CONSTITUTIONAL CADENZAS

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I. INTRODUCTION

If, like me, you are a musical ignoramus, you might wonder what a cadenza is. Since I do not want to pretend to have any musical expertise, I will quote from that most generic and least scholarly of references, Wikipedia:

> The cadenza was originally, and remains, a vocal flourish improvised by a performer to elaborate a cadence in an aria. It was later used in instrumental music, and soon became a standard part of the concerto. Originally, it was improvised in this context as well, but during the 19th century, composers began to write cadenzas out in full. Third parties also wrote cadenzas for works in which it was intended by the

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> composer to be improvised, so the soloist could have a well formed solo that they could practice in advance.[1]

It is intriguing to learn that classical music once had a jazz-like component of improvisation. Apparently, however, something like stare decisis has now taken hold, resulting in musicians relying on "precedents" (the work of earlier performers) rather than trying to improvise.

The question I want to raise is whether the Constitution contains cadenzas—that is, instructions for the interpreter to improvise upon the Constitution's grand themes. I will focus on the Ninth Amendment and the Privileges or Immunities Clause of the Fourteenth Amendment. I will argue that both of these constitutional provisions call for the protection of unenumerated fundamental rights, leaving the specification and evolution of those rights to further elaboration. I will also argue that foreign human rights protections, as well as American traditions, are relevant to that process of elaboration.

Because so much of constitutional scholarship is obsessed with the Supreme Court's role, it is important to observe that the "performers" of the cadenzas are not limited to the Supreme Court. For instance, nearly all state constitutions have language equivalent to the Ninth Amendment.[2] State courts are more accountable to the public than federal courts are, and state constitutions are more readily amendable when the public rejects their views.[3] Thus, in terms of the countermajoritarian difficulty, states may properly feel less inhibited in recognizing fundamental rights.

Apart from their possible use as a basis for invalidating legislation, the Ninth Amendment and its Fourteenth Amendment cousin have several other important uses. First, they provide a basis for the creation of congressional legislation dealing with fundamental rights. Article I of the

1. Wikipedia.com, Cadenza, http://en.wikipedia.org/wiki/Cadenza (last visited Apr. 22, 2008). For those who would like to think more seriously about connections between musical and legal interpretation, I recommend two essays about law and music: Richard A. Posner, *Bork and Beethoven*, 42 STAN. L. REV. 1365 (1990); and Sanford Levinson & J. M. Balkin, *Law, Music, and Other Performing Arts*, 139 U. PA. L. REV. 1597 (1991).

2. *E.g.*, ALA. CONST. art. I, § 36; ILL. CONST. art. I, § 24; IOWA CONST. art. I, § 25; MINN. CONST. art. I, § 16; NEB. CONST. art. I, § 26; N.J. CONST. art. I, ¶ 21; OR. CONST. art. I, § 33.

3. *See generally* G. Alan Tarr & Robert F. Williams, *Foreword: Getting from Here to There: Twenty-First Century Mechanisms and Opportunities in State Constitutional Reform*, 36 RUTGERS L.J. 1075 (2005) (describing the methods of amending state constitutions).

Constitution contains the Necessary and Proper Clause, which authorizes Congress to pass whatever legislation is necessary and proper to achieve the implementation of its own powers or those of the other branches of the federal government.[4] Legislation designed to ensure that neither the courts nor the executive branch violate Ninth Amendment rights is unquestionably "necessary and proper" if Congress thinks that there is some risk of constitutional violations. Even if courts were found to lack the ability to enforce the Ninth Amendment against Congress, the Ninth Amendment could at least serve as a basis for action by Congress to prevent the Executive Branch from violating fundamental rights. Given some of the extravagant claims of presidential power that have been made, it is important to be clear that Congress has the ability to check the President when fundamental rights are concerned.

Congress can also enforce fundamental rights against the states.[5] Section 5 of the Fourteenth Amendment gives Congress the power to enforce the Amendment's provisions, and the Privileges or Immunities Clause is one of those provisions.[6] Hence, if Congress has sufficient grounds for concluding that states have invaded fundamental rights protected by that Clause, it is empowered to legislate in order to protect those rights.

Another potential use for the Ninth Amendment is in terms of statutory interpretation. During the period when the Constitution was drafted, courts interpreted statutes quite freely in order to bring them into accord with natural rights, equity, and the law of nations.[7] Similarly, courts today should feel free to interpret statutes so as to further the aims of the Ninth Amendment. For example, statutes should not be construed to deviate from well-established principles of international human rights law unless this interpretation is unavoidable. This approach to statutory interpretation could be implemented not only by state and federal judges, but also by executive officers.

4. U.S. CONST. art. I, § 8, cl. 18.

5. *See generally* Rebecca E. Zietlow, *Congressional Enforcement of Civil Rights and John Bingham's Theory of Citizenship*, 36 AKRON L. REV. 717 (2003) (discussing the intent to bestow broad power on Congress to define and protect fundamental rights, and to make those rights enforceable against the states).

6. U.S. CONST. amend. XIV, § 5.

7. *See, e.g.*, R. H. Hemholz, *The Law of Nature and the Early History of Unenumerated Rights in the United States*, 9 U. PA. J. CONST. L. 401, 407 (2007) (explaining that between 1789 and 1825 the Supreme Court often cited works on natural law to support decisions of statutory interpretation).

Thus, even individuals who do not think the Ninth Amendment empowers courts to strike down legislation should still be willing to countenance other ways of giving indirect effect to the Ninth Amendment—whether through congressional action to protect fundamental rights or through judicial interpretation of statutes to avoid infringing on rights. In addition, citizens and officials should take these amendments seriously as reminders about the need to respect human rights, even when more direct enforcement of those rights is not present.

To continue the musical metaphor, this essay is organized in four movements. The first movement reprises constitutional history and text.[8] The second movement then considers some methodological issues. The third movement sketches some applications of the Constitution, including the issues of abortion and homosexuality. Finally, the fourth movement responds to the fear of uncontrolled judicial activism.

II. FORGOTTEN CONSTITUTIONAL TEXTS

Despite enormous differences among constitutional theorists, all agree that the constitutional text is binding. Yet, key portions of the text are simply ignored by the courts and slighted by most commentators. I will discuss two such forgotten constitutional mandates: the Ninth Amendment's injunction to protect those rights "retained by the people"[9] and the Fourteenth Amendment's prohibition on state violations of the "privileges or immunities of citizens of the United States."[10]

A. *Madison's Ninth*

"The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."[11] The first thing to notice is that the Constitution does not "create" or "bestow" or even "provide" certain rights; it merely "enumerates" or lists them. The Bill of Rights is apparently a list of rights rather than a source of rights. The second thing to notice is that the list is not exclusive; there are other rights also retained by the people, which retain their full force and effect.

8. For further relevant historical material, see generally DANIEL A. FARBER & SUZANNA SHERRY, A HISTORY OF THE AMERICAN CONSTITUTION 3–21 (discussing the intellectual origins of the Constitution), 313–52 (discussing the development of the Bill of Rights), 361–88 (discussing antebellum legal thought), 423–54 (discussing the development and application of the Fourteenth Amendment) (2d ed. 2005).

9. U.S. CONST. amend. IX.

10. U.S. CONST. amend. XIV, § 1.

11. U.S. CONST. amend. IX.

What could be simpler?[12]

The plain meaning of the Ninth Amendment is confirmed by its legislative history. The key history relating to the Ninth Amendment is easily accessible—it is Madison's explanation when he proposed the Bill of Rights in Congress.[13] Madison's major speech on the proposal directly addressed the exclusivity problem.[14] He recognized the risk that any attempt to list fundamental rights in the Bill of Rights would mistakenly be read to eliminate the legal status of other rights.[15] Madison called this "one of the most plausible arguments I have ever heard urged against the admission of a bill of rights into this system."[16]

Certainly, natural rights were very much on the mind of Madison and his fellow legislators. In his notes for the speech introducing the Bill of Rights, Madison had included the term "natural rights" as part of his categorization of different kinds of rights.[17] His thinking had no doubt evolved over the years, but he still retained his belief in the existence of these rights.

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12. For a spirited debate on this point by my fellow panelists, see Kurt T. Lash, *A Textual-Historical Theory of the Ninth Amendment*, 60 STAN. L. REV. 895 (2008); Randy E. Barnett, *Kurt Lash's Majoritarian Difficulty: A Response to* A Textual-Historical Theory of the Ninth Amendment, 60 STAN. L. REV. 937 (2008) [hereinafter Barnett, *Lash's Majoritarian Difficulty*]; and Kurt T. Lash, *On Federalism, Freedom, and the Founders' View of Retained Rights: A Reply to Randy Barnett*, 60 STAN. L. REV. 969 (2008).

My view on this point is close to Randy Barnett's, explained his article, *The Ninth Amendment: It Means What It Says*, 85 TEX. L. REV. 1 (2006) [hereinafter Barnett, *It Means What It Says*]. I would view the Amendment as protecting discrete rights whereas Barnett sees a protection for undifferentiated liberty. *Id.* at 80. In practical terms, the difference is that Barnett would apply somewhat heightened scrutiny (beyond the current rational basis test) to all regulations, whereas I would apply rational basis to most regulations, while giving a higher degree of scrutiny to regulations that impinge on certain critical individual interests such as procreation. Thus, I would advocate continued rational basis scrutiny for banking regulations, while he would use a higher degree of scrutiny; on the other hand, I would advocate giving a statute regulating procreation a higher level of scrutiny than the banking regulation.

13. Madison's speech is reprinted in FARBER & SHERRY, *supra* note 8, at 323–30.

14. FARBER & SHERRY, *supra* note 8, at 329.

15. *Id.*

16. *Id.*

17. 1 THE RIGHTS RETAINED BY THE PEOPLE: THE HISTORY AND MEANING OF THE NINTH AMENDMENT 64 (Randy E. Barnett ed., George Mason Univ. Press 1989).

When he offered the Bill of Rights to Congress, Madison proposed the following provision to deal with the exclusivity issue:

> *The exceptions here or elsewhere in the constitution, made in favor of particular rights, shall not be so construed as to diminish the just importance of other rights retained by the people*; or as to enlarge the powers delegated by the constitution; but either as actual limitations of such powers, or as inserted merely for greater caution.[18]

The first part of this provision, which I have italicized here, became the basis for the Ninth Amendment. Note that the language after the italics was completely dropped from the final amendment.

We need to take a careful look at Madison's language—both the parts that were ultimately adopted and those that were dropped. The proposal that Madison presented to Congress provides clear signs about the Framers' intent regarding unenumerated rights.

There are several things to notice about Madison's proposal. First, he refers to the unenumerated rights as "other" rights retained by the people just after referring to the express constitutional rights.[19] The implication is that both sets of rights are retained, meaning that those rights already existed and were merely being kept in place. Thus, both enumerated and unenumerated rights are similar in their origins; neither kind is "created" by the Constitution or the Bill of Rights.

Second, notice how Madison refers to the Constitution as "enumerating" certain rights.[20] To "enumerate" means to number or list; it does not mean to create.[21] For example, the Constitution also uses this term to refer to the Census, which obviously lists entities (in this case, people) which already exist beforehand.[22]

Significantly, Madison did not use other terms such as "establish," "ordain," or "vest." Clearly these terms were all familiar to him, as they were used in other parts of the Constitution. According to the Preamble,

18. James Madison, Speech in Congress Proposing Constitutional Amendments (June 8, 1789), *in* JAMES MADISON, WRITINGS 437, 443 (Jack N. Rakove ed., 1999) (emphasis added).

19. *Id.*

20. *Id.* at 448.

21. WEBSTER'S UNABRIDGED DICTIONARY 650 (2d ed., Random House 2001) (defining "enumerate" as "to mention separately as if in counting; . . . [to] specify, as in a list").

22. U.S. CONST. art. I, § 2, cl. 3.

"We the People . . . ordain and establish" the Constitution.[23] Congress is also authorized to "ordain and establish" the lower federal courts.[24] Furthermore, Article I states that the legislative powers of the federal government are "herein granted" and "vested" in Congress.[25] But rights seemingly are not granted, established, vested, or ordained by the Constitution; they—or rather, some of them—are simply listed there.

Third, Madison proposed this language as part of his fifth block of amendments, which also contained the basis for what would later become the first eight amendments of the Constitution. In Madison's original proposal, the amendments would have been inserted into the original text, rather than being placed at the end.[26] In that case, what is now the Ninth Amendment would appear right after the guarantee of habeas corpus and the bans on bills of attainder and ex post facto laws.[27] Thus, Madison was clearly thinking of rights of the same kind. As he said in his main speech about the Bill of Rights, Madison had in mind "rights which are retained when particular powers are given up to be exercised by the legislature," along with other rights such as jury trial "as essential to secure the liberty of the people as any one of the pre-existent rights of nature."[28] The placement of the Ninth Amendment language along with these individual rights was the same in the next draft, which was issued by the House Select Committee on July 28, 1789.[29]

Sometimes the Ninth Amendment is thought to be about limiting federal power in the interest of states' rights. There had been language accompanying the proposed Ninth Amendment dealing with federal powers (as quoted above), but that language was completely dropped from the final amendments. Notably, Madison made a different proposal relating to federalism, which became what is now the Tenth Amendment. That proposal stated that the "powers not delegated by this constitution, nor prohibited by it to the states, are reserved to the states respectively."[30] This amendment was not part of the fifth block (which contained the future

23. U.S. CONST. pmbl.
24. U.S. CONST. art. III, § 1.
25. U.S. CONST. art. I, § 1.
26. *See* Barnett, *It Means What It Says*, *supra* note 12, at 8.
27. *Id.*
28. Madison, *supra* note 18, at 445–46.
29. Madison Resolution (June 8, 1789), *reprinted in* CREATING THE BILL OF RIGHTS: THE DOCUMENTARY RECORD FROM THE FIRST FEDERAL CONGRESS 11, 13–14 (Helen E. Veit et al. eds., 1991) [hereinafter CREATING THE BILL OF RIGHTS].
30. CREATING THE BILL OF RIGHTS, *supra* note 29, at 14.

Ninth Amendment). Instead, it was part of the eighth block of amendments. Madison proposed to insert it in an entirely different part of the Constitution, just after Article VI (rather than Article I).[31]

Madison's explanation and the accompanying proposals make his intentions unmistakable. The proposal that became the Ninth Amendment was not paired with the future Tenth Amendment. It was not about federalism; it was about individual rights. Those individual rights belonged to the same genre as free speech (in the proposed Bill of Rights) or the ban on ex post facto laws (in the original Constitution).[32] Explicitly listing rights had advantages, both in terms of reassuring the public and stimulating judges to come more readily to their defense. But these rights were not specially privileged; indeed, "[n]o proponent of the Bill of Rights asserted that the rights enumerated by Madison's proposed amendments were more important than the rights not enumerated."[33] Madison had done as much as he could to communicate that the listing was not exclusive. There were other important rights, and they too were entitled to respect.

B. *The Privileges or Immunities Clause*

The first section of the Fourteenth Amendment prohibits states from violating due process, equal protection, and the "privileges or immunities of citizens of the United States."[34] The theory behind this section was that

31. *Id.* at 13.

32. There are, of course, various other perspectives on the meaning of the Ninth Amendment. *See, e.g.*, Russell Caplan, *The History and Meaning of the Ninth Amendment*, 69 VA. L. REV. 223, 227 (1983) (defining the Ninth Amendment as "limited to a specific function, well-understood at the time of its adoption: the maintenance of rights guaranteed by the laws of the states"); Thomas McAffee, *The Original Meaning of the Ninth Amendment*, 90 COLUM. L. REV. 1215, 1225 (1990) (tying the meaning of the Ninth Amendment directly to the Tenth, stating the Ninth Amendment "can plausibly be read as an allusion to the general reservation of rights embodied in the system of enumerated powers made explicit in the tenth amendment"). In my view, however, these other interpretations require strained interpretations of the language of the Amendment and of Madison's crucial speech.

33. Mark A. Graber, *Enumeration and Other Constitutional Strategies for Protecting Rights: The View from 1787/1791*, 9 U. PA. J. CONST. L. 357, 385 (2007). Graber also contends that "[e]numeration became the central constitutional strategy for protecting fundamental rights only after the Civil War." *Id*. at 396.

34. U.S. CONST. amend. XIV. This one is the Privileges *or* Immunities Clause—as opposed to the earlier Privileges *and* Immunities Clause in Article IV of the Constitution—and has been nearly forgotten by the Supreme Court, with the exception of a recent right-to-travel case, *Saenz v. Roe*, 526 U.S. 489 (1999). For a recent historiographic overview of the Fourteenth Amendment, see Bryan H. Wildenthal,

states should have respected human rights on the basis of the existing Constitution, but that they had failed to do so. Hence, the federal government needed new powers in order to force them to do so.

John Bingham tried to put such a constitutional amendment on the congressional agenda at an early point of Reconstruction.[35] An early draft of his proposal gave Congress the power to make all laws which shall be "necessary and proper to secure to the citizens of each State all privileges and immunities of citizens in the several States . . . ."[36] Note that this version of the Fourteenth Amendment would have created congressional power but would not have guaranteed rights directly in a way that courts could enforce. Even more importantly, note that Bingham had directly lifted the language of the Privileges or Immunities Clause from the original Constitution. He apparently did not think that Congress had the power to enforce that Clause without additional constitutional assistance.

Bingham argued that this was only a modest, though necessary, change in constitutional law.[37] The majority view among Republicans was that Congress already had the power to protect these rights. Bingham disagreed. He believed that, under the original Constitution, state officers were obligated by oath to comply with the Fifth Amendment and the Privileges and Immunities Clause, but that enforcement of these rights rested solely with the states.[38]

Bingham denied that the provision would take away from any state any right belonging to it. He contended that the rights of liberty and life "are universal and independent of all local State legislation" and "belong, by the gift of God," to all.[39] Bingham found it strange that the federal government had power to vindicate the rights of citizens abroad, but not

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Nationalizing the Bill of Rights: Revisiting the Original Understanding of the Fourteenth Amendment in 1866–67, 68 OHIO ST. L.J. 1509 (2007).

35. CONG. GLOBE, 39th Cong., 1st Sess. 1033–34 (1866).

36. *Id.* at 1034.

37. *See id.*

38. *See id.* at 1034, 1292. This disagreement played itself out on the House floor:

> Debate on the proposed amendment was not extensive, but it was spirited, filled with "points of order" and heated personal interchanges, as well as spots of humor (such as one representative's admission that apparently he was one of the only members of the House who *wasn't* an expert on constitutional law[!]).

FARBER & SHERRY, *supra* note 8, at 433–34.

39. CONG. GLOBE, 39th Cong., 1st Sess. 1089 (1866).

power in peacetime to enforce those rights within the limits of the states. His amendment sought to remedy that situation. However, Congress had more pressing business and Bingham's amendment temporarily went on the back burner. [40]

Two weeks after Congress overrode Johnson's veto of the Civil Rights Act, Representative Stevens placed before the joint committee a new Reconstruction plan. One aspect of the plan was a proposed constitutional amendment.[41] After some maneuvering in committee, Bingham successfully had the original language of the Stevens proposal replaced by his own formulation:

> No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.[42]

Much of the debate took place at a very abstract level. As one constitutional historian puts it, the framers of the Amendment

> strove to have "the truth . . . go out from every deliberative body in the land, as the rays of light radiate from the sun" and paid attention mainly to the substance of the great issues of principle to which they hoped to convert the nation, rather than to how their legal handiwork would be enforced in the future.[43]

Nevertheless, there were some important comments on the first section of the Amendment, particularly the Privileges or Immunities Clause. The debates confirm that, by referring to privileges or immunities, the supporters of the Fourteenth Amendment were drawing a link to the "P & I" Clause of the original Constitution—and also that they interpreted the Clause far more broadly than modern lawyers do as a guarantee of

40. *See* FARBER & SHERRY, *supra* note 8, at 439.

41. *See* CHARLES FAIRMAN, RECONSTRUCTION AND REUNION, 1864–88, PART ONE 1282 (The Oliver Wendell Holmes Devise, History of the Supreme Court of the United States, Vol. 6, 1971); BENJAMIN B. KENDRICK, THE JOURNAL OF THE JOINT COMMITTEE OF FIFTEEN ON RECONSTRUCTION 83–84 (Faculty of Political Science of Columbia University eds., 1914).

42. KENDRICK, *supra* note 41, at 87.

43. WILLIAM E. NELSON, THE FOURTEENTH AMENDMENT: FROM POLITICAL PRINCIPLE TO JUDICIAL DOCTRINE 145 (1988) (citations omitted).

fundamental rights.[44]

In the House, Bingham explained that the effect of the Amendment was "to protect by national law . . . the inborn rights of every person within its jurisdiction whenever the same shall be abridged or denied by the unconstitutional acts of any State."[45] In introducing the Fourteenth Amendment in the Senate, Senator Howard emphasized the Privileges or Immunities Clause and explicitly tied this Clause to Bushrod Washington's sweeping language in the *Corfield v. Coryell* case.[46] He also made it clear that the courts were not yet finished with defining the contours of these rights—rather, this was a work in progress.[47]

Modern scholars are often frustrated that the congressional debates contained so little detail about the meaning of the Privileges or Immunities Clause or other terms such as due process and equal protection. But no detailed explanation was needed. Everyone knew what these clauses meant because the Fourteenth Amendment followed on the heels of extensive debates about fundamental rights, their status under the law of nations, and their constitutional standing. Being politicians, the Amendment's supporters could not entirely resist the opportunity to repeat what they all knew and had already said at length. Basically, however, they had thrashed through all of the issues before and knew what they meant when they referred to the "privileges or immunities" of American citizens: they meant the fundamental rights that had been an American birthright since the Declaration of Independence.

This view of the Fourteenth Amendment is, in the end, the one that fits most naturally with the constitutional text itself. In what may have been the single most influential book on constitutional law of the last thirty years, John Hart Ely made this point about as clearly as possible:

> [T]he most plausible interpretation of the Privileges or Immunities Clause is, as it must be, the one suggested by its language—that it was a delegation to future constitutional decision-makers to protect certain rights that the document neither lists, at least not exhaustively, nor

44. *See, e.g.*, CONG. GLOBE, 39th Cong., 1st Sess. 600 (1866) (statement of Sen. Trumbull).

45. *Id.* at 2542.

46. *Id.* at 2765; *see also* Corfield v. Coryell, 6 F. Cas. 546 (C.C.E.D. Pa. 1823) (No. 3230).

47. CONG. GLOBE, 39th Cong., 1st Sess. 2765 (1866).

even in any specific way gives directions for finding.[48]

Bingham's thinking, along with other anti-slavery Republicans, was strikingly similar to the theories behind the Ninth Amendment. In both eras, leading figures believed in "inborn" or "inalienable" rights; they agreed that these rights needed to be addressed in the Constitution and they adopted broad constitutional language to prevent invasions of those rights.

III. QUESTIONS OF METHODOLOGY

These constitutional texts might seem to leave us completely on our own in identifying fundamental rights. As the title of this Article suggests, I think some degree of discretion inevitably exists in this domain. But this does not mean we are entirely lacking in guidance. If improvisation meant any tune was as good as any other, it would not take years of practice to become a jazz musician, nor would classical musicians have abandoned the difficult task of creating their own credenzas. In this section, I will consider some sources that can guide the identification of fundamental rights.

A. *Other Voices, Other Rooms*

We begin with the possible utility of consulting transnational legal sources. Although neither the Ninth Amendment nor the Privileges or Immunities Clause spell out their meaning note for note, there is some indication of where to look for guidance. When the Constitution was framed and the post-Civil War amendments were adopted, the law of nations was well understood to be the background for domestic law. Those who came forth with our constitutional guarantees of rights had the same view of the law of nations. They emphatically did not think that rights were merely an outgrowth of local culture or that rights existed only when some authoritative legal command gave them official recognition.[49]

48. JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 28 (1980).

49. On the influence of natural law thinking on the framing generation, see Joyce Appleby, *The Americans' Higher-Law Thinking Behind Higher Lawmaking*, 108 YALE L.J. 1995 (1999); Helmholz, *supra* note 7. There is considerable controversy over whether Americans contemplated judicial enforcement of natural law against contrary legislation. *See* Nathan N. Frost et al., *Courts Over Constitutions Revisited: Unwritten Constitutionalism in the States*, 2004 UTAH L. REV. 333, 345–54 (2004) (discussing the history of the controversy over the effect of natural justice—the use of judicial power to halt government acts that violate natural law); Helen K. Michael, *The Role of Natural Law in Early American Constitutionalism: Did the Founders Contemplate*

Take the Thirteenth Amendment's ban on slavery. The supporters of the Thirteenth Amendment believed that slavery was a universal wrong, not just a violation of some peculiarly American norm.[50] If anything, the reverse was true: the United States was the only major Western society that allowed slavery. When they sought to protect basic rights—such as freedom of speech—in the Fourteenth Amendment, the same legislators were keenly aware that those rights had often been violated in Southern states and sometimes in the North.[51]

Earlier, during the Bill of Rights period, judicial opinions, state constitutional provisions, and pronouncements by statesmen made it clear that rights stemmed from a greater source than any local charter or constitution. Do not forget the Declaration of Independence. It said that men were "endowed by their Creator with certain inalienable Rights";[52] it did not say "as Britons, we are endowed by English common law and statute with certain rights." Of course, the colonists thought the second part was also true, and that, to a large extent, the rights of Englishmen were a practical codification of the rights of mankind. But at a deep level of principle, they thought rights were not merely creatures of local law.

Certainly, the Framers had no qualms about looking to foreign and international law.[53] They frequently took guidance from what they called the "law of nations." The law of nations has no exact counterpart today. It was a blend of legal fields we would now consider quite distinct, including international law and commercial law.

Judicial Enforcement of "Unwritten" Individual Rights, 69 N.C. L. REV. 421, 490 (1991) (concluding that the ratifiers did not accept noninterpretivist judicial review); Suzanna Sherry, *The Early Virginia Tradition of Extra-Textual Interpretation*, 53 ALB. L. REV. 297, 326 (1989) (concluding no injustice in the use of natural law to resolve issues); Suzanna Sherry, *The Founders' Unwritten Constitution*, 54 U. CHI. L. REV. 1127, 1176–77 (1987) (finding that the Constitution was never meant to displace natural law). The terms of this debate between commentators may assume that the Framers drew clearer distinctions between various fields of law, and between statutory interpretation and judicial review, than may actually have been the case.

50. *See* FARBER & SHERRY, *supra* note 8, at 392–99 (providing excerpts from the speeches of Representatives Ashley, Orth, Bliss, Rogers, and Davis in favor of the Thirteenth Amendment).

51. *Id.* at 427, 436, 441.

52. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

53. For extensive historical evidence about the use of international authority in U.S. judicial decisions, see Steven G. Calabresi & Stephanie Dotson Zimdahl, *The Supreme Court and Foreign Sources of Law: Two Hundred Years of Practice and the Juvenile Death Penalty Decision*, 47 WM. & MARY L. REV. 743 (2005), and Sarah H. Cleveland, *Our International Constitution*, 31 YALE J. INT'L L. 1 (2006).

According to one influential American judge and legal commentator, the law of nations derived from "principles of right reason, the same views of the nature and constitution of man, and the same sanction of Divine revelation, as those from which the science of morality is deduced."[54] Instrumental to the law of nations were the "general principles of right and justice, equally suitable to the government of individuals in a state of natural equality, and to the relations and conduct of nations."[55]

The idea of an unwritten international law was very much in tune with the thinking of the legal community in the nineteenth century. Today, we think of the common law as being specific to each individual state or country. But until the twentieth century, the common law was considered to be a separate entity shared by all common law courts, rather than a mere aspect of a specific state's law. In the early nineteenth century case of *Swift v. Tyson*, the Supreme Court held that federal courts would apply the general common law rather than the rulings of any particular state court in resolving disputes.[56] In setting down this rule, the Court drew a phrase from Roman law to the effect that certain rules are "not just the law of Rome or Athens or any one place, but the law of all people at all times."[57] While the Court today has repudiated that view of the common law, the opposite view came very naturally to early Americans.

Another indication of the significance of the law of nations comes from the Constitution itself. Article I of the Constitution empowers Congress to define and punish "Offences against the Law of Nations."[58] Accordingly, the very first Congress passed the Alien Torts Statute, which granted the federal courts jurisdiction over any civil action by an alien for a tort committed "in violation of the law of nations or a treaty of the United States."[59]

As the modern Supreme Court has made clear, Congress anticipated that the courts would recognize private causes of action for certain torts in violation of the law of nations.[60] The first Congress assumed that federal

54. 1 JAMES KENT, COMMENTARIES ON AMERICAN LAW *2 (John M. Gould ed.) (1896).

55. *Id.* at *3.

56. Swift v. Tyson, 41 U.S. (16 Pet.) 1 (1842).

57. *Id*. at 19 ("Non erit alia lex Romae, alia Athenis, alia nunc, alia posthac, sed et apud omnes gentes, et omni tempore, una eademque lex obtinebit.").

58. U.S. CONST. art. I, § 8, cl. 10.

59. An Act to establish the Judicial Courts of the United States, (Judiciary Acts) Ch. 20, § 9, 1 Stat. 73 (1789).

60. Sosa v. Alvarez-Machain, 542 U.S. 692, 718–20, 724 (2004).

courts would take international norms as enforceable.[61] Notably, the Court also remarked that this understanding remained effective, notwithstanding the modern shift in views about the status of the common law.[62] It would be unreasonable to assume that courts would "lose all capacity to recognize enforceable international norms simply because the common law might lose some metaphysical cachet on the road to modern realism."[63]

Looking beyond our borders came naturally to the Framers. According to the Declaration of Independence itself, the motivation for issuing this foundational document stemmed from a "decent Respect to the Opinions of Mankind."[64] Early Americans, from Thomas Jefferson on down, understood that the law of nations was part of our legal system. [65]

Early opinions of the Supreme Court were in accord with this view. Chief Justice Marshall proclaimed in *The Charming Betsy* that federal laws "ought never to be construed to violate the law of nations if any other possible construction remains."[66] Marshall also made it clear that, in the absence of legislation, the Supreme Court was "bound by the law of nations which is a part of the law of the land."[67] As Harold Koh, a distinguished international law expert and Dean of Yale Law School, has said, "the early Supreme Court saw the judicial branch as a central channel for making international law part of U.S. law."[68] "Like it or not," he adds, "both foreign and international law are already part of our law."[69]

When the Fourteenth Amendment (and earlier, the 1866 Civil Rights Act) was before Congress, members of Congress relied heavily on a basic premise of the law of nations. As we will see below, they argued that there is an implicit quid pro quo: citizens owe allegiance to their government in exchange for the government's grant of protection to them. Thus, one of the most important rights of citizenship is the right to receive such

61. *Id.* at 715–18, 725.

62. *Id.* at 725.

63. *Id.* at 730.

64. THE DECLARATION OF INDEPENDENCE, Introduction (U.S. 1776).

65. For more on Jefferson's views, see Charles M. Wiltse, *Thomas Jefferson on the Law of Nations*, 29 AM. J. INT'L L. 66 (1935). Note Jefferson's reliance on Grotius, Pufendorf, and especially Vattel. *Id*. at 68–69, 75.

66. Murray v. Schooner Charming Betsy, 6 U.S. (2 Cranch) 64, 118 (1894).

67. The Nereide, 13 U.S. (9 Cranch) 388, 423 (1815).

68. Harold Hongju Koh, *International Law as Part of Our Law*, 98 AM. J. INT'L L. 43, 44 (2004).

69. *Id.* at 57.

protection. This right to government protection served as a source of legal authority to defend the rights of citizens, whether those rights directly derived from the law of nations or from the Privileges or Immunities Clause.

Early in the debates on the Civil Rights Act of 1866, Senator Johnson raised the argument that the government had a duty to protect its citizens under the law of nations. Congress could protect the civil rights of blacks because every government has "authority to provide that the rights of everybody within its limits shall be protected, and protected alike."[70] Johnson concluded that it would have been a disgrace to the members of the Constitutional Convention if they had foreseen the abolition of slavery but failed to give Congress the authority to protect the "rights incident to the condition of a free man."[71]

A similar argument surfaced in the House of Representatives.[72] One influential congressman made a sweeping, non-textual argument: "But throwing aside the letter of the Constitution, there are characteristics of Governments that belong to them as such, without which they would cease to be Governments."[73] Thus, he said, "The rights and duties of allegiance and protection are corresponding rights and duties."[74] Whenever "I owe allegiance to my country, there it owes me protection."[75] Nor could protection of fundamental rights be left to the states: "[E]verybody knows that the rights and immunities of citizens were habitually and systematically denied in certain States to the citizens of other States: the right of speech, the right of transit, the right of domicile, the right to sue, the writ of *habeas corpus*, and the right of petition."[76]

As another leading member of the House explained, the rights protected by the Civil Rights Act were simply the absolute rights of individuals or the natural rights of man.[77] He pointed out that the government surely had the power to protect the rights of its citizens from

70. CONG. GLOBE, 39th Cong., 1st Sess. 530 (1866) (statement of Sen. Johnson). See also Johnson's expostulation in response to a contrary argument by Sen. Henderson. *Id.* at 572.

71. *Id.* at 530.

72. *Id.* at 1263.

73. *Id.* (statement of Rep. Broomall).

74. *Id.*

75. *Id.*

76. *Id.*

77. *Id.* at 1293 (statement of Rep. Shellabarger).

foreign governments by the use of military force if necessary.[78] If we can go to war when our citizens' rights are denied on foreign soil, how is it possible that the government lacks the power to protect citizens' rights through peaceful measures like passing statutes?[79] As another member of the House put it, without the power to protect the rights of its citizens, "the United States is no nation."[80]

Reliance on the law of nations naturally leads to inspection of foreign law.[81] A modern example is provided by Justice Kennedy's opinion in *Lawrence v. Texas*.[82] His efforts to define liberty were useful, though he would have done better relying on the Ninth Amendment. In Justice Kennedy's opinion, one can see the outlines of a workable test for determining whether a right is fundamental.

In defending the proposition that liberty includes the right to engage in same-sex relationships, Kennedy relied on a variety of sources:

- the general thrust of the Supreme Court's jurisprudence on privacy issues, which tended to reject interference with intimate relationships—even though the Court had previously upheld a sodomy ban in an aberrational decision;[83]
- state court decisions holding sodomy laws unconstitutional under their own state constitutions;[84]
- a strong trend toward abolition of sodomy laws by state legislatures;[85] and
- decisions of international human rights tribunals, particularly in Europe, that had rejected sodomy bans.[86]

Justice Kennedy's eclectic approach to constitutional interpretation

78. *Id.*

79. *Id.* at 1119, 1294. Representative Wilson reiterated essentially the same argument. *Id.* at 1294.

80. *Id.* at 1293 (statement of Rep. Shellabarger).

81. For further discussion of the use of foreign law, see BASIL MARKENSINIS & JÖRG FEDTKE, JUDICIAL RECOURSE TO FOREIGN LAW: A NEW SOURCE OF INSPIRATION? 55–108, 139–72 (2006) (surveying the use of foreign law in major jurisdictions, including the United States, and considering possible pitfalls).

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

83. *Id.* at 564–66; *see also* Bowers v. Hardwick, 478 U.S. 186 (1986).

84. *Lawrence*, 539 U.S. at 570–71.

85. *Id.* at 572.

86. *Id.* at 572–73.

shocked Justice Scalia, not to mention the even more irate social conservatives in Congress.[87] But it was Kennedy, rather than Scalia, who was most true to the vision of James Madison and his generation. Looking at this broad array of sources makes perfect sense from the Framers' law of nations perspective. After all, Framers like John Adams believed "'that a lawyer ought never to be without a volume of natural or public law, or moral philosophy, on his table or in his pocket.'" [88]

B. *Tradition and Consensus*

A particularly important question is the role of American traditions in identifying fundamental rights. The Justices are not in agreement about the correct methodology for interpreting tradition. One group of Justices believes that the asserted right needs to be carefully—and by implication, narrowly—defined, with the next step being a comparison with concrete examples of deeply-rooted, historical American rights. Others argue for a broader approach.[89]

Justice David Souter has been the most articulate advocate of the broader position.[90] He argues that the Court should not necessarily look for a long-standing national consensus about the very specific claim for constitutional protection.[91] Demanding such specific historical endorsement would, he said, produce legal petrification.[92] Rather, according to Souter, it is important to "understand old principles afresh by new examples and new counterexamples," shifting the boundaries of those principles over time. [93] In *Washington v. Glucksberg*, the issue was whether Washington's ban on physician-assisted suicide was unconstitutional.[94]

87. *Id.* at 586–605 (Scalia, J., dissenting).

88. Robert A. Ferguson, *Writing the Revolution*, *in* 1 THE CAMBRIDGE HISTORY OF AMERICAN LITERATURE 441 (Sacvan Bercovitch & Cyrus R. K. Patell eds., 1994) (quoting a letter written by Adams to Hezekiah Niles in 1818).

89. For a thoughtful discussion of approaches to tradition, see Richard H. Fallon, Jr., *Foreword: Implementing the Constitution*, 111 HARV. L. REV. 56 (1997); Ronald J. Krotoszynski, Jr., *Dumbo's Feather: An Examination and Critique of the Supreme Court's Use, Misuse, and Abuse of Tradition in Protecting Fundamental Rights*, 48 WM. & MARY L. REV. 923 (2006).

90. Washington v. Glucksberg, 521 U.S. 702, 765–73 (1997) (Souter, J., concurring in the judgment) (detailing his understanding of the proper analysis of unenumerated substantive rights).

91. *Id.* at 769.

92. *Id.* at 770.

93. *Id.*

94. *Id.* at 705–06.

Justice Souter found that the individual interest involved was clearly important enough to require careful scrutiny of the state's justifications, whether or not it constituted a "fundamental" right.[95] He then concluded that the state's interests were sufficiently serious to justify the ban on assisted suicide, as it was not arbitrary or lacking in purpose.[96]

Interpreting traditions can be a tricky business. Demanding that a very specific practice has been in place since the American Revolution, unquestioned and unchanged, would narrow the focus too much. A tradition is not the same as a living fossil. Traditions evolve and may be subject to dispute at any given time. Yet, if we are too loose in our definition of tradition, history will lend the courts very little guidance.

The problem of exactly how to define tradition is hugely important if, as some judges appear to suggest, tradition is the sole determinant of what constitutes a fundamental right. The definition of a tradition is less critical in the approach that I am advocating. Tradition is only one element in the ultimate determination of whether something qualifies as a fundamental right. Traditions that are more concrete and have longer histories get more weight in the analysis. More broadly conceived traditions are also important, but they will not carry the day without more specific support from other elements of the test.

Traditions do not come neatly packaged in a way that provides clear answers to constitutional questions. A judge should be able to show that a value has genuine roots in our traditions. The argument is even stronger when the judge can show that failure to apply a more traditional value in a particular context is due to factors that do not deserve respect, such as racist or sexist prejudices or resentment of political dissenters.

Contemporary social consensus is another important factor. Obviously, the greater the consensus about a value, the more comfortable a judge can feel. This may seem irrelevant for a constitutional court, since consensus is presumably reflected in legislation and therefore does not need constitutional protection.

The truth is more complicated. First, on important issues, a national consensus may exist without being reflected in every region or locality. The most striking example was segregation, which was entrenched in the South but had little credibility at the national level. For example, President Harry Truman had already desegregated the armed forces before the Court

95. *Id.* at 781–82.
96. *Id.* at 782.

even considered the issue of segregation. Other examples of legislation violating a national consensus were the ban on contraception in a handful of states in the 1960s and the criminalizing of homosexual acts in a few states in the 1990s. The question of how much localities should be allowed to deviate from a fundamental national consensus is not necessarily easy, but it should not give rise to grave concerns about the legitimacy of judicial action.

Second, it is naïve to assume that important issues are always deliberated through the legislative process before law is made. Political actors have significant slack that they can use even in the face of a public consensus about values. As recent history shows, important constitutional interests can be invaded through executive fiat without significant deliberation. A key role of the courts is to combat this risk by requiring that the executive return to Congress for clear authorization before stepping into constitutionally dangerous territory. Even within Congress, constitutional issues can be suppressed without true majority support, as when a rider is attached to critical legislation at the last minute. Constitutional litigation can help defend consensus values against such sneak attacks. Thus, even a clear consensus may not always be reflected accurately by legislation. One important judicial task can be to prevent governments from invading rights that are firmly embedded in a national consensus.

Traditions are not self-defining and there will often be disputes about how to understand them. Courts do not have the final word here. Decisions that fall out of touch with the understanding of society as a whole are likely to erode quickly. Nevertheless, courts can help articulate traditions in a way that can be meaningful for society as a whole.

Thus, by closely scrutinizing the rare legislation that violates widely shared traditions or accepted international norms, courts can provide a useful check on the occasional breakdowns of the democratic process. American courts have played this role for many years, though without the clearly articulate basis that the Ninth Amendment and privileges or immunities clause would provide.

IV. APPLICATIONS

The discussion so far has been very abstract. It is useful to consider how all of this works out in practice. This section will discuss key issues such as abortion and homosexuality. The Ninth Amendment and the

Privileges and Immunity Clause mandate that courts consider these issues. The methodology discussed in this Article does not always provide clear answers, but it does provide a roadmap for judicial analysis—and sometimes the answers actually are easy.

A. *Learning from Foreign Decisions About Abortion*

In trying to assess the Court's abortion jurisprudence,[97] it is instructive to consider how the high courts of other countries have dealt with the abortion issue. We might do well to begin with our neighbor to the north.

The Canadian Supreme Court upheld the right to abortion in a 1988 case.[98] One of the Justices observed that, at the most basic level, every pregnant woman is told by the anti-abortion law "that she cannot submit to a generally safe medical procedure that might be of clear benefit to her unless she meets criteria entirely unrelated to her own priorities and aspirations."[99] The Justice concluded that the abortion law's procedural barriers "do not comport with the principles of fundamental justice."[100]

Similarly, another Justice stated that the "security of the person," which is protected by the Canadian Charter, "must include a right of access to medical treatment for a condition representing a danger to life or health without fear of criminal sanction."[101] Although Justice Beetz conceded that protecting the fetus relates to concerns that are "pressing and substantial in a free and democratic society," that objective would not justify the severe breach of a woman's right to personal security.[102]

A third member of the Court, Justice Wilson, stressed that an "aspect of the respect for human dignity on which the *Charter* is founded is the

97. The key cases, of course, are Roe v. Wade, 410 U.S. 113 (1973) and Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833 (1992). There is voluminous literature on the American abortion cases. For a sampling of different perspectives, see Earl M. Maltz, *Abortion, Precedent, and the Constitution: A Comment on* Planned Parenthood of Southeast Pennsylvania v. Casey, 68 NOTRE DAME L. REV. 11 (1992); Reva Siegel, *Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection*, 44 STAN. L. REV. 261 (1992); David A. Strauss, *Abortion, Toleration, and Moral Uncertainty*, 1992 SUP. CT. REV. 1; Robin West, *Liberalism and Abortion*, 87 GEO. L.J. 2117 (1999).

98. Morgentaler v. The Queen, [1988] 1 S.C.R. 30 (Can.).

99. *Id.* at 56.

100. *Id.* at 73.

101. *Id.* at 81.

102. *Id.* at 82.

right to make fundamental personal decisions without interference from the state."[103] Thus, Justice Wilson emphasized that the decision whether to terminate a pregnancy "will have profound psychological, economic and social consequences for the pregnant woman" and that the decision "deeply reflects the way the woman thinks about herself and her relationship to others and to society at large."[104]

The Canadian Court focused its analysis on the woman's rights. The German Constitutional Court's analysis provides a useful contrast because its focus is on the fetus.[105] A 1974 statute authorized abortion on demand in the first trimester of pregnancy.[106] The Court found that the unborn fetus is a person under the German Constitution (Basic Law) and that this law violated the German Constitution's imperative for the protection of human life.[107] This sounds diametrically opposed to the position taken by the U.S. courts, but the situation is more complex. According to the Court, the woman's right to self-determination could not be the sole goal of the law.[108] On the other hand, the government is not required to use the same methods to protect fetal life as other life. In particular, the degree to which the state can require a woman to sacrifice the values in her own life to protect the fetus was limited. Hence, abortion remained justifiable when the woman's life or health were seriously at risk or when the child would be deformed, and its upbringing would involve exceptional self-sacrifice.

Notably, the German Constitutional Court consciously decided not to follow the trend toward abortion liberalization elsewhere because of the special circumstances of German history. In light of the experience of the Nazi years—to which the German Constitution was a response—German law could not afford to take the risk of accepting any action that could be considered to undervalue human life.[109]

As a more recent opinion makes clear, the German government not

103. *Id.* at 166.

104. *Id.* at 171.

105. Bundesverfassungsgericht [BVerfGE] [Federal Constitutional Court] 1975, 39 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 1 (F.R.G.), *translated and reprinted in part in* DONALD P. KOMMERS, THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY 336 (2d ed. 1997).

106. *See* KOMMERS, *supra* note 105, at 336.

107. *Id.* at 338.

108. *Id.* at 339.

109. *See id.* at 337 (discussing the Nazi principles of "'destruction of the unworthy to live,' 'the final solution,' and the 'liquidations,'" all of which the German Constitution sought to eradicate).

only has a duty to protect fetal life, but it also has a constitutional duty to minimize the extent to which pregnancy would place unreasonable demands on women.[110] The government must ensure those women can afford to support their children and that women do not suffer from occupational or educational disadvantages because of childbearing.[111] The government is also entitled to consider that counseling may actually be more effective than criminal sanctions, given the difficulty of criminal enforcement.[112] Except where justifiable reasons for abortion existed, the government cannot reimburse women for the cost of an abortion.[113] However, it can still pay abortion costs for women who could not afford abortions because otherwise those women might resort to illegal abortions, eliminating any chance that counseling would change their minds.[114]

In some ways, the German decisions are even more instructive than the Canadian one. In one direction, the German Court has gone well beyond anything that U.S. judges like Justice Scalia have advocated. Justice Scalia has made it clear that states have every right to legalize abortion on demand if they want to;[115] the German courts have forbidden this. Yet, the German decision is much more sensitive to the rights of the pregnant woman than Justice Scalia. The German Court has analyzed the issue as involving conflicting constitutional rights, holding the woman's right to be less dominant but still worthy of respect. Rather than being blithely willing to impose unwanted pregnancy on women, the German courts have sought to ensure that the burden is not excessive.[116]

The system embraced by the German court may give greater weight to fetal rights than would be justifiable in our system. After all, the Germans were responding, in part, to the special demands of their own historical experience—one that is not shared by the United States. But what is most striking is that, even within the context of rulings that provide constitutional protection to the right to life, the German courts have

110. Bundesverfassungsgericht [BVerfGE] [Federal Constitutional Court] 1993, 88 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 203 (F.R.G.), *translated and reprinted in part in* KOMMERS, *supra* note 105, at 349.

111. *Id.* at 354.

112. *Id.*

113. *Id.* at 355.

114. *Id.*

115. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 979 (1992) (Scalia, J., concurring in the judgment in part and dissenting in part).

116. 88 [BVerfGE] 203 (F.R.G.), *translated and reprinted in part in* KOMMERS, *supra* note 105, at 354.

provided far more protection to women than the abortion restrictions advocated by American right-to-life advocates.

The abortion issue involves a difficult balance. The U.S. abortion rulings—including *Roe v. Wade* itself—have acknowledged that the state has a valid interest in protecting fetal life.[117] Yet, both the American decisions and those from Germany and Canada agree that abortion restrictions can intrude heavily into women's lives by demanding that they accept personal risks or extreme childrearing burdens.

Although it is difficult to be confident about how these competing interests should be balanced, it is obvious that the government cannot simply ignore the woman's side of the equation. The U.S. courts have often been faced with abortion laws that give little or no weight to a woman's interests. These abortion laws are harshly punitive, allow other family members to override the woman's decision as a practical matter, fail to make exceptions that most people think are warranted, and—unlike the German law—fail to provide economic and social support for women faced with the burdens of childrearing. Whatever the ideal balance may be, these laws not only fail to find that balance, they give little evidence of trying.

B. *Homosexual Conduct: An Easy Case*

In *Bowers v. Hardwick*, the Supreme Court held that the right to privacy did not encompass homosexual conduct.[118] In *Lawrence v. Texas*, Justice Kennedy wrote the majority opinion to overrule *Bowers*.[119] He characterized the state law as "touching upon the most private human conduct, sexual behavior, and in the most private of places, the home."[120] He cautioned against the government setting boundaries on sexual conduct, "absent injury to a person or abuse of an institution the law protects."[121] Kennedy also observed that the *Bowers* Court had gotten its history wrong.[122] Traditional "crimes against nature" included opposite-

117. Roe v. Wade, 410 U.S. 113, 162 (1973); *see also Casey*, 505 U.S. at 871.

118. Bowers v. Hardwick, 478 U.S. 186 (1986).

119. Lawrence v. Texas, 539 U.S. 558, 558 (2003). For commentary on *Lawrence*, see Randy E. Barnett, *Justice Kennedy's Libertarian Revolution:* Lawrence v. Texas, 2002–2003 CATO SUP. CT. REV. 21.

120. *Lawrence*, 539 U.S. at 567.

121. *Id.*

122. *Id.* at 568–71. Justice Kennedy thought the historical premises used by the *Bowers* Court were "not without doubt and, at the very least, [were] overstated." *Id.* at 571.

sex as well as same-sex conduct.[123] Only in the 1970s did some states begin to single out same-sex relations for criminal punishment, and only eight states had done so.[124] Other states had moved to repeal or invalidate their bans on anal and oral sex.[125] Five states had declined to follow *Bowers* in interpreting their own state constitutions.[126]

Justice Kennedy emphasized that, five years before *Bowers*, the European Court of Human Rights (ECHR) considered the case of a gay man in Northern Ireland, a country that prohibited same-sex relations.[127] The ECHR held that the laws against homosexual conduct violated the European Convention on Human Rights.[128] The ECHR has authority within what are now the forty-six members of the Council of Europe, which includes the twenty-seven members of the European Union.[129] In its initial encounter with the issues several years before *Bowers*, the ECHR characterized Irish anti-sodomy legislation as a continuing interference with the complaining party's right to respect for his private life. The ECHR could find no basis or any "pressing social need" to make such acts criminal offences.[130]

Later European decisions are also instructive. The ECHR reaffirmed its ruling against Ireland in 1988.[131] In 2003, the Court determined that setting the age of consent for homosexual activities higher than that for heterosexual activities was also a violation of the Convention, a switch from its earlier position.[132] However, the right to private sexual behavior,

123. *Id.* at 570. For further discussion of the historical issues, see William N. Eskridge, Jr., *Hardwick and Historiography*, 1999 U. ILL. L. REV. 631 (1999).

124. Eskridge, *supra* note 123, at 664.

125. *Id.* at 663–64.

126. *Lawrence*, 539 U.S. at 576. The five states that declined to follow *Bowers* are Arkansas, Georgia, Montana, Tennessee, and Kentucky. *Id.*

127. *Id.* at 573 (citing Dudgeon v. United Kingdom, 4 Eur. H.R. Rep. 149 (1982)).

128. *Dudgeon*, 4 Eur. H.R. Rep. at 167–68.

129. European Court of Human Rights, Organisation of the Court, http://www.echr.coe.int/ECHR/EN/Header/The+Court/The+Court/Organisation+of+the+Court/ (last visited Aug. 26, 2008).

130. *Dudgeon*, 4 Eur. H.R. Rep. at 167. Note, however, that the Commission did uphold a differential age of consent for male homosexual acts. *Id.* at 163–64.

131. Norris v. Ireland, 13 Eur. H.R. Rep. 186, 200–01 (1991).

132. Case of L. & V. v. Austria, App. Nos. 39392/98 and 39829/98, 36 Eur. H.R. Rep. 55 (2003); Case of S.L. v. Austria, App. No. 45330/99, 37 Eur. H.R. Rep. 39 (2003). The switch was based in part on an "ever growing European consensus." *L. & V.*, 36 Eur. H.R. Rep. at 43.

even between consenting adults, is not absolute: a 1997 case held that the state could restrict sadomasochistic practices that caused significant injuries.[133]

Justice Scalia accused the *Lawrence* majority of invalidating, by implication, "[s]tate laws against bigamy, same-sex marriage, adult incest, prostitution, masturbation"—yes, he really said that—"adultery, fornication, bestiality, and obscenity."[134] After all, these were all "morals" laws just like bans on homosexuality.[135] He said it was clear that the Court had taken sides in the culture war by dismissing the views of Americans who did not want gays as business partners, scout masters, school teachers, or tenants.[136] "So imbued is the Court with the law profession's anti-anti-homosexual culture, that it is seemingly unaware that the attitudes of that culture are not obviously 'mainstream.'"[137] He also criticized the Court for citing foreign legal authorities, which he called irrelevant to our own national history and traditions.[138] Perhaps nothing else about his opinion would have so surprised the Framers as this insular disregard for the rest of the world.

In short, according to Scalia, the Court's opinion was "the product of a Court, which is the product of a law-profession culture, which has largely signed on to the so-called homosexual agenda . . . ."[139] Justice Scalia ended by warning that gay marriage was a necessary by-product of the Court's decision.[140] That conclusion could be avoided only "if one entertains the belief that principle and logic have nothing to do with the decisions of this Court."[141]

Justice Scalia's rhetoric notwithstanding, the better arguments were on the side of Justice Kennedy. Kennedy was clearly right that homosexual sodomy laws violate the modern understanding of human rights. Such laws have been largely repudiated within the United States, by legislatures elsewhere, and by courts in countries such as South Africa. In addition,

133. *See* R. v. Brown, [1994] 1 A.C. 212 (H.L.) (appeal taken from the Court of Appeal (Criminal Division)).
134. Lawrence v. Texas, 539 U.S. 558, 590 (2003).
135. *Id.*
136. *Id.* at 602.
137. *Id.* at 602–03.
138. *Id.* at 598.
139. *Id.* at 602.
140. *Id.* at 604–05.
141. *Id.*

respected international bodies have found that homosexual relations are protected from government interference. Besides the European decision discussed earlier, the Human Rights Committee has found that anti-sodomy laws violate the International Covenant on Civil and Political Rights (which, by the way, the United States has ratified).[142] In arguing otherwise, Justice Scalia and his supporters are simply ignoring a conclusion that the rest of civilization has long since accepted.[143]

C. *An Even Easier Case (Wrongly Decided)*

Does the government have any duty at all to protect citizens from violence? Or, to put it another way, is there any constitutional right to government protection? The Supreme Court made its position clear in the tragic case of a young boy named Joshua DeShaney.[144] Joshua's story is worth telling in some detail. His father had been given custody of Joshua when his parents divorced.[145] When Joshua was three years old, his father's second wife complained to the police that he had been beating Joshua.[146] The Department of Social Services interviewed the father, but dropped the investigation when he denied the allegations.[147] A year later, Joshua was admitted to a local hospital with bruises and cuts.[148] The doctor on duty suspected child abuse and reported the incident.[149] The county then convened a child protection team, which decided that there was not enough evidence to keep Joshua in government custody.[150] The father entered into

142. Justice Kennedy's opinion in *Lawrence* refers to this international consensus. 539 U.S. at 573, 576–77.

143. For discussion of the sodomy issue from a variety of perspectives, see generally JOHN H. GARVEY, WHAT ARE FREEDOMS FOR? 21–27 (1996) (analyzing the legal significance of male relationships and discussing whether or not the supposed rights associated with those relationships should be allowed to flourish); John M. Finnis, *Law, Morality, and "Sexual Orientation*," 9 NOTRE DAME J.L. ETHICS & PUB. POL'Y 11 (1995) (discussing the improper discriminatory effect of both sodomy laws and the moral norms that influence them); Janet E. Halley, *Sexual Orientation and the Politics of Biology: A Critique of the Argument from Immutability*, 46 STAN. L. REV. 503 (1994) (discussing the effect of biological studies on pro-gay equal protection litigation and the proper focus of pro-gay legal argument).

144. DeShaney v. Winnebago County Dep't of Soc. Servs., 489 U.S. 189 (1989).

145. *Id.* at 191.

146. *Id.* at 192.

147. *Id.*

148. *Id.*

149. *Id.*

150. *Id.*

a voluntary agreement to get counseling.[151] The counseling apparently did not work, if it actually took place at all.[152] A month later, emergency room workers called child protection again to report that Joshua once again had suspicious injuries.[153]

Over the next six months, Joshua's caseworker made visits to the house, during which she saw injuries on his head.[154] She put a note in the file about her suspicions that Joshua was being abused, but she did not do anything about it.[155] Yet again, child protection was called by the emergency room for new injuries, which the emergency room workers attributed to child abuse.[156] Child protection officers did nothing.[157] The next two times the caseworker visited the house, she was told Joshua was too ill to see her.[158] Neighbors reported to the police that they had seen or heard Joshua being abused by his father. Still, no action was taken by the state.[159]

A few months later, Joshua's father beat him into a coma.[160] Surgery showed that Joshua had a series of hemorrhages caused by a long series of head injuries.[161] Joshua was expected to spend the rest of his life in an institution for the profoundly retarded.[162] Despite ongoing evidence of severe abuse, the social worker had done nothing to intervene. Not that she was surprised at the outcome, however. She said, "'I just knew the phone would ring some day and Joshua would be dead.'"[163]

Chief Justice Rehnquist, writing for the Court, explained that it was perfectly constitutional for the county to abandon Joshua to his father's

151. *Id.*

152. *See id.* The Court explains that Joshua's father entered into an agreement to cooperate with the Department of Social Services, but includes no details of his actual attendance at the counseling sessions. *Id.*

153. *Id.*

154. *Id.* at 192–93.

155. *Id.* at 193.

156. *Id.*

157. *Id.*

158. *Id.*

159. *Id.*

160. *Id.*

161. *Id.*

162. *Id.*

163. *Id.* at 209 (Brennan, J., dissenting) (quoting DeShaney v. Winnebago County Dep't of Soc. Servs., 812 F.2d 298, 300 (7th Cir. 1987)).

violence.[164] The Fourteenth Amendment, he wrote, confers no affirmative right to governmental aid, even when needed to preserve a person's life, liberty, or property.[165] Due process applies only when the government's affirmative acts deprive a person of life, liberty, or property—not when it passively allows the destruction of these personal interests by a private citizen.[166] Hence, the government's failure to protect an individual against private violence raises no constitutional issue. Only when the state has actually taken a person into custody does it have a duty to protect that person from violence.[167]

Too bad for Joshua. The government knew about his peril, but had not created the risk of his father's violence, so it had no responsibility. In a nutshell, Wisconsin had no constitutional duty to protect him. If only Joshua had been a murderer serving a life sentence, he would have been entitled to protection. As a mere innocent child, he had no such right.

Justice William Brennan, joined by Justices Thurgood Marshall and Harry Blackmun, dissented.[168] They argued the state had intruded deeply enough in Joshua's life to make his situation analogous to government custody in terms of the government's responsibilities.[169] In a separate, brief, passionate dissent, Justice Harry Blackmun decried the boy's fate: "Poor Joshua! Victim of repeated attacks by an irresponsible, bullying, cowardly, and intemperate father" and then abandoned by state officials.[170]

Despite the Court's brusque response to Joshua's situation, the right to government protection has a solid historical pedigree. In 1608, Sir Edward Coke spoke of a mutual bond between sovereign and subject.[171] Within this bond, the subject owed allegiance and the sovereign owed a duty to protect his subjects.[172] Locke would explain in the following century that one of the main purposes of the social compact is to provide each individual with protection from injury and violence.[173] Blackstone,

164. *Id.* at 194–96.
165. *Id.* at 194–95.
166. *Id.* at 194.
167. *Id.* at 199–200.
168. *Id.* at 203 (Brennan, J., dissenting).
169. *Id.* at 206–07.
170. *Id.* at 213 (Blackmun, J., dissenting).
171. Calvin's Case, (1608) 77 Eng. Rep. 377, 382.
172. *Id.*
173. JOHN LOCKE, TWO TREATISES OF GOVERNMENT 344–48 (Peter Laslett ed., Cambridge Univ. Press 1970) (1690).

too, said that protection and subjection are reciprocal.[174]

As the 1780 Massachusetts Constitution put it, each member of society has the right to its protection in his life, liberty, and property.[175] Of course, not everyone had the right to protection—slaves were largely at the mercy of their masters. But free men were entitled to protection for the price of their allegiance.

This understanding continued through the time of the Fourteenth Amendment. In the 1820s, a leading American legal writer stressed that every person is entitled to the "preventive arm of the magistrate, as a further protection from threatened or impending danger."[176] A number of states had laws making cities and counties liable for damages caused by riots within their jurisdiction on the theory that they had a duty to prevent the riots from taking place.[177]

When Congress adopted the Fourteenth Amendment, it had every reason to be thinking about the government's duty of protection. Violence against blacks was widespread in the South and met with indifference or knowing acquiescence by state officials. Not surprisingly, the congressional debates are replete with references to the duty to protect, particularly the federal government's duty to protect American citizens. There was a general consensus that, in the words of one congressman, "the first duty of the Government is to afford protection to its citizens."[178]

Of course, as a general matter, the government is not responsible for the actions of private individuals. In lawyers' parlance, they are not "state actors" and therefore not covered by the Fourteenth Amendment. Even the most conscientious government cannot expect to eliminate crimes and other abusive conduct. As everyone agreed, Joshua's father was not a state actor. But this does not answer the question of whether state officials also had a share of the responsibility for the harm done to Joshua.

In rejecting Joshua's claims, Chief Justice Rehnquist lumped the right

174. 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 182 (George Sharswood ed., George W. Childs 1870).

175. MASS. CONST. of 1780, pt. I, art. X. *See also* PA. CONST. of 1776, Declaration of Rights, art. VIII.

176. 2 JAMES KENT, COMMENTARIES ON AMERICAN LAW *15 (O. W. Holmes, Jr., ed.) (1873).

177. Steven J. Heyman, *The First Duty of Government: Protection, Liberty, and the Fourteenth Amendment*, 41 DUKE L.J. 507, 541–42 (1991).

178. CONG. GLOBE, 39th Cong., 2d Sess. App. 101 (1867) (statement of Rep. Farnsworth). Much of this history is collected in Heyman, *supra* note 177.

to protection with other affirmative rights to government assistance like welfare payments or public housing.[179] He seemed concerned that a ruling for Joshua could open the door to other possible constitutional claims for government help.[180] The right to protection against private violence, however, is much better established historically than welfare rights and dates back before the idea of the modern welfare state was even hatched.[181]

The Court may also have been worried that recognition of a right to protection would lead federal courts to become deeply involved in the management of state law enforcement. To the extent that resource allocations favor some citizens over others in terms of how much government protection they get, perhaps some degree of judicial oversight would not be such a bad idea. Do not forget that one of the other clauses of the Fourteenth Amendment guarantees everyone the "equal protection of the laws."[182] This has been construed to be a general ban on discrimination, but the core meaning of this mandate is simply that the government has to protect everyone equally.

However, to decide in Joshua's favor, no sweeping judicial scrutiny of law enforcement would be necessary. Elsewhere in its jurisprudence, the Supreme Court has recognized that deliberate indifference is different from negligence or being unreasonable.[183] Because of the Supreme Court's ruling, the full facts of the case were never developed at trial. But the caseworker's actions seem to come very close to deliberate indifference.[184] This should be actionable.

It is one thing to fault a police department for assigning cops to the wrong part of town, or the wrong kinds of cases, or failing to hire enough

179. DeShaney v. Winnebago County Dep't of Soc. Servs., 489 U.S. 189, 196 (1989).

180. *Id.* at 201–03.

181. *See* Calvin's Case, (1608) 77 Eng. Rep. 377, 382 (discussing a sovereign's duties to its subjects).

182. U.S. CONST. amend. XIV, § 1.

183. *See, e.g.*, County of Sacramento v. Lewis, 523 U.S. 833, 851 (1998) ("the [deliberate indifference] standard is sensibly employed only when actual deliberation is practical"); Bd. of the County Comm'rs v. Brown, 520 U.S. 397, 407 (1997) ("[Plaintiff] must demonstrate that the municipal action was taken with 'deliberate indifference' as to its known or obvious consequences. A showing of simple or even heightened negligence will not suffice.") (citation omitted); Farmer v. Brennan, 511 U.S. 825, 835 (1994) ("deliberate indifference entails something more than mere negligence").

184. *See DeShaney*, 489 U.S. at 192–93. The caseworker recorded details of possible incidents of abuse in her notes, but took no action to intervene, even as the danger to Joshua increased. *Id.*

cops in the first place. It is quite another to fault a police officer sitting by for no apparent reason while listening to a victim's screams. Joshua's case is a good deal closer to the latter situation than the former.

The Supreme Court's refusal to recognize Joshua's right to protection is an example of false qualms overcoming human decency. The Court apparently feared that it would be opening the flood gates to a multitude of claims for government assistance. The right to protection, however, rests on a special legal foundation quite unlike other forms of government assistance, such as welfare payments. Nor is there any reason to fear that every mistake by a police officer or social worker would turn into a federal lawsuit. The standard of deliberate indifference is not easy to meet and this barrier would screen out the large majority of cases. Thus, there is nothing to stop one from doing what is obviously the right thing, which is to hold the government responsible for knowingly allowing a child to be beaten into a coma.

V. FUNDAMENTAL RIGHTS AND THE JUDICIAL PROCESS

Resistance to applying the Ninth Amendment is often based on a fear that, without clear textual boundaries, courts will wantonly override democracy. This is a genuine concern, but the answer is not to pretend that some of the Constitution's language does not exist. Rather, the answer is judicial prudence combined with a careful examination of sources, such as international human rights law and existing U.S. legislation and court decisions. Judges in the common law tradition have proved themselves able to exercise judgment responsively, even in the absence of crisp statutory or constitutional mandates.

Lochner v. New York illustrates the dangers that admittedly can arise when courts undertake to pronounce on fundamental values.[185] Why, then, should we take the risk? There is no easy answer to this issue, but it seems clear that in the United States, as in many other parts of the world, we have decided that the risk is worth taking. This may be because of what the world learned during World War II about the critical need to protect human rights. The risk of the occasional unnecessary intrusion on political institutions has seemed worthwhile in order to avoid the opposing risk of human rights violations. In the U.S. system, however, the issue is not seriously in doubt. We have come to rely on the Court to perform this role over the past century. A judicial nominee who explicitly disavowed this role—for example, by arguing in favor of the state's right to ban

185. Lochner v. New York, 198 U.S. 45 (1905).

contraception—would not be confirmable.[186]

The real question is not whether judges should play this role, but how they should do so. In my view, there is no formula that can guarantee the correct result, only guidelines. Good constitutional decisions are neither the mechanical application of formal rules nor the freewheeling world of pure politics. They rely instead on judgment and discretion, which by definition incorporate both flexibility and constraints.

My approach to interpreting the Ninth Amendment cannot be captured in a catchword or a set of instructions. That does not mean that judges can simply rule willy-nilly on which rights are fundamental. The history of Anglo-American courts now stretches back almost one thousand years. During that time, judges have made and remade the common law, but the process has been evolutionary, rather than revolutionary.

Today, the fashionable trend in constitutional theory is toward sweeping abstractions that purportedly can constrain willful judges from bad decisions. Originalists claim that if judges would only pledge allegiance to the original understanding, all our problems would be solved. Other scholars argue that the secret answer lies in John Rawls' political philosophy, or in reading the text of the Constitution with the same obsession for detail as an English professor reading *Paradise Lost*. Still others believe that the sole goal of the courts should be equal political participation by all citizens. What these theories all have in common is a belief that the legal system cannot really work without them. They find repugnant the kind of case-by-case decision-making process that state and federal judges use every day.

Much of the discussion about judicial review is distorted by an almost superstitious sense that it is a suspect institution.[187] This attitude either leads to a fear of undemocratic rule by unelected judges, or to an effort to tame this fear by making judges mere puppets of the Framers of the

186. The reference, of course, is to Judge Robert Bork, whose fear of judicial discretion led him to reject any enforcement of fundamental rights. *See* Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 8–9 (1971) (discussing his view that the Court had incorrectly assigned "fundamental values" constitutional protection through mechanisms such as the penumbral zones of the First, Third, Fourth, Fifth, and Ninth Amendments).

187. The history of this fixation on the supposedly anti-democratic nature of judicial review is explained in detail in Barry Friedman, *The Birth of an Academic Obsession: The History of the Countermajoritarian Difficulty, Part Five*, 112 YALE L.J. 153 (2002).

Constitution. This attitude seems increasingly anachronistic in a world where judicial review is the rule rather than the exception for democracies. Protection of fundamental rights by courts is far from being suspect; rather, it is now more the norm than the exception.

The reason for this spread is simple: much of the rest of the world has come to share the American view that some basic values are too important to be left entirely to the protection of politicians. Majority rule by itself cannot be completely trusted to protect religious, political, racial, and geographic minorities from oppression. This is a lesson Americans learned early, in the years before the Constitution was drafted. Other countries learned the lesson more recently in the post-World War II wave of protections for human rights.

Once we put aside this obsessive insecurity about the role of judges, we can see that they have been quietly performing their jobs without the help of any of the overarching theories that scholars love so much. Anyone who does not think it is possible to decide cases in a principled way without the benefit of a "Big Think" theory, should just watch them. It has been said that at one point, aeronautical engineers had proven that it was impossible for bumblebees to fly. Critics today seem to think it is impossible for judges to make reasoned decisions without the benefit of strict legal formulas. But the bumblebees kept on flying and judges have been engaging in the exercise of reasoned judgment for centuries. If the theorists cannot account for these phenomena, so much the worse for their theories.

The fact is that we do not need master theories or completely predictable judges in order for the system to work. We have built a number of safeguards into the judicial system to keep judges from straying too far. The first, of course, is the selection process. Becoming a federal judge involves a careful screening process. The process does not always work, and some presidents may be less reliable than others in their selections. But the process does tend to produce competent, hardworking, honest judges who truly want to do their jobs well.

We also go to great lengths to imbue judges with a special attitude toward their work. We limit their exposure to outside influences, strictly forbidding private discussions between outsiders and judges about pending cases. There are no friendly lobbyists to wine and dine them while they are deciding cases. We also make judges explain the reasons for their decisions, making these explanations part of the public record. Finally, judges are never completely on their own; trial judges must answer to

higher courts, and appellate judges sit in groups so that no one judge has the final say.

One function of law is social stability and one appeal of a formulaic approach is its promise of stability. Fortunately, we can have this stability without the formula because stability only requires that most cases be reasonably predictable. Because there are easy and predictable cases—most of which never reach the Supreme Court—constitutional law can provide a stable framework for government. It is important to note that many cases that would have been quite difficult when a constitutional provision was adopted can later become predictably easy because they are controlled by precedent. So we need not fear that the law will be reduced to chaos if we abandon the quest for the perfect decision-making formula. Many cases will be straightforward and reasonable judges will readily agree on the outcomes.

This is about the best that any system of decision-making can guarantee. A judge in a hard case is trying to solve a difficult problem. In general, there is no simple recipe for problem-solving, whether the problem arises in law, business, engineering, or medicine. We can help prepare people to solve such problems in various ways—giving them basic tools they need to analyze the problem, talking in general terms about good ways to approach problems, and exposing them to case studies of similar problems. This is, for example, how business schools train corporate managers and how law schools try to train future lawyers and judges. But an element of creativity exists in finding solutions that simply cannot be reduced to a formula, and efforts at guidance simply fade into platitudes.

No doubt, it would be wonderful to have some recipe for making hard decisions. But the absence of such a program is simply part of the human condition. Life presents hard choices. In making these hard decisions, people expand their knowledge, revise their understanding of who they are, and better grasp their fundamental values. Of course, a great many decisions are easy, and that is an important fact about constitutional law. Yet, what is true in personal life is also true in constitutional law. The big decisions cannot be reduced to a formula.

This kind of unstructured yet "reasoned" decision-making is certainly familiar to American lawyers. Attention to precedent and policy dominates the common law. Many important bodies of American law—including torts, contracts, and property—are controlled by the common law to this day. Others, such as criminal law, are rooted in concepts originally

developed by the common law, or like antitrust rules, represent common law elaborations on open-ended statutes. These bodies of law function acceptably, without the benefit of bright-line rules. Constitutional review may require a greater degree of self-discipline and restraint than some of these other bodies of law, but the fundamental process is not dissimilar. So we need not fear that judicial identification of fundamental rights will turn into a free-for-all.

Undoubtedly, it would be very convenient if the Constitution contained a complete listing of human rights, which judges could then define merely by consulting a dictionary. The Ninth Amendment tells us that the Bill of Rights is not exclusive. The Privileges or Immunities Clause of the Fourteenth Amendment is equally frustrating for those who want their rights defined in black and white. Instead, these provisions of the Constitution refer beyond themselves to rights that derive elsewhere.

To give content to these guaranteed rights, judges are in much the same position as musicians faced with a cadenza. They may not rely on detailed directions from the composers, because the text is silent. Instead, they must fill the gap, perhaps relying on precedent (much like musicians who turn to the cadenzas provided by earlier performers), or perhaps by undertaking the difficult task of discerning for themselves how to elaborate on the composer's grand themes. What neither judges nor musicians may do, however, is to give up on the task out of irritation that the text failed to give more explicit guidance. I am in no position to assess how well musicians have lived up to their responsibilities, but in the analogous situation, our courts have done a credible job of implementing the constitutional drafters' vision of human rights.