

UNDERSTANDING *DOBBS V. JACKSON WOMEN’S HEALTH ORGANIZATION*: HOW THE MODERN SUPREME COURT BROKE FROM TRADITION AND CHANGED THE ORIGINAL MEANING OF DUE PROCESS

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But the moderns had lost the sense of vast alternatives, magnificent or hateful, lurking in the background, and awaiting to overwhelm our safe little traditions. If civilization is to survive, the expansion of understanding is a prime necessity.

—Alfred North Whitehead¹

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INTRODUCTION

The Supreme Court’s overruling of *Roe v. Wade*² was reactionary. The methodology the Court deployed to decide *Dobbs v. Jackson Women’s Health Organization*

* Special thanks to my friends and colleagues: Adam R. Pearlman for his support, encouragement, and thoughtful comments and edits to the original work from which this Article comes; Rachel Kroll for her consummate eagle-eye editing of the final draft; Professors Thomas Huff of the University of Montana and James Desveaux of the University of California at Los Angeles for always listening.

¹ ALFRED NORTH WHITEHEAD, *MODES OF THOUGHT* 62–63 (1938).

² 410 U.S. 113 (1973), *overruled by* *Dobbs v. Jackson Women’s Health Org.*, 597 U.S. 215 (2022).

correlates to this impression.³ Whether a right is worthy of constitutional protection depends on whether it is “deeply rooted in [our] Nation’s history and tradition.”⁴ *Dobbs* reminded us that this method requires describing what people at some time in the past would have thought the Constitution protected.⁵ The Constitution protects what conservative jurists decide people in the past would have thought it did, were they confronted *then* with a question *now* before the Court. How could anyone in the twenty-first century accept such a method for deciding what personal liberties the Constitution protects in an ever-changing nation like America?

The question is not merely rhetorical here. It deserves an answer. This Article describes the genealogy of the legal standard applied in *Dobbs* as a reaction to a peculiar feature of twentieth-century American jurisprudence: the doctrine of substantive due process. In the mid-twentieth century, substantive due process would initially vindicate important liberal values against state attempts at regulation.⁶ Modern conservatism reacted with a methodology all its own for applying the doctrine to claims that individual liberty should prevail against democratic authority.⁷ But the modern-conservative method for applying the doctrine wholly accepted the presuppositions of the very jurisprudence against which it reacted. Like liberal substantive due process, modern conservatism assumed there was a category of rights qualifying for heightened protection, and the Court’s duty included deciding which liberties were in it.⁸

There is deep irony here. During the twentieth century, the liberal and conservative methods of applying the doctrine reflected profound ideological and political divisions. But the debate over substantive due process at the Supreme Court included a dramatic reinterpretation of precedent that modern liberals and conservatives shared. Liberalism and conservatism each offered a method for determining whether a right, although unenumerated, was in the Constitution via the category of fundamental rights.⁹ As Justice Samuel Alito put it in *Dobbs*, the Court determines

³ 597 U.S. 215.

⁴ *Id.* at 234; *see also* *Washington v. Glucksberg*, 521 U.S. 702, 720–21 (1997) (noting that the Court has “regularly observed that the Due Process Clause specially protects those fundamental rights and liberties which are, objectively, ‘deeply rooted in this Nation’s history and tradition’” (quoting *Moore v. City of E. Cleveland*, 431 U.S. 494, 503 (1977) (plurality opinion))).

⁵ *See, e.g., Dobbs*, 597 U.S. at 241–55; *see also Glucksberg*, 521 U.S. at 710 (“We begin, as we do in all due process cases, by examining our Nation’s history, legal traditions, and practices.”).

⁶ *See, e.g., Griswold v. Connecticut*, 381 U.S. 479 (1965); *Roe*, 410 U.S. 113.

⁷ *See, e.g., Dobbs*, 597 U.S. 215.

⁸ *See, e.g., id.* at 231 (holding “[t]he right to abortion does not fall within” the “category” of rights “‘deeply rooted in this Nation’s history and tradition’ and ‘implicit in the concept of ordered liberty’” (quoting *Glucksberg*, 521 U.S. at 721)).

⁹ *See Bowers v. Hardwick*, 478 U.S. 186, 195 (1986) (cautioning against “redefining the category of rights deemed to be fundamental”), *overruled by* *Lawrence v. Texas*, 539 U.S. 558 (2003).

whether a liberty interest makes the “select list of fundamental rights that are not mentioned anywhere in the Constitution.”¹⁰ While the liberals on the Court applied the doctrine to protect certain rights, the conservatives developed a method designed to thwart substantive-due-process claims.¹¹

Dobbs was the culmination of a decades-long effort to develop and apply the deeply rooted-in-history-and-tradition test. This modern-conservative method was a product of late-twentieth-century jurisprudence designed to combat the consequences of modern substantive due process.¹² When the *Dobbs* majority surveyed English and American history and tradition, it could not find a widespread affirmation that choosing to abort a fetus is a right qualifying for constitutional protection.¹³ That right is not *in* the Constitution because there’s no mention of it in the Constitution’s text, *and* there’s insufficient historical evidence that at some time, if confronted with the question, people would have thought it should qualify for special protection. The irony abounds: *unenumerated* rights are somehow on a list—a list of fundamental liberties the Constitution protects. Accepting the presuppositions of substantive-due-process doctrine, *Dobbs* concluded the right to abortion is not on the list.

The *Dobbs* methodology is not a new approach to answering questions of what rights constitutional due process protects.¹⁴ But neither is it old and venerable,

¹⁰ *Dobbs*, 597 U.S. at 237.

¹¹ See MATTHEW W. LUNDER, THE CONCEPT OF ORDERED LIBERTY AND THE COMMON-LAW DUE-PROCESS TRADITION 92–93 (2021).

Two methods for deciding which “rights” were worthy of inclusion developed during the twenty-five years after *Griswold*. Both imitated *Griswold*’s emphasizing the asserted liberty and its failing to identify and scrutinize the State’s countervailing interests in order.

One of the two approaches concluded that some liberties were fundamental rights and deserved special protection against the States.

....

The other approach to evaluating fundamental-rights claims appeared as a reaction to the consequences of this one, objecting to the nature of the rights the Court was recognizing as fundamental.

Id.

¹² See *Dobbs*, 597 U.S. at 237–40; LUNDER, *supra* note 11, at 89–124 (explicating the modern-conservative method’s development in *Part II: Fundamental Rights and Modern Conservatism*).

¹³ *Dobbs*, 597 U.S. at 231 (“Until the latter part of the 20th century, such a right was entirely unknown in American law. Indeed, when the Fourteenth Amendment was adopted, three quarters of the States made abortion a crime at all stages of pregnancy.”); *id.* at 234 (“[W]e examine whether the right at issue in this case is rooted in our Nation’s history and tradition and whether it is an essential component of what we have described as ‘ordered liberty.’”); *id.* at 292 (“[T]he Constitution does not confer a right to abortion.”).

¹⁴ See, e.g., *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 980 (1992) (Scalia, J., dissenting) (“The issue is whether [choosing to abort a fetus] is a liberty protected by the Constitution of the United States. I am sure it is not. I reach that conclusion . . . because of

despite its portrayal as such in the modern-conservative jurisprudence of the late twentieth century.¹⁵ And the very words selected from precedent to make this method—“deeply rooted,” “history,” and “tradition”—originally meant something far different than they would come to mean for modern-conservative and liberal jurists alike. It is worth understanding from whence comes the modern-conservative method the Court deployed in *Dobbs* and why the twenty-first-century conservatives use it. The test *Dobbs* applied for determining whether an unenumerated right is in the Constitution will prove as unworkable as the *Dobbs* Court deemed the jurisprudence that gave us *Roe* and *Casey*.¹⁶

What follows here describes and criticizes the modern liberal and conservative approaches to substantive due process. Part I shows how substantive due process came about in the mid-twentieth century as the union of two extant doctrines: incorporation and fundamental rights. Part II then describes how modern conservatism used the doctrine to arrive at the deeply rooted-in-history-and-tradition test and shows the deliberate reconfiguration of the jurisprudence during the latter twentieth century into the novel patchwork of the modern-conservative method applied in *Dobbs*. Part III offers a contrast, describing and explaining the traditional due-process analysis of medieval origin and the concept of ordered liberty it actualized. We are invited to juxtapose the deviant jurisprudence of the moderns against the tradition of reasoned judgment, and to imagine our recurring to the tradition from which America’s highest court has broken.

I. THE TWENTIETH-CENTURY UNION OF THE INCORPORATION AND FUNDAMENTAL RIGHTS DOCTRINES

The doctrine that in the twentieth century became known as “substantive due process” is best understood as the conjoining of two other doctrines: incorporation and fundamental rights. All three addressed a question “of grave and serious import . . . involv[ing] a consideration of what additional restrictions [the Fourteenth Amendment placed] upon the legislative policy of the States.”¹⁷ Ratified during the reconstruction of the Union following the Civil War, the Fourteenth Amendment created new federal causes of action for persons claiming that state governments were infringing important liberties in violation of due process or denying persons equal

two simple facts: (1) the Constitution says absolutely nothing about it, and (2) the long-standing traditions of American society have permitted it to be legally proscribed.”).

¹⁵ For example, in *Glucksberg*, Chief Justice Rehnquist (writing for a two-Justice plurality) described the modern-conservative method—then barely a decade old—as the Court’s “established method of substantive-due-process analysis” that the Court had “never abandoned.” *Washington v. Glucksberg*, 521 U.S. 702, 720, 721 n.17 (1997).

¹⁶ See *Dobbs*, 597 U.S. at 278–89 (concluding the jurisprudence of *Roe* and *Casey* “has proved to be unworkable”).

¹⁷ *Hurtado v. California*, 110 U.S. 516, 520 (1884).

treatment under the law.¹⁸ *How* to adjudicate such claims was a challenge for the federal courts. The language of the Amendment's Due Process Clause—"nor shall any State deprive any person of life, liberty, or property, without due process of law"¹⁹—was not "self-explanatory,"²⁰ and the Supreme Court needed to assure the people that "more than the imposition of the Justices' own choice of values on the States"²¹ supported decisions about whether certain individual interests deserved federal constitutional protection against state action.²²

In the mid-twentieth century, the incorporation doctrine offered what seemed a straightforward scoping of this exercise of the judicial power. According to the doctrine, the Constitution already provided a touchstone—the Bill of Rights—which set forth important liberties against the government.²³ As of the Founding these rights were held against the federal government alone, leaving someone with a grievance against their state's government to pursue, in most cases, a remedy in state court.²⁴ The doctrine's proponents argued that the Fourteenth Amendment incorporated the provisions of the original Bill of Rights and the federal courts could enforce them against the states.²⁵ The total incorporation school was ultimately unsuccessful—the doctrine's proponents never prevailed in arguing that the Fourteenth Amendment

¹⁸ See U.S. CONST. amend. XIV, § 1 ("No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.").

¹⁹ *Id.*

²⁰ See *Poe v. Ullman*, 367 U.S. 497, 540 (1961) (Harlan, J., dissenting) ("It is but a truism to say that this [due-process] provision of both [the Fifth and Fourteenth] Amendments is not self-explanatory.").

²¹ *Bowers v. Hardwick*, 478 U.S. 186, 191 (1986).

²² This debate persisted throughout the twentieth century. See, e.g., *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 849 (1992) ("The inescapable fact is that adjudication of substantive due process claims may call upon the Court in interpreting the Constitution to exercise that same capacity which by tradition courts always have exercised: reasoned judgment. Its boundaries are not susceptible of expression as a simple rule. That does not mean we are free to invalidate state policy choices with which we disagree; yet neither does it permit us to shrink from the duties of our office.").

²³ See U.S. CONST. amends. I–VIII.

²⁴ See, e.g., *Barron v. Baltimore*, 32 U.S. 243, 250–51 (1833) ("[T]he provision in the [F]ifth [A]mendment to the [C]onstitution[] declaring that private property shall not be taken for public use, without just compensation, is intended solely as a limitation on the exercise of power by the government of the United States, and is not applicable to the legislation of the states.").

²⁵ See, e.g., *Adamson v. California*, 332 U.S. 46, 71–72 (1947) (Black, J., dissenting) ("My study of the historical events that culminated in the Fourteenth Amendment, and the expressions of those who sponsored and favored, as well as those who opposed its submission and passage, persuades me that one of the chief objects that the provisions of the Amendment's first section, separately, and as a whole, were intended to accomplish was to make the Bill of Rights, applicable to the states.").

applied all and only the federal Bill of Rights to the states.²⁶ But using selective incorporation during the mid-twentieth century, the Supreme Court decided the states had to honor many rights and liberties enumerated in the Bill of Rights.²⁷

Incorporation reflected a dramatic realignment of post-Reconstruction judicial power. The holdings in the incorporation cases limited the state courts' interpreting of *how* a provision of the Bill of Rights should apply in their proceedings. When depriving persons of life, liberty, and property, the states had to honor basic civil rights by providing due process in their criminal courts *just like* the federal government did in its courts.²⁸ The state courts had to interpret what a provision specifically required as the Supreme Court interpreted what it required in the federal courts.²⁹ Criminal defendants in state proceedings had to be afforded the *forms* of process that would apply were they in federal criminal proceedings. This sudden demand for uniformity defied what the jurisprudence had said until the mid-twentieth century.³⁰

²⁶ See *Casey*, 505 U.S. at 847 ("It is tempting, as a means of curbing the discretion of federal judges, to suppose that liberty encompasses no more than those rights already guaranteed to the individual against federal interference by the express provisions of the first eight Amendments to the Constitution. But of course this Court has never accepted that view." (citation omitted)).

²⁷ See *Duncan v. Louisiana*, 391 U.S. 145, 171 (1968) (Black, J., concurring) ("I want to emphasize that I believe as strongly as ever that the Fourteenth Amendment was intended to make the Bill of Rights applicable to the States. I have been willing to support the selective incorporation doctrine, however, as an alternative, although perhaps less historically supportable than complete incorporation."); see, e.g., *Powell v. Alabama*, 287 U.S. 45 (1932) (incorporating right to counsel in capital cases); *In re Oliver*, 333 U.S. 257 (1948) (incorporating right to a public trial); *Mapp v. Ohio*, 367 U.S. 643 (1961) (incorporating right against unreasonable searches and seizures and applying federal court's exclusionary rule to the states); *Gideon v. Wainwright*, 372 U.S. 335 (1963) (incorporating right to counsel in felony cases); *Malloy v. Hogan*, 378 U.S. 1 (1964) (incorporating right against self-incrimination); *Pointer v. Texas*, 380 U.S. 400 (1965) (incorporating right to confront adverse witnesses); *Klopfer v. North Carolina*, 386 U.S. 213 (1967) (incorporating right to a speedy trial); *Washington v. Texas*, 388 U.S. 14 (1967) (incorporating right to use compulsory process to obtain witness testimony); *Duncan*, 391 U.S. 145 (incorporating right to jury trial).

²⁸ LUNDER, *supra* note 11, at xi.

²⁹ See, e.g., *Duncan*, 391 U.S. at 149 ("[T]he Fourteenth Amendment guarantees a right of jury trial in all criminal cases which—were they to be tried in a federal court—would come within the Sixth Amendment's guarantee.").

³⁰ See *Hurtado v. California*, 110 U.S. 516, 535 (1884) ("The [F]ourteenth [A]mendment' . . . 'does not profess to secure to all persons in the United States the benefit of the same laws and the same remedies. Great diversities in these respects may exist in two States separated only by an imaginary line. . . . Each State prescribes its own modes of judicial proceeding.'" (quoting *Missouri v. Lewis*, 101 U.S. 22, 31 (1879))); *Palko v. Connecticut*, 302 U.S. 319, 323 (1937) ("We have said that in appellant's view the Fourteenth Amendment is to be taken as embodying the prohibitions of the Fifth. His thesis is even broader. Whatever would be a violation of the original bill of rights (Amendments I to VIII) if done by the federal government is now equally unlawful by force of the Fourteenth Amendment if done by a state. There is no such general rule."); *Adamson*, 332 U.S. at 53–54 ("The due

The Supreme Court's new approach seemed to buck the limits of Article III, Section 2 of the Constitution, which authorized the judicial power to decide "Cases" and "Controversies."³¹ When applying the incorporation doctrine, the Court would decide more than the particular case or controversy before it—more than whether *this* defendant in *this* state criminal proceeding should have been afforded some form of process required in the federal courts. The Court would go beyond holding for specific criminal defendants on appeal in specific cases. If a procedural guarantee in the Bill of Rights was "fundamental," the Court would announce a categorical rule: The Constitution guaranteed to *every* criminal defendant, in *every* state, in *every* prospective case, the same form of that process that would apply if the defendant were in a federal proceeding.³² Much to conservative chagrin, the Supreme Court was furthering a civil rights agenda and using the Fourteenth Amendment to broadly legislate uniform criminal procedures across all states, one judicial opinion at a time.³³

This pragmatic approach to enforcing civil rights in the states significantly influenced how the Court would evaluate claims involving substantive liberties. The jurisprudential discourse moved toward arguments about which rights were fundamental and, therefore, the federal courts could protect from state legislatures. Incorporation did the work of enforcing procedural guarantees in the states' criminal proceedings—answering questions about what process must be afforded someone accused of violating the law and facing a deprivation of life, liberty, or property. But its mechanics were less equipped to address allegations that a state had overstepped the bounds of its authority when regulating an important personal liberty. These cases were different. In the substantive cases, a person accused the state of impermissibly impeding the exercise of a fundamental freedom—of wandering beyond the ambit of legitimate legislative authority to interfere with their basic liberty. These cases brought claims that a state's objective was illegitimate, or the means the state chose to accomplish its objective exceeded legislative authority, or both.³⁴

process clause of the Fourteenth Amendment, however, does not draw all the rights of the federal Bill of Rights under its protection. That contention was made and rejected in *Palko v. Connecticut*. It was rejected with citation of the cases excluding several of the rights, protected by the Bill of Rights, against infringement by the National Government." (citation omitted)).

³¹ See U.S. CONST. art. III, § 2.

³² See, e.g., *Duncan*, 391 U.S. at 149 ("Because we believe that trial by jury in criminal cases is fundamental to the American scheme of justice, we hold that the Fourteenth Amendment guarantees a right of jury trial . . .").

³³ See LUNDER, *supra* note 11, at 94 (describing the modern-conservative approach to substantive due process as "echo[ing] conservative criticism of the Court's using selective incorporation to impose upon the States the specific demands of procedural fairness the Bill of Rights required of the federal government" and echoing the conservative argument that "[t]he federal courts were violating the States' right to govern themselves, supplanting the moral judgments of their majorities and dictating their criminal procedures").

³⁴ For an evaluation of whether the State's interest in a homogenously educated public

Incorporation might provide theoretical guidance where an allegedly impermissible state action impacted a substantive right already mentioned in the Bill of Rights, like the “freedom of speech.”³⁵ But the Constitution recognized the people had rights not mentioned anywhere in it—it expressly instructed not to read the Bill of Rights as an exhaustive list of basic rights the people retained.³⁶ In twentieth-century speak: Fundamental rights could be in the Constitution even if they were not in its text. They were there, albeit unenumerated. But the controversy would run deep during the latter half of the century over *how* to determine whether a right was in the Constitution implicitly and thus a *fundamental* right the liberty provision of the Due Process Clause protected. Even as the Court deployed selective incorporation when it came to criminal procedures, it maintained a theory of fundamental rights—Fourteenth Amendment due process could mean federal protection against the states for substantive rights, enumerated or not.³⁷

justified criminalizing teaching in “foreign” languages, see, for example, *Meyer v. Nebraska*, 262 U.S. 390, 399–400 (1923) (“The established doctrine is that this liberty [which the due-process guarantee protects] may not be interfered with, under the guise of protecting the public interest, by legislative action which is arbitrary or without reasonable relation to some purpose within the competency of the State to effect.”). See *Pierce v. Soc’y of Sisters*, 268 U.S. 510, 535 (1925) (“As often heretofore pointed out, rights guaranteed by the Constitution may not be abridged by legislation which has no reasonable relation to some purpose within the competency of the State. The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the State to standardize its children by forcing them to accept instruction from public teachers only.”); see also LUNDER, *supra* note 11, at 39–42 (explaining *Meyer* and *Pierce*).

³⁵ U.S. CONST. amend. I (“Congress shall make no law . . . abridging the freedom of speech . . . or the right of the people peaceably to assemble . . .”); see *De Jonge v. Oregon*, 299 U.S. 353, 364 (1937); *Herndon v. Lowry*, 301 U.S. 242, 258–59 (1937). It is important to note that while in the twentieth century *De Jonge* and *Herndon* may have been thought of as illustrating the incorporation of substantive rights, their own reasonings do not bear this out. These cases, decided the same year as *Palko* and *before* the incorporation doctrine’s primacy, are better understood as examples of the traditional ordered-liberty analysis explained *infra* in Part III. See also LUNDER, *supra* note 11, at 80.

³⁶ U.S. CONST. amend. IX (“The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.”).

³⁷ See, e.g., *Whitney v. California*, 274 U.S. 357, 373 (1927) (Brandeis, J., concurring) (“[T]he due process clause of the Fourteenth Amendment applies to matters of substantive law as well as to matters of procedure. Thus all fundamental rights comprised within the term liberty are protected by the federal Constitution from invasion by the states.”); *Palko v. Connecticut*, 302 U.S. 319, 326 (1937) (“We reach a different plane of social and moral values when we pass to the privileges and immunities that have been taken over from the earlier articles of the federal bill of rights and brought within the Fourteenth Amendment by a process of absorption. These in their origin were effective against the federal government alone. If the Fourteenth Amendment has absorbed them, the process of absorption has had its source in the belief that neither liberty nor justice would exist if they were sacrificed.”); *Adamson v. California*, 332 U.S. 46, 66 (1947) (Frankfurter, J., concurring) (“It may not be amiss to restate the pervasive function of the Fourteenth Amendment in exacting from the States observance of basic liberties. The Amendment neither comprehends the specific

In the 1960s, amid debates over incorporation and fundamental rights, a challenge to a Connecticut law criminalizing married couples' use of contraceptives reached the Supreme Court. *Griswold v. Connecticut* presented an issue of substantive liberty.³⁸ The question was *not* whether the state had properly observed criminal *procedures* when depriving persons of liberty. The question was whether the state's enforcing a law that interfered with an important *substantive* freedom offended the liberty provision of the Due Process Clause. The case was not amenable to a selective-incorporation solution, with one particular provision of the Bill of Rights as its primary ingredient. It presented profound questions of personal liberty: Whether the state's policing private marital intimacy was an appropriate legislative objective and whether the means Connecticut deployed were among the powers reserved to the states.³⁹ The Court's resolution in *Griswold* set off a perturbation in the jurisprudence that would persist into the next century.

The incorporation doctrine significantly influenced the multiple opinions in *Griswold*, most importantly the plurality opinion that Justice William Douglas authored for the Court.⁴⁰ Its reasoning retreated from the total-incorporation approach that Douglas (along with Justice Hugo Black) had previously promoted.⁴¹ But the *Griswold* opinion nevertheless found its justification for exercising the judicial power in the Bill of Rights. It identified in the Court's prior decisions several unenumerated substantive rights of constitutional stature,⁴² and described them as emanating from the "penumbras" of some Bill-of-Rights provisions and forming "zones of privacy."⁴³ Concluding that the relationship of married persons was in such a zone, the Court held that Connecticut's intruding into the marital bedroom violated established constitutional principles.⁴⁴

provisions by which the founders deemed it appropriate to restrict the federal government nor is it confined to them." (citations omitted)).

³⁸ See *Griswold v. Connecticut*, 381 U.S. 479, 481 (1965); see also *Poe v. Ullman*, 367 U.S. 497, 500 (1961) (presenting the same issue as *Griswold* but upholding state court's dismissing for lack of standing).

³⁹ See U.S. CONST. amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.").

⁴⁰ See *Griswold*, 381 U.S. 479; *id.* at 507–08 (Black, J., dissenting); *id.* at 527–28 (Stewart, J., dissenting); *id.* at 486 (Goldberg, J., concurring); *id.* at 499–500 (Harlan, J., concurring); *id.* at 502 (White, J., concurring).

⁴¹ *Adamson v. California*, 332 U.S. 46, 71–72 (1947) (Black, J., dissenting) (arguing for total incorporation and against the ordered-liberty analysis).

⁴² 381 U.S. at 482 ("The right of freedom of speech and press includes not only the right to utter or to print, but the right to distribute, the right to receive, the right to read and freedom of inquiry, freedom of thought, and freedom to teach—indeed the freedom of the entire university community." (citations omitted)).

⁴³ *Id.* at 484 ("The foregoing cases suggest that specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance. Various guarantees create zones of privacy." (citation omitted)).

⁴⁴ *Id.* at 485–86.

Griswold displayed the workings of the twentieth-century intellect on American jurisprudence.⁴⁵ *Griswold*'s spatial metaphor—penumbral zones of substantive liberties—soon literalized into a category of unenumerated rights that were fundamental and thus enforceable against the states via the Fourteenth Amendment's Due Process Clause.⁴⁶ The federal guarantee of due *process* protected discrete *substantive* liberties: substantive due process. A mere seven years after *Griswold*, the Court held in *Roe* that the right to terminate a pregnancy pre-viability was a fundamental right the Fourteenth Amendment protected against state interference.⁴⁷ The right at issue in *Roe* was profoundly controversial and remains so even after *Dobbs*.⁴⁸ But *Roe* was deeply significant at the time for emphasizing *Griswold*'s most significant impact. The reconfiguration of federalism under selective incorporation was not limited to the state's criminal procedures. It included federal judicial review of state substantive legislation implementing social policies.

Like the incorporation cases, *Roe* went beyond adjudicating the controversy among the litigants before the Court. It announced the point at which *every* state's interest in protecting fetal life overcame *every* woman's right to privacy in choosing to terminate a pregnancy. *Roe* presented a statute-like holding, summarizing what the states could anticipate from the federal courts in cases challenging criminal abortion statutes like the Texas law at issue in *Roe*.⁴⁹ With the same apparent disregard for the Case or Controversy limitation of Article III, Section 2 that the selective-incorporation cases evinced, "[t]he [*Roe*] Court explained how it would prospectively resolve the tension between individuals' and the States' interests when evaluating abortion legislation in cases yet to come before it."⁵⁰ Substantive due

⁴⁵ Forthcoming work will elaborate this point: How the incorporation doctrine and substantive due process conformed to the anticipations of the informational environment in which *Griswold* and subsequent cases were decided.

⁴⁶ See, e.g., *Bowers v. Hardwick*, 478 U.S. 186, 195 (1986) ("There should be, therefore, great resistance to expand the substantive reach of those [Due Process] Clauses, particularly if it requires redefining the category of rights deemed to be fundamental."); *Moore v. City of E. Cleveland*, 431 U.S. 494, 549 (1977) (White, J., dissenting) (arguing that "because [Justice Potter Stewart] would not classify in this category the asserted right to share a house with the relatives involved here, he rejects the due process claim").

⁴⁷ *Roe v. Wade*, 410 U.S. 113 (1973).

⁴⁸ See *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215, 337 (2022) (Kavanaugh, J., concurring) ("Abortion is a profoundly difficult and contentious issue because it presents an irreconcilable conflict between the interests of a pregnant woman who seeks an abortion and the interests in protecting fetal life. The interests on both sides of the abortion issue are extraordinarily weighty.").

⁴⁹ See *Roe*, 410 U.S. at 164–65 (summarizing how "[a] state criminal abortion statute of the current Texas type" could violate the Fourteenth Amendment's Due Process Clause and laying out the trimester framework); *Dobbs*, 597 U.S. at 227 ("After cataloging a wealth of other information having no bearing on the meaning of the Constitution, the [*Roe*] opinion concluded with a numbered set of rules much like those that might be found in a statute enacted by a legislature.").

⁵⁰ See LUNDER, *supra* note 11, at 93.

process could enforce protection for fundamental rights against *all* of the states in *one* judicial decision, just like incorporation did with respect to federal criminal procedures enshrined in the Bill of Rights.⁵¹

With this seismic shift in American federalism and de facto diffusion of legislative power to the judiciary, modern legal liberalism and conservatism reduced to dueling methods for *how* to decide whether a liberty interest claimed to be fundamental was in the category of specially protected constitutional rights enforceable against the states. The twentieth-century liberals invoked the zone of privacy—a general right tethered to the Constitution via the Bill of Rights, with more specific rights located within it related to personal autonomy, choice, and intimate relationships and conduct.⁵² The zone of substantive liberties reified, post-*Griswold*, into the category of fundamental rights, then later recurred to its original penumbral geometry as the “realm of personal liberty which the government may not enter.”⁵³ This later description conspicuously—and necessarily—dropped the dependent clause as it had appeared in Justice Byron White’s *Griswold* concurrence: “*without substantial justification*.”⁵⁴ Modern-liberal substantive due process focused on individual rights and de-emphasized scrutiny of countervailing state interests.⁵⁵ The liberals would often not even bother to balance the competing interests of liberty and authority—the

⁵¹ The substantive-due-process jurisprudence post-*Griswold* may be compared to the Court’s *Lochner*-era cases and criticized as similarly demonstrating the Court “super-legislat[ing],” and second-guessing “the wisdom, need, and propriety of laws” passed democratically in the states. *Griswold v. Connecticut*, 381 U.S. 479, 482 (1965). But the modern substantive-due-process cases are markedly different than the *Lochner*-era cases, which preceded the twentieth-century incorporation doctrine’s primacy. Substantive due process was a categorical approach like the *Lochner*-era cases, but it could legislate nationally like selectively incorporating criminal procedures. See LUNDER, *supra* note 11, at 93, 227, 232.

⁵² See, e.g., *Lawrence v. Texas*, 539 U.S. 558, 562 (2003) (“Liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct.”).

⁵³ *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 847 (1992) (“It is a promise of the Constitution that there is a realm of personal liberty which the government may not enter.”).

⁵⁴ *Griswold*, 381 U.S. at 502 (White, J., concurring) (“Suffice it to say that this is not the first time this Court has had occasion to articulate that the liberty entitled to protection under the Fourteenth Amendment includes the right ‘to marry, establish a home and bring up children’ and ‘the liberty . . . to direct the upbringing and education of children’ and that these are among ‘the basic civil rights of man.’ These decisions affirm that there is a ‘realm of family life which the state cannot enter’ *without substantial justification*.” (alteration in original) (emphasis added) (first quoting *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923); then quoting *Pierce v. Soc’y of Sisters*, 268 U.S. 510, 534–35 (1925); then quoting *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942); and then quoting *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944))).

⁵⁵ See LUNDER, *supra* note 11, at 92 (arguing that in the twentieth century “[t]wo methods for deciding which ‘rights’ were worthy of inclusion developed during the twenty-five years after *Griswold*” and noting that both methods “imitated *Griswold*’s emphasizing the asserted liberty and its failing to identify and scrutinize the State’s countervailing interests in order”).

states' justifications proffered for interfering with important personal liberties were not even taken up.⁵⁶

The modern conservatives imitated the liberals' fixating on the "nature of the rights qualifying for heightened judicial protection"⁵⁷ and corresponding disregard for balancing important liberties against justifications for interfering with them.⁵⁸ But as Part II will explain, the conservatives eliminated the need for a connection to the Constitution, redescribed claims to liberty against government as arguments *for* fundamental rights to engage in certain social practices,⁵⁹ and swapped the "zone of privacy"⁶⁰ for a "select list of fundamental rights"⁶¹ that were "objectively, deeply rooted in . . . history and tradition."⁶² To discover whether a right claimed to be fundamental was on the list, the Court would survey the history of the disputed social practice in England and the American states to see whether it was traditionally protected.⁶³ Confronting the social consequences of substantive due process, the modern conservatives were not at all shy about deploying such a brazenly results-oriented method. Writing of the liberty provision of the Fourteenth Amendment's Due Process Clause, Justice Antonin Scalia explained: "[I]ts purpose [was] to

⁵⁶ See, e.g., *Griswold*, 381 U.S. at 503 (White, J., concurring) (criticizing the plurality opinion for not evaluating the state's justification for its action: "An examination of the justification offered . . . cannot be avoided by saying that the . . . statute invades a protected area of privacy and association or that it demeans the marriage relationship"); *United States v. Windsor*, 570 U.S. 744, 796 (2013) (Scalia, J., dissenting) ("[The Majority] makes only a passing mention of the 'arguments put forward' by the [Defense of Marriage] Act's defenders, and does not even trouble to paraphrase or describe them."); cf. *Moore*, 431 U.S. at 547 (White, J., dissenting) ("The term 'liberty' is not, therefore, to be given a crabbed construction. I have no more difficulty than Mr. Justice Powell apparently does in concluding that appellant in this case properly asserts a liberty interest within the meaning of the Due Process Clause. The question is not one of liberty *vel non*. Rather, there being no procedural issue at stake, the issue is whether the precise interest involved . . . is entitled to such substantive protection under the Due Process Clause that this ordinance must be held invalid."); see also LUNDER, *supra* note 11, at 105, 209–10.

⁵⁷ See, e.g., *Bowers v. Hardwick*, 478 U.S. 186, 191 (1986).

⁵⁸ See LUNDER, *supra* note 11, at 94 ("But even as it reacted against the post-*Griswold* emphasis on personal liberty, modern conservatism used it. As the jurisprudence transformed into a battleground for fights over whether an asserted right was in the fundamental-rights category, the modern-conservative method always answered 'no.' The States should be free from federal interference with legislation implementing conservative social policies . . . their resolutions of contending interests in order and liberty should be left undisturbed.").

⁵⁹ See *Michael H. v. Gerald D.*, 491 U.S. 110, 124 (1989); see also *Washington v. Glucksberg*, 521 U.S. 702, 710, 721 (1997).

⁶⁰ *Griswold*, 381 U.S. at 484, 485.

⁶¹ *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215, 237 (2022).

⁶² *Id.* at 239 (quoting *Glucksberg*, 521 U.S. at 720–21).

⁶³ See *id.* at 238 ("[I]n conducting this inquiry, we have engaged in a careful analysis of the history of the right at issue."); *Glucksberg*, 521 U.S. at 710 ("We begin, as we do in all due process cases, by examining our Nation's history, legal traditions, and practices.").

prevent future generations from lightly casting aside important traditional values.”⁶⁴ The Court would describe fundamental rights as social practices and determine whether the American states deemed them sufficiently traditional to deserve federal constitutional protection.⁶⁵

Substantive due process has been criticized, even in *Dobbs*, as an “oxymoron.”⁶⁶ This observation that a provision guaranteeing process is associated with adjudicating substantive rights often serves as a rhetorical jumping-off point for criticism. Substance and process are two distinct categories. Their combination is a Frankenstein’s monster let loose to roam the jurisprudential landscape, wreaking a havoc of rights that no one can find in the Constitution and no one would have believed the Constitution protected, at the founding of the Nation or the ratification of the Reconstruction Amendments. But this is a distraction born of misunderstanding the tradition of reasoned judgment—the tradition from whence the words “deeply rooted in our Nation’s history and tradition” were taken. When judges invoked these talismanic words, they did not mean what *Dobbs* said they did. As Part II describes, it took some effort over decades, along with some fortuity, to reconfigure the jurisprudence and arrive at the patchwork formulation that a modern-conservative plurality successfully applied in *Washington v. Glucksberg*,⁶⁷ and then a majority in *Dobbs*.⁶⁸

II. THE MODERN SUPREME COURT’S BREAK FROM TRADITION

A. *The Modern-Conservative Method*: *Bowers v. Hardwick* and *Michael H. v. Gerald D.*

Dobbs’s deeply rooted-in-history-and-tradition test is not deeply rooted in America’s history and tradition. It is a modern textual patchwork originating in Justice Scalia’s 1989 opinion for a two-justice plurality in *Michael H. v. Gerald D.*⁶⁹ This was the first time a substantive-due-process analysis⁷⁰ formally required that the “asserted right” be described at “the most specific level at which a relevant

⁶⁴ *Michael H.*, 491 U.S. at 122 n.2.

⁶⁵ See LUNDER, *supra* note 11, at 122 (“In its modern-conservative manifestation, the doctrine now limited federal constitutional constraints on the States’ substantive-legislative options to those the States already adopted. This was the intent of those who ratified the Fourteenth Amendment—to ensure that future generations of Americans maintained nineteenth-century social mores.” (emphasis omitted)).

⁶⁶ 597 U.S. at 331 (Thomas, J., concurring).

⁶⁷ 521 U.S. at 705–06 (applying the modern-conservative method to reject a challenge to the State of Washington’s law criminalizing physician-assisted suicide).

⁶⁸ 597 U.S. at 223–302.

⁶⁹ 491 U.S. at 124.

⁷⁰ See *id.* at 121 (describing the appellant’s contention “as a matter of substantive due process” and stating that the “argument is, of course, predicated on the assertion that [the appellant] has a constitutionally protected liberty interest in his relationship with [his daughter]”).

tradition protecting, or denying protection to [it] can be identified.”⁷¹ It was the first time a substantive-due-process analysis formally demanded that a litigant alleging an illegal deprivation of liberty show that the “liberty” of which they had been deprived was “[one] traditionally protected by our society.”⁷² Despite its novelty, the conservatives would tout the method a mere eight years later in *Glucksberg*—just before the turn of the twenty-first century—as the “established method of substantive-due-process analysis”⁷³ that the Court had “never abandoned.”⁷⁴

Justice Scalia’s *Michael H.* opinion would formalize what the Court had done three years earlier in the 1986 decision *Bowers v. Hardwick*. In *Bowers*, the Court formulated the question as whether the Constitution “confer[red] a fundamental right upon homosexuals to engage in sodomy.”⁷⁵ The Court looked to a long list of state statutes from the eighteenth and nineteenth centuries to see if it could find a relevant tradition regarding acts of homosexual sodomy.⁷⁶ Finding only laws purportedly outlawing such conduct, the Court concluded this right was not “deeply rooted in this Nation’s history and tradition” or “implicit in the concept of ordered liberty.”⁷⁷ Like *Griswold*, *Bowers* excluded any inquiry into the state’s justification for regulating private adult consensual intimacy. The *Bowers* Court asked only whether the right to engage in acts of homosexual sodomy was a fundamental right the federal constitution protected and answered no.⁷⁸ The method *Bowers* exemplified made for obvious and foregone conclusions.⁷⁹

⁷¹ *Id.* at 127 n.6.

⁷² *Id.* at 122 (“In an attempt to limit and guide interpretation of the [Due Process] Clause, we have insisted not merely that the interest denominated as a ‘liberty’ be ‘fundamental’ (a concept that, in isolation, is hard to objectify), but also that it be an interest traditionally protected by our society.”).

⁷³ 521 U.S. 702, 703 (1997) (“The Court’s established method of substantive-due-process analysis has two primary features: First, the Court has regularly observed that the Clause specially protects those fundamental rights and liberties which are, objectively, deeply rooted in this Nation’s history and tradition. Second, the Court has required a ‘careful description’ of the asserted fundamental liberty interest.” (citation omitted) (quoting *Reno v. Flores*, 507 U.S. 292, 302 (1993))); *see also id.* at 722 (“[W]e have a tradition of carefully formulating the interest at stake in substantive-due-process cases.”); *Dobbs*, 597 U.S. at 239 (“Thus, in *Glucksberg*, which held that the Due Process Clause does not confer a right to assisted suicide, the Court surveyed more than 700 years of ‘Anglo-American common law tradition,’ and made clear that a fundamental right must be ‘objectively, deeply rooted in this Nation’s history and tradition.’” (quoting *Glucksburg*, 521 U.S. at 711, 720–21)).

⁷⁴ *Glucksberg*, 521 U.S. at 721 n.17.

⁷⁵ *Bowers v. Hardwick*, 478 U.S. 186, 190 (1986).

⁷⁶ *See id.* at 192–94, 192 n.5, 193 n.6.

⁷⁷ *Id.* at 194.

⁷⁸ *Id.* at 192 (“It is obvious to us that neither of these formulations would extend a fundamental right to homosexuals to engage in acts of consensual sodomy. Proscriptions against that conduct have ancient roots.”).

⁷⁹ *See LUNDER, supra* note 11, at 113.

In *Michael H.* three years later, a father's liberty—described at the most specific level like the right in *Bowers*—did not qualify as fundamental either. The appellant, Michael H., had an affair with a married woman, and they had a child together.⁸⁰ Michael established a parental relationship with his daughter, who was born into the household of her mother and her mother's husband.⁸¹ An old state law presumed that a child born into a married couple's household was the natural offspring of the husband.⁸² Wanting to secure visitation rights, Michael needed to challenge the law's presumption of paternity in favor of the mother's husband. The old state law—enacted before reliable paternity testing—prevented Michael from presenting any evidence to rebut the presumption.⁸³ Michael argued that “because he ha[d] established a parental relationship with [his daughter], protection of [her mother's and mother's husband's] marital union [was] an insufficient state interest to support termination of that relationship.”⁸⁴ He claimed this was an illegal deprivation of liberty—an unreasonable interference with his freedom to have a relationship with his daughter.⁸⁵

Refining the *Bowers* inquiry, Justice Scalia in *Michael H.* reduced “the legal issue” to “whether the relationship between persons in the situation of Michael and [his daughter] ha[d] been treated as a protected family unit under the historic practices of our society.”⁸⁶ It had not, and so the liberty for which Michael sought vindication was not a fundamental right.⁸⁷ As in *Bowers*, what mattered was whether

The *Bowers* opinion disregarded the common law's balancing of the State's interest in order against the individual's liberty, and changed the inquiry altogether to whether the Constitution conferred on a class of individuals a fundamental right to engage in a particular sexual practice. The dissents disagreed with such a narrow view of the right asserted, pointing to broader alternative formulations. In the wake of *Roe*, and now *Bowers*, the Court was embroiled in a full-blown culture war, and its jurisprudence reflected the social and political values of a divided nation. Two corresponding factions had emerged on the Court. A ‘liberal’ camp found controversial substantive liberties within the fundamental-rights category, while a ‘conservative’ one fought to keep them out.

Id.

⁸⁰ *Michael H. v. Gerald D.*, 491 U.S. 110, 113 (1989).

⁸¹ *Id.* at 113–14.

⁸² *Id.* at 115.

⁸³ *See id.* at 117 (“The California statute that is the subject of this litigation is, in substance, more than a century old. California Code of Civ. Proc. § 1962(5), enacted in 1872, provided that “[t]he issue of a wife cohabiting with her husband, who is not impotent, is indisputably presumed to be legitimate.” (alteration in original)).

⁸⁴ *Id.* at 121.

⁸⁵ *Id.*

⁸⁶ *Id.* at 124.

⁸⁷ *Id.* at 127.

the states already protected this right. “What counts,” Justice Scalia explained, was “whether the States in fact award substantive parental rights to the natural father of a child conceived within, and born into, an extant marital union that wishes to embrace the child.”⁸⁸ The plurality was “not aware of a single case, old or new, that ha[d] done so,” and “[t]his [was] not the stuff of which fundamental rights . . . [were] made.”⁸⁹

Justice Scalia posed the question in *Michael H.* as whether the Constitution conferred a fundamental right on a natural father to threaten the integrity of a household family to which he did not belong.⁹⁰ This mimicked the *Bowers* Court’s situating the right for exclusion from the category of fundamental rights. And like the long list of old state statutes the Court cited in *Bowers*,⁹¹ in *Michael H.* “a longstanding and still extant societal tradition withh[eld] the very right” Michael claimed was “the subject of a liberty interest.”⁹² Scalia pointed to “the existence of . . . a tradition” denying Michael a hearing, which “continu[ed] to the present day” and thus “refute[d] any possible contention that the alleged right [was] ‘so rooted in the traditions and conscience of our people as to be ranked as fundamental’ or ‘implicit in the concept of ordered liberty.’”⁹³ The state did not already respect Michael’s interest, so his interest was not a right the Constitution could command the state to respect.

Michael H. made explicit—as an abstract statement of method—what *Bowers* implied: Personal-liberty questions would be framed in terms of whether the federal Constitution conferred a fundamental right on persons to engage in certain social practices. And the Court would find answers—to whether such candidates for fundamental rights, although unenumerated, were in the Constitution—*not* in the Court’s jurisprudence interpreting the Constitution. For modern conservatism, the answers would be found in the democratically enacted laws and social practices of the American states.⁹⁴

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.*; see also *id.* at 145 (Brennan, J., dissenting) (“The plurality’s exclusive rather than inclusive definition of the ‘unitary family’ is out of step with other decisions as well. This pinched conception of ‘the family,’ crucial as it is in rejecting Michael’s and [his daughter’s] claims of a liberty interest, is jarring in light of our many cases preventing the States from denying important interests or statuses to those whose situations do not fit the government’s narrow view of the family.”).

⁹¹ *Bowers v. Hardwick*, 478 U.S. 186, 192–94, 192 n.5, 193 n.6 (1986).

⁹² 491 U.S. at 127 n.6.

⁹³ *Id.* (first quoting *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934); and then quoting *Palko v. Connecticut*, 302 U.S. 319, 325 (1937)).

⁹⁴ See, e.g., Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1184 (1989) (“It is more difficult, it seems to me, to derive such a categorical general rule from evolving notions of personal privacy. Similarly, even if one rejects an originalist approach, it is easier to arrive at categorical rules if one acknowledges that the content of evolving concepts is strictly limited by *the actual practices of the society, as reflected in the laws enacted by its legislatures.*” (emphasis added)).

B. Dubious Jurisprudential Developments

This modern-conservative approach to fundamental rights would develop quickly into the method applied in *Dobbs* to overturn *Roe*.⁹⁵ But all of this depended on some suspicious turns in the jurisprudence even before the method developed. Three significant shifts occurred during the twenty-three years between *Griswold* in 1965 and *Michael H.* in 1989. In 1968, *Duncan v. Louisiana* introduced a distinction between analyses for procedural versus substantive-due-process claims.⁹⁶ In 1977, *Moore v. City of East Cleveland* conflated the *Duncan* distinction and applied *Duncan*'s "new approach" for *procedural* questions to a *substantive* one.⁹⁷ And in 1986, *Bowers* adopted the result of *Moore*'s conflating the *Duncan* distinction: a new and different description of fundamental rights.⁹⁸ This set up the radical shift in the jurisprudence that *Michael H.* implemented and *Dobbs* culminated.

1. *Duncan v. Louisiana* Relegated the Concept of Ordered Liberty to a Synonym for the Anglo-American Criminal Justice System

Griswold's union of the two modern doctrines—incorporation and fundamental rights—prompted an attempt to separate them just three years later in *Duncan*. *Duncan* arrived at the Court amid mounting tension in the jurisprudence between *Griswold*'s consequence—categorizing unenumerated rights as fundamental—and selective incorporation's enforcing federal criminal procedures in the states. Under the liberty provision of the Due Process Clause, the Court selectively incorporated forms of federal criminal procedures *and* invoked a quasi-incorporation doctrine to

⁹⁵ See *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215, 292 (2022) ("We therefore hold that the Constitution does not confer a right to abortion. *Roe* and *Casey* must be overruled, and the authority to regulate abortion must be returned to the people and their elected representatives.").

⁹⁶ 391 U.S. 145, 149 n.14 (1968) (explaining that "recent cases applying provisions of the first eight Amendments to the States represent a new approach to the 'incorporation' debate" and presenting a "sort of inquiry that can justify the conclusions that state courts must . . . comply with certain provisions of the Sixth Amendment" mandating criminal processes in the federal courts).

⁹⁷ See 431 U.S. 494, 501–06, 503 n.10 (plurality opinion). The dialogue between Justice Powell's plurality opinion and Justice White's dissent show White trying to convince Powell that *Duncan*'s new approach was for procedural claims, and applying it to the substantive question in *Moore* was a mistake. See, e.g., *id.* at 547 (White, J., dissenting) ("[T]here being no procedural issue at stake, the issue is whether the precise interest involved . . . is entitled to such substantive protection under the Due Process Clause that this ordinance must be held invalid.").

⁹⁸ *Bowers v. Hardwick*, 478 U.S. 186, 192 (1986) ("A different description of fundamental liberties appeared in *Moore* . . . where they are characterized as those liberties that are 'deeply rooted in this Nation's history and tradition.'" (quoting *Moore*, 431 U.S. at 503 (plurality opinion))).

anchor a zone of privacy to the Constitution and identify fundamental, unenumerated substantive rights. *Duncan* would offer a justification for the Court's new approach—selective incorporation—to *procedural* due-process claims and introduce a distinction between procedural- and substantive-due-process analyses now a familiar feature of modern-American constitutional law.⁹⁹

Criminal defendant Gary Duncan attempted to diffuse a tense confrontation between two of his cousins, who had recently transferred to a formerly all-white high school, and four white boys.¹⁰⁰ Duncan either “touched” or “slapped” one of the white boys on his elbow and was convicted after a bench trial of second-degree assault.¹⁰¹ The issue at the Supreme Court was whether Duncan—facing punishment of up to two years in prison—was entitled to a jury trial.¹⁰² As of *Duncan*, the Court had not incorporated the Sixth Amendment's right to a jury trial through the Fourteenth to make it enforceable against the states. Duncan argued at the Supreme Court that without a jury trial his conviction and sentence deprived him of liberty without due process of law.¹⁰³ The Court agreed. Writing for the Court, Justice White offered an “inquiry that c[ould] justify the conclusions” the Court had reached in “recent cases applying provisions of the first eight Amendments to the States”—cases that “represent[ed] a new approach to the ‘incorporation’ debate.”¹⁰⁴

These recent cases showed that the Fourteenth Amendment incorporated procedural requirements enshrined in the Bill of Rights that were necessary to an Anglo-American criminal justice system.¹⁰⁵ In *procedural* cases, the Court should ask whether in “this kind of system”—an “Anglo-American regime of ordered liberty”¹⁰⁶—the criminal procedure was fundamental.¹⁰⁷ The Court observed that most Anglo-American courts required jury trials for similar situations and concluded a jury trial was fundamental to American criminal justice.¹⁰⁸ “A detailed ten-page

⁹⁹ 391 U.S. at 149 n.14.

¹⁰⁰ *Id.* at 147.

¹⁰¹ *Id.* at 146–47.

¹⁰² *Id.* (“Pursuant to 28 U.S.C. § 1257(2) appellant sought review in this Court, alleging that the Sixth and Fourteenth Amendments to the United States Constitution secure the right to jury trial in state criminal prosecutions where a sentence as long as two years may be imposed.”).

¹⁰³ *Id.*

¹⁰⁴ *Id.* at 149 n.14.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* at 149 (“Because we believe that trial by jury in criminal cases is fundamental to the American scheme of justice, we hold that the Fourteenth Amendment guarantees a right of jury trial in all criminal cases which—were they to be tried in a federal court—would come within the Sixth Amendment's guarantee.”).

¹⁰⁸ *Id.* at 149 n.14.

A criminal process which was fair and equitable but used no juries is easy to imagine. It would make use of alternative guarantees and protections which would serve the purposes that the jury serves in the

exegesis of ‘past and contemporary standards’ justified the Court’s holding, revealing the importance and general acceptance of trial by jury in the English and American legal traditions.”¹⁰⁹ Consistent with the Court’s new approach, the holding reached beyond the particular controversy, concluding that the Fourteenth Amendment incorporated against every state the requirement of trial by jury in every case where the Sixth Amendment would require it of the federal government.¹¹⁰

It is critical to notice here *Duncan*’s departure from the ordered-liberty tradition, awaiting further elaboration in Part III. Even as Justice White invoked the words “ordered liberty” in justifying the Court’s “new approach,”¹¹¹ he denied what the tradition required of a judge evaluating a claim where individual liberty challenged democratic authority.¹¹² The concept of ordered liberty informed the traditional approach to adjudicating such claims—an approach that predated by centuries Justice Benjamin Cardozo’s calling it by name thirty-one years before *Duncan* in *Palko v. Connecticut* (1937): “In these and other situations immunities that are valid as against the federal government by force of the specific pledges of particular amendments have been found to be implicit in the concept of ordered liberty, and thus, through the Fourteenth Amendment, become valid as against the states.”¹¹³

Frank Palko was a criminal defendant convicted of first-degree murder and sentenced to death.¹¹⁴ He challenged his conviction, claiming on appeal that Connecticut violated the double jeopardy provision of the Fifth Amendment.¹¹⁵ Palko

English and American systems. Yet no American State has undertaken to construct such a system. Instead, every American State, including Louisiana, uses the jury extensively, and imposes very serious punishments only after a trial at which the defendant has a right to a jury’s verdict. In every State, including Louisiana, the structure and style of the criminal process—the supporting framework and the subsidiary procedures—are of the sort that naturally complement jury trial, and have developed in connection with and in reliance upon jury trial.

Id.

¹⁰⁹ LUNDER, *supra* note 11, at 97 (footnote omitted); *Duncan*, 391 U.S. at 151–62.

¹¹⁰ *Id.* at 149.

¹¹¹ *Id.* at 149 n.14.

¹¹² *Id.*; see LUNDER, *supra* note 11, at 96–97 (explaining Justice White’s distinguishing and dismissing, despite its obvious applicability in *Duncan*, the traditional analysis under the concept of ordered liberty, which required balancing a deprivation of liberty in the particular controversy against the state’s justification for the deprivation—scrutinizing the reasons the state proffered for maintaining some defensible interest in social order via the particular liberty-depriving means the state had chosen in the controversy before the Court).

¹¹³ 302 U.S. 319, 324–25 (1937).

¹¹⁴ *Id.* at 320–22.

¹¹⁵ See *id.* (explaining that Connecticut prosecuted Palko for first-degree murder and sought a death sentence, but a jury convicted him of second-degree murder and he was sentenced to life in prison). Connecticut appealed the conviction under its law allowing the prosecution to appeal from trial court rulings it believed were made in error, and the Connecticut Supreme Court of Errors concluded the trial court had erred when it instructed

made an early incorporation argument, that “[w]hatever would be a violation of the original bill of rights . . . if done by the federal government [wa]s now equally unlawful by force of the Fourteenth Amendment if done by a state.”¹¹⁶ Writing for the Court, Justice Cardozo stated what in 1937 was obvious: “There is no such general rule.”¹¹⁷ It was well established that the American states were free to govern themselves unless in doing so they violated some “principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.”¹¹⁸ In *Palko*, the due-process guarantee applied such a so-rooted fundamental principle of justice: “[T]he legislative judgment, if oppressive and arbitrary, may be overridden by the courts.”¹¹⁹ In discrete cases and controversies, the tradition’s touchstone was reasonableness. This required evaluating the importance of the liberty impacted *and* the state’s justification for interfering with it, considering the circumstances in which the alleged deprivation of liberty occurred.¹²⁰

the jury and excluded certain testimony, and that the errors had prejudiced Connecticut. *Id.* Palko was retried, convicted of first-degree murder, and sentenced to death. *Id.* Palko appealed to the U.S. Supreme Court, arguing that Connecticut’s appealing his first conviction violated due process. *Id.*

¹¹⁶ *Id.* at 323.

¹¹⁷ *Id.* At the time *Palko* was decided, fifty years of Fourteenth Amendment jurisprudence showed the Court had rejected challenges to state criminal procedures that differed from federal procedures with respect to charging documents, the prohibition against self-incrimination, and the jury requirement for criminal and civil trials. Limits that the Fourth Amendment imposed on the federal government, and some provisions of the Sixth, did not bind the states in precisely the same ways. *See Hurtado v. California*, 110 U.S. 516 (1884); *Twining v. New Jersey*, 211 U.S. 78 (1908); *Walker v. Sauvinet*, 92 U.S. 90 (1876); *Maxwell v. Dow*, 176 U.S. 581 (1900); *N.Y. Cent. R.R. Co. v. White*, 243 U.S. 188 (1917); *Wagner Elec. Mfg. Co. v. Lyndon*, 262 U.S. 226 (1923); *Weeks v. United States*, 232 U.S. 383 (1914); *West v. Louisiana*, 194 U.S. 258 (1904); *see also* LUNDER, *supra* note 11, at 50.

¹¹⁸ *Palko*, 302 U.S. at 325 (quoting *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934)); *see Snyder*, 291 U.S. at 105 (“The Commonwealth of Massachusetts is free to regulate the procedure of its courts in accordance with its own conception of policy and fairness unless in so doing it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.”).

¹¹⁹ 302 U.S. at 327; *see* LUNDER, *supra* note 11, at 26 n.86.

¹²⁰ *See, e.g., Palko*, 302 U.S. at 328.

What the answer would have to be if the state were permitted after a trial free from error to try the accused over again or to bring another case against him, we have no occasion to consider. We deal with the statute before us and no other. The state is not attempting to wear the accused out by a multitude of cases with accumulated trials. It asks no more than this, that the case against him shall go on until there shall be a trial free from the corrosion of substantial legal error. This is not cruelty at all, nor even vexation in any immoderate degree. If the trial had been infected with error adverse to the accused, there might have been review at his instance, and as often as necessary to purge the vicious taint. A reciprocal privilege, subject at all times to the discretion

Palko's ordered-liberty concept easily applied to the issue in *Duncan*. *Palko* and *Duncan* each involved a criminal procedure enshrined in the Bill of Rights, and both cases suggested the mechanical answer incorporation offered.¹²¹ *Palko* had rejected the incorporation argument and resolved the case within the tradition of reasoned judgment and its concept of ordered liberty.¹²² But despite *Palko*'s obvious efficacy for evaluating *Duncan*'s argument, Justice White expressly excluded *Palko*'s applicability.¹²³ *Palko* had nothing to offer because it was about a provision of the Fifth Amendment, whereas *Duncan* was about a provision of the Sixth.¹²⁴ The procedural concern in *Palko*—the prohibition against double jeopardy—was not the same as in *Duncan*—the right to a jury trial.¹²⁵ Distinguishing the cases at this level of specificity and disregarding *Palko* was necessary to the new distinction between procedural and substantive analyses that *Duncan* formalized.

With a majority on the Court having succumbed to this formal distinction, the Court need not consider, like it did in *Palko*, whether the state's pursuit of social

of the presiding judge has now been granted to the state. There is here no seismic innovation. The edifice of justice stands, its symmetry, to many, greater than before.

Id. (citations omitted); *see also* *Poe v. Ullman*, 367 U.S. 497, 553 (1961) (Harlan, J., dissenting) ("In my view the appellants have presented a very pressing claim for Constitutional protection. Such difficulty as the claim presents lies only in evaluating it against the State's countervailing contention . . .").

¹²¹ *Compare Palko*, 302 U.S. at 323 ("We have said that in appellant's view the Fourteenth Amendment is to be taken as embodying the prohibitions of the Fifth. His thesis is even broader. Whatever would be a violation of the original bill of rights (Amendments I to VIII) if done by the federal government is now equally unlawful by force of the Fourteenth Amendment if done by a state."), *with Duncan v. Louisiana*, 391 U.S. 145, 147 (1968) ("[A]ppellant sought review in this Court, alleging that the Sixth and Fourteenth Amendments to the United States Constitution secure the right to jury trial in state criminal prosecutions where a sentence as long as two years may be imposed.").

¹²² 302 U.S. at 324–25.

¹²³ *Duncan*, 391 U.S. at 154–55.

¹²⁴ *Id.* at 155.

¹²⁵ *Id.*

In neither *Palko* nor *Snyder* was jury trial actually at issue, although both cases contain important dicta asserting that the right to jury trial is not essential to ordered liberty and may be dispensed with by the States regardless of the Sixth and Fourteenth Amendments. These observations, though weighty and respectable, are nevertheless dicta, unsupported by holdings in this Court that a State may refuse a defendant's demand for a jury trial when he is charged with a serious crime. Perhaps because the right to jury trial was not directly at stake, the Court's remarks about the jury in *Palko* and *Snyder* took no note of past or current developments regarding jury trials, did not consider its purposes and functions, attempted no inquiry into how well it was performing its job, and did not discuss possible distinctions between civil and criminal cases.

Id.

order—its administering justice in *Duncan*’s criminal case without a jury trial—was unreasonable and thus deprived *Duncan* of liberty without due process of law. The Court need only decide—as an abstract intellectual exercise—if the particular *form* of process was fundamental to an Anglo-American criminal justice system and should therefore be enforced against all of the states, all at once, in one judicial decision.¹²⁶

2. *Moore v. City of East Cleveland* Introduced a Different Description of Fundamental Rights

Inez Moore was a grandmother convicted of a misdemeanor under a local ordinance mandating that only members of the same family share a residential dwelling.¹²⁷ Moore failed to comply with a directive to remove from her home one of her grandsons living with her.¹²⁸ After the Ohio Court of Appeals affirmed the conviction—rejecting Moore’s claim “that the ordinance was constitutionally invalid on its face”—the state supreme court denied review.¹²⁹ The Supreme Court reversed.¹³⁰ Despite Justice White’s protesting,¹³¹ Justice Lewis Powell in *Moore* applied *Duncan*’s new inquiry—for selectively incorporating criminal *procedures*—to evaluate whether the ordinance violated a fundamental *substantive* liberty.¹³² This

¹²⁶ *Id.* at 180–81 (Harlan, J., dissenting).

Today’s Court still remains unwilling to accept the total incorporationists’ view of the history of the Fourteenth Amendment. This, if accepted, would afford a cogent reason for applying the Sixth Amendment to the States. The Court is also, apparently, unwilling to face the task of determining whether denial of trial by jury in the situation before us, or in other situations, is fundamentally unfair. Consequently, the Court has compromised on the ease of the incorporationist position, without its internal logic. It has simply assumed that the question before us is whether the Jury Trial Clause of the Sixth Amendment should be incorporated into the Fourteenth, jot-for-jot and case-for-case, or ignored. Then the Court merely declares that the clause in question is “in” rather than “out.”

Id.; see *Adamson v. California*, 332 U.S. 46, 65 (1947) (Frankfurter, J., concurring) (“There is suggested merely a selective incorporation of the first eight Amendments into the Fourteenth Amendment. Some are in and some are out, but we are left in the dark as to which are in and which are out.”).

¹²⁷ *Moore v. City of E. Cleveland*, 431 U.S. 494, 495–96 (1977) (plurality opinion).

¹²⁸ See *id.* at 497. Moore lived with one of her sons and two of her grandsons. *Id.* at 496. But one of her grandsons was not the offspring of Moore’s son residing with her—the boy was his nephew. *Id.* According to the City, this boy was an “illegal occupant.” *Id.* at 497.

¹²⁹ *Id.* at 497–98.

¹³⁰ *Id.* at 506.

¹³¹ *Id.* at 547 (White, J., dissenting) (“The term ‘liberty’ is not . . . to be given a crabbed construction.”).

¹³² *Id.* at 504 n.12 (plurality opinion) (noting that “an approach grounded in history imposes limits on the judiciary that are more meaningful than any based on the abstract formula

tilled the jurisprudential soil in which modern conservatism would sow the seed of its political ideology. It took another nine years from *Moore* to *Bowers* and only another three to *Michael H.* to raise a due-process guarantee protecting only those social practices that were—like selectively incorporated *forms* of criminal procedure—already “deeply rooted in this Nation’s history and tradition.”¹³³ The modern-conservative method for substantive claims would, like the *Duncan* method for procedural ones, find its justifications in historical exegeses rather than reasoned judgment.¹³⁴

In the wake of *Griswold* and its early progeny, Justice Powell could comfortably assert that “freedom of personal choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment.”¹³⁵ Powell cited “a host of cases,” including *Roe*, that “acknowledged a ‘private realm of family life which the state cannot enter.’”¹³⁶ Powell quoted the same precedent that would become the modern-liberal “realm of personal liberty which the government may not enter.”¹³⁷ And like the modern liberals when they would later invoke it, Justice Powell omitted the dependent clause “without substantial justification.”¹³⁸ East Cleveland’s reasons for its law were mentioned,¹³⁹ but they

taken from *Palko v. Connecticut* and apparently suggested as an alternative” and citing *Duncan* as “rejecting the *Palko* formula as the basis for deciding what procedural protections are required of a State, in favor of a historical approach based on the Anglo-American legal tradition” (citation omitted)).

¹³³ *Id.* at 503; see *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997).

¹³⁴ See, e.g., *Dobbs v. Jackson Women’s Health Org.*, 597 U.S. 215, 232–63 (2022); *id.* at 300 (“As we have explained, procuring an abortion is not a fundamental constitutional right because such a right has no basis in the Constitution’s text or in our Nation’s history.”).

¹³⁵ *Moore*, 431 U.S. at 499 (plurality opinion).

¹³⁶ *Id.* (quoting *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944)) (citing *Meyer v. Nebraska*, 262 U.S. 390, 399–401 (1923); *Pierce v. Soc’y of Sisters*, 268 U.S. 510, 534–35 (1925); *Roe v. Wade*, 410 U.S. 113, 152–53 (1973); *Wisconsin v. Yoder*, 406 U.S. 205, 231–33 (1972); *Stanley v. Illinois*, 405 U.S. 645, 651 (1972); *Ginsberg v. New York*, 390 U.S. 629, 639 (1968); *Griswold v. Connecticut*, 381 U.S. 479, 481 (1965); *id.* at 495–96 (Goldberg, J., concurring); *id.* at 502–03 (White, J., concurring); *Poe v. Ullman*, 367 U.S. 497, 542–44, 549–53 (1961) (Harlan, J., dissenting); *Loving v. Virginia*, 388 U.S. 1, 12 (1967); *May v. Anderson*, 345 U.S. 528, 533 (1953); *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942)).

¹³⁷ *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 847 (1992).

¹³⁸ *Id.* (“It is a promise of the Constitution that there is a realm of personal liberty which the government may not enter. We have vindicated this principle before.”). Compare *Moore*, 431 U.S. at 499 (“A host of cases . . . have consistently acknowledged ‘a private realm of family life which the state cannot enter.’” (quoting *Prince*, 321 U.S. at 166)), with *Griswold*, 381 U.S. at 502 (White, J., concurring) (“These decisions affirm that there is a ‘realm of family life which the state cannot enter’ without substantial justification.” (quoting *Prince*, 321 U.S. at 166)).

¹³⁹ *Moore*, 431 U.S. at 499–500 (plurality opinion) (noting East Cleveland’s attempt to “justify [the ordinance] as a means of preventing overcrowding, minimizing traffic and parking congestion, and avoiding an undue financial burden on East Cleveland’s school system”).

were not part of the dispositive analysis. What mattered was the status of the right that Moore claimed East Cleveland violated.¹⁴⁰ *Griswold* had replaced balancing individual liberty against democratic authority with the zone of substantive rights.¹⁴¹ *Moore* would follow *Griswold*'s and *Roe*'s lopsided inquiries and pave the way for the modern-conservative method.

"Our decisions establish," Powell explained in *Moore*, "that the Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in this Nation's history and tradition."¹⁴² The due-process guarantee protected Moore against the City's ordinance for the same reason that Duncan deserved a jury trial.¹⁴³ The jury trial in *Duncan* was a fundamental legal institution in the Anglo-American tradition and thus constitutionally protected;¹⁴⁴ the family in *Moore* was a fundamental social institution worthy of constitutional protection.¹⁴⁵ And like Justice White justified in *Duncan* incorporating the federal jury-trial requirement with its historical pedigree, Justice Powell in *Moore* emphasized "the accumulated wisdom . . . that support[ed] a larger conception of the family."¹⁴⁶ Families' child-rearing decisions implicated in prior due-process cases "long ha[d] been shared with grandparents or other relatives who occup[ied] the same household."¹⁴⁷ The deeply rooted fundamental right to "freedom of personal choice in matters of marriage and family life" extended beyond the members of a nuclear family.¹⁴⁸

¹⁴⁰ *Id.* at 501 ("But unless we close our eyes to the basic reasons why certain rights associated with the family have been accorded shelter under the Fourteenth Amendment's Due Process Clause, we cannot avoid applying the force and rationale of these precedents to the family choice involved in this case.").

¹⁴¹ See discussion of *Griswold*, *supra* notes 38–46 and accompanying text.

¹⁴² 431 U.S. at 503 (plurality opinion).

¹⁴³ *Id.* at 503 & n.12.

¹⁴⁴ *Duncan v. Louisiana*, 391 U.S. 145, 151 (1968) ("It is sufficient for present purposes to say that by the time our Constitution was written, jury trial in criminal cases had been in existence in England for several centuries and carried impressive credentials traced by many to Magna Carta.").

¹⁴⁵ 431 U.S. at 503–04 (plurality opinion) ("It is through the family that we inculcate and pass down many of our most cherished values, moral and cultural.").

¹⁴⁶ *Id.* at 505.

¹⁴⁷ *Id.*

¹⁴⁸ *Id.* at 499; see LUNDER, *supra* note 11, at 104.

The *Moore* opinion changed the jurisprudence in two inestimably profound respects. First, it equated whether a federal-procedural requirement was necessary to an Anglo-American criminal justice system with whether the Due Process Clause protected an unenumerated substantive liberty. But the effect here was far more significant than this simple equation White had divided the [traditional] insight into two conceptual analyses, one procedural and the other substantive. *Moore* recognized *one* of these two—the Court's "new approach to the

Here was the “different description of fundamental liberties”—those “deeply rooted in this Nation’s history and tradition”—that Justice White would import into *Bowers* to evaluate whether the social practice of homosexual sodomy was a fundamental right.¹⁴⁹ But here, nine years before *Bowers*, in his dissenting opinion in *Moore*, Justice White insisted that Justice Powell used the wrong analysis.¹⁵⁰ Justice White pointed to Justice John Marshall Harlan II’s dissenting opinion in the 1961 case of *Poe v. Ullman*, where Harlan had demonstrated *Palko*’s traditional ordered-liberty analysis applied to the question that would reappear in *Griswold* four years later.¹⁵¹ Justice White insisted in his *Moore* dissent that Justice Harlan’s example in *Poe* was the correct analysis for a *substantive* claim like *Moore*’s—Justice White had demonstrated it himself in his concurring opinion in *Griswold*.¹⁵² The proper analysis that *Poe* exemplified required balancing *Moore*’s interest in liberty against East Cleveland’s “needs asserted to justify [its] abridgment.”¹⁵³ But Justice Powell had taken *Duncan*’s new inquiry for procedural-due-process claims and applied it in this substantive-due-process case.¹⁵⁴

incorporation debate”—for *both* procedural and substantive claims. Second, the opinion bolstered the post-*Griswold* fundamental-rights approach, omitting the second step in the common-law analysis. The Due Process Clause protected the liberty to live with one’s family *because* the institution of family was deeply rooted in the Nation’s history and tradition. This did not trigger strict scrutiny of the City’s justification for infringing it. Instead, the Court found yet another right within the fundamental-rights category.

Id.

¹⁴⁹ *Bowers v. Hardwick*, 478 U.S. 186, 192 (1986) (“A different description of fundamental liberties appeared in *Moore v. East Cleveland* where they are characterized as those liberties that are ‘deeply rooted in this Nation’s history and tradition.’” (quoting 431 U.S. at 503 (plurality opinion))).

¹⁵⁰ *Moore*, 431 U.S. at 547 (White, J., dissenting).

¹⁵¹ *Id.* at 542 (citing *Poe v. Ullman*, 367 U.S. 497, 540 (1961) (Harlan, J., dissenting)). *Poe* presented the same issue as *Griswold* but was dismissed for lack of justiciability, four years before *Griswold*, seven years before *Duncan* and Justice White’s introducing the procedural/substantive distinction, and sixteen years before Justice Powell’s conflating the distinction in *Moore*.

¹⁵² See *Griswold v. Connecticut*, 381 U.S. 479, 506–07 (1965) (White, J., concurring); *Moore*, 431 U.S. at 544 (White, J., dissenting) (arguing that Justice Harlan’s example in *Poe* was “surely the preferred approach”); see also LUNDER, *supra* note 11, at 83 (“While Harlan’s concurrence [in *Griswold*] reminded the Court of the principles informing proper due-process analysis, Justice White’s offered the analysis Douglas neglected.”); *id.* at 83–85 (describing Justice White’s example of the traditional analysis in *Griswold*).

¹⁵³ 367 U.S. at 543 (Harlan, J., dissenting) (arguing that “a reasonable and sensitive judgment must [recognize] that certain interests require particularly careful scrutiny of the state needs asserted to justify their abridgment”).

¹⁵⁴ *Moore*, 431 U.S. at 502 (plurality opinion) (alluding to *Griswold*: “There are risks when the judicial branch gives enhanced protection to certain substantive liberties without

Duncan had relegated *Palko*'s "concept of ordered liberty"—a beautifully terse description of our political tradition—to a synonym for the American criminal justice system.¹⁵⁵ A survey of that system's history revealed what particular forms of procedure the Constitution required the states to provide criminal defendants.¹⁵⁶ *Moore*'s conflating, and thus equating, of procedural and substantive analyses set up "ordered liberty" to mean the same for substantive claims in *Bowers*, *Michael H. Glucksberg*, and *Dobbs*. Certain forms of social practices—but only those a survey of history revealed were objectively, deeply rooted in the Nation's (*i.e.*, the American states') tradition—were those the Constitution required the states to respect.

C. Reconfiguring the Tradition

When *Bowers* adopted *Moore*'s "different description of fundamental liberties"—those "deeply rooted in this Nation's history and tradition"¹⁵⁷—the fulfillment of Justice Harlan's prophesying in *Griswold* dawned. "[W]hat I find implicit in the Court's opinion," Harlan had foretold, "is that the 'incorporation' doctrine may be used to restrict the reach of Fourteenth Amendment Due Process."¹⁵⁸ Harlan "could not more heartily agree that judicial 'self-restraint' [was] an indispensable ingredient of sound constitutional adjudication," but he insisted that "the formula suggested for achieving it"—incorporation—was "more hollow than real."¹⁵⁹ Relying on this "illusory restriction on the content of the Due Process Clause" to somehow appropriately constrain the discretion of federal judges ignored the obvious: Other "[s]pecific provisions of the Constitution . . . lend themselves as readily to 'personal' interpretations by judges."¹⁶⁰ The Due Process Clause required interpretation just like other constitutional provisions.¹⁶¹ A simple "formula" like incorporation—whether

the guidance of the more specific provisions of the Bill of Rights" (emphasis omitted)); *id.* at 503 n.10 (likening *Griswold* to *Duncan*: "A similar restraint marks our approach to the question[] . . . whether or to what extent a guarantee in the Bill of Rights should be 'incorporated' in the Due Process Clause because it is 'necessary to an Anglo-American regime of ordered liberty'" (quoting *Duncan v. Louisiana*, 391 U.S. 145, 149–50 n.14 (1968))).

¹⁵⁵ *Duncan*, 319 U.S. at 149 n.14.

¹⁵⁶ See *supra* Section II.B.1.

¹⁵⁷ *Bowers v. Hardwick*, 478 U.S. 186, 192 (1986) (quoting *Moore*, 431 U.S. at 503 (plurality opinion)).

¹⁵⁸ *Griswold*, 381 U.S. at 500 (Harlan, J., concurring) (emphasis omitted); see LUNDER, *supra* note 11, at 83 ("Throughout the remainder of the twentieth century, various factions on the Court would invoke [Justice Harlan's *Griswold* concurrence] as authority for points of view that at best misunderstood, and, at worst, deliberately misrepresented the tradition of reasoned judgment that Harlan and his forbears honored. The modern-conservative approach to personal-liberty claims would soon co-opt not only the words 'history' and 'values' . . . but also the very notion of 'tradition.'").

¹⁵⁹ *Griswold*, 381 U.S. at 501 (Harlan, J., concurring).

¹⁶⁰ *Id.* at 501–02.

¹⁶¹ *Id.* at 500–01.

selective or penumbral—could not “substitute . . . for [the] judgment and restraint” the tradition demanded.¹⁶² There was “no ‘mechanical answer,’”¹⁶³ because “[t]hat tradition [was] a living thing.”¹⁶⁴ It prescribed “limits” on judicial discretion “derived from considerations that are fused in the whole nature of our judicial process [C]onsiderations deeply rooted in reason and in the compelling traditions of the legal profession.”¹⁶⁵

Modern liberalism and conservatism would include the precedential words “deeply rooted,” “history and tradition,” and “implicit in the concept of ordered liberty” in their descriptions of substantive-due-process analyses.¹⁶⁶ But *Griswold* disrupted the tradition, and modern liberalism and conservatism abandoned it altogether. Modern conservatism broke from the tradition, reacting to modern liberalism’s break from it in *Griswold*. The vestigial ordered-liberty moniker would remain a perfunctory invocation. But the modern liberals traded balancing an individual’s interest in liberty against democratically determined social order for a realm of personal liberty which the government may not enter. Embracing this categorical approach for themselves, the modern conservatives likewise eschewed the traditional obligation to balance individual liberty against democratic authority.¹⁶⁷ But

¹⁶² *Poe v. Ullman*, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting) (“Due process has not been reduced to any formula; its content cannot be determined by reference to any code. . . . No formula could serve as a substitute, in this area, for judgment and restraint.”).

¹⁶³ *Id.* at 544 (“[T]here is no ‘mechanical yard-stick,’ no ‘mechanical answer.’”).

¹⁶⁴ *Id.* at 542.

¹⁶⁵ *Id.* at 544–45 (quoting *Rochin v. California*, 342 U.S. 165, 170–71 (1952)).

¹⁶⁶ *See, e.g.*, *Michael H. v. Gerald D.*, 491 U.S. 110, 123–24 (1989); *Bowers v. Hardwick*, 478 U.S. 186, 191–92 (1986); *Cruzan v. Dir., Mo. Dep’t of Health*, 497 U.S. 261, 304 (1990); *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 951–53 (1992) (Rehnquist, C.J., opinion); *Reno v. Flores*, 507 U.S. 292, 303 (1993); *Washington v. Glucksberg*, 521 U.S. 702, 720–21 (1997); *Cnty. of Sacramento v. Lewis*, 523 U.S. 833, 860 (1998) (Scalia, J., concurring); *Lawrence v. Texas*, 539 U.S. 558, 593, 596 (2003) (Scalia, J., dissenting); *Kerry v. Din*, 576 U.S. 86, 93 (2015) (Scalia, J., opinion); *United States v. Windsor*, 570 U.S. 744, 764 (2013); *Timbs v. Indiana*, 586 U.S. 146, 150 (2019); *Dobbs v. Jackson Women’s Health Org.*, 597 U.S. 215, 237–38 (2022).

¹⁶⁷ *See, e.g.*, Scalia, *supra* note 94, at 1178 (“When I was in law school, I was a great enthusiast for this approach—an advocate of both writing and reading the ‘holding’ of a decision narrowly, thereby leaving greater discretion to future courts. Over the years, however—and not merely the years since I have been a judge—I have found myself drawn more and more to the opposite view.”); *id.* at 1180 (“It is very difficult to say that a particular convicted felon who is the object of widespread hatred must go free because, on balance, we think that excluding the defense attorney from the line-up process in this case may have prevented a fair trial. It is easier to say that our cases plainly hold that, absent exigent circumstances, such exclusion is a per se denial of due process.”); *id.* at 1183 (“But unless such a statutory intent [to consider the ‘totality of the circumstances’] is express or clearly implied, courts properly assume that ‘categorical decisions may be appropriate and individual circumstances disregarded when a case fits into a genus in which the balance

they developed a very different criterion to determine what was *not* on the list of fundamental rights—a test for what social practices the American states could banish from the realm.

Conservatives and liberals used vestiges of our tradition to justify their breaking from it in their respective attempts to address significant controversies emerging from a rapidly changing society. In *Moore*, for example, Justice Powell invoked a portion of Justice Harlan's *Griswold* concurrence to support resorting to "history and tradition" as the touchstone for judgments about state action. "Appropriate limits on substantive due process," Powell partially quoted Harlan, "come . . . from careful 'respect for the teachings of history [and] solid recognition of the basic values that underlie our society.'"¹⁶⁸ Powell presented this truncation of Harlan's words to justify applying *Duncan*'s incorporation method in *Moore*, concealing that it was taken from Justice Harlan's argument in *Griswold against* the incorporation doctrine.¹⁶⁹ Harlan had further counseled that appropriate limits on judicial discretion would be found in "wise appreciation of the great roles that the doctrines of federalism and separation of powers have played in establishing and preserving American freedoms."¹⁷⁰ *Moore* exemplified the cut-and-paste characteristic of the modern jurisprudence.

We see this reassembling of the law in *Bowers*'s importing *Moore*'s "different description of fundamental liberties."¹⁷¹ And we see it in Justice Scalia's description in *Michael H.* of fundamental rights—those "so rooted in the traditions and conscience of our people as to be ranked as fundamental."¹⁷² The precedent Scalia quoted did not originally refer to rights at all. *Michael H.*'s redescription of the American legal tradition used a piece of Justice Cardozo's opinion for the Court from half a century earlier in *Snyder v. Massachusetts*.¹⁷³ We need only compare Justice Scalia's declaration in *Michael H.* of what the tradition required—"As we have put it, the Due Process Clause affords only those protections 'so rooted in the traditions and conscience of our people as to be ranked as fundamental'"¹⁷⁴—with what Justice Cardozo said in the opinion from which the words comprising Scalia's

characteristically tips in one direction.'" (emphasis added) (quoting U.S. Dep't of Just. v. Reps. Comm. for Freedom of the Press, 489 U.S. 749, 776 (1989))).

¹⁶⁸ *Moore v. City of E. Cleveland*, 431 U.S. 494, 503 (1977) (plurality opinion) (alteration in original) (quoting *Griswold v. Connecticut*, 381 U.S. 479, 501 (1965) (Harlan, J., concurring)).

¹⁶⁹ *See id.*

¹⁷⁰ *Griswold*, 381 U.S. at 501 (Harlan, J., concurring).

¹⁷¹ *Bowers*, 478 U.S. at 192 (citing *Moore*, 431 U.S. at 503 (plurality opinion)).

¹⁷² *Michael H. v. Gerald D.*, 491 U.S. 110, 122 (1989) (quoting *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934)).

¹⁷³ *Snyder*, 291 U.S. at 103 (presenting the issue whether "the refusal of the trial judge to permit [Defendant Snyder] to be present at a view [of the crime scene] . . . [was] a denial of due process of law under the Fourteenth Amendment of the Constitution of the United States").

¹⁷⁴ 491 U.S. at 122 (quoting *Snyder*, 291 U.S. at 105).

were taken. The Court had never put it as Justice Scalia said. The Court did not say the Constitution afforded those protections—those *rights*—“so rooted in the traditions and conscience of our people as to be ranked as fundamental.”¹⁷⁵

Snyder sat in a long line of cases in the ordered-liberty tradition. *Palko* was decided three years after *Snyder* and cited *Snyder* for the traditional analysis.¹⁷⁶ Rejecting Defendant Snyder’s argument that he was denied due process, the Court reasoned: “The Commonwealth of Massachusetts is free to regulate the procedure of its courts in accordance with its own conception of policy and fairness unless in so doing it offends some *principle of justice* so rooted in the traditions and conscience of our people as to be ranked as fundamental.”¹⁷⁷ Justice Scalia in *Michael H.* simply replaced Cardozo’s so-rooted “principle of justice” with specifically described social practices.¹⁷⁸ Between *Griswold* in 1965 and *Michael H.* in 1989, the precedent was reconfigured into the modern-conservative method eventually applied in *Dobbs* to answer whether the right to abort a fetus was an unenumerated protection that made the select list of objectively, deeply rooted constitutional rights.¹⁷⁹

It was a quick development from *Moore* to *Bowers* and then *Michael H.* In *Moore*, the family was “deeply rooted in . . . history and tradition” like the jury trial in *Duncan*.¹⁸⁰ In *Bowers*, the “fundamental right to engage in homosexual sodomy” was not.¹⁸¹ *Bowers* prompted a complete reversal from Justice White, who abandoned the traditional analysis he had defended in *Moore* and that he and Justice Harlan exemplified in their *Griswold* concurrences.¹⁸² After *Bowers* imported *Moore*’s different description of fundamental rights,¹⁸³ Justice Scalia’s *Michael H.* opinion put a finer point on the method *Bowers* exemplified, formalizing the requirement to describe substantive rights at “the most specific level” and to evaluate them, like procedural guarantees in *Duncan* and just like *Moore*, against forms of past and extant social practices in the American states.¹⁸⁴ *Michael H.* fulfilled Justice Harlan’s prophecy just as it did modern conservatism’s political agenda, and just as *Dobbs* would a mere thirty-three years later.

¹⁷⁵ *Id.* (quoting *Snyder*, 291 U.S. at 105).

¹⁷⁶ See *Palko v. Connecticut*, 302 U.S. 319, 323–25 (1937).

¹⁷⁷ *Snyder*, 291 U.S. at 105 (emphasis added) (citing *Twining v. New Jersey*, 211 U.S. 78, 106, 111, 112 (1908); *Rogers v. Peck*, 199 U.S. 425, 434 (1905); *Maxwell v. Dow*, 176 U.S. 581, 604 (1900); *Hurtado v. California*, 110 U.S. 516 (1884); *Frank v. Mangum*, 237 U.S. 309, 326 (1915); *Powell v. Alabama*, 287 U.S. 45, 67 (1932)).

¹⁷⁸ 491 U.S. at 122–23.

¹⁷⁹ *Dobbs v. Jackson Women’s Health Org.*, 597 U.S. 215, 237–38 (2022).

¹⁸⁰ *Moore v. City of E. Cleveland*, 431 U.S. 494, 503 (1977) (plurality opinion); *Duncan v. Louisiana*, 391 U.S. 145, 149 n.14, 161–62 (1968).

¹⁸¹ *Bowers v. Hardwick*, 478 U.S. 186, 191, 194 (1986).

¹⁸² See *Griswold v. Connecticut*, 381 U.S. 479, 499–501 (1965) (Harlan, J., concurring); *id.* at 502–07 (White, J., concurring); see also LUNDER, *supra* note 11, at 83–85.

¹⁸³ See 478 U.S. at 192.

¹⁸⁴ 491 U.S. at 127 n.6.

It is worth setting out here, as this Part nears its conclusion, Justice Scalia's statement of the modern-conservative method in *Michael H.*:

In an attempt to limit and guide interpretation of the [Due Process] Clause, we have insisted not merely that the interest denominated as a "liberty" be "fundamental" . . . but also that it be an interest traditionally protected by our society. As we have put it, the Due Process Clause affords only those protections "so rooted in the traditions and conscience of our people as to be ranked as fundamental." Our cases reflect "continual insistence upon respect for the teachings of history [and] solid recognition of the basic values that underlie our society. . . ." ¹⁸⁵

This hodgepodge passage exploited *Bowers*'s adoption of *Moore*'s new meaning of "history and tradition" in substantive-due-process analysis. Like Justice Powell in *Moore*, Justice Scalia omitted the third principle in Justice Harlan's triumvirate: "wise appreciation of the great roles that the doctrines of federalism and separation of powers have played in establishing and preserving American freedoms."¹⁸⁶ In Justice Scalia's formulation, a fundamental liberty worthy of constitutional status was a social practice that American society traditionally protected. Scalia misquoted Cardozo, equating Cardozo's so-rooted principles of justice with these traditionally protected social practices.¹⁸⁷ And as authority for this equation, like Justice Powell in *Moore*, Justice Scalia cited "history" and "basic values" from Justice Harlan's *Griswold* concurrence.¹⁸⁸

Just like *Bowers*, *Michael H.*, and *Glucksberg*, the *Dobbs* majority characterized the standard governing the Court's judgment in two dimensions. "The Due Process Clause of the Fourteenth Amendment," the Court said, "has been held to guarantee some rights that are not mentioned in the Constitution, but any such right must be [1] 'deeply rooted in this Nation's history and tradition' and [2] 'implicit in the concept of ordered liberty.'"¹⁸⁹ And just like *Bowers* and every other modern-conservative substantive-due-process opinion since, *Dobbs* ignored the Court's duty—an obligation deeply rooted in our legal tradition—to balance interests in

¹⁸⁵ *Id.* at 122–23 (second and third alterations in original) (first quoting *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934); and then quoting *Griswold*, 381 U.S. at 501 (Harlan, J., concurring)).

¹⁸⁶ *Griswold*, 381 U.S. at 501 (Harlan, J., concurring).

¹⁸⁷ *Michael H.*, 491 U.S. at 122–23.

¹⁸⁸ *Id.*; see LUNDER, *supra* note 11, at 116–18.

¹⁸⁹ *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215, 231 (2022) (quoting *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997)).

order and liberty in discrete cases and controversies. For modern conservatism, the Court need only decide—as an abstract intellectual exercise—if the particular *form* of social practice was already recognized in the American states as worthy of constitutional protection. *Dobbs* was nothing new. Three decades ago, modern conservatism reconfigured the tradition of reasoned judgment and its concept of ordered liberty into a list of deeply rooted social practices sanctioned via democratic imprimatur in the American states.

For modern conservatism, fundamental rights are those social practices so historically rooted in the American states that they have been traditionally—meaning, they are *already*—protected from government intrusion. “The mere novelty of . . . a claim,” the modern conservatives chanted, “is reason enough to doubt that ‘substantive due process’ sustains it.”¹⁹⁰ Just like their liberal colleagues, the modern conservatives made a test for determining whether a right, although unenumerated, was in the Constitution.¹⁹¹ It must be “objectively, deeply rooted in this Nation’s history and tradition”—a test described this way for the first time just before the turn of the twenty-first century by Chief Justice Rehnquist in *Glucksberg*.¹⁹² This was, of course, the justification in *Dobbs* for overruling *Roe v. Wade*.¹⁹³

All of this stood in stark contrast to what had come before it. The dueling twentieth-century approaches to fundamental rights bled into the twenty-first century and eclipsed a venerable decision-making tradition. This tradition respected the *process* that was *due* to someone claiming an arbitrary deprivation of liberty, at the hands of a government responding that the needs of democratic social order made *this* deprivation reasonable. The modern conservatives *and* liberals together forgot the American legal profession’s duty to participate in a process—to balance democratic

¹⁹⁰ *Reno v. Flores*, 507 U.S. 292, 303 (1993); *Glucksberg*, 521 U.S. at 723 (quoting *Flores*, 507 U.S. at 303).

¹⁹¹ *Dobbs*, 597 U.S. at 260 (“We have held that the ‘established method of substantive-due-process analysis’ requires that an unenumerated right be ‘deeply rooted in this Nation’s history and tradition’ before it can be recognized as a component of the ‘liberty’ protected in the Due Process Clause.” (quoting *Glucksberg*, 521 U.S. at 721)).

¹⁹² 521 U.S. at 703. The description of the modern-conservative method did not include the word “objectively” in the case law prior to Chief Justice Rehnquist’s 1997 opinion in *Glucksberg*. The insertion of the word reflected modern-conservatism’s choosing a metric external to federal constitutional jurisprudence, like “history and tradition” in the American states, for deciding substantive due process claims. See LUNDER, *supra* note 11, at 172.

¹⁹³ This had been the strategy all along, but it was not until 2020 that the conservatives had a solid majority committed to deploying the method. See, e.g., *Lawrence v. Texas*, 539 U.S. 558, 588 (2003) (Scalia, J., dissenting) (“But *Roe* and *Casey* have been equally ‘eroded’ by *Washington v. Glucksberg* which held that *only* fundamental rights which are ‘deeply rooted in this Nation’s history and tradition’ qualify for anything other than rational-basis scrutiny under the doctrine of ‘substantive due process.’ *Roe* and *Casey*, of course, subjected the restriction of abortion to heightened scrutiny without even attempting to establish that the freedom to abort *was* rooted in this Nation’s tradition.” (citation omitted)).

conceptions of policy and fairness against fundamental *principles of justice*.¹⁹⁴ Together they reduced an elegant tradition of reasoning to a crude inquisition: Whether an asserted right belonged in the fundamental-rights category—whether it made the list.¹⁹⁵ The conservatives steadfastly answered no in every case. The liberals had a chant of their own—autonomy and dignity¹⁹⁶—which they repeated until the “more transcendent dimension”¹⁹⁷ of “a realm of personal liberty” appeared—one the government is forbidden to enter under any circumstances.¹⁹⁸ But despite its dismissal at the hands of the moderns, the venerable praxis of the tradition of reasoned judgment is worth understanding. This is the endeavor of Part III.

III. THE TRADITION OF REASONED JUDGMENT AND ITS CONCEPT OF ORDERED LIBERTY

Justice Harlan foresaw and warned of the direction *Griswold* could take the law and the country.¹⁹⁹ His wisdom went unheeded, and the modern conservatives co-opted the words “history” and “values” from his *Griswold* concurrence to justify their new method, even as American political conservatism endeavored to own the very notion of tradition.²⁰⁰ But the tradition of reasoned judgment of the premodern era was well-suited to resolve the very controversies around which the moderns developed substantive due process. Unlike the modern approaches to fundamental

¹⁹⁴ See, e.g., *Irvine v. California*, 347 U.S. 128, 147 (1954) (Frankfurter, J., dissenting).

Since due process is not a mechanical yardstick, it does not afford mechanical answers. In applying the Due Process Clause judicial judgment is involved in an empiric process in the sense that results are not predetermined or mechanically ascertainable. But that is a very different thing from conceiving the results as *ad hoc* decisions in the opprobrious sense of *ad hoc*. Empiricism implies judgment upon variant situations by the wisdom of experience. *Ad hocness* in adjudication means treating a particular case by itself and not in relation to the meaning of a course of decisions and the guides they serve for the future. There is all the difference in the world between disposing of a case as though it were a discrete instance and recognizing it as part of the process of judgment, taking its place in relation to what went before and further cutting a channel for what is to come.

Id.

¹⁹⁵ See *id.* (“The effort to imprison due process within tidy categories misconceives its nature and is a futile endeavor to save the judicial function from the pains of judicial judgment.”).

¹⁹⁶ See, e.g., *Moore v. City of E. Cleveland*, 431 U.S. 494, 499 (1977) (plurality opinion); *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 847 (1992); *Lawrence*, 539 U.S. at 572.

¹⁹⁷ *Lawrence*, 539 U.S. at 562.

¹⁹⁸ *Id.* at 578 (citing *Casey*, 505 U.S. at 847); see also LUNDER, *supra* note 11, at 244–45.

¹⁹⁹ See *Griswold v. Connecticut*, 381 U.S. 479, 500–01 (1965) (Harlan, J., concurring).

²⁰⁰ Compare *id.*, with *Michael H. v. Gerald D.*, 491 U.S. 110, 122–24 (1989).

rights, the concept of ordered liberty is deeply rooted in the American political tradition and evident in its deepest legal history.²⁰¹ In his *Griswold* concurrence, Justice Harlan counseled respecting the teachings of history and recognizing basic values—the deeply rooted principles of the American political tradition—in juxtaposing the traditional analysis against Justice Douglas’s penumbral incorporation.²⁰² But just as Justice Cardozo’s “concept of ordered liberty” became a meaningless moniker attached to substantive due process,²⁰³ Justice Harlan’s words became fodder for the modern-conservative’s deeply rooted-in-history-and-tradition test, whose pedigree is short relative to the tradition from which it took those words.²⁰⁴

The notion that America’s organic law protected persons’ basic liberties was of course not new in the mid-twentieth century.²⁰⁵ But the modern treatment of the notion reflected the pragmatism of the late-nineteenth and twentieth centuries.²⁰⁶

²⁰¹ See LUNDER, *supra* note 11, at xiii (“But seven centuries of due-process jurisprudence preceded the modern liberal and conservative personal-liberty doctrines, over 100 years of which was American federal jurisprudence. Throughout it, the voices of great jurists remind us that there is a coherent and principled practice for resolving controversies about legislative interference with basic liberties. And within this tradition, we discover the origin of the due-process guarantee: The Concept of Ordered Liberty.”).

²⁰² *Griswold*, 381 U.S. at 501–02 (Harlan, J., concurring).

²⁰³ See, e.g., *Dobbs v. Jackson Women’s Health Org.*, 597 U.S. 215, 231 (2022) (quoting *Washington v. Glucksberg*, 521 U.S. 702, 702 (1997)).

²⁰⁴ See *Michael H.*, 491 U.S. at 122–23; *Dobbs*, 597 U.S. at 240 (“On occasion, when the Court has ignored the ‘[a]ppropriate limits’ imposed by ‘respect for the teachings of history’ it has fallen into the freewheeling judicial policymaking that characterized discredited decisions” (quoting *Moore v. City of E. Cleveland*, 431 U.S. 494, 503 (1977) (plurality opinion))).

²⁰⁵ See, e.g., *Corfield v. Coryell*, 6 F. Cas. 546, 551–52 (C.C.E.D. Pa. 1823) (No. 3,230).

We feel no hesitation in confining these expressions to those privileges and immunities which are, in their nature, fundamental; which belong, of right, to the citizens of all free governments; and which have, at all times, been enjoyed by the citizens of the several states which compose this Union, from the time of their becoming free, independent, and sovereign. What these fundamental principles are, it would perhaps be more tedious than difficult to enumerate. They may, however, be all comprehended under the following general heads: Protection by the government; the enjoyment of life and liberty, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety; subject nevertheless to such restraints as the government may justly prescribe for the general good of the whole.

Id.

²⁰⁶ *Griswold*, 381 U.S. at 499–500 (Harlan, J., concurring). As explained above, *see supra* notes 45–51 and accompanying text, penumbral incorporation had undeniable appeal to twentieth century pragmatism—just as the Court could decide in a single opinion that a criminal procedural requirement enshrined in the Bill of Rights (and the federal courts’ interpretation of what it demanded) applied in every state court in America, it could impose categorical limitations on the states’ substantive legislative options via the same doctrine.

Incorporation—total, selective, and penumbral—was a recent innovation relative to the American due-process tradition. That tradition’s origin was medieval—the English Magna Carta’s “subordinat[ing] political authority to law.”²⁰⁷ This principle was already assimilated into the common law the colonists brought to the New World.²⁰⁸ It was applied and developed in early American state courts,²⁰⁹ and then

²⁰⁷ See EDWARD S. CORWIN, *LIBERTY AGAINST GOVERNMENT: THE RISE, FLOWERING AND DECLINE OF A FAMOUS JUDICIAL CONCEPT* 22–23 (1948); *id.* at 25 (“[Magna Carta’s] quality as higher law binding in some sense upon government in all its phases steadily strengthened until it becomes possible to look upon it in the fourteenth century as something very like a written constitution in the modern understanding.”); F.W. MAITLAND, *THE CONSTITUTIONAL HISTORY OF ENGLAND: A COURSE OF LECTURES DELIVERED 15–16* (1908) (“Now Magna Carta came to be reckoned as the beginning of English statute law The lawyers of the later middle ages had no occasion to go behind that instrument; the earlier ordinances so far as they had not become obsolete had worked themselves into the common law; but every word of the charter was still of great importance.”); see also *Hurtado v. California*, 110 U.S. 516, 531–32 (1884).

In this country written constitutions were deemed essential to protect the rights and liberties of the people against the encroachments of power delegated to their governments, and the provisions of Magna Charta were incorporated into Bills of Rights. They were limitations upon all the powers of government, legislative as well as executive and judicial.

It necessarily happened, therefore, that as these broad and general maxims of liberty and justice held in our system a different place and performed a different function from their position and office in English constitutional history and law, they would receive and justify a corresponding and more comprehensive interpretation. Applied in England only as guards against executive usurpation and tyranny, here they have become bulwarks also against arbitrary legislation; but, in that application, as it would be incongruous to measure and restrict them by the ancient customary English law, *they must be held to guarantee, not particular forms of procedure, but the very substance of individual rights to life, liberty, and property.*

Hurtado, 110 U.S. at 531–32 (emphasis added).

²⁰⁸ See, e.g., *Bonham’s Case*, 77 Eng. Rep. 638, 647 (1610) (“And it appears in our Books, that in many Cases, the Common Law will control Acts of Parliament, and sometimes shall adjudge them to be void: for when an Act of Parliament is against Common right and reason, or repugnant, or impossible to be performed, the Common Law will control it, and adjudge such Act to be void . . .”).

²⁰⁹ See, e.g., *Norwich Gas Light Co. v. Norwich City Gas Co.*, 25 Conn. 19, 19 (1856); see also *Slaughter-House Cases*, 83 U.S. 36, 89 (1873) (Field, J., dissenting) (looking to *Norwich*—a pre-war state case—when determining how “the recent amendments to the Federal Constitution protect the citizens of the United States against the deprivation of their common rights by State legislation”); *id.* at 110–11 (“As stated by the Supreme Court of Connecticut [in *Norwich*] . . . grants of exclusive privileges, such as is made by the act in question, are opposed to the whole theory of free government, and it requires no aid from any bill of rights to render them void. That only is a free government, in the American sense of

expressed in American federal jurisprudence long before the Civil War and the Reconstruction Amendments.²¹⁰ According to the tradition, organic civil rights derived from an idea²¹¹—“[t]he fundamental theory of liberty upon which all governments in this Union repose.”²¹²

This theory of liberty included a principle of justice applied to exercises of legislative power. An unreasonable interference with an individual’s basic liberty—even an interference sanctioned via regular democratic process—was against the

the term, under which the inalienable right of every citizen to pursue his happiness is unrestrained, except by just, equal, and impartial laws.”); *Lawton v. Steele*, 152 U.S. 133, 136–37 (1894).

The extent and limits of what is known as the police power have been a fruitful subject of discussion in the appellate courts of nearly every State in the Union. It is universally conceded to include everything essential to the public safety, health, and morals, and to justify the destruction or abatement, by summary proceedings, of whatever may be regarded as a public nuisance. . . . Beyond this, however, the State may interfere wherever the public interests demand it, and in this particular a large discretion is necessarily vested in the legislature to determine, not only what the interests of the public require, but what measures are necessary for the protection of such interests. To justify the State in thus interposing its authority in behalf of the public, it must appear, first, that the interests of the public generally, as distinguished from those of a particular class, require such interference; and, second, that the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals. The legislature may not, under the guise of protecting the public interests, arbitrarily interfere with private business, or impose unusual and unnecessary restrictions upon lawful occupations. In other words, its determination as to what is a proper exercise of its police powers is not final or conclusive, but is subject to the supervision of the courts.

Lawton, 152 U.S. at 136–37 (citation omitted).

²¹⁰ See, e.g., *Fletcher v. Peck*, 10 U.S. 87, 128 (1810) (striking down a state’s unreasonable interference with property as a violation of due process); *Corfield*, 6 F. Cas. at 551 (discussing the “fundamental principles” of “all free governments”); see also *Washington v. Glucksberg*, 521 U.S. 702, 758 (1997) (Souter, J., concurring) (explaining that in *Fletcher* Chief Justice John Marshall had “rested the invalidation” of the statute “on alternative sources of authority,” including “general principles which are common to our free institutions”).

²¹¹ See *The Future of Man in the Electric Age*, MARSHALL McLuhan SPEAKS SPECIAL COLLECTION, at 02:39 (1965), <https://marshall-mcluhan-speaks.com/interviews/the-future-of-man-in-the-electric-age> [<https://perma.cc/UCT4-ZYC3>] (“[B]ut in our own western world, the rise of the phonetic alphabet seems to have had much to do with platonic culture and the ordering of experience in terms of ideas . . . classifying data and experience by ideas.”). Forthcoming work explores how the twentieth-century substantive-due-process doctrine conformed to the technological appetite of the informational environment in which the doctrine developed.

²¹² *Poe v. Ullman*, 367 U.S. 497, 543–44 (1961) (Harlan, J., dissenting) (quoting *Pierce v. Soc’y of Sisters*, 268 U.S. 510, 535 (1925)).

rule of law.²¹³ In America, governments were democratic—sovereignty had been wrested from a monarch and vested in the people. The people would make their own laws, but the reason for having governments at all was to secure each person’s basic liberty against arbitrary exercises of sovereign authority.²¹⁴ This was why people had come to the New World. In America, the people could rest assured that their basic freedoms would be preserved even as social order was established via democracy. An arbitrary legislative infringement of an individual’s basic liberty must be against the law. “Arbitrary power, enforcing its edicts to the injury of the persons and property of its subjects, is not law, whether manifested as the decree of a personal monarch or of an impersonal multitude.”²¹⁵

The guarantee of due process applied this principle of justice. Due process “represented the balance which our Nation, built upon postulates of respect for the liberty of the individual, has struck between that liberty and the demands of organized society.”²¹⁶

This balancing of order and liberty was a dynamic legal feature of American democracy—one suitable to a rapidly changing nation in which novel claims to liberty inevitably arose. The fledgling American Nation had not merely substituted majority rule for monarchy and its penchant for tyranny. It chose self-government as the means to establish social order. But it did so within a legal paradigm that imposed limitations on majority rule. The people consented to American democracy because it promised to secure each person’s liberty.²¹⁷

The due-process guarantee implemented an original concept of American governments, testing the validity of legislative resolutions of the tension between the states’ interests in maintaining social order and individuals’ interests in liberty.²¹⁸ In

²¹³ See, e.g., *Calder v. Bull*, 3 U.S. 386, 388 (1798) (“There are certain vital principles in our free Republican governments, which will determine and over-rule an apparent and flagrant abuse of legislative power; as to authorize manifest injustice by positive law; or to take away that security for personal liberty, or private property, for the protection whereof the government was established. An Act of the Legislature (for I cannot call it a law) contrary to the great first principles of the social compact, cannot be considered a rightful exercise of legislative authority.” (emphasis omitted)).

²¹⁴ See, e.g., THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) (“That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed.”).

²¹⁵ *Hurtado v. California*, 110 U.S. 516, 536 (1884).

²¹⁶ *Poe*, 367 U.S. at 542 (Harlan, J., dissenting).

²¹⁷ LUNDER, *supra* note 11, at 4.

²¹⁸ See *id.* at 23 (“The States were free to govern themselves democratically, but the federal courts could review for arbitrariness the balance they struck between maintaining social order and respecting the basic liberties of individuals.”).

controversies where individual liberty challenged democratic authority, the tradition demanded that the *process*—judicial *and* legislative—afforded to persons with whose freedom an American democratic resolution interfered, *substantiated* their basic liberties.²¹⁹

In the late-nineteenth and early twentieth centuries, a lineage of federal jurists recognized the Fourteenth Amendment's due-process guarantee as yet another textual distillation of this extant basic value underlying American society. A political majority could not simply claim, "we are the government," to justify violating a person's basic liberty, because the purpose of American governments in the first instance was to protect essential freedoms from this very abuse.²²⁰ Unlike the modern approaches to personal-liberty claims, this value did not originate with a spatial metaphor connecting unenumerated rights to specific provisions of the Constitution. Nor did it conflate constitutionally protected liberties with a list of social practices of which democratic majorities in the states already approved. The jurists who honored this value found the praxis implementing it in the American legal tradition's deepest precedent—in the common-law justifications resolving discrete cases and controversies.²²¹ Even as the pragmatic appeal of incorporation prevailed in the mid-twentieth century, these jurists invoked this deeply rooted American tradition when adjudicating questions of liberty against government. The tradition was expressly recognized in the jurisprudence until just before the turn of the twenty-first century.²²²

²¹⁹ *Id.* at 118 ("The due-process guarantee substantiated the so-rooted principle that a political majority, in choosing the means to effectuate its social policies, could not unreasonably interfere with a fellow citizen's basic liberty. States were free to enact their own laws, unless in applying them they violated a basic liberty without a reasonable (non-arbitrary) justification. But this conception of American law was directly contrary to the positivist position of modern conservatism."); *id.* at 54 ("The process—legislative or judicial—due those who consented to American democracy substantiated their basic liberties.").

²²⁰ *Id.* at 242. *See generally id.* at 1–32 (Chapter 1 entitled "A Bulwark Against Arbitrary Legislation").

²²¹ *See, e.g., Poe*, 367 U.S. at 544–45 (Harlan, J., dissenting).

Each new claim to Constitutional protection must be considered against a background of Constitutional purposes, as they have been rationally perceived and historically developed. . . . The matter was well put in *Rochin v. California*: "The vague contours of the Due Process Clause do not leave judges at large. We may not draw on our merely personal and private notions and disregard the limits that bind judges in their judicial function. Even though the concept of due process of law is not final and fixed, these limits are derived from considerations that are fused in the whole nature of our judicial process. . . . These are considerations deeply rooted in reason and in the compelling traditions of the legal profession."

Id. (quoting 342 U.S. 165, 170–71 (1952)).

²²² *See Washington v. Glucksberg*, 521 U.S. 702, 765 (1997) (Souter, J., concurring) ("My understanding of unenumerated rights in the wake of the *Poe* dissent and subsequent cases

The tradition demanded “examining the concrete application of principles for fitness with their own ostensible justifications.”²²³ If implementing a state social policy impacted a person’s basic liberty, the legislative judgment was “not immune to distinctions turning . . . on the precise purpose being pursued and the collateral consequences of the means chosen.”²²⁴ A dyadic analysis—each part corresponding to one aspect of the concept of ordered liberty—prescribed how to evaluate these distinctions in light of the arguments proffered for them. A litigant claiming an illegal deprivation of freedom would have to show that a basic liberty was at stake—that the liberty for which they sought protection was one fundamental to the “theory of liberty upon which all governments in the Union repose[d].”²²⁵ If a litigant could meet this threshold, the state would have to withstand scrutiny of the reasons it proffered for the interference in *this* case.²²⁶ The state would have to offer a reasonable justification for its interference—to show that it pursued a legitimate legislative objective and that the means it deployed to accomplish it had not arbitrarily impacted a basic liberty.²²⁷

avoids the absolutist failing of many older cases without embracing the opposite pole of equating reasonableness with past practice described at a very specific level. That understanding begins with a concept of ‘ordered liberty,’ comprising a continuum of rights to be free from ‘arbitrary impositions and purposeless restraints.’” (citation omitted) (quoting *Poe*, 367 U.S. at 549, 543 (Harlan, J., dissenting)); *id.* at 770 (“It is here that the value of common-law method becomes apparent, for the usual thinking of the common law is suspicious of the all-or-nothing analysis that tends to produce legal petrification instead of an evolving boundary between the domains of old principles. Common-law method tends to pay respect instead to detail, seeking to understand old principles afresh by new examples and new counter-examples.”); *see also* LUNDER, *supra* note 11, at 145–66 (explicating Justice Souter’s *Glucksberg* concurrence).

²²³ *Glucksberg*, 521 U.S. at 773 (Souter, J., concurring).

²²⁴ *Id.* at 772.

²²⁵ *Pierce v. Soc’y of Sisters*, 268 U.S. 510, 535 (1925); *see, e.g., Lochner v. New York*, 198 U.S. 45, 68 (1905) (Harlan, J., dissenting) (“[W]hen the validity of a statute is questioned, the burden of proof, so to speak, is upon those who assert it to be unconstitutional.”).

²²⁶ *See Hurtado v. California*, 110 U.S. 516, 530 (1884) (“Sir James Mackintosh ascribes this principle of development to Magna Charta itself. To use his own language: ‘It was a peculiar advantage that the consequences of its principles were, if we may so speak, only discovered slowly and gradually. It gave out on each occasion only so much of the spirit of liberty and reformation as the circumstances of succeeding generations required and as their character would safely bear. For almost five centuries it was appealed to as the decisive authority on behalf of the people, though commonly so far only as the necessities of each case demanded.’” (citation omitted)); LUNDER, *supra* note 11, at 209.

²²⁷ If the litigant claiming a deprivation of liberty did *not* meet the threshold requirement—if the liberty at stake was *not* one demanding a “particularly careful scrutiny of the state needs asserted to justify [its] abridgment,” *Poe*, 367 U.S. at 543 (Harlan, J., dissenting), “the Court would not supplant the judgment of the legislature” if “a plausible explanation reasonably connected a proper legislative goal to the means chosen to accomplish it.” LUNDER, *supra* note 11, at 43 (explaining the “presumption-of-constitutionality” principle as applied in *United States v. Carolene Products Co.*, 304 U.S. 144 (1938)).

This ordered-liberty analysis is “fairly traceable” in Fourteenth Amendment jurisprudence to Justice Joseph Bradley’s 1872 dissent in *The Slaughter-House Cases*.²²⁸ The question was whether Louisiana, along with regulating the location of all slaughtering of animals—in one slaughterhouse downstream of New Orleans—could charter the corporation comprising seventeen persons that would build and exclusively own the operation.²²⁹ Butchers’ unions challenged the law as an illegal deprivation of liberty—as an impermissible interference with the freedom of abattoir workers to make a living according to their trade.²³⁰ Justice Bradley “said that a person’s right to choose a calling was an element of liberty . . . and declared that the liberty . . . protected by due process [was] not truly recognized if [it] may be ‘arbitrarily assailed.’”²³¹ The right to make a living according to one’s trade was a basic liberty,²³² and Bradley scrutinized the as-applied consequences of the law in light of

²²⁸ 83 U.S. 36 (1873); see *Glucksberg*, 521 U.S. at 759 (Souter, J., concurring) (“After the ratification of the Fourteenth Amendment, with its guarantee of due process protection against the States, interpretation of the words ‘liberty’ and ‘property’ as used in Due Process Clauses became a sustained enterprise, with the Court generally describing the due process criterion in converse terms of reasonableness or arbitrariness. That standard is fairly traceable to Justice Bradley’s dissent in the *Slaughter-House Cases*”); LUNDER, *supra* note 11, at 70.

²²⁹ *Slaughter-House Cases*, 83 U.S. at 38–43.

²³⁰ *Id.* at 60.

This statute is denounced not only as creating a monopoly and conferring odious and exclusive privileges upon a small number of persons at the expense of the great body of the community of New Orleans, but it is asserted that it deprives a large and meritorious class of citizens—the whole of the butchers of the city—of the right to exercise their trade, the business to which they have been trained and on which they depend for the support of themselves and their families; and that the unrestricted exercise of the business of butchering is necessary to the daily subsistence of the population of the city.

Id.

²³¹ *Glucksberg*, 521 U.S. at 759 (Souter, J., concurring) (quoting *Slaughter-House Cases*, 83 U.S. at 116 (Bradley, J., dissenting)); *Slaughter-House Cases*, 83 U.S. at 116 (Bradley, J., dissenting) (“Liberty and property are not protected where these rights are arbitrarily assailed.”).

²³² *Slaughter-House Cases*, 83 U.S. at 116 (Bradley, J., dissenting) (“For the preservation, exercise, and enjoyment of these rights [to life, liberty, and property] the individual citizen, as a necessity, must be left free to adopt such calling, profession, or trade as may seem to him most conducive to that end. Without this right he cannot be a freeman. This right to choose one’s calling is an essential part of that liberty which it is the object of government to protect; and a calling, when chosen, is a man’s property and right.”); see also *id.* at 93 (Field, J., dissenting) (“The provisions of the [F]ourteenth [A]mendment, which is properly a supplement to the [T]hirteenth, cover, in my judgment, the case before us, and inhibit any legislation which confers special and exclusive privileges like these under consideration. The [A]mendment was adopted to obviate objections which had been raised and pressed with great force to the validity of the Civil Rights Act [of 1866], and to place the common rights of American citizens under the protection of the National government.”).

the state's justification—protecting the health of the city of New Orleans and adjacent parishes. He concluded:

That portion of the act which requires all slaughter-houses to be located below the city, and to be subject to inspection, etc., is clearly a police regulation. That portion which allows no one but the favored company to build, own, or have slaughter-houses is not a police regulation, and has not the faintest semblance of one. It is one of those arbitrary and unjust laws made in the interest of a few scheming individuals²³³

The means the state deployed for accomplishing its public health objective could not withstand scrutiny under the state's own justification for them. There was no connection between giving the abattoir business to seventeen persons and protecting the health of the city.²³⁴ This aspect of the law was an arbitrary (*i.e.*, unreasonable) and therefore illegal deprivation of workers' liberty.²³⁵

Six years later in *Hurtado v. California*, Justice Matthews authored the Court's opinion analyzing whether California could charge a criminal defendant on information rather than on indictment or presentment to a grand jury.²³⁶ Matthews evaluated the means chosen to charge Hurtado with criminal offenses, and found safeguards sufficient to defeat Hurtado's claim that he was denied due process.²³⁷ "The substitution for a presentment or indictment by a grand jury of the proceeding by information," Matthews explained, only happened "after examination and commitment by a magistrate, certifying to the probable guilt of the defendant, with the right on his part to the aid of counsel, and to the cross-examination of the witnesses produced for the prosecution"²³⁸ The Court was "unable to say" this was "not due process of law."²³⁹ The dissents in *Slaughter-House Cases* and *Hurtado*, taken together, showed that the analysis under the liberty provision of the Due Process Clause, for what we now call substantive (*Slaughter-House Cases*) and procedural (*Hurtado*) cases, was the same.²⁴⁰

²³³ *Id.* at 120 (Bradley, J., dissenting); *see id.* at 87–88 (Field, J., dissenting); *see also* LUNDER, *supra* note 11, at 12–13 (analyzing Justice Stephen Field's dissent in *Slaughter-House Cases*).

²³⁴ *Slaughter-House Cases*, 83 U.S. at 120 (Bradley, J., dissenting); *id.* at 87 (Field, J., dissenting) (concluding the act regulating slaughterhouses was "a mere grant to a corporation created by it of special and exclusive privileges by which the health of the city is in no way promoted").

²³⁵ *Id.* at 120 (Bradley, J., dissenting); *see also id.* at 87–88 (Field, J., dissenting).

²³⁶ 110 U.S. 516 (1884).

²³⁷ *Id.* at 538.

²³⁸ *Id.*

²³⁹ *Id.*

²⁴⁰ *See* LUNDER, *supra* note 11, at 23 ("Whether evaluating substantive legislation alleged to deprive persons of basic liberties without due process (as in the *Slaughter-House* dissents),

The due-process tradition maintained the holism of its medieval origins. The tradition preceded by centuries the modern print-era inclination toward high abstraction and corresponding spatial-visual metaphors for analysis.²⁴¹ Whether a law allegedly infringing a basic liberty required a procedural or substantive analysis was not a question capable of asking until the mid-twentieth century—until after *Duncan* introduced it.²⁴² *Griswold* was the catalyst for the bifurcation in *Duncan*, having melded together the doctrines of incorporation and fundamental rights: The Bill of Rights anchored a zone of privacy to the Constitution, and within the zone were important unenumerated rights the Fourteenth Amendment enforced against the states.²⁴³ But the tradition's premodern sensibility did not distribute the guarantee into conceptual geometric relationships like this. The difference between procedural and substantive *claims* may in hindsight be evident in the jurisprudence before *Griswold*, but two distinct analyses for evaluating them was a late innovation.²⁴⁴ Before the *Duncan* distinction, the traditional analysis was the same whether a claim was procedural or substantive.²⁴⁵ The fragmentation of due process was a twentieth-century happening.²⁴⁶

or criminal procedures ostensibly suffering from the same defect (as in *Hurtado*), the answer to the question of whether a State transgressed the limits of its reserved powers lay in the common-law tradition of arbitrariness review.”).

²⁴¹ See *A Rare Recording of Marshall McLuhan*, at 3:07 (Aug. 6, 2018) (available as audiobook only) (“[I]n any of the media, . . . there’s always a big hidden ground that is usually concealed by the program.”). Forthcoming work will elaborate how the substantive-due-process jurisprudence, like all modern American jurisprudence, illustrated the habits of a twentieth-century intellect under the influence of four hundred years of print-mediated culture, confronting the consequences of an electric (and an emerging electrodigital) informational environment.

²⁴² *Duncan v. Louisiana*, 391 U.S. 145 (1968); see *supra* Section II.B.1.

²⁴³ See *Griswold v. Connecticut*, 381 U.S. 479, 484–85 (1965); *supra* notes 38–46 and accompanying text.

²⁴⁴ See *Duncan*, 391 U.S. at 145.

²⁴⁵ See LUNDER, *supra* note 11, at 22–23 (comparing Justices Field’s and Bradley’s *Slaughter-House Cases* dissents to Justice Matthews’s opinion for the Court in *Hurtado*).

²⁴⁶ See H.J. CHAYTOR, *FROM SCRIPT TO PRINT: AN INTRODUCTION TO MEDIEVAL VERACULAR LITERATURE* 1 (1967).

The breadth of the gulf which separates the age of manuscript from the age of print is not always, nor fully, realised by those who begin to read and criticise medieval literature. When we take up a printed edition of a medieval text . . . we bring unconsciously to its perusal those prejudices and prepossessions which years of association with printed matter has made habitual. . . [I]f a fair judgment is to be passed upon literary works belonging to the centuries before printing was invented, some effort must be made to realise the extent of the prejudices under which we have grown up, and to resist the involuntary demand that medieval literature must conform to our standards of taste . . .

Id.

So in *Palko v. Connecticut*, when Justice Cardozo scrutinized the Connecticut law giving appeal rights to the state in pursuit of an error-free trial, he rejected, like Justice Matthews in *Hurtado*, an early incorporation argument.²⁴⁷ And like *Hurtado*, *Palko* applied the same principle of the *Slaughter-House Cases* dissents: “[T]he legislative judgment, if oppressive and arbitrary, may be overridden by the courts.”²⁴⁸ Thus in Justice Harlan’s *Poe* dissent, it was enough that “neither [Connecticut’s] brief, nor its argument, nor anything in any of the opinions of its highest court in these or other cases even remotely suggests a justification for the obnoxiously intrusive means it has chosen to effectuate [its anti-contraception] policy.”²⁴⁹ For its choice of means the State proffered no reasons.²⁵⁰ The law’s application unreasonably interfered with a basic liberty.²⁵¹ It was a “substantial arbitrary imposition[]” the due-process guarantee prohibited.²⁵² Despite Justice White’s commitment to the tradition in his *Griswold* concurrence,²⁵³ he abandoned his advocacy for it when *Bowers* reached the Court.²⁵⁴ Justice Souter’s concurring opinion in *Glucksberg* remains the most recent example of the premodern tradition’s resolving a current controversy.²⁵⁵

The tradition evaluated the resolution of the tension between democratic and individual interests—in actual controversies—within the uniquely American political design. States must be free to establish order through democratic processes, but law was not whatever a political majority decided.²⁵⁶ Majorities in America were as subject to the principle of Magna Carta as the monarchy of late-medieval England.²⁵⁷ The purpose of American governments was that of all free governments—to secure

²⁴⁷ 302 U.S. 319, 323, 328 (1937); see *supra* notes 113–20 and accompanying text.

²⁴⁸ 302 U.S. at 327.

²⁴⁹ *Poe v. Ullman*, 367 U.S. 497, 554 (1961) (Harlan, J., dissenting).

²⁵⁰ *Id.*

²⁵¹ *Id.* at 555.

²⁵² *Id.* at 543.

²⁵³ *Griswold v. Connecticut*, 381 U.S. 479, 505–07 (1965) (White, J., concurring); see *supra* notes 54, 182 and accompanying text.

²⁵⁴ See *Bowers v. Hardwick*, 478 U.S. 186, 192 (1986); see also *supra* notes 149–54 and accompanying text.

²⁵⁵ See *Washington v. Glucksberg*, 521 U.S. 702, 764 (Souter, J., concurring); LUNDER, *supra* note 11, at 160 (“Justice Souter had completed the canon of twentieth-century due-process precedent. *Palko*, *Poe*, and *Glucksberg* now contained and illuminated the common-law tradition of arbitrariness review. *Palko* presented the moral philosophy and named the concept of ordered liberty. *Poe* provided the first modern example, explaining and elaborating the analysis. And *Glucksberg* demonstrated that attention to the details of each particular controversy informed the proper juxtaposition of contending claims, in turn calibrating their levels of generality and driving the analysis to a conclusion via authentic judicial restraint—one born of a deep and abiding respect for institutional integrity.”).

²⁵⁶ See *Calder v. Bull*, 3 U.S. 386, 388 (1798); *Hurtado v. California*, 110 U.S. 516, 536 (1884).

²⁵⁷ See *Slaughter-House Cases*, 83 U.S. 36, 114–15 (1873) (Bradley, J., dissenting).

the basic liberties of individuals against arbitrary power.²⁵⁸ So the supreme law necessarily limited the power that majorities wielded to make their own temporal laws. It demanded that a counter-majoritarian principle—the “liberty” aspect of the ordered-liberty concept—be honored in the processes through which the states established social order.²⁵⁹ The rule of law in America was a non-positivist ideal.²⁶⁰ It presupposed that free individuals could not consent to live under a government where the mere will of the sovereign—mere majoritarian preference—justified violating their basic liberties.²⁶¹

The judicial process implementing the theory recognized “what a reasonable and sensitive judgment must,” that some individual interests deserved careful review of the majoritarian action allegedly interfering with them.²⁶² Not because when reified these interests sufficiently resembled some abstract and objective criterion. The tradition required neither natural law nor deeply rooted social practices to adjudicate these claims.²⁶³ Instead, an allegation that a majority unreasonably infringed a sacred liberty triggered a court’s obligation to determine whether to subject the allegedly offending state action “to more exacting judicial scrutiny”²⁶⁴ because it could have

²⁵⁸ See *Butchers’ Union Co. v. Crescent City Co.*, 111 U.S. 746, 757 (1884) (Field, J., concurring) (noting that The Declaration of Independence set forth “certain inalienable rights . . . ‘and that among these are life, liberty, and the pursuit of happiness, and to secure these’—not grant them, but secure them—‘governments are instituted among men, deriving their just powers from the consent of the governed’” (quoting THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776))).

²⁵⁹ See LUNDER, *supra* note 11, at 55.

²⁶⁰ In Randy E. Barnett’s *Who’s Afraid of Unenumerated Rights?*, Barnett defines positivism as meaning “that statutes enacted by popularly-elected legislatures are laws *binding* on judges, unless they violate an express prohibition in a popularly-enacted constitution.” Randy E. Barnett, *Who’s Afraid of Unenumerated Rights?*, 9 U. PA. J. CONST. L. 1, 5–6 (2006). Barnett notes the early shift in American law toward a positivist perspective as American lawyers embraced the influence of Blackstone and his conception of sovereignty, and as some argued for the legality of slavery. *Id.* at 9–11. But he notes as well that as late as the 1940s “opinions about the proper role of judges were still fluid enough” that a non-positivist approach “was still possible.” *Id.* at 11; see also ROBERT M. COVER, *JUSTICE ACCUSED: ANTISLAVERY AND THE JUDICIAL PROCESS* 8–30 (1975) (explaining the connection between the tradition of positivism and the expectation that judges should be will-less actors whose only appropriate role is to enforce extant positive law).

²⁶¹ See *Hurtado*, 110 U.S. at 536 (“Arbitrary power, enforcing its edicts to the injury of the persons and property of its subjects, is not law, whether manifested as the decree of a personal monarch or of an impersonal multitude.”).

²⁶² *Poe v. Ullman*, 367 U.S. 497, 543 (1961) (Harlan, J., dissenting).

²⁶³ See LUNDER, *supra* note 11, at 74 (“[Harlan’s *Poe* dissent] was a model of restraint that found meaningful limits on judicial discretion in the common-law practice of arbitrariness review. Harlan eschewed the ease of the incorporation doctrine in favor of fidelity to reasoned judgment. There was no appeal to natural law here, and his opinion announced no unenumerated fundamental right. It did the work of common-law judging, and concluded the law as applied in this case was unreasonable.”).

²⁶⁴ See *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938); LUNDER,

violated a fundamental principle of justice. One “so rooted in the traditions and conscience of [the American] people as to be ranked as fundamental”²⁶⁵; arbitrary government infringement of an individual’s basic liberty was an *ultra vires* act. Governments in America did not have authority the people had not given them. Legislatures could not make laws contrary to the purposes for having legislatures—the purposes for which, according to our tradition, we enter into society.²⁶⁶ “A judge’s obligation in these cases was to determine whether a particular application of majoritarian will impermissibly impinged the liberty of an individual, who, along with every member of the majority, consented to a system of self-government that promised to secure basic liberties against arbitrary majoritarian invasion.”²⁶⁷

The tradition actualized a principle of justice deeply rooted in our nation’s history and tradition.²⁶⁸ All individuals submit to majority rule assured their basic liberties will be protected from the majority when they are not in it. The tradition of reasoned judgment honored this “basic value[] . . . underly[ing] our society.”²⁶⁹ Each person consented to limit the implementation of their own immediate interests when they were in a majority, in the interest of everyone, because each was likely to be in a minority sometimes.²⁷⁰ Understanding this value required careful “respect for the teachings of history.”²⁷¹ Maintaining it required “wise appreciation of the great roles that the doctrines of federalism and separation of powers have played in establishing and preserving American freedoms.”²⁷² These were “considerations deeply rooted in reason and in the compelling traditions of the legal profession.”²⁷³ These eloquent and densely meaningful words became mere trappings for each side in arguments about what rights would be categorized as fundamental in modern America.

Modern conservatism rejected the tradition of reasoned judgment and embraced a majoritarian-positivist ideology.²⁷⁴ The Constitution protected rights against state

supra note 11, at 44 (“Even as it adopted a deferential post-*Lochner*-Era position with respect to legislatures, the Court in footnote 4 unmistakably repudiated the *Slaughter-House* majority’s conclusion that in post-Reconstruction America the federal courts had no role in protecting essential civil liberties.”).

²⁶⁵ *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934).

²⁶⁶ *See Calder v. Bull*, 3 U.S. 386, 388 (1798).

²⁶⁷ LUNDER, *supra* note 11, at 55.

²⁶⁸ *See Palko v. Connecticut*, 302 U.S. 319, 327 (1937).

²⁶⁹ *Griswold v. Connecticut*, 381 U.S. 479, 501 (1965) (Harlan, J., concurring).

²⁷⁰ *See THE FEDERALIST* NOS. 10, 51 (James Madison).

²⁷¹ *Griswold*, 381 U.S. at 501 (Harlan, J., concurring).

²⁷² *Id.*

²⁷³ *Rochin v. California*, 342 U.S. 165, 171 (1952).

²⁷⁴ *Cf. JIMENA CANALES, THE PHYSICIST & THE PHILOSOPHER: EINSTEIN, BERGSON, AND THE DEBATE THAT CHANGED OUR UNDERSTANDING OF TIME* 154 (2015) (“Logical positivism was a heterogeneous movement with many facets. . . . Most logical positivists were driven by two goals: that of building knowledge from a firm empirical foundation and that

governments that federal courts decided those states would have recognized at some prior time. The Constitution protected individuals against majorities in the states so far as federal judges decided those majorities might once have been willing to accede. As bizarre a test this may seem for identifying individual rights held against majorities in the present, we can see its attempt to satisfy—just like the incorporation doctrine—the formalist appetite of the twentieth century.²⁷⁵ Limitations on majority rule derived from past democratic decisions answering to the same system in which a majority claimed to be legitimately operating in the present. So when a person asserted a right held against a majority, a majority must have previously recognized and sanctioned the right or the claim would fail. So long as courts made litigants asserting rights provide a careful description²⁷⁶ of those rights at “the most specific level at which a relevant tradition . . . denying protection to [them] can be identified,”²⁷⁷ and then evaluated them against old social practices,²⁷⁸ there could be no new rights. Very few unenumerated protections would legitimately end up on the *Dobbs* Court’s “select list.”²⁷⁹

The modern-liberal approach likewise satisfied the formalist appetite of twentieth-century thought. Textual provisions of the Bill of Rights had penumbras and

of distancing it from dangerous metaphysics.”). Likewise, modern conservatism would argue for limiting the role of philosophy when it came to law, preferring “a firm empirical foundation” with history and tradition as its referent, and rejecting the “dangerous metaphysics” of modern legal liberalism. *Id.*; see, e.g., Antonin Scalia, *Constitutional Interpretation*, C-SPAN, at 33:18 (Mar. 14, 2005), <https://www.c-span.org/video/?185883-1/constitutional-interpretation> [<https://perma.cc/V8WR-3KQJ>] (“What can you possibly use, besides original meaning? Think about it. Natural law? We all agree on that, don’t we? The philosophy of John Rawls? That’s easy. There really is nothing else.”).

²⁷⁵ See REBECCA GOLDSTEIN, INCOMPLETENESS: THE PROOF AND PARADOX OF KURT GÖDEL 129 (2005) (“The drive for limiting our intuitions went even further. The aim became to eliminate intuitions altogether. This aim is what brings us, at long last, to the notion of a *formal system*. A formal system is an axiomatic system divested of all appeals to intuition.”); *id.* at 132 (“It was meant to obviate our reliance on mathematical intuition altogether, to turn our mathematical activity into processes so completely determined by clearly specified rules as to be purely *mechanical*, requiring no imagination or ingenuity . . .”). These general observations about formalism tell us something about the modern impulse to eliminate intuition from judging—“to turn [our jurisprudence] into processes so completely determined by clearly specified rules as to be purely *mechanical*, requiring no imagination or ingenuity.” *Id.*

²⁷⁶ *Washington v. Glucksberg*, 521 U.S. 702, 722 (1997) (“[W]e have a tradition of carefully formulating the interest at stake in substantive-due-process cases.”).

²⁷⁷ *Michael H. v. Gerald D.*, 491 U.S. 110, 127 n.6 (1989).

²⁷⁸ See *id.* at 124 (“[T]he legal issue in the present case reduces to whether the relationship between persons in the situation of [a father and his biological child born out of wedlock] has been treated as a protected family unit under the historic practices of our society . . .”); *Glucksberg*, 521 U.S. at 710 (“We begin, as we do in all due process cases, by examining our Nation’s history, legal traditions, and practices.”).

²⁷⁹ *Dobbs v. Jackson Women’s Health Org.*, 597 U.S. 215, 237 (2022).

emanations revealing a zone—a conceptually distinct domain—of personal liberty.²⁸⁰ The zone evolved through various forms of repository—a category,²⁸¹ a substantive sphere,²⁸² and a realm²⁸³—for rights qualifying for federal constitutional protection. Modern liberalism operated at a more general level than its conservative counterpart to find a rarified right of privacy that would qualify as in the Constitution and include more specifically described rights—like choosing to abort a fetus in the early stages of pregnancy.²⁸⁴ We should be troubled upon noticing that twentieth-century answers to whether there was constitutional protection for important personal liberties depended on the level of generality at which rights were described.²⁸⁵ The liberals would have the Constitution protect our transcendent liberties found within a zone of privacy penumbral to Bill-of-Rights provisions—the “realm of personal liberty which the government may not enter.”²⁸⁶ The conservatives would have it protect only those social practices the states used to respect and still do—rights “deeply rooted in [our] history and tradition.”²⁸⁷

But according to “fundamental principles as they have been understood by the traditions of our people and our law”²⁸⁸—values deeply rooted in our nation’s political and legal history—“[l]aw is something more than mere will exerted as an act of power.”²⁸⁹ A court’s obligation in personal-liberty cases was to decide whether in each particular controversy a state had run into the “bulwark[] . . . against arbitrary legislation” that was the due-process guarantee.²⁹⁰ The tradition of reasoned judgment obligated judges to engage in a delicate balancing of interests—in light of the facts and circumstances of the actual controversy—when confronting an allegation that a democratic political decision impermissibly interfered with an important personal freedom.²⁹¹ The judge must decide whether, in this particular

²⁸⁰ *Griswold v. Connecticut*, 381 U.S. 479, 484 (1965).

²⁸¹ *Bowers v. Hardwick*, 478 U.S. 186, 191 (1986); *Moore v. City of E. Cleveland*, 431 U.S. 494, 549 (1977) (White, J., dissenting); *Dobbs*, 597 U.S. at 231.

²⁸² *Dobbs*, 597 U.S. at 257 (quoting *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 848 (1992)).

²⁸³ *Lawrence v. Texas*, 539 U.S. 558, 578 (2003) (quoting *Casey*, 505 U.S. at 847).

²⁸⁴ *See Casey*, 505 U.S. at 844.

²⁸⁵ *See Michael H. v. Gerald D.*, 491 U.S. 110, 127 n.6 (1989) (“Why should the relevant category not be even more general—perhaps ‘family relationships’; or ‘personal relationships’; or even ‘emotional attachments in general’?”).

²⁸⁶ *Casey*, 505 U.S. at 847.

²⁸⁷ *Dobbs*, 597 U.S. at 237 (alteration in original) (quoting *Timbs v. Indiana*, 586 U.S. 146, 150 (2019)).

²⁸⁸ *Lochner v. New York*, 198 U.S. 45, 76 (1905) (Holmes, J., dissenting).

²⁸⁹ *Hurtado v. California*, 110 U.S. 516, 535 (1884).

²⁹⁰ *Id.* at 532.

²⁹¹ *Washington v. Glucksberg*, 521 U.S. 702, 768 (1997) (Souter, J., concurring) (“It is no justification for judicial intervention merely to identify a reasonable resolution of contending values that differs from the terms of the legislation under review. It is only when the

controversy, a state had deprived someone of a sacred liberty without honoring the process that every person with whom a free government would dare to interfere deserves.²⁹² Whether an actual person had been subjected to an arbitrary exercise of state power.²⁹³ This was an as-applied endeavor reserved for discrete cases and controversies and limited to review for reasonableness.²⁹⁴

Having traded the traditional praxis for modern formal mechanics, the *Dobbs* Court declared:

The right to abortion does not fall within this category [of fundamental rights]. Until the latter part of the 20th century, such a right was entirely unknown in American law. Indeed, when the Fourteenth Amendment was adopted, three quarters of the States made abortion a crime at all stages of pregnancy.²⁹⁵

This history is true insofar as what it includes, but what it must exclude is worth mentioning. *Dobbs* ignored that the adoption of the Fourteenth Amendment—a temporal fix for modern-conservatism’s identifying substantive-due-process rights—preceded by fifty-two years women’s securing the right to vote.²⁹⁶ All the modern-conservative opinions ignore this hypocrisy. This judicial methodology looks to democratically enacted laws and social practices of the states *then* to determine what federally

legislation’s justifying principle, critically valued, is so far from being commensurate with the individual interest as to be arbitrarily or pointlessly applied that the statute must give way. Only if this standard points against the statute can the individual claimant be said to have a constitutional right.”); see also *Cruzan v. Dir., Mo. Dep’t of Health*, 497 U.S. 261, 279 (1990) (“[D]etermining that a person has a ‘liberty interest’ under the Due Process Clause does not end the inquiry; ‘whether respondent’s constitutional rights have been violated must be determined by balancing his liberty interests against the relevant state interests.’” (quoting *Youngberg v. Romeo*, 457 U.S. 307, 321 (1982))).

²⁹² See *W. Coast Hotel Co. v. Parrish*, 300 U.S. 379, 391 (1937) (“In prohibiting . . . deprivation [of liberty] the Constitution does not recognize an absolute and uncontrollable liberty. Liberty in each of its phases has its history and connotation. But the liberty safeguarded is liberty in a social organization which requires the protection of law against the evils which menace the health, safety, morals, and welfare of the people. Liberty under the Constitution is thus necessarily subject to the restraints of due process, and regulation which is reasonable in relation to its subject and is adopted in the interests of the community is due process.”).

²⁹³ *Glucksberg*, 521 U.S. at 768 n.10 (Souter, J., concurring) (“Precision in terminology . . . favors reserving the label ‘right’ for instances in which the individual’s liberty interest actually trumps the government’s countervailing interests; only then does the individual have anything legally enforceable as against the State’s attempt at regulation.”).

²⁹⁴ See LUNDER, *supra* note 11, at 150 (“Contrary to the Court’s post-*Griswold* absolutist enterprise of identifying (or, in its modern-conservative manifestation, denying) unenumerated fundamental rights, the common-law due-process tradition was an as-applied endeavor, reserved for discrete cases and controversies and limited to review for arbitrariness.”).

²⁹⁵ *Dobbs v. Jackson Women’s Health Org.*, 597 U.S. 215, 231 (2022).

²⁹⁶ See U.S. CONST. amend. XIX (ratified in 1920).

protected rights persons have *now*. But it necessarily suppresses from conscious awareness the duration in between, when our nation's enduring values found novel expression. America changed its mind about who gets to decide the questions that modern conservatism would look to democracy to answer.²⁹⁷

During the twentieth century, novel patterns of human behavior emerged within a society transforming in the throes of a changing environment. From novel patterns of relationship emerged novel actual controversies—"new examples" by which our tradition's "[c]ommon-law method . . . seek[s] to understand old principles afresh."²⁹⁸ As did Justice Bradley in *Slaughter-House Cases*; Justice Matthews in *Hurtado*; Justice Cardozo in *Palko*; Justice Harlan in *Poe*; Justices Harlan and White in *Griswold*; and Justice Souter in *Glucksberg*. We see the opposite in the opinions of the modern-conservative justices, who must exclude certain information from conscious awareness to reject new examples outright and equate fundamental rights with old social practices.

Justice Scalia's *Michael H.* opinion epitomized the modern-conservative break from the tradition. One might have reasonably expected a jurist like Scalia to explore in *Michael H.* the historical application of the presumption of paternity—its maintaining social status and wealth (avoiding bogus claims regarding legitimacy) and resolving disputes about inheritance.²⁹⁹ But this would have meant seeing California's irrebuttable presumption of paternity in light of the environment for which it was made—one without technology for accurately determining paternity. So Justice Scalia emphasized the age of the statute and ignored the presence of a technology arguably eliminating the uncertainty the presumption meant to cure.³⁰⁰

²⁹⁷ For an explanation of the legal sea changes of *West Coast Hotel v. Parrish* and *Brown v. Board*, see, for example, *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 863–64 (1992) ("Each case was comprehensible as the Court's response to facts that the country could understand, or had come to understand already, but which the Court of an earlier day, as its own declarations disclosed, had not been able to perceive. As the decisions were thus comprehensible they were also defensible, not merely as the victories of one doctrinal school over another by dint of numbers (victories though they were), but as applications of constitutional principle to facts as they had not been seen by the Court before."); see also ALFRED NORTH WHITEHEAD, *SCIENCE AND THE MODERN WORLD* 17 (1925) ("If we confine ourselves to certain types of facts, abstracted from the complete circumstances in which they occur, the materialistic assumption expresses these facts to perfection. But when we pass beyond the abstraction, either by more subtle employment of our senses, or by the request for meanings and for coherence of thoughts, the scheme breaks down at once. The narrow efficiency of the scheme was the very cause of its supreme methodological success. For it directed attention to just those groups of facts which . . . required investigation.").

²⁹⁸ *Glucksberg*, 521 U.S. at 768 (Souter, J., concurring).

²⁹⁹ See, e.g., Batya F. Smernoff, *California's Conclusive Presumption of Paternity and the Expansion of Unwed Fathers' Rights*, 26 GOLDEN GATE U. L. REV. 337, 340–41 (1996).

³⁰⁰ *Michael H. v. Gerald D.*, 491 U.S. 110, 117 (1989) ("The California statute that is the subject of this litigation is, in substance, more than a century old."); *id.* at 140 (Brennan, J.,

His opinion excluded from consideration how the environment in which the law originated differed from the environment in which the law was applied to generate the present controversy.³⁰¹ Likewise, three decades later in *Dobbs* the modern-conservative method would “deny every quality of the law but its age.”³⁰²

It is indeed true of abortion that “[u]ntil the latter part of the twentieth century, such a right was entirely unknown in American law.”³⁰³ Until then how could *such a right* have been known? Before modern substantive due process, the tradition of reasoned judgment had never obligated its judges to consider abstract rights and determine which should be categorized (or not) as constitutionally protected. When adjudicating claims to individual liberty against government, the tradition had never demanded that a right be asserted as “fundamental,”³⁰⁴ or be located within a “zone of privacy,”³⁰⁵ or on a “select list”³⁰⁶ of specifically described social practices³⁰⁷ that are “objectively, ‘deeply rooted in this Nation’s history and tradition.’”³⁰⁸ Prior to the incorporation doctrine and substantive due process—both emerging in the twentieth century and the one making the other possible—due process meant neither that before the state could invade an important area of personal privacy it must merely provide some historically sanctioned process, nor that the Constitution protected a category of special substantive rights.

Like all the modern-conservative opinions, *Dobbs* rests on a political presupposition—contrary to the tradition of reasoned judgment—that our law is merely a positivist endeavor. Law is what the sovereign—in America, the people—have said it is. For the modern conservatives, that is all that it is. When it comes to due process, the law requires what the Constitution expressly says or what the people have said in the past. Captive to this majoritarian positivism, the modern conservatives simply put democracy on a temporal axis. We evaluate *now* democratic resolutions of the tension between order and liberty against democratic resolutions *then*. Having arrived here at a pinnacle of irony for a movement that would in the twenty-first

dissenting) (“In the plurality’s constitutional universe, we may not take notice of the fact that the original reasons for the conclusive presumption of paternity are out of place in a world in which blood tests can prove virtually beyond a shadow of a doubt who sired a particular child and in which the fact of illegitimacy no longer plays the burdensome and stigmatizing role it once did.”).

³⁰¹ *Id.* at 140.

³⁰² *Hurtado v. California*, 110 U.S. 516, 529 (1884); *see Dobbs v. Jackson Women’s Health Org.*, 597 U.S. 215, 231 (2022).

³⁰³ *Dobbs*, 597 U.S. at 231.

³⁰⁴ *Roe v. Wade*, 410 U.S. 113, 152 (1973) (quoting *Palko v. Connecticut*, 302 U.S. 319, 325 (1937)).

³⁰⁵ *Griswold v. Connecticut*, 381 U.S. 479, 485 (1965).

³⁰⁶ *Dobbs*, 597 U.S. at 237.

³⁰⁷ *See Michael H. v. Gerald D.*, 491 U.S. 110, 127 n.6 (1989).

³⁰⁸ *Washington v. Glucksberg*, 521 U.S. 702, 720–21 (1997) (quoting *Moore v. City of E. Cleveland*, 431 U.S. 494, 503 (1977) (plurality opinion)).

century begin *denying* American democracy,³⁰⁹ it seems appropriate to mark it with the words of a writer whose dystopian vision of the reproductive power captivated by a reactionary patriarchy is eerily pertinent to the moment. We can only hope the modern-conservative jurists—or are they *historians*?—might hear in them some sound advice.

As all historians know, the past is a great darkness, and filled with echoes. Voices may reach us from it; but what they say to us is imbued with the obscurity of the matrix out of which they come; and try as we may, we cannot always decipher them precisely in the clearer light of our own day.³¹⁰

Wanting to understand the reactionary impression the *Dobbs* opinion leaves us, Parts I–III have examined the deviant substantive-due-process doctrine of the modern Supreme Court, in the light of the tradition from which the Court broke. *Dobbs* is the latest example of modern-conservatism’s replacing the tradition of reasoned judgment with a list of basic liberties reduced to historical artifacts—modern conservatism’s “our Nation’s history and tradition.”³¹¹ This was a foreseeable consequence. Historical artifact is what the Constitution became in the hands of the originalists. Like modern conservatism’s social norms, the meaning of the originalists’ Constitution is limited to “rules fixed in the past.”³¹² But this is not merely a preferred analytic alternative, as it rests on the mistaken assumption that we can effectively address the danger of our federal courts substituting their own judgment for the rule of law with an objective touchstone for constitutional adjudication—one *outside* the constitutional tradition itself. Perhaps equating fundamental rights with what people used to think portrayed as “our Nation’s history and tradition” was intended to prevent the

³⁰⁹ While during the twentieth century modern-conservatism adopted a majoritarian-positivist ideology that emphasized the importance of democracy in the states, in its twenty-first-century manifestation conservatism began trending toward denial that America is a democracy. This is yet another example of the irony modern conservatism sheds as it becomes a caricature of itself in the new environment. See, e.g., Mike Lee, *Of Course We’re Not a Democracy*, MIKE LEE U.S. SENATOR FOR UTAH (Oct. 20, 2020), <https://www.lee.senate.gov/2020/10/of-course-we-re-not-a-democracy> [<https://perma.cc/8VYT-QG5G>]; *Why the Republicans’ Anti-Democracy Turn Has Become Normalized*, THE ECONOMIST (Oct. 27, 2022), <https://www.economist.com/united-states/2022/10/27/why-the-republicans-anti-democracy-turn-has-become-normalised> [<https://perma.cc/2SK8-PEPJ>]; Bernard Dobski, *America Is a Republic, Not a Democracy*, HERITAGE FOUND. (June 19, 2020), <https://www.heritage.org/american-founders/report/america-republic-not-democracy> [<https://perma.cc/2FZ2-MXKJ>].

³¹⁰ MARGARET ATWOOD, *THE HANDMAID’S TALE* 311 (1986).

³¹¹ *Dobbs*, 597 U.S. at 234.

³¹² *Duncan v. Louisiana*, 391 U.S. 145, 176 (1968) (Harlan, J., dissenting).

imposition of jurists' personal preferences when deciding difficult cases. But the Court could better honor our tradition by attending to arguments litigants offer on appeal in light of facts established at trials in district courts, and less what "Blackstone, Coke, Hale, and the like" thought about "quickenings."³¹³

Dobbs paid insufficient respect to the details of the controversy.³¹⁴ It was not until the latter part of the twentieth century that the decision whether to abort a fetus became situated within a modern self-regulating medical profession and patient-doctor relationship. *Dobbs* simply excluded this from consideration—maybe because Blackstone, Coke, and Hale had so little to say on the subject.³¹⁵ But this was an actual occurrence—a consequence of technological change, in turn changing all domains of experience, including the professions of medicine and law.³¹⁶ Novel technological (including pharmacological) treatments changed the medical profession. As technology developed so did medical practice. So did what it meant to have control over one's own health, bodily integrity, reproductive power, and death. So did the patient-doctor relationship. So did what it meant to have or perform an abortive procedure.³¹⁷ This is not to say some new right arose because of these

³¹³ *Dobbs*, 597 U.S. at 242 ("The 'eminent common-law authorities (Blackstone, Coke, Hale, and the like)' all describe abortion after quickening as criminal." (quoting *Kahler v. Kansas*, 589 U.S. 271, 279 (2020))). Note here, again in *Dobbs*—a substantive-due-process case—the Court's citing *Kahler*, a case examining a question of criminal procedure—whether due process required a state to afford a criminal defendant the opportunity to mount a particular defense. This is not surprising, because the method was born of *Moore*'s conflating the *Duncan* distinction. See *supra* Section II.B.2. We can understand the Court's inquiry in *Kahler* as the modern-conservative method for substantive-due-process claims applied to a procedural one. Justice Elena Kagan explained the inquiry as "whether a rule of criminal responsibility is so old and venerable—so entrenched in the central values of our legal system—as to prevent a State from ever choosing another." 589 U.S. at 279. In much the same way the modern-conservative method asked whether a right, claimed to be fundamental, was so "entrenched in the central values of our [social] system . . . as to prevent a State from" outlawing its exercise. *Id.*

³¹⁴ See *Washington v. Glucksberg*, 521 U.S. 702, 770 (1997) (Souter, J., concurring) ("Common-law method tends to pay respect instead to detail, seeking to understand old principles afresh by new examples and new counterexamples.").

³¹⁵ See ALFRED NORTH WHITEHEAD, *PROCESS AND REALITY* 17 (1978) ("[T]here are certain general truths, about the actual things in the common world of activity, which will be obscured when attention is confined to some particular detailed mode of considering them.").

³¹⁶ See LUNDER, *supra* note 11, at 153.

³¹⁷ See *GOP's Historic Midterm Failure*, STEPHEN COLBERT PRESENTS TOONING OUT THE NEWS (Nov. 10, 2022) (downloaded using iTunes). This point was aptly made in the comedic "Abortion Round Table" segment of the episode, where a cartoon reporter interviewed a panel of pro-life men.

Question: "Jerry, in the case of a selective intrauterine growth restriction, should the co-twin be held responsible for the death of the growth-restricted twin or just the doctor and the mother for ordering the

changes—a mistaken understanding to which the liberals on the Court would cling as recently as 2015, and that modern conservatives would aptly criticize.³¹⁸

The modern conservatives in *Glucksberg* gave an efficiency justification for their method—“it avoid[ed] the need for complex balancing of competing interests in every case.”³¹⁹ In light of our tradition and the practical consequence of the method, this justification becomes an accurate *description* with the substitution of just a few words: It *banished the tradition’s* careful balancing of competing interests *from every case*.³²⁰ Just like the modern-liberal method. The modern Supreme Court abandoned the tradition of reasoned judgment, its concept of ordered liberty, and its common-law method of balancing liberty and democratic authority.³²¹ Like the modern liberals in *Lawrence*, *Windsor*, and *Obergefell*, the modern conservatives in *Dobbs* missed yet another opportunity “to understand old principles afresh,” leaving us more “legal petrification instead of an evolving boundary between the domains of old principles.”³²²

CONCLUSION

Justice Clarence Thomas concurring in *Dobbs* observed that as judges’ preferred expressions of freedom change, so too will the test they administer for determining whether a liberty interest is a fundamental right deserving constitutional protection.³²³

fetoscopic laser ablation and/or cord occlusion? And, this is a two-parter. Should an abortion be allowed if a fetus needs surgery for a lower urinary tract obstruction and the mother can’t afford the ambulance to transport her from her regular hospital to one with a neonatal intensive care unit for the vesicocentesis amniotic shunt or cystoscopy?”

Jerry: “I think I would go with we probably should plan for no abortions for any reason.”

Id. at 22:01–22:38.

³¹⁸ See *Obergefell v. Hodges*, 576 U.S. 644, 671–72 (2015) (“[R]ights come not from ancient sources alone. They rise, too, from a better informed understanding of how constitutional imperatives define a liberty that remains urgent in our own era.”).

³¹⁹ 521 U.S. at 722.

³²⁰ See *id.*

³²¹ See, e.g., Bruce Ledewitz, *Justice Harlan’s Law and Democracy*, 20 J.L. & POL. 373, 426 (2004) (comparing Harlan II’s and Scalia’s approaches to law and democracy, noting that “Justice Scalia implies that trying to do the best thing is the ‘common-law method’ of judging and that it is an illegitimate approach”).

³²² *Glucksberg*, 521 U.S. at 770 (Souter, J., concurring). See LUNDER, *supra* note 11, at 169–92 (Chapter 13 entitled “Certain Actions Are Prohibited”); *id.* at 193–216 (Chapter 14 entitled “A Prudential Exercise of the Judicial Power”); *id.* at 217–40 (Chapter 15 entitled “What Freedom Must Become”), for explanations of *Lawrence*, *Windsor*, and *Obergefell*, respectively.

³²³ *Dobbs v. Jackson Women’s Health Org.*, 597 U.S. 215, 334 (2022) (Thomas, J.,

This is as good a description of how the modern-conservative method happened as we might find. The irony of eschewing an oxymoronic concept like substantive due process as an illegitimate exercise of the judicial power while embracing its categorical approach to fundamental rights is evident throughout the Court's opinion in *Dobbs*. As in all the modern-conservative opinions. Modern conservatism purported to resolve its dilemma with an objective standard for adjudicating claims to fundamental rights. But the deeply rooted-in-history-and-tradition test suffers from the same fallacy as the modern-liberal methodology: It reifies the actual experiences of litigants into high abstractions called 'rights' and then invokes an *extraconstitutional* test for determining if the right is *in* the Constitution.³²⁴ The litigants fade from view and are hard to feel in the Court's opinions. But historical exegeses and the metaphysics of liberty are on full display.³²⁵

The new conservative Supreme Court may continue its legal archeology after *Dobbs*, looking for additional modern rights previously misidentified as bona fide American historical artifacts. But judges need not appeal to what some people would have thought *then* to discover what the Constitution means to us *now*, any more than they need a realm of personal liberty hermetically sealed against government entry when deciding personal-liberty cases. We should eschew *any* approach that compels us to disregard our legal tradition. To go anywhere but to our precedent. *Not* to hunt for historical artifacts or for the metaphysics of liberty, but to honor its exemplifying the *process* our tradition has bequeathed us.

concurring) (stating that "[a]s the Court's preferred manifestation of 'liberty' changed, so, too, did the test used to protect it, as *Roe*'s author lamented" and quoting Justice Blackmun's *Casey* dissent, that "[t]he *Roe* framework is far more administrable, and far less manipulable, than the 'undue burden' standard" (quoting *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 930 (1992) (Blackmun, J., concurring in part and dissenting in part))).

³²⁴ See WHITEHEAD, *supra* note 315, at 7–8 ("The aim at generalization is sound, but the estimate of success is exaggerated. . . . the 'fallacy of misplaced concreteness.' . . . consists in neglecting the degree of abstraction involved when an actual entity is considered merely so far as it exemplifies certain categories of thought. There are aspects of actualities which are simply ignored so long as we restrict thought to these categories."); WHITEHEAD, *supra* note 297, at 50–51 ("[T]his spatialization is the expression of more concrete facts under the guise of very abstract logical constructions. There is an error; but it is merely the accidental error of mistaking the abstract for the concrete. It is an example of what I call the 'Fallacy of Misplaced Concreteness.'").

³²⁵ Compare *Glucksberg*, 521 U.S. at 710–19 (exploring the history of the prohibition against assisting suicide in thirteenth-century English common law and early American colonial laws, the first American state and territorial prohibitions, and recent re-examinations and reaffirmations of the states' "deeply rooted . . . assisted suicide bans"), with *Lawrence v. Texas*, 539 U.S. 558, 562 (2003) ("Freedom extends beyond spatial bounds. Liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct. The instant case involves liberty of the person both in its spatial and in its more transcendent dimensions."), and *Obergefell v. Hodges*, 576 U.S. 644, 651–52 (2015) ("The Constitution promises liberty to all within its reach, a liberty that includes certain specific rights that allow persons, within a lawful realm, to define and express their identity.").

Our legal tradition came before any modern political valence. It came before the modern methods of substantive due process. It survived in the opinions of jurists interpreting the constitutional guarantee of due process and recognizing its vitality and duration across vast stretches of time and tremendous change. Our tradition demands that when a government deprives a person of a substantial interest in liberty, it does so reasonably. When reasoning *from* the justification proffered for the means employed to pursue a legitimate interest in order, *to* the personal consequences of those means applied in an actual controversy, we must be assured that the power the government exercises—the power we give it—is appropriately restrained by its own nature and ends.³²⁶

The Supreme Court should recur to our tradition of reasoning and reasonableness instead of rearranging history and tradition to equate constitutional liberty with old social practices. The process that we are due—that we owe to ourselves—will not tolerate any government, whether appropriately controlled by a majority or hijacked by minority interests, exercising its power arbitrarily to deprive anyone of a freedom that all legitimate governments exist to protect. The powers the Constitution gave to the federal government, like those reserved to the states, belong ultimately to the people. And that power—like the power of any legitimate government—cannot be arbitrarily wielded upon them. This tradition was *alive* in resolving actual controversies where individual liberty challenged democratic authority. Its spirit of reasoned judgment now haunts us. We need only invite it into our experience for it to live again.

³²⁶ *Calder v. Bull*, 3 U.S. 386, 388 (1798) (“The nature, and ends of legislative power will limit the exercise of it.”).