Volume 111
Issue 4 *Dickinson Law Review - Volume 111, 2006-2007*

3-1-2007

Finding Rights Specifically

John Safranek

Stephen Safranek

Finding Rights Specifically

John Safranek* and Stephen Safranek**

> Sen. Schumer: "You would disagree that there is no general right to privacy in the Constitution?"
>
> Judge John Roberts: "I wouldn't use the phrase 'general' because I don't know what that means."[1]

I. Introduction

The Supreme Court's decision in *Lawrence v. Texas*[2] reprised the profound jurisprudential discrepancies that have polarized the Court for decades. In *Lawrence*, the Justices disputed not only the constitutionality of the contested right, but its formulation as well: the minority characterized it as a right to homosexual sodomy,[3] while the majority formulated it as a right to privacy or liberty.[4] Although the outcome differed substantially from *Bowers v. Hardwick*,[5] the divergent formulations of the right resembled those of the earlier decision.[6]

This fundamental discrepancy in the formulation of a rights' claim

---

* B.A., University of San Francisco; M.D., University of Nebraska; Ph.D., Catholic University of America.

** Professor of Law, Ave Maria School of Law; B.A., University of San Francisco; M.A., University of Dallas; J.D., University of Notre Dame.

1. William Saletan, *Evasion of Privacy: The Phony Humility of John Roberts*, SLATE, Sept. 15, 2005, http://www.slate.com/id/2126312.

2. 539 U.S. 558 (2003) (striking down a Texas statute criminalizing homosexual sodomy).

3. *Id.* at 597 ("*Bowers*' conclusion that homosexual sodomy is not a fundamental right 'deeply rooted in this Nation's history and tradition' is utterly unassailable.").

4. *Id.* at 578 ("Their right to liberty under the Due Process Clause gives them the full right to engage in their conduct without intervention of the government.").

5. Bowers v. Hardwick, 478 U.S. 186 (1986) (rejecting a constitutional right to homosexual sodomy).

6. *Id.* at 190 ("The issue presented is whether the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy. . . ."); *id.* at 208 (Blackmun, J., dissenting) ("Indeed, the right of an individual to conduct intimate relationships in the intimacy of his or her own home seems to me to be the heart of the Constitution's protection of privacy.").

is not confined to the issue of homosexual sodomy.[7] In numerous important due process cases, the Court could not agree on whether the controlling legal tradition should be framed in general or specific terms.[8] Does the practice of abortion implicate a more general right to liberty and privacy or should it be specified narrowly as a right to abortion?[9] Can the right to assisted-suicide be adjudicated without broader concern for a right to die and autonomy?[10] The jurisprudential issue, which is one of methodology, is whether rights' claims should be articulated in specific or general terms.

The Justices' formulation of the rights' claim ultimately governs their decisions because neither the Constitution nor specific legal traditions explicitly protect most of these controverted acts.[11] Therefore, if jurists specify the rights' claims narrowly, as in *Bowers*,[12] they reject the right because no specific legal tradition exists to overturn the extant statute.[13] However, if the Justices formulate the right in the general terms of autonomy or privacy, which are integral to due process liberty, the right is recognized, as seen in *Lawrence*.[14] Thus, the general or specific formulation of a rights' claim governs the outcome of some of the most controversial constitutional disputes.[15]

---

7. *See infra* notes 9-10 and accompanying text,

8. By *general*, we mean that the principle is formulated to cover a wider range of cases, and correlatively, by *specific*, we mean a narrower range of cases. *See* Don Loeb, *Generality and Moral Justification*, 56 PHIL. & PHENOMENOLOGICAL RES. 79, 81 (1996). We do not mean *range* in a numerical sense as does Frederich Schauer. *The Generality of Law*, 107 W. VA. L. REV. 217, 229 (terming a law such as "Speed Limit 55" a general law because it applies to everyone without exception). Our sense of general is a principle, such as the right to liberty discussed *infra*, which is applicable in many different types of cases.

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

10. *See* Compassion in Dying v. Washington, 850 F.Supp. 1454, 1459-60 (W.D. Wash. 1994) (quoting Planned Parenthood of SE. Pa. v. Casey, 505 U.S. 833, 851 (1992)) ("Like the abortion decision, the decision of a terminally ill person to end his or her life . . . constitutes a 'choice central to personal dignity and autonomy.'"); Washington v. Glucksberg, 521 U.S. 702, 722-23 (1997) ("[A]lthough *Cruzan* is often described as a 'right to die' case, we were, in fact, more precise: We assumed that the Constitution granted competent persons a 'constitutionally protected right to refuse lifesaving hydration and nutrition.'") (citations omitted).

11. *See Bowers*, 478 U.S. at 192-96 nn.5-8, for an exhaustive list of legal proscriptions of sodomy historically.

12. *See id.* at 194-96.

13. *Glucksberg*, 521 U.S. at 769-70 (Souter, J., concurring) ("When identifying and assessing the competing interests of liberty and authority, for example, the breadth of expression that a litigant or a judge selects in stating the competing principles will have much to do with the outcome and may be dispositive . . . [j]ust as results in substantive due process cases are tied to the selections of statements of the competing interests. . . .").

14. *See* Lawrence v. Texas, 539 U.S. 558 (2003).

15. *See* Laurence H. Tribe & Michael C. Dorf, *Levels of Generality in the Definition of Rights*, 57 U. CHI. L. REV. 1057, 1058 (1990) ("The more abstractly one states the

Although this methodological issue is of great import, few scholars or jurists have offered robust justifications for formulating rights in either specific or general terms.[16] Justice Scalia enjoined the methodological debate in *Michael H. v. Gerald D.*,[17] stating that he would formulate the contested right at the most specific level at which he could identify a relevant tradition.[18] His assertion provoked a thorough discussion of this issue in an influential critique offered by Laurence H. Tribe and Michael C. Dorf.[19] Their theory offers the most compelling argument for interpreting rights in general terms, and correlatively, for justifying the most important due process liberty rights of the last four decades.[20]

Tribe and Dorf claim that jurists should articulate rights in general terms, such as the right to intimate association, rather than specify rights narrowly, such as the right to homosexual sodomy.[21] To vindicate their theory, they must defend the constitutional imperative for generalizing rights and then offer a method for formulating rights' at the appropriate level of generality. Tribe's and Dorf's theory fails because the canons of logic, rather than jurisprudential principle, undermine their argument for generalizing rights and support Justice Scalia's theory of specifying

---

already-protected right, the more likely it becomes that the claimed right will fall within its protection.").

16. *See* Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 7 (1971) (explaining jurists' responsibility to define and derive a rights' claim neutrally); Paul Brest, *Fundamental Rights Controversy: The Essential Contradictions of Normative Constitutional Scholarship*, 90 YALE L.J. 1063, 1085 (1981) ("The indeterminacy and manipulability of levels of generality is closely related . . . to the arbitrariness inherent in accommodating fundamental rights with competing government interests."). Other scholars have briefly discussed Justice Scalia's or Tribe & Dorf's theories. *See* Gregory C. Cook, *Footnote 6: Justice Scalia's Attempt To Impose a Rule of Substantive Due Process*, 14 HARV. J.L. & PUB. POL'Y 853, 885-87 (1991) (briefly defending Justice Scalia's Theory); Timothy L. Rattschke Shattuck, *Justice Scalia's Due Process Methodology: Examining Specific Traditions*, 65 S. CAL. L. REV. 2743, 2769-70 (1992) (arguing that Justice Scalia chooses the most specific tradition available); L. Benjamin Young, Jr., *Justice Scalia's History and Tradition: the Chief Nightmare in Professor Tribe's Anxiety Closet,* 78 VA. L. REV. 581, 600-18 (1992) (prescinding from discussing the merits of Justice Scalia's theory and merely arguing that Justice Scalia has not always chosen the most specific tradition in a number of cases); Steven R. Greenberger, *Justice Scalia's Due Process Traditionalism Applied To Territorial Jurisdiction: the Illusion of Adjudication without Judgment*, 33 B.C. L. REV. 981, 1030 (1992) (recounting Tribe & Dorf's criticism of the difficulty of establishing a metric for Justice Scalia's theory of specification discussed *infra*, Part IV Section B).

17. 491 U.S. 110 (1989).

18. *Id.* at 127 n.6. For footnote quoted in full, *see infra* notes 160-61 and accompanying text.

19. *See generally* Tribe & Dorf, *supra* note 15.

20. Their theory justifies rights to contraception, abortion, assisted-suicide, and homosexual rights. *See id.* at 1108 for the types of acts not justified by their theory.

21. *Id.* at 1067 (arguing that the right to intimate association would protect plaintiff-Hardwick's conduct).

rights narrowly.[22]

This study is divided into three parts. Part II critiques Professors Tribe's and Dorf's theory of generalizing rights;[23] Part III discusses the logical impediments to generalizing rights;[24] and Part IV explores Justice Scalia's method for specifying rights.[25] Although the critique is applicable to most general rights' claims, it concentrates on due process rights, the focus of Tribe's and Dorf's theory.[26]

II. The Generality of Rights' Claims

The Supreme Court laid the foundation for modern due process liberty in *Griswold v. Connecticut*,[27] recognizing a narrow right for married couples to purchase contraceptives.[28] Subsequently, the Court generalized due process liberty as the right to "autonomous control over the development and expression of one's intellect, interest, tastes and personality,"[29] "the ability . . . to define one's identity,"[30] and "choices central to personal dignity and autonomy."[31] The following section critiques Tribe's and Dorf's theory, particularly its justification of the Court's generalization of due process liberty.[32]

A. The Theory of Generalizing Rights

Professors Tribe and Dorf criticize Justice Scalia's attempt to specify rights' claims narrowly.[33] In *Michael H.*, Justice Scalia stated that his method of rights' specification examines "the most specific level

22. Cass Sunstein does not hold Justice Scalia's position discussed *infra* that judges should specify precedents and tradition as specifically as possible. In fact he criticizes Justice Scalia for the "width" of his rules and his "elaborate understanding of the Constitution's substantive commitments." CASS SUNSTEIN, ONE CASE AT A TIME 62, 213 (1999) (arguing that the Supreme Court generally should adjudicate on as narrow and shallow grounds as possible, such as invoking the principle of desuetude to overrule *Hardwick*). Inexplicably, Sunstein does not discuss Justice Scalia's opinion in *Michael H.* or his theory of specifying rights' narrowly. Nor does Sunstein address how *Casey* affects his categorization of Justice Scalia as a maximalist and Justice O'Connor, Stevens, and Souter as minimalists. Our discussion reveals the unlimited breadth of the due process favored by these three purported minimalists. Sunstein's work is critiqued in greater depth below.

23. *See* discussion *infra* Part II.

24. *See* discussion *infra* Part III.

25. *See* discussion *infra* Part IV.

26. *See generally* Tribe & Dorf, *supra* note 15.

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

28. *Id.* at 485-86.

29. Doe v. Bolton, 410 U.S. 179, 211 (1973) (Douglas, J., concurring).

30. Roberts v. U.S. Jaycees, 468 U.S. 609, 619 (1984).

31. Planned Parenthood of SE. Pa. v. Casey, 505 U.S. 833, 851 (1992).

32. Tribe & Dorf, *supra* note 15, at 1099.

33. *See* Tribe & Dorf, *supra* note 15, at 1087-95.

at which a relevant tradition protecting, or denying protection to, the asserted right can be identified."[34] Conversely, Tribe and Dorf insist that the Supreme Court should articulate rights in general terms.[35] This section examines their constitutional argument for generalizing rights.

Tribe and Dorf justify abstracting general constitutional rights from specific rights' claims by appeal to Justice Harlan's opinion in *Poe v. Ullman*[36] and the Ninth Amendment.[37] Justice Harlan claimed that the liberty protected by the Due Process Clause of the Fourteenth Amendment "is not a series of isolated points pricked out in terms of the taking of property; the freedom of speech, press, and religion. . . . It is a rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints. . . ."[38]

Tribe and Dorf endorse Harlan's approach of abstracting higher unifying principles from the specific liberties protected by the Bill of Rights.[39] These principles encompass those logically presupposed or instrumentally required by those explicitly enumerated in the Constitution.[40] For example, specific constitutional rights of free speech or religion are tenable only if protected by broader rights to freedom of thought or conscience.[41]

Moreover, constitutional jurisprudence is "rational" only if jurists connect precedents and clauses of the Constitution by abstracting proper unifying principles.[42] A principle, according to Tribe and Dorf, unifies one's intuitions about specific fact situations "at a higher level of abstraction."[43] The unifying principles are the more abstract or general rights that link the more specific rights. Thus, constitutional rights concerning marital, procreative, and childrearing decisions are unified by the general and unenumerated right to control the nature of one's intimate associations.[44]

Tribe and Dorf defend the existence of this unenumerated right by adverting to the Ninth Amendment's requirement that "[t]he enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."[45] Although proscriptive in

34. Michael H. v. Gerald D., 491 U.S. 110, 127 n.6 (1989).
35. Tribe & Dorf, *supra* note 15, at 1099.
36. Poe v. Ullman, 367 U.S. 497 (1961).
37. U.S. CONST. amend. IX.
38. *Poe*, 367 U.S. at 543 (Harlan, J., dissenting).
39. *See* Tribe & Dorf, *supra* note 15, at 1068.
40. *See id.*
41. *Id.* at 1069.
42. *Id.*
43. *Id.* at 1068.
44. *Id.* at 1069.
45. *See* Tribe & Dorf, *supra* note 15, at 1100 (citing U.S. CONST. amend. IX).

character, this rule of construction also plays a prescriptive role in Tribe's and Dorf's theory.[46] They argue that the Ninth Amendment prescribes the generalization of rights to prevent the elevation of enumerated rights above the unenumerated.[47] Exalting enumerated rights as "islands of special protection"[48] would disparage the unenumerated, "those that remain 'underwater.'"[49] The Ninth Amendment thereby condones Justice Harlan's methodology and affirms the act of generalizing rights—in regard to tradition and legal precedent—at higher levels of abstraction.[50]

Professors Tribe and Dorf claim that their theory of generalizing rights constrains jurists from importing their personal values into constitutional jurisprudence. They endorse the common law method to constrain the jurist interpreting the "living Constitution" in general terms.[51] The common law method, which requires jurists to articulate principled distinctions between prior cases, can be applied to historical traditions.[52] For example, in *Bowers* the justices should have asked why traditions for the respect of personal, intimate associations did not apply to gay, intimate relationships.[53]

Tribe's and Dorf's theory further restricts judicial activism by requiring that the general right provide an adequate description of previously recognized rights without reference to the novel rights' claim.[54] Justices must first determine the rationale (or "concerns"[55]) that influenced the precedents, and then only after describing the concerns at the apposite level of abstraction can they test the abstraction against the disputed rights' claim.[56] And jurists must respect not only the holdings of precedents but also their rationales.[57] By applying this common law

46. *Id.* ("To make sense of the Ninth Amendment's *proscriptive* role, readers of the Constitution must assume that it also plays a *prescriptive* role.") (emphasis in original).

47. *See id.*

48. *Id.* ("The Ninth Amendment counsels against the portrayal of enumerated rights as isolated islands of special protection. . . .").

49. *Id.*

50. *Id.* at 1102 ("The Ninth Amendment's presumption in favor of generalizing rights applies to the interpretation of cases and traditions."); *id.* ("Our approach to defining fundamental rights places precedent and historical tradition on a more or less equal footing.").

51. Tribe & Dorf, *supra* note 15, at 1101 ("[T]he method of the common law can constrain a justice interpreting a living Constitution.").

52. *Id.*

53. *Id.* ("[T]he Court should have asked what justification existed for treating the traditions regarding respect for intimate personal associations as inapplicable to gay intimacy.").

54. *Id.* at 1103.

55. *Id.*

56. *Id.*

57. *Id.*

method, the jurists are constrained when selecting the appropriate level of generality.

Thus, Tribe and Dorf offer a theory of generalizing rights that endorses Justice Harlan's method of abstracting novel rights, which are justified constitutionally by the Ninth Amendment.

B. Criticisms of Tribe's and Dorf's Theory

Although Tribe's and Dorf's method of generalizing rights has been employed by the Supreme Court for decades, it is unsupported by the professors' interpretations and undermined by their criticisms.

Tribe and Dorf justify their theory by dubious interpretations of both Justice Harlan's decision in *Poe* and the Ninth Amendment. Justice Harlan states that Due Process liberty is not a series of isolated rights but constitutes a "rational continuum which . . . includes a freedom from all substantial arbitrary impositions and purposeless restraints"[58] and that the state's claims that abridge "certain interests require particularly careful scrutiny."[59] However, neither of these claims requires generalizing rights: a narrowly specified due process liberty right could be part of the rational continuum and also require careful scrutiny. Furthermore, a jurist cannot scrutinize whether a statute is "arbitrary" or "purposeless" unless she considers the specific circumstances of the rights' claim, but a general right by definition omits the particular circumstances. This criticism will be amplified in Part III.

Tribe's and Dorf's interpretation of the Ninth Amendment also is dubious. They assert that the Ninth Amendment equalizes enumerated and unenumerated rights, and thereby condones Justice Harlan's theory of generalizing rights.[60] But they do not explain why the Ninth Amendment requires a jurist to generalize rather than specify unenumerated rights. In other words, the Founding Fathers might have realized that the Constitution could not delineate every specific right that they desired to protect, and therefore they clarified that these unenumerated rights, such as the right to marry according to the conditions and qualifications of that time, deserve as much protection as the enumerated rights. Specified rights are wholly consistent with the Ninth Amendment. Tribe and Dorf do not consider this alternative before merely asserting that the Ninth Amendment prescribes Justice Harlan's method of generalizing rights.[61] But neither the Ninth

58. Poe v. Ullman, 367 U.S. 497, 543 (1961) (Harlan, J., dissenting).

59. *Id.* (Harlan, J., dissenting).

60. Tribe & Dorf, *supra* note 15, at 1100 (stating that the Ninth Amendment condones the "vision elaborated by Justice Harlan in his *Poe* dissent").

61. *See id.* at 1100-01 ("The Ninth Amendment . . . affirmatively acts as a

Amendment nor Justice Harlan's opinion requires jurists to generalize rights.

Tribe and Dorf illuminate the fundamental shortcoming of their theory when they criticize the minority in Bowers for espousing a "right to be let alone."[62] They cogently claim that this putative right raises such questions as whether one retains this right while harming others and what constitutes harm to others.[63] Further, Tribe and Dorf note that an individual could invoke this putative right whenever constrained by law. Their point is that jurists cannot maintain a right to be let alone *simpliciter* and that there are certain acts the right does not protect.[64] If this general right exists, then either it protects both praiseworthy and pernicious behavior or some principle must be adduced to proscribe the latter.

But Tribe's and Dorf's criticism undermines their theory of generalizing rights. They would substitute "a less abstract formulation"[65] for the Bowers minority's right to be let alone, namely, "the fundamental interest all individuals have in controlling the nature of their intimate associations with others."[66] However, this right incurs the same criticisms that they ascribe to "the right to be let alone."[67] Are all intimate associations protected, including those in which one party is harmed? And what constitutes harm? Is spousal abuse or heroin use constitutional if performed with an intimate partner?[68] Tribe's and Dorf's general right to "intimate association" is as problematic as the alternative that they criticize. Thus, their theory of generalizing rights lacks a constitutional basis and is burdened with the same criticisms they level against the right to be let alone.

The shortcoming of Tribe's and Dorf's theory can be traced to their understanding of a "principle."[69] They correctly acknowledge that a principle might "unify our intuitions about specific fact situations at a higher level of abstraction,"[70] but they fail to grasp that only exceptionless general principles can justify subsidiary principles. This

---

presumption in favor of generalizing at higher levels of abstraction.").

62. Bowers v. Hardwick, 478 U.S. 186, 199 (1986) (Blackmun, J., dissenting).

63. Tribe & Dorf, *supra* note 15, at 1067.

64. *See infra* Part II Section B for a more thorough discussion.

65. Tribe & Dorf, *supra* note 15, at 1067 ("These questions make clear the need for a less abstract formulation of the right at stake. . . .").

66. *Bowers*, 478 U.S. at 206 (Blackmun, J., dissenting).

67. *Id.* at 199 (Blackmun, J., dissenting).

68. Tribe denies a right to sell narcotics but defers to precedent rather than explaining how his general right to intimate association proscribes it. Tribe & Dorf, *supra* note 15, at 1106-7(rejecting a right to sell narcotics because "only certain decisions are fundamentally private in character."). This is discussed further *infra*.

69. Tribe & Dorf, *supra* note 15, at 1068.

70. *Id.*

criticism will be developed more thoroughly in the next section.

III. The Specificity of Rights' Claims

The terms of the Constitution do not address the question of the proper specification of rights. In Part III it is argued that the canons of logic, rather than jurisprudential principle, undermine Tribe's and Dorf's theory of generalizing rights. Section A discusses the principle of non-contradiction; Section B examines this principle's bearing on Tribe's and Dorf's theory of generalizing rights' claims; and Section C criticizes the concept of general rights.

A. Canons of Logic

The most fundamental principle of human reasoning is the principle of non-contradiction.[71] This principle states that something cannot simultaneously be and not be in all relevant regards.[72] For example, a being cannot be both a human and a canine. One could claim that a man is also sometimes a canine, either by using the term in a pejorative sense, speaking to the individual's behavior, or perhaps to a canine costume donned by the individual. However, the term *canine* is not being employed univocally in these instances. A being cannot be both human and canine when these terms are used in their primary senses. The principle of non-contradiction attests to the reality of difference in the world.[73]

The principle of non-contradiction cannot be disputed, for any such attempt must be articulated in words that the opponent intends with a particular and non-contradictory meaning.[74] Therefore the opponent's denial of the principle also validates it.[75] The denial is refuted in its very articulation because the opponent is employing words that she intends with specific meanings and not with their contradictories. Thus, the opponent of the principle of non-contradiction must remain silent.[76]

The principle is important to all areas of human knowledge including the field of law, particularly regarding the basic principle of equality. Although many aspects of jurisprudence are controverted, no

71. 2 ARISTOTLE, *Metaphysics, in* THE COMPLETE WORKS OF ARISTOTLE: THE REVISED OXFORD TRANSLATION 1588 (Jonathan Barnes ed., Princeton University Press 1984) ("[I]t is impossible for anything at the same time to be and not to be. . . .").

72. *Id.* at 1588-89 (discussing the qualifications of this principle).

73. It is the reality of difference that provides the distinctions necessary for a legal system to exist. *See* EDWARD LEVI, AN INTRODUCTION TO LEGAL REASONING (1961) ("The finding of similarity or difference is the key step in the legal process.").

74. 2 ARISTOTLE, *supra* note 71, at 1589.

75. *Id.*

76. *Id.*

one disputes that similar cases should be treated similarly.[77] Scholars debate the characteristics that render cases similar but no one disputes how jurists should adjudicate similar cases. The principle of treating like cases alike is derived from the principle of non-contradiction because a jurist contradicts herself if she treats two relevantly similar cases disparately.[78]

The principle of non-contradiction is fundamental to rational discourse. The claim that an opponent is contradicting herself is the most potent argument that an individual can advance because contradiction undermines any argument. The principle underlies all forms of disputes. When an individual disputes her opponent's factual claim, she implicitly applies the principle of non-contradiction by asserting that the factual claim is wrong. She is claiming that the purported fact contradicts the truth, e.g., the number of Supreme Court justices is not five but nine.

The principle of non-contradiction also governs legal and ethical debate. For example, an interlocutor might challenge an opponent of abortion whose opposition is grounded on the protection of human life but who also favors capital punishment. The interlocutor apprehends a contradiction: the proponent favors protecting human beings but killing human beings. The proponent must articulate a principle that resolves the apparent contradiction.[79] One option is to limit her principle to support the inviolability of all *innocent* human life. If her interlocutor challenges her amended claim by noting that she supports killing the innocent in cases of double-effect,[80] she would have to specify her principle further to avoid this contradiction, *viz.*, it is wrong to [intentionally] kill innocent human beings. As she qualifies her principle by specifying it, her interlocutor will find it more difficult to elicit contradictions because specification circumscribes the principle and thereby renders it less vulnerable to contradiction.

This discussion of the principle of non-contradiction illuminates the debate between coherentists and foundationalists. In arguing for the

77. *See* H.L.A. HART, THE CONCEPT OF LAW 155 (1961) ("[I]ts [justice] leading precept is often formulated as 'Treat like cases alike.'").

78. *See* Peter Weston, *The Empty Idea of Equality*, 95 HARV. L. REV. 537, 558 (1982) ("Claims that treatment can be simultaneously just and unequal, or equal but just, are grounded in simple self-contradiction.").

79. The existence of the contradiction does not establish which of the contradictory statements must be altered. R.W. BEARDSMORE, MORAL REASONING 23 (1969) ("Revealing a contradiction can't tell us which of the poles to reject.").

80. For a discussion of the traditional interpretation of the Principle of Double-Effect, *see* Daniel Sulmasy & Edmund Pellegrino, *The Rule of Double Effect*, 159 ARCHIVES OF INTERNAL MEDICINE 545 (1999).

rational congruence between various moral or legal principles,[81] coherentists are merely affirming the principle of non-contradiction. Coherentists claim that a moral or legal theory must be comprised of a set of non-contradictory principles.[82] Each principle must be congruent with all other principles in that theory.[83] The given theory is analogous to a crossword puzzle, in which the letters of each horizontal word must be congruent with those of vertical words. The analogy to crossword puzzles is appropriate because the letters of one word in a crossword will often act as a clue to an unknown word. Similarly, a principle that is easily grasped will shed light on a more obscure situation.[84]

Any valid theory must provide tenable principles that cohere with all the other principles in the theory. To deny coherentism is to deny the principle of non-contradiction, and therefore the denial is undermined in its articulation. However, coherentism alone cannot justify a moral or legal theory because a person could establish an entire theory of principles that are non-contradictory but are incorrect.[85] Some psychotic patients can formulate a web of principles that are non-contradictory but nevertheless are false. The coherence of principles is a necessary but not sufficient requirement for any moral or legal theory.

The principle of non-contradiction also sheds light on the popular alternative to coherentism, namely, foundationalism. Foundationalists assert a fundamental and undeniable principle that is the source of subsidiary principles. Foundationalists correctly recognize that all knowledge must be grounded on a certain foundation.[86] And certainly a

81. The method of analogous reasoning and the concept of precedent are illustrations of coherentism. *See* Ken Kress, *Why No Judge Should be a Dworkinian Coherentist*, 77 TEX. L. REV. 1375, 1384 (1999).

82. *See* Michael DePaul, *Two Conceptions of Coherence Methods in Ethics*, 96 MIND 463 (1987); Norman Daniels, *Wide Reflective Equilibrium and Theory Acceptance in Ethics*, 76 J. PHIL. 256 (1979).

83. STANLEY FISH, THE TROUBLE WITH PRINCIPLE 280 (2001) ("Our beliefs are supported in a lattice or web. . . .").

84. RICHARD MILLER, CASUISTRY AND MODERN ETHICS 232 (1996) ("Moreover, they are more or less unambiguous, requiring no elaborate explanation. As a result, we can use them to reason about more complicated matters, proceeding from "typical" cases to those that are novel, ambiguous, or more elaborate."); JOHN LAIRD, THE IDEA OF VALUE 244 (1959) ("We make weaker opinions cohere with solid ones. . . ."); ALASDAIR MACINTYRE, WHOSE JUSTICE? WHICH RATIONALITY? 114 (1989) (we learn to apply the terms "just" and "unjust" by going from simple to complex cases).

85. LAIRD, *supra* note 84, at 254 ("Right principle cannot be inconsistent, but the rightness and reasonableness cannot be determined by consistency alone."). Michael C. Dorf, *The Coherentism of Democracy and Distrust,* 114 YALE L.J. 1237, 1264 (2005) (Dorf overstates the case in claiming, "[g]iven the possibility of "bad coherence," coherentism seems to be a form of moral relativism.").

86. Gilbert Harmann, *Positive Versus Negative Undermining in Belief Revision*, 18 NOUS. 39 (2003) (Some beliefs will depend on others "until one gets to foundational beliefs that do not depend on any further beliefs for their justification."); *see also* Ken

valid theory requires a foundational principle that precludes an infinite justificatory regress.[87] The error of some foundationalists is to propose foundational principles which are so general that they validate contradictory moral or legal claims.[88] For example, both proponents and opponents of affirmative action invoke the general principle of equality. The contradictory claims arise because the foundational claim requires supplementary principles in order to terminate in a practical conclusion, and these supplementary principles can conflict.[89] Thus, general foundationalist principles such as equality can garner a consensus only by being so vague that they are impotent;[90] once they are delineated into specific practical principles, they are as disputable as other principles.

These foundational legal principles are similar to the foundational moral principle, "Do good and avoid evil," which no one disputes as a formal statement.[91] But controversy ensues once practical conclusions are drawn from it. If a formal principle generates contradictory claims, each of which can be justified by appeal to this principle, then the principle is useless because the moral agents obviously dispute its meaning.[92] If two moral agents can reasonably appeal to the principle of "do good, avoid evil" to justify their respective acts of committing or preventing acts of assisted-suicide, then the principle is useless in resolving the morality of the act. Similarly various foundational principles of laws such as "equal respect" can generate contradictory legal claims. Therefore, the principle of non-contradiction undermines many foundationalist principles.

The principle of non-contradiction is indisputable and integral to

---

Kress, *supra* note 81, at 138.

87. LAIRD, *supra* note 84 ("[T]he prior certainties are accepted on grounds of insight or observation—not coherence.").

88. For a discussion of compelling foundational principles of a moral theory, *see* ALBERT JONSEN & STEPHEN TOULMIN, THE USE AND ABUSE OF CASUISTRY 251-52 (1990). Moral paradigms and axioms are the most obvious examples.

89. Frederick Schauer, *Formalism*, 97 YALE L.J. 509, 514 (1988) (stating liberty and equality require supplementary principles in application to real cases).

90. The concept of equality is crucial and seemingly undeniable in Western law, but as Weston has cogently argued, it is useless unless its content is explicitly delineated. Weston, *supra* note 78, at 547 ("Equality is an empty vessel with no substantive moral content of its own.").

91. THOMAS AQUINAS, SUMMA THEOLOGIA, I-II, Q. 94, a.2 (terming this the first principle of practical reason).

92. LOUIS SEIDMAN AND MARK TUSHNET, REMNANTS OF BELIEF 41 (1995) ("Perhaps it is possible to generate wide agreement on highly abstract principles of justice . . . the very abstraction that makes agreement possible deprives the principle of much use in practice."); *see* H.L.A. HART *supra* note 77, at 155 ("[U]ntil it is established what resemblance and difference are relevant, 'Treat like cases alike' must remain an empty form. To fill it we must know when, for the purposes at hand, cases are to be regarded as alike and what differences are relevant.").

rational discourse and jurisprudence. This logical canon of reasoning serves as the matrix for the discussion of rights' claims in the next section, which reveals how the principle of non-contradiction undermines Tribe's and Dorf's theory of generalizing rights.

B. The Defeasibility of General Rights

Part II discussed Tribe's and Dorf's failure to justify generalizing rights by appeal to Justice Harlan's *Poe* opinion and the Ninth Amendment.[93] This section of Part III reveals the contradictions inherent in generalizing rights' claims at higher levels of abstraction.

Consider an individual desiring to socialize in a public park.[94] If the government tried to prevent her from doing so, she could assert her due process right to liberty, which putatively justifies her rights claim. Her right to socialize in the park seems incontrovertible: she is not disruptive, inebriated, naked, using illicit drugs or inciting others to violence. A general due process right to socialize in the park seems eminently tenable.

In fact, this rights claim is subordinate to numerous conditions. Among others, the individual socializing in the park cannot be disruptive, inebriated or naked. The purportedly incontrovertible general right to socialize in a park is contestable if all of the relevant conditions are not satisfied by the individual. Therefore, a general right to socialize in a park does not exist because it is limited by numerous conditions. Only a very specified right to socialize in a public park exists.

If an individual retains a general right to an act, then she is free to perform that act without interference. If she is not free to perform that act, then she does not retain that general right in any meaningful sense.[95] The notion that an individual possesses a general right that is overridden in a specific instance is fatuous: if the individual cannot exercise the right in the specified circumstance, then she does not retain the right in that circumstance. If the individual cannot exercise her general right to socialize in a park while "disturbing the peace," then she does not retain the general right. The general right to socialize in a park is subject to

---

93. *Supra* Part I.B.

94. Kelly Spencer, *Sex Offenders and the City: Ban Orders, Freedom of Movement, and Doe v. City of Lafayette*, 36 U.C. DAVIS L. REV. 297 (2002) (arguing that a pedophile has a right to visit a park based on a general right to travel).

95. For a dubious attempt to explain how one can retain a right that can be violated, see DIANA MEYER, INALIENABLE RIGHTS 60-61 (1985) (explaining how an agent can abridge a right to life or liberty without violating it); HENRY VEATCH, HUMAN RIGHTS: FACT OR FANCY? 179 (1985) offers a more cogent argument, namely, that only limited rights can be justified. ("Besides, even if on natural law princicples one were to hold that an individual's rights to his life, liberty, and property are limited, albeit inalienable, it would still seem not just likely, but practically unavoidable. . . .")

contradictions, namely, all the conditions that specify the general right: one cannot claim that there is a general right to socialize in a park but that there is no right to socialize in a park if a person is disruptive or inebriated. These conditions function as exceptions that vitiate the general right by contradicting it. The contradiction is resolved either by specifying the general right or denying that there are any circumstances that limit the general right to socialize in a park. The latter alternative is indefensible.

The mistaken notion of general rights retains plausibility because jurists and scholars illustrate this concept with putatively incontestable general rights, such as the right to marry.[96] Most people would assent to the concept of a general right to marry because it is a practice that most are free to perform. But no general right to marry exists because the potential parties must satisfy a variety of conditions: they must be of a certain age;[97] neither party can be coerced or contemporaneously married;[98] both must be unrelated to certain degrees.[99] The putative general right to marry is subordinate to these specifications. Therefore only a specific right to marry exists. All other general rights, even one as fundamental as a right to life, must be similarly specified.

The deficiency of Tribe's and Dorf's theory is that there are no meaningful "general" rights. General rights are useless for adjudication because they are not prescriptive, that is, they cannot justify rights to any specific acts. A "general" right to liberty or marriage exists if *general* means that most citizens are able to satisfy the conditions necessary to exercise the right. However, this sense of a general right does not justify any specific rights because it is descriptive rather than prescriptive: it merely states the fact that most individuals are in fact able to fulfill the conditions that specify the right.[100]

One also could speak of a "general" right if the term expresses the genus of many specific rights. For example, the general right to liberty encompasses both a right to socialize in a park if the individual is not inebriated, disruptive, etc., and the right to marry under another set of

96. Meyer v. Nebraska, 262 U.S. 390, 399 (1923) (The liberty guaranteed by the Fourteenth Amendment "denotes not merely freedom from bodily restraint but also [for example] the . . . right to marry, establish a home and bring up children."); Loving v. Virginia, 388 U.S.12, 12 (1967) (claiming that the law deprived the Lovings of due process by denying them the "freedom of choice to marry").

97. Age and being unmarried are common qualifications. *See, e.g.,* ALASKA STAT § 25.05.011 (Matthew Bender 2006); ARIZ. REV. STAT. § 25-122 (1999); CAL. FAM. CODE § 301 (West 2004).

98. *Id.*

99. DEL. CODE ANN. tit 13 § 101 (1996); HAW. REV. STAT. § 572-1 (1997).

100. *See* John Safranek & Stephen Safranek, *Can the Right to Autonomy Be Resuscitated After Glucksberg*, 69 U. COLO. L. REV. 731, 733-736 (1998) (discussing the analogous descriptive and prescriptive aspects of a right to autonomy).

conditions. After these particular rights have been justified and specified, one could classify these same rights under a "general" right to socialize or marry, and then one can generalize these further to a general right to liberty. But this use also is descriptive rather than prescriptive because it merely classifies in general terms the rights that have been justified in specific circumstances.

If another circumstance arises where the specific right is disputed, such as socializing after a curfew, an individual can neither justify her claim by generalizing it to a right to socialize nor as a right to liberty because the issue is whether this specific act in these circumstances should be afforded constitutional protection. This is precisely the Supreme Court's practice that Tribe's and Dorf's theory defends. While Tribe and Dorf invoke a general right to intimate association to justify homosexual sodomy, the Court adverts to the general rights of liberty, privacy or autonomy.[101] But these general rights do not exist because they must be qualified by numerous exceptions in practice. The Supreme Court, however, can justify the due process liberty rights by analogy to relevantly similar precedents if these precedents have been identified and specified sufficiently. The logical problem for the Court, and for Tribe and Dorf, is that the Court has justified many of these precedents by appealing to general rights that are subject to numerous exceptions.[102] If the general right is defeasible, and the relevant precedents are grounded on the general right, then the precedents are unjustified. Therefore, by appealing to the general right, the Court begs the question of whether the disputed act is another exception. First the Court must find some other basis to justify a right to the specific act and then it can classify the right under the genus of rights to liberty.

The jurist must examine the specific circumstances of the rights' claim to determine whether the specific right exists. If she decides that it does, then the right can be classified as one of those acts that liberty protects. As William Galston has noted, the recognition of a right is the conclusion rather than the origin of legal reasoning.[103] One must first justify the legitimacy of the specific act before a right to the act can be recognized.

Tribe and Dorf, by contrast, abstract a general right from the

101. *See* Tribe & Dorf, *supra* note 15 at 1066-67.

102. Most of the Supreme Court's controversial due process jurisprudence, including contraception, abortion, and homosexual sodomy is grounded on the general right to privacy, liberty, or autonomy. *See id. Griswold* is slightly exceptional insofar as the Court somewhat limited the right to zonal privacy. Griswold v. Connecticut, 381 U.S. 479, 484 (1965).

103. WILLIAM A. GALSTON, JUSTICE AND THE COMMON GOOD 141 (1980) (stating that a right is the outcome or result of moral reasons).

disputed specific right and then employ the general right as the justification for the disputed right.[104] For example, the specific right to homosexual sodomy is abstracted as a claim to the general right to intimate association and because this general right putatively justifies acts analogous to homosexual sodomy, it thereby justifies homosexual sodomy. But the general right does not exist if it is circumscribed in any instance. If a general right to intimate association exists, then Tribe and Dorf must argue that all intimate acts are protected. But because they admit that not every intimate act is protected,[105] then no general right to intimate association exists. Therefore, they cannot justify the right to homosexual sodomy merely because it is an instance of an intimate act. Moreover, they offer no criteria to distinguish intimate acts that are constitutional from those that are unconstitutional.[106]

The concept of general rights is untenable because general rights generate contradictions proportionate to their degree of generality. As a right is articulated in more general terms, it is subject to more exceptions. Conversely, a right that is properly specified is less subject to contradiction. For example, a general right to life is subject to the exceptions of killing in self-defense, capital punishment or double-effect. However, a specific right to life for an individual who is innocent of any crime, and does not threaten another person, is less subject to contradiction. Hence, general rights generate contradictions; specific rights limit them.

C. The Conundrum of General Rights

The previous section discussed how general rights generate contradiction. This section presents a bolder claim: that a general due process liberty right is self-contradictory. If this claim is valid, then jurists err by appealing to a general "right to liberty" in justifying due

104. Tribe & Dorf, *supra* note 15, at 1103 ("Only after the Court has selected the appropriate level of abstraction at which to describe these concerns should it test the asserted specific right against that abstraction.").

105. *Id.* at 1107.

106. Tribe and Dorf claim that the sale of narcotics between consenting adults would run afoul of the Supreme Court's privacy rationale that only certain decisions are fundamentally private in character because "a certain private sphere of individual liberty will be kept largely beyond the reach of the government." Tribe & Dorf, *supra* note 15, at 1106-07 (citing Thornburgh v. Am. Coll. of Obstetricians & Gynecologists, 476 U.S. 772, 772 (1986)). Tribe and Dorf fail to offer any distinction between private drug use and the pertinent privacy precedents. Stephen Gardbaum, a liberal proponent of autonomy, admits that the principle of liberty cannot coherently proscribe drug use, but claims that perhaps other liberal values such as human dignity or equality might trump the right to drug use. Stephen Gardbaum, *Liberalism, Autonomy and Moral Conflict*, 48 STAN. L. REV. 385, 417 (1996).

process rights.

A general due process liberty right is untenable because all human acts can be classified as acts of liberty.[107] A general right to liberty would justify murder, treason, and assault because these can be freely chosen.[108] An interlocutor could correctly assert that these are forbidden by common law or tradition because of the harm inflicted, but she thereby acknowledges that no general right to liberty exists; rather, only certain free acts are legitimate.[109] Either a general right to liberty exists and therefore pernicious acts should be protected, or no general due process liberty right exists.

But the untenability of this general right is even more egregious: a due process liberty right is self-contradictory. The essence of the self-contradiction is that when jurists uphold a right on the basis of liberty, they deny liberty to those opposed to the disputed right.[110] In other words, they deny someone's liberty in the name of someone else's liberty.[111] Similarly, the Supreme Court denies some citizens' autonomy or privacy in the name of upholding others' autonomy or privacy right. If rights to liberty, autonomy or privacy protect important personal decisions, then the Court necessarily violates these rights by upholding some individuals' important decisions at the expense of others' choices.[112]

In *Bowers*, Justice Blackmun illustrated the self-contradictory character of a general due process rights when he attempted to justify the extension of the privacy right to the act of homosexual sodomy.[113] Justice Blackmun noted that the Court had previously recognized that the

---

107. JOSEPH RAZ, THE MORALITY OF FREEDOM 245-46 (1986) (arguing that there is no right to liberty because it is too indiscriminate).

108. RONALD DWOKIN, TAKING RIGHTS SERIOUSLY 267 (1977) ("It diminishes a man's liberty when we prevent him from . . . making love as he wishes, but it also limits it when we prevent him from murdering. . . .").

109. *See id.* at 267-73 (offering a probative argument against a general right to liberty, which leads Dworkin to ground fundamental rights on the principle of equality).

110. *See* John Safranek & Stephen Safranek, *Licensing Liberty: The Self-Contradictions of Substantive Due Process*, 2 TEX. REV. L. & POL. 231, 246 (1998) ("The conundrum facing contemporary liberals is that although they esteem autonomy as a fundamental good, they cannot countenance all autonomous acts; but in proscribing certain depraved acts or lifestyles, liberals violate a person's autonomy.").

111. ANDREW LEVINE, LIBERAL DEMOCRACY: A CRITIQUE OF ITS THEORY 128-29 (1981) (arguing that granting some citizens a right restricts others' freedom).

112. ROBERT F. SCHOPP, *Self-Defense*, *in* IN HARM'S WAY: ESSAYS IN HONOR OF JOEL FEINBERG 265 (Jules L. Coleman & Allen Buchanan eds., 1994) ("When a liberal state enforces the criminal law . . . it also vindicates the sovereignty of the individual by punishing and condemning conduct that violates the person's right to self-determination."). Hampton and many other scholars do not recognize that the criminal's sovereignty is violated by the state.

113. *See generally* Bowers v. Hardwick, 478 U.S. 186, 199-214 (1986) (Blackmun, J., dissenting).

ability to define one's identity is central to any concept of liberty,[114] and that the right to privacy protects decisions important to one's destiny.[115]

Blackmun then considered whether the right to privacy encompassed public sexual acts, which common law and tradition have proscribed. Justice Blackmun faced the dilemma of rejecting a right to public sexual acts while upholding a fundamental decisional privacy right that for some individuals might include defining themselves by public sexual acts.[116]

Justice Blackmun's response illustrates the self-contradiction inherent in the general right to liberty. Blackmun writes:

> Petitioner and the Court fail to see the difference between laws that protect public sensibilities and those that enforce private morality. Statutes banning public sexual activity are entirely consistent with protecting the individual's liberty interest in decisions concerning sexual relations: the same recognition that those decisions are intensely private which justifies protecting them from governmental interference can justify protecting individuals from unwilling exposure to the sexual activities of others.[117]

Blackmun merely asserts that "the same recognition" justifies self-defining *decisions* to engage in homosexual sodomy and proscribes self-defining public sexual *acts*. He characterizes homosexual sodomy as an "intensely private" decision and exhibitionism as an act.[118] He had to characterize them in this manner or he would have been unable to distinguish them if he characterized both properly, *viz.*, private decisions that are enacted. What is the "same recognition" or principle that distinguishes these practices? Both acts can be integral to self-definition, offensive to a certain segment of the population, and intensely personal. Proponents of either act can argue that offended persons need to overcome their antiquated mores, visceral antipathies, or pervasive animus.[119] Indeed, opponents' "unwillingness" to view the public sexual act could be a manifestation of their animus.

The Court could attempt to distinguish exhibitionism from homosexual sodomy by claiming that the former act is publicly displayed

---

114. *Id.* at 205 (quoting Roberts v. United States Jaycees, 468 U.S. 609, 619 (1984) ("[T]he 'ability independently to define one's identity that is central to any concept of liberty' cannot truly be exercised in a vacuum.").

115. *See id.* at 204 (acknowledging that the Supreme Court has recognized a privacy interest with reference to certain decisions that are properly for the individual to make).

116. Romer v. Evans, 517 U.S. 620, 634 (1996).

117. *Id.* at 212-13.

118. *Id.* at 213.

119. *See Evans*, 517 U.S. at 634 ("[L]aws of this kind now before us raise the inevitable inference that the disadvantage imposed is born of animosity toward the class of persons affected.").

and thus can be offensive while the latter is not. But the Court has transformed due process liberty to protect decisional privacy rather than private acts in part because many privacy rights upheld by the Court defy characterization as "private." *Griswold*, for example, could be described as a private act because it regulated a married couple's actions in the privacy of their home.[120] Other acts are not so readily described as private acts. The act of abortion is performed at public clinics and involves commercial transactions. Moreover, the precedents that generated the privacy right, which concerned the education of children in schools, did not concern private acts but private decisions.[121] Thus, the Supreme Court had to transform the due process right to liberty, privacy or autonomy from protecting private acts to protecting decisions.[122]

If due process liberty protects decisions crucial to personhood, and this right to liberty encompasses "intensely private" sexual decisions, as Justice Blackmun claims,[123] then the individual logically should retain a right to perform public sexual acts that she has privately chosen.[124] Conversely, if the government protects individuals from the private *decisions* of exhibitionists, then Blackmun must explain why the government does not protect individuals from the harms they perceive from the private *decisions* of homosexuals or others.

The dilemma that general rights to liberty, autonomy or privacy create for the Supreme Court is that countless decisions are "intensely private."[125] Both the decision to engage in, or prevent, acts of exhibitionism, homosexual sodomy, or assisted-suicide can be crucial to an individual's personhood. If liberty or autonomy is a good that the Constitution protects, then the Court must articulate a principle to distinguish those private decisions that are constitutional. But any criteria would violate the private decisions of those who have adopted contrary criteria in defining their personhoods.[126]

---

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

121. Jeb Rubenfeld, *The Right to Privacy*, 102 HARV. L. REV 737, 743 (1989) (conceding that Meyer v. Nebraska, 262 U.S. 390 (1923), and Pierce v. Soc'y of Sisters, 268 U.S. 510 (1925), did not concern private acts in the home).

122. For a concise critique of the right to autonomy from a proponent of the right to abortion, *see id.* at 754-55 ("Where is our self-definition *not* at stake? Virtually every action a person takes could arguably be said to be an element of his self-definition.") (emphasis in original).

123. *See Bowers*, 478 U.S. at 213.

124. *See* ROBERT H. BORK, SLOUCHING TOWARDS GOMORRAH 103 (1997) ("It is not recorded that any American government, from the founding on, has ever thought it worthwhile to compel anyone's concept of meaning or of the mystery of human life.").

125. *See Bowers*, 478 U.S. at 213.

126. For a cogent argument that an individual loses autonomy whenever the law forces him to act contrary to his choice, *see* ROBERT WOLFF, IN DEFENSE OF ANARCHISM (1970).

The Court possesses no methodology, jurisprudential or otherwise, to resolve these contradictory rights' claims that are justified by appeal to the same general right. The Court would have to construct a hierarchy of self-defining acts or their correlative harms, but this would deny individuals the right to define their lives with a discrepant hierarchy. And finding a constitutional basis for this hierarchy would be problematic.[127] Because the Court's concept of harm encompasses psychological suffering,[128] any individual, including the sexual exhibitionist, suffers harm when the Court proscribes his liberty claim to perform or prevent a specific act. As Robert Bork notes, the Supreme Court would have to choose between the gratifications of the disputants by weighing "the respective claims to pleasure."[129] Thus, Justice Blackmun could not articulate a cogent response to the theoretical rights' claim of the exhibitionist.[130] Nor could the Court rebut Justice Scalia's claim in *Casey* that the right to autonomy would justify numerous rights that the Court had previously rejected.[131]

This criticism vitiates the methodology of Tribe and Dorf, as well as the Court's, because generalizing a right subjects it to more contradictions. The right to marry, if it is specified so that the parties must be uncoerced, of appropriate age and sex, and unrelated, would be subject to few contradictions; but if this rights' claim is merely generalized as the right to marry, it would be subject to more contradictions, e.g., that there is a right to marry but not a right to marry in cases of coercion or consanguinity.[132] The general right to liberty creates the most contradictions, and indeed is self-contradictory, because it is the most general right.

Although general rights are untenable, specification per se does not

127. WILLIAM A. GALSTON, LIBERAL PURPOSES: GOODS, VIRTUES, AND DIVERSITY IN THE LIBERAL STATE 73 (1991) (stating that liberal societies believe in certain goods, but lack any principle to mediate conflicts between them)..

128. Roe v. Wade, 410 U.S. 113, 153 (1973) (stating that maternity, or additional offspring, may force upon the pregnant woman a distressful life or future psychological harm); Doe v. Bolton, 410 U.S. 179, 192 (1973) ("We agree with the District Court that the medical judgment [to perform an abortion] may be exercised in light of all factors—physical, emotional, psychological, familial, and the woman's age—relevant to the well-being of the patient.") (citation omitted).

129. Bork, *supra* note 16, at 9.

130. Nor most other sexual acts; *see* JOHN GARVEY, MEN ONLY, *in* MORALITY, HARM, AND THE LAW 128 (G. Dworkin ed., Westview Press 1994) ("If individuals are free to choose their form of sex, then bestiality and adultery should be allowed.").

131. *See* Planned Parenthood of SE Pa. v. Casey, 505 U.S. 833, 849 (1992) (Scalia, J., dissenting) (asserting that a right to define one's identity would justify rights to homosexual sodomy, polygamy, adult incest, and suicide).

132. Rubenfeld, *supra* note 121, at 783 (questioning that if the right to marry is fundamental, then why don't prescriptions against incestuous and bigamous marriage offend it).

guarantee the constitutionality of the right. Cass Sunstein offers a provocative argument that the Supreme Court should eschew general principles of constitutional jurisprudence and resolve cases as narrowly as possible in order to garner a majority, avoid error, and preclude deleterious consequences.[133] He claims, for example, that the Court unwisely adjudicated *Roe v. Wade* by recognizing a general right to abortion; instead it should have recognized a narrow right to abortion in the case of rape, which the plaintiff in *Roe* claimed was the circumstance of the conception.[134] The problem with Sunstein's theory is that even specific rights must be anchored to the constitution, and therefore, even minimalists such as Sunstein must ultimately appeal to general constitutional principles.[135] This constitutional necessity explains Tribe's and Dorf's desire to generalize specific rights' claims.

General rights generate uncertainty in constitutional law because a general liberty claim encompasses nearly any right. The undefined parameters of a general right to liberty generates more litigation, followed by disappointment, and then finally harm when acts central to an individual's autonomy are legally proscribed.[136] Conversely, the most specified rights are least susceptible to contradiction and dubitability. The "common law" is relatively stable because it has been specified by thousands of cases over centuries. The common law specification of an act such as assault is comprehensive and thus, minimizes contradiction: jurists are constrained by centuries of jurisprudence that have delineated

133. *See* CASS SUNSTEIN, *supra* note 22, at 49-53.

134. *Id.* at 251 (The Supreme Court "might have said, most minimally, that someone who alleges (as did Roe herself) that she was raped may not be required to bring the child to term.").

135. An illustration of Sunstein's problem is his attempt to analogize equal protection cases such as *Romer* to the paradigmatic equal protection case of discrimination against newly freed slaves. *Id.* at 155. Analogizing requires the articulation of a principle to explain both the paradigm and the novel case, and the paradigm has to be cast in general terms to be applicable to the novel case, otherwise no relevant constitutional basis could be found to analogize newly freed slaves with homosexuals in contemporary Colorado. Sunstein can not offer this appropriately general constitutional principle to analogize the paradigmatic instance of equal protection because it would undermine his endeavor to decide cases on narrow grounds. *See* Richard A. Posner, *Reasoning By Analogy*, 91 CORNELL L. REV. 761, 765 (2006) ("One always requires a general understanding of some sort in order to determine relevant similarities."). Sunstein, by contrast, generally disclaims broad principles of constitutional jurisprudence, both in terms of justificatory principles and specific rights' claims, but he ultimately must invoke them to find applicable precedents and to furnish a constitutional basis. For example, he justifies the right to abortion by a right to avoid bodily invasion, CASS SUNSTEIN, *supra* note 22, at 92, but this is a general right. Justice Scalia's originalism admittedly is broad insofar as this theory can be applied broadly to establish a multitude of specific rights, but Justice Scalia has never precluded the use of broadly applied principles such as originalism.

136. Frederick Schauer, *Easy Cases*, 58 S. CAL. L. REV. 399, 406 (1985) (explaining litigation results from uncertainty and vagueness).

the specific factors that constitute assault.[137] Therefore, jurists should specify rights as narrowly as necessary to preclude contradiction. At a minimum, they must not invoke general rights to liberty or autonomy, which violate the principle of non-contradiction.[138]

IV. Criticisms of Justice Scalia's Theory

Justice Scalia and Justice Brennan illustrate two possible methods for classifying rights' claims in *Michael H. v. Gerald D.*[139] Tribe and Dorf criticize Justice Scalia's circumscriptive method while arguing for Justice Brennan's expansive approach. This section examines Justice Scalia's position and his interlocutors' criticisms.

In *Michael H.*, Justice Scalia wrote for the majority in upholding a California Supreme Court decision that denied parental rights to the purported biological father of a child who was conceived by a mother married to another man.[140] The majority stated that a biological father and adulterous mother have not historically been treated as a family unit by society while society has treated the marital family as the family unit whether biological or not.[141] In dissent, Justice Brennan claimed that certain precedents upheld a fundamental liberty interest in the parent-child relationship.[142] Justice Scalia criticized as arbitrary Justice Brennan's abstraction of a liberty interest in the "parent-child" relationship. Justice Scalia offered a more specific characterization of the biological father's rights' claim:

> We do not understand why, having rejected our focus upon the societal tradition regarding the natural father's rights vis-à-vis a child whose mother is married to another man, Justice Brennan would

137. We are not advocating the common law method as the paradigm of constitutional adjudication, in part because it is judge-made law and in part because it is so narrow that it is less useful for lower court jurists who are attempting to adjudicate related cases. *See* Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1178-79 (1989) (stating that the Supreme Court reviews so few cases that it should provide some guidance to lower courts).

138. The obvious rejoinder this invites from liberal scholars is that the Supreme Court would not be able to expand individual freedom if it must narrowly specify rights. But even this result must be more acceptable to liberal scholars than condoning a method that leads to contradiction.

139. 491 U.S. 110 (1989).

140. *Id.* at 110-12.

141. *Id.* at 124 ("Thus, the legal issue in the present case reduces to whether the relationship between persons in the situation of Michael and Victoria has been treated as a protected family unit under the historic practices of our society, or whether on any other basis it has been accorded special protection. We think it impossible to find that it has.").

142. These precedents included Meyer v. Nebraska, 262 U.S. 390, 399 (1923), Skinner v. Oklahoma, 316 U.S. 535, 541 (1942), and Prince v. Massachusetts, 321 U.S. 158, 166 (1944).

> choose to focus instead upon "parenthood." Why should the relevant category not be even more general-perhaps "family relationships"; or "personal relationships"; or even "emotional attachments in general"? Though the dissent has no basis for the level of generality it would select, we do: We refer to the most specific level at which a relevant tradition protecting, or denying protection to, the asserted right can be identified.[143]

This section examines Tribe's and Dorf's three criticisms of Justice Scalia's specification of rights as seen in this case: first, his endeavor to abstract rights from societal traditions is not value-neutral;[144] second, he fails to offer a metric of specificity by which to measure an asserted right;[145] and third, his theory would entail judicial abdication of responsibility for individual rights.[146]

A. Traditions and Values

The first putative deficiency of Justice Scalia's theory is that his extraction of fundamental rights from historical traditions is laden with value choices.[147] Tribe and Dorf claim that if the law is grounded on tradition, then judges must choose between divergent behaviors that are "widely practiced and longstanding."[148] For example, in regard to traditions regarding the family, judges must choose between heterosexuality and homosexuality as well as other non-nuclear family arrangements which are widely practiced and longstanding.[149] Hence, they inevitably make a value-laden choice even when relying on historical traditions.[150]

But this criticism is grounded on a concept of "tradition" that does not distinguish between praiseworthy and invidious acts. If "tradition" consists of any acts that have been "widely" practiced throughout history, then acts such as fraud and spousal abuse merit constitutional privilege. And although historically some citizens have engaged in homosexual relationships, societies have not esteemed or protected them; indeed traditionally, they have punished and ostracized them, as Tribe has elsewhere acknowledged.[151] Tribe and Dorf correctly assert that

---

143. *Michael H.*, 491 U.S. at 127 n.6.

144. Tribe & Dorf, *supra* note 15, at 1086.

145. *Id.*

146. *Id.*

147. *Id.* ("[T]he extraction of fundamental rights from societal traditions is no more value-neutral than the extraction of fundamental rights from legal precedent.").

148. *Id.* at 1087 ("If tradition sufficed, the law would readily protect . . . any number of . . . behaviors that are widely practiced and longstanding.").

149. *Id.*

150. *Id.*

151. LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 943-44 (The Found.

homosexual sodomy is opposed by "majoritarian" values, but only because majorities have historically opposed and legally proscribed it.

An alternative view is that a more certain guide to the traditions of the United States is to discover those acts that a majority of citizens or their representatives have consistently proscribed or prescribed by law. These laws provide a public record of the traditions embraced by majorities. Tribe and Dorf denigrate these "legally cognizable 'traditions'" because their description is subject to manipulation by judges.[152] This claim might be valid regarding certain obscure traditions but others are less vulnerable to manipulation. Some majoritarian values, such as proscriptions of homosexual sodomy, are delineated in the United States legal tradition.[153]

Tribe and Dorf dismiss even clear historical traditions "because even when we discover a clear historical tradition it is hardly obvious what the existence of that tradition tells us about the Constitution's meaning."[154] This claim is valid if one dismisses historical tradition as a constitutional touchstone, but if not, a historical tradition offers a measure of guidance regarding the constitutionality of certain rights' claims. The Supreme Court repeatedly has asserted that the Nation's traditions offer guidance to a right's fundamental character.[155] Hence, Tribe's and Dorf's disparagement of Justice Scalia's use of tradition as either indeterminate or steeped in majoritarian values is untenable, particularly in regard to many obvious legal traditions.

B. The Metric of Specificity

The second deficiency that Tribe and Dorf ascribe to Justice Scalia's theory lies in Scalia's sixth footnote in the opinion.[156] Tribe and Dorf deny the existence of a universal measure of specificity that can be applied to a disputed right.[157] In *Michael H.*, Justice Scalia rejected Justice Brennan's generalization of the disputed right as one of "parenthood."[158] Instead Justice Scalia characterized it as the right of "a natural father of a child conceived within, and born into, an extant

---

Press Inc. 1978) ("[T]he history of homosexuality has been largely a history of disapproval and disgrace."). *Id.* at 944.

152. Tribe & Dorf, *supra* note 15, at 1087.

153. *See* Bowers v. Hardwick, 478 U.S. 186, 194 (1986) for an enumeration of anti-sodomy laws.

154. Tribe & Dorf, *supra* note 15, at 1089.

155. Washington v. Glucksberg, 521 U.S. 702, 721 (1997); Patterson v. New York, 432 U.S. 197, 202 (1977); Leland v. Oregon, 343 U.S. 790, 798 (1952).

156. Tribe & Dorf, *supra* note 15, at 1086.

157. *Id.*

158. *Michael H.*, 491 U.S. at 127 n.6.

marital union that wishes to embrace the child."[159] Scalia added in the sixth footnote that the basis for choosing this level of specificity is obtained by consulting the relevant tradition governing the asserted right.[160] He states that "if no societal tradition existed either supporting or denying the rights of the natural father of a child adulterously conceived, [the Court] would have to consult, and (if possible) reason from, the traditions regarding natural fathers in general."[161] Justice Scalia claims that traditions regarding natural fathers in general would be the next most specific level of generality.

Tribe and Dorf criticize Justice Scalia's formulation of the right contested in *Michael H.* as "arbitrary" and "value-laden."[162] They claim that, at a minimum, the natural father's longstanding relationship with the child should also be included. So the appropriate level of specificity should be the "rights of the natural father of a child conceived in an adulterous but longstanding relationship, where the father has played a major, if sporadic, role in the child's early development."[163]

But Justice Scalia's specification of the disputed rights' claim in *Michael H.* is neither arbitrary nor value-laden: it is determined by the language of the disputed statute. In *Michael H.*, the governing California statute described paternity by stating that a child born to a married woman living with her husband, who is neither impotent nor sterile, is presumed to be a child of the marriage, and that this presumption may be rebutted only by the husband or wife, and then only in limited circumstances.[164] Justice Scalia's specification of the case and search for the relevant tradition are derived from the statute's description of paternity.[165] Contrary to Tribe's and Dorf's claim, the dispute cannot be specified in terms of the biological father's loving relationship with his daughter because the statute does not include this proviso. Tribe and Dorf admit that even if one inserted the father's long-standing relationship into Justice Scalia's specification, no relevant tradition exists that would support their formulation of the rights' claim.[166] But they fail to explain why a jurist must further generalize the right instead of merely

159. *Id.*

160. *Id.* ("We refer to the most specific level at which a relevant tradition protecting, or denying protection to, the asserted right can be identified.").

161. *Id.*

162. *Id.* at 1091 ("[Justice Scalia] cannot escape the value-laden *choice* of a level, and a direction, of abstraction.").

163. *Id.* at 1092.

164. CAL. FAM. CODE § 7611 (West 2006).

165. Michael H. v. Gerald D., 491 U.S. 110, 127 (1989) ("What counts is whether the States in fact award substantive parental rights to the natural father of a child conceived within, and born into, an extant marital union that wishes to embrace the child.").

166. Tribe & Dorf, *supra* note 15, at 1092 ("It is unlikely that any tradition addresses this very question at this precise level of specificity.").

upholding the statute when no relevant tradition is discovered.

Although Tribe and Dorf err in specifying Michael H.'s rights' claim, their discussion illuminates several factors that should govern a jurist's specification of a right and search for the relevant tradition. First, a jurist should not specify a right in general terms that are contradicted by exceptions unless she is willing to resolve the contradictions. The contradiction can be internal, such as the self-contradictory right to liberty, or can involve precedent, as in *Casey*.[167] The former is not amenable to resolution, while the latter can be resolved by qualifying one of the two statements for the sake of coherence. A legal ruling is untenable if jurists are unable or unwilling to resolve the contradiction.

Second, jurists can specify properly only by determining the relevant characteristics of the case. Indeed, the issue of relevance is central to the specification debate. A single human act can be described in myriad ways. An act of first-degree murder can be characterized as acting autonomously, pulling a trigger, discharging a firearm, shooting another person, killing another person, or murder, among others. The number of descriptions can be multiplied by inserting "voluntary" or "involuntary" into most of these descriptions.

Should a jurist interpret the act as generally as possible, i.e., an autonomous act, or more specifically, i.e., first-degree murder? A jurist determines the level of specificity by considering the relevant features of the act. All of the enumerated descriptions capture some aspect of the act but omit other relevant features. One can "pull a trigger" or "discharge a firearm" without harming another person so these descriptions do not fully articulate the relevant features of the act. Nor does "shooting another person" detail the extent of the harm inflicted. The relevant features are that the agent intentionally killed another person freely, with premeditation, and without justification. These are the relevant features of first-degree murder because they characterize the perniciousness of the crime and distinguish it from less heinous types of killing. The relevant features govern the specification of the act as first-degree murder and all are necessary for the act to be specified as such.

One relevant feature of any constitutional rights' claim is the disputed law. Therefore, a jurist should not formulate the right in general terms without reference to the disputed claim. In *Michael H.*, the fact that the conception of the child occurred in an act of adultery was relevant because the statute explicitly limited a biological father's ability to establish parenthood if the biological mother was married to another man at the time of the conception.[168] A jurist must address the adulterous

167. *See generally* Planned Parenthood of SE Pa. v. Casey, 505 U.S. 833 (1992).
168. CAL. FAM. CODE § 7611 (West 2006).

conception in her rights' specification because the dispute would not arise if this was not included in the statute. Therefore, the language of the statute is relevant to the specification of the rights' claim and to the application of governing precedents.

Additionally, a jurist could nevertheless recognize the biological father's claim on grounds of the parent-child relationship, but only if she could cite precedents or traditions that either made the parent-child right absolute (in which case the adulterous character is rendered irrelevant) or explicitly favored the parent-child right without regard to marriage. Therefore the language of the statute is relevant to the specification of the rights' claim and to the application of governing precedents.

Another relevant feature is the rights' claim of the plaintiff. Hence, Plaintiffs such as Michael H. are afforded the opportunity to describe their respective rights' claim as generally or specifically as they choose. However, general rights' formulations are vulnerable to the contradiction of numerous precedents or traditions. Statutes formulated in general terms are similarly vulnerable. Thus, the language of both the statute and the plaintiff's rights' claim must be sufficiently specific to avoid contradicting precedent and historical tradition. And both the plaintiff and the state must articulate their respective claims in terms that describe the relevant features of the disputed act. Jurists can consult historical traditions to determine if the circumstances that define such acts as abortion, adultery, contraception, and suicide have been considered relevant. The existence of such historical or legal traditions provides a constitutional basis for relevance.

Some scholars, including Tribe and Dorf, suggest that the relevant characteristics of any act are culturally relative.[169] This claim undermines jurisprudence because it denies both the objective reality of difference and the existence of distinguishable acts. Murder would differ from a beneficent act only by variable conventional criteria.[170] If these acts can be distinguished then there exist some objective characteristics of relevancy.[171] Moreover, the fact that legal systems worldwide

169. In discussing how the Justices could justify a right to abortion, but not contraception, Tribe and Dorf state, "[p]erhaps the justices secretly adhere to a canon of constitutional construction requiring that fundamental rights begin in vowels: abortion is in, contraception is out. No one would actually argue for such a rule, but this fact is socially and culturally contingent . . . the criteria of relevance are themselves culturally shaped." Tribe & Dorf, *supra* note 15, at 1076-77.

170. John Mikhail, *Law, Science, and Morality: A Review of Richard Posner's The Problematics of Legal Theory*, 54 STAN. L. REV. 1057, 1107 (2002) ("[T]he homicide statutes that one finds in the world's legal systems are remarkably similar.").

171. Admittedly, some laws are social constructs, e.g., driving on the right-hand or left-hand side of the road, but other laws are objectively grounded, e.g., murder. *See id.* for a thorough discussion of this point.

similarly criminalize many acts reveals that human beings are capable of discerning the relevant characteristics of many acts.[172]

Tribe and Dorf cogently criticize one aspect of Justice Scalia's theory. Justice Scalia claimed that if a jurist could not discover a relevant tradition after initially specifying the right, he should then determine the next most specific level and follow that tradition.[173] Tribe and Dorf correctly state that neither they nor Justice Scalia can determine the next most specific level because no one can be certain of which relevant factors to alter.[174] The disputed right can be reformulated in a multitude of ways and Justice Scalia does not provide a metric for the proper alternative specification. A jurist could abstract out the father's sex and consult traditions of natural mothers who conceived children in adulterous relationships, or perhaps they could consider the traditions regarding unmarried fathers' rights when the mother was not married at the time of conception.[175] There is no metric of specificity that jurists can consult to determine the next most specific level.

However, this criticism does not irreparably undermine Justice Scalia's theory. Instead of seeking an alternative specification of the rights' claim, Justice Scalia's theory should require the jurist to defer to the extant statute rather than seeking an alternative tradition grounded on the altered specification of the rights' claim. Hence, if a jurist cannot find a "societal tradition either [supporting or denying the] rights of the natural father of a child adulterously conceived,"[176] then she should uphold the statute. The statute should then be seen as the tradition. The relevant issues of the dispute should constrain the jurist in the traditions she consults, and if she finds none either supporting or refuting the claims, she should defer to the statute by upholding it. If the California statute and the relevant tradition have not made an exception for biological fathers who have played a "major" role in the lives of their children adulterously conceived, then neither should jurists in their survey of relevant traditions. If the citizens of California change the language of the statute, then the jurist should be governed by the altered form.

Tribe's and Dorf's compelling criticism of Justice Scalia's search for the "next most specific level" does not subvert his theory, but it does

172. *See* Mikhail, *supra* note 170, at 1107 (recounting current literature that reveals much uniformity worldwide in legal codes).

173. Michael H. v. Gerald D., 491 U.S. 110, 127 n.6 (1989) ("If, for example, there were no societal tradition . . . [the Court] would have to consult, and (if possible) reason from, the traditions regarding natural fathers in general.").

174. Tribe & Dorf, *supra* note 15, at 1092.

175. *Id.* at 1090-91.

176. *Michael H.*, 491 U.S. at 127 n.6.

vitiate their endeavor to specify Michael H.'s right in general terms. Tribe and Dorf offer neither a "metric" by which to generalize this disputed right nor the precise level of generality that should have been applied in *Michael H.* They merely ask how "family relationships worthy of protection do *not* include someone in Michael H.'s position vis-à-vis his daughter."[177] Their deficiency arises not from their failure to offer a metric, which is not possible, but of generating contradiction by generalizing rights.

Moreover, Tribe's and Dorf's theory allows jurists to import their values into law by framing the contested right in vacuous generalities. This criticism is buttressed by Justice Brennan's opinion in *Michael H.*[178] Justice Brennan eschews appeals such as Tribe's and Dorf's to a general right to "family" or "parenthood" because "it is absurd to assume that we can agree on the content of those terms and destructive to pretend that we do."[179] Brennan's point is that although abstract terms such as "family" or "parenthood" might garner a consensus, the substance of these terms is disputed and therefore, the general term is useless.

More importantly though, Justice Brennan's criticism of attempts such as Tribe's and Dorf's to generalize Michael H.'s rights' claim to "family relationships" reveals the subjectivity inherent in generalizing rights: no metric exists and therefore, jurists can generalize the right in sundry ways, none of which, as Justice Brennan notes, contains a particular content that commands assent.[180] Remarkably, after criticizing the use of general terms such as "family," Justice Brennan upholds Michael H.'s rights by employing an even more general due process right. For Justice Brennan, "'liberty' must include the freedom not to conform."[181] But this "liberty" would protect every individual who engages in any practice legally proscribed, because every law requires conformity. It is as absurd to think that people can agree on the content of "the right not to conform" as "family" or "parenthood."[182]

Tribe and Dorf, Justice Brennan, and many other jurists generalize rights' claims in seductive, vacuous terms, such as "family relationships," "autonomy," or the "right to be let alone." But these terms

177. Tribe & Dorf, *supra* note 15, at 1102.

178. *Michael H.*, 491 U.S. at 136.

179. *Id.* at 127 n.6.

180. *See* Paul Brest, *supra* note 16, at 1089 ("Even assuming that general principles can found in social consensus or derived by moral reasoning, the application of those principles is highly indeterminate and subject to manipulation.").

181. *Michael H.*, 491 U.S. at 141 ("In a community such as ours, 'liberty' must include the freedom not to conform.").

182. Moreover, his claim for a "right not to conform" is subject to Tribe's & Dorf's compelling criticism of the "right to be let alone." Indeed, nearly any generalized right is subject to their potent reduction of the "right to be let alone."

allow jurists to import their values when articulating the substance—which has no constitutional basis—of these very formal terms. A right to "family" seems innocuous until jurists delineate the content of "family" which depends on the subjective values of the jurists. The right to "family" could create constitutional rights for adulterous, abusive, polygamous, gay, heterosexual, or bi-species relationships, depending on the personal values of the jurist. The vacuous character of these general rights allows jurists to impose their values when delineating the substance of these rights. Justice Scalia's method precludes such judicial activism.

C. *Judicial Capitulation of Individual Rights*

Tribe's and Dorf's third criticism is that Justice Scalia's theory capitulates judicial protection of individual rights.[183] Specifically, they criticize Justice Scalia's fourth footnote in *Michael H.*,[184] in which Scalia criticized the practice of first determining whether a liberty is fundamental and then determining whether the government's interest overrides that liberty. Justice Scalia analogized the procedure of isolating the liberty interest from its effect on other people to inquiring whether there is a liberty interest in firing a gun without asking whether it is being discharged into another's body.[185]

Tribe and Dorf claim that individual rights would be circumscribed if jurists combined the method of the sixth footnote, which requires historical traditions to be specified narrowly,[186] with the fourth footnote's requirement that the government's interest must be included in the formulation of the rights' claim.[187] They state that the fundamental character of any liberty interest would be lacking if the government's justification for limiting the liberty is incorporated into the initial definition of the liberty.[188] The liberty would be so specific that no connection to precedent could be established. For example, the right to privacy in *Roe* could be re-characterized as the right to destroy fetuses.[189]

---

183. Tribe & Dorf, *supra* note 15, at 1086 ("[E]ven if Justice Scalia's program were workable, it would achieve judicial neutrality by all but abdicating the judicial responsibility to protect individual rights.").

184. *Id.* at 1096-97.

185. *Michael H.*, 491 U.S. at 124 ("[L]ike inquiring whether there is a liberty interest in firing a gun where the case at hand happens to involve its discharge into another person.").

186. Tribe & Dorf, *supra* note 15, at 1097.

187. *Id.*

188. *Id.* ("When we automatically incorporate the factors that provide the state's possible justifications for its regulation into the initial definition of a liberty, the fundamental nature of that liberty nearly vanishes.").

189. *Id.* ("At a minimum, the privacy right protected in *Roe* becomes the implausible

Part III, section B above revealed that Justice Scalia's criticism of the two-step process is probative. To employ Justice Scalia's example and Tribe's and Dorf's method, an individual could generalize her right to fire a gun (or any other act) as a right to autonomy, because it is important to personhood, and instantly claim a fundamental due process liberty right.[190] But as discussed above, there is no general right to liberty or to fire a gun. There are specific acts of liberty and specific acts of firing guns that one can justify, but no such general rights. Before a jurist can determine if a particular right exists, she must justify the right to the act in those particular circumstances by specifying all the relevant factors that condition the rights' claim.

Tribe and Dorf similarly criticize Justice Scalia's use of "legal 'cognizable' traditions" because such a term constitutes majoritarian values and therefore "one cannot comfortably look to tradition to bolster the judicial role as protector of individual rights against the state."[191] But this criticism begs the question of whether the judiciary's role is to expand certain liberties or to adjudicate according to established and reasonable jurisprudential principle. The criticism that Justice Scalia's originalism could generate rulings "unacceptable" to some is valid insofar as originalism often acquiesces to American democratic majorities, which historically have enacted unjust laws, particularly in regard to race.[192] But no scholar has yet offered a theory of jurisprudence that is impervious to unacceptable results. Either the people (through their representatives) or the judiciary can err by establishing unjust laws; the judiciary is no more infallible than the people on a purely consequential metric.[193] Historically, many American states did not exhibit the racist tendencies that afflicted many jurists.

Liberal scholars often speak of the rights' conflict of "the individual" and "the state," which conjures up images of a defenseless

---

'right' to destroy a fetus.").

190. Schauer, *supra* note 136, at 440 ("[T]he Due Process clause has been interpreted in a way that threatens to make most, if not all, of the remainder of the document [the Constitution] superfluous.").

191. Tribe & Dorf, *supra* note 15, at 1087.

192. Frank Easterbrook, *Abstraction and Authority*, 59 U. CHI. L. REV. 349, 379 (1992) ("Hypothetical horribles start from the belief that a legislature has done what *no* reasonable person could want.").

193. *See* Cass R. Sunstein, *Testing Minimalism: A Reply*, 104 MICH. L. REV. 123, 129 (2005) (Sunstein cites nine cases in which he implies that the Court erred. "The Court's conception of what principle requires, and its understanding of what it means to defend "minority rights," should not be taken as unerring. From the moral point of view, insulation from majoritarian pressures is sometimes the problem, not the solution."); JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 57 (Harvard Univ. Press 1980) (disputes that jurists are more dispassionate than legislators by asking rhetorically whether Taney was better than Lincoln).

individual suffering at the hands of the monolithic and authoritarian government. We do not discount the instances in which state officials act *ultra vires*, such as by illegally wire-tapping a citizen's house or falsifying evidence in a trial. However, in these cases the state officials are not acting according to the established law of the state.

But most of the controversial rights' disputes do not pit an individual against the state, but rather involve the discrepant rights' claims of a minority and majority of individuals, who, in most cases were allowed to establish the law either directly or by their elected representatives. The more fundamental question is why the judiciary must favor the minority, rather than weigh equally the liberty claims of the majority and minority. However, Tribe's and Dorf's derogation is probative only if one adopts their constitutional ideology, namely, that the role of the judiciary is to expand individual rights.[194]

Therefore, Tribe and Dorf are mistaken in asserting that liberties would be curtailed by narrowly specified rights' claims.[195] Only those without a basis in the traditions and history of the United States would be precluded. Other practices that have not been legally regulated could be recognized as rights if the state attempts to proscribe these historical practices. Alternatively, even those practices without a historical basis could become novel rights through the democratic process. Therefore, the citizens would not be burdened with counterintuitive originalist rulings because the majority would be free to proscribe them.[196]

The challenge for liberal scholars is that they must argue that a novel rights' claim is fundamental and that it is constitutionally grounded. Originalists justify the claim by the right's existence in the country's traditions and precedents. Liberals and progressives do not want to be limited to historical practices, yet they must find some constitutional basis for the new right. The only solution for bridging this chasm between novel claim and the historicity of the Constitution is through the notion of general rights, which are so vague that they encompass both the novel and the traditional.

194. Tribe, *supra* note 151, at 944-46. "It is crucial, in asking whether an alleged right forms part of a traditional liberty, to define the liberty at a high enough level of generality to permit unconventional variants to claim protection along with mainstream versions of protected conduct." *Id.* at 946.

195. Tribe & Dorf, *supra* note 15, at 1093 ("Justice Scalia is aware that the method of footnote [six] would severely curtail the Supreme Court's role in protecting individual liberties.").

196. Hence, even the most opprobrious consequences that originalism might entail in the minds of its critics, such as the proscription of contraceptive use or the recognition of racist policies, can be rectified by citizens.

V. Conclusion

Thomas Hobbes introduced modern philosophy to the radical notion of voluntarism, i.e., the good is whatever I desire.[197] Although appealing in concept, voluntarism creates an impediment to the political ordering of discrepant desires. Hobbes offered the Leviathan as a solution: each citizen sacrifices some desires for the sake of bodily safety that the all-powerful and unassailable Leviathan guarantees.

One strand of modern philosophical thought has attempted to construct moral and political theories grounded on Hobbes' notion of voluntarism liberated from the authoritarian Leviathan.[198] John Stuart Mill's theory of liberty outlined an influential scheme of governance predicated on a notion of liberty that is voluntarist in character, albeit not consistently. The crux of his theory of liberty is articulated in the Harm principle, *viz.*, that an individual retains liberty until his actions harm another.[199] One shortcoming of the principle is obvious: the very notion of what constitutes harm for an individual will be entirely subordinate to her wants. For those who want to avoid physical pain, state proscriptions of assisted-suicide are harmful to the individual; to those who think human life is a fundamental good, assisted-suicide is harmful because it devalues that which they hold dear. Any individual denied her desire suffers some type of harm, be it physical, psychological, or financial.[200] Therefore, practitioners and opponents of any act, whether it be abortion, public exhibitionism, shouting in a movie theater, murder or jay-walking, suffer harm when denied their liberty, i.e., doing what they want.

Some method must be adopted to resolve the conflicts among discrepant wants. Despite their best efforts, scholars have failed to produce a metric for weighing pleasure, or correlatively, measuring

197. THOMAS HOBBES, LEVIATHAN 120-21 (Prometheus Books 1985) (1651) ("But whatsoever is the object of any man's Appetite or Desire: that is it, which he for his part calleth Good; and the object of his Hate, and Aversion, Evill; and of his Contempt, Vile, and Inconsiderable.").

198. One of the most influential of Hobbes progeny was David Hume. DAVID HUME, A TREATISE OF HUMAN NATURE 574 (L. A. Selby-Bigge & P. H. Nidditch eds., Oxford University Press 2nd ed. 1978) (1739-40) ("We have already observed, that moral distinctions depend entirely on certain peculiar sentiments of pain and pleasure, and that whatever mental quality in ourselves or others gives us a satisfaction, by the survey or reflection, is of course virtuous; as every thing of this nature that gives uneasiness is vicious.").

199. JOHN STUART MILL, *On Liberty, in* UTILITARIANISM, ON LIBERTY, AND CONSIDERATIONS ON REPRESENTATIVE GOVERNMENT 165 (H.B. Acton, ed., 1972) ("The principle of liberty requires liberty of tastes and pursuits; of framing the plan of our life to suit our own character; of doing as we like, subject to such consequences as may follow: without impediment form our fellow-creatures, so long as what we do does not harm them, even though they should think our conduct foolish, perverse, or wrong.").

200. *See* Roe v. Wade, 410 U.S. 113 (1973); Doe v. Bolton, 410 U.S. 179 (1973).

harm, because these are not quantifiable entities.[201] The only quantitative method of mediating these voluntaristic disputes is that of majoritarianism: assign each person's desire equal weight and count heads. Of course this method can generate gross injustices against any minority, and contemporary liberal theorists have relied on the concept of individual rights to protect individuals against certain injustices that a democratic majority could perpetrate.[202] The liberalist conception of rights maintains that just one person's right can trump the majority's desires.

Social-contract theory provides a rationale for upholding the individual's counter-majoritarian right's claim because the governing constitution binds all citizens by its terms, and if the Constitution protects a specific individual right then the individual can coherently claim that right in the face of the majority's disapproval. But because the United States Constitution does not explicitly protect most individual rights' claims, proponents invoke the Due Process Clause's guarantee of a general right to liberty.

The untenability of this legal claim is patent: the individuals constituting either the majority or the minority are seeking to legalize their liberty (or wants) and those individuals' denied by law endure the harm of a frustrated want. Although either the legislature or the judiciary inflicts harm on the group of individuals whose desires are proscribed, legislatures can appeal to the principle of majority rule, but jurists are bereft of principled justifications.

The Supreme Court could claim that one party to the dispute suffers greater harm, but this would require justices either to quantify desires—which is impossible—or rank the harms, which requires an axiology of desires, for which there exists no constitutional basis. Judicial appeals to public sensibilities or consensus would violate the right of the individual to construct and enact his own axiology. Moreover, ranking desires requires some version of the good because the prevailing desires must be judged as more important than others.[203] But the imposition of a view of the good—that favored by a majority of the Court—violates the liberal tenet that the government must not impose its view of the good on

201. For the most ambitious utilitarian attempt to quantify desires, *see* R.M. HARE, MORAL THINKING: ITS LEVELS METHOD AND POINT 117-29 (Oxford Univ. Press 1982).

202. RONALD DWORKIN, A MATTER OF PRINCIPLE 360-65 (Harvard University Press 1985) (arguing that neutral utilitarianism, in which each person is allowed a vote to express his preference, would permit Nazism).

203. *See* RAZ, *supra* note 107, at 414 ("Since 'causing harm' entails by its very meaning that the action is prima facie wrong, it is a normative concept acquiring its specific meaning from the moral theory within which it is embedded. Without such a connection to a moral theory, the harm principle is a formal principle lacking specific concrete content and leading to no policy conclusions.").

individuals.[204]

The Supreme Court has explicitly embraced a voluntarist view of the good in its principles of liberty, autonomy, and privacy.[205] But the Court cannot distinguish among desires without recourse to a view of the good, which the Court conceals by formulating the rights' claim in terms so general that some precedent applies. By generalizing rights, justices are able to invoke some analogous precedent, thereby, preserving the veneer of principled jurisprudence. But any desire can be similarly generalized so that myriad precedents apply.

Law must be principled or it is merely the imposition of force by the empowered.[206] Generalizing law vitiates its character as law because it fosters unprincipled jurisprudence. Then-Chief Justice nominee John Roberts appropriately expressed perplexity at the concept of a general right to privacy: the concept of a prescriptive general right is indefensible and the notion of a general due process liberty right is self-contradictory. The Supreme Court must eschew general rights and seek refuge in principled specification. Justice Scalia offers a compelling alternative.

---

204. *See id.* at 191 (asserting that equality "supposes that political decisions must be, so far as is possible, independent of any particular conception of the good life, or of what gives value to life."); JOHN RAWLS, POLITICAL LIBERALISM 191-94 (Columbia Univ. Press 1993) (offering a more philosophical basis than Dworkin does for neutrality); CHARLES E. LARMORE, PATTERNS OF MORAL COMPLEXITY 67 (Cambridge Univ. Press 1987) ("A commitment to treating others with equal respect forms the ultimate reason why in the face of disagreement we should keep the conversation going, and to do that, of course, we must retreat to neutral ground.").

205. *See* Planned Parenthood of SE. Pa. v. Casey, 505 U.S. 833, 851 (1992) ("At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of life."); *see also* Roberts v. U.S. Jaycees, 468 U.S. 609, 619 (1984) (The right to privacy protects "the ability independently to define one's identity."); *see also* Doe v. Bolton, 410 U.S. 179, 211 (1973) (Douglas, J., concurring) (The right to privacy protects liberties such as "*the autonomous control over the development and expression of one's intellect, interests, tastes, and personalities.*") (emphasis added).

206. Bork, *supra* note 16 ("This is, I think, the ultimate reason the Court must be principled. If it does not have and rigorously adhere to a valid and consistent theory of majority and minority freedoms based upon the Constitution, judicial supremacy, given the axioms of our system, is, precisely to that extent, illegitimate.").

***