

California Law Review

VOL. 100

AUGUST 2012

No. 4

Copyright © 2012 by California Law Review, Inc., a California Nonprofit Corporation

Rights To and Not To

Joseph Blocher*

When and why should a “right to” include a “right not to”? If a person has a right to engage in an activity or to receive a procedural protection, under what circumstances should he or she also have a right not to engage in that activity or to refuse that process? The basic project of this Article is to show why these questions are important in American constitutional law, to explore how doctrine and scholarship have implicitly and sometimes awkwardly dealt with them, and to suggest normative frameworks with which they can be answered.

Introduction.....	762
I. Choice Rights, Option Rights, and Protection Rights	770
II. Three Types of Rights To and Not To	775
A. Choice Rights: Rights To and Not To	775
1. Substantive Choice Rights	776

Copyright © 2012 California Law Review, Inc. California Law Review, Inc. (CLR) is a California nonprofit corporation. CLR and the authors are solely responsible for the content of their publications.

* Assistant Professor, Duke School of Law. Many thanks to Sara Beale, Stuart Benjamin, Ashutosh Bhagwat, James Boyle, Curt Bradley, Aaron Caplan, Josh Chafetz, Guy Charles, George Christie, John de Figueiredo, Lisa Griffin, Mitu Gulati, Paul Haagen, Laurence Helfer, John Inazu, Kim Krawiec, Marin K. Levy, Bill Marshall, Jed Purdy, Richard Schmalbeck, Neil Siegel, Mark Rienzi, and Ernie Young for illuminating insights, to Jordan Fly and Kathryn McEvilly for exceptional research assistance, and to Dan Golub and the rest of the *California Law Review* for their thoughtful edits and suggestions.

2. Procedural Choice Rights	778
B. Option Rights: Rights To	780
1. Substantive Option Rights	781
2. Procedural Option Rights.....	784
C. Protection Rights: Rights Not To.....	785
1. Substantive Protection Rights	785
2. Procedural Protection Rights	786
D. The Internal Structure of the Taxonomy.....	787
III. Justifying Rights To and Not To.....	791
A. The Inescapable Normativity of the Taxonomy	792
B. Normative Frameworks	801
1. Personal and Public Rights; Intrinsic and Instrumental Freedoms.....	802
2. Beyond Autonomy: Instrumental Choice Rights	811
Conclusion	814

INTRODUCTION

When and why should a “right to” include a “right not to”? If people have a constitutional right to engage in an activity or to receive a procedural protection, under what circumstances should they also have a right not to engage in that activity or to refuse that process?

These questions demand more attention than they have received,¹ because the metes and bounds of constitutional freedom depend in large part on whether people can decline to do or accept the activities and processes the Constitution enumerates. The First Amendment’s “freedom of speech,” to take one

1. Many scholars have addressed the relationship between rights to and not to in specific contexts, especially speech and association. *See, e.g.*, HAIG BOSMAJIAN, *THE FREEDOM NOT TO SPEAK* 195 (1999) (“My primary argument here is that just as the suppression of expression of belief is ‘an affront to the dignity of man, a negation of man’s essential nature,’ so too is compelled political and religious speech.”); THOMAS I. EMERSON, *THE SYSTEM OF FREEDOM OF EXPRESSION* 30 (1970) (“Forcing public expression of a belief is an affront to personal integrity.”); Larry Alexander, *Compelled Speech*, 23 *CONST. COMMENT.* 147, 153–61 (2006) (considering “whether, apart from the legitimacy of government’s purposes in coercing speech, there are harms to the coerced individual from being forced to affirm a proposition he does not believe”); David B. Gaebler, *First Amendment Protection Against Government Compelled Expression and Association*, 23 *B.C. L. REV.* 995 (1982); Seana Valentine Shiffrin, Essay, *What Is Really Wrong with Compelled Association?*, 99 *NW. U. L. REV.* 839, 874 (2005) (“Compelled association . . . displays an objectionable indifference to the autonomous thought processes manifested in voluntary social associations and their genesis, while yet representing an effort to make use of the character virtues associated with the close connections that are the product of voluntary association.”). But John Garvey seems to be the only legal scholar who has given sustained attention to the relationship as a whole. *See generally* JOHN H. GARVEY, *WHAT ARE FREEDOMS FOR?* (1996) [hereinafter GARVEY, *FREEDOMS*] (arguing that freedoms are rights to engage in good actions, and that rights to should only encompass rights not to if the latter also serve the good).

prominent example, has long been recognized as a keystone of American constitutional law and democracy. But until *West Virginia State Board of Education v. Barnette*² established a First Amendment right not to speak, loyalty oaths and other forms of compelled speech were widespread.³ Similarly, the Sixth Amendment's right to "assistance of counsel" has been central to constitutional criminal procedure ever since the Bill of Rights was ratified.⁴ But until *Faretta v. California*⁵ announced a Sixth Amendment right of self-representation, criminal defendants had no right to refuse counsel's assistance. Other examples are not hard to find. Indeed, many of the most contentious and significant debates in American constitutional law can be understood as arguments about whether particular "rights to" encompass "rights not to": whether the right "to bear or beget a child" implies a right not to,⁶ whether the right to live includes a right to assisted suicide,⁷ and so on.

Constitutional law does not supply straightforward solutions to these debates, nor can they be resolved through acontextual analytic reasoning. Determining whether a particular "right to" should be accompanied by a "right not to" is fundamentally an inquiry into the principles or values associated with the right. It might appear, for example, that the right not to speak is a logically necessary part of the "freedom of speech."⁸ But the Supreme Court effectively denied the existence of such a right as late as 1940,⁹ before endorsing it three years later in *Barnette*.¹⁰ And of course many other constitutional "rights to" still do not carry with them a "right not to." For example, criminal defendants can be compelled to accept procedural guarantees such as a speedy and public trial¹¹ or a jury of their peers.¹² Thus the relationship between rights to and not

2. 319 U.S. 624 (1943).

3. See generally BOSMAJIAN, *supra* note 1 (describing loyalty oaths and other incidents of compelled speech in American history).

4. See *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963) (finding the right to be fundamental).

5. 422 U.S. 806, 819 (1975) ("Although not stated in the [Sixth] Amendment in so many words, the right to self-representation—to make one's own defense personally—is thus necessarily implied by the structure of the Amendment."):

6. See, e.g., *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972) (basing right to contraception in notions of privacy and autonomy); *Roe v. Wade*, 410 U.S. 113, 170 (1973) (Stewart, J., concurring) (taking a similar approach to abortion).

7. See *infra* Part II.B.1.

8. The Justices themselves have sometimes suggested that the two concepts are inevitably intertwined. See, e.g., *Riley v. Nat'l Fed'n of the Blind*, 487 U.S. 781, 796–97 (1988) ("[T]he First Amendment guarantees 'freedom of speech,' a term necessarily comprising the decision of both what to say and what *not* to say.") (emphasis added).

9. *Minersville Sch. Dist. v. Gobitis*, 310 U.S. 586 (1940) (upholding compulsory flag salute and recitation of the Pledge of Allegiance in public school).

10. *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943).

11. *Gannett Co. v. DePasquale*, 443 U.S. 368, 382 (1979) ("While the Sixth Amendment guarantees to a defendant in a criminal case the right to a public trial, it does not guarantee the right to compel a private trial."); *id.* at 384 ("[A] defendant cannot convert his right to a speedy trial into a right to compel an indefinite postponement . . .").

to is itself a product and a part of value-laden debates about the purposes and foundations of particular rights. Some rights encompass rights not to while others do not, and separating the former from the latter demands more than the application of formal logic.

The relationship between rights to and not to is therefore important enough to demand analysis, and dynamic enough to respond to it. But thus far the relationship has received only partial or indirect attention from judges and scholars. Some argue that it is descriptively “axiomatic” (even if undesirable) that a right to includes a right not to.¹³ But doctrine does not support this axiom, and never has. Few criminal procedure rights permit their bearers to insist on the inverse of their enumerated guarantees,¹⁴ and the Thirteenth Amendment does not create a right to be a slave.¹⁵ Other scholars, understanding that the symmetry axiom is not universally true, have focused on particular rights to and not to, especially the right to speak or not¹⁶ and the right to associate or not.¹⁷ These rights-specific inquiries are valuable on their own terms, but do not offer much guidance as to how other rights can or should be analyzed. Finally, many scholars have devoted sustained attention to the important question of when constitutional rights are or should be waivable.¹⁸ But as the discussion below demonstrates, waiving a right to *X* and claiming a right to not-*X* are significantly different.¹⁹

Drawing on these lines of scholarship and others, this Article attempts to provide a novel and comprehensive account of the relationship between rights to and not to in American constitutional law. The basic goals of the piece are to show why that relationship is important, to explore how doctrine has implicitly and sometimes awkwardly dealt with it, and to suggest modes of analysis with which it can be explained and evaluated. In doing so, the Article argues that what appear to be formal, logical symmetries between rights to and not to are in fact the products of deeply normative decisions about the purposes and functions of particular rights. To know whether a right to encompasses a right not to, then, one must understand the values underlying the right. Part II first

12. *Singer v. United States*, 380 U.S. 24, 34 (1965) (“[T]here is no federally recognized right to a criminal trial before a judge sitting alone . . .”).

13. See GARVEY, FREEDOMS, *supra* note 1, at 39 (“It is axiomatic in modern constitutional law that freedoms are bilateral rights.”).

14. See *infra* Parts II.A.2 and II.B.2.

15. See, e.g., *Bailey v. Alabama*, 219 U.S. 219, 243–44 (1911); *Clyatt v. United States*, 197 U.S. 207, 217–18 (1905).

16. See, e.g., BOSMAJIAN, *supra* note 1, at 195; EMERSON, *supra* note 1, at 30; Alexander, *supra* note 1, at 153–61; see also SPEECH AND SILENCE IN AMERICAN LAW, *supra* note 1.

17. See, e.g., Shiffrin, *supra* note 1, at 874; Gaebler, *supra* note 1.

18. See, e.g., Jason Mazzone, *The Waiver Paradox*, 97 NW. U. L. REV. 801 (2003); Edward L. Rubin, *Toward a General Theory of Waiver*, 28 UCLA L. REV. 478 (1981); William J. Stuntz, *Waiving Rights in Criminal Procedure*, 75 VA. L. REV. 761 (1989).

19. See *infra* Part I.

creates a taxonomy that describes the form and function of rights to and not to. Part III then outlines normative frameworks that can help explain current practice and enable prescriptive analysis.

Part I begins with the proposition that a right regarding *X* can be understood in three main ways. A *choice right* is a right to both *X* and not-*X*, where not-*X* means refusing to do or accept *X*. An *option right* is a right to *X*. And a *protection right* is a right to not-*X*. These three frameworks are the basic building blocks of the Article's analysis. Because *X* can either be a "substantive" guarantee of individual conduct such as the right to free speech, or a "procedural"²⁰ limitation on government conduct such as the right to a speedy trial, this tripartite taxonomy captures a wide range of constitutional rights. And like all rights, the three frameworks described here can be defined not only by the actions they protect but also by the particular kinds of government power they limit.²¹ A right to *X*—a right to engage in an activity or receive a process, in other words—is a limitation on the government's power to restrain or deny *X*. A right to not-*X*, by contrast—a right not to engage in an activity or to refuse a process—is a limitation on the government's power to coerce or enforce *X*. The three frameworks can therefore be understood as prohibiting restraint of *X*, coercion of *X*, or both.

The differences between these three frameworks of rights—those guaranteeing a choice, an option, or protection—are stark, and the question of classification is therefore a crucial part of defining a right's scope. Consider *Boy Scouts of America v. Dale*, in which the Supreme Court held that the Boy

20. I employ these terms with some hesitation, knowing that the distinction between substantive and procedural rights is blurry at best. See Matthew D. Adler, *Rights Against Rules: The Moral Structure of American Constitutional Law*, 97 MICH. L. REV. 1 (1998) (arguing that rights should be understood as limitations on government power to regulate conduct, not as "personal" guarantees to engage in that conduct). Compare John Hart Ely, *The Irrepressible Myth of Erie*, 87 HARV. L. REV. 693, 724 (1974) ("We were all brought up on sophisticated talk about the fluidity of the line between substance and procedure."), with Jennifer S. Hendricks, *In Defense of the Substance-Procedure Dichotomy*, 89 WASH. U. L. REV. 103 (2011) (arguing that the line is identifiable and desirable).

I use the terms to separate those rights regarding individual conduct—speech, religious practice, arms bearing, and the like—from those regarding the mechanisms by which the government can regulate it—speedy trials, procedural due process, and so on. I assume that the difference between these categories of rights is more or less intuitive, but the dichotomy can safely be ignored if my assumption is faulty.

The Article does not analyze structural guarantees: those establishing the functioning of, and relationship between, the various institutions and branches of government. Such "rights"—requirements of bicameralism and presentment, for example, or perhaps even of federalism itself—are usually (though not always) unwaivable. See, e.g., *New York v. United States*, 505 U.S. 144, 182 (1992) ("Where Congress exceeds its authority relative to the States, therefore, the departure from the constitutional plan cannot be ratified by the 'consent' of state officials."); *Clark v. Barnard*, 108 U.S. 436, 447 (1883) (noting states' ability to waive their sovereign immunity).

21. See Wesley Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L.J. 16 (1913) (describing rights in terms of the correlative duties they impose on others).

Scouts had a right, grounded in the freedom of association, to exclude a gay scoutmaster.²² The reasoning and result of *Dale* would look different under each of the three frameworks described here. If association is a choice right, then the Scouts had rights both to associate and not to associate (i.e., *X* and not-*X*)—a freedom from restraint and coercion with regard to association. Since New Jersey’s antidiscrimination law arguably forced the Scouts to associate with unwanted members by forbidding exclusion on the basis of sexuality, the Scouts could therefore invoke their right not to associate. On this account, which happens to reflect current doctrine,²³ *Dale* was rightly decided, or at least was properly characterized as a freedom of association case.²⁴

But it is possible to imagine a world in which the “right to associate” is exactly that and nothing more. Associating and not-associating, after all, may serve the same values, but they are not the same thing. One action can logically exist without the other. If association is an option right, then the Scouts had only a right to associate—a freedom from government restraint. Such a right would not limit the government’s power to coerce the Scouts into associating with unwanted members. On this account, the Scouts could not challenge the antidiscrimination law on associational grounds, and *Dale* was wrongly decided. Finally, if association is a protection right, then the Scouts had a right not to associate, but no affirmative right to do so. They would therefore be free from coercion, but not from restraint. The government could not force the Scouts to associate with homosexuals, but could forbid them to associate at all. On this reading, *Dale* was rightly decided on associational grounds.

As Part III demonstrates, choosing between these approaches—determining whether a particular guarantee is a choice, option, or protection right—is fundamentally a normative inquiry into the substantive purposes of the right, not solely a matter of finding symmetries or applying formal logic. It might seem obviously correct, for example, that the First Amendment is a choice right while the Eighth Amendment is a protection right. But this is only obvious in light of the purposes those Amendments are meant to serve, not the

22. 530 U.S. 640, 648 (2000).

23. See, e.g., *Roberts v. U.S. Jaycees*, 468 U.S. 609, 623 (1984) (“Freedom of association . . . plainly presupposes a freedom not to associate.”).

24. This Article is concerned with scope of coverage rather than strength of protection, and so does not ask to what degree rights to *X* or not-*X* can be regulated. Frederick Schauer, *Categories and the First Amendment: A Play in Three Acts*, 34 VAND. L. REV. 265, 275–76 (1981) (describing difference between coverage and protection).

By bracketing that question, however, I do not mean to downplay its significance. The fact that all rights are regulable suggests that rights to and not to are more similar than they may seem, because neither is absolute. Nevertheless, for the purposes of this Article, which attempts a broad overview of many different constitutional rights, it would be impossible to discuss with requisite precision the myriad tests and standards that apply to the regulation of various rights. Elsewhere, I explore in more depth the regulation of one specific right to and not to. See Joseph Blocher, *The Right Not to Keep or Bear Arms*, 64 STAN. L. REV. 1 (2012).

conduct or processes they enumerate. That is, one cannot deduce whether a right to *X* includes a right to not-*X* based on acontextual analytic reasoning. Instead, the classification of a right within the taxonomy depends on the values or purposes associated with the right.

Precisely which values or purposes lead to the creation of choice rights is difficult to say in the abstract; the answer varies as much as the rights themselves. Nevertheless, two broad normative frameworks seem to have emerged. First, as Part III.B.1 explains, rights may be classified as guaranteeing a choice, an option, or protection based on whether they exist to further the interests of the individual rightsholder or a broader social interest. To the degree that a right has a “public” component, it is usually treated as an option or protection right.²⁵ To the degree that a right is purely “personal,” however, it will usually be treated as a choice right, at least if the purpose of the right is to protect the *autonomy* of the individual rightsholders (as potentially opposed to, for example, their dignity). This characteristic manifests itself prominently in the constitutional concept of “privacy,” which has been closely associated with autonomy²⁶ and, in turn, what this Article calls choice rights. For example, many judges and scholars have identified privacy and autonomy as the constitutional values behind the rights to choose whether to speak,²⁷ whether to associate,²⁸ “whether to bear or beget a child,”²⁹ and whether to accept counsel.³⁰

25. A similar inquiry is often employed to determine whether a right should be waivable. *See, e.g.,* *Brooklyn Sav. Bank v. O’Neil*, 324 U.S. 697, 704 (1945) (concluding that private rights with public implications should not be waivable, since waiver “would thwart the legislative policy which it was designed to effectuate”); Nancy Jean King, *Priceless Process: Nonnegotiable Features of Criminal Litigation*, 47 UCLA L. REV. 113 (1999) (arguing that interests of third parties and the general public may justify restrictions on waiver).

26. *See infra* Part III.B.1; Louis Henkin, *Privacy and Autonomy*, 74 COLUM. L. REV. 1410, 1425 (1974) (“Primarily and principally the new Right of Privacy is a zone of prima facie autonomy, of presumptive immunity from regulation, in addition to that established by the first amendment.”); *see also* Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 9 (1971) (“Justice Douglas called the amendments and their penumbras ‘zones of privacy,’ though of course they are not that at all. They protect both private and public behavior and so would more properly be labeled ‘zones of freedom.’”).

27. *See, e.g.,* *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 573 (1995) (concluding that compelled speech “violates the fundamental rule of protection under the First Amendment, that a speaker has the autonomy to choose the content of his own message”); C. Edwin Baker, *Scope of the First Amendment Freedom of Speech*, 25 UCLA L. REV. 964, 1000 (1978) [hereinafter Baker, *Scope of the First Amendment*] (“[R]espect for the integrity and autonomy of the individual usually requires giving each person at least veto power over the use of her own body and, similarly, over her own speech.”); Steven J. Heyman, *Righting the Balance: An Inquiry into the Foundations and Limits of Freedom of Expression*, 78 B.U. L. REV. 1275, 1333–34 (1998) (“Coerced expression . . . does violence to the autonomy and dignity of the self. Thus the right to self-expression includes the capacity to determine whether, how, and to whom one wishes to express oneself.”).

28. *See, e.g., Roberts*, 468 U.S. at 617–18 (describing privacy as protecting certain intimate associations from incursion by the state).

And yet even rights with instrumental purposes—those that exist to protect more than autonomy—sometimes can be classified as choice rights.³¹ As Part III.B.2 explains, this can happen in at least three scenarios. First, it can occur where *X* and not-*X* depend on one another to further a particular constitutional value. This helps explain the choice right of expressive association, because it would arguably be difficult or impossible for groups to express themselves if they could not exclude those who would interfere with their messages.³² Second, an instrumental right can be a choice right where *X* and not-*X* are independent, but nonetheless further the same constitutional value. This might be the case with the Second Amendment. In *District of Columbia v. Heller*³³ and *McDonald v. City of Chicago*,³⁴ the Supreme Court found that the “central component” and “core lawful purpose” protected by the Second Amendment is self-defense,³⁵ particularly in the home.³⁶ Inasmuch as the decision not to keep or bear arms in one’s home is a safety decision akin to self-defense, it should arguably be protected by the Amendment for the simple reason that it furthers the same constitutional value.³⁷ The third scenario is where *X* and not-*X* further different values, both of which are constitutionally salient. This might explain the right of adults to or (presumably) not to engage in sexual intercourse. The former component is protected—to some degree,

29. See, e.g., *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972) (basing right to contraception in notions of privacy and autonomy); see *Roe v. Wade*, 410 U.S. 113, 170 (1973) (Stewart, J., concurring) (quoting *Eisenstadt*).

30. See, e.g., *United States v. Dougherty*, 473 F.2d 1113, 1128 (D.C. Cir. 1972) (“[The right to self-representation] is designed to safeguard the dignity and autonomy of those whose circumstances or activities have thrust them involuntarily into the criminal process.”); Erica J. Hashimoto, *Resurrecting Autonomy: The Criminal Defendant’s Right to Control the Case*, 90 B.U. L. REV. 1147, 1149 (2010) (defending *Faretta* on the basis that “the Framers intended to protect the autonomy of criminal defendants when they drafted the Bill of Rights”).

31. Cf. GARVEY, FREEDOMS, *supra* note 1, at 18 (“[F]reedoms are not necessarily bilateral. Whether they are or are not depends on the principles they revolve around.”).

32. *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 648 (2000) (“Forcing a group to accept certain members may impair the ability of the group to express those views, and only those views, that it intends to express.”); *Roberts*, 468 U.S. at 623 (“There can be no clearer example of an intrusion into the internal structure or affairs of an association than a regulation that forces the group to accept members it does not desire. Such a regulation may impair the ability of the original members to express only those views that brought them together.”).

33. 554 U.S. 570 (2008).

34. 130 S. Ct. 3020 (2010).

35. *Heller*, 554 U.S. at 599; *id.* at 630; *McDonald*, 130 S. Ct. at 3036 (“Self-defense is a basic right, recognized by many legal systems from ancient times to the present day, and in *Heller*, we held that individual self-defense is ‘the central component’ of the Second Amendment right.”) (internal citation omitted).

36. *Heller* noted that “the need for defense of self, family, and property is most acute” in one’s home, and emphasized “the right of law-abiding, responsible citizens to use arms in defense of hearth and home.” 554 U.S. at 628, 635; see also Darrell A.H. Miller, *Guns as Smut: Defending the Home-Bound Second Amendment*, 109 COLUM. L. REV. 1278, 1321–36 (2009).

37. See generally Blocher, *supra* note 24 (advocating, with qualifications, the recognition of such a right).

anyway—by privacy interests deriving from the Due Process Clause.³⁸ The latter, which is reassuringly untested in American constitutional law,³⁹ would seem to be supported by not only privacy interests, but also by those deriving from bodily integrity and perhaps even the Thirteenth Amendment.

Establishing this taxonomy and excavating its normative foundations can clarify rights discourse, and may help resolve rights debates. Some courts and legal commentators have seen the connections between rights to and rights not to, but their discussions are often clouded by imprecision and inaccuracy, such as the erroneous but common statement that a right to *X* must necessarily include a right to not-*X*.⁴⁰ Moreover, some of the most important scholarly and public debates in constitutional law feature people talking past each other because they disagree about how to characterize *X* or its proper role. This Article will not resolve these debates, but its taxonomy may at the very least provide a common vocabulary. And its exploration of the taxonomy's inescapable normativity may help move those debates away from unexamined assumptions and towards clear discussions of differing conceptions of rights.⁴¹

This is an Article about American rights discourse, not a philosophical evaluation of rights in the abstract. That framing is both a limitation and a strength. As to the former, the taxonomy laid out in Part II does not address all imaginable forms of rights, and the normative frameworks described in Part III

38. See *Lawrence v. Texas*, 539 U.S. 558, 578–79 (2003).

39. Cf. Glanville Williams, *The Concept of Legal Liberty*, 56 COLUM. L. REV. 1129, 1130 (1956) (“Most legal liberties are not to be found stated in law books, because there is generally no point in making these negative statements.”).

40. *Roberts v. U.S. Jaycees*, 468 U.S. 609, 623 (1984); *Riley v. Nat’l Fed’n of the Blind*, 487 U.S. 781, 797 (1988); see, e.g., Carl H. Esbeck, *A Restatement of the Supreme Court’s Law of Religious Freedom: Coherence, Conflict, or Chaos?*, 70 NOTRE DAME L. REV. 581, 596 n.57 (1995) (“[F]reedom of speech necessarily entails the right not to speak.”); John O. McGinnis, *Reviving Tocqueville’s America: The Rehnquist Court’s Jurisprudence of Social Discovery*, 90 CALIF. L. REV. 485, 528 (2002) (“The power to define who may deliver messages logically includes the power to exclude those parties whose identity is incompatible with the message.”); Michael Stokes Paulsen, *Scouts, Families, and Schools*, 85 MINN. L. REV. 1917, 1922 (2001) (noting freedom of expressive association “logically entails a freedom of autonomous message formation and delivery by the group, including the right of the group to define itself . . . and, finally, to exclude competing messages from being intermingled with the group’s chosen expression”); Kathleen M. Sullivan, *Parades, Public Squares and Voucher Payments: Problems of Government Neutrality*, 28 CONN. L. REV. 243, 248 (1996) (“The right to speak entails the right not to speak.”); Hillary A. Webber, *Equal Justice Under the Law: Why IOLTA Programs Do Not Violate the First Amendment*, 53 AM. U. L. REV. 491, 506 (2003) (referring to the right not to speak and the right not to associate as “corollary rights” of the right to speak and the right to associate); Lloyd L. Weinreb, *A Secular Theory of Natural Law*, 72 FORDHAM L. REV. 2287, 2295 (2004) (“A right to do something is also, necessarily, a right not to do it; for if one did not have a right not to do it, there would be no point in saying that one has a right to do it.”).

41. As noted in the Conclusion, the most prominent example of this is the ongoing debate over the relevance of “action” and “inaction” in the context of the Patient Protection and Affordable Care Act of 2010, the constitutionality of which will likely be resolved by the Supreme Court by the time this Article is in print. Pub. L. No. 111-148, 124 Stat. 119 (2010).

do not even begin to reflect the richness of the literature on rights' functions and purposes. But sufficient unto the Article are the problems thereof. By focusing specifically on existing rights doctrine and discourse, this Article aims to unearth and explore the importance of, relationship between, and rationales behind rights to and not to in the American constitutional tradition.

I.

CHOICE RIGHTS, OPTION RIGHTS, AND PROTECTION RIGHTS

Understanding the relationship between rights to and not to requires knowing what it means to say that a person "has a right to *X*." That is a more complex proposition than it may seem. The scope of a rightsholder's freedom with regard to *X* varies depending on whether she can do or demand *X*, refuse to do or accept *X*, or choose between those possibilities. In other words, she can have a right to, a right not to, or a right to *and* not to. These three frameworks are importantly distinct, and they are designed to limit different kinds of government interference: restraint, coercion, or both. If a right to *X* is a sword that enables its bearer to cut through government restraint, a right to not-*X* is a shield that protects its bearer from government coercion. The three frameworks are the three possible combinations of sword and shield.⁴²

This Article calls these three frameworks choice rights, option rights, and protection rights, and as the following discussion demonstrates, they can be used to describe and analyze much of American constitutional law. *Choice rights* protect both *X* and not-*X*—the ability to choose whether to *X*—and therefore limit the government's power to restrain or compel *X*. As noted above, the freedom of speech is a choice right, which means that it includes a right to speak and a concomitant right not to,⁴³ and thus that the government can neither restrain nor coerce speech. Most substantive rights are choice rights, including the First Amendment freedoms of speech,⁴⁴ religious practice,⁴⁵ and association.⁴⁶ By contrast, few procedural rights are choice rights. Although many can be waived, hardly any constitutional procedures can

42. The fourth possible combination—neither sword nor shield—is equivalent to the absence of a right. As discussed in Part II.D, option and protection rights are so similar that they sometimes appear interchangeable, and yet they remain importantly distinct from choice rights.

43. See *Riley*, 487 U.S. at 797; *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 559–60 (1985) (concluding that the First Amendment freedom of expression "includes both the right to speak freely and the right to refrain from speaking at all") (quoting *Wooley v. Maynard*, 430 U.S. 705, 714 (1977)).

44. *Riley*, 487 U.S. at 797.

45. See *Emp't Div. v. Smith*, 494 U.S. 872, 877 (1990) (holding that the Free Exercise Clause protects the right to engage in religious activity and also prohibits the government from "compel[ling] affirmation of religious belie[f]s").

46. See *Roberts v. U.S. Jaycees*, 468 U.S. 609, 623 (1984) ("Freedom of association . . . plainly presupposes a freedom not to associate.").

be refused. The right to counsel is the only notable example of a procedural choice right.⁴⁷

Option rights protect only *X*, and therefore prohibit government restraint but not government coercion. An option right is something of a constitutional Hobson's Choice⁴⁸—a take-it-or-leave-it freedom that can be invoked in only one direction. The holder of an option right is free to do or demand *X*, but is not free to refuse it. Although most substantive rights are choice rights, some of the fiercest battles in constitutional law can be understood as arguments about whether some of them should be treated as option rights. Many people have argued, for example, that the right to live should not include the right to die,⁴⁹ or that the right to bear a child should not include the right to terminate a pregnancy.⁵⁰ In both cases, there is general agreement about one “side” of the right—to live, or to bear children—and wide disagreement about whether it has a reflection. By contrast, most procedural guarantees are option rights. A criminal defendant can demand a speedy trial, for example, but cannot insist on a slow one. The government can therefore give a speedy trial whether the defendant wants it or not.⁵¹ Waiver, in other words, relieves the government of a duty with regard to *X* rather than creating a duty with regard to not-*X*.⁵²

47. See *Faretta v. California*, 422 U.S. 806 (1975).

48. The phrase refers to an offer in which only one option is given. See *Hobson's Choice*, PHRASE FINDER, <http://www.phrases.org.uk/meanings/hobsons-choice.html> (last visited Mar. 10, 2012) (“Hobson rented out horses . . . but refused to hire them out other than in the order he chose. The choice his customers were given was ‘this or none’; quite literally, Hobson’s choice.”); see also Gerald B. Dworkin, *Compulsion and Moral Concepts*, 78 ETHICS 227, 230 (1968) (“Henry Ford was supposed to have offered his customers a choice of colors—black.”).

49. See, e.g., John H. Garvey, *Control Freaks*, 47 DRAKE L. REV. 1, 8 (1998) (arguing that “freedoms are rights to go in some ways and not others” and that the freedom to live does not include a freedom to die); Yale Kamisar, *When Is There a Constitutional “Right to Die”? When Is There No Constitutional “Right to Live”?*, 25 GA. L. REV. 1203 (1991) (similar).

Constitutional doctrine has struggled to draw clear lines with regard to the rights to live and die. See U.S. CONST. amends. V, XIV (arguably suggesting a right to “life”); *Washington v. Glucksberg*, 521 U.S. 702 (1997) (finding no right to physician-assisted suicide). But see *Cruzan v. Dir., Mo. Dep’t of Health*, 497 U.S. 261, 278–79 (1990) (assuming that in some circumstances there is a right to refuse medical care).

50. See *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972) (basing right to contraception in notions of privacy and autonomy, and finding that the Due Process Clause protects the right to choose “whether to bear or beget a child”); see also *Carey v. Population Servs. Int’l*, 431 U.S. 678, 687 (1977) (describing *Eisenstadt* as establishing “the constitutional protection of individual autonomy” with regard to “childbearing”); *Roe v. Wade*, 410 U.S. 113, 170 (1973) (Stewart, J., concurring) (quoting *Eisenstadt* and finding that its reasoning protects the choice to either continue or terminate a pregnancy).

51. *Gannett Co. v. DePasquale*, 443 U.S. 368, 384 (1979).

52. The exploration of rights and correlative duties is credited to Wesley Hohfeld. See generally Hohfeld, *supra* note 21 (describing framework of jural conceptions); see also Walter Wheeler Cook, *Hohfeld's Contributions to the Science of Law*, 28 YALE L.J. 721, 723–29 (1919). It is a matter of some debate whether constitutional rights are Hohfeldian “privileges” or “rights.” See Mitchell N. Berman, *Coercion Without Baselines: Unconstitutional Conditions in Three Dimensions*, 90 GEO. L.J. 1, 33 n.135 (2001) [hereinafter Berman, *Coercion Without Baselines*] (exploring the

Protection rights guarantee only not- X , and therefore prohibit government coercion but not government restraint. Protection rights are closely related to option rights in that they operate in only one direction. But whereas option rights achieve their goals by guaranteeing desirable actions and processes, protection rights do so by prohibiting undesirable ones. Many procedural rights are protection rights, forbidding the government to impose a process but permitting the government to withhold it. The Eighth Amendment, for example, gives people the right to refuse cruel and unusual punishment, not the right to insist on it.⁵³ Substantive protection rights are rare, but the Thirteenth Amendment might be an example; it creates a right against slavery but no corresponding right to be a slave.⁵⁴

These three frameworks—and the dichotomy between X and not- X on which they are based—are simple to describe, but deceptively difficult to apply. Two points in particular are likely to cause confusion. First, a right to not- X is a right to refuse X , not a right to do everything besides X , nor to do the “opposite” of X . The difference is significant, but discussions of rights often blur it. For example, John Garvey criticizes what he calls “bilateral” rights, which are roughly analogous to what this Article calls choice rights.⁵⁵ According to Garvey, “It is axiomatic in modern constitutional law that freedoms are bilateral rights. . . . This axiom supports a curious form of argument that may be unique to the jurisprudence of freedoms. In form it is this: ‘If I may do x , then I may do not- x .’”⁵⁶

This is indeed a curious form of argument. But it is different from the conception of choice rights described here, which, to borrow Garvey’s terminology, takes the form “If I may do x , then I may not do x .” The difference between these is precisely the difference between having a right against restraint of not- X and a right against coercion of X —a right to do everything that is not speech and a right not to speak, for example.⁵⁷ The latter are the focus of this Article, and actually seem to be the real focus of Garvey’s criticism as well. Elsewhere, he explains that “the idea that freedoms are bilateral” means “that the freedom to do x entails the freedom not to do x .”⁵⁸ This, rather than the “right to do not- X ,” is the type of right not to that appears

difference and endorsing the latter view). The argument of this Article does not depend on whether that is in fact the best reading of Hohfeld.

53. U.S. CONST. amend. VIII.

54. See *infra* Part II.C.1. Of course, one might also characterize the Thirteenth Amendment as requiring freedom, rather than prohibiting slavery. Part II.D discusses the characterization issue in more detail.

55. GARVEY, FREEDOMS, *supra* note 1, at 17.

56. *Id.* at 39.

57. One might say that refusing to speak is, in fact, the same thing as engaging in nonspeech. The two will often overlap, but that does not mean that *all* nonspeech is protected, as the “right to do not- X ” would suggest.

58. GARVEY, FREEDOMS, *supra* note 1, at 17.

in American constitutional law, and which this Article explores. One might argue about whether the “opposite” of the right to a jury of one’s peers is a jury of nonpeers or no jury at all. But that debate, interesting as it may be, involves a fundamentally different question than whether a person should be able to refuse a jury of his peers. Resolution of the latter does not depend on the answer to the former.

The second easy misconception about rights not to is that they are the same thing as waivable rights. They are not. Waiving the right to do *X* means giving up freedom from restraint, not gaining freedom from coercion.⁵⁹ Waiver therefore gives a person autonomy with regard to the legal act of claiming a right to *X*, but not with regard to *X* itself. If *X* is a procedural protection, a person who waives his or her right to *X* has declined to demand it but cannot necessarily refuse it. Consider the Sixth Amendment’s guarantee of a speedy trial. It is clearly a “right to” (i.e., a procedural option right), in that it imposes a duty on government to provide a speedy trial.⁶⁰ It might also be waivable, which means that a criminal defendant can release the government from that duty.⁶¹ But that does not mean that it includes the right to *refuse* a speedy trial, because releasing the government from its duty to provide a speedy trial does not thereby create a separate duty on the part of the government to provide a slow one.⁶²

This method of viewing the inquiry—in terms not only of what rights guarantee but also what they prohibit—illuminates the content of the rights themselves. Because rights generally exist in order to check or prevent particular abuses by government, it is useful to begin not only “with an abstractly conceived account of what it is to be free, but with awareness of, and attendance to, the kinds of pressures, restraints, constraints, etc., to which human beings are, or can be subjected.”⁶³ This second lens helps bring into focus the functions of the various rights frameworks. Again, the relationship can be stated simply: rights to and not to prevent two different kinds of government interference with individual freedom—restraint and coercion. Rights to *X* prevent the government from restraining activity or denying process; rights to not-*X* prevent the government from coercing activity or compelling process. As with *X* and not-*X*, these can be combined in three

59. Even waiving the right to a particular procedure does not give a person the right to refuse it, because “[t]he ability to waive a constitutional right does not ordinarily carry with it the right to insist upon the opposite of that right.” *Singer v. United States*, 380 U.S. 24, 34–35 (1965) (upholding federal rule requiring government consent in order for criminal defendant to waive right to a jury trial).

60. See U.S. CONST. amend. VI (“In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial . . .”).

61. See *Mazzone*, *supra* note 18, at 831 n.194 (“The Court has also not determined whether the right to a speedy trial may be waived, and the courts of appeals have differed on this issue.”).

62. See *Gannett Co. v. DePasquale*, 443 U.S. 368, 384 (1979) (“[A] defendant cannot convert his right to a speedy trial into a right to compel an indefinite postponement . . .”).

63. D.M. White, *Negative Liberty*, 80 *ETHICS* 185, 185 (1970).

relevant ways, which correspond to the three frameworks discussed above. Option rights prevent government restraint, protection rights prevent government coercion, and choice rights prevent both restraint and coercion.

Restraints are government actions that prohibit, punish, or constrain an activity, or deny or withhold a particular process. Restraint is perhaps the most intuitive, common, and recognizable form of government interference with individual liberty; it has certainly received more scholarly and judicial attention than other forms of government interference.⁶⁴ State actions that punish or prevent activities are restraints on conduct. State actions that deny a procedural protection—the right to counsel, say—are restraints on process. Coercions, by contrast, are government actions that compel individuals to do activity *X* or receive process *X*. State actions that force people to engage in particular activities are coercions of conduct. State actions that compel people to accept a specific process—a jury of their peers, for example—are coerced process.

The taxonomy set out above and explored throughout the remainder of this Part serves many functions. As Part II.D describes in detail, it illustrates complicated issues regarding the definition of rights and the relationship between restraint and coercion. But even the act of identifying different forms of rights and their relationship to one another helps advance the essential, ongoing quest for definitional rigor and clarity in the law.⁶⁵ Sometimes a right may allow a person to select *X*, sometimes to refuse it, and sometimes to do either. These are different types of freedom, and as the discussion above demonstrates, one does not necessarily entail the others. Identifying whether a right is a choice, option, or protection right is therefore as essential as knowing the “roads along which a man can decide to walk”⁶⁶ and whether those roads

64. Cf. ROBERT YOUNG, *PERSONAL AUTONOMY: BEYOND NEGATIVE AND POSITIVE LIBERTY* 4 (1986) (“The blame for undue concentration on external obstacles to the exercise of autonomy is largely to be attributed to the negative model of liberty.”).

65. See Andrew Halpin, *More Comments on Rights and Claims*, 10 *LAW & PHIL.* 271, 298–99 (1991) (“[I]t is of importance . . . to recognise the different kinds of legal rights. For else the ambiguity of some vague general sense of a right, albeit capable of spreading comprehensively over every instance of a legal right, will confuse one legal position with another, and will promote dispute at law at the very point where the law should curtail dispute . . .”); see also Mitchell N. Berman, *Constitutional Decision Rules*, 90 *VA. L. REV.* 1, 3 (2004) (“[T]he law cannot hope to sustain [its] compound burden of stability, flexibility, and transparency unless it pays scrupulous attention to its own taxonomy The law simply could not be understood unless it took care to classify itself ‘methodically.’ If it did not properly understand itself, its decision-making would be erratic and doomed to ridicule.”) (quoting Peter Birks, *Rights, Wrongs, and Remedies*, 20 *O.J.L.S.* 1, 3 (2000)).

66. ISAIAH BERLIN, *FOUR ESSAYS ON LIBERTY* xxxix (1969); see also Isaiah Berlin, *Two Concepts of Liberty*, in *CONTEMPORARY POLITICAL PHILOSOPHY: AN ANTHOLOGY* 369, 385 n.9 (Robert E. Goodin & Philip Pettit eds., 2006) (“[T]he extent of my freedom seems to depend on . . . how many possibilities are open to me (although the method of counting these can never be more than impressionistic. Possibilities of action are not discrete entities like apples, which can be exhaustively enumerated) . . .”); Philip Pettit, *Agency-Freedom and Option-Freedom*, 15 *J. THEORETICAL POL.* 387, 387 (2003) (describing the argument “that social freedom is a function of how much choice a person is left by his or her overall context, human and natural”).

are open to one-way or two-way traffic.⁶⁷ The following Parts identify and explore those roads, which are summarized in Table 1.

TABLE 1: Taxonomy

Category	Choice rights	Option rights	Protection rights
<i>Protect</i>	X and not- X	X , but not not- X	Not- X , but not X
<i>Prevent</i>	Restraint and coercion	Restraint, but not coercion	Coercion, but not restraint
<i>Substantive examples</i>	Speech, religious practice	The right to life (arguably)	Prohibition on slavery
<i>Procedural examples</i>	Counsel in criminal cases	Speedy and public trial	Prohibition on cruel and unusual punishments

II.

THREE TYPES OF RIGHTS TO AND NOT TO

A. Choice Rights: Rights To and Not To

Choice rights protect both X and not- X by prohibiting both restraint and coercion of X . They are therefore rights to *and* not to. Where X is a kind of conduct, such as speech, choice rights give their bearers the freedom to choose whether or not to do X . Where X is a kind of process, such as the right to counsel, choice rights give their bearers the freedom to control the process by either demanding or refusing X . This element of autonomy with regard to X is what makes them choice rights.⁶⁸ Option and protection rights, by contrast, do not protect the right to choose, but only to do (or to not do).⁶⁹

67. See GARVEY, FREEDOMS, *supra* note 1, at 5 (using traffic metaphor to describe the difference between “unilateral” and “bilateral” rights); see also Garvey, *Control Freaks*, *supra* note 49, at 8 (“I think that freedoms are rights to go in some ways and not others. We might picture them as one-way streets.”).

Joel Feinberg also adopts a transportation theme, referring to freedom as a “maze of railroad tracks” with multiple switches, each permitting a person to choose one direction or another. JOEL FEINBERG, RIGHTS, JUSTICE, AND THE BOUNDS OF LIBERTY: ESSAYS IN SOCIAL PHILOSOPHY 30, 36 (1980) (reprinting his 1978 essay *The Interest in Liberty on the Scales*).

68. Choice is often said to be the essence of autonomy. See, e.g., David Luban, *Partisanship, Betrayal and Autonomy in the Lawyer-Client Relationship: A Reply to Stephen Ellmann*, 90 COLUM. L. REV. 1004, 1036 (1990) (“Autonomy is a hard concept to define, but as a first cut at its intuitive meaning we may say that autonomy means doing what one wants—choosing freely without outside constraints.”).

This Article relies primarily on a choice conception of autonomy, though of course autonomy can mean very different things in other contexts. The concept has been linked to liberty, “dignity, integrity, individuality, independence, responsibility, and self-knowledge,” GERALD DWORKIN, THE THEORY AND PRACTICE OF AUTONOMY 6 (1988), among many other things. See, e.g., Richard H. Fallon, Jr., *Two Senses of Autonomy*, 46 STAN. L. REV. 875, 877 (1994) (describing “descriptive” and “ascriptive” senses of autonomy); Lois Shepherd, *Dignity and Autonomy After Washington v. Glucksberg: An Essay About Abortion, Death, and Crime*, 7 CORNELL J.L. & PUB. POL’Y 431, 436–37 (1998)

A crucial function of choice rights is to protect both *X* and not-*X*—a fact so basic that it might at times disappear from view. A right to associate that did not also encompass the right not to associate, for example, is almost hard to imagine. The NAACP, it seems, simply *must* have a right to exclude members of the KKK. And yet as essential as this “to or not to” characteristic appears to be, it is not axiomatically true of all rights. Indeed, it seems equally inconceivable that other rights would protect choice. With few exceptions, criminal defendants cannot refuse the procedures the Constitution enumerates—speedy and public trials, for example. The fact that association is treated as a choice right is therefore a fundamental, but not inevitable, characteristic.

Part of the purpose of this Article is to show that these are design alternatives, and that current classifications are significant but not predetermined. After all, the Court did not explicitly recognize the existence of a right “not to associate” until 1985,⁷⁰ and in some limited circumstances it has recognized criminal procedural guarantees as choice rights as well. The following Sections explore the realm of substantive and procedural choice rights and the contexts of their development.

I. Substantive Choice Rights

Nearly all substantive rights are choice rights. That is, almost every right to engage in an activity encompasses the freedom to choose whether or not to engage in that activity. As explored above, this includes the major First Amendment rights, such as freedom of speech,⁷¹ free exercise of religion,⁷² and freedom of association.⁷³ Other substantive rights might also belong on the list of choice rights but have never appeared there for the simple reason that the state rarely compels the activities they protect. Sexual intimacy between adults,

(“Autonomy speaks volumes, and volumes have been justly spoken about it. It is variously understood to mean consent, freedom of choice, the ability to act independently of others, and self-determination.”) (internal citations omitted).

69. Garvey, *Control Freaks*, *supra* note 49, at 1 (“If I had to state [the theory I reject] in one sentence, it would be this: freedom is a right to make choices.”).

70. *Roberts v. U.S. Jaycees*, 468 U.S. 609, 623 (1984).

71. *See, e.g., Riley v. Nat’l Fed’n of the Blind*, 487 U.S. 781, 797 (1988); *Aboud v. Detroit Bd. of Educ.*, 431 U.S. 209, 234 (1977).

72. *See Emp’t Div. v. Smith*, 494 U.S. 872, 877 (1990) (“The government may not compel affirmation of religious belief, punish the expression of religious doctrines it believes to be false, impose special disabilities on the basis of religious views or religious status, or lend its power to one or the other side in controversies over religious authority or dogma.”) (internal citations omitted); *see also* Gail Merel, *The Protection of Individual Choice: A Consistent Understanding of Religion Under the First Amendment*, 45 U. CHI. L. REV. 805, 810–11 (1978) (“[I]ndividual decisions are to be protected whether they operate for or against the validity of any or all religious views.”).

73. *See Boy Scouts of Am. v. Dale*, 530 U.S. 640, 648 (2000) (“Thus, ‘[f]reedom of association . . . plainly presupposes a freedom not to associate.’”) (quoting *Roberts*, 468 U.S. at 623).

for example, is at least an option right.⁷⁴ Presumably there is also a right *not* to be sexually intimate—surely it would be unconstitutional for the state to force people to have sex—but fortunately courts have had no real reason to investigate the question.

Why are many substantive rights treated as choice rights? Part III addresses this question in more detail, but the answer seems to lie, in large part, with the fact that our notions of free action are deeply intertwined with commitments to autonomy and choice.⁷⁵ The Supreme Court’s substantive due process jurisprudence, for example, often refers to choice—not “merely” freedom from restraint—as an essential element of constitutional liberty. In *Meyer v. Nebraska*,⁷⁶ an early precursor of substantive due process, the Court emphasized that “[w]ithout doubt, [liberty] denotes not merely freedom from bodily restraint, but also the right of the individual . . . generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.”⁷⁷

Fifty years later, Justice Douglas picked up a similar thread, arguing that the Fourteenth Amendment protects “freedom of *choice* in the basic decisions of one’s life respecting marriage, divorce, procreation, contraception, and the education and upbringing of children.”⁷⁸ The same theme also appeared in *Eisenstadt v. Baird*,⁷⁹ which extended constitutional protection to “the decision whether to bear or beget a child.”⁸⁰ The plurality in *Planned Parenthood of Southeastern Pennsylvania v. Casey*⁸¹ similarly concluded:

It is a promise of the Constitution that there is a realm of personal liberty which the government may not enter. . . . These matters, involving the most intimate and personal choices a person may make

74. *Lawrence v. Texas*, 539 U.S. 558, 567 (2003).

75. *See infra* Part III.B.1.

76. 262 U.S. 390 (1923).

77. *Id.* at 399. Similarly, in *Allgeyer v. Louisiana*, the Supreme Court endorsed the idea that liberty means more than freedom from restraint: “The liberty mentioned in [the Fourteenth] amendment means not only the right of the citizen to be free from the mere physical restraint of his person, . . . the term is deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties. . . .” 165 U.S. 578, 589 (1897).

Notably, the specific instantiation of the right to privacy at issue in *Meyer*—to educate one’s children—is an option right rather than a choice right, as demonstrated by the existence of compulsory education laws. I nevertheless hold aside any extended discussion of education, because it seems to be tied up with the *age* of the person being educated. That is, children have an option right to an education (and their parents an option right to educate them), while adults probably have a choice right to their own education. The difference, I think, has more to do with age than education, and for clarity’s sake I do not want to introduce another distinction here.

Many thanks to Ash Bhagwat for emphasizing this point, and pressing me to consider it.

78. *Doe v. Bolton*, 410 U.S. 179, 211 (1973) (Douglas, J., concurring) (emphasis added).

79. 405 U.S. 438 (1972).

80. *Id.* at 453.

81. 505 U.S. 833 (1992).

in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment.⁸²

These and other cases enshrine a right against both restraint and coercion of particular activities. They therefore protect autonomy—the freedom to choose—with regard to those activities.

2. *Procedural Choice Rights*

A procedural choice right gives its bearer the freedom to either demand or refuse a particular type of process or treatment by the government. Such rights are rare.

The only prominent example of a procedural choice right is the Sixth Amendment's "assistance of counsel" guarantee, which gives criminal defendants the right to proceed either with or without counsel at trial.⁸³ As the Court has explained, this amounts to "constitutional protection of the defendant's free choice independent of concern for the objective fairness of the proceeding."⁸⁴ This explanation explicitly places the intrinsic value of personal autonomy and dignity above the instrumental values the right might otherwise serve: "The right to appear *pro se* exists to affirm the dignity and autonomy of the accused."⁸⁵

The right to refuse counsel, however, stands alone as a procedural choice right, despite arguments by scholars and some Justices that defendants should have autonomous control over their trials. *Faretta* suggested that "[t]he language and spirit of the Sixth Amendment contemplate that counsel, like the other defense tools guaranteed by the Amendment, shall be an aid to a willing defendant—not an organ of the State interposed between an unwilling defendant and his right to defend himself personally."⁸⁶ But in fact the "other defense tools guaranteed by the Amendment" have *not* been treated as choice rights. To the contrary, the Court has specifically held that the Amendment's guarantees of a speedy and public trial cannot be refused.⁸⁷ Similarly, "although [a defendant] can waive his right to be confronted by the witnesses against him, it has never been seriously suggested that he can thereby compel

82. *Id.* at 847, 851.

83. *Faretta v. California*, 422 U.S. 806, 836 (1975). The same cannot be said of appeal, where criminal defendants can be required to accept court-appointed counsel. *See Martinez v. Court of Appeal*, 528 U.S. 152, 163 (2000) ("[W]e conclude that neither the holding nor the reasoning in *Faretta* requires California to recognize a constitutional right to self-representation on direct appeal from a criminal conviction.").

84. *Flanagan v. United States*, 465 U.S. 259, 268 (1984).

85. *McKaskle v. Wiggins*, 465 U.S. 168, 176–77 (1984); *see also Martinez*, 528 U.S. at 160 ("[T]he *Faretta* majority found that the right to self-representation at trial was grounded in part in a respect for individual autonomy.").

86. 422 U.S. at 820.

87. *See infra* Part II.B.2.

the Government to try the case by stipulation.”⁸⁸ Nor is there a constitutional right to be absent from one’s own trial.⁸⁹ In other words, no “rights not to” accompany these Sixth Amendment rights.

The availability of plea bargaining raises interesting questions about procedural choice rights, for in some sense pleading guilty appears to be the ultimate not-*X* with regard to criminal procedure rights: a refusal to accept counsel, or indeed a trial of any kind. But despite their commonality, pleas are not the not-*X* right one might suppose. For although “[i]n the vast majority of cases . . . the decision whether to plead guilty is entirely the defendant’s,” criminal defendants “do not technically have the *right* to plead guilty; the judge may refuse, under some circumstances, to accept the defendant’s plea.”⁹⁰ Some scholars have argued for recognition of just such a right—invoking *Faretta*, the “personal” nature of Sixth Amendment rights, and the importance of defendant autonomy.⁹¹ But *Faretta* aside, the Court has been reluctant to endorse this or any other version of procedural choice rights.⁹²

It is tempting to explain the Court’s reluctance based on the fact that procedural choice rights would effectively permit criminal defendants to require the government to provide some good or service—precisely the kind of rights-claim frowned upon in our system of “negative” liberty.⁹³ Recognizing such rights would allow defendants to place demands on the government, and “[s]uch positive assistance is in deep tension with the idea of rights as entitlements to autonomy, or as trumps.”⁹⁴ But that cannot be a sufficient explanation, for *all* process rights place demands on government resources. The right to a jury trial or to the assistance of counsel, for example, may force the

88. *Singer v. United States*, 380 U.S. 24, 35 (1965).

89. Federal Rule of Criminal Procedure 43 permits waiver of the presence requirement, but neither Rule 43 nor the Sixth Amendment standing alone confer a *right* to do so. *See, e.g., In re United States*, 597 F.2d 27 (2d Cir. 1979) (recognizing judicial discretion to accept or refuse waiver of appearance); *United States v. Durham*, 587 F.2d 799 (5th Cir. 1979) (same).

90. Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 YALE L.J. 1909, 1917 n.24 (1992); *see also* *North Carolina v. Alford*, 400 U.S. 25, 38 n.11 (1970) (“A criminal defendant does not have an absolute right under the Constitution to have his guilty plea accepted by the court, . . . although the States may by statute or otherwise confer such a right.”).

91. *See, e.g.,* Barry J. Fisher, *Judicial Suicide or Constitutional Autonomy? A Capital Defendant’s Right to Plead Guilty*, 65 ALB. L. REV. 181, 187 (2001) (“This view is consistent with the Sixth Amendment’s antecedent right to a jury trial as a ‘right or privilege of the accused,’ rather than ‘as a part of the structure of government.’”) (internal citation omitted).

92. Scholars have, too. *See* Hashimoto, *supra* note 30, at 1150 n.8 (“There are relatively few articles supporting the constitutional autonomy interest of criminal defendants.”).

93. *See* CHARLES FRIED, *RIGHT AND WRONG* 110–12 (1978) (defining a negative right as “the right not to be wronged intentionally in some specified way,” while “a positive right is a claim to . . . some [specified share of] good[s]”); *see also* *Jackson v. City of Joliet*, 715 F.2d 1200, 1203 (7th Cir. 1983) (concluding that U.S. Constitution “is a charter of negative rather than positive liberties”).

94. ASHUTOSH BHAGWAT, *THE MYTH OF RIGHTS: THE PURPOSES AND LIMITS OF CONSTITUTIONAL RIGHTS* 25 (2010); *see also* J. Harvie Wilkinson III, *The Dual Lives of Rights: The Rhetoric and Practice of Rights in America*, 98 CALIF. L. REV. 277, 277 (2010).

government to spend vast amounts of money.⁹⁵ Indeed, the very function of a process right is to provide some government “benefit” (such as court-appointed counsel) as a result of, or predicate to, government action (such as a criminal prosecution).

The scarcity of procedural choice rights seems to be a function of the very purpose of procedural rights. Unlike protections for individual action, procedural rights generally exist to promote system interests—legitimacy, certainty, and so on—that are in some sense beyond the control of the rightsholder. Part III.B.1 explores this distinction in more detail.

B. Option Rights: Rights To

Whereas choice rights guarantee both *X* and not-*X* by prohibiting both restraint and coercion, option rights guarantee only *X* by prohibiting only restraint. Substantive option rights entitle their bearers to do *X* but not to refuse to do so. Procedural option rights permit their bearers to receive *X* but not to decline it.

If the main function of a choice right is to protect the choice between *X* and not-*X*, the main function of an option right is to enable or guarantee *X* alone. A person with an option right is therefore free to do or receive *X*, but not to refuse to do or accept it. Sometimes a person can waive her right to *X*, meaning that she is free not to insist on it. This gives the rightsholder some measure of autonomy with regard to *X*. But as explained above,⁹⁶ that is not the same as having a *right* to not-*X*, because it does not include a freedom to refuse. If the government seeks to coerce *X* rather than restrain it, an option right is no defense.

As explained in Part II.B.2, option rights operate like one-way streets that permit people to move toward some vision of the good, rather than protecting autonomous choice for its own sake. And if constitutional rights exist in order to promote the good—a contested but not indefensible position⁹⁷—then it seems plausible that enumerating *X* as a good worth protecting should not necessarily give people the ability to invoke that right so as to refuse that good. The right to a public trial, for example, does more than just protect the autonomy of the accused. It also allows the public to see that the defendant “is fairly dealt with and not unjustly condemned,” incentivizes the “judge and prosecutor [to] carry out their duties responsibly,” “encourages witnesses to come forward,” and “discourages perjury.”⁹⁸ These values are not coextensive

95. See, e.g., Rob Nagle, *Public Defender Costs Come Under Scrutiny*, EXAMINER (S.F.), May 26, 2011, <http://www.sfexaminer.com/local/public-defender-costs-come-under-scrutiny> (noting that in 2010 San Francisco’s Superior Court spent \$10,600,000 providing attorneys to indigent defendants).

96. See *supra* notes 59–62 and accompanying text.

97. This is, of course, Garvey’s position. See GARVEY, FREEDOMS, *supra* note 1, at 2.

98. *Waller v. Georgia*, 467 U.S. 39, 46 (1984).

with the interests of the individual on trial. It therefore stands to reason that the individual should not have complete control over whether the trial is public.

Despite this intuitive appeal, option rights also raise significant complications. After all, if the purpose of rights is to permit people to pursue the good, why not simply require them to do so?⁹⁹ That would seem antithetical to our notions of liberty,¹⁰⁰ but option rights do not preclude it. One could perhaps add the proviso that the good is only good when it is freely chosen rather than coerced. But that means making a concession to the importance of autonomous choice, which is exactly what option rights seek to avoid. The following Sections explore how the Court has struck this balance in the context of specific substantive and procedural rights.

1. Substantive Option Rights

As noted above, nearly all substantive rights are choice rights. But one can imagine—and arguably can find—examples of substantive option rights as well: rights that guarantee freedom from restraint but not from coercion. Indeed, some of the most crowded and bitter battles in American constitutional law center on whether particular substantive freedoms should be understood as choice rights or option rights.

John Garvey has given the most full-throated defense of substantive option rights, which he calls “unilateral rights.” Garvey argues that rights exist in order to promote the good,¹⁰¹ and that their scope can and should be understood with that instrumental aim in mind: “Suppose that it is good to do *x*. That does not mean that it is good not to do *x*. If freedom follows the good, we should be free to do *x*. But that does not mean that we should be free not to do *x*.”¹⁰² Of course, what counts as “good” will inevitably be disputed.¹⁰³ But

99. See Dennis J. Goldford, *Response to Professor Garvey*, 47 DRAKE L. REV. 105, 107 (1998) (“If the highest value in [Garvey’s] theory is that we do good things, is there any logical, principled stopping point in his position which would forestall the argument that government should enforce goodness?”).

100. CHARLES FRIED, MODERN LIBERTY AND THE LIMITS OF GOVERNMENT 17 (2007) [hereinafter FRIED, MODERN LIBERTY] (“The greatest enemy of liberty has always been some vision of the good.”).

101. See GARVEY, FREEDOMS, *supra* note 1, at 2 (noting that this argument “inverts the first principle of liberalism—it makes the good prior to the right”); see also Steve Sheppard, *Freedom To and Freedom From: A Response to Garvey and Armacost with a Tinge of Legal Perfectionism*, 47 DRAKE L. REV. 65, 67 (1998) (describing Garvey’s theory as holding that “[a]cts that lack the purpose of a given freedom do not deserve protection by it”); Gregory C. Sisk, *Stating the Obvious: Protecting Religion for Religion’s Sake*, 47 DRAKE L. REV. 45, 45 (1998) (celebrating as “obvious” and correct “Garvey’s observation that our identification, interpretation, and application of constitutional rights should include an understanding of the *purpose* of those rights”). *Contra* JOHN RAWLS, A THEORY OF JUSTICE 31 (1971) (“[T]he concept of right is prior to that of the good.”).

102. GARVEY, FREEDOMS, *supra* note 1, at 40.

103. See LAWRENCE CROCKER, POSITIVE LIBERTY: AN ESSAY IN NORMATIVE POLITICAL PHILOSOPHY 9 (1980) (“To attempt a ‘value neutral’ account of liberty is at best only superficially

option rights are distinct from choice rights precisely because they do not treat autonomy as a dominant value, and as a result do not ensure the right *not* to engage in the enumerated activity or process. They guarantee actions or processes, but not choice.¹⁰⁴

Garvey illustrates his argument for “unilateral” rights with examples drawn—roughly, at least—from constitutional doctrine. For example, he argues that the Due Process Clause, which suggests the existence of a right to “life,”¹⁰⁵ does not give people a right to choose death. The right to life, on this account, prevents the government from restraining a person’s ability to live, but permits the government to coerce a person into doing so. It is therefore a substantive option right that serves the “virtue of courage,” prevents harms to others, and preserves human dignity.¹⁰⁶

Whether current doctrine supports this characterization of life as an option right is a more difficult question.¹⁰⁷ *Washington v. Glucksberg*,¹⁰⁸ which involved a constitutional challenge to a Washington statute barring physician-assisted suicide, is the closest the Supreme Court has come to determining whether the right to live carries with it a right not to live. The U.S. Court of Appeals for the Ninth Circuit struck down the Washington statute, finding that the right to life included the freedom to “determin[e] the time and manner of

more sensible than to give a ‘biology neutral’ account of fish.”); RICHARD A. PRIMUS, *THE AMERICAN LANGUAGE OF RIGHTS* 19 (1999) (“[C]laims of rights are inescapably normative, because rights are always interpreted according to some vision of the good or set of substantive political commitments.”).

104. See Barbara E. Armacost, *Constitutional Remedies and the Morality of Governmental Action: A Response to Garvey*, 47 *DRAKE L. REV.* 19, 19 (1998) (describing Garvey’s view as being that “the American system is not about the freedom to choose but about the freedom to act”); Alan E. Brownstein, *The Right Not to Be John Garvey*, 83 *CORNELL L. REV.* 767, 769 (1998) (“Garvey concedes that freedoms can serve several overlapping interests. His argument seems to reject only one justification for constitutionally protected freedoms: that of protecting personal autonomy.”) (internal citations omitted).

105. To be precise, the Fifth and Fourteenth Amendments say only that people must not be deprived “of life . . . without due process of law.” U.S. CONST. amend. V and XIV. But this language has been read to imply a preexisting right to life, and that such a right is undoubtedly “deeply rooted in this Nation’s history and tradition.” *Cf.* *Moore v. City of E. Cleveland*, 431 U.S. 494, 503 (1977) (plurality opinion). In any event, the Court has recognized that substantive due process protects “bodily integrity,” *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997), which is presumably broad enough to encompass the right to remain alive. And of course the right to life, like all rights, is a right *against* the government—that is, a (nonabsolute) right not to be killed by the government.

106. See Garvey, *Control Freaks*, *supra* note 49, at 13 (arguing, *inter alia*, that “living out the virtue of courage is an act, or more precisely an attitude, that is good in itself”); *id.* at 15–17 (arguing that suicide is not a self-regarding act, and that it impacts concepts of human dignity and the lives of others).

107. Part of the complication comes from the fact that the “right to die” can encompass many different things—passive euthanasia, suicide, assisted suicide, and active voluntary euthanasia—each of which raises different constitutional concerns. See Yale Kamisar, *Physician-Assisted Suicide: The Last Bridge to Active Voluntary Euthanasia*, in *EUTHANASIA EXAMINED: ETHICAL, CLINICAL AND LEGAL PERSPECTIVES* 225, 225 (John Keown ed., 1995).

108. 521 U.S. 702 (1997).

one's own death."¹⁰⁹ A "philosophers' brief" filed with the Supreme Court by Ronald Dworkin, Thomas Nagel, Robert Nozick, John Rawls, Thomas Scanlon, and Judith Jarvis Thompson supported this conclusion, arguing for "a very general moral and constitutional principle—that every competent person has the right to make momentous personal decisions which invoke fundamental religious or philosophical convictions about life's value for himself."¹¹⁰ This would have effectively meant a substantive choice right with regard to life. The Court, however, reversed the Ninth Circuit, rejecting a right to assisted suicide.¹¹¹

Garvey claims that *Glucksberg* is a vindication of life as a unilateral (i.e., option) right.¹¹² But the Court's decision was not solely based on the notion that the good precedes and thereby creates the right. Rather, the Justices concluded that assisted suicide is not a fundamental right because it is not grounded in American tradition, and that Washington's ban was rationally related to a legitimate government purpose¹¹³: "The decision to commit suicide with the assistance of another may be just as personal and profound as the decision to refuse unwanted medical treatment, but it has never enjoyed similar legal protection."¹¹⁴ This reasoning does not rule out the possibility of a right to choose death, only the right to do so with a doctor's help. Indeed, in *Cruzan v. Director, Missouri Department of Health*,¹¹⁵ decided just a few years before *Glucksberg*, the Court noted that its past decisions support the inference "that a competent person has a constitutionally protected liberty interest in refusing unwanted medical treatment."¹¹⁶ This suggests that life is a choice right, even if obtaining a doctor's assistance in ending it is not.

But whether or not it is descriptively true to say that life is an option right, the underlying argument is straightforward: constitutional rights can, and arguably sometimes do, prohibit government restraints of conduct without prohibiting government coercion of conduct. Although (or because) this argument places the concept of the good above that of personal autonomy, it is not an altogether unsatisfying account. But just as the Supreme Court has

109. *Compassion in Dying v. Washington*, 79 F.3d 790, 793 (9th Cir. 1996), *rev'd sub nom.* *Washington v. Glucksberg*, 521 U.S. 702 (1997).

110. Ronald Dworkin et al., *Assisted Suicide: The Philosophers' Brief*, N.Y. REV. BOOKS, March 27, 1997, at 1; *see also* Brief for Ronald Dworkin et al. as Amici Curiae Supporting Respondents, *Glucksberg*, 521 U.S. 702 (Nos. 95-1858, 96-110), 1996 WL 708956.

111. *Glucksberg*, 521 U.S. at 735–36.

112. Garvey, *Control Freaks*, *supra* note 49, at 1 ("[T]he Court's understanding of freedom is similar to the one I propose . . . and the theory it rejects is the one I am most concerned to combat.").

113. *Glucksberg*, 521 U.S. at 728, 735.

114. *Id.* at 725.

115. 497 U.S. 261 (1990).

116. *Id.* at 278. *See also* Shepherd, *supra* note 68, at 432–33 n.13 (emphasizing that *Cruzan* merely assumed, and did not create, a constitutional right to reject medical care).

generally rejected calls for procedural choice rights, so too has it generally rejected arguments for substantive option rights.

2. Procedural Option Rights

Whereas most substantive rights are choice rights, nearly all procedural rights are option rights. They permit their bearers to demand a particular procedural protection but not necessarily to refuse it. The government may not deny such processes, but can impose them on unwilling individuals.

The rights to a speedy and public trial are good examples of procedural option rights. The Sixth Amendment guarantees criminal defendants the option of a speedy and public trial, but does not give them autonomous control over their trials' speed or publicity. In other words, the government must provide a criminal defendant a speedy trial if requested, but need not honor a defendant's request for a slow or private trial. The Court concluded as much in *Gannett Co. v. DePasquale*,¹¹⁷ albeit seemingly in dicta.¹¹⁸ Distinguishing *Faretta* on the basis that its result was driven largely by the word "assistance" in the text of the Sixth Amendment, the Court concluded that "[w]hile the Sixth Amendment guarantees to a defendant in a criminal case the right to a public trial, it does not guarantee the right to compel a private trial."¹¹⁹ Similarly, the Court held that "a defendant cannot convert his right to a speedy trial into a right to compel an indefinite postponement"¹²⁰ As noted above,¹²¹ the Court has reached the same conclusion with regard to other criminal procedure guarantees, such as the right to a jury trial.

And yet there are those who question this state of affairs and argue that, as in *Faretta*, the principle of defendant autonomy should animate the Court's criminal procedure jurisprudence.¹²² These arguments have traditionally—and often successfully—focused on expanding defendants' ability to waive certain rights. The Court now evaluates the waivability of criminal procedure rights against a "background presumption that legal rights . . . are subject to waiver by voluntary agreement of the parties."¹²³ But as noted above, waiving a right to demand does not necessarily give a person a right to refuse, for the simple reason that releasing the government from its duty to provide *X* does not create

117. 443 U.S. 368 (1979).

118. As the Court noted, "the issue here is not whether the defendant can compel a private trial. Rather, the issue is whether members of the public have an enforceable right to a public trial that can be asserted independently of the parties in the litigation." *Id.* at 382–83.

119. *Id.* at 382.

120. *Id.* at 384.

121. See *supra* notes 88–90 and accompanying text.

122. See, e.g., Hashimoto, *supra* note 30, at 1163 ("The history of the Constitution, and in particular the history of the Sixth Amendment, strongly suggests that the autonomy interest recognized in *Faretta* underlies many of the Constitution's criminal trial rights.").

123. *United States v. Mezzanatto*, 513 U.S. 196, 203 (1995).

a corresponding duty not to provide *X*. In *Singer v. United States*,¹²⁴ for example, a criminal defendant argued that he had a right to insist on a trial without a jury—that the right to a jury trial was a choice right. The Supreme Court rejected this argument, saying that “[t]he ability to waive a constitutional right does not ordinarily carry with it the right to insist upon the opposite of that right.”¹²⁵ And in *Gannett*, the question was not whether the defendant could waive his rights to a speedy and public trial but rather whether the government could, notwithstanding his waiver, force him to have a speedy and public trial. Option rights permit the government to do exactly that.

C. Protection Rights: Rights Not To

The final framework consists of protection rights, which guarantee not-*X* without guaranteeing *X* itself. They therefore prohibit coercion of *X* but not restraint of it. Protection rights are closely related to option rights in that they operate in only one direction and are concerned with values other than individual autonomy. But whereas option rights guarantee people freedom to pursue the good, protection rights guarantee people freedom from being forced into the bad.

1. Substantive Protection Rights

Substantive protection rights give their bearers the right to refuse to do something, but not the right *to* do it. They therefore forbid the government to coerce a particular activity, but do not forbid (and sometimes require) the government to restrain it.

The Thirteenth Amendment’s prohibition on slavery is the best example of a substantive protection right. It limits the government’s power to coerce slavery but does not limit the government’s power to restrain it. In fact, because the Amendment’s guarantees cannot be waived, the government is effectively *required* to restrain slavery: “Slavery is forbidden whether or not a person ‘consented’ to it.”¹²⁶ This is demonstrated most clearly by the peonage cases, in which the Court invalidated on Thirteenth Amendment grounds state statutes requiring compulsory service as payment for private debts.¹²⁷ In doing so, the Court made it clear that the amendment does not confer a right to be a slave,

124. 380 U.S. 24 (1965).

125. *Id.* at 34–35. Though it referred to “insist[ing] upon the opposite” of a right, the Court clearly meant *refusing* the right to a jury trial.

126. Seth F. Kreimer, *Allocational Sanctions: The Problem of Negative Rights in a Positive State*, 132 U. PA. L. REV. 1293, 1386 (1984); *id.* at 1387–88 (“The burden of the [T]hirteenth [A]mendment was not only the protection of individual liberty, but the eradication of a social practice deemed incompatible with a free society.”).

127. *See, e.g.*, *Bailey v. Alabama*, 219 U.S. 219, 243–44 (1911); *Clyatt v. United States*, 197 U.S. 207, 217–18 (1905).

even voluntarily. (This of course raises interesting questions about whether choosing slavery can ever be a valid exercise of autonomy.¹²⁸)

As explained below in Part II.D, the distinction between option and protection rights is not always as clear as the line separating option/protection rights from choice rights. One might ask, therefore, whether the Thirteenth Amendment should instead be characterized as a guarantee of freedom—an option right. This is logically plausible; the legal impact would be precisely the same. And yet the language, history, and understanding of the amendment support the protection right characterization. It is, after all, phrased in prohibitory terms, and has long been understood by the Court as forbidding coercion and compulsion.¹²⁹ Those very characteristics make it a protection right.

2. Procedural Protection Rights

Procedural protection rights enumerate processes that people cannot be forced to accept, but which the government can choose to (and sometimes must) deny. Whereas the protection rights framework is all but an empty set with regard to substantive rights, many procedural rights fall within its scope.

The Eighth Amendment's prohibition on cruel and unusual punishment is a particularly interesting example of a procedural protection right.¹³⁰ The amendment clearly permits rightsholders to refuse particular "procedures," thus making the Eighth Amendment a basic not-*X* right. Whether that not-*X* right is waivable is an oddly unanswered question.¹³¹ If it is, then convicted criminals can relieve the government of its duty not to impose a cruel and unusual

128. See JOHN STUART MILL, ON LIBERTY 13, 125 (Currin V. Shields ed., 1956) (1859); Kevin W. Saunders, *The Role of Freedoms: An Introduction to the Symposium*, 47 DRAKE L. REV. v, v (1998) ("Mill . . . takes the position that each of us should be free to make self-regarding choices, and that faced with such a choice, the government should not push us in either direction."); see also *infra* notes 237–39 and accompanying text (discussing Mill's views on autonomy and slavery).

129. *Bailey*, 219 U.S. at 244–45; see also *Butler v. Perry*, 240 U.S. 328, 332 (1916) (interpreting the Thirteenth Amendment to reach "those forms of compulsory labor akin to African slavery which in practical operation would tend to produce like undesirable results"); *Ex parte Virginia*, 100 U.S. 339, 363 (1879) (Field, J., dissenting) (interpreting the Thirteenth Amendment to reach "not merely . . . slavery" but "every other form of compulsory service . . .").

130. At risk of reiterating my earlier disclaimer, see *supra* note 20, it is worth emphasizing that by calling the Eighth Amendment "procedural" I do not mean to suggest that it is not "substantive," only that it limits a particular type of government action, rather than guaranteeing a particular type of individual conduct.

131. The Court has never decided whether the Eighth Amendment right can be waived, *Mazzone*, *supra* note 18, at 831 n.194, but every indication is that it cannot. See, e.g., *Lenhard v. Wolff*, 444 U.S. 807, 811 (1979) (Marshall, J., dissenting) ("Society's independent stake in enforcement of the Eighth Amendment's prohibition against cruel and unusual punishment cannot be overridden by a defendant's purported waiver."); *Gilmore v. Utah*, 429 U.S. 1012, 1018 (1976) (White, J., dissenting); Kimberly A. Yuracko, *Education off the Grid: Constitutional Constraints on Homeschooling*, 96 CALIF. L. REV. 123, 154 (2008).

punishment. But an Eighth Amendment choice right would be even stronger than that: it would permit a person to *insist* on a cruel and unusual punishment.

This would be bizarre, and is certainly not the state of the law. But why? If the purpose of rights is to protect individuals, what is wrong with permitting individual rightsholders to select the manner of their punishment? Perhaps it seems odd that an Eighth Amendment choice right would permit a person to “compel” the government to do something it does not want to do. That sounds like a positive right in the Berlinian sense—a duty on the part of government to provide something to citizens. But it would not be different in that regard from the Sixth Amendment, which requires the government to provide counsel to indigent defendants.¹³² And in the context of both the Eighth and the Sixth Amendments, the government could avoid its obligation simply by declining to undertake the activity that triggers it—punishment or trial.

The real explanation, as explored in more detail in Part III, is that procedural protection rights are not designed to protect individual choice. As with procedural option rights, their purpose is to further some other instrumental good, such as legitimacy, efficiency, or fairness.¹³³

D. The Internal Structure of the Taxonomy

Despite its appealing balance and apparent symmetry, the taxonomy laid out above illuminates difficult issues regarding the definition and content of rights. One of the most problematic issues is the notion that rights to *X* and not-*X* are preexisting categories that courts and scholars can choose to endorse or not—a menu of predefined potential rights available for selection. In fact, American constitutional rights are effectively created, not selected, by judicial and social practice. As Richard Primus puts it, “[r]ights discourse . . . should be understood as a coherent social practice, available to a wide range of political agendas and including within its scope the political arguments of philosophers as well as politicians, though more sophisticated in some contexts than others.”¹³⁴ This means that it is too simple to say that *X* and not-*X* preexist the taxonomy and can simply be slotted into it as judges see fit. To the contrary, the very act of defining *X* and not-*X* is interpretive. The same is true of restraint and coercion. Judges, legal scholars, and philosophers have long struggled to separate or even define the two.¹³⁵ The lines between *X* and not-*X* (or between

132. *Gideon v. Wainwright*, 372 U.S. 335, 339–40 (1963).

133. Jessica Wilen Berg, *Understanding Waiver*, 40 HOUS. L. REV. 281, 304 (2003) (“The rationales justifying such limitations [on waiver] include: (1) the necessity of the rule for the system to function initially; (2) the potential effects on others (including reliance); and (3) the unintentional effects of interfering with a currently functioning and evolved system.”).

134. PRIMUS, *supra* note 103, at 5–6.

135. See generally Harry Frankfurt, *Coercion and Moral Responsibility*, in ESSAYS ON FREEDOM OF ACTION 65 (Ted Honderich ed., 1973) (attempting to define coercion); NOMOS XIV: COERCION (J. Roland Pennock & John W. Chapman eds., 1972) (same); Robert Nozick, *Coercion*, in

restraint and coercion) are therefore *part* of rights discourse, not simply a result of it.

These definitional difficulties manifest themselves, sometimes unannounced, in constitutional doctrine and theory. *Wooley v. Maynard*¹³⁶ is illustrative. In that case, George Maynard was fined for covering up the words “Live Free or Die” on his license plate.¹³⁷ The District Court treated this as an infringement of his right to express himself by covering up the words.¹³⁸ The Supreme Court, however, saw a violation of Maynard’s right *not* to express himself: “Here, as in *Barnette*, we are faced with a state measure which forces an individual, as part of his daily life . . . to be an instrument for fostering public adherence to an ideological point of view he finds unacceptable.”¹³⁹ Which characterization of the case, and of the underlying right, is correct? Is speech or silence the relevant *X*? Was Maynard being restrained or coerced? Consider also the *Dale* scenario. If the government tells the Boy Scouts, “You must accept homosexual members or else be disbanded,” what version of association right is implicated? Is it a restraint of association, since it threatens to prevent the Scouts from associating on their own terms? Is it coerced association, since the Scouts are being told that they must associate with homosexuals? Is it both a restraint and a coercion?

Answering these questions with precision requires some theory of baselines—of how to compare an individual’s position before and after the government acted. Such a theory has been the focus of many ardent¹⁴⁰ but star-crossed¹⁴¹ judicial and scholarly quests. And so like many other distinctions in constitutional law,¹⁴² the difference between restraint and coercion seems

ESSAYS IN HONOR OF ERNEST NAGEL: PHILOSOPHY, SCIENCE, AND METHOD 440 (Sidney Morgenbesser et al. eds., 1969) (same); *see also* Berman, *Coercion Without Baselines*, *supra* note 52, at 12 (“The scholarship has concluded that coercion is a dead end.”).

136. 430 U.S. 705 (1977).

137. *Id.* at 708.

138. *See* *Maynard v. Wooley*, 406 F. Supp. 1381, 1386 (D.N.H. 1976), *aff’d*, 430 U.S. 705 (1977) (“Since we accept plaintiffs’ contention that their acts constituted constitutionally protected symbolic speech and that the state cannot prosecute them for masking the motto, we need not consider whether their First Amendment right to be free from a required affirmation of belief is implicated.”).

139. *Wooley*, 430 U.S. at 715.

140. Unconstitutional conditions doctrine played the role of Helen for many of these quests. *See* Richard A. Epstein, *The Supreme Court 1987 Term—Foreword: Unconstitutional Conditions, State Power, and the Limits of Consent*, 102 HARV. L. REV. 4 (1988) (emphasizing efficiency concerns and problems of monopoly, collective action, and externalities); Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1413, 1416 (1989) (emphasizing systemic and distributional issues).

141. Berman, *Coercion Without Baselines*, *supra* note 52, at 3 (“The Supreme Court’s failure to provide coherent guidance on the subject is, alas, legendary.”); Kathleen M. Sullivan, *Unconstitutional Conditions and the Distribution of Liberty*, 26 SAN DIEGO L. REV. 327, 328 (1989) (“[The] notion [of coercion] is fatally elusive in unconstitutional conditions cases . . .”).

142. The lines between state action and inaction or between speech and nonspeech spring to mind.

simultaneously foundational and elusive. Moreover, as Part III.A argues in more detail, establishing that line is a fundamentally *normative* enterprise. As Mitch Berman puts it, conclusions about coercion “are the product of substantive normative judgments about the proper ways to secure human freedom, and not the other way around.”¹⁴³

Despite the difficulty of these quests, they cannot be abandoned, because constitutional law and discourse continue to treat the characterization of a right as significant. Courts and scholars generally recognize a distinction between rights to and rights not to, even if they are not sure which of those rights is threatened in a particular case. In *Dale*, for example, both parties argued, and the Supreme Court held, that the Scouts’ effort to exclude homosexuals involved an assertion of the right *not* to associate.¹⁴⁴ *Barnette*, too, self-consciously created a new “right not to speak,” rather than simply applying existing First Amendment doctrine.¹⁴⁵

But such a characterization does not solve the problems of distinguishing between *X* and not-*X*, nor between restraint and coercion; it simply shows how unavoidable these distinctions are. The essence of the difficulty lies not necessarily in defining the line between *X* and not-*X*, nor in defining the line between restraint and coercion, but rather in determining which side of the line is the proper starting point. For example, restraint of the right to speak seems identical to coercion of silence, and coercion of speech logically identical to restraint of silence. The statements are equivalent; toggling between restraint and coercion simply switches the valence of *X* to not-*X* or vice versa. But as long as one element can be held constant, the other falls into place. That is, so long as *X* is speech, not silence, then a gag rule is a restraint, not a coercion. And as it turns out, the text of the Constitution—or at least the language of constitutional discourse—does tend to identify most *X*s relatively clearly. The First Amendment, for example, refers to “speech,” not silence. And in most cases, it is possible to tell the difference between restraining and coercing speech. Nor is speech the only example. The identification of *X* is especially straightforward with regard to procedural rights, most of which operate in only one direction. The Seventh Amendment guarantees a jury trial “[i]n Suits at common law, where the value in controversy shall exceed twenty dollars”¹⁴⁶ Having a jury trial is therefore *X*, and it is not particularly difficult to tell the difference between granting and denying a jury trial.

143. Mitchell N. Berman, *The Normative Functions of Coercion Claims*, 8 LEGAL THEORY 45, 47 (2002); see also Sullivan, *Unconstitutional Conditions*, *supra* note 140, at 1428 (“[A]ny useful conception of coercion is irreducibly normative.”).

144. *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 648 (2000).

145. *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943) (explicitly overruling *Minersville Sch. Dist. v. Gobitis*, 310 U.S. 586 (1940)); *id.* at 643 (Black and Douglas, JJ., concurring) (explaining “reasons for our change of view” since *Gobitis*).

146. U.S. CONST. amend. VII.

And yet this is not necessarily a complete solution. For many rights, constitutional and judicial phrasing do not help identify *X*. One might point out, for example, that the First Amendment actually protects “the *freedom* of speech,” so its text does not fully determine whether speech or silence should count as *X*.¹⁴⁷ The many rights that have no direct home in the Constitution’s text—freedom of association, for example, or privacy—are even harder to deal with. And if *X* cannot be established, then it is also impossible *a priori* to differentiate between restraint and coercion (and, by extension, option and protection rights). If restraint of the right to speak is identical to coercion of silence, and coercion of speech is identical to restraint of silence, *and* there is no way to determine which is the better phrasing, where does that leave the trichotomy sketched above?

The best answer is that American rights discourse does, as a practical and doctrinal matter, recognize speech rather than silence as the starting point for First Amendment analysis, public trials rather than private trials as the focus of the Sixth Amendment, the Thirteenth Amendment as prohibiting slavery rather than requiring freedom, and so on. In other words, constitutional text and rights discourse tend to identify an *X*—an activity or a procedure—and either guarantee or prohibit it. In the vast run of cases, shared intuitions exist about what counts as *X* and whether it is protected or prohibited.

But it is somewhat unsatisfying to rest an answer on an appeal to shared intuitions, no matter how strong. So let us accept for the sake of argument that it is impossible to determine whether a given right—even assuming that its function can be identified—should be characterized as preventing restraint or coercion of *X*. If that is so, then one part of the taxonomy above essentially collapses: the division between option and protection rights, which is premised on the difference between restraint and coercion. But this newly combined set is still importantly distinct from choice rights, for even if it is impossible to determine whether a right prohibits restraint or coercion, it is still possible to determine whether it prohibits both. That is, a right against restraint of silence does not necessarily create a right against coercion of speech, nor does a right against coercion of silence create a right against restraint of speech.

Thus in its strongest form, the definitional difficulty essentially transforms the trichotomy into a dichotomy—an analysis of one-way and two-way streets, as it were. For the reasons given above, I do not believe that this is necessary; rights discourse recognizes and supports a distinction between restraint and coercion, and can identify most *X*s without undue complication. But even the dichotomy version of the taxonomy illustrates interesting and valuable lessons about rights and rightsholders. All of the rights discussed here enumerate some activity or procedure, *X*, that rightsholders are either entitled to or protected

147. U.S. CONST. amend. I (emphasis added).

from. The fundamental distinction between choice rights and option/protection rights is that the holder of a choice right has *control* over *X*. It is a good in the holders' possession, not simply held in their name. The following Part addresses the difficult question of how to determine whether any particular right guarantees choice, an option, or protection with regard to *X*.

III.

JUSTIFYING RIGHTS TO AND NOT TO

Part II identified three basic types of constitutional rights—choice rights, option rights, and protection rights—and explained how they work and what differentiates them. This Part attempts to answer the second-order and perhaps more difficult question of why these rights look the way they do, and how particular rights should be classified into the three categories.

Part III.A argues that although this question of classification may appear strictly analytic, it is in fact a deeply normative inquiry into the purposes and values underlying particular rights. Despite the appealing symmetry of the taxonomy laid out in Part II, the relationships among the categories it identifies are in no sense inevitable. Whether a particular right protects choice depends on the values associated with that right, not on a contextual analysis of the relationship between rights to and not to. The taxonomy, in other words, is both a result and a form of rights discourse.

But what kinds of arguments within that discourse have been or should be effective in shaping the taxonomy? This is a difficult question to answer in the abstract, since different rights quite naturally have been animated by different values. Part III.B nevertheless identifies two broad approaches that have descriptive and normative force.

First, a right can be classified as a choice or option/protection right based on whether it is “public” or “personal.” When a right is designed to protect social interests, it will almost always be considered an option or protection right; one that the individual rightsholders cannot subvert by insisting on its opposite. By contrast, when a right is designed to protect the interests of the individual alone, it should generally, though not always, be considered a choice right. Some personal rights are designed to protect the rightsholder's autonomy with regard to certain spheres of activity or procedures. These are choice rights. Other personal rights have an instrumental justification besides autonomy—the protection of dignity, for example. These instrumental personal rights generally operate as option or protection rights.

Second, as the second normative framework shows, choice rights can emerge even when a right is animated by values other than the protection of individual autonomy. This can happen in at least three distinct ways. First, a “right to” may depend on a concomitant “right not to” (or vice versa) in order to function properly. For example, it is often argued that the right to associate

would be meaningless without an accompanying right not to associate.¹⁴⁸ Second, even if a right to and right not to *could* function independently of one another, they might as a practical matter further the same constitutional value. Elsewhere, I have argued that the Second Amendment should be interpreted in this way, since its “core component” of self-defense is implicated both by the decision to keep or bear arms and the decision not to.¹⁴⁹ Finally, sometimes a right to and right not to serve different constitutional values, both (or all) of which are constitutionally salient. For example, the right to speak might be protected as an incident of individual autonomy, while the right not to speak might be protected because of the confusion and distortion that coerced speech would inflict on listeners.¹⁵⁰

The twin goals of this Part are to make sense of how rights are classified and to enable evaluation of how they *should* be classified. Doing so helps clarify the stakes in many of the most difficult and contentious debates in constitutional law: whether the right to continue a pregnancy should include a right not to, whether the right to life encompasses a right to die, and so on. These are arguments about whether particular rights should be classified as choice rights, option rights, or protection rights. The underlying issues in those debates are, in turn, the normative issues discussed here: whether the rights at issue are personal or public, whether autonomy has intrinsic value, whether protecting the choice between *X* and not-*X* serves the rights’ underlying purposes, and so on. It is of course impossible, here or anywhere, to provide fully satisfactory or complete answers to these debates. But at the very least, the analysis may help frame those debates by revealing what they are really about.

A. The Inescapable Normativity of the Taxonomy

In determining whether particular rights to should encompass rights not to, courts and scholars often employ the language of inevitability, as if the relationship between the two can be deduced by formal logic. For example, in *Roberts v. United States Jaycees*, the Supreme Court found that “[f]reedom of

148. See John D. Inazu, *The Unsettling “Well-Settled” Law of Freedom of Association*, 43 CONN. L. REV. 149, 154 (2010) (giving examples of groups that “sought to maintain an unpopular composition and message in the face of antidiscrimination laws. Each was denied associational protection. Each was forced to change its composition—and therefore its message. Each no longer exists in the form it once held and desired to maintain”).

149. Blocher, *supra* note 24.

150. Compare C. EDWIN BAKER, HUMAN LIBERTY AND FREEDOM OF SPEECH 59 (1989) [hereinafter BAKER, HUMAN LIBERTY] (justifying right to speak based on “respect for individual integrity and autonomy”), with Caroline Mala Corbin, *The First Amendment Right Against Compelled Listening*, 89 B.U. L. REV. 939, 979 (2009) (“Compelled speech . . . distorts the marketplace of ideas and democratic decision-making by misrepresenting the views of speakers forced to propound a viewpoint that is not their own.”).

association . . . plainly presupposes a freedom not to associate.”¹⁵¹ And in *Riley v. National Federation of the Blind*,¹⁵² the Court similarly concluded that freedom of speech “necessarily compris[es] the decision of both what to say and what *not* to say.”¹⁵³ Scholarly investigations, too, often refer to rights to and not to as if they are inseparable traveling companions.¹⁵⁴

These arguments are not wrong. Logical relationships do exist between various pairings of rights to and not to. But the logic of those relationships is determined by the values or purposes underlying the rights themselves. For example, it might be appealing to say, as many courts and commentators have, that the right to associate simply must include the right not to associate. But this is not true as a purely logical matter. The acts of associating and not-associating are neither identical nor interdependent. If the purpose of the associational right were solely to permit people to gather—“assembly,” after all, is the enumerated right that association has largely come to replace¹⁵⁵—then there would be nothing “necessary” nor even logical about a right to exclude. Association would simply be an option right. And if the purpose of the right were solely to permit groups to protect “certain intimate relationships”—intimacy, after all, is one of the primary interests served by the right of association¹⁵⁶—then there would be less need to protect the right *to* associate. Association would basically be a protection right.

These outcomes may seem unimaginable; the coexistent rights to and not to associate have an air of inevitability about them. And indeed it is true to some degree that the rights to associate and not associate must travel together. But this is true only because of the values underlying association itself. In other words, an option right of association would be meaningless *only with regard to particular purposes or values*. As Seana Shiffrin explains, “The right of association, *if it is to protect the interests that underpin it*, suggest[s] a corresponding right to exclude unwanted members.”¹⁵⁷ That statement captures the issue perfectly: the relationship between rights to and not to is grounded in the interests, values, and purposes underpinning them. Thus, in *Dale*, when the Supreme Court found that “[f]orcing a group to accept certain members may impair the ability of the group to express those views, and only those views,

151. *Roberts v. U.S. Jaycees*, 468 U.S. 609, 623 (1984); *see also Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 233–35 (1977).

152. 487 U.S. 781 (1988).

153. *Id.* at 797.

154. *See, e.g., Esbeck, supra* note 40, at 596 n.57; McGinnis, *supra* note 40, at 528; Paulsen, *supra* note 40, at 1922; Sullivan, *supra* note 40, at 248; Webber, *supra* note 40, at 506; Weinreb, *supra* note 40, at 2295.

155. *See* John D. Inazu, *The Forgotten Freedom of Assembly*, 84 TUL. L. REV. 565, 606–11 (2010).

156. *Roberts v. U.S. Jaycees*, 468 U.S. 609, 618–20 (1984).

157. Shiffrin, *supra* note 1, at 873 (emphasis added).

that it intends to express,”¹⁵⁸ it was basing its conclusion on a particular constitutional value—expression.

Similarly, the freedom of speech “necessarily compris[es] the decision of both what to say and what *not* to say”¹⁵⁹ if that decision is necessary to the autonomy of the speaker, the marketplace of ideas, or whatever other values underlie the First Amendment. Indeed, speech can be and has been justified as a choice right based on some of these underlying values. Edwin Baker, for example, argued that “respect for individual integrity and autonomy requires the recognition that a person has the right to use speech to develop herself or to influence or interact with others in a manner that corresponds to her values.”¹⁶⁰ He similarly concluded that “respect for the integrity and autonomy of the individual usually requires giving each person at least veto power over the use of her own body and, similarly, over her own speech.”¹⁶¹ Martin Redish has argued similarly that free speech should be protected in part because of individual autonomy interests,¹⁶² and that compelled speech interferes with autonomy and the capacity for critical analysis.¹⁶³ These arguments demonstrate that many different visions of the First Amendment—and there are, of course, many—can arrive at the same conclusion: that the right to speak must include the right not to speak in order for the vision to be made real.

By contrast, other rights do *not* include a right not to, precisely because such a not-*X* right would undermine their very reason for being. This is the case with option and protection rights such as the Thirteenth Amendment’s prohibition on slavery and the Sixth Amendment’s guarantee of a public trial. The purposes those rights serve would be subverted, not advanced, if a rightsholder could refuse or demand *X*. The public trial right, for example, protects not just the accused, but also the public, by ensuring public oversight of judicial processes.¹⁶⁴ Permitting a defendant to insist on a private trial would undermine this function.

The language of inevitability and necessity can therefore mask the deeply normative, value-laden debates that actually determine the classification of various rights. The decision to treat a particular right to as carrying with it a right not to is just that: a decision, one that is driven by the function of the

158. *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 648 (2000).

159. *Riley v. Nat’l Fed’n of the Blind*, 487 U.S. 781, 797 (1988).

160. BAKER, HUMAN LIBERTY, *supra* note 150, at 59.

161. Baker, *Scope of the First Amendment*, *supra* note 27, at 1000.

162. See Martin H. Redish, *The Value of Free Speech*, 130 U. PA. L. REV. 591, 593–94 (1982) (arguing that the primary interest served by free speech is “individual self-realization,” which includes but is not limited to “liberty” and “autonomy”).

163. Martin H. Redish & Kirk J. Kaludis, *The Right of Expressive Access in First Amendment Theory: Redistributive Values and the Democratic Dilemma*, 93 NW. U. L. REV. 1083, 1114–16 (1999).

164. *Waller v. Georgia*, 467 U.S. 39, 46–47 (1984).

right, rather than by some mathematical relationship between X and not- X . This is not to suggest, of course, that they are unrelated.¹⁶⁵ But their relationship is itself premised on substantive conclusions about their purposes or functions—to further personal or public interests, to serve values that support both X and not- X , and so on. The inevitability derives from the value of the right, not from X alone. The taxonomy is therefore consistent with a conception of rights as both enforceable rules and as a form of discourse and practice.¹⁶⁶ As Richard Primus explains, “Rights are bound up with needs, interests, and well-being, the subject matter of political morality generally, and what propositions achieve recognition as rights grows largely from our opinions about which of those propositions are the most substantively deserving of the privileged status that the label ‘rights’ bestows.”¹⁶⁷

Recognizing that the taxonomy itself depends on contestable values and practices helps explain another of its important features: the permeability of its boundaries and the movement of rights within it. Rights, it turns out, are not monogamously committed to one category or another, but rather move among them—option rights evolving into choice rights, for example—as the understanding of their underlying values changes. A few examples suffice to illustrate the phenomenon.

At the time of the Founding, the constitutional guarantee of free speech apparently was thought to prevent restraint, but not coercion; it was therefore an option right, and permitted compelled speech like loyalty oaths. As Sandy Levinson notes, “Loyalty oaths have been part of American history from its (English) origins in the seventeenth century.”¹⁶⁸ But “after a somewhat checkered pattern of case law, the Court has proved quite hostile to most loyalty oaths, though it has refused to reject them entirely.”¹⁶⁹ The development of the right not to speak is part of that story. In the 1940 decision *Minersville School District v. Gobitis*,¹⁷⁰ the Court rejected the argument that schoolchildren had a First Amendment right not to salute the flag. Though the case was presented as a Free Exercise Clause challenge, Justice Frankfurter’s 8-1 majority opinion went on to say that “[e]ven if it were assumed that freedom

165. Cf. GARVEY, FREEDOMS, *supra* note 1, at 17 (asking rhetorically whether “[a]n act and its contradictory, x and not- x , should be like binary stars, closer to each other than they are to anything else”).

166. See Wilkinson, *supra* note 94, at 277 (arguing that “rights exist in two dimensions simultaneously”—both as an ideal and in “positivist terms”—and that we should embrace this duality).

For more critical treatments of rights discourse, see MARY ANN GLENDON, RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE (1991); Thomas L. Haskell, *The Curious Persistence of Rights Talk in the “Age of Interpretation,”* 74 J. AM. HIST. 984, 984 (1987).

167. PRIMUS, *supra* note 103, at 27.

168. Sanford Levinson, *Constituting Communities Through Words That Bind: Reflections on Loyalty Oaths*, 84 MICH. L. REV. 1440, 1449 (1986).

169. *Id.* at 1451.

170. 310 U.S. 586 (1940).

of speech goes beyond the historic concept of full opportunity to utter and to disseminate views,” such a freedom could be abridged in the name of “national cohesion” and “national unity.”¹⁷¹

Things changed just a few years later. The Court granted certiorari in *Barnette*,¹⁷² a case with facts nearly identical to those of *Gobitis*, and proceeded to make an about face, finding that “[i]f there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.”¹⁷³ The right not to speak had been born.

While the mandatory pledges struck down in *Barnette* were not the end of compelled speech in America,¹⁷⁴ the case marked the critical moment that the right not to speak fused with the free speech right, creating something akin to a choice right. Indeed, the Court would soon treat the rights to and not to speak as inseparable. As Chief Justice Burger wrote in *Wooley*, “The right to speak and the right to refrain from speaking are complementary components of the broader concept of ‘individual freedom of mind.’”¹⁷⁵ Justice Brennan emphasized the same symmetry in *Riley*: “[T]he First Amendment guarantees ‘freedom of speech,’ a term necessarily comprising the decision of both what to say and what *not* to say.”¹⁷⁶ As a doctrinal matter, these are now true statements. But their veracity reflects the resolution, perhaps temporary, of a fundamentally normative debate about the value of speech.

Nor is speech the only example of such a progression. Free exercise of religion, too, was not necessarily always understood to be a choice right.¹⁷⁷ But

171. *Id.* at 595.

172. *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943).

173. *Id.* at 642.

174. Loyalty oaths and other abuses of the McCarthy period were yet to come, and many courts accepted their constitutionality. Lawrence M. Friedman, *Some Thoughts About Citizen Lawyers*, 50 WM. & MARY L. REV. 1153, 1167 (2009) (“The McCarthy period was another period of witch hunts, loyalty oaths, and worse. The Supreme Court (and the courts in general) did not exactly cover themselves with glory.”). The Supreme Court itself upheld a National Labor Relations Board requirement that union leaders sign “non-Communist affidavits.” *Am. Commc’ns Ass’n v. Douds*, 339 U.S. 382 (1950).

Of course, there is not necessarily anything constitutionally wrong with compelling speech through the use of subpoena, as McCarthy and HUAC did, so long as the speech that is compelled is not self-incriminating and does not require expression of a particular opinion. See *Barnette*, 319 U.S. at 645 (Murphy, J., concurring) (noting that the First Amendment protects a right not to speak “except insofar as essential operations of government may require it for the preservation of an orderly society,—as in the case of compulsion to give evidence in court”). Many thanks to Josh Chafetz for pushing me on this point.

175. *Wooley v. Maynard*, 430 U.S. 705, 714 (1977).

176. *Riley v. Nat’l Fed’n of the Blind*, 487 U.S. 781, 797 (1988).

177. See *Cnty. of Allegheny v. ACLU*, 492 U.S. 573, 590 (1989) (“Perhaps in the early days of the Republic [the religion clauses] were understood to protect only the diversity within Christianity,

in *Torcaso v. Watkins*,¹⁷⁸ the Court emphatically rejected—on both free speech and free exercise grounds—the notion that political office could be conditioned on religious oaths,¹⁷⁹ thus indicating that free exercise also is a choice right. And of course in *Faretta*, the Court concluded for the first time that the right to assistance of counsel included the right to refuse counsel.¹⁸⁰ That right, the Court found, “exists to affirm the dignity and autonomy of the accused.”¹⁸¹

The normativity of these debates goes even deeper, to the question not only of whether a right should protect choice, but what *kinds* of *X* or not-*X* should be protected. As noted above, for the purposes of this Article, a right to not-*X* simply means the right not to do or accept *X*. But of course such a right can manifest itself in many different kinds of action, not all of which will necessarily be protected. There are a near-infinite number of ways *not* to do something, and recognizing the existence of a right to not-*X* does not mean extending protection to all of these alternatives.

An example might help illustrate the point. Let *X* represent procreation.¹⁸² An option right to *X*, then, would be a right to procreate. In *Buck v. Bell*,¹⁸³ the Court effectively denied the existence of such a right, upholding a program of compulsory sterilization for the “feeble-minded.”¹⁸⁴ But in *Skinner v. Oklahoma*,¹⁸⁵ the Court struck down a law imposing sterilization as punishment for certain categories of crimes. The Court found that it was “dealing here with legislation which involves one of the basic civil rights of man. Marriage and procreation are fundamental to the very existence and survival of the race.”¹⁸⁶ The Court therefore effectively recognized an option right to procreate.¹⁸⁷

This by itself did not establish whether other forms of government interference with procreative freedom were also unconstitutional. After

but today they are recognized as guaranteeing religious liberty and equality to ‘the infidel, the atheist, or the adherent of a non-Christian faith such as Islam or Judaism.’”) (citation omitted).

178. 367 U.S. 488 (1961).

179. *Id.* at 495–96.

180. *Faretta v. California*, 422 U.S. 806, 819 (1975).

181. *McKaskle v. Wiggins*, 465 U.S. 168, 176–77 (1984).

182. The very characterization of the following cases as involving “procreation rights” is of course imperfect; I offer it here simply as one lens through which to view it. See Ruth Bader Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to Roe v. Wade*, 63 N.C. L. REV. 375, 383 (1985) (discussing equality and autonomy rationales).

183. 274 U.S. 200 (1927).

184. *Id.* at 207.

185. 316 U.S. 535 (1942).

186. *Id.* at 541.

187. *Skinner* was itself an equal protection case (the decision turned on whether different groups of criminals were being treated unequally), but the Court clearly based its decision in part on the “basic civil right[]” of procreation and the case has been cited as protecting that activity. See, e.g., Adrienne D. Davis, *Regulating Polygamy: Intimacy, Default Rules, and Bargaining for Equality*, 110 COLUM. L. REV. 1955, 2029 n.247 (2010).

Skinner, the government cannot restrain a person from procreating¹⁸⁸—becoming pregnant or, presumably, carrying a pregnancy to term. But can it coerce a person into doing so? In other words, is there a choice right with regard to procreation? And if so, what *kinds* of not-*X* are covered by the right? This issue is inevitably normative, and has formed the center of some of the most divisive constitutional controversies of the past few decades. Most people probably agree that some forms of compelled procreation are or should be unconstitutional. Surely it is widely accepted that the government cannot force people to have sex for purposes of procreation. But it is not clear that a right not to have sex is the relevant not-*X* right, since coercion of sexual activity is probably unconstitutional for reasons having nothing to do with procreation. The petitioner in *Skinner*, after all, was prevented from procreating, not from having sex. A better question is whether there is a right to engage in sexual activity, or perhaps even to become pregnant, without procreating.

This was the issue at the heart of cases like *Griswold v. Connecticut*¹⁸⁹ and *Roe v. Wade*.¹⁹⁰ The law in *Griswold* made it harder to have sex without getting pregnant; the law in *Roe* made it harder not to carry a pregnancy to term. Both, then, restricted the ability not to procreate, albeit in different ways. And in both cases, the Court effectively recognized a right not to procreate,¹⁹¹ which, when combined with the *Skinner* right, meant a choice right with regard to procreation. *Griswold* did so by recognizing a right to “privacy” that shielded all such decisions from state interference—effectively a “right to autonomy” within certain spheres of life.¹⁹² In that sense, it was not exactly the equivalent of a choice right, but rather an example of the interests underlying the right (privacy, autonomy, and so on) becoming freestanding rights of their own.

But in *Roe*, Justice Blackmun took an approach much more akin to the *X/not-X* analysis discussed here. He focused on the ways in which abortion restrictions effectively force pregnant women to procreate, noting that “[m]aternity, or additional offspring, may force upon the woman a distressful life and future.”¹⁹³ This coercion, he found, was at the heart of the

188. More accurately, *Skinner* establishes that such restraints raise constitutional questions. As noted above, *supra* note 24, this Article focuses on questions of coverage, not levels of protection.

189. 381 U.S. 479 (1965); *see also* *Poe v. Ullman*, 367 U.S. 497, 543 (1961) (Harlan, J., dissenting) (arguing that the Due Process Clause prohibits laws that unjustifiably impinge on the “liberty” protected by the Fourteenth Amendment, which in turn includes “a rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints”).

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

191. *See, e.g.*, I. Glenn Cohen, *The Constitution and the Rights Not to Procreate*, 60 STAN. L. REV. 1135, 1138 (2008) (concluding that “the Fourteenth Amendment’s Due Process Clause and the Supreme Court jurisprudence interpreting it unquestionably protect a fundamental right not to be a gestational parent” and exploring other forms of the right not to procreate).

192. *See* Henkin, *supra* note 26.

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

constitutional problem with restraints on abortion. He expounded on this idea years later in *Planned Parenthood of Southeastern Pennsylvania v. Casey*: “By restricting the right to terminate pregnancies, the State conscripts women’s bodies into its service, forcing women to continue their pregnancies, suffer the pains of childbirth, and in most instances, provide years of maternal care.”¹⁹⁴ Many scholars and advocates have embraced a similar framing. Then-professor Ruth Bader Ginsburg argued that the abortion decision involves “a woman’s autonomous charge of her full life’s course”¹⁹⁵ Jed Rubenfeld has similarly argued that “[a]nti-abortion laws, anti-miscegenation laws, and compulsory education laws all involve the forcing of lives into well-defined and highly confined institutional layers. . . . They affirmatively and very substantially shape a person’s life; they direct a life’s development along a particular avenue.”¹⁹⁶

Griswold and *Roe* can therefore be explained on the grounds that the Court effectively, though not explicitly, held that the right to procreate (*X*) includes a right not to procreate (*not-X*). But as the continuing debate about them demonstrates, the *not-X* right can take many forms. That is, there are many ways to refuse to procreate. *Griswold* extended constitutional protection to one—the use of contraception—which, despite continued criticism of its reasoning, seems to have been more or less accepted by longstanding practice and general consensus.¹⁹⁷ *Roe* extended constitutional protection to another—abortion, which is perhaps even more contentious today than it was when *Roe* was decided. One can accept the existence of a right not to procreate and yet deny that abortion is a protected form of exercising that right. Indeed, opponents of abortion are not likely to recognize it as a valid *not-X*. And that, too, is an irreducibly normative decision.

These examples demonstrate that the relationship between rights to and not to is determined by the values underlying these rights. The move from a right to speak to a right not to speak, for example, was apparently driven by the Court’s changing view of the values and purposes underlying the right. That view, likely influenced by the backdrop of World War II,¹⁹⁸ explains why the

194. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 928 (1992).

195. Ginsburg, *supra* note 182, at 383.

196. Jed Rubenfeld, *The Right of Privacy*, 102 HARV. L. REV. 737, 784 (1989); *see also* RONALD DWORKIN, *FREEDOM’S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION* 98 (1996) (“A woman who is forced by her community to bear a child she does not want is no longer in charge of her own body. . . . The partial enslavement of a forced pregnancy is, moreover, only the beginning of the price a woman denied an abortion pays.”); Judith Jarvis Thomson, *A Defense of Abortion*, 1 PHIL. & PUB. AFF. 47 (1971) (similar).

197. *Cf.* Akhil Reed Amar, *America’s Lived Constitution*, 120 YALE L.J. 1734 (2011) (arguing that constitutional rights can emerge from shared practices, expectations, and beliefs).

198. Primus argues that “[t]he reversal was largely driven by the Court’s desire to distinguish America from wartime Germany.” PRIMUS, *supra* note 103, at 198; *see also* WALTER GELLHORN,

Justices changed tracks in the three years between *Gobitis* and *Barnette*. Similarly, the privacy, dignity, and autonomy interests at work in *Griswold*, *Roe*, and their progeny animated the choice right of procreation. The Court has thus invoked the language of choice—the right to choose between *X* (procreation) and not-*X* (non-procreation)—but the protection of that choice is a result of the Court’s view of the very purposes of the right itself. The Court has, for example, described the abortion decision as “central to personal dignity and autonomy,”¹⁹⁹ and concluded that “[f]ew decisions are more personal and intimate, more properly private, or more basic to individual dignity and autonomy, than a woman’s decision . . . whether to end her pregnancy.”²⁰⁰

This reliance on a kind of purposivist analysis—one that looks to the values underlying particular rights—has led to a fusion of rights and the interests or purposes animating them. When this happens, they become not simply choice rights (rights to or not to do *X*) but truly *rights to autonomy*: to do as one will, within certain boundaries. In *Griswold*, for example, Justice Douglas found that the relevant right was not a right not to procreate, but something seemingly broader: a right to privacy, which he found in the “penumbras” and “emanations” of specific constitutional guarantees.²⁰¹ In that sense, the right became synonymous with the interests underlying it, and has since made its mark in many other areas of constitutional law. In *Lawrence*, for example, the Court determined that “[t]he liberty protected by the Constitution allows homosexual persons the right to make th[e] choice” to engage in private sexual relationships.²⁰² Indeed, *Lawrence* has been described as protecting not equality but individual autonomy and a right to choose.²⁰³

What this suggests is that some choice rights essentially become rights to autonomy, whatever the labels—such as “privacy”—under which they do business. As Louis Henkin explained, the Justices’ invocation of a “right of privacy” in cases like *Roe* and *Griswold* was “misleading, if not mistaken. . . . What the Supreme Court has given us, rather, is something essentially different . . .

AMERICAN RIGHTS: THE CONSTITUTION IN ACTION 96–107 (1960) (exploring the *Gobitis/Barnette* turnaround).

199. *Casey*, 505 U.S. at 851.

200. *Thornburgh v. Am. Coll. of Obstetricians & Gynecologists*, 476 U.S. 747, 772 (1986).

201. *Griswold v. Connecticut*, 381 U.S. 479, 484 (1965); *see also Roe*, 410 U.S. at 152–53 (outlining the line of cases recognizing the right to privacy).

202. *Lawrence v. Texas*, 539 U.S. 558, 567 (2003); *see also id.* (“The statutes do seek to control a personal relationship that, whether or not entitled to formal recognition in the law, is within the liberty of persons to choose without being punished as criminals.”).

The *Lawrence* majority was in turn echoing Justice Blackmun’s dissent in *Bowers v. Hardwick*. *See* 478 U.S. 186, 205 (1986) (Blackmun, J., dissenting) (“[M]uch of the richness of a relationship will come from the freedom an individual has to *choose* the form and nature of these intensely personal bonds.”).

203. *See, e.g.,* Jamal Greene, *Beyond Lawrence: Metaprivacy and Punishment*, 115 YALE L.J. 1862, 1875 (2006) (“*Lawrence* refines the set of choices that an individual has a presumptive right to make to those that qualify in some relevant way as status-defining.”).

and farther-reaching, an additional *zone of autonomy*, of presumptive immunity to governmental regulation.”²⁰⁴ In such cases, rights shed the *X/not-X* framework entirely and become stand-alone rights to autonomy. The realm of freedom protected by these rights is different, perhaps significantly so, from the choice rights described above. For while rights to and not to can be characterized as “bilateral” and “two-way streets,”²⁰⁵ these autonomy rights seem to have three dimensions. They are what courts and scholars mean when they refer to “spheres,”²⁰⁶ “zones,”²⁰⁷ “areas,”²⁰⁸ “realms,”²⁰⁹ “boundaries,”²¹⁰ or “sanctum[s]”²¹¹ of freedom.

The point of this Part is not to resolve these debates, nor to argue that this characterization is the only or even the best way to understand them. The abortion debate is about much more than the right to procreate or not. But the preceding discussion has demonstrated at the very least that the relationships between various rights to and not to depend on a normative analysis of the values and purposes underlying the rights themselves.

B. Normative Frameworks

Demonstrating that the question of classification depends on constitutional values is important, but does not by itself explain or enable critique of current doctrine. Explanation and evaluation require something more: an account of what *kinds* of constitutional purposes and values have shaped—or perhaps

204. Henkin, *supra* note 26, at 1410–11 (emphasis added).

205. See sources cited *supra* note 67.

206. See, e.g., *Lawrence*, 539 U.S. at 562 (“[T]here are other spheres of our lives and existence, outside the home, where the State should not be a dominant presence.”); *Webster v. Reprod. Health Servs.*, 492 U.S. 490, 548 (1989) (Blackmun, J., concurring in part and dissenting in part) (referring to the abortion decision as within that “certain private sphere of individual liberty that the Constitution reserves from the intrusive reach of government”) (citation and internal quotation marks omitted); *Thornburgh v. Am. Coll. of Obstetricians & Gynecologists*, 476 U.S. 747, 772 (1986) (referring to a “sphere of individual liberty”); Bruce J. Winick, *On Autonomy: Legal and Psychological Perspectives*, 37 VILL. L. REV. 1705, 1722 (1992) (referring to a “sphere of individual sovereignty”).

207. See, e.g., *Warden v. Hayden*, 387 U.S. 294, 323, 325 (1967) (Douglas, J., dissenting) (referring to a “zone that no police can enter” in which “the choice of the individual to disclose or reveal what he believes, what he thinks, what he possesses”); Henkin, *supra* note 26, at 1417 (referring to “zones of autonomy”).

208. See, e.g., *Roe v. Wade*, 410 U.S. 113, 152 (1973) (“[T]he Court has recognized that a right of personal privacy, or a guarantee of certain areas or zones of privacy, does exist under the Constitution.”).

209. See, e.g., *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944) (referring to a “private realm of family life which the state cannot enter”).

210. Joel Feinberg, *Autonomy, Sovereignty, and Privacy: Moral Ideals in the Constitution?*, 58 NOTRE DAME L. REV. 445, 447 (1983) (arguing that the Supreme Court’s “privacy” jurisprudence is in fact concerned with “the *sovereign authority* to govern oneself, which is absolute within one’s own moral ‘boundaries’”).

211. *Fisher v. United States*, 425 U.S. 391, 416 (1976) (Brennan, J., concurring) (arguing that the Fifth Amendment protects “a private inner sanctum of individual feeling and thought”) (citation omitted).

should shape—the taxonomy. This Section attempts to provide that account by exploring two broad normative frameworks. The first focuses on whether the right in question is “personal” or “public.” The second focuses on whether the right, even if instrumentally designed to achieve some specific good, implies the existence of a right not to.

The discussion is meant both to describe and to enable normative analysis. That is, by identifying the arguments that best explain current practice, it seeks to provide tools that can be used to evaluate whether particular rights are properly classified, and how future controversies might be resolved.²¹²

1. Personal and Public Rights; Intrinsic and Instrumental Freedoms

The first framework classifies rights based on whether they are “personal” or “public”—whether a right’s justification and scope are focused on the interests of the individual rightsholder or are instead grounded in some broader social interest.²¹³ If the latter, the right should generally be classified as an option or protection right. If the former, one must then ask whether the personal right guarantees individual autonomy for its own sake, in which case a choice right will emerge, or else guarantees autonomy as a means to some other good, in which case an option or protection right will usually be more appropriate.

Public rights, at least as the term is used here, are those justified on the basis of purposes or values that are not coextensive with the interests of the individual rightsholder. Such rights are generally instrumental, existing in order to promote some particular conception of the good. Allowing an individual rightsholder to refuse to do or accept the activity or process enumerated by the right would therefore amount to a distortion of the right itself. Public rights are like gears in a machine that are meant to turn only one way. The unwaivable process rights discussed above are obvious examples.²¹⁴ Of course, “public” rights are still held by individuals, so some of them may balance the system’s interests and the individual rightsholders’ autonomy—for example, by permitting waiver. But that does not mean giving them full control over *X*.

Personal rights, by contrast, are those whose justification, form, and function are centered on the individual rightsholder. They are almost always classified as choice rights. Personal rights tend to, but do not always, value

212. *Cf.* JAMES E. FLEMING, SECURING CONSTITUTIONAL DEMOCRACY: THE CASE OF AUTONOMY 6 (2006) (describing an approach of “constitutional constructivism” that is both interpretive and normative).

213. Mazzone, *supra* note 18, at 865 (“There is a compelling reason to draw this distinction between rights that implicate public values and rights that are more individually oriented.”).

214. *See* United States v. Olano, 507 U.S. 725, 733 (1993) (“[W]hether certain procedures are required . . . and whether the . . . choice must be particularly informed or voluntary, all depend on the right at stake.”); Berg, *supra* note 133, at 300–04 (describing “system limitations” on waiver); King, *supra* note 25 (arguing that interests of nonparties and general public may justify restrictions on waivers).

individual autonomy for its own sake, since they focus on the interests of the person who is engaging in or demanding the enumerated action or process. As discussed in more detail below, the right to privacy (which encompasses several other substantive rights) is a quintessential personal right. And like other personal rights, privacy is generally treated as a choice right—one that permits the rightsholder to choose whether to do or not do (or demand or refuse) the various actions encompassed by the right to privacy. Similarly, those who believe free speech is a fundamentally “individual” right—one grounded in personal autonomy, expression, or identity, for example—tend to treat it as a choice right.

Public rights are almost always option or protection rights, for the simple reason that the values they further lie outside of the individual rightsholder and therefore beyond individual choice. Similar arguments often have been used to explain waivability, which, as noted above, is distinct from but related to the issue of rights to and not to.²¹⁵ Invoking the personal/public distinction, Laurence Tribe concludes that “rights that are relational and systemic are *necessarily* inalienable: individuals cannot waive them because individuals are not their sole focus.”²¹⁶ Similarly, Jason Mazzone suggests a “value-oriented approach to all questions of waiver” under which “if waiver of a constitutional right would undermine a compelling public value protected by the Constitution, then individuals should not be able to waive the right.”²¹⁷

The same approach that applies to waiver can also help explain the classification of public-oriented rights in the trichotomy set out above. It can explain, for example, why procedural rights have almost always been classified as option or protection rights, rather than as choice rights.²¹⁸ Simply put, they are “public” rights serving purposes and values lying outside of individual rightsholders: concerns of legitimacy, transparency, and efficiency in criminal trials, for example.²¹⁹ Allowing criminal defendants to refuse the processes those rights enumerate would mean allowing them to subvert the public values the rights were put into place to protect. An Eighth Amendment jurisprudence

215. See *supra* notes 59–62 and accompanying text.

216. Laurence H. Tribe, Commentary, *The Abortion Funding Conundrum: Inalienable Rights, Affirmative Duties, and the Dilemma of Dependence*, 99 HARV. L. REV. 330, 333 (1985).

217. Mazzone, *supra* note 18, at 804. Others have made similar arguments. See sources cited *supra* note 18; Thomas W. Merrill, *Dolan v. City of Tigard: Constitutional Rights as Public Goods*, 72 DENV. U. L. REV. 859, 862 (1995) (“[W]hen constitutional rights are perceived by courts as having a large public goods dimension, courts will be reluctant to enforce contracts in which individuals waive the exercise of the right in exchange for some discretionary benefit.”).

218. See *supra* Parts II.A.1, II.B.2, and II.C.2.

219. Cf. Jennifer E. Laurin, *Rights Translation and Remedial Disequilibrium in Constitutional Criminal Procedure*, 110 COLUM. L. REV. 1002, 1004 (2010) (“[C]riminal procedure rights are understood not simply as expressing constitutional values, or even as setting the ‘rules of engagement’ for criminal investigation and prosecution, but also as broader regulatory devices in the criminal justice system.”).

that permitted convicted criminals to insist on cruel and unusual punishments, for example, would potentially be worse than no Eighth Amendment at all. Of course, some procedural rights permit waiver, which is a concession to the importance of autonomy. But there are very few procedural choice rights permitting not just waiver but refusal of *X*. The exceptions—such as the right to counsel—exist because they serve, as the Supreme Court put it, a “defendant’s free choice independent of concern for the objective fairness of the proceeding.”²²⁰ Indeed, the Court in *Faretta* specifically held that “[t]he right to defend is *personal* It is the defendant, therefore, who must be free personally to decide whether in his particular case counsel is to his advantage.”²²¹ *Faretta*’s status as an outlier in criminal procedure jurisprudence demonstrates the close connection between public rights and procedural rights, and the consequent rarity of procedural choice rights.

As the *Faretta* example suggests, personal rights—those focused on the interests of the individual rightsholder—are generally classified as choice rights. For example, it has often been argued that the purpose of the free speech right is to protect individual autonomy.²²² If that is true, then it stands to reason that freedom of speech should be a choice right. By contrast, if the purpose of the right is to maximize the total amount of speech, then speech should arguably be classified as an option right—one that would permit the government to compel and thereby increase the total amount of speech.²²³

Nowhere is the relationship between personal rights and choice rights clearer than in the constitutional right to privacy. Once understood and still sometimes described as a right to shield one’s personal information from the outside world,²²⁴ privacy now encompasses something more. Michael Sandel,

220. *Flanagan v. United States*, 465 U.S. 259, 268 (1984).

221. *Faretta v. California*, 422 U.S. 806, 819 (1975) (emphasis added); *id.* (“[H]is choice must be honored out of that respect for the individual which is the lifeblood of the law.”) (citation and internal quotation marks omitted).

222. Rogers M. Smith, *The Constitution and Autonomy*, 60 TEX. L. REV. 175, 185 (1982) (“The infusion of autonomy into constitutional thought was most easily accomplished in the area of free speech.”); see also Fallon, *supra* note 68, at 902–03; Neomi Rao, *Three Concepts of Dignity in Constitutional Law*, 86 NOTRE DAME L. REV. 183, 212 (2011) (“American free speech jurisprudence also links autonomy and negative liberty with the dignity of the individual.”). *But see* CASS R. SUNSTEIN, *THE PARTIAL CONSTITUTION* 235 (1993) (arguing against autonomy-based interpretations of the First Amendment).

223. *Cf.* GELLHORN, *supra* note 198, at 96 (“Free speech, as we know, finds its chief impersonal justification in the fact that unrestricted discussion is in the long run (and often in the short run) likely to advance the welfare of a democratic society. Obviously, this same justification does not support a right to keep one’s mouth closed. If there is any freedom not to speak, its existence must be explained in somewhat different terms.”).

224. See Daniel J. Solove, *Conceptualizing Privacy*, 90 CALIF. L. REV. 1087, 1092 (2002) (stating that privacy can be defined as “the ability to shield oneself from unwanted access by others” and “control over personal information”).

among many others,²²⁵ recognized that constitutional “privacy” is actually “the right to make certain sorts of choices, free of interference by the state.”²²⁶ The constitutional right to privacy thus clearly extends beyond what Justice Kennedy calls its “spatial bounds,”²²⁷ and protects people’s ability to choose *whether* to engage in particular forms of conduct, including abortion²²⁸ and sexual intimacy.²²⁹ Each of these “privacy” rights is what this Article calls a choice right, guaranteeing people’s freedom to choose between *X* and not-*X*. The abortion debate, to take the most controversial example, is essentially about whether the Constitution recognizes a right to choose “whether to bear or beget a child.”²³⁰ Indeed, the very distinction between “pro-life” and “pro-choice” neatly captures the difference between option rights and choice rights.

Classifying personal rights as protecting choice can also help explain another interesting and increasingly important thread of American rights discourse: the protection of choice where the ability to make certain choices is necessary to maintain individual identity. The right-not-to-procreate argument invokes this point by emphasizing the permanent status changes that pregnancy and childbirth impose on women.²³¹ But the argument can be extended into other areas of constitutional law as well. Equal protection doctrine, for example, prevents the government from discriminating on the basis of certain characteristics, such as race, nationality, or sex. These appear to be aspects of

225. See, e.g., Greene, *supra* note 203, at 1890–95 (describing “fundamental decision” privacy); Henkin, *supra* note 26, at 1425 (“Primarily and principally the new Right of Privacy is a zone of prima facie autonomy, of presumptive immunity from regulation, in addition to that established by the first amendment.”); Rao, *supra* note 222, at 207 (“In America, privacy interests are often characterized as being a form of negative freedom—freedom from interference by the government in one’s home or over personal decisions.”); Smith, *supra* note 222, at 189 (“Perhaps the clearest expression of the new concern with autonomy came in the Court’s development of the constitutional right to privacy in the mid-1960’s.”); Lloyd L. Weinreb, *The Right to Privacy*, in *THE RIGHT TO PRIVACY* 25, 31 (Ellen Frankel Paul et al. eds., 2000) (“[P]rivate might be regarded as the face that autonomy presents to others similarly situated in the same community, merely one side of the abstract dichotomy between public and private . . .”).

226. Michael J. Sandel, *Moral Argument and Liberal Toleration: Abortion and Homosexuality*, 77 CALIF. L. REV. 521, 526, 528 (1989).

227. *Lawrence v. Texas*, 539 U.S. 558, 562 (2003) (“Freedom extends beyond spatial bounds. Liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct. The instant case involves liberty of the person both in its spatial and more transcendent dimensions.”).

228. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992); *Roe v. Wade*, 410 U.S. 113 (1973); see also Pamela S. Karlan & Daniel R. Ortiz, *In a Diffident Voice: Relational Feminism, Abortion Rights, and the Feminist Legal Agenda*, 87 NW. U. L. REV. 858, 876 (1993) (“The language of autonomy has provided the central rationale for protecting individual women’s control over the abortion decision.”).

229. *Lawrence*, 539 U.S. 558.

230. *Casey*, 505 U.S. at 875 (“[T]he right recognized by *Roe* is a right ‘to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.’”) (citing *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972)).

231. *Id.* at 851 (“Beliefs about these matters could not define the attributes of personhood were they formed under the compulsion of the State.”).

one's identity, not one's conduct (except in the sense that "being" is conduct) and therefore do not involve autonomous choice in the same way as the decision whether to speak. But as Kenji Yoshino and others have demonstrated, even these seemingly immutable characteristics are intertwined with and sometimes dependent on conduct that is within one's control.²³² Justice Scalia recognized as much in *Romer v. Evans*²³³ when he emphasized the difficulty of drawing lines between sexual "orientation" and "conduct."²³⁴ Restraining the ability to engage in sexual intimacy therefore effectively restrains a person's ability to *be* who they are, just as restraints on abortion arguably coerce pregnant women into being mothers.²³⁵ This connection between conduct and identity seems to have facilitated the migration of equality claims from equal protection to due process. As Yoshino notes, "the Court has moved away from group-based equality claims under the guarantees of the Fifth and Fourteenth Amendments to individual liberty claims under the due process guarantees of the Fifth and Fourteenth Amendments."²³⁶

But while public rights are almost inevitably *not* choice rights, not all private rights *are* choice rights. Many personal rights are (at least arguably) designed with the interests of the individual in mind, and yet do not permit her to choose between *X* and *not-X*. The prohibition on slavery is an interesting example. It can be, and often has been, justified solely on the basis of individual interests, and yet it prohibits individuals from making choices. John Stuart Mill, for example, generally believed that liberty of action could only be limited subject to the harm principle,²³⁷ but nevertheless concluded that people could be prevented from selling themselves into slavery: "The principle of freedom cannot require that he should be free not to be free. It is not freedom to be allowed to alienate his freedom."²³⁸ Since a person who sells himself into slavery "abdicates his liberty; he forgoes any future use of it beyond that single act. He therefore defeats, in his own case, the very purpose which is the justification for allowing him to dispose of himself."²³⁹

As Mill's argument demonstrates, separating those personal rights that protect choice from those that simply guarantee an option or protection requires an investigation of the very purposes of rights and freedoms. Roughly speaking, there are two relevant visions in the philosophical literature: those

232. See generally KENJI YOSHINO, COVERING: THE HIDDEN ASSAULT ON OUR CIVIL RIGHTS (2006); Greene, *supra* note 203.

233. 517 U.S. 620 (1996).

234. *Id.* at 640–42 (Scalia, J., dissenting).

235. See sources cited *supra* note 196.

236. Kenji Yoshino, *The New Equal Protection*, 124 HARV. L. REV. 747, 748 (2011) (citations omitted).

237. MILL, *supra* note 128; see Saunders, *supra* note 128.

238. MILL, *supra* note 128, at 125.

239. *Id.*

that see rights as a means of protecting autonomy for its own sake, and those that see rights as a means of promoting or protecting other goods.²⁴⁰ The former are often referred to as will theories, the latter as welfare (or interest) theories. The difference between them is essentially the difference between treating autonomy as intrinsically and instrumentally valuable.

Will theories value autonomy above all else, and therefore tend to support what this Article calls choice rights. So long as autonomy—the power to choose²⁴¹—is the ultimate good, then choice rights are obviously attractive, since they maximize autonomy by permitting their bearers to select or decline *X*.²⁴² Such arguments are prominent in constitutional theory. Charles Fried, for example, argues that “[i]t is the capacity to choose and judge for ourselves that is the essence of our individuality and so of our liberty.”²⁴³ Richard Fallon says that “autonomy holds unique promise to function as the constitutional value of values.”²⁴⁴ And if autonomy is itself the primary value, then it makes sense that rights to should include rights not to, so that the value itself can be maximized.

The intrinsic/instrumental division, like the public/private distinction described above, has been used to explain waiver rules. Seth Kreimer writes: “If the constitutional right in question is designed to secure an area of autonomy for the citizen against the state, it would seem that the exercise or nonexercise within that area should be in the hands of the citizen.”²⁴⁵ By contrast, “many constitutional rights protect other values or protect individual choice only as a means to the realization of other ends. For such rights, there is no paradox in asserting that the choice of the individual should not decide the applicability of the right in question.”²⁴⁶ Similarly, Kimberly Yuracko argues that “[p]ermitting waiver of a constitutional right makes sense when the justification for the right is primarily to bolster and reinforce the autonomy of the right holder and where permitting waiver does not undermine any larger social goals.”²⁴⁷

Even within the realm of will theories, however, relevant distinctions emerge as to *why* autonomy and choice are worthy of protection. On one account, autonomy and the power of choice is a good worth protecting in and

240. YOUNG, *supra* note 64, at 21 (“According to the one view, . . . autonomy derives its value from other things which it makes possible. According to the second view, autonomy has value in and of itself, independently of what it enables one to do or bring about.”).

241. See sources cited *supra* note 68 (describing choice theories of autonomy).

242. The one potential exception is the autonomous choice to give up one’s autonomy. And that choice—the lone substantive protection right—can itself be explained by reference to autonomy, as Mill does. See MILL, *supra* note 128.

243. FRIED, MODERN LIBERTY, *supra* note 100, at 94.

244. Fallon, *supra* note 68, at 876.

245. Kreimer, *supra* note 126, at 1383.

246. *Id.* at 1387.

247. Yuracko, *supra* note 131, at 153.

of itself.²⁴⁸ On another account, choice is important because it is the most efficient and accurate way to identify the good. Ronald Dworkin describes this as an “evidentiary view” of autonomy.²⁴⁹ Mill seems to embrace it, arguing that a person’s “voluntary choice is evidence that what he so chooses is desirable, or at least endurable, to him, and his good is on the whole best provided for by allowing him to take his own means of pursuing it.”²⁵⁰ It follows that the individual rightsholder may be best positioned to determine whether a particular not-*X* right is necessary to support the *X*-right. In *Dale*, for example, the Supreme Court deferred to the Boy Scouts’ judgment that they needed to exclude homosexuals in order to make their own expressive association valuable.²⁵¹

Inasmuch as it involves protecting choice as an instrument to find the good, the evidentiary view of autonomy sounds a lot like a welfare theory of rights. Whereas will theories tend to be associated with choice rights, welfare theories are closely associated option and protection rights, which exist to promote particular visions of the good rather than individuals’ ability to choose among them. Joseph Raz, for example, argues that autonomy is “valuable only if it is directed at the good” and “does not extend to the morally bad and repugnant.”²⁵² The appeal of this view, too, is relatively straightforward. For inasmuch as rights are animated by values other than autonomy—fairness, legitimacy, or transparency, for example—there is no particular reason to think that individuals should be able to refuse the actions or processes they enumerate. This is true even when those values are not “public.” For example, individual dignity seems to be a squarely personal value. And yet, as Neomi Rao has shown, dignity can also “express and serve as the grounds for enforcing various substantive values,” which “embod[y] a particular view of what constitutes the good life for man,”²⁵³ and “can be used to coerce individuals by forcing upon them a particular understanding of dignity.”²⁵⁴ But

248. See Winick, *supra* note 206, at 1707 (“[A]llowing individuals to make voluntary choices in matters vitally affecting them is developmentally beneficial and may be essential to their psychological well-being.”).

249. See, e.g., RONALD DWORKIN, LIFE’S DOMINION: AN ARGUMENT ABOUT ABORTION, EUTHANASIA, AND INDIVIDUAL FREEDOM 222–23 (1993).

250. MILL, *supra* note 128, at 125.

251. *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 653 (2000).

252. JOSEPH RAZ, THE MORALITY OF FREEDOM 411 (1986). Welfare theories are also associated with the writings of Jeremy Bentham, Joel Feinberg, and Neil MacCormick, among others. See FEINBERG, *supra* note 67, at 209; NEIL MACCORMICK, LEGAL RIGHT AND SOCIAL DEMOCRACY: ESSAYS IN LEGAL AND POLITICAL PHILOSOPHY 143–60 (1982); H.L.A. Hart, *Bentham on Legal Rights*, in OXFORD ESSAYS IN JURISPRUDENCE 171, 171–79 (A.W.B. Simpson ed., 2d series 1973).

253. Rao, *supra* note 222, at 187.

254. *Id.* at 227; see also Robert C. Post, *Three Concepts of Privacy*, 89 GEO. L.J. 2087, 2092 (2001) (“Autonomy refers to the ability of persons to create their own identity and in this way to define themselves. Dignity, by contrast, refers to ‘our sense of ourselves as commanding (attitudinal) respect.’”) (citation omitted).

just as will theories do not always promote choice rights, welfare theories do not always promote option and protection rights. As Part III.B.2 explains in more detail, a right can protect choice even if autonomy is not its animating value.

In practice, the divisions described here tend to shade into one another. As Justice Brandeis put it, “Those who won our independence believed that the final end of the State was to make men free to develop their faculties They valued liberty *both* as an end and as a means.”²⁵⁵ Nevertheless, the personal/public distinction—and the related distinctions between will and welfare theories of rights and intrinsic and instrumental valuation of freedom—can largely explain whether particular *Xs* should be paired with not-*Xs*.

Even with these qualifications, this approach faces many complications. First, what counts as personal and public is likely to be deeply contested. And even if it can be said that the *justification* for a right is personal, that does not mean that its *effects* will be strictly self-regarding. The abortion debate, to take only the most obvious example, is deeply intertwined with the question of whether a fetus has recognizable interests. If it does, then it is difficult to describe abortion as a strictly “personal” incident of the right not to procreate. And even holding aside the question of life itself, many argue that there are public values at issue—the integrity of doctors, dignity of the community, the value of potential human life, or the moral horror and emotional pain felt by those who disapprove of abortion.²⁵⁶ Similar issues arise in other contested areas.²⁵⁷ Garvey, who believes there is no right to suicide (no right to choose between life and death, in other words), writes, “I do not think that our lives are strictly our own, and I think that suicide affects the lives of others in several ways, some of which warrant efforts to prevent it.”²⁵⁸

Second, categorizing rights as choice rights based on whether they are “personal”—where that very concept is conflated with privacy and, in turn, autonomy itself—threatens to be all-encompassing. If autonomy is a stand-alone good, then *all* government interference should presumably be prohibited, and not simply that which limits the freedom to choose between various *Xs* and not-*Xs*.²⁵⁹ This vision of autonomy as a freestanding right, rather than as

255. *Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring) (emphasis added).

256. *See Gonzales v. Carhart*, 550 U.S. 124, 157–58 (2007) (confirming Congress’s interest in protecting the integrity of doctors, the lives of fetuses, and the value of human life in general).

257. Voting presents another situation in which the intrinsic/instrumental and public/private distinctions could be relevant. *See generally* Note, *The Case for Compulsory Voting in the United States*, 121 HARV. L. REV. 591, 592–93, 603 (2007) (making qualified case for compulsory voting).

258. Garvey, *Control Freaks*, *supra* note 49, at 16.

259. GARVEY, FREEDOMS, *supra* note 1, at 5–6 (“If we are ruthless in carrying out this way of thinking we are led to the conclusion that freedoms are universal, not bilateral, in character. If we think of *x* as a road that *X* can travel along, then (according to the bilateralism thesis) such a road should be a two-way street. But it seems just as bad to control *X*’s course as her direction on any particular road.

preventing restraint or coercion of particular *Xs*, is reflected in the Supreme Court's famous conclusion that "the full scope of the liberty guaranteed by the Due Process Clause cannot be found in or limited by the precise terms of the specific guarantees elsewhere provided in the Constitution."²⁶⁰ Without a limiting principle, this reading threatens to swallow the government's ability to regulate any conduct at all.²⁶¹

But choice need not become the right that ate everything. Autonomy can serve as an interest giving shape to other more specific guarantees without necessarily being an enforceable right in and of itself.²⁶² Implicitly identifying this approach in the Court's privacy cases, Louis Henkin explained that "general autonomy for the individual was no longer proclaimed; he had, rather, particular rights and liberties (notably those specified in the early provisions of the Bill of Rights) which may be seen as establishing 'special' zones of autonomy."²⁶³ Making sense of this relationship between parts and the whole—between liberties and liberty—is complicated, but not impossible. The effort here has been to consider whether various specific rights should protect particular areas of autonomous choice, not whether the Constitution creates a freestanding right to be free of government restraint or coercion.

It is far beyond this Article's scope or its author's ability to resolve these debates fully. The goal here is far more modest: to identify the normative frameworks that may help determine whether a particular right to should be accompanied by a right not to. As the preceding discussion demonstrates, one such way is by considering whether a particular right is personal or public, an inquiry that in turn leads to questions about whether the right protects autonomy's intrinsic or instrumental value.

The law cannot say that x_1 is a more important road than $x_2, x_3, \dots x_n$. The importance of any road is a judgment for *X* to make."

260. *Moore v. City of E. Cleveland*, 431 U.S. 494, 502 (1977) (quoting *Poe v. Ullman*, 367 U.S. 497, 542–43 (1961) (Harlan, J., dissenting)); *see also Poe*, 367 U.S. at 543 (Harlan, J., dissenting) ("This 'liberty' is not a series of isolated points pricked out in terms of the taking of property It is a rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints").

261. *See* ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* 99–100 (1990).

262. *See, e.g., Washington v. Glucksberg*, 521 U.S. 702, 727 (1997) ("That many of the rights and liberties protected by the Due Process Clause sound in personal autonomy does not warrant the sweeping conclusion that any and all important, intimate, and personal decisions are so protected").

263. Henkin, *supra* note 26, at 1417; *see also id.* at 1420–21 ("All of these pieces of explicitly protected privacy do not add up to a complete right of privacy even by narrow definition."); GARVEY, *FREEDOMS*, *supra* note 1, at 17 ("[T]here is no universal right to freedom. Instead there are certain domains where we are free to act—certain constellations of protected activity."); Smith, *supra* note 222, at 176 n.11 (noting that "no broad, general autonomy right has been recognized by the Court, only discrete, particular rights with varying weights").

2. *Beyond Autonomy: Instrumental Choice Rights*

The discussion above suggests that only rights whose purpose is to protect individual autonomy should be classified as choice rights. Tautological as it may sound, this is not necessarily accurate. Sometimes a choice right—one that protects both *X* and not-*X*—arises even when the right is instrumentally designed to further constitutional values other than autonomy. For example, some constitutional guarantees are instrumental and yet must encompass both a right to and a right not to in order to achieve their basic aims. In other cases, *X* and not-*X* independently serve the same underlying constitutional values and are protected for that very reason. Finally, a choice right may arise even where different values support *X* and not-*X*, so long as *some* interest appears on both sides of the ledger. Under these three approaches a right may exist for a particular purpose and yet still encompass a right not to.

The first version of this instrumental, purposivist analysis asks whether *X* and not-*X* should both be protected for the simple reason that, given the interests underlying the right, one cannot function without the other. As noted above, the Court has implicitly adopted this approach with regard to the rights of expressive association and speech. An association, it is thought, cannot express itself if it cannot exclude people who would dilute or interfere with its message.²⁶⁴ Similarly, it is plausible to think that the value of speech would be degraded if people could be compelled to engage in it. Listeners would not know whether a speaker was sincere, and coerced speakers themselves might eventually lose the ability to determine and state their own “true” positions.²⁶⁵ The right to *X* must therefore include the right to not-*X* because the values underlying the right could not be vindicated by the former alone. For other rights, however, the inverse right is not so interdependent. The values underlying the right to a public trial, for example—transparency and legitimacy, among other things²⁶⁶—can be achieved without giving defendants the right not to have a public trial. In such cases, the purposivist approach leads to recognition of an option or protection right.

These arguments from necessity can be guided and occasionally even answered by the text or structure of the Constitution itself. Choice rights are sometimes, but not always, phrased to include both the doing and not-doing (or acceptance and refusal) of *X*. In *Faretta*, for example, the Court concluded that the right to decline counsel was “necessarily implied by the structure of the [Sixth] Amendment,” in part because the Amendment refers to the “assistance”

264. See *Roberts v. U.S. Jaycees*, 468 U.S. 609, 618–20 (1984).

265. See Shiffrin, *supra* note 1, at 860–63 (arguing that compelled speech may undermine credibility and sincerity).

266. See *Waller v. Georgia*, 467 U.S. 39, 46 (1984) (“The central aim of a criminal proceeding must be to try the accused fairly . . .”).

of counsel.²⁶⁷ The Court found that “the colonists and the Framers, as well as their English ancestors, always conceived of the right to counsel as an ‘assistance’ for the accused, to be used at his option, in defending himself.”²⁶⁸ By contrast, the Eighth Amendment’s statement that “[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted”²⁶⁹ does not imply the existence of a choice.

Useful as it is, the textualist approach is not a silver bullet solution. The language of the Free Exercise Clause, after all, arguably implies an option right,²⁷⁰ and yet the Court has concluded that the Clause prohibits the imposition, as well as restriction, of religious practice.²⁷¹ Nor is it necessarily clear that phrases such as “freedom of speech” should be read to encompass a right not to speak as well as a right *to* do so. And of course the textualist approach is of limited utility with regard to those rights—including association and privacy—not specifically enumerated in the Constitution.

The second, purposivist approach is somewhat different. It does not ask whether *X* and not-*X* are inseparable, only whether they in fact serve the same underlying values. Where this is the case, rightsholders should be able to choose between them—they should have choice rights, in other words. On these grounds, I have argued that the Second Amendment should be analyzed as a substantive choice right protecting the decision whether to keep and bear arms for self-defense.²⁷² This argument is based on the fact that in *District of Columbia v. Heller*²⁷³ and *McDonald v. City of Chicago*,²⁷⁴ the Supreme Court identified “self-defense” as the “core” and “*central component*” of the Second Amendment right.²⁷⁵ Because the decision not to keep or bear arms also arguably furthers that core purpose, the choice should be protected. But that argument—which carries important qualifications even on its own terms²⁷⁶—would make no sense at all if the “central component” of the Second Amendment were protecting state militias from disarmament by the federal

267. *Faretta v. California*, 422 U.S. 806, 819 (1975).

268. *Id.* at 832.

269. U.S. CONST. amend. VIII.

270. See GARVEY, FREEDOMS, *supra* note 1, at 43 (“Individual choice in matters of religion should remain free: individual decisions are to be protected whether they operate for or against the validity of any or all religious views The individual is freed from . . . the oppressive effects of government regulation in order to believe or disbelieve as he chooses.”).

271. *Emp’t Div. v. Smith*, 494 U.S. 872, 877 (1990) (“The free exercise of religion means, first and foremost, the right to believe and profess whatever religious doctrine one desires. Thus, the First Amendment obviously excludes all ‘governmental regulation of religious *beliefs* as such.’ The government may not compel affirmation of religious belief”) (citations omitted).

272. See Blocher, *supra* note 24.

273. 554 U.S. 570 (2008).

274. 130 S. Ct. 3020 (2010).

275. *Heller*, 554 U.S. at 599.

276. The argument depends, for instance, on a particular reading of the words “self-defense” in *Heller*.

government. Under the militia reading, the decision not to bear arms would have little constitutional salience; it might even undermine the right itself. The right's purpose therefore determines whether it protects *X*, not-*X*, or the freedom to choose between them.

A third possibility would recognize the existence of choice rights even where different purposes support *X* and not-*X*, or where the same purpose supports both but applies more strongly in one direction than the other.²⁷⁷ Assume, for example, that *Lawrence* stands for a right of adults to engage in consensual sexual activity.²⁷⁸ That right is grounded in concerns of privacy, liberty, and equality, and might well be fundamental.²⁷⁹ Presumably there is also a right *not* to engage in sexual activity. But the latter right is undoubtedly even more robust than the former, for surely coercion of sexual intimacy is even more constitutionally problematic than restraint of it. And if that is correct, then *X* and not-*X* are not exactly mirror images, for there are additional interests underlying the protection of the latter. Sexual activity would therefore be a choice right, albeit an asymmetric one.

The purposivist approach to classification has some apparent strengths, both in terms of its descriptive accuracy and its normative appeal. But the difficulties with such an approach should also be obvious. Some are common to all forms of purposivism;²⁸⁰ others are more specific to the particular project at hand. How are we to identify *which* purposes or values are the reason for a right's protection? Does predicating the scope of a right on the right's justification simply add another and perhaps even more contestable interpretive question? And even assuming that these questions can be answered, the purposivist approach can lead into choppy conceptual waters. If *X* and not-*X* are justified by different values, then perhaps they are simply two different rights, not flip sides of the same one. The right to associate, for example, might be completely distinct from the right not to associate, and grounded in totally different values: the former in expression, the latter in intimacy. Rights to *X* and not-*X* could therefore be protected for different reasons, or to different degrees. And yet they remain intertwined, for both are concerned with the same conduct or process and the scope of one leads naturally into the other.

277. Cf. Martin H. Redish & Christopher R. McFadden, *HUAC, the Hollywood Ten, and the First Amendment Right of Non-Association*, 85 MINN. L. REV. 1669, 1672 (2001) ("In addition to the affirmative right of association, the right of non-association should be seen as an outgrowth of a completely different aspect of the First Amendment universe: the line of cases recognizing a First Amendment right not to be forced to speak.").

278. See Greene, *supra* note 203.

279. See Laurence H. Tribe, *Lawrence v. Texas: The "Fundamental Right" That Dare Not Speak Its Name*, 117 HARV. L. REV. 1893, 1904 (2004) (arguing that *Lawrence* preserves a fundamental right to intimate relationships).

280. See generally John F. Manning, *What Divides Textualists from Purposivists?*, 106 COLUM. L. REV. 70 (2006).

This demonstrates that one can believe that rights exist in order to serve particular purposes other than autonomy and yet still conclude that they should encompass both a right to a right not to. That conclusion, like the others discussed in this Part, is irreducibly and inevitably a determination about the purposes and values underlying the right itself.

CONCLUSION

This Article has attempted to show that the relationship between rights to and not to is an integral but underappreciated part of the theory and practice of American constitutional law. The goals here have been to describe the choice, option, and protection frameworks in terms of the government powers they limit; to apply those frameworks to substantive and procedural constitutional rights; and, finally, to consider some implications and complications arising from this approach. Looking at rights through these three frameworks helps illuminate not only the underlying purposes of rights, but also the kinds of action they should protect or processes they should provide.

The approach suggested here offers a vocabulary and a framework through which some of our most important political and legal debates can be openly conducted. At the moment, the clearest of these is the debate over the constitutionality of the Patient Protection and Affordable Care Act (ACA).²⁸¹ Opponents of the ACA have characterized the law not only as an unconstitutional expansion of federal authority, but as an unconstitutional coercion of private action.²⁸² In his opinion finding the mandate unconstitutional, Judge Henry Hudson of the U.S. District Court for the Eastern District of Virginia concluded, “At its core, this dispute is not simply about regulating the business of insurance—or crafting a scheme of universal health insurance coverage—it’s about an individual’s right to choose to participate.”²⁸³

It remains unclear, however, which “X” is implicated by the ACA. One possibility would be the right to decide whether or not to undergo medical

281. Pub. L. No. 111-148, 124 Stat. 119 (2010).

282. See, e.g., Ron Johnson, *ObamaCare and Carey’s Heart*, WALL ST. J., March 23, 2011, at A15 (calling health care reform “the greatest single assault on our freedom in my lifetime” and bemoaning the fact that “[f]or the first time in U.S. history, a personal inaction . . . will be deemed unlawful”); Hank Silverberg, *Virginia AG Argues for Health Care Repeal on Hill*, WTOP.COM (Feb. 16, 2011, 2:52 PM), <http://www.wtop.com/?sid=2274403> (quoting Virginia Attorney General Ken Cuccinelli as saying, “[t]he litigation is not so much about health care as it is about liberty”).

283. *Cuccinelli v. Sebelius*, 728 F. Supp. 2d 768, 788 (E.D. Va. 2010); see also *Florida v. U.S. Dep’t of Health & Human Servs.*, 780 F. Supp. 2d 1256, 1289 (N.D. Fla. 2011) (accepting the individual mandate would mean accepting that “Congress could require that people buy and consume broccoli at regular intervals”).

treatment. Such a right does, after all, have some doctrinal support.²⁸⁴ But it is also inapposite, not least because the ACA requires only the purchase of health insurance, not any particular medical procedures. The right to contract would be a more appropriate claim, but lacks doctrinal support.²⁸⁵

The first step toward having a more successful public debate over the issue would be to begin discussing which right, precisely, is being invoked. The second step would be to begin discussing which *type* of right it should be viewed as—as one of personal autonomy, or as one which intrinsically or instrumentally serves important public purposes.

This Article helps frame and explain the deeper issues underlying this and other constitutional challenges. The ongoing debate over health care reform drives home the fact that the relationship between rights to and not to is a fundamentally normative one, tied up with the purposes and values of rights themselves. Our discourse should reflect that fact.

284. See *supra* notes 115–116. But see *Jacobson v. Massachusetts*, 197 U.S. 11, 26 (1905) (upholding mandatory vaccination and rejecting the “inherent right of every freeman to care for his own body and health in such way as to him seems best”).

285. *W. Coast Hotel Co. v. Parrish*, 300 U.S. 379, 391 (1937) (“[T]he violation alleged by those attacking minimum wage regulation for women is deprivation of freedom of contract. What is this freedom? The Constitution does not speak of freedom of contract.”).

