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## Implicit in The Concept of Ordered Liberty: How Obergefell v. Hodges Illuminates the Modern Substantive Due Process Debate, 49 J. Marshall L. Rev. 1021 (2016)

Matthew Grothouse

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# IMPLICIT IN THE CONCEPT OF ORDERED LIBERTY: HOW *OBERGEFELL V. HODGES* ILLUMINATES THE MODERN SUBSTANTIVE DUE PROCESS DEBATE

MATTHEW R. GROTHOUSE

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## I. INTRODUCTION

Denying an individual the legal privileges and protections accompanying a marriage license, based solely on sexual orientation, is increasingly being recognized as an injustice. But how does this moral indignation translate into Constitutional jurisprudence? This was the crucial question before the Court in *Obergefell v. Hodges*.<sup>1</sup> Interestingly enough, in recognizing an

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1. *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

individual's right to marry regardless of his or her sexual orientation, the majority centered its decision not simply on the more convincing and less controversial Equal Protection Clause; rather, Justice Kennedy crafted the majority opinion largely around substantive due process. This choice catapulted the Due Process Clause to the focus of the dissenting opinions and, in so doing, illuminated the modern substantive due process debate: Does the Due Process Clause carefully protect only those rights "deeply rooted in this Nation's history and traditions"<sup>2</sup> or does it also closely safeguard other, uniquely personal conduct—conduct "implicit in the concept of ordered liberty?"<sup>3</sup>

This Article uses the historical sweep of the Due Process Clause to evaluate the merits of *Obergefell's* majority and dissenting opinions. Specifically, the Article explains why the Due Process Clause's prohibition on arbitrary punishments in general—and legislative judgments in particular—invariably mandates the judicial nullification of arbitrary and irrational legislative acts. What exactly constitutes a "legislative judgment" and how much deference courts should exercise in examining legislative acts are the crucial and largely unanswered questions lying at the heart of the *Obergefell* case (and in substantive due process cases in general). Although the *Obergefell* Court's discussion focuses on a single case, it reflects a larger jurisprudential inquiry some 800 years in the making: What are the limitations on government power and what is the judiciary's role in enforcing those limitations?

## II. OBERGEFELL V. HODGES

Same-sex couples in Ohio, Michigan, Kentucky, and Tennessee sued their relevant state agencies to challenge the constitutionality of those states' bans on same-sex marriage or their refusals to recognize legal same-sex marriages that occurred in other states.<sup>4</sup> The plaintiffs argued that the state laws violated the Due Process Clause and the Equal Protection Clause of the Fourteenth Amendment.<sup>5</sup> Although the trial court in each of these cases ruled in favor of the plaintiffs, the U.S. Court of Appeals for the Sixth Circuit reversed those decisions and held that the states' bans on same-sex marriage, along with their refusals to recognize marriages performed in other states, did not violate the

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2. *Washington v. Glucksberg*, 521 U.S. 702, 720–21 (1997) (internal citations omitted).

3. *Griswold v. Connecticut*, 381 U.S. 479, 500 (1965) (Harlan, J., concurring) (quoting *Palko v. Connecticut*, 302 U.S. 319, 325 (1937) (Cardozo, J.)).

4. *Obergefell*, 135 S. Ct. at 2593.

5. *Id.* at 2623. One group of plaintiffs also brought claims under the Civil Rights Act.

Fourteenth Amendment's Equal Protection and Due Process Clauses.<sup>6</sup> The Supreme Court of the United States granted the plaintiffs' petition for writ of *certiorari* to resolve the following questions: (1) Does the Fourteenth Amendment require a state to license a marriage between two people of the same sex?<sup>7</sup> and (2) Does the Fourteenth Amendment require a state to recognize a marriage between two people of the same sex that was legally licensed and performed in another state?<sup>8</sup>

### A. The Majority Opinion

The Court answered both of the questions on *certiorari* in the affirmative. First, the Court held that the Fourteenth Amendment requires a state to license same-sex marriages.<sup>9</sup> Because marriage is already a well-established fundamental right,<sup>10</sup> the first issue before the Court was a *definitional* one: Does the definition of the "fundamental right"<sup>11</sup> of marriage include same-sex couples? The majority held that the definition must include same-sex couples because their exclusion irrationally restricts those persons' liberty<sup>12</sup> and irrationally discriminates against that class of persons.<sup>13</sup> Most importantly, the Court pointed out that in defining

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6. DeBoer v. Snyder, 772 F.3d 388, 402-03 (6th Cir. 2014).

7. *Obergefell*, 135 S. Ct. at 2593.

8. *Id.*

9. *Id.* at 2607.

10. *Loving v. Virginia*, 388 U.S. 1, 12 (1967) (citing *Skinner v. State of Oklahoma*, 316 U.S. 535, 541 (1942) (recognizing that marriage is among the "basic civil rights of man" and "fundamental to our very existence and survival")).

11. Under the Court's substantive due process analysis, laws prohibiting or otherwise limiting fundamental rights trigger strict scrutiny. *Troxel v. Granville*, 530 U.S. 57, 65 (2000) (internal citations omitted).

12. *See Obergefell*, 135 S. Ct. at 2602 ("Under the Constitution, same-sex couples seek in marriage the same legal treatment as opposite-sex couples, and it would disparage their choices and diminish their personhood to deny them this right.").

13. The principles embedded in the Equal Protection Clause informed the Court's conclusion that the fundamental right of marriage must include same-sex marriage because the exclusion of same-sex couples is irrational and constitutionally intolerable. *See id.* at 2602-03 ("The Due Process Clause and the Equal Protection Clause are connected in a profound way, though they set forth independent principles. Rights implicit in liberty and rights secured by equal protection may rest on different precepts and are not always co-extensive, yet in some instances each may be instructive as to the meaning and reach of the other."); *see also id.* at 2604 ("[T]he marriage laws enforced by the respondents are in essence unequal: same-sex couples are denied all the benefits afforded to opposite-sex couples and are barred from exercising a fundamental right."). This "synergy" between the Equal Protection Clause and Due Process Clause was recognized by the Court in *Skinner v. State of Oklahoma* and *Loving v. Virginia*. In *Skinner*, the Court relied upon the Due Process Clause (or more specifically, the substantive due process-based fundamental right of procreation) to justify the Court's application of strict

a “fundamental right” in the context of substantive due process, the Court is informed by, but not necessarily confined to, those rights “deeply rooted in this Nation’s history and traditions.”<sup>14</sup> As the Court put it, although marriage is “fundamental as a matter of history and tradition,”<sup>15</sup> the content of that right “rise[s], too, from a better informed understanding of how constitutional imperatives define liberty that remains urgent in our own era.”<sup>16</sup> Lastly, the Court held that individual states must honor other states’ legal marriages because “there is no lawful basis for a State to refuse to recognize a lawful same-sex marriage performed in another State on the grounds of its same-sex character.”<sup>17</sup>

### B. Justice Roberts’s Dissent

While seemingly open to striking down laws that discriminatorily deny specific marriage-based benefits to same-sex spouses,<sup>18</sup> Justice Robert rejected the majority’s sweeping substantive due process right to same-sex marriage.<sup>19</sup> In Justice Robert’s opinion,<sup>20</sup> a fundamental rights-based substantive due process claim “falls into the most sensitive category of constitutional adjudication”<sup>21</sup> and should therefore be effectively limited to only those rights that are “so rooted in the traditions

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scrutiny in its Equal Protection analysis. *See Skinner*, 316 U.S. at 541 (“We mention these matters not to reexamine the scope of the police power of the States. We advert to them merely in emphasis of our view that strict scrutiny of the classification which a State makes in a sterilization law is essential, lest unwittingly, or otherwise, invidious discriminations are made against groups or types of individuals in violation of the constitutional guaranty of just and equal laws.”). In *Loving*, the Court relied on the Equal Protection Clause to establish the irrationality of denying the plaintiffs the substantive-due-process-based fundamental right of marriage. *See Loving*, 388 U.S. at 12 (“To deny this fundamental freedom on so unsupportable a basis as the racial classifications embodied in these statutes, classifications so directly subversive of the principle of equality at the heart of the Fourteenth Amendment, is surely to deprive all the State’s citizens of liberty without due process of law.”).

14. *Obergefell*, 135 S. Ct. at 2618. *See also id.* at 2598 (2015) (“History and tradition guide and discipline this inquiry but do not set its outer boundaries.”).

15. *Id.* at 2602.

16. *Id.*

17. *Id.* at 2608.

18. *See id.* at 2623 (Roberts, J. dissenting) (“The equal protection analysis might be different, in my view, if we were confronted with a more focused challenge to the denial of certain tangible benefits.”).

19. *Id.* at 2616 (“I find the majority’s position indefensible as a matter of constitutional law.”); *see also id.* at 2612 (“The majority’s decision is an act of will, not legal judgment. The right it announces has no basis in the Constitution or this Court’s precedent.”).

20. Justice Thomas and Justice Scalia joined Justice Roberts’s opinion. *Id.* at 2610.

21. *Id.* at 2616.

and conscience of our people as to be ranked as fundamental.”<sup>22</sup> Stressing the need for “judicial self-restraint”<sup>23</sup> given substantive due process’s “few ‘guideposts for responsible decisionmaking,’”<sup>24</sup> the Chief Justice reasoned that “an approach grounded in history imposes limits on the judiciary that are more meaningful than any based on [an] abstract formula.”<sup>25</sup> Such limits, Justice Roberts concluded, are “[t]he only way to ensure restraint in this delicate enterprise”<sup>26</sup> lest judges “elevate their own policy judgments to the status of constitutionally protected ‘liberty’”<sup>27</sup> and “convert[] [their] [own] personal preferences into constitutional mandates.”<sup>28</sup> Regardless of the wisdom of the policy, because same-sex marriage is not “deeply rooted in this Nation’s history and traditions,”<sup>29</sup> Justice Roberts asserted that the states have a legitimate interest in preserving “traditional marriage.”<sup>30</sup> Therefore, the government’s denial of same-sex marriage cannot be remedied through substantive due process.

### *C. Justice Scalia’s Dissent*

Justice Scalia wrote separately<sup>31</sup> to criticize what he believed to be the Court’s usurpation of the democratic process.<sup>32</sup> The majority’s “constitutional revision,”<sup>33</sup> Scalia demurred, “robs the People of the most important liberty they asserted in the Declaration of Independence and won in the Revolution of 1776: the freedom to govern themselves.”<sup>34</sup> Relying on the “plain meaning”<sup>35</sup> of the Fourteenth Amendment when it was ratified in

22. *Id.* (quoting *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934)).

23. *Obergefell*, 135 S. Ct. at 2618 (quoting *Collins v. Harker Heights*, 503 U.S. 115, 125 (1992)).

24. *Id.*

25. *Obergefell*, 135 S. Ct. at 2618 (quoting *Moore v. East Cleveland*, 431 U.S. 494, 504, n. 12 (1977) (plurality opinion)).

26. *Obergefell*, 135 S. Ct. at 2617.

27. *Id.*

28. *Id.* at 2618.

29. *Id.* at 2640 (quoting *Washington v. Glucksberg*, 521 U.S. 702, 720–21 (1997)).

30. *See Obergefell*, 135 S. Ct. at 2612–13 (“For all those millennia, across all those civilizations, ‘marriage’ referred to . . . the union of a man and a woman . . . ensuring that children are conceived by a mother and father committed to raising them in the stable conditions of a lifelong relationship.”).

31. Justice Thomas joined Justice Scalia’s dissenting opinion. *Id.* at 2626.

32. *Id.* (Scalia, J. dissenting). Scalia in fact characterizes the Court’s holding as a “threat to American democracy.” *Id.*

33. *Id.* at 2627.

34. *Id.*

35. *See id.* at 2628 (“When the Fourteenth Amendment was ratified in 1868, every State limited marriage to one man and one woman, and no one doubted the constitutionality of doing so. That resolves these cases.”); *see also* ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 1-176 (1997).

1868, Scalia concluded that it is “unquestionable that the People who ratified that provision did not understand it to prohibit a practice [denying same-sex couples the right to marry] that remained both universal and uncontroversial in the years after ratification.”<sup>36</sup> The Justice then chastised the Court for dismissing what “the People ratified”<sup>37</sup> by reinterpreting that Fourteenth Amendment to protect “those rights that the Judiciary, in its ‘reasoned judgment,’ thinks the Fourteenth Amendment ought to protect.”<sup>38</sup> The Court’s ruling, in Scalia’s opinion, was nothing short of a “naked judicial claim to legislative—indeed, *super*-legislative—power.”<sup>39</sup> Ever-forthright, Justice Scalia denounced the Court’s “hubris”<sup>40</sup> in declaring unconstitutional “what was, until 15 years ago, the unanimous judgment of all generations and all societies.”<sup>41</sup> Lastly, the originalist Justice rejected the Court’s assertion that a constitutionally-protected right can “rise . . . from a better informed understanding of how constitutional imperatives define a liberty that remains urgent in our own era.”<sup>42</sup>

#### D. Justice Thomas’s Dissent

Justice Thomas took issue not only with the Court’s particular application of the Due Process Clause, but also with the legal recognition of substantive due process in general.<sup>43</sup> In addition to dismissing substantive due process as a “dangerous fiction,”<sup>44</sup> Justice Thomas questioned the majority’s reliance on the concept of “liberty” to justify the constitutional protection of a government-granted “entitlement.”<sup>45</sup> Lastly, the Justice pointed out that the majority’s opinion “threatens the religious liberty”<sup>46</sup> of individuals wishing to express and exercise their serious and good-faith religious objections to same-sex marriage.<sup>47</sup>

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36. *Obergefell*, 135 S. Ct. at 2628.

37. *Id.*

38. *Id.*

39. *Id.* at 2629. Scalia goes on to say that “[a] system of government that makes the People subordinate to a committee of nine unelected lawyers does not deserve to be called a democracy.” *Id.*

40. *Id.*

41. *Id.* at 2630.

42. *Id.* (quoting *id.* at 2602 (majority opinion)).

43. *Id.* at 2631 (Thomas, J. dissenting). Justice Scalia joined Justice Thomas’s opinion. *Id.*

44. *Id.*

45. *Id.*

46. *Id.* at 2638.

47. *Id.* at 2638-39.

### *E. Justice Alito's Dissent*

In the final dissent, Justice Alito stressed the inherent danger in allowing “five unelected Justices [to] impos[e] their personal vision of liberty upon the American people.”<sup>48</sup> He argued that “[t]he Constitution says nothing about a right to same-sex marriage,”<sup>49</sup> and sided with Court precedent that arguably limits substantive due process protection only to those rights “deeply rooted in this Nation’s history and tradition.”<sup>50</sup> Pointing out that no state before 2003 recognized same-sex marriage,<sup>51</sup> Justice Alito argued that the “deeply-rooted” right of marriage is “inextricably linked to the one thing that only an opposite-sex couple can do: procreate.”<sup>52</sup> Justice Alito, therefore, concluded that same-sex marriage is not a right “deeply rooted in this Nation’s history and traditions” and, thus, cannot be among those fundamental rights protected by the “liberty” of the Due Process Clause.<sup>53</sup> He then criticized the majority for “claim[ing] the authority to confer constitutional protection upon a right simply because they believe that it is fundamental.”<sup>54</sup> “If a bare majority of Justices can invent a new right and impose that right on the rest of the country,”<sup>55</sup> Justice Alito pointed out, “the only real limit on what future majorities will be able to do is their own sense of what those with political power and cultural influence are willing to tolerate.”<sup>56</sup> Going further, Alito suggested that the majority’s decision, which eschews “the virtues of judicial self-restraint and humility”<sup>57</sup> in order to “achieve what is viewed as a noble end by any practicable means . . . evidences the deep and perhaps irremediable corruption of our legal culture’s conception of constitutional interpretation.”<sup>58</sup>

What is the Court’s role in defining what rights are “fundamental” (and therefore uniquely protected by the Constitution) is a question that pervades the majority and dissenting opinions. Should five unelected and unrepresentative Justices have the power to veto democratic majorities? Does the Due Process Clause have a substantive component? If so, should judges be able to roam free in defining what rights are “fundamental” and worthy of the Court’s heightened (and often times fatal) scrutiny? Only a historically-rich understanding of the

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48. *Id.* at 2640 (Alito, J. dissenting). Justice Scalia and Justice Thomas joined Justice Alito’s dissenting opinion. *Id.*

49. *Id.*

50. *Id.* (quoting *Washington v. Glucksberg*, 521 U.S. 702, 720–21 (1997)).

51. *Obergefell*, 135 S. Ct. at 2640.

52. *Id.* at 2641.

53. *Id.* at 2641–42.

54. *Id.* at 2641.

55. *Id.* at 2643.

56. *Id.*

57. *Id.*

58. *Id.*



Due Process Clause and its jurisprudential application provides the necessary insight into these momentous yet exceedingly enigmatic questions.

### III. THE ORIGIN AND DEVELOPMENT OF THE DUE PROCESS CLAUSE

The Due Process Clause guarantees freedom from arbitrary punishment.<sup>59</sup> Absent emergency circumstances, punishment is “arbitrary” if it does not occur via a fundamentally fair judicial adjudication.<sup>60</sup> As explained below, a “fundamentally fair judicial adjudication” necessarily excludes unfair judicial adjudications (precluded by procedural due process), legislative judgments (precluded by substantive due process), and unreasonable executive invasions (precluded by search and arrest warrant requirements).<sup>61</sup> These requirements originate from Magna Carta’s “law of the land” provision.<sup>62</sup> Its history, therefore, provides the keystone to unlocking the meaning of the modern constitutional clause.

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59. See *Bank of Columbia v. Okely*, 17 U.S. (4 Wheat.) 235, 244 (1819) (“As to the words from Magna Charta . . . they were intended to secure the individual from the arbitrary exercise of the powers of government, unrestrained by the established principles of private rights and distributive justice”).

60. See Alexander Hamilton, Remarks on an Act for Regulating Elections, New York Assembly (Feb. 6 1787), reprinted in 4 THE PAPERS OF ALEXANDER HAMILTON 34, 35 (Harold C. Syrett ed., 1962) (explaining that due process requires punishment to be imposed via the “process and proceedings of the courts of justice.”).

61. Criminal search and arrest requirements were originally integral parts of the Fifth Amendment’s “due process of law” until the courts relocated criminal search and arrest rights to the Fourth Amendment in the early twentieth century. See *In re Dorsey*, 7 Port. (Ala.) 293, 404-05 (1838) (emphasis added) (interpreting “due course of law” to mean “those forms of *arrest*, trial and punishment, guaranteed by the constitution, or provided by the common law . . .”); *Beckwith v. Bean*, 98 U.S. 266, 294 (1878) (Harlan, J.) (emphasis added) (“The *arrest and imprisonment* of the plaintiff . . . were therefore in plain violation of the *fifth constitutional amendment*, which declares that no person shall be deprived of his liberty without due process of law. No mere order or proclamation of the President for the arrest and imprisonment of a person not in the military service, in a state removed from the scene of actual hostilities, where the courts are open and in the unobstructed exercise of their jurisdiction, can constitute due process of law, nor can it be made such by any act of Congress”); *Carroll v. United States*, 267 U.S. 132, 170 (1925) (McReynolds, J. dissenting) (emphasis added) (“The arrest of plaintiffs in error was unauthorized, illegal and violated the guarantee of *due process* given by the *Fifth Amendment*”).

62. See Appeal of Ervine, 16 Pa. 256, 263 (1851) (“And Lord Coke says that the words ‘*per legem terræ*,’ mean, by due process of law, and being brought into court to answer according to law”); *Kansas Pac. Ry. Co. v. Dunmeyer*, 19 Kan. 539, 542 (1878) (“The words, ‘by due course of law,’ are synonymous with ‘due process of law’ or ‘law of the land’ . . .”).

### A. England's "Law of The Land" Requirement

Originally, Magna Carta's "by . . . the law of the land" requirement meant "by the ancient rules and customs of *Anglo-Saxon* law," as opposed to Norman law, which rested heavily on the King's prerogative.<sup>63</sup> This requirement was "procedural," in that punishment had to be imposed via specific *Anglo-Sax* laws, as well as "substantive," in that Norman-based laws and customs were thereafter rendered *not* the "Law of the Land."<sup>64</sup>

Following the rise of Parliament,<sup>65</sup> "law" required the assent of both the House of Lords and the House of Commons.<sup>66</sup> This substantive, separation-of-powers limitation meant that not every

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63. *Davidson v. City of New Orleans*, 96 U.S. 97, 102 (1878) ("It is easy to see that when the great barons of England wrung from King John, at the point of the sword, the concession that neither their lives nor their property should be disposed of by the crown, except as provided by the law of the land, they meant by 'law of the land' the ancient and customary laws of the English people . . ."); *see also* *Wynehamer v. People*, 13 N.Y. 378, 432 (1856) ("The first of these clauses, which had its origin in Magna Carta, brief as it is, embodies the most essential guarantees against the exercise of arbitrary power which that instrument contained. Its meaning, as there used, is plain, when we consider that it was the result of a struggle which had lasted for more than a century between the English people and the Norman kings, who had supplanted the laws and customs of the Anglo Saxons, and established in their place the prerogatives of royalty."); *see also* J.H. BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 83 (2d ed. 2002).

64. *See* Timothy Sandefur, *In Defense of Substantive Due Process, or the Promise of Lawful Rule*, 35 HARV. J.L. & PUB. POL'Y 283, 289 (2012) ("Originating at a time before the clear separation of powers, the law of the land provision allows the king to deprive people of rights only under certain circumstances, and thus appears procedural: it guarantees only that the king must follow certain procedures before depriving people of their freedom or property. Yet the presence of those circumstances is *constitutive of the lawfulness* of the king's act, which means that those circumstances are also *substantive*: It is the presence of those circumstances, not the king's royal authority--the what, not the how--that gives the king's acts their lawful character. In other words, the lawfulness guarantee presupposes that there can be a difference between the ruler's act and truly lawful acts").

65. The Magna Carta led to the formation of a committee of 24 barons to guarantee the King's compliance with the charter. J.R. MADDICOTT, *THE ORIGINS OF THE ENGLISH PARLIAMENT, 924-1327* 237 (Oxford 2010). This authority, later mixed with the tradition of "peerage" to differentiate between commoners and the "Great Council," and preceded the formation of the modern-day Parliament, consisting of the House of Commons and the House of Lords. *Id.* at 351-52.

66. Although "law" first required only the assent of the House of Lords, by 1414, the assent of the House of Commons grew to also be required. *See* BAKER, *supra* note 63, at 178 n. 39 ("It was established in the principle that amendments contrary to the terms of Commons' bills had to be resubmitted to the Commons." (citing *Rot. Parl.*, vol. IV, p. 22, no. 10 (1414)); *see also id.* at 178 (citations omitted) ("The parliamentary form of modern legislation is rarely encountered before the end of the thirteenth century, and the consent of the House of Commons was probably not regarded as indispensable until after 1400.")).

political act in the form of a law was in fact *law* and, correspondingly, part of the *law of the land*. So if the King, without the assent of Parliament, decreed that all of his subjects had to surrender an acre of land, such a decree would not have the standing or power of “law.” Consequently, that decree would not be part of the “law of the land” by which men could be deprived of their property. The syllogism is fairly straightforward:

Major Premise: Magna Carta (as assented to by successive English kings) provides that persons (freemen) can only be deprived of their rights by the *law of the land*.

Minor Premise: Executive acts that deprive persons (freemen) of their rights without the assent of Parliament are not “law.”

Conclusion: Persons (freeman) cannot be deprived of their rights by executive acts lacking the assent of Parliament.

Accordingly, the Magna Carta was thereafter understood as precluding arbitrary *executive punishment*. All punishment had to be based on the *law of the land*, that is, the duly passed statutes, common law, and customs of England.<sup>67</sup> This was both a “procedural” and “substantive” requirement.<sup>68</sup>

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67. See BAKER, *supra* note 63, at 83 (citations omitted) (“It came to be thought an Englishman’s birthright to be subject to [the common law] system rather than to any other, and a steady stream of medieval statutes from Magna Carta onwards guaranteed that no free man should be deprived of life, liberty, or property save by ‘due process of law.’ These statutes were intended as legal restraints on the power of the Crown . . .”).

68. The key to understanding both the “procedural” and “substantive” import of the “law of the land” provision to the Magna Carta is understanding that it precludes arbitrary punishment. *Id.* Such a preclusion is both prescriptive, in that it establishes specific modes of procedure and punishment by which individuals can be deprived of their life, liberty, and property, and prohibitive, in that it precludes forms of legislative and executive judgments).

### 1. The “Law of the Land” and Judicial Process

Centuries later, and long after the Due Process statutes<sup>69</sup> were firmly implanted into the “law of the land,” it was established and understood that all deprivations of rights had to be *based on* the “Law of the Land” (that is, all punishments had to originate from established statutes, common law, or custom<sup>70</sup>) and *according to* the “Law of the Land” (that is, according to the arrest, detainment, accusation, and trial procedure firmly established in the common law—as revised and reinforced by Parliament<sup>71</sup>). It was this expanded understanding of the Magna Carta provision that prompted the Petition of Right, an act of Parliament statutorily recognizing “common law liberties.”<sup>72</sup> And it was this *judicial* prerequisite of the “law of the land” clause that Lord Coke thereafter memorialized the “Law of the Land” clause in his immortal *Institutes On The Laws Of England*.<sup>73</sup> The “Law,”

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69. These duly-passed Parliamentary statutes during the reign of King Edward III, which became so entrenched into the common law and customs of England so as to become practically immune from conflicting legislation, include: *5 Edw. 3. c. 9 (1331)* (Eng.) (“[T]hat no man is to be attached by any accusation, nor forejudged of life or limb, nor his lands, tenements, goods or chattels seized into the King’s hands, against the form of the Great Charter and the Law of the Land.”); *25 Edw. 3. c. 4 (1351)* (Eng.) (“that none shall be imprisoned nor put out of his Freehold, nor of his Franchises nor free Custom, unless it be by the Law of the Land . . . .”); *28 Edw. 3. c. 3 (1354)* (Eng.) (“That no Man of what Estate or Condition that he be, shall be put out of Land or Tenement, nor taken, nor imprisoned, nor disinherited, nor put to Death, without being brought in Answer by due Process of the Law.”); *36 Edw. 3. c. 9 (1362)* (Eng.) (“[I]f any man feels himself grieved contrary to any of the articles above written or any others contained in divers statutes, if he will come into the chancery (or someone on his behalf) and make his complaint, he shall now have a remedy there by force of the said articles and statutes without suing anywhere else to have redress.”); *37 Edw. 3. c. 18 (1363)* (Eng.) (“Though it be contained in the Great Charter that no man be taken or imprisoned, or put out of his freehold without process of law.”); *42 Edw. 3. c. 3 (1368)* (Eng.) (“[T]hat no Man be put to answer without Presentment before Justices, or Matter of Record, or by due Process and Writ original, according to the old Law of the Land.”).

70. See Sandefur, *supra* note 64, at 289.

71. See statutes cited *supra* note 69.

72. Frederick Mark Gedicks, *An Originalist Defense Of Substantive Due Process: Magna Carta, Higher-Law Constitutionalism, And The Fifth Amendment*, 58 EMORY L.J. 585, 606 (2009) (“In Coke’s view, Magna Carta did not merely confirm and restore the common law, but also declared the bedrock constitutional principle that the common law bound and limited both the crown and Parliament—a view that Coke emphatically and publicly reaffirmed in the debates surrounding the drafting and execution of the Petition of Right, Parliament’s declaration of fundamental common law liberties enacted as a statutory bill under Coke’s influence in 1628”).

73. EDWARD COKE, *THE SECOND PART OF THE INSTITUTES OF THE LAWS OF ENGLAND* 50 (photo. reprint 2002) (London, W. Clarke & Sons 1817) (1642); see also *In re John & Cherry Sts.*, 1838 N.Y. LEXIS 177, at \*30 (N.Y. Sup. Ct. 1838) (“[The due process clause] is an enlargement and extension of the words

henceforth, did not include arbitrary executive action in any form. Deprivations of rights at all stages had to be based on, and according to, the statutes, common law, and customs of England.<sup>74</sup> Most notably, this was a procedural requirement in that the executive had to arrest, detain, accuse, try and punish freemen according to the statutes and common law of England. However, it was also a substantive limitation, in that any arrest, detainment, accusation, trial, or punishment procedure unilaterally created by the king was not “law” and, therefore, was not part of the *law of the land*.

## 2. The “Law of the Land” and Legislative Limitations

The next step in the “law of the land” evolution occurred over the five year period between 1768 and 1773, starting with the controversy over the expulsion of Member of Parliament John Wilkes.<sup>75</sup> His supporters (and even some of his opponents such as Wilkes’s prosecutor George Grenville<sup>76</sup>) argued that the House of Commons had to follow established procedural rules when expelling a member (i.e. depriving him of his certain vested privileges).<sup>77</sup> They asserted that the House of Commons could not

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in *Magna Charta*, ch. 29: “No freeman shall be disseised of his freehold, etc., but by the law of the land”). Interestingly, in his *Institutes*, Coke suggests at least some “substantive” content in the “law of the land” provision by declaring that monopolies were against Chapter 29 of Magna Carta. See Gedicks, *supra* note 55, at 607.

74. See *New York Times Co. v. U.S. Dep’t of Justice*, 915 F. Supp. 2d 508, 522 (S.D.N.Y. 2013) (quoting Nathan S. Chapman and Michael W. McConnell, *Due Process as Separation of Powers*, 121 YALE L.J. 1672, 1782 (2012) (“The first, central, and largely uncontroversial meaning of ‘due process of law,’ the meaning established in Magna Charta and applied vigorously by Coke against the first two Stuart Kings, was that the executive may not . . . restrain the liberty of a person within the realm without legal authority arising either from established common law or from statute.”). Compare “*Quod principi placuit legis habet vigorem*,” John Kilcullen, *Notes on Medieval Philosophy*, STANFORD ENCYCLOPEDIA PHIL. (2010), <http://plato.stanford.edu/entries/medieval-political/notes.html> (“What pleases the ruler has the force of law, since by *lex regia*, which was made concerning the emperor’s rule, the people conferred on him all of its power to rule.”), and “*Rex est lex loquens*,” Lloyd Duhaime, *Edward Coke 1552-1634*, DUHAIME’S ENCYCLOPEDIA OF LAW (Aug. 29, 2014), [www.duhaime.org/LawMuseum/LawArticle-613/Edward-Coke-1552-1634.aspx](http://www.duhaime.org/LawMuseum/LawArticle-613/Edward-Coke-1552-1634.aspx) (“[T]he king is the law speaking”), with “*Quod Rex non debet esse sub homine, sed sub Deo et lege*,” *Id.* (“The king shall be under no other man’s authority but that of God and the law”).

75. John Wilkes was a Member of Parliament imprisoned for publishing material considered seditious libel. Proceedings in the Commons on the Expulsion of Mr. Wilkes (Nov. 14, 1768), in 16 COBBETT’S PARLIAMENTARY HISTORY OF ENGLAND FROM THE EARLIEST PERIOD TO THE YEAR 1803 534-35 (1813).

76. Chapman and McConnell, *supra* note 74, at 1695.

77. *Id.* at 561. See also *Young v. State Bank*, 4 Ind. 301, 303-04 (1853) (“And, it is a power that should not be possessed by the legislature, in its

simply make up procedure *ipse dixit*: such arbitrary action was not “law” and, as consequence, was not part of the *law of the land* by which a person could be deprived of his liberties under Magna Carta.<sup>78</sup> Therefore, when acting in its judicial capacity, it was contended that Parliament had to follow the applicable and established common law procedures.<sup>79</sup> This was both a “procedural” and “substantive” argument. In one respect, Grenville and others were arguing that Wilkes could only be expelled according to specific and established procedural safeguards. Yet, in another respect, they were declaring that the expulsion of Wilkes was an adjudication and, therefore, to expel Wilkes, the House of Commons had to act in its *judicial* capacity, not its *legislative* capacity<sup>80</sup>—a clear legislative-limiting, separation-of-powers argument.

Five years later, in response to an impending crisis involving the East Indian Company, Parliament passed the Regulating Act of 1773, a bill that rewrote the East Indian Company’s charter and granted to the Crown control over the company affairs.<sup>81</sup> In opposition to this perceived legislative usurpation, the Company and its supporters in Parliament argued that the bill deprived the Company of its established charter rights by an arbitrary legislative act and not by the “Law of the Land” (*i.e.* an adjudication based on the violation of a general and prospective

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legislative capacity; because, in that capacity, it would not be governed by legal rules. In governments where the constitution converts the legislature, on some occasions and for some purposes, into a court, while that body is thus acting, it is governed by the same rules, and restrained in its action by the same authorities, as are courts of law. Not so where it acts simply in its legislative capacity; and to permit it to dispose of judicial questions in that capacity, would be in the highest degree dangerous to the rights of the individual members of the community.”)

78. Proceedings in the Commons on the Expulsion of Mr. Wilkes, *supra* note 75, at 565-66.

79. Proceedings in the Commons on the Expulsion of Mr. Wilkes, *supra* note 75, at 561 (“We are now acting in our judicial capacity, and are therefore to found the judgment which we are to give, not upon our wishes and inclinations; not upon our private belief or arbitrary opinions, but upon specific facts alleged and proved according to the established rules and course of our proceedings. When we act as judges, we are not to assume the characters of legislators . . .”) ; Chapman and McConnell, *supra* note 74, at 1696 (quoting Proceedings in the Commons on the Expulsion of Mr. Wilkes, *supra* note 75, at 590) (“[T]he House when acting as a court of judicature was bound by the law of the land as embodied by ‘like restraints adjudged in other cases by all the courts of law; and confirmed by usage’”).

80. *Id.* at 1696 (quoting Proceedings in the Commons on the Expulsion of Mr. Wilkes, *supra* note 75, at 589-90) (“When houses of Parliament act as ‘courts of judicature,’ they ‘only have the power of declaring’ existing ‘restraints,’ and ‘in the use of that [judicial] power are bound by the law as it stands at the time of making that declaration’”).

81. Chapman & McConnell, *supra* note 74, at 1697 (citing Tea Act, 1773, 13 Geo. 3, c. 44; East India Company Act, 1773, 13 Geo. 3, c. 63-64).

rule of conduct).<sup>82</sup> In addition to its specific and concurrent nature, the Act took vested rights from the Company, even though the Company did not violate any of the terms of its charter.<sup>83</sup> Indeed, as early as 1773, a “legal cause of forfeiture”<sup>84</sup> was considered a fundamental part of the form of “law” by which an individual (or entity) could be deprived of his (or its) rights. These legislative-limiting arguments in both the Wilkes case and the East Indian Company case directly inspired colonial rejection of legislative authority and deeply influenced colonial understanding of the substantive component of the “law of the land.”<sup>85</sup>

### B. *The Colonies and Due Process of Law*

During the period leading up to the Declaration of Independence and the Revolutionary War, Parliament systematically stripped the colonists of those ancient procedural guarantees integral to England’s “common right and reason”<sup>86</sup>

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82. 4 JOHN PHILLIP REID, CONSTITUTIONAL HISTORY OF THE AMERICAN REVOLUTION: THE AUTHORITY OF LAW 31 (1993) (“The constitutional theory was that the government, by granting a charter, vested in a company, colony, or individuals certain inviolable privileges and securities of property that, if not immutable, were answerable only at common law, not to legislative whim and caprice”).

83. See Chapman & McConnell, *supra* note 74, at 1698 (“The proper way to amend the charter, opponents argued, was either to obtain the company’s consent or to prevail in a common law action for breach of charter privileges.”).

84. See Debate in the Lords on the Bill to Restrain the East India Company from Appointing Supervisors in India (Dec. 23, 1772), reprinted in 17 COBBETT’S PARLIAMENTARY HISTORY OF ENGLAND FROM THE EARLIEST PERIOD TO THE YEAR 1803 (1813) (recording a group of members of the House of Lords criticizing the Bill because it “[took] away from a great body corporate, and from several free subjects of this realm, the exercise of a legal franchise, without any legal cause of forfeiture assigned”); see also *id.* at 651 (pointing out that the bill “did not state any delinquency in the Company”).

85. Indeed, the First Continental Congress made a similar “substantive” due process argument when Parliament unilaterally altered the Massachusetts Charter in the Massachusetts Act. See Address to the People of Great Britain (Oct. 21, 1774), in 1 JOURNALS OF THE CONTINENTAL CONGRESS, 1774-1789, at 87 (Worthington Chauncey Ford ed., 1904) (emphasis added) (“Without incurring or being charged with a *forfeiture of their rights*, without being heard, without being tried, without law, and without justice, by an Act of Parliament, their charter is destroyed, their liberties violated, their constitution and form of government changed”).

86. See Dr. Bonham’s Case, 8 Co. Rep. 114a, 118a (C.P. 1610) (“[I]t appeareth in our Books, that in many Cases, the Common Law doth controll Acts of Parliament, and sometimes shall adjudge them to be void: for when an Act of Parliament is against *Common right and reason*, or repugnant, or impossible to be performed, the Common Law will controll it, and adjudge such Act to be void”) (emphasis added) (citations omitted). Leading up to the revolutionary war, colonists expanded the Cokean “common right and reason” to encapsulate rights—both substantive and procedural—that they deemed immune from legislative abrogation. James Otis, for example, argued that a statute authorizing the notorious Writs of Assistance was “against common

and, from time immemorial,<sup>87</sup> inherent in the “law of the land.”<sup>88</sup> Indeed, Parliament abrogated deep-rooted common law immunities at both the pre-trial and trial stages of civil and criminal prosecutions. In regard to pre-trial legal procedure,<sup>89</sup> Parliament authorized Writs of Assistance,<sup>90</sup> stationed standing armies amongst the colonists,<sup>91</sup> uprooted protections against self-incrimination,<sup>92</sup> eviscerated the right to grand juries proceedings,<sup>93</sup> and limited access to the writ of habeas corpus.<sup>94</sup> In regard to trial

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right and reason” and thus “void.” See Thomas Y. Davies, *Can You Handle the Truth? The Framers Preserved Common-Law Criminal Arrest and Search Rules in “Due Process of Law.” “Fourth Amendment Reasonableness” Is Only A Modern, Destructive, Judicial Myth*, 43 TEX. TECH L. REV. 51, 96 (2010). In 1765, John Adams argued that the Stamp Act was unconstitutional because it was “against reason.” *Id.* at 97 (citations omitted).

87. Coke probably exaggerated the “ancient” status of many common law rights. See Gedicks, *supra* note 72, at 598. Notwithstanding, the colonists were more than eager to adopt Coke’s Parliamentary-limiting ideology.

88. The founding charters of the colonies guaranteed the protection of Magna Carta and the common law. See R. Carter Pittman, *The Colonial Constitutional History of the Privilege Against Self-Incrimination in America*, 21 VA. L. REV. 763, 766 (1935) (citation omitted) (“In all of the early American colonies, according to the royal instructions and granted charters, justice was to be administered as closely as possible ‘to the common law of England and the Equity thereof,’ and the colonists were to enjoy the privileges of Englishmen ‘to all intents and purposes as if they had been abiding within . . . [the] realm of England’”).

89. “Pre-trial legal procedure” in this context refers to all laws and government acts pertaining to the search, arrest, detention, and accusation of persons. This distinction is embodied in the first eight Amendments to the Constitution, wherein search, arrest, detention, and accusation procedure is addressed in the Fourth and Fifth Amendments and trial and punishment procedure is addressed in the Sixth, Seventh, and Eight Amendments. U.S. CONST. amends. I-VIII.

90. See Thomas K. Clancy, *The Framers’ Intent: John Adams, His Era, and the Fourth Amendment*, 86 IND. L.J. 979, 980 (2011) (“[T]he period of 1761 to 1791 was characterized by aggressive British search and seizure practices and was the era when the principles that found their way into the Fourth Amendment crystallized”); see Tracey Maclin & Julia Mirabella, *Framing the Fourth*, 109 MICH. L. REV. 1049, 1054 (2011) (“Hostility against writs of assistance and general searches spread to other colonies with the enforcement of the Townshend Revenue Act of 1767”).

91. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) (“He has kept among us, in times of peace, Standing Armies without the Consent of our legislatures”).

92. Pittman, *supra* note 88, at 783-784 (tracing colonial apprehension for compelled self-incrimination to “the prerogative courts of Governor and Council, which . . . were very inquisitorial and oftentimes overbearing.”).

93. See *infra*, notes 76, 77. By transporting trials overseas and to admiralty courts, the Crown side-stepped the common law Grand Jury requirement.

94. See Max Rosenn, *The Great Writ-A Reflection of Societal Change*, 44 OHIO ST. L.J. 337, 338 (1983) (“The English Parliament had frequently suspended the writ during the seventeenth and eighteenth centuries, thereby permitting confinement without indictment, bail, or other judicial process”).



procedure, Parliament stripped the colonist of a trial by jury,<sup>95</sup> a jury of one's own vicinage,<sup>96</sup> and, for all practical purposes, a defendant's right to call witnesses in his favor,<sup>97</sup> to present evidence for his defense,<sup>98</sup> and to have assistance of counsel.<sup>99</sup>

In opposition to these legislative usurpations, the colonists advanced two basic arguments. First, colonists argued that such Acts of Parliament were void as "against common right and reason."<sup>100</sup> Second, the colonists argued that such Acts were arbitrarily applied to the colonies and not the rest of England, and thus they could not properly be considered the "law of the land."<sup>101</sup> The first argument was a procedural one: it stressed that some common law procedural rights were so ancient, so embedded, and so fundamental, that even Parliament could not lawfully abrogate them.<sup>102</sup> The second argument was a substantive one: it recognized

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95. DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) ("For depriving us in many cases, of the benefits of Trial by Jury"). The Stamp Act authorized trial by vice-admiralty courts, which operated under admiralty law, not common law, procedures. Matthew P. Harrington, *The Legacy of the Colonial Vice-Admiralty Courts (Part II)*, 27 J. MAR. L. & COM. 323, 335 (1996).

96. DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) ("For transporting us beyond Seas to be tried for pretended offenses"). The Dockyards Act deprived colonists of the right to trial by local jurors by removing prosecutions for certain crimes to England. See Statement of Violations of Rights (Oct. 14, 1774), *supra* note 85, at 63-73 ("Resolved, N.C.D. That the following acts of parliament are infringements and violations of the rights of the colonists; and that the repeal of them is essentially necessary, in order to restore harmony between Great Britain and the American colonies, viz . . . Also 12 Geo. III. ch. 24, intituled, 'An act for the better securing his majesty's dockyards, magazines, ships, ammunition, and stores,' which declares a new offence in America, and deprives the American subject of a constitutional trial by jury of the vicinage, by authorizing the trial of any person, charged with the committing any offence described in the said act, out of the realm, to be indicted and tried for the same in any shire or county within the realm.").

97. THOMAS JEFFERSON, A SUMMARY VIEW OF THE RIGHTS OF BRITISH AMERICA 15 (1774) ("And the wretched criminal, if he happen to have offended on the American side, stripped of his privilege of trial by peers of his vicinage, removed from the place where alone full evidence could be obtained, without money, without counsel, without friends, without exculpatory proof, is tried before judged predetermined to condemn.").

98. *Id.*

99. *Id.*

100. See Davies, *supra* note 86, at 96 (citations omitted).

101. See THOMAS JEFFERSON, *supra* note 97, at 5 (condemning the "many unwarrantable encroachments and usurpations, attempted to be made by the legislature of one part of the empire, upon those rights which God and the laws have given equally and independently to all").

102. Thomas M. Cooley, A Treatise on the Constitutional Limitations Which Rest upon the Legislative Power of the States of the American Union 175 (1868) ("The maxims of Magna Charta and the common law are the interpreters of constitutional grants of power, and those acts which by those maxims the several departments of government are forbidden to do cannot be considered within any grant or apportionment of power which the people in general terms have made to those departments. The Parliament of Great Britain, indeed, as possessing the sovereignty of the country, has the power to

that, according to the fundamental form of law, legislative acts had to be generally applicable to all English subjects—they could not simply apply to colonists.

After the colonies declared independence in 1776, most of the early states in writing (and all of them in practice) adopted the immortal “law of the land” guarantee.<sup>103</sup> While the provision’s restraint on executive power was well-established and universally accepted among the several states in the pre-Constitutional era,<sup>104</sup> the provision’s restraint on legislative power was still in its infancy and existed only by implication.<sup>105</sup> Since the phrase “law of

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disregard fundamental principles, and pass arbitrary and unjust enactments; but it cannot do this rightfully . . .”). The early state constitutions, although in a largely unorganized and haphazard way, encapsulated many of these fundamental common law rights. See *Holden v. James*, 11 Mass. 396, 404 (1814) (“Many of the articles in that declaration of rights were adopted from the Magna Charta of England, and from the bill of rights passed in the reign of William and Mary.”).

103. See *Duane L. Ostler, Bills of Attainder and the Formation of the American Takings Clause at the Founding of the Republic*, 32 CAMPBELL L. REV. 227, 232 n.20 (2010) (demonstrating that eleven early state constitutions contained “law of the land” provisions and the two other states had “structural constitutions” or retained their colonial charter).

104. See Chapman & McConnell, *supra* note 74, at 1782 (“The first, central, and largely uncontroversial meaning of ‘due process of law,’ the meaning established in Magna Charta and applied vigorously by Coke against the first two Stuart Kings, was that the executive may not seize the property or restrain the liberty of a person within the realm without legal authority arising either from established common law or from statute. In other words, executive decrees are not ‘law’”). The provision’s focus on executive restraint is evident in the early colony charters. See *The Body of Liberties 1641, reprinted in A BIBLIOGRAPHICAL SKETCH OF THE MASSACHUSETTS COLONY FROM 1630 TO 1686* 33 (William H. Whitmore ed. 1890) (“No mans life shall be taken away, no mans honour or good name shall be stayned, no mans person shall be arested, restrayned, banished, dismembred . . . unlesse it be by vertue or equitie of some expresse law of the Country warranting the same, established by a general Court and sufficiently published . . .”).

105. Although active only by implication, the “law of the land” provision’s restraint on legislative action was nevertheless broadly recognized by several early state courts. See Chapman & McConnell, *supra* note 74, at 1707-08 (describing the Pennsylvania case of Isaac Austin where a land dispute was resolved by legislature act and “every branch of the Pennsylvania government concluded that the special and retrospective act . . . was beyond the legislature’s constitutional power”) (citations omitted); *Id.* at 1709 (describing the 1778 case of *Holmes v. Walton* where the New Jersey Supreme Court voided a legislative act that vested a small claims court with six jury members and no right of appeal to hear claims involving goods carried from British territories back to New Jersey because it was “contrary to the constitution of New Jersey” and “contrary to . . . the Law of the Land”) (citations omitted); *Id.* at 1710 (describing the 1786 Rhode Island case of *Trevett v. Weeden* where a statute permitting buyers to force merchants to accept inflated paper money at face value in a “trial without any jury according to the laws of the land” was “strikingly repugnan[t]” because the “law of the land” necessarily included the right to trial by jury) (citations omitted); *id.* at 1713 (describing the 1786 North Carolina case *Bayard v. Singleton* where the North Carolina district

the land,” when read literally, suggested that the legislature could modify “the law,” some state courts rejected the provision’s restraint on legislative authority.<sup>106</sup> It was in New York where these conflicting interpretations were fully played out and conclusively resolved.

Following the revolutionary war, New York passed a law stripping loyalists of their citizenship.<sup>107</sup> Alexander Hamilton, writing under the pseudonym “Phocion,” argued that such a legislative act was “contrary to the law of the land”<sup>108</sup> because legislatures cannot bypass judicial adjudications by passing retrospective punishments.<sup>109</sup> “Law of the land,” Hamilton stressed, meant “due process of law, that is by indictment or presentment of good and lawful men, and trial and conviction in

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court declared that a statute requiring courts to dismiss suits against purchasers of forfeited Tory estates was unconstitutional because it deprived a citizen of his “right to a decision of his property by a trial by a jury” and “ordered, that the suits in question should stand for trial in the next term, according to the course of the common law of the land” (citations omitted); *see also* *Bank of Columbia v. Okely*, 17 U.S. (4 Wheat.) 235, 244 (1819) (“As to the words from Magna Charta, incorporated into the Constitution of Maryland after volumes spoken and written with a view to their exposition, the good sense of mankind has at length settled down to this: that they were intended to secure the individual from the arbitrary exercise of the powers of government, unrestrained by the established principles of private rights and distributive justice.”).

106. *State v. ---*, 2 N.C. 28, 29, 1 Hayw. 38, 50 (1794) (accepting the state’s argument that the North Carolina’s *law of the land* clause gives the legislature free reign to alter or amend such law).

107. Chapman & McConnell, *supra* note 74, at 1713.

108. *Id.* at 1714 (quoting Alexander Hamilton, A Letter from Phocion to the Considerate Citizens of New York (Jan. 1-27, 1784), *reprinted in* 3 THE PAPERS OF ALEXANDER HAMILTON 483-497 (Harold C. Syrett & Jacob E. Cooke eds., 1962). The Act, according to Hamilton, violated “[t]he 13th article of the constitution [of New York],” Hamilton, *supra* note 108, which stated: “[n]o member of this state shall be disfranchised or defrauded of any of the rights or privileges sacred to the subjects of this state by the constitution, unless by the law of the land or the judgment of his peers.” N.Y. CONST. of 1777, art. XIII, *in* 5 THE FEDERAL AND STATE CONSTITUTIONS: COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE STATES, TERRITORIES, AND COLONIES NOW OR HERETOFORE FORMING THE UNITED STATES OF AMERICA [hereinafter THE FEDERAL AND STATE CONSTITUTIONS] 2623, 2632 (Francis Newton Thorpe ed., 1909)).

109. *See* Hamilton, A Letter from Phocion to the Considerate Citizens of New York (Jan. 1-27, 1784), *supra* note 108 (stating that the legislature “cannot, without tyranny, disfranchise or punish whole classes of citizens by general descriptions, without trial and conviction of offences known by laws *previously established* declaring the offence and prescribing the penalty”) (emphasis added); *Id.* at 483 (“The spirit of Whiggism, cherishes legal liberty, holds the right of every individual sacred, condemns or punishes no man without regular trial, and conviction of some crime declared by *antecedent laws . . .*”) (emphasis added); *Id.* at 487 (“No citizen can be deprived of any right which the citizens in general are entitled to, unless *forfeited by some offense*”) (emphasis added).

consequence.”<sup>110</sup> The act before the New York legislature, however, bypassed the judicial branch and rendered judgment *ipse dixit*. To Hamilton, this was illegitimate and unconstitutional. Specifically, Hamilton believed that “law of the land” was best interpreted as “due process of law” and that “due process of law” mandated certain modes of “process” to bring individuals to court (and a trial in consequence). The legislature, therefore, cannot bypass those requirements by preemptively rendering judgment through legislation; legislatures may only create general and prospective

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110. *Id.* (emphasis omitted); *see also id.* at 487 (“It has been seen that the regular and constitutional mode of ascertaining whether this forfeiture has been incurred, is by legal process, trial and conviction.”). This is what Hamilton meant by the statement, “the words ‘due process’ have a precise technical import, and are only applicable to the process and proceedings of the courts of justice . . . .” Hamilton, Remarks on an Act for Regulating Elections, New York Assembly (Feb. 6, 1787), *supra* note 60. Contrary to some erroneous interpretations, Hamilton was not saying that due process of law does not apply to the legislature or only restricts the courts; instead, he was saying that individuals can only be deprived of their life, liberty, or property through regular *judicial* determinations—not by legislative judgments. *See id.* The Supreme Court later reiterated this same “law of the land” interpretation:

By the law of the land is most clearly intended the general law; a law, which hears before it condemns; which proceeds upon inquiry, and renders judgment only after trial. The meaning is, that every citizen shall hold his life, liberty, property, and immunities, under the protection of the general rules which govern society. Every thing which may pass under the form of an enactment, is not, therefore, to be considered the law of the land. If this were so, acts of attainder, bills of pains and penalties, acts of confiscation, acts reversing judgments, and acts directly transferring one man’s estate to another, legislative judgments, decrees, and forfeitures, in all possible forms, would be the law of the land.

*Trs. of Dartmouth College v. Woodward*, 17 U.S. (4 Wheat.) 518, 1819 U.S. LEXIS 330, at \*82 (1819). Webster’s *law of the land* argument centered on a substantive due process of law interpretation of the clause, which, as explained above, rests upon a separation-of powers-doctrine. Not surprisingly, therefore, Webster’s separation of powers argument was nearly identical:

By these acts, the legislature assumes to exercise a judicial power. It declares a forfeiture, and resumes franchises, once granted, without trial or hearing. If the constitution be not altogether wastepaper, it has restrained the power of the legislature in these particulars. If it has any meaning, it is, that the legislature shall pass no act directly and manifestly impairing private property, and private privileges. It shall not judge, by act. It shall not decide by act. It shall not deprive, by act. But it shall leave all these things to be tried and adjudged by the law of the land.

*Id.* at \*80. Crucially, Webster’s substantive due process of law argument in *Woodward* was widely considered the correct interpretation of the Due Process Clause for several decades thereafter. *See COOLEY, supra* note 102, at 353 (“No definition [of the “law of the land” clause], perhaps, is more often quoted than that by Mr. Webster in the Dartmouth College case . . . .”).

rule of conduct.<sup>111</sup> As discussed below, these events in New York, along with Hamilton's interpretation of the "law of the land" as "due process of law," directly influenced the Framers' (particularly James Madison's) adoption of the term "due process of law" in the Fifth Amendment as well as the nation's understanding of the term in general.

### *C. The United States Constitution and Due Process of Law*

The unamended 1787 Constitution included a number of provisions that guaranteed, in part, both procedural due process of law and substantive due process of law. Explicitly, the Constitution safeguarded procedural due process of law by declaring that "[t]he privilege of the writ of habeas corpus shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it,"<sup>112</sup> and that "[t]he trial of all crimes, except in cases of impeachment, shall be by jury; and such trial shall be held in the state where the said crimes shall have been committed."<sup>113</sup> Implicitly, the Constitution's drafters relied upon the continuation and importance of the common law, with all of its ancient immunities and protections.<sup>114</sup> Regarding substantive due

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111. See Hamilton, A Letter from Phocion to the Considerate Citizens of New York (Jan. 1-27, 1784), *supra* note 108 (stating that the legislature "cannot, without tyranny, disfranchise or punish whole classes of citizens by general descriptions, without trial and conviction of offences known by laws previously established declaring the offence and prescribing the penalty") (emphasis added).

112. U.S. CONST. art. I, § 9, cl. 2.

113. U.S. CONST. art. III, § 2, cl. 3.

114. See Statement of Violations of Rights (October 14, 1774), *supra* note 85 ("Resolved, N.C.D. 5. That the respective colonies are entitled to the common law of England, and more especially to the great and inestimable privilege of being tried by their peers of the vicinage, according to the course of that law"); Northwest Ordinance Art. 2, SECOND CONTINENTAL CONGRESS (1787) ("Art. 2. The inhabitants of the said territory shall always be entitled to the benefits . . . of judicial proceedings according to the course of the common law"). Textualists and Originalists have difficulty explaining that the unamended Constitution was purposely framed around a system of law that would have protected all of those deep-rooted privileges and immunities firmly entrenched in the common law, many of which would later be attached to the Constitution in the first eight Amendments. Courts were expected to preserve and protect the People's fundamental common law rights from executive and legislative incursion, just as they did during the Stamp Act and during the Articles of Confederation. See Edmund Randolph, Suggestions for the Conciliation of the Small States (July 10, 1787), in 4 THE FOUNDERS' CONSTITUTION 597 (Philip B. Kurland & Ralph Lerner eds., 1987) ("[A]ny individual conceiving himself injured or oppressed by the partiality or injustice of a law of any particular State may resort to the National Judiciary, who may adjudge such law to be void, if found contrary to the principles of equity and justice").

process of law, the unamended Constitution explicitly declared that “[n]o bill of attainder or ex post facto Law shall be passed,”<sup>115</sup> and that “[n]o state shall . . . pass any bill of attainder, ex post facto law, or law impairing the obligation of contracts.”<sup>116</sup> By its very structure and design, the Constitution recognized and gave full effect to the separation-of-powers doctrine.<sup>117</sup>

These provisions, however, were by no means exhaustive. In fact, one of the arguments in favor a Bill of Rights—which turned one of the strongest argument against a Bill of Rights on its head—was that the inclusion of some common law protections in

115. U.S. CONST. art. I, § 9, cl. 3.

116. U.S. CONST. art. I, § 10, cl. 1; *see also* U.S. v. Brown, 381 U.S. 437, 440 (1965) (“[T]he Bill of Attainder Clause was intended not as a narrow, technical (and therefore soon to be outmoded) prohibition, but rather as an implementation of the *separation of powers*, a general safeguard against legislative exercise of the judicial function or more simply - trial by legislature.”) (emphasis added).

117. THE FEDERALIST NO. 47 (James Madison) (“The entire legislature can perform no judiciary act . . .”); *Id.* (quoting Montesquieu) (“Were the power of judging joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control, for the judge would then be the legislator.”); THOMAS JEFFERSON, NOTES ON THE STATE OF VIRGINIA 123-34 (Lilly & Wait 1832) (“The concentrating [of the three branches of a government] in the same hands is precisely the definition of despotic government . . . . “If therefore the legislature assumes executive and judiciary powers, no opposition is likely to be made; nor, if made, can it be effectual; because in that case they may put their proceedings into the form of an act of assembly, which will render them obligatory on the other branches. They have accordingly, in many instances, decided rights which should have been left to judiciary controversy . . . .”); *Mugler v. Kansas*, 123 U.S. 623, 662 (1887) (“[I]t is a fundamental principle in our institutions, indispensable to the preservation of public liberty, that one of the separate departments of government shall not usurp powers committed by the Constitution to another department”); MD. CONST. of 1776 art. 8, *reprinted in* 3 THE FEDERAL AND STATE CONSTITUTIONS, *supra* note 108, at 1686, 1742 (“That the legislative, executive and judicial powers of government, ought to be forever separate and distinct from each other . . . .”); GA. CONST. of 1777, art. I, *reprinted in* 2 THE FEDERAL AND STATE CONSTITUTIONS, *supra* note 108, at 777, 778 (“The legislative, executive, and judiciary departments shall be separate and distinct, so that neither exercise the powers properly belonging to the other.”); MASS. CONST. of 1780, art. XXX, *reprinted in* 3 THE FEDERAL AND STATE CONSTITUTIONS, *supra* note 108, at 1888, 1893 (“In the government of this commonwealth, the legislative department shall never exercise the executive and judicial powers, or either of them; the executive shall never exercise the legislative and judicial powers, or either of them; the judicial shall never exercise the legislative and executive powers, or either of them; to the end it may be a government of laws, and not of men.”); VT. CONST. of 1793, Ch. 2, § 6, *reprinted in* 6 THE FEDERAL AND STATE CONSTITUTIONS, *supra* note 108, at 3762, 3765 (“The Legislative, Executive and Judiciary departments shall be separate and distinct, so that neither exercise the powers properly belonging to the other.”). Judicial review in early America consistently focused on the separation of powers and legislative adjudications. *See* William M. Treanor, *Judicial Review Before Marbury*, 58 STAN. L. REV. 455, 460 (2005) (demonstrating that pre-*Marbury* judicial review focused on “invalidat[ing] statutes that trenched on judicial authority and autonomy.”).

the unamended Constitution (such as trial by jury in criminal cases), implied the exclusion of other important common law protections and immunities (such as trial by jury in civil cases or the right against self-incrimination).<sup>118</sup> Therefore, it is reasonable to infer that the Framers drafted the Constitution (even absent a Bill of Rights) with the intention and expectation that the many deep-rooted common law immunities would remain intact and inviolate, as they had in England for hundreds of years, and as they had in the colonies before British overreach in the mid-eighteenth century. That is why the “Federalists,” who fully embraced inviolate common law rights, and who vociferously opposed their abrogation by Parliament leading up to the Revolution, nevertheless opposed the addition of a Bill of Rights to the Constitution.<sup>119</sup> Among their many fears of including a Bill of Rights was the implication, which seems unfortunately strong today, that the inclusion of several fundamental common law rights would imply the exclusion of other equally important rights. The Ninth Amendment was thus inserted into the first set of Amendments in order to quell this concern by constitutionally recognizing the existence, importance, and inviolability of other, unenumerated fundamental common law immunities and protections.<sup>120</sup>

Among the list of amendments James Madison presented to Congress in the summer of 1789 was the requirement that “[n]o person shall be . . . deprived of life, liberty, or property, without due process of law.”<sup>121</sup> Madison’s proposed and ultimately ratified provision is important for two reasons. First, Madison’s use of “due

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118. See 1 ANNALS OF CONGRESS 456 (1789) (Joseph Gales ed., 1851) (James Madison) (“It has been objected also against a bill of rights, that, by enumerating particular exceptions to the grant of power, it would disparage those rights which were not placed in that enumeration; and it might follow, by implication, that those rights which were not singled out, were intended to be assigned into the hands of the General Government, and were consequently insecure. This is one of the most plausible arguments I have ever heard urged against the admission of a bill of rights into this system; but, I conceive, that it may be guarded against.”).

119. See Gedicks, *supra* note 74, at 636 (“Federalist arguments rested on the twin assumptions that natural and customary rights existed independently of the federal Constitution or any other text, and that the federal judiciary would be empowered to invalidate acts of Congress or state legislatures intruding upon such rights.”).

120. 1 ANNALS OF CONGRESS 452 (1789) (Joseph Gales ed., 1851) (James Madison) (“The exceptions here or else-where in the constitution, made in favor of particular rights, shall not be so construed as to diminish the just importance of other rights retained by the people; or as to enlarge the powers delegated by the constitution; but either as actual limitations of such powers, or as inserted merely for greater caution”). To the extent that they are recoverable, these rights should be recognized and protected as rights “deeply rooted in this Nation’s history and tradition.” *Moore v. City of East Cleveland*, 431 U.S. 494, 503 (1977).

121. See U.S. CONST. amend V.

process of law” instead of the more prevalent “law of the land” was almost certainly provoked by the New York’s “law of the land” dispute,<sup>122</sup> as New York was the only state that proposed using the term “due process of law” in the Bill of Rights.<sup>123</sup> Madison regularly consulted with New Yorker Hamilton as a co-author of the *Federalist Papers*, and Madison’s proposal inserted the “due process” provision in Article I, Section 9 (which listed limitations on the legislature) and after Clause 3 (which prohibited legislative judgments in the form of bills of attainder and ex post facto laws).<sup>124</sup> Although the Constitution’s provision against bills of attainder and ex post facto laws banned specific forms of legislative judgments, the addition of the “due process of law” clause arguably effectuated a general constitutional ban on legislative adjudications.<sup>125</sup> As Hamilton had stressed during the New York controversy, “due process of law” meant that only courts of justice—via fundamental common law modes and procedures—can punish; the legislature can only pass general and prospective rules of conduct.<sup>126</sup>

When the Fifth Amendment was proposed and ratified, therefore, “due process of law” not only preserved deep-rooted common law “procedural” rights; it also mandated that the legislature pass only “general and prospective rule of conduct” when deprivation of rights are at stake. The most comprehensive and correct early explications of this provision, which capture both its procedural and substantive implications, are found in *Hoke v. Henderson*,<sup>127</sup> *Taylor v. Porter*,<sup>128</sup> and *Wynehamer v People*.<sup>129</sup><sup>130</sup>

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122. See Alexander Hamilton, A Letter from Phocion to the Considerate Citizens of New York (Jan. 1-27, 1784), reprinted in *supra* 3 THE PAPERS OF ALEXANDER HAMILTON, *supra* note 108, at 483-97.

123. Andrew T. Hyman, *The Little Word “Due,”* 38 AKRON L. REV. 1, 6 (2005) (“[t]he New York ratification convention first proposed the ‘due process’ language for inclusion in the Bill of Rights . . .”).

124. Madison’s original placement of the provision as a restraint against the legislature is consistent with Madison’s use of the phrase “due process of law” instead of “law of the land.” See *Wynehamer v. People*, 13 N.Y. 378, 433 (1856) (“But the meaning was rendered more clear by the paraphrase of this article of Magna Charta, which was inserted in a subsequent statute securing privileges to the people, passed in the reign of Edward III., in which the clause, ‘but by the law of the land or the judgment of his peers,’ was changed to the words, ‘without being brought to answer by due process of law.’ This change shows that the object of the provision was, in part at least, to interpose the judicial department of the government as a barrier against aggressions by the other departments”).

125. See Chapman & McConnell, *Due Process*, *supra* note 74, at 1718-19.

126. See Alexander Hamilton, A Letter from Phocion to the Considerate Citizens of New York (Jan. 1-27, 1784), reprinted in *supra* 3 THE PAPERS OF ALEXANDER HAMILTON, *supra* note 108, at 483-97.

127. *Hoke v. Henderson*, 15 N.C. 1, 15-16 (1833) (“In reference to the infliction of punishment and divesting of the rights of property, it has been repeatedly held in this State, and it is believed, in every other of the Union, that there are limitations upon the legislative power, notwithstanding those



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words; and that the clause itself means that such legislative acts, as profess in themselves directly to punish persons or to deprive the citizen of his property, without trial before the judicial tribunals, and a decision upon the matter of right, as determined by the laws under which it vested, according to the course, mode and usages of the common law as derived from our forefathers, are not effectually 'laws of the land,' for those purposes."). This was more or less the same interpretation the North Carolina Supreme Court handed down 28 years earlier. *See Trustees of the Univ. of North Carolina v. Foy and Bishop* 5 N.C. (1 Mur.) 57, 63 (1805) ("[I]ndividuals shall not be so deprived of their liberties or properties, unless by a trial by Jury in a Court of Justice, according to the known and establish rules of decision, derived from the common law . . . . [and] [t]he property vested in the Trustees must remain for the uses intended for the University, until the Judiciary of the country in the usual and common form, pronounce them guilty of such acts, as will, in law, amount to a forfeiture of their rights or dissolution of their body.").

128. *Taylor v. Porter & Ford*, 4 Hill 140, 145-47 (N.Y. Sup. Ct. 1843) ("The words 'law of the land,' as here used, do not mean a statute passed for the purpose of working the wrong. That construction would render the restriction absolutely nugatory, and turn this part of the constitution into mere nonsense . . . . [t]he meaning of the section, then, seems to be, that no member of the state shall be disfranchised of any of his rights and privileges, unless the matter be adjudged against him upon trial had according to the course of the common law. It must be ascertained judicially that he has forfeited his privileges . . . [by] a prosecution or suit instituted and conducted according to the prescribed forms and solemnities for ascertaining guilt, or determining the title to property"). This decision is consistent with the earlier New York case, *Barker v. People*, 3 Cow. 686, 707 (1824) ("If [the right of office] is taken from none but malefactors, in punishment for offences declared by law, and ascertained in the due course of justice, the sense of the whole constitution, is maintained . . .").

129. *Wynehamer v. People*, 13 N.Y. 378, 392-93 (1856) (Comstock, J.) ("To say, as has been suggested, that 'the law of the land,' or 'due process of law,' may mean the very act of legislation which deprives the citizen of his rights, privileges or property, leads to a simple absurdity. The constitution would then mean, that no person shall be deprived of his property or rights, unless the legislature shall pass a law to effectuate the wrong, and this would be throwing the restraint entirely away. The true interpretation of these constitutional phrases is, that where rights are acquired by the citizen under the existing law, there is no power in any branch of the government to take them away; but where they are held contrary to the existing law, or are forfeited by its violation, then they may be taken from him--not by an act of the legislature, but in the due administration of the law itself, before the judicial tribunals of the state"); *Id.* at 477 (Selden, J, concurring) ("Either the guarantee of a judicial trial, according to the course of the common law, is a nullity, or this provision is void. But I am prepared to go further, and to hold that all those fundamental rules of evidence which, in England and in this country, have been generally deemed essential to the due administration of justice, and which have been acted upon and enforced by every court of common law for centuries, are placed by the constitution beyond the reach of legislation. They are but the rules which reason applies to the investigation of truth, and are of course in their nature unchangeable. If it does not follow that to determine what they are, as applicable to judicial proceedings, is a judicial and not a legislative power, still they must necessarily be included in the phrase, 'due process of law.' If this be not the true interpretation of the constitution; if the legislature, in addition to declaring what acts and what intentions shall be criminal, can also dictate to courts and juries the evidence,

Save for these exceptional expositions, most court decisions focused *either* upon procedural due process of law or upon substantive due process of law.

#### *D. Modern Substantive Due Process*

Because it is the role and duty of the courts to “tell what the law is,”<sup>131</sup> because courts must follow the Constitution over conflicting laws,<sup>132</sup> and because the Constitution’s Due Process Clause prohibits legislative judgments, it is the duty of judges to invalidate all legislative acts that assume the character of an adjudication.<sup>133</sup> The crucial question, therefore, is what constitutes

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and change the legal presumptions upon which they shall convict or acquit, there is no barrier to legislative despotism; and the separation of the legislative and judicial departments of the government, the guarantee of trial by jury, and of a trial according to the course of the common law, have all failed to afford any substantial security to individual rights.”). This decision was an enlargement of the explication given by the court just two years prior. See *Westervelt v. Gregg*, 12 N. Y. 202, 209 (1854) (“Due process of law undoubtedly means, in the due course of legal proceedings, according to those rules and forms which have been established for the protection of private rights. Such an act as the legislature may, in the uncontrolled exercise of its powers, think fit to pass, is, in no sense, the process of law designated by the constitution”). Although its interpretation was arguably overextended in some instances, *Wynehamer’s* influence was, nonetheless, important and extensive. See Ryan C. Williams, *The One and Only Substantive Due Process Clause*, 120 *YALE L.J.* 408, 469 n.280 (2010) (“Though courts in most other states rejected the specific holding of *Wynehamer*, namely that prohibition legislation violated the due process and law-of-the-land provisions of state constitutions . . . the decision itself was approvingly cited by multiple courts and constitutional treatise writers around the time of the Fourteenth Amendment’s enactment.”).

130. The United States Supreme Court cited *Hoke* and *Taylor* in its first comprehensive treatment of the Due Process Clause in 1856. See *Murray’s Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. 272, 280 (1856).

131. *Marbury v. Madison*, 5 U.S. 137, 177 (1803) (“It is emphatically the province and duty of the judicial department to say what the law is.”).

132. See *id.* at 180 (“[A] law repugnant to the constitution is void . . .”).

133. See *Hurtado v. California*, 110 U.S. 516, 535-36 (1884) (stating that “[i]t is not every act, legislative in form, that is law. Law is something more than mere will exerted as an act of power” and excluding, as not due process of law, “legislative judgments and decrees, and other similar special, partial and arbitrary exertions of power under the forms of legislation” because “[a]rbitrary power, enforcing its edicts to the injury of the persons and property of its subjects, is not law, whether manifested as the decree of a personal monarch or of an impersonal multitude.”); see also *Calder v. Bull*, 3 U.S. 386, 388-89 (1798) (condemning ex post facto laws, bills of attainder, and bills of pains and penalties as “legislative judgments” and “exercise[s] of judicial power” and stating that such “acts” of the legislature “cannot be considered a rightful exercise of legislative authority”); *Lewis v. Webb*, 3 Me. 326, 331 (1825) (“[I]f the legislature undertake to exercise judicial power, they invade the province of the judiciary; because the constitution and the laws have placed all the judicial power in other hands.”); *Jones’ Heirs v. Perry*, 18 Tenn. 59, 74-75 (1836) (“[T]he legislature is not sovereign; that it is not the

a “legislative judgment?” As discussed above, “law”—in the context of a deprivation of rights<sup>134</sup>—is a “general and prospective rule of conduct”<sup>135</sup> while a “judgment” is a “special and retroactive punishment.” A legislative act assumes the character of a judgment, therefore, when it is not “generally applicable,” when it is not “prospective,” or when it is not a “rule of conduct.” Accordingly, because “special” legislative acts are not generally applicable, it is arguably the duty of the courts to invalidate them.<sup>136</sup> Likewise, because retroactive laws are not prospective, it

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constituent of the courts, nor are they its agents; and that any assumption by the legislature of powers conferred by the constitution upon the judiciary is as destitute of authority as it would be in the courts were they, instead of adjudging what the law is, to undertake the exercise of legislative powers and to prescribe what it shall be.”); *Wynehamer*, 13 N.Y. at 391 (“I entertain no doubt that, aside from the special limitations of the constitution, the legislature cannot exercise powers which are in their nature essentially judicial or executive. These are, by the constitution, distributed to other departments of the government.”); *id.* 392-93 (“To say, as has been suggested, that ‘the law of the land,’ or ‘due process of law,’ may mean the very act of legislation which deprives the citizen of his rights, privileges or property, leads to a simple absurdity. The constitution would then mean, that no person shall be deprived of his property or rights, unless the legislature shall pass a law to effectuate the wrong, and this would be throwing the restraint entirely away. The true interpretation of these constitutional phrases is, that where rights are acquired by the citizen under the existing law, there is no power in any branch of the government to take them away; but where they are held contrary to the existing law, or are forfeited by its violation, then they may be taken from him--not by an act of the legislature, but in the due administration of the law itself, before the judicial tribunals of the state”); *Windsor v. McVeigh*, 93 U.S. 274, 278 (1876) (stating that the purported “law” at issue was “in fact a mere arbitrary edict, clothed in the form of a judicial sentence”).

134. Legislative acts that do not deprive persons of their rights, but rather recognize or restore their rights, arguably may be both special and retroactive, yet still considered “law.” *See Goshen v. Stonington*, 4 Conn. 209, 221-222 (1822) (acknowledging the normally unjust nature of retroactive deprivations of rights but maintaining that “laws of a retroactive nature, affecting the rights of individuals, not adverse to equitable principle, and highly promotive of general good, have been passed, and as often approved . . . the retrospective law, thus far operating on vested rights, is admitted to be unquestionably valid, because it is manifestly just”); *Jones’ Heirs*, 18 Tenn. at 78-79 (“Several cases have been referred to where special laws have been declared constitutional by this court . . . . These cases were all determined upon the principle that they deprived no one of a right, but were enacted to advance the remedy of a party whose right already existed. If they were susceptible of that construction--and we think they were--then no one would doubt their constitutionality.”). Additionally, legislative acts that take liberty and property for the necessary existence and administration of government (i.e., military service, taxes) are “law.”

135. *See Lewis*, 3 Me. at 333 (1825) (“A law is defined as ‘a rule of civil conduct.’ Hence it must in its nature be general and prospective; a rule for all, and binding on all. It is the province of the legislature to make and establish laws; and it is the province and duty of Judges to expound and apply them”) (citation omitted).

136. *See JOHN LOCKE, SECOND TREATISE OF GOVERNMENT* 9 (1690) (Jonathan Bennett ed., 2008) (defining law as a “standing Rule to live by,

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*common to every one in the society in questions . . .*”) (emphasis added); Chapman & McConnell, *supra* note 74, at 1712 (quoting Protest (Dec. 28, 1785), in THE JOURNALS OF THE GENERAL ASSEMBLY OF THE STATE OF NORTH-CAROLINA 51, 51 (2d pagination series, Newbern, N.C., Arnett & Hodge 1786)) (discussing the dissenting legislators’ objections to a North Carolina statute that required courts to dismiss suits against purchasers of forfeited Tory estates, including the objection that “the law of the state must be generally applicable to all citizens, and laws that effectively deprive some citizens of the rights usually enjoyed by all would be ‘a denial of the known and established rules of justice’”); Fletcher v. Peck, 6 U.S. (Cranch) 87, 128 (1810) (Marshall, J.) ” (“It is the peculiar province of the legislature to prescribe *general* rules for the government of society; the application of these rules to individuals in society would seem to be the duty of other departments.”) (emphasis added); Trustees of Dartmouth College v. Woodward, 17 U.S. (4 Wheat.) 518, 1819 U.S. LEXIS 330, at \*82 (1819) (argument of Daniel Webster) (“By the law of the land is most clearly intended the *general law*; a law, which hears before it condemns; which proceeds upon inquiry, and renders judgment only after trial. The meaning is, that every citizen shall hold his life, liberty, property, and immunities, under the protection of the *general rules* which govern society”) (emphasis added); Hurtado v. California, 110 U.S. 516, 535-36 (1884) (“It is not every act, legislative in form, that is law. Law is something more than mere will exerted as an act of power. It must be not a special rule for a particular person or a particular case . . . . The enforcement of these limitations by judicial process is the device of self-governing communities to protect the rights of individuals and minorities, as well against the power of numbers as against the violence of public agents transcending the limits of lawful authority, even when acting in the name and wielding the force of the government”); *id.* (excluding, as not due process of law, “legislative judgments and decrees, and other similar special, partial and arbitrary exertions of power under the forms of legislation”); Caldwell v. Texas, 137 U.S. 692, 697 (1891) (stating that due process requires “laws operating on all alike”); Wall’s Heirs v. Kennedy, 10 Tenn. 554, 555-57 (1831) (stating that “the clause ‘*law of the land*’ means a general public law, equally binding upon every member of the community. The rights of every individual must stand or fall by the same rule or *law* that governs every other member of the body politic, or land, under similar circumstances; and every partial or private law which directly proposes to destroy or affect individual rights, or does the same thing by affording remedies leading to similar consequences, is unconstitutional and void. . . . The part of the constitution referred to was intended to secure to weak and unpopular minorities and individuals equal rights with the majority, who, from the nature of our government, exercise the legislative power. Any other construction of the constitution would set up the majority in the government as a many-headed tyrant, with capacity and power to oppress the minority at pleasure, by odious laws binding on the latter”); In re Dorsey, 7 Port. 293, 1838 Ala. LEXIS, at \*62 (Ala. 1838) (“It is the first principle of the jurisprudence of a free people, having written constitutions, that legislation must be general in its action, and not individuated . . . [a] legislature would be the most dangerous of all despotisms, if it may single out one class of individuals, and deprive them of all the benefits of our system of laws, in exclusion to others, or make one class of citizens, the victims of its policy, when others, are untouched by its action.”); Ex parte Woods, 3 Ark. 532, 536 (1841) (stating that the state constitution’s law-of-the-land provision requires “general law[s]”); Frorer v. People, 141 Ill. 171, 180-81 (1892) (“If the general assembly may thus deprive some persons of substantial privileges allowed to other persons under precisely the same conditions, it is manifest that it may, upon like principle, deprive still other persons of other privileges in

is arguably the duty of the courts to invalidate them.<sup>137</sup> Lastly, because legislative acts that lack causes of forfeiture are not rules of conduct, it is arguably the duty of the courts to invalidate them.<sup>138</sup>

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contracting which, under precisely the same circumstances, are enjoyed by all but the prohibited class; and it can hardly be admissible that the legislative determination that the facts are such as to warrant this discrimination is conclusive, for that would make the general assembly omnipotent, since, if that were so, there could be nothing but its own discretion to control its action in regard to every liberty enjoyed by the citizen; and it might find that the public welfare required that society should be divided into an indefinite number of classes, each possessing or being denied privileges in contracting and acquiring property, as favoritism or caprice might dictate.”); *Anderson v. Bd. of Comm’rs of Cloud Cnty.*, 95 P. 583, 586 (Kan. 1908) (“When it acts upon a public bill, the legislature legislates; when it acts upon a private bill, it adjudicates. It passes from the function of a lawmaker to that of a judge.”).

137. See *Ogden v. Blackledge*, 6 U.S. (2 Cranch) 272, 277 (1804) (“To declare what the law is, or has been, is a judicial power; to declare what the law is to be, is legislative. One of the fundamental principles of all our government is that the legislative power shall be separated from the judicial.”); see also *Bloomer v. McQuewan*, 55 U.S. (14 How.) 539, 553-54 (1852) (“[A] special act of Congress, passed afterwards, depriving the appellees of the right to [construct and use planing machines that were purchased and paid for] certainly could not be regarded as due process of law.”); *Dash v. Van Kleeck*, 7 Johns. 477, 502 (N.Y. Sup. Ct. 1811) (Kent, J.) (“It is a principle in the *English* common law, as ancient as the law itself, that a statute, even of its omnipotent parliament, is not to have a retrospective effect”); *Price v. Hopkin*, 13 Mich. 318, 319 (1865) (“An act of the legislature is not to be construed to operate retrospectively, so as to take away a vested right.”); Wallace Mendelson, *A Missing Link in the Evolution of Due Process*, 10 VAND. L. REV. 125, 127 (1956) (“Such measures of special rather than general, and retrospective rather than prospective, application smack of the judicial decree.”).

138. See *Calder*, 3 U.S. at 388 (stating that legislatures must “establish rules of conduct”); see also LOCKE, *supra* note 136, at 9 (defining “law” as a “standing Rule to live by”); Alexander Hamilton, A Letter from Phocion to the Considerate Citizens of New York (Jan. 1-27, 1784), reprinted in *supra* 3 THE PAPERS OF ALEXANDER HAMILTON, *supra* note 108, at 483-97 (“No citizen can be deprived of any right which the citizens in general are intitled to, unless forfeited by some offence.”) (emphasis added); *Munn v. Illinois*, 94 U. S. 113, 134 (1875) (describing law, in the context of the due process clause, as a “rule of conduct”); *Trustees of the Univ. of North Carolina v. Foy and Bishop* 5 N.C. (1 Mur.) 57, 63 (1805) (“[I]ndividuals shall not be so deprived of their liberties or properties, unless by a trial by Jury in a Court of Justice, according to the known and establish rules of decision, derived from the common law . . . [and] [t]he property vested in the Trustees must remain for the uses intended for the University, until the Judiciary of the country in the usual and common form, pronounce them guilty of such acts, as will, in law, amount to a forfeiture of their rights or dissolution of their body.”). In other words, individuals only give up as much of their rights as necessary for the due maintenance and administration of government (i.e., taxes, militia service, catching fleeing felons, imminent domain, etc.); otherwise, individuals enjoy their life, liberty and property free from government interference until they “forfeit” those rights by the conviction of some public offense. See *Boyd v. United States*, 116 U.S. 616, 630 (1886) (stating that an individual’s “indefeasible right of personal security, personal liberty, and private property” can only be “forfeited

Indeed, without a cause of forfeiture, a legislative act is an adjudication, not a law. It does not, as law must, “declar[e] a penalty for a prohibited act.”<sup>139</sup> Instead, such legislative edicts merely render judgment—in direct violation of the Due Process Clause.<sup>140</sup> Nearly every court in the early republic voided legislative acts that lacked rules of conduct (such as those that confiscated property without a cause of forfeiture).<sup>141</sup> Following the

by her conviction of some public offense”).

139. *Norman v. Heist*, 5 Watts & Serg., 171, 173 (1843) (defining law as a “pre-existent rule of conduct, declarative of a penalty for a prohibited act . . . .”); *Ex parte Law*, 15 F. Cas. 3, 13 (S.D. Ga. 1866) (“The design and object of a law is to regulate conduct; to prescribe and fix a rule or guide for it.”). Government-granted monopolies, for example, deprive individuals of their right to sell a specific good or practice a specific trade without any cause of forfeiture, thereby violating the Due Process Clause. See Edward Coke, *supra* note 73, at 47 (including “monopolies” as an example of a violation of Magna Carta’s “Law of the Land” provision).

140. See *Chicago, B. & Q. R. Co. v. Chicago*, 166 U.S. 226, 235 (1897) (stating that a legislative act that takes private property without just compensation “would be treated not as an exertion of legislative power, but as a sentence -- an act of spoliation”); see also *Hepburn v. Griswold*, 75 U.S. (8 Wall.) 603, 624 (1869) (striking down legislation that compelled persons who held contracts for the payment of gold to accept paper currency of “inferior value” because such a legislative act took property without a cause of forfeiture in violation of the Due Process Clause); *In Re Sinking Fund Cases*, 99 U.S. 700, 738 (1878) (Strong, J. dissenting) (“A statute undertaking to take the property of A. and transfer it to B. is not legislation. It would not be a law. It would be a decree or sentence, the right to declare which, if it exists at all, is in the Judicial Department of the government.”); *Taylor v. Porter & Ford*, 4 Hill 140, 147 (N.Y. Sup. Ct. 1843) (“If the legislature can take the property of A. and transfer it to B., they can take A. himself, and either shut him up in prison, or put him to death. But none of these things can be done by mere legislation. There must be ‘due process of law.’”). Absent emergency circumstances, the Due Process Clause forbids direct punishment through any other means except for the fundamentally fair modes and forms of a judicial adjudication. This means that the legislature cannot directly punish (or deprive an individual of her life, liberty, or property); it may only prospectively prescribe a penalty for a prohibited act. As Hamilton put it: “No citizen can be deprived of any right which the citizens in general are intitled to, unless forfeited by some offense.” Alexander Hamilton, A Letter from Phocion to the Considerate Citizens of New York (Jan. 1-27, 1784), reprinted in *supra* 3 THE PAPERS OF ALEXANDER HAMILTON, *supra* note 108, at 483-97. This is what Justice Taney was arguing in the *Dred Scott* case. See *Scott v. Sanford*, 60 U.S. (19 How.) 393, 450 (1856) (“An act of Congress which deprives a citizen of the United States of his liberty or property, merely because he came himself or brought his property into a particular Territory of the United States, and who had committed *no offense* against the laws, can hardly be dignified with the name of due process of law”) (emphasis added). The problem with Taney’s argument, as pointed out by Abraham Lincoln, was that the Justice treated “negroes [as] property in the same sense that hogs and horses are”—even though this was “notoriously not so.” Abraham Lincoln, *Speech at Springfield, Illinois* (Oct. 4, 1854), reprinted in 2 THE COLLECTED WORKS OF ABRAHAM LINCOLN 245 (Roy P. Basler ed., 1953).

141. See *Wilkinson v. Leland*, 27 U.S. 627, 658 (1829) (Story, J.) (“We know of no case in which a legislative act to transfer the property of A. to B. without

logic of substantive due process to this point, the following question inevitably arises: What if the legislature creates a bogus or sham cause of forfeiture? If the Due Process Clause commands the judiciary to void all legislative judgments, and if legislative acts without causes of forfeiture constitute legislative judgments, then surely the judiciary must also have the authority to void legislative acts that employ bogus causes of forfeiture.<sup>142</sup> This must be so or the legislature could arguably circumvent the Due Process Clause's "cause of forfeiture" requirement by rationalizing all legislative judgments with bogus causes of forfeiture.<sup>143</sup> A legislature's cause of forfeiture, therefore, cannot be a mere pretext for a deprivation of rights. Such is the logical, albeit long-delayed, conclusion of the Due Process Clause's implied prohibition of legislative judgments.

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his consent has ever been held a constitutional exercise of legislative power in any state in the Union. On the contrary, it has been constantly resisted as inconsistent with just principles by every judicial tribunal in which it has been attempted to be enforced.”).

142. See *Jacobson v. Massachusetts*, 197 U.S. 11, 31 (1905) (“Upon what sound principles as to the relations existing between the different departments of government can the court review this action of the legislature? If there is any such power in the judiciary to review legislative action in respect of a matter affecting the general welfare, it can only be when that which the legislature has done comes within the rule that 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, beyond all question, a plain, 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.”) (citations omitted); see also *Lawton v. Steele*, 152 U.S. 133, 137 (1894) (“[The legislature’s] determination as to what is a proper exercise of its police powers is not final or conclusive, but is subject to the supervision of the courts”); *Allgeyer v. Louisiana*, 165 U.S. 578, 590 (1897) (“When and how far such power may be legitimately exercised with regard to these subjects must be left for determination to each case as it arises.”).

143. See *Mugler v. Kansas*, 123 U.S. 623, 669 (1887) (Harlan, J.) (explaining that the judiciary must strike down legislative acts if “it is apparent that its real object is not to protect the community, or to promote the general wellbeing, but, under the guise of police regulation, to deprive the owner of his liberty and property without due process of law”); see also *Bartemeyer v. Iowa*, 85 U.S. 129, 137 (1873) (Bradley, J. concurring) (stating that a state violates the Due Process Clause when “the police regulation [is] a mere pretext . . . [for] an invasion of the right of the citizen . . . .”); *id.* at 138 (Field, J. concurring) (“[U]nder the pretence of prescribing a police regulation, the state c[an] not be permitted to encroach upon any of the just rights of the citizen, which the Constitution intended to guard against abridgment . . . .”); *Lochner v. New York*, 198 U.S. 45, 56 (1905) (“[T]here is a limit to the valid exercise of the police power by the State. . . . Otherwise the Fourteenth Amendment would have no efficacy, and the legislatures of the States would have unbounded power, and it would be enough to say that any piece of legislation was enacted to conserve the morals, the health or the safety of the people; such legislation would be valid no matter how absolutely without foundation the claim might be. . . . The claim of the police power would be a mere pretext -- become another and delusive name for the supreme sovereignty of the State to be exercised free from constitutional restraint.”).

If the Due Process Clause necessarily precludes bogus causes of forfeiture, the question naturally follows: What constitutes a bogus cause of forfeiture? Modern substantive due process theory divides into two general schools of thought: (1) those who believe that substantive due process does not permit the judiciary to evaluate legislatures' causes of forfeiture and (2) those who believe that all arbitrary and irrational legislative acts constitute bogus cause of forfeiture.

1. *Substantive Due Process as a General and Prospective Rule of Conduct Only*

While exhortations that substantive due process is an “oxymoron”<sup>144</sup> or a “contradiction in terms”<sup>145</sup> do not square with the Clause’s historical roots, logical implication, and long-standing jurisprudential interpretation, the argument that substantive due process is (at a certain point) illegitimate is a serious and well-founded criticism. Specifically, so long as the legislature passes a general and prospective rule of conduct, the judiciary’s authority to assess the “reasonableness” of the legislature’s cause of forfeiture is constitutionally questionable.<sup>146</sup> While it is certainly the role and responsibility of the judiciary to void all laws that exceed Congress’s (or a state’s) legislative authority,<sup>147</sup> and while the Due Process Clause prohibits legislative judgments, determining what is and what is not a legitimate exercise of a state’s police power is

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144. *U.S. v. Carlton*, 512 U.S. 26, 39 (1994) (Scalia, J., concurring).

145. JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 18 (1980).

146. This authority is implied from an already-implied imperative (the Due Process’s Clause prohibition against legislative judgments), which is premised on the implied power of the judicial branch to hold laws that violate the Constitution void. *See Marbury v. Madison*, 5 U.S. 137, 138 (1803). Such an awesome power—one that fundamentally transforms the balance of government—should perhaps stand on a heavier foundation than an implication within an implication within an implication. *See Fletcher v. Peck*, 10 U.S. 87, 128 (1810) (“[I]t is not on slight implication and vague conjecture that the legislature is to be pronounced to have transcended its powers, and its acts to be considered as void. The opposition between the constitution and the law should be such that the judge feels a clear and strong conviction of their incompatibility with each other.”).

147. *Mugler v. Kansas*, 123 U.S. 623, 661 (1887) (“[T]he courts must obey the Constitution, rather than the lawmaking department of Government, and must, upon their own responsibility, determine whether, in any particular case, these limits have been passed.”).



a radical assumption<sup>148</sup> of judicial power—one that arguably pushes the judiciary into the legislative domain.<sup>149</sup>

At the same time, however, it can just as reasonably be argued that (1) the Due Process Clause has a history of such judicial assumptions of authority,<sup>150</sup> (2) this implication was well-established prior to the ratification of the Fourteenth Amendment,<sup>151</sup> and that (3) refusing to assume such a responsibility prioritizes form over substance and arguably

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148. See *Twining v. New Jersey*, 211 U. S. 78, 92 (1908) (“There is no doubt of the duty of this court to enforce the limitations and restraints whenever they exist, and there has been no hesitation in the performance of the duty. But whenever a new limitation or restriction is declared, it is a matter of grave import, since, to that extent, it diminishes the authority of the State, so necessary to the perpetuity of our dual form of government, and changes its relation to its people and to the Union.”).

149. See *Atkin v. Kansas*, 191 U.S. 207, 223 (1903) (“No evils arising from such legislation could be more far-reaching than those that might come to our system of government if the judiciary, abandoning the sphere assigned to it by the fundamental law, should enter the domain of legislation, and upon grounds merely of justice or reason or wisdom annul statutes that had received the sanction of the people’s representatives”); *Mugler*, 123 U.S. at 662 (maintaining that the Court “cannot, without usurping legislative functions, override the will of the people as thus expressed by their chosen representatives” because the Court has “nothing to do with the mere policy of legislation”). While the authority of the judiciary is to say what the law is (and via the Due Process Clause, what is “law”), it is the province of the legislature to decide the need for and nature of such laws. See Paul Horwitz, *Three Faces of Deference*, 83 NOTRE DAME L. REV. 1061, 1079 (2008) (noting that “the most prominent legal authority-based justification for [judicial] deference goes to the heart of our constitutional structure: the separation of powers”).

150. From Coke first assuming the judicial power to void Parliamentary acts that violate “common right and reason,” to pre-constitutional state judiciaries assuming the authority to void legislation, to the Supreme Court’s assumption of authority to invalidate laws that conflict with the Constitution, the Anglo-American judiciary enjoys a rich and regarded tradition of assuming awesome judicial authority by implication. See George P. Smith, *Marbury v. Madison, Lord Coke And Dr. Bonham: Relics Of The Past, Guidelines For The Present-Judicial Review In Transition?*, 2 U. PUGET SOUND L. REV. 255, 255 (1979); see also Gordon S. Wood, *The Origins of Judicial Review Revisited, or How the Marshall Court Made More out of Less*, 56 WASH. & LEE L. REV. 787, 801 (1999).

151. See, e.g., CONG. GLOBE, 34TH CONG., 1ST SESS. app. 124 (1856) (statement of Rep. Bingham) (emphasis added) (stating that a statute passed by the legislature of the Kansas territory punishing abolitionist speech “abridges the freedom of speech and of the press, and deprives persons of liberty without due process of law . . .”).

constitutes a dereliction of duty.<sup>152</sup> The second school of thought adopts this line of reasoning.

2. *Substantive Due Process Extends to All Arbitrary and Unreasonable Legislative Acts*

The second school of thought—the prevailing modern approach—interprets the Due Process Clause as precluding “all substantial arbitrary impositions and purposeless restraints.”<sup>153</sup> This approach recognizes that any government deprivation of an individual’s life, liberty, and property must have a rational, defensible justification—it cannot rely on a bogus or sham cause of forfeiture. This is the most expansive and least objective substantive due process interpretation; however, it also most fully reflects the logical conclusion of the Clause’s prohibition on legislative judgments. The theory holds as follows: Legislative acts that deprive individuals of their life, liberty, and property must include causes of forfeiture (lest they be mere legislative judgments); those causes of forfeiture cannot be bogus and so must rationally relate to a legitimate state police power; all activity that does not rationally relate to a legitimate state police power falls within “ordered liberty;” all causes of forfeiture based on “ordered liberty” are necessarily void; therefore, all legislative acts that do not rationally relate to a legitimate state police power are necessarily void and unconstitutional.

While this conclusion may seem straightforward, it in fact rests on three significant assumptions: (1) that state power is limited, (2) that such limits can be defined, and (3) that the judiciary has the authority to enforce those limits. Each of these assumptions, however, arguably has some constitutional and super-constitutional support. First, the Declaration of Independence and the Tenth Amendment make it clear that a state’s police power is not unlimited. As set forth in the Declaration of Independence, all political power in the United States necessarily springs from The People<sup>154</sup> and The People

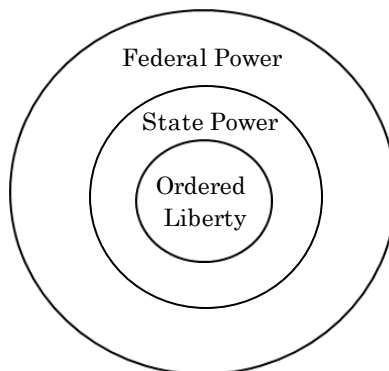
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152. See *Booth v. People of State of Illinois*, 184 U.S. 425, 429 (1902) (Harlan, J.) (stating that courts must look “through mere forms and at the substance of the matter . . .”); *Jones’ Heirs v. Perry*, 18 Tenn. 59, 70-71 (1836) (“If, by making an act of this kind purport to be a legislative resolve, it thereby becomes a legislative and not a judicial act, all judicial power might be usurped by the legislature and exercised constitutionally in the form of legislative resolves.”); Caitlin E. Borgmann, *Rethinking Judicial Deference to Legislative Fact-Finding*, 84 IND. L.J. 1, 3 (2009) (“Because the determination of social facts is nearly always decisive in constitutional decision making, blanket judicial deference would undermine the courts’ crucial responsibility for protecting basic individual rights.”).

153. *Poe v. Ullman*, 367 U.S. 497, 522 (1961) (Harlan, J., dissenting); see also *D.C. v. Heller*, 554 U.S. 570, 687-88 (2008).

154. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

consensually delegate only a portion of that political authority to establish a working government.<sup>155</sup> The Constitution explicitly recognizes this *limited* delegation, wherein all political power is partitioned into a three-tiered system of sovereignty: general but enumerated political power is entrusted to the federal government, wide-ranging but nonetheless limited power is entrusted to respective state governments,<sup>156</sup> and the remaining political power is reserved by and for The People.<sup>157</sup> It is this residual sovereignty that comprises the concept of “private rights”<sup>158</sup> and “ordered liberty.”<sup>159</sup>



Furthermore, the Court’s Commerce Clause jurisprudence throughout the first half of the nineteenth century defined and

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155. See U.S. ex rel. *Turner v. Williams*, 194 U.S. 279, 296 (1904) (Brewer, J. concurring) (“The powers the people have given to the general government are named in the Constitution, and all not there named, either expressly or by implication, are reserved to the people, and can be exercised only by them, or upon further grant from them.”).

156. U.S. CONST. amend. X (“The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, *or to the people*”) (emphasis added).

157. *Id.*

158. See *Munn v. Ill.*, 94 U.S. 113, 124 (1876) (“A body politic’ . . . is a social compact by which the whole people covenants with each citizen, and each citizen with the whole people, that all shall be governed by certain laws for the common good.’ . . . [t]his does not confer power upon the whole people to control *rights which are purely and exclusively private* . . . but it does authorize the establishment of laws requiring each citizen to so conduct himself, and so use his own property, as not unnecessarily to injure another.”) (quoting MASS. CONST. pmbl.) (emphasis added) .

159. See *Jacobson v. Massachusetts*, 197 U.S. 11, 29 (1905) (“There is, of course, a sphere within which the individual may assert the supremacy of his own will and rightfully dispute the authority of any human government, especially of any free government existing under a written constitution, to interfere with the exercise of that will.”); *Lawrence v. Texas*, 539 U.S. 558, 578 (2003) (“It is a promise of the Constitution that there is a realm of personal liberty which the government may not enter.”); JEFFERSON, *supra* note 117, at 292. (“The legitimate powers of government extend to such acts only as are injurious to others.”).

limited state police power;<sup>160</sup> the Court's Takings jurisprudence in the second half of the nineteenth century further identified the limits of that power in contradistinction to individual rights;<sup>161</sup> and, the Court's First Amendment jurisprudence since the

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160. See *Gibbons v. Ogden*, 22 U.S. 1, 19 (1824) ("It was generally qualified, by saying, that it was a power, by which the States could pass laws on the subjects of commercial regulation, which would be valid until Congress should pass other laws controlling them, or inconsistent with them, and that then the State laws must yield."); see also *Mayor, Aldermen & Commonalty of City of New York v. Miln*, 36 U.S. 102, 118 (1837) ("I admit, in the most unhesitating manner, that the states have a right to pass health laws and quarantine laws, and other police laws, not contravening the laws of congress rightfully passed under their constitutional authority."); *Thurlow v. Com. of Mass.*, 46 U.S. 504, 524 (1847); *License Tax Cases*, 72 U.S. 462, 474 (1866). Both the Court's limitation on state police power and its use of heightened judicial scrutiny most likely migrated from its Commerce Clause jurisprudence. See *Hannibal & St. J.R. Co. v. Husen*, 95 U.S. 465, 472-74 (1877) ("While we unhesitatingly admit that a State may pass sanitary laws, and laws for the protection of life, liberty, health, or property within its borders . . . it may not interfere with transportation into or through the State, beyond what is absolutely necessary for its self-protection. It may not, under the cover of exerting its police powers, substantially prohibit or burden either foreign or inter-state commerce. . . . Regarding the statutes as mere police regulations, intended to protect domestic cattle against infectious disease, those courts have refused to inquire whether the prohibition did not extend beyond the danger to be apprehended, and whether, therefore, the statutes were not something more than exertions of police power. That inquiry, they have said, was for the legislature and not for the courts. With this we cannot concur. The police power of a State cannot obstruct foreign commerce or inter-state commerce beyond the necessity for its exercise; and under color of it objects not within its scope cannot be secured at the expense of the protection afforded by the Federal Constitution. And as its range sometimes comes very near to the field committed by the Constitution to Congress, it is the duty of the courts to guard vigilantly against any needless intrusion."); accord *Chy Lung v. Freeman*, 92 U.S. 275, 280 (1875) Not surprisingly, the Commerce Clause, the Fourteenth Amendment, and state police powers all intersected in the Court's trailblazing substantive due process cases. See *Slaughter-House Cases*, 83 U.S. 36, 63 (1872); *Munn*, 94 U.S. at 123; *Allgeyer v. Louisiana*, 165 U.S. 578, 590-592 (1897).

161. See e.g., *Yates v. Milwaukee*, 77 U.S. 497, 504 (1870) ("This riparian right is property, and is valuable, and though it must be enjoyed in due subjection to the rights of the public, it cannot be arbitrarily or capriciously destroyed or impaired. It is a right of which, when once vested, the owner can only be deprived in accordance with established law, and if necessary that it be taken for the public good, upon due compensation."); see also *Wadleigh v. Gilman*, 12 Me. 403, 405 (1835) (maintaining that the "[p]olice regulations may [only] forbid such a use, and such modifications, of private property as would prove injurious to the citizens generally."). The move from arbitrary takings to arbitrary infringement of other rights was inescapable. See *Dent v. W. Va.*, 129 U.S. 114, 121-22 (1889) ("The interest, or, as it is sometimes termed, the estate acquired in [occupations], that is, the right to continue their prosecution, is often of great value to the possessors, and cannot be arbitrarily taken from them, any more than their real or personal property can be thus taken."); *Gilbert v. Minn.*, 254 U.S. 325, 343 (1920) (Brandeis, J. dissenting) ("I cannot believe that the liberty guaranteed by the Fourteenth Amendment includes only liberty to acquire and to enjoy property.").

twentieth century has demonstrated the Court's ability to navigate the line between individual rights-based limitations on state police power and the democratic will.<sup>162</sup> The arc of this jurisprudence reveals that the Court has long recognized that a state's police power is limited to the protection of persons and property, that government restrictions on individual rights must rationally relate to such protection, and that the Court must evaluate that rational relation. A persuasive case can be made, therefore, that state power is limited, that those limits can be defined, and that courts have the ability, duty, and well-established jurisprudential authority to enforce those limits.

This interpretation of the Due Process Clause has dominated the Court's jurisprudence for the last one-hundred and fifty years. However, the dangerously broad scope of discretion inherent in this form of judicial review, as well as the perceived historic abuses arising from that discretion,<sup>163</sup> has over time led the Court to construct self-imposed tiers of scrutiny to confine its discretion in the substantive due process context.<sup>164</sup> The reason behind these self-imposed tiers is simple: Because most legislative acts deprive individuals of life, liberty or property, most legislative acts can be challenged under the Due Process Clause. How closely judges scrutinize those legislative acts and how meticulously they evaluate the factual record thereof often determines the outcome of the legal challenge.<sup>165</sup> While judicial scrutiny should be

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162. See e.g., Herbert W. Titus, *The Free Exercise Clause: Past, Present and Future*, 6 REGENT U. L. REV. 7, 10-11 (1995).

163. See BENJAMIN F. WRIGHT, THE GROWTH OF AMERICAN CONSTITUTIONAL LAW 154 (1967); BERNARD SCHWARTZ, A HISTORY OF THE SUPREME COURT 198 (1993); but see MICHAEL J. PHILLIPS, THE LOCHNER COURT, MYTH AND REALITY: SUBSTANTIVE DUE PROCESS FROM THE 1890S TO THE 1930S 115 (2001); see also David E. Bernstein, *The Story of Lochner v. New York: Impediment of the Growth of the Regulatory State*, in CONSTITUTIONAL LAW STORIES 299, 299 (Michael C. Dorf ed., 2004).

164. See *Obergefell v. Hodges*, 135 S. Ct. 2584, 2616 (2015) (Roberts, J., dissenting) (quoting *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997) ("Our precedents have . . . insisted that judges "exercise the utmost care" in identifying implied fundamental rights, "lest the liberty protected by the Due Process Clause be subtly transformed into the policy preferences of the Members of this Court."); see also *id.* ("The need for restraint in administering the strong medicine of substantive due process is a lesson this Court has learned the hard way.").

165. For example, even though the *Lochner* majority acknowledged that the "liberty to contract" is subject to regulation pursuant to the state's police power (i.e., to the extent that the regulation relates "to the safety, health, morals and general welfare of the public"), *Lochner v. N.Y.* 198 U.S. 45, 53 (1905), and that the state "has the power to prevent the individual from making certain kinds of contracts," it nevertheless struck down the 60 hour work week law after closely scrutinizing it and determining that there was "no reasonable ground for interfering with the liberty of person or the right of free contract by determining the hours of labor, in the occupation of a baker." *Id.* at 57. The four dissenting Justices, hearing the same arguments and reviewing the same factual record, came to the opposite conclusion. See *id.* at 65-74

consistent regardless of the wisdom or politics of the law being challenged, history and human nature dictate otherwise. Often times judges' ideological predispositions and political allegiances trigger extremely inconsistent applications of judicial scrutiny.<sup>166</sup> Such conscious or unconscious ideologically-motivated, politically-charged swings of scrutiny erode judicial objectivity and undermine public confidence in the judiciary. It also significantly increases the risk that legitimate and sometime desperately-needed legislative measures will be nullified by illegitimate judicial decisions.

Ultimately, the deep-seated fear of open-ended and unrestrained judicial discretion in substantive due process jurisprudence led the Court to mandate the use of a highly deferential level of scrutiny<sup>167</sup> in all but only handful of special cases.<sup>168</sup> Only when legislative acts involve "fundamental rights" do courts apply heightened scrutiny, wherein judges may closely examine the legal and evidentiary justifications put forth in support of the act.<sup>169</sup>

This tiered scrutiny approach is designedly predictable: legislative acts reviewed under strict scrutiny are almost always struck down<sup>170</sup> while legislative acts reviewed under rational-basis

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(Harlan, J., dissenting); *see also id.* at 74-76 (Holmes, J., dissenting).

166. *Compare* *Lawrence v. Texas*, 539 U.S. 558 (2003) *with* *McDonald v. Chicago*, 561 U.S. 742 (2010).

167. This level of scrutiny is known as rational basis review, wherein the Court determines whether the act at issue bears a "rational relationship" to a "legitimate governmental purpose," *Heller v. Doe*, 509 U.S. 312, 320 (1993), and where "the burden is on one complaining of a due process violation to establish that the legislature has acted in an arbitrary and irrational way." *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 15 (1976); *see also* *FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 313 (1993) ("In areas of social and economic policy, a statutory classification that neither proceeds along suspect lines nor infringes fundamental constitutional rights must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification."). Such judicial deference is arguably necessary to prevent courts from using substantive due process as a pretext for striking down ideologically repugnant legislative acts.

168. *See* *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938) (enumerating the special circumstances that where the legislative acts should be "subjected to more exacting judicial scrutiny" or "call for a correspondingly more searching judicial inquiry"); *Poe v. Ullman*, 367 U.S. 497, 543 (1961) (Harlan, J., dissenting) (stressing that "certain interests require particularly careful scrutiny of the state needs asserted to justify their abridgment").

169. *See* *McCullen v. Coakley*, 134 S. Ct. 2518, 2530 (2014) (stating that a legislative act that regulates a fundamental right "must be the least restrictive means of achieving a compelling state interest"); *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997) (stating that "the Fourteenth Amendment forbids the government to infringe . . . 'fundamental' liberty interests *at all*, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest") (internal quotations omitted).

170. *See* Gerald Gunther, *Foreword: In Search of Evolving Doctrine on a*

review are nearly always upheld.<sup>171</sup> As a result of this determinative analytical framework, the most critical question in the substantive due process analysis today is whether the challenged act involves a “fundamental right.”<sup>172</sup> Naturally, how courts determine what is and what is not a “fundamental right” has become the crux of the modern substantive due process debate.<sup>173</sup> Some jurists argue that “fundamental rights” should be confined only to those rights explicitly recognized in the Constitution or deeply rooted in this Nation’s history and traditions.<sup>174</sup> Other jurists argue that “fundamental rights” should extend also to conduct essential to one’s self-determination and “implicit in the concept of ordered liberty.” Each approach has its force and its flaws.<sup>175</sup>

a. Substantive Due Process as Limited to Constitutional Rights

The first approach limits the judiciary’s application of strict scrutiny in substantive due process cases to explicitly recognized constitutional rights. The reason behind such a limitation is simple: If the judiciary is going to closely question the legitimacy of legislative causes of forfeiture, then that authority ought to be confined to only those causes that implicate rights explicitly written into the Constitution.<sup>176</sup> Only under such circumstances

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*Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972) (describing strict scrutiny as “strict’ in theory and fatal in fact.”). *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, 796 (2006) (“Overall, 30 percent of all applications of strict scrutiny--nearly one in three--result in the challenged law being upheld.”).

171. *See* Gayle Lynn Pettinga, Note, *Rational Basis with Bite: Intermediate Scrutiny by Any Other Name*, 62 IND. L.J. 779, 798 (1987) (Under traditional application of rational basis review, “legislation is presumptively constitutional.”).

172. *See* Laurence H. Tribe & Michael C. Dorf, *Levels of Generality in the Definition of Rights*, 57 U. CHI. L. REV. 1057, 1058 (1990).

173. *See* *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3059 (2010) (Thomas, J. concurring) (“The one theme that links the Court’s substantive due process precedents together is their lack of a guiding principle to distinguish ‘fundamental’ rights that warrant protection from nonfundamental rights that do not.”).

174. *See* *Obergefell v. Hodges*, 135 S. Ct. 2584, 2618-23 (2015) (Roberts, J., dissenting) (“Our precedents have required that implied fundamental rights be ‘objectively, deeply rooted in this Nation’s history and tradition’ . . . to ensure that when unelected judges strike down democratically enacted laws, they do so based on something more than their own beliefs.”).

175. *See* *Lawrence v. Texas*, 539 U.S. 558, 574 (2003) (quoting *Planned Parenthood of Se. Pennsylvania v. Casey*, 505 U.S. 833, 851 (1992) (“[C]hoices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment.”)).

176. To be sure, the Courts’ invocation of rights recognized elsewhere in

can courts regularly strike down democratically-passed legislation with the objectivity and conviction necessary to nullify democratic majorities. Under no circumstance should courts unearth old rights in the dust of history or forge new rights in the caldron of enlightenment: they should confine themselves—as courts ought—to the explicit dictates of the Constitution.<sup>177</sup> Otherwise, judges heedlessly assume the role of historian or philosopher.<sup>178</sup>

b. Substantive Due Process as Limited to Rights Deeply Rooted in our Nation’s History and Traditions

Squaring the circle of the Supreme Court’s substantive due process precedent, the second approach extends the application of heightened judicial scrutiny to rights “deeply rooted in this Nation’s history and tradition.”<sup>179</sup> This approach recognizes that judicial nullification of democratically-passed laws must not turn on the political preferences or policy judgments of nine (and possibly five) unelected and unaccountable Justices.<sup>180</sup> Therefore,

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the Constitution (such as the First Amendment) does not magically give the Court the jurisdiction to enforce those rights. *Barron v. Baltimore*, 32 U.S. 243, 250 (1833) (holding that the Bill of Rights “contain no expression indicating an intention to apply them to the State governments. This court cannot so apply them”). Unless courts invoke actual jurisdiction-bestowing constitutional provisions (such as the Ninth Amendment for the Fifth Amendment’s Due Process Clause or the Privileges or Immunities Clause for the Fourteenth Amendment’s Due Process Clause), judges undeniably must assume the authority to declare legislative acts illegitimate via the Due Process Clause’s implied prohibition against legislative judgments. Indeed, when courts enforce First Amendment rights against the states through the Fourteenth Amendment’s Due Process Clause, they are relying upon the Due Process Clause’s implied prohibition on bogus causes of forfeiture. Such an implication is by no means limited to Constitutional rights.

177. *See* *Ferguson v. Skrupa*, 372 U.S. 726, 730-31 (1963) (“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.”) (quotations omitted).

178. *See* *Wynehamer v. People*, 13 N.Y. 378, 391-92 (1856) (“[A]side from the special limitations of the constitution, the legislature cannot exercise powers which are in their nature essentially judicial or executive. . . . It is only the ‘legislative power’ which is vested in the senate and assembly. But where the constitution is silent, and there is no clear usurpation of the powers distributed to other departments, I think there would be great difficulty in attempting to define the limits of this power. . . . I am reluctant to enter upon this field of inquiry, satisfied as I am that no rule can be laid down in terms which will not contain the germs of great mischief to society, by giving to private opinion and speculation a license to oppose themselves to the legitimate powers of government.”).

179. *Washington v. Glucksberg*, 521 U.S. 702, 720–21 (1997) (quoting *Moore v. East Cleveland*, 431 U.S. 494, 503 (1977)).

180. It should be noted that the academic exercise of locating rights “deeply rooted in this Nation’s history and tradition” is not always objective. Indeed, the inquiry often times entails ideological-driven bias in both the



it confines the Court's application of heightened (and often times fatal) judicial scrutiny to historically linked, objectively ascertained, and inherently limited circumstances.<sup>181</sup>

c. Substantive Due Process as Extended to Important Conduct Implicit in the Concept of Ordered Liberty

The third approach extends the Court's application of heightened judicial scrutiny to especially important and personal decisions.<sup>182</sup> This approach recognizes that fundamental rights should not be frozen in time or defined by generations prior.<sup>183</sup> Such "privacy rights"<sup>184</sup> and "liberty interests"<sup>185</sup> embrace all

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search for and interpretation of relevant and available historical evidence. See Eric Berger, *Originalism's Pretenses*, 16 U. PA. J. CONST. L. 329, 332 (2013) ("[O]riginalist judges approach the theory eclectically, drawing on useful historical or textual evidence to support a desired conclusion."); see also *id.* at 331 ("[O]riginalism creates an especially misleading illusion of certainty.").

181. See Daniel O. Conkle, *Three Theories of Substantive Due Process*, 85 N.C. L. REV. 63, 93 (2006).

182. See *Obergefell v. Hodges*, 135 S. Ct. 2584, 2597 (2015) (stating that the Due Process Clause's guarantee of liberty "extend[s] to certain personal choices central to individual dignity and autonomy, including intimate choices that define personal identity and beliefs"); see also *Planned Parenthood v. Se. Pennsylvania v. Casey*, 505 U.S. 833, 859 (1992) (quoting *Carey v. Population Servs., Int'l*, 431 U.S. 678, 684-85 (1977) (stating that the Due Process Clause protects an individual's "independence in making certain kinds of important decisions")); *Loving v. Virginia*, 388 U.S. 1, 12 (1967) (stating that the Due Process Clause protects "vital personal rights essential to the orderly pursuit of happiness by free men"). There are other well-merited approaches; however, they have yet to receive any jurisprudential support. See e.g., RANDY E. BARNETT, *RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY* 4-5 (2004).

183. *Obergefell*, 135 S. Ct. at 2598 (stating that this approach to substantive due process "respects our history and learns from it without allowing the past alone to rule the present"); *Rochin v. California*, 342 U.S. 165, 172 (1952) ("[D]ue process of law' requires . . . a judgment not ad hoc and episodic but duly mindful of reconciling the needs both of continuity and of change in a progressive society.").

184. See e.g., *Griswold v. Connecticut*, 381 U.S. 479, 484 (1965) (recognizing an individual's "zone of privacy which government may not force him to surrender to his detriment"); *Roe v. Wade*, 410 U.S. 113 (1973) ("[T]he Court has recognized that a right of personal privacy, or a guarantee of certain areas or zones of privacy, does exist under the Constitution.").

185. See e.g., *Griswold*, 381 U.S. 486 (Goldberg, J. concurring) (concluding that the "liberty" in the Due Process Clause of the Fourteenth Amendment "embraces the right of marital privacy"); *Harris v. McRae*, 448 U.S. 297, 312 (1980) (recognizing that the liberty protected by the Due Process includes "includes the freedom of a woman to decide whether to terminate a pregnancy"); *Lawrence v. Texas*, 539 U.S. 558, 567 (2003) (recognizing that "[t]he liberty protected by the Constitution" includes the right of adult individuals to choose to engage in private and consensual sexual conduct within the privacy of the home).

conduct essential to an individual's self-determination<sup>186</sup> as contained within deeply rooted and traditionally recognized categories of fundamental rights.<sup>187</sup> This approach is far narrower than its opponents represent: It does not permit the Court to attach "fundamental status" and heightened scrutiny to just any conduct the Court—in its "reasoned judgment"—deems deserving. Instead, this approach confines the Court's application of heightened scrutiny to those rights enclosed within deeply rooted and historically recognized categories of fundamental rights.<sup>188</sup> The content of those categories, however, is informed by an ever-developing understanding of liberty, as it is slowly stripped of the prejudice and presumptions of generations past.<sup>189</sup> These rights,

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186. *Casey*, 505 U.S. at 851 ("[C]hoices central to personal dignity and autonomy . . . are central to the liberty protected by the Fourteenth Amendment.").

187. *See Lawrence*, 539 U.S. at 574 ("[O]ur laws and tradition afford constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education."). Such categories also include private and consensual intimate conduct, *see id.* at 562 ("Liberty presumes an autonomy of self that includes freedom of . . . certain intimate conduct."), and bodily integrity. *See Cruzan v. Director of Health*, 497 U.S. 261, 278 (1990) (recognizing that "a competent person has a constitutionally protected liberty interest [implicit in the Due Process Clause] in refusing unwanted medical treatment").

188. *See Lawrence*, 539 U.S. at 572 ("[H]istory and tradition are the starting point but not in all cases the ending point of the substantive due process inquiry.") (quotations omitted); *see also Morris v. Brandenburg*, 2015 WL 4757633, \*14 (N.M. Ct. App. 2015) ("Irrespective of the new interpretive dimensions applied by the United States Supreme Court to address differing applications of due process, the substantive fundamental rights that are recognized to exist under the Due Process Clause of the Fourteenth Amendment have always originated from classic personal interactions or embedded principles in our democratic society.").

189. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2602 (2015) (stating that fundamental rights "rise, too, from a better informed understanding of how constitutional imperatives define a liberty that remains urgent in our own era"); *see also id.* at 2596 (recognizing that "new dimensions of freedom become apparent to new generations"); *id.* at 2598 (stating that "new insight reveals discord between the Constitution's central protections and a received legal stricture"); *Casey*, 505 U.S. at 848 ("Neither the Bill of Rights nor the specific practices of States at the time of the adoption of the Fourteenth Amendment marks the outer limits of the substantive sphere of liberty which the Fourteenth Amendment protects."); *Lawrence*, 539 U.S. at 579 ("[T]imes can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress."); *Harper v. Virginia State Bd. of Elections*, 383 U.S. 663, 669 (1966) ("[W]e have never been confined to historic notions of equality, any more than we have restricted due process to a fixed catalogue of what was at a given time deemed to be the limits of fundamental rights."). This approach is similar to the Court's approach to the application of heightened scrutiny in Equal Protection Clause cases. *See e.g.*, *Lewis v. Harris*, 188 N.J. 415, 471 (2006):

We are told that when the Justices who decided *Brown v. Board of Education*, 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873 (1954), finally

which include the right to use contraceptives,<sup>190</sup> the right of a woman to terminate her own pregnancy,<sup>191</sup> the right to refuse unwanted medical treatment,<sup>192</sup> the right to engage in consensual sodomy,<sup>193</sup> and the right to marry a person of a different race are certainly not “deeply rooted in this Nation’s history or traditions;”<sup>194</sup> nonetheless, they are “implicit in the concept of ordered liberty.”<sup>195</sup>

#### IV. THE *OBERGEFELL* COURT’S APPLICATION OF THE DUE PROCESS CLAUSE

Although the *Obergefell* majority could have decided the case exclusively on Equal Protection grounds,<sup>196</sup> it chose rather to

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rejected legal segregation in public schools, they were deeply conflicted over the issue. Michael J. Klarman, *Brown and Lawrence (and Goodridge)*, 104 *Mich. L.Rev.* 431, 433 (2005). “The sources of constitutional interpretation to which they ordinarily looked for guidance—text, original understanding, precedent, and custom—indicated that school segregation was permissible. By contrast, most of the Justices privately condemned segregation, which Justice Hugo Black called ‘Hitler’s creed.’ Their quandary was how to reconcile their legal and moral views.”

*Id.* (footnote omitted).

190. See *Planned Parenthood of Se. Pennsylvania v. Casey*, 505 U.S. 833, 851 (1992) (quoting *Carey*, 431 U.S. at 678, 685 (1977) (recognizing that the “liberty” protected by the Due Process Clause includes “personal decisions relating to . . . contraception”).

191. See *Lawrence*, 539 U.S. at 565 (“*Roe* recognized the right of a woman to make certain fundamental decisions affecting her destiny . . .”). This right is premised on the fiercely debated proposition that an unborn human life is not a “person” (with full rights and protections) within the meaning of the Constitution. *Roe v. Wade*, 410 U.S. 113, 158 (1973) (“[T]he word ‘person,’ as used in the Fourteenth Amendment, does not include the unborn.”).

192. See *Cruzan v. Director of Health*, 497 U.S. 261, 278 (1990) (recognizing that “a competent person has a constitutionally protected liberty interest [implicit in the Fourteenth Amendment’s Due Process Clause] in refusing unwanted medical treatment”).

193. *Lawrence*, 539 U.S. at 567 (“The liberty protected by the Constitution allows homosexual persons the right to make th[e] choice [to enter into consensual sexual relationships]”).

194. *Loving v. Virginia*, 388 U.S. 1, 12 (1967).

195. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2618 (2015) (Robert, J., dissenting) (citation omitted); *Lawrence*, 539 U.S. at 567 (stating that, “as a general rule,” the Due Process Clause “counsel[s] against attempts by the State, or a court, to define the meaning of the relationship or to set its boundaries absent injury to a person or abuse of an institution the law protects”). As such, States cannot use this conduct as a basis for a legitimate cause of forfeiture. See *supra* notes 154-59.

196. See *SmithKline Beecham Corp. v. Abbott Labs.*, 740 F.3d 471, 484 (9th Cir. 2014) (stating that “heightened scrutiny applies to classifications based on sexual orientation . . .”); *Lawson v. Kelly*, 58 F. Supp. 3d 923, 934 (W.D. Mo. 2014) (finding that “[t]he State’s permission to marry depends on

invoke substantive due process, relying on the interplay between the Due Process and Equal Protection Clauses to strike down the respective state bans on same-sex marriage. Upon a close reading, the majority's analysis—distilled through the objections set forth in the dissenting opinions—provides a reasonable and workable foundation not only for “definitional” substantive due process claims, but also for non-tradition-based substantive due process claims in general.

### A. *The Majority Opinion*

As explained above, the majority in *Obergefell* struck down the respective state bans on same-sex marriage because in its opinion those prohibitions violated the Due Process and Equal Protection Clauses of the Fourteenth Amendment.<sup>197</sup> Since the case did not involve universal denials of or restrictions on a fundamental right, but rather prohibitions on a certain class of persons from exercising what is a well-established fundamental right for others, the majority's substantive due process analysis was far narrower than the dissent represents.<sup>198</sup> Specifically, the majority analysis focused not on inventing a new right, but on whether the exclusion of a certain class of individuals from the definition of a fundamental right was constitutionally permissible. This involved determining whether the states provided “a sufficient justification for excluding the relevant class from the right.”<sup>199</sup> Applying the “converging Clause” approach, the majority concluded that denying individuals the right to marry based on their sexual orientation both irrationally prohibits their exercise of

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the genders of the participants, so the restriction is a gender-based classification” and ultimately concluding that the state statute and constitutional amendment at issue did not survive “intermediate scrutiny”); *see also Lawrence*, 539 U.S. at 584 (O'Connor, J. concurring) (stating that a law criminalizing homosexual sodomy but not heterosexual sodomy does not survive rational review under the Equal protection Clause).

197. *See supra* note 13.

198. The dissent represents the majority's substantive due process analysis as entirely unrestrained and subjective. *See Obergefell*, 135 S. Ct. at 2630 (stating that the Court's substantive due process analysis “stands for nothing whatever, except those freedoms and entitlements that this Court *really* likes”).

199. *Id.* at 2602 (internal citations omitted); *see also id.* at 2618 (Robert, J., dissenting) (characterizing the majority's holding as simply “[e]xpanding a right”). The exclusion question necessarily resolves the case because if the class of persons at issue cannot be excluded from the fundamental right, it would be inherently irrational and arbitrary for states to thereafter *categorically* deny that class of persons the right.

an important liberty interest<sup>200</sup> and irrationally discriminates against that class of persons.<sup>201</sup>

In arriving at this conclusion, the majority implicitly applied a form of heightened judicial scrutiny to address and reject the States' arguments offered in support of their exclusion.<sup>202</sup> The majority relied on the "converging Clause" approach to justify this application of heightened scrutiny.<sup>203</sup> This approach certainly has jurisprudential support: Past case law demonstrates that the Due Process Clause requires heightened scrutiny when the legislative measure at issue denies individuals a fundamental right<sup>204</sup> and the Equal Protection Clause requires heightened scrutiny when the legislative classification at issue involves a fundamental right.<sup>205</sup> However, in each of these cases the Court operated under the assumption that the individuals involved originally could exercise but were thereafter denied the fundamental right due to particular circumstances.<sup>206</sup> *Obergefell* is unique because the case does not involve individuals that by definition could originally exercise but where thereafter denied a fundamental right. Instead, the case

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200. *Id.* at 2604 ("[T]he right to marry is a fundamental right inherent in the liberty of the person, and under the Due Process and Equal Protection Clauses of the Fourteenth Amendment couples of the same-sex may not be deprived of that right and that liberty.").

201. *See id.* at 2607 ("The Constitution . . . does not permit the State to bar same-sex couples from marriage on the same terms as accorded to couples of the opposite sex.").

202. The majority not only closely scrutinized the reasons on record for preserving traditional marriage; it also did not attempt to consider any other possible justifications. *See id.* at 2599-2605; accord *SmithKline*, 740 F.3d at 482 (finding that the Supreme Court did not apply rational review in *U.S. v. Windsor*, 133 S. Ct. 2675 (2013) due to its "failure to consider other unsupported bases" which the court found "antithetical to the very concept of rational basis review."); *contra DeBoer v. Snyder*, 772 F.3d 388, 404 (6th Cir. 2014) *rev'd sub nom. Obergefell*, 135 S. Ct. 2584 ("So long as judges can conceive of some 'plausible' reason for the law—any plausible reason, even one that did not motivate the legislators who enacted it—the law must stand, no matter how unfair, unjust, or unwise the judges may consider it as citizens.").

203. *Obergefell*, 135 S. Ct. at 2603-04.

204. *See M.L.B. v. S.L.J.*, 519 U.S. 102, 116-17 (1996) (stating that "[c]hoices about marriage, family life, and the upbringing of children are among associational rights this Court has ranked as 'of basic importance in our society'" and "demand[] the close consideration [of] the Court") (citations omitted).

205. *See Skinner v. Oklahmoa*, 316 U.S. 535, 541 (1942) (stating that "strict scrutiny of the classification which a State makes in a sterilization law is essential" because such classifications involve the fundamental right to procreate).

206. *See Zablocki v. Redhail*, 434 U.S. 374, 384 (1978) (invalidating a law that prohibited fathers who were behind on child support from marrying); *see also Turner v. Safley*, 482 U.S. 78, 95 (1987) (invalidating burdensome restrictions on marriage based on an individuals' status as a prisoner); *see also M.L.B.*, 519 U.S. at 116 (invalidating a statute requiring indigent mothers to pay a fee in order to appeal the termination of their parental rights).

involves individuals who arguably by definition cannot exercise the fundamental right at issue.<sup>207</sup>

Indeed, as the dissent puts it, the crucial question in the case is not whether “the Constitution protects a right to marry and requires States to apply their marriage laws equally” (which it indisputably does); rather, the primary question is “what constitutes ‘marriage?’”<sup>208</sup> If “marriage” by *definition* does not include same-sex couples, then their exclusion is arguably constitutionally permissible. This kind of definitional exclusion is analogous to the Boy Scouts of America excluding girls or Veterans of Foreign Wars excluding persons who did not serve in the armed forces. Just as “girls” inherently cannot be “Boy Scouts” and non-serving persons cannot by definition be “veterans,” the argument goes that same-sex couples inherently cannot enter into a “marriage” because the very definition of marriage requires a union between *one man and one woman*.

The problem with the dissent’s approach is that every traditional element of marriage is part of its “definition” until it is not. Indeed, the deeply-rooted, traditional definition of marriage can be defined as a “prearranged, long-term union of two individuals of the same race and opposite sex where the woman has no legal status independent of her husband.” This definition, needless to say, inherently excludes interracial marriage (among other types of marriages). While the dissent characterizes *Loving* as a case that did not redefine marriage but instead simply struck down “racial restrictions” on marriage,<sup>209</sup> such a characterization essentially assumes what it sets out to prove—that the same-race requirement was not a fundamental element of marriage. But that is historically inaccurate. Until *Loving*, in many states the same-race requirement was just as deeply rooted of a tradition as the opposite-sex requirement.<sup>210</sup> Just as the dissent in *Obergefell* frames the plaintiffs as arguing for a right to “same-sex marriage,” the individuals in *Loving* argued for a right to “mixed-race marriage”<sup>211</sup>—a right with no history or tradition in the United

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207. The majority’s opinion arguably assumes what it set out to prove: that same-sex marriage is a fundamental right. If marriage by definition does and cannot include same-sex couples, then same-sex marriage does not actually involve a fundamental right.

208. *Obergefell*, 135 S. Ct. at 2612 (Roberts, J. dissenting).

209. *Id.* at 2614.

210. See Cyrus E. Phillips IV, *Miscegenation: The Courts and the Constitution*, 8 WM. & MARY L. REV. 133, 133 (1966) (stating that “[p]rohibitions against miscegenation date back to the earliest colonial times” and “have appeared in the statutes of some forty states”); see also Brief for Respondents at 52, *Loving v. Virginia*, 388 U.S. 1 (1967) (No. 395) (“The Virginia statutes here under attack reflects [sic] a policy which has obtained in this Commonwealth for over two centuries . . .”).

211. See *Kitchen v. Herbert*, 961 F. Supp. 2d 1181, 1202 (D. Utah 2013) *aff’d*, 755 F.3d 1193 (10th Cir. 2014) (“Instead of declaring a new right to interracial marriage, the [*Loving*] Court held that individuals could not be

States.<sup>212</sup> Simply put, the same-race requirement was part of the core definition of marriage until it was not.

Perhaps the “opposite sex” requirement is *more* fundamental to the deeply-rooted, traditional definition of marriage than the same-race requirement,<sup>213</sup> but that is largely immaterial. Just as the “same race” requirement was arguably more fundamental than the “pre-arranged” requirement (yet both are no longer definitional requirements of the fundamental right), the “opposite sex” requirement may very well be more fundamental to the deeply-rooted, traditional definition of marriage than the “same race” requirement (yet both are no longer definitional requirements of the fundamental right). Certainly, some immutable core definition of marriage must exist or marriage would be malleable to the point of meaninglessness.<sup>214</sup> However, because “the right to personal choice regarding marriage is inherent in the concept of individual autonomy,”<sup>215</sup> the Court *must* closely scrutinize any definitional exclusion from the enjoyment of this uniquely important and fundamental right.<sup>216</sup>

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restricted from exercising their existing right to marry on account of the race of their chosen partner. Similarly, the Plaintiffs here do not seek a new right to same-sex marriage, but instead ask the court to hold that the State cannot prohibit them from exercising their existing right to marry on account of the sex of their chosen partner.”) (citations omitted).

212. See *State v. Gibson*, 36 Ind. 389, 405 (1871) (upholding interracial marriage ban based on “the law of races established by the Creator himself”); see Ronald Turner, *Same-Sex Marriage and Loving v. Virginia: Analogy or Disanalogy?*, 71 WASH. & LEE L. REV. ONLINE 264, 279 (2014) (stating that, as a result of *Loving*, “[t]he traditional definition of marriage as the union of persons of the same race was no longer valid”).

213. *Obergefell*, 135 S. Ct. at 2614 (Roberts, J., dissenting) (stating the “core structure of marriage” as the union between a man and a woman”).

214. Without some core definition of marriage, the right would be illusory. That core definition is best expressed as “a special and solemn bond between two individuals entailing certain legal privileges and immunities.” Perhaps the “two individuals” requirement could eventually give way to “a limited number of individuals” requirement. Or perhaps such a requirement constitutes the immutable core of the definition of marriage. The answer to that question is beyond the scope of this Article as it was beyond the scope of the Court’s inquiry in *Obergefell*. See *generally Casey*, 505 U.S. at 869 (“Liberty must not be extinguished for want of a line that is clear.”).

215. *Obergefell*, 135 S. Ct. at 2599.

216. See *Zablocki v. Redhail*, 434 U.S. 374, 384 (1978) (“Although *Loving* arose in the context of racial discrimination, prior and subsequent decisions of this Court confirm that the right to marry is of fundamental importance for *all individuals*.”) (emphasis added). The special legal privileges and protections accompanying marriage are legion. See *Obergefell*, 135 S. Ct. at 2601 (recognizing that “marriage [provides] the basis for an expanding list of governmental rights, benefits, and responsibilities” including “taxation; inheritance and property rights; rules of intestate succession; spousal privilege in the law of evidence; hospital access; medical decisionmaking authority; adoption rights; the rights and benefits of survivors; birth and death certificates; professional ethics rules; campaign finance restrictions; workers’ compensation benefits; health insurance; and child custody, support, and

Accordingly, the *Obergefell* Court closely scrutinized<sup>217</sup> and ultimately rejected the states' arguments tendered in support of their exclusion of same-sex couples from the definition of marriage. Specifically, the majority found that same-sex marriage, with the equal force of opposite marriage, "is inherent in the concept of individual autonomy,"<sup>218</sup> "supports a two-person union unlike any other in its importance to the committed individuals,"<sup>219</sup> "safeguards children and families,"<sup>220</sup> and is the "keystone of the Nation's social order."<sup>221</sup> The majority, therefore, ultimately concluded that the states' reasons for the exclusion were either demonstrably invalid<sup>222</sup> or equally applied to those individuals granted the privilege.<sup>223</sup>

Although the Court's analysis is arguably limited to the context of "definitional" substantive due process claims, it nevertheless provides useful guidance to lower courts for addressing non-tradition-based substantive due process

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visitation rules").

217. By following the framework set forth in *Loving*, *Romer*, and *Windsor*, the majority essentially applied a form of heightened scrutiny to determine whether or not effectively shutting out certain classes of persons from the very definition of a fundamental right is constitutionally permissible. *See id.* at 2602 ("Many who deem same-sex marriage to be wrong reach that conclusion based on decent and honorable religious or philosophical premises, and neither they nor their beliefs are disparaged here. But when that sincere, personal opposition becomes enacted law and public policy, the necessary consequence is to put the imprimatur of the State itself on an exclusion that soon demeans or stigmatizes those whose own liberty is then denied. Under the Constitution, same-sex couples seek in marriage the same legal treatment as opposite-sex couples, and it would disparage their choices and diminish their personhood to deny them this right."); *see also id.* at 2604 ("[T]he right to marry is a fundamental right inherent in the liberty of the person, and under the Due Process and Equal Protection Clauses of the Fourteenth Amendment couples of the same-sex may not be deprived of that right and that liberty.").

218. *Id.* at 2599.

219. *Id.* at 2589.

220. *Id.* at 2600.

221. *Id.* at 2590.

222. *See e.g., id.* at 2601 ("In light of precedent protecting the right of a married couple not to procreate, it cannot be said the Court or the States have conditioned the right to marry on the capacity or commitment to procreate."); *see also id.* at 2600 ("Excluding same-sex couples from marriage thus conflicts with a central premise of the right to marry. Without the recognition, stability, and predictability marriage offers, their children suffer the stigma of knowing their families are somehow lesser. They also suffer the significant material costs of being raised by unmarried parents, relegated through no fault of their own to a more difficult and uncertain family life."); *id.* at 2607 ("The respondents have not shown a foundation for the conclusion that allowing same-sex marriage will cause the harmful outcomes they describe.").

223. *See e.g., id.* at 2601 ("There is no difference between same-and opposite-sex couples with respect to th[e] principle [of marriage as a basis of 'legal and social order']."); *see also Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972) ("[W]hatever the rights of the individual to access to contraceptives may be, the rights must be the same for the unmarried and the married alike.").



challenges. Particularly, the *Obergefell* case shows how lower courts should apply the special kind of heightened scrutiny<sup>224</sup> the Court relies on in non-tradition-based substantive due process rights cases: Closely examine the government's stated rationales by determining whether they are reasonably directly and reasonably consistently related to a legitimate government interest. In such cases (involving rights essential to an individual's autonomy), the stated reasons cannot be too tenuous<sup>225</sup> and the facts supporting them cannot be merely "inconclusive."<sup>226</sup> Additionally, the stated reasons must be closely consistent for similarly situated persons.<sup>227</sup> Most importantly, this "reasonable

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224. This scrutiny is certainly not rational basis scrutiny, but neither does it rise to the level of intermediate scrutiny. Rather, the Court's scrutiny is best described as "rational scrutiny with a bite." See Emma Freeman, *Giving Casey Its Bite Back: The Role of Rational Basis Review in Undue Burden Analysis*, 48 HARV. C.R.-C.L. L. REV. 279, 285 (2013) ("Whereas courts applying traditional rational basis presume legislative legitimacy and require only a superficial nexus between the state's regulatory means and ends, courts employing rational basis with bite scrutinize the actual nature of the state's interest and thoroughly assess its relationship to the challenged statute."). I shall refer to the *Obergefell* Court's specific amalgamation of this "rational scrutiny with a bite" as "reasonable scrutiny."

225. See *supra*, note 200; see also *Lawrence v. Texas*, 539 U.S. 558, 578 (2003) (concluding that, even if drawn to comply with Equal Protection requirement, the anti-sodomy statute "furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual."); *Id.* at 582 (O'Connor, J., concurring) (stating, in the Equal Protection context, "[m]oral disapproval of this group, like a bare desire to harm the group, is an interest that is insufficient to satisfy rational basis review"); *United States v. Windsor*, 133 S. Ct. 2675, 2696 (2013) ("The federal statute is invalid, for no legitimate purpose overcomes the purpose and effect to disparage and to injure those whom the State."); *Loving v. Virginia*, 388 U.S. 1, 12 (1967) ("To deny this fundamental freedom on so unsupportable a basis as the racial classifications embodied in these statutes, classifications so directly subversive of the principle of equality at the heart of the Fourteenth Amendment, is surely to deprive all the State's citizens of liberty without due process of law."); *Romer v. Evans*, 517 U.S. 620, 635 (finding, in the Equal Protection context, that "[t]he breadth of the amendment is so far removed from these particular justifications that we find it impossible to credit them.>").

226. See *e.g.*, *Loving*, 388 U.S. at 8 ("[T]he State argues, the scientific evidence is substantially in doubt and, consequently, this Court should defer to the wisdom of the state legislature in adopting its policy of discouraging interracial marriages."); Brief for Respondents at 41, *Loving v. Virginia*, 388 U.S. 1 (1967) (No. 395) ("Text and authorities which constitute the factual basis for the legislative finding . . . indicate only that there is a difference of opinion as to the wisdom of the policy underlying the enactments.>").

227. See *Obergefell*, 135 S. Ct. at 2604 ("Here the marriage laws enforced by the respondents are in essence unequal: same-sex couples are denied all the benefits afforded to opposite-sex couples and are barred from exercising a fundamental right."); see also *Williams v. Vermont*, 105 S. Ct. 2465, 2471 (1985) (invalidating a tax after refuting the government's stated rationales and demonstrating the tax treated similarly situated persons unequally for reasons unrelated to the purpose of the tax); *Zobel v. Williams*, 457 U.S. 55, 61-62 (1982) (invalidating a discriminatory oil revenue program by closely

scrutiny” is not strict to the point of fatality or overreach;<sup>228</sup> but neither is it so deferential as to permit veiled animus<sup>229</sup> or sham rationality.<sup>230</sup>

### B. *The Dissenting Opinions*

The dissenting opinions advance six basic criticisms of the majority’s decision: (1) it usurps the democratic process;<sup>231</sup> (2) it constitutes judicial legislation;<sup>232</sup> (3) it lacks judicial restraint;<sup>233</sup>

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examining and refuting the government’s stated rationales for discriminating between similarly situated individuals).

228. To be clear, this form of scrutiny does not require a “compelling” or even “important” government interest—just a valid and defensible “legitimate interest.” Moreover, the law need not be “narrowly tailored” but simply “substantially related” to that government interest. Notably, the *Obergefell* majority’s level of scrutiny would have produced different results in both *Dred Scott v. Sanford*, 60 U.S. 393 (1856), and *Lochner v. New York*, 198 U.S. 45 (1905). First, in the *Dred Scott* case, the Court would have closely scrutinized the categorical exclusion of African Americans from basic civil rights and liberties. After determining that the question of citizenship for black persons was at most inconclusive, the Court would have recognized that the exclusion of African Americans from the definition of “citizen” was unjustified. In *Lochner*, the Court would have recognized the legitimate state interest in limiting working hours for bakers due to the physically taxing nature of the job as well the unhealthy conditions of most bake shops. As these conditions were particular for bakers, and as legislatures across the country were slowly implementing step-by-step labor reform, the Court would not have found any veiled animus or unequal treatment. In short, the legislative act in *Lochner* would have easily survived “reasonable scrutiny.”

229. See *Windsor*, 133 S. Ct. at 2693 (“The avowed purpose and practical effect of the law here in question are to impose a disadvantage, a separate status, and so a stigma upon all who enter into same-sex marriages made lawful by the unquestioned authority of the States.”); *Romer*, 517 U.S. at 634 (“[T]he inevitable inference that the disadvantage imposed is born of animosity toward the class of persons affected.”); *Loving*, 388 U.S. at 11 (“The fact that Virginia prohibits only interracial marriages involving white persons demonstrates that the racial classifications must stand on their own justification, as measures designed to maintain White Supremacy.”); see also *Eisenstadt v. Baird*, 405 U.S. 438, 454 (1972) (quoting *Railway Express Agency v. New York*, 336 U. S. 106, 336 U. S. 112-113 (1949) (Jackson, J. concurring) (“[N]othing opens the door to arbitrary action so effectively as to allow those officials to pick and choose only a few to whom they will apply legislation, and thus to escape the political retribution that might be visited upon them if larger numbers were affected.”)).

230. See *e.g.*, *Obergefell*, 135 S. Ct. at 2607 (“The respondents have not shown a foundation for the conclusion that allowing same-sex marriage will cause the harmful outcomes they describe.”); see also *Turner v. Safley*, 482 U.S. 78, 90 (1987) (stating that “[a] factor relevant in determining the reasonableness of a prison restriction . . . is whether there are alternative means of exercising the right that remain open to prison inmates.”).

231. See *Obergefell*, 135 S. Ct. at 2612, 2624-25 (2015) (Roberts, J. dissenting); *id.* at 2626-31 (Scalia, J. dissenting); *Id.* at 2637-38 (Thomas, J. dissenting); *id.* at 2642 (Alito, J. dissenting).

232. See *id.* at 2612 (Roberts, J. dissenting); *id.* at 2629 (Scalia, J.

(4) it directly threatens good-faith, religious objectors;<sup>234</sup> (5) it treats a government-granted privilege as a natural liberty interest;<sup>235</sup> and, (6) it incorrectly dismisses the legitimate state interest of preserving traditional marriage.<sup>236</sup> All six criticisms have at least some merit; however, upon closer analysis, none of them hold water.

The first criticism seemingly rebukes the concept of judicial review in general. Specifically, the fact that “five unelected Justices”<sup>237</sup> can effectively “veto” democratically-passed laws is an inherent and universally accepted part of modern judicial review. Although some do criticize this power and question its Constitutional foundation, the Court nonetheless exercises the power on a regular basis and it is difficult to understand how any Justice who regularly exercises this power can criticize it.<sup>238</sup> The Court, moreover, exercises this power not just in cases involving written and explicitly defined constitutional provisions, but also in cases involving vague concepts such as “free exercise of religion,”<sup>239</sup> “interstate commerce,”<sup>240</sup> “reasonableness,”<sup>241</sup> as well as in cases involving implied and undefined concepts, such as “war powers,”<sup>242</sup> “freedom of association,”<sup>243</sup> and “fundamental fairness,”<sup>244</sup> and yes, “substantive due process.”<sup>245</sup> Indeed, judicial nullification based on implied and undefined concepts is a staple of the modern judiciary.

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dissenting); *id.* at 2643 (Alito, J. dissenting).

233. *See id.* at 2621, 2624, 2626 (Roberts, J. dissenting); *id.* at 2631 (Thomas, J. dissenting); *id.* at 2639, 2643 (Alito, J. dissenting).

234. *See id.* at 2625-26 (Roberts, J. dissenting); *id.* at 2638-39 (Thomas, J. dissenting).

235. *See id.* at 2620 (Roberts, J. dissenting); *id.* at 2629-2637 (Thomas, J. dissenting).

236. *See id.* at 2623 (Roberts, J. dissenting); *id.* at 2641 (Alito, J. dissenting).

237. *Id.* at 2640 (Alito, J. dissenting); *see also id.* at 2612 (Roberts, J. dissenting) (stating that “[f]ive lawyers have closed the debate” and the Court “[s]t[ole] this issue from the people”).

238. The argument that the majority’s *specific* application of substantive due process usurps the democratic process is better addressed through the dissenters’ criticisms arguing the majority lacked judicial restraint, *see* note 232, and failed to properly account for traditional marriage as a legitimate state interest. *See supra* note 236.

239. *See e.g.*, *Church of the Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 531 (1993).

240. *See e.g.*, *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2573 (2012).

241. *See Florida v. Jardines*, 569 U.S. 1 (2013). Often times, what is “reasonable” in Fourth Amendment jurisprudence simply comes down to what “th[e] Court *really* likes.” *Obergefell*, 135 S. Ct. at 2630 (Scalia, J. dissenting).

242. *See Hamdi v. Rumsfeld*, 124 S. Ct. 2633, 2650 (2004).

243. *See NAACP v. Alabama*, 357 U.S. 449, 462 (1958).

244. *See In re Winship*, 397 U.S. 358, 363 (1970).

245. *See McDonald v. Chicago*, 561 U.S. 742, 811 (2010).

Second,<sup>246</sup> the dissenters denounce the *Obergefell* majority's alleged exercise of "judicial legislation."<sup>247</sup> Specifically, the dissenters charge the majority with engaging in "judicial policy making,"<sup>248</sup> "practice[ing] . . . constitutional revision,"<sup>249</sup> "resolv[ing] . . . the policy question of same-sex marriage,"<sup>250</sup> and "invent[ing] a new right and impos[ing] that right on the rest of the country."<sup>251</sup> As explained above, however, it is well-established that the Due Process Clause prohibits legislative judgments, that legislative acts premised on bogus causes of forfeiture constitute legislative judgments, that "all substantial arbitrary impositions and purposeless restraints"<sup>252</sup> constitute bogus causes of forfeiture, and that it is therefore the role and duty of the courts to strike down all legislative acts premised on "arbitrary impositions" or "purposeless restraints."<sup>253</sup> Determining whether or not a legislative act is arbitrary or irrational does not constitute judicial legislation;<sup>254</sup> instead, it is the heart of the modern substantive due process judicial analysis. Moreover, determining whether a class of individuals denied privileges or liberties granted to similarly situated individuals does not constitute judicial legislation either; it is the heart of the modern Equal Protection Clause judicial analysis.<sup>255</sup>

Third, the dissenting Justices assert that the majority's decision lacks judicial restraint. Specifically, they argue that "[t]he majority . . . neglects [a] restrained conception of the judicial role,"<sup>256</sup> that the Justices "roam at large in the constitutional field guided only by their personal views,"<sup>257</sup> and that "[t]he Justices in the majority claim the authority to confer constitutional protection upon that right simply because they believe that it is fundamental."<sup>258</sup> However, as explained above, this is not an accurate representation of the majority's analysis.<sup>259</sup> Far from

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246. The criticism claiming the majority crafted judicial legislation is arguably just an extension of the criticism that the majority usurped the democratic process. .

247. *See Obergefell*, 135 S. Ct. at 2612 (Roberts, J. dissenting) ("The majority's decision is an act of will, not legal judgment."); *see also id.* at 2629 (Scalia, J. dissenting).

248. *Id.* at 2623 (Roberts, J. dissenting).

249. *Id.* at 2627 (Scalia, J. dissenting).

250. *Id.* at 2629 (Scalia, J. dissenting).

251. *Id.* at 2643 (Alito, J. dissenting).

252. *Poe v. Ullman*, 367 U.S. 497, 522 (1961) (Harlan, J., dissenting).

253. *See supra* notes 154-62.

254. *See supra* notes 131-162. Whether the Court exercised the proper level of judicial scrutiny when examining the same-sex marriage ban is an altogether different question. *See supra* notes 232-237.

255. *See Obergefell*, 135 S. Ct. at 2600.

256. *Id.* at 2612 (Roberts, J., dissenting).

257. *Id.* at 2631 (Thomas, J., dissenting) (citations omitted).

258. *Id.* at 2640-41 (Alito, J., dissenting).

259. *See supra* notes 198-223.

“roaming at large in the constitutional field,” the majority’s opinion is actually quite focused: it simply answers the narrow question of whether the class of persons at issue can be legitimately excluded from the definition of the deeply-rooted, fundamental right of marriage.<sup>260</sup> The majority, moreover, does not apply the dangerous “strict scrutiny” used in other “fundamental rights” cases or the “intermediate scrutiny” used in cases involving classifications based on gender; instead, the majority applies a slightly heightened level of scrutiny (“reasonably scrutiny”) that is generally deferential but does not permit veiled animus or indefensible rationality.<sup>261</sup> Far from lacking judicial restraint, the majority’s decision—stripped of its sweeping rhetorical gloss—is built around a markedly restrained analysis.

Fourth, the dissent admonishes the majority for creating a right that directly imperils others’ ability to adhere to their deeply held religious beliefs.<sup>262</sup> Specifically, the dissenting Justices argue that the majority’s ruling does not allow for “accommodations for religious practice.”<sup>263</sup> However, as Justice Thomas points out, “[r]eligious liberty is about freedom of action in matters of religion generally, and the scope of that liberty is directly correlated to the civil restraints placed upon religious practice.”<sup>264</sup> The civil restraints placed upon religious practices that pertain to same-marriage (like the civil restraints pertaining to discrimination against race and gender) are necessary to protect others’ realization and expression of their fundamental rights, as well as to prevent discrimination against a class of persons.<sup>265</sup> Attaining a

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260. See *supra* notes 199.

261. See *supra* notes 228-29.

262. See *id.* at 2625; see also *id.* at 2638 (Thomas, J., dissenting) (“[T]he majority’s decision threatens the religious liberty our Nation has long sought to protect.”).

263. See *id.* at 2625 (Roberts, J., dissenting).

264. *Id.* at 2638 (Thomas, J., dissenting).

265. See William N. Eskridge, Jr., *Noah’s Curse: How Religion Often Conflates Status, Belief, and Conduct to Resist Antidiscrimination Norms*, 45 GA. L. REV. 657, 660 (2011) (recognizing similarities between religious-based objections to race and religious-based objections sexual orientation); Martha Minow, *Should Religious Groups Be Exempt from Civil Rights Laws?*, 48 B.C. L. REV. 781, 810 (2007) (identifying similarities between religious-based objections to gender and religious-based objections sexual orientation); see also *Obergefell*, 135 S. Ct. at 2604 (“Especially against a long history of disapproval of their relationships, this denial to same-sex couples of the right to marry works a grave and continuing harm. The imposition of this disability on gays and lesbians serves to disrespect and subordinate them.”); see also *Davis v. Beason*, 10 S. Ct. 299, 344-45 (1890) (“[W]hile [laws] cannot interfere with mere religious beliefs and opinions, they may with practices. . . . Crime is not the less odious because sanctioned by what any particular sect may designate as ‘religion.’”). *But see* *In re Brown*, 478 So. 2d 1033, 1037 (Miss. 1985) (“Religiously grounded actions or conduct are often beyond the authority of the state to control. Where the religiously grounded ‘action’ is a refusal to act

marriage license requires access to government services and such services cannot be denied to individuals due to another's religious beliefs.<sup>266</sup> Moreover, on a wide enough scale, discriminatory "religious practices" effectively shut out a class of persons from civil society.<sup>267</sup> Whatever difficulties individuals, lawmakers, or courts face in negotiating between religious liberty and the fundamental rights of same-sex couples, they face the same difficulties in negotiating between religious freedom with other state interests.<sup>268</sup>

Fifth, the dissenting Justices criticize the majority for treating a government-granted privilege as a natural liberty interest. Specifically, the dissent argues that "liberty has long been understood as individual freedom *from* governmental action, not as a right *to* a particular governmental entitlement."<sup>269</sup> To some extent, the *dissent has a point*. While government restrictions on an individual's ability to date, cohabit, engage in intimate relations and raise a family with another person of the same sex certainly infringes on that individual's "ordered liberty," many of the "benefits" accompanying marriage are indeed "government entitlements." Nevertheless, some of the "benefits," such as the liberty to visit a spouse in a hospital intensive care unit during restricted visiting hours, and the freedom to live in family-zoned area, *do* involve protections of natural liberty. Moreover, "government entitlements" are protected under the same substantive due process regime as liberty interests.<sup>270</sup> Lastly, as the majority explicitly states, the Equal Protection Clause alone

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rather than affirmative, overt conduct, the State's authority to interfere is virtually non-existent except only in the instance of the grave and immediate public danger").

266. A city official cannot deny gay couples a marriage license any more than a racist pollster can refuse to register an African American voter simply because the pollster's deeply-held religious belief precludes a "mixing of the races." Likewise, a "traditionalist" cannot deny a woman a job because it is his deeply-held religious belief that God made woman for man and woman must be in the home, not the work place. Discrimination is injurious and unlawful and religious-motivated discrimination is no less injurious or unlawful.

267. Discrimination-based exclusion by individuals and businesses on a large scale restricts and can practically deny important goods and services (as well as social equality and dignity) to law-abiding citizens.

268. Indeed, the same problems existed following the *Loving* decision. See *Bob Jones Univ. v. United States*, 461 U.S. 574, 604 (1983) (holding that the governmental interest in eradicating discriminating in education "outweighs whatever burden denial of tax benefits places on petitioners' exercise of their religious beliefs").

269. See *Obergefell*, 135 S. Ct. at 2634 (Thomas, J., dissenting).

270. Such government entitlements are considered a "property right" in due process jurisprudence. See *e.g.*, *Goldberg v. Kelly*, 397 U.S. 254, 262 (1970) (holding that welfare benefits are "a matter of statutory entitlement for persons qualified to receive them" and, therefore, the Due Process Clause precludes their arbitrary or irrational deprivation or denial).

provides perhaps the most compelling ground for the Court's opinion.<sup>271</sup>

Finally, the dissenters' sixth criticism, that the state bans are rationally related to a legitimate government interest, does not hold up to scrutiny. The dissenting Justices offer two "legitimate government interests" in support of the states' same-sex bans: (1) "preserving traditional marriage"<sup>272</sup> and (2) "encourag[ing] potentially procreative conduct to take place within a lasting unit that has long been thought to provide the best atmosphere for raising children."<sup>273</sup> These justifications, however, do not survive the Court's "reasonable scrutiny." First, "tradition" in and of itself is not a legitimate government interest.<sup>274</sup> If it were, every irrational old law could be justified for the sake of being old.<sup>275</sup> The dissenting Justices' second argument, furthermore, is equally as indefensible. In an earlier time, perhaps the dissent could have reasonably argued that marriage served the purpose of confining procreative conduct to a lasting union that enabled stable child rearing. But that is no longer the case; *heterosexual couples* over the last century have re-defined marriage to permit infidelity, no-fault divorce, women's rights, adoption, and the union of barren and sterilized couples.<sup>276</sup> The dissent's procreation-child rearing argument, therefore, is no longer rationally related to the modern

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271. See *Obergefell*, 135 S. Ct. at 2591 ("[U]nder the . . . Equal Protection Clause[] of the Fourteenth Amendment couples of the same-sex may not be deprived of that right and that liberty.").

272. See *id.* at 2623 (Roberts, J., dissenting) (stating that "distinguishing between opposite-sex and same-sex couples is rationally related to the States' legitimate state interest in preserving the traditional institution of marriage") (citations omitted).

273. *Id.* at 2641 (Alito, J., dissenting).

274. *Id.* at 2602 ("If rights were defined by who exercised them in the past, then received practices could serve as their own continued justification . . ."); see also *Lawrence v. Texas*, 539 U.S. 558, 577 (2003); *Baskin v. Bogan*, 766 F.3d 648, 666 (7th Cir.) (Posner, J) ("The state's argument from tradition runs head on into *Loving v. Virginia*, since the limitation of marriage to persons of the same race was traditional in a number of states when the Supreme Court invalidated it.") (citation omitted); Kim Forde-Mazrui, *Tradition As Justification: The Case of Opposite-Sex Marriage*, 78 U. CHI. L. REV. 281, 322 (2011) ("When tradition is offered as a primary justification for a legislative classification, the risk that the classification is motivated by illegitimate purposes is too great to accept without a closer examination of the actual purposes underlying the classification.").

275. The "appeal to tradition" fallacy is one of better known logical fallacies.

276. See Amber Bailey, *Redefining Marriage: How the Institution of Marriage Has Changed to Make Room for Same-Sex Couples*, 27 WIS. J.L. GENDER & SOC'Y 305, 307 (2012); see also *Kitchen v. Herbert*, 961 F. Supp. 2d 1181, 1201 (D. Utah 2013) ("[H]owever persuasive the ability to procreate might be in the context of a particular religious perspective, it is not a defining characteristic of conjugal relationships from a legal and constitutional point of view."). In addition, the law permits (indeed, the Constitution protects) non-married individuals to engage in sexual activity.

institution of marriage.<sup>277</sup> And it would be irrational and arbitrary to grant heterosexual couples who lack procreative abilities the right to marry, yet deny same-sex marriage this important privilege.<sup>278</sup> This is especially true given the fact that, as the majority points out, same-sex marriage equally promotes the remaining state interests furthered by the “privilege” of marriage.<sup>279</sup>

The dissenting Justices, therefore, do not refute the majority’s opinion. Instead, they merely reaffirm the validity of the majority’s explicit and implicit constitutional analysis. The definition of marriage must include same-sex couples because their exclusion irrationally restricts those persons’ liberty and irrationally discriminates against that class of persons.

## V. CONCLUSION

*Obergefell v. Hodges* demonstrates that some rights are “implicit in the concept of ordered liberty” (and therefore “fundamental”) even though they are not “deeply rooted in our Nation’s history and traditions.” More importantly, *Obergefell* shows that the judicial identification and protection of such rights is by no means open-ended and subjective; instead, as the *Obergefell* case and its predecessors implicitly reveal, the judicial identification of new rights is limited to traditionally recognized categories of fundamental rights. The judicial protection of those rights, moreover, is limited by the application of a scrutiny only slightly higher level than “rational basis review”—“reasonable scrutiny.” This narrow and well-confined substantive due process analysis is a reasonable and workable addition to “tradition-based” substantive due process model: It permits the recognition of new rights but within a restrained framework.

While it is true that the modern Court’s expansion of substantive due process to all “arbitrary impositions and

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277. The legislative bans are “so riddled with exceptions that deterrence of premarital sex cannot reasonably be regarded as its aim.” *Eisenstadt v. Baird*, 405 U.S. 438, 449 (1972).

278. See *Kitchen*, 961 F. Supp. 2d at 1211-12 (quoting *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 446 (1985) (“[A]ny relationship between Amendment 3 and the State’s interest in responsible procreation ‘is so attenuated as to render the distinction arbitrary or irrational.’”)); see also *Eisenstadt*, 405 U.S. at 450 (“[I]f health were the rationale, the statute would be . . . discriminatory and overbroad. . . .”); *id.* at 447 (“The Equal Protection Clause . . . den[ies] to States the power to legislate that different treatment be accorded to persons placed by a statute into different classes on the basis of criteria wholly unrelated to the objective of that statute classification.”); *Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920) (“[T]he classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.”).

279. See *supra* notes 218-223.



purposeless restraints” invites a dangerous degree of judicial discretion, and that such an aggressive judicial assumption of authority strongly counsels for a model of restraint and objectivity,<sup>280</sup> the *Obergefell* Court’s approach—a crystallization of the framework set forth in *Casey*, *Romer*, *Lawrence*, and *Windsor*—provides a workable model that permits the recognition and protection of new rights while preserving the judicial restraint and analytical objectivity necessary to uphold the respect for—and therefore authority of—this “dependent” branch of government.

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280. See *Obergefell*, 135 S. Ct. at 2631 (Scalia, J., dissenting) (quoting THE FEDERALIST NO. 78 (Alexander Hamilton) (“The Judiciary is the ‘least dangerous’ of the federal branches because it has ‘neither Force nor Will, but merely judgment; and must ultimately depend upon the aid of the executive arm’ and the States, ‘even for the efficacy of its judgments.’”)).