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An Excess of Methods: Identifying Implied Fundamental Rights in the Supreme Court

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AN EXCESS OF METHODS: IDENTIFYING IMPLIED FUNDAMENTAL RIGHTS IN THE SUPREME COURT

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I. INTRODUCTION

The Supreme Court's cases on implied fundamental rights have been an amalgam, if not a hodgepodge, of due process and equal protection reasoning. The Court's modern doctrine of implied fundamental rights has grown out of several historically distinct lines of cases that the Court has selectively used and selectively ignored. This article examines the provenance of these different lines of fundamental rights cases, the extent to which they were originally independent of each other, and the extent to which the Court has used them interchangeably.[1]

Section II of the article will examine the various and somewhat independent lines of fundamental rights cases that the Court decided before 1960. Section III will illustrate how, beginning in the 1960s, the Court in some instances began to treat these different lines of precedents as interchangeable and thus treated the due process and equal protection versions of implied fundamental rights analysis as roughly equivalent. Section IV will then examine each of the methods the Court has used to identify implied fundamental rights under both the Due Process and the Equal Protection Clauses.

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1. There is an abundance of scholarly literature on the subject of implied fundamental rights, a summary of which is well beyond the scope of this article, which will limit itself to a close and critical examination of the cases, thus focusing on what the Court itself has done. A sampling of the scholarly theories of constitutional interpretation that would help to explain where implied fundamental rights come from include (1) natural law, see JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 48-54 (1980); (2) neutral principles, see *id.* at 54-60; (3) original intent, see Edwin Meese, III, *Toward a Jurisprudence of Original Intent*, 11 HARV. J.L. & PUB. POL'Y 5 (1988); (4) original meaning, see, e.g., Randy E. Barnett, *The Original Meaning of the Commerce Clause*, 68 U. CHI. L. REV. 101, 105 (2001); and (5) policing the process, see ELY, *supra*, at 73-104. For an earlier, lengthier, and different treatment of the sources of implied fundamental rights, see David Crump, *How Do the Courts Really Discover Unenumerated Fundamental Rights? Cataloguing the Methods of Judicial Alchemy*, 19 HARV. J.L. & PUB. POL'Y 795 (1995).

II. THE PRE-1960S IMPLIED FUNDAMENTAL RIGHTS CASES

During the years before 1960, when the Court decided cases that would now likely be said to involve "implied fundamental rights," it did not use any standardized terminology and the more recent terms like "implied fundamental rights," "strict scrutiny" and "compelling interest" did not appear. Rather, the Court during this time developed what would eventually become implied fundamental rights analysis in five independent, unconnected lines of precedents: (1) the "liberty of contract" cases associated with *Lochner v. New York*,[2] (2) the selective incorporation cases, (3) the fundamental rights cases under the Equal Protection Clause, (4) *Snyder v. Massachusetts*, which established the "history and tradition" test,[3] and (5) *Rochin v. California*, which established the "shocks the conscience" standard.[4]

A. Lochner and its Progeny

In the earliest of these lines, represented by *Lochner v. New York*[5] and its progeny and beginning in 1897,[6] the Court focused on the term "liberty" in the Due Process Clause of the Fourteenth Amendment and construed it to include "freedom of contract." From this starting point, the Court was very likely to conclude that any attempt by the state to regulate contractual relations was an unconstitutional infringement on a protected liberty. This meant that state statutes setting minimum wages[7] or maximum hours[8] in the workplace or protecting the right of workers to unionize[9] were presumptively unconstitutional. The Court in these *Lochner*-era cases did not use the terms "fundamental rights" or "strict scrutiny," but, in its review of these labor statutes, it used a level of review that was as demanding as implied by the modern term "strict scrutiny." Whenever the Court in a *Lochner*-type case determined that a statute infringed on a protected "liberty" interest, the statute

2. 198 U.S. 45 (1905).

3. 291 U.S. 97 (1934).

4. 342 U.S. 165 (1952).

5. 198 U.S. 45 (1905).

6. *Lochner*, 198 U.S. at 53. The beginning of the *Lochner* era is considered to have begun in 1897, the year in which the Court decided *Allgeyer v. Louisiana*, 165 U.S. 578 (1897) (invalidating a Louisiana statute that prohibited obtaining insurance on Louisiana property from an insurer who had not complied with Louisiana law, on the ground that it interfered with liberty of contract).

7. Adkins v. Children's Hospital, 261 U.S. 525 (1923) (invalidating District of Columbia law requiring minimum wages for women).

8. *Lochner*, 198 U.S. at 45 (invalidating New York law prohibiting employment of bakery employees for more than ten hours per day or sixty hours per week).

9. Coppage v. Kansas, 236 U.S. 1, 26 (1915) (invalidating Kansas statute that prohibited employers from requiring employees not to join a union).

was typically invalidated as a matter of course, usually without measuring the significance of the government's interest in regulating that activity.[10]

The *Lochner*-era ended in 1937 when the Court decided *West Coast Hotel v. Parrish*, a case that upheld a minimum wage statute and specifically overruled *Adkins v. Children's Hospital*,[11] a *Lochner*-type case to the contrary. As the *Parrish* Court explained, "The Constitution does not speak of freedom of contract."[12] Therefore, the "liberty" protected by the Due Process Clause was not an "absolute and uncontrollable"[13] liberty, but rather one subject to "regulation which is reasonable in relation to its subject."[14] Thus, the *Parrish* case effectively ended any kind of rigid scrutiny of government regulation of business and commercial matters in the name of protecting constitutional liberty and, if that were the end of the story, the *Lochner* line of cases would be of historical significance only.

Mixed in, however, with the typical *Lochner* case regulating labor/management relations were two cases in which the state attempted to regulate parental control over children. In the first of these, *Meyer v. Nebraska*,[15] the Court invalidated a statute that prohibited the teaching of foreign languages, and in the second, *Pierce v. Society of Sisters*,[16] the Court invalidated a statute that required parents to send their children to public schools. The *Meyer* Court specifically cited *Lochner* as one of its sources and then gave an extremely broad definition of "liberty" that went well beyond *Lochner's*. For, according to the Court in *Meyer*,

> Without doubt, [liberty] denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.[17]

Fourteen years after *Meyer*, the Court overruled *Adkins* and in doing so rejected *Lochner's* expansive reading of the term "liberty" in relation to state

10. But there were occasional cases to the contrary. *See* Muller v. Oregon, 208 U.S. 412, 423 (1908) (upholding a maximum hour law for women because a woman's "physical structure" put her at a disadvantage); Bunting v. Oregon, 243 U.S. 426, 439 (1917) (upholding a maximum hour day for factory workers).

11. 300 U.S. 379, 400 (1937) (overruling Adkins v. Children's Hospital, 261 U.S. 525 (1923)).

12. *Id.* at 391.

13. *Id.*

14. *Id.*

15. 262 U.S. 390, 396-397 (1923).

16. 268 U.S. 510, 530 (1925).

17. *Meyer*, 262 U.S. at 399.

regulation of business contracts.[18] It was not immediately clear how that overruling would affect *Meyer* and *Pierce*, with their broad reading of the term "liberty" in the context of family relations. Time would tell that *Meyer* and *Pierce* did survive *Parrish*, and thus this one part of the *Lochner* line of cases is still considered relevant precedent for today's implied fundamental rights cases.

B. Selective Incorporation

At the same time that the Court was exalting freedom of contract in the *Lochner* line of cases, it was also deciding an independent and entirely separate set of Fourteenth Amendment "liberty" cases–those involving the selective incorporation against the states of specific provisions of the Bill of Rights, which by their terms were applicable only against the federal government. During this time, a majority of the Court never adopted the view that the Fourteenth Amendment's Due Process Clause incorporated the entire Bill of Rights.[19] Thus, the Court needed a principle to explain which of those protections were incorporated against the states and which were not. In 1937, just nine months after *Parrish*, the Court in *Palko v. Connecticut* announced such a principle–that the term "liberty" included only those rights that were "implicit in the concept of ordered liberty."[20]Under this principle, the Court would look at each provision of the Bill of Rights and decide whether or not that particular provision was "implicit in concept of ordered liberty."[21] Although the Court was deciding these selective incorporation cases during the same time frame as it was deciding the *Lochner* precedents, the two lines of cases operated independently of each other. *Palko*, for example, did not cite any of the *Lochner* precedents. Since there are a finite number of protections in the Bill of Rights, the selective incorporation cases are something of a closed universe, and they too, like the *Lochner* cases, might be merely of historical interest. Nevertheless, just as one element of the generally discarded *Lochner* world view has survived in *Meyer* and *Pierce*, so one element of the selective incorporation cases survives, that is, *Palko's* "implicit in the concept of ordered liberty" test, which the Court continues to cite today.

C. Implied Fundamental Rights Under the Equal Protection Clause

Independent of these two lines of cases (the *Lochner* and the selective incorporation lines), the Court during the 1940s began a third line of fundamental rights cases, this one under the Equal Protection Clause. In 1942,

18. West Coast Hotel Co. v. Parrish, 300 U.S. 379, 400 (1937).

19. *See* Adamson v. California, 332 U.S. 46, 58 (1947) (rejecting total incorporation).

20. Palko v. Connecticut, 302 U.S. 319, 325 (1937); *see infra* Section IV.B.1 for a further discussion of the "implicit in the concept of ordered liberty" standard.

21. *Id*. at 325.

just five years after it had decided *Parrish* and *Palko*, the Court in *Skinner v. Oklahoma*[22] considered the constitutionality of an Oklahoma statute that provided for the sterilization of felons convicted three times of felonies involving "moral turpitude."[23] This factual setting was an obvious candidate for some kind of heightened scrutiny given the significance and permanence of the state's decision to sterilize. In fact, the language in *Meyer* about protecting the right "to marry, establish a home and bring up children"[24] would have been an obvious precedent to cite in support of an argument that sterilization by the state invaded a protected liberty interest. The Court, however, had just overruled that *Lochner*-kind of reasoning, at least with regard to government regulation of commerce, and the continuing status of *Meyer* and *Pierce* was unclear. Thus, instead of reopening the controversial question about what exactly is contained within the due process concept of "liberty," the Court decided *Skinner* as an equal protection case, since the Oklahoma legislature had not treated all three-time felons the same.[25]

The Court then needed to address how strictly it ought to apply the equal protection mandate. Since this was not a due process case, the Court did not need to concern itself with the intricacies of the term "liberty."[26] Without reference to any provision of the Constitution, the Court announced that procreation was "one of the basic civil rights of man," "fundamental to the very existence and survival of the race," and that the Oklahoma statute would thus be subject to "strict scrutiny."[27] With these words, the Court in *Skinner* effectively created the equal protection version of implied fundamental rights reasoning. In the years following *Skinner*, the Court used implied fundamental rights analysis under the Equal Protection Clause to find that there was a fundamental right to vote in state elections[28] and a fundamental right to some level of access to the criminal process in the courts.[29] Until the 1960s, these implied fundamental rights cases under the Equal Protection Clause tended to ignore the "liberty" precedents of the *Lochner*-era and of the selective incorporation cases, but they tended similarly to lead to invalidation.

D. Snyder and the History and Traditions Test

In addition to these three principal pre-1960s lines of cases, two additional kinds of fundamental rights precedents arose in the area of criminal procedure

22. 316 U.S. 535, 536-37 (1942).
23. *Id*. at 535-37.
24. Meyer v. Nebraska, 262 U.S. 390, 399.
25. *Skinner*, 316 U.S. at 538-541.
26. *See generally id*.
27. *Id.* at 541.
28. *See infra* Section IV.F.1.
29. *See infra* Section IV.F.2.

but outside of the selective incorporation line. In the first of these, the 1934 case of *Snyder v. Massachusetts*,[30] the Court considered the claim that a criminal defendant had been denied the right to accompany the jury when it went to visit the scene of the crime. The Court, in rejecting his due process challenge, adopted the test that "liberty" includes only those principles of justice "so rooted in the traditions and conscience of our people as to be ranked as fundamental."[31] This "traditions" test, although slightly reformulated as a "history and tradition" test by more recent cases,[32] has become one of the Court's modern due process tests.

E. Rochin and the Shocks the Conscience Test

Finally, in 1952, in *Rochin v. California*,[33] a case in which the police had arranged to have a suspect's stomach pumped in order to find evidence of illegal drugs, the Court announced that government conduct that "shocks the conscience" would constitute an invasion of a constitutionally protected liberty.[34] This "shocks the conscience" standard, although ignored by the Court for many years, has recently been revived as a test of the constitutionally protected liberty interest.[35] As the 1960s arrived, the Court had decided implied fundamental rights precedents in five separate lines of cases. The terminology used in these cases was not standardized. The *Lochner* and the selective incorporation cases focused on the term "liberty." In the equal protection cases, the Court did use the terms "fundamental right" and "strict scrutiny," but made no reference to "liberty." The "traditions" and the "shocks the conscience" tests were waiting in the background. In the meantime, the general process of using the term "liberty" to impose substantive limitations on government would come to be called "substantive due process."[36]

III. THE SELECTIVE EQUIVALENCE AND INTERCHANGEABILITY OF DUE PROCESS AND EQUAL PROTECTION PRECEDENTS IN IMPLIED FUNDAMENTAL RIGHTS CASES

As noted in the previous section, the Supreme Court has decided implied fundamental rights cases under both the Due Process and the Equal Protection Clauses of the Fourteenth Amendment. Before 1960, however, the Court treated these lines of precedent as independent of each other. Beginning in the

30. 291 U.S. 97, 103 (1934).

31. *Id.* at 105.

32. *See infra*, Section IV.C.

33. 342 U.S. 165, 172 (1952).

34. *Id.* at 172.

35. *See infra* Section IV.D.

36. *See, e.g.*, Moore v. City of East Cleveland, 431 U.S. 494, 502 (1977) (Powell, J., concurring) ("Substantive due process has at times been a treacherous field for this Court.").

1960s, however, the Court, when it suited its purposes, began on occasion to treat the due process and equal protection precedents as interchangeable. To the extent that fundamental rights themselves under the two Clauses are interchangeable, suggested that the methods for identifying those rights under the two Clauses would also be interchangeable. Thus, any thorough examination of the methods of identifying implied fundamental rights under either of the Clauses must take into account the methods of identifying them under the other Clause as well. These parallel examinations will lead to the conclusion that the Court uses a multiplicity of methods in identifying implied fundamental rights. This Section, then, will demonstrate how the Court has in certain contexts engrafted the due process and equal protection cases onto each other.

Before illustrating that point, it should first be noted that it is not obvious why there is any need to use both the Due Process and the Equal Protection Clauses to identify neither implied fundamental rights nor that suggests why the two Clauses would be interchangeable. At a theoretical and conceptual level, these two Clauses are quite distinct and impose different types of limits on governmental conduct. Thus, the Due Process Clause of the Fourteenth Amendment, which says that a state may not "deprive any person of life, liberty, or property without due process of law," has both a procedural and a substantive aspect.[37] Under the doctrine of procedural due process, the state may not deprive any person of life, liberty, or property, without notice and a hearing.[38] The doctrine of substantive due process imposes substantive limits on government whenever government action interferes with activity that is within a protected interest defined as "life," "liberty" or "property."[39] On the other hand, the Equal Protection Clause, which says that the state may not deny to any person the "equal protection of the laws," imposes no substantive limits on government.[40] It works rather as a comparative limitation on government classifications–thus it requires that those similarly situated be treated

37. U.S. CONST. amend. XIV, § 1.

38. *See, e.g.*, Mathews v. Eldridge, 424 U.S. 319, 332-33 (1976) ("Procedural due process imposes constraints on governmental decisions which deprive individuals of 'liberty' or 'property' interests within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendment. . . . This court consistently has held that some form of hearing is required before an individual is finally deprived of a property interest.").

39. Where no fundamental right is involved, this "substantive" limitation on government is in fact virtually no limitation at all, for a governmental restriction on a non-fundamental right need satisfy only the very deferential test of being "rationally related to legitimate government interests." Washington v. Glucksberg, 521 U.S. 702, 728 (1997). This is a standard that invariably leads to the conclusion that the contested restriction is constitutional. On the other hand, where the government restricts a fundamental right, under the doctrine of substantive due process a much more demanding scrutiny is used. *See, e.g.*, Roe v. Wade, 410 U.S. 113, 155 (1973).

40. U.S. CONST. amend. XIV, § 1.

similarly.[41] Where the Court finds that a classification infringes on an implied fundamental right, it will examine that classification with a more demanding scrutiny.[42]

Thus, it initially seems that the two Clauses work in quite different ways–the first a substantive principle protecting life, liberty, and property, and the second a comparative equality principle that has no substantive content of its own. Notwithstanding the initial plausibility of that distinction, however, with regard to the doctrine of implied fundamental rights, the Supreme Court has in certain instances treated the two doctrines as equivalent and interchangeable. Thus, the Court commonly cites implied fundamental rights equal protection cases in support of due process conclusions and implied fundamental rights due process cases in support of equal protection conclusions. This overlap between the doctrines is exemplified in *Roe v. Wade*[43] and in a long line of marriage cases where the Court has gone back and forth between due process and equal protection analysis.[44]

In *Roe*, as a substantive matter, the Court established the constitutional principle that the term "liberty" in the Due Process Clause includes a right of privacy that "is broad enough to encompass a woman's decision whether or not to terminate her pregnancy."[45] In addition to the substance of its holding, however, the Court in *Roe* made clear that, when it served its purposes, it would treat the due process and equal protection cases as interchangeable.[46] Thus, the Court in *Roe* began by conceding the obvious–that "[t]he

41. *See, e.g.*, Reed v. Reed, 404 U.S. 71, 77 (1971) ("By providing dissimilar treatment for men and women who are thus similarly situated, the challenged section violates the Equal Protection Clause.").

42. *See, e.g.*, Shapiro v. Thompson, 394 U.S. 618, 634 (1969) (finding that where any classification serves to penalize the exercise of a constitutional right, it must be shown to be necessary to promote a compelling governmental interest in order to be constitutional). This brief summary of the differences between due process and equal protection reasoning does suggest one basic difference between fundamental rights analyses under the two Clauses. When the Court finds that a right is fundamental under the Due Process Clause, it is clear that the implied right comes directly out of the Due Process Clause, that is, from its protection of "liberty." On the other hand, to speak of an implied fundamental right "arising under" the Equal Protection Clause is technically inaccurate since that Clause creates no substantive rights. Rather, when the Court speaks of an implied fundamental right in an equal protection case, it is finding a freestanding implied fundamental right–that is, a right independent of the term "liberty" in the Due Process Clause and independent of any other explicit provision in the Constitution–and then imposing a very strict comparative standard of equality on classifications that infringe on such an implied right. What this means is that implied fundamental rights cases under the Equal Protection Clause inevitably involve rights implied from somewhere other than the Equal Protection Clause.

43. 410 U.S. 113, 153 (1973).

44. *See infra* text accompanying notes 46-74.

45. Roe v. Wade, 410 U.S. 113, 153 (1973).

46. *Id*. at 152.

Constitution does not explicitly mention any right of privacy."[47] Then, in support of its assertion that there was nevertheless a constitutionally protected right of privacy, the Court cited "a line of decisions . . . going back perhaps as far as [1891] . . . [in which] the Court has recognized that a right of personal privacy, or a guarantee of certain areas or zones of privacy, does exist under the Constitution."[48] The Court then followed this assertion with a citation to a string of cases that supported the claim.[49] The cited cases included: (1) from the implied fundamental rights precedents of the *Lochner* era, both *Meyer* and *Pierce*, although significantly, *Lochner* itself and its "freedom of contract" relatives were omitted; (2) from the selective incorporation cases, *Palko*, with its reference to "implicit in the concept of ordered liberty;" and (3) from the cases arising under the Equal Protection Clause, both *Skinner* and *Eisenstadt v. Baird*.[50] The citation to *Eisenstadt* is particularly good evidence of the interlocking of due process and equal protection cases. *Eisenstadt* was a 1971 case that provided the essential link between *Griswold v. Connecticut*,[51] the first of the modern privacy cases, and *Roe v. Wade*. In *Griswold*, the Court had invalidated a Connecticut statute that prohibited the use of contraceptives by a married couple, on the ground that it invaded a fundamental right of marital privacy arising from the "penumbras formed by emanations" from particular provisions of the Bill of Rights.[52] Seven years later, in *Eisenstadt*, the Court reviewed a Massachusetts statute that prohibited the distribution of contraceptives to unmarried persons and invalidated it as a matter of equal protection.[53] Without deciding exactly what the constitutional right of access to contraceptives is, the *Eisenstadt* Court insisted that "the rights must be the same for the unmarried and the married alike."[54] Then, in the course of explaining why the right was the same for both, despite the obvious difference between married and unmarried couples that had appeared to be so important in *Griswold*, the Court described this right of privacy in words that would become the foundation of *Roe v. Wade*. The Court stated: "If the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child."[55] As *Roe* would very shortly make clear, the right to decide whether to bear a child

47. *Id.*
48. *Id.*
49. *Id.*
50. 405 U.S. 438 (1972).
51. 381 U.S. 479 (1965).
52. *Id.* at 484; *see infra* Section IV.E.2.
53. Eisenstadt v. Baird, 405 U.S. 438, 453 (1972).
54. *Id.*
55. *Id.* (emphasis removed).

would necessarily include within it the right to decide *not* to bear a child.[56] Thus *Eisenstadt*, an equal protection case, is the essential link between *Griswold* and *Roe*, the two most significant privacy cases the Court has decided.

The Court in *Roe* made an additional contribution to the interchangeability of implied fundamental rights cases under the Due Process and Equal Protection Clauses in terms of the appropriate test to be applied. The *Roe* Court stated, "Where certain 'fundamental rights' are involved, the Court has held that regulation limiting these rights may be justified only by a 'compelling state interest.'"[57] With these words, the Court equated the due process and equal protection tests for review of implied fundamental rights.[58] As noted above, the *Lochner* era decisions of the Court did in fact apply a very demanding level of scrutiny as did the selective incorporation cases, but it was not until *Shapiro v. Thompson*[59] in 1969 (an equal protection case) and *Roe* in 1973 (a due process case) that fundamental rights cases under due process and equal protection were subject to the same "compelling interest" test.

Justice Rehnquist, dissenting in *Roe*, made clear both that the majority had in fact equated the two tests and that he disagreed with that result. According to Rehnquist, "the Court adds a new wrinkle to this [compelling state interest] test by transposing it from the legal considerations associated with the Equal Protection Clause of the Fourteenth Amendment to this case arising under the Due Process Clause of the Fourteenth Amendment . . . accomplish[ing] the seemingly impossible feat of leaving this area of the law more confused than it found it."[60] Whether or not Justice Rehnquist's disapproval is deserved, he did accurately state what the *Roe* majority had done.[61] Thus, the Court in *Roe* made clear that the different strands of implied fundamental rights cases were sufficiently close to a core principle that it was appropriate to cite them interchangeably and that the Court would apply the same "compelling interest" test to both due process and equal protection cases.

This interchangeability and equivalence of implied fundamental rights reasoning under due process and equal protection reasoning is further illustrated in the Supreme Court opinions on marriage as a fundamental right. In 1923, in *Meyer*, the Court had found that the right to marry was part of the "liberty" protected by the Due Process Clause.[62] In 1942, in *Skinner*, the Court

56. *See generally* 410 U.S. 113 (1973).

57. 410 U.S. at 155 (quoting Kramer v. Union Free School Dist., 395 U.S. 621, 627 (1969)).

58. *See supra* text accompanying notes 46.

59. 394 U.S. 618, 634 (1969) (insisting that "any classification which serves to penalize the exercise of [a constitutional right], unless shown to be necessary to promote a compelling governmental interest, is unconstitutional.") (emphasis removed).

60. *Roe*, 410 U.S. at 173 (Rehnquist, J., dissenting).

61. *Id.*

62. *See supra* text accompanying notes 18-20.

found, without any reference to "liberty" in the Due Process Clause or to *Meyer* itself, that as a matter of equal protection marriage is fundamental.[63] In 1965, in *Griswold v. Connecticut*,[64] which was neither a due process nor an equal protection decision, marriage was described as part of "a right of privacy older than the Bill of Rights–older than our political parties, older than our school system . . . an association for as noble a purpose as any involved in our prior decisions."[65] In 1967, in *Loving v. Virginia*,[66] the Court invalidated Virginia's prohibition on interracial marriage on both an equal protection ground (because of its racial classification) and also a due process ground (because "[t]he freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men."[67]). And what authority did the *Loving* Court cite for this claim that the Due Process Clause included a fundamental right to marry? Why *Skinner v. Oklahoma*, of course, that very relevant equal protection case.

Four years later, in *Boddie v. Connecticut*,[68] the Court found that the imposition of certain court and filing fees that restricted the plaintiffs in their effort to bring an action for divorce violated the Due Process Clause.[69] In setting forth the theoretical framework under which the case would be decided, the Court said, "As this Court on more than one occasion has recognized, marriage involves interests of basic importance in our society."[70] In support of this assertion, the Court cited what were now becoming the old standbys–*Loving*, *Skinner*, and *Meyer*,[71] thus once again moving back and forth between due process and equal protection without even appearing to notice. Citing the state's monopolization of the process for entering into and terminating the fundamental right of marriage, the Court concluded that "a State may not, consistent with the obligations imposed on it by the Due Process Clause of the Fourteenth Amendment, pre-empt the right to dissolve this legal relationship without affording all citizens access to the means it has prescribed for doing so."[72]

In 1978, in *Zablocki v. Redhail*,[73] the Court's opinion demonstrated how completely interlocked were its due process and equal protection precedents as they applied to the fundamental right to marriage. In that case, the Court

63. *See infra* text accompanying notes 84-85.
64. 381 U.S. 479 (1965).
65. *Id.* at 486.
66. 388 U.S. 1 (1967).
67. *Id.* at 12.
68. 401 U.S. 371 (1971).
69. *Id.* at 376.
70. *Id.*
71. *Id.*
72. *Id.* at 383.
73. 434 U.S. 374 (1978).

invalidated a Wisconsin statute under which the state would not grant a marriage license to an applicant with outstanding child support orders unless he had received permission from a court.[74] The Supreme Court treated the case as arising under the Equal Protection Clause,[75] and its chain of citations demonstrating that marriage is a fundamental right included, *inter alia*, *Loving*, *Skinner*, *Meyer*, and *Griswold*.[76] Once the Court had determined that the statute infringed on the right to marry and would thus be strictly scrutinized, invalidation followed quickly. Since the Court was using an equal protection analysis, it needed to identify a class of persons treated differently from another class without adequate justification. The Court did so by identifying "a certain class of Wisconsin residents [who] may not marry . . . without first obtaining a court order granting permission to marry."[77] By inference, the comparison class was everyone else in Wisconsin who did not need a court order to get married. The Court determined that there were other ways for the state to accomplish its statutory goals and thus determined that the statute did not survive heightened scrutiny.[78]

Justice Stewart concurred in the result in *Zablocki*, but his refusal to join the majority opinion is instructive on the relationship of fundamental rights analysis under the due process and equal protection clauses. Justice Stewart conceded that "freedom of personal choice in matters of marriage and family life is one of the liberties" protected by the Due Process Clause.[79] According to Stewart, however, the Equal Protection Clause was not relevant to the matter before the Court since:

> Like almost any law, the Wisconsin statute now before us affects some people and does not affect others. But to say that it thereby creates 'classifications' in the equal protection sense strikes me as little short of fantasy. The problem in this case is not one of discriminatory classifications, but of unwarranted encroachment upon a constitutionally protected freedom. I think that the Wisconsin statute is unconstitutional because it exceeds the bounds of permissible state regulation of marriage, and invades the sphere of liberty protected by the Due Process Clause of the Fourteenth Amendment.[80]

As a matter of logic, there is much to recommend of Justice Stewart's analysis, for at a conceptual level there surely ought to be a difference between the substantive protection of liberty under due process and the comparative

74. *Id.* at 375-77.

75. *Id.* at 382.

76. *Id.* at 383-84.

77. *Id.* at 375.

78. *Id.* at 388-91. (finding that the classification was not sufficiently correlated with either of the statute's twin purposes of providing counseling about the need to fulfill support obligations or of protecting the welfare of the out-of-custody child).

79. *Zablocki*, 434 U.S. at 393 (Stewart, J., concurring).

80. *Id.* at 391-92.

protection of classes under equal protection. Stewart's view was expressed only in a concurring opinion, however, and is quite inconsistent with what the majority did in *Zablocki* and with what the Court has done in the other cases discussed in this section.

Before leaving this section on the interchangeability of due process and equal protection precedents in the Supreme Court, one major qualification is in order. The interchangeability goes to the Court's initial *identification* of the implied fundamental right. It does not carry over into the mode of analysis once that right has been identified. This difference arises because, as noted *supra*,[81] fundamental rights cases under the Due Process Clause are substantive, involving state interference with a protected "liberty" interest, while fundamental rights cases under the Equal Protection Clause are comparative, involving the nonsubstantive claim that, if the state treats one person a certain way, it has to treat similarly situated persons that way too.

This distinction is quite clear in the Court's precedents. If *Skinner*, for example, had been a due process opinion decided after *Roe v. Wade*, the Court would probably have concluded that, since a policy of sterilization affected the implied fundamental right of procreation, the state could never sterilize any individual person without a compelling interest. The *Skinner* Court's actual equal protection opinion was more limited. In effect, it said that, if the state wanted to sterilize *anyone* who has three times committed felonies involving moral turpitude, then it must sterilize *all* such felons.[82] The problem with the Oklahoma sterilization statute was a comparative one, that is, its selectively different treatment of those similarly situated.

Other implied fundamental rights cases under the Equal Protection Clause also illustrate this kind of comparative reasoning. In *Harper v. Virginia State Board of Elections*,[83] the Court was addressing the question of whether or not a poll tax implicated an implied fundamental right to vote.[84] One obvious problem with this line of argument was the fact that, as the Court noted, "the right to vote in state elections is nowhere expressly mentioned [in the Constitution]."[85] Since states in some instances do not have to hold elections at all, it would be difficult, as a matter of due process, to insist that the right to vote in state elections is fundamental. But in fact, states have chosen to select most office holders through a popular vote. And thus, as a matter of equal protection, "it is enough to say that once the franchise is granted to the

81. *See supra* text accompanying notes 40-43.

82. *Skinner*, 316 U.S. at 543. This appears to be the meaning of the Court's statement that the constitutional difficulty with the statute might be addressed either by "enlarging on the one hand or contracting on the other . . . the class of criminals who might be sterilized."

83. 383 U.S. 663 (1966).

84. *Id*. at 665.

85. *Id.*

electorate, lines may not be drawn which are inconsistent with the Equal Protection Clause of the Fourteenth Amendment."[86] As in *Skinner*, the comparative nature of the equal protection mandate means that, if the state wants to deprive certain individuals of the right to vote, it has to treat everyone that way.

Griffin v. Illinois[87] is one further illustration of this kind of comparative equal protection reasoning in implied fundamental rights cases. In *Griffin*, the Court considered the claim that a person convicted at a criminal trial but unable to pay for a transcript needed for an appeal was entitled to have that transcript provided by the state without charge.[88] The problem with such a claim was that, as the Court pointed out, "a State is not required by the Federal Constitution to provide appellate courts or a right to appellate review at all."[89] Thus, it seems that the complainant in *Griffin* would have a difficult time claiming a constitutional right to such a transcript. The state, however, had created a system of appellate courts and had provided for a system of appellate review. Thus, as in *Harper*, as a matter of comparative equal protection, the Court was able to say that, once a state had created such a system, it could not grant appellate review "in a way that discriminates against some convicted defendants on account of their poverty."[90]

Thus, although the nature of the scrutiny applied to state infringement of implied fundamental rights issues is different under the Equal Protection and the Due Process Clauses, the Court on occasion considers the cases to be interchangeable in terms of identifying those implied fundamental rights.

IV. THE DIFFERENT METHODS THE SUPREME COURT HAS USED TO IDENTIFY IMPLIED FUNDAMENTAL RIGHTS

This Section will examine the different methods, under the Due Process and Equal Protection Clauses, that the Court has used to identify implied fundamental rights. Specifically, the Court has recognized certain rights as fundamental because (A) they are important; (B) they are implicit in the concept of ordered liberty or implicitly guaranteed by the Constitution; (C) they are deeply rooted in the Nation's history and tradition; (D) they need protection from government action that shocks the conscience; (E) they are necessarily implied from the structure of government or from the structure of the Constitution; (F) they provide necessary access to governmental processes; and (G) previous Supreme Court precedents so identify them.

86. *Id.* 383 U.S. at 665.
87. 351 U.S. 12 (1956).
88. *Id.* at 18.
89. *Id.* at 18.
90. *Id.*

A. Because They Are Important

The simplest and most straightforward method the Court has used to identify an implied fundamental right is to ask–How important is the claimed right? In 1942, in *Skinner v. Oklahoma*, the Court decided the first of its implied fundamental rights cases under the Equal Protection Clause.[91] The Court determined that it would apply a more demanding scrutiny to a law that authorized the sterilization of felons who had been convicted three times of felonies involving moral turpitude.[92] Why the heightened scrutiny? The Court explained,

> We are dealing here with legislation which involves one of the basic civil rights of man. Marriage and procreation are fundamental to the very existence and survival of the race. The power to sterilize, if exercised, may have subtle, far reaching and devastating effects. . . .We advert to [these matters] merely in emphasis of our view that strict scrutiny of the classification which a State makes in a sterilization law is essential.[93]

Note first what is *not* here. Because this is not a due process analysis, there is no need to attach the fundamental right to procreate to the term "liberty." There is no reference to rights "implicit in the concept of ordered liberty," and no reference to anything being "deeply rooted in the Nation's history and tradition." There is no attempt to infer the implied right from any other provision of the Constitution, from the structure of the federal government, or from the structure of the Constitution itself. There is simply a bold assertion, based on an incontrovertible fact of human existence, that procreation is fundamental because it is essential "to the very existence and survival of the race."[94] In short, the test of whether or not a right is fundamental seems to be a simple matter–how important it is.

Unfortunately, the simplicity of this test has the effect of proving too much. If a right is fundamental for constitutional purposes because of its importance to the survival of the human race, then basic claims to food, clothing, and shelter would also seem to be fundamental as well. And what about education, which the Supreme Court called "the most important function of state and local governments?"[95]

However, the Court has rejected attempts to extend *Skinner* beyond its factual setting and, in the course of doing so, has treated the *Skinner* precedent in a very ambivalent manner. On the one hand, the Court continues to cite

91. 316 U.S. 535 (1942).
92. *Id.* at 541.
93. *Id.*
94. *Id.*
95. Brown v. Board of Education, 347 U.S. 483, 493 (1954).

Skinner on a very regular basis in some of its most important cases,[96] thus suggesting that it is a very viable and current precedent, at least for the substance of its holding that procreation is a fundamental right. Yet, at the same time, the Court has rejected the *Skinner* Court method for determining that procreation is a fundamental right. Thus, for example, in the 1970 case of *Dandridge v. Williams*,[97] the Court considered an equal protection challenge to Maryland's welfare program.[98] When determining the proper level of review, the Court noted how significant were the welfare grants that were the subject of the suit and described those grants as among "the most basic economic needs of impoverished human beings."[99] For all that, the Court neither cited *Skinner* nor made any reference to its method of finding rights fundamental because of their connection to the "existence and survival of the race." Rather, the Court said simply, "the Fourteenth Amendment gives the federal courts no power to impose upon the States their views of what constitutes wise economic or social policy."[100] Thus, the Court upheld the state's challenged calculations of financial need in the welfare program under a very deferential standard: "A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it."[101]

Two years later, in the 1972 case of *Lindsey v. Normet*,[102] the Court considered an equal protection challenge to Oregon's summary process for evicting tenants, a procedure that was much speedier than other civil actions and much more limited in terms of the issues that could be raised.[103] The plaintiffs who challenged that process argued for heightened scrutiny since "the 'need for decent shelter' and the 'right to retain peaceful possession of one's home' are fundamental interests which are particularly important to the poor and which may be trenched upon only after the State demonstrates some superior interest."[104] This is the kind of reasoning that the Court used in *Skinner*, but this time the Court rejected the claim, saying, "We do not denigrate the importance of decent, safe, and sanitary housing. But the Constitution does not provide judicial remedies for every social and economic ill. We are unable to perceive in that document any constitutional guarantee of

96. *See, e.g.*, Roe v. Wade, 410 U.S. 113, 152 (1973); Loving v. Virginia, 388 U.S. 1, 12 (1967); Griswold v. Connecticut, 381 U.S. 479, 485 (1965).

97. 397 U.S. 471 (1970).

98. *Id*. at 485.

99. *Id.*

100. *Id.* at 486.

101. *Id.* at 485 (citing McGowan v. Maryland, 366 U.S. 420, 426 (1961)).

102. 405 U.S. 56 (1972).

103. *Id*. at 73.

104. *Id.*

access to dwellings of a particular quality."[105] The Court went on to use a very deferential form of review and uphold the summary process action.[106]

The *Lindsey* Court made no mention of *Skinner*, so there was no need to distinguish *Skinner's* reasoning. Further, the Court made the telling reference to its inability to perceive "*in that document*" (referring to the Constitution) any constitutional guarantee of housing.[107] Of course, it ought not to be surprising that an alleged *implied* fundamental right will not be found "*in that document*." By definition, an *implied* fundamental right will not be found explicitly in the Constitution itself. Further, as a matter of loyalty to precedent, the Court in *Lindsey* was overlooking the fact that the Court in *Skinner* likewise could not have found "*in that document*" a right to procreate. But the *Lindsey* opinion was consistent with the Court's views in *Dandridge*, and it also served as a bridge to the 1973 case of *San Antonio Independent School District v. Rodriguez*,[108] in which the Court appeared to bury the *Skinner* methodology.

In *Rodriguez*, the Court considered an equal protection challenge to the method of financing public schools in Texas through local property taxes.[109] The effect of this method was to produce great disparities in per pupil spending in different school districts.[110] The plaintiffs in this suit argued that the Court should strictly scrutinize these disparities since the right to education with which they interfered, was a fundamental one.[111] The Court's initial response appeared to be very favorable to the plaintiffs and consistent with *Skinner*.[112] The Court conceded that "education is perhaps the most important function of state and local governments,"[113] that it "is required in the performance of our most basic public responsibilities,"[114] and that it is "the foundation of good citizenship."[115] Ultimately, however, in terms of the standard of review that the Court would apply, none of that mattered, for "the importance of a service performed by the State does not determine whether it must be regarded as fundamental for purposes of examination under the Equal Protection Clause."[116]

105. *Id.* at 74.
106. *Id*.
107. *Id*.
108. 411 U.S. 1 (1973).
109. *Id*. at 29.
110. *Id*.
111. *Id*.
112. *Id*.
113. *Id.* at 29 (citing Brown v. Board of Education, 347 U.S. 483, 493 (1954)).
114. *Rodriguez*, 411 U.S. at 30.
115. *Id.*
116. *Id.*

What then was the test? According to the Court,

> It is not the province of this Court to create substantive constitutional rights in the name of guaranteeing equal protection of the laws. Thus, the key to discovering whether education is 'fundamental' is not to be found in comparisons of the relative societal significance of education as opposed to subsistence or housing. Nor is it to be found by weighing whether education is as important as the right to travel. Rather, the answer lies in assessing whether there is a right to education explicitly or implicitly guaranteed by the Constitution.[117]

Since this new *Rodriguez* test directly conflicted with the method the Court had followed in *Skinner*, one might have expected the Court to overrule or distinguish *Skinner*. Surprisingly, the Court cited *Skinner* as supporting authority for its claim that the true test of a fundamental right was not its societal significance but whether it was "explicitly or implicitly guaranteed by the Constitution."[118] This turns the *Skinner* holding on its head. The Court attempted to explain this away with the claim that "[i]mplicit in the Court's opinion [in *Skinner*] is the recognition that the right of procreation is among the rights of personal privacy protected under the Constitution. See Roe v. Wade."[119] This purported explanation is entirely unconvincing. The *Skinner* opinion, of course, had nothing to do with privacy, nothing to do with liberty, nothing to do with the Due Process Clause, and could not possibly have envisioned the Court's due process opinion forty-one years later in *Roe*. The Court in *Skinner*, of course, had made no attempt to ground the fundamental right to procreate in any language in the Constitution, but the *Rodriguez* Court saw a very different *Skinner*.

The absolute nature of the language in *Rodriguez* and its outright rejection of "societal significance" as relevant to the search for implied fundamental rights would seem to have put an end to the matter. It didn't. Twelve years later, in *Plyler v. Doe*,[120] the Court once again reviewed under the Equal Protection Clause a Texas statute that limited access to education.[121] This time the statute authorized local school districts to deny free public school education to the children of undocumented aliens.[122] After *Rodriguez*, it might be expected that the Court would find that the statute implicated no fundamental right and thus would uphold it with minimal scrutiny. In fact, the Court initially paid lip service to *Rodriguez*, stating that "[p]ublic education is not a

117. *Id.* at 33.
118. *Id.* at 33-34 & n.76.
119. *Id.*
120. 457 U.S. 202 (1982).
121. *Id.* at 221.
122. *Id.*

'right' granted to individuals by the Constitution."[123] But then the Court added,

> But neither is it merely some governmental 'benefit' indistinguishable from other forms of social welfare legislation. Both the importance of education in maintaining our basic institutions, and the lasting impact of its deprivation on the life of the child, mark the distinction . . . . In sum, education has a fundamental role in maintaining the fabric of our society.[124]

Having thus announced the importance of education, the Court adopted a somewhat heightened level of scrutiny and invalidated the statute.[125]

This method of weighing the value of education that the *Plyler* Court used sounds quite a bit like a test of "societal significance," without any reference to the text of the Constitution. Thus, the original *Skinner* test–it's fundamental because it's important–is not really dead. But *Plyler* seems to be the only post-*Skinner* case to apply it. Justice Marshall has argued that the importance of an interest should be considered as part of a balancing test he would use in place of the rigid three tiers of review under the Equal Protection Clause.[126] As part of Marshall's balancing, the Court would consider "the relative importance to individuals in the class discriminated against of the governmental benefits that they do not receive."[127] The Court has never adopted Justice Marshall's view.

B. Because They Are Implicit in the Concept of Ordered Liberty or Implicitly Guaranteed by the Constitution

At two different times, in two different kinds of cases, the Court has adopted a test for finding implied fundamental rights that is so circular and empty that it is hard to believe it has had any staying power. Nevertheless, it has. This is a test that answers a question–what fundamental rights should be implied from the Constitution–by repeating the question: implicit rights are those that are implicit in the Constitution. This "implicit" test has both a due process and an equal protection version.

123. *Id.* (citing *Rodriguez*, 411 U.S. at 35).

124. *Id.* at 221.

125. Rather than invoke the traditional, very deferential, rationality test, the Court said that "the discrimination contained in the [challenged statute] can hardly be considered rational unless it furthers some substantial goal of the State." *Id.* at 224. This standard is quite similar to the intermediate scrutiny that the Court applies to gender classifications, that is, that "classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives." Craig v. Boren, 429 U.S. 190, 197 (1976).

126. San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 98-99 (1973) (Marshall, J., dissenting).

127. *Id.* at 99.

1. "Implicit in the Concept of Ordered Liberty" and the Due Process Clause

In 1937, in *Palko v. Connecticut*,[128] a selective incorporation case, the Court was deciding the issue of whether the Fifth Amendment's right to be free of double jeopardy was to be incorporated as part of the "liberty" protected against the states by the Due Process Clause.[129] The Court determined that it was not, because that right was not "implicit in the concept of ordered liberty"[130] and thus abolishing it would not "violate a 'principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.'"[131] The Court distinguished the protection against double jeopardy from a set of rights-freedom of speech, freedom of the press, free exercise of religion, right of peaceable assembly, and the right of one accused of a crime to the benefit of counsel–all of which the Court had already incorporated against the states[132] and were thus presumptively "implicit in the concept of ordered liberty." On the other hand, the Court found that the protection against double jeopardy was quite similar to another set of rights-the protection against self-incrimination, the right to a jury trial, and the right not to be prosecuted without an indictment–all of which the Court at that time had not incorporated against the states[133] and which were thus presumptively not "implicit in the concept of ordered liberty." In response to the obvious-that there is no clear distinction between these two sets of rights-the Court explained that its distinctions were not simply "a hasty catalogue of the cases on the one side and the other [of the line of division],"[134] but rather were the product of "a rationalizing principle which gives to discrete instances a proper order and coherence."[135]

Examination of the rationale in *Palko* makes it very difficult to find the "rationalizing principle [that gives] a proper order and coherence."[136] The most obvious flaw in the Court's rationalizing principle is that, in circular fashion, it simply repeats the question that it was supposed to answer. In purporting to answer the question of how we identify implied fundamental rights under the term "liberty" in the Due Process Clause, the Court's answer is to identify those rights "implicit in the concept of ordered liberty." It does not appear that the Court has advanced the discussion at all by going from the

128. 302 U. S. 319 (1937).
129. *Id*. at 325.
130. *Id.*
131. *Id.*
132. *Id.* at 324.
133. *Id.* at 325.
134. *Palko*, 302 U.S. at 325.
135. *Id.*
136. *Id*.

word "implied" to "implicit." All it has added beyond a rephrasing of the question is the term "ordered." The Court did not explain how the modifier "ordered" limited the scope of what would otherwise be included in "unmodified" liberty or whether it was attempting to exclude a category of rights that could only be part of a "disordered" liberty.

Beyond the circularity and emptiness of the *Palko* test, the substantive problem with *Palko* was the Court's unsupported assumption that it was capable of distinguishing, in a logically consistent way, those rights that are implicit in ordered liberty from those rights that are not. While the Court in *Palko* in 1937 was quite certain that the right to be free of double jeopardy was on the wrong side of the "implicit" line, thirty-two years later, the Supreme Court reached just the opposite result in *Benton v. Maryland*.[137] In that case, the Court decided that the Fifth Amendment right to be free of double jeopardy was in fact part of the "liberty" protected by the Fourteenth Amendment, and, so finding, expressly overruled *Palko*.[138] The *Benton* Court not only reversed the specific result in *Palko*, with regard to double jeopardy, but also asserted that "Palko represented an approach to basic constitutional rights which this Court's recent decisions have rejected."[139] Further, the Court noted, "Our recent cases have thoroughly rejected the Palko notion that basic constitutional rights can be denied by states as long as the totality of the circumstances does not disclose a denial of 'fundamental fairness.'"[140] Finally, the Court made clear that the right to be free from double jeopardy *is* "clearly fundamental to the American scheme of justice."[141]

Benton is thus a thorough rejection both of the specific holding in *Palko* (that double jeopardy is not part of "liberty" under the Due Process Clause) and of its general "approach to basic constitutional rights." The very fact that *Palko* was subsequently overruled, and the resulting anomaly that double jeopardy was considered not to be implicit in the concept of ordered liberty in 1937 but had become so by 1968, suggest that *Palko's* assumption that one can confidently make such distinctions is unwarranted. Yet *Palko* lives on.

In 1986, in *Bowers v. Hardwick*,[142] the Court considered whether a Georgia sodomy statute infringed the fundamental right of privacy that is part of "liberty" under the Due Process Clause.[143] The Court wanted 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'

137. 395 U.S. 784 (1969).
138. *Id.* at 794.
139. *Id.*
140. *Id.* at 795.
141. *Id.* at 796.
142. 478 U.S. 186 (1986).
143. *Id.* at 191.

own choice of values."[144] To demonstrate that its own decision in *Bowers* was not such an imposition of a personal value judgment but rather the result of a rule of law, the Court cited, as one of its two methods,[145] *Palko* and its "implicit in the concept of ordered liberty" test. Conveniently, the Court ignored the fact that *Palko* had been overruled and that this overruling demonstrated the emptiness of its test. The *Bowers* Court then, alluding to "ancient roots" of proscriptions against sodomy, concluded that "to claim that a right to engage in such conduct is . . . 'implicit in the concept of ordered liberty' is, at best, facetious."[146] On reading this explanation of "liberty," one cannot help but be reminded of Justice Stewart's constitutional test for identifying pornography–"I know it when I see it."[147]

Since *Bowers*, the "implicit in the concept of ordered liberty" test occurs occasionally in Supreme Court opinions,[148] often paired with the "history and traditions" test discussed below,[149] but it has no more substance now than it had in *Palko* or *Bowers*.

2. "Implicitly Guaranteed by the Constitution" and the Equal Protection Clause

The Court has also used an "implicit" test under the Equal Protection Clause. In *San Antonio Independent School District v. Rodriguez*,[150] a case decided on equal protection grounds, the Court rejected "societal significance" as the test for a fundamental right and then announced a new test–whether a right is "explicitly or implicitly guaranteed by the Constitution."[151] The same criticisms of circularity and emptiness directed at the *Palko* test are equally applicable here. Since the question is one of *implied* fundamental rights, then, by definition, the right at issue will not be found explicitly in the Constitution. As with the *Palko* test, to say that a right is implied because it is "implicit" does not work.

The plaintiffs in *Rodriguez* did suggest one test that might have saved the "implicitly guaranteed" test–that the implied right be tethered to specific provisions of the Constitution.[152] Specifically, the test of whether or not a right was "implicitly guaranteed" could be measured by how closely connected

144. *Id.* at 191.

145. The other method was the "history and tradition" test. *See infra* Section IV.C.

146. *Id.* at 194.

147. Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

148. *See, e.g.*, Washington v. Glucksberg, 521 U.S. 702, 721 (1997); United States v. Salerno, 481 U.S. 739, 746 (1987).

149. *See infra* Section IV.C.

150. 411 U.S. 1 (1973).

151. *Id.* at 33.

152. *Id.* at 35.

the alleged right was to an existing, explicit constitutional right.[153] The Court had already engaged in this kind of reasoning under the First Amendment when it had found that there is an implied right of association, a right that is not explicitly created by the Constitution but which the Court has found to be so closely connected to freedom of speech that it is necessarily implied.[154] According to the plaintiffs in *Rodriguez*, an implied right to education was similarly connected to the right of free speech and the right to vote since one could not effectively exercise those rights without an education.[155] The Court rejected that argument on the ground that "we have never presumed to possess either the ability or the authority to guarantee to the citizenry the most effective speech or the most informed electoral choice."[156] Thus education is not fundamental.[157] Since *Rodriguez*, the Court occasionally makes reference to the "implicitly guaranteed" test,[158] but it has had no significant effect on Court decisions.

C. Because They Are Deeply Rooted in the Nation's History and Tradition

The Court has sometimes insisted that the test of whether or not a right is fundamental is to be determined by whether or not it is rooted in our Nation's history and traditions. For Justice Scalia, this is the *only* proper test of a fundamental right under the Due Process Clause. This section examines the Court's use of this test.

1. The Supreme Court Precedents

In 1934, in *Snyder v. Massachusetts*,[159] the Court considered a defendant's appeal of a murder conviction.[160] During the trial, the court had allowed the jury to visit the scene of the crime but had not allowed the defendant to accompany the jury.[161] The defendant argued that this denial of his request

153. *Id.* ("Specifically, [appellees] insist that education is itself a fundamental personal right because it is essential to the effective exercise of First Amendment freedoms and to intelligent utilization of the right to vote.").

154. *See, e.g.*, NAACP v. Button, 371 U.S. 415, 430 (1963) ("We need not, in order to find constitutional protection for the kind of cooperative, organizational activity disclosed by the record . . . subsume such activity under a narrow, literal conception of freedom of speech, petition, or assembly. For there is no longer any doubt that the First and Fourteenth Amendments protect certain forms of orderly group activity.").

155. *Rodriguez*, 411 U.S. at 35.

156. *Id*. at 36.

157. *Id*.

158. *See, e.g.*, Moore v. City of East Cleveland, 431 U.S. 494, 503, n.10 (1977).

159. 291 U.S. 97 (1934).

160. *Id*. at 105.

161. *Id*.

amounted to an unconstitutional denial of due process.[162] The Supreme Court rejected that claim and affirmed the conviction and, in the course of doing so, stated what has become one of the standard tests for identifying implied fundamental rights under the Due Process Clause.[163] The Court said that the determination of proper court procedures was ordinarily a matter for state government "unless in so doing it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental."[164] The *Snyder* case could easily have fit within the framework of what we now call procedural due process, since it was a challenge to the procedures used at trial, but the Court in *Snyder* did not bother with such fine distinctions and thus established an appeal to "traditions" as a test of a fundamental right.[165]

This 1934 "traditions" test was revitalized beginning in the 1970s with *Moore v. City of East Cleveland*.[166] In that case, the Court considered a city ordinance that limited occupancy of a dwelling unit to members of a single family and then defined the term "single-family" very narrowly.[167] The effect of this ordinance was that a grandmother was not able to live in her home with her son and two grandsons, since the grandsons were cousins rather than brothers.[168] In a plurality opinion, Justice Powell stated that, under the Due Process Clause, there is a "private realm of family life which the state cannot enter."[169] The key question, though was how to ascertain what was within this "private realm" and thus beyond the reach of state regulation?The Court noted the need to be cautious, for "[s]ubstantive due process has at times been a treacherous field for this Court,"[170] and "the history of the Lochner era"[171] demonstrated the danger of Justices looking to the Due Process Clause and finding their own predilections. There was, however, a method that the Court said would limit the ability of individual Justices to read their own views into the Constitution–that is, the Constitution protects only those values "deeply rooted in this Nation's history and tradition."[172]

The Court then went on to apply the "history and tradition" test. According to the Court,

> Ours is by no means a tradition limited to respect for the bonds uniting the members of the nuclear family. The tradition of uncles, aunts, cousins, and

162. *Id*.
163. *Id*.
164. *Id.* at 105.
165. *Snyder*, 291 U.S. at 105.
166. 431 U.S. 494 (1977) (plurality opinion).
167. *Id*. at 499.
168. *Id*.
169. *Id.* (citing Prince v. Massachusetts, 321 U.S. 158, 166 (1944)).
170. *Id.* at 502.
171. *Id.*
172. *Moore*, 431 U.S. at 503.

> especially grandparents sharing a household along with parents and children has roots equally venerable and equally deserving of constitutional recognition. . . . Even if conditions of modern society have brought about a decline in extended family households, they have not erased the accumulated wisdom of civilization, gained over the centuries and honored throughout our history, that supports a larger conception of the family.[173]

Once the Court had determined that the living arrangement at issue in *Moore* was part of a protected liberty interest, it did not even ask whether there was sufficient state justification, compelling or otherwise, to save it. Instead, the Court simply concluded that "the Constitution prevents East Cleveland from standardizing its children and its adults by forcing all to live in certain narrowly defined family patterns."[174] As far as explaining how it knew what were the relevant traditions that it ought to consider, the Court was silent. It simply asserted, without supporting citation, its own view of the tradition of the extended family.[175]

Probably the most significant case to adopt the "history and tradition" test was *Bowers v. Hardwick*,[176] a 1986 case in which the Court upheld a Georgia sodomy statute against a due process attack.[177] After citing both the "implicit in the concept of ordered liberty" test discussed above,[178] and the "history and tradition" test from *Moore v. East Cleveland*,[179] the Court quickly concluded that neither formulation of the due process standard would extend to reach the claim asserted, which the Court described as "the claimed constitutional right of homosexuals to engage in acts of sodomy."[180] In explaining why this claim was not considered fundamental within our history and traditions, the Court cited a long list of statutes, from the time of the Bill of Rights, from the time of the adoption of the Fourteenth Amendment, and from recent history, that criminalized sodomy and which, according to the Court, demonstrated that there was no history or tradition of protecting such conduct.[181] Indeed, the Court characterized that claim as "facetious."[182]

After *Bowers*, the "history and tradition" test was a favorite of conservative members of the Court. It had the remarkable quality of always leading to the conclusion that any asserted right was not fundamental. It was a particular favorite of Justice Scalia. Three years after *Bowers*, in 1989, the

173. *Id.* at 504-05.
174. *Id.* at 506.
175. *Id*. at 504-5.
176. 478 U.S. 186 (1986).
177. *Id*. at 191.
178. *See supra* Section IV.B.
179. *Bowers*, 478 U.S. at 191-92.
180. *Id.* at 190-91.
181. *Id.* at 193-94.
182. *Id.* at 194.

Court decided the case of *Michael H. v. Gerald D.*,[183] in which a man who had demonstrated a 98.07% probability of being the father of a child sought to establish a legally protected relationship with the child.[184] The relevant California statute provided that a child born to a married woman living with her husband is presumed to be a child of the marriage and that this presumption could be rebutted only by the husband or the wife.[185] The putative father claimed that this presumption, which had the effect of cutting him off from his child, violated his constitutionally protected liberty interest in his relationship with his child.[186] Justice Scalia announced the judgment of the Court, although only Chief Justice Rehnquist joined his entire opinion.[187] The Scalia opinion rejected the claim of the putative father and relied heavily on the "history and traditions" test, citing both *Snyder v. Massachusetts* and *Moore v. East Cleveland*.[188] As Scalia explained, the purpose of limiting due process protection to traditionally protected interests was "to prevent future generations from lightly casting aside important traditional values."[189]

Justice Scalia then applied the "traditions" test to the specific case of parental rights before him.[190] The putative father had cited a number of Supreme Court cases in which the Court had protected the right of an unwed father in relation to his child.[191] The father argued that these cases established the precedent that "a liberty interest is created by biological fatherhood plus an established parental relationship."[192] Justice Scalia rejected that reading of the cases, insisting instead that the cited cases rested on "the historic respect–indeed sanctity would not be too strong a term–traditionally accorded to the relationships that develop within the unitary family."[193] Upon examination of the "traditions" involved, Justice Scalia found that there was no such tradition protecting "the power of the natural father to assert parental rights over a child born into a woman's existing marriage with another man."[194]

In response to Justice Brennan's dissenting view that there was in fact a long history and tradition of protecting the parent/child relationship,[195] Justice

183. 491 U.S. 110 (1989).

184. *Id*. at 113.

185. *See id.* (citing Cal. Evid. Code Ann. Sec. 621 (West Supp. 1989)).

186. *Id*. at 110

187. *Id*.

188. *Id*. at 123.

189. *Michael H.*, 491 U.S. at 123, n.2.

190. *Id*.

191. *See, e.g*., Stanley v. Illinois, 405 U.S. 645 (1972); Quilloin v. Walcott, 434 U.S. 246 (1978); Caban v. Mohammed, 441 U.S. 389 (1979); Lehr v. Robinson, 463 U.S. 248 (1983).

192. *Michael H.*, 491 U.S. at 123.

193. *Id.*

194. *Id.* at 125.

195. *Id.* at 141-42 (Brennan, J., dissenting) (citing Meyer v. Nebraska, 262 U.S. 390 (1923); Skinner v. Oklahoma, 316 U.S. 535 (1942); and Prince v. Massachusetts, 321 U.S. 158 (1944)).

Scalia argued that, in determining the appropriate level of generality to be used in identifying the relevant tradition, the Court should "refer to the most specific level at which a relevant tradition protecting, or denying protection to, the asserted right can be identified."[196] Thus while there might be a general tradition of protecting parent/child relationships, there was no specific tradition of protecting the rights of an unwed father against the interests of a married couple.[197] For Justice Scalia, the statutory presumption in the case did not infringe on any liberty interest and thus, its propriety was "a question of legislative policy and not constitutional law."[198] Although Justice Scalia was able to persuade only one of his colleagues to join his entire *Michael M.* opinion,[199] he bided his time for the chance to put that view into a majority opinion.

Four years later, in *Reno v. Flores*,[200] he got that opportunity. In *Reno*, the Court considered a regulation of the Immigration and Naturalization Service under which alien juveniles who had been arrested and were being held for deportation hearings could be released only to a parent or other relative but would not automatically be released to another adult where no parent or relative was available.[201] The effect of this rule was that juvenile aliens without parents or adult relatives were held in custody pending their deportation hearings.[202] The plaintiffs in the case argued that this practice deprived them of liberty under the Due Process Clause.[203] Justice Scalia wrote the opinion for the Court and rejected that claim.[204]

Consistent with his opinion in *Michael M.*, Justice Scalia identified the right claimed at a very specific level–"the alleged right of a child who has no available parent, close relative, or legal guardian, and for whom the government is responsible, to be placed in the custody of a willing-and-able private custodian rather than of a government-operated or government-selected child-care institution."[205] Given this very specific description of the right involved, Justice Scalia's rejection of the claim was not at all surprising. As he

196. *Id.* at 127, n.6.

197. *Id*. at 129.

198. *Michael H.*, 491 U.S. at 129.

199. Justice Rehnquist joined in the entire Scalia opinion. Justices O'Connor and Kennedy joined in all but footnote 6 of the Scalia opinion. *Id.* at 132 (O'Connor, J., concurring in part). Footnote 6 was the controversial portion of the Scalia opinion in which he asserted that, under the "history and tradition" method, the Court should describe the asserted right at the most specific level possible.

200. 507 U.S. 292 (1993).

201. *Id*. at 302.

202. *Id*.

203. *Id*.

204. *Id*. at 303.

205. *Id* at 302.

explained, "The mere novelty of such a claim is reason enough to doubt that 'substantive due process' sustains it; the alleged right certainly cannot be considered 'so rooted in the traditions and conscience of our people as to be ranked as fundamental.'"[206] On the other hand, Justice Stevens, dissenting, found the claim made by the juvenile aliens not to be a novelty at all.[207] In Stevens' description, the right claimed was not the very specific right of juvenile aliens not to be detained in a very specific setting, but rather the more general "right not to be *detained* in the first place."[208] The tradition that Stevens would cite was that "liberty is the norm, and detention prior to trial or without trial is the carefully limited exception."[209] Thus, for Stevens, the claim of the juvenile aliens would have been part of a protected liberty interest.

For the moment, however, Justice Scalia's view appeared to be ascendant and Justice Stevens' view only a dissenting opinion. Scalia's view again achieved majority status four years later, in 1997, in *Washington v. Glucksberg*,[210] a case in which the Court considered the claim that a statute banning assisted suicide violated the Due Process Clause.[211] Chief Justice Rehnquist wrote the opinion for the Court.[212] He said, "We begin, as we do in all due process cases, by examining our Nation's history, legal traditions, and practices."[213] As explained by Chief Justice Rehnquist, the "history and traditions" method, because it is "carefully refined by concrete examples involving fundamental rights found to be deeply rooted in our legal tradition,"[214] would work to "rein in the subjective elements that are necessarily present in due process judicial review."[215] Justice Rehnquist then went on to review the history and traditions involving suicide and found that, "for over 700 years, the Anglo-American common-law tradition has punished or otherwise disapproved of both suicide and assisting suicide."[216] Rehnquist described this as "a consistent and almost universal tradition that has long rejected the asserted right [the right to commit suicide which includes a right to assistance in doing so], and continues explicitly to reject it today, even for terminally ill, mentally competent adults."[217] Thus, the Court found that assistance in committing suicide was not a fundamental liberty interest

206. *Reno*, 507 U.S. at 303.
207. *Id*. at 341 (Stevens, J., dissenting).
208. *Id*.
209. *Id.*
210. 521 U.S. 702 (1997).
211. *Id*. at 710.
212. *Id*. at 702.
213. *Id.*
214. *Id.* at 722.
215. *Id.*
216. *Glucksberg*, 521 U.S. at 711.
217. *Id.* at 723.

protected by the Due Process Clause.[218] Had the Court been willing to define the tradition more broadly, as a liberty interest in "bodily integrity,"[219] an interest that would mean that "[e]very human being of adult years and sound mind has a right to determine what shall be done with his own body,"[220] then the claim of a right to assisted suicide would have had a stronger foundation.

The Court's most recent review of the "history and traditions" method was in 2003, in *Lawrence v. Texas*,[221] and it was not a good case for the proponents of that model. In *Lawrence*, the Court reviewed a Texas statute that criminalized sodomy between persons of the same sex.[222] As in *Bowers*, the claim was that the statute violated the liberty interest protected by the Due Process Clause.[223] In the course of its opinion, the Court had to address its earlier opinion in *Bowers*, which had adopted the "history and traditions" test and which had described the tradition at a very specific level.[224] In *Lawrence*, however, the Court explained: "History and tradition are the starting point but not in all cases the ending point of the substantive due process inquiry."[225] For the majority in *Lawrence*, the starting point of history and tradition led to an ending point that was reached only after consideration of the more relevant, and more recent "laws and traditions in the past half century."[226] These more recent traditions included a line of Supreme Court cases that, taken as a whole, led to a general principle that "there is a realm of personal liberty which the government may not enter," and this realm includes the private sexual conduct of two consenting adults.[227]

This majority opinion in *Lawrence* is a clear rejection of the "history and traditions" model that had been espoused by Justice Scalia. Justice Scalia, in turn, sharply critiqued the majority for having departed from the Court's precedents.[228] According to Scalia, the *only* fundamental rights that qualify for heightened scrutiny are those "deeply rooted in the Nation's history and tradition."[229] As support for this assertion, he cited, *inter alia*, his own

218. *Id*.

219. *Id.* at 777. (Souter, J., concurring).

220. *Id.* (citing Schloendorff v. Society of New York Hospital, 105 N.E. 92, 93 (N.Y. 1914).

221. 539 U.S. 558 (2003).

222. *Id*. at 564.

223. *Id.* at 564 (indicating that one of the three questions on which certiorari had been granted was whether the criminal conviction violated the interests in liberty and privacy under the Due Process Clause).

224. *See infra* text accompanying notes 193-95.

225. *Lawrence*, 539 U.S. at 572 (citing County of Sacramento v. Lewis, 523 U.S. 833, 857 (1998) (Kennedy, J., concurring)).

226. *Id.* at 571.

227. *Id.* at 578 (citing Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 847 (1992)).

228. *Id*. at 593 (Scalia, J., dissenting).

229. *Id.* at 593.

opinions in *Reno* and *Michael M*. [230] But the "history and tradition" model has never been the *only* method the Court has used to identify implied fundamental rights under the Due Process Clause. The assertion that it has been ignores the other methods identified in this section, as well as the implied fundamental rights cases under the Equal Protection Clause.

2. Does the History and Traditions Model Work?

Those who favor the "history and traditions" method of identifying fundamental rights view the method as an objective means of restraining judges from reading their subjective preferences into the Constitution.[231] Does it really work in that way? In almost any controversial case, there are very likely to be disagreements on the question of exactly what our traditions are.

Firstly, "our traditions" change over time. Justice Harlan, dissenting in *Poe v. Ullman*[232] from the Court's refusal to hear the case on the merits, alluded to this difficulty.[233] Harlan spoke of the necessity of balancing the liberty of the individual with the demands of organized society and of the need to limit judges who might otherwise feel "free to roam where unguided speculation might take them."[234] The appropriate balance would be achieved, according to Harlan, by reference to "what history teaches are the traditions from which [this country] developed as well as the traditions from which it broke."[235] Harlan's reference to the two kinds of traditions–those that we continue to practice and those that we have abandoned–demonstrate one of the more serious problems with the use of tradition to explain constitutional liberty.[236] America has a number of older, less savory traditions-slavery and officially sanctioned racial segregation come most readily to mind-that have been abandoned. At one point in time, however, each of these was part of our county's "history and tradition" and thus could *at that time* appropriately have been used to inform the Court on the meaning of "liberty." Of course, these are not current traditions, but how is a court to know when a tradition is no longer relevant to the determination of "liberty" under the Due Process Clause?

Justice Brennan did not believe that there was an effective response to the question of when traditions gain or lose their relevance. To him, "tradition"

230. *Id.* In a footnote to his dissent, Justice Scalia also made the claim that, in order for a right to be fundamental, it must be *both* "deeply rooted in the Nation's history and tradition" *and* "implicit in ordered liberty." *Id*. at 593 n.3. That claim is not supported by many of the Court's fundamental rights cases.

231. *See, e.g.*, Washington v. Glucksberg, 521 U.S. 702, 722 (1997) ("This approach tends to rein in the subjective elements that are necessarily present in due process judicial review.").

232. 367 U.S. 497 (1961).

233. *Id*. at 542 (Harlan, J., dissenting).

234. *Id.*

235. *Id.*

236. *Id*.

was a concept "as malleable and as elusive as 'liberty' itself," and the claim that it served to limit judicial discretion was merely a seductive pretense.[237] In fact, as Justice Brennan pointed out, a number of interests that previous Supreme Court cases have identified as fundamental, such as the legal right of married and unmarried couples to use contraceptives or the right to raise one's illegitimate child, were not traditionally protected when those cases were first filed, but became so in the aftermath of the Supreme Court opinion.[238] How, asked Brennan, is the Court "to identify the point at which a tradition becomes firm enough to be relevant to our definition of liberty and the moment at which it becomes too obsolete to be relevant any longer."[239]

Secondly, in addition to the problem of traditions changing over time, courts face the historical task of establishing exactly what our traditions were at any particular time. The Court's opinions in *Bowers* and *Lawrence* are an example of how two different courts can give startlingly different accounts of the history that underlies a claimed tradition. In *Bowers*, the Court cited the criminal law pertaining to sodomy during the course of American history to support its conclusion that there was absolutely no tradition in America that would protect what the Court called "a claimed constitutional right of homosexuals to engage in acts of sodomy."[240] On the other hand, seventeen years later, in *Lawrence*, the Court, addressing this same question, insisted that "there is no longstanding history in this country of laws directed at homosexual conduct as a distinct matter."[241] As the *Lawrence* majority viewed earlier sodomy laws, they were "not directed at homosexuals as such but instead sought to prohibit nonprocreative sexual activity more generally."[242] Justice Scalia, of course, disagreed with this interpretation of history. He insisted that the historical record unimpeachably showed "a longstanding history of laws prohibiting *sodomy in general*–regardless of whether it was performed by same-sex or opposite-sex couples,"[243] and this history showed, in "utterly unassailable" fashion, that "homosexual sodomy is not a fundamental right 'deeply rooted in this Nation's history and tradition.'"[244]

Professional historians might be able to take sides on the matter of whose version of history is more accurate, but it does not seem prudent to have a constitutional standard under which the question of what rights are fundamental under our Constitution is answered, not by reference to the

237. Michael H. v. Gerald D., 491 U.S. 110, 137 (1989) (Brennan, J., dissenting).
238. *Id.* at 139-40.
239. *Id.* at 138.
240. *Bowers*, 478 U.S. 192-93, nn.5-7.
241. *Lawrence*, 539 U.S. at 568.
242. *Id.*
243. *Id.* at 596 (Scalia, J., dissenting) (emphasis in original).
244. *Id.* at 597.

Constitution, but by selecting from among competing versions of historical events. If the Court followed this theory, then, as new historical information became available or existing historical theories were revised, fundamental rights under the Constitution might change as well.

Thirdly, the "history and tradition" model is too easily manipulated by the level of generality at which the Court chooses to describe a particular tradition. This dispute about the appropriate level of generality has turned out to be critical. If, like Justice Scalia, one chooses to define the tradition at its most specific level, the effect in most circumstances is to reject the claim of an implied fundamental right. If, on the other hand, one defines the tradition in broader terms, the result is far more likely to support the finding of a fundamental right. In each of the recent cases in which Justice Scalia has staked out a position in opposition to the finding of an implied fundamental right, his very specific description of that right has led to the conclusion that it is not fundamental.

Thus, in *Bowers*, the majority described the tradition as involving "a fundamental right to engage in homosexual sodomy."[245] The dissenters in *Bowers* insisted that the right at issue was no more about homosexual sodomy than "*Stanley v. Georgia* . . . was about a fundamental right to watch obscene movies, or *Katz v. United States* . . . was about a fundamental right to place interstate bets from a telephone booth."[246] The dissenters would have described the right at issue as "'the most comprehensive of rights and the right most valued by civilized men,' namely, 'the right to be let alone.'"[247] Similarly, in *Michael H.*, Justice Scalia described the interest involved as "the power of the natural father to assert parental rights over a child born into a woman's existing marriage with another man," and found no such right protected by our history and traditions.[248] On the other hand, the dissenters in *Michael H.* described the interest broadly as the protection of the parent/child relationship, and they were able to point to a number of cases that protected that right, thus demonstrating that it was part of our history and tradition.[249]

Two additional examples illustrate the point further. In *Reno v. Flores*, Scalia described the issue very narrowly–"the alleged right of a child who has no available parent, close relative, or legal guardian, and for whom the government is responsible, to be placed in the custody of a willing-and-able private custodian rather than of a government-operated or government-selected child-care institution," and found that such a claimed right was not protected

245. *Bowers*, 478 U.S. at 191.

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

247. *Id.* (citing Olmstead v. United States, 277 U.S. 438, 478 (1928)).

248. *Michael H.*, 491 U.S. at 125.

249. *Id.* at 141-42 (Brennan, J., dissenting) (citing Meyer v. Nebraska, 262 U.S. 390 (1923); Skinner v. Oklahoma, 316 U.S. 535 (1942); Prince v. Massachusetts, 321 U.S. 158 (1944)).

by our history and traditions.[250] The dissenters in *Reno* described the right as the right not to be detained without trial and found that that right was protected by our history and traditions.[251] Finally, in *Glucksberg*, the majority defined the interest at stake narrowly, as "a right to commit suicide which itself includes a right to assistance in doing so," and found it not to be part of our history and traditions,[252] while the dissenters would have described it more broadly as the right of "[e]very human being of adult years and sound mind . . . to determine what shall be done with his own body," and would have found it part of our history and traditions and protected by the Due Process Clause.[253]

In sum, it seems that there is no agreement as to how the Court should use traditions that have changed over time, no agreement on what in fact certain traditions were at a particular time, and no agreement on the level of generality at which a given tradition is to be described. Without agreement on these issues, the "history and traditions" test is far too malleable to be a helpful constitutional guide.

D. Because They Need Protection from Government Action that Shocks the Conscience

In 1952, in *Rochin v. California*,[254] the Court considered a case in which the police had arranged to have a suspect's stomach pumped in order to produce evidence of illegal drugs.[255] The question was whether this kind of conduct violated the Due Process Clause.[256] The Court initially cited both *Snyder's* "rooted in the traditions and conscience of our people" test as well as *Palko's* "implicit in the concept of ordered liberty" test.[257] Apparently, these two tests were not precise enough to decide the case. Justice Frankfurter, writing for the majority, found that the proceedings in the case where the police forcibly extracted the contents of a suspect's stomach constituted a kind of conduct that "shocks the conscience" and therefore violated the Due Process Clause.[258]

It was not clear that *Rochin* was a substantive due process case. Since the problem identified was part of the *process* of arresting and investigating the case, it might have been considered a procedural due process case, if not a case on compelled self-incrimination under the Fifth Amendment. Nevertheless,

250. *Reno*, 507 U.S. at 302.

251. *Id.* at 341 (Stevens, J., dissenting).

252. *Glucksberg*, 521 U.S. at 723.

253. *Id.* at 777 (Souter, J., concurring) (citing Schloendorff v. Society of New York Hospital, 105 N.E. 92, 93 (N.Y. 1914)).

254. 342 U.S. 165 (1952).

255. *Id.* at 169.

256. *Id.*

257. *Id.*

258. *Id.* at 172.

the Supreme Court in at least one later case has read *Rochin* as establishing an implied fundamental right to some level of "bodily integrity,"[259] thus suggesting that it establishes a substantive rather than a procedural standard. *Rochin* is a hard case to explain. Its "shocks the conscience" standard hardly provides any sort of objective standard that would make police conduct subject to review by courts in a consistent way. To the extent that *Rochin* was a case of substantive due process, it certainly is strange to describe a protected "liberty" interest, not by reference to the interest protected, but rather by reference to a certain kind of outrageous conduct on the part of the government. In any case, *Rochin* for a long time appeared to be a relatively minor case of merely historical interest, until 1998, when the Court brought it back to life in *County of Sacramento v. Lewis*.[260]

In *Lewis*, a high-speed police chase resulted in the death of one of those being chased.[261] In the lawsuit that followed, the Supreme Court described the issue as "whether a police officer violates the Fourteenth Amendment's guarantee of substantive due process by causing death through deliberate or reckless indifference to life in a high-speed automobile chase."[262] The Court's ultimate answer was no, but in the course of its opinion, it explained that the appropriate standard to use in determining whether "abusive executive action"[263] violates the Due Process Clause is the "shocks the conscience" test from *Rochin*, which the Court described, surprisingly, as having been "repeatedly adhered to" in the years since *Rochin*.[264] The Court then tried to give some objective content to what certainly seems to be an extremely vague and subjective standard.[265] According to the Court, in determining whether police conduct in a high-speed chase "shocks the conscience" and is therefore a violation of substantive due process, neither negligence on the part of the police was sufficient, nor deliberate indifference, but only an "intent to harm suspects physically or to worsen their legal plight."[266]

Justice Scalia concurred in the judgment, finding no violation of substantive due process, but, of course, disagreed with the Court's use of the "shocks the conscience" test.[267] As noted earlier, in Scalia's view, the *only* liberty interests protected under the Due Process Clause were those "deeply rooted in the Nation's history and tradition."[268] In what may well be his most

259. Washington v. Glucksberg, 521 U.S. 702, 720 (1997).
260. 523 U.S. 833 (1998).
261. *Id*. at 836.
262. *Id.* at 836.
263. *Id*. at 846.
264. *Id* at 846-47.
265. *Id*. at 854.
266. *Lewis*, 523 U.S. at 854.
267. *Id*. at 861.
268. *See supra* Section IV.C.

entertaining opinion, Justice Scalia cited Cole Porter in comparing the majority's over-the-top opinion with Porter's examples of top-shelf icons, such as "the Napoleon Brandy, the Mahatma Gandhi, the Cellophane,"[269] and insisted that the majority had resuscitated the "*ne plus ultra* . . . of subjectivity, th' ol' 'shocks-the-conscience' test."[270]

After *Lewis*, the "ol' shocks-the-conscience" test can no longer be regarded as a mere historical relic. Although it is also now clear that the *Rochin* test is a substantive due process test, it is not clear how this analysis fits with the Court's general jurisprudence of implied fundamental rights. Although Justice Scalia treated the issue as one of identifying an implied fundamental right as in *Glucksberg*,[271] the *Lewis* majority spoke of due process as "protection of the individual against arbitrary action of the government,"[272] a test that makes no reference to fundamental rights. As for the future effect of *Lewis*, it is quite possible that the Court will limit its "shocks-the-conscience" test to cases of alleged police misconduct, the factual settings of both *Rochin* and *Lewis*.

E. Structural Arguments: Because They Are Necessarily Implied from the Structure of the Federal Government or from the Structure of the Constitution

1. Implied from the Structure of the Federal Government

In 1969, the Court in *Shapiro v. Thompson*[273] considered an equal protection challenge to a durational residence requirement under which new residents of Connecticut could not receive welfare benefits until they had lived in the state for at least one year.[274] The Court applied a heightened standard of review–"any classification which serves to penalize the exercise of [a constitutional] right [must be] shown to be necessary to promote a compelling governmental interest."[275] The constitutional right at issue here was the "right to travel interstate." Of course, no right to travel is explicitly mentioned in the Constitution. Since this was an equal protection case, the Court could not attach the claimed right to the term "liberty" in the Due Process Clause, but that was not a problem. The Court indicated that it had "no occasion to ascribe the source of this right to travel interstate to a particular constitutional

269. *Lewis*, 523 U.S. at 861 (Scalia, J., concurring).

270. *Id.*

271. *Id.* at 862 ("Adhering to our decision in *Glucksberg*, rather than ask whether the police conduct here at issue shocks my unelected conscience, I would ask whether our Nation has traditionally protected the right respondents assert.").

272. *Lewis*, 523 U.S. at 845 (citing Wolff v. McDonnell, 418 U.S. 539, 558 (1974)).

273. 394 U.S. 618 (1969).

274. *Id*. at 634.

275. *Id.*

provision."[276] Instead, the Court in effect found a freestanding implied right to travel.[277] Its source was not any particular provision in the Constitution itself. Rather, the idea of the right to travel is "fundamental to the concept of our Federal Union."[278]

There is logic to this assertion. The pre-Constitutional Articles of Confederation did indeed contain an express right to travel between the states.[279] The confederacy created by the Articles was much weaker than the subsequent federal union, since the states that established that confederacy retained full sovereignty, and thus without explicit protection, it was not certain that persons were free to travel between these sovereign states. On the other hand, when thirteen sovereign states came together in 1787 to form the United States of America, in that new, more powerful federal union, the states gave up some of their sovereign status. This new Union would not have been possible, and would have made no sense, unless citizens of that Union were free to travel from one end of it to another. Just as the state constitution of Connecticut needs no explicit provision to create a right to travel between New Haven and Hartford, so the federal Constitution did not need an explicit provision to create a right to travel between New Haven and New York City. In both cases, the concept of sovereignty necessarily includes a fundamental right to travel within the jurisdiction of the sovereign. Thus, the structure of the federal union implies a fundamental right to interstate travel.

Notwithstanding the necessity in a federal union of a right to travel, the Court's opinion in *Shapiro* is surprisingly cavalier in its assertion that it need not identify a constitutional source for that right. The Court made no reference to "history and traditions," and no appeal to what is "implicit in the concept of ordered liberty" (although it must be said that, since *Shapiro* was not a due process case, there was no need to cite those precedents). *Shapiro* has the feel of a case decided in a separate universe, a universe where there is no *Lochner*, no line of selective incorporation cases, and no history of implied fundamental rights cases under the Equal Protection Clause. *Shapiro* reaches what is surely the proper result with its reliance on the structure of government to find an implied fundamental right, but, in terms of constitutional method, it is a case unto itself.

Recently, the Court has narrowed this kind of structural argument as it applies to the implied fundamental right to travel. In 1999, in *Saenz v. Roe*,[280] the Court reviewed a California statute that, like the one in *Shapiro*, limited

276. *Id.* at 630.

277. *Id.*

278. *Id.* (citing United States v. Guest, 383 U.S. 745, 757-58 (1966)).

279. ARTICLES OF CONFEDERATION, ART. IV ("The people of each State shall have free ingress and regress to and from any other State.").

280. 526 U.S. 489 (1999).

welfare benefits to new state residents during their first year of residence.[281] Unlike the statute in *Shapiro*, however, the California statute did not deny benefits completely during that period but rather limited the amount of the benefit to a level no higher than the claimant could have received in his or her previous state of residence.[282] The California statute was designed to address the argument in *Shapiro* that the failure to offer any benefit at all during that one-year period was a penalty on the exercise of the right to travel.[283] The Court in *Saenz* saw no constitutional difference between the two statutes and invalidated California's.[284] In its opinion, however, the Court gave a narrower, more nuanced explanation of the constitutional source of the right to travel.[285]

According to the Court, the right to interstate travel is made up of three different components, and each of these components has a different source.[286] The first component-the right of a citizen of one state to cross state borders into another state-is, as in *Shapiro*, "a necessary concomitant of the stronger Union the Constitution created."[287] The second and third components of the right to travel had different origins. The second component–the right, by virtue of state citizenship, to travel temporarily to another state and "be treated as a welcome visitor rather than an unfriendly alien"–is protected by the Privileges and Immunities Clause of Article IV.[288] The third component-the right, by virtue of being a citizen of the United States, to elect to become a resident of another state and be treated like other citizens of that State-is protected by the Privileges or Immunities Clause of the Fourteenth Amendment.[289] Thus, after *Saenz v. Roe*, there are three components of the right to travel between states, and only one needs to be implied. The second and third are now identified as *explicit* constitutional rights that need not be implied from the concept of the federal Union.

The method of implying a fundamental right to travel from the structure of the federal Union is a sound one, but it does not appear to be a method that can be generalized beyond the one specific right to travel. Thus, the Court has not made use of this method of implying fundamental rights for any other right, nor does it seem possible to use it as a foundation for a general theory of identifying implied fundamental rights.

281. *Id*. at 493.
282. *Id.*
283. *See id*.
284. *Id*. at 500.
285. *Id*.
286. *Saenz*, 526 U.S. at 500.
287. *Id.* at 501 (citing United States v. Guest, 383 U.S. 745, 758 (1966)).
288. *Id*. at 500.
289. *Id.* at 502-03.

2. Implied from the Structure of the Constitution

In 1965, the Court in *Griswold v. Connecticut*[290] determined that a Connecticut statute that prohibited the use of contraceptives by married couples was unconstitutional.[291] *Griswold* is widely viewed as a significant linchpin in the development of substantive due process cases that led to *Roe v. Wade* and *Lawrence v. Texas*. Somewhat surprisingly, however, *Griswold* was not a due process decision. In fact, Justice Douglas's opinion for the Court took great pains to note that the Court was *not* following *Lochner* as precedent nor was it basing its decision on the "liberty" interest in the Due Process Clause.[292] Instead Justice Douglas, in a much criticized opinion, spoke of the "penumbras formed by emanations"[293] from the guarantees of specific kinds of privacy in the Bill of Rights and used these "penumbras formed by emanations" as a basis for finding a more generalized, more encompassing right of privacy.[294] This right of privacy included the freedom of a married couple to use contraceptives within the sanctity of their bedroom without the interference of the state.[295]

Justice Douglas's decision to use the terms "penumbras" and "emanations" was not a happy one. That language opened him up to the criticism that his use of sloppy, vague language led to a sloppy, vague constitutional result that was not tethered to any particular provision in the Constitution.[296] *Griswold* appears to have created a freestanding, free-floating constitutional right. So the critique goes. It is difficult to argue in favor of Justice Douglas's choice of the terms "penumbra" and "emanations," but his opinion does contain a defensible constitutional theory of implied fundamental rights.

Justice Douglas examined five provisions of the Bill of Rights that create specific enforceable zones of privacy into which the government may not enter.[297] He identified the right of association protected by the First

290. 381 U.S. 479 (1965).

291. *Id*. at 481-82.

292. *Id.* ("Coming to the merits, we 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. State of New York . . . should be our guide. But we decline that invitation as we did in West Coast Hotel v. Parrish.").

293. *Id.* at 484.

294. *Id.* at 485 ("The present case, then, concerns a relationship lying within the zone of privacy created by several fundamental constitutional guarantees.").

295. *Id.* at 485-86.

296. *See, e.g.*, *Saenz*, 381 U.S. at 508-09 (Black, J., dissenting) ("The Court talks about a constitutional 'right of privacy' as though there is some constitutional provision or provisions forbidding any law ever to be passed which might abridge the 'privacy' of individuals. But there is not. . . . 'Privacy' is a broad, abstract and ambiguous concept which can easily be shrunken in meaning but which can also, on the other hand, easily be interpreted as a constitutional ban against many things other than searches and seizures.").

297. *Griswold*, 381 U.S. at 484.

Amendment, the prohibition of quartering soldiers from the Third Amendment, the right of the people "to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures" in the Fourth Amendment, the protection against self-incrimination in the Fifth Amendment, and the Ninth Amendment's specific recognition that the enumeration of certain rights in the Constitution "shall not be construed to deny or disparage others retained by the people."[298] As Justice Douglas viewed these Amendments, while each created a specific area of privacy into which government may not enter, they also, taken together, created a structure under which government is limited in the extent to which it can invade the private areas of a person's life.[299] The view that the particular areas of privacy protected by the specific amendments are part of a larger, more general right to privacy is strengthened by the Ninth Amendment's specific language to this effect. Douglas is effectively asking, "Can you imagine a Constitution under which the government cannot, without a warrant, come into your home to search for drugs but has the even more intrusive power to dictate to a married couple what they do in the bedroom of that home?" Looking to future controversies, Douglas might have asked, "Can you imagine a Constitution under which the government does not have the power to specify with whom you may associate, but is able to dictate who your sexual partners may be and what sexual activity, with a consenting adult partner, you are allowed to engage in?"

Although the *Griswold* case is an extremely important case on the road to *Roe* and *Lawrence*, Justice Douglas's reasoning in *Griswold* has been given little precedential weight. But the idea that one can identify implied fundamental rights from the structure of the Constitution is a valid one, including the idea that one can imply a general right from a series of specific rights. However, like *Shapiro's* argument from the structure of government, *Griswold's* argument from the structure of the Constitution has been subsequently ignored by the Court.

F. Because They Provide Necessary Access to Governmental Processes

The Court has found that there is an implied fundamental right to vote and an implied fundamental right to some level of access to court processes. The justification for these fundamental rights is that legislation and adjudication in the courts are essential elements of a democracy and that a limitation on access to these two institutions is a threat to the institution of government itself.

298. *Id.* at 484.
299. *Id.*

1. Access to the Legislature

As far back as 1938, in *United States v. Carolene Products,*[300] the Court stated in its famous footnote 4 that the deference courts ordinarily gave to legislative enactments might not be appropriate in reviewing legislation that "restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation."[301] The dictum of this footnote was translated into holding in 1964 in *Reynolds v. Sims*,[302] a case in which the Supreme Court invalidated the method of electing the two houses of the Alabama legislature from geographic districts that had wildly uneven populations and thus disproportionate weight attached to each vote.[303] In explaining why it would give heightened scrutiny to this method of electing the legislature, the Court first cited *Skinner*, since like the law at issue in that case, the restriction on voting touched on "a sensitive and important area of human rights" and it "involve[d] one of the basic civil rights of man."[304] The Court then went on from this vague and general reference to the right's being "important" and "basic" to explain why the right to vote was fundamental.[305] Voting is a fundamental right because "the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights."[306] Because the right to vote is fundamental, "any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized."[307] The Court then used this heightened scrutiny not only to invalidate the disproportionate voting system in *Reynolds*, but also, in later cases, to invalidate other state restrictions on the right to vote, including a poll tax,[308] a requirement of owning or possessing land as a voter qualification,[309] a one-year residency requirement,[310] and a restrictive rule that made it hard for third parties to get access to the ballot.[311]

There is no question that the protection of access to voting is essential for democracy to work so this "protecting access to the legislature" model is an effective explanation of this particular fundamental right. It is, on the other hand, not the kind of model that can be generalized into a theory about implied fundamental rights, other than in the one other closely connected context,

300. 304 U.S. 144 (1938).
301. *Id*.
302. 377 U.S. 533 (1964).
303. *Id*. at 561.
304. *Id.*
305. *Id*. at 562.
306. *Id.*
307. *Id.*
308. Harper v. Virginia State Board of Elections, 383 U.S. 663 (1966).
309. Kramer v. Union Free School Dist. No. 15, 395 U.S. 621 (1969).
310. Dunn v. Blumstein, 405 U.S. 330 (1972).
311. Williams v. Rhodes, 393 U.S 23 (1968).

access to the court system.[312] The Court, however, has not always made it clear how this particular model is to be applied in voting rights cases. For example, in *Bush v. Gore*,[313] the Court found a violation of the Equal Protection Clause in the manner in which Florida was counting ballots in the 2000 presidential election, yet did not make clear what standard of review it was using.[314] Further, the Court purported to limit its ruling to the specific facts before it.[315] So although the right to vote is fundamental, the exact mechanism for courts to use in protecting this right is not clear.

2. Access to the Courts

Since 1956, the Court has applied some kind of heightened scrutiny in reviewing challenges to the denial of access to the courts in criminal cases. In *Griffin v. Illinois*,[316] the Court, on both equal protection and due process grounds, invalidated a state scheme in Illinois under which convicted defendants who could not afford a transcript of the trial proceedings lost the right to appeal.[317] As the Court explained, "a State is not required by the Federal Constitution to provide appellate courts or a right to appellate review at all,"[318] but once the state has established such a system, the state could not limit its availability in a way that discriminated on account of poverty.[319] The *Griffin* Court did not use any of the terminology that we have since come to associate with this area of the law, such as "implied fundamental right," "strict scrutiny," or "compelling interest," nor did it announce any formal method for determining when a right is fundamental. The Court did, in commonsense terms, explain why access to the appellate process was important–since it was important for the "correct adjudication of guilt or innocence."[320] As the Court pointed out, "a substantial proportion of criminal convictions are reversed by state appellate courts."[321] Thus, the opportunity to prove to an appellate court

312. *See infra* Section IV.F.2.

313. 531 U.S. 98 (2000).

314. *Cf. id.* at 104 ("When the state legislature vests the right to vote for President in its people, the right to vote as the legislature has prescribed is fundamental; and one source of its fundamental nature lies in the equal weight accorded to each vote and the equal dignity owed to each voter."), *with id.* at 105 ("The recount mechanisms . . . do not satisfy the minimum requirement for non-arbitrary treatment of voters necessary to secure the fundamental right.").

315. *Id.* at 109 ("Our consideration is limited to the present circumstances, for the problem of equal protection in election processes generally presents many complexities.").

316. 351 U.S. 12 (1956).

317. *Id.* at 18.

318. *Id.* at 18.

319. *Id.*

320. *Id.*

321. *Id.* at 18-19.

that a conviction in the trial court was wrong has some kind of fundamental status.[322]

In 1971, in *Boddie v. Connecticut*,[323] the Court broadened to some extent the fundamental right of access to courts by including certain civil cases.[324] The plaintiffs in *Boddie* were welfare recipients challenging the required fees they had to pay in order to file divorce actions.[325] The Court decided the case on due process grounds, and, to some extent, the Court's heightened scrutiny depended on the resulting infringement of the fundamental right to marriage, which included a right to terminate that marriage.[326] The case was also about access to the courts as a fundamental matter, at least where the state has, through its court system, monopolized the means for adjusting legal relationships.[327] As the Court explained, "due process reflects a fundamental value in our American constitutional system,"[328] and "[i]t is to courts, or other quasi-judicial official bodies, that we ultimately look for the implementation of a regularized, orderly process of dispute settlement."[329] Thus, where the state has through its court system monopolized the method of dispute settlement, as is the case for divorce, then some right of access to the court system is fundamental.[330] On the other hand, the Court has made clear that, as a general rule, fee requirements in civil cases ordinarily are examined only for rationality.[331] It appears that it is only where access to the courts in a civil matter involves some other fundamental interest, like marriage or the parent/child relationship,[332] or where the state has given the courts a monopoly on resolving a particular kind of dispute, that the Court will apply a heightened scrutiny.[333]

The "access to the courts" justification for identifying fundamental rights does not seem to produce any wrong decisions, but it will never be an important building block for a general system of implied fundamental rights. There is first the problem that "access to the courts" arguments are more obviously about procedure than substance and are more easily viewed as questions of procedural due process. Second, the two specific substantive justifications that the Court has used to support the fundamental nature of

322. *Griffin*, 351 U.S. at 19.
323. 401 U.S. 371 (1971).
324. *Id*. at 376.
325. *Id*.
326. *Id.*
327. *Id*. at 374-5.
328. *Id*.
329. *Boddie*, 401 U.S. at 375.
330. *Id*.
331. Ortwein v. Schwab, 410 U.S. 656 (1973).
332. M.L.B. v. S.L.J., 519 U.S. 102 (1996).
333. *Boddie*, 401 U.S. at 375.

access to the court–the desire to get things right and the monopolization of certain dispute settlement procedures–are very difficult to generalize beyond these particular factual settings.

G. Because Previous Supreme Court Precedents Identify Them

The search for the source, or sources, of implied fundamental rights is usually seen to be a search for first principles, that is, basic principles outside the Constitution and outside previous Court decisions that can justify the identification of certain rights as fundamental. Thus, for example, we have the "history and traditions" test and the "implicit in the concept of ordered liberty" test. However, in recent years, in three of the Court's most significant decisions,[334] the Court has engaged in a more modest kind of reasoning. It has not attempted to establish first principles from outside the Constitution but rather has accepted as given previous Supreme Court cases and attempted to use the specific holdings of those cases to establish a more generalized principle of privacy as a fundamental right.

In *Roe v. Wade*,[335] the Court began by conceding that "[t]he Constitution does not explicitly mention any right of privacy."[336] Then, without citation to any general theory of implied fundamental rights, it went on to cite "a line of decisions . . . going back perhaps as far as [1891]"[337] in which "the Court has recognized that a certain right of personal privacy, or a guarantee of certain areas or zones of privacy, does exist under the Constitution."[338] The Court then cited thirteen cases falling into two sets. The first seven identified possible sources of the right to privacy in the Constitution,[339] and the next six identified certain aspects of privacy that were protected.[340] At that point, without choosing any one of the previously cited methods for identifying the right, and without relying on any one of the previously cited aspects of the right, the Court drew the general conclusion that these previous cases, although specific in the kinds of privacy protected, were best understood as recognizing

334. Lawrence v. Texas, 539 U. S. 833 (2003); Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833 (1992); Roe v. Wade, 410 U.S. 113 (1973).

335. 410 U.S. 113 (1973).

336. *Id.* at 152.

337. *Id.*

338. *Id.*

339. Stanley v. Georgia, 394 U.S. 557 (1969); Terry v. Ohio, 392 U.S. 1 (1968); Katz v. United States, 389 U.S. 347 (1967); Boyd v. United States, 116 U.S. 616 (1886); Olmstead v. United States, 2777 U.S. 438, 478 (1928) (Brandeis, J., dissenting); Griswold v. Connecticut, 381 U.S. 479 (1965); Meyer v. Nebraska, 262 U.S. 390 (1923).

340. Loving v. Virginia, 388 U.S. 1 (1967) (marriage); Skinner v. Oklahoma, 316 U.S. 535 (1942) (procreation); Eisenstadt v. Baird, 405 U.S. 438 (1971) (contraception); Prince v. Massachusetts, 321 U.S. 158 (1944) (family relationships); Pierce v. Society of Sisters, 268 U.S. 510 (1925) (child rearing and education); Meyer v. Nebraska, 262 U.S. 390 (1923) (same).

a broad and generalized right to privacy that is part of Fourteenth Amendment "liberty."[341] This right of privacy included within it "a woman's decision whether or not to terminate her pregnancy."[342] This is the kind of legal reasoning that historically was used by common law judges to establish general legal principles from previous specific cases that served as precedents.[343]

Nineteen years after *Roe*, in *Planned Parenthood of Southeastern Pennsylvania v. Casey*,[344] a plurality opinion by Justices O'Connor, Kennedy, and Souter reviewed the precedential value of *Roe v. Wade*.[345] In doing so, the plurality gave great weight to the Court's earlier precedents, without any appeal to underlying theories of where fundamental rights come from.[346] Rather, the plurality emphasized the doctrine of *stare decisis* as crucial to their conclusion that "the essential holding of *Roe v. Wade* should be retained and once again reaffirmed."[347] The plurality explained that "the reservations any of us may have in reaffirming the central holding of *Roe* are outweighed by the explication of individual liberty we have given combined with the force of *stare decisis*."[348] The *Casey* plurality thus used the earlier Supreme Court precedents, particularly *Roe*, and the formal doctrine of *stare decisis* to explain the nature of the fundamental right of privacy as it relates to abortion.

Eleven years later, the Court's opinion in *Lawrence v. Texas*[349] used a similar kind of case-specific reasoning to provide authority for an implied fundamental right.[350] The *Lawrence* Court first made reference to the "liberty" interest that had been identified in the *Pierce*, *Meyer*, *Griswold*, *Eisenstadt*, and *Roe* line of cases.[351] The Court viewed these cases as having established (1) that "the right to make certain decisions regarding sexual conduct extends beyond the marital relationship;"[352] (2) that liberty includes "the right of a woman to make certain fundamental decisions affecting her destiny;"[353] and (3) that this liberty includes a "substantive dimension of fundamental

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

342. *Id.* at 153.

343. The development of the contract doctrine of consideration is a good example of courts developing a general doctrine over time on the basis of a series of particular cases. For a discussion of the historical development of the consideration doctrine, see E. ALLEN FARNSWORTH, CONTRACTS 14-19 (2004).

344. 505 U.S. 833 (1992).

345. *Id*.

346. *Id.* at 849.

347. *Id.* at 846.

348. *Id.* at 852.

349. 539 U.S. 558 (2003).

350. *Id.* at 564-65.

351. *Id.* at 564-65.

352. *Id.* at 565.

353. *Id.*

significance in defining the rights of the person."[354] In light of these precedents, the *Lawrence* Court determined that *Bowers v. Hardwick* had been incorrectly decided and had to be overruled, since its penalties and purposes attempted to regulate "the most private human conduct, sexual behavior, and in the most private of places, the home."[355]

The use of previous cases as precedents rather than an appeal to broad first principles can be viewed as a modest form of judicial reasoning that does not attempt to make new law but only to discern how existing law applies in a new factual setting. Of course, critics of *Roe* and *Lawrence* would say that the Court went well beyond previous precedents rather than simply applying them, but that would be a criticism of the particular use of this method in these cases, rather than a general critique of this method as a form of constitutional reasoning. There still is one unanswerable criticism of this method–how does the Court get its precedents in the first place? That is, by the time of *Roe*, there was a history of implied fundamental rights cases from which the Court could select relevant precedents that would help decide the current case. How had the Courts that decided those earlier cases, without the benefit of precedents, identified implied fundamental rights? The method of reasoning from existing precedents can work in a mature system that has already decided enough relevant cases to serve as precedents, but such a method could never justify the original precedents.

V. CONCLUSION

The United States Supreme Court has no general theory of implied fundamental rights under the Constitution. That should come as no surprise, given that the Court is a multi-member body that changes over time and can decide only the particular case before it. What the Court does have is a series of methods that it uses in particular cases. In the ordinary course, the Court tends to treat the due process and equal protection cases as independent of each other. Thus, the "history and traditions" test, the "implicit in the concept of ordered liberty" test, and the "shocks the conscience" test are used only under the Due Process Clause. On the other hand, the societal importance test, the structural test, and the access to governmental processes test are ordinarily used in equal protection cases.[356] The "explicitly or implicitly guaranteed by the Constitution" test was developed in an equal protection case, but it effectively overlaps the due process "implicit in the concept of ordered liberty" test. Nevertheless, having established separate tests for identifying fundamental rights under the Due Process and Equal Protection Clauses, the

354. *Id.*

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

356. *But see supra* Section IV.E.2, which shows the Court using a structural test in an area other than equal protection.

Court tends to treat them as interchangeable when such treatment serves its purposes.

As for the merits of the tests, none of them is entirely satisfactory. The three Due Process tests-"implicit in the concept of ordered liberty," "history and traditions," and "shocks the conscience"–all have the benefit of being broad theories of general applicability. However, the first of these suffers from the defect of being so vague and circular that it does not at all advance the discussion about the source of implied fundamental rights. The second suffers from the defect that there is no agreement on what our history and traditions are and which ones count and at what level of generality. The third suffers from the defect of beings a standardless, subjective methodology. The method of relying on previous Supreme Court precedents to identify fundamental rights in new settings is a workable method, but only if one accepts the question-begging use of earlier precedents that do not themselves adequately explain the source of the alleged right.

The structural and access analyses that the Court has used under the Equal Protection Clause do not suffer from the defects of vagueness, subjectivity, or disputes over history, but none of them is capable of being generalized to form a broader theory. Thus, the structure of a federal government argument is quite adequate to explain the implied fundamental right to cross state lines, but nothing beyond that. The access to governmental processes method works to explain the fundamental rights to vote and to have some level of access to the courts but, once again, does not seem capable of being generalized into a theory. On the other hand, the more general test of societal importance seems too vague and subjective to constitute a valid constitutional theory.

So where does that leave us? Not in a very satisfactory position. Perhaps the very idea that courts, and therefore judges, are capable of creating an objective, defensible, constitutionally-based method and theory for identifying implied fundamental rights is implausible. A search for an "implied" constitutional right is, by definition, a search for something that cannot be found in the Constitution, but surely the rights themselves exist. The very concept of government in America involves limits on government power and corresponding protections of individual liberty. The Ninth Amendment makes clear that the drafters of the Constitution and of the Bill of Rights were quite certain that not all of the individual rights that are protected from government intrusion find explicit protection in the Constitution. What this means is that courts, and therefore judges, have no choice but to fill in the blanks. This article is an account of the methods the Supreme Court has used in its necessary task of filling in the blanks.