The Right to Seek Joy

*Tyler Rose Clemons**

Abstract

Within the past three years, roughly half of American states have restricted access to gender-affirming medical treatment for children. In this article, I argue that these bans violate transgender children's right to liberty guaranteed by the Fourteenth Amendment's Due Process Clause. I do so by excavating the Framers' understanding of liberty as the right to seek joy. Rooted in the philosophies of John Locke and Epicurus, the Framers understood liberty as the right to make important life decisions according to one's subjective preferences without undue interference from the government. Based on this understanding, I develop a new framework for substantive due process jurisprudence according to which more process becomes "due" as government action impinges upon more natural and necessary liberty interests. Finally, I apply this framework to gender-affirming care bans, concluding that standard legislative and judicial procedures cannot justify the near-total deprivation of transgender people's—including transgender children's—need for medical treatment to achieve their highly natural desire for internal/external gender alignment.

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* Assistant Professor, St. John's University School of Law. Special thanks to Meghan Boone, Leah Litman, Noa Ben Asher, Jane Wettach, Kristan Brown, Carmen Longoria, Anna Arons, Ben Sundholm, and Heather Walter-McCabe for their helpful feedback. Thank you to Jordan Strudler for excellent research assistance. Finally, thank you to the editorial staff of the *Harvard Civil Rights-Civil Liberties Law Review* for their thoughtful and thorough edits.

Introduction

On a predictably sweltering summer day in 2020, I stood in front of a full-length mirror in a shotgun house on First Street in New Orleans. As the COVID-19 pandemic wrought suffering on the world around me,[1] I held a simply cut navy blue dress with white polka dots. I had started hormone replacement therapy a few months earlier—mere days, in fact, before the shutdowns began. Besides a couple of amateur theatrical roles, I had never worn a dress before. Now I was terrified.

I slipped the dress over my curvy frame. As I evaluated its effect in the mirror, fear succumbed to an emotion I did not at first recognize. I turned this way and that, looking over my shoulder and brushing my growing bangs out of my eyes. Then I smiled and twirled. I felt my chest loosen and a pleasant warmth bubbled up from my stomach. Above all, I felt a pervasive sense of rightness, as if my entire body suddenly agreed that yes, this was how things should be.

As it happens, I discovered Marie Kondo's viral decluttering technique that same summer.[2] For those unfamiliar, the method requires physically holding each item in one's home while asking, "Does this spark joy?"[3] I possessed sufficient privilege to be stuck at home with copious free time that summer,[4] so I rolled up my metaphorical sleeves and began sorting. As I paused to evaluate each item according to the assigned criterion, I realized I was scanning for the same subjective emotional response I experienced

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[1] COVID-19 killed an estimated 337,883 Americans in 2020, making it the third leading cause of death that year. *See generally* Farida B. Ahmad, Jodi Cisewski, Arialdi Minino & Robert Anderson, *Provisional Mortality Data—United States, 2020*, 70 U.S. Dep't Health & Hum. Servs. Morbidity & Mortality Wkly. Rep. 519 (2021), https://www.cdc.gov/mmwr/volumes/70/wr/pdfs/mm7014e1-H.pdf [https://perma.cc/DE39-UMFR].

[2] *See generally* Marie Kondo, The Life-Changing Magic of Tidying Up: The Japanese Art of Decluttering and Organizing (Cathy Hirano trans., 2014).

[3] *Id.* at 39–42.

[4] *See* Joanna Gaitens, Marian Condon, Eseosa Fernandes & Melissa McDiarmid, *COVID-19 and Essential Workers: A Narrative Review of Health Outcomes and Moral Inquiry*, 18 Int'l J. Env't Rsch. & Pub. Health 1446, 1446 (2021) ("As the COVID-19 pandemic swept across the globe in 2020, nothing became more apparent than the social inequities that exist between different groups of workers. . . . For example, some middle- and upper-income workers, such as those working in the technology industry, were able to transition from working in an office to working from home, whereas workers in many so-called essential industries, who often receive lower wages, were not afforded the same work-from-home opportunity, placing them at greater risk for exposure to COVID-19.").

when truly wearing a dress for the first time. That realization led me to a name for the feeling. What I felt was joy.

How is it that I discovered joy for the first time as a transgender woman at the age of thirty-two? I do not mean to imply melodramatically that I had never experienced joy before I began transitioning. Rather, it had never occurred to me that my own joy should serve as my primary decision-making criteria for anything at all, much less my own life. The relevance of joy was revolutionary. It changed and continues to change my life.[5]

My central claim in this article is that the experience of joy is not just personally relevant but also *legally*, even *constitutionally*, relevant. Specifically, I claim that the liberty protected by the Due Process Clauses of the Fifth and Fourteenth Amendments to the U.S. Constitution[6] is properly defined as the right to seek joy—that is, the right of each individual to define their[7] own conception of happiness and to make choices that align with that conception. This claim is most pertinent to the class of claims commonly labeled "substantive due process"[8] cases. Substantive due process jurispru-

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[5] By including portions of my own story and those of other trans people in this article, I join a by-now well-established—if not always well-respected—movement of using narrative storytelling as a tool of legal scholarship. *See* Daniel A. Farber & Suzanna Sherry, *Legal Storytelling and Constitutional Law: The Medium and the Message*, *in* Law's Stories: Narrative and Rhetoric in the Law 37–53, 37–38 (Peter Brooks & Paul Gewirtz, eds., 1996). Notable pioneers include Peggy Cooper Davis, Neglected Stories: The Constitution and Family Values (1997); Patricia Williams, The Alchemy of Race and Rights (1991); Mari Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 Mich. L. Rev. 2320 (1987); and Derrick Bell, And We Are Not Saved: The Elusive Quest for Racial Justice (1987). As it was for these pioneers, the medium of storytelling is part of my message: Personal experiences of joy, including my own joy as a transgender woman, are relevant to and deserve consideration and space in legal discussions. *See* Farber & Sherry, *supra*, at 42–44.

A final note on methodology: Throughout this article, I develop legal arguments based on theology, *see infra* notes 42–65; philosophy, *see infra* notes 176–238; and psychology, *see infra* notes 379–398. As with narrative storytelling, my reliance upon insights from extra-legal disciplines indicates my belief in their relevance to legal scholarship and, more fundamentally, my conception of "the law" as one among many overlapping and equally valid means of navigating and seeking to improve the human experience. That said, I claim no expertise in any of these disciplines and offer their insights solely to facilitate legal scholarship, not as substantive interventions in the respective fields. While I have done my best to reproduce these insights accurately from those who *are* experts, any errors are of course my own.

[6] U.S. Const. amends. V, XIV. At least for purposes of substantive due process analysis, which is my focus here, the Supreme Court treats the Clauses the same. *See, e.g.*, Dep't of State v. Muñoz, 602 U.S. 899, 909–12 (2024) (applying the holding of Washington v. Glucksberg, 521 U.S. 702, 720–721 (1997), a Fourteenth Amendment substantive due process case, to Fifth Amendment substantive due process claim). For the sake of clarity, the singular "Due Process Clause" refers to both Clauses for the remainder of the article unless I explicitly indicate otherwise.

[7] Throughout this article, I use the singular they/them/theirs as the indefinite pronoun to facilitate the inclusion of people of all genders, including nonbinary and agender people. *See Gendered Pronouns & Singular "They,"* Purdue Online Writing Library (OWL), https://owl.purdue.edu/owl/general_writing/grammar/pronouns/gendered_pronouns_and_singular_they.html [https://perma.cc/2RMG-4RJS] (last visited Sept. 29, 2025); *see also* Jessica A. Clarke, *They, Them, and Theirs*, 132 Harv. L. Rev. 894, 896–98 (2019).

[8] *E.g.*, Lawrence v. Texas, 539 U.S. 558, 565 (2003) ("[T]he protection of liberty under the Due Process Clause has a substantive dimension of fundamental significance in defining the rights of the person.").

dence seeks to define the unenumerated liberty interests protected by the Due Process Clause.[9]

As substantive due process doctrine currently stands, the definition of constitutional liberty as the right to seek joy is as legally revolutionary as my discovery of joy was personally revolutionary. Tangled in its self-spun web of originalism,[10] the Supreme Court's conservative majority defines liberty based not on the feelings of living people but on the expectations of people who died centuries ago.[11] Specifically, the Court describes the asserted liberty interest as narrowly as possible and then examines the historical record to determine whether Americans would have expected that interest to be protected against government interference when the Constitution was ratified.[12] Emboldened by the Court's stingy understanding of individual liberty, governments at every level of the American federal system have ramped up legislative efforts to enforce conformity and hierarchy.[13]

As a prime example, twenty-six U.S. states and Puerto Rico have banned gender-affirming healthcare for minors within the past three years.[14] These bans prevent transgender and gender-nonconforming[15] children from

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Jamal Greene has (rightly) rejected the substantive/procedural due process distinction as a false dichotomy. *See* Jamal Greene, *The Meming of Substantive Due Process*, 31 Const. Comment. 253, 259–61 (2016).

[9] *See* Leah Litman, *The New Substantive Due Process*, 103 Tex. L. Rev. 565, 567 (2025).

[10] *See* Madiba Dennie, The Originalism Trap: How Extremists Stole the Constitution and How We the People Can Take it Back 4–5 (2024).

[11] *See, e.g.*, Dep't of State v. Muñoz, 602 U.S. 899, 911–12 (2024). Madiba Dennie's explication of the Court's choice to elevate historical over contemporary humans is worth quoting at some length:

> Basically, the [*Dred Scott v. Sandford*] Court reasoned that it had to pick between protecting the historical choices and reputations of the Framers and protecting the human dignity of Black people. They decided that the reputational injury inflicted by acknowledging and repairing tears in our national fabric outweighed the degradation of Black lives. *Dobbs* [*v. Jackson Whole Women's Health*] engages in the same behavior by requiring that we analyze pregnant people's legal rights through the blatantly bigoted lens of the late-eighteenth and early-nineteenth centuries[.]

Dennie, *supra* note 10, at 91–92.

[12] *See Muñoz*, 602 U.S. at 910–12.

[13] I cataloged some of these efforts in a prior article. *See* Tyler Rose Clemons, *Coercive Ideology*, 83 Md. L. Rev. 1121, 1132–33 (2024).

[14] *See infra* Part I.A. Puerto Rico adopted the most stringent ban on gender-affirming medical treatment for individuals below the age of twenty-one in July 2025, less than a month after the Supreme Court upheld the constitutionality of such bans. *See* S. Baum, *Puerto Rico Enacts Most Extreme Care Ban in America, Targeting Trans People Under 21*, Erin in the Morning (July 20, 2025), https://www.erininthemorning.com/p/puerto-rico-enacts-most-extreme-care [https://perma.cc/NP6E-EMVG]; United States v. Skrmetti, 145 S. Ct. 1816, 1837 (2025).

[15] Transgender is "[a]n umbrella term for people whose gender identity and/or gender expression differs from what is typically associated with the sex they were assigned at birth." Clarke, *supra* note 7, at 897–98 (internal quotation omitted). I include "gender-nonconforming" here to recognize that not all individuals whose gender identity or expression does not conform with societal expectations identify as transgender. *See id.* at 898 & n.13; *see also* Dean Spade, *Resisting Medicine, Re/modeling Gender*, 18 Berkeley Women's L.J. 15, 25–26 (2003) (discussing discursive function of medical diagnostic criteria for "gender identity disorder"—now gender dysphoria—in constructing binary gender roles).

accessing puberty-blocking medication and other treatments[16] regardless of the wishes or feelings of their parents, doctors, or—most importantly—the children themselves. Gender-affirming care bans constitute a governmental invasion of one of the most intimate areas of a young person's existence, one that will invariably have profound and far-ranging consequences for their lives. Yet the notion that the Due Process Clause might protect the liberty of young people to make such decisions for themselves is so foreign to contemporary constitutional doctrine that few have dared suggest it.[17] Indeed, when the Supreme Court granted certiorari to decide the constitutionality of such bans in its October 2024 term, it did so only to consider whether the bans violate the Equal Protection Clause of the Fourteenth Amendment.[18]

Those bans were the catalyst for this article, and they provide the context through which I develop and examine my central claim that liberty is the right to seek joy. On the scale of decades, the claim that constitutional liberty should be tied to human happiness is quite new: It tracks the phenomenological insistence of critical legal scholars, especially some

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For clarity and conciseness, I use "transgender" or "trans" interchangeably to refer to all gender-nonconforming people unless otherwise indicated for the remainder of this article.

[16] On gender-affirming healthcare for minors generally, see Jack Turban, Free to Be: Understanding Kids & Gender Identity (2024).

[17] Advocates have argued that *parents* have a fundamental due process right to control the medical treatment their children receive. *See* Complaint at 19–20, Doe v. Thornbury, 679 F. Supp. 3d 576 (W.D. Ky. 2023) (No. 3:23-cv-230). I address the inadequacy of this argument below in Part III.

[18] *See Skrmetti*, 145 S. Ct. at 1824. The Court dodged the due process question by granting the petition of the United States as intervenor, which raised only the equal protection question, and denying the petitions of the private individuals who originally challenged the bans, which raised both the due process and equal protection questions. *See* Petition for Writ of Certiorari at I, *Skrmetti*, 145 S. Ct. 1816 (No. 23-477) (raising only the equal protection question); United States v. Skrmetti, 144 S. Ct. 2679 (2024) (granting the United States's petition); Petition for Writ of Certiorari at i, L.W. v. Skrmetti, 145 S. Ct 2844 (2025) (No. 23-477) (raising both due process and equal protection questions); *Skrmetti*, 145 S. Ct. 2844 (2025) (mem.) (denying petition); Petition for Writ of Certiorari at i, Doe v. Kentucky, 145 S. Ct. 2843 (2025) (No. 23-492) (raising both due process and equal protection questions); *Kentucky*, 145 S. Ct. 2843, 2843 (2025) (mem.) (denying petition).

In June 2025, the Supreme Court held that state bans on gender-affirming care for minors do not violate the Equal Protection Clause. *Skrmetti*, 145 S. Ct. at 1837. Specifically, the Court held that such bans classify based on age and medical condition rather than sex or transgender status; thus, the bans do not trigger heightened scrutiny. *Id.* at 1829–32. The Court further held that the bans satisfy the deferential standard of rational basis review because of the ongoing "'medical and scientific uncertainty'" about the safety and efficacy of gender-affirming medical treatments for minors. *Id.* at 1835–37 (quoting Gonzales v. Carhart, 550 U.S. 124, 163 (2007)).

A full analysis of *Skrmetti*'s panoply of legal and factual flaws exceeds the scope of this article. In any event, other scholars have ably evaluated the equal protection aspects of gender-affirming care bans. *See, e.g.*, Katie Eyer, *As-Applied Equal Protection*, 29 Harv. C.R.-C.L. L. Rev. 49 (2024) (arguing that equal protection analysis of bans requires case-by-case consideration that they usually fail); Katie Eyer, *The Limits of Anti-Classification Doctrine in U.S. v. Skrmetti,* Reg. Rev. (July 14, 2025), https://www.theregreview.org/2025/07/14/eyer-the-limits-of-anti-classification-doctrine-in-u-s-v-skrmetti/ [https://perma.cc/LY6F-PJGQ]. I fully share their conclusion that gender-affirming care bans—whether only for minors or otherwise—violate the Equal Protection Clause as well as the Due Process Clause. *See infra* note 304.

feminist[19] and critical race[20] scholars, that real people's lived experiences are legally relevant. But on the scale of human history, the claim is also very old, stretching back through the American Framers and John Locke to the Ancient Greek philosophers such as Aristotle and Epicurus.[21] It is part of a normative tradition, uncontroversial until relatively recently, which accepts human flourishing as the ultimate point of the law and the facilitation of human flourishing as the fundamental subject of legal scholarship.[22]

This article proceeds in three parts. In Part I, I show that gender transition, the process whereby transgender individuals align their bodies and external gender presentation with their internal sense of gender, is driven by endogenous, or "within the self," criteria. In other words, the only measure of the correctness of an individual's decision about gender transition is their own subjective emotional response. I contrast the endogenous process of gender transition with the *ex*ogenous process of religious conversion, the decision to conform one's conduct and choices to a set of external criteria that may diminish or totally disregard one's subjective emotional response. I conclude that the endogenous nature of gender transition belies the commonly held notion that it is a decision to change who one is instead of a decision to *become* who one is.

In Part II, I propose a new framework for substantive due process analysis, which I call the Epicurean approach, that I contend better aligns with the Framers' intentions and understandings than the current "originalist" framework. In doing so, I show how the "originalist" method, which defines

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[19] *See, e.g.*, Robin L. West, *The Difference in Women's Hedonic Lives: A Phenomenological Critique of Feminist Legal Theory*, 3 Wis. Women's L.J. 81, 142–45 (1987) ("We should aim, simply, to increase women's happiness, joy, and pleasure, and to lessen women's suffering, misery, and pain. As feminist legal critics we could employ this standard: a law is a good law if it makes our lives happier and less painful and a bad law if it makes us miserable, or stabilizes the conditions that cause our suffering."); Catharine MacKinnon, Feminism Unmodified: Discourses on Life and Law 9–10 (1988) ("If it does not track bloody footprints across your desk, it is probably not about women. Feminism, the discipline of this reality, refuses to abstract itself in order to be recognized as a real (that is, axiomatic) theory."); Kimberlé Williams Crenshaw, *Race, Reform, and Retrentchment: Transformation and Legitimation in Antidiscrimination Law*, 101 Harv. L. Rev. 1331, 1369–81 (1988) (critiquing critical legal scholars for failing to account for reality of race consciousness in maintaining hegemony); Davis, *supra* note 5, at 5 ("My argument is that family rights jurisprudence and the political discourse which it both reflects and shapes are enriched and clarified by Motivating Stories of slavery, antislavery, and Reconstruction.").

[20] *See, e.g.*, Crenshaw, *supra* note 19, at 1369–81 (critiquing critical legal scholars for failing to account for reality of race consciousness in maintaining hegemony); Davis, *supra* note 5, at 5 ("My argument is that family rights jurisprudence and the political discourse which it both reflects and shapes are enriched and clarified by Motivating Stories of slavery, antislavery, and Reconstruction."); Matsuda, *supra* note 5, at 2323–26 (labeling attention to lived experiences "outsider jurisprudence"); *see also id.* at 2323 n.17 (collecting similar sources).

[21] *See infra* Part II.A.

[22] *See* Robin West, Normative Jurisprudence: An Introduction 13–14, 31–34 (2011) (tracing the tradition to Thomas Aquinas's *Summa Theological* in the thirteenth century). This article is in part a response to Robin West's call for a progressive natural law jurisprudence that seeks to answer the question, "What is the common good that law ought to promote, or that it must promote for it to be just?" *Id.* at 34.

the liberty of the Due Process Clause based on how the Framers' generation would expect the Clause to be applied, is not actually originalist at all. Rather than a set of determinate rules, the Framers understood and intended "liberty" to be interpreted as a broad principle that would evolve to fit particular times and circumstances.[23]

I further suggest that the individual's right to choose according to their own subjective preferences, as in gender transition, provides the substantive content of that principle. John Locke defined liberty as the pursuit of happiness—a phrase that famously made it into the Declaration of Independence—and explicitly acknowledged that what makes people happy is highly subjective. Locke's writings reflect a much broader seventeenth- and eighteenth-century fascination with the teachings of Epicurus, the Ancient Greek philosopher who emphasized the fulfillment of subjective desires as the surest path to human happiness. But Epicurus shared his Greek contemporaries' understanding that not all desires lead to happiness. Rather, Epicurus sorted desires into natural ones, desires over which humans have little control and which cause pain when unfulfilled, and empty ones, those which actually cause suffering through their fulfillment. He further classified desires based on how necessary they were to fulfill a natural desire.

Epicurus' classification of desires provides a principled approach to evaluating the relative importance of liberty interests in substantive due process cases. The more natural and necessary a desire is, the more process the government must undergo before infringing upon it. I spend the remainder of Part II demonstrating the superiority of the Epicurean approach to the originalist approach, most notably through the parallel examples of *Bowers v. Hardwick*,[24] which applied an originalist approach to a claim involving same-gender sex, and *Lawrence v. Texas*,[25] which applied something close to the Epicurean approach to the same issue.

In Part III, I apply the Epicurean approach to due process I develop in Part II to state bans on gender-affirming medical care. Aligning one's external gender presentation with one's internal gender sense is a highly natural need, and using medical treatments to do so is highly necessary, especially—but by no means only—for transgender people. Because gender-affirming care bans thus function as a near-total deprivation of the natural desire for internal/external gender alignment for trans people, the Epicurean approach requires that such bans undergo considerably more than standard legislative and judicial procedures to satisfy the Due Process Clause. Finally, I show how allowing external gender presentation to be driven by internal gender sense is essential for children, who use the subjective experience of joy to

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[23] This approach is already applied in other areas of constitutional interpretation, such as in applying the Eighth Amendment's ban on cruel and unusual punishment. *See* Atkins v. Virginia, 536 U.S. 304, 311–12 (2002) (noting that the Eighth Amendment "draw[s] its meaning from evolving standards of decency" (internal quotation omitted)).

[24] 478 U.S. 186 (1986).

[25] 539 U.S. 558 (2003).

explore and develop their gender identities. At the very least, the naturalness and necessity of children's need for internal/external gender alignment suggests that age-of-majority requirements do not provide sufficient additional process to rescue otherwise unconstitutional gender-affirming care bans.

Above all, the Epicurean approach exposes the current Supreme Court's cramped definition of constitutional liberty as its own, thoroughly modern fabrication instead of the mandate of the Framers' generation. Recentering joy in substantive due process jurisprudence will not throw open the floodgates of judicial tyranny. Rather, it would move America closer to their constitutional vision. More importantly, it would create a constitutional approach to individual liberty that is sounder, saner, and ultimately kinder than the current "originalist" approach.

I. Inside Out[26]

> Kids aren't ready to make big, life-altering decisions. That's why we don't let kids get tattoos, consume alcohol, or smoke cigarettes. Kids can't even buy cough syrup over the counter. *Why would we encourage them to stop puberty, take cross-sex hormones, face potential sterility, and even prepare to permanently amputate or alter healthy body parts?*[27]

So demands the website of the Family Policy Alliance (FPA) on its website for "Help Not Harm," FPA's model legislation for banning gender-affirming care for minors.[28] As of July 2025, FPA claimed credit for twenty-five state bans and a federal executive order based on "Help Not Harm,"[29] some of which include the phrase itself in their names.[30]

FPA's rhetorical question captures one of the most popular arguments advanced by proponents of gender-affirming care bans for children: children lack the developmental capacity to make the "big, life-altering" decision

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[26] This is a reference to Inside Out (Pixar Animation Studios 2015) and Inside Out 2 (Pixar Animation Studios 2024), which inspired and clarified many of my ideas in this Part.

[27] *Help Not Harm*, Fam. Pol'y All., https://familypolicyalliance.com/help-not-harm [https://perma.cc/MM5J-TJ5D] (last visited Sep. 29, 2025). The emphasis is original—in set-apart, bright red, all-capital letters. *Id.*

[28] *Id.*

[29] *Id.*

[30] *See e.g.*, H.B. 4619, 125th Leg. (S.C. 2024) ("South Carolina's Children Deserve Help Not Harm Act"); S.B. 1138, 55th Leg., 2d Reg. Sess. (Ariz. 2022) ("Arizona's Children Deserve Help Not Harm Act"); *see also* H.B. 648, 2023 Reg. Sess. (La. 2023) ("Stop Harming Our Kids Act").

Three other states labeled their gender-affirming care bans as "Save Adolescents From Experimentation (SAFE)" acts. *See* H.B. 1570, 93d Gen. Assemb., Reg. Sess. (Ark. 2021); S.B. 49, 102d Gen. Assemb. (Mo. 2023); H.B. 68, 136th Gen. Assemb. (Ohio 2023). "SAFE" is an earlier version of "Help Not Harm," as shown by the holdover "Introducing the SAFE Act" heading on FPA's "Help Not Harm" website as I accessed (and archived) it in late July 2024. *See* Fam. Pol'y All., *supra* note 27.

to seek gender-affirming care.[31] This argument is a red herring for at least two reasons. First, gender transition is not a "big, life-altering" decision in the way that advocates—and to some extent the broader public—typically assume. Second, the primary advocates of restricting gender-affirming care for minors routinely allow children to make decisions of similar magnitude. The Family Policy Alliance was founded in 2004 by Focus on the Family,[32] an evangelical Christian organization known for its virulent opposition to LGBTQ rights,[33] which also advocates allowing children as young as four or five years old to convert to evangelical Christianity.[34]

In this Part, I develop both these points by contrasting gender transition with religious conversion. At least as understood by evangelical Christians such as FPA, religious conversion entails a commitment to align one's future words, actions, and beliefs with *exogenous*—that is, outside the self—criteria. Practicing a religion largely means that when the teachings of the chosen faith clearly conflict with personal desires or feelings, the convert chooses to follow the teachings. Religious conversion is a "transition" in the traditional sense: one is not a Christian, Buddhist, Muslim, etc., but chooses to become one.

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[31] Fam. Pol'y All., *supra* note 27; *See* L.W. *ex rel.* Williams v. Skrmetti, 83 F.4th 460, 480 (6th Cir. 2023), *cert. granted sub nom*, United States v. Skrmetti, 2024 WL 3089532 (June 24, 2024); Brandt v. Rutledge, 677 F. Supp. 3d 877, 918 (E.D. Ark. 2023), *rev'd and remanded*, Brandt v. Griffin, 147 F. 4th 867 (8th Cir. 2025) (striking down Arkansas's ban over the state's objections that "many patients will desist in their gender incongruence" or "later come to regret having received irreversible treatments" for gender dysphoria); Eknes-Tucker v. Alabama, 80 F.4th 1205, 1230–41 (11th Cir. 2023) ("[M]any minors may not be finished forming their identities and may not fully appreciate the associated risks. Moreover, Alabama's decision to draw the line at the age of nineteen sufficiently approximates the divide between individuals who warrant government protection and individuals who are better able to make decisions for themselves."); Poe *ex rel.* Poe v. Labrador, 709 F. Supp. 3d 1169, 1193 (D. Idaho 2023), *appeal dismissed*, No. 24-142, 2025 WL 1872749 (9th Cir. June 18, 2025); Doe v. Ladapo, 737 F. Supp. 3d 1240, 1283–84 (N.D. Fla. 2024), *appeal filed*, Doe v. Barsoum, No. 24-12100 (11th Cir. June 27, 2024).

Similarly, when Senator Tom Cotton and Representative Jim Banks introduced federal legislation to subject medical providers to civil liability for providing gender-affirming care to minors, both emphasized age-related incompetence concerns. *See Cotton, Colleagues Introduce Legislation to Protect Children from "Gender-Transition" Surgery*, Tom Cotton Senator for Ark. (Mar. 2, 2023), https://www.cotton.senate.gov/news/press-releases/cotton-colleagues-introduce-legislation-to-protect-children-from-gender-transition-surgery [https://perma.cc/W28B-HNZU] (referencing "young kids, who cannot even provide informed consent" and "a child too young to drive a car or get a tattoo").

[32] *About*, Fam. Pol'y All., https://familypolicyalliance.com/about-us/ [https://perma.cc/9MDZ-AGEZ] (last visited Sep. 29, 2025).

[33] While the Southern Poverty Law Center has stopped short of labeling Focus on the Family as an anti-LGBTQ hate group, they have listed the group as one of the twelve groups most responsible for anti-gay politics in America in 2005. *See A Dozen Major Groups Help Drive the Religious Right's Anti-Gay Crusade*, S. Poverty L. Ctr. (Apr. 28, 2005), https://www.splcenter.org/resources/reports/dozen-major-groups-help-drive-religious-rights-anti-gay-crusade/ [https://perma.cc/G25G-GVWX]. ("No one has spread the anti-gay gospel as widely, or with as much political impact, as James Dobson, the former child development professor and spanking enthusiast who founded Focus on the Family (FOF) in 1977.").

[34] *See infra* notes 93–97 and accompanying text.

By contrast, gender transition entails a decision to *stop* aligning one's words or actions with anything other than *endogenous*—that is, inside the self—criteria. Gender transition means that if someone else's perception of what my gender is or should be conflicts with my own internal gender sense, I choose to follow my internal gender sense. Gender transition is thus not a decision to *become* something other than oneself but rather to stop pretending to be something *other* than oneself.

This comparison clarifies that religious conversion is at least as much of a "big, life-altering decision" as gender transition. Yet the leading advocates of legally restricting gender-affirming care for minors routinely allow children to undergo religious conversion. This inconsistency exposes the push to ban gender-affirming care for minors not as a neutral child-protective measure but as a normative judgment about the validity of transgender identity and the state's role in regulating it. In so doing, it drags the constitutional analysis of such bans from the realm of the government's proper relationship to children to that of liberty more broadly.

A. From the Outside In: Religious Conversion

When I was about twelve years old, after listening to a particularly emotional sermon on Jesus's Parable of the Prodigal Son,[35] I decided to tell my parents that I was romantically and sexually attracted to boys. This was not a "coming out" experience during which I courageously asserted my queer identity and declared my intention henceforth to live accordingly.[36] It was a confession and a plea for help. As an assigned-male child of a deeply evangelical Christian family, I knew that "liking boys" was among the most sinful things I could do, an "abomination" that could separate me from God and my family for all of eternity.[37] But I could not ignore or repress the obvious orientation of the growing desires stirred up by my nascent testosterone-fueled puberty.

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[35] *See Luke* 15:11–32 (King James). As relevant here, the parable involves a man who demands his inheritance from his father early and proceeds to squander it "with riotous living." *Id.* at 15:13. Upon realizing that he was envious of the slop he was giving the pigs he was reduced to feeding in order to survive, the man returns to his father in shame. *Id.* at 15:14–19. Contrary to the man's expectations, however, his father welcomes him with open arms and throws a feast to celebrate his return. *Id.* at 15:20–24. The parable is popular among evangelical Christians as an illustration of the consequences of "riotous living" as well as God's mercy in receiving penitent souls. *See, e.g.*, Joannie DeBrito, *Hope for Parents of Prodigal Children*, Focus on the Fam. (Sep. 23, 2025), https://www.focusonthefamily.com/parenting/hope-for-parents-of-prodigal-children/ [https://perma.cc/3SCN-URYT] (defining a "prodigal child" as "a son/daughter who leaves his or her parents to do things that they do not approve of but then feels sorry and returns home" based on the parable).

[36] *See Coming Out*, LGBTQ Ctr. Univ. N.C.–Chapel Hill, https://lgbtq.unc.edu/resources/coming-out/ [https://perma.cc/E8HE-R967] (last visited Sep. 29, 2025).

[37] *See Leviticus* 18:22 (King James) ("Thou shalt not lie with mankind, as with womankind: it is an abomination.").

My parents were predictably distraught. After their initial shock subsided, my parents informed me that they would be taking me to Love in Action, a Christian ministry that claimed to help men and boys "overcome" their "same-sex attraction."[38] At least once per week for the next six weeks, my parents drove me an hour and a half each way to Memphis for therapy sessions with Bill.[39] During these sessions, Bill and I tried to uncover and work through the "cause" of my sinful attraction to boys. We mostly focused on my relationship with my father, my masturbation habits, and various events from my early childhood. Although I cannot recall anything especially inappropriate or traumatic happening during these sessions,[40] they left me deeply unsettled. After six weeks, I told my parents that the therapy had worked and that I was no longer attracted to boys. I lied. Maybe they believed me because they wanted the lie to be true. Regardless, they no longer forced me to go to Memphis to see Bill. After that, I re-closeted—to my parents, to the world at large, and on some level to myself—for the next decade.[41]

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[38] *See* Casey Sanchez, *Memphis Area Love In Action Offers Residential Program to "Cure" Homosexuality*, S. Poverty L. Ctr. (Jan. 1, 2003), https://www.splcenter.org/resources/reports/memphis-area-love-action-offers-residential-program-cure-homosexuality/ [https://perma.cc/K6H4-ETPT]. Love in Action was a prominent member of Exodus International, an umbrella organization for "ex-gay" or "conversion therapy" Christian organizations that claimed 150 member organizations in 17 countries during its heyday in the early 2000s. *See id.*

"Conversion therapy is an umbrella term to describe a multitude of practices and methods to change or suppress an individual's sexuality or gender identity." Ilias Trispiotis & Craig Purshouse, *'Conversion Therapy' As Degrading Treatment*, 42 Oxford J. Legal Studs. 104, 108 (2022) (internal quotation omitted). About seven percent of queer Americans have undergone some form of conversion therapy; eighty percent of us received it from a religious leader. John R. Blosnich, Emmett R. Henderson, Robert W. S. Coulter, Jeremy T. Goldbach & Ilan H. Meyer, *Sexual Orientation Change Efforts, Adverse Childhood Experiences, and Suicide Ideation and Attempt Among Sexual Minority Adults, United States, 2016–2018*, 110 Am. J. Pub. Health 1024, 1027, 1029 (2020).

Love in Action and its long-time leader, John Smid, were also closely affiliated with Focus on the Family, the evangelical organization that founded the lobbying organization responsible for most gender-affirming care bans. *See* Sanchez, *supra*; *see also* Fam. Pol'y All., *supra* note 27. Both Exodus and Love in Action are now defunct, and Smid lives openly as a gay man who advocates for the cessation of conversion therapy. *See* John Smid, *Former 'Ex-Gay' Leader: These Programs Are Harmful and Don't Work,* Advocate (Jan. 16, 2019, 9:43 AM), https://www.advocate.com/commentary/2019/1/16/former-ex-gay-leader-these-programs-are-harmful-and-dont-work [https://perma.cc/6YGF-2XMH].

[39] Love in Action was most well-known for its long-term residential program. *See* Sanchez, *supra* note 38. I may have been too young to participate in such a program at that time. I do recall that Bill pressured my parents to make me participate in group therapy sessions with other boys "experiencing same-sex attraction," but they persistently refused.

[40] A fact for which I am both lucky and grateful. Some forms of conversion therapy include sexual assault, beatings, forced medication, or shock treatment as "corrective" measures. *See* Trispiotis & Purshouse, *supra* note 38, at 108.

[41] I re-came out to my parents as a gay man when I was 22. Time may not heal all wounds, but it does heal some. I came out to my parents yet again as a trans woman when I was 31. We now enjoy a loving and healthy relationship: They respect my sexuality and gender identity, and I respect their faith.

My experience with conversion therapy is an extreme example of the way that evangelical Christians,[42] such as those behind the gender-affirming care bans for minors,[43] view the nature of religious conversion. For such individuals, religious conversion is a commitment to conform one's future choices—one's words, actions, and in some cases even one's thoughts and feelings[44]—to a set of external criteria prescribed by its doctrines.[45] When personal desires, feelings, or beliefs conflict with religious doctrine, the true convert chooses according to doctrine rather than personal desire.[46]

Religious conversion thus consists of a decision to subordinate one's internal preferences to criteria that are *exogenous*—that is, located outside

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[42] *Evangelicalism* has become a hotly contested term. *See* Frances Fitzgerald, The Evangelicals: The Struggle to Shape America 2–3 (2017). At its broadest and perhaps least polarizing, it "includes any Christian traditional enough to affirm the basic beliefs of the old nineteenth-century evangelical consensus: the Reformation doctrine of the final authority of the Bible, the real historical character of God's saving work recorded in Scripture, salvation to eternal life based on the redemptive work of Christ, the importance of evangelism and missions, and the importance of a spiritually transformed life." *Id.* (quoting George Marsden, Understanding Fundamentalism and Evangelicalism 4–5 (1991)).

Evangelicalism, a religious framework, is analytically distinct from *Christian nationalism*, which is "a *cultural* framework . . . that idealizes and advocates a fusion of Christianity with American civic life." Andrew L. Whitehead & Samuel L. Perry, Taking America Back for God: Christian Nationalism in the United States 10, 20 (2020) (emphasis added). That said, there is considerable overlap between evangelicals and Christian nationalists. *Id.* at 20 (noting that roughly half of evangelicals "embrace Christian nationalism to some degree").

Focus on the Family, the parent organization of the Family Policy Alliance, is both evangelical and Christian nationalist, as indeed its advocacy for legally banning gender-affirming care for minors suggests. *See Understanding the Meaning of the Word "Evangelical,"* Focus on the Family, https://www.focusonthefamily.com/family-qa/understanding-the-meaning-of-the-word-evangelical/ [https://perma.cc/4K3G-ZMKL] (last visited July 15, 2025) (noting that Focus on the Family "identifies itself as an *evangelical* Christian organization" (emphasis original)); Whitehead & Perry, *supra*, at 125 (listing Focus on the Family as a Christian nationalist organization that arose to defend the "centrality of the nuclear (heterosexual, patriarchal) family").

[43] *See supra* notes 27, 32–33 and accompanying text.

[44] *See, e.g.*, *Mark* 12:29–31 (quoting *Deuteronomy* 6:4–5) (New International) ("'The most important [commandment],' answered Jesus, 'is . . . Love the Lord your God with all your heart and with all your soul and with all your mind and with all your strength. The second is this: Love your neighbor as yourself.'"); *Matthew* 5:27–28 (New International) ("You have heard that it was said, 'You shall not commit adultery.' But I tell you that anyone who looks at a woman lustfully has already committed adultery with her in his heart.").

[45] *See* Anne Sofie Roald, *The Conversion Process in Stages: New Muslims in the Twenty-First Century*, 23 Islam & Christian-Muslim Relations 347, 348 (2012) (discussing the advice of a Catholic priest for new converts to avoid drifting away from the faith after their initial zeal wears off by "submit[ting] to the commands of the Church and fulfill[ing] his or her obligations to the Church, and thereby reach the third and last stage, which is that of 'mature' religiosity").

[46] *See, e.g.*, Glen Stanton, *10 Things Everyone Should Know About a Christian View of Homosexuality,* Focus on the Family (Apr. 8, 2024), https://www.focusonthefamily.com/faith/10-things-everyone-should-know-about-a-christian-view-of-homosexuality/ [https://perma.cc/D2E5-3L74] ("One of the marks of a Christian is his or her desire to be obedient to Christ's teaching . . . . The scriptures define and change us, not the other way around . . . . Christianity requires that we each subjugate our sexual (and many other) desires to our faith commitment").

the self.[47] That is because there is a definitional association between the category of "Christian" and the behavior of its members: For evangelicals, being a Christian *means* engaging in certain behaviors and abstaining from others.[48] In my case, for example, what mattered was that the Bible taught that homosexuality was an abomination.[49] Both the strength of my attraction to boys and the suffering I endured by suppressing that attraction were ultimately irrelevant. Being a good Christian meant subordinating

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[47] *See e.g.*, *Exogenous*, Dictionary.com, https://www.dictionary.com/browse/exogenous [https://perma.cc/VBQ2-D5SK] (last visited June 15, 2025) (defining *exogenous* as "originating from outside; derived externally"); *cf.* Patrick L. Mason, *Identity, Markets, and Persistent Racial Inequality*, 32 Rev. Black Pol. Econ. 13, 25 (adapting the terms *exogenous* and *endogenous* to refer to a person's externally perceived race versus their internally felt race, respectively).

Admittedly, at least under ideal circumstances, the initial decision to convert stems from an internal resonance between the religion's tenets and the convert's personal conscience. *See* Martha Nussbaum, Liberty of Conscience: In Defense of America's Tradition of Religious Equality 19–20 (2008). But while the memory of the subjective sense of rightness that accompanied conversion may motivate the convert to persist in practicing the faith, such feelings do not serve as the primary guide for the adherent's conduct.

[48] *See LGBT Issues and the Church: Problems with a "Gay Christian" Identity*, Focus on the Family, https://www.focusonthefamily.com/family-qa/homosexuality-and-salvation/ [https://perma.cc/38DL-AVLV] (last visited July 21, 2025) [hereinafter *Problems with a "Gay Christian" Identity*] ("It's unbiblical and disconnected from Church history—not to mention nonsensical—to call oneself a 'gay Christian.'"); Stanton, *supra* note 46; Fitzgerald, *supra* note 42, at 54–55 ("[T]he Bible was an infallible guide in every situation, and the church taught what was written in it. Coming into contact with people who read the Bible differently, [evangelical] southerners . . . concluded that those others were not Christians."); Trent A. Rogers, God and the Idols: Representations of God in I Corinthians 8–10 156–57 (2016) ("When a particular [early Christian] author (or community) designated something as idolatrous, he forbad the practice and also defined the faithful within the community as those who did not engage in that particular action.").

Evangelical Christianity is not the only religion that views conversion this way. *See* Roald, *supra* note 45 at, 348–51 (discussing similar themes in Islam and Catholicism). But not all religions do so. *See, e.g.*, Philip D. Kennson, *What's In a Name? A Brief Introduction to the "Spiritual But Not Religious*," 30 Liturgy 3, 5 (2013) (discussing "the rhetorical divorce of spirituality from religion [as] revealed in how the spiritual has come to be associated in the popular imagination with the largely individual quest for—and expression of—transcendent experiences and meaning, while the religious has become narrowly defined in terms of more formal institutional structures, rituals, and theological dogma.").

I focus on evangelical Christianity in this section for two reasons. First, it is the faith tradition in which I was raised and thus am most familiar with. Second, it is the religion claimed by the leading proponents of legally banning gender-affirming care for minors. *See supra* note 27, 32–33 and accompanying text (noting that the Family Policy Alliance, the author of the "Help Not Harm" model legislation for gender-affirming care bans, is an offshoot of evangelical Christian organization Focus on the Family). Regardless of how broadly the exogenous model of religious conversion applies, its hegemony in the evangelical Christian context exposes the "big, life-altering decision" justification for gender-affirming care bans as a red herring. *See infra* Part I.C.

[49] *See supra* note 37. Reconciling my faith with my queer identity was a vital early step in my journey toward self-acceptance. Discovering alternative interpretations of biblical passages used to condemn homosexuality helped tremendously. *See generally* Jack Rogers, Jesus, the Bible, and Homosexuality: Explode the Myths, Heal the Church (rev. ed. 2009) (describing the history of anti-queer interpretations of the Bible and developing a pro-queer exigesis); Mel White, Stranger at the Gate: To Be Gay and Christian in America (1995) (providing a personal journey of one gay pastor's journey from closeted fundamentalism to reconciling his faith and sexuality).

my personal feelings and enduring that suffering in order to conform to Christian teachings.[50]

For another, less personal example, consider one of the first major controversies in the early Christian church: the permissibility of eating meat sacrificed to pagan idols.[51] When Paul addressed the controversy in his first letter to the Christians in Corinth, his readers' subjective preferences about eating sacrificial meat played no part in his argument.[52] Regardless of their differences of opinion on the subject, early Christians agreed that there was a single, objectively correct answer: Either eating sacrificial meat was permissible or it was not.[53] Moreover, all agreed that practicing Christianity properly entailed conforming to that answer regardless of an individual Christian's subjective preferences or opinions about eating sacrificial meat.[54] If eating sacrificial meat were deemed sinful and a Corinthian Christian passed a street vendor selling shanks from a lamb sacrificed to Aphrodite,[55] the Christian would be expected to forego purchasing some, no matter how hungry she might be or how good the meat might smell.

This exogenous understanding of religious conversion is further underscored by the various "disciplines" in which believers engage in order to bring their often unruly[56] personal desires and feelings in line with doctrinally appropriate behavior.[57] These disciplines may include studying primary and

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[50] A point underscored by the fact that some gay Christians choose to be celibate for life. *See generally* Mark A. Yarhouse & Olya Zaporozhets, Costly Obedience: What We Can Learn from the Celibate Gay Christian Community (2019).

[51] Sacrificing animals to various deities was a common practice in first-century C.E. Corinth, whose location made it a vital, cosmopolitan trading port within the Roman Empire. *See* Rogers, *supra* note 48, at 8–10, 158–59. Leftover meat from such sacrifices was commonly sold to generate revenue for temples or served at community festivals. *Id.* at 8–10 (discussing Wendell Lee Willis, Idol Meat in Corinth: The Pauline Argument in I Corinthians 8 and 10 (1985)).

[52] *See generally* I *Corinthians* 8–10 (New International).

[53] *See* I *Corinthians* 8:2 (New International) ("Those who think they know something do not yet know as they ought to know."); Rogers, *supra* note 48, at 156–57.

[54] *See* Rogers, *supra* note 48, at 42–44 ("Questions about idolatry were questions of what a person could and could not do."). Paul's own answer to the sacrificial meat question was so confusing and complex that some scholars have suggested that the relevant portions of I Corinthians must actually consist of passages from multiple separate letters. *See, e.g.*, *id.* at 2–7 (summarizing such "partition" theories).

[55] Corinth was the center of the worship of Aphrodite (Romanized as Venus). *Aphrodite*, Brittanica.com, https://www.britannica.com/topic/Aphrodite-Greek-mythology [https://perma.cc/CY7A-QEJ5] (last visited Dec. 22, 2025). A massive temple to her dominated the city's acropolis. *E.g.*, Pausanias, Description of Greece 2.5.1 (W.H.S. Jones trans., 1918) (2d Century A.D.), https://www.theoi.com/Text/Pausanias2A.html#1 [https://perma.cc/TZZ8-QJCU].

[56] A struggle with which even Paul identified. *See Romans* 7:14–25 (New International) ("I do not understand what I do. For what I want to do I do not do, but what I hate I do. And if I do what I do not want to do, I agree that the law is good . . . . For I have the desire to do what is good, but I cannot carry it out. For I do not do the good I want to do, but the evil I do not want to do—this I keep on doing . . . . What a wretched man I am!").

[57] *See* Richard J. Foster, Celebration of Discipline: The Path to Spiritual Growth xvi (20th anniv. ed. 2018) ("[T]he Spiritual Disciplines are actions of body and heart and mind and soul that we actually *do*. Not just admire. Not just study. Not just debate. But *practice*.") (emphasis in original).

secondary religious texts,[58] submitting to discipleship by more experienced members of the faith,[59] or setting up accountability systems to identify and correct behavioral deviations.[60] As the term "discipline" suggests, the point of these religious practices is to impose an external order upon believers' behavior and ultimately upon their internal selves.[61] In the words of evangelical minister Richard Foster,[62] "The purpose of the Spiritual Disciplines is the total transformation of the person."[63]

So characterized, religious conversion is a "transition" in the traditional sense—that is, a shift from one distinct condition to a different, equally distinct condition.[64] For example, I recently transitioned from my previous job at NYU School of Law to my current job at St. John's University School of Law. On May 31, I was an employee of NYU; on June 1, I was no longer an employee of NYU and instead became an employee of St. John's. I engage in a similar transition when I cross the line from my home state of Mississippi into Louisiana: One instant I am physically present in one state and the next I am in the other. In the same manner, a person is something other than a Christian in one moment but becomes a Christian the next.

In such traditional transitions, the existence of the transitioned-to condition depends upon exogenous criteria, independent of subjective feelings or opinions. Being a law professor at St. John's *means* that I perform the duties of a St. John's law professor. If I do not show up to teach my Constitutional Law course because I am tired or because I would prefer to teach the class at a different law school, I will soon transition to yet a third distinct condition: unemployment. My acceptance of the job offer at St. John's signaled my decision to accept these conditions. In the same manner, conversion to evangelical Christianity is a decision to accept "the total transformation of [one's] person" according to the doctrines of the faith.[65]

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[58] Foster calls this "the discipline of study." *Id.* at 62–76.

[59] Foster calls this "the discipline of guidance." *Id.* at 175–89.

[60] Foster calls this "the discipline of confession." *Id.* at 143–57.

[61] *See Discipline*, Merriam-Wesbter.com, https://www.merriam-webster.com/dictionary/discipline#dictionary-entry-1 [https://perma.cc/N4CZ-5RE3] (last visited June 15, 2025) (defining *discipline* both as "a rule or system of rules governing conduct or activity" and "to impose order upon").

[62] I first encountered Richard Foster's *Celebration of Discipline* when Bill, my counselor at Love in Action, gave me a copy and instructed me to read it. *See supra* notes 39–40 and accompanying text. Foster is affiliated with the Evangelical Friends Church International, an evangelical branch of Quakers distinguished by its emphasis on the Bible as the ultimate authority. *See Statement of Faith*, Evangelical Friends Church International, https://efc-international.org/statement-of-faith/ [https://perma.cc/GN2Z-FKZR] (last visited July 14, 2025); *About Richard J. Foster*, Renovaré, https://renovare.org/people/richard-foster/bio [https://perma.cc/66K8-ZEAN] (last visited July 14, 2025).

[63] Foster, *supra* note 57, at 62; *cf. Judges* 17:6; 21:25 (New International) (attributing the violence and chaos plaguing the nascent nation of Israel to the fact that "everyone did as they saw fit").

[64] *See, e.g.*, *Transition*, Merriam-Webster.com, https://www.merriam-webster.com/dictionary/discipline#dictionary-entry-1 [https://perma.cc/9BSE-G5E4] (last visited June 15, 2025) ("to make a change or shift from one state, subject, place, etc. to another").

[65] *See* Foster, *supra* note 57, at 62.

To call oneself a "Christian" without such an acceptance would be as absurd to evangelicals as my declaring that I was still in Mississippi while standing in the heart of New Orleans.

B. From the Inside Out: Gender Transition

Unlike religious conversion, gender transition is *not* a "transition" in the traditional sense. Transgender people are never cisgender and thus do not transition from being cis to being trans[66] in the way that a religious convert transitions from being not-a-Christian to being a Christian. Rather, gender transition is the decision to align one's external gender presentation with one's internal gender identity. Thus, whereas the point of religious conversion is "the total transformation of the [internal] person" according to external criteria,[67] the point of gender transition is the transformation of *external* circumstances to match internal preferences. The appropriate comparison for gender transition is not to changing jobs or crossing state lines but to removing a mask or correcting a lie.

Put another way, gender transition references primarily *endogenous*—that is, within the self[68]—decision-making criteria. This is because gender identity is determined not by external factors but rather by "one's psychological understanding of oneself in terms of masculinity, femininity, a combination of both, and sometimes neither."[69] An individual who makes a

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[66] *See* Natalie Reed, *The Null HypotheCis*, Freethought Blogs: Sincerely, Natalie Reed (Apr. 17, 2012), https://freethoughtblogs.com/natalie reed/2012/04/17/the-null-hypothecis/ [https://perma.cc/ZR62-VKPL] (discussing the logical fallacy of treating cisgender identity as the null hypothesis).

[67] *See* Foster, *supra* note 57, at 62.

[68] *Endogenous*, Merriam-Webster.com, https://www.merriam-webster.com/dictionary/discipline#dictionary-entry-1 [https://perma.cc/9BSE-G5E4] (last visited June 15, 2025) (defining *endogenous* as "proceeding from within; derived internally"); *cf.* Mason, *supra* note 47, at 25.

[69] Turban, *supra* note 16, at 38. Turban calls this psychological understanding "one's *transcendent* sense of gender." *Id.* (emphasis in original). Transgender feminist and biologist Dr. Julia Serano describes a similar phenomenon, which she calls "subconscious sex." Julia Serano, Whipping Girl: A Transsexual Woman on Sexism and the Scapegoating of Femininity 86–90 (2007).

I use "internal gender sense" to refer to this subjective sense of gender. Importantly, internal gender sense is not inherently binary (male/female). *See* Clarke, *supra* note 7, at 897–98; Am. Psych. Ass'n, *Guidelines for Psychological Practice with Transgender and Gender Nonconforming People*, 70 Am. Psych. 832, 834–35 (2015). Some people's internal gender sense is not static, Turban, *supra* note 16, at 168, and some have no internal gender sense at all. *See Inqueery: What Does It Mean to Be Agender?*, them (Aug. 7, 2018), https://www.them.us/story/inqueery-agender [https://perma.cc/YR3V-B767]. My argument does not ultimately depend upon the existence of this internal gender sense, since my points would apply equally to a collection of unaffiliated subjective preferences that society codes as gendered.

Finally, it bears noting that sociocultural context regarding specific manifestations and expressions of gender plays a significant if not yet fully understood role in shaping internal gender sense. *See* Deborah L. Best & John E. Williams, *Gender and Culture*, in The Handbook of Culture and Psychology 195, 202–03 (David Matsumoto 1st ed., 2001); *see also* James W. Messerschmidt, Flesh and Blood: Adolescent Gender Diversity and Violence 37

choice that aligns with their internal gender sense experiences a sensation known as "gender euphoria."[70] Gender euphoria broadly refers to a spike of positive emotions caused by "a joyful feeling of rightness in one's gender/sex."[71] Common experiences that cause gender euphoria include feminizing or masculinizing one's body, wearing gender-affirming clothes or makeup, being called by new (correct) names or pronouns, and—perhaps above all—being perceived as the correct gender by others.[72] Gender euphoria may manifest as a rush of excitement, an outburst of giddy laughter, a surge in confidence, or a quiet sense of contentedness.[73] The warm flush of exuberance I experienced when I tried on a dress for the first time was an experience of gender euphoria.[74]

An individual's internal gender sense, discovered through experiences of gender euphoria, provides the principal reference point for gender transition. Thus, unlike with religion,[75] there is no definitional association between a particular gender identity and the preferences or behavior of the individuals who happen to share it. As Dorothy Sayers put it in 1938: "It is no good saying: 'You are a little girl and therefore you ought to like dolls'; if the answer is, 'But I don't,' there is no more to be said."[76]

(2004) ("Individuals negotiate the embodied masculine and feminine practices that are prevalent and attributed as such in their particular milieu(s) and, in so doing, commit themselves to a *fundamental* project of masculine or feminine attribution—'I'm a boy' or 'I'm a girl.' This *fundamental gender project* is the primary gendered mode by which individuals choose to relate to the world and to express oneself in it.") (emphasis in original).

[70] *See* Turban, *supra* note 16, at 15. The term *gender euphoria* appears to have originated within online trans communities as a counterpart to the more established medical term *gender dysphoria*. *See* Will J. Beischel, Stéphanie Gauvin & Sari van Anders, *"A Shiny Little Gender Breakthrough": Community Understandings of Gender Euphoria*, 23 Int'l J. Transgender Health 274, 274–276, 284–85 (2022).

[71] Beischel, *supra* note 70, at 286 ("Seemingly central to these positive emotions are a constellation of feelings related to authenticity, rightness, or being 'at home.'"). For some people, particularly those near the beginning of their gender transition process, gender euphoria is sometimes followed by a sudden backlash of negative emotions such as shame, fear, or even despair. This may be because the experience of gender euphoria confirms the individual's transness—a scary fact for many—or because it highlights the gender *dysphoria* the individual experiences in other areas of their life. These negative emotions do not undercut or alter the sensation of gender euphoria, and they are most effectively resolved by continuing to move toward the individual's authentic gender expression with mindfulness and support. *See id.* at 282.

[72] *Id.* at 282–84.

[73] *Id.* at 281–82; *cf.* Elliot Page, *The Euphoria of Elliot Page*, Esquire (June 1, 2022, 6:00 AM), https://www.esquire.com/entertainment/tv/a40011366/elliot-page-umbrella-academy-euphoria/ [https://perma.cc/SQD4-94NP] ("For me, euphoria is simply the act of waking up, making my coffee, and sitting down with a book and being able to read.").

[74] *See supra* text accompanying notes 1–4.

[75] *See supra* notes 42–45 and accompanying text.

[76] Dorothy Sayers, *Are Women Human? Address Given to a Women's Society, 1938*, 8 Logos 165, 173 (2005).

Compare my experience with conversion therapy[77] to my experience of trying on a dress for the first time.[78] In the former, I experienced an internal desire, my attraction to boys, that I suppressed due to a purely external source: what I was told was required to be a good Christian. Choosing to follow my desire by acting on my attraction to boys would have disqualified me from being a Christian, at least to my family and the vast majority of the other people who made up my world at the time.[79] By contrast, when I tried on a dress, my experience was driven purely by my desire to do so and the joy I felt as a result. I did not decide to try on a dress because I was a woman and "good women wear dresses." Nor would anyone seriously argue that a decision never to wear a dress again—say if my trying on a dress had sparked revulsion or discomfort rather than joy—would disqualify me from being a woman.[80]

None of this is to deny the reality or significance of assigned gender as a social construct.[81] As I discuss further in Part III, society assigns every individual to a gender at the moment of birth (or before),[82] proceeds to make all sorts of assumptions about an individual's preferences and behavior based on assigned gender,[83] and frequently punishes individuals for failing to conform to those assumptions.[84] Unsurprisingly, individuals can and often do choose to conform to assumptions about their assigned gender rather than their internal gender sense.[85] Transgender people may also make decisions based on societal assumptions about masculinity and femininity rather than their internal gender sense.[86] But assigned gender is analytically distinct from internal gender sense and therefore does not determine gender identity.

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[77] *See supra* notes 1–2 and accompanying text.

[78] *See supra* notes 35–41 and accompanying text.

[79] *See Problems with a "Gay Christian" Identity*, *supra* note 48 (describing attempts to identify as both gay and Christian "nonsensical").

[80] Which is not to deny that there are many who would argue that I am not a good woman or a woman at all. But their reasons generally concern my biology rather than my attire.

[81] *See, e.g.*, Alison Stone, *Essentialism and Anti-Essentialism in Feminist Philosophy*, 1 J. Moral Phil. 135, 139 (2004).

[82] *See* Beverly I. Fagot & Mary D. Leinbach, *Gender-Role Development in Young Children: From Discrimination to Labeling*, 13 Dev. Rev. 205, 205 (1993).

[83] Commonly known as "gender stereotypes." *See, e.g.*, Price Waterhouse v. Hopkins, 490 U.S. 228, 250–51 (1989) (holding that "sex stereotyping" is a prohibited form of sex discrimination).

[84] *See id.* at 234–36 (describing denial of promotion for woman accountant for failing to act according to feminine stereotypes); Kate Manne, Down Girl: The Logic of Misogyny 62–64 (2018) (defining *misogyny* as the punishment of women for failing to perform according to patriarchal expectations).

[85] *See* Carol Lynn Martin, Lisa Eisenbud, & Hilary Rose, *Children's Gender-Based Reasoning About Toys*, 66 Child Dev. 1453, 1465 (1995) (demonstrating a "hot potato" effect in which children quickly discarded toys they previously found attractive upon learning that the toy was associated with the "other" gender).

[86] Often in order to "pass," or be perceived by others as a cisgender member of one's binary gender category, as a means of feeling safe or valid. *See Passing*, TransHub, https://www.transhub.org.au/passing [https://perma.cc/UVP9-GUK5] (last visited July 16, 2025).

Indeed, the very point of gender transition is to stop making choices based on societal assumptions about one's assigned gender and to begin choosing instead based on internal gender sense. An important moment in every transgender person's journey is the realization that nothing we can do or not do, be or not be, can disqualify us from belonging to the gender that aligns with our internal gender sense. Speaking with a deeper voice, shaving my face, or having certain body parts do not make me "not a woman" in the same way that wearing pants or being handy around the house does not make a cisgender woman "not a woman." I am a woman who happens to do and have those things. My "womanness" is endogenous, a priori, and unassailable.

C. Exposing the Double Standard

When I was around eight years old, my parents took me to a presentation of "Heaven's Gates & Hell's Flames"[87] at one of the larger Southern Baptist churches in our small Mississippi town. For the next forty-five minutes, I watched as a series of individuals "died" and their souls received eternal judgment. Some were welcomed into heaven with hugs from angels and a beaming actor depicting Jesus. Others were dragged into hell, literally kicking and screaming, by demons under the command of an actor wearing a grotesque mask meant to depict Satan. During these scenes, Jesus and the angels turn their backs as Satan cackled at the damned soul's screams and desperate pleas for mercy. This happened even to "good" people who had never deliberately harmed others or committed any crime. The only way to avoid such a horrific fate was to have your name written in the "Lamb's Book of Life," which meant that you had "accepted Jesus as your personal savior" and committed your life to following Christian teachings.

I was terrified. So when the play ended with an invitation to make such a commitment, I patted my mother's hand and told her that I wanted to do so.[88] After the music finished, those of us who raised our hands—many of them also children accompanied by a parent—were ushered into the back room of the church to speak with one of the play's "counselors." Mine led me in a version of the "Sinner's Prayer,"[89] gave me a card with some information on it, and encouraged me to be baptized and to join a church group

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[87] The traveling play, which is still performed today, has been produced by Reality Outreach Ministries for forty years in one hundred countries. The organization claims that the play has induced "millions of people [to give] their lives to Jesus!" *What is Your Outreach Plan This Year?,* Reality Outreach Ministries, https://www.realityoutreach.org [https://perma.cc/7HEY-UESF] (last visited July 9, 2025).

[88] I had actually already made such a commitment and been baptized, when I was perhaps six years old, following my church's annual summer Vacation Bible School. Such was my terror of eternal damnation that I wanted to be absolutely sure. My church's pastor at the time assured me that no harm could come of "getting dunked twice."

[89] *See, e.g.*, *What Is the Sinner's Prayer?*, Harvest.org, https://harvest.org/know-god-article/what-is-the-sinners-prayer/ [https://perma.cc/ME6E-2QNH] (last visited July 9, 2025).

for discipleship. No one asked me how much I knew about Christianity or how long I had been considering conversion. No one asked me whether I had discussed conversion with my parents or even whether they approved of my decision. At the age of eight, I was allowed to dispose of my eternal soul with less time and forethought than I typically devoted to deciding what to ask my parents to get me for Christmas.

As my experience with conversion therapy four years later demonstrates,[90] that decision would have major consequences for my life on earth as well. Conversion therapy has been clinically linked to all sorts of adverse mental health outcomes, including a significantly increased risk of thinking about, planning, or attempting suicide.[91] Despite my own experience with conversion therapy lasting only a few weeks, I have spent thousands of dollars and dozens of hours in multiple forms of therapy attempting to heal from the scars it left on me. And those scars still hurt—as evidenced by the fact that the two paragraphs above describing my experience were far and away the most painful thing I have ever written in a law review article. If only healing those scars was as easy as nursing a hangover or removing a regrettable tattoo.[92]

Yet despite the tremendous significance with which evangelical Christians imbue the conversion decision, it is commonplace within the evangelical community to allow[93] young children to make such decisions with minimal forethought, oversight, or safeguards. For example, Focus on the Family, the parent organization of the Family Policy Alliance,[94] has a page on its website dedicated to helping parents "lead[their] children to the Savior."[95] Its author begins by noting that her "children were 4 and 5 when they believed in Jesus for salvation."[96] In addition to helping children understand that they are inherently sinful and that Jesus died for their sins, the author encourages parents to "to talk about God's commands with their children at all times of the day, both at home and while they are out."[97]

Compare this to the procedural hurdles even adolescents must clear to gain access to gender-affirming medical care. At minimum, an adolescent[98]

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[90] *See supra* notes 35–41 and accompanying text.

[91] Blosnich et al., s*upra* note 38, at 1027–28 & tbl.4.

[92] *Cf. supra* note 27 and accompanying text (noting that "we don't let kids get tattoos [or] consume alcohol").

[93] As my experience shows, "allow" is often an understatement. In many families, churches, and communities, "encourage," "pressure," or even "demand" would be more appropriate verbs.

[94] The lobbying group behind most state bans on gender-affirming care for minors. *See supra* note 27 and accompanying text.

[95] Kelly J. Stigliano, *Leading Your Children to the Savior,* Focus On The Family (Sep. 1, 2017), https://www.focusonthefamily.com/parenting/leading-your-children-to-the-savior/ [https://perma.cc/S7DE-X7XX].

[96] *Id.*

[97] *Id.*

[98] The use of this term instead of "children" or "minors" is deliberate. The most recent version of the *Standards of Care for Health of Transgender and Gender Diverse People* (formerly the

may receive puberty-suppressing hormones only from a specially trained physician who has conducted a "comprehensive biopsychosocial assessment" of the adolescent and clinically diagnosed them with "gender incongruence" that is "marked and sustained over time."[99] The doctor must also educate the adolescent about all the potential consequences of gender-affirming care,[100] verify that the adolescent is mentally stable and mature enough to give informed consent,[101] and involve the adolescent's parents so long as doing so would not be harmful to the adolescent.[102] The adolescent's desire to obtain gender-affirming care drives the process from start to finish; should they decide they no longer wish to take puberty suppressants, no one will accuse them of "not really" being a member of their gender identity.[103] Finally, research suggests that the physical effects of puberty suppressants

World Professional Association for Transgender Health, or WPATH, Standards) restricts access to any form of gender-affirming medical treatment, including hormone therapy, to individuals who have reached Tanner Stage 2. *See* Eli Coleman, Asa E. Radix, Walter P. Bouman, George R. Brown, Annelou L. C. de Vries, Madeline B. Deutsch, Randi Ettner, Lin Fraser, Michael Goodman, Jamison Green, Adrienne B. Hancock, Thomas W. Johnson, Dan H. Karasic, Gail A. Knudso, Scott F. Leibowitz, Heino F. L. Meyer-Bahlburg, Stan J. Monstrey, Joz Motmans, Leena Nahata, Timo O. Nieder, Sari L. Reisner, Christina Richard, Loren S. Schechter, Vin Tangpricha, Amy C. Tishelman, Michael A. A. Van Trotsenburg, Sam Winter, Kelly Ducheny, Noah J. Adam, Tamara M. Adrián, Luke R. Allen, David Azul, Harjit Bagga, Koray Başar, David S. Bathor, Javier J. Belinky, Dianne R. Berg, Jens U. Berli, Rachel O. Bluebond-Langner, Mark-Braum Bouma, Marci L. Bowers, Pierre J.Brassard, Jack Byrne, Luis Capitán, Crystal-Jade Cargill, Jeremi M. Carswell, Sand C. Chang, Gaya Chelvakuma, Trevor Corneil, Katherine B. Dalke, Michael G. DeCuypere, Elma de Vries, Michael Den Heijer, Aaron H. Devor, Cecilia Dhejne, Alexus D'Marco, E. Kale Edmiston, Laura Edwards-Leeper, Randall Ehrbar, Dianne Ehrensaft, Justus Eisfeld, Els Elaut, Laura Erickson-Schroth, Jamie L. Feldman, Alessandra D. Fisher, Maurice M. Garcia, Luk Gijs, Susie E. Green, Blaine P. Hall, Teresa L. D. Hardy, Michael S. Irwig, Laura A. Jacobs, Aron C. Janssen, Katherine Johnson, Daniel T. Klink, Baudewijntje P. C. Kreukels, Laura E. Kuper, Elizabeth J. Kvach, Matthew A. Malouf, Ren Massey, Tom Mazur, Chris McLachlan, Shane D. Morrison, Scott W. Mosser, Paula M. Neira, Ulrika Nygren, Jennifer M. Oates, Juno Obedin-Maliver, Georgios Pagkalos, Jude Patton, Nittaya Phanuphak, Katherine Rachlin, Terry Reed, G. Nic Rider, Jiska Ristori, Sally Robbins-Cherry, Stephanie A. Roberts, Kenny A.Rodriguez-Wallberg, Stephen M. Rosenthal, Kirill Sabir, Joshua D. Safer, Ayden I. Scheim, Leighton J. Seal, Tshegofatso J. Sehoole, Katherine Spencer, Colton St. Amand, Thomas D. Steensma, John F. Strang, Gerald B. Taylor, Kelly Tilleman, Guy G. T'Sjoen, Lida N. Vala, Norah M. Van Mello, Jaimie F. Veale, Jennifer A. Vencill, Ben Vincent, Linda M. Wesp, Michaela A. West & Jon Arcelus, *Standards of Care for Health of Transgender and Gender Diverse People, Version 8*, 23 Int'l J. Transgender Health S1, S48 (2022) (hereinafter "WPATH 8"). Tanner Stage 2 typically corresponds approximately to age 11 for assigned-female individuals and to age 11.5 for assigned-male individuals. *See* Brian Evans & Aurora Bennett, *Tanner Stages,* Univ. of Cinn., https://med.uc.edu/landing-pages/reproductive-physiology/lecture-3/tanner-stages [https://perma.cc/3CV9-GBR9] (last visited July 21, 2025).

[99] WPATH 8, *supra* note 98, at S48.

[100] Including the potential for sterility and options for preserving fertility. *Id.* at S57.

[101] *Id.* at S61–S63.

[102] *Id.* at S57–S59. To obtain any form of gender-affirming surgery, an adolescent must satisfy all these criteria *and* have undergone a full year of hormone therapy under the supervision of a doctor. *See id.* at S64–S65.

[103] *Cf. id.* at S50 (recommending that doctors "facilitate the exploration and expression of gender openly and respectfully so that no one particular identity is favored").

are almost entirely reversible[104] and that the rare cases of desistance result in little negative—and perhaps even positive—emotional effects.[105]

Against this backdrop, consider again the claim of the Family Policy Alliance that "[k]ids aren't ready to make big, life-altering decisions."[106] The contention that a teenager should not be able to receive puberty blockers from their doctor with informed consent and the support of their parents is logically inconsistent with the contention that an emotional eight year old should be allowed to convert to evangelical Christianity with practically no forethought or safeguards.

Or rather, those positions are logically inconsistent only if based on the justification that "kids aren't ready to make big, life-altering decisions." They are perfectly consistent if based instead on a normative judgment that kids should be free to "give their lives to Jesus" but not free to be trans. But if children's developmental capacity is not really the justification for denying them access to gender-affirming care, the distinguishing factor is no longer the decision-maker—that is, children versus adults—but the nature of the decision itself—that is, religious conversion versus gender transition. In other words, the debate is not about children but about freedom.

In the American tradition, which freedoms should be protected from government interference is a question of constitutional law. Religious conversion is of course explicitly protected by the First Amendment to the U.S. Constitution.[107] In the remainder of this article, I argue that the nature of gender transition qualifies it as a form of liberty that should likewise be constitutionally protected from undue governmental interference. Doing so requires excavating the Framers' understanding of liberty as the aligning of deeply personal parts of a person's life with their subjective preferences.

II. Liberty As the Pursuit of Happiness

Protecting individual rights against legislative incursion is among the most important constitutional innovations of the American Framers.[108] Against the backdrop of the British Parliament's interference with what they saw as their fundamental freedoms, the Framers marked off certain spheres of individual conduct and choices with which otherwise legitimate

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[104] *See, e.g.*, *Study Bolsters Evidence that Effects of Puberty Blockers Are Reversible*, Am. Physiological Ass'n (Apr. 5, 2024), https://www.physiology.org/detail/news/2024/04/05/study-bolsters-evidence-that-effects-of-puberty-blockers-are-reversible?SSO=Y [https://perma.cc/AFU9-EEW9].

[105] *See, e.g.*, Marie-Amélie George, *Exploring Identity*, 55 Fam. L.Q. 1, 25 (2021) (discussing recent psychological research on effects of desistance).

[106] *See supra* note 27 and accompanying text.

[107] U.S. Const. amend. I.

[108] *See* William J. Brennan, Jr., *Reason, Passion, and "The Progress of the Law"*, 10 Cardozo L. Rev. 3, 13–15 (1988).

legislative majorities could not interfere.[109] In the now-classic words of Justice Robert Jackson:

> The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.[110]

While everyone agrees that such rights exist,[111] their precise articulation spurs endless debate.[112] This is particularly true of "unenumerated rights," those without an explicit foothold in the text of the Constitution itself.[113] The most controversial of these are rights defined by the Supreme Court as part of the "liberty" protected by the Due Process Clauses of the Fifth and Fourteenth Amendments.[114] The jurisprudence of defining these rights is called "substantive due process,"[115] and it is a perennial favorite target of conservative critics of the Supreme Court—often including its own justices.[116]

In this Part, I argue that the Framers understood the principle of liberty protected by the Due Process Clauses of the Fifth and Fourteenth Amendments to be the "pursuit of happiness"—what I call the right to seek joy. I begin with current substantive due process jurisprudence, which addresses the so-called problem of excessive subjectivity by defining liberty according to the expectations of the Framers' generation. Applying Jack Balkin's concept of *framework originalism*,[117] I show how the current

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[109] *Id.*

[110] West Va. Bd. of Educ. v. Barnette, 319 U.S. 624, 638 (1943).

[111] *See, e.g.*, 303 Creative, LLC v. Elenis, 600 U.S. 570, 584–86 (2023) (quoting *Barnette*, 319 U.S. at 642).

[112] *E.g.*, Litman, *supra* note 9, at 571–75.

[113] *E.g.*, *id.* at 572–573. *But see id.* at 572–73 ("The written Constitution has some indication that there is a set of not-explicitly-spelled-out substantive rights that are protected from government interference."); Brennan, *supra* note 108, at 13 (noting the "open-ended[ness]" of other, seemingly more specific Constitutional provisions).

[114] *See* U.S. Const. amend. V, XIV § 1; Douglas NeJaime & Reva Siegel, *Addressing the* Lochner *Objection: Substantive Due Process and the Role of Courts in a Democracy*, 96 N.Y.U. L. Rev. 1902, 1903–06 (2021).

The substantive due process analysis is the same for both the Due Process Clause of the Fifth Amendment and that of the Fourteenth Amendment. *See, e.g.*, Department of State v. Muñoz, 602 U.S. 899, 909–12 (2024) (applying the rule of Washington v. Glucksberg, 521 U.S. 702, 720–721 (1997), a Fourteenth Amendment substantive due process case, to Fifth Amendment substantive due process claim). Thus, for the sake of clarity, I will use the singular "Due Process Clause" to refer to the text of both Clauses for the remainder of this section.

[115] *E.g.*, Litman, *supra* note 9, at 572.

[116] NeJaime & Siegel, *supra* note 114, at 1903–06.

[117] *See* Jack Balkin, Living Originalism 21–22 (2011).

Supreme Court's "originalist" approach toward substantive due process does not actually comport with the intention of the Framers, who used expansive words such as "liberty" to indicate broad principles of interpretation rather than determinate rules.

To flesh out the actual principle of liberty embedded in the Due Process Clause, I begin by tracing the phrase "pursuit of happiness" to its immediate antecedent in John Locke's *Essay Concerning Human Understanding* and thence to the Ancient Greek philosophers, particularly Epicurus. These sources demonstrate that the Framers' definition of "happiness" corresponded with the Greek concept of *eudaimonia*, a deeper sense of wellbeing that I call joy. In the *Essay*, Locke defined liberty as the right to make choices according to one's subjective preferences in pursuit of *eudaimonia*.

I then dive deeper into Epicurus's unique classification of subjective desires according to how natural and necessary they are, which he believed was a reliable indicator of how likely their fulfillment would lead to happiness. I suggest that the Epicurean classification system provides an objective means of assessing the relative importance of liberty interests that Framers would have understood and likely approved. Finally, I synthesize an "Epicurean approach" to substantive due process analysis according to which the government must engage in greater process to justify infringing upon more necessary means of achieving natural liberty interests. I conclude this Part by contrasting the originalist approach to the constitutionality of bans on same-gender sex in *Bowers v. Hardwick* with the more Epicurean approach to the same issue in *Lawrence v. Texas*.

A. The Irony of "Originalism"

In July 2015, less than a month after the Supreme Court ruled that the Fourteenth Amendment protects the right to same-gender marriage in *Obergefell v. Hodges*,[118] Justice Samuel Alito spoke to Bill Kristol about his opposition to the majority's decision.[119] In reaching its holding, the *Obergefell* majority explicitly rejected narrow historical understandings of "liberty" in favor of "a liberty that remains urgent in our own era."[120] Rather, the majority held, the liberty protected by the Due Process Clause "extend[s] to certain personal choices central to individual dignity and autonomy, including intimate choices that define personal identity and beliefs."[121]

Speaking to Kristol, Alito derided the majority for baselessly constitutionalizing its own "postmodern" view of liberty, which he described as

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[118] Obergefell v. Hodges, 576 U.S. 644, 675–76 (2015).

[119] *See* Samuel Alito, Associate Justice, *Samuel Alito on the Supreme Court, Recent Decisions, and His Education*, CONVERSATIONS WITH BILL KRISTOL (July 10, 2015), at 1:08:37, https://conversationswithbillkristol.org/transcript/samuel-alito-transcript/ [https://perma.cc/8RVW-JH5M] (hereinafter "Alito Interview"); *see also Obergefell*, 576 U.S. at 736–42 (Alito, J., dissenting).

[120] *Obergefell*, 576 U.S. at 671–72.

[121] *Id.* at 663.

"the freedom to define your understanding of the meaning of life."[122] "[H]ow do we determine what liberty in the 14th Amendment means?" Alito asked rhetorically.

> Liberty means different things to different people. . . . There's no limit . . . . If it's not in the text of the Constitution or it's not something that is objectively [] ascertainable, if it's just whatever I as an appointee of the Supreme Court happens to think is very important, . . . it raises questions of legitimacy[.][123]

Alito's critique of *Obergefell* rehashes a longstanding critique of substantive due process jurisprudence.[124] Every first-year law student hears the fable of *Lochner v. New York*,[125] in which the fin-de-siecle Supreme Court, controlled by callous Gilded Age plutocrats, struck down New York's maximum-hours law for bakers as violating the "liberty of contract" supposedly protected by the Due Process Clause.[126] Students further learn that Justice Oliver Wendell Holmes's dissenting view[127] became that of a majority of the Court three decades later:

> In each case the violation alleged by those attacking minimum wage regulation for women is deprivation of freedom of contract. What is this freedom? The Constitution does not speak of freedom of contract. It speaks of liberty and prohibits the deprivation of liberty without due process of law. In prohibiting that deprivation, the Constitution does not recognize an absolute and uncontrollable liberty.[128]

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[122] Alito Interview, *supra* note 119, at 1:08:37; *see also Obergefell*, 576 U.S. at 737 (Alito, J., dissenting) ("[f]or today's majority, [liberty] has a distinctively postmodern meaning.").

[123] Alito Interview, *supra* note 119, at 1:08:37. Alito's comments addressed only *Obergefell*'s substantive due process reasoning, but the majority based its holding on both the Due Process Clause and the Equal Protection Clause of the Fourteenth Amendment. *See Obergefell*, 576 U.S. at 675–76.

[124] *See, e.g.*, NeJaime & Siegel, *supra* note 114, at 1903–06; Litman, *supra* note 9, at 572 ("Substantive due process represents the idea that the due process clauses of the Fifth and Fourteenth Amendments safeguard certain substantive rights that the government cannot restrict with what would otherwise be constitutionally adequate procedures.").

Alito's interview comments addressed only *Obergefell*'s substantive due process reasoning. *See* Alito Interview, *supra* note 119, at 1:08:37 ("Well, the decision was based on, really, one word in the 14th Amendment . . . . So this was all based on liberty and on a substantive protection of liberty"); *see also Obergefell*, 576 U.S. at 738–41 (Alito, J., dissenting) (dismissing the majority's equal protection reasoning). But the majority based its holding on both the Due Process Clause and the Equal Protection Clause of the Fourteenth Amendment. *See id.* at 675–76 (majority opinion).

[125] 198 U.S. 45 (1905). Jamal Greene calls *Lochner* a "constitutional meme." Greene, *supra* note 8, at 281–83.

[126] *See Lochner*, 198 U.S. at 53–56; NeJaime & Siegel, *supra* note 114, at 1905–06 & nn.18, 20.

[127] *See Lochner*, 198 U.S. at 75–76 (Holmes, J., dissenting).

[128] West Coast Hotel Co. v. Parrish, 300 U.S. 379, 391 (1937).

Lochner's rise and fall has bestowed the case with totemic significance within constitutional law, making it a byword for the kind of "judicial activism" whereby judges exploit the ambiguity of the word "liberty" in the Due Process Clause to constitutionalize their own policy preferences.[129] Unsurprisingly, therefore, critics of later decisions based on that liberty frequently invoke *Lochner*, accusing justices of elevating their personal views on contraception, abortion, and sexuality,[130] for example, to the status of constitutional rights in the same way that the *Lochner* majority elevated the "freedom of contract."[131] For example, though Alito did not mention *Lochner* by name, he alluded to the decision heavily in his July 2015 critique of *Obergefell*.[132]

1. The Originalism Two-Step

Alito's proposed solution to the excess subjectivity of substantive due process is commonly called "originalism," the belief that the Constitution's meaning is strictly limited to the "original public meaning" of its text at the time it was drafted.[133] Indeed, proponents of originalism often tout its supposed ability[134] to cabin the excess subjectivity of substantive due process jurisprudence as one of its primary advantages.[135] The originalist method

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[129] *See* NeJaime & Siegel, *supra* note 114, at 1905–06; Howard Gillman, *De-Lochnerizing Lochner*, 860 B.U. L. Rev. 859, 861 (2005).

[130] *See* Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 331–34 (Thomas, J., concurring).

[131] *See* NeJaime & Siegel, *supra* note 114, at 1905–06 ("[t]he constitutional objection to substantive due process is routinely captured by a single declaration: *Lochner*."); Litman, *supra* note 9, at 576–77.

[132] *See* Alito Interview, *supra* note 119, at 1:08:37 ("The idea of substantive due process has been very controversial throughout the Court's history. It was a prominent feature in a number of pre-New Deal Supreme Court decisions where it was used to protect property rights. And the New Deal Constitutional Revolution tried to either kill off substantive due process completely or relegate it to very, very minor role."); *see also Dobbs*, 597 U.S. at 240 ("On occasion, when the Court has ignored the appropriate limits imposed by respect for the teachings of history, it has fallen into the freewheeling judicial policymaking that characterized discredited decisions such as *Lochner v. New York*. The Court must not fall prey to such an unprincipled approach." (internal alterations and citations omitted)).

[133] Dennie, *supra* note 10, at 4; *see also, e.g.*, *Dobbs*, 597 U.S. at 235, 241 (Alito, J., for the majority) ("Constitutional analysis must begin with the language of the instrument, which offers a fixed standard for ascertaining what our founding document means." (internal quotation omitted)), ("[G]uided by the history and tradition that map the essential components of our Nation's concept of ordered liberty, we must ask what the *Fourteenth Amendment* means by the term 'liberty.'"

[134] "Supposed" because originalism itself is riddled with subjectivity. *See, e.g.*, Dennie, *supra* note 10, at 10–12, 18, 28, 88–92; Reva B. Siegel, *The History of History and Tradition: The Roots of* Dobbs*'s Method (and Originalism) in the Defense of Segregation*, 133 Yale L.J.F. 99, 101 (2023) (discussing the choice to determine the "history and tradition" of abortion rights by the state-counting method).

[135] *See* Washington v. Glucksberg, 521 U.S. 702, 720–22 (1997) ("This [history-focused] approach tends to rein in the subjective elements that are necessarily present in due-process judicial review."); Alito Interview, *supra* note 119, at 1:08:37 (praising *Glucksberg*'s approach as limiting subjectivity).

of substantive due process analysis involves two steps.[136] The first step is to articulate a "'careful description of the fundamental liberty interest,'"[137] which in practice requires defining the right as narrowly and specifically as possible.[138] The next step is to inquire whether the right, so defined, is "'objectively, deeply rooted in this Nation's history and tradition.'"[139] Unsurprisingly, substantive due process rights often do not survive this analysis.[140]

In *Department of State v. Muñoz*, for example, Sandra Muñoz, an American citizen, challenged the government's denial of her husband's visa to live with her in the United States.[141] Muñoz claimed that the denial violated her fundamental right to marriage,[142] which the Supreme Court has repeatedly held to be part of the liberty protected by the Due Process Clause of the Fifth Amendment.[143] But Muñoz jumped over the first step in the originalist analysis. A "careful description" of the right asserted by Muñoz, the Court held, showed that it was "something distinct" from the more general right to marriage; the right Muñoz claimed was instead "*the right to reside with her noncitizen spouse in the United States*."[144] The Court had little trouble dismissing this characterization of the right due to the U.S. government's extensive "history and tradition" of excluding foreign nationals.[145]

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[136] *See* Department of State v. Muñoz, 602 U.S. 899, 910 (2024) (quoting *Glucksberg*, 521 U.S. at 721).

[137] *Id.*

[138] *See* DENNIE, *supra* note 10, at 78–79.

[139] *Muñoz*, 602 U.S. at 909–12 (quoting *Glucksberg*, 521 U.S. at 720–21).

[140] The originalist method of substantive due process analysis has experienced varying levels of success at the Supreme Court. First articulated by Justice Antonin Scalia in a footnote joined by only one other justice in his plurality opinion for the Court in Michael H. v. Gerald D., 491 U.S. 110, 127 n.6 (1989) (denying the right of an "adulterous natural father" to visit his child), a majority of the Court deployed the method to deny the right to assisted suicide in Washington v. Glucksberg, 521 U.S. 702, 720–22. A majority of the Court then explicitly rejected the originalist method in Lawrence v. Texas, 539 U.S. 558, 572 (2003) ("[H]istory and tradition are the starting point but not in all cases the ending point of the substantive due process inquiry." (internal quotation and alterations omitted)). This remained the case until the Court decided Department of State v. Muñoz in June 2024, in which it applied the *Glucksberg* test verbatim without citing *Lawrence* at all. *See Muñoz*, 602 U.S. at 910–12; *see also* Tyler Rose Clemons, *Stealth Overruling*, ST. JOHN'S L. REV. (forthcoming 2025) (manuscript on file with author) (discussing the uncertainty of the status of *Lawrence* specifically and substantive due process analysis more broadly after *Muñoz*).

[141] *Muñoz*, 602 U.S. at 902–03.

[142] *Id.* at 910.

[143] *See, e.g.*, Obergefell v. Hodges, 576 U.S. 644, 671 ("The right to marry is fundamental as a matter of history and tradition."); Loving v. Virginia, 388 U.S. 1, 12 (1967).

[144] *Muñoz*, 602 U.S. at 910–11.

[145] *See id.* at 911–12.

2. Unoriginalist Originalism

Decades of progressive scholars have roundly (and rightly) criticized originalism as regressive, incoherent, and disingenuous.[146] I broadly agree with these critiques. I am not an originalist. Why, then, have I written an article devoted to the admittedly originalist project of excavating the Framers' understanding of the relationship between liberty and happiness? Answering that question requires first understanding why the current canon of "originalism" practiced by conservative legal scholars and a majority of current Supreme Court justices[147] is not itself originalist.

Recall that the guiding principle of originalism is fidelity to the "original public meaning" of the Constitution.[148] In *Living Originalism*, Jack Balkin parses five distinct things humans may mean when we use the word *meaning*:

> (1) semantic content ("What is the meaning of this word in English?"); (2) practical applications ("What does this mean in practice?"); (3) purposes or functions ("What is the meaning of life?"); (4) specific intentions ("I didn't mean to hurt you"); or (5) associations ("What does America mean to me?").[149]

Balkin argues that being faithful to the Constitution's "original meaning" requires only fidelity to the first type of meaning, the semantic content of the document's text.[150]

This matters because the Constitution's Framers used different kinds of language to create different types of provisions.[151] Balkin classifies these as *determinate rules* (e.g., "the president must be thirty-five"); *standards* (e.g., "no unreasonable searches and seizures"); and *principles* (e.g., "no denials of equal protection").[152] Where the Constitution's text lays down a determinate rule, Balkin says, the Framers intended for it to be applied as written.[153] But where the Constitution sets forth a standard or principle, the Framers intended "to channel politics through certain key concepts but delegate the details to future generations."[154] In other words, the Framers' choice of expansive language in key constitutional provisions deliberately delegated

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[146] For a recent and accessible entry into this extensive catalog of criticism, I cannot recommend Madiba Dennie's *The Originalism Trap* highly enough. *See* Dennie, *supra* note 10. *See also generally* Siegel, *supra* note 134.

[147] *See supra* note 117 and accompanying text.

[148] *See supra* note 133 and accompanying text.

[149] *See* Balkin, *supra* note 117, at 12.

[150] *Id.* at 13.

[151] *Id.* at 6.

[152] *Id.*

[153] *Id.*

[154] *Id.* at 6–7.

authority—and responsibility—to future generations to apply the provisions in a manner that made sense for their own times and circumstances.[155]

Balkin uses the term *framework originalism* to capture the way this approach views the Constitution as "an initial framework for governance that sets politics in motion and must be filled out over time through constitutional construction."[156] He contrasts this approach with what he calls "skyscraper originalism," which "views the Constitution as more or less a finished product[.]"[157] Skyscraper originalists treat all of the Constitution's text—including language clearly meant to be applied as standards or principles—as if it laid down determinate rules.[158] They do so by stretching the definition of *meaning* beyond "semantic content" to "expected application."[159] For example, when attempting to determine whether a specific criminal sanction violates the Eighth Amendment's prohibition on "cruel and unusual punishment,"[160] expectation originalists check to see whether the sanction would have been considered cruel and unusual at the time the Constitution was ratified.[161]

This particular form of originalism, which I will call *expectation originalism* moving forward, is what people usually mean when they say "originalism"—not least because it is the form espoused by a current majority of the justices of the Supreme Court.[162] According to expectation originalism, the Constitution's substantive content, including its application to all specific situations, was set in stone the day it was ratified.[163] The only legitimate means of changing the Constitution's content—including its application to specific situations—is to amend it.[164] Because the outcome of each constitutional case is not so much to be decided as discovered,[165] expectation

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[155] *See id.* ("[F]idelity to the Constitution *requires* future generations to engage in constitutional construction." (emphasis added)). This point represents Balkin's attempt to synthesize originalist interpretation with the interpretative philosophy that is typically considered its opposite, "living constitutionalism," which holds that the Constitution "evolves, changes over time, and adapts to new circumstances, without being formally amended." David A. Strauss, The Living Constitution 1 (2010).

[156] Balkin, *supra* note 117, at 21.

[157] *Id.*

[158] *See id.* at 32.

[159] *See id.* at 7, 23.

[160] *See* U.S. Const. amend. VIII.

[161] Balkin, *supra* note 117, at 32–33.

[162] *See id.* at 7 (describing the expected-application originalism of Antonin Scalia); *see also* New York Rifle & Pistol Ass'n, Inc. v. Bruen, 597 U.S. 1, 26–30 (2022) (requiring courts to search for a "historical analogue" to determine constitutionality of firearm regulation); Dobbs v. Jackson Whole Women's Health Org., 597 U.S. 215, 239–255 (2022) (Requiring courts to search for a "historical analogue" for the right to access abortion).

[163] Hence Balkin's skyscraper-versus-framework metaphor. *See* Balkin, *supra* note 117, at 21–22.

[164] *Id.*

[165] *Cf.* Charles Fried, *Balls and Strikes*, 61 Emory L.J. 641, 641 (2012) (discussing Chief Justice John Roberts's statement at his Senate confirmation hearing that his role as a Supreme Court justice is simply to "call balls and strikes").

originalists disparage any departure from expected applications as illegitimate judicial activism.[166] Thus, by blurring the boundary between semantic content and expected application in the definition of "original meaning,"[167] expectation originalists create a false dichotomy whereby judges must either adhere to eighteenth-century applications of constitutional provisions or impose their personal policy preferences as law.[168]

The subjectivity critique of substantive due process doctrine and the corresponding two-step solution form a classic illustration of expectation originalism. When an expectation originalist asks whether a liberty interest is "deeply rooted in our nation's history and tradition," they are actually asking whether the Framers' generation would have expected the interest to be protected against governmental intrusion.[169] It is as if expectation originalists believe that by including "liberty" in the Due Process Clause, the Framers intended to insert not a broad principle of governance but an exhaustive list of existing regulations that they simply could not be bothered to write down. Expectation originalists then shoot down any attempt to apply the principle rather than the list as subjective, activist, or—most ironically of all—"postmodern."[170]

This is ironic because there is no historical evidence whatsoever that the individuals who wrote and ratified the Constitution intended for it to be interpreted in this manner.[171] Indeed, as Balkin ably demonstrates, the most common-sense reading of the Constitution itself suggests that the Framers intended to delegate the details of at least the broadest constitutional provisions to future generations.[172] Accordingly, it is not merely legitimate to

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[166] *See, e.g.*, *Dobbs*, 597 U.S. at 240 ("On occasion, when the Court has ignored the appropriate limits imposed by respect for the teachings of history, it has fallen into the freewheeling judicial policymaking that characterized discredited decisions such as *Lochner v. New York*. The Court must not fall prey to such an unprincipled approach." (internal alterations and citations omitted)); *see also* BALKIN, *supra* note 117, at 16–17, 22.

[167] *See* BALKIN *supra* note 117.

[168] *Id.* at 16–17, 22.

[169] *See supra* note 141 and accompanying text; *see also supra* note 161 and accompanying text.

[170] *See supra* note 119 and accompanying text. To the extent it can be defined, "postmodernism" is "a set of critical, strategic and rhetorical practices employing concepts such as difference, repetition, the trace, the simulacrum, and hyperreality to destabilize other concepts such as presence, identity, historical progress, epistemic certainty, and the univocity of meaning." Gary Aylesworth, *Postmodernism*, STAN. ENCYC. OF PHIL. (Feb. 5, 2015), https://plato.stanford.edu/entries/postmodernism/ [https://perma.cc/AEH7-QQ58]. The term was first used in 1979, *id.*, around the same time that expectation originalism came into vogue. *See infra* note 171. It is unclear how "the freedom to define your understanding of the meaning of your life," which as I shall show is a very old idea, fits within this definition of postmodernism.

[171] By contrast, there is considerable historical evidence that expectation originalism was born in the Southern opposition to *Brown v. Board of Education*, 387 U.S. 483 (1954) and forged in the fires of the U.S. Department of Justice under Ronald Reagan. *See* Siegel, *supra* note 134, at 101; Calvin Terbeek, *"Clocks Must Always Be Turned Back":* Brown v. Board of Education *and the Racial Origins of Constitutional Originalism*, 115 AM. POL. SCI. REV. 821 (2021).

[172] BALKIN, *supra* note 117, at 6–7.

interpret and apply such provisions differently than the Framers' generation, but doing so also adheres more closely to their original vision for the Constitution than expectation originalism does.[173] In short, originalism, at least in its expectation form, is not *just* regressive, incoherent, and disingenuous. It also fails on its own terms.

Building on Balkin's concept of framework originalism, this Part considers the Fifth and Fourteenth Amendments' guarantee against the deprivation of liberty without due process of law as a *principle* rather than a *determinate rule* of constitutional text. That is, instead of applying eighteenth-century expectations to specific modern situations, I attempt to identify the broader principles and values that the Framers' generation sought to enshrine within the Due Process Clause as well as how those principles and values would have influenced their consideration of specific applications of the Clause.

Whatever normative force originalism may possess,[174] I do not undertake this excavation of the principle of liberty based on some belief that the Framers' intentions, no matter how broadly interpreted, should ultimately control constitutional interpretation. Rather, my reasons for doing so are twofold. First, I wish to demonstrate that fidelity to the constitutional project of the Framers does not require we recreate—or even permit the recreation of—the white supremacist, cisheterosexist, patriarchal slave society of the 1790s or 1860s. Second, I believe that the Framers' understanding of liberty as the right to seek joy provides a basis for a substantive due process jurisprudence that is both more workable and more humane.

B. The Meaning of Liberty

The Framers' Epicurean understanding of liberty as the pursuit of happiness provides both substance and limits to the liberty protected by the Due Process Clause. In other words, Justice Alito's two-fold critique of *Obergefell* is wrong on both counts.[175] Defining "liberty" as evolving self-definition is neither impossibly subjective nor postmodern, but literally

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[173] Justice Breyer makes a similar point in his dissent in Dobbs v. Jackson Whole Women's Health Org., 597 U.S. 215, 374 (2022) (Breyer, J., dissenting) ("The Framers (both in 1788 and 1868) understood that the world changes. So they did not define rights by reference to the specific practices existing at the time. Instead, the Framers defined rights in general terms, to permit future evolution in their scope and meaning.").

[174] Balkin devotes an entire chapter to the case for "original meaning" in *Living Originalism*, *supra* note 117, at 35–58. He makes the commonsense observation that fidelity to the Constitution means caring about its original meaning by definition: Americans are not required to follow the Constitution, but attempting to do so with any kind of sincerity does require following its original meaning to some extent. *Id.* at 38; *see also* Strauss, *supra* note 155, at 4 (noting that "as a matter of rhetoric, everyone is an originalist sometimes"). This point suggests that "originalism-or-not" is yet another false dichotomy. Regardless, a precise understanding of the appropriate role of original meaning in constitutional interpretation is not necessary to demonstrate that expectation originalism's understanding is wrong.

[175] *See supra* notes 119–123 and accompanying text.

ancient and deeply rooted in the Framers' original understanding of the constitutional text.

1. A Brief Genealogy of "The Pursuit of Happiness"

In 1689, English philosopher John Locke declared in his *Two Treatises on Civil Government* that all humans are born with three natural rights: "life, liberty, and [property]."[176] Historians generally agree that Thomas Jefferson drew heavily upon the *Second Treatise* when writing the Declaration of Independence nearly a century later, but opinions diverge sharply about why Jefferson substituted the phrase "the pursuit of happiness" for "property," as the third of Locke's natural rights.[177] Some believe that the change was essentially meaningless, nothing more than a rhetorical flourish with no substantive content.[178] Others believe that Jefferson intended the phrase to be synonymous with Locke's definition of property.[179] Yet others believe the opposite—that is, that the replacement signaled a break with the English emphasis on private property rights in favor of broader societal interests.[180]

But the *Two Treatises* was neither all that John Locke wrote nor all that Thomas Jefferson read of him. Locke published another work in 1689, this one titled *An Essay Concerning Human Understanding*.[181] Though less explicitly concerned with political philosophy, the *Essay* elaborated upon Locke's foundational ideas about freedom, power, and the nature of human existence. In Chapter XXI of Book II, titled "Of Power," Locke developed his definition of liberty.[182] He began with the basic premise that all human desires are motivated by the impulse to avoid pain and to seek pleasure, which he defines as happiness.[183] But though everyone shares this basic

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[176] *See* John Locke, Two Treatises of Government and A Letter Concerning Toleration 136–37 (Ian Shapiro ed. Yale Univ. Press 2003) (1689). Locke's original word for property was "estate," but the two terms are synonymous. *See also* Carli N. Conklin, The Pursuit of Happiness in the Founding Era: An Intellectual History (2019).

[177] *Id.*

[178] *See* Conklin, *supra* note 176 at 4–5.

[179] *See* Conklin, *supra* note 176 at 4.

[180] *See* Edmond N. Cahn, *Madison and the Pursuit of Happiness*, 27 N.Y.U. L. Rev. 266–67 (1952). Though popular in the mid-twentieth century, this view appears to have fallen out of favor. While Edmond Cahn could state with confidence that "the myth that Jefferson had abandoned Locke and preoccupation with property rights when he substituted 'the pursuit of happiness' [had] won wide acceptance" in 1952, *see id.*, Cari Conklin does not even mention this interpretation in her 2019 discussion of the replacement. (*See* Conklin, *supra* note 176, at 4–5 (discussing two approaches to the replacement—one approach where "pursuit of happiness" is seen as a "glittering generality" with no substantive meaning and one approach where "pursuit of happiness" is seen as synonymous with property rights—without discussing the view that the replacement signaled an abandonment of Locke's emphasis on property rights).

[181] John Locke, An Essay Concerning Human Understanding (London, T. Longman, 1793) (1689). I cite to Thomas Longman's 1793 printing of the *Essay* to reflect the text as Jefferson and other Framers most likely read it.

[182] *See id.* at 220–74.

[183] *See id.* at 245–247.

impulse, people differ widely in what makes them happy.[184] Locke viewed this subjectivity of desire as natural and good, comparing the variety of human desires to those of different kinds of insects; some are like bees and prefer flower nectar, while others are like beetles and prefer different foods.[185]

The truth of this simile, Locke said, gives us "a clear view into the state of human liberty. Liberty it is plain, consists in a power to do, or not to do; to do, or forbear doing, as we will."[186] Locke defined liberty as the right to align our existence with our subjective preferences about what makes us happy. In other words, Locke saw liberty as synonymous with the freedom to engage in "the pursuit of happiness"—a phrase that Locke used in Chapter XXI multiple times.[187]

It is practically impossible to prove that Jefferson relied upon any single text when drafting the Declaration in the early summer of 1776.[188] But it is certain that Jefferson and his contemporaries were familiar with and influenced by Locke's *Essay* at least as much if not more than his *Two Treatises*.[189] In this context, Jefferson's use of "the pursuit of happiness" was neither meaningless nor about property.[190] Rather, Jefferson used the phrase to mean something very close to "liberty" itself.[191]

2. The Epicurean Guide to Happiness

As Jefferson borrowed from Locke, so Locke in turn borrowed from a much older source: the Ancient Greek philosophers. Like Locke, the Greeks universally believed that happiness was the ultimate point of human

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[184] *See id.* at 247, 255–56.

[185] *Id.* at 256.

[186] *Id.*

[187] *Id.* at 251–52 (verbatim phrase); *id*. at 257, 260 ("pursue happiness"); *id.* at 246 ("Happiness, under this view, every one constantly pursues . . .").

[188] *See* Cahn, *supra* note 180, at 272.

[189] *See id.*; Andrew Browning, Nat'l Const. Ctr., *Thomas Jefferson: Reader and Writer*, at 19:10, https://constitutioncenter.org/media/files/WTP_Jefferson_TH_Transcript.pdf [https://perma.cc/XS6E-J73Q] (Andrew Browning: "Locke to many modern readers, means the *Two Treatises on Government*, but in Jefferson's time, the *Essay on Human Understanding* was a far more influential, far better known document.").

Cari Conklin traces Jefferson's use of "the pursuit of happiness" to the second section of William Blackstone's introduction to his *Commentaries on the Laws of England* instead of Locke's *Essay*. *See* Conklin, *supra* note 176, at 5–6. Jefferson's well-documented disdain for Blackstone—which Conklin herself notes, *see id.* at 6—makes Locke the more likely source. The distinction does not matter overmuch since Conklin and I ultimately trace the concept to the same source: *eudaimonia*. *Compare* Conklin, *supra* note 176, at 127, 131–34, *with infra* Part II.A.2.

[190] *See supra* notes 180–182 and accompanying text.

[191] This redundancy may account for the phrase's subsequent absence from the text of the Constitution; there is no need to protect the pursuit of happiness separately if the concept is included within explicitly protected "liberty."

existence—what I call joy.[192] But both Locke and the Greeks meant something quite different by "happiness" than the modern conception of ephemeral positive feelings.[193] Rather, when the Greeks spoke of happiness, they used the word *eudaimonia*, a word that connotes a more lasting sense of well-being and satisfaction with the general direction of one's life.[194] As Aristotle classically put it: "As far as its [the highest good's] name goes, most people practically agree; for both the many and the cultivated call it happiness [*eudaimonia*], and they suppose that living well and doing well are the same as being happy."[195]

Like Locke, the Greeks also understood that individuals have different ideas about what makes them happy—that happiness is subjective.[196] But neither Locke nor the Ancient Greeks were hedonists.[197] While they acknowledged that many paths lead to happiness, they understood that not every path does so.[198] In other words, not every choice that brings happiness in the modern sense leads to *eudaimonia*.[199]

Ancient Greek philosophers devoted much of their individual teachings to articulating various means of distinguishing between desires that lead to *eudaimonia* and those that do not.[200] One Greek philosopher's proposed answer to the dilemma exerted outsized influence over Founding-era political theory:[201] that of Epicurus, who lived in Athens between 341 and 270 B.C.E.[202] Most importantly for my purposes, Epicureanism profoundly shaped the ideas of John Locke and Thomas Jefferson.[203]

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[192] *See* Julia Annas, The Morality of Happiness 11–12, 44 (1993).

[193] *See id.* at 45–46; Conklin, *supra* note 176, at 5–6.

[194] *See* Annas, *supra* note 192 at 44, 330.

[195] Aristotle, Nicomachean Ethics 1095a (Terence Irwin trans.).

[196] *See id.* at 39 ("But about what happiness [*eudaimonia*] is they disagree, and the many do not give the same answer as the wise.").

[197] At least not by the modern definition of hedonism. *See* Annas, *supra* note 192, at 334–35 & n.1; George K. Strodach, *Introduction*, in Epicurus, The Art of Happiness (George K. Strodach trans. 2012) at 62 ("[T]he Epicurean ideal is hardly what we mean by a life of pleasure or even a pleasant life."); *see* Annas, *supra* note 192, at 334–35 & n.1; *see generally* George K. Strodach, *Introduction*, in Epicurus, The Art of Happiness 1–76 (George K. Strodach trans. 2012); *see also infra* notes 223–226 and accompanying text.

[198] *See* Annas, *supra* note 192, at 46.

[199] *See supra* notes 195–196 and accompanying text.

[200] *See* Annas, *supra* note 192, at 44.

[201] *See* Catherine Wilson, Epicureanism at the Origins of Modernity (2008); Howard Jones, *Epicurus and Epicureanism*, in The Classical Tradition (Anthony Grafton et al. eds., 2010). Little known in England before the mid-seventeenth century, Epicureanism surged in popularity due to the efforts of the French philosopher Pierre Gassendi and the English Dr. Walter Charleton, who served as physician to Charles I. *Id.*

[202] Annas, *supra* note 192, at 44. Frustratingly few records of Epicurus' direct teachings remain, and much of his philosophy must be inferred from better-preserved objections to his ideas written by other ancient philosophers. *See id.* at 5, 5 n.1; David Konstan, *Epicurus*, Stan. Encyc. Phil. (July 8, 2022), https://plato.stanford.edu/entries/epicurus/#Sour [https://perma.cc/5TAL-9XTV] (listing historical sources).

[203] Jefferson openly described himself as "an Epicurean" in an 1819 letter to William Short. Letter from Thomas Jefferson to William Short (Oct. 31, 1819), https://founders.archives.gov/

Epicurus divided subjective desires in two basic ways.[204] First, he divided "natural" desires from "empty" desires.[205] Natural desires are those over which humans have no control, including biological necessities such as eating, drinking, and sleeping, as well as emotional requirements such as love and humor.[206] Empty desires, by contrast, are those that are based on faulty beliefs—beliefs that are not merely factually mistaken but so wrong as to be harmful or dysfunctional.[207] Gratifying natural desires leads individuals to fulfill their natures and thereby to become happy;[208] gratifying empty desires leads individuals to act contrary to their natures, frustrating their quest for happiness and wasting valuable time and energy.[209]

Epicurus further divided natural desires into "necessary" and "non-necessary" desires.[210] These categories correspond roughly with "needing" versus "wanting."[211] "A desire is necessary if we cannot be happy, or healthy, or even alive, if we do not have the object of that desire."[212] All other desires are non-necessary.[213] The necessity of a desire often turns on the level of specificity of its object.[214] In other words, while the general desire for food is undeniably both natural and necessary, the desire for a specific *type* of food is usually non-necessary.[215] Indeed, insistence upon fulfilling a natural desire in a specific way can even transform the desire into an empty one, since such a demand is based upon the false belief that only one particular object can satisfy the more general need.[216] It is both natural and necessary for me to eat regular meals, but if I refuse to eat anything but cheeseburgers

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documents/Jefferson/03-15-02-0141-0001 [https://perma.cc/PP8G-RX6C]. Though Locke was cagier about his Epicureanism—likely due to the increased risk of religious persecution for "heresy" during his time—historians and philosophers widely acknowledge the influence of Epicureanism (as "purified" by Gassendi, *see supra* note 201) on his work. *See, e.g.*, Jones, *supra* note 201. At any rate, Chapter XXI of Book II of the *Essay* is shot through with Epicurean ideas. *Compare* Locke, *supra* note 181, at 245–56, *with* Julia Annas, *Epicurus on Pleasure and Happiness*, 15 Phil. Topics 5, 15–18 (1987); *see also* Strodach, *supra* note 197 at 31 (using a quotation from Locke's *Essay* to "richly elaborate" a passage from Epicurus).

[204] Annas, *supra* note 192, at 190.

[205] *Id.* at 190, 337.

[206] *See id.* at 337 (noting that "the natural/not natural distinction cuts right across that of mental and bodily").

[207] *Id.* at 190.

[208] *Id.* at 336–37 ("[T]he Epicurean strategy for living the best life is directed at finding and following natural desires.").

[209] *Id.* at 190.

[210] *Id.*

[211] *Id.* at 191–93.

[212] *Id.* at 191.

[213] See *id.* at 191–92 ("Non-necessary desires will just be desires whose objects we do not need, and which do not bring pain if not satisfied.").

[214] *Id.* at 192–23. Annas acknowledges that Epicurus did not explicitly articulate this generic/specific distinction within any of the extant texts, but I share her belief that its explanatory power is strong enough to make it implicit in his theory of desire. *See id.*

[215] *Id.*

[216] *Id.* at 192.

and cheesecake, my desire will become empty even as my arteries fill up with cholesterol.

Taken together, Epicurus' classification of desire may be mapped out in the following grid:

FIG 1: Epicurus' Classification of Subjective Desires[217]

	EMPTY	**NATURAL**
NECESSARY		Desires without which humans cannot live or be physically, mentally, or emotionally healthy.
NON-NECESSARY	Desires based on beliefs that are both (1) false and (2) harmful.	Specific means of fulfilling natural desires.

Epicurus's emphasis on subjective experience as the most reliable indicator of happiness makes his classification system subject to relatively simple empirical verification.[218] If the fulfillment of a desire leads to physical and emotional flourishing—or if its denial causes pain or misery—it is likely natural and necessary. If the fulfillment of a desire itself leads to pain or misery, it is likely empty. As Jefferson pithily put it: "Happiness [is] the aim of life. Virtue [is] the foundation of happiness. Utility [is] the test of virtue."[219]

This emphasis on subjective experience also forestalls two potential misreadings of Epicurus's system by modern readers. First, Epicureanism is not hedonism.[220] Despite later associations of "epicureanism" with self-indulgence and materialism,[221] Epicurus did not advocate unrestrained sensualism. Indeed, his classification system was premised on the acknowledgement that gratifying every passing desire that happened to arise within an individual would not make that person happy.[222]

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[217] The necessary/empty box is blacked-out because empty desires by definition cannot be necessary.

[218] *See* ANNAS, *supra* note 192, at 188; Annas, *supra* note 203, at 5, 17.

[219] Jefferson to Short, *supra* note 203, encl. ("Syllabus of the Doctrines of Epicurus"); *see also* LOCKE, *supra* note 181, at 255–57; Strodach, *supra* note 197, at 27–28, 58 ("An act is moral [in an Epicurean sense] if in the long run, all things considered, it produces in the agent a surplus of pleasure over pain; otherwise it is immoral.").

[220] *See* STRODACH, *supra* note 197.

[221] *See, e.g.*, *Epicure*, MERRIAM-WEBSTER.COM, https://www.merriam-webster.com/dictionary/epicure [https://perma.cc/3EZE-3WV7] (defining "epicure" as "one devoted to sensual pleasure" and noting that "Detractors of Epicurus in his own time and later. . . reduced [Epicurus'] notions of pleasure to material and sensual gratification."); ANNAS, supra note 192, at 334–35; Strodach, *supra* note 197, at 61 (noting that "Epicureans have been purposely misrepresented as sensualists and 'high livers' by their rivals and detractors, both ancient and modern").

[222] *See* ANNAS, *supra* note 192, at 334.

Both Locke and the Greeks believed that happiness is constrained by what they called the laws of nature.[223] Individuals' power to shape reality according to their subjective preferences is limited by the natural world; they can control their choices but not the consequences of those choices.[224] It may bring a person joy to jump off a third-story balcony, but that joy will not suspend gravity or cushion their landing.[225] So conceived, the laws of nature function like karma or common sense.[226]

This insight leads to the related point that neither Epicurus nor Locke used "natural" to mean conformity to a preconceived ideal of appropriate behavior.[227] Any progressive attempt to reclaim "natural" must make this distinction explicitly due to the modern tendency to legitimize oppression by imposing such ideals, typically based on identity characteristics such as race, gender, or sexual orientation. For example, American governments have prohibited women from being lawyers,[228] people of different races from marrying,[229] and people of the same gender from having sex[230]—all because such things are supposedly "unnatural." To make matters worse, the term "natural law" has become associated with a strain of regressive legal scholarship over the past century that has attempted to justify such oppression.[231]

The inclination to "naturalize" oppression is not unique to Americans, of course. Virtually every human society is structured according to group-based social hierarchies.[232] Within such hierarchies, members of dominant groups "systematically enjoy a disproportionate share of power and resources at the expense of members of subordinated groups[.]"[233] While dominant groups routinely deploy the threat of violent force to achieve and maintain their position, it is rarely sufficient.[234] Dominant groups also seek to naturalize their domination via some ideology.[235] In other words,

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[223] *See id.* at 135–37; Locke, *supra* note 181, at 255–57.

[224] Locke, *supra* note 181, at 255–57.

[225] *See id.* at 257 ("He has vitiated his own palate, and must be answerable to himself for the sickness and death that follows from it. The eternal law and nature of things must not be altered to comply with his ill-ordered choice.").

[226] *See* Conklin, *supra* note 176, at 30–33 (discussing the empiricism of the Scottish "Common Sense" school of philosophy and its influence on William Blackstone).

[227] *See* Annas, *supra* note 192, at 191 (noting that Epicurus's understanding of naturalness did not "rest[] on a substantive antecedently established notion of what human nature is, and still less implie[d] any antecedent ability to pick out what is natural and what is not").

[228] Bradwell v. Illinois, 83 U.S. 130 (1872).

[229] *See* Loving v. Virginia, 388 U.S. 1 (1967).

[230] Bowers v. Hardwick, 478 U.S. 186 (1986).

[231] *See* West, *supra* note 22, at 12–13, 48–53; Nicholas Bamforth & David A. J. Richards, Patriarchal Religion, Sexuality, and Gender: A Critique of the New Natural Law 228–78 (2008) (thoroughly illustrating the connections of the "new natural law" movement to sexism and homophobia).

[232] Clemons, *supra* note 13, at 1149.

[233] *Id.*

[234] *Id.* at 1150.

[235] *Id.* at 1162, 1162 n. 250.

dominant groups seek to make their domination seem a function of nature rather than something the dominant group itself has artificially imposed upon society. Thus, men have claimed that it is "natural" for them to rule over women; white people that it is "natural" for them to enslave non-white people; religious majorities that it is "natural" to outlaw dissident faiths and practices; and heterosexual people that is "natural" to forbid other forms of sexual activity.

The Epicurean definition of "natural" is not merely different from but antithetical to such uses of the term. According to Epicurus, the naturalness of a desire is discernible not by reason or revelation but solely by subjective experience: If the fulfillment of a desire is withheld, does pain or death necessarily ensue?[236] If so, the desire qualifies as natural. If not, it does not.

Hierarchies of domination obviously fail this simple test. The very fact that dominant groups have defined themselves according to so many different characteristics across space and time illustrates that their dominance is not natural.[237] Harm does not inevitably ensue if white people do not rule over nonwhite people—indeed, quite the opposite. If certain white people experience psychological pain from their inability to fulfill their desire to rule over nonwhite people, Epicurus would define such a desire as "empty," based on the false belief that such dominance is necessary for their happiness.[238]

Even when dominant groups have lost their dominance, echoes of the dominant ideology tend to linger. Depending on the totality of a dominant group's control and the length of their rule, it may take generations to recognize and root out tenets of dominant ideology masquerading as "common sense" beliefs.[239] From a non-Epicurean perspective, this process may seem like the discovery of "new" natural desires. But it is actually the stripping away of the empty beliefs that propped up domination and inhibited human happiness.

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[236] *See* Annas, *supra* note 192, at 137; *see also* Locke, *supra* note 181, at 255–57.

I use "necessarily" here to mean the strictest form of causation: Failing to fulfill the desire *invariably* results in pain or death *without* further human intervention. This qualification is necessary because humans often impose pain or death on one another to enforce conformity with artificial hierarchies. *See supra* notes 233–234 and accompanying text. That authorities would arrest, torture, and kill anyone caught practicing Protestant Christianity during the Spanish Inquisition does not render the desire for Catholic supremacy "natural."

[237] Psychologists Jim Sidanius and Felicia Pratto call such hierarchies "arbitrary-set systems" in which groups are defined based on "any . . . socially relevant group distinction the human imagination is capable of constructing." Jim Sidanius & Felicia Pratto, Social Dominance: An Intergroup Theory of Social Hierarchy and Oppression 33 (1999).

[238] *See supra* notes 207–209 and accompanying text.

[239] *See* Clemons, *supra* note 13, at 1151, 1156.

3. The Right to Subjectivity

Epicurus defined happiness as the ongoing gratification of one's subjective desires with due consideration of the natural consequences of one's choices.[240] When Locke and later Jefferson spoke of "pursuing happiness" and defined "liberty" as the freedom to do so, this is what they meant.[241] As such, this definition suggests significant insights into the original understanding of the principle of "liberty" protected by the Due Process Clause.

At first glance, defining "liberty" as "the pursuit of happiness" seems to do little to resolve the problem of excess subjectivity.[242] Like the definition of liberty, the means of achieving happiness often differ widely from person to person.[243] Excavating the Framers' original understanding of liberty as the pursuit of happiness exposes the kerfuffle over subjectivity as a red herring. If "liberty" means the right of individuals to align their lives with their subjective preferences in a manner that brings them happiness,[244] then *subjectivity is the entire point of liberty*. In other words, liberty is the ability of each individual to pursue the experiences that bring them joy without undue interference by the government.

Debates about substantive due process typically turn on whether a discrete interest counts as "liberty."[245] But based on the Framers' definition understood through the Epicurean approach, *every* government action that hinders *any* individual's ability to act upon their subjective preferences is, for that reason, an infringement upon that person's liberty. If that proposition conjures visions of anarchy and a chaotic "state of nature," it is because the Supreme Court has taken an all-or-nothing approach to the level of permissible government infringement based on the outcome of its liberty-or-not inquiry. If the Court determines that an interest counts as liberty, the government cannot interfere with the interest except in the most extreme circumstances; if not, the government is essentially free to trammel the interest at will. This all-or-nothing approach was on full display in *Muñoz*, in which the plaintiff sought additional process but something less than strict scrutiny for the State Department's denial of her request for her non-citizen husband to live with her in the United States.[246] For failing to align her asserted interest

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[240] *See* Annas, *supra* note 192, at 336–37; Annas, *supra* note 203, at 17 ("Epicurus in telling us how to act is bringing several factors into our judgment as to how to achieve the final good of a pleasant life, and central among these is virtue.").

[241] *See supra* Part II.B.1.

[242] *See supra* Part II.A.1.

[243] *See supra* note 198 and accompanying text.

[244] *See supra* Part II.A.

[245] Indeed, this inquiry is the entire point of the two-step originalist method. *See supra* notes 138–141 and accompanying text.

[246] Department of State v. Muñoz, 602 U.S. 899, 911 (2024).

with the cramped liberty-or-not inquiry, the Court dismissed Muñoz's claim as "neither fish nor fowl."[247]

This is another false dichotomy—one not supported by the text of the Due Process Clause itself. As the Court's "procedural due process" cases indicate, the combinations of various procedural hurdles the Court can impose upon government action are virtually infinite.[248] Similarly, the Court need not limit itself to one of two extreme outcomes in substantive due process cases. Rather, if various domains of human life deserve varying levels of protection from government intrusion,[249] it makes sense to create a sliding scale whereby government action becomes more difficult—more process becomes *due*—as the action intrudes into progressively more important domains. As Jamal Greene has noted, "[d]ue process contemplates a rule of reason that calibrates the relation between, on one hand, the nature and scope of a deprivation and, on the other, the process that attends it."[250]

Accordingly, substantive due process debates should be—indeed, *are*—less about the definition of "liberty" than about the definition of "due."[251] Substantive due process cases do not require judges to decide *whether* an interest counts as liberty but *how* important that liberty is. In other words, substantive due process jurisprudence is about the relative importance of the interest at stake weighed against both the government's specific interest in

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[247] *Id.* (further noting that such a "right would be a category of one: a substantive due process right that gets on procedural due process protections.").

[248] The Court has primarily reserved its procedural due process jurisprudence for deprivation of liberty interests that arise from *state* law rather than the definition of liberty within the Due Process Clause itself. *See, e.g.*, Vitek v. Jones, 445 U.S. 480, 488 (2005). To give the doctrine more coherence than it perhaps deserves, the Court appears first to assess whether the asserted liberty interest qualifies as "fundamental." If so, it applies substantive due process protections—i.e., strict scrutiny. *See supra* note 245 and accompanying text. If not, the Court *may* assess whether the asserted liberty interest has been sufficiently created by state law. *See* Kerry v. Din, 576 U.S. 86, 97–98 (2015) (plurality opinion). If so, the Court applies procedural due process protections. *Id.*; Vitek, 445 U.S. at 495–97.

To give a few representative examples, the procedural protections devised by the Court under its procedural due process jurisprudence include requiring pre-action administrative hearings, Goldberg v. Kelly, 397 U.S. 254, 266 (1970) (termination of welfare benefits); Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 542–543 (1985) (termination of public employment); requiring post-action administrative hearings, Culley v. Marshall, 601 U.S. 377, 377 (2024); requiring notice and an opportunity for interested parties to be heard, Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950) (settlement of common trust fund accounts); Tulsa Professional Collection Servs. v. Pope, 485 U.S. 478, 491 (1988); and requiring notice of factual bases of charges and access to counsel in rebutting them, Hamdi v. Rumsfeld, 542 U.S. 507, 533, 539 (2004). *See also* Greene, *supra* note 8, at 260 ("Multiple ambiguities enable a diversity of 'processes' to satisfy the textual commands of the Due Process Clause.").

[249] *See supra* notes 108–110 and accompanying text.

[250] Greene, *supra* note 8, at 253–54. As Greene also notes, the difference between "procedural due process" and "substantive due process" is contested. *Id.* at 254 n.5. Indeed, Justice Barrett and Justice Sotomayor's clash over the definition and relationship between the two concepts is only the latest entry in a debate spanning decades. *Compare* Michael H. v. Gerald D., 491 U.S. 110, 130 (1989) (plurality opinion), *with id.* at 156 n.12 (Brennan, J., dissenting); *compare Din*, 576 U.S. at 97–98 (plurality opinion), *with id.* at 109–10 (Breyer, J., dissenting).

[251] *See* Greene, *supra* note 8, at 259–61.

regulating the particular liberty interest at issue and its general interest in regulation more broadly.[252]

C. The Epicurean Approach to Substantive Due Process

Uncovering the Framers' Epicurean understanding of the relationship between liberty and happiness gives substance to the principle of liberty-as-the-pursuit-of-happiness that they sought to enshrine within the Due Process Clause and thus elucidates how courts should interpret and apply the Clause.[253] That principle fills the gap between untethered judicial subjectivity on the one hand and the adherence to determinate rules demanded by expectation originalism on the other.[254] Specifically, Epicureanism suggests that the Framers valued liberty interests according to how essential they are to human happiness. Though the Framers defined liberty as respect for individuals' subjective preferences about various parts of their lives, that respect did not extend to individuals' subjective valuations of the importance of those various parts. In other words, the ranking of the domains of human life in which subjectivity must be respected is itself objective.

1. Operationalizing Epicureanism

Recall that Epicurus divided human desires into natural and empty ones, further dividing natural desires into necessary and unnecessary ones.[255] Natural and necessary desires are those at the core of human existence such that an individual has little control over them and failing to satisfy them causes physical or emotional pain.[256] Natural but unnecessary desires include things an individual wants but does not need; failing to satisfy them will not cause the individual pain but neither will satisfying them bring harm.[257] Finally, empty desires are those based on false beliefs, such that satisfying them actually impedes rather than advances the individual's happiness.[258]

The Epicurean classification of desires supplies objective criteria for determining the relative importance of liberty interests for protection against government intrusion. According to this criteria, necessary means of fulfilling natural desires are the most important liberty interests. Thus, the more necessary an asserted liberty interest is to fulfilling a natural desire, the more difficult it should be for the government to intrude upon it.

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[252] Because every liberty interest cannot receive heightened protection without frustrating the point of government.

[253] *See supra* notes 156–157 and accompanying text.

[254] *See supra* notes 164–170 and accompanying text.

[255] *See supra* notes 212–218 and accompanying text.

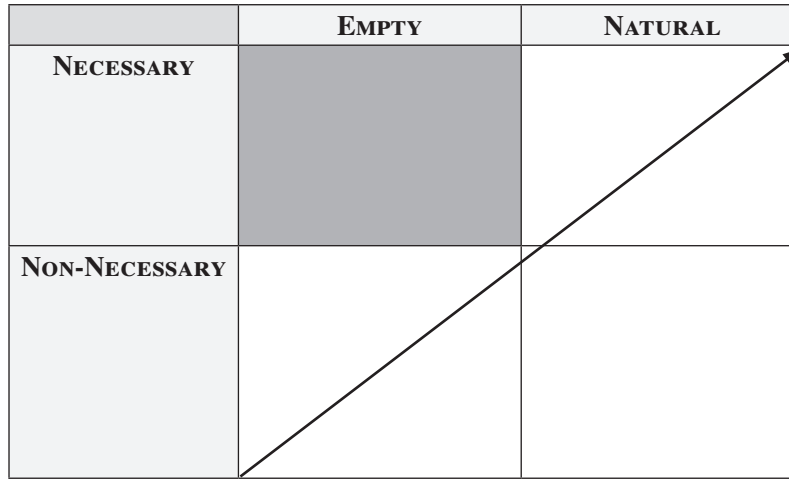
[256] *Id.*

[257] *Id.*

[258] *Id.*

By contrast, the government should have considerably more latitude to regulate empty desires. Unnecessary means of fulfilling natural desires occupy a middle ground, where perhaps "normal" legislative and judicial processes apply. Imposing a vector representing required process on the above grid of Epicurean desires visualizes this spectrum:

FIG. 2: Regulable Interests



a. The Naturalness Analysis

Identifying an asserted liberty interest's place along this spectrum should begin with an assessment of the *naturalness* of the desire the interest aims to fulfill. Two primary principles ground this stage of the analysis. First, because specific means of fulfilling desires are the domain of the *necessity* analysis,[259] the naturalness assessment should occur at the highest level of generality.[260] Thus, for example, the relevant question is the naturalness of the desire to eat writ large, not the naturalness of the desire to eat nothing but cheeseburgers.

Second, recall that empirical verification is the ultimate test of naturalness in the Epicurean sense.[261] Thus, naturalness is not a function of a particular judge's life experiences or a Platonic ideal of what is natural.[262] It is not even a function of a particular plaintiff's own experiences. Rather, the relevant inquiry is whether humans objectively experience[263] nontrivial

[259] *See infra* Part II.C.1.b.

[260] *See supra* note 192, at 190.

[261] *See supra* notes 220–221 and accompanying text.

[262] *See supra* note 227 and accompanying text.

[263] The impossibility of a truly objective standard, and the harm caused by obscuring relevant social characteristics in pretending one exists, are among the most enduring insights of

physical, mental, emotional, or psychological suffering if the desire goes unfulfilled. So conceived, Epicureanism itself indicates several obvious categories of natural desires. Physical necessities such as eating, drinking, sleeping, breathing, and having sex clearly qualify as natural desires.[264] So do emotional necessities such as human connection, spiritual freedom, and intellectual stimulation.[265]

Where the naturalness analysis is not obvious or may be especially subject to prejudice, judges should be guided by scientific findings regarding the desire. Particularly relevant scientific disciplines include biology as well as the social sciences, especially sociology and anthropology, due to these disciplines' focus on documenting consistencies and variations in humans' lived experiences. Evidence that a desire is immutable or universally experienced strongly indicates that it is natural in the Epicurean sense.[266] Contemporary or historical social practices respecting the importance of the desire may also indicate its naturalness.[267] A judge's own life experiences may be relevant; a judge who empathizes with a plaintiff's painful deprivation of a desire will instinctively recognize that desire as natural. Finally, it bears emphasizing that the presence or lack of any particular form of evidence is not dispositive in the naturalness analysis. These suggestions are merely possible means to the end of determining whether the deprivation of the desire objectively causes human suffering.

b. The Necessity Analysis

Lawyers being what we are, it will usually be possible to orient any asserted liberty interest toward some broadly defined natural desire. Thus, most claims will require an analysis of how *necessary* the specific asserted liberty interest is to fulfill the natural desire. So long as any alternative means of fulfilling a natural desire remains available, specific means of fulfilling the desire are "unnecessary" under the Epicurean classification system. But necessity is itself a spectrum, a function of both the general availability of alternatives and the relative efficacy of those alternatives. Forbidding

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Critical Legal Theory, particularly in critiques of the "reasonable man" standard in the fields of criminal and tort law. *See, e.g.*, Victoria Nourse, *After the Reasonable Man: Getting Over the Subjectivity/Objectivity Question*, 11 New Crim. L. Rev. 33, 35 (2008). By "objective," I adopt here Victoria Nourse's concept of the reasonable man as an heuristic that "bridge[s] the law as positive enterprise . . . and the defendant's actual situation" in a manner that "both *reflects* and *restrains* majoritarian norms." *Id.* at 37–38. In this context, "objective" means that "naturalness" does not require that *every* other human experience suffering if the desire is deprived, but it is also not sufficient if *only* the plaintiff does so. The heuristic is a gesture toward the middle, a principle rather than a determinate rule.

[264] *See* Annas*, supra* note 192, at 337.

[265] *See id.*

[266] *See id.* at 190–91 ("[T]hus a thing's nature [in the Epicurean sense] is what it is (what it really is, we might say) as opposed to what merely happens to be true of it, or is true of it only by virtue of its relation to something else.").

[267] Subject to the caveat that such practices may reflect domination rather than naturalness. *See supra* notes 227–239 and accompanying text.

citizens from eating cheeseburgers is less restrictive than forbidding them from eating anything but cheeseburgers. These examples clarify that the necessity analysis is about how close the regulation comes to a total ban. As the impingement on effective means of fulfilling the natural desire nears totality, government regulatory authority decreases, thus requiring more procedure to justify its exercise.

Consider the facts of *City of Grants Pass v. Johnson*.[268] Grants Pass, Oregon, places several restrictions on when and where people may sleep within its borders.[269] Specifically, people may not sleep "on public sidewalks, streets, or alleyways", or in a "campsite"—essentially any place with a pillow or sleeping bag—on public property.[270] Homeless residents of Grants Pass challenged, and the Court ultimately analyzed, these restrictions under the Eighth Amendment,[271] but many—including seemingly the Supreme Court itself—believed the better claim to be one of substantive due process.[272] Under the two-step analysis espoused in *Glucksberg* and revived by *Muñoz*,[273] the Court would likely analyze a substantive due process challenge to the Grants Pass ordinances by defining the homeless plaintiffs' interest as something like sleeping with a blanket on public property and then perusing historical sources to determine whether the Americans of 1868 widely acknowledged that interest as part of the "definition of ordered liberty."[274] If they would have done so, the Court would almost certainly invalidate the ordinances; if not, it would allow Grants Pass to continue enforcing its restrictions on sleeping.[275]

Returning to the Epicurean roots of substantive process analysis obviates this all-or-nothing approach. Under the Epicurean approach, the Court would accept the homeless residents' subjective desire to sleep with a blanket on public property as a liberty interest[276] and then assess how natural

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[268] 603 U.S. 520 (2024).

[269] *Id.* at 537.

[270] *Id.*

[271] *Id.* at 538.

[272] *See id.* at 544–45 (noting that a due process claim against a law that criminalizes status rather than conduct "may have made some sense"). The plaintiffs relied on *Robinson v. California*, 370 U.S. 660 (1962), which held that criminalizing the status of being addicted to drugs violated the Eighth Amendment. *See* Grants Pass, 603 U.S. at 544. In 2019, the Ninth Circuit extended *Robinson*'s holding to invalidate ordinances such as those of Grants Pass as unconstitutionally criminalizing the status of being homeless. *Id.* at 533–34 (discussing Martin v. Boise, 920 F.3d 584 (9th Cir. 2019)). The Supreme Court's opinion in *Grants Pass* rejected this extension. *Id.* at 560–61.

[273] *See supra* notes 138–141 and accompanying text.

[274] *See id.* Because the regulations at issue are state rather than federal, the Fourteenth Amendment's Due Process Clause applies, making 1868 the relevant year for originalist analysis.

[275] As the Court did indeed, rejecting the homeless plaintiffs' Eighth Amendment claims. *See* Grants Pass, 603 U.S. at 560–61.

[276] *See supra* notes 247–249 and accompanying text. Importantly, "subjective desire" refers here to homeless residents' preferred choice out of all *available* alternatives, not all *ideal* alternatives.

and necessary that desire is. Beginning with the broadest characterization of the natural desire at stake,[277] sleep is universally essential to human survival and thus a natural desire.[278] The Court's analysis would therefore turn on the necessity of the homeless plaintiffs' fulfilling that desire in this specific way—i.e., sleeping with a blanket outside. In other words, the Court would evaluate the availability of alternative places to sleep and the efficacy of those alternatives. As the Court's opinion in *Grants Pass* documents, those alternatives, while extant, are relatively few.[279] What is more, they are undesirable, and therefore of limited effectiveness, for a variety of reasons.[280] Thus, the homeless plaintiffs' desire to sleep on public property is thus natural and highly (if not strictly) necessary.

As another example, recall again *Department of State v. Muñoz*, in which an American citizen sought additional process for the State Department's denial of her request for her non-citizen husband to live with her in the United States.[281] By freeing the substantive due process analysis from the cramped liberty-or-not inquiry, the Epicurean approach would create space for a more nuanced treatment of Muñoz's claim. Under the Epicurean approach, the Court would begin by acknowledging that Muñoz's subjective preference to live with her non-citizen husband in the United States qualifies as a liberty interest and proceed to evaluate how natural and necessary that desire is. Again beginning with the broadest characterization of the desire at stake, the Court itself has repeatedly acknowledged[282] that the desire for long-term romantic partnership of the kind embodied in marriage is a natural desire for most humans.[283] Moreover, while the desire to marry a specific person may not be "necessary" in the strictest sense, most humans experience considerably less latitude in choosing a spouse than in choosing what to eat for lunch. For that reason, the Court has consistently rejected restrictions that prevent people from marrying the individual of their choice.[284]

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[277] *See supra* notes 261–262 and accompanying text.

[278] *See* Grants Pass, 603 U.S. at 563 (Sotomayor, J., dissenting) ("Sleep is a biological necessity, not a crime.").

[279] *Id.* at 539 (majority opinion) (noting lower courts' finding that the total number of involuntarily homeless people in Grants Pass exceeds the number of practically available shelter beds).

[280] *See id.* at 539, 549–56; *see also id.* at 569–72 (Sotomayor, J., dissenting) ("Shelter beds that are available in theory may be practically unavailable . . . .").

[281] 602 U.S. 899, 902–03 (2024).

[282] *See, e.g.*, *id.* at 920–21 (Sotomayor, J., dissenting) (quoting Obergefell v. Hodges, 576 U.S. 644, 671 (2015)).

[283] *See supra* note 208 and accompanying text (noting that natural desires may be emotional as well as physical).

Some people do not experience romantic attraction to others or only do so under specific circumstances. See Chantelle Pattemore, *What Is Aromatic?*, PsychCentral (Oct. 29, 2021), https://psychcentral.com/health/what-is-aromantic [https://perma.cc/K7LC-N639]. Their (lack of) experience of romantic desire is also natural and does not undercut the naturalness of romantic desire in general.

[284] *See* Muñoz, 602 U.S. at 929–32 (Sotomayor, J., dissenting) (collecting cases).

Finally, Muñoz's desire to live with her husband is also highly natural and necessary; for many, living together is central to the very definition of marriage and family.[285]

Thus, if Muñoz simply desired to marry and live with her husband, her liberty interest would be near the most natural and most necessary end of the Epicurean spectrum.[286] But Muñoz wants to live with her husband *in the United States*. That additional layer of specificity moves her interest toward the "unnecessary" side of the Epicurean spectrum. It does not move her interest so far, however, as to untether it completely from her natural and necessary interest in living with her husband.[287] How far each additional layer of specificity moves a natural interest toward the unnecessary side of the spectrum depends on the number and efficacy of available alternatives to achieve the natural interest.[288] In other words, the Court should ask: Understanding that living with her husband in the United States is her first choice, how possible would it be for Muñoz to live with him in his home country or elsewhere? How well does that option fulfill her natural and necessary desire to live with her husband? These are the kinds of questions that should guide the necessity analysis.

c. Determining Due Process

As the final step in the Epicurean approach, the judge would determine the level of process necessary to justify the government's infringement of the asserted liberty interest. In doing so, the judge would not be limited to the options of strict scrutiny or nothing currently available to substantive due process claimants.[289] Standard legislative and judicial procedures would continue to serve as a baseline, providing sufficient procedural protection for "empty" desires or minor infringements of natural desires. Where the court found a significant infringement of a natural desire, however, it could pull from the full panoply of additional procedural protections[290] to craft a remedy appropriate to the naturalness of the liberty interest at stake and the extent to which the challenged government action inhibited that interest.

In *Grants Pass*, for example, where the homeless plaintiffs' desire to sleep on public property is thus natural and highly necessary, it makes sense to require the city to engage in more than its normal level of process—its

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[285] A fact that the Court has also acknowledged and thus protected. *See* Moore v. City of East Cleveland, 431 U.S. 494, 499–500 (1977).

[286] And indeed would be vindicated by the Court's existing substantive due process precedents. *See supra* notes 284–285 and accompanying text.

[287] *Cf.* Muñoz, 602 U.S. at 932 (Sotomayor, J., dissenting) (noting that "[t]he majority . . . makes the same fatal error it made in *Dobbs*: requiring too careful a description of the asserted fundamental liberty interest" (citation modified)).

[288] *See supra* text between notes 269–270.

[289] *See supra* notes 247–252 and accompanying text.

[290] *See supra* note 250 (listing court-prescribed procedural protections in procedural due process cases).

standard legislative (city council) and judicial (municipal court) procedures—to justify impinging upon the plaintiffs' liberty interest. As a start, the Court might require the city to show that providing sufficient shelter beds without religious or other unnecessary restrictions was unduly burdensome before allowing it to criminalize sleeping on public property.

Muñoz provides a more nuanced case. Intuitively, requiring someone to leave the United States to live with their spouse seems like a substantial burden but not quite a total ban.[291] It is precisely in such intermediate circumstances that the Epicurean approach shows its value. Rather than limiting the outcomes of substantive due process cases to strict scrutiny or nothing, the Epicurean approach would allow the Court to craft intermediate procedural protections appropriate to intermediate burdens on natural interests.[292] In Muñoz's case, requiring the State Department to provide a factual basis for the denial of her husband's visa seems like a small escalation of process compared to the substantial burden that denial imposes on her interest in living with her husband.[293] Regardless of which procedures the Court prescribed, however, the Epicurean approach refocuses the substantive due process inquiry on the appropriate questions and expands its options beyond strict scrutiny. After all, there are many more animals than fish and fowl,[294] and our world is impoverished by pretending otherwise.

d. A Note About Discretion

Despite my best efforts at clarity and precision, my description of the Epicurean approach to substantive due process may draw the objection that it provides judges with too much discretion. My response is twofold.

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[291] *See* Muñoz, 602 U.S. at 933 (Sotomayor, J., dissenting) ("This Court has never required that plaintiffs be fully prevented from exercising their right to marriage before invoking it. Instead, the question is whether a challenged government action burdens the right . . . . There can be no real question that excluding a citizen's spouse from the country "burdens" the citizen's right to marriage as this Court has repeatedly defined it.").

Justice Sotomayor's dissent in *Muñoz* tracks the logic of the Epicurean approach insofar as it centers the burden on fundamental rights in the substantive due process analysis. *See id.* But while Justice Sotomayor would limit intermediate procedural remedies to the type requested in this and similar immigration cases, *see id.* at 935–36 (discussing Kleindienst v. Mandel, 408 U.S. 753 (1972)), I would open the full panoply of procedural protections to all substantive due process claims.

[292] As it already crafts intermediate protections for substantial burdens on intermediate interests in procedural due process cases. *See supra* note 250.

[293] This is not to suggest that courts must craft different procedural remedies for each individual's substantive due process claim based on the claimant's individualized preferences and circumstances. Under the Epicurean approach, the level of individualized consideration in the prescription of procedures is also a function of the importance of the interest. For most interests, it will be sufficient for the courts to prescribe a set of procedural requirements for the generalized interest. Thus, the Court could require that in cases in which it denies a visa to a spouse of a U.S. citizen, the State Department must provide a factual basis. The Court need not concern itself with prescribing additional procedures in individualized cases of that sort unless it became obvious that its procedural prescription was generally inadequate to protect the interest.

[294] *See* Muñoz, 602 U.S. at 910–11 (majority opinion).

First, the Epicurean approach gives judges no more discretion than other judicial philosophies, especially expectation originalism. Contrary to claims that expectation originalism transforms judging into "calling balls and strikes,"[295] expectation originalists routinely exercise considerable discretion in defining the contours of the right at stake,[296] determining which historical periods, sources, and facts are relevant to the analysis,[297] and even in deciding when to apply originalist principles instead of deferring to admittedly non-originalist precedent.[298] Unsurprisingly, expectation originalist justices almost exclusively exercise this discretion in ways that align with their own political and ideological interests.[299]

In *United States v. Skrmetti*,[300] for example, the majority played with levels of generality by defining the classification drawn by gender-affirming care bans as based on treatment for a specific medical condition rather than based on transgender status.[301] The majority then further relied uncritically upon on a non-originalist precedent, *Geduldig v. Aiello*,[302] for the principle that regulations of a medical procedure that apply only to one gender do not trigger heightened equal protection scrutiny.[303] Exercising this discretion allowed the Court's politically conservative, avowedly expectation originalist majority to reach a result that aligned with the values of white Christian nationalism—cutting off access to gender-affirming medical treatment for minors in states with bans—while pretending to espouse neutral principles and eschew political debate.[304]

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[295] *See supra* note 167.

[296] *See* Laurence H. Tribe & Michael C. Dorf, *Levels of Generality in the Definition of Rights*, 57 U. Chicago L. Rev. 1057, 1071 (1990) (noting that "the indeterminacy and manipulability of levels of generality require the Court to make value choices in deciding whether to infer a fundamental right from a constellation of precedent and historical practice" (citation modified)).

[297] *See* Reva B. Siegel, *The Levels-of-Generality Game: "History and Tradition" in the Roberts Court*, 47 Harv. J.L. & Pub. Pol'y 563, 584–90 (2024); Mary Ziegler, *The History of Neutrality:* Dobbs *and the Social-Movement Politics of History and Tradition*, 133 Yale L.J.F. 161, 164 (2023).

[298] *See* Richard H. Fallon, Jr., *Selective Originalism and Judicial Role Morality*, 102 Tex. L. Rev. 221, 244 (2023) (defining "selective originalism" as "a practice of constitutional decision-making in which putatively originalist Justices of the Supreme Court sometimes ignore or subordinate their avowed originalist premises . . . and instead rest their decisions on prior judicial precedents based partly on their policy-based preferences"); Kyle C. Velte, *The Supreme Court's Gaslight Docket*, 97 Temp. L. Rev. 391, 420 (2024).

[299] *See id.* at 231–32; Melissa Murray, *Making History*, 133 Yale L.J.F. 990, 996 (2024) ("[T]he Roberts Court, for all its bleating about neutrality and objectivity, has deployed history . . . in a manner that yields certain outcomes.").

[300] 145 S. Ct. 1816 (2025).

[301] *Id.* at 1832–33.

[302] 417 U.S. 484 (1974), *overruled on statutory grounds by* 42 U.S.C. § 2000e–(k).

[303] Skrmetti, 145 S. Ct. at 1833–34 (discussing Geduldig, 417 U.S. at 486, 492–97); *see also* Geduldig, 417 U.S. at 492–97 (reaching its holding with no discussion of original meaning).

[304] *See* Skrmetti, 145 S. Ct. at 1837 ("The voices in these debates raise sincere concerns; the implications for all are profound. The Equal Protection Clause does not resolve these disagreements. Nor does it afford us license to decide them as we see best. Our role is not to judge

Second and more fundamentally, the claim that "unelected judges should not exercise discretion" is a red herring.[305] Indeed, that claim is even more of a red herring than the claim that "kids should not make big, life-altering decisions," because the act of judging *is*, by definition, the act of exercising discretion.[306] The federal judiciary exists to resolve "cases and controversies"[307] between two parties advancing mutually incompatible but at least somewhat plausible interpretations of the relevant law.[308] Judges would be superfluous if legal interpretation were a discretionless, mechanical exercise.

Discretion-or-not is yet another false dichotomy. The actual debate is over *how* judges should exercise discretion and over *what kinds* of decisions. The goal, then, is not to eliminate judicial discretion—which would be both impossible and undesirable—but to channel that discretion to the kinds of decisions judges should make, identify both legitimate and illegitimate criteria by which judges should make those decisions, and implement transparency measures to ensure that judges are making the right kinds of decisions using the right criteria.[309] While these ideas crystallized in the

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the wisdom, fairness, or logic of the law before us, but only to ensure that it does not violate the equal protection guarantee of the Fourteenth Amendment. Having concluded it does not, we leave questions regarding its policy to the people, their elected representatives, and the democratic process." (internal quotation omitted)).

Kyle Velte has fruitfully analyzed this series of maneuvers by the Court as a form of "judicial gaslighting." *See* Kyle C. Velte, *The Supreme Court's Gaslight Docket*, 97 Temple L. Rev. 391, 411–13 (2024) ("[T]the Court must convince its audience (the American people) that what we are seeing—the implicit or explicit reversal of rights grounded not in principled legal analysis but rather in rank partisanship, and an adherence to white Christian values and business interests, above other values—is not *actually* what is happening. To admit that an adherence to such values is what is actually happening would threaten the rule of law and the purported neutrality of the Court in fundamental ways that could destabilize the entirety of our system of government." (emphasis original)).

[305] *Cf.* Siegel, *supra* note 134, at 605 (noting that originalist claims about the past "*conceal*[] *rather than constrain*[] judicial discretion and values-based reasoning" (emphasis original)).

[306] *See Judge*, Merriam-Webster.com, https://www.merriam-webster.com/dictionary/judge [https://perma.cc/UP7E-DM7G] (last visited July 18, 2025) (defining *judge* as "to *form an opinion about* through careful weighing of evidence and testing of premises" (emphasis added)); *Judge*, Oxford English Dictionary, https://www.oed.com/dictionary/judge_v?tab=meaning_and_use#40218771 [https://perma.cc/L4BZ-M9PP] (last visited July 18, 2025) (defining *judge* as "to form or pronounce an opinion").

[307] *See* U.S. Const. art. III.; Loper Bright Enters. v. Raimondo, 603 U.S. 369, 384–85 (2024).

[308] *See* Fed. R. Civ. P. 8(a) (requiring a complaint to contain "a short and plain statement of the claim showing that the pleader is entitled to relief"); 11(b) (requiring attorneys signing a pleading to certify that its "claims, defenses, and other legal contentions are warranted by existing law or by a *nonfrivolous* argument for extending, modifying, or reversing existing law or for establishing new law" and prescribing sanctions for violating this requirement (emphasis added)); 12(b)(6) (requiring courts to dismiss complaints for "failure to state a claim upon which relief can be granted").

[309] *Cf.* Federalist No. 78 (Alexander Hamilton) (discussing "the exercise of judicial discretion" according to principles "adopted by [judges] themselves, as consonant to truth and propriety, for the direction of their conduct as interpreters of the law").

Legal Process school of jurisprudence in the mid-twentieth century,[310] even contemporary expectation originalists abide by them, at least in practice.[311]

Expectation originalists also seem to agree that questions about protecting individual liberty interests from undue governmental interference are among the kinds of decisions over which judges should exercise discretion.[312] Thus, the real issue is whether the criteria supplied by the Epicurean approach for judges to make that kind of decision are superior to the criteria provided by expectation originalism. To further aid the reader in making that assessment, I conclude this Part by comparing two cases: one that embodies expectation originalism's approach to substantive due process and the other that closely tracks the Epicurean approach to the same issue.

2. Epicureanism Applied: Same-Gender Sex

Thus far in this Part, I have presented the Epicurean approach as a novel framework for substantive due process doctrine. While my excavation of the Lockean/Epicurean roots of the approach is indeed new, the approach itself closely tracks one strain of substantive due process analysis that has at times gained ascendancy over expectation originalism at the Supreme Court. Even more than *Obergefell v. Hodges*,[313] which I discuss briefly above,[314] *Lawrence v. Texas*[315] applied a substantive due process analysis close to the Epicurean approach in finding that the right to choose sexual partners regardless of gender is part of the liberty protected by the Due Process Clause. *Lawrence* is particularly illustrative because it explicitly overturned an earlier case, *Bowers v. Hardwick*,[316] that applied an expectation originalism approach to the same issue. Contrasting *Bowers* and *Lawrence* highlights the fallacy of expectation originalism and further demonstrates the superiority of the Epicurean approach as a method of substantive due process analysis.

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[310] *See, e.g.*, Ernest A. Young, *Institutional Settlement in a Globalizing Judicial System*, 54 DUKE L.J. 1143, 1159–61 (2005) (discussing the principle of comparative institutional competence); Richard H. Fallon, Jr., *Reflections on the Hart and Wechsler Paradigm*, 47 VAND. L. REV. 953, 966 (1994) (discussing the principle of reasoned elaboration).

[311] *See* Rucho v. Common Cause, 588 U.S. 684, 721 (2019) (Roberts, C.J.) (holding that federal courts should not hear challenges to partisan gerrymandering); Loper Bright, 603 U.S. at 395 (Roberts, C.J.) (holding that deference to an executive agency's legal interpretation is not a legitimate decision-making criterion for judges interpreting a statute); Dobbs v. Jackson Whole Women's Health Org., 597 U.S. 215, 269–78 (2022) (Alito, J.) (criticizing *Roe v. Wade* for "ma[king] little effort to explain how [its holding] could be deduced from any of the sources on which constitutional decisions are usually based").

[312] *See supra* notes 110–111 and accompanying text.

[313] 576 U.S. 644 (2015).

[314] *See supra* notes 120–121 and accompanying text.

[315] 539 U.S. 558 (2003).

[316] 478 U.S. 186 (1986).

a. Expectation Originalism: *Bowers v. Hardwick*

In August 1982, Atlanta police officers visited the home of Michael Bowers to serve a traffic warrant and found him having sex with another man in his bedroom.[317] Georgia officials charged Bowers under its law criminalizing "sodomy," which included the particular act in which Bowers and his partner were engaged until interrupted by the police.[318] Although prosecutors eventually decided not to prosecute him, Bowers turned the tables. He brought his own lawsuit alleging that Georgia's criminalization of sexual conduct between consenting adults, including adults of the same gender, violated the Due Process Clause of the Fourteenth Amendment[319] as interpreted in substantive due process cases such as *Griswold v. Connecticut*[320] and *Roe v. Wade*.[321]

By one vote, the Supreme Court rejected Bowers's substantive due process challenge.[322] Although the precise formulation of the two-step originalist substantive due process test[323] would not occur until one year later,[324] the *Bowers* majority presaged its emphasis on "history and tradition" in defining fundamental rights.[325] Surveying the historical restrictions against "homosexual sodomy," the Court tersely concluded that "to claim that a right to engage in such conduct is 'deeply rooted in this Nation's history and tradition' or 'implicit in the concept of ordered liberty' is, at best, facetious."[326] Apparently finding the majority's language insufficiently categorical, Chief Justice Warren Burger chimed in to emphasize that "[d]ecisions

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[317] *Id.* at 187–88, 188 n.1.

[318] *Id.*

[319] *Id.* at 188–91.

[320] 381 U.S. 479 (1965).

[321] 410 U.S. 113 (1973), *overruled by* Dobbs v. Jackson Whole Women's Health, 597 U.S. 215 (2022).

[322] Bowers, 478 U.S. at 192.

[323] *See supra* Part II.A.1.

[324] *See supra* note 142.

[325] *See supra* notes 138–141.

[326] *Bowers*, 478 U.S. at 194. Note the discretion exercised in defining the asserted interest as engaging in a certain form of conduct ("homosexual sodomy") rather than belonging to a specific identity (being gay). *Cf. supra* note 296 and accompanying text. Drawing on Eve Sedgwick's work in *Epistemology of the Closet*, Janet Halley identified this act/identity distinction as a "double bind," a systematic arrangement of two symbolic systems that permits an advocate to move seamlessly between the two as necessary to make their opponent's argument unwinnable. Janet E. Halley, *Reasoning About Sodomy: Act and Identity In and After* Bowers v. Hardwick, 79 Va. L. Rev. 1721, 1747–49 (1993) (quoting Eve K. Sedgwick, Epistemology of the Closet 11 (1990)). In other words, the *Bowers* majority treats queer sexuality alternatively as an act or as an identity as necessary to serve its predetermined goal of denying it constitutional protection. *See id.* I posit that the Court deployed a similar device to deny protection to transgender identity in *United States v. Skrmetti*. 145 S.Ct. 1816, 1832–33 (2025). *See supra* note 303 and accompanying text.

of individuals relating to homosexual conduct have been subject to state intervention throughout the history of Western civilization."[327]

Though the moral/immoral dichotomy takes centerstage in *Bowers*,[328] the natural/unnatural distinction also subtly permeates both the majority opinion and Burger's concurrence.[329] The Court accepted the indisputable fact that large swaths of society had long believed same-gender sex to be "unnatural" as sufficient justification for Georgia to regulate it. Under the Epicurean approach, however, society's current and historical attitude toward the asserted liberty interest is relevant but not dispositive to whether the desire is truly natural.[330] The Court thus had an additional duty—one it did not perform in *Bowers*—to determine whether society's belief that same-gender sex is unnatural was authentic or the result of domination.[331]

That analysis might have looked something like this. Michael Bowers's asserted liberty interest was to have private, consensual sex with men. At the most generic level,[332] the human desire for sex is eminently natural. Most humans experience the desire to have sex as a pressing need and experience mental, emotional, and even physical pain from prolonged sexual deprivation. As with sleeping and eating, a total government ban on sex of any kind is difficult to fathom.[333]

Since the Georgia criminal sodomy statute was not a total ban on sex, the question shifts to how *necessary* it was for Bowers to engage in the conduct prohibited by the statute—i.e., sex with men—in order to fulfill his natural need for sex. In other words, how many alternatives did the prohibition leave Bowers, and how effective were those alternatives in fulfilling his needs? Though the evidence was admittedly less conclusive in 1986, the overwhelming scientific consensus today is that the sexual attraction of the vast majority of people is significantly affected by the gender of their potential partners; that people possess little or no conscious control over this effect; and that obtaining sexual fulfillment with a partner of gender to which one is not sexually attracted is difficult if not impossible for most people.[334] In short, a ban on same-gender sex was practically the same as a ban on sex altogether for Michael Bowers.

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[327] Bowers, 478 U.S. at 196 (Burger, C.J., concurring).

[328] *See id.* at 196 (majority opinion); *id.* at 197 (Burger, C.J., concurring) ("To hold that the act of homosexual sodomy is somehow protected as a fundamental right would be to cast aside millennia of moral teaching.").

[329] *See id.* at 191 (majority opinion) ("No connection between family, marriage, or procreation on the one hand and homosexual activity on the other has been demonstrated"); *id.* at 197 (Burger, C.J., concurring) (highlighting several historical descriptions of homosexual conduct as a "crime against nature").

[330] *See supra* note 269 and accompanying text.

[331] *See supra* notes 229–241 and accompanying text.

[332] *See supra* notes 261–262 (indicating that the naturalness analysis occurs at the highest level of generality).

[333] *See supra* note 208 and accompanying text.

[334] *See Understanding sexual orientation and homosexuality,* Am. Psych. Ass'n (October 29, 2008), https://www.apa.org/topics/lgbtq/orientation [https://perma.cc/UD8P-ALEA].

Under the Epicurean approach, the Court would have recognized that enacting and enforcing a near-total impingement of Michael Bowers's natural liberty interest requires for a correspondingly high level of process—considerably more than the routine legislative and judicial procedures by which Georgia enacted its sodomy ban and enforced it against Michael Bowers.[335]

b. The Epicurean Approach: *Lawrence v. Texas*

That is exactly what happened almost two decades later in *Lawrence v. Texas*.[336] In a near-identical repeat of the circumstances in *Bowers*, Houston police visited the home of John Lawrence and found him having sex with another man.[337] Lawrence was charged and convicted of "deviate sexual intercourse."[338] Like Michael Bowers before him, Lawrence challenged his conviction under the Due Process Clause of the Fourteenth Amendment.[339] After Lawrence's claim failed in the Texas courts, the Supreme Court accepted his invitation to reconsider *Bowers*.

Though the *Lawrence* Court engaged critically with *Bowers*'s historical survey of social attitudes toward same-gender sex[340] and in its narrow definition of the right at stake,[341] its primary innovation was to reject expectation originalism's acceptance of historical social attitudes as inherently sufficient justification for governmental regulation.[342] The *Bowers* Court erred in treating historical social attitudes as the *end* of substantive due process analysis instead of merely as one *means* of determining the ultimate criterion of constitutional liberty.[343] The *Lawrence* Court defined this criterion by quoting at some length from *Planned Parenthood v. Casey*:

> These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one's own

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[335] *See supra* Part II.C.1.c.

[336] 539 U.S. 558 (2003).

[337] *Id.* at 562–63.

[338] *Id.*

[339] *Id.*

[340] *See id.* at 571 ("In summary, the historical grounds relied upon in *Bowers* are more complex than the majority opinion and the concurring opinion by Chief Justice Burger indicate. Their historical premises are not without doubt and, at the very least, are overstated."). That is, the *Lawrence* Court recognized and called out the *Bowers* majority for its results-driven exercise of discretion in elevating certain historical sources and practices while ignoring others. *Cf. supra* note 299 and accompanying text.

[341] Lawrence, 539 U.S. at 566–67 (noting the *Bowers* Court's "failure to appreciate the extent of the liberty at stake"). *Cf. supra* notes 298, 328 and accompanying text.

[342] *See* Lawrence, 539 U.S. at 572 ("History and tradition are the starting point but not in all cases the ending point of the substantive due process inquiry." (internal quotation omitted)).

[343] *Id.*

> concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State.[344]

This (in)famous passage warrants unpacking. In it, the Court holds that the Due Process Clause marks off a zone of liberty interests in which individuals possess the presumptive right to make choices that align with their subjective preferences free from government regulation. The Court defines that zone using several different phrases, each suggesting centrality to self-definition, particularly regarding our relationships to one another.[345] Finally, the Court implies that the Due Process Clause protects personal decisions within that zone *even if* historical and contemporary social attitudes permit or even encourage governmental regulation.[346]

This analysis should seem familiar because it closely tracks the Epicurean approach to substantive due process articulated above. Like *Lawrence*, the Epicurean approach defines liberty as the right to align one's choices with one's subjective preferences.[347] Though its terminology differs, the Epicurean approach—like *Lawrence*—places a higher value on liberty interests central to self-definition.[348] And like *Lawrence*, the Epicurean approach acknowledges that the passage of time may expose negative social attitudes about a liberty interest as the lingering consequence of the naturalizing tendencies of domination rather than genuine human inclinations.[349]

In short, *Lawrence* was not an untethered elevation of personal preferences masquerading as constitutional law. Instead, *Lawrence* is an opinion grounded in an understanding of liberty as a subjective and dynamic principle that the Framers would have recognized and ratified. Justice Kennedy captured this understanding in the final paragraph of *Lawrence*:

> Had those who drew and ratified the Due Process Clauses of the Fifth Amendment or the Fourteenth Amendment known the components of liberty in its manifold possibilities, they might have been

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[344] *Id.* at 574 (quoting Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 851 (1992) (plurality)). The Court overruled *Casey* in *Dobbs v. Whole Women's Health Organization*, 597 U.S. 215, 231 (2022). It has not yet clarified the status of this portion of *Casey* quoted in *Lawrence*, which remains good law—at least for now.

[345] *See* Lawrence, 539 U.S. at 573–75 (defining "[t]hose matters" in the quotation from *Casey* as "personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education").

[346] *See id.* at 572, 578–79.

[347] *See supra* text accompanying notes 245–246.

[348] *See supra* Part II.B.2.

[349] *See id.*

I would depart from *Lawrence* only insofar as the Court ends its analysis by articulating the importance of the liberty interest at stake. Under the Epicurean approach, the Court would then decide how much process would be required for Texas to infringe upon that liberty interest. Since the liberty interest clearly requires more than the state's standard legislative and judicial processes, however, the result would be the same. *Cf. supra* text accompanying notes 291–292.

> more specific. They did not presume to have this insight. They knew times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress. As the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom.[350]

III. Gender As Liberty

In truth, my discovery of joy when I tried on a dress for the first time at the age of thirty-two was more of a re-discovery. Though my memories of the period are fragmentary, joy seems to have supplied the central organizing principle of my life until I was about five years old. Kodak prints and VHS tapes from that period unfailingly show a child overflowing with energy, a precocious little ham who would put on a grand show for the smallest of audiences at the drop of a hat. In one endearingly prophetic Olan Mills shot, an exuberant young Tyler Rose claps her hands over an open storybook balanced on her lap. By the age of eleven, that girl had vanished. In her place was a painfully shy, deeply insecure, achingly lonely "sissy" who hid away with her books and video games as often as she could get away with.

What happened? Shame happened. Shame is the opposite of joy. Not indifference, not sadness, not even despair. Shame. Many trans people vividly recall their first experience of shame related to their gender. My moment happened when I was around five years old. I had been obsessed with the "Hollywood Hair Barbie," whose long blonde hair turned purple when sprayed with a magic solution, since I had seen her advertised during Saturday morning cartoons. Naturally, when my paternal grandfather asked me what I wanted for Christmas that year, I enthusiastically told him about her. Far from sharing my excitement, my grandfather's face fell, and he turned away from me. At the time, I lacked the vocabulary to describe the mortification radiating off him in waves. But I was old enough to receive the message clearly: What I wanted—who I was—was not okay.

I have often described the years that followed as "the snuffing of the spark." Upon realizing that everyone around me expected me to act like a boy, I tried very hard to do so. I was very bad at it. Joy no longer served as my criterion for deciding what to do, wear, say, or be. Now I was driven by relentless fear.

What my grandfather did to me on a personal level, legal bans on gender-affirming care do on the level of states and nations. In other words, such bans codify the displacement of joy by fear as the driving force in transgender people's lives. In this Part, I show how the Epicurean approach renders that displacement legible and relevant to substantive due process analysis. Most humans experience the desire to align their external gender

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[350] Lawrence, 539 U.S. at 578–79.

presentation with their internal gender sense as a pressing need, one that causes mental and emotional suffering when unfulfilled. Thus, in Epicurean terms, the desire for internal/external gender alignment is natural and necessary. This suggests that the government must employ a high degree of process—something beyond standard legislative and judicial procedures—to justify measures that significantly inhibit that desire.

Finally, I return to the wrinkle of childhood. As with all individuals,[351] children interpret the subjective experience of joy as a signal that an experience resonates with their sense of self. Indeed, society encourages children to engage in "joy exploration" through the activity that characterizes childhood more than any other: play. This exploration applies to gender as much as any other facet of a child's identity. Thus, for children as well as adults, "gender transition" is not a single major decision point but an ongoing process whereby children continually experiment, monitor, and align their external gendered experiences with their developing internal sense of who they are. This process is as natural and necessary for children as it is for adults.

Even assuming that children's experience of gender differed in some way that justified increased government intervention, however, the additional process afforded children by gender-affirming care bans is plainly inadequate. The only such process is the age of majority requirement, the arbitrary bright line at which children become legal adults. To claim that the government can suppress a 17-year-old's natural, necessary liberty interest in internal/external gender alignment at 11:59 p.m. but that it cannot do so sixty seconds later when the person turns 18 is to take neither liberty nor due process seriously.

A. The Naturalness of Gender Identity

For the sake of simplicity, let me begin the analysis with adults. Assume that one of the states that bans gender-affirming healthcare for minors[352] extends its ban to cover all individuals regardless of age.[353] In other words, the state bans the use of any medical treatment—including but not limited to hormone replacement therapy in any form and surgery of any kind—to accomplish gender transition. An adult resident of the state who desires medical treatment for gender transition challenges the ban on substantive due process grounds. What results?

Under the Epicurean approach, the analysis begins by acknowledging the individual's subjective desire to seek medical treatment for gender transition as a liberty interest.[354] It proceeds by assessing the naturalness—in the

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[351] *See supra* Part I.B.

[352] *See supra* notes 27–30 and accompanying text.

[353] I turn to the added wrinkle of children's minor status below in Part III.B.

[354] *See supra* notes 247–249 and accompanying text.

Epicurean sense—of that desire.[355] The vast majority of humans experience the need to align their bodies with their internal sense of gender as a pressing need.[356] Indeed, the need is so pressing that most cisgender individuals routinely fulfill it without conscious thought, which they may do because their bodies already align with their internal sense of gender. Importantly, however, even some cisgender people pursue medical treatment for gender-affirming purposes. Cisgender men may undergo hormonal therapy or breast reduction surgery to treat gynecomastia, a condition defined by breast growth considered larger-than-average for assigned male individuals.[357] Cisgender women also commonly undergo surgeries such as breast augmentation to enhance physical features associated with feminine gender identity.[358]

The naturalness of the desire for internal/external gender alignment is reinforced by the pain caused by the frustration of that desire. The resulting psychological distress, clinically labeled *gender dysphoria*,[359] frequently manifests as depression, anxiety, low self-esteem, relationship difficulties, and suicidal ideation.[360] Attempts to alleviate psychological symptoms may lead to physical harms, including drug abuse, intentional self-harm and suicide,[361] and unsafe attempts to minimize or alter bodily sources of dysphoria.[362] While these symptoms are obviously more common among

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[355] *See supra* Part II.C.1.a.

[356] *See* TUEBAN, *supra* note 69 and accompanying text.

[357] *See* Ronald S. Swerdloff & Jason C. M. Ng, *Gynecomastia: Etiology, Diagnosis, and Treatment*, NAT'L LIBR. OF MED. (Jan. 6, 2023), https://www.ncbi.nlm.nih.gov/books/NBK279105/ [https://perma.cc/823Y-4VKM]. The normative bias of gynecomastia is proved by the fact that up to 60 percent of boys satisfy its diagnostic criteria by the time they turn 14, though most cases resolve within three years. *See id.* Still, the American Society of Plastic Surgeons reports that 3,000 cisgender American boys underwent breast reduction surgery in 2022 alone. TURBAN, *supra* note 16, at 133.

[358] *See, e.g.*, Elizabeth R. Didie & David B. Sarwer, *Factors that Influence the Decision to Undergo Cosmetic Breast Augmentation Surgery*, 12 J. WOMEN'S HEALTH 241, 242, 250 (2003). The classification of breast-related gender-affirming surgery for cisgender women as "cosmetic" while breast-related gender-affirming surgery for cisgender men is "medical" is, of course, pure sexism. *See* Preeta Saxena, *Trading and Managing Stigma: Women's Accounts of Breast Implant Surgery*, 42 J. CONTEMP. ETHNOGRAPHY 347, 348 (2013).

[359] *See* Garima Garg, Ghada Elshimy & Raman Marwaha, *Gender Dysphoria*, NAT'L LIBR. OF MED. (July 11, 2023), https://www.ncbi.nlm.nih.gov/books/NBK532313/ [https://perma.cc/SU6A-9BB7].

[360] *Id.*; *see also* Kate Cooper, Alisa Russell, William Mandy & Catherine Butler, *The Phenomenology of Gender Dysphoria in Adults: A Systematic Review and Meta-Synthesis*, 80 CLINICAL PSYCH. REV. 1, 5–6 (2020) (developing typology of gender dysphoria symptoms in adults).

[361] *See* Cooper, Russell, Mandy, & Butler, *supra* note 360, at 5–6; *see also* Catherine Butler, Richard Joiner, Richard Bradley, Mark Bowles, Aaron Bowes, Claire Russell & Veronica Roberts, *Self-Harm Prevalence and Ideation in a Community Sample of Cis, Trans, and Other Youth*, 20 INT'L J. TRANSGENDERISM 447, 452 (2019) (finding that "self-harm ideation and perceived peer self-harm is significantly higher in transgender youth populations").

[362] For example, transmasculine individuals—those assigned female at birth—may develop eating disorders as a means of decreasing breast size. *See* TURBAN, *supra* note 16, at 23. Transfeminine individuals—those assigned male at birth—may attempt to remove their penises

transgender people,[363] cisgender people exhibit similar symptoms when suffering from gender dysphoria.[364]

The naturalness of the desire for internal/external gender alignment is further reinforced by the inability of most people to control it.[365] A person's gendered physical characteristics are primarily genetically determined.[366] While science still lacks a precise understanding of the factors that contribute to the development of a person's internal sense, those factors are also largely outside an individual's conscious control.[367] Accordingly, denying medical treatment for gender dysphoria is not a neutral act. Individuals whose internal gender sense does not align with their gendered physical characteristics *will* experience gender dysphoria, just like a person born with astigmatism will experience blurred vision. Denying a cisgender boy who develops gynecomastia access to breast reduction surgery simply because he was genetically predisposed to do so is just as absurdly cruel as denying the astigmatic person access to glasses. In exactly the same manner, denying transgender children access to gender-affirming medical care until they turn eighteen forces them to undergo a puberty process that is misaligned with their internal gender sense, thereby condemning them to years of psychological suffering as they develop dysphoric physical characteristics that can only be altered with immense time and resources—if ever.[368]

The near-universality of the need to align one's body with one's internal sense of gender and the inevitable pain that results from the frustration of that need suggests that the desire is highly natural. Under the Epicurean approach, the next step in the analysis is an evaluation of the necessity of the plaintiff's chosen means to fulfill that general need.[369] How many alternatives does a state ban on medical treatments for gender transition leave an individual to align their body with their internal sense of gender, and how efficacious are those alternatives at fulfilling that need?[370]

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or testicles through banding or cutting. *See* Matthew St. Peter, Anton Trinidad, & Michael S. Irwig, *Self-Castration by a Transsexual Woman: Financial and Psychological Costs: A Case Report*, 9 J. Sexual Med. 1216, 1217 (2012).

[363] Because the category of "transgender" is defined by internal/external gender misalignment. *See* Clarke, *supra* note 7, at 897–98 (internal quotation omitted).

[364] *See, e.g.*, Martin Sollie, *Management of Gynecomastia: Changes in Psychological Aspects After Surgery: A Systematic Review*, 7 Gland Surgery S70, S70 (noting that "[s]tudies performed on adults and adolescents with gynecomastia have reported significant negative impact on psychosocial aspects, such as well-being, social functioning, mental health, and self-esteem"); Didie & Sarwer, *supra* note 358, at 242 (cataloging symptoms of psychological distress in cisgender women seeking breast augmentation).

[365] *See supra* note 205 and accompanying text.

[366] *See* Turban, *supra* note 16, at 35–36.

[367] *See id.* at 84–86.

[368] *See id.* at 139–40 ("While the puberty blocker was reversible, puberty itself was not.").

[369] *See supra* Part II.C.1.b.

[370] *Id.*

Without interventions defined as "medical" to treat gender dysphoria, a transgender person is left with two primary alternatives: psychotherapy[371] and social transition—that is, presenting oneself as and living according to one's internal sense of gender.[372] Both can be and often are vital to transgender individuals' treatment regimens for gender dysphoria.[373] For many transgender individuals, however, non-medical interventions are insufficient to alleviate the worst symptoms of their gender dysphoria.[374] Moreover, social transition without gender-affirming medical treatment may actually worsen some transgender individuals' gender dysphoria and may also subject them to societal stigma and discrimination.[375] These facts confirm the intuitive conclusion that a state ban on medical treatment for the purpose of gender transition is practically the same as a ban on fulfilling the natural need for internal/external gender alignment—at least for transgender people.

Having determined that the pursuit of gender-affirming medical treatment is highly necessary to achieve the highly natural desire for internal/external gender alignment, the final step in the analysis is to determine the level of process that is "due" before the state could constitutionally ban such treatment.[376] A precise articulation of the set of procedures that could justify such a ban—if such a set of procedures exists at all—is beyond the scope of this article. Suffice it to say that such a ban, which would function as a death sentence for many trans people,[377] could not possibly be justified by a state's standard legislative procedures subjected to rational basis review.

B. Unto the Least of These[378]

Limiting gender-affirming care bans to minors does not cure the bans' constitutional defects under the Epicurean approach. It is just as important—if not more so—for children's decisions about gender to be driven by their

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[371] *See* WPATH 8, *supra* note 98, at S175–S176.

[372] *Id.* at S107.

[373] *See id.* at S32, S171.

[374] *See id.* at S110–S111; Turban, *supra* note 16, at 145–146 (discussing 2015 study that showed that "though therapy alone can be helpful for co-occuring mental health challenges other than gender dysphoria, puberty blockers are needed to truly improve mental health when adolescents are suffering from physical gender dysphoria").

[375] *See* WPATH 8, *supra* note 98, at S37, S39–S40.

[376] *See supra* Part II.C.1.c.

[377] *See, e.g.*, Jody L. Herman, Taylor N.T. Brown, & Ann P. Haas, Suicide Thoughts and Attempts Among Transgender Adults: Findings from the 2015 U.S. Transgender Survey 16–17 & tbl.4 (UCLA Sch. L. Williams Inst. 2019), https://williamsinstitute.law.ucla.edu/wp-content/uploads/Suicidality-Transgender-Sep-2019.pdf [https://perma.cc/ULM2-RU5V] (finding that transgender adults "who wanted, and subsequently received, hormone therapy and/or surgical care had substantially lower prevalence of past-year suicide thoughts and attempts than those who wanted hormone therapy and surgical care but had not received them").

[378] *See Matthew* 25:40 (King James) ("And the King shall answer and say unto them, Verily I say unto you, Inasmuch as ye have done it unto one of the least of these my brethren, ye have done it unto me.").

internal gender sense than it is for adults' decisions. Yet the only additional process afforded to minors by gender-affirming care bans is the age-of-majority requirement, the one-size-fits-all line that automatically subjects all minors to additional state regulation. The age-of-majority requirement provides insufficient process to justify the extensive intrusion into minors' natural desire for internal/external gender alignment wrought by gender-affirming care bans.

1. Gender, Interrupted

Children perceive the salience of gender categories at a remarkably early age[379] and quickly integrate gender into their primary schema for understanding the world and their place within it.[380] Left to their own devices, children play with gender.[381] Because gender identity often does not stabilize until after age 10,[382] gender nonconformity is common even among young children who go on to identify as cisgender.[383] As with other facets of their identity, children discover and develop their internal gender sense by exploring a range of gendered experiences to see what "sparks joy." Research has verified the psychological benefits of permitting children to engage in such gender exploration.[384] If anything, this gender identity formation process makes it *more* natural and necessary for children's external gender experiences to be guided by their developing internal gender sense than it is for adults.

Alas, adults rarely leave children to their own devices when it comes to gender.[385] Adults assign each child to a gender category at the moment they are born if not sooner.[386] Children strive to learn about gender roles not as an open-ended exploration of possible identities but rather as an important way of comprehending and solidifying their membership in their pre-assigned

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[379] *Id.*; Christia Spears Brown et al., Gender in Childhood 21–23 (2020) (noting that "[s]ome research suggests that, by three or four months, infants can distinguish between women's and men's faces").

[380] Fagot & Leinbach, *supra* note 82, at 206.

[381] *See* Beverly I. Fagot, Mary D. Leinbach, & Richard Hagan, *Gender Labeling and the Adoption of Sex-Typed Behaviors*, 22 Dev. Psych. 440, 442–43 (1986) (finding that preschool children who are unaware of gender differences are significantly less likely to play in ways that conform with gender stereotypes); Erica S. Weisgram, Megan Fulcher, & Lisa M. Dinella, *Pink Gives Girls Permission: Exploring the Roles of Explicit Gender Labels and Gender-Typed Colors on Preschool Children's Toy Preferences*, 35 J. Applied Dev. Psych. 401, 401–02, 407–08 (2014) (noting similar behavioral modification by preschool children to conform with toys associated with their assigned gender).

[382] *See* George, *supra* note 105, at 21.

[383] Am. Psych. Ass'n, *supra* note 69, at 843.

[384] *See* George, *supra* note 105, at 25.

[385] Adults, and especially parents, often have a vested interest in children's gender conformity. *See id.* at 16 ("[G]ender is an especially salient trait for parents. Parents face incredible social pressures to identify their child as male or female[.]").

[386] Fagot & Leinbach, *supra* note 82, at 205.

gender category.[387] This impulse often manifests as a period of intense gender rigidity, usually between the ages of three and five, during which a child becomes hypersensitive to gender cues and may misattribute practically any behavior discrepancy to differences in gender roles.[388] Children look to adults' emotional responses to their gender-coded behavior as perhaps the most important indication of whether the child is "doing gender right."[389] Thus, at least in terms of gender, children gauge the value of play less by their *own* subjective experiences—whether they are having fun or not—than those of their parents or other adult caregivers.[390] But children quickly internalize and begin to police their play activities for gender conformity even in the absence of adults or other children.[391]

Children work so hard to get gender right because they understand the consequences of getting it wrong. Regardless of gender identity, most people know what it is like to be ignored, mocked, or ostracized for violating societal gender norms. The unique pain associated with such a response is called *gender threat*.[392] As with touching a hot stove, one or two experiences of gender threat are usually sufficient to induce most children to live comfortably inside the norms of their assigned gender.[393] Thus, children learn to sacrifice their subjective preferences to secure society's approval[394] and, relatedly, their own emotional and even physical safety.[395]

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[387] *See* Carol Lynn Martin & Diane Ruble, *Children's Search for Gender Cues: Cognitive Perspectives on Gender Development*, 13 Current Directions in Psych. Sci. 67, 68 (2004); Kristina M. Zosuls & Diane N. Ruble, *Gender-Typed Toy Preferences Among Infants and Toddlers*, *in* Gender Typing of Children's Toys: How Early Play Experiences Impact Development 49, 49 (Erica S. Weisgram & Lisa M. Dinella, eds., 2018) (noting that "it is difficult to identify another behavioral characteristic, other than clothing choices, that more clearly differentiates boys and girls than do toy preferences" (internal citations omitted)).

[388] *See* Martin & Ruble, *supra* note 387, at 67–68 (quoting one example in which, having watched his father and a male friend order pizza while his mother ordered lasagna, pronounced that "Men eat pizza and women don't"); Diane N. Ruble, Lisa J. Taylor, Lisa Cyphers, Faith K. Greulich, Leah E. Lurye, & Patrick E. Shrout, *The Role of Gender Constancy in Early Gender Development*, 78 Child Dev. 1121, 1132 (2007).

[389] *See* Beverly I. Fagot & Mary D. Leinbach, *The Young Child's Gender Schema: Environmental Input, Internal Organization*, 60 Child Dev. 663, 671 (1989) ("[T]he child's comprehension [of gender roles] *as a whole* is significantly influenced by the parents' affective, rather than informational, input regarding gender." (emphasis added)).

[390] *See* Martin, Eisenbud, & Rose, *supra* note 85, at 1465 (demonstrating a "hot potato" effect in which children quickly discarded toys they previously found attractive upon learning that the toy was associated with the "other" gender).

[391] *Id.* at 1454–55 & fig.1; Eva Änggård, *Children's Gendered and Non-Gendered Play in Natural Spaces*, 21 Child., Youth, & Env'ts 5, 27 (2011); Eunsook Hyun & Dong Haw Choi, *Examination of Young Children's Gender-Doing and Gender-Bending in Their Play Dynamics: A Cross-Cultural Exploration*, 36 Int'l J. Early Childhood 49, 50–51 (2004).

[392] *See* Turban, *supra* note 16, at 52–53.

[393] *See* Änggård, *supra* note 391, at 25–27; Hyun & Choi, *supra* note 391, at 62–63.

[394] *See* Fagot & Leinbach, *supra* note 82, at 671.

[395] *See* Turban, *supra* note 16, at 91–95 (recounting the consequences of gender threat for one transgender girl).

But adults' success in imposing gender norms on most children does not negate the fact that doing so interrupts an otherwise normal and natural process of human development. Because cisgender children's internal gender sense is by definition comparatively close to their assigned gender, the sacrifices they must make to conform to adult expectations of their gender are relatively small. Conversely, the vast distance between trans children's internal gender sense and adult expectations of their assigned gender means that most *cannot* conform, at least not without causing significant emotional, psychological, and even physical harm to themselves.[396] Regardless, the difference is one of degree, not kind. Whether cisgender or transgender, children experience the denial of their natural and necessary desire for internal/external gender alignment as a sacrifice, or, in Lockean terms, a serious infringement of their liberty. As with transgender adults,[397] that infringement can have serious and even life-threatening consequences for transgender minors.[398]

2. Majority Rule

As I explain above,[399] bans on gender-affirming medical treatment work an almost total deprivation of a transgender adult's liberty interest in internal/external gender alignment, thus if standard legislative and judicial procedures would be insufficient to justify that infringement. If children experience the need for internal/external gender alignment as much if not more than adults, it follows that standard legislative and judicial procedures are insufficient to justify gender-affirming care bans limited to minors as well.

But let us assume for the sake of argument that children experience gender differently enough to justify some measure of additional government interference. As with practically all laws affecting children, the only additional process afforded by existing gender-affirming care bans for minors is

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[396] *See supra* notes 361–366 and accompanying text. *See* Diana M. Tordoff, Jonathon W. Wanta, Arin Collin, Cesalie Stephney, David J Inwards-Breland & Kym Ahrens, *Mental Health Outcomes in Transgender and Nonbinary Youths Receiving Gender Affirming Care*, 5 J. Am. Med. Ass'n Network Open 1, 7 (2022) (finding that receiving desired puberty blockers lowered the risk of suicidality by 73 percent).

[397] *See supra* note 377.

[398] *See* Wilson Y. Lee, J. Nicholas Hobbs, Steven Hobaica, Jonah P. DeChants, Myeshia N. Price, & Ronita Nath, *State-level anti-transgender laws increase past-year suicide attempts among transgender and non-binary young people in the USA*, 8 Nature Human Behavior 2096 (2024) (finding a 33–49 percent increase in the number of trans individuals between the ages of thirteen and seventeen years old who attempted suicide in the year after their state adopted a gender-affirming care ban); Diana M. Tordoff et al., *Mental Health Outcomes in Transgender and Nonbinary Youths Receiving Gender Affirming Care*, 5 J. Am. Med. Ass'n Network Open 1, 7 (2022) (finding that receiving desired puberty blockers lowered the risk of suicidality by 73 percent).

[399] *See supra* Part III.A.

the definition of "minor" itself, commonly known as the "age of majority."[400] Set by most states at 18 years old,[401] this is the moment in a person's life at which they lose the status of child and become a legal adult, with all the rights and corresponding duties of adulthood.[402]

The age of majority requirement is plainly inadequate to justify a near-total deprivation of a liberty interest as natural and necessary as children's desire for internal/external gender alignment. Setting aside the importance of the gender identity formation process during young childhood,[403] most adolescents develop the cognitive and emotional skills of an average adult years before reaching the age of majority.[404] This includes a stable understanding of their internal gender sense.[405] It is absurd to suggest that the passage of twenty-four hours between the last day of a person's seventeenth year and the first day of their eighteenth is sufficient to justify such a severe violation of their liberty. Perhaps it is enough to support forbidding them from getting a tattoo or buying cigarettes or alcohol.[406] But it cannot possibly justify denying someone access to medical treatment without which they are likely to suffer severe physical, emotional, and psychological damage and possibly even death.[407]

Conclusion: Surprised by Joy

We are hard pressed on every side, but not crushed;
Perplexed, but not in despair;
Persecuted, but not abandoned;
Struck down, but not destroyed.[408]

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[400] *See* Vivian E. Hamilton, *Adulthood in Law and Culture*, 91 Tul. L. Rev. 55, 68–69 (2016).

[401] *Id.* at 65 ("Forty-four states have adopted eighteen as the presumptive age of legal majority. Six have set their ages of majority higher, with five states setting it at nineteen and one at twenty-one.").

[402] *Id.* at 68–69.

[403] *See supra* Part III.B.1.

[404] *See* Hamilton, *supra* note 400, at 89 ("In sum, adolescents' basic cognitive abilities mature by age sixteen and give them the capacity to learn, process information, reason, and make rational decisions.").

[405] Am. Psych. Ass'n, *supra* note 69, at 841–43.

[406] *See supra* note 27. *But see* Roper v. Simmons, 543 U.S. 551, 574 (2005) ("Drawing the line at 18 years of age is subject, of course, to the objections always raised against categorical rules. The qualities that distinguish juveniles from adults do not disappear when an individual turns 18. By the same token, some under 18 have already attained a level of maturity some adults will never reach. For the reasons we have discussed, however, a line must be drawn."); Annette Ruth Appell, *Accommodating Childhood*, 19 Cardozo J. L. & Gender 715, 718 (2013) ("While acknowledging the 'natural' differences between many children and most adults, I challenge the totalizing categorical distinction between adulthood and childhood, the extent of the limitation on children's agency, and their segregation from public life.").

[407] *See supra* note 400 and accompanying text.

[408] II *Corinthians* 4:8–9 (New International Version).

As I (re)discovered joy in a shotgun house in New Orleans, C.S. Lewis (re)discovered joy in a zoo.[409] As with me, joy suffused Lewis's earliest years.[410] But the untimely death of his mother[411] and his experiences at school[412] snuffed his spark. By the time Lewis reached adolescence, he had developed "a deeply ingrained pessimism" according to which "the universe was, in the main, a rather regrettable institution."[413]

While trying on a dress for the first time rekindled my spark, Lewis's conversion to Christianity rekindled his.[414] And as the alignment of my external gender presentation with my internal gender sense changed my life, the joy sparked in the resonance of Lewis's conscience with his newfound faith changed his.[415]

True joy is transformative and generative. This is the beautiful reality of Epicurus's notion that a natural desire will always reveal itself by its results.[416] Lewis's joy produced the magic of *The Chronicles of Narnia*, which the young Tyler Rose read until the covers literally fell off the books. Trans joy is just as powerful. "To have your whole essence ripped apart and put back together again," Angelica Ross has said, "is the kind of pain that could only produce something as beautiful as trans people."[417]

American constitutional law protects experiences of joy like Lewis's conversion,[418] as it should. The Framers' generation learned from centuries of religious warfare how natural it is for a person to form their own opinions on matters of faith, and how necessary it is for that person to put those opinions into practice.[419] But American constitutional law does not protect experiences of joy like mine and millions of other trans Americans. Instead, it subjects our ability to fulfill desires, every bit as natural and necessary as Lewis's faith to the whims of legislative majorities.

That difference is not just logically inconsistent. It is also inconsistent with the principle of liberty that the Framers codified in the Due Process Clause, first in 1787 and again in 1868.[420] Thus, while I began this article by exploring the differences between religious conversion and gender

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[409] *See* C.S. Lewis, Surprised by Joy: The Shape of My Early Life 289, 223–24 (1955).

[410] *Id.* at 6–7.

[411] *Id.* at 20–23.

[412] *Id.* at 85–87.

[413] *Id.* at 75.

[414] *Id.* at 289 ("When we set out I did not believe that Jesus Christ is the Son of God, and when we reached the zoo I did.").

[415] *See id.*

[416] *See supra* notes 220–21 and accompanying text.

[417] The Freedom to Exist with Elliot Page – A Soul of a Nation Presentation (ABC television broadcast, aired June 6, 2023) (0:30).

[418] *See* U.S. Const. amend. I (prohibiting laws "respecting the establishment of religion or prohibiting the free exercise thereof").

[419] *See* Nussbaum, *supra* note 47, at 19–20.

[420] *See* U.S. Const. amend. V; U.S. Const. amend. XIV, §2.

transition,[421] I end by highlighting their similarity. The essence of both is a courageously vulnerable attempt to wrest joy out of the indifferent chaos of human existence.

People as diverse as English political philosopher Thomas Hobbes[422] and Buddhist nun Pema Chödrön agree: Life is hard.[423] To be alive is to struggle. During our comparatively brief lives, each of us strives to make meaning, to find purpose, to connect to others, to thrive in our own ways. No matter how it is achieved, the experience of joy in the midst of such pain is always a miracle.

The role of the law is to protect as many of these beautifully diverse paths to human flourishing as possible. Foreclosing one path for no better reason than that a legislative majority disagrees with it—or that people hundreds of years ago disagreed with it—is the height of tyranny. A "liberty" which permits such tyranny is no liberty at all.

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[421] *See supra* Part I.

[422] Thomas Hobbes, Leviathan 84 (A.R. Waller ed., 1904) (1651) ("And the life of man [is] solitary, poor, nasty, brutish, and short.").

[423] Pema Chödrön, When Things Fall Apart: Heart Advice for Difficult Times 71 (20th Anniv. Ed. 2016) (1997) ("The essence of life is that it's challenging . . . . To be fully alive, fully human, and completely awake is to be continually thrown out of the nest.").