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## Overcoming Lochner in the Twenty-First Century: Taking Both Rights and Popular Sovereignty Seriously as We Seek to Secure Equal Citizenship and Promote the Public Good

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# OVERCOMING *LOCHNER* IN THE TWENTY-FIRST CENTURY: TAKING BOTH RIGHTS AND POPULAR SOVEREIGNTY SERIOUSLY AS WE SEEK TO SECURE EQUAL CITIZENSHIP AND PROMOTE THE PUBLIC GOOD

*Thomas B. McAfee* \*

*Professor McAfee reviews substantive due process as the textual basis for modern fundamental rights constitutional decision-making. He contends that we should avoid both the undue literalism that rejects the idea of implied rights, as well as the attempt to substitute someone's preferred moral vision for the limits, and compromises, that are implicit in—and intended by—the Constitution's text. He argues, moreover, that we can largely harmonize the various goals of our constitutional system by taking rights seriously and by understanding that securing rights does not exhaust the Constitution's purposes.*

## I. INTRODUCTION

It is now over one hundred years since the Supreme Court decided *Lochner v. New York*,<sup>1</sup> and the case symbolizes, perhaps more than any other, the modern debate over courts offering protection to unenumerated fundamental rights. In the contemporary debate on constitutional interpretation, one school of thought opposes the idea of implied rights, concluding they are the product of undue judicial activism rooted in an anti-democratic elit-

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Portions of this article are derived from chapter 7 of *Powers Reserved for the People and the States: A History of the Ninth and Tenth Amendments* (2006), which I co-authored with The Honorable Jay S. Bybee, of the United States Court of Appeals for the Ninth Circuit, and Professor Christopher Bryant, both former colleagues. The author acknowledges support for research provided by the William S. Boyd School of Law, as well as Jesse Panoff's research assistance. Also appreciated are Rob Correales's, a colleague, helpful comments on an earlier draft.

1. 198 U.S. 45 (1905).

ism.<sup>2</sup> At the other end of the spectrum, those whom Professor Bruce Ackerman has dubbed “rights foundationalists,” contend that “the American constitution is concerned, first and foremost, with their protection.”<sup>3</sup> In their minds, “the whole point of having rights is to trump decisions rendered by democratic institutions that may otherwise legislate for the collective welfare.”<sup>4</sup> Though it presents a confusing situation, rights foundationalists appear to be divided into two very different, and surprisingly even warring, groups. One group argues for a particular reading of American constitutional history and contends that the framing generation intended to secure *all* valid moral claims—rights—whether they are found in the written Constitution or not.<sup>5</sup> The other group relies centrally on the Constitution’s text and concludes that, semantically, the document is most fairly read as securing “equality” and “liberty”—moral concepts that interpreters appropriately read in an open-ended fashion.<sup>6</sup> Remarkably enough, though both groups contend for almost identical constructions of the American Constitution, it is difficult to determine which group perceives the other as the more unreasonable.<sup>7</sup> Inasmuch

2. *See, e.g.*, ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* (1990); Rex E. Lee, *Preserving Separation of Powers: A Rejection of Judicial Legislation Through the Fundamental Rights Doctrine*, 25 ARIZ. L. REV. 805, 805, 810–11 (1983).

3. 1 BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* 11 (1991).

4. *Id.*; *accord*, Thomas B. McAfee, *A Critical Guide to the Ninth Amendment*, 69 TEMP. L. REV. 61, 92 (1996) (The “rights-foundationalist account of the Constitution has potentially profound implications for our legal order, as well as for the practice of judicial review.”).

5. *E.g.*, RANDY E. BARNETT, *RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY* 1–5 (2004); CHARLES L. BLACK, JR., *A NEW BIRTH OF FREEDOM: HUMAN RIGHTS NAMED, AND UNNAMED* 1–5 (1997); CALVIN R. MASSEY, *SILENT RIGHTS: THE NINTH AMENDMENT AND THE CONSTITUTION’S UNENUMERATED RIGHTS* 3–5, 13–17 (1995); Thomas C. Grey, *Do We Have an Unwritten Constitution?*, 27 STAN. L. REV. 703, 705 (1975); Suzanna Sherry, *The Founders’ Unwritten Constitution*, 54 U. CHI. L. REV. 1127, 1127–28 (1987).

6. *E.g.*, SOTIRIOUS A. BARBER, *THE CONSTITUTION OF JUDICIAL POWER*, at ix–xii (1993); RONALD DWORKIN, *FREEDOM’S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION* 7–12 (1996); Michael S. Moore, *Do We Have an Unwritten Constitution?*, 63 S. CAL. L. REV. 107, 110 (1989).

7. *Compare* BLACK, *supra* note 5, at 3 (describing substantive due process as “paradoxical, even oxymoronic”), JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 18 (1980) (observing that because “there is simply no avoiding the fact that the word that follows ‘due’ is ‘process,’” it seems we “need periodic reminding that ‘substantive due process’ is a contradiction in terms—sort of like ‘green pastel redness’”), Akhil Reed Amar, *The Supreme Court, 1999 Term—Foreword: The Document and the Doctrine*, 114 HARV. L. REV. 26, 123 (2000) (observing that “the very phrase ‘substantive due process’ teeters on self-contradiction,” and hence “provides neither a sound starting point nor a directional push to proper legal analysis”), *and id.* at 38 (concluding that during the

as members of each group appear to rest their theory on an overwhelming presumption in favor of a broad implication of an open-ended system of rights, the tenacity of their disagreements is a bit perplexing.

*Lochner* remains troubling to modern thinkers precisely because if there remains a rough consensus, even if sometimes strenuously challenged, that something went wrong during the *Lochner* era,<sup>8</sup> there is no such consensus about exactly what went

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*Lochner* era “judges generally underenforced the document-supported rights of blacks and women while overenforcing various nondocumentarian claims of rich and powerful interests”), with RONALD DWORKIN, *JUSTICE IN ROBES* 282 n.4 (2006) (arguing that “[t]hose who say that ‘substantive due process’ is an oxymoronic phrase, because substance and process are opposites, overlook the crucial fact that a demand for coherence of principle, which has evident substantive consequences, is part of what makes a process of decision making a legal process”), DWORKIN, *supra* note 6, at 2 (contending that “contemporary constitutions declare individual rights against the government in very broad and abstract language” and that judges should “interpret and apply these abstract clauses on the understanding that they invoke moral principles about political decency and justice”), Ronald Dworkin, *Unenumerated Rights: Whether and How Roe Should be Overruled*, in *THE BILL OF RIGHTS IN THE MODERN STATE* 381, 385–87 (Geoffrey R. Stone et al. eds., 1992) (contending that the Bill of Rights “consists of broad and abstract principles of political morality,” which encompass “all the dimensions of political morality that in our political culture can ground an individual constitutional right”; and concluding that “the Constitution guarantees the rights required by the best conceptions of the political ideals of equal concern and basic liberty,” which means opponents of unenumerated rights are merely “revisionists” who “hope to curtail” the exercise of valid constitutional interpretive power), *id.* at 384 (the purpose of critics of Dworkin’s interpretation is to “turn the Bill of Rights from a constitutional charter into a document with the texture and tone of an insurance policy or a standard form commercial lease”), *id.* at 386 (contending that even acknowledging the distinction between “enumerated” and “unenumerated” rights concedes too much to those who claim that judges lack authority to add to the “enumerated”), Moore, *supra* note 6, at 123 (contending that, on his reading, “the only authoritative text (‘law’) for any legitimate decisions, even *Roe v. Wade*, is the written document itself”), and Robert C. Post, *The Supreme Court, 2002 Term—Foreword: Fashioning the Legal Constitution: Culture, Courts, and Law*, 117 HARV. L. REV. 4, 94 n.440 (2003) (concluding, based on the use of the word “liberty” in the text of the Due Process Clause, that the Due Process Clause provides “as much meaningful guidance as does the word ‘equal’ in the Equal Protection Clause”).

8. *Lochner* clearly raised as many objections as virtually any case in American history; indeed, the case has become a symbol for an era that is often summed up as illustrating judicial derelection. See, e.g., LAWRENCE G. SAGER, *JUSTICE IN PLAIN CLOTHES: A THEORY OF AMERICAN CONSTITUTIONAL PRACTICE* 156, 235 n.11 (2004) (acknowledging the “infamy” involved when a “proper noun or a case becomes a verb,” as in the charge of “Lochnerizing”); BERNARD H. SIEGAN, *ECONOMIC LIBERTIES AND THE CONSTITUTION* 23 (1980) (viewing *Lochner* as “one of the most condemned cases in United States history” and noting that judges who enforce economic due process “continue to receive adverse treatment in the opinions and commentaries”); KATHLEEN M. SULLIVAN & GERALD GUNTHER, *CONSTITUTIONAL LAW* 497 (15th ed. 2004) (“[I]ts very name later became synonymous with inappropriate judicial intervention in the legislative process.”); David E. Bernstein, *Lochner v. New York: A Centennial Retrospective*, 83 WASH. U. L.Q. 1469, 1473 (2005) (observing that “*Lochner* has become one of the most reviled Supreme Court cases of all time”); David A. Strauss, *Why Was Lochner Wrong?*, 70 U. CHI. L. REV. 373, 373 (2003) (describing *Lochner* as “one of the great anti-precedents of the twentieth century”).

wrong and its implications for contemporary constitutional adjudication.<sup>9</sup> Nevertheless, in the most recent era, the Supreme Court has returned to its practice, going back to at least the turn of the twentieth century, of imposing unenumerated fundamental rights as limits on the powers of government.<sup>10</sup> Perhaps because this practice was widely associated with the Court's controversial practice of limiting government's capacity to regulate the economy,<sup>11</sup> many modern scholars have expressed enthusiasm about devising an alternative justification.<sup>12</sup> In more recent years, however, several constitutional scholars have not only endorsed the modern Court's revised fundamental rights jurisprudence, but have advocated a return to the methodology of the *Lochner* era.<sup>13</sup>

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9. Thus in an article addressing this very question, Professor Strauss observes that it is now "generally accepted . . . that the courts can properly recognize constitutional rights that are not explicitly mentioned in the text of the Constitution." Strauss, *supra* note 8, at 375.

10. For general treatments of the heyday of economic substantive due process, sometimes called the "*Lochner* era," see Nathan N. Frost, Rachel Beth Klein-Levine & Thomas B. McAfee, *Courts Over Constitutions Revisited: Unwritten Constitutionalism in the States*, 2004 UTAH L. REV. 333, 371-92 [hereinafter *Courts Over Constitutions Revisited*]; David E. Bernstein, *Lochner Era Revisionism, Revised: Lochner and the Origins of Fundamental Rights Constitutionalism*, 92 GEO. L.J. 1, 13, 31-35 (2003).

11. As we moved away from the New Deal Court crisis, and especially as the Court moved away from its reliance on the *Lochner* era's economic substantive due process, scholars began to look for alternative rationales for an expansive judicial role in discovering and defining the scope of unnamed personal rights. An irony in all this is that one of the leading critics of the Court relying on principles not found in the text of the Constitution, Professor Corwin, became the one who actually suggested that the scholarly search for new rationales might lead to the Ninth Amendment. Edward S. Corwin, *The "Higher Law" Background of American Constitutional Law*, 42 HARV. L. REV. 149, 152-53 (1928) (finding that the Ninth Amendment takes "the principles of transcendental justice" and translates them "into terms of personal and private rights"). In other works, of course, Corwin clarified that he was opposed to courts basing individual rights decision-making on unenumerated principles, whether derived from the Ninth Amendment or from unwritten constitutionalism more generally. *E.g.*, EDWARD S. CORWIN, *COURT OVER CONSTITUTION: A STUDY OF JUDICIAL REVIEW AS AN INSTRUMENT OF POPULAR GOVERNMENT* 126-27 (1938).

12. The most popular alternative, embraced by constitutional scholars from the 1960s to the present, centers on the Constitution's Ninth Amendment. Despite my best efforts, proponents of modern fundamental rights jurisprudence justify that position by relying on the Ninth Amendment. For the alternative perspective, see THOMAS B. MCAFEE, *INHERENT RIGHTS, THE WRITTEN CONSTITUTION, AND POPULAR SOVEREIGNTY: THE FOUNDERS' UNDERSTANDING* 169-73 (2000) [hereinafter MCAFEE, *INHERENT RIGHTS*]; THOMAS B. MCAFEE, ET AL., *POWERS RESERVED FOR PEOPLE AND THE STATES: A HISTORY OF THE NINTH AND TENTH AMENDMENTS* 225-26 (2006); Thomas B. McAfee, *The Original Meaning of the Ninth Amendment*, 90 COLUM. L. REV. 1215 (1990).

13. See, *e.g.*, BARNETT, *supra* note 5; RANDY E. BARNETT, *THE STRUCTURE OF LIBERTY: JUSTICE AND THE RULE OF LAW* 17-23 (1998); SIEGAN, *supra* note 8 (viewing *Lochner* as "one of the most condemned cases in United States history" and noting that judges who enforce economic due process "continue to receive adverse treatment in the opinions and commentaries"); Bernard H. Siegan, *Rehabilitating Lochner*, 22 SAN DIEGO L. REV. 453,

Without question the *Lochner* decision-making era still has its critics,<sup>14</sup> but there is no consensus on precisely what went wrong<sup>15</sup> and whether one can adequately distinguish between more recent variations on the unenumerated fundamental rights theme.<sup>16</sup> Though it has flirted with other justifications, the modern Supreme Court has continued to rely on the Due Process Clause to justify its fundamental rights jurisprudence. It is, therefore, the Due Process Clause that is considered in this article.

## II. THE PERENNIAL STRUGGLE: SECURING PRIVATE RIGHTS WHILE GUARANTEEING EQUAL CITIZENSHIP AND PROMOTING THE PUBLIC GOOD

Surveying the work of the Constitutional Convention, James Madison wrote, "Among the difficulties encountered by the convention, a very important one must have lain in combining the requisite stability and energy in government with the inviolable attention due to liberty and to the republican form." These are diverse elements of

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454 (1985). For an overview of such perspectives, see Thomas B. McAfee, *Substance Above All: The Utopian Vision of Modern Natural Law Constitutionalists*, 4 S. CAL. INTERDISC. L.J. 501, 511–13 (1995).

14. E.g., WILLIAM M. WIECEK, *THE LOST WORLD OF CLASSICAL LEGAL THOUGHT: LAW AND IDEOLOGY IN AMERICA, 1886–1937*, at 194–97 (1998); Thomas B. McAfee, *Restoring the Lost World of Classical Legal Thought: The Presumption in Favor of Liberty Over Law and the Court Over the Constitution*, 75 U. CIN. L. REV. 1499, 1499–1500 [hereinafter McAfee, *Classical Legal Thought*] (critiquing Barnett's *Restoring the Lost Constitution: The Presumption of Liberty*).

15. For competing explanations of what "went wrong" during the *Lochner* era, see, for example, ELY, *supra* note 7; GEOFFREY R. STONE ET AL., *CONSTITUTIONAL LAW 750–55* (5th ed. 2005); SULLIVAN & GUNTHER, *supra* note 8, at 497–500; LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW 574–78* (2d ed. 1988); John Harrison, *Substantive Due Process and the Constitutional Text*, 83 VA. L. REV. 493, 522, 530 n.101 (1997) (describing how the Court in *Calder v. Bull*, 3 U.S. (3 Dall.) 386 (1798), relied on the example of a law that takes property from A and gives it to B reflects that "the legislature was acting like a court and hence was not giving the process due to the function being performed."); Strauss, *supra* note 8, at 375, 381–86; Cass R. Sunstein, *Lochner's Legacy*, 87 COLUM. L. REV. 873 (1987) [hereinafter Sunstein, *Lochner's Legacy*]; Charles Warren, *The New "Liberty" Under the Fourteenth Amendment*, 39 HARV. L. REV. 431 (1926). In addition, compare David E. Bernstein, *Lochner's Legacy's Legacy*, 82 TEX. L. REV. 1 (2003), with Cass R. Sunstein, Reply, *Lochnering*, 82 TEX. L. REV. 65 (2003).

16. Though there is nothing like the consensus that something was deeply wrong with *Lochner*, it remains true that more recent examples of fundamental rights substantive due process have been intensely controversial. See, e.g., Michael J. Klarman, *Substantive Due Process (Update 2)*, in 5 *ENCYCLOPEDIA OF THE AMERICAN CONSTITUTION* 2576, 2577 (Leonard W. Levy & Kenneth L. Karst eds., 2d ed. 2000) (observing that modern courts have been accused of using "subjective value judgments not tethered to the constitutional text").

the public good; the task, Madison said, was one of “mingling them together in their due proportions.” The result was a balanced republic. Political balance or proportionality of this sort is not as exciting, and perhaps not as easy to celebrate, as are the inspiring principles of the Declaration of Independence. Yet the durability of those principles has depended heavily on that sense of proportion which produced and which informs the Constitution.<sup>17</sup>

The debate over whether the constitutional text must state a right if that right is to be considered part of the supreme law of the land, as well as discussion about the nature and ultimate source of rights deemed to be implicit in the written Constitution, has been with us from early in the American republic. As early as 1798, in *Calder v. Bull*, Justices Chase and Iredell confronted the question of the role of constitutional text in establishing constitutional rights.<sup>18</sup>

In a presentation that was most clearly constitutional dictum, Justice Chase articulated the view that the Constitution “must be construed to contain implicitly all those individual rights that would be essential terms of a fair social contract.”<sup>19</sup> According to Justice Chase, specific “vital principles” would “overrule an apparent and flagrant abuse of legislative power; as to authorize manifest injustice by positive law.”<sup>20</sup> Under Justice Chase’s view, our constitutional order precludes legislation that conflicts with the requirements of a fair social contract “even if not ‘expressly restrained by the Constitution.’”<sup>21</sup>

By contrast, Justice Iredell objected to the views of “some speculative jurists” that the Supreme Court could invalidate a law “merely because it is, in their judgment, contrary to the principles of natural justice.”<sup>22</sup> Legislation that violates clear constitutional provisions is “unquestionably void,” Iredell reasoned, but “[t]he ideas of natural justice are regulated by no fixed standard,”

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17. Harry M. Clor, *Reflections on the Bill of Rights*, in *OUR PECULIAR SECURITY: THE WRITTEN CONSTITUTION AND LIMITED GOVERNMENT* 153, 156 (Eugene W. Hickok, Jr. et al., eds., 1993) (quoting *THE FEDERALIST* NO. 37, at 233–34 (James Madison) (Jacob E. Cooke ed., 1961)).

18. 3 U.S. (3 Dall.) 386 (1798). See generally Edward B. Foley, *The Bicentennial of Calder v. Bull: In Defense of a Democratic Middle Ground*, 59 *OHIO ST. L.J.* 1599 (1998).

19. Foley, *supra* note 18, at 1599.

20. *Calder*, 3 U.S. (3 Dall.) at 388 (emphasis omitted).

21. 1 LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 1336–37 (3d ed. 2000) (alteration in original) (quoting *Calder*, 3 U.S. (3 Dall.) at 387).

22. *Calder*, 3 U.S. (3 Dall.) at 398–99 (Iredell, J., concurring).

so that the Court cannot invalidate a law with which it simply disagrees.<sup>23</sup>

For Iredell, the response to the possibility of oppressive legislation was “to define with precision the objects of the legislative power, and to restrain its exercise within marked and settled boundaries.”<sup>24</sup> He thus opposed a judicial power to invalidate laws on grounds of policy, which he read Justice Chase’s opinion as supporting, concluding that such actions were “not only undemocratic and contrary to the English legal tradition we had inherited,” but were “fundamentally inconsistent with the concept of a written constitution.”<sup>25</sup>

Ironically enough, although Justice Chase’s dictum appeared to contemplate a willingness to go beyond the written Constitution,<sup>26</sup> it is almost equally clear that “the limiting principles he articulated seem to be drawn more from Whig understandings of the British constitution than from doctrines of natural law and natural right.”<sup>27</sup> *Calder* has come to stand, first and foremost, as an example of the “doctrine of *vested rights*,” which Professor Edward Corwin described as “the foundational doctrine of constitutional limitations in this country.”<sup>28</sup> Notwithstanding the fact that modern critics of the vested rights doctrine contend that it rests ultimately not on the written Constitution, but on “the theory of fundamental and inalienable rights,”<sup>29</sup> it is equally true that the doctrine “grew out of a recognition that when legislatures act like courts, the potential for abuse grows not only by the omission of some particular procedure in question—such as trial

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23. *Id.* at 399. For Iredell, it was sufficient to justify the conflicting position that “when there is disagreement among citizens concerning the content of a fair social contract, there is no way to know for sure who has the correct view.” Foley, *supra* note 18, at 1599.

24. *Calder*, 3 U.S. (3 Dall.) at 399.

25. DAVID P. CURRIE, *THE CONSTITUTION IN THE SUPREME COURT: THE FIRST HUNDRED YEARS, 1789–1888*, at 47 (1985).

26. For careful analysis of John Hart Ely’s attempt to reduce Justice Chase’s argument to one based on a positivist reading of the Constitution’s text, see *Courts Over Constitutions Revisited*, *supra* note 10, at 348–49.

27. Thomas B. McAfee, *Prolegomena to a Meaningful Debate of the “Unwritten Constitution” Thesis*, 61 U. CIN. L. REV. 107, 130 n.73 (1992) [hereinafter McAfee, *Prolegomena*].

28. Edward S. Corwin, *The Doctrine of Due Process of Law Before the Civil War*, 24 HARV. L. REV. 366, 375 (1911).

29. *Id.*



by jury—but also by the departure from separation of powers.<sup>30</sup> Even if the vested rights doctrine involved the Supreme Court in the process of finding “implied rights,” the implication grew directly out of the purposes for creating three branches of government and separating their powers. It did not have to lead the Court to its modern doctrine of implied fundamental rights. In fact, the modern doctrine of implied fundamental rights directly contradicts the understanding of constitutionalism articulated during the debate over the ratification of the Constitution.<sup>31</sup>

Even prior to the Court’s decision in *Calder v. Bull*,<sup>32</sup> it was already apparent that the American system was more successful in creating a meaningful system of collective self-government than it was at securing all the rights the people were entitled to and assuring the equal status of all citizens before the law. The most obvious reason for this result was the compromise at the constitutional convention to permit slave-holding states to continue the institution of slavery.<sup>33</sup> Perhaps another reason was the recognition by the Constitution’s Framers that, although constitutions should attempt to set forth immutable principles, they inevitably will fall short and, therefore, a method of amending them should be supplied.<sup>34</sup> Early in the nation’s history, moreover, the state constitutions’ declarations of rights presumed the qualified nature of individual rights guarantees and, partly for that very reason, frequently relied “on language of obligation and of statement[s] of principle—language that itself suggests something other than a hard legal rule—rather than the language of direct

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30. *Courts Over Constitutions Revisited*, *supra* note 10, at 382; *accord*, JOHN V. ORTH, DUE PROCESS OF LAW: A BRIEF HISTORY 49–50 (2003) (observing that, although the Court began with the proposition that the violation of vested rights effectively denied procedural due process through the denial of “a judicial proceeding,” it was also clear that “another meaning lurked, redistributive and substantive,” the consequence being the doctrine of substantive due process); Harrison, *supra* note 15, at 522; Wallace Mendelson, *A Missing Link in the Evolution of Due Process*, 10 VAND. L. REV. 125, 136 (1956) (recognizing separation of powers as the “narrow” bridge between procedural due process and the doctrine of vested rights).

31. See, e.g., *Courts Over Constitutions Revisited*, *supra* note 10, at 336; Thomas B. McAfee, *Inalienable Rights, Legal Enforceability, and American Constitutions: The Fourteenth Amendment and the Concept of Unenumerated Rights*, 36 WAKE FOREST L. REV. 747, 748–51 (2001) [hereinafter McAfee, *Inalienable Rights*].

32. 3 U.S. (3 Dall.) 386 (1798).

33. McAfee, *Classical Legal Thought*, *supra* note 14, at 1579.

34. See MCAFEE, *INHERENT RIGHTS*, *supra* note 12, at 22–23; Philip A. Hamburger, *The Constitution’s Accommodation of Social Change*, 88 MICH. L. REV. 239, 300–01 (1989).

command and prohibition.”<sup>35</sup> Courts became engaged in a serious practice of judicial review only gradually and during the nation’s first century, somewhat occasionally.

During the nation’s first century, the institution of human slavery, a central compromise in the drafting of the original Constitution,<sup>36</sup> had at least two dramatic forms of impact on the process of limiting government. The first was that it required the omission of rights from the Constitution that might threaten the existence of slavery.<sup>37</sup> Illustrative is the history of George Mason’s proposed “natural equality” in the Virginia Bill of Rights. The proposal stated that “all men are by nature *equally free* and independent, and have certain inherent rights.”<sup>38</sup> Fearful of the potential impact of the provision on the constitutionality of slavery, the following language was added: “of which, *when they enter into a state of society*, they cannot, by any compact, deprive or divest their posterity.”<sup>39</sup> This language “was included precisely in order to clarify that the fundamental rights that people retain as they enter civil society did not apply to the Black race because the slaves had never entered into a state of civil society in Virginia.”<sup>40</sup> Regarding the Federal Constitution, there is no room for doubt that “[t]he Founders deliberately omitted the Declaration [of Independence’s] doctrine of equal rights from the Bill of Rights, not because that doctrine was considered mere rhetoric, but because its inclusion in the Constitution would have been dangerous to

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35. MCAFEE, *INHERENT RIGHTS*, *supra* note 12, at 24.

36. For an attempt to summarize the original compromise and to briefly describe its impact on the nation’s constitutional practice, see McAfee, *Classical Legal Thought*, *supra* note 14, at nn.396–416 and accompanying text.

37. See McAfee, *Classical Legal Thought*, *supra* note 14, at 1579.

38. VA. CONST. of 1776, Bill of Rights, § 1 (emphasis added), *reprinted in* 7 THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE STATES, TERRITORIES, AND COLONIES NOW OR HERETOFORE FORMING THE UNITED STATES OF AMERICA 3812, 3813 (Francis Newton Thorpe ed., 1909) [hereinafter STATE CONSTITUTIONS]. The proposal was obviously related to Thomas Jefferson’s assertion of the “self-evident” truth “that all men are created equal.” THE DECLARATION OF INDEPENDENCE, para. 2 (U.S. 1776).

39. VA. CONST. of 1776, Bill of Rights, § 1 (emphasis added), *reprinted in* STATE CONSTITUTIONS, *supra* note 38, at 3812–13.

40. Thomas B. McAfee, *Does the Federal Constitution Incorporate the Declaration of Independence?*, 1 NEV. L.J. 138, 149–50 (2001) (citing Warren M. Billings, “*That All Men are Born Equally Free and Independent*”: Virginians and the Origins of the Bill of Rights, in THE BILL OF RIGHTS AND THE STATES 335, 339–40 (Patrick T. Conley & John P. Kaminski eds., 1992)).

the continued existence of slavery."<sup>41</sup> As a consequence, the very content of the Federal Bill of Rights—including both what was inserted and what was omitted—was affected by “the taint of America’s greatest evil, race slavery.”<sup>42</sup>

Second, the need to accommodate slavery prompted some to oppose the application of private rights to the extent that exercise of private rights might be deleterious to the slavery institution. An example is the First Amendment’s guarantee of freedom of speech.<sup>43</sup> Among those whose free speech interests were systematically suppressed in nineteenth-century America were “[r]adical abolitionists [who] insisted that the sinful and coercive laws of the state placed barriers between individuals and God’s ‘higher law.’”<sup>44</sup> By the 1830s Southern states began “banning antislavery speech and demanding that the North follow suit.”<sup>45</sup> Legal doctrines that permitted suppression of speech interests early in the nation’s history carried over until the “bad tendency” doctrine and the “constructive intent” doctrine were used to justify prosecutions of abolitionists on grounds that their words could lead to slave revolts.<sup>46</sup>

Of course, the protection courts offered to individual rights in the nineteenth century, quite apart from securing the institution of human slavery, was not close to what has become commonplace in the twentieth century.<sup>47</sup> It can be accurately asserted that “no right of free speech as we know it existed, either in law or practice, until a basic transformation of the law governing speech during the period from about 1919 to 1940.”<sup>48</sup> Before that time, “one

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41. Robert J. Reinstein, *Completing the Constitution: The Declaration of Independence, Bill of Rights and Fourteenth Amendment*, 66 TEMP. L. REV. 361, 362–63 (1993).

42. CHRISTOPHER L. EISGRUBER, CONSTITUTIONAL SELF-GOVERNMENT 117 (2001).

43. See MICHAEL KENT CURTIS, FREE SPEECH, “THE PEOPLE’S DARLING PRIVILEGE:” STRUGGLES FOR FREEDOM OF EXPRESSION IN AMERICAN HISTORY 117–54 (2000).

44. DAVID M. RABBAN, FREE SPEECH IN ITS FORGOTTEN YEARS 24 (1997).

45. CURTIS, *supra* note 43, at 117.

46. David Kairys, *Freedom of Speech*, in THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE 190, 196 (David Kairys ed., 3d ed. 1998).

47. Professor Rabban notes a “pervasive judicial hostility to virtually all free speech claims” prior to World War I. RABBAN, *supra* note 44, at 2. Those of a progressive political orientation “challenged traditional conceptions of individual rights protected by the Constitution” prior to World War I, associating constitutional rights “with the excessive individualism to which they attributed the destructive inequality and division they saw throughout American society.” *Id.* at 3.

48. Kairys, *supra* note 46, at 191.

spoke publicly only at the discretion of local, and sometimes federal, authorities, who often prohibited what they or influential segments of the community did not want to hear.”<sup>49</sup>

A classic early example is the criminal conviction of the evangelist Reverend William F. Davis, a “longtime active opponent of slavery and racism,”<sup>50</sup> for preaching the gospel on Boston Common.<sup>51</sup> The conviction was based on a city ordinance “that prohibited ‘any public address’ on public grounds without a permit from the mayor.”<sup>52</sup> Though the twentieth-century Supreme Court would recognize public parks, sidewalks, and streets as “public forums,” which means the state must provide significant reasons to limit speech opportunities,<sup>53</sup> the decision in *Davis* underscores “that there was no tradition of or legally protected right to free speech as we know it prior to the transformation.”<sup>54</sup> To the extent that a given right could be linked to supporting and reinforcing the role of the people in a democratic system, it was more likely to receive fairly substantial support from both commentators and courts.<sup>55</sup>

#### A. *Popular Sovereignty and Its Implications for Rights*

Popular sovereignty was the basis of the Federalist founders’ confidence in the proposed Federal Constitution, including its omission of a bill of rights.<sup>56</sup> Those most responsible for the adoption of the Constitution believed that a well-structured govern-

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49. *Id.*

50. *Id.* at 192.

51. *Commonwealth v. Davis*, 39 N.E. 113 (Mass. 1895).

52. Kairys, *supra* note 46, at 192. Judge Holmes reasoned that to forbid public speaking “in a highway or public park” no more infringes individual rights “than for the owner of a private house to forbid it in his house.” *Davis*, 39 N.E. at 113. His opinion was upheld by the United States Supreme Court in 1897. *Davis v. Massachusetts*, 167 U.S. 43, 48 (1897).

53. See STEVEN H. SHIFFRIN & JESSE H. CHOPER, *THE FIRST AMENDMENT: CASES, COMMENTS, QUESTIONS* 387–89 (2d ed. 1996).

54. Kairys, *supra* note 46, at 194.

55. Rabban observes, for example, that “most commentary on the Sedition Act of 1798 has criticized it for punishing legitimate political speech and has often added that it violated the First Amendment,” bringing us to the point where increasingly “people argued that the role of speech in a democracy requires First Amendment protection of dissenting opinions by unpopular minorities.” RABBAN, *supra* note 44, at 13.

56. See, e.g., Gregory S. Ahern, *Virtue, Wisdom, Experience, Not Abstract Rights, form the Basis of the American Republic*, available at <http://www.nhinet.org/ahern1.htm> (last visited Nov. 26, 2007).

ment that adequately represented the people was the ultimate security for the rights they held.<sup>57</sup> The Federalists not only believed that the federal government simply had not been granted sufficient power to threaten basic rights, but they were also confident that the well-recognized power of the people to “alter or abolish” their form of government meant the Constitution could be amended if in some important way it was ineffective.<sup>58</sup>

Fortunately, as participants in the process of constitution-making and amending have discovered, “the people” who have attended American constitutional conventions have essentially felt compelled to adopt general rules that they know will be applied uniformly to both friends and foes. This has also meant in practice, however, that if the people as a collective entity “shared” or “assumed the validity of” particular assumptions or prejudices, the net result could be the inclusion of a constitutional provision or adoption of a constitutional amendment that was at best “short-sighted”—or at worst fundamentally unjust.<sup>59</sup> Though the founding generation believed in a moral reality from which one might derive certain basic rights claims, they had just witnessed the English ignore—nay, even abuse—the columnists’ “rights of

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57. Ultimately “the proper guardians of rights are the people—whose sovereignty constitutes the most basic right of all.” GEORGE W. CAREY, *THE FEDERALIST: DESIGN FOR A CONSTITUTIONAL REPUBLIC* 153 (1989); *accord*, JEREMY WALDRON, *LAW AND DISAGREEMENT* 244 (1999) (contending that if the question framed is “who shall decide what rights we have,” his answer is, “The people whose rights are in question have the right to participate on equal terms in that decision,” and also supplying reasons for concluding that we should not “instead entrust final authority to a scholarly or judicial elite”).

58. 2 *THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION* 383–84 (Merrill Jensen ed., 1976) (James Wilson stated that “We the People” is “tantamount to a volume and contains the essence of all the bills of rights that have been or can be devised.”); *THE FEDERALIST* NO. 84 (Alexander Hamilton), *supra* note 17, at 578–79 (contending that the Constitution, in expressly stating the doctrine of popular sovereignty—“We the People”—and thereby acknowledging the authority of the people to amend the Constitution to better meet their needs and to secure their rights, “is a better recognition of popular rights than volumes of those aphorisms which make the principal figure in several of our state bills of rights, and which would sound much better in a treatise of ethics than in a constitution of government”).

59. *See, e.g., Courts Over Constitutions Revisited*, *supra* note 10, at 355–57 & 356 n.115 (citing G. ALAN TARR, *UNDERSTANDING STATE CONSTITUTIONS*, 106, 108 (1998)) (describing American constitutional provisions that denied free Blacks—not to mention Chinese residents and Mormons—the right to vote, imposed property-owning requirements to make one eligible to vote, conditioned holding public office on one’s status as a Protestant or being a non-minister, and safeguarded the institution of slavery). *See generally* *CONSTITUTIONAL STUPIDITIES, CONSTITUTIONAL TRAGEDIES* (William N. Eskridge, Jr. & Sanford Levinson eds., 1998).

Englishmen,” and therefore held no illusions that rights were “automatically” secured against government invasion.<sup>60</sup>

The nation’s experience with state constitutions does quite a bit to confirm the basic validity of Madison’s insight that liberty was more likely to receive security and protection from the national government in an extended republic than from state governments.<sup>61</sup> One of the ironies at the turn of the twentieth century was that a relatively activist Supreme Court did a great deal to reinvigorate the nation’s system of individual rights, but did so at the cost of declining to implement the Fourteenth and Fifteenth Amendments’ purpose to assure every citizen equal status under law<sup>62</sup>—a step that seemed at least implicit in the Declara-

60. MCAFFEE, *INHERENT RIGHTS*, *supra* note 12, at 120 (Based on their shared experience, “the opposing camps” in the debate over ratification of the proposed Constitution, “shared remarkably similar premises that it was important that the Constitution secure the fundamental natural rights and that the natural rights did not operate as inherent, enforceable limitations on government power.”); Thomas B. McAfee, *The Bill of Rights, Social Contract Theory and the Rights “Retained” by the People*, 16 S. ILL. U. L. J. 267, 276 (1992) (“Antifederalist opponents of the proposed Constitution, did not believe that their fundamental rights were inherent features of legal and constitutional orders, whether or not found in the written Constitution”); *id.* at 285–87 (Federalists shared with Antifederalists “the same basic assumptions about the relationship between the written Constitution, natural rights, and social contract theory;” but they contended that all rights were secured under the Constitution because “the government thereby contemplated was designed to accomplish a limited number of specific national objects,” reserving all else to the people.).

61. THE FEDERALIST NO. 10 (James Madison), *supra* note 17, at 57, 64 (Noxious factions are “united and actuated by some common impulse of passion, or of interest, adverse to the rights of other citizens, or to the permanent and aggregate interests of the community,” and experience shows that “the same advantage, which a Republic has over a Democracy, in controlling the effects of faction, is enjoyed by a large over a small Republic,” and hence “the Union over the States composing it.”); *see also* DAVID F. EPSTEIN, *THE POLITICAL THEORY OF THE FEDERALIST* 102 (1984) (describing *Federalist 10* as “an implicit indictment of the states,” which “begins by citing complaints against ‘our governments’—at least primarily our state governments—and concludes by showing the superiority of the ‘large . . . republic’ constituted by a new government for the Union” and noting that Madison’s conviction about the states “is why Madison proposed to the Constitutional Convention that the national legislature be given a veto over state acts; and it was in support of that proposal that Madison presented the arguments of *Federalist 10*”).

62. The same Supreme Court that brought us *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1856), *superseded* by U.S. CONST. amends. XIII, XIV, also brought us the *Civil Rights Cases*, 109 U.S. 3 (1883) and *Plessy v. Ferguson*, 163 U.S. 537 (1896), *overruled* by *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954). *See* KEITH E. WHITTINGTON, *CONSTITUTIONAL INTERPRETATION: TEXTUAL MEANING, ORIGINAL INTENT, AND JUDICIAL REVIEW* 174 (1999) (contending that the “federal judiciary’s complicity in the turn-of-the century’s system of racial oppression should serve as a warning of the political possibilities once an unwavering focus on the Constitution’s terms and purposes is lost”); Amar, *supra* note 7, at 38 (observing that “judges generally underenforced the document-supported rights of blacks and women while overenforcing various nondocumentarian claims of rich and powerful interests”); Robert J. Kaczorowski, *Popular Constitutionalism versus Justice in Plainclothes: Reflections from History*, 73 *FORDHAM L. REV.* 1415, 1436–37 (2005) (concluding that “[t]he

tion of Independence and was the central purpose of the Fourteenth Amendment.<sup>63</sup>

B. *The Right to Pursue the Public Weal and the Rights of Individuals*

Americans of the founding era were deeply committed to *individual* rights, which typically consisted of what we call negative rights—freedom *from*. Modern Americans sometimes do not understand that the American founders were also committed to “positive liberty,” referring to “the liberty of the citizens of a self-governing society to participate and act for the public good and to use their government to seek, in Aristotle’s words, ‘not merely life alone, but the good life.’”<sup>64</sup> From the perspective of its framers, the Federal Constitution was concerned most with the puzzle of how to combine these factors together—how to create a truly republican form of government, whereby the people might govern themselves, that simultaneously respected and implemented the moral claims (“rights”) of individual members of that society.<sup>65</sup> As Americans contemplated their first Constitution, it was clear that representative government had a well-deserved reputation for *not* respecting rights—a reputation that had been confirmed in many minds by the American experience under state constitutions adopted during the confederation period.<sup>66</sup>

John Adams, the author of the Massachusetts Constitution, the document with the largest impact on the substantive content of the proposed Federal Constitution, was extremely clear that “happiness of society is the end of government . . . . From this

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Court diminished the scope of the Fourteenth and Fifteenth Amendments’ guarantees of fundamental rights, of Congress’s power to enforce the rights they secured, and of Congress’s power to remedy their violation”—thereby undermining the “justice-seeking and rights-protecting Constitution” and creating a “moral anomaly” in our constitutional law).

63. See, e.g., Reinstein, *supra* note 41, at 392.

64. RALPH KETCHAM, FRAMED FOR POSTERITY: THE ENDURING PHILOSOPHY OF THE CONSTITUTION 40 (1993).

65. See MCAFFEE, INHERENT RIGHTS, *supra* note 12, at 45.

66. Historically, it was clear that “popular government has a bad reputation which it has fully earned by its history of instability, injustice, and failure.” EPSTEIN, *supra* note 61, at 5. “The confederation period, 1776–1787, was characterized by a continuing dialogue over how to resolve the tension between government by consent and the idea of limited government that preserved liberty.” MCAFFEE, INHERENT RIGHTS, *supra* note 12, at 45. The result was that “reformers advocated constitutional change by contending against the degree of power granted to the legislative branches and the failure to provide satisfactory mechanisms for checking and limiting that power.” *Id.* at 47.

principle it will follow, that the form of government which communicates ease, comfort, security, or, in one word, happiness, to the greatest number of persons, and in the greatest degree, is the best.”<sup>67</sup> Given that the Framers held a realistic—not an idealistic—view of human nature, their goal of seeking the good of society and the happiness of its members reflected that they were hopeful without being perfectionists.<sup>68</sup> The goal was to strike a reasonable “balance between liberty and authority” with each individual surrendering “enough control over his original rights to permit government to maintain an organized, stable, peaceful pattern of human relations.”<sup>69</sup> Consequently “eighteenth-century values of natural rights never totally supplanted the seventeenth-century American belief in a community held together by substantive values reflected in moral legislation.”<sup>70</sup> Indeed, when James Madison offered his proposed Bill of Rights to the first Congress, he explained that he had included only “those safeguards which they have been long accustomed to have interposed between them and the magistrate who exercised the sovereign power.”<sup>71</sup>

The themes that grew out of the positive liberty conceptions of the founding generation may have been key to American avoidance of excessive individualism, which is a result of a society exclusively focused on adequately securing Lockean individual rights.<sup>72</sup> Thus a modern commentator suggests that the notion of

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67. CLINTON ROSSITER, *SEEDTIME OF THE REPUBLIC: THE ORIGIN OF THE AMERICAN TRADITION OF POLITICAL LIBERTY* 414 (1953) (quoting 4 *THE WORKS OF JOHN ADAMS* 193 (Charles Francis Adams & Co. ed., Boston, Little, Brown 1865)). James Wilson stated that “the happiness of the society is the *first* law of every government.” *Id.* at 410–11 (quoting 3 *THE WORKS OF THE HONOURABLE JAMES WILSON, L.L.D.* 206 (Bird Wilson ed., Philadelphia, Lorenzo Press 1804)). Also, James Iredell stated that “[t]he object of all government is, or ought to be, *the happiness of the people governed.*” *Id.* at 411 (quoting 1 GRIFFITH J. MCREE, *LIFE AND CORRESPONDENCE OF JAMES IREDELL* 217 (1949)).

68. See ROSSITER, *supra* note 67, at 442–43.

69. *Id.*

70. David F. Forte, *Ideology and History*, 13 *GEO. L. REV.* 1501, 1507 (1979).

71. JAMES MADISON, *ADDRESS OF 8 JUNE 1789*, reprinted in *XI DEBATES IN THE HOUSE OF REPRESENTATIVES, FIRST SESSION: JUNE–SEPTEMBER 1789*, at 818, 821 (Charlene Bangs Bickford et al. eds., 1992).

72. Working from the assumption of plenary state legislative powers, in the nineteenth century “Americans resorted to law to promote public safety, stimulate economic development, police public spaces, control morals, protect public health, and in general promote collective welfare. They did not waste a moment’s concern about overriding individual interests in doing so.” WIECEK, *supra* note 14, at 68. See generally FRANK BOURGIN, *THE GREAT CHALLENGE: THE MYTH OF LAISSEZ-FAIRE IN THE EARLY REPUBLIC* (1989); WILLIAM J. NOVAK, *THE PEOPLE’S WELFARE: LAW AND REGULATION IN NINETEENTH-*



an early American republic as a kind of laissez-faire utopia is simply a myth:

In reality, antebellum Americans took seriously the maxim *salus populi suprema lex esto* (let the welfare of the people be the supreme law), and used governmental regulation pervasively to promote the people's welfare. Powerful local self-government was the norm, not only in the long settled East, but all along the frontiers as well. Law was central in this thoroughly regulated social order, identifying the loftiest ideals of the people as well as prescribing the minutiae of their social intercourse. The doctrine of the police power provided the all-pervasive reality of government presence in antebellum America.<sup>73</sup>

An aspect of America's lack of a libertarian heritage is its consistent dedication to the idea that one purpose of government is to develop or promote a public morality. Even at a time when the Supreme Court was generally more solicitous to Tenth Amendment claims of state rights, it upheld a federal statute prohibiting the use of channels of interstate commerce in prostitution. The Court concluded that the national government could act "to promote the general welfare, material and moral."<sup>74</sup> Similarly, in upholding a federal ban on lotteries, the Court affirmed the government's power "to protect the public morals."<sup>75</sup> Chief Justice Warren, who presided over what many characterize as a constitutional revolution, recognized as a long established principle "the right of the Nation and of the States to maintain a decent society."<sup>76</sup>

American political and legal traditions are complex. One scholarly treatment recognizes at least three "central strands of our culture—biblical, republican, and modern individualist."<sup>77</sup> The republican cultural strand refers to "a devotion to political self-government and the requisite *virtues* of public spirited citizenship; that is, the recognition that authentic self-government requires citizens with a responsible concern for public affairs and

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CENTURY AMERICA (1996).

73. WIECEK, *supra* note 14, at 68.

74. *Hoke v. United States*, 227 U.S. 308, 322 (1913).

75. *Lottery Case*, 188 U.S. 321, 356 (1903).

76. *Jacobellis v. Ohio*, 378 U.S. 184, 199 (1964) (Warren, C.J., dissenting).

77. ROBERT N. BELLAH ET AL., *HABITS OF THE HEART: INDIVIDUALISM AND COMMITMENT IN AMERICAN LIFE* 28 (1985).

willingness . . . to subordinate private interests thereto.”<sup>78</sup> According to Professor Harry Clor:

[i]n the formative years of the Republic and throughout much of the nineteenth century, the biblical and republican strands provided a delimiting moral and cultural context for American liberalism. Because of these two influences upon it, our individualism was constrained by ideas of obligation to community; “both of these traditions placed individual autonomy in a context of moral and religious obligation that in some contexts justified obedience as well as freedom.” . . .

[O]ur Lockean and Madisonian liberalism has had to make room for opposing influences both civic and religious.<sup>79</sup>

### III. THE DUE PROCESS CLAUSE AS A SOURCE FOR EVALUATING GOVERNMENT INTRUSION

When judges base their decisions either on constitutional text or on longstanding consensus, they do not usurp the right of the people to self-government, but hold the representatives of the people accountable to the deepest and most fundamental commitments of the people.

. . .

. . . To be sure, there can be bad, evil, or counterproductive traditions; but if so, one would expect to see a movement away from them. At least, there is more reason to have faith in the product of decentralized decisions, based on experiments and experience over a period of many years, than in the abstract theorizing of particular individuals, even oneself. Imposition of a new, untried, principle will almost certainly have unintended and unpredictable consequences, which is why prudent statesmen are guided by experience rather than by idealistic speculation.<sup>80</sup>

The Court has adopted the view that liberty interests are secured by the Due Process Clause of the Fourteenth Amendment.<sup>81</sup> Even so, during most of the twentieth century, the Supreme Court underscored that the security given to rights by the Due

78. HARRY M. CLOR, *PUBLIC MORALITY AND LIBERAL SOCIETY: ESSAYS ON DECENCY, LAW AND PORNOGRAPHY* 30 (1996).

79. *Id.* at 30–31 (quoting BELLAH ET AL., *supra* note 77, at 142–43).

80. Michael W. McConnell, *The Right to Die and the Jurisprudence of Tradition*, 1997 UTAH L. REV. 665, 682–83.

81. *Id.* at 666, 670.

Process Clause did not require the Court to engage in creative efforts to “discover” rights; it merely had to secure rights that were “implicit in the concept of ordered liberty” or “deeply rooted in this Nation’s history and tradition.”<sup>82</sup> Notwithstanding the Court’s preference for due process liberty, however, most commentators have not shared the enthusiasm. Thus even a modern advocate of unenumerated fundamental rights has concluded that “the very phrase ‘*substantive due process*’ teeters on self-contradiction,” and hence “provides neither a sound starting point nor a directional push to proper legal analysis.”<sup>83</sup> And another advocate of unenumerated fundamental rights decision-making has described substantive due process as “paradoxical, even oxymoronic.”<sup>84</sup> Without so much as an explanation of how the Court’s construction of due process fundamental rights could trump other public interests, or in any way relate to the intention to preserve a right to fair process, the Court has essentially abandoned any attempt to explain how the guarantee has come to play the role it does.<sup>85</sup>

A. *The Case for Substantive Due Process—Perceiving Legislatures as Not the Only Source of the Law of the Land*

Although “substantive due process has been the victim of merciless criticism,” it still remains “the most plausible justification for finding rights not clearly or explicitly set forth in [constitu-

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82. Cass R. Sunstein, *Sexual Orientation and the Constitution: A Note on the Relationship Between Due Process and Equal Protection*, 55 U. CHI. L. REV. 1161, 1168 (1988) (quoting *Bowers v. Hardwick*, 478 U.S. 186, 191–92 (1986), *overruled by Lawrence v. Texas*, 539 U.S. 558 (2003)).

83. Amar, *supra* note 7, at 123; *see also id.* at 122–23 (describing recent unenumerated rights cases as “invoking the nonmammalian whale of substantive due process, a phantasmagorical beast conjured up by judges without clear textual warrant”). Pushing the point further, Justice Thomas went so far as to contend that the only reason the Court could not properly reevaluate the area of unenumerated fundamental rights was “that neither party has argued that our substantive due process cases were wrongly decided and that the original understanding of the Due Process Clause precludes judicial enforcement of unenumerated rights under that constitutional provision.” *Troxel v. Granville*, 530 U.S. 57, 80 (2000) (Thomas, J., concurring).

84. BLACK, *supra* note 5, at 3; *see also* ELY, *supra* note 7, at 18 (contending that because “there is simply no avoiding the fact that the word that follows ‘due’ is ‘process,’” it appears we “need periodic reminding that ‘substantive due process’ is a contradiction in terms—sort of like ‘green pastel redness’”).

85. *See* Thomas B. McAfee, *The Constitution as Based on the Consent of the Governed—Or, Should We Have an Unwritten Constitution?*, 80 OR. L. REV. 1245, 1273 n.129 (2001) [hereinafter McAfee, *Consent of the Governed*]. *See generally* Harrison, *supra* note 15.

tional] text.”<sup>86</sup> Indeed, from the beginning, the commitment to requiring compliance with due process of law, and keeping the government within the “law of the land,” has not been limited to requiring compliance with acts of Parliament, but included common law and customary conceptions of law.<sup>87</sup> Well before the American Revolution, Lord Coke wrote that the granting of an economic monopoly “is against the liberty and freedom[ ] of the subject,” and, consequently, such a grant was “against this great charter [—Magna Carta].”<sup>88</sup>

Unsurprisingly then, it was antebellum state courts that interpreted due process to restrain “arbitrary deprivations of property,” and it was also during this period that courts began to perceive due process as “establishing equal treatment as a constitutional norm” and prohibiting laws “which aided one class of individuals” to the detriment of others.<sup>89</sup> The clause thus became a means of reinforcing customary limits on political power. Even if the Due Process Clause does not convey an extremely narrow or concrete limitation, but actually serves to reinforce customary limits on political power, it should not be read as effectively establishing the Constitution’s enforceable “inalienable rights” clause.<sup>90</sup>

86. See *Courts Over Constitutions Revisited*, *supra* note 10, at 387–92.

87. See, e.g., JOHN V. ORTH, *DUE PROCESS OF LAW: A BRIEF HISTORY* 6, 9–14 (2003); FRANK R. STRONG, *SUBSTANTIVE DUE PROCESS OF LAW: A DICHOTOMY OF SENSE AND NONSENSE* 10, 12–13 (1986); James W. Ely, Jr., *The Oxymoron Reconsidered: Myth and Reality in the Origins of Substantive Due Process*, 16 *CONST. COMMENT* 315, 320–21 (1999); John V. Orth, *Taking From A and Giving to B: Substantive Due Process and the Case of the Shifting Paradigm*, 14 *CONST. COMMENT* 337, 337–38 (1997); Robert E. Riggs, *Substantive Due Process in 1791*, 1990 *WIS. L. REV.* 941, 951, 960–61, 968, 986.

88. STRONG, *supra* note 87, at 11 (quoting SIR EDWARD COKE, 2 *INSTITUTES OF THE LAWS OF ENGLAND* 47 (London, W. Clarke & Sons 1809)). The modern American tendency has been to assume that the founders of the American Constitution were deeply committed to abstract moral claims and wrote them into the Constitution. But the Cokeian model—rooted as much in custom and tradition as it was in “reason”—was much more deeply entrenched in American constitutional thought than any commitment to abstract natural rights. E.g., Michael W. McConnell, *Tradition and Constitutionalism Before the Constitution*, 1998 *U. ILL. L. REV.* 173, 174–76.

89. Ely, Jr., *supra* note 87, at 336, 338.

90. The central objections to so conceiving the Supreme Court’s role are both epistemological and institutional. It is, in the first place, unclear that the Court is up to the task of demonstrating that the rights it would enforce are “decreed” by God or nature. Cf. STEVEN D. SMITH, *THE CONSTITUTION AND THE PRIDE OF REASON* 25 (1998); Ronald J. Allen, *Constitutional Adjudication, the Demands of Knowledge, and Epistemological Modesty*, 88 *NW. U. L. REV.* 436, 439 (1993). Beyond the history showing that such open-ended power was never intended to be given to the Supreme Court, “commentators have noted that in modern cases raising the most challenging political-moral questions—especially those on

The history of substantive due process adjudication can be read either as a genuine grappling with text and history or as a “freeing” of the judiciary from any obligation to either.<sup>91</sup> It is difficult to quarrel with Justice White’s contention that “the substantive content of the Clause is suggested neither by its language nor by preconstitutional history; that content is nothing more than the accumulated product of judicial interpretation.”<sup>92</sup> The requirement of due process of law bases to some degree constitutional claims on the legal order itself. That order’s establishment of expectations through common law or statutory rulings become the source of these claims.<sup>93</sup> It is part of our constitutional tradition that authoritatively adopted judicial decisions may be embraced by the nation as a whole and become a settled part of our constitutional order.<sup>94</sup> In embracing a long-established judicial doc-

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abortion, homosexuality, and the right to die—the treatment of the core moral questions have been unenlightening at best.” McAfee, *Consent of the Governed*, *supra* note 85, at 1289; *see also infra* note 131.

91. *See generally Courts Over Constitutions Revisited*, *supra* note 10, at 371–92. If we are not careful, we could turn the Due Process Clause into the “Life, Liberty, or Property Clause” as judges create and impose their own notions of what should be inalienable rights.

92. *Moore v. City of E. Cleveland*, 431 U.S. 494, 543 (1977) (White, J., dissenting); *accord* Daniel O. Conkle, *Three Theories of Substantive Due Process*, 85 N.C. L. REV. 63, 77–78 (2006) (concluding that there is a lack of evidence suggesting that substantive due process was “embraced by the original, objective public meaning of the clause,” with the implication that its values “emerge from a process of nonoriginalist decisionmaking”); Harrison, *supra* note 15, 494–95.

93. An example is presented by *Cruzan*’s reliance on the long-established common law right to refuse even necessary medical care—as a basis for acknowledging a right to decide on medical care relating to death. *Cruzan v. Dir., Mo. Dep’t of Health*, 497 U.S. 261, 268–69 (1990); *see* McConnell, *supra* note 88, at 174.

94. *See* Michael J. Perry, *What is “the Constitution”?* (and Other Fundamental Questions), in CONSTITUTIONALISM: PHILOSOPHICAL FOUNDATIONS 99, 105 (Larry Alexander ed., 1998); *accord* Michael W. McConnell, *Active Liberty: A Progressive Alternative to Textualism and Originalism?*, 119 HARV. L. REV. 2387, 2414 (2006) (reviewing STEPHEN BREYER, *ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION* (2005)) (observing that “most originalist judges recognize the need for a consistent, coherent doctrine of respect for settled precedent”). Elsewhere I have clarified my own view that despite our commitment “to the idea of a fixed and written Constitution, as well as to the idea of objective interpretation,” it remains imperative to recall that “fallible human beings will implement those ideals.” Thomas B. McAfee, Brown and the *Doctrine of Precedent: A Concurring Opinion*, 20 S. ILL. U. L.J. 99, 100 (1995) [hereinafter McAfee, Brown]. Though some have suggested that one cannot reconcile commitment to objective or original meaning with a similar commitment to well-established precedent, the reality is “Supreme Court Justices have seldom purported to be anything other than originalists, and they have always struggled with the question of precedent.” Thomas B. McAfee, *The Role of Legal Scholars in the Confirmation Hearings for Supreme Court Nominees—Some Reflections*, 7 ST. JOHN’S J. LEGAL COMMENT. 211, 237 (1991); *see id.* at 236–38 (describing the complexity of the issue between originalism and precedent and citing the work of Professor Henry P. Monaghan to illustrate that originalists *can be* strongly committed to precedent);

trine, and applying it with relatively modest ends in mind, we are a long way from endorsing “the simplistic slogan that the Constitution means what this Court says it means.”<sup>95</sup> Thus, it may be that the doctrine of precedent will justify reading the Due Process Clause as protecting life, liberty, and property against arbitrary deprivations and as establishing equal treatment as an enforceable constitutional norm. But neither historical evidence nor the doctrine of precedent support empowering courts to engage in the moral analysis required to “discover,” and then to impose, natural and inalienable rights and subjecting laws impacting on such rights to the strictest forms of judicial scrutiny.

The Supreme Court has often viewed itself as governed by the proper understanding of the traditions of our law rather than by moral abstractions.<sup>96</sup> As Judge Michael McConnell wrote, this “‘traditionalist’ approach holds that the open-ended, normative language of the Constitution should be interpreted in light of the long-standing legal practices and traditions of the nation.”<sup>97</sup> Writing for a plurality in *Moore v. City of East Cleveland*, Justice Powell clarified that “an approach grounded in history imposes limits on the judiciary that are more meaningful than any based on the abstract formula taken from *Palko v. Connecticut*, and apparently suggested as an alternative.”<sup>98</sup> As the Court itself expressed in *Washington v. Glucksberg*:

The right assumed in *Cruzan*, however, was not simply deduced from abstract concepts of personal autonomy. Given the common-law rule that forced medication was a battery, and the long legal tradition protecting the decision to refuse unwanted medical treatment, our

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see also Larry Alexander, *Introduction to CONSTITUTIONALISM: PHILOSOPHICAL FOUNDATIONS* 1, 5 (Larry Alexander ed., 1998) (observing that thoughtful originalists recognize “a role to Supreme Court precedents that conflict with original intent”).

95. McAfee, Brown, *supra* note 94, at 100. For a compelling argument that giving effect to well-established precedent can adequately establish the “legal” legitimacy of the Court’s action, see Richard H. Fallon, Jr., *Legitimacy and the Constitution*, 118 HARV. L. REV. 1787, 1821–24 (2005). Many agree “that precedent contributes to the predictability and continuity of constitutional law,” and that the Court’s decision-making about overruling precedent has frequently required “erroneous reasoning and some other serious flaw justifying overruling, including unworkability and inconsistencies with case law.” Michael J. Gerhardt, *The Role of Precedent in Constitutional Decisionmaking and Theory*, 60 GEO. WASH. L. REV. 68, 77, 145 (1991).

96. See, e.g., *Washington v. Glucksberg*, 521 U.S. 702, 725 (1997); *Moore v. City of E. Cleveland*, 431 U.S. 494, 504 n.12 (1977).

97. McConnell, *supra* note 88, at 174.

98. *Moore*, 431 U.S. at 504 n.12 (citation omitted); accord MILTON R. KONVITZ, *FUNDAMENTAL RIGHTS: HISTORY OF A CONSTITUTIONAL DOCTRINE* 116 (2001).

assumption was entirely consistent with this Nation's history and constitutional traditions. The decision to commit suicide with the assistance of another may be just as personal and profound as the decision to refuse unwanted medical treatment, but it has never enjoyed similar legal protection.<sup>99</sup>

Judge McConnell suggested that the approach articulated in *Glucksberg* would likely yield a more cautious, incremental analysis of fundamental rights.<sup>100</sup> "The traditionalist approach," observed McConnell, "is inductive and experiential" and "reasons up from concrete cases."<sup>101</sup> The Court itself seeks to avoid over-generalization: "That many of the rights and liberties protected by the Due Process Clause sound in personal autonomy does not warrant the sweeping conclusion that any and all important, intimate, and personal decisions are so protected . . . ."<sup>102</sup> Concluding that fundamental rights must be either textually based or "objectively, 'deeply rooted in this Nation's history and tradition,'"<sup>103</sup> the Court clarified that its task is to determine whether government has acted arbitrarily by invading an interest that society has come to view as fundamental, not what the Justices are persuaded *should be* fundamental.<sup>104</sup>

## B. *The Lochner Era: What Went Wrong?*

### 1. Literalism and "Unenumerated" Rights

A strong consensus remains that the *Lochner*-era Court was profoundly wrong, but we have lost, if we ever had, a consensus about precisely how the Court went wrong. Some have suggested that the crux of the problem was that the right recognized in

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99. *Glucksberg*, 521 U.S. at 725. The Eleventh Circuit Court of Appeals reads this aspect of *Glucksberg* as stating good law, notwithstanding the intervening decision of the Supreme Court in *Lawrence v. Texas*, 539 U.S. 558 (2003). See *Williams v. Attorney Gen.*, 378 F.3d 1232, 1234–37 (11th Cir. 2004).

100. McConnell, *supra* note 80, at 672.

101. *Id.* This approach differs from the "moral philosophic approach," which tends to be "deductive and theoretical, deriving specific prescriptions from more general theoretical propositions." *Id.* By contrast, the more tradition-oriented approach is the "heir to legal realism: cautious, empirical, flexible, skeptical of claims of overarching theory." *Id.*

102. *Glucksberg*, 521 U.S. at 727 (citation omitted); accord *Williams*, 378 F.3d at 1235; *Lofton v. Sec'y of Dep't of Children and Family Servs.*, 358 F.3d 804, 815–17 (11th Cir. 2004).

103. *Glucksberg*, 521 U.S. at 720–21 (quoting *Moore v. City of E. Cleveland*, 431 U.S. 494, 503 (1977) (plurality opinion)).

104. McConnell, *supra* note 80, at 670–71.

*Lochner*—“liberty of contract”—was not enumerated in the Constitution itself.<sup>105</sup> This argument from text—or the “lack of” relevant text—is often associated with the views of Justice Black and is easily characterized as reflecting a “kind of literalism.”<sup>106</sup> At first blush, this criticism seems especially powerful inasmuch as Justice Black was well-known for a certain kind of literalism—some of his fame came from his First Amendment insistence that “no law” means “no law.”<sup>107</sup>

Despite Justice Black’s invocation of the First Amendment’s language along these lines (“no law means NO LAW”), he conceded that “speech pursued as an integral part of criminal conduct was beyond first amendment protection.”<sup>108</sup> Justice Black’s literalistic tendencies have not stood as a barrier to his acceptance of the reasonable implications of the rights expressly secured by constitutional text. The First Amendment, for example, expressly forbids government from abridging not only the “freedom of speech, or of the press,” but equally “the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.”<sup>109</sup>

In 1958, in *NAACP v. Alabama ex rel. Patterson*, the Supreme Court held that the right to express one’s views, when combined with First Amendment rights to meet with others (“to assemble”) and to petition the government for change (“redress of grievances”), meant there was a right to associate with others for political purposes.<sup>110</sup> Justice Black did not dissent from the Court’s decision in *Patterson*, even though the Court recognized the “free-

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105. For discussion of this objection, see Strauss, *supra* note 8, at 378–81.

106. *Id.* at 381.

107. SHIFFRIN & CHOPER, *supra* note 53, at 2 (citing *Konigsberg v. State Bar*, 366 U.S. 36, 61 (1961) (Black, J., dissenting)).

108. *Id.* (citing *Konigsberg*, 366 U.S. at 61). My First Amendment students each year enjoy the discovery, after reading Black’s strenuous objections to any and all applications of the Clear and Present Danger test and his rather literal basis for rejecting the whole concept of unprotected “obscene” expression, *Konigsberg*, 366 U.S. at 63, that the same Justice Black joined a dissenting opinion in *Cohen v. California*, 403 U.S. 15, 27 (1971) (Blackmun, J., dissenting). The *Cohen* dissent, of course, dismissed Cohen’s inflammatory jacket-based expression as an “absurd and immature antic” that was “mainly conduct and little speech.” *Id.* at 27.

109. U.S. CONST. amend. I.

110. 357 U.S. 449, 460–61 (1958). The Court reasoned, moreover, that state law mandating disclosure of complete membership lists, including names, addresses, and so forth, infringed on the “rights of [the NAACP’s] rank-and-file members to engage in lawful association in support of their common beliefs.” *Id.* at 460.



dom of association” as “an independent right, possessing an equal status with the other rights specifically enumerated in the first amendment.”<sup>111</sup> There is no room for doubt that some rights, like the right of political association, exist as implications of what it means to recognize “other rights,” such as the right to assemble, to petition for redress of grievances, and the right of free speech. It would in fact mean very little, as a practical matter, to have a “right” to petition and assemble if the state possessed an unqualified and legally enforceable state interest in obtaining, without limitation, information about the membership of political organizations.<sup>112</sup>

In contrast to Ninth Amendment rights, however, there is no inference contended that “unenumerated” fundamental rights flow from the nature and substance of the rights secured by the text. Rather, the inference on behalf of “unenumerated” fundamental rights flows from the very concept of constitutional rights. The assumption is that every right that people reasonably “should have,” that limits government power in some way, in fact *does* exist as a limit on government power as a consequence of the “rights” assumptions underlying the social contract political theory that undergirded the Constitution.<sup>113</sup> The only problem is that the social contract political theory actually held by those who drafted and ratified America’s state constitutions assumed that limits on government power in favor of fundamental rights would have to be included in the written Constitution to serve as constitutional limits on government power.<sup>114</sup> This is at least one reason why American courts have not found particular constitutional provisions, or perhaps constitutional amendments, to be “uncon-

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111. Thomas I. Emerson, *Freedom of Association and Freedom of Expression*, 74 YALE L.J. 1, 2 (1964).

112. For a treatment of the differences between deriving fundamental rights as a “necessary condition” for the meaningful protection of an express right, in contrast to deriving a fundamental right as supplying the “best justification” for a right found in the text, see Walter Sinnott-Armstrong, *Two Ways to Derive Implied Constitutional Rights*, in LEGAL INTERPRETATION IN DEMOCRATIC STATES 231 (Jeffrey Goldsworthy & Tom Campbell eds., 2002) (explaining that the modern Court has sometimes appeared to justify securing unnamed rights as an implication of “republican” or constitutional government itself).

113. For evidence of the assumptions held by those who drafted the Constitution, see McAfee, *Prolegomena*, *supra* note 27, at 168–69.

114. *See id.* at 167–69. The overwhelming evidence of the view of the framers, Federalist and Anti-Federalist, about the powers of legislatures under the state constitutions confirm as well that these were their assumptions. *See Courts Over Constitutions Revisited*, *supra* note 10, at 336–40.

stitutional” violations of “rights.”<sup>115</sup> Undue literalism is one thing; the determination that courts hold a general power to “invent” or “create” constitutional rights, according to their own sense of good public policy or adequate “rights” analysis, is another. To hold otherwise is to insist upon the ultimate sovereignty of America’s courts.<sup>116</sup>

## 2. The Search for “Inalienable” Rights

It may well be, however, that Justice Black’s larger opposition, the one with greater validity, was not the idea that constitutional values are sometimes derived from an implication as much as by reliance on explicit text. Rather, his opposition may stem from his concern that when the Court elaborates “the same natural law due process philosophy found in *Lochner*,”<sup>117</sup> it grants itself a virtually open-ended mandate to secure as personal rights whatever particular members of the Court want to deem fundamental.<sup>118</sup>

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115. See *Courts Over Constitutions Revisited*, *supra* note 10, at 357.

116. See Philip Soper, *Some Natural Confusions About Natural Law*, 90 MICH. L. REV. 2393, 2415 (1992) (When judges determine the meaning and application of natural law, “the system remains positivist in the most significant sense, with the judge simply serving as the sovereign in place of the legislature.”).

117. *Griswold v. Connecticut*, 381 U.S. 479, 515 (1965) (Black, J., dissenting). There is not much question that some members of the Supreme Court—perhaps most starkly, Justice Field—wanted to read the Fourteenth Amendment as legally protecting the inalienable natural rights referred to in the Declaration of Independence. See *Munn v. Illinois*, 94 U.S. 113, 141–42 (1876) (Field, J., dissenting); ARNOLD M. PAUL, *CONSERVATIVE CRISIS AND THE RULE OF LAW: ATTITUDES OF BAR AND BENCH, 1887–1895*, at 72 (Peter Smith ed., 1976) (1960) (citing Justice Brewer, *Protection to Private Property from Public Attack, Address Before the Yale Law School* (June 23, 1891), in 10 RAILWAY & CORP. L.J. 281, 283 (1891)); Bernstein, *supra* note 10, at 35–38; J. Roland Pennock, *Introduction to NOMOS XVIII, DUE PROCESS xv, xvii, xxii* (J. Roland Pennock & John W. Chapman eds., 1977) (referring to substantive due process as “constitutionalized natural law,” as it is found in “a blend of history, ideas of natural right, and the closely related philosophical concept of respect for persons”).

118. Justice Black’s basic instinct was that *Lochner*-era decision-making had all too often rested on the assumption—articulated in an ABA speech in 1892 by its President, Judge Dillon—that only judges, or some equally elite group, could discern the “eternal and indestructible sense of justice and right, written by God on the living tablets of the human heart, and revealed in his Holy Word.” PAUL, *supra* note 117, at 79 (quoting JOHN F. DILLON, *THE LAWS AND JURISPRUDENCE OF ENGLAND AND AMERICA* 17 (1894)). Judge Dillon concluded that our written constitutions had “incorporated the moral law into the organic limitations of government,” including securing the “eternal” rights that were now “menaced both openly and covertly.” *Id.* Hence, as we approached the turn of the twentieth century, direct reliance on the Declaration of Independence’s “unalienable rights” became increasingly common in the federal courts. *Id.* at 89; accord Bernstein, *supra* note 10, at 35–38, 43 (asserting that “liberty of contract” is “among the inalienable rights of the citizen” (quoting *Frisbie v. United States*, 157 U.S. 160, 165 (1895))). A direct result was that, whereas the standard question concerning challenged acts of legislation historically had

Notwithstanding the tendency of some modern revisionists to attribute the *Lochner* era with linking the due process limitation to nineteenth-century prohibitions on “class legislation,” my own review of the literature supports the position that the Supreme Court found some laws invaded “fundamental rights protected by the Due Process Clause.”<sup>119</sup>

As Professor David Bernstein has observed, many American lawyers and judges thought of the Constitution “not as being solely the powers and prohibitions contained within the four corners of a document,” but as including unwritten principles that “complemented and supplemented the written document.”<sup>120</sup> It was not uncommon for courts in this period to rely on “limitations on [legislative] power which grow out of the essential nature of all free governments,” and thus to refer to “[i]mplied reservations of individual rights, without which the social compact could not exist.”<sup>121</sup> From the Supreme Court’s decision in the *Slaughter-House Cases* until the *Lochner* era was fully established, members of the Court occasionally “assert[ed] that natural rights constituted an inherent limit on government authority.”<sup>122</sup> Notwithstanding their near-universal belief that their purpose was to secure rights “antecedent to government,” American judges also agreed that American history “limited the scope of the judicial enforceability of natural rights to those rights considered fundamental to the Anglo-American heritage of liberty.”<sup>123</sup>

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concerned the constitutional provision that it violated, increasingly the question became whether the challenged statute had been authorized. PAUL, *supra* note 117, at 92 (citing Richard C. McMurtrie, *A New Canon of Constitutional Interpretation*, 41 AM. L. REG. 1, 8–9 (1893)); *cf. Courts Over Constitutions Revisited*, *supra* note 10, at 385–86 (describing the negative reaction of Oliver Wendell Holmes, Jr. to this same reversal of the question to be asked).

119. Bernstein, *supra* note 10, at 13. Professor Bernstein shows that anti-class legislation, which invoked the theme of avoiding “discriminating” laws that disparaged some citizens, was an important Fourteenth Amendment idea, but was related to equal protection and did not carry great bite in the period leading to *Lochner*. *Id.* at 14–21. Indeed, a “narrow understanding of class legislation carried the day” in *Holden v. Hardy*, 169 U.S. 366 (1898), just a few years before *Lochner*, and again in *Knoxville Iron Co. v. Harbison*, 183 U.S. 13 (1901). *Id.* at 22–23. Moreover, the *Lochner* opinion itself could easily have been framed far more clearly in “class legislation” terms. *Id.* at 24–26.

120. *Id.* at 31; *see also id.* at 32–38.

121. *Loan Ass’n v. Topeka*, 87 U.S. (20 Wall.) 655, 663 (1874). The case is discussed in *Courts Over Constitutions Revisited*, *supra* note 10, at 353.

122. Bernstein, *supra* note 10, at 36.

123. *Id.* at 35, 37; *see id.* at 38. Professor Bernstein emphasizes, “[t]here was no set formula for judges to determine what the essential rights of the American people were.” *Id.* Even so, the opinions generally combined “a fundamental rights analysis with a historicist

Perhaps most of the failures of the *Lochner* era grew out of a tendency to be so immersed in the “logic” of the cases and rules that there was a failure to pay close attention to the facts of the case. As Professor William Wiecek observes:

Classical method emphasized deduction and logic, rejecting empirical scientific or social science research. Such an approach led judges to ignore inconvenient facts in a burlesque of the modern aphorism, “My mind’s made up; don’t confuse me with the facts.” The best-known example is Justice Rufus Peckham’s pontifical utterance dismissing proffered medical evidence in the *Lochner* case: “We do not believe in the soundness of the views which uphold this law.” In place of disciplined factual enquiry, judges would substitute their own uninformed musings about social reality, as Peckham did about the occupation of a baker.<sup>124</sup>

One result was a heavy dependence on logic and a relative indifference to “social reality.”<sup>125</sup> Thinkers of the era believed that “[t]he law’s ‘decisions come like the answer to an algebraic problem, without partiality.’”<sup>126</sup>

Consequently, what may have infected the *Lochner* era of judicial decision-making has little to do with literalism and much to do with the confidence of the Court in asserting, and then concluding, what was fundamental in America and what was universally fundamental. Relatedly, Reinhold Niebuhr, the thoughtful and profound theologian, social, and political thinker, noted that those most deeply committed to the decision-making of the *Lochner* era “believed in a pre-established harmony in society, akin to the harmony of non-historical nature which would guarantee justice if only governmental controls were reduced to minimal terms.”<sup>127</sup>

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perspective.” *Id.* at 39. “Populist agitation of the period, which fueled fears of imminent Socialism,” helped generate demands for “constitutional protections for private enterprise.” *Id.* at 41.

124. WIECEK, *supra* note 14, at 81 (footnote omitted).

125. *Id.*

126. *Id.* (quoting CYRUS NORTHROP, *THE LEGAL PROFESSION AS A CONSERVATIVE FORCE IN OUR REPUBLIC: AN ADDRESS DELIVERED BEFORE THE GRADUATING CLASSES AT THE SIXTY-EIGHTH ANNIVERSARY OF YALE LAW SCHOOL ON JUNE 28, 1892* at 8 (New Haven, Hoggson & Robinson 1892); see also Roscoe Pound, *Liberty of Contract*, 18 *YALE L.J.* 454, 458 (1909) (stating that the constitutionality of legislation is “tried by artificial criteria of general application and prevents effective judicial investigation or consideration of the situations of fact behind or bearing upon the statutes”).

127. REINHOLD NIEBUHR ON POLITICS: HIS POLITICAL PHILOSOPHY AND ITS APPLICATION TO OUR AGE AS EXPRESSED IN HIS WRITINGS 10 (Harry R. Davis & Robert C.

Niebuhr was thus convinced that the era of economic substantive due process suggested that the Supreme Court had mistaken the enlightenment-era rationalism, which "enlarges the intensity and extent of social cohesion in modern man's common life," for the means by which humanity would achieve justice and social peace.<sup>128</sup> The true believers and strongest advocates of economic substantive due process shared a "liberal faith"—one believing "that society is moving toward a universal community and a frictionless harmony of all social life by forces inherent in history itself."<sup>129</sup> The consequence was a failure to perceive the moral ambiguity inherent in modern political life.<sup>130</sup> Niebuhr, in fact, contended that "*political morality* must be morally ambiguous because it cannot merely reject, but must also deflect, beguile, harness and use self-interest for the sake of a tolerable harmony of the whole."<sup>131</sup> Political morality is not only ambiguous by necessity, it is also historically conditioned.<sup>132</sup> As Niebuhr argued, "every precise definition of the requirements and the perils of government is historically conditioned by the comparative dangers of either a too strict order or of potential chaos in given periods of history."<sup>133</sup>

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Good eds., 1960) [hereinafter NIEBUHR ON POLITICS]; cf. Sunstein, *Lochner's Legacy*, *supra* note 15, at 884 (comparing *Lochner*-era decisions with the one in *Buckley v. Valeo*, 424 U.S. 1 (1976)). In *Buckley*, the Court concluded that "the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment." *Buckley*, 424 U.S. at 48–49. Sunstein contends that in both cases "the existing distribution of wealth is seen as natural, and failure to act is treated as no decision at all," that "[n]eutrality is inaction, reflected in a refusal to intervene in markets or to alter the existing distribution of wealth," and that "the existing distribution of wealth must be taken as simply 'there,'" so that "efforts to change that distribution are impermissible." Sunstein, *Lochner's Legacy*, *supra* note 15, at 884.

128. NIEBUHR ON POLITICS, *supra* note 127, at 5; *id.* at 9. Liberal culture, according to Niebuhr, was infected with "too great an optimism about the goodness of human nature" and a corresponding tendency to "underestimate the difficulties of relating life to life, will to will, interest to interest, in a harmonious social life." *Id.*

129. *Id.* at 11.

130. *See id.* at 15, 19.

131. REINHOLD NIEBUHR, *THE CHILDREN OF LIGHT AND THE CHILDREN OF DARKNESS: A VINDICATION OF DEMOCRACY AND A CRITIQUE OF ITS TRADITIONAL DEFENCE* 73 (1944) (emphasis added); cf. Pound, *supra* note 126, at 460 (noting that "the growing period of American law coincided with the high tide of individualistic ethics and economics" and "the individualist conception of justice reached its complete logical development after the doctrine itself had lost its vitality").

132. NIEBUHR, *supra* note 131.

133. *Id.*

One thing seems certain—among *Lochner*'s critics, whether economists, secular law professors, or theologians, the near-universal criticism of the Court of that era was a certain "lack of humility: an inability, or refusal, to understand that although they were vindicating an important value, matters were more complicated than they thought."<sup>134</sup> Advocates of the world view embodied in *Lochner*-era decision-making engaged in a "reductionist enterprise that sought to identify some minimal number of fundamental principles, universally and at all times valid, to which all law must conform."<sup>135</sup> As the Court itself has acknowledged recently, *Lochner* demonstrates that "there is reason for concern lest the only limits to such judicial intervention become the predilections of those who happen at the time to be Members of this Court."<sup>136</sup> The result is judicial supremacy.<sup>137</sup>

### C. *Due Process and Equal Protection*

There is a tendency to assume that the constitutional limitations set forth in the text are part of a logically interconnected whole. A similar assumption appears to provide the only explanation for the conclusion that the Equal Protection Clause did not protect homosexuals discriminated against because of their sexual preference.<sup>138</sup> Courts and commentators derived this conclusion from the Supreme Court's refusal in *Bowers v. Hardwick* to

134. Strauss, *supra* note 8, at 386.

135. WIECEK, *supra* note 14, at 261. Writing as a contemporary early in the *Lochner* era, Dean Pound concluded that "liberty of contract" reflected "[t]he absolute certainty which is one of our legal ideals, an ideal responsible for much that is irritatingly mechanical in our legal system," and which "is demanded chiefly to protect property." Pound, *supra* note 126, at 461.

136. *Moore v. City of E. Cleveland*, 431 U.S. 494, 502 (1977). The concern is that Supreme Court Justices "are neither trained as political philosophers nor selected on that basis." Conkle, *supra* note 92, at 114. Professor Conkle concludes, "For the Supreme Court to make decisions simply on the basis of political-moral reasoning—acting, in effect, as a 'bevy of Platonic Guardians'—reflects an extravagant conception of the judicial role, one that takes the Court well beyond the customary limits of judging." *Id.* (quoting LEARNED HAND, *THE BILL OF RIGHTS* 73 (1958)); see *supra* note 90 and accompanying text.

137. See WIECEK, *supra* note 14, at 261 (quoting *Lochner v. New York*, 198 U.S. 45, 61 (1905)).

138. *E.g.*, *Watkins v. U.S. Army*, 847 F.2d 1329, 1358 (9th Cir. 1988) (Reinhardt, J., dissenting). After granting a rehearing, the court, sitting en banc, withdrew its opinion and reinstated an earlier opinion of the district court, estopping the Army from "refusing to reenlist Watkins on the basis of his homosexuality." *Watkins v. U.S. Army*, 875 F.2d 699, 701, 711 (9th Cir. 1989). The court, however, did not reach the constitutional issues raised in its 1988 decision. *Id.* at 705; see also Sunstein, *supra* note 82, at 1162.

extend the constitutional right of privacy to encompass the right to engage in sodomy.<sup>139</sup>

As Professor Cass Sunstein observes, however, the Court's holding in *Hardwick* reflected that "[f]rom its inception the Due Process Clause has been interpreted largely (though not exclusively) to protect traditional practices against short-run departures."<sup>140</sup> By contrast, the constitutional requirement of equality before the law has long "been understood as an attempt to protect disadvantaged groups from discriminatory practices, however deeply engrained and longstanding."<sup>141</sup> So while the Due Process Clause is by its nature "backward" looking, with the primary question being whether "an existing or time-honored convention . . . is violated by the practice under attack," . . . the Equal Protection Clause "looks forward, serving to invalidate practices that were widespread at the time of its ratification and that were expected to endure."<sup>142</sup> If Professor Sunstein accurately perceives that the "two clauses therefore operate along different tracks," it would also follow that "statutes that are unaffected by the Due Process Clause may be drawn into severe doubt by principles of equal protection."<sup>143</sup>

To illustrate, compare the Supreme Court's holding in *Hardwick*<sup>144</sup> with the Ninth Circuit's 1988 ruling in *Watkins v. U.S. Army* that a military discharge based exclusively on sexual preference violated the Equal Protection Clause.<sup>145</sup> Perry Watkins enlisted in 1967 and, despite acknowledging "homosexual tendencies" in a pre-induction medical form, was found qualified and

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139. 478 U.S. 186, 191 (1986), *overruled by* *Lawrence v. Texas*, 539 U.S. 558 (2003).

140. Sunstein, *supra* note 82, at 1163. Sunstein relates this approach to substantive due process to a view of judicial review as supplying a safeguard "against novel developments brought about by temporary majorities who are insufficiently sensitive to the claims of history." *Id.* As Professor Marc Fajer noted, prior to establishing "broad unenumerated limits on the powers of government, the Supreme Court often has been careful to demonstrate that the particular claim is supported by a strong historical tradition." Marc A. Fajer, *With All Deliberate Speed? A Reply to Professor Sunstein*, 70 IND. L.J. 39, 40 (1994).

141. Sunstein, *supra* note 82, at 1163.

142. *Id.*

143. *Id.* at 1163-64.

144. 478 U.S. 186, 196 (1986), *overruled by* *Lawrence v. Texas*, 539 U.S. 558 (2003).

145. 847 F.2d 1329, 1352 (9th Cir. 1988), *withdrawn en banc*, *Watkins v. U.S. Army*, 875 F.2d 699, 705, 711 (9th Cir. 1989) (estopping the Army from denying reenlistment to a soldier based on his homosexuality, but not addressing the constitutional issues raised in its 1988 decision). The *Watkins* case is also used illustratively in Sunstein's article. Sunstein, *supra* note 82, at 1164-69.

admitted into the Army.<sup>146</sup> The Army board voted to discharge Watkins in 1981 because of his revelation of his sexual orientation, but he was given the highest possible rating for his “performance and professionalism.”<sup>147</sup>

When the Ninth Circuit held that the discharge violated the Equal Protection Clause, Judge Reinhardt based his dissent on the belief that *Hardwick* controlled, despite finding it clear that *Hardwick* was wrongly decided.<sup>148</sup> He contended that “[w]hen conduct that plays a central role in defining a group may be prohibited by the state, it cannot be asserted with any legitimacy that the group is specially protected by the Constitution.”<sup>149</sup> The assumption was that it would be “illogical to hold that those who engage in acts that can be criminalized might by virtue of that fact qualify as a suspect class.”<sup>150</sup> Yet numerous equal protection cases—the entire category, for example, of the “fundamental rights”-equal protection case law—were “self-consciously designed to prohibit states from drawing impermissible lines with respect to rights that the Due Process Clause does not substantively protect.”<sup>151</sup> It may be especially difficult in the post-legal realism era to take seriously the idea that the Supreme Court could not uphold the prohibition of the very conduct that helped define a presumptively unlawful classification.

There is no question, however, that *Hardwick* did not consider, and was not asked to consider, whether the challenged law violated the Equal Protection Clause. The Court never received the opportunity to review the history of discrimination against gays and lesbians or the likelihood that the challenged law reflected past and present prejudice based on sexual preference.<sup>152</sup> Contrast the Supreme Court’s oblivion to the history of discrimina-

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146. *Watkins*, 847 F.2d at 1330.

147. *Id.* at 1332–33.

148. *Id.* at 1358 (Reinhardt, J., dissenting). The judge went on, nonetheless, to contend that the Court “egregiously misinterpreted” the Constitution in *Hardwick*, directly comparing it to the Court’s decision in *Plessy v. Ferguson*, 163 U.S. 537 (1896), *overruled by* *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954). *Watkins*, 847 F.2d at 1358 (Reinhardt, J., dissenting).

149. *Watkins*, 847 F.2d at 1357 (Reinhardt, J., dissenting). The court took the same basic approach in *Padula v. Webster*, 822 F.2d 97, 102 (D.C. Cir. 1987).

150. Sunstein, *supra* note 82.

151. *Id.*

152. See ELY, *supra* note 7, at 162–64 (discussing prejudice towards and stereotypes of homosexuals).



tion and hostility toward gays and lesbians with *Watkins's* emphasis on that very history and its likely relationship to military policy.<sup>153</sup> Equally important is:

The rationale accepted in *Hardwick* as sufficient for due process purposes—relating principally to traditionally held moral norms—has little or no weight in the context of an equal protection challenge; consider the Court's rejection of such norms in the areas of race and sex discrimination. The *Watkins* court also pointed to the peculiar difficulty of using political avenues to seek redress and the usual irrelevance of sexual orientation to legitimate governmental goals. In these respects, the pattern of discrimination on the basis of sexual orientation is strikingly analogous to the pattern of discrimination against blacks.<sup>154</sup>

#### D. *Due Process and Anti-Sodomy Laws: The Case of Lawrence v. Texas*

The issue concerning how the Court should find fundamental rights under the Due Process Clause was raised again in 2003 in *Lawrence v. Texas*.<sup>155</sup> In *Lawrence*, the Supreme Court overruled *Hardwick* and invalidated a Texas anti-sodomy law that prohibited particular sexual conduct between persons of the same sex.<sup>156</sup> Some have read *Lawrence* as establishing either a broad fundamental right of intimate sexual conduct<sup>157</sup> or at least recognizing a John Stuart Mill-like constitutional presumption in favor of liberty.<sup>158</sup> Though *Lawrence* is a useful and healthy reminder that the Due Process Clause “reflect[s] a ‘tradition’ that must be conceived as ‘a living thing,’”<sup>159</sup> it should not be read either as estab-

153. See *Watkins*, 847 F.2d at 1345–49; see also Sunstein, *supra* note 82, at 1176.

154. Sunstein, *supra* note 82, at 1176–77 (footnotes omitted); accord Fajer, *supra* note 140, at 39 (“At a doctrinal level, courts need not handle equal protection analysis with the kind of caution appropriate for nontextual rights such as the right to privacy.”).

155. 539 U.S. 558 (2003).

156. *Id.* at 562, 578.

157. *E.g.*, James E. Fleming, *Lawrence's Republic*, 39 TULSA L. REV. 563, 571, 575 (2004).

158. *E.g.*, Randy E. Barnett, *Justice Kennedy's Libertarian Revolution: Lawrence v. Texas*, 2002–2003 CATO SUP. CT. REV. 21, 40–41; see also Fleming, *supra* note 157, at 574. For a less enthusiastic reaction than Professor Barnett's, see Keith Burgess-Jackson, *Our Millian Constitution: The Supreme Court's Repudiation of Immorality as a Ground of Criminal Punishment*, 18 NOTRE DAME J.L. ETHICS & PUB. POL'Y 407, 414 (2004).

159. Post, *supra* note 7, at 54 (quoting *Poe v. Ullman*, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting)). See *Poe*, 367 U.S. at 542 (Harlan, J., dissenting) (contending that “[a] decision of this Court which radically departs from [that tradition] could not long survive, while a decision which builds on what has survived is likely to be sound”). *Lawrence* thus

lishing a new, expansive fundamental right of intimate sexual conduct or as recognizing a presumption of liberty that would preclude society from using its police power to promote society's moral values.

As a Due Process Clause holding, the Court's decision in *Lawrence* "is best seen as a successor to *Griswold v. Connecticut*,"<sup>160</sup> and as involving the "judicial invalidation of a law that had become hopelessly out of touch with existing social convictions."<sup>161</sup> Just as the Court in *Griswold* invalidated a law "that was ludicrously inconsistent with public convictions in Connecticut and throughout the nation,"<sup>162</sup> *Lawrence* is a part of "a civil rights revolution" which had already succeeded in "delegitimizing prejudice against and hatred for homosexuals."<sup>163</sup> The reason there is room for doubt whether *Lawrence* should even be called a "fundamental rights" decision, or instead, a "rational basis" review,<sup>164</sup> is precisely because the challenged prohibition of private sexual conduct confronted the problem of "[ ] desuetude, American style," in that "enforcement of the relevant law can no longer claim to have significant moral support in the enforcing state or the nation as a whole."<sup>165</sup> "Given that . . . criminal laws in this

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illustrates that implementing substantive due process is not a "mechanical exercise of isolating 'fundamental rights' as though they were a historically given set of data points on a two-dimensional grid." Laurence H. Tribe, *Lawrence v. Texas: The "Fundamental Right" That Dare Not Speak Its Name*, 117 HARV. L. REV. 1893, 1898 (2004).

160. Cass R. Sunstein, *What Did Lawrence Hold? Of Autonomy, Desuetude, Sexuality, and Marriage*, 2003 SUP. CT. REV. 27, 27 (citing *Griswold v. Connecticut*, 381 U.S. 479 (1965)).

161. *Id.* Indeed, at least one prominent constitutional theorist has suggested that *Lawrence* is best read as articulating a new, third alternative theory—in addition to "historical tradition" and "reasoned judgment"—of "Evolving National Values" as the appropriate theory of substantive due process. Conkle, *supra* note 92, at 82, 123–45; see *id.* at 133, 141, 144–45 (suggesting that an evolving values approach, with its requirement of a "contemporary national consensus," would enable courts "to operate in relative harmony with the principle of majoritarian self-government," even as "it constrains the Court's discretion in a manner that honors the criterion of judicial objectivity and competence").

162. Sunstein, *supra* note 160, at 28. As Professor Wellington observed, the statute challenged in *Griswold* was enacted in 1879, and the passage of time properly "eliminated any deference that the Court might have paid toward the legislature's interpretation of public morality." HARRY H. WELLINGTON, *INTERPRETING THE CONSTITUTION: THE SUPREME COURT AND THE PROCESS OF ADJUDICATION* 90 (1990).

163. Sunstein, *supra* note 160, at 29.

164. For useful analysis of why *Lawrence* is properly read as concerning a basic right, notwithstanding its sometimes confusing language, see *id.* at 29–30.

165. *Id.* at 30 (emphasis omitted). As Professor Conkle asserts:

When societal thinking changes to the point of creating a national consensus, no less than when a national consensus is longstanding, there is reason to believe that the liberty embraced by that consensus is worthy of recognition as

field have notoriously been honored in the breach and, almost from the start, have languished without enforcement," only an exercise of "grossly stereotyped roles," used to justify treating some individuals "less well than others," explains the prosecutions that produced the *Lawrence* case.<sup>166</sup>

As soon as we recognize that the Court's treatment of the sodomy prohibition was based on its conclusion that such laws are anachronistic,<sup>167</sup> several features that otherwise seem mysterious suddenly seem plain enough. For example, the risk of the abusive use of such laws—invariably a risk for criminal laws that, for a variety of reasons, may be too costly to be consistently enforced—is especially powerful when one realizes that "the very *fact* of criminalization, even unaccompanied by any appreciable number of prosecutions, can cast already misunderstood or despised individuals into grossly stereotyped roles."<sup>168</sup> Such laws, then, are not only anachronistic, but are harmfully so. The Supreme Court's conclusion that the Texas sodomy statute presented a harmfully anachronistic law sheds critical light on the Court's assertion that "the fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice."<sup>169</sup>

A governing majority almost certainly viewed interracial cohabitation,<sup>170</sup> let alone marriages prohibited by anti-miscegenation laws,<sup>171</sup> as immoral at the time legislative prohibitions were enacted. But, merely invoking a conventional ground for using state police powers does not liberate a state from its duty to refrain from enacting racially discriminatory laws or unacceptably creating "classes" of citizenship in violation of its duty to supply equal protection of the law. Though courts have long recognized the legitimacy of government acting to preserve and protect public morality,<sup>172</sup> when the Court viewed the law challenged in

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a matter of political morality—perhaps not universally, but at least in the contemporary United States.

Conkle, *supra* note 92, at 140.

166. Tribe, *supra* note 159, at 1896.

167. See *Lawrence v. Texas*, 539 U.S. 558, 571–73 (2003).

168. Tribe, *supra* note 159, at 1896 (footnote omitted).

169. *Lawrence*, 539 U.S. at 577 (quoting *Bowers v. Hardwick*, 478 U.S. 186, 216 (1986) (Stevens, J., dissenting), *overruled by Lawrence v. Texas*, 539 U.S. 558 (2003)).

170. See, e.g., *McLaughlin v. Florida*, 379 U.S. 184 (1964).

171. See *Loving v. Virginia*, 388 U.S. 1 (1967).

172. See *supra* notes 76–78 and accompanying text; see also *Mugler v. Kansas*, 123 U.S.

*Lawrence* as anachronistic, we understand how the Court's own prior holdings perceiving limits to basic liberty rights have been based on the Court's willingness to sustain society's commitment to its moral values.<sup>173</sup>

The Supreme Court has not previously, and should not now, adopt a Millian "harm principle"<sup>174</sup> as a constitutional limit on the police powers of the states. John Hart Ely was correct when he suggested that if there is anything we can be grateful for to the *Lochner*-era Court, it is that, as to the rational basis test, "they misapplied it."<sup>175</sup> It is generally recognized that a central characteristic of *Lochner*-era jurisprudence was the willingness of the Court to conclude that certain legislative "ends" could not constitutionally be pursued.<sup>176</sup> If the Supreme Court consistently were to, in any case involving an individual's claimed liberty interest, shift the burden of proof to the State to demonstrate an adequate state purpose to justify the restriction on liberty, we would find ourselves thrown back into the *Lochner* era. Perhaps our most respected single-volume treatise on constitutional law said this about *Lawrence*:

Perhaps the most important question left open by *Lawrence* is whether, in 2003, there was a majority of the Justices on the Supreme Court who would be willing to consider all forms of economic and social welfare legislation under a true reasonableness test. If the Court were to make independent judgments as to whether any and

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623, 660–61 (1887); Clor, *supra* note 17, at 155–56.

173. The classic example is the Court's recognition that obscenity is not expression protected by the free speech clause of the First Amendment. *See, e.g., Miller v. California*, 413 U.S. 15, 24 (1973) (States may continue to limit "works which, taken as a whole, appeal to the prurient interest in sex, which portray sexual conduct in a patently offensive way, and which, taken as a whole, do not have serious literary, artistic, political, or scientific value."); *Roth v. United States*, 354 U.S. 476, 485 (1957) (Obscene utterances "are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality." (quoting *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942))). *See generally* Clor, *supra* note 17 (noting that in order to achieve a "balanced republic," "elements of the public good" had to be in James Madison's words, "mingl[ed] . . . together").

174. *See generally* Fleming, *supra* note 157, at 574.

175. John Hart Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 *YALE L.J.* 920, 941 (1973).

176. It has been argued that "it is the insistence on a general power of courts to determine the appropriate 'ends' that government might legitimately and constitutionally pursue that most singularly characterizes an activist judiciary, whether in 1905 or 2005." *Courts Over Constitutions Revisited*, *supra* note 10, at 387. *See generally* Gerald Gunther, *The Supreme Court, 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 *HARV. L. REV.* 1, 21–22 (1972).

every law limiting individual autonomy was reasonably related to a legitimate interest, we would have a complete return to the form of judicial review that was used by the Court during the period from the mid-1890s until 1937.<sup>177</sup>

The other thing to be aware of is that “*Lawrence’s* words sound in due process, but much of its music involves equal protection.”<sup>178</sup> Indeed, there is much to be said in support of Professor Sunstein’s view:

Rather than invalidating the Texas statute on grounds of substantive due process, the Court should have invoked the Equal Protection Clause to strike down, as irrational, the state’s decision to ban homosexual sodomy but not heterosexual sodomy. In important respects, this approach would have been more cautious than the Court’s own. It would have had the large advantage of making it unnecessary to overrule any precedent. At the same time, an equal protection ruling would have recognized the fact, established by the Court’s opinions, that the Equal Protection Clause does not build on long-standing traditions, but instead rejects them insofar as they attempt to devalue or humiliate certain social groups. The problem in *Lawrence* is not adequately understood without reference to the social subordination of gays and lesbians, not least through the use of the criminal law.<sup>179</sup>

The real theme of the Fourteenth Amendment is equal citizenship, and equality before the law is its one undisputable purpose.<sup>180</sup> If there were a provision under which any thoughtful constitutional framer might legitimately have anticipated a clash between the requirements of the constitutional text and the as-

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177. JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW § 14.28, at 936 (7th ed. 2004).

178. Sunstein, *supra* note 160, at 30. As Professor Tribe observed, “this reductionist conflation of ostracized identity with outlawed act in turn reinforces the vicious cycle of distancing and stigma that preserves the equilibrium of oppression in one of the several distinct dynamics at play in the legal construction of social hierarchy.” Tribe, *supra* note 159, at 1896; see also SAGER, *supra* note 8, at 224 (“[T]here is an unmistakable echo of the anthem sounded in the elder Justice Harlan’s dissent in *Plessy v. Ferguson*: ‘There is no caste here.’”); Fleming, *supra* note 157, at 573 (comparing Kennedy’s opinion in *Romer v. Evans*, 517 U.S. 620 (1996), which treated the challenged provision “as reflecting unconstitutional animus against a politically unpopular group,” with *Lawrence’s* “same move, though it grounds its holding in the Due Process Clause rather than equal protection”); Post, *supra* note 7, at 97 (“Themes of respect and stigma are at the moral center of the *Lawrence* opinion, and they are entirely new to substantive due process doctrine.”).

179. Sunstein, *supra* note 160, at 32.

180. See generally McAfee, *Inalienable Rights*, *supra* note 31, at 785–92. For additional strong support for the view that equality before the law is at the center of the Fourteenth Amendment, see John Harrison, *Reconstructing the Privileges or Immunities Clause*, 101 YALE L.J. 1385 (1992).

sumptions entertained by many engaged in our constitutional culture, it would be the clause in section 1 requiring, but not really defining, substantively “equal laws.”<sup>181</sup> The most straightforward way to justify the Court’s decision in *Lawrence*, then, would be to see the challenged sodomy statute as creating a “status-based classification of persons undertaken for its own sake,” and therefore as presenting the sort of “animus” that “represent core offenses of the equal protection guarantee.”<sup>182</sup>

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181. See Harrison, *supra* note 180, at 1387 (citing U.S. CONST. amend. XIV, § 1). The Constitution does not contain a provision that open-endedly promises to secure “liberty” interests. It may well be that the “equal laws” requirement was intended to be secured by the Privileges or Immunities Clause, considering in particular that section 2 of the Fourteenth Amendment explicitly recognizes the right of states to deny or “abridge” the right of the freedmen to vote. U.S. CONST. amend. XIV, § 2. See generally Harrison, *supra* note 180. The evidence is overwhelming, in any event, that the Framers believed that they meaningfully could require “equal laws,” so the Court’s aggressive stand in *Lawrence*, even when using “heightened” rationality review, Sunstein, *supra* note 160, at 34, makes a great deal more sense than to vastly expand the liberty rights and interests of American citizens.

182. Sunstein, *supra* note 160, at 37 (quoting *Romer v. Evans*, 517 U.S. 620, 621 (1996)).

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