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PUTTING RATIONALITY BACK INTO THE RATIONAL BASIS TEST: SAVING SUBSTANTIVE DUE PROCESS AND REDEEMING THE PROMISE OF THE NINTH AMENDMENT

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I. INTRODUCTION

Substantive due process is broken. This doctrine, which provides that the Due Process Clauses of the Fifth and Fourteenth Amendments contain substantive limits on the power of federal and state governments, has been an important protector of rights since its beginnings in English law, and the main vehicle through which the protections of the Bill of Rights have been incorporated against the states.[1] However, as currently practiced by the Supreme Court of the United States, the tiered scrutiny formulation of substantive due process is illusory. It is followed only in easy cases, and abandoned in hard ones.[2] This practice throws the legitimacy of the entire doctrine into question.

The legitimacy of the doctrine is an important issue because substantive due process is the primary means through which the

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1. *See* CALVIN MASSEY, AMERICAN CONSTITUTIONAL LAW: POWERS AND LIBERTIES 445–47 (2d ed. 2005).

2. *See infra* notes 222–47 and accompanying text (explaining the current state of substantive due process); *see also* Daniel O. Conkle, *Three Theories of Substantive Due Process*, 85 N.C. L. REV. 63, 63, 66–68 (2006) (noting that substantive due process is in "serious disarray" and discussing three inconsistent theories relied on by the Court); Mark C. Niles, *Ninth Amendment Adjudication: An Alternative to Substantive Due Process Analysis of Personal Autonomy Rights*, 48 UCLA L. REV. 85, 137–40 (2000) (describing substantive due process used by the Court as a "weak and ultimately unsatisfactory mechanism").

Court gives substance to the Ninth Amendment's rights "retained by the people."[3] The failure to articulate a consistent test, combined with the vagueness of the language of the Ninth Amendment and the practical consequences of the Court's professed adjudication mechanism for rights, has led to a reluctance on the part of the Court to protect rights.[4]

Under the Court's current due process adjudication mechanism, rights are either classified as "fundamental," in which case laws infringing upon them are subject to strict scrutiny, a test which is almost always "fatal in fact" for the infringing law, or they are not classified as fundamental, and are subjected to a rational basis test that almost always upholds the infringing law.[5] Because a finding that a right is fundamental almost always leads to the conclusion that the law infringing it is invalid, courts have been understandably cautious in recognizing new rights.[6] However, the only alternative is the weak rational basis test, which provides little protection for rights.

The legitimacy problems with substantive due process as it is currently practiced have prompted many legal scholars to urge the abandonment of due process altogether in favor of other mechanisms of protecting unenumerated rights.[7] As well-thought out

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3. U.S. CONST. amend. IX; *see also* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 794 (3d ed. 2006) (discussing Ninth Amendment rights).

4. *See* Niles, *supra* note 2, at 137, 138 (noting problems associated with due process adjudication of unenumerated rights); Joseph F. Kadlec, Note, *Employing the Ninth Amendment to Supplement Substantive Due Process: Recognizing the History of the Ninth Amendment and the Existence of Nonfundamental Unenumerated Rights*, 48 B.C. L. REV. 387, 387–88 (2007) (also noting problems associated with due process adjudication).

5. Randy E. Barnett, *Scrutiny Land*, 106 MICH. L. REV. 1479, 1480 (2008); *see* Note, *supra* note 4, at 387–88, 390–91; *see also* Gerald Gunther, *The Supreme Court, 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972) (referencing the phrase "fatal in fact" to describe strict scrutiny). *But see* Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 VAND. L. REV. 793, 794–96 (2006) (using empirical analysis to dispute the contention that strict scrutiny is nearly always fatal to the infringing law).

6. *See* Niles, *supra* note 2, at 137–38. The Supreme Court of the United States has articulated this reluctance. *See, e.g.*, Collins v. City of Harker Heights, 503 U.S. 115, 125 (1992) (stating that the Court is "reluctant to expand the concept of substantive due process because guideposts for responsible decisionmaking in this uncharted area are scarce and open-ended" (citing Regents of the Univ. of Mich. v. Ewing, 474 U.S. 214, 225–26 (1985)).

7. *See infra* notes 241–58 and accompanying text (discussing these ideas); *see also* Barnett, *supra* note 5, at 14–80 (proposing an alternative to the substantive due process doctrine); Niles, *supra* note 2, at 123–43 (proposing an alternative to the substantive due process doctrine).

as these proposed solutions are, however, they all share a fundamental problem as a practical manner: they would all require a substantial overhaul of the entire body of case law that has evolved around the due process doctrine in the last century and a half. Because of the practical problems involved with such an overhaul, these solutions are unlikely to be adopted.

There is, however, another way in which substantive due process can be revitalized to better protect rights and provide a more consistent doctrine. This revitalization can be achieved without significantly changing the doctrine itself. The answer lies in strengthening the rational basis test.

The rational basis test as it currently stands is too weak. By allowing any plausible reason for the legislation to suffice, whether or not it was a true reason for the legislation, and by asking only whether lawmakers could have thought that it was reasonably related to the subject it purported to advance, the Court has essentially made the rational basis test the equivalent to no test at all.

A strengthened rational basis test, however, would require that the legislation at issue actually be reasonably related to its legislative purpose, and that the purpose be valid. Such a test would allow courts to better protect rights, while at the same time retain the benefits of tiered scrutiny as it currently exists. By allowing courts to inquire into the purpose behind the legislation and to look at the link between the ends and the means, courts will no longer have to try to find some way around the test in hard cases, and the doctrine will become more consistent and legitimate.

This article argues for the adoption of a strengthened rational basis test that would allow courts to scrutinize the actual purpose behind legislation and demand that the legislation actually be reasonably related to its valid legislative purpose. Part II looks at the question of why it is desirable to save substantive due process rather than replace it with some other doctrine. Part III examines how substantive due process came to be the dominant form of protection for unenumerated rights, and how it has evolved from its antecedents in English law to the current test. It concludes that substantive due process has been an ever-evolving doctrine, but that the protection of rights has been a constant throughout its history. Part IV examines how the system has become broken in recent years, with the rational basis test and the strict scrutiny test edging further away from each other and the Supreme Court

of the United States abandoning the doctrine in hard cases. Part V then advocates for using a strengthened rational basis test to return rationality to the rational basis test, add legitimacy to the doctrine of substantive due process, and better protect unenumerated rights. It explains how the strengthened rational basis test would work in practice, and how the test avoids some of the problems of the other tests, including the *Lochner* problem.

II. WHY SAVE SUBSTANTIVE DUE PROCESS AT ALL?

One question that must be addressed is why it is desirable to save substantive due process at all. After all, the concept of substantive due process has had numerous detractors since its introduction.[8] The criticisms of substantive due process as a concept range from the awkwardness of its terminology,[9] to its supposed lack of a historical foundation,[10] to a rejection of its open-ended nature as a foundation for unenumerated rights.[11] Thus, goes the argument, if substantive due process is self-contradictory, ahistorical, and doctrinally vague, why engage in a quixotic effort to make it work?

The problem with this argument is that substantive due process is the chosen path used by courts to give effect to the language of the Ninth Amendment to the United States Constitution.[12] In its text, the Ninth Amendment clearly indicates that there are rights other than those enumerated in the Bill of Rights

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8. *See, e.g.*, JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 14–30 (1980).

9. *See id.* at 18 (famously referring to substantive due process as a "contradiction in terms" akin to "green pastel redness").

10. *See id.* at 15 (noting the argument that the phrase "due process of law" in the Fourteenth Amendment was taken from the language of the Fifth Amendment's Due Process Clause, and that "[t]here is general agreement that the [Fifth Amendment's Due Process Clause] had been understood at the time of its inclusion to refer only to lawful *procedure[s]*"); *see also* DAVID P. CURRIE, THE CONSTITUTION IN THE SUPREME COURT: THE SECOND CENTURY 45 (1990) (arguing that substantive due process was "not what was provided in Magna Charta"); Edward S. Corwin, *The Doctrine of Due Process of Law Before the Civil War*, 24 HARV. L. REV. 366, 372–73 (1911); Charles Warren, *The New "Liberty" Under the Fourteenth Amendment*, 39 HARV. L. REV. 431, 440–41 (1926).

11. *See, e.g.*, ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 31 (1990) (referring to substantive due process as a "sham").

12. 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."); *see infra* Part III (discussing how substantive due process came to be the dominant form of protection for unenumerated rights).

that deserve constitutional protection.[13] For over one hundred years, the Due Process Clauses of the Fifth and Fourteenth Amendments have been the chosen vehicles for discovering and applying these rights. While it may be argued that the concept of unenumerated rights should be abandoned in favor of only textual rights and democratic majorities,[14] there is no question that unenumerated rights have been a part of American constitutionalism from the beginning, and that substantive due process has been the main workhorse of the doctrine. If unenumerated rights are going to continue to be a feature of the constitutional landscape, this will likely continue.

Further, the criticisms of substantive due process as a concept are not, for lack of a better word, as "substantial" as they might first appear. It is true that the phrase itself, "substantive due process," is ungainly.[15] Substantive due process itself seems to be a contradiction in terms, in the famous words of John Hart Ely, a "'green pastel redness.'"[16] However, this twist of terminology is explained by its history. The term "substantive due process" was coined by its opponents, as a way of denigrating the concept.[17] The Supreme Court did not use the term until 1948, long after its supposed heyday was past.[18]

Those who criticize substantive due process as ahistorical argue that the original meaning of the Due Process Clause was simply procedural, and that courts illegitimately grafted substantive concerns on it to further their own ideas of what the law

13. *See* U.S. CONST. amend. IX.

14. *See, e.g.*, Michael W. McConnell, *A Moral Realist Defense of Constitutional Democracy*, 64 CHI.-KENT L. REV. 89, 107 (1988) (contrasting unenumerated rights with constitutional democracy).

15. MASSEY, *supra* note 1, at 445 ("Substantive due process is an ungainly concept.").

16. ELY, *supra* note 8, at 18.

17. JAMES R. STONER, JR., COMMON-LAW LIBERTY: RETHINKING AMERICAN CONSTITUTIONALISM 134 (2003) (stating that the term substantive due process was "devised precisely to discredit" the idea).

18. *See* James W. Ely, Jr., *The Oxymoron Reconsidered: Myth and Reality in the Origins of Substantive Due Process*, 16 CONST. COMMENT. 315, 319 & n.20 (1999) (identifying Justice Rutledge's dissent in *Republic Natural Gas Co. v. Oklahoma*, 334 U.S. 62, 90 (1948), as the first mention of the term by a justice on the Supreme Court).

should be in the late eighteen hundreds and early nineteen hundreds.[19] However, the idea that due process contains a substantive concept is much older than that.

The term "due process" has its roots in the "law of the land" provision in Chapter 39 of the Magna Carta.[20] There is some debate as to whether Chapter 39 intended any substantive restraints on the government in its original form.[21] However, by the seventeenth century, it was invoked as not only a procedural guarantee that the government must obey the laws in force, but also as a substantive guarantee that the laws themselves be consistent with the natural and customary rights of the people.[22] Under this invocation, laws that contravened the customary rights were not law, but instead were arbitrary assertions of power.[23] This is not to say that there existed some concept of judicial review that would allow judges to overturn laws, but rather that such laws were not entitled to be called law.[24]

This notion of the substantive content of due process was imported by the colonists to the Americas, even as it began to wane in Great Britain in favor of parliamentary supremacy.[25] By the time of the American Revolution, due process in Britain had be-

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19. *See* RAOUL BERGER, GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT 221–22 (1997) (arguing that the "one thing quite plainly [due process] *did not mean*, in either 1789 or 1866 . . . [was] judicial power to override legislation on substantive or policy grounds"); *see also* Edward S. Corwin, *The Doctrine of Due Process of Law Before the Civil War*, *in* 1 SELECTED ESSAYS ON CONSTITUTIONAL LAW 203, 205, 206 (Pendleton Howard ed., 1938).

20. *See* Ely, *supra* note 18, at 320–21. Chapter 39 provides, in pertinent part, that "[n]o free man shall be taken, imprisoned, disseised, outlawed, banished, or in any way destroyed, nor will We proceed against or prosecute him, except by lawful judgment of his peers and by the law of the land." *Id.* at 320.

21. *Compare, e.g.*, BERGER, *supra* note 19, at 224–26, *with* Charles Howard McIlwain, *Due Process of Law in Magna Carta*, *in* 1 SELECTED ESSAYS ON CONSTITUTIONAL LAW, *supra* note 19, at 174, 202 ("There is evidence in plenty . . . that 'the law of the land' was understood in 1215 also to mean the substantive principles of the customary law.").

22. *See, e.g.*, Frederick Mark Gedicks, *An Originalist Defense of Substantive Due Process: Magna Carta, Higher-Law Constitutionalism, and the Fifth Amendment*, 58 EMORY L.J. 585, 596–612 (2009) (explaining the use of the "law of land" provision in English constitutional law of the late seventeenth century); *see also* JOHN PHILLIP REID, RULE OF LAW: THE JURISPRUDENCE OF LIBERTY IN THE SEVENTEENTH AND EIGHTEENTH CENTURIES 78–79 (2004).

23. *See* Gedicks, *supra* note 22, at 596.

24. *Id.* at 644–45 (discussing the classical understanding of "the law").

25. JOHN PHILLIP REID, CONSTITUTIONAL HISTORY OF THE AMERICAN REVOLUTION: THE AUTHORITY OF RIGHTS 76 (1986); REID, *supra* note 22, at 78–79; Gedicks, *supra* note 22, at 595.

come whatever Parliament enacted.[26] However, America still clung to the idea that due process had substance, and could be used to restrain governments from violating rights.[27] It would be an important part of the colonists' arguments against British rule, wherein they cited the Magna Carta's "law of the land" provision as a substantive bar to Parliament's actions.[28] This is the background against which the Fifth Amendment's Due Process Clause was created, and the language carried forward into the Fourteenth Amendment. Thus, the Due Process Clause is not such an ahistorical home for unenumerated rights as might be thought.

Further, although substantive due process has been criticized for lacking sufficient guideposts for decisionmaking,[29] it is not clear that any of the suggested replacements fare any better in this regard. Neither the Privileges or Immunities Clause, as suggested by John Hart Ely,[30] nor the Ninth Amendment, as suggested by others,[31] provide any more reliable guideposts for interpretation. Although the Privileges or Immunities Clause does at least speak of "privileges" and "immunities," it gives no clues as to how to determine what those categories encompass.[32] Indeed, the problem with its open-ended nature has led to its constitutional irrelevance.[33] In the same manner, although the Ninth Amendment suggests that there are other rights "retained by the

26. *See* REID, *supra* note 22, at 78.

27. *Id*; *see also* Robert E. Riggs, *Substantive Due Process in 1791*, 1990 WIS. L. REV. 941, 963–69 (detailing the uses of the law of land provisions in Colonial America).

28. *See* REID, *supra* note 22, at 77–78; Riggs, *supra* note 27, at 970–71.

29. *See* Washington v. Glucksberg, 521 U.S. 702, 719–21 (1997) (commenting that the Court has "always been reluctant to expand the concept of substantive due process because guideposts for responsible decisionmaking in this uncharted area are scarce and open-ended" (quoting Collins v. City of Harker Heights, 503 U.S. 115, 125 (1992))); CHARLES L. BLACK, JR., A NEW BIRTH OF FREEDOM 3 (1997) (comparing substantive due process to a "patched and leaky tire" that "follows no sound method of interpretation"); *see also* Niles, *supra* note 2, at 135–40 (noting the criticisms of substantive due process).

30. ELY, *supra* note 8, at 28–30.

31. *See, e.g.*, Niles, *supra* note 2, at 137–38.

32. *See* U.S. CONST. amend. XIV, § 1.

33. *See* Michael Kent Curtis, *Historical Linguistics, Inkblots, and Life After Death: The Privileges or Immunities of Citizens of the United States*, 78 N.C. L. REV. 1071, 1085 (2000) (ascribing Justice Frankfurter's fear of the open-ended nature of the Privileges or Immunities Clause as one of the reasons for his opposition to using it as a vehicle for incorporation in *Adamson v. California*, 332 U.S. 46, 61 (1997) (Frankfurter, J., concurring)).

people," it does not in its text provide any guidelines for ascertaining what those rights might be.[34]

As a practical matter, it really does not matter if the protection of unenumerated rights is located in the Due Process Clause, the Privileges or Immunities Clause, or the Ninth Amendment; the concept is the same: There are certain things that are beyond the power of governments to do. Whether this is because these things transgress on the rights "retained by the people,"[35] the "privileges or immunities of citizens of the United States,"[36] or the "Law of the Land"[37] that serves as the foundation for "due process,"[38] makes little interpretive difference. The key is determining how to effectively protect unenumerated rights.

Many prestigious scholars in the field of unenumerated rights have issued calls to abandon substantive due process in favor of other methods of judicially protecting unenumerated rights.[39] However, each of these methods had the disadvantage of requiring the Court to embrace an essentially new doctrine and enact a wholesale change in jurisprudence. Substantive due process, on the other hand, is in use now. It is not that substantive due process is a better way to protect unenumerated rights than the Ninth Amendment or the Privileges or Immunities Clause; rather, it is simply another way to get to the same result. Its current advantage lies in the fact that it is the one actually used by the Court, and that this usage is likely to continue.[40] Therefore, if unenumerated rights are to be protected, and the Ninth Amendment's command that the rights retained by the people are not to be disparaged, substantive due process needs to be fixed.

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34. U.S. CONST. amend. IX; Jeffrey D. Jackson, *Blackstone's Ninth Amendment: A Historical Common Law Baseline for the Interpretation of Unenumerated Rights*, 62 OKLA. L. REV. 167, 168 (2010).

35. U.S. CONST. amend. IX.

36. U.S. CONST. amend. XIV, § 1.

37. U.S. CONST. art. VI, cl. 2.

38. U.S. CONST. amend. XIV, § 1.

39. *See* RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY 259–69 (2004) (advocating a "presumption of liberty" approach); Niles, *supra* note 2, at 135–43 (advocating replacing substantive due process with an approach based on Lockean concepts of personal autonomy).

40. *See* Richard B. Saphire, *Doris Day's Constitution*, 46 WAYNE L. REV. 1443, 1469–70 (2000) (noting that "it is difficult to imagine anything less probable in the modern world of constitutional jurisprudence than the prospect that the Court . . . will repudiate its substantive due process doctrine").

III. GETTING TO THE HEART OF THE PROBLEM: HOW WE GOT HERE

To understand why substantive due process is broken, it is necessary to look at the way courts, and the Supreme Court in particular, developed its doctrine and the doctrine of unenumerated rights. A look at the history reveals that, while the concept of unenumerated rights as a counterbalance to governmental power has a long pedigree in both American and English law, the concept is a continually evolving one.

A. *The Colonial View of Substantive Due Process*

Embedded in the ideas of constitutional law brought to America by the colonists was the notion that there were traditional rights that could not be infringed on by government, even if most Americans weren't exactly sure what those rights were.[41] By the time of the framing of the Constitution and the adoption of the Bill of Rights, the popular concept of rights was that set forth in William Blackstone's Commentaries.[42]

According to Blackstone, the traditional and customary absolute rights of the individual were: (1) the right of personal security, that is the right to enjoyment of life, limb, health and reputation; (2) the right of personal liberty to move freely from place to place and profession to profession, without confinement; and (3) the right of private property, which is the free use, enjoyment, and disposal of all acquisitions.[43] These rights, however, were not absolute in all applications.[44] Rather, they [w]ere bound by 'the laws of the land,' that is, by the valid laws enacted to protect and regulate society."[45] However, the valid laws were not all laws.[46] Instead, they were only "those laws that comport[ed] with 'the law of the land.'"[47]

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41. Jackson, *supra* note 34, at 176.

42. *Id.* at 200–01.

43. 1 WILLIAM BLACKSTONE, COMMENTARIES *125–41.

44. *Id.* at *119.

45. Jackson, *supra* note 34, at 208; *see* 1 BLACKSTONE, *supra* note 43, at *119–20, *134, *140.

46. Jackson, *supra* note 34, at 208.

47. *Id.*; *see* 1 BLACKSTONE, *supra* note 43, at *124.

The first commandment of a valid law was that it could not be "arbitrary."[48] This concept of nonarbitrariness was a fundamental one in English law.[49] While we today tend to think of the term arbitrary as randomness or caprice, arbitrariness at the time had a more specific constitutional meaning. It meant rule unbounded by traditional law and rights; the opposite of rule of law.[50] This prohibition extended even to Parliament, and constrained its power.[51] Of course, in a constitutional system without judicial review, this did not mean that Parliament could not enact arbitrary laws, but rather that those laws were not proper laws because they lacked legitimacy.[52]

According to Blackstone, for a law not to be arbitrary it must instead be "reasonable."[53] Blackstone thought a law was reasonable if it advanced the public good, for then it increased rather than restrained liberty by benefiting the civil society that protected liberty.[54] In interpreting Blackstone:

> Reasonableness [was] not the only test of a law's validity, however. The absolute rights of an individual [could] be restrained only "so far . . . (and no farther) as is necessary" for the needs of civil society. The idea [was] to find the correct balance between the liberty of the individual and the needs of society, and the key to this determina-

48. Jackson, *supra* note 34, at 208; *see* 1 BLACKSTONE, *supra* note 43, at *129–32.

49. *See* 1 BLACKSTONE, *supra* note 43, at *129–32.

50. *See* REID, *supra* note 22, at 41.

51. *See, e.g.*, 1 BLACKSTONE, *supra* note 43, at *129 (noting that laws directing the punishment of light and trivial offenses by death were arbitrary). Blackstone's use of arbitrariness is interesting because Blackstone's *Commentaries* straddled the line between the old English concept of due process as a constraint on Parliament and the new British concept of due process being whatever Parliament enacted. *See* Jackson, *supra* note 34, at 209. Although Blackstone's *Commentaries* came down squarely on the side of parliamentary supremacy as a whole, they contained some language that echoed the old concept of due process. *Id.*

52. *See* Jackson, *supra* note 34, at 178, 211.

53. *See id.* at 208.

54. *See* 1 BLACKSTONE, *supra* note 43, at *126. By way of contrast, a law that restrained conduct without any good aim was destructive of liberty. *Id.* Blackstone used the statute of Edward IV prohibiting the wearing of pikes of more than two inches in length on the boots of those persons who were under the rank of lord as an example of an arbitrary law, because such a prohibition served no public purpose. *Id.* at *122. However, he cited the prescription of Charles II that all persons were to be buried in woolen garments as an example of a reasonable law, in that it advanced the governmental objective of benefitting the wool trade. *Id.* Although this may seem to be a low threshold for public benefit, the wool trade was of vital economic importance to Great Britain, and the degree to which its protection was a matter of public interest should not be understated. *Id.*

> tion [was] custom and tradition. Thus, there [were] traditional and customary limitations on what government [could] do.[55]

It is important to emphasize that rights as understood by the Framing generation were not absolutes, nor was every right claimed as important as every other. For instance, while there was an absolute right to private property, not all property and its uses were equal. Property could not be taken away completely, unless for a true public purpose and with compensation.[56] However, there were several ways in which the uses of property could be regulated to various degrees: In Blackstone's England, the law restricted "offences against public trade" such as forestalling the market by buying merchandise on the way to market, or regrating, that is, reselling merchandise in the same market.[57] The extent to which any particular right existed depended upon the situation. But the rights existed as limits.

What emerged, then, was a sort of means-ends doctrine. To be valid rather than arbitrary, the law had to have a proper end; that is, one which was a valid thing for government to regulate.[58] Further, the means had to be reasonable and not infringe on customary rights.[59] Laws that did not fit this test were considered to be arbitrary assertions of power, even if there was no court that could pronounce them so.[60]

This idea of limits on governmental power imposed by reasonableness and customary rights was imported by the colonists to America, and by the time of the Revolution, had a much more robust interpretation than in Great Britain at the time. Where British law had moved toward accepting Parliamentary supremacy, men like James Otis and John Adams could still argue the American view that Parliament's actions were limited by the "law of the land," and that the Navigation Acts and the Stamp Act were therefore invalid.[61]

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55. Jackson, *supra* note 34, at 208–09 (citing 1 BLACKSTONE, *supra* note 43, at *121).

56. *See* 1 BLACKSTONE, *supra* note 43, *138–39.

57. 4 WILLIAM BLACKSTONE, COMMENTARIES *158–59; *see also* FORREST MCDONALD, NOVUS ORDO SECLORUM: THE INTELLECTUAL ORIGINS OF THE CONSTITUTION 14–36 (1985) (describing the various ways in which property might be taken or regulated).

58. Jackson, *supra* note 34, at 208 (citing 1 BLACKSTONE, *supra* note 43, at *724–25).

59. *Id.* at 209.

60. *See supra* notes 39–43 and accompanying text.

61. RODNEY L. MOTT, DUE PROCESS OF LAW 125–36 (1926).

B. *The Development of Doctrine*

This undercurrent of arbitrary and unreasonable actions of government as contrary to due process ran through the law in the late eighteenth and early nineteenth centuries as well, although it was only rarely stated.[62] Much of the mention of due process during this time had to do with procedure rather than substance.[63] Nevertheless, the idea that there were substantive limits to governmental action found expression in the doctrine against impairment of vested property rights.[64] It was not until the latter half of the nineteenth century that substantive due process, as we currently understand it, coalesced into a vital form in American law.

Some popular accounts of substantive due process mark its inception from the infamous case of *Dred Scott v. Sandford*,[65] as if merely linking substantive due process to that case rather than its roots in Magna Carta makes the whole concept illegitimate.[66] It is true that Justice Taney's opinion spoke of prohibiting slavery in the territories of the Missouri Compromise as a violation of the Fifth Amendment Due Process Clause.[67] However, this is really just a continuation of the "vested property rights" line of due process jurisprudence that was well established in American law by that time.[68] It really has little to do with the concept of un-

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62. *See* Charles Grove Haines, *Due Process of Law After the Civil War*, *in* 1 SELECTED ESSAYS ON CONSTITUTIONAL LAW, *supra* note 19, at 268.

63. *See* Corwin, *supra* note 10, at 370–73. Some state courts did express the concept that the various due process and law of the land provisions in their state constitutions were hedges against arbitrary legislation. *See, e.g.*, Dunn v. City Council of Charleston, 16 S.C.L. (Harp.) 189, 199 (S.C. Const. Ct. App. 1824) ("Various opinions have been entertained of the meaning of those words, 'the law of the land,' but all the commentators have considered them as intending, in some way or other, to operate as a check upon the exercise of arbitrary power.").

64. *See* Charles M. Hough, *Due Process of Law—To-Day*, in 1 SELECTED ESSAYS ON CONSTITUTIONAL LAW, *supra* note 19, at 302, 306–07.

65. 60 U.S. (19 How.) 393 (1857).

66. *See* BORK, *supra* note 11, at 32 ("Who says *Roe* must say *Lochner* and *Scott*."); David P. Currie, *The Constitution in the Supreme Court: Article IV and Federal Powers, 1836–1864*, 1983 DUKE L.J. 695, 736 & n.262 (stating that *Dred Scott* was "at least very possibly the first application of substantive due process in the Supreme Court, . . . [and was] the original precedent for *Lochner v. New York* and *Roe v. Wade*").

67. *Dred Scott*, 60 U.S. at 451–52 ("The right to traffic in [slavery] . . . was guarantied [sic] to the citizens of the United States, in [any] State that might desire it, for twenty years. And the Government in express terms is pledged to protect it in all future time, if the slave escapes from his owner.").

68. *See* Jack M. Balkin & Sanford Levinson, *Thirteen Ways of Looking at* Dred Scott,

enumerated rights and liberties, or the Due Process Clause as protection against arbitrary governmental action.[69] Further, if pedigree is somehow important, supporters of substantive due process could just as easily cite the arguments made by abolitionists such as Samuel Chase during the same time period—that by recognizing slavery in the territories, the federal government was denying slaves their right to freedom in violation of the Due Process Clause of the Fifth Amendment.[70] Although the Court did not adopt this theory, the argument "formed the centerpiece of antislavery constitutional doctrine, appearing in every antislavery party platform between 1844 and 1860."[71]

Due process as a hedge against arbitrary governmental action and interference with liberty moved from a latent background assumption to the forefront after the Fourteenth Amendment applied it to state enactments. Its progress was gradual, with the Court in the *Slaughter-House Cases* dismissing the butchers' due process argument with the brief comment that

> it is sufficient to say that under no construction of that provision that we have ever seen, or any that we deem admissible, can the restraint imposed by the State of Louisiana upon the exercise of their trade by the butchers of New Orleans be held to be a deprivation of property within the meaning of [the Due Process Clause of the Fourteenth Amendment].[72]

However, at the same time, the Court was setting out the beginnings of its unenumerated rights jurisprudence in *Loan Association v. Topeka*.[73] In that case, the Court, although not referencing

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82 CHI.-KENT L. REV. 49, 74 (2007).

69. *See* Christopher L. Eisgruber, *The Story of* Dred Scott*: Originalism's Forgotten Past*, *in* CONSTITUTIONAL LAW STORIES 78–80 (Michael C. Dorf ed., 2004) (critiquing the "*Dred* Again" arguments).

70. *See, e.g.*, SALMON P. CHASE, THE ADDRESS AND REPLY ON THE PRESENTATION OF A TESTIMONIAL TO S.P. CHASE BY THE COLORED PEOPLE OF CINCINNATI WITH SOME ACCOUNT OF THE CASE OF SAMUEL WATSON 29–30 (1845); *see also* EARL M. MALTZ, THE FOURTEENTH AMENDMENT AND THE LAW OF THE CONSTITUTION 8 (2003) (referencing Chase's argument).

71. MALTZ, *supra* note 70, at 8.

72. 83 U.S. 36, 80–81 (1872). Much of the Court's opinion in the *Slaughter-House Cases* centered on the Privileges or Immunities Clause. The Due Process argument was "not . . . much pressed" by the litigants. *Id.* at 80; *see* Edward S. Corwin, *The Supreme Court and the Fourteenth Amendment*, 7 MICH. L. REV. 643, 647 (1909). In dissent, Justice Bradley argued that "a law which prohibits a large class of citizens from adopting a lawful employment, or from following a lawful employment previously adopted, does deprive them of liberty as well as property, without due process of law." *Slaughter-House Cases*, 83 U.S. at 122 (Bradley, J., dissenting).

73. 87 U.S. 655 (1874).

due process, nevertheless applied the classic "public purpose" requirement in finding that the city's issuance of bonds to benefit private bridge builders was void.[74] In so doing, the Court, through Justice Miller, the author of the *Slaughter-House Cases*,[75] noted:

> It must be conceded that there are such rights in every free government beyond the control of the State. A government which recognized no such rights, which held the lives, the liberty, and the property of its citizens subject at all times to the absolute disposition and unlimited control of even the most democratic depository of power, is after all but a despotism.[76]

Over the next few years, the idea that due process could be invoked as a protection against arbitrary legislation appears to have been assumed by courts, but its parameters were uncertain. In *Munn v. Illinois*, the argument of the plaintiffs was that legislation fixing the maximum prices for grain storage violated due process because it was beyond the power of the state.[77] The Court rejected this argument in deference to Illinois's judgment that the property in question was affected with a public interest, but noted that "[i]f no state of circumstances could exist to justify such a statute, then we may declare this one void, because in excess of the legislative power of the State."[78]

Similarly, in *Davidson v. New Orleans*, wherein the Court addressed the constitutionality of an assessment of taxes on real estate in Louisiana, Justice Miller cited the long history of due process as a restriction on governmental action, but attempted to tread carefully regarding its actual application.[79] He stated that there existed "some strange misconception" that the Due Process Clause was "a means of bringing to the test of the decision of this court the abstract opinions of every unsuccessful litigant in a State court of the justice of the decision against him, and of the merits of the legislation on which such a decision may be founded."[80] He further noted:

> If, therefore, it were possible to define what it is for a State to deprive a person of life, liberty, or property without due process of law,

74. *Id.* at 664–65.
75. 83 U.S. at 57.
76. *Loan Ass'n*, 87 U.S. at 662.
77. 94 U.S. 113, 123 (1876).
78. *Id.* at 130, 132–33.
79. 96 U.S. 97, 102, 104 (1877).
80. *Id.* at 104.

> in terms which would cover every exercise of power thus forbidden to the State, and exclude those which are not, no more useful construction could be furnished by this or any other court to any part of the fundamental law[,][81]

but stated that the wiser course would be to rely on "the gradual process of judicial inclusion and exclusion, as the cases presented for decision shall require, with the reasoning on which such decisions may be founded."[82]

There were other rumblings of substantive due process during this time period, but they provided no clear doctrine.[83] At the same time, the Court refused to use the Due Process Clause as an opportunity to incorporate the Bill of Rights against the states.[84] Although the foundations for the doctrine of substantive due process were laid during this time, the doctrine itself would not take shape until the late 1880s.[85]

The doctrine came in *Mugler v. Kansas*, wherein the Court addressed whether a legislature could rightly prohibit the manufacture and sale of liquor for personal use.[86] The plaintiffs in *Mugler* argued that such a regulation was beyond the power of the state

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81. *Id.*

82. *Id.*

83. *See, e.g.*, Yick Wo v. Hopkins, 118 U.S. 356 (1886). Although the Court invalidated the ordinances in question because of their discriminatory nature, it went on to state that

> [T]he fundamental rights to life, liberty, and the pursuit of happiness, considered as individual possessions, are secured by those maxims of constitutional law which are the monuments showing the victorious progress of the race in securing to men the blessings of civilization under the reign of just and equal laws . . . for the very idea that one man may be compelled to hold his life, or the means of living, or any material right essential to the enjoyment of life, at the mere will of another, seems to be intolerable in any country where freedom prevails, as being the essence of slavery itself.

Id. at 370. The role of *Yick Wo v. Hopkins* in the development of due process is open to some debate. Some commentators have argued that *Yick Wo* is the first example of *Lochner*-like substantive due process protecting economic rights. *See, e.g.*, Gabriel J. Chin, *Unexplainable on Grounds of Race: Doubts About* Yick Wo, 2008 U. ILL. L. REV. 1359, 1373. Still others have argued that it was primarily an equal protection case that had little impact on the development of the doctrine. *See, e.g.*, David E. Bernstein, *Revisiting* Yick Wo v. Hopkins, 2008 U. ILL. L. REV. 1393, 1399. The most that can probably be said about *Yick Wo* was that it helped advance the idea of the Due Process Clause as a substantive barrier to arbitrary exercises of state power. MALTZ, *supra* note 70, at 111–12 (arguing that the clear implication of the *Yick Wo* analysis was that the Fourteenth Amendment would be a barrier to arbitrary substantive action as well as procedural action).

84. United States v. Cruikshank, 92 U.S. 542, 552 (1875).

85. Stephen Gardbaum, *New Deal Constitutionalism and the Unshackling of the States*, 64 U. CHI. L. REV. 483, 492 (1997).

86. 123 U.S. 623, 653 (1887).

and therefore a violation of due process.[87] In its analysis, the Court, through Justice Harlan, set forth the general rules. He recognized that the legislature was the proper authority to "determine, primarily, what measures are appropriate or needful for the protection of the public morals, the public health, or the public safety."[88] However, he noted:

> It does not at all follow that every statute enacted ostensibly for the promotion of these ends, is to be accepted as a legitimate exertion of the police powers of the State. There are, of necessity, limits beyond which legislation cannot rightfully go. While every possible presumption is to be indulged in favor of the validity of a statute, the courts must obey the Constitution rather than the law-making department of government, and must, upon their own responsibility, determine whether, in any particular case, these limits have been passed.[89]

The Court then stated the forerunner of the rational basis test:

> If . . . a statute purporting to have been enacted to protect the public health, the public morals, or the public safety, has no real or substantial relation to those objects, or is a palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge, and thereby give effect to the Constitution.[90]

Even after announcing this test, however, the Court went on to hold that the statute had a real relation to the protection of the public safety from the effects of intoxicating liquors.[91]

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87. *Id.* at 660.

88. *Id.* at 661.

89. *Id.* (citing Sinking Fund Cases, 99 U.S. 700, 718 (1878)).

90. *Id.*

91. *Id.* at 661–62. The Court concluded that it

> is difficult to perceive any ground for the judiciary to declare that the prohibition by Kansas of the manufacture or sale, within her limits, of intoxicating liquors for general use there as a beverage, is not fairly adapted to the end of protecting the community against the evils which confessedly result from the excessive use of ardent spirits. There is no justification for holding that the State, under the guise merely of police regulations, is here aiming to deprive the citizen of his constitutional rights; for we cannot shut out of view the fact, within the knowledge of all, that the public health, the public morals, and the public safety, may be endangered by the general use of intoxicating drinks; nor the fact established by statistics accessible to every one, that the idleness, disorder, pauperism, and crime existing in the country, are, in some degree at least, traceable to this evil. . . . Nor can it be said that government interferes with or impairs any one's constitutional rights of liberty or of property, when it determines that the manufacture and sale of intoxicating drinks, for general or individual use, as a beverage, are, or may become, hurtful to society, and constitute, therefore, a business in which no one may lawfully engage.

Id. at 661–63.

The test announced in *Mugler* was applied the next year in upholding a statute making it illegal to sell or possess to sell oleomargarine.[92] The Court brushed aside the petitioners' offer of proof that their particular oleomargarine products were wholesome, stating instead that: "It is entirely consistent with that offer that many, indeed, that most kinds of oleomargarine butter in the market contain ingredients that are or may become injurious to health. The court cannot say, from anything of which it may take judicial cognizance, that such is not the fact."[93]

The rule of due process under the Fourteenth Amendment, as announced by *Mugler* and practiced by the Supreme Court, was one which presumed the validity of the legislative act in question, and placed the burden on the challenger of the law to show its unconstitutionality.[94] Further, facts supporting the statute were presumed to exist.[95] However, the Court reserved for itself the final question over whether the state law was reasonably related to the public welfare, or whether it was instead arbitrary.[96] A challenger could always rebut the presumption of constitutionality by presenting facts showing that the law was not reasonably related to the public welfare, or unreasonably infringed on rights guaranteed by the Constitution.[97] The test for validity of federal regulation under the Due Process Clause of the Fifth Amendment was presumed to be the same, with the inquiry being whether the act was a reasonable exercise of a federal power, or transgressed some right guaranteed by the Constitution.[98] Under this test, the

92. Powell v. Pennsylvania, 127 U.S. 678, 679, 683, 684 (1888) (citing *Mugler*, 123 U.S. at 623).

93. *Id.* at 684.

94. Sweet v. Rechel, 159 U.S. 380, 392–93 (1895); *Mugler*, 123 U.S. at 661 (citing *Sinking Fund Cases*, 99 U.S. at 718).

95. *Sweet*, 159 U.S. at 393 (citations omitted).

96. *Mugler*, 123 U.S. at 661.

97. *Id.*

98. Adair v. United States, 208 U.S. 161, 174–80 (1908) (holding that a federal statute criminalizing the discharge of employees for joining a labor union was not a valid exercise of the Commerce Clause and violated the Fifth Amendment's Due Process Clause because it unreasonably deprived the defendant employer of personal liberty and property). The Fifth Amendment's Due Process Clause was not often invoked during this time. *See* MOTT, *supra* note 61, at 204–05; Walter F. Dodd, *Implied Powers and Implied Limitations in Constitutional Law*, *in* 1 SELECTED ESSAYS ON CONSTITUTIONAL LAW, *supra* note 19, at 353–54. According to Professor Dodd, the reasons for this may include: (1) the fact that states have more general powers than the federal government; (2) the fact that state laws are subject to review from both state and federal courts; (3) the inherent distrust of state legislatures by state and federal courts; and (4) the greater pressure upon those courts to apply constitutional limitations on state enactments. *Id.* at 352–54.

Court took upon itself the task of exercising a substantive review of both the ends that the legislation purported to meet as well as the means by which it purported to meet them.

The application of these principles generally resulted in the state or federal law at issue being upheld. From 1887 to 1912, the Supreme Court decided ninety-eight cases in which it considered the validity of substantive social or economic legislation under the Due Process Clause.[99] Of these, the legislation was held to be constitutional in ninety-two cases, and overturned in only seven.[100] These seven cases, more so than the ones in which the Court upheld the legislation in question, are instructive in showing the Court's reasoning process during this time. In six of them, the Court overturned the statute using what would become the two dominant forces of substantive due process: (1) the protection against arbitrary legislation,[101] and (2) the jurisprudence of unenumerated fundamental rights.[102]

In *Dobbins v. Los Angeles*, the Court considered the validity of a statute that barred the building of gas works outside of a certain area.[103] The plaintiff had secured a permit within the privileged area and was in the process of building when the city council amended the statute so that the plaintiff's property was outside of the permitted area.[104] In analyzing the case, the Court admitted that

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99. Ray A. Brown, *Due Process of Law, Police Power, and the Supreme Court*, 40 HARV. L. REV. 943, 944 (1927). In an earlier article, Charles Warren had put the number as 560 cases between 1887 and 1911. Charles Warren, *The Progressiveness of the United States Supreme Court*, 13 COLUM. L. REV. 294, 295 (1913). However, Warren counted many cases that actually fit under the Equal Protection Clause, contained only procedural due process questions, or were concerned with taxation, eminent domain and rate regulation, thus making Brown's count a more accurate guide of substantive due process. Brown, *supra* note 99, at 944 n.7 (explaining his methodology).

100. *See* Brown, *supra* note 99, at 944 & n.8 (citations omitted). Brown actually lists six, but he does not include *Allgeyer v. Louisiana*, 165 U.S. 578 (1897), which is also a case where the Court overturned the legislation in question under the Due Process Clause. *See* Warren, *supra* note 99, at 295 (listing *Allgeyer*).

101. *See* St. Louis, Iron Mountain & S. Ry. Co. v. Wynne, 224 U.S. 354, 359 (1912); Dobbins v. City of Los Angeles, 195 U.S. 223, 239 (1904).

102. *See Adair*, 208 U.S. at 173–74; Lochner v. New York, 198 U.S. 45, 53 (1905); *Allgeyer*, 165 U.S. at 578.

103. 195 U.S. 223, 234 (1904).

104. *Id.* at 224–25. The plaintiff alleged that the ordinance was modified at the insistence of the Los Angeles Lighting Company, which had a monopoly on gasworks in the area. *Id.* at 225.

> every intendment is to be made in favor of the lawfulness of the exercise of municipal power, making regulations to promote the public health and safety, and that it is not the province of courts, except in clear cases, to interfere with the exercise of the power reposed by law in municipal corporations for the protection of local rights and the health and welfare of the people in the community.[105]

However, the court stated

> [N]otwithstanding this general rule of the law, it is now thoroughly well settled by decisions of this court that municipal by-laws and ordinances, and even legislative enactments undertaking to regulate useful business enterprises, are subject to investigation in the courts with a view to determining whether the law or ordinance is a lawful exercise of the police power, or whether under the guise of enforcing police regulations there has been an unwarranted and arbitrary interference with the constitutional rights to carry on a lawful business, to make contracts, or to use and enjoy property.[106]

The Court in *Dobbins* did not fall back on the doctrine of vested property rights. Rather, it admitted that even though the plaintiff had already invested money and completed considerable construction, the city still had the power to regulate her use of the property for health, safety, or welfare reasons.[107] Instead, the Court analyzed the alleged reason for the ordinance, public safety, and held that it was not reasonably related to the change in the statute because the area in which the plaintiff was to build was no different than the new permitted area.[108] The Court also noted that while, in general, it did not inquire into the actual motives of legislation, it would take motives into account when the facts revealed that the purpose was unlawful or discriminatory.[109]

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105. *Id.* at 235–36.

106. *Id.* at 236.

107. *Id.* at 238. The Court noted that

> notwithstanding the grant of the permit, and even after the erection of the works, the city might still, for the protection of the public health and safety, prohibit the further maintenance and continuance of such works, and the prosecution of the business, originally harmless, may become, by reason of the manner of its prosecution or a changed condition of the community, a menace to the public health and safety. In other words, the right to exercise the police power is a continuing one, and a business lawful to-day may in the future, because of the changed situation, the growth of population or other causes, become a menace to the public health and welfare, and be required to yield to the public good.

Id. at 238–39 (citations omitted).

108. *Id.* at 239–40.

109. *Id.* at 240.

In *St. Louis, Iron Mountain and Southern Railway Co. v. Wynne*, the Court also overturned a statute mandating that a railroad either pay within thirty days the demand of a livestock owner for livestock killed by a train, or be liable for double the amount eventually awarded by a jury, plus attorneys' fees.[110] The Court held that the statute was not a reasonable way to secure its avowed purpose, which was the prompt settlement of just demands, but was rather an arbitrary penalty for failing to accede to extravagant demands.[111]

In both *Dobbins* and *Wynne*, the Court followed the standard method of analyzing legislation for arbitrariness: the legislation was given the presumption of constitutionality, and the test was whether the legislation was reasonably related to the permissible end that it was designed to achieve.[112] This is in line with the procedure prescribed in *Mugler*. However, in three other cases during this time period, the Court suggested that some other test might apply where legislation was challenged as violating certain fundamental rights.

The first of these cases was *Allgeyer v. Louisiana*, which dealt with a statute construed to prohibit a Louisiana citizen from contracting for marine insurance with a New York insurance company not licensed to do business in the state.[113] In considering this question, the Court set out a broad definition of "liberty" under due process, stating:

> The liberty mentioned in [the Fourteenth Amendment] means, not only the right of the citizen to be free from the mere physical restraint of his person, as by incarceration, but the term is deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties, to be free to use them in all lawful ways, to live and work where he will, to earn his livelihood by any lawful calling, to pursue any livelihood or avocation, and for that purpose to enter into all contracts which may be proper, necessary and essential to his carrying out to a successful conclusion the purposes above mentioned.[114]

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110. 224 U.S. 354, 358 (1912).

111. *Id.* at 359–60. Part of the Court's opinion hinged on the fact that the plaintiff received only $400 in damages from the jury, while the initial demand had been $500. *Id.* at 359.

112. *Id.* at 359–60; *Dobbins*, 195 U.S. at 238–40.

113. 165 U.S. 578, 583–84 (1897).

114. *Id.* at 589.

The Court held that while the freedom to make contracts in pursuit of business was subject to reasonable state restrictions, such restrictions could not extend to prohibiting the making of contracts outside of the state's jurisdiction.[115]

Allgeyer straddled the line between a traditional means-ends arbitrariness review and what would become a fundamental rights standard. The opinion said nothing about the presumption of reasonableness, but also stopped short of holding that the liberties it declared had some sort of special status in the due process calculus.[116] That would change just eight years later, however, when, in *Lochner v. New York*, the Court transformed *Allgeyer*'s right to enter into proper, necessary, and essential contracts into the unenumerated right of "liberty of contract."[117]

C. Lochner *and Liberty of Contract*

Lochner is one of the most commented-on opinions in history. Although scholars have many different interpretations of exactly what the Court's motivations were in striking down New York's wage and hour legislation for bakeshops,[118] *Lochner*'s significance for substantive due process is that it represents the beginning of fundamental rights jurisprudence as we know it today.[119] In some ways, *Lochner* looks like a traditional means-ends arbitrariness analysis, with the question being whether the act had a relation

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115. *Id.* at 591.

116. *See* David N. Mayer, *The Myth of "Laissez-Faire Constitutionalism": Liberty of Contract During the* Lochner *Era*, 36 HASTINGS CONST. L. Q. 217, 259 (2009). Mayer notes that the liberty of contract as stated in *Allgeyer* was actually quite moderate, in that it was the freedom to pursue a lawful calling through lawful means, subject to reasonable legal constraints. *Id.*

117. James W. Ely, Jr., *"To Pursue Any Lawful Trade or Avocation": The Evolution of Unenumerated Economic Rights in the Nineteenth Century*, 8 U. PA. J. CONST. L. 917, 947–48 (2006) (discussing that liberty of contract as a fundamental right was connected to the established right to pursue a lawful vocation).

118. *See, e.g.*, HOWARD GILLMAN, THE CONSTITUTION BESIEGED: THE RISE AND DEMISE OF *LOCHNER* ERA POLICE POWERS JURISPRUDENCE 1–18 (1993) (arguing that *Lochner* was the result of an opposition to class legislation); FRANK R. STRONG, SUBSTANTIVE DUE PROCESS OF LAW: A DICHOTOMY OF SENSE AND NONSENSE 95 (1986) (arguing that *Lochner* was a product of Social Darwinism); Cass R. Sunstein, Lochner's *Legacy*, 87 COLUM L. REV. 873, 873–75 (1987) (arguing that the *Lochner* Court's motivation was based on preexisting common law norms).

119. *See generally* David E. Bernstein, Lochner *Era Revisionism Revised:* Lochner *and the Origins of Fundamental Rights Constitutionalism*, 92 GEO. L.J. 1 (2003) (arguing that *Lochner* is best understood in the context of the Court's fundamental rights jurisprudence).

to promoting the health, safety, and welfare of the public.[120] However, the Court in *Lochner* made a crucial change to the calculus: Rather than presume the statute in question to be constitutional, the Court reversed the presumption to favor liberty of contract.[121] Although not explicitly stating so, the Court clearly placed the burden on the state to justify the legislation as a labor or health law, and the state's failure to do so led to the law's demise.[122]

Lochner was followed soon after by *Adair v. United States*.[123] In that case, interpreting the Fifth Amendment's Due Process Clause rather than the Fourteenth's, the Court struck down a federal criminal statute prohibiting the discharge of an employee for joining a labor organization.[124] In making this determination, the Court followed the analysis from *Lochner*: first holding that the law infringed on liberty of contract, and then requiring the government to justify the intrusion by, in this case, showing that the statute was a proper regulation of interstate commerce.[125]

Thus, by the end of 1912, the Supreme Court's substantive due process jurisprudence had evolved along the two lines that mark such jurisprudence today. Ordinary legislative enactments challenged as a deprivation of liberty or property, as in *Dobbins* and *Wynne*, were subject to the classic arbitrariness formula, whereby the legislative enactment was presumed to be constitutional and the burden placed on the challenger to show that the legislative scheme bore no relation to a legitimate governmental purpose.[126] However, certain legislation that infringed on special liberties—such as the liberty of contract—was subject to a different standard; one in which the presumption was switched to the liberty interest, and the burden placed on the government to establish the legitimacy of the legislation. To be sure, the difference was

120. Lochner v. New York, 198 U.S. 45, 57 (1905).

121. *Id.* at 56; David E. Bernstein, *The Story of* Lochner v. New York, *in* CONSTITUTIONAL LAW STORIES, *supra* note 69, at 344 (noting the presumption in favor of liberty of contract); Robert E. Cushman, *The Social and Economic Interpretation of the Fourteenth Amendment*, *in* 2 SELECTED ESSAYS ON CONSTITUTIONAL LAW, *supra* note 19, at 70; Mayer, *supra* note 116, at 258 (noting that the *Lochner* standard created a moderate presumption in favor of liberty).

122. *Lochner*, 198 U.S. at 64–65.

123. 208 U.S. 161, 161 (1908).

124. *Id.* at 180.

125. *Id.* at 172, 176.

126. *See* St. Louis, Iron Mountain & S. Ry. Co. v. Wynne, 224 U.S. 354, 359 (1912); Dobbins v. Los Angeles, 195 U.S. 223, 236, 239–40 (1904).

minor, because the Court generally made a substantive inquiry as to whether the legislation actually bore a relation to a legitimate governmental purpose, and the government could always overcome the presumption of liberty of contract by showing that the legislation did further some legitimate governmental purpose.[127]

As the Court's doctrine of substantive due process evolved, so did its concept of what evidence would suffice to support legislation. The Court's decision in *Lochner* is often criticized for ignoring evidence that would have shown that the bakeshop legislation served a health purpose.[128] Lost in this criticism is the fact that no such evidence was presented to the Court, either in the record below or in the briefs.[129] It is true that the Court during this time period tended to be somewhat mechanical in that it tended to favor abstract legal theory over actual facts.[130] For example, the Court in *Adair* assumed an equality in the ability to bargain for contract between the employer and employee, even though reality showed that this was not the case.[131] However, by 1912 counsel to the Court had begun to present, and the Court to listen to, actual evidence on the social and economic need for legislation.[132] In *Muller v. Oregon*, a case decided a bare three years after *Lochner*, and less than a month after *Adair*, the Court took judicial notice of the "general knowledge" of the danger to the health of women

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127. *See, e.g.*, Muller v. Oregon, 208 U.S. 412, 420–23 (1908) (discussing the relationship between the minimum hours law and health of women).

128. *See, e.g.*, Learned Hand, *Due Process of Law and the Eight-Hour Day*, 21 HARV. L. REV. 495, 502–03 (1908); Dean M. Hashimoto, *Science as Mythology in Constitutional Law*, 76 OR. L. REV. 111, 138 (1997) (citing Lochner v. New York, 198 U.S. 45, 59, 70–71 (1905)); Roscoe Pound, *Liberty of Contract*, 18 YALE L.J. 454, 480 (1909).

129. Bernstein, *supra* note 121, at 345–46. The criticism of the Court tends to track the dissenting opinion of Justice Harlan, wherein he cited medical treatises and statistics showing that the trade of baking was unhealthy. However, it is not known where Harlan got this information. *Id.* at 346. Writing in 1922, Robert E. Cushman noted that "[t]here was certainly little in the briefs of counsel in the [early due process] cases to inspire the courts to take a liberal view of questions of constitutionality in close cases." Cushman, *supra* note 121, at 74 n.50.

130. *See* Cushman, *supra* note 121, at 71.

131. Adair v. United States, 208 U.S. 161, 174–75 (1908). The Court stated that

> the right of the employe[e] to quit the service of the employer, for whatever reason, is the same as the right of the employer, for whatever reason, to dispense with the services of such employe[e]. . . . In all such particulars the employer and the employe[e] have equality of right, and any legislation that disturbs that equality is an arbitrary interference with the liberty of contract which no government can legally justify in a free land.

Id.

132. *See* Cushman, *supra* note 121, at 73 (citing Felix Frankfurter, *Hours of Labor and Realism in Constitutional Law*, 29 HARV. L. REV. 353 (1916)).

from working long hours presented to it in the plaintiffs' brief, and upheld Oregon's minimum hours law.[133]

From 1913 to 1920 the Court decided ninety-seven cases regarding substantive due process, and in only five of them was the legislation overturned.[134] In *Adams v. Tanner*, the Court applied the standard test for arbitrary legislation in overturning a Washington statute forbidding employment agencies from charging a fee from persons seeking employment.[135] Liberty of contract was involved in two of those cases, but the Court struggled to apply a consistent test. In *Smith v. Texas*, the Court reversed a conviction under a statute making it a misdemeanor to act as a railway conductor without having served two years as a freight conductor or brakeman.[136] Although the Court did not explicitly set out a test, it appears to have applied a mild presumption in favor of liberty of contract and right to employment.[137] Similarly, in *Coppage v. Kansas*, decided five months later, the Court, although recognizing a "strong general presumption in favor of the validity of state laws," placed the burden on the state to justify as a legitimate exercise of power a statute punishing an employer for requiring as a condition of employment that an employee not join a labor union.[138] However, in *Bunting v. Oregon*, a case in which the Court upheld a maximum-hours law quite similar to the one at issue in

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133. 208 U.S. 412, 420–21 (1908). The Court stated:

> The legislation and opinions referred to in the margin may not be, technically speaking, authorities, and in them is little or no discussion of the constitutional question presented to us for determination, yet they are significant of a widespread belief that woman's physical structure, and the functions she performs in consequence thereof, justify special legislation restricting or qualifying the conditions under which she should be permitted to toil.

Id. at 420.

134. *See* Brown, *supra* note 99, at 944. Brown contends that there were actually seven cases in which the legislation was overturned on this basis, listing: Buchanan v. Warley, 245 U.S. 60 (1917); Adams v. Tanner, 244 U.S. 590 (1917); McFarland v. American Sugar Refining Co., 241 U.S. 79 (1916); Truax v. Raich, 239 U.S. 33 (1915); Coppage v. Kansas, 236 U.S. 1 (1915); Smith v. Texas, 233 U.S. 630 (1914); and Chicago, Milwaukee & St. Paul Ry. v. Polt, 232 U.S. 165 (1914). *Id.* at 944 n.9. However, both *McFarland* and *Truax* were really decided on equal protection grounds. *McFarland*, 241 U.S. at 86; *Truax*, 239 U.S. at 41–43.

135. *Tanner*, 244 U.S. at 595–96 (quoting McLean v. Arkansas, 211 U.S. 539, 547 (1909)).

136. 233 U.S. at 635–36, 642.

137. *Id.* at 636–41. In addition, Justice Joseph Lamar, the author of the opinion, appears to have leaned heavily on his personal knowledge of the railway business in finding no justification for the law. *Id.* at 640 n.1.

138. 236 U.S. at 14.

Lochner, the Court appears to have applied a presumption in the other direction, requiring the challenger to show that the statute was unconstitutional.[139]

The Court also began to extend its "special liberties" jurisprudence from freedom of contract to other liberties. In *Buchanan v. Warley*, the Court struck down an ordinance promoting segregation in housing.[140] In doing so, the Court applied a *Lochner*-like analysis, first holding that the law denied freedom of property under the Fourteenth Amendment, and then holding that it was not justified by state police power.[141]

During the 1920s the Court entered the so-called "heyday" of *Lochner*-era due process jurisprudence.[142] During this time period, the Court struck down more statutes for violations of substantive due process than ever before.[143] Nevertheless, the Court still upheld far more statutes against due process challenges than it struck down.[144] The cases during this time period reflect a further development of the different strains of due process, but also reflect the continuing confusion over the test.

In cases such as *Adkins v. Children's Hospital* and *Chas. Wolff Packing Co. v. Court of Industrial Relations*, the Court made clear what had before only been hinted: the standard really had shifted, at least where liberty of contract was concerned.[145] Rather than presume constitutionality and examine the legislation for a reasonable relation to a permissible end, "[f]reedom of contract [was now] the general rule, and restraint the exception."[146] Government could only abridge this freedom in "exceptional" circumstances, such as where the business regulated was affected with a public interest.[147] Where the statute involved did not fall within

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139. 243 U.S. 426, 434–39 (1917).

140. 245 U.S. 60, 70, 82 (1917).

141. *Id.* at 73–82; *see also* David E. Bernstein, *Philip Sober Controlling Philip Drunk:* Buchanan v. Warley *in Historical Perspective*, 51 VAND. L. REV. 797, 873–74 (1998) (connecting *Lochner* and *Buchanan* with other civil liberties cases).

142. Bernstein, *supra* note 119, at 10–11 (identifying the different periods of the Court during the *Lochner* era).

143. *See* CHEMERINSKY, *supra* note 3, at 616.

144. *See id.*

145. Chas. Wolff Packing Co. v. Court of Indus. Relations, 262 U.S. 522, 534 (1923); Adkins v. Children's Hosp., 261 U.S. 525, 546 (1923).

146. *Chas. Wolff*, 262 U.S. at 534; *see Adkins*, 261 U.S. at 546.

147. *Chas. Wolff*, 262 U.S. at 534; *see Adkins*, 261 U.S. at 546. The Court in *Adkins* identified these exceptional circumstances as including statutes: (1) "fixing rates and

these narrow exceptions, it was declared to violate due process.[148] Within these categories, however, the Court upheld a broad variety of restrictions on liberty of contract.[149]

Outside the liberty of contract area, the Court applied a means-ends analysis to judge the constitutionality of the legislation, although not always with a consistent standard. In some cases, the Court applied a presumption of constitutionality,[150] while in others, no mention was made of the test.[151]

The Court also expanded due process liberty to encompass other civil liberties.[152] In *Meyer v. Nebraska*, the Court struck down a state law banning the teaching of languages other than English until after the eighth grade.[153] In an opinion by Justice McReynolds, the Court held in sweeping fashion that the liberty in the Due Process Clauses of the Fifth and Fourteenth Amendments included

> not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy the privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.[154]

In holding that the legislation unlawfully infringed on the occupational opportunity of teachers, the opportunities of pupils to

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charges [for] businesses impressed with a public interest;" (2) "relating to contracts for the performance of public work;" (3) "prescribing the character, methods and time for payment of wages;" and (4) "fixing hours of labor." 261 U.S. at 546–48.

148. Lochner v. New York, 198 U.S. 45, 53 (1905).

149. *See, e.g.*, Yeiser v. Dysart, 267 U.S. 540, 540–41 (1925) (upholding state law limiting amounts attorneys could charge in workers' compensation cases); Radice v. New York, 264 U.S. 292, 294–95, 298 (1924) (upholding state law prohibiting nighttime employment of women in restaurants located in large cities).

150. *See, e.g.*, Cudahy Packing Co. v. Parramore, 263 U.S. 418, 421–22, 426 (1923) (upholding law extending workers' compensation liability for employees injured going to workplace); Prudential Ins. Co. v. Cheek, 259 U.S. 530, 548 (1922) (upholding state law that required employers to grant request from departing employees for letter of reference stating particulars of employment and reasons for leaving).

151. *See, e.g.*, James-Dickinson Farm Mortgage Co. v. Harry, 273 U.S. 119, 123–24 (1927) (upholding statute expanding state fraud liability to false promises justified under principles of common law); Nicchia v. New York, 254 U.S. 228, 230–31 (1920) (law requiring payment of dog license fee to private humane society justified because dog ownership was an "imperfect" property right).

152. Bernstein, *supra* note 119, at 49.

153. 262 U.S. 390, 403 (1923).

154. *Id.* at 399 (citations omitted).

acquire knowledge, and the power of parents to control their children's education, the Court applied a means-ends test.[155] The Court noted that the purported end, to ensure a ready understanding of English, was perhaps desirable, but stated that the means adopted exceeded the power of the state.[156]

The Court in *Meyer* did not purport to apply the same test that it would use for liberty of contract.[157] However, the Court clearly applied a standard akin to the ones in *Lochner* and *Buchanan v. Warley*. Once the regulation was found to infringe upon a right the Court classified as "fundamental," the burden shifted to the State to justify the intrusion.[158]

Meyer was soon followed by a number of other cases extending protection to civil liberties.[159] In many of those cases, the Court's review followed the same pattern as in *Meyer* by requiring the State to justify the intrusion on rights.[160]

D. *Decline of Liberty of Contract*

By the 1930s, however, the special presumption in favor of liberty of contract was already fading in the face of an expansive definition of the "affected with a public interest" exception.[161] In *O'Gorman & Young v. Hartford Fire Insurance Co.*, the Court held in a 5-4 decision that even the wages paid to employees in a business affected with a public interest could be regulated, so long as the regulation was reasonably related to a legitimate pub-

155. *Id.* at 401–03.

156. *Id.* at 402.

157. *Compare id.* at 390, *with* Adkins v. Children's Hosp., 261 U.S. 522, 522 (1923).

158. *Meyer*, 262 U.S. at 402 ("The interference [with the fundamental rights] is plain enough and no adequate reason therefore in time of peace and domestic tranquility has been shown.").

159. Bernstein, *supra* note 119, at 49; *see* Stromberg v. California, 283 U.S. 359, 368–70 (1931) (holding that the right of free political discussion is a fundamental part of the constitutional system, and this right encompasses displaying a red flag in a public place as a symbol of opposition to organized government); Farrington v. Tokushige, 273 U.S. 284, 298–99 (1927) (upholding an injunction against a statute imposing special restrictions on foreign language schools); Gitlow v. New York, 268 U.S. 652, 667–70 (1925) (holding that the First Amendment's freedom of expression is a fundamental right included in the Fourteenth Amendment, but finding the statute in question constitutional); Pierce v. Soc'y of Sisters, 268 U.S. 510, 534–35 (1925) (overturning a law prohibiting private nonreligious schools).

160. *See, e.g.*, *Farrington*, 273 U.S. at 298–99; *Pierce*, 268 U.S. at 534–35.

161. *See, e.g.*, Tagg Bros. & Moorhead v. United States, 280 U.S. 420, 439 (1930).

lic interest.[162] In *Nebbia v. New York*, the category of businesses "affected with a public interest" was expanded to include all businesses, in all of their aspects, subject only to the requirements of reasonable relation to a legitimate purpose.[163] In an opinion authored by Justice Owen Roberts, the Court stated:

> It is clear that there is no closed class or category of businesses affected with a public interest, and the function of courts in the application of the Fifth and Fourteenth Amendments is to determine in each case whether circumstances vindicate the challenged regulation as a reasonable exertion of governmental authority or condemn it as arbitrary or discriminatory. The phrase "affected with a public interest" can, in the nature of things, mean no more than that an industry, for adequate reason, is subject to control for the public good. In several of the decisions of this court wherein the expressions "affected with a public interest," and "clothed with a public use," have been brought forward as the criteria of the validity of price control, it has been admitted that they are not susceptible of definition and form an unsatisfactory test of the constitutionality of legislation directed at business practices or prices. These decisions must rest, finally, upon the basis that the requirements of due process were not met because the laws were found arbitrary in their operation and effect. But there can be no doubt that upon proper occasion and by appropriate measures the state may regulate a business in any of its aspects, including the prices to be charged for the products or commodities it sells.[164]

By announcing that any business could be "affected with a public interest," the Court effectively retired the category, and with it, much of the special status that liberty of contract had enjoyed.[165]

Finally, in *West Coast Hotel v. Parrish*, the Court abolished the special status for liberty of contract altogether.[166] In upholding a state law establishing minimum wages for women, the Court stated:

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162. 282 U.S. 251, 257–58 (1931). Several commentators have traced the beginning of today's rational basis test to Justice Brandeis's majority opinion in *O'Gorman*. *See* Barnett *supra* note 5, at 1481–82.

163. 291 U.S. 502, 536–37 (1934).

164. *Id.* (citing Chas. Wolff Packing Co. v. Court of Indus. Relations, 262 U.S. 522, 535 (1923)).

165. *See* Cushman, *supra* note 121, at 80. Liberty of contract would have one more moment in the sun, in *Morehead v. New York ex rel. Tipaldo*, 298 U.S. 587, 610–13 (1936). In that case, the Court struck down a New York minimum wage law for women and minors. *Id.*

166. 300 U.S. 379, 391–92 (1937).

> The Constitution does not speak of freedom of contract. It speaks of liberty and prohibits the deprivation of liberty without due process of law. In prohibiting that deprivation 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. This essential limitation of liberty in general governs freedom of contract in particular.[167]

Although liberty of contract's special status had been for all intents and purposes killed by *Nebbia* in 1934,[168] and formally buried by *Parrish* in 1937,[169] the idea that some rights were entitled to special status lived on. The incorporation doctrine began in 1925 in *Gitlow v. New York*[170] and continued in 1931 when the Court held that both the First Amendment's free speech and free press guarantees were a part of the Fourteenth Amendment's Due Process Clause.[171] These decisions paved the way for the enforcement of much of the Bill of Rights against the states through due process.[172] Along with these decisions, the Court also engrafted their tests.

For the development of general substantive due process and unenumerated rights, however, the incorporation case that would become most significant was one in which the Court actually refused incorporation. In *Palko v. Connecticut*, the Court refused to incorporate the Fifth Amendment's double jeopardy provision.[173] However, the Court did articulate a standard for what rights would be encompassed within due process: those "implicit in the concept of ordered liberty" and "'so rooted in the traditions and

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167. *Id.*

168. *See* 291 U.S. at 536–37.

169. *See* 300 U.S. at 391–92.

170. 268 U.S. 652, 667–70 (1925).

171. Near v. Minnesota, 283 U.S. 697, 722–23 (1931) (incorporating freedom of press); Stromberg v. California, 283 U.S. 359, 368 (1931) (incorporating free speech provision).

172. *See, e.g.*, Mapp v. Ohio, 367 U.S. 643, 655 (1961) (incorporating Fourth Amendment search and seizure rules); Everson v. Bd. of Educ., 330 U.S. 1, 16–18 (1947) (incorporating First Amendment Establishment Clause); Cantwell v. Connecticut, 310 U.S. 296, 305 (1940) (incorporating First Amendment Free Exercise Clause); DeJonge v. Oregon, 299 U.S. 353, 365–66 (1937) (right of peaceable assembly); Powell v. Alabama, 287 U.S. 45, 71 (1932) (requiring counsel for indigent defendants in capital cases).

173. 302 U.S. 319, 322 (1937).

conscience of our people as to be ranked as fundamental.'"[174] Although *Palko* was meant to be a limitation on due process claims, it also reinforced the idea that fundamental rights fell within the purview of the Fourteenth Amendment.[175] This idea, combined with a case decided five months later, would set the stage for the modern interpretation of substantive due process.

E. *The Modern View of Substantive Due Process*

In *United States v. Carolene Products Co.*, the Court reiterated that most laws infringing on liberty would be analyzed under what would become known as the rational basis test, stating that, under that test

> the existence of facts supporting the legislative judgment is to be presumed, for regulatory legislation affecting ordinary commercial transactions is not to be pronounced unconstitutional unless in the light of the facts made known or generally assumed it is of such a character as to preclude the assumption that it rests upon some rational basis within the knowledge and experience of the legislators.[176]

However, in its famous Footnote Four, the Court stated that "[t]here may be a narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments, which are deemed equally specific when held to be embraced within the Fourteenth."[177] The Court also suggested that a more searching inquiry might need to be conducted where the legislation at issue "restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation," and is directed at particular religious, national, or racial minorities, or prejudices "discrete and insular minorities."[178] Just as importantly, Footnote Four repurposed the Court's prior civil liberties cases to fit this new configuration.[179] Thus, *Pierce* became a case about religious minorities, and *Meyer*

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174. *Id.* at 325 (quoting Snyder v. Massachusetts, 291 U.S. 97, 105 (1934)). In 1969, the Court decided that the double jeopardy provision did fit under this definition, overruling *Palko*. *See* Benton v. Maryland, 395 U.S. 784, 794 (1969).

175. *Palko*, 302 U.S. at 322, 324–25.

176. 304 U.S. 144, 152 (1938).

177. *Id.* at 152 n.4.

178. *Id.* at 152 n.4.

179. Bernstein, *supra* note 119, at 52–53.

a case about national minorities, a result which no doubt surprised their author, Justice McReynolds.[180]

The implications of what the Court said in *Palko* and *Carolene Products*, along with what the Court implied, were significant for substantive due process jurisprudence. On the one hand, most legislation was to be judged by the minimally restrictive rational basis standard, which presumed the constitutionality of the legislation and the existence of facts to support it.[181] However, the test was not a rubber stamp, because the Court also said the following in *Carolene Products*:

> We may assume for present purposes that no pronouncement of a legislature can forestall attack upon the constitutionality of the prohibition which it enacts by applying opprobrious epithets to the prohibited act, and that a statute would deny due process which precluded the disproof in judicial proceedings of all facts which would show or tend to show that a statute depriving the suitor of life, liberty or property had a rational basis.[182]

Further, *Carolene Products* said that there might be a more searching review for legislation implicating those rights in the Bill of Rights.[183] This had the obvious effect of protecting the rights that had been incorporated at the time, along with their right-specific tests.[184] However, the Court has always said that these rights were incorporated, not because they were contained in the Bill of Rights, but rather because they were "fundamental."[185] This raised the question of whether there were other, unenumerated, fundamental rights that might also be judged by a stricter standard, and further, just what that standard might be.

For substantive unenumerated rights cases, as opposed to incorporation cases, the answer would not come until 1973.[186] After *Carolene Products*, but prior to 1973, the Court avoided finding new unenumerated rights by recasting the few rights it was will-

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180. *Carolene Products*, 304 U.S. at 153 n.4 (citations omitted). Justice McReynolds dissented without opinion in *Carolene Products*. *Id.* at 155.

181. *Id.* at 152.

182. *Id.*

183. *Id.* at 152 n.4.

184. *See id.* at 152–53 & n.4.

185. *See* Duncan v. Louisiana, 391 U.S. 145, 148–49 (1968) (collecting Supreme Court decisions that incorporate Bill of Rights provisions on the basis of a "fundamental right").

186. *See* Roe v. Wade, 410 U.S. 113, 162–64 (1973); Richard H. Fallon, Jr., *Strict Judicial Scrutiny*, 54 UCLA L. REV. 1267, 1283 (2007) (identifying *Roe v. Wade* as the first application of the strict scrutiny test to substantive due process).

ing to recognize as extensions of enumerated rights, or in one famous case, *Griswold v. Connecticut*, as residing within "penumbras" created by "emanations" of those rights.[187]

When the Court finally decided to recognize a new unenumerated right, the Court grafted onto substantive due process jurisprudence the same test it had developed in First Amendment cases dealing with freedom of speech, freedom of association, and free exercise of religion, as well as Fourteenth Amendment equal protection cases dealing with classifications based on race or classifications infringing on fundamental rights.[188] What has come to be known as the strict scrutiny test has its beginnings in statements made by the Court in the 1942 case, *Skinner v. Oklahoma*.[189] In determining that a statute providing for the mandatory sterilization of some three-time felons violated the Equal Protection Clause, the Court stated that because procreation was "one of the basic civil rights of man . . . strict scrutiny of the classification which a State makes in a sterilization law is essential."[190] However, the Court in *Skinner* did not elaborate on what such scrutiny might entail.[191]

By the late 1950s and early 1960s, the Court was more certain. In the area of free speech, the Court began to require that governmental entities show a compelling interest in order to justify infringing on speech.[192] Similarly, in First Amendment free association cases, the Court began requiring a compelling interest, and requiring a substantial relationship between such interest

187. 381 U.S. 479, 484–86 (1965); Peter Preiser, *Rediscovering a Coherent Rationale for Substantive Due Process*, 87 MARQ. L. REV. 1, 44–45 (2003).

188. *See, e.g.*, Kramer v. Union Free Sch. Dist. No. 15, 395 U.S. 621, 627 (1969) (classification based on race); Shapiro v. Thompson, 394 U.S. 618, 634 (1969) (classifications infringing on fundamental rights); Sherbert v. Verner, 374 U.S. 398, 406–09 (1963) (free exercise of religion); Bates v. City of Little Rock, 361 U.S. 516, 525 (1960) (freedom of association); Speiser v. Randall, 357 U.S. 513, 529 (1958) (freedom of speech); *see also* Fallon, *supra* note 186, at 1274–83 (detailing the development of strict scrutiny in these areas of law).

189. 316 U.S. 535 (1942); *see* Fallon, *supra* note 186, at 1281–82 (identifying *Skinner* as the first time that the Court used a term akin to strict scrutiny).

190. *Skinner*, 316 U.S. at 541.

191. *See* Fallon, *supra* note 186, at 1282 (noting *Skinner*'s omission).

192. *See* NAACP v. Button, 371 U.S. 415, 438 (1963) (stating that "only a compelling state interest in the regulation of a subject within the State's constitutional power to regulate can justify limiting First Amendment freedoms"); *Speiser*, 357 U.S. at 529 (noting that the State had "no such compelling interest at stake" to justify infringing on protected speech).

and the statute involved.[193] By this time, the compelling interest requirement had also become the measure for laws substantially infringing the free exercise of religion, along with a requirement that "no alternative forms of regulation" existed to combat the evil.[194]

During this time period, the Court was not only applying the compelling interest test to First Amendment claims incorporated under due process, it was also applying it in cases under the Equal Protection Clause.[195] The Court held that race-based classifications were "'constitutionally suspect' and subject to 'the most rigid scrutiny.'"[196] In 1969 the Court held that all classifications involving "fundamental" rights would be judged by a strict scrutiny test that required the government to show that the regulation was necessary to promote a compelling interest.[197]

In *Roe v. Wade*, the Court imported strict scrutiny into due process.[198] The Court held that, to overcome the right to privacy in abortion decisions, the governmental entity would have to demonstrate a "compelling state interest" and that the legislation was "narrowly drawn to express" only that interest.[199]

At the same time the Court was developing its new version of fundamental rights jurisprudence, however, it began to take the rational basis test further and further away from having any relevance as a constitutional test. Where the Court had previously engaged in a substantive review of ends and means, it now began to distance itself from any such responsibility.[200] In *Lincoln Federal Labor Union v. Northwestern Iron & Metal Co.*, the Court stated that it

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193. Gibson v. Fla. Legislative Investigation Comm., 372 U.S. 539, 546 (1963); *Bates*, 361 U.S. at 524–25.

194. Sherbert v. Verner, 374 U.S. 398, 406–07 (1963).

195. *See, e.g.*, McLaughlin v. Florida, 379 U.S. 184, 196 (1964) (due process); *Skinner*, 316 U.S. at 541 (Equal Protection Clause); *see* Fallon, *supra* note 186, at 1277–78, 1282–83 (tracing both race and fundamental rights-based equal protection analysis).

196. *McLaughlin*, 379 U.S. at 192 (quoting Bolling v. Sharpe, 347 U.S. 497, 499 (1954)); Korematsu v. United States, 323 U.S. 214, 216 (1944).

197. Kramer v. Union Free Sch. Dist. No. 15, 395 U.S. 621, 627 (1969); Shapiro v. Thompson, 394 U.S. 618, 634 (1969).

198. 410 U.S. 113 (1973); *see* Fallon, *supra* note 186, at 1283.

199. 410 U.S. at 155 (citations omitted).

200. *See* EDWARD KEYNES, LIBERTY, PROPERTY, AND PRIVACY: TOWARD A JURISPRUDENCE OF SUBSTANTIVE DUE PROCESS 143–46 (1996).

> has consciously returned closer and closer to the earlier constitutional principle that states have power to legislate against what are found to be injurious practices in their internal commercial and business affairs, so long as their laws do not run afoul of some specific federal constitutional prohibition, or of some valid federal law."[201]

Similarly, in 1952's *Day-Brite Lighting, Inc. v. Missouri*, the Court made it clear that "we do not sit as a super-legislature to weigh the wisdom of legislation nor to decide whether the policy which it expresses offends the public welfare."[202]

In 1955, the Court decided *Williamson v. Lee Optical*,[203] a case that pushed rational basis to the brink of insignificance.[204] The law at issue in *Williamson* forbade opticians from fitting or duplicating lenses without a prescription from an ophthalmologist or optometrist.[205] In holding the law to be constitutional, the Court held that the proper question was not whether the law had a reasonable relation to a legitimate interest, but rather whether the lawmakers could have reasonably thought that it did.[206] The Court stated that "it is enough that there is an evil at hand for correction, and that it might be thought that the particular legislative measure was a rational way to correct it."[207] The Court also made it clear that it was abdicating almost all responsibility for review of nonfundamental rights, stating:

> The day is gone when this Court uses the Due Process Clause of the Fourteenth Amendment to strike down state laws, regulatory of business and industrial conditions, because they may be unwise, improvident, or out of harmony with a particular school of thought. . . . For protection against abuses by legislatures the people must resort to the polls, not to the courts.[208]

As if *Williamson* were not enough, the Court has proceeded, through a series of decisions following it, to further "refine" the rational basis test out of existence. The Court has stated "Where . . . there are plausible reasons for [the government's] action . . . [i]t is . . . 'constitutionally irrelevant whether this reason-

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201. 335 U.S. 525, 536 (1949).

202. 342 U.S. 421, 423 (1952).

203. 348 U.S. 483 (1955).

204. *See* Barnett, *supra* note 5, at 1485 (stating that *Williamson* made the presumption of constitutionality "for all practical purposes, irrebuttable").

205. 348 U.S. at 485 & n.1.

206. *Id.* at 487–88.

207. *Id.* at 488.

208. *Id.* (quoting Munn v. Illinois, 94 U.S. 113, 134 (1876)).

ing in fact underlay the legislative decision. . . .'"[209] Further, "a legislative choice is not subject to courtroom factfinding and may be based on rational speculation unsupported by evidence or empirical data."[210] Apparently, it also no longer even matters under the rational basis test whether the facts supporting the legislation are true.[211] To overcome the presumption of constitutionality, the challenger must show that no rational legislator could have thought that the law was reasonably related to its purpose.[212]

The strict scrutiny strand and the rational basis test strand unite to form the predominant test today. Articulated in its most complete form in *Washington v. Glucksberg*,[213] and reaffirmed last year in *District Attorney's Office for the Third Judicial District v. Osborne*,[214] the test requires "a 'careful description'" of the purported right or liberty interest.[215] The Court then looks to see whether the purported right or liberty interest is fundamental, employing a test looking at whether the interest is "deeply rooted" in the history and traditions of the nation.[216] If the right is deeply rooted, and thus fundamental, it is subject to strict scrutiny and cannot be infringed unless the regulation at issue is both in furtherance of a compelling governmental interest and narrowly tailored to further that interest.[217] As a practical matter, the finding that an interest is fundamental is fatal to the infringing law.[218] If, however, the interest is not fundamental, then the infringing law need only be reasonably or rationally related to a legitimate state interest to pass constitutional muster.[219]

The evolution of substantive due process from its English antecedents to the *Glucksberg* test reveals two very important facts

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209. U.S. R.R. Ret. Bd. v. Fritz, 449 U.S. 166, 179 (1980) (quoting Flemming v. Nestor, 363 U.S. 603, 612 (1960)). *Fritz* was technically what might be thought of as an equal protection case under the Due Process Clause of the Fifth Amendment. *See id.* at 173 n.8.

210. FCC v. Beach Commc'ns, Inc., 508 U.S. 307, 315 (1993).

211. *See* Gregory v. Ashcroft, 501 U.S. 452, 473 (1991). In *Gregory*, the Court held in an Equal Protection Clause case that a mandatory retirement age for judges had a rational basis even though, "it is far from true that all judges suffer significant deterioration in performance at age 70. It is probably not true that most do. It may not be true at all." *Id.*

212. *See* Vance v. Bradley, 440 U.S. 93, 111 (1979).

213. 521 U.S. 702, 719–23 (1997).

214. 557 U.S. ___, ___, 129 S. Ct. 2308, 2319–23 (2009).

215. *Glucksburg*, 521 U.S. at 721 (quoting Reno v. Flores, 507 U.S. 292, 302 (1993)).

216. *Id.* at 720–21 (quoting Moore v. City of E. Cleveland, 431 U.S. 494, 503 (1977)).

217. *Id.* at 721 (citing *Flores*, 507 U.S. at 302).

218. *See supra* note 5 and accompanying text.

219. *Glucksberg*, 521 U.S. at 722, 728.

related to the enforcement of unenumerated rights. First, the concept of substantive due process has always been an evolving one, with different formulations of the doctrine shifting in response not only to different facts, but also to different ideas regarding such things as the proper allocation of government power and the proper evidence that courts might consider in determining whether the government has overstepped those bounds. The other side of this realization is that there really is no "golden age" of substantive due process where the doctrine was pure. Nonetheless, there has always been a clear understanding that unenumerated rights exist, and that substantive due process serves to protect them.

IV. THE BREAKDOWN OF THE SYSTEM

Unfortunately, the system described in *Glucksberg* has run into problems. This should be no surprise given the polarization that both the strict scrutiny test and the rational basis test have undergone. The strict scrutiny test is so strict that almost all legislation fails to meet it.[220] Although it may not actually live up to its reputation as "strict in theory, fatal in fact," it is the rare case indeed where legislation lives up to its requirements.[221] Because of this, the Court has retreated into what one commentator has referred to as a "rights-identifying shell," where it is hesitant to identify new rights.[222] On the other hand, the only alternative allowed by the formula is the rational basis test, which is tantamount to no test at all.[223]

The distance between the two prongs has caused problems in hard cases, where the interests are important. In such hard cases, the Court has chosen to ignore *Glucksberg* entirely, in favor of other tests.[224] In *Planned Parenthood of Southeastern Pennsylvania v. Casey*, the Court employed a test based on what the joint opinion by Justices O'Connor, Kennedy, and Souter characterized

220. *See* Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 VAND. L. REV. 793, 796 (2006).

221. *Id.* at 796–97.

222. Niles, *supra* note 2, at 138.

223. *See* Barnett, *supra* note 5, at 1485 (characterizing the test as "[n]o matter what the person whose liberty is restricted has to say, the government wins").

224. *See* Daniel O. Conkle, *Three Theories of Substantive Due Process*, 85 N.C. L. REV. 63, 64–68 (2006) (noting the different theories employed by recent Supreme Court decisions involving substantive due process).

as "reasoned judgment," based on "'the balance which our Nation, built upon the postulates of respect for the liberty of the individual, has struck between that liberty and the demands of organized society.'"[225] In looking at the liberty interest of a woman in choosing an abortion, the Court eschewed the usual fundamental right calculation and level of scrutiny analysis in favor of a more abstract balancing test.[226] The Court began with the idea that "[a]t the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life."[227] From this, the Court found a "constitutional liberty of the woman to have some freedom to terminate her pregnancy," which it then balanced against "the interest of the State in the protection of potential life" to conclude that the line for the right should be drawn at viability, and that states could regulate the right so long as they did not impose an undue burden on its exercise.[228]

The Court in *Casey* made no mention of fundamental rights, strict scrutiny, or rational basis. Rather, as Professor Daniel O. Conkle has noted, the Court seemed to "announce[ ] a presumptive right of personal autonomy and self-definition."[229] The difference between this approach and the approach in *Glucksberg* is evident. Where the test from *Glucksberg* demands a narrow definition of the asserted interest and then requires proof of historical relevance,[230] the *Casey* approach begins with a presumption of liberty within the wide sphere of personal autonomy and balances the governmental interest against it from there.[231] Further, rather than the almost "all-or-nothing" approach of fundamental versus nonfundamental rights employed in *Glucksberg*,[232] the *Casey* approach seeks to find a balance between the competing interests.[233]

Abortion is not the only area in which the Court has abandoned the *Glucksberg* framework. In *Lawrence v. Texas*, the Court did not expressly articulate whether the liberty interest of persons to

225. 505 U.S. 833, 837, 849–50 (1992) (quoting Poe v. Ullman, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting)); *see also* Conkle, *supra* note 224, at 103–04 (referring to the approach in *Casey* as the "reasoned judgment" theory of substantive due process).

226. *See generally Casey*, 505 U.S. at 833.

227. *Id.* at 851.

228. *Id.* at 869, 871, 874.

229. Conkle, *supra* note 224, at 104.

230. Washington v. Glucksberg, 521 U.S. 702, 720–21 (1997).

231. *Casey*, 505 U.S. at 857.

232. *Glucksberg*, 521 U.S. at 721; *id.* at 770 (Souter, J., concurring).

233. *Casey*, 505 U.S. at 849–50.

engage in private homosexual conduct was "fundamental," or whether the scrutiny required was strict scrutiny or some other level.[234] Rather, the Court simply held that the interest was part of the personal liberty inherent in the Fourteenth Amendment, and could not be criminalized by the state.[235] Rather than talk of "rights," such as the right to privacy, the *Lawrence* opinion talks of "liberty" as a more amorphous concept.[236]

Even in situations involving enumerated rights where the Due Process Clause is not involved, the Court's recent jurisprudence has problems with its tiered scrutiny framework. In 2008's *District of Columbia v. Heller*, the Court determined that there is a private right to "keep and bear arms" under the Second Amendment.[237] However, in discussing that interest in relation to the District of Columbia's firearms law, the Court refused to specify what level of scrutiny it was employing, stating instead that the law banning handguns from the home was unconstitutional "[u]nder any of the standards of scrutiny that we have applied to enumerated constitutional rights."[238] In response to Justice Breyer's dissenting opinion questioning this statement and stating that the law would almost certainly pass rational basis review, the majority opinion conceded the point but stated that "rational-basis scrutiny is a mode of analysis we have used when evaluating laws under constitutional commands that are themselves prohibitions on irrational laws."[239] According to the majority, "[i]n those cases, 'rational basis' is not just the standard of scrutiny, but the very substance of the constitutional guarantee."[240]

The decision of the Court in *Heller* does little to clear up the confusion regarding the proper test for constitutional rights. It affirms that the rational basis test is not applicable to enumerated rights, but intimates that there may be other tests that might apply. Moreover, as Justice Breyer notes in his dissent, the opinion approves a set of gun restrictions, including restrictions on concealed weapons, prohibitions of firearms in certain locales, and

234. 539 U.S. 558, 594 (2003) (Scalia, J., dissenting).
235. *Id.* at 578 (majority opinion).
236. *Id.* at 578–79.
237. 554 U.S. ___, ___,128 S. Ct. 2783, 2799 (2008).
238. *Id.* at ___, 128 S. Ct. at 2817.
239. *Id.* at ___, 128 S. Ct. at 2817 n.27.
240. *Id.*

regulation of commercial firearm sales, "whose constitutionality under a strict scrutiny standard would be far from clear."[241]

Nor is Justice Breyer's dissenting opinion any more clarifying than the majority's opinion. He argues that the "adoption of a true strict scrutiny standard for evaluating gun regulations would be impossible" because nearly all gun regulations further a compelling state interest, the "concern for the safety and . . . lives of [the state's] citizens."[242] Thus, he contends, any case will turn on an interest-balancing test of whether the "regulation at issue impermissibly burdens the [interests protected by the Second Amendment] in the course of advancing [governmental safety concerns]."[243] However, it is difficult to see why Breyer thinks this fact should invalidate the strict scrutiny test, as what he is describing *is* actually the strict scrutiny test.[244] That is, a court first looks to see whether the state interest is compelling, and if so, whether the regulation is "narrowly tailored" to advance that interest, which is simply another way of saying that the rule does not impermissibly burden the exercise of the right.

What has emerged, then, is an unworkable system. In this system, the Court professes to have a standard framework for substantive due process, the *Glucksberg* test, with a carefully regimented procedure for defining rights and then assessing their importance, which then translates into a formula for judging the validity of the law in question.[245] The problem comes in cases where this framework produces a result that is incompatible with what the majority of the Justices think the right answer should be. In these "hard" cases, the right involved is not sufficiently accepted as important enough to be classified as fundamental. However, the only alternative is the rational basis test,[246] which, as noted above, is almost toothless. In such circumstances, the Court abandons the framework altogether. Thus, instead of the framework determining the answer, the answer itself determines the framework in many cases.

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241. *Id.* at ___, 128 S. Ct. at 2851 (Breyer, J., dissenting).

242. *Id.* (quoting United States v. Salerno, 481 U.S. 739, 755 (1987)).

243. *Id.* at ___, 128 S. Ct. at 2852.

244. *See id.* at ___, 128 S. Ct. at 2851 (A "'strict scrutiny' test would . . . require reviewing with care each gun law to determine whether it is 'narrowly tailored to achieve a compelling governmental interest,'" (quoting Abrams v. Johnson, 521 U.S. 74, 82 (1997))).

245. *See* Washington v. Glucksberg, 521 U.S. 702, 720–21 (1997).

246. *See supra* notes 204–12 and accompanying text.

This may not be an insurmountable problem for the Supreme Court of the United States, in that it sees very few substantive due process cases. It is a much greater problem, however, for lower federal and state courts, who see the majority of litigation on this subject. Those courts are required to apply the Supreme Court's framework, and are not free to invent their way around hard cases involving rights. For these courts, the extreme deference created by the rational basis test, combined with the extreme strictness of the strict scrutiny test, almost guarantees that their decision will be skewed against the claimant. As a result, the Ninth Amendment's promise that the "rights retained" by the people shall not be "disparaged" is broken.[247]

V. PUTTING RATIONALITY BACK INTO THE RATIONAL BASIS TEST

What then, is to be done to redeem the promise of the Ninth Amendment with regard to unenumerated rights? Legal scholars have no shortage of answers in this regard. A number of scholars favor dispensing with the tiered scrutiny system altogether, in favor of systems that they claim do a better job of properly balancing the power of the government and the rights of people.[248] Under Randy Barnett's "presumption of liberty" framework, for example, any interference with what he terms "rightful conduct" must be justified by a governmental showing that it is both necessary and proper.[249] Under Mark Niles's "Ninth Amendment adjudicatory mechanism," any governmental intrusion affecting private activity must be justified by a showing that "the public impact of the act is substantial enough, and the public interest [is] compelling enough, to justify the [intrusion]."[250]

These tests and others like them that scholars have developed are often quite well-developed and eloquent. Were the task to de-

247. *See* Barnett, *supra* note 5, at 1496 (arguing that the *Glucksberg* formulation as currently used violates the Ninth Amendment).

248. *See, e.g.*, *id.* at 1496–1500 (arguing that his "presumption of liberty" framework fits better with the proper interpretation of unenumerated rights than the *Glucksberg* framework); Niles, *supra* note 2, at 123–43 (advocating replacing substantive due process with a "Ninth Amendment adjudication mechanism" that would examine "whether government action that places a significant burden on the expression of personal autonomy or freedom is motivated by an unconstitutional interest in controlling private action or private choices").

249. BARNETT, *supra* note 39, at 259–66.

250. Niles, *supra* note 2, at 132–33. Niles describes this test as similar to the fit test of intermediate scrutiny under the Equal Protection Clause. *Id.* at 133.

sign a mechanism to protect unenumerated rights out of a blank slate, each would have undeniable appeal. The problem, however, is that the jurisprudence on unenumerated rights is hardly a blank slate. Trying to overhaul the entire system of tiered scrutiny in favor of an entirely new system would require a doctrinal shift of a magnitude even greater than that of 1937. To date courts show no signs of moving in this direction. Although Barnett characterized the Supreme Court's decision in *Lawrence v. Texas* as a move towards his presumption of liberty framework,[251] this move was apparently shortlived, as the majority of the lower courts continue to use the *Glucksberg* framework.[252]

This is not to say that proponents of these comprehensive reforms are misguided in their theory, as the history of substantive due process demonstrates that theories can become doctrine under the right conditions.[253] However, the chances of a complete overhaul of substantive due process jurisprudence in the near future exceedingly small. Thus, the authors of these types of theories should not be too surprised that they remain theoretical.

The same can be said for those proponents who would jettison substantive due process in favor of privileges or immunities or both under the Fifth and Fourteenth Amendments.[254] At first glance, this would seem more likely to happen than a total reworking of unenumerated rights, in that the only precedent that would have to be overturned is the unpopular *Slaughter-House Cases*.[255] For a brief time, legal scholars believed that the Court's 1999 opinion in *Saenz v. Roe*, wherein the Court invoked the right to travel as a component of privileges or immunities to invalidate a California statute restricting Temporary Assistance to Needy Families payments for newcomers to the state,[256] heralded a rebirth of the Fourteenth Amendment Privileges or Immunities Clause.[257] Once again, that optimism appears to have been prema-

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251. Barnett, *supra* note 5, at 1495.

252. *See* Brian Hawkins, Note, *The* Glucksberg *Renaissance: Substantive Due Process Since* Lawrence v. Texas, 105 MICH. L. REV. 409, 424–31 (2006) (surveying lower court substantive due process cases after *Lawrence* and concluding that the *Glucksberg* framework was overwhelmingly used while *Lawrence* was barely mentioned).

253. *See supra* notes 117–75 and accompanying text (detailing the rise and fall of liberty of contract).

254. *See, e.g.*, ELY, *supra* note 8, at 28–30.

255. 83 U.S. (16 Wall.) 36 (1873).

256. 526 U.S. 489, 495, 497–98, 503 (1999).

257. *See* Kyle Alexander Casazza, Note, *Inkblots: How the Ninth Amendment and the*

ture, as the Privileges or Immunities Clause has not been relied upon again in the ten-plus years since *Saenz*.[258] Further, a recent attempt to revive the Privileges or Immunities Clause as the vehicle for incorporating the Second Amendment received a chilly reception by the Court.[259]

This lack of practicality is also a problem for those advocating the abandonment of tiered scrutiny in favor of a return to some Lochnerian golden age of due process wherein the "government always bear[s] the burden" to demonstrate a "substantial relation" between a restriction on liberty and the government's need for health, safety, and economic welfare.[260] If the history of substantive due process demonstrates one thing, it is that there is no golden age where the doctrine of substantive due process was perfect.[261] Rather, substantive due process and unenumerated rights in general have always been evolving, from their birth in England to the present.[262] The present system of tiered scrutiny is simply a product of that evolution.

More importantly for our purposes, there seems to be little appetite among modern courts for such a return. The closest the Supreme Court has come to traveling the road to this sort of balancing was Justice Souter's concurring opinion in *Glucksberg*.[263]

Privileges or Immunities Clause Protect Unenumerated Constitutional Rights, 80 S. CAL. L. REV. 1383, 1402–03 (2007) (discussing the optimism surrounding the Clause in the wake of *Saenz*). *But see* Laurence H. Tribe, Saenz *Sans Prophecy: Does the Privileges or Immunities Revival Portend the Future—Or Reveal the Structure of the Present?*, 113 HARV. L. REV. 110, 110 (1999) (discussing this optimism but stating that such a revival was "unlikely").

258. James Fox, *Fourteenth Amendment Citizenship and the Reconstruction-Era Black Public Sphere*, 42 AKRON L. REV. 1245, 1246–47 (2009) (discussing the legal irrelevance of the Privileges or Immunities Clause because it is rarely utilized in courts "[w]ith the single exception of . . . *Saenz*").

259. Transcript of Oral Argument at 6–7, McDonald v. City of Chicago, 561 U.S. ___, 130 S. Ct. 3020 (2010) (No. 08-1521), *available at* http://www.supremecourt.gov/oral_arguments/argument_transcripts/08-1521.pdf. Addressing petitioners' argument that the Privileges or Immunities Clause should be used to incorporate the Second Amendment, Justice Scalia inquired "why are you asking us to overrule 150, 140 years of prior law, when—when you can reach your result under substantive due [process]—I mean, you know, unless you're bucking for a—a place on some law school faculty." *Id.* at 6:25–7:3.

260. *See, e.g.*, Preiser, *supra* note 187, at 48–53 (favoring a return to what Preiser characterizes as the "standard developed at the birth of substantive due process").

261. *See* discussion Part III *supra* (describing the development of substantive due process throughout English and American history).

262. *See* discussion Part III *supra*.

263. *See* Washington v. Glucksberg, 521 U.S. 702, 752–89 (1997) (Souter, J., concurring).

In that concurring opinion, Justice Souter set forth a theory of due process in which the court would weigh and balance the competing liberty interest and governmental interest in order to determine whether the law in question is reasonable.[264] However, his invitation to jettison tiered scrutiny in favor of complex balancing was explicitly rejected by the majority.[265] With Justice Souter's departure from the Court, there appears no one ready to take up such a move.

This leaves supporters of substantive due process jurisprudence in a quandary. It seems irrefutable that the *Glucksberg* tiered scrutiny approach, as currently set in law, is broken. As currently set out, the rigor of the strict scrutiny test makes the Court reluctant to recognize new fundamental rights, but the impotence of the rational basis test leaves all other rights essentially unprotected. On the other hand, there is little appetite for abandoning that approach in favor of a different system altogether. What is needed, then, is a way to preserve the Court's current substantive due process jurisprudence to a great extent, while at the same time provide a way to protect important rights that courts are reluctant to deem fundamental. The best way to do this is to bring some meaning back into the rationality review by strengthening the rational basis test.

A. *Why Strengthen Rational Basis as Opposed to Other Solutions?*

The assertion that the salvation of substantive due process jurisprudence lies in the strengthening of the rational basis test raises an important question: Why is it more desirable to strengthen the rational basis test than to establish a level of "intermediate scrutiny" review, such as the one that already exists under the Fourteenth Amendment's Equal Protection Clause?

To answer that question, it is useful to remember what the Equal Protection Clause's levels of tiered scrutiny are designed to do. Although due process tiered scrutiny and equal protection tiered scrutiny share many of the same terms, they are not synonymous. Tiered scrutiny under due process is based on the importance of the right in question, while Tiered scrutiny under

264. *Id.* at 766–69.
265. *Id.* at 721–22.

equal protection is based primarily on motive.[266] Strict scrutiny is required for "suspect classes" under equal protection because of the prospect of invidious discrimination against these classes.[267] Intermediate scrutiny is required for those classes that are labeled "quasi-suspect" because of the likelihood of discriminatory motivation or effect.[268] Due process tiered scrutiny, on the other hand, is based on the importance of the right at issue, with the level of scrutiny dependent on whether the right is fundamental or not.

Further, establishing a middle tier for due process would simply move the problem down a level. On the one hand, courts might be more likely to classify rights in that middle level, as the test involved would not be as "fatal in fact" to the law as in the strict scrutiny analysis.[269] Nevertheless, there would still be reluctance on the part of the courts to highlight such rights by according them special status.

Finally, intermediate scrutiny has been heavily criticized because of its indeterminate language.[270] Unlike strict scrutiny or the rational basis test, intermediate scrutiny is more overtly a "balancing mode" that invites judges to weigh a multitude of factors.[271] Although this is not in and of itself a fatal flaw, it does tend to make decisions under intermediate scrutiny subject to charges of judicial activism. Taken together, all of these factors make intermediate scrutiny a hard sell in the due process framework.

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266. *See generally* 2 CHESTER JAMES ANTIEAU & WILLIAM J. RICH, MODERN CONSTITUTIONAL LAW §§ 25.02–25.04 (2d ed. 1997) (discussing tiered scrutiny in the equal protection context).

267. *See id.* § 25.02. The equal protection framework is to some extent concerned with the nature of rights, in that it also applies heightened judicial scrutiny to those laws that affect fundamental interests such as those that affect the electoral process, the right to travel, and access to the courts. However, this heightened scrutiny does not fit well within the three-tiered framework. *See id.* § 25.04 (discussing equal protection analysis of burdens on fundamental interests).

268. *See* 3 RONALD D. ROTUNDA & JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE § 18.3(a)(iv) (4th ed. 2008).

269. If the equal protection test were carried across, it would end up being something like putting the burden on the government to show that the governmental interest is important and that the law is substantially related to that interest.

270. *See* George C. Hlavac, *Interpretation of the Equal Protection Clause: A Constitutional Shell Game*, 61 GEO. WASH. L. REV. 1349, 1375 (1993) (criticizing the intermediate scrutiny test as too "malleable").

271. Kathleen M. Sullivan, *Post-Liberal Judging: The Roles of Categorization and Balancing*, 63 U. COLO. L. REV. 293, 293–94 (1992).

B. *Strengthening the Test*

The first step in strengthening the rational basis test is to understand the principles that it seeks to promote. On the one hand, the rational basis test is rooted in the English common law concept that laws cannot be "arbitrary," but instead must be based on reason.[272] On the other hand, the rational basis test reflects the determination that the legislature is the primary authority to determine what laws are necessary, and should be given deference.[273] Only if laws contravene accepted rights or are not rationally related to a proper legislative purpose can they be stricken by a court.[274] This is a recognition not only of legislative prerogative and the democratic process, but also a recognition of the limits of judicial competence. In general, courts should keep to the areas in which they have competence, and leave the wisdom of policy to the legislatures.

These principles mean that, even though the rational basis test needs to be strengthened, the presumption of constitutionality should still apply. As noted previously, the idea that a law enacted by the legislature should be presumed valid unless shown to violate the Constitution is longstanding in American legal theory, and has been a part of the rational basis test since its beginnings in the late eighteen hundreds.[275]

Those scholars who would apply a presumption in favor of liberty base their argument on the idea that liberty is the default state under the American form of government,[276] or on the argument that the original underpinnings of the presumption of constitutionality are no longer valid.[277] However, neither of these arguments provide justification for abandoning long-held precedent.

The idea that the government must justify every intrusion into liberty because liberty is the default state of our government ignores the longstanding traditions relating to governmental power. While it is true that the federal government is one of limited

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272. *See supra* notes 48–51 and accompanying text.

273. *See* Mugler v. Kansas, 123 U.S. 623, 661 (1887).

274. City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 440 (1985); *see also* Washington v. Glucksberg, 521 U.S. 702, 728 (1997).

275. *See* Sweet v. Rechel, 159 U.S. 380, 392–93 (1895); *Mugler*, 123 U.S. at 661.

276. *See* Preiser, *supra* note 187, at 51.

277. *See* BARNETT, *supra* note 39, at 260.

powers, from the beginning of the Republic, it has been allowed to use those powers in a wide variety of manners, so long as the use was neither arbitrary nor transgressed identified rights.[278] This is even more true when the enactments of state legislatures are concerned. The power of state legislatures is to enact legislation for health, safety, and welfare, even where it may to some extent curtail the ability of its citizens to do as they please.[279] This power is curtailed only when its use transgresses constitutional rights or is arbitrary.[280]

Randy Barnett has argued that the presumption of constitutionality is no longer valid because its assumption that legislatures, whether state or federal, would carefully consider the constitutional protections of liberty before enacting legislation that would infringe upon it, has been shown to be false.[281] He contends that because this proposition was shown to be erroneous, the presumption of constitutionality must also fail.[282]

I will be the first to admit that this argument has some undeniable appeal. However, it shortchanges the original justification of the presumption of constitutionality and ignores political realities. The original justification of the presumption was not only that legislatures would consider the constitutionality of the enactment, which today to us sounds naïve, but also that deference to the legislature's decisions would promote republican principles, and that the legislatures possessed an institutional superiority over courts in deciding factual issues such as the necessity for legislation.[283] Neither of these arguments are dependent upon the legislature actually considering the constitutionality of the legislation it enacts.

More importantly, the political realities argue in favor of keeping the presumption. In today's world, where charges of "judicial activism" come from both sides of the political spectrum, it is in the best interests of courts to incorporate some deference to the

278. *See, e.g.*, McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 323–25 (1819) (providing an expansive view of the Necessary and Proper Clause).

279. *See* U.S. CONST. amend. X.

280. *See* Barnes v. Glen Theatre, Inc., 501 U.S. 560, 575, 580 (1991) (explaining the concept of state police powers).

281. BARNETT, *supra* note 39, at 260.

282. *Id.*

283. *See* F. Andrew Hessick, *Rethinking the Presumption of Constitutionality*, 85 NOTRE DAME L. REV. 1447, 1469–72 (2010).

legislature in their decisions. It is difficult to conceive that the abandonment of the rationale would do anything but hurt the legitimacy of the courts.

It is important to carefully note the burden that the presumption of constitutionality places on the challenger of a statute. The presumption of constitutionality is not a rule of evidence that requires the presumption of certain facts when others have been proven, but rather simply a method of allocating the burden of persuasion.[284] It simply places the burden on the challenger of the regulation to bring before the court evidence from which the court can base its conclusion that the legislation is unconstitutional.[285]

The allocation of the burden is not the main problem with the way the rational basis test operates today. Rather, the problem is the nature of the burden allocated. The standard, as articulated in cases such as *Williamson v. Lee Optical* and *FCC Communications v. Beach*, which requires that the challenger produce evidence to negate every possible basis for the legislation, whether or not the basis was the actual reason for the legislation, or whether or not the basis is supported by any evidence, is the true problem with the rational basis test.[286] Properly applied, without resort to a judicial dodge, the *Williamson* and *Beach* standard is so toothless as to constitute no meaningful review at all; instead it essentially makes the presumption of constitutionality "irrebuttable."[287]

There is no institutional reason for this level of deference. The heart of the rational basis standard is that the court should not interfere if the purpose of the legislation is reasonably related to some valid governmental purpose. This standard, however, should not be read to prevent courts from inquiring into the governmental purpose of the legislation, or determining the fit of the solution to the purpose. It is true that courts have "never require[d] a legislature to articulate the reasons for enacting a statute."[288] Nevertheless, this does not mean that legislatures never

284. *See* Michael L. Stokes, *Judicial Restraint and the Presumption of Constitutionality*, 35 U. TOL. L. REV. 347, 365–66 (2003) (discussing the use of the doctrine by the Supreme Court of Ohio).

285. *Id.*

286. *See supra* notes 203–12 and accompanying text (describing the test articulated in *Williamson* and its progeny).

287. Barnett, *supra* note 5, at 1485.

288. FCC v. Beach Commc'ns, Inc., 508 U.S. 307, 315 (1993).

articulate the reasons for enacting a statute, nor that the court is incapable of ascertaining the reasons even when they are not articulated. Indeed, determining the legislative intent in enacting a statute from the language used, principles of statutory construction, and legislative history is one of the things that courts are generally tasked with when interpreting statutes.[289] It is true that this is not an exact science; however, it is certainly not so faulty as to justify courts in throwing up their hands in defeat.

Nor should courts be required to stand idly when legislation negatively impacts rights simply because "a legislative choice is not subject to courtroom factfinding and may be based on rational speculation unsupported by evidence or empirical data."[290] While it is enough for most purposes that the law be reasonably related to a legitimate purpose, it must still be just that—reasonably related. It should not be enough that some legislator somewhere thought the law might be reasonably related to a legitimate purpose.

Instead, the proper test under a strengthened rational basis standard should be akin to that used by the Supreme Court in *City of Cleburne v. Cleburne Living Center, Inc.*,[291] one of the so-called "rational basis with bite" cases decided under the Equal Protection Clause.[292] In these cases, the Court professed to apply the rational basis standard, but none of the different versions of the standard employed in the cases were the same rational basis standard that *Williamson* set out.[293]

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289. *See* WILLIAM N. ESKRIDGE, JR., PHILIP P. FRICKEY & ELIZABETH GARRETT, LEGISLATION AND STATUTORY INTERPRETATION 213 (2000) (citations omitted). Of course, not every member of the current Court agrees with this idea. Justice Scalia believes that legislative history is unreliable and is not a valid means of determining legislative intent. *See* ANTONIN SCALIA, *Common-Law Courts in a Civil Law System*, *in* A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 29–37 (Amy Gutmann ed., 1997).

290. *See Beach Commc'ns*, 508 U.S. at 315.

291. 473 U.S. 432, 446 (1985).

292. *See* Romer v. Evans, 517 U.S. 620, 634–35 (1996); *Cleburne*, 473 U.S. at 442–47; Plyler v. Doe, 457 U.S. 202, 223–24 (1982). The term "rational basis with bite" that has now entered the constitutional law lexicon was spawned by a 1972 Harvard Law Review article by Gerald Gunther. *See* Gunther, *supra* note 5. Gunther was referring to six equal protection cases decided in 1971 and 1972 in which the Supreme Court stated it applied rational basis review, but seemed to make a more searching inquiry. *Id.* at 19–21. Gunther stated that these cases had "bite," unlike the "traditionally toothless minimal scrutiny standard." *Id.* at 18–19.

293. *See Romer*, 517 U.S. at 633–36; *Cleburne*, 473 U.S. at 449–50; *Plyler*, 457 U.S. at 223–24.

Cleburne is a prime example of the inherent limitations of the modern rational basis test.[294] In *Cleburne*, the Court faced a Texas zoning ordinance that excluded group homes for the mentally disabled.[295] As the Court noted, the real reason for the legislation seemed to be "an irrational prejudice against the mentally retarded."[296] Nevertheless, the government asserted several reasons for denying the Cleburne Living Center a permit under the zoning ordinance, including attitudes of neighbors, likelihood that residents of the home might be harassed by area students, and potential overcrowding of the facility.[297]

The Court was squarely faced with a dilemma in *Cleburne*. It was reluctant to include mental retardation as a new quasi-suspect class because it would subject all government action based on that classification to a more probing level of review.[298] However, under the rational basis test as it stood, the discriminatory legislation would almost certainly pass. At least one of the reasons, the potential overcrowding of the facility, was almost certainly a legitimate governmental reason for denying the permit.[299] It did not matter, under the *Williamson* standard, that this might not have been the true reason for the legislation; *Williamson* made it clear that the dispositive inquiry was not whether the law had a reasonable relation to a legitimate interest, but rather whether the lawmakers could have reasonably thought that it did.[300] Further, it did not matter that the City had not chosen to deny permits for other group homes in the area before.[301] Under the *Williamson* standard, "'reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind.'"[302]

Faced with this problem, the Court nonetheless purported to apply rational basis level scrutiny, holding that "legislation that distinguishes between the mentally retarded and others must be

294. *Cleburne*, 473 U.S. at 449–50.
295. *Id.* at 435.
296. *Id.* at 450.
297. *Id.* at 448–50.
298. *Id.* at 446.
299. *Id.* at 458 (Marshall, J., concurring in part and dissenting in part).
300. *See* Williamson v. Lee Optical, Inc., 348 U.S. 483, 487–88 (1955).
301. *Cleburne*, 473 U.S. at 449–50.
302. *Id.* at 458 (Marshall, J., concurring in part and dissenting in part) (quoting *Williamson*, 348 U.S. at 489).

rationally related to a legitimate governmental purpose" to withstand equal protection review.[303] The Court reviewed the purposes asserted by the government one by one and determined that none were a rational or constitutional basis for excluding group homes for the mentally retarded.[304] The Court dealt with the City's claim of overcrowding by noting that the zoning code would not have excluded other group homes, such as fraternities or sororities.[305]

Despite assertions to the contrary, *Cleburne* was not a case of the Court applying intermediate scrutiny as that term is normally known.[306] In traditional intermediate scrutiny, the Court requires that the legislation in question bear a substantial relation to an important governmental purpose.[307] The Court in *Cleburne* did not require that the purpose be important, or that the relation be substantial.[308]

In *Cleburne*, the Court really engaged in a traditional means-ends test of rationality. It was skeptical of the motives behind the legislation, but its primary holding was that, even accepting the proferred reasons behind the arguments as legitimate, the statute was not rationally related to them.[309] For the Court, the means chosen to achieve the alleged legitimate governmental purpose were not rational, and reinforced the notion that the true purpose of the legislation was impermissible discrimination.[310]

Cleburne also demonstrates the shortcoming of the *Williamson* version of the rational basis test, which is its inability to probe the motives of the city's action.[311] There was really no question that the genesis of the refusal to issue the permit was prejudice

303. *Id.* at 446 (majority opinion).

304. *Id.* at 448–50.

305. *Id.* at 449–50.

306. *See* Gayle Lynn Pettinga, Note, *Rational Basis With Bite: Intermediate Scrutiny by Any Other Name*, 62 IND. L.J. 779, 801 (1987) (arguing that the analysis in *Cleburne* and other cases was "nothing more than a camouflaged application" of intermediate scrutiny). The argument that some of the rational basis with bite cases are indeed applying intermediate scrutiny is much stronger for cases such as *Plyler v. Doe*. *Id.* at 785.

307. *See, e.g.*, Craig v. Boren, 429 U.S. 190, 204 (1976).

308. *Cleburne*, 473 U.S. at 437–38, 442–44 (holding that the court of appeals erred in applying the intermediate scrutiny standard in deciding the case).

309. *Id.* at 449–50.

310. *See id.* at 450.

311. *Compare Cleburne*, 473 U.S. at 450 (expressing skepticism towards the motives behind the legislation), *with* Williamson v. Lee Optical, Inc., 348 U.S. 483, 487–88 (1955) (stating that the legislation in question "need not be in every respect logically consistent with its aims to be constitutional").

against the group involved. In making motive irrelevant, the *Williamson* standard would have allowed this discrimination so long as there was another rational basis that would have supported the decision. The problem with this standard is that there is *almost always* another rational basis for any type of legislative action. This problem is particularly acute if the governmental body promulgating the legislation is not obliged to base its action on any sort of evidence, or to even be correct about the relation between the ends and the means.

Cleburne further demonstrates the problems that exist at the other end of the scrutiny spectrum. The Court's reluctance to consider mental retardation as a suspect or quasi-suspect classification was based on the idea that there are often good reasons for legislative classifications that treat those persons suffering from mental retardation differently, and often more favorably, than other persons.[312] The Court feared that requiring legislatures to justify those favorable laws under a heightened scrutiny standard would cause them to refrain from passing such laws at all.[313] The heightened standard, even at intermediate scrutiny, was too high a bar.

Had the Court not departed from the *Williamson* standard in *Cleburne*, the plaintiffs would have been left without protection. While it might be comforting to say, as the Court has said on numerous occasions, that in the absence of protection, plaintiffs would be able to find a remedy through the democratic process,[314] this remedy would have been highly unlikely to occur in the case of group homes for the developmentally disabled. Although the majority in *Cleburne* stated that mentally retarded individuals were not politically powerless, a determination based mostly on the fact that many laws offer them specific protections,[315] the majority's decision did not comprehend that the situation might be different in a situation where the issue involved a group home zoning decision made by a city government.

The problem with motive and purpose is just as acute in the substantive due process context as it is in equal protection. In the

312. *Cleburne*, 473 U.S. at 441–46.

313. *Id.* at 444–45.

314. *See, e.g.*, *id.* at 440; *Williamson*, 348 U.S. at 488 (quoting Munn v. Illinois, 94 U.S. 113, 134 (1877)).

315. *Cleburne*, 473 U.S. at 443–45.

same way that majorities can discriminate against minorities in singling them out for discriminatory treatment, majorities can also fail to recognize or infringe upon politically unpopular rights. Under the *Williamson* version of rational basis, such infringement can almost always be justified by some purpose.

Under a strengthened rational basis analysis under the Due Process Clause, however, courts would be empowered, as the Supreme Court did in *Cleburne*, to look at the purposes behind the governmental action. In doing so, courts would be allowed to use all of the tools that they normally use in determining legislative intent, including the language of the statute itself and the circumstances surrounding its passage. The focus of such an inquiry would be, not on technically plausible reasons for the action, but on the actual (or at least probable) reason for the action. Courts would also, of course, consider any justifications for the statutes raised by the parties. However, where those justifications consist of nothing more than ad hoc rationalizations, courts would be allowed to disregard them to reach the true purpose of the regulation.

There is an argument to be made, and in fact has been made most notably by Justice Scalia, that legislative history should not be authoritative in the interpretation of a statute.[316] However, there is a real difference, I believe, between using legislative history to try to determine the legislature's intent regarding how a statute is to be applied to a particular issue, and using the legislative history to demonstrate the purpose the statute was designed to reach. In the former case, the issue involved may be one of which the majority of legislators, to quote Scalia, were "blissfully unaware of the *existence* . . . much less had any preference as to how it should be resolved."[317] When talking about the main purpose behind the enactment of the statute itself, however, there is generally always at least some information from which a statutory purpose, or at least a small number of likely purposes, can be divined.[318] This is especially true considering that, unlike matters

316. *See* SCALIA, *supra* note 289, at 29–30 (arguing that legislative history should not be used to determine the intent of a statute because of its unreliability).

317. *Id.* at 32.

318. *See, e.g.*, Church of the Holy Trinity v. United States, 143 U.S. 457, 459 (1892). The *Holy Trinity* case construing the Alien Contract Labor Law of 1885 is one of the cases most often used to demonstrate the vagaries of legislative history because the legislative history could be interpreted in so many different ways. *See* ESKRIDGE, FRICKEY &

of statutory interpretation, where the statute involved may be quite old, statutes and other enactments involved in constitutional challenges are generally quite recent.[319]

It must be emphasized that the burden is still on the party challenging the statute to demonstrate that the statute is not rationally related to a valid legislative purpose, either because the purpose itself is not within the power of the government, or because the connection between the statute and the purpose is tenuous. The government is still entitled to a presumption of constitutionality, and facts supporting the enactment are presumed, *until rebutted* by the challenging party.

Unlike the *Williamson* test, however, the ultimate determination of reasonableness turns on whether the enactment *actually does* bear a rational relationship to the valid governmental purpose. Where the legislative enactment infringes on an identified liberty interest, it is not enough that some legislator might have thought that there was a rational relationship. Liberty demands an actual rational link between the means and the ends.

C. *Benefits of a Strengthened Rational Basis Test*

Using a strengthened rational basis test as the bottom tier of scrutiny in substantive due process review affords several benefits to the system. From a practical standpoint, the continuation of the current tiered scrutiny system does not disrupt the current legal landscape. One of the primary benefits cited for using tiered scrutiny is that it "avoids the need for complex balancing of competing interests in every case."[320] Under the proposed system with strengthened rational basis, this benefit continues. Although a reviewing court will have a greater responsibility to inquire as to whether there really is a rational basis of the legislation, this is a

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GARRETT, *supra* note 289, at 217; Carol Chomsky, *Unlocking the Mysteries of* Holy Trinity*: Spirit, Letter, and History in Statutory Interpretation*, 100 COLUM. L. REV. 901 (2000); Adrian Vermeule, *Legislative History and the Limits of Judicial Competence: The Untold Story of* Holy Trinity Church, 50 STAN. L. REV. 1833 (1998). However, while the legislative history of the statute in that case may not have solved the question of whether the Act was to apply to ministers, there was no real question that the overall purpose of the Act was to keep out foreign labor.

319. There are, of course, exceptions. The statute at issue in *Lawrence* was passed in 1974. However, it was not constitutionally challenged because, up until *Lawrence*, it had *never* been enforced. *See* Jackson, *supra* note 34, at 217.

320. Washington v. Glucksberg, 521 U.S 702, 722 (1997).

lesser, and more precise, inquiry than one requiring the court to balance competing interests on a case-by-case basis. The primary beneficiaries of the retention of tiered scrutiny will be the lower courts, who will be able to rely on a familiar landscape to frame their decisions.

The use of a strengthened rational basis also retains the protection for truly fundamental rights inherent in the current tiered scrutiny system. Those rights that have been afforded strict scrutiny protection in the past will continue to receive it. As a result, the risk that a sea change in the Court's substantive due process jurisprudence will upset long-held rights is greatly reduced. Similarly, the pressure to refrain from creating new fundamental rights for fear of putting them beyond the reach of the democratic process with too much protection, or the pressure to create new fundamental rights lest important liberty interests be left entirely unprotected is diminished as well. Courts can continue to act carefully in those areas where "'guideposts for responsible decisionmaking . . . are scarce and open-ended,'"[321] while at the same time allowing a level of protection for liberty.

Moreover, and perhaps most importantly, the use of a strengthened rational basis standard will help to restore a level of honesty to the substantive due process doctrine. As I have suggested above, the Supreme Court of the United States already abandons the *Glucksberg* framework and employs what might be thought of as a strengthened rational basis standard where enough justices determine that the result under the *Williamson* version of rational basis would do injustice, such as in *Cleburne* or *Lawrence*.[322] This infidelity to the stated doctrine in hard cases does nothing to promote the legitimacy of the Court or provide consistent guidelines for lower courts to follow. Making the implicit standard explicit, and applying it in a consistent manner, would not only result in a more legitimate doctrine, but would provide the lower courts with a standard that was actually worthy of that name.

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321. *Id.* at 720 (quoting Collins v. City of Harker Heights, 503 U.S. 115, 125 (1992)).

322. *See supra* notes 244–45 and accompanying text.

D. *Avoiding the* Lochner *Problem*

One of the criticisms generally associated with any attempt to strengthen court review over constitutional issues is that strengthened review will allow courts to judicially overreach by substituting their own policy preferences for those of democratically-elected legislatures, a problem often associated with the Supreme Court's decision in *Lochner*.[323] One prestigious scholar has noted that "[a]voiding '*Lochner*'s error' remains a primary focus of constitutional law and constitutional scholarhip."[324] Indeed, it seems almost incumbent on any scholar proposing a theory of unenumerated rights to show how the theory would not "revive" the error of *Lochner*.[325]

Of course, scholars generally disagree regarding what *Lochner*'s error actually was.[326] Insofar as the error is considered to be a court substituting its policy choices for those of the legislature, a strengthened rational basis test is not a great danger. As noted previously, the Court in *Lochner* reversed the traditional calculus for due process by requiring the state to justify its exercise of authority and overcome the presumption of "liberty of contract."[327] *Lochner* is thus closer to an example of a fundamental rights case than a rational basis one. Further, *Lochner* also reflects the formalistic law of its time period, in that it appears the Court in *Lochner* felt bound to only consider the facts presented to it, and to try to fit the law into a permissible or impermissible category—a permissible "health law," or an impermissible "labor law."[328]

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323. *See, e.g.*, *Glucksberg*, 521 U.S. at 720 (noting the reluctance to expand substantive due process "lest the liberty protected by the Due Process Clause be subtly transformed into the policy preferences of the Members of this Court" (citations omitted)); Moore v. City of E. Cleveland, 431 U.S. 494, 502 (1977) ("As the history of the *Lochner* era demonstrates, there is reason for concern lest the only limits to [substantive due process] intervention become the predilections of those who happen at the time to be Members of this Court."); *see also* Ian Bartrum, *The Constitutional Canon as Argumentative Metonymy*, 18 WM. & MARY BILL OF RTS. J. 327, 359 (2009) (calling the traditional perception of *Lochner* as the decision "we love to hate: a decision whose symbolic overreach calls into doubt the very institution of judicial review").

324. David E. Bernstein, *Lochner*'s Legacy's *Legacy*, 82 TEX. L. REV. 1 (2003).

325. *See* Bernstein, *supra* note 121, at 326 (noting that "avoiding '*Lochner*'s error' remains the central obsession . . . of contemporary constitutional law.'" (citing Gary D. Rowe, Lochner *Revisionism Revisited*, 24 L. & SOC. INQUIRY 221, 223 (1999))).

326. Bernstein, *supra* note 324, at 1.

327. *See supra* notes 121–22 and accompanying text.

328. *See* Lochner v. New York, 198 U.S. 45, 57–58 (1904). See also the discussion in the

Similarly, the other *Lochner* era cases so often decried as anti-democratic also fall into the same category. They bear classic hallmarks of fundamental rights jurisprudence, and reflect concerns over the categorical limitations of legislative power.[329] The concern in those cases was not that the means were not reasonably related to the ends, but that the means themselves were not a legally valid way of reaching those ends.

In contrast, a strengthened rational basis test concerns the nexus between the means and the ends of legislation, and asks whether the legislation is in fact reasonably related to the ends it seeks to promote. Thus, the focus is on the validity of the means by which the ends are promoted. Under a strengthened rational basis test, a vast majority of laws will still be held to be constitutional, because most laws *actually are* reasonably related to their discernible valid legislative purpose. The benefit of the strengthened rational basis review will be in those cases where the legislature oversteps its bounds, either through a pretextual law aimed at unpopular groups or activities, or a belief in a set of facts proven not to exist. These are exactly the cases where courts are supposed to step in. Doing so is not substituting the court's belief for the legislature regarding the best way to accomplish a particular end, but rather requiring that the legislature's act infringing on liberty actually bear a relation to a valid purpose. Liberty should require nothing less.

E. *Implementation*

Another benefit of using a strengthened rational basis standard is its ease of implementation. Unlike other substantial due process "fixes" that would require an overhaul of existing jurisprudence, the application of *Cleburne*-style rational basis to new due process cases can be accomplished with relatively little change to the existing jurisprudential structure. In part, this is because, as noted above, the jurisprudence of substantive due

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New York Court of Appeals decision, wherein the majority, considering the statute as a whole, held that the hours law was a health law rather than a labor law; two judges concurred by stating that the law could be both a health law and a labor law; and two judges dissented, holding that the law was a labor law only. People v. Lochner, 69 N.E. 373, 380–84, 387–89 (N.Y. 1904).

329. *See, e.g.*, Chas. Wolff Packing Co. v. Court of Indus. Relations, 262 U.S. 522, 534 (1923); Adkins v. Children's Hosp., 261 U.S. 525, 546 (1923).

process has always been an evolving one, with changes occurring incrementally.[330] Thus, there is no real baseline that can be deemed to be the "correct" doctrine, and no substantive due process cases (i.e., the *Slaughter-House Cases*) that must be overruled or reinterpreted for the standard to be implemented. Similarly, because the Supreme Court of the United States has in fact all but ignored its rational basis doctrine in hard cases such as *Lawrence*, there is ample competing case law to support such a change.

Instead, to implement strengthened rational basis, the Court would only have to begin requiring its use on a prospective basis. In fact, it seems plausible that lower courts could actually begin implementing the standard using *Lawrence* and *Cleburne* as precedent. In the same way that substantive due process moved from *Allgeyer* to *Lochner* to *Munn* to *Carolene Products*, the rational basis test can move from its toothless form to one that can protect liberties while at the same time not usurp the lawmaking power of federal and state legislatures.

VI. CONCLUSION

The Ninth Amendment requires that the rights "retained by the people" not be den[ied] or disparage[d]."[331] The Supreme Court of the United States has chosen, for good or ill, to use substantive due process to protect those rights. While the historical basis for doing so might be open for debate, the reality is an established fact.

However, substantive due process, as currently interpreted by the courts, is broken. Although the Supreme Court of the United States still professes to adhere to the concepts of tiered scrutiny as set forth in *Glucksberg*, this adherence is one of convenience, and is abandoned in hard cases. While this is less of a problem for the Supreme Court, it is a problem of great concern for the lower courts, who continue to attempt to faithfully apply *Glucksberg*. It is also a problem for the legitimacy of substantive due process as a judicial doctrine, as a test with standards that are ignored at whim leaves the impression that there are really no standards at all. The problem is the current interpretation of tiered scrutiny,

330. *See* discussion *supra* Part III (tracing the history of substantive due process).

331. U.S. CONST. amend. IX.

which is based on a strict scrutiny standard for fundamental rights that is very difficult to overcome, and a rational basis standard for nonfundamental rights that is almost impossible to fail. It forces courts to face the prospect of classifying a right as fundamental, and thus taking it "outside the arena of public debate and legislative action," or applying a rational basis standard akin to no review at all. Under such circumstances, lower courts, who cannot creatively interpret their way around the test, too often fail to protect rights.

While there are no shortage of opinions on ways to fix substantive due process, from abandoning substantive due process in favor of a privileges or immunities analysis, to applying a "presumption of liberty," to importing heightened scrutiny from equal protection analysis, all of these suffer from the same problem—there is little chance that the Court will abandon its current due process formulation, at least publicly.

There is another solution, however, that could be adopted by the Court with little change to the established constitutional order. By adopting a stricter formulation of the rational basis test requiring that the law truly bear a reasonable relation to its actual purpose, the all-or-nothing tendencies of the current test can be ameliorated, and rights can be protected to a greater extent than is possible under the current formulation. The use of a strengthened rational basis test would reduce pressure on courts in hard cases, and would further the legitimacy of substantive due process. Further, such a change could easily be accomplished without the necessity of overhauling substantive due process and endangering the protection of those rights which have already been deemed fundamental.

Rights are important. However, their protection is only as strong as the legitimacy of the doctrine that protects them. Applying *Cleburne*-style rational basis with teeth in place of the current rational basis standard yields a standard that is actually useful, even in hard cases, which contributes to the legitimacy of substantive due process as a whole, and helps redeem the promise of the Ninth Amendment that the rights "retained by the people" will not be disparaged.