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Legal Pragmatism and the Constitution

Daniel A. Farber*

[T]he law is administered by able and experienced men, who know too much to sacrifice good sense to a syllogism¹

Almost all constitutional law courses begin with *Marbury v. Madison*.² Thus, the first topic on the agenda is the legitimacy of judicial review. A casual reader of law reviews might well conclude that today this is not just the first but the only issue on the agenda of constitutional scholars. The dominant approach to constitutional law is to attempt to construct a theory of judicial review.³ Such a theory, if successful, would provide constitutional law with a firm theoretical foundation that would justify judicial review and dictate its parameters.⁴ The attempt to create a theory of judicial review is so prevalent today that it is sometimes difficult to imagine an alternative anal-

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1. O. HOLMES, *THE COMMON LAW* 36 (1881).

2. 5 U.S. (1 Cranch.) 137 (1803). Many leading constitutional law casebooks place *Marbury* near the beginning. See G. GUNTHER, *CONSTITUTIONAL LAW* 2 (11th ed. 1985); W. LOCKHART, Y. KAMISAR, J. CHOPER & S. SHIFFRIN, *CONSTITUTIONAL LAW* 1 (6th ed. 1986); R. ROTUNDA, *MODERN CONSTITUTIONAL LAW* 1 (1981).

3. Many such theories exist. See, e.g., J. ELY, *DEMOCRACY AND DISTRUST* 105-83 (1980) (representation-reinforcing theory of judicial review); M. PERRY, *THE CONSTITUTION, THE COURTS AND HUMAN RIGHTS* 91-145 (1982) (noninterpretive review in human rights cases); Linde, *Judges, Critics, and the Realist Tradition*, 82 YALE L.J. 227 (1972) (legal realism); Sandalow, *Judicial Protection of Minorities*, 75 MICH. L. REV. 1162, 1183-95 (1977) (process-based theory of judicial review); Wellington, *History and Morals in Constitutional Adjudication* (Book Review), 97 HARV. L. REV. 326, 326-27 (1983) (reviewing M. PERRY, *THE CONSTITUTION, THE COURTS AND HUMAN RIGHTS* (1982)). An excellent critique of this trend toward grand theory can be found in Kaufman, *Judges or Scholars: To Whom Shall We Look for Our Constitutional Law?*, 37 J. LEGAL EDUC. 184, 185-91, 193-202 (1987).

4. For an unusually explicit call for such a theory, see Ackerman, *Beyond Carolene Products*, 98 HARV. L. REV. 713, 743-46 (1985) (calling for the fashioning of a "legally cogent set of higher-law principles").

ysis of constitutional law.⁵

Yet this approach to constitutional law is not, and could not be, the approach of the judges who actually decide constitutional cases. If judges needed a sound theoretical foundation before proceeding, *Marbury v. Madison* would still be on the Supreme Court docket, having been reargued at the beginning of each Term but never actually decided. Presumably the rest of the Court's constitutional docket of the last century would be on the weekly conference list, with the notation "held pending decision in *Marbury v. Madison*." In reality, of course, the Court's need to decide actual cases has prevailed over any desire for theoretical justification.

The thrust of this Article is that the Supreme Court is right on this score, and the scholars are wrong. Constitutional law needs no grand theoretical foundation. None is likely ever to be forthcoming, and none is desirable. Instead, legal pragmatism is a sufficient basis for constitutional law. Legal pragmatism—which essentially means solving legal problems using every tool that comes to hand, including precedent, tradition, legal text, and social policy—renounces the entire project of providing a theoretical foundation for constitutional law.

Part I of this Article first attacks the foundationalist project. It argues that the project is unlikely to succeed and that success actually would not provide the kinds of benefits foundationalists hope for.⁶ Part I then explains the pragmatist alternative and attempts to rebut the common objections to legal pragmatism: that it is unprincipled, that it disregards precedent, that it is too ad hoc, and that it denigrates legal rights. These objections stem from a misunderstanding of the nature of pragmatism and, in particular, from a confusion between pragmatism and utilitarianism.⁷

Part II tries to demonstrate the viability of the pragmatist alternative using the example of *Roe v. Wade*.⁸ Whereas the foundationalist project might be summarized as "justify judicial

5. An excellent recent summary of the current debate about constitutional theory can be found in Komesar, *Back to the Future—An Institutional View of Making and Interpreting Constitutions*, 81 NW. U.L. REV. 191 (1987). On the increasing prevalence of grand theory and the rejection of common sense and legal tradition by contemporary scholars, see Kronman, *Living in the Law*, 54 U. CHI. L. REV. 835, 873-76 (1987).

6. See *infra* text accompanying notes 33-48.

7. This confusion is encouraged by the common usage of *pragmatic* to mean practical as opposed to principled.

8. 410 U.S. 113 (1973).

review, show that *Lochner* is illegitimate, and then apply the theory to *Roe*,"⁹ a pragmatic analysis of the same set of problems takes a different route. The pragmatic analysis begins by considering whether the Court should have the power to protect fundamental rights not named in the Constitution itself. The pragmatic justification for the fundamental rights doctrine¹⁰ is based on a blend of the text of the Constitution, Supreme Court precedent, some evidence of original intent, and a balanced assessment of the doctrine's societal benefits.¹¹

As Part II explains, the obvious problem is determining what rights are fundamental in the constitutional sense. *Lochner*'s protection for economic liberty does not withstand pragmatic analysis, because giving serious judicial scrutiny to all economic legislation would severely disrupt existing American institutions and cause an extraordinary expansion of the role of the judiciary.¹² *Roe*, however, dealt with a far narrower right: the right of individuals to control their procreation. The Court in *Roe* was on solid ground in finding this right to be fundamental.

What makes *Roe* a hard case is not the question whether a fundamental right is involved. Rather, the tough question—the issue that has made the abortion debate so “bitter and divisive”¹³—is whether the state's compelling interest in preserving human life is sufficiently implicated to justify banning abortion.¹⁴ Having found the presence of a fundamental right, the Court had no alternative but to assess the strength of the state interest. Without considering the details of the balance the Court struck, this Article concludes, with some misgivings, that the Court was correct in holding that the Constitution protects the right of a woman to have an abortion under some circum-

9. In *Lochner v. New York*, 198 U.S. 45 (1905), the Court struck down a statute limiting bakers to a 60-hour work week. *Id.* at 46, 64. In *Roe*, it held existing abortion laws unconstitutional and created a three-trimester scheme governing abortion regulation. 410 U.S. at 164-65.

10. References to fundamental rights in this Article do not include rights that the Constitution explicitly provides such as free speech.

11. See *infra* text accompanying notes 49-92.

12. Much of modern constitutional theory attempts to refute *Lochner*. Pragmatism attempts to accomplish this primarily by showing that *Lochner* could achieve its goals only at an unacceptable cost to other social norms. See *infra* text accompanying notes 123-70.

13. K. LUKER, ABORTION AND THE POLITICS OF MOTHERHOOD 10 (1984).

14. This point was made early in the debate about *Roe* in Heyman & Barzelay, *The Forest and the Trees: Roe v. Wade and Its Critics*, 53 B.U.L. REV. 765, 775 (1973). Unfortunately, that article had little impact on subsequent writers.

stances. At least, the Court's conclusion was sufficiently reasonable that it should not be overruled.¹⁵

I. PRAGMATISM AND CONSTITUTIONAL LAW

Foundationalism has been the prevailing style of recent constitutional scholarship. Scholars have proposed various theories of judicial review in the effort to discover a unified principle that would provide the basis for judicial decisions. In this section, I argue that such a foundation probably does not exist.¹⁶ I do not regard this a great loss, however, because I doubt that constitutional law needs such a foundation.

A growing number of scholars share my discontent with foundationalism. An impressive array of recent legal commentary has suggested a movement away from grand theory toward something new,¹⁷ variously called "intuitionism,"¹⁸ "pragma-

15. See *infra* text accompanying notes 213-22. Because *Roe* is on the books, this is a more pressing question than whether it was correctly decided in the first place.

16. This section builds on portions of an earlier work, Farber & Frickey, *Practical Reason and the First Amendment*, 34 UCLA L. REV. 1615, 1639-56 (1987).

17. See G. CALABRESI, IDEALS, BELIEFS, ATTITUDES AND THE LAW: PRIVATE LAW PERSPECTIVES ON A PUBLIC LAW PROBLEM xv (1985); C. STONE, EARTH AND OTHER ETHICS: THE CASE FOR MORAL PLURALISM (1987); Bennett, *Objectivity in Constitutional Law*, 132 U. PA. L. REV. 445, 495-96 (1984); Eskridge, *Dynamic Statutory Interpretation*, 135 U. PA. L. REV. 1479, 1497-1538 (1987); Fish, *Dennis Martinez and the Uses of Theory*, 96 YALE L.J. 1773, 1779-99 (1987); Gutmann, *The Rule of Rights or the Right to Rule?*, in NOMOS XXVIII: JUSTIFICATION 165, 166-75 (J. Pennock & J. Chapman eds. 1986); Komisar, *supra* note 5, at 216-19; Kronman, *supra* note 5, at 848-61; Kronman, *Alexander Bickel's Philosophy of Prudence*, 94 YALE L.J. 1567, 1567-73 (1985) [hereinafter Kronman, *Bickel's Philosophy of Prudence*]; Lyons, *Justification and Judicial Responsibility*, 72 CALIF. L. REV. 178, 178-79, 183-87 (1984); Michelman, *The Supreme Court, 1985 Term—Foreword: Traces of Self-Government*, 100 HARV. L. REV. 4, 17-36 (1986) [hereinafter Michelman, *Traces of Self-Government*]; Michelman, *Justification (and Justifiability) of Law in a Contradictory World*, in NOMOS XXVIII: JUSTIFICATION 71 (J. Pennock & J. Chapman eds. 1986); Selznick, *The Idea of a Communitarian Morality*, 75 CALIF. L. REV. 445, 462-63 (1987); Sherry, *Civic Virtue and the Feminine Voice in Constitutional Adjudication*, 72 VA. L. REV. 543, 580-613 (1986); Shiffrin, *Liberalism, Radicalism, and Legal Scholarship*, 30 UCLA L. REV. 1103, 1192-1215 (1983); Stick, *Can Nihilism be Pragmatic?*, 100 HARV. L. REV. 332, 385-401 (1986); Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29, 68-87 (1985); Teachout, *The Soul of the Fugue: An Essay on Reading Fuller*, 70 MINN. L. REV. 1073, 1092-94 (1986); Wellman, *Political Reasoning and Judicial Justification: Toward an Adequate Theory*, 57 U. COLO. L. REV. 45, 87-115 (1985); West, *Liberalism Rediscovered: A Pragmatic Definition of the Liberal Vision*, 46 U. PITT. L. REV. 673, 726-38 (1985); Alexander, *Interpreting Legal Constructivism* (Book Review), 71 CORNELL L. REV. 249, 249-51 (1985) (review-

tism,"¹⁹ "prudence,"²⁰ "institutionalism,"²¹ or "practical reason."²² The difference among the views of these various scholars is mostly a matter of emphasis. For present purposes what they have in common is more important, particularly their rejection of foundationalism and their emphasis on context, judgment, and community.²³

The recent attacks on legal foundationalism are part of a broader intellectual movement. Many philosophers of science, for example, now reject the notion of a unitary scientific method in favor of nonfoundationalist views of the scientific enterprise.²⁴ In philosophy as well, foundationalist approaches

ing B. ACKERMAN, *RECONSTRUCTING AMERICAN LAW* (1984)); T. Grey, *Holmes and Legal Pragmatism* (July, 1987) (unpublished manuscript available at Minnesota Law Review). Some of these works are critically analyzed in Tushnet, *Anti-Formalism in Recent Constitutional Theory*, 83 MICH. L. REV. 1502, 1531-44 (1985).

For related work in the broader stream of philosophy, in addition to the works cited in previous notes, see, for example, 3 H. PUTNAM, *REALISM AND REASON: PHILOSOPHICAL PAPERS* 199-204, 287-303 (1983); R. RORTY, *CONSEQUENCES OF PRAGMATISM* (1982); M. WALZER, *SPHERES OF JUSTICE* (1983); B. WILLIAMS, *ETHICS AND THE LIMITS OF PHILOSOPHY* (1985).

This group of scholars is highly diverse, and an intellectual history might well focus on some of the sharp divisions among them. For present purposes, however, their common traits are more significant.

18. See Shiffrin, *supra* note 17, at 1201; Alexander, *supra* note 17, at 251.

19. Sagoff, Book Review, 92 YALE L.J. 1065, 1080-81 (1984).

20. See Kronman, *Bickel's Philosophy of Prudence*, *supra* note 17, at 1569.

21. Komesar, *supra* note 5, at 216-19.

22. See Michelman, *Traces of Self-Government*, *supra* note 17, at 22-26; Wellman, *supra* note 17, at 87.

23. As Frank Michelman put it:

Situated practical judgment seems always to involve a combination of something general with something specific, endorsement of both a general standard and a specific application, or of both a general value and a specific means to its effectuation. Judgment mediates between the general standard and the specific case. In order to apply the standard in the particular context before us, we must interpret the standard. Every interpretation is a reconstruction of our sense of the standard's meaning and rightness. This process, in which the meaning of the rule emerges, develops, and changes in the course of applying it to cases is one that every common law practitioner will immediately recognize.

Michelman, *Traces of Self-Government*, *supra* note 17, at 28-29; see also Kronman, *Bickel's Philosophy of Prudence*, *supra* note 17, at 1605-06 (discussing prudentialism of common law lawyers).

24. In one of the most influential books of the past thirty years, Thomas Kuhn argued that a complex undertaking such as modern physics cannot be reduced to a simple set of rules. Instead, modern physics relies on a whole collection of shared values, assumptions, and techniques. T. KUHN, *THE STRUCTURE OF SCIENTIFIC REVOLUTIONS* (1962); see also Luban, *Legal Modernism*, 84 MICH. L. REV. 1656, 1691 (1986) (lack of mechanical determinacy acceptable in

have come under increasing attack. Robert Nozick has explained the growing concern about the viability of foundationalist philosophical analysis:

Philosophers often seek to deduce their total view from a few basic principles, showing how all follows from their intuitively based axioms. The rest of the philosophy then strikes readers as depending upon these principles. One brick is piled upon another to produce a tall philosophical tower, one brick wide. When the bottom brick crumbles or is removed, all topples, burying even those insights that were independent of the starting point.²⁵

As philosophers increasingly have realized, an interlocking web of belief, in which each belief is supported by many others rather than by a single foundational "brick," is inherently far sturdier than a tower.²⁶ Like nonfoundational legal scholars,

applying legal principles). In other words physics is as much a way of life as a body of rules. Kuhn spoke of the ongoing everyday work of the scientist as "normal science"; occasionally this process breaks down until a new paradigm can be devised. T. KUHN, *supra*, at 24-25.

Kuhn's "paradigms" have become part of the common intellectual vocabulary, but the term is almost always used to mean something like "world-view." Kuhn had a more specific meaning in mind. For him a paradigm was not so much a set of assumptions or a perspective as an actual example of scientific work that served as a model for future researchers. T. KUHN, *THE ESSENTIAL TENSION: SELECTED STUDIES IN SCIENTIFIC TRADITION AND CHANGE* 292-319 (1977) [hereinafter T. KUHN, *ESSENTIAL TENSION*]. Thus, Newton not only created specific theories, but his own work became the very model of what it was to be a physicist. Similarly, the discovery of Uranus became a paradigm for work in astronomy. See T. KUHN, *THE STRUCTURE OF SCIENTIFIC REVOLUTIONS* 114-15 (1962). As Kuhn explained such models transmit the scientific tradition:

Scientists work from models acquired through education and through subsequent exposure to the literature often without quite knowing or needing to know what characteristics have given these models the status of community paradigms. And because they do so, they need no full set of rules. The coherence displayed by the research tradition in which they participate may not imply even the existence of an underlying body of rules and assumptions that additional historical or philosophical investigation might uncover. . . . Paradigms may be prior to, more binding, and more complete than any set of rules for research that could be unequivocally abstracted from them.

Id. at 46.

Kuhn noted the importance of problem solving exercises in the education of scientists. See T. KUHN, *ESSENTIAL TENSION*, *supra*, at 350-51. Kuhn also stressed the role of shared scientific values, which shape but "do not determine choice." *Id.* at 331.

25. R. NOZICK, *PHILOSOPHICAL EXPLANATIONS* 3 (1981).

26. Even if we are satisfied that, in Nozick's analogy, the bottom brick suggested by a commentator is an important insight, we may not be committed to accepting the additional bricks on top of it. "[T]he fact that deduction necessitates its conclusions gives rise to an important objection to the deductive thesis—namely, that deduction cannot accommodate the distinction between the applicability of a rule and its warranted application." Wellman, *supra* note

nonfoundational philosophers have come to realize that reason can encompass more than deductive logic.²⁷

In this Article, I use the term *legal pragmatism* for the nonfoundational approach to law. This term highlights the connection between the new turn in legal thought and the American pragmatist philosophers. Although, as we shall see, the pragmatists were not opponents of such virtues as community, tradition, or seasoned judgment,²⁸ they emphasized the active role of intelligence in solving social problems.²⁹ Thus, pragmatism evokes, better than some of the other terms,³⁰ the blend of intelligent creativity and the conservative virtues that charac-

17, at 107; see also *id.* at 69-74 (discussing deductive validity). When a concrete application of grand theory cannot be squared with our complex, situationally sensitive web of beliefs, the former is most likely to give way. As Don Herzog explained:

Suppose for a moment that someone succeeds, where so many have failed, in discovering the foundations of political theory. He arrives at some remote premises that we all concede are undeniable. Then he triumphantly unfolds the implications contained in the junction of the premises and the true minor premises he adds The outcome he counts on, of course, is agreement, the end of doubt—the best sign that he has developed a stunning justification. But contrast our political commitments to our commitment to his foundations. The political commitments are staunch, even fervent, carefully considered in vivid and concrete contexts; the foundational commitment is new, tentative, probably fuzzy because the foundations are so abstract. If it turns out they are incompatible, which are we more likely to abandon?

D. HERZOG, *WITHOUT FOUNDATIONS* 222-23 (1985); see also J. FISHKIN, *BEYOND SUBJECTIVE MORALITY* 118 (1984) (“[T]he basis for any given [rationalist decisional] procedure is not so strong that we must cling to it regardless of *any* of its implications for particular cases.”) (emphasis in original).

27. The “web of belief,” as opposed to the “tower,” is an especially appropriate model of legal decision making. In law a supportable answer may sometimes descend from deductive analysis alone. More often such an answer will ascend from a combination of arguments, none of which standing alone would constitute a sufficient justification. Such “supporting arguments” are “rather like the legs of a chair and unlike the links of a chain.” R. SUMMERS, *INSTRUMENTALISM AND AMERICAN LEGAL THEORY* 156 (1982). The judge’s search, then, is for contextual justification for the best legal answer among the potential alternatives. See Stick, *supra* note 17, at 349-51.

28. John Dewey, for example, emphasized all of these in his writings. See J. DEWEY, *THE PUBLIC AND ITS PROBLEMS* 57, 105, 111, 154, 159-61, 213-15 (1927).

29. For the reader who is unfamiliar with pragmatism, the essays by Bernstein and Rorty in *POST-ANALYTIC PHILOSOPHY* 3, 48 (J. Rajchman & C. West eds. 1985), provide a good introduction. A more extensive contemporary argument for pragmatism can be found in R. RORTY, *supra* note 17.

30. See *supra* notes 18-22 and accompanying text.

terizes our great judges.³¹ As the example of Justice Brandeis demonstrates,³² the pragmatist judge can seek to foster social progress while still honoring the existing legal tradition.

I begin the case for legal pragmatism with a negative argument: the alternative does not work. I then discuss some of the attractive features of legal pragmatism. I complete the case for legal pragmatism by addressing the concerns raised by some scholars about whether pragmatism is compatible with such judicial virtues as respect for precedent and tradition, and, more generally, with principled decision making.

A. FOUNDATIONALISM AND ITS DISCONTENTS

In the last fifteen years, a tremendous outpouring of scholarly works on constitutional theory has occurred.³³ From the right have come strong arguments for original intent as the key to constitutional adjudication,³⁴ met on the left with arguments in favor of other sources of constitutional guidance such as case law, societal consensus, or moral philosophy.³⁵ Although able scholars have skillfully argued each of these approaches, no consensus has emerged about the proper approach to judicial review or the best basis for justifying review. Scholars have not met the demand for a principled foundation for judicial review. Of course, continued efforts might yet bear fruit; perhaps all we need is a little more patience. For several reasons, however, the foundationalist search seems unlikely to succeed.

To begin with, the flaws in existing foundationalist efforts are deep and difficult to remedy. Originalism is vulnerable to attacks that by now are familiar.³⁶ Original intent is often diffi-

31. See Fuller, *Reason and Fiat in Case Law*, 59 HARV. L. REV. 376, 376-77 (1946) (on Cardozo); T. Grey, *supra* note 17, at 31-33, 71-75.

32. Brandeis has been called "perhaps the greatest *practicing* pragmatist American law has known." T. Grey, *supra* note 17, at F18 n.265 (emphasis in original). For a recent appraisal of his years on the bench, see Krislov, *Reappraising Brandeis: Comments on Recent Works*, 4 CONST. COMMENTARY 319, 325-27 (1987).

33. Although debate about specific constitutional issues has certainly continued, much of the limelight has shifted to larger questions of judicial legitimacy.

34. The most famous are R. BERGER, *GOVERNMENT BY JUDICIARY* 363-72 (1977), and Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1 (1971).

35. See, e.g., P. BOBBITT, *CONSTITUTIONAL FATE* (1982); J. ELY, *supra* note 3, at 73-104; M. PERRY, *supra* note 3, at 91-145; Fiss, *Objectivity and Interpretation*, 34 STAN. L. REV. 739 (1982); Levinson, "The Constitution" in *American Civil Religion*, 1979 SUP. CT. REV. 123.

36. A fuller analysis of originalism will appear in D. FARBER & S. SHERRY,

cult to ascertain because of blanks in the historical record (particularly concerning the views of the ratifiers of constitutional provisions), the divergent views of decision makers, and the usual difficulties of interpreting any text (particularly texts of ancient vintage).³⁷ Beyond these practical problems is the question of just what kind of intent to look for. For example, do we look for the framers' philosophical theory of equality, their general views of racial discrimination, their (possibly nonexistent) specific views about affirmative action, or the views they would have had about affirmative action if they had thought about it then or if they were alive today? And more fundamentally, why is the intent of the long-dead authors of the Constitution binding on present-day Americans, many of whom would have been disenfranchised in 1789 or 1866 anyway? None of these arguments individually is devastating, but cumulatively they make the originalist project dubious.

Although originalism is unsatisfying, its rivals have also been subject to withering criticism.³⁸ Nonoriginalists have looked in various directions for the correct judicial methodology, including a search for flaws in the political process, reliance on community consensus or tradition, excursions into political philosophy, and more recently forays into literary criticism. Yet none of these approaches has proved satisfactory as an alternative to originalism. Again, the flaws are familiar. Each nonoriginalist method turns out to be too vague or too controversial to serve as a foundation for judicial review. Nonoriginalists also seem unable to take the constitutional text and history sufficiently seriously. If judges can readily identify community, or perhaps even transcendental, values, the need for legislatures and the rest of democratic government is unclear. And if judges are free to create constitutional law out of thin air, why do we bother having a written and popularly ratified Constitution at all?³⁹

A HISTORY OF THE AMERICAN CONSTITUTION, ch. 14 (forthcoming 1988). For a helpful article assembling the arguments against originalism, see Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U.L. REV. 204 (1980).

37. These arguments are summarized in Brest, *supra* note 36, and in Komesar, *supra* note 5, at 203-10.

38. The earlier attempts at nonoriginalist theory are incisively critiqued in Brest, *The Fundamental Rights Controversy: The Essential Contradictions of Normative Constitutional Scholarship*, 90 YALE L.J. 1063 (1981). More recent efforts relying on literary theory are demolished in Grey, *The Constitution as Scripture*, 37 STAN. L. REV. 1 (1984).

39. In a sense the one fundamental value the nonoriginalists cannot seem to account for is democracy itself. See J. ELY, *supra* note 3, at 59-60.

The problem is not that either the originalists or their opponents are completely wrong.⁴⁰ Both approaches seem to have important and useful ideas, and both approaches can be helpful in deciding cases. But neither approach seems likely to provide a satisfactory foundation for constitutional law. Together, constitutional text, history, political philosophy, and the American tradition may point to answers in individual cases, but none of them standing alone can provide enough support or direction for the practice of judicial review.⁴¹

Even if the available foundationalist theories were more viable, they probably could not do the work their creators intend. Ultimately, foundationalist theories are intended to make judicial decisions more principled. In practice they seem unlikely to have that effect for two reasons.

First, foundationalist theories are too abstract to determine the results in particular cases. Even if all of the theoretical problems with originalism were resolved, for example, originalist judges would be as likely as professional historians to differ in their interpretations of the historical records.⁴² Rather than debate the virtues and vices of affirmative action, originalist judges would debate the proper interpretation of the debates on the Freedman's Bureau.⁴³ Not only would the results likely reflect political predispositions, but the real values at stake would be concealed beneath historiographic debates.⁴⁴ Nonoriginalist judges likewise could find themselves engaged in equally unproductive debates about the proper reading of Kant or Locke.⁴⁵

Second, unless a majority of the members of the Court agree on a single version of foundationalism, foundationalism can lead to inconsistent and therefore unprincipled judicial out-

40. My reason for dismissing them so cursorily here is not that these theories are unimportant, but just that their flaws are so well known. Despite these flaws, both originalism and its competing theories have much to offer.

41. Ely devastatingly criticizes each individual nonoriginalist methodology, see J. ELY, *supra* note 3, at 43-72, but never discusses the possibility of their functioning jointly. See Kaufman, *supra* note 3, at 191-92.

42. Presumably, if constitutional interpretation were purely a matter of historical research, we would do better to turn constitutional law over to the American Historical Association rather than the Supreme Court.

43. See Belz, *The Civil War Amendments to the Constitution: The Relevance of Original Intent*, 5 CONST. COMMENTARY 115, 137 (1988).

44. For a vigorous but ultimately unsuccessful defense of originalism, see Maltz, *The Failure of Attacks on Constitutional Originalism*, 4 CONST. COMMENTARY 43 (1987).

45. Ely imagines the following judicial opinion: "We like Rawls, you like Nozick. We win, 6-3. Statute invalidated." J. ELY, *supra* note 3, at 58.

comes. Whenever three or more theories are present on the Court, the possibility exists for cycles in which proponents of the various theories form shifting coalitions, leading to a pattern of outcomes consistent with none of the theories.⁴⁶ Constitutional law—viewed as a set of outcomes—might well be more consistent and principled if the Justices took into account from the beginning the differing views of their colleagues, rather than sticking to their own foundationalist theories.⁴⁷

Besides failing to make judicial decision making more principled, the foundationalist project might also fail to achieve another of its major goals, making judicial review acceptable in a democracy. Rigorously foundationalist Justices, being less willing to compromise their views with those held by other branches of government or major social groups—and unwilling to be swayed by the intensely held views of other Justices—very well might be seen as zealots rather than prophets, imposing a narrow sectarian political creed on the rest of society. Having embraced a global constitutional theory, the Court would also find it more difficult to make adjustments as society changed. Thus, a Court obsessed with theoretical consistency might be less able to play a useful role in the practical tasks of democratic government.⁴⁸

B. THE PRAGMATIST ALTERNATIVE

The heart of pragmatist thought is the view that the ultimate test is always experience.⁴⁹ The truth of propositions is to be tested by their “cash value,” James said, that is, their consequences in terms of our experiences.⁵⁰ Similarly, according to

46. See Easterbrook, *Ways of Criticizing the Court*, 95 HARV. L. REV. 802, 826 (1982). “There is no reason why we cannot ask each Justice to develop a principled jurisprudence and to adhere to it consistently. What we cannot do is ask the same of the Court, as an institution.” *Id.* at 832.

47. See Kress, *The Interpretive Turn*, 97 ETHICS 834, 847-48 (1987).

48. See Kronman, *Bickel's Philosophy of Prudence*, *supra* note 17, at 1589-1603.

49. See, e.g., PHILOSOPHICAL WRITINGS OF PIERCE 5 (J. Buchler ed. 1955) (“experience alone teaches anything”). The picture most congenial to the pragmatist is not the thinker contemplating the Absolute in his study, but the mechanic grappling with a tough repair job in the machine shop. No foundational view can tell the mechanic in advance how to solve every problem.

50. See W. JAMES, PRAGMATISM 95-113 (1975). The following passage summarizes his view:

Pragmatism, on the other hand, asks its usual question. “Grant an idea or belief to be true,” it says, “what concrete difference will its being true make in anyone’s actual life? How will the truth be realized? What experiences will be different from those which would obtain if

Dewey, the value of art rests in its ability to enrich the human experience.⁵¹

Pragmatism seems especially congenial to the legal mind. Like the pragmatist philosophers,⁵² lawyers are trained to be highly suspicious of glittering generalities and abstract theories. Holmes's adage that the life of the law is experience rather than logic⁵³ summarizes much of the lawyer's creed. The case method used in law schools, at its best, forces students to think about specific cases rather than general rules⁵⁴—thinking things rather than words, to paraphrase another Holmesianism.⁵⁵

Pragmatism has several advantages as an approach to constitutional law. First, pragmatism responds to our sense that some constitutional problems are simply *hard* and unresponsive to any preset formula; it may take all of our intelligence and creativity to devise an acceptable solution. Foundational grand theories aspire to make constitutional law easy by providing a single recipe for all decisions—a recipe, moreover, that will never require change, no matter how much society evolves. Foundationalist analysis supposes that the genuine conflicts that underlie many constitutional cases will dissolve. Pragmatism, however, acknowledges that there are real conflicts that have to be squarely confronted rather than finessed.⁵⁶

Second, pragmatism is a politically healthier approach to

the belief were false? What, in short, is the truth's cash-value in experiential terms?"

Id. at 97; see PHILOSOPHICAL WRITINGS OF PIERCE, *supra* note 49, at 25, 29-31, 252, 290.

51. J. DEWEY, *ART AS EXPERIENCE* 85, 117, 344-46 (1934).

52. James stated:

A pragmatist turns his back resolutely and once for all upon a lot of inveterate habits dear to professional philosophers. He turns away from abstraction and insufficiency, from verbal solutions, from bad *a priori* reasons, from fixed principles, closed systems, and pretended absolutes and origins. He turns towards concreteness and adequacy, towards facts, towards action, and towards power. . . . [This] means the open air and possibilities of nature, as against dogma, artificiality and the pretence of finality in truth.

W. JAMES, *supra* note 50, at 31.

53. O. HOLMES, *supra* note 1, at 312; see also *id.* at 213 ("Law, being a practical thing, must found itself on actual forces.").

54. See Merryman, *Legal Education There and Here: A Comparison*, 27 STAN. L. REV. 859, 873-75 (1975).

55. O. HOLMES, *COLLECTED LEGAL PAPERS* 238 (1920).

56. Pragmatism also allows judges to use every available intellectual tool to solve constitutional problems. Foundationalists seek to isolate some privileged set of constitutional techniques—whether they be the techniques of literary criticism, political philosophy, or historical analysis. Constitutional

constitutional law. By encouraging incremental decision making rather than global remedies, pragmatism reduces the risk of unjustified radical intrusions into social institutions, and increases the possibility of dialogue between the Court and other segments of society. It also allows judges to appeal to a broad range of values, rather than restricting them to a single source of normative support. For example, majoritarianism is a powerful American value, as both originalists and process theorists insist.⁵⁷ Yet a judicial decision may be stronger if it does not rely exclusively on majoritarianism, because other widely shared values may have a more decisive bearing in cases in which the implications of majoritarianism are ambiguous. By appealing to a broader web of values, the judge may be better able to build consensus.

Third, although pragmatism is not solely concerned with the utilitarian consequences of judicial decisions, it does prompt a healthy concern about the societal impact of law.⁵⁸ Too often, judges seem unconcerned about the societal effects of constitutional rules. For example, the Supreme Court struck down the legislative veto while explicitly disclaiming any interest in whether that device had promoted the goals of democratic self-government.⁵⁹ Similarly, in recent busing cases, the Court has never evidenced any concern about whether busing has functioned effectively to promote racial equality in education.⁶⁰ This is not to say that the results of these cases were wrong, but the Court could profitably give more thought to whether its decisions actually further societal goals such as freedom, equality, and democracy.

Despite these virtues legal pragmatism has come under serious attack. Critics charge that it is inconsistent with respect toward precedent, history, and legal texts; that it is incompatible with strong enforcement of individual rights; and that it leads to unprincipled and inconsistent judicial decisions.

The most vehement of the recent critics has been Ronald Dworkin. In a recent book, he attacks legal pragmatism as essentially unprincipled:

problems are difficult enough without deciding in advance to rule certain techniques off limits.

57. See J. ELY, *supra* note 3, at 63-69.

58. See T. Grey, *supra* note 17, at 7-9.

59. See *INS v. Chadha*, 462 U.S. 919, 959 (1983).

60. See *Dayton Bd. of Educ. v. Brinkman*, 443 U.S. 526 (1979); *Columbus Bd. of Educ. v. Penick*, 443 U.S. 449 (1979); *Dayton Bd. of Educ. v. Brinkman*, 433 U.S. 406 (1977).

The pragmatist takes a skeptical attitude toward the assumption we are assuming is embodied in the concept of law: he denies that past political decisions in themselves provide any justification for either using or withholding the state's coercive power. He finds the necessary justification for coercion in the justice or efficiency or some other contemporary virtue of the coercive decision itself, as and when it is made by judges, and he adds that consistency with any past legislative or judicial decision does not in principle contribute to the justice or virtue of any present one. If judges are guided by this advice, he believes, then unless they make great mistakes, the coercion they direct will make the community's future brighter, liberated from the dead hand of the past and the fetish of consistency for its own sake.⁶¹

In its most "virulent" form, Dworkin says, pragmatism becomes activism: "[a]n activist justice would ignore the Constitution's text, the history of its enactment, prior decisions of the Supreme Court interpreting it, and long-standing traditions of our political culture."⁶² The activist would "ignore all these in order to impose on other branches of government his own view of what justice demands."⁶³ The less virulent pragmatist, Dworkin observes, does pay some attention to precedent, not for its own sake but because of the social interest in legal stability and predictability.⁶⁴

Dworkin's understanding of pragmatism as a form of instrumentalism is shared even by some authors more sympathetic to pragmatism.⁶⁵ His understanding is nevertheless quite mistaken. The pragmatist philosophers were keenly sensitive to the importance of tradition, not just as an instrumental value but as a necessary ingredient in all human reasoning.⁶⁶ For the pragmatists, tradition was not, as Dworkin would have it, the "dead hand of the past," but rather the essential foundation for intellectual and social progress. Consistency with the past is, as Holmes said, as much a necessity as a virtue, for "[t]he past gives us our vocabulary and fixes the limits of our imagina-

61. R. DWORKIN, *LAW'S EMPIRE* 151 (1986); *see also id.* at 95 (Under pragmatism, judges would "make whatever decisions seem to them best for the community's future, not counting any form of consistency with the past as valuable for its own sake.").

62. *Id.* at 378.

63. *Id.*

64. *Id.* at 158.

65. *See* West, *supra* note 17, at 724-29 (arguing that pragmatism is instrumentalist and rejects tradition as source of moral authority).

66. This does not mean, of course, that a pragmatist judge must *always* respect precedent rather than basing decisions on broader principles. A "return to first principles" is essentially a rejection of a narrow part of the tradition to be faithful to a broader vision of that tradition.

tion."⁶⁷ According to the pragmatists, the mind is never a blank sheet; it is always structured by experience and culture.⁶⁸

Thus, according to Dewey, creativity and innovation do not arise from a rejection of tradition but rather from a full embrace of it:

"Schools" of art are more marked in sculpture, architecture, and painting than in the literary arts. But there has been no great literary artist who did not feed upon the works of the masters of drama, poetry, and eloquent prose. In this dependence upon tradition there is nothing peculiar to art. The scientific inquirer, the philosopher, the technologist, also derive their substance from the stream of culture. This dependence is an essential factor in original vision and creative expression. The trouble with the academic imitator is not that he depends upon traditions, but that the latter have not entered into his mind; into the structure of his own ways of seeing and making. They remain upon the surface as tricks of technique or as extraneous suggestions and conventions as to the proper thing to do.⁶⁹

Similarly, pragmatist judges would not simply view existing law as a constraint or as a factor in a utilitarian analysis. Instead, they would have already internalized it as part of their own way of thinking.⁷⁰

Dworkin's error stems from a common confusion between pragmatism and forms of instrumentalism such as utilitarianism.⁷¹ Dewey, for example, strongly attacked instrumentalism for assuming that goals and means could be separated. As he explained, the means used are themselves part of the consequences of a decision and therefore must be assessed in making a choice.⁷² For instance, a "good political constitution, honest police-system, and competent judiciary, are means of the prosperous life of the community because they are integrated portions of that life."⁷³ They are not, in other words, simply ways of promoting other social benefits; they are also social benefits

67. See O. HOLMES, *supra* note 55, at 139.

68. See W. JAMES, *supra* note 50, at 35, 83, 104, 119; PHILOSOPHICAL WRITINGS OF PIERCE, *supra* note 49, at 256.

69. J. DEWEY, *supra* note 51, at 265. Earlier in the book, Dewey observes that great artists digest rather than shun tradition. *Id.* at 159.

70. A similar view is expressed in R. BERNSTEIN, BEYOND OBJECTIVISM AND RELATIVISM: SCIENCE, HERMENEUTICS, AND PRAXIS 77, 129-31, 142 (1983).

71. For another example from a sympathetic student of pragmatism, see West, *supra* note 17, at 724-28; see also *id.* at 735 (citing Bentham, a founder of utilitarianism, to explain the pragmatist perspective on the abortion issue). A similar misreading of Lon Fuller's work is criticized in Teachout, *supra* note 17.

72. J. DEWEY, EXPERIENCE AND NATURE 361-63, 367-68 (1925). Holmes shared this view. See T. Grey, *supra* note 17, at 82.

73. J. DEWEY, *supra* note 72, at 367.

in themselves.⁷⁴

The difference between the Dworkinian judge and the pragmatist is not that the pragmatist views the past as a dead hand. Rather, unlike Dworkin's mythical judge Hercules,⁷⁵ the pragmatist does not purport to be an outside observer of legal texts, seeking the proper interpretation. For the pragmatist, existing law is not primarily a collection of texts that requires a struggle to interpret, but rather a way of thought that a judge has internalized.⁷⁶ Rather than being constrained by existing law, the pragmatist judge is empowered by the legal tradition⁷⁷—without it, the judge would hardly know how to begin to think about deciding cases.⁷⁸

Another common objection to legal pragmatism is that it is inconsistent with full recognition of legal rights. Dworkin, for example, contends that the pragmatist does not really believe that people have rights. Only as a strategic matter, he says,

74. The pragmatist judge, then, views the written opinion not just as a way of obtaining other social goods, but also as an activity worth doing well for its own sake. Because the judge is part of an ongoing legal tradition, the relationship of the judge's decisions to that tradition is an essential part of evaluating them.

75. Hercules is "an imaginary judge of superhuman intellectual power and patience," R. DWORKIN, *supra* note 61, at 239, who carries out Dworkin's jurisprudential program. In Dworkin's view a judge should attempt to construct a global interpretation of all existing legal texts that both makes them consistent with each other and also makes the legal system the best possible system consistent with these texts. *See id.* at 225-58. Dworkin summarized his position as follows:

Judges who accept [his view] decide hard cases by trying to find, in some coherent set of principles about people's rights and duties, the best constructive interpretation of the political structure and legal doctrine of their community. They try to make that complex structure and record the best these can be.

Id. at 255. In short, for Dworkin, a judge is someone who develops a successful interpretive theory that covers existing legal materials and then applies it to particular cases. From a pragmatic point of view, what is most problematic about this perspective is that it portrays the judge as someone standing outside of and theorizing about society, rather than as an active participant in that society.

76. When someone expresses concern that a potential judicial nominee "lacks the judicial temperament" or is "too ideological" or "not in the mainstream," the real issue is often whether the potential nominee has really internalized legal thought, or merely goes through the motions of legal analysis to justify results reached on other grounds.

77. Similar views are expressed in Black, *Reflections on Teaching and Working in Constitutional Law*, 66 OR. L. REV. 1, 16-17 (1987); Fish, *Anti-Professionalism*, 7 CARDOZO L. REV. 645, 670 (1986).

78. This critique of Dworkin is forcefully presented in Fish, *supra* note 17, at 1780-81, 1785-94.

does the pragmatist act "*as if*" people had rights.⁷⁹ It is true that the pragmatist does not view rights as part of the ontological furniture of the world, having some existence independent of particular human societies. To discover whether the members of an isolated tribe have legal rights, we have to go talk to them; we cannot find the answer by reading Rawls, Nozick, or Dworkin. But living in a society that does recognize the existence of legal rights, the American pragmatist need not view those rights as purely instrumental means of acquiring other goods. For, as we have already seen, the pragmatist is committed to denying the dichotomy between ends and means.

A related question is whether pragmatism is compatible with full support for constitutional rights against majoritarian legislation. Several authors have argued that utilitarianism is inconsistent with judicial protection of constitutional rights, in terms that might seem to apply to pragmatism as well. The argument is that utilitarianism makes individual happiness the test for social decisions, and voters are better able to register their preferences at the ballot box than judges are able to discern those preferences.⁸⁰ Moreover, all preferences have equivalent value so long as their fulfillment makes people happy, so courts cannot distinguish between fundamental human values and any other form of social gratification.⁸¹

This argument is of doubtful validity even against utilitarianism,⁸² but is clearly invalid as applied to pragmatism. The pragmatist is not committed to viewing all gratifications as equal. Instead, the pragmatist seeks to promote an evolving picture of human flourishing.⁸³ And it is quite foreign to the spirit of pragmatism to say that some one method, such as majority voting, is *a priori* the best way to promote social welfare. Like all other questions, the question of how to promote a flourishing society for the pragmatist is to be answered as much by experience than theory.⁸⁴

For the pragmatist, then, the question of the advisability of judicial review turns on its usefulness for promoting a flourish-

79. R. DWORKIN, *supra* note 61, at 152-53 (emphasis in original).

80. See Ely, *Constitutional Interpretivism: Its Allure and Impossibility*, 53 IND. L.J. 399, 404-06 (1978).

81. Bork, *supra* note 34, at 10-11.

82. For a persuasive rebuttal of this argument, at least as applied to John Stuart Mill, see West, *In the Interest of the Governed: A Utilitarian Justification for Substantive Judicial Review*, 18 GA. L. REV. 469 (1984).

83. This point is persuasively made in West, *supra* note 17, at 693-701.

84. See J. DEWEY, *supra* note 28, at 145-46, 202-03.

ing democratic society—democratic not just in the sense of ballot casting but also in the sense that citizens are in charge of the intelligent development of their lives.⁸⁵ Has judicial review promoted such a society? The record over the past two centuries has been ambiguous, but on the whole judicial review seems to have worked. In any event, for the pragmatist, the question is not a pressing one.⁸⁶ Judicial review *is* a part of our social system, and the live questions do not involve musty, theoretical disputes about its legitimacy or desirability, but acutely pressing disputes about its proper exercise.⁸⁷

As to whether pragmatism is consistent with a true commitment to rights such as free speech, the answer is surely *yes*. Pragmatists such as Dewey placed great faith in the ability of individuals to grow and control their lives intelligently. This faith leads to a corresponding enthusiasm about freedom of expression.⁸⁸ Moreover, because the pragmatist does not feel the foundationalist need to isolate a single value in support of the first amendment, the amendment can be tied to a broad range of social goods such as the functioning of the democratic process, development of the arts, progress in the sciences, protection of minorities, as well as an appreciation of free speech as a value in and of itself.⁸⁹ For those who doubt that pragmatic judges can be expected to do battle for great constitutional principles like free speech, the example of Justice Brandeis is again instructive.⁹⁰

One final question is whether pragmatism leads to ad hoc

85. See *id.* at 111, 125-35, 143-45, 147-49; West, *supra* note 17, at 717.

86. See Kaufman, *supra* note 3, at 185, 187-88.

87. As Grey states:

The truth is that there is just enough of a case for the legitimacy of supplemental judicial review to convince those of us who already believe that, on the whole, the practice produces somewhat better results than would occur in its absence. This modest precedential defense at least does not oversell the product by presupposing, with little justification, that our political life would be both very different and very much worse than it is were it not for judicial review.

Grey, *supra* note 38, at 20. Grey invokes the Burkean presumption that any long-standing social practice probably serves some useful purpose.

88. See J. DEWEY, *supra* note 28, at 166-71, 176-84, 208-09; West, *supra* note 17, at 717, 731.

89. Phil Frickey and I have discussed this point at length in a recent article. See Farber & Frickey, *supra* note 16, at 1639-56.

90. On Brandeis as a pragmatist, see *supra* note 32. For Brandeis's stirring defense of free speech, see *Whitney v. California*, 274 U.S. 357, 372 (1927) (Brandeis, J., concurring).

decisions, lacking any coherence or attachment to principle.⁹¹ Dewey certainly thought not. Indeed, he stressed the importance of system in law, so as to make law as coherent and predictable as possible.⁹² The difference between the pragmatist and the foundationalist is not that the pragmatist disavows legal theory, but rather that the pragmatist takes no position in advance about how broad in scope such theory should be. Can we have a unified theory of all private law, all contract law, and all promissory estoppel cases, or perhaps only promissory estoppel cases dealing with promises of pension benefits to employees? For the pragmatist, the only way to answer this question is to decide cases, try to construct theories, and determine what level of generality works best. The pragmatist would like as much system as possible but is agnostic about how much this will really turn out to be.

The real test for legal pragmatism—on pragmatist terms!—is not whether it can meet these theoretical objections, but whether it works, in the sense of providing the basis for a persuasive analysis of concrete constitutional problems. The remainder of this Article attempts to provide a pragmatist perspective on a difficult constitutional problem. The goal is not, of course, definitively to resolve the problem, but rather to identify a viable (if provisional) solution.

II. A PRAGMATIC PERSPECTIVE ON THE FUNDAMENTAL RIGHTS DEBATE

As John Ely has pointed out, much of the contemporary debate about the foundations of constitutional law is really a debate about *Roe v. Wade*⁹³ and the related line of privacy cases.⁹⁴ The attack immediately made against *Roe* was that the Court had simply resurrected the “old” substantive due process of the *Lochner v. New York*⁹⁵ period, in which the Court read freedom of contract into the Constitution as a fundamental right. Today, a new wrinkle has been added to the debate by arguments that economic liberty does indeed deserve a greater degree of constitutional protection than it currently receives.

Analytically, the fundamental rights debate can be broken

91. This is the charge made in Alschuler, *Failed Pragmatism: Reflections on the Burger Court*, 100 HARV. L. REV. 1436, 1437, 1455 (1987).

92. Dewey, *Logical Method and Law*, 10 CORNELL L.Q. 17, 19, 24-25 (1924).

93. 410 U.S. 113 (1973).

94. See J. ELY, *supra* note 3, at 2-3.

95. 198 U.S. 45 (1905).

down into three questions. First, is the entire idea of fundamental rights justifiable? Second, is economic freedom such a fundamental right? Or in other words, was *Lochner* really wrong? And third, what about *Roe*—can it really be distinguished from *Lochner*?

A. THE LEGITIMACY OF FUNDAMENTAL RIGHTS

There is no doubt that a court enforcing the first amendment may have to address thorny issues and that the answers are often controversial. But a court deciding a first amendment case does have the assurance that the Constitution has something to say about the case. How to apply the first amendment may be difficult, but at least no one doubts that the Constitution really does protect some forms of speech.

When we leave the specific provisions of the Bill of Rights, however, the very relevance of the Constitution becomes questionable. Before even addressing *what* the Constitution has to say about abortion, for example, we have to face grave doubts about whether it has anything to say about the matter. Before considering whether specific rights are fundamental, it behooves us to consider whether courts should ever enforce rights that are not specifically designated in the Constitution.

For a pragmatist the analysis must start—but not finish—with an examination of our constitutional text, history, and traditions. The text itself strongly suggests that additional, nonenumerated rights exist. In particular, the ninth amendment seems quite explicit: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."⁹⁶ The fourteenth amendment's reference to "privileges or immunities of citizens of the United States"⁹⁷ also implies the existence of some category of unspecified rights.

History also supports the recognition of fundamental rights. Natural rights concepts permeated American thought in the revolutionary period.⁹⁸ To take just a few scattered examples, the most notable embodiment of the natural rights view is

96. U.S. CONST. amend. IX.

97. U.S. CONST. amend. XIV, § 1.

98. For an extensive discussion of this history, see Grey, *Origins of the Unwritten Constitution: Fundamental Law in American Revolutionary Thought*, 30 STAN. L. REV. 843 (1978); see also B. BAILYN, *THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION* 184-89 (1967); B. WRIGHT, *AMERICAN INTERPRETATIONS OF NATURAL LAW: A STUDY IN THE HISTORY OF POLITICAL THOUGHT* 3-123 (1931).

the Declaration of Independence itself. Another famous example is James Otis's argument against the right of Parliament to authorize writs of assistance: "As to Acts of Parliament, an Act against the Constitution is void: an Act against natural Equity is void: and if an Act of Parliament should be made, in the very Words of this Petition, it would be void. The Executive Courts must pass such Acts into disuse."⁹⁹ Similarly, in protesting the Stamp Act, the Whigs turned to the courts for support, contending that the Act was unconstitutional and therefore void.¹⁰⁰

Some recent historical scholarship suggests that the belief in natural law as a judicially enforceable restriction on legislatures persisted into the late eighteenth and early nineteenth centuries.¹⁰¹ Under this view enforcement of natural rights by courts would not even require a textual basis. In any event the enactment of the ninth amendment seems to provide just such a textual basis for fundamental rights.¹⁰² Indeed, the existence of fundamental rights was implicit in the Federalist argument against the need for a Bill of Rights. No Bill of Rights was necessary, the Federalists contended, because the federal government had only limited powers.¹⁰³ This argument makes no sense if each of the enumerated powers is considered to be free of any implicit limitation. For example, without some notion that Congress's power to regulate interstate commerce does not extend to bans on the interstate shipment of religious books, it is difficult to see how Congress's having only a limited number of powers could eliminate the need for explicit protection for religious freedom.¹⁰⁴

99. Grey, *supra* note 98, at 869 (quoting 2 THE WORKS OF JOHN ADAMS 521-22 (C. Adams ed. 1850)).

100. *Id.* at 879-81.

101. See, e.g., Sherry, *The Founders' Unwritten Constitution*, 54 U. CHI. L. REV. 1127 (1987).

102. See J. ELY, *supra* note 3, at 33-41.

103. See D. FARBER & S. SHERRY, *supra* note 36, ch. 8; 2 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADAPTION OF THE FEDERAL CONSTITUTION 435-37 (J. Elliot 2d ed. 1891) [hereinafter ELLIOT'S DEBATES]; THE FEDERALIST No. 84, at 578-79 (A. Hamilton) (J. Cooke ed. 1961). Indeed, the Federalists went farther, contending that a Bill of Rights would actually be dangerous because it would be construed to limit otherwise valid rights that were not on the list. See 3 ELLIOT'S DEBATES, *supra*, at 626 (Madison); 1 ANNALS OF CONG. 439, 732 (J. Gales ed. 1789).

104. Ely suggests that some laws would be universally regarded as barbaric, so that any reasonable civilized judge would feel morally impelled to resign rather than enforce them. See J. ELY, *supra* note 3, at 182-83. Given the Framers' desire to create a federal government of limited powers, however, it seems unlikely that they would have intended to delegate the power to engage in incontestably barbaric conduct. There is no reason to believe that the Bill

There is also substantial historical evidence that the natural law tradition influenced the drafters of the fourteenth amendment.¹⁰⁵ The idea of higher law was deeply embedded in the jurisprudence of the time, particularly in what was then called the *law of nations*, a term that included a variety of subjects such as public international law, conflict of laws, and even parts of commercial law.¹⁰⁶ The antislavery Republicans, including Abraham Lincoln, placed great credence in the Declaration of Independence, with its natural law philosophy. Although the legislative history of the fourteenth amendment is sparse, there were extensive debates on the closely related Civil Rights Act, in which fundamental rights figured prominently.¹⁰⁷ For example, Senator Trumbull, in a major speech defending the bill after President Johnson's veto, asserted that

[t]o be a citizen of the United States carries with it some rights; . . . They are those inherent, fundamental rights which belong to free citizens or free men in all countries, such as the right enumerated in this bill, and they belong to them in all the States of the Union. The right of American citizenship means something.¹⁰⁸

The fundamental rights idea also has been a continuing theme in Supreme Court decisions.¹⁰⁹ Early decisions by Chief Justice Marshall and others had a strong natural law tinge.¹¹⁰

of Rights was intended as a complete catalogue of all unacceptable governmental abuses; the language of the ninth amendment strongly suggests the contrary.

105. For a recent survey of the evidence and the scholarly literature, see Kaczorowski, *Revolutionary Constitutionalism in the Era of the Civil War and Reconstruction*, 61 N.Y.U. L. REV. 863, 890-928 (1986).

106. See Farber & Muench, *The Ideological Origins of the Fourteenth Amendment*, 1 CONST. COMMENTARY 235, 241-46 (1984). The grip of this concept on the judicial mind is illustrated by *Watson v. Tarpley*, 59 U.S. (18 How.) 517 (1855), in which the Supreme Court refused to follow a Mississippi negotiable instruments statute in a Mississippi case because the statute was contrary to the law of nations. *Id.* at 520.

107. Farber & Muench, *supra* note 106, at 246-51. Bingham, who drafted the fourteenth amendment, adhered to a belief in the higher law. See CONG. GLOBE, 36th Cong., 2d Sess. App. 83 (1861).

108. CONG. GLOBE, 39th Cong., 1st Sess. 1757 (1866). For other similar statements by Trumbull, see *id.* at 319, 322, 476, 600. Chase, who was later to be Chief Justice, also expressed natural law views. See THE ANTISLAVERY ARGUMENT 391-92 (W. Pease & J. Pease eds. 1965) ("No court is bound to enforce unjust law." (quoting Chase)).

109. See, e.g., *Terrett v. Taylor*, 13 U.S. (9 Cranch.) 43, 50 (1815) (Story, J.); *Fletcher v. Peck*, 10 U.S. (6 Cranch.) 87, 139 (1810); *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 388, 394 (1798). See generally, Nelson, *The Impact of the Antislavery Movement upon Styles of Judicial Reasoning in Nineteenth Century America*, 87 HARV. L. REV. 513, 530-31 (1974).

110. See Sherry, *supra* note 101, at 1167-76.

From the late nineteenth century through the present, the Court has viewed the due process clause as embodying those rights fundamental to citizens of a free country. This formulation, which received its most notable modern phrasing in Justice Cardozo's opinion in *Palko v. Connecticut*,¹¹¹ was also the basis for the selective incorporation doctrine, under which most of the Bill of Rights was read into the fourteenth amendment.¹¹² And this formulation also figured in Justice Harlan's discussion of the right of privacy, in which he said the fourteenth amendment was intended to embrace fundamental rights "which belong . . . to the citizens of all free governments," for "the purposes" of securing "which men enter into society."¹¹³ This language is remarkably like that used by Senator Trumbull almost exactly a century earlier.

For a pragmatist, precedent and original intent count but are not decisive. The pragmatist must also ask whether the idea of fundamental rights works, whether it produces better results for society. Putting aside the question of judicial enforcement for the moment, the concept of fundamental rights appears to be a useful one. It reminds citizens and legislators that a democracy does not seek total control of its citizens. It recognizes that people, both as individuals and as members of families and other institutions, need room to experiment and grow. The fundamental rights concept is a useful reminder of the value of individual freedom.

A more troublesome question is whether courts should enforce fundamental rights against the actions of other governmental bodies. There is no evading two strong arguments against judicial enforcement: it is subject to abuse, and it always involves some sacrifice of our strong belief in majority rule.

These are powerful arguments for caution, but they do not support complete judicial withdrawal. As the Federalists said in the debates on the Constitution, any power can be abused, but this fear in itself cannot be sufficient to justify eliminating a governmental power.¹¹⁴ As to what is called the "counter-

111. 302 U.S. 319, 326-27 (1937).

112. See, e.g., *Duncan v. Louisiana*, 391 U.S. 145, 148-49 (1968).

113. *Poe v. Ullman*, 367 U.S. 497, 541 (1961) (Harlan, J., dissenting) (quoting *Corfield v. Coryell*, 6 F. Cas. 546, 551 (C.C.E.D. Pa. 1823) (No. 3230) and *Calder*, 3 U.S. at 388).

114. D. FARBER & S. SHERRY, *supra* note 36, ch. 7; Ellsworth, *The Landholder*, No. 3 (Nov. 19, 1787), reprinted in 1 THE FOUNDERS' CONSTITUTION 303, 304 (P. Kirkland & R. Lerner eds. 1987).

majoritarian difficulty," this is always a problem, but sometimes more so than others. For example, the Court in enforcing the fundamental right may be intervening to correct a breakdown in the normal process of representation.¹¹⁵ Or, the decision in question may be an aberration issuing from some eccentric local government and contrary to a clear national consensus.¹¹⁶

Moreover, although majority rule is obviously a very good thing,¹¹⁷ it is contrary to the spirit of pragmatism to transform this observation into an absolute.¹¹⁸ Majority rule is desirable, but invariable adherence to majority rule may not be wise. Sometimes slavish adherence to the norm of majority rule may involve unacceptable sacrifices of other critically important values.¹¹⁹ Unless we place an infinite value on majority rule, there must be some situation in which a small intrusion on this value is justified to avoid a major loss of some other value.¹²⁰

The remaining argument against legal recognition of fundamental rights is that made by Bork and Ely: there simply is no way a court can distinguish a fundamental right from any other personal interest. In its strong form, as made by Bork,¹²¹ this argument is untenable. As a society we do share some notions about the relative importance of various personal inter-

115. See J. ELY, *supra* note 3, at 105-79.

116. See Conkle, *The Legitimacy of Judicial Review in Individual Rights Cases: Michael Perry's Constitutional Theory and Beyond*, 69 MINN. L. REV. 587, 632-34 (1985). One notable example is *Griswold v. Connecticut*, 381 U.S. 479 (1965), discussed in *infra* note 180. Another example is *Moore v. City of East Cleveland*, 431 U.S. 494 (1977), in which the Court struck down a local zoning ordinance that prohibited a grandmother from living with two of her grandchildren, because the two were cousins rather than siblings. Although the Court did take issue with the results of the democratic political process of one small city, it seems doubtful that the result intruded on the views of a nationwide majority. On the contrary, the Court was bringing a deviant locality into line with a firm national consensus. Rhetoric about the counter-majoritarian difficulty just does not ring true on these facts.

117. As Ely demonstrates, this is probably the one point about government on which Americans most agree. See J. ELY, *supra* note 3, at 5-7.

118. The fallacy in Ely's powerful argument against fundamental rights is his shift from the truth that Americans view majority rule as generally the best way to decide issues to the fallacy that we *always* view it this way. See *id.*, *supra* note 3, at 59-60.

119. As Ely concedes, the Framers did think that some substantive values, such as freedom of religion, should not be left to majority control. See *id.*, *supra* note 3, at 94-95.

120. The example of *Moore*, which is discussed *supra* note 116, is also apposite here. The damage to the norm of democratic self-government was minor, while the countervailing value was powerful.

121. See Bork, *supra* note 34, at 10.

ests. Few people seriously think, for example, that the right to eat popcorn is as important as the right to medical care.

Ely's version of this argument, however, is more difficult to answer. Ely contends that on the kinds of issues that actually will come before courts, when a majority has chosen to invade an arguably fundamental right, courts have no principled way of determining whether the right should be considered fundamental.¹²² For the pragmatist the best way to answer Ely is not to contest his theoretical objections directly, but rather to see if fundamental rights analysis works. The best way to find out whether it is possible to draw principled distinctions is to try to draw them. The next two sections attempt to do just that.

B. ECONOMIC LIBERTY AS A FUNDAMENTAL RIGHT

Today, *Lochner* is one of the ogres of constitutional law, mostly used as an epithet to hurl at opposing constitutional theorists.¹²³ The question whether its approach should be resurrected nevertheless deserves attention. Scholars have recently argued for a renewed judicial activism in scrutinizing economic legislation. Although the most notable of these scholars is Richard Epstein,¹²⁴ a prominent conservative, others are centrists or liberals.¹²⁵ Moreover, the Supreme Court has begun to enforce more vigorously the specific constitutional provisions protecting vested property rights,¹²⁶ suggesting the possibility

122. J. ELY, *supra* note 3, at 50-54, 58-59, 66-69.

123. Kennedy, *Toward an Historical Understanding of Legal Consciousness: The Case of Classical Legal Thought in America, 1850-1940*, 3 RES. LAW AND SOC. 3, 10 (1980).

124. See R. EPSTEIN, *TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN* (1985); Epstein, *Toward a Revitalization of the Contract Clause*, 51 U. CHI. L. REV. 703 (1984). Professor Bernard Siegan is another outspoken libertarian advocate of *Lochnerism*. See B. SIEGAN, *THE SUPREME COURT'S CONSTITUTION: AN INQUIRY INTO JUDICIAL REVIEW AND ITS IMPACT ON SOCIETY* 41-88 (1987); B. SIEGAN, *ECONOMIC LIBERTIES AND THE CONSTITUTION* (1980); Siegan, *Rehabilitating Lochner*, 22 SAN DIEGO L. REV. 453 (1985). Siegan was nominated for the U.S. Court of Appeals by President Reagan. See *An Injudicious Choice for Judge*, N.Y. Times, Mar. 5, 1988, at 26, col. 1 (city ed.). In contrast to Siegan, another prominent conservative has been an outspoken critic of the attempt to resurrect *Lochner*. See Bork, *The Constitution, Original Intent, and Economic Rights*, 23 SAN DIEGO L. REV. 823 (1986).

125. See Levy, *Property as a Human Right*, 5 CONST. COMMENTARY 169 (1988); Mashaw, *Constitutional Deregulation: Notes Toward a Public, Public Law*, 54 TUL. L. REV. 849 (1980); Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29, 68-85 (1985).

126. See, e.g., *Nollan v. California Coastal Comm'n*, 107 S. Ct. 3141 (1987); *First English Evangelical Lutheran Church v. County of Los Angeles*, 107 S. Ct. 2378 (1987); *Hodel v. Irving*, 107 S. Ct. 2076 (1987). In land use cases, re-

that the Court might be open to persuasion by these arguments for increased protection for all economic interests.¹²⁷ Finally, any analysis of *Roe* can hardly avoid confronting the question of *Lochner*.

The argument for economic activism comes in three forms. One is based on a natural law theory of property rights and individual economic freedom. Another, based on current economic theories, contends that legislation should be struck down unless it is at least arguably justified by some kind of market failure. Laws that transfer wealth from one group to another, rather than increasing total social wealth, are labeled *rent-seeking* and considered undesirable. A final argument is a less rigorous attack on rent-seeking that would allow the legislature to promote a broader range of public values but that would strike down laws outside of this range.

1. The Natural Law Theory

Richard Epstein is the primary proponent of the natural law theory of property rights and individual economic freedom.¹²⁸ I will not undertake a detailed philosophical critique of his natural law position for two reasons.¹²⁹ First, as a pragmatist, I simply do not believe in the possibility of deducing universal moral principles from unquestionable premises. Second, as a lawyer, I regard the philosophical question as somewhat beside the point. The question, after all, is not whether it is morally wrong for legislatures to engage in economic regula-

strictions on future activities are not always easy to distinguish from takings of present vested rights. As a result these cases have led to fear of a *Lochner* revival. See McGinley, *Regulatory "Takings": The Remarkable Resurrection of Economic Substantive Due Process Analysis in Constitutional Law*, 17 *Env'tl. L. Rep. (Env'tl. L. Inst.)* 10369 (1987).

127. Some lower federal court judges seemingly have some degree of sympathy with arguments for increased judicial protection of property rights. See *Chicago Bd. of Realtors v. City of Chicago*, 819 F.2d 732, 741-45 (7th Cir. 1987) (separate opinion of Posner, J., joined by Easterbrook, J.); *Illinois Psychological Ass'n v. Falk*, 818 F.2d 1337, 1341 (7th Cir. 1987) (Posner, J.). Judge Posner does not, however, accept Epstein's libertarian activism. See Posner, *The Constitution as an Economic Document*, 56 *GEO. WASH. L. REV.* 4, 20-24 (1987).

128. Epstein's views are summarized in Epstein, *An Outline of Takings*, 41 *U. MIAAMI L. REV.* 3 (1986).

129. The interested reader will find a powerful critique of Epstein's natural law theory in Kelman, Book Review, 74 *CALIF. L. REV.* 1829, 1833-44 (1986). The connection between autonomy and property control, which Epstein simplistically identifies, is explored more realistically in Baker, *Property and Its Relation to Constitutionally Protected Liberty*, 134 *U. PA. L. REV.* 741 (1986). In recent speeches, I am told, Epstein has de-emphasized natural law as the basis of his approach.

tion, but rather whether a court should hold such regulations unconstitutional.

In analyzing the constitutional issue, the starting point is again the language and history of the Constitution. The Constitution does show some regard for property rights and also reflects the suspicion that some kinds of economic regulation, such as impairments of contracts, are economically harmful.¹³⁰ Nevertheless, the specific provisions in the Constitution dealing with economic rights all concern vested property rights;¹³¹ that is, they protect assets already acquired by individuals rather than the opportunity to acquire future assets. This is not, of course, to say that they preclude a broader libertarian interpretation, but they certainly do not mandate it.

Moreover, the idea of natural economic rights is contrary to much of our tradition. Benjamin Franklin, for example, once said that " 'Private Property . . . is a Creature of Society, and is subject to the Calls of that Society, whenever its Necessities shall require it, even to its last Farthing; its contributions therefore to the public Exigencies are . . . to be considered . . . the Return of an obligation previously received, or the Payment of a just Debt.' " ¹³² Franklin's views were typical of the colonial and revolutionary period.¹³³ Even when Lockean individualism became more prominent in the period before the framing of the Constitution, it was not understood to entail absolute property rights. The just compensation clause, for example, was narrowly understood to involve only physical seizure of property by the government.¹³⁴

One of the most influential discussions of fundamental

130. See U.S. CONST. art. I, § 10 ("No State shall . . . coin Money; emit Bills of Credit; . . . pass any . . . Law impairing the Obligation of Contracts . . ."); *id.* amend. V ("No person shall be . . . deprived of . . . property, without due process of law; nor shall private property be taken for public use, without just compensation.").

131. Cf. THE FEDERALIST No. 44, at 248-49 (J. Madison) (E. Scott ed. 1894) (viewing impairment of contracts clause as "constitutional bulwark in favor of personal security and private rights").

132. Note, *The Origins and Original Significance of the Just Compensation Clause of the Fifth Amendment*, 94 YALE L.J. 694, 700 (1985) (quoting B. FRANKLIN, *Queries and Remarks Respecting Alterations in the Constitution of Pennsylvania*, in 10 THE WRITINGS OF BENJAMIN FRANKLIN 54, 59 (A. Smythe ed. 1907)).

133. See F. McDONALD, *NOVUS ORDO SECLORUM: THE INTELLECTUAL ORIGINS OF THE CONSTITUTION* 22-25 (1986); Note, *supra* note 132, at 695-701.

134. See Note, *supra* note 132, at 710-16; cf. *Ware v. Hylton*, 3 U.S. (3 Dall.) 199, 211 (1796) ("[P]roperty is the creature of civil society, and subject, in all respects, to the disposition and control of civil institutions.").

rights—a discussion prominently cited by the Framers of the fourteenth amendment¹³⁵—is found in Justice Washington's opinion in *Corfield v. Coryell*.¹³⁶ Among the rights he listed were "[p]rotection by the government; the enjoyment of life and liberty, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety; subject nevertheless to such restraints as the government may justly prescribe for the general good of the whole."¹³⁷ Thus, like Blackstone and Locke,¹³⁸ Washington considered economic liberty not as an absolute natural right, but rather as inherently qualified by the public good. Governmental regulation of the market, and programs intended to redistribute wealth were fairly widespread in the period between independence and the framing of the fourteenth amendment, indeed up to the *Lochner* period itself.¹³⁹ The constitutional status that *Lochner* conferred on economic liberty was a recent innovation, with little basis in previous law,¹⁴⁰ and held sway for only about thirty years.

Turning from tradition to contemporary consensus, we find widespread acceptance of pervasive governmental regulation. Adopting Epstein's views would mean abolishing national labor laws, the minimum wage, occupational safety legislation, and many other unquestioned government regulations.¹⁴¹ Epstein concedes that some statutes he regards as unconstitutional are too deeply entrenched in our society to be dislodged.¹⁴²

More fundamentally, however, these laws are too deeply embedded in our common sense conception of property¹⁴³ and

135. See Farber & Muench, *supra* note 106, at 265-66.

136. 6 F. Cas. 546 (C.C.E.D. Pa. 1823) (No. 3230).

137. *Id.* at 551-52.

138. See Grey, *The Malthusian Constitution*, 41 U. MIAMI L. REV. 21, 46 (1986). Epstein's misreading of Locke is discussed in Schwartz, *Property Rights and the Constitution: Will the Ugly Duckling Become a Swan?*, 37 AM. U.L. REV. 9, 14-19 (1987); Note, *Richard Epstein on the Foundations of Takings Jurisprudence*, 99 HARV. L. REV. 791, 797-807 (1986).

139. See L. FRIEDMAN, A HISTORY OF AMERICAN LAW 157-78, 187-91 (1973) (discussing poor relief, government spending, and government regulation); Grey, *supra* note 138, at 41-48 (discussing the long Anglo-American tradition of poor relief); Schwartz, *supra* note 138, at 19-24. Epstein himself concedes that his view on welfare programs "surely runs against much of our political tradition." Epstein, *supra* note 128, at 18.

140. See Currie, *The Constitution in the Supreme Court: The Protection of Economic Interests, 1889-1910*, 52 U. CHI. L. REV. 324, 326, 378-82 (1985).

141. See R. EPSTEIN, *supra* note 124, at 327-28; Grey, *supra* note 138, at 23; Schwartz, *supra* note 138, at 32-33.

142. R. EPSTEIN, *supra* note 124, at 324-29.

143. This has been called "social property," that is, property as understood

liberty to be ignored. Given this background of pervasive and accepted governmental intervention, the idea of a natural right to be free from all governmental interference is simply foreign to our culture.¹⁴⁴ We can hardly imagine what our lives—or property ownership, for that matter—would be like without this pervasive aspect of our society. To say that we were born with economic liberty but are now enslaved by governmental regulation seems as eccentric as saying that “fish were born to fly but everywhere they swim.”¹⁴⁵

2. Rent-seeking

The rent-seeking approach is based on the economic theory that special interest groups frequently obtain government help in extracting money from the general public as taxpayers or consumers. The technical term for this ill-gotten gain is *economic rent*. These special interest groups are relatively easy to organize because they are small and their members have much to gain. For corresponding reasons the public finds it difficult to protect itself: members of the public have small, individual stakes in any piece of legislation, and the large number of people affected makes organization difficult.¹⁴⁶ As a result, according to this economic theory, we can expect the rent seekers to win. Most legislation, then, will really involve some rip-off of the public, even if it purports to serve the public interest.¹⁴⁷ Hence, courts should be deeply suspicious of regulatory legislation.¹⁴⁸

Although this approach leads to results similar to *Lochner*,

by society at large, as opposed to lawyers. Krier & Schwartz, *Talking About Taking* (Book Review), 87 YALE L.J. 1295, 1307-10 (1978).

144. See Cribbet, *Concepts in Transition: The Search for a New Definition of Property*, 1986 U. ILL. L. REV. 1, 26-42.

145. I am indebted to my colleague Gerald Torres for this phrase, which he used in a somewhat different context.

146. See Ackerman, *supra* note 4, at 719.

147. See G. STIGLER, *THE CITIZEN AND THE STATE: ESSAYS ON REGULATION* (1975); Landes & Posner, *The Independent Judiciary in an Interest-Group Perspective*, 18 J.L. & ECON. 875, 877-78 (1975). The fountainhead of this theory is M. OLSON, *THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS* (1965). More recently, Olson has argued that prolonged rent-seeking ultimately saps stable societies of their economic vitality. See M. OLSON, *THE RISE AND DECLINE OF NATIONS* 41-47 (1982).

148. See Epstein, *supra* note 124, at 713-15, 734. Another argument for placing less trust in legislatures is that statutes may reflect only shifting coalitions and arbitrary agenda rules. See Riker & Weingast, *Constitutional Regulation of Legislative Choice: Political Consequences of Judicial Deference to Legislatures*, 74 VA. L. REV. 373 (1988).

it is not a natural rights approach. The *Lochner* Court considered maximum hours legislation a violation of the rights of the bakers and their employers. The rent-seeking theory accuses the legislation of raising the price of bread to the detriment of consumers. Thus, the theory protects freedom of contract for instrumental reasons, not because it views this freedom as an especially important value in its own right.

The rent-seeking theory is vulnerable to three attacks. First, it is based on a simplistic model of the political process. We all know that special interest groups make a difference in the legislative process, but the idea that they are generally decisive is a caricature. A wide range of empirical studies by political scientists and economists have confirmed that legislators' views of the public interest do matter.¹⁴⁹ One study of natural gas legislation, for example, found that political ideology was an excellent predictor of a legislator's vote.¹⁵⁰ Probably the most dramatic refutation of the rent-seeking model, however, is found in recent legislation deregulating crucial industries. The passage of such legislation is squarely contrary to the model's predictions.¹⁵¹ Moreover, arguments about the public interest, often deriving from the work of influential economists, played a crucial role in obtaining these reforms.¹⁵² Thus, in presuming that statutes are normally the result of improper influence, the rent-seeking model is too cynical about the legislative process. Second, the rent-seeking model, if taken seriously, would require much broader judicial review than even the *Lochner* Court contemplated. Regulatory legislation is far from being the only potential form of rent-seeking. Recognizing this, Epstein broadens his attack to include such matters as the progressive income tax, which he regards as a taking of private property without just compensation.¹⁵³ Particular provisions of the tax code would also presumably be vulnerable to charges of

149. For an extensive review of the literature, see Farber & Frickey, *The Jurisprudence of Public Choice*, 65 TEX. L. REV. 873, 883-90, 893-901 (1987). One of the best studies is Kalt & Zupan, *Capture and Ideology in the Economic Theory of Politics*, 74 AM. ECON. REV. 279 (1984).

150. See Mitchell, *The Basis of Congressional Energy Policy*, 57 TEX. L. REV. 591, 598 (1979) (as measured by the rating given by the Americans for Democratic Action).

151. See Kelman, *Public Choice and Public Spirit*, PUB. INTEREST, Spring 1987, at 80, 86.

152. Nelson, *The Economics Profession and the Making of Public Policy*, 25 J. ECON. LITERATURE 49, 60-64 (1987).

153. R. EPSTEIN, *supra* note 124, at 295-303; see also *id.* at 322-24 (tax and transfer programs unconstitutional).

rent-seeking.¹⁵⁴ But this is only the beginning. The risk of rent-seeking is also found in legislation involving tariffs, defense contracts, public works projects, direct subsidies, and government loans. For control of rent-seeking to be effective, all of these diverse governmental activities would have to be subject to judicial scrutiny. Leaving some areas such as tariffs or the defense budget untouched would simply encourage special interest groups to concentrate their efforts on those areas. If rigorous judicial scrutiny were limited to regulatory programs, the amount of rent-seeking in other governmental programs would increase, largely cancelling out the reduction in rent-seeking regulatory programs.

Third, limiting government to the pursuit of economic efficiency unacceptably eliminates other legitimate public goals. Major governmental programs, many of them with broad popular support and deep historical roots, are premised on a variety of other goals, such as environmentalism, promotion of racial equality, or redistribution of income.¹⁵⁵

Thus, acceptance of the rent-seeking model would require radical shifts in our social institutions by drastically altering existing expectations about governmental action. Doing this in the name of an abstract economic theory is rather contrary to

154. See Doernberg & McChesney, *On the Accelerating Rate and Decreasing Durability of Tax Reform*, 71 MINN. L. REV. 913, 953-59 (1987) (giving examples).

155. As Frank Michelman explains:

To apply with any semblance of judicially principled rigor the economics-inspired, market failure condition on the validity of legislation—the rule that legislation is invalid unless it can somehow be seen as aimed at maximizing wealth by realizing potential gains from trade that the market may be failing to realize—would, as Justice Linde argued, be to rule out, or at any rate call into serious question, a great deal of legislation whose constitutionality many would not care to think the least bit questionable whatever we may think of its merits. Clouds of constitutional doubt would hang over legislation transferring wealth to the needy or to other favored groups such as veterans; over legislation aimed at ends lacking true economic exchange value such as preservation of endangered animal species, or of municipal sanctuaries for family values; over legislation simply expressing “a sense of the fitness of things” as by forbidding ungrateful lawsuits by injured automobile guests, or inhumane treatment of animals, or consanguineous intermarriages; over legislation groping towards the redefinition of values in flux or ferment, a good example being laws which, by forbidding discrimination against the interests of women, or the handicapped, or racial minorities, inevitably seem to call for some form and degree of special solicitude for those interests.

Michelman, *Politics and Values or What's Really Wrong with Rationality Review?*, 13 CREIGHTON L. REV. 487, 508 (1979).

the conservative vein in pragmatist thought.¹⁵⁶ More importantly, the dramatic expansion of judicial review to encompass essentially all political issues entails a radical decrease in the domain for democratic decision making. Legal pragmatism does not view democracy as an absolute, but it does view democracy as a major value, not to be heedlessly sacrificed. In short, a pragmatist judge could easily reject the rent-seeking model.¹⁵⁷

3. The Public Values Model

The *public values* model, the final version of heightened judicial scrutiny, does not suffer from the defect of specifying economic efficiency as the exclusive, legitimate goal of governmental regulation. Rather, this model would allow the government to implement a broader range of public values. Nevertheless, this model, too, has its flaws.

To begin with, the notion of public values is far from self-explanatory. For example, classic rent-seeking legislation is often supported by reference to noneconomic values. Restrictions on advertising by lawyers, for example, were said to rest on the values of professionalism.¹⁵⁸ Aid for farmers, which some consider a classic example of a "raid on the Treasury,"¹⁵⁹ is said to be justified by the inherent value of the family farm. If judges accept all of these as public values, the public value model will have little impact. On the other hand, if judges attempt to give the model bite by narrowing the class of acceptable public values, they will lack any generally acceptable standards for making the distinction.¹⁶⁰

The practical benefits of a public value approach are also

156. The theory itself, by giving special status to a single value, that of economic efficiency, is also contrary to the moral vision of pragmatism.

157. To the extent that any good *could* be accomplished by invalidating rent-seeking statutes, much of it could be accomplished with less dislocation in legal doctrine by simply narrowing or eliminating the state action exemption from the antitrust laws. That doctrine allows state regulation to impose anticompetitive practices without violating federal antitrust laws. See Wiley, *A Capture Theory of Antitrust Federalism*, 99 HARV. L. REV. 713, 715-23 (1986). Doing so would allow federal courts to invalidate anticompetitive state laws, but would not require revolutionizing constitutional law.

158. See *Bates v. State Bar*, 433 U.S. 350, 368-72 (1977) (discussing professionalism rationale).

159. See Bruff, *Legislative Formality, Administrative Rationality*, 63 TEX. L. REV. 207, 218 (1984) (stating that dairy price supports are "a fairly stark payoff to a favored group").

160. This point is discussed more extensively in Farber & Frickey, *supra* note 149, at 908-11.

somewhat dubious. Special interest groups often have the greatest effect, not on an overall legislative program, but on the details of the statute.¹⁶¹ Judges have two choices, neither desirable, in applying the public value model to this situation. First, they could strike down the entire statute on the theory that it is tainted by the special interest provisions. This course is unattractive if only because it eliminates legislation that by hypothesis the court considers to have an overall legitimate purpose. It would also allow groups to kill legislation by attaching special interest riders, inviting courts to strike down the entire statute.

Alternatively, the court could simply strike down the special interest provisions. This is also problematic. The special interest aspects of the legislation may not involve severable provisions, but rather changes in the drafting of the basic statutory scheme. If so, considerable judicial rewriting would be required. Moreover, this approach would make it more difficult to pass genuine public value legislation.¹⁶² If we approve of tax reform, civil rights legislation, deregulation, or any other major legislative initiative, we cannot afford to tie the political hands of the sponsors. An unprincipled exemption for a special interest may be the necessary political price of a valuable reform.

A final disadvantage of the public value approach is that it requires heightened judicial scrutiny of the reasonableness of such a broad range of legislation to insure that the purported public value is indeed plausibly related to the legislation. Essentially all legislation would be subjected to this reasonableness test. This is a vast quantitative increase in the scope of judicial review, inasmuch as serious judicial scrutiny is currently limited to discrete categories of statutes.¹⁶³ The Framers of the Constitution rejected the idea of making federal judges part of a Council of Revision with veto power over new legislation. Making all legislation subject to judicial scrutiny for reasonableness seems uncomfortably close to a Council of Revision. What is at stake here is more than an arcane historical detail. It is quite basic to the institutional role of the Supreme Court that its functioning should not duplicate the presidential veto

161. See K. SCHLOZMAN & J. TIERNEY, ORGANIZED INTERESTS AND AMERICAN DEMOCRACY 8, 163-64, 311, 392, 394-95 (1986).

162. Whereas a politically powerful special interest group can now be satisfied by granting it an exemption, this would become impossible if the exemptions were judicially invalidated. Any adversely affected special interest group would have only one choice: fight the entire legislation.

163. See Komesar, *supra* note 5, at 215.

power. Giving the Supreme Court a general veto power curtails democracy—as judicial review always does—but here the conflicting value of controlling special interests seems too pallid to justify the sacrifice.

Thus, a revival of *Lochner*, whether in the guise of natural law, Chicago School economics, or even political liberalism, is an unappealing prospect. As natural law *Lochner* rests on a vision about the nature of property and economic freedom that our society simply does not have. In its Chicago School form, serious implementation would involve a revolutionary restructuring of both our government and our economy. In its mildest form, as represented by the public values model, it would still significantly alter the institutional role of the judiciary and probably achieve little.

4. A *Lochner* Obituary

Three closing comments about *Lochner* are in order. First, the practical importance of *Lochner* should not be exaggerated. The preceeding discussion was based on the premise that *Lochner* would be rigorously applied. But the Court was never really rigorous in following *Lochner*. Even in the *Lochner* era, the Court upheld most regulatory legislation,¹⁶⁴ and some that it struck down may well have been ill-advised.¹⁶⁵ Many state courts have continued to apply substantive due process restrictions to economic regulations.¹⁶⁶ This has not apparently re-

164. See Currie, *supra* note 140, at 381-82.

165. Liberal lawyers seem to take it for granted that wage and hour restrictions are desirable. See L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 8-7, at 453-55 (1978). Even politically liberal economists, however, seem to disagree. See P. SAMUELSON, *ECONOMICS* 369 (11th ed. 1980); Foster, Book Review, 4 *CONST. COMMENTARY* 443, 448 (1987). For a discussion of the economic literature, see Bryden, *Brandeis's Facts*, 1 *CONST. COMMENTARY* 281, 319-21 (1984); see also *Chicago Bd. of Realtors v. City of Chicago*, 819 F.2d 732, 742 (7th Cir. 1987) (separate opinion of Posner, J., joined by Easterbrook, J.) (according to a survey, the single proposition "from which there is the least dissent among American economists is that 'a ceiling on rents reduces the quantity and quality of housing available'" (quoting Frey, Pommerehne, Schneider & Gilbert, *Consensus and Dissension Among Economists: An Empirical Inquiry*, 74 *AM. ECON. REV.* 986, 991 (1984))).

166. See Note, *State Economic Substantive Due Process: A Proposed Approach*, 88 *YALE L.J.* 1487, 1487-88 (1979). For recent examples, see *Fein v. Permanente Medical Group*, 474 U.S. 892, 893 (1985) (White, J., dissenting from summary affirmance) (citing state decisions striking down tort reform laws); *Department of Ins. v. Dade County Consumer Advocate's Office*, 492 So. 2d 1032, 1035 (Fla. 1986) (striking down law forbidding insurance rebates); *Kentucky Milk Mktg. & Antimonopoly Comm'n v. Kroger Co.*, 691 S.W.2d 893, 900 (Ky. 1985) (striking down prohibition on predatory milk pricing); *Western*

sulted either in any grave harm to the democratic political system of those states or in any noticeable gains to their economies. Thus if *Lochner* were resurrected, it probably would be applied only fitfully.¹⁶⁷

Second, rejection of *Lochner* does not necessarily mean that the judiciary has no role in overseeing regulatory legislation. For example, the contract clause and takings clause may require special scrutiny of retroactive legislation that impairs settled expectations. The judiciary might also be able to play some role in policing the process by which economic regulation is enacted.¹⁶⁸ What rejection of *Lochner* does entail is a rejection of any *general* judicial role in protecting economic freedom.

Third, although the discussion so far has treated *Lochner* as an open question, to be decided on its merits, the issue has really long been settled. The constitutional jurisprudence of the past fifty years has decisively rejected substantive protection of economic liberty of the kind found in *Lochner*.¹⁶⁹ Whether *Lochner* was really a bad idea, as I have argued here, is no longer a genuinely open question.¹⁷⁰

Energy Co. v. Genie Land Co., 737 P.2d 478, 484 (Mont. 1987) (striking down statutory requirement that owner of mineral rights obtain consent from owner of surface rights to commence mining). Other courts have used equal protection analysis to reach similar results. See, e.g., Farley v. Engelken, 740 P.2d 1058, 1068 (Kan. 1987) (striking down limitation on damage recoveries in medical malpractice cases); Hanson v. Williams County, 389 N.W.2d 319, 328 (N.D. 1986) (striking down statute of limitations for product liability cases). For an extensive discussion of judicial methodology in this area, see Auerbach, *The Anatomy of an Unusual Economic Substantive Due Process Case: Workers' Compensation Insurers Rating Ass'n v. State*, 68 MINN. L. REV. 545 (1984). To the extent heightened scrutiny involves a greater scrutiny of means (rather than sharp restrictions on permissible legislative ends), it is vulnerable to the criticisms made in the next subsection.

167. It is of course no argument for *Lochner* that it would be too inconsistently applied to do major harm.

168. For some suggestions along these lines, see Farber & Frickey, *supra* note 149, at 911-24.

169. See J. NOWAK, R. ROTUNDA & J. YOUNG, CONSTITUTIONAL LAW 352-57 (3d ed. 1986).

170. One of the most thoughtful twentieth-century commentators on the Supreme Court, Robert McCloskey, suggested that the Court probably should not have gone so far in completely abdicating judicial review over economic regulations. McCloskey, *Economic Due Process and the Supreme Court: An Exhumation and Reburial*, 1962 SUP. CT. REV. 34, 60-61. Nevertheless, he believed that even by 1962 the law was too well settled for the question to be considered open:

All things considered, then, it seems best that the cause of economic rights be left by the Supreme Court to lie in its uneasy grave.

C. THE ABORTION ISSUE

The Supreme Court in *Roe* recognized the existence of a constitutional right to an abortion under some circumstances. My concern here is not with the Court's specification of when abortions can be banned. Rather, the crucial issue is whether the Court was justified in holding that the right to an abortion is at least sometimes protected by the Constitution. The key criticism of the Court's decision—the basis for comparing *Roe* to *Lochner*—attacks the Court's recognition of this constitutional right.¹⁷¹

My discussion of *Roe* proceeds in three phases. First, I discuss whether the Court properly recognized a right to an abortion. I argue that the Court was correct in determining that a fundamental right—the right to procreative autonomy—was involved. What makes *Roe* a hard case is not this initial step in the analysis, but rather the problem of assessing the reasonableness of the state's interest in forbidding abortions. Second, I consider whether the arguments made against *Lochner* in the preceeding section also militate against *Roe*. Finally, I consider whether, if *Roe* was incorrectly decided, it should be overruled.

1. Abortion and Fundamental Rights

The *Roe* Court was somewhat vague about the nature of the fundamental right implicated in *Roe*,¹⁷² but later decisions indicate that the Court had in mind a fundamental right to control procreation.¹⁷³ As discussed earlier,¹⁷⁴ the fundamental

... If the Supreme Court of today had a free hand in choosing the subjects of judicial review, there might well be an argument for choosing the right to work over some of the other subjects that engage Court attention. But it does not have a free hand; its liberty of choice has been considerably foreclosed by the episodic course of constitutional law since 1937. The Supreme Court, like the American political system of which it is a part, proceeds by impulse rather than by design, pragmatically rather than foresightedly. Like the United States, the Court derives advantages from this approach; but like the United States, the Court, too, is bound by its limitations.

Id. at 62.

171. For a useful summary of the *Roe* debate, see G. GUNTHER, *supra* note 2, at 525-35. To the extent that the attack on *Roe* is based on a general rejection of the fundamental rights doctrine, it is answered in Section IIA *supra*.

172. See 410 U.S. at 152-53 (referring to "right of personal privacy, or a guarantee of certain areas or zones of privacy" having "some extension" to matters such as procreation and family). The privacy rubric does not seem particularly helpful in analyzing this issue, because the concept of privacy includes a diverse collection of individual interests.

173. *Bowers v. Hardwick*, 106 S. Ct. 2841, 2844 (1986) (discussing "fundamental right to decide whether or not to beget or bear a child"); *Carey v. Pop-*

rights doctrine is deeply entrenched in our constitutional tradition. The first issue in evaluating *Roe* is whether the Court was correct in viewing control of procreation as a fundamental right.

Despite the vehemence of the attacks on *Roe*,¹⁷⁵ it seems clear that the Court was correct in classifying procreative rights as fundamental. Although these rights were not discussed specifically in connection with the fourteenth amendment,¹⁷⁶ historians suggest that Republicans, who drafted and enacted the amendment, considered rights relating to the family fundamental.¹⁷⁷ American society has traditionally drawn a distinction between public matters involving government and the marketplace and private matters involving the family.¹⁷⁸ As Professor Cox, who believes that *Roe* was wrongly decided, concedes, "it is hard to think of a more fundamental invasion of personal liberty than to tell a woman that she must or may not bear a child."¹⁷⁹

As the *Roe* Court pointed out, a line of Supreme Court decisions going back many years had granted parenthood and procreation a fundamental constitutional status.¹⁸⁰ That the Court

ulation Servs. Int'l, 431 U.S. 678, 688-89 (1977) (reading *Roe* as involving "right of decision in matters of childbearing"); see also *Thornburgh v. American College of Obstetricians & Gynecologists*, 476 U.S. 747, 775-82 (1986) (Stevens, J., concurring) (discussing woman's interest in making decision on childbearing). For an extensive discussion of the fundamental rights doctrine as it bears on *Roe*, see *Developments in the Law—The Constitution and the Family*, 93 HARV. L. REV. 1156, 1161-87, 1303-06 (1980).

174. See *supra* text accompanying notes 98-122.

175. The standard arguments against *Roe* can be found in Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L.J. 920 (1973); Epstein, *Substantive Due Process by Any Other Name: The Abortion Cases*, 1973 SUP. CT. REV. 159 (1973); Morgan, *Roe v. Wade and the Lesson of the Pre-Roe Case Law*, 77 MICH. L. REV. 1724 (1979); see also *supra* note 171.

176. Although the Framers of the Bill of Rights did not refer to procreative rights, it is not difficult to imagine what their reaction would have been if George III had had the temerity to tell the colonists how many children they could have.

177. See Farber & Muench, *supra* note 106, at 276 n.158.

178. See, e.g., Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 HARV. L. REV. 1497, 1501-02 (1983).

179. A. COX, *THE COURT AND THE CONSTITUTION* 329 (1987); see also *id.* at 334 (concluding that *Roe* was wrong). Even Judge Bork concedes that marital privacy of the kind involved in *Griswold*, the contraception case, is "essential to a civilized society." *The Grilling of Judge Bork*, NEWSWEEK, Sept. 28, 1987, at 27, 29.

180. See *Roe*, 410 U.S. at 152-53. Among the cases cited in *Roe* were *Loving v. Virginia*, 388 U.S. 1, 12 (1967) (striking down ban on interracial marriages, partly on ground that marriage is fundamental right); and *Skinner v.*

was not simply imaginatively rewriting precedent is indicated by the number of lower court judges who had correctly anticipated *Roe* on the basis of similar reasoning.¹⁸¹ Popular consensus also supported the *Roe* Court's recognition of the right to an abortion, with a large majority of the public favoring legalization of abortion under at least some circumstances.¹⁸²

Moreover, the Court's decision to exercise judicial review in *Roe* was also supported by the presence of defects relating to the political process.¹⁸³ Procreative autonomy is important to both genders, but women bear the physical burden and, in our society, most of the social burden of raising children.¹⁸⁴ Many abortion statutes were passed before women could even vote,¹⁸⁵

Oklahoma, 316 U.S. 535, 541 (1942) (striking down a mandatory sterilization law). The most notable of the earlier cases was *Griswold v. Connecticut*, 381 U.S. 479 (1965), in which the Court declared unconstitutional a ban on the use of contraceptives "for the purpose of preventing conception," even by married couples. *Id.* at 480, 485-86. As some leading constitutional commentators have stated, the *Roe* Court's recognition of a fundamental right "developed without great difficulty" out of earlier cases such as *Griswold*. J. NOWAK, R. ROTUNDA & J. YOUNG, *supra* note 169, at 694; *accord*, Heymann & Barzelay, *supra* note 14, at 769-75.

181. The lower court cases are discussed in E. RUBIN, *ABORTION, POLITICS, AND THE COURTS: Roe v. Wade AND ITS AFTERMATH* 43-59 (1987); Comment, *A Survey of the Present Statutory and Case Law on Abortion: The Contradictions and the Problems*, 1972 U. ILL. L.F. 177, 184-91. The extent of popular consensus can be seen from the fact that the California bill liberalizing abortion was signed by no other than Ronald Reagan. See E. RUBIN, *supra*, at 23.

182. See Callahan, *How Technology is Reframing the Abortion Debate*, 16 HASTINGS CENTER REP., Feb. 1986, at 33, 38; Sussman, *Attitudes on Legalized Abortion Have Changed with the Times*, *The Washington Post Nat'l Weekly Ed.*, Jan. 13, 1986, at 37. For example, in 1972 over 70% favored an abortion "if there is a strong chance of serious defect in the baby," and over 80% "if the woman's own health is seriously endangered by the pregnancy." There was also a striking trend toward legislative liberalization in this period. See Comment, *supra* note 181, at 179-83.

183. See Kaufman, *supra* note 3, at 199-200 (linking *Roe* with gender equality).

184. See Karst, Book Review, 89 HARV. L. REV. 1028, 1036-37 (1976). John Ely suggests that fetuses are even less politically powerful than women, Ely, *supra* note 175, at 933-35, but this seems irrelevant without a previous determination that fetuses are *entitled* to have their interests represented in the political process—or in other words, that they are themselves "persons" protected by the fourteenth amendment. The *Roe* Court had little difficulty rejecting the personhood argument, see 410 U.S. at 157-59, and that aspect of the opinion has not been controversial with scholars. If fetuses are not protected by the fourteenth amendment, their exclusion from the political process is irrelevant in determining the level of scrutiny. Neither animals nor foreign nationals abroad are represented in the American political process, but this is no reason for strict scrutiny of governmental actions affecting them since they are not entitled to constitutional protection.

185. For example, the Texas statute involved in *Roe* was passed before the

and women are still underrepresented in legislatures.¹⁸⁶ Moreover, much of the opposition to abortion stems from highly organized, intense pressure based on sectarian religious beliefs¹⁸⁷—a form of political activity about which the Framers were rightly concerned. In terms of current case law, then, *Roe* is buttressed by the cases invoking heightened scrutiny in laws involving gender discrimination,¹⁸⁸ as well as cases expressing concern about political entanglement by religious groups.¹⁸⁹ Admittedly, *Roe* does not fit squarely into either line of cases. Combined, however, with the clear American consensus about the fundamental nature of procreative rights, these cases give powerful support to the argument for serious judicial scrutiny of abortion laws.

Given the presence of a fundamental right, the Court was

Civil War. See E. RUBIN, *supra* note 181, at 57. See generally J. ELY, *supra* note 3, at 164-69 (arguing that past political exclusion of women justifies heightened judicial scrutiny).

186. See *Frontiero v. Richardson*, 411 U.S. 677, 686 n.17 (1973) (plurality opinion) (women "vastly" underrepresented among government officeholders). Apparently, one of the major problems female candidates face is greater difficulty in fundraising. See *Women Candidates Need Special Help*, Minneapolis Star & Tribune, Oct. 30, 1985, at 15A.

It is important, however, not to overplay the gender theory. One of the themes of Luker's book is that the abortion battle is largely a battle among women. See K. LUKER, *supra* note 13, at 192-215. Indeed, some studies suggest that women as a group may be more strongly opposed to abortion than men. See H. RODMAN, B. SARVIS & J. BONAR, *THE ABORTION QUESTION* 141-44 (1987); Uslander & Weber, *Public Support for Pro-Choice Abortion Policies in the Nation and the States: Changes and Stability After the Roe and Doe Decisions*, 77 MICH. L. REV. 1772, 1779 (1979). For this and other reasons, the gender discrimination theory does not seem strong enough by itself to support *Roe*.

Despite the substantial female support of the prolife movement, the gender theory should not be entirely discarded. Many women who are against abortion in the abstract change their mind when confronted with an unwanted pregnancy. See H. RODMAN, B. SARVIS & J. BONAR, *supra*, at 38. Also, because career women strongly favor the prochoice position, that position would be politically more powerful if women were more equally represented in the membership of legislatures. Hence, the limited political role of women, even today, probably does facilitate the passage of anti-abortion legislation. Moreover, other forms of gender discrimination may be responsible, in subtle ways, for some women's opposition to abortion.

187. See K. LUKER, *supra* note 13, at 196-97, 223-24.

188. See *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 723-24 (1982); *Craig v. Boren*, 429 U.S. 190, 197 (1976). The prolife activists are often motivated by the very stereotypes about women's roles that the Court condemned in these cases. See K. LUKER, *supra* note 13, at 205-15.

189. See *Lemon v. Kurtzman*, 403 U.S. 602, 622-24 (1971); *Everson v. Board of Educ.*, 330 U.S. 1, 8-9 (1947); see also L. TRIBE, *supra* note 165, § 15-10, at 928-30.

obligated to assess independently the state's justification for infringing the right. What makes *Roe* so difficult is the strength of the countervailing interest asserted by the state: the interest in preserving human life. Few issues in contemporary law or politics are more controversial or deeply emotional than the validity of this justification. *Roe* is a hard case in more ways than one. Nevertheless, my tentative view is that the Court was correct in holding a total ban on abortion unconstitutional.

In particular, I doubt that the interest in preserving human life is sufficiently implicated to justify banning all abortions before the eighth week of pregnancy—a category that includes over one-half of all abortions.¹⁹⁰ Before the twelfth week,¹⁹¹ the fetus does not engage in organized movement. At twelve weeks, its brain weighs only about ten grams, and the cerebral cortex (the main distinction between humans and animals) is primitive and almost nonexistent.¹⁹² Brain wave studies also suggest that consciousness cannot begin any earlier than the twelfth week and probably only later.¹⁹³ These facts make it difficult to say that the fetus has already become in any real sense a living person.¹⁹⁴ The possibility that it will later become a person gives the fetus moral value,¹⁹⁵ but this possibility is itself conditioned on the woman's willingness to continue the pregnancy, the very question at issue.¹⁹⁶ Against this value

190. See Callahan, *supra* note 182, at 36. He adds that over 90% of abortions are performed before the twelfth week of pregnancy. *Id.*

191. My argument would probably support a right to abortion through the first trimester, so the restriction to eight weeks is simply a matter of caution to provide a margin of error. For present purposes the important question is not the precise extent of the protected right but its existence.

192. See Comment, *Technological Advances and Roe v. Wade: The Need to Rethink Abortion Law*, 29 UCLA L. REV. 1194, 1208 (1982).

193. See *id.* at 1207-10.

194. This point is not necessarily decisive, for the state can have a strong interest in protecting things other than persons. See Ely, *supra* note 175, at 926. Also, note that it is not inconsistent to say that the fetus is morally not yet a person while conceding that it is biologically alive and a member of our species. See Wreen, *Abortion: The Extreme Liberal Position*, 12 J. MED. & PHIL. 241, 242 (1987).

195. The argument against banning abortion is even stronger at the very beginning of pregnancy, when the embryo has no nervous system at all, and in fact may not even be fully individuated: until the end of the second week, twinning is still possible. See H. RODMAN, B. SARVIS & J. BONAR, *supra* note 186, at 34; Callahan, *supra* note 182, at 34-36; King, *The Juridical Status of the Fetus: A Proposal for Legal Protection of the Unborn*, 77 MICH. L. REV. 1647, 1673-74 (1979).

196. Even if the fetus is a person, the woman may not be morally obligated to continue the pregnancy under all circumstances. See J. THOMSON, *RIGHTS, RESTITUTION AND RISK* 11-12, 18-19 (1986).

must be weighed the powerful reasons¹⁹⁷ that may impel a woman to choose an abortion.¹⁹⁸ On balance, preservation of the fetus, at a point in pregnancy when consciousness could not yet exist, is too weak a justification to eliminate the woman's fundamental interest in deciding whether to bear a child.¹⁹⁹

If only my personal assessment were involved, I would be troubled about making it the basis for a constitutional holding on such a difficult question. In reality, however, this assessment is not merely personal. It is in fact a widespread societal consensus.²⁰⁰ Over eighty percent of the American people believe that abortion is permissible to preserve the mother's health or to prevent the birth of a deformed child.²⁰¹ There is an equally widespread belief that a woman pregnant as the result of rape is entitled to an abortion.²⁰² None of these circumstances would be considered sufficient justification for murder, so the implicit assumption must be that less is at stake. This societal consensus, which is by no means a break from earlier

197. Although it is a prolife cliché that women have abortions for reasons of casual convenience, this does not seem to be true: women take the abortion decision very seriously. See K. LUKER, *supra* note 13, at 203, 285 n.3.

198. As John Ely conceded in his scathing critique of the *Roe* opinion, "Let us not underestimate what is at stake: Having an unwanted child can go a long way toward ruining a woman's life." Ely, *supra* note 175, at 923.

199. See Kushner, *Having a Life versus Being Alive*, J. MED. ETHICS 1, 5-8 (1984). The idea that a person's life does not begin with conception in no way conflicts with common sense. It seems decidedly odd, for example, to answer a question about whether a person has ever been in New York City, with the answer "Yes, she visited there several months before she was born." This seems peculiar in precisely the same way as answering the question, "Did Lincoln ever return to Springfield?" with "Yes, after he was dead."

200. See Perry, *Abortion, the Public Morals, and the Police Power: The Ethical Function of Substantive Due Process*, 23 UCLA L. REV. 689, 733-34 (1976). I also take comfort from the fact that my view is shared by such moderate, thoughtful judges as Justices Blackmun, Powell, and Stevens.

201. See *supra* note 182. By 1979 some 70% of all lawyers believed that "abortion decisions should be left to the woman." Nowak, *Professor Rodell, The Burger Court, and Public Opinion*, 1 CONST. COMMENTARY 107, 126 (1984). Notably, 77% of Catholics interviewed recently believed that abortion should be legal if there is a "strong chance of serious defect in the baby." Sussman, *supra* note 182, at 37. The Court's rulings should not, of course, be dictated by public opinion polls, but when a previous decision enjoys widespread public support, overruling it in the name of majoritarianism seems pedantic. Admittedly, popular opinion does not necessarily correspond with the precise test adopted in *Roe*, but it does support the *Roe* Court's decision that women have a right to an abortion under at least some circumstances.

202. See Sussman, *supra* note 182, at 37. More detailed information about public opinion regarding abortion can be found in K. LUKER, *supra* note 13, at 216-17, 224-27, 287 n.18; H. RODMAN, B. SARVIS & J. BONAR, *supra* note 186, at 135-56; Uslander & Weber, *supra* note 186.

American traditions,²⁰³ is inconsistent with a belief that preservation of the fetus automatically outweighs the woman's vital interests.²⁰⁴

Thus, in seeking to impose a complete ban on abortion, the state is invading a fundamental right based on a justification that the great majority of Americans, for good reason, do not accept.²⁰⁵ Given this social consensus, a court would be well justified in rejecting the "right to life" justification and hence holding that a complete ban on abortion is unconstitutional.²⁰⁶

Some readers, no doubt, disagree with my assessment of the strength of the state interest. This should not, however, be surprising, nor should it count against legal pragmatism as a method. Legal pragmatism does not claim to make hard cases easy, or to transform bitter disputes into tranquil consensus. Legal pragmatism does, however, attempt to do two things. First, it attempts to bring to light the real crux of disputes. Here, the real issue is the fetus's status, rather than a jurisprudential argument about judicial review. *Roe* would be an equally hard case even if the Constitution explicitly protected the right to privacy. Second, legal pragmatism attempts to resolve disputes by finding arguments that can command the greatest possible consensus. On the abortion issue, we cannot

203. As Professor Luker observes, *Roe* is "much more in line with the traditional treatment of abortion than most Americans appreciate"; the view that abortion is murder is a "relatively recent belief in American history." K. LUKER, *supra* note 13, at 11, 14. Abortions were actually very widespread, and frequently performed by doctors, even when they were purportedly illegal. *See id.* at 36-37, 45-47, 49-51, 81. Prosecutions were few, and penalties were light. *Id.* at 53-54.

204. Pro-life activists do not accept any of these justifications for abortion. *See* K. LUKER, *supra* note 13, at 230.

205. The passage of anti-abortion statutes by many legislatures does not militate against this conclusion. Before *Roe* the legislative process was flawed in the ways discussed earlier. *See supra* text accompanying notes 184-89. Since *Roe*, pro-choice groups have been able to rely on the courts rather than being forced to organize and protect themselves in the legislature.

206. The existence of a societal consensus is neither a necessary nor a sufficient basis for judicial intervention. Rather, recourse to the conventional social understanding is one possible ingredient in a judge's analysis, which in some contexts may provide useful guidance. In the analysis in the text, for example, consensus and tradition function fairly noncontroversially in establishing a right to procreative freedom and also serve to bolster the analysis of the state's interest, but other factual and normative premises play a crucial role in the argument. For an insightful discussion of related jurisprudential problems, see Sadurski, *Conventional Morality and Judicial Standards*, 73 VA. L. REV. 339 (1987) (see especially pages 395-97).

expect even the best possible arguments to produce unanimity. At most, we can hope to persuade the "undecideds."

2. *Roe* Versus *Lochner*

In arguing against a revival of *Lochner*, I suggested that taking *Lochner* seriously would massively disrupt existing institutions and expectations.²⁰⁷ *Roe* is different. Because it is limited to a relatively narrow constitutional right—procreative freedom—it neither requires a widespread restructuring of existing governmental operations nor places the Court in the position of routinely determining the reasonableness of all legislation. The right to freedom of contract and relating interests in economic autonomy is simply much broader than the focused right upheld in *Roe*.

Still, even if *Roe* itself is seen as upholding only a narrow fundamental right, a critic of *Roe* might respond, a similar reasoning process might be used to establish a whole panoply of new constitutional rights. The *Roe* holding may be much more limited than *Lochner*, but the *Roe* methodology may be just as dangerous in the long run.²⁰⁸ To the extent that this argument is aimed at the general notion of fundamental rights, it has already been rebutted, but it can also be taken as a more specific attack on the *Roe* opinion. Because the *Roe* Court was fairly offhand in its explanation of why abortion is a fundamental right, a similarly offhand argument might suffice to create additional fundamental rights.

This argument, though not unreasonable, has proved unfounded. The Court has not enthusiastically created new fundamental rights on the basis of the *Roe* model. Instead, it has been resistant to arguments in favor of expanding *Roe*.²⁰⁹ Furthermore, the argument for *Roe* rests on an unusual combination of factors: a strong consensus in favor of the importance of procreative rights, supported by a line of existing Supreme Court precedent; significant flaws in the political process because of the involvement of gender issues and religious entanglement; an objective basis for doubting the reasonableness of the state's justification; and an overwhelming social consensus

207. See *supra* text accompanying notes 141-45 & 153-57.

208. In this view the real threat is not *Roe* itself but "meta-*Roe*."

209. See *Bowers v. Hardwick*, 106 S. Ct. 2841, 2843-44 (1986); *Whalen v. Roe*, 429 U.S. 589, 603-04 (1977). I do not mean to endorse the *Bowers* opinion. That case raises issues different from but perhaps as difficult as *Roe* itself. See Kaufman, *supra* note 3, at 198-99.

against the logic of the state's position. It seems unlikely that an equally strong case can be made in favor of many other arguably fundamental rights.

In part the strength of the reaction against *Roe* among constitutional scholars is attributable to the opinion itself. In declaring the presence of a fundamental right, the Court was too cursory, as if it found implying such rights an easy matter requiring little justification.²¹⁰ In its balancing the Court may well have been too categorical and too dismissive of the state's regulatory interests.²¹¹ These features of the *Roe* opinion are unhappily reminiscent of the *Lochner* style. Nevertheless, the basic holding of the case seems sound and is not vulnerable to these criticisms.²¹²

3. Should *Roe* Be Overruled?

As I suggested earlier, for a pragmatist the *Lochner* question is no longer an open one. The *Roe* question is not so well settled, but a pragmatist must also take into account the fact that *Roe* has been decided. For the purposes of this section, I will assume that *Roe* was wrong. If so, should it be overruled?²¹³

For three reasons I believe that even if *Roe* was wrong it should not be overruled. First, *Roe* does not satisfy the normal tests²¹⁴ the Court uses to justify overruling. If it was wrong, it was not egregiously wrong. It has not been undermined by later precedent, and the Court has not found its test unworkable.²¹⁵ And apart from direct reliance on the *Roe* opinion by doctors and by millions of women, it has also reshaped the political landscape in ways that would be difficult to undo.²¹⁶

210. See *Roe*, 410 U.S. at 152-53.

211. As I have stressed throughout, my concern in this Article is not with the details of the Court's holding, but with the basic decision to give at least some abortions constitutional protection.

212. *Roe* simply is not *Lochner*, but like generals, constitutional scholars seem always to be condemned to fight the last war over again.

213. As before, I will address only the basic holding that abortions are constitutionally protected, rather than the details of the Court's balancing.

214. For an insightful discussion of these standards, see Frickey, *Stare Decisis in Constitutional Cases: Reconsidering National League of Cities*, 2 CONST. COMMENTARY 123 (1985).

215. For discussion of the post-*Roe* decisions, see J. NOWAK, R. ROTUNDA & J. YOUNG, *supra* note 169, at 696-700.

216. The right-to-life movement itself essentially owes its existence to *Roe*; legislative liberalization of abortion did not spark the same violent opposition, see K. LUKER, *supra* note 13, at 126-37. Also, I suspect that the long-run effect of *Roe* has been to leave the women's movement weaker than it otherwise

Thus, the normal standards for applying *stare decisis* militate against overruling *Roe*.

Second, overruling *Roe* would not in reality restore significant power to the state legislatures. For practical reasons, those legislatures would find themselves largely powerless to halt abortions. Even when abortions were illegal, the laws were virtually unenforceable; indeed, studies suggest that almost as many illegal abortions occurred before *Roe* as legal abortions immediately after *Roe*. Today, increased public approval of abortions, support for the right of abortion by gynecologists (many of whom are now women), and the virtual certainty that many states would choose not to illegalize abortion, would all make state bans on abortions ineffective.²¹⁷ To the extent these laws had any effect, their impact would be on the most vulnerable groups of women: the poor, adolescents, racial minorities, and the handicapped. Moreover, strict abortion bans do not have majority support, given the overwhelming public view that at least some abortions are justified.²¹⁸ Thus, as a practical matter, overruling *Roe* would not be a meaningful blow for majority rule.²¹⁹

Third, overruling *Roe* at this point would be more than a correction of an erroneous opinion. It would be seen by the public as a major defeat for the Court as a guardian, even if sometimes an overzealous guardian, of individual rights. The Bork confirmation hearings made it clear just how seriously Congress and the public take the Court's role, and indeed how well accepted the concept of fundamental rights has become.²²⁰

would have been, by depriving the movement of what would otherwise have been a powerful political issue. Prochoice groups are clearly weaker as a result of the complacency induced by *Roe*. See *id.* at 241.

217. For an extensive explanation of these and other reasons why overruling *Roe* would have a minimal effect on the number of abortions performed, see Kaplan, *Abortion as a Vice Crime—A "What If" Story* (forthcoming in LAW & CONTEMP. PROBS.). See also Collins, *Is There "Life" (or "Choice") After Roe?*, 3 CONST. COMMENTARY 91 (1986).

218. See *supra* notes 182, 201.

219. The same factors suggest that overruling *Roe* would not be in accordance with "the prevailing sense of justice today," as Justice Stevens put it in *Runyon v. McCrary*, 427 U.S. 160, 189-92 (1976) (Stevens, J., concurring).

220. The fundamental rights issue may well have been Bork's downfall. As one commentator explained:

The issue that jelled for the opposition, surprisingly, was privacy. The number of senators who gave prominence to the privacy issue in their speeches opposing Judge Bork was striking.

Indeed, the privacy issue underwent a fascinating transformation during the course of this confirmation debate.

Before the confirmation hearings began, the word "privacy" in

For the Court to abandon one of its most important decisions upholding individual rights, while under intense political fire and soon after major personnel changes, would be too much of an abdication of its independence and institutional role.²²¹

No doubt there is room for a fine-tuning of *Roe*. The precise balance cast by the Court is subject to reassessment based on further thought and new information. It would be a mistake, however, for the Court to repudiate the basic principle of *Roe*.²²² And any fine-tuning should be cautious, for even if the Court could have reasonably struck a different balance in *Roe*, stare decisis places a considerable burden on those who seek to restrike the balance.

CONCLUSION

This Article began by criticizing grand theory as an approach to constitutional law. The strongest argument against grand theory is based on experience: many extremely able people have attempted to discover the true foundation of con-

political discourse was widely understood as a metaphor for abortion, a politically dangerous topic.

During the hearings, privacy became another metaphor entirely. It came to stand for the whole theme of fundamental rights, the concept of an expansive Constitution in contrast to Judge Bork's view that the Constitution was limited by its precise language and the intent of its 18th Century framers.

The abortion question itself became subsumed into the broader question of a generalized right to privacy, a concept that politicians were suddenly rushing to embrace.

Greenhouse, *What Went Wrong*, N.Y. Times, Oct. 7, 1987, at B10, col. 1, cols. 3-5 (city ed.); see also Kurland, *Bork: The Transformation of a Conservative Constitutionalist*, 9 CARDOZO L. REV. 127, 132-34 (1987) (criticizing Bork on this basis); Rosenthal, *Victory for Conservatism*, N.Y. Times, Oct. 9, 1987, at 27, cols. 5, 6 ("The Griswold case . . . was for some [Senators] the touchstone.").

221. Notably, only 17% of judges interviewed in a recent poll thought *Roe* should be overruled; an equal number thought it was wrongly decided but should be upheld because of stare decisis; and 44% thought it was rightly decided. The rest were undecided. *The View from the Bench*, Nat'l L.J., Aug. 10, 1987, at S-12.

222. The discussion in Part IIC may be a bit jarring to some readers. The Supreme Court does not, for example, customarily cite public opinion polls in its decisions. This raises the interesting question of "transparency": to what extent is the judge obligated to write an opinion fully explaining the true reasons? To the extent pragmatism involves an expansion in the range of analysis now incorporated in conventional judicial rhetoric, this is a particular problem for the pragmatist judge. A full analysis of this problem would be too complex to attempt here, but two preliminary remarks are in order. First, transparency is a great virtue, but not necessarily an absolute. Second, pragmatist rhetoric is probably less jarring in dealing with remedial matters or matters of judicial process like stare decisis—as in this Subsection.

stitutional law, and none has succeeded. There are also reasons for doubting that a foundational approach to constitutional law is desirable. The alternative is a less structured mode of decision making called *legal pragmatism*. Legal pragmatism tries to analyze problems based on both social policy and traditional legal doctrines, seeking a satisfactory adjustment of the two. Although some might argue that legal pragmatism is inherently ad hoc, I have argued that principled pragmatism is far from being an oxymoron.²²³

The pragmatist attempt to combine respect for precedent and judicial creativity is as much a way of thought as a set of doctrines. Hence, legal pragmatism is easier to exhibit than to summarize. But if there is any one passage that summarizes the essence of legal pragmatism, it comes from the opening paragraph of one of the most famous books in American legal history, Holmes's *The Common Law*:

It is something to show that the consistency of a system requires a particular result, but it is not all. The life of the law has not been logic: it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed. The law embodies the story of a nation's development through many centuries, and it cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics. In order to know what it is, we must know what it has been, and what it tends to become. We must alternately consult history and existing theories of legislation. But the most difficult labor will be to understand the combination of the two into new products at every stage.²²⁴

This blend of principle and policy, of tradition and innovation, is the essence of legal pragmatism. It holds the key to a fruitful understanding of constitutional law.

The second half of the Article attempted to justify these claims on behalf of legal pragmatism by demonstrating its application to a central problem in modern constitutional law: whether (and if so, when) the Supreme Court should give constitutional status to rights not named in the constitutional text.

223. As a perceptive recent article points out,

The ideologue seeks an iron logic. Who says *A*, he thunders, must say *B*. But that is not the only way to act in accord with principle. There is a difference between the coherence of ideas, so dear to philosophers, and the coherence of our lives or the coherence of practical judgment.

Selznick, *supra* note 17, at 463.

224. O. HOLMES, *supra* note 1, at 1.

This practice of protecting unwritten fundamental rights, I have argued, is strongly rooted in our legal and social traditions. Although it carries risks, and therefore should only be done cautiously, recognition of unwritten fundamental rights has been a valuable part of our constitutional process.

The more difficult question is what rights the Court should recognize. Earlier in this century, the Court gave constitutional status to a general right of economic liberty. Arguments have been made recently in various guises for a return to vigorous Supreme Court oversight of economic legislation. Such oversight, however, would involve too pervasive a judicial role in overseeing most government operations, as well as potentially too radical a restructuring of society.

*Roe v. Wade*²²⁵ is the ultimate test for fundamental rights analysis. The discussion in this Article is limited to the core holding of *Roe* that the state must allow abortion under at least some circumstances. I have argued that the right of procreative freedom involved in *Roe* is clearly fundamental, but that the sufficiency of the state's interest in banning abortions is a closer question. On balance, however, particularly given the strong public consensus that at least some abortions are permissible, I believe that a complete ban on abortions cannot be justified. Even if this conclusion is wrong, little would be gained and much damage would be done to the Court by overruling *Roe*.

Legal pragmatism does not, as the analyses of *Lochner* and *Roe* indicate, lend itself to simple answers to hard constitutional questions. The pragmatist's answers may be less elegant, but in the end I believe they are more satisfying than those that any grand theory could provide.

225. 410 U.S. 113 (1973).