

DUE PROCESS AFTER DOBBS

*S.L. Mikochik**

ABSTRACT

Dobbs overturned *Roe* and *Casey* because they had applied a reckless approach to substantive due process, guided by the light of the justices' own values. *Dobbs*, however, went to the opposite extreme, applying a wooden approach to substantive due process that had confined it to the stocks of history. This essay will critique both approaches, and propose some middle grounds that would respect history and allow our understanding of constitutional principles to develop.

TABLE OF CONTENTS

1. INTRODUCTION.....	37
2.....	38
3.....	43
4.....	50
5.....	62
6.....	67

1. INTRODUCTION

I have a two-fold aim in this essay: The first is to trace the defective development of substantive due process on the Supreme Court; the second is to show whether the Court successfully set it aright in *Dobbs v. Jackson Women's Health Organization*, which overturned *Roe v. Wade* and *Planned Parenthood v. Casey*.¹ *Roe* and *Casey* had asserted “raw judicial power . . . as a matter of constitutional law,”² and were correctly overruled. Nevertheless,

* Stephen L. Mikochik is a professor emeritus at Temple University School of Law in Philadelphia and a Senior Lecturer at Ave Maria School of Law in Naples, Florida.

¹ 597 U.S. 215, 292 (2022) (overturning *Roe v. Wade*, 410 U.S. 113 (1973) and *Planned Parenthood v. Casey*, 505 U.S. 833 (1992)).

² *Id.* at 277–78.

Dobbs overreacted, and its fixation on history has turned the wilderness of substantive due process into a petrified forest.³

2.

To understand substantive due process, it is first necessary to recognize its connection with natural law in Supreme Court history. Early in that history, there were Justices willing to limit legislative power, exercised contrary to natural law, without reference to the Constitution. For example, in *Calder v. Bull*, Justice Chase claimed that “[t]o maintain that our Federal, or State, Legislature possesses . . . powers [contrary to such principles], if they had not been expressly restrained[,] would . . . be a political heresy, altogether inadmissible in our free republican governments.”⁴ Even Chief Justice Marshall, in *Fletcher v. Peck*, was willing to rely on the “general principles which are common to our free institutions” in rejecting a challenge to a legislative land grant.⁵

By the mid-Nineteenth Century, however, the practice had ceased, due perhaps to the Court’s initial reluctance to enter the slavery controversy. In *Jones v. Van Zandt*,⁶ it refused to consider the claim that the 1793 Fugitive Slave statute⁷ violated natural law:

Before concluding, it may be expected by the defendant that some notice should be taken of the argument, urging on us a disregard of the constitution and the act of Congress in respect to this subject, on account of the supposed inexpediency and invalidity of all laws recognizing slavery or any right of property in man. But that is a political question, settled by each State for itself; and the federal power over it is limited and regulated by the people of the States in the constitution itself, as one of its sacred compromises, and which we possess no authority as a judicial body to modify or overrule.

³ See *id.* at 250, 300.

⁴ 3 U.S. (3 Dall.) 386, 388–89 (1798) (emphasis omitted).

⁵ 10 U.S. (6 Cranch) 87, 139 (1810).

⁶ *Jones v. Van Zandt*, 46 U.S. (5 How.) 215, 229, 232 (1847).

⁷ Fugitive Slave Act of 1793, ch. 7, 1 Stat. 302 (repealed 1864).

Whatever may be the theoretical opinions of any as to the expediency of some of those compromises, or of the right of property in persons which they recognize, this court has no alternative, while they exist, but to stand by the constitution and laws with fidelity to their duties and their oaths.⁸

After the Civil War, the Court rejected an attempt to rely on natural law as a way of construing the Privileges or Immunities Clause of the newly adopted Fourteenth Amendment.⁹ It was concerned that the construction, if adopted, would render the States merely provinces at the whim of Congress:

[W]here it is declared that Congress shall have the power to enforce that article, was it intended to bring within the power of Congress the entire domain of civil rights heretofore belonging exclusively to the States?

All this and more must follow, if the proposition of the plaintiffs in error be sound. For not only are these rights subject to the control of Congress whenever in its discretion any of them are supposed to be abridged by State legislation, but that body may also pass laws in advance, limiting and restricting the exercise of legislative power by the States, in their most ordinary and usual functions, as in its judgment it may think proper on all such subjects.¹⁰

Yet, the Civil War itself had “radically change[d] the whole theory of the relations of the State and Federal governments to each other and of both these governments to the people.”¹¹ The question was whether Congress or the Court was better able to elaborate that relationship, reconciling expanded Federal power with a measure of autonomy left to the States. It was the Court that took the lead over the next four decades in its construction of the Due Process Clause of the Fourteenth Amendment.

Initially, however, the Court appeared hesitant to rely on that Clause. Writing six years after his majority opinion in the *Slaughter-House Cases*, Justice Miller decried that:

⁸ *Jones*, 46 U.S. (5 How.) at 231.

⁹ *See Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 78–79 (1872).

¹⁰ *Id.* at 77–78.

¹¹ *Id.* at 78.

[T]here exists some strange misconception of the scope of this provision as found in the fourteenth amendment. . . . [T]he clause under consideration is looked upon as a means of bringing to the test of the decision of this court the abstract opinions of every unsuccessful litigant in a State court of the justice of the decision against him, and of the merits of the legislation on which such a decision may be founded.¹²

Miller's concern, however, was not with using the Due Process Clause to forge the new relationship, but rather ensuring it was developed incrementally, an approach the Court, not Congress, could better undertake:

[A]part from the imminent risk of a failure to give any definition which would be at once perspicuous, comprehensive, and satisfactory, there is wisdom, we think, in the ascertaining of the intent and application of such an important phrase in the Federal Constitution, by the gradual process of judicial inclusion and exclusion, as the cases presented for decision shall require, with the reasoning on which such decisions may be founded.¹³

By the beginning of the twentieth century, the Court had returned to considerations of natural law, but now as a way of construing the Due Process Clause of the Fourteenth Amendment. In *Twining v. New Jersey*, the Amendment was construed to protect rights no free government could violate.¹⁴ As the Court later phrased it, such rights were "implicit in the concept of ordered liberty" so that "neither liberty nor justice would exist if they were sacrificed."¹⁵

Twining fashioned a compound analysis for implementing the Due Process Clause that incorporated principles of natural law. The analysis first required persons alleging violations of the Clause to prove that the State had deprived them of "liberty," a term that "means[] not only the right of the citizen to be free from the mere physical restraint of his person, as by incarceration, but . . . [also] the right of the citizen to be free in the enjoyment of

¹² Davidson v. New Orleans, 96 U.S. 97, 104 (1877).

¹³ *Id.*

¹⁴ 211 U.S. 78, 101–02 (1908).

¹⁵ See *Palko v. Connecticut*, 302 U.S. 319, 325–26 (1937) (citation omitted).

all his faculties [and] to be free to use them in all lawful ways.”¹⁶ Deprivations of liberty were not limited to denials of procedural fairness¹⁷ since even before the Civil War, due process analysis was thought to appraise the justifications for the deprivation as well.¹⁸

Challengers had the further burden of showing that their liberty was deprived without due process of law.¹⁹ Since the terms “due process” and “law of the land” were considered synonymous, they had to prove that the deprivation was of a right settled in Anglo-American law:

What is due process of law may be ascertained by an examination of those settled usages and modes of proceedings existing in the common and statute law of England before the emigration of our ancestors, and shown not to have been unsuited to their civil and political condition by having been acted on by them after the settlement of this country.²⁰

In other words, “A process of law . . . which is not otherwise forbidden, must be taken to be due process of law, if it can show the sanction of settled usage both in England and in this country.”²¹ If the analysis ended there, however, the result “would be to deny every quality of the law but its age, and to render it incapable of progress or improvement.”²² States were thus permitted to experiment, even at the expense of ancient usage; but no change could “be made which disregards those fundamental principles, to be ascertained from time to time by judicial action, which have relation to process of law, and protect the citizen in his private right, and guard him against the arbitrary action of government.”²³

¹⁶ *Allgeyer v. Louisiana*, 165 U.S. 578, 589 (1897).

¹⁷ *See Whitney v. California*, 274 U.S. 357, 373 (1927) (Brandeis, J., concurring) (“Despite arguments to the contrary which had seemed to me persuasive, it is settled that the due process clause of the Fourteenth Amendment applies to matters of substantive law as well as to matters of procedure.”).

¹⁸ *See Dred Scott v. Sanford*, 60 U.S. (19 How.) 393, 452 (1857), *superseded by constitutional amendment*, U.S. CONST. amend. XIV.

¹⁹ *See Twining v. New Jersey*, 211 U.S. 78, 107 (1908).

²⁰ *Id.* at 100 (citing *Murray’s Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272, 280 (1855)).

²¹ *Id.* at 101 (quoting *Hurtado v. California*, 110 U.S. 516 (1884)).

²² *Id.* (quoting *Hurtado*, 110 U.S. at 529).

²³ *Id.*

Thus, to prevail, challengers were required to show, not only that their claim concerned settled law, but that the State had disregarded those “immutable principles of justice which inhere in the very idea of free government”²⁴ and consequently had passed “the limits of those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions.”²⁵ Accordingly, *Twining* judged the validity of state action under the Due Process Clause ultimately against the background of natural law. Two decades later, the Court succinctly summarized that reliance:

While this court has not attempted to define with exactness the liberty thus guaranteed, the term has received much consideration and some of the included things have been definitely stated. Without doubt, it denotes not merely freedom from bodily restraint, but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.²⁶

²⁴ *Id.* at 102 (citations omitted) (internal quotation marks omitted). Since the question in *Twining* was whether the States were required to afford a privilege against self-incrimination to defendants in criminal prosecutions, the thrust of its due process analysis was naturally addressed to the denial of procedural fairness:

We are not here concerned with the effect of due process in restraining substantive laws, as, for example, that which forbids the taking of private property for public use without compensation. We need notice now only those cases which deal with the principles which must be observed in the trial of criminal and civil causes.

Id. at 110. Cases before *Twining* had established that Due Process applied to matters of substance, see *Allgeyer v. Louisiana*, 165 U.S. 578, 589 (1897); *Chicago, B. & Q. R. Co. v. Chicago*, 166 U.S. 226, 233–34 (1897); *Holden v. Hardy*, 169 U.S. 366, 384, 389–90 (1898); and nothing in *Twining* evidenced an intent to limit the due process analysis it had fashioned to matters of procedure.

²⁵ *Twining*, 211 U.S. at 102 (citation omitted) (internal quotation marks omitted).

²⁶ *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923) (citations omitted).

Though the *Twining* standard became moribund with FDR's appointments to the Supreme Court,²⁷ it was revived in 1997 to reject a claimed right to physician-assisted suicide.²⁸ During the intervening years, however, the Court developed a jurisprudence of substantive due process in its "privacy" cases that strayed both from *Twining* and from natural law.

3.

The Court's "privacy" jurisprudence began in 1965 with *Griswold v. Connecticut*.²⁹ The Court struck down a state statute criminalizing the use of contraceptives by married couples.³⁰ No one opinion garnered a majority on the Court.³¹ The seminal opinion, however, was written by Justice John Marshall Harlan.³² His approach is generally viewed as defending a married couple's right to use contraceptives. Harlan, however, actually argued that the intimate relation between the married couple was itself an elemental aspect of human liberty that the State could not invade.³³

²⁷ *Twining's* specific holding, that the Fourteenth Amendment did not require States to grant criminal defendants a privilege against self-incrimination, was overruled in *Mallory v. Hogan*, 378 U.S. 1, 6 (1964). That, however, did not end the debate on the Court over the *Twining* Doctrine itself. See *Duncan v. Louisiana*, 391 U.S. 145, 164, 167–69 (1968) (Black, J., concurring) (criticizing Justice Harlan's defense of *Twining*).

²⁸ See *Washington v. Glucksberg*, 521 U.S. 702, 720–21 (1997) ("[T]he Due Process Clause specially protects those fundamental rights and liberties which are, objectively, deeply rooted in this Nation's history and tradition, and implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed." (citations omitted) (internal quotation marks omitted)).

²⁹ 381 U.S. 479 (1965).

³⁰ *Id.* at 480.

³¹ Justice Douglas delivered the opinion of the Court. I agree with the contention that his penumbral argument was "facial[ly] absurd." *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215, 332 n.* (Thomas, J., concurring). Admittedly, Bill of Rights guarantees may require recognition of unexpressed rights "necessary in making the express guarantees fully meaningful." See *Griswold*, 381 U.S. at 483. In contrast, "penumbras[] formed by emanations" from the Bill of Rights, *id.* at 484, was so elastic a notion that it proved contraception necessary to make freedom of association meaningful.

³² Harlan's concurrence incorporated by reference his dissent in *Poe v. Ullman*. See *Griswold*, 381 U.S. at 500.

³³ *Poe v. Ullman*, 367 U.S. 497, 553 (1961) (Harlan, J., dissenting).

Harlan first observed that “[t]he Due Process Clause of the Fourteenth Amendment stands . . . on its own bottom.”³⁴ By this, he meant that the Clause was “not dependent on [the provisions of the Bill of Rights] or any of their radiations.”³⁵ He thus carried forward the understanding of due process the Court had adopted in *Twining*:

[I]t is possible that some of the personal rights safeguarded by the first eight Amendments against national action may also be safeguarded against state action[] because a denial of them would be a denial of due process of law. If this is so, it is not because those rights are enumerated in the first eight Amendments, but because they are of such a nature that they are included in the conception of due process of law.³⁶

Thus, Harlan asked not whether the Court should incorporate the text of Bill of Rights guarantees against the States but whether their underlying purposes were sufficiently fundamental so as to come within the concept of due process of law:

[I]t is the purposes of those guarantees and not their text, the reasons for their statement by the Framers and not the statement itself which have led to their present status in the compendious notion of liberty embraced in the Fourteenth Amendment.³⁷

That “compendious notion” was broad enough to include all basic values “implicit in the concept of ordered liberty.”³⁸ It thus secured rights “which are . . . fundamental; which belong . . . to the citizens of all free governments for the purposes of securing which men enter into society.”³⁹ Harlan claimed that marriage between a man and a woman was one of those

³⁴ *Griswold*, 381 U.S. at 500 (Harlan, J., concurring).

³⁵ *Id.* Harlan’s analysis was directed in part against “the historically unfounded [total] incorporation formula long advanced by . . . [Justice] Black.” *Id.* at 501 (Harlan, J., concurring).

³⁶ *Twining v. New Jersey*, 211 U.S. 78, 99 (1908) (citation omitted).

³⁷ *Poe*, 367 U.S. at 544 (Harlan, J., dissenting) (citations omitted) (internal quotation marks omitted).

³⁸ *Griswold*, 381 U.S. at 500 (Harlan, J., concurring) (citation omitted).

³⁹ *Poe*, 367 U.S. at 541 (Harlan, J., dissenting) (alteration in original) (citations omitted) (internal quotation marks omitted).

interests that “require[d] particularly careful scrutiny of the state needs asserted to justify their abridgment”:⁴⁰

The laws regarding marriage which provide both when the sexual powers may be used and the legal and societal context in which children are born and brought up, as well as laws forbidding adultery, fornication and homosexual practices which express the negative of the proposition, confining sexuality to lawful marriage, form a pattern so deeply pressed into the substance of our social life that any Constitutional doctrine in this area must build upon that basis.⁴¹

Harlan did not separately analyze whether such laws regarding marriage were deeply settled in Anglo-American law and implicit in the concept of ordered liberty. He accepted them without question as “form[ing] a pattern so deeply pressed into the substance of our social life” that they were fundamental.⁴² His concern instead was whether he could extend that pattern to include the novel claim of marital privacy.

That pattern was not fixed in time but rather “a living thing,” calling the Court periodically to balance “the liberty of the individual” with “the demands of organized society.”⁴³ Yet, Harlan considered the Court’s authority to strike that balance carefully circumscribed:

Each new claim to Constitutional protection must be considered against a background of Constitutional purposes, as they have been rationally perceived and historically developed. . . . The decision of an apparently novel claim must depend on grounds which follow closely on well-accepted principles and criteria. The new decision must take ‘its place in relation to what went before and further [cut] a channel for what is to come.’⁴⁴

Harlan then turned to the merits. Connecticut argued that its anti-use statute protected the moral welfare of its citizens “both directly, in that it consider[ed] the practice of contraception immoral in itself, and

⁴⁰ *Id.* at 543 (citations omitted).

⁴¹ *Id.* at 546 (citations omitted).

⁴² *Id.*

⁴³ *Id.* at 542.

⁴⁴ *Id.* at 544 (quoting *Irvine v. California*, 347 U.S. 128, 147 (1954)).

instrumentally, in that the availability of contraceptive materials tends to minimize the disastrous consequence of dissolute action.”⁴⁵ He found it unnecessary to pass on the State’s first justification, though he rejected the claim that it was patently irrational.⁴⁶ He thought the Court was required, however, not just to consider Connecticut’s moral judgment as an abstract proposition, but also to pass on the means the State chose to implement that judgment.⁴⁷ Critical for Harlan was the fact that the State elected to implement its moral determination by invading marital intimacy itself:

Precisely what is involved here is this: the State is asserting the right to enforce its moral judgment by intruding upon the most intimate details of the marital relation with the full power of the criminal law. . . . [T]he statute allows the State to enquire into, prove and punish married people for the private use of their marital intimacy.

This, then, is the precise character of the enactment whose Constitutional measure we must take.⁴⁸

Along with marriage, the Connecticut enactment also “involve[d] what, by common understanding throughout the English-speaking world, must be granted to be a most fundamental aspect of liberty, the privacy of the home in its most basic sense.”⁴⁹ The law did “not invade the privacy of the home in the usual sense, since the invasion involved here may, and doubtless usually would, be accomplished without any physical intrusion whatever into the home.”⁵⁰ The Constitution’s protections for the privacy of the home in the Third and Fourth Amendments were expressly concerned with only physical invasion.⁵¹ Harlan concluded, however, that limiting due process “to what is explicitly provided in the Constitution [would divorce it] from the rational purposes, historical roots, and subsequent developments of the relevant provisions”:⁵²

⁴⁵ *Id.* at 545 (internal quotation marks omitted).

⁴⁶ *Id.* at 546–47.

⁴⁷ *Id.* at 547.

⁴⁸ *Id.* at 548.

⁴⁹ *Id.* (citations omitted) (internal quotation marks omitted).

⁵⁰ *Id.* at 549.

⁵¹ U.S. CONST. amends. III, IV.

⁵² *Poe*, 367 U.S. at 549 (Harlan, J., dissenting).

To be sure, the times presented the Framers with two particular threats to [the] principle [of privacy against arbitrary official intrusion], the general warrant, and the quartering of soldiers in private homes. But though Legislation, both statutory and constitutional, is enacted, . . . from an experience of evils, . . . its general language should not, therefore, be necessarily confined to the form that evil had theretofore taken. A principle, to be vital, must be capable of wider application than the mischief which gave it birth.⁵³

It was the rational purposes underlying the Amendments, and not their text, that was ultimately determinative for Harlan:

[I]f the physical curtilage of the home is protected, it is surely as a result of solicitude to protect the privacies of the life within. . . . The home derives its pre-eminence as the seat of family life. . . .

Of this “whole private realm of family life” it is difficult to imagine what is more private or more intimate than a husband and wife’s marital relations.⁵⁴

Harlan acknowledged, however, that the family was not beyond regulation and the privacy of the home was not absolute:

I would not suggest that adultery, homosexuality, fornication and incest are immune from criminal enquiry, however privately practiced. . . . But not to discriminate between what is involved in this case and either the traditional offenses against good morals or crimes which, though they may be committed anywhere, happen to have been committed or concealed in the home, would entirely misconceive the argument that is being made.

Adultery, homosexuality and the like are sexual intimacies which the State forbids altogether, but the intimacy of

⁵³ *Id.* at 551 (alteration in original) (citations omitted) (internal quotation marks omitted). As for “subsequent developments,” marital intimacy was not at issue in the opinions Harlan cited. *See, e.g.,* *Gilbert v. Minnesota*, 254 U.S. 325, 334 (1920) (Brandeis, J., dissenting) (challenging a state statute that could criminalize advocacy of pacifism in the home).

⁵⁴ *Poe*, 367 U.S. at 551–52 (Harlan, J., dissenting).

husband and wife is necessarily an essential and accepted feature of the institution of marriage, an institution which the State not only must allow, but which always and in every age it has fostered and protected.⁵⁵

“Though the State has argued the Constitutional permissibility of the moral judgment underlying this statute,” Harlan concluded that “[nothing] even remotely suggests a justification for the obnoxiously intrusive means it has chosen to effectuate that policy”.⁵⁶

Although the Federal Government and many States have at one time or another had on their books statutes forbidding or regulating the distribution of contraceptives, none, so far as I can find, has made the use of contraceptives a crime. Indeed, a diligent search has revealed that no nation, including several which quite evidently share Connecticut’s moral policy, has seen fit to effectuate that policy by the means presented here.⁵⁷

It was the “utter novelty” of the means Connecticut had employed that condemned it conclusively in Harlan’s judgment:⁵⁸

Though undoubtedly the States are and should be left free to reflect a wide variety of policies, and should be allowed broad scope in experimenting with various means of promoting those policies, . . . [t]here are limits to the extent to which a legislatively represented majority may conduct . . . experiments at the expense of the dignity and personality of the individual. In this instance these limits are, in my view, reached and passed.⁵⁹

⁵⁵ *Id.* at 552–53. Harlan went on to acknowledge that “[I]t is one thing when the State exerts its power . . . to say who may marry, but it is quite another when, having acknowledged a marriage and the intimacies inherent in it, it undertakes to regulate by means of the criminal law the details of that intimacy.” *Id.* at 553. Given that Harlan considered that the “intimacies which the law has always forbidden . . . can have no claim to social protection,” *id.* at 553, he did not likely mean to give the State a free hand to recognize as marriages what intimacies it wished.

⁵⁶ *Id.* at 554.

⁵⁷ *Id.* at 554–55 (footnotes omitted).

⁵⁸ *Id.* at 554.

⁵⁹ *Id.* at 555 (citation omitted) (internal quotation marks omitted).

Harlan acknowledged that the claim to marital privacy was novel; it received explicit protection neither in the Constitution nor in Anglo-American legal history. He inferred it syllogistically, however, from two accepted principles. The primary premise was that marriage is between a man and a woman, where “the sexual powers may be used and [which provides] the legal and societal context in which children are born and brought up.”⁶⁰ The secondary premise was the privacy of the home as “the seat of family life.”⁶¹ If there was privacy for the family, there must be privacy for the couple’s sexual relations, which formed the basis for such family.

Since the privacy of the home was not absolute, however, neither was the privacy of marital relations. Connecticut argued that, as “adultery, homosexuality, fornication and incest are [not] immune from criminal enquiry, however privately practiced,”⁶² it could also ensure that the marital relation was not abused by contraception:

It is one thing when the State exerts its power either to forbid extra-marital sexuality altogether, or to say who may marry, but it is quite another when, having acknowledged a marriage and the intimacies inherent in it, it undertakes to regulate by means of the criminal law the details of that intimacy.⁶³

Since Connecticut’s statute “marks an abridgment of important fundamental liberties,” Harlan concluded that “[a] closer scrutiny and stronger justification than [mere rationality] are required.”⁶⁴ Connecticut failed to carry that burden since, as Harlan asserted, the anti-use statute was unprecedented, now turning novelty against the State.

⁶⁰ *Id.* at 546.

⁶¹ *Id.* at 551.

⁶² *Id.* at 552.

⁶³ *Id.* at 553.

⁶⁴ *Id.* at 554 (citation omitted).

The Court would disregard Harlan's careful mode of analysis seven years later,⁶⁵ embarking on an approach to substantive due process that Justice White would call the "exercise of raw judicial power."⁶⁶

4.

In *Eisenstadt v. Baird*, Justice Brennan's opinion for a short-staffed Court invalidated a Massachusetts law criminalizing the distribution of contraceptives to unmarried, but not married persons for the purpose of preventing pregnancy.⁶⁷ Brennan invalidated the law under the Equal Protection Clause, claiming to apply settled rational-basis analysis.⁶⁸ Had he actually applied that analysis, the State's distinction between married and unmarried persons should have survived. The paradigm for that analysis was set forth in *Williamson v. Lee Optical Company*:

The problem of legislative classification is a perennial one, admitting of no doctrinaire definition. Evils in the same field may be of different dimensions and proportions, requiring different remedies. Or so the legislature may think. Or the reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind. The legislature may select one phase of one field and apply a remedy there, neglecting the others. The prohibition of

⁶⁵ Harlan himself may have set the stage three years after *Griswold*, when he dissented in *Duncan v. Louisiana*, from the incorporation of the Sixth Amendment Jury Trial Right against the States:

[T]he very breadth and generality of the [Fourteenth] Amendment's provisions suggest that its authors did not suppose that the Nation would always be limited to mid-19th century conceptions of "liberty" and "due process of law" but that the increasing experience and evolving conscience of the American people would add new "intermediate premises."

391 U.S. 145, 175–76 (1968) (Harlan, J., dissenting).

⁶⁶ *Roe v. Wade*, 410 U.S. 179, 222 (1973) (White, J., dissenting).

⁶⁷ 405 U.S. 438, 454–55 (1972). Justices Powell and Rehnquist did not participate in the case. *Id.* at 455.

⁶⁸ *Id.* at 447.

the Equal Protection Clause goes no further than the invidious discrimination.⁶⁹

Brennan, however, actually applied heightened scrutiny since he thought the State's distinction between married and unmarried persons was invidious: "If the right of privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child."⁷⁰

Brennan's suggestion that the right of privacy recognized in *Griswold* included the decision whether or not to "bear" a child was pure *ipse dixit*. Further, he reformulated the claim as the freedom to make parenting decisions,⁷¹ where Harlan, in contrast, had considered it as a claim for privacy in marital intimacy.⁷² Brennan, like Harlan, did not challenge the State's authority to declare contraception immoral⁷³ but concluded that the State must apply the policy to married and unmarried alike, even "[c]onceding that [it] could, consistently with the Equal Protection Clause, regard the problems of extramarital and premarital sexual relations 'as evils . . . of different dimensions and proportions,'"⁷⁴ and "[e]ven conceding [it] a full measure of discretion in fashioning means to prevent fornication":⁷⁵

⁶⁹ 348 U.S. 483, 489 (1955) (citations omitted). Under that analysis, the legislature, for example, might have considered the availability of contraceptives for fornication more serious than their availability for adultery. Further, it was free to address health issues associated with contraception among unmarried persons, without addressing it among married couples as well.

⁷⁰ *Eisenstadt*, 405 U.S. at 453 (citations omitted). The only supporting decision Justice Brennan cited involving sexuality was *Skinner v. Oklahoma*, 316 U.S. 535 (1942). *Skinner*, however, named "marriage and procreation," not co-habitation and contraception, as "basic civil rights of man." *Id.* at 541.

⁷¹ Brennan agreed in *Griswold* with Harlan's characterization of the right. *Griswold v. Connecticut*, 381 U.S. 479, 495 (1965) (Goldberg, J., joined by Warren, C.J., and Brennan, J., concurring) ("I agree with Mr. Justice Harlan's statement [that] . . . [o]f this whole private realm of family life, it is difficult to imagine what is more private or more intimate than a husband and wife's marital relations." (internal quotation marks omitted)).

⁷² *Poe v. Ullman*, 367 U.S. 497, 548 (1961) (Harlan, J., dissenting).

⁷³ *Eisenstadt*, 405 U.S. at 453.

⁷⁴ *Id.* at 448 (quoting *Williamson v. Lee Optical Inc.*, 348 U.S. 483, 489 (1955)).

⁷⁵ *Id.* at 449.

It is true that in *Griswold* the right of privacy in question inhered in the marital relationship. Yet the marital couple is not an independent entity with a mind and heart of its own, but an association of two individuals each with a separate intellectual and emotional makeup.⁷⁶

Admittedly, there were indications in *Griswold* that a ban on distribution, rather than use, could apply equally to married and unmarried persons.⁷⁷ That said, as Brennan was forced to concede, *Griswold*—and Anglo-American law, with its long-standing prohibitions against fornication—offered no basis for him to claim that it was not the marital bond itself that gave rise to the right of privacy. *Eisenstadt* thus set the stage for the Court's recognition of unenumerated rights under substantive due process with no basis in legal history or tradition.

That change commenced the next year with Justice Blackmun's majority opinion in *Roe v. Wade*.⁷⁸ He claimed that "the Fourteenth Amendment's concept of personal liberty and restrictions upon state action" created a zone of privacy, protecting rights with "some extension to . . . marriage, procreation, contraception, family relationships, and child rearing and education."⁷⁹ Such a zone, he asserted, was "broad enough to encompass a woman's decision whether or not to terminate her pregnancy."⁸⁰ Blackmun, however, was forced to concede that, since "[t]he pregnant woman cannot be isolated in her privacy . . . [t]he situation [of abortion] . . . is inherently different from [the decisions] with which . . . [the cases he had relied on] were respectively concerned."⁸¹ It followed from Blackmun's concession that the zone of privacy these cases created was likewise "inherently different" from the decision whether or not to terminate a pregnancy.⁸²

⁷⁶ *Id.* at 453.

⁷⁷ See *Griswold v. Connecticut*, 381 U.S. 479, 485 (1965) ("The present case . . . concerns a law which, in forbidding the *use* of contraceptives rather than regulating their manufacture or sale, seeks to achieve its goals by means having a maximum destructive impact upon [the marital] relationship.").

⁷⁸ 410 U.S. 113 (1973).

⁷⁹ *Id.* at 152–53 (citations omitted).

⁸⁰ *Id.* at 153.

⁸¹ *Id.* at 159.

⁸² *Id.*

Blackmun claimed that “only personal rights that can be deemed fundamental or implicit in the concept of ordered liberty are included in this guarantee of personal privacy.”⁸³ *Twining* had defined such rights as “fundamental principle[s] of liberty and justice which inhere[] in the very idea of free government.”⁸⁴ Harlan had described them as “what, by common understanding throughout the English-speaking world, must be granted to be a most fundamental aspect of liberty.”⁸⁵ Given that most States had criminalized abortion throughout pregnancy at the time *Roe* was decided and had done so for a long time before, neither standard was satisfied.⁸⁶ Blackmun himself had to concede that abortion was not a right long settled in American law:

[A]fter the War Between the States[,] legislation began generally to replace the common law [where criminal penalties for abortion applied only once quickening had occurred]. . . .

Gradually, in the middle and late 19th century the quickening distinction disappeared from the statutory law of most States and the degree of the offense and the penalties were increased. By the end of the 1950’s a large majority of the jurisdictions banned abortion, however, and whenever performed, unless done to save or preserve the life of the mother.⁸⁷

Ultimately, Blackmun rested the right to abort, not on history or precedent, but on “[t]he detriment that the State would impose upon the pregnant woman by denying [the] choice altogether,”⁸⁸ a policy decision the Court was simply not authorized to make. Further, even though the balance involved “issues over which reasonable men may easily and heatedly

⁸³ *Id.* at 152 (citation omitted) (internal quotation marks omitted).

⁸⁴ *Twining v. New Jersey*, 211 U.S. 78, 106 (1908).

⁸⁵ *Poe*, 367 U.S. at 548 (Harlan, J., dissenting).

⁸⁶ *Roe*, 410 U.S. at 117–18, 139.

⁸⁷ *Roe*, 410 U.S. at 139 (footnote omitted). *See id.* at 174 (Rehnquist, J., dissenting) (“The fact that a majority of the States reflecting, after all the majority sentiment in those States, have had restrictions on abortions for at least a century is a strong indication, it seems to me, that the asserted right to an abortion is not so rooted in the traditions and conscience of our people as to be ranked as fundamental.” (citation omitted) (internal quotation marks omitted)).

⁸⁸ *Id.* at 153.

differ,”⁸⁹ Blackmun required that “regulation limiting these rights may be justified only by a compelling state interest.”⁹⁰ In contrast, Harlan had given the State broad discretion in the moral policies it adopted:

If we had a case before us which required us to decide simply, and in abstraction, whether the moral judgment implicit in the application of the [anti-use] statute to married couples was a sound one, the very controversial nature of these questions would, I think, require us to hesitate long before concluding that the Constitution precluded [the State] from choosing as it has among these various views.⁹¹

Brennan had set the stage in *Eisenstadt* for *Roe*. Likewise, his opinion in *Carey v. Population Services International*⁹² laid the foundation for Justice O’Connor’s attempted rehabilitation of *Roe* in *Planned Parenthood v. Casey*.⁹³ In striking down New York’s limitations on the sale of contraceptives to minors and adults, Brennan began by blatantly revising the analysis in *Griswold*: “*Griswold* may no longer be read as holding only that a State may not prohibit a married couple’s use of contraceptives. Read in light of its progeny, the teaching of *Griswold* is that the Constitution protects individual decisions in matters of childbearing from unjustified intrusion by the State.”⁹⁴

With no historical basis, Brennan transformed protection of the marital bedroom into protection of individual decisions in matters of childbearing.⁹⁵ With no historical basis, he elevated the *ipse dixit* he used in *Eisenstadt* for heightening Equal Protection scrutiny to the status of a fundamental due process right.⁹⁶ In language O’Connor would later echo, he justified such

⁸⁹ *Doe v. Bolton*, 410 U.S. 179, 222 (1973) (White, J., dissenting).

⁹⁰ *Roe*, 410 U.S. at 155 (citations omitted) (internal quotation marks omitted).

⁹¹ *Poe v. Ullman*, 367 U.S. 497, 547 (1961) (Harlan, J., dissenting) (citation omitted).

⁹² 431 U.S. 678 (1977).

⁹³ 505 U.S. 833 (1992); *see infra* text accompanying notes 103–106.

⁹⁴ *Carey*, 431 U.S. at 687.

⁹⁵ *Id.*

⁹⁶ *Id.* at 686 (citations omitted) (“[W]here a decision as fundamental as that whether to bear or beget a child is involved, regulations imposing a burden on it may be justified only by compelling state interests and must be narrowly drawn to express only those interests.” (citing *Roe v. Wade*, 410 U.S. 113, 155–56 (1973))).

right as concerning “the most intimate of human activities and relationships.”⁹⁷

Though Brennan appeared to concede that *Griswold* did not address the manufacture or sale of contraceptives, he recharacterized the “intrusion into the sacred precincts of marital bedrooms” that was the central issue in *Griswold* into a “particularly repulsive” violation of the underlying right to make child-bearing decisions: “[S]ubsequent decisions have made clear that the constitutional protection of individual autonomy in matters of childbearing is not dependent on that element.”⁹⁸

Foreshadowing O’Connor’s “undue burden” analysis in *Casey*, Brennan further declared that “the same test must be applied to state regulations that burden an individual’s right to decide to prevent conception or terminate a pregnancy by substantially limiting access to the means of effectuating that decision as is applied to state statutes that prohibit the decision entirely.”⁹⁹ Thus, whether there was a separate constitutional right to access contraceptives, bans on distribution that present a “significant burden” on the right to make child-bearing decisions were collaterally unconstitutional.¹⁰⁰ Consequently, Brennan invalidated not only distribution bans, despite their history to the contrary,¹⁰¹ but also burdens short of direct prohibitions. In short, Brennan’s assertion that *Griswold* be “put . . . in proper perspective”¹⁰² revealed how unprincipled substantive due process had become.

Justice O’Connor, writing for a plurality in *Planned Parenthood v. Casey*, attempted to rehabilitate *Roe* nineteen years after it was decided.¹⁰³ Though she relied on Harlan for the proposition that due process had a substantive component and that it protected unenumerated rights, *she nonetheless characterized Griswold, not as prohibiting invasion of marital privacy, but as “not permit[ting] a State to forbid a married couple to use contraceptives.”*¹⁰⁴ She further acknowledged Harlan’s admonition that “[a] decision of this Court which radically departs from [“what history teaches are the

⁹⁷ *Id.* at 685.

⁹⁸ *Id.* at 687 (citation omitted) (internal quotation marks omitted).

⁹⁹ *Id.* at 688.

¹⁰⁰ *See id.* at 689.

¹⁰¹ *Poe v. Ullman*, 367 U.S. 497, 546 n.12 (1961) (Harlan, J., dissenting).

¹⁰² *Carey*, 431 U.S. at 687.

¹⁰³ 505 U.S. 833, 844–46 (plurality opinion).

¹⁰⁴ *Id.* at 848–49.

traditions from which [the nation] developed as well as the traditions from which it broke”] could not long survive.”¹⁰⁵ Nevertheless, she embraced Brennan’s *ipse dixit* in *Eisenstadt* recognizing “the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.”¹⁰⁶

It is worth noting at the outset that whatever reservations O’Connor entertained about reaffirming *Roe* “would go only to the strength of the state interest in fetal protection, not to the recognition afforded by the Constitution to the woman’s liberty.”¹⁰⁷ Yet the right she reaffirmed, to have an abortion before viability, did not appear in *Roe* but was more a conflation of the pregnant woman’s liberty interest limited by the State’s interest in protecting fetal life:

Roe’s essential holding, the holding we reaffirm, [includes] a recognition of the right of the woman to choose to have an abortion before viability and to obtain it without undue interference from the State. Before viability, the State’s interests are not strong enough to support a prohibition of abortion or the imposition of a substantial obstacle to the woman’s effective right to elect the procedure.¹⁰⁸

She did not explain why viability was relevant where the State restricted abortion to protect maternal health. If the definition of a right included its limitations, as O’Connor reasoned, the definition would vary with

¹⁰⁵ *Id.* at 849–50 (quoting *Poe*, 367 U.S. at 542 (Harlan, J., dissenting)).

¹⁰⁶ *Id.* at 851 (quoting *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972)). Other cases O’Connor cited—“afford[ing] constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing . . . education[, and] . . . the private realm of family life,” were all distinct from abortion as not involving the termination of another life. *Id.* at 851–52 (citations omitted) (internal quotation marks omitted). She noted that these cases “involve[ed] the most intimate and personal choices a person may make in a lifetime,” *id.* at 851; she later agreed, however, “[t]hat many of the rights and liberties protected by the Due Process Clause sound in personal autonomy does not warrant the sweeping conclusion that any and all important, intimate, and personal decisions are so protected, and *Casey* did not suggest otherwise.” *Washington v. Glucksberg*, 521 U.S. 702, 727–28 (Rehnquist, C.J., joined by O’Connor, Scalia, Kennedy & Thomas, JJ.).

¹⁰⁷ *Casey*, 505 U.S. at 858.

¹⁰⁸ *Id.* at 846.

each separate limiting interest. Further, even though she confirmed “the State’s power to restrict abortions after fetal viability, if the law contains exceptions for pregnancies which endanger the woman’s life or health,”¹⁰⁹ she did not explain how a right limited by viability rather than continuing throughout pregnancy would support such exceptions.¹¹⁰

O’Connor placed the right to abortion squarely on the undeniable fact that “[t]he mother who carries a child to full term is subject to anxieties, to physical constraints, to pain that only she must bear.”¹¹¹ This was the same policy ground at the heart of *Roe*.¹¹² O’Connor, however, further implied that restrictions on abortion might raise issues of sex discrimination: “[The pregnant woman’s] suffering is too intimate and personal for the State to insist, without more, upon its own vision of the woman’s role.”¹¹³ Yet a year later, the Court held that the interest in preventing abortion to protect fetal life was not itself invidious discrimination against women.¹¹⁴

O’Connor further claimed that “in some critical respects the abortion decision is of the same character as the decision to use contraception . . . because they involve personal decisions concerning not only the meaning of procreation but also human responsibility and respect for it.”¹¹⁵ But even Blackmun was forced to concede that abortion and contraception were inherently different since the former, but not the latter, involved termination of another life.¹¹⁶ Moreover, O’Connor’s contention that “[i]f indeed the woman’s interest in deciding whether to bear and beget a child had not been recognized as in *Roe*, the State might as readily restrict a woman’s right to choose to carry a pregnancy to term as to terminate it,”¹¹⁷ equates taking life with attempts to preserve it and abortion with procreation, a basic civil right

¹⁰⁹ *Id.*

¹¹⁰ O’Connor did not separately examine whether a pregnant woman’s right to life would require such exceptions. She may have simply presumed without explanation that it would outweigh the life of a viable fetus even when capable of “independent existence” outside the womb. *See infra* notes 124–25.

¹¹¹ *Id.* at 852.

¹¹² *Roe v. Wade*, 410 U.S. 113, 153, 159, 163 (1973).

¹¹³ *Casey*, 505 U.S. at 852.

¹¹⁴ *Bray v. Alexandria Women’s Health Clinic*, 506 U.S. 263, 273–74 (1993).

¹¹⁵ *Casey*, 505 U.S. at 852–53.

¹¹⁶ *Roe*, 410 U.S. at 159.

¹¹⁷ *Casey*, 505 U.S. at 859.

“fundamental to the very existence and survival of the race.”¹¹⁸ O’Connor claimed that *Roe* had also relied on bodily integrity to support the abortion right: “*Roe* . . . may be seen not only as an exemplar of *Griswold* liberty but as a rule . . . of personal autonomy and bodily integrity, with doctrinal affinity to cases recognizing limits on governmental power to mandate medical treatment or to bar its rejection.”¹¹⁹

Roe, however, rejected the notion that prior cases had recognized an unlimited right to bodily integrity.¹²⁰ Further, as O’Connor herself acknowledged, all the cases she relied on involved forced medical treatment and not a right to access such treatment.¹²¹ The prior cases have a “doctrinal affinity”¹²² to “the common law doctrine of informed consent . . . generally encompassing the right of a competent individual to refuse medical treatment.”¹²³ The right to receive medical treatment, in contrast, lacks such affinity.

O’Connor further claimed that “[i]n some broad sense it might be said that a woman who fails to act before viability has consented to the State’s intervention on behalf of the developing child.”¹²⁴ It could equally be said, as “an element of fairness,”¹²⁵ that a woman who consents to intercourse has assumed the very real risk of pregnancy, a risk contraceptives cannot wholly eliminate.

O’Connor identified *Roe*’s trimester analysis as its primary defect, concluding that “[a] framework of this rigidity was unnecessary and in its later interpretation sometimes contradicted the State’s permissible exercise of its powers.”¹²⁶ As she saw it, “[t]he trimester framework suffers from these basic flaws: in its formulation it misconceives the nature of the pregnant

¹¹⁸ *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942).

¹¹⁹ *Casey*, 505 U.S. at 849, 857.

¹²⁰ *Roe*, 410 U.S. at 154 (“[I]t is not clear to us that . . . one has an unlimited right to do with one’s body as one pleases bears a close relationship to the right of privacy previously articulated in the Court’s decisions. The Court has refused to recognize an unlimited right of this kind in the past.” (citations omitted)).

¹²¹ *Casey*, 505 U.S. at 857.

¹²² *Id.*

¹²³ *Cruzan v. Dir., Mo. Dep’t of Health*, 497 U.S. 261, 277 (1990).

¹²⁴ *Casey*, 505 U.S. at 870.

¹²⁵ *Id.*

¹²⁶ *Id.* at 872.

woman's interest; and in practice it undervalues the State's interest in potential life."¹²⁷

She concluded that "a necessary reconciliation of the liberty of the woman and the interest of the State in promoting prenatal life, require . . . that we abandon the trimester framework as a rigid prohibition on all previability regulation aimed at the protection of fetal life."¹²⁸

O'Connor did not believe this required reevaluation of the pregnant woman's right as recognized in *Roe* but concluded that the right was only abridged if the State imposed an undue burden on its exercise:

The fact that a law which serves a valid purpose, one not designed to strike at the right itself, has the incidental effect of making it more difficult or more expensive to procure an abortion cannot be enough to invalidate it. Only where state regulation imposes an undue burden on a woman's ability to make this decision does the power of the State reach into the heart of the liberty protected by the Due Process Clause.¹²⁹

She thus created a new class of Fourteenth Amendment rights. Under standard analysis, a claim received only rational basis review unless it was classified as fundamental. In that event, the State could still prohibit the exercise of the right if its interest was compelling and the prohibition was necessary to achieve that end. O'Connor contended that an interest "designed to strike at the right itself" was illicit.¹³⁰ The contention, however, had no bearing on abortion as she had already defined the right in relation to the compelling end of protecting fetal life.¹³¹ In other words, the State could regulate the claim to abort but not outright deny it; it thus assumed an element of absolute protection. In contrast, rather than requiring the State to demonstrate that no less drastic alternatives were available, she permitted it to pursue restrictions, less than outright denials, that the claimant could not

¹²⁷ *Id.* at 873.

¹²⁸ *Id.*

¹²⁹ *Id.* at 874. All but one of the opinions O'Connor cited for this proposition were her own. The exception was the decision in *Ohio v. Akron Center for Reproductive Health*, 497 U.S. 502, 519–20 (1990), where Justice Kennedy had concluded that the challenged statute regulating minors' access to abortion, and thus justifying broader State discretion, did not "impose an undue, or otherwise unconstitutional, burden."

¹³⁰ *Casey*, 505 U.S. at 873.

¹³¹ *Id.* at 874.

show were unduly burdensome.¹³² She thus pulled a junior varsity class of liberty interests out of thin air.

O'Connor did not disturb *Roe's* conclusion that a fetus was not a person and repeatedly understated its value before viability. She characterized the fetus as having only "potential life."¹³³ Yet there is no question that the fertilized egg begins and continues to divide, and develops on a trajectory of its own and not as a part of the woman's body:

Fetal development is an orderly and intricate process. . . . Between conception and delivery, there are many detailed steps that have to occur. There are three stages of fetal development: germinal, embryonic, and fetal. . . .

The germinal stage is the shortest stage of fetal development. It begins at conception when a sperm and egg join in [the] fallopian tube. The sperm fertilizes the egg and creates a zygote. The zygote begins its journey down to [the] uterus over the course of about one week. During this journey, the zygote divides many times, eventually creating two separate structures. One structure eventually becomes the embryo (and later, the fetus) and the other becomes the placenta. Cell division continues at a rapid pace. Eventually, the zygote turns into a blastocyst. The blastocyst arrives at [the] uterus and implants into [the] uterine lining. . . .

The embryonic stage lasts from about the third week of pregnancy until the . . . eighth week The blastocyst begins to take on distinct human characteristics. It's now called an embryo. Structures and organs like the neural tube (which later becomes the brain and spinal cord), head, eyes, mouth, and limbs form. The cells that will form the fetal heart begin to cluster around five to six weeks and can pulse. Buds that will become arms and legs also form around the sixth week. By the end of the eighth week, most of the embryo's organs and systems take shape. . . .

¹³² *Id.*

¹³³ *Id.* at 852, 859, 871, 872. She was not merely restating *Roe*, as she herself indicated that "[o]n the other side of the equation is the interest of the State in the protection of potential life." *Id.* at 871.

The fetal stage of development begins around the ninth week and lasts until birth. . . . The fetus gets its assigned sex around nine weeks of pregnancy The fetus’s major organs and body systems continue to grow and mature. Things like fingernails, eyelashes, and hair also grow. The fetus is able to move its limbs, although [the pregnant woman] may not feel it until 20 weeks of pregnancy. The majority of growth—in both weight and length—happens in the fetal stage.¹³⁴

O’Connor alternatively repeated *Roe*’s characterization of the fetus as having only “the potentiality of human life.”¹³⁵ “Fetus,” however, is not a separate species with the potential of turning human. It is one phase in “an orderly and intricate process” of human development. That process begins with a being that is genetically human and inevitably ends, not with a plant or a tadpole, but with a being likewise human.

Roe conflated two distinct questions: What is a fetus’s species, and what is its legal status. The latter concerns whether a fetus is a person, not “in the whole sense,”¹³⁶ as Blackmun misstated it, but in the fundamental sense of having the right to life. Given that laws had changed by the time the Fourteenth Amendment was adopted to criminalize pre-quickening abortion,¹³⁷ its framers could have considered fetuses among the persons whose lives that Amendment protected from deprivation without due process of law.

In any event, O’Connor let stand *Roe*’s claim that, even if a fetus were neither a person nor human, the State could assert an interest in its preservation. That interest became compelling at viability, not simply as a reaffirmation of *Roe*, but because it was “the time at which there is a realistic possibility of maintaining and nourishing a life outside the womb, so that the independent existence of the second life can in reason and all fairness be the object of state protection that now overrides the rights of the woman.”¹³⁸ Though the State usually accommodates the rights of physically separate claimants, that is not always the case, as the common law protection of pre-

¹³⁴ *Fetal Development*, CLEV. CLINIC (Mar. 19, 2024), <https://perma.cc/66QL-ZN2U>.

¹³⁵ *Casey*, 505 U.S. at 871, 876, 879.

¹³⁶ *Roe v. Wade*, 410 U.S. 113, 162 (1973).

¹³⁷ *Id.* at 138–39.

¹³⁸ *Casey*, 505 U.S. at 870 (citation omitted).

viability quickened fetuses demonstrates. The question concerns whether the pregnant woman and the fetus are of equal value, not whether they have independent existence. This is why O'Connor presumed that the life of a viable fetus could not outweigh the life or health of the pregnant woman since the latter was a person and the former, as Blackmun argued and she apparently agreed, was not. Writing for the Court five years later in *Washington v. Glucksberg*, Chief Justice Rehnquist attempted to put the Court's substantive due process house back in order.¹³⁹

5.

In *Glucksberg*, Rehnquist announced a standard for identifying fundamental rights that took elements from *Twining* and *Palko*:

Our established method of substantive-due-process analysis has two primary features: First, we have regularly observed that the Due Process Clause specially protects those fundamental rights and liberties which are, objectively, "deeply rooted in this Nation's history and tradition," and "implicit in the concept of ordered liberty," such that "neither liberty nor justice would exist if they were sacrificed." Second, we have required in substantive-due-process cases a "careful description" of the asserted fundamental liberty interest.¹⁴⁰

The first feature of this standard requires history as a baseline: The claimed rights must be "so rooted in the traditions and conscience of our people as to be ranked as fundamental."¹⁴¹ In contrast, to be "implicit in the concept of ordered liberty," they must also be "such that neither liberty nor justice would exist if they were sacrificed."¹⁴² Requiring, as a threshold, that such rights have a firm basis in history "tends to rein in the subjective elements that are necessarily present in due-process judicial review";¹⁴³

¹³⁹ 521 U.S. 702, 705 (1997) (rejecting a challenge to the State's ban on assisted suicide).

¹⁴⁰ *Id.* at 720–21 (citations omitted).

¹⁴¹ *Id.* at 721 (quoting *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934)).

¹⁴² *Id.* (citation omitted) (internal quotation marks omitted).

¹⁴³ *Id.* at 722. The Court thus rejected Justice Souter's reliance on Harlan's base in *Poe*, whether the State had committed "one of those arbitrary impositions or purposeless restraints at odds with the Due Process Clause of the Fourteenth Amendment," *id.* at

requiring, as a floor, that they are “implicit in the concept of ordered liberty” not only provides flexibility for state experimentation but also revives natural law as an aspect of due process analysis.

The second feature of Rehnquist’s analysis, “carefully refining” the claimed right, was a further method “to rein in the subjective elements”¹⁴⁴ that had plagued much of the Court’s privacy caselaw, as for example, characterizing the claim as a right to engage in “intimate and personal”¹⁴⁵ activities that could extend to most sexual conduct. Such elements were evident in the en banc Court of Appeals decision under review in *Glucksberg*. That court had announced: “Properly analyzed, the first issue to be resolved is whether there is a liberty interest in determining the time and manner of one’s death,”¹⁴⁶ or, in other words, “[i]s there a right to die?”¹⁴⁷ Relying on an expansive reading of *Casey* and *Cruzan v. Director, Missouri Department of Health*, which had assumed a Fourteenth Amendment liberty interest in refusing artificially administered nutrition and hydration,¹⁴⁸ the Court of Appeals answered in the affirmative;¹⁴⁹ but the Supreme Court reversed:

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

752 (Souter, J., concurring in the judgment) (internal quotation marks omitted) (quoting *Poe v. Ullman*, 367 U.S. 497, 543 (1961) (Harlan, J., dissenting)), as too expansive. Souter, however, had further quoted Harlan as recognizing that “certain interests requir[e] particularly careful scrutiny of the state needs asserted to justify their abridgment.” *Id.* (quoting *Poe*, 367 U.S. at 543 (Harlan, J., dissenting)).

¹⁴⁴ *Id.* at 722 (majority opinion).

¹⁴⁵ *Id.* at 726–27 (“That many of the rights and liberties protected by the Due Process Clause sound in personal autonomy does not warrant the sweeping conclusion that any and all important, intimate, and personal decisions are so protected” (citation omitted)).

¹⁴⁶ *Compassion in Dying v. Washington*, 79 F.3d 790, 801 (9th Cir. 1996).

¹⁴⁷ *Id.* at 799.

¹⁴⁸ 497 U.S. 261, 265 (1990) (upholding a requirement for clear and convincing evidence of an incompetent patient’s wishes before artificially administered nutrition and hydration were removed).

¹⁴⁹ *Compassion in Dying*, 79 F.3d at 799–801, 838–39.

traditions. The decision to commit suicide with the assistance of another may be just as personal and profound as the decision to refuse unwanted medical treatment, but it has never enjoyed similar legal protection.¹⁵⁰

Harlan had previously cautioned against viewing history and tradition too narrowly:

[T]hough “Legislation, both statutory and constitutional, is enacted, . . . from an experience of evils . . . its general language should not, therefore, be necessarily confined to the form that evil had theretofore taken. . . . [A] principle, to be vital, must be capable of wider application than the mischief which gave it birth.”¹⁵¹

Rehnquist heeded this warning in *Cruzan*. In addressing the novel claim regarding whether there was a liberty interest in refusing artificially administered nutrition and hydration, he set forth his first premise: “At common law, even the touching of one person by another without consent and without legal justification was a battery.”¹⁵² From this, he derived his next premise: “This notion of bodily integrity has been embodied in the requirement that informed consent is generally required for medical treatment.”¹⁵³ “The logical corollary of the doctrine of informed consent,” he continued, “is that the patient generally possesses the right not to consent, that is, to refuse treatment.”¹⁵⁴ He concluded, assuming for the purposes of the case, that “the United States Constitution would grant a competent person a constitutionally protected right to refuse lifesaving hydration and nutrition.”¹⁵⁵

¹⁵⁰ *Glucksberg*, 521 U.S. at 725.

¹⁵¹ *Poe v. Ullman*, 367 U.S. 497, 551 (1961) (Harlan, J., dissenting) (quoting *Weems v. United States*, 217 U.S. 349, 373 (1910)).

¹⁵² *Cruzan*, 497 U.S. at 269.

¹⁵³ *Id.* (“The informed consent doctrine has become firmly entrenched in American tort law.”).

¹⁵⁴ *Id.* at 270.

¹⁵⁵ *Id.* at 279. Rehnquist, however, accepted without analysis that such administration was “medical treatment,” rather than basic care that patients might have a legal duty not to refuse. *Id.* at 276.

With this conclusion in mind, Rehnquist turned in *Vacco v. Quill*,¹⁵⁶ decided with *Glucksberg*, to whether physician-assisted suicide was analogous. The consequences of both were the same, the patient died; yet the means were different: “First, when a patient refuses life-sustaining medical treatment, he dies from an underlying fatal disease or pathology; but if a patient ingests lethal medication prescribed by a physician, he is killed by that medication.”¹⁵⁷

Further, Rehnquist recognized that the intent underlying refusal of life-support and assisted suicide was not necessarily the same:

[A] physician who withdraws, or honors a patient’s refusal to begin, life-sustaining medical treatment purposefully intends, or may so intend, only to respect his patient’s wishes and to cease doing useless and futile or degrading things to the patient when the patient no longer stands to benefit from them. The same is true when a doctor provides aggressive palliative care; in some cases, painkilling drugs may hasten a patient’s death, but the physician’s purpose and intent is or may be, only to ease his patient’s pain. A doctor who assists a suicide, however, must, necessarily and indubitably, intend primarily that the patient be made dead. Similarly, a patient who commits suicide with a doctor’s aid necessarily has the specific intent to end his or her own life, while a patient who refuses or discontinues treatment might not.¹⁵⁸

¹⁵⁶ 521 U.S. 793, 796–97 (1997) (rejecting an equal protection challenge to New York’s ban on assisted suicide, while permitting refusal of life-sustaining treatment).

¹⁵⁷ *Id.* at 801 (citations omitted).

¹⁵⁸ *Id.* at 801–02 (alteration in original) (citations omitted) (internal quotation marks omitted). Chief Justice Roberts employed a similar analysis in *United States v. Rahimi*, 602 U.S. 680, 690 (2024), rejecting a Second Amendment challenge to a federal statute prohibiting persons from possessing firearms if subject to a restraining order that finds them a credible threat to their intimate partners. The challenged regulation “need not be a ‘dead ringer’ or a ‘historical twin’ [to settled practice,]” *id.* at 692 (citation and footnote omitted); but “when . . . [it] does not precisely match its historical precursors, it still may be analogous enough to pass constitutional muster.” *Id.* (citation omitted) (internal quotation marks omitted). Roberts, like Rehnquist in *Vacco*, concluded that “[w]hy and how the regulation burdens the right are central to this inquiry.” *Id.* (citation omitted).

“Put differently,” Rehnquist observed, “the law distinguishes actions taken because of a given end from actions taken in spite of their unintended but foreseen consequences.”¹⁵⁹ Given that “[t]he law has long used actors’ intent or purpose to distinguish between two acts that may have the same result,”¹⁶⁰ he denied that physician-assisted suicide and refusal of life-saving treatment were analogous.¹⁶¹

¹⁵⁹ *Vacco*, 521 U.S. at 802–03 (citations omitted) (internal quotation marks omitted).

¹⁶⁰ *Id.* at 802 (citations omitted).

¹⁶¹ *Id.* at 803–08. Though he ultimately concurred in the judgments in both *Glucksberg* and *Vacco*, Justice Souter reasoned that the two acts were analogous:

The argument supporting [the challengers’] position thus progresses through three steps of increasing forcefulness. First, it emphasizes the decriminalization of suicide. . . . While the common law prohibited both suicide and aiding a suicide, with the prohibition on aiding largely justified by the primary prohibition on self-inflicted death itself, . . . the State’s rejection of the traditional treatment of the one leaves the criminality of the other open to questioning that previously would not have been appropriate. The second step in the argument is to emphasize that the State’s own act of decriminalization gives a freedom of choice much like the individual’s option in recognized instances of bodily autonomy. One of these, abortion, is a legal right to choose in spite of the interest a State may legitimately invoke in discouraging the practice, just as suicide is now subject to choice, despite a State’s interest in discouraging it. The third step is to emphasize that [challengers] claim a right to assistance not on the basis of some broad principle that would be subject to exceptions if that continuing interest of the State in discouraging suicide were to be recognized at all. [They] base their claim on the traditional right to medical care and counsel, subject to the limiting conditions of informed, responsible choice when death is imminent, conditions that support a strong analogy to rights of care in other situations in which medical counsel and assistance have been available as a matter of course.

Washington v. Glucksberg, 521 U.S. 702, 781 (1997) (Souter, J, concurring in the judgment). The fallacy in Souter’s analysis was in concluding that the decriminalization of suicide undermined the basis for prohibiting its assistance. In contrast, Rehnquist observed that:

[T]he movement away from the common law’s harsh sanctions [against the suicide’s family] did not represent an acceptance of suicide; rather . . . this change reflected the growing consensus that it was unfair to punish the suicide’s family for his wrongdoing. . . .

6.

Finally, in *Dobbs v. Jackson Women’s Health Organization*,¹⁶² Justice Alito attempted to fashion a unitary standard for substantive claims under the Due Process Clause. Writing for the majority, he used that standard to overturn *Roe* and *Casey*, holding that liberty in the Fourteenth Amendment did not include a right to abortion.¹⁶³

Alito began by recognizing that the Due Process Clause had protected substantive, as well as procedural rights.¹⁶⁴ His focus, however, was on the former:

[O]ur decisions have held that the Due Process Clause protects two categories of substantive rights.

The first consists of rights guaranteed by the first eight Amendments. . . . The second category—which is the one in question here—comprises a select list of fundamental rights that are not mentioned anywhere in the Constitution.¹⁶⁵

He then claimed that prior cases had applied a unitary standard in both: “In deciding whether a right falls into either of these categories, the Court has long asked whether the right is ‘deeply rooted in [our] history and tradition’ and whether it is essential to our Nation’s ‘scheme of ordered liberty.’”¹⁶⁶

The three cases Alito cited in support all used this same language. The first, *Timbs v. Indiana*, addressed a procedural, not a substantive right:

That suicide remained a grievous, though nonfelonious, wrong is confirmed by the fact that colonial and early state legislatures and courts did not retreat from prohibiting assisting suicide.

Id. at 713–14 (majority opinion) (citations omitted). Thus, in decriminalizing suicide, States were not recognizing “a freedom of choice”; rather, in retaining the criminal penalty for assistance, they “continued to condemn it as a grave public wrong.” *Id.* at 714 (“No sophistry is tolerated . . . which seek[s] to justify self-destruction as commendable or even a matter of personal right[.]” (quoting *Blackwood v. Jones*, 149 So. 600, 601 (1933))).

¹⁶² *Dobbs v. Jackson Women’s Health Org.*, 597 U.S. 215 (2022).

¹⁶³ *Id.* at 240.

¹⁶⁴ *Id.* at 237.

¹⁶⁵ *Id.*

¹⁶⁶ *Id.* at 237–38 (citing *Timbs v. Indiana*, 586 U.S. 146, 150 (2019); *McDonald v. City of Chicago*, 561 U.S. 742, 764, 767 (2010); *Glucksberg*, 521 U.S. at 721).

Whether the Excessive Fines Clause of the Eighth Amendment was applicable to the States.¹⁶⁷ The second, *McDonald v. Chicago*, did involve a substantive right, but one contained in the Bill of Rights: Whether the right to keep and bear arms was likewise applicable to the States.¹⁶⁸ The third case was *Glucksberg* itself.¹⁶⁹ Alito did not mention, however, in his citation to *Glucksberg*, that there was an alternative formulation of the standard in that case, one that he had already found controlling: For the Due Process Clause to guarantee rights not mentioned in the Constitution, the right must be “implicit in the concept of ordered liberty,”¹⁷⁰ rather than “essential to our Nation’s scheme of ordered liberty.”¹⁷¹

Thus, based on these cases, Alito formulated an overarching standard for due process analysis: If a substantive right is enumerated in the Bill of Rights or if it is nonetheless deeply rooted in our legal history and tradition, the Court will apply it against the States under the Fourteenth Amendment only if it is essential to an American scheme of ordered liberty.¹⁷²

Before turning to the merits, Alito again affirmed that in recognizing unenumerated rights the Court would be “guided by the history and tradition that map the essential components of our Nation’s concept of ordered liberty.”¹⁷³ In curbing judicial discretion, however, it is sufficient to consider

¹⁶⁷ 586 U.S. at 149 (2019).

¹⁶⁸ 561 U.S. at 767 (2010).

¹⁶⁹ *Glucksberg*, 521 U.S. at 720–21 (1997).

¹⁷⁰ *Dobbs*, 597 U.S. at 231 (citations omitted).

¹⁷¹ *Id.* at 237–38 (citations omitted) (internal quotation marks omitted). Alito also quoted from *Duncan v. Louisiana*, 391 U.S. 145, 148 (1968), asking whether “a right is among those fundamental principles of liberty and justice which lie at the base of our civil and political institutions.” *Dobbs*, 597 U.S. at 239 n.19 (internal quotation marks omitted). He failed to mention, however, that *Duncan* was, by this language, expressly fashioning a new standard for incorporating procedural protections from the Bill of Rights. *Duncan*, 391 U.S. at 149 n.14. Alito further noted that Justice Cardozo in *Palko v. Connecticut*, 302 U.S. 319, 325 (1937), had quoted his own opinion in *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934) (internal quotation marks omitted), as requiring “a principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.” *Dobbs*, 597 U.S. at 239 n.19. He failed also to mention here, however, that *Palko* was the source of the standard that the Due Process Clause guaranteed only rights “implicit in the concept of ordered liberty” without which “a fair and enlightened system of justice would be impossible.” *Palko*, 302 U.S. at 325.

¹⁷² *See Dobbs*, 597 U.S. at 231, 237–38.

¹⁷³ *Id.* at 240.

only claims deeply rooted in our legal history.¹⁷⁴ Requiring that they are also essential to that history, rather than asking whether “neither liberty nor justice would exist if they were sacrificed,”¹⁷⁵ would prove largely redundant.

Alito did not mention that his standard was originally fashioned in *Duncan v. Louisiana* to decide whether procedural provisions in the Bill of Rights, specifically the Sixth Amendment Jury Trial Right, would apply against the States.¹⁷⁶ As Harlan had observed of the application of that standard in *Duncan*:

The Court says that some clauses [of the Bill of Rights] are more “fundamental” than others, but it turns out to be using this word in a sense that would have astonished Mr. Justice Cardozo [in *Palko*] and which, in addition, is of no help. The word does not mean “analytically critical to procedural fairness” for no real analysis of the role of the jury in making procedures fair is even attempted. Instead, the word turns out to mean “old,” “much praised,” and “found in the Bill of Rights.” The definition of “fundamental” thus turns out to be circular.¹⁷⁷

Alito fashioned a standard for substantive due process that required a long history in Anglo-American law before a claimed right was recognized as the law of the land:

[I]t would be anomalous if similar historical support [required for incorporating express Bill of Rights’ provisions] were not [also] required when a putative right is not mentioned anywhere in the Constitution. Thus, in *Glucksberg* . . . the Court . . . made clear that a fundamental right must be “objectively, deeply rooted in this Nation’s history and tradition.”¹⁷⁸

Alito reasoned that relying on such history and tradition would rein in judicial discretion regarding the meaning of “liberty” under the Fourteenth Amendment: “Historical inquiries of this nature are essential

¹⁷⁴ *See id.*

¹⁷⁵ *Palko*, 302 U.S. at 326 (citing *Twining v. New Jersey*, 211 U.S. 78, 99 (1908)).

¹⁷⁶ *Duncan*, 391 U.S. 145, 149 n.14.

¹⁷⁷ *Id.* at 183 (Harlan, J., dissenting).

¹⁷⁸ *Dobbs*, 597 U.S. at 239 (citing *Washington v. Glucksberg*, 521 U.S. 702, 720–21 (1997)).

whenever we are asked to recognize a new component of the ‘liberty’ protected by the Due Process Clause because the term ‘liberty’ alone provides little guidance. ‘Liberty’ is a capacious term.”¹⁷⁹

Given *Eisenstadt*, *Roe*, and the like, Alito had good reason to fear that the Court had surrendered to “the natural human tendency to confuse what [the Fourteenth] Amendment protects with our own ardent views about the liberty that Americans should enjoy.”¹⁸⁰ Overreaction, however, is another “natural human tendency” that the Court fell prey to after *Lochner*,¹⁸¹ and that may explain its “ardent views” about Originalism today.¹⁸² The long-standing “reluctan[ce]’ to recognize rights that are not mentioned in the Constitution”¹⁸³ may have given way in *Dobbs* to a practical refusal.

In any event, history will provide both the floor and the ceiling for identifying unenumerated rights after *Dobbs* since inquiring what has a long pedigree in American legal history and what is essential to an American scheme of ordered liberty is effectively to ask the same question. Besides eliminating the broad discretion States had under the prior standard, Alito’s reformulation would confine unenumerated rights only to those firmly established at the time the Fourteenth Amendment was ratified.

In contrast, Harlan had observed that:

[T]he very breadth and generality of the [Fourteenth] Amendment’s provisions suggest that its authors did not suppose that the Nation would always be limited to mid-19th century

¹⁷⁹ *Id.* In support, Alito referenced the “well-known essay [of] Isaiah Berlin report[ing] that ‘[h]istorians of ideas’ had cataloged more than 200 different senses in which the term [freedom] had been used.” *Id.* at 239 (quoting ISIAH BERLIN, *FOUR ESSAYS ON LIBERTY* 121 (1969)). Berlin provided no authority for the number of historians he claimed.

¹⁸⁰ *Dobbs*, 597 U.S. at 239.

¹⁸¹ *See Lochner v. New York*, 198 U.S. 45, 63–65 (1905) (holding unconstitutional a New York law that limited the hours an employee could work per week as being an arbitrary interference with the freedom to contract guaranteed by the Fourteenth Amendment); *cf. Ferguson v. Skrupa*, 372 U.S. 726, 732 (1963) (footnote omitted) (“Whether the legislature takes for its textbook Adam Smith, Herbert Spencer, Lord Keynes, or some other is no concern of ours.”).

¹⁸² *See, e.g., United States v. Rahimi*, 602 U.S. 680, 728 (2024) (Kavanaugh, J., concurring) (coupling Scalia with Madison and Marshall as “leading actors and theorists in the earliest and latest chapters of the American constitutional story”).

¹⁸³ *Dobbs*, 597 U.S. at 239.

conceptions of “liberty” and “due process of law” but that the increasing experience and evolving conscience of the American people would add new “intermediate premises.”¹⁸⁴

The *Dobbs* Court, however, emphatically rejected this perspective for an overly rigid reliance on history.¹⁸⁵

Unquestionably, to avoid the return of “raw judicial power,” rights firmly fixed in history must form the foundation for any subsequent substantive due process analysis, though the Court should allow States the latitude to experiment as long as basic justice is not denied. That said, extending historically rooted rights through the syllogistic and analogical reasoning Harlan and Rehnquist had employed would provide for gradual growth while preserving the needed continuity.

In a famous passage, Chief Justice Marshall explained that the Constitution was “intended to endure for ages to come, and consequently, to be adapted to the various crises of human affairs,” and thus to provide “for exigencies, which, if foreseen at all, must have been seen dimly.”¹⁸⁶

No one denies that, to survive, government requires stability; that the Judiciary is the institution best able to provide that stability; and that it must rely in large measure on history to perform that function. Yet, “it is a *constitution* we are expounding,”¹⁸⁷ not a sacred text but a governmental scheme the Framers devised to let people live out their lives peacefully in an unpredictable world. They were not prophets but men who could foresee the future, if at all, only dimly. They thus adopted a Constitution “to be adapted to the various *crises* of human affairs” and established a tri-part government to address exigencies “as they occur.”¹⁸⁸ But to fixate on history as the beginning and the end when such exigencies involve novel claims of substantive rights is to deprive the Court “of the capacity to avail itself of experience, to exercise its reason, and to accommodate its . . . [judgement] to circumstances.”¹⁸⁹ In the end, exigencies only foreseen dimly will not be seen at all if the Court is always facing backwards.

¹⁸⁴ *Duncan v. Louisiana*, 391 U.S. 145, 175 (1968) (Harlan, J., dissenting).

¹⁸⁵ *See Dobbs*, 597 U.S. at 231, 237–40.

¹⁸⁶ *M’Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 415 (1819) (emphasis omitted).

¹⁸⁷ *Id.* at 407.

¹⁸⁸ *Id.* at 415.

¹⁸⁹ *Id.* at 415–16.