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"A foolish consistency is the hobgoblin of little minds . . . ."[1]

I. INTRODUCTION

Lochner v. New York[2] is one of the most reviled cases in Supreme Court history.[3] The Court's repudiation of *Lochner* in the late 1930s is part of the folklore students learn when they first study American constitutional law.[4] However, *Lochner* continues to significantly influence the modern judicial enforcement of civil liberties in cases involving equal protection, substantive due process, and the free speech guarantees of the First Amendment (hereinafter referred to collectively as "civil liberties").[5] The development of modern tiered scrutiny can best be understood by acknowledging *Lochner*'s role in its creation. This Article therefore examines the "ghost of *Lochner*" in the Court's modern civil liberties cases.[6]

The *Lochner* opinion epitomizes a system of analysis which dominated

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1. RALPH WALDO EMERSON, *Self-Reliance*, *in* ESSAYS: FIRST SERIES, 58, 58 (1856).

2. 198 U.S. 45 (1905).

3. *See* Donald L. Beschle, *No More Tiers? Proportionality as an Alternative to Multiple Levels of Scrutiny in Individual Rights Cases*, 38 PACE L. REV. 384, 389 (2018); Ashutosh Bhagwat, *Purpose Scrutiny in Constitutional Analysis*, 85 CALIF. L. REV. 297, 310 (1997); Nathan S. Chapman & Michael W. McConnell, *Due Process as Separation of Powers*, 121 YALE L. J. 1672, 1798 (2012); Barry Friedman, *The History of the Countermajoritarian Difficulty, Part Three: The Lesson of* Lochner, 76 N.Y.U. L. REV. 1383, 1385 (2001).

4. However, not everyone agrees with the vilification of *Lochner*. For a review of the revisionist interpretation of *Lochner*, *see* Friedman, *supra* note 3, at 1386–87.

5. *See* Cass R. Sunstein, *Lochner's Legacy*, 87 COLUM. L. REV. 873 (1987); *see also* Bhagwat, *supra* note 3, at 304. This Article does not deal extensively with modern limitations on enumerated governmental powers (e.g., the Commerce Clause or taxing power) or criminal rights and powers. For a discussion of *Lochner*'s influence in those subject areas, *see* Aziz Z. Huq, *Tiers of Scrutiny in Enumerated Powers Jurisprudence*, 80 U. CHI. L. REV. 575 (2013). This Article only discusses three-tiered scrutiny in the context of the equal protection, substantive due process, and the free speech component of the First Amendment.

6. *See* Richard H. Fallon, Jr., *Strict Judicial Scrutiny*, 54 UCLA L. REV. 1267, 1293 (2007); Vicki C. Jackson, *Constitutional Law in an Age of Proportionality*, 124 YALE L.J. 3094, 3126 (2015); Sunstein, *supra* note 5, at 873.

Supreme Court decision making from the 1880s until 1937.[7] The decisions in that period were influenced by a limited sense of government and the protection of a free market, which preserved the status quo distribution of wealth and entitlements.[8] The *Lochner* era was an era of judicial activism in which the Court applied its narrow view of governmental powers to invalidate both state economic statutes through its substantive due process rational relation test and federal economic statutes through its limited interpretation of the Commerce Clause. Although some have argued that *Lochner* and its progeny can trace its roots back to the legal philosophy of the Founding Fathers,[9] these decisions eventually came into direct conflict with Franklin D. Roosevelt's ("FDR") New Deal and the powerful political progressive coalition that formed during the Great Depression.[10]

That confrontation produced the strongest political attack on the Supreme Court in American history.[11] FDR used a new invention—the radio—to speak directly to Americans in their homes for the first time.[12] He spoke out against the Court and blamed it for the country's failure to recover from the Great Depression. FDR's attack eventually culminated in his "court-packing" plan, which proposed an additional Justice be added to the Court for every then current Justice over seventy who refused to retire. However, in 1937, before the court-packing proposal could be seriously considered by Congress, the Court's decision in *West Coast Hotel v. Parrish*—which came to be known as the "switch in time that saved Nine"—was announced.[13] This decision marked the death of the *Lochner* era.[14] However, the true importance of 1937 extends well beyond the *West Coast Hotel* decision.

Between 1937 and 1941, eight of the nine members of the Supreme Court either died or retired.[15] FDR was therefore presented with an unprecedented opportunity—the ability to appoint an entire Court in a fairly short period of time.[16] Many of the Justices he appointed served on

7. Some commentators believe *Lochner*'s influence was eroding before 1937. *See* Randy E. Barnett, *Scrutiny Land*, 106 MICH. L. REV. 1479, 1482 (2008); Tara Leigh Grove, *Tiers of Scrutiny in a Hierarchical Judiciary*, 14 GEO. J. L. & PUB. POL'Y 475, 476 (2016). This Article agrees with the majority consensus that 1937 is a convenient date for the end of the *Lochner* era. *See infra* note 88 and accompanying text.

8. *See* Sunstein, *supra* note 5, at 877, 882, 889.

9. *See* Friedman, *supra* note 3, at 1386–87. *See also infra* note 146 and accompanying text.

10. *See* Sunstein, *supra* note 5, at 912.

11. *See infra* note 79 and accompanying text.

12. *See infra* note 79 and accompanying text.

13. *See* Michael Klarman, *An Interpretive History of Modern Equal Protection*, 90 MICH. L. REV. 213, 215 (1991).

14. *See infra* notes 85–88 and accompanying text.

15. *See infra* note 89 and accompanying text.

16. *See infra* note 90 and accompanying text.

the Court for decades.[17] All of them shared FDR's political perspectives and were determined to increase government power—particularly federal power—and destroy the analytic methodology of substantive due process. They were determined to vilify *Lochner* and *Lochner*izing forever.[18]

The *Lochner* era was criticized as being ad hoc and subjective. The *Lochner* Court was perceived as enforcing its own views of social policy to thwart the policies adopted by politically elected legislatures and was therefore seen as activist and counter majoritarian.[19] The post-1937 Court rejected the *Lochner* restraints on the federal commerce power in a trilogy of cases which effectively immunized an expansion of federal power from judicial review.[20] The same Court employed the *Lochner* substantive due process rational relation test but reversed its application. The *Lochner* rational relation test presumed a statute was unconstitutional and consistently invalidated legislative activity. However, after 1937, the same language presumed that statutes were constitutional and deferred to legislative policy decisions.[21]

Lochner and its progeny implicate the appropriate role of legislatures and the judiciary in defining the scope of modern civil rights. The Constitution clearly envisions Congress as a guarantor of federally granted civil rights, as evidenced by the enabling clauses of the Thirteenth, Fourteenth and Fifteenth Amendments and the post-1937 interpretation of the Commerce Clause. Additionally, state legislatures can protect rights consistent with federal decisions. During the *Lochner* era, the Court did not demonstrate enough respect for legislative determinations of rights. However, after *Lochner*, the Court exhibited an excessive deference to legislative action. Modern legislatures delineate rights, and the judicially created three-tiered scrutiny test respects legislatures by weighing both the importance of the asserted legislative purpose and the extent to which the statute promotes that purpose. The perceived relationship between the legislatures and the judiciary during different periods of the Court's history has also contributed to the development of the modern protection of civil liberties in America.

This Article argues that the Supreme Court's post-*Lochner* protection of civil liberties is best viewed in two distinct periods. The first runs from 1937 until approximately 1971 when the death of Justice Hugo Black left an aging Justice Douglas as the only FDR appointee still on the Court.[22]

17. *See infra* note 91 and accompanying text.

18. *See* Friedman, *supra* note 3, at 1386; Klarman, *supra* note 13, at 222.

19. *See* Friedman, *supra* note 3, at 1385; Sunstein, *supra* note 5, at 874.

20. *See infra* notes 85–86 and accompanying text.

21. *See* Williamson v. Lee Optical of Oklahoma Inc., 348 U.S. 483 (1955); Barnett, *supra* note 7, at 1484.

22. *See Justices 1789 to Present*, SUPREMECOURT.GOV, https://www.supremecourt.gov/about

Lochner's reversal during this period created a different America, and its vilification was an emotional response led by the FDR appointees who "internalized the criticisms" of the opinion.[23] In the enforcement of civil liberties, this period was dominated by a two-tiered analysis that strictly presumed constitutionality for almost all laws but rigidly presumed unconstitutionality for certain types of laws. This period also saw the expansion of the Equal Protection Clause and free speech, but refused to acknowledge the concept of substantive due process. Finally, legal scholars of this period prioritized the values of neutral principles, precedence, and consistency in legal decision-making.[24]

The second period begins with the Burger Court in 1971 and runs to the present.[25] The 1973 opinion in *Roe v. Wade* revealed a Court capable of a more dispassionate reaction to the *Lochner* era.[26] This mature view of *Lochner* enabled the Court to create the modern three-tiered system of scrutiny. The Court also reinstituted a new substantive due process methodology, which has expanded the modern protection of civil liberties (hereinafter referred to as "new substantive due process" to distinguish it from pre-1937 "old substantive due process"). The modern system has been subjected to the same criticisms that the Court initially ascribed to *Lochner* in the first period—it is ad hoc, subjective, and counter majoritarian. However, these perceived flaws overvalue the benefits derived from a rigid sense of precedence and consistency. The amount of judicial subjectivity contained in the modern three-tiered test is consistent with American legal history's tradition of protecting civil liberties.

Despite its objectors,[27] the three-tiered analysis is firmly established in modern Supreme Court civil liberties jurisprudence. Three-tiered scrutiny is actually the latter portion of a two-part inquiry.[28] The first part varies depending on the constitutional basis of the right being asserted. If the Equal Protection Clause is at issue, the Court examines whether the

/members_text.aspx (last visited May 22, 2020).

23. *See* Klarman, *supra* note 13, at 222.

24. *See* Phillip J. Closius, *Rejecting the Fruits of Action: The Regeneration of the Waste Land's Legal System*, 71 NOTRE DAME L. REV. 127, 145 (1995). The Courts of the first period are oddly contradictory. While espousing the virtues noted, the cases frequently overrule many prior decisions, especially regarding old substantive due process, criminal law, interstate commerce, and racial classifications.

25. *See infra* note 117 and accompanying text.

26. *See infra* note 118 and accompanying text.

27. R. Randall Kelso, *Filling Gaps in the Supreme Court's Approach to Constitutional Review of Legislation: Standards, Ends, and Burdens Reconsidered*, 33 S. TEX. L. REV. 493, 514–16, 540–47 (1992); Jeffrey M. Shaman, *Cracks in the Structure: The Coming Breakdown in the Levels of Scrutiny*, 45 OHIO ST. L. J. 161, 163–72 (1984); R. George Wright, *What if All Levels of Constitutional Scrutiny Were Completely Abandoned*, 45 U. MEM. L. REV. 165 (2014).

28. Three-tiered scrutiny is not mentioned anywhere in the Constitution. The entire test is judicially crafted, as were the tests of the *Lochner* era and the first period. *See* Fallon, *supra* note 6, at 1268.

classification is a suspect, intermediate, or mere classification. If substantive due process is the basis for the claim, the inquiry shifts to whether the liberty interest being asserted is a fundamental, intermediate, or mere right. If the free speech guarantee is being interpreted, the Court first determines whether the content is protected, intermediate, or unprotected.[29]

The second part of the tiered scrutiny analysis is the same for all civil liberties claims.[30] The test weighs the importance of the asserted legislative purpose and its relationship to the means embodied in the statute.[31] To satisfy the highest level of scrutiny, the legislative purpose must be important enough to be considered "compelling," and the statute's means must be necessary to accomplish that compelling purpose. The presumption that applies to the highest level of scrutiny is that the statute is invalid. To satisfy the middle tier of scrutiny, the legislative purpose must be important, and the means must be substantially related to the achievement of that important purpose. This level carries no presumption of validity or invalidity. Minimal scrutiny simply requires that the legislative purpose be legitimate and the statute's means rationally relate to effectuating that legitimate purpose. This deferential test presumes the statute is valid.[32] Heightened scrutiny refers to the highest and middle tiers of scrutiny.[33]

This Article proceeds in four parts. Part II analyzes the development of the same three levels of scrutiny which apply to equal protection, new substantive due process, and free speech cases.[34] Part III examines the different methods for determining the appropriate level of scrutiny in each of the three constitutional settings.[35] Part IV discusses the values of limited judicial subjectivity, which is embodied in modern civil liberties analyses.[36] Finally, Part V concludes by summarizing the arguments and

29. *See infra* notes 255–273 and accompanying text.

30. *See* Fallon, *supra* note 6, at 1269; Grove, *supra* note 7, at 475.

31. This Article assumes, as the Court does, that legislative purpose can be determined. Determination of purpose by a large legislative body may, in fact, be difficult. *See* Bhagwat, *supra* note 3, at 323. The Court in applying the rational relation test will allow government litigators to speculate on purpose. *See* U.S. R.R. Ret. Bd. v. Fritz, 449 U.S. 166 (1980); Bhagwat, *supra* note 3, at 355.

32. *See* Bhagwat, *supra* note 3, at 314–19 for a review of the modern Court's evaluation of legislative purpose.

33. The terms consistently used in this Article to describe the three levels of scrutiny are the ones used most frequently by the Court and constitutional scholars. *See* Michael Herz, *Nearest to Legitimacy: Justice White and Strict Rational Basis Scrutiny*, 74 U. COLO. L. REV. 1329, 1367 (2003); Fallon, *supra* note 6, at 1273–74. However, the Court in not always consistent in the use of these terms and occasionally will not use them at all. *See* G. Edward White, *Historicizing Judicial Scrutiny*, 57 S.C. L. REV. 1, 2 n.2 (2005) ("Court opinions often do not openly acknowledge the scrutiny levels decision but instead merely employ a particular doctrinal framework associated with the level.").

34. *See infra* Part II.

35. *See infra* Part III.

36. *See infra* Part IV.

analysis set forth in this Article.[37]

II. THE MATURATION OF THE TIERED SCRUTINY TEST

In modern constitutional law, the Supreme Court applies the same test in cases involving equal protection, new substantive due process, and free speech issues.[38] The second part of the test, which weighs the legislative purpose and analyzes the relationship between the statute's means and that purpose, derives from *Lochner*'s test and aftermath.

A. The Lochner Era (1880s–1937)

The modern tiered scrutiny test traces its roots to the 1819 case *McCulloch v. Maryland*.[39] *McCulloch* dealt with the federal government's power to create a national bank.[40] In his opinion delineating the scope of the federal government's Article I, Section 8 powers, Justice Marshall stated: "Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional."[41] Marshall therefore created the "means/ends" analysis early in the history of American constitutional law.[42]

Nearly a century later, the *Lochner* Court incorporated the *McCulloch* test into its old substantive due process analysis:

> The act must have a more direct relation, as a means to an end, and the end itself must be appropriate and legitimate, before an act can be held to be valid which interferes with the general right of an individual to be free in his person and in his power to contract in relation to his own labor.[43]

The New York statute at issue in *Lochner* prohibited bakers from working

37. *See infra* Part V.

38. *See infra* notes 107–137 and accompanying text.

39. 17 U.S. 316 (1819).

40. *Id.* at 322–23.

41. *Id.* at 421.

42. *See id.* The "means/end" test was first popularized by Alexander Hamilton during his dispute with Thomas Jefferson over the validity of the First Bank of the United States. *See* ALEXANDER HAMILTON, *Opinion as to the Constitutionality of the Bank of the United States (1791)*, *in* MELVIN I. UROFSKY & PAUL FINKELMAN, DOCUMENTS OF AMERICAN CONSTITUTIONAL & LEGAL HISTORY 133, 135 (3d ed., vol. I 2008) ("To designate or appoint the *money* or *thing* in which taxes are to be paid, is not only a proper but a *necessary exercise* of the power of collecting them."). The power of Congress to create the First Bank was never decided by the Supreme Court. LEE EPSTEIN & THOMAS G. WALKER, CONSTITUTIONAL LAW FOR A CHANGING AMERICA: INSTITUTIONAL POWERS AND CONSTRAINTS 147 (10th ed. 2020).

43. Lochner v. New York, 198 U.S. 45, 57–58 (1905).

more than sixty hours per week or more than ten hours per day.[44] The state defended the statute as both a labor regulation and health law.[45] The Court dismissed the labor argument because the statute intruded into a private relationship, an illegitimate end of government.[46] Such a purpose "involves neither the safety, the morals, nor the welfare, of the public, and that the interest of the public is not in the slightest degree affected by such an act."[47] The Court's belief in the limited role of government and the priority of the free market therefore dictated its holding that any regulation of labor was beyond a state's regulatory police power.

The *Lochner* opinion did concede that the state's asserted interest in the health of the bakers and public was a legitimate legislative purpose.[48] However, the means employed by the statute—establishing daily and weekly maximum working hours—was not rationally related to effectuating that asserted health purpose.[49] "It is manifest to us that the limitation of the hours of labor . . . has no such direct relation to, and no such substantial effect upon, the health of the employee, as to justify us in regarding the section as really a health law."[50] The Court noted that a health concern would justify the state in regulating matters such as plumbing, painting, drainage, and the number of bathrooms per baker.[51] The Court concluded that the utilization of an irrational means meant that the purpose asserted was not really the legislature's motivation. Rather, New York used health to disguise its real motive—"to regulate the hours of labor between the master and his employees (all being men, *Sui juris*), in a private business, not dangerous in any degree to morals, or in any real and substantial degree to the health of the employees."[52] In such circumstances, the freedom to contract was protected by the Constitution; thus, the interfering statute was invalidated.[53]

The *Lochner* era utilized its version of the rational relation test to invalidate federal and state legislation which interfered with the natural law rights protected by old substantive due process. The right to contract and the right to an occupation highlighted in *Lochner* itself were the ones most frequently used to invalidate progressive laws passed by state legislatures.[54] During the same era, the Court employed a narrow

44. *Id.* at 57.
45. *Id.*
46. *See id.*
47. *Id.*
48. *See id.* at 62.
49. *See id.* at 64.
50. *Id.*
51. *See id.* at 61–62.
52. *Id.* at 64.
53. *Id.*
54. *See, e.g.*, Coppage v. Kansas, 236 U.S. 1 (1915); Allgeyer v. Louisiana, 165 U.S. 578 (1897).

interpretation of the word "interstate" in Article I, Section 8 of the Constitution to invalidate progressive federal legislation based on the Commerce Clause.[55]

During this period, America itself was changing radically. The advent of the Industrial Revolution produced massive factories and sweat shops. Monopolistic corporations established a national presence beyond the regulatory power of any individual state. Immigrants came to America, which led to the abundance of labor that made sweat shops possible.[56] However, immigration also provided a new wave of voters, as immigrants became citizens. These new voters demanded that the government regulate businesses and owners (e.g., by establishing minimum wage and overtime standards and legalizing union activity) to counter employers' leverage in free market bargaining.[57]

The *Lochner* era was founded on a belief in a limited role of government in regulating private affairs and the maintenance of the free market status quo distribution of wealth.[58] These two principles would ultimately clash with a newly formed Democratic political supermajority founded primarily on immigrants and the unemployed.[59] The conflict was foretold by Justice Holmes in his *Lochner* dissent: "[t]he 14th Amendment does not enact Mr. Herbert Spencer's Social Statics. . . . I think that the word 'liberty,' in the 14th Amendment, is perverted when it is held to prevent the natural outcome of a dominant opinion . . . ."[60]

The *Lochner* era also revealed tensions in America still present today—rich versus poor, Republican (party of businesses and employers) versus Democrat (party of immigrants and employees), free market capitalism versus socialism, and small government versus big government. The *Lochner* opinion was controversial even during the era it dominated, especially in the post-Depression period.[61] These tensions erupted when

55. *See* Carter v. Carter Coal Co., 298 U.S. 238 (1936); Schechter Poultry Corp. v. United States, 295 U.S. 495, 550–51 (1935).

56. *See* Charles Hirschman & Elizabeth Mogford, *Immigration and the American Industrial Revolution from 1880 to 1920*, 38 SOC. SCI. RES. 897 (2009) ("The size and selectivity of the immigrant community, as well as their disproportionate residence in large cities, meant they were the mainstay of the American industrial workforce."). Furthermore, "[i]mmigrants and their children comprised over half of manufacturing workers in 1920, and if the third generation (the grandchildren of immigrants) are included, then more than two-thirds of workers in the manufacturing sector were of recent immigrant stock." *Id.*

57. *See* MARK D. BREWER & L. SANDY MAISEL, PARTIES AND ELECTIONS IN AMERICA: THE ELECTORAL PROCESS 41 (9th ed. 2020).

58. *See* Sunstein, *supra* note 5, at 877, 882.

59. *See* Friedman, *supra* note 3, at 1387.

60. Lochner v. New York, 198 U.S. 45, 75–76 (1905) (Holmes, J., dissenting). Holmes believed that the distribution of wealth and entitlements was purely political and should be modified by legislative implementations of distributive justice. Sunstein, *supra* note 5, at 918.

61. *See* Friedman, *supra* note 3, at 1388.

the Court encountered the New Deal's legislative reforms.[62]

B. 1937 and the Repudiation of the Lochner Era

The Wall Street Crash of 1929 ("the Crash") started the Great Depression. Republican presidents had been in power since 1920 and appointed eight Supreme Court Justices between then and 1932.[63] At the time of the Crash, the stock market was subject only to minimal, ineffective regulation.[64] The speculative investments and corrupt practices which spurred the Crash wiped out the individual stock accounts of many average Americans who invested in the market during the 1920s.[65] The resulting Great Depression also caused many Americans to lose their bank savings accounts, jobs, and homes.[66] By 1932, with no end to the Great Depression in sight, the electorate was angry and Democratic.[67] A large majority of Americans elected FDR and a Democratic Congress on the promise of a legislative New Deal, which would lift the country out of the Great Depression caused by the Republicans.[68] Democratic majorities also dominated newly elected state legislatures.[69]

The New Deal's implementation depended on a major expansion of the federal government's power. The New Deal's legislative agenda provided for national regulation of virtually the entire economy—a task which appeared beyond the reach of any particular state. Minimum wage,

62. *See* Fallon, *supra* note 6, at 1286–87; Klarman, *supra* note 13, at 222; Shaman, *supra* note 27, at 161.

63. President Harding appointed four Justices, President Coolidge appointed one, and President Hoover appointed three Justices. *Justices 1789 to Present*, SUPREMECOURT.GOV, https://www.supremecourt.gov/about/members_text.aspx (last visited May 22, 2020).

64. *See* Paul Krugman, *Partying Like It's 1929*, NEW YORK TIMES (Mar. 21, 2008), https://www.nytimes.com/2008/03/21/opinion/21krugman.html ("This banking crisis of the 1930s showed that unregulated, unsupervised financial markets can all too easily suffer catastrophic failure."); Steven Melendez, *Effects of the Stock Market Crash*, ZACKS (Mar. 13, 2019), https://finance.zacks.com/effects-stock-market-crash-7707.html; *SEC: Securities and Exchange Commission*, HISTORY (Dec. 6, 2019), https://www.history.com/topics/us-government/securities-and-exchange-commission ("Prior to the creation of the SEC, so-called Blue Sky Laws were on the books at the state level to help regulate securities sales and prevent fraud; however, they were mostly ineffective.").

65. *See* BRENDA LANGE, THE STOCK MARKET CRASH OF 1929: THE END OF PROSPERITY 4–6 (2007).

66. *See id.*

67. *See* BREWER & MAISEL, *supra* note 57, at 41.

68. *See id.*

69. Rob Oldham & Jacob Smith, *Wave Elections (1918–2016) / State Legislative Waves*, BALLOTPEDIA (June 19, 2018), https://ballotpedia.org/Wave_elections_(1918-2016)/State_legislative_waves. In fact, the election of 1932 produced the largest loss in state legislative seats against the president's party in the past century—with outgoing President Herbert Hoover's Republican party losing 1,022 state legislative seats. *Id.* From 1918–2016, "[t]he median number of seats lost by the president's party is 82. The average number of seats lost is about 169." *Id.*

overtime, securities regulations, banking rules, and the creation of federal agencies with oversight responsibilities were all contained within the New Deal proposals.[70] The New Deal envisioned a federal government vastly different from the one that had existed between 1789 and 1932.[71]

The *Lochner* Court invalidated numerous attempts by both federal and state governments to regulate the economy and implement the progressive agenda that formed the basis of the New Deal.[72] With the Depression persisting, FDR blamed the Court for the continuation of the shattered economy.[73] FDR and the Democrats were reelected with an even larger majority in 1936.[74] This emboldened FDR even more in his attacks on the Court.

Fortified by this popular mandate, FDR proposed his court-packing plan to Congress on February 5, 1937.[75] The proposal stated that the President, with the consent of the Senate, would appoint a new judge to any federal court in which a judge who had served at least ten years on the bench had not retired within six months of reaching age seventy.[76] In 1937, six Supreme Court justices were over the age of seventy. In his message to Congress transmitting the plan, FDR attacked the Justices directly: "at the present time the Supreme Court is laboring under a heavy burden. . . . This brings forward the question of aged or infirm judges—a subject of delicacy and yet one which requires frank discussion."[77] FDR further argued that "[m]odern complexities call also for a constant infusion of new blood in the courts, just as it is needed in executive functions of the Government and in private business."[78]

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70. *See New Deal*, ENCYLOPÆDIA BRITANNICA, https://www.britannica.com/event/New-Deal (last visited Feb. 6, 2022).

71. *See* Sunstein, *supra* note 5, at 912.

72. Scholars have estimated that the Court in the *Lochner* era invalidated approximately 200 regulatory statutes. *See* Klarman, *supra* note 13, at 221. Similar regulations were invalidated by state courts in the 1930s. *See, e.g.*, Bramley v. State, 2 S.E.2d 647, 651 (Ga. 1939) ("[U]nless an act restricting the ordinary occupations of life can be said to bear some reasonable relation to one or more of these general objects of the police power, it is repugnant to constitutional guaranties and void."); Regal Oil Co. v. State, 10 A.2d 495, 499 (N.J. 1939) ("The regulation signs can accomplish but one thing and that is to deny prosecutor its guaranteed right to engage in its lawful private business. Such a result is fatal.").

73. *See infra* note 79 and accompanying text.

74. *See* Andrew Glass, *FDR Wins a Second Term, Nov. 3, 1936*, POLITICO (Nov. 3, 2018, 6:41 AM), https://www.politico.com/story/2018/11/03/fdr-wins-a-second-term-nov-3-1936-955317 ("In seeking a second term, FDR won the highest share of the popular and electoral vote since the largely uncontested election of 1820.").

75. *See* Franklin D. Roosevelt, *Message to Congress on the Reorganization of the Judicial Branch of the Government*, THE AMERICAN PRESIDENCY PROJECT, https://www.presidency.ucsb.edu/documents/message-congress-the-reorganization-the-judicial-branch-the-government (last visited May 3, 2020).

76. *Id.*

77. *Id.*

78. *Id.*

FDR also effectively used the radio to direct public anger towards the Court and energize support for his court-packing plan. His radio address to the nation on March 9, 1937, summarized his vitriol toward the Court:

> I want to talk with you very simply about the need for present action in this crisis—the need to meet the unanswered challenge of one-third of a Nation ill-nourished, ill-clad, ill-housed. . . . When the Congress has sought to stabilize national agriculture, to improve the conditions of labor, to safeguard business against unfair competition, to protect our national resources, and in many other ways, to serve our clearly national needs, the majority of the Court has been assuming the power to pass on the wisdom of these acts of the Congress—and to approve or disapprove the public policy written into these laws. . . . We have, therefore, reached the point as a nation where we must take action to save the Constitution from the Court and the Court from itself. . . . This plan will save our national Constitution from hardening of the judicial arteries.[79]

As the attacks from an unprecedentedly popular FDR continued on a personal level, the political pressure on the Court reached historic heights. In 1937, the Court released two opinions which signaled the end of the *Lochner* era. The first, *West Coast Hotel Co. v. Parrish*, was an old substantive due process attack on a state minimum wage statute for women.[80] By a vote of 5–4, the Court changed its interpretation of the rational relation test:

> 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. . . . Liberty under the Constitution is thus necessarily subject to the restraints of due process, and regulation which is reasonable in relation to its subject and is adopted in the interests of the community is due process.[81]

The opinion also reflected the progressive political beliefs held by FDR and the Democratic party:

> There is an additional and compelling consideration which recent economic experience has brought into a strong light. The exploitation of a class of workers who are in an unequal position with respect to bargaining power and are thus relatively defenseless against the denial of a living wage is not only detrimental to their health and well being, but casts a direct

79. Franklin D. Roosevelt, A "Fireside Chat" Discussing the Plan for Reorganization of the Judiciary, 1937 PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT (Mar. 9, 1937). *See also March 9, 1937: Fireside Chat 9: On "Court-Packing"*, MILLER CENTER, https://millercenter.org/the-presidency/presidential-speeches/march-9-1937-fireside-chat-9-court-packing (audio recording of President Roosevelt's address) (last visited May 6, 2020).

80. West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937).

81. *Id.* at 391.

> burden for their support upon the community. . . . The community is not bound to provide what is in effect a subsidy for unconscionable employers. The community may direct its law-making power to correct the abuse which springs from their selfish disregard of the public interest.[82]

The Court directly overruled the earlier case *Adkins v. Children's Hospital* but effectively overturned *Lochner* and its premise of the limited power of government.[83] As noted by the *West Coast Hotel* dissent, the concept of "unconscionable employers" was not grounded in previous Supreme Court opinions and was inconsistent with the idea of a free market economy.[84]

The 1937 case *N.L.R.B. v. Jones & Laughlin Steel Corp.* was yet another case that signaled the demise of the *Lochner* era.[85] *Jones* was the first in a trilogy of cases that dramatically reversed the *Lochner* era's interpretation of the Commerce Clause.[86] Federal power was expanded forever. Although a minority of commentators disagreed with characterizing 1937 as the end of the *Lochner* era,[87] the *West Coast Hotel* and *Jones* opinions support the majority of commentators' assertion that *Lochner*'s influence ended then.[88]

In 1937, the unusually high number of vacancies on the Supreme Court also support that this year marked the end of the *Lochner* era and was pivotal in American constitutional history. Since a total of seven Justices died or retired between 1937 and 1941,[89] FDR was able to appoint an almost entirely new Court in less than four years.[90] As a result, many of

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82. *Id.* at 399–400.

83. *West Coast Hotel* would forever be remembered as the "switch in time that saved the Nine." *See* Daniel E. Ho & Kevin M. Quinn, *Did A Switch in Time Save Nine?*, 2 J. LEGAL ANALYSIS 69, 70 (2010). The phrase refers to Justice Roberts joining the five-Justice majority opinion. *See id.*; *supra* note 81 and accompanying text. Some scholars have objected to this unfair characterization of his vote. *See* Felix Frankfurter, *Mr. Justice Roberts*, 104 U. PA. L. REV. 311, 313 (1955) ("It is one of the most ludicrous illustrations of the power of lazy repetition of uncritical talk that a judge with the character of Roberts should have attributed to him a change of judicial views out of deference to political considerations."); Alan C. Kohn, *A Legal Essay: The Judicial Activism Myth*, 67 J. MO. B. 106, 109 (2011) ("Available evidence suggests, however, that Justice Roberts' switch was not caused by the court-packing scheme. He had made up his mind to desert the Four Horsemen and join Hughes, Brandeis, Stone and Cardozo as early as December 1936, when he voted to hear *West Coast Hotel Co. v. Parrish*.").

84. *See West Coast Hotel Co.*, 300 U.S. at 405–07 (Sutherland, J., dissenting).

85. N.L.R.B. v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937).

86. *See also* Wickard v. Filburn, 317 U.S. 111 (1942); United States v. Darby, 312 U.S. 100 (1941).

87. *See supra* note 7.

88. 1937 is the year accepted by most scholars as the end of the *Lochner* era. *See* Suzanne B. Goldberg, *Equality Without Tiers*, 77 S. CAL. L. REV. 481, 525 (2004). *See also* Fallon, *supra* note 6, at 1287; Klarman, *supra* note 13, at 222; Sunstein, *supra* note 5, at 878.

89. *Justices 1789 to Present*, SUPREMECOURT.GOV, https://www.supremecourt.gov/about/members_text.aspx (last visited May 22, 2020).

90. *See id.* FDR replaced Justices Van Devanter, Sutherland, Cardozo, Brandeis, Butler, McReynolds, and Chief Justice Hughes. *Id.* "Van Devanter timed his retirement announcement for the

those Justices served for decades on the Supreme Court and became figures of legendary influence: Hugo Black (1937–1971), Stanley Reed (1938–1957), Felix Frankfurter (1939–1962), William Douglas (1939–1975), Frank Murphy (1940–1949), James Byrnes (1941–1942), and Robert Jackson (1941–1954).[91] These Justices were aligned with FDR's New Deal philosophy and were committed to expanding the federal government's power. They also disavowed *Lochner* and old substantive due process. FDR's criticism of the *Lochner* era—that it involved decision making that was ad hoc, subjective, and protective of the wealthy status quo, substituting the Court's preferred social policies for those of the legislature—became entrenched in Supreme Court opinions and scholarly literature.[92]

C. The Beginnings of Tiered Scrutiny (1937–1971)

The era between 1937 and 1971 (the "first period" of the modern protection of civil liberties) reflects the influence of the FDR judicial appointees.[93] The Court's decisions during this period evince the emotional reaction to the *Lochner* era that dominated the FDR presidency.[94] The Court overwhelmingly deferred to the social policies of the democratically elected federal and state legislatures. Particularly in economic matters, the Court established a role of minimal constitutional oversight.[95] Government powers were perceived as broad, and the reach of the federal government's authority under the Commerce Clause was virtually limitless.[96] Old substantive due process was reviled as the manifestation of an aged Court subjectively substituting its outdated values for the decisions of a majoritarian electorate.[97] The Court continued to apply the rational relation test but with the opposite

morning of the day on which the Senate Judiciary Committee was to vote on the court-packing plan. His announcement helped persuade some members of the committee that the Court need not be packed." Richard K. Neumann Jr., *The Revival of Impeachment as a Partisan Political Weapon*, 34 HASTINGS CONST. L.Q. 161, 243 (2007).

91. *Justices 1789 to Present*, SUPREMECOURT.GOV, https://www.supremecourt.gov/about/members_text.aspx (last visited May 22, 2020).

92. *See* Klarman, *supra* note 13, at 221–22.

93. Justices Black and Douglas served on the Court for thirty-four and thirty-six years respectively. *Justices 1789 to Present*, SUPREMECOURT.GOV, https://www.supremecourt.gov/about/members_text.aspx (last visited May 22, 2020).

94. This Article does not examine in detail all of the relevant cases in the development of three-tiered scrutiny. A number of others do so fully and there is no reason to repeat them all here. *See* Barnett, *supra* note 7, at 1481–95; Bhagwat, *supra* note 3, at 326–55; Fallon, *supra* note 6, at 1273–84; Klarman, *supra* note 13, at 251–316; Shaman, *supra* note 27, at 163–72; Sunstein, *supra* note 5, at 873–902.

95. *See* Shaman, *supra* note 27, at 161.

96. From 1937–1995, the Court did not impose any significant limits on the reach of federal power embodied in the Commerce Clause. *See* United States v. Lopez, 514 U.S. 549, 553 (1995).

97. *See* Sunstein, *supra* note 5, at 874.

presumption than before—statutes were now presumptively valid rather than invalid.[98]

However, the seeds of dissatisfaction with the deferential model in civil liberties cases were planted early in this period. The decision in *United States v. Carolene Products Co.* validated a congressional statute regulating the quality of milk shipped in interstate commerce.[99] The opinion is a model for the coming era of deference:

> Even in the absence of such aids, the existence of facts supporting the legislative judgment is to be presumed, for regulatory legislation affecting ordinary commercial transactions is not to be pronounced unconstitutional unless in the light of the facts made known or generally assumed it is of such a character as to preclude the assumption that it rests upon some rational basis within the knowledge and experience of the legislators.[100]

The opinion, however, is known for the most consequential footnote in American constitutional history—footnote 4 states:

> There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten Amendments, which are deemed equally specific when held to be embraced within the Fourteenth. . . . It is unnecessary to consider now whether legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation, is to be subjected to more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment than are most other types of legislation. . . . Nor need we enquire whether similar considerations enter into the review of statutes directed at particular religious, or national, or racial minorities[;] whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.[101]

The *Carolene Products* footnote inspired the civil liberty protections of this first period. The second sentence inspired the decisions by which most of the first ten Amendments were incorporated into the Fourteenth,[102] the third sentence persuaded the Court to enter the field of legislative apportionment,[103] and the final sentence led to the modern application of the Equal Protection Clause.[104] However, even the

98. *See* Barnett, *supra* note 7, at 1481.

99. United States v. Carolene Products Co., 304 U.S. 144 (1938).

100. *Id.* at 152.

101. *Id.* at 152 n.4.

102. *See* Duncan v. Louisiana, 391 U.S. 145 (1968).

103. *See* Baker v. Carr, 369 U.S. 186 (1962).

104. *See* Skinner v. Oklahoma, 316 U.S. 535 (1942). The Equal Protection Clause has been

footnote was clear that the rational relation test would not be revived in the context of protecting civil liberties. The modern protection of civil liberties would require the language of an entirely new test.

The *Carolene Products* footnote laid the foundation for the two-tiered system of analysis that dominated this period. Substantive due process could not be the basis of this new system because the Court still rejected it as part of its intense anti-*Lochner* bias. The new "heightened" scrutiny was therefore developed in equal protection[105] and free speech[106] cases.

By the end of the first period, the Court established a clear two-tiered system for equal protection and free speech cases.[107] In equal protection cases, certain classifications (particularly those based on race or a wealth-based classification of certain "fundamental rights") were constitutionally suspect. In free speech cases, certain types of expression—such as political opinions—were considered preferred speech. In both situations, the test employed did not mirror, but was derived from, the rational relation test. The Court still evaluated the purpose of the legislation, but the purpose needed to have heightened importance rather than mere legitimacy. If the purpose was found to have heightened importance, the Court would then analyze the means by which the statute effectuated that purpose. The test required that the means be more than merely rationally related to the purpose.[108] Despite its antipathy to *Lochner*, the first period Court retained the essential structure of the *Lochner* test—examine legislative purpose and critique statutory means.[109] The Courts simply intensified the language of the rational relation test.[110]

The two-tiered system also contained presumptions. The presumption for the heightened scrutiny test was that the statute was invalid, while the presumption for the rational relation test was that the statute was valid. However, the presumptions during this period were effectively

described as the analytical repudiation of *Lochner*. *See* Sunstein, *supra* note 5, at 913.

105. Shapiro v. Thompson, 394 U.S. 618, 634 (1969) ("necessary to promote a compelling governmental interest"); Bolling v. Sharpe, 347 U.S. 497, 499 (1954) ("constitutionally suspect"); Korematsu v. United States, 323 U.S. 214, 216 (1944) ("suspect" and "most rigid scrutiny"); Skinner v. Oklahoma, 316 U.S. 535, 541 (1942) ("strict scrutiny").

106. NAACP v. Button, 371 U.S. 415, 438 (1963) ("compelling state interest"); Speiser v. Randall, 357 U.S. 513, 529 (1958) ("compelling interest").

107. For a more detailed history of the development of the two-tiered system, *see* Bhagwat, *supra* note 3, at 304–07; Fallon, *supra* note 6, at 1273–84.

108. Although some opinions of the first period used the word "compelling" to describe the level of importance required for legislative purpose, the Court was not consistent in its use of the term. The description of the relationship of the means to the purpose was also inconsistent. The Court would also use terms such as strict scrutiny, suspect, most rigid scrutiny, or heightened scrutiny. *See supra* notes 105–106. This Article generally refers to the first period's non-deferential test as heightened scrutiny.

109. *See* Friedman, *supra* note 3, at 1416.

110. *See* Barnett, *supra* note 7, at 1487; Fallon, *supra* note 6, at 1273–84.

irrebuttable.[111] The heightened scrutiny test was essentially never satisfied; the rational relation test was inevitably deferential.[112] The highest level of scrutiny was famously described as "'strict' in theory and fatal in fact."[113]

The two-tiered system served many of the first period Court's goals. The *Carolene Products* footnote effectuated the heightened scrutiny test, which also reflected the Court's anti-*Lochner* bias.[114] However, the rational relation test was still the methodology of deference. The presumptive invalidity of the heightened scrutiny test and the presumptive validity of the rational relation test both appeared to be objective and not subjective. Decisions were not ad hoc—legislative restrictions based on certain classifications or certain expressions were always invalid while others (the majority) were always valid.[115] The two tier test therefore seemingly avoided the "counter-majoritarian difficulty" posed by the *Lochner* era and potentially the *Carolene Products* footnote.[116]

D. The Modern Tiered Scrutiny Test (1971–Present)

The era from 1971 to the present (the "second period") begins with the influence of the FDR appointees waning from the Court.[117] *Roe v. Wade*, the first major civil liberties decision of the period, revealed a different attitude toward *Lochner*.[118] Although well-known for its abortion holding, the opinion is also critical in the creation of the modern three-tiered system's evolution. In its legal analysis, the Court stated that it felt that "[t]his right of privacy" is "founded in the Fourteenth Amendment's concept of personal liberty . . . ."[119] This simple phrase revealed an acceptance of *Lochner* that had been absent from Supreme Court opinions for the past thirty-six years. The Court in *Roe* restored substantive due process ("new substantive due process") as a viable constitutional methodology. *Roe* also confirms *Lochner*'s holding that rights, including the right to privacy at issue in *Roe*, are not absolute. The Court then

111. *See* Barnett, *supra* note 7, at 1485, 1496.

112. *See* Ashutosh Bhagwat, *The Test that Ate Everything: Intermediate Scrutiny in First Amendment Jurisprudence*, 2007 U. ILL. L. REV. 783, 784 (2007); Shaman, *supra* note 27, at 162.

113. *See* Gerald Gunther, *In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972); Bhagwat, *supra* note 3, at 307.

114. *See* Jackson, *supra* note 6, at 3126.

115. *See* Shaman, *supra* note 27, at 162.

116. *See* Barnett, *supra* note 7, at 1486; Bhagwat, *supra* note 3, at 326; Fallon, *supra* note 6, at 1270.

117. The death of Justice Black in late 1971 left an aging Justice Douglas as the only FDR appointee left on the Court. *Justices 1789 to Present*, SUPREMECOURT.GOV, https://www.supremecourt.gov/about/members_text.aspx (last visited May 22, 2020).

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

119. *Id.* at 153.

incorporated the two-tiered test into the new substantive due process system. Ultimately, *Roe* held that the right of privacy may only be infringed by legislation which reveals a compelling state purpose and whose means are necessary to the accomplishment of that purpose.[120]

Roe then revealed a further break with the first period Court's methodology by announcing that legislation can actually satisfy the compelling interest test. Texas argued that its ban on abortions was justified by its interests in maternal health and the potential life of the fetus. The Court ruled that the state's interest in maternal health becomes compelling at the end of the first trimester.[121] However, the Court found that the state's chosen means —a total ban on abortions—was not necessary to accomplish such an interest. The state was only permitted to impose regulations more directly related to maternal health, such as qualifications for individuals performing abortions or standards for abortion facilities. The second interest, the potential life of the fetus, satisfied the compelling interest test at the end of the second trimester.[122] The Court found a total ban on abortions was valid at that point because it was the only means available to effectuate the interest in potential life.[123]

Roe therefore altered the effectively irrebuttable presumption of invalidity from that employed by the first period Court. The presumption employed in its earlier version was in fact illusory—the statutes at issue were almost always invalidated.[124] *Roe* created a presumption that was more consistent with the traditional use of the term—an *occasionally* rebuttable presumption in which most statutes infringing on *certain rights* would be invalidated, but the legislature could satisfy the standard in a small minority of cases. The *Roe* decision did not directly analyze the rational relation test's deferential presumption, but it certainly implied that the presumption of validity would be transformed into an occasionally rebuttable presumption.[125]

The modified two-tier system established in *Roe* also revived the anti-

120. For a more involved description of the development of the compelling purpose/necessary to the accomplishment of test, *see* Fallon, *supra* note 6, at 1321–27.

121. This date was selected because medical data available at that time revealed that the end of the first trimester was the point at which the abortion was more dangerous to the mother's health than going to term. *Roe*, 410 U.S. at 149, 163.

122. This date was chosen because medical data available indicated this was the point at which the fetus was viable, that is able to live outside the mother's womb, albeit with artificial assistance. *Id.* at 149–50, 163–64.

123. The "necessary to the accomplishment" test for evaluating the fit between the means and the purpose in the second period's highest level of scrutiny would be defined as the "only" way to accomplish the purpose. *See* Bhagwat, *supra* note 3, at 301; Fallon, *supra* note 6, at 1326.

124. The statutes were invalidated almost every time, disregarding the repudiated holdings in Korematsu v. United States, 323 U.S. 214 (1944) and Hirabayashi v. United States, 320 U.S. 81 (1943).

125. *See* Todd W. Shaw, *Rationalizing Rational Basis Review*, 112 NW. U. L. REV. 487, 498 (2017).

Lochner critique of judicial subjectivity. Dissenting, Justice Rehnquist noted:

> As in *Lochner* and similar cases applying substantive due process standards to economic and social welfare legislation, the adoption of the compelling state interest standard will inevitably require this Court to examine the legislative policies and pass on the wisdom of these policies in the very process of deciding whether a particular state interest put forward may or may not be 'compelling.'[126]

Roe's delineation of the moment when a state's purpose became compelling was a type of judicial balancing rooted in *Lochner*.[127]

Shortly after *Roe*, the Court extinguished the old two-tier system in *Craig v. Boren*.[128] *Craig* involved an equal protection challenge to an Oklahoma statute prohibiting the sale of 3.2% beer to men under twenty-one and women under eighteen.[129] The issue was whether gender discrimination would be subjected to the compelling or rational relation test. The Court decided that it was subject to neither and instead created a third level of scrutiny—intermediate scrutiny.[130] The test for intermediate scrutiny, which is effectively middle tier scrutiny, still examined state purpose and statutory means, but both inquiries were linguistically averaged from the other two levels—the state's purpose must be important, and the means must be substantially related to the effectuation of that important purpose.[131] The new middle tier scrutiny would not have a presumption of validity or invalidity. The *Craig* opinion concluded that the statute at issue failed to satisfy the new intermediate standard.[132] The intermediate standard had been foreshadowed by Justice Marshall from his dissent in the 1973 decision in *San Antonio Independent School District v. Rodriguez*, which critiqued the rigidity of the first period Court's two-tiered scrutiny.[133]

The addition of intermediate scrutiny completed the judicial framework for the modern protection of civil rights. This third tier of scrutiny was created in part to provide more flexibility in judicial analysis than the two-tier system previously allowed.[134] The new third tier of

126. *Roe*, 410 U.S. at 174 (Rehnquist, J., dissenting).

127. *See* Friedman, *supra* note 3, at 1416.

128. *See* Craig v. Boren, 429 U.S. 190 (1976).

129. *Id.* at 191–92.

130. *See id.* at 197–99.

131. *See id.* at 197 ("To withstand constitutional challenge, previous cases establish that classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives.").

132. *See id.* at 204.

133. *See* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 98–99 (1973) (Marshall, J., dissenting).

134. *See* Jackson, *supra* note 6, at 3127.

scrutiny was quickly applied to new substantive due process and free speech. Three-tier scrutiny has become a staple of the Court's civil liberties methodology in the almost fifty years since *Craig*.[135] In fact, much recent litigation and scholarly literature on the subject have assumed the framework and focused particularly on the first part of the analysis, which concerns the classifications, rights, or content that should be slotted into each level of scrutiny.[136]

Nevertheless, the judiciary's acceptance of the test has not lessened anti-*Lochner* criticisms.[137] The Court has again been accused of substituting its views of proper social policy for those of elected legislatures. As presumptions became rebuttable, they also became less predictable. Decisions were therefore attacked as ad hoc and subjective.[138] Despite not having a presumption, intermediate scrutiny has been subject to the critique of subjectivity.[139] Justice Rehnquist initiated the critical dialogue in his dissent in *Craig v. Boren*, the case that created intermediate scrutiny:

> The Court's [standard of review] apparently comes out of thin air. . . . How is this Court to divine what objectives are important? How is it to determine whether a particular law is "substantially" related to the achievement of such objective, rather than related in some other way to its achievement? Both of the phrases used are so diaphanous and elastic as to invite subjective judicial preferences or prejudices relating to particular types of legislation, masquerading as judgments whether such legislation is directed at "important" objectives or, whether the relationship to those objectives is "substantial" enough.[140]

The perceived inconsistencies in the Court's civil rights cases have inspired some commentators to suggest more than three levels of scrutiny exist, with "rational relation with a bite" being the most popular.[141] The appearance of additional layers of scrutiny can be attributed to the occasional satisfaction of both the compelling and rational relation

135. Although some commentators have argued that the Court should emphasize the "means" portion of the test (especially if invalidating a statute) rather than the "purpose" part, this Article treats both parts of the test as equal and subject to the appropriate presumption. *See* Bhagwat, *supra* note 3, at 319–27 (reasserting Gunther's view that the Court should focus more on means and leave purpose to the legislature); Goldberg, *supra* note 88, at 512.

136. *See* Fallon, *supra* note 6, at 1292.

137. *See generally* Jud Mathews & Alec Stone Sweet, *All Things in Proportion? American Rights Review and the Problem of Balancing*, 60 EMORY L.J. 797 (2011). *See also* Bhagwat, *supra* note 3, at 308, 319; Shaman, *supra* note 27, at 163–72.

138. *See* Bhagwat, *supra* note 3, at 308, 319.

139. *See* Fallon, *supra* note 6, at 1298–99.

140. Craig v. Boren, 429 U.S. 190, 220–21 (1976) (Rehnquist, J., dissenting).

141. *See* Raphael Holoszyc-Pimentel, *Reconciling Rational Basis Review: When Does Rational Basis Bite?*, 90 N.Y.U. L. REV. 2070 (2015); Steven Menashi & Douglas H. Ginsburg, *Rational Basis with Economic Bite*, 8 N.Y.U. J. L. & LIBERTY 1055 (2014); Shaw, *supra* note 125, at 498–501.

rebuttable presumptions.[142] The tests are also clearly subjective in their application. However, the judicial subjectivity evinced in the Court's opinions is grounded in an appropriate framework and consistent with a more flexible concept of precedent.[143] If judicial subjectivity is accepted, three-tiered scrutiny with two rebuttable presumptions is a more accurate description of the modern civil liberties test than any of the proposed "additional tiers" alternatives.

III. CLASSIFICATIONS, RIGHTS, AND CONTENT: THE ENTRY TO SCRUTINY

By 1976, after the Court created the three tiered levels of scrutiny, the inquiry then shifted toward the consideration of what factors should determine the appropriate level of scrutiny in any given case.[144] As previously noted, the tests for equal protection, new substantive due process, and free speech are the same. However, all three constitutional doctrines have a different methodology for determining what level of scrutiny applies in a particular case. Since the 1970s, the Court has been reluctant to expand application of the highest level of scrutiny. The modern Court has been much more willing to employ intermediate scrutiny as the tool for balancing infringements on civil liberties. In fact, some commentators have identified intermediate scrutiny as the Court's default position.[145]

A. Rights in Old Substantive Due Process

Natural law was the dominant legal philosophy during the lives of the Founding Fathers and the adoption of the Constitution. A basic tenet of that doctrine is that individual citizens possessed innumerable rights against the government that were established or implied by the common law. For example, the Declaration of Independence and the Ninth Amendment reflect beliefs in natural law at the time.[146]

After the Supreme Court refused to define the Fourteenth Amendment's Privileges and Immunities Clause as imposing natural law

142. *See* Goldberg, *supra* note 88, at 489.

143. *See infra* notes 280, 288–294 and accompanying text.

144. Some commentators have suggested that, given the decades-long stability of the test, modern civil rights litigation really focuses on the gateway determination of how to get heightened scrutiny. *See* Barnett, *supra* note 7, at 1489; Fallon, *supra* note 6, at 1297.

145. *See infra* note 168 and accompanying text.

146. *See* U.S. CONST. amend. IX ("The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."); THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) ("We hold these truths to be self-evident, that all men . . . are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness.").

obligations on the states,[147] the *Lochner* era utilized the term "liberty" in the Due Process Clause to accomplish that result. Old substantive due process broadly defined the rights inherent in the Fourteenth Amendment's use of the term liberty. The Court in *Meyer v. Nebraska* reflected the *Lochner* era's prototypical definition of liberty:

> Without doubt, [liberty] denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.[148]

Additionally, the *Lochner* era embraced economic rights (e.g., the right to contract and an occupation) and social rights (e.g., the right to raise children, marry, and acquire knowledge) as protected by the Fourteenth Amendment. Laws passed under state police powers were subject to the rational relation test whenever those laws infringed on the rights contained in this broad definition of liberty. Meanwhile, economic rights served as vehicles for invalidating federal and state laws that attempted to regulate the economy and eventually end the Great Depression.[149] The Court from 1937 to 1973 accepted this same definition of rights as the *Lochner* era but subjected them all to the deferential rational relation test.

B. Classifications in Equal Protection

The first period Court's rejection of old substantive due process dictated that heightened scrutiny would begin with the emergence of the Fourteenth Amendment's Equal Protection Clause. Whereas old substantive due process defined rights, equal protection evaluated classifications. The modern compelling test is therefore rooted in the first period Court's attempt to eliminate discrimination based on race by subjecting racial classification to a scrutiny more exacting than the deferential standard.[150] *Palmore v. Sidoti*, a case invalidating a race-based custody decision on equal protection grounds, is often credited as the first equal protection case to use the terminology of the modern

147. *See* Slaughter-House Cases, 83 U.S. 36 (1872).

148. Meyer v. Nebraska, 262 U.S. 390, 399 (1923). *See also* Pierce v. Soc'y of the Sisters of the Holy Names of Jesus & Mary, 268 U.S. 510, 534–35 (1925) ("[W]e think it entirely plain that the Act . . . unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control.").

149. *See supra* note 51 and accompanying text.

150. *See supra* notes 105–106, 108 and accompanying text.

"compelling/necessary to the accomplishment of" test.[151] The Court has consistently applied the highest level of equal protection scrutiny to classifications based on race (including affirmative action) and national origin.[152]

The Court has also identified certain "indicia of suspectness" which might be used to give the highest level of protection to other classifications.[153] In *Rodriguez*, the Court echoed the *Carolene Products* footnote by defining such indicia as a class that has been "saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process."[154] In *Murgia*, the Court noted that a class of individuals over age fifty "have not experienced a 'history of purposeful unequal treatment' or been subjected to unique disabilities on the basis of stereotyped characteristics not truly indicative of their abilities."[155] In *Plyler v. Doe*, the Court also noted that heightened scrutiny would only be given to classes that were involuntary.[156] Classifications that met these criteria would be labeled "suspect" classifications and would be subjected to the compelling/necessary to the accomplishment of test and the occasionally rebuttable presumption of invalidity.[157]

The Court has interpreted these criteria narrowly since the 1970s. The highest level of equal protection scrutiny is only given to classifications based on race (including affirmative action),[158] national origin,[159] and state restrictions based on alienage.[160] Commentators have attacked the Court for not expanding the suspect class category in decades.[161] The Court has been criticized particularly for not applying heightened scrutiny

151. *See* Palmore v. Sidoti, 466 U.S. 429, 432–33 (1984).

152. *See* Massachusetts Bd. of Ret. v. Murgia, 427 U.S. 307, 312 (1976) ("[E]qual protection analysis requires strict scrutiny of a legislative classification only when the classification impermissibly interferes with the exercise of a fundamental right or operates to the peculiar disadvantage of a suspect class.").

153. *See* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 28 (1973).

154. *Id.*

155. Massachusetts Bd. of Ret. v. Murgia, 427 U.S. 307, 313 (1976).

156. Plyler v. Doe, 457 U.S. 202, 219 n.19 (1982) ("We reject the claim that 'illegal aliens' are a 'suspect class.' . . . Unlike most of the classifications that we have recognized as suspect, entry into this class, by virtue of entry into this country, is the product of voluntary action.").

157. *See* Goldberg, *supra* note 88, at 485.

158. *See* Palmore v. Sidoti, 466 U.S. 429 (1984).

159. *See* City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 440 (1985).

160. *See* Bernal v. Fainter, 467 U.S. 216, 227 (1984).

161. *See* Goldberg, *supra* note 88, at 485.

to classifications based on wealth,[162] gender,[163] and age.[164]

Intermediate scrutiny is governed by the same indicia noted above for suspect class status but with some complicating factors. *Craig v. Boren* declared that classifications based on gender should not be subjected to the compelling test in part because women are not a minority of the population, but the Court reasoned that such classifications deserve more than mere deferential scrutiny because women have been subjected to restrictions based on stereotypical assumptions in the past.[165] Classifications based on an individual's status as an out-of-wedlock child are also given intermediate scrutiny because the status is beyond the individual's control and bears no relation to the individual's ability to contribute to society.[166] *Plyler v. Doe* granted intermediate scrutiny to classifications that completely deprived undocumented children of an education, because the children did not voluntarily choose their status, and the law imposed a lifetime of hardships upon children who were not responsible for their disabling status.[167]

Intermediate scrutiny is therefore applied in cases where the class has *some* indicia of suspectness—not enough to warrant the highest level of scrutiny but enough to deserve something more than deferential scrutiny. Some commentators have suggested that, given the Court's reluctance to expand the number of classes that receive strict scrutiny, intermediate scrutiny has emerged as the Court's default equal protection analysis.[168]

Regents of Univ. of California v. Bakke clarified the development of the modern three-tiered system of scrutiny.[169] The case involved an equal protection challenge to the admissions policies of the medical school at the University of California at Davis. The school reserved sixteen out of one hundred positions in its entering class for members of defined minority races.[170] The school's policy was based on race, but it disadvantaged a majoritarian group to the advantage of particular

162. *See* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1 (1973). The Court's common law-based perspective that poverty is a private matter and not the result of government action is similar to *Lochner*'s approach to wealth. *See* Sunstein, *supra* note 5, at 889.

163. *See* Craig v. Boren, 429 U.S. 190 (1976).

164. *See* Massachusetts Bd. of Ret. v. Murgia, 427 U.S. 307 (1976).

165. *See Craig*, 429 U.S. at 197–98. The Court later indicated that classifications based on "real" gender differences would only receive deferential scrutiny. *See* Michael M. v. Superior Court of Sonoma Cty., 450 U.S. 464, 469 (1981).

166. *See* Clark v. Jeter, 486 U.S. 456, 461 (1988).

167. *See* Plyler v. Doe, 457 U.S. 202, 223 (1982). *See also supra* note 156 and accompanying text.

168. *See* Bhagwat, *supra* note 112, at 785.

169. *See* Regents of Univ. of California v. Bakke, 438 U.S. 265 (1978).

170. *Id.* at 275. On the 1974 application form, applicants were asked "whether they wished to be considered as members of a 'minority group,' which the Medical School apparently viewed as 'Blacks,' 'Chicanos,' 'Asians,' and 'American Indians.'" *Id.* at 274.

minority groups.[171] *Bakke* therefore is the first case to decide the level of scrutiny to be applied to affirmative action initiatives. Justice Powell, writing for the majority, concluded that all racial classifications, including those which could be labeled benign, must be declared suspect and thereby subject to the strict scrutiny test.[172] Although white applicants did not possess any of the indicia of suspectness, the Court reasoned that all racial classifications are inherently suspect.[173] The Court noted that even those intended to be benign could have the actual effect of disadvantaging minority groups.[174]

Channeling *Roe*, Justice Powell concluded that three of the four objectives which motivated the policy were not compelling,[175] but the fourth—"obtaining the educational benefits that flow from an ethnically diverse student body"[176]—satisfied the compelling standard.[177] *Bakke* therefore reaffirmed that the presumption of invalidity in the compelling test was occasionally rebuttable. However, the opinion noted that the means chosen to implement this compelling objective were unnecessary to accomplish the policy's purpose. The Court considered that a holistic admissions approach considering race as one of many factors would be a necessary means, whereas the hard quota in the University of California's policy was not.[178]

Justice Brennan's impassioned opinion argued that affirmative action initiatives should be granted intermediate scrutiny.[179] This lesser scrutiny was appropriate because the disadvantaged white students possessed none of the indicia of suspectness.[180] The historic disadvantages placed on the defined minorities mandated that the Court show leniency to legislatures trying to remedy those past practices.[181] The argument for intermediate scrutiny, although often repeated by minority opinions in later cases, never received a majority vote.[182] The modern Court subjects all

171. *See id.*

172. *See id.* at 291 ("Racial and ethnic distinctions of any sort are inherently suspect and thus call for the most exacting judicial examination.").

173. *See id.*

174. *See id.* at 298.

175. *See id.* at 307–11. The three purported purposes that did not satisfy the test were "(i) reducing the historic deficit of traditionally disfavored minorities in medical schools and in the medical profession; (ii) countering the effects of societal discrimination; [and] (iii) increasing the number of physicians who will practice in communities currently underserved . . . ." *Id.* at 306 (internal citations and quotation marks omitted).

176. *Id.* at 306.

177. *See id.* at 311–12.

178. *See id.* at 318–19.

179. *See id.* at 356–62 (Brennan, J., concurring in part and dissenting in part).

180. *See id.* at 357.

181. *See id.* at 363–64.

182. *See, e.g.*, City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989); Wygant v. Jackson Bd.

affirmative action initiatives to the compelling/necessary to the accomplishment of test.[183]

Although considerable attention is given to the two classes of heightened scrutiny, the vast majority of legislative classifications are judged under the deferential rational basis standard. The Court's continuing anti-*Lochner* bias makes deferential scrutiny particularly appropriate for classifications the Court perceives as "economic" in nature.[184] The Court has also applied deferential scrutiny to classifications based on wealth[185] and age,[186] despite forceful dissents supporting heightened scrutiny in both cases.[187] However, the second period's deferential standard includes an occasionally rebuttable presumption of validity.[188] The Court has therefore infrequently invalidated legislation even when applying the deferential standard.[189] The Court is more likely to invalidate laws under deferential review if the legislature has evinced animus toward a particular class,[190] such as individuals with disabilities[191] or homosexual persons.[192]

The Court has also given suspect status to a limited group of rights that emerged from the first period's anti-*Lochner* bias. Under the Equal Protection Clause, classifications that impinge on certain fundamental rights in connection with discrimination based on wealth receive suspect

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of Educ., 476 U.S. 267 (1986).

183. *See, e.g.*, Fisher v. Univ. of Texas at Austin, 136 S. Ct. 2198 (2016); Gratz v. Bollinger, 539 U.S. 244 (2003); Grutter v. Bollinger, 539 U.S. 306 (2003); Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995).

184. *See* U.S. R.R. Retirement Bd. v. Fritz, 449 U.S. 166 (1980); City of New Orleans v. Dukes, 427 U.S. 297 (1976); Williamson v. Lee Optical of Okla., Inc., 348 U.S. 483 (1955). *But see Fritz*, 449 U.S. at 197–98 (Brennan, J., dissenting) (criticizing the majority for being too deferential in applying deferential scrutiny).

185. *See* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1 (1973).

186. *See* Massachusetts Bd. of Ret. v. Murgia, 427 U.S. 307 (1976).

187. *See Murgia*, 427 U.S. at 319–24 (Marshall, J., dissenting); *Rodriguez*, 411 U.S. at 62–63 (Brennan, J., dissenting); *Rodriguez*, 411 U.S. at 97–100 (Marshall, J., dissenting).

188. This Article contends that the three-tiered system is better understood by focusing on the nature of the presumption at hand rather than considering more than three levels of scrutiny. However, many commentators have adopted the concept of "rational review with a bite" to explain the occasional invalidation of legislation under the deferential standard. *See supra* note 141 and accompanying text.

189. *See* Goldberg, *supra* note 88, at 512–13 (stating that the Court has invalidated legislation under deferential scrutiny in approximately 10% of the cases between 1973 and 2004). Goldberg sees this number as evidence of a fourth tier of scrutiny. *See also* Holoszyc-Pimentel, *supra* note 141, at 2071–72 (stating that the Court in equal protection cases has invalidated statutes under the rational relation test 17 times out of over 100 challenges—approximately 15%). This Article suggests that a rate of approximately 10%–15% is consistent with an occasionally rebuttable presumption.

190. *See* Klarman, *supra* note 13, at 217.

191. *See* City of Cleburne, Tex. v. Cleburne Living Ctr., 473 U.S. 432 (1985).

192. *See* Romer v. Evans, 517 U.S. 620 (1996).

class status.[193] These cases involved laws which limited voting rights,[194] access to the judicial system,[195] and the right to interstate travel,[196] all based on wealth criterions. While this line of cases has never been overruled, the protection of fundamental rights under equal protection has not been expanded since 1973. In that year, *Roe* reinstituted the methodology of new substantive due process. The expansion of constitutional rights, therefore, shifted from equal protection and returned to its proper home in the Due Process Clause. Fundamental rights being decided in the equal protection context is best attributed to the first period Court's anti-*Lochner* bias. FDR appointees were not willing to revive substantive due process, so they forced the concept of fundamental rights into equal protection. The *Roe* decision properly returned the protection of rights to new substantive due process. Also in that year, the Court in *Rodriguez* refused to apply suspect class status to a claim concerning the deprivation of the right to an education based on a wealth criterion.[197] Given the priority placed on education in other decisions,[198] the Court's unwillingness to include it as a fourth fundamental right signaled the end of efforts to expand the fundamental rights list in the context of equal protection.[199] While never overruled, these cases are best viewed historically as equal protection anomalies.

C. Rights Under New Substantive Due Process

The modern revitalization of new substantive due process actually has its roots in a first period opinion, *Griswold v. Connecticut*.[200] The case involved two Connecticut statutes that made it illegal to use, or assist others in using, contraceptives.[201] The opinion was written by Justice Douglas, an FDR appointee. He reveals early in the opinion his antipathy to old substantive due process and *Lochner*:

> [W]e are met with a wide range of questions that implicate the Due Process Clause of the Fourteenth Amendment. Overtones of some arguments suggest that [*Lochner*] should be our guide. But we decline that invitation . . . . We do not sit as a super-legislature to determine the wisdom,

193. *See* Fallon, *supra* note 6, at 1281–83.

194. *See* Kramer v. Union Free Sch. Dist. No. 15, 395 U.S. 621 (1969); Harper v. Virginia State Bd. of Elections, 383 U.S. 663 (1966).

195. *See* Boddie v. Connecticut, 401 U.S. 371 (1971); Griffin v. Illinois, 351 U.S. 12 (1956).

196. *See* Shapiro v. Thompson, 394 U.S. 618, 634 (1969).

197. *See Rodriguez*, 411 U.S. at 18–23.

198. *See* Brown v. Board of Education, 347 U.S. 483, 493 (1955) ("[E]ducation is perhaps the most important function of state and local governments.").

199. *See* Klarman, *supra* note 13, at 264, 288–89.

200. *See* Griswold v. Connecticut, 381 U.S. 479 (1965).

201. *Id.* at 480.

> need, and propriety of laws that touch economic problems, business affairs, or social conditions.[202]

The Court disavowed the old substantive due process and instead decided the statutes conflicted with the penumbras of the Bill of Rights. The right to privacy was found in these implications, and the statutes intruded on the right by criminalizing the use of contraceptives by married couples.[203] Douglas surprisingly reaffirmed the validity of the Court's holdings in *Meyer* and *Pierce*, the old substantive due process cases, but recast them as First Amendment decisions.[204]

Justice Black, another FDR appointee, dissented from the opinion. He dismissed Douglas's penumbra analysis as a forced reading of the Bill of Rights, which would ultimately dilute the explicit rights they were written to protect.[205] Black noted that the right to privacy was not explicitly found in the Constitution, and its recognition by the Court was in fact based on old substantive due process and natural law. He of course could not join in such a holding:

> If these formulas based on 'natural justice,' . . . are to prevail, they require judges to determine what is or is not constitutional on the basis of their own appraisal of what laws are unwise or unnecessary. The power to make such decisions is of course that of a legislative body. . . . I do not believe that we are granted [this] power . . . . The two [cases] they do cite and quote from, [*Meyer*] and [*Pierce*], were both decided in opinions by Mr. Justice McReynolds which elaborated the same natural law due process philosophy found in [*Lochner*] . . . . I merely point out that the reasoning stated in *Meyer* and *Pierce* was the same natural law due process philosophy which many later opinions repudiated, and which I cannot accept.[206]

Justice Harlan concurred in the opinion, embracing a revival of substantive due process. He explicitly refuted Black's criticism that due process was too subjective:

> In my view, the proper constitutional inquiry in this case is whether this Connecticut statute infringes the Due Process Clause of the Fourteenth

202. *Id.* at 481–82.

203. *See id.* at 483 ("[T]he First Amendment has a penumbra where privacy is protected from governmental intrusion."). Although the penumbra analysis has been extensively written about in legal commentary, penumbras were never used again by a majority opinion of the Court. *Griswold* is therefore best seen as an expression of the first period's anti-*Lochner* bias. *See* Fallon, *supra* note 6, at 1284.

204. *See Griswold*, 381 U.S. at 482–83. This fanciful interpretation of both cases only confirms the extreme anti-*Lochner* bias of the FDR appointees. *See supra* note 184 and accompanying text.

205. *See Griswold*, 381 U.S. at 509 (Black, J., dissenting) ("One of the most effective ways of diluting or expanding a constitutionally guaranteed right is to substitute for the crucial word or words of a constitutional guarantee another word or words, more or less flexible and more or less restricted in meaning.").

206. *See Griswold*, 381 U.S. at 511–16 (Black, J., dissenting).

> Amendment because the enactment violates basic values implicit in the concept of ordered liberty . . . . The Due Process Clause of the Fourteenth Amendment stands, in my opinion, on its own bottom. . . . Judicial self-restraint . . . will be achieved . . . only by continual insistence upon respect for the teachings of history, solid recognition of the basic values that underlie our society, and wise appreciation of the great roles that the doctrines of federalism and separation of powers have played in establishing and preserving American freedoms. Adherence to these principles will not, of course, obviate all constitutional differences of opinion among judges, nor should it. Their continued recognition will, however, go farther toward keeping most judges from roaming at large in the constitutional field than will the interpolation into the Constitution of an artificial and largely illusory restriction on the content of the Due Process Clause.[207]

Harlan's perspective that history would limit judicial subjectivity eventually provided a crucial foundation for new substantive due process.

The *Roe* opinion was the death knell for penumbras. The Court explicitly stated that substantive due process was the source for the right to privacy. Further, the Court implied that henceforth, substantive due process would be the constitutional analysis for protecting natural law rights, which are not specifically mentioned in the Constitution. [208] However, the Court needed to create a "new" system to avoid a direct reincarnation of *Lochner*. As noted above, the *Roe* opinion borrowed the term "heightened scrutiny" from equal protection and created the compelling/necessary to the accomplishment of test. The highest level of scrutiny would not be given to all rights but only those deemed by the Court to be "fundamental."[209] The term comes from Justice Harlan's concurrence in *Griswold*, as does its definition. Authoring the *Roe* opinion, Justice Blackmun wrote:

> These decisions make it clear that only personal rights that can be deemed 'fundamental' or 'implicit in the concept of ordered liberty,' [*Palko*], are included in this guarantee of personal privacy. They also make it clear that the right has some extension to activities relating to marriage, [*Loving*];

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207. *Griswold*, 381 U.S. at 500–02 (Harlan, J., concurring) (internal citations and quotation marks omitted). Justice Goldberg's concurrence was based on the Ninth Amendment. *See Griswold*, 381 U.S. at 486–99 (Goldberg, J., concurring). Justice Black trivialized that argument in his dissent. *See Griswold*, 381 U.S. at 518–21 (Black, J., dissenting). The Ninth Amendment has been effectively ignored by the Court since *Griswold*. *See* BENNETT PATTERSON, THE FORGOTTEN NINTH AMENDMENT (1955); Kurt T. Lash, *The Lost Jurisprudence of the Ninth Amendment*, 83 TEX. L. REV. 597, 689 (2005) ("For the next thirty years [following 1937], not a single invocation of either the Ninth or Tenth Amendments would be successfully brought in any federal court."); Seth Rokosky, *Denied and Disparaged: Applying the "Federalist" Ninth Amendment*, 159 U. PA. L. REV. 275, 276–94 (2010); Tejshree Thapa, *Expounding the Constitution: Legal Fictions and the Ninth Amendment*, 78 CORNELL L. REV. 139, 151–160 (1992).

208. *See* Roe v. Wade, 410 U.S. 113, 168–71 (1973) (Stewart, J., concurring).

209. *See* Barnett, *supra* note 7, at 1480.

> procreation, [*Skinner*]; contraception, [*Baird*]; family relationships, [*Prince*]; and child rearing and education, [*Pierce*; *Meyer*].[210]

The distinction between fundamental and mere rights would be decided by a review of history, as envisioned by Justice Harlan. The *Roe* opinion extensively surveys the history of abortion in Western Civilization to justify its conclusion that the right to privacy encompasses a woman's decision of whether to terminate her pregnancy.[211] *Roe* defined the parameters of the highest level of scrutiny under new substantive due process.[212]

The Court later reaffirmed the use of history to define which rights are fundamental in *Washington v. Glucksberg*.[213] The opinion also reflects the fear that new substantive due process will be subjected to the anti-*Lochner* critique of judicial subjectivity:

> Our established method of substantive-due-process analysis has two primary features: First, we have regularly observed that the Due Process Clause specially protects those fundamental rights and liberties which are, objectively, "deeply rooted in this Nation's history and tradition," and "implicit in the concept of ordered liberty," such that "neither liberty nor justice would exist if they were sacrificed[.]" Second, we have required in substantive-due-process cases a "careful description" of the asserted fundamental liberty interest. Our Nation's history, legal traditions, and practices thus provide the crucial "guideposts for responsible decisionmaking," that direct and restrain our exposition of the Due Process Clause. . . . This approach tends to rein in the subjective elements that are necessarily present in due-process judicial review.[214]

Roe therefore opened the door for the Court's reconsideration of the natural law conception of unenumerated constitutional rights. Many rights were considered to be fundamental pursuant to natural law doctrine. Once the Court expanded the number of fundamental rights, it invariably exposed itself to judicial subjectivity critiques.[215] The Court responded by stating that U.S. history, legal traditions and values were "objective" considerations that would restrain justices' interpretation of fundamental rights.[216]

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210. *Roe*, 410 U.S. at 152–53 (majority opinion).

211. *See Roe*, 410 U.S. at 129–46.

212. *See id.* at 164–67. The Court tinkered later with access to the compelling test in the abortion context. A plaintiff must now show that an allegedly invalid statute "unduly burdens" the fundamental right of a woman to choose whether to bear or beget a child. *See* Gonzales v. Carhart, 550 U.S. 124 (2007); Planned Parenthood v. Casey, 505 U.S. 833 (1992).

213. *See* Washington v. Glucksberg, 521 U.S. 702 (1997).

214. *Id.* at 720–22 (internal citations omitted).

215. *See* Barnett, *supra* note 7, at 1487.

216. *See* Fallon, *supra* note 6, at 1316–21.

Intermediate scrutiny in new substantive due process has been less developed than in equal protection and free speech. *Moore v. City of East Cleveland* (which involved the right to extended family living),[217] *Youngberg v. Romeo* (which involved the right to proper treatment in involuntary confinement),[218] and *Cruzan v. Director, Missouri Dep't. of Health* (which involved the right of the unconscious to refuse medical treatment)[219] are best seen as providing protection for intermediate liberty rights. History dictates that these rights are too important for the rational relation test but not fundamental enough to warrant the compelling test.

Intermediate scrutiny is also a tool the Court has employed to develop a consensus on rights that deserve more than deferential scrutiny. An example of such a process is the use of intermediate scrutiny to expand the right to privacy to include sexual orientation. *Bowers v. Hardwick* first presented the Court with a challenge to a Georgia statute criminalizing sodomy.[220] The defendants argued that their homosexual sex practices were protected under the *Griswold* and *Roe* definition of privacy.[221] The *Hardwick* opinion disagreed and asserted that the right of privacy defined in previous cases was meant to protect marriage, child rearing, contraceptives, and abortion: "Accepting the decisions in these cases and the above description of them, we think it evident that none of the rights announced in those cases bears any resemblance to the claimed constitutional right of homosexuals to engage in acts of sodomy that is asserted in this case."[222]

Lawrence v. Texas explicitly overruled *Hardwick*.[223] The Texas statute at issue in *Lawrence* criminalized "deviate sexual intercourse" and included anal and oral sex within its definition of deviate.[224] The Court invalidated the statute but never described the right of privacy at issue as fundamental or used the phrase "compelling purpose." The opinion focused mainly on the history of anti-sodomy statutes and the political changes regarding sexual orientation post-*Hardwick*. The clearest statement the Court makes is that "[t]hese references show an emerging awareness that liberty gives *substantial* protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex."[225] The opinion further defined the liberty interest as protecting

217. *See* Moore v. City of E. Cleveland, 431 U.S. 494 (1977).

218. *See* Youngberg v. Romeo, 457 U.S. 307 (1982).

219. *See* Cruzan v. Dir., Missouri Dep't of Health, 497 U.S. 261 (1990).

220. Bowers v. Hardwick, 478 U.S. 186 (2003).

221. *See id.* at 190–91.

222. *Id.*

223. Lawrence v. Texas, 539 U.S. 558, 578 (2003).

224. *See id.* at 563.

225. *Id.* at 572 (emphasis added).

"choices central to personal dignity and autonomy . . . ."[226] The Court concluded by noting that the case did not present any issues involving minors, coerced individuals, public conduct, prostitution, or same-sex marriage.[227] The Court was clearly worried about political backlash on the issue of same-sex marriage.

United States v. Windsor invalidated the federal Defense of Marriage Act ("DOMA").[228] The Court placed heavy emphasis on the states' ability to control marriage. In this case, New York recognized the validity of a marriage between plaintiff and her deceased same-sex partner.[229] However, DOMA excluded the plaintiff from the definition of a surviving spouse.[230] Plaintiff therefore did not qualify for the marital exemption under the federal estate tax.[231] Plaintiff paid $363,053 in estate taxes, which she would have avoided with the benefit of the DOMA exemption.[232] She then filed a suit asking for a refund based on the invalidity of DOMA.[233]

The Court discussed in some detail whether the case involved new substantive due process or equal protection.[234] The Court noted that *Lawrence* had relied on the substantive due process right of privacy to invalidate the statute at issue there. However, the Court ultimately relied on equal protection to invalidate DOMA.[235] The Court examined the congressional purpose behind its passage and determined that it evidenced an animus to homosexuals.[236] The Court invalidated the statute by concluding that such directed hostility failed the rational relation test.[237] The power to degrade or demean was not a legitimate purpose of government.[238]

Obergefell v. Hodges revealed a majority that was finally ready to

226. *Id.* at 574 (quoting *Casey*, 505 U.S. at 851).

227. *See id.* at 578.

228. United States v. Windsor, 570 U.S. 744, 775 (2013).

229. *See id.* at 769.

230. *See id.* at 752.

231. *Id.* at 753.

232. *Id.*

233. *Id.*

234. *Id.* at 764–75. This is a frequent occurrence in cases involving sexual orientation. An earlier case invalidated a Colorado law on the basis of an equal protection violation. *See* Romer v. Evans, 517 U.S. 620, 635–36 (1996). The issue turns on whether the Court focuses on the homosexual person's right to privacy and autonomy, or focuses on the disparate treatment between heterosexual couples and homosexual couples.

235. *Windsor*, 570 U.S. at 775.

236. *Id.* at 770–72.

237. *Id.* at 775.

238. *See id.* ("The federal statute is invalid, for no legitimate purpose overcomes the purpose and effect to disparage and to injure those whom the State, by its marriage laws, sought to protect in personhood and dignity.").

resolve the issue of same-sex marriage.[239] Multiple cases were united by the Court, all claiming a disadvantage because of a state law only recognizing opposite-sex marriages.[240] The opinion focused its analysis on new substantive due process and the fundamental nature of the right to marry. The Court reasoned that same-sex couples were entitled to the same benefits of marriage as opposite-sex couples based on principles of autonomy and personal dignity.[241] The statutes at issue demeaned and stigmatized same-sex couples.[242] The majority tried to counter the dissent's objection—that the Court was usurping the legislative process—by noting that individuals are not required to wait for legislative action when existing statutes violate fundamental rights.[243] The Court also relied on equal protection concepts to bolster its conclusion that statutes are invalid to the extent that they forbid same-sex couples from enjoying the same right to marry as opposite-sex couples.[244] However, the Court never used the language of the compelling/necessary to the accomplishment of test.

Justice Scalia's dissent reflected the first period Court's anti-*Lochner* sentiment that the majority opinion was a clear usurpation of legislative power.[245] An unrepresentative majority of nine had, in his view, declared itself to be a super legislature.[246] Chief Justice Roberts's dissent was even more direct in espousing anti-*Lochner* bias.[247] He repeated Scalia's usurpation argument and noted that the civil, rather than criminal, nature of the statutes made their invalidation even more egregious.[248] Roberts even updated the famous line from Holmes's dissent in *Lochner* to include a reference to a progressive philosopher, stating: "the Fourteenth Amendment does not enact John Stuart Mill's *On Liberty* any more than it enacts Herbert Spencer's Social Statics."[249]

239. *See* Obergefell v. Hodges, 135 S. Ct. 2584 (2015).

240. *See id.* at 2593.

241. *See id.* at 2597–2600.

242. *See id.* at 2601–02.

243. *See id.* at 2605 ("The dynamic of our constitutional system is that individuals need not await legislative action before asserting a fundamental right.").

244. *See id.* at 2601 ("[B]y virtue of their exclusion from that institution, same-sex couples are denied the constellation of benefits that the States have linked to marriage.").

245. *See id.* at 2629 (Scalia, J., dissenting).

246. *See id.* at 2629 (Scalia, J., dissenting) ("This is a naked judicial claim to legislative—indeed, *super*-legislative—power; a claim fundamentally at odds with our system of government.").

247. *See id.* at 2621 (Roberts, J., dissenting) ("The Court was 'asked'—and it agreed—to 'adopt a cautious approach' to implying fundamental rights after the debacle of the *Lochner* era. Today, the majority casts caution aside and revives the grave errors of that period.").

248. *See id.* at 2620.

249. *Id.* at 2622. Justice Thomas dissented to note his disagreement with the revival of substantive due process. *See id.* at 2631 (Thomas, J., dissenting). Justice Alito's dissent repeated the usurpation critique. *See id.* at 2642–43 (Alito, J., dissenting).

The Court's rulings on homosexual rights therefore evolved in nineteen years from describing the right to privacy as a mere liberty in *Hardwick* to declaring it a fundamental right in *Obergefell*. In between, the Court used intermediate scrutiny as a means of assessing its own and the nation's changing attitude toward homosexual rights, especially regarding the politically sensitive issue of marriage. *Obergefell*'s refusal to use the compelling test can be explained by its reliance on a finding of legislative animus towards same-sex couples, as stated in *Romer* and *Windsor*.[250] The animus purpose fails any test, including the deferential one.[251] The Court's reflection of a growing political consensus regarding gay rights stands in sharp contrast to the *Lochner* era Courts' refusal to acknowledge the political realities of the New Deal.[252]

Similar to classifications in equal protection, most of the liberty interests that come before the Court are labeled mere rights and receive the deferential rational relation test.[253] New substantive due process still reflects the first period's anti-*Lochner* bias by confining all economic rights (particularly the reviled rights to contract and have an occupation) to the status of mere rights.[254]

D. Free Speech Rights

Free speech cases are difficult to organize. Free speech rights under

250. *See id.* at 2596–97 (majority opinion).

251. *See* Bhagwat, *supra* note 3, at 326; Fallon, *supra* note 6, at 1271; Goldberg, *supra* note 88, at 492.

252. *See* Friedman, *supra* note 3, at 1383–84 (discussing whether adherence to judicial norms or public acceptance of the decision determines the Court's legitimacy); Sunstein, *supra* note 5, at 906–07. For the argument that the Court erred in considering political consensus in its opinions, *see Obergefell*, 135 S. Ct. at 2629–30 (Scalia, J., dissenting); *Lawrence*, 539 U.S. at 597–98 (Scalia, J., dissenting).

253. *See, e.g.*, Washington v. Glucksberg, 521 U.S. 702 (1997) (regarding the right to assisted suicide); Whalen v. Roe, 429 U.S. 589 (1977) (regarding the right to informational privacy); Kelley v. Johnson, 425 U.S. 238 (1976) (regarding a policeman's right to appearance); Ferguson v. Skrupa, 372 U.S. 726 (1963) (regarding the right to an occupation).

254. *See, e.g.*, New Motor Vehicle Bd. v. Orrin W. Fox Co., 439 U.S. 96, 106–07 (1978); Exxon Corp. v. Governor of Md., 437 U.S. 117, 124–25 (1978) ("Regardless of the ultimate economic efficacy of the statute, we have no hesitancy in concluding that it bears a reasonable relation to the State's legitimate purpose in controlling the gasoline retail market, and we therefore reject appellants' due process claim."). *See also* E. Enterprises v. Apfel, 524 U.S. 498, 537 (1998) ("[T]his Court has expressed concerns about using the Due Process Clause to invalidate economic legislation."); Concrete Pipe & Prod. v. Constr. Laborers Pension Tr., 508 U.S. 602, 639 (1993) ("[U]nder the deferential standard of review applied in substantive due process challenges to economic legislation there is no need for mathematical precision in the fit between justification and means."); Usery v. Turner Elkhorn Mining Co., 428 U.S. 1, 15 (1976) ("[L]egislative Acts adjusting the burdens and benefits of economic life come to the Court with a presumption of constitutionality, and that the burden is on one complaining of a due process violation to establish that the legislature has acted in an arbitrary and irrational way."). *Cf.* Stop the Beach Renourishment, Inc. v. Fla. Dep't of Env't. Prot., 560 U.S. 702, 721 (2010) ("[W]e have held for many years (logically or not) that the 'liberties' protected by substantive due process do not include economic liberties.").

the First Amendment are given the same three-tiered scrutiny as classifications and rights, but the determination of the appropriate levels has developed differently. This Article focuses only on the government's direct regulation of speech (mainly on content) and the government's regulation of the media.[255]

1. Direct Regulation of Speech

This Article is less concerned with the nuances of regulating speech and more focused on the adaption of the three-tiered scrutiny test to First Amendment values. This Section is therefore not intended to be an exhaustive analysis of modern rules for restricting speech. In fact, the Court created the modern methodology for determining what speech is protected by defining which speech is not protected. The First Amendment generally protects opinion and advocacy but does not protect incitement, conspiracy, nor unlawful conduct. *Brandenburg v. Ohio* held that speech which evinces a clear and present danger of unlawful activity was not protected by the First Amendment.[256] *Cohen v. California* declared fighting words non-protected.[257] Obscenity as defined in *Miller v. California* is also not protected.[258] *Central Hudson Gas & Electric Corp. v. Public Service Commission* declared that commercial speech, which is false, misleading, or illegal, is not protected.[259] Finally, "true threats" as delineated in *Virginia v. Black* are non-protected.[260]

The Court used the term "non-protected" to describe the test appropriate for the conduct defined in these cases, but a more accurate

255. For a more detailed analysis of tiered scrutiny and the First Amendment, *see* Bhagwat, *supra* note 112, at 783–802; Fallon, *supra* note 6, at 1278–81.

256. *See* Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) ("[T]he constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.").

257. *See* Cohen v. California, 403 U.S. 15, 20 (1971) ("This Court has also held that the States are free to ban the simple use . . . of so-called 'fighting words,' those personally abusive epithets which, when addressed to the ordinary citizen, are, as a matter of common knowledge, inherently likely to provoke violent reaction."). Fighting words must be "a direct personal insult" that is clearly "directed to the person of the hearer." *Id.*

258. Miller v. California, 413 U.S. 15, 23 (1973). *Miller* created a three-part test for obscenity: "(a) whether 'the average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value." *Id.* at 24 (internal citations omitted). The Court also provided definitions of these concepts. *See id.* at 25–26.

259. *See* Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557, 563–64 (1980).

260. *See* Virginia v. Black, 538 U.S. 343, 359 (2003). "'True threats' encompass those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals." *Id.*

description of the test is "least protected." Non-protected speech still receives the deferential rational relation test. The five cases noted above also narrowed the definition of these categories of speech in relation to the definitions previously adopted by the Court.[261] The Court subtly created more protected speech by effectively limiting the scope of non-protected speech. The Court in *Cohen* also broadened free speech by noting that the government could not suppress speech because it disagreed with its message, and proscribing "offensive" conduct may not even be a legitimate governmental purpose.[262]

Intermediate scrutiny is also clearly defined in the context of free speech. The heart of the test is still "important purpose/substantially related," but the Court adds an additional first and fourth part to the test. The statute at issue must also be content neutral and provide ample alternative channels of communication in order to satisfy intermediate scrutiny.[263] The content neutral criterion does not apply to commercial speech, which is limited to intermediate scrutiny by *Central Hudson Gas*.[264] The four-part intermediate scrutiny test is most often applied to time, place, and manner restrictions[265] in a traditional public forum[266] and symbolic speech[267] regulations.[268]

The highest level of protected speech is not as clearly defined as the two lower levels. Political speech is clearly protected,[269] and viewpoint restrictions in any public forum are clearly prohibited.[270] In a traditional public forum, speaker identity and subject matter restrictions are also prohibited.[271] Government attempts to limit opinion on any subject are arguably subject to the compelling interest test, no matter how offensive the opinion may be.[272] In *Cohen*, Justice Harlan wrote:

261. *See supra* notes 256–260 and accompanying text.

262. *See Cohen*, 403 U.S. at 25–26.

263. *See* Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 293 (1984).

264. *See Cent. Hudson Gas & Elec. Corp.*, 447 U.S. at 564. *See also* 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484 (1996).

265. *See* Heffron v. Int'l Soc'y for Krishna Consciousness, Inc., 452 U.S. 640, 647–48 (1981).

266. *See* Cox v. New Hampshire, 312 U.S. 569, 576 (1941). Traditional public forums include streets, sidewalks, and parks.

267. *See* Texas v. Johnson, 491 U.S. 397, 405–07 (1989).

268. *See* Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 293–94 (1984), which noted that the test for time, place, and manner restrictions was the same intermediate scrutiny as regulations on symbolic speech. *See also* Bhagwat, *supra* note 112, at 784.

269. *See* New York Times Co. v. Sullivan, 376 U.S. 254, 269–70 (1964).

270. *See* Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983).

271. *See id.* The public forum analysis detailed in *Perry* also has three tiers: traditional public forum at compelling level, non-public forum at deferential rational relation test, and quasi-public forum at intermediate scrutiny depending on how it is opened. *See id.* at 45–46.

272. *See* R.A.V. v. City of St. Paul, 505 U.S. 377, 382 (1992); FCC v. Pacifica Found., 438 U.S. 726, 745–47 (1978).

> The constitutional right of free expression is powerful medicine in a society as diverse and populous as ours. It is designed and intended to remove governmental restraints from the arena of public discussion, putting the decision as to what views shall be voiced largely into the hands of each of us, in the hope that use of such freedom will ultimately produce a more capable citizenry and more perfect polity and in the belief that no other approach would comport with the premise of individual dignity and choice upon which our political system rests.[273]

If a government regulates based on the content of speech, the Court will likely subject the restriction to the highest level of scrutiny if it does not fit into any of the clearly defined limits of lower and intermediate scrutiny.

2. Government Regulation of the Media

The more recent free speech cases have forced the Court to adapt its analysis to the changes brought about by advances in technology. Even today, the bulk of the Court's First Amendment principles were crafted in a world dominated by newspapers, radio, television, and street corner messaging. Technological advances produced a dilemma concerning how to best adapt those rules and values to constantly changing developments in communications. The Court has generally dealt with this issue by assessing the appropriate level of scrutiny for different media forms.

FCC v. Pacifica Foundation established the principle that each form of media is its own law.[274] The Court has implemented this concept by assigning media to one of the three levels of scrutiny. The criteria for heightened protection are the extent of invasion of the home, accessibility to minors, spectrum scarcity, and history of governmental control.[275] The governmental action at issue must only be a regulation, not a total ban.[276]

The Court first gave the highest level of protection to newspaper and print media in *Miami Herald Publishing Company v. Tornillo*.[277] Delivering the majority opinion, Justice Burger wrote:

> [Government] compulsion to publish that which [newspaper editors believe] should not be published is unconstitutional. A responsible press is an undoubtedly desirable goal, but press responsibility is not mandated by

273. *Cohen*, 403 U.S. at 24.

274. *See Pacifica*, 438 U.S. at 748 ("We have long recognized that each medium of expression presents special First Amendment problems.").

275. *See Pacifica*, 438 U.S. at 738 n.2, 748–49; Red Lion Broad. Co. v. FCC, 395 U.S. 367, 375–77, 389–90 (1969).

276. *See Pacifica*, 438 U.S. at 744–45.

277. *See* Miami Herald Pub. Co. v. Tornillo, 418 U.S. 241 (1974).

> the Constitution and like many other virtues it cannot be legislated. . . . The Florida statute exacts a penalty on the basis of the content of a newspaper.[278]

The highest level of protection was justified because the print media did not invade the home, was not subject to spectrum scarcity or historical governmental regulation, and its access to minors was limited by price. The Court has used similar reasoning to apply the highest level of scrutiny to government regulation of sexually explicit material on the internet,[279] 900 telephone calls,[280] and premium cable channels.[281]

Intermediate scrutiny was applied to government regulation of certain media that satisfied some, but not all, of the heightened scrutiny criteria. Cable operators are not like print editors, in that they select channels to deliver content to viewers rather than creating the content themselves. To the Court, spectrum scarcity was less important because fiber optics allowed cable operators to deliver hundreds of channels, but cable still relied on telephone poles and other public right of ways for access to its customers.[282] The Court has also incorporated intermediate scrutiny into the "secondary effects" test, which delineates the boundaries for real property zoning laws to regulate sexually explicit material.[283]

Finally, the "on air" broadcast media of television and radio are subject to the lowest level of scrutiny.[284] Both traditional television and radio are subject to the channel limitations of spectrum scarcity, invade the home, are easily accessible to minors, and have a history of government regulation since their creation.[285] "On air" television and radio are therefore subject to the most government regulation.

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278. *Id.* at 256.

279. *See* Reno v. ACLU, 521 U.S. 844, 868–69 (1997).

280. *See* Sable Commc'ns of California, Inc. v. FCC, 492 U.S. 115, 127–28 (1989).

281. *See* United States v. Playboy Entm't Grp., Inc., 529 U.S. 803, 814 (2000).

282. *See* Denver Area Educ. Telecomms. Consortium, Inc. v. FCC, 518 U.S. 727, 748 (1996) (regarding regulation of sexually explicit material); Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 644–45 (1994) (discussing must-carry rules).

283. *See* City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 50–52 (1986); Young v. Am. Mini Theatres, Inc., 427 U.S. 50, 69–73 (1976). The secondary effects test is essentially intermediate scrutiny without the content neutral first requirement. The zoning laws at issue in both cases focused on the sexually content of the businesses covered by the statutes. The secondary effects test has not been extensively used outside the context of real property zoning since it is based on content. *See* Boos v. Barry, 485 U.S. 312, 321 (1988) (explaining that the secondary effects test cannot be used to justify limits on protests outside a foreign embassy).

284. "On air" refers to broadcasts that send signals capable of being received by an antenna. Cable television and satellite radio, for example, are not "on air."

285. *See Pacifica*, 438 U.S. at 748–49 (regulating sexually explicit monologue); *Red Lion Broad. Co.*, 395 U.S. at 395–401 (validating a "fairness doctrine" for television more extensive than the "right to reply" statute invalidated in *Miami Herald Pub. Co.*).

IV. IN DEFENSE OF JUDICIAL SUBJECTIVITY

The modern equal protection, new substantive due process, and free speech methodologies are founded on the subjectivity of judges.[286] All of these methodologies provide for principled subjectivity, but it is subjectivity, nonetheless. The weighing of legislative purpose in satisfaction of a compelling or important standard is by nature judicial balancing.[287] The indicia of suspectness in equal protection, the investigation into history in new substantive due process, and the non-protected definitions in free speech all include a significant element of subjectivity, but it is limited by the legal standards contained in the tests.[288] This Article contends that such subjectivity was inevitable once the Court started protecting unenumerated rights, giving specific meaning to general phrases such as equal protection and free speech and expanding intermediate scrutiny.[289] The necessity of subjectivity was further enhanced by the Court's statement that rights were not absolute[290] and its decision to change both presumptions from essentially irrebuttable to rebuttable.[291] Finally, subjectivity is inevitable in a democratic system premised on the belief that executive and legislative action cannot be inconsistent with constitutional rights and values.[292]

This Article further contends that the degree of subjectivity that is inherent in the current legal status of all three doctrines is appropriate and workable. The system is an effective combination of legal standards and judicial discretion. The nearly fifty years of decisions under this analysis provide an understandable framework for lower courts and litigants. The current system also allows for a gradual integration of changing social values, as evidenced by the Court's expansion of homosexual rights. The rigidity criticized in the two-tier system has been effectively eliminated in the three-tier system.[293]

The resistance to judicial subjectivity was the product of FDR appointees' emotional anti-*Lochner* bias. *Lochner* was criticized as being

286. Three-tiered scrutiny is not found in the Constitution. The entire test is judicially developed. *See* Fallon, *supra* note 6, at 1285.

287. *See* Beschle, *supra* note 3, at 384; Bhagwat, *supra* note 3, at 311; Mathews & Sweet, *supra* note 137, at 806–07.

288. *See* Bhagwat, *supra* note 3, at 325; Fallon, *supra* note 6, at 1316–21; Mathews & Sweet, *supra* note 137, at 801.

289. *See* Barnett, *supra* note 7, at 1498; Bhagwat, *supra* note 112, at 824–25 (acknowledging judicial balancing in three-tier test but wanting it to be more principled).

290. *See* Beschle, *supra* note 3, at 387.

291. *See* Bhagwat, *supra* note 112, at 784, 786, 797; Mathews & Sweet, *supra* note 137, at 826.

292. *See* Beschle, *supra* note 3, at 384 (discussing that no explicit provision exists in the Constitution for balancing individual rights against the social costs of enforcing that right).

293. *See* Jackson, *supra* note 6, at 3127.

ad hoc, subjective, unprincipled, and usurping the legislative function.[294] The same criticisms have been asserted against the modern three-tiered scrutiny test.[295] From 1791 into the 1930s, the Court would reverse lower court errors on a more case-by-case basis.[296] These decisions were necessarily more subjective and ad hoc. The Judiciary Act of 1925 significantly expanded the Court's discretionary certiorari review and correspondingly reduced mandatory review. The Act and the Court's increasing caseload began the Court's shift away from case-by-case reversal of error toward broader policy decisions to guide lower courts.[297] This trend merged with the FDR appointees' abhorrence of *Lochner* to produce an extreme antipathy to judicial subjectivity in the first period. In fact, judicial subjectivity was an accepted fact of legal life at common law and during the Court's first 140 years.[298] Judges have always made law.[299]

The values of precedent, properly understood, are still preserved within the subjective tiered scrutiny system. Anti-*Lochner* bias in the first period led to an unusually strict and rigid interpretation of precedent by legal process scholars.[300] This proved just as unworkable as the two-tiered system of effectively irrebuttable presumptions.[301] An appropriate emphasis on precedent should be more flexible.[302] The Court in the second period has been less sensitive to the criticisms of being subjective and ad hoc in its decisions.[303] The Court has recently reaffirmed the factors that are considered in the reversal of precedent.[304] Precedent as

294. *See supra* note 19 and accompanying text.

295. *See* Bhagwat, *supra* note 3, at 319–21; Bhagwat, *supra* note 112, at 824; Goldberg, *supra* note 88, at 525; Mathews & Sweet, *supra* note 137, at 804.

296. *See* Fallon, *supra* note 6, at 1293.

297. *See* Grove, *supra* note 7, at 476.

298. *See* MELVIN A. EISENBERG, THE NATURE OF THE COMMON LAW 157–59 (1988); Closius, *supra* note 24, at 150.

299. *See* Beschle, *supra* note 3, at 402.

300. *See* Closius, *supra* note 24, at 145–46. A number of the Warren Court's most notable decisions overruled prior decisions. *See* Ramos v. Louisiana, 140 S. Ct. 1390, 1411–12 (2020) (Kavanaugh, J., concurring). Many of those decisions were criticized by legal scholars as unprincipled. *See* Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 31–35 (1959). *See also* Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 8 (1971); Michael Anthony Lawrence, *Justice-As-Fairness as Judicial Guiding Principle: Remembering John Rawls and the Warren Court*, 81 BROOK. L. REV. 673, 717–19 (2016); David A. Strauss, *The Common Law Genius of the Warren Court*, 49 WM. & MARY L. REV. 845, 847–48 (2007).

301. *See* Grove, *supra* note 7, at 487–91; Shaman, *supra* note 27, at 172 (discussing the dangers of rigidity and inhibitions of analysis).

302. *See* Closius, *supra* note 24, at 152–54; Friedman, *supra* note 3, at 1383 (questioning whether legitimacy is determined by adherence to judicial norms or public acceptance of the decision).

303. *See* Grove, *supra* note 7, at 476–87 (discussing the change in 1925 from history of case-by-case decisions and correcting lower courts to the development of broad doctrines intended to guide lower courts). *See also supra* notes 214–216, 297–298 and accompanying text.

304. *See Ramos*, 140 S. Ct. at 1405 (majority opinion) ("To balance these considerations, when it

thus defined is properly a more flexible or elastic concept,[305] especially when the Court is interpreting the Constitution instead of a statute.[306]

The major criticisms of judicial subjectivity are, in the end, unpersuasive. The criticism of judicial subjectivity is subjective in and of itself. Much criticism of judicial subjectivity is rooted in disagreement with the results of a particular case or line of cases.[307] Neither conservatives nor liberals are consistent in their criticism of subjectivity. In the *Lochner* era, liberal progressives criticized a conservative Court for being ad hoc and subjective. In the second period, conservatives criticized a more liberal Court for being ad hoc and subjective. Conservative justices are scathing critics of the Court's subjectivity in the context of abortion and homosexual rights but are criticized for subjectivity by liberal Justices in *Citizens United v. FEC*[308] and *Bush v. Gore*.[309] The criticism that a decision is subjective and ad hoc is frequently employed as a tool for those who do not agree with the result. Finally, some critics will simply disagree with the pace of an evolving Court's delineation of a constitutional right. The Court will seem more subjective as the cases evolve to a final position.[310]

Judicial subjectivity does not usurp the legislative process. The Constitution clearly envisions that Congress and state legislatures are responsible for making law. However, every court since the early days of American constitutional history has agreed that majority rule cannot impinge on the rights granted to individuals by the Constitution.[311] The question of legislative prerogatives is therefore really a question of what rights are granted by the Constitution. Once that universally accepted

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revisits a precedent, this Court has traditionally considered 'the quality of the decision's reasoning; its consistency with related decisions; legal developments since the decision; and reliance on the decision.'"). *See also Ramos*, 140 S. Ct. at 1414 (Kavanaugh, J., concurring) for a slightly different formulation of the factors. The list of factors by Justice Kavanaugh notably adds "changed facts since the prior decision; the workability of the precedent;" and "the age of the precedent." *Id.* Prior cases should not be overruled simply because a Justice believes it was wrongly decided. *See id.* ("A garden-variety error or disagreement does not suffice to overrule. In the view of the Court that is considering whether to overrule, the precedent must be egregiously wrong as a matter of law in order for the Court to overrule it.").

305. *See id.*

306. *See Ramos*, 140 S. Ct. at 1405 (majority opinion); *Ramos*, 140 S. Ct. at 1413 (Kavanaugh, J., concurring).

307. *See* Goldberg, *supra* note 88, at 487 (criticizing giving suspect class status to affirmative action statutes).

308. *See* Citizens United v. FEC, 558 U.S. 310, 408–09 (2010) (Stevens, J., concurring in part).

309. *See* Bush v. Gore, 531 U.S. 98, 128–29 (2000) (Stevens, J., dissenting) ("Although we may never know with complete certainty the identity of the winner of this year's Presidential election, the identity of the loser is perfectly clear. It is the Nation's confidence in the judge as an impartial guardian of the rule of law.").

310. The cases in the areas of affirmative action, *see supra* notes 169–183 and accompanying text, gay rights, *see supra* notes 220–252 and accompanying text, and gender discrimination, *see supra* notes 128–132, 165 and accompanying text, provide examples.

311. *See* Marbury v. Madison, 5 U.S. 137, 177–78 (1803).

premise is conceded, the power of the Court to define and declare the parameters of constitutional rights becomes the most significant inquiry. The Court will always usurp the majoritarian legislative process whenever it declares constitutional rights. *Brown v. Board of Education* was criticized for usurping the legislative process.[312]

The Court's protection of civil liberties can often lead to an evolving relationship between legislatures and the Court, even in its most controversial subjects. The decisions expanding homosexual rights have been criticized as legislative usurpation by emotional dissents, but the opinions both cited and shaped legislative grants of rights. The abortion decisions likewise reflect a decades-long give and take between the Court and legislatures, despite criticisms of usurpation. The Court's decision to apply intermediate rather than strict scrutiny to gender discrimination, while intensely criticized by liberals, has provided a framework for judicial and legislative advancements in gender equality.

Judicial subjectivity is inherent in rebuttable presumptions. Once the Court established that rights are not absolute, and that presumptions of invalidity and validity should be transformed from effectively irrebuttable to occasionally rebuttable, subjectivity in decision-making was inevitable. The effectively irrebuttable presumption was created by FDR appointees in the first period to insulate themselves from the critique of subjectivity. However, that rigid two-tier system ultimately proved unworkable. The changed presumptions, combined with the creation of intermediate scrutiny, made the subjectivity of judicial balancing a necessary part of the system.[313]

Many critics correctly state that the Court is frequently unwilling to acknowledge the subjective nature of its decisions.[314] This Article agrees with this criticism. In the interests of judicial transparency, the Court should admit its subjectivity. The Court is still sensitive to the anti-*Lochner* bias of the first period. The Court should complete the maturation of its reaction to *Lochner* by simply acknowledging subjectivity is inherent in its constitutional interpretation.

Finally, many proposed one-test alternatives to three-tiered scrutiny are equally subjective.[315] Many commentators have argued that the three-tiered system should be abandoned in favor of a proportionality system,

312. *See* HENRY J. ABRAHAM, THE JUDICIARY: THE SUPREME COURT IN THE GOVERNMENTAL PROCESS 80 (1965).

313. *See* Mathews & Sweet, *supra* note 137, at 853.

314. *See* Mathews & Sweet, *supra* note 137, at 837.

315. *See* Goldberg, *supra* note 88, at 492. Goldberg suggests one test with three inquiries: (1) whether there is a "plausible, nonarbitrary" reason for the discrimination; (2) whether the statute is based simply on "generalizations about a characteristic" that are not directly relevant to the regulatory context; and (3) whether the statute evinces bias or hostility. *Id. See also* Shaman, *supra* note 27, at 173–82.

which has been adopted by many other countries.[316] Proportionality, in effect, provides one test for all constitutional rights. This Article does not perceive any significant benefits in refusing to acknowledge that some rights are more constitutionally significant than others.[317] A more nuanced approach seems just as valuable as a unitary analysis. However, the proportionality system is just as subjective and susceptible to the other criticisms of the modern Court as three-tiered scrutiny.[318]

V. CONCLUSION

A strict interpretation of precedent can become a foolish consistency. Reflexively applying the "ad hoc" criticism of the *Lochner* era to the modern three-tiered scrutiny test epitomizes a rigid sense of precedent. The fifty years of three-tiered scrutiny adjudication has grounded its development in constitutional language and values. The heightened scrutiny framework and the three-tiered test are clear and settled. As noted above, the Court has even clarified the factors that guide it in assessing whether to overrule prior decisions. The modern three-tiered system is more flexible than the first period's rigid two-tiered system, and its results can be characterized as more "case-by-case" than its predecessor. However, case-by-case is not necessarily ad hoc. A less rigid system is still consistent with a respect for precedent.[319]

Justice Douglas,[320] one of the most liberal Justices of the first period, and Justice Scalia,[321] one of the most conservative Justices of the second period, both wrote that the Court does not sit as a "super legislature" to overturn the policy decisions of another branch of government. Both were wrong. When the Court defines the parameters of any constitutional right, the Court is a super legislature—by definition, the Court is limiting the extent of legislative authority. The three-tier scrutiny test acknowledges the constitutional value of separation of powers by

316. *See* Beschle, *supra* note 3, at 385–86; Jackson, *supra* note 6, at 3094; Mathews & Sweet, *supra* note 137, at 799.

317. *See* Mathews & Sweet, *supra* note 137, at 810.

318. *See* Mathews & Sweet, *supra* note 137, at 800–03, 806–07.

319. Flexibility is noted as one of the significant benefits of proportionality, a system many commentators favor over three-tiered scrutiny. *See* Jackson, *supra* note 6, at 3127–28; Mathews & Sweet, *supra* note 137, at 801–03; Shaman, *supra* note 27, at 172–77.

320. *See Griswold*, 381 U.S. at 482 ("We do not sit as a super-legislature to determine the wisdom, need, and propriety of laws that touch economic problems, business affairs, or social conditions."); Day-Brite Lighting, Inc. v. Missouri, 342 U.S. 421, 423 (1952) ("Our recent decisions make plain that we do not sit as a super-legislature to weigh the wisdom of legislation nor to decide whether the policy which it expresses offends the public welfare.").

321. *See Obergefell*, 135 S. Ct. at 2629 (Scalia, J., dissenting) ("This is a naked judicial claim to legislative—indeed, *super*-legislative—power; a claim fundamentally at odds with our system of government.").

subjecting the vast majority of classifications, rights, or conduct to the deferential standard of review. However, for those classifications, rights, or expressions that qualify for heightened scrutiny, the Court's functioning as a super legislature is constitutionally appropriate.

Americans today enjoy more civil rights than any other people in history. That accomplishment is attributable in part to a complex constitutional dance between legislatively created rights and judicially created rights. The Constitution, as applied to a modern, technological America, also requires a delicate balancing within the sphere of judicially created rights to ensure appropriate deference to legislative determinations. Three-tiered scrutiny, and the judicial subjectivity inherent within it, embodies the appropriate respect for legislative values upon which the modern protection of civil rights and separation of powers depend.