JUDICIAL ENGAGEMENT, WRITTEN CONSTITUTIONS, AND THE VALUE OF PRESERVATION: THE CASE OF INDIVIDUAL RIGHTS

Elizabeth Price Foley[*]

> The constitution and laws of a State are rarely attacked from the front; it is against secret and gradual attacks that a Nation must chiefly guard. . . . [C]hanges are overlooked when they come about insensibly by a series of steps which are scarcely noted. One would do a great service to Nations by showing from history how many States have thus changed their whole nature and lost their original constitution.[1]

INTRODUCTION

Written constitutions are arguably the best, most important invention of law. A written social compact, superior to ordinary laws, allows citizens to understand both the powers possessed by their government and, conversely, the rights retained by the people. The difficulty, however, is that words used in a written constitution are often imprecise; they do not always convey or capture the full, contextual meaning understood by those who wrote and ratified them. This meaning gap ineluctably grows larger with the passage of time. What was widely understood in year one of a constitution becomes fuzzier in year fifty, even fuzzier in year 100, and may be all but lost by year 200.

Those living in year 200 may not only lack understanding of the meaning of the constitution's words but—far worse—they may not even care. They may take the position that their written constitution is "living"—that what the words meant over 200 years ago should not really matter anymore because it is what the people want or need them to mean *today* that is important. Unfortunately, the living constitution position is inherently unstable and, when properly understood, undermines the entire purpose of having a written constitution in the first place. As George Will once aptly expressed it, "A constitution is supposed to freeze things. It is an anti-evolutionary device."[2]

---

[*] Elizabeth Price Foley is the Institute for Justice Chair in Constitutional Litigation and Professor of Law at Florida International University College of Law. She would like to thank Clark Neily and David Rivkin for sharing their ideas about the scope and limits of judicial engagement. Any opinions and errors in this Article are, of course, solely those of the author.

[1] 3 EMMERICH DE VATTEL, THE LAW OF NATIONS OR THE PRINCIPLES OF NATURAL LAW 18 (Charles G. Fenwick trans., Carnegie Inst. of Wash. 1916) (1758).

[2] *This Week* (ABC television broadcast July 3, 2011) (comments of George Will).

Living constitutionalism is an interpretive methodology that allows the meaning of the carefully chosen words of a written constitution to change with the times, morphing and stretching on an as-needed basis.[3] Under this methodology, judges reinterpret those words to suit some perceived political or pragmatic expediency. Such flexibility may be convenient, but it places far too much power in the hands of judges—particularly, in the U.S. system, the nine Justices of the U.S. Supreme Court—and over time, causes the citizenry to view their written Constitution as little more than a politically manipulable blob of Play-Doh. If there is a perception that something is "amiss" with the Constitution as written, such a system simply defaults to a "let the judges fix it" mentality.[4] There is no need for "We the People" to get involved, and certainly no need to resort to "cumbersome" formal amendment processes.[5]

When judges alter a written constitution because its original meaning is no longer convenient, useful or modern, they engage in *judicial activism*.[6] They are actively seeking to modify the written social compact to suit their own, or their perception of society's, current preferences. Judicial activism is a usurpation of the proper judicial role, and it undermines the proper role of We the People. Only the People may amend the written constitution when a sufficiently large number (i.e., a supermajority) believes strongly enough that a formal, written modification of the social charter is necessary.[7] As eloquently articulated by Alexander Hamilton in *Federalist No. 78*:

> Until the people have, by some solemn and authoritative act, annulled or changed the established form, it is binding upon themselves collectively, as well as individually; and no presumption or even knowledge of their sentiments, can warrant their representatives in a departure from it, prior to such an act. But it is easy to see, that it would require an uncommon portion of fortitude in the judges to do their duty as faithful guardians of the Constitution, where legislative invasions of it had been instigated by the major voice of the community.[8]

Hamilton's prescience is obvious. His fear that "it would require an uncommon portion of fortitude" for judges "to do their duty as faithful guardians of the Constitution" has proven true.[9] Construction of many of the most important rights-protecting portions of the Constitution has result-

---

3 *See* ANTONIN SCALIA, A MATTER OF INTERPRETATION 47 (1997).

4 *See* Elizabeth Price Foley, *The Role of International Law in U.S. Constitutional Interpretation: Original Meaning, Sovereignty and the Ninth Amendment*, 3 FIU L. REV. 27, 29-30 (2007) (discussing the democratic harms inherent in living constitutionalism).

5 *See* U.S. CONST. art. V (requiring approval of constitutional amendments by two-thirds of both houses of Congress and ratification by three-quarters of the States).

6 *See* BLACK'S LAW DICTIONARY 391 (3d Pocket ed. 2001).

7 *See* U.S. CONST. art. V.

8 THE FEDERALIST NO. 78, at 468-69 (Alexander Hamilton) (Clinton Rossiter ed., 2003).

9 *Id.*

ed in virtually unbridled activism, and woefully inadequate *judicial engagement*. Judicial engagement refers to the need for judges to *enforce the written constitution*, even when doing so may strike the judge as pragmatically difficult, politically unpalatable, or even morally wrong.[10] A judge who is properly engaged, in other words, is a judge who views her job as one of enforcing and preserving the written Constitution.[11] In the words of Article VI of the U.S. Constitution, judicial engagement means that the judge is "bound by Oath or Affirmation, to support this Constitution,"[12] even though she may vehemently disagree with the end result of her decision. An engaged judge understands her role as an interpreter; a neutral third party who must endeavor to implement the meaning of a regulation, statute, or, in this particular case, a constitution that is consonant with the meaning of those who wrote and formally approved its text. An engaged judge will not re-write the text to suit her own preferences or her perception of the preferences of a new generation. By construing the written text consonant with its original meaning, an engaged judge preserves the writing. Engaged judges thus show immense respect for the republican processes that created written legal texts, be they regulations, statutes, or constitutions. Engaged judges' refusal to construe laws to "fit the times" exhibit deference to the will of the people, who always possess the ultimate power to trump judges' construction by repealing or amending the text. Alexander Hamilton articulated this view of the proper role of judges in *Federalist No. 78*, in which he assured the American public that giving judges the power to invalidate statutes inconsistent with the Constitution did not imply a superiority of the judiciary over the legislature, but merely that,

> the power of the people is superior to both, and that where the will of the legislature, declared in its statutes, stands in opposition to that of the people, declared in the Constitution, the judges ought to be governed by the latter rather than the former. They ought to regulate their decisions by the fundamental laws rather than by those which are not fundamental.[13]

This Article will explore the difference between judicial activism and judicial engagement by examining the Supreme Court's evolutionary approach to individual rights. I hope to convince the reader that judges have strayed too far afield from the Constitution's original meaning in the realm of individual rights, engaging in judicial activism rather than appropriate judicial engagement. Following this analysis, I will offer a plausible and

---

10 Chip Mellor, *Mellor: Judicial Engagement*, PHILLY.COM (June 4, 2011, 8:00 AM), http://www.philly.com/philly/blogs/inq_ed_board/Mellor-Judicial-engagement.html.

11 *Cf.* Florida v. U.S. Dep't of Health & Human Servs., 648 F.3d 1235, 1284 (11th Cir.) ("When Congress oversteps those outer limits [of its powers under the Constitution], the Constitution requires judicial engagement, not judicial abdication."), *cert. granted*, 132 S. Ct. 604 (2011).

12 U.S. CONST. art. VI ("[A]ll . . . judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution . . . .").

13 THE FEDERALIST NO. 78, *supra* note 8, at 466.

familiar solution to the problem of activism—a blueprint, if you will, for getting our judges properly engaged in enforcing our written Constitution.

I. THE FIRST CENTURY OF RIGHTS: DENYING THE APPLICABILITY OF INDIVIDUAL RIGHTS AGAINST THE STATES

Judicial enforcement of individual rights has long been problematic. Throughout much of our early constitutional history, the Bill of Rights has been viewed as inapplicable to the States.[14] Even after ratification of the Fourteenth Amendment and its Privileges or Immunities Clause, the Court has continued its reticence to incorporate the Bill of Rights to the States. The net result is that, to a large degree, judicial engagement in the protection of individual rights has been slow, haphazard, and incomplete.

A. *Incorporation Prior to the Fourteenth Amendment*

I have written elsewhere that the long road to "incorporation" of the Bill of Rights—making them binding on the States as well as the federal government—was unfortunate and arguably inappropriate.[15] The Bill of Rights itself—other than the First Amendment, which explicitly targets the U.S. Congress,[16] and the Seventh Amendment's Reexamination Clause, which explicitly targets the federal courts—does not, as a textual matter, indicate whether the rights contained therein are enjoyed only vis-à-vis the newly created federal sovereign or the state sovereigns as well.[17] The Bill's explicit mention of the federal sovereign in the First and Seventh Amendments suggests an awareness of the need to specify the sovereign against which the right applied. This construction could reasonably imply that all *other* provisions of the Bill were rights enjoyed *simpliciter*, against all governments within the newly formed United States.

This broad view of the Bill of Rights is certainly unorthodox, at least when viewed through modern eyes. We are all taught early on that the Supreme Court, in its 1833 decision *Barron v. Baltimore*,[18] roundly rejected the idea that the Bill of Rights could be binding on the States.[19] In *Barron*, Chief Justice John Marshall rejected the notion that the Fifth Amendment's Takings Clause could be binding on the States, and more broadly declared

---

14 *See* Barron v. Baltimore, 32 U.S. (7 Pet.) 243, 250 (1833) (holding that the Bill of Rights was not binding on the States).

15 ELIZABETH PRICE FOLEY, LIBERTY FOR ALL: RECLAIMING INDIVIDUAL PRIVACY IN A NEW ERA OF PUBLIC MORALITY 23-35 (2006).

16 U.S. CONST. amend. I ("Congress shall make no law . . . .").

17 *See generally* U.S. CONST. amends. I-X.

18 32 U.S. (7 Pet.) 243 (1833).

19 *Id.* at 250.

in dicta that the remainder of the Bill "contain[s] no expression indicating an intention to apply them to the state governments. This court cannot so apply them."[20]

Oddly, Marshall's opinion in *Barron* never even acknowledged the fact that several high state courts reached the opposite conclusion, holding that various provisions of the Bill of Rights *were* indeed binding on them.[21] Even the U.S. Supreme Court, fourteen years before *Barron*, seemed confused, writing an opinion that assumed at least a part of the Bill of Rights was binding on the States. Specifically, in an opinion ironically penned by Chief Justice Marshall, *Bank of Columbia v. Okely*,[22] the Court unanimously concluded that a Maryland summary debt collection law was consonant with the Seventh Amendment's right to civil jury trial, clearly implying that the amendment was binding on the States.[23]

In addition, for several decades after the broad dicta in *Barron*, state supreme courts balked, insisting that they were bound by portions of the federal Bill of Rights.[24] Prominent lawyers continued to hold the belief or impression (whichever one chooses to call it) that the Bill of Rights *was* binding on the States. This belief persisted among many members of the Thirty-Ninth Congress who debated and approved the Fourteenth Amend-

---

20 *Id.*

21 State v. Moor, 1 Miss. 134, 138 (1823) (Fifth Amendment Double Jeopardy Clause); State v. Ledford, 3 Mo. 102, 105-06, 110 (1832) (Fifth Amendment Indictment and Due Process Clauses); State v. Powell, 7 N.J.L. 244, 245 (1823) (Fifth Amendment Indictment Clause); People v. Goodwin, 18 Johns. 187, 200-01 (N.Y. Sup. Ct. 1820) (Fifth Amendment Double Jeopardy Clause).

22 17 U.S. (4 Wheat.) 235 (1819).

23 *Id.* at 244 (stating that the Maryland law gave "full effect to the seventh amendment of the constitution" because "the words are, that the *right* of trial by jury shall be preserved, which places it on the foot of a *lex pro se introducta*, and the benefit of it therefore may be relinquished").

24 *See* State v. Buzzard, 4 Ark. 18, 28 (1842) (determining that a concealed weapon prohibition did not violate the Second Amendment); Campbell v. State, 11 Ga. 353, 366-67 (1852) ("[I]t is in vian [sic] to shield [the people] from a blow aimed by the Federal arm, if they are liable to be prostrated by one dealt with equal fatality by their own [State]. . . . It was not because it was supposed that legislation over the subjects here enumerated [in the Bill of Rights] might be better and more safely entrusted to the State governments, that it was prohibited to Congress. It was to *declare* to the world the fixed and unalterable determination of our people, that these invaluable rights which had been established at so great a cost of blood and treasure, should never disturbed by *any* government."); Nunn v. State, 1 Ga. 243, 250-51 (1846) (describing the Second Amendment as binding on the state, because some portions of the Bill of Rights "were designed for the benefit of every citizen of the Union in all courts and in all places; and the people of the several States, in ratifying them in their respective State conventions, have virtually adopted them as a beacon-lights to guide and control the action of their own legislatures, as well as that of Congress"); Rhinehart v. Schuyler, 7 Ill. 473, 523 (1846) (finding the Fifth Amendment's Due Process Clause binding on the State); State v. Smith, 11 La. Ann. 633, 633-34 (1856) (assuming that the Second Amendment applied to the States, but did not prohibit police regulations necessary for public safety); Merriam v. Mitchell, 13 Me. 439, 457 (1836) (assuming the Fourth Amendment's probable cause requirement was applicable and violated); McDaniel v. State, 16 Miss. 401, 416 (1847) (assuming the Sixth Amendment's Confrontation Clause was binding on state courts but not violated by introduction of a dying declaration).

ment for ratification. For example, Republican Robert Hale of New York objected to the original draft of the Fourteenth Amendment because he thought it would give Congress too much power over the States.[25] Notably, Hale believed the Bill of Rights was already binding on the States, so there was no need to enlarge congressional power to protect the rights of U.S. citizens and the newly emancipated slaves:

> Now, what are these amendments to the Constitution, numbered from one to ten . . . ? What is the nature and object of these articles? They do not contain, from beginning to end, a grant of power anywhere. On the contrary, they are all restrictions of power. They constitute the bill of rights, a bill of rights for the protection of the citizen, and defining and limiting the power of the Federal and State legislation. They are not matters upon which legislation can be based.[26]

The House sponsor of the Fourteenth Amendment (and the amendment's original drafter, Representative John Bingham of Ohio), responded to Hale by challenging him to "point to a single decision" of federal or state courts in which the Bill of Rights had been held applicable to the states for the benefit of citizens, including African Americans.[27] Hale responded that he had

> not been able to prepare a brief for this argument, and therefore [could not] refer the gentleman to any case. . . . But still I have, somehow or other, gone along with the impression that there is some sort of protection thrown over us in some way, whether with or without the sanction of a judicial decision that we are so protected. Of course, I may be entirely mistaken in all this, but I have somehow had that impression.[28]

At this point, Representative Eldridge of Wisconsin chimed in, expressing similar views to Hale, and asking Bingham if he "ha[d] found or heard of a case in which the Constitution of the United States has been pronounced to be *insufficient* [to protect the rights of citizens]?"[29] Bingham replied the next day on the floor of the House, citing *Barron* to his colleagues.[30]

Similarly, the Senate sponsor of the Fourteenth Amendment, Senator Jacob Howard of Michigan, explained to his Senate colleagues that the Constitution contained "a mass of privileges, immunities, and rights" that had been held not binding on the States.[31] According to Senator Howard, the purpose of Section 1 of the Fourteenth Amendment was thus "to restrain the power of the States and compel them at all times to respect these great

---

25 CONG. GLOBE, 39th Cong., 1st Sess. 1064 (1866).

26 *Id.*

27 *Id.* (statement of Rep. Bingham of Ohio).

28 *Id.*

29 *Id.* (emphasis added).

30 *Id.* at 1089-90.

31 CONG. GLOBE, 39th Cong., 1st Sess. 2765 (1866).

fundamental guarantees,"[32] imposing "a general prohibition upon all the States, as such, from abridging the privileges and immunities of the citizens of the United States."[33]

These exchanges among members of the Thirty-Ninth Congress show there was deep and abiding misunderstanding of the scope and applicability of the Bill of Rights well after *Barron* was decided, and even among the nation's elite. And because the states notoriously disregarded what were widely perceived to be the fundamental rights of humankind—at least when it came to African-American slaves or abolitionists—the Thirty-Ninth Congress that proposed the Fourteenth Amendment believed the amendment would make the Bill of Rights formally binding upon the States.[34] As Justice Thomas's thorough research in *McDonald v. City of Chicago*[35] showed, these congressional speeches articulating the purpose of the Fourteenth Amendment were widely circulated to the ratifying public via pamphlets and newspapers.[36]

B. *Incorporation After the Fourteenth Amendment*

The portion of the Fourteenth Amendment designed to bind the Bill of Rights on the States was the Privileges or Immunities Clause.[37] Unfortunately, in its 1873, 5-4 decision in the *Slaughterhouse Cases*,[38] the Supreme Court held that the "privileges or immunities" referred to by the Fourteenth Amendment were only rights that "owe their existence to the Federal government, its National character, its Constitution, or its laws."[39] Curiously, this did *not* include the Bill of Rights, but merely an odd list of things such as accessing the federal government and transacting business with it, accessing national seaports, demanding protection of one's life, liberty, and property when on the high seas or abroad, petitioning the government for a redress of grievances by the federal government, and the writ of habeas corpus.[40] Four dissenting Justices, led by Justice Stephen J. Field, ardently asserted that the majority's narrow interpretation made the Privileges or Immunities Clause "a vain and idle enactment, which accomplished noth-

---

32 *Id*. at 2766.

33 *Id*. at 2765.

34 *See id.* at 1088, 1090.

35 130 S. Ct. 3020 (2010).

36 *See id*. at 3074 ("As a whole, these well-circulated speeches indicate that § 1 was understood to enforce constitutionally declared rights against the States, and they provide no suggestion that any language in the section other than the Privileges or Immunities Clause would accomplish that task.").

37 U.S. CONST. amend. XIV, § 1 ("No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States . . . . ").

38 83 U.S. (16 Wall.) 36 (1873).

39 *Id*. at 79.

40 *Id*. at 79-80.

ing, and most unnecessarily excited Congress and the people on its passage."[41]

The net effect of the *Slaughterhouse Cases* was that after fighting an extremely bloody Civil War, the only legal changes accomplished were ending the institution of slavery,[42] deeming the freed slaves official U.S. "citizens,"[43] and granting African Americans the right to vote.[44] The key constitutional provision designed to ensure that equal *rights* were provided—the Privileges or Immunities Clause of the Fourteenth Amendment—was gutted by the decision. Not only did the *Slaughterhouse Cases* effectively take a black marker and mark out the Privileges or Immunities Clause, but the 1896 decision in *Plessy v. Ferguson*,[45] in blessing the doctrine of "separate but equal," gutted the effectiveness of the amendment's other key provision, the Equal Protection Clause.[46]

The *Slaughterhouse* and *Plessy* decisions thus made it impossible for many decades to even *consider* making the Bill of Rights binding on the States. Indeed, after these decisions, the only portion of the Fourteenth Amendment remaining legally in play as a vehicle for incorporation was the Due Process Clause of the Fourteenth Amendment—rather ironic, since this Clause, by its own words, is designed to ensure fair *process* is provided before individuals' life, liberty or property can be deprived. This Clause does not, as a textual matter, protect any substantive rights.[47] Despite this textual and arguably even contextual understanding of the nature of due process,[48] the Supreme Court, if it wanted to incorporate the Bill of Rights, had only two choices: overrule *Slaughterhouse*, or look to the Due Process Clause.

---

41 *Id*. at 96 (Field, J., dissenting).

42 U.S. CONST. amend. XIII, § 1 ("Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.").

43 *Id.* amend. XIV, § 1 ("All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside.").

44 *Id.* amend. XV, § 1 ("The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.").

45 163 U.S. 537 (1896).

46 *See id.* at 550-52; *see also id.* at 552 (Harlan, J., dissenting).

47 *See* McDonald v. City of Chi., 130 S. Ct. 3020, 3062 (Thomas, J., concurring) ("The notion that a constitutional provision that guarantees only 'process' before a person is deprived of life, liberty, or property could define the substance of those rights strains credulity for even the most casual user of words.").

48 *Id.* (noting that no one on the present Court "argues that the [substantive] meaning they attribute to the Due Process Clause was consistent with public understanding at the time of its ratification. . . . [A]ny serious argument over the scope of the Due Process Clause must acknowledge that neither its text nor its history suggests that it protects the many substantive rights this Court's cases now claim it does").

The Court chose the latter approach. Beginning in 1925, in *Gitlow v. New York*,[49] the Supreme Court took the first step toward incorporating the Bill of Rights using the Due Process Clause. And in an ironic twist, the first portion of the Bill of Rights incorporated was the First Amendment—odd because the First Amendment is the only portion of the Bill of Rights, other than the Reexamination Clause of the Seventh Amendment, that textually applies only to the *federal* government. It explicitly declares that "*Congress* shall make no law" prohibiting free speech and press, etc.

Since *Gitlow*, incorporation of the Bill of Rights through the Due Process Clause has become the accepted method of the Court. Incorporation, however, has not been total, but "selective." Although Justice Hugo Black adamantly insisted that the entirety of the enumerated rights in the Bill of Rights should be binding on the States (thus excluding the Ninth Amendment),[50] a majority of the Court has never accepted total incorporation, instead preferring a clause-by-clause, incremental approach.[51] The ability to incrementally make the Bill of Rights binding on the States is likely one reason why the Court opted not to simply overrule *Slaughterhouse*. If the "privileges or immunities of citizens of the United States" referred to the Bill of Rights, that Clause would demand that the entire Bill be immediately binding upon the States, not just bits and pieces of it. The Court's selective incorporation approach using the Due Process Clause has thus given it control over the timing and content of the rights incorporated against the States. At present, very few portions of the Bill have not been incorporated. A few notable exceptions include the Indictment Clause of the Fifth Amendment, the Seventh Amendment's right to civil jury trial, and the Eighth Amendment's prohibition of excessive fines.[52]

The Court's first century of rights jurisprudence thus evinces a remarkable reticence to extend the protections of the Bill of Rights to citizens as against their own States. The applicability of the Bill of Rights to the States, as a textual and contextual matter, was a lot more ambiguous than

---

49 268 U.S. 652 (1925).

50 *See* Adamson v. California, 332 U.S. 46, 90 (1947) (Black, J., dissenting). Black later expressed his belief that the proper basis for making the Bill of Rights binding upon the States was the Privileges or Immunities Clause. Duncan v. Louisiana, 391 U.S. 145, 166 (1968) (Black, J., dissenting) ("'No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States' seem to me an eminently reasonable way of expressing the idea that henceforth the Bill of Rights shall apply to the States. What more precious 'privilege' of American citizenship could there be than that privilege to claim the protections of our great Bill of Rights? I suggest that any reading of 'privileges or immunities of citizens of the United States' which excludes the Bill of Rights' safeguards renders the words of this section of the Fourteenth Amendment meaningless." (footnote omitted)).

51 *See McDonald*, 130 S. Ct. at 3034 (majority opinion) ("While Justice Black's theory was never adopted, the Court eventually moved in that direction by initiating what has been called a process of 'selection incorporation,' *i.e.*, the Court began to hold that the Due Process Clause fully incorporates particular rights contained in the first eight Amendments.").

52 *Id.* at 3034-35 & n.13.

Chief Justice Marshall's opinion in *Barron* revealed. Many high state courts had, in fact, considered their States bound by various provisions of the Bill, and indeed continued to do so, in defiance of *Barron*, for many decades afterwards.[53] Even after the Civil War and the ratification of the Fourteenth Amendment—whose Privileges or Immunities Clause was clearly designed to make the Bill binding on the States—the Supreme Court refused to interpret the text in a way consonant with its original meaning.

Indeed, the hallmark of the Supreme Court's first century of constitutional rights interpretation is a contortion of the constitutional text and a blatant disregard of its historical context, with the goal of giving the States a free pass from the Bill of Rights. This first century was thus a living constitutionalism century, in which Justices of the Court felt it their paternalistic duty to preserve the Union by kowtowing to "states' rights."[54] They did so not because this is what the Constitution or its historical meaning demanded—it most certainly did not—but because they felt free to disregard constitutional text and context in the name of some unspoken greater good, moral sensibility, or other subjective motivation. The net result of such living constitutionalism, as is always the case, is that the will of the people, evidenced by their fundamental charter of government, was thwarted, and protection for their most fundamental individual rights was denied against their state governments. Judges in this first century were not "engaged" in protecting and defending the Constitution; they went out of their way to ignore and contort it to reach desired ends.

II. THE SECOND CENTURY OF RIGHTS: BIFURCATING RIGHTS BY "TYPE" AND CREATING TIERS OF REVIEW

The Fourteenth Amendment and its subsequent jurisprudence ushered in a period of incorporation unanticipated by both earlier courts and the ratifiers of the Fourteenth Amendment. In the Court's second century, the Court's due process jurisprudence gave rise to unexpected, categorical divisions of rights: economic and non-economic, enumerated and unenumerated, fundamental and non-fundamental. These divisions represented a further retreat from the Court's willingness to engage in textual and contextual judicial engagement.

---

53 *See* cases cited *supra* note 24.

54 *See* Plessy v. Ferguson, 163 U.S. 537, 550-52 (1896); Slaughterhouse Cases, 83 U.S. (16. Wall.) 36, 78-79 (1873); Barron v. Baltimore, 32 U.S. (7 Pet.) 243, 250 (1833).

A. *Devaluing Economic Rights*

Once the Supreme Court found an acceptable vehicle by which it felt comfortable incorporating the Bill of Rights, it also expressed its belief that certain rights were more "valuable" than other rights. The beginning of this distinction occurred with a 5-4 decision of the New Deal Court, *Nebbia v. New York*,[55] a due process challenge to a New York law setting retail prices for milk.[56] Mr. Nebbia, a grocery store proprietor, claimed that governmental price fixing deprived him of his property and liberty of contract without due process.[57] The Court rejected these contentions, reasoning that "the guaranty of due process, as has often been held, demands only that the law shall not be unreasonable, arbitrary or capricious, and that the means selected shall have a real and substantial relation to the object sought to be attained."[58]

The *Nebbia* decision articulated an early version of rational basis review for assertions of "economic" rights as against laws regulating the conduct of business.[59] But the *Nebbia* Court's rational basis review was quite a different beast from the modern version of this standard: it permitted invalidation of economic laws only if the court found them "unreasonable, arbitrary or capricious," but it also demanded proof from the government "that the means selected *shall have a real and substantial relation to the object sought to be attained*."[60] This last requirement—a close fit between the purpose of the law and the means used to achieve it—is notably absent from modern rational basis review.[61] While on the surface *Nebbia* seems consonant with modern rational basis review, it was in fact much less deferential, and notably more searching in its quest for a means-end fit. The rational basis standard of review articulated in *Nebbia* applied to *all* laws challenged under the Due Process Clauses. Bifurcation of standards of review according to the *type* of law being challenged did not develop until several years later.

The seed of modern rational basis review was sown in the infamous "Footnote Four" of the 1937 decision in *United States v. Carolene Products Co.*[62] In Footnote Four, the Court for the first time suggested that altering the "degree of scrutiny" would be desirable according to the type of law

---

55 291 U.S. 502 (1934).

56 *Id.* at 515.

57 *Id.* at 521-23.

58 *Id.* at 525.

59 *See id.* at 537 ("If the laws passed are seen to have a reasonable relation to a proper legislative purpose, and are neither arbitrary nor discriminatory, the requirements of due process are satisfied . . . .").

60 *Id.* at 525 (emphasis added).

61 *See infra* notes 68-69 and accompanying text.

62 304 U.S. 144 (1938).

being challenged.[63] Pursuant to Footnote Four, a law that "on its face" offends "a specific prohibition of the Constitution, such as those of the first ten amendments" were deemed inappropriate for the presumption of constitutionality (i.e., rational basis review) and thus demanded closer judicial scrutiny.[64] Similarly, under the Equal Protection Clause, laws directed at certain "discrete and insular minorities" were to be presumed unconstitutional and given closer scrutiny.[65]

The net effect of Footnote Four was that economic rights were given second-class status because laws restricting economic rights—most notably the liberty of contract—did not "on their face" offend a "specific prohibition" of the Bill of Rights. As a result, laws affecting economic liberty—minimum wages, maximum hours, licensure, etc.—were presumed constitutional and could be invalidated only if the Court could imagine no rational basis for the law.[66] By contrast, any law affecting other, non-economic rights—enumerated rights such as speech, press, search and seizure, and the like—are presumed unconstitutional and carefully scrutinized by the court, to ensure that the government has an "important" or "compelling" justification for the law and that it is "narrowly tailored" or "substantially related" to that justification.[67]

As any modern law student knows, the result of all this is that we have two distinct classes of constitutional rights under the Due Process Clauses: economic and non-economic. The former are virtually always upheld, in rubber stamp fashion, and the latter are often (but not always) closely scrutinized by the judiciary, demanding both a sufficiently compelling purpose and a tight means-end fit ("narrow tailoring") to pass constitutional muster.

---

63 Footnote Four states:

> There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments, which are deemed equally specific when held to be embraced within the Fourteenth.
>
> It is unnecessary to consider now whether legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation, is to be subjected to more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment than are most other types of legislation. . . .
>
> Nor need we enquire whether similar considerations enter into the review of statutes directed at particular religious, or national, or racial minorities, [or] whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.

Id. at 152 n.4 (citations omitted).

64 *See supra* note 63 and accompanying text.

65 *Carolene Prods.*, 304 U.S. at 152 n.4.

66 *See* Williamson v. Lee Optical of Okla., Inc., 348 U.S. 483, 488, 491 (1955).

67 *See* Korematsu v. United States, 323 U.S. 214, 216 (1944) ("It should be noted, to begin with, that all legal restrictions which curtail the civil rights of a single racial group are immediately suspect. That is not to say that all such restrictions are unconstitutional. It is to say that courts must subject them to the most rigid scrutiny.").

Consider the classic articulation of rational basis review of *Williamson v. Lee Optical*,[68] in which the Court unanimously declared:

> The day is gone when this Court uses the Due Process Clause of the Fourteenth Amendment to strike down state laws, regulatory of business and industrial conditions, because they may be unwise, improvident, or out of harmony with a particular school of thought. . . . We cannot say that the regulation has no rational relation to that objective [reducing commercialism in health care] and therefore is beyond constitutional bounds.[69]

Notice that, under rational basis review, the citizen challenging the economic law not only bears the burden of persuasion, but this burden is nearly impossible to meet: She must convince the court that there is *no conceivable legitimate purpose* served by the law. The government bears virtually no burden whatsoever; even if the "legitimate purpose" posited is not actually served by the law, the court must nonetheless sustain it.[70] The only thing a court does, in a rational basis case, is simply check to see that the legislature was not acting utterly and completely irrationally. If there was *any* rational thought conceivable behind the law—even if it was not actually on the minds of most of the legislators who voted for it—the law will be upheld.[71] Needless to say, for the citizen aggrieved by an economic law, invoking rational basis review is likely to trigger a rubber stamping exercise, devoid of meaningful, intelligent judicial inquiry.

Strict scrutiny is reserved exclusively for non-economic rights that are deemed "fundamental" in nature.[72] Strict scrutiny is so demanding, in fact, that law professors often tell their students that it is "'strict' in theory fatal in fact."[73] Yet this common understanding of strict scrutiny may be more hyperbole than fact. A comprehensive empirical study conducted by Professor Adam Winkler revealed that, of all federal court decisions employing

---

68 348 U.S. 483 (1955).

69 *Id.* at 488, 491 (emphasis added).

70 *See* Heller v. Doe, 509 U.S. 312, 320-21 (1993) ("A statute is presumed constitutional, and '[t]he burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it,' whether or not the basis has a foundation in the record. Finally, courts are compelled under rational-basis review to accept a legislature's generalizations even when there is an imperfect fit between means and ends." (alteration in original) (citation omitted) (quoting Lehnhausen v. Lake Shore Auto Parts Co., 410 U.S. 356, 364 (1973))).

71 *See id.*

72 *See* Washington v. Glucksberg, 521 U.S. 702, 722 (1997) ("[B]y establishing a threshold requirement—that a challenged state action implicate a fundamental right—before requiring more than a reasonable relation to a legitimate state interest to justify the action, it avoids the need for complex balancing of competing interests in every case.").

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

strict scrutiny between 1990 and 2003, 30 percent resulted in the law being *upheld*.[74]

One reasonable implication of Winkler's study is that strict scrutiny, far from being a death knell to an action, is in fact a tough but survivable standard. This, in turn, suggests that its highly deferential cousin, rational basis review, may tilt the scales too far and unnecessarily in the government's favor. Because rational basis does not require the government to prove *anything*—the citizen challenging the law bears the burden of convincing the court that the law is utterly irrational—it sacrifices meaningful judicial engagement in pursuit of a make-believe notion that complete deference is necessary to preserve the integrity of republican legislative processes. If Winkler's study is accurate, it seems logical to conclude that something more demanding than modern rational basis review, but less demanding than strict scrutiny, achieves a more appropriate balance between the competing goals of enforcing the Constitution and restraining judges from substituting their own views for those of democratically elected representatives.

Equally important, the bifurcation of rights into arbitrary categories—nowhere mentioned in the text or the historical context of the Constitution—is once again an example of judicial activism. Categorizing asserted rights into economic and non-economic categories is entirely judge-created doctrine, and it seem to have been devised for no other reason than to enable the post-New Deal Court to more easily carry out the progressive economic agenda, creating significant doctrinal wiggle room for the Court to uphold laws regulating the economy. This is more than a little ironic, as rational basis review is often justified on the basis that it keeps judges from imposing their subjective preferences and reversing the will of the people as expressed through their democratic branches. Yet the Court's own decision during the New Deal Era to give economic rights second-class status—and thus only rational basis review—is a rather severe imposition of judicial preferences. This action trumps the will of the people expressed in the Constitution, which is by definition a higher law than any ordinary statute. The bifurcation of rights into economic and non-economic categories is classic activism, and a refusal of the Court to engage in meaningful review of any law is claimed to violate any constitutional right.

B. *Devaluing Unenumerated Rights*

In addition to the bifurcation of rights into economic and non-economic categories, the Court has also elected to further divide rights into

---

[74] Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 VAND. L. REV. 793, 815 tbl.1 (2006).

enumerated and unenumerated rights.[75] This division is contrary to the text and historical context of the Ninth Amendment, which states: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."[76] Yet precisely by bifurcating rights into enumerated and unenumerated categories, the Court's jurisprudence has disparaged these "other" rights retained by the people. Unenumerated rights—like economic rights—are given second-class status, and are skeptically viewed by many jurists who fear being labeled as "activist" judges. As the Court acknowledged in *Washington v. Glucksberg*,[77] recognition of new, unenumerated rights requires the "exercise [of] the utmost care . . . lest the liberty protected by the Due Process Clause be subtly transformed into the policy preferences of the members of this Court."[78]

It is understandable why judges—particularly those, such as federal judges, who are appointed rather than elected—would be cautious in recognizing rights not specifically enumerated in the text of the Constitution. Recognizing constitutional rights thwarts republican processes in the sense that doing so places those rights beyond the reach of majoritarian preferences, entrenching them within the safe confines of supreme constitutional law.[79] Judges that are too eager to recognize constitutional rights would thus take for themselves great power, commensurately reducing the scope of representative democracy.

Yet the Ninth Amendment tells judges not to construe the Constitution in such a rights-restricting way.[80] The Ninth Amendment is about as clear as constitutional text can be, informing judges and the people that it is perfectly legitimate—and hence, not "activist"—to be willing and able to recognize rights other than those specifically enumerated elsewhere in the Constitution.[81] As James Madison, the father of the Bill of Rights, told his House colleagues:

> It has been objected also against a bill of rights, that, by enumerating particular exceptions to the grant of power, it would disparage those rights which were not placed in that enumeration; and it might follow, by implication, that those rights which were not singled out, were intended to be assigned into the hands of the General Government, and were consequently insecure. This is one of the most plausible arguments I have ever heard urged against the admission of a bill of rights into this system; but, I conceive, that it may be guarded against. I

---

75 *See Glucksberg*, 521 U.S. at 720.

76 U.S. CONST. amend. IX.

77 521 U.S. 702 (1997).

78 *Id.* at 720 (quoting Collins v. City of Harker Heights, 503 U.S. 115, 125 (1992)) (internal quotation marks omitted).

79 *See id.* ("By extending constitutional protection to an asserted right or liberty interest, we, to a great extent, place the matter outside the arena of public debate and legislative action.").

80 *See* U.S. CONST. amend. IX.

81 *See id.*

> have attempted it, as gentlemen may see by turning to the last clause of the fourth resolution [that became the Ninth Amendment].[82]

Madison also believed that the Bill of Rights would be vigorously enforced, including the Ninth Amendment. He told his colleagues that if the Bill was passed by Congress and ratified by the people,

> independent tribunals of justice will consider themselves in a peculiar manner the guardians of those rights; they will be an impenetrable bulwark against every assumption of power in the legislative or executive; they will be naturally led to resist every encroachment upon rights expressly stipulated for in the constitution by the declaration of rights.[83]

Unfortunately, Madison's confidence in the judiciary was misplaced. The Ninth Amendment—like the Privileges or Immunities Clause—has been effectively crossed out of the constitutional text. As Professor John Hart Ely wryly observed:

> Occasionally a commentator will express a willingness to read [the Ninth Amendment] for what it seems to say, but this has been, and remains, a distinctly minority impulse. In sophisticated legal circles mentioning the Ninth Amendment is a surefire way to get a laugh. ("What are you planning to rely on to support that argument, Lester, the Ninth Amendment?")[84]

The Supreme Court has never given the Ninth Amendment any substantive meaning, nor used it as a basis for any decision. Such blatant disregard for constitutional text is contrary to commonsense and deeply respectful of the people. As Chief Justice John Marshall said in *Marbury v. Madison*,[85] "It cannot be presumed that any clause in the constitution is intended to be without effect."[86]

Just as the demise of the Privileges or Immunities Clause forced the Court to look to the Due Process Clause as the textual basis for incorporation, the demise of the Ninth Amendment has also forced the Court to look to the Due Process Clause to do the heavy lifting as the textual basis for its recognition of unenumerated rights. The word "liberty" within the Due Pro-

---

82 1 ANNALS OF CONG. 456 (1789) (Joseph Gales ed., 1834). The last clause of Madison's fourth proposal (the original version of the Ninth Amendment) read:

> The exceptions here or elsewhere in the constitution, made in favor of particular rights, shall not be so construed as to diminish the just importance of other rights retained by the people, or as to enlarge the powers delegated by the constitution; but either as actual limitations of such powers, or as inserted merely for greater caution.

Id. at 452.

83 *Id.* at 457.

84 John Hart Ely, *The Ninth Amendment*, *in* THE RIGHTS RETAINED BY THE PEOPLE: THE HISTORY AND MEANING OF THE NINTH AMENDMENT 179, 179 (Randy E. Barnett ed., 1989).

85 5 U.S. (1 Cranch) 137 (1803).

86 *Id.* at 174.

cess Clauses has thus taken on disproportionate, substantive meaning, while oddly the Court has shown a complete lack of interest in giving substantive content to the other words, namely "life" and "property," in those Clauses.[87] The Court's substantive due process approach has thus had the predictable consequence of encouraging judicial activism because the Court's analytical foundation—the Due Process Clause—provides no meaningful textual or contextual clues as to its proper use or reach within this substantive territory.

The Court has attempted to give the substantive due process blob some definition by creating a doctrine of "fundamental" rights. Pursuant to this judge-made doctrine, to qualify as a fundamental right, the right as "carefully described" must be one that is "objectively, 'deeply rooted in this Nation's history and tradition,' and 'implicit in the concept of ordered liberty,' such that 'neither liberty nor justice would exist if [it] were sacrificed.'"[88] Rights identified by this test as fundamental enjoy the benefit of strict scrutiny; laws affecting non-fundamental rights, by contrast, are subjected only to modern rational basis review.[89]

The fundamental/non-fundamental rights distinction is yet another recent judicial invention, and it has not been consistently applied. Moreover, as the reader can see from the description of the Court's "test" for deciding whether an asserted right is fundamental, there is tremendous leeway for judges to inject their own subjective preferences into this critical determination. What does "deeply rooted in this Nation's history and tradition" mean? Does this mean that Anglo-American jurisprudence must have long recognized the right being asserted? Or does it mean that such Anglo-American jurisprudence must not have *prohibited* the right? For example, one does not find a rich vein of Anglo-American jurisprudence recognizing many rights we take for granted, such as skipping, wearing the color green, or wearing a hat. Would such a lack of long-time legal sanction mean that such things would not qualify as fundamental rights, allowing government to restrict them for any reason short of the utterly irrational? Or would a longstanding lack of prohibition of such things suggest they are, in fact, fundamental in nature?

Consider a more substantial and controversial example such as marriage: the Court has told us that the right to marry is a fundamental right, yet it has never actually explained fully what this right consists of or why it

---

87 *See, e.g.*, Bd. of Regents v. Roth, 408 U.S. 564, 572 (1972).

88 Washington v. Glucksberg, 520 U.S. 702, 720-21 (1997) (quoting Moore v. City of E. Cleveland, 431 U.S. 494, 503 (1977) (plurality opinion), and Palko v. Connecticut, 302 U.S. 319, 325-26 (1937)).

89 *See Glucksberg*, 521 U.S. at 767 n.9 (Souter, J., concurring).

is fundamental, other than uttering conclusory sentences to that effect.[90] Is it accurate to characterize state-sanctioned civil marriage as "deeply rooted" in our history and tradition? Until relatively recently in Anglo-American history, marriage was considered to be a religious status with which government interfered very little.[91] Who, when, and how one could marry were governed by religious authorities until the passage of Lord Hardwicke's Marriage Act in England in 1753.[92] Is it the several hundred years prior to Lord Hardwick's Marriage Act that should count in the Court's justification, or should only the last two and a half centuries be considered? Is the right to marry best "carefully described" as a right to exercise one's religion and marry within the confines of that religion's rules, or as an affirmative right to obtain a state-sanctioned civil marriage license? If it is the latter, is it more accurate to describe the right as a right to marry one other person of the opposite gender, as has been the unbroken historical Anglo-American tradition? Or is it a broader right to marry whomever one loves, no matter how many or what gender?

Even with the Court's attempt to handcuff itself from running wild in the recognition of unenumerated rights, there is still serious potential for subjectivism and hence, judicial activism. Indeed, one need look no further than the types of unenumerated rights acknowledged by the Court as deserving of constitutionally protected status such as contraception,[93] abortion,[94] marriage,[95] and recreational sex.[96] By contrast, other unenumerated rights arguably as, or more deeply, rooted in Anglo-American history and tradition—such as the freedom to pursue a lawful occupation, voluntarily enter into binding contracts, own a business, or even own property—have not been the subject of attention or explicit protection by the Court's substantive due process jurisprudence.[97]

While there may be legitimate reasons for recognizing some of the unenumerated rights recognized by the Court thus far,[98] the Court's stead-

---

90 *See* Loving v. Virginia, 388 U.S. 1, 12 (1967) ("The freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men."); Skinner v. Oklahoma, 316 U.S. 535, 541 (1942) (describing marriage as one of the "basic civil rights of man").

91 *See* Charles P. Kindregan Jr., *The Marriage Debate in Historical Perspective: Changing Norms and the Evolution of Civil Marriage* 5-10 (Suffolk Univ. Law Sch. Faculty Publ'ns, Paper No. 32, 2006), *available at* http://lsr.nellco.org/cgi/viewcontent.cgi?article=1041&context=suffolk_fp.

92 *See* LAWRENCE STONE, THE FAMILY, SEX AND MARRIAGE: IN ENGLAND 1500-1800, at 35 (1977).

93 *See* Griswold v. Connecticut, 381 U.S. 479, 485 (1965).

94 *See* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 846 (1992).

95 *See Loving*, 388 U.S. at 12; *Skinner*, 316 U.S. at 541.

96 *See* Lawrence v. Texas, 539 U.S. 558, 572 (2003).

97 See James W. Ely, Jr., *"To Pursue Any Lawful Trade or Avocation": The Evolution of Unenumerated Economic Rights in the Nineteenth Century*, 8 U. PA. J. CONST. L. 917, 952-54 (2006).

98 See Michael J. Perry, *Substantive Due Process Revisited: Reflections on (and Beyond) Recent Cases*, 71 NW. U. L. REV. 417, 468-69 (1976).

fast refusal to seriously ponder the nature and meaning of the Ninth Amendment evinces a disturbing lack of judicial engagement directly contrary to the rule of construction provided by the amendment's text. Similarly, the Court's fundamental rights jurisprudence verges on the absurd, employing unclear standards in inconsistent ways, and evincing classic indicia of judicial activism.

III. THE THIRD CENTURY OF RIGHTS: SOLVING THE IMBALANCE THROUGH JUDICIAL ENGAGEMENT

The solution to judicial activism is proper judicial engagement. Whether courts are construing the Constitution's provisions relating to individual rights or government powers—which, after all, are but two sides of the same coin—judges should not be afraid to be meaningfully engaged in the enforcement of individual rights. A judicial philosophy that counsels judges to be engaged here, but not there, is an abdication of the judge's oath to protect the Constitution. The oath requires the judge to internalize her duty to protect the *entire* delicate structure, not merely portions of it that the judge considers to be "more important" than others.[99] The Constitution as a whole is important; each word, each sentence, each clause, each article, must be respected and defended with equal vigilance.

Perhaps the most intellectually honest method of accomplishing this engagement objective is to jettison the present standards of review and the arbitrary categorizations of individual rights. Unfortunately, however, the damage seems to be done and, pragmatically, it would be virtually impossible to unravel this Gordian knot. Enormous interest and reliance has developed around these categories of review, especially for rights and groups that have enjoyed the protective ambit of heightened review.[100] Those who defend these rights or represent these groups would not likely go quietly into the good night and acquiesce to a more unified approach in the name of intellectual honesty.

So what is to be done? One possible semi-solution that would lessen, yet not eliminate, the impact of the Court's past activism would be to bulk up rationality review, raising it, if you will, to a more engaged level. This approach would ensure that the judiciary becomes more meaningfully engaged in areas such as economic and non-fundamental rights, yet still not as engaged as they are in non-economic, fundamental rights. This would leave intact the heightened engagement for fundamental, non-economic rights,

---

99 *Cf.* Frank H. Easterbrook, *What's So Special About Judges?*, 61 U. COLO. L. REV. 773, 773 (1990) ("Nothing in the text of the Constitution marks a special role for judges; each public official applies the Constitution when it is time to act.").

100 *See* Jason Parish & Joy Haynes, *Same-Sex Marriage and Domestic Partnerships*, 5 GEO. J. GENDER & L. 545, 552-53 (2004).

while simultaneously elevating engagement in the neglected category of economic and non-fundamental rights.

In order to raise the standard of review for these long-neglected rights, it would be preferable to borrow a standard with which the bench and bar have some familiarity, rather than create a new standard out of whole cloth. Along these lines, I would propose the use of "old-school" rational basis review—the kind of rational basis review used by the pre-New Deal Court in cases such as *Nebbia v. New York*.[101] Recall that this old-school rational basis review—like modern rational basis review—only permitted the courts to invalidate laws that were arbitrary or irrational. Yet at the same time, this old-school rational basis review required the government to prove "a real and substantial relation to the object sought to be attained."[102]

By requiring the government to prove a close fit between the means chosen and the purpose of the law, *Nebbia*'s old-school rational basis review inherently engaged both the government and the judges. It is a common-sense way of expressing the idea that if the government wants the courts to defer to their legislative judgment that law X has been enacted to serve legitimate purpose Y, the government should actually have to convince the court, by a preponderance of the evidence, that Y was the true motivating purpose behind the law.

Such a common-sense requirement is absent in modern rational basis review, which requires judges to uphold laws if they can imagine any conceivable legitimate purpose behind the law.[103] Such breathtaking deference is the farthest thing from judicial engagement. It encourages governments to be lazy and sloppy in their lawmaking, allowing them to enact law X for *inappropriate* purpose Y, while evading all meaningful judicial scrutiny. The government's lawyers can be confident that, pursuant to modern rational basis review, the judges will sustain law X if the government's lawyers or the judges themselves can imagine that there *might have been* (but actually were not) other, appropriate purposes that *could have been* served by the law. Perversely, this complete deference standard transforms judges into advocates on behalf of the government and against the citizen. Needless to say, this is not, by any stretch of the imagination, proper judicial engagement.

In many ways, the old-school rational basis review I am advocating is essentially what is happening already in a series of rights cases that have become known as "rationality review with bite" cases, including *City of Cleburne v. Cleburne Living Center, Inc.*,[104] *Romer v. Evans*,[105] and *Law-*

---

101 *See supra* notes 55-60 and accompanying text.

102 Nebbia v. New York, 291 U.S. 502, 525 (1934).

103 *See* Dandridge v. Williams, 397 U.S. 471, 485 (1970).

104 473 U.S. 432 (1985).

105 517 U.S. 620 (1996).

rence v. Texas.[106] In these cases, the Court gave lip service to modern rational basis review, but these decisions did not feel highly deferential. One reason for this feeling is that in each of these cases, despite rational basis review, the citizens challenging the law won.[107] This is an extremely unusual outcome, given the degree of deference modern rational basis review normally involves.

But beyond their unusual outcomes, these cases are given the "rationality review with bite" label because the Court seemed to be giving some "teeth" to modern rational basis review. Rather than reflexively deferring, the Court seemed to demand that the government prove not only a legitimate purpose behind the law, but also some actual evidence of a meaningful relation, or fit, between the ends articulated and the means chosen to achieve them. In *Cleburne*, for example, a city denied a special use permit for the construction of a home for the mentally retarded.[108] The city justified its decision by reference to its concerns about the safety of the residents, safety of nearby residents and schoolchildren, the property's location in a flood zone, density of the home itself, and the home's potential impact on nearby traffic and neighborhood tranquility.[109] While all of these purposes would normally qualify as "legitimate" government interests, the *Cleburne* Court believed they were merely pretext for discriminatory animus, and concluded: "The short of it is that requiring the permit in this case appears to us to rest on an irrational prejudice against the mentally retarded . . . ."[110]

Such meaningful scrutiny of the government's motivation is often warranted, and can be accomplished by demanding the government articulate the purpose served by the law. This would allow both parties to introduce evidence on the legitimacy of that purpose, and then determine whether the purpose is substantially served by the law. In *Cleburne*, for example, the City of Cleburne asserted that its zoning ordinance was "aimed at avoiding concentration of population and at lessening congestion of the streets,"[111] yet the Supreme Court did not simply accept this otherwise legitimate interest as furthered by the ordinance. Rather, it stated that such "concerns obviously fail to explain why apartment houses, fraternity and sorority houses, hospitals and the like, may freely locate in the area without a permit."[112] Notice that this approach—inquiring as to why the city failed to similarly restrict density in other types of housing—is not something the Court would normally do under rational basis review. By allowing—and considering—evidence on other types of housing, the Court engaged in a level of scrutiny

106 539 U.S. 558 (2003).

107 *Lawrence*, 539 U.S. at 576, 578-79; *Romer*, 517 U.S. at 635-36; *Cleburne*, 473 U.S. at 448-50.

108 *Cleburne*, 473 U.S. at 435.

109 *Id.* at 448-50.

110 *Id.* at 448, 450.

111 *Id.* at 450.

112 *Id.*

noticeably higher than modern rational basis review. In doing so, the Court did not place a heavy burden on the government, but it did place *some* burden on the government, and it allowed the citizen to introduce evidence challenging both the legitimacy of that alleged purpose and the law's relationship to that purpose. Under modern rational basis review, by contrast, the government's burden would have been non-existent, and the citizen's burden would have been virtually impossible to meet: namely, proving that the law could not possibly, by any stretch of the imagination, serve any conceivable legitimate government purpose.

Employing this sort of rationality review with bite—akin to old school rational basis review—could help restore judges' proper role as protectors of our written Constitution. It would allow courts to jettison modern rational basis review, which effectively and awkwardly asks judges to assume the role of advocate on behalf of the government. More meaningful rationality review thus would help reduce the gap between highly demanding strict scrutiny and completely deferential modern rational basis review. It would level the playing field of constitutional rights somewhat, allowing courts to take all rights more seriously, not just those deemed "fundamental" or "non-economic" or "enumerated." Though I do not advocate, for pragmatic purposes, eliminating all of these categories, I do believe there is a need to rethink, in a more global fashion, our courts' approach to recognizing and enforcing constitutional rights. Moving even a baby step toward a more unitary approach to rights would help restore a more meaningful level of judicial engagement, preserve the written Constitution, and, ultimately, enhance respect for our government and the Constitution.