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Essay

The History of "Substantive" Due Process: It's Complicated

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In a recent *Texas Law Review* article,[1] Joshua Hawley provides a brief, elegant narrative of the rise, decline, and revival of the Supreme Court's "substantive" due process jurisprudence since the Civil War.[2] According to Hawley, the postbellum Supreme Court adopted a natural-rights-based understanding of due process of law that limited the scope of the government's authority over the private sphere. The Due Process Clause was thought to protect liberty—liberty meant protecting contract and property rights from unreasonable or arbitrary government interference; and protecting contract and property rights from unreasonable or arbitrary government interference meant limiting the scope of government's authority to regulate under the inherent "police powers."[3]

In *Lochner v. New York*,[4] the majority's police-powers jurisprudence collided with Justice Holmes's powerful moral skepticism, as expressed in his famous and influential dissent. Holmes rejected the underlying natural-rights premise of the Court's due process decisions and abjured any test that

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1. Joshua D. Hawley, *The Intellectual Origins of (Modern) Substantive Due Process*, 93 TEXAS L. REV. 275 (2014).

2. The phrase "substantive due process" is anachronistic when applied to the period before the 1940s. The conceptual separation of due process into "substantive" and "procedural" parts arose later. *See* JAMES W. ELY, JR., THE GUARDIAN OF EVERY OTHER RIGHT: A CONSTITUTIONAL HISTORY OF PROPERTY RIGHTS 103–04 (2d ed. 1998); G. EDWARD WHITE, THE CONSTITUTION AND THE NEW DEAL 245 (2000).

3. Hawley, *supra* note 1, at 282–96.

4. 198 U.S. 45 (1905).

required courts to determine whether legislation was arbitrary or unreasonable.[5] Instead, Holmes argued that the Court should limit itself to protecting those few rights recognized by societal consensus as fundamental.[6]

Holmes's skepticism carried the day by the late 1930s, leading the Court to overturn *Lochner* and associated precedents and begin a three-decades-long quest for a new theory of what due process protects. Eventually, the ideas of mid-century philosophers who focused on liberty as a function of the autonomy to develop one's capacities, such as John Dewey and Isaiah Berlin, came to dominate liberal thought. That dominance seeped into the sphere of judicial ideology and led to the Court's reinvention of substantive due process as protecting a right to "self-development," based on an "ethic of liberty and authenticity" in cases like *Griswold v. Connecticut*,[7] *Eisenstadt v. Baird*,[8] and *Roe v. Wade*.[9]

Hawley's is an interesting contribution to the debate over the history of substantive due process, and I agree with many points he makes. Overall, though, I find that Hawley makes overly broad assertions while either failing to provide sufficient evidence for his claims, or, worse, ignoring contrary evidence and theories provided by other scholars. Below, I complicate the story Hawley tells, by discussing alternative and additional explanations for the developments he discusses.

I. The Origins of the Supreme Court's Postbellum Due Process Jurisprudence

Hawley treats the Supreme Court's due process jurisprudence from the 1870s to the 1930s as a single phenomenon.[10] That is problematic, given that over six decades the Court hosted several dozen justices who often disagreed among themselves. These justices created shifting majorities that, for example, did not recognize the liberty-of-contract doctrine until the 1890s, and then proceeded to uphold the vast majority of legislation challenged under that doctrine, especially through 1923.[11] Nevertheless, Hawley insists that the Court's due process jurisprudence can be explained by the justices' adherence to a natural-rights philosophy, while they policed the boundaries of government power by interpreting and enforcing the limits of the government's so-called police powers.

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5. *Id.* at 75 (Holmes, J., dissenting).
6. *Id.* at 75–76 (Holmes, J., dissenting).
7. 381 U.S. 479 (1965).
8. 405 U.S. 438 (1972).
9. 410 U.S. 113 (1973).
10. Hawley, *supra* note 1, at 283–91.
11. Ray A. Brown, *Due Process of Law, Police Power, and the Supreme Court*, 40 HARV. L. REV. 943, 944–45 (1927); Michael J. Phillips, *The Progressiveness of the* Lochner *Court*, 75 DENV. U. L. REV. 453, 455–61 (1998); Charles Warren, *The Progressiveness of the United States Supreme Court*, 13 COLUM. L. REV. 294, 295 (1913); Charles Warren, *A Bulwark to the State Police Power—the United States Supreme Court*, 13 COLUM. L. REV. 667, 695 (1913).

Hawley is hardly the first scholar to argue that the Court's postbellum due process jurisprudence was primarily motivated by a belief in natural rights[12] (though, in my opinion, the Court's enthusiasm for natural rights was strongly tempered by historicism).[13] Nor is he the first to note that the scope of the police powers was the key factor in determining whether government regulations were within the scope of the police powers.[14] Unfortunately, no one has yet well explained how police powers, an un-enumerated powers doctrine, came to play such a large role in American constitutional jurisprudence.[15] Like other authors, myself included, Hawley just assumes the viability of the doctrine without much explanation.

Hawley, meanwhile, entirely neglects the debate among historians as to whether judicial opposition to "class legislation," rather than fealty to natural rights, was the key factor underlying the Supreme Court's jurisprudence.[16] Howard Gillman, for example, agrees with Hawley that the scope of the police powers was the key issue for courts enforcing the Fourteenth Amendment's Due Process Clause between the 1880s and 1920s. Gillman, however, also believes that opposition to "class legislation," and not the protection of natural rights, was the underlying ideological commitment that motivated the Justices when they invalidated regulatory legislation because it exceeded the police powers.[17] Barry Cushman, a very prominent and prolific historian of the relevant era whose work goes uncited in Hawley's article, takes a similar position to Gillman's.[18]

In past work, I have argued that American courts' focus on opposition to class legislation through 1905 was gradually superseded by a more rights-oriented focus starting with the Supreme Court's decision in *Lochner v. New York*.[19] Indeed, I have argued that *Lochner*'s main doctrinal signifi-

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12. *E.g.*, DAVID E. BERNSTEIN, REHABILITATING *LOCHNER*: DEFENDING INDIVIDUAL RIGHTS AGAINST PROGRESSIVE REFORM 3 (2011).

13. *See* David E. Bernstein, Lochner *Era Revisionism, Revised:* Lochner *and the Origins of Fundamental Rights Constitutionalism*, 92 GEO. L.J. 1, 45–46 (2003).

14. *E.g.*, HOWARD GILLMAN, THE CONSTITUTION BESIEGED: THE RISE AND DEMISE OF *LOCHNER* ERA POLICE POWERS JURISPRUDENCE 132 (1993).

15. The only book-length work on the police power does not really address the issue. *See generally* MARKUS DIRK DUBBER, THE POLICE POWER: PATRIARCHY AND THE FOUNDATIONS OF THE AMERICAN GOVERNMENT (2005).

16. *E.g.*, MICHAEL J. BRODHEAD, DAVID J. BREWER: THE LIFE OF A SUPREME COURT JUSTICE, 1837–1910, at 120 (1994); GILLMAN, *supra* note 11, at 93; Michael Les Benedict, *Laissez-Faire and Liberty: A Re-Evaluation of the Meaning and Origins of Laissez-Faire Constitutionalism*, 3 LAW & HIST. REV. 293, 305–14 (1985); Victoria F. Nourse & Sarah A. Maguire, *The Lost History of Governance and Equal Protection*, 58 DUKE L.J. 955, 963–66 (2009).

17. *See* Howard Gillman, *Preferred Freedoms: The Progressive Expansion of State Power and the Rise of Modern Civil Liberties Jurisprudence*, 47 POL. RES. Q. 623, 649 (1994).

18. Barry Cushman, *Some Varieties and Vicissitudes of Lochnerism*, 85 B.U. L. REV. 881, 883–89 (2005); *see also* Jack M. Balkin, *"Wrong the Day It Was Decided":* Lochner *and Constitutional Historicism*, 85 B.U. L. REV. 677, 687–88 (2005).

19. Bernstein, *supra* note 10, at 45–46.

cance was that the Court almost entirely ignored Lochner's class-legislation-focused brief in favor of a focus on Lochner and his employees' liberty-of-contract rights.[20]

Initially, like Hawley, I believed this rights-oriented focus to have been limited by the scope of the police powers throughout the so-called *Lochner* era. In subsequent work, however, I pointed out that beginning with *Buchanan v. Warley*[21] in 1917, the Supreme Court issued a series of due process decisions in which it acknowledged that the government had acted reasonably and thus within the scope of the police powers, but added that the government still acted unconstitutionally because the relevant police-power justifications could not justify infringement on the important rights at issue.[22] These cases, treated as mere "police powers" cases by Hawley, (or in one instance, incorrectly identified by Hawley as an incorporation case),[23] in significant ways anticipate modern "fundamental rights" jurisprudence.

One point I failed to appreciate until recently is that by the 1920s—generally considered the high point of the Court's pre-New Deal due process jurisprudence[24]—it's not at all clear that the philosophies we associate with classical "conservative" jurisprudence, in particular belief in the judicial enforceability of natural rights, had any advocates remaining on the Supreme Court. Perhaps the greatest champion on the Court of natural-rights-based limitations on the government, Justice Stephen Field,[25] died in 1895,[26] a decade before *Lochner*. The last Justices who had supported (usually in dissent) relatively stringent limitations on scope of the police power, Justices Rufus Peckham and David Brewer,[27] died in 1909 and

20. *Id.*

21. 245 U.S. 60 (1917).

22. David E. Bernstein, *The Conservative Origins of Strict Scrutiny*, 19 GEO. MASON L. REV. 861, 864 (2012).

23. Hawley identifies Gitlow v. New York, 268 U. S. 652 (1925), as First Amendment incorporation case. A close reading of the case, however, reveals that the Court merely mentioned it assumed that the right to freedom of speech was protected by the Due Process Clause against the states just as it was protected against the federal government by the First Amendment. The Court did not, however, state that freedom of speech was protected against the states *because* the right also appeared in the First Amendment.

24. Though Hawley, oddly, seems to think the opposite.

25. *See* PAUL KENS, JUSTICE STEPHEN FIELD: SHAPING LIBERTY FROM THE GOLD RUSH TO THE GILDED AGE 122–25 (1997).

26. IIT Chicago-Kent College of Law, *Stephen J. Field*, OYEZ, https://www.oyez.org/justices/stephen_j_field [https://perma.cc/FV8B-RLQR].

27. D. Grier Stephenson, *The Supreme Court and Constitutional Change:* Lochner v. New York *Revisited*, 21 VILL. L. REV. 217, 234–36 (1976). For dissents by Justices Brewer and Peckham from decisions upholding regulatory legislation, see McLean v. Arkansas, 211 U.S. 539, 552 (1909); Bacon v. Walker, 204 U.S. 311, 320 (1907); Union Bridge Co. v. United States, 204 U.S. 364, 403 (1907); Gardner v. Michigan, 199 U.S. 325, 335 (1905); Atkin v. Kansas, 191 U.S. 207, 224 (1903); Otis v. Parker, 187 U.S. 606, 611 (1903); Booth v. Illinois, 184 U.S. 425, 431 (1902); Dayton Coal & Iron Co. v. Barton, 183 U.S. 23, 25 (1901); Knoxville Iron Co. v. Harbison, 183

1910, respectively.[28] Justice John Marshall Harlan, who was less strict than Peckham and Brewer in his interpretation of the police powers' scope (except in the context of segregation regulations, where he was far stricter) but was a consistent advocate of natural rights,[29] died in 1911.[30]

The "conservative" Justices who served on the Court over the next two decades—men like George Sutherland, James McReynolds, and Willis Van Devanter—all had backgrounds in Progressive politics.[31] McReynolds, for example, served as attorney general of the United States in the Wilson administration on the strength of his reputation as a trustbuster. Despite later being known as "reactionaries" for their votes to invalidate elements of the New Deal, all of these Justices seemed (unlike the Brewers and Peckhams of an earlier generation) to accept basic Progressive premises,[32] and were neither in general hostile to the growth of the regulatory state nor in thrall to natural rights.[33]

The decline of natural-rights thinking on the Supreme Court was much more than just a matter of changes in personnel. In the early twentieth century, the general intellectual credibility of classically liberal thought declined precipitously in favor of progressivism.[34] Arguably, the battle on the Court in the 1920s and early 1930s was not, as suggested in my previous work, between conservatives with a lingering belief in natural rights and Progressive positivists. Rather, it involved moderate Progressives who sought to preserve some traditional limitations on government authority (particularly in light of the surge in federal power during World War I)[35] while mostly acceding to the growth of progressive regulation on one side;[36] their opponents were more radical progressives who denied that ei-

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U.S. 13, 22 (1901); and Holden v. Hardy, 169 U.S. 366, 398 (1898).

28. IIT Chicago-Kent College of Law, *Rufus Peckham*, OYEZ, https://www.oyez.org/justices/rufus_peckham [https://perma.cc/QUM8-8CJ4]; IIT Chicago-Kent College of Law, *David J. Brewer*, OYEZ, https://www.oyez.org/justices/david_j_brewer [https://perma.cc/X5SC-HRUT].

29. *See generally* MILTON R. KONVITZ, FUNDAMENTAL RIGHTS: HISTORY OF A CONSTITUTIONAL DOCTRINE 38–40 (2001) (noting Harlan's influence on the development of natural-rights jurisprudence on the Supreme Court in the years leading up to *Lochner*).

30. IIT Chicago-Kent College of Law, *John M. Harlan*, OYEZ, https://www.oyez.org/justices/john_m_harlan [https://perma.cc/WYX7-GXDC].

31. *See* Barry Cushman, *The Secret Lives of the Four Horsemen*, 83 VA. L. REV. 559, 559–60 (1997).

32. *See id.* at 566–67.

33. *But see* HADLEY ARKES, THE RETURN OF GEORGE SUTHERLAND: RESTORING A JURISPRUDENCE OF NATURAL RIGHTS 25–30 (1994) (tenuously attributing Justice Sutherland's jurisprudence to natural rights).

34. *See generally* ARTHUR A. EKIRCH, JR., THE DECLINE OF AMERICAN LIBERALISM (1955); PAUL D. MORENO, THE AMERICAN STATE FROM THE CIVIL WAR TO THE NEW DEAL: THE TWILIGHT OF CONSTITUTIONALISM AND THE TRIUMPH OF PROGRESSIVISM (2013).

35. *See* Robert C. Post, *Defending the Lifeworld: Substantive Due Process in the Taft Court Era*, 78 B.U. L. REV. 1489 (1998).

36. *See* Harry G. Hutchison, Lochner*, Liberty of Contract, and Paternalism: Revising the Re-*

ther the Constitution or anything else put any inherent, judicially enforceable constraints on the scope of government authority.

The various explicit doctrinal concessions the Supreme Court made to government authority in the 1920s should not be seen, as Hawley apparently sees it, as surrender. Rather the Court retrenched from broad, vague tests balancing liberty and government power that served poorly to restrain the growth of government[37] in favor of narrow but much more specific doctrines that tried to delineate the proper line between the private and public spheres.[38] In doing so, the Court sought to encourage judicial enforcement of that line.

II. Why Pre-New Deal Due Process Jurisprudence Collapsed

Hawley attributes the collapse of the Court's pre-New Deal due process jurisprudence to the judicial abandonment of natural-rights ideology in favor of Holmesian skepticism.[39] I agree with Hawley that the key to the Holmesian critique of the "old" substantive due process jurisprudence was the rejection of natural rights in favor of positivism. But as noted previously, it's not at all clear that by the 1930s natural rights was still a significant force that motivated any member of the Supreme Court.

Holmes was undoubtedly considered a giant of legal thought by early-twentieth-century Progressives, and his *Lochner* dissent was very influential.[40] Nevertheless, it's far too simplistic to attribute the decline of *Lochner*-ian jurisprudence solely to the power of Holmes's skepticism of moral absolutes. For one thing, Holmes wasn't merely a skeptic. He also applied Darwinian notions to law, believing that democratic law-making was a sur-

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visionists? Review Essay: David N. Mayer, Liberty of Contract: Rediscovering a Lost Constitutional Right, 47 IND. L. REV. 421, 423 & nn.22–23 (2014). For a related discussion of the fact that leading supporters of restrictions on the scope of the federal commerce power were moderate Progressives, see Logan E. Sawyer III, *Creating* Hammer v. Dagenhart, 21 WM. & MARY BILL OF RTS. J. 67, 87 (2012).

37. *See* George W. Alger, *The Courts and Legislative Freedom*, 111 ATLANTIC MONTHLY 345, 347 (1913) (stating that an individual who looks for "a definition of this police power, so-called . . . finds there is no concrete definition of it" and that it "is incapable of exact definition").

38. In 1923, the Court interpreted its precedents as allowing for the following types of statutes despite their infringement on liberty of contract, in addition to statutes that pursued traditional police-power ends: (1) those "fixing rates and charges to be exacted by businesses impressed with a public interest"; (2) "[s]tatutes relating to contracts for the performance of public work"; (3) "[s]tatutes prescribing the character, methods and time for payment of wages"; and (4) "[s]tatutes fixing hours of labor" to preserve the health and safety for workers or the public at large. Beyond those exceptions, the Court stated that "freedom of contract is . . . the general rule and restraint the exception; and the exercise of legislative authority to abridge it can be justified only by the existence of exceptional circumstances." Adkins v. Children's Hosp., 261 U.S. 525, 546–48 (1923).

39. Hawley, *supra* note 1, at 282.

40. Melvin I. Urofsky, *Myth and Reality: The Supreme Court and Protective Legislation in the Progressive Era*, 1983 SUP. CT. HIST. SOC'Y Y.B. 53, 58 (stating that Justice Holmes's dissent in *Lochner* "raised the spirits of the faithful and kept them hoping for a better day and a Court more attuned to contemporary realities").

vival-of-the-fittest process the courts presumptively had no justification to interfere with.[41] He combined his Darwinism with a contempt for much of humanity, and for the "unfit" in particular, as reflected in his opinion in *Buck v. Bell*.[42]

Nor was Holmes necessarily his era's the most influential opponent of what has come to be known as judicial activism. He certainly was not a lone critic. Holmes, along with many other leading Progressive figures, including Louis Brandeis and Learned Hand, were influenced by Harvard law professor James Bradley Thayer and his belief in judicial restraint.[43] Thayer seems to have been less a skeptic of absolute morality and more a skeptic that judges had the competency, legitimacy, and neutrality to review legislation passed by democratic legislatures. Skepticism of non-expert judges deciding complex matters of social policy is a consistent theme in progressive critiques of due process jurisprudence through the 1930s. Louis Brandeis's focus on "social facts," first in his so-called Brandeis Briefs, and later in his judicial opinions as a Supreme Court Justice, was premised on the notion that legal reasoning shorn of true expertise was incapable of competently resolving disputes between claims of arbitrary deprivations of liberty and claims of government authority to serve the public good.[44]

Moreover, it was German positivists and not Holmes who pioneered the attempt to undermine natural rights' influence on the law.[45] Many of the leading lights of Progressive constitutionalism, such as Roscoe Pound, studied in Germany and came back ready to attack the American affinity for natural rights as contrary to modern, sophisticated legal thought. Barry

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41. DAVID M. RABBAN, LAW'S HISTORY: AMERICAN LEGAL THOUGHT AND THE TRANSATLANTIC TURN TO HISTORY 230–31, 240 (2013) (describing the influence of evolutionary social thought on Holmes's views); G. EDWARD WHITE, JUSTICE OLIVER WENDELL HOLMES: LAW AND THE INNER SELF 41, 148–52 (1993); Steven J. Heyman, *The Dark Side of the Force: The Legacy of Justice Holmes for First Amendment Jurisprudence*, 19 WM. & MARY BILL OF RTS. J. 661, 690 (2011).

42. 274 U.S. 200, 207 (1927).

43. James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129, 144 (1893); *see* Wallace Mendelson, *The Influence of James B. Thayer Upon the Work of Holmes, Brandeis, and Frankfurter*, 31 VAND. L. REV. 71, 73 (1978); Edward A. Purcell, Jr., *Learned Hand: The Jurisprudential Trajectory of an Old Progressive*, 43 BUFF. L. REV. 873, 874, 885 (1995).

44. For an argument that Brandeis served as a transitional figure between progressive jurisprudence and modern constitutional liberalism, see David E. Bernstein, *From Progressivism to Modern Liberalism: Louis D. Brandeis as a Transitional Figure in Constitutional Law*, 89 NOTRE DAME L. REV. 2029, 2040–49 (2014).

45. *See generally* M. H. Hoeflich, *Transatlantic Friendships & the German Influence on American Law in the First Half of the Nineteenth Century*, 35 AM. J. COMP. L. 599 (1987); Michele Graziadei, *Changing Images of Law in XIX Century English Legal Thought (The Continental Impulse)*, *in* THE RECEPTION OF CONTINENTAL IDEAS IN THE COMMON LAW WORLD, 1820-1920, at 115 (Mathias Reimann ed., 1993); John E. Herget, *The Influence of German Thought on American Jurisprudence*, 1880-1918, *in* THE RECEPTION OF CONTINENTAL IDEAS IN THE COMMON LAW WORLD, 1820-1920, at 203 (Mathias Reimann ed., 1993).

Cushman suggests that once the intellectual underpinnings of late-nineteenth-century constitutional thought had been undermined, it was only a matter of time before the entire superstructure of pre-New Deal jurisprudence collapsed, in the sphere of due process and elsewhere.[46]

Finally, one needs to account for the influence of the labor movement and other Progressive political forces in opposing the Court's pre-New Deal due process jurisprudence.[47] These forces managed to associate that jurisprudence in the public mind with sympathy for large corporate entities, hostility to working people, and general reaction. When that perception merged with the economic crisis of the Great Depression, extant due process jurisprudence was destined to be in deep trouble.

III. The Intellectual Origins of Modern Substantive Due Process

Hawley criticizes my work and others' for asserting continuities between the Court's pre-New Deal due process jurisprudence and "modern" due process jurisprudence.[48] He argues instead that elite understandings of liberty promoted by prominent philosophers led the Court for due process purposes to adopt a new understanding of liberty as grounded in individual autonomy, necessary for self-development.[49]

In part, my disagreement with Hawley reflects our competing understandings of what motivated the Court's due process jurisprudence before the New Deal, and whether that jurisprudence had gone beyond a focus on the scope of the police power and into the realm of fundamental-rights analysis. But in part, Hawley is addressing a different aspect of due process's intellectual history than I have. My discussions of substantive due process do not purport to be a history of how changes in the understanding of the concept of liberty among elite American intellectuals influenced due process jurisprudence. Rather, it's a history of doctrinal development, what legal historians call an "internalist" perspective on the Court's due process jurisprudence. I argue that modern liberals purported to be erasing the influence of *Lochner v. New York* and its progeny while keeping many pre-New Deal precedents and assumptions that they reconfigured and reinterpreted to serve modern liberal ideological ends.

Hawley instead provides an "externalist" perspective, linking the

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46. BARRY CUSHMAN, RETHINKING THE NEW DEAL COURT: THE STRUCTURE OF A CONSTITUTIONAL REVOLUTION 6 (1998).

47. WILLIAM G. ROSS, A MUTED FURY: POPULISTS, PROGRESSIVES, AND LABOR UNIONS CONFRONT THE COURTS, 1890-1937, at 41–43, 47 (1994) (recounting the reactions of Progressives and others to *Lochner* and similar decisions); Barry Friedman, *The History of the Countermajoritarian Difficulty, Part Three: The Lesson of* Lochner, 76 N.Y.U. L. REV. 1383, 1391–96 (2001) (showing that Progressives consistently accused the Court of favoring the wealthy and powerful at the expense of workers and others who needed government assistance).

48. Hawley, *supra* note 1, at 278–79.

49. *Id.* at 302–03.

Court's newfound willingness to protect un-enumerated rights under the Due Process Clause in cases like *Griswold v. Connecticut*[50] to the triumph of a particular liberal conception of rights.[51] I applaud Hawley for exploring how general American intellectual trends may have affected the Court's decisions. New understandings of the meaning of liberty inevitably came to the fore to replace the natural-rights-descended notions of liberty, emphasizing contractual and property rights, that had informed the so-called *Lochner* Court. However, I find Hawley's account to be at best unproven. He never demonstrates the intellectual influence of the leading liberal philosophers he cites on the Justices of the Warren and Burger Courts, nor is his reading of the relevant cases persuasive.

Here's what Hawley says about Justice William O. Douglas's opinion in *Griswold*:

> The ethic of authenticity and liberty as self-development explains the Court's new conception of privacy. In keeping with that ethic, the majority's opinion emphasized the freedom to make intimate and personal decisions, decisions basic to one's identity and relationships, in terms of moral distance from outside influence or coercion: this is what the majority meant by "privacy."[52]

Compare this to what Douglas actually wrote:

> The present case, then, concerns a relationship lying within the zone of privacy created by several fundamental constitutional guarantees. And it concerns a law which, in forbidding the use of contraceptives, rather than regulating their manufacture or sale, seeks to achieve its goals by means having a maximum destructive impact upon that relationship. Such a law cannot stand in light of the familiar principle, so often applied by this Court, that a governmental purpose to control or prevent activities constitutionally subject to state regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms. *NAACP v. Alabama,* 377 U.S. 288, 307. Would we allow the police to search the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives? The very idea is repulsive to the notions of privacy surrounding the marriage relationship.
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> We deal with a right of privacy older than the Bill of Rights—older than our political parties, older than our school system. Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is

50. 381 U.S. 479 (1965).
51. *Id.* at 322–30.
52. *Id.* at 329.

> an association for as noble a purpose as any involved in our prior decisions.[53]

Read narrowly, *Griswold* isn't primarily about "the ethic of authenticity and liberty as self-development," or any other broad, novel philosophical ideal; it's about mundane marital privacy, the importance of which Douglas suggests has been recognized by civilized people for millennia. The next two cases Hawley discusses, *Eisenstadt* and *Roe*, protect a "privacy" right to control procreation free from government interference, not a general right to "authenticity and self-development."

Hawley is undoubtedly right that contemporary philosophical understandings of liberty informed the Court's due process decisions that began with *Griswold*—the Court is not composed of monks who live in isolation from general societal and intellectual trends—even if it's not clear he has correctly identified the players who most influenced the Justices. But why did the Court's adoption of its new understanding of the liberty protected by due process manifest itself most quickly and most strongly in the area of reproductive freedom, and not, say, in a right to use mind-altering chemicals? Surely the relevant factors included:

- the growing influence of the women's rights/feminist movement, which emphasized reproductive freedom;[54]
- elite judges' distaste with what they saw as the reactionary agenda of the Catholic Church[55]—i.e., anti-birth control in *Griswold* and *Eisenstadt*, and anti-abortion in *Roe* (the Catholic Church was the only religious group identified in *Roe* as hostile to abortion[56]);
- the popularity of population control in elite liberal circles in the 1960s and 1970s, combined with some residual support in such circles for eugenics;[57]
- sympathy with the poor and especially members of minority groups;[58] and

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53. Griswold v. Connecticut, 381 U.S. 479, 485–86 (1965).

54. Bonnie Eisenberg & Mary Ruthsdotter, *History of the Women's Rights Movement*, NAT'L WOMEN'S HIST. PROJECT (1998), http://www.nwhp.org/resources/womens-rights-movement/history-of-the-womens-rights-movement/ [https://perma.cc/7GHV-STAK] (discussing the history of the women's rights movement and its focus on reproductive rights during the twentieth century).

55. The hostility of American liberals to the Catholic Church in the mid-twentieth century was pervasive, though it's been largely forgotten. *See* KEN I. KERSCH, CONSTRUCTING CIVIL LIBERTIES: DISCONTINUITIES IN THE DEVELOPMENT OF AMERICAN CONSTITUTIONAL LAW 240 (2004).

56. Roe v. Wade, 410 U.S. 113, 161 (1973).

57. Mary Ziegler, *The Framing of a Right to Choose:* Roe v. Wade *and the Changing Debate on Abortion Law*, 27 LAW & HIST. REV. 281, 282 (2009).

58. It was widely known that the wealthy could access birth control and abortion through private physicians regardless of legal constraints, while the poor could not. *See* Katha Pollitt, *Abor-*

- belief in the autonomy of the medical profession from demagogic and ignorant legislators, with *Roe* in particular emphasizing the right of a woman to make an abortion decision in consultation with her physician.[59]

IV. Conclusion

Hawley seeks to demonstrate that modern substantive due process jurisprudence was a novel invention of the Warren and Burger Courts, having no significant antecedents in the due process jurisprudence of the so-called *Lochner* era. Hawley makes some eminently reasonable points, especially with regard to how the Court replaced its historic natural-rights-based constitutionalism with a positivist understanding of the law that invites Justices to read their own philosophical views into the Due Process Clauses. And it's certainly true that the modern conception of liberty adopted by the Court, focusing on individual and especially reproductive autonomy, is a far cry from the property- and contract-centered understandings of a century ago.

Nevertheless, Hawley provides an incomplete account of the development and abandonment of pre-New Deal due process jurisprudence, and a somewhat idiosyncratic or perhaps tendentious account of the development of modern due process jurisprudence that almost certainly overemphasizes the role of philosophers in inspiring modern due process jurisprudence. In both cases, he exaggerates the influence of particular "great men"—Holmes in the early twentieth century and Dewey in mid-century—when the influences on the Supreme Court, both internal and external, were much broader.

The history of what has come to be known as substantive due process is fraught with political implications, even more so now that same-sex marriage has joined abortion as a right protected by the Court under the rubric of due process. It's tempting to create a simplified version of the past that explains how we got from point A to point B, and that implicitly or explicitly teaches some profound lesson about the present.[60] History, however, rarely truly lends itself to such convenience. It's complicated.

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tion in American History, ATLANTIC (May 1997), http://www.theatlantic.com/magazine/archive/1997/05/abortion-in-american-history/376851/ [https://perma.cc/B9AK-2Y6N] (discussing how when abortions were illegal "well-connected white women with private health insurance were sometimes able to obtain 'therapeutic' abortions, a never-defined category that remained legal throughout the epoch of illegal abortion. But these were rare, and almost never available to nonwhite or poor women.").

59. *Roe*, 410 U.S. at 163.

60. *See* David E. Bernstein, Lochner*'s Legacy's Legacy*, 82 TEXAS L. REV. 1, 19 (2003) (criticizing Cass Sunstein's famous article, Lochner's *Legacy*, for presenting an overly simplified and at times inaccurate account of *Lochner* in support of contemporary constitutional aims).