University of Florida Journal of Law & Public Policy

Volume 16 | Issue 3 Article 2

2005

Inconsistent Levels of Generality in the Characterization of Unenumerated Fundamental Rights

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INCONSISTENT LEVELS OF GENERALITY IN THE CHARACTERIZATION OF UNENUMERATED FUNDAMENTAL RIGHTS

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"[I]n most matters it is more important that the applicable rule of law be settled than that it be settled right."[1]
— Justice Brandeis, April 11, 1932

"Liberty finds no refuge in a jurisprudence of doubt."[2]
— Justice Scalia, June 26, 2003

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* J.D. with High Honors, Rutgers University School of Law — Camden (2005). The author would like to thank Sarah Ricks for her comments on earlier drafts.

1. Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 406 (1932) (Brandeis, J., dissenting).

2. Lawrence v. Texas, 539 U.S. 558, 586 (2003) (Scalia, J., dissenting) (citing Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 844 (1992)).

I. INTRODUCTION

Highly publicized cases such as *Lawrence v. Texas*[3] and *Williams v. Attorney General of Alabama*[4] bring to light a continuing weakness in Fourteenth Amendment jurisprudence.[5] These cases illustrate that the U.S. Supreme Court has failed to provide the guidance necessary to advance coherent decisionmaking in the lower federal courts,[6] promote the perception that the federal judiciary is transcendent of politically divisive issues,[7] and develop methodologies capable of defining the role of the

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3. 539 U.S. 558 (2003).
4. 378 F.3d 1232 (11th Cir. 2004).
5. The Fourteenth Amendment states in part:

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

U.S. CONST. amend. XIV, § 1.

6. *See* Denise E. Choquette, Note, Reno v. Flores *and the Supreme Court's Continuing Trend Toward Narrowing Due Process Rights*, 15 B.C. THIRD WORLD L.J. 115, 123 (1995) (explaining how the current confusion in due process jurisprudence has reduced its doctrinal integrity).

7. When courts inconsistently utilize methods for characterizing fundamental rights or inadequately articulate their methodology, both court observers and the general public perceive their reasoning as results-oriented jurisprudence. In the wake of *Williams*, one columnist offered this criticism:

> Between the cheap-shot framing, the too-easy slippery slope argument (citing the inexorable path from sex toys to "adult incest, prostitution, obscenity, and the like"), and the ever popular contention that judges must never second-guess legislatures on anything, the majority opinion in *Williams* sounds virtually every note in the increasingly ugly wars over the activist judges and invalid constitutional interpretation. Buried amid the dismissive rhetoric, there is a creditable discussion of the constitutional limits of *Lawrence* here. But as judges are increasingly tempted to thrash out the culture wars in the pages of their opinions, the label "activist judge" starts to fit either side rather well.

Dahlia Lithwick, *A Sexual Bill of Rights*, SLATE, Aug. 4, 2004, *available at* http://www.slate.com/id/2104768 (last visited Feb. 15, 2005); *see also* Frank H. Easterbrook, *Abstraction and Authority*, 59 U. CHI. L. REV. 349, 373 (1992) ("The rule of law attracts formidable support only so long as people believe that there is a rule of *law* and not a rule by *judges*."); Jeffrey Rosen, *Sex Appeal*, THE NEW REPUBLIC, July 30, 2003, *available at* http://faculty.smu.edu/jkobylka/newsItems/Lawrence%20TNR.htm (last visited Feb. 15, 2005).

judiciary.[8] Specifically, when asked to recognize a fundamental right under the Due Process Clause of the Fourteenth Amendment,[9] the U.S. Supreme Court has failed to articulate a substantial justification for the level of generality in characterizing the legal issue.[10]

When a complaining party alleges that a state or federal statute violates a fundamental right guaranteed by the U.S. Constitution, before it can evaluate the merits of the claim, the court must first characterize the legal issue. The manner in which the court characterizes the issue critically defines the scope and boundaries of its reasoning and significantly impacts its holding.[11] If the court frames an asserted fundamental right with a highly specific level of generality so that only a handful of historically protected traditions are relevant,[12] there is only a small likelihood that it

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8. By permitting manipulation of the level of generality, judges improperly expand their role in government, infringe upon the responsibilities of political actors and violate the principle of separation of powers. "Instead of assuming power and then searching for a level of abstraction, the court should search for that degree of generality capable of justifying a judicial role." Easterbrook, *supra* note 7, at 372.

9. The term "liberty" in the Due Process Clause has been interpreted to incorporate selected enumerated rights found within the Bill of Rights, as well as selected unenumerated rights, which are "chiefly determined based on the historical accident of which sorts of cases [the courts] elect to hear." Lithwick, *supra* note 7. Since the repudiation of "the use of substantive due process as a basis for protecting economic rights, the Supreme Court has struggled to find a firm foundation for other rights not explicitly delineated in the constitutional text." Laurence H. Tribe & Michael C. Dorf, *Levels of Generality in the Definition of Rights*, 57 U. CHI. L. REV. 1057, 1059-60 (1990). Inherently, given the "scarce and open-ended" nature of a case-by-case determination of "liberty," the danger exists that judges may ". . . read into the Constitution their own subjective sympathies and social preferences." *See* ROBERT H. BORK, THE TEMPTING OF AMERICA 61 (1990) (citing United States v. Carolene Prods. Co., 304 U.S. 144, 153 n.4 (1938); Collins v. City of Harker Heights, 503 U.S. 115, 125 (1992)). For example, although there is no mention of contraception or family planning within the text of the U.S. Constitution, the U.S. Supreme Court has recognized as fundamental the right of married persons to use birth control and the right of women to choose to have an abortion. *See* Roe v. Wade, 410 U.S. 113 (1973); Griswold v. Connecticut, 381 U.S. 479 (1965).

10. Easterbrook, *supra* note 7, at 358 (arguing that it is important to have a consistent theory of choice because the level of generality can be used to justify any outcome).

11. The Origins and Scope of *Roe v. Wade*: Hearing Before the Subcommittee on the Constitution, Committee on the Judiciary, U.S. House of Representatives, Apr. 22, 1996 (testimony of Mark Tushnet, Professor, Georgetown University) ("Everything turns on how specifically or abstractly we define the right claimed to be fundamental."); BORK, *supra* note 9, at 148 (stating that the level of generality is of crucial importance).

12. In recent years, the debate over the level of generality has typically occurred within the context of whether an asserted fundamental right has been traditionally and historically protected. A court will characterize the issue by referencing history and tradition, and then will review history to determine whether similar traditions have been protected. *See* Cruzan v. Dir., Mo. Dep't of Health, 497 U.S. 261, 293-94 (1990) (Scalia, J., concurring); Michael H. v. Gerald D., 491 U.S. 110, 122-24 (1989) (plurality); *see also* David Crump, *How Do the Courts Really Discover*

will recognize a new right.[13] If the court frames an asserted fundamental right more abstractly[14] so that any number of historically protected traditions apply, its recognition of a new right is much more promising.

Certainly, fundamental rights have long been a focus of significant scholarly and political debate. But this debate has paid little attention to the particular methodology the court uses to characterize the issues. In times like these, when cultural forces are waging a political battle over contentious issues such as gay rights, courts must undertake a thought-provoking review of their characterization of asserted fundamental rights. The absence of a thorough examination of generality only perpetuates the cynical, but unfortunately accurate, perspective that courts too often engage in results-oriented jurisprudence.[15] Furthermore, existing literature and recent fundamental rights case law have created a constitutional environment that begs further examination of the appropriate level of generality.

Immediately following the decision in *Michael H. v. Gerald D.*,[16] prominent scholars wrote on these difficulties.[17] Although there is no

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Unenumerated Fundamental Rights? Cataloguing the Methods of Judical Alchemy, 19 HARV. J.L. & PUB. POL'Y 795, 865 (1996). For example, if an asserted fundamental right receives a high level of abstraction, such as "the right to be left alone," a court will examine statutes, common law and precedent to determine whether there are other rights "to be left alone" that have been historically protected. If a court concludes that other "rights to be left alone" have been established or protected in the past (which, undoubtedly, it will), then the asserted fundamental right will be recognized. Conversely, if the characterization of the asserted right is descriptive, such as "whether the right to buy vibrators has been historically protected," only a few, if any, relevant traditions are likely to exist. Therefore, the asserted right will probably not be recognized. Although generality, history, and tradition have recently been more frequently linked, the two-tiered system favored by some courts is not required. *See* Lawrence v. Texas, 539 U.S. 558, 571 (2003) (commenting that history is usually the starting point of the inquiry, but it does not have to be the ending point).

13. Easterbrook, *supra* note 7, at 352.

14. *See id.* at 353 (commenting on how words such as "general" and "abstract" are terms that are general in nature, which can create confusion and misunderstanding).

15. *See* David B. Anders, Note, *Justices Harlan and Black Revisited: The Emerging Dispute Between Justice O'Connor and Justice Scalia Over Unenumerated Fundamental Rights*, 61 FORDHAM L. REV. 895, 909 (1993) (arguing that by narrowly defining the right at issue, judges can reject the right for lack of specific constitutional support, without dealing with broader, more difficult issues); *see also* Gina D. Patterson, *The Supreme Court Passes the Torch on Physician Assisted Suicide:* Washington v. Glucksberg *and* Vacco v. Quill, 35 HOUS. L. REV. 851, 871 (1998). *But see* Crump, *supra* note 12, at 869 (arguing that a specific definition of the tradition does not inevitably lead to a choice against that right).

16. *Michael H.*, 491 U.S. at 110.

17. *See* Tribe & Dorf, *supra* note 9; Bruce Ackerman, *Liberating Abstraction*, 59 U. CHI. L. REV. 317 (1992); Easterbrook, *supra* note 7. Tribe is the Tyler Professor of Constitutional Law at Harvard Law School; Ackerman is the Sterling Professor of Law & Political Science at Yale

doubt that these publications played a valuable role in advancing the Fourteenth Amendment dialogue, there are two reasons why further discussion is needed. First, recent decisions such as *Lawrence* and *Williams* have renewed the debate on generality by demonstrating that the U.S. Supreme Court still fails to provide jurisprudence that is consistent enough to guide lower federal courts. Second, there exists a need to independently evaluate the problem of generality in unenumerated rights. Previous discussions have focused largely on the generality problem in broad perspective, but this Article focuses specifically on unenumerated fundamental rights. There is no doubt that the generality problem exists in almost all areas of the law, whether constitutional[18] or otherwise,[19] but the difficulties associated with unenumerated rights are wholly distinct and require an innovative, novel examination.

University; Judge Easterbrook sits on the U.S. Court of Appeals for the Seventh Circuit and is a senior lecturer at the University of Chicago Law School.

18. Generality is problematic in enumerated fundamental rights, separation of powers, the Commerce Clause, and the Takings Clause. *See* Ackerman, *supra* note 17, at 318-19, 46-48.

19. The difficulties in determining the level of generality are not unique to an analysis of fundamental rights. The same problem occurs in intellectual property cases in determining the scope of copyright protection. In *Nichols v. Universal Pictures Corp.* Judge Learned Hand was asked to compare two plays featuring feuding Irish Catholic and Jewish families to determine whether one play infringed on the copyright of the other. Nicholas v. Universal Pictures Corp., 45 F.2d 119 (2d Cir. 1930). The plaintiff's play, *Abie's Irish Rose*, presented a Jewish family living in prosperous circumstances in New York. The father, a widower, had only one son. *Id.* at 120. The boy fell in love with a young woman, who to his father's great disgust was Irish Catholic. *Id.* The defendant's play, *The Cohens and the Kellys*, presented two families living side by side in the poorer quarters of New York. *Id.* The wives in both families were still living and the families shared a mutual animosity that existed before any relationship between the children developed. *Id.* The issue in the case was whether the defendant's play was "substantially similar" to the plaintiff's. *Nicholas*, 45 F.2d at 121. The circuit court had no doubt that the two plays factually corresponded, but it refused to hold that the defendant had infringed on the plaintiff's copyright. *Id.* Copyrights protect expression, not ideas, and the circuit court reasoned that the characterization of the plaintiff's expression could not extend to all plays involving feuding Jewish and Irish Catholic families. *Id.* at 122. Limiting the generality of the expression to the detail of the actors, rather than feuding Jewish and Irish Catholic families, meant that the scope of the plaintiff's copyright could not extend to include the defendant's play. *Id.* Similar to an analysis of fundamental rights, the circuit court selected a level of generality based entirely on what it deemed appropriate for the individual case and not by reference to a formalistic system. This method of reasoning leaves a court with unfettered discretion and creates inconsistency and uncertainty in copyright jurisprudence. *See generally* John W.L. Ogilvie, *Defining Computer Program Parts Under Learned Hand's Abstractions Test in Software Copyright Infringement Cases*, 91 MICH. L. REV. 526 (1992) (implicating the generality problem in intellectual property); Mark A. Lemley, *Convergence in the Law of Software Copyright?*, 10 HIGH TECH. L.J. 1 (1995); Richard Armstrong Beutel, *Software Engineering Practices and the Idea/Expression Dichotomy: Structured Design in Methodologies Define the Scope of Software Copyright?*, 32 JURIMETRICS J. 1 (1991).

The major challenge in evaluating unenumerated rights is that, because they have no basis in the text of the U.S. Constitution, they cannot provide their own formula for a level of generality.[20] In comparison, consider two enumerated rights that do provide their own formula: the Third Amendment's defense against quartering soldiers and the Eighth Amendment's safeguard against cruel and unusual punishment. The Third Amendment states: "No Soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law."[21] The Eighth Amendment states: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted."[22] The two texts thus stipulate two different levels of generality. The Third Amendment is very fact-specific and therefore demands a high (or narrow) level of generality, while the Eighth Amendment speaks in more abstract terms and therefore requires a low (or broad) level of generality.[23]

Contrary to enumerated rights, unenumerated rights provide no inherent mechanism of interpretation. Absent guidance from the U.S. Supreme Court, lower federal courts have been left to characterize these rights in whatever manner they see fit. Admittedly, their lack of textual support leaves unenumerated rights inherently susceptible to manipulation by both conservative and liberal judges[24] and tempts constitutional scholars to reinterpret their meaning in a manner that is consistent with their own jurisprudential outlook.[25] However, the "discovery"[26] of

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20. BORK, *supra* note 9, at 149; *see also* Easterbrook, *supra* note 7, at 365 (pointing out how different constitutional amendments operate on dramatically different planes of generality).

21. U.S. CONST. amend. III.

22. U.S. CONST. amend. VIII.

23. Quite clearly, "narrow level of generality" and "broad level of generality" are not precise terms, but they are good indicators as to how a court should characterize an issue involving those rights.

24. For a number of reasons, this author has reservations about labeling judges as "liberal" or "conservative." Too often these terms are used improperly or deceptively to describe political liberalism or conservativism when in fact they address specific judicial philosophies relating to the nature and responsibilities of the judiciary. In short, judicial liberalism is sometimes described as taking an active role in policy determinations in cases that could alternatively be deferred to the wisdom of the legislature. It is also defined as "[a]n interpretation that applies a writing in light of the situation presented and that tends to effectuate the spirit and purpose of the writing." BLACK'S LAW DICTIONARY 135 (2d pocket ed. 2001). The tension that exists between these philosophies can be seen in the most famous footnote in U.S. Supreme Court history. *See* United States v. Carolene Prods., 304 U.S. 144, 153 n.4 (1938). Without expressing judgment as to the unanswerable question of which method is superior, this Article addresses the weaknesses in both liberal and conservative methods for determining the appropriate level of generality for unenumerated fundamental rights.

25. Liberal scholars such as Tribe incorrectly attempt to present enumerated and unenumerated rights in the Bill of Rights as a "coherent whole." *See* Easterbrook, *supra* note 7, at

unenumerated rights should not be a tool for results-oriented members of the legal community. In fact, requiring courts to use a moderate level of generality, and to apply it rigorously and consistently to the characterization of potential unenumerated fundamental rights, may help to solve many of the difficulties explained herein.

By analogizing legal writing techniques, this Article examines the magnitude and consequences of how courts characterize potential fundamental rights. Then, by providing a limited case survey, it charts current judicial approaches to determine whether they are effective and consistent. Finally, it argues that the manner in which courts characterize unenumerated fundamental rights must be reevaluated in favor of a genuine, consistent and pragmatic approach.

II. THE IMPORTANCE OF THE "QUESTION PRESENTED"

Presenting an issue in favorable terms and effectively defining the boundaries of analysis induces a reader to evaluate the issues of law and fact as guided by the lens of the writer's camera.[27] In legal writing, "the lens of the camera" is commonly referred to as the Question Presented and serves two important functions.[28] It defines the decision that the reader is asked to make, and also can be used as a tool of persuasion.[29]

To construct a persuasive Question Presented, legal writers generally consider several guidelines: the issue should (1) be stated in terms of the

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364. These scholars also question why conservative scholars do not uniformly apply their narrow level of generality to other provisions of the U.S. Constitution. *See* Ackerman, *supra* note 17, at 318-19 (criticizing Justice Scalia for inconsistently applying broad generality to separation of powers and narrow generality to fundamental rights); *see also id.* at 321 (calling Easterbrook a "selective abstractionist"). But the search for consistency in generality should focus on asserted rights that provide no textual indication of how they should be characterized. Offering an approach that provides a consistent level of generality for both enumerated and unenumerated rights only invites further difficulties and compromises coherence. Furthermore, Tribe's criticisms fail to recognize the uniquely problematic pitfalls of unenumerated rights.

26. This Article makes no attempt to rectify the questionable legitimacy of unenumerated fundamental rights.

27. *See* MARY BERNARD RAY & JILL J. RAMSFIELD, LEGAL WRITING: GETTING IT RIGHT AND GETTING IT WRITTEN 289 (3d ed. 2000); Patricia M. Wald, *19 Tips from 19 Years on the Appellate Bench*, 1 J. APP. PRAC. & PROCESS 7, 12 (1999); *see also* Tracy Bach, *Teaching the Poetry of the Question Presented*, 9 PERSP.: TEACHING LEGAL RES. & WRITING 142 (2001); Patterson, *supra* note 15, at 871 (arguing that the key to winning the debate lies in framing the inquiry).

28. *See* Sup. Ct. R. 14.1(a) (requiring that a petition for a writ of certiorari include questions presented). Additionally, interoffice legal memoranda and judicial opinions utilize a formal "Question Presented" section.

29. RICHARD K. NEUMANN, JR., LEGAL REASONING AND LEGAL WRITING 355 (4th ed. 2001).

facts of the case; (2) eliminate all unnecessary detail; (3) be readily comprehensible on first reading; (4) avoid self-evident conclusions; (5) leave the reader no choice but to accept it as an accurate statement of the question; (6) be subtly persuasive; and (7) clearly define the decision the court is being asked to make.[30] One may not need to individually address each of these factors, but should keep in mind a few overarching themes. The Question Presented sets forth the theory of the case and offers the opportunity to provide a prediction of what will subsequently be argued. As famed scholar Karl N. Llwellyn stated:

> Of course, the first thing that comes up is the issue and the first art is the framing of the issue so that if your framing is accepted the case comes out your way. Got that? Second, you have to capture the issue, because your opponent will be framing an issue very differently . . . And third, you have to build a technique of phrasing your issue which will not only capture the Court but which will stick your capture into the Court's head so that it can't forget it.[31]

Since the Question Presented serves as an early roadmap, it is important to remain credible. A legal writer should always avoid factual inferences and conclusions of law because "[j]udges ignore [q]uestions that go beyond the solid facts."[32]

By way of example, the following is a formula for a typical Question Presented: "Whether a certain legal status exists when relevant law governs the situation and these legally significant facts exist."[33] Applying this formula to the facts and law of *Lawrence* could yield any of the following choices:[34](1) whether there exists a fundamental right to be left alone; (2) whether there exists a fundamental right to engage in sexual acts in the privacy of your own home; or (3) whether there exists a fundamental right of homosexuals to engage in sodomy and hence invalidate the laws of many states, which make such conduct illegal and have done so for a

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30. *Id.* at 358; *see also* MARY BETH BEAZLEY, A PRACTICAL GUIDE TO APPELLATE ADVOCACY 111 (2002); ROBIN S. WELLFORD, LEGAL REASONING, WRITING, AND PERSUASIVE ARGUMENT (2002).

31. Bryan A. Garner, *The Deep Issue: A New Approach to Framing Legal Questions*, 5 SCRIBES J. LEGAL WRITING 1, 11 (1994-1995) (citing Karl N. Llewellyn, *A Lecture on Appellate Advocacy*, 29 U. CHI. L. REV. 627, 630 (1962)).

32. NEUMANN, *supra* note 29, at 358.

33. BEAZLEY, *supra* note 30, at 111.

34. In *Lawrence*, the petitioner sought to invalidate a Texas statute that banned intimate sexual conduct between two members of the same sex. *See* Lawrence v. Texas, 539 U.S. 558, 564 (2003).

very long time. Strikingly, although each of the three examples is based on an identical set of facts, formulation one is overtly favorable to a party seeking recognition of a fundamental right, while formulation three is explicitly unfavorable. By manipulating the level of generality, the legal writer powerfully frames and loads the issue presented in a manner that, if adopted by the court, provides a predictable result.

There is no doubt that a legal writer should formulate the Question Presented favorably to the party he or she represents. However, even though a grossly manipulated level of generality may appear convincing, a legal writer must also be mindful that the ultimate goal of advocacy is that a court will adopt the reasoning of the brief. Thus, while an advocate in favor of recognition of a right may be tempted to frame the issue very broadly, a court may not sympathize with such an approach.

The American court system depends upon attorneys acting in an aptly zealous manner on behalf of their clients. There is nothing wrong with a legal writer attempting to frame the Question Presented as reasonably or absurdly as he or she wishes. But there is a problem when the judiciary takes such action. When a court adopts overly zealous language or undertakes its own inappropriate formulation of the Question Presented, it distorts its role as an objective truth-seeker while cloaking itself in the appearance of restraint. Unlike legal writers, judges must frame issues in a way that dictates a genuine analysis of the law and facts, free from preconceived notions. When judges take it upon themselves to manipulate the issue, they provide a shrewd opportunity for results-oriented jurisprudence. Rather than appearing biased by improperly applying the law or mischaracterizing the facts, a results-oriented judge can frame the issue with a level of generality that commands the desired effect, while preserving the ability to properly apply the law and facts in a structure that manufactures a predictable result.

Absent any affirmative methodology to provide a consistent and reasonable level of generality, which would limit judicial abuse of the Question Presented, Supreme Court jurisprudence is greatly influenced by whichever Justice has the opportunity to frame the Question Presented. The following survey of fundamental rights cases[35] illustrates that this approach, or lack thereof, is in need of reexamination.

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35. The survey of cases presented in this Article is by no means a comprehensive list of fundamental rights cases featuring the generality problem. These cases do however provide enough information to illustrate the inconsistency of U.S. Supreme Court jurisprudence in this area.

III. FUNDAMENTAL RIGHTS CASES

The appropriate starting point to a discussion on the level of generality in unenumerated fundamental rights[36] begins with *Griswold v. Connecticut*,[37] in which the court characterized the issue at hand in infamously broad terms and demonstrated the dangers of unfettered judicial discretion.[38] In *Griswold*, the U.S. Supreme Court[39] invalidated a Connecticut statute that made it illegal to provide "information, instruction, and medical advice to married persons as to the means of preventing conception."[40] With little legal reasoning, a majority of the Court, through Justice Douglas, asked whether the penumbral rights of the First, Third, Fourth, Fifth, and Ninth Amendments of the Bill of Rights[41] created a "zone of privacy" which prevented the government from infringing upon the petitioner's rights to counsel his patients.[42] The so-called "penumbra of rights analysis," previously unknown in U.S.

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36. Justice Douglas's analysis did not specifically address the Fourteenth Amendment's right to "liberty," but nevertheless, today *Griswold* is recognized within a fundamental rights context. *See Lawrence*, 539 U.S. at 564 (stating that the most pertinent beginning point to analyzing "liberty" under the Due Process Clause is the decision in *Griswold*); *see also* Gregory C. Cook, Note, *Footnote 6: Justice Scalia's Attempt to Impose a Rule of Law on Substantive Due Process*, 14 HARV. J.L. & PUB. POL'Y 853, 879 (1991). *But see Lawrence*, 539 U.S. at 594-95 (Scalia, J., dissenting) (arguing that *Griswold* expressly disclaimed any reliance on substantive due process).

37. 381 U.S. 479 (1965).

38. Although the Court proclaims that it will not "sit as a super-legislature to determine the wisdom, need, and propriety of laws that touch economic problems, business affairs, or social conditions," it is clear that many conservative jurists such as Justices Black, Stone, Scalia, or Judge Bork would argue that the Court in *Griswold* did just that. *Griswold*, 381 U.S. at 482. In his thoughtful dissent, Justice Black, joined by Justice Stewart, expressed concern for the majority's characterization of the issue, which created a right to "privacy." *Id.* at 508 (Black, J., dissenting). Although Justice Black is sympathetic to the petitioner's situation, he does not believe that the constitutional guarantees that the majority discusses are supported by any specific constitutional provision. *Id.* at 510.

39. The group of justices who sat during the 1967-1968 term have been described as "the most 'liberal' in the entire history of the high tribunal. [The Court] was dominated by five liberal activists: Chief Justice Warren and Associate Justices William O. Douglas, William Brennan, Abe Fortas, and Thurgood Marshall." Michael R. Belknap, *The Warren Court and the Vietnam War: The Limits of Legal Liberalism*, 33 GA. L. REV. 65, 68 (1998).

40. *Griswold*, 381 U.S. at 480 (citing C.G.S.A. §§ 53-32, 54-196 (1958 rev.)).

41. Justice Douglas cited to the right of association contained within the penumbra of the First Amendment; the Third Amendment's guarantee of privacy against quartering soldiers; the Fourth Amendment's explicit guarantee to be "secure in their persons, houses, papers, and effects;" and the Fifth Amendment's protection against self-incrimination as "enable[ing] [a] citizen to create a zone of privacy which government may not force him to surrender to his detriment." *Id.* at 484. Justice Douglas also cited to the "retained rights" of the Ninth Amendment. *Id.*

42. *Id.* at 484-85.

Supreme Court jurisprudence, provided an opportunity for the Court to evaluate whether general notions of "privacy" found in the U.S. Constitution protected the conduct at issue. Given this expansive mandate accompanied by such a broad generality,[43] the Court concluded that the state's governance of such intimate conduct between married persons was "repulsive" to the U.S. Constitution.[44]

Following *Griswold*, another early fundamental rights case demonstrating the implications of a broad level of generality was *Loving v. Virginia*.[45] In *Loving*, the defendants were a married couple prosecuted under Virginia criminal law for violating a statute that banned interracial marriage.[46] Writing for the majority, Chief Justice Warren stated that the question presented was whether the choice to marry could be restricted by invidious racial discrimination.[47] Concluding that "marriage is one of the 'basic civil rights of man,' fundamental to our very existence and survival,"[48] the Court answered its own question with a resounding "no."

As evidenced from the description of both *Griswold* and *Loving*, the Court offered little reasoning for their broad level of generality in early fundamental rights cases. The reason for the Court's generality is threefold. First, the Court's primary concern was to invalidate laws that clashed starkly with American values, which had been dramatically defined by the civil rights and women's liberation movements. Second, the Court had not yet found a "firm foundation"[49] for its substantive due process analysis. Third, during that time, scholars were not concerned with judicial activism and the dangers of judge-made policy decisions. Few

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43. Although Justice Douglas cited cases suggesting certain amendments have "penumbras," he cited no precedent for his notion of a "penumbra of rights" or "zone of privacy." *See id.* at 484-85.

44. *Id.* at 485-86.

45. 388 U.S. 1 (1967).

46. *Id.* at 2-3. Although the defendants were sentenced to a year in jail, their sentence was commuted in exchange for their promise not to return to the state of Virginia for at least twenty-five years. *Id.* at 3. In commuting their sentence, the Judge made the following statement:

> Almighty God created the races white, black, yellow, malay and red, and he placed them on separate continents. And but for the interference with his arrangement there would be no cause for such marriages. The fact that he separated the races shows that he did not intend for the races to mix.

Id.

47. *See id.* at 12.

48. *Id.*

49. Tribe & Dorf, *supra* note 9, at 1059-60.

people would have considered the Court's characterization of an issue to be a tool for usurping the will of the people.[50]

Despite what some would see as progress in the jurisprudence of the U.S. Supreme Court, the broadly worded approach of *Griswold* and *Loving* has not always commanded a majority.[51] Subsequent to the leadership of Chief Justice Warren, the makeup of the Court shifted, and by the time of *Bowers v. Hardwick*,[52] there was no longer a liberal majority. In *Bowers*, a practicing homosexual brought an action challenging a Georgia statute that criminalized the practice of sodomy.[53] Justice White, presented the issue in exceedingly narrow terms: *"The issue presented is whether the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy and hence invalidates the laws of the many States that still make such conduct illegal and have done so for a very long time."*[54]

Justice White's characterization of the issue in *Bowers* is very striking. Like any persuasive Question Presented, it directs the reader down an inevitable path and makes immediately apparent that there is only one answer to the Court's hypothetical question.[55] No reasonable person would ever consider the notion that the U.S. Constitution confers a fundamental right to explicitly engage in sodomy.[56] The Court found that since the text of the U.S. Constitution does not mention homosexuals or sodomy and

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50. Critics of substantive due process suggest that judges should not find or declare fundamental rights because it is a job more legitimately suited for the citizens of a democracy who can vote to determine what protections should be included within the text of the U.S. Constitution. *See* James W. Hillard, *To Accomplish Fairness and Justice: Substantive Due Process*, 30 J. MARSHALL L. REV. 95, 111 (1996); *see also* Washington v. Glucksberg, 521 U.S. 702, 720 (1997) (echoing caution in expanding the doctrine of due process at the expense of democratic ideals such as public debate and legislative action). *But see* Brian C. Goebel, Note, *Who Decides If There Is "Triumph in the Ultimate Agony?" Constitutional Theory and the Emerging Right To Die With Dignity*, 37 WM. & MARY L. REV. 827, 850 (1996) (arguing that the doctrine of substantive due process is a necessary check on legislative and executive power).

51. Justice Brennan famously quipped, "[f]ive votes can do anything around here." Richard Lacago, *The Soul of a New Majority*, TIME, July 10, 1995, at 48.

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

53. *Id.* at 188.

54. *Id.* at 190 (emphasis added). By comparing this language to the language issue in *Loving* or in *Griswold*, it is easy to see the effects of the characterization of the issue. *See supra* text accompanying notes 41-42, 48. Narrowly describing the circumstances in which a right can be found makes the chances of the petitioner's success very unlikely.

55. *See* Tribe & Dorf, *supra* note 9, at 1067 (commenting on how both the *Bowers* majority and dissent began with question-begging formulations).

56. When a question posed by the Court is "gorgeously loaded language . . . [it is n]ot surprising that the answer to that question was, 'Um. No.'" Lithwick, *supra* note 7.

sodomy is not a right that has been traditionally or historically protected by society, the statute was constitutional.[57]

In dissent, Justice Blackmun articulated an alternate level of generality:[58] "[a] fair reading of the statute and of the complaint *clearly reveal[ed] that the majority had distorted the question [the] case present[ed].*"[59] The case was "no more about a fundamental right to engage in homosexual sodomy . . . than *Stanley v. Georgia*[60] . . . was about a fundamental right to watch obscene movies, or *Katz v. United States*[61] . . . was about a fundamental right to place interstate bets from a telephone booth."[62] Rather, the case should more rightly be characterized as "the most comprehensive of rights and the right most valued by civilized men, namely, the *right to be let alone.*"[63] The Court's "almost obsessive focus on homosexual activity"[64] prevented it from evaluating the genuine issue in the case. The Court avoided deciding the constitutionality of government intrusion into the private affairs of consenting adults by framing the issue in a way which provided a preordained result.[65]

Although *Bowers* may have been the first unenumerated fundamental rights case to present the question in narrow terms, it is not the most

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57. *See Bowers*, 478 U.S. at 191-94; *supra* text accompanying note 12-13 (discussing the U.S. Supreme Court's use of history and tradition in its fundamental rights analysis).

58. Justice Blackmun was joined by Justices Brennan, Marshall, and Stevens. Interestingly, Justice Powell, upon retiring from the bench, later commented to one of his law clerks that he regretted his decision to side with the majority. Tony Mauro, *Gay Rights a Personal Issue for High Court Advocate* (Mar. 31, 2003), *available at* http://www.law.com/jsp/article.jsp?id=1048518202633 (last visited Feb. 15, 2005). Justice Powell also believed, that at the time, he had never actually met a homosexual. *Id.*

59. *Bowers*, 478 U.S. at 200 (Blackman, J., dissenting) (emphasis added). Justice Blackmun demonstrated that the Question Presented by Justice White contained a more specific level of generality than the statute.

60. 394 U.S. 557 (1969). In *Stanley*, the defendant was convicted of a Georgia statute that made it a crime to possess obscene materials. *Id.* at 558-59. The defendant appealed, and the U.S. Supreme Court reversed, on the grounds that a ban on mere possession of obscene materials in one's own home was a violation of the First Amendment. *Id.* at 568.

61. 389 U.S. 347 (1967). In *Katz*, the defendant was convicted of bookkeeping crimes. *Id.* at 348. Law enforcement officers had used an electronic device to listen and record the defendant's conversations absent a search warrant. *Id.* at 356-57. The U.S. Supreme Court held that utilizing electronic devices, without a search warrant, violated the Fourth Amendment. *Id.* at 359.

62. *Bowers*, 478 U.S. at 199 (internal quotations omitted).

63. *Id.* (citing Olmstead v. United States, 277 U.S. 438, 478 (1928)) (internal quotations omitted) (emphasis added).

64. *Id.* at 200.

65. *See* Choquette, *supra* note 6, at 129.

famous case to do so.[66] In *Michael H. v. Gerald D.*[67] Justice Scalia, for the first time, explained his methodology and distinguished it from the broadly worded methodology of the Court's more liberal members.[68] In footnotes that riddle the opinion, Justice Brennan and Justice Scalia reproach one another on their respective methods of determining the correct level of generality.[69] Justice Brennan merely contended that broader approaches should not be foreclosed,[70] whereas Justice Scalia fully articulated his narrow approach and argued that it should be applied to every fundamental rights case.

In *Michael H.*,[71] a man whose blood tests indicated there was a 98.07% probability of paternity and who had established a parental relationship with his daughter, Victoria D., filed an action to establish paternity and visitation rights.[72] Carole D., the mother of Victoria, had an affair with the plaintiff while married to another man, Gerald D.[73] Three years after Victoria was born, Carole informed Michael that he may be the child's father.[74] After a blood test indicated a high probability that Michael was Victoria's father, Michael began a relationship with Victoria.[75] However, shortly thereafter, Carole began living with another man, and rebuffed Michael's attempts to visit Victoria.[76] Michael then challenged a California statute,[77] which presumed that a child born to a married woman living with her husband is a child of the marriage, on the theory that it infringed upon his fundamental right to maintain a relationship with his daughter.

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66. *See* Adam B. Wolf, Note, *Fundamentally Flawed: Tradition and Fundamental Rights*, 57 U. MIAMI L. REV. 101, 112 (2002) (mentioning how *Michael H.* brought fundamental rights jurisprudence to the forefront).

67. 491 U.S. 110 (1989).

68. *See* Crump, *supra* note 12, at 866-68. The problems associated with choosing the appropriate level of generality had not been addressed in cases such as *Bowers*. *Id.* at 866 n.318.

69. "[O]n the surface [Justice Scalia] merely takes a potshot at Justice Brennan [in footnote 4]." Tribe & Dorf, *supra* note 9, at 1096; *see also id.* (citing Justice Brennan's criticism that footnote 6 is "arrogance cloaked as humility").

70. *See Michael H.*, 491 U.S. at 127 n.6; *see also* Cook, *supra* note 36, at 866 n.74.

71. *Michael H.*, 491 U.S. at 113.

72. *Id.* at 114.

73. *Id.* at 113.

74. *Id.* at 114.

75. *See id.*

76. *Michael H.*, 491 U.S. at 114.

77. CAL. EVID. CODE § 621(a) (West 1989).

Writing for a plurality of the Court,[78] Justice Scalia narrowly defined the issue in the case as *"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."*[79] Given Scalia's narrow interpretation of the issue at hand, the plurality found that Michael and Victoria's relationship was not one which deserved special protection.[80]

In footnote 6 of the opinion, Justice Scalia defended his narrow characterization of the issue in the case:

> 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. If, for example, there were no societal tradition, either way, regarding the rights of the natural father of a child adulterously conceived, we would have to consult, and (if possible) reason from, the traditions regarding natural fathers in general. But there is such a more specific tradition, and it unqualifiedly denies protection to such a parent.[81]

As Justice Scalia viewed it, his decision to refer to the most specific level of generality possible avoided "arbitrary decisionmaking."[82] The Court was bound to an identifiable tradition which prevented judicial activism and eliminated the temptation to infuse political and social preferences.[83]

Notably, footnote 6 is joined only by Chief Justice Rehnquist.[84] Justice O'Connor (joined by Justice Kennedy) wrote separately to express disagreement with Justice Scalia's methodology: "I concur in all but

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78. *Michael H.*, 491 U.S. at 113. Five Justices held that the statute did not violate the Fourteenth Amendment; four Justices joined the plurality opinion (except for footnote 6, in which only Chief Justice Rehnquist joined). *Id.* The statute states, "Except as provided in subdivision (b), the issue of a wife cohabiting with her husband, who is not impotent or sterile, is conclusively presumed to be a child of the marriage." *Id.* Justice Stevens concurred separately and Justices Brennan, Marshall, Blackmun, and White dissented. *Id.* at 112. Although Justice White wrote the majority opinion in *Bowers*, he curiously filed a dissent in *Michael H.*, in which Justice Brennan joined which focuses its criticism on a narrow level of generality. *Id.*

79. *Id.* at 124 (emphasis added).

80. "[Justice] Scalia narrowly defined the right at issue so as to assure that the conclusion that he was looking for would naturally follow." Choquette, *supra* note 6, at 130.

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

82. *Id.*

83. Justice Scalia "is primarily concerned with 'judicial activism' undermining the legitimacy of the Court." Choquette, *supra* note 6, at 129.

84. *Michael H.*, 491 U.S. at 113.

footnote 6 of Justice Scalia's opinion. This footnote sketches a mode of historical analysis to be used when identifying liberty interests protected by the Due Process Clause of the Fourteenth Amendment that may be somewhat inconsistent with our past decisions in this area."[85] In her view, applying the most specific level of generality, without deliberation, contradicts the reasoning of previous fundamental rights cases.[86]

Similar to *Bowers*,[87] the dissent in *Michael H.* provides an illustrative comparison of generality.[88] Unlike Justice Scalia, Justice Brennan characterized the issue in the case as *"whether parenthood is an interest that historically has received our attention and protection."*[89] Justice Scalia responded:

> Because such general traditions provide such imprecise guidance, they permit judges to dictate rather than discern the society's views. The need, if arbitrary decisionmaking is to be avoided, to adopt the most specific tradition as the point of reference — or at least to announce, as Justice [Brennan] declines to do, some other criterion for selecting among the innumerable relevant traditions that could be consulted. . . . Although assuredly having the virtue (if it be that) of leaving judges free to decide as they think best when the unanticipated occurs, a rule of law that binds neither by text nor by any particular, identifiable tradition is no rule of law at all.[90]

Undoubtedly, the point of Justice Scalia's specific generality methodology is to prevent legislative-like policy decisions that activist judges are able to make because of the open-ended nature of the Due Process Clause's right to "liberty."[91] Conversely, Justice Brennan, like Justice Blackmun in

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85. *Id.* (O'Connor, J., concurring) (citing Griswold v. Connecticut, 381 U.S. 479 (1965); Eisenstadt v. Baird, 405 U.S. 438 (1972)).

86. "On occasion this Court has characterized relevant traditions protecting asserted rights at levels of generality that might not be 'the most specific level' available." *Id.* (O'Connor, J., concurring) (citing Loving v. Virginia, 388 U.S. 1, 12 (1967); Turner v. Safley, 482 U.S. 78, 94 (1987); United States v. Stanley, 483 U.S. 669, 709 (1987)).

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

88. Justice Brennan's dissent was joined by Justices Marshall and Blackmun. *See Michael H.*, 491 U.S. at 136 (Brennan, J., dissenting).

89. *Id.* at 139 (Brennan, J., dissenting) (emphasis added).

90. *Id.* at 127 n.6.

91. Crump, *supra* note 12, at 868 (arguing that Justice Scalia's approach protects legislative power and Justice Brennan's approach empowers the "judicial legislator").

Bowers, is less concerned with activism and more interested in the expansion and protection of individual rights.[92]

> [T]he plurality acts as if the only purpose of the Due Process Clause is to confirm the importance of interests already protected by a majority of the States. Transforming the protection afforded by the Due Process Clause into a redundancy mocks those who, with care and purpose, wrote the Fourteenth Amendment.[93]

The evaluation of isolated examples of liberty issues, instead of the general liberty issues, would only serve to reinforce already protected rights and strengthen prejudices.[94]

Perhaps conceding the defeat of his footnote 6 methodology, in *Reno v. Flores*[95] Justice Scalia did not apply his "most specific level" of generality requirement; instead, Scalia settled for a "moderately-narrow" level of generality. In *Flores*, a class of juvenile aliens who had been detained because of deportability suspicions, brought suit challenging the Immigration and Naturalization Service's regulations governing the release of detained juvenile aliens into the custody of "responsible adults."[96] Without reference to *Michael H.*,[97] Justice Scalia, writing for the Court, stated that a "[s]ubstantive due process analysis must begin with a careful description of the asserted right, for '[t]he doctrine of judicial self-restraint requires us to exercise the utmost care whenever we are asked to break new ground in this field.'"[98] Sounding the same activism alarm bells in *Michael H,*[99] Justice Scalia stated the issue at hand had nothing to do with "freedom from physical restraint,"[100] freedom to come and go at will,[101] or the rights of parents to have their children released into their custody.[102] Instead, the issue is more properly characterized as *whether "a child who has no available parent, close relative, or legal guardian, and for whom the government is responsible, [has a fundamental right] to be*

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92. *See Michael H.*, 491 U.S. at 140-41 (Brennan, J., dissenting).
93. *Id.* (Brennan, J., dissenting).
94. *See generally id.* at 136-37 (Brennan, J., dissenting).
95. 507 U.S. 292 (1993).
96. *Id.* at 294, 296.
97. *Michael H.*, 491 U.S. at 110.
98. *Flores*, 507 U.S. at 302 (quoting Collins v. Harker Heights, 503 U.S. 115, 125 (1992) (citing Bowers v. Hardwick, 478 U.S. 186, 194-95 (1986))).
99. *See Michael H.*, 491 U.S. at 110.
100. *Flores*, 507 U.S. at 302.
101. *Id.*
102. *Id.*

placed in the custody of a willing-and-able private custodian rather than of a government-operated or government-selected child-care institution."[103] The exact implications of Scalia's "careful description"[104] requirement are unclear, and the requirement does not appear to differ in any practical sense from footnote 6.[105] Both formulations are at the narrow end of the spectrum of generality, and in the vast majority of cases, a court's decision to use either formulation will not impact its holding.

The cryptic nature of the careful description requirement, unaccompanied by any citation, is more likely a strategic ploy rather than a concession. At least in *Flores*, Justice Scalia gained the support of Justice Kennedy,[106] who, along with Justice O'Connor, concurred in all but footnote 6 of *Michael H.*[107] Furthermore, following *Flores*,[108] courts adopted the "careful description" requirement in other groundbreaking fundamental rights cases.[109]

The confusion built into this point is exemplified in the recent case of *Lawrence v. Texas*,[110] a fitting example of the consequences of incoherent

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103. *Id.* (emphasis added).

104. *Id.*

105. *See* Michael H. v. Gerald D., 491 U.S. 110, 127 n.6 (1989).

106. *See Flores*, 507 U.S. at 293.

107. *Michael H.*, 491 U.S. at 132.

108. *Flores*, 507 U.S. at 292.

109. In *Washington v. Glucksberg*, terminally ill patients, doctors, and a nonprofit organization brought action against the State of Washington seeking declaratory judgment that a statute banning assisted suicide violated substantive due process. Washington v. Glucksberg, 521 U.S. 702, 707-08 (1997). Chief Justice Rehnquist, writing for the Court, cited *Flores*'s "careful description" requirement and determined that the issue was properly characterized as "*whether the 'liberty' specially protected by the Due Process Clause include[d] a right to commit suicide which itself includes a right to assistance in doing so.*" *Id.* at 721, 723 (emphasis added). Curiously and without explanation, Chief Justice Rehnquist also noted that neither the Ninth Circuit's characterization of the issue, "*whether there is a liberty interest in determining the time and manner of one's death,*" or the respondent's, *whether there is "'liberty to choose how to die' and a right to 'control of one's final days,'*" were "carefully formulated." *Id.* at 722 (emphasis added). Concurring, Justice Souter refused to reduce due process jurisprudence to any formula. In place of the two-tiered framework and that included the "careful formulation" requirement, Justice Souter adopted the rational continuum approach of Justice Harlan's dissent in *Poe*. *See id.* at 765-66 (Souter, J., concurring) (citing Poe v. Ullman, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting)). Justice Souter's method results in a characterization of the issue as "*whether the statute sets up one of those 'arbitrary impositions' or 'purposeless restraints' at odds with the Due Process Clause of the Fourteenth Amendment.*" *Id.* at 752 (Souter, J., concurring) (citing *Poe*, 367 U.S. at 543 (Harlan, J., dissenting)).

110. 539 U.S. 558 (2003).

fundamental rights jurisprudence. Its "intensely divisive" politics[111] demonstrate the continuing crisis of consistency and the inherent dangers of judicial discretion in selecting the permissible level of generality. Similar to *Bowers*,[112] the petitioner in *Lawrence* was convicted of "deviate sexual intercourse" in violation of a Texas statute that forbade two persons of the same sex from engaging in intimate sexual conduct.[113] The delicate politics of the case and the current makeup of the U.S. Supreme Court which continues to evidence deep political and philosophical divisions,[114] made a consistent and principled approach to characterizing the issue as an unrealistic goal.

The Court's opinion, written by Justice Kennedy, was a consequence of judicial and political compromise that further fractured and complicated fundamental rights jurisprudence.[115] Although the Court purported to overrule *Bowers*,[116] in which the Court refused to find that there was a fundamental right to engage in sodomy,[117] the Court in *Lawrence* did not declare that there is a fundamental right to engage in sodomy and did not use a strict scrutiny analysis.[118] Instead, by invoking "emerging" traditions[119] it conducted the same selective history lesson that Justice

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111. *Id.* at 587 (Scalia, J., dissenting) (commenting on how the issue in *Lawrence* may be as divisive as the abortion issue in *Roe*).

112. 478 U.S. 1866 (1986).

113. *Lawrence*, 539 U.S. at 563.

114. *See generally* MARK TUSHNET, A COURT DIVIDED 9-12 (2005); *see also* Anders, *supra* note 15, at 916 (describing a "rift" between even those justices who were at one point both considered "conservative").

115. Justice Scalia explained that:

> Today's opinion is the product of a Court, which is the product of a law-profession culture, that has largely signed on to the so-called homosexual agenda, by which I mean the agenda promoted by some homosexual activists directed at eliminating the moral opprobrium that has traditionally attached to homosexual conduct.

Lawrence, 539 U.S. at 602 (Scalia, J., dissenting).

116. "*Bowers* was not correct when it was decided, and it is not correct today. It ought not to remain binding precedent. *Bowers v. Hardwick* should be and now is overruled." *Id.* at 578.

117. *Bowers*, 478 U.S. at 1866.

118. "Not once does [the Court] describe homosexual sodomy as a 'fundamental right' or a 'fundamental liberty interest,' nor does it subject the Texas statute to strict scrutiny." *Lawrence*, 539 U.S. at 594 (Scalia, J., dissenting).

119. Justice Kennedy concluded that "emerging" traditions were more relevant to the analysis:

> [T]he past half century show[s] an emerging awareness that liberty gives substantial protection to adult persons in deciding how to conduct their private

Scalia is often criticized for,[120] and abandoned the long standing application of the rational basis test for moral legislation.[121]

Despite Justice Kennedy's agreement with the careful formulation of *Flores*,[122] his refusal to join footnote 6 of *Michael H.*[123] served as a precursor to the Court's decision in *Lawrence*.[124] In refusing to join footnote 6, Justices Kennedy and O'Connor emphasized that the Court has, at times, used various levels of generality.[125] Justice Kennedy argued in *Lawrence* that the *Bowers* Court's characterization of the issue failed "to appreciate the extent of the liberty at stake"[126] and he implied that the Court should revert back to the broader generality of *Griswold*.[127] Kennedy stated, "To say that the issue in *Bowers* was simply the right to engage in certain sexual conduct demeans the claim the individual put forward, just as it would demean a married couple were it to be said marriage is simply about the right to have sexual intercourse."[128] Therefore, the Court should have characterized the issue as "*whether the majority may use the power of the State to enforce . . . views [based on moral principles not before the Court] on the whole society through operation of the criminal law.*"[129] Justice Kennedy, like Justices Blackmun and Brennan before him, attempted to demonstrate that by focusing on a specific factual example, the Court fails to appreciate the larger liberty issue in the case.[130]

Neither the *Lawrence* opinion nor the *Bowers'* dissent describe any procedural mechanisms or methodology used to determine level of generality applied in those two cases.[131] Justice Kennedy states that the narrow generality of *Bowers* demeans the petitioner's claim, but he does not explain how he forms his more moderate level of generality.[132]

> lives in matters pertaining to sex. "[History and tradition are the starting point but not in all cases the ending point of the substantive due process inquiry."

Lawrence, 539 U.S. at 571 (citing County of Sacramento v. Lewis, 523 U.S. 833, 857 (1998)).

120. *See* Wolf, *supra* note 66, at 103.

121. *See generally id.* at 599 (Scalia, J., dissenting).

122. 507 U.S. 292, 293-94 (1994).

123. 491 U.S. 110, 113 (1989).

124. *Lawrence*, 539 U.S. at 558.

125. *Michael H.*, 491 U.S. at 132 (O'Connor, J., concurring).

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

127. The Court began its analysis with an evaluation of *Griswold*. Griswold v. Connecticut, 381 U.S. 479 (1965); *Lawrence*, 539 U.S. at 564.

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

129. *Id.* at 571 (emphasis added).

130. *See generally id.* at 558.

131. *See id.*

132. *Id.* at 567.

The difficulties of *Lawrence*, and the problem of courts arbitrarily selecting narrow, moderate or broad levels of generality, are further illuminated at the circuit level in the recent case *Williams v. Attorney General*.[133] In *Williams*, the American Civil Liberties Union challenged an Alabama statute that prohibited the commercial distribution of "any device designed or marketed as useful primarily for the stimulation of human genital organs for any thing of pecuniary value."[134] Utilizing the analytical framework of *Glucksberg*[135] and *Flores*,[136] a sharply divided court held that the statute did not violate the petitioner's fundamental rights.[137]

The circuit court characterized the issue in the case as *whether the right to "use sexual devices when engaging in lawful, private sexual activity [is] . . . 'objectively, deeply rooted in this Nation's history and tradition' and 'implicit . . . in the concept of ordered liberty, such that neither liberty nor justice would exist if [it] were sacrificed.'"*[138] The circuit court's characterization is similar to characterizations in *Bowers*,[139] *Michael H*,[140] or *Flores*.[141] However, unlike those cases, *Williams* arrives at the level of generality by utilizing a "statutory scope method."[142] Instead of calculating the level of generality using the footnote 6 method or the "careful description" method, the Court determined that "the scope of the liberty interest at stake here must be defined in reference to the scope of the Alabama statute."[143] Since the statute in question banned the commercial distribution of sexual devices and placed a burden on an individual's

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133. 378 F.3d 1232 (11th Cir. 2004).

134. *Id.* at 1233 (11th Cir. 2004) (internal quotations omitted) (citing ALA. CODE § 13A-12-200.2 (2003)).

135. 521 U.S. 702 (1997).

136. 507 U.S. 292 (1993).

137. *See Williams*, 378 F.3d at 1233.

138. *Id.* at 1239 (citations omitted) (emphasis added). The circuit court in *Williams II* also stated that the district court properly characterized the issue as when it focused narrowly on the right to use sexual devices. *Id.* (internal quotations omitted) (emphasis added) (citing Williams v. Pryor, 240 F.3d 944, 953 (11th Cir. 2001)). The circuit court concluded that the district court incorrectly framed the issue as a "*generalized 'right to sexual privacy.'*" *Id.* (emphasis added) (citing *Williams III*, 220 F. Supp. 2d 1257, 1277 (N.D. Ala. 2002)). The dissent insisted that *Lawrence* recognized that a liberty interest could not be defined by the scope of the conduct prohibited. *See Williams*, 378 F.3d at 1257 n.16 (Barkett, J., dissenting). Therefore, the issue, according to Judge Barkett, should more properly be characterized as "*whether consenting adults have a right to sexual privacy. . . .*" *Id.* at 1257 (emphasis added).

139. 478 U.S. 186 (1986).

140. 491 U.S. 110 (1989).

141. *Flores*, 507 U.S. at 292.

142. *See generally Williams*, 378 F.3d at 1232.

143. *Id.* at 1241.

ability to use such devices, the issue in the case should be characterized in a way that it describes a right to buy, sell and use such devices.[144]

Despite the *Williams* Court's intent on maintaining the same level of judicial restraint demonstrated by Justice Scalia, one could imagine a scenario where the statutory scope method results in a holding contrary to the footnote 6 method. If a criminal statute is general in nature, but not unconstitutionally vague, such as a ban on lewd behavior, the level of generality under the statutory scope method would be somewhat abstract. The Court would be forced to characterize the issue as whether there was a right to engage in lewd behavior, or some variation thereof. Contrarily, under the footnote 6 method, the asserted right might be characterized narrowly enough to actually describe the specific conduct.[145] Under footnote 6 analysis, the issue would be characterized as whether there exists a right to engage in public urination.[146] Thus, it is worth noting that even when courts choose a consistent level of generality, it is possible that two distinct formulations for arriving at a "narrow" level could produce conflicting results. *Williams* demonstrates not only that *Lawrence* failed to alleviate lower court confusion, but also that a consistent formulation may be necessary to determine a consistent level of generality.[147]

IV. SUMMARY OF THE LEVELS OF GENERALITY

The following is a summary of the discussion above. As one can see from the chart, the U.S. Supreme Court has inconsistently applied the level of generality.[148] The Court used a broad level of generality in *Griswold*,[149] while the Court used a narrow level of generality in *Bowers*.[150] Given the enormous power of the Question Presented in characterizing the issue, it is no surprise that a narrow generality has uniformly resulted in the Court's denial of an asserted right, while a broad generality has uniformly resulted in the Court's recognition of a right.

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144. *Id.* at 1242.

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

146. *Id.*

147. *See Williams*, 378 F.3d at 1232.

148. At least two law students have attempted to argue that *Griswold*, *Eisenstadt*, and *Loving* are not inconsistent with footnote 6 of *Michael H. See* Cook, *supra* note 36, at 879-81; Timothy L. Raschke Shattuck, Note, *Justice Scalia's Due Process Methodology: Examining Specific Traditions*, 65 S. CAL. L. REV. 2743, 2759-63 (1992).

149. 381 U.S. 479 (1965).

150. 478 U.S. 186 (1986).

LEVEL OF GENERALITY[151]

CASE	GENERALITY	FUNDAMENTAL RIGHT?
Griswold v. Connecticut	Broad	YES
Loving v. Virginia	Broad	YES
Bowers v. Hardwick (majority)	Narrow	NO
Bowers v. Hardwick (dissent)	Broad	YES
Michael H. v. Gerald D. (plurality)	Narrow	NO
Michael H. v. Gerald D. (dissent)	Broad	YES
Reno v. Flores	Narrow	NO
Washington v. Glucksberg	Narrow	NO
Lawrence v. Texas (majority)	Moderate	MAYBE
Lawrence v. Texas (dissent)	Narrow	NO
Williams v. Attorney General of Alabama (majority)	Narrow	NO
Williams v. Attorney General of Alabama (dissent)	Broad	YES

V. PROBLEMS WITH EACH LEVEL OF GENERALITY

Depending on which members of the U.S. Supreme Court can garner a majority of votes will not only determine the level of generality, but also the method of analysis and the articulation of that method. However, as disconcerting as that may seem, even if a consistent level is applied to each case, whether broad, moderate, or narrow, each has its own shortcomings.

A. *Broad Generality — Is There any Identifiable Method?*

Justice Scalia is acutely aware of the criticisms of his overall judicial philosophy and of his method for determining the appropriate level of generality. His response to these criticisms, however, is that a consistently narrow (even if somewhat flawed) methodology is better than no

151. Since *Lawrence* did not review the statute under strict scrutiny, even though the Court purported to overrule *Bowers*, it is unclear whether it held that there is a fundamental right to homosexual conduct in the privacy of one's own home. *See* Lawrence v. Texas, 539 U.S. 558 (2003).

methodology.[152] No other Justice on the Court has provided a suitable alternative to replace the method offered by Justice Scalia in footnote 6 of *Michael H.*;[153] absent any affirmative theory of their own, the other members of the Court, as well as the judicially liberal members of academia, are largely reduced to articulating counterarguments.[154]

Before discussing the downfalls of applying a broader generality method, it is worth noting that Justice Blackmun's dissent in *Bowers* is convincing in one respect. It successfully argues that the most specific example of a liberty right is not the liberty right itself.[155] By distorting the level of generality to focus on an example of the right, instead on the broader liberty issue, the Court made no effort to genuinely and sincerely evaluate the circumstances of the case.[156] It is, after all, the responsibility of the judiciary to decipher between essential and non-essential facts.

However, despite its strengths, Justice Blackmun's alternative level of generality is completely unworkable. Were the Court to apply "*the right to be let alone*"[157] or a variation thereof to circumstances beyond the facts of *Bowers*, fundamental rights would be found in any circumstances in which a person was left to his or her own devices. Taken to its logical extreme, Justice Blackmun's characterization would hold as a constitutional guarantee the right to build a crystal methamphetamine lab in a person's basement. Justice Blackman fails to articulate a level of generality that can be consistently applied to other fundamental rights cases and provokes opponents to parade a list of horribles.[158]

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152. "'You can't beat somebody with nobody.'" Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 855 (1989) (arguing that although originalism has its difficulties, unlike nonoriginalism, it is an identifiable method).

153. 491 U.S. 110, 127 n.6 (1989).

154. *See* Tribe & Dorf, *supra* note 9, at 1071 (admitting that a broader approach is an imprecise and indeterminate mission).

155. *See Bowers*, 478 U.S. at 199-214 (Blackman, J., dissenting).

156. For example, Justice Blackmun pointed out that *Katz v. United States* was not a case about the right to place interstate bets, but was about the constitutional right to be free from unreasonable searches. Furthermore, *Stanley v. Georgia* was not a case about the right to watch pornographic movies, but was about the constitutional right to free speech. *Id.* at 199 (Blackmun, J., dissenting) (citing Katz v. United States, 389 U.S. 347 (1967); Stanley v. Georgia, 394 U.S. 557 (1969)).

157. *Id.*

158. *See* Williams v. Attorney Gen. of Ala., 378 F.3d 1232, 1240 (11th Cir. 2004) (arguing that a high level of abstraction would protect a fundamental right to prostitution, obscenity, and adult incest); BORK, *supra* note 9, at 204 (arguing that a high level of abstraction would protect a fundamental right to unconventional sexual behavior and kleptomania). The parade of horribles is a rhetorical device whereby, in this case, the speaker argues against using a broad level of generality by listing a number of undesirable results. Its power lies in its exaggeration and

In addition to the glaring problem of the parade of horribles, there is the concern that such a method could "permit judges to dictate rather than discern . . . society's views."[159] For example, Justice Scalia pointed to Justice O'Connor's and Justice Brennan's opinions in *Michael H.*[160] Each Justice arbitrarily chose their own level of generality, and by doing so, each decided the case differently. In dissent, Justice Brennan characterized the issue as "whether parenthood is an interest that historically has received our attention and protection"[161] and concluded that the circumstances of this case fell within his characterization of the asserted right.[162] Justice O'Connor in concurrence, hesitantly joined the plurality's characterization with the caveat that she may apply broader levels of generality in future fundamental rights cases.[163] Although each Justice was confronted with the same facts and precedent, each allowed his or her own sympathies to dictate the level of generality, which caused each to decide the case differently.

Admittedly, the parade of horribles argument is simplistic because it ignores the role of the judiciary. Although any formulation can be taken to a logical extreme, the judiciary has the responsibility to differentiate between what is self-evidently wrong and what is not. Judges are asked regularly to draw arbitrary lines between legal and illegal conduct, whether it involves the balancing of competing interests in the Fourth Amendment's "reasonableness" test[164] or whether it requires a determination of what "shocks the conscience" under the Fourteenth Amendment.[165] Although *Griswold*[166] and the *Bowers*[167] dissent utilized an inarticulate and inapplicable formulation of generality, it is disingenuous to claim that a system must be free from the consequences of logical extremes or arbitrary dividing lines.

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emotional impact. *See* Wikipedia "parade of horribles," *available at* http://en.wikipedia.org/wiki/Parade_of_horribles (last visited Aug. 25, 2005).

159. Michael H. v. Gerald D., 491 U.S. 110, 127 n.6 (1989).

160. *Id.*

161. *Id.* at 139 (Brennan, J., dissenting).

162. *See id.* The answer to the Question Presented by Justice Brennan is "too clear to dispute." *Id.*

163. "I would not foreclose the unanticipated by the prior imposition of a single mode of historical analysis." *Id.* at 132 (O'Connor, J., concurring) (citing Poe v. Ullman, 367 U.S. 497, 542, 544 (1961) (Harlan, J., dissenting)) (arguing against Justice Scalia's insistence that the only method that should be utilized is the one that recognizes the most specific level at which the asserted right can be identified).

164. *See* U.S. CONST. amend. IV.

165. *See* U.S. CONST. amend. XIV.

166. 381 U.S. 479 (1965).

167. 478 U.S. 186 (1986).

The most forceful and consequently fatal argument for utilizing broad generality is the danger that judges will become judicial-legislators. Should a court elect to consistently apply a broad level of generality, it would be left to discern and interpret sweeping conclusions about historically protected traditions.[168] The price of consistently applying a broad level of generality would not only be a precarious increase in judicial discretion, but also a violation of America's democratic system of government.

B. *Narrow Generality — Is this Really the Solution?*

Despite footnote 6's noble attempts and its lofty ambition,[169] it commits the very same quandaries of judicial decisionmaking that it seeks to avoid and it fails to satisfy the ambition of its design. In other words, "[f]ar from providing judges with a value-neutral means for characterizing rights, it instead gives a method for disguising the importation of values."[170] Such a contradiction has left at least one distinguished critic to boldly announce that footnote 6 is "doomed to fail."[171]

Even those who disregard a cynical theory that footnote 6's generality formulation was specifically designed to reinforce a politically conservative agenda,[172] those who disagree with footnote 6 widely

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

169. Justice Scalia's methodology in footnote 6 has earned him much criticism, however it "reflects an admirable intellectual rigor." Crump, *supra* note 12, at 866.

170. Tribe & Dorf, *supra* note 9, at 1059.

171. *Id.* at 1095.

172. Such a debate would prove fruitless anyway; and it is worth noting that this view is contradictory to Justice Scalia's most famous opinions. Unexpectedly to the casual observer, Justice Scalia has, at times, been the Court's leading civil libertarian and the most active participant in reversing decisions that protect a politically conservative agenda. In *United States v. Eichman*, Justice Scalia joined the majority as the fifth vote, in a five to four decision, invalidating a federal law that banned the practice of flag burning on the grounds that it violated free speech. *See* United States v. Eichman, 496 U.S. 310 (1990). He did this despite later calling the petitioners in the case "scruffy, bearded, sandal wearing people who go around burning the American flag." Alice Koskela, *Scalia Shows Textualists Have a Sense of Humor*, 43 ADVOCATE 31, 32 (2000). In *BMW v. Gore*, contrary to the Republican Congress's legislative goal of reducing punitive damage awards, Justice Scalia dissented from the Court's decision to overturn a state court's punitive damage award of two million dollars on the grounds that it was "grossly excessive." *See* BMW v. Gore, 517 U.S. 559 (1996). In *Kyllo v. United States*, Justice Scalia wrote the majority opinion in a 5 to 4 decision that held that the use of thermal imaging to detect heat differentiation in the home (to find heat lamps used to grow marijuana), absent a warrant, was a violation of the Fourth Amendment's constitutional guarantee against unreasonable searches. *See* Kyllo v. United States, 533 U.S. 27, 34 (2001). Most recently, in the case of *Blakely v. Washington*, in another 5 to 4 decision and over the strong dissent of Justice O'Connor, Justice Scalia reasoned that factors used by trial judges in sentencing prisoners that are not considered by the jury and proved beyond a

recognize its intellectual disingenuousness. "[T]he footnote 6 program imports values surreptitiously — claiming all the while only to be discovering values that are out there in societal traditions — it enables judges to disguise and distort what is at stake."[173] There are three primary ways in which footnote 6 does this.[174] First, it requires judges to identify the most specific level of generality at which they can recognize a relevant tradition.[175] This task is more easily done in theory than in practice. Second, it requires judges to subjectively evaluate what has been traditionally and historically protected in American society.[176] History is far from a perfect science.[177] Lastly, it requires each judge's subjective and individual analysis.[178] Each judge evaluating history has his or her own personal prejudices, philosophy and forethought. There is no such thing as the objective historical observer.

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reasonable doubt, violated the Sixth Amendment's constitutional guarantee to a trial by jury. Blakely v. Washington, 124 S. Ct. 2531, 2536 (2004). These decisions illustrate that Justice Scalia is driven by more than a desire to forward a politically conservative agenda. *But see* Michael H. v. Gerald D., 491 U.S. 110, 144 (1989) (Brennan, J., dissenting) (commenting on how Justice Scalia "no fewer than six times" overemphasizes that the plaintiff is an "adulterous natural father" and implies that Justice Scalia is not viewing the facts of the case objectively).

173. Tribe & Dorf, *supra* note 9, at 1096.

174. A review of epistemological theories reveals that Justice Scalia's search for valueless methodologies is problematic for a fourth reason: it is "self-referentially incoherent." As Roy Clouser demonstrates, any belief that claims neutrality is in fact, a nonneutral belief. ROY CLOUSER, KNOWING WITH THE HEART 87 (1999). This means, that, statements of belief, including neutral claims, are value-based statements which must be referenced in order to make the original claim. Justice Scalia uses his own values to say that he can create a method that is value-free. To clarify, take the example of Charles Darwin's skepticism. Darwin questioned whether the human brain could obtain knowledge or truth because the theory of evolution relies on random chance to generate the characteristics common to a particular species. Since a human being's brain is merely a random evolutionary byproduct, Darwin claimed that it could not be known for certain that belief-forming capacities were truthful. *Id.* at 88. However, for Darwin to provide such a skeptical outlook for the capacities of the human brain to generate certain knowledge, he had to rely on the very certainty he is questioning. To call the capacities of the human into question, Darwin had to rely on the fact that the brain has accurate belief forming capacities. Darwin's skepticism, much like those who claim to create value-less methodologies to determine fundamental rights, rely on the very thing they are questioning, in order to question it. Thus, Justice Scalia, should abandon his hopes of discovering a value-less method.

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

176. *See id.*

177. Given the tremendous level of scholarship devoted to utilizing history and tradition in the law, this Article will not attempt to contribute to the discussion.

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

Perhaps most problematic is the process of determining the most specific tradition.[179] Since footnote 6's specificity has a logical stopping point,[180] and does not require specificity beyond absurdity, it inevitably fails to escape a choice based on values.[181] As footnote 6 explains, if there are no societal traditions either protecting or denying an asserted right, judges are asked to "consult, and (if possible) reason from," the traditions one increment more general than the one that did not yield a conclusive answer.[182] In truth, there is no "most specific level."[183] Paradoxically, footnote 6 refuses to decipher between the relevant and irrelevant facts of *Michael H.*, while at the same time it chooses not to include further specificity such as the plaintiff's job, his or her race, or his or her geographical region.[184]

Why is Justice Scalia's characterization of the issue more appropriate than the following hypothetical characterization: Whether an adulterous, African American, working class father whose child is living with her affluent European American mother and stepfather can treat his relationship as a protected family unit under the historic practices of our society, or whether the relationship has been accorded special protection. The answer is that neither Justice Scalia's characterization in *Michael H.* nor the proposed hypothetical is appropriate.[185] Both involve making a judgment regarding the correct level of specificity, fail to appreciate essential and nonessential facts, defer the judiciary's role in the adjudication process, and abandon the judiciary's responsibility to check past and present legislation by the majority.[186]

An analysis of the level of generality need not include history and tradition, nor must it only selectively rely on them.[187] However, under the guise of footnote 6, history and tradition are required elements that dictate

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179. Tribe & Dorf, *supra* note 9, at 1091; *see also* 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, 1026 (1992).

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

181. Tribe & Dorf, *supra* note 9, at 1091.

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

183. *Id.*

184. *See id.*

185. *See generally id.* at 110.

186. *Id.*

187. In *Lawrence*, Justice Kennedy made selective use of history and tradition largely as a way to determine that the prejudices of *Bowers* had passed and that there was an "emerging recognition" of protection for homosexual conduct and other private conduct between consenting adults in the privacy of their home. *See* Lawrence v. Texas, 539 U.S. 558, 572 (2003).

rather than aid generality.[188] To Justice Scalia's dissenters, footnote 6's linkage between history and tradition and the level of generality, promoted the dangers of reinforcing a "stagnant, archaic, hidebound document steeped in the prejudices and superstitions of a time long past."[189] Had a specific level of generality been used that did not implicate a "dead" Constitution,[190] it is doubtful that the justices would be so vigorous in their objections.

It has been stated, "[t]o know the truth of history is to realize its ultimate myth and its inevitable ambiguity."[191] As any historian knows, history is imperfect, and it is often recorded by those in powerful and prestigious positions. When a judge searches through annals, the judge is unwillingly exposed to writers who may have agendas of their own. Historians, right or wrong, consciously or unconsciously, partake in propaganda ranging from the benign — "herofication" of Helen Keller and Woodrow Wilson,[192] to the destructive suppression of the barbaric practices of Christopher Columbus.[193] Merely discussing history as if it were an objective source of determining the most specific description at which a relevant tradition can be identified would naively subject one's fundamental rights methodology to potentially treacherous values.[194]

Apart from the subjectivity of history itself, the subjectivity of the judge looking through history also plays a part in deceptively importing values. In the words of noted historian Howard Zinn,

> It is not possible [to be an objective historian] . . . What you get in a history lecture is a selection by the writer . . . and that selection is made according to that . . . writer's bias, and there's no way of avoiding that. What I always tell my students from the outset is that they're not going to get an objective history because they're going to get my point of view . . . .[195]

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

189. *Id.* at 141 (Brennan, J., dissenting); *see also* Crump, *supra* note 12, at 869 (commenting on how the "real quarrel" reduces to the history-and-tradition approach itself).

190. In reference to his originalism, Justice Scalia is fond of saying that he likes his U.S. Constitution "dead." David M. Zlotnick, *Justice Scalia and His Critics: An Exploration of Scalia's Fidelity to His Constitutional Methodology*, 48 EMORY L. J. 1377, 1382 (1999).

191. Ferenc M. Szasz, *Quotes About History*, *at* http://hnn.us/articles/1328.html (quoting Roy P. Basler) (last visited Mar. 21, 2005).

192. JAMES LOEWEN, LIES MY TEACHER TOLD ME 19 (1995).

193. *Id.* at 36.

194. *See generally* LOEWEN, *supra* note 192.

195. Wolf, *supra* note 66, at 127 (citing Audio tape: Howard Zinn Interview on KPFK, 90.7 FM, Los Angeles, Cal. (n.d.)).

Whether deliberately or not, judges view history through a lens clouded by their own politics and philosophies and are likely to selectively choose those traditions with which they are most familiar and can identify.

> Historians, then, are the generalizers, the synthesizers. They look at an event or series of events and try to bring relevant knowledge from all fields to bear on understanding the situation. Viewed in this light, history is a verb, not a noun — an approach rather than a subject. This approach is sometimes termed the "historical method," which — as I understand it generally involves trying to identify all relevant information about an historical development, critically examining sources for validity and bias, then selecting and organizing this information into a well-constructed narrative that sheds some light on human experience.[196]

Judges are prone to the subjectivity of history itself and the undeniable weaknesses of the historical method.

Apart from the disingenuous values of footnote 6, there is also a very real practical problem. The method fails to account for the very purpose of the Fourteenth Amendment,[197] the protection of minority interests.[198] A methodology that requires a historical analysis of the most specific generality at which the relevant tradition can be identified, reinforces democratically sanctioned prejudice — the very core concern of Justice Brennan's dissent in *Michael H.*[199]

> The Fourteenth Amendment was enacted to free Americans from the shackles of government-sponsored oppression, not to further past subjugation. To resort to tradition in interpreting the Due Process Clause makes a mockery of the Fourteenth Amendment by adopting discrimination as the paradigm against which the government's actions are to be judged.[200]

The Due Process Clause was not meant to act as a source of redundancy and it has become almost universally accepted, albeit begrudgingly by

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196. Michael G. Maxwell, *The Nature of History*, *available at* http://studentsfriend.com/onhist/nature.html (last visited Mar. 20, 2005).

197. *See* U.S. CONST. amend. XIV.

198. *See* Crump, *supra* note 12, at 867 (commenting on how criticism of Justice Scalia's method is most forceful when it attacks the insufficient protection of minority rights).

199. Michael H. v. Gerald D., 491 U.S. 110, 140-41 (1989) (Brennan, J., dissenting).

200. Wolf, *supra* note 66, at 103 (citation omitted).

conservative scholars, as an independent source of substantive rights. Inherently, given this design, a tension exists between the Clause's independent protection of minority interests and the dangers of judicial activism. Although this tension can never be adequately remedied, it can be managed to where the level of generality exists so that each of these concerns are reflected.

Supporters of Justice Scalia acknowledge the power of this criticism, but refute it to the extent possible under a conservative judicial philosophy.[201] Perhaps the best response that can be offered is that the Due Process Clause is not stagnant to an absolute degree. "The virtue of a democratic system with a First Amendment is that it readily enables the people, over time, to be persuaded that what they took for granted is not so, and to change their laws accordingly."[202] Although it can take decades, or perhaps even centuries, society's views of historically and traditionally protected rights gradually progress.

Another counterargument offered by supporters, as well as Justice Scalia himself, is that an insistence on the most specific level of generality does not uniformly lead to a choice against recognizing an asserted fundamental right.[203] "[I]nstead, it is a mixed bag that sometimes will, and sometimes will not, strengthen the individual's case."[204] In footnote 4 of *Michael H.*, Justice Scalia argued that Justice Brennan's method incorrectly looked at the rights of the plaintiff in isolation from the potential rights and consequences of the other parties involved.[205] He equated this characterization of the liberty interest to:

> [F]iring a gun where the case at hand happens to involve its discharge into another person's body. The logic of [such an approach] . . . leads to the conclusion that if [the plaintiff] . . . had begotten [the child] . . . by rape, that fact would in no way affect his possession of a liberty interest in his relationship with her.[206]

A high degree of specificity in reviewing history and tradition inevitably leads to a reinforcement of majority interests. However, it is possible that

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201. *See* Shattuck, *supra* note 148, at 2781-82 (arguing that determining the protection of minority interests under Scalia's formulation largely depends on one's view).

202. SCALIA DISSENTS 197 (Kevin A. Ring ed., 2004).

203. *See* Crump, *supra* note 12, at 870.

204. *See id.* at 869 (arguing that a specific definition of a tradition does not inevitably lead to a choice against an asserted right).

205. Michael H. v. Gerald D., 491 U.S. 110, 123 n.4 (1989).

206. *Id.*

denying the minority interest, by failing to recognize an asserted fundamental right, protects the rights of the other parties involved.[207]

Each of these replies falls well short of addressing their criticisms. By asserting that footnote 6 protects minority interests, one fails to appreciate the urgency and importance of the Fourteenth Amendment. Its passage was meant to be an immediate response and solution to the prejudices of the southern states. Furthermore, a "mixed bag" of rights that protect all parties involved is hardly a genuine answer to Justice Brennan. In a case such as *Michael H.*,[208] other parties may have had countervailing interests. However, in other fundamental rights cases, there may be third parties with no legitimate interests. What is the countervailing interest in a case such as *Lawrence*?[209] In his dissent in *Lawrence*, even Justice Thomas admitted that the statute "is . . . uncommonly silly,"[210] a waste of law enforcement resources, and that had he been a member of the Texas legislature, he would have voted to repeal the law.[211]

Thus, after much deliberation, it is evident that footnote 6's requirement of the most descriptive level of generality fails to prevent the importation of values and inhibits the very purpose of the Fourteenth Amendment.[212] Despite its admirable effort, it, like the broad generality of Justice Scalia's detractors, has significant and unavoidable difficulties.

VI. CONSISTENCY, NOT "OBJECTIVITY" IS THE ANSWER

According to Paul Brest, "[O]bjectivity in legal interpretation . . . [is] on a par with the fantasy of a single, objective reading of *Hamlet* or of Balinese culture."[213] Courts must engage in a more thought-provoking analysis and abandon any attempt to discover a hidden treasure — a valueless determination of the level of generality in unenumerated fundamental rights. Motivated by *Marbury v. Madison*,[214] it has become an unavoidable consequence, intentional in design,[215] that the abstract

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207. *See id.*

208. *Id.* at 110.

209. 539 U.S. 558 (2003).

210. *Id.* at 605 (Thomas, J., dissenting) (quoting Griswold v. Connecticut, 381 U.S. 479, 527 (1965) (Stewart, J., dissenting)).

211. *Id.* (Thomas, J., dissenting).

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

213. Paul Brest, *Interpretation and Interest*, 34 STAN. L. REV. 765, 771 (1982).

214. 5 U.S. (1 Cranch) 137 (1803). In *Marbury*, the U.S. Supreme Court established the doctrine of judicial review.

215. "Perhaps in a perfect world, elected legislatures would accomplish the generalization of rights. But the Framers understood all too well that this is not a perfect world. Like it or not, judges

phrases of the U.S. Constitution demand value-based decisionmaking from the judiciary. Courts, especially conservative jurists, must move beyond the indistinguishable fires of judicial activism and abandon false hopes of a valueless system. "[T]he process of abstraction can never be performed as a matter of pure logic; it will always involve judgment."[216] Individuals import their perspective into everything they do, and determining how to characterize an asserted fundamental right is no different.

Abandoning the hopes of valueless determinations of the level of generality is not a concession to the judicial legislators. It acknowledges that footnote 6 will never succeed. Its failure lies not only in its design, but also in its dismissive analysis and demeaning tone.[217] It may never gain the support of the majority of the people or more than two votes on the U.S. Supreme Court.[218] Judicial liberals will never be defeated, but they can be controlled in a manner that strikes a balance between those who view Justice Scalia as an example of judicial restraint and as the protector of democracy, and those who view Justice Brennan as a defender of individual rights.

The balance between alternative methodologies can be struck by promoting the consistent application of a moderate level of generality.[219] Consistency prevents a return to Lochner Era[220] decisionmaking by restraining the sympathies of the liberal judge. No longer will liberal judges be permitted to arbitrarily expand the level of generality when the facts of a case assimilate with individual policy. A moderate level of generality empowers courts with a defined role, sanctioning more than mere deference to the legislature on issues that demand a courageous judiciary. Consistency, combined with a moderate level of generality, addresses the concerns of both liberals and conservatives and abandons insincere attempts to discover nonexistent judicial objectivity.

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must squarely face the task of deciding how abstractly to define our liberties." Tribe & Dorf, *supra* note 9, at 1099.

216. Greenberger, *supra* note 179, at 1029.

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

218. Had Justice Thomas been a member of the Court during *Michael H.*, it is likely he too would have joined Justice Scalia and Chief Justice Rehnquist in footnote 6.

219. Tribe & Dorf are wrong when they claim that "[a]bstraction pushes us constantly to check practice against principle." Tribe & Dorf, *supra* note 9, at 1099. Abstraction is not the solution to the problem, but is the problem itself. As abstraction increases and generality becomes broader, courts are granted limitless power to exceed their authority and move past the boundaries of their design.

220. During the disastrous Lochner Era, the U.S. Supreme Court often overturned the legislature's regulation of economic rights on the grounds that they violated the Due Process Clause.

VII. CONCLUSION

Admittedly, a methodology that consistently applies a moderate level of generality in characterizing unenumerated fundamental rights is not the perfect solution. After all, "moderate" is a somewhat indistinct term and it suffers from the same difficulties as applying the footnote 6 methodology.[221] Just like there is no "most specific" level, there will never be a complete consensus on what is "moderate." The goal of consistency also suffers from shortcomings and nuance. Although Justice Scalia has warned that "[l]iberty finds no refuge in a jurisprudence of doubt,"[222] it diminishes the value of consistency when courts lose sight of common sense notions of justice and instead apply principle for its own sake.[223]

Despite the problems of applying a moderate level of generality to unenumerated fundamental rights jurisprudence, a good faith effort to utilize a moderate generality that is consistently applied is the most practical and genuine solution. For the conservative, it offers a measure of restraint. For the liberal, it offers the chance to protect and preserve individual rights. In the end, the goal is not suppression of issues rightly before the judiciary, but the prevention of question-begging formulas made possible by judge made manipulation of the Question Presented.

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

222. Lawrence v. Texas, 539 U.S. 558, 586 (2003) (Scalia, J. dissenting) (quoting Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 844 (1992)).

223. *See, e.g.*, BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 51 (1921).