

Winter 1989

## Constitutional Reasoning for Rights

Mary Jane Morrison

Follow this and additional works at: <https://scholarship.law.missouri.edu/mlr>



Part of the [Law Commons](#)

---

### Recommended Citation

Mary Jane Morrison, *Constitutional Reasoning for Rights*, 54 MO. L. REV. (1989)  
Available at: <https://scholarship.law.missouri.edu/mlr/vol54/iss1/7>

This Article is brought to you for free and open access by the Law Journals at University of Missouri School of Law Scholarship Repository. It has been accepted for inclusion in Missouri Law Review by an authorized editor of University of Missouri School of Law Scholarship Repository. For more information, please contact [bassettcw@missouri.edu](mailto:bassettcw@missouri.edu).

# CONSTITUTIONAL REASONING FOR RIGHTS

Mary Jane Morrison\*

In 1986, the Supreme Court called a halt to further libertarian development of the right of privacy when, in *Bowers v. Hardwick*,<sup>1</sup> the Court refused to find privacy protection for homosexuals who engage in sodomy with consenting adult partners in private places. The Court put particular emphasis on three points. First, it noted that Georgia's statute is undergirded by a wide-spread and long-standing view of homosexual sodomy as immoral.<sup>2</sup> Nine jurists sitting in Washington, D.C., are in no better position, of course, than a political majority of persons in Georgia to decide what is moral.<sup>3</sup> Second, the Court noted that constitutional interpretations for implied rights pose greater risks of illegitimacy than for express rights, and the need for caution therefore is greater.<sup>4</sup> The text of the Constitution provides no basis for saying the right of privacy ought to be formulated as, for example, "the right to make autonomous decisions concerning intimate matters," according to a majority of the Court. That is, they saw the Court's earlier privacy cases as at most formulating the right as "the right to decide child-begetting, child-bearing, and child-rearing matters," but no such matter related to homosexual sodomy.<sup>5</sup> Third, the Court was deeply troubled by the prospect of a raft of particular next cases: If the right of privacy protects homosexual sodomy, "privacy" covers "autonomous, intimate decisions," how could the Court draw a principled distinction in the next case between homosexual sodomy and incest, adultery, use of illicit drugs in the home, and so on?<sup>6</sup>

In this Article, I explore the nature of constitutional reasoning about rights, with particular emphasis on the reasoning surrounding implied fun-

---

\* Copyright. Mary Jane Morrison. 1988. Professor of Law, Hamline University School of Law. Ph.D. University of Illinois; J.D. College of William & Mary; A.M. University of Illinois; B.A. University of Florida. I am indebted to Howard Vogel and, as always, Fred Schauer for reading this article in draft.

1. 478 U.S. 186 (1986).

2. *Id.* at 192-96.

3. Not everyone would agree with the Court, or with my "of course." See generally M. PERRY, *THE CONSTITUTION, THE COURTS, AND HUMAN RIGHTS* (1982) [hereinafter PERRY].

4. 478 U.S. at 191-92, 194-95.

5. *Id.* at 191.

6. *Id.* at 195-96.

damental rights and substantive due process privacy. Reasoning about express or implied rights themselves based upon their canonical formulations,<sup>7</sup> i.e. reasoning on the basis of their official names, always eventually gives out. Nonhysterical next-case worries are a sign canonically-based reasoning about a right has given out, and that point usually and naturally arises much earlier for implied rights than for express ones because implied rights' formulations are not as textually secure as those of express ones. When canonically-based reasoning for any right gives out, however, further constitutional interpretation for the right can continue based upon clauses in the Constitution that apply to rights generally, such as the equal protection clause.

Even implied rights have canonical formulations, which arise from the text and through interpretive arguments. At least some implied rights present no greater interpretive hazard of illicit importation of the interpreters' idiosyncratic values into the arena of constitutional law than do express rights. The implied right to travel and, perhaps surprisingly, substantive due process privacy are two examples of rights that do not pose very great interpretive hazards. Substantive due process privacy, however, is not a "right" in the same sense that "right" aptly describes the right to travel or the right to freedom of speech. Rather, for reasons I will explain, substantive due process privacy is a right in a sense similar to that in which equal protection of the laws is a "right." Casting its name as "right to privacy," therefore, can be misleading.

I will cover the implied rights of travel and voting before turning to substantive due process privacy for two reasons. First, travel and voting rights serve as vehicles for making my descriptions of constitutional reasoning about rights concrete. Even when rights are express, the reasoning

---

7. That is, both implied and express rights have official names or established descriptive phrases associated with them. These names or phrases meet and themselves in turn set regularity-of-use, hence canonical, standards for reasoning about the rights based directly upon their names or descriptions.

My use of "canonical" is thus slightly idiosyncratic. I use it to indicate one aspect of the nonrelativistic nature of discourse in constitutional law and to provide a name that bridges some of the gaps between constitutional text and constitutional doctrine. By "canonical formulation," then, I mean the conventionally accepted name for a right or doctrine, not something about pedigree. I also mean the name is crystallized only insofar as questions about the scope of the right or doctrine already have been answered. For as-yet unasked and unanswered questions, the canonical formulation need not be crystallized.

In another article, without employing "canonical," I describe the evolutionary process of the Court's fourth amendment exclusionary rule as a function of the intersection of the recastability of language under malleable constitutional theories. Morrison, *Choice of Law for Unlawful Searches*, 41 OKLA. L. REV. 579 (1988) [hereinafter Morrison, *Choice*]. That article and the present one are extensions of my work on the nature of legal language. Morrison, *Excursions Into the Nature of Legal Language*, 37 CLEV. ST. L. REV. (1989) [hereinafter Morrison, *Excursions*].

patterns basically are the same as for implied rights. Second, some of the trouble with the jurisprudence of the privacy cases stems from conceiving of substantive due process privacy as an implied fundamental right in the ways the right to travel or to vote are implied fundamental rights. Using travel and voting implied rights to illustrate constitutional reasoning about rights sets up the contrast between those rights as rights and the equal protection clause as a "right," hence introducing a different notion for substantive due process privacy.

My goal in covering substantive due process privacy is more ambitious, however; I hope to satisfy all three of the *Bowers* Court's concerns about privacy. Although the Court reached the proper substantive due process privacy result in *Bowers*, its hint<sup>8</sup> that it might reach a *different* result were the issue one of the heterosexual sodomy shows the Court is poised on the brink of misconceiving substantive due process privacy. This misconception will jeopardize all the Court's privacy cases, from the 1923 child-rearing case of *Meyer v. Nebraska*<sup>9</sup> to the 1965 child-begetting case of *Griswold v. Connecticut*<sup>10</sup> and, of course, the 1973 child-bearing case of *Roe v. Wade*.<sup>11</sup> It is, therefore, a profoundly disturbing possibility for constitutional interpretation as an institutional concern, as well as on libertarian grounds. On the other hand, the Court's decision in *Bowers* does not finally settle the question of whether a state may imprison anyone for engaging in consensual, adult, private sexual activity that deviates from the "missionary norm" of one husband atop one wife.

## I. CONSTITUTIONAL REASONING PATTERNS IN GENERAL

For every constitutional right, whether express or implied, there always are two competing possible interpretive answers the Supreme Court could give as to whether such-and-so is an instance of the right: Yes, or no.<sup>12</sup> As a series of questions leads to a body of answers and instances/non-instances of the right, the shape or scope of the right becomes more determinate. Affirmative answers are right-amplifying. They increase the possibilities of finding another such-and-so also is an instance of the right. Negative answers are right-limiting. They permanently or temporarily prevent the right's growth; but they, too, give definition to the shape or scope of the right. When the negative answer flows fairly easily from the already established body of the right—i.e., from the jurisprudence of the right,

---

8. 478 U.S. at 188 n.2 ("We express no opinion on the constitutionality of the Georgia Statute [as applied to heterosexual sodomy]").

9. 262 U.S. 390 (1923).

10. 381 U.S. 479 (1965).

11. 410 U.S. 113 (1973).

12. Federal courts do not give "maybe" answers to such questions except in dicta.

including the imprimatur of text or cases on the words for expressing that right—the negative answer gives permanent limiting shape to the right. Permanence in constitutional law, of course, is not eternal or unchanging. It marks only the point at which doctrines such as *stare decisis* and other even less rigid, more informal kinds of precedent-reasoning come to bear. In this sense, affirmative answers also give permanent but not eternal shape to the right. When, however, the negative answer flows because there is no basis in the body of the right for giving any other answer, then that negative answer may be only temporarily right-limiting. This happens when the established nouns and adjectives for expressing the right do not themselves, either affirmatively or negatively, already provide the basis for a certain answer, and the Court would need to adopt a new adjective or noun to give an affirmative answer.

As a series of answers to instances-questions builds up a more determinate shape for a right, by building up the approved nouns and adjectives for describing the right, the answer to the next instance-question may be tilted. But the “yes” and “no” answers still compete for actualization. If the Court gives an answer in favor of which previous answers tilt, the new answer reinforces the determinate shape the right has had and adds a bit more to the right’s shape. That new shape will endure as long as a satisfactory theory of the right supports it. If, however, the Court gives the answer against which previous answers tilt, that decision both reshapes the right and demands explanation in terms of retheorizing about the right to ease what otherwise appears as a drift towards inconsistency or brute force, ad hoc decision making.

To illustrate, suppose, fancifully, the Court at one time had held that the speech clause of the first amendment protected public performances of plays, the press clause protected their texts, but neither clause protected pictures. Even pictures of plays were unprotected “unless the pictures are produced by the press.” When a question arose about protection of “silent” movies, which include frames of written text, the Court then could have decided these movies were (a) protected under the speech clause, (b) protected under the press clause, or (c) not protected under either clause. Answer (a) would write “oral” out of speech-clause jurisprudence, and the distinction between plays-in-performance and plays-in-text would have needed a new explanation. Under answer (b), any notion that the press clause was tied to “printing press” would evaporate, and the distinction between a cartoon in a newspaper and a painting in a museum would have needed new explanation or to be dropped.

If, on the other hand, the Court would have given the no-protection answer (c), later issues about “talking” movies would be in near equipoise as to protection (because there is oral play-like activity in public) or lack of protection (because it is a movie, i.e., is a nonprinting-press picture). But issues about mime performances at Carnegie Hall would be tilted in favor of saying unprotected (neither oral nor produced by a printing press).

Yet, even in mime cases the Court still would have had the option of giving the other answer (i.e., protected) and then would need to account for the reshaping of the speech and press clauses this different answer would produce (e.g., perhaps, public performance of entertainment expressing political or social commentary). That explanation in turn would exert pressure on the older views of movies and museum pictures, and so on.

Thus, something like the law of gravity to which architects and builders must pay attention also applies to constitutional interpretation. Interpretation of rights needs a firm foundation. Some interpretations may project from the right's already-built structure. Further interpretations may rest their weight upon the cantilevered portion, either vertically or horizontally, until they become "too heavy" for the shelf. At that point, some of the new interpretation's weight must shift back to the central structure by straps or guys, rods running to the ground to support the cantilevered shelf,<sup>13</sup> or the new interpretation cannot be placed upon it. Constitutional text and theory provide the weight-bearing mechanisms for constitutional interpretation—foundation and explanation. The building-code requirement of soundness of structure—sound theory—is the overriding rule for the enterprise.

Constitutional interpretation operates under several interpretive rules that guide and constrain the interpretive choices about the "meaning" of "right R" among a range of meanings, readings, or interpretive options. This range is loosely fixed by the words expressing that right, the common and historical understanding of those words, the interpretations thereof in earlier cases, and so on. The particular form in which the interpretive question arises also serves to shape it. The elements of this range of choices,  $\{r_1 \dots r_n\}$ , at one end of the range fill the blank in "Yes, this is an instance of right R because \_\_\_\_" and at the other end fill in "No, this is not an instance of R because \_\_\_\_." These readings thus are rules for determining the instances of the right. They express the conditions of deployment of "R" within the confines of the Constitution.<sup>14</sup>

The choice of  $r_x$  as a "meaning" of "R" is comparative. For example,  $r_x$  may be a better interpretation or reading of "R" than is  $r_y$  because reading "R" as  $r_y$  makes R a small, highly particularized right of the sort appropriate to a code, but not to the Constitution; or  $r_y$  may make R too uncontrollable, make too many clauses in the Constitution superfluous, etc.; or very occasionally, "R" plainly does not "mean"  $r_y$ , or, even less

---

13. Either of these is a form of retheorizing, *i.e.*, of reinterpreting.

14. The state action doctrine functions at the  $r$  "reading" level to limit the instances of R, as in first amendment rights. The justiciability doctrine limits the instances of R enforceable in federal court, but whether it functions at the  $r$  level is not entirely clear. In any event, an R that is not enforceable in some sense has no meaning, *i.e.*, no  $r$  reading, *e.g.*, the guarantee clause.

often, "R" plainly "means"  $r_x$  or something closely approaching  $r_x$ . These three bases for the comparative judgment about  $r_x$  and  $r_y$  in  $\{r_1 \dots r_n\}$  are interpretive rules that we might name the "this is a Constitution we are expounding" rule, the "but we are only the Court" rule, and the constitutional version of a "plain meaning" rule.<sup>15</sup>

The "this is a Constitution we are expounding" and "but we are only the Court" rules hunt together. The first cuts against readings from the very narrow, restrictive, right-limiting end of  $\{r_1 \dots r_n\}$ ; and the second cuts against readings from the very broad, expansive, right-amplifying end of the range. Because these two rules operate together and point in opposite directions, neither standing alone is dispositive on an interpretive issue. The results under one rule, however, often will be more compelling than those under the other, where compellingness in turn may be a partial function of the congruence of one rule's results with those under some third rule (perhaps the plain meaning rule), with those under previous cases, and so forth.<sup>16</sup>

The third interpretive rule, the constitutional "plain meaning" rule usually eliminates possible interpretations as the interpretation of "R," leaving the other possible reading of the comparative pair as the better in a derivative sense. Sometimes, of course, the "plain meaning" rule operates more nearly like the contracts "plain meaning" rule, i.e., positively on meaning instead of by elimination. The rule, unlike the other two, is useful primarily for initial, unrefined constructions of a clause expressing a right<sup>17</sup> or for summary judgments dismissing claims under the Constitution. This is true partly because it more clearly is a *meaning* interpretive rule than are the other two rules. It also therefore is useful for excising a group of cases that misshape the interpretation of a clause.

For example, the question in *Brown v. Board of Education*<sup>18</sup> basically is whether "equal" in "equal protection of the laws" is better read as

15. There are other interpretive rules, the nature of which I will describe in operation in later sections.

16. "And so forth" here carries heavy weight, obviously. One of the possibilities, which I leave as an open question in this Article, is that the "and-so-forth" include political theory, moral insight, etc., in some more deep-seated sense than such theories or insights are integral to the rules in the cases I discuss in this Article. *But see supra* note 3.

17. That is, it tends to select one end of the range without selecting a particular element of that end.

18. 347 U.S. 483 (1954). "Failed experiment" readings of *Brown* are commonplace in the literature on constitutional law. *E.g.*, Cornell, *Institutionalization of Meaning, Recollective Imagination and the Potential for Transformative Legal Interpretation*, 136 U. PA. L. REV. 1135, 1167-68 (1988). These readings treat *Brown* as resting on intangible and psychological inequality effects of segregated public schools on black students, 347 U.S. at 493-94 (especially 494 n.11), and on the express rejection of *Plessy's* view that segregation marks blacks as inferior only if they choose to put that construction on it. *Id.* at 494-95. *See also* L. TRIBE,

“undifferentiated” or as “equivalent.” Certainly each is a viable reading for “equal” in a nonconstitutional sense. “Equivalent” probably is the predominate meaning of “equal” in nonconstitutional contexts, e.g., for mathematicians in their studies and for parents doling snacks out to children. The “equivalent” sense of “equal” not only allows parents to give three small cookies to one child and one large cookie or three slices of apple to another child, but also allows “separate but equal” public school educational systems. That is, it allows for differentiation and classification among receivers as long as what they receive is equivalent, i.e., *otherwise* is “the same” without being identical.

The settled understanding of “equal” in the equal protection clause, however, more closely approximates “undifferentiated” than it does “equivalent” for one very good reason: As the framers of the fourteenth amendment must have known and intended in 1868, and even the Court’s “separate but equal” case of *Plessy v. Ferguson*<sup>19</sup> stated, the equal protection clause centers on “enforc[ing] the absolute equality of the . . . races *before the law* . . . .”<sup>20</sup> The clause, after all, speaks of “equal protection of the laws,” and classification is at the heart of the law: This act is criminal, that one is a breach of contract, this other one requires a license, that one is to remain free of government regulation, and so on. When, as in *Brown*, the only differentiating factor the state uses in determining who goes to which school is race, the schools are inherently unequal under the

AMERICAN CONSTITUTIONAL LAW §16-15 (2d ed. 1988) [hereinafter *TRIBE*, *ACL*].

I center my reading of *Brown* on the Court’s conclusion that “[s]eparate educational facilities are inherently unequal.” *Id.* at 495. Empirical facts are irrelevant to inherent differences, except in prompting us to see the differences, i.e., here, inequalities.

Even if, however, my reading is a rational reconstruction of *Brown* that reflects three and a half decades of a new understanding of “equal protection of the laws,” such reconstruction is possible only because the opinion itself contains the basic elements for it, viz., the sentence I quote above. *See generally* Morrison, *Choice*, *supra* note 7. Compare radical reconstruction, which rewrites an opinion to reach the same result under a different analysis. Some of the ways I describe cases in this Article may be rational reconstruction, but not radical reconstruction.

19. 163 U.S. 537 (1896).

20. *Id.* at 544 (emphasis added). The whole sentence shows how the Court slipped into error in *Plessy*:

The object of [the fourteenth] amendment was undoubtedly to enforce the absolute equality of the two races before the law, but in the nature of things it could not have been intended to abolish distinctions based upon color, or to enforce social, as distinguished from political equality, or a commingling of the two races on terms unsatisfactory to either.

*Id.* Thus, having stated the interpretation of the clause properly up to the first comma, the Court went on to confuse the amendment’s prohibiting state action from drawing distinctions in the law along racial lines with the amendment’s prohibiting a person’s issuing dinner invitations along racial lines. *See* text following this note.



fourteenth amendment. That amendment prohibits states from using the color of someone's skin as a reason for giving that person different treatment under the law.<sup>21</sup> *Brown* may have been a politically difficult case, but it was not a hard<sup>22</sup> case for constitutional interpretation. Its holding fits like a glove with the plain meaning of the words of the fourteenth amendment and removes a body of cases that had been misshaping the meaning of the clause by making sound theory impossible.

Reasoning in a case such as *Brown* is one of two kinds of clause-reasoning. *Brown* reasoned about the scope of a right based upon the textual canonical formulation of the right: "equal protection of the laws." Clause-reasoning ultimately bottoms all legitimate constitutional interpretation, but it is not always as simple as that of *Brown*. Reasoning to the existence of implied fundamental rights, for example, sometimes begins with straightforward clause-reasoning of the type in *Brown*, but just as often the reasoning connection between the existence of the right and clauses in the Constitution is looser and more informal. The most vital connection between constitutional clauses and implied rights, however, is still further different. The clauses enable reasoning about the right to continue when scope questions about the right cannot be answered positively through canonically-based reasoning because the right lacks a sufficiently complete textually secure canonical form, on pain of otherwise violating the "but we are only the Court" rule against judicial activism. In this connection the reasoning is not *of* or *about* clauses but *under* them,<sup>23</sup> such as under the equal protection clause, one of the privileges and immunities clauses, the due process clause, etc. When reasoning under a right's canonical form "gives out," the shift to reasoning under one of these clauses provides a textual basis and accompanying jurisprudence for positively providing answers to questions of whether the Constitution protects (or protects against) certain activities. This is the other type of clause reasoning.

Rights-reasoning, i.e., reasoning about a right based upon its canonical form (which is clause-reasoning when the right is express) always gives out at some point. If it did not, judges could turn into philosophers and derive all constitutional rights from two or three clauses in the Constitution. For implied rights, which do not have textual canonical form in the same way or to the same extent, the point at which rights-reasoning gives out comes

21. Cf. Congress' use of § 5 of the fourteenth amendment.

22. I comment on Professor Tribe's recent criticism of theories that turn hard cases into easy ones beginning *infra* at note 107. L. TRIBE, CONSTITUTIONAL CHOICES 6-7 (1985) [hereinafter TRIBE, CHOICES].

23. This is an awkward way of putting a point I spell out more fully later. For the nonce, when reasoning is *under* a clause, the clause does not present interpretive issues of its own; whereas when reasoning is *of* or *about* a clause, the interpretive focus is the clause itself. *Brown* was of the latter sort, the voting rights cases ultimately are of the former sort, but both sets of cases dealt with the equal protection clause.

early. As a consequence, most constitutional interpretations about implied rights are under such clauses as the equal protection clause. The most interesting aspects of implied rights, however, are the reasoning that leads to “finding” them and the extent to which they differ among themselves in having sufficient, secure canonical form to sustain rights-reasoning. A few of them, such as the instrumentalist implied right to travel, have a broad secure canonical form that supports fairly long-running reasoning about their instances.

Most of them, however, sustain rights-reasoning only by having narrower canonical form, as is true of the implied right to vote for state legislators and certain other important state officials. When the canonical form of the implied right is broad, as “right to vote” is broad, usually it lacks sufficient content to sustain rights-reasoning via that form for very long without running afoul of the rule against judicial activism, i.e., the “but we are only the Court” rule. Yet, to avoid judicial activism, the Supreme Court recently has shown increasing tendency to fragment one of the most controversial implied rights, the right to privacy, which could have greatly encompassing content, into a group of highly particularized, small rights: the right to use artificial-device contraceptives; the right to first-trimester abortions, to second-trimester abortions under certain circumstances, and to third-trimester abortions if one’s life is in jeopardy from pregnancy; the right to live with one’s own blood relatives, but no right to live with large groups of friends; the right to decide whether one’s children will study foreign languages or go to private schools; but not the right to decide who one’s sexual partners will be, etc. This sort of fragmenting risks violating the “this is a Constitution we are expounding” interpretive rule. Moreover, such fragmentation is most controversial and problematic when the resulting code-like rights are implied rights because, paradoxically, it smacks of judicial activism in the form of decisions by fiat, judge’s own values, and so on. This means, of course, there is something seriously wrong with the Court’s right of privacy cases as implied rights cases, and I turn to that problem in section III.

## II. THREE EXAMPLES OF IMPLIED RIGHT REASONING

The right to travel is an instrumentalist implied right that has fairly secure, albeit broad, canonical form. The security of its form and its breadth initially arise from the same source, namely the textually secure canonical reformulation of a portion of the assembly and petition clauses of the first amendment.<sup>24</sup>

---

24. The Articles of Confederation contained an express provision of the right to travel. *United States v. Guest*, 383 U.S. 745, 763-64 (1966) (Harlan, J., concurring). When Nevada imposed a head tax on persons leaving the state on public transportation, the Court struck it down, holding for the first time that

The assembly clause provides for "the right of the people peaceably to assemble . . . ." Although the clause does not contain the words "in groups" or "together," it plainly means the people have a right to assemble in groups, as long as their grouping is peaceable both in origin and in continuation. For two or more people to assemble will require at least one of them to travel to the others, except in the case of Siamese twins, for whom assembling is not something they do.

The petition clause provides for the right of the people "to petition government for redress of grievances." Although this clause could be interpreted to mean, for example, the people have only the right to send letters of petition for redress from their homes in their various states to Congress in Washington, D.C., the clause also is open to interpretation as securing the right to petition in person. For New Yorkers to petition Congress in person requires travel, as it does for anyone whose home is not the corridors of the Capital Building.

Further, the juxtaposition of the petition clause on the heels of the assembly clause itself makes legitimate the conjoined interpretation that the people have the right to travel to the seat of government to petition in person, in groups or singly, for redress of grievances. That right is *not* an implied right. Rather, its expression is as textually secure as an express right as are "the right to assemble in groups" and "the right to petition in person," although the words "in groups," and "in person" do not occur among the words the framers of the first amendment used in writing the assembly and petition clauses.<sup>25</sup>

Reformulating those two clauses, as in part, "the right to travel to the seat of government to petition for redress," however, provides the

there is a right to travel:

[The citizen] has the right to come to the seat of government to assert any claim he may have upon that government, or to transact any business he may have with it. To seek its protection, to share its offices, to engage in administering its functions. He has a right to free access to its seaports . . . to [government] offices, and the courts of justice in the several states . . . .

*Crandall v. Nevada*, 73 U.S. (6 Wall.) 35, 44 (1867). The Court did "not concede that the question [of the validity of the statute was] to be determined" by reference to the commerce clause. *Id.* at 43. But the Court also did not cite the first amendment's assembly and petition clauses or the commerce clause in the passage quoted above; rather, the Court's reasoning clearly was founded upon the nature and structure of the federal system, not the text of the Constitution as such.

Professor Tribe suggests the right might be founded in the commerce clause or either of the privileges and immunities clauses. TRIBE, *ACL*, *supra* note 18, at 1379 nn.9-10, 1455 n.3. He also suggests the right may be part of a notion of personhood. *Id.* § 14-15.

25. Hence, skeptical arguments about the implied right to travel that try to make something of the fact that the marks for "travel" are not among the marks of the Constitution are not even plausible arguments.

textual security for "right to travel" as the canonical formulation of the implied right to travel, which is instrumentalist in a two-fold sense. First, the interpretive reasoning that undergirds reformulating a portion of the assembly and petition clauses as "the right to travel to the seat of government to petition for redress of grievances" itself is instrumentalist. Second, the legitimacy of not limiting the right to travel solely to this one purpose is more or less instrumentalist. For example, travel often is instrumental to exercise of rights under the free speech clause or the religious exercise clause, as well as to commercial activity within the country or abroad, and is a background assumption for the privileges and immunities clauses.

Instrumentality, standing alone, is not enough to secure travel the status of a constitutional guarantee, of course;<sup>26</sup> warm coats or coffee are not constitutional guarantees, although either of them well may be instrumental to free speech in a park in January or to staying awake through a Sunday sermon. Travel has status as a constitutional right, and thus is different from coffee: If Congress were to forbid travel except for the purpose of petitioning government officials for redress, the prohibition regularly would run afoul of the speech clause;<sup>27</sup> or, for travel to church, Mecca, Rome, Jerusalem, or Salt Lake City, of the free exercise clause of the first amendment. In contrast, upon a certain kind of showing, Congress could prohibit the use of coffee even as part of a religious ceremony.<sup>28</sup> Further, the instrumentalist tie of travel to assembling in groups, petitioning in person, speaking freely, practicing religion, or even engaging in commerce, is not one of mere instrumentality. Rather, the tie is very strong and regularly is one of necessary means to guaranteed end.

---

26. *E.g.*, *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1 (1973).

27. To make this point, I assume the existence of current speech clause jurisprudence. If, on the other hand, the Court were not to invalidate travel prohibitions under the speech clause, but were to continue to give the first amendment a basically libertarian gloss, the Court probably would invalidate the travel law under an expansive reading of "right to petition government for redress of grievances" when, for example, the travel is of delegates to Atlanta or Detroit for political party conventions, etc. This is not to say such expansive twisting of the petition clause would be intellectually satisfactory or even ultimately as protective as an analysis under the speech clause. Rather, it is only to point out the "toothpaste tube" phenomenon of constitutional interpretation: When the pressures for a particular result are sufficiently strong, but the direct route to that result is closed off because of earlier interpretations the Court will not overturn, the Court will find another route to the result, just as a hole will open to let toothpaste out of hard-squeezed tube when the cap is screwed down tightly.

28. Think of the handling of poisonous snakes as part of Sunday services: Because laws prohibiting handling poisonous snakes in crowds reasonably and substantially serve an important secular safety purpose, the law is valid even as against certain groups of charismatics.

Finally, the Constitution as a whole, in text, history, and theory, envisions ours as a society in which the people will travel relatively freely.<sup>29</sup> This puts the interpretive shoe on the other foot and casts the burden of interpretive argument upon those who would deny that the Constitution secures to the people the right to travel. But that is a telling point only in that it follows multiple positive arguments in favor of the implied right as a constitutional guarantee decently seated in the text of the Constitution.

Most implied rights as constitutional guarantees are more controversial than the right to travel. Consider the voting rights issues that arose in *Reynolds v. Sims*<sup>30</sup> and its companions.<sup>31</sup> The central question in these cases is how general the constitutional right to vote is. Is it merely the express-text right to vote for certain federal officials?<sup>32</sup> Or is that express right merely one instance of a more general right to vote secured in the Constitution? If there is such a more general right, the further question is whether one of its constitutional instances is a right to vote for certain state officials and, even further, how such a state voting right reads, *i.e.*, what "right to vote" means at this state level.<sup>33</sup>

Reasoning about the generality of a right very nearly is the mirror reverse of reasoning about whether such-and-so is an instance of a right. Certainly, the yes-no options exist as in instances questions, with the same

29. *E.g.*, the commerce, postal, and admiralty clauses all touch upon travel; and their modes of expression in the Constitution themselves suggest that regulation of travel must be reasonable and not wholly prohibitory except when the prohibition is founded upon achieving some end other than merely one of prohibiting travel, as in, for example, the Mann Act. Similar considerations arise in explications of the way in which the privileges and immunities clauses give testimony to the framers' assumptions that the people would travel.

30. 377 U.S. 533 (1964).

31. *Lucas v. Forty-fourth Colorado Gen. Assembly*, 377 U.S. 713 (1964); *Roman v. Sincok*, 377 U.S. 695 (1964); *Davis v. Mann*, 377 U.S. 678 (1964); *Maryland Comm. for Fair Representation v. Tawes*, 377 U.S. 656 (1964); *WMCA v. Lomenz*, 377 U.S. 633 (1964).

32. For heuristic reasons, I will use this as shorthand for the provisions of U.S. CONST. art. I, §2, cl. 1 (elections of Representatives); amend. XVII, cl. 1 (elections of Senators); art. II, §1, cl. 1 and amends. XII, XVII, cl. 1, and XXIII, §1 (elections of President and Vice-President by Electors); and amend. XXIV, §1 (primaries and other elections for President, Vice-President, Electors, Senators, and Representatives; poll tax prohibited).

33. Note that I temporarily will not be treating *Reynolds* as a "one person, one vote" case and will be reserving equal protection clause aspects of the *Reynolds* set of cases for discussion under *Lucas*.

The difference between those last two questions I ascribe to the *Reynolds* cases could be marked more plainly by distinguishing between "right to elect [state legislators]" and "right to vote in elections of [state legislators]" throughout this Article. I eschew these linguistic formulations only in order to simplify an already overly complex illustration of implied right reasoning, given that the distinctions among what I call the "central question," the "further question" and the "even further" question in the text are clear (or, at least, now are).

consequences for theorizing and retheorizing. The reasoning also involves the same kinds of interpretive rules except, perhaps, the plain meaning rule. It differs, if at all, in that any right may be stated in more general form, simply by omitting adjectives or prepositional phrases. For example, "right to be free of unreasonable searches and seizures" may be restated (albeit improperly) as "right to be free of searches and seizures" and, even more generally, as "the right to be free." The crux of a constitutional generality question is whether that more general formulation of the right is legitimate. Thus, the express-text "right to vote for certain federal officials" may be formulated more generally as "right to vote;" but the constitutional question is whether there is a constitutional right that partakes of this general formulation but is not identical to the express-text federal right. Although this effectively probes the strength or necessity of the adjective "federal" in "right to vote for certain federal officials," the generality reasoning does not directly focus on such adjectives or qualifying phrases in the first stage of reasoning. Moreover, it probes them later only indirectly, via the context in which the constitutional question ultimately arises in a particular case: state officials?, legislators?, governor?, water district board members?, etc.<sup>34</sup>

Perhaps the usual mode in which a question of legitimacy of generality arises is one in which there are two or more apparently related rights,  $R_1$  and  $R_2$ , and the question is whether there is some right  $R_{\rho}$  of which the two or more rights are instances. That is, the question usually is whether there is some theory under which  $R_1$  and  $R_2$  are unified. Such an inquiry, for example, might unify the establishment and free exercise clauses of the first amendment. Similarly, but conversely, the existence of a more general theory than is necessary for the free speech clause might lead to giving content to the press clause, which currently does not have a theoretical life of its own.<sup>35 36</sup>

---

34. Such reasoning therefore is cousin to the amplitude-of-powers reasoning, which passes under the necessary and proper clause, for the power "to establish post offices and post roads," "to regulate commerce among the States," etc., only in its later stages.

35. *Branzburg v. Hayes*, 408 U.S. 665 (1972); *see also* *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 795 (1978) (Burger, C.J., concurring). *See generally* Anderson, *The Origins of the Press Clause*, 30 UCLA L. REV. 455, 457 (1983) ("no Supreme Court decision has rested squarely on the Press Clause, independent of the Speech Clause"). *Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575, 582 (1983) (use tax on costs of paper and ink for only newspaper invalid because it "singles out the press") does not establish a different proposition: The result would be the same had the statute singled out stationery stores.

36. The seven opinions in *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980) (criminal trials cannot be conducted in secret even at the defendant's request and the state's acquiescence), may be evidence of the need for  $R_{\rho}$  theories for reconciling some rights-conflict issues.

Generality reasoning is complicated and controversial even when  $R_1$  and  $R_2$  are express-text rights. But when one of the rights as well as  $Rho$  is an implied right, the potential for controversy increases in direct, perhaps even geometric, proportion to the complexity of the interpretive arguments. In such circumstances, the point at which rights-reasoning gives out comes very early because the rights are not secure in their canonical form. This is not the same as saying they do not have canonical form. Every right has canonical form. Some are almost solely textually canonical, hence very secure; whereas others nearly are only interpretively canonical. Most fall somewhere in between these two extremes.<sup>37</sup>

Generality inquiries arise in physics as well as in constitutional law, albeit under ultimately different reasoning constraints. For example, physicists search for a unified field theory that bridges the laws of gravity, the strong and weak forces, and the electromagnetic force. Just as each of the laws of gravity, the electromagnetic force, etc., has its own adequate theory, none of which itself is adequate to be the unified field theory; so too each right  $R_1$  and  $R_2$  will have its own theory, adequate to it in the sense that the  $R_1$  theory explains why such-and-so is an instance of  $R_1$  and similarly for the  $R_2$  theory and its instances. The role  $Rho$  plays is to explain how  $R_1$  and  $R_2$  are related, by having its own theory of why  $R_1$  and  $R_2$  are instances of  $Rho$ . True  $Rho$ -level theories therefore necessarily are richer than  $R$ -level theories. But, again, any "R" may be stated in "Rho" form simply by generalizing already general formulations of "R." Unless, however, the theory for  $Rho$  is richer than is necessary for adequate explanation of the instances of  $R$ ,  $R$  does not have true  $Rho$ -level formulation.

Suppose  $R$  is the "right to vote for certain federal officials" and its  $Rho$  formulation is "right to vote."<sup>38</sup> The fundamentally first question in

---

37. The third amendment right, the right of "the Owner" not to have soldiers quartered in her house without her consent during peacetime and not except as prescribed by law during wartime, is almost solely textually canonical. In this regard it very nearly is like the minimum age provisions of articles I and II in leaving very little room for interpretive issues to arise. In contrast, "right of privacy" as the name for an implied right nearly is only interpretively canonical, which is part of the legitimacy problem this "right" has. Most constitutional rights have canonical form that falls in between these two extremes, such as "right to travel" or "right to be free of unreasonable searches and seizures."

38. This is the proper formulation for  $Rho$ , given the particular instantiation I give here for the reasoning pattern about implied fundamental rights. If  $R$  were formulated in greater conformity to the text of the Constitution, instead of the shorthand I purposely use here,  $Rho$  might be formulated as "the right to vote for governing officials," which has only slightly greater generality than "right to vote directly for Representatives and Senators to Congress and indirectly, via the Electoral College, for President and Vice President."

The trouble with these other specifications for  $R$  and  $Rho$  is that, in tandem, they invite a pattern of reasoning that is, first, not how the Court in fact reasoned

a case such as *Reynolds* then is whether the Constitution, C, secures or contains Rho in true Rho form, i.e., whether Rho has any content greater than that of R as Rho-in-C. If not, Rho-in-C simply is R and "right to vote" is simply a truncated version of "right to vote for certain federal officials" that will not support interpretations cantilevered from the latter. The second question, if Rho-in-C has true Rho form, is whether R', the right to vote for certain state officials, is an instance of Rho in C. Outside the context of C, of course, this R' is an instance of Rho, as are the right to vote in family decisions about ordering chicken for dinner or the right to vote for deacons at the Freemason Street Baptist Church. But state-action doctrine eliminates family-decision voting from Rho in C, and first amendment doctrine eliminates church-election voting from Rho in C.

Hence the constitutional question is whether R' is an instance of Rho in C, not merely the constitutionally uninteresting question of whether R' is an instance of Rho. If so, the precise ultimate question in the *Reynolds* cases arises, namely what "right to vote for certain state officials" "means" in the sense of what its instance-readings are. In compressed and preview form, the reasoning that answers the first two questions is that: (1) because C contains two theories for R, one of which is fully adequate to explain R and the other of which is considerably richer, and (2) because C contains vestige traces of R', there is sufficient basis for saying there is a true Rho form of R that legitimately may be said to be secured in C and for saying R' also is secured in C. The portion of the argument that makes these conclusions compelling (i.e., the better of two possible opposite views) is that R has two readings in C. First,  $r_x$  approximately equals the right to democratic, majoritarian, representational participation through elections; and second,  $r_y$  approximately equals the right to cast a ballot in a free election.<sup>39</sup> The two readings, in virtually exhausting the potential range of

---

in the voting cases and, second, is fraught with danger because it invites "essence" reasoning by analogy. All lawyers, including members of the Court interpreting the Constitution, regularly reason by analogy, of course. But trying to decide whether, for example, a state must rectify gross malapportionment for the state legislature on the basis of the "meanings" of the words expressing the federal voting right is dangerous because it can come down to a naked 5-4 majority vote based on little more than how the individual justices use English. I will try to make this latter point more fully and clearly in connection with my discussion of why the precise question in *Lucas*, 377 U.S. 713 (1964), has to be answered under equal protection clause reasoning, instead of through reasoning about what "democratic" or "majoritarian" or "representational" "mean." See *infra* text following note 48.

39. I exaggerate the actual readings for R. Something approaching  $r_x$  fits elections to the House of Representatives; and something approaching  $r_y$  fits elections of Senators and, via the Electoral College, of President/Vice-president. To arrive at something approaching this  $r_x$  for R, of course, we have to do a bit of interpretive stitching of "[t]he House . . . shall be composed of Members . . . elected by the People of the several States . . ." in § 2 of article I to "Representatives



readings  $\{r_1 \dots r_n\}$  for R, are inconsistent with one another on their surfaces. C contains both narrow theories and a broad theory under which this inconsistency dissolves. The latter theory is itself the theory of Rho, which therefore is secured in C. The vestige traces in C of R', which is an instance of Rho, thus are legitimate evidence that R' is secured in C as well.<sup>40</sup>

The crucial point, then, is that C contains express-text readings  $r_x$  and  $r_y$  for R that, in coming from opposite ends of the range of potential readings for R, are inconsistent with one another. Usually, the law, including the Constitution, avoids inconsistency by having only one reading for a right or by having only a nest of near and related readings for a right. When, however, there are two inconsistent readings for a right—i.e., when there are two inconsistent rules of deployment *prima facie* each applicable to a circumstance—we handle the inconsistency in one of two ways. First, we treat one of the readings/rules as the weightier and accord it general-rule status, and treat the other reading/rule as the exception to the general rule. Or, second, we treat the two readings/rules as separate but related. Doing the latter requires that we be able to state surrounding factors for each rule that determine when one or the other applies in given circumstances. Because such factors determine which rule applies, and are theories in that narrow sense, we are able to ignore the inconsistency that otherwise obtains between the two readings/rules. To avoid inconsistency through the general-rule-with-exception approach, however, we must have a theory that is richer than the sub-theories for either rule in that there must be an explanation that compellingly eases the inconsistency.

Resolution of the  $r_x/r_y$  inconsistency for R is possible under a separate-rules approach because C provides the surrounding factors that determine which applies. The  $r_x$  version applies to elections of Representatives to the House, and the  $r_y$  version applies to election of Senators, etc. Every instinct we have about the Constitution, however, strongly suggests that the proper relation between  $r_x$  and  $r_y$  is one of general rule with an exception, not one of separate-but-related rules. That is, our common understanding of C is that an  $r_x$  reading of any right-to-vote, including of R, is the more

shall be apportioned among the several States according to their respective numbers counting the whole number of persons in each State, excluding Indians not taxed" in § 2 of the fourteenth amendment, all the while remembering the battle-cry of "no taxation without representation," etc.

Arriving at something approaching  $r_y$  for R is more difficult, but it comports with the nonrepresentational aspects of two Senators for each state, irrespective of populations thereof, and the potential nonmajoritarian aspects of Electors' elections of President and Vice-President in the provisions of § 3 of article I, even as changed by the seventeenth amendment to provide for direct election, and clause 2 of §1 of article II and the twelfth amendment, etc.

40. I take up the precise actual questions that surfaced in the *Reynolds* cases later when I turn to the *Lucas* question. See text following note 48.

weighty reading considered as a reading of C as a whole instead of merely R as a part. We have a strong view of ours as a democratic, majoritarian, representational government and society. For example, one of the seminal sources of the Revolution and for a variety of taxation clauses in C<sup>41</sup> was “no taxation without representation,” i.e., that ours is to be a democratically ordered society.<sup>42</sup> Further, C contains a rich theory that secures  $r_x$  as a general rule and  $r_y$  as an exception, namely the historical justifications for the addition of  $r_y$  clauses to C for the Senate and the Electoral College, although all other clauses in C that touch upon voting in virtually *any* form are majoritarian clauses.<sup>43</sup> Because C contains (1) a numerical weighting of  $r_x$  over  $r_y$  for R, (2) both a narrow theory and a rich theory for dissolving the inconsistency between  $r_x$  and  $r_y$  for R, and (3) an  $r_x$  general reading for C as a whole, there is strong reason to say C contains a true Rho-level right to vote, not simply an R-level right to vote. Further, there are express-text traces of non-R instances of Rho in the text of C, and these traces reconfirm that Rho has “true Rho-level right” status in that there is more than one instance of Rho on the surface of C. These vestiges of non-R instance of Rho in particular are of R’ in the provisions of article I, section 2 and the seventeenth amendment, under which federal voters for House and Senate elections are to have the same qualifications as are requisite for them to vote for members of the most numerous house of their own state legislatures. Moreover, some amendments to the constitution use “right to vote” without language that beyond-reasonable-dispute limits the right to vote to voting for Senators, Representatives, and the President.<sup>44</sup>

---

41. For example, the framers did not count “Indians not taxed” in the enumeration for apportioning Representatives. U.S. CONST. art. I, § 2, cl. 3 (retained in amend. XIV, §2). *See also* U.S. CONST. art. I, § 8, cl. 1 (uniformity of duties, imposts, excises); art. I, § 9, cl. 4 (superseded by amend. XVI).

42. I am uncertain whether the existence of this kind of evidence of a Rho right—*i.e.*, evidence of Rho itself in *its* own generality: here, right to vote, as opposed to right to vote *in* or *for*—always is necessary in reasoning to a Rho as an implied right, instead of to merely an R’ as an implied right. If such evidence is essential, there may be additional barriers to the implied right of privacy as a Rho general right with R’ child-bearing, R’ child-rearing, etc., instances as well as express fourth and fifth amendment  $R_1/R_2$  instances, instead of merely an R’ implied right of child bearing/rearing privacy.

43. Some of the majoritarian clauses, of course, require super-majorities, such as provisions for overriding a veto or amending the Constitution. U.S. CONST. art. I, § 7, cls. 2, 3 (two-thirds to override veto); art. V (amendments). The exceptions relate to non-momentous internal matters in Congress, such as that less than a majority may continue business under adjournment and one-fifth may compel a roll call vote, U.S. CONST. art. I, § 5, cls. 1, 3; or relate to the momentous issue that a state may not be deprived of equal suffrage in the Senate without its consent. U.S. CONST. art. V.

44. Compare the language of the fifteenth, nineteenth, and twenty-sixth amendments to the language of the fourteenth and twenty-fourth amendments: The latter carry language that delimits the “right to vote” scope of the amendments

All of these points, put grossly, are that our common understanding is that ours is a democratic society, run representationally by a voting populace, at both the federal and state levels; and that the Constitution secures this vision both expressly and interstitially. Hence, the arguments that make the existence of a true Rho-level Rho both legitimately possible and the better view also make compelling the view that one of the non-R instances of Rho in C is a right (approaching) R', i.e., a right securing a right to vote for state legislators. Although there is room for a contrary view, such a view would be better only if we were blind to the text and history of the Constitution and to our understanding of the kind of society ours is, and only if we ignored the way in which C itself dissolves the inconsistency between  $r_x$  and  $r_y$  for R.

But deciding that R' is secured in C does not end the matter. The question becomes what "R'" means. In particular, does R' have both  $r_x$  and  $r_y$  readings, as R does, or only one of these readings, or does it have some third reading? If R' has only reading  $r_y$ , for example, then states may have wholly nonrepresentative legislatures. If it has both  $r_x$  and  $r_y$  readings, legislatures may be modeled on the federal plan. Similarly the readings for R' might be constrained by doctrines that do not affect the readings for R. For example, a justiciability doctrine might constrain the Court from giving R' a reading that would result in requiring states to rectify gross malapportionment, but the reading would have to allow the Court to prevent states from completely abrogating R' given that R' is a right secured in C.<sup>45</sup>

The same considerations that lead to choosing as better the view that C secures a true Rho and that R' is an instance of that Rho, lead to

---

to elections for Representatives, Senators, President. The former say "[t]he right of citizens of the United States to vote shall not be denied or abridged by the United States or by any state on account of . . ." (race, color, previous conditions of servitude; sex; age, for those who are at least eighteen). This language obviously could be understood as impliedly guaranteeing a right to vote in states for state legislators, governor, etc. I put the point in the text in "beyond-reasonable-dispute" terms, instead of saying flatly that the fifteenth, nineteenth, and twenty-sixth amendments guarantee a right to vote in state elections, for two important reasons: First, the question in the *Reynolds* cases was whether there is a right to vote in state elections in a democratic, majoritarian, representational form; and these three amendments, one of which was ratified into the Constitution during the year the Court announced the *Reynolds* rules, do not address the "democratic vote" aspect of the right to vote questions. Second, although those three amendments are susceptible of being hammered into shapes that answer the question for the *Reynolds* cases, I want to suggest here that nuances of clauses in the Constitution are a vibrant source of information for constitutional reasoning about implied fundamental rights even when they are not the basis for the conclusions.

45. The possibility that R' had a third reading such as this justiciability doctrine was settled negatively in *Baker v. Carr*, 369 U.S. 186 (1962), and reconfirmed in the equal protection aspects of the *Reynolds* cases. See *infra* text following note 48.

choosing as better the view that R' has at least an  $r_x$  reading, namely that  $r_x$  is a reading of C as a whole and not merely of R as a part. Does R' then also have an  $r_y$  reading and, like R, deviate from the usual rule against inconsistent readings? The answer is negative on both general-reasoning and particular-reasoning grounds. As to general reasoning, if too many instances of Rho in C or even the most important non-R instance of Rho in C had both an  $r_x$  "general rule" reading and an  $r_y$  "exception" reading, the weights of  $r_x$  and  $r_y$  would decrease and increase, respectively. But that deprives  $r_x$  and  $r_y$  of their relative status of general-rule-with-an-exception and imbues them instead with a separate-but-related-rules status. Because R' is one of the most important non-R instances of Rho in C, it cannot have an  $r_y$  reading unless we are willing to force a radical reshaping of C of the sort drafters of constitutions do, not courts. That is, general reasoning about the status in which  $r_x$  and  $r_y$  stand to one another in C lead to understanding "the right to vote for state legislators" to mean only "the right to democratic majoritarian, representational participation." Moreover, this general reasoning is confirmable through the negative, particular-reasoning results of checking whether the explanation that supports  $r_y$  as an "exception" reading for R applies to R': That explanation does not apply to R' as a matter of historical fact.<sup>46</sup>

Hence, on two grounds R' means only  $r_x$  unless the Court violates the "we are only the Court" interpretive rule against judicial activism. This, almost perversely, is because R' is only an implied fundamental right, whereas R is an express right that not only comes from the Constitution with a canonical form but also comes with two express-text meanings. There is sufficient text and history to constrain  $r_y$  as an exception to  $r_x$  that sometimes applies to R, but nothing of either sort exists for R'.

When, however, certain related issues about R' arise, there is greater room for coherent disagreement about the determinate scope of R' or of some near relative of R'. The former concerns issues of how  $r_x$  determines whether such-and-so is an instance of R', and the latter concerns issues of the scope of Rho. For either kind of question, rights-based reasoning of the sort that leads to Rho, R', and  $r_x$  rapidly gives out. The answers to the questions must rest on reasoning tied to some other clause in the Constitution, on pain of the Court's otherwise being open to a charge of judicial activism.

For example, rights-reasoning may lead to deciding that the Constitution guarantees the right to elect the governor of a state, as well as legislators, but it does not provide a basis for saying the chief of police must be elected. Again, this is because the Rho "right to vote" has little more than that as its secure canonical form. Even if the canonical form of R' more nearly is "right to vote for major governing officials" than it is

---

46. 377 U.S. at 573-76.

“right to vote for state legislators,” only the most adventurous reasoning can torture the right to vote for major governing officials far beyond state legislators and governors to the point of police chiefs. To do so would invite an extension to water district board members or dog catchers.<sup>47</sup> The Court properly gives right-limiting answers about the scope of a right when rights-reasoning gives out in this way. That is, it denies that such-and-so is an instance of the right when there is no positive basis in the canonical formulation for giving either an affirmative or a negative answer.<sup>48</sup>

This need not completely foreclose constitutional protection, however, any more than it does when a question about how  $r_x$  determines whether such-and-so is an instance of implied right R' cannot be answered on a rights-reasoning basis because R' does not have sufficiently complete, textually secure canonical form. For example, given that there is a constitutional right to vote for state legislators and that “right to vote” in this context means a “right to democratic, majoritarian, representational participation,” may a state by all-but-unanimous popular vote adopt a legislature modeled on the federal Senate-House plan? There is some room for attempting to answer this question, which arose in *Lucas*,<sup>49</sup> through rights-reasoning. Some clauses in the Constitution might suggest the state may, but only very tenuously.<sup>50</sup> Analysis of the meaning of “right to democratic, majoritarian, representational participation” would be necessary to support a full argument. Yet these analyses would be no more or less compelling than exactly contrary analyses leading to the conclusion that the state may not adopt such a legislative model. The issue would thereby be reduced to how broadly an individual justice uses “democratic.” Here, rights-reasoning gives out because there is no constitutional text canonically ordering the adjectives in “democratic, majoritarian, representational voice.” Rather, political theories of the Constitution order these adjectives, and such theories give rise to legitimate differences in judgment as to whether the theories are sound, complete, elegant, and so on.

---

47. To give a rights-amplifying answer about electing chiefs of police, the Court ought to use the alternate reasoning I describe later in the text, for when rights-reasoning gives out, although the Court would not use the equal protection clause, as my later example does, to ground the extension of its reasoning. (This is not to say such an alternative is possible.) Otherwise, the Court should reach a right-limiting answer, as it did in the cases of the following note.

48. *E.g.*, *Ball v. James*, 451 U.S. 355 (1981); *Salyer Land Co. v. Tulare Lake Basin Water Storage Dist.*, 410 U.S. 719 (1973). Of course, the Court literally denied that *nonlandowners* have a constitutional right to vote for water district boards (and are not denied equal protection if landowners are allowed to vote for such boards); but the reason the Court is correct is that no one, not even landowners, has such a constitutional right, for reasons I state in this paragraph of the text.

49. 377 U.S. 713.

50. *E.g.*, § 2 of article I, with its implicit distinction between a House and Senate at the state level in describing voter requirements for federal elections.

Hence, when the question is whether a political majority, by state-wide referendum, can deprive a political minority of representational participation in future elections, no amount of reasoning about “democracy” or about whether “majority rule” is weightier than “representational voice” within our constitutional framework will be sufficiently free of the possible taint of idiosyncratic uses of “democratic,” “majoritarian,” or “representational.” To answer this *Lucas* question in a way less likely to be tainted by the socio-political views or idiosyncratic speech habits of the justices, the reasoning must shift its focus from the implied right to vote to a clause such as the equal protection clause, which applies generally to a variety of rights. That is, it must shift from rights-reasoning to clause-reasoning because the rights-reasoning has given out as a source of interpretive information.<sup>51</sup> This shift provides a textual basis and coordinate body of jurisprudence to ground the answer. The answer in turn indirectly will supply further “meaning” to the implied right. Over time, through repetition and reapplication in slightly altered circumstances, a group of such clause-reasoned answers may come to give the implied right more complete canonical form. This more complete form in turn allows the resumption of rights-reasoning, within the ground requirements for the cantiliver principle, until such reasoning gives out again.<sup>52</sup>

In *Lucas*, the equal protection clause answers whether “majority rules” or “representational voice” is the weightier in “right to democratic, majoritarian, representational participation,” i.e., what “democracy” “means” under the Constitution for the *Lucas* question. That clause provides canonical order to the adjectives in that it tells us a political majority may deprive itself of “its” own fundamental rights, including the right to majority rule, but may not deprive the political minority of its fundamental rights, including the right to representational participation in democratic rule, even through a popular referendum. Voters who dissent from having a nonrepresentational state senate are deprived of equal protection of the laws; and states therefore may not model their legislatures on the federal system.

Of course, this resolution depends upon two points, each of which was resolved in *Reynolds*: Voters, not trees or parcels of land, hold the right to representational participation in state legislative elections; i.e., state senators represent people.<sup>53</sup> Second, each voter has an equal right to representational participation.<sup>54</sup> These two points are versions of “one person, one vote,” taken in two different aspects. The first version comes

---

51. Again, if the right is an express right, the rights-reasoning is clause-reasoning but will eventually give out too; and the shift then is to a different clause.

52. See *supra* text between notes 11-14.

53. 377 U.S. at 562

54. 377 U.S. at 560-61.

from rights-reasoning about the nature of "right" itself, namely that the usual rule is rights-holders are natural persons. Exceptions to this rule are given explicit sanction in the text of the Constitution, none of which applied in *Reynolds*. They are also shorthand modes of referring to groups of persons organized under descriptions such as "state government versus federal government," "Congress versus the Executive," etc., none of which applied in *Reynolds*.

The second version, however, comes from straight-forward clause-reasoning under the equal protection clause. *Reynolds*, like *Lucas*, is an equal protection clause case that answers a question that cannot arise unless the Constitution secures an implied right to vote with the implied right to vote for state legislators as one of its constitutional instances. That is, the "one person, one vote" rule of *Reynolds* is not itself an implied right. Rather, it is an equal protection rule about an implied right. Objections to the "*Reynolds* rule," therefore, are aimed at the right itself and not usually at the equal protection analysis under which the Court reached the ultimate rules in *Reynolds*, *Lucas*, and other "right to vote" cases.<sup>55</sup>

Reasoning about a right under a clause such as the equal protection clause or the privileges and immunities clause is distinctly easier and safer than reasoning about the right itself, especially when the right is an implied right. These clauses are nearly content neutral and formalistic. They apply to a vast body of rights of greater and lesser importance. The jurisprudence of the clauses, therefore, is independent of the particular right in question. It stabilizes against interpreters' tendencies to manipulate the law or to import their own values.

Of course, the jurisprudence of the equal protection clause and similar clauses is not entirely "neutral." For example, different levels of scrutiny apply to different categories of rights under the equal protection clause. But the three-tier or sliding-scale analytic framework for deploying the equal protection clause, including the rules for determining which of the levels of scrutiny to deploy for which kinds of rights, are general rules that are formulable and deployable independently of the particular right in question. Small manipulations of equal protection analysis that are result-oriented for a particular right therefore are vastly dislocative for major

---

55. Some critics, unfortunately, confuse the point. Virtually all the Court's "right to vote" cases are equal protection clause cases. *E.g.*, *Kramer v. Union Free School Dist.*, 395 U.S. 621 (1969) (franchise restriction; strict scrutiny under equal protection clause). A few in part are rights-instances cases, but they reach negative answers (*see supra* note 34) and probably always will except on such narrow and improbable issues as whether a state may have its legislature appoint a governor instead of having the people elect her, etc. Under the analysis I have given of *Reynolds*, its companions and progeny, it is literally accurate but misleading to say, however, that the Court never has *held* that any particular political officers or bodies of a state must be elected or only has held that *if* the state grants franchise rights, voters must hold the rights equally.

portions of the library of cases on the Constitution, i.e., set off large ripple effects through the whole pool. They therefore are easier to see and, more importantly, are easier to guard against.

In contrast, result-oriented manipulations of rights, especially if by small increments, have much more local effects. They amount only to adding another adjective to the description of the right and are harder to see or guard against. Yet their illegitimacy is as great as other result-oriented manipulation. When the rights are express, the textual words for those rights serve to constrain result-oriented manipulation, hence to constrain illegitimate interpretation. But when the rights are implied, even this guardrail is missing. Rights-reasoning for them quickly becomes treacherous, and shifting to reasoning under a clause such as the equal protection clause becomes imperative.

One of the striking oddities of the privacy cases is the great extent to which they appear to continue to be rights-reasoning cases, unlike the voting-rights cases. The wonder, then, is not that when a majority of the Court recently in *Bowers* saw itself as being asked to add yet another right-amplifying adjective to the description of the right of privacy, the Court refused to continue rights-reasoning and reached a right-limiting result. The wonder instead is that the Court did not refuse even earlier, if the right of privacy is an implied right in some sense similar to the ways the right to travel or to vote are implied rights. In the first part of the next section I sketch the arguments surrounding the implied-right version and an equal protection version of privacy. I then analyze substantive due process privacy, making clear its dissimilarity to the rights to travel or to vote. Under this analysis, the constitutional meaning of "right of privacy" essentially, here put almost cryptically, is that a political majority may not use the criminal law to enforce its own view about how best to make morally responsible or otherwise sound decisions *when some identically acting people, without explanation, are exempt from the majority's judgment* and when the political minority is made up of good people whose moral views are within the accepted range of reasonable moral dispute. In the second part of the next section, I turn to a detailed examination of the Court's next-case worries in *Bowers*. These concluding analyses will serve as a reiteration, albeit in different garb, of the general descriptions of constitutional reasoning with which I began this Article.

### III. SUBSTANTIVE DUE PROCESS PRIVACY

The primary arguments for the right of privacy as an implied constitutional right follow the pattern of the right-existence or of the right-instance arguments for the right to travel or the right to vote. Privacy as a right, however, has a major and important difference from, for example, voting as a right. The Constitution provides limitations to the instances of voting rights, thereby preventing "right to vote" from having an un-



controllably expansive scope. The phrase "right to vote" itself poses substantial limits on its own denotative scope and sense. Thus, state action doctrine prevents voting on the family dinner menu from being constitutionally guaranteed, and "voting" is a notion that covers *how* decisions are to be made but leaves a whole universe of substantive decisions unaffected. It does not affect the *what* of decisions except that, in general, the majority will rule. But even this majority rule is constrained by the equal protection clause and a variety of express limitations on government (hence on the majority) in the Bill of Rights.

The right of privacy also is subject to state action doctrine. But that doctrine does not significantly reduce the likelihood of the privacy right's having a scope so expansive that it too broadly disables the political majority from instituting its social and political views. Similarly, "privacy" is a notion that fundamentally and immediately affects the "what" of a majority's decisions because "private" is a notion that covers *who* decides, namely the individual and not the majority.

Put another way, "voting" and "nonvoting" partition the universe of human affairs. We may not be entirely certain of where the partition-line falls, but we are sure the vast part of the universe is on the nonvoting side. We therefore need not be *too* concerned about the exact location of the partition line. But with the partitioning of the universe of human affairs into "private" and "public," we easily can see that one way of thinking about the Constitution would leave most of the domain under the public partition, while another way would leave most of it under the private partition. Locating the partition line therefore is extraordinarily important. Unfortunately, arguments that address the issue cannot be resolved simply by recourse to the text of the Constitution in any obvious way, nor by reference to our societal understanding that majority rules. This is true for two reasons. First, denominating something as "private" *means* the majority has no right to decide for the individual or to sanction him or her for his or her decision. Second, we as a society also believe that some matters are none of the majority's business, i.e., are private, hence "constitutional silence" cannot be determinative. The further consequence of this difference between voting rights and privacy rights is that there can be considerable dispute among reasonable people as to whether such-and-so is an instance of the privacy right.

Both problems with the right to privacy come down to the same thing: We appear not to have a textually secure canonical formulation for the right that both guides and constrains interpretations. Locating this right in "the Fourteenth Amendment's concept of personal liberty,"<sup>56</sup> in the penumbra of various provisions of the Bill of Rights,<sup>57</sup> or in the ninth

---

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

57. *Griswold*, 381 U.S. at 484-85.

amendment's reservation of rights to people<sup>58</sup> does little toward solving those problems. Scholars have drafted ingenious arguments about the source of the privacy right. The arguments intend to seat "privacy" in one or more of these clauses in ways that effectively will give guidance and constraint similar to the ways canonical text guides and constrains interpretations of other rights. But, as all America knows after the Senate confirmation hearings for Judge Bork, these arguments are subject to reasonable and serious, as well as to implausible and preposterous, challenges. The dispute focuses upon whether what the Court is doing in the name of the due process clause in the privacy cases is illicit because the Court is importing substantive values *into* the Constitution instead of finding them already in the Constitution.<sup>59</sup>

To avoid what is arguably a tainted process, other scholars have suggested the substantive due process cases ought more properly be conceived of as equal protection cases.<sup>60</sup> Although some of these equal protection

58. 410 U.S. at 153 (referring to district court's view).

59. The literature is vast. There basically are three sorts of views of the privacy right of *Griswold-Roe*. One camp consists of rights theories, some of which are unitary, e.g., Gerety, *Redefining Privacy*, 12 HARV. C.R.-C.L. REV. 233 (1977); others of which are mixed-rights theories, e.g., Thomson, *The Right to Privacy*, 4 PHIL. & PUB. AFFAIRS 295 (1975). See also TRIBE, ACL, *supra* note 18, at ch. 15 (privacy as set of irreducible minimum attributes for personhood); Richards, *Sexual Autonomy and the Constitutional Right to Privacy: A Case Study in Human Rights and the Unwritten Constitution*, 30 HASTINGS L.J. 957 (1979) (permissible content of legal enforcement of morals). A second camp consists of conventional morality theories; but the lines aren't always clear between this camp and the first one, e.g., Richards, *supra*. The primary expression of this second view is in PERRY, *supra* note 3; Perry, *Substantive Due Process Revisited: Reflections on (and Beyond) Recent Cases*, 71 NW. U. L. REV. 417 (1977); Perry, *Abortion, The Public Morals, and the Police Power: The Ethical Function of Substantive Due Process*, 23 UCLA L. REV. 689 (1976) (arguing due process clause authorizes courts to consult extra-constitutional values to strike down criminal laws that purport to further public morals but in fact touch upon nonobtrusive private matters because then the law is *ultra vires*). Of these two camps, my thesis about substantive due process bears some relation to those of the second camp, but it also bears some relation to those of the third set of views, i.e., the camp of the critics of substantive due process. The camp leader here is Dean Ely, who favors process theories and representation-reinforcing theories (hence favors the equal protection clause). See generally J.H. ELY, *DEMOCRACY AND DISTRUST* (1980) [hereinafter ELY].

The ultimate dispute between the critics and the members of the first two camps is aptly captured in the following exchange: Dean Ely writes that "substantive due process" is a contradiction in terms—sort of like 'green pastel redness.'" ELY, *supra*, at 18 ("By the same token, 'procedural due process' is redundant"). Professor Tribe replies that "the words that follow 'due process' are 'of law', and the word 'law' seems to have been the textual point of departure for substantive due process." TRIBE, CHOICES, *supra* note 22, at 11 (footnote omitted).

60. E.g., G. CALABREISI, IDEALS, BELIEFS, ATTITUDES AND THE LAW 110-14 (1985); Regan, *Rewriting Roe v. Wade*, 77 MICH. L. REV. 1569 (1979). They argue, for example, that *Roe* can be anchored under an equal protection analysis and

arguments have great strength, they cannot provide a way around the Court's decision in *Bowers v. Hardwick*.<sup>61</sup> Moreover, even if equal protection analysis were adequate for grounding *Roe* and, consequently, *Griswold*, it is not obviously adequate for explaining how the "informational" regulation cases are right, although it is adequate for the abortion funding cases.<sup>62</sup> That is, equal protection analysis lacks an adequate center for explaining why the state cannot require women who have come to a clinic for an abortion to listen to a litany of information about the abortion process, the medical, psychological and moral consequences of abortion, and so on.<sup>63</sup>

---

that *Griswold* will follow on the skirt hems of *Roe*. Women, after all, are the only persons who are burdened with choosing between foregoing sexual intercourse and running the risk of becoming pregnant, given that no method of contraception short of hysterectomy is completely failsafe. Because men are not and, for biological reasons, cannot be similarly burdened with such an either-or choice about sexual intercourse, abortion statutes such as those in *Roe* deny women equal protection of law. Further, because women run a particular risk through sexual intercourse that men do not run, namely that their bodies may become host to a fetus, women are denied equal protection of law if they and their male partners cannot use or obtain contraceptives. *Roe* and *Griswold* thus reach the right result, but for the wrong reasons, according to this argument.

61. Under Dean Ely's equal protection clause views, many laws aimed at homosexuals would be unconstitutional, but criminal sodomy statutes would not necessarily be among them. ELY, *supra* note 59, at 162-64, 255 n.92. Further, most of the equal protection arguments for women's sexual equality (hence abortion rights) will not easily carry over to homosexual men. See preceding note. This is because those arguments are consequentialist theories, not self-expression or autonomy theories. Nor would a suspect-class approach work here because homosexuality does not "announce itself" the way color, accent or surname, and, in the old days, birth certificates and school records announced race, ethnic origin, and illegitimacy for all the world to see and hear. Finally, even if homosexuals were a suspect class, there would be no violation of equal protection requirements if the sodomy statute applies to everyone: They are not uniquely burdened by such a prohibition, whether "sodomy" is taken in its narrowest or in its broadest sense.

62. If abortion statutes deny women equal protection because they are uniquely burdened for having engaged in sexual intercourse with men, surely poor women are uniquely burdened under regulations that will not defray some of the occasional costs of their sexual activity. To recognize an economic right for poor women who want an abortion, however, whether under equal protection analysis or under fundamental rights analysis, disrupts too vast an area of constitutional law: The Court increasingly has been getting out of the "Herbert Spencer's statics" business, *i.e.*, out of the business of seeing economic theories embedded in the Constitution. Although this point usually is offered to explain the demise of *Lochner*, I refer here to the evolution currently underway to replace the economic theories of active and dormant commerce clause analysis with representation-reinforcing theories, as well as to the Court's abandoning such distinctions as those between taxes and penalties in taxing power cases, etc. See also *infra* text beginning at note 97.

63. Thornburgh v. American College of Obstetrics & Gynecology, 476 U.S. 747 (1986). "The States are not free, under the guise of protecting maternal health or potential life, to intimidate women into continuing pregnancies. . . . [These

These are not inadequacies unique to an equal protection analysis. Fundamental rights analysis similarly has difficulty explaining the categorization of *Roe* and its predecessors as about procreation and family but *Bowers* as about sexual acts. Rights analysis also has difficulty explaining how a woman who has a *right* to abort can be denied the means of effectuating that right, especially if her right to use contraceptives is an instrumentalist form in a strong sense of her right to avoid bearing a child. Nor does the fundamental rights approach easily explain how the Court's holdings in such cases as *Thornburgh v. College of Physicians*<sup>64</sup> follows from *Roe*, which no longer is a "right of privacy . . . founded in the Fourteenth Amendment's concept of personal liberty. . . ."<sup>65</sup> Rather, given the *Bowers* description of the right of privacy, *Roe* is a "right to terminate a pregnancy." That right is further modified by a variety of governmental interests, which themselves would appear to be open to including interests of ensuring the woman makes a medically-informed and morally-grounded decision about aborting.

Any libertarian theory of the privacy cases, to be adequate, must satisfactorily explain how these other cases concerning the illegality of certain information regulations for abortion, the lack of constitutional guarantee for abortion funding, and so on—as well as such major privacy cases as *Roe*, *Griswold*, *Moore v. City of East Cleveland*,<sup>66</sup> and *Bowers*—fit together.<sup>67</sup> Fundamental rights and equal protection analysis, in short,

---

statutes attempt] to deter a woman from making a decision that, with her physician, is hers to make." *Id.* at 759. The statutes provided suspension or license revocation for physicians, and criminal penalties for others, for failing to supply "informed consent" information to the woman. *Id.* at 759-60.

64. *Id.*

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

66. 431 U.S. 494 (1977).

67. The alternative is that some or all are wrong; hence, libertarian theory has the burden. My special burden is *Baker v. Wade*, 553 F. Supp. 1121 (N.D. Tex. 1982), *aff'd on other grounds*, 743 F.2d 236 (5th Cir. 1984), *rev'd*, 769 F.2d 289 (5th Cir. 1985) (en banc); *rehearing en banc denied*, 774 F.2d 1285 (5th Cir. 1985); *cert. denied*, 106 S. Ct. 3337 (1986). The Texas statute in *Baker* criminalized only homosexual sodomy; the Fifth Circuit upheld it, and the Court refused to grant a writ of certiorari. Refusing to grant that writ does not establish precedent of any kind, of course, but I am not naive enough to believe that it was a neutral act on the part of the Court. Nor am I naive enough to believe the current Court will use the substantive due process doctrine I describe in this Article to strike such a statute down—or any other doctrine, for that matter—when/if a "conflict among the circuits" arises.

Part of the problem is that the Justices believe substantive due process privacy is a rights theory, and an increasing number of the Justices believe that rights theory rests on the shoulders of *Lochner* or, at least, on the same kind of mistake. However, see *infra* text beginning at note 97. Another part of the problem is that the Court feels besieged by the outcry over *Roe* and is unwilling to step once more into the breach, at least as long as the Court can avoid doing so under neutral rules such as the rules for refusing a writ of certiorari.

leave much to be desired on this score. Most importantly, neither fundamental rights analysis nor equal protection analysis adequately expressly addresses the ultimate rebellion-point of many Americans about *Roe* and *Griswold*: whether abortion and artificial-device contraceptives are moral. That issue is of more than passing interest for theories of the right of privacy in that it is, in a sense, the motherlode for the right in ways that provide secure canonical form for "right of privacy" as a due process "right" of individuals against the majority. The very security of this form will obviate a raft of next-case worries that became an urgent matter for the Court in 1986 in *Bowers*.

The analysis in the remainder of this section is a pointedly amplified version of the Court's own, if today almost unconscious, theory of the right of privacy as a due process limitation on criminalization. Privacy analysis threatens to become disarrayed because it has drifted away from this linchpin connection to the due process clause and has delved instead into substantive explorations of privacy instances, i.e., into the meaning of "privacy" itself, separated from its due process clause source. When the "privacy" is cut adrift from that clause, the Court is on treacherously thin constitutional ground in that "privacy" does not have as its canonical form the form under which any members of the Court reasoned about privacy in *Bowers*. The Court properly then reaches right-limiting negative answers to the instances questions. But increasing numbers of such negative answers will tend to make the Court uneasy about its earlier right-amplifying answers. Such uneasiness could lead the Court to "revoke" the right of privacy entirely, which is troubling on libertarian grounds and would result from the Court's forgetting that the right of privacy *does* have secure canonical form, just not the one under which the Court increasingly has taken to reasoning.

#### A. *Morality Grounding for Statutes*

The morality tension that lurks in *Roe*, as well as in *Griswold*, finally surfaced fully in *Bowers*. The Court essentially declared that, because homosexual sodomy long and widely has been viewed in the United States and Western civilization as immoral and condemnable, Georgia is not constitutionally disabled from taking and enforcing the same view through its criminal law.<sup>68</sup> Such reasoning should give all advocates of the right of privacy great fear: Could not the same be said of abortion and, perhaps to a lesser extent, intentionally nonprocreative sexual intercourse? There have, of course, also long been people who did not view abortion or the use of artificial means of avoiding conception as immoral; but the same point could be made about sexual relations between two people of the

---

68. As will become apparent, the *Bowers* rule is not properly put in this way as a substantive due process privacy rule: It needs to omit "homosexual."

same sex. If the latter point did not count in *Bowers*, and it did not, how could the former point count in *Roe* and *Griswold*?

Some jurists and scholars have attempted to explain aspects of the morality reasoning in *Roe*. Justice Blackmun, for example, addressed this problem in part in his discussion of whether the fetus is a person under the fourteenth amendment.<sup>69</sup> If the answer had been that the fetus is, the state then apparently would have had an all-but insuperable argument that abortion is murder, hence proscribable under the usual rules and defenses for murder. Similarly, scholars have explored the notion that the *Roe* decision calls a halt in an area fraught with moral ambiguity and dispute to allow a new moral consensus to form.<sup>70</sup> Yet nothing angers the right-to-life activists more than Justice Blackmun's paragraphs about "person," and nothing heretofore has made convincingly clear how his whole opinion—including his canvassing of ancient, common law, and Western views about abortion and of contemporary diversity of statutory approaches to abortion—has any bearing on a morality issue or how it is a legitimate part of substantive due process reasoning.<sup>71</sup>

The morality issue is complex for individuals and theologians, but its resolution under the Constitution is relatively straightforward. It is, moreover, one whose basic outlines the Court articulated clearly in the second half of the third of the three arguments in *Eisenstadt v. Baird*:<sup>72</sup> The state

69. 410 U.S. at 159-62 (concluding "the unborn have never been recognized in the law as persons in the whole sense").

70. *E.g.*, Tribe, *Structural Due Process*, 10 HARV. C.R.-C.L. REV. 269 (1975). See also *supra* the conventional morality theorists of note 59. There also are arguments that the right of privacy is a "moral concept . . . of personal autonomy," Feinberg, *Autonomy, Sovereignty, and Privacy: Moral Ideal in the Constitution?*, 58 NOTRE DAME L. REV. 445, 483-92 (1983); or is a decision-allocation rule for areas of moral flux, Tribe, *Foreword: Toward a Model of Roles in the Due Process of Life and Law*, 87 HARV. L. REV. 1 (1973). All such notions have been greeted with the charge that the right of privacy then stands for the "privatization of morality [and constitutionalizes] moral relativism." Bork, *Tradition and Morality in Constitutional Law* 3 (1984) (monograph).

71. The clear implication of Justice White's canvassing the history of attitudes about sodomy in ancient Greece, Henry VIII's England, and American jurisdictions from the Revolution to the present in *Bowers* is that he believes the similar discussion in *Roe* of the western world's ancient and modern views on abortion was an operation in the methodology for finding the "content" of due process privacy. Probably he is correct in believing that Justice Blackmun had such a view of what he was doing in *Roe*. I offer a different account of the role of such canvassing in substantive due process cases, namely that the Court is insuring that there is not some morality argument that will justify the statute but that the state's representative has not thought to offer. See *infra* note 84 and accompanying text.

72. 405 U.S. 438 (1972). Even if, Justice Brennan wrote, contraception is immoral (hence contraceptives are immoral) and even if the *Griswold* right to use contraceptives

is no bar to a prohibition on the distribution of contraceptives, the State

may not use the criminal law to further a notion of what conduct is blameworthy unless the state's mode of implementing its view is neither over- nor under-inclusive. This holds true even when the lack of inclusive fit stems from a constitutional provision or guarantee that disables the state from achieving a better fit. Lacking that, the state needs some other basis that meets "fit" requirements because due process and equal protection limit what the state may make criminal in the absence of undergirding notions of blameworthiness.

This is not a novel view for Justice Brennan to have advanced in *Eisenstadt*, although he advanced it solely in traditional equal protection terms, at one juncture with a coordinate right-reasoned view about *Griswold* fundamental privacy.<sup>73</sup> But its lack of novelty is exactly what allows us to see how properly to restructure his point within traditional constitutional criminal law due process doctrine and thus within the line of substantive due process reasoning that began *Lochner v. New York*. *Meyer v. Nebraska* and *Pierce v. Society of Sisters*, of course, are cases that do so without *Lochner's* misstep.<sup>74</sup> The Court stressed in those two cases that the state could not adopt the model of Plato's *Republic* for how best to mold children into good citizens and enforce that view through the criminal law.<sup>75</sup> In this sense, *Roe* says the state cannot adopt certain methods for

could not, consistent with the Equal Protection Clause, outlaw distribution to unmarried but not to married persons. In each case the evil, as perceived by the State, would be identical, and the underinclusion would be invidious.

*Id.* at 454. To Justice Brennan's rule I have added that overinclusion is invidious and that lack of fit because constitutional guarantees disable the state from achieving better fit is no excuse. And of course, I do not tie the rule in the text to the equal protection clause. I provide arguments for each variation in the text that follows. Those arguments also will make clear what my analysis would be in a case in which the legislature had not been so inept as to distinguish between the married and unmarried.

73. That is, in the first half of the third argument, he reasoned that privacy belongs to individuals, not to marital units: If *Griswold* prevents states from banning distribution of artificial modes of contraception to married persons (and not just use by them), the same rule governs as to the unmarried. 405 U.S. at 453-54.

74. I detail the misstep in *Lochner* beginning *infra* at note 97.

75. The *Meyer* statute criminalized teaching children any modern foreign language other than English before the ninth grade in any public or private school. 262 U.S. at 397. Criminal sanctions therefore did not attach to out-of-school tutorials in any language at any age or to teaching ancient language at any age in any school. Hence, traditional criminal law "harm" arguments could not support the statute. *Id.* at 400, 403. To the state's argument that inhibiting training of children in foreign languages contributed to their civil development and Americanization, the Court responded that the state could not use these means, even if Plato and the Spartans would have approved of them. *Id.* at 401-02.

The *Pierce* statute criminalized parents' failure to send their children to public school from age 8 to 16. 268 U.S. at 530-31. The state could not argue education was harmful, *id.* at 534, therefore, and had to trace the harm to the difference between public and private education. It tried to do that by claiming only public

molding women into morally responsible agents. The ultimate libertarian reason is no one, not even an overwhelming political majority, has a monopoly on socio-educational moral truth in areas in which good people have diverse views. But the *constitutional* reason is that the state particularly cannot use the criminal law to give effect to its views in such an area when the state's rule is inconsistent with the state's own views.

The state, i.e., a governing political majority of the people and their legislators, is the arbiter and guardian of public morality, health and safety. It may use the criminal law as a means to further these ends as long as such means comply with constitutional constraints. Those constraints stem primarily from the due process and equal protection clauses and the cruel and unusual punishment clause. These restraints conjointly and collectively require the criminal law to satisfy notice, universality, and just-punishment standards, all of which are variations of a due process fairness principle.<sup>76</sup> But due process fairness requirements are not satisfied simply if there is regularity in a non-vague criminal statute's enactment, availability of the enactment in public documents, and evenhanded enforcement. Rather, as the degree of severity of the sanctions for the statute's violation increases and the extent of the statute's exemptions broaden due to narrow definition of the proscribed act, the due process notice requirement must be more adequately served than by the mere possibility that actors could consult statute books in the local library to discover what standard of conduct the state has decreed. The state satisfies the notice requirement for the statute in a deeper sense by having moral grounds that any adult member of the society is highly likely to know,<sup>77</sup> or by having health or safety grounds that promote avoidance of reasonably obvious risks such that anyone is likely to act within the ambit of the statute.<sup>78</sup>

Because the state is the arbiter of morality and safety, courts usually simply accept a state's assertion that actors had the requisite due process

---

schools could be trusted to instill loyalty to the United States, *id.* at 528 (argument of appellant); that private religious schools were contributing to a "rising tide of religious suspicions," *id.* at 525 (argument of appellant); and that the law primarily would affect immigrants or their children and would contribute to their Americanization. *Id.* To this the Court responded, "The fundamental theory of liberty . . . excludes any general power of the State to standardize its children by forcing them to accept instruction from public teachers only." *Id.* at 535.

For the purpose of my analysis of substantive due process, the important points in *Meyer* and *Pierce* are that the states did not have criminalization "harm" arguments that could pass scrutiny by justifying the distinctions the statutes drew. (These cases also, of course, contain passages that support rights theories and the ultra vires version of conventional morality theories. See *supra* note 59).

76. I examine some of the due process limits of the law and the consequences for the language of the law in Morrison, *Excursions*, *supra* note 7.

77. See, e.g., *Morissette v. United States*, 342 U.S. 246 (1952); cf. *Lambert v. California*, 355 U.S. 225 (1957).

78. See, e.g., *United States v. Park*, 421 U.S. 658 (1975); *United States v. Freed*, 401 U.S. 601 (1971).



notice. That is, the court accepts unsupported assertions from the state that the prohibited conduct is blameworthy or is obviously inherently dangerous. On rare occasions, however, the constitutional due process guarantees—that no one shall be deprived of life, liberty, or property without due process of law—bring political majorities and minorities into conflict in ways that pit courts as ultimate guarantors of due process fairness against states as arbiters of public morality or safety. Suppose, for example, a state prohibited and punished all whistling in public on grounds that whistling is immoral or is inherently dangerous. Even if there were no first amendment problems with such a statute, there are due process criminalization problems. The state's assertions of justification simply and clearly are not even plausible, let alone arguably true. Courts cannot ignore that lack of plausibility without also failing in their constitutional duty to ensure fairness in a sense remote from the usual fairness issue in criminal law.

Criminal statutes that raise due process notice problems by being imperfectly justified in moral or safety terms usually are not as clearly problematic as a statute prohibiting and penalizing public whistling. When they are so clearly problematic, courts tend to strike the statutes under the first amendment or other provisions rather than under the due process clause.<sup>79</sup> When, however, courts use the due process clause to constrain the states from criminalizing certain conduct, the states have opened the door to this due process review by defining the crime in such a way that some conduct identical to the proscribed conduct and equally an instance of the alleged moral or safety justification is exempt from the prohibition, but the state is unable to justify that distinction except through recourse to notions about how actors ought to make blameless moral decisions. Substantive due process, i.e., the right of privacy doctrine, disallows states from using the criminal law to enforce majoritarian views about moral reasoning when the dissenting views are ones reasonable, good people hold; when the moral conclusions are subject to reasonable, legitimate dispute; and when the criminal statute the majority uses exempts some similarly acting persons from its proscriptions without an explanation proper to criminalization justifications.

In *Griswold*,<sup>80</sup> for example, Connecticut could have made criminal all modes of contraception, and perhaps prevented Supreme Court substantive due process review, by advancing the unsupported moral ground that all contraception is immoral. But no one believes this, not even the Vatican.<sup>81</sup> Perhaps if Connecticut had such a statute and alleged it to be undergirded

---

79. E.g., flag desecration statutes. *Meyer* and *Pierce* had first amendment aspects to them and therefore fall in between those cases and such cases as *Griswold* and *Roe*.

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

81. The Vatican allowed the "rhythm" method of avoiding pregnancy.

by this moral view, the Court properly would have taken judicial notice that this is not even a plausibly good faith claim.<sup>82</sup> As things were, Connecticut's statute proscribed and penalized only all artificial-device contraception. This sort of statute on its face invites a substantive due process analysis because the best morality argument in its favor is that there are only two morally proper ways for couples to have sexual relations: either procreatively or Vatican-roulette procreatively. Connecticut did not even proffer this moral argument, however. If it had, the state would have needed to explain the moral distinction between possibly (even if "we hope not") procreative sexual relations and sexual relations the parties intend to be nonprocreative. Such an explanation would be necessary because there is no preanalytic, a priori, or even reasonably certain moral truth to the proposition that nonprocreative sex is immoral or that guarding against procreation during sexual intercourse is morally wrong.<sup>83</sup>

Because criminal statutes that do not rest on moral grounds alone must further other interests with a reasonable degree of inclusive fit, contraception statutes stand or fall depending on whether proscribing and penalizing the use of artificial-device contraceptives furthers those interests in rational ways. The statute in *Griswold* did not. Prohibiting use of such contraceptives is an irrational way to further a health interest, for example, and has the most marginal effect imaginable on illicit sexual activity. Moreover, the primary three dangers of illicit sex are harming one's family by adultery, bringing diseases home, and producing illegitimate children. These dangers either are not avoided or affected through the criminalization of artificial-device contraceptive use or are better met through the use of such contraceptives. Absent other justifications, and the Court could think of none,<sup>84</sup> the Connecticut statute was irrational and had to fall.

---

82. *I.e.*, treated it like the no-public-whistling statute.

83. This may be to say our society does not believe nonprocreative sex is immoral. That, of itself, may explain why Connecticut in fact did not offer this moral argument for its statute: That moral argument, too, would be treated like the one for the "public whistling" statute.

84. The grounding of criminal statutes needs to be what rational legislators could have had as reasons; hence, if the state's attorney general cannot think of the appropriate grounds, the Court must further its differential role in a democratic society as much as possible by supplying an appropriate ground if it can, unless the statute infringes a constitutional guarantee or limitation (other than the due process clause, taken in the substantive due process uses I describe in this Article) on governmental power.

For substantive due process analysis, the best way to understand Justice Blackmun's canvassing the social and legal history of abortion all the way back to the Persian empire in *Roe*, 410 U.S. at 129-52, and the law's views of the unborn, *id.* at 159-62, is to see him as searching, first, for the justifying argument Texas' attorney general had not been able to provide for the Texas statute. The same then would be true, but conversely (*i.e.*, confirmingly) for Justice White's historical nutshell on homosexual sodomy in *Bowers*, 478 U.S. at 192-94. Under this way

The substantive due process privacy doctrine thus has two parts. The first part is that the due process clause limits what the state may make criminal because, under that clause, the three central norms for criminalization are blameworthiness, universality, and notice. These three norms set conjoint standards. When a criminal law exempts some peoples' acts from its coverage, the requirements of a blameworthiness of the others' acts increases. As blameworthiness lessens, notice requirements increase, etc. For example, the law never has criminalized all homicide, i.e., all killing of human beings by human beings. The reason, of course, is that societies as a whole never have viewed all homicide as immoral, nor even all intentional homicide as immoral. The law does criminalize some kinds of homicide, however, and categorizes the crimes according to varying notions of blameworthiness under which the criminalization inclusively fits. Thus, we view murder, which is but an intentional species of homicide, as immoral and a killer's murderous act as highly blameworthy. We treat homicide as less blameworthy should the act be in the heat of passion, and treat homicide as not blameworthy at all when it springs from insanity. For each level of criminalization of homicide, the level of blameworthiness increases in proportion to the extent of the exceptions of homicidal acts from the scope of the criminal statute. The statutes for negligent homicide to manslaughter to murder form a continuum that, read left to right, cover acts of decreasing inclusiveness but increasing blameworthiness by falling at different places on a mens rea line.<sup>85</sup>

---

of viewing the role of such discussions in substantive due process reasoning, they are different in kind from similar discussions in cruel and unusual punishment issues, ordered liberty issues, or privileges and immunities issues. Specifically, in the substantive due process cases, they are *not* modes of discovering or searching for values at all in their first uses, but are part of the Court's discharge of its duty not to invalidate legislation simply because the state's representative is not sharp enough to proffer a validating ground. In this regard, a substantive due process challenge in its first stage does not shift a heavy burden to the state in the same way that a challenger's making out a prima facie case under the first amendment or the commerce clause shifts a large burden to the state.

The second point of such socio-historical discussions in substantive due process cases is to ensure there is reasonable dispute among people of good will about morality or moral reasoning in the second stage of substantive due process reasoning and does not arise unless the results in the first stage are negative, i.e., there are no tailored moral grounds for the statute with its exemptions. (This, too, is not best understood as a search for values, then, but for the existence of *competing* values.) Hence, Justice White's opinion in *Bowers* quite properly never reaches the issue of whether good and reasonable people do not view homosexual sodomy as immoral because the statute did not fail to pass the first stage (albeit not for the reasons he assigns by considering only homosexual sodomy): The lack of comments about such other views in *Bowers* is stark and ought to have some constitutionally rational explanation—simply suggesting the *Bowers* majority is homophobic simply will not do.

85. The social harm arguably is the same in each situation, depending upon how elastically we use "social harm."

When the state justifies a statute that prohibits and punishes murder by saying murder is immoral, there is a one-to-one correlation between the moral proposition, including its exemptions, and the statute, including its exemptions. "Murder" for the moral proposition and for the statute is the unjustified and unexcused intentional killing of one human being by another, but intentional homicide in legitimate self defense is not murder. When, however, the state justifies an abortion statute that covers all but therapeutic abortion by saying abortion is immoral, the justification is overinclusive. "Abortion" for the moral proposition does not have "self defense," i.e. therapeutic grounds, built into the moral assertion because abortion is just artificially induced miscarriage. But the statute defines the prohibited and penalized conduct so as to exempt therapeutic abortion. At most, then, the moral assertion for the abortion statute would have to be that nontherapeutic abortion is immoral. That assertion, however, by the very presence of the adjective "nontherapeutic" demonstrates this moral assertion at best is derivative from some other moral argument the state is not asserting. The effect of the due process clause in this circumstance, which is the juncture of the second part of substantive due process, is to tell states that if they cannot or will not give the true moral ground, and if the Court cannot figure out that ground for itself,<sup>86</sup> the Court will review the statute with an eye to whether the state is using the criminal law to choose one among many legitimately competing reasonable views which good people hold.<sup>87</sup> If the state is, the statute violates the due process clause's requirements for criminalization unless it furthers health or safety goals within a fair degree of inclusive fit.<sup>88</sup>

The doctrinal rules of criminal law due process for blameworthiness, universality and notice thus are geared to accommodating the principle that the state—i.e., a governing majority—is the arbiter of morality by setting only limited, formal (i.e., nonsubstantive) constraints on what the state may make criminal through unsupported appeal to morality. When the state fails to meet these minimum formal due process standards, its statute is open to review under the second part of substantive due process privacy doctrine. This is the "substantive" part of due process that gives canonical content to "right to privacy": When good people have differing reasonable views about how best to make decent moral or sound personal decisions,

---

86. See *supra* note 84.

87. *Id.*

88. The review standard on these health or safety justifications, of course, would be higher than mere rationality because the statute already has run into trouble as a criminalization statute for lack of moral grounding. This is similar to the heightened review of health and safety justifications for inclusive-fit issues in equal protection analysis when the statute appears to draw distinctions on the basis of knee-jerk, stereotyping reactions of habit about gender differences instead of legislators' thoughtful choices. *E.g.*, *Craig v. Boren*, 429 U.S. 190 (1976); *Reed v. Reed*, 404 U.S. 71 (1971).

the majority may not use the criminal law to rule out and criminalize the minority's view.

Because this second doctrine is closely related to the first set of doctrines, it is located with them under the due process clause. The phrase "right of privacy" simply is the shorthand designation for the second doctrine; but privacy analysis cannot begin unless the state has prompted privacy review by failing to meet the requirements of the first set of doctrines, particularly by failing to meet the universality requirement. That is, privacy analysis begins only when the state exempts some people from its criminal statute by being underinclusive for the statute's alleged moral grounding. This is true even when the state's statute is under-inclusive for the state's moral view due to reasons beyond the state's power.

For example, the Constitution prevents states from not exempting some women from an abortion statute; i.e. the cruel and unusual punishment clause of the eighth amendment and the due process and equal protection clauses of the fourteenth amendment require states to treat therapeutic abortion as noncriminal. This prevents the states from using, as a moral argument for criminalizing other abortions, that all abortion is immoral. This in turn puts the state in the position of needing to provide moral justification for the statute that is neither over- nor under-inclusive. If the state fails to show such moral grounding, it must give nonmoral justifications. Those justifications, of course, also must inclusively fit the distinction the statute draws between therapeutic and nontherapeutic abortion, even if the state draws this distinction only because the Constitution forces the state to draw it. No one yet has arrived at a moral justification for criminalizing only nontherapeutic abortion. That is, the moral arguments would fit a statute that criminalizes all abortion. Not only has no state ever had such a statute, but the Constitution forbids it.

Hence, moral views about abortion are not at issue in constitutional review of abortion statutes not because the Supreme Court will not countenance those views or prefers some views to others, nor because the Constitution prohibits some or all of those moral views, but only because the states do not *have* moral arguments that fit what the state is doing when the state, as it must, exempts some abortions from criminal sanction. Further, states may not use quasi-moral arguments about how its citizens should engage in moral reasoning and enforce those arguments through the criminal law when there is reasonable dispute among good people as to how to reason and what to conclude about such matters.

Exactly because the substantive due process point in *Roe* precludes states from choosing one view of how to ensure its citizens make morally responsible decisions and from enforcing that view through the criminal law, states may not require women, as a precondition to abortion, to submit to an inquisition as to whether they have thought through the moral ramifications of aborting, nor to submit to a lecture on those ramifications. Nor may states cloak a moral inquiry or message in the modern substitute

form of “psychological ramifications” when they plainly are using these “information” regulations to ensure morally responsible decision making and backing these regulations with penal or quasi-penal sanctions.<sup>89</sup>

States may spend their monies, however, to spread their views about the morality of abortion or of nontherapeutic abortion for certain reasons.<sup>90</sup> They may express opinions in non-face-to-face settings about the physical, psychological, or even moral consequences of abortion, or about alternatives to abortion. In face-to-face settings, states may require medical staffs to *offer* to discuss these ramifications with the woman, of course; that is good medical practice.<sup>91</sup> States also may refuse to pay for abortions.<sup>92</sup> As with all other expenditures of tax monies, states constitutionally may do virtually as they wish.

The properly stated substantive due process privacy message for the constitutional issues in *Bowers* follows the pattern of *Roe* and *Griswold*: Georgia constitutionally may criminalize *all* sodomy, both homosexual and heterosexual, through an unsupported appeal to a moral assertion that *all* sodomy by anyone with anyone always is immoral. As long as Georgia takes such a view, it does not open the door to substantive due process analysis in that it does not take the first step in doing so; it avoids criminal law due process analysis by making its statute and moral judgment both absolute and universal. This means, of course, that Justice White’s very suggestion that heterosexual sodomy might be treated to a different result from the *Bowers* result is a timebomb for *Bowers*. For, as soon as “sodomy is immoral” becomes “homosexual sodomy is immoral,” the stage is set for saying the immorality argument itself is not yet complete because the general principle is not yet stated. When a state does claim that homosexual sodomy is immoral, but heterosexual sodomy is not, the analytical map is the one Justice Blackmun set out in *Roe*. The Court’s decision in *Bowers* is not, then, the end of hope for homosexuals. Their hopes, however, rest in the almost Kafkaesque hope that, just once more, the majority will discriminate against them.

Alternatively, Justice White’s hint is a timebomb for substantive due process privacy itself. If the Court were to say heterosexual sodomy is a protected privacy right activity but continue to say homosexual sodomy is not, it would be unable to explain why, while accepting a similar assertion about homosexual sodomy, it refused to accept the state’s unsupported

89. *Thornburgh*, 476 U.S. 747. See *supra* note 63.

90. E.g., “gender-preference is not a good moral reason for abortion,” etc., on state-sponsored public service messages.

91. Similarly, states may require women to sign forms consenting to abortion, just as they would sign forms consenting to heart surgery, even if states do not require the latter consent forms. *Planned Parenthood v. Danforth*, 428 U.S. 52, 65-66 (1976).

92. *Harris v. McRae*, 448 U.S. 297 (1980); *Maher v. Roe*, 432 U.S. 464 (1977).

assertion that all sodomy, even heterosexual sodomy, is immoral. A state's assertion about the immorality of even heterosexual sodomy is not, after all, so lacking in plausibility as to not be in good faith. Yet that is the only ground upon which the Court legitimately may second-guess a state's unsupported moral assertion for a criminal statute in which there is one-to-one correlation between the state's universal, absolute moral assertion and statutory prohibition. The Court, then, eventually would notice that it is arbitrating morality without constitutional justification and, out of confusion, probably would end the *Meyer-Pierce* line of substantive due process, just as it did the *Lochner* line. Unlike *Lochner*, which originally was mistaken, however, the *Meyer-Pierce* line would end because the Court made a post-*Bowers* error in constitutional interpretation. That mistake would be, as hinted in *Bowers*, of thinking of substantive due process privacy review as a matter of delving into the "meaning" of "private" as most Americans use "private."

### B. Next-Case Worries and an Ancient Case

One of the long-standing sources of discomfort with rights theories of substantive due process is *Lochner*, including its later rejection. *Lochner's* mistakeness today is a constitutional given. Yet there is considerable difficulty about how to say *Lochner* was wrong without also shaking the foundations of *Griswold*, *Roe*, *Moore*, and other substantive due process cases. Saying *Lochner* was about economic freedom, which is not a constitutional guarantee, while the other cases are about privacy or familial freedom does not ensure that we are not mistaken about whether privacy or familial freedom *is* a constitutional guarantee. This specter of *Lochner* accounts in large part for the majority's *Bowers* rule. The majority could discern no existing way, other than by fiat, to distinguish consensual, adult bedroom-private homosexual sodomy from incest, adultery, or use of illicit homemade drugs. The very possibility that the true difference between *Lochner's* rationale and that of *Griswold-Roe* is only fiat then makes especially dangerous holdings that appear necessarily to rest on fiat: homosexual acts protected but incestuous acts unprotected.

That is, a majority of the Court currently views substantive due process as a privacy right theory with some trepidation. With each adjective the Court adopts to describe protected activity under the right, the Court treads on ever more slippery ground exactly because there is a dearth of express text to act as an anchor. With the addition of each new adjective, then, the Court increasingly risks charges of making the privacy right up as it goes along. Although adopting new adjectives could be deemed neutral "constitutional interpretation," the Court's claims to be merely interpreting, and not constructing from its members' values or their perceptions of our values are stronger when there is express text anchoring the most central nouns and adjectives. Correspondingly, such claims are weaker when the Court deals with implied fundamental rights, as long as the Court's rea-

soning remains in the arena of rights analysis instead of turning to some express-text clause of the Constitution that applies to rights in general, such as the equal protection clause. Of course, with each refusal to add another adjective, the Court engages in constitutional interpretation, and hence in theory construction. But refusals to add new adjectives for rights at least comports with the minimalizing principle of better-safe-than-sorry, i.e. the "but we are only the Court" rule against judicial activism, and is especially important when the rights are implied rights.

For example, the very words "the freedom of speech" in the first amendment not only authorize the Court to engage in constitutional interpretation and theory construction, but also serve as constraints on that interpretation and construction. Had those words been "the freedom of expression," first amendment doctrine predictably would have developed quite differently in that "expression" authorizes and constrains differently from "speech." With implied rights, such as the right to vote for state legislators, there are no first-level textual constraints similar to those for "the freedom of speech." There are, however, second-level constraints in that the Constitution embodies a general bedrock for that right by providing *some* express-text "right to vote" language tied to state legislative elections as well as a quasi-textual constitutional purpose for voting, namely democratic rule. This purpose, itself "writ upon the Constitution" through a variety of clauses, including those for federal elections to the House of Representatives, provides a third-level of constraints and authority for constitutional interpretation and theory construction. For the right of privacy as an implied right, however, there arguably are no first- or second-levels of authority or constraints; and currently there is no third-level quasi-textual purpose that does more than restate "right of privacy" as "right to be let alone by government." But near-synonymy provides only translation, not purpose or explanation.

All of this means the dissenters in *Bowers* must take very seriously the majority's next-case worries, which are of the usual two sorts that arise in any rights-reasoned case. First, is there some way to describe the currently litigated activity on the basis of already-established adjectives from earlier cases? Second, if the Court must adopt a new adjective in order to hold the litigated activity protected, will this new adjective itself invite a particular group of next cases about which the justices' immediately predictable views are that those activities are not protected? These two questions are bound up with the cantilever principle: Any recasting of existing, established nouns or adjectives, whether from the text of the Constitution or from cases interpreting it, may result in expanding the denotative scope of a right.<sup>93</sup> The recasting therefore must be within rea-

---

93. Recasting also, of course, may make a retreat on the scope of a right; but then the principle at stake is the reverse of the cantilever principle and centers



sonable possibility according to the way Americans in general, and not merely lawyers, speak English.<sup>94</sup> It ultimately also must fit with the theory of the right or with a revamped theory thereof. If, however, the recasting immediately invites a set of foreseeable next-cases, the interpreters must be ready to extend protection to those foreseeable next-case instances, or have some reasonable grasp how to distinguish them later.<sup>95</sup>

If the interpreters do recast, the recasting builds adjectives and nouns up on previous ones and extends the cantilevered "shelf" describing the right. This process can repeat as long as the new interpretations conform to the same set of rules for cantilevering. At some point, however, a new interpretation will be too remote from the original nouns and adjectives, i.e. very far out on or above a cantilevered description of the right. At that point, rights-reasoning gives out and must stop, or there must be a super-theory that reanchors the extensions to the original description without the mediation of the intervening extensions. If rights-reasoning has given out, the only way to reach a right-amplifying result through interpretation is to reason under a different clause in the Constitution, as I have explained earlier.

The dissenters in *Bowers* were not able to convince the majority of the existence of already-established adjectives adequate to protect homosexual sodomy under the right of privacy exactly because everything the dissenters could suggest put a gloss on those adjectives that raised horrific next-case worries. If, for example, the Court had agreed to say the established adjectives of earlier cases were "consensual adult sexual activities in private places," the *Bowers* activity would be protected but so too would incest between an adult child and his or her parent or between grown siblings, as well as adultery and fornication. Not only were all members of the Court, including dissenters, at least predictably unlikely at the time of *Bowers* to say incest is protected under the right of privacy, but also reaching that result in the incest next-case would require adopting even more adjectives for a privacy right already light of express-text ties of the "sexual activity" sort in the Constitution. Nor could the Court *simply* describe the right so as to avoid these next cases by adding "nonincestuous" or "nonadulterous." Brute force, decision by fiat, does not conform to the rules for constitutional interpretation exactly because it inherently lacks legitimizing theory. Hence, the *kind* of adjectives that would be requisite to deeming even all-adult incest unprotected would be very different from

---

upon whether the retreat is overruling, even if only subsilentio or informally, previous interpretations of the Constitution or "cancelling" provisions in the Constitution.

94. See generally Morrison, *Excursions*, *supra* note 7.

95. If the second of these three applies, the interpreters probably ought to indicate at the time of recasting how the foreseeable next-cases are distinguishable. Usually, the dissenters will force this upon the interpreting majority.

the kind of adjectives that already surrounded the privacy right. They effectively would be consent rules, which usually do not have constitutional status. Finally, although such consent-rule development could be further applicable for holding adultery not protected, they would do nothing towards resolving constitutional privacy issues for fornication or use of illicit drugs. Rather than run any of these next-case worries, the majority in *Bowers* viewed the already-established adjectives for the privacy right as centered upon child-begetting, child-bearing, child-raising, i.e., as being effectively "fairly-traditional decisional privacy of fairly-traditional families." That is, for these interpreters, rights-reasoning simply had given out for "right of privacy."

The problem of the implied right theory for privacy is that it can, and in *Bowers* did, throw a monkey wrench into constitutional analysis when litigants try to make it do work it is not yet ready to do. Our current theory of privacy as an implied right is not yet ready to answer *Bowers* questions because it is not ready to answer certain next-case questions. Perhaps it never will be ready unless the Court makes a quantum leap in constitutional interpretation, i.e., a move out on a cantilevered shelf that will remain a "mistake" in the absence of later legitimizing theory. In the meantime, by treating the *Bowers* question as only a privacy right question calling for interpretation of the meaning of "right of privacy," the dissenters and majority have misdirected substantive due process privacy analysis. The proper question in *Bowers* is whether Georgia constitutionally may criminalize *all* sodomy; and the proper answer is that Georgia may, even if Georgia's basis for criminalizing sodomy is only the unsupported moral assertion that all sodomy is immoral. The situation is similar for next-cases involving incest and, very probably, adultery or fornication.

These answers of course do at least temporarily constrain the development of the right of privacy as an implied right from having ever-more libertarian contours. They reinforce any inclination to take the *Griswold-Roe* privacy cases as a familial right (albeit, with *Eisenstadt's* lessons, not as a "formal family" familial right) instead of as a sexual-autonomy or intimate-decision right. On the other hand, these answers do not foreclose further development of privacy as a right that includes all adult nonincestuous consensual sexual activity in private places. But such development would have to come soon enough and tie the substantive due process privacy "right" to the margins of some other express-text clause in the Constitution. Certain answers to questions implicating the right of privacy under the eighth amendment's cruel and unusual punishment clause, for example, could provide for the further development of "right of privacy" what the equal protection clause provided for "right to vote" in *Reynolds* and *Lucas*.

Be that as it may, substantive due process privacy already is fully adequate to handle all of the *Bowers* Court's next-case worries. For example,

states criminalize all incest. Therefore, there are no under- or over-inclusion problems between the incest statutes and their blameworthiness moral justification. Hence, full blown, statute-invalidating substantive due process privacy review is not at all applicable. Similarly, a state may criminalize all fornication on the grounds that it is immoral and prevent the second stage of substantive due process privacy review. There may be other sorts of limits to criminalizing fornication, of course, but those limits stem from other clauses in the Constitution, such as the eighth amendment's prohibition against cruel and unusual punishment. If, for example, the punishment for fornication were the same as that of rape or robbery, the sanction arguably would be "too great for the crime."

Further, the state could criminalize less than all fornication or acts that implicate fornication. For example, it could criminalize "open and notorious cohabitation" but not criminalize the proverbial "one night stand." All the state needs to do to justify its statute is, first, remember not to say that it rests on the moral ground that fornication is immoral. That ground is over-inclusive for the statute. Second, the state should have reasonably good grounds that do undergird the statute with some rationality (i.e., ones that go to "open and notorious"). Third, the state should not impose a disproportionate penalty for violations of the statute.

The first main point the Supreme Court needs to remember about substantive due process privacy is that it is a two-part constitutional limitation on what states may criminalize. The limitation is triggered when the state's reasons for criminalization are over-inclusive with respect to the statute's prohibition and the statute exempts some people's equally blameworthy acts from the proscription without sufficient explanation for the deviation from the due process requirement of universality in criminal statutes and therefore the statute's "underinclusion [is] invidious."<sup>96</sup>

The second main point the Court needs to remember is that the Court's privacy cases only derivatively are about the meaning of "private" or "privacy." That meaning is the result, not of the Courts' delving into the meaning of "privacy" directly, but of substantive due process privacy review. When, as in *Bowers*, the Court treats a privacy question as turning on "the meaning" of "private" or "privacy," even if only in terms of the meaning previous cases derivatively have established for either word, the Court misconceives its task as interpreter of the Constitution. It is likely then to make the same misstep it made in *Lochner*, in which the Court strung together its views of the "meanings" of "liberty" and "property" to cover "freedom of contract" and embedded them in the Constitution under the due process clause. That clause, like the equal protection clause, is not itself the source of substantive rights, whether of contract or of privacy, just as critics of substantive due process long have claimed.

---

96. *Eisenstadt*, 405 U.S. at 454 (full quote *supra* note 72).

Rather, the clause is procedural: It sets formal limits on criminal lawmaking. The ultimate substantive due process privacy rule, that states may not use the criminal law to shape its morally decent minority citizens into conforming to a majority's view about *how* to make morally responsible decisions, is no more substantive than the three-tier-review rules for the equal protection clause. These rules, also, of course, are substantive, but in a decidedly different sense of "substantive" than is appropriate to the rules for freedom of speech or free exercise of religion. That is to say, due process and equal protection "rights" are rights in a different and more general sense than are free speech rights, religious freedom rights, etc. The kinds of difficulties that arise for rights, namely that rights-reasoning eventually gives out when canonical text comes to an end, therefore do not arise for equal protection and due process "rights," including the substantive due process privacy "right."

*Lochner* of course, was wrong because it rested on the 1905 majority justices' own economic theories, just as *Plessy* was wrong because it rested on the majority justices' racial prejudices. Yet, just as the *Plessy* Court got the interpretation of the equal protection clause right at the first juncture and *then* went into error through racial prejudice, so did the *Lochner* Court. The statute in that case attached criminal penalties to an employer's requiring or allowing bakery employees to work more than 60 hours per week or 10 hours per day.<sup>97</sup> In the terminology of this article, the adjective "bakery" needed justification in that the statute did not apply to all employers and employees, thereby exempting a majority of persons in New York and raising "fit" issues. But the state in fact gave the Court perfectly adequate justifications: credible health concerns for the bakers and the public.<sup>98</sup> The Court simply failed to comprehend the significance of the justifications or, because of its own blinders of economic theory, refused to believe the state's proffered health reasons.<sup>99</sup> Some of this was the state's own fault: The New York attorney general also offered paternalistic reasons for the statute.<sup>100</sup> Further, the challengers argued the statute violated the equal protection clause because it did not apply to all bakery employees: "It really affects but a portion of the baking trade, namely, employees 'in a biscuit, bread or cake bakery, or confectionery establishment.'"<sup>101</sup>

The *Lochner* Court clearly held "the right of contract" and an entwined notion of "property and liberty" protected under the due process clause of the fourteenth amendment made the New York statute unconstitutional.<sup>102</sup>

---

97. 198 U.S. at 46 n.1.

98. *Id.* at 51.

99. *Id.* at 57-62.

100. *Id.* at 51.

101. *Id.* at 48. What the challengers claimed as to the statute's coverage was literally true, but what other kinds of bakeries trade are there?

102. *Id.* at 53.

But that is at the same stage as the “separate but equal” stage of *Plessy*, i.e., *after* the *Plessy* Court confused issues about private racial discrimination with the state’s power to engage in public racial discrimination and enforce it through the criminal law *and after* the *Plessy* Court got the law right at first: The equal protection clause absolutely enforces equality for the races before the law.<sup>103</sup> Similarly, the *Lochner* Court saw clearly what was at stake in New York’s using the criminal law to cover only bakery employees on health justifications: “[A]ll occupations more or less affect the health” of workers, hence all would be regulable in like manner on like justifications.<sup>104</sup> But when the state regulates on health and safety grounds, even using the criminal law, it may approach the problem in a piecemeal fashion both as to substantive due process challenges and as to equal protection challenges,<sup>105</sup> as long as the justifications bear a rational fit to the statute and its exemptions or underinclusions.<sup>106</sup>

### CONCLUSION

Professor Tribe recently abjured constitutional “theories that offer or presuppose answers . . .” to questions such as whether pornography advocates or sexual-intimacy privacy advocates can lay better claim to the free speech clause of the first amendment.<sup>107</sup> Thus, theories that claim to legitimize judicial review or to make “such excruciatingly hard cases” as *Roe* “seem easy,” whether easily right or easily wrong, are “not simply amusing in their pretensions but, in the end, as dangerous as they are unconvincing.”<sup>108</sup> The danger is the stilling of doubt in favor of either “easy” answer in matters of the power of some people over others—whether of nine justices over many voters and their legislators or of majorities over minorities — “*is the beginning of tyranny.*”<sup>109</sup>

I have endeavored in this Article to describe some of the ways constitutional reasoning can lead to different sets of answers, some of which will seem better than others for a variety of reasons. Some of the “answers” I have given about the cases I discuss do claim to make those cases “right.”

---

103. 163 U.S. at 544.

104. 198 U.S. at 59, concluding at 60 this would result in the nullification of the “liberty of person and [the] freedom of contract.”

105. See, e.g., *Railway Express Agency v. New York*, 336 U.S. 106 (1949) (ban on ads on vehicles, exempting ads of vehicle’s owners, upheld against equal protection challenge).

106. *Roe*, 410 U.S. 113; *Eisenstadt*, 405 U.S. 438.

107. L. TRIBE, CHOICES, *supra* note 22, at 6.

108. *Id.* at 6-7 (footnotes omitted).

109. *Id.* at 7 (italics in original).

For this I make no apology.<sup>110</sup> The result in *Brown*, for example, fits my instincts, the way I use words like “equal protection of the laws,” and the moral and nonsequitur mistakes I can see in *Plessy*. My analysis of substantive due process similarly makes *Roe* and *Bowers* “right” (but surely *not* easy cases or easy issues, whether for the Court or for Ms. Roe or Mr. Hardwick or the rest of us) by removing the room for the most challenging “illegitimacy” charges about them.

Two things about my extrapolations of the reasoning processes I describe may not be fully on the surface of my descriptions, however, and therefore my making no apology for theorizing or offering “right” answers may not be clear. The first is the value of the passage of time and of increasing experience in deciding similar cases: I make no claim that the Warren Court or the Burger Court “knew” it was reasoning in the pattern I describe for *Brown*, the *Reynolds* cases, or the *Griswold-Roe* cases. Nor do I claim that either Court at the time of these cases could have stated the holdings as I have stated them. Indeed, the substantive due process rule I describe arguably did not fully form until *Bowers*; that is, had the Court reached the opposite result in *Bowers*, the pathway to the substantive due process rule of this article would have closed. We instead would have branched off to the rights version of the right of privacy and now would be facing a different set of current and future problems. I find the pathway we, in fact, are on more comfortable ground for now, as long as the Court does not make the misstep it is poised on the brink of making, although—and this is my second point—I expect someday we will see how to retrace our steps to or cross over to a rights theory. When we see how to do that, we will have a new “right” answer that will not be subject to the illegitimacy challenges of the left to *Bowers* or of the right to *Roe*. That is all “right” means in constitutional law: that we have a way of talking about our constitutional interpretation that we find intellectually and legally coherent and satisfying.

---

110. I am in sympathy, however, with the precise target of Professor Tribe's remarks: the interpretivists/noninterpretivist dispute about legitimacy. Thus, I am perfectly willing to believe that, for example, “the framers [of the equal protection clause] did not [intend it] to constitutionalize” a principle that “radiate[s] . . . equality of the races.” PERRY, *supra* note 3, at 67 (concluding *Brown*, 347 U.S. 483, with whose rule he emphatically agrees, rests on the values of the Court, not of the framers). But the complete answer to the debate about *this* issue of framers' intentions and linguistic meaning is, they should have used less broad language, then, even for decisions that could have been rendered the day after ratification. See R. DWORKIN, *TAKING RIGHTS SERIOUSLY* 134 (1977), in which he addresses the other end of the range Wittgenstein addressed in his “Shew the children a game” slip comment. L. WITTGENSTEIN, *PHILOSOPHICAL INVESTIGATIONS* 33 (2d ed. 1958) (trans. G. Anscombe). See generally Morrison, *Excursions*, *supra* note 7, for arguments that the language of the law is English; that means it presents the same possibilities of and limits on “uptake” in audiences as any other uses of English.

