2008

Scrutiny Land

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106 Mich. L. Rev. 1479-1500 (2008)

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Scrutiny Land is the place where government needs to justify to a court its restrictions on the liberties of the people. In the 1930s, the Supreme Court began limiting access to Scrutiny Land. While the New Deal Court merely shifted the burden to those challenging a law to show that a restriction of liberty is irrational, the Warren Court made the presumption of constitutionality effectively irrebuttable. After this, only one road to Scrutiny Land remained: showing that the liberty being restricted was a fundamental right. The Glucksberg *Two-Step, however, limited the doctrine of fundamental rights to those (1) narrowly defined liberties that are (2) deeply rooted in tradition and history. In this Article, I explain how the ability to define accurately almost any liberty as broad or narrow improperly gives courts complete discretion to protect liberty or not as it chooses. I then describe an alternative that is suggested by the approach taken by the Court in* Lawrence v. Texas*: a general presumption of liberty. Not only is such an approach practical, it is also more consistent with the text and original meaning of the Constitution than is the* Glucksburg *Two-Step.*

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INTRODUCTION

Angel Raich is a seriously ill forty-one-year-old mother of two who, in 2002, sought an injunction allowing her to use cannabis to alleviate her intense pain as well as the life-threatening wasting syndrome from which she suffers. She initially prevailed in the Ninth Circuit, but the Supreme Court in 2005 rejected Angel's argument that applying the federal Controlled

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Substances Act ("CSA") to the personal cultivation, possession, and use of state-authorized cannabis for medical purposes was unconstitutional because it exceeded the power of Congress to "regulate Commerce . . . among the several States."[1] On remand, Angel renewed her alternate theory that the CSA's complete ban on the medical use of cannabis violated the Due Process Clause of the Fifth Amendment by denying her fundamental right to preserve her life. In March 2007, the Ninth Circuit rejected this argument, effectively ending her five-year legal battle against the application of the CSA to seriously ill persons.[2]

The Ninth Circuit's rejection of Angel's constitutional claim shines a spotlight on a serious problem with the Supreme Court's current approach to protecting liberty under the Due Process Clauses of the Fifth and Fourteenth Amendments. Ever since the New Deal, the Supreme Court has limited the protection afforded by the Due Process Clauses to what it calls "fundamental rights." Unless the Court characterizes the liberty as "fundamental," it will not evaluate or "scrutinize" the government's claim that its restrictions on the liberty are truly necessary. With laws restricting mere "liberty interests" not deemed fundamental, the Court will blindly accept the government's claim that its restriction is "reasonable."

In short, a claimant challenging a statute needs a ticket into "Scrutiny Land" where the government must justify its restrictions on liberty. To get that ticket, a claimant must jump through the hoop of showing her liberty is fundamental. Otherwise, she automatically loses. The outcome of Angel's case, therefore, like all other due process cases, turned on whether the liberty she asserted was fundamental.

In this Article, I examine the doctrine of fundamental rights and propose an alternative, which the Supreme Court has already taken a step toward embracing, that would address its key flaws. Part I traces the evolution of the doctrine of fundamental rights from its inception in 1931 through its 1997 incarnation in *Washington v. Glucksberg*. Part II examines *Glucksberg*'s alteration of the doctrine and demonstrates how the decision's method enables judges to avoid scrutinizing legislation whenever they wish. Part III describes the alternative route paved by *Lawrence v. Texas*, and Part IV builds on the Court's decision in *Lawrence* to propose an approach to substantive due process cases that would overcome the major weaknesses of the fundamental rights doctrine.

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1. Gonzales v. Raich, 545 U.S. 1, 5 (2005) (quoting U.S. CONST., art. I, § 8, cl. 3).

2. Raich v. Gonzales, No. 03-15481, 2007 WL 754759 (9th Cir. Mar. 14, 2007). In rejecting this claim, the Ninth Circuit held out some hope that, if criminally prosecuted, Angel qualified for the defense of "necessity." *Id.* at *7. According to the necessity doctrine, a person may not be punished for preserving her life when she is forced to chose between her life and disobeying a criminal law. *Id.* Though not entitling Angel to an injunction against the CSA, the Court strongly indicated she could assert a necessity defense to any future federal criminal prosecution. *Id.* The Ninth Circuit thereby offered a potential lifeline to other criminal defendants who can prove that they, like Angel, have no other choice but to use cannabis to save their lives.

I. The Origin of the Doctrine of Fundamental Rights

The requirement that a right be fundamental before the government must justify interfering with the exercise of that right dates back to the 1930s. The requirement's origins can be traced to a presumption. The "presumption of constitutionality" was first used to reverse the scrutiny that the Progressive Era Court had been employing to assess the reasonableness of restrictions on liberty under the Due Process Clauses. In *O'Gorman & Young, Inc. v. Hartford Fire Insurance Co.*,[3] the Court refused to strike down an insurance regulation, holding that "the presumption of constitutionality must prevail in the absence of some factual foundation of record for overthrowing the statute."[4] Writing for a 5–4 majority, Justice Brandeis described the implication of this presumption:

> It does not appear upon the face of the statute, or from any facts of which the court must take judicial notice, that in New Jersey evils did not exist in the business of fire insurance for which this statutory provision was an appropriate remedy. The action of the legislature and of the highest court of the State indicates that such evils did exist. The record is barren of any allegation of fact tending to show unreasonableness.[5]

In other words, the burden was on the person challenging the statute to establish its unreasonableness; otherwise, the legislation was deemed to be reasonable.

The use of a robust presumption of constitutionality had been urged by James Thayer in an 1893 article in the *Harvard Law Review* entitled *The Origin and Scope of the American Doctrine of Constitutional Law*.[6] Thayer contended that "there is often a range of choice and judgment [and] in such cases the constitution does not impose upon the legislature any one specific opinion, but leaves open this range of choice; and that whatever choice is rational is constitutional."[7] Justice Brandeis's adoption of this approach in *O'Gorman* was triumphantly noted by Walton H. Hamilton, an economist on the Yale Law School faculty, an ardent New Dealer, and a sharp critic of the Progressive Era Supreme Court's constitutional skepticism toward social regulation. His hosannas are worth reading at length:

> The demand is to find an escape from the recent holdings predicated upon "freedom of contract" as "the rule," from which a departure is to be allowed only in exceptional cases. The occasion calls not for the deft use of tactics, but for a larger strategy. The device of presumption is almost as old as law; Brandeis revives the presumption that acts of a state legislature are valid and applies it to statutes regulating business activity. The factual brief

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3. 282 U.S. 251 (1931).

4. *Id.* at 257–58.

5. *Id.* at 258 (footnote omitted).

6. James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 Harv. L. Rev. 17 (1893).

7. *Id.* at 144.

> has many times been employed to make a case for social legislation; Brandeis demands of the opponents of legislative acts a recitation of fact showing that the evil did not exist or that the remedy was inappropriate. He appeals from precedents to more venerable precedents; reverses the rules of presumption and proof in cases involving the control of industry; and sets up a realistic test of constitutionality. It is all done with such legal verisimilitude that a discussion of particular cases is unnecessary; it all seems obvious—once Brandeis has shown how the trick is done. It is attended with so little of a fanfare of judicial trumpets that it might have passed almost unnoticed, save for the dissenters, who usurp the office of the chorus in a Greek tragedy and comment upon the action. Yet an argument which degrades "freedom of contract" to a constitutional doctrine of the second magnitude is compressed into a single compelling paragraph.[8]

O'Gorman shows that the process of weakening the Due Process Clause scrutiny of the Progressive Era Supreme Court began well before the election of President Roosevelt.[9] In 1929, President Hoover nominated Charles Evans Hughes to replace Chief Justice Taft. Hoover then nominated Owen Roberts to take the seat of Justice Sanford a week before *O'Gorman* was argued. With the Court presumably divided four to four, the case was held over for reargument so that Justice Roberts could participate. He and Hughes thereby determined the outcome of the case, which was decided 5–4. Thus, Hoover appointees led the abandonment of an across-the-board protection of liberty under the Due Process Clause exemplified by *Lochner v. New York*[10] before the New Deal even began.[11]

Even so, after *O'Gorman* there still remained two potential routes to Scrutiny Land. The first was identified by the Court in 1938 in *United States v. Carolene Products Co.*[12] After reaffirming the existence of a presumption

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8. Walton H. Hamilton, *The Jurist's Art*, 31 COLUM. L. REV. 1073, 1074–75 (1931) (footnotes omitted). Ironically, the Brandeis Brief to which Hamilton refers was innovated by attorney Brandeis to satisfy the scrutiny employed by the Progressive Era Court and is still hailed today as having provided a much-needed injection of "realism" into the judicial system in place of its traditional reliance on more "formalist" methods of legal reasoning. *See, e.g.*, Michael Rustad & Thomas H. Koenig, *The Supreme Court and Junk Social Science: Selective Distortion in Amicus Briefs*, 72 N.C. L. REV. 91, 106 (1993) ("[T]he [Brandeis] brief was a brilliant break with the formalist tradition and had a significant impact on legal thought."). Yet the presumption adopted by Justice Brandeis replaced reliance on such data with a formal presumption in favor of the statute, suggesting that Brandeis's commitment to realism was driven by the results he was seeking rather than by any overarching methodological principle.

9. That the Progressive Era Court's across-the-board protection of liberty was eroded starting well before the New Deal and extending until the 1940s, rather than by a sharp political "switch" in 1937, is the thesis of BARRY CUSHMAN, RETHINKING THE NEW DEAL COURT: THE STRUCTURE OF A CONSTITUTIONAL REVOLUTION (1998). Cushman's influential book has singlehandedly altered the conventional wisdom among constitutional scholars about the supposed switch in 1937.

10. 198 U.S. 45 (1905).

11. This is less surprising when one considers that Hoover, though a Republican, was also an avid political progressive. *See generally* JOAN HOFF WILSON, HERBERT HOOVER: FORGOTTEN PROGRESSIVE (Oscar Handlin ed., 1975) (describing Hoover's progressive politics).

12. 304 U.S. 144 (1938).

of constitutionality,[13] the Court created an exception to it in what became the most celebrated footnote in constitutional history: "There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments, which are deemed equally specific when held to be embraced within the Fourteenth."[14]

Footnote four became famous because it created the two-tier protection of rights under the Due Process Clause that is the basis of the modern doctrine of fundamental rights. According to the first paragraph of footnote four, only a "specific prohibition"—that is, a limitation on a right that is enumerated—is the kind of prohibition that warrants shifting the presumption of constitutionality or, at least, narrowing its scope.[15]

Little remembered today, however, is a second road to Scrutiny Land that once existed. In *O'Gorman*, *Carolene Products*, and even such permissive cases as *NLRB v. Jones & Laughlin Steel Corp.*,[16] *United States v. Darby*,[17] and *Wickard v. Filburn*,[18] the New Deal Court only *disparaged* the unenumerated rights retained by the people; it did not *deny* them altogether. Although he shifted the burden of proof to those asserting a Due Process Clause challenge, Justice Brandeis never denied that opponents of a statute could introduce empirical evidence of its *ir*rationality. Surprisingly, neither did the New Deal Court. In a much-neglected passage of *Carolene Products*, having affirmed the existence of a presumption of constitutionality, Justice Stone offered the following observation:

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13. *Id.* at 152 ("[T]he existence of facts supporting the legislative judgment is to be presumed, for regulatory legislation affecting ordinary commercial transactions is not to be pronounced unconstitutional unless in the light of the facts made known or generally assumed it is of such a character as to preclude the assumption that it rests upon some rational basis within the knowledge and experience of the legislators.").

14. *Id.* at 152 n.4. Of course, footnote four also identifies two other circumstances in which there may be a narrower scope for the presumption of constitutionality: when legislation adversely affects the "political processes which can ordinarily be expected to bring about repeal of undesirable legislation" and legislation that is the product of "prejudice against discrete and insular minorities." *Id.* at 152–153 n.4. But I am concerned here with the constitutional protection of individual liberties, which is the subject of the first paragraph of footnote four.

15. As I have explained elsewhere, this doctrine seems obviously to contradict the Ninth Amendment's injunction that "[t]he enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." U.S. CONST. amend. IX. Elevating some rights to be protected solely because they were enumerated, while denying or disparaging others solely because they were not, is a direct violation of the injunction of the Ninth Amendment. *See* Randy E. Barnett, *The Ninth Amendment: It Means What It Says*, 85 TEX. L. REV. 1 (2006). When confronted with a Ninth Amendment challenge, the New Deal Court had to distort the text—running it together with the Tenth—and ignore its origin to dismiss it. *See* United Pub. Workers v. Mitchell, 330 U.S. 75, 96 (1947) ("[W]hen objection is made that the exercise of a federal power infringes upon rights reserved by the Ninth and Tenth Amendments, the inquiry must be directed toward the granted power under which the action of the Union was taken. If granted power is found, necessarily the objection of invasion of those rights, reserved by the Ninth and Tenth Amendments, must fail.").

16. 301 U.S. 1 (1937).

17. 312 U.S. 100 (1941).

18. 317 U.S. 111 (1942).

> We may assume for present purposes that no pronouncement of a legislature can forestall attack upon the constitutionality of the prohibition which it enacts by applying opprobrious epithets to the prohibited act, and that *a statute would deny due process which precluded the disproof in judicial proceedings of all facts which would show or tend to show that a statute depriving the suitor of life, liberty or property had a rational basis.*[19]

In other words, so far as the New Deal Court was concerned, the presumption of constitutionality was still rebuttable by those bringing a Due Process Clause challenge to a statute.

It was not until 1955, some twenty-four years after the Supreme Court adopted the presumption of constitutionality in *O'Gorman*, that the Warren Court moved from disparaging the other rights retained by the people to denying them altogether. This dubious honor belongs to *Williamson v. Lee Optical of Oklahoma, Inc.*[20] In *Williamson*, a three-judge panel of the district court[21] faithfully applied the presumption of constitutionality in the manner the Supreme Court had described in *Carolene Products*:

> It is recognized, without citation of authority, that all legislative enactments are accompanied by a presumption of constitutionality; and, that the court must not by decision invalidate an enactment merely because in the court's opinion the legislature acted unwisely. Likewise, where the statute touches upon the public health and welfare, the statute cannot be deemed unconstitutional class legislation, even though a specific class of persons or businesses is singled out, where the legislation in its impact is free of caprice and discrimination and is rationally related to the public good. A court only can annul legislative action where it appears certain that the attempted exercise of police power is arbitrary, unreasonable or discriminatory.[22]

The lower court clearly believed that the presumption of constitutionality was just that: a presumption that could be rebutted. And, after evaluating the operation of this regulatory scheme, the judges concluded that "the means

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19. *Carolene Products*, 394 U.S. at 152 (emphasis added). Later in his opinion, Justice Stone expanded on how the presumption of constitutionality may be rebutted:

> Where the existence of a rational basis for legislation whose constitutionality is attacked depends upon facts beyond the sphere of judicial notice, such facts may properly be made the subject of judicial inquiry, and the constitutionality of a statute predicated upon the existence of a particular state of facts may be challenged by showing to the court that those facts have ceased to exist. Similarly we recognize that the constitutionality of a statute, valid on its face, may be assailed by proof of facts tending to show that the statute as applied to a particular article is without support in reason because the article, although within the prohibited class, is so different from others of the class as to be without the reason for the prohibition, though the effect of such proof depends on the relevant circumstances of each case, as for example the administrative difficulty of excluding the article from the regulated class.

Id. at 153–54 (citations omitted).

20. 348 U.S. 483 (1955).

21. The panel included Judge Alfred P. Murrah, the namesake of the federal building in Oklahoma City that was destroyed by a truck bomb in 1995.

22. Lee Optical of Okla., Inc. v. Williamson, 120 F. Supp. 128, 132 (W.D. Okla. 1954).

chosen in this particular instance is 'arbitrary and oppressive' and not reasonably adapted to the accomplishment of the end sought."[23]

In the Warren Court, it fell to Justice Douglas to explain for the first time how the presumption of constitutionality was, for all practical purposes, irrebuttable. Still good law today, *Williamson* is widely cited for its proposition that a law is "rational," and therefore constitutional, under the Due Process Clause if a judge can imagine a possible reason why the legislature *might* have enacted the law.[24] Since there is always a possible reason, this form of rational basis scrutiny is always satisfied. Obviously, an irrebuttable presumption is not truly a presumption of law. It is a rule: No matter what the person whose liberty is restricted has to say, the government wins. Under this approach, the second road to Scrutiny Land is closed.

After *Williamson*, just one road to Scrutiny Land remained: the route mapped by footnote four. Only those liberties that were specifically enumerated in the Constitution would be protected judicially under the Due Process Clause. But a firm distinction between enumerated and unenumerated rights lasted only ten years. In 1965, for the first time since the New Deal "revolution,"[25] the Supreme Court employed enhanced scrutiny of a state statute to protect a right that did not appear to be among the "specific prohibition[s]" of the Constitution: the "right of privacy." In *Griswold v. Connecticut*,[26] Justice Douglas sought to reconcile this expansion of judicial scrutiny with the revision of *Carolene Products* he had engineered in *Williamson*, according to which all government regulations of liberty would irrebuttably be upheld unless they violated an enumerated right.

From this need to reconcile the irreconcilable came one of the most ridiculed sentences in the annals of the Supreme Court: the "specific guarantees in the Bill of Rights have penumbras, formed by emanations from those

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23. *Id.* at 143.

24. *Williamson*, 348 U.S. at 487–88. As Justice Douglas explained:

> The legislature *might* have concluded that the frequency of occasions when a prescription is necessary was sufficient to justify this regulation of the fitting of eyeglasses. Likewise, when it is necessary to duplicate a lens, a written prescription may or may not be necessary. But the legislature *might* have concluded that one was needed often enough to require one in every case. Or the legislature *may* have concluded that eye examinations were so critical, not only for correction of vision but also for detection of latent ailments or diseases, that every change in frames and every duplication of a lens should be accompanied by a prescription from a medical expert. To be sure, the present law does not require a new examination of the eyes every time the frames are changed or the lenses duplicated. For if the old prescription is on file with the optician, he can go ahead and make the new fitting or duplicate the lenses. But the law need not be in every respect logically consistent with its aims to be constitutional. It is enough that there is an evil at hand for correction, and that it *might be thought* that the particular legislative measure was a rational way to correct it.

Id. (emphases added).

25. That the constitutional transformation before and during the New Deal was a revolution rather than a restoration has been shown by Bruce Ackerman and Howard Gillman. *See* 1 BRUCE ACKERMAN, WE THE PEOPLE: FOUNDATIONS (1991); HOWARD GILLMAN, THE CONSTITUTION BESIEGED: THE RISE AND DEMISE OF LOCHNER ERA POLICE POWERS JURISPRUDENCE (1993).

26. 381 U.S. 479 (1965).

guarantees that help give them life and substance."[27] Writing for the majority, Justice Douglas adamantly refused to reopen the second road to Scrutiny Land that he had closed down in *Williamson*:

> [W]e are met with a wide range of questions that implicate the Due Process Clause of the Fourteenth Amendment. Overtones of some arguments suggest that *Lochner v. New York* should be our guide. But we decline that invitation as we did in *West Coast Hotel Co. v. Parrish* . . . [and] *Williamson v. Lee Optical Co.* . . . .[28]

Instead he sought to widen the lanes on the "specific prohibition" road of footnote four by locating enforceable guarantees in their "emanations."[29] Thus was born the modern doctrine of "fundamental rights."[30]

This doctrine is a vexatious solution to a problem of the post-New Deal Supreme Court's own making: How does the Court withdraw from scrutinizing economic liberty and thereby uphold the New Deal regulatory program while preserving the judicial protection of "personal liberties"? Because of the particular substance of the rights that were enumerated in the Bill of Rights, footnote four provided what seemed like a neat answer: by protecting only enumerated rights, which happened to be "personal," one could leave unenumerated economic liberties unprotected.

Predictably, the doctrine did not perfectly fit the Court's objective. For one thing the Bill of Rights was overinclusive insofar as it protected economic liberties. Most obvious is the Takings Clause. For this reason, the scope of this express prohibition eventually had to be limited.[31] Similarly, the freedom of speech could include some "commercial speech." And scrutiny of commercial speech could easily bleed over into the realm of economic regulation. When the Court tentatively scrutinized the regulation of truthful commercial speech, Chief Justice Rehnquist, later the author of the *Glucksberg* Two-Step, vociferously objected to protecting commercial speech:

> The Court's decision today . . . returns to the bygone era of *Lochner v. New York*, in which it was common practice for this Court to strike down economic regulations adopted by a State based on the Court's own notions of the most appropriate means for the State to implement its considered policies.

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27. *Id.* at 484.

28. *Id.* at 481–82 (citation omitted).

29. *Id.* at 484.

30. The term "fundamental rights" can be used either of two ways. A fundamental right may be simply any *unenumerated* right that gets one to Scrutiny Land. Alternatively, a fundamental right is *either* an enumerated right *or* an unenumerated right that shifts the presumption of constitutionality and gets a claimant to Scrutiny Land. The choice between these two usages is entirely semantic. Both require that the Court distinguish those unenumerated rights that are "fundamental" and get one to Scrutiny Land from "liberty interests" that do not.

31. *See, e.g.*, Haw. Hous. Auth. v. Midkiff, 467 U.S. 229 (1984) (interpreting "public use" to mean "public purpose"); Kelo v. City of New London, 545 U.S. 469 (2005) (same).

> I had thought by now it had become well established that a State has broad discretion in imposing economic regulations.[32]

And at least one enumerated personal right expressly included in the Bill of Rights, the right to keep and bear arms, needed to be ignored altogether.[33]

The bigger problem with footnote four was its under-inclusiveness. There were personal liberties the Court wanted to protect that were not among the specific prohibitions of the Constitution. Accordingly, the pre-*Glucksberg* Court expanded the set of fundamental rights beyond express prohibitions to include some unenumerated rights—most notably, the right of privacy. In so doing, however, the Court was compelled to distinguish between those unenumerated liberties that merited protection from the others that did not.

While *Griswold* was grounded ostensibly in the penumbras of specific prohibitions in the Bill of Rights, by 1973, in *Roe v. Wade*,[34] the Court rested the right of privacy explicitly on the Due Process Clause.[35] For those judicial "progressives" who favored protecting a right of privacy, the challenge was obvious: how to expand the road to Scrutiny Land without returning to the bad old days of the Progressive Era Court's across-the-board protection of liberty? Some means was needed to distinguish those unenumerated liberties that were fundamental from those that were not.

In contrast, although some judicial "conservatives" surely oppose extending judicial protection to unenumerated rights at all[36]—in essence favoring returning to the due process jurisprudence of 1955 to 1965—this would require overruling *Griswold*, which no current Justice has openly supported. Consequently, those judicial conservatives who purport to accept *Griswold* while opposing extending the right of privacy to abortion (or any other unenumerated liberty) essentially favor somehow returning to the due process jurisprudence of 1965 to 1973.

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32. Central Hudson Gas & Elec. v. Pub. Serv. Comm'n, 447 U.S. 557, 589 (1980) (Rehnquist, J., dissenting) (citation omitted).

33. *But see* Parker v. District of Columbia, 478 F.3d 370 (D.C. Cir. 2007) (affirming that the right to keep and bear arms is a personal and individual right); United States v. Emerson, 270 F.3d 203 (5th Cir. 2001) (same).

34. 410 U.S. 113 (1973).

35. While Justice Blackmun's opinion seemed to equivocate on this in places, it was unambiguous by the end. *Compare id.* at 153 ("This right of privacy, whether it be founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action, as we feel it is, or, as the District Court determined, in the Ninth Amendment's reservation of rights to the people, is broad enough to encompass a woman's decision whether or not to terminate her pregnancy."), *with id.* at 164 ("A state criminal abortion statute of the current Texas type . . . is violative of the Due Process Clause of the Fourteenth Amendment.").

36. *See, e.g.*, Raoul Berger, *The Ninth Amendment as Perceived by Randy Barnett*, 88 Nw. U. L. REV. 1508, 1517–18 (1994) (arguing that the judicial protection of rights is properly limited to those expressly stipulated in the Bill of Rights). The ongoing disparagement of the so-called incorporation doctrine of the Fourteenth Amendment that began as early as 1949 indicates a discomfort even with the first paragraph of footnote four, at least as it applies to states. *See, e.g.*, Charles Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights?—The Original Understanding*, 2 STAN. L. REV. 5 (1949).

Because the substance of their critique would attack *Griswold* as well as *Roe*, however, whether judicial conservatives do or do not want to return to an unqualified reading of footnote four is often unclear. But so long as judicial conservatives concede that *some* unenumerated rights are "fundamental" and therefore merit protection, they must offer a way to distinguish those fundamental unenumerated rights from other liberty interests—preferably one that can be used as a barrier to extending protection to any unenumerated right that has not already been recognized by the Court.

II. PUTTING THE RABBIT INTO THE HAT: THE *GLUCKSBERG* TWO-STEP

Enter *Washington v. Glucksberg*,[37] the case that is the subject of this Symposium. In *Glucksberg*, the Court was called upon to decide whether a state ban on physician-assisted suicide was constitutional. Only if the right in question was deemed "fundamental" would those challenging the statute get to Scrutiny Land. If not, the statute would be upheld as rational. Writing for the majority, Chief Justice Rehnquist offered the following two-step method of identifying fundamental rights:

> Our established method of substantive-due-process analysis has two primary features: First, we have regularly observed that the Due Process Clause specially protects those fundamental rights and liberties which are, objectively, deeply rooted in this Nation's history and tradition and implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed. Second, we have required in substantive-due-process cases a careful description of the asserted fundamental liberty interest. Our Nation's history, legal traditions, and practices thus provide the crucial guideposts for responsible decisionmaking that direct and restrain our exposition of the Due Process Clause.[38]

According to Chief Justice Rehnquist, then, fundamental rights are those that are "objectively, deeply rooted in this Nation's history and tradition, and implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed."[39]

The first step of Rehnquist's formula in *Glucksberg* was borrowed (without attribution) from Justice White's opinion for the majority in *Bowers v. Hardwick*:

> Striving to assure itself and the public that announcing rights not readily identifiable in the Constitution's text involves much more than the imposition of the Justices' own choice of values on the States and the Federal Government, the Court has sought to identify the nature of the rights qualifying for heightened judicial protection. In *Palko v. Connecticut* it was said that this category includes those fundamental liberties that are "implicit in the concept of ordered liberty," such that "neither liberty nor justice would exist if [they] were sacrificed." A different description of fundamental lib-

37. 521 U.S. 702 (1997).

38. *Id*. at 720–21 (citations and internal quotation marks omitted).

39. *Id.* (citations and internal quotation marks omitted).

> erties appeared in *Moore v. East Cleveland*, where they are characterized as those liberties that are "deeply rooted in this Nation's history and tradition."[40]

Now that *Bowers* has been repudiated,[41] it is *Glucksberg* alone upon which courts rely as authority for this test.

There is much that is unclear about the *Glucksberg* version of this formulation. Does a right have to be *both* deeply rooted in tradition *and* implicit in the concept of ordered liberty, or just one or the other? Is a right's rootedness in history and tradition a sign that it is implicit in the concept of ordered liberty? Or, more likely, is the absence of its traditional protection a sign that it is not implicit? Perhaps most importantly, does a liberty need to have been legally protected in our traditions or merely traditionally unregulated?

In this Article, I will pass over these and other difficulties with the *Glucksberg* formulation to focus on a more basic problem with the whole idea of fundamental rights. Unless a right is deemed by the Court to fit one of these formations or the other, it is not considered to be "fundamental" and the claimant cannot get into Scrutiny Land. And *Glucksberg* adds a crucial second step to the analysis: before one can tell whether a right is either "deeply rooted" or "implicit in the concept of ordered liberty," one must first "carefully define" the liberty in question. And this turns out to make all the difference.

In the *Glucksberg* Two-Step, a right must be "carefully defined" before a court can decide whether it is "deeply rooted." But there is always more than one way to accurately define a particular liberty. In *Bowers*, the majority defined the right being asserted as "a fundamental right [of] homosexuals to engage in sodomy."[42] In contrast, the dissent defined the right as "the right to decide for themselves whether to engage in particular forms of private, consensual sexual activity."[43]

The same sort of conflict over defining the right arose in *Raich v. Gonzales*. There, Angel contended that applying the CSA to her cannabis use infringed her *right to preserve her life*.[44] If any right is fundamental, this would surely seem to be. After all, a right to "life" is specifically mentioned in the Due Process Clause itself, and both sides of the abortion debate assert

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40. 478 U.S. 186, 191–92 (1986) (citations omitted).

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

42. *Bowers*, 478 U.S. at 190.

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

44. In its opinion, the Ninth Circuit evaluates Angel's assertion in her brief of a right to "'mak[e] life-shaping medical decisions that are necessary to preserve the integrity of her body, avoid intolerable physical pain, and preserve her life.'" Raich v. Gonzales, No. 03-15481, 2007 WL 754759, at *10 (9th Cir. Mar. 14, 2007) (quoting Appellants' Opening Brief at 11, *Raich*, 2007 WL 754759 (No. 03-15481), *available at* http://www.angeljustice.org/downloads/RemandRaichvGonzalesOpeningBrief.pdf). This formulation of the right was broad enough to encompass co-plaintiff Diane Monson, whose back pain and spasms were not life-threatening, and who withdrew from the lawsuit shortly before briefing was complete. *See id.* at *4. With Diane no longer in the case, the right asserted in oral argument was Angel's right to preserve her life.

its fundamentality. For example, the recently upheld federal Partial-Birth Abortion Ban Act of 2003, like the abortion law struck down in *Roe v. Wade*, includes an exception to its ban when the procedure is necessary to protect "the life of a mother."[45] So if the right at issue in Angel's case is defined as the right to preserve her life, she has jumped through the fundamental rights hoop and entered Scrutiny Land.

How did the government respond to this? By claiming that the liberty in question is the *right to obtain and use marijuana*, which it then denied is either implicit in the concept of ordered liberty or deeply rooted in the nation's history or traditions.[46] Setting aside the fact that marijuana was completely unregulated in the United States until the mid-twentieth century and was widely used as a medication for most of our history, it is obviously much harder to claim that a right to use cannabis for medical purposes meets either of these tests, at least as compared with a right to preserve one's life.

Given that the outcome of a fundamental rights analysis turns entirely on the description of the liberty in question, which definition of the liberty in *Raich* was accurate? The dirty little secret of constitutional law is that, purely as a descriptive matter, they were *both* correct. Angel is preserving her life *and* she is using cannabis for medical purposes. And there are many other accurate ways of defining the liberty: a right to use any substance that is necessary to preserve one's life, a right to take any measures to preserve one's life, a right to use marijuana, a right to act in any way that does not harm others, etc.

But if Angel's and the government's definitions of the liberty are both descriptively accurate—with one leading to enforcement and the other not—a court may determine the outcome of a due process challenge simply by picking the accurate definition that leads to the desired result. Using the *Glucksberg* Two-Step, a court may rule however it wishes simply by choosing how to describe the right. The second step of the doctrine established by *Glucksberg* puts the rabbit in the hat for any future court to pull out whenever it wants to deny protection to an unenumerated right.

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45. *See* Partial-Birth Abortion Ban Act of 2003, 18 U.S.C. § 1531(a) (Supp. III 2003), which reads as follows:

> Any physician who, in or affecting interstate or foreign commerce, knowingly performs a partial-birth abortion and thereby kills a human fetus shall be fined under this title or imprisoned not more than 2 years, or both. This subsection does not apply to a partial-birth abortion that is necessary to save the life of a mother whose life is endangered by a physical disorder, physical illness, or physical injury, including a life-endangering physical condition caused by or arising from the pregnancy itself.

Id.

46. *See* Supplemental Brief for the Appellees at 15, 20, *Raich*, 2007 WL 754759 (No. 03-15481), *available at* http://www.angeljustice.org/downloads/RemandGovernmentsSupplementalBrief.pdf (characterizing plaintiff's claim as "a fundamental right to obtain and use marijuana").

In *Raich*, the Ninth Circuit accepted the government's description, and the outcome followed like night follows day.[47] Because a "right to use cannabis for medical purposes" is not deeply rooted, etc., it was not deemed fundamental. Because it was not fundamental, Angel could not enter Scrutiny Land, and her challenge failed. Had the Ninth Circuit chosen her description of a fundamental right to preserve her life, Angel would still have needed to show at trial that she *must* use cannabis to survive. But because the court accepted the government's description of the right, she never got that chance. Case closed.

Why accept the government's description rather than Angel's? In making its choice, the Ninth Circuit relied on *Glucksberg*, stating that "*Glucksberg* instructs courts to adopt a *narrow* definition of the interest at stake."[48] Actually, as the court's own parenthetical shows, *Glucksberg* required a " '*careful*' description of the asserted fundamental liberty interest."[49] But the Ninth Circuit's spin on *Glucksberg* may well have reflected what Chief Justice Rehnquist meant as opposed to what he wrote.

Eight years before *Glucksberg*, Chief Justice Rehnquist had joined Justice Scalia's plurality opinion in *Michael H. v. Gerald D.*[50] There Justice Scalia began his analysis by reiterating the deeply rooted criterion that is the first part of the *Glucksberg* Two-Step[51] and then offered his own method for defining unenumerated rights in due process cases: "We refer to the most specific level at which a relevant tradition protecting, or denying protection to, the asserted right can be identified."[52] Justice Scalia explained that judges should be as specific as possible in identifying the relevant tradition: "Because [more] general traditions provide such imprecise guidance, they permit judges to dictate rather than discern the society's views."[53] In other words, only by defining rights at the most specific level at which they are

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47. *See Raich*, 2007 WL 754759, at *14 ("Raich's careful statement does not narrowly and accurately reflect the right that she seeks to vindicate. Conspicuously missing from Raich's asserted fundamental right is its centerpiece: that she seeks the right to use *marijuana* to preserve bodily integrity, avoid pain, and preserve her life.").

48. *Id.* at *13 (emphasis added); *see also id.* at *14 ("As in *Glucksberg*, *Flores*, and *Cruzan*, the right must be carefully stated *and narrowly identified* before the ensuing analysis can proceed." (emphasis added)).

49. Washington v. Glucksberg, 521 U.S. 701, 721 (1997) (emphasis added) (quoting Reno v. Flores, 507 U.S. 292, 302 (1993)). Neither did the other two cases cited by the Ninth Circuit in *Raich* require a narrow definition: instead, *Flores* noted that " '[t]he doctrine of judicial self-restraint requires us to exercise the utmost care whenever we are asked to break new ground in this field.' " 507 U.S. at 302 (quoting Collins v. City of Harker Heights, 503 U.S. 115, 125 (1992)). Curiously, the Ninth Circuit quoted both *Glucksberg* and *Flores*, referring respectively to " 'careful description,' " *Raich*, 2007 WL 754759, at *8 (quoting *Glucksberg*, 521 U.S. at 721), and " 'utmost care,' " *Raich*, 2007 WL 754759, at *9 (quoting *Flores*, 507 U.S. at 302), while interpreting both to mean narrow description.

50. 491 U.S. 110 (1989).

51. *Id*. at 122–24 (plurality opinion).

52. *Id.* at 127–28 n.6. Although the rest of Justice Scalia's opinion was joined by three other Justices, this footnote was joined only by Chief Justice Rehnquist. *Id.* at 113.

53. *Id.* at 128 n.6.

traditionally identified would a judge be finding or discerning the right rather than making it up and imposing it on society.

In their landmark 1990 article, Laurence Tribe and Michael Dorf offered several powerful criticisms of Justice Scalia's approach in *Michael H.* First, there is no "single dimension along which abstraction must be measured. A right may be broad along one dimension, while narrow along another."[54] Second, the problem of levels of abstraction is not limited to unenumerated rights but extends with equal force to such enumerated rights as the freedom of speech.[55] Third, "historical traditions, like rights themselves, exist at various levels of generality."[56] Fourth, the choice of a legal "tradition" by which to judge the specificity of a right itself involves a value judgment.[57] Fifth, the description of traditions also involves value judgments.[58] And sixth, it is not at all clear what *is* the most specific level of generality by which to define a tradition protecting a right.[59]

The *Raich* case illustrates how the method described by Justice Scalia in *Michael H.* was subtly transformed by *Glucksberg*. Justice Scalia's approach in *Michael H.* had one step: identify "the most specific level at which a relevant tradition protecting, or denying protection to, the asserted right can be identified."[60] The court looks to historical tradition for the definition of the right. In this approach, it is tradition that (supposedly) provides the specificity of a right's definition, thereby giving rise to all the problems identified by Tribe and Dorf.

In *Glucksberg*, Chief Justice Rehnquist divided the inquiry into two discrete steps: first one defines the right carefully, and second one asks whether the right, so defined, is " 'deeply rooted in this Nation's history and tradition.' "[61] As described in *Glucksberg*, only after "carefully" defining the right does one look to see whether or not it is deeply rooted in tradition. Regardless of whether Rehnquist meant to alter the approach from that of *Michael H.* (which he does not cite in this section of *Glucksberg*), in cases such as *Raich*, courts have interpreted "careful" to mean "narrow" or "specific."

However open-ended Justice Scalia's reliance on tradition to define the specificity of a right may be, Chief Justice Rehnquist's two-step approach is

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54. Laurence H. Tribe & Michael C. Dorf, *Levels of Generality in the Definition of Rights*, 57 U. CHI. L. REV. 1057, 1067 (1990).

55. *Id.* at 1061.

56. *Id.* at 1088.

57. *Id.* at 1087 ("[T]he law has never given its blessing to behavior simply because it is 'traditional.' If tradition sufficed, then the law would readily protect homosexuality, non-nuclear family arrangements, and any number of other behaviors that are widely practiced and longstanding.").

58. *Id.*

59. *Id.* at 1090.

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

61. Washington v. Glucksberg, 521 U.S. 702, 721 (1997) (quoting Moore v. City of E. Cleveland, 431 U.S. 494, 503 (1977) (plurality opinion)). In his actual formulation the order is reversed, but this seems to be the order in which these Two-Steps must be conducted. How else can one look to see whether a right is deeply rooted in the nation's tradition without first defining it carefully?

even more amorphous. Rehnquist leaves the level of abstraction at which one defines a right entirely unconstrained, leaving the outcome of the "deeply rooted" step completely in the control of judges. Of course, that's just fine with Justice Scalia, provided that the narrowest definition is always chosen and the recognition of an unenumerated right is invariably denied. When that happens, judges are not imposing their will on society.

Given that Rehnquist's opinion in *Glucksberg* is more recent and represents the opinion of a majority of the Court, not just two Justices, it is understandable that it is *Glucksberg*'s method rather than *Michael H.*'s that has been followed by lower courts, as illustrated by *Raich*. But this also means that, if they choose not to read "careful" as "narrow" or "specific," judges can also define a liberty more broadly and still claim to be consistent with the letter, if not the spirit, of *Glucksberg*.

III. An Alternative to Fundamental Rights: *Lawrence v. Texas*

Glucksberg is the approach of those judicial conservatives who, like Chief Justice Rehnquist and Justice Scalia, want to see no further extension of substantive due process to other enumerated rights. As illustrated by *Raich*, the *Glucksberg* Two-Step allows a court to turn away any protection of an unenumerated liberty it does not wish to recognize. But *Glucksberg* is not the only approach the Supreme Court has used to analyze unenumerated liberties.

In *Planned Parenthood of Southeastern Pennsylvania v. Casey*,[62] in a portion of the joint opinion commonly attributed to Justice Kennedy,[63] the Court shifted the focus from privacy to liberty—and even relied on the Ninth Amendment to do so: "Neither the Bill of Rights nor the specific practices of States at the time of the adoption of the Fourteenth Amendment marks the outer limits of the substantive sphere of liberty which the Fourteenth Amendment protects. See U.S. Const., Amend. 9."[64]

Then, in *Lawrence v. Texas*,[65] writing for a majority of the Court, Justice Kennedy declined to use the *Glucksberg* Two-Step in reversing *Bowers v. Hardwick*. First, Justice Kennedy rejected the narrow definition of the right at issue as it had been defined in *Bowers*; he stated that the *Bowers* formulation failed "to appreciate the extent of the liberty at stake."[66] Instead, as in *Casey*, Justice Kennedy began his opinion by emphasizing the protection of liberty rather than privacy:

> *Liberty* protects the person from unwarranted government intrusions into a dwelling or other private places. In our tradition the State is not omnipres-

62. 505 U.S. 833 (1992).

63. *See* Linda Greenhouse, *Adjudging a Moral Harm to Women From Abortions*, The New York Times, Apr. 20, 2007, at A18 (identifying the discussion of liberty in *Casey* as the "portion of the opinion usually attributed to Justice Kennedy.").

64. *Id.* at 848.

65. 539 U.S. 558 (2003).

66. *Id*. at 567.

> ent in the home. And there are other spheres of our lives and existence, outside the home, where the State should not be a dominant presence. *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 in its more transcendent dimensions.[67]

Other examples of this focus on liberty pervade the opinion.[68] Indeed, while a right of privacy is only discussed in the specific context of *Griswold*, "liberty" appears in the opinion at least twenty-five times, not including uses of the word "freedom."

Nowhere in his opinion did Justice Kennedy even purport to jump through the hoop provided by *Glucksberg* to get to Scrutiny Land, as Justice Scalia pointedly noted: "Though there is discussion of 'fundamental proposition[s]' and 'fundamental decisions,' nowhere does the Court's opinion declare that homosexual sodomy is a 'fundamental right' under the Due Process Clause . . . ."[69]

But that's not the only way in which *Lawrence* deviated from the modern fundamental rights jurisprudence. While scrutinizing the Texas antisodomy statute, the Court never said it was applying the strict scrutiny that it normally uses to protect a fundamental right. Instead, the *Lawrence* Court seemed to employ the same rational basis scrutiny it had used previously in the Equal Protection Clause case of *Romer v. Evans*,[70] where it had concluded that "the provision was 'born of animosity toward the class of persons affected' and further that it had no rational relation to a legitimate governmental purpose."[71] Justice Scalia also noticed the *Lawrence* Court's deviation from the modern fundamental rights methodology:

> [N]or does [the majority] subject the Texas law to the standard of review that would be appropriate (strict scrutiny) if homosexual sodomy *were* a "fundamental right." . . . Instead the Court simply describes petitioners' conduct as "an exercise of their liberty"—which it undoubtedly is—and proceeds to apply an unheard-of form of rational-basis review that will have far-reaching implications beyond this case.[72]

Exactly what method the Court used in *Lawrence* is not clear. Clearly, however, it was not employing the *Glucksberg* Two-Step. Instead, it broadened the protection of unenumerated rights to protect liberty generally, or at least some version of personal liberty, but with a lower standard of review than

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67. *Id.* at 562 (emphasis added).

68. *See, e.g.*, *id.* at 564 ("We conclude the case should be resolved by determining whether the petitioners were free as adults to engage in the private conduct in the exercise of their liberty under the Due Process Clause of the Fourteenth Amendment to the Constitution."). "There are broad statements of the substantive reach of liberty under the Due Process Clause in earlier [Progressive-era] cases . . . ." *Id.*

69. *Id.* at 586 (Scalia, J., dissenting) (citations omitted).

70. 517 U.S. 620 (1996).

71. *Lawrence*, 539 U.S. at 574 (quoting *Romer*, 517 U.S. at 634).

72. *Id.* at 586 (Scalia, J., dissenting).

strict scrutiny. With the *Lawrence* approach, it is easier to get to Scrutiny Land, but Scrutiny Land offers less protection than it once did.

In Scrutiny Land the government must justify its regulation of or its restrictions on liberty. But a distinctive feature of *Lawrence* was its rejection of a particular governmental justification for the antisodomy law: bare moral disapproval.[73] In doing this, the Court principally relied upon Justice Stevens's dissenting opinion in *Bowers* where he wrote "the fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice; neither history nor tradition could save a law prohibiting miscegenation from constitutional attack."[74]

In other words, *Lawrence* did not purport to assess the degree to which the statutory prohibition might have met a legitimate state purpose. Instead, it rejected an open-ended conception of the police power of states and found that the particular purpose of the statute was illegitimate or improper. This is analogous to finding a federal statute unconstitutional because, however effective it might be, its purpose is not among the enumerated powers in Article I, Section 8. An amicus brief filed in *Lawrence* urged the Court to adopt the position that state police powers do not include restrictions on liberty based solely on the bare moral disapproval of a majority.[75]

Although it represents an entirely different approach to the Due Process Clause, the majority in *Lawrence* did not directly question the method of *Glucksberg*; they merely ignored it. Since *Lawrence* was decided, its method has not made another appearance in a Supreme Court case, despite the fact that Justice Kennedy and the four Justices who joined in his opinion are still sitting. And lower courts, like the Ninth Circuit in *Raich*, largely continue to employ the *Glucksberg* Two-Step to prevent claimants from getting to Scrutiny Land.[76] Nevertheless, *Lawrence* points the way to an alternative to the modern doctrine of fundamental rights: protecting a "presumption of liberty."

IV. The Presumption of Liberty

From its inception in the 1930s, modern fundamental rights doctrine was designed to restrict the protection of liberty that the Supreme Court had afforded prior to the New Deal. Its very name establishes that, the Ninth

73. *Id.* at 577–78 (majority opinion).

74. Bowers v. Hardwick, 478 U.S. 186, 216 (1986) (Stevens, J., dissenting).

75. *See* Brief of the Institute for Justice as Amicus Curiae in Support of Petitioners at 1, Lawrence v. Texas, 539 U.S. 558 (Jan. 16, 2003) (No. 02-102) ("Texas asserts that it may criminalize a noncommercial, nonpublic, non-harmful activity between consenting adults in the privacy of their home for the sole reason that it believes that activity immoral. This brief asserts that Texas' statute exceeds the police power.").

76. *See* Brian Hawkins, Note, *The* Glucksberg *Renaissance: Substantive Due Process since* Lawrence v. Texas, 105 Mich. L. Rev. 409, 431 (2006). *But see* Reliable Consultants, Inc. v. Earle, No. 06-51067, 2008 WL 383034, at *2 (5th Cir. Feb. 12, 2008) (holding a state ban on the commercial sale of sex toys unconstitutional "[b]ecause the asserted governmental interests for the law do not meet the applicable constitutional standard announced in Lawrence v. Texas").

Amendment notwithstanding, only some liberties—those that are fundamental rights—get enhanced protection. After this doctrine was promulgated, other liberties remained somewhat protected, at least in principle, by the potential to affirmatively show that a particular restriction on an unenumerated liberty was irrational. As we have seen, this option for protecting unenumerated rights was effectively eliminated in 1955.[77]

Perhaps as an unintended consequence of making it impossible to rebut the presumption of constitutionality based on a statute's irrationality, the Court ultimately expanded the notion of fundamental rights in 1965 to include some unenumerated rights that were not among the "specific prohibitions" of the Constitution. This expansion was highly controversial, especially after it was used to protect abortion rights.

By allowing a court to reject any unenumerated rights claim it might care to, the *Glucksberg* Two-Step limited the protection of additional liberties, thereby moving the doctrine of fundamental rights back to where it stood between 1955 and 1965 while grandfathering in *Griswold*. As Tribe and Dorf observed, "Justice Scalia is aware that the method of [*Michael H.*'s] footnote 6 would severely curtail the Supreme Court's role in protecting individual liberties. Indeed, that seems to be his purpose."[78]

There is just one tiny problem with this nifty doctrine: it is unconstitutional. The Ninth Amendment prohibits any rule of construction that either disparages or denies an unenumerated right simply because it was not enumerated.[79] As we have seen, this is exactly what footnote four did; it disparaged unenumerated rights by reserving the greatest protection for the "specific prohibitions" in the Bill of Rights. After *Carolene Products*, an unenumerated right could still be protected, at least in theory, but it fell to the claimant to rebut the presumption of constitutionality and show that a restriction on such a liberty was irrational. After *Williamson*, the presumption of constitutionality became virtually irrebuttable, thereby denying unenumerated rights altogether. With or without a rebuttable presumption, a two-tier treatment of constitutional rights violates both the plain and original meaning of the Ninth Amendment, which bars the disparagement or denial by the federal government of the natural rights of individuals.[80]

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77. Curiously, in his dissenting opinion in *Lawrence*, Justice Scalia asserts that "liberty interests unsupported by history and tradition, though not deserving of 'heightened scrutiny,' are *still* protected from state laws that are not rationally related to any legitimate state interest." *Lawrence*, 539 U.S. at 593 n.3 (Scalia, J., dissenting). For this proposition he relies upon *Glucksberg* and cites the page where the following much less rights-affirming passage appears: "[B]y establishing a threshold requirement—that a challenged state action implicate a fundamental right—before requiring more than a reasonable relation to a legitimate state interest to justify the action, [fundamental rights jurisprudence] avoids the need for complex balancing of competing interests in every case." Washington v. Glucksberg, 521 U.S. 702, 722 (1997). It is doubtful that Justice Scalia meant to suggest that the rational relation test has more bite than he knows it has; indeed in *Lawrence* itself he protests giving it any bite at all.

78. Tribe & Dorf, *supra* note 54, at 1093.

79. *See* Barnett, *supra* note 15, at 1.

80. *See id.* at 80; *see also* Randy E. Barnett, *The People or the State?:* Chisholm v. Georgia *and Popular Sovereignty*, 93 VA. L. REV. 1729, 1748–55 (2007) (discussing why the protection of

In *U.S. Public Workers v. Mitchell*, the New Deal Court responded to this constitutional problem by casually reducing the meaning of the Ninth Amendment to that of the Tenth.[81] In *Troxel v. Granville*,[82] however, Justice Scalia dealt with the problem in a different fashion. Perhaps because the Tenth Amendment has now been held to be a justiciable affirmative constraint on federal power,[83] he neither cited *Mitchell* nor equated the Ninth Amendment with the Tenth. Instead, Justice Scalia simply dismissed the Ninth Amendment as nonjusticiable without any examination of the Amendment's text or original meaning. Although he agreed that the right of parents to direct the upbringing of their children is "among the 'othe[r] [rights] retained by the people' which the Ninth Amendment says the Constitution's enumeration of rights 'shall not be construed to deny or disparage,' "[84] he asserted that "the Constitution's refusal to 'deny or disparage' other rights is far removed from affirming any one of them, and even further removed from authorizing judges to identify what they might be, and to enforce the judges' list against laws duly enacted by the people."[85] Accordingly, such parental rights are to be protected only "in legislative chambers or in electoral campaigns."[86] Scalia then remarked, "I do not believe that the power which the Constitution confers upon me *as a judge* entitles me to deny legal effect to laws that (in my view) infringe upon what is (in my view) that unenumerated right."[87] By this maneuver, Justice Scalia was able to convert a matter of constitutional interpretation—that is, the original meaning of the Ninth Amendment—into a noninterpretive issue of process or judicial role.[88]

This is neither the time nor place to dissect all that is wrong with Justice Scalia's reading of the Ninth Amendment. Suffice it to say that the Ninth Amendment is not a "source" of constitutional rights. The "other" rights to which it refers are natural rights that preexist the Constitution. The Ninth Amendment affirms that a preexisting natural right is not to be treated any differently from a natural right that happened to have been included in the Constitution's enumeration of certain rights.[89] Perhaps it would be possible

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"other rights retained by the people" extends beyond the rejection of one particular construction of the Constitution based on the existence of enumerated rights).

81. *See supra* note 15.

82. 530 U.S. 57 (2000).

83. *See, e.g.*, Printz v. United States, 521 U.S. 898, 919, 923 (1997).

84. *Troxel*, 530 U.S. at 91 (Scalia, J., dissenting).

85. *Id.*

86. *Id.* at 92.

87. *Id.*

88. *See* Randy E. Barnett, *Constitutional Clichés: Does Trite Make Right?*, 36 CAP. U. L. REV. (forthcoming 2008) (discussing the tendency to use various catch phrases to convert matters of substance into issues concerning judicial role).

89. *See* Barnett, *supra* note 15; *see also* Randy E. Barnett, *Kurt Lash's Majoritarian Difficulty*, 60 STAN. L. REV. (forthcoming 2008) (discussing the fundamental problems with a majoritarian reading of the rights retained by the people).

for courts to decline to protect any rights at all, including those enumerated in the Bill of Rights, without violating the Ninth Amendment (though I do not think so). But so long as enumerated rights merit judicial protection, so too do unenumerated rights. So saith the Ninth Amendment, which has not yet been repealed.

As I have elsewhere proposed,[90] the original meaning of the Ninth Amendment, together with that of the Privileges or Immunities Clause of the Fourteenth Amendment,[91] supports the conclusion that the Constitution *does* protect a right to liberty, as the Court hints in *Lawrence*. By acknowledging this protection and moving further toward a doctrine recognizing a general presumption of liberty, the Supreme Court could extract itself from its fundamental rights tangle.

A genuine problem with a general presumption of liberty arises, however, if "protecting" a right means its exercise cannot be regulated or restricted in any way. If this is what it entails to protect a right, then of course such protection would need to be reserved for just a handful of super-important or "fundamental" rights. Otherwise, all lawmaking powers of government would be completely overridden by individual rights, which is obviously not a mandate of the Constitution.

Justice Scalia made much the same point in his dissenting opinion in *Lawrence*:

> [The Texas antisodomy statute] undoubtedly imposes constraints on liberty. So do laws prohibiting prostitution, recreational use of heroin, and, for that matter, working more than 60 hours per week in a bakery. But there is no right to "liberty" under the Due Process Clause, though today's opinion repeatedly makes that claim. The Fourteenth Amendment *expressly allows* States to deprive their citizens of "liberty," *so long as "due process of law" is provided*."[92]

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90. *See* Randy E. Barnett, *The Proper Scope of the Police Power*, 79 NOTRE DAME L. REV. 429 (2004). The next three paragraphs summarize this analysis.

91. The Privileges or Immunities Clause declares that "[n]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States." U.S. CONST. amend. XIV, § 1.

92. Lawrence v. Texas, 539 U.S. 558, 592 (2002) (Scalia, J., dissenting) (citations omitted) (quoting U.S. CONST. amend. XIV, § 1). Of course, taken seriously, the final sentence in this passage would also prohibit courts from striking down state laws under the Due Process Clause of the Fourteenth Amendment when they violate enumerated rights. Any resistance by Justice Scalia to this implication of adopting a purely "procedural" conception of due process would have to be based on precedent, or simply on its objectionable consequences, rather than on original meaning. *See generally* Randy E. Barnett, *Scalia's Infidelity: A Critique of "Faint-Hearted" Originalism*, 75 U. CIN. L. REV. 7 (2006) (describing how Justice Scalia justifies overriding original meaning with precedent or objectionable consequences).

A serious problem with modern "substantive" due process doctrine—that partially compensates for the wrongful redaction of the Privileges or Immunities Clause of the Fourteenth Amendment by the Supreme Court in *The Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1873)—is that it invites this sort of overstatement. While literally true of the original meaning of the Due Process Clause, it is false with respect to the original meaning of the Constitution as a whole. *See* RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY 192–208 (2004) (discussing the Supreme Court's substitution of substantive due process for the Privileges or Immunities Clause).

But the judicial protection of liberty simply requires that the government must justify as necessary and proper its exercise of its powers to (1) prohibit wrongful and (2) regulate rightful acts. A law is "proper" if its purpose is within the power of government to pursue. At the federal level, the purpose of the law must be among those purposes enumerated in Article I, Section 8 of the Constitution. At the state level, the purpose of a statute must be within the properly-defined police power of a state. The term "police power" does not appear in the Constitution; it is a constitutional construction that allows the Constitution to be put into effect. As such, it may not be used to contradict or override what the Constitution says or what it implies.

Implicit in the Ninth Amendment, and the Privileges or Immunities Clause of the Fourteenth, is the principle that the people retain their natural rights when they surrender to government the executive power to enforce their rights.[93] A conception of the police power that is consistent with this principle would have the following components: (1) a *prohibition* of an act is proper when the act violates the rights of others (e.g., murder, rape, robbery, theft, trespass)—because such an act wrongfully violates the rights of another person, it is not properly called a "liberty"; (2) a *regulation* of liberty is proper when it is necessary to protect the rights of others from the risk of violation—for example, health and safety laws; and (3) to establish that a regulation of liberty is "necessary" would require the government to show some degree of fit between means and ends and that the measure is not simply a pretext for restricting the exercise of liberties of which the legislature disapproves.

This approach to protecting liberty generally resembles how courts now protect the enumerated natural rights of speech, press, and assembly. The prohibition of wrongful acts, such as fraud, defamation or trespass are constitutional notwithstanding that the acts being prohibited are speech or assembly. Regulations of rightful exercises of speech or assembly in the form of rules governing "time, place, and manner" are proper insofar as there is an appropriate fit between means and ends, they do not place an undue burden on the exercise of these rights, and they are not pretexts for prohibiting speech of which the government disapproves.

While there is much more to be said about this approach, this brief sketch reveals the following features:

(1) Instead of distinguishing those liberties that merit enhanced protection from those that do not, this approach seeks to identify the proper powers of federal and state governments.

(2) Rather than place an insurmountable burden of justification on the government that is fatal in fact as "strict scrutiny" is sometimes said to be, a presumption of liberty would be genuinely rebuttable.

(3) Only laws restricting the rightful exercise of a liberty—a small subset of all legislation—are scrutinized under this approach (although laws

93. I discuss this implication of the Ninth Amendment in Barnett, *supra* note 80.

> that do not restrict liberty might be scrutinized on other grounds, such as those suggested by the other two paragraphs of footnote four).

One potential price of extending judicial protection to liberty generally is the reduction of the protection now afforded to those preferred liberties that are deemed to be fundamental. But it is not at all clear that the proposed degree of scrutiny is any more permissive than the way the Supreme Court now protects the freedoms of speech and press in practice while purporting to apply "strict scrutiny."[94] Of course, a court could always preserve a two-tiered approach by which the government must justify its restrictions on liberties as described above, but meet an increased burden when laws trench upon rights deemed to be fundamental. Because such an approach would only disparage rather than completely deny the other rights retained by the people, it would be a significant improvement over the modern doctrine of fundamental rights, especially as expounded by the *Glucksberg* Two-Step.

CONCLUSION

Although her case took five years to litigate, Angel Raich never got her day in court. The entire trip to the Supreme Court and back was pre-trial. All Angel was seeking was a hearing at which the government would have to justify its restrictions on her access to home grown medical cannabis. Perhaps it could have done so, but because the Ninth Circuit employed the *Glucksberg* Two-Step, it never had to try.

Requiring the government to justify its restrictions on liberty as necessary and proper need not pose an insurmountable obstacle to government regulation. Presumably, if Congress and state legislatures take seriously the limits imposed upon them by the Constitution, they should be in a position to substantiate a proper rationale for restricting liberty. For those who fear this is not the case, Scrutiny Land is a scary place that needs to be avoided. But for Angel Raich, it was the land promised by the Constitution that she was not allowed to enter.

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94. *See, e.g.*, Buckley v. Valeo, 424 U.S. 1, 16, 75 (1976) (per curiam) (applying "exacting scrutiny" and a "strict standard of scrutiny" to, and in large part upholding, regulations of political speech and association); McConnell v. Fed. Election Comm'n, 540 U.S. 93 (2003) (following *Buckley*); Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 VAND. L. REV. 793 (2006).