

ARTICLE

HOW DO THE COURTS *REALLY* DISCOVER UNENUMERATED FUNDAMENTAL RIGHTS? CATALOGUING THE METHODS OF JUDICIAL ALCHEMY

DAVID CRUMP*

I. INTRODUCTION	798
II. SOURCES AND JUSTIFICATIONS OF UNENUMERATED FUNDAMENTAL RIGHTS: AN INTERPRETIVE MORASS ..	806
A. <i>Textual Arguments</i>	806
1. The Ninth Amendment	806
2. The Due Process and Equal Protection Clauses	810
3. Clauses Considered Together.....	814
4. Holistic Arguments (as Opposed to Clause- by-Clause Interpretation): Use of the Broad Concept of a Constitution to Infer Natural Rights from the Document as a Whole	816
B. <i>Originalist Intentionalism</i>	819
1. The Basic Concept of Originalism.....	820
2. "Sophisticated" Originalism.....	823
3. Challenges for Sophisticated Originalism: School Desegregation and Capital Punish- ment	824
4. A Synthesis of Originalism and Textualism?	828
C. <i>Supplementation—and What Formerly Was Called "Noninterpretivism"</i>	829
D. <i>The Morass</i>	837

* Newell H. Blakely Professor of Law, University of Houston; A.B., 1966, Harvard College; J.D., 1969, University of Texas. The author gratefully acknowledges the comments upon an earlier draft of this Article made by Professors Douglas W. Kmiec and David S. Day, as well as the research assistance of Carey C. Jordan. These acknowledged individuals are not responsible, however, for any deficiencies in the Article.

III. METHODOLOGIES FOR RECOGNIZING UN-ENUMERATED FUNDAMENTAL RIGHTS: WHAT ARE THE APPROACHES, AND WHEN ARE THEY JUSTIFIABLE?	838
A. <i>Derivation of Fundamental Rights from the Text: Exclusion of All Except Explicitly Protected Rights, Such as by Incorporation of the Bill of Rights</i>	840
B. <i>Derivation of Fundamental Rights from the Text: Penumbral and Structural Arguments</i>	843
C. <i>Historical Intentionalism or Originalism in Deriving Fundamental Rights</i>	848
D. <i>Evaluation of the Private Importance of the Interest to Affected Individuals as a Means of Identifying Fundamental Rights</i>	852
E. <i>Recognition of the Interest as Historically and Traditionally Protected</i>	860
F. <i>Determining the Reach of Fundamental Rights by Defining the Degree of Abstraction: The Problem of the Correct Level of Generality</i>	863
1. Treatment of the Generality Problem in <i>Michael H. v. Gerald D.</i>	865
2. Justice Scalia's "Most Specific Level" Approach Compared to Other Justices' Indeterminate Approaches: A Critique.....	866
3. A Focus Upon a Tradition of State Power as Compared to a Tradition Recognizing the Claimed Liberty Interest: Can Different Levels of Generality Be Justified?	870
G. <i>Recognition of the Interest as an Essential Requisite of "Ordered Liberty"</i>	871
H. <i>Recognition of the Interest as Fundamental to the "American Scheme of Justice"</i>	874
I. <i>Evaluation of the Systemic Importance of the Interest to our Theories of Government; "Process-Based" Theories</i>	874
1. Systemic Importance or Individual Importance?	874
2. Systemic Importance versus "Process" Theories.....	876

- 3. Judicial Restraint: Is the Systemic-Importance Approach Sound? 879
- J. *Natural Law Evaluations of the Relative Importance of Individual, Systemic, or Governmental Interests*..... 879
 - 1. Government Conduct that “Shocks the Conscience” 880
 - 2. The *Carolene Products* Test 883
 - 3. Contemporary Moral Philosophy, “Contemporary Ratification,” or Interpretation by “Twentieth-Century Americans:” Natural Law..... 885
 - 4. Other Approaches, from “Evolving Standards” to Sociological Jurisprudence to Consensus 891
 - 5. Categorization of “Merely Economic” Interests, “Social” Interests, “Privacy” Claims, Matters of “Bodily Security,” and Similar Fixed Categories 892
- K. *Identification in Precedents of the Supreme (or Other) Courts*..... 895
- IV. “NEGATIVE” METHODOLOGIES: TESTING WHETHER AN INTEREST SHOULD BE FUNDAMENTAL BY INQUIRING INTO THE REASONS WHY IT SHOULD NOT BE 898
 - A. *Consideration of Pragmatic Counterbalancing Factors: The Need for Governmental Flexibility* 900
 - 1. Preserving Judicial and Legislative Roles 900
 - 2. Reconciling the Positive and Negative Methodologies: Considering Both in Every Case 904
 - 3. The Negative Methodology as a Solution to the *Lochner* Problem 906
 - B. *Consideration of Pragmatic Counterbalancing Factors, Continued: Collision of the Interest with Other Individual Interests of Equal or Greater Dignity* 908
 - C. *Economic Interest-Balancing* 910
- V. CONCLUSION 912

I. INTRODUCTION

Left with no quality of life and in continual pain, a terminally ill individual claims the constitutional right to assisted suicide.¹ A court orders a four-year-old boy to live permanently with biological parents who earlier acquiesced in his adoption, and thus it deprives this frightened child of his interest in remaining with the only family he ever has known.² Another person seeks a constitutional right to acupuncture³ or to the use of prohibited drugs⁴ or the right *not* to ingest forcibly administered drugs.⁵ Then there are the more familiar arguments that the Supreme Court has addressed, centering upon procreation, marriage, interstate travel, and the right to vote.⁶ Such is the nature of unenumerated fundamental rights.

Then, too, there are the sillier claims, that sometimes are successful in spite of their silliness. A Palm Beach resident once claimed the right to jog topless and persuaded a court to strike

1. The Supreme Court never has decided a case comparable to this hypothetical. *Cf. Cruzan v. Director, Mo. Dep't of Health*, 497 U.S. 261 (1990) (adjudicating procedural due process claim regarding withholding of life support). Other courts, however, have decided similar cases. *See Quill v. Vacco*, 80 F.3d 716 (2d Cir. 1996) (finding a right to assisted suicide in the Equal Protection Clause); *Compassion in Dying v. Washington*, 79 F.3d 790 (9th Cir. 1996) (en banc) (finding a substantive due process right to assisted suicide); *infra* note 514.

2. *Cf. Mike Robinson, Baby Richard Cries at Goodbye*, HOUSTON CHRON., May 1, 1995, at A3 (reporting on aftermath of similar but not identical case decided under Illinois law); Mindy Schulman Roman, Note, *Rethinking Revocation: Adoption From a New Perspective*, 23 HOFSTRA L. REV. 733, 760 (1995) (arguing that preservation of biological parentage by revocation of adoption not only hurts children, but discourages prospective parents from adopting and thereby "contributes to the subordination . . . of all women").

3. *See, e.g., Andrews v. Ballard*, 498 F. Supp. 1038, 1048-50 (S.D. Tex. 1980) (holding that a person has a constitutional right to obtain acupuncture treatment).

4. *See, e.g., Ravin v. State*, 537 P.2d 494, 502, 504 (Alaska 1975) (holding that generally "there is not a fundamental constitutional right to possess or ingest marijuana," but nevertheless interpreting state constitutional right of privacy as protecting in-home use); *Miller v. State*, 458 S.W.2d 680, 684 (Tex. Crim. App. 1970) (holding that a person does not have a constitutional right to "quietly possess and enjoy a hallucinogen or narcotic drug"); Mary Beth Sheridan, *Court Throws Colombia into Turmoil by Decriminalizing Drugs*, HOUSTON CHRON., May 10, 1994, at A8 (reporting decision of Colombia's constitutional court protecting cocaine use as part of each person's right to "freely develop his personality").

5. *See, e.g., Washington v. Harper*, 494 U.S. 210, 228 (1990) (holding that under certain conditions "the Due Process Clause permits a State to treat a prison inmate who has a serious mental illness with antipsychotic drugs against his will").

6. *See, e.g., Planned Parenthood v. Casey*, 505 U.S. 833 (1992) (procreation); *Moore v. City of E. Cleveland*, 431 U.S. 495 (1977) (family); *Shapiro v. Thompson*, 394 U.S. 618 (1969) (travel); *Reynolds v. Sims*, 377 U.S. 533 (1964) (vote). Although not all of these cases use fundamental rights terminology, each depends upon elevated status of the right claimed. *See infra* notes 17-22 and accompanying text.

down a contrary city ordinance.⁷ A gardener successfully claimed the right to use a gasoline-powered leaf blower in contravention of an ordinance motivated by concerns about noise and pollution.⁸ Recognition of these “rights” denigrates the Constitution because it unnecessarily countermands the democracy that the Constitution establishes.⁹ And yet if the courts are to recognize rights that by definition are unrecognizable, and if they are to use unspecified methods to do so, it must be expected that some of the results will be dubious. This, too, is the nature of unenumerated fundamental rights.

There would be no serious conflict with democratic values if the courts were to recognize any or all of these claims as “liberty” interests covered under the terms of the Due Process Clause.¹⁰ A mere liberty interest, according to the cases, is protected only against arbitrary defeasance. If the government can articulate a rational basis for believing that the interference may advance a legitimate legislative objective, the cases say that the claim fails.¹¹ Thus, it does little harm to recognize a liberty interest not set out in the Constitution, such as an interest in ingesting hallucinogens (or for that matter in jogging topless), because usually the body politic can overcome these interests with ease. And in

7. See *DeWeese v. Town of Palm Beach*, 812 F.2d 1365 (11th Cir. 1987). The court purported to apply a rational basis test, finding that there was no legitimate interest of the town to which the ordinance could be said to be reasonably connected. If, however, the court truly had applied the rational basis test, it easily would have found minimally sufficient interests (for example, enhancement of Palm Beach’s upscale tourist trade, prevention of sight pollution, or equal treatment of topless men and women) that the ordinance arguably addressed. Cf. *infra* note 11 (explaining the rational basis test). Instead, the court must have afforded the claimed right an elevated status, a conclusion that is confirmed by the court’s rhetoric, which extols the “liberty interest in personal dress.” *DeWeese*, 812 F.2d at 1367.

8. See *Cerisse Anderson, The Verdict, My Friend, Is Blowing in the Wind*, NAT’L L.J., Feb. 2, 1995, at A27 (reporting the decision of a village justice in Scarsdale, N.Y.). The court dismissed a charged violation of the ordinance by holding it unconstitutional on the extravagant ground that it was an “arbitrary and irrational exercise of police power, which unduly burdened the defendant by singling out one machine in one type of location [property not adjoining a golf course], when less restrictive legislation exists to protect the public health, comfort, safety, and welfare.” *Id.* This out-of-control rhetoric is not an application of the rational basis test. See *infra* notes 10-11 and accompanying text. Instead, by its insistence on “less restrictive” legislation, it resembles strict scrutiny—the fundamental right to use a gasoline leaf blower.

9. Cf. *infra* note 14 and accompanying text (discussing the Madisonian dilemma).

10. U.S. CONST. amend. V (“No person shall . . . be deprived of life, liberty, or property, without due process of law”); U.S. CONST. amend. XIV (“No State shall . . . deprive any person of life, liberty, or property, without due process of law”).

11. See, e.g., *FCC v. Beach Communications, Inc.*, 113 S. Ct. 2096, 2102 (1993) (allowing even “rational speculation unsupported by evidence or empirical data” to suffice as a rational basis).

those rare cases where it cannot, the reason is that the democratic action at issue has no rational connection to the values the body politic has sought to advance.

Instead, the more troublesome antidemocratic effect arises when a court affords elevated status to an asserted liberty interest by characterizing it as a right, or in tautological but familiar terms, as a "fundamental" right. Then, say the cases, the State is subject to a burden of proof that it rarely can surmount.¹² A court will apply strict scrutiny, meaning that the government must demonstrate a compelling interest to which its law is narrowly tailored.¹³ It is by these uneasy balances that American constitutionalism has treated what is known as the Madisonian dilemma,¹⁴ or the difficult problem¹⁵ of protecting minority

12. Some commentators have argued against this approach. It may be true that such "rights" talk "unduly emphasizes individual rights and individual liberty, and encourages 'autonomy, separation and isolation in the war of all against all,' in contrast with European emphasis on 'social solidarity.'" MARY ANN GLENDON, *ABORTION AND DIVORCE IN WESTERN LAW* 58 (1987). Perhaps for this reason, Chief Justice Rehnquist opted for a general balancing test in *Cruzan v. Director, Mo. Dep't of Health*, 497 U.S. 261, 279 (1990).

But perhaps this balancing reasoning avoids the issue. If some interests of persons are to be considered basic and given special protection, then some form of elevated scrutiny of countervailing state interests must be implied. One influential theory recognizes "rights" along with "privileges," "powers," and "immunities." See Wesley N. Hohfeld, *Rights and Jural Relations*, in *PHILOSOPHY OF LAW* 357, 357 (Joel Feinberg & Hyman Gross eds., 4th ed. 1991). Other theorists have recognized that this scheme allows the holder of a "right" to injure unduly the interests of others and would modify the Hohfeldian vision to impose "responsibilities" on the holder of the right. See Leon E. Trakman & Sean Gatién, *Abortion Rights: Taking Responsibilities More Seriously than Dworkin*, 48 S.M.U. L. REV. 585, 585-606 (1995). But cf. John Hasnas, *From Cannibalism to Caesarians: Two Conceptions of Fundamental Rights*, 89 NW. U. L. REV. 900, 939-40 (1995) (concluding that fundamental rights should be treated in the classical manner, as absolute, because the purpose of such rights is to restrain state power, and that restraint would be ineffective if state officials frequently were permitted to recognize and resolve conflicts among rights); *infra* note 20 (critiquing the undue burden standard).

13. See, e.g., *Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd.*, 502 U.S. 105, 118 (1991) (quoting *Arkansas Writers' Project v. Ragland*, 481 U.S. 221, 231 (1987) (holding content-based restrictions on speech unconstitutional unless "necessary to serve a compelling state interest and narrowly drawn to achieve that end")). This level of review has been described as "strict" in theory but usually "fatal" in fact. See Gerald Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972).

14. Cf. DAVID CRUMP, EUGENE GRESSMAN & DAVID S. DAY, *CASES AND MATERIALS ON CONSTITUTIONAL LAW* 12-14 (2d ed. 1993) (discussing the dilemma and some of the proposals for solution); Steven P. Croley, *The Majoritarian Difficulty: Elective Judiciaries and the Rule of Law*, 62 U. CHI. L. REV. 689 (1995) (exploring the dilemma from the perspective of an elected judiciary, concluding that elected pressures compromise constitutionalism and the rule of law, and arguing that the dilemma is in any event not easily resolvable).

15. There is a sense in which every protection of individual autonomy is inconsistent with collective democracy. In this sense, some commentators argue that only anarchy is

rights within a regime of majority rule.

Not all of the Justices appear to accept the terminology of fundamental rights,¹⁶ at least not uniformly. Sometimes the cases refer to interests as “significant”¹⁷ or use similar designations¹⁸ without explaining exactly what level of enhanced protection the Court has in mind. Other cases talk about a “careful”¹⁹ level of scrutiny or about rights protected against “undue”²⁰ burdens. In still other cases, the Court has purported to apply rational basis review but in fact has struck down laws at least minimally related to legitimate objectives, leaving the suspicion that the real basis of decision actually concerns the sensitive nature of the classifications or interests at issue.²¹ All of these approaches, however, are functionally similar to the reasoning of fundamental rights, except for differences of degree.²² Therefore, al-

compatible with autonomy in the final analysis. See Morris Lipson, *Autonomy and Democracy*, 104 YALE L.J. 2249 (1995).

16. Again, it is arguable that “rights talk”—treatment of a right with the implication that it licenses the holder to injure others indiscriminately—creates a dysfunctional society. See *supra* note 12. The terminology of fundamental rights is used here with the qualification that some judges prefer other formulas—which, in appropriate contexts, may indeed be preferable. But cf. G. Sidney Buchanan, *A Very Rational Court*, 30 HOUS. L. REV. 1509 (1993) (critiquing departures from strict scrutiny and urging expanded use of that standard).

17. See, e.g., *Cruzan v. Director, Mo. Dep’t of Health*, 497 U.S. 261, 282-83 n.10 (1990).

18. For example, in *Harper* the Court refers to the interest in avoiding unwarranted antipsychotic drugs, with understatement, as “not insubstantial.” *Washington v. Harper*, 494 U.S. 210, 229 (1990).

19. See, e.g., *Moore v. City of E. Cleveland*, 431 U.S. 494, 499 (1977).

20. See *Planned Parenthood v. Casey*, 505 U.S. 833, 874 (1992) (O’Connor, J., plurality opinion). Indeed, some courts have extended the undue burden standard beyond the abortion context: to parental rights, see *Herndon v. Tuhey*, 857 S.W.2d 203 (Mo. 1993); to the right to die, see *Compassion in Dying v. Washington*, 850 F. Supp. 1454, 1462-64 (W.D. Wash. 1994); and to rights of family association, see *Griffin v. Strong*, 983 F.2d 1544 (10th Cir. 1993). This reasoning is problematical because it substitutes a vague standard for strict scrutiny of denials of important rights. But perhaps it comports both with the text of the Due Process Clause and with the avoidance of deficiencies in absolutist treatment of rights. See *supra* note 12; see also Valerie J. Pacer, *Salvaging the Undue Burden Standard—Is It a Lost Cause? The Undue Burden Standard and Fundamental Rights Analysis*, 73 WASH. U. L.Q. 295 (1995) (suggesting that the undue burden formula allows the erosion of fundamental rights and should be tightened by the addition of a requirement of moral neutrality).

21. See, e.g., *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432 (1985) (declining to apply strict scrutiny to a city’s denial of a permit for a mental retardation center and holding the city’s action unconstitutional for lack of a rational basis despite proffered justifications including avoidance of harassment of residents by students at a nearby school); *Plyler v. Doe*, 457 U.S. 202 (1982) (declining to analyze denial of free public education to illegally present alien children under either suspect classification or fundamental rights standards and instead striking the state law down by finding no rational basis, over a dissent arguing that such a law “simply is not ‘irrational’”).

22. Indeed, the Court has identified a middle tier of review, by which a state is required to demonstrate “substantial” relationship to an “important” purpose. See, e.g.,

though recognizing that labels and levels of scrutiny may differ, this Article refers generally to interests that are afforded enhanced protection as fundamental rights, in accordance with widely accepted terminology.

The problem is in knowing which interests to characterize as fundamental. One solution is to limit the category to rights marked as special by the text or history of the Constitution itself.²³ This approach has the advantage of deference to the democratic forces that underlay the adoption of the Constitution, even though it may countermand the democracy that opposes the fundamental right today. Conversely, it is when these elevated interests are not mentioned in the Constitution—or in other words, when the courts recognize unenumerated fundamental rights, that the dissonance with democracy is most severe.²⁴ Legal philosophers therefore have engaged in furious debate about the origins and justification of unenumerated rights,²⁵ and indeed it is debatable whether the entire endeavor of recognizing them can be justified.²⁶ But in at least one sense the question is moot, because the courts, including the Supreme Court, consistently have resolved it by simply recognizing the rights. Therefore, the question arises: how do the courts do it? If there are rights that are protected by the Constitution but not

Craig v. Boren, 429 U.S. 190 (1976) (holding that gender classifications trigger this level of enhanced scrutiny). Perhaps there also is a real but unacknowledged fourth level, or what might be called “enhanced rational basis” or “rational basis with a bite.” See *supra* note 21; cf. CRUMP, *supra* note 14, at 805 (suggesting that *Cleburne* may represent an application of enhanced rational basis). In any event, all of these devices countermand arguably rational democratic choices to greater or lesser degrees, and thus they differ qualitatively from rational basis review, which by definition does not.

23. See *infra* Part III.A-B.

24. Some commentators argue that there cannot be any real distinction between “enumerated” and “unenumerated” rights. Both, they say, require interpretation. For example, Professor Dworkin points out that flag-burning is not expressly protected in the First Amendment, and hence the decisions protecting that activity really concern an “unenumerated” right, in a sense. See Ronald Dworkin, *Unenumerated Rights: Whether and How Roe Should Be Overruled*, 59 U. CHI. L. REV. 381, 386-89 (1992). Granting that both kinds of interests require interpretation, the matter is one of degree and of specificity. The flag-burning decisions (whether one agrees with them or not) are more closely tied to a specific core value expressed in the Constitution than the abortion decisions. The concept of “unenumerated” rights is used in this Article with the understanding, after Dworkin, that it is one of degree.

25. See *infra* Part II.C.

26. See, e.g., Lino A. Graglia, *Judicial Review on the Basis of “Regime Principles”: A Prescription for Government by Judges*, 26 S. TEX. L.J. 435, 436 (1985) (discussing the legitimacy of judicial review, but concluding that it would be of no great importance if it were confined to enforcing the Constitution, which “contains few limitations on self-government, and those limitations are almost never violated”).

recognized in it, how have the courts gone about the business of recognizing them?

To date, legal philosophers have paid more attention to analyzing, abstractly, *whether* the courts should recognize unenumerated rights than to cataloguing, as a practical endeavor, precisely *how* the courts have gone about doing it in the real world.²⁷ Perhaps this emphasis is understandable, because philosophers are more concerned with global questions than with matters of plumbing. But one cannot be much of a philosopher without understanding at least something about the plumbing. Professors Bickel and Ely, for example, both acknowledged that the “hardest questions” were, “[w]hich values qualify?” and “how is the court to evolve and apply them?”²⁸ If, for example, the actual answers to the “how” question have emerged as uniformly dangerous and difficult, it is not beyond the realm of possibility that this plumbing problem might persuade the philosopher to reconsider his answer to the “whether” question. Or at least, the difficulty may make the philosopher wonder to what extent we should continue to recognize fundamental rights, given the awkward contraption we so far have produced. And by the same token, if our methodology convinces us that a particular interest is so overwhelmingly important that it requires careful protection, this conclusion tends to justify the recognition of unenumerated rights. In this sense, the “whether” question and the

27. See *infra* Part II.C.

Several commentators usefully have addressed the methodology question, but few have attempted comprehensiveness. As usual, Professor Tribe's text has an extremely valuable analysis. See LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 777-80 (2d ed. 1988). This coverage is brief in proportion to the significance of the subject (although Professor Tribe also considers it elsewhere in connection with specific kinds of rights). Other commentators also have considered the issue. See JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 43-72 (1980) (analyzing use of “the judge's own values,” “natural law,” “neutral principles,” “reason,” “tradition,” “consensus,” and “predicting progress,” as potential methodologies). Many commentators have addressed particular methodologies without attempts at comprehensiveness, and many others have considered smaller aspects of particular methodologies—such as the so-called “level-of-generality” problem that arises in connection with the history-and-tradition approach. See *infra* Part III.F. For influential works about general methods of constitutional interpretation, see PHILIP BOBBITT, *CONSTITUTIONAL INTERPRETATION* (1991); PHILIP BOBBITT, *CONSTITUTIONAL FATE* (1982); Randall R. Kelso, *Styles of Constitutional Interpretation and the Four Main Approaches to Constitutional Interpretation in American Legal History*, 29 VAL. U. L. REV. 121 (1994); and *Symposium on Philip Bobbitt's Constitutional Interpretation*, 72 TEX. L. REV. 1703, 1703-967 (1994).

28. ELY, *supra* note 27, at 43 (quoting ALEXANDER BICKEL, *THE LEAST DANGEROUS BRANCH* 55 (1962)).

“how” question are inseparable,²⁹ or at least they are closely-related inquiries, even though the latter aspect of the problem has received less attention.

This Article, therefore, concentrates upon the “hard question” that previous articles have treated less frequently: given that the courts seem to accept the charge of protecting unenumerated fundamental rights, precisely *how* have the courts in the real world gone about the business of recognizing them? The Article begins not with this question, but with the more abstract question whether these rights should be protected. The second Part, in other words, examines sources and justifications for unenumerated fundamental rights, on the theory that the methods for recognizing them cannot be evaluated in a vacuum. But the third and fourth Parts contain the more important work of the Article, which is to catalogue and examine the various methodologies the Supreme Court has used in deriving unenumerated rights.

The Court has used a strikingly large number of approaches, and these varying formulas lead to dramatically different results. Unfortunately, the Court has done little to indicate which of its inconsistent methodologies is to be preferred in a given case, beyond identifying the Justices who have written and joined each opinion. Although describing and explaining each of the approaches has value, this Article attempts to go farther, by evaluating each approach and discussing the conditions under which it is useful. A final Part contains the author’s conclusions, which are that if unenumerated rights are to be recognized, a pluralistic approach combining different methodologies is most appropriate; that negative methods focusing on the harmful effects of strict scrutiny must be used in conjunction with arguments for recognizing rights; and that the effort must be coupled with judicial restraint that increases according to the vagueness of the method.

Above all, this Article is an attempt to describe how the Supreme Court *really* goes about the business of identifying unenumerated fundamental rights. An initial observation is in order: the reasoning in the cases is not rocket science. Reading a

29. I am indebted to Professor Douglas Kmiec for this insight, as well as for many insights into the way that natural rights analysis has influenced methods of identifying fundamental interests.

constitution should not be rocket science anyway; if it is that complicated, that is probably an indication that the basic law cannot be read to cover it.³⁰ In fact, the Supreme Court's methods are not scientific at all,³¹ although a few of the Justices have had pretensions in that direction.³² They are more like the methods of astrology, by which a visionary seer claims the power to trace general but durable-sounding statements back to ambiguous symbols, from which the interpreter insists they can be derived.³³ Better yet, they are like the methods of a modern alchemy, conjuring up mystical formulae to conceal the sleight of hand by which a judge transforms the base metal of personal inclinations into the gold of fundamental rights.³⁴ If that description seems unflattering,³⁵ let it also be said that cataloguing these methods is among the best arguments one can make against a regime of government by judges.

30. Professor Graglia put it this way:

One unfamiliar with the Constitution could easily get the impression from defenses of judicial review . . . that the Constitution is an esoteric and lengthy document, like, say, the Bible or the Talmud, or at least the Tax Code, in which one might by sufficient study find all manner of interesting things. [But] the Constitution is very short and straightforward . . . and apparently quite easy to understand.

Graglia, *supra* note 26, at 435-36.

31. The method is not scientific because, among other reasons, it is not replicable by experiment or independent observation. *Cf. Developments in the Law—Confronting the New Challenges of Scientific Evidence*, 108 HARV. L. REV. 1481, 1484 (1995) (contrasting approaches of law and science).

32. For example, Justice Frankfurter's enthusiasm for scientific jurisprudence has to be read to be believed. He argued that due process violations could be derived by a disinterested inquiry pursued in the spirit of science, on a balanced order of facts exactly and fairly stated, on the detached consideration of conflicting claims, . . . on a judgment not *ad hoc* and episodic but duly mindful of reconciling the needs both of continuity and of change in a progressive society.

Rochin v. California, 342 U.S. 165, 172 (1952).

33. After his elaborate hocus pocus in *Rochin*, for example, all that Justice Frankfurter could come up with to explain his conclusion was that the offending conduct "shocks the conscience." *Id.* at 171.

34. The use of hocus pocus to create the illusion of science and to conceal the actual methodology, followed by firm assertions that the result has followed from the hocus pocus, is the technique of alchemy. These manipulations characterize the judicial method in some cases. *See supra* notes 32-33.

35. Another arguable comparison is to say that techniques for reading the Constitution sometimes resemble the way a televangelist might read the Bible. One advocate of contemporary philosophy as a supplementation, for example, compares the Constitution to "scripture." *See* Thomas C. Grey, *The Constitution as Scripture*, 37 STAN. L. REV. 1 (1984). *But cf.* Graglia, *supra* note 26 (criticizing this view); Duncan Kennedy, *American Constitutionalism as Civil Religion: Notes of an Atheist*, 19 NOVA L. REV. 909 (1995) (expressing constitutional skepticism).

II. SOURCES AND JUSTIFICATIONS OF UNENUMERATED FUNDAMENTAL RIGHTS: AN INTERPRETIVE MORASS

Textually, from the beginning, there was the Ninth Amendment. Then, too, there were the Due Process and Equal Protection Clauses of the Fifth and Fourteenth Amendments, as well as other parts of the Bill of Rights. And all along, there were structural arguments, as well as arguments based upon the nature of the entire document as a plan for limited government or protection of natural rights. There were the source documents from which ideas were borrowed, the debates by the Founders, and other interpretive writings. These and other sources ultimately ripened into judicial decisions recognizing interests of individuals strong enough to overcome otherwise legitimate actions by government, even absent explicit directions in the text. These are the sources of unenumerated fundamental rights.

A. Textual Arguments

1. The Ninth Amendment

The Ninth Amendment provides that “[t]he enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.”³⁶ The double negative results in an ambiguity so intractable that Judge Bork once compared it to an “ink blot” smeared on the Constitution, concealing what is written underneath.³⁷ Does the Amendment furnish a source of unenumerated rights? Or does it remove what otherwise might be a bar to the recognition of these rights? Or, finally, does it simply express a truism, that that which is not stated is not stated?

Some Justices and commentators have argued the first of these positions—that the Ninth Amendment furnishes a source of protection—but this appears to be a minority position in ac-

36. U.S. CONST. amend. IX.

37. See *Nomination of Robert H. Bork to be Associate Justice of the Supreme Court of the United States: Testimony Before the Senate Comm. on the Judiciary*, 100th Cong., 2d Sess. 249 (1989) (statement of Judge Bork). But cf. Randy E. Barnett, *Getting Normative: The Role of Natural Rights in Constitutional Adjudication*, 12 CONST. COMMENTARY 93, 94 (1995) (critiquing Judge Bork's views); Raoul Berger, *The Ninth Amendment, as Perceived by Randy Barnett*, 88 NW. U. L. REV. 1508 (1994) (critiquing Barnett's “cornucopia” view of the Amendment).

tual adjudications by the Court. In *Roe v. Wade*,³⁸ for example, the lower courts relied on the Ninth Amendment, and although the Supreme Court majority indicated a preference for the Due Process Clause, it suggested that the Ninth might be the source of the right to abortion.³⁹ And Justice Goldberg, concurring in *Griswold v. Connecticut*,⁴⁰ relied confusingly upon the Ninth Amendment not precisely as creating unenumerated rights, but as an authorization to the judiciary to identify and protect them.⁴¹ The most serious textual difficulty with this argument is that the Amendment does not speak in positive terms. It does not purport to define rights or to point to any source of them other than "retention" by the people. Instead, by its terms, it merely removes what would otherwise be a bar to the recognition of rights established in some other way.⁴²

On the other hand, there is the view that the Ninth Amendment means little or nothing. That is, it neither creates rights nor influences the reading of other provisions that might do so; it merely states the truism that rights that otherwise can be inferred from the Constitution can be inferred from it. As Judge Bork suggested, "I do not think you the court [should] make up what might be under the ink blot if you cannot read it."⁴³ Or—as

38. 410 U.S. 113 (1973).

39. See *id.* at 122; Barnett, *supra* note 37, at 105.

40. 381 U.S. 479 (1965).

41. See *id.* at 491-93 (1965) (Goldberg, J., concurring). Justice Goldberg denied that the Amendment is an "independent" source, but he treated it as authorizing judicial recognition, and he argues that it would have "no effect" if the right of marital privacy were not recognized. See *id.* at 983-84.

42. Perhaps it can be read, as can virtually any part of the Constitution, to mean more than its narrowly interpreted terms, particularly by adding history to the text. Thus, Justice Goldberg cited Madison's explanation for the amendment as a part of his basis for interpretation. See *supra* note 41; *infra* note 46.

For the positivist view that the "retained" rights were only those elsewhere protected in the Constitution, see Thomas B. McAfee, *The Bill Of Rights, Social Contract Theory And The Rights "Retained" By The People*, 16 S. ILL. L.J. 267 (1992). But see Philip A. Hamburger, *Natural Rights And Positive Law: A Comment on Professor McAfee's Paper*, 16 S. ILL. L.J. 307 (1992) (arguing that natural rights were given up in exchange for a written Constitution, and thus, although natural rights are the basis for the Ninth Amendment, they are not to be separately protected through it); Steven J. Heyman, *Natural Rights, Positivism And The Ninth Amendment: A Response To McAfee*, 16 S. ILL. L. REV. 327 (1992) (arguing that rights retained in the Ninth Amendment were intended to be determined by independent reference to natural law); David N. Mayer, *The Natural Rights Basis Of The Ninth Amendment: A Reply To Professor McAfee*, 16 S. ILL. L. REV. 313 (1992) (supporting a "natural rights reading" of the Ninth Amendment, as an authorization to the judiciary to infer principles of higher law).

43. *Nomination of Robert H. Bork to be Associate Justice of the Supreme Court of the United States: Testimony Before the Senate Comm. on the Judiciary*, 100th Cong., 2d Sess. 249 (1989)

it is written in *Ecclesiastes*—“[T]hat which is crooked cannot be made straight, and that which is wanting cannot be numbered.”⁴⁴ But the greatest textual difficulty with such a reductionist approach is the maxim that prefers interpretations giving meaning to every provision in a document. This principle exists today, and it also existed at the time the Ninth Amendment was adopted.⁴⁵ At the same time, Judge Bork’s metaphor is a salutary reminder of the need for restraint against seeing what is not there.

An intermediate position would treat the Ninth Amendment as removing a bar to the recognition of unenumerated rights that otherwise might exist, merely because they are unenumerated. Thus, the Ninth Amendment removes the maxim, “*expressio unius exclusio alterius*,” by which the expression of one principle excludes all others that are not expressed.⁴⁶ One example of this exclusionary reasoning is *U.S. Term Limits, Inc. v. Thornton*,⁴⁷ in which the Court held that the specification in the Constitution of three qualifications for candidates for Congress—age, citizenship and residence—“fixed” the list of possible requirements and prohibited States from adding others, such as maximum years of service. The Ninth Amendment, if used as a rule against *exclusio alterius*, would prevent a similar confinement of the Bill of Rights. This interpretation would afford meaning to the Ninth Amendment as a rule of construc-

(statement of Judge Bork).

44. *Ecclesiastes* 1:15 (King James).

45. See, e.g., *Griswold v. Connecticut*, 381 U.S. 479, 490-91 (1965) (Goldberg, J., concurring) (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 174 (1803) (“It cannot be presumed that any clause in the Constitution is intended to be without effect.”)).

46. Madison explained the concern that a Bill of Rights, “by enumerating particular exceptions to the grant of power, . . . would disparage those rights which were not placed in the enumeration,” and he argued that his draft of the Ninth Amendment had “guarded against” this inference. 1 ANNALS OF CONG. 439 (Gales & Seaton eds., 1834), cited in *Griswold*, 381 U.S. at 491-93 (Goldberg, J., concurring); see also Philip A. Hamburger, *Natural Rights, Natural Law and American Constitutions*, 102 YALE L.J. 907 (1993) (demonstrating that the drafters of the Constitution saw the positive law they had created as consistent with the use of natural law); Philip A. Hamburger, *Trivial Rights*, 70 NOTRE DAME L. REV. 1 (1994) (expanding upon the argument of Theodore Sedgwick against enumeration of every “trifle” in a Bill of Rights and demonstrating the consensus that rights were innumerable and included countless natural rights). Thus, it can be argued that the Ninth Amendment, even as a rule of construction, is one of the textual anchors to the natural law tradition, which the Founders knew they could neither fully capture in writing nor analytically escape.

47. 115 S. Ct. 1842 (1995). For a description of this case, see Todd Cornelius Zubler, Recent Development, *Federal Preclusion of State-Imposed Congressional Term Limits: U.S. Term Limits, Inc. v. Thornton*, 19 HARV. J.L. & PUB. POL’Y 174 (1995).

tion:⁴⁸ it is not itself a source of rights, but other potential sources are not to be ignored merely because they are inexplicit. This, it is submitted, is textually the most satisfying interpretation of the Ninth Amendment, because it both gives the Amendment meaning and honors its language.

But perhaps this approach to the Ninth Amendment as a rule of construction begs the question. In examining other possible sources, and applying the Ninth Amendment as a rule of construction, just how enthusiastic should the reader be in inferring these elusive unenumerated rights? One approach might be to recognize only those rights that arise by necessary implication.⁴⁹ At its extreme, this argument would approach the position that the Ninth Amendment is a truism, consigning it, in contravention of the rule against meaninglessness, to oblivion. Alternatively, the rule of construction might be stated as preferring an interpretation of ambiguous language that gives rise to the recognition of new rights, or as encouraging such a reading. At the extreme, this argument would make the rule of construction a more significant source than the source itself.⁵⁰ As the reader made exuberant by the Ninth Amendment then hunts for restrictions on democracy hidden like Easter eggs in the silent crevices of the Constitution, this argument approaches that of interpreting the Ninth Amendment as a source in its own right.⁵¹

There is no sound way out of this difficulty except for each individual member of the judiciary to recognize, first, that some measure of implication is necessary because "[w]e must never forget that it is a constitution that we are expounding,"⁵² while

48. This is Professor Tribe's formulation. See TRIBE, *supra* note 27, at 774, 776.

49. For arguments in favor of reading the Amendment narrowly, see Raoul Berger, *The Ninth Amendment*, 66 CORNELL L. REV. 1 (1980); Henry Monaghan, *Our Perfect Constitution*, 56 N.Y.U. L. REV. 353, 366-67 (1981). Professor Monaghan argues that as a "repositor[y] for an external schedule of rights," the "list" of those affected by the Ninth Amendment was "closed as of 1791 or 1868." Monaghan, *supra*, at 367, 395.

50. For arguments in favor of reading the Ninth Amendment broadly, see CHARLES BLACK, *DECISION ACCORDING TO LAW 44-68* (1981); ELY, *supra* note 27, at 38; Barnett, *supra* note 37, at 105.

51. Thus, Justice Goldberg's concurring opinion in *Griswold* used the Ninth Amendment to conclude that "the right of privacy is a fundamental personal right emanating 'from the totality of the constitutional scheme under which we live.'" *Griswold v. Connecticut*, 381 U.S. 479, 494 (1965) (Goldberg, J., concurring). If the rule of construction is not to be confined to use in interpreting other language but instead can be invoked to broaden the "totality" of the "constitutional scheme," then there are few policy choices denied the Justices.

52. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 407 (1819).

simultaneously recognizing the importance of judicial restraint that is inherent in the Article III grant of judicial power.⁵³ The difficulty, however, is that in actual cases the Court is required to say precisely where the needle falls on the scale, and balancing principles of interpretation against judicial restraint provides only the most meager sort of beginning. To put the matter more concretely, it is difficult to find principled guidelines for the breadth of the Ninth Amendment as a rule of construction when the Court is faced, for example, with the right-to-die claim of a suffering yet sentient person who is terminally ill. This, as we shall see later, is only one of the problems that have led the Court to generate multiple and inconsistent methodologies for identifying fundamental rights.

2. *The Due Process and Equal Protection Clauses*

The Fourteenth Amendment provides, "[N]or shall any State deprive any person of life, liberty, or property, without due process of law"⁵⁴ The Fifth Amendment imposes a similar restraint upon the federal government.⁵⁵ These tiny Due Process Clauses probably are the most significant sources of unenumerated fundamental rights today.⁵⁶

The text of the Due Process Clause itself supports an approach that ranks individual interests from the most preferred to the least. Thus, the phrase "due process" readily translates

53. Article III extends only "judicial" power, as opposed to legislative or executive power, and only to "Cases" and "Controversies." See U.S. CONST. art. III, § 2, cl. 1 ("The judicial Power shall extend to [certain] Cases [and] . . . to [certain] Controversies . . ."). The judiciary is so limited as to make it the "least dangerous" branch to the political rights of the people, "because it will be least in a capacity to annoy or injure them." THE FEDERALIST NO. 78, at 490 (Alexander Hamilton) (B. Wright ed., 1961). Or so the Founders intended (at least some of them). See Martin H. Redish, *Federal Judicial Independence: Constitutional and Political Perspectives*, 46 MERCER L. REV. 697, 706-08 (1995).

54. U.S. CONST. amend. XIV, § 1.

55. See U.S. CONST. amend. V ("No person shall . . . be deprived of life, liberty, or property, without due process of law . . .").

56. Other provisions, too, have furnished source material for unenumerated fundamental rights. Among these are the First Amendment and the Fourth and Fifth Amendments, which the Court has cited in various cases as sources of an unenumerated right of privacy. See *infra* note 448 and accompanying text. The Eighth Amendment's prohibition of cruel and unusual punishments is another example. See *infra* note 157 and accompanying text.

For an excellent development of textualist theory, see Douglas Laycock, *Individual Liberty and Constitutional Architecture: The Founders' Prompt Correction of Their Own Mistake*, 16 HARV. J.L. & PUB. POL'Y 75 (1993); Douglas Laycock, *Taking Constitutions Seriously: A Theory of Judicial Review*, 59 TEX. L. REV. 343 (1981); George H. Taylor, *Structural Textualism*, 75 B.U. L. REV. 321 (1995).

itself into "that process which is due," but to identify the level of process that is "due," a court must of necessity evaluate the importance or strength of the interests to which the process will be applied.⁵⁷ Greater care should attend the adjudication of a death penalty case than of a schoolteacher's decision to send a pupil to detention hall. If a court were to approve procedures that produced equal probabilities of mistaken sanctions in these two cases, it would contradict the very notion of "due" process. As Justice Harlan explained, the text of the Due Process Clause "is a rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints, . . . and which also recognizes, . . . that certain interests require particularly careful scrutiny of the state needs asserted to justify their abridgement."⁵⁸ In other words, the Court did not merely invent, out of the whole cloth, either rational basis review for run-of-the-mill liberty interests or enhanced protection for more substantial ones; these concepts, or their equivalents, are readily inferable from the text.

But there are arguments, too, against reading the Due Process Clause as a protection of unspecified fundamental rights. First, the Clause can be interpreted as purely procedural, or as protecting the process for defeasance rather than the rights themselves.⁵⁹ Second, historic intentionalism provides an arguable basis for confining the Fourteenth Amendment to issues of racial equality and closely allied categorizations.⁶⁰ Furthermore, an intentionalist approach might justify a narrow reading by tracing the Due Process Clause to its origins in source documents of more specific meaning, such as Magna Carta.⁶¹

57. *Cf. Mathews v. Eldridge*, 424 U.S. 319 (1976) (establishing a test for procedural due process that considers the strength of the private interest as compared to opposing governmental interests, together with the value of procedural safeguards).

58. *Poe v. Ullman*, 367 U.S. 497, 543 (1961) (Harlan, J., dissenting); see *TRIBE*, *supra* note 27, at 774.

59. For example, Justice White argued that "the substantive content of the Clause is suggested neither by its language nor by preconstitutional history." *Moore v. City of E. Cleveland*, 431 U.S. 494, 543 (1977) (White, J., dissenting).

60. See, e.g., *The Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1873) (confining the Due Process Clause narrowly).

61. The Clause derives from the requirement that in proceedings against a free man, the King must follow "the law of the land," a concept of narrower meaning than modern conceptions of due process. *MAGNA CARTA* ch. 39 (1215); see *Albright v. Oliver*, 114 S. Ct. 807, 812 (1994) (recognizing that due process is derived from the language in Magna Carta). For other discussion of the influence of Magna Carta, see *Hurtado v. California*, 110 U.S. 516, 542 (1884); John Paul Stevens, *The Bill of Rights: A Century of*

The argument that the Clause is purely procedural has been stated often, but the Court has rejected it soundly.⁶² Again, the text can be used to support the Court's logic.⁶³ By this pure-procedure approach, the government could deprive an individual of a right that is soundly established, for example, the right to vote, on a basis that is admittedly arbitrary, such as that the affected individual was born in an odd-numbered year. It then could sustain the denial if it provided fair conditions for determining these admittedly arbitrary conditions—that is, by providing an accurate process for determining whether the affected individual was born in 1943 or 1967. The problem is, first, that this process-oriented reading of the Clause still would require an evaluation of the strength of the individual's interest, and thus it still would require the Court to generate a list of preferred interests. In other words, even if the Clause were confined to procedural concerns, the Court would be forced to recognize a list of unenumerated fundamental rights,⁶⁴ because that is the only way it can determine that the process is commensurate with the interest at stake. Furthermore, at its extreme, the creation of a watertight substance-procedure distinction becomes nonsensical, because an outrageous definition of the substantive right becomes indistinguishable in its effects from an arbitrary procedure. The fallout from *Erie Railroad v. Tompkins*,⁶⁵ if nothing else, demonstrates the artificiality of any formal barrier between the two concepts.⁶⁶ And finally, an unduly narrow reading of the Due Process Clause arguably denies to the Ninth Amendment its proper role as a rule of construction.⁶⁷ For these reasons, it is perhaps not surprising that the Supreme Court consistently has understood the Due Process Clause to contain a substantive

Progress, 59 U. CHI. L. REV. 13, 14, 19 (1992).

62. "Although a literal reading of the Clause might suggest that it governs only the procedures by which a State may deprive persons of liberty, for at least 105 years, at least since *Mugler v. Kansas*, 123 U.S. 623, 660-61 (1887), the clause has been understood to contain a substantive component as well, one 'barring certain government actions regardless of the fairness of the procedures used to implement them. . . .'" *Planned Parenthood v. Casey*, 505 U.S. 833, 846 (1992).

63. See generally TRIBE, *supra* note 27, at 297-406 (exploring arguments for preferred rights).

64. See *supra* note 57 and accompanying text.

65. 304 U.S. 64 (1938).

66. See generally David Crump, *The Twilight Zone of the Erie Doctrine: Is There Really a Different Choice of Equitable Remedies in the "Court a Block Away"?*, 1991 WIS. L. REV. 1233 (analyzing various tests for distinguishing substance and procedure).

67. See *supra* Part II.A.1.

component "barring certain government actions regardless of the fairness of the procedures used to implement them."⁶⁸

Arguments based upon historic intentionalism sometimes have succeeded in confining the Due Process Clause narrowly.⁶⁹ These arguments, however, depend upon reading an unrealistically uniform state of mind into the votes of those who secured the adoption of the Fourteenth Amendment,⁷⁰ and more importantly, they ignore the open-textured language of the Clause.⁷¹ Thus, arguments that would limit the Clause to race-related rights are vulnerable to the criticism that the Clause expresses no such restriction but instead uses language of absolute generality: it literally protects every "liberty" and every interest in "property." Likewise, arguments that would confine the Clause to a closed set of interests based upon historical antecedents such as Magna Carta, with its assurance against defeasance except under "the law of the land," must reckon with the different language of the Fourteenth Amendment, which instead guarantees "due process." Moreover, both of these kinds of arguments can be attacked by considering the National Citizenship⁷² and Privileges and Immunities Clauses⁷³ of the Fourteenth Amendment, which, even though the courts virtually have reduced them to a dead letter, demonstrate the generality of the intentions underlying the Fourteenth Amendment.⁷⁴

The Equal Protection Clause also implies that the courts must designate categories of rights entitled to enhanced protection. By its terms, the Clause is absolute; but if the judiciary were to insist upon perfect equality in every application of economic or

68. See *Planned Parenthood v. Casey*, 505 U.S. 833, 846 (1992) (quoting *Daniels v. Williams*, 474 U.S. 327, 331 (1986)).

69. See *supra* note 60 and accompanying text.

70. Cf. Trisha Olson, *The Natural Law Foundation of the Privileges and Immunities Clause of the Fourteenth Amendment*, 48 ARK. L. REV. 347 (1995) (concluding that the Equal Protection and Due Process Clauses were of lesser importance and explicating the natural law content of the Privileges and Immunities Clause); Eugene Gressman, *The Unhappy History of Civil Rights Legislation*, 50 MICH. L. REV. 1323 (1952) (concluding that the Privileges and Immunities Clause was the intended core of the Fourteenth Amendment, that it was intended to cover a broad array of fundamental rights, and that the Due Process and Equal Protection Clauses were of secondary importance).

71. Cf. CRUMP, *supra* note 14, at 84.

72. See U.S. CONST. amend. XIV, § 1 ("All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside.").

73. See U.S. CONST. amend. XIV, § 1 ("No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States . . .").

74. See *supra* note 70.

social legislation, it would destroy the legislative function, because perfect precision is unattainable in legislation.⁷⁵ This difficulty suggests that the Clause must be read together with an implied principle of deference to the legislature, such as by a presumption of constitutionality. But if that deference were extended to interests within the hard core of the Amendment's protection—if it were to preserve a law requiring diminished procedural guarantees for property claims of racial minorities, for example—the presumption would not square with the purpose of the Amendment.⁷⁶ Thus the Equal Protection Clause implies that deviations from precise equality are to be restricted according to the strength of the underlying interests at stake, and it, too, implies that the Court must generate a ranking of interests from least to most preferred.

Again, these arguments are a conundrum. They do not tell what level of recognition of fundamental rights is minimally sufficient, nor do they provide any stopping point in that endeavor. Again, the solution lies in recognizing the duty of constitutional interpretation while confining it by the principle of judicial restraint.

3. *Clauses Considered Together*

In addition to arguments based upon particular provisions (or particular provisions interpreted according to other provisions that supply rules of construction), there are arguments that can be based upon combinations of provisions. A court may observe the parallelism of multiple parts and infer either separation or common purpose.⁷⁷ It may contrast different provisions.⁷⁸ Or it may observe that a given interpretation of one provision is the only reasonable way to make another provision make sense.⁷⁹

75. *Cf.* *FCC v. Beach Communications, Inc.*, 113 S. Ct. 2096, 2101 (1993) (justifying a deferential conception of the rational basis standard on the ground, among others, that it is necessary to the legislative branch's independence and ability to function).

76. *See supra* note 60 and accompanying text.

77. Thus, for example, the doctrine of separation of powers is not express; it can be inferred textually from the parallel structures of the first three Articles. *See CRUMP, supra* note 14, at lxiv.

78. *See infra* note 81 and accompanying text; *see also* *Bowsher v. Synar*, 478 U.S. 714 (1986) (inferring the doctrine from delegation of three defined categories of powers); *INS v. Chadha*, 462 U.S. 919 (1983) (same).

79. Thus, the inference of a right to vote, guaranteed through the Fourteenth Amendment, can be justified by the argument that, without it, the system of representative government set up by Article I would not make sense. *See, e.g., Kramer v. Union Free*

Alternatively, some freewheeling interpreters would draw global inferences from the nature of a constitution even apart from its precise text, or from the fact of its adoption by the assent of those exercising the franchise.⁸⁰

Thus, for example, one might infer the preferred status of the freedom of speech not only by considering the ostensibly absolute terms of the First Amendment, but also by contrasting them with less absolute or qualified protection such as that of the Fourth Amendment, which protects only against “unreasonable” searches and seizures.⁸¹ Arguably, First Amendment interests gain strength by this comparison. In addition to other textualist and structural arguments, perhaps the comparison strengthens the inference of a preferred status for speech, or its categorization as a fundamental right.

An even more abundant smorgasbord of putative rights can be found if one combines ostensibly unrelated provisions, infers a “purpose” from the comparison, and then enforces as positive law the purpose thus divined. This is the methodology underlying the famous metaphor of the penumbra in *Griswold v. Connecticut*.⁸² It is a treacherous methodology. It is one thing to derive the purpose of an enactment as an aid to the interpretation of that enactment; it is quite another to enforce such a purpose or intent as though it had itself been enacted.⁸³ Not surprisingly, therefore, the Supreme Court has declined to follow the *Griswold* methodology in subsequent cases, and it pointedly used the Due Process Clause, instead, as a preferred route to its holding in *Roe v. Wade*.⁸⁴ Nevertheless, there may be cases in which such penumbral messages speak clearly, and in such cases the argument for heeding them may be stronger than it was in *Griswold*. The doctrine of separation of powers, for example, is not express in the United States Constitution as it is in some other constitutions, but the parallelism of the first three Articles is so

Sch. Dist., 395 U.S. 621 (1969); *infra* Part III.B.

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

81. Compare U.S. CONST. amend. I (“Congress shall make no law . . . abridging the freedom of speech . . .”) with U.S. CONST. amend. IV (“The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . .”). For an analysis of this comparison, see CRUMP, *supra* note 14, at 814 (discussing preferred status of speech and ostensible absoluteness of protection).

82. 381 U.S. 479 (1965).

83. See *infra* Part III.B (critiquing *Griswold*).

84. See *Roe v. Wade*, 410 U.S. 113, 153 (1973).

striking that the courts have used it to support inference of the doctrine.⁸⁵

Other structural arguments include the inference of a right as protected by one provision because it is a prerequisite to the proper operation of other provisions. Thus, for example, the Constitution frequently mentions votes and voters as well as elective offices, but it contains no explicit protection for the right to vote itself. An argument can be founded upon the reasoning that the unenumerated interest in voting must be given a high order of protection if the provisions governing voters, elections, and offices are to have the meaning that the text appears to reserve for them, and therefore, that it should be recognized as a fundamental right.⁸⁶

4. *Holistic Arguments (as Opposed to Clause-by-Clause Interpretation): Use of the Broad Concept of a Constitution to Infer Natural Rights from the Document as a Whole*

Finally, there are arguments that infer rights, particularly natural rights, from the nature of a constitution, quite apart from its textual provisions or from the acts underlying its adoption. Perhaps the most famous such argument is that of Justice Chase in *Calder v. Bull*,⁸⁷ which relies upon the preamble, the grant of legislative power, and the nature of the Constitution as a "social compact," to infer that "[a]n ACT of the Legislature (for I cannot call it a law) contrary to the *great first principles* of the *social compact*, cannot be considered a *rightful exercise* of legislative authority."⁸⁸ In opposition, Justice Iredell emphasized the Court's duty to enforce the actual provisions of the Constitution rather than striking down legislation "merely because it is, in their judgment, contrary to the principles of natural justice. The ideas of natural justice are regulated by no fixed standard . . ."⁸⁹

Granting the persuasiveness of Justice Iredell, perhaps Justice Chase nevertheless was the better prophet. As Professors Nowak

85. See *supra* note 77 and accompanying text.

86. See *supra* note 79.

87. 3 U.S. (3 Dall.) 386 (1798).

88. *Id.* at 388.

89. *Id.* at 399 (Iredell, J., dissenting). For a valuable discussion of *Calder*, concluding that Justices Chase and Iredell probably were not in real disagreement, that Justice Chase restricted judicial review to "very clear case[s]," and that Justice Iredell accepted natural law adjudication, see William R. Castro, *James Iredell and the American Origins of Judicial Review*, 27 CONN. L. REV. 329, 351-57 (1995).

and Rotunda put it, "In form, the Supreme Court has adopted the views of Justice Iredell In substance, however, the beliefs of Justice Chase have prevailed as the Court continually has expanded its basis for reviewing the acts of other branches of government."⁹⁰ To put the matter another way, although the inference of natural rights merely from the existence of the Constitution may not persuade the Court today, open-textured provisions such as those of the Fourteenth Amendment have allowed the Court to supplement the text with rights that powerfully resemble the natural rights that Justice Chase advocated and Justice Iredell denied.

On the one hand, there certainly is support for the notion that natural law was widely respected among the Founders, and one can infer that some of them contemplated its use in interpreting the Constitution as a whole.⁹¹ On the other hand, use of natural law in a holistic manner—in other words, inferring from the Constitution "as a whole" that a court should impose natural law philosophies unrelated to any identified clause—necessarily departs from any moorings in the text and history.⁹² To attempt

90. JOHN E. NOWAK & RONALD D. ROTUNDA, *CONSTITUTIONAL LAW* 352 (4th ed. 1991).

91. See Thomas C. Grey & Michael Mello, *Adhering to Our Views: Justices Brennan and Marshall and the Relentless Dissent from Death as a Punishment*, 22 FLA. ST. U. L. REV. 591, 660-65 (1995); Thomas C. Grey, *Do We Have an Unwritten Constitution?*, 27 STAN. L. REV. 703, 715-16 (1975); see also Edward S. Corwin, *The Natural Law and Constitutional Law*, 3 NAT. L. INST. PROCEEDINGS 47, 54-57 (1950) (persuasively documenting statements of at least some Founders favoring use of natural law in interpretation).

Perhaps the most readable response to Professor Grey is contained in Lino A. Graglia, *Do We Have an Unwritten Constitution?—The Privileges or Immunities Clause of the Fourteenth Amendment*, 12 HARV. J.L. & PUB. POL'Y 83 (1989). Professor Graglia tells us the question "is not a difficult one. The answer is 'no,' we have a written one." *Id.* at 88; see Lino A. Graglia, *Do Judges Have a Policy-Making Role in the American System of Government?*, 17 HARV. J.L. & PUB. POL'Y 119 (1994); Lino A. Graglia, *How Should Courts Interpret the Bill of Rights?*, 15 HARV. J.L. & PUB. POL'Y 149 (1992); Lino A. Graglia, "Interpreting" the Constitution: *Posner on Bork*, 44 STAN. L. REV. 1019 (1992).

92. One of the great divisions of constitutional scholars is between those that insist on what Judge Posner calls "clause-by-clause" interpretation and those who prefer what he calls "holistic" theories. Richard A. Posner, *Legal Reasoning From the Top Down and From the Bottom Up: The Question of Unenumerated Constitutional Rights*, 59 U. CHI. L. REV. 433, 439-40 (1992). He gives Professor Dworkin as an example of the holistic type, seeking consistency across clauses, viewing the Constitution as an integrated structure of moral and political principles. See *id.* at 439. This approach is ambitious; it also is vague and idiosyncratic. Advocates of clause-by-clause interpretation include Judge Bork—and, apparently, Judge Posner himself. Asking about intentions underlying, for example, the Equal Protection Clause is a difficult inquiry, but it concerns one clause; to ask about intent embodied in the whole "sheaf of documents" that comprises the Constitution is "to enter cloudcuckooland." *Id.* at 440. The point is not that holistic interpretation is wrong, but that it cuts free from the Framers' intent. See *id.* Dworkin responds by rejecting the distinction. See Dworkin, *supra* note 24, at 390-91. For an argument advocating replacement

to reconcile the holistic approach with the Framers' thinking—given the mass of differing intentions that underlie the whole sheaf of documents that make up the Constitution and the differing times at which they were adopted—is, in Judge Posner's phrase, "to enter clouduckooland."⁹³

And not only does such a holistic approach depart from the Framers' intentions; it arguably departs from any possible limits. "Contemporary philosophical systems based on feminism, wealth maximization, neutral conversation, liberal equality, or libertarianism are natural law philosophies."⁹⁴ Treating "the Constitution as a whole" as a charter for selecting judge-preferred principles from these disparate sources is to make it a blank page. The document is not really a source for a holistic philosopher; instead, it serves the function that the Muses did for the creative minds of classical poets. In fact, it would seem to matter little to the holistic creator whether the text and history were those of the Constitution of the United States, or of the old Soviet Union, or of the Daughters of the Confederacy, or of the United Auto Workers.⁹⁵ Notions of "equality" and "fairness," for example, undoubtedly can be teased out of all of those constitutions textually, and if one ignores the text, one can effortlessly mold those notions (and thus the law) to whatever shape one pleases. The trouble with this view, in other words, is that the Constitution does have positive terms—and a holistic philosophy ignores them.

Thus, Judge Posner argues persuasively that interpretation is

of bipolar approaches with fuzzy logic, see Edward S. Adams & Torben Spaak, *Fuzzifying the Natural Law-Legal Positivist Debate*, 43 BUFF. L. REV. 85 (1995).

93. Posner, *supra* note 92, at 439-40; see also Michael S. Moore, *Do We Have an Unwritten Constitution?*, 63 S. CAL. L. REV. 107, 114-17 (1989) (describing at least four plausible definitions of the written document, all arguably relevant to constitutional theory).

94. Phillip E. Johnson, *Some Thoughts About Natural Law*, 75 CAL. L. REV. 217, 218 (1987). For discussion of modern theories of natural law, see RONALD M. DWORIN, *TAKING RIGHTS SERIOUSLY* (1978); JOHN RAWLS, *A THEORY OF JUSTICE* (1971). For a historical review, see ALESSANDRO PASSERIN D'ENTRÈVES, *NATURAL LAW: AN HISTORICAL SURVEY* (1965).

95. Typically, such constitutions refer to broad notions of equality, democratic governance, and other springboards for a natural rights philosophy. But actually, if it is the document as a whole that counts rather than any clause in it, the holistic philosopher does not need any textual reference at all to infer these themes in the desired shape; it is the mere existence of the document as a social compact that is the Muse. In fact, it is entirely possible for a scholar with pro-Soviet views to criticize implementation of the United States Constitution from a vantage point that glorifies Soviet interpretations of similar values. See Vasily A. Vlasihin, *Political Rights and Freedoms in the Context of American Constitutionalism: A View of a Concerned Soviet Scholar*, 84 NW. U. L. REV. 257 (1989).

better anchored if it proceeds clause-by-clause.⁹⁶ This view presumably would allow combinations of clauses, and even structural and policy arguments—but not holistic denial of the text. Even a clause-by-clause view allows for (and indeed requires) supplementary interpretation, and in the context of the broad open spaces of, for example, the Due Process Clause, it may allow some readers to cook up a feast of choices rivaling the holistic approach in resorting to supplementation.⁹⁷ But at least it has positive parameters: “due” process imports into the interpretation the important notion that the State is not bound to supply that which is *not* due, and thus it limits the reader.⁹⁸ It also requires consideration of the interests of the body politic and the balancing of those interests against the claims of the individual. This is not much of a bulwark for judicial restraint, but it is something, and the holistic approach would discard it.

B. *Originalist Intentionalism*

The preceding arguments all can be derived from the constitutional text. One method of interpretation is to derive them from the text in the absence of all other sources, thus excluding the debates of the Founders, the proceedings in the States upon ratification, and the historical documents that influenced them. This approach—which might be called “textual nonoriginalism,”⁹⁹ or “strict” textualism—would grant primacy to the text as

96. See Posner, *supra* note 92, at 439-40. Professor Dworkin replies by dismissing altogether the distinction between clause-by-clause and holistic methods on the ground that one cannot read a clause without a holistic view. See Dworkin, *supra* note 24, at 390-91. Here, Dworkin’s deconstruction is a little too relentless; even granting that every reader approaches every clause with an existing philosophy, there still is merit in insisting that the reader direct attention on a clause-by-clause basis—and for that matter, in insisting upon an effort to overcome bits of philosophy that conflict with the clause (that is, prejudices). This view would see an attempt to achieve thematic consistency across clauses (which Dworkin evidently regards as a virtue) as, instead, a vice, at least to the extent that it denigrates real differences in text and history from clause to clause.

97. Thus, Judge Posner frankly acknowledges,

In areas to which the constitutional text and history and a long decisional tradition cannot fairly be made to speak, such as that of sexual rights, we must either renounce a judicial role or suffer the judges to fall back on their personal values enlightened so far as they may be by careful study of the pertinent social phenomena.

Posner, *supra* note 92, at 450; see also Eugene Gressman, *Bicentennializing Freedom of Expression*, 20 SETON HALL L. REV. 378, 389-97 (1990) (interpreting the First Amendment as incorporating natural law components and natural rights as including the “inatre sanctity of individual autonomy”).

98. See *supra* Part II.A.2.

99. Cf. Michael J. Perry, *The Legitimacy of Particular Conceptions of Constitutional Interpre-*

though there were a kind of parole evidence rule cutting off differences, merging disagreements into the compromises embodied in the text, and consigning all questions of unexpressed intent to meaninglessness.¹⁰⁰ Professor Sunstein explains it by saying, "The words were enacted; the original understanding was not. . . . [I]ntentions . . . are therefore not binding."¹⁰¹ For some provisions that transparently embody compromises between bipolar positions, or that adopt language distinct from source documents or historical purposes, perhaps such a rigorous textualism can be justified; in any event, this approach has been advocated by some commentators and Supreme Court justices.¹⁰² This view would recognize intent only through the text, and it would allow contemporary interpretation by Justices functioning as "twentieth century Americans."¹⁰³

1. *The Basic Concept of Originalism*

An opposing view, however, would advance a jurisprudence of original intent. The strongest proponents of this view would search the knowledge, perceptions, and purposes of the Founders as a basis for deciding every constitutional issue.¹⁰⁴ The text is one indicator of the historical intent, but in this view it is only one such indication; the debates and source documents also are valid indicators. Advocates of this approach forcefully argue that

tation, 77 VA. L. REV. 669, 686-94 (1991) (adopting this term, critiquing its adherents' conclusions, and concluding that originalism is the "only legitimate approach"—but meaning, by that term, a "sophisticated" originalism).

100. Cf. Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204, 214-24 (1980) (critiquing the method that takes the language as the primary or exclusive source). In a different context, Professor Pierce uses the term "hypertextualism" to describe this method. See Richard J. Pierce, *The Supreme Court's New Hypertextualism: An Invitation to Cacophony and Incoherence in the Administrative State*, 95 COLUM. L. REV. 749, 752-53 (1995).

101. CASS R. SUNSTEIN, *AFTER THE RIGHTS REVOLUTION* 129 (1990). *But cf.* Perry, *supra* note 99, at 692 (critiquing this view on the ground that the original understanding is one legitimately authoritative understanding, and nonoriginalist textualism does not explain why other understandings should be preferred to it).

102. Cf. Justice William Brennan, *The Constitution of the United States: Contemporary Ratification*, 27 S. TEX. L. REV. 433, 438 (1986) (arguing that "[c]urrent Justices read the Constitution in the only way we can: as twentieth-century Americans. . . . [T]he ultimate question must be: What do the words of the text mean in our time?"); Frederick Schauer, *Easy Cases*, 58 S. CAL. L. REV. 399, 414-23 (1985) (advocating the view that sometimes the language may make the case "easy").

103. See *supra* note 102.

104. See, e.g., RAOUL BERGER, *GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT* 363-64, 407-08, 417-18 (1977); Robert H. Bork, *Styles in Constitutional Theory*, 26 S. TEX. L.J. 383 (1985); Edwin Meese, III, *The Supreme Court of the United States: Bulwark of a Limited Constitution*, 27 S. TEX. L. REV. 455 (1985).

other methods, including contemporary reading of the text and natural rights reasoning, elevate the idiosyncratic preferences of unelected judges to the status of fundamental law.¹⁰⁵ Attorney General Edwin Meese, for example, argues that “far too many of the Court’s opinions [are] . . . mere policy choices rather than articulations of constitutional principle.”¹⁰⁶ Originalism, on the other hand, arguably avoids the taint of ideological predilection and avoids a dictatorship of the judiciary, and thus it “reflects a deeply rooted commitment to the idea of democracy.”¹⁰⁷

Detractors argue, however, that originalism is “anachronistic.”¹⁰⁸ Instead, they maintain, “the genius of the Constitution rests not in any static meaning it might have had in a world that is dead and gone, but in the adaptability of its great principles to cope with current problems and current needs.”¹⁰⁹ Originalists respond by arguing that original intentions can be adapted to current problems by inferring how the purposes of the Founders best would apply to modern conditions. Thus, General Meese responded that “a jurisprudence of original intention is not confined to the circumstances from which those original principles sprang. Rather, those principles can be applied to new circumstances, circumstances often unforeseen by the founders themselves.”¹¹⁰ Here, however, the detractors argue that the effort to discern intentions and then apply them to unforeseen conditions is so fruitless, because of heavy layers of ambiguity, that it merely furnishes an excuse for imposing precisely the kinds of policy choices that originalists claim to avoid. “It is arrogant to pretend that from our vantage we can gauge accurately the intent of the Framers on application of principle to specific, contemporary questions,” says Justice Brennan. “Typically, all that can be gleaned is that the framers themselves did not agree about the application or the meaning of particular constitutional provisions and hid their differences in cloaks of generality.”¹¹¹ Furthermore, the opponents argue that originalists’ hoped-for depoliticization of the judiciary is itself a political

105. *See supra* note 104.

106. Meese, *supra* note 104, at 464.

107. *Id.* at 465.

108. *See* Brennan, *supra* note 102, at 437.

109. *Id.* at 438.

110. Attorney General Edwin Meese, III, Lecture at the University of Dallas (February 27, 1986), *quoted in* CRUMP, *supra* note 14, at 74.

111. Brennan, *supra* note 102, at 435.

choice, expressing "antipathy to claims of the minority to rights against the majority."¹¹²

It even has been asserted that the original intention was that the original intention would not be authoritative, or at least that it would not be absolutely binding. Thus, Professor Powell argues that early references to "intentions" underlying the Constitution referred to purposes "evidenced in the Constitution's language and discerned through structural methods of interpretation; it did not refer to the personal intentions of the framers or of anyone else."¹¹³ But this conclusion is not universally recognized as definitive, either. Professor Berger argues, "We are told that the framers intended to leave it 'to succeeding generations [meaning judges] . . . to rewrite the "living" Constitution anew,' an argument opposed to historical fact."¹¹⁴ He quotes Jefferson: "Our peculiar security is in the possession of a written Constitution. Let us not make it a blank paper by construction."¹¹⁵ Without respect for the limits on judicial power provided by originalism, says Professor Berger, "The entire democratic structure is undermined and the way is paved from Weimar to Hitler."¹¹⁶

Then, too, some have argued against originalism on the ground that it gives control to the dead hand from the grave. Dean Ely argues that the most frequently litigated constitutional provisions, to the extent that they ever represented the "voice of the people," represent the voice of "people who have been dead for a century or two."¹¹⁷ He also quotes Jefferson, who wrote to Madison " 'that the earth belongs in usufruct to the living;' that the dead have neither powers nor rights over it."¹¹⁸ This argument is buttressed by the consideration that up to eighty percent

112. *Id.* at 436.

113. H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885, 948 (1985). *But cf.* Perry, *supra* note 99, at 692-94 (arguing that originalism can be justified even if its use was not part of original intent); Charles A. Lofgren, *The Original Understanding of Original Intent?*, 5 CONST. COMMENTARY 77 (1988) (giving a critical analysis of Powell's work).

114. BERGER, *supra* note 104, at 363-64; *see also* Philip A. Hamburger, *The Constitution's Accommodation of Social Change*, 88 MICH. L. REV. 239 (1989) (concluding after careful analysis that neither Federalists nor anti-Federalists desired a living or changing Constitution, that they instead sought permanence, and that they took pains to avoid coverage of issues that they considered likely to need change).

115. BERGER, *supra* note 104, at 407-08.

116. *Id.* at 410.

117. JOHN HART ELY, *DEMOCRACY AND DISTRUST* 30 (1980).

118. *Id.*

of the potential electorate was excluded from voting on the adoption of the Constitution, including women, members of racial minorities, and persons who did not own property.¹¹⁹ Perhaps this consideration destroys the argument for originalism, the detractors imply. But originalists might retort: if so, does it not also destroy the entire Constitution?

The juxtaposition of these arguments soon leads to impasse. Perhaps a synthesis of originalism and textualism is appropriate instead.¹²⁰ Perhaps, in other words, it is possible to use originalism for the purpose of construing ambiguous language when the historical intention is relatively clear and when it can accurately be applied to present-day conditions. This theory supplies no criteria, however, by which to determine that a provision is unambiguous;¹²¹ for example, Professor Berger would apply originalist limitations to the Due Process and Equal Protection Clauses.¹²² A related approach might limit the Fourteenth Amendment to concerns closely tied to race—an interpretation that arguably contradicts the open-textured language. As Dean Ely puts it, “We know from its history that [the Fourteenth Amendment] was meant particularly to combat inequality toward blacks. We also know, however—and would rightly presume it even if we didn’t—that the decision to use general language, not tied to race, was a conscious one.”¹²³ If we interpret such open-textured provisions restrictively to honor the intent of the drafters, ask the nonoriginalists, do we not violate the intent expressed by their choice of general, inclusive language?

2. “Sophisticated” Originalism

In response to critics’ exposure of the inconsistencies in so-called strict originalism, Judge Bork and others have developed the theory into what Professor Perry calls the sophisticated ver-

119. See Larry G. Simon, *The Authority of the Framers of the Constitution: Can Originalist Interpretation Be Justified?*, 73 CAL. L. REV. 1482, 1498 n.44 (1985).

120. Cf. Richard S. Kay, *Adherence to the Original Intentions in Constitutional Adjudication: Three Objections and Responses*, 82 NW. U. L. REV. 226 (1988) (responding to criticisms that adherence to original intentions is: (1) impossible; (2) self-contradictory; and (3) wrong).

121. Cf. Mark V. Tushnet, *A Note on the Revival of Textualism in Constitutional Theory*, 58 S. CAL. L. REV. 683, 686-88 (1985) (arguing that ambiguity is itself difficult to discern accurately).

122. See BERGER, *supra* note 104, at 417-18.

123. ELY, *supra* note 117, at 30.

sion.¹²⁴ Perhaps this was the version that was there all along, and “unsophisticated” originalism was merely the opponents’ caricature of originalist scholars’ beliefs—but in any event, originalism today is widely recognized as a potent theory, owing to the sophisticated brand of it. This approach emphasizes (perhaps more forcefully than the originalists did at first) that it is not the subjective intentions of individual Founders that count, but the public or objective meaning of the document, either to drafters or ratifiers; and more importantly, it reemphasizes that the originalist takes the *principles* the Framers established, not merely their specific intentions, and applies them to today’s conditions.¹²⁵

Thus, Judge Bork acknowledges that judges construing a provision “whose core is known but whose outer reach and contours are ill defined, face the never-ending task of discerning the meaning of the provision from one case to the next.”¹²⁶ Judges thus “may evolve doctrine . . . so long as they are faithful to the basic meaning”¹²⁷ It is entirely possible under this conception for a constitutional principle to have meanings that none of the Founders contemplated, as issues they did not conceive or resolve arise in the application of their principles.¹²⁸

3. Challenges for Sophisticated Originalism: School Desegregation and Capital Punishment

In the form in which sophisticated originalism is interpreted by Professor Perry, it even is possible for original principles to require a result that the Framers specifically did not believe they were mandating, so long as it cannot be shown that they meant to constitutionalize that belief.¹²⁹ For example, notwithstanding the Founders’ expectation that the death penalty would continue to exist, and even notwithstanding their provision for its

124. Perry, *supra* note 99, at 674-86.

125. See *id.* For a vigorous critique of efforts to debunk originalism by mischaracterizing it, see Raoul Berger, *An Anatomy of False Analysis: Original Intent*, 1994 B.Y.U. L. REV. 715.

126. ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* 167-68 (1990).

127. *Id.*

128. See *infra* notes 129-39 and accompanying text.

129. See Perry, *supra* note 99, at 701. Professor Perry argues that Judge Bork understands this proposition—and applies it to educational desegregation but not to capital punishment. Perhaps, however, the two problems are distinguishable. See *infra* notes 130-39 and accompanying text.

continuation by expressly recognizing capital cases in the text, Professor Perry argues that the sophisticated originalist cannot rule out a reading of the Eighth Amendment¹³⁰ that would abolish capital punishment as cruel and unusual.¹³¹ Of course, one still must construct an argument for “ruling *in*” this counterintuitive concept. Presumably, this elusive affirmative argument for abolition would be based on assertedly “original” principles of “cruelty” and “unusualness” (or “cruel-and-unusualness”) taken at a high degree of generality and abstraction. For example, Professor Moore describes a theory of originalism that searches for the “true nature” of the Constitution’s grand phrases:

such . . . originalism would develop theories about the nature of equality, liberty, liberties of speech and of worship, cruel punishment, and the like, in a never-completed quest to discover the true nature of such things. To seek such theories is to conform to the original understanding, just as to seek to apply the word “tiger” by the best theory of what tigers are is to conform to the usual authorial intention in the use of that word.¹³²

In cases in which we have no sound indication of the original meaning, perhaps this view is persuasive. But when we do have evidence from the drafters, there is a danger that resort to such subjective concepts as “best theory” or “true nature” may encourage substitution of the interpreter’s preferences for the Founders’ principles. If, for example, the author had drawn a picture of a tiger (as the Founders drew a picture of cruel and unusualness by implicitly acknowledging the Eighth Amendment’s compatibility with capital punishment), or if the author lived exclusively in India rather than Africa, we would depart from the author’s intention if we abstractly sought the “best” concept of a tiger, in disregard of these evidences of intent.

Thus, the problem with this approach to the affirmative argument is that it does not give sufficient weight to the Founders’ public expression of belief in the appropriateness of capital punishment, which ought at least to be weighed in the balance in

130. U.S. CONST. amend. VIII (“Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.”).

131. See Perry, *supra* note 99, at 701.

132. Moore, *supra* note 93, 110-14 (1989). Professor Perry, interestingly, disagrees with Professor Moore’s reasoning in this particular. See Perry, *supra* note 99, at 701 & n.93.

constructing an *affirmative* principle of cruel and unusualness. At least circumstantially, the broad abstract principle the abolitionists desire is opposed by the Founders' specifically and definitely expressed belief, and even though this consideration may not negate the broad principle, it affects the argument for establishing it. Professor Perry argues, "that [the Founders] did not believe they were prohibiting a practice does not mean that the correct application of a principle they established does not prohibit the practice."¹³³ But this argument does not establish the affirmative case for abolition; and further, the Framers' publicly expressed belief in the constitutionality of capital punishment, even if not solely determinative, ought to be evidence of the contours of the original principle. Even granted that evidence that the Founders themselves accepted capital punishment does not conclusively negate the prohibition, it weighs heavily against those who would affirmatively construct such a principle of prohibition. Professor Perry puts the issue in terms of whether the Founders "meant to constitutionalize the death penalty,"¹³⁴ but perhaps that is not the question; instead, one might better ask whether an abolitionist can show that the Founders really meant to establish principles that, fairly applied, would outlaw it today—giving fair weight to what they did have to say about their own acceptance of it.

Another way of looking at the matter is to say that the use of a high degree of generality to create a cruel-and-unusualness that would prohibit capital punishment is an illegitimate use of originalism when it is opposed by objective, public expressions of original understanding that are both definite and specific (such as the text that specifically addresses capital punishment). As Judge Bork puts it, the level of abstraction should be that which "the text and historical evidence warrant," or the level of generality that "interpretation of the words, structure and history . . . fairly supports."¹³⁵ Professor Perry appears to defend this concept.¹³⁶ Play in the joints (or for that matter intellectual dishonesty) may enable a judge to manipulate the level of generality, but this kind of result-oriented distortion is a misuse of the doctrine—and the possibility of misuse is hardly peculiar to

133. Perry, *supra* note 99, at 701.

134. *Id.*

135. BORK, *supra* note 126, at 149-50.

136. See Perry, *supra* note 99, at 678-81.

originalism.

Furthermore, critics argue that even sophisticated originalists cannot distinguish their defense of cases such as the school desegregation decision, *Brown v. Board of Education*,¹³⁷ that depart from the original understanding as narrowly understood, while the originalists debunk abolition of capital punishment.¹³⁸ But Judge Bork's treatment of the level of generality does uphold this distinction. Specific understandings may have contemplated the continuation of educational segregation, but the text and other understandings create affirmative principles to the contrary that are of greater weight, and a more appropriate level of generality, when applied to public education today. As Judge Bork says, "[I]t became evident over time that the racial separation the ratifiers of the fourteenth amendment assumed"—given the changed characteristics of public education and the failed efforts at separate-but-equal—"was completely inconsistent with the equal protection of the laws they mandated."¹³⁹ More importantly, there was no consensus approving of separate-but-equal definitively expressed in the text of the Constitution, as there is for the specific case of capital punishment, and as there is for the general principle of equality. Distinguishing these two problems of school desegregation and capital punishment is a matter of degree, as are all questions of conflicting evidence. To put the matter another way, sophisticated originalists might experience greater difficulty in defending *Brown* if segregated education had been recognized, analogously to capital punishment, in the text of the Constitution. This condition might have called for a level of specificity that might counteract the generality of the Equal Protection Clause. Fortunately, however, there is no such pro-segregation text, and even though many of the Founders may have contemplated continued segregation, the lesser degree of consensus from that accepting capital punishment meant that there never was likely to be any pro-segregation expression.

In summary, Judge Bork is on sound ground in holding on to

137. 347 U.S. 483 (1954).

138. See Perry, *supra* note 99, at 701.

139. BORK, *supra* note 126, at 169; see also *infra* notes 177-78 and accompanying text (developing both Judge Bork's theory and other routes to originalist justification, including Professor McConnell's theory that the drafters actually regarded school segregation as unconstitutional after all).

capital punishment while rejecting segregated schools. Professor Perry's criticisms are based upon a higher level of generality than seems compatible with the Founders' specific provisions for capital cases, and although he dispenses with the negative arguments, it is harder to construct an affirmative principle for absolute abolition given those specific statements.

4. *A Synthesis of Originalism and Textualism?*

Nevertheless, Professor Perry may be correct in arguing that, although we should all be (sophisticated) originalists, we necessarily all use nonoriginal textualism too, because originalism gives out before all the questions of equality are answered.¹⁴⁰ But another (and more positive) way of putting this conclusion is that the original understanding, in the form of deliberately open provisions containing principles that the Founders knew they could not measure, requires judges to decide new questions while applying standards such as the process that is "due" and the meaning of "equal" protection. As Judge Bork puts it, judges may evolve doctrine and disagree about it, so long as they remain faithful to the basic meaning.¹⁴¹ In fact, Professor Perry goes so far as to call Judge Bork a "[f]ormer"¹⁴² originalist judge, and he argues that originalists may have lost the war in the sense that most of the modern decisions that they find most objectionable can be justified from the sophisticated version that they have developed in response to critics.¹⁴³ But perhaps not, if the level of generality is treated as Judge Bork suggests; the textual nonoriginalists may win some of the battles, but if text and history result in an effective tool for preventing them from always seeking the highest possible levels of abstraction, they may not win them all.¹⁴⁴

Again, the contest between originalists and those using other methods of interpretation is a conundrum. The problem is that there are arguments making each approach sound at least plausible. Still, perhaps the different theories can coexist. If (as Justice Brennan argues) we cannot accurately discern all of the

140. See Perry, *supra* note 99, at 710-11.

141. See *supra* note 127 and accompanying text.

142. See Perry, *supra* note 99, at 713.

143. See *id.* at 710.

144. Cf. *supra* notes 129-39 (comparing the problems of school desegregation and capital punishment).

original intentions of the Founders, perhaps there still is room for a jurisprudence of original intention, that is, application of those principles that *can* be discerned and applied.¹⁴⁵ Open provisions, particularly those that we know are deliberately open as a result of conscious drafting choices, can be treated as such, but with the abstraction held to reasonable levels by the text and history. Again, the path out of these interpretive difficulties is to recognize that the duty of interpretation must be balanced against the corresponding duty of judicial restraint.

C. *Supplementation—and What Formerly Was Called
“Noninterpretivism”*

The interpretivist position is that every constitutional decision should reflect an interpretation of the Constitution. There is heavy consensus behind this position, with many commentators regarding it as self-evident.¹⁴⁶ A particular decision may reflect original intent or it may derive from other textual interpretation, but it should be derived from the Constitution.¹⁴⁷ Some commentators regard the text, or the text and original intent, as exclusive.¹⁴⁸

An opposing position, on the other hand, is that judges can (indeed must) use values derived from external sources. One cannot adequately give meaning to the Constitution, the supplementers say, merely by reading its language and history.¹⁴⁹ Some modern theorists reject altogether the distinction between interpretivists' and noninterpretivists' approaches to the Consti-

145. For example, Justice Scalia recognizes the flaws in originalism and considers it subject to exceptions—but he also considers it generally superior to other theories, and hence he is a “faint-hearted” originalist. See Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 864 (1989). Public flogging was tolerated at the time of the founding, for example, but Justice Scalia concludes that a decision allowing it today might be unacceptable, and as a faint-hearted originalist he can reach the palatable result of prohibiting it. See *id.* 861-62; see also David B. Anders, *Justices Harlan and Black Revisited: The Emerging Dispute between Justice O'Connor and Justice Scalia Over Unenumerated Fundamental Rights*, 61 FORDHAM L. REV. 895, 897-99 (1993) (comparing split between Justices Harlan and Black concerning originalist and textualist approaches to that between Justices O'Connor and Scalia).

146. See, e.g., TRIBE, *supra* note 27, at 771; see also *infra* note 150 (describing Professor Grey's position).

147. *But cf.* Grey, *supra* note 91, at 706 (1975) (arguing that judicial protection of rights “would be better justified by explication of contemporary moral and political ideals not drawn from the constitutional text”). Professor Tribe argues that Grey's statement “adds little,” because “in the end it is the *text* that invites.” TRIBE, *supra* note 47, at 771.

148. See *supra* note 104.

149. See, e.g., *supra* notes 70, 100, 108, 147.

tution and maintain, instead, that *both* approaches amount to "interpreting" the Constitution. These theorists argue that we are "all" interpretivists, and that the real debate is about whether and how much to supplement.¹⁵⁰

Supplementers can point to such open phrases as "freedom of speech," "due process," and "equal protection," which they can argue are more evocative of a broad philosophy than they are descriptive, and which are more general in phrasing than the historical concerns that produced them. Further, they can point to a wide variety of existing decisions that do not seem justifiable by strict textualism alone and yet are embedded in our constitutional law, with *Roe v. Wade* and *Brown v. Board of Education* as examples. Further, the nature of a constitution as a fundamental document arguably supports a flexible reading.

Some supplementation theories are based upon the conception that judges are more appropriate guardians of fundamental liberties or "enduring general values" than are legislators or executives. Professor Bickel, for example, argued that "courts have certain capacities for dealing with matters of principle that legislatures and executives do not possess."¹⁵¹ He recognized the fundamental conflict of Madisonian democracy produced by this theory of judicial review, and he sought to rationalize judicial review so that, even if not fully consistent with democratic theory, it at least would not be limitlessly antidemocratic.¹⁵² This result, he hoped, would be achieved by scholarship that sorted "enduring" from nonenduring values.¹⁵³ "Judges have, or should have, the leisure, the training, and the insulation to follow the ways of the scholar in pursuing the ends of government. . . . [They can] appeal to men's better natures, to call forth their aspirations, which may have been forgotten in the moment's hue and cry [in the legislature]."¹⁵⁴

Not surprisingly, this theory was criticized on the ground that supplementation is nothing but result-oriented judicial creation, enabling the judge to impose his idiosyncratic preferences as positive law.¹⁵⁵ Professor Wechsler attempted to solve this prob-

150. See Grey, *supra* note 35, at 1-2.

151. ALEXANDER BICKEL, *THE LEAST DANGEROUS BRANCH* 25-26 (1962).

152. See *id.* at 19, 27.

153. See *id.* at 24-26.

154. *Id.* at 25-26.

155. See, e.g., Bork, *supra* note 104, at 389-90.

lem by explaining that a search for “neutral principles” was what was called for: “To be sure, the courts decide . . . only the case they have before them. But must they not decide on grounds of adequate neutrality and generality, tested not only by the instant application but by others that the principles imply?”¹⁵⁶ Even if this was an apt description of the proper judicial role, it seemed impossible to implement as a method. It is one thing to call for neutral principles, but it is another thing to recognize their absence in a judicial opinion, much less to insist upon redress of that deficiency from the judge who has written it.

Perhaps, for these reasons, the advocates of supplementation still should leave room for a separate concept of noninterpretivism, with the difference between the two being a matter of degree. Noninterpretivism is, in this view, an overriding application of supplementation, one that extends it so that extrinsic principles control to a degree that cannot be justified by resort to text and history. Perhaps result-orientedness and departure from neutrality of principles should strengthen the case for this label. The position of Justice Brennan on capital punishment is an arguable example of supplementation that should be characterized as noninterpretivist even in a world that characterizes a wide variety of approaches as interpretivism. “As I interpret the Constitution,” says Justice Brennan, “capital punishment is under all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments.”¹⁵⁷ He justifies this conclusion as follows:

156. Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 15 (1959). *But cf.* Mark V. Tushnet, *Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles*, 96 HARV. L. REV. 781 (1983) (arguing that the neutral principles approach fails to constrain judges).

157. Brennan, *supra* note 102, at 443-44. For a sympathetic treatment of Justice Brennan's approach, see Michael Mello, *Adhering to Our Views: Justices Brennan and Marshall and the Relentless Dissent to Death as a Punishment*, 22 FLA. ST. U. L. REV. 591 (1995). Professor Mello defends Justice Brennan's “relentless” dissents in death penalty cases, despite the doctrine of *stare decisis* and other constraints, as “legitimate.” He acknowledges that the two Justices “dealt with the law by rejecting it,” compares their approach to civil disobedience, and sees the foundation of Justice Brennan's views as natural justice, reflecting a “shift from emphasis on abstract rules to emphasis on *justice*” *Id.* at 605, 663-64, 684-85. Interpretation, by contrast, would honor the abstract rules that Justice Brennan replaced with conceptions of “justice.” *Cf.* C.M.A. McCauliff, *Constitutional Jurisprudence of History and Natural Law: Complementary or Rival Modes of Discourse?*, 24 CAL. W. L. REV. 287, 290-91, 333, 328 (1988) (demonstrating how natural justice enabled Justice Brennan to escape most interpretive principles); John B. Wefing, *Cruel and Unusual Punishment*, 20 SETON HALL L. REV. 478, 485, 491-95 (1990) (describing Justice Brennan's view as a “natural law approach,” contrasting it to those of Justices who seek not to impose “their own view,” and critiquing the absence of objective limits).

[F]oremost among the moral principles recognized in our cases and inherent in the prohibition [on cruel and unusual punishments] is the primary principle that the state . . . must treat its citizens in a manner consistent with their intrinsic worth as human beings. . . . For me, then, the fatal constitutional infirmity of capital punishment is that it treats members of the human race as nonhumans, as objects to be toyed with and discarded. . . . It is thus inconsistent with the fundamental premise of the Constitution that even the most base criminal remains a human being possessed of some potential, at least, for common human dignity.¹⁵⁸

Justice Brennan's position, as has been suggested above, does not easily square with a jurisprudence of original intention.¹⁵⁹ Likewise, it is difficult to reconcile with textualist interpretivism, because the Constitution assumes the possibility of "capital" cases.¹⁶⁰ An interpretation even of a relatively open provision such as the prohibition upon cruel and unusual punishments seems doubtful when it is opposed by both of these interpretive methods; this opposition strengthens the possibility that the reasoning is noninterpretivist.

Furthermore, the moral principles expounded by Justice Brennan may not support consistent results when treated without application of the personal values of the individual judge. For example, a different judge might conclude that life imprisonment is just as unconstitutional as capital punishment under Justice Brennan's analysis, if it can be read as denying a "base criminal's" dignity or "intrinsic worth."¹⁶¹ Conversely, some judges might calculate that the "intrinsic worth" of an individual murder in a particularly heinous case is such as to support capital punishment. In other words, Justice Brennan does not use neutral principles, and one might conclude that this sort of sup-

158. Brennan, *supra* note 102, at 443-44.

159. See CRUMP, *supra* note 14, at 79-80 (critiquing Justice Brennan's view); *infra* note 160 and accompanying text.

160. See, e.g., U.S. CONST. amend. V ("No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury . . . nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb . . . nor be deprived of life, liberty, or property, without due process of law . . .") (emphasis added); see also *supra* Part II.B.3 (critiquing attempts at originalist and textualist justifications for an absolute prohibition of capital punishment).

161. Cf. Sherry F. Colb, *Freedom from Incarceration: Why Is This Right Different from All Other Rights?*, 69 N.Y.U. L. REV. 781 (1994) (arguing that even after a procedurally correct conviction, a defendant should have a fundamental right that should protect against imprisonment unless the state can demonstrate that it is necessary to serve a compelling state interest, narrowly tailored to the individual case).

plementation deserves to be labeled noninterpretivist.¹⁶² Even accepting the criticism that has been leveled at neutral principles reasoning,¹⁶³ one can observe that some “principles” depart so far from neutrality—or support contradictory results so easily—that the charge of variance from interpretivism has merit. Finally, the Justice’s reference to the moral principles “in our cases” is unfortunately not supported by any citation¹⁶⁴ to any case, and it is difficult to construe the obvious candidates for these “cases”¹⁶⁵ as taking the dignity principle into a dimension that would outlaw capital punishment altogether today—aside from the question whether interpreting prior decisions, divorced from consideration of their constitutional bases, qualifies as interpretation of the Constitution.¹⁶⁶

One of the most vigorous opponents of supplementation is Judge Bork, who colorfully (and effectively) lampoons Bickel’s theory of enduring values (drawn from “the thought and the vision of the philosophers and the poets”), Dean Wellington’s “conventional morality,” Professor Dworkin’s “fusion of constitutional law and moral theory,” Professor Grey’s “higher law” of unwritten “natural rights,” and Professor Parker’s theory that judges should “take seriously and work from . . . the classical conception of a republic, including its elements of relative

162. Cf. CRUMP, *supra* note 14, at 79-80 (critiquing Justice Brennan’s view).

163. See *supra* note 156.

164. See Brennan, *supra* note 102, at 443-44.

165. For example, in *Stanford v. Kentucky*, 492 U.S. 361 (1989), Justice Brennan argued that the dignity principle prevented the execution of persons under seventeen, but the majority disagreed and upheld it. See *id.* at 392-93 (Brennan, J., dissenting). In *Trop v. Dulles*, 356 U.S. 86 (1958), while outlawing the punishment of revocation of citizenship, the Court described “the dignity of man” as underlying the Eighth Amendment, but it pointedly based its decision upon the more objective test of “evolving standards of decency,” as tested by comparison with multistate legislation, public opinion, and other objective sources. These standards would uphold at least some use of capital punishment today. *Id.* at 100-01.

Justice Brennan also has argued that the dignity principle means at least that the Eighth Amendment is offended by “excessiveness,” which he measures by two aspects: “the unnecessary and wanton infliction of pain” and punishment “grossly out of proportion to the severity of the crime.” *Stanford*, 492 U.S. at 392-93 (Brennan, J., dissenting) (quoting *Gregg v. Georgia*, 428 U.S. 153, 173 (1976)). But if capital punishment were carried out by means that insured that pain was neither unnecessary nor wanton, and if it were confined to heinous murders so that it was not disproportionate (or not grossly so), it would not offend these principles.

166. See *infra* Part III.K (critiquing the methodology of basing unenumerated fundamental rights on statements in prior decisions without considering the reasoning of such decisions or their connection to the Constitution).

equality, mobilization of the citizenry, and civic virtue."¹⁶⁷ Judge Bork answers, "This, it seems, is to be constitutional theory as written by the Committee on Public Safety."¹⁶⁸ He adds:

The progression by no means stops there. It could not stop there. The nature of the non-interpretive enterprise is such that its theories must end in constitutional nihilism and the imposition of the judge's merely personal values on the rest of us. The reason is that none of these theorists has been able—and I venture to suggest none ever will be able—to build a philosophical structure that starts from accepted premises and logically demonstrates the answers, or the range of allowable answers, to questions not answered by the written Constitution.¹⁶⁹

Thus, Judge Bork concludes that "the inevitable end to non-interpretivist, value-choosing theory is constitutional nihilism."¹⁷⁰ As an example, he quotes Professor Brest to the effect that the legitimacy of judicial review in a democratic polity is "essentially incoherent and unresolvable" because "the Madisonian dilemma is in fact unresolvable," and he denounces Professor Perry's statement that Perry's "commitment to constitutional policy making by the judiciary" is such that if unable to reconcile it with democratic elections, he would "have to question the axiomatic character" of "electorally accountable policy making."¹⁷¹ "In a word, if judicial rule and democracy come into conflict, Perry will have to question the desirability of democracy."¹⁷²

But it is doubtful that an absolute renunciation of supplementation can be justified. Such an approach, strictly applied, would give little weight to open-textured provisions such as the Due Process Clause, which the drafters must have known would require unspecified liberty interests to be evaluated.¹⁷³ In fact, as an antidote to noninterpretivism, Judge Bork writes, "The institutions and traditions of the American republic, including the historic Constitution, are our best chance for happiness and

167. Bork, *supra* note 104, at 386-87.

168. *Id.*

169. *Id.*

170. *Id.* at 387-88.

171. Bork, *supra* note 104, at 387, 388, 391.

172. *Id.* Perhaps Judge Bork's reading of Professor Perry is too negative. Perry questions the "axiomatic" proposition that democracy is a universal means for settling every issue. But this position is consistent with the notion that certain minority rights should be protected against infringement by the majority.

173. See *supra* note 123 and accompanying text.

safety,"¹⁷⁴ and he quotes Justice Story in praise of a constitution "addressed to the common sense of the people."¹⁷⁵ But is not Judge Bork's reliance on the "institutions and traditions of the American republic," in addition to the "historic Constitution," a call for supplementation? It appears to be so, at least to the extent that the "institutions and traditions" are not to be found in the "historic Constitution" itself, even though Judge Bork may have confined it sufficiently to avoid noninterpretivism.

Likewise, an antisupplementer must repudiate all supplementation-based decisions, which, according to some of these theorists, include the condemnation of school segregation in *Brown v. Board of Education*.¹⁷⁶ This result is problematical, because rejection of *Brown* would be so impolitic that even the strictest constructionists do not embrace it. Professor Berger, for example, explains that he would not repudiate all nonoriginal decisions: "It would . . . be utterly unrealistic and probably impossible to undo the past in the face of the expectations that the segregation decisions, for example, have aroused in our black citizenry—expectations confirmed by every decent instinct."¹⁷⁷ Presumably, most other strict originalists similarly would retain the *Brown* decision, and thus they, like Professor Berger, must find reasons for keeping it.¹⁷⁸ However, when a holding is extraconsti-

174. Bork, *supra* note 104, at 395.

175. *Id.*

176. See, e.g., BERGER, *supra* note 104, at 417-18; see also, BORK, *supra* note 126, at 75-76 (1990) (concluding that ratifiers of the Fourteenth Amendment "did not think it outlawed segregated education").

177. BERGER, *supra* note 104, at 412-13, 417-18.

Judge Bork uses a different route to the same result: He argues that "endless litigation" flowed from the separate-but-equal school decisions, producing a "burden on the courts" without ever producing a satisfactory equality. He defends *Brown* as avoiding this result, and he concludes that the segregation the drafters tacitly assumed is incompatible with the equality they expressly mandated. BORK, *supra* note 126, at 82; cf. Raoul Berger, *Robert Bork's Contribution to Original Intention*, 84 NW. U. L. REV. 1167, 1176-83 (1990) (discussing this justification); Richard A. Posner, *Bork and Beethoven*, 42 STAN. L. REV. 1365, 1375-76 (1990) (same).

178. Actually, the *Brown* decision can be reconciled with originalism in a way that does no violence to either: by applying the drafters' original intent in modern circumstances, recognizing that they have changed. Thus, the public schools of 1954 were vastly different from the schooling that existed at the time the Fourteenth Amendment was adopted. The legal duty to attend school had become basic and universal, and the interest in equality had come to resemble more closely the rights of contract and property ownership that the Founders expressly contemplated. In fact, the *Brown* decision uses these and certain other lines of reasoning, which even strict originalists might be able to accept. See *Brown v. Board of Education*, 347 U.S. 483, 489-90 (1954). Professor Berger's approach is different, however: he concludes that *Brown* is inconsistent with original principles but that it should be retained for extrinsic reasons. See *supra* note 176 and accompanying

tutional, and we decide to keep it because of extraconstitutional reasons found in popular acceptance or settled expectations or because of "expectations confirmed by every decent instinct," is not this reasoning ipso facto supplementation? And is it possible to conclude that Professor Berger thereby uses at least a little of the same nonoriginalist approach that he persuasively condemns?

Some originalists would avoid this catastrophe by applying original intent as transformed to fit the changed circumstances of today's times.¹⁷⁹ But if the originalist accepts this view and still scorns all supplementation as noninterpretivism, is there not a contradiction in the transformation itself, which uses "the circumstances of today's times," which are extraconstitutional? A fair application of this method to the Due Process Clause, for example—weighing interests according to today's "circumstances"—would give as exuberantly activist a reading to the Clause as any confessed supplementer might like, all under the guise of "originalism."¹⁸⁰

Furthermore, as the debate earlier referred to between Justices Chase and Iredell implies, support for the use of natural law in reading the Constitution is neither solely recent nor isolated.¹⁸¹ The commentators have produced arguments to the effect that even an originalist jurisprudence cannot exclude a natural law component in constitutional interpretation, because

text.

In addition, with new historical scholarship, Professor McConnell argues impressively that *Brown* reflects original intent in a more direct way. Between 1870 and 1875, for example, large majorities in Congress voted repeatedly for bills that never became law, but that reflected a belief that school segregation was unconstitutional. He concludes that "school segregation was understood during Reconstruction to violate the principles of equality in the Fourteenth Amendment." Michael W. McConnell, *Originalism and the Desegregation Decisions*, 81 VA. L. REV. 947, 1140 (1995). Thus, there may have been no need for the Court in *Brown* to have emphasized the changed nature of today's schools; it would have held segregation unconstitutional even if it had been willing to "turn the clock back." Again, however, this happy conclusion does not fully square with Professor Berger's "preservation" justification for keeping *Brown*.

179. See *supra* note 178.

180. This is not to say that judicial restraint would not be enforced better if the judge begins with an originalist mind-set and then "supplements" by adaptation to today's circumstances. Such a method probably would be more tilted toward restraint. The point, however, is that supplementation cannot be avoided by this kind of originalism even after the original intent has been derived, and the problem really is one of judicial restraint.

181. See generally *Commentary on Constitutional Positivism*, 25 CONN. L. REV. 831 (1993); *Natural Law Symposium*, 38 CLEV. ST. L. REV. 1 (1990); *Symposium, Perspectives on Natural Law*, 61 U. CIN. L. REV. 1 (1992); *Symposium on Law and Philosophy*, 12 HARV. J.L. & PUB. POL'Y. 611 (1989) (including comparison of natural rights, consequentialism, utilitarianism, and other philosophies).

of the publicly expressed beliefs of many of the Founders in it.¹⁸² And because textualist interpretation contains open terms such as the Due Process Clause, some commentators believe that persuasive arguments can be made against the exclusion of natural law if such supplementation is to take place.¹⁸³ On the other hand, natural law is regulated by “no fixed standard,” as Justice Iredell aptly stated,¹⁸⁴ and it presents a danger of government by judiciary of a kind that our written Constitution was intended to prevent.

Again there is the interpretive paradox: supplementation is dangerous to the concept of a written constitution, but in some instances it appears to have been both necessary and intended under our Constitution. Even those who reject supplementation, even those who do so in the strongest terms, are themselves arguably using it—at least in some cases. The trick is in restraining supplementation so that it does not become plain old-fashioned noninterpretivism. The chains that can be used to hold it down include both textual interpretation and originalist jurisprudence. And again, the duty to interpret the Constitution must be balanced by judicial restraint.

D. *The Morass*

At the very least, Judge Bork was right on the major points.¹⁸⁵ Supplementary theories are troublesome because they threaten respect for a written constitution, and the clash of such theories with democracy is particularly troublesome. Still, perhaps Judge Bork overstates the case in arguing that any theory of supplementation must be inherently nihilistic.¹⁸⁶ In part, this is so because originalism produces its own constitutional catastrophes. The Constitution itself creates the inconsistency between the judicial role and democracy, because it contemplates a system of majority rule within a framework for protection of minority interests. And it explains all of this in the appropriate manner for

182. See Suzanna Sherry, *Natural Law in the States*, 61 U. CIN. L. REV. 171 (1992). Of course, one must distinguish between natural law as a source for the (positive law) provisions in the Constitution and its use as an interpretive device, but arguably there is originalist support for both.

183. See Barnett, *supra* note 37, at 96.

184. See *supra* notes 87-89 and accompanying text.

185. See *supra* notes 167-75 and accompanying text.

186. See *supra* note 170 and accompanying text.

a constitution: by grandiloquent generalities.

Instead, one may find a route out of the morass by adopting a pluralistic approach. Originalist intentions should be honored when they speak clearly, but open text should be recognized when it speaks with comparable force.¹⁸⁷ Supplementary theories should be used only when they are most necessary and with careful recognition of the limits imposed by democracy and judicial restraint. And it should not be considered out of bounds to criticize as noninterpretivist those uses of supplementation that recklessly override the limits set both by the text and by history.

Furthermore, methodologies for recognizing unenumerated fundamental rights—which are among the types of supplementation most threatening to democratic processes—should be chosen in ways that properly respect the text and the original intent. They should be as nearly neutral as possible, and they should imply limits that respect democratic values. These are difficult conditions to meet, and it therefore is not surprising that the Supreme Court has identified a plethora of methods, most of which it has failed to justify persuasively. It is to those methods, therefore, that this article turns in the following section.

III. METHODOLOGIES FOR RECOGNIZING UNENUMERATED FUNDAMENTAL RIGHTS: WHAT ARE THE APPROACHES, AND WHEN ARE THEY JUSTIFIABLE?

The Supreme Court consistently has answered the first question, whether to recognize unenumerated fundamental rights, by recognizing them.¹⁸⁸ To mix the metaphor, it has found its way out of the morass by cutting the Gordian knot. In fact, virtually all of the Justices seem to recognize the necessity of identifying some interests that are entitled to special protection even though their elevated status is not explicit in the Constitution. The Justices have vastly different views, however, concerning sources and justifications for these protections. Thus, the logic by which each Justice decides to protect unenumerated rights is

187. It must be recognized that clarity is a relative term in this context. It cannot be treated as meaningless, however, if constitutional interpretivism is to have any meaning at all.

188. See, e.g., *infra* Part III.E (demonstrating that even the Justices who are most committed to judicial restraint recognize rights entitled to enhanced protection, although they use supplementation methods characterized by restraint).

important not only for its own sake, but also for the light it casts upon the identification of those rights. This logic determines the extent to which each Justice is willing to infer these specially-protected interests and the methodology each uses in deriving them.

Not surprisingly, then, the Court has used a wide variety of methods, ranging from the restrained approach of locating protected interests in the constitutional text to the generous test of evaluating interests by the importance they have for contemporary individuals. Because the Justices do not uniformly agree upon these methods, it also is understandable that opinions for the Court rarely express consensus about the way the methods are chosen, or whether they fit into a hierarchy, or whether some methods are preferable in some situations and others in other situations. This Part of this Article is an effort to supply the missing catalog of these methods of judicial alchemy and to evaluate the advantages or disadvantages of each.

These methods lie along a continuum, all the way from hair-trigger formulas that can support a cornucopia of fundamental rights to stingy theories that protect virtually nothing that is not undeniably enumerated.¹⁸⁹ In a sense, they compete with each other for the favor of the Justices; but in another sense, they do not compete but rather complement each other. The reader may conclude that no one method is comprehensive or exclusive, and indeed, the Justices themselves often have used two or three different theories in combination while analyzing a single interest.¹⁹⁰ In addition, it may be helpful to mention at the outset that many of the theories are versions of natural law, or as Professor Corwin put it, "Natural Law under the skin."¹⁹¹ For example, such phrases as "ordered liberty," "the American scheme of justice," and "conduct that shocks the conscience," tend to dissolve into invitations for the judge to evaluate the relative importance of individual and societal interests. Perhaps it would be better if these formulas were replaced by labels that made their

189. Compare, e.g., *infra* Part III.A (confining rights to those expressed in the text) with *infra* Part III.D (recognizing rights deemed sufficiently important to the affected individual).

190. For example, in *Roe v. Wade*, 410 U.S. 113 (1979), the Court purported to use ordered liberty, importance to the individual, and derivation from precedent. See *id.* at 152-53; *infra* Part III.D, G, K.

191. Corwin, *supra* note 91, at 47.

natural law basis more explicit, so that the Justices' subjective balancing could not be disguised. But on the other hand, the different tests are distinct because they imply, and therefore nudge the Justices toward, different degrees of acceptance of unenumerated rights. Thus, by asking whether a given right is essential to any society valuing ordered liberty, we would adopt a narrower theory of fundamental rights than if we asked merely whether it is important to the individual who asserts it, even though both are natural-rights inquiries. Therefore, this Part of the Article—in addition to cataloguing the methods—attempts to appraise where each one lies on the continuum, or how powerful is its support of judicial alchemy.

A. Derivation of Fundamental Rights from the Text: Exclusion of All Except Explicitly Protected Rights, Such as by Incorporation of the Bill of Rights

One approach is to prefer those rights that are explicitly given exalted status in the Constitution itself. This might be the approach of a strict textualist determined to confine the judicial role narrowly. Such an approach presumably would afford fundamental status to the freedom of speech, the free exercise of religion, or the right to counsel in a criminal case. But it would not recognize a fundamental right to "privacy;"¹⁹² instead, it would perceive that there is an interest in being free from searches and seizures, because the text says so, and it would follow the text in protecting that interest only against "unreasonable" incursions.¹⁹³ It would be problematical whether such a strict textualist would give elevated protection to structurally important rights that are inexplicit in the document, such as the right to vote.

Justice Black expressed something akin to this strict view in advocating the total incorporation theory, or the enforcement of the Bill of Rights in its entirety against the States.¹⁹⁴ He cited

192. Cf. *Griswold v. Connecticut*, 381 U.S. 479, 507-27 (1965) (Black, J., dissenting) (concluding that the Court speaks as though there is a general "right of privacy" in the Constitution, "[b]ut there is not").

193. See *id.*

194. See *Adamson v. California*, 332 U.S. 46, 69-72, 77-78, 83-85, 89-90 (1947) (Black, J., dissenting). For the view that the Fourteenth Amendment not only incorporated the Bill of Rights, but by that incorporation also renewed, transformed, and "re-mold[ed]" it, see Akhil Reed Amar, *The Bill of Rights and the Fourteenth Amendment*, 101 YALE L.J. 1193 (1992) (calling this theory "refined incorporation"). For a thoroughgoing criticism of

originalist arguments in support of this approach,¹⁹⁵ although history (and the text) also support arguments opposing the theory.¹⁹⁶ Justice Black, peculiarly among the Justices, carried incorporation a step farther: he would have limited the meaning of due process to the protection of interests covered by the Bill of Rights, a kind of "reverse incorporation" theory.¹⁹⁷ In this way, he hoped to prevent judges from "roaming at will"¹⁹⁸ among supplementary theories, choosing by personal preference. The Court, by contrast, has adopted a selective incorporation approach,¹⁹⁹ and it has declined to limit the Due Process Clause so narrowly.

A similar approach to narrowing the Due Process Clause is to be found in Dean Ely's famous critique of *Roe v. Wade*.²⁰⁰

[*Roe v. Wade*] is . . . a very bad decision. Not because it will perceptibly weaken the Court—it won't; and not because it conflicts with either my idea of progress or what the evidence suggests is society's—it doesn't. It is bad because it is bad constitutional law, or rather because it is *not* constitutional law and gives almost no sense of an obligation to try to be. . . .

. . . The point that often gets lost in the commentary, and obviously got lost in *Roe*, is that . . . *before the Court* can get to the "balancing" stage, *before* it can worry about the next case and the case after that . . . it is under an obligation to trace its premises to the charter from which it derives its authority. A

Professor Amar's theory, see Raoul Berger, *Incorporation of the Bill of Rights: Akhil Amar's Wishing Well*, 62 U. CIN. L. REV. 1 (1993).

195. Justice Black pointed out that the drafters had full knowledge of the decision in *Barron v. Baltimore*, 32 U.S. (7 Pet.) 243 (1833), which had held the Bill of Rights inapplicable to the States. He concluded that the debates showed that "one of the chief objects" of the Fourteenth Amendment was "to overturn the rule that case had announced." *Adamson*, 332 U.S. at 71-72 (Black, J., dissenting).

196. See, e.g., *Duncan v. Louisiana*, 391 U.S. 145, 215 (1968) (Harlan, J., dissenting) (negating that intent to incorporate underlies the decision). Compare Charles Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights?*, 2 STAN. L. REV. 5 (1949) (concluding no intent to incorporate) with J. JACOBUS TENBROEK, *EQUAL JUSTICE UNDER LAW 223* (1965) (identifying natural law values reflected in the Bill of Rights that the Founders allegedly intended to protect). As often happens, there is arguable evidence that the Founders intended incorporation and arguable evidence that they did not so intend. "The preponderance of historical evidence . . . indicates that the drafters of the amendment did not intend to apply all of [its] provisions to the States." NOWAK & ROTUNDA, *supra* note 90, § 11.5.

197. See *Adamson*, 332 U.S. at 69-72, 77-78, 83-85, 89-90 (Black, J., dissenting); *TRIBE*, *supra* note 27, at 774.

198. *Adamson*, 332 U.S. at 90-91.

199. See *Duncan*, 391 U.S. at 148.

200. See John Hart Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L.J. 920, 947-49 (1973).

neutral and durable principle may be a thing of beauty and joy forever. But if it lacks connection with any value the Constitution marks as special, it is not a constitutional principle and the Court has no business imposing it. . . .

On the one hand, it is fair to debunk the reasoning and result of *Roe*. On the other hand, it begs the question to criticize the *Roe* Court for a failure to "trace its premises to the charter from which it derive[d] its authority" or to connect the result to a "value the Constitution marks as special." The *Roe* Court did in fact trace its alleged authority to the Due Process Clause,²⁰¹ and it did explain why it perceived in that Clause a special status for the right it recognized.²⁰² The real question is why *Roe's* tracing of that special status is unconvincing. The answer lies in *Roe's* emphasis of one of the most doubtful methods of identifying fundamental rights, the importance-to-the-individual approach, which is critiqued in a later section of this Article.²⁰³ It does not lie in any criticism of interpreting the Due Process Clause as open-ended, because the Clause is open-ended.

Thus, in addition to the obvious problem that many would find such an approach unduly narrow, a strict textualist quickly would confront a dramatic inconsistency by insisting upon explicit enumeration in the text of every interest that is to be given enhanced protection. The Due Process and Equal Protection Clauses do not explicitly limit themselves to interests that are textually set forth. Instead, their language covers every liberty interest and calls for an evaluation of the strength of the interests at stake. The Ninth Amendment reinforces the principle that insistence on express statements is to be avoided. Thus, even apart from other intentionalist approaches such as originalism, or theories of a living Constitution, contemporary ratification, or natural rights, the strict textualist is defeated by her own arguments. A strict interpretation of the text does not exclude an inference that some extratextual rights are to be afforded elevated protection; instead, the text *requires* this inference.

201. See *supra* note 39 and accompanying text.

202. See *infra* Part III.D.

203. See *id.*

B. *Derivation of Fundamental Rights from the Text: Penumbra and Structural Arguments*

Perhaps the textualist can improve the argument by a willingness to infer from the constitutional text protections that are less than explicit. The right to vote is one immediate candidate; although never expressly mentioned in any provision of the original Constitution or the Bill of Rights, the rights of members of a voting electorate are essential to various provisions in Articles I and II. In fact, the Supreme Court used an approach similar to this kind of textual derivation in *Kramer v. Union Free School District*²⁰⁴:

“[S]ince the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights, any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized.” . . . This careful examination is necessary because statutes distributing the franchise constitute the foundation of our representative society. . . . Accordingly, when we are reviewing statutes which deny some residents the right to vote, the general presumption of constitutionality afforded state statutes and the traditional approval given state classifications if the Court can conceive of a “rational basis” for the distinctions made are not applicable.²⁰⁵

Kramer and other voting rights cases also use other kinds of methodologies,²⁰⁶ but the methodology of deriving the interest from values marked as special in the constitutional text has the advantage of widely-acceptable justification.

But there also are problems with such an approach. One is that even this more relaxed textualism does not solve the problem presented by the language of the Due Process Clause. That text is not confined to values implicit in the constitutional scheme any more than it is confined to those that are textually explicit. Instead, the words are global, affording to every liberty interest the protection of that process which is “due.”

Nor is this problem of narrowness the only defect. An exuberant interpreter can find all manner of specially-protected values in the constitutional text if given a free hand to find them. Any-

204. 395 U.S. 621 (1969).

205. *Id.* at 626.

206. For example, this language could be considered an appeal to the systemic importance of the right, apart from its recognition in the text. See *infra* Part III.H.

one less rigorous than the most strictly honest broker is likely to abuse such a method of interpretation; the result-oriented ideologue is likely to do even worse. A prime example is the penumbra-based reasoning in *Griswold v. Connecticut*.²⁰⁷ Justice Douglas's opinion traipses in a disassociated way through interpretations of the First, Third, Fourth, Fifth, and Ninth Amendments, derives as the purpose of each of them the protection of an amorphous right of privacy, and confuses this concept with a nonspecific power of autonomous action that it then substitutes for privacy.²⁰⁸ The peroration includes the following:

The foregoing cases suggest that specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance. Various guarantees create zones of privacy. . . .

. . . .

We have had many controversies over these penumbral rights of "privacy and repose." . . . These cases bear witness that the right of privacy which presses for recognition here is a legitimate one.²⁰⁹

But what the Court meant by this was not the noncontroversial concept that the autonomy claim was a "legitimate" liberty interest, but rather that this penumbral creation was so basic, preferred, and fundamental that it would overcome even reasonable legislation directed at reasonable ends.²¹⁰ The opinion fails to justify this conclusion convincingly from the text that it cites.

It is difficult to escape the impression that Justice Douglas's opinion supports a result reached independently of its logic. In other words, it is result-oriented.²¹¹ Even apart from that criti-

207. 381 U.S. 479 (1965).

208. *See id.* at 484-85.

209. *Id.* (citations omitted).

210. Justice Douglas pointedly distinguished the standard applicable to economic, business, and social laws. *See id.* at 482. His reasoning is markedly different from that of Justice White, who concurred on the ground that the law at issue failed the rational basis test, *see id.* at 505-06 (White, J., concurring), and from that of Justice Stewart, who dissented because even though the case concerned "an uncommonly silly law," he thought it was constitutional. *See id.* at 527 (Stewart, J., dissenting).

211. *See CRUMP*, *supra* note 14, at 514-16 (criticizing and defending the *Griswold* reasoning). An analogous argument can be observed in Owen M. Fiss, *State Activism and State Censorship*, 100 YALE L.J. 2087 (1991), in which Fiss derives the purpose of the First Amendment as assuring the widest possible debate about public issues, and then seeks to apply this purpose as though it were written into the amendment as positive law. "The

cism, however, surely it is treacherous to infer an unexpressed purpose underlying an ad hoc concatenation of unrelated provisions, and it is more treacherous, then, to enforce this alleged purpose as though it were positive law, independently expressed. On the one hand, using intent to interpret a given constitutional provision has an appealing appearance of legitimacy. On the other hand, enshrining that vaguely-expressed intent in fundamental status, equal to the words that the Founders actually expressed, is something else. One can argue with at least equal force that if the Framers had intended to enact a broad protection of privacy-and-autonomy-related rights, they could have made the expression of that meaning more conveniently discernible²¹² than by inference from numerous diffuse sources.²¹³

As an analogy to Justice Douglas's reasoning method, one might consider a murder statute together with the legislative purpose underlying it. The statute prohibits a narrowly-circumscribed and relatively well-defined range of human conduct. The underlying legislative purposes are more diffuse: protection of the reverence for life, deterrence of invasions of the bodily security of individuals, and the like. Now, enforcing the murder statute is one thing; but if we infer and then equally enforce the alleged "purposes" that we think might underlie the statute as though they were part of the statute itself, the results are nonsensical. For example, we probably would infer the criminalization of killings in self defense, or of orders by com-

error Fiss commits . . . is to mistake an effect of the principle for the principle itself." Charles Fried, *The New First Amendment Jurisprudence: A Threat to Liberty*, 59 U. CHI. L. REV. 225, 226 (1992).

The real trouble begins when this conception of the First Amendment is pressed further to *deny* free speech protection to speakers who wish *not* to pronounce certain views. . . . The protection of [the right not to speak] has already been denied to broadcasters, who may be compelled to carry programs they deplore. Fiss's argument entails a denial of this protection to newspapers as well.

Id. at 227. The ultimate result, as Fried says, is "a short step to suppression pure and simple." *Id.* at 228.

212. Thus, for example, Roger Sherman drafted a proposed amendment that provided, "The people have certain natural rights which are retained by them when they enter into Society. Such are the rights . . . of pursuing happiness & Safety . . ." Herbert Mitgang, *Handwritten Draft of a Bill of Rights Found*, N.Y. TIMES, July 29, 1987, at A1. This draft was found and recognized years later, in 1987. It was pasted in a volume of James Madison's papers, giving rise to the inference that these terms were considered but rejected. *See id.*

213. The Ninth Amendment does not necessarily remove this particular negative implication. As a rule of construction, it depends upon other provisions for its meaning. A textualist well might conclude that it is improper to attach it to a nonexistent provision, such as the penumbra that Justice Douglas inferred.

manders sending soldiers into battle, or for that matter, of abortions.

In fact, the *Griswold* reasoning implies approval of other “penumbras” that seem wildly indefensible, but that can be justified by the *Griswold* logic just as easily as its right of privacy. For example, is not a “free enterprise penumbra” actually a better inference? A wide variety of provisions in the Constitution are designed to protect and foster private economic activity²¹⁴—ranging from the State Money Clause,²¹⁵ the Bills of Credit Clause,²¹⁶ the Contract Clause,²¹⁷ and the Takings Clause,²¹⁸ to the Commerce Clause²¹⁹ and other powers of Congress.²²⁰ Perhaps one can discern from these sources a “penumbra” that would protect the liberty to conduct one’s economic affairs free from all regulation. One need only consider Justice Marshall’s opinion in *Ogden v. Saunders*,²²¹ in which the argument was made that the Contract Clause, together with natural rights implied by the Constitution, was intended precisely to protect businesses against regulation.²²² The problem, among others, is that such a free-enterprise penumbra would resurrect the *Lochner* monster,²²³ thereby sanctioning a decision that every supplementer seeks to distinguish.²²⁴ The consequence would be the indiscriminate destruction of every kind of economic regulation, in-

214. Cf. James Madison, *Statement of the Causes of the Constitutional Convention*, in 5 ELLIOT’S DEBATES ON THE FEDERAL CONSTITUTION 109-22 (Jonathan Elliot ed., 2d ed. 1901) (stating the economic rationales, among others, that led to the Convention).

215. U.S. CONST. art. I, § 10, cl. 1 (“No State shall . . . coin money . . . [or] make any Thing but hold and silver Coin a Tender in Payment of Debts . . .”).

216. U.S. CONST. art. I, § 10, cl. 1 (“No State shall . . . emit Bills of Credit . . .”).

217. U.S. CONST. art. I, § 10, cl. 1 (“No State shall . . . pass any . . . Law impairing the Obligation of Contracts . . .”).

218. U.S. CONST. amend. V (“nor shall private property be taken for public use, without just compensation”).

219. U.S. CONST. art. I, § 8, cl. 3 (“The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes . . .”).

220. See U.S. CONST. art. I, § 8 (listing the powers of Congress).

221. 25 U.S. (12 Wheat.) 213 (1827).

222. See *id.* at 332.

223. See *Lochner v. New York*, 198 U.S. 45 (1905) (using liberty-of-contract reasoning as supporting a de facto fundamental right to strike down a statute regulating bakers’ work hours).

224. See, e.g., *Planned Parenthood v. Casey*, 505 U.S. 833, 861-62 (1992) (distinguishing the Court’s inference of the right to abortion from the Court’s inference, since overruled, of the right to contract, on the ground that “the lesson seemed unmistakable to most people by 1937 . . . was that *Lochner* and its progeny rested on fundamentally false factual assumptions”).

cluding those that no one otherwise would regard as unconstitutional.²²⁵ And yet, both textualist²²⁶ and intentionalist²²⁷ support for this dubious "free enterprise penumbra" is arguably more specific than support for the penumbra conjured up in *Griswold*.

This lack of limits and inconsistency is the inevitable result of the *Griswold* reasoning.²²⁸ It invites extension, without recognizing any limiting principle. Contradictory implications seem likely. For example, the *Griswold* Court emphasized that it was protecting the sexual privacy of *married* persons;²²⁹ but the next question, which was certain to arise and did arise in *Eisenstadt v. Baird*,²³⁰ was whether the *Griswold* principle extended to unmarried couples. Having extended the principle in *Eisenstadt*, largely by ignoring its earlier marital privacy reasoning²³¹ (and having similarly extended the right to minors), the Court later, and just as inevitably, faced questions regarding whether adultery, incest,

225. The kind of regulation at issue in *Lochner* itself is an example. See *supra* note 221.

226. The provisions relied on to hypothesize this "penumbra," see *supra* note 214 and accompanying text, are more unified in purpose than those relied on in *Griswold*, and thus they lend themselves more readily to the inference of that purpose—except for the doubtful legitimacy of this penumbra reasoning in the first place.

227. See CHARLES BEARD, *AN ECONOMIC INTERPRETATION OF THE CONSTITUTION OF THE UNITED STATES 178-80* (1986); *supra* notes 214-21.

228. One of the problems underlying the penumbra concept is its use of metaphor to justify the decision, or as a step in the logic. Metaphor may be an excellent method of explaining, illustrating, or visualizing a concept, but it is a poor method of establishing that the illustrated concept is true, unless the logician is inclined toward the mystical.

Furthermore, the metaphor in *Griswold* is badly-hashed. It suggests that the guarantees of the Bill of Rights "have penumbras, formed by emanations from those guarantees." *Griswold v. Connecticut*, 381 U.S. 479, 484 (1965). But a "penumbra" is a partial shadow, which cannot be "formed by emanations" from the same source, unless a dark body is manipulated between the source and the penumbra. (In *Griswold*, of course, the manipulator is Justice Douglas.) Nor does this metaphor help to understand how the various fuzzy shadows "formed" by the different "emanations" could coalesce into one fundamental guarantee of privacy.

For a famous and extremely interesting use of metaphor from physics to illuminate legal issues, see Laurence H. Tribe, *The Curvature of Constitutional Space: What Lawyers Can Learn from Modern Physics*, 103 HARV. L. REV. 1 (1989). Professor Tribe uses general relativity theory, and its explanation of the curvature of space adjoining bodies with mass, to critique the majority opinion in *DeShaney v. Winnebago County Dep't of Social Servs.*, 499 U.S. 189 (1989). The majority's failing, Professor Tribe argues, is in declining to perceive the State as a massive body that bent the legal landscape so that protection was diverted from the victim, as a body bends space in physics. See Tribe, *supra*, at 7-12. The analogy may hold, but it has the potential to mislead; will the next argument attempt to apply the inverse square rule (or some similarly inapplicable aspect of the metaphor) to the state's gravity? See *id.* at 6 n.15. The problem is that a metaphor is unlike a good legal test, in that it does not tell us when to stop applying it. Justice Brennan said the same thing, more or less, without the metaphor. See *id.* at 10-11.

229. See *Griswold*, 381 U.S. at 480.

230. 405 U.S. 438 (1972).

231. See *id.*

or fornication (including that engaged in by minors) implicated fundamental rights.²³² Here, it drew the line.²³³ The result is that an unmarried fourteen-year-old has a fundamental right to contraceptives but (presumably) can be prohibited from doing anything with them.²³⁴

It would be a mistake, however, to apply this criticism to every structural inference from the text, or even to every construction resembling Justice Douglas's penumbral reasoning. The right to vote rests on a sounder foundation.²³⁵ So does the quasipenumbral doctrine of separation of powers.²³⁶ Perhaps all that can be said is that "good" penumbras—those that can be solidly justified—can be respected without violence to an interpretivist constitutional theory, but that "bad" ones—those that strain unpersuasively to link diffuse and scattered language—should be avoided.²³⁷ With this caveat, the implication of unenumerated fundamental rights from the terms and structure of the text may help the strict constructionist to make better sense of the theory.

C. *Historical Intentionalism or Originalism in Deriving Fundamental Rights*

Another way to honor the Due Process Clause, without giving free reign to the idiosyncratic preferences of judges, is to add originalism to the arsenal of interpretive methods furnished by textual intentionalism (or perhaps better, as a limit on other methods).²³⁸ Whereas a strict textualist might regard the consti-

232. See *Bowers v. Hardwick*, 478 U.S. 186 (1986).

233. The Court reasoned that if sexual conduct in the home between consenting adults were to be given general protection,

it would be difficult, except by fiat, to limit the claimed right to homosexual conduct while leaving exposed to prosecution adultery, incest, and other sexual crimes even though they are committed in the home. We are unwilling to start down that road.

Id. at 195-96.

234. At least, this is so to the extent that fornication is implied within the Court's list of "adultery, incest, and other sexual crimes." *Id.*; see also *Carey v. Population Servs. Int'l*, 431 U.S. 678 (1977) (striking down restrictions on sales of contraceptives to children under sixteen); *Bowen v. Kendrick*, 487 U.S. 589 (1988) (holding that prevention of teenage sexuality is a legitimate governmental purpose).

235. See *supra* Part III.A.

236. See *supra* note 85 and accompanying text. Perhaps this sounder basis exists because the doctrine of separation of powers can be justified by original intent—as well as by textualist logic that does not need to partake of the flight of fancy inherent in the metaphor of the penumbra.

237. See *supra* note 236.

238. See *supra* Part II.B. It can be argued, however, that originalism is not a source of

tutional language as merging the compromised intentions of the drafters into a single expression, thereby making other expressions of intent irrelevant in the manner of a constitutional parol evidence rule, originalist intentionalism would consider other sources as evidence of the Founders' intentions and use these intentions in interpreting ambiguous provisions. This approach allows for supplementation but, supporters would argue, confines it so as to limit judges' abilities to constitutionalize their preferences.²³⁹

The most compelling example of the use of this reasoning by the Supreme Court is the *Slaughter-House Cases*.²⁴⁰ Confronted with the ambiguous language of the Due Process and Equal Protection Clauses, Justice Miller's opinion for the Court used a jurisprudence of original intention to resolve it:

The most cursory glance at these [civil rights amendments] discloses a unity of purpose, when taken in connection with the history of the times, which cannot fail to have an important bearing on any question of doubt concerning their true meaning. . . .

The institution of African slavery, as it existed in about half the States of the Union . . . culminated in the effort, on the part of most of the States in which slavery existed, to separate from the Federal government and to resist its authority. This constituted the war of the rebellion. . . .

[I]n the light of this recapitulation of events, . . . and on the most casual examination of the language of these amendments, no one can fail to be impressed with the one pervading purpose found in them all, lying at the foundation of each, and without which none of them would have been

unenumerated fundamental rights, at least insofar as the originalism is of the type that insists on the text as a starting point. See, e.g., DOUGLAS W. KMIEC, *THE ATTORNEY GENERAL'S LAWYER* (1988) (including an explication of the views of Attorney General Meese, with whom Professor Kmiec worked). In this view, interpretation must begin with the text, and original intent is an aid to interpreting the text; fundamental rights therefore would be limited to enumerated ones. This reasoning, however, is the beginning of the analysis. If the "enumeration" in the text is an open-textured provision such as the Due Process or Equal Protection Clauses, or even if it is a more specific provision that still requires explication, like the First Amendment's protection of freedom of speech, the resulting "enumerated" rights really resemble *unenumerated* ones.

239. See KMIEC, *supra* note 238. It must be recognized that originalism, at least to the extent that it applies principles as the interpreter infers the Founders would use them in today's circumstances, may introduce extraconstitutional values that resemble other kinds of supplementation, even exuberantly activist kinds. See *supra* notes 179-80 and accompanying text. But it seems fair to conclude that originalism, as its supporters claim, is more likely to serve the ends of restraint.

240. 83 U.S. (16 Wall.) 36 (1872).

even suggested; we mean the freedom of the slave race . . .

We do not say that no one else but the negro can share in this protection. Both the language and spirit of these articles are to have their fair and just weight in any question of construction. . . .

. . . [But] [w]e doubt very much whether any action of a State not directed by way of discrimination against the negroes as a class, or on account of their race, will ever be held to come within the purview of this provision. It is so clearly a provision for that race and for that emergency, that a strong case would be necessary for its application to any other. . . .²⁴¹

In this manner, the Court strictly confined the Fourteenth Amendment but at the same time afforded it an interpretation that the Court considered consistent with its historical purpose.

The trouble with this kind of originalism is that it may give inadequate meaning to the text. Thus, the *Slaughter-House* majority purported to give "the language and spirit" their "fair and just weight,"²⁴² but in fact it hardly did so. The opinion is devoid of references to the openness of the Due Process and Equal Protection Clauses. It ignores the generality of their language. From the extratextual source of historical intentionalism, it infers a narrow restriction that, had it actually been the universal intent, would easily have been made express.²⁴³ In fact, the generosity of the language is so obvious that, from the text, it is difficult to argue otherwise than that the Fourteenth Amendment was intended to extend beyond matters of race.²⁴⁴ Instead, the most important kind of textual analysis the Court seems to have made is to declare a "unity of purpose" to abolish slavery—a kind of reductionism that rivals the penumbral reasoning in *Griswold* for result-orientedness.²⁴⁵

241. *Id.* at 67-68, 71-72, 81.

242. *See supra* note 241 and accompanying text. For an analysis that criticizes the decision (together with modern decisions), see Michael J. Gerhardt, *The Ripple Effects of Slaughter-House: A Critique of the Negative Rights View of the Constitution*, 43 VAND. L. REV. 409 (1990).

243. *Cf.* U.S. CONST. amend. XV (extending protection to the right to vote, and expressly limiting itself to concerns of "race, color, or previous condition of servitude"). Thus, the text demonstrates that the drafters were aware of their ability to use language limiting coverage to racial concerns, and the Fifteenth Amendment strengthens the inference that their failure to do so in the Fourteenth Amendment was both deliberate and significant.

244. *See supra* note 123 and accompanying text.

245. That is to say, the reading of such disparate language as that of the National

Another criticism of originalism is that it allegedly springs from a political choice. Specifically, Justice Brennan argues that originalism “expresses antipathy to claims of the minority to rights against the majority.”²⁴⁶ It is impossible to construct a scoreboard that would test this assertion in light of every arguable fundamental right, but the brief answer is—not necessarily. At the very least, it certainly is true that there are instances in which the original understanding would support the constitutional right when contemporary textual interpretation would not. Thus, “opponents of the [Vietnam] War [were] eager to return to the original understanding of the war power,” which might have helped them argue that their postings overseas were illegal.²⁴⁷ And an even more compelling example is *Park Lane Hosiery Co. v. Shore*,²⁴⁸ in which the majority, including Justice Brennan, decided against the right to jury trial. In a solitary dissent, which was based upon the original understanding, Justice Rehnquist would have held in favor of the constitutional right: “If a jury would have been impaneled in a particular kind of case in 1791, then the Seventh Amendment requires a jury trial today”²⁴⁹

Thus the originalism of the *Slaughter-House Cases* is partly correct, to the extent that it recognizes racial classifications as a special problem.²⁵⁰ This justification supports modern suspect classification reasoning, which is an interpretive methodology with overwhelming acceptance.²⁵¹ And the fact that originalism does not always expand the domain of the judiciary in protecting unenumerated rights is not, by itself, an objection; to that extent, it is preservative of the decisions made through the re-

Citizenship, Privileges and Immunities, Due Process, and Equal Protection Clauses, to contain a “unity of purpose” that nowhere is expressed or necessarily implied, is similar in its disingenuousness to that of reading the First, Third, Fourth, Fifth, and Ninth Amendments as having a unified purpose of protecting privacy. And the disingenuousness exists in *Slaughter-House* notwithstanding the fact that it is used as a means of restraint, as opposed to the activism of *Griswold*.

246. Brennan, *supra* note 102, at 438.

247. Sanford Levinson, *Fidelity to Law and the Assessment of Political Activity, Or, Can a War Criminal Be a Great Man*, 27 STAN. L. REV. 1185, 1200 n.68 (1975).

248. 439 U.S. 322 (1979).

249. *Id.* at 345.

250. *See, e.g.*, *Strauder v. West Virginia*, 100 U.S. 303 (1879) (holding racial exclusion from juries unconstitutional and emphasizing the design of the Equal Protection Clause as a protection against racial discrimination).

251. *See, e.g.*, *Loving v. Virginia*, 388 U.S. 1 (1967) (unanimously striking down an antimiscegenation law by use of suspect-classification reasoning).

publican democracy set up by the Constitution.²⁵² Instead, the error of the *Slaughter-House* majority was in giving excessive weight to its own reading of ambiguous and contradictory historical intentions—a weight that crushed the influence of the text, notwithstanding the Court's protestations to the contrary.

Some original intentions can be clearly discerned,²⁵³ while others cannot.²⁵⁴ And sometimes, the intent is reflective of a general understanding, like the racial concerns that underlay the Fourteenth Amendment, whereas other instances reflect the conflicting desires of diffusely contending constituencies—like the varying interpretations that historically might be said to underlie the nonracial implications of the same Amendment.²⁵⁵ The solution to these problems lies in recognizing that there is no unified field theory: the original intent should be persuasive to us when it speaks persuasively, and the text should be controlling on those issues for which it is analogously authoritative.

D. *Evaluation of the Private Importance of the Interest to Affected Individuals as a Means of Identifying Fundamental Rights*

Another method of recognizing unenumerated rights, which differs sharply from both originalism and strict textual derivation, is to evaluate the private importance of the interest to individual persons asserting it. This methodology begins by hypothesizing an individual affected by the problem at issue²⁵⁶ and using

252. Indeed, that is the point: judicial restraint arguably helps the courts to achieve consonance with democracy. See *supra* notes 167-72 and accompanying text.

253. For example, the original intent behind the Contract Clause, that of safeguarding invested capital to assure credit at reasonable costs, is relatively clear. See CRUMP, *supra* note 14, at 389-93. The Court properly used this original intent in *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234 (1978), to conclude that impairment of the contract at issue was unconstitutional, because it severely damaged investors' reliance interests based upon their contractual expectations.

254. Thus, in *Brown v. Board of Education*, 347 U.S. 483 (1954), the Court reasoned that the intentions of the drafters regarding segregated schools were inconclusive, at least as considered in light of the changed circumstances of public education.

255. See *supra* notes 195-96 and accompanying text (discussing conflicting views of those supporting total incorporation of the Bill of Rights and those opposing it).

256. Thus, in *Mathews v. Eldridge*, 424 U.S. 319 (1976), the Court's analysis is based upon a (typical) disability recipient whose benefits are terminated, although the Court recognized that not all such individuals would be identically affected. The Court usually does not make inference of the right depend upon the precise circumstances of the individual plaintiff (even though those circumstances will govern the application of the right in a particular case), because the Court seeks instead to articulate general (or "neutral") principles. Nor is this approach identical to the finding of "systemic" interests, see *infra* Part III.I of this Article, which are interests that parallel the requirements for our system of government to function. Instead, as in *Mathews*, the Court usually tacitly hy-

common experience (or the judge's perception of it) to gauge the strength of the desires or needs to which this individual probably would be subjected, relative to other interests.²⁵⁷ The only textual or originalist justification for such an approach is the open terms of the constitutional language, but arguably there are cases in which such a justification may be persuasive.²⁵⁸ At the same time, this tenuous connection, together with its manipulability, means that the importance-to-the-individual reasoning is readily subject to abuse.

The procedural due process cases are one application to which the methodology seems suited. For example, in *Goldberg v. Kelly*²⁵⁹ and *Mathews v. Eldridge*,²⁶⁰ the Court analyzed the requirement of a predeprivation hearing by comparing the government's justification of its procedure to the strength of the threatened interest of the private citizen. To say that such a framework for analysis is justifiable does not guarantee correct results. For example, in *Goldberg* the Court required a pretermination hearing so elaborate that it undoubtedly wasted resources that otherwise could have increased transfer payments; in *Lassiter v. Department of Social Services*,²⁶¹ on the other hand, the Court denied counsel to a terminated parent in a way that some might think unfair to the individual. Such decisions depend heavily upon judgments about the relative strengths of the competing values, which, unfortunately, usually are incommensurate. To paraphrase Justice Scalia, the question the Court is required to answer in such cases is akin to asking, "When is a line as long as a rock is heavy?"²⁶² Nevertheless, for procedural due process, im-

pothesizes a typical individual and focuses upon that individual's probable interests.

257. Thus, the *Mathews* Court inferred the potential harm that was "generally likely" to be suffered by the prototypical individual it had hypothesized, if it did not recognize the right at issue. *Mathews v. Eldridge*, 424 U.S. 319, 341 (1976).

258. One might consider, for example, the two cases hypothesized in connection with notes *supra* 1-2. The interest in avoiding continuation of a terminal disease accompanied by severe pain seems significant, but beyond the right to refuse treatment, no interest of the affected individual seems clearly established by any other method; and if the interest is to be protected at all, it likely will be only by the importance-to-the-individual approach. Likewise, there is no other well-established protection of the mistakenly-adopted child from his natural parents, and use of the importance-to-the-individual method might be called for in this case as well.

259. 397 U.S. 254 (1970).

260. 424 U.S. 319 (1976).

261. 452 U.S. 18 (1981).

262. See *Bendix Autolite Corp. v. Midwesco Enters.*, 486 U.S. 888, 897 (1988). Moreover, in addition to the incommensurability of the competing values, the values themselves are not measurable in "importance" in any recognized way, as a line and rock would be

portance to the individual is one element in an arguably sound method of analysis. This approach is not confined to interests protected by the text or contemplated by the Founders, and instead it honors the generality of the Due Process Clause. It provides a common framework for decision of a wide range of questions, even though it requires a kind of supplementation that makes for debatable results.²⁶³

Outside the arena of procedural due process, the importance-to-the-individual approach is a less reliable guide. The linchpin paragraph²⁶⁴ of *Roe v. Wade* provides a striking example. After the Court has set forth the Ninth Amendment, the Due Process Clause and its own precedents as potential sources for a broad right of "privacy" or procreative autonomy,²⁶⁵ it faces the need to justify the inclusion of abortion within this right. The Court's reasoning is purely and classically an argument for recognition of the importance of the interest to the individual:

This right of privacy . . . is broad enough to encompass a woman's decision whether or not to terminate her pregnancy. The detriment that the State would impose upon the pregnant woman by denying this choice altogether is apparent. Specific and direct harm medically diagnosable even in early pregnancy may be involved. Maternity, or additional offspring, may force upon the woman a distressful life and future. Psychological harm may be imminent. Mental and physical health may be taxed by child care. There is also the distress, for all concerned, associated with the unwanted child, and there is the problem of bringing a child into a family already unable, psychologically and otherwise, to care for it. In other cases, as in this one, the additional difficulties and continuing stigma of unwed motherhood may be involved. All these are factors the woman and her responsible physician necessarily will consider in consultation.²⁶⁶

Most of the Court's privacy decisions contain a turning point—a leap away from logic founded on strict constitutional

in inches or pounds. See *infra* notes 264-89 and accompanying text.

263. See *supra* notes 259-61 and accompanying text.

264. See *Roe v. Wade*, 410 U.S. 113, 153-54 (1973).

265. It is the "linchpin" paragraph because it is the place in which the Court resolves the most debatable issue in the case—that is, not whether procreational autonomy should be given some level of due process protection as a liberty interest, or whether it sometimes merits enhanced or fundamental status, but whether *this* claimed interest, in abortion, merits such protection.

266. *Roe*, 410 U.S. at 153.

premises, and a resort to sophistic armchair philosophy.²⁶⁷ This swing paragraph from *Roe v. Wade* conceals such a magic moment—an instant of alchemy, in which the Court transforms debatable private perceptions into firm statements of public law. Perhaps it cannot be otherwise if the Court is to use the importance-to-the-individual approach. Justice Holmes, of all people, is quoted as having said that he considered a law constitutional unless it made him “puke.”²⁶⁸ At least the paragraph quoted above from *Roe* does not approach the rhetoric of *Planned Parenthood v. Casey*,²⁶⁹ in which the Court explained the elevated status of the right to abortion by the untestable assertion that “[a]t the heart of liberty is the right to define one’s own concept of existence, of meaning, of the universe, and of the mystery of human life.”²⁷⁰

It should come as no surprise that rhetoric this mushy is manipulable. One exercise that demonstrates just how mushy it can be, is to imagine that someone other than Justice Blackmun—say, someone with idiosyncratic values diametrically opposed to his—were to have written *Roe v. Wade*. For example, what if Henry Hyde had written the *Roe* opinion? Representative Hyde is widely recognized as conscientious, honest, capable, and fair.²⁷¹ The Hyde Amendment, which prohibited the use of federal funds for most abortions, is emblematic of his philosophy.²⁷² If Representative Hyde had been transformed into Justice Hyde, he could have written a linchpin paragraph precisely parallel to

267. Thus, in *Griswold v. Connecticut*, 381 U.S. 479 (1965), the Court first labors to derive the penumbra, using language that bristles with citations; it then applies the penumbra, with brief reasoning and few citations, to derive a right of marital privacy that includes birth control by appeals to the sanctity of marriage. In *Eisenstadt v. Baird*, 405 U.S. 438 (1972), the Court extends the right by concluding that if it means anything, it must include the decision to bear or not to bear a child, which must be the same for unmarried as married people. (*Why* must it be the same? And if it must, does that not undercut the mystical language in *Griswold* that depended on showing that marital privacy was different?)

268. See PHILIPPA STRUM, *LOUIS D. BRANDEIS: JUSTICE FOR THE PEOPLE* 361 (1984) (quoting Justice Brandeis quoting Justice Holmes to his law clerks). This approach to judicial restraint at least has the virtue of candor. “The point is only that our deepest values . . . live below thought and provide warrants for action even when we cannot give those values a compelling or perhaps any rational justification.” Posner, *supra* note 92, at 447.

269. 505 U.S. 833 (1992).

270. *Id.* at 851.

271. Representative Hyde is Chairman of the House Committee on the Judiciary.

272. See *Harris v. McRae*, 448 U.S. 297 (1980) (upholding the Hyde Amendment as constitutional).

Justice Blackmun's in *Roe*, but reaching the opposite result. Most of the words, in fact, would be the same, with only different value judgments plugged in. Here, the value judgments are in italics:

This right of privacy . . . is *not* broad enough to encompass a woman's decision whether or not to terminate her pregnancy. The *advantage* that the State would *bring* upon the pregnant woman by *preventing* this *mistake* is apparent. Specific and direct *improvements* medically diagnosable even in early pregnancy may be involved. Maternity, or additional offspring, may *bring* to the woman *an unexpectedly joyous* future. Psychological *advantages* may be imminent. Mental and physical health may be *improved* by child care. There is also the *happiness*, for all concerned, associated with the *previously unexpected but now wanted* child, and there is the *delight* of bringing a child into a family *that thought it was* unable, psychologically and otherwise, to care for it, *but that now finds it to be life's greatest joy*. In other cases, as in this one, the continuing *public support for a woman who has avoided the error of abortion* may be involved. All these are factors *that justify the State's prohibition here*.

Some interpreters might consider this swing paragraph as rhetorically sound as the actual one in *Roe*, and perhaps, if readers were able to shed the baggage of their own philosophies,²⁷³ the persuasiveness of the second paragraph, paradoxically, might be made to seem equal to that of the first.

In part, the manipulability of this methodology conceals a number of subsidiary questions in the ambiguous concept of "importance." Does the interest have to be important only to the lone plaintiff in the case, or must it be one that might be important to a hypothetical "average" person who is somewhat similarly situated?²⁷⁴ Must it be shared by a large enough group so

273. Thus, for example, Professor Lawson asks whether certain definitions of feminist legal theory might include "a pro-life activist who genuinely thinks that pro-life policies are good for women (either adult women, unborn women, or both) . . ." Gary Lawson, *Feminist Legal Theories*, 18 HARV. J.L. & PUB. POL'Y 325, 328 (1995). Professor Dworkin, while arguing that women have procreative rights that include abortion, candidly acknowledges that a State reasonably may insist on a woman's knowing of others' belief that "there are philosophic and social arguments of great weight that can be brought to bear in favor of continuing the pregnancy." RONALD DWORIN, *LIFE'S DOMINION: AN ARGUMENT ABOUT ABORTION, EUTHANASIA, AND INDIVIDUAL FREEDOM* 153 (1993) (quoting *Casey*, 505 U.S. at 872 (O'Connor, J., plurality opinion)). This acknowledged interest of the State, in the abortion cases, is overcome by individual interests. But why? Only because the judges have considered it more important and, on that basis, have awarded it a qualitatively different status.

274. See *supra* notes 256-57.

that it might have some degree of systemic importance?²⁷⁵ Does the destruction of other interests, held by other persons, count in the balance?²⁷⁶ And from which vantage point is “importance” to be evaluated?²⁷⁷

For example, Professor Michelman challenged the categorization of education as a fundamental right by a famous question: “[W]hy education and not golf?”²⁷⁸ Professor Tribe responded,

The time may come when constitutional law will answer the scholar’s question . . . with a reply that is likely to make human sense—“because education is more important” [than golf]—and when this answer, however odd it may seem to some lawyers, will seem inescapable to those who take their lessons from life itself.²⁷⁹

But granting that this reasoning has rhetorical force, it is not so because equality of education is more “important” than golf to every individual. For example, one may conjure up the hypothetical case of an aspiring teenage golf professional who is denied access to a public course on the dubious ground that years ago, he dropped out of high school. If that is not enough to make golf more important than education at least to this individual, we can hypothesize that the judge’s brother is Arnold Palmer, and so this judge rightly can claim to know from “life itself” that golf is important—maybe even “fundamentally” important. Thus, the *real* reason the right to golf is a less appealing candidate for fundamental status than the right to education has nothing to do with the relative importance of the two interests to this one individual. A threshold level of education is a universally-shared interest. The intensity of this individual plaintiff’s interest is aberrational²⁸⁰ and cannot be elevated above the interest in education without hamstringing proper state action and

275. See *infra* Part III.I.

276. This question does not refer to balancing that would occur after the right is characterized as fundamental; that is done by strict scrutiny. Instead, it refers to the possibility that the Court might, as it has in some cases, consider the probable effects of the initial characterization on necessary legislation or on other claimed interests, and might balance these effects against individual importance. See *infra* Part IV.

277. See *infra* notes 278-89 and accompanying text.

278. Frank I. Michelman, *Foreword: On Protecting the Poor Through the Fourteenth Amendment*, 83 HARV. L. REV. 7, 59 (1969).

279. TRIBE, *supra* note 27, at 774.

280. Cf. *supra* notes 256-57, 274 and accompanying text (arguing that the Court must focus upon a typical individual in a position to be affected).

denigrating equal or greater interests of others.²⁸¹ But—and this is the key point—judges who are fond of Arnold Palmer and are merely set free to “take their lessons from life itself” might hear the sympathetic case of the aspiring teenager and decide that golf is important enough.

It may seem silly, as Professor Tribe implies, to become overly analytical about this paper struggle between education and golf. But however silly it seems, the problem is not purely a “scholar’s question.” Real courts have used importance-to-the-individual reasoning to reach astonishingly silly (and astonishingly harmful) results in real cases. Beyond the topless jogging and gasoline-powered leaf blower cases cited in the Introduction to this Article,²⁸² there is the strange, true story of Richard R. Kreimer, also known as the stinking man.²⁸³ Kreimer was a homeless individual in Morristown, New Jersey, who frequented the public library. Unfortunately, he stared at and followed other patrons to such an extent as to disturb them, talked loudly to himself and others, and exuded an odor so strong and offensive that it prevented other people from using certain areas of the library. The library’s management therefore adopted policies against “noisy or boisterous activities, unnecessary staring, [and] following another person,” as well as a requirement that “personal hygiene shall conform to the standard of the community for public places.”²⁸⁴

Kreimer sued, asserting claims under the Due Process and Equal Protection Clauses, among other laws. The district judge then performed an astounding feat of alchemy: he held the library’s policy facially invalid because it made “personal attributes such as appearance, smell, and manner of cleanliness determinative.”²⁸⁵ The judge reasoned that there was an elevated right to choice in these personal attributes of smell and manner of cleanliness, and he required proof of actual “disruptions which are incompatible with the library’s function” to overcome this right of choice.²⁸⁶ In other words, the Court used heightened scrutiny, in the form of a requirement of narrowly targeted im-

281. See *infra* Part III.K-L.

282. See *supra* notes 7-8 and accompanying text.

283. See *Kreimer v. Bureau of Police*, 958 F.2d 1242 (3d Cir. 1992).

284. *Id.* at 1247.

285. *Id.* at 1268-69.

286. *Id.* at 1269.

portant government purposes, to invalidate this modest and sensible policy. If that was not clear enough, the Court pointedly disallowed the library from preventing “that which may not be sanctioned merely on the basis of ‘annoyance’ ”²⁸⁷—thus declining to exercise rational basis review. The linchpin of this conclusion, according to the district court, was the degree to which the hygiene restriction “impinges upon individual liberty.”²⁸⁸ Although the court of appeals reversed, the city and library settled for a total of \$230,000 rather than face the disproportionate cost of litigation of remaining issues, concerning application of the library rules individually to Kreimer, before the same district judge.²⁸⁹ Thus, the manipulability of the importance-to-the-individual methodology allowed an intellectually dishonest district judge to prefer an interest that most charitably can be called dubious, while utterly ignoring legitimate governmental interests—and, indeed, while destroying the most basic rights of others.

A separate but related difficulty with the “importance” method is that it depends crucially upon the level of generality at which the Court analyzes the claimed interest. Advocates of freewheeling recognition of fundamental rights, for example, will seek to define the interest broadly. They will seek to label it as a right to be left alone, or a freedom not to conform, or (as in *Kreimer*) a right to control one’s own “personal attributes.” These platitudes are global enough to include virtually any putative rights one pleases. Those who seek to restrain the judiciary, on the other hand, will define the interest as narrowly and specifically as possible—as a desire to engage in homosexual sodomy, for example, or a claimed interest in ingesting psychotropic drugs, or the right to drive off other library patrons by exuding an overpowering odor. This problem of identifying the appropriate level of abstraction is a difficulty shared by other methods as well, including the history-and-tradition test, which is the subject of the next Section. Discussion of the issue, therefore, is deferred until after that Section. Here, suffice it to say that the disagreement about levels of abstraction as yet admits of no clear solution among the Justices, and it contributes significantly to

287. *Id.*

288. *Kreimer*, 958 F.2d at 1269.

289. See *Settlement Ends Portion of Morristown Homeless Case*, N.J. L.J., Mar. 9, 1992, at 5.

the manipulability of the importance-to-the-individual approach.

There remain some cases that best can be rationalized by the importance-to-the-individual approach, and in which the reasoning is not opposed by the text or history. The procedural due process decisions are one example; perhaps there are others.²⁹⁰ But the manipulability, subjectivity, and lack of limiting principles that are inherent in the importance-to-the-individual methodology should make courts wary of using it except in the most compelling kinds of cases.

E. *Recognition of the Interest as Historically and Traditionally Protected*

Many of the Court's fundamental rights decisions look to whether the interest has been the subject of historical and traditional protection. This is the approach taken by most Justices who recognize the need for supplementation to interpret the flexible Due Process Clause, but who value judicial restraint. For example, Chief Justice Rehnquist and Justices White and Scalia all appear to have embraced variations of this approach.²⁹¹

The history-and-tradition method has the advantage of providing a touchstone outside the judge's own perceptions. Unlike the importance-to-the-individual method or other notions of natural rights based on contemporary philosophy, which arguably depend more heavily upon the judge's values, the history-and-tradition approach demands that the judge consult an ostensibly objective source: the opinions of others, expressed over an extended period of time. Such a derivation also has the appearance of generality and disinterestedness, because it consults principles that were not made for the present emergency in the case at bar. And finally, making sense of the mass of historical precedent from nonconstitutional sources arguably resembles the usual judicial role in a more comfortable way than does evaluation of importance of an interest to a hypothetical indi-

290. See *supra* notes 1-2, 258 and accompanying text (discussing putative rights to die or to live with adoptive family).

291. See *infra* notes 292-97 and accompanying text. There actually are many antecedents to this formula. Justice Holmes's famous dissent in *Lochner* argues for majority rule unless opposed by "fundamental principles as they have been understood by our tradition and our law." *Lochner v. New York*, 198 U.S. 45, 76 (1905) (Holmes, J., dissenting); see also *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934) ("so rooted in the traditions and conscience of our people as to be ranked as fundamental"); *Moore v. City of E. Cleveland*, 431 U.S. at 503 (1977) (protecting the family because it is "deeply rooted in this Nation's history and tradition").

vidual.

For example, in *Michael H. v. Gerald D.*,²⁹² Justice Scalia examined history to discern a tradition for legal protection of the marital family, as opposed to the relationships of an adulterous natural father.²⁹³ In *Cruzan v. Director, Missouri Department of Health*,²⁹⁴ Chief Justice Rehnquist cited a mass of informed consent cases to consider whether there was a tradition of elevated status for the right to refuse treatment.²⁹⁵ Such an analysis gives recognition to the due process continuum in a way that seems flexible to a degree, but limits the scope of incursions upon democracy.

But critics argue that there is a circularity to the history-and-tradition approach. It tests whether a given interest should be protected by asking whether it has been respected in the past. If the objective is to secure the interests of the minority, some would argue that such an approach is internally inconsistent, because if a right has been historically and traditionally respected, the majoritarian political process is likely to protect it independently of the courts.²⁹⁶ This method therefore can be criticized as extending protection only to those interests that need it least. In fact, it is arguable that this is precisely the point; in confining fundamental rights to those deeply rooted in this Nation's history and tradition in *Bowers v. Hardwick*, Justice White explained:

Nor are we inclined to take a more expansive view of our authority to discover new fundamental rights embedded in the Due Process Clause. The Court is most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or design of the Constitution. That this is so was painfully demonstrated by the face-off between the Executive and the Court in the 1930s, which resulted in the repudiation of much of the substantive gloss that the Court had placed on

292. 491 U.S. 110 (1989).

293. *See id.* at 124-26 (Scalia, J., plurality opinion).

294. 497 U.S. 261 (1990).

295. *See id.* at 269.

296. Thus, Justice Brennan in *Michael H. v. Gerald D.* complained that the majority had insisted on confining the Due Process Clause to interests "traditionally protected by our society," rather than interests "that society traditionally has thought important," as he believed it should. *Michael H.*, 491 U.S. at 140 (Brennan, J., dissenting). The majority's approach, he argued, would protect only "interests already protected by a majority of the states." *Id.*

the Due Process Clause of the Fifth and Fourteenth Amendments.²⁹⁷

And perhaps the appearance of circularity diminishes, and the history-and-tradition method becomes more attractive, when one separates the tradition of respect for a value from the application of protection to that value in the individual case.²⁹⁸ The existence of a majoritarian value is no guarantee that it will be applied uniformly in cases where broader state interests, powerful individuals, or the press of emergencies are arrayed against it. A history-and-tradition approach fills this gap by requiring the State to respect the value uniformly. Indeed, this consideration raises another theoretical objection: the history-and-tradition approach might even contravene the principle of judicial restraint, ironically, in some cases—by preventing the States from engaging in useful innovations.²⁹⁹

Furthermore, the apparent objectivity of the history-and-tradition method is less obvious when one considers what sources are to be consulted. The judge's choice of antecedents may influence the outcome with a dollop of the same subjectivity that is inherent in the importance-to-the-individual model. Is the judge to derive the requisite "history and tradition" solely from obvious legal sources such as statutes and judicial opinions,³⁰⁰ or may the Court consider philosophical essays, epic novels, and the thoughts of poets?³⁰¹ In a right-to-die case involving a claim to assisted suicide, for example, perhaps such works as *Thanatopsis*³⁰² and *Crossing the Bar*³⁰³ would have much to say to some judges about which values are deeply rooted in our history and

297. *Bowers v. Hardwick*, 478 U.S. 186, 194-95 (1986).

298. *Cf. supra* note 296 (setting out Justice Brennan's formulation).

299. This problem was raised and addressed, for example, in *Cruzan*. Chief Justice Rehnquist recognized a "significant" liberty interest in refusing unwanted medical treatment. *Cruzan v. Director, Mo. Dep't of Health*, 497 U.S. 261, 277 (1990). Nevertheless, the Chief Justice declined to confine the States by recognizing this interest in the right-to-die context, on the theory that it is better "not to attempt, by any general statement, to cover every possible phase of the subject." *Id.* (quoting *Twin City Bank v. Nebeker*, 167 U.S. 196, 202 (1897)).

300. *Cf. Cruzan v. Director, Mo. Dep't of Health*, 497 U.S. 261 (1990) (considering decisional law in analyzing the alleged right of an incompetent to refuse treatment).

301. *Cf. Bork, supra* note 104, at 387 (criticizing Bickel's theory that judges could derive supplementation from "the vision of the philosophers and the poets").

302. William Cullen Bryant, *Thanatopsis*, in *THE POETICAL WORKS OF WILLIAM CULLEN BRYANT* 21 (1909).

303. Alfred Lord Tennyson, *Crossing the Bar*, in *2 BRITISH LITERATURE: FROM BLAKE TO THE PRESENT DAY* 687 (Hazelton Spencer, Walter E. Houghton & Herbert Barrows eds., 1952).

tradition, but they might have little to say to other judges.³⁰⁴ If an interest is deeply rooted in the tradition of a minority, such as Native American use of peyote, is that sufficient? And is it only sustained traditions that have persisted from the founding of the Republic to the present day that furnish a reliable guide, or may a particular Justice emphasize recent history, or (perhaps just as rationally) recognize abandoned traditions that were deeply rooted shortly after the time of the enactment? In judging "this Nation's history and tradition" in a case like *Bowers v. Hardwick*, should the Court consider the sweep of western civilization back to the traditions of antiquity?

Even with these criticisms, the history-and-tradition model has the advantages of greater objectivity and deference to democracy than other methods that frequently compete with it.³⁰⁵ It also affords at least minimal recognition to the flexibility of the Due Process Clause, although critics would see its narrowness and arguably its circularity as its most significant defects.³⁰⁶ For these reasons, the identification of an interest as deeply rooted in our nation's history and tradition supports elevation of its status with relative (even if not complete) confidence. Not coincidentally, it also may mean that a majority of the Supreme Court is likely to concur in that categorization.³⁰⁷

F. *Determining the Reach of Fundamental Rights by Defining the Degree of Abstraction: The Problem of the Correct Level of Generality*

There also is room for manipulation of the history-and-tradition approach (and, as we shall see, of other approaches too) in the level of generality that the analyst chooses for characterizing the relevant tradition.³⁰⁸ The freewheeling judge, who

304. See *supra* note 301. For an example of the tracing of traditions back to ancient societies, see Mark D. Frederick, *Physician Assisted Suicide: A Personal Right?*, 21 S.U. L. REV. 59, 63-64 (1994) (arguing that the Bible describes suicide without condemnation, and the Greeks and Romans condoned it in special circumstances, but explaining that in the Middle Ages the Church condemned it as a sin comparable to murder, leading to modern Anglo-American condemnation).

305. For example, Chief Justice Rehnquist's use of a history-and-tradition approach in *Cruzan* resulted in deference to the state legislature. See *Cruzan v. Director, Mo. Dep't of Health*, 497 U.S. 261, 277-83 (1990). Justice Brennan, in dissent, used both a history-and-tradition approach and an importance-to-the-individual approach in arguing for the overturning of the statute. See *id.* at 304-06 (Brennan, J., dissenting).

306. See *supra* notes 296 & 298 and accompanying text.

307. See *supra* note 291 and accompanying text.

308. See Bruce Ackerman, *Liberating Abstraction*, 59 U. CHI. L. REV. 317 (1992); Frank H. Easterbrook, *Abstraction and Authority*, 59 U. CHI. L. REV. 349 (1992); John Hart Ely,

assumes expansive powers to imagine new rights, will propose a comprehensive formula—such as the “right to be let alone” or the “right not to conform.”³⁰⁹ By putting the matter in these terms, the judge has appealed to an idea vague enough so that there is bound to be history galore to which he can resort, and at the same time, he has claimed a territory broad enough so that it is sure to include the judge’s pet theories. In fact, this rhetoric implies no limits that would exclude even preposterous claims, such as the desire of some people to “be left alone” while conspiring to fix prices (an absurd claim, but nevertheless, and unfortunately, one that is deeply rooted in our nation’s history and tradition), or the right “not to conform” by ingesting hallucinogens such as LSD. Meanwhile, at the opposite end of the spectrum, the judge who seeks to confine fundamental rights will define the issue in narrow terms, as encompassing only the specific behavior that the individual claimant seeks to protect.³¹⁰ This latter approach minimizes the likelihood of a meaningful tradition by insisting that it be precisely congruent with the interest at stake. This condition is unlikely to be met unless the interest already is the subject of majoritarian protection.³¹¹

It should be emphasized, once again, that this problem of generality is not peculiar to the history-and-tradition approach. In fact, it is a difficulty with all methodologies for recognizing fundamental rights. In deciding from the text whether flag-burning is protected speech, for example, one must define the value being protected; broad or narrow definition of “speech” affects the conclusion. We already have seen that originalism can be manipulated by expanding or contracting the abstractness of the question, and so can the importance-to-the-individual approach. Statement of the interest with greater or lesser precision always affects the likelihood that it will be supportable as fundamental, no matter which method one uses, and this is why the generality problem is—well, “general.” The reason the problem

Another Such Victory: Constitutional Theory and Practice in a World Where Courts Are No Different from Legislatures, 77 VA. L. REV. 833 (1991); Laurence H. Tribe & Michael C. Dorf, *Levels of Generality in the Definition of Rights*, 57 U. CHI. L. REV. 1057, 1065-67 (1990). Perhaps Judge Bork had the best answer: the judge should use “the level of generality that the text and historical evidence warrant.” BORK, *supra* note 126, at 149; *see infra* notes 334-35 and accompanying text.

309. *See infra* notes 407-08 and accompanying text.

310. *See supra* note 297 and accompanying text.

311. Thus, the question of generality is related to the circularity problem mentioned above. *See supra* notes 296-98 and accompanying text.

is analyzed here, in conjunction with the history-and-tradition approach, is merely that the Supreme Court has analyzed it most notably in this context.

1. *Treatment of the Generality Problem in Michael H. v. Gerald D.*

The most interesting case exposing this level-of-abstraction problem is *Michael H. v. Gerald D.*³¹² There, an adulterous biological father sought to exercise paternal rights to a daughter he had parented with a married woman, who now lived with her husband and the child. The husband and wife naturally opposed recognition of the adulterous father's claimed rights, which arguably would have destroyed the integrity of their own family unit. Justice Scalia's plurality opinion forthrightly addressed the generality issue and concluded, in his now-famous footnote 6, that the Court should "refer to the most specific level at which a relevant tradition protecting, or denying protection to, the asserted right can be identified."³¹³ This approach, Justice Scalia implied, was necessary to limit judicial activism, to protect the legitimacy of the Court, to avoid arbitrary results, to prevent judges from dictating to the democracy, and to encourage neutral, reproducible decisions.³¹⁴ The claimed interest thus reduced to that of an unwed father desiring to exercise parental rights over an adulterously-conceived child living in the marital family,³¹⁵ and Justice Scalia had little difficulty in concluding that there was no rooted tradition supporting this claim. As he pointed out, the tradition was to the opposite effect—protecting the marital family.³¹⁶

312. 491 U.S. 110 (1989). There is a prodigious literature on this case. See, e.g., Kathleen M. Sullivan, *The Justices of Rules and Standards*, 106 HARV. L. REV. 22 (1992) (distinguishing the approaches of the Court's center and its conservatives); Ernest Young, *Rediscovering Conservatism: Burkean Political Theory and Constitutional Interpretation*, 72 N.C. L. REV. 619 (1994) (comparing centrist and conservative versions of originalism); Gregory C. Cook, Note, *Footnote 6: Justice Scalia's Attempt to Impose a Rule of Law on Substantive Due Process*, 14 HARV. J.L. & PUB. POL'Y 853 (1991); Timothy L. Raschke, Note, *Justice Scalia's Due Process Methodology: Examining Specific Traditions*, 65 S. CAL. L. REV. 2743 (1992); Robin West, Comment, *The Ideal of Liberty: A Comment on Michael H. v. Gerald D.*, 139 U. PA. L. REV. 1373, 1388-89 (1991) (arguing that Justice Brennan actually demonstrates conservative virtues); L. Benjamin Young, Jr., Note, *Justice Scalia's History and Tradition: The Chief Nightmare in Professor Tribe's Anxiety Closet*, 78 VA. L. REV. 581 (1992).

313. *Michael H.*, 491 U.S. at 127-28 n.6 (Scalia, J., plurality opinion).

314. See *id.* at 128 n.6.

315. See *id.* at 124-26.

316. See *id.*

Only Chief Justice Rehnquist concurred in all of this reasoning. Justices O'Connor and Kennedy excluded the controversial footnote 6 from their concurrence, observing that the insistence on a highly specific tradition "may be inconsistent with some of our past decisions in this area."³¹⁷ Although arguably true,³¹⁸ this objection left these two Justices open to Justice Scalia's criticism that they had reserved the right to choose "the tradition they select."³¹⁹ Likewise, Justice Brennan, joined by Justices Marshall and Blackmun, rejected Justice Scalia's approach in his dissent. Instead of analyzing the most specific tradition, these dissenters would have asked whether the claim under consideration is "close enough to the interests we already have protected to be deemed an aspect of 'liberty' as well."³²⁰ Finally, Justice White dissented, on the ground that the relevant tradition was contained in the Court's "unwed father cases" (as opposed, presumably, to *adulterous* unwed father cases).³²¹ Under these cases, Michael H. had "a protected liberty interest in a relationship with his child" because he had "demonstrated a sufficient commitment to his paternity."³²²

2. Justice Scalia's "Most Specific Level" Approach Compared to Other Justices' Indeterminate Approaches: A Critique

Although Justice Scalia's approach ostensibly reflects an admirable intellectual rigor, it has not earned him plaudits from all the commentators. For example, at least one of his critics accuses him of the very arbitrariness he seeks to avoid, in that his allegedly exclusive reliance on the "most specific level" test as-

317. *See id.* at 132.

318. For example, no such principle had been relied upon in such cases as *Bowers* or *Moore*. On the other hand, these cases may be distinguishable as not recognizing or raising the level-of-generality problem.

319. *Michael H.*, 491 U.S. at 128 n.6 (Scalia, J., plurality opinion).

320. *Id.* at 142 (Brennan, J., dissenting). This arguably is a correct statement of the basic principle of the Court's unwed father cases. *See Lehr v. Robertson*, 463 U.S. 248 (1983); *Caban v. Mohammed*, 441 U.S. 380 (1979); *Quilloin v. Walcott*, 434 U.S. 246 (1978); *Stanley v. Illinois*, 405 U.S. 645 (1972). The principle may not be directly applicable, however, to a case in which an adulterous father's interests conflict with arguable interests of the members of the marital family.

321. *Michael H.*, 491 U.S. at 157-58 (White, J., dissenting).

322. Edward Gary Spitko, Note, *A Critique of Justice Antonin Scalia's Approach to Fundamental Rights Adjudication*, 1990 DUKE L.J. 1337, 1343; *see also* David B. Anders, *Justices Harlan and Black Revisited: The Emerging Dispute between Justice O'Connor and Justice Scalia over Unenumerated Fundamental Rights*, 61 FORDHAM L. REV. 895 (1993) (contrasting originalist and textualist styles).

sertedly is not derived from the Fourteenth Amendment's text or history,³²³ does not emphasize the protection of minority interests,³²⁴ and does not solve the problem of ambiguity in defining traditions.³²⁵ These criticisms may have some force, but perhaps that is why Justice Scalia has placed himself in a position to claim innocence of the charge that he "exclusively" relies on any single test.³²⁶

Moreover, the criticisms are overstated. The very concept of "due" process calls for interest-by-interest³²⁷ limitation in proportion to the strength of the specific claim at issue, and it implies a respect for countervailing interests—a respect that is lacking in, for example, Justice Brennan's methodology. This textual analysis is enhanced by the originalist argument that rights of adulterous fathers vis-à-vis the marital family are remote from the historical concerns underlying the Fourteenth Amendment. Furthermore, it is not merely the Fourteenth Amendment to which Justice Scalia's approach must claim obeisance, but the entire Constitution, including the grant of judicial power in Article III. That power is limited to Cases and Controversies,³²⁸ and although it must involve the articulation of abstract principles, the judicial role implies decision on narrow grounds.³²⁹ These considerations dovetail with recognition of the distinctness of the legislative power and its protection through judicial restraint.

The criticism that Justice Scalia's approach insufficiently protects minority rights is more debatable. That consequence arguably is implicit in the history-and-tradition approach,³³⁰ and perhaps it is the choice of this method that causes this lesser protection. Justice Scalia's reasoning, in this view, merely applies the history-and-tradition approach with intellectual rigor. But this is not the full answer, because the legitimate value of minor-

323. See Spitko, *supra* note 322, at 1343-48.

324. See *id.* at 1352-59.

325. See *id.* at 1348-52. This criticism is undermined partially by the difficulty of enunciating neutral principles in the first place, as the author acknowledges. See *id.* at 1347. In addition, it is more seriously undermined by the even greater lack of consistency and constraint in the approaches of other Justices. See *supra* notes 319-21 and accompanying text.

326. See *supra* note 145.

327. See *supra* Part II.A.2.

328. See U.S. CONST. art. III, § 2, cl. 1 ("The judicial Power shall extend to [certain] Cases . . . [and certain] Controversies . . .").

329. See Redish, *supra* note 53, at 706-08.

330. See *supra* note 296 and accompanying text.

ity protection sits in opposition to the equally legitimate value of majority rule, across the great divide of the Madisonian dilemma.³³¹ Justice Scalia's approach, by defining a real basis for judicial restraint, protects legislative (and hence democratic) power. Justice Brennan's approach is less rigorously limited, in that it ties the result to past exercises of judicial power—the very power sought to be limited—and it does so only by asking whether the extension is “close enough” to past assumptions of that same power. This standard is both circular enough and vague enough to allow a determined judicial legislator to tack and weave as desired.

Finally, it is only Justice Scalia's approach that limits judicial power enough to allow the legislature to protect minority rights other than the one at issue. The critics tend to overlook the interests of the members of the marital family.³³² It takes little imagination to see the possibility that Michael H.'s regular intervention in parental advice, control, and decisions might undermine Gerald D.'s relationships both with his wife and with his daughter. Presumably, recognition of a “right” for Michael H. would empower him to assert his interests even if he acted in direct contravention of the marital father's approach to the child, and indeed even if they conflicted with the daughter's desires or best interests.³³³ Justice Brennan's approach leaves no room for these considerations because, inconsistently with the Fourteenth Amendment's text, he recognizes neither countervailing interests nor enforceable limits on the interest he prefers. There is no basis in the Constitution, and no justification short of judicial egocentrism, to suppose that judges can sort out the clashing interests of the marital family and the biological father better than legislators. This, indeed, is the burden of Justice Scalia's argument.³³⁴

Perhaps an alternative approach to the history-and-tradition method would be to define the level of generality in the same manner as those who generated and participated in the tradi-

331. See *supra* note 14 and accompanying text.

332. Spitko's articulate analysis, for example, gives little attention to this issue. See *supra* note 322.

333. Indeed, the state law provided the biological father the opportunity to convince a trial judge that visitation would be in the child's best interests. Justice Stevens based his concurrence on this factor. Michael H. v. Gerald D., 491 U.S. 110, 133 (1989) (Stevens, J., concurring in the judgment).

334. See *id.* at 128 n.6 (Scalia, J., plurality opinion).

tion at issue would have defined it. This approach is analogous to Judge Bork's determination of generality for originalism by reference to history, text, and structure, as we saw above. Thus, the Court would define *both* the tradition *and* its level of generality by historical acceptance. Such an approach, although subject to all the analytical difficulties of the history-and-tradition approach itself, might achieve a greater objectivity than the various methods used by the Justices in *Michael H. v. Gerald D.* At the same time, it might preserve a realistic limit on the judicial power to create new fundamental rights.

A comparison of this "historically accepted generality" approach to Justice Scalia's footnote 6, however, may show that his approach is more closely on target than the reasoning of other Justices. It is unlikely, for example, that those who historically observed a tradition of recognizing a right to be left alone in sexual matters extended this attitude in complete indifference to the particular sexual practice at issue. They probably did not extend it to prostitution, incest, bestiality—or adultery. Similarly, it is unlikely that the proponents of unwed fathers' rights contemplated indiscriminate extension of those interests to destroy countervailing concerns of the marital family in the event of adultery. Thus, the history-and-tradition approach seems to demand a narrow definition if the resulting decision is to be faithful to the very history and tradition to which it traces. By this reasoning, it is not Justice Scalia's refinement of the test with which critics of *Michael H.* have their real quarrel, but the history-and-tradition approach itself. And perhaps—as most of the Justices seem to accept—due process cannot be read by history and tradition alone, just as it cannot be reduced to any one unified field theory.

Furthermore, Justice Scalia's critics appear to conclude that specific definition of the tradition leads inevitably to a choice against the right. But this inference need not uniformly be true. Specific definition may sometimes produce, instead, a stronger case for the individual. When asked about a right to die, for example, many people can be expected to predicate the answer on the precise circumstances, including such factors as permanence of painful conditions, quality of life, competency, free choice, medical futility, prognosis, and level of confidence in the infor-

mation.³³⁵ Specificity in these factors enhances right-to-die cases rather than diminishing them, because although it is unlikely that there is a tradition recognizing death-related rights in the healthy population generally, the finding of such a tradition is more likely if the issue is narrowed to cases of anencephalic babies³³⁶ or vegetative persons who have left clear and convincing directives. These conclusions are reinforced by the description in the principal opinions in *Cruzan* of the right to refuse treatment as “significant”³³⁷ and by the Court’s assumption that a right to refuse nutrition and hydration might exist sometimes. Thus, Justice Scalia’s insistence on specificity is not uniformly a choice against unenumerated rights; instead, it is a mixed bag that sometimes will, and sometimes will not, strengthen the individual’s case.

3. *A Focus Upon a Tradition of State Power as Compared to a Tradition Recognizing the Claimed Liberty Interest: Can Different Levels of Generality Be Justified?*

Justice Scalia concurred separately in *Cruzan*, however, and introduced a new factor into the calculus. He emphasized a tradition of state power to prevent suicide rather than a right to refuse treatment or nutrition.³³⁸ This analysis focuses on the flip side, as it might be called, of the history-and-tradition approach. It does not inquire whether history and tradition support the claimed right, but rather, it asks whether there is a tradition of recognizing its opposite—that is, state power to prevent the conduct at issue. Both approaches might amount to substantially the same question if treated in the same way, with identical levels of generality. Justice Scalia’s approach in *Cruzan*, however, was not precisely the flip side of his *Michael H.* analysis, in that it was not symmetrical to his earlier reasoning. Unlike his analysis of rights at the most specific level of definition, Justice Scalia’s

335. Cf. *infra* note 514 (setting out the factors considered by one court that recognized right).

336. Cf. E. Haavi Morreim, *Futilitarianism, Exoticare, and Coerced Altruism: The ADA Meets Its Limits*, 25 SETON HALL L. REV. 883, 922-25 (1995) (suggesting reasons and precedent for limiting treatment, in response to the case of anencephalic born with no brain except a brain stem). *But cf. In re Baby K*, 832 F. Supp. 1022 (E.D. Va. 1993), *aff’d*, 16 F.3d 590 (4th Cir. 1994) (construing federal emergency medicine legislation, in case of anencephalic, as requiring care until death or stabilization, and concluding that any other limits must be drawn by Congress).

337. See *Cruzan v. Director, Mo. Dep’t of Health*, 497 U.S. 261, 277 (1990).

338. See *id.* at 294-300.

opinion in *Cruzan* did not analyze this tradition of state power at the most specific level. Instead, he considered a *general* power of suicide prevention.³³⁹

This general approach to state power, which tends to uphold governmental incursions into individual autonomy, facially seems inconsistent with Justice Scalia's insistence on specificity in defining traditions supporting unenumerated rights. The commentators have taken him to task for this perceived inconsistency.³⁴⁰ But perhaps there is a way in which the difference can be defended. Because legislative power reflects democratic processes, it may be proper to define it as occupying a broader space than is denied to it by nondemocratic judicial definition of unenumerated rights. Thus analyzed, Justice Scalia's general-traditions approach to state power is not inconsistent with his specific-traditions approach to unenumerated rights, and the difference can be seen as serving the goal of judicial restraint. At some point, however, the analysis would be incomplete without asking whether there are exceptions to the general tradition of state power (such as for anencephalic babies or for persistent vegetatives whose directives are clear). In other words, a general tradition of state power may be a sensible focus, because it simply reflects the same issues of history and tradition from a different perspective; but Justice Scalia would lose the neutrality and reproducible results he seeks if, in a proper case, he did not recognize specific traditions of autonomy as exceptions.

*G. Recognition of the Interest as an Essential Requisite of
"Ordered Liberty"*

In *Palko v. Connecticut*,³⁴¹ the Court confined fundamental liberties to those that are "implicit in the concept of ordered liberty," such that "neither liberty nor justice would exist if [they] were sacrificed."³⁴² *Palko* actually concerned the selective incorporation of the Bill of Rights. The freedom of speech was incorporated because it was essential to a free society; the require-

339. *See id.*

340. *See, e.g.,* Benjamin C. Ziporski, *The Pedigrees of Rights and Powers in Scalia's Cruzan Concurrence*, 56 U. PITT. L. REV. 283, 286-87 (1995) (critiquing "statism" allegedly reflected in Justice Scalia's specificity principle as applied to rights, coupled with use of history-and-tradition not confined by specificity to recognize state power).

341. 302 U.S. 319 (1937).

342. *Id.* at 326.

ment of a grand jury indictment, on the other hand, was not, because a society that valued both liberty and order could opt instead for examining trials, preliminary hearings, or other screening mechanisms.³⁴³ In *Adamson v. California*,³⁴⁴ the Court extended this reasoning and held that the Fifth Amendment did not apply to the States because its guarantees were not essential to ordered liberty:

Specifically, the due process clause does not protect . . . the accused's freedom from giving testimony by compulsion in state trials that is secured to him against federal interference by the Fifth Amendment. . . . For a state to require testimony from an accused is not necessarily a breach of a state's obligation to give a fair trial.³⁴⁵

The Court later overruled this specific holding, and it ultimately rejected ordered liberty as a method of selective incorporation.³⁴⁶ Nevertheless, the ordered liberty approach has persisted as a test for fundamental rights.³⁴⁷

This is a minimalist standard. It protects only those interests whose recognition is *essential* to ordered liberty—those that are so clearly “implicit” in the concept that “neither liberty nor justice would exist if [they] were sacrificed.”³⁴⁸ In fact, the ordered liberty test is narrower than one depending on history and tradition, because even values rooted in history and tradition would fail the ordered liberty test unless they were essential. Consequently, those who regard due process as protecting a general continuum of rights, and who resist its confinement to only necessary implication, would be likely to reject the *Palko* approach.

Nevertheless, the ordered liberty method combines judicial restraint with recognition of some flexibility in the text, and the Court has used it in such important cases as *Bowers* and *Roe*. In *Bowers*, for example, the Court rejected a right to homosexual conduct between consenting adults with the observation, “to claim that a right to engage in such conduct is ‘deeply rooted in this Nation’s history and tradition’ or ‘implicit in the concept of

343. See *id.* at 323-24.

344. 332 U.S. 46 (1947).

345. *Id.* at 54.

346. See *Duncan v. Louisiana*, 391 U.S. 145 (1968); *infra* Part III.G.

347. See *infra* notes 349-51 and accompanying text.

348. *Palko*, 302 U.S. at 325-26.

ordered liberty' is, at best, facetious."³⁴⁹ But perhaps there is wiggle room even in the ordered liberty test, and in the hands of Justices less confined by judicial restraint, it has been transformed to a broader source of rights. Thus Justice Blackmun, writing for the dissenting Justices in *Bowers*, wrote that "this case is about 'the most comprehensive of rights and the right most valued by civilized men,' namely, 'the right to be let alone. . . .'"³⁵⁰ By thus generalizing the issue, and tying it to rights that are "comprehensive" and "most valued," a Court perhaps can breathe generosity into even the *Palko* test. And in *Roe*, the Court recognized the guarantee of personal privacy, including abortion, as "implicit in the concept of ordered liberty,"³⁵¹ citing such cases as *Prince v. Massachusetts*,³⁵² *Pierce v. Society of Sisters*,³⁵³ and *Meyer v. Nebraska*,³⁵⁴ which relate to family relationships, child rearing, and education. Whatever merit there may be in the argument that these latter three interests are so essential that "neither liberty nor justice would exist if [they] were sacrificed," it is at least possible to imagine a theoretical society that might restrict abortion but nevertheless value liberty and justice. Thus, even if one agrees with the holding or even with most of the reasoning of *Roe v. Wade*, one must recognize that Justice Blackmun did not faithfully follow the *Palko* test.³⁵⁵

The *Palko* approach would protect speech and voting rights, probably the right to own property, presumably the right to free exercise of religion, and perhaps family and child rearing rights. These interests are protected to some degree by most societies that recognize individual freedom. But the scope of protection of each of these rights, under a minimalist test, might be far less

349. *Bowers v. Hardwick*, 478 U.S. 186, 194 (1986).

350. *Id.* at 201 (Blackmun, J., dissenting) (quoting *Olmstead v. United States*, 277 U.S. 438, 437 (1928) (Brandeis, J., dissenting)).

351. *Roe v. Wade*, 410 U.S. 113, 126 (1973).

352. 321 U.S. 158 (1944).

353. 268 U.S. 510 (1925).

354. 262 U.S. 390 (1923).

355. There is little support, however, for the notion that abortion . . . is 'implicit in the concept of ordered liberty' as given in *Palko* . . . ; nor can it be supported under the standard that rights 'deeply rooted in this Nation's history and tradition' shall be protected. Instead, the opposite is quite true.

Mark D. Frederick, *Physician-Assisted Suicide: A Personal Right*, 21 S.U. L. REV. 59, 72 (1994). *But cf.* Peggy Cooper Davis, *Neglected Stories and the Lawfulness of Roe v. Wade*, 28 HARV. C.R.-C.L. L. REV. 299 (1993) (arguing that the Fourteenth Amendment reflected concerns about family, children, and procreational privacy, as denied by slavery, and that these "neglected stories" constitute a history and tradition supporting *Roe*).

than our Supreme Court has granted.³⁵⁶ And perhaps because it seems unlikely to perceive new rights that arguably should be recognized, and because its narrowness means that the rights already recognized under it are a closed set, most Justices have used the ordered liberty test only in conjunction with other, broader approaches.³⁵⁷

H. *Recognition of the Interest as Fundamental to the "American Scheme of Justice"*

In *Duncan v. Louisiana*,³⁵⁸ the Court revised its partial incorporation of the Bill of Rights to select not only those essential to ordered liberty, as in *Palko*, but also those "fundamental to the American scheme of justice."³⁵⁹ This approach primarily has been used in the incorporation debate; it has not been extended to interests not covered by the Bill of Rights. Perhaps, however, the approach of testing whether an interest is "deeply rooted in our Nation's history and tradition" is the close equivalent, applicable to liberty interests not protected by the Bill of Rights. In the context of unenumerated rights, the *Duncan* approach is interesting primarily for that equivalency, and because it demonstrates the narrowness of the *Palko* formula.

I. *Evaluation of the Systemic Importance of the Interest to our Theories of Government; "Process-Based" Theories*

1. *Systemic Importance or Individual Importance?*

In *Kramer v. Union Free School District*,³⁶⁰ the Court's reasoning included the following:

"Since the right to exercise the franchise in a free and unimpaird manner is preservative of other basic civil and political rights, any alleged infringement of the right of citizens to vote

356. For example, a society that valued ordered liberty might protect the freedom of speech but nevertheless part company with American constitutionalism by refusing to include commercial speech, see *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557 (1990); or racist hate speech, see *Brandenburg v. Ohio*, 395 U.S. 444 (1969); or futile vulgarities, see *Cohen v. California*, 403 U.S. 15 (1971).

357. See, e.g., *Bowers v. Hardwick*, 478 U.S. 186, 194 (1986) (combining *Palko* test with history-and-tradition approach); *Roe v. Wade*, 410 U.S. 113, 126 (1973) (combining it with an importance-to-the-individual approach).

358. 391 U.S. 145 (1968).

359. See *id.* at 148-54.

360. 395 U.S. 621 (1969).

must be carefully and meticulously scrutinized." . . . This careful examination is necessary because statutes distributing the franchise constitute the foundation of our representative society. Any unjustified discrimination in determining who may participate in political affairs or in the selection of public officials undermines the legitimacy of representative government.³⁶¹

Thus, evaluation of the systemic importance of the interest to our theories of government may be one of the means that the Justices use in determining that it is fundamental. The Court used a similar method to recognize the right to travel in *Shapiro v. Thompson*.³⁶² Although recognizing that this right "finds no explicit mention in the Constitution," the Court borrowed from *United States v. Guest*³⁶³ to explain that it "occupies a position fundamental to the concept of our Federal Union. . . . [A] right so elementary was conceived from the beginning to be a necessary concomitant of the stronger Union the Constitution created."³⁶⁴

This approach bears a close relationship to several other methods discussed above. For example, the *Kramer* reasoning parallels derivation from the text through structural arguments.³⁶⁵ Furthermore, any interest that truly exhibits systemic importance for our system of government is likely to have been heavily emphasized in our nation's history and tradition.³⁶⁶ In addition, both *Kramer's* protection of the right to vote and (to a lesser extent) *Shapiro's* recognition of the right to travel resemble an ordered liberty approach.³⁶⁷ But actually, something different is happening in these cases: the Court has gone beyond the text, and its reasoning does not depend upon whether the rights at issue are essential requisites of all free societies. Instead, the interests are fundamental because, it is argued, they are supportive of the federal union and republican democracy established in the American Constitution. It was not essential to this reasoning for the Court to have found that the interests ever had been traditionally respected, because extension of the franchise in *Kramer* and of travel privileges to the plaintiffs in *Shapiro*

361. See *id.* at 626 (1969) (quoting *Reynolds v. Sims*, 377 U.S. 533, 562 (1964)).

362. 394 U.S. 618 (1969).

363. 383 U.S. 745 (1966).

364. *Shapiro*, 394 U.S. at 630-31.

365. See *supra* Part III.B.

366. See *supra* Part III.E.

367. See *supra* Part III.G.

arguably was "preservative" of the constitutional scheme irrespective of whether these values ever had been recognized before or not.

In a way, this approach is the converse of the importance-to-the-individual method, which asks whether the interest is connected to the welfare of the person claiming it.³⁶⁸ The systemic importance approach likewise examines the "importance" of the interest, but in a different way. It asks whether the interest is "important" to persons *other* than the ones asserting it, and it usually means that this secondary effect touches the entire body politic. Perhaps it is in this sense that one can say, with Professor Tribe, that education is "more important" than golf and hence more deserving of elevated protection.³⁶⁹ Even though some individuals such as aspirants to the PGA tour may value golf more highly than increasing their education, education has more systemic importance.

2. Systemic Importance versus "Process" Theories

This systemic approach has some resemblance to so-called process-based theories of fundamental rights. The process concept appears to have originated in the famous *Carolene Products* footnote,³⁷⁰ which advocated heightened scrutiny of laws "restricting political processes" because these arguably are the kinds of laws that democracy, by definition, is less likely to correct. Process-oriented theory is closely associated with the work of Dean Ely, who argued that if the courts concentrate upon "reinforcing" representation in the political process, they will resolve the Madisonian dilemma in a satisfactory way—because their actions will not be antidemocratic, but instead will reinforce the democracy.³⁷¹

This praise for process theory, however, is too facile. The theory inevitably involves judges in deciding what constitutes a "restriction" of the process, for which they must turn to extra-constitutional (and possibly antidemocratic) values. They must do the same to decide whether, and how, to "reinforce" democracy, which ordinarily will be accomplished at the expense of

368. See *supra* notes 278-81 and accompanying text.

369. See *supra* note 279 and accompanying text.

370. See *United States v. Carolene Products Co.*, 304 U.S. 144, 153 n.4 (1938); see *infra* Part III.I of this Article.

371. See ELY, *supra* note 27.

another value. Often, they will find themselves choosing between different *theories* of democracy.

Kramer itself is an example of these difficulties. The New York law at issue there restricted voting in school board elections to owners or lessees of taxable property and parents or custodians of schoolchildren. It thus confined the electorate to those directly affected, and it excluded no one except those who had dramatically less incentive to care or know about issues. The Supreme Court's decision, which outlawed this approach, can be criticized as diluting the votes of taxpayers who paid for the service and parents who consumed it merely to extend the franchise to those to whom the issues could have had only derivative importance. *Kramer* also can be criticized on the ground that it arguably allows unaffected persons to control the destinies of affected ones, a feature that seems undemocratic. Imagine, for example, that the entire electorate had voted to adopt the system at issue in *Kramer*, because the disenfranchised members of the electorate had been persuaded to release the responsibility for school district issues that were remote from their interests; the Supreme Court's reasoning still would hold this choice unconstitutional.³⁷² In short, whether the *Kramer* decision *reinforced* democracy, or whether instead it actually *restricted* it, depends upon debatable propositions.

These concerns are not merely theoretical. The Supreme Court later backtracked from *Kramer* in a way that undermined its reasoning. In *Salyer Land Co. v. Tulare Lake Basin Water Storage District*,³⁷³ for example, the Court upheld a California law that confined voting rights in an irrigation district to landowners. The Court's reasoning was that landowners disproportionately were affected because they paid all taxes and consumed most services, and that the district was a special-purpose entity rather than a plenary governmental authority. The trouble is, this rea-

372. Cf. *Lucas v. General Assembly of Colo.*, 377 U.S. 713 (1964) (holding that a voting system adopted by a statewide referendum that included the entire electorate, but which resulted in the dilution of some voters' franchise, was not salvaged by those voters' participation in setting up the system by referendum).

In effect, this is precisely what happened in *Kramer*, because the statute there at issue had been adopted by the state legislature, whose members all voters equally participated in electing. But process theory depends on the unlikelihood of democratic correction—a factor that thus seems absent in *Kramer*. Thus, it is arguable that this concern should have led to the opposite result.

373. 410 U.S. 719 (1973).

soning would have led to the opposite result in *Kramer*, which also involved an agency of limited rather than plenary authority (a school board), and which also concerned a restriction of the franchise to those disproportionately affected. Then, in *Ball v. James*,³⁷⁴ the Court upheld a "one acre, one vote" system limiting the franchise to landowners, although the agency at issue sold electricity to hundreds of thousands of other residents. This retreat from *Kramer* arguably illustrates flaws in Dean Ely's theory. Judge Bork puts it more bluntly, by labeling Ely "a non-interpretivist whether he knows it or not The difficulty is that there is neither a constitutional nor an extraconstitutional basis for making the Constitution more democratic than the Constitution is."³⁷⁵

Perhaps, then, it is misleading to concentrate globally on "the process." Instead, maybe it is better to evaluate the systemic importance of the interest at stake, rather than arrogating to the judiciary the power to decide debatable issues of democratic theory. Such an approach might have preserved the choice made by New York in *Kramer* by recognizing that the systemic importance of extending the franchise to minimally affected voters is debatable, notwithstanding the general importance of the right to vote. Although this approach would not address Judge Bork's criticism of extraconstitutionalism, some recognition of systematically important unenumerated interests (such as the right to vote) seems called for by the Due Process text.³⁷⁶

Thus, the systemic-importance approach arguably is less pretentious than the claims of process-oriented theorists. Perhaps it would serve judicial restraint better simply because, by avoiding pretensions, it avoids papering over the value judgments with rhetoric. Furthermore, the systemic-importance approach is more general. For example, this approach identifies the right to travel as fundamental because of its systemic importance, as in *Shapiro*, whereas the "process" label is more difficult to apply to

374. 451 U.S. 355 (1981). Perhaps *Ball* and *Salyer* can be distinguished from *Kramer* on the ground that they involve government agencies of narrower or more special purposes than a school district. But this distinction is dubious, a school district, too, has a special purpose, one that seems as specific as an irrigation-and-flood-control district or a utility agency, especially when compared to a more plenary authority such as a city or State. The real difference in the cases is one that depends on political theories of democracy.

375. Bork, *supra* note 104, at 390.

376. See *supra* Part II.A.2, C.

travel rights.³⁷⁷

3. *Judicial Restraint: Is the Systemic-Importance Approach Sound?*

If honestly applied, the systemic-importance method is consistent with judicial restraint. Furthermore, it is appealing because, in cases such as *Kramer* and *Shapiro*, it ties conclusions to the constitutional text and history in a direct way. But like the ordered liberty approach, the systemic-importance test is narrow, and it seems probable that the interests protected under it already are a closed set. Furthermore, a systemic approach will do nothing to identify rights that are important to the individuals claiming them, even if they are of cataclysmic importance. The right to refuse medical treatment, for example, might not qualify even if loose scientific experimentation caused excruciating agony to the affected individuals. This criticism is traceable to an arguable defect that is more theoretical: Confining fundamental rights to those that are systematically important might be said to violate the generality of the Due Process Clause, which by its terms applies to all liberty interests without limitation.

J. *Natural Law Evaluations of the Relative Importance of Individual, Systemic, or Governmental Interests*

The Justices have used a variety of different formulas for evaluating the relative importance of individual, systemic, or governmental interests, as well as for limiting such an evaluation with judicial restraint. The formulas may at first blush appear to focus on issues other than “importance,” but in virtually every instance that factor actually is the real determinant. These tests all have apparent advantages—but they also carry disadvantages, not the least of which is that they obscure the subsidiary questions, appear more convincing than they really are, and thus facilitate the constitutionalization of judicial preferences. Perhaps they can be tested, usefully, by an inquiry into how easily each formula could be called upon by a hypothetical judge to support unacceptable results, such as by justifying the notorious result in *Lochner v. New York*.³⁷⁸

377. Travel is only indirectly related to the processes of democracy, but it is systematically important to a constitutional value unrelated to any such process, namely the combining of the States into a union. See *supra* notes 362-64 and accompanying text (discussing *Shapiro*).

378. 198 U.S. 45 (1905).

1. Government Conduct that "Shocks the Conscience"

In *Rochin v. California*,³⁷⁹ arresting officers observed the defendant swallow two morphine capsules in an effort to destroy them as evidence; later, at a hospital, medical personnel forced an emetic solution through a tube into his stomach to recover the capsules, which were introduced at his trial. Justice Frankfurter's opinion relied upon the Due Process Clause to reverse the conviction, because he found the government's conduct to "offend those canons of decency and fairness which express the notions of justice of English-speaking peoples," to "shock the conscience," and to "offend a 'sense of justice.'"³⁸⁰ Thus, *Rochin* stands for what is sometimes called the shock-the-conscience test, or an approach that would grant elevated protection to an interest if the circumstances of its invasion by the government are such as to offend canons of decency and fairness or to "offend a 'sense of justice.'"

The approach of asking whether the government's conduct is sufficiently "shocking" before condemning it gives a comfortable sense that this test will recognize only compelling cases, leaving a general presumption of deference to the legislature. Thus the *Rochin* test, by focusing upon the government's conduct, seems far removed from the subjectivity of, for example, the importance-to-the-individual approach. But perhaps that is so only because it papers over subjective evaluations of the underlying factors with vague terms such as "conscience," "decency," and one's "sense of justice"—all of which might give free reign to the judge's idiosyncratic prejudices.

For example, it may be worth asking precisely *why* the government conduct in *Rochin* shocked the Court's conscience. It was not simply because of the type of intrusion; if, for example, *Rochin* had swallowed a poison, the "forcible extraction" of his stomach contents that the Court saw as shocking might instead be considered justified—even humane. Nor was it "shocking" because the government was attempting to retrieve evidence. The Court has approved analogous intrusions for that purpose under some circumstances, such as the nonconsensual seizure of blood for intoxication testing that was upheld in *Schmerber v.*

379. 342 U.S. 165 (1952).

380. *Id.* at 172-76.

California.³⁸¹ With these observations, the rhetoric in *Rochin* dissolves into a monumentally nonspecific test: the real reason the government violated due process was that the Court decided that the interest in avoiding the destruction of evidence was insufficient to overcome the individual interest counterbalancing the particular invasion together with the systemic interest in regularizing protection against nonessential invasions of bodily security.

Thus stated, the *Rochin* formula reveals itself as an unpredictable basis for close linedrawing. In fact, to a Justice less concerned about the individual and systemic interests and more sympathetic to the government's purposes, the shock-the-conscience test might even have produced the opposite result in *Rochin*.³⁸² Perhaps there is a potential Supreme Court Justice, somewhere, who would view *Rochin* as shocking not because of the government's conduct but because of the Court's condonation of the defendant's deliberate destruction of evidence. This latter act probably was independently criminal, but in the view of our (imaginary) more restrictive jurist, Justice Frankfurter's opinion rewarded it. Thus, this hypothetical Supreme Court Justice might reason that the defendant's conduct made the recovery of the evidence necessary, that the government used the method that was most humane and least intrusive under the circumstances, that it caused only minor and temporary discomfort, and that other arrested individuals would get the message and therefore avoid destruction of evidence in the future.³⁸³ Conversely, the actual *Rochin* opinion educated every street criminal that one can succeed in avoiding conviction by eating the evidence. The point is not that this hypothetical "Justice's" reasoning is correct—arguably, it is not; the point is that the

381. 384 U.S. 757 (1966); cf. *Winston v. Lee*, 470 U.S. 753 (1985) (using a balancing test to analyze involuntary surgery to remove a bullet from a robbery suspect). See generally Allison Mylander Gregory, *Smugglers Who Swallow: The Constitutional Issues Posed by Drug Swallowers and Their Treatment*, 56 U. PITT. L. REV. 323, 351-58 (analyzing constraints on the body intrusiveness of law enforcement methods).

382. Cf. *Irvine v. California*, 347 U.S. 128 (1954) (holding that invasion of marital privacy by hiding a microphone in a bedroom did not sufficiently shock the conscience as to require the exclusion of resulting evidence under the Due Process Clause).

383. Thus, one can argue that the concealment by government of a microphone in the bedroom is actually *more* "shocking," because it is not justified by an immediate need to retrieve evidence that the defendant will otherwise succeed in destroying—but the Supreme Court's subjective shock-testing methodology led it to the opposite result in the hidden microphone case. See *id.*

shock-the-conscience test actually depends upon a balance of unstated interests. Thus, it encourages subjective reactions rather than actual interest-balancing, and the impression of accuracy and indeed of judicial restraint that it creates may be misleading. The shock-the-conscience test just is not very good as judicial alchemy.

Perhaps for these reasons, the *Rochin* principle has had a checkered career in subsequent cases. For example, in *United States v. Russell*,³⁸⁴ the Court dealt with standards for the defense of entrapment. In dictum, the Court cited *Rochin* and warned that "we may some day be presented with a situation in which the conduct of law enforcement agents is so outrageous that due process principles would absolutely bar the government from invoking judicial processes to obtain a conviction."³⁸⁵ This invitation immediately called forth a variety of attacks upon government conduct, resolvable only by subjective evaluations of outrageousness. But in spite of their large number,³⁸⁶ twenty years' worth of these shock-the-conscience attacks produced only one case in which an appellate court ever used the *Rochin-Russell* doctrine to bar a prosecution³⁸⁷—and even that court later disavowed this holding.³⁸⁸ The doctrine came to be ridiculed by courts attempting to follow it,³⁸⁹ and in *Hampton v. United States*,³⁹⁰ its author, then-Justice Rehnquist, sought to recant his "maybe someday" dictum. He was joined by only two other Justices, leaving six who did not concur in its overruling.³⁹¹ At least one federal court of appeals has concluded, nevertheless, that the doctrine "simply does not exist," criticizing its "unavoidable subjectivity."³⁹² The final nail in the coffin may have been hammered down by *United States v. Payner*,³⁹³ in which the Supreme Court limited the doctrine to cases in which the government has vio-

384. 411 U.S. 423 (1973).

385. *Id.* at 431-32.

386. The Court in *United States v. Tucker*, 28 F.3d 1420, 1423 (6th Cir. 1994), stated that the *Russell* dictum had been cited over 200 times.

387. *See United States v. Twigg*, 588 F.2d 373 (3d Cir. 1978).

388. *See United States v. Beverly*, 723 F.2d 11 (3d Cir. 1983).

389. *See, e.g., United States v. Santana*, 6 F.3d 1 (1st Cir. 1993).

390. 425 U.S. 484 (1976).

391. *See id.* at 489 (Rehnquist, J., plurality opinion).

392. *United States v. Tucker*, 28 F.3d 1420, 1426 (6th Cir. 1994); *see also United States v. Miller*, 891 F.2d 1265 (7th Cir. 1989) (rejecting the defense, with a concurrence of Judge Easterbrook calling for the doctrine to be overruled).

393. 447 U.S. 727 (1980).

lated some protected right of the defendant, independent of the allegedly shocking conduct that the defendant claims as a due process violation.

Perhaps there does exist a place for the shock-the-conscience test in discerning fundamental rights in situations other than that of *Rochin*. Perhaps it even could be applied in the instance of, say, a right-to-die claim asserted by a sentient, suffering, and terminally-ill person—could the government's preservation of such a life be said to "shock the conscience?" But on the other hand, it is clear that the test is useful only if we remember that it requires a careful balancing of the interests that it conceals. Part of its usefulness is that it does contain a salutary encouragement of judicial restraint by recognizing elevated scrutiny only upon a "shocking" violation, and thus it nudges the judge toward deferring to the legislature when the issue is debatable. In this regard, it might seem at first blush that the shock-the-conscience approach measures up well against the *Lochner* criterion, because it arguably helps to avoid justifying the result in that case. But then again, a Court that fiercely disapproved of regulating the work hours of bakers might have been eager to conclude that such a law "shocked its conscience" in the same way as the activities in *Rochin*.

2. *The Carolene Products Test*

The famous footnote in *United States v. Carolene Products Co.*³⁹⁴ was a pioneering effort to resolve the Madisonian dilemma. That dilemma briefly can be stated as the problem of reconciling protection of minority rights with a system of Madisonian democracy, or majority rule.³⁹⁵ The dilemma cannot ever be resolved perfectly, because neither majority nor minority can be trusted to draw the dividing line without overriding valid interests of the other; all solutions necessarily are imperfect to varying degrees. In *Carolene Products*, Justice Stone's opinion for the Court protected majority rule by a "presumption of constitutionality,"³⁹⁶ and on this basis it upheld a statute regulating commerce in

394. 304 U.S. 144, 152-53 n.4 (1938). For an extremely interesting analysis of the drafting of the footnote and the battles over it, see Peter Linzer, *The Carolene Products Footnote and the Preferred Position of Individual Rights: Louis Lusk and John Hart Ely vs. Harlan Fiske Stone*, 12 CONST. COMMENTARY. 277 (1995).

395. See *supra* note 14 and accompanying text.

396. *Carolene Products*, 304 U.S. at 152 n.4.

milk. A statute falling under this presumption, such as the one there at issue, was to be upheld if it was supported by a rational basis. In dictum, Justice Stone indicated how he would protect minority rights—by distinguishing certain kinds of cases for which a rational basis might be insufficient, and in which stricter scrutiny might be warranted:

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

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

Nor need we inquire 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 may call for a correspondingly more searching judicial inquiry.³⁹⁷

In summary, *Carolene* implies that legislation is presumptively to be upheld as constitutional except in three cases: violations of specific prohibitions, restrictions of political processes, or prejudice against “discrete and insular” minorities such as religious or ethnic groups.

This approach was an amalgamation of textualism (because it protected rights marked as special in the constitutional language) with a nontextualist approach that depended on evaluations of the systemic or individual importance of particular interests. And for the times, it was a brilliant insight. It recognized that a pluralistic approach to minority rights might be required, and thus it gave not one but three different definitions of enhanced interests. Furthermore, it managed generally to preserve majority rule while effectively identifying some of the minority rights that most needed protection. A great deal of ambiguity was hidden in the notion of “legislation which restricts . . . political processes,”³⁹⁸ and even more lurked in the identification of

397. *Id.* at 152-53 n.6 (citations omitted)

398. *Id.*; see *supra* Part III.I.2 (discussing arguable deficiencies in process theories).

“discrete and insular minorities;”³⁹⁹ nevertheless, the formula seemed appealingly neutral and comprehensive.

One difficulty with the *Carolene Products* test, however, is that it tells little about the identification of special rights that are unrelated to political processes or to religious or ethnic minorities. It is not helpful in identifying even systematically important rights, such as the right to travel, that are not directly tied to the political process.⁴⁰⁰ Furthermore, the difficulty of defining “discrete and insular” minorities makes *Carolene Products* an uncertain means of protecting even historical-and-traditional values, such as the right to refuse medical treatment.⁴⁰¹ Who is the discrete and insular minority in such a situation—is it sentient persons who wish to die? Nonsentient persons who wish to die? All those who might ever prefer the choice to die, or ever have occasion to refuse treatment? In such a case, the *Carolene Products* formula unfortunately dissolves into the same kind of concealed balance of individual, systemic, and governmental interests that was observed above in the *Rochin* approach. Furthermore, *Carolene Products* fails the acid test, because it is even possible that it could be used to justify the result in *Lochner*⁴⁰² by such reasoning as categorizing hard-working bakers as a discrete-and-insular minority who deserve special protection of their “fundamental” liberty of contract.

3. *Contemporary Moral Philosophy, “Contemporary Ratification,” or Interpretation by “Twentieth-Century Americans:” Natural Law*

Justice Brennan particularly is identified with the school of thought that justifies textualist interpretation by “twentieth-century Americans,” or by what he calls “contemporary ratification.”⁴⁰³ This school’s supporters justify this approach by its avoidance of the ambiguity inherent in originalism, as a means of overcoming strictures imposed by a limited electorate long

399. *Carolene Products*, 304 U.S. at 152 n.4; see CRUMP, *supra* note 14, at 14 (discussing ambiguities in this concept, exemplified by differing consequences for claims to abortion rights of identifying the relevant “minority” as women, or pregnant women, or fetuses-unborn children, or persons who care deeply about the right to life).

400. See *supra* note 362 and accompanying text.

401. See *supra* note 399 and authority therein cited.

402. See *supra* note 378 and accompanying text.

403. See Brennan, *supra* note 102, at 438 (arguing that “[c]urrent Justices read the Constitution in the only way we can: as twentieth-century Americans. . . . [T]he ultimate question must be: What do the words of the text mean in our time?”).

since dead, and as a means of overcoming the alleged choice against minority rights that narrower intentionalism is said to entail.⁴⁰⁴ In addition, supporters point to the open texturing of many constitutional guarantees, which could have alerted the drafters to the possibility that they were creating a "living" Constitution.⁴⁰⁵ Detractors, of course, emphasize the most serious flaws in this method: The focus on contemporaneity contradicts the purpose of a written constitution, and it removes all but the weakest of restraints upon judicial activism.⁴⁰⁶

Justice Brennan's own opinions, together with those in which he has joined, demonstrate both the approach and its deficiencies. In *Michael H. v. Gerald D.*, for example, Justice Brennan would have protected the right of visitation and paternity of an adulterous father, despite the interests of the marital family, on the ground that the opposite result "squashes" the "freedom not to conform."⁴⁰⁷ This conclusion followed from his assertion that under our Constitution, "We are not an assimilative, homogeneous society, but a facilitative, pluralistic one."⁴⁰⁸ The trouble with such generalities is: (1) they can be used to protect almost any interest in doing almost anything; (2) they can be used to overcome almost any opposing interest no matter how important (such as, in *Michael H.*, the right of the marital family to privacy); and (3) they require the consultation of no source of authority outside the judge's own idiosyncratic impulses.

Other constitutional philosophers have attempted to improve upon this methodology by seeking formulas that would encourage judges to use narrower rulings and to recognize fundamental rights more sparingly. Thus, Professor Bickel formulated his theory of "enduring values," and Professor Wechsler advanced his test of "neutral principles."⁴⁰⁹ There have been other theories

404. See *supra* notes 108-12 and accompanying text.

405. See *supra* note 123 and accompanying text.

406. See *supra* note 104. Consider the following:

If the living legal community is indeed the right benchmark, it is tempting to ask: why a constitution? A written constitution—the instrument that separates us from the United Kingdom, where living majorities mold traditions and thus governmental institutions to suit tastes—is designed to be an anchor to the past.

Frank H. Easterbrook, *Abstraction and Authority*, 59 U. CHI. L. REV. 349, 363 (1992).

407. *Michael H. v. Gerald D.*, 491 U.S. 110, 141 (1989) (Brennan, J., dissenting).

408. *Id.*

409. See BICKEL, *supra* note 151, at 19-27; Wechsler, *supra* note 156, at 15; *supra* notes 151-56 and accompanying text.

that arguably have improved upon these approaches.⁴¹⁰ The touchstone of all of these uses of contemporary moral philosophy has been their necessarily imperfect effort to solve the Madisonian dilemma: that is, to retain respect for democracy by preserving a general regime of majority rule, at the same time that one's philosophy creates realistic protections for minority rights.⁴¹¹ Ultimately, these systems appear to reduce to consideration of the interests at issue, whether individual, systemic, or governmental, and a relative weighing of each.

For example, Professor Perry advanced a comprehensive theory of "public morals" (as opposed to private morals), which, he asserted, had a constitutional basis even though it required the Court to derive extratextual values.⁴¹² He explained the constitutional basis from the text and history:

The Founding Fathers and . . . those who were responsible for the Fourteenth Amendment, intended that the specific content of the vague, ethical norms of the Constitution, including due process, remain to some extent an open question to be answered by each generation, for each generation. . . .⁴¹³

The theory itself is as follows:

[T]he public morals are those commands proscribing nonobtrusive human behavior which, according to the conventions of the moral culture, merit the sanction of law behind them. Putting the matter in this fashion reveals an important distinction between the commands to which conventional moral culture subscribes and the commands to which it not only subscribes but believes should have the force of law and thus be legally binding on all, subscribers and nonsubscribers alike. [This distinction separates "*private*" from] *public* morals. There is a significant difference between doing something because one believes it to be morally right and wanting others compelled by the law to do that same thing whether or not *they* believe it is morally right. . . .⁴¹⁴

The Supreme Court is the appropriate body for determining this moral issue, rather than a legislature, according to Professor Perry:

410. See *supra* note 167 and accompanying text.

411. See *supra* note 14 and accompanying text.

412. See Michael J. Perry, *Abortion, The Public Morals, and the Police Power: The Ethical Function of Substantive Due Process*, 23 UCLA L. REV. 689, 692 (1976).

413. *Id.* at 691-705.

414. *Id.* at 726-27.

The conclusion seems reasonable that the Supreme Court and the judicial system over which it presides are quite competent to measure the metes and bounds of the public morals. . . . The Court, as it inquires whether a legislative act serves the public morals, need not assume the same highly deferential posture that it takes toward matters of social and economic policy. In the area of social and economic policy not only are social conventions by and large settled, but the legislature has a special expertise; neither of these observations holds true with respect to many issues in the public morals.

[U]ltimately, however, each individual Justice must map the relevant contours of conventional moral culture alone. . . . [I]n truth it is unlikely that a very unconventional person would become a Justice of the Supreme Court. The collectivity which is the Supreme Court is, in this sense, a jury. . . .⁴¹⁵

The distinction between public and private morals seems useful, but the difficulty is in how one discerns the difference for constitutional purposes. For example, it seems debatable whether Supreme Court Justices are "conventional" so that they are "in this sense, a jury," any more so than a legislature is; and it seems debatable whether legislators lack "expertise" in discerning the public morals. And if some of these public morals are "settled" and therefore are amenable to legislative treatment, why does it follow that the Court is better for fixing the other ones, which by definition are "unsettled?" Does it not follow from the very fact that they are "unsettled" that these latter questions have less valid claim to being called "public morals," under Professor Perry's definition?

Professor Perry's theory must take account of (and distinguish) the *Lochner* decision. He distinguishes *Lochner* on the ground that it "was predicated on an absurdly narrow 'reading' of the prevailing social attitudes (even of that pre-New Deal period)."⁴¹⁶ But cannot *Lochner* be defended⁴¹⁷ on at least as sound a "reading" of such attitudes as can *Roe*, in that a public morality view of due process, valuing personal autonomy, presumably

415. *Id.* at 729-30.

416. *Id.*

417. Cf. Joseph D. Grano, *Judicial Review and a Written Constitution in a Democratic Society*, 28 WAYNE L. REV. 1, 36 (1981) (effectively critiquing Professor Perry's argument on this ground). "Presumably, had public opinion been more strongly in the Court's favor, *Lochner* would have been correctly decided." *Id.*

would value the freedom to contract and to choose employment?⁴¹⁸ Furthermore, laissez faire views, although not universally held, were firmly a part of the American political tradition at the time, arguably to a greater extent than a morality permitting abortion was at the time of *Roe*.⁴¹⁹ *Lochner's* treatment of the freedom of contract can be supported, too, by appeals to the text and constitutional history.⁴²⁰

Having said this much, one must recognize that Professor Perry is correct in asserting that the text of the Due Process Clause requires the Court to evaluate unenumerated rights—and it can be argued that its openness does not exclude contemporary concepts. It is in its elevation of the factfinding competence of the Justices over that of legislatures, giving them “juror-like” status, that Professor Perry’s public morality theory seems most vulnerable.⁴²¹ In fact, it can be argued that it was precisely because of their assumption of this factfinding status⁴²² that the Justices in *Lochner* misread the relevant social attitudes (and the Constitution) to the extent that they did. Nevertheless, other supporters of importance-based theories deal with *Lochner*

418. See CRUMP, *supra* note 14, at 342-43 (attempting to generate arguments supporting *Lochner*). As Professor Ackerman puts it, “The *Lochner* Court was not making it up.” Bruce Ackerman, *Liberating Abstraction*, 59 U. CHI. L. REV. 317, 340 (1992). Professor Ackerman adds:

The Contract and Property Clauses are no more, but no less, a part of the Constitution than are the Free Speech and Establishment Clauses. Peckham’s decision in *Lochner* . . . has deep intellectual roots in our most successful movements of constitutional politics. Freedom of contract is deeply entrenched in the Free Labor and Abolitionist sources of the Reconstruction Amendments, with roots that run as deep as the Enlightenment and Commonwealth ideas that provide the interpretive context for the Founding Bill of Rights. When *Lochner* was decided in 1905, moreover, Americans had decisively repudiated the Populist effort to transform the emerging laissez-faire economy. . . . It is simply anachronistic to suppose that the courts of the *Lochner* era were engaging in an utterly undemocratic and noninterpretive form of value imposition.

Id. at 340-41.

419. See CRUMP, *supra* note 14, at 342-43.

420. See *id.*

421. Thus, Professor Perry refined his theory to require courts to focus upon “basic moral ideas to which society has long subscribed.” Michael J. Perry, *Constitutional “Fairness:” Notes on Equal Protection and Due Process*, 63 VA. L. REV. 383, 388 n.26 (1977). “Majoritarian views of specific issues of the day may be impulsive, or irrational, or venal.” *Id.* In this sense, judges may be better analysts because they are more insulated—but only if they focus, not on contemporary morals, but on those of “long” standing. This approach resembles the restriction of fundamental rights to those “deeply rooted in our Nation’s history and tradition,” a narrower method than Professor Perry appears to advocate.

422. The key to the *Lochner* opinion, arguably, is Justice Peckham’s assertion, indistinguishable from a fact finding, that “[w]e do not believe in the soundness of the views which uphold this law.” *Lochner v. New York*, 198 U.S. 45, 50 (1905).

similarly. Thus, Professor Tribe argues that the error in *Lochner* lay "not in judicial intervention to protect liberty, but in a misguided understanding of what liberty actually required in the industrial age."⁴²³

If this is so, and arguably it is, judges should not recognize public morals as the stuff of constitutional law unless they can foresee that the principles will endure from this age to the next. But principles that meet this test will, in all likelihood, also be rooted in history and tradition, which perhaps is therefore a better test. It follows that the scope of moral philosophy that is not justifiable by history and tradition should be narrow indeed. Professor Perry's theory, in fact, supports this view, because he later argued that a public morals approach should focus upon those "basic moral ideas to which society has long subscribed."⁴²⁴ This formula sounds very much like a transformation of public morals into a history-and-tradition approach, and indeed it would place Professor Perry's approach in a framework congenial even to Justices most concerned about judicial restraint.

But even with this reconception, a contemporary-morals philosophy of natural rights can have pernicious results. Besides *Lochner*, there is *Bradwell v. Illinois*,⁴²⁵ in which the Supreme Court used an appeal to "higher" principles to destroy the Fourteenth Amendment rights of women.⁴²⁶ As the Court saw it, the nature of women was "timidity and delicacy," resulting in a proper role restricted to "the domestic sphere."⁴²⁷ These conclusions, explained the Court, were

founded in the divine ordinance, as well as in the nature of things . . . This is the law of the Creator. And the rules of civil society must be adapted to the general constitution of things, and cannot be based on exceptional cases.⁴²⁸

On this (natural law) basis, the Court used contemporary

423. TRIBE, *supra* note 27, at 769. For the view that New Deal-era rejections of *Lochner* reflected democratic actions that were the functional equivalent of a constitutional amendment, see BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* 119-21 (1991); for the theory that they reflected transformations of economic discourse and the political basis of law, see Lawrence Lessig, *Understanding Changed Readings: Fidelity and Theory*, 47 *STAN. L. REV.* 395 (1995).

424. Perry, *supra* note 421, at 388 n.26.

425. 83 U.S. 130 (1872).

426. *See id.* at 141-42 (1872) (Bradley, J., concurring); *see also* *Muller v. Oregon*, 208 U.S. 412, 421-22 (using similar kinds of rationales to restrict employment of women).

427. *Bradwell*, 83 U.S. at 141-42 (Bradley, J., concurring).

428. *Id.*

morals as a ground for denying women the right to become attorneys.

Justice Brennan's opinions, considered above, also dramatically demonstrate the shortcomings of contemporary philosophy as a method of supplementation. Particularly to the extent that they result in the recognition of fundamental rights on the basis of their importance to the individuals asserting them, such reasoning provides no satisfactory stopping point. The use of this method, therefore, should be accompanied by the same stringent invocation of judicial restraint as should the importance-to-the-individual approach. On the other hand, the language of the Due Process Clause does apply its rational continuum to all "liberty" interests, including those that are important to individuals. The Due Process Clause thus arguably calls for some evaluation of the importance to the individual, and by its text, supporters can argue, it does not exclude contemporary philosophy as a means of evaluation.

4. *Other Approaches, from "Evolving Standards" to Sociological Jurisprudence to Consensus*

There are too many related approaches to name them all here, but the concept of "evolving standards of decency,"⁴²⁹ as a means of interpreting the prohibition on cruel and unusual punishment, stands out as a method that resembles contemporary moral philosophy. It uses ostensibly objective criteria such as legislative actions, jury decisions, law of other countries, public opinion polls, learned groups, and hypothetical decisions of "informed" citizenries, to derive the meaning of cruel and unusualness.⁴³⁰ It thus is a species of sociological jurisprudence,⁴³¹ which determines public positions by quasiscientific comparisons, and it is related to the derivation of values by consensus.⁴³²

The broad outlines of this methodology fit the approaches of most of the Justices to the Eighth Amendment.⁴³³ The most sig-

429. See *supra* notes 157-65 and accompanying text.

430. See John B. Wefing, *Cruel and Unusual Punishment*, 20 SETON HALL L. REV. 478, 487 (1990).

431. See *id.* at 485-86 (describing Justice Marshall's approach and comparing it to sociological methodology in determining public opinion).

432. See *supra* note 27 (citing Dean Ely's analysis of consensus as a means of deriving fundamental values).

433. See Wefing, *supra* note 430, at 483-84 (describing this method as "recognized by virtually all members of the Court").

nificant differences lie in the degree to which different Justices accept speculative as opposed to objective indicia of "evolving standards." Justice Scalia, for example, gives more weight to objective facts such as actual sentencing practices across the States.⁴³⁴ He also rejects foreign countries' practices, concluding that "it is *American* conceptions of decency that are dispositive,"⁴³⁵ thus decreasing the tendency for diffusion. Justice Marshall also adopts a sociological approach to evolving standards, but with an odd twist that deprives it of objectivity: he would consider the opinions of a hypothetical "informed" citizenry. He is thus able, even as he concedes that contemporary standards of decency permit capital punishment, to conclude that it is unconstitutional because people would vote against it if only they were better "informed."⁴³⁶ This view is disingenuous, because people probably are as well informed about the death penalty, if not better so, than any other subject of law and politics. The citizenry probably understands the issues surrounding capital punishment better, for example, than it understands the Establishment Clause or the workings of the Federal Reserve System. Justice Marshall's construct of an "informed" citizenry as a means for avoiding actual consensus, sociological jurisprudence, or other objective constraints converts evolving standards into a natural law philosophy constrained only by the judge's imaginings, and it is peculiarly destructive of the values of democracy. It would have furnished a comfortable justification, for example, to the antidemocratic Justices who concurred in *Lochner*.

5. *Categorization of "Merely Economic" Interests, "Social" Interests, "Privacy" Claims, Matters of "Bodily Security," and Similar Fixed Categories*

From its experience with the freedom of contract recognized in *Lochner*, the Court learned that economic interests often require regulation that in turn necessitates broad legislative freedom. Hence, the Court has repeatedly invoked the principle that "economic and social" legislation qualifies for the most expansive sort of deference.⁴³⁷ But the subjects to which the Court

434. See *Stanford v. Kentucky*, 492 U.S. 361, 370-71 (1989).

435. *Id.* at 2975 n.1.

436. See *Gregg v. Georgia*, 428 U.S. 153, 232 (1976) (Marshall, J., dissenting).

437. See *infra* notes 438-40.

has applied this approach are not limited to commercial interests. They have ranged from legislation that disadvantages established occupations,⁴³⁸ to restrictions on recoveries for personal injuries,⁴³⁹ to welfare payments.⁴⁴⁰ At times, the approach seems indistinguishable from knee-jerk pigeonholing, as the Court preordains the result by distinguishing merely "economic" regulation from other legislation that may impinge upon fundamental rights.⁴⁴¹

At the opposite end of the spectrum, the Court has treated the complex of interests falling under the "privacy" rubric as a pigeonhole designating virtually automatic fundamental status. Thus, for example, many of the Court's historic abortion decisions refuse to engage in a balancing of all of the interests.⁴⁴² And even when the Court has confronted problems that most people would categorize under the general heading of privacy, such as the collection of personal information in government data banks in *Whelan v. Roe*,⁴⁴³ it has tended to avoid the privacy label when it intended to uphold the regulation. Likewise, in *Paul v. Davis*,⁴⁴⁴ the Court held that an unsullied reputation was not a specially protected liberty interest by summarily categorizing it as outside the "right to privacy."⁴⁴⁵

Finally, it has been argued that the interest in determining the

438. See *Williamson v. Lee Optical*, 348 U.S. 483 (1955).

439. See *Duke Power Co. v. Carolina Envtl. Study Group, Inc.*, 438 U.S. 59 (1978).

440. See *Dandridge v. Williams*, 397 U.S. 471 (1970).

441. *Duke Power* arguably is such a case. The Court reduced the cap upon recoveries for personal injury to a "classic example of an economic regulation—a legislative effort to structure and accommodate the 'benefits and burdens of economic life . . .'" *Duke Power*, 438 U.S. at 83. This characterization overlooks the relationship of the issue to bodily security, as well as the systemic importance of such recoveries to our tort system, their importance to individuals, and their deep roots in our history and tradition.

442. For example, it has been argued that in the spousal and parental notification and consent cases, the Court failed to weigh the relevant spousal and parental interests as adding to the weight of the state's interest in potential life. See, e.g., *Bellotti v. Baird*, 443 U.S. 622 (1979); *Planned Parenthood v. Danforth*, 428 U.S. 52 (1976); CRUMP, *supra* note 14, at 532.

443. 429 U.S. 589 (1977).

444. 424 U.S. 693 (1976).

445. *Id.* For arguments positing that economic rights or property rights should be given protection commensurate with other political rights, see Richard A. Epstein, *Property, Speech, and the Politics of Distrust*, 59 U. CHI. L. REV. 41, 46-47 (1992) ("[F]ree speech will produce more net social benefit in a world in which property rights are more carefully protected."); Richard E. Levy, *Escaping Lochner's Shadow: Toward a Coherent Jurisprudence of Economic Rights*, 73 N.C. L. REV. 329 (1995); see also *Dolan v. City of Tigard*, 114 S. Ct. 2309 (1994) (suggesting that economic liberties should not be "relegated to the status of a poor relation").

uses and security of one's own body is a categorically protected right. Some theorists have posited that this interest might better support the holding in *Roe v. Wade* than the Court's actual reasoning.⁴⁴⁶ A categorical approach that gave intrinsic superiority to this interest, however, would be unworkable. The courts still would need to examine the underlying values to avoid dubious results such as constitutionalization of a right not to wear a motorcycle helmet or a right to ingest hallucinogenic drugs.⁴⁴⁷ At least one federal district court has held that an asserted right to prostitution, based upon an interest in bodily determinism purportedly derived from *Roe v. Wade*, states a claim for relief sufficient to survive a motion to dismiss.⁴⁴⁸ And an absolute right to suicide might also emerge as uniformly fundamental under a categorical body-use-and-security approach—a result that none of the Justices seems willing to reach. Thus, the statement that the category of interests is fundamental is only a crude approximation of appropriate treatment for bodily security interests, and the courts still must consider them on a case-by-case basis.

This fixed-categories approach may have the advantage of relative predictability. Furthermore, it may have some policy validity, in the sense that the categorization of a right as economic is a reminder that the state ordinarily will have significant interests in regulatory flexibility whereas the labeling of an interest as a "privacy" claim may indicate that its importance to the individual merits enhanced protection. But obviously, there are cases

446. This reasoning was used to a limited degree in *Roe*. See *supra* Part III.D; cf. Erwin Chemerinsky, *Rationalizing the Abortion Debate: Legal Rhetoric in the Abortion Controversy*, 31 BUFF. L. REV. 107, 142 (1982) (arguing that, by recognizing "the right of a person to decide what happens in and to his or her body," a court can "avoid arbitrary line-drawing"). "No right is held more sacred . . . than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law." *Union Pac. Ry. Co. v. Botsford*, 141 U.S. 250, 251 (1981); see also *Planned Parenthood v. Casey*, 505 U.S. 833, 927 (1992) (Blackmun, J., concurring in part, concurring in the judgment in part, and dissenting in part) ("[P]ersonal decisions that profoundly affect bodily integrity, identity and destiny should be largely beyond the reach of government."). But cf. *infra* note 447 and accompanying text (suggesting that a categorical right of this kind would require line-drawing). The trouble is, these statements apply to nonrights, such as a person's desire to consume heroin, or not to wear a motorcycle helmet, as persuasively as they do to procreational interests.

447. These cases are different from the abortion case but would be similarly affected if a categorical interest in bodily determination were recognized as fundamental.

448. See Maya Bell, *Prostitution Compared to Abortion: Woman with Jane Roe II Alias Sues to Make Profession Legal*, HOUSTON CHRON., Aug. 13, 1995, at A4 (describing suit by Palm Beach County resident, filed before United States District Judge Jose Gonzales, that the judge "twice has refused to dismiss").

that test these categories, and there are some in which mere pigeonholes become a procrustean bed. For example, Justice Stewart's opinion in *Dandridge v. Williams*⁴⁴⁹ recognized that it was not the economic-and-social categorization that the Court applied to the welfare payments at issue, but the factors underlying that categorization, that truly were controlling:

To be sure, the cases . . . enunciating [the rational basis standard] under the Equal Protection Clause, have in the main involved state regulation of business or industry. The administration of public welfare assistance, by contrast, involves the most basic economic needs of impoverished human beings. We recognize the dramatically real factual difference between the cited cases and this one, but we can find no basis for applying a different constitutional standard. . . . [I]t is a standard that is true to the principle that the Fourteenth Amendment gives the federal courts no power to impose upon the States their views of what constitutes wise economic or social policy.⁴⁵⁰

In other words, such seemingly fixed categories are in the end only a shorthand means of expressing the conclusion that results from the more cumbersome but more comprehensive approach that measures due process by evaluating all of the individual, systemic, and governmental interests.

K. *Identification in Precedents of the Supreme (or Other) Courts*

On occasion the Supreme Court has traced rights to prior decisions in a way that seems independent of text and history. For example, in *Roe v. Wade*, Justice Blackmun's opinion for the Court includes the following:

The Constitution does not explicitly mention any right of privacy. In a line of decisions, however, going back perhaps as far as *Union Pacific R. Co. v. Botsford*, the Court has recognized that a right of personal privacy, or a guarantee of certain areas or zones of privacy, does exist under the Constitution. In varying contexts, the Court or individual Justices have, indeed, found at least the roots of that right in the First Amendment, *Stanley v. Georgia*; in the Fourth and Fifth Amendments, *Terry v. Ohio*; in the penumbras of the Bill of Rights, *Griswold v. Connecticut*; in the Ninth Amendment, *id.*, at 486 (Goldberg, J., concurring); or in the concept of liberty guaranteed by the first section of the Fourteenth Amend-

449. 397 U.S. 471 (1970).

450. *Id.* at 485.

ment, see *Meyer v. Nebraska*.⁴⁵¹

Although each of these cases tied the fundamental right of privacy in some way to textual sources, and although the *Roe* Court purported to do so as well,⁴⁵² Justice Blackmun did not rely upon any connection between the textual basis of each precedent and the abortion right at issue in *Roe*.⁴⁵³ Instead, the precedent seems to be an independent source that is used to support the conclusion in its own right.

In its simplest form, this approach may consist only of applying the doctrines governing stare decisis. Then, the use of precedent as authority—or the overruling of precedent—seems constitutionally justifiable by the grant of judicial power in Article III.⁴⁵⁴ This was the battleground in *Planned Parenthood v. Casey*, for example. But it was not what was happening in *Roe v. Wade*. Instead, the Court used the reasoning in prior decisions to go beyond those decisions and to establish a new kind of elevated right. And it did so without adopting or even analyzing the cases that it cited; indeed, it implicitly rejected the reasoning of most of them.⁴⁵⁵

At worst, this approach can be characterized as permitting the extension by one judge of another's constitutional mistake. An earlier decision that identifies a fundamental right must be based upon some methodology for the process of identification. But if a later court adopts the conclusion of an earlier court, such as the *Griswold* recognition of an elevated privacy right, while rejecting the premises that underlie it—as the *Roe* Court implicitly rejected *Griswold's* penumbra rationale⁴⁵⁶—perhaps there is an argument that the result lacks justification.

But supporters of this method can offer reasons for it.⁴⁵⁷ The

451. *Roe v. Wade*, 410 U.S. 113, 152 (1973) (internal citations omitted).

452. See *supra* note 39 and accompanying text.

453. The Court relied principally on the Due Process Clause, see *supra* note 39 and accompanying text, not on the various amendments cited in the authorities, see *supra* note 451.

454. The use of precedent as authority was a firmly established judicial role, exemplified by the common law.

455. See *supra* note 453.

456. The Court relied principally on the Due Process Clause, without referring to or attempting to justify the penumbra-based reasoning of *Griswold*.

457. See, e.g., Robert W. Bennett, *Objectivity in Constitutional Law*, 132 U. PA. L. REV. 445, 486 (1984) ("It is plausible to see those prior decisions as opening a future that could accommodate *Roe v. Wade*."). Thus, it is argued, the debate about *Roe* is "misconceived," to the extent that it seeks to trace the result to an "authoritative basis:"

use of selected portions of precedent is an arguable ingredient in the judicial power, just as is the application of *stare decisis*. In fact, because no case ever is precisely identical to another, and no statement of a rule ever can encompass all of its arguable rationales, refinements, limitations, and exceptions, perhaps the bits-and-pieces approach is more characteristic of the judicial power, and perhaps *stare decisis* is the rare if not nonexistent special case.⁴⁵⁸ Supporters of this view point to the dialectic process by which judges receive information, as well as their relative insulation from democratic passions, coupled with their training and experience.⁴⁵⁹ These considerations justify, in the minds of supporters, the use as precedent of a part of the reasoning in an opinion that a later court otherwise rejects. Perhaps there also is a degree of judicial restraint in such a method, perhaps even of a kind that protects democratic processes: a judge following precedent is not following his own idiosyncratic preferences—even though the process may amount to adoption of the equally idiosyncratic preferences of another judge. In this view, the judge is constrained—even if not very forcefully—by concerns of continuity and incrementalism.

On the other hand, although this reasoning may defend the legitimacy of the common law when the deviations cumulate away from prior understandings, it seems less suited to interpretation of a Constitution, for which the text and history provide (relatively) fixed points of authority. If judges leapfrog over each other in successive opinions to reach results that are remote from the text and history, it seems fair to compare the results to those sources to test its legitimacy.⁴⁶⁰ It also seems fair to doubt an opinion, such as *Roe*, that relies on other opinions without

“Viewed as a question of judicial objectivity, the legitimacy of *Roe v. Wade* depends not upon whether there is some authoritative basis on which the Court can substitute its value judgment for that of the legislature but on whether the Court can successfully define its opinion as a natural outgrowth of what it has received.” *Id.*

This approach to objectivity, which may accurately describe the legitimacy of the common law, seems less applicable to the interpretation of a Constitution, for which the text and history provide certain fixed points (at least relatively fixed). The common law may remain legitimate even if deviations by judges from prior understandings happen to cumulate. But if in Constitutional adjudication judges leapfrog over each other in successive opinions to reach results that are remote from the text and history, it does seem fair to compare their results to that “authoritative basis” to test their legitimacy.

458. Cf. Mark V. Tushnet, *Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles*, 96 HARV. L. REV. 781 (1983) (concluding that neutral principles cannot restrain judges).

459. See, e.g., BICKEL, *supra* note 151, at 25-26.

460. See *supra* note 457.

explaining why it does not accept their reasoning.⁴⁶¹ Thus, because it is difficult to distinguish this method from the enshrining of constitutional mistakes in permanent form, the use of precedent as an independent source—independent, that is, from interpretation of the constitutional provisions relied upon in the prior decision—probably should be viewed with skepticism. It should not alone be the basis for the recognition of new fundamental rights. On the other hand, it has been defended as consistent with the judicial role and arguably traces to the Constitution in the judicial power, and its supporters can point out that it does honor the flexibility of the Due Process Clause.

IV. "NEGATIVE" METHODOLOGIES: TESTING WHETHER AN INTEREST SHOULD BE FUNDAMENTAL BY INQUIRING INTO THE REASONS WHY IT SHOULD NOT BE

In addition to the positive methods described above for elevating an interest to fundamental status, the Supreme Court sometimes has used what might be called "negative" methodologies. It has asked about the reasons why the questioned interest should *not* be recognized as fundamental. This inquiry usually is not identified as separate from the positive tests, even though it arguably should be included in every opinion. For example, identification of an interest as "important," either systematically or to the individual, says nothing about the consequences for the legislative and judicial roles that would result from labeling it as fundamental.

In fact, this is the real defect in *Lochner*. The interest there in question was the liberty of contract, which anyone who enjoys working in a chosen profession would recognize as "important." But *Lochner* could not properly be decided on this basis alone. Instead, *Lochner* could have been decided more sensibly if the Court had not limited its consideration to the positive arguments for fundamentality, but instead had evaluated the negative consequences as well.⁴⁶² Thus, the negative-consequences methodology is useful because, among other reasons, it can help the courts to escape the *Lochner* trap in a way that cannot be achieved if they consider only the positive tests for fundamental rights.

461. See *supra* notes 453, 456 and accompanying text.

462. See *infra* notes 492-500 and accompanying text.

The appropriateness of this negative methodology has seldom been explored within the Court, but in *Michael H. v. Gerald D.*, Justices Brennan and Scalia undertook a little-noticed but spirited debate about it. Justice Brennan argued that the claimed liberty interest should be evaluated without any consideration of the competing interests at all:

[W]e never before have looked at the [interests] that the [claimant of the alleged fundamental right] seeks to disrupt, rather than the one he seeks to preserve, in determining whether he has a liberty interest According to our established procedure under the Due Process Clause, . . . we first ask whether the person claiming constitutional protection has an interest that the Constitution recognizes; if we find that he or she does, we next consider the State's interest in limiting the extent of the procedures that will attend the deprivation of that interest.⁴⁶³

Justice Scalia, writing for the plurality, firmly rejected this "strange" reasoning:

Justice Brennan insists that in determining whether a liberty interest exists we must look at [it] in isolation, without reference to [its consequences] We cannot imagine what compels this strange procedure of looking at the act which is assertedly the subject of a liberty interest in isolation from its effect upon other people—rather like inquiring whether there is a liberty interest in firing a gun where the case at hand happens to involve its discharge into another person's body.⁴⁶⁴

These two passages slip by each other like ships in a fog; but in the context of the claim at issue, Justice Scalia has the better of the argument. At least when the Court is evaluating whether a claimed liberty interest should be elevated to fundamental status (as it was in *Michael H.*),⁴⁶⁵ the Justices simply *must* take account of consequences. The use of negative consequences in deciding whether to recognize such a categorical right is different from consideration of such consequences in the defeasance of the

463. *Michael H. v. Gerald D.*, 491 U.S. 110, 145 (1989) (Brennan, J., dissenting).

464. *Id.* at 124 n.4 (Scalia, J., plurality opinion).

465. If the issue in *Michael H.* had concerned a mere liberty interest, it would have been subject to defeasance upon the State's articulation of a rational basis—and that test unquestionably was met. *See supra* note 11. Instead, Justice Brennan's reasoning must have been premised on a heightened status for the claimed right. *Cf. Michael H.*, 491 U.S. at 148-56 (Brennan, J., dissenting) (inquiring into the strength of the state's interest and pronouncing it not sufficiently "powerful").

right. Once a Court decides that a right is fundamental, it must subject invasions of the right to heightened scrutiny, or the categorization is meaningless. But there is no reason to make it off limits for the Court to consider, *before* it grants this status to a putative right, whether heightened scrutiny would have ruinous effects on legislative power to prevent greater harm to other interests that are equally deserving of protection.

Justice Brennan appears to accord lesser weight to precedent in which the Court has properly inquired whether creation of a fundamental right would hamstring legislatures or distort the role of the judiciary, as a basis for deciding against the right.⁴⁶⁶ Perhaps he was influenced, in *Michael H.*, by his characterization of the question as involving a "liberty" interest, as opposed to a fundamental right.⁴⁶⁷ Or perhaps he decided as he did because he concluded that the case did not present a substantive due process issue, as is indicated by his use of procedural due process methodology and citation of procedural authority.⁴⁶⁸ In any event, the consideration of consequences, or what sometimes is called "prudential" reasoning,⁴⁶⁹ is an appropriate method of constitutional analysis in some cases, and it is the Court's best hope of killing the *Lochner* monster while it keeps unenumerated fundamental rights alive.

A. *Consideration of Pragmatic Counterbalancing Factors: The Need for Governmental Flexibility*

1. *Preserving Judicial and Legislative Roles*

In *Dandridge v. Williams*,⁴⁷⁰ the Supreme Court refused to recognize subsistence welfare, in the form of Aid to Families with

466. See *infra* Part IV.A.1 of this Article.

467. See *supra* notes 463 & 465 and accompanying text.

468. Thus, Justice Brennan argued that the issue was whether the interest could be denied without a hearing, and he declined to acknowledge that California simply could categorize it as unrecognized if it was a mere liberty interest and if there was a rational basis for doing so. See *Michael H.*, 491 U.S. at 136, 145 (Brennan, J., dissenting).

469. See PHILIP BOBBITT, *CONSTITUTIONAL FATE* 59-73 (1982) (describing prudential argument as one of six categories of approaches). For an example of the application of prudentialism (or the use of consequences) as an interpretive device in a very different context, see Sanford Levinson, *The Embarrassing Second Amendment*, 99 *YALE L.J.* 637, 655-57 (1989) (applying prudential reasoning, or evaluation of consequences, to determine the extent of the right to keep and bear arms).

470. 397 U.S. 471 (1970).

Dependent Children, as a fundamental right.⁴⁷¹ Its reasoning included the following:

We need not explore all the reasons that the State advances in justification of the regulation. It is enough that a solid foundation for the regulation can be found in the state's legitimate interest in encouraging employment and in avoiding discrimination between welfare families and families of the working poor. . . .

We do not decide today that the Maryland regulation is wise, that it best fulfills the relevant social and economic objectives that Maryland might ideally espouse, or that a more just and humane system could not be devised. Conflicting claims of morality and intelligence are raised by opponents and proponents of almost every measure, certainly including the one before us. But the intractable economic, social, and even philosophical problems presented by public welfare programs are not the business of this Court. . . .⁴⁷²

The Court ostensibly used this reasoning to explain why the State had satisfied the rational basis standard, and not, on the face of the Court's opinion, to determine that standard. But a careful reading shows that these same rationales were the foundation of the decision about the standard itself. The rational basis test, said the Court, "is a standard that is true to the principle that the Fourteenth Amendment gives the federal courts no power to impose upon the states their views of what constitutes wise economic or social policy."⁴⁷³

This case is the inverse of most of the Court's other approaches to the identification to fundamental rights. Instead of emphasizing the reasons why it *should* categorize the questioned interest as fundamental, the *Dandridge* Court gave controlling weight to the reasons why it thought it *should not* do so. Perhaps it could have been argued that the importance-to-the-individual approach would have supported an elevated status for the interest in subsistence; indeed, the dissent argued that "the individual interests here at stake . . . clearly distinguish this case from

471. *Id.* at 486. The Court soon extended this holding to housing and shelter, *see Lindsey v. Normet*, 405 U.S. 56 (1972); and to education (at least insofar as the level of educational spending is concerned), *see San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973).

472. *Dandridge*, 397 U.S. at 485-86.

473. *Id.* at 485.

the 'business regulation' equal protection cases."⁴⁷⁴ The argument is obvious: the freedom of speech or the right to vote mean little if one cannot eat. Likewise, one can argue the systemic importance of the alleged right, in that, without the transfer payments represented by welfare, significant groups in the population cannot survive, much less participate in the political process. Furthermore, a society that values "ordered liberty" surely will furnish subsistence to its weakest members, and it even is arguable that the interest in receiving subsistence from government in times of extreme privation is "deeply rooted in our Nation's history and tradition." But the Court was not persuaded by any of these "positive" arguments; instead, its emphasis was upon the *negative* consequences of judicial intervention in a quintessentially legislative problem.

This approach can be justified by the argument that it is self-defeating for the Court to intervene in a problem that, by hypothesis, its intervention cannot help to solve. If there is anything that characterizes the problem of welfare assistance, it is its intractability. Paradox abounds. Arguably there is an unusual need for government flexibility; the State needs breathing space, most of all, to experiment.⁴⁷⁵ Many commentators theorize, for example, that consistent support creates dependence or other disadvantages for the recipients.⁴⁷⁶ Therefore, it is unlikely that sporadic court intervention can improve upon legislative and administrative experience in ensuring the pragmatic workability of a welfare system. Furthermore, although a line drawn by the legislature can be redrawn if it exhibits disastrous unintended consequences, a line drawn by the Court and set in the concrete of a constitutional holding must be dynamited loose either by a constitutional amendment or by a departure from *stare decisis*. Like indiscriminate dive bombers, unable to distinguish friendlies from foes, the Court would wreak havoc upon the progress of those plodding in the trenches of the legislature, if it drew constitutional lines that closely limited welfare reform. And then the Court blithely would fly away, with no need to confront the new problems it had created.

Indeed, perhaps the problem of Court intervention in the

474. *Id.* at 522 (Marshall, J., dissenting).

475. *See, e.g.*, James A. Barnes, *Losing the Initiative*, 22 CAL. POL. 2046 (1990).

476. This sort of proposition would be difficult to prove or to disprove in a timely manner in a judicial forum, even if ultimately subjected to scientific inquiry.

Dandridge situation lies even deeper. Justice Stewart's opinion, at times, sounds like a decision on justiciability. Almost as though the case involved a political question⁴⁷⁷ or an unripe question outside the case-or-controversy requirement, his opinion talks about the Court's lack of "power"⁴⁷⁸ to strike down state laws that the Justices might consider improvident. *Dandridge* is decided in substantive terms, but it reads like a decision about the limits of the judicial power.⁴⁷⁹

Traditional conceptions of the competence of judges, in fact, do furnish powerful support for the *Dandridge* reasoning.⁴⁸⁰ If subsistence is a fundamental right, for example, how does one decide what is the "minimally acceptable" level of subsistence? Is it that which will maintain life, or that which will maintain robust health? Or is it that which will enable the poorest among us to participate in the culture as skillfully as the richest?⁴⁸¹ Probably the only way to resolve these questions is by societal consensus, which is better expressed through a legislature than by an unelected brigade of platonic guardians rejecting every decision that cannot pass strict scrutiny.

Furthermore, many fundamental rights concern matters in which the government is deeply involved or even has a monopoly (as in the case of access to the courts or voting rights).⁴⁸² On the other hand, the question of subsistence is one that generally is answered by private efforts. Even with those whom it assists or subsidizes, the State reasonably may expect and may encourage private contributions by others or by the recipients, and strict scrutiny of legislative calibrations would make the necessary line drawing impossibly complex.⁴⁸³ Another consideration is that

477. In fact, the political question doctrine depends upon such factors as whether the issue is amenable to judicially manageable standards, whether political discretion is involved, and whether respect for coordinate branches is implicated. See, e.g., *Nixon v. United States*, 113 S. Ct. 732 (1993); *Baker v. Carr*, 369 U.S. 186 (1962). These factors arguably counseled caution in *Dandridge* as well.

478. See *Dandridge*, 397 U.S. at 485.

479. Cf. *Lujan v. Defenders of Wildlife*, 500 U.S. 915 (1993) (holding that the case-or-controversy requirement is not satisfied when immediate injury required for standing is not demonstrated).

480. See *supra* note 477.

481. See CRUMP, *supra* note 14, at 788-89.

482. See *id.*

483. See *id.*; cf. *Anderson v. Edwards*, 115 S. Ct. 1291 (1995) (upholding California's "non-sibling filing unit rule" as consistent with federal law governing AFDC after considering a California rule under three distinct federal regulations as well as the basic statute).

when the State affirmatively regulates the self-motivated conduct of private individuals, there always is the concern that it may act with discriminatory motive; but when it sets the level of public assistance, its aim generally is to conserve the public fisc, an aim that more arguably is legitimate.⁴⁸⁴ The United States is dependent for funding upon its economy, one in which motivations are heavily influenced by such matters as government benefits, and in which the efficiency of such a system depends upon the avoidance of overspending by government. This is not a concern that is within the competence of judges deciding only the case or controversy before them.

To put these arguments concretely, the Maryland legislature needed to keep at least six objectives in mind, and decide how to compromise them all, when it passed the enactment at issue in *Dandridge*. First, it needed to define eligibility in a way that protected the weakest members of society; second, it needed to set a level of subsistence that would be sufficient for these individuals; third, it needed to set this level in such a way as to create a fair differential from the incomes of the working poor; fourth, it needed to avoid encouraging the conception of new dependents; fifth, it needed to minimize fraud; and sixth, it needed to accomplish all of these purposes within a budget that did not preempt other government spending or ruin the state's economy. And because these purposes conflicted with each other, the Maryland legislature necessarily confronted the problem of balancing each one against all of the others. But there is little in the Constitution or even in the most expansive arguments for supplementary interpretivism that tells a judge how to compromise the goal of adequate subsistence, for example, with the goal of equitably balancing welfare payments against the incomes of working breadwinners. It seems doubtful that strict scrutiny of such a legislative decision could be made consistent with the judicial role.

2. *Reconciling the Positive and Negative Methodologies: Considering Both in Every Case*

In opposition to the *Dandridge* approach, it has been argued that the importance of having enough to eat is such that it is

484. See CRUMP, *supra* note 14, at 788-89.

“fundamental” at least in the vernacular sense.⁴⁸⁵ It also is necessary to the exercise of other fundamental rights, because the rights to associate with others, to travel, or to speak would have little value if the person exercising them did not have minimal subsistence.⁴⁸⁶ Finally, it could be argued that the courts should attempt to counteract upper-middle-class bias in the definition of fundamental rights, rather than protecting solely those abstract rights that are significant in the philosophy of the “professional class from which most lawyers and judges . . . are drawn.”⁴⁸⁷ Arguably, the courts should strive even harder to protect rights when the affected people have less influence in the political process, such as those dependent upon subsistence benefits.⁴⁸⁸

In this regard, Justice Marshall, in dissent, argued that the welfare interest at issue in *Dandridge* “simply defies easy characterization,”⁴⁸⁹ so that a kind of sliding scale should be used to measure it. This approach, he concluded, was preferable to a dichotomy between “economics and social welfare” legislation subject to rational basis analysis, on the one hand, and the “definition of a ‘right,’ fundamental or otherwise,” on the other.⁴⁹⁰ Rather, Justice Marshall suggested, “concentration must be placed upon the character of the classification in question, the relative importance to individuals in a class discriminated against of the governmental benefits that they do not receive, and the asserted state interest in support of the classification.”⁴⁹¹

None of these arguments, however, is persuasive, at least as against the basic approach taken in *Dandridge*. Even if subsistence is important, Justice Stewart’s argument is that judges will not improve the solutions to such intractable problems. Thus, even if it is granted that judges ought to overcome middle class

485. *See id.*

486. *See id.*; *supra* note 473 and accompanying text.

487. ELY, *supra* note 27, at 59.

488. *See* William Rich, *Equal Protection for the Poor: Fair Distribution to Meet Brutal Needs*, 24 SAN DIEGO L. REV. 1117 (1987).

489. *Dandridge v. Williams*, 397 U.S. 471, 520 (1970) (Marshall, J., dissenting). Justice Marshall advocated this sliding scale approach in other cases as well, such as *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307 (1976) (holding that age is not a suspect classification and that government employment is not a fundamental right); and *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973) (holding that education funding is not a fundamental right).

490. *Dandridge*, 397 U.S. at 520 (Marshall, J., dissenting).

491. *Id.* at 521.

bias, it does not follow that *Dandridge* was wrongly decided; even if the Court is sensitive to concerns of poor persons, it should not act in a way that makes it more difficult for the legislature to address those concerns. And finally, although Justice Marshall's sliding scale has a pleasing theoretical generality, ad hoc balancing would make consistency difficult. In particular, it would debase the status of those fundamental rights and suspect classifications that the Court actually has recognized. If the Court were to refuse to define fundamental rights, and were to weigh each interest in an undetermined manner against the "asserted state interests" opposing it, then such interests as the freedom of speech or the right to vote would be more easily compromised.

Thus, the *Dandridge* approach of examining the need for legislative flexibility is a useful addition to the definition of fundamental rights. In fact, one can argue that these questions of judicial competence, conflicting objectives, linedrawing, and legislative flexibility should be emphasized in every case that breaks new ground in the categorization of rights with elevated status. But contrary to the approach of Justice Marshall, the Court should not balance on an ad hoc, case-by-case basis, despite the theoretical appeal of such a sliding scale. With nine different cooks testing the broth, all attaching subjective valuations to the competing ingredients in the stew, Justice Marshall's approach would dissolve in unpredictability, and it would grant uncertain protection to interests that the Court clearly has designated for elevated protection. Instead, the Court should consult the pragmatic consequences in connection with the initial decision to grant the questioned interest the status of rational basis, middle-tier, or strict scrutiny review.

3. *The Negative Methodology as a Solution to the Lochner Problem*

As is shown above, every supplementer must confront the problem posed by *Lochner v. New York*.⁴⁹² Advocates of contempo-

492. 198 U.S. 45 (1905). Some commentators maintain that it is impossible to distinguish *Lochner*. Thus Professor Dworkin concludes, "After a near century of treating *Lochner* as a whipping boy, no one has produced a sound mechanical test that it fails." Dworkin, *supra* note 24, at 393. Dworkin's solution: first, "all we can do . . . is to point out how and where the arguments are bad," and second, judges must "accept an independent and superior constraint of integrity." *Id.* Dworkin's first solution is flawed, however, because if we lack a sound test, we cannot tell where the arguments are bad; and his second solution may be a triumph of hope over reason, because integrity cannot be identified, either, without a sound test. Thus, for example, *Lochner* remains a consistent deci-

rary moral philosophy, in particular, struggle to distinguish this orphan case, to which none wishes to be related—and the Supreme Court has taken special pains in its procreation decisions to deny the connection.⁴⁹³ Thus, Professor Perry differentiates *Lochner* as “predicated on an absurdly narrow ‘reading’ of the prevailing social attitudes (even of that pre-New Deal period).”⁴⁹⁴ In response, Professor Grano shows where this argument can be attacked: if public opinion had supported the Court just a little more strongly, such reasoning might uphold *Lochner*.⁴⁹⁵ Professor Tribe puts it less definitively (but perhaps is more closely on target) when he argues that the error in *Lochner* “lay not in judicial intervention to protect ‘liberty’ but in a misguided understanding of what liberty actually required in the industrial age.”⁴⁹⁶ Similarly, the joint opinion in *Planned Parenthood v. Casey* concludes that *Lochner* and its antecedents “rested on fundamentally false factual assumptions about the capacity of a relatively unregulated market to satisfy minimal levels of human welfare,” a perception that became “unmistakable” after the Great Depression.⁴⁹⁷

In other words, *Lochner* is wrong because the Court considered only the positive arguments for recognizing an elevated liberty interest in the freedom to contract, and it did not evaluate the negative consequences of hamstringing legislatures by labeling this interest as a fundamental right. It also did not give proper weight to the limits of the judicial role,⁴⁹⁸ or the degree to which the Court would distort that role if it arrogated to itself the Herculean task of supervising by heightened scrutiny every single intervention in a relatively unregulated market that might be appropriate to promote safety, welfare, quality, or accuracy.⁴⁹⁹

sion if the reader accepts its authors’ premises; and with that consistency, the Justices can claim integrity too.

This Article shows a better way. The test of asking, not whether a “right” can be justified in *Lochner*, but whether such a “right” destroys essential legislative flexibility, is a superior means of preventing future *Lochners*. It focuses on what really was wrong with the Court’s decision.

493. See *infra* notes 494-97 and accompanying text.

494. Perry, *supra* note 412, at 703.

495. See Grano, *supra* note 417, at 36.

496. TRIBE, *supra* note 27, at 769; see also *id.* at 578-81 (discussing the decline of *Lochner*).

497. *Planned Parenthood v. Casey*, 505 U.S. 833, 861-62 (1992).

498. Cf. *supra* notes 477-79 and accompanying text (comparing the *Dandridge* reasoning with decisions on the limits of the judicial power).

499. Compare this statement with the *Casey* analysis of *Lochner*. See *supra* note 497 and

When the error in *Lochner* is stated thus—not as wrongful recognition that an unenumerated right to contract can be supported by positive arguments, but rather as a failure to use the converse methodology of considering the negative consequences—it becomes easier to see how a rejection of *Lochner* can be reconciled with other fundamental rights decisions. The Court simply could not do the task it assigned itself in *Lochner* without destroying the necessary roles of both the judicial and legislative branches. It is debatable whether *Casey* contains this necessary analysis.⁵⁰⁰ In any event, the point is that every decision about unenumerated fundamental rights should do so.

B. *Consideration of Pragmatic Counterbalancing Factors, Continued: Collision of the Interest with Other Individual Interests of Equal or Greater Dignity*

In *Michael H. v. Gerald D.*, the Court upheld the California courts' denial of paternity and visitation to an adulterous father, in preference for exclusive rights in the marital couple. The plurality opinion by Justice Scalia emphasized that this result was necessary to protect other interests of equal or greater constitutional dignity:

We do not accept Justice Brennan's criticism that this result "squashes" the liberty that consists of "the freedom not to conform." It seems to us that reflects the erroneous view that there is only one side to this controversy—that one disposition can expand a "liberty" of sorts without contracting an equivalent "liberty" on the other side. Such a happy choice is rarely available. Here, to *provide* protection to an adulterous natural father is to *deny* protection to a marital father, and vice versa. If Michael has a "freedom not to conform" (whatever that means), Gerald must equivalently have a "freedom to conform." . . . Our disposition does not choose between these two "freedoms," but leaves that to the people

accompanying text.

500. *Casey* distinguishes the overruling of *Lochner* on the ground that the *Lochner* decision had been unmistakably recognized as resting on fundamentally false factual assumptions, whereas there had been no such erosion of *Roe*. See *Casey*, 505 U.S. at 861-62. It also recognized, however, that the rigid trimester formula in *Roe* "was unnecessary and in its later interpretation sometimes contradicted the State's permissible exercise of its powers," which should have "substantial flexibility." *Id.* at 869. Thus, the overruling of the trimester framework is predicated on precisely the kind of negative-consequence test that the Court used in *Dandridge*. See *supra* Part IV.A.1. Opponents of *Roe* may justly claim that that decision failed to consider the negative consequences of the abortion right in the first place—but perhaps it is not fair to criticize *Casey* on this ground, because it upheld *Roe* as a matter of stare decisis.

of California. Justice Brennan's approach chooses one of them as the constitutional imperative, on no apparent basis except that the unconventional is to be preferred.⁵⁰¹

Justice Scalia proceeded to reject a fundamental right of an adulterous father to paternity on the ground that it was not "so rooted in the traditions and conscience of our people as to be ranked as fundamental." In fact, "quite to the contrary, our traditions have protected the marital family . . . against the sort of claim Michael asserts."⁵⁰²

In a way, this approach resembles the reasoning in *Dandridge*. It evaluates the pragmatic consequences of characterizing a particular right as fundamental, as a counterweight to that categorization. As in *Dandridge*, rather than considering only the positive arguments, it considers the negatives as well. The principal difference is that the *Dandridge* Court's focus was on the interest of the State in flexibility but Justice Scalia's opinion in *Michael H.* also concentrates upon the interests of others that would be destroyed if the claimed fundamental right were recognized.

Thus, for example, a complete evaluation of the interests in conflict might have produced a different result in the stinking man case, *Kreimer v. Bureau of Police*.⁵⁰³ Even if it is granted that Kreimer had liberty interests in using the public library, and in talking loudly to himself, staring at or following others, and even in exuding a powerful odor, there were counterbalancing considerations against the recognition of these (dubious) liberty interests as fundamental rights. Giving elevated status to Kreimer's interests, as the district court there did, destroyed other library patrons' repose, privacy, autonomy, and First Amendment interests. Simply put, the Court should not have created a novel right of elevated status in *Kreimer* without considering these counterbalancing factors, even if it had been correct in its surprising conclusion that there is a strong interest in exuding a strong odor. In fact, it should not have done so without recognizing that a continuum of hypothetical circumstances might call for legislative rather than judicial balancing of the interests

501. *Id.* at 130.

502. *Id.* at 124. Often, characterizing an interest as a "right" means that it overcomes other interests that might equally be so characterized. See Patricia M. Wald, *Whose Public Interest Is It Anyway?: Advice for Altruistic Young Lawyers*, 47 ME. L. REV. 3, 10-21 (1995) (analyzing Judge Wald's own pro bono cases and wondering whether the rights established were a net gain or a net loss for the public interest).

503. 958 F.2d 1242 (3d Cir. 1992); see *supra* notes 283-89 and accompanying text.

of others.

Even when it has recognized a core kind of fundamental right, such as the right to autonomy in procreative matters, the Court should be reluctant to extend the protected interest to novel circumstances without considering countervailing factors. Blind extension of the right to procreative autonomy, for example, would sanction a *Brave New World*⁵⁰⁴ approach to such contemporary problems as commerce in frozen embryos, employment of surrogate mothers, or tissue farming by abortion.⁵⁰⁵ Instead, it should be recognized that there is a needed region of legislative flexibility to prevent negative consequences of these endeavors in which the State has legitimate interests and in which a "right" may destroy countervailing "rights." Likewise, the Court's decisions on such issues as parental and spousal notification may ignore countervailing individual interests.⁵⁰⁶ Again, if the right accurately is characterized as fundamental, it does not seem that the resulting heightened scrutiny should be watered down by ad hoc balancing, but the initial decision to recognize the interest as a fundamental right should not be undertaken without an inquiry into other individual interests that might be compromised by the categorization.

C. Economic Interest-Balancing

Procedural due process decisions are governed by the test of *Mathews v. Eldridge*,⁵⁰⁷ which is essentially an economic approach. There, the Court held that an evaluation of the process that is due "generally requires consideration of three distinct factors."⁵⁰⁸

First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such

504. See ALDOUS HUXLEY, *BRAVE NEW WORLD* (1946).

505. Cf. William Boulier, *Sperm, Spleens and Other Valuables: The Need to Recognize Property Rights in Human Body Parts*, 23 HOFSTRA L. REV. 693 (1995) (urging a complete change in the fundamental concepts of law relating to corpses); Anne Reichman Schiff, *Solomonic Decisions in Egg Donation: Unscrambling the Conundrum of Legal Maternity*, 80 IOWA L. REV. 265 (1995) (demonstrating that new reproductive technology has led to an unprecedented confusion of biological, and therefore legal, family relationships, requiring an entirely new legal structure); Lisa M. Burkdall, Note, *A Dead Man's Tale: Regulating the Right to Bequeath Sperm in California*, 46 HASTINGS L.J. 875 (1995) (critiquing a case that suggests a privacy-related right to devise sperm by will for posthumous use and calling for its regulation).

506. See *supra* note 442 and accompanying text.

507. 424 U.S. 319 (1976).

508. *Id.* at 335.

interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguard; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.⁵⁰⁹

The economic, and indeed the mathematical, nature of this test can be demonstrated by translating it into an algebraic equation, in which due process is satisfied if and only if

$$I \times P < G$$

where I is the value of the "private interest that will be affected;" P is the "risk of an erroneous deprivation . . . and the probable value . . . of . . . substitute procedural safeguards" (expressed as a probability that enhanced procedure will prevent erroneous deprivation); and G is "the government's interest, including . . . the fiscal and administrative burdens."

Although this test has so far been confined to questions of procedural due process, it closely resembles the sliding scale suggested by Justice Marshall. Specifically, Justice Marshall's approach would not depend upon the categorization of interests as fundamental rights. Instead, he argues that "concentration must be placed upon the character of the classification in question, the relative importance to individuals in the class discriminated against of the governmental benefits that they do not receive, and the asserted state interest in support of the classification."⁵¹⁰

For reasons stated in preceding Sections of this Article, it would be unwise to use this sliding scale on a case-by-case basis, as Justice Marshall advocates.⁵¹¹ That is so even though it may describe what the Court "really" is doing in some cases,⁵¹² because the firm categorization of certain rights as fundamental—the freedom of speech, for example—is needed to keep them from being balanced away, and because an ad hoc approach would lead to inconsistency. On the other hand, there is some

509. *Id.*

510. *Dandridge v. Williams*, 397 U.S. 471, 521 (1970) (Marshall, J., dissenting); see *supra* notes 489-91 and accompanying text.

511. See *supra* Part IV.A.2.

512. In particular, it may make sense of cases in which the court purports to use low-tier scrutiny but in which it invalidates laws that appear to have at least minimally adequate connection to legitimate interests. See *supra* note 21 and accompanying text. These results are explainable as reactions to incursions upon sensitive rights or classifications with minimal justifications.

appeal to this approach when it is the initial recognition of a fundamental right that is at stake, or its extension to novel questions concerning conflicting interests. Here, the balancing approach resembles what is happening in such cases as *Dandridge* or *Michael H. v. Gerald D.*, in which the probability of unfair defeasance of an interest and the importance of that interest are weighed against, and are overcome by, the strength of the government's interest in maintaining legislative flexibility or in recognizing other persons' competing interests.⁵¹³

V. CONCLUSION

None of these approaches to fundamental rights is exclusively superior to all others. All have been used by Justices of the Supreme Court in an effort to resolve concrete cases. Perhaps a pluralistic system is best, in which the Justices consider each test as potentially applicable to some cases or circumstances, but with due regard for the disadvantages of each. For example, it would be inappropriate to use the importance-to-the-individual test as the exclusive method of deciding whether the freedom of speech is entitled to elevated protection, because the constitutional text so clearly grants that protection. And it may not be appropriate to deny a right-to-die claim of a terminally-ill but sentient person who suffers agonizing pain, solely because it is not marked as special in the text, or because it is outside the original understanding, or because there is a need for governmental flexibility, or because it is not deeply rooted in our Nation's history and tradition—without at least considering, at some level, its importance to the affected individual.

But the importance-to-the-individual approach always should evoke skepticism. Because every interest arguably is important to some who would exercise it, this test has no logical stopping point, and because subjective evaluations by judges is all that the Court has to go by, this approach gives excessive reign to idiosyncratic preferences. A maximum of judicial restraint is called for, therefore, in connection with this test. Nevertheless, the text of the Due Process Clause, together with extremely important individual interests, might support the use of this approach in some cases. Approaches involving natural rights, contemporary moral philosophy, or "contemporary ratification" of the Consti-

513. See *supra* Part IV.A-B.

tution as read by "twentieth century Americans" are phrases that are likely to describe admixtures of the importance-to-the-individual methodology and the systemic importance technique. These approaches have many of the disadvantages of the importance-to-the-individual test—if not greater disadvantages, because of the greater mushiness in their labels.

Testing whether the claimed right is "deeply rooted in our Nation's history and tradition," by contrast, is likely to produce a narrower catalogue of fundamental rights. It has the advantage of greater apparent objectivity, even though a certain amount of subjective judgment is implicit in the identification and evaluation of the relevant tradition. This method is vulnerable, however, to the criticism that it is circular, in that traditionally-valued interests are not likely to need protection because, ipso facto, majoritarian protection should be forthcoming for them. One might expect this approach to be narrower than, say, the importance-to-the-individual method. Nevertheless, the objectivity and confinement of the rights that would be protected as fundamental under the history-and-tradition test are more in keeping with the judicial role than other supplementary methods, and it features a greater degree of built-in judicial restraint. Likewise, there is the approach of protecting only those rights that are essential to ordered liberty. This approach, too, encourages restraint, because it protects only those interests without which a free society could not exist. For this reason, some observers might consider it unduly narrow, because the terms of the Due Process Clause are not confined expressly to the protection of interests that are essential to ordered liberty.

Whenever it recognizes a novel right or extends an existing one to new circumstances, the Court always should consider the pragmatic consequences and the limits of the judicial role. The preceding methods are "positive" ones; this approach, conversely, is a "negative" one, in that it amounts to deciding whether a right should be recognized as fundamental by analyzing why it should *not* be. In particular, the Court should consider the need for legislative flexibility in protecting the right or dealing with related state interests, as well as the consequences to other individuals' rights of equal or greater dignity. This weighing of the countervailing factors also is implicit in the concept of "that process which is due," just as is the weighing of the positive arguments for recognizing the asserted right at issue. Although

the consideration of these countervailing interests should not be done on an ad hoc basis when recognized rights are concerned, it should be done in connection with every new decision to grant elevated status to a given interest. This approach would have produced more appropriate reasoning in the *Lochner* line of cases. Today it still is needed, to avoid *Lochnerizing* new liberty interests into fundamental rights. The negative consequences methodology, in fact, is the best way to solve the *Lochner* problem.

As a concrete example, one might consider application of these methods to the complex of interests often lumped together as the putative "right to die." This problem includes at least four arguable claims of right: first, in refusing treatment; second, in refusing nutrition and hydration; third, in self-directed death or assisted suicide; and fourth, in euthanasia. The Supreme Court has not considered a case that presents these problems in the context of a sentient but terminal individual suffering severe pain. Several state supreme courts and federal courts have done so, with varying results.⁵¹⁴

The text of the Constitution contains no explicitly-elevated protection of these interests, and penumbral or structural arguments are difficult to make in support of any of them.⁵¹⁵ But the importance to the individual of each of these interests may be compelling, particularly if the individual is terminal, sentient, and severely affected by pain.⁵¹⁶ On the other hand, the judicial

514. See *Quill v. Vacco*, 80 F.3d 716 (2d Cir. 1996) (finding a right to assisted suicide in the Equal Protection Clause); *Compassion in Dying v. Washington*, 79 F.3d 790 (9th Cir. 1996) (en banc) (finding a substantive due process right to assisted suicide); *People v. Kevorkian*, 527 N.W.2d 714 (Mich. 1994) (rejecting claimed right to assisted suicide, using history-and-tradition approach), *rev'g* *People v. Kevorkian*, 62 U.S.L.W. 1097 (Mich. Ct. App. Dec. 13, 1993) (upholding the claim by using the ordered-liberty approach and considering a four-factor test involving the individual's degree of free choice, quality of life, competency, and permanency of painful physical condition, and recognizing "rational suicide" as "implicit in the concept of ordered liberty"); *cf.* *Gray v. Romeo*, 697 F. Supp. 580 (D.R.I. 1988) (recognizing a right to substituted judgment for removing nutrition and hydration, on the basis of the bodily-integrity rationale); *McKay v. Bergstedt*, 801 P.2d 617 (Nev. 1990) (upholding a right to refuse life support). Several other cases are cited in *Cruzan*, including the seminal right to die case, *In re Quinlan*, 355 A.2d 647 (N.J. 1976) (upholding the removal of life support).

515. Perhaps the Due Process Clause, which protects the interest in "life," can be read to include an interest in ending life, much as the freedom of speech is said to include the rights not to speak and not to listen. In the suicide context, however, this interpretation seems to stretch the text.

516. *Cf. supra* note 514. See generally Frederick, *supra* note 304 (arguing for the recognition of a fundamental right of rational choice of physician-assisted suicide in appropriate cases); *Symposium on Medical Futility*, 25 SETON HALL L. REV. 873-1073 (1995) (dealing

restraint that should accompany the importance-to-the-individual methodology, coupled with contrary state interests such as protecting life, avoiding mistakes in choices, and considering rights of others, combine to counsel caution.⁵¹⁷ And when we ask which of these interests is deeply rooted in our nation's history and tradition, it is probable that only the right to refuse treatment qualifies; a right to assisted suicide or euthanasia probably would not.⁵¹⁸ None of the claimed interests, except arguably the right to refuse treatment, is likely to qualify under a minimalist ordered liberty approach, or under an approach emphasizing systemic importance.⁵¹⁹ Thus, a judge who emphasizes judicial restraint, and who considers ordered liberty or history and tradition to be appropriate tests, may decide that the right to refuse treatment deserves elevated status, but that the other interests do not. This result is reinforced by consideration of the negative consequences, such as the effect on needed legislative flexibility, that would result from recognizing a comprehensive right to die as fundamental.

A judge who is more willing to read the Due Process Clause broadly might give weight to the importance-to-the-individual methodology and thereby decide in favor of assisted suicide. It is submitted, however, that the concern for judicial restraint in connection with this approach should be at its strongest.⁵²⁰ Furthermore, consideration of counterbalancing factors, such as the need for legislative flexibility, should countermand this result in

with the phenomenon of medical futility, the difficulty of its determination, and its legal consequences).

517. *Cf. Cruzan v. Director, Mo. Dep't of Health*, 497 U.S. 261 (1990) (recognizing competing interests, the ambiguity of approaches, and the state's need for flexibility as reasons for rejecting the claimed right to substituted decision for the incompetent); Thomas A. Eaton & Edward J. Larson, *Experimenting with the Right to Die in the Laboratory of the States*, 25 GA. L. REV. 1253, 1254 (1991) (emphasizing the uniqueness of each patient—"[t]here is no 'typical' case"—as a reason for preserving legislative power to experiment with legal tests); Thomas W. Mayo, *Constitutionalizing the "Right to Die,"* 49 MD. L. REV. 103 (1990) (arguing against a fundamental right); G. Steven Neely, *Chaos in the "Laboratory of the States": The Mounting Urgency in the Call for Judicial Recognition of a Constitutional Right to Self-Directed Death*, 26 U. TOL. L. REV. 81 (1994) (arguing that invasive medical technology, lack of patient control, imprecise understandings of suicide, chance distributions of agonizing deaths, and other factors have created an urgent need for judicial recognition of the right to self-directed death).

518. *Compare Cruzan* (recognizing a substantial interest in refusing treatment and assuming a protected right of a competent person to refuse hydration and nutrition) with *supra* note 514 (listing cases in which courts declined to find assisted suicide protected under the history-and-tradition standard).

519. *Cf. supra* note 514 (discussing cases).

520. *See supra* Part III.D.

any case short of the most compelling.⁵²¹

The use of this pluralistic methodology provides only a loose framework for analysis. It does not specify outcomes. Furthermore, it requires a sophisticated kind of judicial restraint. But no single approach could take adequate account of the constitutional text and history, the Supreme Court's actual decisions, and the text of the Due Process Clause, nearly as well. If the Court were to treat these different approaches as a continuum of alternatives, and examine them all with due regard for their relative advantages and disadvantages, the pluralistic system that would result might be an improvement over the current regime of selection of methods by designation of the Justice writing the opinion. It might even reduce the degree to which the search for fundamental rights resembles the science of alchemy.

521. *See supra* note 518.