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# "Life" and "Liberty": Their Original Meaning, Historical Antecedents, and Current Significance in the Debate Over Abortion Rights

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# "Life" and "Liberty": Their Original Meaning, Historical Antecedents, and Current Significance in the Debate Over Abortion Rights

Sheldon Gelman<sup>1</sup>

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## INTRODUCTION

The legal controversy over abortion has been a dispute about constitutional "liberty." Constitutional debate has ranged far and wide over questions of natural law, interpretative method, and judicial function,<sup>2</sup> yet liberty remains the focal

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2. Compare Ronald Dworkin, *Unenumerated Rights: Whether and How Roe Should be Overruled*, 59 U. CHI. L. REV. 381, 387 (1992) (arguing that the words of the Bill of Rights denote "broad and abstract principles of political morality" that courts must interpret) with Frank H. Easterbrook, *Substance and Due Process*, 1982 SUP. CT. REV. 85, 125 (arguing that the "method of substantive due process" is that "the Court makes no pretense that its judgments have any basis other than the Justices' view of desirable policy") with Richard A. Epstein, *Substantive Due Process by Any Other Name: The Abortion Cases*, 1973 SUP. CT. REV. 159, 185 (criticizing the "entire method of constitutional interpretation that allows the Supreme Court in the name of Due Process both to 'define' and to 'balance' interests on the major social and political issues of our time") and with MICHAEL J. PERRY, *THE CONSTITUTION, THE COURTS, AND HUMAN RIGHTS* ix (1982) (defending "noninterpretive review"—by which Perry means "constitutional policymaking (by the judiciary) that goes beyond the value judgments established by the framers of the written Constitution"—in

point. It is widely believed that *if* abortion and privacy rights derive from anything in the Constitution, they derive from "liberty," and that if anything in the Constitution tells us how to treat those rights, "liberty" does.<sup>3</sup>

In *Roe v. Wade*,<sup>4</sup> the Court traced abortion rights to the "liberty" guaranteed in the Due Process Clauses.<sup>5</sup> *Planned Parenthood v. Casey*<sup>6</sup> reaffirmed those rights in an opinion that began and ended with the word "liberty."<sup>7</sup> Critics of *Roe* and *Casey* argue that "liberty" does not or cannot encompass abortion rights,<sup>8</sup> or that abortion represents an ordinary "liberty interest" that governments may restrict with a relatively free hand, rather than a fundamental right deserving strict scrutiny.<sup>9</sup>

These views of liberty rest on a century old interpretation of the phrase "life, liberty, or property" that treats "liberty" as the preeminent term in the Due Process Clauses and as a source of new, unenumerated rights. The phrase "life, liberty, or prop-

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human rights cases); see also Paul Brest, *The Fundamental Rights Controversy: The Essential Contradictions of Normative Constitutional Scholarship*, 90 YALE L.J. 1063, 1109 (1981) (arguing that the current controversy about fundamental rights and substantive due process is unproductive, "limit[ing] both our vision and the possibilities for social change"); Michael J. Perry, *The Legitimacy of Particular Conceptions of Constitutional Interpretation*, 77 VA. L. REV. 669, 702-09 (1991) (in a modification of his earlier positions, arguing that "originalism" in constitutional interpretation also "entails nonoriginalism" and providing a typology of originalist and nonoriginalist positions). See generally GERALD GUNTHER, CONSTITUTIONAL LAW 514-21 (12th ed. 1991) (summarizing the debates over these subjects).

3. See, e.g., *Planned Parenthood v. Casey*, 112 S. Ct. 2791, 2804 (1992) (joint opinion of O'Connor, Kennedy, & Souter, JJ.) ("The controlling word in the case before us is 'liberty.'"); *id.* at 2844 (Blackmun, J., concurring in part and dissenting in part) ("A fervent view of individual liberty . . . [has] led the Court . . . [to reaffirm *Roe*.]"); *id.* at 2853 ("The Chief Justice's criticism of *Roe* follows from his stunted conception of individual liberty.").

4. 410 U.S. 113 (1973).

5. U.S. CONST. amend. V & amend. XIV, § 1.

6. *Planned Parenthood v. Casey*, 112 S. Ct. 2791 (1992) (joint opinion of O'Connor, Kennedy, & Souter, JJ.).

7. *Id.* at 2803 ("Liberty finds no refuge in a jurisprudence of doubt"); *id.* at 2833 ("Our Constitution is a covenant . . . . We invoke it once again to define the freedom guaranteed by the Constitution's own promise, the promise of liberty.").

8. E.g., ROBERT H. BORK, *THE TEMPTING OF AMERICA* 111-16 (1990).

9. E.g., *Webster v. Reproductive Health Servs.*, 492 U.S. 490, 520 (1989) (plurality opinion) (describing access to abortion as a "liberty interest"); *Casey*, 112 S. Ct. at 2867 (Rehnquist, C.J., concurring in the judgment in part and dissenting in part) ("A woman's interest in having an abortion is a form of liberty protected by the Due Process Clause, but States may regulate abortion procedures in ways rationally related to a legitimate state interest.").

erty" and the word "liberty," however, carried different meanings when the Due Process Clauses became part of the Constitution. Tracing back to the Magna Carta,<sup>10</sup> the phrase acquired its modern connotation—as a comprehensive list of important or fundamental rights—in seventeenth and eighteenth century England, particularly in the writings of Whigs and social contract theorists like John Locke and Frances Hutcheson.<sup>11</sup> This tradition considers *life*, not liberty, the most basic right. Moreover, this "life" includes more than mere biological existence; it also encompasses physical integrity, "health and indolency of body,"<sup>12</sup> and even a minimum quality of life. Guided by these influences, eighteenth and nineteenth century Americans thought of "life" expansively when they devised the Constitution and ratified the Fourteenth Amendment.<sup>13</sup>

Today "right to life" designates a political position opposed to abortion. Yet, if "life" means what it did when the Framers drafted the Constitution, bodily integrity is part and parcel of the concept, and abortion, which implicates a woman's "health" and "body," warrants constitutional protection as an aspect of "life."

Although a right does not gain in constitutional stature simply because it rests on a different word, the shift from "liberty" to "life" involves more than just semantics. The textual and historical evidence for abortion rights exists under the rubric of "life," but critics, blinded by their anachronistic understanding of "liberty," miss the evidence. Looking at the wrong word, they charge that abortion rights lack a basis in the constitutional text.<sup>14</sup> Meanwhile, proponents of abortion rights offer general theories of text interpretation and constitutional method to prove that "liberty" includes a right of abortion. Such theories

10. *Reprinted in* SELECT DOCUMENTS OF ENGLISH CONSTITUTIONAL HISTORY 42 (George B. Adams & H. Morse Stephens eds., 1929); *see generally* Robert E. Riggs, *Substantive Due Process in 1791*, 1990 Wis. L. Rev. 941, 948-58 (examining the antecedents of due process in the Magna Carta).

11. *See* discussion *infra* part II.

12. JOHN LOCKE, A LETTER CONCERNING TOLERATION 26 (James H. Tully ed., Hackett Publishing Co. 1983) (William Popple trans., 1st ed. 1689) (capitalization in original omitted).

13. *See* discussion *infra* part III.

14. *E.g.*, Planned Parenthood v. Casey, 112 S. Ct. 2791, 2874 (1992) (Scalia, J., concurring in the judgment in part and dissenting in part) ("the Constitution says absolutely nothing about [abortion]"); BORK, *supra* note 8, at 112 ("the right to abort, whatever one thinks of it, is not to be found in the Constitution"); John H. Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L.J. 920, 943 (1973) ("Roe lacks even colorable support in the constitutional text, history, or any other appropriate source of constitutional doctrine").

are unnecessary, however, to explain the obvious relationship between abortion and a woman's health and body, and therefore, between abortion and the constitutional right of life. "Life" provides a textual source for abortion rights, answering the charge that abortion lacks a basis in the Constitution.

In addition to ignoring "life," modern constitutional theorists understand "liberty" in a way that conflicts with the Framers' understanding. Locke, one of the main influences on revolutionary American thinkers, understood "liberty" to mean "enjoyment of natural rights," such as the right of life.<sup>15</sup> This "liberty" does not grow out of any concept of freedom from physical restraints, as the modern concept does, and it does not imply freedom from valid rules that enhance lives.<sup>16</sup> Nor could one *derive* new rights from the Lockean concept of liberty: its shape and reach depend on the meaning of other natural rights which do not, in turn, depend on the meaning of liberty.

The modern understanding of "liberty" lacks a conceptual grounding. The Court repudiated *Lochner v. New York*<sup>17</sup> and its conception of liberty during the 1930s,<sup>18</sup> but the Court has not enunciated a new concept of "liberty" to replace *Lochner*'s. In the name of "liberty," the Court has eased review of social and economic legislation, incorporated guarantees of the Bill of Rights into the Fourteenth Amendment, and proclaimed a substantive due process doctrine that encompasses rights of privacy and abortion.<sup>19</sup> The Court, however, has not related these three strands of liberty to one another, nor has it related them to a larger conception of liberty, as it did in the *Lochner* era. Lacking any larger conception of liberty, the Court and modern commentators fall back on apparent commonplaces. "Liberty" is pre-

15. See discussion *infra* part II.B.2.

16. In particular, if a duly enacted law preserves human life, according to Locke, that law could not also infringe on liberty. See discussion *infra* parts II.B.3, V.A.

17. 198 U.S. 45 (1905).

18. During the *Lochner* era, the Court struck down welfare enactments and economic reforms as violations of Fourteenth Amendment "liberty." See generally GUNTHER, *supra* note 2, at 436-53 (surveying *Lochner* era thinking and decisions). For further discussion, see *infra* parts IV.B, V.C.3.

The *Lochner* line of cases was effectively overruled by *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937), which upheld a minimum wage law against a constitutional challenge. See *Casey*, 112 S. Ct. at 2798 (joint opinion of O'Connor, Kennedy, and Souter, JJ.) (describing *West Coast Hotel* as the case that overturned the *Lochner* line of cases).

19. See, e.g., GUNTHER, *supra* note 2, at 491-93 (surveying developments).

sumed to mean "freedom from restraint,"<sup>20</sup> with the most basic liberty characterized as the freedom of movement.<sup>21</sup> The need for balancing liberty against public imperatives is thought to be obvious.<sup>22</sup>

Such commonplaces seem self-evident, but each conflicts with Locke's, and the Framers', conception of liberty: that liberty is not freedom from restraint; its core meaning is not freedom of movement; and, because it never opposes individual rights to public imperatives, it leaves nothing to be "balanced." Indeed, the modern commonplaces about liberty originally appeared 200 years ago as David Hume's criticisms of Locke's theory.<sup>23</sup> When the Framers embraced the social contract, however, they necessarily rejected Hume's critical views.<sup>24</sup> The modern commonplaces about liberty, which appear obviously true, are in fact historically false.

All of this bears on arguments made against *Roe*. Critics portray *Roe* as an egregiously wrong interpretation of Fourteenth Amendment "liberty," and so as a uniquely bad decision lacking any semblance of support in the Constitution's text.<sup>25</sup> Yet, if liberty's core meaning is *not* "freedom from physical restraint," then *Roe*'s right of abortion is no more farfetched, as a textual matter, than *O'Connor v. Donaldson*'s<sup>26</sup> right of a sane, nondangerous person to be free from physical confinement in a state mental hospital. For *O'Connor* becomes more plausible

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20. *E.g.*, *Planned Parenthood v. Casey*, 112 S. Ct. 2791, 2805 (joint opinion of O'Connor, Kennedy, & Souter, JJ.) ("liberty . . . includes a freedom from all substantial arbitrary impositions and purposeless restraints") (quoting *Poe v. Ullman*, 367 U.S. 497, 543 (1961) (Harlan, J., dissenting from dismissal on jurisdictional grounds)); Ely, *supra* note 14, at 935 ("Of course a woman's freedom to choose an abortion is part of the 'liberty' the Fourteenth Amendment says shall not be denied without due process of law, as indeed is anyone's freedom to do what he wants.").

21. *See, e.g.*, *Casey*, 112 S. Ct. at 2859 (Rehnquist, C.J., concurring in the judgment in part and dissenting in part) (noting that the meaning of liberty "extends beyond freedom from physical restraint"); *Foucha v. Louisiana*, 112 S. Ct. 1780, 1785 (1992) ("Freedom from bodily restraint has always been at the core of the liberty protected by the Due Process Clause from arbitrary governmental action."); *Youngberg v. Romeo*, 457 U.S. 307, 316 (1982) ("Liberty from bodily restraint always has been recognized as the core of the liberty protected by the Due Process Clause.") (quoting *Greenholtz v. Nebraska Penal Inmates*, 442 U.S. 1, 18 (1979) (Powell, J., concurring in part and dissenting in part)); *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923) ("freedom from bodily restraint").

22. *See, e.g.*, *Romeo*, 457 U.S. at 321 (asserting that "liberty interests" must be balanced against "relevant state interests").

23. *See* discussion *infra* part II.C.3.

24. *See* discussion *infra* part III.A.

25. *See, e.g.*, sources cited *supra* note 14.

26. 422 U.S. 563 (1975).

than *Roe* only when "liberty" means *physical freedom*, the very meaning Locke rejected. Robert Bork, for example, argues that the constitutional "liberty" to do anything (such as have an abortion) implies the liberty to do *everything*, because the concept of liberty cannot distinguish among different human wants.<sup>27</sup> His argument presumes that "liberty" means "freedom from restraint."<sup>28</sup> If liberty does not have that meaning, however, as it does not in the Lockean tradition, then Bork's *reductio ad absurdum* collapses.

The Lockean conception of liberty has another, more direct bearing on the abortion controversy. The modern doctrine of substantive due process, the judicial technique of strict scrutiny, and the various strands of "liberty" in the modern Court's jurisprudence all reflect a Lockean idea of "liberty." *Roe* itself reflects the same idea, and, in that way, marks a return to the Framers' own conception of liberty.

The remaining sections of this Article provide evidence for the arguments summarized in this introduction. Part I outlines the present day controversy over liberty and abortion, including the multiple, conflicting opinions in *Casey*. Part II examines the phrase "life, liberty, or property," and the meaning of its component rights, in the era before the American Revolution. This history begins with the Magna Carta and reaches a crucial stage in seventeenth century England, when social contract theory appeared. Part III, which surveys the meaning of "life, liberty, or property" during the American revolutionary era, concludes that the Framers adopted the Lockean, social contract meaning of that phrase. Part IV describes the movement away from social contract conceptions during the *Lochner* era, when the Court defined "liberty" to mean "freedom from restraint." Part V argues that each of modern liberty's three strands—incorporation of the Bill of Rights, rational review of social and economic legislation, and protection of fundamental rights—recreates earlier social contract conceptions, and that modern "privacy" recreates the

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27. Every clash between a minority claiming freedom from regulation and a majority asserting its freedom to regulate requires a choice between the gratifications (or moral positions) of the two groups. When the Constitution has not spoken, the Court will be able to find no scale, other than its own value preferences, upon which to weigh the competing claims. . . . There is . . . no principled way to make the necessary distinctions.

BORK, *supra* note 8, at 257-58; see also Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 14 (1971) (asserting that the Court "cannot pick and choose between competing [individual] gratifications").

28. See discussion *infra* part II.B.2.

social contract right of "life." Finally, Part VI reexamines the abortion debate in light of the historic concepts of "life" and "liberty." It argues that historic "life" provides an ample warrant for the right of abortion, that *Roe's* opponents employ a conception of liberty that the Framers rejected, and that strict scrutiny aptly implements our historic rights.

## I. LIBERTY, *ROE* v. *WADE*, AND THE CRITICS

### A. MODERN INTERPRETATIONS OF LIFE, LIBERTY, OR PROPERTY

Nothing in the Constitution's wording suggests that "life," "liberty," and "property" differ dramatically in their significance or operation as rights.<sup>29</sup> Yet today, "liberty" is preeminent. Indeed, it is capable of designating the entire set of Fourteenth Amendment freedoms. The Court has said that the Fourteenth Amendment incorporates a right when that right represents "fundamental principles . . . of liberty"<sup>30</sup> or is "necessary to . . . [a] regime of ordered liberty."<sup>31</sup> "Liberty" has also become the textual source for substantive due process rights that appear nowhere else in the Constitution, rights such as physical integrity and bodily autonomy,<sup>32</sup> freedom of movement,<sup>33</sup> freedom from harm,<sup>34</sup> treatment in state institutions,<sup>35</sup> the opportunity to attend private schools,<sup>36</sup> and to learn foreign languages in public

29. For an argument that one of the three rights has always predominated over the others, see discussion *infra* part II.B.3.d.

30. *Duncan v. Louisiana*, 391 U.S. 145, 148 (1968) (emphasis added) (quoting *Powell v. Alabama*, 287 U.S. 45, 67 (1932)). The *Duncan* Court was speaking of rights appearing in the Fifth and Sixth Amendments. *Id.*

31. *Id.* at 150 n.14 (emphasis added).

32. See, e.g., *Washington v. Harper*, 494 U.S. 210, 221 (1990) (asserting that state prisoners possess "a significant liberty interest in avoiding the unwanted administration of antipsychotic drugs under the Due Process Clause of the Fourteenth Amendment"); *Ingraham v. Wright*, 430 U.S. 651, 672 (1977) ("corporal punishment in public schools implicates a constitutionally protected liberty interest").

33. *Youngberg v. Romeo*, 457 U.S. 307, 316 (1982) (declaring "freedom from bodily restraint" to be at "the core of the liberty protected by the Due Process Clause") (quoting *Greenholtz v. Nebraska Penal Inmates*, 442 U.S. 1, 18 (1979) (Powell, J., concurring in part and dissenting in part)).

34. *Id.* at 315 (asserting that "personal security" is a liberty interest protected by the Fourteenth Amendment); *Ingraham*, 430 U.S. at 673 (same).

35. E.g., *Romeo*, 457 U.S. at 322 (finding a retarded inmate of a state school entitled to "such training as may be reasonable in light of . . . [his] liberty interests in safety and freedom from unreasonable restraints").

36. *Pierce v. Society of Sisters*, 268 U.S. 510, 535 (1925) (referring to the "liberty which the Fourteenth Amendment guarantees"). *Pierce* also used "liberty" in the more general sense described earlier in this paragraph by referring to "the fundamental theory of liberty upon which all governments in this Union repose." *Id.*

schools,<sup>37</sup> as well as the right of abortion. Indeed, "liberty" can stand for *all* constitutional rights, a connotation that the *Casey* Court employed when it equated the "freedoms guaranteed by the Constitution's own promise" with the "promise of liberty."<sup>38</sup>

"Property," in contrast, receives a narrower reading. The Court decides when economic expectations constitute protected "property" interests, entitling someone to *procedural* due process,<sup>39</sup> but property in the Due Process Clauses is not a broad source of constitutional right. The Court set this pattern during the *Lochner* era when, as one commentator observes, an "expanded definition of 'liberty' swallowed up 'property'"<sup>40</sup> and "[t]he right to acquire, own, and use property became an aspect of the broad 'liberty' secured by due process."<sup>41</sup>

"Life" plays an even smaller constitutional role today. Saying that the "words 'liberty' and 'property' in the Due Process Clause of the Fourteenth Amendment must be given some meaning,"<sup>42</sup> the Court has implied that "life," which appears in

37. *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923) ("The problem for our determination is whether the statute . . . unreasonably infringes the liberty guaranteed . . . by the Fourteenth Amendment.")

38. *Planned Parenthood v. Casey*, 112 S. Ct. 2791, 2833 (emphasis added).

39. *See, e.g., Goss v. Lopez*, 419 U.S. 565, 574 (1975) (holding that a student's suspension from a public school implicates property and liberty interests protected by the Fourteenth Amendment).

40. Henry P. Monaghan, *Of "Liberty" and "Property,"* 62 CORNELL L. REV. 405, 413 n.57 (1977).

41. *Id.* at 434-35. Monaghan notes that the *Lochner* era of the Court was in step with "social and political theorists" who "increasingly emphasized that the protection of economic interests was an aspect of 'liberty,' rather than 'property.'" *Id.* at 434. Monaghan cites *Coppage v. Kansas* which graphically illustrates liberty's new preeminence:

The principle is fundamental and vital. Included in the right of personal liberty and the right of private property—partaking of the nature of each—is the right to make contracts for the acquisition of property. . . . If this right be struck down or arbitrarily interfered with, there is a substantial impairment of *liberty* in the long-established constitutional sense . . . .

An interference with this liberty so serious as that now under consideration . . . .

236 U.S. 1, 14 (1915) (emphasis added). What began the paragraph as rights of "personal liberty and . . . private property" became, by the start of the next paragraph, a right of "liberty."

42. *Board of Regents v. Roth*, 408 U.S. 564, 572 (1972). "Prior to *Roth*," Monaghan writes, "Supreme Court definitions of 'liberty' and 'property' had amounted to taking the words 'life, liberty or property' as a universal concept embracing all interests valued by sensible men." Monaghan, *supra* note 40, at 409. In effect "liberty" and "property" exhausted the meaning of the Due Process Clause, making "life" superfluous: "[T]here seems to have been an overriding consensus," according to Monaghan, "that every individual 'interest' worth

the same clause, need not. Substantive and procedural rights no longer receive recognition under the rubric of "life." Life itself, in the sense of biological existence, counts as a "liberty" interest, and even the "right to die" receives analysis as an aspect of "liberty."<sup>43</sup> As Justice Marshall once accurately observed, "constitutional principles of liberty, property, and due process, evolve over time,"<sup>44</sup> an observation that includes all of the operative terms of the Due Process Clause except "life." "Life" was omitted because it does not designate a "constitutional principle" or even a legal concept, but only the *fact* of "biological existence." In effect, the newly expanded right of "liberty" swallowed up the historic right of life.

The modern, expansive interpretation of "liberty" has, of course, received criticism. Justice Black, in particular, dissented from the idea of "fundamental liberties . . . [as] things apart from the Bill of Rights."<sup>45</sup> He argued that the Fourteenth Amendment created no new substantive rights.<sup>46</sup> By the time of *Roe*, however, every sitting Justice had accepted the idea of substantive due process rights in principle,<sup>47</sup> and it

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talking about is encompassed within the 'liberty' and 'property' secured by the due process clause." *Id.* at 406-07. Monaghan was describing doctrinal changes that limited the reach of "liberty" and "property;" he was not himself suggesting that "life" had been overlooked in interpretations of the clause.

43. *Cruzan v. Director, Missouri Dep't of Health*, 497 U.S. 261, 279 n.7 (1990) ("We believe this issue is . . . properly analyzed in terms of a Fourteenth Amendment liberty interest.").

In dissent, Justice Stevens questioned whether a woman in a profound, irreversible vegetative state still has "life" as that word is commonly understood, or as it is used in both the Constitution and the Declaration of Independence." *Id.* at 345. Yet, Justice Stevens also described the issue as "whether . . . the Constitution protects the *liberty* of seriously ill patients to be free from life-sustaining medical treatment." *Id.* at 331 (emphasis added). "Life" became a factor because the state had asserted an interest in preserving life to counter Ms. Cruzan's liberty interest. *Id.* at 335.

44. *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 466 (1985) (Marshall, J., concurring in the judgment in part and dissenting in part).

45. *Adamson v. California*, 332 U.S. 46, 86 (1947) (Black, J., dissenting); see also *Duncan v. Louisiana*, 391 U.S. 145, 162 (1968) (Black, J., concurring); *Griswold v. Connecticut*, 381 U.S. 479, 507 (1965) (Black, J., dissenting). In these cases, Justice Black argued that the Fourteenth Amendment, taken as a whole, incorporates the first eight amendments and makes them binding against the states. *E.g., Adamson*, 332 U.S. at 89. He denied, however, that "liberty," or any other word in the Due Process Clause, confers rights other than those guaranteed in the Constitution's first eight amendments. *E.g., Duncan*, 391 U.S. at 168-71.

46. *Adamson*, 332 U.S. at 90 (Black, J., dissenting).

47. Seven Justices joined Justice Blackmun's opinion in *Roe v. Wade* which treats abortion as a "fundamental" right, see 410 U.S. 113, 152-54 (1973), and as an aspect of the right of privacy "founded in the Fourteenth Amendment's

fell to commentators to advance criticisms as broad as Justice Black's.

## B. TWO CRITICS OF *ROE V. WADE*

John Hart Ely and Robert H. Bork are two of *Roe*'s most prominent critics. Ely made his arguments shortly after *Roe* was decided;<sup>48</sup> Bork has critiqued the case more recently.<sup>49</sup> They disagree about much in constitutional law. Ely allows a limited role for judges in declaring new constitutional rights,<sup>50</sup> a position that Bork considers a constitutional "heresy."<sup>51</sup> Bork argues that the unvarying test of constitutional meaning lies in the Framers' original intent,<sup>52</sup> a view that Ely describes as an "impossibility."<sup>53</sup> Yet, they concur about *Roe*: both men regard the case as a constitutional catastrophe.

Ely and Bork offer two general criticisms of *Roe*. First, like Justice Black,<sup>54</sup> they challenge the very idea of substantive due process rights. Ely argues that the Due Process Clause confers only procedural rights because "due process" means "procedure," and, thus, it cannot create new substantive entitlements like a right of abortion.<sup>55</sup> Bork agrees.<sup>56</sup>

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concept of personal liberty," *id.* at 153. Justice Stewart's concurring opinion, *id.* at 167, expressly describes the holding of *Griswold* as a return to the "doctrine of substantive due process," *id.* at 168, and notes that he "now accept[s] it as such." *Id.* Justice Rehnquist dissented in *Roe*, *id.* at 171, but agreed that liberty "embraces more than the rights found in the Bill of Rights," *id.* at 173. Thus, he too accepted a variant of substantive due process. For discussion of Chief Justice Rehnquist's views on substantive due process, see *infra* parts I.C.1, V.B. Justice White also dissented in *Roe*, saying that "nothing in the language or history of the Constitution supports a right to abortion." 410 U.S. at 221. Justice White, however, had already accepted a substantive concept of "liberty" in *Griswold v. Connecticut*. 381 U.S. 479, 502 (1965) (White, J., concurring).

48. Ely, *supra* note 14; JOHN H. ELY, *DEMOCRACY AND DISTRUST* (1980).

49. BORK, *supra* note 8; *but see* Bork, *supra* note 26 (a pre-*Roe* essay criticizing substantive due process theories).

50. Ely, *supra* note 48, at 73-179.

51. BORK, *supra* note 8, at 1-4, 178-85, 194-99.

52. *Id.* at 143-60.

53. Ely, *supra* note 48, at 1-41. Ely and Bork have also expressed a critic's admiration for each other's work. *E.g.*, BORK, *supra* note 8, at 194 (calling Ely's critique of fundamental values theory "devastating" and "highly entertaining," and "recommend[ing] it highly"); John H. Ely, *Another Such Victory: Constitutional Theory and Practice in a World Where Courts Are No Different from Legislatures*, 77 VA. L. REV. 833, 846 n.30 (1991) (declaring Bork's criticisms of Ely's own work "among the fairest that has appeared").

54. *See supra* notes 45-46 and accompanying text.

55. ELY, *supra* note 48, at 14-21.

56. BORK, *supra* note 8, at 32.

This criticism has two practical drawbacks, however. First, its narrow view of the Due Process Clause is unlikely to carry the Court in the foreseeable future because each member of the Court, at the time *Casey* was decided, had rejected it,<sup>57</sup> possibly because of its far reaching consequences. By adopting this view, the Court would overturn *Griswold v. Connecticut's* right of marital privacy,<sup>58</sup> as well as *Roe's* right of abortion.<sup>59</sup> In fact, every substantive due process right would fail, unless the Court reconceptualized the rights under another constitutional provision.<sup>60</sup> Furthermore, the First Amendment would no longer apply to the states if the Fourteenth Amendment carried *only* a procedural meaning.<sup>61</sup> Although Ely and Bork argue that democratic legislatures would not enact such measures,<sup>62</sup> the possibility remains daunting.

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57. Every opinion in *Planned Parenthood v. Casey*, except Justice Scalia's, explicitly endorsed a substantive conception of liberty. See discussion *infra* part I.C.1. Justice Scalia would have applied a rational relationship test, a test also making Fourteenth Amendment "liberty" a substantive right, albeit a relatively weak right. *Planned Parenthood v. Casey*, 112 S. Ct. 2791, 2875 (1992). Moreover, Justice Scalia also joined Chief Justice Rehnquist's opinion, which deemed abortion a (substantive) "liberty interest." See discussion *infra* part I.C.1; see also *supra* note 47 and accompanying text (discussing how every member of the *Roe* Court has embraced some idea of substantive due process and some kind of Fourteenth Amendment substantive liberty right).

58. 381 U.S. 479 (1965).

59. Other substantive laws not covered by this conception of the Due Process Clause might include a ban on marriage, a requirement that women become pregnant, or, conversely, a requirement that women undergo abortion or sterilization. See, e.g., Bork, *supra* note 8, at 64 ("To say, for example, that sterilization . . . [is] a deprivation of liberty without due process of law would . . . [be] transparently to add to the Constitution a principle that had not been there before.").

60. Bork, for example, suggests that *Meyer v. Nebraska*, 262 U.S. 390 (1923) (invalidating, on substantive due process grounds, a ban on foreign language instruction in public schools) and *Pierce v. Society of Sisters*, 268 U.S. 510 (1925) (invalidating, on substantive due process grounds, a ban on attendance at private elementary schools) could have reached the same results on First Amendment grounds. BORK, *supra* note 8, at 47-49.

61. See generally Thomas C. Grey, *Do We Have an Unwritten Constitution?*, 27 STAN. L. REV. 703, 710-14 (1975) (cataloging the doctrinal consequences of what he then termed the "pure interpretative" model of the Constitution). For his part, Bork observes that the "controversy over the legitimacy of incorporation [of the Bill of Rights, including the First Amendment] continues to this day" but "as a matter of judicial practice, the issue is settled." BORK, *supra* note 8, at 94.

62. BORK, *supra* note 8, at 234 (arguing that "[t]he Constitution does not forbid every ghastly hypothetical law. . . . We are not framing a constitutional philosophy for a society imagined in a particularly horrible piece of science fiction. We are talking about our society"); ELY, *supra* note 48, at 182 (suggesting

The second problem with the *general* argument against substantive due process is that it makes abortion rights a constitutional inference no worse than the right to marital privacy,<sup>63</sup> the right to attend private schools,<sup>64</sup> or even the right of sane persons to remain free from state mental hospital commitment.<sup>65</sup> By putting *Roe* in the same class as other substantive due process decisions, the argument fails to capture Bork's and Ely's sense of *Roe* as a uniquely bad decision.

Perhaps as a way to avoid these problems, Ely and Bork also characterize *Roe* as a case *utterly* lacking support in the Constitution. This line of criticism has proven more influential. Ely finds *Roe* "frightening" because the "super-protected right" of abortion is not "inferable from the language of the Constitution, the framers' thinking respecting the specific problem in issue, any general value derivable from the provisions they included, or the nation's governmental structure."<sup>66</sup> The Court simply addressed "a question [that] the Constitution has not made the Court's business."<sup>67</sup> Moreover, if the right of abortion does not originate in the Constitution, it must have originated from some other source. Ely identifies that source as the personal value preferences of the *Roe* Justices, which *Roe* imposed on the nation.<sup>68</sup>

More than a decade later, Bork echoes Ely's description. Bork argues that *Roe* provides "not one line of explanation, not one sentence that qualifies as legal argument," because "the right to abort, whatever one thinks of it, is not to be found in the Constitution."<sup>69</sup> *Roe* is "not legal reasoning," but "fiat," a glaring example of constitutional "heresy," Bork continues.<sup>70</sup> This heresy is that the Justices' personal views about politically correct outcomes, rather than the Constitution, are the law of the

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that those who think that judges are needed to prevent irrational laws, like a hypothetical ban on gall bladder surgery, simply "don't believe in democracy.").

63. *Griswold v. Connecticut*, 381 U.S. 479, 485-86 (1965).

64. *Pierce v. Society of Sisters*, 268 U.S. 510, 535 (1925).

65. *O'Connor v. Donaldson*, 422 U.S. 563, 573-75 (1975) (holding that a state may not confine in a mental hospital persons found to pose no threat, at least without affording treatment).

66. Ely, *supra* note 14, at 935-36 (internal citations omitted).

67. *Id.* at 943.

68. *Id.* at 937-43. Specifically, Ely describes *Lochner v. New York* as a case in which the Court "manufactured a constitutional right . . . and used it to superimpose its own view of wise social policy" and argues that *Roe* is like *Lochner*. *Id.* at 937.

69. BORK, *supra* note 8, at 112.

70. *Id.* at 114.

land.<sup>71</sup> Bork makes the same point in a discussion of *Casey*: “[T]he Constitution contains not one word that can be tortured into the slightest relevance to abortion, one way or the other.”<sup>72</sup>

This line of criticism, unlike the earlier one, allows a distinction between *Roe* and cases involving physical liberty, such as the decision barring commitment of sane, harmless, and untreated persons to mental hospitals.<sup>73</sup> Presumably, the Court could “torture” the word “liberty” so that it seems relevant to whether a person should remain physically free.<sup>74</sup> Such decisions may be mistaken, because the word “liberty” confers no substantive rights, but the error is less egregious than *Roe*’s: at least *something* in the Constitution’s language supports the result.<sup>75</sup> On the other hand, abortion has no relation whatsoever to “liberty,” unless “liberty” means that one can do whatever one wants, which is absurd.<sup>76</sup>

Justice White elaborated on this argument in *Bowers v. Hardwick*.<sup>77</sup> Rejecting a claim to constitutional “privacy” for homosexual relations, he wrote: “The Court is most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or design of the Constitution.”<sup>78</sup> This suggests a kind of

71. *Id.* at 7 (describing the “heresy of political judging” in constitutional cases).

72. Robert H. Bork, *Again, a Struggle for the Soul of the Court*, N.Y. TIMES, July 8, 1992, at A19.

73. O’Connor v. Donaldson, 422 U.S. 563, 573-75 (1975).

74. Bork also criticizes the idea that the Due Process Clause “guarantee[s] . . . laws with substance that strikes [the Supreme Court] as fair.” Bork, *supra* note 72, at A19. It is not clear, however, whether Bork thinks that in a decision about substantive standards for mental hospital commitment, “liberty” counts as a word that can be “tortured into the slightest relevance” to the affected person’s freedom.

75. BORK, *supra* note 8, at 47-49.

76. Bork, *supra* note 27, at 9 (arguing that a constitutional “right of freedom” would be tantamount to “a general constitutional right to be free of legal coercion, a manifest impossibility in any imaginable society”).

77. 478 U.S. 186, 190-91 (1986).

78. *Id.* at 194. Bork regarded *Bowers* as evidence that Justice White “knew the Court had long been performing a questionable function in this area.” BORK, *supra* note 8, at 117; *see id.* at 117-19 (continuing the discussion). Regarding the passage quoted in the text, Bork comments as follows:

That is quite right, or almost so. Perhaps [Justice White] had to put the matter as one of coming ‘nearest to illegitimacy’ in order not to offend members of the majority who had joined decisions that had no roots in the ‘language or design of the Constitution,’ but on this topic there is no question of near or far. When constitutional law is judge-made and not rooted in the text or structure of the Constitution, it does not approach illegitimacy, it *is* illegitimate, root and branch.

sliding scale, with increasing judicial caution as a right's "cognizable roots" in the Constitution diminish. It also suggests that, at the short end of the scale, acute questions exist about the Court's legitimate function and constitutional role.

### C. *PLANNED PARENTHOOD V. CASEY*

In *Casey*, the Court confronted basic questions of "liberty" and abortion. Reaffirming the "essential holding"<sup>79</sup> of *Roe* by a vote of five to four, the Court produced five opinions.<sup>80</sup> Bitterly divided, the Justices agreed only that their dispute revealed profound differences over the meaning of constitutional "liberty."

#### 1. *Casey* and the Concept of Liberty

In *Casey*, Justices O'Connor, Kennedy, and Souter signed an extraordinary "joint opinion" which Justices Stevens and Blackmun joined insofar as it affirmed *Roe*.<sup>81</sup> This opinion declared the "definition of liberty" to be the central issue in abortion controversies,<sup>82</sup> defended *stare decisis* as a means of securing liberty (because liberty requires certainty),<sup>83</sup> explained that "the reservations any of us may have . . . [about] *Roe* are

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*Id.* at 119-20. While Bork insists that a right either is or is not supported by the Constitution's text, Justice White recognizes degrees of constitutional support. *Bowers*, 478 U.S. at 194. Moreover, this support need not be immediately visible or transparent, since Justice White wrote about "cognizable roots" found in the Constitution and "roots," of course, are hidden from sight. *Id.* Interestingly, Bork appropriates the same metaphor of "roots" in commenting on Justice White's observation, but in Bork's case, the metaphor became an "all or nothing" affair: constitutional error should be eliminated, "root and branch." BORK, *supra* note 8, at 120.

79. *Planned Parenthood v. Casey*, 112 S. Ct. 2791, 2804 (1992) ("reaffirm[ing] the "essential holding" of *Roe*); see also *id.* at 2808 (referring to *Roe*'s "central holding"). Justices O'Connor, Kennedy, and Souter understood *Roe*'s essential holding to include the "right of the woman to choose to have an abortion before [fetal] viability." *Id.* at 2804. *Roe* recognized two state interests that might restrict the right to choose an abortion before viability: an interest in the mother's health and an interest in the fetus' potential life. *Id.* Like *Roe*, the joint opinion found these interests "insufficient to justify a ban on abortions prior to viability." *Id.* at 2817.

80. *Id.* at 2803, 2838, 2843, 2855, 2873.

81. *Id.* at 2803.

82. "Liberty finds no refuge in a jurisprudence of doubt," the opinion began, "[y]et 19 years after our holding that the Constitution protects a woman's right to terminate her pregnancy in its early stages . . . that definition of liberty is still questioned." *Id.* at 2803.

83. *Id.* ("Liberty finds no refuge in a jurisprudence of doubt.").

outweighed by the explication of individual liberty<sup>84</sup> given in the opinion, and ended by linking liberty, in near mystical fashion, to the Court's constitutional role and to the identity of the nation.<sup>85</sup> Although the joint opinion affirmed *Roe's* "essential holding," it also upheld all but one of the abortion restrictions before the Court<sup>86</sup> using a new constitutional standard, the "undue burden" test.<sup>87</sup>

Justices Stevens and Blackmun wrote separate opinions expanding on their respective views of *Roe*, concurring in the in-

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84. *Id.* at 2808. The opinion also offered "liberty" as the reason why some of the joint opinion's authors voted to uphold *Roe* even though "as individuals . . . [we] find abortion offensive to our most basic principles of morality." *Id.* at 2806. The Justices' personal views could not "control [their] decision," however, because "[their] obligation is to define the liberty of all, not to mandate [their] own moral code." *Id.*

85. The opinion closes with the following passage:

Our Constitution is a covenant running from the first generation of Americans to us and then to future generations. . . . Each generation must learn anew that the Constitution's written terms embody ideas and aspirations that must survive more ages than one. We accept our responsibility not to retreat from interpreting the full meaning of the covenant in light of all of our precedents. We invoke it once again to define the freedom guaranteed by the Constitution's own promise, the promise of liberty.

*Id.* at 2833.

86. The disputed Pennsylvania law in *Casey* required that physicians inform women about the risks of abortion and about the "probable gestational age of the child"; abortion facilities notify women about the availability of literature, authored by the state, describing fetal development and alternatives to abortion; women receive medical counseling about alternatives to abortion; women wait 24 hours after receiving the notices and the counseling before obtaining abortions; and minors obtain parental consent, or court approval, for an abortion. *Id.* at 2822, 2825, 2832. On the last point, the joint opinion would follow earlier cases such as *Ohio v. Akron Center for Reproductive Health*, 497 U.S. 502 (1990) and *Hodgson v. Minnesota*, 497 U.S. 417 (1990). The Pennsylvania abortion law also included emergency provisions that dispensed with the restrictions when necessary for a woman's health, which the Court interpreted so that "compliance with [Pennsylvania's other] abortion regulations would not in any way pose a significant threat to the life or health of a woman." *Casey*, 112 S. Ct. at 2822 (joint opinion of O'Connor, Kennedy, & Souter, JJ.) (quoting *Planned Parenthood v. Casey*, 947 F.2d 682, 701 (1991)). It also contained provisions that required abortion facilities to file medical reports with the state. *Id.* at 2832. In these reports, the identity of the patient remained confidential, but facilities had to report the identity of the physician performing each procedure, the woman's age, the number of the woman's prior pregnancies and also the number of prior abortions she had received, any medical complications, medical conditions that would have complicated the woman's continued pregnancy, the weight of the aborted fetus, the marital status of the woman, and, if applicable, the basis for invoking the emergency provisions. *Id.*

87. The joint opinion struck down, as an "undue burden," the requirement that women notify their husbands of an impending abortion. *Id.* at 2826-31.

validation of a spousal notification requirement, and dissenting from the Court's treatment of the other state regulations.<sup>88</sup> Both Justices based their positions on an understanding of "liberty."<sup>89</sup> Justice Stevens wrote that "*Roe* is an integral part of a correct understanding of . . . the concept of liberty."<sup>90</sup> Justice Blackmun contended that "[a] fervent view of individual liberty"<sup>91</sup> had led the Court to reaffirm *Roe*, while a "stunted conception of individual liberty"<sup>92</sup> underlay the opposing position.

Chief Justice Rehnquist and Justice Scalia also wrote separate opinions, joined by each other and by Justices Thomas and White.<sup>93</sup> Both argued for sustaining all the challenged regulations; language in each opinion strongly implied that *Roe*, and *Casey*, should be overruled as soon as practicable.<sup>94</sup> Unsurprisingly, both opinions also featured discussions of "liberty."

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88. Justice Stevens would have struck down the following requirements, which the joint opinion sustained: notice of the availability of state authored materials about abortion, *id.* at 2841; the 24 hour waiting period, *id.*; notice of potential state financial assistance for the costs of prenatal care and childbirth, *id.* at 2843; as well as the potential liability of the father for child support, *id.*; notice of the gestational age of the fetus, *id.*; and counseling about alternatives to abortion, *id.* Justice Stevens seemingly accepted post-viability regulations on abortion because of *stare decisis*, rather than his own independent analysis. *Id.* at 2838-39; *see also id.* at 2839-40 & n.3 (analyzing the state's interest in potential life in such a way that post-viability abortions do not affect the interest any more than pre-viability abortions do).

Justice Blackmun would have invalidated all of the challenged Pennsylvania provisions, including the provision that only a physician may supply information about the nature of abortion, its health risks, and the probable gestational age of the fetus. *Id.* at 2850-52.

89. In addition, Justices Blackmun and Stevens suggested that abortion implicates a woman's right to equality. *Id.* at 2846 (Blackmun, J., concurring in part, concurring in the judgment in part, and dissenting in part) ("A State's restrictions on a woman's right to terminate her pregnancy . . . implicate constitutional guarantees of gender equality."); *id.* at 2838 (Stevens, J., concurring in part and dissenting in part) ("*Roe* is an integral part of a correct understanding of both the concept of liberty and the basic equality of men and women."); *see also id.* at 2847 n.4 (Blackmun, J., concurring in part, concurring in the judgment in part, and dissenting in part) (citing commentators who have advanced equal protection theory); *see also* Susan R. Estrich & Kathleen M. Sullivan, *Abortion Politics: Writing for an Audience of One*, 138 U. PA. L. REV. 119, 124 n.10 (1989) (reviewing other authorities supporting the equal protection theory of abortion rights).

90. *Casey*, 112 S. Ct. at 2838 (Stevens, J., concurring in part and dissenting in part).

91. *Id.* at 2844.

92. *Id.* at 2853. Justice Blackmun also referred to "the Chief Justice's cramped notion of individual liberty." *Id.*

93. *Id.* at 2855, 2873.

94. Chief Justice Rehnquist described the joint opinion's "undue burden" test as "a standard which is not built to last," *Casey*, 112 S. Ct. at 2866, labeled

Justice Scalia attacked the joint opinion's claims that "liberty" lends itself to meaningful, principled interpretation by judges using "reasoned judgment." "[W]hat the Court calls 'reasoned judgment,'" Justice Scalia wrote, "turns out to be nothing but philosophical predilection and moral intuition."<sup>95</sup> For his part, Justice Scalia was "sure"<sup>96</sup> that abortion is not "a liberty protected by the Constitution" because of "two simple facts: (1) the Constitution says absolutely nothing about it, and (2) the longstanding traditions of American society have permitted [abortion] to be legally proscribed."<sup>97</sup> Justice Scalia's portrayal

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the joint opinion's outcome "an unjustified constitutional compromise," *id.* at 2855-56, and stated that "authentic principles of *stare decisis* do not require that any portion of the reasoning in *Roe* be kept intact," *id.* at 2860-61, a judgment that presumably applies to the *Casey* joint opinion's "reasoning" as well.

Justice Scalia stated that a constitutional holding should be overruled if the Court incorrectly decided the case and it had failed to produce a settled body of law. *Id.* at 2884. Using those standards, *Roe* warrants overruling. *Id.*; see also *id.* at 2875 ("Roe was plainly wrong"); *id.* at 2880-81 (*Casey*'s departures from *Roe* demonstrate that *Roe* failed to produce a settled body of law.). Using the same standards, it would appear that *Casey* also warrants overruling, see *id.* at 2880 (The undue burden test is "inherently standardless" and produces a "jurisprudence of confusion."). Moreover, the joint opinion brought "vividly to [Justice Scalia's] mind," *id.* at 2885, the plight of Chief Justice Taney who—like the *Casey* joint opinion's authors—thought he had permanently settled a major national controversy with a constitutional decision: *Dred Scott v. Sanford*, 60 U.S. (19 How.) 393 (1856). "We should get out of this area," Justice Scalia concluded, "where we have no right to be, and where we do neither ourselves nor the country any good by remaining." *Casey*, 112 S. Ct. at 2885.

Justice Blackmun, in contrast, closed his opinion by stating: "I am 83 years old. I cannot remain on this Court forever, and when I do step down, the confirmation process for my successor well may focus on the issue before us today. That, I regret, may be exactly where the choice . . . will be made." *Id.* at 2854-55. It is remarkable that Justice Blackmun wrote in this way, but, in light of the dissenters' all but expressed determination to overrule *Roe* and *Casey*, he only stated the obvious.

95. *Id.* at 2884. Justice Scalia asserted that both the *Roe* majority and the *Casey* joint opinion used a "reasoned judgment" technique, and he found its failings to be evident:

The emptiness of the "reasoned judgment" that produced *Roe* is displayed in plain view by the fact that, after more than 19 years of effort by some of the brightest (and most determined) legal minds in the country, after more than 10 cases upholding abortion rights in this Court, and after dozens upon dozens of amicus briefs submitted in this and other cases, the best the Court can do to explain how it is that the word "liberty" *must* be thought to include the right to destroy human fetuses is to rattle off a collection of adjectives that simply decorate a value judgment and conceal a political choice.

*Id.* at 2875.

96. *Id.* at 2874.

97. *Id.* Justice Scalia thus suggested tradition as a source of constitutional right, even in the absence of supporting constitutional text. *Id.* At the same

of a Constitution silent about abortion and a "liberty" that cannot—by itself, at least—produce new constitutional rights recalls Ely's and Bork's criticisms of *Roe*.<sup>98</sup> Like Ely and Bork, Justice Scalia discerned a constitutional catastrophe in *Roe*'s approach to "liberty."<sup>99</sup>

Chief Justice Rehnquist approached "liberty" in a less general way, but the concept remains vital to his opinion. The meaning of liberty "extends beyond freedom from physical restraint,"<sup>100</sup> he wrote, citing cases protecting marriage, procreation, and contraceptive use as aspects of "liberty."<sup>101</sup> Nonetheless, the Chief Justice argued that it is a mistake to treat abortion as a fundamental right warranting strict scru-

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time, he questioned the states' ability to require abortions. *Id.* at 2873-74. *Roe*, he wrote, "sought to *establish*—in the teeth of a clear, contrary tradition [the history of state abortion prohibitions and restrictions before 1972]—a value found nowhere in the constitutional text." *Id.* at 2874 n.1. "[I]t does not follow," he continued, "that the Constitution does not protect childbirth simply because it does not protect abortion." *Id.* The difference is that "[t]here is, of course, no comparable tradition barring recognition of a 'liberty interest' in carrying one's child to term free from state efforts to kill it." *Id.* This example, he concluded, "shows the utter bankruptcy of constitutional analysis deprived of tradition as a *validating* factor." *Id.* (emphasis added).

Justice Scalia finds no provision of the Constitution that speaks to abortion, and he cites none that speaks to childbirth. *Id.* at 2874. Apparently, then, whenever the Constitution is silent, tradition can create a constitutional right. Indeed, it is the absence of any tradition barring childbirth that Justice Scalia finds dispositive. *Id.* It is true that throughout American history childbirth was not prohibited. If such a tradition creates enforceable constitutional rights, however, legislatures may not regulate new subjects and *Lochner* may well be correct. Perhaps this explains why Justice Scalia cited, in the case of childbirth, not a tradition of no regulation, but the lack of a tradition regulating it. It is possible, however, that Justice Scalia himself would not find a constitutional right to childbirth, and only meant to say that a judge who does find such a right commits a less egregious error than that of *Roe*.

98. See *supra* notes 55-76 and accompanying text.

99. See *supra* note 94 (comparing *Roe* and *Casey* to *Dred Scott*).

100. *Casey*, 112 S. Ct. at 2859.

101. *Id.* (citing *Loving v. Virginia*, 388 U.S. 1 (1967) (marriage); *Griswold v. Connecticut*, 381 U.S. 479 (1965) (contraceptive use); *Skinner v. Oklahoma*, 316 U.S. 535 (1942) (procreation)). Although Justice Scalia and Chief Justice Rehnquist joined in each other's opinions (and Justices Thomas and White joined both), Chief Justice Rehnquist seems to have a broader conception of substantive "liberty." For example, to show that marriage is a protected aspect of liberty, Chief Justice Rehnquist cited *Loving v. Virginia*, 388 U.S. 1 (1967), a case that invalidated state prohibitions of interracial marriage. *Casey*, 112 S. Ct. at 2859. Justice Scalia also cited *Loving* approvingly, but he only described it as an equal protection case. *Id.* at 2874 n.1. Furthermore, Justice Scalia's opinion said nothing about procreation or contraceptive use. It is not obvious how Justice Scalia's "text plus tradition" approach could square with *Griswold's* right to use contraceptives. See *supra* note 97 (explaining Justice Scalia's "text plus tradition" approach).

tiny.<sup>102</sup> Because “[a] woman’s interest in having an abortion is [only] a form of liberty protected by the Due Process Clause,”<sup>103</sup> not a fundamental right,<sup>104</sup> he concluded that states “may regulate abortion procedures in ways rationally related to a legitimate state interest.”<sup>105</sup> Chief Justice Rehnquist then cited *Williamson v. Lee Optical*,<sup>106</sup> a case employing a particularly toothless version of the rational basis test.<sup>107</sup> Chief Justice Rehnquist thus considered rational basis scrutiny as the default standard of constitutional review, even in matters affecting a person’s health and body.

## 2. Undue Burdens and *Roe*’s “Essential Holding”

Although *Casey* reaffirmed *Roe*’s “essential holding,” the joint opinion departed from *Roe* in a number of ways. Repudiating *Roe*’s “trimester framework,”<sup>108</sup> it produced two changes in

102. We are now of the view that, in terming this right fundamental, the Court in *Roe* read the earlier opinions on which it based its decision much too broadly. Unlike marriage, procreation and contraception, abortion “involves the purposeful termination of potential life.” . . . The abortion decision must therefore “be recognized as *sui generis*, different in kind from the others that the Court has protected under the rubric of personal or family privacy and autonomy.”

*Casey*, 112 S. Ct. at 2859 (citations omitted).

103. *Id.* at 2867.

104. Beginning with his *Roe* dissent, the Chief Justice has consistently portrayed abortion as a liberty interest, rather than a fundamental right. In *Roe*, he argued that abortion regulations constitute a form of “social and economic legislation” and that the Court “traditionally applie[s]” the rational basis test to such legislation. 410 U.S. 113, 173 (1973) (Rehnquist, J., dissenting). The same argument, however, applies with equal force to contraceptive bans, marriage regulations, and sterilization, leaving no room for strict scrutiny. See *supra* note 101. Thus, at the time of *Roe*, the Chief Justice disagreed with the majority of the Court about the meaning of constitutional liberty.

In contrast, in his *Casey* opinion, the Chief Justice suggested that abortion is “*sui generis*” and therefore, it should not receive the same constitutional treatment as marriage, procreation, or contraception. See *supra* note 102 and accompanying text. He thus implied, but did not explicitly state, that those other activities warrant more stringent protection than rational basis scrutiny. His *Casey* opinion also quoted Justice White’s caution that the Justices should not take an “expansive view of our authority to discover new fundamental rights,” a view that presupposes that there *are* fundamental rights, even if abortion is not among them. *Casey*, 112 S. Ct. at 2860 (quoting *Bowers v. Hardwick*, 478 U.S. 186, 194 (1986)).

105. *Id.* at 2867.

106. *Id.* (citing 348 U.S. 483 (1955)).

107. See, e.g., LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 8-7, at 582 (2d ed. 1988) (citing *Williamson* as an example of “virtually complete judicial abdication” in the review of socioeconomic legislation).

108. The joint opinion described the trimester framework as one allowing “almost no regulation at all . . . during the first trimester of pregnancy; regula-

the abortion law. First, the joint opinion replaced *Roe*'s trimesters with a system of unequal semesters, one pre-viability and one post-viability. During the pre-viability semester, states may regulate but not "unduly burden" the right of abortion.<sup>109</sup> In the post-viability semester, states may prohibit abortion outright to protect the potential life of the fetus.<sup>110</sup> To the limited extent that fetuses become "viable" before the third trimester, this new framework advances the point at which states may prohibit abortion. This change is quite modest in terms of dates,<sup>111</sup> and arguably is not inconsistent with *Roe* at all, because *Roe* also used viability as its ultimate criterion.<sup>112</sup>

The second change produced by *Casey* is more significant, for it allows some pre-viability regulations that post-*Roe* cases had previously prohibited. *Roe* barred pre-viability abortion restrictions when their purpose was to preserve fetal life.<sup>113</sup> The joint opinion, however, allowed such state restrictions, as long as they do not conflict with the "urgent claims of the woman to retain the ultimate control over her destiny and her body."<sup>114</sup> To reconcile the state's interest in potential life with the conflicting "claims" of the woman, Justices O'Connor, Kennedy, and Souter propounded the "undue burden" test.

An undue burden exists, according to *Casey*, when "a state regulation has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus."<sup>115</sup> Statutes "designed to strike at the right itself"<sup>116</sup> and

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tions designed to protect the woman's health, but not to further the State's interest in potential life, are permitted during the second trimester; and during the third trimester, when the fetus is viable, prohibitions are permitted provided the life or health of the mother is not at stake." *Casey*, 112 S. Ct. at 2817-18.

109. *Id.* at 2820-21.

110. *Id.* at 2821.

111. The Justices, in the joint opinion approached this issue as follows:

The soundness or unsoundness of . . . [using viability as a legal dividing line] in no sense turns on whether viability occurs at approximately 28 weeks, as was usual at the time of *Roe*, at 23 to 24 weeks, as it sometimes does today, or at some moment even slightly earlier in pregnancy, as it may if fetal respiratory capacity can somehow be enhanced in the future.

*Id.* at 2811.

112. "Whenever . . . [viability] may occur, the attainment of viability may continue to serve as the critical fact, just as it has done since *Roe*." *Id.* at 2811-12.

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

114. *Casey*, 112 S. Ct. at 2816.

115. *Id.* at 2820.

116. *Id.* at 2819.

statutes that use means other than reasonable persuasion to deter women from obtaining abortions<sup>117</sup> fail the purpose component of the test. Measures that do more than “make abortions a little more difficult or expensive to obtain”<sup>118</sup> will fail the “effect” prong.<sup>119</sup> Applying this test, the joint opinion found that all of the challenged notice and consent regulations, except spousal notification, were reasonable attempts at persuasion<sup>120</sup> that did not, on their face, make abortion significantly “more difficult or expensive to obtain.”<sup>121</sup> Hence, the restrictions did not consti-

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117. *Id.* at 2820 (“the means chosen by the State to further the interest in potential life must be calculated to inform the woman’s free choice, not hinder it”).

118. *Id.* at 2829.

119. *See id.* at 2821 (“To promote the State’s profound interest in potential life, throughout pregnancy the State may take measures to ensure that the woman’s choice is informed, and measures designed to advance this interest will not be invalidated as long as their purpose is to persuade the woman to choose childbirth over abortion. These measures must not be an undue burden on the right.”).

120. *Id.* at 2821-33. The joint opinion used language suggesting that a state interest in informed medical decision making—rather than any interest in potential life—was at stake. For example, states may “ensure” a woman’s abortion decision “is thoughtful and informed.” *Id.* at 2818. Further, states may mandate “a reasonable framework for a woman to make a decision,” *id.*, and require “the giving of truthful, nonmisleading information about the nature of the procedure,” *id.* at 2823. Nevertheless, Justices O’Connor, Kennedy, and Souter relied on the more controversial interest in potential life, not on the state’s interest in informed medical decision making. A brief examination of the practical issues may shed light on these Justices’ reasoning.

In enacting the Pennsylvania statute, the legislature tried “to persuade the woman to choose childbirth over abortion.” *Id.* at 2821. Simple honesty required the Justices to acknowledge that fact. Nor was it plausible to invoke a generalized state interest in medical decision making when candidates for other surgical procedures—gall bladder removal, for example—were not subject to similar requirements. Moreover, the joint opinion conceivably used the “interest in potential life” as an olive branch to *Roe*’s opponents. Justices O’Connor, Kennedy, and Souter were “call[ing] the contending sides of a national controversy to end their national division by accepting a common mandate rooted in the Constitution,” an undertaking that would be expedited if each side saw something positive in the Court’s opinion. *Id.* at 2815.

121. *Id.* at 2829. *Casey* was a challenge to the facial constitutionality of the Pennsylvania statute, and it remains possible that, upon a fuller factual record, more of Pennsylvania’s abortion restrictions could fail the undue burden test. *See, e.g., id.* at 2826 (upholding the 24 hour waiting period “on the record before us, and in the context of this facial challenge”); *see also id.* at 2845 (Blackmun, J., concurring in part, concurring in the judgment in part, and dissenting in part) (noting that “the joint opinion has not ruled out the possibility that these regulations may be shown to impose an unconstitutional burden” and expressing confidence that “in the future evidence will be produced” that warrants invalidating the remaining requirements); *id.* at 2880 (Scalia, J., concurring in the judgment in part and dissenting in part) (agreeing with Justice Blackmun

tute undue burdens, and the state could attempt to preserve potential fetal life by imposing them.

The joint opinion also applied the undue burden test to health regulations. After *Roe*, the Court applied strict scrutiny to such measures,<sup>122</sup> but the joint opinion repudiated those decisions and substituted its undue burden test: "As with any medical procedure, the State may enact regulations to further the health or safety of a woman seeking an abortion. Unnecessary health regulations that have the purpose or effect of presenting a substantial obstacle to a woman seeking an abortion impose an undue burden on the right."<sup>123</sup> Nor are states restricted to the technique of reasonable persuasion, as they are when potential fetal life is at stake. In order to protect a woman's health, states may mandate the conditions under which abortions take place, if such conditions do not unduly burden the right.

### 3. The Puzzle of Undue Burdens

Although the words "undue burden" appeared in earlier abortion cases,<sup>124</sup> *Casey* created the undue burden test. In doing so, the joint opinion seemingly confounded the distinction between strict scrutiny and rationality review that lay at the heart of the Justices' disagreements about abortion. Until *Casey*, the Justices premised their disagreement about abortion on a few basic propositions: fundamental rights receive strict scrutiny;<sup>125</sup> strict scrutiny allows abridgements of a right only when necessary to further a compelling government interest;<sup>126</sup> and mere liberty interests could be abridged by any state measure

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that, on a different factual record, the undue burden standard might "ultimately require the invalidation of each provision upheld today").

122. *E.g.*, *Planned Parenthood Ass'n v. Ashcroft*, 462 U.S. 476, 481-82 (1983) (striking down a requirement that second trimester abortions be performed in hospitals, rather than outpatient clinics); *Akron v. Akron Ctr. for Reproductive Health*, 462 U.S. 416, 437-39 (1983) (same).

123. 112 S. Ct. at 2821 (joint opinion of O'Connor, Kennedy, & Souter, JJ.).

124. *See id.* at 2819 (citing cases); *id.* at 2820 (citing opinions by "individual members of the Court, including two of us" using the undue burden test in possibly inconsistent ways); *see also id.* at 2876 n.3 (Scalia, J., concurring in the judgment in part and dissenting in part) (concluding the joint opinion was "clearly wrong" to claim that earlier cases established the undue burden standard).

125. Fundamental rights are those rights deemed fundamental under the Fourteenth Amendment. *See generally* TRIBE, *supra* note 107, § 11-4 (discussing the concept of fundamental or preferred rights).

126. *See generally* GUNTHER, *supra* note 2, at 491-93, 505-06 (analyzing strict scrutiny of substantive due process rights).

rationally related to a legitimate state purpose.<sup>127</sup> The undue burden test, however, has no apparent connection to the framework of strict scrutiny and rational basis review.

Instead, the joint opinion said that state regulations incidentally affect every right and that "not every law which makes a right more difficult to exercise is, *ipso facto*, an infringement of that right."<sup>128</sup> To determine *which* regulations infringe a constitutional right, the joint opinion deployed the undue burden test, a test reminiscent of Commerce Clause<sup>129</sup> standards for distinguishing permissible burdens on interstate commerce from impermissible ones.<sup>130</sup>

The undue burden test is not necessarily inconsistent with characterizing abortion as a fundamental right. In abortion funding cases, while *Roe* remained an unquestionable authority, the Court struggled nonetheless with questions about the scope of the right and whether the right controls state funding decisions.<sup>131</sup> The undue burden test seems relevant to such problems. Moreover, *Roe* itself stated that a state "may . . . regulate the abortion procedure in ways that are *reasonably related* to maternal health."<sup>132</sup> Health regulation of a fundamental

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127. See generally *id.* (analyzing rational basis review of substantive due process rights).

128. *Casey*, 112 S. Ct. at 2818 (joint opinion of O'Connor, Kennedy, & Souter, JJ.). The Justices stated that "not every ballot access limitation amounts to an infringement of the right to vote. Rather, the States are granted substantial flexibility in establishing the framework within which voters choose the candidates for whom they wish to vote." *Id.*

Perhaps the constitutional right to attend private schools provides a more apt analogy. Notwithstanding this right, a state could presumably encourage parents to utilize public schools. To that end, a state could perhaps require private school principals to inform prospective students of public school alternatives; impose a 24 hour waiting period on private school enrollment; or provide state literature regarding public schools. On the other hand, it seems doubtful that election laws could require a 24 hour waiting period before someone voted Republican, or, for that matter, that a housing law could require a 24 hour waiting period before someone moves into a racially integrated neighborhood.

129. U.S. CONST. art. I, § 8 ("Congress shall have Power To regulate commerce . . . among the several States . . .").

130. See, e.g., *Quill Corp. v. North Dakota*, 112 S. Ct. 1904, 1914 (1992) (stating that "[u]ndue burdens on interstate commerce may be avoided").

131. *Harris v. McRae*, 448 U.S. 297 (1980) (upholding a federal statute barring Medicaid payments for certain medically necessary abortions); *Maher v. Roe*, 432 U.S. 464 (1977) (upholding a state's exclusion of medically unnecessary abortions from its Medicaid program).

132. *Roe v. Wade*, 410 U.S. 113, 164 (1973) (emphasis added). See generally *Casey*, 112 S. Ct. at 2857 (Rehnquist, C.J., concurring in the judgment in part and dissenting in part) (surveying the Court's post-*Roe* decisions on health regulations of abortion).

right, it seems, triggers a reasonableness standard rather than strict scrutiny. Although post-*Roe* decisions subjected health regulations to heightened scrutiny, the language of *Roe* suggests that something less than strict scrutiny comports with abortion's status as a fundamental right. Perhaps *Roe*'s strict scrutiny only applies to core applications of the right.

The *Casey* Court, however, did not explicitly confine the undue burden test to peripheral applications of *Roe* or to questions about the scope of abortion rights. Rather, the Court left open the possibility that the test completely supplants the strict scrutiny framework. The joint opinion never said whether the "right [to abortion] itself,"<sup>133</sup> at its core, constitutes a fundamental right that enjoys strict scrutiny.<sup>134</sup>

Nor did Justices O'Connor, Kennedy, and Souter merely ignore strict scrutiny and the distinction between it and rational basis review.<sup>135</sup> Rather, the joint opinion repeatedly used language that confounds fundamental rights and liberty interests, strict scrutiny and the rational basis test. For example, the opinion described a state's interest in potential life as "profound"<sup>136</sup> and "substantial,"<sup>137</sup> terms that do not readily fit the strict versus rational scrutiny framework.<sup>138</sup> A "profound"

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133. *Casey*, 112 S. Ct. at 2819 (joint opinion of O'Connor, Kennedy, & Souter, JJ.) ("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.") (emphasis added).

134. Justice Blackmun viewed the joint opinion in a different light: "Our precedents and the joint opinion's principles require us to subject all non-*de minimis* abortion regulations to strict scrutiny." *Id.* at 2846 (Blackmun, J., concurring in part, concurring in the judgment in part, and dissenting in part). Justice Scalia disagreed and responded:

Justice Blackmun's effort to preserve as much of *Roe* as possible leads him to read the joint opinion as more "constan[t]" and "steadfast" than can be believed. He contends that the joint opinion's "undue burden" standard requires the application of strict scrutiny to "all non-*de minimis*" abortion regulations . . . but that could only be true if a "substantial obstacle" . . . were the same thing as a non-*de minimis* obstacle—which it plainly is not.

*Id.* at 2883 n.7 (Scalia, J., concurring in the judgment in part and dissenting in part) (internal citations omitted).

135. See, e.g., *Webster v. Reproductive Health Servs.*, 492 U.S. 490, 520 (1989).

136. *Casey*, 112 S. Ct. at 2821 (joint opinion of O'Connor, Kennedy, & Souter, JJ.).

137. *Id.* at 2820.

138. The term "substantial," however, describes the kind of state interest required to withstand an Equal Protection Clause challenge under application of intermediate level scrutiny. For a discussion of intermediate scrutiny, see

interest, however, sounds like a “compelling” interest. To advance compelling interests, a state may prohibit abortion at any point during a pregnancy.<sup>139</sup> Yet, the joint opinion reached the opposite conclusion—holding that states may not prohibit pre-viability abortions—which only adds to the confusion.

The joint opinion also invoked “legitimate” state ends.<sup>140</sup> It said that recognizing potential life as a legitimate interest, as *Roe* did, implies that states must be able to further that interest throughout a pregnancy.<sup>141</sup> For that reason, the joint opinion regarded *Roe* as self-contradictory. Once *Roe* recognized a legitimate state interest in potential life, the Court could not bar *all* pre-viability measures to protect that life, or so the joint opinion argued. Criticizing that argument, Justice Stevens observed as follows:

[I]t is not a “contradiction” to recognize that the state may have a legitimate interest in potential human life and, at the same time, to conclude that that interest does not justify the regulation of abortion before viability . . . . The fact that the State’s interest is legitimate does not tell us when, if ever, that interest outweighs the pregnant woman’s interest in personal liberty.<sup>142</sup>

Justice Stevens’s objection, however, presumes that strict scrutiny, or at least something more than the rational basis test, applies, because, under a rational relationship test, *some* means are inevitably available to advance every legitimate state interest. Thus, if the joint opinion applied the rational basis test, its discussion of pre-viability abortion restrictions would make sense: the validity of some abortion restrictions would follow from the existence of a state interest in potential life. Once again, however, the joint opinion’s terms of art clash with its conclusions. The rational basis test allows abortion prohibitions at any point during a pregnancy, a conclusion the joint opinion emphatically rejected.

Justice Scalia suggested an explanation for these contradictions. The joint opinion stated that undue burdens on abortion

JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW § 14.3, at 576-78, § 14.23 (4th ed. 1991) (surveying cases).

139. See *supra* note 79. By definition, this passes the other benchmark of strict scrutiny: a prohibition of abortion is “necessary” to preserve a nonviable fetus’ potential life.

140. *E.g.*, *Casey*, 112 S. Ct. at 2820 (joint opinion of O’Connor, Kennedy, & Souter, JJ.). “A statute which, while furthering the interest in potential life or some other valid state interest, has the effect of placing a substantial obstacle in the path of a woman’s choice cannot be considered a permissible means of serving its *legitimate* ends.” *Id.* (emphasis added).

141. *Id.* at 2821.

142. *Id.* at 2839 (Stevens, J., concurring in part and dissenting in part).

are not "permissible" means of advancing "legitimate interests."<sup>143</sup> Those terms, Justice Scalia observed, are "commonly associated with the rational-basis test."<sup>144</sup> Yet, Justice O'Connor, a co-author of the joint opinion, had previously associated "undue burdens" with strict scrutiny.<sup>145</sup> "This confusing equation of the two standards," Justice Scalia wrote, "is apparently designed to explain how [Justice Kennedy] who joined the plurality opinion in *Webster* . . . which adopted the rational basis test, could join an opinion expressly adopting the undue burden test."<sup>146</sup> Justice Scalia's explanation could apply as well to the general confounding of strict scrutiny and rational basis review that emerges from the joint opinion. On this theory, the joint opinion covered the Court's tracks, in effect, by destroying the woods.<sup>147</sup>

The joint opinion's goal of settling the constitutional controversy over abortion once and for all suggests another explanation. Perhaps it ignored the distinction between strict and rational basis scrutiny to achieve common ground among the Justices, who sharply disagreed about the proper treatment of abortion rights.<sup>148</sup> Whether that reason is "principled" or is just another way of phrasing Justice Scalia's point seems debatable.<sup>149</sup>

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143. *Id.* at 2877 n.4 (Scalia, J., concurring in the judgment in part and dissenting in part) (quoting *id.* at 2820-21).

144. *Id.*

145. *Id.* (quoting *Akron v. Akron Ctr. for Reproductive Health, Inc.*, 462 U.S. 416, 463 (1983) (O'Connor, J., dissenting) ("The 'undue burden' . . . represents the required threshold inquiry that must be conducted before this Court can require a State to justify its legislative actions under the exacting 'compelling state interest' standard.")).

146. *Id.* at 2877 n.4 (Scalia, J., concurring in the judgment in part and dissenting in part).

147. This explanation comports with the rest of Justice Scalia's opinion, which portrays the joint opinion as unprincipled in every respect. *E.g.*, *id.* at 2883 ("It is particularly difficult . . . to sit still for the Court's lengthy lecture upon the virtues of 'constancy,' . . . of 'remain[ing] steadfast,' . . . of adhering to 'principle.'") (citations omitted).

148. *E.g.*, *Webster v. Reproductive Health Servs.*, 492 U.S. 490, 520-21 (1989).

149. An obvious tension exists between demands of principle, viewed in terms of the careers and convictions of the individual Justices, and the same demands on the Court as an institution. The *Casey* dissenters argued that past constitutional mistakes (notably, in their view, *Roe v. Wade*) should be readily overturned, even by newly appointed justices. *Casey*, 112 S. Ct. at 2860-61. This view suggests that the Court is not unprincipled if every Justice acts according to his or her own personal principles. In contrast is the joint opinion's insistence on institutional integrity. *Id.* at 2808, 2814-16. The joint opinion looked to the institutional integrity of the Court which consisted of the collec-

This Article suggests a different explanation.<sup>150</sup> Rationality review and strict scrutiny embody antagonistic conceptions of liberty that date from the seventeenth century. Largely forgotten, this historic conflict today hides behind the unchanging formula of "life, liberty, and property." Nevertheless, *Casey* represents a continuation of this 300 year old dispute about human rights. Unwittingly, the joint opinion tried to embrace both historically antagonistic positions.<sup>151</sup>

## II. THE HISTORIC MEANINGS OF LIFE, LIBERTY, AND PROPERTY

### A. THE MAGNA CARTA

The language of the Due Process Clause traces back to Chapter 39 of the Magna Carta, which reads: "No free man shall be taken or imprisoned or dispossessed, or outlawed, or banished, or in any way destroyed . . . except by the legal judgment of his peers or by the law of the land."<sup>152</sup> This chapter possesses the same general structure and, allowing for the linguistic differences between the time periods,<sup>153</sup> the same meaning as the Due Process Clause. Both begin with a prohibition, proceed to a list of rights, and conclude with an "except" clause. The lists of rights are strikingly similar. The Magna Carta speaks of being "dispossessed;" the Due Process Clause speaks of a right to "property." The Magna Carta protects against being "taken or imprisoned;" the Due Process Clause protects "liberty." The Magna Carta guarantees against being "in any way destroyed;" the Due Process Clause protects "life." Finally, the "except" clauses are synonymous, or at least they were in the minds

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tive integrity of the Justices and their adherence to precedent, while the *Casey* dissenters assessed judicial integrity justice by individual Justice.

150. See discussion *infra* parts II-V (describing historical conceptions of life and liberty) and part VI.A (reexamining the *Casey* opinions in light of those historic conceptions of rights).

151. See discussion *infra* part VI.A.

152. SELECT DOCUMENTS OF ENGLISH CONSTITUTIONAL HISTORY, *supra* note 10, at 47.

153. The Due Process Clause simply replaces the Magna Carta's passive verb phrases with abstract nouns that designate rights and rearranges the order of those rights. Thus, "[n]o free man shall be taken or imprisoned" becomes "[n]or shall any state deprive any person of . . . liberty;" the freedom from being "dispossessed" becomes a right to "property;" and the freedom from being "destroyed" becomes a right to "life." Compare *id.* with U.S. CONST. amend. XIV, § 1 (emphasis added).

of the Framers, who thought "due process of law" meant the same thing as "law of the land."<sup>154</sup>

Standing alone, these parallels suggest that "life" in the Due Process Clause means more than mere animate existence. The Magna Carta's freedom from "destruction" protected against physical alteration, short of death, and against bodily harms.<sup>155</sup> When Kings cut off subjects' limbs, for example, it "destroyed" the victims in an obvious way, although the unfortunate person remained alive. If the Due Process Clause excluded guarantees against dismemberment and maiming, it would protect significantly less than Magna Carta "life." That would be surprising, given the close parallels between the two documents. More than 500 years elapsed between the Magna Carta and the Constitution, but it is difficult to believe that at any point during that time rights were reformulated so as to preserve all the Magna Carta's freedoms except the freedom from bodily harm.

## B. SEVENTEENTH CENTURY DEVELOPMENTS

During the seventeenth century, while Parliament and Stuart Kings battled each other,<sup>156</sup> Chapter 39 of the Magna Carta became critically important to England's political life.<sup>157</sup> In these struggles, Chapter 39 freedoms played three different roles. First, Stuarts' opponents cited the Magna Carta as a binding law limiting the King's powers,<sup>158</sup> with Chapter 39 functioning as a simple list of rights granted by royal charter. Also, there came to exist a sense of the Magna Carta as "fundamental," as in some way basic to the English government, even binding on the King and Parliament in a special way.<sup>159</sup> Last, the

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154. Rightly or wrongly, the Framers followed Coke's view on this point. *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 28 (1991) (Scalia, J., concurring).

155. Closer in time to the drafting of the Constitution, Blackstone observed that persons had a "natural inherent right" not to have their limbs "wantonly destroyed or disabled." 1 WILLIAM BLACKSTONE, COMMENTARIES \*126.

156. This struggle included the Civil War of 1640 and the Revolution of 1688, which deposed the Stuart dynasty. Against the Stuarts' claims of absolute royal power, their opponents raised the powers of Parliament and the restraints of English law.

157. The Magna Carta already formed a basic part of the British Constitution by this time; Parliaments had reenacted it and Kings had reconfirmed it numerous times during the Middle Ages. Faith Thompson, *Parliamentary Confirmations of the Great Charter*, 38 AM. HIST. REV. 659, 660-64 (1933) (stating that the Magna Carta had been reconfirmed at least 44 times).

158. See generally WILLIAM F. SWINDLER, *MAGNA CARTA: LEGEND AND LEGACY* 166-207 (1965) (describing seventeenth century controversies over royal powers).

159. See generally Riggs, *supra* note 10, at 963.

idea emerged that Chapter 39 freedoms originated from the "social contract," a more profound source than the Magna Carta itself.

In late seventeenth century England, social contract theory became the political philosophy of the Whigs, the party that prevailed over the Stuarts in the Glorious Revolution of 1688.<sup>160</sup> The theory of a social contract holds that people create political societies by exchanging promises that set the terms upon which government functions.<sup>161</sup> Beyond that basic point, however, social contract theorists disagreed among themselves. In John Locke's version, the social contract guarantees Magna Carta freedoms, including rights of body, health, and limb.<sup>162</sup> In contrast, Thomas Hobbes, the founder of social contract theory, argued that Magna Carta freedoms did not exist at all, because the social contract had ruled them out.<sup>163</sup> This division in social contract theory would be replayed in an uncannily similar way within American constitutional law.<sup>164</sup>

## 1. Thomas Hobbes

America's founding fathers had little use for the inventor of social contract theory. In his magnum opus, *Leviathan*,<sup>165</sup>

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160. The most famous social contract theorist, John Locke, was an active Whig, and according to recent scholarship, he was also a participant in Whig conspiratorial activities against the King. RICHARD ASHCRAFT, *REVOLUTIONARY POLITICS AND LOCKE'S TWO TREATISES OF GOVERNMENT* *passim* (1986). Indeed, Locke wrote most of his *Second Treatise of Government*, the classic of social contract theory, in advance of the Glorious Revolution of 1688, intending the work as a call to rebellion. See Peter Laslett, *Introduction to JOHN LOCKE, TWO TREATISES OF GOVERNMENT* 46-49 (Peter Laslett ed., student ed. 1988) (3d ed. 1698). The book was not published, however, until after the revolution, and it was widely read as an after-the-fact justification for the events of 1688. *Id.* at 3.

161. See discussion *infra* parts II.B.1-2, II.C.1.

162. See discussion *infra* part II.B.2.

163. See discussion *infra* part II.B.1.

164. For discussion of the Americans' endorsement of social contract theory, see for example, BERNARD BAILYN, *THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION* 58-59 (1967) (discussing the American colonists' acceptance of social contract theory of government); DAVID A.J. RICHARDS, *FOUNDATIONS OF AMERICAN CONSTITUTIONALISM* 90 (1989) ("The American revolutionary and constitutional minds . . . framed their enterprises on the basis of Lockean political theory."); GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC 1776-1787*, at 282-91 (1969) (describing the increasing importance of Locke's social contract theory in American political thinking after 1776, especially in the drafting of state constitutions). For discussion of how the seventeenth century themes and opposition within the theory reemerge in American constitutional law, see *infra* parts II.B.3.c-d.

165. THOMAS HOBBS, *LEVIATHAN* (C.B. Macpherson ed., 1985) (Head ed. 1651).

Thomas Hobbes argued that subjects owe absolute obedience to sovereigns and that rebellion or revolution is always wrong, regardless of government provocation.<sup>166</sup> These positions, of course, completely contradict the views of the Framers. Moreover, Hobbes never used the phrase "life, liberty, or property."<sup>167</sup> Yet, he remains an important figure in the history of the Due Process Clause. His creation, social contract theory, animated the Framers, launched the modern rights of life and liberty, and set in motion a dynamic between those rights which still persists. Hobbes is also important because the Framers regarded his version of the social contract as an anathema. That makes Hobbes's views significant, albeit negative, clues to the Framers' intentions.

In general, Hobbes's social contract theory posits two stages of political life, nature and society, each having a distinctive kind of "liberty." People surrender *natural* liberty for *civil* liberty. The social contract creates civil society and thereby enhances human life. This theory of a social bargain contains three elements: an account of human life in a state of nature, including an examination of the rights that exist in nature; an explanation of why people change their natural state and form political society; and an account of the political society that social contracts produce, including, crucially, an account of the individual political rights that result from the contract.<sup>168</sup>

Hobbes thought that people lived in a condition of "mere nature" before governments existed. Neither governments nor enacted laws restrained anyone's actions.<sup>169</sup> This was a state of pure liberty, because Hobbes defined liberty as the "absence of

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166. *Id.* at 228-32, 270.

167. This wording appeared frequently in Stuart England, see *infra* part II.B.1, and Hobbes occasionally lapsed into something very close to it. For example, he said that political society affords the only means for a person to "secure his life and liberty." HOBBS, *supra* note 165, at 163. Hobbes rarely used such expressions, however, and his phrase "life and liberty" has nothing like the talismanic quality it would acquire from other writers. Moreover, Hobbes believed that people lose all their natural liberty by seeking the aid of political society, and that the kind of "liberty" that remains hardly deserves the word. See discussion *infra* part II.B.1.

168. See *infra* notes 169-181 and accompanying text. Locke's theory contains the same general architecture and the same three elements as Hobbes's, but Locke's interpretation of each element differs significantly. See discussion *infra* part II.B.2. The differences produced two dramatically different accounts of political rights.

169. HOBBS, *supra* note 165, at 183-88.

externall [*sic*]<sup>170</sup> Impediments,"<sup>171</sup> and he counted legal obligations among those impediments.<sup>172</sup> In this state of unconstrained free choice, or liberty, everyone could choose to do anything, including choosing to take another's life or possessions. Neither possessions nor persons enjoy any protection beyond one's own capacity for self defense. This result, a condition of lawlessness, produces a war of all against all. As Hobbes famously wrote, "the life of man [in a state of nature was] . . . solitary, poore, nasty, brutish, and short."<sup>173</sup>

In order to secure their "lives"—and, as we shall see, Hobbes did not use that word casually—people surrender all of their natural liberty to a sovereign through the social contract.<sup>174</sup> This is the second element of the theory. Under Hobbes's version, the contract creates a sovereign who becomes vested with the natural liberty that the subjects had enjoyed in mere nature.<sup>175</sup> Liberty in a "Common-wealth,"<sup>176</sup> as Hobbes called this new condition of political life, differs radically from the natural liberty of "mere nature":

The Libertie, whereof there is so frequent, and honourable mention . . . is not the Libertie of Particular men; but the Libertie of the Common-wealth . . . For as amongst masterlesse men, there is perpetuall war, of every man against his neighbour; no inheritance, to transmit to the Son, nor to expect from the Father; no propriety of Goods, or Lands; no security; but a full and absolute Libertie in every Particular man: So . . . every Common-wealth, (not every man) has an absolute Libertie, to doe what it shall judge (that is to say, what that Man, or Assemblie that representeth it, shall judge) most conducing to their benefit.<sup>177</sup>

In short, the sovereign's liberty to affect its will is the political liberty of the subjects in a commonwealth. Hobbes reconciled liberty with absolute power by making them identical. That is paradoxical if we think of individual liberty as a set of rights against government; Hobbes obviously did not think that way.

Hobbes did offer, however, a second description of political liberty that better suits the idea of liberty as rights against government:

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170. Certain authorities frequently quoted in this Article, like Hobbes, wrote in Old English. To ensure that the device, *sic*, is not overused, the editors have not indicated any other variations in spelling or grammar found in the Old English quotations.

171. HOBBS, *supra* note 165, at 189.

172. *Id.*

173. *Id.* at 186.

174. *Id.* at 223-39.

175. *Id.*

176. *Id.* at 223-39.

177. *Id.* at 266.

As for . . . Lyberties,<sup>178</sup> they depend on the silence of the Law. In cases where the Sovereign has prescribed no rule, there the Subject hath the liberty to do, or forbear, according to his own discretion. And therefore such Liberty is in some places more, and in some lesse; and in some times more, in other times lesse, according as they that have the Sovereignty shall think most convenient.<sup>179</sup>

Consistently with the first account, Hobbes identified "liberty" with an absolute sovereign's will. Now, however, "liberty" relates to subjects' freedom of action, not the sovereign's. Hobbes had derived a meaning for individual liberty from his idea of unfettered sovereign power.

Hobbes insisted that a sovereign cannot give up its powers over liberty and property. Magna Carta-type restraints on the sovereign, its protections of liberty or property, are ineffective, Hobbes claimed, because the social contract settles the sovereign's powers once and for all.<sup>180</sup> Having surrendered natural liberty to form a commonwealth, Hobbes's social contractors gained "life" in return. "[T]he motive, and end [of the social contractors] . . . is nothing else but the security of a mans person, in his life, and in the means of so preserving life, as not to be weary of it."<sup>181</sup> Thus, Hobbesian "life" encompasses bodily integrity (the "security of a mans person, in his life"), biological existence ("preserving life"), and an element of quality of life ("the [necessary] means of so preserving life, as not to be weary of it.").

These aspects of life describe the social contractors' goals in surrendering their liberty, but they also supply a basis for a kind of right within commonwealths:

As it is necessary for all men that seek peace, to lay down certaine Rights of Nature; that is to say, not to have libertie to do all they [like]: so it is necessarie for mans life, to retaine some; as [the] right to governe their owne bodies; enjoy aire, water, motion, waies to go from place to place; and all things else without which a man cannot live, or not live well.<sup>182</sup>

In this quotation, Hobbes again invested "life" with three different aspects: biological existence, bodily integrity, and quality of

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178. The full text states, "[a]s for *other* Lyberties." *Id.* at 271 (emphasis added). Hobbes explained that people possess the liberty of defending their own lives against the sovereign. *Id.* This right, however, is less important than it might seem, because the sovereign retains the right to overcome the subject's resistance. See *infra* notes 190-192 and accompanying text.

179. HOBBS, *supra* note 165, at 271.

180. *Id.* at 230 (arguing that, although society is formed by a social contract, "there can happen no breach of Covenant on the part of the Sovereigne").

181. *Id.* at 192.

182. *Id.* at 211-12.

life.<sup>183</sup> Now, however, Hobbes suggested that the *only* liberties to survive a transition from “nature” to commonwealth are those necessary to secure “life.”

Hobbes confirmed and refined the point elsewhere in *Leviathan*. Because the purpose of a social contract is to secure the contractors’ lives, “no man can transferre, or lay down his Right to save himselfe from Death, Wounds, and Imprisonment.”<sup>184</sup> Those rights not being surrendered, subjects retain them in Commonwealth, even against the sovereign. Thus, a subject enjoys a “Liberty to disobey” sovereign commands “to kill, wound, or mayme himselfe; or not to resist those that assault him; or to abstain from the use of food, ayre, medicine, or any other thing, without which he cannot live.”<sup>185</sup> These are the only commands that a subject may disobey. Deriving these liberties from a concept of “life,” Hobbes reversed the procedure of modern courts which deduce “life interests” from a concept of “liberty.”

Yet, Hobbes’s descriptions of the right to disobey are inconsistent. His first account extends to “life” in all three of its aspects, including quality of life (“all things . . . without which a man cannot live, or not live well”).<sup>186</sup> The second account, on the other hand, omits quality of life. Hobbes said only that a person can disobey a sovereign’s instruction to “abstain from the use of food, ayre, medicine, or any other thing, without which he cannot live.”<sup>187</sup>

It is easy to see why Hobbes equivocated about quality of life. *Including* it seems to give subjects the right to disobey sovereign commands that affect in any way the quality of their lives.<sup>188</sup> That would render the supposedly absolute sovereign

183. The same three elements appear in Hobbes’s description of the first law of nature: “[A] man is forbidden to do, that, which is destructive of his life, or taketh away the means of preserving the same; and to omit, that, by which he thinketh it may be best preserved.” *Id.* at 189.

184. *Id.* at 199. Interestingly, this passage treats imprisonment in the same way as bodily “destruction.”

185. *Id.* at 269.

186. *Id.* at 212 (emphasis added).

187. *Id.* at 269 (emphasis added).

188. *Leviathan*’s frontispiece includes a graphic representation of how the social contract intermingles the sovereign’s existence and the subjects’ lives. See front cover of *Leviathan* for this portion of the original frontispiece; see also *id.* at 73 (reprinting the full frontispiece). The frontispiece depicts a crowned sovereign towering over a hilly terrain. *Id.* Small towns and trees dot the landscape. *Id.* From a distance, the sovereign views this scene and appears to be wearing a rough, chain mail suit. *Id.* On closer inspection, however, a mass of small human figures comprise the chain mail suit. *Id.* These people are not part of an article of clothing: their mass forms the sovereign’s body. *Id.*

virtually powerless to command individuals, because almost anything can affect one's quality of life. It would change Hobbes's theory beyond recognition.

Despite the reference to "liv[ing] well," Hobbes's scheme of retained rights does not include everything that might enhance a person's life. Many life enhancements result from the institution of a commonwealth: they are not *retained* from nature. Consequently, subjects have no right to disobey the sovereign's commands relating to these aspects of life. Consider Hobbes's full description of the deficiencies of "mere nature":

In such condition, there is no place for Industry; because the fruit thereof is uncertain and consequently no Culture of the Earth; no Navigation, nor use of the commodities that may be imported by Sea; no commodious Building; no Instruments of moving, and removing such things as require much force; no Knowledge of the face of the Earth; no account of Time; no Arts; no Letters; no Society; and which is worst of all, continuall feare, and danger of violent death; And the life of man, solitary, poore, nasty, brutish, and short.<sup>189</sup>

Hobbes's reference to "liv[ing] well," then, does not confer a right to disobey sovereign commands relating to "Industry" or "Arts" or "commodious Building," even though they are among the things that separate the *life* of a commonwealth from the "solitary, poore, nasty, brutish, and short" *life* of mere nature.

Such problems have little practical significance in *Leviathan*, given how the rest of Hobbes's theory unfolds. A subject's right of disobedience, according to Hobbes, imparts no corresponding duty upon a sovereign to respect either the right or the act of disobedience. A sovereign remains at liberty to kill, maim, and starve its subjects, despite the retained liberties of the latter. Moreover, a subject's resistance to a sovereign is bound to

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Just as a social contract transforms the liberty of individuals into the sovereign's liberty, it seems to transform the lives of individuals into the sovereign's life, at least in the sense that their bodies become his. This image captures many of the nuances of Hobbes's theory. Under the Hobbesian social contract, people retain the right not to submit to the sovereign's demands upon their lives, in the sense of existence or physical integrity. See *supra* note 185 and accompanying text. The frontispiece shows discrete persons who retain their individual identities—although their faces are turned toward the sovereign—who, together, form the body of the state. See HOBBS, *supra* note 165, at 73.

In light of this picture, one could theorize that a "good life" and the benefits of culture were Hobbesian attributes of the collective, the sovereign. All that was necessary to individual existence and individual physical integrity had to be preserved because without the individual units, the collective itself could not exist.

189. See HOBBS, *supra* note 165, at 186.

fail,<sup>190</sup> because no one could assist the subject<sup>191</sup> and everyone is bound to assist the *sovereign* against the subject, despite the affected subject's "right" to disobey.<sup>192</sup> In the context of modern constitutional theory, however, this "quality of life" dilemma in *Leviathan* assumes considerable importance.

Hobbes gave "life" the kind of expansive definition that "liberty" enjoys today. Hobbesian "life," as we have seen, includes mere existence, bodily integrity, and, to some degree, things necessary for a good life. Conversely, Hobbesian "liberty" is a denuded concept. Its underlying idea, "absence of restraint," says nothing about which rights or restraints ought to exist. Thus, new rights are not inferable from Hobbes's concept of liberty. The modern view, conceiving of rights as aspects of liberty, would have seemed incoherent to Hobbes.

This same conception of "liberty" underlies Bork's criticism of *Roe* with its insistence that "liberty" is not an intelligible source of rights.<sup>193</sup> There is one important difference, however. Hobbes made "liberty" subservient to "life," but *Roe's* critic overlooks "life" entirely.

In an age when "life, liberty, and property" was already a well-known political formula, Hobbes pioneered the idea that "life" and "liberty" cannot peacefully co-exist as principles, whatever the Magna Carta's wording. A competition between "life" and "liberty" provides the animating force of *Leviathan*. His social contractors had to choose between the liberty of nature and the life enhancements of commonwealth; they could not have both. Hobbes's social contract amounts to a mechanism for choosing life over liberty. Patrick Henry's famous cry, "give me liberty, or give me death,"<sup>194</sup> precisely reverses the principle of *Leviathan*.

Another feature of Hobbes's account deserves notice. *Leviathan* does not clearly distinguish between "is" and "ought." Life and liberty have both attributes. In the end, however, "life" seems more like a fact, and "liberty" more like a right. Hobbes's social contractors surrender natural liberty for a better life, but not for a meaningful *right* to life enforceable against the sover-

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190. *Id.* at 268-69.

191. *Id.* at 270 ("To resist the Sword of the Common-wealth, in defence of another man, guilty, or innocent, no man hath Liberty.").

192. *Id.* at 269-71.

193. See discussion *supra* part I.B.

194. Quoted in MOSES COFF TYLER, PATRICK HENRY 145 (Houghton, Mifflin & Co. 1898).

eign.<sup>195</sup> Subjects enjoy virtually no rights in a commonwealth, although a commonwealth enhances their lives. Conversely, people lead severely diminished lives ("nasty, brutish, and short") in mere nature, where their liberty gives them a *right* to "every thing."<sup>196</sup>

In treating "life" as a fact, and in opposing life and liberty, Hobbes presaged American constitutional developments. Modern constitutional law also treats life as a fact and liberty as a right. Further, it too makes one of the two terms predominate. Whereas Hobbes elevated life over liberty, however, modern constitutional law raises "liberty" over life. Moreover, it fails to recognize the fundamental opposition between them that Hobbes did; it proceeds as if it had made no choice at all.

## 2. John Locke

Locke's *Second Treatise on Government* powerfully influenced the Framers of the Constitution. It portrays government as a means of securing life, liberty, and property, and it warrants rebellion whenever government fails to secure these rights.<sup>197</sup> Revolutionary era Americans embraced both points, writing the first into their constitutions and acting on the second by launching the American Revolution.

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195. Subjects in the commonwealth retain the right to disobey sovereign commands that threaten their lives or bodily integrity. See *supra* note 185 and accompanying text. They do not acquire that right, however, from the social contract; it is the same right that everyone enjoyed in nature. Because all of the subjects of a commonwealth are bound to assist the sovereign in overcoming another subject's right of disobedience, one could hardly call the right a substantial one. See *supra* notes 190-192 and accompanying text.

196. See *supra* text accompanying note 189.

197. See, e.g., BILLYN, *supra* note 164, at 27 ("In pamphlet after pamphlet the American writers cited Locke on natural rights and on the social and governmental contract . . ."); BORK, *supra* note 8, at 230 (suggesting that "the Founders greatly admired John Locke," or at least suggesting that such a claim would be plausible); *id.* at 134 (ridiculing the claim that "in order to understand the American Constitution . . . one must study not John Locke or even James Madison, but a modern German Marxist"); RODNEY L. MOTT, *DUE PROCESS OF LAW: A HISTORICAL AND ANALYTICAL TREATISE OF THE PRINCIPLES AND METHODS FOLLOWED BY COURTS IN THE APPLICATION OF THE CONCEPT OF "LAW OF THE LAND"* 90 (Bobbs-Merrill Co. 1926) ("[I]n the realm of political theory the authority of John Locke and the leaders of the Whig revolution of 1688 was practically unchallenged. It would seem . . . that as regards both law and political science, colonial thought in the middle of the eighteenth century was very similar to English thought at the end of the seventeenth century."); RICHARDS, *supra* note 164, at 78-97 (discussing Lockean theory as the basis for American constitutional thinking). But see *infra* note 314 (discussing Garry Wills's view that Locke's influence on the Declaration of Independence has been overrated).

In fact, Locke had adopted Hobbes's basic theoretical framework, although the *Second Treatise* arrives at conclusions radically different from Hobbes's. Locke, like Hobbes, described a state of nature, a social contract, and a transition to civil society. He differed with Hobbes, however, on two basic points. Locke insisted that "life" encompasses the life of all humanity. Locke also had a different conception of when life constitutes an *enforceable* right. Both differences emerge in Locke's account of a "law of nature."

Locke understood the "laws of nature" to command mutual preservation, not merely self-preservation, as Hobbes believed. While Hobbes described the "law of nature"<sup>198</sup> as counseling aggression against others,<sup>199</sup> Locke told an entirely different story. In a pivotal paragraph of *The Second Treatise*,<sup>200</sup> Locke wrote as follows:

The State of Nature has a Law of Nature to govern it, which obliges every one: And Reason, which is that Law, teaches all Mankind, who will but consult it, that being all equal and independent, no one ought to harm another in his Life, Health, Liberty, or Possessions, . . . Every one . . . is bound to preserve himself, and not to quit his Station wilfully; so by the like reason when his own Preservation comes not in competition, ought he, as much as he can, to preserve the rest of Mankind, and may not unless it be to do Justice on an Offender, take away, or impair the life, or what tends to the Preservation of the Life, the Liberty, Health, Limb or Goods of another.<sup>201</sup>

Like Hobbes, then, Locke began with an expansive concept of "life." In the quoted passage, Locke derived all other rights—liberty, health, limb, and goods—by exploiting ambiguities in the words "life" and "preservation." He began, as Hobbes had, with "life" as self preservation, or simply remaining alive. "Every one," Locke wrote, "is bound to preserve himself, and not to quit his Station wilfully," which is to say, not to commit suicide. Yet, that meaning expands over the course of the paragraph into a broader right of "life."

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198. Hobbes defined law of nature as "a Precept, or generall Rule, found out by Reason, by which a man is forbidden to do, that, which is destructive of his life, or taketh away the means of preserving the same; and to omit, that, by which he thinketh it [life] may be best preserved." HOBBS, *supra* note 165, at 189.

199. "[T]here is nothing . . . [a person] can make use of, that may not be a help unto him, in preserving his life against his enemyes; [and] It followeth, that in such a condition, every man has a Right to every thing; even to one anothers body." *Id.* at 189-90.

200. In 1776, Virginia adopted this paragraph in its Declaration of Rights, which was a model for the Constitution's Bill of Rights. See discussion *infra* part III.B.

201. See LOCKE, *supra* note 160, at 271 (emphasis omitted).

The duty to preserve one's own life became the duty to preserve everyone's life ("by the like reason . . . ought he . . . to preserve the rest of Mankind"). "Preserving" life thus means "not impair[ing]" life. Not impairing life, in turn, entails protecting a person's liberty, health, limb, and goods. The duty of refraining from suicide, with which Locke began the paragraph, turns into everyone's entitlement to a full life, by the end of the paragraph. In this way, Locke derived all natural rights, including "liberty," from the concept of "life."

Another ambiguity reinforces this conclusion. Locke closed his paragraph by invoking a duty not to "take away, or impair the life, or what tends to the Preservation of the Life, the Liberty, Health, Limb or Goods of another."<sup>202</sup> Here, the word "Preservation" may relate to "Life" alone, or it may relate to the entire phrase that follows, depending on how one reads the comma after "Life." One interpretation deems "Liberty, Health, Limb or Goods" to be things that "tend[] to the Preservation of the Life." They matter, on this reading, only because of their connection with life. Locke's starting premises about self-preservation bear the weight of this interpretation. On the other hand, this interpretation fails to explain the panoply of natural rights Locke posited in the *Second Treatise*. Liberty and goods become superfluous, deserving protection if, and only if, "life" demands it.

According to the second interpretation, "Liberty," "Health," "Limb," and "Goods" warrant preservation in their own right; not merely as means of preserving life. This reading does account for the full panoply of natural rights. It fails to explain, however, how those rights follow from the duty of "not quitting one's station," the narrow sense of self-preservation that was Locke's starting point. Evidently, "life" has come to mean not just existence, but a full or good or unimpeded "life." Other rights follow from that broad idea of "life." Like Hobbes, then, Locke treated "life" as an expansive concept that encompasses the basic elements people seek in their lives. Unlike the author of *Leviathan*, however, Locke made "life" a broadly enforceable right, indeed, the source of other rights.

For example, Locke derived property rights from his expansive idea of "life."<sup>203</sup> "Men, being once born," Locke explained,

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202. *Id.*

203. Interestingly, Locke is widely regarded as the philosopher of "property" rights. See, e.g., RICHARD A. EPSTEIN, *TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN*, 9-18 (1985) (discussing Locke and property rights).

"have a right to their Preservation, and consequently to Meat and Drink, and such other things, as Nature affords for their Subsistence."<sup>204</sup> The right to life, or "preservation," therefore accounts for the first form of property, the right to possess food, as well the right to be sustained in other ways. A parallel argument, based on revelation, follows similar lines: God gave the world to people in common, and also gave "them reason to make use of [the world] to the best advantage of *Life*."<sup>205</sup> In so making use of the world, people employ things and land: in short, property. Thus, property exists in the service of "life."

Locke also related "property" and personhood: "Though the Earth . . . be common to all Men," he wrote, "yet every Man has a Property in his own Person,"<sup>206</sup> that is, in his own "life." From this comes property of every description:

The Labour of his Body, and the Work of his Hands, we may say, are properly his. Whatsoever then he removes out of the State that Nature hath provided, and left it in, he hath mixed his Labour with, and joyned to it something that is his own, and thereby makes it his Property . . . For this Labour being the unquestionable Property of the Labourer, no Man but he can have a right to what that is once joyned to, at least where there is enough, and as good left in common for others.<sup>207</sup>

Thus, property rights arise when labor "joyns" a part of the world to some person's life.

Likewise, Locke portrayed "liberty" as subordinate to "life."<sup>208</sup> Lockean "liberty" is not the prime right, or the source of other rights, or even a right of the same high order as life. In each respect, it differs from the modern concept of "liberty." The condition of nature is "a State of Liberty";<sup>209</sup> Locke argued, it is "not a State of Licence,"<sup>210</sup> because "though Man in that State [of Nature] ha[s] an uncontroleable Liberty, to dispose of his Person or Possessions, yet he has not Liberty to destroy himself, or so much as any Creature in his Possession, but where some nobler use, than its bare Preservation calls for it."<sup>211</sup> Here, "lib-

204. LOCKE, *supra* note 160, at 285.

205. *Id.* at 286 (emphasis added).

206. *Id.* at 287 (emphasis omitted).

207. *Id.* at 287-88 (emphasis omitted).

208. See *supra* text accompanying note 201 (quoting Locke's passage introducing natural rights which is part of a larger argument about liberty and the state of nature).

209. LOCKE, *supra* note 160, at 270 (emphasis omitted).

210. *Id.* (emphasis omitted).

211. *Id.* at 270-71.

erty" seems to mean "absence of restraint,"<sup>212</sup> as it does in *Leviathan*, but Locke was denying that "liberty" in nature is this raw liberty. For even in nature, Lockean liberty is limited by considerations pertaining to life; preservation of *life*, not liberty, is Locke's starting point. From this beginning, "liberty" follows the contours of the right of "life."

This "liberty" is an anomalous right. Although Locke often invoked liberty in the same breath as life and property, the rights of life and property in fact delimit liberty. Indeed, all of natural law limits liberty, even in a state of nature where "all Men are naturally in . . . a State of perfect Freedom to order their Actions, and dispose of their Possessions, and Persons as they think fit, *within the bounds of the Law of Nature*, without asking leave, or depending upon the Will of any other Man."<sup>213</sup> Though liberty is so limited, it does not reciprocally limit or constrain other rights.<sup>214</sup> One does not ask, for example, whether "life" and "liberty" point toward opposite conclusions in a particular case; liberty is *always* subordinate to life.<sup>215</sup> Its subordination raises questions of what kind of right "liberty" really is, and whether it is a right like life or property at all.

At one point, the *Second Treatise* mentions a liberty "of innocent Delights."<sup>216</sup> If Locke had any sense of "liberty" as a free standing right to autonomy, functioning like rights of life and property, this is the only place in the *Second Treatise* where he expressed it. Locke never defined "innocent delights," and, again, there is only one reference to the concept. It seems likely, however, that "innocent delights" are actions that do not violate someone else's rights ("innocent") and that do not breach the actor's own duties. If so, "innocent delights" constitute the residual category of actions that are not otherwise prohibited. Something is an innocent delight because one wants it, and because no natural right or duty happens to require forbearance.

This points to an idea that is implicit in Locke's account. Any interference with another person must have *some reason* for

212. Similarly, Locke stated that no one has the "Liberty to destroy himself," meaning that restraints exist on everyone's ability to do so. See text accompanying note 211.

213. LOCKE, *supra* note 160, at 269 (emphasis omitted) (other emphasis added).

214. Thus, a kind of short circuit exists in Locke's use of "liberty." Natural rights limit natural liberty; yet "liberty" is one of the natural rights.

215. See *supra* text accompanying notes 201 and 211.

216. LOCKE, *supra* note 160, at 352 ("For in the State of Nature, to omit the liberty he has of innocent Delights, a Man has two Powers . . . [namely, preserving himself and others, and punishing violations of the laws of nature]").

it: either protection of life, protection of property, or the ill-defined "nobler use"<sup>217</sup> considerations which Locke invoked at the outset. That represents a basic principle of liberty in the *Second Treatise*. It is a weak principle, however, because *any* valid reason for interfering overcomes it. Indeed, it recalls Hobbesian liberty: anything is permissible so long as the sovereign has not forbidden it. If Hobbesian liberty is what remains after the sovereign issues its commands, Lockean "innocent delights" are what remain after one satisfies natural law and right, and those natural rights are extensive. Locke's liberty is not really an independent force; it is what remains after every other force exerts itself.

Locke's treatment of natural rights yields a state of nature dramatically different from Hobbes's. While Hobbes imagined an entirely unrestrained liberty,<sup>218</sup> Locke saw a liberty entirely constrained by right. In Locke's state of nature, people enjoy natural rights of life and property. Moreover, everyone may "execute" the law of nature and protect their natural rights by punishing offenders.<sup>219</sup> Nature, therefore, includes both a system of rights and a method of enforcing them.

Even so, nature leaves much to be desired on Locke's account. Everyone interprets and "executes" the laws of nature according to their own lights. Bias and self-interest inevitably predispose many people to misinterpret.<sup>220</sup> No "known and indifferent Judge" with "Authority to determine all differences"<sup>221</sup> exists in nature, and the power to "back and support"<sup>222</sup> judgments about the law of nature is inadequate, because it relies entirely upon private action. The Lockean social contract remedies these problems by creating a "known and indifferent Judge" of natural right, with power to enforce its judgments. The advent of this judge produces "political society," or a Commonwealth.

In *Leviathan*, contractors surrender the unrestrained liberty of nature for the prospect of an enhanced life in the commonwealth.<sup>223</sup> Lockean social contractors, by contrast, never have unrestrained liberty in nature, and they always enjoy an

217. *Id.* at 271 (arguing that one may not "destroy" himself or any other "Creature" unless "some nobler use, than its bare Preservation calls for it").

218. *See supra* notes 169-173 and accompanying text.

219. LOCKE, *supra* note 160, at 272-76.

220. *Id.* at 275-76, 350-53.

221. *Id.* at 351 (emphasis omitted).

222. *Id.*

223. *See supra* note 174 and accompanying text.

entitlement to life and estate, albeit an entitlement with an imperfect method of enforcement in the state of nature. These contractors could not trade an unrestrained liberty that they never possessed, and they would not trade for a condition less desirable than nature, where they already enjoyed natural rights. These Lockean contractors create political society to preserve their "Lives, Liberties and Estates,"<sup>224</sup> the things guaranteed to them by the Law of Nature, through the institution of a better method of enforcement. The social contract effects this change. Locke's "known and indifferent judge," the enforcer of natural rights, however, is not a judiciary. It is the legislature.<sup>225</sup> Laws are the arbiters, but the existence of these laws, in turn, affects natural right. Property and liberty undergo important changes in political society.

The *Second Treatise* has surprisingly little to say regarding property in political society. "[I]n Governments," Locke wrote, "the Laws regulate the right of property, and the possession of land is determined by positive constitutions."<sup>226</sup> This perhaps suggests that natural property rights are completely subject to laws in political society. Locke did not mean, however, that regulation could obliterate natural property rights. "The Supream Power," he wrote, "cannot take from any Man any part of his Property without his own consent."<sup>227</sup>

By "consent," Locke may have meant "collective consent," specifically, the consent of the people's representatives in the Legislature.<sup>228</sup> More likely, he had a stringent concept of what constituted a taking. "Taking" for Locke seems to mean "appropriation" by the government, rather than merely making someone's property less valuable:

I have truly no Property in that, which another can by right take from me, when he pleases, against my consent. Hence it is a mistake to think, that the Supream or Legislative Power . . . can do what it will, and dispose of the Estates of the Subject arbitrarily, or take any part of them at pleasure. . . .

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224. LOCKE, *supra* note 160, at 350.

225. *Id.* at 324-25.

226. *Id.* at 302.

227. *Id.* at 360 (emphasis omitted).

228. Laslett, *Editorial Notes* to LOCKE, *supra* note 160, at 360-61 n. accompanying lines 5-7 (observing that "Locke leaves it possible to suppose that consent is collective, not individual."). *But see* LOCKE, *supra* note 160, at 361 (arguing that the legislature—presumably the agency that could give "collective" consent—cannot take "any part of the Subjects Property, without *their own consent*") (emphasis omitted) (other emphasis added).

[H]owever . . . [the Legislature] may have power to make Laws for the regulating of Property between the Subjects one amongst another, yet [it] can never have a Power to take to [itself] . . . the whole or any part of the Subjects Property, without their own consent. For this would be in effect to leave them no Property at all.<sup>229</sup>

Natural property rights thus survived the transition to political society, where they limited legislative powers and, at the same time, were subject to legislative limitation and "regulation."

Locke offered a much fuller account of how the social contract affects the liberty of the state of nature. Locke carefully distinguished<sup>230</sup> between "natural liberty" and the liberty of persons in political society, which he called "civil liberty":

T[he] Natural Liberty of Man is to be free from any Superior Power on Earth, and not to be under the Will or Legislative Authority of Man, but to have only the Law of Nature for his Rule. The Liberty of Man, in Society, is to be under no other Legislative Power, but that established, by consent, in the Common-wealth, nor under the Dominion of any Will, or Restraint of any Law, but what the Legislative shall enact, according to the Trust put in it. [That trust, according to Locke, requires the legislature to comply with natural law.] Freedom . . . is not . . . [a] Liberty for every one to do what he lists [likes], to live as he pleases, and not to be tyed by any Laws: But Freedom of Men under Government, is, to have a standing Rule to live by, common to every one of that Society, and made by the Legislative Power erected in it; A Liberty to follow my own Will in all things, where the Rule prescribes not; and not to be subject to the inconstant, uncertain, unknown, Arbitrary Will of another Man. As Freedom of Nature is to be under no other restraint but the Law of Nature.<sup>231</sup>

In short, laws enacted by a duly constituted legislature do not abridge civil liberty, provided the laws comport with natural right; whereas natural *liberty*, as shown earlier,<sup>232</sup> is itself *not* a determinant of what natural right requires.

This requirement of consistency with natural right separates Locke's and Hobbes's ideas of civil liberty. Hobbes would have agreed with Locke that civil liberty was the "[l]iberty to follow my own Will . . . where the rule prescribes not." That echoes Hobbes's idea of liberty as the choices a sovereign left unregulated.<sup>233</sup> Hobbes envisioned social contractors *surrendering* their natural liberty to the sovereign, however, with liberty in a commonwealth becoming the *sovereign's* freedom to do as it

229. LOCKE, *supra* note 160, at 360-61 (emphasis omitted).

230. In contrast, American courts during the *Lochner* era equated constitutional "liberty" with "natural liberty." See discussion *infra* part IV.A.

231. LOCKE, *supra* note 160, at 283-84 (emphasis omitted).

232. See *supra* notes 208-214 and accompanying text.

233. See discussion *supra* part II.B.1.

pleases.<sup>234</sup> Natural right is not a political constraint on the Hobbesian sovereign's choices; virtually all sovereign enactments bind the subjects.<sup>235</sup> In contrast, Locke thought of civil liberty as enforcing and securing natural right.

Thus, Hobbes and Locke had radically different conceptions of law and liberty. Hobbes defined liberty as freedom from restraint.<sup>236</sup> Given that definition, even duly enacted laws constitute restraints abridging natural liberty because they limit freedom of action. Hobbes therefore regarded all laws as infringements of natural liberty. For him, the idea of laws that *enhance* liberty was just nonsense. By contrast, Locke offered precisely that idea of liberty:

For Law, in its true Notion, is not so much the Limitation as the direction of a free and intelligent Agent to his proper Interest, and prescribes no farther than is for the general Good of those under that Law. Could they be happier without it, the Law, as an useless thing would of it self vanish; and that ill deserves the Name of Confinement which hedges us in only from Bogs and Precipices. So that, however it may be mistaken, the end of Law is not to abolish or restrain, but to preserve and enlarge Freedom: For in all the states of created beings capable of Laws, where there is no Law, there is no Freedom. For Liberty is to be free from restraint and violence from others which cannot be, where there is no Law: But Freedom is not, as we are told, A Liberty for every Man to do what he lists [likes]: (For who could be free, when every other Man's Humour might domineer over him?) But a Liberty to dispose, and order, as he lists, his Person, Actions, Possessions, and his whole Property, within the Allowance of those Laws under which he is; and therein not to be subject to the arbitrary Will of another, but freely follow his own.<sup>237</sup>

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234. See *supra* text accompanying note 174.

235. In theory, the subjects of a Hobbesian commonwealth have a right to disobey sovereign commands that threaten their lives. See discussion *supra* part II.B.1. This could not be described, however, as a political right because a sovereign remains free to subdue subjects who assert this so-called "right." See *supra* text accompanying notes 189-191. In addition, the sovereign's other subjects remain bound to support the sovereign against the subject whose life is threatened. See *supra* text accompanying note 192.

Indeed, there were no conditions of human life—apart from the moment of negotiating the social contract—when Hobbes treated natural law as more than hortatory. Hobbesian sovereigns should obey natural law, but need not do so. Persons in a state of nature also should obey natural law, but apart from the command of self preservation, circumstances prevent them from doing so.

236. See *supra* notes 177-179 and accompanying text.

237. LOCKE, *supra* note 160, at 305-06 (emphasis omitted). The relation between "freedom" and "liberty" in this passage is unclear. At one point, Locke defined "freedom" in terms of "liberty" ("Freedom is not . . . A Liberty for every Man to do what he lists"); but at another point, he defined "liberty" in terms of being "free" ("For Liberty is to be free from restraint and violence from others which cannot be, where there is no Law"). Still elsewhere it appears that lib-

Far from meaning "absence of restraint," Lockean civil liberty and natural liberty depend on compliance with valid restraints. According to Locke, enacted laws may be invalid for substantive or procedural reasons. Substantively, the laws must comport with natural right, while procedurally they must issue from a duly constituted authority, such as a government or a legislature established by a social contract. Substantive liberty consists of respect for natural right plus the principle of "innocent delights," the idea that any interference with someone's actions requires a valid reason.<sup>238</sup> Procedural liberty is the right of living under a duly constituted government.

In Locke's theory, the laws of nature, the goals of civil society, and the purposes of individual actors are identical: each consists of the preservation of life, liberty, and estate.<sup>239</sup> This identity is a hallmark of his political philosophy. Yet, Locke described these laws, goals, and purposes using numerous different phrases. For example, in *The Second Treatise* he referred to "Life, . . . Liberty, Health, Limb . . . [and] Goods";<sup>240</sup> "Lives, Liberties, and Estates";<sup>241</sup> "Life, Health, Liberty, or Possessions";<sup>242</sup> "Estate, Liberty, Limbs and Life";<sup>243</sup> "Lives, Liberties

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erty is freedom, and freedom is liberty ("For in all the states of created beings capable of Laws, where there is no Law, there is no Freedom. For Liberty is to be free from restraint and violence"). Then again, sometimes "liberty" seems to mean "raw liberty" or "absence of restraint" ("Liberty for every man to do what he lists"); and sometimes it means "liberty under law" (e.g., the last sentence).

Without referring to either this passage or the word "liberty," Laslett remarks on Locke's "extraordinary" failure to define his terms in the *Second Treatise*. Laslett, *Introduction to LOCKE*, *supra* note 160, at 84. Laslett also notes the similarity between this *Second Treatise* passage and a *Leviathan* passage. In *Leviathan*, Hobbes observed as follows: "For the use of Lawes' is . . . to direct and keep [the People] in such a motion, as not to hurt themselves . . . as Hedges are set, not to stop Travellers, but to keep them in the way." Laslett, *Editorial Notes to LOCKE*, *supra* note 160, at 305-06 n. accompanying line 16 (quoting HOBBS, *supra* note 165, at 388). Hobbes never recognized, however, a right or a liberty to be free of bad laws, a right that is central to Locke's *Second Treatise*. Nor would Hobbes have accepted Locke's claim that an essential part of "liberty" is being subjected to laws which comport with natural right.

238. See *supra* notes 216-217 and accompanying text.

239. The obligations of parents to children also fall under the heading of preserving (the child's) life, liberty, and estate. LOCKE, *supra* note 160, at 303-18.

240. *Id.* at 271.

241. *Id.* at 350.

242. *Id.* at 271.

243. *Id.* at 313 (referring to interests of a child that the parent must protect).

and Fortunes";<sup>244</sup> "Lives or Goods";<sup>245</sup> "Lives or Liberties";<sup>246</sup> and "Liberties and Properties."<sup>247</sup> A more comprehensive statement appears in Locke's *Letter Concerning Toleration*,<sup>248</sup> in which he invoked "Life, Liberty, Health and Indolency of Body; and the Possession of outward things, such as Money, Lands, Houses, Furniture and the like."<sup>249</sup> This version renders property as a list of possessions, and adds "Health" and "Indolency of Body"<sup>250</sup> to "Life."

These variations are not as surprising as they seem. No canonical text, such as the Due Process Clause, fixed Locke's choice of words. Although the Magna Carta inspired Locke's formulae, the *Second Treatise* insists that life, liberty, and estate derive from Reason and the social contract, not from the Great Charter.<sup>251</sup> Locke's variations are also consistent with the rhetoric of his age and party.<sup>252</sup>

244. *Id.* at 359.

245. *Id.* at 311 (referring to power of parents).

246. *Id.* at 312 (referring to power of parents).

247. *Id.* at 367. See Laslett, *Editorial Notes to LOCKE, supra* note 160, at 323 n. accompanying para. 87 (surveying the *Second Treatise's* various phrasings of the natural rights formula).

248. JOHN LOCKE, A LETTER CONCERNING TOLERATION (James H. Tully ed., 1983) (William Popple trans., 1689).

249. *Id.* at 26.

250. See 7 OXFORD ENGLISH DICTIONARY 884-85 (2d ed. 1989) (defining "indolency" as "Freedom from pain; a state of rest or ease, in which neither pain nor pleasure is felt.") (cross-referencing "indolence" definition (2) and citing Locke's usage).

251. At one point, Locke evoked the language of Chapter 39, observing that the power of a legislature cannot be used to "destroy, enslave, or designedly to impoverish the Subjects." LOCKE, *supra* note 160, at 357. In general, however, the more modern formulas—"life, liberty or estate" and its variants—suggest that the Magna Carta is not the source of these rights.

252. By this time, the language of fundamental rights had a modern, abstract cast, but the phrasings varied. For example, political writers invoked: "lives and liberties," A LETTER FROM A GENTLEMAN IN THE CITY, TO ONE IN THE COUNTRY, CONCERNING THE BILL FOR DISABLING THE DUKE OF YORK TO INHERIT THE IMPERIAL CROWN OF THIS REALM, 12-13 (1680), *quoted in* ASHCRAFT, *supra* note 160, at 190; "lives, liberties, and estates," *cited in* ASHCRAFT, *supra* note 160, at 206 n.107 (quoting from FRANCIS S. RONALDS, THE ATTEMPTED WHIG REVOLUTION OF 1678-1681, at 13 (1974)); and "lives, liberties, and properties," *cited in* ASHCRAFT, *supra* note 160, at 291 (quoting LAURENCE ECHERD, THE HISTORY OF ENGLAND 998-99 (1720)). Another version of the litany added a fourth element: "laws, liberties, lives and estates." ASHCRAFT, *supra* note 160, at 315 (emphasis added) (quoting PAPERS OF THE EARL OF SHAFTESBURY, Public Records Office, London). Still another writer inveighed against the arbitrary power of kings to "dispose of . . . [the subjects'] lands, goods, persons, liberty and property," *id.* at 203 (quoting WILLIAM LAWRENCE, MARRIAGE BY THE MORAL LAW OF GOD VINDICATED 324 (1680)), a phrasing that rendered the traditional freedom from "destruction" in terms of protecting "persons," rather than "lives."

Obviously, Locke's failure to mention a right at one point or another does not mean that he intended to exclude it.<sup>253</sup> Some formulations of his exclude every right—life, liberty, and estate, as well as health, limb, and body. Although Locke mentioned "health" and "limb" less often than "life," and used the phrase "indolency of body" only once, he still believed that the laws of nature and the purposes of the social contract guarantee those rights. Within the social contract framework it could hardly be otherwise; no one would agree to social arrangements that imperiled their health, limbs, or body. Locke's equation of natural right with the personal objectives of the social contractors ensures protection for those rights.

Because the *Second Treatise* often omits a specific reference to health, limb, and body, the question arises of what other terms encompass those rights. "Property," "liberty," and "life" are all viable possibilities. Locke spoke of a "property" in one's person, for example, a property that presumably could include health, limb, and body. Again, because "liberty" includes every natural right, a state depriving someone of the full use of her body or her health would not be a state of "liberty." "Life," however, is still the most likely candidate for embodying these concepts. Life represents the fundamental Lockean right. Moreover, Locke's fullest statements treat health, limb, and body as aspects of "life." Furthermore, those who followed Locke explicitly treat health, limb, and body under the rubric of "life."<sup>254</sup>

### 3. Some Comparisons

The present day, expansive notion of "liberty" differs radically from Lockean liberty in several ways. First, unlike modern

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According to Ashcraft, Whigs urging the exclusion of James II, a Catholic, from the throne adopted the slogan "No Popery, No Slavery and Liberty and Property," *id.* at 224, which recalls Locke's treatment of slavery as a violation of the right to life. See discussion *infra* part II.B.3.a.

253. The alternative is to suppose that Locke changed his mind, wildly and erratically, throughout the book—here considering "life" a natural right, there regarding "life" as nothing—without even commenting on the discrepancies.

254. For discussion, see *infra* part II.C.1 (discussing Hutcheson's views) and part II.C.2 (discussing Blackstone's views).

The modern interpretation of "life, liberty or property" makes it easy to overlook broader meanings of the word "life." Beyond mere survival, we want to have a "life." Nor is this broad idea of life confined to animate things. Robert Bork, for example, writes of "[p]rofessions and academic disciplines that once possessed a *life* and structure of their own" but have succumbed to "the belief that nothing matters beyond politically desirable results." BORK, *supra* note 8, at 1 (emphasis added).

"liberty," Lockean "liberty" is incapable of yielding new rights, nor does it provide a benchmark for testing the validity of laws.<sup>255</sup> Further, Lockean "liberty" seems superfluous in the formula of "life, liberty, and property," whereas modern "liberty" seems to be the most important of the three rights.<sup>256</sup> Precisely because of such differences, social contract theory places modern developments into perspective.<sup>257</sup> This section argues that the modern construction of "life, liberty, and property" mirrors Locke's construction, using the same three elements to produce an inverted structure.<sup>258</sup>

a. *Liberty as a Summary Term*

For a law to be valid under the modern view of liberty, it must measure up to liberty's standards; liberty affords a benchmark of a law's validity.<sup>259</sup> Locke turned that view on its head. Except for the minimal principle of "innocent delights," Locke did not test the substantive validity of laws against the standard of liberty; his "liberty" has virtually no independent substantive content.<sup>260</sup>

Locke's "liberty" is almost entirely the product of other forces and concepts: the rights of life and property, the social contract, and, in civil society, the dynamics of legitimate government.<sup>261</sup> To understand these forces is to completely understand Locke's theory of rights. With the possible exception of "innocent delights," no reference to political "liberty" is even necessary.<sup>262</sup> Having discovered an infringement of the right of life,

255. See discussion *infra* part II.B.3.a.

256. See discussion *infra* part II.B.3.b.

257. See discussion *infra* part II.B.3.c (comparing Locke's and Hobbes's theories to Ely's and Bork's).

258. See discussion *infra* part II.B.3.d.

259. See *supra* notes 29-38 and accompanying text.

260. It is true that any violation of Lockean natural right also infringes Lockean political liberty. That follows from Locke's definition, making the observance of natural right an essential part of liberty. See *supra* text accompanying notes 231-233. This connection, however, does not lend weight or explanatory power to the concept of liberty. One still does not look to "liberty" in order to decide whether a law violates natural right; rather, one looks to natural right to decide whether there has been a violation of liberty.

261. See discussion *supra* part II.B.2.

262. It may be tempting to ask why Locke treated liberty as he did. To a degree, the question is unfair: we might as well ask why anyone *fails* to regard liberty as Locke did. In another way, the question is almost unanswerable. Conceivably, Locke was concerned about the chaos of the commonwealth years, when England was riven by civil war; perhaps he connected that period to an unbridled conception of liberty. Or, he may have reacted to the authoritarianism that Hobbesian "liberty" produced. Then again, Locke's patrons and polit-

for example, it conveys nothing new to also call it an infringement of "liberty."

The modern, expansive idea of "liberty" is often considered an outgrowth from the idea of "freedom from physical restraint."<sup>263</sup> Yet, Locke rejected the idea of "freedom from physical restraint" even as the starting point, or core meaning, of liberty. For one thing, Lockean liberty *depends* on the existence of some restraints.<sup>264</sup> What hedges us in from "Bogs and Precipices"—literally, a physical restraint—enhances, rather than denies, our liberty.<sup>265</sup> Moreover, Locke treated unjust deprivations of freedom as infringements of the right of *life*, even when physical liberty is literally lost. Slavery, for example, represents a loss of "[f]reedom from Absolute, Arbitrary Power."<sup>266</sup> Locke summarized why slavery is wrong as follows:

Freedom from Absolute, Arbitrary Power, is so necessary to, and closely joyned with a Man's Preservation, that he cannot part with it, but by what forfeits his Preservation and Life together. For a Man, not having the Power of his own Life, cannot, by Compact, or his own Consent, enslave himself to any one, nor put himself under the Absolute, Arbitrary Power of another, to take away his Life, when he pleases.<sup>267</sup>

Even a brief, unjust restriction on someone's movements constitutes a threat to *life*:

This makes it Lawful for a Man to kill a Thief, who has not in the least hurt him, nor declared any design upon his Life, any farther then by the use of Force, so to get him in his Power, as to take away his Money, or what he pleases from him: because using force, where he has no Right, to get me into his Power, let his pretence be what it will, I have no reason to suppose, that he, who would take away my Liberty, would not when he had me in his Power, take away every thing else.<sup>268</sup>

Lacking independent analytical power and incapable of explaining even the freedom from physical restraint, Lockean liberty has the power to summarize political rights. This power follows from the fact that *any* infringement of natural right and

ical allies were aristocrats; they perhaps had a sense of order that was inconsistent with an unbridled concept of liberty.

263. See *supra* note 100 and accompanying text.

264. See *supra* text accompanying note 237.

265. See *supra* text accompanying note 237.

266. LOCKE, *supra* note 160, at 284 (emphasis omitted).

267. *Id.* (emphasis omitted). Locke allowed for slavery as an incident of lawful conquest because the lawful conqueror would have had the right to take the captive's life. *Id.* He thought that slavery arose when someone "forfeited his own Life, by some Act that deserves Death" and the person to whom the life was forfeited "delay to take it, and make use of him to his own Service." *Id.*

268. *Id.* at 279-80 (emphasis omitted). Similarly, Hobbes deemed freedom of movement a "right . . . necessarie for mans life." See *supra* note 182 and accompanying text.

any deviation from the social contract are, on Locke's definition, also violations of "liberty."<sup>269</sup> One could summarize Locke's political theory by observing that people are entitled to "liberty," although the concept of "liberty" itself adds little or nothing of its own. Lockean "liberty" is like a logo on a building: eliminate the logo, and the structure remains the same. Indeed, Locke said that he intended to use the word "property," rather than "liberty," to stand for the rights of life, liberty, and estate.<sup>270</sup> Although the *Second Treatise* often uses "property" in the narrower sense, as a synonym for "estate" (for example, in the account of how "property" arises from labor and derives from "life") and often uses "liberty" in a broader sense (for example, in Locke's discussion of the state of nature as a state of "liberty"), the inconsistencies of usage do not matter: they do not change the structure of his theory.<sup>271</sup> Whether the logo atop Locke's theory reads "liberty" or "property," the theory's content and structure stay the same.

Nonetheless it remains significant that Lockean "liberty" has the potential to summarize the theory of political right. Locke designed "liberty" with that potential in mind. He did not *have* to attach the label "liberty" to states that honor natural rights; Locke *chose* to do so. The likely explanation is that "liberty" functioned as a summary term for civil rights long before Locke wrote the *Second Treatise*. Had Locke ignored that usage, his discussion would not seem to be an analysis of "liberty" at all. For that reason, Lockean "liberty" also has the capacity to designate all of our rights.<sup>272</sup> Like a hollow shell, Locke's political "liberty" *can* contain all of our rights. One hundred years later, American revolutionaries used "liberty" as a summary

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269. Recall that Lockean "liberty" connotes respect for natural rights (substantive liberty) and the existence of a duly created government, consistent with the social contract. See discussion *supra* part II.B.2.

270. LOCKE, *supra* note 160, at 350. The broader meaning of "property" was common usage in the late seventeenth century. Laslett, *Editorial Notes to LOCKE*, *supra* note 160, at 102-03. At one point, Hobbes even followed it by observing that "[o]f things held in *propriety*, those that are dearest to a man are his own life, & limbs; and in the next degree, (in most men,) those that concern conjugall affection; and after them riches and means of living." HOBBS, *supra* note 165, at 382-83 (emphasis added).

271. For discussion of Locke's inconsistent usage, see Laslett, *Editorial Notes to LOCKE*, *supra* note 160, at 102 (noting that Locke often used "property" in the narrow sense).

272. Hobbes also labored to reconcile his unique conception of "liberty" with accepted usage. At one point, he defined political "liberty" as all the activities the sovereign had left unregulated. See discussion *supra* part II.B.1.

term and thought of themselves as Lockean.<sup>273</sup> Then, almost 300 years later, American courts began to *derive* natural rights from liberty, the reverse of Locke's procedure, and virtually no one noticed the difference.<sup>274</sup>

b. *The Meaning of "Liberty" in the Natural Rights Formula*

Discerning Locke's intended meaning for "liberty" requires additional analysis of phrases such as "life, limb, health, liberty and goods"<sup>275</sup> and "life, liberty and estate." The meaning of these references to "liberty" must be inferred from the *Second Treatise* as a whole. First, "liberty" means that only laws enacted by a duly constituted legislature—or, in a state of nature, only individual acts that enforce natural right—carry binding force.<sup>276</sup> This is a kind of "procedural" liberty, a right of freedom from restraint unless the restraint issues from a particular source. In addition, "liberty" connotes the minimal principle of "innocent delights," the idea that every restraint of a person requires some valid reason.<sup>277</sup> Standing alone, "life" and "property" and "natural right" do not convey these ideas, and to that extent, Lockean "liberty" is not superfluous. Beyond the minimal principle of innocent delights, however, the "liberty" of "life, liberty and estate" lacks any substantive content of its own. "Liberty" does not even tell us when freedom of movement can be restricted; Locke thought that "life" performs that function, as the example of the "thief" shows.<sup>278</sup> "Life" and "property"—not "liberty"—distinguish substantively permissible restraints from impermissible ones in Locke's theory.

As noted earlier, the word "liberty" *can* summarize Locke's political theory, including the entitlement to natural rights. In the phrase "life, liberty and estate," and in Locke's other wordings of the natural rights formula, however, "liberty" does not even do that. If it did, the phrase "life, liberty and property" would suffer from the redundancy noted earlier in connection with the modern view: "life" and "property" would be superflu-

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273. See discussion *infra* part III.A.

274. See discussion *infra* part IV.A.

275. This problem is the reverse of one that arises under modern definitions of "liberty." The modern view sees the "liberty" of the Due Process Clause as a comprehensive source of rights. If "liberty" protects rights of life and property, however, the words "life" and "property" become superfluous. In the *Second Treatise*, the problem arises whether "liberty" is superfluous.

276. See discussion *supra* pp. 629-30 and text accompanying note 237 (enacted laws) and text accompanying note 219 (state of nature).

277. See discussion *supra* part II.B.2.

278. See *supra* text accompanying note 268.

ous. We would be entitled to life and property, and we would also be entitled to "liberty," which includes life and property.

This interpretation of *Second Treatise* "liberty" is of interest because it parallels Ely's and Bork's interpretation of "liberty" in the Due Process Clause.<sup>279</sup> Those critics, as noted earlier, deny that due process "liberty" has any substantive meaning.<sup>280</sup> If the preceding analysis is correct, the *Second Treatise* seemingly supports their interpretation.<sup>281</sup>

In fact, the *Second Treatise* anticipates two modern and seemingly inconsistent approaches to the Due Process Clause. Locke's treatment of "liberty," as just discussed, supports that due process "liberty" lacks substantive content. At the same time, the *Second Treatise* as a whole, the social contract idea of "life," and the idea that "liberty" standing alone incorporates natural rights support the view that the Due Process Clause includes a comprehensive system of substantive, natural rights.

### c. *Locke and Hobbes; Ely and Bork*

Despite social contract theory's age and philosophical focus, it sheds light on Ely's and Bork's respective approaches to the Due Process Clause. Ely's work resembles Locke's theory, at least up to a point, whereas Bork's views often parallel Hobbes's ideas.

Although Ely and Bork offer similar criticisms of *Roe*, their approaches to the Fourteenth Amendment differ.<sup>282</sup> Bork reads constitutional "liberty" as meaning "freedom from restraint," the freedom to do as one pleases, which is precisely Hobbes's meaning.<sup>283</sup> The definition makes it impossible to single out particu-

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279. See discussion *supra* part I.B. Bork, however, would not accept the principle of innocent delights, because he denies that due process "liberty" imposes a rationality test. BORK, *supra* note 8, at 45 (criticizing Holmes's *Lochner* dissent, which had proposed a rationality test); *id.* at 234 (asserting that, although the anti-contraceptive statute struck down in *Griswold* was a "lunatic law," it was not unconstitutional).

280. See discussion *supra* part I.B.

281. For their interpretations, Ely and Bork rely on the words "due process," which they say designates "process" or procedure. The *Second Treatise*, however, arrives at the same interpretation of "liberty" without any reference to "due process." If the constitutional guarantee read, "No person shall be deprived of liberty," the interpretation described in the text would remain unchanged.

282. See discussion *supra* part I.B.

283. For example, Bork criticizes the idea that "liberty" includes the "freedom not to conform." "A 'freedom not to conform'? What can that possibly mean? Freedom from law? Law requires conformity within the subjects it covers." BORK, *supra* note 8, at 239. That was precisely Hobbes's point in saying

lar choices—abortion, for example—as special. Thus, Bork argues that either liberty allows everything, which is absurd, or it protects nothing; among human wants, liberty plays no favorites.<sup>284</sup> Bork's two poles, a liberty that encompasses every choice and a liberty that encompasses none, parallel Hobbes's alternatives of nature, where humanity is at liberty to do everything, and a commonwealth, where subjects, having surrendered it, have a *natural* liberty to do nothing. In effect, Bork gives a modern twist to the seventeenth century concept of "license," of men and women doing as they please. Locke denied that nature is a state of license;<sup>285</sup> Hobbes thought nature is precisely that.<sup>286</sup> Without using the same metaphor, Bork sides with Hobbes: he too thinks of liberty as "license."

Whereas "license" connoted social anarchy in the seventeenth century, another kind of license, *judicial* license, troubles Bork in the twentieth century.<sup>287</sup> He knows that judges will never lift all legal restraints, so not even their misguided concept of constitutional liberty will really produce social anarchy.<sup>288</sup> On the other hand, judges will confer license selectively, Bork thinks, in accordance with their personal value preferences.<sup>289</sup> They will choose to license abortion, for example. Judges deciding as they please have judicial "license," an unconstrained, standardless liberty to decide constitutional cases. Interestingly, Bork expresses his alarm at this development using terms that would befit a state of social anarchy or license.<sup>290</sup>

Ely too denies that substantive rights can be derived from liberty. What separates him from Bork, however, is an attraction to Locke's idea of procedural "liberty," as well Ely's sense that "liberty"—or a related term, like "privileges and immunities"—is capable of summarizing rights. The latter tendency

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that "where the Sovereign has prescribed no rule, there the subject hath the liberty to do, or forbear, according to his own discretion." HOBBS, *supra* note 165, at 271; *see* discussion *supra* part II.B.1.

284. For a discussion of Bork's views, *see supra* part I.B.

285. LOCKE, *supra* note 160, at 270; *see* discussion *supra* part II.B.2.

286. *See supra* notes 169-173 and accompanying text.

287. Bork, *supra* note 27, at 10 (arguing that judges are obliged to treat all human gratifications equally, absent an explicit constitutional direction to the contrary and that modern judges ignore this obligation).

288. BORK, *supra* note 8, at 18 (pointing out that "[n]o court" is "so willful" as to impose its own preference "in every case").

289. *Id.*

290. *See, e.g., id.* at 10-11 (arguing that 1960s "activists" with "Jacobin" tendencies are now fighting a battle against "the limits of respectable politics and . . . political neutrality," with the federal courts a major battleground in this struggle).

shows itself in two ways. Ely essentially accepts a summary concept of liberty in matters of procedural due process, which addresses the question of whether government action must be accompanied by a hearing.<sup>291</sup> He thinks procedural due process reaches every serious individual interest, and he finds such a summary concept useful, despite its generality.

Ely also applies the idea of summarizing rights to certain "substantive" issues. In the Fourteenth Amendment, Ely perceives "a delegation to future constitutional decision-makers to protect rights that are not listed either in the . . . Amendment or elsewhere in the document."<sup>292</sup> In effect, the Fourteenth Amendment allows later generations to decide what rights an earlier generation's summary term should include. Yet, Ely also denies that new rights can be *derived* from "liberty" or any other general term.<sup>293</sup> In Ely's view, "future constitutional decision-makers" should protect the workings of democratic political processes, for example, the one person, one vote principle, as well as the rights of socially disenfranchised groups, such as racial minorities.<sup>294</sup> He thinks this consistent with the democratic structures of the Constitution, which ought to guide the present day understanding of the Fourteenth Amendment.<sup>295</sup> Ely's views resemble Locke's "procedural liberty," the entitlement to governance by duly constituted authorities.<sup>296</sup> Locke believed that procedural liberty, that is, the guarantee of a properly constituted government, usually assures the people's substantive, natural rights.<sup>297</sup> Yet, Locke thought that even a properly constituted government could fail in that regard.<sup>298</sup> The *Second Treatise* therefore establishes conformity to natural right—what I call "substantive liberty"—as an independent test of the validity of government action.

Ely interprets the Fourteenth Amendment the way Locke interpreted the social contract, until that last step. Ely distin-

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291. Thus, Ely believes that "if you . . . [are] seriously hurt by the state you . . . [are] entitled to [procedural] due process." Ely, *supra* note 48, at 19. This makes "liberty"—or as Ely also suggests, the "phrase 'life, liberty or property' . . . read as a unit," a summary for all protected rights.

292. *Id.* at 30. Ely finds this meaning in the Privileges and Immunities Clause of § 1 of the Fourteenth Amendment, rather than in the Due Process Clause. *Id.* at 22-30.

293. *Id.* at 11-30.

294. *Id.* at 73-179.

295. *E.g., id.* at 181.

296. For discussion, see *supra* part II.B.3.c.

297. See discussion *supra* part II.B.3.b. and pp. 629-30.

298. See *supra* pp. 629-30.

guishes between government structure and substantive rights, and, as Locke had, emphasizes how structure assures against abuse. Ely concludes, however, that *only* structure could provide that assurance.<sup>299</sup> Not recognizing "life, liberty, and property" as substantive rights, he argues for unenumerated constitutional rights that only relate to structure. Ely thus applauds *Baker v. Carr*,<sup>300</sup> assuring the fairness of political representation, and *Brown v. Board of Education*,<sup>301</sup> protecting political minorities, but he regards *Roe* as a disaster. Whereas Locke recognized structure and substance, Ely considers only structure. Whether or not the logic of the Constitution dictates Ely's theory, his work reflects, at least up to a point, the logic of the *Second Treatise*.

As it happens, Locke also considered legislative apportionment, the *Baker* issue, and arrived at an answer like Ely's solution. Population shifts had distorted the ancient Parliamentary district system, and Locke thought that the King had a duty to create more representative districts.<sup>302</sup> This was a rare case of Locke faulting a Stuart king for *not* exercising additional power. No precedent existed for royal redistricting, but Locke believed it was required, just as Ely believes that the logic of political representation mandates one person, one vote. Interestingly, *Democracy and Distrust*<sup>303</sup> also ends on the same note that the *Second Treatise* does, asking when citizens may disobey government.<sup>304</sup> Little in Ely's book addresses disobedience,

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299. Structure, that is, plus enumerated rights.

300. 369 U.S. 186 (1962).

301. 347 U.S. 483 (1954).

302. LOCKE, *supra* note 160, at 372-73.

To what gross absurdities the following of Custom, when Reason has left it, may lead, we may be satisfied when we see the bare Name of a Town, of which there remains not so much as the ruines, where scarce so much Housing as a Sheep-coat; or more Inhabitants than a Shepherd is to be found, sends *as many Representatives* to the grand Assembly of Law-makers, as a whole County numerous in People, and powerful in riches . . . . If therefore the Executive, who has the power of Convoaking the Legislative, observing rather the true proportion, than fashion of *Representation*, regulates, not by old custom, but true reason, the *number of Members* . . . it cannot be judg'd, to have set up a new Legislative, but to have restored the old and true one . . . .

*Id.*

303. ELY, *supra* note 48.

304. Compare LOCKE, *supra* note 160, at 406-28 (discussing the right of revolution) with ELY, *supra* note 48, at 183 (considering when a citizen, or a judge, ought to disobey a law).

however, and the ending was conceivably a bow in Locke's direction.<sup>305</sup>

The same cannot be said about Bork's work. As Bork understands the Constitution, it embodies precise directives for human action, comparable to the commands of a Hobbesian sovereign.<sup>306</sup> Bork, like Hobbes, emphasizes the relativity of all values; what is good is what people want.<sup>307</sup> Apart from wants, no standard of human value exists. That, in turn, explains Bork's and Hobbes's insistence on precise legal directives. General statements of value cannot direct people's actions because values do not exist, apart from particular wants. Therefore, such statements are meaningless, and individuals interpret value statements to validate their desires. To avoid this result, legal rules must be precise, addressing particular wants and actions, rather than meaningless values. "Liberty" is a case in point. Given their theory of value, Hobbes and Bork understand "liberty" as unrestrained "license" because liberty cannot possibly mean anything else. Both are positivists, deeply distrusting abstractions, and "liberty" is the most abstract right of all.

Bork is not a Hobbesian, of course. Hobbes thought agreements never bind the sovereign;<sup>308</sup> Bork regards all officials as subordinate to the Constitution.<sup>309</sup> It is one thing to make a sovereign absolute, as Hobbes does; it is something different to make the Constitution sovereign. Yet within the confines of his theory, Bork follows Hobbes's conception of right, and he has a similar theory of value. In not trivial ways, therefore, Bork's Constitution and Hobbes's social contract resemble one another,<sup>310</sup> and both differ dramatically from Locke's conceptions. Of course, Ely and Bork have something else in common: they

305. Elsewhere in the book, Ely recalls being "a lad studying philosophy in the late 1950's," but he does not, however, mention any particular philosophers who influenced him. ELY, *supra* note 48, at 53.

306. Compare HOBBS, *supra* note 165, at 311-35 (developing the theory of law as the "Command" or "Sign of the Will" of a sovereign) with BORK, *supra* note 27, at 6 ("Court must be controlled by principles exterior to the will of the Justices").

307. See discussion *supra* note 27.

308. See *supra* text accompanying note 180.

309. BORK, *supra* note 8, at 2 (arguing that the Constitution should "control judges").

310. I have characterized Ely's and Bork's positions in terms of "liberty," but they themselves sometimes use other terms. When Ely embraces a summary term for rights, for example, he chooses "privileges and immunities" rather than "liberty." See *supra* note 292 and accompanying text. Although Bork deals with liberty explicitly, he does not view his own criticisms of the judiciary as premised on a particular meaning of that term. Yet, these critics' arguments

ignore "life," the concept from which Locke derived political "liberty." In a distinctively modern way, they have "liberty" displacing "life."

d. *Mirror Images*

The modern picture of "life, liberty, and property" is a mirror image of Locke's version. Today "life" is a spurious right, "liberty" is preeminent, and property is often linked with liberty.<sup>311</sup> The *Second Treatise*, on the other hand, makes "life" preeminent, treats "liberty" as a spurious substantive right, and links "property" with life.<sup>312</sup> The foremost right in one series, whether life or liberty, becomes spurious in the other, while "property" holds a middle position in both.

The pattern of primary, intermediate, and spurious natural rights is a kind of rhetorical fingerprint, shared by the *Second Treatise* and modern constitutional law. Both impose the pattern upon a phrase, "life, liberty, or property," that suggests three rights equal in stature, not a hierarchy of rights.

Neither the pattern of primary, spurious, and secondary rights, nor the phrasing that suggests three equally important rights, is inevitable. The Due Process Clause and the *Second Treatise* might have treated the three rights as equal in stature, as well as in name, but neither document did. Nor do the documents readily identify the true stature of each right. Again, there could be two co-equal rights and one lesser one, or two spurious rights instead of one. Yet, both documents employ the same misleading verbal formula allied with the same odd hierarchy of primary, spurious, and secondary rights.

Whether Locke originated these patterns, or passed them on from another source, remains unclear. At a minimum, he did pass them on, which enhances his place in our constitutional history. The *Second Treatise* would supply the model for Section 1 of the Virginia Declaration of Rights, which, in turn, became the model for constitutional "life, liberty, or property."<sup>313</sup> Ironically, today's modern, expansive concept of "liberty" in fact originated in Locke's attempt to diminish "liberty" and subordinate it to "life."

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follow the familiar lines, and address the recognized dilemmas, of social contract theory.

311. See discussion *supra* part II.A.

312. See discussion *supra* part II.B.2.

313. See discussion *infra* part III.B.

## C. EIGHTEENTH CENTURY DEVELOPMENTS

## 1. Frances Hutcheson

The Scottish philosopher Frances Hutcheson exercised an influence on revolutionary America that rivaled Locke's. Garry Wills identifies Hutcheson as the most powerful philosophical influence on Jefferson and the text of the Declaration of Independence.<sup>314</sup> Hutcheson also had an extraordinarily influential idea of "liberty." In matters of general philosophy, he belonged to the same school of thought as David Hume: whereas Locke conceived of the human mind as a *tabula rasa*, an empty slate written upon by experience, Hutcheson and Hume saw distinct human capacities or "faculties."<sup>315</sup> In his political philosophy, however, Hutcheson followed Locke rather than Hume. Hutcheson posited a social contract and government based on con-

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314. GARRY WILLS, *INVENTING AMERICA 167-255* (1978). Wills also suggests that Locke's influence on the Declaration of Independence has been exaggerated and that revolutionary Americans never viewed Locke as the preeminent authority on politics. *Id.* at 167-75. Many owned and read the *Second Treatise*, but they also owned and read other political works by many other authors. *Id.* at 171. Wills concludes that Locke's book was not so renowned that we can assume its influence in any particular case. *Id.* at 175. *Contra* RICHARDS, *supra* note 164, at 80-81 and n.15 (arguing that Jefferson derived the language and premises of his Declaration of Independence from Locke, and that Wills "focuses . . . too narrowly" on other figures).

Wills's argument is not inconsistent, however, with Locke's exercising a decisive influence on the Americans' understanding of "life, liberty, or property." Wills allows that Locke might have had a greater influence on others than he did on Jefferson. Moreover, revolutionary era constitutions clearly echo language of the *Second Treatise*. See *infra* part III.B. In any event, much of Wills's analysis addresses Locke's, Hutcheson's, and Jefferson's respective views of human nature and human knowledge, rather than addressing political questions that underlay "life, liberty, or property." It is those questions that are directly relevant, because the Framers wrote "life, liberty or property"—not a theory of mind or epistemology—into the Constitution.

Finally, Hutcheson himself followed the ideas, and occasionally the phrasing of Locke's *Second Treatise*, on the basic issues of political rights. See *infra* part II.C.1. Therefore, the question of which one exercised the greater influence is less important than it might seem. Regarding the social contract and life, liberty, or property—Hutcheson was a Lockean.

315. See generally WILLS, *supra* note 314, at 193-206 (contrasting Locke's mental theory with Hutcheson's and Hume's); see also Daniel Walker Howe, *The Language of Faculty Psychology in the Federalist Papers*, in *CONCEPTUAL CHANGE AND THE CONSTITUTION* 107 (Terrence Ball & J.G.A. Pocock eds., 1988) (describing the seventeenth and eighteenth century picture of the human mind as consisting of separate "faculties," rather than a Lockean *tabula rasa*).

sent,<sup>316</sup> and many details of his political theory, as well as some of its language, echo the *Second Treatise*.<sup>317</sup>

More systematic than Locke, Hutcheson considered the first natural right to be the "right to life, and to that perfection of body which nature has given."<sup>318</sup> That right, Hutcheson contended, is "intimate" to everyone by "our immediate sense of moral evil in all cruelty occasioning unnecessary pain, or abatement of happiness to any of our fellows."<sup>319</sup> Hutcheson also invoked an "inalienable" right "over our lives and limbs."<sup>320</sup> Among the "perfect"—or what we might call the "compelling"—rights, Hutcheson included a person's right "to his life; to a good name; to the integrity and soundness of his body; to the acquisitions of his honest industry; to act according to his own choice within the limits of the law of nature: this right we call natural liberty . . ."<sup>321</sup> He further followed Locke in distinguishing natural from civil liberty, and, as the following quotation suggests, in subjecting all liberty to the laws of nature:

Civil liberty and natural have this in common, that as the latter is the right each one has to act according to his own inclination within the limits of the law of nature: So civil liberty is the right of acting as one inclines within the bounds of the civil laws, as well as those of nature. Laws are so far from excluding liberty, that they are its natural and surest defence . . . If indeed civil liberty meant an exemption from the

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316. 2 FRANCES HUTCHESON, A SYSTEM OF MORAL PHILOSOPHY 225-32 (Augustus M. Kelley 1968) (1st ed. 1755). Hutcheson summarized his view as follows:

Civil power is most naturally founded by these three different acts of a whole people. 1. An agreement or contract of each one with all the rest . . . 2. A decree or designation, made by the whole people, of the form or plan of power . . . 3. A mutual agreement or contract between the governors thus constituted and the people . . .

*Id.* at 227. Hutcheson allowed, however, that government could justly precede consent under one set of circumstances. For this exception to apply, a person with "sufficient power" must have a "plan of polity, truly effectual for the general good"; the people being "stupid" and "prejudiced," reject the plan; yet, there is "all rational ground of concluding, that upon a short tryal [the people] will heartily consent to it." *Id.* at 231. This exception varies the timing of, but not the necessity for, consent.

317. For example, Hutcheson distinguished natural liberty from civil liberty; identified a law of nature; and, in general, asked how the laws of nature are effectuated in civil society. See discussion *infra* part II.C.1.

318. 1 HUTCHESON, *supra* note 316, at 293.

319. *Id.* at 293.

320. MORTON WHITE, THE PHILOSOPHY OF THE AMERICAN REVOLUTION 204 (1978).

321. 1 HUTCHESON, *supra* note 316, at 257.

authority of the laws, the best regulated states would allow least liberty.<sup>322</sup>

Hutcheson's position on "life" closely resembles Locke's view. Both ranked "life" first among rights, implicitly or explicitly; both rejected the idea of "life" as mere biological existence; and both protected bodily integrity as an aspect of "life." Hutcheson's right posits an ideal bodily state, bodily "perfection" and "soundness," whereas Locke built his right to life on the idea of non-interference with a current state, "indolence of body." This may reflect other differences between Hutcheson and Locke regarding the human nature, but in terms of the *right* to life, it amounts to little.<sup>323</sup>

In terms of "liberty," however, Hutcheson introduced a new element. He held that human beings possess certain "faculties," including a "moral" faculty,<sup>324</sup> with distinctively human designs.<sup>325</sup> These faculties make up the human constitution. Consequently, Hutcheson regarded the satisfaction of human desires as an inherently good thing:

[I]n fact it is for the good of the system [that is, for the happiness of all] that every desire and sense natural to us, even those of the lowest kinds, should be gratified as far as their gratification is consistent with the nobler enjoyments, and in a just subordination to them; there seems a natural notion of right to attend them all. We think we have a right to gratify them, as soon as we form moral notions, until we discover some opposition between these lower ones, and some principle we naturally feel to be superior to them. This very sense of right seems the foundation of that sense of liberty, that claim we all naturally insist upon to act according to our own inclination in gratifying any desire, until we see the inconsistency of its gratification with some superior principles.<sup>326</sup>

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322. 2 HUTCHESON, *supra* note 316, at 281-82 (internal quotation marks omitted). Hutcheson also echoed Locke's view that civic power was held in "trust for the publick good." *Id.* at 272. For a discussion of Locke's views on these points, see *infra* part II.B.2.

323. I doubt that Hutcheson would have recognized lesser rights of life for persons whose bodies were not "perfect," because that would make too much of the differences in wording.

324. For a summary of Hutcheson's views, see WILLS *supra* note 314, at 193-200.

325. 1 HUTCHESON *supra* note 316, at 93.

In contrast, Lockean theory recognizes the human capacity for choice but seemingly attaches little moral value to it. It is a datum, an aspect of the natural world. In Locke's view, moral force emanates from natural law, not human choice. Further, Locke's principle of "innocent delights" allows interference with free choice for *any valid reason*. See *supra* notes 237-239 and accompanying text.

326. 1 HUTCHESON, *supra* note 316, at 254-55 (emphasis omitted). Hutcheson's mention of "the nobler enjoyments" recalls Locke's claim that no one can

In this conception, "liberty," or the satisfaction of human desires, possesses intrinsic value. That remains true even though lesser desires must be subordinated to "nobler" considerations. Hutcheson even defined "liberty" as the ability to gratify desire:

As nature has implanted in each man a desire of his own happiness, and many tender affections toward others in some nearer relations of life, and granted to each one some understanding and active powers, with a natural impulse to exercise them for the purposes of these natural affections; 'tis plain each one has a natural right to exert his powers, according to his judgment and inclination, for these purposes, in all such industry, labour, or amusements, as are not hurtful to others in their persons or goods, while no more publick interests necessarily requires his labours, or requires that his actions should be under the direction of others. This right we call *natural liberty*. . . . This right of natural liberty is not only suggested by the selfish parts of our constitution, but by many generous affections, and by our moral sense, which represents our own voluntary actions as the grand dignity and perfection of our nature.<sup>327</sup>

Hutcheson thus valued voluntary action, in ways that Locke did not. Whereas Hutcheson envisioned the "grand dignity and perfection of our nature," Locke saw a mere absence of restraint, and, perhaps the raw, biological capacity of choice.<sup>328</sup> Like Locke's famous *tabula rasa*, a mind empty of knowledge and not predisposed to hold any kind of information, the Lockean will is not fit for particular choices.<sup>329</sup> Hutcheson, on the other hand, conceived of the will as predisposed to choices that ought to be made. Thus, Locke's "liberty" is morally superfluous;<sup>330</sup> Hutcheson's has moral significance. Locke made autonomy, or "innocent delights," a residual category that receives virtually no attention;<sup>331</sup> Hutcheson made "liberty" a basic, animating force of his theory and of human life.

These distinctions are not merely academic. Suppose, for example, that the Due Process Clause used a Lockean conception of "liberty." The principle of "innocent delights" would ensure that any interference with a person's action has a valid reason. Moreover, everyone could "follow . . . [his or her] own Will in all things, *where the Rule prescribes not.*"<sup>332</sup> On the

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destroy "any Creature" except "where some *nobler* use . . . calls for it." LOCKE, *supra* note 160, at 271 (emphasis added).

327. 1 HUTCHESON, *supra* note 316, at 293-95 (second emphasis omitted).

328. See discussion *supra* pp. 625-26.

329. See *supra* note 325.

330. See discussion *supra* part II.B.3.b.

331. See *supra* note 216 and accompanying text.

332. LOCKE, *supra* note 160, at 283-84 (emphasis added).

other hand, no right of individual autonomy in decision making would exist beyond what an insistence on legality and natural right, without any reference to liberty, would afford. For instance, a "liberty" to use contraceptives could not exist in the face of a valid "rule" that prohibits their use. Indeed, the word "liberty" would probably add nothing to the phrase "due process." Without any mention of "liberty," due process suggests the principle of legality and the requirement of valid reasons. Therefore, if the Clause read, "no person shall be deprived of *life or property* without due process of law" it would mean the same thing. Hutcheson's "liberty," by contrast, *is* a right to autonomy. One could construct an argument, for example, that the right to choose contraceptives constitutes an aspect of "liberty," even though the government has outlawed contraceptives. That meaning adds something to the Due Process Clause.

Subjecting these two ideas of liberty to the technique of constitutional balancing also reveals their differences. To "balance" is to weigh individual liberty interests against competing interests of the government.<sup>333</sup> Because Lockean "liberty" is "weightless," it adds nothing to the balance on the individual's side. Since it demands no more than a duly enacted law, and honors any valid reason for the enactment, Lockean "liberty" confers nothing beyond an entitlement to due administration of the laws. Generally, however, courts do not balance an individual's interests in due administration of the laws (Lockean "liberty") against any governmental interest in departures from the principle of "due administration."<sup>334</sup> In contrast, Hutcheson's conception of "liberty" does not have weight that courts can balance against government interests. In Hutcheson's view, the fact that somebody desires an action affords *some* reason to regard the action as moral. His principle of autonomy is not absolute because choices "hurtful to others in their persons or goods" and acts contrary to higher "publick interests" are not allowed.<sup>335</sup> Nor is modern liberty absolute.

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333. See, e.g., *Youngberg v. Romeo*, 457 U.S. 307, 321 (1982) (asserting that "liberty interests" must be balanced against "relevant state interests").

334. Under extraordinary circumstances, such balancing is conceivable. At least *Korematsu v. United States* suggests something very much like it. 323 U.S. 214 (1944). Upholding the exclusion of Japanese Americans from areas of the West Coast during World War II, *id.* at 219, the Court seemingly recognized a kind of emergency exception, allowing departures from the ordinary course of constitutional law under certain conditions of war, *id.* at 223-24.

335. 1 HUTCHESON, *supra* note 316, at 294; see also *id.* at 256 ("[N]o moral agent . . . can upon close reflection approve himself in . . . following any other disposition of his nature, when he discerns, upon the best evidence he can have,

One should not exaggerate Hutcheson's differences with Locke. Severe limitations on autonomy separate Hutcheson's philosophy from hedonism and anarchism. One should also remember that Locke employed a chameleon concept of "liberty" capable of blending with a wide variety of views.<sup>336</sup> It would not even be farfetched to take Hutcheson's approach as a gloss on Locke's liberty, one that internalized into human nature matters which Locke treated as part of the human environment. Most importantly, Hutcheson, like Locke,<sup>337</sup> subjected his conception of "liberty" to the right of life,<sup>338</sup> to unnamed "nobler enjoyments,"<sup>339</sup> and to the requirements of law.<sup>340</sup> Desiring or willing an action creates no more than a rebuttable presumption that the action comports with the human constitution; upon analysis, that action might still turn out to be impermissible.

Ultimately, the law prevails. Hutcheson, like Locke, regarded civil liberty as "the right of acting as one inclines *within the bounds of the civil laws, as well as those of nature.*"<sup>341</sup> Yet, the fact remains that Hutcheson made more of "liberty" than Locke did. If someone desires an action, that desire alone affords a reason to regard the action as consistent with "nature." Hutcheson's "liberty" has moral force, while Locke's "liberty" does not. Thus, Hutcheson's liberty forms a bridge between the Lockean and the modern conceptions.

## 2. Blackstone

Blackstone's *Commentaries on the Laws of England*<sup>342</sup> was the most influential and widely-read law book in America during the latter eighteenth century.<sup>343</sup> Published in 1765, the *Com-*

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that doing so is contrary to the universal interest or the most extensive happiness [of humanity].").

336. For discussion, see *supra* part II.B.3.a.

337. See *supra* notes 208-212 and accompanying text (liberty subordinate to life); *supra* note 211 and accompanying text (no liberty to destroy a creature except where there is a "nobler use" than its bare preservation); *supra* note 231 and accompanying text (liberty subject to law).

338. See *supra* note 318 and accompanying text.

339. See *supra* note 326 and accompanying text.

340. See *supra* note 322 and accompanying text.

341. 2 HUTCHESON, *supra* note 316, at 281 (emphasis added) (internal quotation marks omitted).

342. BLACKSTONE, *supra* note 155.

343. Charging a grand jury in 1799, for example, Supreme Court Justice Iredell described the *Commentaries* thus:

for nearly thirty years . . . the manual of almost every student of law in the United States, and its uncommon excellence has also introduced it into the libraries, and often to the favorite reading of private gentle-

*mentaries* appeared too late to influence colonial charters or early American state constitutions. Moreover, Blackstone was a conservative royalist. The Magna Carta and the *Second Treatise* had been forged out of political struggles with English kings, but Blackstone's *Commentaries* glorify royal power. None of this endeared Blackstone to revolutionary colonists like Jefferson.<sup>344</sup> Nevertheless, Blackstone's work had a wide and often sympathetic audience. As Justice Iredell said, Blackstone's "view of . . . [a] subject could scarcely be unknown to those who framed the Amendments to the Constitution . . . ."<sup>345</sup>

Despite his conservatism, Blackstone largely followed Locke's view of "life, liberty, and property." In particular, Blackstone recognized "limb" and "health" in tandem with the right to "life," and like Hutcheson, Blackstone did so explicitly. For example, he distinguished "*absolute* rights," which "are so in their primary and strictest sense; such as would belong to their persons merely in a state of nature, and which every man is entitled to enjoy, whether out of society or in it,"<sup>346</sup> from "relative

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men; so that his [Blackstone's] views of . . . [a] subject could scarcely be unknown to those who framed the Amendments to the Constitution . . . ."

FRANCES WHARTON, *STATE TRIALS OF THE UNITED STATES* 478 (1849), *quoted in* Julian S. Waterman, *Thomas Jefferson and Blackstone's Commentaries*, 27 Nw. L. REV. 629, 654 (1933). In particular, Justice Iredell was referring to Blackstone's views of freedom of the press, and its relevance to the meaning of the First Amendment, but the same point applies to the Due Process Clause of the Fifth Amendment. See LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 112 (2d ed. 1985) (noting the "ubiquity of Blackstone" among revolutionary era lawyers, who "referred to Blackstone constantly"); KERMIT L. HALL, *THE MAGIC MIRROR: LAW IN AMERICAN HISTORY* 52 (1988) (observing that Blackstone was "preeminent, and no other legal figure equalled his impact on the colonies"); Duncan Kennedy, *The Structure of Blackstone's Commentaries*, 28 BUFFALO L. REV. 209 (1979) (concluding that the *Commentaries* were "the single most important source on English legal thinking in the 18th century, and it has had as much (or more) influence on American legal thought as it has had on British").

Certain Americans criticized Blackstone, including Thomas Jefferson, but the disagreement never touched the enumeration of absolute rights in the *Commentaries*. To the contrary, Jefferson deemed Blackstone hostile to liberty and overly sympathetic to authority—in effect as insufficiently dedicated to natural rights. See HALL, *supra*, at 52; Waterman, *supra*, at 629-34. Jefferson also objected to Blackstone's views about judicial power to declare and alter the common law, Waterman, *supra*, at 642-45, a disagreement with overtones for the American practice of judicial review. Yet, the issue of judicial review should not be confused with questions of the existence and identity of fundamental rights—a matter that Jefferson and Blackstone agreed about in the first instance.

344. See Waterman, *supra* note 343, at 634-35.

345. WHARTON, *supra* note 343, at 478.

346. 1 BLACKSTONE, *supra* note 155, at \*123.

rights," which "are incident to . . . [persons] as members of society . . . standing in various relations to each other."<sup>347</sup> The "principal aim of society," according to Blackstone, is "to protect individuals in the enjoyment of those absolute rights, which were vested in them by the immutable laws of nature."<sup>348</sup> These rights Blackstone called "personal security,"<sup>349</sup> "personal liberty,"<sup>350</sup> and "property."<sup>351</sup>

"Personal security" is Blackstone's version of the Magna Carta's freedom from "destruction," and the Lockean-Hutchesonian right of "life." It encompasses "a person's legal and uninterrupted enjoyment of his *life*, his *limbs*, his *body*, his *health*, and his reputation."<sup>352</sup> "Limbs" include "those members which may be useful . . . [to a person] in fight" and which "enable [him] to protect himself from external injuries in a state of nature."<sup>353</sup> Such limbs "cannot be wantonly destroyed or disabled."<sup>354</sup> "Body" includes "the rest . . . [of someone's] person or body," that is, everything not included under "limbs," and "body" is protected by "the same natural right."<sup>355</sup> Evidently, Blackstone believed that life, limb, body, health, and reputation belong together because the loss of any one of them, including reputation, could be said to "destroy" a person.

Reputation aside, the subcategories of "personal security" mesh with Locke's account of life. Locke cited "limb" and "health," and his "indolency of body" appears indistinguishable from Blackstone's right to one's "body." Blackstone followed Hutcheson even more closely, in that Hutcheson also included reputation as an aspect of "life." Thus, Blackstone, the most prominent legal influence on the Framers, and Locke and Hutcheson, probably the most prominent philosophical influences, agreed on a formula for higher order rights that includes "limb," "health," and "[indolency of] body."

The fact that Blackstone's "life" is only a subcategory of his right of personal security does not change the analysis. The Framers did not use "life" in Blackstone's narrow sense, intending thereby to exclude health, limb, and body from constitu-

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347. *Id.*

348. *Id.* at \*120.

349. *Id.* at \*125.

350. *Id.* at \*130.

351. *Id.* at \*134.

352. *Id.* at \*125 (emphasis added).

353. *Id.* at \*126.

354. *Id.*

355. *Id.* at \*130.

tional protection. It seems inconceivable that anyone familiar with Locke, Hutcheson, and Blackstone would use "life" to *limit* widely accepted notions of natural right. These writers held that health, limb, and body are fundamental rights that belong to the same family of rights as "life." Therefore, the Framers would not choose the word "life" to express the opposite idea, that health, limb, and body are *not* protected. The lengthy tradition of reading "life" broadly rules out a narrow interpretation that Blackstone himself would have rejected.

More general reasons also support this conclusion. If the Framers intended to constrict the meaning of natural right, as understood by Blackstone, Hutcheson, and Locke, some evidence of their intent and reasons should have survived. It is no small thing, in a revolutionary document, to excise widely-accepted natural rights. Yet, the Framers left no evidence of an intention to narrow the classic natural rights formulas in any way. Still another consideration reinforces these conclusions. Blackstone, Hutcheson, and Locke thought that fundamental rights underlie the relations of persons to other persons, as well as the relation of persons to governments.<sup>356</sup> These rights form the basis of private as well as constitutional law, as the *Commentaries* make abundantly clear. Thus, removing "body" and "limb" from the meaning of "life" would imply the unthinkable: that persons could freely maim each other in their private relations without interference from the law.

### 3. David Hume

Like Frances Hutcheson, David Hume was a Scottish moralist philosopher. Yet, Hume was also a severe critic of social contract theory, and he advanced a radically different conception of rights. Hume regarded the social contract as a fantasy.<sup>357</sup> Nations may originate, he said, with a population's tacit consent to the rule of a particular person, but that is not a social contract. An act of acquiescence to existing political

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356. In effect, social contract theory blurs the distinction between public and private rights, because all rights derived from the "compact" among persons or from a natural right that predates political society's existence.

357. See DAVID HUME, *Of the Origin of Government*, in *ESSAYS, MORAL AND POLITICAL* (1777), reprinted in HUME'S *MORAL AND POLITICAL PHILOSOPHY* 311-14 (Henry D. Aiken ed., 1972) [hereinafter HUME, *Origin of Government*]; DAVID HUME, *Of the Original Contract*, in *ESSAYS, MORAL AND POLITICAL* (1777), reprinted in HUME'S *MORAL AND POLITICAL PHILOSOPHY* 356-72 (Henry D. Aiken ed., 1972) [hereinafter HUME, *Original Contract*].

power or authority does not create political power;<sup>358</sup> because the authority precedes the tacit consent, consent cannot explain the authority. Nor is there the bargaining between equals that social contract theory posits. More generally, the long history of governments founded by conquest, violence, and fraud, governments now accepted by their subjects, suggests that political power originates from something other than a contract.<sup>359</sup>

Hume also argued that an exchange of promises *cannot* underlie government. Promises are meaningless, he said, without a prior understanding that people should honor them. This prior understanding arises from a process Hume called "convention":

This convention is not of the nature of a *promise*: For even promises themselves . . . arise from human conventions. It is only a general sense of common interest; which sense all the members of the society express to one another, and which induces them to regulate their conduct by certain rules. I observe, that it will be for my interest to leave another in the possession of his goods, *provided* he will act in the same manner with regard to me. He is sensible of a like interest in the regulation of his conduct. When this common sense of interest is mutually express'd, and is known to both, it produces a suitable resolution and behaviour. And this may properly enough be call'd a convention or agreement betwixt us, tho' without the interposition of a promise . . . Two men, who pull the oars of a boat, do it by an agreement or convention, tho' they have never given promises to each other.<sup>360</sup>

Not only does "convention" replace contract, but the desire to protect property—rather than preservation of life—becomes the impetus of political society:

[H]av[ing] . . . observ'd, that the principal disturbance in society arises from those goods, which we call external, and from their looseness and easy transition from one person to another; they must seek for a remedy, by putting these goods, as far as possible, on the same footing with the fix'd and constant advantages of the mind and body. This can be done after no other manner, than by a convention enter'd into by all the members of the society to bestow stability on the possession of those external goods, and leave every one in the peaceable enjoyment of what he may acquire by his fortune and industry. . . . Instead of

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358. HUME, *Original Contract*, *supra* note 357, at 357-60. Note the trace of this idea in Hutcheson's claim that, under some circumstances, acquiescence to a plan of political power could follow the institution of the plan. *See supra* note 316. Hutcheson nonetheless insisted that consent was essential to political power; if consent was not forthcoming, the power was illegitimate. *See supra* note 316.

359. HUME, *Original Contract*, *supra* note 357, at 362-63. Hume remarked that government was "formed by violence and submitted to from necessity." *Id.* at 363.

360. DAVID HUME, *A TREATISE OF HUMAN NATURE* 490 (L.A. Selby-Bigge ed., Oxford University Press, 2d ed. 1978) (1739).

departing from our own interest, or from that of our nearest friends, by abstaining from the possessions of others, we cannot better consult both these interests, than by such a convention; because it is by that means we maintain society, which is so necessary to their well-being and subsistence, as well as to our own.<sup>361</sup>

These three points—political authority preceding political consent, conventions dictated by “interests” rather than binding promises, and security for property rather than “life” as the primary political concern—led Hume to a view of “liberty” radically different from the social contract theories, and uncannily like the modern view. Reduced to essentials, social contract theory is an analytical device that subordinates “liberty” to “life.” The theory envisions people who trade natural liberty to form political societies, by mutual consent, in the interests of “life.” Hume, on the other hand, ruled out consent as the source of political power, seeing political life as a constant battle between “liberty” and “authority.” In Hume’s view, neither principle should, or could, entirely overcome the other:

In all governments there is a perpetual intestine struggle, open or secret, between Authority and Liberty, and neither of them can ever absolutely prevail in the contest. A great sacrifice of liberty must necessarily be made in every government, yet even the authority which confines liberty can never and perhaps ought never in any constitution to become quite entire and uncontrollable. The sultan is master of the life and fortune of any individual, but will not be permitted to impose new taxes on his subjects; a French monarch can impose taxes at pleasure, but would find it dangerous to attempt the lives and fortunes of individuals. . . . The government which, in common appellation, receives the appellation of “free,” is that which admits of a partition of power among several members whose united authority is no less, or is commonly greater, than that of any monarch, but who, in the usual course of administration, must act by general and equal laws that are previously known to all the members and to all their subjects. In this sense it must be owned that liberty is the perfection of civil society, but still authority must be acknowledged essential to its very existence.<sup>362</sup>

This inevitable conflict of liberty and authority is not Hume’s only difference with Hobbes, Hutcheson, and Locke. Another is that Hume does not seem to recognize “life” as a basic force in political life: all three of his “fundamental laws of nature” relate to property and contract.<sup>363</sup> There is still another difference. Hume thought that nations develop distinctive political institutions, based on unique mixtures of liberty and authority. Social

361. *Id.* at 489.

362. HUME, *Original Contract*, *supra* note 357, at 313-14.

363. HUME, *supra* note 360, at 526 (stating that “the three fundamental laws of nature [are] . . . stability of possession . . . its transference by consent . . . and[ ] the performance of promises”) (emphasis omitted).

contract theorists, by contrast, suppose that *every* political society is fundamentally the same, insofar as all result from the same type of social contract.<sup>364</sup> For Hume, universal guarantees of life, liberty, and property, or universal constraints on government such as no taxation without representation, simply do not exist. For Locke and Hutcheson, societies do not exist without such guarantees.

Hume's ideas have a distinctly modern ring because they resemble the current gloss on the Due Process Clause. Like the modern Court, Hume saw "liberty" as the counterpoint to government authority and thought that when liberty is enhanced, authority is necessarily diminished, and vice versa. Yet also like the modern Court, Hume believed that liberty and authority must co-exist. It also follows from Hume's views that each nation must look to its own customs and traditions, rather than to a single, unvarying architecture of liberty, to understand itself.<sup>365</sup> Similarly, modern constitutional law often espouses that view, most recently in the *Casey* joint opinion.<sup>366</sup> Hume even treats "life" and "body" as natural facts, not political rights, just as the modern reading of "life" in the Due Process Clause does.<sup>367</sup> Hume wrote, for example, about "putting . . . goods, as far as possible, on the same footing with the fix'd and constant advantages of the mind and body."<sup>368</sup>

Hume's ideas seem commonplace only because they enjoy such wide acceptance today. The ideas are not obviously true. Indeed, it is difficult to imagine *any* idea of "liberty" being obviously true. As we have seen, Locke, Hobbes, and Hutcheson differed with Hume on every point. For that matter, the Framers of the Fifth Amendment Due Process Clause also disagreed with Hume. That clause speaks in the language of social contract theory of "life, liberty, and property," which Hume emphatically rejected.<sup>369</sup> Today, however, we read the Due Process Clause as a compendium of Humean principles. Hume's balance of liberty and authority has become a lodestar for interpreting the clause,

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364. See discussion *supra* parts II.B.1 (Hobbes), II.B.2 (Locke), II.C.1 (Hutcheson).

365. See *supra* text accompanying note 362.

366. See discussion *infra* part VI.A.

367. See discussion *supra* part I.A.

368. HUME, *supra* note 360, at 489.

369. Moreover, the Virginia Declaration of Rights, upon which the clause is based, is unmistakably Lockean in style and content. See discussion *infra* part III.B.

as we increasingly look to Humean customs and traditions, rather than to Lockean concepts, to define our rights.<sup>370</sup>

So we have come full circle. Propositions that the Framers embraced, such as Locke's and Hutcheson's idea of "life," we now reject out of hand, as a matter of the definition of words. In place of those tenets, we find the politics of Hume which the Framers rejected when they endorsed social contract theory and the "life, liberty, and property" formula. All this is done, paradoxically, in the name of faithfulness to the Framers' intent.

### III. RIGHTS IN THE AMERICAN FOUNDING ERA

#### A. REVOLUTIONARY LIBERTY

In the revolutionary era, "liberty" became the Americans' rallying cry. The question remains, however, as to which "liberty" the Americans had in mind: Hobbes's, Locke's, Hutcheson's, or Hume's. Hobbes's account was anathema to the Americans, for he stood for everything the Americans opposed.<sup>371</sup> Locke's account of natural rights and the social contract<sup>372</sup> and Hutcheson's theory of human faculties and happiness<sup>373</sup> were particularly influential. Although cited less frequently, Hume enjoyed respect too,<sup>374</sup> but not because of his theory of liberty.<sup>375</sup>

Colonial writers often misunderstood English theorists or cited them for the most unlikely propositions.<sup>376</sup> Even serious American authors could be excused if they missed nuances in

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370. For a discussion of the role of history and tradition in English constitutional thought prior to the seventeenth century, see Thomas C. Grey, *Origins of the Unwritten Constitution: Fundamental Law in American Revolutionary Thought*, 30 STAN. L. REV. 843, 852-54 (1978). This earlier tradition, Grey points out, regarded "custom" as "the most reliable evidence of the content of natural law." *Id.* at 854. Hume departed from that tradition. Customary arrangements were not presumptively reasonable, in his view; they had custom—and only custom—to commend them. On the other hand, custom was more than enough.

371. See BAILY, *supra* note 164, at 28-29 (noting that American loyalists and patriots alike denounced Hobbes).

372. See discussion *supra* part II.B.2.

373. See discussion *supra* part II.C.1.

374. See BAILY, *supra* note 164, at 28 n.8; MORTON WHITE, *PHILOSOPHY, THE FEDERALIST, AND THE CONSTITUTION* 9 (1987) (citing Hume and Locke as prime influences on *The Federalist*).

375. Jefferson, for one, expressed profound dislike for Hume's political views. For discussion of Jefferson's view of Hume, see Craig Walton, *Hume and Jefferson on the Uses of History in HUME: A RE-EVALUATION* 389 (Donald W. Livingston & James T. King eds., 1976).

376. See BAILY, *supra* note 164, at 28-29.

Locke's or Hutcheson's theory of liberty, because the arguments are philosophical, complex, and only subtly different from competing accounts. The chameleon-like qualities of "liberty" in the *Second Treatise* did not help,<sup>377</sup> nor did the emotional aura that attached to "liberty" in a revolutionary era. With so much risked in its name, it must have been difficult to appreciate that "liberty" has a long tradition of meaning different things to different people. Nice distinctions between Locke's, Hutcheson's, and Hume's ideas could be lost under these circumstances.

Liberty gained in rhetorical importance during this era as compared with Locke's or Hutcheson's treatment of the subject, and it also gained in emotional force as compared with Hume's approach. "We will be freemen, or we will die,"<sup>378</sup> a colonial wrote in 1768 as he warned against "betray[ing] the trust reposed in us by our ancestors, by giving up the least of our liberties."<sup>379</sup> This "trust" presumably consisted of natural rights, which is what Locke meant by the term,<sup>380</sup> although Locke referred to a trust reposed in legislatures, not individuals, and Locke's "trust" has nothing to do with "ancestors," apart from the social contractors. Most importantly, "liberty" or "freedom" occupied the center of the rhetorical stage, a place that Locke never gave it.

Revolutionary political reflections often included Hume's idea of liberty, mixed in with the conceptions of Locke and Hutcheson. A 1774 sermon, for example, declared that "[p]erfect liberty and perfect government are perfectly harmonious,"<sup>381</sup> a Lockean and Hutchesonian theme.<sup>382</sup> The same author, however, sought to "estimate the quantity of liberty in any particular constitution,"<sup>383</sup> which reflects a Humean sentiment at odds

377. See discussion *supra* part II.B.3.a.

378. Silas Downer, *A Discourse at the Dedication of the Tree of Liberty* (1768), reprinted in 1 AMERICAN POLITICAL WRITING DURING THE FOUNDING ERA 1760-1805, at 97, 107 (Charles S. Hyneman & Donald S. Lutz eds., 1983).

379. *Id.*

380. Locke argued that the power of government extended no "farther than the common good," LOCKE, *supra* note 160, at 353 (emphasis omitted); that the public good lay in the protection and preservation of natural rights, *id.*; and that the legislature's "trust" was to protect this public good, *id.* at 356, 372. See also *id.* at 375 (applying the concept of "trust" to the executive power). Hutcheson used "trust" in the same way, invoking, for example, "the trust intended for . . . [a sovereign] by the laws." 2 HUTCHESON, *supra* note 316, at 305.

381. Nathaniel Niles, *Two Discourses on Liberty* (1774) reprinted in 1 AMERICAN POLITICAL WRITING DURING THE FOUNDING ERA, *supra* note 378, at 257, 270.

382. See discussion *supra* parts II.B.2, II.C.1.

383. NILES, *supra* note 381, at 259.

with the Lockean notion of "perfect" liberty.<sup>384</sup> Nevertheless, the author returned to a social contract theme, treating civil liberty as due administration of the laws in the manner of Locke, Hutcheson, and even Hobbes,<sup>385</sup> by declaring as follows:

Civil Liberty consists, not in any inclinations of the members of a community; but in the being and due administration of such a system of laws, as effectually tends to the greatest felicity of a state . . . . [T]o live under such a constitution, so administered, is to be the member of a free state.<sup>386</sup>

Still, a major concern of the era has a strong Humean flavor. The American colonists were preoccupied with questions of political power's relationship to liberty.<sup>387</sup> They thought power pushed against liberty's "legitimate boundaries"<sup>388</sup> and that power's "natural prey, its necessary victim, was liberty, or law, or right."<sup>389</sup> Yet, they also deemed political power "necessary"<sup>390</sup> and "natural,"<sup>391</sup> regarding it as a by-product of the social contract,<sup>392</sup> a Lockean and Hutchesonian view. The colonists thought they had derived their conception of power and liberty from Locke,<sup>393</sup> but in fact, Lockean theory has little to

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384. On this question of "liberty" and "perfection," Hume wrote as follows:

The government which, in common appellation, receives the appellation of "free," is that which . . . in the usual course of administration, must act by general and equal laws that are previously known to all the members and to all their subjects. In this sense it must be owned that liberty is the perfection of civil society, but still authority must be acknowledged essential to its very existence . . . .

HUME, *Origin of Government*, *supra* note 357, at 314.

Although liberty may be the "perfection of civil society," the converse is not true: civil society is not the "perfection of liberty" to Hume. Nor would Hume desire a "perfect liberty," since he insists that liberty must be counterbalanced with authority. Even Hume's identification of liberty with the "perfection of civil society" is grudging; he says there is a "sense" in which that "must be owned." His reluctance arises from an emphatic rejection of Locke's ideals of consent and natural right as the sole foundations for legitimate government.

385. Locke and Hutcheson regarded legal restraints as essential to civil liberty. See *supra* parts II.B.2, II.C.1. The idea of a state enjoying "felicity" suggests Hobbes's concept of freedom as an attribute of sovereigns rather than of individuals. See *supra* part II.B.1.

386. NILES, *supra* note 381, at 260.

387. See generally BAILYN, *supra* note 164, at 55-60.

388. *Id.* at 56.

389. *Id.* at 57.

390. *Id.* at 58.

391. *Id.*

392. BAILYN, *supra* note 164, at 59.

393. *Id.* ("[p]ower created legitimately by those voluntary compacts which the colonists knew from Lockean theory to be logical and from their own experience to be practical").

say about power, and that little is not consistent with these colonial views.

According to Locke, authority and law do not compete with liberty. To the contrary, Locke regarded authority and law as civil liberty's essential components.<sup>394</sup> Moreover, Locke did not worry about "too much" power: government authority is either exercised in accordance with the people's "trust," or it is not, with no question of degree.<sup>395</sup> Finally, Locke portrayed "absolute power" as ultimately a threat to "life,"<sup>396</sup> not liberty, because "he who would get me into his Power without my consent, would use me as he pleased, when he had got me there, and destroy me too when he had a fancy to it . . . . To be free from such force is the only security of my Preservation."<sup>397</sup>

In no small measure, the colonists' views of power are Humean.<sup>398</sup> Hume had envisioned a "perpetual intestine struggle . . . between Authority and Liberty;"<sup>399</sup> precisely what worried the Americans. Hume also recognized degrees of liberty, something Locke never did. On the other hand, the colonists saw power as an insidious threat to liberty,<sup>400</sup> while Hume envi-

394. See *supra* part II.B.2.

395. Locke did discuss questions of degree, but in another connection. Locke argued that people would not revolt—though they had a right to do so—over occasional or minor breaches of the government's trust. Only sustained and serious breaches, affecting large numbers of people, would trigger rebellion, he thought. LOCKE, *supra* note 160, at 415 ("Revolutions happen not upon every little mismanagement in publick affairs.") (emphasis omitted). There is an idea of degree here, but it is not a matter of degrees of liberty. Nor is it a question of authority slowly gaining the upper hand over liberty; Locke simply did not think of liberty and authority in that way.

396. *Id.* at 279 (emphasis added).

397. *Id.* Locke went on to say that being in another person's "Absolute Power" was "against the Right of my Freedom" and made one "a Slave." *Id.* Then he observed that one who would "take away . . . Freedom" in a state of nature "must necessarily be supposed to have a design to take away every thing else, that Freedom being the Foundation of all the rest." *Id.* (emphasis omitted). Perhaps more than any other passage in the *Second Treatise*, this one treats "freedom" as a fundamental concept, but it still subordinates "freedom" to "life." Remaining free, Locke pointed out, "is the only security of my Preservation." *Id.* Freedom is the "Fence" protecting one's life. *Id.* In addition, "he, who would take away my Liberty, would . . . when he had me in his Power, take away everything else." *Id.* at 280 (emphasis omitted). Moreover, the theme of the chapter is the right to make war upon those who threaten one with "Destruction." *Id.* at 278. Thus, "freedom" counts because of its connection with "life."

398. See generally BAILYN, *supra* note 164, at 55-93 (describing the colonists' views of the conflict between power and liberty).

399. See *supra* note 362 and accompanying text.

400. See generally BAILYN, *supra* note 164, at 55-93.

sioned myriad accommodations of liberty and authority. Similarly, the idea of an ideal state or degree of liberty, which the colonists' conception implied, is closer to Locke than to Hume.<sup>401</sup>

In sum, the colonists sometimes blended together the conceptions of liberty advanced by Hobbes, Locke, Hutcheson, and Hume. The colonists also regarded "liberty" as a force that animates history and politics, in a way that none of these English philosophers did.<sup>402</sup> Of course, the colonists differed among themselves, in political viewpoint and in their abstract conceptions of liberty. Yet, some general conclusions about their views are possible.

First, Hobbesian elements occasionally infiltrated American thinking. The tendency to attribute the quality of liberty to a nation, rather than an individual, and the view that natural liberty represents the sole distinguishing feature of the state of nature are Hobbesian ideas. Almost certainly, the inherent appeal of these ideas, rather than any overt reliance on Hobbes as an authority, explains their appearance. Because Hobbes created social contract theory, his variants of it constituted powerful alternatives, within the larger structure of the theory. Those who learned their social contract theory by studying Locke or Hutcheson could easily reinvent Hobbesian principles, without realizing what they had done. Further, the drafters of American Due Process Clauses rejected Hume's views. Although the colonials sometimes commingled Hume's ideas with Locke's and Hutcheson's, and Hume's ideas of liberty and authority found some support among the Americans, especially after the Revolutionary War,<sup>403</sup> the Americans remained firmly committed to social con-

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401. Hume had a high regard for the English system, however, and for the degree of liberty it afforded. See DAVID HUME, *Idea of a Perfect Commonwealth*, in *ESSAYS, MORAL AND POLITICAL* (1777), reprinted in *HUME'S MORAL AND POLITICAL PHILOSOPHY*, *supra* note 357, at 373-85 (describing an ideal commonwealth).

402. Hume regarded history as a perpetual battle between liberty and authority, not the gradual unfolding of liberty's design; and social contract theorists thought that the original contract set the terms of social life once and for all. For further discussion of the social contract theorists' view of history, see *infra* part VI.A.

403. The Americans felt in need of a theory of social conflict after 1776. See Wood, *supra* note 164, at 608-09 (suggesting that the Americans' concerns about social faction led them to a more individualistic conception of liberty after the Revolution); Grey, *supra* note 370, at 892 (suggesting that beliefs about natural law may have changed after the Revolution). Locke portrayed life, liberty, and property as every individual's right, every person's goal, and every government's trust. At the same time, Locke ignored social division and faction, which produce competing conceptions of life, liberty, and property. Hence, the Ameri-

tract theory, thereby rejecting the essentials of Hume's political philosophy.<sup>404</sup> Americans still believed in natural rights,<sup>405</sup> although they worried more than Locke did about whether those rights would prevail in the short term. Liberty might be at war with authority, as Hume said, but that did not mean all outcomes of the battle were equally legitimate.<sup>406</sup> The war of liberty and authority jeopardized natural rights, according to the Americans, but it did not *replace* these rights, as Hume had argued.<sup>407</sup>

## B. LIFE, LIBERTY, AND PROPERTY IN REVOLUTIONARY ERA CONSTITUTIONS

Colonial charters and early state constitutions often included clauses modeled after the Magna Carta,<sup>408</sup> clauses using the modern formula of "life, liberty and estate,"<sup>409</sup> or both.<sup>410</sup>

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cans had to turn to Hume, not Locke. Moreover, one of Hume's essays anticipates Madison's discussion of faction and political society in *The Federalist No. 10*. See DOUGLAS ADAIR, "That Politics May Be Reduced To A Science:" David Hume, James Madison, and the Tenth Federalist, in *FAME AND THE FOUNDING FATHERS* 93, 98-102 (1974); HUME, *supra* note 401; *THE FEDERALIST No. 10* (James Madison).

404. See discussion *supra* notes 371-375 and accompanying text; see also *infra* notes 413-422 and accompanying text (describing the Lockean ideas and wording of the Virginia Declaration of Rights).

405. See BAILY, *supra* note 177, at 26-27 (describing the influence of Locke and natural rights theory).

406. *Id.* at 55-93 (describing the Americans' fears about power).

407. It may be that the "war" of liberty and authority, and Hume's influence generally, mattered more on questions of government structure than on questions of individual right during this era.

408. *E.g.*, FUNDAMENTAL CONST. OF EAST N.J., art. XIX, reprinted 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* 2574, 2580 (Francis N. Thorpe ed., 1909) [hereinafter *FEDERAL AND STATE CONSTITUTIONS*] (providing "[N]o person or persons . . . shall be taken and imprisoned, or be devised of his freehold, free custom or liberty, or be outlawed or exiled, or any other way destroyed; nor shall they be condemn'd or judgment pass'd upon them, but by lawful judgment of their peers . . .").

409. *E.g.*, CHARTER OF FUNDAMENTAL LAWS OF WEST N.J. of 1676, ch. XVII, reprinted in 5 *FEDERAL AND STATE CONSTITUTIONS*, *supra* note 408, at 2548, 2549 (employing the modern phrasing: "[N]o . . . inhabitant . . . shall be deprived or condemned of life, limb, liberty, estate, property or any ways hurt in his or their privileges, freedoms or franchises, upon any account whatsoever, without a due tryal, and judgment passed by twelve good and lawful men . . .").

410. *E.g.*, MD. CONST.'S DECLARATION OF RIGHTS of 1776, art. XXI, reprinted in 3 *FEDERAL AND STATE CONSTITUTIONS*, *supra* note 408, at 1686, 1688 (stating "no freeman ought to be taken, or imprisoned, or disseized of his freehold, liberties, or privileges, or outlawed, or exiled, or in any manner destroyed, or deprived of his life, liberty, or property, but by the judgment of his peers, or by the

Magna Carta-type clauses guarantee bodily integrity, under the heading of a freedom from "destruction." Some of the modern clauses explicitly guarantee "limb," or "person,"<sup>411</sup> in addition to the usual life, liberty, and estate. Other clauses, however, confine themselves to "life, liberty, and property," and do not explicitly mention "destruction," "limb," or "person." Yet, these clauses could hardly mean less than the Magna Carta phrasing that Americans still used. The only difference between the two might be that "life, liberty, and property" exclude the full freedom from "destruction." That would be true if "life" in the modern formula encompasses biological existence and no more. If, however, "life, liberty, and property" had somehow come to mean "all of the Magna Carta rights, except limb, health, and body," then it would be incredible for Americans to also subscribe to the Magna Carta formula, which they did, sometimes combining it with "life, liberty, and property" in the same clause.

The Americans' adherence to social contract theory, their familiarity with Locke, Hutcheson, and Blackstone, and, after the Stamp Act crisis, their revolutionary beliefs, all strongly suggest that all "life, liberty, property" clauses protect "life" in the full social contract sense of the term.<sup>412</sup> Indeed, by the late eighteenth century, it is doubtful that "life, liberty, and property" could be used any other way. For example, Hume did not suggest that "life, liberty, and property" means something different than Locke's interpretation; rather, disbelieving the natural rights of life, liberty, and property, Hume simply avoided the phrase. In America, this was an era that treated absolute rights as "self-evident," a time of revolutionary triumph when any idea of constricting previously recognized natural rights, such as the

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law of the land."); see also N.C. CONST.'S DECLARATION OF RIGHTS OF 1776, art. XII, reprinted in 5 FEDERAL AND STATE CONSTITUTIONS, *supra* note 408, at 2787, 2788; S.C. CONST. OF 1778, art. XLI, reprinted in 6 FEDERAL AND STATE CONSTITUTIONS, *supra* note 408, at 3241, 3257.

411. *E.g.*, MASS. CONST. OF 1780, pt. 1, art. II, reprinted in 3 FEDERAL AND STATE CONSTITUTIONS, *supra* note 408, at 1888, 1889 ("no subject shall be hurt, molested, or restrained, in his person, liberty, or estate, for worshipping . . .") (emphasis added); PA. CONST. OF 1790, art. IX, sec. 11, reprinted in 5 FEDERAL AND STATE CONSTITUTIONS, *supra* note 408, at 3092, 3101 ("all courts shall be open, and every man, for an injury done him in his lands, goods, person, or reputation, shall have remedy by the due course of law") (emphasis added); CHARTER OF FUNDAMENTAL LAWS OF WEST N.J. OF 1676, ch. XVII, reprinted in 5 FEDERAL AND STATE CONSTITUTIONS, *supra* note 408, at 2548, 2549.

412. If people make an original compact that protects what they hold dear, they will surely include protection for health, limb, and body in the agreement. For discussion, see *supra* part II.C.2.

right of freedom from "destruction," must have been unthinkable.

Furthermore, Article 1 of the most influential constitutional document of the revolutionary era, George Mason's 1776 Declaration of Rights for Virginia,<sup>413</sup> makes its commitment to social contract theory and Lockean principles explicit:<sup>414</sup>

[A]ll men are by nature equally free and independent, and have certain inherent rights, of which, when they enter into a state of society, they cannot, by any compact, deprive or divest their posterity; namely, the enjoyment of life and liberty, with the means of acquiring and possessing property, and pursuing and obtaining happiness and safety.<sup>415</sup>

That section of the Declaration largely reprises Locke's derivation of natural rights in his *Second Treatise*: "being all equal and independent," Locke wrote, "no one ought to harm another in his Life, Health, Liberty, or Possessions."<sup>416</sup>

Articles 2 and 3 of Mason's Virginia Declaration also follow Locke's derivation of natural rights. Article 2 reiterates a basic theme of the *Second Treatise*,<sup>417</sup> declaring that "all power is vested in, and consequently derived from, the People."<sup>418</sup> Article 3 proclaims that governments failing to serve "the common ben-

413. VIRGINIA DECLARATION OF RIGHTS of 1776, *reprinted in* 2 THE ROOTS OF THE BILL OF RIGHTS: AN ILLUSTRATED SOURCE BOOK OF AMERICAN FREEDOM 234 (Bernard Schwartz ed., 1980). Bernard Schwartz calls the Virginia Declaration "a landmark in the development that was to culminate in the federal Bill of Rights," Bernard Schwartz, *Commentary to VIRGINIA DECLARATION OF RIGHTS of 1776*, *in* 2 THE ROOTS OF THE BILL OF RIGHTS, *supra*, at 233, and "the first document that may truly be called an American Bill of Rights," *id.* at 233-34.

414. One writer calls the Virginia Declaration "an echo of John Locke." ROBERT A. RUTLAND, *THE BIRTH OF THE BILL OF RIGHTS 1776-1791*, at 27 (1955).

415. VIRGINIA DECLARATION OF RIGHTS of 1776, art. 1, *supra* note 413, at 234. Many states copied this clause. *See, e.g.*, CONST. OR FORM OF GOVERNMENT FOR THE COMMONWEALTH OF MASS. of 1780, pt. 1, art. I, *reprinted in* 3 FEDERAL AND STATE CONSTITUTIONS, *supra* note 408, at 1888, 1889 ("All men are born free and equal, and have certain natural, essential, and unalienable rights; among which may be reckoned the right of enjoying and defending their lives and liberties; that of acquiring, possessing, and protecting property; in fine, that of seeking and obtaining their safety and happiness"); VT. CONST. of 1777, ch. 1, § I, *reprinted in* 6 FEDERAL AND STATE CONSTITUTIONS, *supra* note 408, at 3737, 3739 ("all men are born equally free and independent, and have certain natural, inherent and unalienable rights, amongst which are the enjoying and defending [sic] life and liberty; acquiring, possessing and protecting property, and pursuing and obtaining happiness and safety").

416. LOCKE, *supra* note 160, at 271.

417. *See, e.g., id.* at 412 (arguing that when a government grasps for "Absolute Power over the Lives, Liberties, and Estates of the People" it forfeits its legitimate power, and the "the Power . . . devolves to the People") (emphasis omitted).

418. VIRGINIA DECLARATION OF RIGHTS of 1776, art. 2, *supra* note 413, at 234.

efit, protection, and security of the people" are liable to be overturned by a "majority of the community," which has "an indubitable, unalienable, and indefeasible right, to reform, alter, or abolish" them.<sup>419</sup> Locke, for his part, insisted on the "Supream Power" of the "People" to "remove or alter" the government.<sup>420</sup> Although Locke did not require the concurrence of a majority before a right to remove the government arose, he did observe that "it . . . [is] impossible for one or a few oppressed Men to disturb the Government, where the Body of the People do not think themselves concerned in it,"<sup>421</sup> but it is a different matter when the government oppression "is so great, that the Majority feel it."<sup>422</sup> Thus, the premises, and often the language, of the Virginia Declaration echo the *Second Treatise*. Given these similarities, one could fairly read the Virginia Declaration's right of "life" as meaning the same thing as "life" in the *Second Treatise*, a right that encompasses health, body, and limb. Because the Virginia Declaration became a model for other constitutions in the era, including the Federal Constitution, the same interpretation applies to them.

The Virginia Declaration reflects Hutcheson's as well as Locke's influence. Mason's reference to rights that men *cannot* bargain away in any compact sounds Hutcheson's basic theme of

419. *Id.* art. 3, at 234.

420. LOCKE, *supra* note 160, at 367 (emphasis omitted).

421. *Id.* at 404 (emphasis omitted).

422. *Id.* at 380 ("Nor let any one think, this lays a perpetual foundation for Disorder: for this operates not, till the Inconvenience is so great, that the Majority feel it, and are weary of it, and find a necessity to have it amended"); see also *id.* at 414-15 (explaining why citizens do not resort to revolution to remedy every misstep of government officials).

The 1780 Massachusetts Constitution comes even closer to Locke's exact wording. Without mentioning a "majority," it declares that "the people have a right to alter the government, and to take measures necessary for their safety, prosperity, and happiness" whenever the government fails to protect individuals in the enjoyment of "their natural rights, and the blessings of life." CONST. OR FORM OF GOVERNMENT FOR THE COMMONWEALTH OF MASS. of 1780, preamble, reprinted in 3 FEDERAL AND STATE CONSTITUTIONS, *supra* note 408, at 1889. The Massachusetts Constitution also declares that "life, liberty, and property" ought to be protected "according to standing laws" and that "the people of this commonwealth are not controllable by any other laws than those to which their constitutional representative body have given their consent." *Id.* at art. 10, reprinted in 3 FEDERAL AND STATE CONSTITUTIONS, *supra* note 408, at 1891. For his part, Locke explained that "the Legislative . . . is bound to dispense Justice, and decide the Rights of the Subject by promulgated standing laws," LOCKE, *supra* note 160, at 358 (emphasis omitted), and emphasized that nothing can have the "force and obligation of a Law, which has not its Sanction from that Legislative, which the publick has chosen and appointed," *id.* at 356 (emphasis omitted).

inalienable rights.<sup>423</sup> Similarly, the references to "enjoyment" of life and liberty owe more to Hutcheson than to Locke, because Hutcheson's natural liberty includes an element of personal autonomy and Locke's does not.<sup>424</sup> Any differences between Locke and Hutcheson about "liberty" probably seemed of little importance, however, assuming anyone recognized them at the time. Only the later history of "liberty" makes such questions important.<sup>425</sup>

#### IV. THE RISE AND FALL OF A NEW "LIBERTY"

During America's founding era, the right of "life" protected a person's health, limb, and body. Two hundred years later, life, health, limb, and body have become aspects of "liberty," to the extent they receive constitutional protection at all. Today, the right of "life" approaches meaninglessness.<sup>426</sup> Political, social, and legal events of the nineteenth century suggest how "life" lost its meaning and how "liberty" came to supplant it.

##### A. AFTER THE FOURTEENTH AMENDMENT: POLICE POWER THEORY

What "life" meant to John Locke in 1690, it also meant to George Mason in 1790. It retained that meaning through the first three quarters of the nineteenth century, including the period when Congress wrote and adopted the Fourteenth Amendment. Justice Field, referring to the Fourteenth Amendment in 1877, observed that:

By the term "life," as here used, something more is meant than mere animal existence. The inhibition against its deprivation extends to *all those limbs and faculties by which life is enjoyed*. . . . The deprivation not only of life, but of whatever God has given to every one with life, for its growth and enjoyment, is prohibited by the provision in question . . . .<sup>427</sup>

423. See WILLS, *supra* note 314, at 229-39 (arguing that Hutcheson's concept of "unalienable rights" underlay Jefferson's reference to "inalienable rights" in the Declaration of Independence).

424. See discussion *supra* part II.C.1.

425. See discussion *infra* part VI.C.

426. See discussion *supra* part I.A.

427. *Munn v. Illinois*, 94 U.S. 113, 142 (1877) (Field, J., dissenting) (emphasis added). Justice Field dissented in the *Slaughter-House Cases* because the Court rejected life, liberty, and property as constitutionally enforceable substantive rights. 83 U.S. (16 Wall.) 36, 83 (1873) (Field, J., dissenting). In *Munn*, the majority adhered to the rationale of the *Slaughter-House Cases*, but no Justice, in either case, contended that the word "life" meant something less than Justice Field claimed it did.

Story's *Commentaries on the Constitution* agreed, noting that "[t]he limbs are equally protected with the life."<sup>428</sup> "Due process," another writer said, "is nothing new. It is only the Magna Carta over again . . . . [It] protects life and limb against attack . . . . '[L]ife and liberty' . . . cover the things specified by Blackstone, but they cover more."<sup>429</sup> Counsel in the *Slaughter-House Cases* also emphasized this understanding of "life," arguing that life encompasses "the right to one's self, to one's own faculties, physical and intellectual, . . . [to] one's own brain, eyes, hands, feet, in a word to . . . [one's] soul and body . . . an incontestable right . . . of whose enjoyment and exercise by its owner no one could complain."<sup>430</sup>

Yet in the last quarter of the nineteenth century, a new concept of "liberty" supplanted the traditional idea of "life." A series of state court decisions, interpreting due process clauses in state constitutions, mark the change.<sup>431</sup> These decisions treat "human faculties," which Justice Field saw as aspects of life, under the heading of "liberty." In 1888, the New York Court of Appeals said "[t]he term 'liberty' . . . is deemed to embrace the right of man to be free in the enjoyment of the faculties with which he has been endowed by his Creator."<sup>432</sup> The Ohio Supreme Court agreed, characterizing "liberty" as a "right to the free use of . . . [a person's] faculties."<sup>433</sup> Standing alone, these are not major departures from the historic understanding: Hutcheson himself could have said much the same thing.<sup>434</sup>

428. JOSEPH STORY, 2 COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 697 (Melville M. Bigelow ed., Boston, Little, Brown, & Co., 1891).

429. HENRY BRANNON, A TREATISE ON THE RIGHTS AND PRIVILEGES GUARANTEED BY THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES 103, 107, 110 (1901). Brannon's last remark, that "life and liberty" now "cover more" than in Blackstone's era, was directed to state constitutions specifically, but his larger point was that in the Fourteenth Amendment, the words warranted the same expansive interpretation. *See id.*

430. 83 U.S. (16 Wall.) 36, 45 (1873) (providing the reporter's account of plaintiff's argument and noting that counsel cited THIERS, DE LA PROPRIÉTÉ 36, 47).

431. *E.g.*, *Braceville Coal Co. v. People*, 35 N.E. 62, 64 (Ill. 1893) (invalidating a requirement that employers pay weekly wages); *City of Cleveland v. Clements Bros. Const. Co.*, 65 N.E. 885, 891 (Ohio 1902) (invalidating restrictions on hours of work by employees of public contractors); *People v. Gillson*, 17 N.E. 343, 347 (N.Y. 1888) (invalidating a prohibition on premiums in connection with retail food sales); *In re Jacobs*, 98 N.Y. 98, 115 (N.Y. 1885) (invalidating a prohibition on manufacturing cigars in tenement houses).

432. *Gillson*, 17 N.E. at 345; *see also infra* note 435 and accompanying text.

433. *Clements Bros.*, 65 N.E. at 888.

434. *See* discussion *supra* part II.C.1.

At the same time, courts began to characterize labor and occupational choice as preeminent opportunities for exercising human "faculties." In 1893, the Illinois Supreme Court stated that "liberty" includes the "right of every man to be free in the use of his powers and faculties, and to adopt and pursue such avocation or calling as he may choose."<sup>435</sup> In 1902, the Ohio Supreme Court tightened the connection between human faculties and labor, finding that "liberty" encompasses a person's right "to the free use of all his faculties in the pursuit of an honest vocation."<sup>436</sup> Other courts concurred.<sup>437</sup> This emphasis on labor—paid labor or a vocation—was new, even though the principle that human labor implicates natural rights dates back to Locke and Hutcheson. Although Locke treated labor as the basis of property rights<sup>438</sup> and Hutcheson considered labor a protected aspect of natural liberty,<sup>439</sup> neither philosopher regarded paid labor as the epitome of liberty, as nineteenth century American courts appeared to think.

Even more dramatically, courts began to ignore the right of "life" in favor of an expansive concept of liberty. This change unfolded over the period of a single decade. To illustrate, Justice Field treated "life" as a signal right in 1877.<sup>440</sup> In the next year, the New York Court of Appeals treated "life" as a vital con-

435. *Braceville Coal Co.*, 35 N.E. at 63.

436. *City of Cleveland v. Clements Bros. Const. Co.*, 65 N.E. 885, 888 (Ohio 1902).

437. See, e.g., *Ex parte Kubach*, 24 P. 737, 738 (Cal. 1890) (per curiam) ("any person is at liberty to pursue any lawful calling, . . . not encroaching on the rights of others"); *In re Morgan*, 58 P. 1071, 1073 (Colo. 1899) ("[Liberty] includes the privilege of choosing any lawful occupation for the exercise of one's physical and mental faculties which is not injurious to others."); *People v. Gillson*, 17 N.E. 343, 345 (N.Y. 1888) ("A person living under our constitution has the right to adopt and follow such lawful industrial pursuit, not injurious to the community, as he may see fit. The term 'liberty' . . . is not dwarfed into mere freedom from physical restraint . . . but . . . [includes the] right to use his faculties in all lawful ways, to live and work where he will, to earn his livelihood in any lawful calling, and to pursue any lawful trade or avocation.").

438. See discussion *supra* part II.B.2.

439. "[T]is plain each one has a natural right to exert his powers, according to his own judgment and inclination, for these purposes, in all such industry, labour, or amusements, as are not hurtful to others in their persons or goods, while no more publick interests necessarily requires his labours, or requires that his actions should be under the direction of others. This right we call natural liberty.

1 HUTCHESON, *supra* note 316, at 294 (emphasis omitted). The inclusion of "amusements," the stress placed on human happiness, and especially the recognition of limits on liberty all distinguish Hutcheson's account from that of late nineteenth century American judges.

440. See *supra* note 427 and accompanying text.

cept that is at least the equal of "liberty." According to *Bertholf v. O'Reilly*,<sup>441</sup> the guaranty of "life, liberty, and property":

is not construed in any narrow or technical sense. The right to life may be invaded, without its destruction. One may be deprived of his liberty in a constitutional sense without putting his person in confinement. Property may be taken without manual interference therewith or its physical destruction. The right to life includes the right of an individual to his body in its completeness and without dismemberment; the right to liberty, the right to exercise his faculties and to follow a lawful avocation for the support of life; the right of property, the right to acquire power and enjoy it in any way consistent with the equal rights of others and the just exactions and demands of the State.<sup>442</sup>

Here the court gave equal billing to the three rights, and each received an expansive interpretation.<sup>443</sup> The court did treat the enjoyment of human faculties and the pursuit of a vocation as aspects of liberty, but the court also linked the pursuit of a vocation to the "support of life," a phrase that echoes Locke and Hutcheson, who had made liberty subservient to life.<sup>444</sup>

Within ten years, liberty became preeminent in the New York Court of Appeals's eyes; property became an adjunct to liberty; and life, for all intents and purposes, disappeared as a right. In 1885, for example, the court reviewed the meaning of the state's due process clause in *In re Jacobs*.<sup>445</sup> The judges observed that "liberty" and "property" warrant expansive interpretations,<sup>446</sup> but they made no such observation about "life." "Life," in fact, received no attention as a right. The *Jacobs* court quoted an earlier case which referred to the "common business and callings of life"<sup>447</sup> and the "ordinary callings of life,"<sup>448</sup> but now the court described the right to pursue such callings as an aspect of "liberty."<sup>449</sup> It was one thing to invoke "avocation[s] for

441. 74 N.Y. 509 (N.Y. 1878).

442. *Id.* at 515.

443. If any right in *Bertholf* seems poised to assume the preeminent position, it is property rather than liberty.

444. See discussion *supra* parts II.B.2, II.C.1.

445. 98 N.Y. 98 (N.Y. 1885).

446. Regarding the former, the *Jacobs* court observed that "one may be deprived of his liberty and his constitutional rights thereto violated without the actual imprisonment or restraint of his person." *Id.* at 106. Regarding the latter, the court said that "[t]he constitutional guaranty that no person shall be deprived of his property without due process of law may be violated without the physical taking of property for public or private use." *Id.* at 105.

447. *Id.* at 107 (quoting *Butchers Union Co. v. Crescent City Co.*, 111 U.S. 746, 757 (1884) (Field, J., concurring) (emphasis added)).

448. *Id.* (quoting *Butchers*, 111 U.S. at 764 (Bradley, J., concurring) (emphasis added)).

449. *Id.* at 106-07.

the support of *life*,<sup>450</sup> as the *Bertholf* court did, in an opinion that treats “life” as a right on par with “liberty,” but it is another thing to speak of the “ordinary callings of life” when “life” received no attention as a right. In *Jacobs*, the New York Court of Appeals treated “life” as a natural fact rather than a natural right.

*People v. Gillson*,<sup>451</sup> an 1888 decision of the New York Court of Appeals, secured the new analytical and rhetorical framework. *Gillson* invalidated a law prohibiting premiums or prizes in connection with the retail food sales.<sup>452</sup> For the court, Justice Peckham examined the meaning of due process clauses,<sup>453</sup> but altogether ignored the right of life. Justice Peckham did observe that food is among the “necessaries of life,”<sup>454</sup> and that the law affects the “liberty to adopt or follow . . . a livelihood.”<sup>455</sup> None of that, however, was tied to any *right* of life. Indeed, Justice Peckham used “livelihood” in place of older expressions, such as “calling of life,”<sup>456</sup> that at least hint at a broader role for the concept. Moreover, he treated liberty as more salient than property, discussing liberty at length and property only in passing.<sup>457</sup> Property had survived as a right, but it would exist henceforth in liberty’s shadow.

By 1891, the Framers’ concept of “life” was becoming a historical relic. That year, the *Harvard Law Review* published a student essay arguing that Blackstone’s definition of personal security—including “life, limb, health, and reputation”—was “fairly . . . included under the term ‘life’ in our constitutions.”<sup>458</sup> The author also observed that the “true meaning” of “life, liberty, and property” was being lost, submerged in ever expanding and unjustifiably broad definitions of “liberty” that courts were spinning out.<sup>459</sup> The author’s historical investigation had led

450. *Bertholf v. O'Reilly*, 74 N.Y. 509, 515 (N.Y. 1878) (emphasis added).

451. 17 N.E. 343 (N.Y. 1888).

452. *Id.* at 344.

453. *Id.* at 345-47.

454. *Id.* at 346 (stating that coffee was “almost one of the necessaries of life to a large number of people.”).

455. *Id.*

456. See *supra* text accompanying note 447.

457. See *People v. Gillson*, 17 N.E. 343, 345-46 (N.Y. 1888).

458. Charles E. Shattuck, *The True Meaning of the Term “Liberty” in Those Clauses in the Federal and State Constitutions Which Protect “Life, Liberty, and Property,”* 4 HARV. L. REV. 365, 377 (1891).

459. *Id.* at 374-82 (arguing that “liberty” meant “freedom from . . . [physical] restraint”); *id.* at 383-92 (arguing that cases adopting a broader interpretation are wrong).

him to the broad definition of "life," and his discoveries must have seemed new, because his essay won a prize.<sup>460</sup>

During the same period, the theory of a "police power" moved to the fore, implementing a conception of liberty that differs dramatically from Locke's and Hutcheson's ideas. A state's "police power" consists of its power to enact laws "promot[ing] the health, peace, morals, education, and good order of the people."<sup>461</sup> Police power theory regards such laws as *infringements* on liberty, albeit necessary, and therefore, valid ones.<sup>462</sup> "Liberty" in police power theory means "freedom from restraint."<sup>463</sup> It follows that general welfare came at the cost of individual right. Infringements of liberty, however, did not always violate constitutional guarantees; government itself would be impossible if they did. According to these theorists, measures *within* the police power's scope comport with constitutional "liberty" (although liberty is in fact lost), while *outside* of the police power's range, the constitutional right of liberty holds sway.<sup>464</sup>

Given this framework, it is little wonder that courts viewed social and economic legislation with a wary eye. Using the police power doctrine, courts ensured that any cost in liberty was "reasonably necessary."<sup>465</sup> As the New York Court of Appeals explained, unless courts confine the police power to its proper bounds, "the power of the legislature would be practically without limitation. In the assumed exercise of the police power in the interest of the health, the welfare, or the safety of the public, every right of the citizen might be invaded and every constitutional barrier swept away."<sup>466</sup> To prevent this, courts would determine whether laws were "reasonably necessary" and would prohibit legislatures from cloaking laws "under the guise of a police regulation" when there was another legislative "object and purpose."<sup>467</sup>

These conceptions differ dramatically from Locke's and Hutcheson's ideas. Social contract theory does not define "civil liberty" as freedom from legal restraint, as police power theory

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460. *Id.* at 365.

461. *Barbier v. Connolly*, 113 U.S. 27, 31 (1885).

462. *Lochner v. New York*, 198 U.S. 45, 53 (1905) (noting that the right of liberty is subject to "such reasonable conditions as may be imposed by states pursuant to the police power").

463. *E.g.*, *Jacobson v. Massachusetts*, 197 U.S. 11, 26-27 (1905) (treating liberty as the right of "freedom from restraints").

464. *Id.*

465. *People v. Gillson*, 17 N.E. 343, 346 (N.Y. 1888).

466. *In re Jacobs*, 98 N.Y. 98, 110 (N.Y. 1885).

467. *Gillson*, 17 N.E. at 347.

does. To the contrary, Locke's and Hutcheson's "liberty" depends on the *existence* of restraints.<sup>468</sup> That is true in a state of nature, and even more true in civil society, where laws *preserve* liberty. The conflict that animates police power theory, public good versus individual liberty, is absent in the social contract tradition. Locke regarded public good and individual right as harmonious;<sup>469</sup> Hutcheson thought laws constitute the "natural and surest defence"<sup>470</sup> of liberty; and even Hobbes identified individual liberty in a commonwealth with the liberty of the sovereign, obviating any conflict between public and individual good.<sup>471</sup>

Police power theory, in effect, guards *natural* liberty, something that does not exist in Locke's and Hutcheson's *civil* society. Nineteenth century theorists supposed that natural liberty coexists with civil society, and that civil society necessarily encroaches on natural liberty.<sup>472</sup> In fact, police power theory conceives of the state in the way that Hobbes had conceived of individuals in a state of nature: unbounded and lacking innate controls. Therefore, the boundary between political society and natural liberty requires zealous guarding, and that is the office of the courts. By contrast, social contract theory replaces natural liberty with civil liberty, and civil liberty is subject to enacted laws as well as natural right. Neither laws nor the social con-

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468. See discussion *supra* parts II.B.2, II.C.1.

469. See discussion *supra* part II.B.2. In theory, Locke allowed that an individual's own life, liberty, and estate could come "in competition," LOCKE, *supra* note 160, at 271, with the life, liberty, and property of "Mankind," *id.* Under those circumstances, Locke allowed the individual to prefer his or her own preservation. Yet, such conflicts received little attention from Locke. By and large, he thought everyone's interests were harmonious. Even Locke's account of property in the state of nature emphasizes that enough would be left for everyone: B would be no worse off, Locke maintained, because A had acquired property. See *id.* at 288 ("For this Labour being the unquestionable Property of the Labourer, no Man but he can have a right to what that is once joyned to, at least where there is enough, and as good left in common for others.") (emphasis omitted).

470. 2 HUTCHESON, *supra* note 316, at 281.

471. See discussion *supra* part II.B.1.

472. RICHARD A. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN 3-18 (1985). Epstein treats rights in a way reminiscent of police power theory, yet claims that his account is Lockean: "A [Lockean] natural rights theory asserts that the end of the state is to protect liberty and property, as these conceptions are understood independent of and prior to the formation of the state." *Id.* at 5. Like police power theorists, however, Epstein ignores the Lockean right of "life" and uses natural, rather than civil, liberty as the standard for government action. Those two steps turn Locke's social contract idea into police power theory, a very different animal.

tract infringe natural liberty, in this view, because for Hutcheson, Hobbes, and Locke, natural liberty is the coin paid in the social contract. Natural liberty does not coexist with governments, and so governments could not infringe upon it.

Unsurprisingly, given these antithetical frameworks, social contract and police power theories produce different hierarchical rights. Social contract theory posits an expansive right to life,<sup>473</sup> while police power theory ignores life. Police power doctrine makes liberty, defined as freedom from restraint, an all encompassing right; social contract theory does not even regard "liberty" as a freedom from restraint. When a Lockean legislature protected health, it preserved the right of life; when a police power legislature protected health, it pursued a public objective at the price of liberty.

Yet, Locke's chameleon-like concept of "liberty" could obscure his differences with police power theory. Indeed, the *Second Treatise* sometimes reads as if Locke had created the police power doctrine. For example, Locke wrote that a person joining civil society must "part . . . with as much of his natural liberty in providing for himself, as the good, prosperity, and safety of the Society shall require."<sup>474</sup> Police power theorists could agree wholeheartedly; they demanded, after all, that public measures be "reasonably necessary." Locke's reference to "the good, prosperity, and safety of the Society" echoes the police power concept of "the health, the welfare, [and] the safety of the public."<sup>475</sup>

Locke was no police power theorist, however. He declared it "not only necessary, but just" for people to sacrifice their liberty, because "other Members of the Society do the like."<sup>476</sup> This is not police power theory's grudging sacrifice of liberty. Moreover, Locke's contractors sacrifice their natural liberty *to one another* as consideration for a social contract; they do not lose natural "liberty" through state encroachment, as police power theory supposes. Nor is Locke's "natural liberty" the "freedom from restraints" of police power theory. Rather, Lockean natural liberty is subject to demands imposed by the life and health of all humanity.<sup>477</sup> Locke's dictum about sacrificing as much liberty as the public good "shall require" should be read expansively: it is

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473. As the preceding account suggests, Hobbes's, Locke's, and Hutcheson's disagreements with each other turned on the concept of "liberty." They all offered essentially the same definition of "life."

474. LOCKE, *supra* note 160, at 353.

475. *In re Jacobs*, 98 N.Y. 98, 110 (N.Y. 1885).

476. LOCKE, *supra* note 160, at 353.

477. *See generally supra* part II.B.2.

an observation about how much, not how little, natural liberty is lost.

*Lochner v. New York*<sup>478</sup> illustrates these differences. The Court<sup>479</sup> struck down a supposed "health" law that limited the workday of bakery employees, finding the law outside of the police power's scope, and, hence, a violation of liberty.<sup>480</sup> The *Lochner* Court dismissed any relationship between hours of work and healthfulness of bread as ephemeral,<sup>481</sup> and it refused to countenance any measure designed to redress an imbalance of bargaining power between employer and employee.<sup>482</sup> What remained was an argument that the statute fell within the scope of the state's police power because it protected the health of individual bakers.<sup>483</sup> The Court viewed bakery labor, however, as not fundamentally different from other lines of work. A state could therefore justify virtually any labor regulation in any occupation by using the same arguments. That, the *Lochner* Court concluded, would nullify the liberty to make employment contracts.<sup>484</sup> Like many opinions of the era, *Lochner's* pivotal argument takes the form of a *reductio ad absurdum*: if the state can do *this*, it can do *anything*.

*Lochner* is the epitome of a police power decision: it ignores the right of life, emphasizes choice of occupation as an aspect of liberty,<sup>485</sup> and focuses on the police powers of states,<sup>486</sup> with "liberty" being the dominant theme of the opinion. Yet, *Lochner*

478. 198 U.S. 45 (1905).

479. As a member of the New York Court of Appeals, Justice Peckham, the author of the decision, was instrumental in the development of police power theory. For example, Justice Peckham authored *People v. Gillson*, 17 N.E. 343 (N.Y. 1888). See *supra* note 431. Later, in *Lochner*, he produced the opinion that lent its name to this entire era of American constitutional law.

480. *Lochner*, 198 U.S. at 57.

481. *Id.*

482. *Id.*

483. The "law must be upheld, if at all, as a law pertaining to the health of the individual engaged in the occupation of a baker." *Id.*

484. *Id.* at 60. Liberty of person and freedom of contract would be reduced to "visionary" status. *Id.*

485. *Id.* at 53; see also *Allgeyer v. Louisiana*, 165 U.S. 578, 589 (1897) (stating that "liberty . . . means not only the right of the citizen to be free from the mere physical restraint of his person . . . but the term is deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation; and for that purpose to enter into all contracts which may be proper, necessary and essential to his carrying out to a successful conclusion the purposes above mentioned.").

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

makes no sense on Lockean principles. In the *Second Treatise*, liberty is not a higher value than health; rather, health is part and parcel of "life."<sup>487</sup> More importantly, measures that promote the health of workers simply do not infringe on Lockean "liberty." In fact, a failure to protect workers' health constitutes a breach of the public good and a violation of the right of "life." Nor is it particularly threatening that similar measures might cover other lines of work, because "liberty," in Locke's scheme, does not depend on any particular number of free, unregulated choices. *Lochner's reductio* guards the boundary between *natural* liberty and society, a boundary that, as noted earlier, does not exist in Locke's theory.

*Lochner's* police power concept also diverges from Hutcheson's ideas, notwithstanding the element of "autonomy" in his concept of natural liberty. The good of all human beings represents the highest moral and political values to Hutcheson, who believed that human beings are constituted so as to feel this obligation.<sup>488</sup> He also regarded natural liberty as the exercise of the human constitution.<sup>489</sup> Hutcheson recognized that an individual's felt desires do not *always* tend to the greatest good; some desires ought to be suppressed.<sup>490</sup> Such views do not allow for the sharp clash between individual liberty and social welfare in a state of civil society<sup>491</sup> that animates police power theory.

487. See *supra* notes 201-202, 254 and accompanying text.

488. 1 HUTCHESON, *supra* note 316, at 9-10 (describing an innate desire for our own and humanity's happiness); *id.* at 272 ("[A]ll wise and just laws have some tendency to the general happiness, or to the good of some part of the system subservient to and consistent with the general good."); 2 *id.* at 105 (stating that all have a "higher sense of obligation to do nothing contrary to any publick interest").

489. See discussion *supra* part II.C.1

490. See *supra* text accompanying note 335.

491. Hutcheson believed that "industry" and "labor" provide occasions for the exercise of "natural liberty." Although people can misuse this liberty, he thought that:

[w]hile they are not injurious to others, and while no wise human institution has for the publick good subjected them to the controll of magistrates or laws, the sense of natural liberty is so strong, and the loss of it so deeply resented by human nature, that it would generally create more misery to deprive men of it because of their imprudence, than what is to be feared from their imprudent use of it . . . . Let men instruct, teach, and convince their fellows as far as they can about the proper use of their natural powers, or persuade them to submit voluntarily to some wise plans of civil power where their important interests shall be secured. But till this be done, men must enjoy their natural liberty as long as they are not injurious, and while no great publick interest requires some restriction of it.

With its new definition of "liberty" and its eviscerated right of life, the police power theory defined a new constitutional era. The wonder is not that the new doctrines diverge from the original understandings, rather, it is that the new doctrines sound so much like the older ones, despite their contrary characters. Because the same word, "liberty," lent itself to both eras, the change largely escaped notice.<sup>492</sup>

## B. THE DEMISE OF THE POLICE POWER THEORY

Police power theory met its sudden demise in the late 1930s and early 1940s, after President Roosevelt criticized the Court for its decisions invalidating New Deal measures.<sup>493</sup> Doctrinally, the Court now rejected "reasonable necessity," the police power standard of "liberty," and substituted a "rationality" test, an easily satisfied requirement that, as a practical matter, accommodates every social or economic measure put to the test. Minimum wage and maximum hour laws, price regulations, and other social and economic legislation that the Court had struck down, it now sustained.<sup>494</sup> This shift usually receives an institutional, and even an overtly political, explanation: President Roosevelt had challenged the Court, and the Court yielded.<sup>495</sup>

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1 HUTCHESON, *supra* note 316, at 294-95. The laborer thus should be left alone in a state of nature, so long as no one else is harmed. Submission to "wise plans of civil power" that secure "important interests" of the individual, like living under a legitimate government, however, deprives one of this natural liberty. "Civil liberty" takes its place. There is nothing absurd about regulating everyone's hours of work, if that is part of a "wise plan . . . of civil power." *Id.*

492. *But see* Shattuck, *supra* note 458, at 384-92 (noting developments in the interpretation of liberty in constitutional law).

493. *See* GUNTHER, *supra* note 2, at 122-24 (describing President Roosevelt's and the Court's relationship during this period); *see also* Planned Parenthood v. Casey, 112 S. Ct. 2791, 2812 (1992) (joint opinion of O'Connor, Kennedy, & Souter, JJ.) (arguing that the end of the *Lochner* era resulted when the Depression taught the "unmistakable" lesson that the *Lochner* line of cases rested on "fundamentally false factual assumptions about the capacity of a relatively unregulated market to satisfy minimal levels of human welfare"); *id.* at 2863-64 (Rehnquist, C.J., concurring in the judgment in part and dissenting in part) (observing that *Lochner* was overturned while President Roosevelt's proposal to "reorganize" the Supreme Court was pending in Congress, but arguing that *Lochner* represented a constitutional, rather than an economic or policy mistake on the Court's part, and warranted overruling for that reason alone).

494. *E.g.*, Williamson v. Lee Optical Co., 348 U.S. 483 (1955) (upholding what appeared a rather tenuous measure on rationality grounds); United States v. Carolene Prods. Co., 304 U.S. 144 (1938) (announcing a rationality test); West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937) (overruling a prior decision and upholding a minimum wage law that applied to women).

495. *See, e.g.*, Casey, 112 S. Ct. at 2883 (Scalia, J., concurring in the judgment in part and dissenting in part) (implying that the Court's abandonment of

In the process, the Justices adopted a different vision of their constitutional competence and responsibilities; the Court's institutional role changed, as the Justices deferred to the political branches of government, at least in social and economic matters.<sup>496</sup>

Yet, these developments have a conceptual dimension as well, because the Court's conception of "liberty" had changed. "Reasonable necessity" had implemented the police power view; "rationality," the new standard, reflects an entirely different view of "liberty." Unfortunately, the Court did not articulate this new view. It portrayed rational basis review in negative terms, as a repudiation of *Lochner*;<sup>497</sup> in positive terms, as a deferential review;<sup>498</sup> and in comparative terms, as the lowest level of constitutional scrutiny.<sup>499</sup> Yet, the Court never explained the meaning of this new "liberty." Social contract theory describes the "liberty" of the Framers, and police power theory describes the "liberty" of the *Lochner* era, but modern "liberty" lacks any theoretical grounding.

Modern "liberty" includes two other strands that the Court has also left dangling, tying them neither to each other, nor to the rational basis test, nor to any large conception of liberty. One strand involves the Constitution's first eight amendments, and the question of whether Fourteenth Amendment "liberty" incorporates those guarantees and makes them applicable to the states. The Court resolved this question by a process of "selective incorporation" that, in practice, incorporates the bulk of the Bill of Rights.<sup>500</sup> Liberty's other strand is the concept of sub-

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*Lochner* was, among other things, a "switch in time" that saved the Court from further political contests with President Roosevelt).

496. See, e.g., *Nebbia v. New York*, 291 U.S. 502, 537 (1934) ("The courts are without authority either to declare . . . [economic and social] policy or, when it is declared by the legislature, to override it.").

497. See generally GUNTHER, *supra* note 2, at 456-65 (describing the shift from *Lochner* to rational basis review).

498. E.g., *Ferguson v. Skrupa*, 372 U.S. 726, 730 (1963) (declaring that courts will no longer "substitute" their social and economic beliefs for the judgments of legislative bodies, as they had in the *Lochner* era).

499. E.g., *TXO Prod. Corp. v. Alliance Resources Corp.*, 113 S. Ct. 2711, 2719 (1993) (discussing rational basis scrutiny).

500. For discussion, see, e.g., TRIBE, *supra* note 107, § 11-2 (asserting that the Court has incorporated all, or significant parts, of the First, Second, Fourth, Fifth, Sixth, and Eighth Amendments, and citing cases). *But see* *Fresno Rifle & Pistol Club Inc. v. Van De Kamp*, 965 F.2d 723, 730 (9th Cir. 1992) (declining to incorporate the Second Amendment and reaffirming the doctrine of selective, rather than total, incorporation); NOWAK & ROTUNDA, *supra* note 138, § 10.2 (noting that the Second Amendment right to bear arms, the Fifth Amendment

stantive due process and the line of decisions that includes *Roe* and *Casey*. These cases seem to define the problem of liberty for our time, yet they say less about the *nature* of liberty than one would expect. Generally, we know the result a Justice derives from substantive "liberty."<sup>501</sup> Often we know which technique, rational basis review or strict scrutiny, a Justice thinks is appropriate.<sup>502</sup> Sometimes we even know that one Justice thinks another Justice has a "stunted" view of liberty.<sup>503</sup> What "liberty" actually *means*, however, we are told less often.

*Roe*, in particular, received criticism for its brief treatment of liberty.<sup>504</sup> The Court seemingly announced that protected liberties exist under the Constitution, including privacy, and that some aspects of privacy are fundamental, including abortion.<sup>505</sup> No articulated theory of liberty supports Justice Blackmun's conclusions, nor did the *Roe* dissenters advance any contrary theory of liberty. Justice Rehnquist asserted, with little explanation, that a rationality test should apply.<sup>506</sup> In dissent, Justice White argued that "nothing in the language or history of the Constitution . . . support[s] the Court's judgment,"<sup>507</sup> but he did not elaborate any conception of liberty either; instead, he implied that elaboration is unnecessary, since *no* viable theory of liberty could support *Roe*'s result.

Justice Blackmun's and Chief Justice Rehnquist's *Casey* opinions also fit the same mold. Justice Blackmun wrote passionately about liberty, but, in substance, reiterated the conclu-

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right to indictment by a grand jury, and the Seventh Amendment right to a jury in civil trials have not been incorporated, and citing cases).

501. See, e.g., *Planned Parenthood v. Casey*, 112 S. Ct. 2791, 2805 (1992) (joint opinion of O'Connor, Kennedy, and Souter, JJ.) ("the Court was no doubt correct in finding [marriage] to be an aspect of liberty protected against State interference by the substantive component of the Due Process Clause").

502. See, e.g., *Doe v. Bolton*, 410 U.S. 179, 233 (1973) (Rehnquist, J., dissenting) ("I view the compelling-state-interest standard as an inappropriate measure of the constitutionality of State abortion laws.").

503. *Casey*, 112 S. Ct. at 2853 (Blackmun, J., concurring in part, concurring in the judgment in part, and dissenting in part).

504. E.g., Michael J. Perry, *Abortion, the Public Morals, and the Police Power: The Ethical Function of Substantive Due Process*, 23 UCLA L. Rev. 689, 691 (1976) (observing that the *Roe* Court "failed to locate this vague right in constitutional text or tradition"); Donald H. Regan, *Rewriting Roe v. Wade*, 77 MICH. L. REV. 1569, 1569 (1979) (noting that even *Roe*'s supporters find the opinion dissatisfying); see also *supra* part I.B (discussing Bork's and Ely's criticisms).

505. *Roe v. Wade*, 410 U.S. 113, 152, 154 (1973).

506. *Id.* at 172-73 (Rehnquist, J., dissenting).

507. *Id.* at 221 (White, J., dissenting).

sions he had stated in *Roe*.<sup>508</sup> Chief Justice Rehnquist also restated his *Roe* conclusions,<sup>509</sup> adding that *even if* substantive due process sometimes yields fundamental rights (like a right to marry, to procreate, or to have access to contraceptives), abortion is not one of them.<sup>510</sup> Without offering an account of either "liberty interests" or fundamental rights, the Chief Justice assigned abortion and contraception to different categories.<sup>511</sup>

Justice Scalia and the *Casey* joint opinion each went further toward a definition of "liberty," although they proceeded in opposite directions. The joint opinion described constitutional "liberty" as a meaningful concept whose present day significance can be discovered through the process of "reasoned judgment."<sup>512</sup> Justice Scalia denied that claim, finding in "reasoned judgment" only a cloak for "personal predilection[s]" of the Justices.<sup>513</sup> The joint opinion invoked the "balance struck by this country" between "the liberty of the individual" and the demands of organized society.<sup>514</sup> Justice Scalia argued that constitutional "liberty" does not protect acts that the Constitution's text never mentions, at least when there exists a national history of prohibiting the acts in question.<sup>515</sup>

The joint opinion went farther than Justice Scalia, however, by espousing a theory of *political* as well as constitutional liberty. Justice Scalia sought to explain what "liberty" means in the Constitution, not what "liberty" means apart from that document.<sup>516</sup> Yet, the Framers protected "liberty," the political concept dating back to the Magna Carta, not some new, juridical idea of "constitutional liberty." Since the demise of the police power theory, that seemingly trivial truth is often forgotten: "constitutional liberty" means liberty.

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508. See discussion *supra* part I.C.1.

509. In *Casey*, Chief Justice Rehnquist adopted a different attitude toward non-abortion, substantive due process cases such as *Griswold*. See *supra* part I.C.1.

510. *Planned Parenthood v. Casey*, 112 S. Ct. 2791, 2859 (1992) (Rehnquist, C.J., concurring in the judgment in part and dissenting in part).

511. *Id.* The attempted distinction surely requires some elaboration. One could as well describe contraception as a "purposeful interference with potential life" and ask how it differs from abortion.

512. *Id.* at 2806 (joint opinion of O'Connor, Kennedy, & Souter, JJ.).

513. *Id.* at 2876 (Scalia, J., concurring in the judgment in part and dissenting in part).

514. *Id.* at 2806 (quoting *Poe v. Ullman*, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting from dismissal on jurisdictional grounds)).

515. *Id.* at 2874 (Scalia, J., concurring in the judgment in part and dissenting in part).

516. *Id.*

It is possible, of course, that the Court's decisions on constitutional liberty lack a coherent relationship to any deeper conception of liberty. Perhaps there once was a connection, but over time it became attenuated beyond recognition, as "liberty" became a technical legal term. Perhaps no concept of liberty capable of guiding judicial decision making ever existed, or ever could exist, an argument suggested by Justice Scalia and made by Robert Bork.<sup>517</sup> Perhaps "liberty," correctly understood, produces the results that police power theory reached, and, being unable to subscribe to that theory, we jerry-rig specious solutions to the problem of defining "liberty."

All of these suppositions are mistaken. Each presumes that the *Lochner* era closed the 300 year old tradition of thinking about human rights that began with Thomas Hobbes. In fact, the end of the *Lochner* era marks a return to the Lockean conception of rights that had animated the Framers.

## V. MODERN LIBERTY: ECHOES OF THE SOCIAL CONTRACT

The three strands of modern "liberty" are rarely considered parts of a single, coherent doctrine. Incorporation is thought of as the solution to a problem of federalism. Rational review is supposed to be an institutional response to the crisis of the New Deal, a product of events in the 1930s, rather than the 1790s or the 1860s. Substantive due process elicits a variety of viewpoints, ranging from Bork's account of constitutional heresy, to Justice Blackmun's confidence that the Court can identify fundamental rights, to Chief Justice Rehnquist's idea of "rationality" as a self-evident default standard of constitutional review. Yet, all three strands of modern "liberty"—incorporation, rationality review, and substantive due process—also appear as parts of Locke's and Hutcheson's version of liberty, a coincidence which suggests that modern "liberty" in fact reprises social contract theory.

### A. INCORPORATION

Civil liberty, according to Locke and Hutcheson, requires that enacted laws comport with natural right: liberty, in effect, incorporates the natural rights of life and property.<sup>518</sup> This con-

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517. See *supra* notes 95-99 and accompanying text (Justice Scalia) and notes 282-285 and accompanying text (Bork).

518. See *supra* parts II.B.2, II.C.1.

ception parallels the modern idea of Fourteenth Amendment "liberty" incorporating fundamental rights spelled out elsewhere in the document, in the Bill of Rights. Both approaches understand "liberty" in terms of basic rights that exist apart from the concept of liberty itself.

Today "liberty" is often regarded as a *source* of rights, a fountain from which rights flow, rather than a vessel that conveys other, independent rights. Given modern definitions, the idea of liberty "incorporating" other rights seemingly makes little sense. Justice Frankfurter, for example, criticized the incorporation thesis as an "extraordinarily strange" interpretation of the Due Process Clause, an interpretation that "[t]hose reading the English language with the meaning which it ordinarily conveys . . . [and] those conversant with the political and legal history of the concept of due process" must find incredible.<sup>519</sup> Yet, Locke understood "liberty" in precisely that way; the Framers followed Locke; and the "liberty" of incorporation theory functions exactly like Lockean liberty. Like later commentators, Justice Frankfurter committed the fallacy of confusing his personal theory of liberty with a dictionary definition of the word.

## B. RATIONAL BASIS REVIEW

Rational basis review requires a state to have a legitimate purpose for its enactments, and that the state's methods bear a rational relationship to its purpose.<sup>520</sup> Since the close of the *Lochner* era, the Court has tested social and economic legislation against the guarantee of "liberty" using this lenient standard. Rationality, however, is a quintessentially Lockean test for "liberty," or, to be more precise, for the residue of "liberty" that remains after subtracting the natural rights of life and property that liberty incorporated. Lockean "liberty" requires that any interference with a person have some reason for it.<sup>521</sup> This restriction is weak, because *any* reason will do, and because Locke did not recognize an independent principle of autonomy.<sup>522</sup> The requirement of a "reason" represents a minimum demand that suits liberty's minimal, independent substantive content.<sup>523</sup> Likewise, the modern idea of "rationality review" requires some

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519. *Adamson v. California*, 332 U.S. 46, 63 (1947) (Frankfurter, J., concurring).

520. *See supra* part I.C.3.

521. Otherwise, the idea of "innocent delights" allows a person to do as he or she wishes. *See* discussion *supra* part II.B.2.

522. *See supra* notes 214-216, 328-332 and accompanying text.

523. *See supra* note 216 and accompanying text.

reason, or any reason, for a state's action. It represents exactly the same principle as that asserted by Locke.

### C. SUBSTANTIVE DUE PROCESS AND PRIVACY

The third strand of modern liberty, consisting of substantive due process rights and privacy, also follows the social contract model. In this context, however, *life* rather than liberty is the relevant Lockean right. Modern doctrines of privacy and substantive due process effect a return to the social contract conception of life.

Several considerations point to this conclusion. One is the weakness of textual arguments based on "liberty." Such arguments fail to explain why economic liberties receive only rational basis review, while other liberties, like the right to use contraceptives, are entitled to strict scrutiny. The Constitution's text draws no distinction among the different kinds of liberty. If the Constitution contains a textual basis for rights of privacy, "liberty" seems not to be it.

There are also suggestions that the Court did not actually rely on "liberty" in *Griswold v. Connecticut* or *Roe v. Wade*. *Roe's* perfunctory references, for example, hardly indicate that the Justices seriously reflected on "liberty" as part of their deliberations.<sup>524</sup> Nor did *Griswold*, which created modern privacy, rely on "liberty" as an animating concept. Justice Douglas for the *Griswold* Court derived privacy from "penumbras" of the First, Third, Fourth, and Fifth Amendments, not from any concept of "liberty."<sup>525</sup> In their dissents, Justices Stewart and Black denied that "liberty" constitutes a source of privacy rights,<sup>526</sup> and only two of the concurring Justices, Harlan and White, argued that an unalloyed right of "liberty" supports the *Griswold* result.<sup>527</sup> In his concurring opinion, Justice Goldberg<sup>528</sup> relied on "liberty," but with evident uneasiness.<sup>529</sup>

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524. See *supra* note 504 and accompanying text.

525. *Griswold v. Connecticut*, 381 U.S. 479, 483-84 (1965).

526. *Id.* at 530 (Stewart, J., dissenting); *id.* at 507-08 (Black, J., dissenting).

527. *Id.* at 499-500 (Harlan, J., concurring) ("ordered liberty" is the proper test); *id.* at 502 (White, J., concurring) (relying on the "liberty" protected by the Due Process Clause).

528. *Id.* at 486 (Goldberg, J., concurring).

529. To buttress his liberty argument, Justice Goldberg emphasized the Ninth Amendment, which he considered evidence of the Framers' commitment to unenumerated fundamental rights. *Id.* at 488. Although Justice Goldberg also stated that the Ninth Amendment is not a binding source of independent constitutional rights, the fact remains that "liberty" alone did not appear to him strong enough to carry the day. *Id.* at 487-93.

Later cases unhesitatingly cite "liberty" as the source of privacy rights,<sup>530</sup> and it is tempting to explain the *Griswold* Justices' uneasiness as arising from their fear of tainting the new doctrine with the ghost of *Lochner* era substantive due process.<sup>531</sup> Taking the Justices at their word, however, a majority of the *Griswold* Court doubted, or flat out did not believe, that privacy rights flow from "liberty."

It is true, of course, that none of the *Griswold* Justices specifically cited "life" as the source of privacy rights. Yet, Justice Douglas wrote of marital privacy as protecting a "way of life,"<sup>532</sup> a description that Locke himself might have used to describe the same right. Justice Douglas also quoted an 1886 decision<sup>533</sup> that described the Fourth and Fifth Amendments as protection against "invasions of the sanctity of a man's home and the *privacies of life*,"<sup>534</sup> a phrase that explicitly links privacy to life.

Justice Goldberg went further, all but reinventing the Lockean conception of rights. Justice Goldberg suggested that Fourteenth Amendment "liberty" somehow incorporates Ninth Amendment unenumerated rights.<sup>535</sup> His unspoken premise is that "liberty" represents a commitment to independently existing, fundamental rights which is precisely the Lockean meaning of "liberty."<sup>536</sup> If Justice Goldberg had also recognized "life" as the relevant, "enumerated" right, the parallel with Locke would have been complete.

In fact, the very concept of constitutional "privacy" suggests a Lockean conception of liberty. If "liberty" constitutes a source of rights, "privacy" has no real analytical function. The process of deriving rights from "liberty" does not require an intermediate premise like privacy. Nor does liberty have so many aspects

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530. *E.g.*, *Planned Parenthood v. Casey*, 112 S. Ct. 2791, 2805 (1992) (joint opinion of O'Connor, Kennedy, & Souter, JJ.) (citing cases); *Moore v. City of East Cleveland*, 431 U.S. 494, 499 (1977) ("freedom of personal choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment") (quoting *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632, 639-40 (1974)).

531. *Lochner* relied on "liberty," see *supra* note 478, and if the new substantive due process flows from some other source, so much the better. For a review of arguments that liken *Griswold* and *Roe* to *Lochner*, see generally Helen Garfield, *Privacy, Abortion, and Judicial Review: Haunted by the Ghost of Lochner*, 61 WASH. L. REV. 293 (1986).

532. *Griswold v. Connecticut*, 381 U.S. 479, 486 (1965) (emphasis added).

533. *Boyd v. United States*, 116 U.S. 616 (1886).

534. *Griswold*, 381 U.S. at 484 (emphasis added) (quoting *Boyd*, 116 U.S. at 630) (internal quotations omitted).

535. *Id.* at 488.

536. See discussion *supra* part II.B.2.

that subcategories, like "privacy," are required to keep track of them all.<sup>537</sup> Thus, *Griswold* could have derived the right of access to contraceptives without any mention of "privacy." On the other hand, if the liberty of *Griswold* is Locke's liberty, it becomes necessary to spell out the independent right—in this case, privacy or "life"—that is being threatened.

The *Roe v. Wade* opinion invites a similar conclusion. Critics fault *Roe* for not explaining the derivation of "privacy" from "liberty,"<sup>538</sup> but this very "failure" fits the Lockean model in which rights are not *derived* from "liberty" at all.<sup>539</sup> *Roe's* "privacy" does not really originate with "liberty." In Justice Blackmun's opinion, the concept of privacy lends its content to liberty; liberty does not define privacy.<sup>540</sup> *Roe's* "liberty," then, like Locke's, is made up of free standing rights having a prior, independent existence of their own. The Court did not explain how privacy follows from liberty because privacy simply does not arise in that way. Just as *Griswold's* and *Roe's* "liberty" recreates Lockean liberty, their concept of "privacy" recreates the Lockean right of "life." Privacy operates in *Griswold* and *Roe* as a fundamental right, supplying substance to the concept of liberty, in the same way that "life" in the *Second Treatise* supplies "liberty" with content.<sup>541</sup> The application of the privacy doctrine to abortion rights follows the contours of Lockean "life."

Descriptions of privacy today often read like invocations of the social contract right of life, suggesting, once again, their identity. Proponents of abortion rights, for example, often mention a woman's right to control her "life."<sup>542</sup> Such references are

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537. The Court had recognized only one substantive due process right since the demise of police power theory, the right of access to contraceptives in *Griswold* itself.

538. See, e.g., Perry, *supra* note 504, at 690-91.

539. See discussion *supra* parts II.B.3.a-b.

540. 410 U.S. 113, 152-53 (1973).

541. See discussion *supra* part II.B.2.

542. Some legal commentary characterizes abortion rights in the same way. See, e.g., *Planned Parenthood v. Casey*, 112 S. Ct. 2791, 2846 (1992) (Blackmun, J., concurring in part, concurring in the judgment in part, and dissenting in part) (describing family planning as a "critical life choice" for a woman and referring to the "impact" of a pregnancy "on a woman's life"); Guido Calabresi, *The Supreme Court 1990 Term, Foreword: Antidiscrimination and Constitutional Accountability (What the Bork-Brennan Debate Ignores)*, 105 HARV. L. REV. 80, 91 (1991) (stating that "anti-abortion laws impose a degree of control over women's lives . . . that is not imposed on men"); Estrich & Sullivan, *supra* note 89, at 127 (stating that "[l]iberty requires independence in making the most important decisions in life"); Ruth B. Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to Roe v. Wade*, 63 N.C. L. REV. 375, 383 (1985) (Justice Ginsburg, then a Circuit Judge, arguing that abortion rights bear on "a

not intended to invoke the Fourteenth Amendment, yet, like Justice Douglas's *Griswold* opinion, they echo the Lockean right to "life." Nor are the echoes always casual: "Privacy," the Supreme Court has stated, is freedom from government interference in "matters . . . fundamentally affecting a person,"<sup>543</sup> recalling Locke's and Hobbes's equation of a right to "life" with a right to one's "person."<sup>544</sup>

Commentators have come even closer to Locke's formulations. Jed Rubenfeld, for example, argues that the idea of personhood "has so invaded privacy doctrine that [personhood] now regularly is seen either as the value underlying the right or as a synonym for the right itself."<sup>545</sup> Rubenfeld views privacy as the right not to have the government "take over the lives of . . . persons,"<sup>546</sup> a formulation that strikingly parallels a passage from the *Second Treatise*:

[D]eclaring by Word or Action . . . a sedate settled Design, upon another Mans Life, puts him in a State of War with him against whom he has declared such an Intention . . . .

. . . .

And hence it is, that he who attempts to get another Man into his Absolute Power, does thereby put himself into a State of War with him; It being . . . understood as a *Declaration of a Design upon his Life*. For I have reason to conclude, that he who would get me into his Power without my consent, *would use me as he pleased, when he had got me*

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woman's autonomous charge of her full life's course," an argument that Justice Ginsburg—like social contract theorists—derived from an idea of equality); Reva Siegal, *Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection*, 44 *STAN. L. REV.* 261, 335 (1992) (stating that "society intervenes in women's lives to protect the unborn").

"Life" also helps to bridge the gap between constitutional and purely philosophical arguments about abortion rights. Thus, a leading philosophical argument about abortion—Judith Jarvis Thompson's hypothetical case of a woman who awakens one day to find another adult suddenly connected to, and dependent upon, her body—involves many of the same questions about limb, health, and body, and about control over a life, that one would expect in a Lockean account of "life." Judith J. Thompson, *A Defense of Abortion*, 1 *PHIL. & PUB. AFF.* 47, 48-49 (1971).

543. *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972) (emphasis added).

544. See discussion *supra* parts II.B.1-2.

545. Jed Rubenfeld, *The Right of Privacy*, 102 *HARV. L. REV.* 737, 752 (1989). Although Rubenfeld criticizes widely held views about personhood, nothing in his critique weakens the connection between modern personhood (or privacy) and historic life. He even suggests a view of privacy that uncannily resembles the older conception. See *infra* note 550.

546. *Id.* at 784 (emphasis omitted). Rubenfeld also describes privacy as the "fundamental freedom not to have one's life too totally determined by a . . . state." *Id.*

*there, and destroy me too when he had a fancy to it . . . . To be free from such force is the only security of my Preservation.*<sup>547</sup>

The phrase "design upon his life" in this passage connotes the intent to kill, but it also signifies an intent to "design" someone's life. Lockean theory insists that the latter implies the former: "he who . . . would use me as he pleased . . . [would] destroy me too when he had a fancy . . . ."<sup>548</sup> For his part, Rubinfeld finds precisely this sense of designing another person's "life"—the heart of the Lockean concept<sup>549</sup>—to be at the heart of constitutional privacy. Like Justice Goldberg in *Griswold* and Justice Blackmun in *Roe*, Rubinfeld recreates Locke's conception of rights without realizing it. Rubinfeld even denies that privacy arose from the social contract tradition.<sup>550</sup> Yet, a Lockean analysis represents the real driving force behind his analysis. Viewed in this light, police power theory and the *Lochner* era mark an interlude between the Framers' social contract beliefs and the reprise of those beliefs in modern privacy and substantive due process theory.

## VI. ABORTION AND THE SOCIAL CONTRACT

Today's disputes about abortion parallel historic arguments over social contract theory. We have already seen how Bork's and Ely's criticisms of *Roe* follow the historic fault lines,<sup>551</sup> and with the addition of a Humean element, the same is true of *Casey*.

547. LOCKE, *supra* note 160, at 278-79 (emphasis omitted) (other emphasis added).

548. *Id.* The next passage in the *Second Treatise* reiterates this point: One can kill a thief in self defense even though the thief has not "hurt" the victim or "declared any design" to do so. *Id.* at 279. Locke explained his reasoning as follows: "using force, where he has no Right, to get me into his Power, let his pretence be what it will, I have no reason to suppose, that he, who would take away my Liberty, would not when he had me in his Power, take away every thing else." *Id.* at 280 (emphasis omitted). *Cf.* Rubinfeld, *supra* note 545, at 806 (arguing that privacy violations consist of the "forced, affirmative occupation and direction of individuals' lives").

549. *See* Estrich & Sullivan, *supra* note 89, at 125-26 (describing rights of liberty and autonomy in terms that echo Locke's account of the right of life); Regan, *supra* note 504, at 1615 (stating that "unwanted pregnancy is serious bodily harm justifying the use of deadly force in self-defense").

550. Rubinfeld, *supra* note 545, at 804 ("The right to privacy, as I have sought to elucidate it, became a right only at the moment when we constituted ourselves as a democratic polity . . . . It does not purport to antedate the Constitution or to arise from a source, such as the 'social contract,' superior in authority to the Constitution. The right to privacy is a constitutional right because the Constitution is the document that establishes democracy in this country.")

551. *See* discussion *supra* part II.B.3.c.

## A. CASEY AND ITS LOCKEAN PARALLELS

The *Casey* joint opinion includes a powerful strain of Hume's ideas. Hume regarded liberty as a malleable thing that history shapes into various forms in different societies, and he thought that all political institutions reflect the struggle of liberty with authority, a contest in which too much liberty is as dangerous as too much authority.<sup>552</sup> At the same time, Hume believed that English political history had produced an especially happy accommodation of the two.<sup>553</sup> The *Casey* joint opinion embodies uncannily similar views. Quoting Justice Harlan's opinion in *Poe v. Ullman*,<sup>554</sup> the authors of the joint opinion agreed that due process:

represent[s] the balance which our Nation, built upon postulates of respect for the liberty of the individual, has struck between that liberty and the demands of organized society . . . . The balance of which . . . [we] speak is the balance struck by this country, having regard to what history teaches are the traditions from which it developed as well as the traditions from which it broke.<sup>555</sup>

The conflict of liberty and authority, the recognition of authority's indispensability, and the idea of a uniquely *national* definition of liberty all echo Hume.<sup>556</sup> Each of the themes differs, in rhetoric or in substance, from the Lockean social contract ideas that Hume had attacked.

Unlike the derivative and subordinate "liberty" of Locke, Justice Harlan's "liberty" is a basic force in political society and theory. Using Justice Harlan's concept, one can meaningfully ask whether liberty encompasses a particular right. With Lockean "liberty," by contrast, the issue becomes whether a right follows from life or property, because Lockean liberty only incorporates those rights. Thus, Justice Harlan unhesitatingly invoked "liberty" in *Griswold* when other Justices, with a more Lockean outlook, either ignored "liberty" altogether or compounded it with Ninth Amendment fundamental rights. Justice Harlan's "balance" between liberty and the "demands of organized society" echoes another Humean critique of Locke's theory. "Balancing" presupposes both a conflict between liberty and authority (or, in modern terms, between individual liberty and "le-

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552. See discussion *supra* part II.C.3.

553. See *infra* note 562.

554. 367 U.S. 497 (1961) (Harlan, J., dissenting from dismissal on jurisdictional grounds).

555. *Planned Parenthood v. Casey*, 112 S. Ct. 2791, 2806 (1992) (joint opinion of O'Connor, Kennedy, & Souter, JJ.) (quoting 367 U.S. at 542).

556. For discussion of Hume's views, see *supra* part II.C.3.

gitimate" state interests) and the possibility of resolving the conflict in a variety of ways that are more or less favorable to liberty.<sup>557</sup> These very points lay at the heart of Hume's attack on Locke. Locke had portrayed rightful authority as a component of civil liberty, not something in conflict with it;<sup>558</sup> thus, one could never balance Lockean liberty against authority. Nor could Lockean liberty subordinate itself, in any degree, to authority.

Yet, Justice Harlan and the authors of the *Casey* joint opinion also recognized a Lockean strain in "liberty." The joint opinion quotes Justice Harlan's description:

This "liberty" is not a series of isolated points . . . . It is a rational continuum which . . . includes a freedom from all substantial arbitrary impositions and purposeless restraints, . . . and which also recognizes, what a reasonable and sensitive judgment must, that certain interests require particularly careful scrutiny of the state needs asserted to justify their abridgment.<sup>559</sup>

This passage is decidedly not Humean. Hume's "liberty" is formed by history out of different materials in different nations,<sup>560</sup> something like an evolving geological landscape. Neither the political nor geographical landscape could be described as a "a rational continuum," in Hume's view. Nor does Hume's liberty cover "all substantial arbitrary impositions." To the contrary, he insisted that "liberty" encompasses different things in different nations. The animating ideas of this passage of the *Casey* joint opinion—that rights have a universal form, that they afford comprehensive protection, and that they are discoverable by reason—echo Locke rather than Hume.

Strictly speaking, Justice Harlan did not contradict himself. In the passage that echoes Hume, Justice Harlan was analyzing the concept of "*due process*," while in the passage that echoes Locke, he was analyzing "*liberty*." Justice Harlan thought that due process limits the entitlement to liberty, which is what the text of the Fourteenth Amendment suggests. Yet, an undeniable tension exists between Justice Harlan's two formulations. This tension arises from what he said and not from any Humean or Lockean gloss on his views.<sup>561</sup> How rights can be rational

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557. See *supra* note 555 and accompanying text.

558. See *supra* note 231 and accompanying text.

559. *Casey*, 112 S. Ct. at 2805 (1992) (joint opinion of O'Connor, Kennedy, & Souter, JJ.) (quoting *Poe v. Ullman*, 367 U.S. 497, 543 (1961) (Harlan, J., dissenting from dismissal on jurisdictional grounds)).

560. See *supra* note 362 and accompanying text.

561. Justice Harlan was hardly the first to combine Lockean and Humean elements in a single account of liberty. For example, a leading political scientist

constructs and historical byproducts at the same time requires some explanation. Lockean and Humean principles suggest, if not an explanation, at least a way of describing the tensions within this conception of liberty.

Hume viewed political authority *and* political liberty as fluid concepts taking varied shapes and forms in different societies: history, rather than moral principle, determines their form.<sup>562</sup> Locke, on the other hand, held that principles of life, liberty, and property decisively shape *every* political society. These rights are not fluid, as Hume envisioned them, and they do not conform to a shape that history imposes. Rather, Locke's rights are fixed in content and universal in application. Everywhere and necessarily these rights shape human affairs and history through the medium of the social contract. Justice Harlan and the *Casey* joint opinion embraced the views of both Hume and Locke, despite the inconsistency. The result is *Casey's* doctrinal confusion. The joint opinion's Lockean strain points in the direction of *Roe* and strict scrutiny; its Humean strain points toward Justice Scalia's reliance on tradition.

#### B. *ROE*, STRICT SCRUTINY AND LOCKEAN RIGHTS

Strict scrutiny is the natural technique for implementing Locke's vision of rights. Lockean rights represent universal moral principles, and a principle cannot be universal when government interests prevail over it, even if government interests prevail only sometimes and only on "balance." Nor can rights determine the course of political history, which is their Lockean destiny, if the demands of government "authority" exert a coun-

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of the Civil War era defined liberty as "a high degree of untrammelled political action in the citizen, and an acknowledgment of his dignity and his important rights by the government," JAMES M. MCPHERSON, *ABRAHAM LINCOLN AND THE SECOND AMERICAN REVOLUTION* 45 (quoting FRANCIS LIEBER, *ON CIVIL LIBERTY AND SELF-GOVERNMENT* (1853)), a definition that is both Lockean (liberty as recognition of important rights) and Humean (liberty as freedom from government restraints). In similar fashion, revolutionary era writers overlooked the tensions and conflicts between these competing conceptions of liberty. See *supra* part III.A. When Justice Harlan and the authors of *Casey* developed legal tests from such ideas, the tensions surfaced.

562. See *supra* part II.C.3. Hume also thought England had reached a particularly happy political state, HUME, *Idea of a Perfect Commonwealth*, *supra* note 401, at 383-84, and he wrote an essay recommending improvements in its form of government, see *generally id.* There is no contradiction, however. Moral principles do not underlie the natural, physical world, yet human beings try to shape nature in accordance with their moral principles. Similarly, Hume allowed individuals a role in shaping history, without supposing that history itself represents the play of moral principles.

tervailing force of their own on political history. Strict scrutiny embodies Locke's ideas by subordinating government interests to individual right.

Conversely, Hume's rights are ill-suited to strict scrutiny. Hume recognized no universal principles, and he thought that historical accidents determine the balance of liberty and authority in particular societies; in his view, liberty does not trump government authority. Hume looked for accommodations between right and authority; strict scrutiny, by contrast, elevates rights and subordinates authority under all but the most compelling circumstances.

The fit between these theories of right and judicial technique is not perfect, however. Locke recognized no conflict between government ends and individual rights, so he failed to acknowledge what strict scrutiny allows, the possibility of compelling government interests overcoming individual right under some circumstances. Similarly, the Humean conception suggests that *every* government action reflects a possible, and therefore, an acceptable balance of liberty and authority. Carried to an extreme, this would mean that not even irrational government action violates individual right.

Even these incongruities, however, reflect tensions within modern judicial doctrine. The technique of strict scrutiny sometimes appears inconsistent with *any* restriction on fundamental rights, an appearance that suits a purely Lockean position. Rational basis review sometimes appears to tolerate every possible government action, which is the same tendency noted in Hume. In any case, strict scrutiny's affinity for Locke, and rational basis review's affinity for Hume, are clear.

*Roe* itself embodies a Lockean theory of rights, even though the Court's balancing of interests might appear Humean. The *Roe* Court identified state "interests"<sup>563</sup> in maternal health and in potential fetal life and spoke of balancing<sup>564</sup> state interests against the woman's right of privacy. This balancing seems to reflect Hume's opposition between liberty and authority, rather than the identity of individual right and government purpose posited by Locke. The appearance of balancing, however, is misleading.

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563. *Roe v. Wade*, 410 U.S. 113, 150 (1973).

564. *Id.* (stating that the life of a pregnant woman is to be "balanced" against the potential life of a fetus); *id.* at 152 ("It is with these interests, and the weight to be attached to them, that this case is concerned.").

All government interests that the *Roe* Court deemed worthy of consideration, the health of the woman as well as the "potential life" of the fetus, represent aspects of the Lockean right of *life*, which encompasses health as well as human existence.<sup>565</sup> The Court gave no weight to any other interest. Viewed this way, *Roe's* apparent balancing resolves questions *internal* to the concept of life. In *Roe*, Justice Blackmun did not balance "life" against anything else, but simply explained what the right of life requires in the particular case of abortion. Authority, Justice Harlan's "demands of organized society," counts for nothing in this analysis, apart from the government's obligation to preserve *life*.

In a similar way, Justice Stevens's opinion in *Casey* uses the language of Humean balancing to define the contours of a Lockean-style right. Justice Stevens posited state "interests"<sup>566</sup> in restricting abortion and asked whether those state interests "outweigh the pregnant woman's interest in personal liberty."<sup>567</sup> In fact, Justice Stevens dismissed every consideration not germane to historic "life." There are *legitimate* (not compelling) state interests, he said, in "minimizing . . . [the] offense" that "a million abortions each year"<sup>568</sup> causes to those who regard abortion as wrong. There is also a legitimate state interest in "expanding the population," either to add "additional productive citizens" to society or because "the potential human lives [not aborted] might include the occasional Mozart or Curie."<sup>569</sup> To invalidate abortion prohibitions that serve those interests is to diminish the government's power.<sup>570</sup> Justice Stevens, however, did not "balance" those interests against the woman's right of privacy, as a Humean approach would suggest, nor did he analyze it as a question of degree. Effectively applying strict scrutiny, Justice Stevens simply deemed such interests incapable of

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565. See discussion *supra* part II.B.2.

566. *Planned Parenthood v. Casey*, 112 S. Ct. 2791, 2839 (1992) (Stevens, J., concurring in part and dissenting in part).

567. *Id.*

568. *Id.* at 2840.

569. *Id.*

570. Based on Hutcheson's principles, see *supra* part II.C.1., one might argue that an increase in population or an additional genius among the population would benefit the life of mankind as a whole—humanity as a system. That, in turn, would create a conflict between individual and "system" rights. However Hutcheson might resolve that conflict, Locke clearly comes down on the side of the individual. Locke, *supra* note 160, at 271.

diminishing the woman's right.<sup>571</sup> Although Justice Stevens wrote as if government interests and individual interests had to be weighed against one another, in reality, he did not "balance" these interests but simply ruled out the government interests using the benchmarks of Lockean "life." His opinion is an attempt to define a right of "life" and its contours, rather than an effort to assess competing government and individual interests.

This technique of appearing to seek a Humean balance while actually defining the contours of Lockean life, suggests a larger point. Strict scrutiny is often distinguished from rational basis review in quantitative terms. Strict scrutiny is said to require a *weightier* state interest and to demand a *closer* fit between the state's means and its ends than the rational basis test. Yet, in the area of abortion, at least, something more basic separates the two tests. Strict scrutiny effectively implements the historic right of "life," ruling out consideration of factors that do not bear on "life." Rational basis review, on the other hand, does not recognize the Lockean right of life, but instead identifies Humean-type "interests" that attach to individuals and the state. What separates the two approaches is precisely what separates Locke's conception of rights from Hume's formation.

The Court's division in *Casey*, thus, echoes an older dispute. Justices Blackmun and Stevens, adhering closely to *Roe*, adopted a Lockean view of rights. Justice Scalia emphasized history and Chief Justice Rehnquist emphasized rationality, but what distinguishes both of these opinions is the failure to recognize a Lockean right of life. The authors of the joint opinion, attempting to combine Locke's and Hume's views of rights, produced unsurprisingly confusing results by confounding strict scrutiny and rational review.<sup>572</sup> This may or may not have covered shifting positions on abortion, as Justice Scalia thought,<sup>573</sup> but it surely reflects the joint opinion's ambivalence about the deepest questions of liberty.

### C. HOW LOCKEAN LIFE SHOULD CHANGE MODERN DEBATE

The congruence of *Roe v. Wade* with Locke's political philosophy has three important implications: "life" provides the textual basis for abortion rights in the Constitution; further, strict

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571. The "state interest in population control," Justice Stevens wrote, "would not be sufficient to overcome a woman's liberty interest." 112 S. Ct. at 2840 n.3.

572. See discussion *supra* part I.C.

573. See discussion *supra* part I.C.3.

scrutiny is required to implement the right; and last, far from being a reprise of *Lochner*, as critics charge, *Roe* constitutes a decisive rejection of *Lochner* era jurisprudence.

The first, most obvious implication is that "life's" historic meaning—including limb, health, and indolency of body—affords a secure, textual base for abortion rights in the Constitution. Moreover, opinions like *Roe* and *Griswold* contain a powerful Lockean strain because their right of privacy recreates the Lockean right of life.<sup>574</sup> Thus, privacy itself has a textual foundation in the Constitution.

The existence of this textual basis does not preclude all argument about abortion rights, but it does change the nature of the controversy. Defeating the right of abortion requires argument about the meaning of constitutional "life," rather than a claim that the Constitution says nothing about the subject. One might argue that fetuses have lives, and that a conflict, therefore, exists between the woman's and the fetus' rights of life. No Justice has ever endorsed that argument,<sup>575</sup> and the considerations cited in *Roe*—for example, that abortion is not generally regarded as murder<sup>576</sup> and that fetuses are not counted in the census,<sup>577</sup> counsel strongly against it. Nonetheless that kind of argument is the only one that responds to the right of "life."<sup>578</sup>

574. See discussion *supra* part II.B.2.

575. See Kathleen M. Sullivan, *Foreword: The Justices of Rules and Standards*, 106 HARV. L. REV. 24, 28 & n.28 (1992) (pointing out that no member of the Court has ever adopted the theory that human life begins at conception).

576. *Roe v. Wade*, 410 U.S. 113, 138-141 & 157-58 n.54 (1973).

577. *Id.* at 157 n.53.

578. It should be noted that Hutcheson thought abortions immoral, 2 HUTCHESON, *supra* note 316, at 107 ("Mankind . . . ha[s] a . . . right to prevent any perversions of the natural instinct [of human reproduction] from its wise purposes, or any defeating of its end. Such are all monstrous lusts, and arts of abortion."), while Blackstone considered abortions after "quickening" to be illegal, 1 BLACKSTONE, *supra* note 155, at \*129-30 (arguing that legally protected life begins at the point of quickening, when a fetus "is able to stir in the mother's womb," and noting that abortion after quickening, though illegal, constitutes an offense less serious than murder or manslaughter). See also *Roe*, 410 U.S. at 132-36 (discussing the common law treatment of quickening, which generally occurs from the sixteenth to the eighteenth week of pregnancy). It is important, however, to understand the premises about women's roles and the human condition that underlay these conclusions. For it is those premises, rather than a restrictive concept of "life" or a degraded concept of rights, that produced their stands on abortion.

Hutcheson stressed the moral equality of men and women, dissenting from the idea that wives surrender their legal identity to their husbands. 2 HUTCHESON, *supra* note 316, at 165. Nonetheless, Hutcheson thought that men "more generally excel in fortitude, or strength of genius," even if there are "other as amiable dispositions in which women excelled." *Id.* at 163; see also *id.* at 164

The second implication is that abortion does not constitute a mere "liberty interest," as the *Casey* dissenters thought; rather it warrants strict scrutiny. Strict scrutiny corresponds to Locke's and the Framers' view of rights as the shaping force behind social arrangements and political structures. Conversely, the "rational basis" test advocated by the *Casey* dissenters reflects either Hume's views, which are decidedly *not* incorporated into the Due Process Clauses, or else a truncated version of Lockean "liberty" that omits the concept's prime function of incorporating other natural rights.<sup>579</sup> Either position reflects a historical mistake.

The fit between the *Second Treatise* and modern theory is not perfect, however. One flaw arises from Locke's failure to dis-

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(arguing that a wife ought to defer to her husband in some matters because of his wisdom, and he ought to defer to her in other matters, but when they disagree about really important questions, arbitration by a third party is desirable). Regarding sexual matters, Hutcheson sometimes argued that men should not be promiscuous, because, if they were, women would be promiscuous too; as a result, men would not care for children because of uncertainty about paternity. *See, e.g., id.* at 162 ("if the husband could have children by another woman, that other woman may bear them to another man, for as good purpose to the publick"). Similarly, he spoke of a woman's, but not a man's, "character for chastity." *Id.* at 157.

Hutcheson's starting point was a "general obligation on . . . individuals" to "continu[e] the human race" by producing, and educating children. *Id.* at 106-07. Although both men and women labor under that obligation—men, for example, had to refrain from promiscuity because it makes it difficult to identify a child's natural father, who has a special duty to educate and support the infant, *id.* at 107, 157—women had more of the burden of reproduction. "[A] nation is made populous," Hutcheson wrote, "when all the women are kept bearing and nursing of [sic] children while they are capable of it." *Id.* at 160. This moral duty of women to bear children apparently underlies Hutcheson's view of abortion. Recall his description of "arts of abortion" as "perversions of the natural instinct [toward human reproduction] from its wise purposes" and as means of "defeating" that natural instinct's "end." *See supra* this note. Considerations of "life" led Hutcheson to his view of abortion.

If, however, we reject the premise of a duty to reproduce—or the still more fundamental premise that unending increases in population benefit humanity—Hutcheson's position on abortion collapses and his own right of "life" points to the opposite conclusion. *But see id.* at 191 (arguing that "children cannot be deemed accessions or fruits going along with property of their parents bodies"—an argument, however, designed to show that parents could not neglect their children's education, once the child has a "soul;" Hutcheson did not argue that fetuses have souls and he did not link this argument to the question of abortion.).

Blackstone's views on abortion were part and parcel of a more invidious view of women's roles. He argued, for example, that the "very being or legal existence of the woman is suspended during . . . marriage." 1 BLACKSTONE, *supra* note 169, at \*442.

579. *See* discussion *supra* parts II.B, II.C.3, V.B.

tinguish between actions proper for legislatures and actions proper for courts. Because Locke had no conception of an independent judiciary whose decisions on fundamental law bind the legislative and executive branches,<sup>580</sup> and because he did not distinguish measures a government *might* take to preserve life, liberty, or estate from measures that it *must* take, Locke never anticipated essential distinctions in a system of judicial review. Without these distinctions, if a legislature constitutionally may enact a Medicare program in order to preserve lives, for example, it follows that courts *must* mandate a Medicare program to protect the right of life. This difficulty recalls the so-called "double standard" in substantive due process theories based on liberty,<sup>581</sup> whereby some liberties are singled out for strict scrutiny, while most liberties receive the less rigorous rational basis review. Now the problem is justifying anything less than strict scrutiny in a scheme that treats "life" as an expansive fundamental right.

Just as strict scrutiny seems exceptional in a modern theory of liberty, rational basis review is exceptional, and demands an explanation, in Lockean theories. Such an explanation exists, and it originates, surprisingly enough, with Hobbes. Recall that Hobbes and Locke offered similar definitions of "life,"<sup>582</sup> despite their otherwise profound differences over how to organize political societies. Yet, Hobbes drew an important distinction when he made a sovereign's command over industry, art, and science (as well as property, taxation, and forms of governance) absolute.<sup>583</sup> Other aspects of "life," those closer to its core meaning of personhood, however, receive very different treatment:

As it is necessary for all men that seek peace, to lay down certaine Rights of Nature . . . so it is necessarie for mans life, to retaine some; as [the] right to governe their owne bodies; enjoy aire, water, motion,

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580. In fact, Locke regarded the *legislature* as the umpire of rights in a government. LOCKE, *supra* note 160, at 407 (asserting the people provided for "Umpirage . . . in their Legislative, for the ending all Differences, that may arise amongst any of them"); *id.* at 325 (asserting that "the Legislative" is the "Judge on Earth" that "determine[s] all . . . Controversies"); *see also* Laslett, *Editorial Notes to LOCKE, supra* note 160, at 325 n. accompanying lines 13-19 (observing that "Locke talks of the Legislative where the Judiciary might be expected").

581. *See generally* GUNTHER, *supra* note 2, at 503-06 (describing the "double standard" problem).

582. Both began with "life" in the sense of self preservation, and both concluded with a much broader meaning. *See supra* parts II.B.1-2, II.B.3.c.

583. Hobbes argued that unquestioning obedience by subjects was necessary in these cases in order to secure a higher quality of life. *See supra* part II.B.1.

waies to go from place to place; and all things else without which a man cannot live, or not live well.<sup>584</sup>

People thus retain the rights necessary for "life," including the right to "governe . . . [one's] owne body," at the same time that, in order to enhance their lives, they surrender all other rights. By singling out core attributes of "life," Hobbes in effect created two levels of scrutiny for government action: one allows questioning sovereign commands, and the other requires unquestioning acceptance.

Locke implicitly suggested a similar distinction. Locke's listing of the rights of "health," "limb," and "indolency of body," which he singled out as special attributes of "life," seems identical to Hobbes's right of governing one's body. It is not farfetched to suggest that Locke, like Hobbes, and like *Roe v. Wade*, would have recognized their special quality as well by according them a higher level of protection. Conversely, matters never included in Locke's natural rights formulas, such as rights to contract and structure economic arrangements, would receive a lower level of protection.

An understanding of Lockean political philosophy in relation to *Roe* produces two reinterpretations of constitutional history. First, far from being a return to *Lochner*'s excesses, as *Roe*'s critics contend, *Roe* decisively rejects *Lochner*'s conception of liberty.<sup>585</sup> *Lochner* rested on a Hobbesian idea of liberty as "freedom from restraint,"<sup>586</sup> a Humean idea of individual rights perpetually in conflict with government authority,<sup>587</sup> and, somewhat inconsistently, a peculiarly American idea of "liberty" as sacred and nearly inviolable,<sup>588</sup> notwithstanding all of the above. These ideas are far removed from the Lockean conceptions that animated the Framers and that underlie *Roe*. In fact, it is *Roe*'s critics, like Bork, who recreate *Lochner*'s idea of "liberty" as "freedom from restraint."<sup>589</sup>

Further, *Roe*'s relationship to *Griswold* needs rethinking. Doctrinally, *Griswold* is commonly regarded as a more funda-

584. HOBBS, *supra* note 165, at 211-12. The same elements appear in Hobbes's account of a "Law of Nature": "[A] man is forbidden to do, that, which is destructive of his life, or taketh away the means of preserving the same; and to omit, that, by which he thinketh it may be best preserved." *Id.* at 189.

585. See generally Garfield, *supra* note 531.

586. See *supra* notes 171-172 and accompanying text (Hobbes's idea of liberty as the "absence of externall impediments").

587. See *supra* note 362 and accompanying text.

588. See discussion *supra* part III.A, especially note 402 and accompanying text.

589. See *supra* note 307 and accompanying text.

mental decision than *Roe*,<sup>590</sup> but in fact *Roe* squares better with the historical meaning of "life" and so, enjoys an even firmer foundation in the Constitution. Arguably, the interests at stake in *Griswold* implicate health or "indolency of body," yet their connection is weaker than in the case of abortion. Locke recognized no right of self-fulfillment or self-gratification, as such. Sexual expression may constitute a Lockean "innocent delight" with which no one has any rational reason to interfere, and it has still a stronger claim to being an aspect of Hutcheson's "liberty," which encompasses the use of human faculties.<sup>591</sup> Yet, abortion's claim under the right of life is even more powerful and goes back further in the social contract tradition. Although *Griswold* can claim support in Hutcheson's idea of liberty and perhaps as a Lockean "innocent delight," *Roe*'s is the more fundamental right because it directly implicates a woman's health, limb, and life.

#### D. IMPLICATIONS OF LOCKEAN LIFE FOR OTHER CONSTITUTIONAL QUESTIONS

The historic meaning of life bears on a variety of constitutional questions besides abortion. For example, in *Paul v. Davis*,<sup>592</sup> the Court misread the relevant history and, as a result, also misread the Fourteenth Amendment. The *Paul* Court concluded that "liberty" does not encompass reputation, and that reputation, standing alone, enjoys no protection under the Due

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590. See, e.g., *Planned Parenthood v. Casey*, 112 S. Ct. 2791, 2860 (1992) (Rehnquist, C.J., concurring in the judgment in part and dissenting in part) ("The Court in *Roe* reached too far when it analogized the right to abort a fetus to the right[] involved in . . . *Griswold*, and thereby deemed the right to abortion fundamental."); compare Walter Dellinger & Gene B. Sperling, *Abortion and the Supreme Court: The Retreat from Roe v. Wade*, 138 U. PA. L. REV. 83, 93 (1989) (arguing that *Roe* follows from *Griswold* and asking, "[i]f *Griswold* is to remain good law, how can one fail to conclude that women have at least a presumptive fundamental liberty interest in deciding to terminate a pregnancy?") and Estrich & Sullivan, *supra* note 89, at 128-29 (arguing that *Roe* is an inseparable part of the fabric of the right recognized in *Griswold*) with William Van Alstyne, *Closing the Circle of Constitutional Review from Griswold v. Connecticut to Roe v. Wade: An Outline of a Decision Merely Overruling Roe*, 1989 DUKE L.J. 1677, 1683 (arguing that "*Griswold* . . . did not imply *Roe*, or anything even close").

591. See discussion *supra* part II.C.1.

592. 424 U.S. 693, 701 (1976) ("The words 'liberty' and 'property' as used in the Fourteenth Amendment do not in terms single out reputation as a candidate for special protection . . ."); accord *Siegert v. Gilley*, 111 S. Ct. 1789, 1794 (1991) (reaffirming *Paul v. Davis* and applying its rationale to a claim that implicated the Fifth Amendment Due Process Clause).

Process Clause.<sup>593</sup> Historic "life," however, does include "reputation": it is the shadow cast by one's "life."<sup>594</sup> If the meaning of words in the founding era matters, reputation deserves constitutional protection after all.

Again, Justice White's principle in *Bowers v. Hardwick*,<sup>595</sup> that a constitutional right's force and weight should be proportional to the explicitness of its support in the document, produces new results because of the textual right of life. Interests that qualify only marginally as aspects of liberty may relate to "life" explicitly, and in that way gain added constitutional force. In *Youngberg v. Romeo*,<sup>596</sup> for example, the Court readily recognized the right to physical liberty of retarded, involuntary inmates of state institutions, but found it "more troubling"<sup>597</sup> that the plaintiff also claimed a right to habilitation or institutional treatment. In the end, the Court recognized a treatment right that effectuated interests in *physical* liberty, and no more.<sup>598</sup> States must provide treatment, according to *Romeo*, only when treatment would enhance the patient's freedom of movement within the institution, or speed freedom from confinement.<sup>599</sup> If "life" had its proper place in constitutional law, however, the Court might well recognize a more expansive right; certainly, there would be no reason to confine treatment, an aspect of "life" and "health," to the parameters of physical "liberty."

There is also a wider implication. What the Court found "troubling" in *Romeo* was the idea of a constitutional entitlement to ameliorative government action.<sup>600</sup> Repeatedly, the Court has held that due process does not guarantee minimum

593. 424 U.S. at 711-12.

594. Blackstone counted reputation among the things secured by the right of personal security, *see supra* text accompanying note 349, and Hutcheson included one's "good name" among the things protected by the right of life, *see supra* text accompanying note 321.

595. 478 U.S. 186, 194-95 (1986).

596. 457 U.S. 307, 316 (1982).

597. *Id.*

598. The Court contained any right to treatment within the limits of a right to physical liberty: it held, in effect, that when states are constitutionally obliged to protect physical liberty, an otherwise required measure is not excused merely because it also constitutes treatment. *Id.* at 324.

599. *Id.* at 322 ("[T]he minimally adequate training required by the Constitution is such training as may be reasonable in light of respondent's liberty interests in safety and freedom from unreasonable restraints.").

600. *Id.* at 317 (noting that the state has no constitutional duty to provide "substantive services" to those in its border).

levels of housing, care, service, or sustenance,<sup>601</sup> and these precedents made a right to treatment more problematic in the eyes of the *Romeo* Court.<sup>602</sup> Decisions denying an entitlement to minimum necessities, however, stand in tension with the right to "life." Minimum levels of sustenance are necessary for *life*, and preservation of life is the foremost right in the social contract tradition. The whole point of the right is to require affirmative government action so that people can live "well," as Hobbes said.<sup>603</sup>

Forcible medical interventions also implicate this right of life. In *Cruzan*,<sup>604</sup> a widely-noticed case, the Court recognized a "liberty interest" in refusing life-saving treatments,<sup>605</sup> but it also posited a balancing test, with the state's interest in "life" set against the interest of the individual, leading the Court to defer to the state.<sup>606</sup> Recognition of the right to "indolency of body" might have changed this result by adding weight to the individual's interest or triggering strict scrutiny of the state's measures. The right of refusing treatment would have had more "cognizable roots in the Constitution."<sup>607</sup>

Finally, a state prison inmate's freedom from forced, psychiatric drugging provides another example in which the historic right of life could change a constitutional result. In the Court's eyes, an inmate's "liberty interest" in freedom from drugging<sup>608</sup> warranted minimal substantive and procedural protections.<sup>609</sup> Yet, that freedom constitutes an integral part of historic life, be-

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601. See generally *DeShaney v. Winnebago County Dep't of Social Servs.*, 489 U.S. 189, 195-96 (1989) (citing cases).

602. On the other hand, the Court has recognized a right to government services—and, specifically, to medical care—for those held involuntarily in government facilities. See *Romeo*, 457 U.S. at 317. Thus, it is questionable whether the *Romeo* plaintiffs' argument even challenged the Court's precedents. Indeed, the Court had no difficulty in declaring that institutionalized retarded persons possess a right to ordinary medical treatment not limited by any relationship between treatment and physical liberty. *Id.* at 324.

603. HOBBS, *supra* note 165, at 212. Beyond the minimum requirements of continued existence and health, "living well" may not be a core attribute of life, and so it would not receive heightened protection.

604. *Cruzan v. Director, Missouri Dep't of Health*, 497 U.S. 261 (1990).

605. *Id.* at 279.

606. *Id.* at 281-82.

607. See *supra* note 78 and accompanying text.

608. *Washington v. Harper*, 494 U.S. 210, 221 (1990).

609. *Id.* at 222 (upholding forced drugging of dangerous inmates so long as the drugging is deemed "in the prisoner's medical interests, given the legitimate needs of his institutional confinement"); *id.* at 228-36 (upholding internal prison medical review procedures against a procedural due process challenge); compare *id.* at 237 (Stevens, J., concurring in part and dissenting in part) (call-

cause it implicates one's health and body.<sup>610</sup> As in *Cruzan*, recognizing the full dimensions of the historic right to life enhances the individual's claim and invites the application of strict scrutiny.<sup>611</sup>

### CONCLUSION

Judges seem to have the luxury of building constitutional theories as if out of sand. According to the critics of *Roe v. Wade*, the Justices simply chose a theory that suited their fancy; they lacked a constitutional blueprint for their theoretical castle in the sand. This Article contends that these critics are mistaken because a constitutional blueprint in fact exists—the historic right of life, which includes limb, health, and indolency of body. True, *Roe* may not be the only structure that could have been built upon that right, but “life” is the recognizable blueprint for the decision nonetheless. Blueprints translate with difficulty into structures, and *Roe* is as close an approximation as any.

Moreover, the structures of modern substantive due process bear an uncanny resemblance to those of Locke and Hutcheson, the seventeenth and eighteenth century philosophers whose views profoundly influenced the Framers of the Constitution. It is as though, after building our own structures, we suddenly came upon the sand castles that the Framers tried to capture in their constitutional blueprint. Time has worn away some of their details, and the world surrounding the Framers' castles may have vanished, but the Framers' structures and ours pretty well match. This is a reason to believe in blueprints.

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ing the state's procedures “a mock trial before an institutionally biased tribunal”).

610. The side effects of the drugs included a disfiguring syndrome that resulted from neurological damage in 10-25% of drugged patients, along with a wide array of other distressing physical and mental symptoms. *Id.* at 229-30 (surveying the drugs' side effects). A small percentage of recipients died from drug effects, *id.*, implicating “life” in the narrow sense. See generally Sheldon Gelman, *Mental Hospital Drugs, Professionalism, and the Constitution*, 72 GEO. L.J. 1725, 1740-49 (1984) (assessing the significance of side effects to patients, doctors, and the law). It is also worth noting that Harper, the plaintiff, thought the drugs affected his “life” as well as his liberty: “Well all you want to do is medicate me and you've been medicating me . . . [Y]ou are burning me out of my life . . . you are burning me out of my freedom.” *Harper*, 490 U.S. at 240 n.4 (Stevens, J., concurring in part and dissenting in part).

611. In dissent, Justice Stevens wrote that “[t]here is no doubt . . . that a competent individual's right to refuse such medication is a fundamental liberty interest deserving the highest order of protection.” *Id.* at 241.