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The Right to Seek Joy

Tyler Rose Clemons[[1]](#footnote-2)\*

# 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,[[2]](#footnote-3) 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.[[3]](#footnote-4) For those unfamiliar, the method requires physically holding each item in one’s home while asking, “Does this spark joy?”[[4]](#footnote-5) I possessed sufficient privilege to be stuck at home with copious free time that summer,[[5]](#footnote-6) 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 when 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 decisionmaking criteria for anything at all, much less my own life. The relevance of joy was revolutionary. It changed and continues to change my life.[[6]](#footnote-7)

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[[7]](#footnote-8) is properly defined as the right to seek joy—that is, the right of each individual to define their[[8]](#footnote-9) 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”[[9]](#footnote-10) cases, though Jamal Greene has rightly rejected the substantive/procedural due process distinction as a false dichotomy.[[10]](#footnote-11)

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,[[11]](#footnote-12) the Supreme Court’s conservative majority defines liberty based not on the feelings of living people but on the feelings of people who died centuries ago.[[12]](#footnote-13) 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.

As a prime example, twenty-five U.S. states have banned gender-affirming healthcare for minors within the past three years.[[13]](#footnote-14) These bans prevent transgender and gender-nonconforming[[14]](#footnote-15) children from accessing puberty-blocking medication and other treatments[[15]](#footnote-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 none have dared suggest it.[[16]](#footnote-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.[[17]](#footnote-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, that claim is quite new: It tracks the phenomenological insistence of critical legal scholars, especially some feminist[[18]](#footnote-19) and critical race[[19]](#footnote-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.[[20]](#footnote-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.[[21]](#footnote-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 instead of pretending to be someone else.

In Part II, I contend that the individual’s right to choose according to their own subjective preferences, as in gender transition, is the substantive content of the liberty protected by the Due Process Clause. 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 establish that pursuing gender-affirming healthcare to align one’s body with one’s internal gender sense is a natural, necessary desire, state infringement of which therefore requires more than standard legislative and judicial procedures. 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* and *Lawrence v. Texas*.

In Part III, I suggest that the Epicurean approach to due process I develop in Part II highlights the inadequacy of our constitutional treatment of children. Through play, children quickly develop the ability to identify and express their subjective preferences, especially about highly personal characteristics such as gender. Yet the law gives children’s parents and the state near-total control of their lives up until 11:59 p.m. on the night before their eighteenth birthday, after which that authority transfers automatically, Cinderella-like, to the now-adult. The Epicurean approach indicates that the age-of-majority process is insufficient to justify infringement upon children’s natural and necessary desires, including the desire to pursue gender-affirming healthcare. Taking liberty seriously means taking joy seriously, including children’s joy.

# I. Inside Out[[22]](#footnote-23)

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?*[[23]](#footnote-24)

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.[[24]](#footnote-25) As of July 2024, FPA claimed credit for twenty-three state bans based on “Help Not Harm,”[[25]](#footnote-26) some of which include the phrase itself in their names.[[26]](#footnote-27)

FPA’s rhetorical question captures one of the most popular arguments advanced by proponents of gender-affirming care bans for children: kids are too young to make the “big, life-altering” decision to seek gender-affirming care.[[27]](#footnote-28) This argument rests on two assumptions. The first is the well-established belief that children lack the competence—that is, the maturity, intelligence, foresight, etc.—to make “big, life-altering decisions” for themselves.[[28]](#footnote-29) The second is that the choice to seek gender-affirming care is such a decision.

I return to the first assumption in Part III of this essay. In this Part, I challenge the second. That is, I contend that the choice to receive gender-affirming care is not a “big, life-altering” decision in the way that FPA and other proponents of banning gender-affirming care understand it. This is true on a factual level: Almost all the consequences of the most common forms of gender-affirming care provided to young people are reversible.[[29]](#footnote-30) But it is also true on a deeper level, in the way that transgender people actually experience gender transition, one aspect of which may involve seeking gender-affirming care.

If the claim that gender transition is not a “big, life-altering decision” seems counterintuitive, it is likely due to the very term “gender transition.” The word *transition* usually implies a shift from one distinctcondition to a different one.[[30]](#footnote-31) 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.

By contrast, gender “transition” does not entail changing from a distinct condition to a different one. Transgender people are never cisgender and thus do not transition from being cis to being trans.[[31]](#footnote-32) Rather, gender transition is the decision to align one’s external gender presentation with one’s internal gender identity. It is not a decision to *become* something other than oneself but rather to *stop pretending to be* something other than oneself. The appropriate comparison is not to changing jobs or crossing state lines but to removing a mask or correcting a lie. I was never a man who decided to become a woman. I was a woman who finally decided to start living as one.

## Exogenous Criteria: Religious Conversion

Let me elaborate on this difference further by contrasting gender transition with religious conversion.[[32]](#footnote-33) Religious conversion is a transition in the traditional sense: One is something other than an adherent one moment and becomes an adherent the next. Moreover, the decision to adopt a new faith is a commitment to conform one’s future choices—one’s words, actions, and in some cases even one’s thoughts and feelings[[33]](#footnote-34)—to a set of external criteria prescribed by its doctrines. While the choice of a particular faith ideally stems from a person’s conscience,[[34]](#footnote-35) religious conversion itself consists of a decision to subordinate one’s internal preferences to criteria that are *exogenous*—that is, located outside the self.[[35]](#footnote-36)

Choosing the dictates of one’s faith over one’s subjective desires is often difficult, as the Apostle Paul acknowledged in his letter to the early Christians in Rome:

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![[36]](#footnote-37)

To avoid being in the same wretched boat as Paul, believers engage in various disciplines,[[37]](#footnote-38) such as studying primary and secondary religious texts,[[38]](#footnote-39) submitting to discipleship by more experienced members of the faith,[[39]](#footnote-40) or setting up accountability systems to identify and correct behavioral deviations.[[40]](#footnote-41) 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.[[41]](#footnote-42) In the words of Protestant minister Richard Foster, “The purpose of the Spiritual Disciplines is the total transformation of the person.”[[42]](#footnote-43)

Consider one of the first major controversies in the early Christian church: the permissibility of eating meat sacrificed to pagan idols.[[43]](#footnote-44) 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.[[44]](#footnote-45) 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.[[45]](#footnote-46) Moreover, all agreed that practicing Christianity properly entailed conforming to that answer regardless of an individual Christian’s subjective preferences about eating sacrificial meat.[[46]](#footnote-47) If eating sacrificial meat were deemed sinful and a Corinthian Christian passed a street vendor selling shanks from a lamb sacrificed to Aphrodite,[[47]](#footnote-48) the Christian would be expected to forego purchasing some—no matter how hungry she might be. Similarly, some contemporary Christians experience sexual desire toward members of their own gender but choose to remain chaste because they believe that homosexuality is sinful.[[48]](#footnote-49)

## Endogenous Criteria: Gender Transition

While religious practice requires subordination of individual desires through discipline, subjective preferences supply the sole consideration during the process of gender transition. In other words, while religious practice references exogenous decision-making criteria,[[49]](#footnote-50) gender transition references purely endogenous—that is, within the self[[50]](#footnote-51)—decision-making criteria. That is because unlike religion, gender has no external existence beyond an individual’s subjective sense of who they are and what brings them joy.[[51]](#footnote-52) This is the truth in the second-wave-feminist cliché that “gender is just a construct”: Individuals make choices that society codes as gendered; individuals do not make choices because of gender.[[52]](#footnote-53) 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.”[[53]](#footnote-54)

When a transgender person makes a choice that aligns with their internal gender sense, especially early in their transition, they often experience a sensation called “gender euphoria.”[[54]](#footnote-55) Gender euphoria broadly refers to a spike of positive emotions caused by “a joyful feeling of rightness in one’s gender/sex.”[[55]](#footnote-56) 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.[[56]](#footnote-57) Gender euphoria may manifest as a rush of excitement, an outburst of giddy laughter, a surge in confidence, or a quiet sense of contentedness.[[57]](#footnote-58) The warm flush of exuberance I experienced when I tried on a dress for the first time was an experience of gender euphoria.[[58]](#footnote-59)

While “euphoria” suggests positive feelings of extraordinary intensity,[[59]](#footnote-60) I believe that gender euphoria constitutes cisgender people’s everyday experience of gender. The difference is that cisgender people, most of whom have rarely or never felt *dys*phoric about their gender, have no baseline of comparison; they take the alignment between their internal gender sense and others’ perception of their gender for granted. The intensity of transgender people’s first experiences of that alignment is largely due to its novelty, much as a starving person savors a simple meal in ways that a satiated person cannot understand. The normality of gender euphoria is further demonstrated by the fact that its intensity tends to fade as transgender people spend more time living in alignment with their internal gender sense.[[60]](#footnote-61)

The crucial difference between cisgender people and transgender people is that society’s assumptions and expectations about the internal gender sense of cisgender people are largely correct, while society’s expectations and assumptions about the internal gender sense of transgender people are largely incorrect. This is called *cisnormativity*.[[61]](#footnote-62) Thus, gender transition is not the decision to adopt a new gender in the way one adopts a new religion.[[62]](#footnote-63) It is rather a decision to stop attempting to conform to society’s incorrect assumptions and begin living—as cisgender people do—according to one’s internal gender sense.[[63]](#footnote-64)

In *Sister Citizen*, Melissa Harris-Perry uses the metaphor of a “crooked room” to describe how cultural myths distort Black women’s perception and presentation of themselves.[[64]](#footnote-65) The metaphor references psychological studies demonstrating field dependence, a phenomenon in which environmental cues influence humans’ spatial awareness.[[65]](#footnote-66) One such study asked participants to sit up straight while seated in a crooked chair in a room with crooked features. While some participants were able to align themselves vertically, others insisted they were sitting up straight while leaning as much as thirty-five degrees.[[66]](#footnote-67) Participants’ differing reference points for verticality distinguished the two groups. Those who aligned themselves with the room’s features—an exogenous reference point—believed they were vertical despite tilting. But those who trusted their own internal sense of uprightness—the endogenous reference point—were able to sit up straight despite the room’s crooked features.[[67]](#footnote-68)

Similarly, Harris-Perry argues, Black women must consciously disregard warped stereotypes about their identities—as promiscuous “jezebels,”[[68]](#footnote-69) nurturing “mammies,”[[69]](#footnote-70) angry “sapphires,”[[70]](#footnote-71) or even indomitable “superwomen”[[71]](#footnote-72)—to “sit up straight” and become who they truly are as individuals.[[72]](#footnote-73) Harris-Perry identifies Janie Mae Crawford, the heroine of Zora Neale Hurston’s 1937 novel *Their Eyes Were Watching God*, as an example of a Black woman who struggled to be and eventually became such an individual. “[B]y choosing her own burdens rather than allowing the burdens of others to be heaped on her back, Janie refutes her grandmother’s prophecy that [B]lack women are the mules of the world,” Harris-Perry writes. “Janie’s quest is about carving out a life that suits her authentic desires rather than conforming to the limiting, often soul-crushing expectations that others have of her.”[[73]](#footnote-74)

For transgender people, gender transition is the effort to sit up straight in a room made crooked by society’s false assumptions and expectations about who we are. It is the decision to seek joy. Angelica Ross, a Black trans woman actress and coder known for her roles on television shows such as *POSE* and *American Horror Story*, puts it this way:

The biggest misconception about trans people is that trans is a choice. It’s the biggest misconception because *it is* a choice. And it’s hard to understand that when the choice I’m talking about is *choosing yourself*. That’s the choice. And you realize that there’s so many people who are not trans who are not choosing themselves in their everyday life. That’s the jealousy. That’s the hatred, is people seeing trans people make a choice to choose themselves, and they can’t make the same choice for themselves. I don’t mean in the same way. I don’t mean that everybody wants to transition. But everybody wants to be free.[[74]](#footnote-75)

# II. Liberty As the Pursuit of Happiness

The American legal tradition is notoriously suspicious of human emotions.[[75]](#footnote-76) Judges are generally expected to treat both their own emotions[[76]](#footnote-77) and those of the parties[[77]](#footnote-78) as irrelevant to the disposition of cases. This suspicion stems from Enlightenment-era behavioral theories that pitted reason against emotion, enshrining the former as the guardian of justice and the latter as its enemy.[[78]](#footnote-79) In a system built upon consistent principles and rules designed to resolve similar cases in similar ways,[[79]](#footnote-80) emotion’s high degree of contingency and subjectivity tends to be disruptive.[[80]](#footnote-81)

These concerns apply with special force in the realm of constitutional law, which is supposed to “advance rule-of-law values like stability, consistency, and predictability over time and across generations[.]”[[81]](#footnote-82) Indeed, the Framers designed the Constitution with the explicit purpose of insulating governmental decisions from the emotional whims of the people and their representatives.[[82]](#footnote-83) The Framers believed that divorcing decisions from the personal emotions and private interests of the decision-maker was the cornerstone of creating a government “of laws, not of men.”[[83]](#footnote-84)

Yet despite their well-documented disdain of emotion, the Framers consistently emphasized the importance of one emotion in particular: happiness. As every American schoolchild knows, Thomas Jefferson listed “the pursuit of happiness” among the inalienable rights with which all humans are self-evidently endowed.[[84]](#footnote-85) But Jefferson was far from the only Framer who centered happiness in his political philosophy.[[85]](#footnote-86) Unlike most modern legal actors, the Framers and the legal philosophers who inspired them understood the freedom to pursue one’s personal vision of happiness to be both the point and the pinnacle of liberty.

In this Part, I argue that the pursuit of happiness—what I call joy—is part of the liberty protected by the Due Processes Clauses of the Fifth and Fourteenth Amendments as originally understood. 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*, which I define and contrast with unrestricted hedonism. I propose that *eudaimonia* is part of the “substance” of “substantive due process,” and that Epicurus’s classification of subjective desires provides a limiting principle for substantive due process claims that Framers would have understood and likely approved. I suggest that the Supreme Court’s substantive due process jurisprudence as embodied in *Lawrence v. Texas* better comports with this original understanding than that of more recent cases such as *Dobbs v. Jackson Women’s Health Organization* or *United States v. Muñoz*. Finally, I show that gender transition, including the decision to seek gender-affirming care, falls squarely within this definition of liberty.

## The Meaning of Happiness

### Locke’s *Essay Concerning Human Understanding*

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].”[[86]](#footnote-87) 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.[[87]](#footnote-88) Some believe that the change was essentially meaningless, nothing more than a rhetorical flourish with no substantive content.[[88]](#footnote-89) Others believe that Jefferson intended the phrase to be synonymous with Locke’s definition of property.[[89]](#footnote-90) 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.[[90]](#footnote-91)

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*.[[91]](#footnote-92) 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 “On Power,” Locke developed his definition of liberty.[[92]](#footnote-93) He began with the basic premise that all human desires are motivated by the impulse to seek pleasure and avoid pain, which he defines as happiness.[[93]](#footnote-94) But though everyone shares this basic impulse, people differ widely in what makes them happy.[[94]](#footnote-95) 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.[[95]](#footnote-96)

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.”[[96]](#footnote-97) 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 uses in Chapter XXI four distinct times.[[97]](#footnote-98)

It is practically impossible to prove that Jefferson relied upon any single text when drafting the Declaration in the early summer of 1776.[[98]](#footnote-99) 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*.[[99]](#footnote-100) In this context, Jefferson’s use of “the pursuit of happiness” was neither meaningless nor about property.[[100]](#footnote-101) Rather, Jefferson used the phrase to mean something very close to “liberty” itself.[[101]](#footnote-102)

### *Eudaimonia*

Much of the *Essay*’s discussion of happiness tracks the ideas of Ancient Greek philosophers so closely that, had modern conceptions of plagiarism existed in 1689, Locke would have been in trouble for failing to footnote his work. Like Locke, the Greeks universally believed that happiness was the ultimate point of human existence.[[102]](#footnote-103) But both Locke and the Greeks meant something quite different by “happiness” than the modern conception of ephemeral positive feelings.[[103]](#footnote-104) 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.[[104]](#footnote-105) 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.”[[105]](#footnote-106)

Like Locke, the Greeks also understood that individuals have different ideas about what makes them happy—that happiness is subjective.[[106]](#footnote-107) But neither Locke nor the Ancient Greeks were hedonists.[[107]](#footnote-108) While they acknowledged that many paths lead to happiness, they understood that not every path does so.[[108]](#footnote-109) In other words, not every choice that brings happiness in the modern sense leads to *eudaimonia*.[[109]](#footnote-110)

Both Locke and the Greeks believed that happiness is constrained by what they called “the laws of nature.”[[110]](#footnote-111) These laws were discernible not by reason or revelation[[111]](#footnote-112) but solely by experience.[[112]](#footnote-113) 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.[[113]](#footnote-114) It may bring a person joy to jump off a third-story balcony, but that joy will not suspend gravity or cushion their landing.[[114]](#footnote-115) So conceived, “the laws of nature” function like karma or common sense.[[115]](#footnote-116)

Oscar Wilde vividly illustrated the consequences of pursuing individual desires without respect for the laws of nature in his 1891 novel *The Picture of Dorian Gray*.[[116]](#footnote-117) The novel portrays the struggle between the sincere, lovestruck Basil and the cynical, sophisticated Lord Henry for the soul of the young, beautiful Dorian.[[117]](#footnote-118) During their first meeting in Basil’s painting studio, Henry serenades Dorian with a soliloquy on sensualism:

I believe that if one man were to live out his life fully and completely, were to give form to every feeling, expression to every thought, reality to every dream—I believe that the world would gain such a fresh impulse of joy that we would forget all the maladies of medievalism, and return to the Hellenic ideal . . . But the bravest man among us is afraid of himself. The mutilation of the savage has its tragic survival in the self-denial that mars our lives. We are punished for our refusals . . . . The only way to get rid of a temptation is to yield to it. Resist it, and your soul grows sick with longing for the things it has forbidden to itself, with desire for what its monstrous laws have made monstrous and unlawful . . . . Live! Live the wonderful life that is in you! Be always searching for new sensations. Be afraid of nothing.[[118]](#footnote-119)

The onslaught overwhelms Dorian,[[119]](#footnote-120) who takes Henry’s insincere words[[120]](#footnote-121) to heart and begins to live by them. As the novel progresses, Dorian descends into degradation in relentless pursuit of pleasure, heedless of the consequences for himself or others. He suddenly falls in love with and just as quickly discards a young actress, driving her to suicide.[[121]](#footnote-122) He surrounds himself with sumptuous riches of every kind.[[122]](#footnote-123) He picks fights with sailors and cavorts with thieves.[[123]](#footnote-124) He begins to frequent opium dens.[[124]](#footnote-125) Most shamefully, he treats the people in his life as expendable and brings them to shame.[[125]](#footnote-126)

Of course, the conceit of the novel is that Dorian *is* in some way free from the laws of nature. Instead of suffering the consequences of his choices himself, those consequences are reflected in the portrait of Dorian that Basil finished on the very day Dorian met Lord Henry.[[126]](#footnote-127) While Dorian himself remains impossibly, youthfully beautiful,[[127]](#footnote-128) the portrait steadily becomes more hideous as Dorian fulfills each destructive whim.[[128]](#footnote-129)

Even the painting cannot shield Dorian from the psychological consequences of his choices, however. In denial, he locks it away and eventually kills Basil to keep his secret secure.[[129]](#footnote-130) Finally, consumed by guilt and frustration, Dorian grabs the knife with which he killed his former friend and stabs the painting. In doing so, he fatally stabs himself.[[130]](#footnote-131)

 Often misread as the manifesto of Wilde’s “new Hedonism,”[[131]](#footnote-132) *Dorian Gray* is actually Wilde’s sobering critique of a life guided by nothing more than self-centered desire.[[132]](#footnote-133) The force of Wilde’s critique is in the fact that despite being supernaturally shielded from virtually all of the natural consequences of his actions, Dorian winds up miserable and dead by his own hand. Far from “a fresh impulse of joy,”[[133]](#footnote-134) as Lord Henry predicted, Dorian’s indulgences brought nothing but suffering for him and those around him. Neither Locke nor the Greeks would have characterized Dorian’s tragic life as “the pursuit of happiness.”

### Epicureanism

Because the Ancient Greek philosophers unanimously agreed that happiness was the ultimate goal of life, they devoted much of their individual teachings to articulating various means of distinguishing between illusory desires and true happiness.[[134]](#footnote-135) One Greek philosopher’s proposed answer to the dilemma exerted outsized influence over Founding-era political theory[[135]](#footnote-136): that of Epicurus, who lived in Athens between 341 and 270 B.C.E.[[136]](#footnote-137) Most importantly for my purposes, Epicureanism profoundly shaped the ideas of John Locke and Thomas Jefferson.[[137]](#footnote-138)

More than any other ancient philosopher, Epicurus emphasized the utility of subjective pleasure as a guide toward happiness.[[138]](#footnote-139) Despite later associations of “epicureanism” with self-indulgence and materialism,[[139]](#footnote-140) however, Epicurus understood that gratifying every passing desire that happened to arise within an individual would not make that person happy.[[140]](#footnote-141) Rather, the gratification of some desires leads to happiness while the gratification of others does not. Epicurus devised a system to help distinguish between the two.

Epicurus divided subjective desires in two basic ways.[[141]](#footnote-142) First, he divided “natural” desires from “empty” desires.[[142]](#footnote-143) 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.[[143]](#footnote-144) 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.[[144]](#footnote-145) Gratifying natural desires leads individuals to fulfill their natures and thereby to become happy[[145]](#footnote-146); gratifying empty desires leads individuals to act contrary to their natures, frustrating their quest for happiness and wasting valuable time and energy.[[146]](#footnote-147)

Epicurus further divided natural desires into “necessary” and “non-necessary” desires.[[147]](#footnote-148) These categories correspond roughly with “needing” versus “wanting.”[[148]](#footnote-149) “A desire is necessary if we cannot be happy, or healthy, or even alive, if we do not have the object of that desire.”[[149]](#footnote-150) All other desires are non-necessary.[[150]](#footnote-151) The necessity of a desire often turns on the level of specificity of its object.[[151]](#footnote-152) 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.[[152]](#footnote-153) 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.[[153]](#footnote-154) It is both natural and necessary for me to eat regular meals, but if I refuse to eat anything but cheeseburgers 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[[154]](#footnote-155)

|  |  |  |
| --- | --- | --- |
|  | **Natural** | **Empty** |
| **Non-Necessary** | Specific objects of natural desires | Desires based on beliefs that are both (1) false and (2) harmful.  |
| **Necessary** | Desires without which humans cannot live or be physically, mentally, or emotionally healthy  |  |

Consider the desires of *Dorian Gray*’s characters according to this matrix.[[155]](#footnote-156) Assuming that Dorian’s friend and painter Basil was in love with him,[[156]](#footnote-157) Basil’s sexual and romantic desire for Dorian was natural and necessary; humans who feel sexual and romantic attraction[[157]](#footnote-158)—including for members of the same gender—experience such feelings as uncontrollable needs and experience pain when such needs go completely unmet.[[158]](#footnote-159) That said, Basil’s desire to satisfy his generic sexual and romantic needs with Dorian specifically was non-necessary. Had Basil insisted upon attempting to do so heedless of reality, such as Dorian’s refusal or unavailability, the desire would have become empty. Perhaps it did.[[159]](#footnote-160) Perhaps Basil’s obsession was part of his drive to seek out Dorian on the night Dorian murdered him.[[160]](#footnote-161)

 By contrast, all Dorian’s desires became empty the moment he fell under Lord Henry’s sway.[[161]](#footnote-162) They were empty because they were based on the belief that only ephemeral pleasurable sensations matter—that it is possible “‘[t]o cure the soul by means of the senses, and the senses by means of the soul!”[[162]](#footnote-163) That belief poisons even Dorian’s otherwise natural desires, such as his admiration and love for the young actress Sybil Vane.[[163]](#footnote-164) He avoids or silences anyone who confronts him with the suffering he inflicts so casually upon others.[[164]](#footnote-165) But he cannot silence his own conscience: “His soul, certainly, was sick to death.”[[165]](#footnote-166) A tree is known by its fruit.[[166]](#footnote-167) The proof is in the pudding.[[167]](#footnote-168)

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Epicurus defined happiness as the ongoing gratification of one’s subjective desires with due consideration of the natural consequences of one’s choices.[[168]](#footnote-169) As Jefferson pithily put it, “Happiness [is] the aim of life. Virtue [is] the foundation of happiness. Utility [is] the test of virtue.”[[169]](#footnote-170) When Locke and later Jefferson spoke of “pursuing happiness” and defined “liberty” as the freedom to do so, this is what they meant. As such, this definition suggests significant insights into the original understanding of the substantive rights encompassed with the “liberty” protected by the Due Process Clause.

## The Meaning of Liberty

Protecting individual rights against legislative incursion is among the most important constitutional innovations of the American Framers.[[170]](#footnote-171) 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 legislative majorities could not interfere.[[171]](#footnote-172) 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.[[172]](#footnote-173)

While everyone agrees that such rights exist,[[173]](#footnote-174) however, their precise articulation spurs endless debate.[[174]](#footnote-175) This is particularly true of “unenumerated rights,” those without an explicit foothold in the text of the Constitution itself.[[175]](#footnote-176) 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.[[176]](#footnote-177) The jurisprudence of defining these rights is called “substantive due process,”[[177]](#footnote-178) and it is a perennial favorite target of conservative critics of the Supreme Court—often including its own justices.[[178]](#footnote-179)

### The False Dichotomy 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*,[[179]](#footnote-180) Justice Samuel Alito spoke to Bill Kristol about his opposition to the decision.[[180]](#footnote-181) “[H]ow do we determine what liberty in the Fourteenth 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’s objectively [] ascertainable, if it’s just whatever I as an appointee of the Supreme Court happen to think is very important, . . . it raises questions of legitimacy[.]”[[181]](#footnote-182) Alito further accused the *Obergefell* majority of baselessly constitutionalizing its own “postmodern” view of liberty, “the freedom to define your understanding of the meaning of your life.”[[182]](#footnote-183)

Alito’s critique of *Obergefell* rehashes a longstanding critique of substantive due process.[[183]](#footnote-184) Every first-year law student hears the fable of *Lochner v. New York*,[[184]](#footnote-185) 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.[[185]](#footnote-186) Students further learn that Justice Oliver Wendell Holmes’s dissenting view[[186]](#footnote-187) 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.[[187]](#footnote-188)

*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.[[188]](#footnote-189) Unsurprisingly, therefore, critics of later decisions based on that liberty frequently invoke *Lochner*, accusing justices of elevating their personal views on contraception,[[189]](#footnote-190) abortion,[[190]](#footnote-191) and sexuality,[[191]](#footnote-192) for example, to the status of constitutional rights in the same way that the *Lochner* majority elevated the “freedom of contract.”[[192]](#footnote-193) Though Alito did not mention *Lochner* by name, he alluded to the decision heavily in his July 2015 critique of *Obergefell*.[[193]](#footnote-194)

Alito’s proposed solution to the excess subjectivity of substantive due process is 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.[[194]](#footnote-195) Indeed, proponents of originalism often tout its supposed ability[[195]](#footnote-196) to cabin the excess subjectivity of substantive due process jurisprudence as one of its primary advantages.[[196]](#footnote-197) The originalist method of substantive due process analysis involves two steps.[[197]](#footnote-198) The first step is to articulate a “‘careful description of the fundamental liberty interest,’”[[198]](#footnote-199) which in practice requires defining the right as narrowly and specifically as possible.[[199]](#footnote-200) The next step is to inquire whether the right, so defined, is “‘objectively, deeply rooted in this Nation's history and tradition.’”[[200]](#footnote-201) Unsurprisingly, substantive due process rights rarely survive this analysis.[[201]](#footnote-202)

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 U.S.[[202]](#footnote-203) Muñoz claimed that the denial violated her fundamental right to marriage,[[203]](#footnote-204) which the Supreme Court has repeatedly held to be part of the liberty protected by the Due Process Clause of the Fifth Amendment.[[204]](#footnote-205) 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*.”[[205]](#footnote-206) 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.[[206]](#footnote-207)

But the originalist choice between a myopic, regressive[[207]](#footnote-208) historical inquiry and a free-wheeling, unrestrained rule-by-judges is a false dichotomy. 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, Alito’s two-fold critique of *Obergefell* is wrong on both counts.[[208]](#footnote-209) Defining “liberty” as evolving self-definition is neither impossibly subjective nor postmodern, but literally ancient and deeply rooted in the Framers’ original understanding of the Constitutional text.[[209]](#footnote-210)

### The Right to Subjectivity

At first glance, defining “liberty” as “the pursuit of happiness” seems to do little to resolve the problem of excess subjectivity. Like the definition of liberty, the means of achieving happiness often differs widely from person to person.[[210]](#footnote-211) Excavating the Framers’ original understanding of liberty as the pursuit of happiness exposes the kerfuffle over subjectivity as a red herring, however. If “liberty” means the right of individuals to align their lives with their subjective preferences in a manner that brings them happiness,[[211]](#footnote-212) then *subjectivity is the entire point of liberty*.

Debates about substantive due process typically turn on whether a discrete interest counts as “liberty.”[[212]](#footnote-213) But based on the Framers’ definition, *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,”[[213]](#footnote-214) 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.[[214]](#footnote-215) 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 U.S.[[215]](#footnote-216) For failing to align her asserted interest with the cramped liberty-or-not inquiry, the Court dismissed Muñoz’s claim as “neither fish nor fowl.”[[216]](#footnote-217)

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.[[217]](#footnote-218) 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, 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 of and scope of a deprivation and, on the other hand, the process that attends it.”[[218]](#footnote-219)

Accordingly, substantive due process debates should be—indeed, *are*—less about the definition of “liberty” than about the definition of “due.”[[219]](#footnote-220) 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 regulating the particular liberty interest at issue and its general interest in regulation more broadly.[[220]](#footnote-221)

### The Point of Happiness

Here, the excess subjectivity objection raises its head for the final time: What prevents judges from ranking the importance of liberty interests based on their own personal preferences?[[221]](#footnote-222) Once again, the Framers’ understanding of liberty as the pursuit of happiness provides the answer. That understanding suggests that the Framers valued liberty interests according to their essentiality 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.

Recall that Epicurus divided human desires into natural and empty ones, further dividing natural desires into necessary and unnecessary ones.[[222]](#footnote-223) 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.[[223]](#footnote-224) 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.[[224]](#footnote-225) Finally, empty desires are those based on false beliefs, such that satisfying them actually impedes rather than advances the individual’s happiness.[[225]](#footnote-226)

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, natural and necessary desires are the most important liberty interests. Thus, the more natural and necessary an asserted liberty interest is, the more difficult it should be for the government to intrude upon it. By contrast, the government should have virtually free rein to regulate empty desires. Natural but unnecessary desires occupy a middle ground, where perhaps “normal” legislative and judicial processes apply. Imposing a vector representing government authority on the above grid of Epicurean desires visualizes this spectrum:

Fig. 2: Regulable Interests

|  |  |  |
| --- | --- | --- |
|  | **Natural** | **Empty** |
| **Non-Necessary** |  |  |
| **Necessary** |  |  |

At the far end of this spectrum—the point at which human desires are most natural and most necessary—lies a zone of liberty interests over which government regulatory authority must be essentially nil. For example, it is difficult to imagine a level of process sufficient to justify a regulation that totally prohibits individuals from fulfilling desires essential for their physical survival, such as eating or sleeping.[[226]](#footnote-227)

It is equally difficult to fathom why any government would enact such a sweeping prohibition. That said, many regulations restrict specific means of fulfilling such desires—e.g., telling people *what* they may (not) eat, *where* they may (not) sleep, etc. 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 citizens from eating cheeseburgers is less restrictive than forbidding them from eating anything but cheeseburgers. Telling a koala that it may eat anything in the world other than eucalyptus leaves is similarly restrictive. These examples clarify that the necessity analysis is about how close the regulation comes to a total ban. As the impingement nears totality, government regulatory authority decreases, thus requiring more processes to justify its exercise.

Consider the facts of *City of Grants Pass v. Johnson*.[[227]](#footnote-228) Grants Pass, Oregon, places several restrictions on when and where people may sleep within its borders.[[228]](#footnote-229) 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.[[229]](#footnote-230) Homeless residents of Grants Pass challenged these restrictions under the Eighth Amendment,[[230]](#footnote-231) but many—including seemingly the Supreme Court itself—believe the better claim to be one of substantive due process.[[231]](#footnote-232) Under the two-step analysis espoused in *Glucksberg* and revived by *Muñoz*,[[232]](#footnote-233) 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 the Americans of 1868 widely acknowledged that interest as part of the “definition of ordered liberty.”[[233]](#footnote-234) If so, the Court would almost certainly invalidate the ordinances; if not, it would allow Grants Pass to continue enforcing its restrictions on sleeping.[[234]](#footnote-235)

 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[[235]](#footnote-236) and then assess how natural and necessary that desire is. Because the general need to sleep makes it a natural desire,[[236]](#footnote-237) the Court’s analysis would 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.[[237]](#footnote-238) What is more, they are undesirable for a variety of reasons.[[238]](#footnote-239) Because the homeless plaintiffs’ desire to sleep on public property is thus natural and highly (if not strictly) necessary, it makes sense to require Grants Pass to engage in more than its normal level of process—its standard legislative (city council) and judicial (municipal court) procedures—to justify impinging upon the plaintiffs’ liberty interest. [What might those procedures look like?]

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 U.S.[[239]](#footnote-240) By freeing the substantive due process analysis from the cramped liberty-or-not inquiry, the Epicurean approach creates space for a more nuanced treatment of Muñoz’s claim. Under the Epicurean approach, the Court would begin with by acknowledging that Muñoz’s subjective preference to live with her non-citizen husband in the U.S. qualifies as a liberty interest and proceed to evaluate how natural and necessary that desire is. As the Court itself has repeatedly acknowledged,[[240]](#footnote-241) the desire for long-term romantic partnership of the kind embodied in marriage is a natural desire for most humans.[[241]](#footnote-242) 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.[[242]](#footnote-243) 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.[[243]](#footnote-244)

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.[[244]](#footnote-245) 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.[[245]](#footnote-246) 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.[[246]](#footnote-247) In other words, the Court should ask: Understanding that living with her husband in the U.S. 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?

Intuitively, requiring someone to leave the U.S. to live with their spouse seems like a substantial burden but not quite a total ban.[[247]](#footnote-248)
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[[248]](#footnote-249) 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.[[249]](#footnote-250) 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,[[250]](#footnote-251) and our world is impoverished by pretending otherwise.

### The Emptiness of Domination

Anyone familiar with the history of domination may flinch away from the use of “natural” as a criterion for the relative importance of a liberty interest. American governments have prohibited women from being lawyers,[[251]](#footnote-252) people of different races from marrying,[[252]](#footnote-253) and people of the same gender from having sex[[253]](#footnote-254)—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.[[254]](#footnote-255) To emphasize that the Epicurean approach is not a Trojan horse whereby these and similar tyrannies may be reintroduced in the guise of “nature,” this section clarifies what the Epicurean classification of “natural” includes.

Let me begin with what the Epicurean classification of “natural” does *not* include. Virtually every human society is structured according to group-based social hierarchies.[[255]](#footnote-256) Within such hierarchies, members of dominant groups “systematically enjoy a disproportionate share of power and resources at the expense of members of subordinated groups[.]”[[256]](#footnote-257) The threat of violent force is necessary but insufficient for dominant groups to achieve and maintain their position.[[257]](#footnote-258) Dominant groups also seek to naturalize their domination via some ideology.[[258]](#footnote-259) In other words, 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.

Recall that Epicurus limited natural desires to those over which humans have no control, such that failing to fulfill them brings pain or even death.[[259]](#footnote-260) So defined, Epicurean “naturalness” is subject to easy empirical verification: If the fulfillment of a desire is withheld, does pain or death necessarily ensue?[[260]](#footnote-261) 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.[[261]](#footnote-262) 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.[[262]](#footnote-263)

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.[[263]](#footnote-264) From a non-Epicurean perspective, this process may seem like the discovery of “new” natural desires.[[264]](#footnote-265) But it is actually the stripping away of the empty beliefs that propped up domination and inhibited human happiness.

### The Naturalness of Gender Identity

The final step in this subsection is to apply the Epicurean approach to bans on gender-affirming healthcare for transgender people. To simplify the analysis, assume that one of the states that bans gender-affirming healthcare for minors[[265]](#footnote-266) extends its ban to cover all individuals regardless of age.[[266]](#footnote-267) 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 result?

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.[[267]](#footnote-268) It proceeds by assessing the *naturalness*—in the Epicurean sense—of that desire.[[268]](#footnote-269) The vast majority of humans experience the need to align their bodies with their internal sense of gender as a pressing need.[[269]](#footnote-270) 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.[[270]](#footnote-271) 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.[[271]](#footnote-272) Cisgender women also commonly undergo surgeries such as breast augmentation to enhance physical features associated with feminine gender identity.[[272]](#footnote-273)

The naturalness of the desire for internal/external gender alignment is reinforced by the pain caused by the frustration of that desire.[[273]](#footnote-274) The resulting psychological distress, clinically labeled *gender dysphoria*,[[274]](#footnote-275) frequently manifests as depression, anxiety, low self-esteem, relationship difficulties, and suicidal ideation.[[275]](#footnote-276) Attempts to alleviate psychological symptoms may lead to physical harms, including drug abuse, intentional self-harm and suicide,[[276]](#footnote-277) and unsafe attempts to minimize or alter bodily sources of dysphoria.[[277]](#footnote-278) While these symptoms are obviously more common among transgender people,[[278]](#footnote-279) cisgender people exhibit similar symptoms when suffering from gender dysphoria.[[279]](#footnote-280)

The naturalness of the desire for internal/external gender alignment is further reinforced by the inability of most people to control it.[[280]](#footnote-281) A person’s gendered physical characteristics are primarily genetically determined.[[281]](#footnote-282) 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.[[282]](#footnote-283) 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.[[283]](#footnote-284)

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.[[284]](#footnote-285) 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?[[285]](#footnote-286)

Without interventions defined as “medical” to treat gender dysphoria, a transgender person is left with two primary alternatives: psychotherapy[[286]](#footnote-287) and social transition—that is, presenting oneself as and living according to one’s internal sense of gender.[[287]](#footnote-288) Both can be and often are vital to transgender individuals’ treatment regimens for gender dysphoria.[[288]](#footnote-289) For many transgender individuals, however, non-medical interventions are insufficient to alleviate the worst symptoms of their gender dysphoria.[[289]](#footnote-290) 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.[[290]](#footnote-291) 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.[[291]](#footnote-292)

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.[[292]](#footnote-293) 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, could not possibly be justified by a state’s standard legislative procedures subjected to rational basis review.

## The Approaches in Application

Two cases dealing with the intimate rights of queer people, *Bowers v. Hardwick*[[293]](#footnote-294) and *Lawrence v. Texas*,[[294]](#footnote-295) illustrate the contrast between the two approaches to substantive due process analysis I outline in the previous subsection.

### The False Dichotomy: *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.[[295]](#footnote-296) Georgia officials charged Bowers with its law criminalizing “sodomy,” which included the particular act in which Bowers and his partner were engaged until interrupted by the police.[[296]](#footnote-297) 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[[297]](#footnote-298) as interpreted in substantive due process cases such as *Griswold v. Connecticut[[298]](#footnote-299)* and *Roe v. Wade*.[[299]](#footnote-300)

By one vote, the Supreme Court rejected Bowers’s substantive due process challenge.[[300]](#footnote-301) Although the precise formulation of the two-step originalist substantive due process test[[301]](#footnote-302) would not occur until one year later,[[302]](#footnote-303) the *Bowers* majority presaged its emphasis on “history and tradition” in defining fundamental rights.[[303]](#footnote-304) 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.”[[304]](#footnote-305) Apparently finding the majority’s language insufficiently categorical, Chief Justice Warren Burger chimed in to emphasize that “[d]ecisions of individuals relating to homosexual conduct have been subject to state intervention throughout the history of Western civilization.”[[305]](#footnote-306)

Though the moral/immoral dichotomy takes centerstage in *Bowers*,[[306]](#footnote-307) the natural/unnatural distinction also subtly permeates both the majority opinion and Burger’s concurrence.[[307]](#footnote-308) 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.[[308]](#footnote-309) 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. 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.

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, 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.[[309]](#footnote-310) As with sleeping and eating, a total government ban on sex of any kind is difficult to fathom.[[310]](#footnote-311)

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.[[311]](#footnote-312) In short, a ban on same-gender sex was practically the same as a ban on sex altogether for Michael Bowers.

Recognizing the supreme naturalness of Bowers’s desire for same-gender sex might have made the *Bowers* Court curious about why so much of society believed that such sex is *un*natural. That curiosity might have prompted a deeper historical analysis that exposed the roots of that belief in domination. Regardless, under the Epicurean approach, the Court would have recognized that enacting and enforcing a near-total impingement of Michael Bower’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.

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

That is exactly what happened almost two decades later in *Lawrence v. Texas*.[[312]](#footnote-313) 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.[[313]](#footnote-314) Lawrence was charged and convicted of “deviate sexual intercourse.”[[314]](#footnote-315) Like Michael Bowers before him, Lawrence challenged his conviction under the Due Process Clause of the Fourteenth Amendment.[[315]](#footnote-316) 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,[[316]](#footnote-317) its primary innovation was to reject historical social attitudes as inherently sufficient justification for governmental regulation.[[317]](#footnote-318) 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.[[318]](#footnote-319) 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 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.[[319]](#footnote-320)

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.[[320]](#footnote-321) 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.[[321]](#footnote-322)

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.[[322]](#footnote-323) Though its terminology differs, the Epicurean approach—like *Lawrence*—places a higher value on liberty interests central to self-definition.[[323]](#footnote-324) 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.[[324]](#footnote-325)

In short, *Lawrence* was not an untethered elevation of personal preferences masquerading as constitutional law. Instead, *Lawrence* was a philosophically consistent opinion grounded in an understanding of liberty as subjective and dynamic 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 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.[[325]](#footnote-326)

# III. Are Children Human?[[326]](#footnote-327)

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 ok.

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.

My experiences, while dramatic, are not unique. In this Part, I want to suggest that American law requires every child, not just trans children, to sacrifice too much of themselves—their own subjective preferences and ultimately their joy—to adults. On the one hand, we facilitate children’s discovery of their individual subjective preferences through play. On the other, we give multiple other people—parents and other adult caregivers—a unilateral and legally unchallengeable veto over the child’s express preferences. That veto extends to every aspect of a child’s life, from their afterschool activities and meals to their gender expression and sexual conduct. Moreover, that veto remains virtually unchanged from birth until the child reaches the age of majority despite the tremendous changes in capacity that occur over that period.

Liberty, elucidated by the Epicurean approach, demands more. Children’s subjective preferences, particularly those touching on the core of their identities, cannot be totally stripped of legal protection merely because they belong to children. At the very least, the Epicurean approach suggests that the abrogation of children’s most natural, necessary liberty interests requires more process than the age-of-majority regime provides. Taking liberty seriously would require a reconfiguration of the relationship between children, parents, and the state. But doing so would ultimately render all of us more happy–joyous–and free.

## The Power of Play

Children play. Children also do other things,[[327]](#footnote-328) and adults also play.[[328]](#footnote-329) But the primacy of play is one of the chief characteristics that distinguishes childhood from adulthood.[[329]](#footnote-330) Society expects adults to give children ample time and space to play[[330]](#footnote-331); society further expects children to take advantage of that time and space to do so.[[331]](#footnote-332)

Play serves many functions, none of which may be said to be its ultimate “point.”[[332]](#footnote-333) That said, one of play’s most important functions is what sociologist Thomas Henricks calls “self-realization,” the process whereby individuals experience themselves *as* individuals, distinct from other humans.[[333]](#footnote-334) As people play, they subconsciously monitor their emotional reactions to their experiences.[[334]](#footnote-335) By doing so, individuals discover and delimit their preferences for activities, experiences, and interactions[[335]](#footnote-336)—what “sparks joy”[[336]](#footnote-337) within them and what does not. The realization that what sparks joy within me is different from what sparks joy within you is central to establishing that we are different people—that I have a “self” that is not the same as your “self.”[[337]](#footnote-338)

To be clear, play’s facilitation of self-realization is about more than mapping our particular neural circuitry to identify our most efficient dopamine-release triggers.[[338]](#footnote-339) If Locke and the Ancient Greeks were correct that happiness is the point of human existence[[339]](#footnote-340) and that individuals naturally vary in what brings them happiness,[[340]](#footnote-341) then play is an essential means whereby individuals explore, express, and fulfill their distinct paths to well-being and self-actualization. Furthermore, if Locke was correct that liberty consists of the right to align our choices with our subjective preferences about our lives,[[341]](#footnote-342) then play is the practice and precondition of liberty.

With this added context, I repeat: Children play. From practically the moment they are born, adults encourage children to distinguish between experiences that bring them joy and those that do not.[[342]](#footnote-343) Without outside inference,[[343]](#footnote-344) most children have become adept at identifying and expressing their personal preferences—often with exasperating bluntness and frequency—well before they reach adolescence. [Elaboration—consider examples]

[Transition]

## The Tyranny of Childhood

If liberty is the right to exercise subjective preferences and children have subjective preferences, then children’s subjective preferences count as liberty interests. The Supreme Court has frequently acknowledged that children possess constitutional rights[[344]](#footnote-345); it has occasionally even acted as though it actually believes they do.[[345]](#footnote-346) Most often, however, the Court has paid lip service to children’s rights as a prelude to granting their parents, the state, or some combination of the two the right to supersede them.[[346]](#footnote-347) Even in *Bellotti v. Baird*, the high-water mark of the Court’s vindication of the rights of minors against both their parents and the state, the Court said plainly: “States validly may limit the freedom of children to choose for themselves in the making of important, affirmative choices with potentially serious consequences.”[[347]](#footnote-348)

The Anglo-American tradition has a word for the restriction of individual liberty without adequate justification: *tyranny*.[[348]](#footnote-349) For most of American history, the Court accepted individuals’ membership in various “natural” groups as sufficient justification for sweeping restrictions on their liberty.[[349]](#footnote-350) Thus, humans could be denied the right to vote[[350]](#footnote-351) or participate in certain professions[[351]](#footnote-352) because they happened to be women.[[352]](#footnote-353) More starkly, humans could be stripped of their humanity and sold as chattel slaves because they happened to be Black.[[353]](#footnote-354) After decades of relentless activism by the members of such groups, the Court finally began to acknowledge that categories such as gender and race failed to justify the deprivations of liberty for which they were cited.[[354]](#footnote-355) Indeed, the Court now views legal distinctions based on such categories as inherently constitutionally suspect, justifiable only in the rarest circumstances.[[355]](#footnote-356)

Despite these developments, membership in the category of “child” continues to serve as sufficient justification for subordinating practically all of an individual’s preferences about their own life to those of other people or the state.[[356]](#footnote-357) As Annette Ruth Appell has put it, “The law empowers adults . . . to dictate the terms of children’s lives: their language, their religion, what they can read, what they eat, where they live, where they can go, when they can go out, and when they must be home.”[[357]](#footnote-358) Adults may issue commands to children without considering their wishes and without explanation.[[358]](#footnote-359) Adults may enforce their commands to children by imposing further deprivations of liberty and even by physically striking the child.[[359]](#footnote-360) If the child appeals to the state, it will side with the adult for no other reason than that the adult *is* the adult.[[360]](#footnote-361) In short, the law enthrones adults to rule over children’s lives with a totality that would make Louis XIV[[361]](#footnote-362) or George III[[362]](#footnote-363) envious.[[363]](#footnote-364)

The extent to which the law deprives children of liberty might suggest that it defines the category of childhood with corresponding nuance and care. Not so. Every person is born into the category of childhood and remains there until they reach the “age of majority,”[[364]](#footnote-365) which almost every state sets at eighteen.[[365]](#footnote-366) Throughout that period, during which humans undergo gradual but dramatic increases in capacity,[[366]](#footnote-367) adults’ sweeping legal authority over the child remains essentially unchanged before suddenly evaporating overnight.[[367]](#footnote-368) Thus, the night before a person’s eighteenth birthday, their parent may order them to eat broccoli for dinner and spank them if they refuse. If the child calls the police, the law will treat the spanking as a legitimate (if perhaps ill-advised) exercise of parental authority and refuse to intervene.[[368]](#footnote-369) But if precisely the same incident happens twenty-four hours later, the law will treat the “spanking” as criminal battery.[[369]](#footnote-370)

### From Property to Paternalism

The proffered justification for the legal subordination of children has evolved over time. Until recently, the Anglo-American common law tradition defined children as the legal property of their parents, particularly their fathers.[[370]](#footnote-371) When the overt classification of human beings as property became illegal after the Civil War,[[371]](#footnote-372) the justification for adults’ control over children—as for white Americans’ control over Black Americans[[372]](#footnote-373)—morphed to preserve the status quo.[[373]](#footnote-374) Today, the most common justification for the legal subordination of children is what Appell calls the “development thesis,” that “children are unwise, weak, unreasonable and wild whereas adults are wise, strong, reasonable, and restrained.”[[374]](#footnote-375) Accordingly, because children lack the capacity to know or assert their own interests, adults’ control over children’s lives until they reach the age of majority is necessary to protect children’s “best interests.”[[375]](#footnote-376)

The shift from property to paternalism as an ostensible rationale has had little practical effect on children’s control over their own lives.[[376]](#footnote-377) As with other forms of paternalism,[[377]](#footnote-378) the development thesis is a velvet glove of difference covering the iron fist of domination.[[378]](#footnote-379) Of course there are “real differences”[[379]](#footnote-380) between children and adults: Young humans are physically, mentally, and emotionally vulnerable in ways that decrease naturally as they age.[[380]](#footnote-381) But the law compounds that vulnerability by rendering children *legally* powerless to assert their own interests.[[381]](#footnote-382) In a stunning display of circular logic, the law then cites children’s powerlessness as justification for handing control of their lives over to adults and the state.[[382]](#footnote-383) To quote Simone de Beauvoir quoting George Bernard Shaw, “The white American relegates the [B]lack [American] to the rank of shoe-shine boy, and then concludes that [B]lack [Americans] are only good for shining shoes.”[[383]](#footnote-384)

Children’s comparatively diminished capacity during the earliest years of their lives does not justify, much less require, giving other people total control over their lives until they turn eighteen.[[384]](#footnote-385) Years before their eighteenth birthday, most children develop a level of decisional capacity that the law deems sufficient for adults.[[385]](#footnote-386) Many adults also experience temporary or permanent states of intense vulnerability, but the law protects their right to make decisions for themselves in all but the most extreme circumstances.[[386]](#footnote-387) As a measure of capacity, then, the age-of-majority regime is both grossly over- and under-inclusive.[[387]](#footnote-388)

These realities belie the development thesis as the real reason for the legal subordination of children. Simply put, the category of childhood exists for the benefit of adults, not children.[[388]](#footnote-389) Adults often override children’s preferences for reasons that have nothing to do with—indeed, that blatantly contravene—children’s “best interests.”[[389]](#footnote-390) The law not merely permits but protects such domination as a constitutional right of parents, shielding their decisions from interference by the state or children themselves in all but the most extreme circumstances of neglect and abuse.[[390]](#footnote-391) Even in those circumstances, the law does not permit children to act on their own behalf, instead requiring the state to act on the child’s behalf.[[391]](#footnote-392)

That some—hopefully most—parents do not abuse their authority over their children[[392]](#footnote-393) is no answer. A benevolent tyrant is still a tyrant.[[393]](#footnote-394) The true harm of the current regime is not that every child is abused but that it renders every child susceptible to abuse by legally stripping them of the power to fight back. It subjects every child to a profoundly consequential lottery of parental characteristics.[[394]](#footnote-395) Some children are born to parents who view them as individual humans to nurture and cherish; others are born to parents who view them as inconveniences to be tolerated, minions to be exploited, or victims to be tortured. The law renders children born to bad parents just as unable to change their circumstances as children born to good parents are uninterested in changing theirs.

Nor is the temporary nature of childhood an adequate response.[[395]](#footnote-396) First, it is tragic but true that some children will never reach adulthood and thus will never receive the ostensible payoff for their temporary subordination.[[396]](#footnote-397) More fundamentally, adults’ power over children during the most formative decades of their lives often creates path dependencies that heavily influence their choices when they are finally free.[[397]](#footnote-398) Indeed, even when not explicitly asserted and enforced, adults’ legal authority over children profoundly shapes their choices and ultimately their lives. To illustrate this point, I return once more to my core example: gender identity.

### Compulsive Cisnormativity[[398]](#footnote-399)

For better or worse,[[399]](#footnote-400) gender is one of the fundamental categories by which humans structure our lives.[[400]](#footnote-401) Children perceive the salience of gender categories at a remarkably early age[[401]](#footnote-402) and quickly integrate gender into their primary schema for understanding the world and their place within it.[[402]](#footnote-403) In theory, the self-realization function of play[[403]](#footnote-404) seems ideally suited to facilitate children’s exploration of gender; monitoring one’s emotional responses to various play activities associated with masculinity or femininity can provide valuable clues to one’s internal gender sense.[[404]](#footnote-405)

Alas, children most often experience gender not as something to explore but as something to “get right.”[[405]](#footnote-406) Adults assign each child to a gender category at the moment they are born if not sooner.[[406]](#footnote-407) 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 gender category.[[407]](#footnote-408) This impulse often manifests as a period of intense gender rigidity, usually between the ages of 3 and 5, during which the child becomes hypersensitive to gender cues and may misattribute practically any behavior discrepancy to differences in gender roles.[[408]](#footnote-409) Children look to their parents’ emotional responses to their gender-coded behavior as perhaps the most important indication of whether the child is “doing gender right.”[[409]](#footnote-410) Thus, at least in terms of gender, children gauge the value of play experiences less by their *own* subjective experiences—whether they are having fun or not—than those of their parents or other adult caregivers.[[410]](#footnote-411) But children quickly internalize and begin to police their play activities for gender conformity even in the absence of adults or other children.[[411]](#footnote-412)

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*.[[412]](#footnote-413) 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.[[413]](#footnote-414) Thus, children learn to sacrifice their subjective preferences to secure their parents’ approval[[414]](#footnote-415) and, relatedly, their own emotional and even physical safety.[[415]](#footnote-416)

## Taking Liberty Seriously

At bottom, the legal subordination of children is a surviving manifestation of the American propensity for defining liberty *as* inequality. As Annette Appell has brilliantly shown, the primary function of the legal category of childhood is to facilitate the liberty of adults.[[416]](#footnote-417) Childhood creates a class of people whose liberty may be trampled to demarcate those of us whose liberty must be respected. The most recent excuse for depriving children of liberty is that they lack capacity, but adults are not granted liberty because they *have* capacity. Adults are granted freedom because they are adults. This tautological exclusion mirrors some of the worst sins in American history: Just as in the past white people were deemed free because they were not Black and men were deemed free because they were not women, adults are deemed free merely because they are not children.[[417]](#footnote-418)

As with past injustices, this fundamental misconception of liberty obscures the gross unconstitutionality of bans on gender-affirming care for minors. Applying an affirmative definition of liberty—one based on what all humans *are* rather than what some of us are *not*—exposes the bans as cruel and unwarranted state intrusions into one of the most fundamental aspects of a person’s life. Through such bans, state governments effectively say to children:

We, the state, have decided to force you to undergo a certain kind of puberty. We have decided to force you to grow facial hair and to experience erections and ejaculate—or to grow breasts and to menstruate—despite your express wishes. We have decided this because of an accident of your birth, like the ones that made you need glasses for your astigmatism and orthotics for your flat feet. We have decided this despite the fact that the remedy for that accident is as safe and readily available as glasses and orthotics. We have decided this despite the fact that we *know* doing so causes you significant pain now, and will almost certainly cause you significant pain in the future, on the very slight chance that *not* deciding this will cause you some pain *one day*. We will even do so despite the fact that your parents and your doctors agree with you instead of us. We will do so because *we* want you to undergo a certain kind of puberty. And we can *make* you do it.

Such a sinister speech sounds more like George Orwell’s Big Brother than the American Framers.[[418]](#footnote-419) And adding “because you are a child” to the end does not make it better. True, through the systems of chattel slavery and patriarchy, the Framers often *acted* in such a domineering manner. But what they *said* was this: “We hold these truths to be self-evident: That all people are created equal. That they are endowed by their Creator with certain unalienable rights. That among these are life, liberty, and the pursuit of happiness.”[[419]](#footnote-420) We, the Framers’ heirs in this constitutional experiment, have too often done as they did, not as they said.[[420]](#footnote-421)

Taking liberty seriously means taking children seriously. I am not the first woman to make this claim.[[421]](#footnote-422) But I renew it now, with added urgency, because the wholesale exclusion of children from the definition of liberty may soon provide an opening through which the freedom of all of us may be assailed. The proliferation of bans on gender-affirming care for minors provides a stark example, as many states now move to expand such bans to adults.[[422]](#footnote-423)

I am aware that expanding the definition of liberty to grant children more self-determination would be deeply unsettling to the existing liberal order.[[423]](#footnote-424) I decline to further complicate and expand this article by proposing specific legal reforms regarding children’s rights. Others have suggested thoughtful innovations based on accommodation[[424]](#footnote-425) and relational[[425]](#footnote-426) models. I add here only that even a sincere interpretation of the existing classical liberal system of negative rights and autonomy suggests that the law should no longer render children, particularly adolescents, completely powerless to enforce their subjective preferences for their own lives.[[426]](#footnote-427) The age-of-majority regime is a sham that enables violations such as gender-affirming care bans. We can and must do better.

# 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.[[427]](#footnote-428)*

As I (re)discovered joy in a shotgun house in New Orleans, C.S. Lewis (re)discovered joy in a zoo in Bedfordshire.[[428]](#footnote-429) As with me, joy suffused Lewis’s earliest years.[[429]](#footnote-430) But the untimely death of his mother[[430]](#footnote-431) and his experiences at school[[431]](#footnote-432) 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.”[[432]](#footnote-433)

While trying on a dress for the first time rekindled my spark, Lewis’s conversion to Christianity rekindled his.[[433]](#footnote-434) I began this article by highlighting the differences between religious conversion and gender transition.[[434]](#footnote-435) I end by suggesting that the two are vitally similar on another, perhaps much more important, level. 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[[435]](#footnote-436) and Buddhist nun Pema Chödrön agree: Life is hard.[[436]](#footnote-437) To be alive is to struggle.[[437]](#footnote-438) 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.

To find joy is to live. 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 generative. “To have your heart 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.”[[438]](#footnote-439)

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.

1. \* Assistant Professor, St. John’s University School of Law. Special thanks to Meghan Boone, Jane Wettach, Noa Ben Asher, Kristan Brown, Anna Arons, Ben Sundholm, [others]. [↑](#footnote-ref-2)
2. COVID-19 killed an estimated 337,883 Americans in 2020, making it the third leading cause of death that year. Farida B. Ahmad et al., Provisional Mortality Data—United States, 2020 (U.S. Dep’t of Health & Human Servs. Mar. 31, 2021), <https://www.cdc.gov/mmwr/volumes/70/wr/pdfs/mm7014e1-H.pdf> [https://perma.cc/DE39-UMFR]. [Additional statistics, article re lingering suffering/effects]. [↑](#footnote-ref-3)
3. *See* *generally* Marie Kondo, The Life-Changing Magic of Tidying Up: The Japanese Art of Decluttering and Organizing (Cathy Hirano trans., 2014). [↑](#footnote-ref-4)
4. *Id.* at 39–42. [↑](#footnote-ref-5)
5. *See* Joanna Gaitens et al., *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.”). [↑](#footnote-ref-6)
6. 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 Constutitonal Law: The Medium and the Message*, in Law’s Stories: Narrative and Rhetoric in the Law (Peter Brooks & Paul Gewirtz, eds.) 37–53, 37–38 (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 36–47;anthropology, *see infra* notes 63–72; philosophy, *see infra* notes 105–114, 133–153;literature, *see infra* notes 115–132; and psychology, *see infra* notes 325–X. 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. [cite—Marcuse? Cohen? West? Mezey?]. 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. [↑](#footnote-ref-7)
7. U.S. Const. Amend. 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, 144 S. Ct. 1812, 1821–22 (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. [↑](#footnote-ref-8)
8. 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* Purdue Online Writing Library (OWL), *Gendered Pronouns & Singular “They*,*”* <https://owl.purdue.edu/owl/general_writing/grammar/pronouns/gendered_pronouns_and_singular_they.html> [https://perma.cc/25Q2-3CD5] (accessed Dec. 10, 2024); *see also* Jessica A. Clarke, *They, Them, and Theirs*, 132 Harv. L. Rev. 894, 897–98 (2019). [↑](#footnote-ref-9)
9. *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.”). [↑](#footnote-ref-10)
10. *See* Jamal Greene, *The Meming of Substantive Due Process*, 31 Const. Comment. 253, 259–61 (2016). [↑](#footnote-ref-11)
11. *See* Madiba Dennie, The Originalism Trap: How Extremists Stole the Constitution and How We the People Can Take it Back 4–5 (2024). [↑](#footnote-ref-12)
12. *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 90–92. [↑](#footnote-ref-13)
13. *See infra* Part I.A. [↑](#footnote-ref-14)
14. 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).

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. [↑](#footnote-ref-15)
15. On gender-affirming healthcare for minors generally, see Jack Turban, Free to Be: Understanding Kids & Gender Identity (2024). [↑](#footnote-ref-16)
16. Advocates have argued that *parents* have a fundamental due process right to control the medical treatment their children receive. *See* Complaint ¶¶ 78–83, 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. [↑](#footnote-ref-17)
17. *See* United States v. Skrmetti, 144 S. Ct. 2679 (2024); Amy Howe, *Supreme Court to Hear Challenge to Ban on Transgender Health Care for Minors* (SCOTUSblog Dec. 3 2024, 3:11 P.M.), https://www.scotusblog.com/2024/12/supreme-court-to-hear-challenge-to-ban-on-transgender-health-care-for-minors/ [https://perma.cc/8PCN-RENJ].

Other scholars have ably evaluated the equal protection aspects of gender-affirming care bans. *See, e.g.*, [Eyer article, others].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. [↑](#footnote-ref-18)
18. *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 (“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.”); [↑](#footnote-ref-19)
19. *See, e.g.*, 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.”); Matsuda, *supra* note 5, at 2323–26 (labeling attention to lived experiences “outsider jurisprudence”); *see also id.* 2323 n.17 (collecting similar sources). [↑](#footnote-ref-20)
20. *See infra* Part II.A. [↑](#footnote-ref-21)
21. *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. [↑](#footnote-ref-22)
22. 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. [↑](#footnote-ref-23)
23. Fam. Pol’y All., *Help Not Harm*, <https://familypolicyalliance.com/help-not-harm/> [https://perma.cc/6FT3-4HP7] (last visited July 22, 2024). The emphasis is original—in set-apart, bright red, all-capital letters. *Id.*

FPA, which claims to be a Christian ministry, was founded in 2004 by Focus on the Family. *See* Fam. Pol’y All., *About Us*, <https://familypolicyalliance.com/about-us/> [https://perma.cc/L9B5-QXRM] (last visited July 22, 2024). Focus on the Family is a Christian fundamentalist organization known for its virulent opposition to LGBTQ rights. While the Southern Poverty Law Center has stopped short of labeling Focus on the Family as an anti-LGBTQ hate group, SPLC listed the group as one of the twelve groups most responsible for anti-gay politics in America in 2005. *See* Southern Poverty Law Center, *A Dozen Major Groups Help Drive the Religious Right’s Anti-Gay Crusade* (Apr. 28, 2005), <https://www.splcenter.org/fighting-hate/intelligence-report/2005/dozen-major-groups-help-drive-religious-right%E2%80%99s-anti-gay-crusade?page=0%2C0#10> [https://perma.cc/VXY3-V2XV] (“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.”). [↑](#footnote-ref-24)
24. *Id.* [↑](#footnote-ref-25)
25. *Id.* [↑](#footnote-ref-26)
26. *E.g.*,H.B. 4619, 125th Leg. (S.C. 2024) (“South Carolina’s Children Deserve Help Not Harm Act”); S.B. 1138, 55th Leg. (Ariz. 2022) (“Arizona’s Children Deserve Help Not Harm Act”); *see also* H.B. 648, 2023 Sess. (La.) (“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, 93rd Leg. (Ark. 2021); S.B. 49, 2023 Sess. (Mo.); H.B. 68, 135th Leg. (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 6. [↑](#footnote-ref-27)
27. *See* Fam. Pol’y All., *supra* note 6; 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), *appeal docketed*, 8th Cir. July 21, 2023 (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*, --- F. Supp. 3d ---, No. 1:23-cv-269, 2023 WL 8935065, at \*14 (D. Idaho Dec. 26, 2023), *appeal docketed*, 9th Cir. Jan. 9, 2024; Doe v. Ladapo, --- F. Supp. 3d ---, No. 4:23-cv-114, 2024 WL 2947123, at \*28 (N.D. Fla. June 11, 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*” (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/J5XV-472C] (referencing “young kids, who cannot even provide informed consent” and “a child too young to drive a car or get a tattoo”). [↑](#footnote-ref-28)
28. *E.g.*, Parham v. J.R., 442 U.S. 584, 603–04 (1979) (“Most children, even in adolescence, simply are not able to make sound judgments concerning many decisions, including their need for medical care or treatment.”); Annette Ruth Appell, *Accommodating Childhood*, 19 Cardozo J. L. & Gender 715, 730 (2013) (“As vulnerable works-in-progress, children are largely subordinate under the law, cast as objects of parental liberty, future citizens, and as unwise, unreliable, and vulnerable.”). [↑](#footnote-ref-29)
29. *See, e.g.*, Am. Physiological Ass’n, *Study Bolsters Evidence that Effects of Puberty Blockers Are Reversible* (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]. [↑](#footnote-ref-30)
30. *See, e.g.*, Merriam-Webster.com, *Transition*, <https://www.merriam-webster.com/dictionary/transition#dictionary-entry-2> [https://perma.cc/MV3P-9PH] (“to make a change or shift from one state, subject, place, etc. to another”). [↑](#footnote-ref-31)
31. *See* Natalie Reed, *The Null HypotheCis*, Sincerely, Natalie Reed (Apr. 17, 2012), <https://freethoughtblogs.com/nataliereed/2012/04/17/the-null-hypothecis/> [https://perma.cc/ZR62-VKPL] (discussing the logical fallacy of treating cisgender identity as the null hypothesis). [↑](#footnote-ref-32)
32. I use “religion” and “faith” interchangeably throughout this essay. [↑](#footnote-ref-33)
33. *See, e.g.*, Mark 12:29–31 (quoting Deuteronomy 6:4–5) (New International Version) (“‘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 Version) (“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.”).

I use Christianity as my primary example in this section for two reasons. First it is the faith tradition in which I was raised, and thus I am most familiar with it, and it is the ostensible faith of many of the most ardent proponents of the bans on gender-affirming care that is the topic of this essay. *See supra* note 6 and accompanying text (noting that the FPA, the author of the model legislation for gender-affirming care bans, as an offshoot of Christian fundamentalist organization Focus on the Family). My doing so does not imply that other religions do not contain similar imperatives. [↑](#footnote-ref-34)
34. *See* Martha Nussbaum, Liberty of Conscience: In Defense of America’s Tradition of Religious Equality, 19–20 (2008). [↑](#footnote-ref-35)
35. *E.g.*, Dictionary.com, *Exogenous*, <https://www.dictionary.com/browse/exogenous> [https://perma.cc/D4CC-N9AM] (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). [↑](#footnote-ref-36)
36. Romans 7:14–25 (New International Version). [↑](#footnote-ref-37)
37. *See* *generally* 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 original)). [↑](#footnote-ref-38)
38. Foster calls this “the discipline of study.” *Id.* at 62–76. [↑](#footnote-ref-39)
39. Foster calls this “the discipline of guidance.” *Id.* at 185–87. [↑](#footnote-ref-40)
40. Foster calls this “the discipline of confession.” *Id.* at 143–57. [↑](#footnote-ref-41)
41. *See* Merriam-Wesbter.com, *Discipline*, <https://www.merriam-webster.com/dictionary/discipline#dictionary-entry-1> [https://perma.cc/N4CZ-5RE3] (defining *discipline* both as “a rule or system of rules governing conduct or activity” and “to impose order upon”). [↑](#footnote-ref-42)
42. Foster, *supra* note 22, at 62; *cf.* Judges 17:6; 21:25 (New International Version) (attributing the violence and chaos plaguing the nascent nation of Israel to the fact that “everyone did as they saw fit”). [↑](#footnote-ref-43)
43. 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* Trent A. Rogers, God and the Idols: Representations of God in I Corinthians 8–10 158 (2016). Leftover meat from such sacrifices was commonly sold to generate revenue for temples or served at community festivals. *Id.* (discussing Wendell Lee Willis, Idol Meat in Corinth: The Pauline Argument in I Corinthians 8 and 10 (1985)). [↑](#footnote-ref-44)
44. *See generally* I Corinthians 8–10 (New International Version). [↑](#footnote-ref-45)
45. *See* I Corinthians 8:2 (New International Version) (“Those who think they know something do not yet know as they ought to know.”); Rogers, *supra* note 28, at 156–57 (“When a particular 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.”). [↑](#footnote-ref-46)
46. *See* Rogers, *supra* note 28, at 42–44 (“Questions about idolatry were questions of what a person could and could not do.”). As the sacrificial meat controversy itself demonstrates, both the definitions of permissible activity and the degree to which the faithful must adhere to them are hotly debated within religious communities. *See id.*; *id.* at 156–57.

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). [↑](#footnote-ref-47)
47. Aphrodite (Romanized as Venus) was the patron deity of Corinth. 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), <https://www.theoi.com/Text/Pausanias2A.html#1> [https://perma.cc/TZZ8-QJCU]. [↑](#footnote-ref-48)
48. *See generally* Mark A. Yarhouse & Olya Zaporozhets, Costly Obedience: What We Can Learn from the Celibate Gay Christian Community (2019). [↑](#footnote-ref-49)
49. *See supra* note 20. [↑](#footnote-ref-50)
50. *E.g.*, *Endogenous*, Dictionary.com, <https://www.dictionary.com/browse/endogenous> [https://perma.cc/Z498-UV8D] (defining *endogenous* as “proceeding from within; derived internally”). *Cf.* Mason, *supra* note 34, at 25. [↑](#footnote-ref-51)
51. Dr. Jack Turban, the director of the Gender Psychiatry Program at the University of California, San Francisco, calls this subjective sense “one’s *transcendent* state of gender.” Turban, *supra* note 14, at 38–39 (emphasis 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 14, 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. *See infra* note 37 and accompanying text. [↑](#footnote-ref-52)
52. *See, e.g.*, Alison Stone, *Essentialism and Anti-Essentialism in Feminist Philosophy*, 1 J. Moral Phil. 135,139 (2004). Societal constructs of masculinity and femininity make it possible to “perform” gender, *see* Julia Serano, Excluded: Making Feminist and Queer Movements More Inclusive Ch. 6 (2103), as well as to discriminate against someone based on their failure to perform according to their perceived gender. *See* Price Waterhouse v. Hopkins, 490 U.S. 228, 250–51 (1989) (holding that “sex stereotyping” is a prohibited form of sex discrimination); *see also* 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). [↑](#footnote-ref-53)
53. Dorothy Sayers, *Are Women Human? Address Given to a Women’s Society, 1938*, 8 Logos 165, 173 (2005). [↑](#footnote-ref-54)
54. *See* Turban, *supra* note 14, 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 et al., *“A Shiny Little Gender Breakthrough”: Community Understandings of Gender Euphoria*, 23 Int’l J. Transgender Health 274, 274–276, 284–85 (2022). [↑](#footnote-ref-55)
55. *Id.* at 286. “Seemingly central to these positive emotions are a constellation of feelings related to authenticity, rightness, or being ‘at home.’” *Id.*

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, *see infra* notes X–Y and accompanying text—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* Beischel et al., *supra* note 39, at 282. [↑](#footnote-ref-56)
56. *Id.* at 282–84. [↑](#footnote-ref-57)
57. *Id.* at 281–82. *Cf.* Elliot Page, *The Euphoria of Elliot Page*, Esquire (June 1, 2022 6:00 A.M.), <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.”). [↑](#footnote-ref-58)
58. *See supra* text accompanying notes 1–4. [↑](#footnote-ref-59)
59. *See* *Euphoria*, Dictionary.com, <https://www.dictionary.com/browse/euphoria> [https://perma.cc/WZ3S-83UK] (defining *euphoria* as “a state of intense happiness and self-confidence”). [↑](#footnote-ref-60)
60. *See* Beischel et al., *supra* note 39, at 282. [Consider *cf’ing* to Imani Perry’s description of Black Americans experiencing Black Panther and wondering if this is how white people feel all the time]. [↑](#footnote-ref-61)
61. *See Cisnormativity*, Cambridge.org, <https://dictionary.cambridge.org/us/dictionary/english/cisnormativity#:~:text=Meaning%20of%20cisnormativity%20in%20English&text=Cisnormativity%20assumes%20that%20everyone%20identifies,they%20were%20assigned%20at%20birth> [https://perma.cc/JH8K-JAEW]. [↑](#footnote-ref-62)
62. *See* [internal cross reference]. [↑](#footnote-ref-63)
63. *See* Turban, *supra* note 14, at 115–16. [↑](#footnote-ref-64)
64. Melissa V. Harris-Perry, Sister Citizen: Shame, Stereotypes, and Black Women in America 28–29 (2011). [↑](#footnote-ref-65)
65. *Id.* (citing H.A. Witkin et al., *Field-Dependent and Field-Independent Cognitive Styles and Their Educational Implications*, 47 Rev. Educ. Research 1 (1977)). [↑](#footnote-ref-66)
66. *Id.* [↑](#footnote-ref-67)
67. *Id.* [↑](#footnote-ref-68)
68. *See id.* at 53–69. [↑](#footnote-ref-69)
69. *See id.* at 69–86. [↑](#footnote-ref-70)
70. *See id.* at 86–96. [↑](#footnote-ref-71)
71. *See id.* at 183–220. [↑](#footnote-ref-72)
72. Drawing on Hannah Arendt, Harris-Perry calls this phenomenon “recognition.” *Id.* at 35–43 (“Craving recognition of one’s special, inexchangeable uniqueness is part of the human condition”). Harris-Perry uses Zora Neale Hurston’s character Janie Mae Crawford as an example of a Black woman who struggles to achieve—and eventually succeeds in achieving—such a life. [↑](#footnote-ref-73)
73. *Id.* at 28; *see also generally* Zora Neale Hurston, Their Eyes Were Watching God (1937). Harris-Perry’s characterization of Janie’s journey echoes that of Celie in *The Color Purple*, who declares to her abusive husband in the novel’s pivotal scene: “I’m pore, I’m black, I may be ugly and can’t cook . . . But I’m here.” Alice Walker, The Color Purple 207 (1982). [↑](#footnote-ref-74)
74. Angelica Ross Interview, Soul of a Nation (@soulofanation), Instagram (June 6, 2023), <https://www.instagram.com/soulofanation/reel/CtKeuo8uPFD/> [https://perma.cc/A65N-FABX] (quoted in Turban, *supra* note 14, at 56). [↑](#footnote-ref-75)
75. *See* Susan A. Bandes, *Introduction*, in The Passions of Law 1–15, 1–2 (Susan A. Bandes ed. 1999) (“In the conventional story, emotion has a certain, narrowly defined place in law.”). Beginning as early as the 1980s, a growing body of scholarship, sometimes called “law and emotions,” has critiqued the conventional account of the limited role of emotions within law from both descriptive and normative standpoints. *See, e.g.*, *id.*; Kathryn Abrams & Hila Keren, *Who’s Afraid of Law and Emotions*, 94 Minn. L. Rev. 1997, 1998 & n.1 (2010); *see also* William J. Brennan, Jr., *Reason, Passion, and “The Progress of the Law”*, 10 Cardozo L. Rev. 3, 3 (1988) (“It is my thesis that this interplay of forces, this internal dialogue of reason and passion, does not taint the judicial process, but is in fact central to its vitality. This is particularly true, I think, in constitutional interpretation.”); Gary Peller, *Reason and the Mob: The Politics of Representation*, 2 Tikkun 28, X (1987). [↑](#footnote-ref-76)
76. *See* Terry A. Maroney, *The Persistent Cultural Script of Judicial Dispassion*, 99 Calif. L. Rev. 629, 633 (2011) (“judicial dispassion has come to be regarded as a core requirement of the rule of law”). *But see* Jamal Greene, *Pathetic Argument in Constitutional Law*, 113 Colum. L. Rev. 1389, 1393 (2013) (arguing that despite the persistent cultural script of judicial dispassion, “appeals to pathos are an important element of constitutional practice”). [↑](#footnote-ref-77)
77. Maroney, *supra* note 61, at 635; Tyler Rose Clemons, *Coercive Ideology*, 83 Md. L. Rev. 1121, 1144–45 (“[T]he American legal tradition does not treat psychological injuries as serious); Ann Althouse, *Standing, in Fluffy Slippers*, 77 Va. L. Rev. 1177, 1178 (1991) (critiquing “the [Supreme] Court’s willful exclusion of emotion and real context from its decisions” and “its misguided characterization of this exclusion as heroic”). The handful of instances in which parties’ emotions are treated as legally relevant, such as calculating remedies in certain torts cases, are exceptions that prove the rule. *See* Bandes, *supra* note 60, at 2; Clemons, *supra*, at 1145. *But see* Khiara Bridges, *Race and the Roberts Court*, 136 Harv. L. Rev. 23, 132 (2022) (arguing that the Roberts Court is increasingly solicitous of the hurt feelings of white plaintiffs challenging measures designed to remedy racial discrimination). [↑](#footnote-ref-78)
78. Doni Gewirtzman, *Our Founding Feelings: Emotion, Commitment, and Imagination in Constitutional Culture*, 43 U. Richmond L. Rev. 623, 635–37 (2009). [↑](#footnote-ref-79)
79. *See* *Stare Decisis*, Black’s Law Dictionary (12th ed. 2024); Planned Parenthood of Se. Penn. v. Casey, 505 U.S. 833, 854–55 (1992), *overruled on other grounds by* Dobbs v. Jackson Women’s Health Org., 597 U.S. 215, 231 (2022). [↑](#footnote-ref-80)
80. Gewirtzman, *supra* note 63, at 623, 636; *see also generally* Kathy A. Winter & Nicholas A. Kuiper, *Individual Differences in the Experience of Emotions*,17 Clinical Psych. Rev. 791, 798 (1997) (“[I]ndividual differences in personality mediate affective responses to life events”). [↑](#footnote-ref-81)
81. Gewirtzman, *supra* note 63, at 623, 640–44; *see also* *Dobbs*, 597 U.S. at 387–88, 412–14 (Breyer, J., dissenting) (quoting *Casey*, 505 U.S. at 705). [↑](#footnote-ref-82)
82. *See* Gewirtzman, *supra* note 63, at 637–40, 645–47; Maroney, *supra* note 61, at 634–35; add Klarman, Framers’ Coup. [↑](#footnote-ref-83)
83. *See* John Adams, Thoughts on Government (1776), <https://founders.archives.gov/documents/Adams/06-04-02-0026-0004> [https://perma.cc/AGT4-PF2J]; *see also* *Dobbs*, 597 U.S. at 388 (“Judges’ personal preferences do not make law; rather, the law speaks through them.”). [↑](#footnote-ref-84)
84. The Declaration of Independence para. 2 (U.S. 1776). [↑](#footnote-ref-85)
85. *See* Carli N. Conklin, The Pursuit of Happiness in the Founding Era: An Intellectual History 97–99, 106–09 (2019); Edmond N. Cahn, *Madison and the Pursuit of Happiness*, 27 N.Y.U. L. Rev. 265, 268–69 & n.8 (1972). The use of the indefinite masculine is deliberate; with few notable exceptions, women’s voices were excluded from the conversations that shaped the Constitution. *See* [cite—probably Siegel’s post-Dobbs stuff]. [↑](#footnote-ref-86)
86. *See* John Locke, Two Treatises on Civil Government 234 (1884 ed. 1689). Locke’s original word for property was “estate,” but the two terms are synonymous. *Id.*; *see* *also* Conklin, *supra* note 70, at 3. [↑](#footnote-ref-87)
87. *Id.* [↑](#footnote-ref-88)
88. *Id.* at 4–5. [↑](#footnote-ref-89)
89. *Id.* at 4. [↑](#footnote-ref-90)
90. Cahn, *supra* note 70, at 266–67. Though popular in the mid-twentieth century, this view appears to have fallen out of favor. *Compare* *id.* (“This historical myth . . . has won wide acceptance”) *with* Conklin, *supra* note 70, at 4–5 (discussing two approaches to the replacement without discussing this view). [↑](#footnote-ref-91)
91. John Locke, An Essay Concerning Human Understanding (2015 ed. 1689). [↑](#footnote-ref-92)
92. *Id.* at 166–202. [↑](#footnote-ref-93)
93. *Id.* at 182–83. [↑](#footnote-ref-94)
94. *Id.* at 183, 189–190. [↑](#footnote-ref-95)
95. *Id.* at 190. [↑](#footnote-ref-96)
96. *Id.* [↑](#footnote-ref-97)
97. *Id.* at 184, 187, 188, 192. [↑](#footnote-ref-98)
98. *See* Cahn, *supra* note 70, at 272. [↑](#footnote-ref-99)
99. *See id.*; 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 70, 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*. *See id.* at 127, 131–34; *infra* Part II.A.2. [↑](#footnote-ref-100)
100. *See supra* notes 72–75 and accompanying text. [↑](#footnote-ref-101)
101. 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.” [↑](#footnote-ref-102)
102. *See* Julia Annas, The Morality of Happiness 11–12, 44 (1993). [↑](#footnote-ref-103)
103. *See* *id.* at 45–46;Conklin, *supra* note 70, at 5. [↑](#footnote-ref-104)
104. Annas, *supra* note 87, at 44. 330. [↑](#footnote-ref-105)
105. Aristotle, Nicomachean Ethics bk. I, at 3 & n.3 (Terence Irwin trans., Hackett Pub. Co. ed. 2019). [↑](#footnote-ref-106)
106. *See id.* (“But about what happiness [*eudaimonia*] is they disagree, and the many do not give the same answer as the wise.”). [↑](#footnote-ref-107)
107. At least not by the modern definition of hedonism. *See* Annas, *supra* note 87, at 334–35 & n.1; *see also infra* notes 101–118 and accompanying text. [↑](#footnote-ref-108)
108. *See* Annas, *supra* note 87, at 46. [↑](#footnote-ref-109)
109. *See supra* notes 88–89 and accompanying text. [↑](#footnote-ref-110)
110. *See* Annas, *supra* note 87, at 135–37; Locke, *supra* note 76, at 190–91. [↑](#footnote-ref-111)
111. Thus distinguishing them from modern theories of “natural law.” *See, e.g.*, John Finnis, Natural Law and Natural Rights 23–24 (2d ed. 2011). [↑](#footnote-ref-112)
112. *See* Annas, *supra* note 87, at 137; Locke, *supra* note 76, at 190–91. [↑](#footnote-ref-113)
113. *Id.* [↑](#footnote-ref-114)
114. *See* *id*. (“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.”). [↑](#footnote-ref-115)
115. *See* Conklin, *supra* note 70, at 30–33 (discussing the empiricism of the Scottish “Common Sense” school of philosophy and its influence on William Blackstone). [↑](#footnote-ref-116)
116. *See* Oscar Wilde, The Picture of Dorian Gray (1998 paperback ed. 1890). [↑](#footnote-ref-117)
117. *E.g.*, *id.* at 10–12. [↑](#footnote-ref-118)
118. *Id.* at 14–15, 18. [↑](#footnote-ref-119)
119. *Id.* at 15 (“‘Stop!’ faltered Dorian. ‘stop! You bewilder me. I don’t know what to say. There is some answer to you, but I cannot find it. Don’t speak. Let me think. Or, rather, let me try not to think.”). [↑](#footnote-ref-120)
120. *See* *id.* at 16 (“With his subtle smile, Lord Henry watched [Dorian]. He knew the precise psychological moment when to say nothing. He felt intensely interested. He was amazed at the sudden impression his words had produced . . . He had merely shot an arrow into the air. Had it hit the mark?”); *see also id.* at 5–6 (“‘I don’t believe that, Harry, and I don’t believe you do either.’”). [↑](#footnote-ref-121)
121. *Id.* at 80–81. [↑](#footnote-ref-122)
122. *Id.* at 106–15. [↑](#footnote-ref-123)
123. *Id.* at 116. [↑](#footnote-ref-124)
124. *Id.* at 150–55. [↑](#footnote-ref-125)
125. *See id.* at 116, 122–25. [↑](#footnote-ref-126)
126. *See id.* at 86–87, 182–83. [↑](#footnote-ref-127)
127. *See id.* at 104, 116. [↑](#footnote-ref-128)
128. *See id.* at 128–29 (“‘My God!’ [Basil] exclaimed. ‘and this is what you have done with your life, why, you must be worse even than those who talk against you fancy you to be!’ He held the light up again to the canvas, and examined it. The surface seemed to be quite undisturbed, and as he had left it. It was from within, apparently, that the foulness of horror had come. Through some strange quickening of inner life the leprosies of sin were slowly eating the thing away. The rotting of a corpse in a watery grave was not so fearful.”). [↑](#footnote-ref-129)
129. *Id.* at 100–01, 127–30. [↑](#footnote-ref-130)
130. *Id.* at 182–84. [↑](#footnote-ref-131)
131. *See id.* at 18. [↑](#footnote-ref-132)
132. *See* Isobel Murray, *Introduction*, in *id.*, viii–xv, at xi. [↑](#footnote-ref-133)
133. *See* *supra* note 103 and accompanying text. [↑](#footnote-ref-134)
134. *See* Annas, *supra* note 87, at 44. [↑](#footnote-ref-135)
135. *See* Catherine Wilson, Epicureanism at the Origins of Modernity X (2008);Howard Jones, *Epicurus and Epicureanism*, in The Classical Tradition X–Y, Z (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.* [↑](#footnote-ref-136)
136. Annas, *supra* note 87, at 44. [↑](#footnote-ref-137)
137. 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/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 120) on his work. *See, e.g.*, Jones, *supra* note 120, at X. At any rate, Chapter XXI of Book II of the *Essay* is shot through with Epicurean ideas. *Compare* Locke, *supra* note 76, at 182–91 *with* Julia Annas, *Epicurus on Pleasure and Happiness*, 15 Phil. Topics 5, 15–18 (1987). [↑](#footnote-ref-138)
138. *See* Annas, *supra* note 70, at 188; Annas, *supra* note 122, at 5, 17. 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 & 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). [↑](#footnote-ref-139)
139. *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 70, at 334–35. [↑](#footnote-ref-140)
140. *See* Annas, *supra* note 70, at 334. [↑](#footnote-ref-141)
141. *Id.* at 190. [↑](#footnote-ref-142)
142. *Id.* at 190, 337 [↑](#footnote-ref-143)
143. *See id.* at 337 (noting that “the natural/not natural distinction cuts right across that of mental and bodily”). [↑](#footnote-ref-144)
144. *Id.* at 190. [↑](#footnote-ref-145)
145. *Id.* at 336–37 (“the Epicurean strategy for living the best life is directed at finding and following natural desires.”). [↑](#footnote-ref-146)
146. *Id.* at 190. [↑](#footnote-ref-147)
147. *Id.* [↑](#footnote-ref-148)
148. *Id.* at 191–93. [↑](#footnote-ref-149)
149. *Id.* at 191. [↑](#footnote-ref-150)
150. 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.”). [↑](#footnote-ref-151)
151. *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.* [↑](#footnote-ref-152)
152. *Id.* [↑](#footnote-ref-153)
153. *Id.* at 192. [↑](#footnote-ref-154)
154. The necessary/empty box is blacked-out because empty desires by definition cannot be necessary. [↑](#footnote-ref-155)
155. *See* *supra* notes 101–118 and accompanying text. [↑](#footnote-ref-156)
156. *See* Murray, *supra* note 117, at x. [↑](#footnote-ref-157)
157. [Cite] re aromantic and asexual people. [↑](#footnote-ref-158)
158. [Cite]. [↑](#footnote-ref-159)
159. *See* Wilde, *supra* note 101, at 1–12 (“‘As long as I [Basil] live, the personality of Dorian Gray will dominate me.’”). [↑](#footnote-ref-160)
160. *See id.* at 120–21, 129–31. *But see* *id.* at 125–26 (“‘As for what I [Basil] said to you [Dorian] tonight, I have said it for your good. You know I have always been a staunch friend to you.’”). [↑](#footnote-ref-161)
161. *See supra* notes 103–105 and accompanying text. [↑](#footnote-ref-162)
162. Wilde, *supra* note 101, at 151. [↑](#footnote-ref-163)
163. *See* *id.* at 38–46, 120–21, 129–31, 156–58. [↑](#footnote-ref-164)
164. *See id.* at 35–36 [↑](#footnote-ref-165)
165. *See id.* at 151. [↑](#footnote-ref-166)
166. *See* *Luke* 6:43–45. [↑](#footnote-ref-167)
167. *See* *The Scoop on ‘The Proof is in the Pudding*,*’* Merriam-Webster.com (visited Aug. 17, 2024), <https://www.merriam-webster.com/wordplay/origin-of-the-proof-is-in-the-pudding-meaning> [https://perma.cc/B4YY-K43H]. [↑](#footnote-ref-168)
168. *See id.* at 336–37; Annas, *supra* note 122, 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.”). [↑](#footnote-ref-169)
169. Jefferson to Short, *supra* note 122, encl. (“Syllabus of the Doctrines of Epicurus”); *see also* Locke, *supra* note 76, at 190–91. [↑](#footnote-ref-170)
170. *See* Brennan, *supra* note 60, at 13–15. [↑](#footnote-ref-171)
171. *Id.* [↑](#footnote-ref-172)
172. West Va. Bd. of Educ. v. Barnette, 319 U.S. 624, 638 (1943). [↑](#footnote-ref-173)
173. *See, e.g.*, 303 Creative v. Elenis, 600 U.S. 570, 584–86 (2023) (quoting *Barnette*, 319 U.S. at 642). [↑](#footnote-ref-174)
174. *E.g.*,Leah Litman, *The New Substantive Due Process*, 102 Tex. L. Rev. (forthcoming 2025) (manuscript at 8) (on file with author). [↑](#footnote-ref-175)
175. *E.g.*, *id.* (manuscript at 6). *But see* *id.* (manuscript at 7) (“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 60, at 13 (noting the “open-ended[ness]” of other, seemingly more specific Constitutional provisions). [↑](#footnote-ref-176)
176. *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, 144 S. Ct. 1812, 1821–22 (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. [↑](#footnote-ref-177)
177. *E.g.*, Litman, *supra* note 159 (manuscript at 6). [↑](#footnote-ref-178)
178. NeJaime & Siegel, *supra* note 161, at 1903–06. [↑](#footnote-ref-179)
179. 576 U.S. 644, 675–76 (2015). [↑](#footnote-ref-180)
180. *See* *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). [↑](#footnote-ref-181)
181. Alito Interview, *supra* note 165, 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. [↑](#footnote-ref-182)
182. Alito Interview, *supra* note 165, at 1:08:37; *see also* *Obergefell*, 576 U.S. at 737 (Alito, J., dissenting) (“For today's majority, [liberty] has a distinctively postmodern meaning.”). [↑](#footnote-ref-183)
183. *See, e.g.*, 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); Leah Litman, *The New Substantive Due Process*, 102 Tex. L. Rev. (forthcoming 2025) (manuscript at 6) (on file with author) (“Substantive due process represents the idea that the due process clauses of the Fifth and Fourteenth Amendment 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 165, 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). [↑](#footnote-ref-184)
184. 198 U.S. 45 (1905). Jamal Greene calls *Lochner* a “constitutional meme.” Jamal Greene, *The Meming of Substantive Due Process*, 31 Const. Comm. 253, 281–82 (2016). [↑](#footnote-ref-185)
185. *See id.* at 53–54; NeJaime & Siegel, *supra* note 168, at 1905–06 & nn.18, 20. [↑](#footnote-ref-186)
186. *See* *Lochner*, 198 U.S. at 75–76 (Holmes, J., dissenting). [↑](#footnote-ref-187)
187. West Coast Hotel Co. v. Parrish, 300 U.S. 379, 391 (1937). [↑](#footnote-ref-188)
188. *See* NeJaime & Siegel, *supra* note 168, at 1905–06; Howard Gillman, *De-Lochnerizing Lochner*, 860 B.U. L. Rev. 859, 861 (2005). [↑](#footnote-ref-189)
189. *See* Griswold v. Connecticut, 381 U.S. 479, 485–86 (1965) [↑](#footnote-ref-190)
190. See Planned Parenthood of Se. Penn. v. Casey, 505 U.S. 833, 846–47 (1992), *overruled by* Dobbs v. Jackson Whole Women’s Health, 597 U.S. 215, 231 (2023). [↑](#footnote-ref-191)
191. *See* Lawrence v. Texas, 539 U.S. 558, 578–79 (2003). [↑](#footnote-ref-192)
192. *See* NeJaime & Siegel, *supra* note 168, at 1905–06 (“The constitutional objection to substantive due process is routinely captured by a single declaration: *Lochner*.”); Litman, *supra* note 168 (manuscript at 10–13). [↑](#footnote-ref-193)
193. *See* Alito Interview, *supra* note 165, 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.”). [↑](#footnote-ref-194)
194. Madiba Dennie, The Originalism Trap: How Extremists Stole the Constitution and How We The People Can Take It Back 4 (2024) [↑](#footnote-ref-195)
195. “Supposed” because originalism itself is riddled with subjectivity. *See, e.g.*, *id.* 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*, 2023 Yale L.J.F. 99, 101 (discussing the choice to determine the “history and tradition” of abortion rights by the state-counting method); others. [↑](#footnote-ref-196)
196. *See* Washington v. Glucksberg, 521 U.S. 702, 720–22 (1997) (Rehnquist, C.J., for the majority) (“This [history-focused] approach tends to rein in the subjective elements that are necessarily present in due-process judicial review.”); Alito Interview, *supra* note 165, at 1:08:37 (praising *Glucksberg*’s approach as limiting subjectivity); others. [↑](#footnote-ref-197)
197. *See* Department of State v. Muñoz, 144 S. Ct. 1812, 1821–22 (2024) (quoting *Glucksberg*, 521 U.S. at 721). [↑](#footnote-ref-198)
198. *Id.* at 1822. [↑](#footnote-ref-199)
199. *See* Dennie, *supra* note 179, at 78–79. [↑](#footnote-ref-200)
200. *Muñoz*, 144 S. Ct. at 1822 (quoting *Glucksberg*, 521 U.S. at 720–21). [↑](#footnote-ref-201)
201. 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) (“History 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*, 144 S. Ct. at 1821–22. [↑](#footnote-ref-202)
202. *Id.* at 1817. [↑](#footnote-ref-203)
203. *Id.* at 1822. [↑](#footnote-ref-204)
204. *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). [↑](#footnote-ref-205)
205. *Muñoz*, 144 S. Ct. at 1822 (emphasis original). [↑](#footnote-ref-206)
206. *See id.* at 1820–21. [↑](#footnote-ref-207)
207. *See, e.g.*, Dennie, *supra* note 179, at 27–28. [↑](#footnote-ref-208)
208. *See supra* notes 164–167 and accompanying text. [↑](#footnote-ref-209)
209. I am not an originalist. [elaborate—cite to Dennie, inclusive constitutionalism]. [↑](#footnote-ref-210)
210. *See* *supra* notes 88–91 and accompanying text. [↑](#footnote-ref-211)
211. *See supra* Part II.A.1. [↑](#footnote-ref-212)
212. Indeed, this inquiry is the entire point of the two-step originalist method. *See supra* notes 182–191 and accompanying text. [↑](#footnote-ref-213)
213. [cite to Locke, Hobbes, maybe SEP] [↑](#footnote-ref-214)
214. [footnote re strict scrutiny]. [↑](#footnote-ref-215)
215. Department of State v. Muñoz, 144 S. Ct. 1812, 1822 (2024). [↑](#footnote-ref-216)
216. *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.”). [↑](#footnote-ref-217)
217. [cite for PDP distinction—maybe Michael H fight between Scalia and Brennan? Maybe Brennan’s discussion of Goldberg? Litman? Greene?] *See* Greene, *supra* note 169, at 260 (“[M]ultiple ambiguities enable a diversity of ‘processes’ to satisfy the textual demands of the Due Process Clause.”). [↑](#footnote-ref-218)
218. *Id.* at 253–54. As Greene also notes, the difference between “procedural due process” and “substantive due process” is contested. *Id.* at 254 n.5. [↑](#footnote-ref-219)
219. *See* *id.* at 259–61. [↑](#footnote-ref-220)
220. Since every liberty interest cannot receive heightened protection without frustrating the point of government. [↑](#footnote-ref-221)
221. *See* Alito Interview, *supra* note 165, at 1:08:37 (“For libertarians, for classical liberals, [liberty] does include the protection of economic rights and property rights. For progressive social democrats, it includes the protection, a right to liberty means freedom from want, etc., etc. Government benefits. And there are many other conceptions.”). [↑](#footnote-ref-222)
222. *See supra* notes 126–138 and accompanying text. [↑](#footnote-ref-223)
223. *Id.* [↑](#footnote-ref-224)
224. *Id.* [↑](#footnote-ref-225)
225. *Id.* [↑](#footnote-ref-226)
226. Such a regulation would be equivalent to a death sentence, thereby implicating the due process guarantee to “life” as well as “liberty.” It would also implicate the Eighth Amendment’s guarantee against cruel and unusual punishment. The American legal system places so many procedural safeguards around actual death sentences that other parts of the world have classified being subjected to the process—as distinct from the death sentence itself—as a form of torture. [cite re “Death penalty phenomenon]. [↑](#footnote-ref-227)
227. 144 S. Ct. 2202 (2024). [↑](#footnote-ref-228)
228. *Id.* at 2213. [↑](#footnote-ref-229)
229. *Id.* [↑](#footnote-ref-230)
230. *Id.* at 2216–17. [↑](#footnote-ref-231)
231. *See id.* at 2217–18 (noting that a due process claim against a law that criminalizes status rather than conduct “may have made some sense”); *see also* [scholarly sources]. [↑](#footnote-ref-232)
232. *See supra* notes 181–191 and accompanying text. [↑](#footnote-ref-233)
233. *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. [cite]. [↑](#footnote-ref-234)
234. As it indeed it did, rejecting the homeless plaintiffs’ Eighth Amendment claims. *See Grants Pass*, 144 S. Ct. at 2226. [↑](#footnote-ref-235)
235. *See supra* note 197–199 and accompanying text. Importantly, “subjective desire” refers here to homeless residents’ preferred choice out of all *available* alternatives, not all *ideal* alternatives. People do not choose to be homeless. [cite]. [↑](#footnote-ref-236)
236. *See* *Grants Pass*, 144 S. Ct. at 2228 (Sotomayor, J., dissenting) (“Sleep is a biological necessity, not a crime.”). [↑](#footnote-ref-237)
237. *Id.* at 2214 (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). [↑](#footnote-ref-238)
238. *See id.* at 2214, 2220–24; *id.* at 2228–33 (“Shelter beds that are available in theory may be practically unavailable[.]”) (Sotomayor, J., dissenting). [↑](#footnote-ref-239)
239. 144 S. Ct. 1812, 1817 (2024). [↑](#footnote-ref-240)
240. *E.g.*, *id.* at 1828 (Sotomayor, J., dissenting) (quoting Obergefell v. Hodges, 576 U.S. 644, 671 (2015)). [↑](#footnote-ref-241)
241. *See supra* note 128 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. [↑](#footnote-ref-242)
242. Loving, Obergefell, others? [↑](#footnote-ref-243)
243. A fact that the Court has also acknowledged and thus protected. *See* [cases regarding dwelling together]. [↑](#footnote-ref-244)
244. And indeed would be vindicated by the Court’s existing substantive due process precedents. *See supra* notes 225–228 and accompanying text. [↑](#footnote-ref-245)
245. *Cf.* *Muñoz*, 144 S. Ct. at 1834 (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.” (internal quotation and alterations omitted)). [↑](#footnote-ref-246)
246. *See supra* text accompanying [between?] notes 211–212. [↑](#footnote-ref-247)
247. *See* *Muñoz*, 144 S. Ct. at 1835 (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 1836–37 (discussing *Kleindienst v. Mandel*, 408 U.S. 753 (1972)), I would open the full panoply of procedural protections to all substantive due process claims. [↑](#footnote-ref-248)
248. As it already crafts intermediate protections for substantial burdens on intermediate interests in procedural due process cases. *See* [cite to PDP cases]. [↑](#footnote-ref-249)
249. 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. [↑](#footnote-ref-250)
250. *See Muñoz*, 144 S. Ct. at 1822 (majority opinion). [↑](#footnote-ref-251)
251. *Bradwell* [↑](#footnote-ref-252)
252. *Loving* [↑](#footnote-ref-253)
253. *Bowers* [↑](#footnote-ref-254)
254. *See* West, *supra* note 20, at 12–13, 48–53; Nicholas Bamforth & David A. J. Richards, Patriarchal Religion, Sexuality, and Gender: A Critique of the New Natural Law 228–278 (2008) (thoroughly illustrating the connections of the “new natural law” movement to sexism and homophobia). [↑](#footnote-ref-255)
255. Clemons, *supra* note 62, at 1149. [↑](#footnote-ref-256)
256. *Id.* [↑](#footnote-ref-257)
257. *Id.* at 1150. [↑](#footnote-ref-258)
258. *Id.* at 1162 & n.250. [↑](#footnote-ref-259)
259. *See supra* note 128 and accompanying text. [↑](#footnote-ref-260)
260. 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* note 241 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.” [↑](#footnote-ref-261)
261. 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). [↑](#footnote-ref-262)
262. *See supra* notes 137–138 and accompanying text. [↑](#footnote-ref-263)
263. *See* Clemons, *supra* note 62, at 1151, 1156. [↑](#footnote-ref-264)
264. [Cite to Scalia’s Lawrence dissent, Roberts/Alito’s Obergefell dissent] [↑](#footnote-ref-265)
265. *See supra* notes 6–9 and accompanying text. [↑](#footnote-ref-266)
266. I turn to the added wrinkle of children’s minor status below in Part III. [↑](#footnote-ref-267)
267. *See supra* notes 195–198 and accompanying text. [↑](#footnote-ref-268)
268. *See surpa* notes 126–131. [↑](#footnote-ref-269)
269. *See supra* note 36; [others]. [Cite for agender.] [↑](#footnote-ref-270)
270. *See supra* notes 44–48 and accompanying text. [↑](#footnote-ref-271)
271. *See generally* 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 14, at 133. [↑](#footnote-ref-272)
272. *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). [↑](#footnote-ref-273)
273. *See supra* notes 148 and accompanying text. [↑](#footnote-ref-274)
274. *See* Garima Garg et al., *Gender Dysphoria*, Nat’l Libr. of Med. (July 11, 2023), https://www.ncbi.nlm.nih.gov/books/NBK532313/ [https://perma.cc/SU6A-9BB7]. [↑](#footnote-ref-275)
275. *Id.*; *see also* Kate Cooper et al., *The Phenomenology of Gender Dysphoria in Adults: A Systematic Review and Meta-Synthesis*, 80 Clinical Psych. Rev. 1, 5–6 (2020). [↑](#footnote-ref-276)
276. *Id.*; *see also* Catherine Butler et al., *Self-Harm Prevalence and Ideation in a Community Sample of 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 trans-gender youth populations”). [↑](#footnote-ref-277)
277. For example, transmasculine individuals—those assigned female at birth—may develop eating disorders as a means of decreasing breast size. *See* Turban, *supra* note 14, at 23. Transfeminine individuals—those assigned male at birth—may attempt to remove their penises or testicles through binding or cutting. *See* Michael S. Irwig et al., *Self-Castration in a Transsexual Woman: Financial and Psychological Costs: A Case Report*, 9 J. Sexual Med. 1216 (2012). [↑](#footnote-ref-278)
278. Because the category of “transgender” is defined by internal/external gender misalignment. [↑](#footnote-ref-279)
279. *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 256, at 242 (cataloging symptoms of psychological distress in cisgender women seeking breast augmentation). [↑](#footnote-ref-280)
280. *See supra* note 142 and accompanying text. [↑](#footnote-ref-281)
281. *See* Turban, *supra* note 14, at 35–36. [↑](#footnote-ref-282)
282. *See* *id.* at 84–86. [↑](#footnote-ref-283)
283. *See* *id.* at 139–40 (“[W]hile the puberty blocker was reversible, puberty itself was not.”). [↑](#footnote-ref-284)
284. *See supra* notes 132–138. [↑](#footnote-ref-285)
285. *See supra* text between notes 211–212. [↑](#footnote-ref-286)
286. *See* E. Coleman et al., *Standards of Care for Health of Transgender and Gender Diverse People, Version 8*, 23 Int’l J. Transgender Health S1, S175–S176 (2022) (hereinafter “WPATH 8”). [↑](#footnote-ref-287)
287. *Id.* at S39–S40. [↑](#footnote-ref-288)
288. *See id.* at S32, S171. [↑](#footnote-ref-289)
289. *See id.* at S110–S111, S128–S130; Turban?. [↑](#footnote-ref-290)
290. *See* WPATH 8, *supra* note 265, at S37, S39–S40. [↑](#footnote-ref-291)
291. [Refer back to FN re EPC challenge.] [↑](#footnote-ref-292)
292. *See supra* text between notes 211–212. [↑](#footnote-ref-293)
293. 478 U.S. 186 (1986). [↑](#footnote-ref-294)
294. *Bowers*, 478 U.S. at 187–88; [book source]. [↑](#footnote-ref-295)
295. 539 U.S. 558 (2003). [↑](#footnote-ref-296)
296. *Bowers*, 478 U.S. at 187–88 & n.1. [↑](#footnote-ref-297)
297. *Id.* at 188–91. [↑](#footnote-ref-298)
298. 381 U.S. 479 (1965). [↑](#footnote-ref-299)
299. 410 U.S. 113 (1973), *overruled by* Dobbs v. Jackson Whole Women’s Health, 597 U.S. 215 (2022). [↑](#footnote-ref-300)
300. *Bowers*, 478 U.S. at 192. [↑](#footnote-ref-301)
301. *See supra* Part II.B.1. [↑](#footnote-ref-302)
302. *See supra* note 186. [↑](#footnote-ref-303)
303. *See supra* notes 182–185. [↑](#footnote-ref-304)
304. *Bowers*, 478 U.S. at 194. [↑](#footnote-ref-305)
305. *Id.* at 196 (Burger, C.J., concurring). [↑](#footnote-ref-306)
306. *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.”). [↑](#footnote-ref-307)
307. *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”). [↑](#footnote-ref-308)
308. [source—Eskridge?]. [↑](#footnote-ref-309)
309. [cite]. (with *see also supra* cite to footnote discussing asexual people). [↑](#footnote-ref-310)
310. *See supra* note 211 and accompanying text. [↑](#footnote-ref-311)
311. [cite]. [↑](#footnote-ref-312)
312. 539 U.S. 558 (2003). [↑](#footnote-ref-313)
313. *Id.* at 562–63. [↑](#footnote-ref-314)
314. *Id.* [↑](#footnote-ref-315)
315. *Id.* [↑](#footnote-ref-316)
316. *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.”). [↑](#footnote-ref-317)
317. *See id.* 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)). [↑](#footnote-ref-318)
318. *Id.* [↑](#footnote-ref-319)
319. *Id.* at 574 (quoting Planned Parenthood of Se. Penn. 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. [↑](#footnote-ref-320)
320. *See id.* 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”). [↑](#footnote-ref-321)
321. *See id.* at 572, 578–79. [↑](#footnote-ref-322)
322. *See supra* text accompanying notes 77–80, 195–197. [↑](#footnote-ref-323)
323. *See supra* Part II.B.3. [↑](#footnote-ref-324)
324. *See supra* Part II.B.4.

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 222–223. [↑](#footnote-ref-325)
325. *Lawrence*, 539 U.S. at 578–79. [↑](#footnote-ref-326)
326. This Part’s title invokes the title of Dorothy Sayers’s 1938 speech to a women’s society: “Are women human?” *See* Sayers, *supra* note 52, at 165. Her point then, as mine is now, is that no person’s humanity is reducible to their membership in a particular category—e.g., “women” or “children”—and that defining or depriving any person of self-determination is literally in*human*. *See id.* at 166–167. [↑](#footnote-ref-327)
327. *See, e.g.*, Appell, *supra* note 27, at 742–47 (noting that “children in the U.S. have been, and continue to be, active laborers, consumers, and political activists during what law and society now construct as their childhoods”); Barbara Bennett Woodhouse, Hidden in Plain Sight: The Tragedy of Children’s Rights from Ben Franklin to Lincoln Tate 6–7 (2008) (“History has been purged of stories about children’s agency and voice that make adults uncomfortable. Adults do not like to advertise the pivotal role played in American history and culture by acts of youthful defiance.”). [↑](#footnote-ref-328)
328. *See* Thomas S. Henricks, Play Reconsidered: Sociological Perspectives on Human Expression 14 (2008); *see also generally* Adult Play: A Reversal Theory Approach (John H. Kerr & Michael J. Apter, eds.) (1991) (surveying sports, sex, civil disobedience, and other behaviors as forms of adult play). [↑](#footnote-ref-329)
329. *See* Sharon Stephens, *Introduction: Children and the Politics of Culture in “Late Capitalism*,*”* in Children and the Politics of Culture (Sharon Stephens, ed.) 3–48, 33 (1995) (describing “the notion of childhood as a domain of *play*” (emphasis original)); Erica S. Weisgram et al., *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 (2014) (noting that “toy play is a fundamental aspect of young children’s daily experience”). [↑](#footnote-ref-330)
330. *See* U.N. Convention on the Rights of the Child, G.A. Res. 44/25, art. 31, U.N. Doc. A/RES/44/25 (Nov. 20, 1989) [hereinafter “UNCRC”], https://www.ohchr.org/sites/default/files/crc.pdf [https://perma.cc/GV6U-HQZP] (“State parties recognize the right of the child to rest in leisure, to engage in play and recreational activities appropriate to the age of the child”); Int’l Play Ass’n, Declaration on the Importance of Play (2014) [hereinafter “IPA Decl.”], http://ipaworld.org/wp-content/uploads/2015/05/IPA\_Declaration-FINAL.pdf [https://perma.cc/9QT7-W3JA]. [↑](#footnote-ref-331)
331. *See, e.g.*, Roberta Michnick Golinkoff et al., *Why Play = Learning: A Challenge for Parents and Educators*, in Play = Learning: How Play Motivates and Enhances Children’s Cognitive and Social-Emotional Growth (Dorothy G. Singer et al., eds.) 3–12, 7–10 (2006) (cataloging research demonstrating importance of play to children’s emotional wellbeing). *But see id.* at 3–6 (decrying increasing emphasis on structured, “educational” activities at the expense of play in children’s lives); Stephens, *supra* note 311, at 33 (noting “contemporary laments about the loss of quality of play in children’s lives”). [↑](#footnote-ref-332)
332. Developmental psychologist and play theorist Brian Sutton-Smith calls this “the ambiguity of play.” *See* Brian Sutton-Smith, The Ambiguity of Play 1 (1997); Brian Sutton-Smith, *Play Theory: A Personal Journey and New Thoughts*, 1 Am. J. Play 80, 112 (2008) (“My argument [in *The Ambiguity of Play*] held that play was ambiguous, and the evidence for that ambiguity lay in these quite different scholarly ways of viewing play. Further, over the years it became clear to me that much of play was by itself—in its very nature, we might say—intentionally ambiguous”).

Indeed, the point*less*ness of play may be an essential component of its definition. *See, e.g.*, Serenella Besio, *The Need for Play for the Sake of Play*, in Play Development in Children with Disabilities (Serenella Besio et al., eds.) 9–52, 14 (2017). [↑](#footnote-ref-333)
333. *See* Thomas S. Henricks, *Play as Self-Realization: Toward a General Theory of Play*, 6 Am. J. Play 190, 197, 203 (2013). [↑](#footnote-ref-334)
334. *Id.* at 203.

Humans engage in emotion-monitoring during all activities, not just play. But positive emotions are the primary intended result of play in a way that distinguishes it from other activities. *See id.* at 197. (“People seek out the distinctive encounters we call play with the anticipation that they will be rewarded with a succession of positive emotions.”). [↑](#footnote-ref-335)
335. *See id.* (“[C]reatures who play seek to acquaint themselves with the character of the world in which they operate and to evaluate the personal standings they can achieve within that world.”). [↑](#footnote-ref-336)
336. *See* Kondo, *supra* note 2, at 39–42. [↑](#footnote-ref-337)
337. This understanding of play is consistent with, but is by no means dependent upon, the classical liberal ideal of the independent, autonomous self. Whether the individual is discovering the pre-existing preferences of a gestalt self or experiencing spontaneous positive affect as a fleeting personal preference (or something between these extremes), an individual’s subjective response to a play experience will differ from those of others and thus will facilitate self-realization. *See* Henricks, *supra* note 315, at 200–01 (discussing various conceptions of the self in relation to play). [↑](#footnote-ref-338)
338. *See, e.g.*, Stephanie Watson, *Dopamine: The Pathway to Pleasure*, (Harv. Health Publ’g Apr. 18, 2024) <https://www.health.harvard.edu/mind-and-mood/dopamine-the-pathway-to-pleasure> [https://perma.cc/NQA8-BQXD].

That said, fun is undoubtedly among play’s most important characteristics. *See* Besio, *supra* note 314, at 13. *Cf.* *supra* note 88 and accompanying text (discussing modern definitions of “happiness” as “ephemeral positive feelings”). [↑](#footnote-ref-339)
339. *See supra* notes 87–90 and accompanying text. [↑](#footnote-ref-340)
340. *See supra* notes 79–80, 91 and accompanying text. [↑](#footnote-ref-341)
341. *See supra* notes 81–82 and accompanying text. [↑](#footnote-ref-342)
342. [Source on infant play] [↑](#footnote-ref-343)
343. *See infra* Part III.B. [↑](#footnote-ref-344)
344. *See* Planned Parenthood of Cent. Mo. v. Danforth, 428 U.S. 52, 74–75 (collecting cases to support the proposition that “[m]inors, as well as adults, are protected by the Constitution and possess constitutional rights”). [↑](#footnote-ref-345)
345. *See, e.g.*, Tinker v. Des Moines Ind. Cmty. Sch. Dist., 393 U.S. 503, 509 (1969) (holding that children’s right to engage in “pure speech” at school cannot be abridged merely “to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint”); W. Va. Bd. of Educ. v. Barnette, 319 U.S. 624, 637–38, 642 (1943) (holding that children cannot be compelled to say the Pledge of Allegiance at school). [↑](#footnote-ref-346)
346. *See especially* Parham v. J.R., 442 U.S. 584, 600–04, 620–21 (1979) (acknowledging that “a child, in common with adults, has a substantial liberty interest in not being confined unnecessarily for medical treatment” before holding that no adversarial proceeding is required for parents or the state to admit a child to a mental institution against the child’s wishes). [↑](#footnote-ref-347)
347. 443 U.S. 622, 651 (1979) (limiting states’ ability to restrict pregnant minors’ access to abortions, including by requiring parental consent or notification). The fate of the *Bellotti* line is uncertain since the Court overturned the abortion right upon which it was based in *Dobbs v. Jackson Whole Women’s Health*, 597 U.S. 215, 231 (2022). [↑](#footnote-ref-348)
348. *E.g.*, *Tyranny*, Dictionary.Cambridge.org, <https://dictionary.cambridge.org/us/dictionary/english/tyranny> [https://perma.cc/82LX-45J3]. [↑](#footnote-ref-349)
349. *See* Appell, *supra* note 27, at 716–17; Vivian E. Hamilton, *Adulthood in Law and Culture*, 91 Tul. L. Rev. 55, 61–62 (2016). [↑](#footnote-ref-350)
350. Minor v. Happersett, 88 U.S. 162, 177–78 (1875) (holding that forbidding women from voting does not violate the Fourteenth Amendment), *superseded by* U.S. Const. Amend. XIX (1920) (forbidding discrimination based on sex in granting the right to vote). [↑](#footnote-ref-351)
351. Bradwell v. Illinois, 83 U.S. 130, 138–39 (1872) (holding that forbidding women from practicing law does not violate the Fourteenth Amendment), *abrogated by* Reed v. Reed, 404 U.S. 71, 75–76 (1971) (holding that sex-based classifications implicate the Equal Protection Clause). [↑](#footnote-ref-352)
352. *See* Sayers, *supra* note 52, at 168–71; MacKinnon, *supra* note 17, at 40 (“On the first day that matters, dominance was achieved, probably by force. By the second day, division along the same lines was firmly, if imperfectly, in place. On the third day if not sooner, differences were demarcated, together with social systems to exaggerate them in perception and in fact, *because* the systematically differential delivery of benefits and deprivations required making no mistake about who is who. Comparatively speaking, man has been resting ever since.” (emphasis original)). [↑](#footnote-ref-353)
353. *See* Scott v. Sandford, 60 U.S. 393, 407 (1857) (infamously noting that Black Americans “had not rights which the white man was bound to respect” under the U.S. Constitution), *superseded by* U.S. Amend. XIV (1868) (granting U.S. citizenship to all people born on U.S. soil).

Like gender, *see supra* notes 50–52 and accompanying text, race is a social construct rather than a biological reality. *See* Joseph Graves & Alan Goodman, Racism, Not Race: Answers to Frequently Asked Questions 57–58 (2022) (“The social definitions of race utterly fail to describe the underlying biological variation found in human beings . . . . Variation is nonracial. It is almost always continuous, without clear breaks, and it is nonconcordant. Finally, variation within a continent, social race, or local group is much greater than variation among them.”). Racism, by contrast, “is systematic discrimination by a powerful individual or institution against individuals based on their perceived membership in a socially defined racial group.” *Id.* at 18. Thus, “racism, unlike race, is not a fiction, a superstition, or a hoax. It is a crime against humanity.” Barbara Fields & Karen Fields, Racecraft: The Soul of Inequality in American Life 99–103 (2012). [↑](#footnote-ref-354)
354. *See* Melissa Murray, *Stare Decisis and Remedy*, 73 Duke L.J. 1500, 1520–22 (2024); Appell, *supra* note 27, at 716–17. [↑](#footnote-ref-355)
355. *E.g.*, Students for Fair Admissions, Inc. v. Harvard Coll., 600 U.S. 181, 206–208 (2023) (hereinafter “*SFFA*”). I have elsewhere criticized the Court’s myopic focus on racial classification rather than racial subordination as the core equal protection injury. *See* Clemons, *supra* note 76, at 1133–40. My critique of the legal category of childhood in this Part is consistent with that criticism; my ultimate point here is that the classification of childhood facilitates the subordination of children. *See id.* at 1139 n.100; 1146. [↑](#footnote-ref-356)
356. Appell, *supra* note 27, at 716–19; Emily Buss, *Allocating Developmental Control Among Parent, Child, and State*, 2004 U. Chi. Legal F. 27, 29 (“The competition for developmental control of a child is classically framed as a competition between parent and state.”). [↑](#footnote-ref-357)
357. Appell, *supra* note 27, at 729–32. Anne Dailey and Laura Rosenbury apply the label “the authorities framework” to “[t]he existing regime of laws relating to children [that] hinges on the fundamental question of adult control over children and their development.” Anne C. Dailey & Laura A. Rosenberry, *The New Law of the Child*, 127 Yale L.J. 1448, 1451 (2018). [↑](#footnote-ref-358)
358. *See* *id.* *Cf.* Rebecca Hanrahan & Louise Antony, *Because I Said So: Toward a Feminist Theory of Authority*, 20 Hypatia 59, 67–68 (2005) (“[P]arents themselves have to demand that they be reason enough for their children; it is often legitimate for a parent to say, ‘Because I said so.’”). [↑](#footnote-ref-359)
359. All fifty states permit parents to employ corporal punishment against their children so long as doing so does not physically injure the child. *See* Julie Ma et al., *Adverse Childhood Experiences and Spanking Have Similar Associations with Early Behavior Problems*, 235 J. Pediatrics 170, 170 (2021). Eighteen states permit public school officials to employ corporal punishment against students, and all but two states permit private school officials to do so. Mandy A. Allison et al., *Corporal Punishment in Schools*, 152 Pediatrics 1, 2 & tbl.1 (2023); *see also* Ingraham v. Wright, 430 U.S. 651, 683 (1977) (holding that children have no constitutional right against corporal punishment in public schools). More than half of American children have been spanked by the age of three. Ma et al., *supra*, at 170. [↑](#footnote-ref-360)
360. *See* Dailey & Rosenbury, *supra* note 351, at 1459–60; Appell, *supra* note 27, at 716–17; Hamilton, *supra* note 343, at 70. [↑](#footnote-ref-361)
361. [Cite to Schama’s *Citizens*] [↑](#footnote-ref-362)
362. [Historical source] [↑](#footnote-ref-363)
363. *See id.* at 1463 (“Far from being left alone to make their own choices, children are directed by their parents and the state into relationships, activities, educational instruction, and ways of life that are not of their own choosing.”). [↑](#footnote-ref-364)
364. Hamilton, *supra* note 343, at 68–69 (listing “Freedom from Parental Authority” as one of the primary legal effects of reaching the age of majority). [↑](#footnote-ref-365)
365. *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.”). [↑](#footnote-ref-366)
366. *See id*. 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.”). [↑](#footnote-ref-367)
367. *See id.* at 68–70. [↑](#footnote-ref-368)
368. *See supra* note 353. Exercising totalitarian control over another person’s choices is difficult, of course. *See* Clemons, *supra* note 76, at 1150, 1154 & n.199. Like all humans, children can and often do find creative ways to exercise agency in even the most oppressive relationships, and children’s ability to resist parental authority naturally increases with age. *See* Appell, *supra* note 27, at 730; Barbara Bennett Woodhouse, *The Dark Side of Family Privacy*, 67 Geo. Wash. L. Rev. 1247, 1258 (1999) (“Voicelessness and powerlessness do not accurately characterize relationships between tiny children and their caregivers, as the parent of any screaming infant well knows.”). That does not change the fact that, with very few exceptions, the law endorses adults’ attempts to control children. *Id.*; Dailey & Rosebury, *supra* note 351, at 1459–60 (“[I]f parents minimally fulfill their duties, the state protects their relationships with their children and their childrearing choices . . . . Children are no longer considered property, but they remain under the direction and control of parents in the first instance.”). [↑](#footnote-ref-369)
369. *See* *Battery*, Legal Information Institute, <https://www.law.cornell.edu/wex/battery> [https://perma.cc/B3XR-4FLL]. [↑](#footnote-ref-370)
370. Barbara Bennett Woodhouse, *“Who Owns the Child?”:* Meyer *and* Pierce *and the Child as Property*, 33 Wm. & Mary L. Rev. 995,1041–50 (1992) (tracing the history of defining children as property through *Meyer v. Nebraska*, 262 U.S. 390 (1923), and *Pierce v. Society of Sisters*, 268 U.S. 510 (1925)); Dailey & Rosenbury, *supra* note 351, at 1457–58; Appell, *supra* note 27, at 724–25 & n.27. [↑](#footnote-ref-371)
371. *See* U.S. Const. Amend. XIII (outlawing “slavery” and “involuntary servitude, except as punishment for crime whereof the party shall have been duly convicted”). [↑](#footnote-ref-372)
372. *See* Woodhouse, *supra* note 364, at 1041 & n.206; *see also generally* Douglas A. Blackmon, Slavery by Another Name: The Re-Enslavement of Black Americans from the Civil War to World War II (2008). [↑](#footnote-ref-373)
373. Woodhouse, *supra* note 364, at 1047–50 (noting that under the developing “best interests of the child” model, “[j]udges and litigants still often reasoned in the language of ownership and possession” of children); Dailey & Rosenbury, *supra* note 351, at 1459–60 (noting that despite the abandonment of the children-as-property regime, “the law nevertheless retains a strong commitment to parental rights”).

The evolution of the justification for children’s subordination is an example of what Reva Siegel has described as “preservation-through-transformation”: “The ways in which the legal system enforces social stratification are various and evolve over time. Efforts to reform a status regime bring about changes in its rule structure and justificatory rhetoric . . . In short, status-enforcing state action evolves in form as it is contested.” Reva Siegel, *Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action*, 49 Stan. L. Rev. 1111, 1113 (1997). *Cf.* Fields & Fields, *supra* note 347, at 222–24 (comparing “racecraft” to witchcraft as a moral explanation for social realities such that the objective truth of the explanation may be disproven or shifted without disturbing its justificatory power). [↑](#footnote-ref-374)
374. Appell, *supra* note 27, at 721. [↑](#footnote-ref-375)
375. *See* *id.* at 733–35; Dailey & Rosenbury, *supra* note 351, at 1459–60 (“Contemporary judges, policymakers, and scholars therefore generally embrace parental rights as the starting point for protecting children’s interests.”); Woodhouse, *supra* note 364, at 1047–50. [↑](#footnote-ref-376)
376. *See* *supra* note 367. [↑](#footnote-ref-377)
377. The rhetoric of paternalism and people-as-property has frequently overlapped in Euro-American history. *See, e.g.*, Ira Berlin, Many Thousands Gone: The First Two Centuries of Slavery in North America 3–4 (noting the favorite metaphor of white owners of Black enslaved people to be that of a benevolent father toward his incompetent children); Simone de Beauvoir, The Second Sex 266–68 (Constance Borde & Sheila Malovany-Chevalier trans., Vintage Books 1st ed. 2011) (1949) (describing paternalism as one of the myths that subordinates women); *see also* Appell, *supra* note 27, at 722–23 (comparing the legal status of children to the doctrine of coverture for women). [↑](#footnote-ref-378)
378. *See* Catharine MacKinnon, Toward a Feminist Theory of the State 219 (1989). [↑](#footnote-ref-379)
379. *Cf.* Reva Siegel, *Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection*, 44 Stan. L. Rev. 261, 267 (1992) (critiquing “physiological naturalism” because “human reproduction is not simply a physiological process; like eating and dying, it is a social process, occurring in and governed by culture”). [↑](#footnote-ref-380)
380. *See* Allison James & Adrian L. James, Constructing Childhood: Theory, Policy, and Social Practice 18 (2004). [↑](#footnote-ref-381)
381. *See* Appell, *supra* note 27, at 718 (“[C]hildren’s vulnerability is not located in the child, but instead in the political and legal systems that create vulnerability.”). [↑](#footnote-ref-382)
382. *Id.* *Cf.* MacKinnon, *supra* note 372, at 224 (“Clearly, there are many differences between women and men. Systematically elevating one-half of a population and denigrating the other half would not likely produce a population in which everyone is the same.”). [↑](#footnote-ref-383)
383. de Beauvoir, *supra* note 371, at 12. [↑](#footnote-ref-384)
384. Appell, *supra* note 27, at 718 (“While acknowledging ‘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.”), 724 (“While the development thesis does have a natural referent—physical and cognitive vulnerability—the response to this vulnerability is not inevitable.”); James & James, *supra* note 374, at 18 (“[T]he ways in which these biological ‘facts’ [of children’s vulnerability] are interpreted in relation to ideas about children’s needs *do* vary between cultures and account for the wide variety in the kinds of social discriminations and legal differentiations made—or not made—between children and older people in any society.” (emphasis original)). [↑](#footnote-ref-385)
385. *See* Hamilton, *supra* note 343, 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.”). [↑](#footnote-ref-386)
386. Appell, *supra* note 27, at 718 & n.18 (noting that vulnerability is “a widespread phenomenon that is part of the human condition”), 725–26. [↑](#footnote-ref-387)
387. A fact even the Supreme Court has acknowledged. *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.”). [↑](#footnote-ref-388)
388. *See* Appell, *supra* note 27, at 726 (noting that the age-of-majority regime “sacrifice[es] childhood to adulthood”). [↑](#footnote-ref-389)
389. Barbara Bennett Woodhouse’s book-length treatment of the manifold ways that adults exploit their legal power over children is heartbreakingly definitive. *See* *generally* Woodhouse, *supra* note 321. [↑](#footnote-ref-390)
390. *See* Troxel v. Granville, 530 U.S. 57, 68–69 (2000) (plurality opinion) (“Accordingly, so long as a parent adequately cares for his or her children (i.e., is fit), there will normally be no reason for the State to inject itself into the private realm of the family to further question the ability of that parent to make the best decisions concerning the rearing of that parent's children.”); Reno v. Flores, 507 U.S. 292, 303–04 (1993) (“‘The best interests of the child,’ a venerable phrase familiar from divorce proceedings, is a proper and feasible criterion for making the decision as to which of two parents will be accorded custody. But it is not traditionally the sole criterion—much less the sole *constitutional* criterion—for other, less narrowly channeled judgments involving children, where their interests conflict in varying degrees with the interests of others. Even if it were shown, for example, that a particular couple desirous of adopting a child would best provide for the child's welfare, the child would nonetheless not be removed from the custody of its parents so long as they were providing for the child *adequately*.” (emphasis original)). [↑](#footnote-ref-391)
391. *See* Woodhouse, *supra* note 362, at 1253–54. [↑](#footnote-ref-392)
392. *But see* Nat’l Children’s All., *National Statistics on Child Abuse*, <https://www.nationalchildrensalliance.org/media-room/national-statistics-on-child-abuse/> [] (noting that roughly 25 percent of girls and 8 percent of boys in the United States experience child abuse and that 76 percent of abusers are their parents or legal guardians) [accessed Dec. 21, 2024 12:16 P.M.]. [↑](#footnote-ref-393)
393. *See* Woodhouse, *supra* note 362, at 1258 (“This status, as a dependent subject within an autonomous unit, was not good for women, even when the family realm was ‘governed’ by loving and devoted husbands. Why would we assume a similar conceptual status is good for children?”). [↑](#footnote-ref-394)
394. *See* Appell, *supra* note 27, at 721. Hereditary monarchy has also frequently been described as a lottery or dice roll, sometimes handing the throne to geniuses and sometimes to ruinous idiots. [Cite to Gibbon].

This point also answers another common response to criticisms of the legal construction of childhood: that because everyone experiences it, it cannot be unequal. *See* Appell, *supra* note 27, at 724–25. [↑](#footnote-ref-395)
395. *See id.* (citing the common justification that “children’s confinement is justified because . . . children eventually will be free”). [↑](#footnote-ref-396)
396. *See, e.g.*, Jason E. Goldstick et al., *Current Causes of Death in Children and Adolescents in the United States*,386 N.E. J. Med. 1955, 1955 & fig.1 (2022) (noting that 45,222 Americans under the age of nineteen died by firearm in 2020 alone). [↑](#footnote-ref-397)
397. Acknowledgment of this fact is implicit in the frequent emphasis on children’s “right to an open future.” *See* Joseph Millum, *The Foundation of the Child’s Right to an Open Future*, 45 J. Soc. Phil. 522, 522 (2014). I completely agree with the existence of such a right, but I believe it can be best protected by giving children more of an open *present*. [↑](#footnote-ref-398)
398. This subsection’s title references Adrienne Cecile Rich, *Compulsory Heterosexuality and Lesbian Experience (1980)*, 15 J. Women’s Hist. 11 (2003). [↑](#footnote-ref-399)
399. *See supra* note 50–52 and accompanying text. [↑](#footnote-ref-400)
400. *See* Beverly I. Fagot & Mary D. Leinbach, *Gender-Role Development in Young Children: From Discrimination to Labeling*, 13 Dev. Rev. 205, 205–206 (1993). [↑](#footnote-ref-401)
401. *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”). [↑](#footnote-ref-402)
402. Fagot & Leinbach, *supra* note 344, at 206. [↑](#footnote-ref-403)
403. *See supra* notes 330–334 and accompanying text. [↑](#footnote-ref-404)
404. *See supra* note 50. [↑](#footnote-ref-405)
405. *See* Fagot & Leinbach, *supra* note 344, at 206 (“Children are unified beings who experience the contingencies of a sex-typed world, who try to make sense of all they take in, who care very much about their identity as girl or boy, and who stive to get it right.”). [↑](#footnote-ref-406)
406. *Id.* at 205. [↑](#footnote-ref-407)
407. *See* Martin & Ruble, *supra* note 342, at 68; 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 (Erica S. Weisgram & Lisa M. Dinella, eds.) 49–72, 49 (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)). [↑](#footnote-ref-408)
408. *See* Martin & Ruble, *supra* note 342, 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 et al., *The Role of Gender Constancy in Early Gender Development*, 78 Child Dev. 1121,1132 (2007). [↑](#footnote-ref-409)
409. *See* Beverly I. Fagot & Mary D. Leinbach, *The Young Child’s Gender Schema: Environmental Input, Internal Organization*, 60 Child Dev. 663, 674 (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 original)). [↑](#footnote-ref-410)
410. *See* Carol Lynn Martin et al., *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). [↑](#footnote-ref-411)
411. *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). [↑](#footnote-ref-412)
412. *See* Turban, *supra* note 14, at 51–52. [↑](#footnote-ref-413)
413. *See* Änggård, *supra* note 353, at 25–25; Hyun & Choi, *supra* note 353, at 62–63. [↑](#footnote-ref-414)
414. *See* Fagot & Leinbach, *supra* note 351, at 671. [↑](#footnote-ref-415)
415. *See* Turban, *supra* note 14, at 91–95 (recounting the consequences of gender threat for one transgender girl). [↑](#footnote-ref-416)
416. Appell, *supra* note 27, at 722–24. [↑](#footnote-ref-417)
417. *See id.* at 725 (noting that some philosophers acknowledge that “our treatment of children is similar to the way we used to treat women and slaves”). [↑](#footnote-ref-418)
418. *See* George Orwell, 1984 (1949). [↑](#footnote-ref-419)
419. The Declaration of Independence para. 2 (U.S. 1776). [↑](#footnote-ref-420)
420. A core problem with originalism. *See supra* note 93, . [↑](#footnote-ref-421)
421. Appell, Woodhouse, Minow, others. [↑](#footnote-ref-422)
422. [news sources] [↑](#footnote-ref-423)
423. Appell, Woodhouse [↑](#footnote-ref-424)
424. Appell [↑](#footnote-ref-425)
425. Woodhouse, West, others? [↑](#footnote-ref-426)
426. I emphasize that I am suggesting that authority over children’s lives be transferred to children themselves, not merely from parents to the state. Concerns about this false dilemma run through many of the Supreme Court’s parental rights cases, leading the Court and scholars to posit “nonconformity” as a justification for granting parents—rather than the state—authority over children. [Meyer, Pierce, articles]. This justification presupposes that authority over children should not belong in the first instance to *children themselves*, who would ensure nonconformity simply by being their individual selves. *See supra* note 93, 336 and accompanying text. [↑](#footnote-ref-427)
427. II Corinthians 4:8–9 (New International Version). [↑](#footnote-ref-428)
428. *See* C.S. Lewis, Surprised by Joy: The Shape of My Early Life 289 (1955). [↑](#footnote-ref-429)
429. *Id.* at 6–7. [↑](#footnote-ref-430)
430. *Id.* at 20–23. [↑](#footnote-ref-431)
431. *Id.* at 85–87. [↑](#footnote-ref-432)
432. *Id.* at 75. [↑](#footnote-ref-433)
433. *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.”). [↑](#footnote-ref-434)
434. *See supra* Part I. [↑](#footnote-ref-435)
435. Thomas Hobbes, Leviathan 84 (A.R. Waller, ed. 1904) (1651) (“And the life of man [is] solitary, poor, nasty, brutish, and short.”). [↑](#footnote-ref-436)
436. 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.”). [↑](#footnote-ref-437)
437. [Brene Brown, TED Talk] [↑](#footnote-ref-438)
438. Freedom to Exist doc, 0:30. [↑](#footnote-ref-439)