April 12, 2015

Avoiding the Guillotine: The Need for Balance and Purpose in Determining Fundamental Rights under the Fourteenth Amendment

Timothy A Campbell, University of Dayton
Avoiding the Guillotine: The Need for Balance and Purpose in Determining Fundamental Rights under the Fourteenth Amendment

Timothy Alan Campbell¹

“To be ignorant of what occurred before you were born is to remain always a child. For what is the worth of human life, unless it is woven into the life of our ancestors by the records of history?”

Marcus Tullius Cicero²

“History [is] liberation from the tyranny of the present”

Simon Schama³

I. Introduction

The Supreme Court’s use of history in fundamental rights jurisprudence has recently come under criticism in legal and academic circles.⁴ The traditionalists Cicero and Schama both share the belief that history has value in society.⁵ But for rationalists, history has little to no value in the determination of individual rights and liberties because it is backward looking and allows for little progress in society.⁶ Rationalists argue fundamental rights should be determined by objective reason, not history.⁷

Is rationalism the answer in defining fundamental rights? For traditionalists, because history still has value in today’s world, the answer is no.⁸ According to Schama, “history is of

¹ University of Dayton School of Law, J.D., Pittsburg State University, M.A. in History, B.A. in History (minor in Political Science). He is interested in American constitutional law, political history, and political philosophy. First, he thanks his intellectual sparring partner Clint Burke for the many hours of discussion that inspired parts of this Comment. Second, he likes to thank Dean Paul McGreal and Professor Dennis Greene for their advice and inspiration in writing this article. Finally, he thanks his friends and family for their encouragement.


³ Simon Schama, Simon Schama: History as a liberation from the tyranny of the present, YOUTUBE, https://www.youtube.com/watch?v=Z-IUn2ShBTY.


⁵ See infra notes 8-13 and accompanying text.

⁶ See infra Part III-C-1a. Rationalists, in the scope of the article, refer to those that advocate against the use of tradition, or only want to use tradition sparingly.

⁷ See infra Part III-C-1a.

⁸ See infra Part III-C-1b and Part III-C2a; see also, Gail Heriot, Traditionalism and Rationalism in the Courts, 42 SAN DIEGO L. REV. 1105, 1107 (2005) (“Historically, this has meant a culture of legal traditionalism in the courts decision making driven by legal precedent. Oliver Wendell Holmes put it well: “The life of the law has not been logic: it has been experience.” Abstract principles like liberty and equality, no matter how high-minded or appealing they might sound, were historically frowned upon in legal discourse. It was the less high-minded and even boring precedents that mattered. In the absence of strong political pressure for change, which would be registered through the legislatures and not the courts, traditionalism was the way of caution.”).
necessity” in order to understand where humanity will go in the future. An individual living “entirely within the contemporary” is “an act of dangerous intolerance.” In a similar vein, Cicero argues that to be ignorant of one’s history is to remain a child. Edmund Burke would reflect this same idea, that society cannot truly progress without a perspective of its past. Building on Cicero, Burke, and Schama inevitably leads to the argument that progress built without history is an immature progression of society.

Both rationalists and traditionalists bring valid reasons why their vantage point is required when considering the meaning of fundamental rights in the United States. Although each side has its valid reasons to support their vantage point, both sides cannot stand on their own. Even though tradition is open to change, requiring a right to be found in tradition makes progress in a society slow, and if hardship is great without a proposed fundamental right, a great injustice can accrue if justice is ignored. The rationalist’s use of abstract ideals, such as liberty, in interpretation is as malleable as history. Also, the potential of tradition as an aid to constitutional law is limited by the stock references towards slavery, segregation, and oppression. True, tradition includes dark chapters like slavery, but tradition is a living thing, and for tradition to be living, it needs another ingredient. Finally, the Court has been pursuing an attempt for an objective principle to determine rights. But, the Court’s attempt resembles a snark hunt because rights, by nature, are subjective entities.

9 Schama, supra note 3; see also, Poe v. Ullman, 367 U.S. 497, 544 (1961) (Harlan, J. dissenting) (arguing, “novel claim must depend on grounds which follow closely on well-accepted principles and criteria,” and takes its place “in relation to what went before and further . . . a channel for what is to come.”).
10 Schama, supra note 3.
11 Kellow, supra note 2.
12 See infra notes 207-216 and accompanying text.
13 Further elaboration of this argument is outside the bounds of the Comment.
14 See infra Part III-C.
15 See infra p. 31 and note 180.
16 See infra notes 207-216 and accompanying text.
17 See infra note 70 and accompanying text. Even a traditionalist like Burke stated that tradition must be met against a standing policy of justice and right. See Yuval Levin, The Great Debate: Edmund Burke, Thomas Paine, and the Birth of Right and Left, 81 (2014).
18 John Hart Ely, Forward: On Discovering Fundamental Values, 92 Harv. L. Rev. 5, 36 (1978) (“There are moral philosophers who think utilitarianism is the answer; there are others who feel just as strongly it is not. Some regard enforced economic redistribution as a moral imperative; others would find it morally censurable. The two most renowned recent works of moral and political philosophy, John Rawls’ A Theory of Justice and Robert Nozick’s Anarchy, State and Utopia, reach very different conclusions. There simply does not exist a method of moral philosophy”).
21 Ronald J. Krotosynski, Jr., Dumbo’s Feather: An Examination and Critique of the Supreme Court’s Use, Misuse, and Abuse of Tradition in Protecting Fundamental Rights, 48 Wm. & Mary L. Rev. 923, 958 (arguing that, “If, as Harlan wrote, ‘tradition is a living thing,’ there must be room for substantive due process doctrine to take account of the new as well as the old.”). Although Krotosynski looks to state counting as a way to make tradition a living entity, Id. at 952-59, this Comment will argue that in order to make tradition living, it must be merged with rationalism.
22 See infra p. 21 note 124.
23 A “snark hunt” refers to the hunting of an imaginary creature, the stark, in Lewis Carroll’s poem The Hunting of the Snark. The Hunting of the Snark, ENotes.com, http://www.enotes.com/topics/hunting-snark (last visited Feb. 28, 2015. One of Carroll’s central concerns in The Hunting of the Snark is the theme of nothingness. Id. In the end, the meaning of the snark remains elusive, and those “lucky” enough to meet the snark face their own annihilation. In the
This Comment argues two points. Broadly, an objective principle to determine fundamental rights is non-existent because rights by their nature are subjective. Hence, the Court must accept some subjectivity, but it needs to install guideposts to direct the judge’s discretion. The Court also needs to adopt a balanced approach that combines rationalism and traditionalism. They need to look at the purpose of the asserted right, the specificity of the asserted right, legal precedent, and history in formulating a balanced approach.\(^{25}\)

Part II of this Comment provides a brief overview of rationalism and traditionalism, and relevant background on fundamental rights jurisprudence. Part III analyzes various facets of the traditionalist-rationalist divide in finding meaning to the term fundamental rights. Part III-D proposes a balanced approach that attempts to bridge the divide, and provide a way for judges to determine fundamental rights in the future. Finally, Part IV concludes the main points and opens the floor for future debate.

\section*{II. Background}

“Fundamental right” is not a term found in the Constitution’s text, but over the years it has become a source of protection under various clauses of the Constitution.\(^{26}\) The fundamental rights doctrine has been troublesome for two reasons: the implied nature of fundamental rights, and lack of a principled basis for the Court’s decisions on what constitutes a fundamental right and where it can be found in the Constitution.\(^{27}\) This controversy has led to questions of the Court’s illegitimacy.\(^{28}\) This section will give an overview of traditionalism and rationalism, fundamental rights before the Fourteenth Amendment, and after the passage of the Fourteenth Amendment setting the stage for analyzing the nature of rights, and the use of history in determining fundamental rights.

\subsection*{A. An Overview of Traditionalism and Rationalism}

Traditionalists seek to use history and precedent as a way of caution in the absence of strong political pressure for change.\(^{29}\) They believe in the accumulated wisdom compounded over time that is not immediately obvious to the observer.\(^{30}\) As a result, traditionalists are suspicious of arguments built on abstract principles.\(^{31}\) Traditionalism does not avoid change, but seeks slow incremental change in order to avoid egregious errors.\(^{32}\) It also grounds itself in the

\footnotesize

\(^{24}\) See infra, Part III-B. What the Court has been left with is nothing, that is they are left with no objective principles.

\(^{25}\) See infra, Part III-D.


\(^{27}\) Id. at 1477-78.

\(^{28}\) See Moore v. City of East Cleveland, Ohio, 431 U.S. 494, 544 (1977) (White, J. dissenting) (stating, “[t]he Judiciary . . . comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or even the design of the Constitution”).

\(^{29}\) Heriot, supra note 8, at 1107.

\(^{30}\) Id.

\(^{31}\) Id.

\(^{32}\) Id. The French Revolution’s use of the guillotine to create a “just society” provides on example of an egregious error. See Young, supra note 19, at 706 (arguing that if slavery is the strike against traditionalism, the French
particulars of a society in order to know what traditions make a society successful from those that do not. Finally, traditionalists fear the consequences of an unchained rationalism.

Rationalists have faith in man’s ability to construct better practices using reason and principle. The rationalist sees tradition with a weary eye. Rationalists argue that in a nation with a history of oppression, reliance on tradition will perpetuate discrimination. Consequently, rationalists are more trusting of man being able to apply abstract reason rather than history. Rationalists argue that rationalism allows society to progress at a faster pace than tradition. Finally, rationalism argues that man is not obligated to follow the traditions of the past.

B. Fundamental Rights before the Passage of the Fourteenth Amendment

The debate over fundamental rights began in 1798 in Calder v. Bull. The case centered on the ability of the Connecticut legislature to set aside a decree of a probate court. Justice Samuel Chase, writing for the Court, introduced the notion of the existence of implied rights. After crafting implied rights, Justice Chase based those implied rights on the idea of natural rights. Justice Chase went further, and without saying “fundamental rights,” stated that, “there are certain vital principals in our free Republican governments, which will determine and overrule an apparent and flagrant abuse of legislative power.”

But, Calder also pointed to the problem of forming fundamental rights on a rationalist definition of natural rights. Justice James Iredell rejected the notion of voiding a law because it was “contrary to the principle of natural justice.” Justice Iredell’s criticism of natural rights rested on his belief that natural rights provided no fixed standard because men have differed on Revolution’s desire for an abstract ideal of social justice is an equal strike against rationalism). Based on this observation, one could say that traditionalists are not afraid of change as long as they can avoid the guillotine. Id. But, it must not be overlooked that judges are only human, not studied philosophers, and over the centuries no one has accepted the advantages of being ruled by a philosopher-king. See Ely, supra note 18, at 38-39 (quoting Robert Dahl, “[a]fter nearly twenty-five centuries, almost the only people who seem to be convinced of the advantages of being ruled by philosopher-kings are . . . a few philosophers”). See, e.g., Wolf, supra note 4, at 101. See generally, Legal Traditionalism, 43 STAN. L. REV. 1035 (1991). See generally, Calder v. Bull, 3 U.S. 386 (1798). See id. See infra Part III-C-1a. The rationalists’ faith in applying reason over history creates a paradox. See infra notes 276 and accompanying text.

See generally, David J. Luban, Legal Traditionalism, 43 STAN. L. REV. 1035 (1991). See infra notes 154-57 and accompanying text. See generally, Calder v. Bull, 3 U.S. 386 (1798). See id. See id. at 387-88 (observing, “I cannot subscribe to the omnipotence of a State Legislature, or that it is absolute and without control; although its authority should not be expressly restrained by the Constitution, or fundamental law, of the State”). See id. at 388 (1798). It is beyond this Comment’s boundaries to determine whether natural law is the same as natural justice, or if they are distinct philosophical lines of inquiry. For the purposes of this Comment, natural law and natural justice will be used interchangeably.

Id. From this quote, it can be inferred that the idea of fundamental rights were born. See generally id. Id. at 398 (Iredell, J. concurring).
the subject.\textsuperscript{48} In basing the Court’s opinion on abstract principle, all it could say was that a legislative body was inconsistent with natural justice.\textsuperscript{49} However, Justice Iredell added that fundamental law must serve as a guide to determine the validity of an act.\textsuperscript{50} Lastly, he included a quick look at history when determining whether the Connecticut legislature’s actions violated the Constitution.\textsuperscript{51}

The explicit use of the term fundamental rights would not occur until \textit{Corfield v. Coryell}.\textsuperscript{52} Fundamental rights, Justice Washington pointed out, are all comprehended in general terms.\textsuperscript{53} After \textit{Corfield}, the term fundamental rights were often used to refer to rights of a higher order, but the meaning of higher order was left undefined.\textsuperscript{54} The lack of a definition could stem from the Supreme Court’s refusal to embrace Justice Chase’s suggestion of grounding fundamental rights in natural rights.\textsuperscript{55} Instead, the Supreme Court adopted Justice Iredell’s criticism of natural law.\textsuperscript{56}

\textbf{C. Fundamental Rights after the Passage of the Fourteenth Amendment}

After the passage of the Fourteenth Amendment, the Supreme Court in \textit{Slaughterhouse} closed the door on the ability to find fundamental rights in a citizen’s privileges and immunities.\textsuperscript{57} Post \textit{Slaughterhouse}, fundamental rights under the Fourteenth Amendment were found under the Due Process and Equal Protection Clauses.\textsuperscript{58} The roots of the modern test for determining fundamental rights began in 1908.\textsuperscript{59}

The roots of a test for determining fundamental rights began in \textit{Twining v. New Jersey}, which held the Fifth Amendment did not apply to the states.\textsuperscript{60} Justice Moody remarked, “It is sufficient to say that there are certain immutable principles of justice which inhere in the very idea of free government which no member of the Union may disregard.”\textsuperscript{61} These principles, Justice Moody added were “fundamental principles of liberty and justice which lie at the base of all our civil and political institutions[,] [and those institutions]. . . must not work a denial of
fundamental rights.”  Additionally, Justice Moody looked to history, in deciding whether protection from self-incrimination was fundamental to due process.  

Twenty-six years later, Justice Cardozo laid out what would develop into today’s test to determine fundamental rights. In Snyder, Justice Cardozo reasoned that a state was free to regulate its court’s in any manner, “unless in doing it offends some principle so rooted in the traditions and conscience of our people to be ranked as fundamental.” Justice Cardozo later added to his statement that a right, in order to be fundamental, must be essential to the “scheme of ordered liberty.”

A right is fundamental to the scheme of ordered liberty if justice would be impossible without such a right. On the other hand, a right is not fundamental to ordered liberty if justice can still be done without the right. Also, Justice Cardozo set out a “unifying principle,” which would aid in determining the appropriate location of a proposed fundamental right. He phrases the unifying principle as a question, asking whether an individual would be subject to a hardship that is shocking “that our policy will not endure it?”

While, Justices Moody and Cardozo used history to limit respective rights, Justice Harlan took a view that history does not always have to be so limiting. In Poe v. Ullman, the majority upheld a law banning the sale of contraceptives. Justice Harlan, looking back at previous fundamental rights cases, observed that the Court’s prior decisions represented a balance between “liberty and the demands of organized society.” He added that, “if the supplying of content to this Constitutional concept has of necessity been a rational process, it certainly has not been one where judges have felt free to roam where unguided speculation might take them.” The balance, as Justice Harlan saw it, was:

having regard to what history teaches are the traditions from which it developed as well as the traditions from which it broke. That tradition is a living thing. A decision of this Court which radically departs from it could not long survive, while a decision which builds on what has survived is likely to be sound.

62 Id. 
63 See id. at 107-11 (after a through analysis of due process from the Magna Charta to post-Ratification of the United States Constitution, Justice Moody held that “if fundamental in any sense, [prohibition against self-incrimination] is not fundamental in due process of law, nor an essential part of [due process]. We believe that this opinion is proved to have been correct by every historical test by which the meaning of the phrase can be tried.”). It is important to note that Justice Moody only used history as one aid, and not an essential element in the analysis. See id at 107. If history were an essential element, Justice Moody argues that American jurisprudence could only be unloosened by constitutional amendment, and would render the law incapable of improvement. Id. at 101.
65 Id. at 105.
67 Id.
68 Id.
69 Id. at 328.
70 Id.
72 Id. at 509.
73 Id. at 542 (Harlan, J. dissenting).
74 Id. at 542 (Harlan, J. dissenting).
75 Id. at 542 (Harlan, J. dissenting).
Justice Harlan argued that each new claim must be seen in the context of history and purpose. He added that any “novel claim must depend on grounds which follow closely on well-accepted principles and criteria,” and takes its place “in relation to what went before and further . . . a channel for what is to come.”

The modern approach was articulated in Washington v. Glucksberg. First, the Court required a careful description of the fundamental right. Second, the Court would determine whether the asserted right was “deeply rooted in this nation’s history and tradition,” and “implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed.” If the asserted right reached this standard, a state’s regulation would need to pass strict scrutiny, but if the right failed, a state’s regulation would only have to pass the rational basis test. Applying the test to the case, the Court held that the right to commit suicide with a physician’s assistance was not fundamental.

However, Glucksberg pointed the Court towards tradition that is non-living. The view that history does not have a living aspect has played a significant role in the area of defining an asserted right as either general or specific. This battle is emblematic in the intellectual skirmish in Michael H. v. Gerald D. between Justice’s Scalia and Brennan. Justice Scalia observed that a fundamental right must be defined at the “most specific level at which tradition, protecting, or denying protection to, the asserted right can be identified.” Countering Justice Scalia, Justice Brennan reasoned that specificity was too limiting, and that it would be better if fundamental rights were defined generally. Recently, the history of fundamental rights jurisprudence also includes a tension to move away from history and replace it with abstract ideals.

---

76 See id. at 542-44 (Harlan, J. dissenting).
77 Id. at 544 (Harlan, J. dissenting). Justice Harlan’s remark is very similar to Burke’s idea of prescription. See infra note 236 and accompanying text.
79 Id.
80 Id.
81 Id. at 722.
82 Id. at 723.
83 See infra, Part III-C-2b.
85 Compare id. at 127 n.6 (holding that a fundamental right must be defined with “the most specific level at which a relevant tradition protecting, or denying protection to, the asserted right can be identified” with id at 140-41 (Brennan, J. dissenting) (a fundamental right should be defined generally), see also, Branson D. Dunlop, Comment, Fundamental or Fundamentally Flawed? A Critique of the Supreme Court’s Approach to the Substantive Due Process Doctrine Under the Fourteenth Amendment, 39 UN. DAYTON LAW REV. 261, 272 (2014) (illustrating the impact of defining a right specifically and generally in the Bowers v. Hardwick and Lawrence v. Taylor)). For a critique on this intellectual skirmish over general and specific rights, see infra Part III-C-1d.
86 Michael H., 491 U.S. at 127 n.6.
87 Id. at 140-41 (Brennan, J. dissenting).
88 The most recent intellectual skirmish over history versus abstraction took place in McDonald between Justice’s Stevens and Scalia. Compare McDonald v. Chicago, 561 U.S. 742, 803-05 (2010) (Scalia, J. concurring) (internal citation omitted, emphasis original) (“Justice [Stevens’] response . . . empowers judges to eliminate or expand what the people have prescribed: The traditional, historically focused method, he says, reposes discretion in judges as well. Historical analysis can be difficult . . . [b]ut the question to be decided is not whether the historically focused method is a perfect means of restraining aristocratic judicial Constitution-writing; but whether it is the best means available in an imperfect world. Or indeed, even more narrowly than that: whether it is demonstrably much better than what Justice [Stevens’] proposes. I think it beyond all serious dispute that [history] is much less subjective, and intrudes much less upon the democratic process. It is less subjective because it depends upon a body of evidence susceptible of reasoned analysis rather than a variety of vague ethico-political First Principles whose combined conclusion can be found to point in any direction the judges favor. . . . Moreover, the methodological differences
III. Analysis

This analysis begins with putting Justice Oliver Wendell Holmes’ work, The Path of Law, in its correct place in the debate over fundamental rights. Part III-B argues that the nature of rights does not allow for an objective principle for determining fundamental rights. Part III-C analyzes and critiques various aspects of the rationalist and traditionalist divide. In the subsection, the analysis begins with a more theoretical tint. But the subsection ends with a critique of the divide by illustrating the arguments of Justices Stevens and Scalia in McDonald. Part III-D proposes a balanced approach, based on the analysis’s conclusions, in order to determine fundamental rights.

A. Correcting the “Path of the Law”

Those opposed to using history as a tool in determining fundamental rights often plant their flag in Justice Oliver Wendell Holmes’ work, The Path of the Law. It was there that Justice Holmes uttered one of his famous remarks on history:

[i]t is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past.

The remark reflects the attitude of the claims against the use of precedent. Justice Holmes added to this statement that “[e]verywhere the basis of principle is tradition, to such an extent that we . . . are in danger of making the role of history more than it is.”

But, rationalists have a problem in planting their flag with the words of Justice Holmes. In a statement years after The Path of the Law, Justice Holmes created a paradox regarding the differences among the American people (though perhaps not among graduates of prestigious law schools) with regard to the moral judgments Justice [Steven’s] would have courts pronounce. And whether or not special expertise is needed to answer historical questions, judges most certainly have no “comparative . . . advantage,” in resolving moral disputes. What is more, his approach would not eliminate, but multiply, the hard questions courts must confront, since he would not replace history with moral philosophy, but would have courts consider both . . . It is Justice [Stevens’] approach, not the Court’s, that puts democracy in peril) with id at 871-72 (Stevens, J. dissenting) (internal citation omitted) (“If the practice in question lacks any “oppressive and arbitrary” character, if judicial enforcement of the asserted right would not materially contribute to “a fair and enlightened system of justice,” then the claim is unsuitable for substantive due process protection. Implicit in Justice Cardozo’s test is a recognition that the postulates of liberty have a universal character. Liberty claims that are inseparable from the customs that prevail in a certain region, the idiosyncratic expectations of a certain group, or the personal preferences of their champions, may be valid claims in some sense; but they are not of constitutional stature. Whether conceptualized as a “rational continuum” of legal precepts, or a seamless web of moral commitments, the rights embraced by the liberty clause transcend the local and the particular.”). This Comment will critique these arguments in Part III-C-3.

89 See, e.g., Luban, supra note 39, at 1042; see also, Bowers v. Hardwick, 478 U.S. 186, 199 (1986) (Blackmun, J. dissenting). Interestingly, Justice Blackmun, ten years previously, used history when he concluded that a woman’s right to pregnancy was a protected fundamental right. See generally, Roe v. Wade, 410 U.S. 113 (1973).

90 Holmes, O.W., Path of the Law, 10 HARV. L. REV. 457, 469 (1897).


92 Holmes, supra note 90, at 471.
value of history when he stated that, “a page of history is worth a volume of logic.” On one hand Justice Holmes inferred that history is valueless. Yet, on the other hand, Justice Holmes stated that history is worth a volume of logic. At first, one might ignore the Holmes paradox as just a moment of inconsistency. Nonetheless, when Justice Holmes’ Henry IV quote is placed in the context of The Path of the Law, the paradox is lost.

The Henry IV quote placed in context demonstrates that Justice Holmes is not calling for an end to history in legal analysis. Before the Henry IV quote, Justice Holmes stated, “[t]he rational study of the law is to a large extent . . . the study of history.” He continued:

History must be a part of the study, because without it we cannot know the precise scope of the rules[,] which it is our business to know. It is a part of the rational study, because it is the first step toward an enlightened scepticism [sic], that is, toward a deliberate reconsideration of those rules.

Justice Holmes makes two arguments (1) history is a requirement in a rational legal study, and (2) history is only a step in the process. Thus, according to Justice Holmes history adds value to a rational study. The second step for the lawyer is to master economics. Although economics recognizes the past limits our future possibilities, it fails to take into account that we are obligated to the past.

Anthony T. Kronman contends that Justice Holmes’ second step should be understood as a “call for the rejection of tradition and . . . precedent itself . . . [and] an unshackling of the law from the authority of the past and its replacement by the timeless authority of reason.” However, Kronman’s concerns are mislaid for two reasons: first, Justice Holmes does not get rid of history, and second, Justice Holmes does not welcome a legal system based on reason alone. Justice Holmes stated that it is a “fallacy” to think that logic is the only force at work in

---

93 Compare, id. at 468 (stating that, “[i]t is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV”) with New York Trust Co. v. Eisner, 256 U.S. 345, 349 (1921) (observing that, “a page of history is worth a volume of logic”).
94 Eisner, 256 U.S. at 349.
95 See supra, note 93.
96 See supra, note 90 and accompanying text.
97 See generally, Holmes, supra note 90.
98 But see, Kronman, supra note 91, at 1036 (Kronman argues that Holmes’ remarks should be seen as a desire to replace tradition by the timeless authority of reason “embodied in the calculative judgments of economic science”).
99 Holmes, supra note 90, at 469 (emphasis added).
100 Id. (emphasis added). Justice Holmes’ idea of history acting as a scope is reflective of Justice Harlan’s position of history acting as a living entity reflecting what went before and what will later come. See supra, notes 72-77 and accompanying text. Additionally, Justice Holmes’ remark is almost Burkean in observing that looking at history is a way to look forward. See infra Part III-C.
101 Holmes, supra note 90, at 469.
102 Id.
103 Kronman, supra note 91, at 1036.
104 Id.
105 See supra, notes 98-101 and accompanying text.
106 See Holmes, supra note 90, at 465 (observing that, “[t]he danger of which I speak is . . . [a] notion that a given system, ours, for instance, can be worked out like mathematics from some general axioms of conduct”).
the development of law. What Justice Holmes wanted to rid the law of was the use of moral phraseology.

Although morality is a part of the language of the law, the distinction between the law and morality is important. The law should be understood to have definite limits. It should be thought of in the terms of material consequences, which enable an individual to predict rather than mentally ponder whether their actions are inside or outside the law. When we speak of rights in a moral sense, we speak not of legal limits, but limits based on our conscience or ideals. As a result, this leads to a “confusion of thought,” resulting from “assuming that the rights of man in a moral sense are equally rights in the sense of the Constitution and the law.” According to Justice Holmes by “ridding ourselves of an unnecessary confusion we should gain very much in the clearness of our thought.” Justice Holmes does not see morality as a limit. Additionally, morality in the law follows Justice Iredell’s critique in Calder of natural justice; it differs between individuals and thus cannot be a fixed standard.

The correct path of the law, as set forth by Justice Holmes, is not the path rationalists seek because Justice Holmes not only allows the use of history, he requires its use. But it is also fair to say it is not the path a traditionalist would prefer either because Justice Holmes does not deny rationalism has a place at the table. The correct path to law appears to be a balance between rationalism and traditionalism. On one end, rationalism with a limitless eye towards the future, and traditionalism providing the limits rationalism lacks on the other end. However, morality in the law serves its place too, and should not be repudiated from the legal sphere. Rights by their nature cannot be formed until first feeling some moral sympathy or revulsion towards some action. History and reason provide tools to determine which moral rights are the same as those in the law and Constitution.

The real difficulty of Justice Holmes’ formulation is the use of economics as a second step in a Holmesian legal analysis. Economics wrongly assumes that humans are rational beings that make rational decisions. Instead, humans are influenced more by morality and emotions rather than rational thought. Justice Holmes spoke against the law being worked out in some mathematical axiom, and mathematics is at the heart of economic study. Consequently,

---

107 Id. at 465.
108 Id. at 464.
109 Id. at 460.
110 Id.
111 Id.
112 Id.
113 Id.
114 Id. at 464.
115 Id. at 460.
116 See supra notes 47-49 and accompanying text.
117 See infra Part III-B.
118 For example, history has limited a moral right to terminate life-prolonging treatment or assist one in committing suicide. See e.g. Cruzan v. Director, Missouri Dept. of Health, 497 U.S. 261 (1990); Washington v. Glucksberg, 521 U.S. 702 (1997).
119 See Dan Ariely, The End of Rational Economics, HARVARD BUSINESS REVIEW, https://hbr.org/2009/07/the-end-of-rational-economics. Ariely argues that “we are now paying a terrible price for our unblinking faith in the power of the invisible hand.” Id. He adds, “we’re painfully blinking awake to the falsity of standard economic theory – that human beings are capable of always making rational decisions . . . .” Id.
120 See infra notes 127-30; See also JONATHAN HAIDT, THE RIGHTEOUS MIND: WHY GOOD PEOPLE ARE DIVIDED BY POLITICS AND RELIGION 53-71 (2012).
121 Holmes, supra note 90, at 465.
economics is an emotionless practice and may not factor in the hardship a practice has on an individual. The economic analysis of weighing of costs and benefits can be improved by adding Justice Cardozo’s "unifying principle" formulated in *Palko*.

A hardship factor enters a dose of morality into the formulation. By examining the "hardship" of a particular law, along with looking at history, a later generation will be better able to make the next step.

**B. The Nature of Rights: Why Rights cannot be Objective**

The Supreme Court, in its fundamental rights analysis, has stressed the need for an "objective principle" to determine what is and what is not a fundamental right. Yet, the nature of rights, and how individuals determine them, questions whether such a truly objective principle can exist. Rights by their nature are not objective, but are driven by an individual's values and emotions. This line of thought is the opposite of the rationalist line of thought that the passions are the servant of reason.

The modern proponent of rights being driven, not by reason, but by an individual's subjective values is Edward O. Wilson. Wilson posited two questions about the nature of universal rights. First, are universal rights determined by humans in a way based on reason? Second, are universal rights determined only because people feel revulsion and sympathy and thus invent stories about universal rights? Wilson believed that reason is the slave to the passions. He argued that universal rights are fabricated justifications based on consultation with the "emotive centers of . . . [the] brain." Joshua Greene later confirmed Wilson's argument:

---

122 See supra notes 69-70 and accompanying text.
123 It should not be misconstrued that this Comment argues that an economic analysis cannot be used in legal analysis. The point to be made is that an economic analysis may not be best for determining fundamental rights. Economics focuses on the objective, but rights are founded on one's subjective value judgment towards feeling whether something is or is not deserving of a particular right. See supra Part III-B. Since the nature of rights is subjective, economics would have a difficulty in applying these subjective feelings. See supra Part III-B. Lastly, economics would struggle with the issues of abstraction as seen in Part III-C. A fuller elaboration of whether economics has a place in the fundamental rights debate is outside the Comment's reach.

124 See Michael H. v. Gerald D., 491 U.S. 110, 137 (1989) (Brennan, J. dissenting) (questioning the plurality's rationale, "'[w]hat the deeply rooted traditions of the country are is arguable.' Indeed, wherever I would begin to look for an interest 'deeply rooted in the country's traditions,' one thing is certain: I would not stop (as does the plurality) at Bracton, or Blackstone, or Kent, or even the American Law Reports in conducting my search. Because reasonable people can disagree about the content of particular traditions, and because they can disagree even about which traditions are relevant to the definition of 'liberty,' the plurality has not found the objective boundary that it seeks."); see also, Moore v. City of East Cleveland, Ohio, 431 U.S. 494, 549-50 (1977) (White, J. dissenting)(reasoning, "'[w]hat the deeply rooted traditions of the country are is arguable; which of them deserve the protection of the Due Process Clause is even more debatable. The suggested view would broaden enormously the horizons of the Clause; and, if the interest involved here is any measure of what the States would be forbidden to regulate, the courts would be substantively weighing and very likely invalidating a wide range of measures that Congress and state legislatures think appropriate to respond to a changing economic and social order.").
125 See generally, HAIDT, supra note 120.
126 Id. at 28. There are three viewpoints on the reason-emotion dichotomy: (1) a view based on Plato that emotions are the slaves of reason and as such man is a rational being; (2) a view based on Thomas Jefferson that reason and emotion are co-emperors; (3) and a view based on David Hume that reason is the slave of emotions. Id. at 28-30.
127 Id. at 32.
128 Id.; see also, supra note 126.
129 HAIDT, supra note 120, at 32.
We have strong feelings that tell us in clear and uncertain terms that some things simply cannot be done and that other things simply must be done. But it’s not obvious how to make sense of these feelings, and so we, with the help of some especially creative philosophers, make up a rationally appealing story [about rights].

The point that Wilson and Greene come across is that rights are not a rational construct, but an emotional construct. In essence, the nature of rights is not objective but subjective. Thus, Wilson and Greene give light to Justice Iredell’s critique of natural rights in *Calder*, that natural rights could not provide a standard to determine rights because of their subjective nature.

Wilson and Greene’s findings should concern the Court. Because of the subjective nature of rights, a judge will base his decision on the amount of feelings of sympathy and revulsion he feels towards the case in front of him. A system based on the nature of rights alone will result in inconsistent judicial decision-making, and decisions that could overlook the ramifications of creating a right. Also, a decision based on the nature of rights alone can impede progress of a society simply because a judge’s emotions are not swayed to recognize a proposed right. Thus, Wilson and Greene’s findings stress the need for a test that is built with guideposts that limit a judge’s determination of rights based on his emotions. Hence, a judge must have more tools at his disposal.

The Court should also be skeptical of the ability to find an objective principle because rights come attached to a normative value. Rights are normative, in that, they have a direct bearing on the discourse of how humans ought to behave. Rights are unavoidably a part of moral discourse, and without a normative discourse, a society would be void of rights. Because rights are a part of a normative discourse, a judge or claimant cannot decide whether a right does or does not exist without making reference to the particular community. A judge, failing to make reference to the rights of a community, would be “whistling in the dark” when attempting to determine rights. Hence, specific rights rest on individual and social value judgments. As such, rights vary between cultures and individuals, and are at best ambiguous.

---

130 *Id.* at 67. A detailed discussion on the rhetoric of rights is outside the bounds of the Comment. See RONALD BEINER, WHAT’S THE MATTER WITH LIBERALISM, 80-97 (1992) (discussing and critiquing the liberal view of rights rhetoric).

131 See supra notes 46-49 and accompanying text.

132 See supra notes 127 to 131 and accompanying text.

133 See generally, LLOYD L. WEINREB, OEDIPUS AT FENWAY PARK: WHAT RIGHTS ARE AND WHY THERE ARE ANY? (1994).

134 *Id.* at 86.

135 A normative discourse, in the law and philosophy, is a discourse on how things ought to be in society or legally. See Law and Language, § 3.2 STANFORD ENCYCLOPEDIA OF PHILOSOPHY, http://plato.stanford.edu/entries/law-language (describing, “Legal philosophers have tried to explain the normativity of law — the fact that the law of a community is, or presents itself as, a guide to the conduct of members of a community.”).

136 WEINREB, supra note 133, at 2-3. Hence, one can argue that an objective principle for rights would create a world void of rights. *Id.*

137 *Id.* at 9. William Galston observes rights discourse in a different way, “[t]he language of rights is at most a convenient proxy for a heterogeneous collection of familiar moral reasons.” BEINER, supra note 130, at 82.

138 WEINREB, supra note 133, at 9.

139 *Id.* at 13.
Further, the normative nature of rights shows that rights emerge not from the abstract reason, but from experiences of the community.\footnote{Id. at 100.} In fact, abstract rights, such as justice, liberty, or equality cannot be sustained without content from the community.\footnote{Id. at 156.} This content is based on the community’s laws, rules, and practices.\footnote{Id. at 149.} Additionally, rights come with responsibilities and qualifications.\footnote{See generally, id.} Rights act as balance between the individual as an autonomous being, and the ordered society. Thus, rights act as a limit on the individual.\footnote{Id. at 98.} When an individual’s powers exceed his due in society, rights invalidate them to extend the power to others.\footnote{Id.} Finally, rights can only be identified by their function, or what the right does.\footnote{Id. at 37.}

The lack of objectivity in the nature of rights requires giving a judge tools or guideposts, to fairly analyze a fundamental rights claim. A fully objective standard would ignore the nature of rights, and be tantamount to a “rational delusion.”\footnote{HAIDT, supra note 120, at 88. Haidt argues that reason was not made to find the truth but evolved to engage in arguments, persuasion, and manipulation. Id. at 88-91. Consequently, Haidt contends that we must be wary of reason. Id.} The Court must accept the subjective nature of rights if it wants to move to a less history focused test for fundamental rights. A new test for fundamental rights must include a dose of subjectivity with limits placed on the judge’s decision-making process.

The normative nature of rights requires that history and legal precedent are guideposts in the fundamental rights analysis. A judge, for example, could use history to examine how a claimed right fits into the traditions that have come and gone, whether society is progressing in a way that would accept such a right, and weigh the consequences of a claimed right. Legal precedent can also serve as a guidepost to limit the emotional nature of determining rights.\footnote{Id. at 88-91.} For example, a judge who is not morally swayed by a rights claim may be swayed if legal precedent is swinging in favor of such a right. Thus, both history and legal precedent can serve as objective tools. But, history and legal precedent are backward looking. The judge should be allowed a subjective forward-looking tool. By factoring in the purpose or the function of the right, a judge has such a tool to examine the consequences on the community without the right. These three tools, history, legal precedent, and the function of the right are based on the nature of rights, and serve as the foundation of the balance test described in this Comment.\footnote{In this Comment, the term legal precedent refers not only to case law, but state precedents (i.e. are state’s moving to legally accept a right or deny a particular right).}

C. The Rationalists and the Traditionalists

First, the subsection examines the rationalist-traditionalist divide from the rationalist perspective. Then, the analysis examines the issue from the traditionalist’s camp. Finally, the subsection illustrates this divide by critiquing the argument in \textit{McDonald} between Justice Scalia and Justice Stevens.

\footnote{See infra Part III-D.}
1. The Rationalists

First, this subsection looks at the rationalist argument against history. Afterwards, it will critique the rationalist argument against history. Third, it will critique the rationalist problem with placing equality and abstract ideals as the central purpose of rights. The subsection concludes with an analysis of the rationalist replacement of history with general rights and a presumption of liberty.

a. The Argument against History

Rationalists’ arguments against the use of history in fundamental rights jurisprudence vary. Adam B. Wolf argues that tradition “strips substance from fundamental rights jurisprudence.” Wolf contends that by tying fundamental rights to history reduces a new right’s opportunity to garnish constitutional protection. He added, that in a nation “whose history is riddled with oppression, relying on tradition often only reinforces injustice.” Finally, Wolf claims that tradition does not facilitate objectivity, and is malleable and thus leads to abuse in fundamental rights opinions.

Additionally, rationalists argue that because traditions arbitrarily end, they deserve no allegiance from the present generation. As David J. Luban illustrates, if the present was obligated to the past then “we ought to be still offering animal sacrifices to Apollo.” Thus, Luban warns caution in accepting Edmund Burke’s version of a chain linking the present to the past. As Luban argues, the “cultural chain linking ‘us’ to ‘our’ descendants will be interrupted and begun anew countless times.”

Luban further states that traditionalists, such as Kronman, overlook how action plays a role in human culture. Here, Luban borrows Hannah Arendt’s concept of action. Arendt defined action to mean political action, and characterized it as “beginning something new on our own initiative.” Action, Arendt argued, is an “interruption” in culture, and without action, society would be “mere preservation.” Essentially, Arendt’s action-less world would truly be a

---

150 See e.g., Wolf, supra note 4 (arguing that tradition eviscerates fundamental rights); see e.g., David J. Luban, supra note 39, at 1058 (arguing that instead of getting rid of history is impossible, but observes a need to distinguish between historical thinking versus historicist thinking).
151 Wolf, supra note 4, at 114. For further elaboration see infra Part III-C-1c.
152 Wolf, supra note 4, at 114.
153 Id. at 115 (2002); see also, Rebecca L. Brown, Tradition and Insight, 103 YALE L.J. 177, 204 (1993) (arguing, “A more substantive objection to the use of tradition to define constitutional liberties is that it tends to narrow the scope of potential protections for liberty even in the face of increasingly tolerant societal mores. It defines liberty by reference to traditions which are themselves identified by reference to the past and thus “protect[s] the ‘liberty’ of the individual to conform to established historical traditions, rather than the liberty of the individual to rebel against them”).
154 See, Wolf, supra note 4, at 102-104.
155 See, Luban, supra note 39, at 1046.
156 Id.
157 Id.
158 Id.
159 See generally id.
160 See id. at 1052.
161 Id.
162 Id.
world without progress. Thus, traditionalism serves as nothing more than a mere tool for preservation rather than innovation.\(^{163}\)

Yet, Luban points out that, “Initiation [action] without preservation is pointless, perhaps, but preservation without initiation is unbearable. Action thus forms the necessary counterpoise . . .”\(^{164}\) Nonetheless, Luban states that neither Kronman nor Burke adequately characterized, what Luban calls, the “intergenerational social contract.”\(^{165}\) Luban states the social contract contains two clauses that pull at opposite ends.\(^{166}\) The two clauses are such:

The first, upon which Kronman and Burke focus exclusively, is a “preservation” clause, in which we pledge to conserve our ancestral heritage and trust that our descendants will likewise preserve theirs. The second, which Kronman and Burke neglect altogether, is an “innovation” clause, in which we offer our descendants the same freedom to break with the past that we ourselves enjoy.\(^{167}\)

Luban’s last argument concerning history deals with the value of traditionalism itself.\(^{168}\) Tradition only has value when individuals claim a particular tradition.\(^{169}\) That is individuals claim tradition, rather than tradition claims an individual.\(^{170}\) Traditionalists focus on history for its own sake, wishing to “blot out everything they know about the later course of history, including the present need.”\(^{171}\) Luban hints that the traditionalism of today is a natural and self-defeating response to the “sense of spiritual homelessness that marks the modernist predicament.”\(^{172}\) Finally, he equates traditionalism with the “striking irrationalist and Counter-Enlightenment backlash” that occurred alongside the “rationalization of society.”\(^{173}\)

Rebecca Brown argues that tradition as a basis for the definition of constitutional protection has a regressive effect on the community.\(^{174}\) Brown elaborates that tradition creates complacency, and that it suggests, “Where we have been is where we want to be,” and what has been tolerated in practice for a long time is good.\(^{175}\) As a result, traditions tend to be majoritarian in nature.\(^{176}\) Lastly, tradition as binding betrays another tradition: “the tradition of finding a better way to run a country.”\(^{177}\) For example, Brown argues that the Constitution was written

\(^{163}\) See generally id.
\(^{164}\) Id. at 1052.
\(^{165}\) Id. at 1055.
\(^{166}\) Id.
\(^{167}\) Id.
\(^{168}\) See id. at 1057-60.
\(^{169}\) Id. at 1059.
\(^{170}\) Id.
\(^{171}\) Id.
\(^{172}\) Id. at 1058.
\(^{173}\) Id. at 1059-60.
\(^{174}\) Brown, supra note 153, at 204.
\(^{175}\) Id.
\(^{176}\) See, id. at 205 (observing, “When we examine the origins of traditions, it becomes apparent that the source of tradition is largely majoritarian. Traditions are not formed by the few, the eccentric, the outcast, the marginalized. Rather, traditions arise from laws passed by legislatures and from practices recognized, approved, and absorbed by mainstream culture. This is not necessarily either a good or a bad thing, but there is irony, as Professor Ely recognized: ‘[I]t makes no sense to employ the value judgments of the majority as the vehicle for protecting minorities from the value judgments of the majority’”).
\(^{177}\) Id. at 204.
because the founders were dissatisfied with earlier political traditions. Although true, this does not mean that the founders abandoned those political traditions.

Rationalists doubt whether a judge can make a good historian. Judges engage in selection of the history most favorable to their position without any examination of relevancy or accuracy. Brown takes it one step further and contends that, “a judge is incapable of ascertaining a definitive answer to a constitutional question by examining history and tradition.” Finally, in a similar vain to Luban, Brown argues that traditionalism along the lines of Kronman and Burke suggests blind obedience.

b. The Critique of the Rationalist Argument against History

The rationalist argument against history’s use in fundamental rights has its weak points. First, the issue of history’s malleability cuts both ways. Although, judges can pick and choose a particular piece of history for the purpose they want to achieve, rationalist ideas of liberty and equality can also be shaped to get a resolution desired by a judge. For example, the Supreme Court has rejected natural law as a basis for rights partly because of the concerns that natural law was malleable. Next, because the nature of rights is subjective, rather than objective, judges will naturally shape evidence in order to justify the creation of a right. Again, a truly objectionable tool when determining rights is improbable.

Similarly, traditionalists would question whether a judge would make a good philosopher. The judiciary has done no better in using reason than history to determine fundamental rights. The major problem with using reason is assuming that there is one method of philosophy. For example, there are those that think utilitarianism is the answer, but equally those that do not agree it is the answer. Additionally, there are those who believe enforced economic redistribution is the moral imperative, while others find redistribution

178 Id.
179 See infra, notes 299-303 and accompanying text.
180 Brown, supra note 153, at 211.
181 Id.
182 Interestingly, Justice Iredell had the similar remarks over definitiveness in regards to rationalism, as Brown does against history. See supra note 48 and accompanying text. Combining Brown and Justice Iredell’s points of view on traditionalism and abstraction leads to the observation that neither traditionalism nor rationalism alone can provide a definitive answer for determination of fundamental rights. This observation causes difficulties when the Supreme Court has agreed that there are such vital fundamental principles. See Part II-B & C. Because of this conundrum, fundamental rights need a bridging of the two schools of thought.
183 See Brown, supra note 153, at 212 (arguing, “For Burke and adherents of this view, tradition has a place in constitutional interpretation simply because it is the past. Its authoritative force is inherent and direct. Translated into the language of constitutional interpretation, the argument is that current judgments about the role of government under the Constitution must be made in conformity with the traditions of society. It suggests blind obedience.”).
184 See supra p.31 note 182 (comparing the remarks of Brown and Justice Iredell).
185 See e.g., Wolf, supra note 4, at 137-53 (explaining that tradition is results oriented).
186 See supra 56 and accompanying text.
187 See supra Part III-B.
188 See supra Part III-B.
189 See generally, Ely, supra 18.
190 Id. at 36.
191 See supra p. 3 n. 18.
192 Ely, supra note 18, at 36.
unconscionable. Further, how is the judge to react when two philosophers looking at the same topic come up with two diametrically opposed conclusions? As with history, the judge will be left with picking which moral philosophy suits the outcome that he desires.

The value of tradition and precedent is to guide a judge’s discretion rather than make them blind to the present needs of society. Rationalism without any grounding may unleash extremism and ignore the particulars that make a society successful. Thus, traditionalism seeks caution, not mere “preservation,” before introducing change into society. To use Hannah Arendt’s words, traditionalists seek guidance from the past before they take action. As Luban pointed out action would be “pointless” without preservation. Justice Harlan, in Ullman, pointed out another value in using tradition, “A decision of this Court which radically departs from [tradition] could not long survive, while a decision which builds on what has survived is likely to be sound.” Thus, a right built on tradition has a better shot at survival than a right built on abstraction alone.

Although it is true that traditionalism alone can be a mere tool for preservation, tradition does not have to mean preservation only. The brand of traditionalism subscribed to by Justice Harlan is close to Luban’s version of the social contract. Justice Harlan believed that tradition could be a living entity. But in order to be living, tradition needs another ingredient to push society forward. That ingredient can be in the accepting Arendt’s point of a necessity to take action. If tradition is seen as living, and not mere persevering, than tradition does not ignore the second clause of Luban’s social contract nor Brown’s “tradition of finding a better way to run the country.” Finally, tradition in this manner would not, in Wolf’s fears, reinforce injustice.

Next, Wolf argues that tying fundamental rights to history reduces the opportunity for new interests to gain constitutional protection. However, the point of fundamental rights is not to give every right interest the label of fundamental. In fact, to label every right fundamental makes the notion of fundamental rights meaningless. The purpose of fundamental rights is to determine the “vital principals in our free Republican governments” which “over-rule an apparent and flagrant abuse of legislative power.” Not every right is going to be vital enough to overrule legislative power. Justice Moody in Twining, and Justice Cardozo in Palko reflect the understanding that some rights lack a fundamental quality.

193 Id.
194 See, e.g., id (describing the works of John Rawls and Robert Nozick. Rawls’ A Theory of Justice and Nozick’s Anarchy, State and Utopia examined the same topic, but reached differing conclusions).
195 LEVIN, supra note 17, at 128-33.
196 See supra, note 164 and accompanying text.
198 Tradionalism as a foundation in reforming society is the central point behind Burke’s idea of prescription. See generally, LEVIN, supra note 17. But equally, a right cannot be based on tradition alone. See Part III-B.
199 Compare Ullman, 367 U.S. at 542 (1961) (Harlan, J. dissenting) (reasoning, “The balance struck by this country, having regard to what history teaches are the traditions from which it developed as well as the traditions from which it broke. That tradition is a living thing”) with Luban, supra note 39, at 1055 (describing the social contract as including two clauses, one to preserve, and the other the ability to break with the past).
200 See supra note 75 and accompanying text.
201 See supra note 21 and accompanying text.
202 See supra notes 160-62 and accompanying text.
203 See supra note 177 and accompanying text.
204 See supra note 153 and accompanying text.
205 See infra Part III-C-1c.
207 See supra Part II-C.
determined whether justice is impossible with or without the claimed right. Therefore, rather than stripping fundamental rights jurisprudence of its substance, tradition protects the substantive purpose of fundamental rights.

Burke does not ignore the “innovation” clause, and focus exclusively on preservation. Burke stated that one of the requirements of the statesman was a “disposition to preserve and an ability to improve.” Burke simply questions the manner in which society progresses forward. Society progresses best when it gradually builds on what is best and improves what is worst. For Burke, government must function not only with abstract principle, but also with the nation’s traditions. Burke is skeptical about man’s ability to discover and apply justice, and questions whether this knowledge is accessible by reason alone. A nation cannot be treated as a blank check “upon which he may scribble whatever he pleases.” The statesman must consider the “existing materials of his country.” Because the results of reforms take time to make their impact, history and nature should inform the statesman. In this way, Burke’s model is closer to the normative nature of rights than a theory built on abstraction.

As such, the statesman should drive society towards creating space for individuals to exercise their freedom and benefits. The space to exercise these freedoms and benefits require a “right to restraint,” that is the right for government to restrain the rights of others so that the rights of individuals will be protected. Thus, if every right was fundamental, as Wolf argues, then the right of restraint would be violated, and society cannot enjoy those rights protected by society.

Additionally, Burke would have a response for Wolf’s argument that history only reinforces injustice. History used properly is a “great volume . . . unrolled for our instruction, drawing the materials of future wisdom from the past errors and infirmities of mankind.” Burke continues, “History consists for the greater part of the miseries brought upon the world by pride, ambition, avarice, revenge, lust, sedition, hypocrisy, ungoverned zeal, and all the train of disorderly appetites.” But, history also includes efforts to fix the vices of the past, and offer lessons that neither a statesman nor a judge could ignore.

Finally, using tradition is not an irrational reaction to the Enlightenment that Luban believes it to be. As we have seen, traditionalism serves as a way to limit the discretion of a

---

208 See supra, notes 67-68 and accompanying text.
209 See supra, note 167 and accompanying text.
210 LEVIN, supra note 17, at 8 (emphasis added).
211 See generally, id.
212 Id. at 77.
213 Id. at 6.
214 Id. at 77.
215 Id. at 56.
216 Id.
217 Id.
218 See supra, Part III-B; see also, LEVIN, supra note 17, at 10 (arguing, “[Burke] thought rights could not be disconnected from . . . society and . . . could not be understood apart from the particular circumstances of particular societies in particular moments”).
219 LEVIN, supra note 17, at 77.
220 Id. at 110.
221 LEVIN, supra note 17, at 56.
222 Id.
223 Id.; See also, Edward P. Steegmann, Of History and Due Process, 63 IND. L. J. 369, 398 (1988) (concluding, “careful consideration reveals that the [evils of tradition] are overborne by the immense goods which can flow from a proper resort to tradition”).
judge from creating a right without thinking of the ramifications. The backward looking aspect of traditionalism, if used properly, should not be ignored. If that aspect is ignored, we are ignoring a practice used by the Founders themselves, and a part of the American constitutional system.\textsuperscript{224} For example, James Madison based his ideas for the Constitution not in a rationalist vacuum, but by studying the governments of the past and present.\textsuperscript{225}

c. The Problem of the Centrality of Equality and Abstract Ideals

Rationalists make equality a central facet to the substance of fundamental rights jurisprudence.\textsuperscript{226} Tradition strips substance from the purpose of fundamental rights.\textsuperscript{227} Wolf observes that, “judicial insistence that the asserted liberty be rooted in history and tradition . . . is a way to reduce dramatically or eliminate altogether the opportunity for litigants to establish a successful claim to constitutional protection.”\textsuperscript{228} In effect, tradition serves only to turn due process into a redundancy, and as a result nullify the “countermajoritarian purpose of the of the Fourteenth Amendment.”\textsuperscript{229} Finally, rationalists argue that government should be judged by “how effectively it respects man’s individual freedom and equality.”\textsuperscript{230} Thus, using tradition makes it inefficient to respect another man’s individual freedom and equality.

The problem with the centrality of equality is similar to Justice Iredell’s criticism with basing fundamental rights on natural rights in Calder.\textsuperscript{231} The notion of equality does not provide either a fixed or objective standard that rationalists desire because what is equal to one may not be equal to another. Thus, equality, like natural rights, harkens back to Justice Iredell’s criticism that there can be no fixed standard when men have differed on the subject.\textsuperscript{232}
Also, equality runs into the problems of the subjective nature of rights.233 A judge is only going to find the need for equality if he has “strong feelings that tell [him/her] in clear and uncertain terms that some things simply cannot be done.”234 If the judge has strong feelings for advancing equality, he/she will simply create a “rational appealing story” about why a right is needed.235 A judge basing a right on the notion of equality, without any limits, opens the door to expanding fundamental rights to those rights that society does not wish to be fundamental. In essence, the judge opens himself up to criticism of the court’s legitimacy and claims of judicial activism or overreach. Finally, the Court basing its decision on the abstract notion of equality can only state that the government was inconsistent with equality.

Similarly, rationalists, by resting fundamental rights on abstract ideals, treat the country as a blank check, “upon which he may scribble whatever he pleases.”236 Because abstract rights do not provide explicit rules a judge should “make the most of the existing materials of his country.”237 Building on those existing materials does not require “an abstract study of nature but a very particular understanding of the history and character of one’s society.”238 For this reason, history and not only nature must inform a judge in determining fundamental rights, and as such history should not be abandoned lightly.239

Further, Burke is skeptical of man’s ability to discover and apply justice and equality because man cannot reason abstractly without an imaginative context.240 In Burke’s mind, it is through prescription – the improving of society by building upon its strengths through trial and error – that society is best able to reach the standards of justice and equality.241 Next, the underlying problem with equality being central to fundamental rights is that true equality is ultimately unachievable.242

Additionally, human reason has its limits in governing and applying ideals such as equality. Burke list three primary reasons to caution against a focus on abstract ideals: (1) abstraction creates confusion about the purpose of politics; (2) theory ignores the circumstances and particulars crucial to the success of policy; and (3) overreliance on theory may open the door to extremism and immoderation.243 On Burke’s first point, by focusing on abstract principles, society believes that the purpose of politics, is not advancing the interests or happiness of the nation as a whole, but to prove a particular point.244 Burke argues that the problem is that the insistence on abstract precision leads to decisions based on philosophical speculation.245 This philosophical speculation is not attuned to societies motives or interests necessary to well-informed change.246

---

233 See supra Part III-B.
234 See supra note 130 and accompanying text.
235 See supra note 130 and accompanying text.
236 LEVIN, supra note 17, at 56.
237 Id.
238 Id.
239 See, id.
240 See, id. at 77.
241 Id.
242 Id. at 83.
243 See, id. at 128-33.
244 Id. at 128.
245 See, id. at 130.
246 See, id.
On Burke’s second point, he observes that theory is of a general and universal character. Burke rested this argument on two beliefs (1) a nation’s characteristics, needs, and interests are undermined when politics become a game of “applied metaphysics;” and (2) when “egalitarian abstraction” is practiced you fail to know the people. Finally, basing fundamental rights on universal ideals rather than our society goes against fundamental rights jurisprudence.

Burke’s last point addresses the traditionalists’ fear of rationalism unchained. The push for perfection of an abstract idea is a pursuit to the extremes, and as true equality, perfection of an abstract idea is not possible. Traditionalists argue that the extreme desire for perfection of an abstract theory resists all restraint, and as such tears out the “pieces [of] the whole contexture of the commonwealth.” Finally, an individual approaching the Constitution, as rationalists do, with an eye towards measuring it against abstract principle, without regard to a nation’s history, is to “prefer one’s own reason over the collective wisdom of one’s countrymen.”

As a result, Yuval Levin argues:

A politics built on modern reason inevitably becomes a self-fulfilling prophecy: rejecting all that cannot explain itself in terms of modern reason and therefore leaving in place only those elements of political life that meet its standards – regardless of what society may actually need or what as proven capable of serving the community in years gone by.

Although Levin speaks of politics, his words can be applied to the notion of fundamental rights. Rights based on abstract ideas will inevitably reject tools or restraints that go against or limits those ideas. History limits the abstract idea of equality, and hence according to rationalists history cannot meet their standards. Thus, rationalists will reject tradition and leave only in place what will allow them to advance equality. But, by getting rid of tradition, rationalists get rid of a tool that is capable of serving the community.

Finally, equality as a central principle in fundamental rights runs against an individual’s right to restraint. Society cannot exist if individuals are allowed to follow their passions unrestrained, and consequently there is a right for government to restrain an individual’s passions.

---

247 Id. at 131.
248 Id.
249 Id. at 131-32.
250 Id. at 131-32.
251 See supra p. 6 note 34.
252 LEVIN, supra note 17, at 133.
253 Id. at 133.
254 Id. at 141.
255 Id. at 143.
256 See supra note 75. When tradition is seen as a living entity, it serves the community and adheres to the purpose Burke argues tradition serves. See supra note 241 and accompanying text.
257 See supra note 220 and accompanying text.
in order to protect another’s rights. When a rationalist removes tradition from the equation of rights, he removes a check on both the individual and the state, which leaves individuals unable to defend their freedoms and subjects them to the brutalities of the state or individuals.

**d. The Problem of a Rationalist Replacement: General v. Specificity of Rights and the “Presumption of Liberty”**

Rationalists need a replacement if history is taken away from the process of determining fundamental rights. Justice Brennan proposed that fundamental rights should be determined at a general level. Randy E. Barnett purposes a “presumption of liberty” to determine fundamental rights.

The root of the debate over whether fundamental rights should be defined generally or specifically is the fight between Justices Scalia and Brennan in *Michael H.* The use of a more general rather than a specific tradition gives the formulation of fundamental rights more breadth than a specific tradition. Rationalists argue that the Ninth Amendment condones general rights found at higher levels of abstraction. Further, they argue that generalizing rights will constrain judges from using their personal values to determine fundamental rights. The common law, rationalists argue, can constrain “a justice interpreting a living Constitution.”

General rights have problems with the nature of rights. First, general rights may not be attuned to the needs of a particular community. Because of the normative discourse, in which rights are a part, a right’s existence must be decided with reference towards community needs. Next, general rights such as equality, liberty, and justice come from abstract reason, and cannot be sustained without content from the community. Also, general rights goes against the notion of rights being a balance between an individual and an ordered society. That is, rights do not just expand, but they also limit the rights of individuals.

---

258 See, LEVIN, supra note 17, at 110.
259 *Id.* at 86.
260 See supra note 87 and accompanying text.
263 See, West, *supra* note 262, at 1377; *see also*, John Safranek & Stephen Safranek, *Finding Rights Specifically*, 111 PENN ST. L. REV. 945, 946 (2007) (arguing, “Therefore, if jurists specify the rights' claims narrowly, as in Bowers, they reject the right because no specific legal tradition exists to overturn the extant statute. However, if the Justices formulate the right in the general terms of autonomy or privacy, which are integral to due process liberty, the right is recognized, as seen in Lawrence. Thus, the general or specific formulation of a rights' claim governs the outcome of some of the most controversial constitutional disputes”).
265 *Id.* at 950.
266 *Id.* at 950 n. 51.
267 See supra Part III-B.
268 See supra note 137 and accompanying text.
269 See supra notes 137-40 and accompanying text.
270 See supra note 141 and accompanying text.
271 See supra notes 143-46 and accompanying text.
272 See supra note 144 and accompanying text.
As mentioned, the nature of rights is subjective not objective. A judge determining what is and what is not a right will naturally bring in his/her subjective personal values. Additionally, if a judge defined a right generally, his discretion would be boundless. Next, general rights would generate constitutional uncertainty because a general liberty claim encompasses nearly any right. For example, a general right to liberty would “justify murder, treason, and assault because these can be freely chosen.” The broad reach of general rights, extends rather than constrains a judge’s discretion.

Society cannot exist without limits to an individual’s rights, and thus, the right to restraint must be initiated. Because of one’s right to restraint, rights claims are subject to numerous conditions. For example, an individual has the right to travel. However, an individual cannot drive inebriated, go over the speed limit, or be disruptive on a plane. Even something more fundamental to a democracy, such as voting, has its limitations. An individual must be eighteen, registered, and be able to present a form of identification. In sum, general rights create a contradiction, either you have a general right in something or you do not have a general right. In turn, the common law does constrain general rights, but ironically, it constrains general rights by creating specificity, and thus precludes the contradictions created by general rights.

Finally, a judge is not likely to review a rights claim by only looking at the general level. Rather, a judge will examine a rights claim based on particular circumstances. General rights omit the judge’s ability to examine the particular circumstances of a claim. Thus, fundamental rights based on a general definition allow for a judge’s decision to be based more on philosophical speculation rather than the particulars of a case. Therefore, general rights may provide the broad basis for a rights claim, but a court should look to specificity of a right in order to limit the reach of a general right and their own discretion.

---

273 See supra note 125-31 and accompanying text.
274 See supra note 139 and accompanying text.
275 See supra discussion on pp. 23-26.
276 Safranek & Safranek, supra note 263, at 965.
277 Id. at 960 (observing, “Either a general right to liberty exists and therefore pernicious acts should be protected, or no general due process liberty rights exist.”).
278 See supra note 220 and accompanying text.
279 Safranek & Safranek, supra note 263, at 957.
281 Id. at 951.
282 Id.
283 See Id.
284 See supra notes 245-46 and accompanying text.
285 See supra Part III-B.
The idea of specific rights, and its use of history, has been criticized for allowing value judgments. As explained previously, the determination of rights is going to create subjective value choices. Because of the subjective nature of rights, history and the specificity of rights help narrow the judge’s discretion. Furthermore, the rationalist fear of tradition as backward and limiting is shortsighted.

The rationalist shortsightedness ignores the purpose tradition serves in the advancement of society pointed out by both Burke and Justice Harlan. Burke and Justice Harlan agreed with the premise that history can teach society what works well from what fails, and from those lessons society can learn how to move forward. Ironically, although rationalists have faith in man’s ability to reason and apply abstract ideals, they do not have faith that man can distinguish from tradition the “praiseworthy” and the “invidious” acts. One could label this as a “rationalist paradox,” either man has the ability to apply both abstract ideals and decipher the good from tradition, or man does not.

Randy E. Barnett purposes a general presumption of liberty should be used when determining fundamental rights. Barnett’s argument first rests on the notion that the Ninth Amendment prohibits the Glucksberg test from treating unenumerated rights differently simply because they were not enumerated. Although Barnett’s reading of the Ninth Amendment does mean rights arising from unenumerated natural law are not abrogated, it is against the understanding of the founders that those rights are superior to the written constitution. A general presumption of liberty runs into the same difficulty as other general rights mentioned previously. The final problem with finding a rationalist replacement to tradition is that “the Enlightenment is not an objective, tradition-neutral point at all, but rather is itself a tradition, [and thus] is as vulnerable to a fundamental challenge as any other tradition.”

---

287 Safranek & Safranek, supra note 263, at 967.
288 See supra Part III-B.
290 See supra, discussion pp. 12, 31-38.
291 See supra, discussion pp. 12, 31-38.
292 See, Safranek & Safranek, supra note 263, at 967.
293 See generally, Barnett, supra note 228.
294 See, id. at 1496. Barnett, supra note 228.
295 See, McConnell, supra note 50, at 23 (arguing that the Ninth Amendment only creates a presumption that unenumerated rights have the same protection as the enumerated Bill of Rights, and serve as only guides).
296 See supra Part III-B.
297 David M. Wagner, The Man Who Declines to be Socrates: Justice Scalia, Truth, and the Jurisprudence of Tradition, 12 WIDENER L. REV. 473, 485 (2006); see also, Dominic Green, Choose Your Own Enlightenment, THE ATLANTIC MONTHLY, http://www.theatlantic.com/politics/archive/2015/03/choose-your-own-enlightenment/387355/?utm_source=SFFB (explaining the challenges to the tradition of the Enlightenment). Dominic Green argues that the ideals of the Enlightenment are being “decoupled” partly because modern society is forgetting the lessons of the Enlightenment. Id. Also, Green points out that as with history, the Enlightenment had its dark sides. Id. For example, although Rousseau “loathed authority,” he awarded the state with the “privilege of ‘forcing people to be free.’” Id. Finally, the Enlightenment, as with rights, the Enlightenment depended on local varieties. Id. Vincenzo Ferrone “calls the Enlightenment a ‘centaur:’ an impossible combination. It was a set of abstract philosophical ideals, but it was also a lived historical experience, full of ordinary disappointments and irregularities.” Id.
2. The Traditionalists

First, this subsection makes a broad case for why traditionalism matters in determining fundamental rights. Next, the section concludes arguing that the Glucksberg test takes fundamental rights jurisprudence backwards, and ignores the living nature of tradition.

a. Why Traditionalism?

It has been stated, that “the law accords the past an authority that philosophy does not.” The past has the power, unlike philosophy, to confer legitimacy on the actions of the present. As Kronman elaborates, “In philosophy, unlike law, the past has no authoritative force, no power of its own to legitimate or justify, and no philosopher ever says—as lawyers and judges often do—that the judgments of his predecessors compel him to decide an issue one way rather than another.” Thus, only tradition has the ability to give legitimacy, and hence a stronger foundation, to a rights claim. Finally, tradition, unlike philosophy, does not live in the present only, therefore avoiding Schama’s “dangerous intolerance” or Cicero’s warning of always remaining a child.

Precedent serves three important values: (1) provide fairness, (2) provide predictability, and (3) strengthen institutional credibility. First, precedent provides fairness by presenting consistency in decision-making. Consistency forms the principle that decisions that are not consistent are unfair, unjust, or wrong. Second, precedent allows for the parties to anticipate the future. Third, consistent decision making strengthens the decision-making institution’s credibility and the environment of the institution. Finally, because of the limitations of human reasoning “deference to precedent may be needed to achieve the greatest amount of welfare overall.”

Next, United States tradition includes the Constitution, the Bill of Rights, and other documents that “embody centuries of legal and political thought, practice, and experience.” These sources have provided a way for American constitutional law to be refined and built upon. United States tradition embodies wisdom that we might forget, but need to remember, and helps the courts do the right thing when reasons for not acting seem so strong. As Justice

\[\text{Footnotes:}\]


299 See, Kronman, supra note 91, at 1033.

300 Id.

301 See supra notes 76-78 and accompanying text.

302 See, Kronman, supra note 91, at 1033; See also supra note 2 and accompanying text; See also supra note 1 and accompanying text.


304 Id. at 595-96.

305 Id. at 596.

306 Id. at 597.

307 Id. at 600.

308 Kronman, supra note 91, at 1042.

309 Broughton, supra note 298, at 25.

310 This can be seen in the development of fundamental rights jurisprudence. See supra Part II-B,C; see generally, Vogel, supra note 26 (discussing the development of fundamental rights under Cardozo); See also, Broughton, supra note 298, 24-67 (discussing tradition’s use of from Ancient Athens to Justice Scalia’s time on the bench).

311 Wagner, supra note 298, at 480.

25
Harlan stated, “A decision of this Court which radically departs from [tradition] could not long survive, while a decision which builds on what has survived is likely to be sound.” For example, the ideals from Brown v. Board of Education are on stronger ground because the holding was built on precedent rather than abstraction alone.

Traditionalists do not deny the necessity of change, but only the pace at which rationalists want change to occur. According to Burke, change is necessary for the preservation of both the law and the state. A society that changes often and quickly, changes in an unprincipled manner, and changes with wherever that year’s fashion takes. A state’s citizens who go to wherever the breeze takes them are “little better than the flies of summer.” Change at a quick pace threatens the stability and continuity of institutions that rely on a tension between authority and freedom.

The American constitutional system did not break away, but adopted the Burke’s idea of prescription. J. Richard Broughton makes three observations of the American constitutional System: (1) the Constitution did not break from the established traditions of Americans; (2) it adopted English historical experience, and (3) the Constitution denies a priori government. Furthermore, the founders recognized that theories did not help in the period after the American Revolution. As a result, the founders dropped the democratic theories of Paine and Rousseau, and went to the British constitution for inspiration. Finally, although tradition has served as a device to limit judges and preserve majority viewpoints, tradition has also served a dominant role in explaining individual rights within the meaning of the Constitution. Recently the Court has used tradition as a limiting factor, rather than using tradition as a living entity.

b. The Glucksberg Back Step

By the time of Glucksberg, the Court moved far from the early days of fundamental rights since Calder. However, Glucksberg took fundamental rights jurisprudence backwards, and reopened criticism to the Court’s use of tradition. Chief Justice Rehnquist’s opinion in Glucksberg denied the lessons of Justice Harlan’s dissent in Ullman. As a result, Chief Justice

312 See supra note 75 and accompanying text.
314 See supra note 32 and accompanying text.
315 Broughton, supra note 298, at 31; See also, Kronman, supra note 91, at 1048 (arguing that this necessity rests because of the self-destructive nature of democracy).
316 Kronman, supra note 91, at 1049.
317 Id.
318 Broughton, supra note 298, at 31.
319 See generally, id at 31-39 (describing Burke’s influence on American constitutional law).
320 Id. at 31. A priori is defined as relating to or denoting reasoning or knowledge that proceeds from theoretical deduction rather than from observation or experience. A Priori definition and Meaning, MERRIAM-WEBSTER, http://www.merriam-webster.com/dictionary/a%20priori.
321 Broughton, supra note 298, at 32.
322 Id.
323 Id. at 38.
324 See infra Part III-C-2b.
325 See supra Part II-A and accompanying text.
Rehnquist overlooked Justice Harlan’s idea that history must not be limiting, but can be a living thing, and that you must balance history with purpose.\textsuperscript{327}

The \textit{Glucksberg} decision overlooked the Burkean purpose of tradition that was adopted by the American constitutional system.\textsuperscript{328} Tradition looks backwards in order for society to progress in a more stable and mature manner.\textsuperscript{329} Instead, \textit{Glucksberg} simply looks backwards to see if the right can be found “deeply rooted.”\textsuperscript{330} Hence, the \textit{Glucksberg} test looks traditionalist on its face, but because the formulation lacks a forward-looking element, the test is not likely to be Burkean approved. Further, because the \textit{Glucksberg} test lacks a forward element, it does not allow for Arendt’s “action,” and therefore is mere preservative.

A Burkean approach is reflected in Justice Souter’s criticism of Chief Justice Rehnquist’s opinion. Justice Souter argues that the court is confined to “the values that it recognizes to those truly deserving constitutional stature.”\textsuperscript{331} These values are those that can be found either in the Constitution or the “traditions from which [the Nation] developed,” or revealed by contrast with “the traditions from which it broke.”\textsuperscript{332} Justice Souter stated that the Court cannot draw on personal values and disregard limits, but a decision should be derived from “considerations deeply rooted in reason” and “compelling traditions.”\textsuperscript{333} Justice Souter’s arrangement, unlike Chief Justice Rehnquist’s, is not mere preservation, but a path for a mature action to be taken.

\section*{3. The Rationalist-Traditionalist Divide Illustrated: Analysis of Scalia-Stevens in \textit{McDonald v. City of Chicago}}

In \textit{McDonald}, the Court was asked whether the Second Amendment’s right to keep and bare arms was a fundamental right.\textsuperscript{334} The Court held that the right to keep and bare arms was a fundamental right under the Fourteenth Amendment.\textsuperscript{335} Justice’s Scalia and Stevens debated the process the majority used to reach to its conclusion.\textsuperscript{336} Justice Scalia came to the defense of history, while Justice Stevens argued in favor of a more rational system to determine fundamental rights.\textsuperscript{337}

Justice Stevens’ focused his discussion of rights on the meaning of the term “liberty.”\textsuperscript{338} Interestingly, Justice Stevens argued that in considering the meaning of the term liberty the content of the Bill of Rights is only informative.\textsuperscript{339} Effectively, Justice Stevens is removing a guidepost to determine the meaning of liberty and to limit the judge’s discretion. However, by cutting liberty from the tradition of the Bill of Rights, liberty alone is not able to confer

\begin{flushright}
\textsuperscript{328} See supra notes 319-24 and accompanying text.
\textsuperscript{329} See supra discussion Part III-C-1b, 2a.
\textsuperscript{330} 521 U.S. at 721.
\textsuperscript{331} Id. at 767 (Souter, J. concurring).
\textsuperscript{332} Id. (Souter, J. concurring).
\textsuperscript{333} Id. (Souter, J. concurring).
\textsuperscript{334} McDonald v. City of Chicago, 561 U.S. 742, 767 (2010) (internal citation omitted) (reasoning, “we must decide whether the right to keep and bear arms is fundamental to our scheme of ordered liberty, or as we have said in a related context, whether this right is “deeply rooted in this Nation's history and tradition”).
\textsuperscript{335} Id. at 778.
\textsuperscript{336} See supra, note 88.
\textsuperscript{337} See supra, note 88.
\textsuperscript{338} See, McDonald, 561 U.S. at 864-65 (2010) (Stevens, J. dissenting) (holding, “we must ask whether the interest is comprised within the term liberty).
\textsuperscript{339} See, id. at 871 (Stevens, J. dissenting).
\end{flushright}
legitimacy to a new fundamental right. Justice Stevens puts it more poignantly, “liberty claims that are inseparable from . . . customs . . . are not of constitutional stature . . . the rights embraced by . . . liberty . . . transcend the local and the particular.”

Nevertheless, Justice Stevens’ approach to liberty is flawed. Because, Justice Stevens makes liberty universal, he is making liberty a general right. A general right does not limit, but expands a judge’s discretion. Liberty based on universal character goes against fundamental rights jurisprudence, which calls for a fundamental right to be based on a particular system of justice. Additionally, by accepting only a universal, rather than a particular form of liberty, Justice Stevens ignores the Burkean character adopted by the American constitutional system.

Because of the universal character of liberty, a judge will have to reason from theoretical deduction, rather than observation or experience, and thus overlooks that the Constitution denies a priori decisions.

Justice Scalia challenges Justice Stevens approach as having a subjective nature. However, any rights inquiry must accept that an objective test is unnatural because the nature of rights is subjective. But, Justice Scalia is correct in criticizing Justice Stevens’ insistence that his approach provides guideposts to limit a judge’s subjectivity in the process. A judge needs stronger guideposts than the abstract ideal of liberty can provide because of the subjective nature of rights. Also, Justice Scalia argues that Justice Stevens approach is undemocratic.

Next, Justice Scalia argues that a historically focused test is the “best means available” to restrain “aristocratic judicial Constitution-writing.”

Justice Stevens next suggests that the Second Amendment right is not fundamental because it is “different in kind” from other rights we have recognized. In one respect, of course, the right to keep and bear arms is different from some other rights we have held the Clause protects and he would recognize: It is deeply grounded in our nation's history and tradition. But Justice Stevens has a different distinction in mind: Even though he does “not doubt for a moment that many Americans . . . see [firearms] as critical to their way of life as well as to their security,” he pronounces that owning a handgun is not “critical to leading a life of autonomy, dignity, or political equality.” Who says? Deciding what is essential to an enlightened, liberty-filled life is an inherently political, moral judgment—the antithesis of an objective approach that reaches conclusions by applying neutral rules to verifiable evidence.

Id. (Scalia, J. concurring) (emphasis original, internal citation omitted).

Id. at 804 (Scalia, J. concurring).
according to Justice Scalia, because it is less subjective, and intrudes less upon the democratic process.\textsuperscript{352} Unlike philosophical speculation, history’s use is dependent upon evidence that can be reasonably analyzed.\textsuperscript{353} Justice Scalia, in a similar vein as Justice Iredell, points out that an abstract ideal such as liberty can be found in any direction the judge desires.\textsuperscript{354} For example, the differences that divide historians are nothing in comparison with the differences that divide the American people in regard to moral judgments over terms such as liberty.\textsuperscript{355} However, Justice Stevens is correct in arguing that a “rigid historical test” is inappropriate in determining fundamental rights because our history is filled with discriminatory episodes.\textsuperscript{356} Furthermore, Justice Stevens points out the fact that \textit{Glucksberg} only looks backwards.\textsuperscript{357} He adds that Justice Scalia’s approach is “unfaithful to the expansive principle [which] Americans laid down when they ratified the Fourteenth Amendment.”\textsuperscript{358} Finally, Justice Stevens argues that a “judge” who outsources “the interpretation of liberty to historical sentiment has turned his back on a task the Constitution assigned him” and drains “the document of its intended vitality.”\textsuperscript{359} Nonetheless, both Justices Scalia and Stevens appear to be unfaithful to American constitutional system in regards to the use of history.\textsuperscript{360} As Burke and Justice Harlan point out, history is not intended to be limiting.\textsuperscript{361} History is intended to give a judge a source to learn from the past to improve the future.\textsuperscript{362} Thus, the use of history, although looking backwards, must have an eye to the future.\textsuperscript{363} Ignoring history, or using history without a forward element, drains the Constitution and its institutions of their vitality.\textsuperscript{364} 

A judge does not turn his back on his constitutional duties by looking to history; instead the judge is following the Burkean approach adopted by the American constitutional system.\textsuperscript{365}

\footnotesize
\begin{enumerate}
\item See \textit{id.} (Scalia, J. concurring).
\item McDonald \textit{v.} City of Chicago, 561 U.S. 742, 804 (2010) (Scalia, J. concurring) (arguing, “[History] is less subjective because it depends upon a body of evidence susceptible of reasoned analysis rather than a variety of vague ethico-political First Principles whose combined conclusion can be found to point in any direction the judges favor”).
\item Id. (Scalia, J. concurring); \textit{see also}, discussion of Justice Iredell’s critique of natural rights at notes 46-51.
\item Id. (Scalia, J. concurring).
\item \textit{See, id. at 874} (Stevens, J. dissenting) (arguing, “A rigid historical test is inappropriate in this case, most basically, because our substantive due process doctrine has never evaluated substantive rights in purely, or even predominantly, historical terms”); \textit{See also, id. at 876} (Stevens, J. dissenting) (arguing, “we must never forget that not only slavery but also the subjugation of women and other rank forms of discrimination are part of our history; and it effaces this Court’s distinctive role in saying what the law is, leaving the development and safekeeping of liberty to majoritarian political processes”).
\item \textit{See, id. at 875} (Stevens, J. dissenting) (internal citations omitted) (observing that, “For if it were really the case that the Fourteenth Amendment’s guarantee of liberty embraces only those rights ‘so rooted in our history, tradition, and practice as to require special protection,’ then the guarantee would serve little function, save to ratify those rights that state actors have already been according the most extensive protection”).
\item Id. (Stevens, J. dissenting).
\item McDonald \textit{v.} City of Chicago, 561 U.S. 742, 877 (2010) (Stevens, J. dissenting).
\item \textit{See supra}, discussion Part III-C-1b,c, and Part III-C-2a.
\item \textit{See supra}, notes 75, 199-225 and accompanying text.
\item \textit{See supra}, Part III-C-1b and Part III-C-2a.
\item \textit{See supra}, discussion on pp. 53-55.
\item For a more poignant way of stating this argument \textit{see Brown, supra} note 18. The Hon. Janice Brown asserts, “[j]udicial quietism and judicial adventurism are both problematic. The result is either democratic despotism or judicial supremacy. Neither bodes well for the sustainability of American constitutionalism.” \textit{Id.} 7.
\item \textit{See supra}, notes 319-25.
\end{enumerate}
Also, Justice Stevens falls victim to the “rationalist paradox.”

He has more faith in the judge applying an abstract liberty than in the judge’s ability to separate the good historical traditions from the bad. In sum, Justice Scalia and Justice Stevens bring out valid points. Yet, on their own, both Justices Scalia and Stevens fail to make a clear and stable path to determining fundamental rights. What is needed is a balanced approach towards determining fundamental rights.

D. Towards a Balanced Approach for Fundamental Rights

The tradition of fundamental rights jurisprudence is a balance of differing variables. For example, for Justice Holmes it was a balance between history and economics. Justice Harlan argued that it was a balance between “liberty and the demands of organized society.” Justice Cardozo examined whether justice in society could continue to stand with or without the proposed right. Simply, the approach to determining fundamental rights is one where the judge is not “free to roam where unguided speculation might take them.”

Fundamental rights jurisprudence is also a process that accepts the belief in principles that a judge cannot disregard. As observed by Justice Moody, fundamental rights are “those principles of liberty and justice which lie at the base of all our civil and political institutions.” Nonetheless, the process of determining fundamental rights is also one that requires history and precedent if it were to stay true to the Burkean principle adopted by the American constitutional system. Finally, a fundamental rights test must accept some subjectivity, but needs to limit that subjectivity with guideposts. This section will look at the bases of the proposed balance test. The test weighs four items: (1) the purpose of the asserted right; (2) the specificity of the asserted right; (3) legal precedent; (4) and history. Finally, it will examine how the prongs of balance test work.

1. Bases of the Balance Test

a. The Purpose of the Asserted Right

The purpose prong of the asserted right examines the reason for the purposed fundamental right. It answers the question, why does society need this proposed fundamental right? This base could be seen as the “rationalist” base. Within the purpose prong are various factors such as, action and hardship, justice and equality, and liberty and justification. The action and hardship factor is based on Arendt’s requirement for action, and Justice Cardozo’s measurement of hardship. Here, the judge examines the need for the Court to take the

---

366 See supra, discussion on pp. 48-49 (“One could label this as a “rationalist paradox,” either man has the ability to apply both abstract ideals and decipher the good from tradition, or man does not.”
367 See supra, Part III-A.
368 See supra, notes 71-77 and accompanying text.
369 See supra, notes 67-68 and accompanying text.
370 See supra, note 74 and accompanying text.
371 See supra, note 61 and accompanying text.
372 See supra note 62 and accompanying text.
373 See supra note 62 and accompanying text.
374 See supra notes 319-25 and accompanying text.
375 See supra note 74 and discussion on pp. 28-29.
initiative to determine whether a rights claim is fundamental. The decision to take action is driven by the amount of hardship that would accrue from the denial of the right. If hardship exists, the judge weighs the amount of the hardship and determines whether it can be alleviated by the creation of a new fundamental right.

Under the second factor, justice and equality, the judge determines whether justice or equality can exist with or without the proposed fundamental right. When examining justice and equality, the Court should be mindful of avoiding the extremes that come with applying abstract ideals. They must be observant that true justice or true equality is not possible. Finally, the judge must weigh the amount of intrusion to one’s liberty that occurs because of the denial of the right. When examining the intrusion of liberty, the Court must look at the justification for the intrusion of liberty. The intrusion of liberty might be justifiable if society sees the proposed right goes against the needs of the community. For example, an intrusion on the liberty to commit murder goes against the community’s desire for protection of life.

b. Specificity of the Asserted Right

The specificity of the asserted right prong prohibits the proposed right to be only based on a general right such as liberty, justice, or equality. The proposed right must be defined at the most specific level possible for the court or judge to determine whether the interest is fundamental to society. Requiring the proposed right to be as specific as logically possible avoids the problems at issue with general rights. Additionally, the specificity of rights prevents a flood of fundamental rights to the point that the notion of fundamental rights is meaningless. Finally, by requiring the proposed right to be specific in nature allows for a judge to examine whether the proposed right is acceptable to society. For example, a judge may not feel at ease to deny a right that was described in the general terms of equality. But, if the proposed right was specifically defined, a judge could truly analyze the purposed right.

c. Legal Precedent

The opposite end of the balanced test begins with the legal precedent prong. Legal precedent examines two issues: common and statutory law, and federalism. First, the court will examine whether common or statutory law exists regarding the proposed right. If such law exists regarding the proposed right, the judge will examine whether that right has been accepted, limited, or denied. Courts should also factor in the amount of time legal precedent has existed. For example, a court should not give much weight to a law that limited a proposed right if that law has not been regularly enforced.

The Court should also factor in the amount of divergence from legal precedent that would be caused by accepting the proposed right. A judge should take greater caution with the greater the divergence for three reasons. First, granting such a right that is a great divergence from precedent could damage the Court as an institution. Second, the legislature may be the best institution to handle the proposed right as the amount of divergence increases. Third, the Court

376 See supra Part III-C-1c.
377 See supra Part III-C-1d.
378 See supra Part III-C-1d.
379 See supra discussion p. 35.
380 See supra notes 303-08 and accompanying text.
381 See supra notes 303-08 and accompanying text.
should be wary of making a quick and sudden change to the system for the fear of overcorrecting.

Finally, a judge should also factor in federalism when weighing legal precedent. In this part of the examination, the Court observes the actions the states have taken, if any, towards the proposed fundamental right. The Court should be hesitant if a majority of states have taken action against a proposed fundamental right. However, a judge should not be that hesitant, if a majority of states have accepted the proposed fundamental right at the state level.

d. History

The history prong examines the proposed right in relation to United States historical tradition. Under this prong, the Court looks to whether history mentions the existence of the proposed right. However, a judge should not look for the proposed right verbatim in history. Instead, the judge should examine history for whether there is a sense, or a basis, of the proposed right in United States historical tradition. The basis of the proposed right should be related to the corresponding level of specificity.

If such a sense exists in the historical record the Court should weigh history in the right’s favor. But, if such a basis for the proposed right does not exist then two possibilities exist depending on the weight given to the purpose prong. If the weight of the purpose prong is small, and there is no basis for the proposed right in the United States historical record then the Court should weigh history against the right’s favor. However, if the weight of the purpose prong is large, then the judge is allowed to go to English tradition to examine whether a basis for the right can be found. Because a judge is limited to American and English tradition, the judge’s discretion over examining history is more limited than if he was able to examine world history.

2. How the Test Works

As seen in figure one, the balance test works like a scale with varying factors. Each of these prongs works together in some fashion. One side of the scale weighs the specificity prong and the purpose prong, while the opposite side weighs the legal precedent and history prongs. In order for the proposed right to be fundamental, the sum of the specificity and the purpose must be greater or equal to the sum of legal precedent and history. Visually, we can picture the test as

\[ FR = (SpR) + PR \geq LP + Hx \]

Thus, a fundamental right equals the sum of the specificity of the asserted right and the purpose of the asserted right being greater or equal to legal precedent and history.

In the test, the Court looks at the specificity prong before weighing the purpose prong. By first examining specificity, the formula narrows the judge’s discretion on the subsequent prongs. For example, imagine an individual claims that he has a fundamental right to vote without showing photo identification. If the judge started with the purpose of the asserted right, he might

---

382 See supra note 21.
383 See supra note 21.
384 For a discussion of the importance of history see supra Part III-C1b, c and 2a. For a discussion of the proper use of history see supra discussion in Part III-C-3.
385 Where FR stands for fundamental right, SpR stands for the specificity of the asserted right, PR the purpose of the asserted right, LP stands for legal precedent, and Hx stands for history. SpR is in parenthesis because the specificity prong must be worked out first.
set the purpose prong on protecting the right to vote. The right to vote is a broad purpose. The broader purpose, protecting the right to vote, gives a judge a wider spectrum of history to review. Thus, broader the purpose, more malleable history becomes. A broader purpose may also lead to a broader legal precedent that might favor a broad purpose. In effect, a broad purpose may not limit subjectivity, but increase it. Specificity forces the judge to focus on the specific right and why society needs the specific right.

Starting at the specificity prong, limits the possibility of an overbroad purpose, but still allows for subjectivity. In effect, we are looking for a specific rather than broad purpose of the asserted right. The weight of the specificity prong will depend on the level of specificity the right can be given and still be logically sound. The more specific, the greater the weight will be given the specificity prong, while a more general level will give the specificity prong a smaller weight. Here, the specificity prong would be set at the right to vote without showing photo identification.

The purpose prong is partially set by the specificity prong, and the purpose prong examines the question; why does society need this purpose right to be fundamental. As a result, in our example, the purpose could be stated as the need to alleviate the hardship placed on voters by voter identification laws. The weight given to the purpose prong will be the summation of the factors of action and hardship, justice and equality, and liberty and justification. If the sum of those variables is small, then the weight of the purpose prong is small. But if the sum of those variables is large, then the weight of the purpose prong is larger.

The Court might look at whether the voter identification laws cause enough of a hardship on the voter that action is required. The judge might look at whether voter identification laws ensure, or do not ensure equal ability or opportunity to vote. When looking at justice, the judge might examine whether discrimination exists in the creation of voter identification laws. But, the judge will also factor, under the liberty and justification prong, the justifications of voter identification laws such as protecting the integrity of American elections.386

The value of legal precedent is dependent on whether precedent is in favor of the asserted right. If legal precedent is in favor of the proposed right, legal precedent will be given a smaller value. The smaller value is given in order for the other side of the scale to be greater or equal to the side of precedent and history. However, if legal precedent is against the asserted right, then legal precedent will be given a larger value. In the case of voter identification laws, legal precedent is against our proposed fundamental right to vote without photo identification. The Supreme Court upheld voter identification laws, and states have adopted tough voter identification laws.387 However, there is some legal precedent against such laws at both the state and federal level.388

History’s value works in the same fashion as the legal precedent. If history is in favor of the asserted right then history will be given a smaller value. Again, this smaller value is to allow

386 The hardship prong would have to take into account a September 2014 Government Accountability Office report that showed the impact of voter identification laws is inclusive. GAO Report on Voter Identification Laws, GOV’T ACCOUNTING OFFICE, http://www.gao.gov/assets/670/665966.pdf. For example, in ten studies conducted by the GAO, five showed no statistically significant effect on turnout, four found decreases in turnout, and one found an increase in turnout that was statistically significant. Id. Additionally, when looking at race, every racial category had a drop in turnout. Id. at figure 7. The same drop across the board is seen across other categories such as education, age, and income Id.


388 See supra p. 47 n. 280.
for the purpose and specificity prongs to be greater or equal to the legal precedent and history side of the formula. If history is against the right, the judge’s next step depends on the weight of the purpose prong. When the purpose prong is small, then the judge will give history a greater value. But if the purpose prong is large, and the judge finds the right in English tradition, then history will have a smaller value. Yet, if the purpose prong is large, but United States and English tradition is quiet on the asserted right, history will be given a large value.

Giving history a value to whether voting without photo identification is difficult because these laws are a recent phenomenon. If we started with purpose of protecting the right to vote rather than specificity of an asserted right, a judge will have a greater span to review whether the asserted right exists. But, with a limited purpose, the judge’s scope of history is limited in timeframe. Yet, recent history is not excluded under the history prong and a judge may use recent history to give history a greater weight. Nonetheless, a judge may also give history a neutral value because voter identification laws have been a recent phenomenon. It must be remembered, that this balanced approach is not meant to give a dispositive answer. Instead, the formula and its factors are meant to be guides for the judge’s ultimate decision.

In sum, using the voter identification example, the Court first looks at the specificity of the asserted right. For example, the specific right might be the right to vote without photo identification. Then, the Court looks at the purpose of the right. In analyzing why society needs a fundamental right to vote without photo identification the judge examines whether action must be taken, the impact on justice and equality without the right, and also examines justifications for voter identification laws.

As explained, legal precedent is against the right, but history is quieter on whether the right exists. If history is given a large value, the asserted right to vote without photo identification is outweighed. If history is given a neutral value, things will inevitably become greyer. But given the weight of legal precedent against the purposed right, a judge might think that the legislative branch would be the best body to handle the situation and rule against the purposed right.

Figure 1: Bases and Their Factors

IV. Conclusion: Opening a Floor to Debate

The Supreme Court’s saga of determining fundamental rights predates the Court’s creation of judicial review in *Marbury.*\(^{390}\) Since that period of time, the rationalists and the traditionalists have debated over the roles of history and abstract ideals in formulating fundamental rights.\(^{391}\) Each camp wants to determine fundamental rights in their own image, but their own images are flawed and fail to stand on their own. The purpose of this Comment is not only to apply a new theory, but also to propose a shift in our understanding of fundamental rights.

The need for correction is threefold. History has value to determine rights. Justice Holmes declared that it is required in legal analysis.\(^{392}\) Also, history is required in the American constitutional system. The legitimacy of fundamental rights speaks to the necessity of bridging the two camps that cannot stand on their own.\(^{393}\) Finally, the subjective nature of rights demands an end to the Court’s snark hunt for an objective principle to determine rights.

The beginning of that correction is formulated in the proposed balance test. First, the balance test accepts the subjective nature of rights. Hence, it does not attempt to formulate an objective principle. Instead, it guides the judge’s discretion by examining four general areas. The areas examined start to bridge the two camps. The purpose of the asserted right prong is meant to be the rationalist prong. In the purpose prong abstraction finds a home, while the history prong serves as the traditionalist domain. But both prongs are offset by the need to look at legal precedent and the specificity of the asserted right.

The proposed test accepts that history is a necessary part in the determination of fundamental rights, and is a settled part of the American constitutional system. However, history cannot be a limiting entity, but must have an eye on the future. As Justice Holmes stated, history is a requirement, but it is only a step, not the whole exam. Traditionalists such as Burke and Justice Harlan would agree that history is a living thing, you learn from the past to improve the future. You do not look into the past just to see if a right can exist today.

Tradition must be balanced with rationalism and vice versa. Tradition grants legitimacy that a new right needs, because philosophy cannot grant such legitimacy. More importantly, the very ideals that rationalists admire such as liberty, equality, and justice, have their own traditions.\(^{394}\) How best to improve those ideals can only come from the past. In order for liberty, equality, and justice to be built on lasting foundations they must be liberated from the “tyranny of the present” by re-examining the past from which those ideas came.\(^{395}\)

---


\(^{391}\) See supra Part II B, C.

\(^{392}\) See supra note 100 and accompanying text.

\(^{393}\) Justice Iredell’s point that natural rights lacks a definitive answer can be applied to traditionalism. See supra Part III-C-2b. Hence, rationalism and traditionalism lack definitive results. This is not to say that both sides do not have valid points, the difficulty is both sides have valid points. See supra Part III-C-3. Yet, each side needs the other in order to give judges the full picture when determining fundamental rights. See supra note 21. The way forward is to go together.

\(^{394}\) For example, the question of what justice means has been debated since the time of Plato’s *Republic.* See, LEO STRAUSS & JOSEPH CROPSEY, HISTORY OF POLITICAL PHILOSOPHY 4-5 (1964).

\(^{395}\) See supra note 297.