USING POPULAR REFERENDUMS TO DECLARE FUNDAMENTAL RIGHTS

I. INTRODUCTION

Rights are generally understood as individual interests that society values enough to afford legal protection.[1] However, rights also define the boundaries between spheres of political authority.[2] Under either understanding, rights impose limits on governmental action against individuals. Focus on the former understanding of rights usually leads to the often challenging task of attempting to measure the objective value of an individual interest; focus on the latter examines the "legitimate scope of state authority in the specific . . . arena at issue."[3]

The Founding Fathers were acutely aware of the "struggle between Liberty and Authority."[4] Proceeding with the assumption that each person possesses certain fundamental rights, the Constitution sought to establish a national government of limited powers so as to preserve these rights. Although popular sovereignty lies at the heart of our government, the Framers refused to implement a direct democracy and instead, created a republican government to control the passions of the people with a rational, informed, and deliberate process that would protect minority interests.[5] After all, the tyranny of the majority was dreaded as much as the tyranny

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[1] *See* RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 184-205 (Harvard University Press 1977); Alan E. Brownstein, *The Right Not to be John Garvey*, 83 CORNELL L. REV. 767, 813 (1998).

[2] *See* Richard H. Pildes, *Why Rights are Not Trumps: Social Meanings, Expressive Harms, and Constitutionalism*, 27 J. LEGAL STUD. 725, 731 (1998).

[3] *Id.* For example, a pro-choice advocate might characterize the issue as involving personal autonomy and the right to make decisions involving one's body, while a pro-life advocate might characterize the issue in terms of an unborn fetus's interest in survival and the legitimacy of governmental authority to protect this interest. Under this method, emphasis is placed on the value of that interest. Alternatively, the issue can be examined by asking whether the federal government has the authority to control such a decision. Under this method, the focus is on the scope of legitimate governmental authority over such matters.

[4] JOHN STUART MILL, ON LIBERTY 1 (John Gray ed., Oxford World's Classics 1998) (1869).

[5] *See* THOMAS E. CRONIN, DIRECT DEMOCRACY: THE POLITICS OF INITIATIVE, REFERENDUM, AND RECALL 7, 13 (Harvard University Press 1989).

of a king. The idea of the people as lawmakers is therefore controversial.

Fundamental rights limit governmental action because such rights receive special protection in courts. Laws that restrict fundamental rights are presumptively unconstitutional. However, fundamental rights do not include all rightful conduct. Conduct that does not harm others is regularly infringed upon by legislation, sumptuary[6] and otherwise. When challenged, such laws enjoy a presumption of constitutionality, and the individual bears the burden of proving that the government had no rational basis for enacting the legislation.

According to the Constitution, the people *retained* certain rights when they consented to being governed.[7] Courts are generally reluctant to identify these rights. If the people retain any rights, only the people have the power to specify them. As government grows, the danger of infringing on those rights increases. Therefore, the people may appropriately set limits on governmental authority that threaten certain rights which the people view as fundamental to liberty. Once enumerated, the government would not be able to infringe upon these rights absent a compelling interest.

Once declared, these rights can be used in court to shift the burden of proof to the government whenever liberty interests are involved. This note concludes that the device of the popular referendum, or initiative, should be used to preserve any rights that were retained by the people when the federal government was formed.[8] Doing so would ease the burden of courts and give notice to legislatures. Declaring fundamental rights not surrendered to the government is not lawmaking, nor is it the proper function of the legislature or the courts. It is a power specifically left to the people by the Constitution and can only be exercised by the people.

Part I of this note examines the concept of fundamental rights and provides a brief history of its judicial doctrine. In distinguishing fundamental rights from other rights, courts are imposing their own value judgments, which is problematic because only traditional rights receive protection.

Part II further examines how courts distinguish between fundamental rights and liberty interests. This distinction determines the level of scrutiny with which challenged laws are evaluated.

Part III of this note explores the inherent problems in protecting unenumerated rights. Some judges support doing so, while others assert that it is outside the power of the judiciary. Problematically, the modern Supreme Court protects some

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[6] "Sumptuary legislation" refers to regulation or prohibition of personal conduct on moral or religious grounds, e.g., laws against gambling, prostitution, and recreational drug use.

[7] U.S. CONST. amend. IX. states that, "[t]he enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people."

[8] The terms "initiative" and "referendum" are used interchangeably here, although technically, an initiative refers to an original statute or constitutional amendment proposed by the people and submitted to the legislature for approval, whereas a referendum refers to the demand of the people, by petition, to popularly approve or revoke a law already passed by the legislature. *See* JOHN M. ALLSWANG, THE INITIATIVE AND REFERENDUM IN CALIFORNIA, 1898-1998 1 (Stanford University Press 2000).

unenumerated rights, which raises questions about the competency and the legitimacy of such power. Part IV concludes that the issue of rights cannot be left to legislatures.

Part V of this note contemplates the role of the people in deciding the issue of fundamental rights, and concludes that the power belongs to them and should be exercised using the device of the popular referendum.

II. FUNDAMENTAL RIGHTS: A BRIEF SUMMARY

Some rights are more important than others. Rights have historically been distinguished by their importance, whether formulated as rights, commandments, laws, or moral maxims.[9] With respect to the Ten Commandments, for example, it would be difficult to argue that "You shall not Kill" is of equal importance to "Neither shall you steal."[10] Accordingly, violation of these commandments has usually been punished with different degrees of severity.[11]

Likewise, the Bill of Rights does not state or imply that the right against unreasonable searches and seizures[12] is of equal importance to the right against excessive bail.[13] Distinctions must inevitably be made, since societies value different rights at different times, and certain transgressions cause more harm than others. James Madison, the person primarily responsible for the framing and enactment of the Bill of Rights, spoke of the "great rights, the trial by jury, freedom of the press, . . . [and] liberty of conscience."[14]

The Constitution did not originally include a Bill of Rights.[15] The Federalists argued that, because the federal government could only act within its enumerated powers, a Bill of Rights would be redundant, even dangerous.[16] An enumeration of rights would be redundant because all rights and powers not surrendered to the national government were retained; therefore, no further explicit protection was needed.[17] An enumeration of rights would be dangerous, the Federalists argued, because any right excluded could be lost.[18] Furthermore, such an enumeration could be used to "justify an unwarranted expansion of federal powers."[19] Eventually,

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[9] MILTON R. KONVITZ, FUNDAMENTAL RIGHTS: HISTORY OF A CONSTITUTIONAL DOCTRINE 2-3 (Transaction Publishers 2001).

[10] *See id.* at 2.

[11] *See id.* at 2-3.

[12] U.S. CONST. amend. IV ("The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . .").

[13] U.S. CONST. amend. VIII ("Excessive bail shall not be required, nor excessive fees imposed, nor cruel and unusual punishments inflicted.").

[14] KONVITZ, *supra* note 9, at 8.

[15] *See* Randy Barnett, *Reconceiving the Ninth Amendment*, 74 CORNELL L. REV. 1, 4-10 (1988).

[16] *See id.*

[17] *See id.* at 4

[18] *Id.* at 10.

[19] *Id.*

"[t]he danger of interpreting federal powers too expansively was handled by the Tenth Amendment, while the danger of jeopardizing unenumerated rights was addressed by the Ninth Amendment."[20]

The Ninth Amendment confirms the existence of unenumerated rights not surrendered to the government.[21] The notion that the people retained certain rights upon which the government may not ordinarily infringe is also supported by the Supreme Court's recognition of certain unenumerated rights as fundamental through the principle of substantive due process.[22]

There is some evidence to suggest that courts have a *duty* to protect *all* rights, enumerated or not.[23] If the Federalists had prevailed following the ratification of the Constitution, no Bill of Rights would have been included.[24] Therefore, if the Federalists supported the protection of *any* rights by the judiciary, only unenumerated rights could be supported.[25]

The Supreme Court first recognized the concept of fundamental rights in 1823 in an opinion by Justice Bushrod Washington.[26] In interpreting the Privileges and Immunities Clause of Article IV, Section 2 of the Constitution,[27] Justice Washington concluded that the privileges and immunities protected by the clause are those that "are, in their nature, fundamental; which belong, of right, to the citizens of all free governments; and which have, at all times, been enjoyed by the citizens of the several States . . . ."[28]

Originally, the Bill of Rights applied only to the federal government and not to the states. In 1925, the Supreme Court held the First Amendment applicable to the states through the Fourteenth Amendment's due process clause.[29] The Court held that "freedom of speech and . . . press . . . are among the fundamental personal rights and 'liberties' protected by the due process clause of the Fourteenth Amendment from impairment by the states."[30] The Supreme Court developed the doctrine of fundamental rights in 1937. Fundamental rights came to include liberties protected by the Bill of Rights and others, as well, provided the rights were "rooted in the traditions and conscience of our people . . ." and "of the very essence

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[20] Barnett, *supra* note 15, at 10.

[21] U.S. CONST. amend. IX.

[22] *See, e.g.*, Griswold v. Connecticut, 381 U.S. 479 (1965) (holding that a state law against contraceptive use was invalid because it infringed on the right to marital privacy).

[23] Barnett, *supra* note 15, at 4-5.

[24] *See id.*

[25] *See id.*

[26] Corfield v. Coryell, 6 Fed. Cas. 546 (No. 3230) (C.C.E.D. Pa. 1823).

[27] U.S. CONST. art. IV, § 2 states, "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States."

[28] Corfield, 6 Fed. Cas. at 551. The Court, however, rejected endowing themselves with the power to review restrictive state legislation as it later did using the due process and equal protection clauses of the Fourteenth Amendment; for a general discussion see KONVITZ, *supra* note 9, at 9.

[29] Gitlow v. New York, 268 U.S. 652 (1925).

[30] *Id.* at 666 (citing U.S. CONST. amend. I).

of a concept of ordered liberty . . . [such] that a fair and enlightened system of justice would be impossible without them."[31] This principle, articulated by Justice Cardozo, became the standard for determining whether a right is fundamental, and is still used by the Court today. By adopting this test, the Court implicitly acknowledges that the protection of rights involves imposing a hierarchy of values on constitutional interpretation.[32] In other words, some rights are more important than others.

The kind of value judgments exercised by the courts is problematic. First, there is no practical distinction between a right that is fundamental and one that is simply traditional. If courts are only willing to protect traditional rights, many others will go unprotected. Second, judges are protecting rights that are simply not enumerated in the Constitution. This raises questions of competence and the legitimacy of the courts' authority to make these difficult determinations.

III. THE PROBLEMATIC DISTINCTION BETWEEN LIBERTY INTERESTS AND FUNDAMENTAL RIGHTS IN COURTS[33]

Where the constitutionality of a statute is challenged, courts have drawn a distinction between a liberty interest and a fundamental right.[34] This distinction determines the level of scrutiny courts are to apply when evaluating statutes. Courts first resolve whether the claimed right is fundamental. If the right is deeply rooted in our nation's tradition and history, or implicit in the concept of ordered liberty, it is fundamental[35] and the statute must pass strict scrutiny, which requires that the

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[31] Palko v. Connecticut, 302 U.S. 319, 325 (1937).

[32] KONVITZ, *supra* note 9, at 13.

[33] Because much of this note deals with the distinction between liberty interests and fundamental rights, some clarification is warranted. "Liberty interest" refers to any conduct that, in and of itself, does not harm or interfere with the rights of others. For example, using drugs in one's home or owning a gun are liberty interests. "Fundamental rights" refers to rights that, in the words of Justice Cardozo, represent "the very essence of a scheme or ordered liberty. . . principles of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Palko*, 302 U.S. at 325 (internal quotes omitted). Because they are so rooted in our tradition of liberty, fundamental rights receive special protection by the courts against government intrusion, usually by way of the Fourteenth Amendment due process clause. *See, e.g., Griswold*, 381 U.S. at 485-86.

[34] *See* Foucha v. Louisiana, 504 U.S. 71, 117 (1992) (liberty interest is not a *per se* fundamental right) (Thomas, J., dissenting); Michael H. v. Gerald D., 491 U.S. 110, 111 (1989) (ruling, *inter alia*, that the claimant failed to prove that his liberty interest in visitation and paternity rights of a child born out of an adulterous affair was one so deeply imbedded within society's traditions as to be a fundamental right.).

[35] *See* Moore v. East Cleveland, 431 U.S. 494, 503 (1977) (plurality opinion); Snyder v. Massachusetts, 291 U.S. 97, 105 (1934) (explaining that the state of Massachusetts could regulate court procedure so long as it did not offend a principle of justice "so rooted in the traditions and conscience of our people as to be ranked as fundamental"); *Palko*, 302 U.S. at 325-26 ("[I]mplicit in the concept of ordered liberty" . . . "[such] that neither liberty nor justice would exist if they were sacrificed.").

statute be narrowly tailored to serve a compelling government interest.[36] The test has been called "strict in theory, fatal in fact," meaning that, practically speaking, statutes usually fail to survive.[37] The individual's interest in exercising his or her fundamental right is favored, and the burden is on the government to prove that the law is both necessary and proper.

On the other hand, if the court classifies the right as a liberty interest, the statute is evaluated under a rational basis test. This test determines whether the statute is a reasonable measure aimed at remedying some public evil.[38] Here, the presumption favors the constitutionality of the statute, and the burden is on the individual to show that the statute unreasonably interferes with his or her interest.[39]

A. From a Well-Loved Dissent: The Rational Basis Test

The rational basis test seems to have originated from Justice Holmes' dissent in *Lochner v. New York*,[40] an infamous case among constitutional scholars. The majority invalidated a state law that prohibited bakers from working more than sixty hours a week or more than ten hours a day.[41] The majority sharply scrutinized the purpose of the law and the intent of the legislature in enacting it.[42] The Court reasoned that the baker convicted of violating the law was presumptively entitled to determine his own work hours, and the government had to show that its interest in restricting those hours was fair, reasonable, and appropriate.[43]

In his dissent, Justice Holmes sharply criticized the majority's scrutiny of the legislature.[44] However, Justice Holmes did seem to accept the principle of substantive due process by stating that a law could be invalidated upon a finding "that a rational and fair man necessarily would admit that the statute proposed would infringe fundamental principles as they have been understood by the traditions of our people and our law."[45] It would appear, then, that like the modern Court, Justice Holmes would not disapprove of enforcing at least some unenumerated rights.

With the onset of the Great Depression and Franklin Roosevelt's New Deal

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[36] *See* Reno v. Flores, 507 U.S. 292, 301-02 (1993) ("[The Fourteenth Amendment] forbids the government to infringe [upon] . . . 'fundamental' liberty interests *at all*, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest.").

[37] Gerald A. Gunther, *The Supreme Court, 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972).

[38] *See generally* Williamson v. Lee Optical Co., 348 U.S. 483 (1955).

[39] *See id.*

[40] 198 U.S. 45 (1905).

[41] *See id.*

[42] *Id.* at 57.

[43] *See id.* at 56.

[44] *See id.* at 65 (Holmes, J., dissenting).

[45] *Id.* at 76.

program, the Supreme Court began backtracking from the policies promulgated by the *Lochner* Court.[46] As legislatures passed more economic legislation aimed at alleviating the pressures of the Depression, the Supreme Court viewed its role in a far more limited fashion, in an attempt to avoid the appearance of creating policy that thwarted the will of the people as represented by their legislatures.[47] The trend culminated with *United States v. Carolene Products*,[48] where Justice Stone articulated the famous footnote four, which outlined the modern theory of constitutional interpretation.[49] Judicial review of economic legislation was virtually abdicated, and the Court maintained that heightened scrutiny was only appropriate where legislation comes within a specific constitutional prohibition, undermines the political process, or affects discrete and insular minorities.[50] Although the Court's new policy was arguably appropriate during the Depression, it has continued until today without much challenge. Therefore, under current doctrine, unless a law violates a specifically enumerated right or a *traditional* right, deference is given to the legislature, and the law is upheld unless it can be shown that the law is irrational.

There have been several instances where the Supreme Court has defied majoritarian sentiment and ruled in favor of minority liberty interests. For example, in *Brown v. Board of Education*,[51] the Court held that segregated schools were unconstitutional, even though the vast majority of Americans supported "separate but equal" schooling.[52] However, as important as the decision was, Brown still fell in line with *Carolene*'s footnote four, and therefore did not suggest any new method of protecting unenumerated rights.

B. Liberty Not Protected: Bowers v. Hardwick[53]

An example of the effect of the distinction between a liberty interest and a fundamental right is the case of *Bowers v. Hardwick*, where the Supreme Court upheld the constitutionality of a criminal statute prohibiting sodomy, and accordingly, ruled that the claimant had no fundamental right to engage in homosexual sodomy.[54] The dissent characterized the issue differently, arguing that the majority was rejecting the fundamental right to engage in consensual, private sexual conduct.[55] The right in question in *Bowers* can properly be called a liberty

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[46] *See generally*, Nebia v. New York, 291 U.S. 502 (1934); Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398 (1934).

[47] *Nebia*, 291 U.S. at 526-27.

[48] 304 U.S. 144 (1938).

[49] *See id.* at 152.

[50] *See id.*

[51] 347 U.S. 483 (1954).

[52] *See* Michael McConnell, *The Originalist Justification for Brown: A Reply to Professor Klarman*, 81 VA. L. REV. 1937, 1940 (1995).

[53] 478 U.S. 186 (1986).

[54] *See id.*

[55] *See id.* at 214 (Stevens, J., dissenting). In a separate dissent, Justice Blackmun

interest if not a fundamental right, since it consists of conduct that does not harm others.

Bowers is an example of the Supreme Court reinforcing conventional majoritarian judgments of traditionally immoral behavior. In such a case, where both politicians and courts are reluctant to defend traditionally unpopular liberty interests, the status quo seems firmly entrenched. Even as majoritarian trends change in urban areas in favor of tolerating traditionally questionable liberty interests, the pressure on the establishment to maintain current policy is substantial. Even if the public became less concerned with and threatened by certain conduct, such as smoking marijuana to alleviate suffering, courts and politicians have little incentive to consider those interests. The majority of constituents may not be bothered by certain behavior, and therefore may not pressure politicians to change existing policy.

The interest of the government in restricting arguably harmless conduct to promote or protect public health and welfare is rational enough, and traditional enough, to support a rational basis level of scrutiny. However, such an interest does not survive strict scrutiny because it is too broad and vague. With respect to general liberty interests, legislatures can potentially pass any law to protect the public interest. The government receives the benefit of the doubt, rather than the individual citizen. However, as Ronald Dworkin has concluded, legal rights must protect individuals' freedom of action from governmental efforts to promote the general interest if they are to be taken seriously.[56]

IV. THE PROTECTION OF UNENUMERATED RIGHTS IS LIMITED TO TRADITIONAL RIGHTS

Courts are generally reluctant to identify unenumerated rights. Many judicial conservatives eschew any attempt at identification, maintaining that such an exercise is beyond their power.[57] Judges who do engage in such an exercise limit the declaration of unenumerated fundamental rights to those that are deeply rooted in our history and tradition, a small and limited pool.[58]

A. The Modern Supreme Court's Approach

The modern Supreme Court supports the protection of some unenumerated rights.[59] The Ninth Amendment's mandate, that "the enumeration in the Constitution of certain rights shall not be construed to deny or disparage others

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characterized the right at issue as the "right to be let alone." Interestingly, the challenged statute that criminalized sodomy defined the conduct as "any conduct from one person's genitals to another's mouth or anus." GA. CODE ANN. § 16-6-2(a) (1984). The conduct at issue, therefore, encompassed more than homosexual behavior.

[56] *See* DWORKIN, *supra* note 1, at 184.

[57] *See, e.g.*, Troxel v. Granville, 530 U.S. 57, 91-95 (2000) (Scalia, J., dissenting).

[58] *See Moore*, 431 U.S. at 503; *Snyder*, 291 U.S. at 105; *Palko*, 302 U.S. at 325-26.

[59] *See, e.g.*, Planned Parenthood v. Casey, 505 U.S. 833 (1992).

retained by the people," seems to require it.[60] Some judicial conservatives, such as Justice Scalia, agree that there are unenumerated rights, but assert that the judiciary is not competent to discern what these rights are.[61]

When asked about his view of the Ninth Amendment during his Supreme Court confirmation hearing, Judge Robert Bork likened the Amendment to an inkblot on the Constitution, stating that:

> I do not think you can use the Ninth Amendment unless you know something of what it means. For example, if you had an amendment that says 'Congress shall make no' and then there is an inkblot, and you cannot read the rest of it, and that is the only copy you have, I do not think the court can make up what might be under the inkblot.[62]

In essence, Judge Bork would not support the protection of any rights not specifically enumerated in the Constitution.

Despite such objections, the Supreme Court has broadly construed "liberty" in the Fourteenth Amendment's Due Process Clause as including the right to marry,[63] have children,[64] direct the education and upbringing of one's children,[65] marital privacy,[66] contraceptive use,[67] bodily integrity,[68] and abortion prior to viability.[69]

B. Establishing a Presumption of Liberty to Protect Unenumerated Rights

The distinction between unprotected liberty interests and protected fundamental rights would not exist if courts simply treated all liberty interests as presumptively protected. As Professor Randy Barnett has observed, the Ninth Amendment can be used to establish a general presumption of liberty:

> According to the presumptive approach, individuals are Constitutionally privileged to engage in rightful behavior-acts that are within their sphere of moral jurisdiction-and such behavior is presumptively immune from

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[60] U.S. CONST. amend. IX.

[61] *See* Troxel v. Granville, 530 U.S. 57, 91-95 (2000) (Scalia, J., dissenting). In his dissent, Scalia argues that the Court cannot confer unenumerated rights. Scalia's method of interpretation more closely reflects the guidelines from *Carolene Products*, and would recognize only the explicit rights and prohibitions in the Constitution as justifying a departure from rational basis scrutiny.

[62] THE BORK DISINFORMERS, WALL ST. J., Oct. 5, 1987, at 22 col. 1.

[63] *See* Loving v. Virginia, 388 U.S. 1 (1967).

[64] *See* Skinner v. Oklahoma *ex rel.* Williamson, 316 U.S. 535 (1942).

[65] *See* Pierce v. Society of Sisters, 268 U.S. 510 (1925); Meyer v. Nebraska, 262 U.S. 390 (1923).

[66] *Griswold*, 381 U.S. at 485-86.

[67] *Id.*; Eisenstadt v. Baird, 405 U.S. 438 (1972).

[68] Rochin v. California, 342 U.S. 165 (1952).

[69] *Casey*, 505 U.S. at 860.

> governmental interference... [L]egislation must be scrutinized by independent tribunals of justice to see whether, in the guise of performing these permissible functions, the legislature is seeking instead to invade individual rights. Legislation in pursuit of ends deemed by the Constitution to be appropriate—and defined at the federal level by the enumerated powers provisions—may rebut the presumption in favor of rightful activity when such legislation passes the sort of meaningful scrutiny we associate with the infringement of other Constitutional rights. As legislative activity becomes less extraordinary, however, increased skepticism of the purported justifications of legislation is warranted. Legislative inflation results in a general diminution of legislative value.[70]

An alternative to a general presumption of liberty in courts is to allow the people to declare certain rights as fundamental, and thereby achieve the same level of presumptive liberty.[71] For example, if the people declared that the right to be left alone, for example, was a fundamental right, the government would have the burden of proof with regard to *all* rightful conduct. If the right to privacy was declared a fundamental right, judges would not have to make such far-reaching statements such as, "[The] guarantees in the Bill of Rights have penumbras, formed by emanations . . . that help give them life and substance. Various guarantees create zones of privacy . . . ."[72] to enforce rights retained by the people. In this way, rightful conduct would be restricted only to the extent that the government could prove that a statute serves a compelling interest outweighing a private one.

C. The Problem With Only Protecting Traditional Rights

Courts have generally maintained that traditional rights are protected, while others are not. In so ruling, the courts have essentially made value judgments concerning certain claimed rights. As a result, courts do not recognize unpopular conduct, presented as liberty rights, as fundamental. The use of tradition in determining constitutional protection is problematic.[73] Indeed, the existence of

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[70] Barnett, *supra* note 15, at 35-36.

[71] Professor Barnett's proposal could be realized most directly if the people simply declared as fundamental the right to a presumption of liberty in the courts.

[72] *Griswold*, 381 U.S. at 484. The Court held that the right to privacy indirectly guaranteed by the Bill of Rights served to invalidate a state law prohibiting the use of contraceptives. The right found in *Griswold* was extended most notably in Roe v. Wade, 410 U.S. 113 (1973) and is still recognized today as a constitutionally protected right.

[73] Edward Gary Spitko, Note, *A Critique of Justice Antonin Scalia's Approach to Fundamental Rights Adjudication*, 1990 DUKE L.J. 1337 (1990). Spitko argues that problems with Scalia's fundamental rights approach include the "lack of a clear working definition of tradition, the uncertainty surrounding any effort to reconstruct the past, and the bias introduced by the application of our own constructed notions of our predecessors' beliefs and customs to a current case." *See id.* at 1340.

tradition may be "a reason for rejecting it as controlling."[74] One need only look at slavery and the denial of equal rights to women as illustrations of this position. To hold tradition as the measure of protected rights "forsake[s] other alternatives for the future," extinguishes other, less popular ones, and often does not reflect actual practice.[75] If all liberty interests were protected uniformly, a court's subjective determination of *traditional* rights would not be necessary.

The purpose of the Ninth Amendment was to protect rights of which the Framers were uncertain, perhaps unaware, and to guard against an overly intrusive government.[76]The Framers likely believed that certain rights might evolve with the development of society and would be articulated by the people at the appropriate time.[77] Therefore, it was necessary to address such an eventuality. If such an assertion is true, only the people have the power to declare these rights.

Another argument against permitting courts to protect unenumerated, fundamental rights, is that such an exercise involves the "transference of decision-making power on issues of social policy from electorally accountable officials. . . to a majority of nine lifetime appointees."[78] Although value judgments are inevitably made regarding which rights deserve protection and which do not, it is only appropriate for either the people, or officials subject to electoral control to make these choices.[79]

Whether the Court continues to recognize unenumerated (but traditional) rights, or whether it adopts a more conservative method and exclusively protects enumerated rights, a vast number of liberty interests will remain unprotected. Neither solution is acceptable to those interested in protecting the right to pursue life, liberty, and happiness, and in ensuring that the government does not grow too powerful.

V. A CHECK ON LEGISLATION

James Madison asserted that the greatest threat to liberty and individual rights came from the legislature.[80] In a speech to the House, he stated that the legislature "is the most powerful, and most likely to be abused, because it is under the least control. Hence, so far as a declaration of rights can . . . prevent the exercise of

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[74] J.M. Balkin, *Tradition, Betrayal, and the Politics of Deconstruction*, 11 CARDOZO L. REV. 1623 (1990).

[75] *See id.*

[76] Randall R. Murphy, *The Framers' Evolutionary Perception of Rights: Using International Human Rights Norms as a Source for Discovery of Ninth Amendment Rights*, 21 STETSON L. REV. 423, 426 (1992).

[77] *See id.*

[78] Lino A. Graglia, *The Constitution and "Fundamental Rights," in* THE FRAMERS AND FUNDAMENTAL RIGHTS 86, 97 (Robert A. Licht ed., 1991).

[79] *See id.* at 100.

[80] Barnett, *supra* note 15, at 17 (quoting 1 THE DEBATES AND PROCEEDINGS IN THE CONGRESS OF THE UNITED STATES 454 (J. Gales & W. Seaton eds. 1834) (Statement of Rep. James Madison)).

undue power, it cannot be doubted but such declaration is proper."[81]

Despite the Framers' intent to create a national government of limited powers, Congress' power to regulate all forms of conduct, even conduct traditionally left to states, has become virtually unlimited.[82] Nevertheless, the Constitution *does* contain a textual limitation of congressional power: the Necessary and Proper Clause.[83]

As early as *McCulloch v. Maryland*,[84] the Supreme Court has exhibited reluctance to question the necessity and propriety of congressional legislation.[85] Therefore, Congress is entrusted with the responsibility of carefully deliberating over a proposed piece of legislation. However, legislatures seem to have little regard for individual liberty interests, except to the extent that those interests are established, organized, and monied.

Moreover, the primary role of the legislature is to make law, not declare rights. Many laws have the effect of restricting rights. As Professor Randy Barnett has argued, "legislation is typically claiming to 'regulate' the exercise of rightful conduct or to prohibit rightful conduct altogether so as to achieve some 'compelling state interest' or social policy."[86] There is also some evidence that statutes that restrict rights "tend to reduce average welfare because legislative voting fails to account for the intense preferences of those whose rights are

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[81] *Id.*

[82] Congress uses the Commerce Clause to justify much of its legislation regulating conduct. U.S. CONST. art. I, § 8 states that "Congress shall have [p]ower [t]o . . . regulate [c]ommerce . . . among the several [s]tates . . . ." Congressional authority under the Commerce Clause currently includes the power to regulate any activity that uses a channel or instrumentality of interstate commerce, or that substantially affects interstate commerce. *See* United States v. Lopez, 514 U.S. 549 (1995); United States v. Morrison, 529 U.S. 598 (2000). *Lopez* and *Morrison* presented a marked departure from prevailing Supreme Court doctrine, as the Court struck down as unconstitutional congressional power under the Commerce Clause to enact the Gun-Free School Zones Act of 1990 and the Violence Against Women Act of 1994 respectively. *See id.* Until *Lopez*, the Supreme Court had not checked Congressional power for approximately fifty years. The Commerce Clause had been expanded considerably in Wickard v. Filburn, 317 U.S. 111 (1942). In *Wickard*, the Court upheld enforcement of the Agricultural Adjustment Act, which prohibited the marketing of wheat in excess of individual allotments. The appellee, a farmer, grew wheat in excess of his quota solely for personal consumption. The Court held that this activity constituted interstate commerce because it substantially affected interstate commerce. *See id.*

[83] U.S. CONST. art. I, § 8 states that "Congress shall have Power . . . [t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers . . . ." The word "foregoing" indicates that Congress can only enact necessary and proper legislation related to its *enumerated* powers, and not *any* legislation that is necessary and proper. In contrast, the Ninth Amendment seems to specifically expand individual rights *beyond* those enumerated. Ironically, while congressional power has expanded greatly beyond its enumerated powers, individual rights are typically limited to enumerated ones.

[84] 17 U.S. (4 Wheat.) 316 (1819).

[85] *See id.*

[86] Randy E. Barnett, *Necessary and Proper*, 44 UCLA L. REV. 745, 790 (1997).

invaded."[87]

Ideally, if a law is "proper," it will not infringe on the citizenry's ability to engage in rightful conduct. However, legislation often seems to result from powerful lobbying interests, rather than from meaningful consideration of necessity and propriety. As Professor Barnett argues, the legislative process has ensured that statutes which restrict rightful conduct are suspect:

> Statutes that emerge from the legislative process are not entitled to the deference they now receive unless there is some reason to think that they are a product of necessity, rather than mere interest. And a statutory prohibition of liberty will not be presumed to be an appropriate regulation. Statutes do not create a duty of obedience in the citizenry simply because they are enacted. Without some meaningful assurance of necessity and propriety, statutes are to be obeyed merely because the consequences of disobedience are onerous. This is an insidious view of statutes that undermines respect for all law.
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> The only way that statutes may create a prima facie duty of obedience in the citizenry is if some agency not as affected by interest (or affected by different interests) will scrutinize them to ensure that they are both necessary and proper. However imperfect they may be, only courts are presently available to perform this function. Without judicial review, statutes are mere exercises of will, and are not entitled to the same presumption of respect that attaches to statutes surviving meaningful scrutiny.[88]

John Stuart Mill, in his essay on the enduring struggle between individual liberties and state authority, asserted that one principle governed the relationship between the two interests:

> [T]he only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant. He cannot rightfully be compelled to do or forbear because it will be better for him to do so, because it will make him happier, because, in the opinions of others, to do so would be wise, or even right. These are good reasons for. . . reasoning with him. . ., but not for compelling him, or visiting him with any evil in case he do otherwise. To justify that, the conduct from which it is desired to deter him, must be calculated to produce evil to some one else. The only part of the conduct of any one, for which he is amenable to society, is that which concerns others. In the part which merely concerns himself, his independence is, of right, absolute. Over himself, over his own body and

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[87] Lynn A. Stout, *Strict Scrutiny and Social Choice: An Economic Inquiry into Fundamental Rights and Suspect Classifications*, 80 GEO. L.J. 1787, 1790 (1992).

[88] Barnett, *supra* note 86, at 792.

mind, the individual is sovereign.[89]

Deciding the extent to which the government may control rightful conduct is largely left to courts. Judicial review is possibly the only check against laws promulgated by the so-called "tyranny of the majority." If courts did not defend minority or unpopular interests, quite possibly no one would. However, alternatives exist: courts could refuse to presume a statute's constitutionality, and instead insist that the government show its necessity and propriety; or, the people could declare fundamental rights, thus shifting the burden to the government regarding any specific laws that infringe upon those rights.

It seems clear, though, that the legislature should not be the final arbiter of rightful conduct:

> Given that the most dangerous branch of the national government was the legislature, it is unlikely that Madison would have envisioned the protection of the rights retained by the people being consigned exclusively to the legislature. Given that the governmental threat to the rights and liberties of the people was likely to be promoted by the majority seeking to operate against the minority, it is equally unlikely that Madison would have envisioned the protection of the rights retained by the people being consigned exclusively to the device of popular insurrection.[90]

The sheer size of the current federal administrative state has practically ensured the intrusion of government into almost every aspect of modern life. As a result, the "breadth of [the federal government's] ambition increases the likelihood of clashes between the will of the government and the liberties of the citizenry."[91] Although courts are left to define the boundaries, it is really up to the people to exercise the power to which they are entitled.

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[89] MILL, *supra* note 4, at 10-11. Mill concedes that there are exceptions to the general rule. However, any command that compels an individual to act against his or her free will must be scrutinized carefully:

> [T]here is . . . in the world at large an increasing inclination to stretch unduly the powers of society over the individual, both by the force of opinion and even by that of legislation and as the tendency of all the changes taking place in the world is to strengthen society, and diminish the power of the individual, this encroachment is not one of the evils which tend spontaneously to disappear, but, on the contrary, to grow more and more formidable. The disposition of mankind, whether as rulers or as fellow-citizens, to impose their own opinions and inclinations as a rule of conduct on others, is so energetically supported by some of the best and by some of the worst feelings incident to human nature, that it is hardly ever kept under restraint by anything but want of power; and as the power is not declining, but growing, unless a strong barrier of moral conviction can be raised against mischief, we must expect, in the present circumstances of the world, to see it increase.

Id. at 18-19.

[90] Barnett, *supra* note 15, at 19.

[91] Barnett, *supra* note 86, at 746.

VI. POWER TO THE PEOPLE!

If people were given the opportunity to declare fundamental rights using popular referendums, would they care? Even if they did, would the majority of voters on a given referendum vote in favor of minority liberty interests?

There is some evidence that majorities occasionally defend minority interests.[92] Everyone, in one way or another, is interested in individual liberty rights. Some adamantly advocate the right to own firearms; others, the right to use recreational drugs or to otherwise self-medicate. Any given right may be strongly supported by the affected group, but may be contrary to majoritarian notions of appropriate conduct. This problem may, for instance, explain the difficulty in enacting equal protection laws for homosexuals.[93] As a result, there may be a fundamental problem with successfully declaring any particular right proposed by a referendum.

However, once it is understood that by protecting general liberty—any conduct that does not harm others—all individual liberties will be protected. By advocating the general right to control one's body or to be left alone to make decisions that do not affect others, smaller factions will come together and support each other's interests. Since organized groups have lobbying power, and diffuse groups are less likely to be protected because of their inferior bargaining position,[94] supporting general liberty interests presents a solution to various rights-concerns. Opponents of legislation that regulates morality are at a particular disadvantage.[95] Because only a portion of any given constituency may practice a particular form of rightful conduct, it is doubtful that the conduct will achieve majoritarian support. Therefore, conduct not supported by majority sentiment or the Constitution

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[92] For example, in November 1996, 56% of participating California voters approved Proposition 215, the "Medical Use of Marijuana" initiative, also known as the "Compassionate Use Act." *See* U.S. v. Cannabis Cultivators Club, 5 F.Supp.2d 1086, 1091 (N.D. Cal. 1998). The U.S. Supreme Court overruled this decision. *See* U.S. v. Cannabis Cultivators Club, 532 U.S. 483 (2001). The Act made it legal under California law for seriously ill patients and their primary caregivers to possess and cultivate marijuana for the patient's use, if the patient's physician recommended such treatment. *See id.* According to a national poll conducted by CNN, 79% of voters support legalizing medical marijuana. *See* Daniel Forbes, *Let Them Eat Chemo,* SALON.COM, May 15, 2001, *available at* <http://salon.com/news/feature/2001/05/15/marijuana/index.html>. More recently, despite widespread opposition by the state's political establishment, 61% of participating California voters passed Proposition 36. Starting July 1, 2001, all people convicted of simple drug use or possession—even heroin and cocaine—are no longer sent directly to jail, but instead must be released and offered drug treatment. *See* William Booth, *Calif. Drug Users Get Treatment, Not Jail,* WASHINGTONPOST.COM, August 13, 2001, *available at* <http://www.lindesmith.org/news/news_prop36.html>. The passage of Proposition 36 may demonstrate that California voters recognize the futility of incarcerating people who, essentially, only harm themselves.

[93] DANIEL A. FARBER & PHILIP P. FRICKEY, LAW AND PUBLIC CHOICE: A CRITICAL INTRODUCTION 142-48 (University of Chicago Press 1991).

[94] Bruce Ackerman, *Beyond Carolene Products,* 98 HARV. L. REV. 713, 719 (1985).

[95] *See* FARBER & FRICKEY, *supra* note 93, at 146.

potentially becomes a victim of government prohibition or interference.

Popular declaration of rights would instruct courts, and preclude them from using questionable methods to infer constitutional rights. In addition, declaring rights would not automatically invalidate any laws. For example, if the above-mentioned rights were fundamental, the government could still compel people to drive the speed limit and join the army simply by showing that the law serves a compelling government interest.[96]

Individual citizens, conversely, are generally not in a position to defend rightful conduct in court. Under current doctrine, however, the individual is forced to prove that his or her *specific* conduct is fundamental or deeply rooted in history and tradition. If the right cannot be shown to be fundamental, the individual has to prove that the law in question is not rational, a nearly impossible task. This burden provides the government with a free pass to enact any "rational" legislation not specifically prohibited by the Constitution.

Since the people have the power, the people should exercise that power. The popular referendum is an ideal device for this purpose because it involves deliberation and discussion in the context of popular consideration. The electorate is more sophisticated and informed because of the general availability of higher education and the omnipresence of mass media. As a result, the people are capable of recognizing the importance of protecting certain rights.

Declaring fundamental rights is not lawmaking. It merely clarifies rights retained by the people and puts the burden on the government to prove that a challenged law serves a compelling interest. Popular declaration of rights may encourage the electorate, particularly its youth, to become more involved in communicating with the government it often views with skepticism and frustration. A declaration could properly express the boundaries of particular legislation and force lawmakers to give more consideration to individual liberty interests.

Moreover, it is the people's role, not the judiciary's or the legislature's, to specify these rights. Although some judges apparently believe that it is more important to defend liberty interests than to strictly interpret the Constitution, a broad construction of "liberty" in the Constitution is problematic because enforcing unenumerated rights necessarily involves the judiciary in creating rights.[97] In addition, broadly construing the Due Process Clause may create an incentive to litigate.

Lastly, since a right necessarily involves a liberty interest—rightful conduct that does not injure others—there is no real danger that the people will act inappropriately. The people will simply limit the ability of the government to pass broad laws, supposedly for the common welfare, that interfere with rightful conduct. The government will still be able to use its police powers to restrict

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[96] *See* Reno v. Flores, 507 U.S. 292 (1993).

[97] Many so-called judicially-enforced rights are based on a broad construction of the due process clause in the Fourteenth Amendment, which states, "[N]or shall any State deprive any person of life, *liberty*, or property, without due process of law . . . . " U.S. CONST. amend. XIV, § 1 (emphasis added).

rightful conduct with legislation that has legitimate and essential public goals, regardless of whether the conduct falls under a declared right.

VII. CONCLUSION

Since the people have retained certain rights, it is up to the people to identify and declare their rights. Assuming that society evolves and strives for justice, discovery of rights lies just as much in common experience and the sharing of information as it does in the scholarly research of judges. Declarations will ease the burden on courts in identifying the rights that deserve special consideration.

Legislatures generally are free to enact laws that interfere with rightful conduct. Giving legislatures the benefit of the doubt is dangerous. The people must assume responsibility for safeguarding their own rights, and for ensuring that their rights are not passively surrendered. Declarations by the people will restrict the ability of legislatures to pass laws that interfere with the exercise of liberty. The main effect of declaring fundamental rights will be to impose on the government the burden of proving in court that a challenged law is both necessary and proper. As the party with the most resources, it is the government's rightful burden to establish necessity and propriety, not the individual exercising his or her liberty.

Although originally used to approve the Amendments that would add a declaration of rights to the Constitution, Representative Eldridge Gerry made a comment relevant to any declaration of rights when he stated, "This declaration of rights, I take it, is intended to secure the people against the maladministration of the Government; if we could suppose that, in all cases, the rights of the people would be attended to, the occasion for guards of this kind would be removed."[98]

As the sovereign, it is the people's duty to declare the limits of government's authority to regulate or prohibit rightful conduct. By declaring fundamental rights through the device of the popular referendum, the people can help ensure retention of their autonomy in the midst of increasingly broad efforts by the federal government to implement its social policies. The government has gone from promoting general welfare to coercing it, and does not mind trampling individual liberties in order to do so.

Benjamin N. Smith

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[98] Barnett, *supra* note 15, at 12 (1988) (quoting 1 DEBATES AND PROCEEDINGS IN THE CONGRESS OF THE UNITED STATES 778 (J. Gales & W. Seaton eds. 1834) (Remarks of Rep. E. Gerry)).