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THE FRAGMENTED LIBERTY CLAUSE

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This conference charitably opens with a gift. Its organizers begin by granting to substantive due process the right to exist. This is not a small or insignificant gift. Political experience suggests how big a step it is for one antagonist to grant the other's right to exist. With that matter conceded, it seems, the contenders need not fight the battle for legitimacy, but may devote all their energies to the definition of boundaries.

But this gift is a Trojan Horse; it poses a menacing challenge hidden deep within. If the proponents of substantive due process cannot defend its boundaries satisfactorily, then evidently the principle of enforceable liberty itself is at risk of being banished to oblivion with a pronouncement of illegitimacy across the board. Alan Meese admits as much:

The absence of such an explanation [for the way in which the Supreme Court has treated liberty], or, what may be worse, the provision of an explanation that will not withstand scrutiny, suggests that the distinction between personal rights and economic rights, *and, with it, the legitimacy of the enterprise of substantive due process*, is an illusion.¹

This Essay is an effort to rout the troops crouched in the bowels of the marvelous Horse, to challenge them with a strong offensive charge on behalf of vigorous liberty protection under the Fourteenth Amendment. More prosaically, my purpose is to suggest some of the limitations of what I will call the "conservative critique" of substantive due process, a critique taken up in

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1. Alan J. Meese, *Will, Judgment, and Economic Liberty: Mr. Justice Souter and the Mistranslation of the Due Process Clause*, 41 WM. & MARY L. REV. 3, 8 (1999) (emphasis added).

Meese's paper.² The foundation of that critique is that, because the Framers valued some of the types of liberty that we now call economic rights, modern courts should give robust protection to these rights, and only these rights, against most types of government regulation.³ The judiciary's failure since 1937 to do so, the critique maintains, constitutes a breach of fidelity to the Constitution itself and casts serious doubt on any judicial effort to protect liberties of any kind from state abridgment.

The conservative critique propounds impoverished notions of both liberty and fidelity. This Essay offers some reminders about the development of liberty in this country, as well as some historical, theoretical, and common sense considerations that might guide us in the development of a better approach to the protection of liberty under the Constitution.

Professor Meese is on the right track when he questions the relatively recent splitting of liberty into two distinct categories, economic and personal.⁴ He correctly questions the Supreme Court's decision to apply strict scrutiny to laws curtailing personal liberties while seeking only a rational basis for laws impinging upon economic liberties. This artificial pigeonholing—particularly when the arbitrary choice of pigeonhole has such radically significant consequences—serves neither history nor principle. Though I grant Meese this first step of his argument, my concession ends here. Meese goes astray when he suggests that the categories themselves are meaningful, but that

2. See *id.* at 10-11. Similar complaints have been raised in numerous other writings by conservative scholars. See, e.g., Robert H. Bork, *The Constitution, Original Intent, and Economic Rights*, 23 SAN DIEGO L. REV. 823 (1986) (arguing that judges should be limited by the historical intention of the constitutional text to protecting rights as they are stated in the Contract Clause and the Takings Clause); Frank H. Easterbrook, *The Constitution of Business*, GEO. MASON L. REV., Winter 1988, at 53 (criticizing the revival of substantive due process in modern jurisprudence); Frank H. Easterbrook, *Substance and Due Process*, 1982 SUP. CT. REV. 85 (arguing that, when confronted with a substantive due process issue, the Supreme Court is likely to give the legislature deference in its analysis of "substance" but not "process"); Wayne McCormack, *Economic Substantive Due Process and the Right of Livelihood*, 82 KY. L.J. 397 (1993) (arguing that substantive due process has limited value only in protecting certain economic rights).

3. See Meese, *supra* note 1, at 16-17; *supra* note 2.

4. See Meese, *supra* note 1, at 4-8.

if substantive due process is to be "principled,"⁵ then the specific freedoms occupying privileged and nonprivileged positions should simply switch places. He does not go far enough in taking on the categorical jurisprudence that characterizes modern analysis of liberty under the Due Process Clause.

In place of the dichotomous reasoning that has developed around the question of constitutional liberty, I propose a more integrated, common sense understanding of the place of liberty in the roster of individual rights protected by judicial scrutiny under the Fourteenth Amendment. A critical comment on the conservative critique of substantive due process, which would still allow for the fragmenting of liberty into two categories, is one step in the process of reaching that goal.

This Essay discusses the way in which courts have traditionally understood a constitutional claim to liberty under the Due Process Clause, suggesting that liberty did not originate as a fragmented or hierarchical notion. Rather, liberty represented the freedom to do what individuals wished to do, without privileging some activities over others. Liberty, however, has never been understood as absolute, and thus the courts came to understand liberty as a concept shaped by the needs of the community. Accordingly, the nature of reasons that a state offers for restraining liberty is a key component of the meaning of liberty itself. Courts lost sight of this idea of liberty as a balance between individual freedom and the needs of a democratically governed society, and the protection of liberty has suffered as a consequence.

I. THE HISTORICAL MEANING OF LIBERTY

Very early in our nation's history, and with conceptual roots reaching back to seventeenth-century English legal and political theory, state courts undertook what we might today see as a preliminary consideration of liberty as a constraint on state power.⁶ At the time, it was not phrased or conceived in those

5. *Id.* at 11.

6. See James W. Ely, Jr., *The Oxymoron Reconsidered: Myth and Reality in the Origins of Substantive Due Process*, 16 CONST. COMMENTARY 315 *passim* (1999). Professor Ely traces the use of "due process" as a means to curtail governmental power

terms; only later did liberty develop into a notion of a shield that might be erected to protect the individual from the exercise of state power.⁷ Instead, the focus was on the limits of state power itself.⁸ The question facing early courts was where state governmental power comes from and where appropriate limits must be drawn, based on the nature of the authority to make law.⁹

The Supreme Court contributed to this effort with its famous early decisions in *Calder v. Bull*¹⁰ and *Fletcher v. Peck*,¹¹ in which the Court recognized the effect of "general principles of our political institutions" in limiting the power of government.¹² "The purposes for which men enter into society will determine the *nature* and *terms* of the *Social* compact . . ."¹³ Those terms, together with the nature of a free republican society, contained some inherent limitations on what legislatures might do.¹⁴ The precise contours of such a limitation, of course, remained to be delineated, but there was much common ground in the understanding of the role of the state.

State courts were a much more common source of reflection upon the question of limiting government power. A helpful example is *In re Vandine*,¹⁵ a Massachusetts Supreme Court opinion written in 1828. The law challenged in that case prohibited unlicensed persons from removing filth or refuse from houses in Boston.¹⁶ *Vandine*, prosecuted for violating the law, did not deny that "the city may direct the time and manner of removing filth," but argued that "they have no right to say that it shall be

in this country as far back as the late eighteenth century, primarily in state courts and on the basis of state law. *See id.* at 328. Even in antebellum America, "[d]ue process, then, helped mark the bounds of legitimate government." *Id.* at 345. My focus is on the federal courts' adoption of those views in their interpretation of the Fourteenth Amendment.

7. *See id.* at 322.

8. *See id.* at 324.

9. *See id.* at 331.

10. 3 U.S. (3 Dall.) 386 (1798).

11. 10 U.S. (6 Cranch) 87 (1810).

12. *Id.* at 139.

13. *Calder*, 3 U.S. (3 Dall.) at 388.

14. *See Fletcher*, 10 U.S. (6 Cranch) at 135.

15. 23 Mass. (6 Pick.) 187 (1828).

16. *See id.* at 187.

removed only by persons having a license."¹⁷ The court acknowledged the prevailing rule that if the restraint is "unreasonable, it is void";¹⁸ "if necessary for the good government of the society, it is good."¹⁹ Accordingly, "regard must be had to its object and necessity."²⁰ Three conclusions followed: first, "the law [was] reasonable"; second, it was "well adapted to preserve the health of the city"; and third, it was "within the power of the government to prescribe."²¹ The logical relation among these three statements, all contained in a single sentence, is evident from the discussion: *because* the city had good reasons for passing this law, reasons that related to the *common* good of the city, it consequently was within the government's *power*.²²

From the vantage point of the conservative critique in 1999, certainly one could complain that Vandine's right to pursue an occupation had been "trammelled by the legislature at will."²³ Even at this early point in history, however, courts recognized that rights to liberty were not absolute, but were constrained by a notion of the common good.²⁴ A great deal can be learned about early notions of liberty and power from this court's treatment of the license issue.

The court in *Vandine* distinguished a seemingly similar case presented by the defendant, and explained why it was not controlling:

The mayor and commonalty of London made a by-law, that no carman within the city should go with his cart, without license from the wardens of such an hospital, under a certain penalty for each offence; and it was held to be a void by-law, because it was in restraint of the liberty of the trade of a carman, and it was held to be unreasonable, because it went to the private benefit of the wardens of the hospital, and was in the nature of a monopoly.²⁵

17. *Id.* at 189.

18. *Id.* at 190-91.

19. *Id.* at 192.

20. *Id.* at 191.

21. *Id.* at 192.

22. *See id.* at 191.

23. Meese, *supra* note 1, at 8.

24. *See supra* notes 15-22 and accompanying text.

25. *Vandine*, 23 Mass. (6 Pick.) at 191.

Howard Gillman has insightfully pointed out a key feature of the comparison between the valid and the invalid laws discussed in *Vandine*:

[I]t is clear that the distinction does not rest on the extent to which market freedom is impaired—the impairment is identical in each case—but rather on the consideration of whether the interference legitimately advances the general welfare of the community or illegitimately advances the particular welfare of private interests.²⁶

Two identical interferences with liberty may meet with opposite results under due process analysis depending on the state's reasons for its action.²⁷

This case quite explicitly illustrates the heart of liberty jurisprudence both before and after passage of the Fourteenth Amendment. Everything a person may wish to do can be understood to fall within the Supreme Court's own definition of "liberty": "to be free in the enjoyment of all [one's] faculties; to be free to use them in all lawful ways . . ." ²⁸ The feature distinguishing valid interferences with any liberty from invalid ones is the *reason* the state offers for the interference. If the state articulates a valid reason to interfere with liberty, it will prevail; if it can offer no reason or only an illegitimate reason, then its law will fail. Thus, liberty is held by all for all acts, but it is "held on such reasonable conditions as may be imposed by the governing power of the State . . ." ²⁹

26. HOWARD GILLMAN, *THE CONSTITUTION BESIEGED: THE RISE AND DEMISE OF LOCHNER ERA POLICE POWERS JURISPRUDENCE* 51-52 (1993).

27. This may not seem so strange when one remembers that a similar result attends treatment under the Equal Protection Clause. If two people of the same minority race are denied the same job, one out of discriminatory intent and the other because she failed a test that disproportionately disadvantages members of her race, the first will have recourse under the Constitution although the second will not. *See Washington v. Davis*, 426 U.S. 229, 239 (1976) ("[C]ases have not embraced the proposition that a law or other official act, without regard to whether it reflects a racially discriminatory purpose, is unconstitutional *solely* because it has a racially disproportionate impact."). The legitimacy of the state's action is evaluated not on the basis of the burden borne by the individual but rather by the reasons that the state offers to justify its action. *See id.* at 246.

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

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

This simple proposition explains why the term "liberty" was not the focus of debate or discussion in the early days of the Fourteenth Amendment and for decades afterward. A claim to liberty had to be neither established nor defended. Until the middle of the twentieth century, liberty was not a hierarchical collection of discrete activities, some more valued than others, but a continuum as integrated as a human life. The relevant case law acknowledges this.³⁰

In *Mugler v. Kansas*,³¹ one of the first interpretations of the Fourteenth Amendment's Due Process Clause, the Court considered a claim that the prohibition laws of Kansas deprived a brewer of liberty and property without due process of law.³² In a majority opinion spanning twenty-two pages of the United States Reports, at most only two paragraphs even generously could be characterized as a discussion of the existence or contours of a "right."³³ Although the existence of some unarticulated right and some interference with that right went unquestioned, the Court started from the unhesitating position that "[n]o one may rightfully do that which the law-making power, upon reasonable grounds, declares to be prejudicial to the general welfare."³⁴ Thus, the bulk of the Court's opinion focused on the reach of state power—a question that would, in turn, depend upon the reasons for which the state had passed its law.³⁵ In response to that question, the Court concluded that "it [cannot] be said that government interferes with or impairs any one's constitutional rights of liberty or of property, when it determines that the manufacture and sale of intoxicating drinks . . . are, or may become, hurtful to society, and constitute, therefore, a business in which no one may lawfully engage."³⁶ The statute survived because the state had a valid reason for passing it.

The *Lochner* case itself took the same approach in 1905.³⁷ The challenge in that case, of course, involved a state law limiting

30. See *infra* notes 31-67 and accompanying text.

31. 123 U.S. 623 (1887).

32. See *id.* at 653, 657.

33. See *id.* at 662-63.

34. *Id.* at 663 (emphasis added).

35. See *id.* at 663-74.

36. *Id.* at 662-63.

37. See *Lochner v. New York*, 198 U.S. 45, 53-65 (1905).

the working hours of bakers to ten per day or sixty per week.³⁸ The Court did not pause long in considering whether the petitioner had alleged a constitutional interest. Its discussion of the nature of the right at stake, if "discussion" is not too generous a word, comprised three sentences, in which the Court acknowledged the existence of a liberty falling within the protection of the Fourteenth Amendment.³⁹ Yet, the Court understood liberty to be "held on such reasonable conditions as may be imposed by the governing power of the state in the exercise of those powers [relating to safety, health, morals, and general welfare], and with such conditions the Fourteenth Amendment was not designed to interfere."⁴⁰ Consequently, the rest of the majority opinion focused upon the state's reasons for passing the law under review.⁴¹ In contrast to the statute in *Mugler*, but under the same legal framework, the statute in *Lochner* did not survive because the state failed to persuade the Court that its reasons for passing it were, in fact, based on sincere notions of the common good.⁴²

In 1908, the Court applied the same standard in *Muller v. Oregon*,⁴³ concluding that the state had offered a valid reason for curtailing the liberty of employers and their female employees to contract for the number of working hours.⁴⁴ In *Muller*, the Court credited the state's claim that the specific characteristics of women justified state intervention in an otherwise free market relationship.⁴⁵ It is undeniable that the nature of the liberty here and the degree of interference with this personal liberty are identical to those involved in *Lochner* only three years prior. The difference in outcomes is a result of what reasons the state of-

38. *See id.* at 52.

39. *See id.* at 53.

40. *Id.*

41. *See id.* at 53-65.

42. *See id.* at 62-63 (acknowledging "a suspicion that there was some other motive dominating the legislature than the purpose to subserve the public health or welfare"). For further discussion of these reasons, see *infra* notes 67-112 and accompanying text.

43. 208 U.S. 412 (1908).

44. *See id.* at 421-23 (holding that a woman's physical structure and maternal responsibilities were valid reasons to restrict the hours of employment of women).

45. *See id.*

ferred for curtailing that liberty. Liberty, forty years after passage of the Fourteenth Amendment, still achieved its contours in terms of the state's reasons for limiting it.⁴⁶ Without recognizing that the *nature* of the liberty is not a controlling factor, one would have to conclude that these two cases were irreconcilable. There is, however, a consistency in the analysis when one discerns the critical role of the state's reasons in the shaping of the liberty interest itself.

Much of the language in *Lochner* and the other state-law cases in which the Court discussed a state's reasons for legislation might be construed to suggest that the important question is simply whether the state has the *power* to pass the act under its police powers.⁴⁷ Coincidentally, the general legislative power of a state government, given the name "police powers," is defined by categories that involve the reasons for regulation—health, safety, and morals.⁴⁸ Thus, in the liberty cases in which the bulk of the Court's analysis involves the state's reasons for its legislation, it is difficult to tell whether these reasons are part of the analysis of the due process claim, or instead are simply an analysis of whether the power exists in the state to pass the law at issue under its police powers. The actual language of the opinions might equally permit of either interpretation. If it were only the latter, however, and the sole issue was whether the state had the power to pass the law, an individual claim of constitutional violation (other than some injury sufficient to provide standing) would be unnecessary to invalidate the law. If the state were without power to pass the law because it did not fall

46. See, e.g., *Bunting v. Oregon*, 243 U.S. 426, 437-39 (1917) (upholding a law requiring overtime wages in factories because of sufficient evidence of health-related purpose); *Coppage v. Kansas*, 236 U.S. 1, 25-26 (1915) (striking down a law prohibiting employers from imposing non-union status as a condition of employment because of the lack of a purpose related to health, safety, morals, or public welfare).

47. See, e.g., *Lochner v. New York*, 198 U.S. 45, 54 (1905).

48. At a deeper level, this is no coincidence. The nature of liberty in a free society has important connections to the powers of government, the purposes for which social compacts are entered into, and the like. The term "coincidentally" is used here only to emphasize that the inquiry into whether liberty has been impaired unconstitutionally is separate from the inquiry into whether power exists to pass the law, even though in the case of states the inquiries involve the same question—whether the law is passed for the common good.

within the bounds of its police power, then any claim to liberty would be superfluous. Under these circumstances, the state would be utterly without power to pass the law, resulting in an invalid law that would be simply without effect.

The Court's consistent and serious discussion of reasons in this entire line of liberty cases under the Fourteenth Amendment, however, has a more significant purpose than merely to show that the laws at issue are or are not within the regulatory power of the state. Rather, the nature of the state's reasons is a part of the analysis of the liberty claim itself; liberty under the Fourteenth Amendment is shaped and refined by the reasons offered to curtail it. The nature of the liberty right granted by the Fourteenth Amendment is that an individual holds freedoms subject to the legitimate needs of the general public. Understood this way, liberty is a relational concept reflecting the individual's relationship to the community, for whose benefit alone liberty may be restricted. This interpretation finds support in the cases in which the litigant claiming an infringement of liberty challenges a federal, not a state, law. This is an important distinction because the powers of the federal government, unlike those of the states, are not clearly defined by the purposes for which the government legislates.⁴⁹ For the federal government, the Constitution enumerates these powers by reference to the objects of the legislation. As a result, it should be possible to discern whether a claim of a liberty violation itself requires an examination of government reasons for its laws. If not, then one

49. One could argue that Congress's motives in legislating were important to the Court in determining whether its laws fell within the enumerated powers, at least before *United States v. Darby*, 312 U.S. 100 (1941), in which the Court held that if the regulation was one of commerce, Congress's motive in passing it was irrelevant. *See id.* at 113-15. The motive analysis in that case, however, involved different concerns from those discussed here, and focused on whether the commerce power required Congress to have a commercial reason for passing the law, as opposed to motives inspired by morality or justice. *See id.* at 115; *cf.* *Katzenbach v. McClung*, 379 U.S. 294, 301-05 (1964) (upholding the validity of Title II of the Civil Rights Act of 1964 as applied to privately owned restaurants affecting interstate commerce). It may be that some version of the motive inquiry will return to Commerce Clause analysis after *United States v. Lopez*, 514 U.S. 549, 561-63 (1995) (holding that a law prohibiting gun possession in a school zone did not affect interstate commerce because gun possession is not commercial), but that has no bearing on the discussion in text.

would expect that the Court would not adopt, in cases involving due process challenges to federal laws, the analysis of whether the law had been passed for the common good. That question is not relevant to the existence of federal power as such. Rather, the appropriate inquiry would be whether the federal government possessed the power to pass the law under the terms of Article I, Section 8.⁵⁰ Interestingly, however, when this issue arose the Court still searched for evidence of a common good.

In *Adair v. United States*,⁵¹ the Court confronted the critical question whether a *federal* law prohibiting interstate carriers from discharging employees on account of union membership unconstitutionally deprived the employers and employees of liberty without due process of law in violation of the Fifth Amendment.⁵² The Court used interesting means to conclude that the law deprived both groups of due process.⁵³ First, it took up the familiar rhetoric about freedom of contract, quoting liberally from the writings of Thomas Cooley.⁵⁴ The Court then discussed the *Lochner* case at length, including that opinion's emphasis on the police powers of the states.⁵⁵ Having provided this doctrinal backdrop, with no mention of any difference that might arise out of the fact that this case concerned the federal government and the Fifth Amendment rather than a state and the Fourteenth, the Court stated the applicable rule of law: "[T]he rights of liberty and property guaranteed by the Constitution against deprivation without due process of law, [are] subject to such reasonable restraints *as the common good or the general welfare may require . . .*"⁵⁶ It found no legitimate function of government that would justify such a restraint on an individual's freedom to retain the personal services of another, and concluded that the law at issue consequently violated the Fifth Amendment.⁵⁷

50. See U.S. CONST. art. I, § 8.

51. 208 U.S. 161 (1908).

52. See *id.* at 168-72.

53. See *id.* at 178-80.

54. See *id.* at 173.

55. See *id.* at 173-74.

56. *Id.* at 174 (emphasis added).

57. See *id.* at 180. This is the point on which Justice McKenna's dissent dis-

As a separate matter, however, the Court addressed an odd claim by the government that the authority to pass the law "can be referred to the power of Congress to regulate interstate commerce, without regard to any question of personal liberty or right of property arising under the Fifth Amendment."⁵⁸ This claim seemed to suggest that even if the law transgressed the right to liberty, it should still survive if the government possessed the substantive regulatory power under the Commerce Clause to pass it. If the government's argument was odd, the Court's response was even odder. It found that substantive power over interstate commerce did not exist, precisely *because* the law transgressed the right to liberty. The Court stated that "the power to regulate interstate commerce, great and paramount as that power is, cannot be exerted in violation of any fundamental right secured by other provisions of the Constitution."⁵⁹ Thus, failing as a provision for the common good, this law violated, *first*, the Due Process Clause, and *then*, as a consequence, the Commerce Clause as well. This awkward analysis makes clear that the question of impermissible encroachment on liberty is separate from that of regulatory power.⁶⁰ This law violated the Fifth Amendment for the same reason that the statute in *Lochner* violated the Fourteenth: it infringed liberty without serving the common good.⁶¹

agreed. The dissenting opinion found both a public purpose and a connection to interstate commerce in the regulation, and thus found that the statute neither violated the Fifth Amendment nor exceeded Congress's powers under the interstate commerce clause. *See id.* at 182-90 (McKenna, J., dissenting).

58. *Id.* at 176.

59. *Id.* at 179-80. Although there was precedent for a holding that the act simply exceeded the power of Congress under its commerce power and therefore was without effect, *see, e.g.,* United States v. E.C. Knight Co., 156 U.S. 1, 17 (1895), the Court chose not to resolve the case on that ground.

60. *See Adair*, 208 U.S. at 180.

61. Justice Holmes's dissent confirmed this characterization of the majority opinion: "The ground on which this particular law is held bad is not so much that it deals with matters remote from commerce among the States, as that it interferes with the paramount individual rights, secured by the Fifth Amendment." *Id.* at 191 (Holmes, J., dissenting). In response to the majority's holding, Justice Holmes stated that he "could not pronounce it unwarranted if Congress should decide that to foster a strong union was for the best interest, not only of the men, but of the railroads and the country at large." *Id.* at 192 (Holmes, J., dissenting). Holmes refuted the majority's conclusion regarding the Fifth Amendment with a statement that the law

The Court's analysis in *Adair* says something important about the constitutional right to liberty. Whatever the basis of the regulatory authority that may be exerted, the individual holds a right not to be interfered with except as necessary for the common good. It suggests that the reasons the government offers to support its restraints on liberty will shape the contours of the liberty itself. Significantly, the analysis does not necessarily require an examination of what type of liberty is at stake, but only the validity of the state's reasons for curtailing it, measured against a standard of the common good. That standard, the common good, once apparently a reasonably clear standard against which to measure state action, was still the benchmark, but becoming more and more difficult to define.⁶²

The vision of what the right to liberty guarantees did not nominally change with the advent of the New Deal.⁶³ In 1925, the Court described the liberty right as one that "may not be abridged by legislation which has no reasonable relation to some purpose within the competency of the State."⁶⁴ In 1934, the Court reaffirmed that "regulation . . . is unconstitutional only if arbitrary, discriminatory, or demonstrably irrelevant to the policy the legislature is free to adopt, and hence an unnecessary and unwarranted interference with individual liberty."⁶⁵ These statements of the same rule undoubtedly contained different

indeed could be considered in the interest of the common good, confirming the relationship between the common good and the liberty protected by the Due Process Clause. *See id.* at 191 (Holmes, J., dissenting); *see also* *Adkins v. Children's Hosp.*, 261 U.S. 525, 546-54 (1923) (resolving a Fifth Amendment liberty claim against a minimum wage law passed by Congress for the District of Columbia by applying the standard from state cases in which the state must offer a valid reason in the interest of the public welfare to justify interference with freedom of contract).

62. The *Adair* opinion, with its peculiar vacillation between rights and powers, may have signaled a period of transition for the Court, in which the prior important understanding of the common good as a defining influence on the right to liberty was undergoing change.

63. *See* CASS R. SUNSTEIN, *THE PARTIAL CONSTITUTION* 25 (1993) (arguing that "the antiauthoritarian impulse, understood as a requirement of reasons, lies at the heart of American constitutional law"); LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 8-7, at 582-85 (2d ed. 1988) ("[I]t is significant that the Court never wholly abandoned the position that legislatures, at least in their regulatory capacity, must always act in furtherance of public goals . . .").

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

65. *Nebbia v. New York*, 291 U.S. 502, 539 (1934).

nuances in expression that reflected undeniable changing attitudes about expanding state power. These articulations focused more on the means the state might choose to achieve its ends than on the validity of the ends themselves. Yet even during this period, the Court still voiced a principle that the state's reasons for restricting liberty would determine constitutional validity. In 1937, the Court announced the rule again: "[R]egulation which is reasonable in relation to its subject and is adopted in the interests of the community is due process."⁶⁶ Although "the interests of the community" is admittedly a weaker phrase than "the common good" of the prior generation, it seems that the Court still retained some allegiance to a rule requiring it to examine state reasons for legitimacy. A significant problem for the New Deal Court was that changing understandings of the common good left it with little in the way of limits on legitimate state reasons, and consequently little that the Court's scrutiny could achieve.

II. REASONS AND TRANSLATION

This Essay argues that, very early on in our constitutional history, a principle developed that proclaimed "[a]n exercise of legislative powers would be considered valid only if it could reasonably be justified as contributing to the general welfare."⁶⁷ This principle embodied a variant of the equality principle, that one of the protections a free people enjoy is the guarantee that laws always will be passed for the good of all, and not for the private benefit or emolument of particular, favored individuals or interests.⁶⁸ The notion inhered in the very idea of government

66. *West Coast Hotel Co. v. Parrish*, 300 U.S. 379, 391 (1937); see also *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 (1938) (stating the Court's assumption that a statute would violate due process if its challenger were precluded from showing the legislature had no valid reason for passing the challenged law).

67. GILLMAN, *supra* note 26, at 49.

68. See *id.* at 49, 54 ("[I]t was assumed that this emphasis on equality would have as one of its residual benefits the protection of important individual liberties."); see also *Wally's Heirs v. Kennedy*, 8 Tenn. (2 Yer.) 554, 555 (1831) ("The rights of every individual must stand or fall by the same rule or law that governs every other member of the body politic, or land, under similar circumstances; and every partial, or private law which directly proposes to destroy individual rights . . . is unconstitutional and void.").

itself, as well as in the liberal vision of the reasons for having instituted government in the first instance.⁶⁹ Just as, in a monarchy, favored status could be bestowed on particular friends of the ruler thereby threatening liberty for all, in a democracy, favored status could be bestowed on factions or groups that were able to win a disproportionate share of legislative beneficence.⁷⁰ These consequences were to be resisted and feared. The principle of the common good responded to these fears by requiring that states have reasons, related to the common good, to justify interferences with the liberty of individuals.⁷¹

The cases interpreting the Fourteenth Amendment's liberty clause pervasively reflect this commitment. The question in each case was whether the state had offered, in defense of its restraint on liberty, a reason related to the common good. The importance of this showing by the state is illustrated by comparing *Lochner* with *Muller v. Oregon*,⁷² the case decided just three years later, but having the opposite outcome. Both cases involved challenges to state laws limiting the working hours of certain workers.⁷³ In *Lochner*, the law applied to bakers;⁷⁴ in *Muller*, it applied to women employed in factories or laundries.⁷⁵

69. In *Munn v. Illinois*, 94 U.S. 113 (1876), the Court noted this historical fact: When the people of the United Colonies separated from Great Britain . . . [t]hey retained for the purposes of government all the powers of the British Parliament, and through their State constitutions, or other forms of social compact, undertook to give practical effect to such as they deemed necessary for the common good and the security of life and property.

Id. at 124.

70. See Michael Les Benedict, *Laissez-Faire and Liberty: A Re-Evaluation of the Meaning and Origins of Laissez-Faire Constitutionalism*, 3 LAW & HIST. REV. 293, 314-26 (1985) (comparing a modern legislature's passage of "special legislation" that benefits only a small percentage of the overall constituency to a king's favoritism during feudal times).

71. See *id.*; see also THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 1226 (Walter Carrington ed., 8th ed., Little, Brown, & Co. 1927) ("The dimensions of the government's police power are identical with the dimensions of the government's duty to protect and promote the public welfare." (quoting *Leonard v. State*, 127 N.E. 464, 465 (Ohio 1919))).

72. 208 U.S. 412 (1908).

73. See *id.* at 418-19; *Lochner v. New York*, 198 U.S. 45, 52 (1905).

74. See *Lochner*, 198 U.S. at 52-53.

75. See *Muller*, 208 U.S. at 418-19.

In *Lochner*, the Court found no public purpose served by the law; it was deemed class legislation and therefore rendered void as a violation of the individual's right to freedom of contract.⁷⁶ In *Muller*, the Court responded to an argument framed along the same lines by making a significant statement on its way to upholding the law.⁷⁷ The Court stated: "As healthy mothers are essential to vigorous offspring, the physical well-being of [a] woman becomes an *object of public interest* and care in order to preserve the strength and vigor of the race."⁷⁸ The Court did not merely find that reasons might exist why women needed extra protection for their *own* health; such a finding might have justified, in some measure, protective legislation, but would still have failed, in the eyes of some, to provide the "public purpose" so essential to validity. Rather, the Court constructed an argument for the impact on the *common* weal of the exploitation of women workers, and thus supplied the public purpose required by precedent.

The Court decided *Muller* in 1908, not in the 1930s, and provided the first example of the Court's evolving approach to the task of applying the constitutional rule. The old principle of constitutional law required the Court to seek a public purpose in the regulation that would justify a restraint on liberty. In *Muller*, this meant that the Court must search for a public purpose in a law restricting the working hours of women in factories. Applying this constitutional principle, the Court found that the circumstances of the changing times supplied a new public purpose that might not have existed in prior ages.⁷⁹ Yet the constitutional principle itself remained unchanged.

In 1937, a similar analysis appeared in *West Coast Hotel Co. v. Parrish*,⁸⁰ the case credited with overruling *Lochner*.⁸¹ Despite

76. See *Lochner*, 198 U.S. at 62-64.

77. See *Muller*, 208 U.S. at 421.

78. *Id.* (emphasis added).

79. See *id.* at 420-23.

80. 300 U.S. 379 (1937).

81. See *Planned Parenthood v. Casey*, 505 U.S. 833, 861 (1992) (opinion of O'Connor, Souter, Kennedy, JJ.) (stating *West Coast Hotel* "signaled the demise of *Lochner*"); ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 489 (1997).

this claim to fame, *West Coast Hotel* did not repudiate the long-standing constitutional principle, applied in *Lochner*, that a state may curtail liberty only as necessary for the common good. In that respect, *West Coast Hotel* no more overruled *Lochner* than any decision finding a criminal confession to be voluntary overrules *Miranda v. Arizona*.⁸² Indeed, the Court in *West Coast Hotel* explicitly articulated its quest for a public purpose to justify the minimum wage law at issue, as follows:

The exploitation of a class of workers who are in an unequal position with respect to bargaining power and are thus relatively defenseless against the denial of a living wage is not only detrimental to their health and well being *but casts a direct burden for their support upon the community*. What these workers lose in wages the taxpayers are called upon to pay. . . . The community is not bound to provide what is in effect a subsidy for unconscionable employers.⁸³

Although one may criticize the soundness of this reasoning on economic grounds,⁸⁴ one cannot deny that the quoted statement supplies what consistently had been required to justify a curtailment of liberty. Since the passage of the Fourteenth Amendment, the Court had required the state to show a public, common purpose for the law at issue because such a showing assured critics that the law was neither class legislation nor government by favoritism, but was a measure designed to benefit the community. That is what always had been required, and the Court required it in *West Coast Hotel*. In that respect, nothing had changed.

This is not to trivialize the changes that took place in due process jurisprudence between 1905 and 1937. Great numbers of scholars in many disciplines have written volumes on the question of how to explain the *Lochner*-Era cases and the changes that followed.⁸⁵ Certainly the many legal, political, philosophical,

82. 384 U.S. 436 (1966) (applying the Fifth Amendment's self-incrimination clause to police interrogations).

83. *West Coast Hotel*, 300 U.S. at 399 (emphasis added).

84. See Meese, *supra* note 1, at 46-49.

85. See, e.g., BERNARD H. SIEGAN, *ECONOMIC LIBERTIES AND THE CONSTITUTION* (1980); Richard A. Epstein, *The Mistakes of 1937*, *GEO. MASON L. REV.*, Winter 1988, at 5; James E. Fleming, *Constructing the Substantive Constitution*, 72 *TEX. L. REV.*

and historical insights that come to us from those pages cannot be summarized here with any degree of fairness or accuracy.⁸⁶ For purposes of this Essay, however, one point is especially important.

The changes were not redefinitions of constitutional principle or liberty. They were changes in the understanding of what constituted a valid public purpose of government. There is nothing trivial about that concept. Yet it is a matter of *applying* a constitutional principle, not a matter of *devising* a constitutional principle. When an interpreter seeks to apply a constitutional principle to a changed world, she first must acquire the same types of information that an intentionalist would wish to acquire, to familiarize herself with the context in which the principle would have been understood at the time of its adoption.⁸⁷ Her object is to grasp the original meaning as best she can and carry it across to the changed context of her own contemporary circumstances, while remaining true to the etymological roots of the word "interpret": to go between.⁸⁸ Here, the interpreter seeks to preserve the meaning of the liberty clause of the Fourteenth Amendment in the face of drastically changing social, governmental, and economic conditions. As demonstrated above, the original understanding of the liberty clause permitted a state to restrain the liberty of an individual only for reasons designed to promote the common good.⁸⁹ Proponents of the conservative critique have offered copious evidence of the views of the nine-

211 (1993); Stephen E. Gottlieb, *Compelling Governmental Interests: An Essential but Unanalyzed Term in Constitutional Adjudication*, 68 B.U. L. REV. 917 (1988); Herbert Hovenkamp, *The Cultural Crises of the Fuller Court*, 104 YALE L.J. 2309 (1995) (reviewing OWEN M. FISS, *TROUBLED BEGINNINGS OF THE MODERN STATE* (1994)); Paul Kens, *Lochner v. New York: Rehabilitated and Revised, but Still Reviled*, 1995 J. SUP. CT. HIST. 31 (1995); Michael J. Phillips, *The Progressiveness of the Lochner Court*, 75 DENV. U. L. REV. 453 (1998); Cass R. Sunstein, *Lochner's Legacy*, 87 COLUM. L. REV. 873 (1987).

86. See generally Barry Friedman, *The Lessons of Lochner (The History of the Countermajoritarian Difficulty, Part 2B)* (unpublished manuscript, on file with the *William and Mary Law Review*) (discussing different accounts of the *Lochner* Era with regard to judicial review).

87. See Rebecca L. Brown, *Tradition and Insight*, 103 YALE L.J. 177, 214 (1993).

88. See *id.* at 214-15 & n.200 (citing THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 685, 1534 (1976)).

89. See *supra* notes 24-29 and accompanying text.

teenth-century, laissez-faire advocates like Thomas Cooley, early courts, and scholars to establish that in the original understanding of this principle, the notion of "common good" was taken to preclude laws benefitting any subset of the community, any class-specific legislation, and certainly any purely redistributive legislation.⁹⁰ Thus, it appears that the founders of the Fourteenth Amendment assumed that purely redistributive or paternalistic legislation, at least as applied to adult men, does not serve the common good. More generally, the founding community assumed that the individual man was the atomistic center of society, and that the absence of government intervention most securely protected his liberty to engage in consensual, non-fraudulent economic transactions.⁹¹

The interpreter of 1937 did not live in a world that shared those assumptions. By that time, the suffering of workers and the changes in the economic and social order had persuaded many that liberty was not protected adequately without regulation,⁹² and that indeed the absence of governmental interference

90. See Meese, *supra* note 1, at 41 & nn.178-82; *supra* note 2.

91. See *Mugler v. Kansas*, 123 U.S. 623, 663 (1887) ("Those rights are best secured, in our government, by the observance, upon the part of all, of such regulations as are established by competent authority to promote the common good."). Justice Jackson expressed the thought with characteristic elegance:

[T]he task of translating the majestic generalities of the Bill of Rights, conceived as part of the pattern of liberal government in the eighteenth century, into concrete restraints on officials dealing with the problems of the twentieth century, is one to disturb self-confidence. These principles grew in soil which also produced a philosophy that the individual was the center of society, that his liberty was attainable through mere absence of governmental restraints, and that government should be entrusted with few controls and only the mildest supervision over men's affairs. We must transplant these rights to a soil in which the *laissez-faire* concept or principle of non-interference has withered at least as to economic affairs, and social advancements are increasingly sought through closer integration of society and through expanded and strengthened governmental controls. These changed conditions often deprive precedents of reliability and cast us more than we would choose upon our own judgment.

West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 639-40 (1943).

92. See *Planned Parenthood v. Casey*, 505 U.S. 833, 861 (1992) (opinion of O'Connor, Souter, Kennedy, JJ.) ("[T]he lesson . . . seemed unmistakable to most people by 1937, that the interpretation of contractual freedom protected in *Adkins* rested on fundamentally false factual assumptions about the capacity of a relatively unregulated market to satisfy minimal levels of human welfare."); Lawrence Lessig,

into the economic affairs of the working public was *harmful* to the public good—an irony in which the application of the principle undermines the value embodied in the principle itself.⁹³ This offers a perfect example of the observation that one who insists on adherence to the specific understandings of the founders, “ignoring changes in context, changes rather than preserves meaning . . . [and] defeats rather than advances fidelity.”⁹⁴ The Court responded to this realization by supplying a new application of the constitutional principle—a new understanding, in the language of the old rule, of what “the common good” demanded.⁹⁵

When Professor Meese criticizes the economic soundness of the government’s justifications for New Deal legislation in the 1930s, he asks too much of the interpretative process.⁹⁶ He is not content to allow the Court to apply to liberty claims the then-current notions of what the common good may have required. Rather, he demands that these notions actually be correct, when analyzed in hindsight by later evaluative standards. He now finds the suggested rationale for the common good unpersuasive under current economic analysis, and consequently concludes that the interpretation itself was invalid at the time it was made.⁹⁷ He overlooks, however, the very important feature of the Court’s job in enforcing the constitutional principle: that it ensure, not legislative perfection in attaining its goals, but only a legitimate effort at promoting the common good. Even in

Understanding Changed Readings: Fidelity and Theory, 47 STAN. L. REV. 395, 460-61 (1995) (“[T]he Court points to the *facts learned* during the recent Depression, to facts the Court can take ‘judicial notice’ of, to facts that reveal the public interest affected by this legislation . . . [to] preserve . . . [under traditional police power] the state power to regulate.”).

93. See TRIBE, *supra* note 63, § 8-7, at 585 (“[I]f . . . [*West Coast Hotel*] was right and . . . [*Lochner*] wrong, the reason can *only* be that, in twentieth century America, minimum wage laws, as a substantive matter, are *not* intrusions upon human freedom in any constitutionally meaningful sense, but are instead entirely reasonable and just ways of attempting to combat economic subjugation and human domination.”).

94. Lawrence Lessig, *Fidelity in Translation*, 71 TEX. L. REV. 1165, 1188 (1993).

95. See *West Coast Hotel Co. v. Parrish*, 300 U.S. 379, 400 (1937).

96. See Meese, *supra* note 1, at 48 (suggesting that the Court’s analysis in *West Coast Hotel* was illegitimate because “[f]ew, if any, modern economists believe that minimum wage laws would have averted the Great Depression, or that the regulation of working conditions is an effective tool of macroeconomic stabilization”).

97. See *id.* at 48-51.

Lochner, the Court asked for only “a reasonable ground” for legislative action, a ground that is not “too shadowy and thin to build any argument for the interference of the legislature.”⁹⁸ Historically, what has been sought is an assurance that the statute has a plausible basis; perfect wisdom and accuracy on the part of the legislature has never been a prerequisite for decision-making by either the legislature or the judiciary. The opinions of the New Deal Court demonstrate the effort that a legitimate interpretation requires.

The case of *Home Building & Loan Association v. Blaisdell*⁹⁹ offers a paradigmatic example of this type of interpretation of constitutional principle. Although that case involved the Contracts Clause rather than the Due Process Clause, its reasoning so aptly illustrates the process I describe that it deserves detailed mention here. In *Blaisdell*, during the midst of the Depression, the State of Minnesota passed a measure providing relief for homeowners threatened with foreclosure.¹⁰⁰ The law allowed the postponement of mortgage sales and periods of redemption, in violation of the contractual terms of the debt instruments.¹⁰¹ The creditors challenged the law as a violation of the Contracts Clause, but the Supreme Court upheld the law.¹⁰² The Court did not dispute the dissent’s persuasive showing that if ever there were a situation that presented exactly the evil that the Contracts Clause had been designed to prevent, it was this case. Indeed, the Framers had worried specifically about class legislation such as this, which favored debtors at the expense of creditors and relieved one side of a bargain of its contractual obligations for the private benefit of the other side.¹⁰³ How could the majority possibly reconcile the Minnesota law with the Framers’ commitment to preventing this very type of favoritism? It did so in one critical sentence:

Where, in earlier days, it was thought that only the concerns of individuals or of classes were involved, and that those of

98. *Lochner v. New York*, 198 U.S. 45, 62 (1905).

99. 290 U.S. 398 (1934).

100. *See id.* at 416.

101. *See id.* at 417-18.

102. *See id.* at 444-48.

103. *See Benedict, supra* note 70, at 311.

the State itself were touched only remotely, it has later been found that the fundamental interests of the State itself are directly affected; and that the question is no longer merely that of one party to a contract as against another, but of the use of reasonable means to safeguard the economic structure upon which the good of all depends.¹⁰⁴

This was not so much an articulation of a change in political theory as it was a description of a change in economic reality. Atomistic, individual concerns had become common, societal concerns. Although the Framers assumed, reasonably, that this type of legislation would benefit only individuals or classes in 1789, the *Blaisdell* Court, again reasonably, saw that, under then-prevailing economic conditions, the very same legislation in 1934 would indeed serve a broad public purpose.¹⁰⁵ In order to serve the meaning of the constitutional rule requiring such a public purpose, the Court thought itself obliged to abandon its original application of the rule. Thus, it consciously avoided the phenomenon of the originalist's betrayal of fidelity: "[W]ith a growing recognition of public needs and the relation of individual right to public security, the court has sought to prevent the perversion of the clause through its use as an instrument to throttle the capacity of the States to protect their fundamental interests."¹⁰⁶ By finding in the new social order a *public* interest in the enforcement of the individual contracts under the extraordinary conditions of the Depression, the Court embarked on the same mode of interpretation that also led the same Court to consider the larger effect of employment relations on the public as a whole in the due process arena.

To summarize, the notion of liberty as a function of a relationship between an individual and the state's legitimate public needs survived the New Deal. Both the *Lochner*-Era Court and subsequent courts, through the time of the New Deal, remained faithful to a constant notion of constitutional principle based on their understanding of liberty.¹⁰⁷ Those who charge that the

104. *Blaisdell*, 290 U.S. at 442.

105. *See id.*

106. *Id.* at 443-44.

107. *See supra* notes 46 and 63-66 and accompanying text.

Lochner-Era judges illegitimately imposed their own laissez-faire political values on the law, without a genuine care for liberty under the Constitution, bear the burden of explaining why these same judges upheld many state regulations of business of various kinds during this same period.¹⁰⁸ The same Supreme Court that struck down the statute in *Lochner* also upheld numerous state laws providing for various types of regulatory interference with private commercial activity, including railroad rates, minimum wages, and professional licensing requirements—laws anathema to the laissez-faire vision of government.¹⁰⁹ These decisions stressed that the laws were valid because the state had a legitimate reason for enacting them.¹¹⁰ The interference with the private economic order was no less severe than in the cases in which the Court struck down the law. The difference was that in some cases the state persuaded the Court that the measure was in fact an effort to provide for the common good—a variable that has no place at all in the absolute thinking of true laissez-faire philosophy. The success of the so-called “Brandeis Brief”¹¹¹ during this period, known for provision of social empirical data, shows that the Court was interested in refining its notion of what the public good required, rather than ritualistically condemning all innovative state acts as partial legislation at odds with the laissez-faire tradition. This, in turn, suggests an interest in giving meaningful content to the constitutional notion of liberty.¹¹²

108. Those in the other camp, who applaud the *Lochner* Court for adhering to an ardent commitment to the absolute protection of economic rights as against all incursions from state government, bear the same burden of explanation for the lack of uniformity in results.

109. See, e.g., *Bunting v. Oregon*, 243 U.S. 426 (1917) (upholding maximum-hours and overtime law); *Muller v. Oregon*, 208 U.S. 412 (1908) (upholding maximum-hours law for women in laundries); *Holden v. Handy*, 169 U.S. 366 (1898) (upholding maximum-hours law for miners); *Mugler v. Kansas*, 123 U.S. 623 (1887) (upholding prohibition law); *Munn v. Illinois*, 94 U.S. 113 (1876) (upholding regulation fixing warehousing rates).

110. See *supra* note 106 and accompanying text.

111. See *Muller*, 208 U.S. at 419 (identifying social science data as an important factor relevant to issues facing the state).

112. Support for this conclusion comes from a source with a different perspective. See *Benedict*, *supra* note 70, at 305 (arguing that the courts of the period did not simply pull substantive due process out of thin air in order to protect the privileged

III. WHERE THE CONSERVATIVE CRITIQUE (AND THE WARREN COURT) WENT WRONG

Things did change, but not in the 1930s when most people say they changed. Things changed in the 1960s, during the rights revolution, on the watch of the Warren Court. During that time the Supreme Court began to lose its moorings in understanding the meaning of liberty under the Fourteenth Amendment.

The first significant change came in 1963, when the Supreme Court decided *Ferguson v. Skrupa*.¹¹³ The Court might have resolved this challenge to a Kansas law on the ground that the state's prohibition of the practice of debt adjusting except as incident to the practice of law served a public purpose, and thus kept the flame of constitutional liberty alive, at least nominally; however, the Court did not do so. Instead, Justice Black, writing for the Court, interpreted the earlier expansion of what might constitute a public good in the New Deal cases as an abandonment of any requirement that there be a public good underlying the passage of a law.¹¹⁴ Reflecting the widespread skepticism of legal thought at the time, Justice Black derided the notion that judges could determine whether a statute is for the public good without simply "substitut[ing] their social and economic beliefs for the judgment of legislative bodies, who are elected to pass laws."¹¹⁵ Accordingly, he disavowed any role for the courts whatsoever in enforcing the liberty clause of the Fourteenth Amendment, which he did not count as a "specific federal constitutional prohibition"¹¹⁶ at all. This marked a radical departure from existing law.¹¹⁷

classes, but instead adhered to a time-honored aversion to self-dealing by those in power, translated to cover what they perceived as class legislation—a threat to an American heritage of liberty).

113. 372 U.S. 726 (1963).

114. *See id.* at 730.

115. *Id.*

116. *Id.* at 731.

117. Justice Harlan's brief concurrence in the judgment, on the ground that the act bore "a rational relation to a constitutionally permissible objective," demonstrates that he, too, viewed the majority opinion as abandoning the established constitutional test. *Id.* at 733 (Harlan, J., concurring).

The second change came in 1965, in *Griswold v. Connecticut*.¹¹⁸ Commentators often view *Griswold* as a great step forward for the enforcement of liberty under the Fourteenth Amendment, a major piece of structural support in the edifice of the rights revolution.¹¹⁹ Although it was an explicit reaffirmation that some type of liberty lies beyond the reach of state power, it came as a mixed blessing. Instead of robustly reclaiming the constitutional principle that had prevailed since the nineteenth century—that individual liberty may not be curtailed by the state except as necessary to promote the common good—the majority in *Griswold* adopted a peculiarly defensive posture.

The first sign of trouble appeared when the Court opened its analysis by disavowing the liberty cases, such as *Lochner*, and conspicuously failed to characterize the issue before it as a question of the enforcement of liberty under the Fourteenth Amendment at all.¹²⁰ Instead of framing the issue as a claim that had centuries of common law precedent behind it, the Court grasped for provisions of the Bill of Rights—perhaps feeling the need to supply the “specific federal constitutional prohibitions” of which Justice Black had spoken in *Skrupa*.¹²¹ It chose to offer the famous “penumbras” argument, wedging the marital privacy at issue in the case into the status of some shadow of a protected right.¹²² *Griswold* was the first case in a hundred years of liberty cases in which the focus of the Court’s analysis rested on the nature of the right rather than on the nature of the state’s reasons for limiting it. By making the right itself the issue and defending it in this unconventional and ultimately unpersuasive way, the Court left liberty weakened and ripe for fragmentation.

Apparently, the *Griswold* Court took literally the extreme rights-skeptical view of Justice Black in *Skrupa*, as testament

118. 381 U.S. 479 (1965).

119. See GEOFFREY R. STONE ET AL., CONSTITUTIONAL LAW 950-51 (3d ed. 1996); David Luban, *The Warren Court and the Concept of a Right*, 34 HARV. C.R.-C.L. L. REV. 7, 27 (1999); Ira C. Lupu, *Untangling the Strands of the Fourteenth Amendment*, 77 MICH. L. REV. 981, 994, 998-99 (1979); Richard A. Posner, *Legal Reasoning from the Top Down and from the Bottom Up: The Question of Unenumerated Constitutional Rights*, 59 U. CHI. L. REV. 433, 445 (1992).

120. See *Griswold*, 381 U.S. at 481-83.

121. See *Skrupa*, 372 U.S. at 731.

122. See *Griswold*, 381 U.S. at 484.

that the Court was no longer in the business of protecting liberty under the Due Process Clause. Although the cases upon which this conclusion rested, such as *West Coast Hotel Co. v. Parrish*, did not demand that interpretation, the *Griswold* majority was not willing to take on the skeptics' derisive indictment in favor of a continued adherence to the principle of protected liberty.

At the same time, the invasion of liberty at stake in *Griswold*, prohibition on the use of contraceptives by married couples, seemed more difficult to tolerate than the obliteration of a debt-adjuster's profession in *Skrupa*. Faced with the two conflicting realizations—that the Court no longer enforced liberty and that the statute in *Griswold* seemed to go too far in legislating private matters—the Court was in a bind. Instead of abandoning either one of those conflicting commitments, the Court chose to distinguish the line of cases that had been interpreted in *Skrupa* as the death knell of liberty enforcement.¹²³ Consequently, the Court concluded that there could be different *kinds of liberty*, some of which could receive judicial protection under the Due Process Clause and some of which could not. The decision to fragment the ancient notion of liberty and make constitutional protection depend on the qualitative nature of the human activity at stake was unprecedented.

It was also a step backward for the protection of liberty. Instead of applying the old general rule that all liberty would be protected, subject to valid state reasons for interference, the Court now would recognize a special category of preferred freedoms, termed "fundamental" liberties, that alone would receive meaningful protection from state abridgment.¹²⁴ The notion of protecting "fundamental rights" may sound progressive, but it severely restricts the number and kind of freedoms that receive any protection at all and invites the erection of higher and higher hurdles to those seeking to claim that their right is, in fact, fundamental.¹²⁵ After *Griswold*, only one right, abortion, has

123. See *id.* at 482.

124. See *id.* at 486 (Goldberg, J., concurring).

125. The subsequent cases bear this out. Not since *Roe v. Wade*, 410 U.S. 113 (1973), has a litigant succeeded in attaining entrance for a new right into the elite club of those deemed "fundamental." See, e.g., *Washington v. Glucksberg*, 521 U.S.

been added to the list of preferred freedoms, and it no longer holds that status.¹²⁶ Accordingly, the seeds of rights-skepticism sown by Alexander Bickel, when he charged that judicial review is a deviant institution in a democracy,¹²⁷ were nourished by Justice Black in his attack on judicial subjectivity, and ultimately bore fruit, ironically, in *Griswold v. Connecticut*.¹²⁸

What the Warren Court did wrong, the conservative critique of substantive due process does equally wrong. Professor Meese's paper examines the cases through the past century and sees liberty of contract or liberty to pursue an occupation protected in the early days and not protected in the later days.¹²⁹ In each case, he looks to the nature of the particular liberty and the nature of the limitation on market freedom.¹³⁰ He concludes that today "some forms of liberty, such as privacy, find shelter in the Constitution, while other forms, such as the right to pursue an occupation, may be trammelled by the legislature at will."¹³¹ "If the Due Process Clause contains a substantive component," he charges, "[Justice Souter] does not provide a valid explanation for the differential treatment of economic rights and so-called personal rights, such as the right of privacy."¹³² What Professor Meese's analysis fails to recognize is the central role of reasons in the analysis of liberty under the Due Process Clause. As a consequence, he sees great inconsistencies: in one case the Court finds a restraint constitutional, while in another it strikes down

702 (1997) (refusing to recognize a fundamental right to assisted suicide); *Cruzan v. Missouri Dep't of Health*, 497 U.S. 261 (1990) (refusing to recognize a fundamental right to die); *Michael H. v. Gerald D.*, 491 U.S. 110 (1989) (refusing to recognize a fundamental right to establish a relationship with one's biological child); *Bowers v. Hardwick*, 478 U.S. 186 (1986) (refusing to recognize a fundamental right to choose sexual partners).

126. See *Planned Parenthood v. Casey*, 505 U.S. 833, 840 (1992) (applying an "undue burden" analysis to the right to abortion and avoiding entirely the use of the term "fundamental right").

127. See ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 16-23 (2d ed. 1986).

128. See Rebecca L. Brown, *Accountability, Liberty, and the Constitution*, 98 COLUM. L. REV. 531, 550-52 (1998).

129. See Meese, *supra* note 1, at 11-56.

130. See *id.*

131. *Id.* at 8.

132. *Id.* at 11.

a law imposing the same limitation on market freedom. Failing to acknowledge that the nature of the liberty is not dispositive of the constitutional inquiry, he is utterly unable to account for the differences in outcome of the various cases in which the impairment of liberty was challenged. Without this recognition, there is no doctrine, and it is no wonder that Meese simply gives up and dismisses the entire century-long venture as the judges' "unwillingness to protect the sort of economic liberties valued by the Framers," an exercise of "will and not judgment."¹³³

The challenge for courts in an era in which a laissez-faire conception of legitimate state action no longer garnered widespread support was, and remains, to find some way to evaluate state reasons or "common good" to permit meaningful enforcement of the right to liberty. It cannot be the case that, because more modern understandings of the public interest and of legislative motivations blur the once-bright line between laws that serve the common good and those that do not, liberty is simply swallowed up by any plausible claim of state interest.

CONCLUSION

The central role of reasons in the sound analysis of liberty under the Constitution is not arbitrary. It captures the heart of what it means to be a free citizen in a representative democracy. Although there is tension in the very idea of freedom in a society of laws, this tension is no excuse for courts simply to abdicate their responsibility to protect it. Justice Harlan saw this relationship exactly as history presents it, when he said that "[d]ue process . . . has represented the balance which our Nation, built upon postulates of respect for the liberty of the individual, has struck between that liberty and the demands of organized society."¹³⁴ Harlan's description captured the concept of ordered liberty, which calls for judgment in every case to preserve the "order" without abandoning the "liberty."

Protection of liberty is something that will, and should, change with the needs of the times. In times of economic crisis,

133. *Id.* at 63-64. Meese's paper does examine the various justifications offered to support the laws upheld during the New Deal, and finds them wanting. *See id.* at 46-56.

134. *Poe v. Ullman*, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting).

the public good may require sacrifices of the more affluent that would be unjustified in times of plenty.¹³⁵ Without relegating liberty to contentless categories, it is easy to imagine that state involvement in the more public activities of an individual in the marketplace generally may turn out to be more necessary to the common good than state involvement in the individual's more private activities. Although that may sound a bit like a bifurcation of liberty into categories, a closer look reveals that the inquiry focuses not on the nature of the liberty but on the types of needs the public is likely to muster for interfering with different types of activities in which a human being may wish to engage. Without the indefensible fragmentation of liberty into categories, the Court could achieve a continuum in which various combinations of freedoms, state needs, and degrees of interference plot out into a sensible regime, consistent with a coherent understanding of freedom and social responsibility in a liberal state.

A formula for reinstating liberty to its place as a protected right under the Constitution is beyond the goals of this Essay, but certain guidelines emerge from the theory set forth here. First, human liberty must be seen as a continuum, and not as a polarized set of activities, some of which can, by some measure, be deemed fundamental while others are merely ordinary. Second, the need of the state to limit freedom is the only meaningful way to distinguish one state law from another as a matter of constitutional validity. Finally, the overall value to be served in trying to make the judgments necessary to interpret the liberty clause under the first two guidelines is freedom in citizenship, the balance that is ordered liberty.

135. The Supreme Court may be sensing that it is time to give more protection to the so-called "economic" freedoms now that the prosperity of much of the community appears to have reached a relatively stable level. For signs of this emerging protection of economic freedoms, see *Eastern Enters. v. Apfel*, 524 U.S. 498 (1998) (recognizing a substantive constitutional limitation on retroactive regulation); *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996) (recognizing a substantive constitutional limitation on punitive damages); *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992) (recognizing a substantive constitutional limitation on regulatory restraint on use of property).