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## ARTICLES

### CHILDREN OF DISTANT FATHERS: SKETCHING AN ETHOS OF CONSTITUTIONAL LIBERTY

GENE R. NICHOL\*

CIVILIZATION [MAY BE JUDGED BY] THE DEGREE OF DIVERSITY ATTAINED  
AND THE DEGREE OF UNITY RETAINED. . . .<sup>1</sup>

—W.H. AUDEN

In this article, Professor Gene R. Nichol argues for a constitutional right to self-governance that legitimizes the court's inquiry into the nature of fundamental personal rights. He locates this right in the ninth amendment, which affords protection to unlisted liberties. The clearest statement of the American commitment to self-governance, he argues, is found in Thomas Jefferson's Declaration of Independence, and in the philosophy of Jeffersonian individualism. Drawing on the writing of Jefferson and Lincoln, Professor Nichol asserts that our society has committed itself to "the progressive unfolding of individual sovereignty."

Critics of the United States Supreme Court's decisions that give constitutional protection to personal privacy interests have never suffered from a lack of ammunition. The Court has failed to locate unambiguously the textual source of rights identified in cases such as *Griswold v. Connecticut* and *Roe v. Wade*. Nor has it been able to construct a general theory that might explain why some rights have been found fundamental while others have not. The result has been uncertainty about future decisions, and protests that the Court's actions in this area are an illegitimate usurpation of power. Professor Nichol argues that only by recognizing and explicitly incorporating our societal dedication to self-governance into constitutional discourse can a principled jurisprudence that mediates between personal autonomy and state interests be constructed.

#### I. INTRODUCTION

The privacy, or substantive due process, cases have posed difficulties of profound dimension for American constitutionalists.<sup>2</sup> Easily the

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1. W.H. AUDEN, *FOREWORDS & AFTERWORDS* 9 (1973).

2. The privacy cases have engendered a massive literature. See, e.g., the authorities cited in Grey, *Eros, Civilization and the Burger Court*, 43 *LAW & CONTEMP. PROBS.* 83, 99-100 (1980).

most controversial coinage of the modern United States Supreme Court, the civil privacy doctrine<sup>3</sup> has touched upon matters fit for the novelist's pen: family, marriage, sex, morality, pornography, and abortion, to name but a few. Judicial policy making in such areas no doubt rankles. Not surprisingly, major movements, encouraged by preachers,<sup>4</sup> journalists,<sup>5</sup> political parties,<sup>6</sup> a president,<sup>7</sup> and now the United States Department of Justice,<sup>8</sup> have been spawned to overthrow one or more components of the doctrine.

Moreover, the methodology employed by our highest tribunal to develop the privacy right has not ameliorated opposition. Without elucidation, various interests have been decreed either fundamental or not pursuant to a jurisprudential scheme which has not yet been broadcast beyond the walls of the Justices' conference room. The Court has been unable to conclude whether privacy analysis is based on textual,<sup>9</sup> consensus,<sup>10</sup> traditional,<sup>11</sup> or autonomy interests.<sup>12</sup> No expressed theory offers even an approximate explanation of the various decisions, and the Court has apparently given up the attempt.<sup>13</sup>

The reason for all the difficulty, and perhaps for at least some of the controversy,<sup>14</sup> is easy to ascertain. The right of marital privacy pro-

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3. I mean here to distinguish the Supreme Court's "privacy" cases from a body of decisions perhaps more deserving of the name—the search and seizure cases interpreting the fourth amendment. *See, e.g.,* *Mapp v. Ohio*, 367 U.S. 643 (1961).

4. The most prominent of clerics involved in a massive and heart-felt anti-abortion movement is Rev. Jerry Falwell. *See generally*, R. LIEBMAN & R. WUTHNOW, *THE NEW CHRISTIAN RIGHT: MOBILIZATION AND LEGITIMATION* 1-39, 188-207 (1983).

5. *See, e.g.,* G. WILL, *STATECRAFT AS SOULCRAFT: WHAT GOVERNMENT DOES* 84-5 (1983).

6. The 1984 Republican Party platform included an anti-abortion plank. *See*, *Washington Post*, Aug. 22, 1984, at A11, col. 6.

7. President Reagan has called for a constitutional amendment overturning the abortion decisions. *See* R. REAGAN, *ABORTION AND THE CONSCIENCE OF THE NATION* (1984); *N.Y. Times*, Jan. 31, 1985, at A16, col. 1.

8. The Justice Department has recently asked the United States Supreme Court to overrule *Roe v. Wade*, 410 U.S. 113 (1973). *See Thornburgh v. American College of Obstetricians and Gynecologists*, 737 F.2d 283 (3d Cir. 1985), *aff'd*, 106 S. Ct. 2169 (1986).

9. *See Griswold v. Connecticut*, 381 U.S. 479 (1965) (theory that privacy rights are found in the "penumbra" of the first amendment).

10. *See Poe v. Ullman*, 367 U.S. 497, 548 (1961) (Harlan, J., dissenting).

11. *Griswold*, 381 U.S. at 486 (marital privacy "older" than the Constitution).

12. *See Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972) ("If the right of privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted government intrusion. . . ." (emphasis in original)).

13. *See* Justice Blackmun's majority opinion in *Roe v. Wade*, 410 U.S. at 153 ("[The] right of privacy, whether it be founded in the Fourteenth Amendment concept of personal liberty . . . or . . . in the Ninth Amendment reservation of rights to the people, is broad enough to encompass a woman's decision whether or not to terminate her pregnancy . . .").

14. Of course the aversion to the substantive rule in *Roe v. Wade* would likely be pronounced even if a constitutional amendment explicitly granted a woman the right to terminate her pregnancy.

tected in *Griswold v. Connecticut*,<sup>15</sup> the freedom to terminate a pregnancy without interference by the state upheld in *Roe v. Wade*,<sup>16</sup> and the interests in familial association recognized in *Moore v. City of East Cleveland*,<sup>17</sup> to mention only the cornerstones of the privacy doctrine, are not derived from the text of the Constitution. Nor can it be said with candor that they are implicit in the various provisions' demands.<sup>18</sup> Rather, the privacy cases have assumed that certain interests are so vital to our scheme of individual liberty that they merit constitutional status even if not explicitly listed in the text. The notion that rights which are "fundamental,"<sup>19</sup> "implicit in the concept of ordered liberty,"<sup>20</sup> or "whathaveyou"<sup>21</sup> are judicially cognizable assumes that constitutional liberties may be broader, more expansive, and more vibrant than the particulars of the Bill of Rights.

That premise is a troubling one. If one accepts the claim that in a representative democracy important policy decisions are to be made by elected representatives, extensive judicial authority is disconcerting from the outset. But some exercises of constitutional review present greater difficulty than others. On rare occasions, a ruling is based on the clear and unambiguous dictates of the text,<sup>22</sup> thus minimizing friction with democratic theory. The Justices can reasonably claim to be merely enforcing long standing mutual promises made by the nation as a whole, not the judiciary. Judicial attempts to venture past the strictures of the text, however, seem to offer no such solace. Fundamental rights "discovered" by unelected judges prevail over conflicting interests asserted by more representative institutions. Thus, tensions with the premises of representative government arise when a federal court looks beyond the text, as is done in the *Griswold* line of cases, to rule that a community is powerless to regulate various aspects of human behavior.

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15. 381 U.S. 479 (1965).

16. 410 U.S. 113 (1973).

17. 431 U.S. 494 (1977).

18. Justice Douglas' penumbra theory made this claim in *Griswold*. He made little effort to explore, however, the connection between marital privacy and the specific textual provisions on which he relied. Instead he turned to the importance and tradition of the right. *Griswold*, 381 U.S. at 486.

19. See, e.g., *Roe v. Wade*, 410 U.S. at 152; *Griswold*, 381 U.S. at 486 (Goldberg, J., concurring).

20. See, e.g., *Palko v. Connecticut*, 302 U.S. 319, 325 (1937).

21. The phrase is Alexander Bickel's. See A. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 55 (1962).

22. See, e.g., *Strauder v. West Virginia*, 100 U.S. 303 (1880) (statute excluding blacks from jury eligibility on its face unconstitutional).

Comparisons to an earlier era when an activist judiciary sought to thwart the initiatives of the New Deal seem unavoidable.<sup>23</sup>

The almost unprecedented criticism which the privacy cases have engendered has claimed, in short, that such judicial actions are illegitimate.<sup>24</sup> It has become commonplace to characterize the privacy decisions as usurpations of legislative power, unsupported by either textual mandate or national judgment. The business of the judiciary, it is argued, is interpreting the Constitution, not formulating broad social policy. Since the privacy cases do not draw on the text, they are, at bottom, rooted in mere preference, not law. Critics claim that assertions that various interests are fundamental are hopelessly circular, reflecting only the generally liberal philosophies of the judges who pronounce them.<sup>25</sup> The judicial protection of unlisted autonomy interests is said to be illegitimate because it carries no constitutional pedigree. And a court which reaches beyond the dictates of the Constitution reaches beyond its power.

Still, fear of judicial power presents only part of the privacy picture. The bulk of the interests protected in the cases seem somehow to belong to us as individuals. Almost intuitively, Americans feel that the intricacies of their sexual experiences, the particulars of their chosen lifestyles, and the aspects of their private lives generally, are none of the government's business. The idea that the state should not intrude into the intimate decisions of life is a vague yet persistent component of our societal ethos. It is not surprising then that as respected a figure as Justice Brandeis would refer to a right "to be let alone" in the "development of the emotions,"<sup>26</sup> "sensations" and "beliefs;"<sup>27</sup> or that the Supreme Court, even in the 1950's, would declare in *Kent v. Dulles*<sup>28</sup> that "outside areas of plainly harmful conduct, every American is left to shape his own life as he thinks best, do what he pleases, go where he pleases."<sup>29</sup> Neither *Griswold* nor its progeny go that far. The privacy cases primarily provide a refuge from intrusive state regulation for cer-

23. I refer here to the *Lochner* era and the confrontation between the Supreme Court and the New Deal. See *Lochner v. New York*, 198 U.S. 45 (1905); *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936).

24. See, e.g., R. BERGER, *GOVERNMENT BY JUDICIARY* 300-302 (1977); J. ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 43-73 (1980); Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1 (1971); Monaghan, *Our Perfect Constitution*, 51 N.Y.U. L. REV. 396 (1981); Rehnquist, *The Notion of a Living Constitution*, 54 TEX. L. REV. 693 (1976).

25. J. ELY, *supra* note 24, at 43-70.

26. *Olmstead v. United States*, 277 U.S. 438, 478 (1927) (Brandeis, J., dissenting).

27. *Id.*

28. 357 U.S. 116 (1958).

29. *Id.* at 126. See also, *Roberts v. United States Jaycees*, 104 S. Ct. 3244, 3250 (1984) ("ability independently to define one's identity" is "central to any concept of liberty . . .").

tain marital, procreative, and familial interests.<sup>30</sup> Nevertheless, apparently drawing upon an American ethos of personal liberty,<sup>31</sup> privacy analysis assumes that some infringements of personal autonomy are beyond the power of the state even though they are not proscribed by the particulars of the Constitution.

This Article addresses the validity of the substantive due process cases' implicit premise—that certain core liberty interests, though not expressly protected by the Bill of Rights, are constitutional in nature. To my mind, Justice Brandeis' often quoted dissent in *Olmstead v. United States*<sup>32</sup> and Justice Douglas' opinion in *Kent v. Dulles* touch upon essential aspects of the American vision of constitutional liberty. Decisions such as *Griswold*, which attempt to safeguard the ability of individuals to develop and act on their own conceptions of how life should be lived, recognize and draw on that vision. My claim is that there is, among the unenumerated "rights"<sup>33</sup> acknowledged by the ninth amendment, a liberty interest of broader scope than the isolated<sup>34</sup> provisions of the Bill of Rights—which I shall describe as a right of "self-governance."<sup>35</sup> Defined here as the ability to formulate, shape, and act upon the core aspects of one's sense of identity, character, and personality, the right to self-governance is rooted in an American dedication to personal autonomy in moral decision-making. If such a commitment can be demonstrated, judicial efforts to shield autonomy interests should be considered within the heart of our constitutional heritage, implementing rather than thwarting our vision of democracy. The *Griswold* cases' implicit claim that constitutionally protected liberty demands special solicitude for certain personal decisions, especially concerning what is, or is not the good life, is correct.

The tools used here to support the claim for a constitutional interest in self-governance are at least marginally non-traditional.<sup>36</sup> This

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30. The privacy cases form the core of the Supreme Court's substantive due process efforts. The Court has recognized a handful of other autonomy interests outside the classic privacy sphere. See, e.g., *Roberts*, 104 S. Ct. at 3244 (freedom of association); *Youngberg v. Romeo*, 457 U.S. 307 (1982) (limited right to treatment in state mental facility). The privacy cases have protected procreative decisions. See, e.g., *Moore*, 431 U.S. at 494 (right to choose family living arrangement); *Roe v. Wade*, 410 U.S. at 113 (right to abortion); *Eisenstadt*, 405 U.S. at 438 (contraceptive use by unmarried persons); *Skinner v. Oklahoma*, 316 U.S. 535 (1942) (freedom from sterilization); and family-related interests and *Meyer v. Nebraska*, 262 U.S. 390 (1925) (right to choose parochial education curriculum).

31. Since the Supreme court has not tied its privacy determinations to any textual provision, the decisions must be based upon some concept of fundamental liberties.

32. 227 U.S. 438, 478 (1936).

33. See *infra* section IV.A. for the discussion of my use of the term "rights."

34. *Poe*, 367 U.S. at 543 (Harlan, J., dissenting).

35. See *infra* text accompanying notes 231-72 for a definition and discussion of self-governance in Section IV.

36. But see the arguments for judicial power set forth in M. PERRY, *THE CONSTITUTION, THE COURTS AND HUMAN RIGHTS* (1982); FISS, *Forward: The Forms of Justice*, 93 HARV. L. REV. 1

Article argues that our constitutive tradition, the efforts we have made to define ourselves as a society, supports the recognition of a constitutional autonomy interest. Drawing primarily on the speeches and writings of two of the United States' principal political architects, Thomas Jefferson and Abraham Lincoln, I will attempt to show that we have committed ourselves—and at the time of the Civil War re-dedicated ourselves—to a particular sort of relationship between the citizen and the state. Our constitutional ethos<sup>37</sup> assumes not only the intrinsic value of personal choice, but is premised upon a sense of moral equality and independence reflecting a belief that human beings are capable of setting the course for their own lives.

To justify the recognition of an interest in self-governance, this discussion centers less on the merits of particular privacy cases than on the validity of judicial protection of non-textual autonomy interests. The effort is, in short, to claim legitimacy for the enterprise. Contrary to the heated arguments of the critics of substantive privacy review, judicial attempts to secure autonomy interests, when rooted in our societal commitment to self-governance, invigorate the open-ended provisions of the constitutional charter in a manner which fosters the underlying principles of our republic.

My claims for the constitutionalization of a right to self-governance are necessarily multi-faceted. At the least, the provision defeats the strict textualist's claim that only those rights explicitly listed in the Constitution are retained by the people. The legislative history of the ninth amendment suggests as well that the framers believed that even broader conceptions of retained liberties were not meant to be foreclosed by the adoption of the specifics of the first eight amendments. Part III presents an argument that constitutional analysis can be appropriately instructed by the exploration of our political tradition. In order to identify the admittedly expansive view of personal autonomy reflected in a right to self-governance, this Article turns primarily to the works of Jefferson and Lincoln. From their theories of the relationship between the individual and the state—theories to which they sought to commit the United States—a right of self-governance can be gleaned. Its existence can be supported even when one concedes that Jeffersonian individualism was not the only founding premise of our republic, and that it must undoubtedly be adapted to a modern, highly-interdependent society. Part IV preliminarily defines and measures the scope of the right.

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(1979); Grey, *Origins of the Unwritten Constitution: Fundamental Law in American Revolutionary Thought*, 30 STAN. L. REV. 843 (1978); Richards, *The Individual, The Family and The Constitution: A Jurisprudential Perspective*, 55 N.Y.U. L. REV. 1 (1980).

37. The use of this term is suggested by Phillip Bobbitt's excellent book. See P. BOBBITT, *CONSTITUTIONAL FATE* 94 (1982).

Finally, having outlined a framework of Jeffersonian liberty, I return explicitly to the claim that the constitution should be interpreted to include a right of self-governance. American constitutional decision-making is in major part a process of societal self-definition. Through its tensions, we choose and hone fundamental values, specifying the principles for which we stand and inching toward the sort of country we wish to become. Thus, the process appropriately responds to the "founding, constitutive aspirations"<sup>38</sup> of our public tradition. It is here that the contributions of Jefferson and Lincoln play a significant role.

## II. THE NINTH AMENDMENT AND NON-TEXTUAL RIGHTS

Gordon Wood has written perceptively about the pervasive ambivalence among the founders of our republic over the relationship between written and natural law.<sup>39</sup> That they enacted a Constitution embodying explicit limitations on government power could be said to demonstrate the founders' adherence to Samuel Adams' belief that expressly written documents were the best security against the danger of an "indefinite dependence upon an indeterminate power."<sup>40</sup> Furthermore, there was substantial demand for inclusion of a Bill of Rights both during and after the ratification process. More strongly than their successors, the colonists were schooled in the abuses of power. Explicit declarations of positive law were thought to be among the stoutest tools which could be aimed at such usurpation. As Thomas Jefferson wrote to James Madison, "... a bill of rights is what the people are entitled to against every government on earth. . . ."<sup>41</sup>

Yet, the American vision of civil liberty had been premised—almost necessarily so—on contractarian theory.<sup>42</sup> Putting laws on parchment merely affirmed their existence, it did not create them.<sup>43</sup> A people so fresh from revolution could not easily concede that legal rights existed only if confirmed by positive enactment. Ambiguity about the nature of law thus led many to seek explicit written charters, though they "... were never willing to acknowledge that the 'obligation of the ruled to obey' depended 'solely upon, "Be it enacted, Etc." ' "<sup>44</sup>

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38. Perry, *The Authority of Text, Traditions and Reasons: A Theory of "Constitutional Interpretation"*, 58 S. CAL. L. REV. 551, 563 (1985).

39. G. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC 1776-1787* at 291-94 (1969).

40. Adams, House of Representatives of Massachusetts to the Speakers of other Houses of Representatives (Feb. 11, 1768) in 1 WRITINGS OF SAMUEL ADAMS 185 (H. Cushing ed. 1968).

41. Letter from Thomas Jefferson to James Madison (Dec. 20, 1787) in *THE PORTABLE JEFFERSON* 430 (M. Peterson ed. 1975) [hereinafter cited as JEFFERSON].

42. G. WOOD, *supra* note 39, at 259-305.

43. *Id.* at 294.

44. *Id.* at 295.



This same ambivalence is reflected in the Bill of Rights. Although the provisions of the first eight amendments were designed to provide specific reservoirs of individual freedom from federal intervention, the ninth amendment declares that the "... enumeration of certain rights, shall not be construed to deny or disparage others retained by the people."<sup>45</sup> The tenth amendment makes a distinct claim concerning government powers: those not delegated are "... reserved to the states ... or to the people."<sup>46</sup> On its face, therefore, the Bill of Rights nods to both positive law and at least some notion of natural or other non-textual authority.

Ambivalence over the force of natural law was not the only motivation for the ninth amendment. A Bill of Rights was, of course, thought to be an essential bulwark against legislative abuse. In a more strategic vein, however, it also seemed likely that lingering opposition to the Constitution itself could be assuaged by a declaration of liberties. Introducing the Bill of Rights in the House of Representatives, Madison reminded his colleagues that "... it will be a desirable thing to extinguish from the bosom of every member of the community, any apprehension that there are those among his countrymen who wish to deprive them of the liberty for which they valiantly fought and honorably bled."<sup>47</sup> Tactically, therefore, Madison was interested in producing a list of liberties which would be accepted universally, quickly, and without controversy.

Writing to Randolph during the debates, Madison explained that it had been "... absolutely necessary in order to effect anything, to abbreviate debate, and exclude every proposition of doubtful and unimportant nature."<sup>48</sup> Introducing his proposals, he claimed that his purpose had been to formulate only alterations "likely to meet the concurrence required by the constitution."<sup>49</sup> To that end, Madison counselled his allies that items of a "controvertible nature ought not to be hazarded," since "two or three contentious additions would even now prostrate the whole project."<sup>50</sup>

The desire to propose a list of rights sufficiently uncontroversial so as to assure swift passage resulted in an obvious concern over what would be left out. Madison conceded on the floor of the Congress that worry over the negative implication arising from listing "particular ex-

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45. U.S. CONST. amend. IX.

46. U.S. CONST. amend. X.

47. THE BILL OF RIGHTS 1024 (B. Schwartz ed. 1980) [hereinafter cited as RIGHTS].

48. Letter from James Madison to John Randolph (Aug. 21, 1789) in 5 WRITINGS OF JAMES MADISON 417-18 (G. Hunt ed. 1904) [hereinafter cited as MADISON].

49. RIGHTS, *supra* note 47, at 1025.

50. Letter from James Madison to John Pendleton (June 21, 1789) in MADISON, *supra* note 48, at 405-06.

ceptions to the grant of power" was "one of the most plausible arguments . . . urged against the admission of a bill of rights. . . ." <sup>51</sup> His response, long before anticipated, was the inclusion of the ninth amendment. The language of the provision was designed to lay to rest the claim that only those rights named in the first eight amendments are protected from government abrogation. The amendment, therefore, clearly means what it says. Whether or not it can be seen as a repository of independent federal rights, it surely reflects the framers' belief that fundamental liberties exist which are not set forth in the text. <sup>52</sup>

Constitutional theorists who insist that only those liberties clearly set forth in the text are subject to judicial enforcement thus have understandable difficulty with the ninth amendment. Their supposedly strict textual approach carries obvious appeal. Quite logically, it calls for the enforcement of expressed enumerations of positive rights, and those alone. <sup>53</sup> The source of judicial power appears clear as well—the language of the text. No subjectivity or usurpation here. Because of the language of the ninth amendment, however, the tight interpretivist claim is plagued by self-contradiction. The language of the text is said to control, except when that language calls for the recognition of unlisted rights. Moreover, the strict textualist is forced to embrace the negative implication arising from the adoption of the Bill of Rights which Madison went to such pains to avoid. <sup>54</sup>

The debates over the framing of the Bill of Rights also offer some guidance as to the types of interests which were not included. The most obvious omissions were those interests thought to be insubstantial. Congressman Sedgwick's arguments against the inclusion of a right to assembly demonstrate the point. Sedgwick—with some belated support from the Supreme Court <sup>55</sup>—thought that the protection of freedom of speech rendered the right of assembly unnecessary. The protection of "minutiae," he argued, was "derogatory to the dignity of the House." <sup>56</sup> Were the assurance of all rights to have been the goal of the Bill of Rights, "[The Committee] might have gone into a very lengthy enumeration of rights; they might have declared that a man should have a right to wear his hat if he pleased; that he might get up when he pleased, and go to bed when he thought proper. . . ." <sup>57</sup> The Congress, of course,

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51. *Id.* at 1031.

52. *See, e.g., Griswold*, 381 U.S. at 486, 488 (Goldberg, J., concurring).

53. *See, e.g., Griswold*, 381 U.S. at 507-10 (Black, J., dissenting); R. BERGER, *supra* note

24. *See also* Schauer, *Easy Cases*, 58 S. CAL. L. REV. 399, 431 n.83 (1985).

54. *See* *Dronenburg v. Zech*, 741 F.2d 1388 (D.C. Cir. 1984) (opinion of Judge Bork holding right to privacy does not protect homosexual conduct); Bork, *supra* note 24.

55. *See, e.g., United Mine Workers v. Illinois State Bar Ass'n*, 389 U.S. 217 (1967); *Thomas v. Collins*, 323 U.S. 516 (1945); *DeJonge v. Oregon*, 299 U.S. 353, 364 (1937).

56. RIGHTS, *supra* note 47, at 1090.

57. *Id.*

accepted the right of assembly over Sedgwick's protest. It did so, however, under the belief that assembly constitutes a vital interest, not that trivial rights should be listed.<sup>58</sup>

Omitted rights could be deemed trivial, in the sense Sedgwick and Madison<sup>59</sup> used the term, in two distinct ways. A right—such as a right to wear a hat—could be simply thought unimportant. In that case, if Congress were to pass a statute forbidding the wearing of hats in public, the ninth amendment would, one supposes, defeat an inference that the national government was empowered to so legislate. Just because the Bill of Rights chooses not to protect trivial interests does not mean, without more, that no trivial rights exist.

More importantly, however, Sedgwick regarded the assembly right trivial because "it would never be called in question."<sup>60</sup> What was the need to protect interests which would never be abrogated? In the event that future, unforeseeable civil liberties crises arose—as they undoubtedly would—the ninth amendment was designed in part to overcome any inference that claims to constitutional protection had been foreclosed. Consider, for example, the ordinance struck down in *Moore v. City of East Cleveland*.<sup>61</sup> Might not the family interests abrogated there—the right of a grandmother to live with her grandson—be the sort which Sedgwick or Madison thought "would never be called into question?" The ninth amendment should at least stand as an impediment to a claim that such an interest cannot receive constitutional protection because it is not listed in the Bill of Rights.

The ninth amendment was also proposed to meet a final concern of Madison and the other architects of the Bill of Rights. One of the weightiest arguments made against the adoption of any declaration of liberties was that the rights could not be described with sufficient breadth. Better to leave assumed rights unexpressed than to fix cribbed descriptions of them in the stone of positive law. Jefferson, writing to Madison before the Bill of Rights was presented to the Congress, urged against scuttling the project over these difficulties.<sup>62</sup>

Madison chose to follow the advice of his mentor, coupled with the protections of the ninth amendment. In Congress, Madison argued that a Bill of Rights was a good idea "provided it can be framed as not to imply powers not meant to be included in the enumeration. . . . I am

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58. *Id.*

59. Madison explained to Randolph the need to exclude matters of an "unimportant nature." MADISON, *supra* note 48, at 417.

60. RIGHTS, *supra* note 47, at 1090.

61. 431 U.S. 494 (1977). In *Moore*, an East Cleveland zoning ordinance employed a restrictive definition of allowable "single-family" dwellings. Mrs. Moore was convicted of violating the provision by living with her son and two grandsons. The Supreme Court invalidated the conviction employing substantive due process analysis.

62. JEFFERSON, *supra* note 41, at 430.

sure that the rights of conscience in particular, if submitted to public definition would be narrowed much more than they are likely ever to be by an assumed power."<sup>63</sup> Madison proved prescient on that very point. The broader "rights of conscience" became the narrower, if more pointed, establishment and free exercise clauses in the final draft of the Bill of Rights.<sup>64</sup> Yet his inclusion of the ninth amendment stands as recognition that "public definition[s]" of essential liberties are almost inescapably narrow. Broader unenumerated liberties should not be "denied or disparaged" by the listing of their more precise counterparts.

The ninth amendment, therefore, plays an essential role in analyzing the propriety of the judicial protection of various non-textual liberties. At bottom, the amendment defeats any claim that there are no non-textual constitutional rights. Beyond that, the rationale for the amendment easily suggests that a negative inference is particularly inappropriate in cases in which the interference with liberty is of a sort unfamiliar to the framers. Since the drafters included the amendment primarily to remedy inescapable defects of lack of foresight and narrowness of language, analogy to expressed guarantees as a source of decision-making in many modern, unforeseeable constitutional disputes is strongly supported by the history of the "forgotten"<sup>65</sup> amendment.

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63. 1 ANNALS OF CONGRESS 439 (1789).

64. RIGHTS, *supra* note 47, at 1026-29.

65. See B. PATTERSON, THE FORGOTTEN NINTH AMENDMENT (1955); Redlich, *Are There "Certain Rights . . . Retained By The People"?*, 37 N.Y.U. L. REV. 787 (1962). See also Madison's declarations in THE FEDERALIST No. 37, at 236 (J. Madison) (J. Cooke ed. 1961):

The use of words is to express ideas. Perspicuity, therefore, requires not only that the ideas should be distinctly formed, but that they should be expressed by words distinctly and exclusively appropriate to them. But no language is so copious as to supply words and phrases for every complex idea, or so correct as not to include many equivocally denoting different ideas. Hence it must happen that however accurately the discrimination may be considered, the definition of them may be rendered inaccurate by the inaccuracy of the terms in which it is delivered.

The specificity/generality argument made here can, of course, be seen to cut both ways. I claim that Madison turned to specific, widely accepted, and essentially non-controversial liberty guarantees so as to assure speedy ratification. He included the ninth amendment to alleviate concern over what was left out and to remedy defects resulting from the narrowness and specificity of the language employed. It is also true that phrases like "freedom of speech" and "freedom of the press," because of their vagueness and breadth, work to create consensus during the ratification process which would likely not have existed concerning concrete disputes about expression. For example, Adams and Jefferson could more easily agree on the propriety of the first amendment than on the constitutionality of the Alien and Sedition Act. This disparity may suggest something about the way that the first amendment should be interpreted, however, though I am not sure exactly what that something would be. However, this observation does not change the fact that the ninth amendment was designed in no small part to address the implications of ratifying "half a loaf."

More important to the remainder of this Article, however, the ninth amendment presented a partial response to the Bill of Rights' choice of specificity over generality. Specificity helped to assure consensus—obviously necessary if such an expedited package deal was to be successful. In this light, the Bill of Rights itself might reasonably be seen as a listing of prohibitions of government powers which, at the time, seemed particularly essential to the framers. Given their recent disputes with England, the list is an understandable one. But, as Madison recognized, the list is dangerous for what it does not say, and for political theorists like Jefferson and Madison it could at best represent but "half a loaf." The amendment should defeat an inference that the listing of specific aspects of self-regulation—freedom of expression or worship, for example—implies that no more generalized right is protected. Since the ninth amendment was aimed at curing the absence of "requisite latitude" in the various provisions of the text, it provides support for the recognition of a broader, more theoretical constitutional interest such as a right to self-governance.

### III. AN ETHOS OF CONSTITUTIONAL LIBERTY

To acknowledge our ancestors means we are aware that we did not make ourselves. . . . The grace with which we embrace life, in spite of the pain, the sorrows, is always a measure of what has gone before.<sup>66</sup>

—ALICE WALKER

It is one thing to show that there are unenumerated rights. It is quite another to discover what those rights might be. The judicial protection of "fundamental" personal liberties has been claimed justifiable primarily through four sorts of arguments. The first—tradition<sup>67</sup>—appeared in *Griswold* itself. Justice Douglas argued that the marital privacy rights abrogated by the Connecticut statute had been recognized even before the adoption of the Constitution.<sup>68</sup> Apart from *Griswold*, however, few of the privacy decisions can claim sustenance from any

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66. A. WALKER, *REVOLUTIONARY PETUNIAS AND OTHER POEMS* 1 (1971).

67. See, e.g., *Adamson v. California*, 332 U.S. 46, 59-60 (1947) (Frankfurter, J., concurring); J. ELY, *supra* note 24, at 60-63.

68. *Griswold*, 381 U.S. at 486.

even moderately honest concept of tradition.<sup>69</sup> Consensus,<sup>70</sup> a second candidate, at least presents the possibility of vitality.<sup>71</sup> But as Dean Ely has persuasively shown, there is no existing American consensus to instruct decision-making in modern constitutional disputes; and even if there is such a consensus, the judiciary is particularly ill-suited to discover it.<sup>72</sup>

Moral philosophy, a third possibility, has proven a fertile field for autonomy theorists.<sup>73</sup> As a method of decision-making, it offers the comfort of articulated principle and the sense of satisfaction which comes from merging the demands of reason with those of the Constitution. But as is the case with any non-textual (or perhaps even textual) rights theory, the use of moral philosophy to measure constitutional power is subject to charges of indeterminacy.<sup>74</sup> More importantly, it is flawed as a foundation for constitutional principle. There is, and should be, a gulf between philosophy and law, constitutional or otherwise. At a minimum, if constitutional principle is to provide, to use Charles Black's phrase, decision according to law,<sup>75</sup> it must find its genesis in societal commitment. If, for example, the next decade were to present a new Aristotle whose modern visions of the relationship between the individual and the state proved incapable of refutation, it is unclear why, for that reason alone, our constitutional order should have changed one whit. Moral philosophy may well hone and criticize constitutional principle, but without public ratification it cannot provide its foundation.

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69. Obviously *Roe v. Wade*, 410 U.S. at 113, cannot be supported on the basis of traditionally accepted government limits. Neither can *Carey v. Population Services*, 431 U.S. 628 (1977) (contraception rights of non-married minors); *Eisenstadt*, 405 U.S. at 438 (contraception rights of non-married persons); or *Stanley v. Georgia*, 394 U.S. 557 (1969) (private possession of pornographic materials).

70. See *Furman v. Georgia*, 408 U.S. 238, 299-300 (Brennan, J., concurring); *id.* at 360-69 (Marshall, J., concurring); Lupu, *Untangling The Strands of The Fourteenth Amendment*, 77 MICH. L. REV. 981, 1040 (1979); Wellington, *Common Law Rules and Constitutional Double Standards: Some Notes on Adjudication*, 83 YALE L.J. 221, 284 (1973).

71. Depending on how one measures popular will—an insurmountable problem for the judiciary—consensus could be said to support the bulk of the privacy cases, even possibly the abortion rulings. It would, however, by definition afford little protection to unpopular rights. See *Doe v. Commonwealth Attorney*, 403 F. Supp. 1199 (E.D. Va. 1975), *aff'd*, 425 U.S. 901 (1976) (no substantive due process right to practice homosexual conduct).

72. J. ELY, *supra* note 24, at 63-69.

73. See, e.g., Dworkin, *The Forum of Principle*, 56 N.Y.U. L. REV. 469 (1981); Michaelman, *Welfare Rights in a Constitutional Democracy*, 1979 WASH. U.L.Q. 659; Richards, *Human Rights as the Unwritten Constitution: The Problem of Change and Stability in Constitutional Interpretation*, 4 U. DAYTON L. REV. 295 (1979); Richards, *Moral Philosophy and the Search for Fundamental Values in Constitutional Law*, 42 OHIO ST. L.J. 319 (1981).

74. See J. ELY, *supra* note 24, at 56-60; M. PERRY, *supra* note 36, at 91-97.

75. See C. BLACK, *DECISION ACCORDING TO LAW* (1981). But see, Richards, *Interpretation and Historiography*, 58 S. CAL. L. REV. 490, 533 (1985), "The rich common discourse between philosophy and law . . . dcepen[s] both enterprises."

More successful arguments for a constitutional autonomy guarantee have been based upon a fourth method of analysis, analogy and extrapolation from existing textual guarantees and structure of government.<sup>76</sup> Constitutional decision-making based upon relation to explicit guarantees, again a technique suggested in *Griswold*,<sup>77</sup> is consistent with both the language of the open-ended provisions of our charter and the demand that limitations on government power be rooted in societal commitment rather than individual philosophical predilection. Yet, as is the case with Justice Douglas' penumbral theory, analogical analysis can focus its attention in an almost endless variety of directions. While one critic might find privacy rights through analysis of equal citizenship,<sup>78</sup> another could derive freedom of contract from constitutional provisions protecting economic expectations, such as the contracts clause<sup>79</sup> and the takings clause.<sup>80</sup> "Penumbralizing" can reasonably provide little protection for modern autonomy interests unless the method accepts fairly loose linkage between explicit and penumbral rights. The link between *Griswold's* privacy right, for example, and the language of the first, third, fourth, and fifth amendments is an elusive one. If loose analogy is allowed, however, the theory collapses into the fundamental rights analysis it was designed to avoid.

Discovery by analogy, if it employs no overarching theory of liberty to direct its inquiry, also carries a hint of playing Hamlet without the Prince. Specific rights are advocated on the strength of their ties to other specific, but recognized, constitutional interests. Less likely to occur, however, is a search for a broader concept of individual freedom which may instruct a number of the specified textual guarantees. I hope to examine our constitutional commitment to autonomy in a more generalized, yet possibly more direct, fashion. Moving past the listed references, it may be possible to explore constitutional liberty itself, taking Thoreau's advice to "gird up [our] loins once more, and continue [our] pilgrimage to its fountainhead."<sup>81</sup>

Even if I am correct, however, that these various rights theories fall short of providing adequate defenses of the privacy cases on their own

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76. See, e.g., C. BLACK, *supra* note 75, at 50; C. BLACK, *STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW* (1969); Black, *The Unfinished Business of the Warren Court*, 46 WASH. L. REV. 3 (1970); Laycock, Book Review, 59 TEX. L. REV. 343 (1981).

77. 381 U.S. at 481-86. Justice Douglas' penumbral theory, pursuant to which he derived the right of marital privacy protected in *Griswold*, is similar to analogic interpretations.

78. See, e.g., Karst, *The Freedom of Intimate Association*, 89 YALE L.J. 624, 663 (1980).

79. U.S. CONST. art. I, § 10, cl. 1, provides in pertinent part, "No State shall . . . pass any . . . Law impairing the Obligation of Contracts."

80. U.S. CONST. amend. V states in pertinent part, "[No] private property [shall] be taken for public use, without just compensation."

81. H.D. THOREAU, *CIVIL DISOBEDIENCE*, reprinted in *THE PORTABLE THOREAU* 135 (C. Bode ed. 1947).

terms, my goal is to supplement and draw upon their claims rather than to replace them. My arguments for constitutional recognition of a right of self-governance turn, at least in part, to a core, consensus commitment of our political tradition. Like moral theorists, I seek to examine the philosophy of liberty which is reflected in our constitutional order. An analogist could point out that a right of self-governance, as I describe it below, has roots in the listed guarantees of equal protection, free expression, religious liberty, and freedom from unreasonable searches and seizures. Further, I hope to provide additional ammunition for such traditional rights claims. If I am able to identify a commitment to personal autonomy which undergirds our democratic foundations, that commitment may provide a crucial link to various arguments for the protection of substantive interests based upon political or ethical philosophy. Any examination of our historical dedication to self-determination may also assist in the discovery of appropriate analogues to the enumerated provisions of the Bill of Rights.

Still, I primarily choose a different tack. My arguments supporting a constitutional interest in self-governance are rooted in what I see as an American dedication to the progressive unfolding of individual sovereignty. The centerpiece of my position is a claim of societal commitment. Unlike rights theories based upon moral or political philosophy, I argue not only that the protection of various autonomy interests is justified because it is wise or laudable, but, more fundamentally, because we have chosen that course as a nation. At first glance, of course, it seems odd to search for constitutional interests through some process of societal self-exploration. Yet constitutional inquiry inevitably implicates both our relationship to our national past and our identity as Americans.<sup>82</sup> I shall argue as well that constitutional decision-making is a major tool by which we constitute ourselves as a society—based upon both past and present promises to each other and to ourselves. Professor Tribe is surely correct that “. . . in making [constitutional] choices we reaffirm and create, select and shape, the values and truths we hold sacred. Such decisions determine much about how we define our society and specify much about what we stand for and what sort of country we wish to become.”<sup>83</sup> That being the case, it seems appropriate that constitutional interests should be traceable not only through explicit textual provisions and direct analogies to those provisions,<sup>84</sup>

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82. See Levinson, Book Review, 59 TEX. L. REV. 395, 419 (1981).

83. Tribe, *Constitutional Calculus: Equal Justice or Economic Efficiency*, 98 HARV. L. REV. 592, 595 (1985).

84. See Black, *The Unfinished Business of the Warren Court*, 46 WASH. L. REV. 3, 37 (1970).



but also, as Charles Black has written, through "matter[s] of record as to national judgment."<sup>85</sup>

I will attempt to identify a "national judgment," or dedication, to the promotion of individual liberty which entails a grounding commitment to the concept of self-governance. Based primarily upon the writings of Jefferson and Lincoln, my arguments acknowledge that the recognition of specific rights plays an important role in determining the specific nature of our culture.<sup>86</sup> If it can be shown that we have committed ourselves as a people to a view of individual self-determination which limits the power of government to impose its vision of the good life upon its citizenry, then the case for judicial enforcement of that commitment is strong.

Such arguments are, no doubt, a step outside the main channels of modern constitutional scholarship, and even perhaps modern intellectual thought. They assume, for example, that the response to the question "[i]s that what America stands for?"<sup>87</sup> should be taken seriously. Instead of offering the usual academic stance—which takes as its primary mission the discovery and exaggeration of analytical flaws, and thereby generally concludes that nothing of substance about values or societal commitment can be said<sup>88</sup>—my aim is to offer at least some affirmative content for the often vacuous referent, American ideology. Finally, I assume here that we can learn from what has gone before. We are neither the first, nor, one hopes, the last generation to struggle with the dilemmas contained in the phrase "ordered liberty."<sup>89</sup> I argue that some principal actors in our constitutional history—even if not the semi-divine characters portrayed in our civics classes—have contributed to our perceptions of human liberty in profound ways.

It remains to be asked, of course, even if constitutional analysis can appropriately take cognizance of matters of "national judgment," why turn to Jefferson and Lincoln? Among American political figures, Jefferson and Lincoln are, no doubt, powerful spokesmen of our common ideals. A trip to the Washington Mall alone gives testimony to that

85. See C. BLACK, *supra* note 75, at 63.

86. See Tushnet, *An Essay On Rights*, 62 TEX. L. REV. 1363, 1365 (1984).

87. The question is widely attributed to Chief Justice Warren. See Bartlett, *Earl Warren—A Tribute*, 58 CALIF. L. REV. 17 n.8 (1970); Cox, *Chief Justice Earl Warren*, 83 HARV. L. REV. 1, 2 (1969); Traynor, *Chief Justice Warren's Fair Question*, 58 GEO. L.J. 1, 4 (1969).

Professor Monaghan uses the question to deride aggressive constitutional theorists. See Monaghan, *Our Perfect Constitution*, 56 N.Y.U. L. REV. 353, 396 (1981).

88. See, e.g., Levinson, *What Do Lawyers Know (and What Do They Do With Their Knowledge)? Comments On Schauer and Moore*, 58 SO. CAL. L. REV. 441 (1985); Levinson, *Law as Literature*, 60 TEX. L. REV. 373 (1982); Tushnet, *supra* note 84; Tushnet, *Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles*, 96 HARV. L. REV. 781 (1983).

89. *Palko v. Connecticut*, 302 U.S. 319, 325 (1937).

much. Yet their roles in our democratic development are, if anything, more profound than their respective memorials suggest.

Thomas Jefferson, author of the Declaration of Independence, draftsman of the Virginia Bill Establishing Religious Freedom, mentor of James Madison who played key roles in the enactment of the Constitution and Bill of Rights, spearhead of the democratic revolution of 1800, and third President of the United States, can rightly be called the primary architect of our democracy.<sup>90</sup> Carl Becker correctly claimed that “. . . more than any other man, we think of Jefferson as having formulated the fundamental principles of our American democracy, of what we now like to call the American way of life.”<sup>91</sup> Lincoln himself asserted that the “principles of Jefferson are the definitions and axioms of a free society.”<sup>92</sup> Jefferson’s cause of self-government was, as Franklin Roosevelt declared over four decades ago, “a cause to which we [as a nation] . . . are committed. . . .”<sup>93</sup>

Even Jefferson’s most strident modern critic, Leonard Levy, characterizes him as “the foremost spokesman of the [founding] generation”<sup>94</sup> and the “central figure in the American libertarian tradition.”<sup>95</sup> In his admittedly unbalanced attack on Jefferson’s civil liberties record, Levy admits that Jefferson’s principles “sprang from the deepest aspirations of the people.”<sup>96</sup> His efforts, to quote Levy, constituted “a classic

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90. See generally C. BECKER, *THE DECLARATION OF INDEPENDENCE* (1922); D. BOORSTIN, *THE LOST WORLD OF THOMAS JEFFERSON* (1948); H.S. COMMANGER, *JEFFERSON, NATIONALISM, AND THE ENLIGHTENMENT* (1975); J. DOS PASSOS, *THE MEN WHO MADE THE NATION* (1957); JEFFERSON, *supra* note 40; T. JEFFERSON, *NOTES ON THE STATE OF VIRGINIA*, (W. Peden ed. 1955); L. LEVY, *JEFFERSON AND CIVIL LIBERTIES: THE DARKER SIDE* (1963); D. MALONE, *JEFFERSON AND THE RIGHTS OF MAN* (1951); S. PADOVER, *A JEFFERSON PROFILE* (1956); C. PATTERSON, *THE CONSTITUTIONAL PRINCIPLES OF THOMAS JEFFERSON* (1953); M. PETERSON, *THE JEFFERSON IMAGE IN THE AMERICAN MIND* (1960); N. SCHACHNER, *THOMAS JEFFERSON: A BIOGRAPHY* (1951); G. WILLS, *INVENTING AMERICA: JEFFERSON’S DECLARATION OF INDEPENDENCE* (1978).

Some have argued that Alexander Hamilton actually contributed more to the development of our government structure and sense of nationalism than did Jefferson. See, e.g., G. GROB & G. BILLIAS, 1 *INTERPRETATIONS OF AMERICAN HISTORY: PATTERNS AND PERSPECTIVES* 189-224 (4th ed. 1982). My argument for the constitutionalization of a Jeffersonian view of individual autonomy does not assume that Jefferson was either the best person among the founding generation or its unequivocal leader. Rather, I think that Jefferson has helped form the American vision of personal liberty and the appropriate relation between the individual and the state. Hamilton offers no rivalry on such issues.

91. Becker, *What Is Still Living in the Political Philosophy of Thomas Jefferson?*, reprinted in M. PETERSON, *THOMAS JEFFERSON: A PROFILE* 42 (1967).

92. Letter from Abraham Lincoln to H.L. Pierce and others (Apr. 6, 1859) in ABRAHAM LINCOLN: *HIS SPEECHES AND WRITINGS* 489 (R. Basler ed. 1946) [hereinafter cited as LINCOLN].

93. Franklin Roosevelt, Address at the Dedication of the Thomas Jefferson Memorial (Apr. 13, 1943) in JEFFERSON READER 246 (F. Rosenberger ed. 1953).

94. See L. LEVY, *supra* note 90, at xi.

95. *Id.* at xii.

96. *Id.* at 1. Leonard Levy has strongly criticized Jefferson’s public performance on civil liberties issues. He points, most particularly, to actions against the Burr conspiracy and in support of scattered libel suits. See *id.* at 42-92. Given the tensions presented throughout Jefferson’s public

expression of the American creed of intellectual as well as religious liberty. . . ."<sup>97</sup>

Lincoln, on the other hand, personifies not only our national commitment to save the Union, but to save it, and democratic government, "dedicated"<sup>98</sup> to the principles of the Declaration of Independence.<sup>99</sup> Lincoln's "memorable vision of what this country was truly about . . . has prevailed and become part of our ordinary political consciousness."<sup>100</sup> Even if a bit ethnocentric, there is much truth in George Will's claim that Lincoln was the "greatest statesman in the history of democracy."<sup>101</sup> Perhaps more important for the purposes of this Article, Will refers to the Lincoln-Douglas debates as an introduction to the "central event of our democracy."<sup>102</sup> And again, even Lincoln's harshest critics have admitted—vital to my claims here—that his presidency was directed toward the recontracting of American society on the basis of Jeffersonian maxims of democracy.<sup>103</sup>

By turning to Jefferson and Lincoln as sources of the American political tradition, it is not necessary to embrace the saintly portraits of their lives reflected in high school history books. Whether or not they

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career, the record cannot be seen as a devastating one. The potential instability of the early government, the actions of the Federalists threatening the development of democracy in the United States, and Burr's unpredictability as well as possible dangerousness, at least, work to make Jefferson's behavior understandable. Whether or not Levy's allegations are accurate, they do not undercut the arguments for constitutionalizing Jeffersonian liberty theories here.

Levy would not necessarily disagree. He concludes that "in the long run [Jefferson's] pen was mightier than his practice, for his rhetoric helped to create an American creed." *Id.* at 19. That his "libertarianism was considerably less than perfect or that his practice lagged behind his faith does not one whit diminish the achievements by which he is best remembered and should be. That he did not always adhere to his libertarian principles does not erode their enduring rightness." *Id.* at 175-76. Jefferson, Levy continues, "survives . . . because a free people still cherishes the spirit of liberty and its foremost exponent among the founders of the Republic." *Id.* at 2. My claim is that Jefferson is a primary spokesman of American constitutional ideals and that his formulations of freedom represent a fundamental part of our constitutive ethos because we have embraced them as a people. If Levy is right about a variety of Jefferson's acts, then it is true that Jefferson's pen has been literally more powerful than his conduct. Like Woodrow Wilson, I think that the "immortality of Jefferson does not lie in any one of his achievements but in his attitude toward mankind." *See infra* note 112. His pen has shaped our ideals as a nation, and, as I argue in the final section of this Article, American constitutional law is inextricably bound to those ideals. *See also infra* note 126.

97. L. LEVY, *supra* note 90, at 6.

98. *See* The Gettysburg Address, in LINCOLN, *supra* note 92, at 734. *See generally* R. HOFSTADTER, *THE AMERICAN POLITICAL TRADITION: AND THE MEN WHO MADE IT* (1948); *THE LINCOLN READER* (P. Angle ed. 1947); J. NICOLAY, *ABRAHAM LINCOLN* (1906); S. OATES, *WITH MALICE TOWARD NONE* (1977); C. SANDBURG, *ABRAHAM LINCOLN: THE PRAIRIE YEARS; THE WAR YEARS* (1939); K.C. WHEARE, *LINCOLN* (1948).

99. LINCOLN, *supra* note 92, at 734.

100. *See infra* text accompanying notes 136-55.

101. Will, *What to Read? Start With Genesis*, *Washington Post* June 28, 1984, at 15, § I, col. 1.

102. *Id.*

103. *See* G. WILLS, *supra* note 90.

were extraordinary persons, which they clearly were, Jefferson and Lincoln were central actors in the two primary constitutive phases of our history: the founding of the republic<sup>104</sup> and the final forging of the nation through the Civil War. When a nation is "created," or rededicated, attention necessarily turns to the distinguishing characteristics of the ensuing entity. It is in this role of self-exploration,<sup>105</sup> dedication,<sup>106</sup> and aspiration<sup>107</sup> that Jefferson and Lincoln have so significantly helped form our vision of ourselves as a nation. For this reason alone it is unsurprising that prominent historians would call Jefferson and Lincoln "the central figure[s] in the history of American democracy."<sup>108</sup>

Even though they were products of their respective eras, hardly free from the shortcomings and prejudices of their times,<sup>109</sup> and even if on occasion their practices fell somewhat short of their declarations,<sup>110</sup> Jefferson and Lincoln remain primary spokesmen of American political ideology.<sup>111</sup> Their public declarations sought to explore and direct the underlying premises of our democratic institutions, helping to build our political tradition in haunting phrases. Woodrow Wilson thus rightly claimed that the "immortality of Jefferson does not lie in any one of his achievements but in his attitude towards mankind."<sup>112</sup> It is possible that in honoring Jefferson and Lincoln the American people reflect their own ideals and aspirations more than history. But it is in part, I will argue, the ideals and aspirations of the nation which constitutional law seeks to tap. The felt, symbolic hold which both they and their visions of political life exercise over the American people are more important than their specific actions. For me, Jefferson and Lincoln are prin-

104. T. PAINE, *COMMON SENSE*, reprinted in *THE SELECTED WORK OF TOM PAINE* 18 (H. Fast ed. 1945).

105. "On the question of liberty, as a principle, we are not what we have been . . . The fourth of July has not quite dwindled away; it is still a great day—for burning fire-crackers!!" (emphasis in original). Letter from Abraham Lincoln to George Robertson (Aug. 15, 1855) in 2 *THE COLLECTED WORKS OF ABRAHAM LINCOLN* 318 (R. Basler ed. 1953) [hereinafter cited as 2 *LINCOLN WORKS*].

106. The Gettysburg Address, in *LINCOLN*, *supra* note 92, at 734 ("conceived in liberty and dedicated to the proposition that all men are created equal").

107. "[The Declaration of Independence is] meant to set up a standard maxim for a free society, which could be familiar to all, and revered by all, constantly looked to, constantly labored for . . ." Lincoln, speech at Springfield, Illinois (June 26, 1857) in *LINCOLN*, *supra* note 92, at 361.

108. L. LEVY, *supra* note 90, at 1.

109. Jefferson held slaves and Lincoln called for the return of blacks to Africa to solve the slavery issue. See S. OATES, *supra* note 90, at 126. See also *infra* note 162.

110. Here, particularly, Jefferson has been the subject of attack. See L. LEVY, *supra* note 90. See also *supra* note 96; *infra* text accompanying notes 126-27.

111. See C. BECKER, *supra* note 90, at 17; Becker, *What Is Still Living in the Political Philosophy of Thomas Jefferson*, 87 *Proceedings of the American Philosophical Society* 201-10 (1944); L. LEVY, *supra* note 90, at 1-24.

112. D. BOORSTIN, *supra* note 90, at ix. See also R. HOFSTADTER, *supra* note 98, at 92 ("The Lincoln legend has come to have a hold on the American imagination that defies comparison with anything else in political mythology").

cial architects of our constitutive tradition. Even if they are not, their efforts at least represent major contributions to our societal attempts at self-definition.

*A. The Jeffersonian Concept of Individual Liberty*

[T]he Welshman got it planted where it will trouble us for a thousand years. Each age will have to reconsider it.<sup>113</sup>

—ROBERT FROST

Thomas Jefferson proclaimed in the Declaration of Independence that "all men are created equal" and "endowed by their Creators with Certain inalienable rights; that among these are life, liberty and the pursuit of happiness."<sup>114</sup> By these words, the Second Continental Congress sought not only to sever its relationship with Great Britain, but to dedicate the freed colonies to a philosophy of government. As Lincoln would write eighty years later, Jefferson "... in the concrete pressure of a struggle for national independence ... introduced into a merely revolutionary document, an abstract truth, applicable to all men and all times."<sup>115</sup>

Of course the sexist terminology, the grim realities of an acknowledged slavery, the colonial embrace of aristocracy, and the vagueness of "liberty" and the "pursuit of happiness" complicate the Declaration's status as "an abstract truth" for all times. Jefferson's concept of liberty was no doubt an imperfect one, at least for the interdependent society which is two centuries its successor. Its application has not only been

113. R. FROST, *The Black Cottage*, reprinted in A TRIBUTE TO THE SOURCE 20 (H. Carruth ed. 1979).

114. READINGS IN AMERICAN DEMOCRACY 67 (G. Stourgh ed. 1959). See also G. WILLS, *supra* note 90. Garry Wills' *Inventing America* has received much attention for its attempt to dislodge the Declaration of Independence from its previously accepted roots in Lockean philosophy. See, e.g., C. BECKER, *supra* note 90 (arguing that the Declaration is based in the writings of John Locke). Perhaps taking advantage of the fact that Jefferson's early library was destroyed by fire, making proof of the claim impossible, Wills argues that Jefferson drew not on Locke but on the Scottish moral sense theorists Francis Hutcheson, David Hume, and Thomas Reid in formulating the document.

The arguments presented here are unaffected by Wills' position. First, the Jeffersonian portrait of individual liberty I examine is drawn from the entire body of Jefferson's thought, not only, or even primarily, from the Declaration. Second, Wills' efforts seemed designed to overcome the use of a Lockean philosophical overlay to translate either the Declaration of Independence or Jeffersonian thought. His work thus contradicts historians such as Carl Becker and Daniel Boorstin. See *supra* note 90. In American constitutional theory, Wills' position is at odds with writers like David A.J. Richards who seek to measure constitutional principle, in part, through a Lockean lens. See, Richards, *supra* note 75. My arguments, however, rely on Jefferson and Lincoln, through their own language. Jefferson is not used as a tool to get to Locke, or as Wills would use him, to get to Hutcheson.

115. LINCOLN, *supra* note 92, at 489.

incomplete in both his time and thereafter, but Jefferson's maxims have been most successfully employed to justify economic interests which he would have likely rejected. Yet Jefferson's analysis of "liberty" points to the core of the relationship between citizen and the state in ways which remain compelling.

For Jefferson, the "right of personal freedom," like the rights of thinking or publishing, could not be "surrendered" to the government.<sup>116</sup> His first post-Declaration attempts to explore the boundaries of the concept occurred in the concrete arena of the Virginia legislature's pitched battles over the disestablishment of the Anglican Church. The Bill for Establishing Religious Freedom, authored by Jefferson within a year of the Declaration,<sup>117</sup> stated that "the opinions of men are not the object of civil government, nor under its jurisdiction . . . it is time enough . . . to interfere when principles break out into overt acts against peace and good order."<sup>118</sup> Four years later when he was removed a bit from the fray, he generalized this concept in his widely regarded Notes on the State of Virginia.<sup>119</sup> Presaging John Stuart Mill by three quarters of a century, Jefferson wrote that "the legitimate powers of government extend to such acts only as are injurious to others."<sup>120</sup>

Upon assuming the Presidency, Jefferson offered his closest approximation to a treatise on good government. In his first inaugural address he listed the demand for a "wise and frugal government, which shall restrain men from injuring one another, which shall leave them otherwise free to regulate their own pursuits of industry and improvement" as a touchstone "of our political faith."<sup>121</sup> By the end of his life he had altered the formulation only slightly, writing that "no man has a natural right to commit aggression on the equal rights of another; and this is all from which the laws ought to restrain him."<sup>122</sup> Political liberty for Jefferson amounted primarily to safeguarding individuals from transgressions by their neighbors, leaving them otherwise unhampered in their efforts at self-development.

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116. Letter from Thomas Jefferson to David Humphreys (Mar. 18, 1789) in *RIGHTS*, *supra* note 47, at 998-1000.

117. See L. LEVY, *supra* note 90, at 3-8; N. SCHACHNER, *supra* note 90, at 156-162.

118. Jefferson, *A Bill Establishing Religious Freedom* (June 1779) in *JEFFERSON*, *supra* note 41, at 252-53.

119. See J.S. MILL, *ON LIBERTY* 60 (1948) (" . . . the sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their member is self-protection. That the only purpose for which power can be rightfully exercised over any member of a civilized community against his will, is to prevent harm to others."

120. *JEFFERSON*, *supra* note 41, at 223.

121. Thomas Jefferson, First Inaugural Address (Mar. 4, 1801) in *JEFFERSON*, *supra* note 41, at 294.

122. Letter from Thomas Jefferson to James Gilmer (June 7, 1816) in C. PATTERSON, *supra* note 90, at 59.

Jefferson's laissez-faire philosophy reflected an interesting set of underlying premises. Paramount among these was his belief that the proper ends of government did not include the attainment of the good society. Even if America could be counted on to produce a natural aristocracy,<sup>123</sup> its rulers should not be charged with defining the ends of society. Only the Creator was qualified, in Daniel Boorstin's words, "to make the blueprint for community."<sup>124</sup> A people develop, in short, by being unleashed from subservience to kings, priests, and nobles. Government attempts to define the good or moral life are not only intrusive and presumptuous, they are, at bottom, bad policy. "The evils flowing from the duperies of the people, are less injurious than those from the egoism of their agents."<sup>125</sup>

Proscribing non-injurious acts in order to foster a government-sponsored vision of the moral life also violated Jefferson's commitment—nascent though it was<sup>126</sup>—to equality. In no small part, Jefferson thought that coercion denigrated the moral instinct "nature hath

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123. Letter from Thomas Jefferson to John Adams (Oct. 28, 1813) in JEFFERSON, *supra* note 41, at 533-39. ("For I agree with you that there is a natural aristocracy among men. The grounds of this are virtue and talents.")

124. See D. BOORSTIN, *supra* note 90, at 191.

125. D. BOORSTIN, *supra* note 90, at 191.

126. Speaking of Jefferson's commitment to equality can reasonably disturb. See L. HIGGINBOTHAM, *IN THE MATTER OF COLOR* (1978). Jefferson wrote that blacks are "inferior to whites in the endowments both of body and of mind," and that "women should be neither seen nor heard in society's decision-making councils." *Id.* at 10, 41. He owned slaves as well. It is, of course, difficult to convey the horror of this chapter of American life. The narrow vision of equality under which the United States has developed is a devastating and undeniable aspect of our history. All progress, however, assumes original defect, and Jefferson was committed to the unfolding development of equality. Letter from Thomas Jefferson to Edward Coles (Aug. 25, 1814) in JEFFERSON, *supra* note 41, at 545. Jefferson, unlike many southerners of his day, at least appeared to recognize the injustice of slavery

The public mind would not yet bear [emancipation], nor will it bear it even at this day.

Yet the day is not distant when it must bear and adopt [emancipation], or worse will follow. Nothing is more certainly written in the book of fate, than that these people are to be free . . . . If . . . it is left to force itself on, human nature must shudder at the prospect held up.

N. SCHACHNER, *supra* note 90, at 154. And, of course, in his *Notes on the State of Virginia* he wrote "Indeed I tremble for my country when I reflect that God is just; that his justice cannot sleep forever." T. JEFFERSON, *supra* note 90, at 156. Jefferson drafted a Virginia bill for emancipation early in his career and attempted to stop the spread of slavery into the Northwest territories. The original Declaration also included a diatribe on the slave trade. See R. HOPSTADTER, *supra* note 98, at 21.

The central focus of my claims for the constitutionalization of self-governance, however, is the Jeffersonian vision of the relationship between the citizen and the state. The arguments do not turn on his personal practices or on his moral worth. Jefferson had a tragic concept—as did the bulk of his contemporaries—of the classes of persons who should be considered competent members of the political community. Two centuries later we have done much to correct that. What I examine here is the relationship between the state and its political community. I argue that the American vision of that relation assumes an ability to self-govern.

planted in our breasts."<sup>127</sup> To his mind, incidental differences in mind and body were dwarfed by an all important equality in the governing faculty of human beings.<sup>128</sup> His plowman-professor analogy is instructive: "State a moral case to a ploughman and a professor. The former will decide it as well, and often better than the latter, because he has not been led astray by artificial rules."<sup>129</sup> Democracy's future, for Jefferson, was largely dependent on freeing common citizens from the moral dictates of an intellectual, religious, or hereditary elite. Yet Jefferson's aversion to "morals legislation" went deeper than his philosophical commitment to innate morality.

Democracy was for Jefferson a theory of government which draws its sustenance from its regard for human beings and the value of their lives. The true basis of democratic government, he wrote, "is the equal right of every citizen, in his person and property, and in their management."<sup>130</sup> Self-government assumes an ability in the commoner not only to elect his leaders, but to regulate his affairs as well. And Jefferson was "optimistic . . . that the people have been made competent for self-government."<sup>131</sup> Limiting state intrusion into personal autonomy, therefore, was an essential component of a broader Jeffersonian program launched in the "name of the natural equality of man" to "[lay] the axe to the foot of psuedo-aristocracy."<sup>132</sup> His efforts to abolish entail and primogeniture, secure religious liberty, eliminate property qualifications for elected office, and broaden electoral participation were similar cornerstones in a "foundation laid for a government truly republican."<sup>133</sup> In short, Jefferson opted for a political system premised upon tolerance rather than persecution, and reason rather than coercion, to foster both democratic ideals and the intrinsic value of human beings. No doubt the circle of his vision, like that of his contemporaries, was tragically narrow. Whole segments of the society of his day were excluded from full membership in the American polity. Yet the theory

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127. Letter from Thomas Jefferson to Thomas Law (June 13, 1814) in JEFFERSON, *supra* note 41, at 542.

128.

Man was destined for society. His morality therefore was to be formed to this object. He was endowed with a sense of right and wrong merely relative to this. This sense is as much a part of his nature as the sense of hearing, seeing, feeling; it is the true foundation of morality.

Letter from Thomas Jefferson to Peter Carr (Aug. 10, 1787) in JEFFERSON, *supra* note 41, at 424.

129. *Id.* at 425.

130. Letter from Thomas Jefferson to Samuel Kercheval (July 12, 1816) in JEFFERSON, *supra* note 41, at 555.

131. D. BOORSTIN, *supra* note 90, at 181.

132. Letter from Thomas Jefferson to John Adams (Oct. 28, 1813) in JEFFERSON, *supra* note 41, at 537. See also M. PETERSON, ADAMS AND JEFFERSON; A REVOLUTIONARY DIALOGUE 22-23 (1976).

133. AUTOBIOGRAPHY OF THOMAS JEFFERSON 62 (1959).



of government he introduced assumed a community sharing a common humanity. It invited its citizens to promote in themselves the humanity which bound them to each other. Two centuries of struggle have dramatically expanded the circle of those considered competent, autonomous, and fully-participating members of society. The theory of government to which Jefferson sought to dedicate the fledgling nation demands that all its members be assumed competent to govern the direction of their own lives.

*B. Lincoln and Rededication*

The poet . . . drags the dead out of their coffins and stands  
them again on their feet . . . he says to the past, Rise and  
walk before me that I may realize you.<sup>134</sup>

—WALT WHITMAN

If Jefferson attempted to carve out democratic governing principles for the United States, Lincoln attempted to save them. The tragic American embrace of slavery triggered an eventual and unavoidable re-examination of our national commitments to liberty and equality. Arguments over the extension of slavery into the territories rekindled long smouldering conflicts and threatened the continued vitality of compromises institutionalized by the framers of the original compact. Inevitably, the meaning and relevance of the Declaration of Independence were brought into play. Following earlier arguments by John Calhoun, proponents of slavery or of "states rights" offered a variety of interpretations or reformulations of the Declaration.<sup>135</sup> Its terms were argued to implicitly exclude blacks,<sup>136</sup> guarantee state equality,<sup>137</sup> claim only that Americans were equal to British,<sup>138</sup> or even to be no more than "self-evident lies."<sup>139</sup> Opponents of slavery deemed the continuation of the institution fatally inconsistent with a government dedicated to freedom for all. Simply put, in the decades preceeding the Civil War, the slavery issue re-focused national attention to unanswered questions concerning those ideals for which our society stood. The Illinois senatorial campaign of 1858 between Stephen Douglas and Abraham Lincoln offered the most pointed, and probably the most literate, debates over the American constitutional ethos in our history.

134. *Preface to W. WHITMAN, LEAVES OF GRASS* (1926).

135. See C. Becker, *supra* note 90, at 251-52. See also 3 *THE COLLECTED WORKS OF ABRAHAM LINCOLN* 301 (R. Basler ed. 1953) [hereinafter cited as 3 *LINCOLN WORKS*].

136. 2 *LINCOLN WORKS, supra* note 105, at 405.

137. *Id.* at 385.

138. *Id.* at 406.

139. 3 *LINCOLN WORKS, supra* note 135, at 301-02.

Responding to Judge Douglas' claims for "popular sovereignty" and support for the Dred Scott decision, Lincoln called for a rededication to the literal meaning of the Declaration. To Lincoln's mind, on the question of liberty, we were not what we once had been:

When we were the political slaves of King George, and wanted to be free, we called the maxim that "all men are created equal" a self-evident truth, but now when we have grown fat, and have lost all dread of being slaves ourselves, we have become so greedy to be *masters* that we call the same maxim "a self-evident lie."<sup>140</sup>

Accordingly, the persistent theme of both Lincoln's unsuccessful 1858 senatorial campaign and his presidency was that the nation "re-adopt the Declaration of Independence, and . . . the practices and policy which harmonize with it."<sup>141</sup> For Lincoln, "our republican robe" had been "soiled and trailed in the dust."<sup>142</sup> Rededicating ourselves to the principles of Jefferson—"the definitions and axioms of a free society"<sup>143</sup>—would serve "to repurify it."<sup>144</sup> No doubt he saw his major presidential mission as the saving of the Union. But he believed just as profoundly that it was essential to "have so saved it as to make and keep it worthy of the saving."<sup>145</sup> That necessitated we "reinaugurate the good old 'central ideas' of the Republic" reflected in the Declaration.<sup>146</sup>

Lincoln, of course, was well aware of the seeming inconsistencies of the Declaration. As Martin Luther King, Jr. reminded a century later: "that document was always a declaration of intent rather than of reality."<sup>147</sup> Slavery was only the grossest of the "realities" which haunted it. In truth, of course, the "all" who were "created equal" were at best white, propertied males. Lincoln argued, however, that the framers of the Declaration:

did not mean to assert the obvious untruth, that all were then actually enjoying that equality, nor yet, that they were about to confer it immediately upon them . . . . They meant simply to

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140. 2 LINCOLN WORKS, *supra* note 105, at 318. See also Bestor, *State Sovereignty and Slavery: A Reinterpretation of Proslavery Constitutional Doctrine, 1846-1860*, 54 J. ILL. ST. HIST. SOC'Y 117 (1961) (claiming that Southern states' rights arguments were assertions of power, not rights; and that Republican rebuttal was based on claims of rights).

141. SELECTED WRITINGS AND SPEECHES OF ABRAHAM LINCOLN 44-45 (T.H. Williams ed. 1943) [hereinafter cited as SELECTED WRITINGS].

142. *Id.*

143. LINCOLN, *supra* note 92, at 488-89.

144. SELECTED WRITINGS, *supra* note 141, at 44.

145. *Id.* at 45.

146. 2 LINCOLN WORKS, *supra* note 105, at 385.

147. M.L. KING, JR., WORDS OF MARTIN LUTHER KING 52 (1983).

declare the *right*, so that *enforcement* of it might follow as circumstances should permit. They meant to set up a standard maxim for a free society, which could be familiar to all, and revered by all constantly looked to, constantly labored for, and even though never perfectly attained, constantly approximated, thereby constantly spreading and deepening its influence. . . .<sup>148</sup>

To Lincoln, therefore, the "sentiment" of the Declaration of Independence "was that which gave promise that in due time the weights would be lifted from the shoulders of all."<sup>149</sup>

Nor, for Lincoln, was the decision whether to cling to the Declaration an inconsequential one. The noble experiment of self-government hung in the balance. "*Most governments*," he wrote, "have been based, practically, on the denial of the equal rights of men."<sup>150</sup> Ours, on the other hand, "began by *affirming* those rights."<sup>151</sup> Refusing to be ruled by the belief that some are too "ignorant, and vicious" to share in government, our commitment to democracy supposed that if all are given a chance, "the weak [would] grow stronger, the ignorant, wiser, and all better, and happier together."<sup>152</sup> Yet these very principles were openly endangered. "It is now no child's play," Lincoln argued, "to save the principles of Jefferson from total overthrow in this nation."<sup>153</sup> The Civil War itself, he believed, was being fought over the ideal of true self-government. Speaking to the special session of Congress called to ratify his early actions to defend the Union, he made the point clearly:

This is essentially a people's contest. On the side of the Union it is a struggle for the maintaining in the world that form and substance of government whose leading object is to elevate the condition of men—to lift artificial weights from all shoulders; to clear the paths of laudable pursuits for all. . . . Yielding to partial and temporary departures, from necessity, this is the leading object of the government for whose existence we contend.<sup>154</sup>

This is the essential theme of another of our fundamental constitutive documents, the Gettysburg Address. Speaking at a battlesight

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148. LINCOLN, *supra* note 92, at 361.

149. Abraham Lincoln, Address at Independence Hall, Philadelphia, Pennsylvania (Feb. 22, 1861) in SELECTED WRITINGS, *supra* note 141, at 113.

150. LINCOLN, *supra* note 92, at 279.

151. *Id.*

152. *Id.*

153. *Id.* at 489.

154. Abraham Lincoln, Message to Congress in Special Session (July 4, 1861) in SELECTED WRITINGS, *supra* note 141, at 139-40.

which he hoped would signal a changing tide in the war effort, Lincoln proclaimed to both North and South, and to the world, the purposes of the war and the purposes of the nation. The struggle sought to determine whether a nation "conceived in Liberty, and dedicated to the proposition that all men are created equal," could endure.<sup>155</sup> The "great task remaining before" those who survived the awful conflict was to "be here dedicated to . . . a new birth of freedom,"<sup>156</sup> so that democratic government would not perish from the earth.

It is not coincidence, of course, that Lincoln employed the procreative metaphor. The framers' efforts had been attempts—with "temporary departures from necessity"—to launch a true republic. Under the weight of slavery, however, the endeavor was floundering. Not only had the past half-century offered little concrete progress towards democratization, strong voices now sought, in Lincoln's view, to set a different course. The Civil War, therefore, demanded a rededication to the founding principles if the Union were to remain "worthy of the saving." Otherwise, the "experiment"<sup>157</sup> would be stillborn.

Primarily, of course, we consider Lincoln's legacy a re-commitment to equality. Its central focus was the assurance that the phrase "all men are created equal" included black men as well as white ones—an obvious precursor of the thirteenth, fourteenth and fifteenth amendments. But his reassertion of Jeffersonian political philosophy was far broader than the mere demand for equal treatment. Equality alone, without a fundamental commitment to personal liberty as well, fell short of Lincoln's concept of self-government.

It is not surprising that Lincoln spoke with far greater affection for the Declaration than the Constitution itself. The founding Charter had hardly been friendly to the cause of black freedom.<sup>158</sup> It was no mistake that at Gettysburg he had dated the founding of the republic at 1776 rather than 1789.<sup>159</sup> In Lincoln's view, our constitutive principles were more basic and more profound than the specifics set forth in the text. Framing an illustration based upon Biblical metaphor,<sup>160</sup> and echoing the sentiments of the ninth amendment, he explained:

There is something back of [the Constitution and the Union] entwining itself more closely about the human heart. That something, is the principle of "Liberty to all"—the principle that clears the *path* for all—gives *hope* to all—and, by conse-

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155. LINCOLN, *supra* note 92, at 734.

156. *Id.*

157. SELECTED WRITINGS, *supra* note 141, at 45.

158. The text of the original Constitution essentially described slaves as three-fifths human. U.S. CONST. art. I, § 2, cl. 3.

159. See G. WILLS, *supra* note 90, at xiv-xv.

160. See *Proverbs* 25:11.

quence, *enterprise* and *industry* to all. The expression of that principle in our Declaration of Independence . . . was the word "*fitly spoken*" which has proved an "apple of gold" to us. The *Union* and the *Constitution*, are the *picture* of *silver*, subsequently framed around it. The picture was made, not to *conceal* or *destroy* the apple; but to *adorn*, and *preserve* it. The *picture* was made *for* the apple—not the apple for the picture. So let us act, that neither *picture*, or *apple* shall ever be blurred, bruised or broken.<sup>161</sup>

Lincoln's principle "liberty to all," for which he claimed the Constitution was subsequently framed, embodies the joint American ideals of autonomy and equality. Equality, in this most fundamental sense, was relatively easy to comprehend, even if hellish to actually bring about. It demanded the increased expansion of those groups of individuals considered full participating members of the political community.<sup>162</sup> But what of Lincoln's concept of liberty?

In the debates with Senator Douglas, Lincoln recalled Jefferson and repeatedly defined liberty as follows: "I believe each individual is naturally entitled to do as he pleases with himself and the fruit of his labor, so far as it in no wise interferes with any other man's rights."<sup>163</sup> He reiterated the definition as president.<sup>164</sup> But even more clearly than Jefferson, Lincoln tied the concept of personal autonomy to the commitment to self-government:

I trust I understand and truly estimate the right of self-government. My faith in the proposition that each man should do precisely as he pleases with all that is exclusively his own lies at the foundation of the sense of justice there is in me. I extend the principle to communities of men as well as to individu-

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161. 4 THE COLLECTED WORKS OF ABRAHAM LINCOLN 169 (R. Basler ed. 1953) [hereinafter cited as 4 LINCOLN WORKS].

162. See SELECTED WRITINGS, *supra* note 141, at 140. It has been argued that the Republican Party's pre-Civil War platform, which sought to prevent the spread of slavery into the territories, was not pro-black. Rather, it was designed to stop the institution of slavery from becoming national in scope and thereby destroying the white free labor system. E. FONER, FREE SOIL, FREE LABOR, FREE MEN: THE IDEOLOGY OF THE REPUBLICAN PARTY BEFORE THE CIVIL WAR 301-317 (1970). Lincoln's hope for colonization of the former slaves is perhaps consistent with this claim. Even so, it does not run counter to the concept of self-governance. If Lincoln believed at the time, as is likely, that blacks and whites may have difficulty living in equal circumstance, he perhaps considered colonization so that the entire political community of both groups might achieve self-government.

163. LINCOLN, *supra* note 92, at 394.

164. Abraham Lincoln, Address at a Sanitary Fair (Apr. 18, 1864) in LINCOLN, *supra* note 92, at 748.

als. . . . The doctrine of self-government is right—absolutely and eternally right.<sup>165</sup>

For both Jefferson and Lincoln, therefore, democracy entailed two distinct components of self-government. The first, and that on which we customarily focus attention, is the ability of the entire community, through its representatives, to enact and enforce the laws which shall regulate its interaction. Second, and perhaps more clearly tied to democratic commitment to personal worth, self-government assumes that, absent threat of harm to others, decisions concerning how life should be led are to be left to individuals. Both considered personal autonomy, so defined, to lie “back of,” or predate the Constitution itself. Both believed that this general concept of liberty represented a key feature of the American constitutive ethos which is only partially addressed by various provisions of the Bill of Rights. For Jefferson, such a vision of the relationship between the individual and the state was a cornerstone of a true republic. Lincoln successfully fought to “recontract”<sup>166</sup> our polity on that basis. Both saw private self-government as the “sheet-anchor of American republicanism.”<sup>167</sup>

### *C. Jeffersonian Thought in a Non-Jeffersonian World*

[Our constitutional] principles grew in soil which also produced a philosophy that the individual was the center of society, that his liberty was attainable through mere absence of governmental restraints, and that government should be entrusted with few controls and only the mildest supervision over men's affairs. We must transplant these rights to a soil in which the *laissez-faire* concept . . . has withered . . . and social advancements are increasingly sought through closer integration of society . . . and strengthened governmental controls.<sup>168</sup>

—JUSTICE JACKSON

Gleaning constitutional rights from Jeffersonian thought, as refined and embraced by Lincoln, is controversial for a variety of reasons. Moving beyond the language of the Bill of Rights towards a claimed commitment to a particular relationship between the individual and her

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165. SELECTED WRITINGS, *supra* note 141, at 37.

166. G. WILLS, *supra* note 90, at xiv.

167. SELECTED WRITINGS, *supra* note 141, at 37. Jefferson argued that the “true foundation of republican government is the equal right of every citizen, in his person and property, and in their management.” JEFFERSON, *supra* note 130, at 555.

168. *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 639-40 (1943).

government is troubling enough. It is also true, however, that Jeffersonian individualism is but one strain in our political history, and that the world of late 20th century America is drastically different than that of the founders. Further, it is obvious that the tool used by Jefferson and Lincoln to measure the scope of personal autonomy—harm to others—is essentially the same as that subsequently developed and honed by John Stuart Mill.<sup>169</sup> It is subject, therefore, to the same attacks for indeterminacy and even vacuousness to which Mills' work has been subjected. These objections can be met—or, at least, deflected below, where I explore Jeffersonian liberty as a modern concept. Searching for the core of its meaning—in his time as well as our own—I attempt to justify the concept of self-governance.

Jefferson's political philosophy has been ascribed to the liberal tradition drawn from Locke and Hobbes.<sup>170</sup> That characterization seems the correct one, despite a recent attempt to call it into question.<sup>171</sup> Since my arguments turn on the language of Jefferson rather than some conceptual overlay of Lockean individualism,<sup>172</sup> however, that debate is not central to my claims. Another contemporary debate, though, directly confronts an attempt to constitutionalize the core aspects of Jeffersonian liberty.

While Lockean individualism was once thought to have provided the sole touchstone of American political thought, modern historians have recognized that a quite distinct civic republican tradition has contributed to our ideological origins as well.<sup>173</sup> Civic republicanism, to generalize, downplays the individualism of liberal political theory concentrating instead on the development of social institutions so as to foster the public good. If the liberal ethic would leave individuals alone to pursue their own interests and ends, the republican ethic attempts to refine civic virtue, orienting citizens to a common good beyond their individual interests.<sup>174</sup> It could be argued, therefore, that looking at

169. See J.S. MILL, *supra* note 119.

170. See C. BECKER, *supra* note 90, at 79 ("The Americans did not borrow it, they inherited it. The lineage is direct: Jefferson copied Locke and Locke quoted Hooker.").

171. See G. WILLS, *supra* note 90.

172. David A.J. Richards has fashioned an interesting body of work basing constitutional analysis on Lockean individualism. See, e.g., Richards, *supra* note 75; Richards, *Conscience, Human Rights and the Anarchist Challenge to the Obligation to Obey the Law*, 18 GA. L. REV. 771, 772-776 (1984); Richards, *The Individual, The Family, and the Constitution: A Jurisprudential Perspective*, 55 N.Y.U. L. REV. 1 (1980); Richards, *Sexual Autonomy and the Constitutional Right to Privacy: A Case Study in Human Rights and the Unwritten Constitution*, 30 HASTINGS L.J. 957 (1979).

173. See J. POCOCK, *THE MACHIAVELLIAN MOMENT* (1975); C. ROBBINS, *THE EIGHTEENTH CENTURY COMMONWEALTH MAN* (1959); G. WILLS, *EXPLAINING AMERICA: THE FEDERALIST* (1981); G. WOOD, *supra* note 39; Shalhope, *Toward A Republican Synthesis: The Emergence of An Understanding of Republicanism in American Historiography*, 29 WM. & MARY Q. 49 (1972).

174. See generally G. WILLS, *supra* note 5.

Jeffersonian thought alone suggests only a part (though clearly the dominant part) of our political heritage.

The actual influence of civic republicanism on the framing of the Constitution has recently been heatedly challenged.<sup>175</sup> Even so, it may be mistaken to characterize a Jeffersonian commitment to personal autonomy as inconsistent with civic republicanism. Jefferson's writings reveal a belief that governmental coercion works to undermine, rather than to enhance, civic virtue. The polity as a whole enjoys greater progress under the "duperies of the people" than the "egoism of their agents."<sup>176</sup> Further, for Jefferson, the sovereignty of individual conscience provides the cornerstone of our civil religion. Self-governance is one of the principle tenets of "our political faith," a "text of our civil instruction,"<sup>177</sup> and an essential tool if true civic virtue is to be fostered.

At a more fundamental level, the debate over the source of American tradition—virtue or will—does not detract from a claim that we have sought to guarantee self-governance. My argument is premised upon the breadth of the ninth amendment and an asserted commitment to personal sovereignty. It is, at bottom, an argument about the way in which the Bill of Rights should be interpreted. Although there is reasonable dispute over the various influences of liberal or republican thought in the framing of the Constitution, the Bill of Rights itself falls clearly in the liberal camp. Madison described it as a list of "private rights,"<sup>178</sup> and characterized the entire framework as merely restating "the perfect equality of mankind."<sup>179</sup> Although Madison's early wavering on the Bill of Rights may have reflected a substantial bow to civic republicanism,<sup>180</sup> he eventually supported and even introduced the measures in Congress. Turning to an explicitly liberal justification for a charter of rights, he argued that "independent tribunals of justice will consider themselves in a peculiar manner the guardians of the Bill of Rights."<sup>181</sup> Its prohibitions of power, in short, were designed to provide a bulwark against defects in republican virtue. Like Jefferson, Madison concluded that a Bill of Rights "is of great potency always,

175. See J. DIGGINS, *THE LOST SOUL OF AMERICAN POLITICS: VIRTUE, SELF-INTEREST, AND THE FOUNDATIONS OF LIBERALISM* (1985) (arguing that classic republicanism was an idea whose time had come, and gone, by 1787).

176. See *supra* note 126.

177. See *supra* note 147.

178. RIGHTS, *supra* note 47, at 1030-31.

179. *Id.* at 1029.

180. "To suppose that any form of government will secure liberty or happiness without any virtue in the people, is a chimerical idea." James Madison, Address to Virginia Convention (June 20, 1788) in *THE COMPLETE MADISON* 339 (S. Padover ed. 1953) [hereinafter cited as *COMPLETE MADISON*]. Jefferson has been credited with converting Madison to the idea of a Bill of Rights. See L. LEVY, *supra* note 90, at 3.

181. 1 *ANNALS OF CONGRESS*, *supra* note 63, at 439.



and rarely inefficacious. A brace the more will often keep up the building which would have fallen with that brace the less."<sup>182</sup>

Still, even if Jefferson's and Lincoln's concepts of individual autonomy are conceded to be instructive concerning the demands of constitutional liberty, much work is left to be done. Their worlds are not our own. In many particulars, they are "lost" to us.<sup>183</sup> Many of the premises which led Jefferson to foster autonomy have been rejected by our society over the course of the past two centuries. The firm belief in a benevolent God directing the course of the universe, trust in the rational intelligence and goodwill of individuals, the creed that the government which governs least governs best, and the assertion that the welfare of its citizens is not the concern of the state, have all been shaken from their earlier predominant places in our thought. The interdependence of a modern technological society suggests as well that Jeffersonian liberty may be a relic best left aside.

Jefferson's embrace of autonomy in non-injurious private decision-making was but one part of a far broader political philosophy. That philosophy placed its heaviest<sup>184</sup> reliance on freedom as a negative principle, the absence of restraint. Whereas society results from the virtues of women and men, government flows from their vices. If freed from the heavy hand of state suppression, individuals would thrive in a community of brotherhood, fed by an innate morality and supported by the progress wrought of increased knowledge. Government, so contemplated, is at best a necessary evil which perpetually poses danger to individual prosperity through its tendencies toward expansion.<sup>185</sup> Lovers of human development, therefore, should be lovers of limited government.

In practical terms this meant that in the political realm Jefferson thought that the power of government should be limited to the protection of civil order. In the economic sphere he assumed that the free play of private initiative would produce optimum wealth. In the international arena, Jefferson assumed that strict dedication to national interests by each sovereign would produce the most appropriate balances of power and trade.<sup>186</sup> Automatically, the basically unrestrained pursuit of self-interest would foster the public good. Since it was not the job of government to mold the ideal society, his political philosophy focused

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182. JEFFERSON, *supra* note 41, at 439.

183. See D. BOORSTIN, *supra* note 90.

184. Jefferson, however, was strongly committed to the development of public education, proposing bills amending the Constitution of the College of William & Mary in 1779 and establishing a system of public education in 1817. He also, of course, helped to establish the University of Virginia. See L. LEVY, *supra* note 90, at 9-13.

185. See generally Becker, *supra* note 91, at 46-58.

186. *Id.* at 56.

almost exclusively on where government should not intrude. His *laissez-faire* offered little indication, on the other hand, of where it ought to go.<sup>187</sup>

That world view seems strangely simplistic in the latter decades of the 20th century. All but the most sentimental libertarians—yearning for a supposed golden era—recognize its demise. Many of the premises which sustained Jefferson's political philosophy are less familiar as well. World wars and holocausts have shaken any belief in the moral perfectability of mankind. The massive interdependency of modern society has blurred the distinctions between private and governmental decision-making. Most importantly, however, our view of the appropriate scope of government power and concern has been fundamentally altered. No longer, to our way of thinking, is it mandatory or even acceptable for government to be unconcerned about the welfare of its citizens.

I spoke earlier of Jefferson and Lincoln shepharding the nation through two of its primary constitutive phases,<sup>188</sup> the founding and the Civil War. The Great Depression and the federal government's response to it are appropriately characterized as a third. The New Deal accomplished one of the few successful gradualist revolutions in history, centralizing power in the national government in order to temper the harsh effects of economic self-interest run rampant.<sup>189</sup> The adoption of the principles of the welfare state assumed at least a partial rejection of pure Lockean individualism in favor of social minded community. In the words of Franklin Roosevelt, the "New Deal [sought] to cement our society, rich and poor, manual workers and brain workers, into a voluntary brotherhood of free men, standing together striving together for the common good of all."<sup>190</sup> Thus, the United States of the New Deal and the Great Society poses considerable tension with Jefferson's America. Far more than any theoretical concern for a long lost civic republicanism, the conflict between Jeffersonian individualism and Rooseveltian brotherhood obscures our political tradition.

Still, our rejection of the Jeffersonian view of the relationship between the individual and the state has been but partial. We have conceded, after a struggle,<sup>191</sup> that property and the power it carries come

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187. See D. BOORSTIN, *supra* note 90, at 195.

188. The notion of constitutive phases used here partially parallels a much more elaborate scheme of constitutional interpretation set forth in Ackerman, *The Storrs Lectures: Discovering The Constitution*, 93 YALE L.J. 1013 (1984).

189. See generally J.M. BURNS, *ROOSEVELT: THE LION AND THE FOX* 161-291 (1956); A. SCHLESINGER, *THE POLITICS OF UPHEAVAL* (1960); A. SCHLESINGER, *THE COMING OF THE NEW DEAL* (1959).

190. N. MILLER, *FDR: AN INTIMATE HISTORY* 344 (1983).

191. See G. GUNTHER, *CONSTITUTIONAL LAW* 448-470 (11th ed. 1985).

"clothed with a public interest."<sup>192</sup> Accordingly, the state can appropriately regulate it to promote the public good. We are less willing to make the same concessions for the human conscience.

Our hesitance shows itself in a number of ways. It perhaps explains the persistent struggle in constitutional law to identify preferred or fundamental human interests.<sup>193</sup> Even as the Supreme Court capitulated to the New Deal in *United States v. Carolene Products Co.*,<sup>194</sup> it began to formulate an argument in that case's famous footnote that all human liberties are not defeasible under perceived visions of the public interest.<sup>195</sup> More pointedly, we seem to cling stubbornly to Jefferson's recognition of democracy as an assertion of values about the worth of human beings.<sup>196</sup> Vigorous protection of rights of expression<sup>197</sup> and equality<sup>198</sup> have been premised in major part on the Jeffersonian vision of individual dignity. And we consider it profoundly inconsistent with our legacy as Americans to be told by our government what is best for us.

One of the primary goals of constitutional decision-making, therefore, is to determine the appropriate breadth to be given to basic commitments to autonomy in a highly interdependent, increasingly technological society. What sorts of individual interests should be secured, honed, expanded or diluted in the face of a changing cultural atmosphere? Unlike Jefferson, we have concluded that there are specific moral ends to be served by government. Those include not only guarantees of security, both foreign and domestic, but the assistance and sheltering of the most unfortunate among us. But like Jefferson we search for a sanctuary of human autonomy insusceptible to invasion by government.

The uncertainties posed by attempts to maneuver such a line are substantial. The task itself, however, has been fairly clearly described. This subsection began with a quotation from Justice Jackson's remarkable opinion in *West Virginia State Bd. of Educ. v. Barnette*.<sup>199</sup> Jackson argued that one of the primary, and most difficult, tasks of constitutional interpretation was to "transplant" the ideals of the framers "to a

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192. See Patterson, *Property Rights In The Balance—The Burger Court and Constitutional Property*, 43 MD. L. REV. 518, 531 (1984).

193. See G. GUNTHER, *supra* note 191, at 787-854.

194. 304 U.S. 144 (1938).

195. 304 U.S. 144, 152-53 n.4 (1938).

196. *Id.*

197. See, e.g., *Columbia Broadcasting Sys., Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94, 156-65 (1973) (Douglas, J., concurring); *Schneider v. Smith*, 390 U.S. 17, 25 (1968); *Everson v. Bd. of Education*, 330 U.S. 1, 16 (1947); *Barnette*, 319 U.S. at 645-46; Little, *Thomas Jefferson's Religious Views and Their Influence on the Supreme Court's Interpretation of the First Amendment*, 26 CATH. U.L. REV. 57 (1976).

198. See *Harper v. Va. Bd. of Elections*, 383 U.S. 663 (1966); *Reynolds v. Sims*, 377 U.S. 533 (1964).

199. 319 U.S. 624 (1943).

soil in which the *laissez-faire* concept . . . has withered . . . and social advancements are increasingly sought through closer integration of society . . . and strengthened government controls."<sup>200</sup> The religion clauses provide a ready example of both the necessity and the intractability of the interpretive task Jackson identified. The religion clauses may well have been designed to erect a "wall" separating church and state.<sup>201</sup> In a modern society in which government reaches repeatedly into our homes and our schools, however, complete separation may work to endanger values of religious exercise which the first amendment was designed to secure. Accordingly, rather than blindly insisting upon separation, the Justices necessarily attempt to "transplant" the values reflected in the religion clauses to a more complex society. Jefferson's call for absolute personal autonomy absent harm to others is perhaps, as well, only imperfectly "transplantable" into the soil of modern American society. The neat boundaries Jefferson envisioned separating the various prerogatives of the individual, state government, and federal government have become blurred. Still, our constitutional ethos includes a core of Jeffersonian commitment to self-governance which we surrender at our peril.

Even so, the very formulation of the Jeffersonian vision of the appropriate sphere of personal autonomy must be examined. Both Jefferson and Lincoln embraced what we now consider a Millian concept of individual liberty. Jefferson claimed that "[t]he legitimate powers of government extend to such acts only as are injurious to others."<sup>202</sup> Lincoln, altering the phrase, argued that each is "entitled to do as he pleases with himself and the fruit of his labor, so far as it in no wise interferes with any other man's rights. . . ."<sup>203</sup> Madison echoed such sentiments.<sup>204</sup>

But, without more, the Millian concept of self-regarding acts, as has been widely noted, is potentially incoherent and scrupulously inde-

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200. *Id.* at 639-40.

201. In *Everson v. Bd. of Educ.*, 330 U.S. 1, 16 (1947), the Supreme Court stated: "In the words of Jefferson, the clause against establishment of religion by law was intended to erect 'a wall of separation between church and state.'" See 8 WRITINGS OF THOMAS JEFFERSON 113 (H. Washington ed. 1854). Justice Rehnquist has recently challenged the propriety of following the Jeffersonian version of separation. See *Wallace v. Jaffree*, 105 S. Ct. 2479, 2508-2520 (1985) (Rehnquist, J., dissenting).

202. JEFFERSON, *supra* note 41, at 210-11.

203. LINCOLN, *supra* note 92, at 394.

204. See COMPLETE MADISON, *supra* note 180, at 267. All enjoy an "equal property in the free use of [the] faculties and free choice of the objects on which to employ them." "Government is instituted to protect property of every sort; as well as that which lies in the various rights of individuals . . . . This being the end of government, that alone is a *just* government which *impartially* secures to every man, whatever is his *own*. . . ." *Id.* at 267-68 (emphasis in original).

terminate.<sup>205</sup> As the law of standing aptly demonstrates, determining what is "injury" is no simple task.<sup>206</sup> A Jeffersonian/Millian view of liberty, one assumes, would reject regulations barring conduct merely because of the displeasure such acts create in the minds of third parties. Yet we all seem to concede the propriety of statutes prohibiting public sexual acts. Some psychic disturbances, apparently, can be shielded through the use of legal sanction. What then of legislation making it illegal for gay couples to hold hands in public? Or an arrest for wearing a tee shirt inscribed "Fuck the Ayatollah"? The answers do not flow easily from asking only which actions are "injurious to others."

Harm to property, of course, is easily reached by government even under the Millian formulation. Yet, to ask the question of the sages, "What is property?" May not it be thought to include, with the help of legislative enactment, the interest of a wife in her husband's fidelity?<sup>207</sup> Well, one might respond, not if Millian liberty is to be vibrant and accomplish its task of laying waste to morals legislation. A plethora of intangible interests, however, have been recognized as property when given the shield of positive law.<sup>208</sup> If a "right" to commit adultery is to be saved as a core aspect of autonomy, it must have something to do with the centrality of sexual choice and expression to human development. Absence of harm alone does not get you from here to there.

Nor is the notion of self-regarding acts any less elusive. The Millian formula is obviously aimed heavily at paternalism. But if I smoke five packages of cigarettes a day, develop lung cancer at fifty, rob society of twenty years of productive service, and become a public charge with thousands of dollars of hospital bills to be carried by the state, can my smoking be considered a non-injurious act? The mutual concern ushered in by the New Deal necessarily results in mutual duties and mutual harms. It is likely true that any action leads to consequences well beyond the scope of a pre-ordained perimeter of individual concern.<sup>209</sup> No one, as it goes, is an island.

Finally, consider the question of causation. What causes harm? "If I fail to respond to starvation in Ethiopia, do I cause death abroad?"<sup>210</sup>

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205. See, e.g., Professor Grey's excellent short work on the relationship between Millian liberty and legal sanction. T. GREY, *THE LEGAL ENFORCEMENT OF MORALITY* 6-33 (1983). See also P. DEVLIN, *THE ENFORCEMENT OF MORALS* (1965).

206. See J. VINING, *LEGAL IDENTITY: THE COMING OF AGE OF PUBLIC LAW* (1978); Nichol, *Abusing Standing: A Comment on Allen v. Wright*, 133 U. PA. L. REV. 635, 653-54 (1985); Nichol, *Rethinking Standing*, 72 CALIF. L. REV. 68 (1984).

207. See T. GREY, *supra* note 205, at 10-20.

208. See, e.g., *Wisconsin v. Constantineau*, 400 U.S. 433 (1971) (interest in reputation as property); *Goldberg v. Kelly*, 397 U.S. 254 (1970) (welfare rights as property). But see *Paul v. Davis*, 424 U.S. 693 (1976) (limiting *Constantineau*).

209. See L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 888 (1978).

210. See T. GREY, *supra* note 205, at 23-33.

If I, as a Congressman, vote to cut off Aid to Families with Dependent Children, do I cause it here? The interdependence of American society—far more pronounced than in Jefferson's day—weakens any attempt to define the relationship between the individual and the state solely in negative terms. Interrelationship—not only between ourselves and our government, but between ourselves and our fellow humans—robs the Jeffersonian definition of liberty of its earlier power. Focusing exclusively on the harm, or the lack thereof, caused by particular conduct neither works perfectly as a tool for decision-making nor captures completely the essence of the Jeffersonian plea for autonomy. If personal freedom is assured, for example, in order to foster self-development, it may well be that the "freedom" to have an impact upon others is essential to any healthy sense of identity.<sup>211</sup> As Hannah Arendt has written, to "live an entirely private life means above all to be deprived of things essential to a truly human life."<sup>212</sup> There is slippage in both directions.

#### IV. A RIGHT OF SELF-GOVERNANCE

Nature and human life are as various as our several constitutions. Who shall say what prospects life offers to another?

Could a greater miracle take place than to look through  
each others' eyes for an instant?<sup>213</sup>

—H.D. THOREAU

If the yardstick which Jefferson used to measure the expanse of individual liberty misses the mark in an interdependent, technological society, his rationale for drawing the line is more illuminating. At bottom, the Jeffersonian view of individual liberty reflects a set of political and moral value judgments—a way of "regarding man and the life of man."<sup>214</sup> Those values, he believed, are implicit in commitment to re-

211. See L. TRIBE, *supra* note 209, at 886-89.

212. H. ARENDT, *THE HUMAN CONDITION* 58 (1958). See also R. UNGER, *PASSION: AN ESSAY ON PERSONALITY* 98-104 (1984).

213. H.D. THOREAU, *WALDEN*, reprinted in *THE PORTABLE THOREAU* 266 (C. Bode ed. 1977).

214. Becker, *supra* note 91, at 60. Obviously, I part company somewhat here with Sanford Levinson. In reviewing Wills' book on the Declaration of Independence, Levinson claims that it "... is simply not open to an intellectually sophisticated modern thinker to share Jefferson's world." Levinson, Book Review, 57 *TEX. L. REV.* 847, 856 (1979). Never having laid claim to either sophistication or modernism, I am undeterred by the remark. In truth, however, I make no claim that we can embrace Jefferson's world jot-for-jot, nor that we should so desire. I argue instead that the American vision of personal liberty is tied to Jefferson's view of the relationship between the individual and the state.

I am puzzled, however, about Levinson's stance in the review. He praises Wills and yet refers to Daniel Boorstin's, *The Lost World of Thomas Jefferson*, as a "brilliant work." *Id.* at 856.

publican government. They provide the grounding principles of democracy.

Jefferson's embrace of "personal liberty" to engage in conduct "non-injurious to others" was designed to secure a refuge of human freedom shielded from the intrusion of the state. For him such a safe haven was essential in order to serve two fundamental democratic principles: the belief that competent human beings are capable of making their own decisions about how life should be led, and the commitment to treating all members of the political community as equals.<sup>215</sup> A right to self-governance serves these twin aims.

Jefferson's dedication to autonomy resulted from his perceptions of the shortcomings of the "old world." For too many centuries, the mass of human beings had been considered the subjects of emperors, kings, aristocrats and clergymen—dependent, in their liberties, upon the good graces of their masters. The American experiment turned to a different premise, claiming that the guarantees of personhood were derived "from the laws of nature, and not the gift[s] of the chief magistrate."<sup>216</sup> Whether the argument of natural right itself constitutes nothing more than "a sound to dispute about"<sup>217</sup> is in this sense beside the point. The distinction had been drawn. Personal liberties, at least in certain core particulars, inhere in the status of being fully human. As John Kennedy would explain much later, we are heirs of a revolution which assumes that human rights "come not from the generosity of the state but from the hand of God."<sup>218</sup>

The inalienable characteristics with which men and women are "endowed" include not only the liberty, but the competence to rule themselves. They no more need to be told by government how to make themselves happy than they need to be told how to vote. That "pursuit" is left to the individual. Nor, for Jefferson, had the Creator bungled his work. A creature placed upon the earth to live in social circumstances must be capable of successfully directing her quest for happiness without the dictates of a supposed superior, whether that superior claims his status by divine right, birth, or allegedly elevated moral insight. The very premise of self-government requires no less.

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Wills major effort, however, is to show that Boorstin "describes the lost world of Benjamin Rush," not Thomas Jefferson. G. WILLS, *supra* note 90, at 200. I find it hard to understand how both can be right.

215. See R. DWORKIN, *TAKING RIGHTS SERIOUSLY* 270-74 (1976); Richards, *supra* note 36, at 8.

216. Jefferson, *A Summary View of the Rights of British America*, reprinted in JEFFERSON, *supra* note 41, at 20.

217. J. BENTHAM, 8 *WORKS OF JEREMY BENTHAM* 577 reprinted in H.L.A. HART, *ESSAYS ON BENTHAM* 82 (1982).

218. John F. Kennedy, Inaugural Address (Jan. 20, 1961) in R. HOFSTADTER & B. HOFSTADTER, *GREAT ISSUES IN AMERICAN HISTORY* 450 (1982).

The competence of even common persons to shape the course of their own lives carries other ramifications for the appropriate scope of government powers. If individuals enjoy a sense of moral equality, then it is beyond the state's legitimate authority to attempt to foster its "blueprint" of the moral life. Such efforts to forcibly elevate the moral worth of the citizenry, or to impose the moral sentiments of one segment of the community upon another, represent "egoism" and insult to independent moral agents. Jefferson's attempted wall insulating non-injurious acts from government regulation was thus designed primarily to give broad recognition to the value of human autonomy, the first principle of self-government.<sup>219</sup>

But respect for autonomy is only half of the Jeffersonian liberty equation. Without a concept of protected personal freedom, equality itself is endangered. As Jefferson declared in his first inaugural, our republic is premised on "our equal right to the use of our own faculties, to the acquisitions of our industry, to honor and confidence from our fellow citizens."<sup>220</sup> No doubt for Jefferson, as for Mill, "he who sets his own plan employs all his faculties."<sup>221</sup> Potentially, therefore, when society dictates the moral "plan" of its citizenry, it denies to some of its citizens the equal use of their faculties. It fails without good reason (i.e., harm) to afford "honor and confidence" to the life choices of its members. Instead, as Ronald Dworkin has argued, government insults its citizens when it abrogates their moral independence.<sup>222</sup> The "professor" degrades the "plowman" by dictating what is in his best interest. The state denies my equality when it attempts to save my soul by force. The line between injurious and non-injurious action was an effort to distinguish valid regulation from insult—to contrast societal protection

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219. In his first inaugural, Jefferson sought to insulate non-injurious acts in order to leave individuals "free to regulate their own pursuits of industry and improvement." See JEFFERSON, *supra* note 41, at 293; C. BECKER, *supra* note 90, at 278-79. See also, Richards, *supra* note 75, at 538, "Self-rule of one's conscience is . . . a deep . . . constitutional value . . . not properly the subject of political bargaining. . . ."

220. JEFFERSON, *supra* note 41, at 292. Note the similarity between Jefferson's demand for "honor and confidence from our fellow citizens" and Professor Dworkin's arguments that government "must treat those whom it governs with concern, that is, as human beings who are capable of suffering and frustration, and respect, that is, as human beings who are capable of forming and acting upon intelligent conceptions of how their lives should be lived." R. DWORKIN, *supra* note 215, at 272.

221. J.S. MILL, *supra* note 119, at 52.

222. Professor Dworkin has defended the Millian formulation as designed to distinguish liberty as license from "liberty as independence, that is, the status of a person as independent and equal rather than subservient." R. DWORKIN, *supra* note 215, at 262-64. Accordingly, Dworkin argues, Mill sought to define political independence so as to foster individual dignity. He attempted, in short, to draw a line between the "regulation that connoted equal respect and the regulation that denied it." *Id.* at 263. I attempt to make similar claims about the political philosophy of Jefferson. The critical distinction between Millian and Jeffersonian political philosophy for purposes of constitutional analysis is the American commitment to the Jeffersonian principle.



of all of its members from the denial of some of its members' full autonomy.

Jefferson characterized this sense of moral independence—which I have called an interest in self-governance—as the grounding principle of American government. “The true foundation of republican government,” he wrote, “is the equal right of every citizen in his person and property and their management.”<sup>223</sup> James Madison employed similar terms, arguing that a person enjoys “an equal property in the free use of his faculties and free choice of the objects on which to employ them.”<sup>224</sup> In *Federalist No. 10*, he went so far as to claim that the protection of the “diversity in the faculties of men” is the “first object of government.”<sup>225</sup> And Lincoln claimed simply that “the faith . . . that each . . . should do precisely as he pleases with all that is exclusively his own lies at the foundation of the sense of justice there is in me.”<sup>226</sup>

The key to these various formulations, of course, is intrinsic respect for the dignity of humans. We allow people, so far as is possible, to choose the course of their lives because we know that, to be fully human, choice is demanded.<sup>227</sup> We respect the choices of our fellow citizens so as to afford respect for their humanity. Jefferson, in fact, penned his distinction between injurious and non-injurious acts expressly to carve out an essential space in which we are “free to regulate [our] own pursuits of industry and improvement.”<sup>228</sup> The concept of self-governance, as the following section reveals, is designed to serve the same ends. The freedom to develop personal “pursuits of industry and improvement” was key to the Jeffersonian vision. He assumed that each is competent to perform them—for without such competence self government itself would have to be rejected. He likewise assumed that government was incompetent—both practically and as a matter of political ethics—to dictate the way in which life should be led. Even if the barriers which Jefferson, Madison, and Lincoln sought to construct separating the spheres of private and public concern have lost their solidity over the course of the past century, our commitments to individual sovereignty and dignity—as ends in their own right—have not.

Jefferson sought to dedicate—and Lincoln to rededicate—this nation to a theory of government which presumes that human development and happiness can be entrusted to ordinary human hands. More

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223. JEFFERSON, *supra* note 130, at 555.

224. COMPLETE MADISON, *supra* note 180, at 267.

225. THE FEDERALIST No. 10, at 78 (J. Madison) (J. Cooke ed. 1961).

226. SELECTED WRITINGS, *supra* note 141, at 140.

227. H. NIEBUHR, CHRIST AND CULTURE 249-50 (1951) (“We make [personal choices] in freedom because we must choose. We are not free not to choose. Choice is involved in the resolution to wait a while before we commit ourselves to a line of action. . . . We continue to be human only by continued choices.” See also W. JAMES, ESSAYS IN PRAGMATISM 108-09 (1948).

228. See *supra* note 216.

pointedly, the relevant hands empowered were those of the individual being regulated. One of the continuing missions of such a government is the removal of "artificial barriers"<sup>229</sup> to self-development. Obviously the term "artificial" is a loaded one as it implies that some limitations of individual autonomy are appropriate while others are illegitimate. The criterion of harm to others is a rough attempt to measure the artificiality of various abrogations of liberty. If it fails to accommodate the interdependency of modern life, a finer tuning of the mode of autonomy analysis is required—not the scrapping of first principles. Now, as then, a key aspect of our societal ethos is the belief that the driving forces towards happiness, actualization, and development, or "industry and improvement," lie with the individual. Thus, when a person makes a choice in the effort to shape and act upon her own identity—to exercise self-governance—state interference should require substantial justification. By so limiting our government we reaffirm our belief in the dignity and value of our fellows. At the same time, we honor our unfolding commitment to equality. We recognize, as Robert Kennedy movingly proclaimed, that when we teach that a person is lesser "because of his beliefs or the policies he pursues, when [we] teach that those who differ from [us] threaten [our] family, then [we] also learn to confront others not as fellow citizens but as enemies—to be met not with cooperation but with conquest, to be subjugated and mastered."<sup>230</sup>

The effort to draw the constitutional line which separates the legitimate activities of the state from the protected realm of individual choice is a continuing part of our heritage. The answers formulated by our forefathers are not sufficient to meet the problems of our day. But when the legitimacy of judicial attempts to draw lines guaranteeing personal sovereignty is called into question, we do well to recall that we claim, as a society, to be dedicated to that task.

#### *A. Self-Governance—Definition and Scope*

The sheep and the wolf are not agreed on the definition of  
liberty.<sup>231</sup>

—A. LINCOLN

Claims of illegitimacy have not been the only objections hurled by the critics of the privacy cases. A second, and equally vexing problem has arisen from attempts to define and measure the scope of an asserted

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229. See D. MALONE, *supra* note 90, at 153-54.

230. See Robert Kennedy, Speech to Cleveland City Club (Apr. 5, 1968) in J. NEWFIELD, ROBERT KENNEDY: A MEMOIR 274 (1978).

231. See *supra* note 164.

right to privacy or autonomy. Explanations of the interests sustained in the cases seem, most often, to say either too little or too much. The Supreme Court itself has scarcely tried to establish the parameters of a privacy claim,<sup>232</sup> and the efforts of commentators have been criticized as both subjective and indeterminate.<sup>233</sup> To generalize, pundits have argued that privacy analysis can neither be justified by sources of positive law, nor confined by judicially manageable standards of decision-making.

My efforts here, of course, have predominately concerned only the first of these areas of dispute. I have proceeded in this fashion for several reasons. One is practical. The arguments presented here for the legitimacy of autonomy analysis are fairly extensive. Further, though the legitimacy and definitional issues are in one sense inextricable, questions of constitutional pedigree present the first and most vigorously asserted hurdle to privacy review. Any argument over the appropriate fine tuning of an autonomy right must be premised on a claim that the Constitution envisions the protection of some such interest. Legitimacy issues have also provided most of the heat in the privacy debate. Arguments of usurpation have formed the central focus of allegations that substantive due process review constitutes "government by judiciary."<sup>234</sup>

Concentration on the validity of judicial recognition of autonomy interests, as opposed to the particulars of definitional issues, can be justified, therefore, so long as one believes that the shortcomings of any proffered definition of self-governance are not fatal to legitimacy. Indeterminacy is indeed a messy aspect of American constitutional law.<sup>235</sup> It is, however, an unavoidable one.<sup>236</sup> The failure to develop a consensus definition of, for example, equal protection after one cen-

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232. *But see* Justice Stevens, opinion for the Court in *Whalen v. Roe*, 429 U.S. 589, 598-99 (1977) ("The cases sometimes characterized as protecting 'privacy' have in fact involved at least two different kinds of interests. One is the individual interest in avoiding disclosure of personal matters, and another is the interest in independence in making certain kinds of important decisions").

233. *See* L. TRIBE, *supra* note 209, at 886-97. "[T]o define the province of privacy distinctly is impossible." J.F. STEPHEN, *LIBERTY, EQUALITY, FRATERNITY* 160 (1967).

234. *See* R. BERGER, *supra* note 24, at 249-82; L. LUSKY, *BY WHAT RIGHT?* 79 (1975).

235. *See* Singer, *The Player and The Cards: Nihilism and Legal Theory*, 94 *YALE L.J.* 1, 14-25 (1984); Tushnet, *supra* note 96, at 1371-79.

236. *See* J. ELY, *supra* note 24, at 67 ("there does not exist a nontrivial constitutional theory which will not involve judgment calls"); Henkin, *Privacy and Autonomy*, 74 *COLUM. L. REV.* 1410, 1432-33 (1974):

"But it is long past time to recognize the caveats to that 'realism,' and the limits of 'government by judiciary'—the restraining power of the judicial process, the Court's institutional character, the inability of justices to escape constitutional language and history, the history of the nation and of the court and a national subconscious echoing with ancestral voices."

tury,<sup>237</sup> or freedom of speech or religion after two,<sup>238</sup> cannot reasonably be made the basis of an argument that the fourteenth and first amendments should not be enforced by the courts. If a constitutional interest in self-governance can be justified, we should, nine score years after *Marbury v. Madison*,<sup>239</sup> expect judicial efforts to hone it. Accordingly, I have thought it appropriate here to direct the bulk of my attention to the claim that non-textual autonomy interests can reasonably be seen as constitutional in nature. My consideration of the full breadth of a right of self-governance will, therefore, be preliminary, leaving its full development to a subsequent article.

Nevertheless, the grounding premises of a constitutional right to autonomy provide substantial guidance in determining the appropriate scope of the right. Commentators have characterized the various autonomy interest reflected in the decisions as indicative of a right to "intimate association,"<sup>240</sup> "control over the intimacies of personal identity,"<sup>241</sup> "moral independence,"<sup>242</sup> "preservation of attributes of an individual,"<sup>243</sup> and "equal citizenship."<sup>244</sup> There is much to be gained from such suggestions, especially if one is willing to limit an autonomy doctrine to sexual and reproductive freedom. Our commitment to self-regulation, however, extends beyond the bounds of the bedroom. The notion of democracy expounded by Jefferson and Lincoln includes belief both in the capacity of individuals to set the course of their own lives and the fundamental moral equality of all in deciding which pursuits are acceptable. Drawing upon these premises, I define self-governance more broadly as the ability to formulate, shape, and act upon the core aspects of one's sense of identity, character and personality. This standard avoids reliance on a constructed boundary between individual and state prerogative, such as harm to others, which in a modern society becomes increasingly artificial. Rather, the boundaries of self-governance turn on the values implicit in democratic government. So defined, the concept incorporates our grounding commitment to the

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237. See, e.g., Westen, *The Empty Idea of Equality*, 95 HARV. L. REV. 537 (1982).

238. See, e.g., Choper, *The Religion Clauses of the First Amendment: Reconciling The Conflict*, 41 U. PITT. L. REV. 673 (1980); Greenawalt, *Religion as a Concept in Constitutional Law*, 72 CALIF. L. REV. 753 (1984); Laycock, *Toward A General Theory of the Religion Clauses: The Case of Church Labor Relations and The Right to Church Autonomy*, 81 COLUM. L. REV. 1373 (1981); Schauer, *Speech and "Speech"—Obscenity and "Obscenity": An Exercise in the Interpretation of Constitutional Language*, 67 GEO. L.J. 899 (1979).

239. 5 U.S. (1 Cranch) 137 (1803).

240. Karst, *The Freedom of Intimate Association*, 89 YALE L.J. 624 (1980).

241. Gerety, *Redefining Privacy*, 12 HARV. C.R.-C.L. L. REV. 233, 236 (1977).

242. R. DWORKIN, *A MATTER OF PRINCIPLE* 353-70 (1985).

243. L. TRIBE, *supra* note 209, at 889.

244. Karst, *supra* note 240, at 663; Karst, *Equality as a Central Principle in the First Amendment*, 43 U. CHI. L. REV. 20 (1957).

moral concepts of dignity, personality, and independence amid a highly interdependent culture.<sup>245</sup>

The right, as gleaned from our historical commitment, is the flip side of our long embraced dedication to self-government. Autonomous, self-governing individuals not only choose their leaders and thereby set societal policies from their own ranks, they reserve for themselves the power to make certain core decisions about how they should lead their lives. To use Jefferson's words, government must leave its citizens "free to regulate their own pursuits of industry and improvement" and afford "honor and confidence" to the choices made.<sup>246</sup> When the government seeks to substantially interfere with such attempts at self-regulation, its reasons for doing so must be weighty.

Under the umbrella of self-governance which I have described, at least presumptive claims could be made in the familiar privacy cases—*Griswold v. Connecticut*,<sup>247</sup> *Eisenstadt v. Baird*,<sup>248</sup> *Roe v. Wade*,<sup>249</sup> and *Carey v. Population Services*.<sup>250</sup> Some other claims consistently rejected by the Supreme Court, such as unmarried heterosexual<sup>251</sup> and homo-

245. See R. DWORKIN, *supra* note 215, at 262-63.

246. JEFFERSON, *supra* note 41, at 293.

247. 381 U.S. 479 (1965).

248. 405 U.S. 438 (1972). In *Eisenstadt*, the Supreme Court upheld the right of unmarried adults to use contraceptives free from intrusion by the state.

249. 410 U.S. 113 (1973).

250. 431 U.S. 628 (1977). My defense of *Roe v. Wade*, at this juncture, is a limited one. Much of the attack levelled against the abortion cases has centered on legitimacy. See R. BERGER, *supra* note 24; J. ELY, *supra* note 24; Schauer, *supra* note 53. The claim is that the right to choose whether to terminate a pregnancy is not lodged in the Constitution. A right of self-governance would thwart this illegitimacy argument. The right I have outlined, however, is presumptive. Obviously, the state's interest—protection of the fetus—in the abortion context is a powerful one. Whether the Court should have deferred to legislative efforts to protect potential life has not been my principal thrust here. Unlike most commentators, however, I do argue that the abortion issue is the Court's business.

A tentative defense of the decision could be based upon the following lines. Constitutional interests in self-governance offer protection for the decision to terminate a pregnancy unless compelling state concerns overcome the claim of autonomy. The governmental interest in regulating abortion—protection of the fetus—is, at least in the early stages of pregnancy, difficult to measure. Determining whether a fetus is a "person," thereby justifying state intrusion, is essentially a non-rational decision. Science and rational analysis may reveal much about the characteristics of a fetus at various stages of its growth. Technology may even advance the point at which the fetus can survive outside the womb. But science cannot settle the essentially moral issue of the fetus's status.

If this is true, *Roe v. Wade* may reflect a justifiable conclusion that in the face of a constitutional claim of autonomy it is impermissible for a state to take one side of a moral/religious dispute and demand that its citizens fall into line. If the "personhood" of the fetus cannot be demonstrated by rational, non-religious inquiry, no compelling justification exists to outweigh a woman's constitutionally recognized interest in governing her own body. For a different conclusion derived from similar premises, see Greenawalt, *Religious Convictions and Lawmaking* (forthcoming in MICH. L. REV.).

251. *Hollenbaugh v. Carnegie Free Library*, 439 U.S. 1052, 1053 (Marshall, J., dissenting from denial of *cert.*).

sexual fornication,<sup>252</sup> would be embraced as well. Further, a right of self-governance would offer at least limited protection not only to various lifestyle decisions like marriage<sup>253</sup> and cohabitation,<sup>254</sup> but to an assortment of claims directly implicating individual self-determination as well, such as a right of a competent person to refuse medical or psychological treatment,<sup>255</sup> or to die.<sup>256</sup> In all of these instances, substantial prima facie showings can be made that government sanctions challenged interfere with an individual's ability to shape her life (or death) to suit her character without meaningful justification. Sanctions in these areas are, in that sense, potentially violative of one of the first premises of democratic government—that individuals are capable of making intelligent decisions about the direction of their lives. The demand for moral equality, which secures space for the practice of autonomy by our fellows so long as no significant harm is threatened, is endangered as well.

Of course the principle I have defined paints with a very broad, if somewhat abstract, brush. It is easy enough to say that by experimenting in pre-marital sexual relationships, deciding whether or not to use contraceptives, or choosing to live with an extended family, one shapes and acts upon essential elements of her character. But John Hinckley's assassination attempt of President Ronald Reagan, however misguided it may have been, could probably be described in similar terms. Obviously, therefore, any claimed right of self-governance can be but presumptive<sup>257</sup> in nature. Myriad choices, ranging from the "freedom" to smoke marijuana to the "liberty" to ride a motorcycle

252. *Doe v. Commonwealth's Attorney*, 403 F. Supp. 1199 (E.D. Va. 1975), *aff'd*, 425 U.S. 1 (1976) (upholding sodomy law against attack by consenting adult homosexuals).

253. *Zablocki v. Redhail*, 434 U.S. 374 (1978); *Boddie v. Connecticut*, 401 U.S. 371 (1970) (divorce); *Loving v. Virginia*, 388 U.S. 1 (1967).

254. See *supra* note 251.

255. Consider, for example, indications of a constitutional "liberty interest in avoiding the unwanted administration of antipsychotic drugs" in *Mills v. Rogers*, 457 U.S. 291, 299 (1982). See also *Rennie v. Klein*, 462 F. Supp. 1131 (D. N.J. 1978).

256. The key here, of course, is competence. Compare *In re Brooks*, 32 Ill. 2d 361, 205 N.E.2d 435 (1965) (competent adult may not be compelled to receive blood transfusion in face of contrary religious belief) with *Application of President and Directors of Georgetown College, Inc.*, 331 F.2d 1000, *reh'g denied*, 331 F.2d 1010 (D.C. Cir. 1964), cert. denied, 377 U.S. 978 (1964) (circumstances suggesting individual lacked time or capacity for competent reflection concerning refusal to accept treatment). See also *In re Eichner*, 426 N.Y.S.2d 517 (1980); *In re Quinlan*, 70 N.J. 10, 335 A.2d 647 (1976).

The autonomy right described here is based, in major part, upon a claimed societal commitment to the belief in individual competence. Therefore, the right is much more difficult to apply to the claims of minors. Based on concepts of self-governance, *Carcy v. Population Services International*, 431 U.S. 628 (1977) (invalidating certain limitations on distribution of contraceptives to minors) is much more difficult to justify than *Griswold*. Also, *Bellotti v. Baird*, 443 U.S. 622 (1979) (limiting parental consent requirement in abortion context) is more troubling than *Roe v. Wade*.

257. See *Henkin, supra* note 236, at 1429, and *Karst, supra* note 240, at 627, for similar claims.

*sans chapeau*, come neatly within its grasp.<sup>258</sup> Reasonable measurement of the scope of self-governance therefore, must examine both the dangers which the government regulation presents to attributes of individuality inherent in selfhood, and the values of health, safety, and general welfare which the regulation may serve.

Still, we are not left completely rudderless. Self-governance assumes not only that individuals are competent to run their own lives, but that they are no less able than their fellows to determine what is the ideal life. Given these parameters, a right of self-governance might reasonably be said to limit the advancement of various state regulatory aims.

Much essentially paternalistic regulation is designed to minimize the threat of tangible harm. Seat belt laws, work safety regulations, and motorcycle helmet laws are examples. Such sanctions, to some degree,<sup>259</sup> limit the individual's ability to shape and act upon aspects of her character. Yet the motivation for government intervention is to prevent injury and the costs, both personal and societal, which necessarily result. Other examples of paternalistic legislation—anti-contraceptive laws, obscenity laws, fornication and homosexuality regulations, for example—seem largely designed to forcibly elevate the moral character of the citizenry. A right of self-governance is directly at odds with such governmental attempts to foster its own moral blueprint of the desirable life. Self-governance, therefore, cautions against government dictates which proscribe activity because officials think it ignoble.<sup>260</sup> A state's ability to suppress conduct which causes harm only in the eyes of a third party beholder would probably also be curtailed.<sup>261</sup> The Supreme Court has indicated as much by ruling that "the Constitution

258. See, e.g., *Whalen v. Roe*, 429 U.S. 589 (1977) (informational privacy); *Stanley v. Georgia*, 394 U.S. 557 (1969) (private possession of obscene material for personal use); *Skinner v. Oklahoma*, 316 U.S. 535 (1942) (sterilization of certain felons); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925) (child raising); *Dronenburg v. Zech*, 741 F.2d 1388 (D.C. Cir. 1984) (discharge from U.S. Navy for homosexual acts); *Carnohan v. United States*, 616 F.2d 1120 (9th Cir. 1980) (use of laetrile); *Karr v. Schmidt*, 460 F.2d 609, 621 (5th Cir. en banc), *cert. denied*, 409 U.S. 989 (1972) (hair style); *King v. New Rochelle Municipal Housing Authority*, 442 F.2d 646 (2d Cir. 1971) (intrastate travel); *Schuman v. Philadelphia*, 470 F. Supp. 714 (D. Hawaii 1979) (right to name child); *Alaska v. Erickson*, 574 P.2d 1 (Alaska 1978) (use of cocaine); *Baker v. Nelson*, 291 Minn. 310, 191 N.W. 2d 185 (1971) (homosexual marriage); *People v. Fries*, 42 Ill. 2d 446, 250 N.E.2d 149 (1969) (challenge to motorcycle helmet law); *Ravin v. State*, 537 P.2d 494 (Alaska 1975) (marijuana use).

259. It could be questioned, of course, whether these sanctions limit "core" aspects of one's sense of character or identity as defined here. The point I seek to raise, however, is the tension between a self-governance interest and the acceptability of certain state regulatory interests typically offered to overcome autonomy claims.

260. See R. DWORKIN, *supra* note 242, at 353-61.

261. See *O'Connor v. Donaldson*, 422 U.S. 563 (1975) (limiting power of government to confine non-dangerous persons); L. TRIBE, *supra* note 209, at §§ 15-19, p. 981; Gerety, *supra* note 241, at 279.

leaves matters of taste and style . . . largely to the individual."<sup>262</sup> If my choices about how to shape my life are to be valued, they should not be sanctionable merely because other equally sovereign individuals dislike them. Freedoms of speech and religion, of course, are premised upon similar theories. Other keys to analyzing the validity of state intrusions upon autonomy could be offered as well,<sup>263</sup> but my point here is not to measure the exact breadth of the constitutional right. It is rather to justify its existence. By exploring an American constitutional ethos reflected both in the text and in our identifiable aspirations as a people, I hope to show that the protection of concepts of self-governance is critical to our embrace of personal dignity and to democracy itself.

A further clarification of terminology is essential. Thus far, I have spoken of a "right" or "interest" in self-governance in very loose terms. It has not escaped my attention, however, that such "rights talk" is a controversial enterprise. And it should be. Much confusion,<sup>264</sup> and perhaps even much deception,<sup>265</sup> takes place under various claims of right. In arguing that Americans enjoy, or at least that the Constitution envisions, a right of self-governance, I make no claim that such a right, natural or otherwise, hovers for our discovery like one of Plato's forms just beyond the presently distorted horizon. Nor do I think that there is, or should be, a right to self-governance in the "strong sense," as Professor Dworkin uses the term, meaning a liberty that can never be overcome by the public good.<sup>266</sup>

I speak, rather, of rights as they appear to me to exist, or to be given solicitude, in the American constitutional system of the past half-century. Modern life and government are perhaps too complex to countenance rights which are either categorical, formalistic, or absolute.<sup>267</sup> The reality of United States Supreme Court decision-making instead amounts to the assertion of various values, deemed by the Justices to be constitutional in nature, against legislative or executive prerogative. When a challenged government action inhibits a constitutional value to a sufficient degree, the Court trumps majority will. Such values, or claims of right, are neither perfectly outcome determinative nor capable

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262. *Cohen v. California*, 403 U.S. 15, 25 (1971) (right to wear shirt with offensive declaration).

263. See, e.g., G. WHITE, *PATTERNS OF AMERICAN LEGAL THOUGHT* 309-10 (1978); Gerety, *supra* note 241, at 236-66; Henkin, *supra* note 236; Parker, *A Definition of Privacy*, 27 *RUTGERS L. REV.* 275, 281 (1974).

264. See J. BENTHAM, *supra* note 217, at 81-83.

265. Tushnet, *supra* note 86, at 1371. See also Deigh, Book Review, 51 *U. CHI. L. REV.* 668 (1984); Hare, *Arguing About Rights*, 33 *EMORY L.J.* 631 (1984).

266. R. DWORKIN, *supra* note 215, at 269.

267. See Mensch, *The History of Mainstream Legal Thought*, in *THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE* 18-39 (D. Kairys, ed. 1982).



of being completely insulated from judicial manipulation.<sup>268</sup> Some may wish that the world of constitutional decision-making were more pristine, but, happily to my mind, it is not. Constitutional law becomes predictable and provides essential stability only to the extent that patterns of judicial treatment of these values—free expression, the right to equality, procedural fairness, and the rest—become ascertainable.

Therefore, the central debate among constitutional theorists, not surprisingly, concerns the appropriate sources of constitutional values.<sup>269</sup> Some would limit judicial authority to the unambiguous dictates of the text.<sup>270</sup> Others would go further, finding limits in the structure and functions of government.<sup>271</sup> A few would pose no limits at all.<sup>272</sup> For the most part, however, we correctly demand that the values which trigger judicial review justifiably be considered constitutional in nature. The most comfortable sources of judicially enforceable values, to be sure, are those lodged in the phrases of the text. The strict textualists have at least this much right. But as I have tried to show above, that answer alone will not do. My assertion that we should enjoy a “right” to self-direction is merely a claim that the judicial cognizance of the value of self-governance in constitutional litigation is appropriate.

### B. Progress

We think our civilization near its meridian, but we are yet  
only at the cock-crowing and the morning star.<sup>273</sup>

—RALPH WALDO EMERSON

It seems perhaps a strange endeavor to seek the protection of modern privacy/autonomy interests—abortion, increased sexual autonomy, the right to die, and others—at the hands of Jefferson and Lincoln. In all probability, such particular interests were beyond their contemplation. We may speculate as well that, representatives of their times as they were in other instances, they would have been personally unsympathetic to such claims. Conceding as much, however, it does not follow that the Jeffersonian concept of autonomy cannot be appropriately applied to unforeseen privacy interests.

268. See Perry, *Taking Neither Rights Talk Nor The "Critique of Rights" Too Seriously*, 62 TEX. L. REV. 1405 (1984).

269. See G. GUNTHER, *supra* note 191, at 525-35; M. PERRY, *supra* note 36, at 97; Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L.J. 920 (1973).

270. See, e.g., R. BERGER, *supra* note 24; Bork, *supra* note 24; Monaghan, *supra* note 24; Rehnquist, *supra* note 24.

271. C. BLACK, *STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW* (1969); J. ELY, *supra* note 24.

272. See, e.g., P. BOBBITT, *supra* note 37; M. PERRY, *supra* note 36; Fiss, *supra* note 36.

273. R.W. EMERSON, *THE PORTABLE EMERSON* 201 (C. Bode ed. 1963).

First, and perhaps obviously, self-governance sets forth a relationship between the individual and the state, offering each a sphere of sovereignty. If that relationship entrusts the individual with determining what is for himself the good life, the protective sphere remains even as the vision of the good life alters. Second, and perhaps more central to our understanding of an evolving concept of autonomy, Jeffersonian philosophy carries a heavy commitment to progress.<sup>274</sup>

To Jefferson, a child of the Enlightenment, the belief in human progress was central to political and intellectual thought. Citizens should be set free, and kept that way, in order to move forward in the light of ever-expanding knowledge.<sup>275</sup> As he explained: "laws and institutions must go hand in hand with the progress of the human mind. As that becomes more developed, more enlightened, as new discoveries are made, new truths disclosed, and manners and opinions change with the change of circumstances, institutions must advance also, and keep pace with the times."<sup>276</sup> Lincoln echoed not only these sentiments<sup>277</sup> but also the belief that the Declaration of Independence itself "contemplated the progressive improvement in the condition of all. . . ."<sup>278</sup> Progress in the development of equality was hoped for by Jefferson,<sup>279</sup> struggled for by Lincoln, and achieved in substantial part in our constitutional order.<sup>280</sup> The trend of our history, as John Ely has noted, has been "relentlessly away" from the elitism of early America.<sup>281</sup> The classes of persons considered autonomous, fully-participating members of our society, have been the subject of a steady, if painfully slow, expansion.

Jefferson and Lincoln intended just as assuredly that the scope of personal autonomy would develop with society. Lincoln thought the Declaration's commitment to "liberty to all" was most pointed for future use, its aspirations to be ". . . labored for, . . . constantly approxi-

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274. Letter from Thomas Jefferson to John Ludlow (Sept. 6, 1824) in JEFFERSON, *supra* note 41, at 583; H.S. COMMANGER, *supra* note 90, at 113; D. MALONE, *supra* note 90, at xvi.

275. D. BOORSTIN, *supra* note 90, at 239-45; D. MALONE, *supra* note 90, at 153-54.

276. JEFFERSON, *supra* note 130, at 559.

277. LINCOLN, *supra* note 92, at 279, 361; SELECTED WRITINGS, *supra* note 141, at 113.

278. LINCOLN, *supra* note 92, at 362.

279. See, e.g., Letter from Thomas Jefferson to Edward Coles (Aug. 25, 1814) in JEFFERSON, *supra* note 41, at 545 (letter concerning hopes for emancipation):

I had always hoped that the younger generation receiving their early impressions after the flame of liberty had been kindled in every breast, and [had] become as it were the vital spirit of every American . . . would have sympathized with oppression wherever found and proved their love of liberty beyond their own share of it . . . yet the hour of emancipation is advancing in the march of time.

280. I note particularly the 13th, 14th, 15th, 19th, 24th and 26th amendments to the Federal Constitution.

281. J. ELY, *supra* note 24, at 6.

mated.”<sup>282</sup> Jefferson, on the other hand, explained that advances in human knowledge would serve by “softening and correcting the manners and morals of man. . . .”<sup>283</sup> He believed, therefore, that the adoption of self-government would eventually thwart what he saw as the “awing [of] the human mind by stories of raw-head and bloody-bones to a distrust of its own vision. . . .”<sup>284</sup> As such “monkish ignorance and superstition” was discarded,<sup>285</sup> new frontiers of personal choice would be opened. The reactions of “laws and institutions” to the discovery of new truths must match the development of the mind. “Where this progress will stop,” Jefferson wrote, “no one can say.” Yet, in its wake “barbarism . . . recedes before the steady step of amelioration.”<sup>286</sup>

Jefferson foresaw that the visions of succeeding generations would be more experienced, more complex, and more enlightened than his own. Their problems and their solutions would be fashioned by their own wits. He would have assumed that after two centuries of the nation’s development the boundaries of personal autonomy would have been pushed well beyond those of his time and even his comfort. He sought to initiate a progressive development of individual liberty, breaking down barriers discovered to be artificial.<sup>287</sup> Such a philosophy assumes that as old stereotypes are pierced, the realm of personal choice will be augmented. A society which once saw divine mandate in the subordination of women and blacks, the beating of school children, and the incarceration of adulterers might indeed recognize a “steady step of amelioration” and reverse its command. Nothing is more consistent with Jeffersonian thought than that future autonomy struggles would be unforeseen and unforeseeable. The constant in this process, to Jefferson’s way of thinking, would not be the particulars protected, but rather the commitment to self-determination. “Nothing,” he believed, “is unchangeable but the inherent and unalienable rights of man.”<sup>288</sup>

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282. LINCOLN, *supra* note 92, at 361.

283. Letter from Thomas Jefferson to John Adams (Jan. 11, 1816) in JEFFERSON, *supra* note 41, at 550.

284. Letter from Thomas Jefferson to Eldridge Gerry (Jan. 26, 1799) in JEFFERSON, *supra* note 41, at 478.

285. Letter from Thomas Jefferson to Roger C. Weightman (June 24, 1826) in JEFFERSON, *supra* note 41, at 585.

286. Letter from Thomas Jefferson to William Ludlow (Sept. 6, 1824) in JEFFERSON, *supra* note 41, at 583.

287. See JEFFERSON, *supra* note 41.

288. Letter from Thomas Jefferson to John Cartwright (June 5, 1824) in JEFFERSON, *supra* note 41, at 581.

## V. CONCLUSION: INTERPRETING THE CONSTITUTION

The poet forms the consistence of what is to be from what  
has been and is . . . [h]e places himself where future be-  
comes the present.<sup>289</sup>

—WALT WHITMAN

For Jefferson and Lincoln, "self-governance" provides the foundation for our system of government, pre-dating the framing and "entwining itself more closely about the human heart."<sup>290</sup> Still, it is obviously a difficult step to move from their efforts to set the course of the nation to the recognition of explicit interests in modern constitutional law. The ninth amendment opens a door for the argument through its embrace of unlisted rights and its concern that the specific guarantees are not stated with the requisite breadth. But only if constitutional decision-making is appropriately seen as an aspect of societal self-definition can the leap from political commitment to constitutional law be successfully managed.

Sanford Levinson has written that we must "recognize the extent to which discussions of constitutional theory implicate the very notion of our identity as Americans, [and] more particularly, our relationship to our national past."<sup>291</sup> That is the case, it seems to me, because the interpretation of our national charter is inextricably mixed with the interpretation of our national tradition. Constitutional interpretation is, in this sense, a "mediation of the past and present,"<sup>292</sup> drawing from our heritage, seeking to reaffirm and re-create central societal values. It is unavoidable that Supreme Court adjudication serves to some extent to "shape people's vision of their Constitution and of themselves."<sup>293</sup> If that shaping reflects only the predilections of the Justices, we are rightly concerned about legitimacy. It is not the job of the judiciary to create an American ethos out of whole cloth. But judicial efforts to measure the phrases of the Constitution in response to the "*founding, constitutive aspirations*" of the American political tradition are not subject to the same charges of usurpation.<sup>294</sup> They instead build upon David Richards' suggestion that "constitutional interpretation . . .

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289. *Preface to W. WHITMAN, LEAVES OF GRASS* (1855).

290. 4 LINCOLN WORKS, *supra* note 161, at 169.

291. Levinson, Book Review, 59 TEX. L. REV. 395, 419 (1981).

292. D. TRACY, THE ANALOGICAL IMAGINATION 99 (1981).

293. Linde, *Judges, Critics, and the Realist Tradition*, 82 YALE L.J. 227, 238 (1972).

294. Perry, *supra* note 38, at 563.

delve[s] into the history and nature of larger cultural and political traditions, which constitutionalism expresses."<sup>295</sup>

It is here that I think the work of Michael Perry has proven particularly useful. Perry argues that aggressive, non-textual or non-originalist review can be justified by an American founding commitment to moral evolution.<sup>296</sup> Tempering judicial authority through congressional control over federal jurisdiction, Perry stakes a claim for substantive as well as process-based review.<sup>297</sup> I find Perry's ultimate conclusion troubling. I am unsure of his use of the American commitment to moral evolution largely because I am unsure what that means. Moral evolution, as a justification for constitutional decision-making, is a bit of a loose cannon. The demands of moral evolution in, for example, the teenage contraceptive cases, the abortion cases, or even the school prayer cases are, to me, unfathomable. Nor does it seem necessary, or advisable, to turn so completely from the text of the Constitution.

Yet Perry presents strong claims that our national commitment is far more extensive than the specific dictates of the Constitution, and that the process of constitutional decision-making must be sufficiently broad to encompass societal attempts at self-definition. National judgment or societal commitment, if it can be discovered, may provide a "source of values . . . that can serve as a reservoir of decisional norms in human rights cases."<sup>298</sup> It is ostrich-like, of course, to insist that the line between national commitment and judicial whim is a bright one. But it is exactly the same shade as the line which separates legitimacy from usurpation. It can be claimed with the utmost ease, of course, that Jefferson and Lincoln do not speak for the people of the United States. But unless that argument retreats to a claim that nothing short of the positive enactment of a constitutional provision can help to reveal the American constitutional ethos—a claim precluded by the ninth amendment—turning to Jefferson and Lincoln seems sound.

Mark Tushnet has argued that "rights-talk often conceals a claim that things ought to be different within an argument that things are as the claimant contends."<sup>299</sup> There is much truth in Tushnet's point. I make no claim here, however, that a right of self-governance has been given consistent protection by the Court. Nor do I argue that the text of the Constitution or reasonable analogies which can be drawn therefrom demand the acknowledgment of such a right. Nor even is it my position

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295. Richards, *supra* note 75, at 548. See also, E. ROSTOW, *THE SOVEREIGN PREROGATIVE: THE SUPREME COURT AND THE QUEST FOR LAW* 93-94 (1962) ("Constitutional interpretation require[s] a judge to be thoroughly steeped in the history and public life of the country").

296. M. PERRY, *supra* note 36, at 97-103.

297. *Id.* at 91-145.

298. *Id.* at 97.

299. Tushnet, *supra* note 86, at 1371.

that the only possible reading of our history as a nation is one that reveals commitment to the progressive enhancement of autonomy in moral choice. My claim is rather that the best among us, through their public acts and declarations, have tried to commit us to that course. Our obligation as an "interpretive community"<sup>300</sup> is to explore our political tradition searching for resources helpful in fulfilling the central aspirations of the nation. The record of performance has been far less than ideal. Yet, despite the strident claims of modern pundits, when the Court fosters individual autonomy, it draws upon what Martin Luther King, Jr. described as "those great wells of democracy that were dug deep by the founding fathers in the Declaration of Independence and the Constitution."<sup>301</sup>

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300. This is Stanley Fish's term. See S. FISH, *IS THERE A TEXT THIS CLASS?: THE AUTHORITY OF INTERPRETIVE COMMUNITIES* (1980).

301. Martin Luther King, Jr., Speech at Masonic Temple, Memphis, Tennessee (Apr. 3, 1968) in MARTIN LUTHER KING, JR. 224 (F. Schulke ed. 1976).

