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Judicial Activism and Fourteenth Amendment Privacy Claims: The Allure of Originalism and the Unappreciated Promise of Constrained Nonoriginalism*

Daniel O. Conkle**

I. Introduction

Nearly half a century ago, Professor Alexander Bickel spawned a vigorous and ongoing academic debate by identifying the "root difficulty" of judicial review—that it is "a countermajoritarian force in our society."[1] As Bickel explained, the Supreme Court may claim to speak for "the people," but when it "declares unconstitutional a legislative act or the action of an elected executive, it thwarts the will of representatives of the actual people of the here and now," supporting the charge that "judicial review is undemocratic."[2] Some two decades later, in the 1980s, Attorney General Edwin Meese III made the academic debate a matter of public concern even as he announced a position that would heavily influence the appointment of Justices by President Reagan and subsequent Republican presidents. According to Meese, judicial review is legitimate only when confined to a "juris-

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1. ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 16 (1962).

2. *Id.* at 16-17.

prudence of original intention,"[3] the forerunner of contemporary originalism. Citing democratic precepts and the rule of law, Meese argued that the Supreme Court and other courts should confine themselves to "the original meaning of constitutional provisions . . . as the only reliable guide for judgment."[4] In this fashion, courts could enforce constitutional principles without acting undemocratically because they would be giving effect to values that were originally placed in the Constitution by a democratic process, that of constitutional enactment or constitutional amendment. Conversely, Meese maintained, courts have no business enforcing other values in the name of the Constitution.[5]

Constitutional theory and practice have evolved since Bickel and Meese offered their notable contributions, but the underlying issues remain unchanged. How can judicial enforcement of the Constitution, including the judicial recognition of individual rights, be reconciled with democratic self-government and with the norm of judicial objectivity? These issues present themselves in various settings, but they are cast in stark relief in Fourteenth Amendment "privacy" cases. Did the Supreme Court exceed its authority in *Roe v. Wade*?[6] Was it right to protect sexual liberty in *Lawrence v. Texas*?[7] Should the Court extend its privacy precedents to protect a right to same-sex marriage? In cases such as these, the Supreme Court—an unelected and politically insulated institution—is asked to recognize novel claims of right on the basis of constitutional language no more specific than the generalities of the Due Process and Equal Protection Clauses. Can the Court legitimately recognize such claims, and, if so, according to what decisionmaking methodology?

The charge of "judicial activism" (as contrasted with "judicial restraint") is used by critics of all sorts, in various settings and with various meanings. Focusing specifically on the Supreme Court's consideration of Fourteenth Amendment privacy claims, however, one can usefully define judicial activism—or "legislating from the bench"—by linking it directly to the countermajoritarian difficulty identified by Bickel and to Meese's attempt to cabin the judicial role. So understood, judicial activism is Supreme Court decisionmaking that (1) frustrates the process of majoritarian self-government and (2) is a product of judicial discretion, unconstrained by controlling sources of law. In reality, however, each of these two dimensions is a matter of degree, meaning that judicial decisionmaking can be more or less activist (or, con-

3. Edwin Meese, III, *The Supreme Court of the United States: Bulwark of a Limited Constitution*, 27 S. TEX. L. REV. 455, 464 (1986) (text of speech to American Bar Association in Washington, D.C., July 9, 1985) (emphasis omitted).

4. *Id.* at 465-66.

5. *See id.* at 464-66. For contemporary media accounts, see Philip Shenon, *Meese and His New Vision of the Constitution*, N.Y. TIMES, Oct. 17, 1985, at 14; Stuart Taylor Jr., *Administration Trolling for Constitutional Debate*, N.Y. TIMES, Oct. 28, 1985, at 10.

6. 410 U.S. 113 (1973).

7. 539 U.S. 558 (2003).

versely, more or less restrained), depending on the character of the Court's decisionmaking methodology.

One might contend that judicial activism, so understood, plays a valuable role in contemporary American government. For present purposes, I do not deny the strength of that argument. Even so, surely we can agree that judicial activism is at least *presumptively* problematic, because majoritarian self-government is a vital democratic value and because constitutional interpretation—like judicial decisionmaking generally—should not merely entail open-ended judicial policymaking; it should be constrained by objective criteria. Perhaps judicial activism can be defended nonetheless, but only if it serves a function that is sufficiently important to justify its departure from the usual norms of majoritarian self-government and objectively determined judicial decisionmaking.

My purpose here, however, is not so much to defend judicial activism as to consider its presumptively problematic character and to assess and reevaluate the originalist solution that has customarily been proposed. Attorney General Meese believed that adherence to originalism would control the Supreme Court's discretion even as it preserved majoritarian self-government, and contemporary critics tend to agree. But as I will explain, originalism may be overrated in its constraining force, and, conversely, some forms of nonoriginalist interpretation—in particular, those that rely on objective determinations of traditional or contemporary American societal values—may constrain the Court in meaningful ways. Relatedly, originalism may frustrate majoritarian self-government no less than these competing nonoriginalist methodologies, which, indeed, can be seen as relatively inoffensive to majoritarian values. As a result, critics of judicial activism might wish to reconsider their typical stance, that of embracing originalism and rejecting nonoriginalism as categorically illegitimate.

II. Majoritarian Self-Government and Judicial Objectivity

Judicial activism is presumptively problematic because it undermines two fundamental values: majoritarian self-government and judicial objectivity. The principle of (representative) majoritarian self-government traces its origins to the Declaration of Independence.[8] Moreover, as Professor John Hart Ely explained, constitutional amendments have repeatedly expanded the franchise, "substantially strengthen[ing] the original commitment to control by a majority of the governed" and making it ever more apparent that "rule in accord with the consent of a majority of those governed is the core of the American governmental system."[9] Judicial objectivity is likewise a consensus value, a value closely linked to the rule of law itself. Courts are not "na-

8. *See* THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) ("Governments are instituted among Men, deriving their just Powers from the Consent of the Governed.").

9. JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 7 (1980).

ked power organs."[10] Rather, as Justice Cardozo insisted, their task is that "of a translator, the reading of signs and symbols given from without."[11] Judicial decisionmaking, including constitutional interpretation, should be based upon objectively determined values, not merely the judges' own.

III. Is Originalism the Answer?

At first glance, originalism seems a well-designed response to the problem of judicial activism. It honors the value of majoritarian self-government by grounding itself in the majoritarian process that produced the Constitution, including its amendments, and it honors the value of judicial objectivity by carefully confining the judicial role. In the words of Attorney General Meese, the Supreme Court is to do no more than uncover and enforce "the original meaning of constitutional provisions."[12] It has no license to update the Constitution, to transform its meaning, or to give effect to the Justices' own values or ideological dispositions.

But can originalism truly constrain and guide the Justices in any definitive way? Justice Brennan thought not. In a contemporaneous response to Meese, Brennan offered criticisms that continue to resonate. Brennan contended that "doctrinaire" originalism amounts to "arrogance cloaked as humility."[13] Such an approach, he argued, "feigns self-effacing deference to the specific judgments of those who forged our original social compact,"[14] but this is pretense. As Brennan explained, the historical evidence typically is sparse and ambiguous, and, because every constitutional provision had multiple framers and ratifiers, there are serious conceptual and practical problems in attempting to discern the collective intention that underlies it.

At the same time, if we cannot identify this collective intention with any degree of specificity, it is difficult to argue that originalism, except in the most general and amorphous sense, is truly in service of majoritarian values—that is, values that were constitutionalized by the framers and ratifiers through a majoritarian governmental process. Indeed, if originalism can take us no further than broad constitutional generalities, we might be led to adopt Justice Brennan's view that the Constitution protects "the human dignity of every individual,"[15] as well as his generalized response to the countermajoritarian difficulty itself—that the Constitution, at some level of abstraction, in fact was intended to protect minority rights as well as majority rule.[16] If originalism cannot meaningfully con-

10. Courts "are bound to function otherwise than as a naked power organ; they participate as courts of law." Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 19 (1959).

11. BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 174 (1921).

12. Meese, *supra* note 3, at 465-66.

13. William J. Brennan, Jr., *The Constitution of the United States: Contemporary Ratification*, 27 S. TEX. L. REV. 433, 435 (1986) (text of speech at Georgetown University, October 12, 1985).

14. *Id.*

15. *Id.* at 439.

16. *See id.* at 436-37.

strain, it honors neither the value of judicial objectivity nor, in any concrete sense, the value of majoritarian self-government.

Despite Brennan's objections, originalism has gained ground since the 1980s. It plays a powerful role in contemporary Supreme Court decisionmaking, and it has been endorsed to one degree or another by a wide range of academic commentators, leading one to proclaim, "We are all originalists now."[17] Not quite, but the movement is clearly in that direction. Yet today's originalism is not the "doctrinaire" originalism of the 1980s. Rather, originalism has evolved and matured, in part to meet the objections identified by Brennan and others. As Vasan Kesavan and Michael Stokes Paulsen have explained, the focus of originalism has gradually shifted from the "original intent" of the framers to the "original understanding" of the ratifiers and on to the "original meaning" of the constitutional text.[18] The "original meaning" approach, which currently dominates, "asks not what the Framers or Ratifiers meant or understood subjectively, but what their words would have meant objectively—how they would have been understood by an ordinary, reasonably well-informed user of the language, in context, at the time, within the relevant political community that adopted them."[19]

The original meaning approach addresses some of the analytical difficulties associated with originalism, but it arguably weakens originalism's majoritarian foundations by shifting the focus away from the intentions and understandings of the officials who voted to adopt the constitutional provision in question.[20] In any event, the original meaning approach does not alleviate, and it may exacerbate, the potential for open-ended and unconstrained "originalist" decisionmaking. Professor Richard S. Kay argues that this new version of originalism generally should lead to the same results as the older (and in his view wiser) variants, but Kay notes that the original meaning approach potentially can generate "an enlarged range of plausible outcomes, threatening to subvert the clarity and stability of constitutional meaning that is central to the constitutionalist enterprise."[21] In reality, it is doubtful that originalism of any variety can produce clear and stable interpretive outcomes, especially if interpreters feel free to read the original meaning—or intention or understanding—at a high level of generality or abstraction, one that permits Justices and commentators of all stripes to join the chorus, "We are all originalists now."

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17. Jeffrey Rosen, *Originalist Sin: The Achievement of Antonin Scalia and its Intellectual Incoherence*, THE NEW REPUBLIC, May 5, 1997, at 26.

18. Vasan Kesavan & Michael Stokes Paulsen, *The Interpretive Force of the Constitution's Secret Drafting History*, 91 GEO. L.J. 1113, 1134-48 (2003).

19. *Id.* at 1144-45 (footnote omitted); *see id.* at 1127-33, 1139-48.

20. *See* Richard S. Kay, *Original Intention and Public Meaning in Constitutional Interpretation*, 103 Nw. U. L. REV. (forthcoming 2009) (manuscript at 16-22, available at http://ssrn.com/abstract=1259867).

21. *Id.* at 2 (manuscript); *see id.* at 22-31.

The Supreme Court's recent decision in *District of Columbia v. Heller*[22] is revealing. All nine Justices embraced originalist reasoning to resolve the question before them: whether the Second Amendment protects an individual right to possess and use weapons for nonmilitary purposes.[23] Five Justices said yes; four said no. Writing for the majority, Justice Scalia invoked the original meaning approach, dissecting the Second Amendment's language and exhaustively canvassing historical materials from before, during, and after the founding period, all to determine the meaning of the text at the time of its adoption.[24] Speaking for the dissenters, Justice Stevens employed a similar approach, parsing the Amendment's text and analyzing the same sorts of historical data as Scalia, but reaching the polar opposite conclusion.[25] At least in *Heller*, originalism "struck out" as an objective methodology.[26] Plausibly supporting each side of the debate, it provided no objective guidelines that were sufficiently clear to control the Justices' discretion. For the same reason, *Heller* cannot be said to honor any discernable majoritarian decision that was made through the political process by which the Second Amendment was adopted.

What, then, of Fourteenth Amendment privacy claims? Even if originalism could not control the Supreme Court's discretion in *Heller*, surely, one might assume, it can rule out the recognition of unenumerated rights grounded in nothing more than the general language of the Fourteenth Amendment. Indeed, Justices Scalia and Thomas, the Court's most persistent proponents of originalism, have suggested that they would be inclined to repudiate the Court's privacy precedents, at least to the extent that these precedents rely on the doctrine of substantive due process,[27] and their view is strongly supported by the text of the Due Process Clause.[28] Even so, the meaning of "due process of law" at the time of the Fourteenth Amendment's adoption is not entirely free from doubt. Thus, according to Professor Laurence H. Tribe, "there is a reasonable historical argument that, by 1868, a recognized meaning of the qualifying phrase 'of law' was substantive."[29] In any event, there is other language in the Fourteenth Amendment. It protects "the privileges or immunities of citizens of the United States" and "the

22. 128 S. Ct. 2783 (2008).

23. The Amendment provides: "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." U.S. CONST. amend. II.

24. *Heller*, 128 S. Ct. at 2788-2812.

25. Stevens relied in part on the Second Amendment's legislative and drafting history, suggesting a focus on original intent as opposed to meaning, but much of his opinion was devoted to refuting the majority's original meaning analysis on its own terms. *See id.* at 2822-42 (Stevens, J., dissenting).

26. *See* Douglas W. Kmiec, *Of Judicial Methods and Judicial Integrity: Has Originalism Struck Out?*, PREVIEW U.S. SUP. CT. CAS., Aug. 11, 2008, at 386.

27. *See, e.g.*, Albright v. Oliver, 510 U.S. 266, 275-76 (1994) (Scalia, J., concurring); Troxel v. Granville, 530 U.S. 57, 80 (2000) (Thomas, J., concurring in the judgment).

28. *See* John Harrison, *Substantive Due Process and the Constitutional Text*, 83 VA. L. REV. 493 (1997).

29. 1 LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 1333 (3d ed. 2000).

equal protection of the laws."[30] To date, the Privileges or Immunities Clause has been read narrowly by the Supreme Court,[31] but the original meaning of this provision arguably is much broader than the Court has so far recognized. And the Court has already extended the Equal Protection Clause well beyond its specific historical objectives,[32] an interpretation plausibly within the original meaning of the Clause, broadly understood.

Relying especially on the Privileges or Immunities Clause and the Equal Protection Clause, Professor Jack M. Balkin, a progressive convert to originalism, recently has demonstrated the far-reaching potential of originalist interpretation. Focusing on the constitutional text and its underlying principles (as opposed to its expected applications), Balkin contends that the original meaning of the Fourteenth Amendment is sufficiently capacious to support not only unenumerated rights, but the most controversial unenumerated right of all: the right to abortion.[33] At first blush, Balkin's argument seems strained, but in reality it is not unreasonable. The critical question is the level of abstraction at which the original meaning properly is characterized. Balkin characterizes the original meaning generally, permitting him to support the basic result (if not the details or reasoning) of *Roe v. Wade*[34]—a decision widely regarded as the Supreme Court's most activist individual rights decision in the last half century, if not in the Court's entire history. Needless to say, Justices Scalia and Thomas, among others, would reject Balkin's argument by characterizing the original meaning much more narrowly. Yet the very existence of competing views on this question, views that cannot be dismissed as untenable, highlights the weakness of originalism in providing objective standards that can control the discretion of the Court—even (and perhaps especially) in resolving claims arising under the general language of the Fourteenth Amendment.[35] And if the Justices can reasonably decide these questions either way, their decisions cannot be said to rest on the policymaking of the majoritarian representatives who framed and ratified the Amendment.

IV. Unconstrained Nonoriginalism

Many assume that nonoriginalism is unconstrained by objective criteria and necessarily entails the judicial flouting of majoritarian self-government. The Su-

30. U.S. CONST. amend. XIV.

31. *See* Slaughter-House Cases, 83 U.S. 36, 74-80 (1873); *cf.* Saenz v. Roe, 526 U.S. 489 (1999) (reading the Clause to protect certain equality rights, but only in the context of durational residence requirements).

32. *See, e.g.*, Romer v. Evans, 517 U.S. 620 (1996); City of Cleburne v. Cleburne Living Center, 473 U.S. 432 (1985); Craig v. Boren, 429 U.S. 190 (1976).

33. *See* Jack M. Balkin, *Abortion and Original Meaning*, 24 CONST. COMM. 291 (2007).

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

35. *Cf.* Jack M. Balkin, *Original Meaning and Constitutional Redemption*, 24 CONST. COMM. 427, 488 (2007). ("[I]f what matters to us is the original meaning of the text, then the principles underlying the constitutional text should be as general as the text itself.")

preme Court itself has contributed to this impression, sometimes suggesting that the Justices' own philosophical and policy analysis is enough to justify the recognition of unenumerated rights. *Roe v. Wade*, for instance, rested heavily on the Justices' appraisal of competing interests in the context of abortion.[36] And when the Court later reaffirmed *Roe*'s "central holding" in *Planned Parenthood of Southeastern Pennsylvania v. Casey*,[37] it relied not only on precedent but also on "reasoned judgment,"[38] offering what it called an "explication of individual liberty."[39] "At the heart of liberty," the Court declared, "is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life."[40] Accordingly, "[t]he destiny of the woman must be shaped to a large extent on her own conception of her spiritual imperatives and her place in society."[41] Echoing *Roe*, the Court carefully examined and evaluated the specific concerns of a woman seeking an abortion, and it concluded that her interest warrants special constitutional protection. Recalibrating the state's competing interest in protecting fetal life, the *Casey* Court adopted the "undue burden" test to replace *Roe*'s "strict scrutiny,"[42] but it continued to protect the right to choose abortion prior to fetal viability, citing not only stare decisis but also the Justices' own understandings of "reason" and "fairness."[43]

Whatever the merits of this sort of creative, unconstrained nonoriginalism,[44] it is frankly at odds with the values of majoritarian self-government and judicial objectivity, and it therefore constitutes an aggressive form of judicial activism. To be sure, originalism, in the right (or wrong) hands, can be equally unconstrained and therefore equally activist. Witness the Supreme Court's split decision in *Heller* and Professor Balkin's originalist defense of the right to abortion. If judicial activism is the problem (or at least a presumptive problem), it may be that the solution lies neither in originalism nor in unconstrained nonoriginalism—interpretive approaches that, in the end, may have more in common than first meets the eye.[45]

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36. *See Roe*, 410 U.S. at 152-66.

37. 505 U.S. 833, 853 (1992).

38. *Id.* at 849.

39. *Id.* at 853.

40. *Id.* at 851.

41. *Id.* at 852.

42. *See id.* at 869-79 (plurality opinion).

43. *Id.* at 870.

44. Elsewhere I have argued that an approach along these lines has important strengths but is plagued by serious weaknesses. *See* Daniel O. Conkle, *Three Theories of Substantive Due Process*, 85 N.C. L. REV. 63, 98-115 (2006).

45. *Cf.* Richard A. Posner, *In Defense of Looseness: The Supreme Court and Gun Control*, THE NEW REPUBLIC, Aug. 27, 2008, at 32, 32 (arguing that *Heller* reflected "a freewheeling discretion strongly flavored with ideology"); J. Harvie Wilkinson III, *Of Guns, Abortions, and the Unraveling Rule of Law*, 95 VA. L. REV.

V. Constrained Nonoriginalism

Nonoriginalism, by definition, is not constrained by the original meaning—or intention or understanding—of the constitutional text. Yet this concession does not necessarily leave the Justices "free to roam where unguided speculation might take them."[46] In the context of Fourteenth Amendment privacy claims, *Roe* and *Casey* reveal the open-ended potential of unconstrained nonoriginalism, but other cases suggest that nonoriginalism can be more modest. Indeed, the Court's decisions in this setting support two competing theories of constrained nonoriginalism: the theory of historical tradition and the theory of evolving national values.

According to the first theory, the Court is authorized to recognize unenumerated rights only if the rights can be found in an objective appraisal of American social and legal history. According to the second, more progressive theory, the Court can identify unenumerated rights on the basis of an objective determination of contemporary national values, including values emerging over time. As I will explain, these two approaches are relatively non-activist, because they honor majoritarian self-government and judicial objectivity to a considerable degree—certainly more so than unconstrained nonoriginalism or its jurisprudential first cousin, unconstrained originalism.

A. The Theory of Historical Tradition

According to the theory of historical tradition, unenumerated privacy rights need not be traced to the original meaning (or intention or understanding) of the Fourteenth Amendment. Yet the theory nonetheless demands a historical inquiry, and it authorizes only a narrowly confined nonoriginalism. Embracing this theory in *Washington v. Glucksberg*,[47] the Supreme Court stated that the Fourteenth Amendment's protection of unenumerated rights extends only to those liberties, narrowly and specifically defined, that are "'deeply rooted in this Nation's history and tradition.'"[48] "Our Nation's history, legal traditions, and practices," the Court explained, "provide the crucial 'guideposts for responsible decisionmaking' that direct and restrain our exposition of the Due Process Clause,"[49] providing a "restrained methodology" that minimizes the risk of subjective judicial decisionmaking.[50] Applying this approach in the case at hand, the Court refused to recognize a constitutional right to physician-assisted suicide. Based upon its analysis of state laws and their common law antecedents, the Court

(forthcoming 2009) (manuscript available at http://ssrn.com/abstract=1265118) (comparing *Heller* with *Roe* and arguing that both involved the activist invalidation of majoritarian policies).

46. Poe v. Ullman, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting).

47. 521 U.S. 702 (1997).

48. *Id.* at 721 (quoting Moore v. City of East Cleveland, 431 U.S. 494, 503 (1977) (plurality opinion)).

49. *Id.* at 721 (quoting Collins v. Harker Heights, 503 U.S. 115, 125 (1992)).

50. *See id.* at 721-22.

concluded that, with rare exception, "our laws have consistently condemned, and continue to prohibit, assisting suicide,"[51] producing "a consistent and almost universal tradition that has long rejected the asserted right, and continues explicitly to reject it today, even for terminally ill, mentally competent adults."[52]

Although the Court rejected the constitutional claim in *Glucksberg*, the theory of historical tradition supports the Court's recognition of unenumerated rights in other cases. In *Glucksberg*, for example, the Court distinguished its earlier decision in *Cruzan v. Director, Missouri Department of Health*[53] as one that protected "the traditional right to refuse unwanted lifesaving medical treatment,"[54] a right derived from "the common-law rule that forced medication was a battery" and "the long legal tradition protecting the decision to refuse unwanted medical treatment."[55] This theory also supports the Court's decision in *Moore v. City of East Cleveland*.[56] In *Moore*, the Court invalidated a housing ordinance that restricted occupancy to "nuclear families," thereby protecting the right of extended families to live together. As Justice Powell explained in his plurality opinion, "the institution of the family is deeply rooted in this Nation's history and tradition," and this historical tradition extends to "uncles, aunts, cousins, and especially grandparents sharing a household along with parents and children."[57] Similar reasoning may also explain the Court's holdings (if not always its opinions) in other cases protecting marital and family rights that have longstanding support in the American legal system.[58]

The theory of historical tradition authorizes a form of constitutional interpretation that is nonoriginalist but highly conservative. By preserving "deeply rooted" rights, the Supreme Court furthers stability in the law, protects societal expectations concerning individual freedom, and protects "the accumulated wisdom of civilization,"[59] advancing a Burkean constitutional vision by precluding precipitous departures from time-honored traditions.[60] At least as articulated in *Glucksberg*, moreover, the Court's methodology is objective, constrained, and confined. The Court is to define the constitutional claim narrowly and with precision, and it is then to canvass American social and legal history

51. *Id.* at 719.
52. *Id.* at 723.
53. 497 U.S. 261 (1990).
54. *Glucksberg*, 521 U.S. at 720.
55. *Id.* at 725.
56. 431 U.S. 494 (1977).
57. *Id.* at 503-04 (plurality opinion).
58. *See, e.g.*, Zablocki v. Redhail, 434 U.S. 374 (1978); Griswold v. Connecticut, 381 U.S. 479 (1965); Pierce v. Society of Sisters, 268 U.S. 510 (1925); Meyer v. Nebraska, 262 U.S. 390 (1923).
59. *Moore*, 431 U.S. at 505 (plurality opinion).
60. *See* Michael W. McConnell, *The Right to Die and the Jurisprudence of Tradition*, 1997 UTAH L. REV. 665, 682-85 & n.96 (1997).

(and its antecedents), working from the past to the present, to determine whether the claim has broad and longstanding historical as well as contemporary support. To be sure, there is no litmus test, and the Court cannot entirely avoid a normative judgment, because it must decide whether the claim of liberty is not only traditional but also valuable and worthy of constitutional recognition. But the Court cannot go beyond the recognition of deeply rooted rights, determined by objective inquiry. And the constitutionalization of these deeply rooted rights is in relative harmony with the principle of majoritarian self-government, because the Court protects only rights that, over time, have been recognized, approved, and maintained by the American people and their elected representatives.[61]

B. The Theory of Evolving National Values

There is a competing and more progressive theory of constrained nonoriginalism, the theory of evolving national values. As with the theory of historical tradition, this approach requires the Supreme Court to canvass American social and legal history as it relates to the particular claim at hand. But it does not limit constitutional protection to liberties that are deeply rooted in American history. Instead, the critical question under this approach is whether, on the basis of objective criteria, the asserted individual right has broad *contemporary* support in the national culture. This contemporary support might be a continuation of longstanding tradition. To this extent, the theory of evolving national values encompasses the theory of historical tradition. But the contemporary support might reflect a change from the past. What matters is the current, evolved state of our national culture, including especially our national legal culture.

The theory of evolving national values has not been expressly embraced by the Supreme Court. Even so, it finds implicit support in the Court's jurisprudence, including especially the Court's most recent privacy decision, *Lawrence v. Texas*.[62] In *Lawrence*, the Court held that the Fourteenth Amendment protects the right of consenting adults to engage in private sexual conduct, including homosexual conduct. This result could not be justified under the theory of historical tradition,[63] and the Court's opinion, although ambiguous and multifaceted, can be read to suggest the theory of evolving national values. The Court considered the centuries-long legal and social condemnation of sodomy, but it cited an "emerging awareness" concerning the proper scope of personal liberty and argued that "our laws and traditions in the past half century are of most relevance

61. For a much more elaborate discussion and evaluation of the theory of historical tradition, see Conkle, *supra* note 44, at 83-98.

62. 539 U.S. 558 (2003).

63. Plainly, this is not a deeply rooted, traditional liberty. *See* Bowers v. Hardwick, 478 U.S. 186, 191-95 (1986), *overruled by Lawrence*, 539 U.S. at 578; *see also* Conkle, *supra* note 44, at 117-18.

here."[64] The Court noted that a substantial majority of the states, rejecting past history, had decriminalized consensual sodomy, and that it was rarely prosecuted even in the thirteen states that had not.[65] In short, the constitutional claim was supported by a general consensus in the national legal culture, objectively discernable in the contemporary pattern of state laws and enforcement efforts. In declaring an unenumerated constitutional right, the Court did no more than bring outlier states into conformity with the general national pattern.

Unlike the conservative, backward-looking philosophy that undergirds the theory of historical tradition, the theory of evolving national values is grounded in a more forward-looking, progressive understanding of American political morality. Under this theory, the Court can do more than preserve traditional rights. It also can recognize new rights, rights emerging over time. This approach thus protects liberty to a greater degree even as it promotes a philosophy of political-moral progress. But the Court's decision-making is not open-ended. Rather, it is constrained by the requirement of a contemporary national consensus, which must exist for the particular claim at hand.

As with the "deeply rooted" inquiry under the theory of historical tradition, the requirement of a contemporary national consensus does not provide a bright-line test. There must be a general consensus among the states, not uniformity or even near-uniformity, creating the potential for close questions and differences of opinion. And even if the required consensus exists, the Court must decide, by normative evaluation, whether the claim of liberty is worthy of constitutional protection. That is, it must decide whether the consensus should be constitutionalized as an unenumerated right, bringing outlier states in line and making the general consensus a matter of national uniformity. Despite its ambiguities, however, this approach, like that of historical tradition and for similar reasons, honors the values of judicial objectivity and majoritarian self-government to a substantial degree. The Court cannot go beyond the recognition of rights supported by an objectively determined contemporary national consensus, a consensus grounded in social patterns and legal policies reflecting broadly shared values and majoritarian policymaking.[66]

The potential—and the limits—of this theory of unenumerated rights can be seen in the context of same-sex marriage. Although rights relating to hetero-

64. *Lawrence*, 539 U.S. at 571-72; *cf.* Poe v. Ullman, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting) (arguing that substantive due process should be informed by "the traditions from which [this country] developed" and "the traditions from which it broke," because "tradition is a living thing").

65. *See Lawrence*, 539 U.S. at 572-73. The Court also cited comparable developments abroad. *See id.*

66. Elsewhere I have elaborated and defended the theory of evolving national values, drawing upon the Supreme Court's suggestive language in *Lawrence v. Texas* and contending that the appropriate methodology for identifying unenumerated rights is similar to the Court's "evolving standards of decency" analysis in Eighth Amendment capital cases. *See* Conkle, *supra* note 44, at 123-48.

sexual marriage are deeply rooted, same-sex marriage has no such pedigree and therefore could not be protected under the theory of historical tradition. Under the theory of evolving national values, however, the absence of historical support is not determinative, and a constitutional right could emerge over time. At present, the Supreme Court could not properly declare a right to same-sex marriage, because there is nothing close to a national consensus favoring such a right, nor even a right to comparable legal benefits. Only a handful of states currently authorize same-sex marriages, and several acted only under the compulsion of state court rulings invoking state constitutional law.[67] Fewer than ten additional states provide legal benefits for same-sex couples through civil union or domestic partnership laws.[68] In time, however, the national tide may very well turn in favor of same-sex marriage, or at least in favor of comparable legal benefits, creating a general consensus that would support the recognition of an unenumerated Fourteenth Amendment right. Only then could the Court legitimately rule in that manner. Under this theory, the Court can promote political-moral progress, but only to a degree, and only in a manner befitting the limited role of the judiciary in a democratic society.

VI. Conclusion

It is commonly believed that originalism is the answer to the problem of judicial activism, but recent judicial and academic elaborations of originalism raise serious doubts. Conversely, nonoriginalism, in particular forms, can rein in judicial activism by confining the Supreme Court to a decisionmaking methodology that is guided by objective criteria and that can operate in relative harmony with the value of majoritarian self-government. Under any interpretive theory, the recognition of unenumerated rights is activist to a degree, but functional arguments may justify an activism that is relatively confined and not excessively undemocratic. I have discussed two theories of constrained nonoriginalism that warrant serious consideration on this basis. The theory of historical tradition posits a conservative, Burkean function. That of evolving national values invokes a more forward-looking, progressive function, grounded in the belief that American political morality can and does evolve and improve over time.

Given the elastic margins of contemporary originalism, it would not be difficult to characterize either or both of these theories as originalist rather than nonoriginalist. Professor (now Judge) Michael W. McConnell, for example, has linked the approach of historical tradition

67. *See* Goodridge v. Department of Public Health, 798 N.E.2d 941 (Mass. 2003); Kerrigan v. Commissioner of Public Health, 957 A.2d 407 (Conn. 2008); Varnum v. Brien, No. 07-1499, 2009 WL 874044 (Iowa Apr. 3, 2009). Such state-court decisions do not directly reflect majoritarian decisionmaking and therefore are of limited weight in discerning a consensus of majoritarian values. *See* Conkle, *supra* note 44, at 135 & n.401.

68. The Human Rights Campaign helpfully documents, catalogs, and maps the laws of all fifty states on its web site. *See* http://www.hrc.org/documents/Relationship_Recognition_Laws_Map.pdf.

to the original meaning of the Privileges or Immunities Clause, read alongside the Due Process Clause.[69] And an abstract conception of the Fourteenth Amendment's original meaning, à la Professor Balkin, likewise could be used to support the theory of evolving national values.[70] If so, then these approaches might qualify as constrained originalism, rather than constrained nonoriginalism.

Contrary to McConnell and Balkin, I would frankly concede that the theories of historical tradition and evolving national values are nonoriginalist. The constraints of each theory are real, but they do not derive from the original intent, the original understanding, or the original meaning of the Fourteenth Amendment. More to the point, the critical distinction is not between originalism and nonoriginalism. That distinction is increasingly evanescent. What matters is the methodology by which the Supreme Court identifies unenumerated rights and whether that methodology honors the values of majoritarian self-government and judicial objectivity.

69. *See* McConnell, *supra* note 60, at 691-98.

70. Indeed, aspects of Balkin's argument can be read to suggest an approach somewhat along these lines. *See* Balkin, *supra* note 33, at 329-36.