.[263]

The American Romantic and transcendentalist Ralph Waldo Emerson taught a similar expressivist version of authenticity.[264] "Insist on yourself," Emerson preached, "never imitate."[265] Emerson emphasized that moral order was not to be discovered within the cosmos, but within the individual.[266] Only the individual—not societies or cultures or governments—had the capacity for true moral choice.[267] Emerson's expressivism led him to a radical form of individual self-reliance. He cast society and the state as oppressive influences to be resisted. "[W]ith the appearance of the wise man, the State expires," he wrote.[268] The truly authentic person had no need for government; he could direct his own life without the aid of others. "The appearance of character makes the State unnecessary."[269]

What had begun with Augustine as a turn to the inner voice of God had become by the nineteenth century an ethic of individual moral independence: of self-discovery, self-fulfillment, and self-expression. This was the ethic that Dewey employed to fashion a reformed account of liberalism.[270]

2. Reforming Liberalism.—The Romantic version of authenticity treated political society with skepticism—at best. In Emerson's thought, for example, society and state were forces hostile to individual self-development.[271] Dewey integrated this highly individualist ethic into a theory of progressive liberalism that was notably friendly to government action. He did it by making individual self-realization the aim of political society.[272] Rather than asking individuals to subordinate their personal ends to the good of the whole, Dewey cast the good of the whole as the free

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262. *See id.* at 28–29 (arguing that one should not conform to external standards but live by one's own).

263. *Id.*

264. *See, e.g.*, John Holzwarth, *Emerson and the Democratization of Intellect*, 43 POLITY 313, 314 (2011) (explaining Emerson's theory of self-reliance); George Kateb, *Emerson and Self-Reliance*, *in* 8 MODERNITY AND POLITICAL THOUGHT 1, 16–19 (Morton Schoolman ed., 1995) (same).

265. 1 RALPH WALDO EMERSON, *Self-Reliance*, *in* THE WORKS OF RALPH WALDO EMERSON 18, 35 (1883).

266. *See* COPLESTON, *supra* note 220, at 264 (describing the significance of individual self-reliance in the development of Emerson's moral doctrine).

267. *See id.* (noting that to Emerson, "[c]onformism [was] a vice").

268. RALPH WALDO EMERSON, *Politics*, *in* THE WORKS OF RALPH WALDO EMERSON, *supra* note 265, at 236, 244.

269. *Id.*

270. *See* ALEXANDER, *supra* note 224, at 271–73 (summarizing Dewey's views on the development of culture and the pluralistic democratic ideal).

271. *See supra* notes 267–69 and accompanying text.

272. WESTBROOK, *supra* note 222, at 438.

development of personal ends.[273] This move built on the relativist premises Dewey shared with Justice Holmes and the other pragmatists, but went beyond the critique of natural rights and the private–public distinction to supply a new and affirmative political ideal: the ideal of authentic self-development.

As Dewey had it, the relativist rejection of natural rights and a permanent human *telos* cleared the path for a more accurate, and ultimately more inspiring, assessment of human nature, one informed by the ethic of authenticity.[274] Values were not things persons discovered in the universe, Dewey concluded; values were things individuals made.[275] And by making values, individuals made themselves.[276] Echoing Emerson, Herder, and Rousseau before them,[277] Dewey concluded that human nature was not static. It could change from era to era, culture to culture.[278] Which was to say, individuals had within them the potential for what Dewey called "growth."[279] He understood this growth to be just the sort of personal discovery that the ethic of authenticity made central. Growth, Dewey said, meant the "realization of [individual] capacities";[280] "self-initiated expression";[281] the "develop[ment] [of individual] faculties";[282] and "full development of [individual] powers."[283] Individual growth was the outworking of the individual's distinctiveness, the originality that only she could discover and articulate.

Dewey converted this capacity for self-development into the touchstone of political society. He described growth as the ultimate human Good—"the only moral 'end'"[284]—and thus as the ultimate end of politics as well. With this claim, Dewey replaced the earlier liberalism's commitment to a particular human *telos* and the account of rights and society that came from it with a decidedly non-telic, subjectivist vision of individual choice and self-realization.[285] "Liberalism is committed to an end that is at once enduring

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273. *Id.*

274. *See* KLOPPENBERG, *supra* note 122, at 132–44 (explaining Dewey's nonteleological ethics).

275. *Id.* at 133–34.

276. *Id.* at 139.

277. *See supra* section III(A)(1).

278. *See* KLOPPENBERG, *supra* note 122, at 140–44 (noting Dewey's rejection of a *summum bonum* in favor of the inherently indeterminate ethical standard of democracy).

279. *Id.* at 140; *see also* COPLESTON, *supra* note 220, at 369–74 (elucidating Dewey's perspective on individual growth as moral end); Stuhr, *supra* note 216, at 91–97 (discussing Dewey's understanding of self-actualization as a social product).

280. JOHN DEWEY, LIBERALISM AND SOCIAL ACTION 56 (Capricorn Books 1963) (1935).

281. *Id.* at 90.

282. *Id.* at 66.

283. *Id.* at 93.

284. DEWEY, *supra* note 216, at 177.

285. *See* KLOPPENBERG, *supra* note 122, at 139–44 (discussing Dewey's instrumentalist approach to ethics).

and flexible: the liberation of individuals so that realization of their capacities may be the law of their life," he wrote.[286]

This embrace of authentic self-development as the end of political life produced a new description of liberty and a new role for government. On Dewey's account, individuals realized their selfhood by discovering their unique potentials and bringing those potentials to fruition.[287] And that meant self-discovery and human freedom belonged together. Only if the individual was able to voice her convictions and pursue her own ends could she be free.[288] Anything less than that, any infringement of her powers of self-development, would render her less than human.[289] "[T]he cause of the liberty of the human spirit" therefore *was* "the cause of opportunity of human beings for full development of their powers."[290] The two were one and the same.

Dewey's intellectual mentor Emerson might well have agreed, but Emerson drew from that premise a deep hostility to government.[291] Dewey came to a different conclusion. Authentic self-development necessitated government action.[292] Dewey believed that the social and economic circumstances of early-twentieth-century America worked to stifle individual agency.[293] The withering of the face-to-face rural community, for example, the ubiquity of wage labor, the epidemic of urban poverty, and the concentration of economic power in ever fewer hands—these developments, Dewey thought, denied large numbers of Americans the practical opportunity to develop their capacities.[294] That being so, a good many Americans would cease to be free if government failed to intervene.[295] With this logic, Dewey turned the older liberalism's solicitude for the individual and his rights against it. The public–private distinction, he argued, with its implied limits on government power, destroyed individual freedom rather than advanced it. "Earlier liberalism regarded the separate and competing economic action of individuals as the means to social well-being as the end. We must reverse the perspective," Dewey concluded, "and see that socialized economy is the means of free individual development as the end."[296]

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286. DEWEY, *supra* note 280, at 56.

287. Stuhr, *supra* note 216, at 93–94.

288. *Id.* at 94–95.

289. *Id.* at 95.

290. DEWEY, *supra* note 280, at 93.

291. *See* COPLESTON, *supra* note 220, at 264 (explaining Emerson's belief that individual self-development and self-reliance, once achieved, render the State unnecessary).

292. Stuhr, *supra* note 216, at 94–96.

293. WESTBROOK, *supra* note 222, at 434.

294. *Id.* at 432–35 (highlighting Dewey's identification of the general societal ills of his time as obstacles to self-realization).

295. Stuhr, *supra* note 216, at 96 ("Democratic ends, [Dewey] argued, require democratic means for their realization . . . .").

296. DEWEY, *supra* note 280, at 90.

In calling for extensive government regulation, even government planning, of the economy, Dewey drew close to the program of early twentieth-century socialism.[297] But while socialism prescribed government organization of economic life for the good of the collective, Dewey concluded that "[t]he ultimate place of economic organization in human life is to assure the secure basis for an ordered expression of *individual* capacity."[298] His political theory remained, he insisted, a form of liberalism.[299] But not the liberalism of laissez-faire, rather the liberalism of individual self-realization and moral progress.[300]

Dewey's embrace of the ethic of authenticity and his associated account of individual growth affirmed the basic elements of the relativist critique but moved beyond mere positivism. Democracy, for Dewey, was more than the rule of the many by force. Democracy rested on an ethical ideal. One of Dewey's principal contributions to liberal theory was to enable relativists to champion ethical norms without endorsing any particular moral system as "true."[301] Rather than abandon ethical norms along with the notion of a morally charged universe, Dewey derived norms from the very fact of relativism and subjectivity.[302] His reformed liberalism jettisoned talk of natural rights and natural law, only to substitute in its place an ethic of individual self-development.[303]

Dewey's intellectual synthesis was an impressive achievement and highly influential. By the 1930s, Dewey's reformulated, Romantic liberalism had won a significant following among democratic theorists.[304] Still, Dewey's ideas contained more than a few ambiguities. For one thing, Dewey had precious little to say about rights. At times, he appeared to regard the very concept with suspicion as too closely associated with the earlier liberalism's apology for the market and the separation of public and

297. WESTBROOK, *supra* note 222, at 429–30, 441.

298. DEWEY, *supra* note 280, at 88 (emphasis added).

299. WESTBROOK, *supra* note 222, at 430–32.

300. *Id.* at 431–34, 438–39.

301. *See* KLOPPENBERG, *supra* note 122, at 140–42 (describing how Dewey's instrumentalism provided "a method of answering ethical questions" without deriving "universally applicable" ethical maxims).

302. *See* KLOPPENBERG, *supra* note 122, at 141 (describing how Dewey rejected "specific moral guidelines" in favor of providing a process for "solving moral problems"); WESTBROOK, *supra* note 222, at 433 (noting that the participation of individuals formed the values of a democratic society); Stuhr, *supra* note 216, at 93–95 (arguing that, according to Dewey, a government or society must foster the growth of its members' individuality).

303. KLOPPENBERG, *supra* note 122, at 139–40; WESTBROOK, *supra* note 222, at 438–39; Stuhr, *supra* note 216, at 93–95.

304. PURCELL, *supra* note 224, at 206–07 (noting the volume of scholars who followed Dewey's views).

private.[305] And that underscored another, more profound ambiguity: just what sort of freedom was it that Dewey endorsed? Dewey himself called his new liberalism a form of positive liberty.[306] True democracy, Dewey argued, democracy for individual self-development, set the human person "free *positively*, free to live his own life, free to express himself."[307] Liberalism could never focus merely on the absence of external restraints, Dewey said.[308] So-called negative freedom failed to guarantee that individuals would have the opportunity to develop their personalities.[309]

This was true not only because the conditions of twentieth-century life, if not alleviated by the state, closed off the avenues for personal development for a good many Americans. It was also true because humans were social creatures.[310] Human development took place only within society, and for this reason it was only through collective social action in the form of government that individuals could achieve the growth that Dewey regarded as the aim of living.[311] Indeed, for all his emphasis on the individual, Dewey more than occasionally spoke as if individual growth and social growth were the same activity.[312] Dewey believed individual freedom was bound up inextricably with *social* progress and *social* development.

But might there come a point at which collective social action hindered individual development rather than propelled it? This was a question Dewey never conclusively answered. He remained committed until the end of his life to wedding individual self-realization with government activism.[313] But the mid-century struggle against first Nazi and then Soviet totalitarianism directed the liberal theory he helped articulate into new channels. More specifically, it forced democratic theorists to identify the bounds of government authority and to articulate a theory of individual rights. Both became urgent tasks in the face of authoritarianism. And liberal theorists addressed both by returning to the ethic of authenticity.

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305. *See* John Dewey, *The Future of Liberalism*, 32 J. PHIL. 225, 225–27 (1935) (describing how "the *laissez-faire* doctrine was held by the degenerate school of liberals to express the very order of nature itself").

306. KLOPPENBERG, *supra* note 122, at 44.

307. *Id.* (emphasis added) (quoting John Dewey, Address at the Sunday Morning Service of the University of Michigan Students' Christian Association (Mar. 27, 1892), *reprinted in* 4 JOHN DEWEY, *Christianity and Democracy*, *in* THE EARLY WORKS OF JOHN DEWEY, 1882–1898, at 3, 5 (Jo Ann Boydston et al. eds., 1971) (internal quotation marks omitted).

308. WESTBROOK, *supra* note 222, at 435.

309. *Id.* at 435–36; Stuhr, *supra* note 216, at 94–95.

310. *See* KLOPPENBERG, *supra* note 122, at 139–40 (explaining Dewey's views on the connection between the development of individual personalities and societal institutions).

311. *Id.*

312. *Id.*; WESTBROOK, *supra* note 222, at 433–34.

313. *See* PURCELL, *supra* note 224, at 200–02, 206 (documenting how Dewey continued to refine his philosophy throughout the 1920s and 1930s in response to the changing international political landscape).

B. The Limits of the State

By the middle 1930s, Dewey's reconstructed liberalism had attracted widespread support, but it was never without its detractors. A substantial cadre of social scientists and political theorists sympathetic to moral realism—the belief that some moral facts are true independent of social context or circumstance—questioned Dewey's celebration of ethical subjectivity.[314] The outbreak of political absolutism in Europe crystallized these theorists' misgivings and provided the occasion for a vigorous public challenge.[315] The critics' contention was that Dewey's relativism could supply no principled account of government's limits or individual rights.[316] Rather than abandon relativist premises, however, Dewey and his sympathizers launched an aggressive counterargument: they contended that relativism provided the only sure limits on state power.[317] With this argument, liberal theorists reaffirmed their commitment to relativism, helping entrench it as the prevailing opinion of American intellectuals.[318] But though it ratified, in this sense, Dewey's foundational claims, this defense recalibrated Dewey's liberal theory in at least one significant way. It turned his celebration of individual and social self-discovery into an account of the state's *limits* instead of its possibilities. This was a change that would echo in American constitutional law.[319]

The critics' principal charge was that Dewey's ethical subjectivism amounted to a doctrine of force: the Good was whatever the most powerful said it was.[320] As Leonard Eslick of St. John's College put it at a meeting of the American Catholic Philosophical Association in 1942: "The effect of [Dewey's approach] is inevitably moral skepticism, and from this to *realpolitik* and totalitarianism the distance is not very far."[321] Critics contended that Dewey's liberalism actually undermined democracy by denying individuals the only certain bulwark against political absolutism—rights.[322] Dewey spoke of individual growth as an ethical ideal, but he also said that individual growth required collective action, that it was not

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314. *Id.* at 180–96 (describing the challenges to Dewey's liberalism).

315. *Id.* at 137–38.

316. *Id.* at 179–81.

317. *See id.* at 160–62 (describing the relativists' rebuttal that realism encouraged totalitarianism).

318. *See id.* at 200–05 (explaining the liberal consensus in favor of relativist thought and for the idea that moral absolutism and political authoritarianism are linked).

319. *See infra* Part IV.

320. *See* PURCELL, *supra* note 224, at 180 (citing critics comparing Dewey's philosophy to totalitarianism).

321. Leonard Eslick, *Current Conceptions of Truth*, 18 PROC. AM. CATHOLIC PHIL. ASS'N 24, 29 (1942).

322. PURCELL, *supra* note 224, at 180 ("[Critics] charged Dewey with . . . denying man's God-given rights, and denying the true purpose of government as the protection of those rights.").

meaningful outside a collective context.[323] Worse, Dewey described growth as amorphous, changeable, evolutionary.[324] It meant different things for different societies in different contexts, and that meant it provided no firm bar to government interference in the life of the individual. Armed with the elastic duty to promote personal self-discovery, there was no telling what government might do.[325] "The plain truth," said one critic, "is that, John Dewey, more than any other single American writer, has undermined the principles on which American democracy rests!"[326] The social scientist Arnold Brecht summed up the antirelativist critique when he wrote in the *American Political Science Review* that "[t]here can be little doubt that totalitarianism has greatly profited from the value-emptiness which has been the result of positivism and relativism in the social sciences."[327]

For a time, the severity of these allegations appeared to disrupt the consensus in favor of moral and epistemic relativism and posed, by extension, a sharp challenge to Dewey's liberal project.[328] Defenders of that project and of relativism responded by converting the core relativist claims into an account of government's limits.

Dewey himself launched the counterargument. He had been contending since at least the 1920s that belief in moral absolutes was incompatible with democracy.[329] Under fire in the late 1930s, Dewey deployed that claim against his critics. As Dewey had it, moral realism was the philosophy that harbored totalitarian impulses, not relativism.[330] Realism encouraged overconfidence and disdain for opposing views.[331] It was rigid: it led to a disinterest in social experimentation, personal growth, and ethical discovery in favor of fixed boundaries for private and public, rights and duties.[332]

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323. COPLESTON, *supra* note 220, at 367–68.

324. KLOPPENBERG, *supra* note 122, at 140; Stuhr, *supra* note 216, at 93–95; *see also* COPLESTON, *supra* note 220, at 367–74 (distinguishing between custom and growth and explaining that "Dewey's answer is . . . that when a problematic situation arises, such as a clash between man's developing needs on the one hand and existing social institutions on the other, impulse stimulates thought and inquiry directed to transforming or reconstructing the social environment").

325. *See* PURCELL, *supra* note 224, at 180–82 (describing critics' aversion to Dewey's empowerment of government).

326. Stephen F. McNamee, *Presidential Address*, *in* PHASES OF AMERICAN CULTURE 7, 11 (1941).

327. Arnold Brecht, 35 AM. POL. SCI. REV. 545, 545 (1941) (reviewing JACQUES MARITAIN, SCHOLASTICISM AND POLITICS (1940)).

328. *See* PURCELL, *supra* note 224, at 181–83 (noting that scholars began to criticize the value-free approach of relativism).

329. *Id.* at 200–01; *see also, e.g.*, DEWEY, *supra* note 216, at 30, 61–66 (discussing the role of "contentious" learning and feudalism in efforts to establish a class system in society).

330. *See* PURCELL, *supra* note 224, at 200–02 (noting Dewey's argument that moral realism was linked to totalitarianism).

331. *See id.* at 201–02 (noting moral realism's tendency to embrace a single truth).

332. *See* JOHN DEWEY, FREEDOM AND CULTURE 89–102 (Capricorn Books 1963) (1939) (recognizing that absolutist totalitarian regimes encourage freedom of discussion, criticism, and voluntary associations much less than countries with suffrage and popular representation);

Above all, moral realism sanctioned the dangerous belief that truth really could be identified for all time and then made politically permanent.[333] In this, moral realism fueled a dangerous sort of utopianism that invited political coercion.[334] Political scientist John Lewis summarized this alleged affinity between moral realism and absolutism: Commitment to moral absolutes, he wrote, "invites the dangerous conclusion that since *one* right course exists, since there is an absolute common good, an elite group, however small, . . . is the best guardian of the welfare of the state."[335]

Dewey's fellow travelers developed the corollary: Relativism bred liberty. Relativism's critics, then, had it exactly wrong. Far from endangering democratic freedom, relativism was the only certain way to safeguard it because only relativism imposed dependable limits on the state.[336] Thomas Vernor Smith of the University of Chicago articulated the relativists' line of thought when he claimed that belief in moral absolutes stimulated "a push for power."[337] Commitment to moral and intellectual relativism, by contrast, disciplined this impulse by curbing the uses to which power could be put.[338] Drawing on Dewey as well as the positivism of Justice Holmes, Smith argued that "civilization . . . lies somewhere beyond conscience" and its truth claims.[339] Relativism taught that nothing was certain and all ethical ideals contingent.[340] That meant majorities had no right to impose their views as final. And it also meant that individuals deserved as much freedom as possible to work out their own ends, according to their own lights. "Democracy," Smith insisted, "does not require, *or permit*, agreement on fundamentals."[341] Majorities were of course welcome to believe what they wanted about the Good, but any use of government power to force others to accept their conclusions was illegitimate.[342] By circumscribing the appropriate uses of political authority, relativism guaranteed limited government,

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PURCELL, *supra* note 224, at 201–02 (explaining the argument that relativism engenders freedom of discussion, criticism, and voluntary associations).

333. *See* PURCELL, *supra* note 224, at 202 (recognizing that the danger of political attachment to one "right" course is inherent in absolutism).

334. *See id.* (suggesting absolutism can easily lead to one political group's supremacy).

335. John D. Lewis, *The Elements of Democracy*, 34 AM. POL. SCI. REV. 467, 477 (1940).

336. *See* PURCELL, *supra* note 224, at 200–02 (discussing the advent and acceptance of a theoretical contrast between "totalitarian and absolutist" Nazism and "nonabsolutist and relatively free" American society).

337. T.V. SMITH, BEYOND CONSCIENCE 343 (1934).

338. *Id.* at 344 ("[U]nless the individualistic is common, . . . unless the private is shared, . . . unless egoism is a good for others now, there never can be other good than power triumphant or checkmated.").

339. *See id.* at vii, 334–35 (discussing the fungibility of truth, particularly in the context of military victors).

340. PURCELL, *supra* note 224, at 204–05.

341. T.V. SMITH, DISCIPLINE FOR DEMOCRACY 124 (1942) (emphasis added).

342. PURCELL, *supra* note 224, at 209.

individual freedom, equality, and mutual tolerance.[343] In the words of Harvard philosopher Philipp Frank: "[T]his relativism has been for centuries the only effective weapon in the struggle against any brand of totalitarianism."[344]

By the late 1940s, the relativists' counterargument had been widely made and widely accepted in both the social scientific and legal communities.[345] This outcome was hardly surprising, given the ascendance of the relativist position before the late 1930s. But the new majority view brought an important shift in emphasis. John Dewey linked relativism to individual choice and self-development—this was the heart of his reformed liberalism—but insisted that the aspiration to authentic growth licensed, even required, robust government action.[346] The gathering postwar consensus, by contrast, retained Dewey's twin commitments to relativism and individual self-development, but recast them as restraints on collective action. They were the values that *limited* the state, not empowered it, and that prevented oppression and absolutism. With this reformulation, the ethic of authenticity was well on its way to becoming something for Dewey it had not been—an account of individual rights—and a new apology for a concept central to the police powers doctrine and the older understanding of liberty: the private sphere.

C. *Authenticity, Individual Rights, and the Private Sphere*

Once liberal theorists began characterizing the contingent nature of moral and ethical norms as a limit on government action, it was only a short distance to thinking of the individual's capacity to define those norms for herself as a right held against the state. In the aftermath of the Second World War, liberal theorists made precisely that connection. Authentic self-development, what Dewey had called "growth," was basic to human dignity and thus foundational to any account of human rights, the argument ran. But this step carried surprising implications. For authentic self-development to be possible, liberal theorists reasoned, the individual required some space in which to make the profound choices that defined her personhood. The right to self-development turned out to require some sort of private sphere. The ethic of authenticity thus led liberal theorists back to the private–public distinction central to the police powers doctrine, but with a difference. Liberal theorists now located this private sphere not in civil society but within

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343. *See id.* at 215 (explaining one notable relativist scholar's perspective that relativist democracy requires broad toleration of individual differences and compromise).

344. Philipp Frank, *The Relativity of Truth and the Objectivity of Values*, *in* SCIENCE PHILOSOPHY AND RELIGION: THIRD SYMPOSIUM 12, 13 (1943) (internal quotation marks omitted).

345. PURCELL, *supra* note 224, at 209–10.

346. *See* WESTBROOK, *supra* note 222, at 433–39, 441 (noting Dewey's arguments for "the full flowering of individuality" and for socialization of the American economy).

the person herself. In the new liberalism, the private sphere had become personal privacy.

Many scholars drew the connection between value relativism, authentic self-development, and individual rights. In 1957, the constitutional theorist Carl Friedrich suggested that the U.S. Constitution guaranteed "each member of the Community a substantial amount of freedom . . . to search out the truth for himself, to argue and to be wrong."[347] This was, Friedrich said, America's great "moral belief."[348] Writing at the same time, the popular poet and essayist Archibald MacLeish defined freedom as the right to choose "the truth which is true for [oneself]."[349] But one of the most influential translations of relativism and authenticity into the argot of individual rights came from the pen of the English émigré Isaiah Berlin. It was Berlin's achievement to restate the Deweyian commitment to individual choice and ethical self-discovery in the classic language of the Anglo-American liberal tradition—that is, as a matter of negative freedom.[350]

Berlin began from the now-familiar premise that belief in unchanging moral facts paved the road to totalitarianism.[351] All the great despotisms of the modern age, he said, had in common "a Platonic ideal," namely, that "all genuine questions must have one true answer and one only, all the rest being necessarily errors."[352] But "[t]o force people into the neat uniforms demanded by dogmatically believed-in schemes is almost always the road to inhumanity."[353] So far Berlin and Dewey were in perfect agreement. But Berlin's critical move came next: he identified the notion of moral universals with the "idea of a perfect society"[354] and the two together with "positive freedom." Moral realism, Berlin said, led straight on to the idea of liberty as

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347. C.J. FRIEDRICH, CONSTITUTIONAL REASON OF STATE: THE SURVIVAL OF THE CONSTITUTIONAL ORDER 12–13 (1957).

348. *Id.* at 10 (emphasis omitted).

349. ARCHIBALD MACLEISH, FREEDOM IS THE RIGHT TO CHOOSE: AN INQUIRY INTO THE BATTLE FOR THE AMERICAN FUTURE, at viii (1951).

350. *See* JOHN GRAY, ISAIAH BERLIN: AN INTERPRETATION OF HIS THOUGHT 50–59, 67 (2013) (identifying Berlin's focus on negative liberty as allowing for self-creation). I am grateful to Ian MacMullen for pointing out to me that philosophers and historians of philosophy mean different things by "authenticity," and that some may worry at the association of Berlin with that term. Philosophical debates aside, for the purposes of my argument in this Article, what I mean by "authenticity" is nothing other than "a view of man as inherently unfinished and incomplete, as essentially self-transforming . . . as at least partly the author of himself and not subject comprehensively to any natural order." *Id.* at 45. That is precisely the view of the human person that John Gray and others have identified as foundational to Berlin's political theory. *See id.* at 56–59, 67, 176–79, 192–95 (chronicling the importance of self-creation to Berlin's theory).

351. For a thorough discussion of Berlin's "value-pluralism," see GRAY, *supra* note 350, at 74–110.

352. ISAIAH BERLIN, *The Pursuit of the Ideal*, *in* THE CROOKED TIMBER OF HUMANITY 1, 5 (Henry Hardy ed., 1991).

353. *Id.* at 19.

354. ISAIAH BERLIN, *The Decline of Utopian Ideas in the West*, *in* THE CROOKED TIMBER OF HUMANITY, *supra* note 352, at 20, 40.

collective self-mastery, which turned out upon close examination to be nothing other than liberty as submission. According to Berlin, moral realism implied that there was "a common good, valid for all mankind"[355]—or put another way, "a harmonious solution of the problems of mankind"[356]—that could be discovered by reason or perhaps revelation. There was in short a single truth that held all of human life together. The individual achieved self-mastery by identifying this truth and conforming himself to it.[357] As Berlin had it, that notion of self-mastery ended in submission because it implied that those recalcitrant persons who failed to understand the true human *telos* could be forced to conform to it for their own benefit and for the benefit of the whole.[358] This amounted to a "monstrous impersonation, which consists in equating what X would choose if he were something he is not, or at least not yet, with what X actually seeks and chooses."[359]

Dewey lauded collective self-mastery as potentially liberating to the individual.[360] But Berlin claimed that authentic self-development and positive freedom were mutually exclusive.[361] Collective mastery stifled authentic, personal discovery precisely because it assumed that there was one "common good, valid for all mankind" to be realized.[362] But there was not. Dewey had not taken his own conclusions seriously enough. The world contained not one but many goods, incommensurate with each other, among which each individual must choose based on her unique understanding of herself and her life ends.[363] "There are many things which men do have in common," Berlin maintained, "but that is not what matters most. What *individuali[z]es* them, makes them what they are, . . . is what they do *not* have in common with all the others."[364] Berlin traced this insight to Herder[365] and endorsed the grandly individualist ambition of the Romantic movement "to achieve self-reali[z]ation and free self-expression against whatever odds."[366] Self-development could only ever be *individual* self-development.

Positive freedom, then, was a dangerous chimera. The aspiration to authentic self-development required limits on the state and liberty for the individual—"negative freedom" by which Berlin meant the capacity of

355. *Id.* at 43.

356. *Id.* at 44.

357. ISAIAH BERLIN, *Two Concepts of Liberty*, *in* FOUR ESSAYS ON LIBERTY 118, 131–34 (1969).

358. *Id.* at 133.

359. *Id.*

360. *See* KLOPPENBERG, *supra* note 122, at 139–40 (describing Dewey's views regarding the relationship between self-realization, society, and attainment of the individual's capacities).

361. GRAY, *supra* note 350, at 58–59.

362. BERLIN, *supra* note 354, at 43.

363. GRAY, *supra* note 350, at 78–82.

364. BERLIN, *supra* note 354, at 39 (emphasis added).

365. *Id.* at 37–40.

366. *Id.* at 43.

individuals "to choose to live as they may desire."[367] That was the kind of freedom that made self-development possible. And because it did, Berlin saw negative liberty as "a truer and more humane ideal than the goals of those who seek in the great, disciplined, authoritarian structures the ideal of positive self-mastery."[368] Negative liberty honored the basic right of the individual to choose her own ends. Berlin connected that right of choice to human dignity.[369] Leaving individuals free to arrive at their own understandings of the Good honored their identity as "self-transforming human beings."[370] For Berlin, the "freedom to choose ends"[371] was the most foundational of political rights—in fact the most foundational of all human rights—and the only just basis for political society.[372]

Berlin's translation of authentic self-development into a species of individual rights suggested a new definition of political liberty: liberty as the right to authentic self-development, as the right to choose. This was an ethical ideal, a metaethic in fact, that Berlin and other proponents believed held universal significance for the just ordering of political society.[373] But importantly, it did not depend on any particular description of the Good or system of natural law. Liberty as the right to self-development was grounded rather on relativism, without need for other moral claims or absolutes.[374] The relativism that rejected the natural rights theories of the eighteenth and nineteenth centuries turned out to support a rights theory of its own.

The turn toward rights was not the only parallel between the coalescing idea of liberty as self-development and the older liberalism. The redescription of self-development as negative freedom led scholars to rediscover—and then reimagine—the distinction between private and public. This reconstruction began in the early 1950s as a new genre of "public sociology" merging social analysis, political philosophy, and legal theory emphasized the vital importance of private space for authentic self-development. One of the first and most influential entries in this field was *The Lonely Crowd*, appearing in 1950 and written principally by legal-scholar-turned-social-theorist David Riesman.[375] Riesman described healthy individuality in terms directly taken over from the ethic of authenticity. True

367. BERLIN, *supra* note 357, at 170.

368. *Id.* at 171 (internal quotation marks omitted).

369. *Id.* at 172.

370. *Id.* at 171; *see also* GRAY, *supra* note 350, at 45–46, 50–51, 88–90 (explicating Berlin's doctrine of value pluralism).

371. BERLIN, *supra* note 357, at 172.

372. *See* GRAY, *supra* note 350, at 177–79, 194–95 (noting that Berlin ascribes great importance in human life to the freedom to make choices).

373. BERLIN, *supra* note 357, at 171–72.

374. GRAY, *supra* note 350, at 97–98.

375. DAVID RIESMAN, THE LONELY CROWD: A STUDY OF THE CHANGING AMERICAN CHARACTER (1950).

individuality depended on "heightened self-consciousness," he said, on the "success of [the person's] effort to recognize and respect his own feelings, his own potentialities, his own limitations."[376] The hectic social world of post-war America, however, worked against such self-realization by relentlessly denying individuals the moral and psychic space necessary to develop their inner capacities.[377] Increasingly dominated by a powerful mass media and characterized by new, impersonal living arrangements like the suburbs, American social life had become invasive.[378] Lacking moral space for self-development, the individual fell into conformism, with a resulting loss of capacity to choose her own ends.[379]

Riesman's findings became a common refrain. Additional studies published in the 1950s connected the development of authentic personhood to the existence of some private sphere that would protect and nurture the "core self."[380] As the sociologist Leontine Young explained: "Without privacy there is no true individuality."[381] But it was not so much physical space or seclusion these theorists lauded; it was a qualitative distance from the demands and influences of others, including both society and government.[382] What individuals needed to develop their personalities was a form of moral privacy for the inner self. Reflecting the intrinsic and qualitative sense of this private space, social theorists sometimes spoke of it not as privacy at all, but as autonomy.[383] Autonomous individuals, Riesman postulated, were those who had separated themselves from the mores of society and risen above their social influences to become capable of true and genuine choice.[384]

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376. *Id.* at 305.

377. *See id.* at 295 (suggesting that individuals need "some freedom of behavior" to develop autonomy).

378. *See id.* at 273–74 (commenting on the social significance of mass media).

379. *See id.* at 307–08 (asserting that American culture impedes the development of autonomy).

380. *See, e.g.*, ERVING GOFFMAN, THE PRESENTATION OF SELF IN EVERYDAY LIFE 69–70 (1959) (discussing the individual's ability to build his own "social distance" from others); KURT LEWIN, RESOLVING SOCIAL CONFLICTS 18–19 (1948) (stating Americans are "more willing to be open to other individuals" on peripheral layers of personality than Germans, but that their inner layers are just as guarded); Edward A. Shils, *Social Inquiry and the Autonomy of the Individual*, *in* THE HUMAN MEANING OF THE SOCIAL SCIENCES 114, 118–20 (Daniel Lerner ed., 1959) (considering the "sacredness of individuality" and how individuals create and sustain a sphere of privacy built from memories, intentions, and tastes; an involuntary sharing of the sphere of privacy infringes upon one's autonomy).

381. LEONTINE YOUNG, LIFE AMONG THE GIANTS 130 (1966).

382. *See* RIESMAN, *supra* note 375, at 295 (asserting that most individuals "need the opportunity for some freedom of behavior if they are to develop and confirm their autonomy of character").

383. *Id.* at 287.

384. *Id.*

Riesman explicitly linked this privacy or autonomy with political freedom.[385] Absent privacy, freedom was not possible.[386] "The idea that men are created free and equal is both true and misleading," he concluded.[387] "[M]en are created different; they lose their social freedom and their individual autonomy in seeking to become like each other."[388] By the end of the 1950s, some legal scholars had reached the same judgment. In a 1958 essay, Clinton Rossiter matter-of-factly referred to privacy as an element of liberty, with privacy defined as a sort of moral independence.[389] "Privacy is a special kind of independence, which can be understood as an attempt to secure autonomy in at least a few personal and spiritual concerns, if necessary in defiance of all the pressures of modern society," he wrote.[390] "The free man is the private man, the man who still keeps some of his thoughts and judgments entirely to himself," and who maintained, as a consequence, "an unbreachable wall of dignity and reserve against the entire world."[391]

And so the private–public distinction was central to liberty after all. But the private sphere required by liberty defined as authentic self-development was not a type of civil society free from government regulation, but rather personal privacy, a moral independence, psychic space—autonomy. This privacy was as necessary against social intrusion as it was against government. The point was that privacy, like authenticity itself, was something that inhered in the individual. It described the individual's needs, if she was to be authentic, to choose her own ends; in a word, to be free.

The ethic of authenticity had enjoyed a long career in Western thought before Dewey plucked it up in the early twentieth century. In his hands, it became the nerve of a new understanding of liberty. By the early 1960s, liberty defined as self-development—as the right to choose—was exerting a profound influence on American thought, from the academy to popular culture.[392] Archibald MacLeish voiced its animating ethos when he claimed it as the very essence of "the American Proposition."[393] "[I]f men, all men, are free to make their own way by their own means to the truth which is true for them, each one of them," MacLeish wrote, this "will be a better world:

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385. *Id.* at 295–96.

386. *Id.* (noting that totalitarianism, which seeks to minimize freedom, "wages open and effective war on autonomy").

387. *Id.* at 373.

388. *Id.*

389. Clinton Rossiter, *The Pattern of Liberty*, *in* ASPECTS OF LIBERTY: ESSAYS PRESENTED TO ROBERT E. CUSHMAN 15, 17 (Milton R. Konvitz & Clinton Rossiter eds., 1958).

390. *Id.* (emphasis omitted).

391. *Id.*

392. *See, e.g.*, MACLEISH, *supra* note 349, at viii–ix ("[The American Proposition] is, indeed, the one new and wholly revolutionary idea the world we call the modern world has produced . . . .").

393. *Id.* at viii.

juster, stronger, wiser, more various."[394] That was liberty as authentic self-development. And it was soon to fuel a major constitutional renovation.

IV. The Revival of Substantive Due Process

For nearly thirty years after it renounced the police powers doctrine in *West Coast Hotel v. Parrish*, the Supreme Court carefully confined its use of the Due Process Clause to incorporating those portions of the Bill of Rights it deemed fundamental.[395] Then came, in swift succession, *Griswold v. Connecticut*,[396] *Eisenstadt v. Baird*,[397] and *Roe v. Wade*.[398] By 1973, the Court had decoupled the fundamental rights analysis from the text of the Bill of Rights, announced a constitutional right to privacy not enumerated in the document, and prescribed strict scrutiny for statutes found to conflict with this privacy right—all in the name of the Due Process Clause of the Fourteenth Amendment. The Court had revived substantive due process.

At the center of the revived doctrine was a new conception of liberty. One could detect its influence as early as *Griswold v. Connecticut* in the Court's sudden emphasis on the notion of privacy.[399] *Eistenstadt* and then especially *Roe* clarified that this "privacy" interest stood for a complex of ideas about the rights of the individual and the limits of governmental power reaching far beyond the use of contraceptives by married couples. The issue in fact was never contraceptives, it was always personal liberty. The story of these cases and those that followed is the story of the Court refashioning its due process jurisprudence to vindicate this ideal of liberty, an ideal that became progressively more distinct and well-defined—if ever-broader—in the progression from *Griswold* to *Eisenstadt* to *Roe* and ultimately to *Planned Parenthood v. Casey*[400] and *Lawrence v. Texas*.[401]

The background complex of ideas about the individual, rights, and government that the Court began by calling "privacy"[402] and eventually identified as a species of Due Process "liberty"[403] will by now appear quite familiar. It is the ideal of authentic self-development. Justice Brennan's description of "privacy" in *Eisenstadt* as "the right . . . to be free from

394. *Id.*

395. This middle way was forged by Justice Brennan, a methodology he called "selective incorporation." *See* William J. Brennan, Jr., *The Bill of Rights and the States*, 36 N.Y.U. L. REV. 761, 769 (1961) (explaining that the Court "opened [the] door" for incorporation of the Bill of Rights through the Fourteenth Amendment). For the Supreme Court's own rehearsal of this history, see McDonald v. Chicago, 561 U.S. 742, 763–66 (2010).

396. 381 U.S. 479 (1965).

397. 405 U.S. 438 (1972).

398. 410 U.S. 113 (1973).

399. *Griswold*, 381 U.S. at 483–86.

400. 505 U.S. 833 (1992).

401. 539 U.S. 558 (2003).

402. *Griswold*, 381 U.S. at 483–86.

403. *Roe*, 410 U.S. at 152–53.

unwarranted governmental intrusion into matters . . . fundamentally affecting [the] person"[404] could have been penned by Isaiah Berlin or any number of mid-century liberal theorists, perhaps even by John Dewey. And liberty defined as *Roe* defined it, as the right of the individual to choose her own ends, her own values, her own way of life, was liberty as authentic self-development.

This revised conception of liberty unlocks the story of substantive due process's revival. It explains why the *Griswold* Court seized on the ideal of privacy, even as it propounded a definition of that term unknown to earlier case law. It explains the theoretical connection between *Griswold*, *Eisenstadt*, and *Roe*, a problem that has puzzled scholars for years.[405] And it reveals the essential continuity of due process doctrine from *Roe* right through *Casey* and *Lawrence*. Contrary to some who have found in *Lawrence* a "constitutional revolution" that produced a new jurisprudence of liberty,[406] that case represented merely the logical outworking of the constitutional revolution begun decades earlier with the idea of liberty as authentic self-development.

This revised ideal of liberty also explains the Court's transformation of the fundamental rights doctrine. Lacking a stand-alone definition of liberty—one located beyond the text of the Bill of Rights—the fundamental rights inquiry had for thirty years served principally as a vehicle for incorporation.[407] The Court's discovery of liberty as self-development, however, provided an independent measure of fundamentality, one outside the

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404. Eisenstadt v. Baird, 405 U.S. 438, 453 (1972).

405. *See, e.g.*, Janet L. Dolgin, *The Family in Transition: From* Griswold *to* Eisenstadt *and Beyond*, 82 GEO. L.J. 1519, 1537–46 (1994) (comparing the Court's holdings in *Griswold* and *Eisenstadt* and asserting that *Eisenstadt* "signals a fundamental alteration in . . . society's view" of the American family); John Hart Ely, *The Wages of Crying Wolf: A Comment on* Roe v. Wade, 82 YALE L.J. 920, 926–37 (1973) (arguing that *Griswold*, but not *Roe*, is justifiable based on a right to privacy derived from the enumerated privacy rights in the Constitution); Epstein, *supra* note 2, at 169–70 (arguing that *Griswold* has little application to abortion cases because there is no fetus to consider in *Griswold*); Kenneth L. Karst, *The Freedom of Intimate Association*, 89 YALE L.J. 624, 674–76 (1980) (asserting that while *Griswold* is about sexual privacy, *Eisenstadt* is about "the status of women" and "the freedom of intimate association beyond marriage"); Michael J. Sandel, *Moral Argument and Liberal Toleration: Abortion and Homosexuality*, 77 CALIF. L. REV. 521, 526–28 (1989) (claiming that while traditional privacy was at stake in *Griswold*, it was not in *Eisenstadt*); Laurence H. Tribe & Michael C. Dorf, *Levels of Generality in the Definition of Rights*, 57 U. CHI. L. REV. 1057, 1074–77 (1990) (arguing that *Roe* was not compelled by *Griswold* and *Eisenstadt*). *See generally* JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW 1010–13 (8th ed. 2010) (noting the differences between protections for privacy in *Eisenstadt* and *Griswold*); KATHLEEN M. SULLIVAN & NOAH FELDMAN, CONSTITUTIONAL LAW 500–01 (18th ed. 2013) (same).

406. Randy E. Barnett, *Justice Kennedy's Libertarian Revolution:* Lawrence v. Texas, 2003 CATO SUP. CT. REV. 21, 21.

407. Individual Justices had from time to time called for expanding the fundamental rights analysis to include unenumerated rights; for example, see Justice Douglas's dissent in *Poe v. Ullman*, 367 U.S. 497, 516 (1961) (Douglas, J., dissenting), and Justice Harlan's dissent in the same case, *id.* at 541 (Harlan, J., dissenting).

Constitution's text. By the time of *Roe*, the Court had deployed this new criterion of fundamentality to refashion the fundamental rights analysis into a doctrine of unenumerated rights.

In this Part, I analyze the arrival of modern substantive due process by first rereading each of the cases constitutive to the doctrine's emergence—*Griswold*, *Eisenstadt*, and *Roe v. Wade*—in light of the ideal of liberty as self-development.[408] I then trace the ideal's influence on the doctrine's continuing development, including the Court's decisions in *Planned Parenthood v. Casey* and *Lawrence v. Texas*. What this careful reading reveals is that from beginning to end, modern substantive due process depends on the idea of liberty as authentic self-development.

A. Rereading Griswold

The *Griswold* case involved the prosecution of the director of a birth-control clinic and an affiliated physician for dispensing contraceptives to married couples in violation of Connecticut law.[409] After finding that the defendants had standing to raise the constitutional claims of the married persons they advised, Justice William Douglas concluded for the Court that the statute offended the Fourteenth Amendment[410]—though not, Douglas insisted, because the Court intended "*Lochner v. New York* [to] be our guide."[411] Douglas's strenuous disavowal of *Lochner* provides an important clue to the Court's reasoning. Whatever else the Court was doing, it had no intention of returning to the police powers jurisprudence that *Lochner* symbolized. Instead, the majority saw its project in *Griswold* as something altogether different. While *Lochner*-style jurisprudence meant (according to the Court) "determin[ing] the wisdom, need, and propriety of laws that touch economic problems, business affairs, or social conditions,"[412] the *Griswold* Court believed itself to be protecting a qualitatively different interest: the "intimate relation of husband and wife and their physician's role in one aspect of that relation."[413] The Court called this interest "privacy"[414] and declared the use of judicial review to vindicate it not only constitutionally permissible but constitutionally compelled.[415]

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408. I begin with *Griswold* rather than *Roe* for the simple reason that it is not until *Griswold* that the new approach to due process commanded a majority of the Court.

409. Griswold v. Connecticut, 381 U.S. 479, 480 (1965).

410. And presumably the Due Process Clause, though Justice Douglas did not say so directly. *Id.* at 480–86.

411. *Id.* at 482 (citation omitted).

412. *Id.*

413. *Id.*

414. *Id.* at 485–86.

415. We now know of course that Justice Douglas's earliest circulated draft of the *Griswold* opinion relied not on "privacy" at all but rather on a right to "intimate association." BERNARD SCHWARTZ, THE UNPUBLISHED OPINIONS OF THE WARREN COURT 231–36 (Bernard Schwartz ed., 1985) (containing the draft of the *Griswold* opinion). But Justice Douglas appears not to have been

Justice Douglas spent the balance of his opinion trying to explain why this was so—what precisely this privacy was and why it held constitutional status.[416] A close reading reveals that the answers to those queries shared a common rationale, rooted in the notion of liberty as self-development: The Court was using "privacy" in a unique sense, to indicate a form of moral autonomy that protected certain personal activities and decisions from government oversight. And it regarded this privacy interest as constitutional because it found it central to individual liberty.

The difficulty for the Court was that "privacy" was not a right enumerated in the Bill of Rights. Given the posture of its due process jurisprudence since *Parrish*, that left the Court in a quandary: either deny protection to the privacy right or recur to substantive due process, which the Court associated with the police powers doctrine. The basic shape of the Court's analysis can be explained by its efforts to escape from this dilemma—to simultaneously extend constitutional protection to privacy *and* to avoid any reliance on the police powers rubric.[417] As *Griswold*'s reasoning demonstrated, that agenda—and more specifically, the Court's commitment to the idea of privacy and the interests it stood for—would ultimately require the Court to invent a different doctrine of unenumerated rights.

Not surprisingly given its renunciation of *Lochner*, the majority began by invoking the language of incorporation.[418] This is a point often missed, but that is vital to understanding the Court's analysis. After suggesting that protecting the "intimate relation of husband and wife" is a different business from evaluating government regulation of economic and social conditions, Douglas immediately noted that the Court had interpreted the specific guarantees of the First Amendment to include certain ancillary rights: rights critical to making the text's enumerated guarantees meaningful.[419] For example, the Court had recognized the right to associate, to read, and—reinterpreting the police powers cases *Pierce v. Society of Sisters* and *Myers v. Nebraska* as First Amendment cases—to educate one's children and teach a foreign language.[420] "Without [these] peripheral rights," Douglas explained, "the specific rights would be less secure."[421] This was logic rooted in incorporation: ancillary interests could be constitutionally protected if

satisfied with that line of reasoning, and it did not win the assent of the Court. Following the advice of Justice Brennan, Justice Douglas shifted the focus of the opinion to the right of privacy. *Id.* at 237–38.

416. *Griswold*, 381 U.S. at 482–86.

417. *See* WHITE, AMERICAN JUDICIAL TRADITION, *supra* note 35, at 354 (attributing the Court's reluctance to make substantive inquiries in the due process area to the constraints imposed by *Parrish*).

418. *Griswold*, 381 U.S. at 481–82.

419. *Id.* at 482.

420. *Id.* at 482–83.

421. *Id.*

sufficiently linked to textually enumerated rights. Douglas's argument was that the right to privacy was like other ancillary interests the Court had already recognized. Justice Douglas made this claim explicit a paragraph later by pointing out that the Court had recently found the First Amendment to imply "privacy in one's associations."[422] "In other words, the First Amendment has a penumbra where privacy is protected from governmental intrusion," Douglas reasoned.[423] He claimed that the Third, Fourth, and Fifth Amendments might similarly include ancillary rights to privacy.[424]

But it was just here that the Court's innovative use of "privacy," sounding in the ideal of authentic self-development, became apparent. American law had indeed recognized various privacy interests for decades, including interests located in the Third, Fourth, and Fifth Amendments, and after Louis Brandeis and Samuel Warren's seminal 1890 article, *The Right to Privacy*,[425] in tort law as well. But the privacy interests protected in these areas of law were not what *Griswold* meant by privacy. To state the difference succinctly: constitutional and tort law protected privacy interests in seclusion and secrecy.[426] *Griswold* protected autonomy.[427]

The Third Amendment prohibition on quartering soldiers[428] is a paradigmatic example of privacy as seclusion. The text protects the physical privacy of home owners, or one might say, their peace and quiet

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422. *Id.* at 483 (quoting NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449, 462 (1958)); *see also* NAACP v. Button, 371 U.S. 415, 430 (1963) (affirming that "the First and Fourteenth Amendments protect certain forms of . . . group activity").

423. *Griswold*, 381 U.S. at 483.

424. *Id.* at 484–85.

425. Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 219 (1890).

426. Richard A. Posner, *The Uncertain Protection of Privacy by the Supreme Court*, 1979 SUP. CT. REV. 173, 176–90.

427. Warren and Brandeis's 1890 article on privacy in tort law is sometimes identified as the earliest statement of the modern due process right to privacy. The comparison misleads more than it reveals. Warren and Brandeis treat privacy as a form of secrecy: they argue that tort law protects certain personal information from public disclosure. "The common law secures to each individual the right of determining, . . . to what extent his thoughts, sentiments, and emotions shall be communicated to others." Warren & Brandeis, *supra* note 425, at 198. To the extent it emphasized privacy as secrecy, Warren and Brandeis's theory was of a piece with other privacy protections in American law. What is more interesting is the pair's *defense* of privacy rules. Warren and Brandeis call for enhanced secrecy protections in order to guard the "personality" of private citizens. *Id.* at 205–07. Their references to a right of "inviolate personality," and their claim that it is this right, and not the right to private property, that best justifies tort privacy rules, does anticipate the modern due process emphasis on selfhood as the ground of rights. *Id.* at 205. But the Warren–Brandeis theory is not yet a theory of self-*actualization*; it lays no emphasis on self-development. Those themes would be developed by other thinkers in the decades that followed, prompting a corresponding change in the notion of privacy itself. *See supra* Part III.

428. U.S. CONST. amend. III ("No Soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law.").

enjoyment.[429] Fourth Amendment law to the time of *Griswold* similarly focused on privacy as seclusion. *Mapp v. Ohio*,[430] *Kremen v. United States*,[431] and *Weeks v. United States*,[432] to take three of the more prominent Fourth Amendment cases at the time of *Griswold*, all emphasized the citizen's right to be free from intrusions on his peace and quiet.[433] In fact, it may be the case, as Richard Posner has argued, that the importance early Fourth Amendment jurisprudence attached to the defendant's ownership of property reflected the Court's view that "the purpose of the Fourth Amendment [was] simply to protect peace and quiet from the disruptive consequences of police searches."[434] The famous *Olmstead* case,[435] concerning wiretapping by federal officers,[436] is consistent with this emphasis. The Court's conclusion there that wiretapping did not violate the Fourth Amendment turned on the lack of physical trespass on the defendant's property, which meant the defendant's seclusion had not been disrupted.[437]

Fifth Amendment case law similarly protected an interest in seclusion and also an interest in secrecy. The seminal case was *Boyd v. United States*[438] from 1886; there the Court invalidated a federal customs statute providing that an individual's failure to produce documentation sought by federal officials would be deemed an admission of any allegations concerning its contents.[439] The Court found the statute in violation of both the Fourth and Fifth Amendments.[440] As to the Fifth Amendment, the Court held that the "forcible and compulsory extortion of a man's own testimony or of his private papers" contravened the Amendment's core guarantees.[441] The

429. *See generally* Posner, *supra* note 426, at 174 (characterizing the invasion of physical privacy as the "disruption of peace and quiet").

430. 367 U.S. 643 (1961).

431. 353 U.S. 346 (1957).

432. 232 U.S. 383 (1914).

433. *See Mapp*, 367 U.S. at 646–47 (asserting that the doctrines of the Fourth and Fifth Amendments "apply to all invasions on the part of the government . . . of the sanctity of a man's home and the privacies of life" (quoting Boyd v. United States, 116 U.S. 616, 630 (1886)) (internal quotation marks omitted)); *Kremen*, 353 U.S. at 347 (describing the search of the cabin in which defendants were found—and the seizure of its entire contents—as "beyond the sanction" of existing Supreme Court jurisprudence); *Weeks*, 232 U.S. at 391 (quoting *Boyd*, 116 U.S. at 630)).

434. Posner, *supra* note 426, at 180.

435. Olmstead v. United States, 277 U.S. 438 (1928).

436. *Id.* at 456–57.

437. *Id.* at 464–66; *see* Silverman v. United States, 365 U.S. 505, 509–12 (1961) (indicating electronic eavesdropping device implanted in wall of defendant's premises trespassed on defendant's property in violation of the Fourth Amendment). For a survey of the Court's Fourth Amendment jurisprudence at the time of *Griswold*, see generally Alan F. Westin, *Science, Privacy, and Freedom: Issues and Proposals for the 1970's, Part II: Balancing the Conflicting Demands of Privacy, Disclosure, and Surveillance*, 66 COLUM. L. REV. 1205, 1238–39 (1966).

438. 116 U.S. 616 (1886).

439. *Id.* at 622, 638.

440. *Id.* at 634.

441. *Id.* at 630.

physical seizure of the property was a constitutional violation (of seclusion), but *Boyd* held that the disclosure of information the defendant sought to keep confidential was also constitutionally problematic. This was privacy as secrecy.[442]

As for the First Amendment, to the degree it protected "privacy" interests at all, it protected them in the sense either of seclusion or secrecy. By the time of *Griswold*, the Court had invoked "privacy" in First Amendment cases as a description of the householder's interest in the quiet enjoyment of her premises, including an interest in being free from the noise of sound trucks[443] and the intrusions of door-to-door salespersons.[444] It had also recently defended the right of private associations to keep their membership lists secret, perhaps an example of privacy as secrecy, though the Court did not cast this series of cases as involving "privacy" rights.[445]

Tort law protections for privacy meanwhile also focused on protecting secrecy—the "right of publicity" conferred on celebrities enforceable rights in the advertising value of their name, while the "false light" tort prevented disclosure of intimate personal facts about another when the newsworthiness of those facts was outweighed by the harm publication would cause them.[446]

In short, constitutional as well as tort law recognized privacy interests in seclusion and secrecy. *Griswold* invoked "privacy" to mean something different. That difference came into focus with the Court's description of the protected activity at issue in the case. The fatal feature of the Connecticut statute, the Court emphasized, was its attempt to forbid "the *use* of contraceptives" by married couples.[447] That is, the right to carry on a certain *activity* was the issue in *Griswold*, not the right to keep information secret or even to enjoy the peace and quiet of one's property. True, Justice Douglas did gesture toward privacy as seclusion by alluding to the geographic space where the use of contraceptives would likely occur: the home.[448] But his

442. *See id.* (holding that the Constitution protects individuals from disclosure of incriminating private information). By the time of *Griswold*, the Fifth Amendment had ceased to offer much in the way of general protection for even the interests of seclusion and secrecy. In 1896, the Court limited the privilege against self-incrimination to witnesses who feared criminal prosecution. *See* Brown v. Walker, 161 U.S. 591, 608–10 (1896); Westin, *supra* note 437, at 1238.

443. Kovacs v. Cooper, 336 U.S. 77, 87 (1949).

444. Breard v. Alexandria, 341 U.S. 622, 632–33 (1951).

445. *See generally* Gibson v. Fla. Legislative Investigation Comm., 372 U.S. 539 (1963) (invalidating the conviction of an NAACP president for not divulging the list of members); NAACP v. Button, 371 U.S. 415 (1963) (protecting a private association's legal practices in the face of intrusive state law); Louisiana *ex rel.* Gremillion v. NAACP, 366 U.S. 293 (1961) (holding that a law requiring out-of-state organizations to disclose its members was unconstitutional); Bates v. City of Little Rock, 361 U.S. 516 (1960) (reversing the convictions of defendants charged with violating a law requiring organizations to disclose membership lists).

446. *See* Richard A. Posner, *The Right of Privacy*, 12 GA. L. REV. 393, 412–20 (1978) (describing different privacy protections afforded in tort law).

447. Griswold v. Connecticut, 381 U.S. 479, 485 (1965).

448. *Id.*

reasoning only served to underscore that it was not privacy as seclusion he was talking about after all. "Would we allow the police to search the sacred precincts of marital bedrooms" to enforce the statute, Douglas asked rhetorically.[449] But of course the law routinely permits searches of homes and other invasions of seclusion if the underlying conduct is criminal. Douglas's argument was that the conduct in *Griswold*—the use of contraceptives—could not be made criminal because to do so would violate the right to privacy. The privacy right in question then could not be the right to seclusion in the home. Rather it was the right to freedom in the marital relationship—freedom to make intimate decisions about one's sexual and family life and to see those decisions through without interference by the state. This was privacy conceived as a right of choice over matters that touched the relationship of marriage, which the Court described as the most intimate and meaningful of human relationships.[450] In sum, the privacy the Court had in mind was a sort of moral space for intimate decision making and personal, marital fulfillment.

The ethic of authenticity and liberty as self-development explains the Court's new conception of privacy. In keeping with that ethic, the majority's opinion emphasized the freedom to make intimate and personal decisions, decisions basic to one's identity and relationships, in terms of moral distance from outside influence or coercion: this is what the majority meant by "privacy." And the background notions of authenticity and self-development explain why the language of privacy came naturally to the Court, despite the innovative quality of its definition when read against prior case law.[451]

But precisely because the Court's conception of privacy departed so markedly from the definitions the Court had used previously in reference to the First, Third, Fourth, or Fifth Amendments, it was difficult to see how the *Griswold* privacy right could be characterized as ancillary to the specific guarantees of those texts, that is, as somehow necessary to make those guarantees meaningful. And in fact Justice Douglas fairly quickly, if subtly, abandoned the ancillary rights line of argumentation in favor of a different contention: that the First, Third, Fourth, Fifth, and possibly Ninth Amendments evinced a commitment to the ideal of privacy, an ideal standing apart from any particular textual guarantee.[452] This was the key language: "The present case, then, concerns a relationship lying within the zone of

449. *Id.*

450. *Id.* at 485–86.

451. Michael Sandel views the privacy right announced in *Griswold* as consistent "with traditional notions of privacy going back to the turn of the century." Sandel, *supra* note 405, at 527. Sandel places the critical intellectual break a bit later, beginning with *Eisenstadt*. *Id.* at 527–28. But this misses Justice Douglas's reconceptualization of privacy, which the later cases merely developed.

452. *Griswold*, 381 U.S. at 484–85.

privacy created by several fundamental constitutional guarantees."[453] This was a new argument, not that the right to privacy was ancillary to any particular amendment, but that it was implied by the ethos of *all of them together*. That is to say, the right to privacy was a freestanding constitutional right, an overarching norm generated by the suggestions and implications of the text.

With that, Douglas abandoned the incorporation analysis that had dominated the Court's due process jurisprudence since 1937. Instead, *Griswold* announced a constitutional right independent of any specific Bill of Rights provision. The substance of the right had to do with the freedom to make personal choices central to the intimate relationship of marriage, an idea deeply consonant with the ideal of authentic self-development. But profound ambiguity remained. Beyond the right to select and use contraception, the Court's new right to privacy remained undefined, and its relationship to the Court's broader due process jurisprudence uncertain. If *Griswold* did not use traditional incorporation analysis, neither did it recur to the language of the police powers. The Court was innovating in service to an ideal of personal freedom it found compelling. *Eisenstadt* and *Roe* pressed that innovation forward, linking privacy to due process liberty and fashioning a new doctrine of fundamental rights.

B. Rereading Eisenstadt *and* Roe

1. Eisenstadt v. Baird.—*Eisenstadt v. Baird* reached the Court seven years after *Griswold*, in 1972. The defendant in the case, William Baird, was convicted under Massachusetts law of distributing contraceptives to an unmarried person.[454] Writing for the Court, Justice Brennan dismissed as pretextual the state's asserted interests in preventing premarital sex and protecting public health.[455] The statute's true aim, he reasoned, was simply to regulate contraceptive use.[456] Whether or not that was a valid purpose the Court claimed not to decide because—and this was the key holding—any law permitting distribution of contraceptives to married but not unmarried individuals violated the Equal Protection Clause.[457]

In one sense, this outcome was puzzling. *Griswold*'s emphasis on the marital relationship had directly suggested that differentiation between married and unmarried persons was permissible. But now the Court held otherwise, and with logic that clarified the substance of the emerging right to privacy. "It is true that in *Griswold* the right of privacy in question inhered

453. *Id.* at 485.
454. *Eisenstadt*, 405 U.S. 438, 440 (1972).
455. *Id.* at 447–52.
456. *Id.* at 452–53.
457. *Id.* at 454–55.

in the marital relationship," Brennan acknowledged.[458] But, he went on, "the marital couple is not an independent entity."[459] It was rather "an association of two individuals each with a separate intellectual and emotional makeup."[460] Then came the *coup de grâce*: "If the right of privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child."[461] According to Brennan and the *Eisenstadt* majority, the right to privacy was necessarily an individual right because it protected the making of choices fundamental to the individual's life interests. *Eisenstadt* thus recast *Griswold*'s talk of marriage and marital intimacy. That language, *Eisenstadt* maintained, served merely to identify the (personal) choices at stake in that case as profoundly important ones because they were connected to a relationship that defined the individual's life. But it was not as if the marital relationship conferred on its participants the right to make profound life choices. That right belonged ever and always to the individual. Marriage was merely the setting for those choices.

Critics have long charged that *Eisenstadt*'s description of the right to privacy as individual rather than corporate represents an unprincipled break with the logic of *Griswold*.[462] But the ideal of authentic self-development suggests otherwise. That ideal taught that moral choice was ultimately a project of self-discovery, and this project could be pursued only by individuals. The person's ends and values were meaningful only if selected by the individual according to her "measure."[463] Both *Griswold* and *Eisenstadt* are perfectly consistent with this logic. The choices in *Griswold* concerned a relationship deeply significant to the life of the individual and were for that reason weighty. It represented no break in the logic, only a further articulation of it, to say that the decisions themselves could only finally be made by the individual person. If privacy was a right of choice, it could only belong to the individual who did the choosing.

Eisenstadt made the right to privacy a resolutely individual right centered on fundamental life decisions. As in *Griswold*, *Eisenstadt* portrayed this "privacy" not as seclusion or as secrecy, but as freedom of moral choice and self-development. In this respect, *Eisenstadt* brought the emerging privacy right even more closely into alignment with the ideal of authentic self-development.

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458. *Id.* at 453.
459. *Id.*
460. *Id.*
461. *Id.*
462. *Cf.* Epstein, *supra* note 2, at 169–70 (noting difficulties in reconciling the two cases).
463. *See supra* notes 256–60 and accompanying text.

2. Roe v. Wade.—By any measure, *Roe v. Wade* is a landmark case, not least in this sense: It was here that substantive due process was fully and finally reborn. *Roe* marked the arrival of the privacy interest as an account of due process *liberty* and completed the development of a new doctrinal framework to vindicate this liberty as privacy, liberty as self-development.

The question in *Roe* of course was the constitutionality of a Texas law making it a crime to "procure an abortion."[464] The Court had appeared to signal its view on that issue the year before in *Eisenstadt* when it held that the Fourteenth Amendment guaranteed individuals the right to decide whether to "bear or beget a child."[465] Still, *Roe* involved an important factual predicate not present in *Eisenstadt*—namely, the presence of prenatal life. That factual difference might have rendered the individual-choice analysis of *Eisenstadt* more difficult or even inapplicable, given that the choice at issue in *Roe* touched not just the deciding individual but potentially a third party as well. Strikingly, however, the Court turned the question of prenatal life into a further defense of individual moral autonomy, revealing the true scope and substance of the "privacy" right, which a majority of Justices were now prepared to describe as a matter of individual liberty.

Justice Harry Blackmun's opinion for the Court included a lengthy historical investigation of abortion laws from antiquity to the present as well as a survey of medical and scholarly opinion circa 1972.[466] But the dispositive analysis centered on the question of prenatal life. Blackmun acknowledged this question early on, noting in his second paragraph "the sensitive and emotional nature of the abortion controversy."[467] Indeed, he laid great stress on "the vigorous opposing views . . . and . . . the deep and seemingly absolute convictions that the subject inspires."[468] Blackmun's point, however, was not merely that abortion was a delicate subject or politically charged. His point was that abortion was the sort of comprehensive moral question that implicated an individual's deepest beliefs. One's view on the controversy concerning the fetus, Blackmun wrote, involved "[o]ne's philosophy, one's experiences, one's exposure to the raw edges of human existence, one's religious training, one's attitudes toward life and family," and finally, "the moral standards one establishes and seeks to observe."[469]

In other words, the open question of the fetus's status made the abortion issue not less a matter of personal privacy, but more of one. Here was the crux of it according to Justice Blackmun and the Court: The judgment about

464. Roe v. Wade, 410 U.S. 113, 117 (1973).
465. *Eisenstadt*, 405 U.S. at 453.
466. *Roe*, 410 U.S. at 129–47.
467. *Id.* at 116.
468. *Id.*
469. *Id.*

the fetus's personhood involved the woman's very "life and future";[470] it implicated her "[m]ental and physical health";[471] and above all, it touched her deepest moral convictions. "In view of all this," Blackmun concluded, "we do not agree that, by adopting one theory of life, Texas may override the rights of the pregnant woman that are at stake."[472] The question of the fetus's status was precisely the sort of morally freighted, identity-defining question that the values of authenticity and autonomy demanded be settled by the woman for herself. It was the capacity to address questions like these that defined the woman's agency and her dignity. Reasonable people disagreed on when the fetus became a person or what its rights should be,[473] and that was just the point. Such disagreement was irreducibly personal and moral in character and therefore had to be left to the individual. "[The] right of privacy, . . . is broad enough to encompass a woman's decision whether or not to terminate her pregnancy."[474]

This reasoning further clarified the sort of privacy interest the Court found so compelling. *Roe* made apparent in a way that even *Griswold* and *Eisenstadt* had not that the right to privacy went well beyond seclusion or secrecy. An abortion after all was not a private activity undertaken in the quiet of one's home, but a medical procedure performed by physicians already closely regulated by the state.[475] The privacy of *Roe*, rather, was the right to make one's own life decisions by one's own moral compass and then see them through. It was a right to choice and to action in public in keeping with that choice. Choice—over life-defining, morally fraught questions—was the keynote. The Court expressly declined to locate the woman's right to abortion in her bodily integrity. "[I]t is not clear to us," the Court wrote, "that the . . . right to do with one's body as one pleases bears a close relationship to the right of privacy."[476] Rather, the privacy of *Roe* concerned personal choice on matters central to individual selfhood, just as the ethic of authenticity would suggest.

As to the sphere of this privacy interest, the private place *Roe* protected was not the home or a social space of some kind. The relevant private place was the individual's inner sanctum of moral decision. The individual had a right to make her choices there—within, by her own lights—and then to play them out in public without state interference. While the issue in *Roe* involved

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470. *Id.* at 153.

471. *Id.*

472. *Id.* at 162.

473. *See id.* at 116 (acknowledging the "vigorous opposing views" engendered by the "abortion controversy").

474. *Id.* at 153.

475. *See* WHITE, AMERICAN JUDICIAL TRADITION, *supra* note 35, at 396–97 (explaining that *Roe* was "not a privacy case in the *Griswold* sense" because an abortion "was a semi-public act" requiring a woman to visit a hospital).

476. *Roe*, 410 U.S. at 154.

family life, as *Griswold* and *Eisenstadt* had as well, the privacy right *Roe* endorsed was not logically limited to family concerns. It was a right to individual moral autonomy on all matters that touched the identity of the individual—a right to choose and decide those matters for oneself.[477]

And in *Roe*, for the first time, the Court was ready to describe this right as a form of liberty. *Roe* inherited from *Griswold* and *Eisenstadt* the uncertain status of what the *Griswold* opinion had called a freestanding constitutional right to privacy.[478] When he turned to consider the scope of this right, Justice Blackmun dutifully rehearsed *Griswold*'s reasoning that the privacy right emerged from "the penumbras of the Bill of Rights."[479] But Blackmun had no sooner rehearsed it than he abandoned it and turned to a different analysis. The very decisions *Griswold* had cited as evidence of a penumbral right Blackmun now argued "make it clear that only personal rights that can be deemed 'fundamental' or 'implicit in the concept of ordered liberty' are included in this guarantee of personal privacy."[480] This was the test from *Palko v. Connecticut*, the test of fundamentality that the Court had used for more than three decades for purposes of incorporation.[481] Blackmun now claimed that the fundamental rights referenced in *Palko* included the woman's right to terminate her pregnancy.[482] The reason was that this privacy right was central to liberty.

It was at this point that the Court's embrace of a new definition of due process liberty began to have major doctrinal implications. By holding that "[t]his right of privacy . . . [is] founded in the Fourteenth Amendment's concept of personal liberty,"[483] Blackmun and the majority reoriented the fundamental rights analysis of *Palko*. As Blackmun had it, fundamentality was no longer merely a judgment about the guarantees in the Bill of Rights, it could include any truly weighty, compelling interest properly basic to due process liberty. The right to privacy was thus something more than an ancillary right, and it was something different from a freestanding, penumbral constitutional interest. It was a right stemming directly from the Due Process Clause's liberty guarantee.

In one way, Justice Blackmun's move was nothing new. Multiple Justices had already argued that the fundamental rights *Palko* said the Due

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477. *See* Sandel, *supra* note 405, at 528 (noting *Roe* expanded privacy to encompass certain sorts of personal choices); Smith, *supra* note 6, at 190 (describing Justice Douglas's concurrence in *Roe* as analogizing privacy with autonomy); J. Harvie Wilkinson III & G. Edward White, *Constitutional Protection for Personal Lifestyles*, 62 CORNELL L. REV. 563, 590 (1977) (discussing *Roe*'s expansion of the privacy-as-autonomy theory from *Eisenstadt*).

478. *See* Griswold v. Connecticut, 381 U.S. 479, 484–85 (1965) (recognizing various penumbral rights to privacy).

479. *Roe*, 410 U.S. at 152.

480. *Id.* (citation omitted) (quoting Palko v. Connecticut, 302 U.S. 319, 325 (1937)).

481. *See supra* Part II.

482. *Roe*, 410 U.S. at 153.

483. *Id.*

Process Clause protected should not be limited to those inscribed in the Constitution's text. Justice Douglas took this position in dissent in *Poe v. Ullman*,[484] as did Justice Harlan.[485] Justices Harlan,[486] Goldberg, Brennan, and Chief Justice Warren had argued for unenumerated fundamental rights in *Griswold*.[487] But the idea had never garnered majority support. *Roe* marked a turning of the tide. Liberty, the Court was now ready to say, meant more than the rights listed in the Constitution. It had something to do with "privacy," where privacy meant the ability to make one's own life decisions. Blackmun's formulation of the *Palko* test in fact made it sound as if the fundamental rights inquiry were about what rights were fundamental to *privacy* rather than to *liberty*: "[O]nly personal rights that can be deemed 'fundamental' . . . are included in this guarantee of personal privacy," he wrote.[488] The phrasing was likely inadvertent, but telling nonetheless. Liberty and privacy, where privacy was understood as moral self-determination, belonged together for the majority.

By invoking *Palko* and fundamental rights but severing that analysis from the constitutional text, *Roe* invented a new doctrinal framework. Going forward, the way to determine whether an asserted interest was constitutionally protected as a fundamental right under the Due Process Clause was to ask whether it was essential to or implicit in the individual's ability to realize her own ends, to make her own life choices, or as a later case would put it, "to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life."[489] Authentic self-development had become the Court's vision of liberty.

As it reoriented the fundamental rights inquiry, *Roe* revived the judicial surveillance of legislation once characteristic of the police powers era. The right to privacy was part of "the Fourteenth Amendment's concept of personal liberty and restrictions upon state action,"[490] *Roe* held. Those restrictions were to be enforced by the Court. To carry them into effect, *Roe* borrowed the tiers of scrutiny the Court had developed in its equal protection jurisprudence and incorporated them into the law of due process.[491] Justice Blackmun prescribed strict scrutiny for state action touching privacy interests or other fundamental rights. "Where certain fundamental rights are

484. 367 U.S. 497, 516 (1961) (Douglas, J., dissenting).

485. *Id.* at 541–43 (Harlan, J., dissenting).

486. Griswold v. Connecticut, 381 U.S. 479, 500–02 (1965) (Harlan, J., concurring).

487. *Id.* at 486–87 (Goldberg, J., concurring).

488. *Roe*, 410 U.S. at 152 (citation omitted) (quoting Palko v. Connecticut, 302 U.S. 319, 325 (1937)).

489. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 851 (1992) (plurality opinion).

490. *Roe*, 410 U.S. at 153.

491. The method of balancing state interests deemed restrictive to liberty by subjecting the state interest to a particular level of "scrutiny" originated with *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942). *See* WHITE, AMERICAN JUDICIAL TRADITION, *supra* note 35, at 397 (explaining that the balancing test "was borrowed from . . . *Skinner v. Oklahoma*" and applied in *Roe v. Wade*).

involved, . . . regulation limiting these rights may be justified only by a compelling state interest," he advised.[492] The Court would resume its former role as the arbiter of legislative reasonableness. But this time, reasonableness meant not appropriate exercise of the police power but state action appropriately respectful of individual autonomy and choice.

C. *The Later Career of Authentic Self-Development*

Roe embraced privacy as liberty—or perhaps more accurately, it made clear that what *Griswold* and *Eisenstadt* had called privacy had really been an idea of liberty all along.[493] By supplying the liberty of the Due Process Clause with substantive content drawn from the ethic of authenticity, *Roe* set the trajectory of substantive due process into the future. Just as a commitment to something like the ethic of authenticity animated the *Griswold–Eisenstadt–Roe* trilogy, the same ideal would inspire the Court's seminal substantive due process cases in the years to come. Indeed, the Court's commitment to the ethic of authenticity would deepen rather than diminish over time, with the Court's fullest expressions of the authenticity ethic coming decades after *Roe* in *Planned Parenthood v. Casey* and *Lawrence v. Texas*.

In *Casey*, decided in 1992, a three-Justice plurality explained the Court's continuing commitment to the right to privacy in language drawn directly from the idea of authentic self-development. "Our law affords constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education," the plurality instructed.[494] The Justices emphasized that these decisions necessarily belonged to the individual because of the morally freighted nature of the issues involved. They were "the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy."[495] They were, that is to say, choices that defined the personhood of those who made them. And so: "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. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State."[496]

Here were the major themes of the twentieth-century authenticity ethic all in one place. Moral relativism, individual choice connected to personal

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492. *Roe*, 410 U.S. at 155 (internal quotation marks omitted) (quoting Kramer v. Union Free Sch. Dist. No. 15, 395 U.S. 621 (1969); Shapiro v. Thompson, 394 U.S. 618, 634 (1969); Sherbert v. Verner, 374 U.S. 398, 406 (1963)).

493. This is a point Randy Barnett and other proponents of the *Lochner* revival miss. *See, e.g.*, Barnett, *supra* note 406, at 29–31 (analyzing the Court's choice to base its *Griswold* decision on privacy *rather than* liberty); *see also infra* subpart V(A).

494. *Casey*, 505 U.S. at 851 (plurality opinion).

495. *Id.*

496. *Id.*

dignity, moral privacy, and the right to self-realization as a limit on state action—*Casey* synthesized the prevailing intellectual trends of a century and deployed that synthesis as a definition of liberty. Indeed, if the *Casey* plurality made anything clear, it was that the Court was more deeply committed to the equation of authentic self-development with liberty than it was to the abortion right itself. The *Casey* plurality freely rewrote abortion doctrine, abandoning the trimester framework and loosening restrictions on state regulation of abortion rights.[497] The plurality took its stand on the ethic of authenticity.[498]

This commitment to liberty as authenticity reached its apotheosis eleven years later in *Lawrence v. Texas*.[499] The question before the Court was the constitutionality of a Texas statute prohibiting same-sex sodomy.[500] The Court invalidated the law as a violation of the right to personal choice and self-realization.[501] "Liberty presumes an autonomy of [the] self that includes freedom of thought, belief, expression, and certain intimate conduct," the Court reasoned.[502] Preventing homosexual couples from expressing their mutual affection in a physical relationship denied them this "autonomy" and, by extension, the capacity to define and enact their personhood.[503]

Some have recently argued that *Lawrence* represented a decisive break with the due process jurisprudence of the preceding decades and heralded a new doctrine of liberty-based rights protection.[504] On the contrary, *Lawrence* was a seminal decision for the type of law it invalidated, but the reasoning was not new at all. Rather, *Lawrence* merely embellished the notion of liberty traced by the Court in *Griswold*, *Eisenstadt*, and *Roe* decades earlier. If the opinion made any contribution to the intellectual development of due process doctrine, it was to make clear that the right to privacy was entirely subordinate to and dependent on the Court's larger understanding of liberty. Writing for the majority, Justice Kennedy invoked "liberty" no fewer than twenty-five times; he mentioned the "right of privacy" exactly once.[505] With its defense of liberty as the animating ideal of substantive due process, *Lawrence* aptly summarized thirty years of due process jurisprudence. "Liberty," Justice Kennedy concluded, "protects the person from

497. *Id.* at 869–79.

498. *Id.* at 851; *cf.* MICHAEL J. SANDEL, DEMOCRACY'S DISCONTENT: AMERICA IN SEARCH OF A PUBLIC PHILOSOPHY 92 (1996) (explaining the "voluntarist" assumptions at the base of the Court's contemporary abortion jurisprudence).

499. 539 U.S. 558 (2003).

500. *Id.* at 562–63.

501. *Id.* at 578–79.

502. *Id.* at 562.

503. *Id.* at 574.

504. *See, e.g.*, Barnett, *supra* note 406, at 33–37 (arguing that Justice Kennedy's opinion in *Lawrence* represented a "potentially revolutionary" departure from previous due process jurisprudence which focused primarily on privacy and fundamental rights).

505. *Lawrence*, 539 U.S. at 562–79.

unwarranted government intrusions into a dwelling or other private places"[506]—but not merely physical spaces. "Freedom extends beyond spatial bounds. Liberty presumes an autonomy of [the] self."[507] This was the crux of modern substantive due process.

In the years since, the Court has continued to invoke the authenticity ideal to expand the rights of sexual autonomy, most recently in its decision in *United States v. Windsor*.[508] "Private, consensual sexual intimacy between two adult persons of the same sex may not be punished by the State," Justice Kennedy wrote for the Court, citing *Lawrence*, because such intimacy is "[an] element in a personal bond" that is central to individual identity.[509] And the authenticity ideal has inspired the expansion of substantive due process beyond sexual privacy rights. In 1976, Justices Thurgood Marshall and William Brennan contended that a New York county regulation limiting the hair length of police officers was "inconsistent with the values of privacy, self-identity, autonomy, and personal integrity" protected by the Due Process Clause.[510] In a very different context, a majority of the Court suggested in *Cruzan v. Missouri Department of Health*[511] in 1990 that the due process commitment to moral autonomy might guarantee individuals a right to "refus[e] unwanted medical treatment."[512] Indeed, "autonomy" has become, for many, shorthand for what the Constitution as a whole is about. Charles Fried expressed today's prevailing consensus when he remarked in an essay from the early 1990s that "[a]utonomy is the foundation of all basic liberties."[513]

But even as the Court's commitment to liberty as authentic self-development spurred the expansion of substantive due process, it has provoked an increasingly fierce critique, the basic elements of which were traced by Justice Byron White in his 1986 dissent in *Thornburgh v. American College of Obstetricians and Gynecologists*.[514] White argued that the "personal autonomy" endorsed by the Court in *Roe* could not be derived from the Constitution's text or tradition.[515] White's argument had two parts. First, he maintained that none of the pre-*Roe* "privacy" cases endorsed a right to privacy-as-personal-autonomy of the breadth suggested by *Roe*.[516] Second,

506. *Id.* at 562.

507. *Id.*

508. 133 S. Ct. 2675 (2013).

509. *Id.* at 2692 (quoting *Lawrence*, 539 U.S. at 567) (internal quotation marks omitted).

510. Kelley v. Johnson, 425 U.S. 238, 251 (1976) (Marshall, J., dissenting).

511. 497 U.S. 261 (1990).

512. *Id.* at 278.

513. Charles Fried, *The New First Amendment Jurisprudence: A Threat to Liberty*, *in* THE BILL OF RIGHTS IN THE MODERN STATE 225, 233 (Geoffrey R. Stone et al. eds., 1992).

514. 476 U.S. 747 (1986).

515. *Id.* at 790–91 (White, J., dissenting).

516. *See id.* (arguing that, while the definition of "fundamental liberties" is debatable, *Roe* unquestionably went beyond a traditional understanding of the concept).

he contended that the privacy-autonomy right recognized in *Roe* could not satisfy the test for fundamentality as set out in *Palko*.[517] Contrary to *Palko*, the *Roe* autonomy right was not "implicit in the concept of ordered liberty"[518] nor, using the Court's restatement of *Palko* in *Moore v. East Cleveland*[519] in 1977, "deeply rooted in this Nation's history and tradition."[520] For Justice White, the second factor was decisive. If the right was not enumerated or clearly established in tradition or common law, it was not a fundamental right.

Justice White's approach was taken up in subsequent years by the dissenters in *Casey*[521] and *Lawrence*[522] and occasionally espoused in majority opinions as well. After hinting in *Cruzan* that due process liberty included the right to refuse medical treatment, the Court held in *Washington v. Glucksberg*[523] in 1997 that such a right lacked "any place in our Nation's traditions" and on that ground, declined to count it as a liberty interest within the meaning of due process.[524] In 2010, the Court used the same approach to the Second Amendment incorporation question in *McDonald v. Chicago*.[525] These oscillating fundamental rights tests have caused some confusion, not least because the Justices who typically favor one approach have sometimes joined the other approach without comment.[526] What should be clear, however, is that these competing tests represent a struggle over the ideal of liberty as authentic self-development.

At the beginning of his opinion in *Roe*, Justice Blackmun invoked—and lauded—Justice Holmes's famous dissent in *Lochner*.[527] The citation proved simultaneously ironic and fitting. It was ironic because while the Court in *Roe* continued to reject the police powers jurisprudence, the version of substantive due process it embraced in its stead cast the Court in almost precisely the same role of legislative superintendent that it had occupied at the zenith of the *Lochner* era. Like the police powers version of substantive

517. *See id.* at 791–93 (maintaining that choice in the matter of abortion is neither "deeply rooted" nor "implicit in the concept of ordered liberty," as evidenced by widely different convictions over the issue (internal quotation marks omitted)).

518. *Id.* at 91–93 (quoting Palko v. Connecticut, 302 U.S. 319, 325 (1937)).

519. 431 U.S. 494 (1977).

520. *Thornburgh*, 476 U.S. at 92–93 (White, J., dissenting) (quoting *Moore*, 431 U.S. at 503 (plurality opinion)) (internal quotation marks omitted).

521. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 952–53 (1992) (Rehnquist, C.J., concurring in part and dissenting in part).

522. Lawrence v. Texas, 539 U.S. 558, 586–88 (2003) (Scalia, J., dissenting).

523. 521 U.S. 702 (1997).

524. *Id.* at 723.

525. 561 U.S. 742 (2010).

526. *See* Steven G. Calabresi, *Substantive Due Process After* Gonzales v. Carhart, 106 MICH. L. REV. 1517, 1522 (2008) (noting that Justice Kennedy, for one, has joined majority opinions adopting different standards for identifying fundamental rights).

527. Roe v. Wade, 410 U.S. 113, 117 (1973).

due process, the modern variant functioned as a doctrine of governmental limits: It protected liberty by preventing certain types of government action. More particularly, both doctrines prevented government interference with the private sphere. But as we have seen, the modern doctrine understood the private sphere in a new and different way—as internal, personal, and connected to individual authenticity.

The reference to Holmes's condemnation of *Lochner* was fitting, on the other hand, because the theory of liberty embraced by the modern version of substantive due process was built on the relativism espoused by Holmes and Dewey and their contemporaries. Liberty as authentic self-development turned that relativism into a metanorm, an ethical principle, which in turn became the animating idea of modern substantive due process. The end of the police powers doctrine had been a beginning after all.

V. Rethinking Due Process: Implications

My purpose in this Article has been to analyze the emergence of modern substantive due process by excavating the doctrine's intellectual sources and mapping the ways in which those sources shaped, informed, and propelled substantive due process's rebirth. I have offered, in short, a new account of the modern doctrine's origins and development. This revised account challenges some increasingly influential narratives about substantive due process and its meaning, and in this final Part, I want to focus on two of them: first, the libertarian-influenced school of *Lochner* revivalism and second, Jack Balkin's theory of "living originalism."

As to the first, a number of scholars have lately contended that the *Lochner* case anticipated various of the Court's twentieth-century rights-protecting decisions, and for that reason, and for its liberty-protecting character more generally, the *Lochner* doctrine is worthy of revival.[528] This argument comes in different versions, but in all its iterations, it overlooks the rise of the ethic of authenticity and the profound influence this idea exerted on the development of due process doctrine. As a consequence, the story the *Lochner* revivalists tell of *Lochner*'s meaning, modern due process doctrine,

528. *See, e.g.*, BARNETT, RESTORING THE LOST CONSTITUTION, *supra* note 9, at 214 (praising *Lochner* as liberty-protecting); BERNSTEIN, REHABILITATING *LOCHNER*, *supra* note 8, at 124 (contending that *Lochner*'s legacy "lives on" in the Court's substantive due process jurisprudence); Randy E. Barnett, *Judicial Engagement Through the Lens of* Lee Optical, 19 GEO. MASON L. REV. 845, 860 (2012) [hereinafter Barnett, *Judicial Engagement*] ("I would prefer that courts adopt a 'presumption of liberty' of the sort the Court seemed to employ in *Lochner* . . . ."); Barnett, *supra* note 406, at 21 (referring to *Lawrence* as a "constitutional revolution" thanks to its focus on guarding "liberty" rather than "fundamental rights"); Barnett, *The Proper Scope of the Police Power*, *supra* note 9, at 493–94 (praising *Lawrence* for "implicitly reject[ing]" the idea of an unlimited police power in favor of a renewed focus on liberty); Bernstein, Lochner *Era Revisionism*, *supra* note 8, at 60 (arguing that although *Griswold*, *Roe*, and other privacy cases can be traced to *Lochner*, the Court's decision in *Lawrence* is "even more *Lochner*ian" than the others because the Court is now concerned with protecting "liberty" rather than "privacy").

and the relationship between the two is more than a little distorted. I do not have the space here to develop a comprehensive critique of the revivalist school, but I hope in this Part to point out the ways in which the analysis I have developed offers a much-needed corrective to these *Lochner* proponents.

Living originalism, on the other hand, is at once an account of how the Supreme Court's abortion jurisprudence connects to the Constitution's text and history and an interpretive theory of constitutional meaning. Here again, space will not permit me to develop a full-scale argument, but I will suggest the ways in which this Article's analysis casts appreciable doubt on the story about the abortion cases' place in constitutional law that living originalism tells.

A. Lochner *Revivalism*

Lochner revisionism has been in full flood for the better part of two decades now.[529] But some scholars have recently gone beyond revisionism to argue for the affirmative worth of *Lochner*-era jurisprudence. Call them the *Lochner* revivalists. The two principal exponents of the revivalist school are David Bernstein and Randy Barnett, both libertarian scholars who make somewhat different arguments for *Lochner*'s revival. Bernstein claims that *Lochner* represents a form of fundamental rights jurisprudence that anticipated and quietly informed many of the Supreme Court's rights-protecting decisions from the last century.[530] Put simply, Bernstein sees deep continuity between the *Lochner* era and the modern approach to fundamental rights.[531] Barnett, too, reads *Lochner* as rights-protecting but (correctly) maintains that the police powers jurisprudence that informed *Lochner*'s reasoning came to an end in the late 1930s,[532] or at the latest possible date, in 1955 with *Williamson v. Lee Optical*.[533] Barnett casts the period running from the end of police powers due process until approximately *Lawrence v. Texas* as an unfortunate interlude characterized by judicial disregard of the liberty-protecting restrictions on government power he believes are written—sort of—in the Constitution.[534] Barnett argues that courts should recover

529. Bernstein, Lochner *Era Revisionism*, *supra* note 8, at 5–7.

530. *Id.* at 28; *see supra* note 8.

531. *See* Bernstein, Lochner *Era Revisionism*, *supra* note 8, at 52–60 (discussing how "*Lochner*ian fundamental rights analysis" continued to influence later due process jurisprudence).

532. Barnett, *supra* note 406, at 23–29 (describing cases from the time period that display this shift).

533. 348 U.S. 483 (1955); *see* Barnett, *supra* note 406, at 845, 857–58 (identifying *Lee Optical* as the terminal point for the police powers doctrine).

534. *See* Barnett, *Judicial Engagement*, *supra* note 528, at 860 ("The modern rational basis approach . . . represents a judicial abdication of its function to police the Constitution's limits on legislative power."); Barnett, *supra* note 406, at 24–32 (providing a critical account of the rise and fall of the "New Deal Constitutional revolution" through *Lawrence*); Barnett, *The Proper Scope of the Police Power*, *supra* note 9, at 492–95 (hailing *Lawrence* as a return to form).

these liberty protections—the "lost Constitution," he calls them—by recovering police powers due process.[535]

Or more accurately, Barnett argues for recovering a *version* of the police powers jurisprudence, a version critically shaped, as it turns out, by the ethic of authentic self-development. And here we reach the critical similarity between Barnett's theory and Bernstein's. For all their differences, the pro-*Lochner* arguments made by both depend on the idea of liberty as authentic self-development. Both scholars interpret *Lochner* and, in Barnett's case, the police powers jurisprudence, in light of this notion of liberty, though neither acknowledge or even appear to recognize the debt. And so in the end, it is not so much *Lochner* they defend, but their own preferred iterations of the ethic of authenticity.

1. Bernstein: Lochner *as Fundamental Rights Constitutionalism.*— David Bernstein's central claim is that what he calls *Lochner*ian jurisprudence—he has little or nothing to say about the police powers framework generally—is a form of fundamental rights constitutionalism.[536] Bernstein maintains that the most persuasive interpretation of *Lochner* is that the Court "was seeking to protect what it saw as fundamental individual rights against excessive government intrusion."[537] According to him, the Justices did this by "identifying rights they deemed fundamental to American liberty, and decreeing that the Due Process Clause protect[ed] those rights against the states."[538] The key analytic question, as he has it, was whether the challenged state regulation trenched on an individual right that was truly fundamental. The Court invoked due process only "when a violation of a fundamental right such as liberty of contract was involved."[539] A right was fundamental if it was a natural right "antecedent to government."[540] The *Lochner*-era Court never demanded, Bernstein says, that fundamental rights be enumerated in the text of the Constitution.[541] On the contrary: "[T]he Supreme Court's *Lochner*ian jurisprudence [was] nurtured and sustained by

535. Barnett, *Judicial Engagement*, *supra* note 528, at 860; *see also* BARNETT, RESTORING THE LOST CONSTITUTION, *supra* note 9, at 267 (arguing for a return to heightened scrutiny for government restrictions on "liberty").

536. *See generally* Bernstein, Lochner *Era Revisionism*, *supra* note 8 (claiming that fundamental rights jurisprudence can trace its origins to *Lochner*ian due process decisions).

537. *Id.* at 31.

538. BERNSTEIN, REHABILITATING *LOCHNER*, *supra* note 8, at 110.

539. Bernstein, Lochner *Era Revisionism*, *supra* note 8, at 30.

540. *Id.* at 37.

541. *Id.* at 31–35.

a belief that it was the judiciary's role to protect unenumerated fundamental constitutional rights from government invasion."[542]

On Bernstein's retelling, *Lochner* comes to look much like the Court's fundamental rights cases following *Griswold*—in other words, *Lochner* comes to look much like modern substantive due process. And that is exactly the point. Bernstein insists that though the Court noisily abandoned review of economic regulations under the Due Process Clause in the late 1930s, it continued to use *Lochner*'s methodology to enforce other fundamental rights against the states, first through the incorporation doctrine and then, from the middle 1960s onward, by protecting nontextual rights deemed central to personal autonomy.[543] Indeed, Bernstein reads *Griswold* as a profoundly *Lochner*ian case insofar as it rested on the "notion that the individual rights protections of the Fourteenth Amendment are primarily found in the Due Process Clause's protection of fundamental unenumerated rights," an idea he attributes to *Lochner*.[544] In fact, to the extent *Lochner* stands for the protection of unenumerated individual rights, Bernstein argues that the *Lochner*-era cases are the "true progenitors"[545] of the "modern Supreme Court's broad protection of civil liberties and civil rights,"[546] including the "right to terminate pregnancy and to engage in private consensual sex."[547] At the end of the day, the modern Court is doing nothing other than what the *Lochner* Court did: protecting rights it deems fundamental.[548]

This account of the relationship between the *Lochner* era and modern substantive due process is confused. To begin with, Bernstein fundamentally mistakes the character of the *Lochner*-era police powers jurisprudence. As we have seen, that jurisprudence focused not on protecting particular individual rights, fundamental or otherwise, but on protecting a private *sphere* of liberty from government intrusion.[549] The rights themselves—whether the right to contract or to labor or to own and sell property—did virtually no analytic work in the police powers framework. Rather, the doctrine's central concern was to limit the exercises of governmental power in and over the private sphere by limiting government to those regulations reasonably necessary to protect the public good.[550] The doctrine defined "necessary to the public good" as regulations benefitting the public as a whole and directly connected to the health, safety, or morals of the

542. *Id.* at 51.
543. *Id.* at 52–53.
544. *Id.* at 55.
545. BERNSTEIN, REHABILITATING *LOCHNER*, *supra* note 8, at 116.
546. *Id.* at 123.
547. *Id.* at 116.
548. *Id.* at 110.
549. *See supra* Part I.
550. *See supra* subpart I(A).

populace.[551] The aim, again, was to protect the social sphere where citizens exercised their most important rights—it was this sphere, not particular rights, the doctrine guarded.

Bernstein misses all of this, in part because he is anxious to discount the critique lodged by Justice Oliver Wendell Holmes and other progressive detractors of the police powers doctrine. Bernstein derides Holmes's *Lochner* dissent as decidedly idiosyncratic and analytically unserious; it failed to engage or otherwise meaningfully respond to, he claims, the widespread consensus that the Constitution protected unenumerated individual rights.[552]

Bernstein has got Holmes wrong.[553] Holmes did not argue against the consensus for constitutional protection of "fundamental" rights because there was no such consensus. He argued against judicial scrutiny of legislation for reasonableness.[554] More broadly, he argued against the central premises of the police powers doctrine: natural rights, the inviolability of property, and the distinction between the public and private spheres. And his critique, though indeed a minority position at the time of *Lochner*, eventually carried the day. In due course most members of the Court came to share Justice Holmes's skepticism of the police powers doctrine and its major premises, leading them, in the end, to reject the entire enterprise of attempting to confine the government to reasonable exercises of its police authority.[555]

Having failed to acknowledge this decisive break, at once doctrinal and, more critically, *intellectual*, Bernstein fails to see the profound reimagining of liberty the Holmesian critique helped set off. The union of liberalism and authenticity, the valorization of personal choice, the redefinition of the private sphere: Bernstein screens all this out. Consequently, he does not recognize that contemporary fundamental rights jurisprudence bears a distinctly different shape than its police powers forbearer, a shape given it by the intellectual revolution of the first half of the twentieth century. And he is left arguing for a connection between substantive due process old and new that the cases simply will not bear. Though Bernstein claims that the Supreme Court's contemporary civil liberties doctrine can be traced to "Lochnerian due process decisions such as *Adkins v. Children's Hospital* (1923), *Buchanan v. Warley* (1917), *Meyer v. Nebraska* (1923), *Pierce v.*

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551. *See supra* subpart I(A).

552. *See* BERNSTEIN, REHABILITATING *LOCHNER*, *supra* note 8, at 36–37 (describing Justice Holmes's dissent and his "hostility to individual rights"); Bernstein, Lochner *Era Revisionism*, *supra* note 8, at 37–38 (claiming there was a "virtual consensus" on the Court regarding the protection of fundamental rights).

553. Bernstein is following Howard Gillman here, who similarly and mistakenly discounts Justice Holmes. *See* GILLMAN, *supra* note 39, at 131 (arguing that Justice Holmes's dissent ignored constitutional tradition).

554. Lochner v. New York, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting).

555. *See supra* subpart I(B).

Society of Sisters (1925), and *Gitlow v. New York* (1925),"[556] all those cases but one turned on the reasonableness of the relevant state's police power regulations. The outlier was *Gitlow*, the lone decision treating the substance of an individual right—free speech, in that case—but it was decided outside the *Lochner* police powers framework on a theory of incorporation.[557] *Gitlow*, in other words, is not a *Lochner* case at all.[558]

Ultimately, the fundamental rights jurisprudence Bernstein defends is not *Lochner* or the police powers doctrine. It is a decidedly modern iteration of substantive due process, premised on the decidedly modern notion of liberty as authentic self-development.

2. Barnett: The Lost Constitution.—Randy Barnett makes a different argument for reviving *Lochner*, though the version of *Lochner* he wants to revive turns out to be as thoroughly anachronistic as Bernstein's. Unlike Bernstein, Barnett realizes that the police powers doctrine protected not specific rights, but a private sphere of rights and liberty.[559] He also recognizes, again in contrast to Bernstein, that the Court rejected this doctrinal formula in the middle twentieth century.[560] Barnett considers this rejection a lamentable act of constitutional infidelity because restrictions on the police power, he believes, are embedded in the Constitution.[561] More exactly, he claims the Constitution protects unenumerated natural rights—not simply those listed in the document—by requiring the government to demonstrate that any incursion on personal liberty is reasonable: necessary for the health or safety of the public or to protect the rights of third parties.[562] This requirement that government justify as reasonable any regulation trenching on the private sphere is part of what Barnett calls the "lost Constitution," lost when the Supreme Court abandoned the police powers jurisprudence.[563]

But there is a strange quality about Barnett's lost Constitution. The sphere of liberty it supposedly protects sounds remarkably like the liberty of

556. BERNSTEIN, REHABILITATING *LOCHNER*, *supra* note 8, at 123.

557. Gitlow v. New York, 268 U.S. 652, 666 (1925).

558. *See* WHITE, JUSTICE HOLMES, *supra* note 35, at 441–42 (noting that Justice Holmes saw "liberty of contract" and "liberty of speech" as different rights requiring differing forms of analysis, as reflected in Justice Holmes's *Gitlow* dissent).

559. *See* BARNETT, RESTORING THE LOST CONSTITUTION, *supra* note 9, at 213–14 (noting that the *Lochner* doctrine deals broadly with the "liberty of the individual").

560. *Id.* at 228–29; Barnett, *supra* note 406, at 24–27. Barnett has recently speculated that perhaps the final break came with *Lee Optical* in 1955. *See supra* note 533 and accompanying text.

561. Barnett reads them in the Ninth Amendment and the Privileges or Immunities Clause, and perhaps even the Due Process Clause. BARNETT, RESTORING THE LOST CONSTITUTION, *supra* note 9, at 205–08, 234–42.

562. *Id.* at 235, 238.

563. *See id.* 354–57 (criticizing modern due process doctrine as unfaithful to the Constitution's liberty-protecting provisions and purposes).

authentic self-development. Barnett reads provisions like the Ninth Amendment and Privileges or Immunities Clause and perhaps even the Due Process Clause to protect "abstract natural rights" that, he says, "define a boundary or jurisdictional space"—and here is the key language—"*within which people should be free to make their own choices.*"[564] This is Barnett's version of the police powers doctrine. The Constitution protects unenumerated natural rights by guaranteeing a private sphere of liberty that is above all a "moral space," Barnett claims, "within which persons must be free to make their own choices and live their own lives if they are to pursue happiness while living in society with others."[565] And again: "[N]atural liberty rights define a sphere of moral jurisdiction that persons have over certain resources in the world—including their bodies. This jurisdiction establishes boundaries within which persons are free to do as they wish."[566] In short, the sphere of liberty Barnett believes the lost Constitution vouchsafes is a sphere defined by the right to autonomy and authentic self-development.

Whatever else can be said for this conception of liberty, it is not one rooted in the nineteenth-century police powers jurisprudence. Instead, Barnett has reformulated that doctrine in light of the modern notion of liberty as authentic self-development. Barnett's discomfort with the actual police powers doctrine can be glimpsed in his dismissal of morals legislation. He acknowledges that the police power was typically understood to permit states to protect "not only the 'health and safety' of the general public, but its 'morals' as well,"[567] and that on this rationale, states adopted laws banning gambling, alcohol consumption, prostitution, and other types of activities that imposed no direct third-party harm.[568] But Barnett objects to these exercises of the police power as unreasonable on the ground that they limit "purely private activity,"[569] including what one does with one's body.[570] As he has it, the Constitution forbids the state from adopting regulations of this sort because what the Constitution ultimately prohibits is intrusion on "the moral space within which persons [are] free to make their own choices."[571] Consensual, private acts that do not directly harm third parties belong to that "moral space."[572] The moral choices these acts involve are basic to individual

564. *Id.* at 73 (emphasis added).

565. *Id.* at 80.

566. *Id.* at 258.

567. *Id.* at 329.

568. *Id.*

569. *Id.* at 331.

570. *Id.* at 258.

571. *Id.* at 80. The other reason Barnett gives is that judgments about morality cannot be reviewed for their rationality. *Id.* at 331. This argument too reflects a modernist mindset—in this case, a modern skepticism of moral value not shared by the nineteenth-century advocates of the police powers doctrine.

572. *Id.* at 80.

dignity; they are the means by which people "live their own lives."[573] The nineteenth-century practitioners of the police powers doctrine, Barnett concludes, simply did not recognize this fact.[574]

But then that is because the nineteenth-century notion of liberty was noticeably different from the one Barnett propounds. Barnett's emphasis on personal choice and moral freedom are modern preoccupations, not nineteenth-century ones. His effort to revive the police powers doctrine thus amounts, in the end, to a proposal to expand the ethic of authenticity to include not just sexual and reproductive rights but also the right to contract, to engage in commerce, to consume controlled substances[575]—to do anything, in sum, that does not impose direct third-party harm.[576] In this respect, Barnett is more radical than Bernstein. He would abandon the contemporary fundamental rights jurisprudence altogether and return to a rule requiring the government, state or federal, to justify any and all of its actions as "reasonable," where reasonable means necessary to the public health or safety.[577] Barnett wants the courts to go back to protecting a private sphere of liberty, but liberty understood now as authentic self-development.

Barnett's anachronistic interpretation of liberty and the police powers is abetted by his blinkered reading of the development of modern substantive due process. He claims that the Court's positivist turn to fundamental rights reflected in *Carolene Products* footnote four "foreshadows the entire post-New Deal theory of judicial review and constitutional rights."[578] But this assessment is misleading at best: it misses the truly big story, the intellectual watershed that redefined liberty and spurred the major doctrinal innovations of the 1960s. The Court has indeed focused more or less consistently on fundamental rights in the decades since the police powers' demise, but what it understands as "fundamental" has changed markedly, following its changed understanding of liberty.[579] Barnett ignores this seminal shift and is left struggling to explain how *Griswold*, *Eisenstadt*, *Roe*, and the

573. *Id.*

574. *See id.* at 328–29 (arguing that judges construed the police power too broadly); *see also* Randy E. Barnett, *The Misconceived Assumption About Constitutional Assumptions*, 103 NW. U. L. REV. 615, 656–58 (2009) (voicing skepticism of government regulation of "purely private morality").

575. *See* Barnett, *supra* note 406, at 41 (suggesting that proponents of medicinal cannabis ought to benefit from a presumption of liberty).

576. *Id.*; *see also* BARNETT, RESTORING THE LOST CONSTITUTION, *supra* note 9, at 333–34 (arguing that the Fourteenth Amendment requires states to show that an exercise of the police power either protects individual rights or regulates liberty in a way that protects third-party rights).

577. *See* Barnett, *supra* note 406, at 41 (explaining that a robust "presumption of liberty" would allow the courts to protect a larger set rights).

578. *Id.* at 27.

579. *See supra* Part IV.

unenumerated rights cases that followed fit into the positivist jurisprudence of footnote four. He eventually admits they hardly fit at all.[580]

Though they make different arguments, Bernstein and Barnett share a common shortcoming. They do not appreciate the origins and development of modern substantive due process. Consequently, they do not realize the extent to which they are the modern doctrine's intellectual debtors. *Lochner* may or may not be worthy of revival, but these contemporary advocates have in fact been making the case for something else: for a revised version of liberty as authentic self-development.

B. Living Originalism

Jack Balkin tells a different story about the fit between the Court's recent rights jurisprudence and the Constitution.[581] He offers an explanation of *Roe* and the Court's line of abortion cases that purports to connect that jurisprudence to the Fourteenth Amendment's original meaning. As to what counts as original meaning, Balkin offers a theory he calls "living originalism."[582] The intellectual history developed here suggests that Balkin's explanation of the abortion jurisprudence is at best myopic. Balkin claims to explain *Roe* based on the original meaning of equal protection, but his argument turns critically on more recent ideas—on freedom of choice and authenticity.[583] In a word, Balkin is deeply indebted to the ideal of authentic self-development. Balkin's insistence that this ideal can be called "original" to the Fourteenth Amendment exposes how anachronistic his thesis truly is.

Consider Balkin's explanation of the Court's abortion jurisprudence. According to him, *Roe* is best understood as an application of the Equal Protection Clause.[584] This of course is a different rationale from the one the Court has offered, but it is the one, Balkin thinks, that actually connects the result in *Roe* with the text of the Constitution.[585] The main thrust of Balkin's argument is that prohibiting a woman from obtaining an abortion is to force her into the role of mother, a role that carries profound personal and economic burdens as well as weighty social expectations.[586] To press a woman into this role is to "subordinate" her, Balkin says, in violation of the Equal Protection

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580. *See* Barnett, *supra* note 406, at 29–31 ("Nevertheless, 'emanations' and 'penumbras' could not conceal the fact that the protection of an unenumerated right of privacy was outside the framework of Footnote Four.").

581. *See generally* BALKIN, LIVING ORIGINALISM, *supra* note 14; Balkin, *Abortion and Original Meaning*, *supra* note 14.

582. BALKIN, LIVING ORIGINALISM, *supra* note 14, at 3–6, 21–23.

583. *See* Balkin, *Abortion and Original Meaning*, *supra* note 14, at 323–25 (claiming that anti-abortion laws deny women a significant choice in the direction of their lives and control over their bodies).

584. *Id.* at 319–28.

585. *Id.* at 325–27; *accord* BALKIN, LIVING ORIGINALISM, *supra* note 14, at 214–15.

586. Balkin, *Abortion and Original Meaning*, *supra* note 14, at 323–24.

Clause's (or alternatively, the Privileges or Immunities Clause's) rule against caste legislation.[587]

But Balkin's antisubordination argument has a curious feature. He is not arguing that motherhood is degrading per se. Motherhood is not, in this sense, like chattel slavery or the inferior social roles assigned African-Americans and other racial minorities in American history. His argument, rather, is that motherhood is degrading *if not freely chosen*. "It is one thing if women freely choose to become mothers, assume the physical burdens and risks of pregnancy and childbirth, and take on the various social roles and expectations of motherhood in our society," Balkin explains.[588] "It is quite another when the state forces them against their will . . . ."[589] When the state denies women a free choice, "it denies them their *liberty* in the most profound way."[590] Balkin's argument against subordination turns out to be an argument based on liberty, where liberty is understood as personal choice and autonomy. In short, it is an argument from the ideal of authentic self-development. Which means that though Balkin claims to offer a different rationale from the one adopted by the Court in its due process jurisprudence, he in fact works from the same controlling ethic.

This is not to say that Balkin's argument from choice and authenticity is wrong; only that, in the end, it relies on an understanding of liberty and not merely equal protection. And this understanding of liberty is distinctly native to the twentieth century. Still, Balkin insists his argument is originalist,[591] which betrays something important about Balkin's brand of originalism: it depends on a dehistoricized reading of constitutional principles. But if the foregoing analysis reveals anything, it is that concepts and principles—like "liberty"—are as historically conditioned as any other piece of language. That is to say, the choice is always between one historically situated understanding of a principle and another. There is no such thing as a universal concept that lives beyond history.[592] To prefer liberty as self-development, for instance (as Balkin does), to the notion of liberty at back of the police powers doctrine is to prefer a thoroughly modern definition of the principle of liberty. It is not to apply some abstract, universal principle of liberty to new historical circumstances. It is no good telling an advocate of the police powers doctrine that you agree with her concept of liberty but

587. *Id.* at 320–24.

588. *Id.* at 324.

589. *Id.*

590. *Id.* (emphasis added).

591. *E.g.*, Jack M. Balkin, *Original Meaning and Constitutional Redemption*, 24 CONST. COMMENT. 427, 449 (2007).

592. I take this point to be one of the central contributions of Quentin Skinner's important work. *See, e.g.*, Skinner, *Meaning and Understanding*, *supra* note 5, at 52–53 (describing how studying the history of ideas illuminates that "truths may in fact be the merest contingencies of our particular history and social structure" (footnote omitted)).

simply want to apply it in a different way. In fact, advocates of modern substantive due process advance a markedly different concept altogether.[593] In other words, one can privilege the original, historical meaning of a principle or not, but privileging the original meaning means privileging the historically situated meaning. If one is not willing to privilege the meaning of the principle as understood at the time, in its historical particularity, one is not willing to be an originalist.

But really, Balkin's explanation of the Court's abortion jurisprudence is less committed to originalism than to authentic self-development. Balkin notes that his defense of *Roe* is one he has learned from other theorists.[594] That in itself is telling. Like Balkin, many or even most defenders of the Court's due process doctrine embrace the ideal of authentic self-development. Yet they rarely argue for it. This is as true for the critics of due process as it is for detractors, and of course for revisionists like David Bernstein and Randy Barnett as well. Most participants on all sides in the current debate over due process simply do not recognize the intellectual foundations of the doctrine they are disputing or their dependence on those same foundations. The debate has been impoverished and sometimes simply beside the point as a result. It is time to set the story straight.

Conclusion

The intellectual history of modern substantive due process is a fascinating tale, and more importantly, it is a useful one. When we understand its intellectual origins, we see substantive due process in fresh perspective. Modern substantive due process is something different and more than the sterile debating positions of the last forty years have usually allowed. It is an attempt to answer the enduring challenge of imposing limits on popular government. It is an effort to define and protect individual rights. Above all, it is an interpretation of liberty. That this interpretation has become powerfully pervasive is by now, I trust, fully apparent. Whether it is worthwhile, or for that matter legitimate as a matter of constitutional interpretation, are entirely different questions. With any luck, this Article will help make answering those vital queries possible.

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593. *See, e.g.*, Balkin, *Abortion and Original Meaning*, *supra* note 14, at 319–28 (outlining his theory of equal citizenship).

594. *Id.* at 292 & n.3.