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A RIGHT TO PASTIMES?

This is a problem in constitutional jurisprudence—an exam question, if you like. The problem is to find a fatal flaw in the following argument.

“The Supreme Court should recognize a constitutional right to pastimes, protecting Americans against arbitrary and capricious state inference with activities as varied as basketball and bird watching. Although the concept of such a right is novel, it can be justified by standard principles of constitutional jurisprudence:

1. The text of the Constitution is not the only source of constitutional rights; extratextual sources such as Supreme Court precedents, penumbras of the Bill of Rights, and our evolving national needs, traditions, and aspirations should also be consulted.
2. The Declaration of Independence is a fundamental part of our tradition, embodying as it does our highest collective aspirations. As such, it is a potential source of constitutional rights.
3. One of the rights enumerated in the Declaration is ‘the pursuit of happiness.’
4. Pastimes are essential to happiness. As Pascal maintained, humans are not happy without diversions; left to themselves even monarchs feel wretched. That is why, notes Pascal, they are surrounded by people whose function is to amuse them.
5. There is, therefore, a constitutional right to pastimes, grounded not only in the Declaration, but also in penumbras of the second amendment (right to bear arms), and scattered decisions, perhaps including *Stanley v. Georgia* as well as some of the other “privacy” decisions under the fourteenth amendment. For if conjugal relations are a species of “privacy,” then surely reading in solitude is also deserving of the label, and if the right to possess deadly weapons is protected in at least some circumstances—despite strong policy arguments against it—the associated right to engage in the innocent pastime of angling is equally deserving of judicial protection.
6. The objections to such a right are obvious but misguided. While many will regard pastimes as too trivial for judicial protection, the same may be said of every constitutional right *at its margin*: that freedom of expression may be construed to include nude dancing does not gainsay its centrality in the constitutional system; that the establishment clause leads, ultimately,

to arguments about the White House Christmas tree does not detract from the fundamental nature of the underlying right. Similarly, the fact that a right to pastimes may lead to cases involving video games does not rebut the importance of the core of this right.

“It is true, no doubt, that the pursuit of happiness is commonly thought of as less elevated than the pursuit of liberty and equality. We talk as if the Court’s role is to promote virtue instead of pleasure. But this distinction is vague and difficult to defend. Whatever the founders may have believed, in our time liberty and equality are esteemed chiefly because, and to the extent that, they are thought to be conducive to happiness. Even if we reject that commonsensical justification, and rely instead on some sort of natural rights theory, the same theory should justify a right to pastimes. Why is the right to buy condoms more noble or fundamental than, say, the right to hear Beethoven or to play chess?

“Happiness is the essential foundation of the civilized polity that constitutional theorists from Publius to Ely have sought to achieve, and without which no other constitutional right is secure. The right to pastimes can therefore be justified as a necessary adjunct to all of the rights that are explicitly protected by the Bill of Rights. For if the people are unhappy, no party, no doctrine, no theory of interpretation can prevent their politics from being bigoted and mean-spirited. Would a society that prohibited dancing and wine be less grim, or less oppressive, than one that forbade commercial advertising?

“This is not to say that all regulations of pastimes are unconstitutional. The right to pastimes obviously should not be treated as a general rule, like religious liberty or freedom of speech, with only a handful of carefully-circumscribed exceptions. On the contrary, most regulations of pastimes should be upheld, simply because they have adequate (or arguably adequate) justifications. This is not inconsistent with the concept of a constitutional right. It is what the courts do, in practice if not always in theory, under the dormant commerce clause, the just compensation clause, the equal protection clause, and the right to privacy. All these rights are, in effect, exceptions to a general rule that there is no such right. There is no right, for example, not to be deprived of profits by government regulation, but in a tiny handful of extreme situations compensation must be paid for a “constructive taking.” Likewise, there is in fact no general rule against government interference with pri-

vacy, only a few situations in which that interference is thought to be so severe and unwarranted that the Court deems it unconstitutional. Most clearly of all, the Constitution permits unequal treatment of various classes of people, despite the equal protection clause, whenever the government can justify the discrimination, and usually even if the justifications are implausible. "Denial of equal protection" does not describe a factual situation; rather, it is a conclusory label (like "denial of due process") that the Court applies in the extremely rare cases in which it is willing to invalidate laws that draw unjustifiable distinctions.

"Some may argue that a right to pastimes is unnecessary, because by and large the government does not enact blatantly unreasonable regulations of pastimes. Even if the premise of this argument is correct, the conclusion does not follow. The fact that a right is tacitly respected argues *for*, not *against*, its existence: When *Griswold* was decided, the right to contraceptives was almost universally respected in America; this made Connecticut's infringement of the right seem all the more outrageous.

"It is not necessary, and would be foolish, to try to anticipate all the laws that should be struck down under this right. As with all new constitutional rights, the contours of the right to pastimes can be determined gradually, in the traditional case-by-case process of constitutional adjudication."

D.P.B.