Author: Aaron J. Rappaport
Source: Utah Law Review
Citation: 2001 Utah L. Rev. 441 (2001).
Title: Beyond Personhood and Autonomy: Moral Theory and the Premises of Privacy

Originally published in UTAH LAW REVIEW. This article is reprinted with permission from UTAH LAW REVIEW and University of Utah S.J. Quinney College of Law.
BEYOND PERSONHOOD AND AUTONOMY: MORAL THEORY AND THE PREMISES OF PRIVACY

Aaron J. Rappaport*

TABLE OF CONTENTS

I. INTRODUCTION ................................................. 442

II. THE MORAL PREMISE OF PERFECTION ................................. 451
   A. Personhood and Privacy .................................... 452
   B. Personhood and Perfectionism .............................. 454

III. PERFECTIONISM AND THE STRUCTURE OF PRIVACY ................... 456
   A. A Question About Assumptions .............................. 459
   B. Mill's Principle of Liberty .................................. 460
   C. The Private and Public Sectors ............................ 464
   D. Balancing and the Structure of Privacy .................... 466

IV. THE INSTITUTIONAL PREMISE ...................................... 469
   A. Justifying Judicial Review .................................. 469
   B. Reflections on the Countermajoritarian Difficulty ..... 471

V. THE BREADTH OF PRIVACY .......................................... 476
   A. The Essential Attributes of Personhood ...................... 476
   B. The Radical Scope of Privacy ............................... 479
      1. Associational Privacy ..................................... 480
      2. The Right of Intimate Association ......................... 482
   C. State Interests and Moral Offense .......................... 484

VI. THE FORCE OF TRADITION .......................................... 487
   A. The Failure of Tradition ..................................... 488
   B. Lord Devlin and the Relevance of Traditional Morality .... 490
      1. The Disintegration Thesis .................................. 491
      2. The Disintegration Thesis Reconsidered .................... 493

*Assistant Professor, University of California, Hastings College of Law. Many friends and colleagues read earlier drafts of this Article. I owe them all a debt of gratitude. Thanks to Vik Amar, Ash Bhagwat, Bill Dodge, David Fagman, Joe Grodin, Evan Lee, Joe Liu, Marc Miller, Thomas Morawetz, Jessica Richter, Reuel Schiller, and Bill Wang. Special thanks to the Playa del Carme study group—Ellen Jacobs, Gerson Jacobs, Michael Jacobs, and Judith Rappaport.
I. INTRODUCTION

Constitutional law can make no genuine advance until it isolates the problem of rights against the state and makes that problem part of its own agenda. That argues for a fusion of constitutional law and moral theory, a connection that, incredibly, has yet to take place.\footnote{RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 149 (1978) [hereinafter DWORKIN, RIGHTS].}

Privacy poses a particular puzzle for its defenders.\footnote{This Article uses the term “privacy” to refer to the Supreme Court’s constitutional decisions protecting the freedom to make certain kinds of “important” decisions, including decisions regarding abortion, contraception, marriage, and childrearing. I will not address other subjects that sometimes fall under the label of “privacy,” such as issues concerning the control of personal information. See Jed Rubenfeld, The Right of Privacy, 102 HARV. L. REV. 737, 740 (1989) (distinguishing constitutional privacy from informational privacy).} The difficulty, as Paul Brest has noted, is that neither the text of the Constitution, nor original intent, nor tradition can justify the specific contours of that jurisprudence.\footnote{See, e.g., Paul Brest, The Fundamental Rights Controversy: The Essential Contradictions of Normative Constitutional Scholarship, 90 YALE L.J. 1063, 1064 (1981) (“The judges and scholars who support judicial intervention usually acknowledge that the rights at stake—variously described in terms of privacy, procreational choice, sexual autonomy, lifestyle choices, and intimate association—are not specified by the text or original history of the Constitution.”); id. at 1085 (discussing “indeterminacy and manipulability” of tradition-based theories).} None of these standard modes of constitutional interpretation can explain why privacy rights extend to abortion but not homosexual relations, to contraception but not
adultery, to the withdrawal of life support systems, but not to assisted suicide. How, if at all, can these distinctions be justified?

The answer, for many defenders of the doctrine, lies in moral principle, in showing how moral values justify specific claims about privacy rights. Sometimes these moral arguments are made explicitly, as in David Richards’ Kantian approach to privacy. But more typically such views are implicit. Claims that privacy rights are rooted in ideals of autonomy, personhood, intimate association, self-hood, or human dignity all seem to reflect the belief that the favored values are morally appealing. Matthew Adler has argued that the moral approach is the “standard defense of the Court’s decisions in the ‘privacy’ cases, such as Griswold v. Connecticut or Roe v. Wade.”

Some individuals believe that the moral approach is profoundly wrong. To them, the Court should never look to moral principle for guidance in deciding the

---

4The text of the Due Process Clause, for example, is not self-defining and does not, by itself, provide support for the precise scope of the privacy doctrine. Why, for example, does the text establish a right to childrearing and bodily integrity, but not to fornication and assisted suicide? Why are fundamental rights qualified in nature, subject to preemption by a sufficiently strong state interest? Original intent is similarly inadequate. From an originalist perspective, it is unclear why privacy rights extend to such matters as contraception and abortion (which the Framers said little, if anything, about), but not to property rights (which were of central concern to the founding generation). See, e.g., Jennifer Nedelsky, Private Property and the Limits of American Constitutionalism 228 (1990) (noting, with qualifications, that “the Lochner era opinions show ... an impressive continuity with the Federalists’ vision of constitutionalism, complete with the rights of property as the central boundary to state power ...”). Finally, “tradition” fails as an explanation for the specific scope and structure of the Court’s decisions. Indeed, if tradition were the test, non-traditional practices, such as abortion and interracial marriage, would not be protected. See infra Part VI.A (examining deficiencies of tradition in greater detail).


6See, e.g., Louis Henkin, Privacy and Autonomy, 74 Colum. L. Rev. 1410, 1425 (1974) (“[T]he new Right of Privacy is a zone of prima facie autonomy, of presumptive immunity from regulation.”).


9Paul Freund, Speech to the American Law Institute, American Law Institute, 52nd Annual Meeting 42–43 (1975) (referring to “attributes of an individual which are irreducible to his selfhood”), quoted in Craven, supra note 7, at 702 n.15.


proper scope of privacy rights. 12 My intention here is not to enter into that debate, but simply to assume the necessary connection between privacy and morality. That is, for the purposes of this Article, I will assume that the specific scope and structure of privacy rights can only be justified on moral grounds, and that this is an entirely appropriate basis for justifying those rights. 13 I will call this starting point the “moral thesis.” My object is to ask the further question: If the moral thesis is true, what can normative constitutional scholarship 14 say about the relationship between moral principle and privacy?

One answer is that normative scholarship should seek to clarify how moral ideals inform the specific scope and structure of privacy rights. A standard approach to pursuing that agenda begins by affirming some favored moral principle, and proceeds by claiming that the principle requires a distinct privacy jurisprudence. This approach is prescriptive in nature; it seeks to identify the “correct” privacy jurisprudence, to spell out how privacy should be structured. The prescriptive approach has high ambitions: It aspires to articulate nothing less than the morally justified structure of privacy rights.

Those high ambitions engender controversy. Even those who accept the moral thesis disagree markedly about which moral principles are correct, and how those principles apply to concrete disputes. Thus, for example, a natural lawyer like John Finnis can argue that the “public promotion and facilitation of homosexual activity” impedes basic “human goods,” 15 while a political theorist

---

12Monaghan is one. Monaghan, supra note 11, at 394–95. See also John Hart Ely, Democracy and Distrust 44–54 (1980).

13A range of legal theorists have argued that moral principles underlie all interpretive questions about constitutional law or constitutional rights. See, e.g., Erwin Chemerinsky, Interpreting the Constitution 138 (1987) (“Inescapably, constitutional law requires normative analysis about what values should be protected from majoritarian decision making... Choosing values inevitably is an inquiry into political and moral theory.”); Ronald Dworkin, Freedom’s Law 2 (1996) [hereinafter Dworkin, Freedom] (arguing for a “moral reading” of constitutional liberties, an approach that “proposes that we all—judges, lawyers, citizens—interpret and apply these abstract clauses on the understanding that they invoke moral principles about political decency and justice”); Walker, supra note 5, at 13 (“Constitutional theory... cannot avoid reliance upon moral premises.”). See also Michael Moore, Moral Reality, 1982 Wis. L. Rev. 1061 (1982). I am sympathetic to this broader claim, although adopting it is unnecessary for this Article’s analysis.

14I use the term “normative constitutional scholarship” to refer to efforts to identify, or assist individuals in identifying, principles to guide in interpreting the Constitution. Not all kinds of constitutional scholarship are “normative” in nature. See Walker, supra note 5, at 13 n.8 (distinguishing normative constitutional scholarship from other types).

like Stephen Macedo can reach precisely the opposite conclusion about homosexual conduct.\footnote{Stephen Macedo, *Against the Old Sexual Morality of the New Natural Law*, in *NATURAL LAW, LIBERALISM AND MORALITY* 27, 28 (R. George ed., 1996) ("[T]he new natural law’s own moral stance, properly understood, provides grounds for affirming the good of sexual relationships between committed, loving homosexual partners, and for extending the institution of marriage to homosexuals.").}

As Richard Posner has observed, the persistent controversy reflects the fact that underlying moral questions—about the nature of the “human good”—are not only sharply contested, they are ultimately irresolvable.\footnote{RICHARD A. POSNER, *THE PROBLEMATICS OF MORAL AND LEGAL THEORY* 131 (1999) ("Even if there is an objectively correct answer to every moral question . . . , the answer will appear arbitrary because there is no reasoning process that a judge might follow that would strike a detached observer as furnishing objective justification for the answer."). For a similar point, see Arthur Allen Leff, *Unspeakable Ethics, Unnatural Law*, 1979 DUKE L.J. 1229, 1241 (1979) (discussing “provable unprovability of normative propositions”); Richard Delgado, *Norms and Normal Science: Towards a Critique of Normativity in Legal Thought*, 139 U.PA.L. REV. 933, 960 (1991) ("[F]or every social reformer’s plea, an equally plausible argument can be found against it.").}

For Posner, these difficulties suggest that legal commentators should avoid the futile and potentially pernicious field of moral theory altogether. But that conclusion may be premature. Posner fails to acknowledge that the standard approach does not exhaust the possibilities for moral theory in the privacy realm. In this Article, I will pursue an alternative approach, one that attempts to answer a different set of questions about the link between law and morality. Rather than trying to identify the correct moral ideal as a guide to assessing the best legal doctrine, this approach takes the Court’s existing privacy precedents as a given, and seeks to identify the *moral premises* implicit in those decisions.\footnote{Pierre Schlag has argued that, given the unprovability of ultimate ends, normative scholarship is indistinguishable from “advocacy” pieces. Since normative scholars can not “prove” the correctness of their favored positions, they employ rhetorical tricks and ploys to persuade the reader that their views are correct. Pierre Schlag, *Normative and Nowhere to Go*, 43 STAN. L. REV. 167 (1990).}

These premises are what an individual must accept if she is to believe that the Court’s privacy decisions are morally justified. One might think of this approach as involving a kind of thought experiment. In it, one assumes that the Court’s jurisprudence is justified, and then tries to “back out” the premises that underlie that conclusion. This effort is certainly normative, at least in the sense that it seeks to identify a principled moral argument that supports the Court’s privacy decisions. But it is also fundamentally descriptive in nature: The effort seeks to identify a moral argument that “fits” existing privacy precedent and that explains the moral significance of that jurisprudence.19

What is the point of this thought experiment? Why seek out the moral premises of the Court’s decisions? Simply stated, this approach represents a way of helping an individual assess the merits of the Court’s jurisprudence, principally by making clear the “price” of supporting the doctrine. That is to say, the method clarifies just what assumptions must be accepted in order to endorse the Court’s doctrine.

Consider a simple example. Suppose you are trying to determine whether to support the Court’s decision in Griswold, which holds that a right to contraception exists. As one who embraces the moral thesis, you will endorse that decision only if it is morally justified. But is it? To help answer that question, you ask someone who supports the decision to explain the moral basis of the ruling.

reproducing or vindicating common moral beliefs. It aims at displaying the connection between moral ideas and principles in ways which manifest their intelligibility.”); David A.J. Richards, Moral Philosophy and the Search for Fundamental Values in Constitutional Law, 42 OHIO ST. L.J. 319, 324–25 (1981) [hereinafter Richards, Moral Philosophy] (“[S]erious moral philosophy today, as has been the case since Socrates, shares a common method—namely, the attempt to explicate ordinary and considered moral judgments in a self-critical and reflective way.”). In some of his earlier writings, Posner himself acknowledges a modest role for moral theory in assessing the premises of belief. See, e.g., POSNER, supra note 17, at 55–56.

19This general methodology resembles Ronald Dworkin’s theory of constitutional interpretation. According to Dworkin, individuals should strive to identify the best theory of political morality that “fits” the Court’s jurisprudence. Ronald Dworkin, Law’s Ambitions for Itself, 71 VA. L. REV. 173, 178 (1985) (describing two constraints on interpretation: a requirement of “justification” and a requirement of “fit”).

Nonetheless, the present approach differs in significant ways from Dworkin’s. Perhaps most notably, Dworkin infuses his theory with prescriptive force. That is, he suggests that a moral theory’s alignment with the relevant legal materials is itself a reason for adopting that theory as one’s own. Dan Simon, A Psychological Model of Judicial Decision Making, 30 Rutgers L.J. 1, 124 (1998) (“It is important to note that the notion of coherence in Dworkin’s theory is not merely descriptive, . . . it is prescriptive through and through. The decision must endorse the interpretation that best justifies the extant legal practice and institutions as a coherent scheme of principle.”). I make no such claim. As discussed further below, a moral theory should be adopted only if the premises of that theory are found to be persuasive. The mere fact that a moral theory fits the Court’s precedents offers no evidence of its moral correctness. For an analysis of Dworkin’s theory roughly along these lines, see WALKER, supra note 5, at 42 (1990) (discussing Dworkin’s “normative ambivalence”).
Imagine the individual replies that: (1) promoting human welfare should be the goal of a good society; (2) government regulation of intimate choices undermines human welfare in the long run; and (3) decisions about childbirth—including decisions about contraceptive use—are intimate choices. Decisions about contraception, as a result, should be protected from government regulation.

These various propositions are the “premises” of an argument in favor of the Court’s contraception ruling. If found to be compelling, the premises would offer a rationale for treating the Griswold decision as morally justified. Of course, in practice, several arguments—each with its own sets of premises—might be found to support a given moral claim about privacy. Under these circumstances, one would want to consider the most persuasive argument in support of the ruling in order to assess the decision in its best light. This is sometimes called the “principle of charitable interpretation.”

It may seem rather straightforward to identify a set of plausible arguments for Griswold. Indeed, given the range of possible arguments, each with its own corresponding premises, this endeavor might not seem particularly useful. But the question at issue in this Article is more challenging. I am interested in assessing the moral basis, not of a single privacy decision like Griswold, but of the Court’s privacy jurisprudence as a whole. The challenge, in short, is to identify at least one plausible moral argument capable of supporting the full breadth of the Court’s privacy decisions. Is such an argument conceivable?

---

20 Robert J. Ackermann, Modern Deductive Logic 10 (1970) (“An argument is a claim that some assertion in a sequence of assertions follows from the other assertions made previously in the argument. The assertion which is claimed to follow from the others is called the conclusion of the argument, and the assertion or assertions it is said to follow from are called the premise or premises of the argument.”) (emphasis in original); Neil MacCormick, Legal Reasoning and Legal Theory 21 (1995) (“[A]n argument . . . purports to show that one proposition, the conclusion of the argument, is implied by some other proposition or propositions, the ‘premises’ of the argument.”).

21 According to that principle, “[w]hen more than one interpretation of an argument is possible, the argument should be interpreted so that the premises provide the strongest support for that conclusion.” Jerry Cederblom & David W. Paulsen, Critical Reasoning 28 (2001). See also Robert P. George, Making Men Moral 65 (1996) (adopting as a canon of interpretation the following precept: “select among equally plausible interpretations of a text that interpretation under which the position taken or argument made in the text is more plausible”). Ronald Dworkin appears to adopt a similar principle of interpretation when he directs individuals to adopt the “best” theory of political morality that can support the existing legal structure. Dworkin, supra note 19, at 178 (arguing that a judge, in deciding which of several interpretations should be adopted, should favor the one that “provides the better justification”). See also Ronald Dworkin, Law’s Empire 90 (1986) [hereinafter Dworkin, Empire] (“General theories of law . . . try to show legal practice as a whole in its best light.”).
One might be skeptical, especially if the Court’s jurisprudence is defined with any degree of specificity. The Supreme Court, after all, does not appear to be guided by an overarching set of normative principles. Its decisions seem to mark off an uneven road, advancing the right of privacy in one direction (e.g., Griswold), limiting that right in others (e.g., Bowers), and in some cases paving and then repaving its handiwork in an effort to find just the right shape and breadth (e.g., the abortion decisions). One might be forgiven for thinking that the jurisprudence is the result more of personal or political preferences than any principled approach to adjudication.

This skepticism, however, is unfounded. As I argue in this Article, one can identify a plausible moral argument that is capable of supporting both the scope and structure of the Court’s privacy decisions—even when defined at a relatively high level of specificity. In terms of scope, the argument offers an explanation for the Court’s major privacy decisions, including rulings regarding contraception, abortion, bodily integrity, and childrearing. In terms of structure, the argument explains why privacy rights are qualified rights; that is, rights that can be overcome by a sufficiently strong state interest.

This argument may not provide support for each and every nuance of the Court’s doctrine. It may not lend support for the Court’s specific reasoning in any given case. But, as I will suggest, the theory provides an argument for the Court’s bottom-line rulings with regard to the major privacy decisions. In doing so, the theory succeeds in illuminating the core features of that jurisprudence.

This moral argument is notable for an additional reason: It draws upon moral and political principles that have deep roots in American culture. These principles—such as perfectionism, liberty and tradition—are often treated as separate and unrelated concepts. But as the argument presented in this Article makes clear, these concepts fit together to form an integrated and potentially compelling theory of political morality. From the perspective of this moral argument, one can view the privacy doctrine as an effort, in a specific legal context, to offer a coherent response to a set of interrelated questions concerning the moral ends of society, the role of government, and the relevance of tradition.

---

22DWORKIN, RIGHTS, supra note 1, at 156 (noting possibility that “no coherent set of principles could be found that has independent appeal and that supports the full set of our immediate convictions; indeed, it would be surprising if this were not often the case”).

23Cf. OLIVER WENDELL HOLMES, JR., THE COMMON LAW (1881) (“The felt necessities of the time... 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.”).

24To avoid any confusion, let me emphasize that I do not claim in this Article that the theory outlined below is the only theory that might support the Court’s jurisprudence. If additional theories are found, the task would be to identify the most persuasive one. But since no other theory has been identified that can support both the scope and structure of the Court’s jurisprudence, I will proceed on the assumption that the moral argument outlined here is the most persuasive one available.
The central premises of this moral theory are described in a series of steps. Since the overall goal of this Article is to identify a moral argument for the Court’s privacy decisions, the first step is to identify a moral principle to serve as the foundation of that theory. Part II confronts this initial task, describing the moral ideal. The principle, which is called the principle of “perfectionism,” rests on the classical belief that there is a “good life” for man, and that human beings should strive to fulfill their deepest potentials. The idea is analogous to modern concepts of self-fulfillment, self-realization, or human flourishing. As this part explains, perfectionism is consistent with the common view that certain decisions individuals make are more important to their fulfillment than others. Some—such as decisions about who to marry—are fundamental.

A second question concerns the morally justified legal structure. Given the principle of perfectionism, what legal architecture is best able to promote that moral ideal? Because perfectionism is compatible with a range of social structures, additional premises are needed to translate the moral ideal into a specific legal system. One such premise is the political principle of “liberty,” which stands for the proposition that individuals are best suited to make decisions about their own good (i.e., their moral perfection). This is the ideal of self-governance—“autonomy”—that lies at the heart of the classical liberal tradition.

Part III, which discusses the liberty principle, draws heavily from J.S. Mill’s classic work, On Liberty. In doing so, this part explains how liberty effectively splits decision making authority into two spheres—one private and one public. In the private sphere, the individual possesses the authority to determine what is best for his own good. But in the public sphere, the government may enact regulations to promote the public’s welfare.

The difficulty is that the private and public spheres are not distinct—private acts have public consequences, and public regulations affect private interests. The Court’s privacy jurisprudence can be seen as a method of resolving this tension, by balancing decision making power between the private and public spheres in a way that is thought to promote human welfare (i.e., perfection) over the long run. Simplifying somewhat, this structure holds that individuals should have presumptive authority over decisions that significantly affect their chances at fulfillment. These significant decisions are what the Court calls “fundamental” privacy interests. In this way, a theory of liberty and perfectionism—or “liberal perfectionism”—establishes a moral argument in support of the structure of the privacy doctrine.

A related question concerns the institutional mechanism that will best preserve this legal structure. In theory, that structure might be maintained by any one of several entities—by a self-policing legislature, a council of revision, or some other institution. As Part IV discusses, a basic premise of the privacy doctrine is that the Court is responsible for defending privacy rights against legislative overreaching. The implicit normative assumption must be that, in
undertaking this role, the Court will promote the moral goals of human perfection.

The moral, structural, and institutional assumptions outlined in the first three parts of the Article are sufficient to explain the basic structure of the Court's privacy jurisprudence. Moreover, as Part V discusses, these premises, when supplemented by several others, also help to make sense of the general scope of the Court's privacy jurisprudence, including the Court's decisions regarding bodily integrity, marriage, contraception, abortion, and childrearing.

At the same time, this analysis makes clear that the theory of liberal perfectionism does not offer a perfect fit: It militates for an extremely broad—some might say radical—sweep for those rights. It calls for a privacy right that extends heightened protection to homosexual sodomy, and perhaps incest and fornication. The theory, as a result, seems to conflict in significant ways with the Supreme Court's more constrained view of privacy rights. In order to reconstruct an argument in support of the Court's jurisprudence, an additional limiting principle is needed to close the gap.

Part VI offers such a premise. Drawing on the writings of Patrick Devlin, this part argues that "tradition" offers an appropriate constraint. Although tradition has been subject to criticism from moral and legal theorists, this part attempts to rehabilitate the concept by treating it as a proxy for deeper concerns about social cohesion and institutional legitimacy. In effect, this part argues that the Court should decline to announce a new privacy right if such a ruling would pose a significant threat to social cohesion or the Court's public legitimacy.

With this fourth element of the theory identified, the major components of a coherent theory of privacy are set in place. In effect, these core premises constitute a layered argument, which together provide grounds for believing that the general scope and structure of the Court's privacy jurisprudence is morally justified. I will refer to the entire argument as the "Normative Theory." For ease of reference, the four basic elements are summarized below:

(1) **Moral premise:** The ultimate standard of valuation for human affairs is human perfection. Human beings should strive to fulfill their objective good. Certain kinds of decisions are "fundamental" in the sense that they have an extremely significant effect on an individual's opportunities for perfection.

(2) **Structural premises:** The existing structure of the Court's privacy jurisprudence promotes human perfection. This conclusion reflects two subsidiary assumptions:
(a) *Principle of Liberty:* Citizens should be responsible for assessing their own good, and government should be responsible for protecting the good of the public.

(b) *Balancing Test:* Since public and private interests conflict, some division of authority between the two spheres is required. The privacy doctrine divides decision making authority in a principled manner that promotes human perfection.

(3) *Institutional Premise:* Judicial review will help preserve the morally-justified structure of privacy as defined by the above premises.

(4) *Prudential Premise:* "Tradition" serves as a limitation on the scope of privacy to the extent necessary to preserve social cohesion and the Court's public legitimacy.

These premises constitute the core elements of a moral argument in support of the Court's privacy jurisprudence. Much work is needed to fill in the details of the theory. Nonetheless, this preliminary effort will suggest that the Court's privacy doctrine has a normative logic, one that has not been apparent to most observers, or even perhaps to the Justices themselves. By identifying the premises of privacy, this effort helps individuals evaluate the Court's jurisprudence by making clear what must be endorsed to view that doctrine as morally justified. By exposing premises, and showing how those premises interrelate, the Normative Theory encourages a more reflective judgment concerning the significance of this puzzling body of constitutional law.

II. THE MORAL PREMISE OF PERFECTION

Any effort to clarify the premises of a moral claim must obey the rules of practical reasoning, and principally the requirement of logical consistency. According to that requirement, a set of premises will be treated as a valid ground for a given conclusion only if the "premis[es] do in fact imply (or entail) the conclusion. By that is meant that it would be self-contradictory for anyone to

---

*I do not claim in this Article that the Justices themselves were influenced or motivated by the Normative Theory. Indeed, as discussed further below, the Court's opinion in Washington v. Glucksberg, 521 U.S. 702 (1997), suggests that at least a plurality of the present Court would find the theory unappealing. See infra Part VII. But the motivation of the Justices, or for that matter the Framers of the Constitution, is not relevant to this Article's analysis. Simply put, the theory outlined here might be a post-hoc rationalization of the Court's decisions, but it might be deemed persuasive nonetheless. That is, one might find the Court's decisions in *Glucksberg* (or *Griswold*, or *Roe*, or *Bowers*) to be morally compelling on grounds unforeseen by the Supreme Court."
assert the premises and at the same time to deny the conclusion.26 In short, the moral claims made about privacy must flow from their underlying premises.27

One implication of this requirement is that a moral argument in favor of the Court's privacy jurisprudence must have a moral principle at its foundation. That might seem obvious: One can not make a moral claim without believing that moral principles exist, and that such principles support the asserted position.28 The difficult question lies in determining what sort of moral principle might plausibly serve as a foundation for a moral argument in favor of the Court's privacy jurisprudence.

A. Personhood and Privacy

One place to begin this discussion is with a now-famous excerpt from the Supreme Court's decision in Planned Parenthood of Southeastern Pennsylvania v. Casey,29 in which the Court reaffirmed a right to abortion. Privacy rights, Justices Souter, Kennedy and O'Connor wrote, consist of the:

most intimate and personal choices a person may make in a lifetime . . . . At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under the compulsion of the State.30

One of the things that makes this excerpt interesting is that it draws upon a concept—personhood—that has been espoused as a central organizing idea for

---

26MACCORMICK, supra note 20, at 21–22.
27This is intuitively understood. Imagine an individual who believes that judicial protection of contraceptive rights is morally justified. But, in explaining his rationale for that belief, the individual states, as a premise, that judicial review of state regulations is never justified on moral grounds. Here, the explanation does not make sense: The premises and conclusions are in direct conflict. In this case, we do not say that the individual has identified a premise of his belief. We say that he is confused and muddled in his thinking.
28MACCORMICK, supra note 20, at 5 ("[A]ny mode of evaluative argument must involve, depend on, or presuppose, some ultimate premises which are not themselves provable, demonstrable, or confirmable in terms of further or ulterior reasons.").
30Id. at 851. This excerpt has been broadly cited by both liberals and conservatives. Liberals have typically extolled the language. See, e.g., DWORKIN, FREEDOM, supra note 13, at 121 (applauding the Casey decision for putting the right to abortion on "a more secure basis"). Conservatives have criticized the language for sowing confusion about the scope of privacy rights. See, e.g., infra Part VII.A (discussing Justice Rehnquist's attacks on Casey).
privacy rights. Laurence Tribe, J. Baxter Craven, and others have suggested that “personhood” is the touchstone for determining the scope of privacy rights.\(^{31}\)

This concept, unfortunately, has proved difficult to decipher, since personhood proponents have been circumspect about advancing a clear definition of the term.\(^{32}\) Nonetheless, for many, the concept of personhood seems to signify that certain decisions are more important than others for a reason—because they are somehow fundamental to an individual’s efforts to define himself or herself. As one commentator observed, “[p]roponents of personhood forge a link between the privacy case law and individuals’ personal identity.”\(^{33}\)

The Supreme Court has stated that privacy rights reflect particularly “important” decisions for the individual.\(^{34}\) Personhood-as-self-definition ostensibly offers a metric for identifying what those rights are. These rights represent decisions central to an individual’s conception of himself or herself. Thus, childbearing, marriage, and childrearing all deserve heightened protection by the Court because they are so closely linked to one’s identity.

Although influential, this concept of personhood has also been subject to severe criticism. One line of attack, advanced by Jed Rubenfeld, emphasizes that just about anything can be deemed essential to self-definition, at least from a subjective perspective. One person might see his hairstyle or career as being critical to his identity.\(^{35}\) Another might view drug use or driving without a seatbelt in the same way.\(^{36}\) Should these decisions constitute a fundamental

\(^{31}\) Tribes, supra note 7, at 1308, §15-3 (speaking of the right to personhood interchangeably with the right to privacy); Craven, supra note 7, at 701 (arguing that, even if personhood rights are not deemed “fundamental,” they should be cognizable by courts and trigger heightened scrutiny). See also Freund, supra note 9 (asserting that privacy rights protect those “attributes of an individual which are irreducible in his selfhood”).

\(^{32}\) Craven, supra note 7, at 702 (“It is too soon to attempt a precise definition of the term ‘personhood.’ The term . . . includes elements of the concepts of individuality, autonomy, and privacy.”).

\(^{33}\) Rubenfeld, supra note 2, at 753.


\(^{35}\) See Rubenfeld, supra note 2, at 755. Tribe, in fact, suggests that matters such as dress or appearance should be deemed “fundamental,” since they are essential to an individual’s self-definition. Tribes, supra note 7, at 1386–88.

\(^{36}\) In an early law review article, David Richards considered, and seemed to offer tentative support for, expanding privacy rights to include drug use. David A.J. Richards, Sexual Autonomy and the Constitutional Right to Privacy: A Case Study in Human Rights and the Unwritten Constitution, 30 Hastings L.J. 957, 1015 n.245 (1979) [hereinafter Richards, Sexual Autonomy] (“Perhaps a good argument could be made that dress and hair length are important ways in which human beings define themselves and must thus be regarded as basic life choices. Perhaps, soft drug
interest? If the goal is to identify the premises of the Court's existing privacy jurisprudence, the answer must be no. The morally-justified scope of privacy rights can not turn on the subjective interests or beliefs of the individual affected.

A second equally powerful objection concerns the normative significance of the personhood concept. Moral claims require a moral principle, but the normative significance of personhood is not apparent. Why is permitting an individual to define himself or herself morally significant? Isn't it possible, if not likely, that some individuals will define themselves in ways that are morally questionable, if not sinful? What value lies in giving individuals a right to pursue such a course of action?

Both objections make clear that personhood remains a mysterious term; its proponents have not explained how the standard should be applied or why the standard has normative significance. These deficiencies do not mean that the concept of personhood should be discarded. But the concept must be clarified if it is to serve as a basis for constructing a moral argument for privacy.

B. Personhood and Perfectionism

One way to salvage the concept of personhood is to reconceive it as an expression of a distinct moral tradition, which some have called "perfectionism." This doctrine, often traced to the writings of Aristotle, rests on the ideal of the "good life"—on the belief that human beings have certain ends that constitute their ultimate good.

Perfectionism is a "moral" ideal, in the sense that it generates obligations for individuals. Human beings have a duty to promote their own (and other individuals') perfection as far as they are able, and thus to achieve what classical writers called "virtue," or human excellence. Fulfilling one's inner potential leads to a state of being that Aristotle labeled "eudaimonia," and that we might use could be regarded as a form of autonomous control over internal psychic space and attitudes . . . . On the other hand, these arguments may be strained.

See Rubenfeld, supra note 2, at 755.

See, e.g., GEORGE, supra note 21, at 19-47 (discussing Aristotle's role in the "central tradition" of perfectionism). Cf. COHEN, supra note 18, at 17-18 ("[L]aw has instrumental value in so far as it promotes good human activity, or more briefly, the good life. . . . Accordingly, the valuation of law is part of that branch of ethics which we have called moral science, and every legal element can receive a final evaluation in terms of the good life.").

See, e.g., CHRISTINE M. KORSGAARD, THE SOURCES OF NORMATIVITY 8 (1998) (stating that normative principles "make claims on us; they command, oblige, recommend, or guide. Or at least, when we invoke them, we make claims on one another. When I say that an action is right, I am saying that you ought to do it.") (emphasis in original).

See, e.g., JOHN RAWLS, A THEORY OF JUSTICE 25 (1971) (defining perfectionism as "realization of human excellence in the various forms of culture").
translate roughly as “self-fulfillment,” “self-realization,” “flourishing,” or simply “happiness.”"  

Perfectionism assumes that certain kinds of human activities and interests are more important to the good life than others. Thus, for example, Aristotle believed that contemplation or intellectual activity was essential to human fulfillment. Other theorists have suggested that decisions relating to emotional commitments or physical activity are critical to the fulfilled life. Whatever their specific position, perfectionists assume that certain kinds of decisions are fundamental to flourishing. 

Finally, the perfectionist believes that these aspects of human flourishing are “objective” in nature; that is, they have a value independent of what anyone happens to think is valuable. Thus, the perfectionist who believes that emotional commitment is essential to the good life believes that this is so even if another individual, or the entire community, happens to believe otherwise. In this sense,

---

41 Stephen Feldman, Republican Revival/Interpretive Turn, 1992 Wis. L. Rev. 679, 689 (1992) (“The telos or natural end of human life is eudaimonia or happiness, and one achieves happiness by living a life in accordance with virtue.”).  
42 For one account of how different human potentials are to be weighed, see Hurka, supra note 18, at 84–98.  
43 Id. at 85.  
44 Martha Nussbaum has articulated a range of “human capabilities” that “can be convincingly argued to be of central importance to any human life, whatever else the person pursues or chooses.” Martha C. Nussbaum, In Defense of Universal Values, 36 Idaho L. Rev. 379, 415 (2000). According to Nussbaum, these “central human functional capabilities” include, among other things, an interest in life, bodily integrity, emotions, and practical reason. Nussbaum argues, consistent with the principle of perfectionism, that society is obligated to promote these human capabilities. Id. at 416 (“[T]he structure of social and political institutions should be chosen, at least in part, with a view to promoting at least a threshold level of these human capabilities.”).  
45 Hurka, supra note 18, at 5 (stating that perfectionism constitutes “an objective theory of the good. It holds that certain states and activities are good, not because of any connection with desire, but in themselves”).  

This use of the term “objective” may cause some confusion. In the legal profession, the term is sometimes associated with the “reasonable person” standard. By contrast, in this Article, the term is used in its philosophical sense, to refer to a belief in “moral realism,” which is the belief that “the good is a morally authoritative reality that transcends the relativities of culture, social power relations, and private preferences.” Walker, supra note 5, at 25. See Michael S. Moore, Moral Reality Revisited, 90 Mich. L. Rev. 2424, 2425, 2432 n.34, 2435 (1992) [hereinafter Moore, Reality Revisited] (asserting that morality must exist independent of what we believe); Jeremy Waldron, The Irrelevance of Moral Objectivity, in Natural Law Theory 158, 158 (R. George ed., 1994) (asserting that the moral realist believes that “[t]here are facts which make some moral judgements (that is, some statements of value or principle) true and others false, facts which are independent of anyone’s beliefs about the matters in question”). See generally David O. Brink, Moral Realism and the Foundations of Ethics 14–36 (1989) (discussing realism and conventionalism in ethics).  

Lest this clarification itself cause confusion, let me emphasize that the philosophical doctrine of “moral realism” is not associated with the concept of “legal realism” taught in law schools. See Waldron, supra, at 158–59 (distinguishing moral and legal realism).
statements about what is good or valuable for human beings are intended as statements about objective moral truth.

These preliminary comments about perfectionism might be summarized as follows:

(1) Moral premise: The ultimate standard of valuation for human affairs is human perfection. Human beings should strive to fulfill their objective good. Certain kinds of decisions are “fundamental” in the sense that they have an extremely significant effect on an individual’s opportunities for perfection.

Defined in this way, the principle of perfectionism provides a basis for making claims about which decisions are important to an individual, without slipping into the subjectivity that Rubenfeld criticizes. When a perfectionist says that decisions about, say, marriage are more significant to an individual than decisions about, say, hairstyle, he believes this is true even if others disagree. He believes, in other words, that he is making a claim about the objective nature of human flourishing.46

Admittedly, the concept of perfectionism is rather vague, and individuals can and do disagree vehemently about what constitutes the “good life.” Subsequent sections, as a result, will explore the specific content of the ideal in further detail.47 But the general concept of perfectionism is sufficiently clear for us to begin to consider the link between perfectionism and the basic structure of privacy rights.

III. PERFECTIONISM AND THE STRUCTURE OF PRIVACY

Perfectionism, Isaiah Berlin has written, constitutes “the central tradition of western thought” regarding morality, politics, and law.48 Its influence, not surprisingly, has been broadly felt in American society. Whether drawn from the works of Aristotle or Aquinas, or from intermediaries such as Hooker,49

46To be sure, individuals disagree about what constitutes human flourishing so that their claims might appear, at least to the external observer, “subjective.” But from the perspective of the individual who embraces perfectionism (which is the perspective that we care about), assertions about the human good are intended as claims about the nature of objective moral reality.

47See infra Part V.A (discussing essential attributes of personhood).


perfectionist ideals infused the intellectual climate of the founding generation. One of the leading legal theorists of that generation, James Wilson, drew on perfectionist ideals in his theory of American society. At the very least, the Framers uniformly embraced the idea of a universal and objectively-defined set of moral ideals, binding on human beings. They called these ideals the "natural law." 


The term "natural law" has been applied to a range of theories about morality, law, and politics. See, e.g., JOHN E. COONS & PATRICK M. BRENNAN, BY NATURE EQUAL: THE ANATOMY OF A WESTERN INSIGHT 123 (1999) (natural law has "countless conceptions"); BENJAMIN F. WRIGHT, JR., AMERICAN INTERPRETATIONS OF NATURAL LAW 4 (1931) ("[N]o single classification... adequately explains the varying interpretations given to this elusive concept."); Robert George, Natural Law and Civil Rights: From Jefferson's Letter to Henry Lee to Martin Luther King's Letter From Birmingham Jail, 43 CATH. U. L. REV. 143, 151, 152 (1993) (acknowledging differences among theories).

Nonetheless, as a statement about morality, natural law theorists typically agree on the core idea that moral principles exist independent of human belief, and that such principles are binding on human beings. COONS & BRENNAN, supra, at 123 ("Every version of natural law claims to rest upon an order of good and evil that holds apart from human preference and obligates the individual."); DWORKIN, FREEDOM, supra note 13, at 316 (natural law "refers to an objective moral reality which endows people with fundamental moral rights that are not created by custom or convention or legislation, but rather exist as an independent body of moral principle."); WALTER LIPPMANN, THE PUBLIC PHILOSOPHY 175 (1955) (stating that natural law "was not someone's fancy, someone's prejudice, someone's wish or rationalization, a psychological experience and no more. It is there objectively, not subjectively. It can be discovered. It has to be obeyed."); PAUL SIGMUND, NATURAL LAW AND POLITICAL THOUGHT, at ix (1971) ("In all its diverse forms, the theory of natural law represents a common affirmation about the possibility of arriving at objective standards, and a common procedure for doing so—looking for a purposive order in nature and man."). See also Michael S. Moore, Law as a Functional Kind, in NATURAL LAW THEORY 188, 192 (Robert P. George ed., 1994) [hereinafter Moore, Functional Kind] (distinguishing between natural law as a metaethical thesis—which is how I use the term—and natural law as a legal theory). For a recent and highly influential attempt to articulate a natural law theory of morality, see JOHN FINNEIS, NATURAL LAW AND NATURAL RIGHTS (1980).

The Framers' belief in a natural law of universal and objective principles is widely recognized. DWORKIN, FREEDOM, supra note 13, at 316 (asserting that most of the eighteenth century statesmen who drafted and argued for the Constitution believed in natural law); KNUD HAAKONSSEN, NATURAL LAW AND MORAL PHILOSOPHY 324 (1996) (stating that during the founding period the "common theoretical framework for teaching and learning was certainly natural law theory"); Terry Brennan, Natural Rights and the Constitution: The Original 'Original Intent,' 15 HARV. J.L. & PUB. POL'Y 965, 975 (1992) ("The texts and debates of the ratification era show that the founding generation almost universally accepted natural law."); Thomas B. McAffee, Substance Above All: The Utopian Vision of Modern Natural Law Constitutionalists, 4 S. CAL. INTERDISC. L. J. 501, 502 n.3 (1995)
Perfectionism is not of historical interest only. To the contrary, perfectionist ideals still resonate in American culture. The idea of achieving one's full potential—of "being all that you can be"—captures something at the very heart of the American Dream. Not surprisingly, political leaders throughout the twentieth century have invoked perfectionist-sounding ideals. Even within the academy today, perfectionism is experiencing a revival, with several influential moral philosophers promoting and exploring perfectionist themes.

Nonetheless, the relevance of perfectionism for this Article's purposes does not depend on its acceptance by the public, by the Framers, by the Supreme Court, or by the legal academy. Rather, the concept's relevance turns solely on whether perfectionism offers a basis for explaining and making intelligible the Court's privacy jurisprudence; that is, whether it offers a plausible premise of that jurisprudence. At least initially, one might be skeptical that perfectionism offers such a foundation.

A range of theorists have expressed concern that perfectionism tends to support a paternalistic government system. In part, this concern reflects the fact that Aristotelian (and Platonic) political theory envisioned a highly intrusive State. But it also reflects the perception that perfectionism and paternalism are

("[N]o constitutional historian worth his salt could question that the premise of a moral reality (or 'natural law' in the terms of the eighteenth century) . . . was an article of faith for the founding generation."); Chase J. Sanders, Ninth Life: An Interpretive Theory of the Ninth Amendment, 69 IND. L.J. 759, 800 (1994) ("[I]t is not open to dispute that the Framers unequivocally believed in natural rights and law.") (emphasis omitted).

52 President William Jefferson Clinton, Remarks to Citizens of Royal Oak, MI (Aug. 27, 1996) (describing the "American Dream" as the "possibility for every person to live up to their God-given abilities . . . to live out their dreams no matter where they live, what they start with, what their racial or their religious background is"); Jeffrey Rosen, The Agonizer, THE NEW YORKER, Nov. 11, 1996, at 86 (quoting Justice Kennedy as saying that the American people have a "shared vision" that includes the "idea that each man and woman has the freedom and capacity to develop to his or her potential").

53 See, e.g., LET THE WORD GO FORTH: THE SPEECHES, STATEMENTS AND WRITINGS OF JOHN F. KENNEDY 197 (Theodore C. Sorensen ed., 1988) ("[N]ot every child has an equal talent or an equal ability or an equal motivation, but they should have the equal right to develop their talent and their ability and their motivation, to make something of themselves."); President William Jefferson Clinton, Remarks to Citizens of Pontiac, MI (Aug. 28 1996) ("I believe that we ought to have a country where everybody has a chance to live up to their God-given abilities.").

54 See, e.g., ALAN GEWIRTH, SELF-FULFILLMENT (1998); HURKA, supra note 18.

55 See HURKA, supra note 18, at 147 (noting that Aristotle and Plato both seem to give credence to these fears, as they conceived of an active government seeking to mould citizens' characters); BASIL MITCHELL, LAW, MORALITY, AND RELIGION IN SECULAR SOCIETY 92 (1967) ("Plato seems to have drawn the inference . . . that where the truth is known there is no need of freedom . . . ."). Cf. JOHN STUART MILL, ON LIBERTY 72 (Gertrude Himmelfarb ed., 1984) ("The ancient commonwealths thought themselves entitled to practise, and the ancient philosophers countenanced, the regulation of every part of private conduct by public authority, on the ground that the State had a deep interest in the whole bodily and mental discipline of every one its
somehow linked. The rationale for believing in such a connection is straightforward. If perfection is the goal of each human being, then society should strive to ensure that as many citizens as possible are able to realize their full potentials.\textsuperscript{56} And if that is the social objective, government would seem obligated to use all available tools—including the coercive force of the law—to ensure that individuals make correct choices about matters central to fulfillment. In this light, Aristotle's view—that the "best government most promotes the perfection of all its citizens"—makes sense.\textsuperscript{57}

Perfectionism, in short, seems incompatible with the idea of a sphere of freedom insulated from government regulation.\textsuperscript{58} How, then, can perfectionism ground an argument in support of the Court's privacy jurisprudence?

\section*{A. A Question about Assumptions}

The answer is that the conflict between perfectionism and privacy is more apparent than real, for perfectionism is compatible with many different legal structures. The favored structure depends on one's assumptions about which structure best advances human perfection. For example, the neo-conservative writer, Frank Meyer, has argued that a sharply limited State is the best way to

\begin{quote}
\textsuperscript{56}This step from individual to social good is consistent with Aristotle's views. Joseph R. Grodin, Rediscovering the State Constitutional Right to Happiness and Safety, 25 Hastings Const. L.Q. 1, 11 (1997) (asserting that for Aristotle, "[j]ust as human perfection consists in the attainment of one's natural ends . . . so the perfect society is one which is conducive to that attainment"). Nonetheless, this step is certainly not free from controversy. Theorists have questioned whether individual goods, in principle, can be aggregated or compared in a coherent manner. See, e.g., JOHN FINNIS, FUNDAMENTALS OF ETHICS 89–94 (1983) (suggesting that incommensurability makes attempts to aggregate human goods within a single life, or across multiple lives, incoherent); JOSEPH RAZ, THE MORALITY OF FREEDOM 321–66 (1988) (discussing incommensurability problems). As discussed in Part VIII, infra, these questions are beyond the scope of this Article.

\textsuperscript{57}HURKA, supra note 18, at 147. H.L.A. Hart calls this the "classical thesis," which holds that "not only may the law be used to punish men for doing what morally it is wrong for them to do, but it should be so used." H.L.A. Hart, Social Solidarity and the Enforcement of Morality, 35 U. Chi. L. Rev. 1, 1 (1967) (emphasis added). This theory, Hart observed, was "strongly associated with a specific conception of morality as a uniquely true or correct set of principles—not man-made . . . ." Id.

\textsuperscript{58}ISAIAH BERLIN, FOUR ESSAYS ON LIBERTY 152 (1984) (warning of a seemingly natural progression "from an ethical doctrine of . . . individual self-perfection to an authoritarian state obedient to the directives of an elite of Platonic guardians"). See also Robert P. George, Preface, in NATURAL LAW, LIBERALISM, AND MORALITY, at v (R. George ed., 1996) ("A standard liberal objection to Aristotelian . . . political thought is that it licenses an excessively expansive and intrusive role for political authorities."); Christopher Wolfe, Being Worthy of Trust: A Response to Joseph Raz, in NATURAL LAW, LIBERALISM, AND MORALITY 131, 145 (R. George ed., 1996) (attacking "perfectionism" of Joseph Raz on grounds that the doctrine is an "invitation to liberal tyranny").
promote human fulfillment. According to Meyer, “virtue” (or human perfection) is “the moral end[]” of society, but freedom from government coercion is “the political conditions of those ends.”\textsuperscript{59} Libertarians sometimes take this position to an extreme, arguing that the best State is one limited to a few essential functions, such as national defense and criminal justice.\textsuperscript{60} That position rests on a fundamental skepticism about state power and, thus, envisions an extremely broad private sector insulated from government interference.

Of course, the libertarian’s extreme distrust of the State is not reflected in the Court’s privacy jurisprudence. Rather, the Court’s doctrine establishes a much more limited sphere of protection from government regulation. According to Supreme Court precedent, privacy rights extend only to a small number of “important” personal decisions. And even for these protected rights, government regulation is permissible, so long as the regulation is justified by a “compelling” state interest. If the libertarian’s extreme distrust of state power is not a premise of the Court’s privacy jurisprudence, what is? What additional assumption or assumptions must be made in order to translate the perfectionist moral principle into the Court’s legal doctrine?

\textbf{B. Mill’s Principle of Liberty}

One answer worth exploring is the ideal of “autonomy,” which is often associated with the Court’s privacy jurisprudence. Many theorists have asserted that autonomy represents the core ideal underlying privacy rights, while others see it as at least a critical ingredient of these decisions.\textsuperscript{61} Although autonomy is

\textsuperscript{59}FRANK S. MEYER, IN DEFENSE OF FREEDOM 28 (1996).
\textsuperscript{60}Meyer’s formulation provides a gloss on the neo-conservative slogan: “Libertarian \textit{means} to virtuous \textit{ends}.” \textit{Id.} at 163 (“Virtue in freedom—that is the goal of our endeavor.”).
\textsuperscript{61}See, e.g., Joel Feinberg, \textit{Autonomy, Sovereignty, and Privacy: Moral Ideals in the Constitution?}, 58 NOTRE DAME L. REV. 445, 483 (1983) (asserting that the Court “in recent years appears to have discovered a basic constitutional right suggestive of our ‘sovereign personal right of self-determination,’ and has given it the highly misleading name of ‘the right to privacy’”); David A.J. Richards, \textit{Autonomy in Law, in The Inner Citadel: Essays on Individual Autonomy} 246, 246 (John Christman ed., 1989) (“Autonomy is a core value in American public and private law, since it is one of the constitutive ingredients of the generative idea of background rights of the person to which interpretive controversy in American law characteristically appeals.”); Rogers M. Smith, \textit{The Constitution and Autonomy}, 60 TEX. L. REV. 175, 175 (1982) (stating that autonomy is a “pivotal constitutional value” in privacy cases and in other contexts). \textit{See also} PAUL W. KAHN, \textit{LEGITIMACY AND HISTORY: SELF-GOVERNMENT IN AMERICAN CONSTITUTIONAL THEORY} 154–70 (1992); Henkin, supra note 6, at 1425; Gene R. Nichol, \textit{Children of Distant Fathers: Sketching an Ethos of Constitutional Liberty}, 1985 WIS. L. REV. 1305, 1309 (1985) (suggesting privacy is linked to ideal of self-governance).
a malleable concept, it is commonly used to refer to the "general capacity to be self-determining, to be in control of one's own life." John Stuart Mill was one of the most eloquent defenders of this ideal. In his classic work, *On Liberty*, Mill declared,

"[t]he only freedom which deserves the name is that of pursuing our own good in our own way . . . . Each is the proper guardian of his own health, whether bodily or mental and spiritual. Mankind are greater gainers by suffering each other to live as seems good to themselves than by compelling each to live as seems good to the rest."

Individuals, in short, are best able to make decisions about how to pursue their own good. Following Mill, I will call this concept of self-governance the principle of "liberty."

Like perfectionism, the principle of liberty has proved extremely influential in American thought. It has been embraced by such far-seeing thinkers as James

---


63*The Oxford Companion to Philosophy* 70 (Ted Honderich ed., 1995). See also RAZ, supra note 56, at 372 ("The ideal of autonomy is that of the autonomous life . . . . to be maker or author of his own life . . . ."); Rao, supra note 62, at 360 n.1 (asserting that autonomy "evokes images of self-rule, self-determination, and self-sovereignty").

This definition is consistent with the term's etymology, which is based on the words "autos" (self) and "nomos" (rule or law). GERALD DWORKIN, *The Theory and Practice of Autonomy* 12 (1988). The concept of "moral autonomy" has a distinct meaning for Kantian philosophers, referring to the capacity to reflect upon, formulate, and act upon higher-order life plans. RAZ, supra note 56, at 370 n.2 (distinguishing "personal autonomy" from Kantian "moral autonomy"); John P. Safranek & Stephen J. Safranek, *Can the Right to Autonomy Be Resuscitated After Glucksberg?*, 69 U. COLO. L. REV. 731, 734 (1998) (noting that Kantian "scholars of autonomy" concentrate on different aspects of the term than do ethicists and legal scholars).

64MILL, supra note 55, at 72 (emphasis in original).

65Under this formulation, one might view liberty and autonomy-as-self-governance as synonyms. Henkin, supra note 6, at 1424–25 (referring to "freedom from regulation" as "autonomy"); Safranek & Safranek, supra note 63, at 738 ("Contemporary legal scholars generally employ autonomy in a manner identical to the classical notion of liberty.").
Wilson, Thomas Jefferson, and Abraham Lincoln. And it remains a favored ideal in modern industrial nations, including the United States and Britain.

Recently, however, some have criticized the concept as a basis for justifying a right to privacy. Michael Sandel, for example, argues that the concept of autonomy undermines the idea that individuals have an objective good towards which they should strive. Rather, says Sandel, the ideal of autonomy enshrines individual choice as an end in itself, and thus treats all decisions an individual makes in the private sphere as equally worthy and valid. As Sandel explains, "the liberal ethic installs the self as "sovereign, cast as the author of the only obligations that constrain... We are 'self-originating sources of valid claims.'"

This criticism, however, misconstrues the relevance of liberty to the moral theory being developed here. Liberty, under this schema, is not an end in itself. Rather, liberty constitutes a political assumption about the best way to advance the moral ends of human perfection. That is, the individual is assumed to know how best to pursue his or her own perfection. Perfectionism and liberty thus exist

---

66 Wilson, supra note 50, at 587 ("Nature has implanted in man the desire of his own happiness... she has furnished him with a natural impulse to exercise his powers for his own happiness, and the happiness of those for whom he entertains such tender affections. If all this be true... he has a right to exert those powers for the accomplishment of those purposes... provided he does no injury to others; and provided some publick interests do not demand his labours. This right is natural liberty.").

67 Presaging Mill by 75 years, Thomas Jefferson wrote that "the legitimate powers of government extend to such acts only as are injurious to others," implying that the State has no authority to interfere with an individual's acts simply out of concern for the individual's own good. Letter from Thomas Jefferson to James Madison (Dec. 20, 1787), in THE PORTABLE THOMAS JEFFERSON 223 (M. Peterson ed., 1975), quoted in Nichol, supra note 61, at 1325.

68 Abraham Lincoln embraced the same concept: "I trust I understand and truly estimate the right of self-government. My faith in the proposition that each man should do precisely as he pleases with all that is exclusively his own lies at the foundation of the sense of justice that is in me." SELECTED WRITINGS AND SPEECHES OF ABRAHAM LINCOLN 37 (T. Harry Williams ed., 1943), quoted in Nichol, supra note 61, at 1332. Lincoln made similar statements in debates with Stephen Douglas, and as President. See Nichol, supra note 61, at 1332.

69 Raz, supra note 56, at 369–70 (noting that the ideal of autonomy is "particularly suited to the conditions of the industrial age" and has set down "deep roots").


71 Meyer, supra note 59, at 24 ("[F]reedom is only a means whereby men can pursue their proper end, which is virtue."). See also Patrick Devlin, THE ENFORCEMENT OF MORALS 108 (1965) ("Freedom is not a good in itself. We believe it to be good because out of freedom there comes more good than bad. If a free society is better than a disciplined one, it is because—and this certainly was Mill's view—it is better for a man himself that he should be free to seek his own good in his own way and better for the society to which he belongs... .")
on different conceptual planes. Perfectionism is the ultimate moral goal; liberty is the political means of achieving that goal.\textsuperscript{72}

One implication of viewing liberty as a means to an end—rather than as an end itself—is that an individual can use his freedom poorly (\textit{i.e.,} in ways that fail to promote self-realization). Liberty, in this sense, comes with a corresponding responsibility—a moral duty to use one’s freedom wisely, to develop one’s faculties and talents, to pursue one’s full potential. Thus, even if individuals are free from legal restraints in the private sphere, they are not free from moral obligations—the obligation to pursue their full potential as human beings.\textsuperscript{73}

A second implication is that the ultimate justification for liberty lies in its ability to promote human welfare. Mill agreed with this essential point, which is why he saw it necessary to make two different arguments in \textit{On Liberty} for liberty’s value in serving the good.\textsuperscript{74} Mill’s first argument is straightforward. Liberty reflects an institutional judgment that individuals are better able to assess their path to fulfillment than government. As Mill declared, “[t]he strongest of all the arguments against the interference of the public with purely personal conduct is that, when it does interfere, the odds are that it interferes wrongly and in the wrong place.”\textsuperscript{75}

The second argument is more subtle. According to Mill, the development of one’s reasoning ability is a part of what it means to perfect oneself. Thus, individuals must be free to exercise their decision making skills; individuals

\textsuperscript{72}I qualify this statement below. Liberty can also be a “constitutive” element of human perfection. \textit{See infra} note 76 and accompanying text (discussing “moral muscles” argument for liberty).

\textsuperscript{73}Members of the founding generation understood this point clearly. They affirmed that objective moral ideals—the natural law—dictated how individuals should use their freedom. Randy E. Barnett, \textit{A Law Professor’s Guide to Natural Law and Natural Rights}, 20 HARV. J. L. & PUB. POL’Y 655, 669 (1997) (“[N]atural law ethics instructs us on how to exercise the liberty that is defined and protected by natural rights.”) (emphasis omitted); Philip A. Hamburger, \textit{Natural Rights, Natural Law, and American Constitutions}, 102 YALE L.J. 907, 923 (1993) (“Natural law, according to Americans, was a type of reasoning about how individuals should use their freedom.”); Smith, \textit{supra} note 61, at 177–79 (discussing founders’ views). \textit{See also} Wilson, \textit{supra} note 50, at 242 (“The laws of nature are the measure and the rule; they ascertain the limits and the extent of natural liberty.”).

\textsuperscript{74}For Mill, liberty’s justification lay in its service to the moral principle of “utility.” Mill, \textit{supra} note 55, at 69–70 (“I forego any advantage which could be derived to my argument from the idea of abstract right as a thing independent of utility. I regard utility as the ultimate appeal on all ethical questions . . . .”). A debate exists over whether Mill’s moral philosophy reflects a hedonistic measure of utility or one that conforms with the Aristotelian ideal of human perfection. Some suggest that both strands of thought exist in his writings. \textit{See}, e.g., Richard Norman, \textit{The Moral Philosophers} 107–08 (1998). Resolving that debate is unnecessary for this Article’s purposes. Whatever Mill’s beliefs, my goal is to explore whether a theory of political morality that melds a moral premise of perfectionism and a political premise of liberty can provide support for the Court’s privacy jurisprudence.

\textsuperscript{75}Mill, \textit{supra} note 55, at 151.
benefit simply by struggling to make choices. This is Mill’s famous “moral muscles” argument. According to this second argument, freedom is an essential element—a constitutive part—of human development.

Of course, the view that liberty promotes the human good is not without controversy. Some have argued that autonomy is problematic as an ideal because individuals often make counterproductive and self-destructive decisions about their lives. One might respond that a belief in liberty does not require an assumption that citizens always make correct decisions. It only requires a relative institutional judgment—a judgment that over the long run it is better to let individuals decide how best to lead their lives, than to give such power to the government. To be sure, one might acknowledge that certain exceptions are necessary, such as for juveniles and the mentally incompetent. But self-governance remains the general rule.

Again, the goal of this Article is not to “prove” that Mill’s liberty principle is correct—that individuals really are best able to chart a path to perfection. Rather, the goal is to determine whether a theory based on a political ideal of liberty and a moral ideal of perfectionism—what might be called “liberal perfectionism”—can offer a basis for arguing that the Court’s privacy jurisprudence is morally justified.

C. The Private and Public Sectors

To be sure, one might doubt that liberal perfectionism is capable of explaining the full complexity of the Court’s privacy jurisprudence. One

---

76 Id. at 119–27; Feinberg, supra note 61, at 458 n.16.
77 See, e.g., JAMES FITZJAMES STEPHEN, LIBERTY, EQUALITY, FRATERNITY 18 (Stuart O. Warner ed., 1993) (questioning whether the “mass of adults are so well acquainted with their own interests and so much disposed to pursue them that no compulsion or restraint put upon any of them by any others for the purpose of promoting their interests can really promote them”). See also H.L.A. HART, LAW, LIBERTY, AND MORALITY 32–33 (1963) (“Mill carried his protests against paternalism to lengths that may now appear to us fantastic. . . . [W]e no longer sympathize with this criticism this is due, in part, to a general decline in the belief that individuals know their own interests best . . . .”).
78 As Mill put it, “[a]ll errors which [the individual] is likely to commit against advice and warning are far outweighed by the evil of allowing others to constrain him to what they deem his good.” Mill, supra note 55, at 143.
79 Id. at 69 (noting that paternalistic intervention is sometimes justified in promoting well-being of children or mentally handicapped individuals).
80 A number of theorists today might be classified as liberal perfectionists (or “perfectionist liberals”) in the sense that they ground liberal principles on perfectionist accounts of the human good. See, e.g., RAZ, supra note 56, at 369–429. See also DOUGLAS B. RASMUSSEN & DOUGLAS J. DEN UYL, LIBERTY AND NATURE: AN ARISTOTELIAN DEFENSE OF THE LIBERAL ORDER (1991). These theorists, however, do not attempt to trace the link between principles of political morality and the Supreme Court’s privacy jurisprudence in any detailed manner.
fundamental problem with liberty as a political ideal is its *indefinite* scope.\(^{81}\) The concept seems to hold that an individual should retain control over all aspects of his or her life. But should an individual have unfettered control over decisions relating to the use of drugs, sexual practices, dress, or whether or not to put on a seatbelt? Plainly the Supreme Court has not deemed every infringement of personal autonomy a violation of privacy rights.\(^{82}\) How, then, do liberty and perfectionism provide a basis for understanding the scope and structure of the Court’s privacy jurisprudence?

The solution to this puzzle is not hard to see. The key is to recognize that liberty stands only for the proposition that an individual is the best judge of his or her *own* interests. But it does not signify that an individual is the best judge of his or her *neighbor’s* interests.\(^{83}\) Thus, an individual’s decision, which promotes his own fulfillment, might also impede another person’s opportunity for fulfillment. Liberty bars society from interfering with a competent adult’s views of his own good, but it does not bar the State, through elected government, from acting to protect the interests of other members of the public.\(^{84}\)

That is what Mill meant when he affirmed his one simple principle for government action: Government should act *only* to prevent harm to others.\(^{85}\) Though, as we will see subsequently, the concept of harm is an ambiguous one, Mill’s core position is sufficiently clear. Government may not regulate simply

\(^{81}\)Rubenfeld, *supra* note 2, at 750–51 ("[T]o call an individual ‘autonomous’ is simply another way of saying he is morally free . . . . To be sure, the privacy doctrine involves the ‘right to make choices and decisions’. . . . The question, however, is which choices and decisions are protected.").


\(^{83}\)See, e.g., MILL, *supra* note 55, at 141. See also 1 WILLIAM BLACKSTONE, *Commentaries on the Laws of England* 125 (St. George Tucker ed., 1803) (photo. reprint 1969) ("For no man, that considers a moment, would wish to retain the absolute and uncontrolled power of doing whatever he pleases: the consequence of which is, that every other man would also have the same power; and then there would be no security to the individuals in any of the enjoyments of life.").

\(^{84}\)For purposes of this Article, I will refer to the elected branches of government simply as "the government." This usage is meant to exclude the federal judiciary.

\(^{85}\)MILL, *supra* note 55, at 68 ("[T]he only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others."). Several commentators have suggested that Mill’s harm principle should, or does, serve as a touchstone for the Court’s privacy doctrine. Comment, *Limiting the State’s Police Power: Judicial Reaction to John Stuart Mill*, 37 U. Chi. L. Rev. 605, 625 (1970) (noting that Mill’s influence on the judiciary is unclear, but he “appears to be one of the main influences on this undercurrent of unenumerated rights . . . .”); Note, *Unenumerated Rights—Substantive Due Process, the Ninth Amendment, and John Stuart Mill*, 1971 Wis. L. Rev. 922, 936 (1971) ("On Liberty provides a workable standard by which to determine those rights which are preferred under the [N]inth [A]mendment."). Cf. PAUL BREST, *Processes of Constitutional Decisionmaking* 798 (1975) (asking whether the “Constitution . . . enact[s] John Stuart Mill’s *On Liberty*”); John Hart Ely, *Democracy and the Right to be Different*, 56 N.Y.U. L. Rev. 397, 401–03 (1981) (contrasting Mill’s theory with constitutional design). None, however, has attempted to demonstrate, in any detail, how Mill’s liberty principle might help justify the specific scope and structure of the Court’s privacy jurisprudence.
because it believes the regulation is "good" for the individual; it may do so only to protect the public from injury.\textsuperscript{86} Under this analysis, then, the liberty principle creates a division of decision making authority. The individual possesses the authority to determine what is best for his or her own life; the government retains the authority to assess what lies in the public's interest.

The difficulty is that a clear separation between the private and public sectors is not possible. Almost any government regulation to promote the public welfare will infringe upon an individual’s self-governance, and almost any action an individual takes will have some direct or indirect effect on other citizens.\textsuperscript{87} Thus, an inevitable tension arises between the private and the public realms. Some further premise must be adopted to explain how to resolve this tension—to clarify when the individual should decide and when the government should govern.

\textbf{D. Balancing and the Structure of Privacy}

One can view the Court's privacy jurisprudence as an attempt to do precisely that—to resolve the tension between private and public interests in a principled manner. In effect, this involves a kind of balancing test, which weighs the public benefit of a regulation against the cost it imposes on affected individuals.\textsuperscript{88}

According to the principle of liberty, every government regulation that limits personal decision making is "costly" for the individual, in the sense that it interferes with the individual's superior decision making capacity concerning his or her own good. Regulations, thus, increase the danger that an individual will be hampered in the pursuit of fulfillment by raising the risk that the individual will be coerced into making a morally-inferior choice (\textit{i.e.}, a choice that impedes human perfection).

\textsuperscript{86}MILL, supra note 55, at 68.

\textsuperscript{87}GEORGE, supra note 21, at 36 ("Perhaps every generation must learn for itself that 'private' immorality has public consequences. In our own time, we have ample reason to doubt that orthodox liberalism's distinction between private and public immorality can be maintained . . . .").

\textsuperscript{88}The Justices have frequently suggested that the Court's due process doctrine involves a balancing of public and private interests. See, e.g., Cruzan v. Dir., Mo. Dept of Health, 497 U.S. 261, 279 (1990) ("[W]hether respondent's constitutional rights have been violated must be determined by balancing his liberty interests against the relevant state interests.") (internal citations omitted); United States v. Salerno, 481 U.S. 739, 750 (1987) (stating that the individual's liberty interest is placed on "the other side of the scale" against government's interest); Poe v. Ullman, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting) (due process "has represented the balance which our Nation, built upon postulates of respect for the liberty of the individual, has struck between that liberty and the demands of organized society"). \textit{Cf.} David L. Faigman, \textit{Reconciling Individual Rights and Government Interests: Madisonian Principles Versus Supreme Court Practice}, 78 Va. L. Rev. 1521, 1525 (1992) (discussing the "delicate accommodation inherent in the Constitution between majoritarian will and individual liberty").
The magnitude of that cost varies depending on the nature of the individual interest regulated. The more important the decision to the individual’s opportunity for self-fulfillment, the greater the possible harm to the individual’s objective interests. Thus, to the extent one believes that choosing a spouse is more central to self-fulfillment than deciding whether to wear a seatbelt, regulations affecting the former decision will be more costly to the individual than those affecting the latter. In this way, a sliding scale of costs can be developed, ranging from the most minimal sort of intrusion in the private sphere to the most significant.

The fact that regulations are costly, of course, does not mean that government regulation is never justified. It merely means that the State must advance a sufficiently powerful regulatory interest—or benefit—to overcome that cost. Thus, as the cost of its regulations vary, so will the State’s burden of justification. The greater the infringement on individual autonomy (and, hence, the greater the “cost” of regulation), the greater the State’s burden of justification. As Justice Souter recently remarked, “the kind and degree of justification that a sensitive judge would demand of a State [under the Due Process Clause] would depend on the importance of the interest being asserted by the individual.”

At one extreme, where the personal interest at issue is not, as an objective matter, significant, the State need only advance a minimal interest of its own (and must take only minimal care to assure that the regulation is narrowly tailored). As the individual’s interest becomes more important, a greater public benefit is demanded, and greater attention must be paid to ensuring that costs are minimized. At the other extreme, when the State interferes with very important individual decisions, the State must advance an extremely important interest, and it must make all possible efforts to ensure that it is pursuing the least restrictive alternative.

Following the Court’s terminology, the most vital personal interests might be called “fundamental” interests. When legislation implicates such interests, the State must advance an extremely important concern—a compelling state interest—and it must make all reasonable efforts to ensure that the least restrictive method is used to achieve that objective. As the Court would say, these highly intrusive regulations must be subject to “strict scrutiny.”

80As Justice Souter has written, the Supreme Court has “used various terms to refer to fundamental liberty interests,” including “basic liberty,” “interests [deserving] particularly careful scrutiny,” “protected liberty,” “constitutionally protected liberty interest,” “protected liberty interest,” and simply “liberty interest.” Glucksberg, 521 U.S. at 768 n.10 (Souter, J., concurring) (citations omitted).
81See, e.g., Reno v. Flores, 507 U.S. 292, 302 (1993) (stating that regulations that substantially burden a fundamental interest may be upheld only if “narrowly tailored to serve a compelling state interest”).
Here, then, is the basic structure of the Court’s privacy jurisprudence. Individuals are left with presumptive control over decisions “fundamental” to their fulfillment, but the State may regulate such decisions if it can advance a sufficiently compelling state interest. The strict scrutiny test, in short, can be explained in terms of the moral premise of perfectionism, and the set of structural premises discussed above. In abbreviated form, the argument can be stated as follows:

(1) Moral premise: The ultimate standard of valuation for human affairs is human perfection. Human beings should strive to fulfill their objective good. Certain kinds of decisions are “fundamental” in the sense that they have an extremely significant effect on an individual’s opportunities for perfection.

(2) Structural premises: The existing structure of the Court’s privacy jurisprudence promotes human perfection. This conclusion reflects two subsidiary assumptions:

(a) Principle of Liberty: Citizens should be responsible for assessing their own good, and government should be responsible for protecting the good of the public.

(b) Balancing Test: Since public and private interests conflict, some division of authority between the two spheres is required.

The theory of liberal perfectionism described here suggests that the privacy doctrine should reflect a “sliding scale” of burdens on the State, depending on how intrusive the regulation is for the individual. In reality, the Court has adopted a more categorical approach, typically applying a very strict standard of review for infringements of fundamental interests and an extremely lenient standard of review for non-fundamental interests. To be sure, the Court sometimes “bends the rules” by applying lesser or greater scrutiny depending on the nature of the infringement. See, e.g., Schware v. Bd. of Bar Examiners of New Mexico, 353 U.S. 232 (1957) (exercising heightened form of rational review for regulation implicating significant, but not fundamental, interest). But overall the Court seems to favor a more categorical approach to privacy rights, rather than a fluid sliding scale approach.

Does this mean that the Court has rejected the balancing approach outlined in the text? No. As David Faigman has noted, courts employ a variety of methods for translating balancing tests into legal doctrine. See, e.g., Faigman, supra note 88, at 1534–38. These range from fluid, ad hoc approaches (in which the Court makes an independent assessment of the individual and state interests at stake) to more categorical tests (in which the Court assigns weights to broad categories of state and individual interests in ways that more or less predetermine how decisions will be resolved in the future). Any effort to explain why the Court has favored a more categorical approach over an ad hoc balancing approach in the privacy arena would require an analysis of the various normative factors favoring one approach over another. See, e.g., Kathleen M. Sullivan, Foreword: The Justices of Rules and Standards, 106 HARV. L. REV. 22, 62–113 (1992) (discussing factors favoring one approach over another).
The privacy doctrine divides decision making authority in a principled manner that promotes human perfection.

IV. THE INSTITUTIONAL PREMISE

The theory of liberal perfectionism developed so far provides an argument for the structure of the Court’s privacy jurisprudence. The assumptions suggest that, where fundamental interests are implicated, the individual’s decision making authority is presumptively protected from regulation. Liberal perfectionism affirms that maintaining this structure will promote human perfection—the moral end of society. The question remains: How is the structure itself to be maintained? What institutional mechanism, if any, is best able to preserve this legal architecture?

A. Justifying Judicial Review

This is a question of institutional design. The favored institution must be capable of identifying fundamental interests (i.e., those interests that are objectively essential to human fulfillment), and it must be suited to defending those interests against overreaching government regulators. The Court is an obvious choice for this role, especially when viewed from the perspective of liberal perfectionism. Liberty, after all, stands for the proposition that the elected branches of government are poorly suited for evaluating the significance of a given decision for the affected individual; those branches tend to favor the majority’s interest at the individual’s expense. The implication is that an independent institution must be established that will be attuned more to individual interests and less to majority passions. Moreover, the institution must have sufficient power to defend individual liberty against legislative encroachment. The Court, insulated from political pressures, and with a power of review over legislative acts, offers a natural choice.

To be sure, opposing views have, on occasion, been advanced. Some critics of judicial review, for example, have argued that an unelected judiciary is often tempted to abuse its power of review—say, by striking down laws that are, in

92Neil K. Komesar, Imperfect Alternatives 5 (1994) (stating that institutional choice reflects a “judgment, often unarticulated, that the goal in question is best carried out by a particular institution”).

93As Alexander Hamilton observed, the institutional structure of the courts—life tenure, protected salaries—helps insulate the courts from majority will and make it a natural defender of individual liberty against legislative action. See, e.g., The Federalist No. 78 (Alexander Hamilton) (“This independence of judges is equally requisite to guard the Constitution and the rights of individuals from the effects of those ill humors which the arts of designing men, or the influence of particular conjectures, sometimes disseminate among the people themselves . . .”).

HeinOnline -- 2001 Utah L. Rev. 469 2001
fact, justified by a compelling interest. A better solution, these critics suggest, would be to rely on the elected branches to police themselves; that is, to allow those branches to make their own judgments about the scope of fundamental interests and the adequacy of countervailing state concerns. This fear of judicial abuse underlies calls by one conservative theorist, Robert Bork, to abolish judicial review entirely.\textsuperscript{94}

Once again, the goal is not to resolve this dispute, but to identify what assumption an individual must hold to believe that the present privacy jurisprudence is justified. Plainly, that jurisprudence is premised on a belief that the Court has a role in identifying fundamental interests and in striking down laws that violate strict scrutiny. A liberal perfectionist would find that role justified only if he thought that the Court, in exercising the power of review, helped to preserve the morally justified scope of privacy.

Certainly, this premise does not require the liberal perfectionist to believe that the Court will always be correct in identifying fundamental interests, or that it will always assess state interests accurately. Rather, to endorse judicial review in the privacy sphere, one need only believe that, on balance, the benefits of judicial review outweigh its disadvantages.\textsuperscript{95} The bottom line is that a third premise must be added to the two listed above:

(1) \textit{Moral premise}: The ultimate standard of valuation for human affairs is human perfection. Human beings should strive to fulfill their objective good. Certain kinds of decisions are “fundamental” in the sense that they have an extremely significant effect on an individual’s opportunities for perfection.

(2) \textit{Structural premises}: The existing structure of the Court’s privacy jurisprudence promotes human perfection. This conclusion reflects two subsidiary assumptions:

(a) \textit{Principle of Liberty}: Citizens should be responsible for assessing their own good, and government should be responsible for protecting the good of the public.

(b) \textit{Balancing Test}: Since public and private interests conflict, some division of authority between the two spheres is required.


\textsuperscript{95}The point is simply that institutional choices are choices among “imperfect alternatives.” KOMESAR, \textit{supra} note 92, at 5 (“Institutional choice is difficult, as well as essential. The choice is always a choice among highly imperfect alternatives.”).
The privacy doctrine divides decision making authority in a principled manner that promotes human perfection.

(3) *Institutional Premise:* Judicial review will help preserve the morally-justified structure of privacy as defined by the above premises.

The three premises might be called “institutional liberal perfectionism.” Taken together, they generate a moral argument in support of the Court’s review of regulations implicating fundamental interests. The third premise holds that judicial review helps preserve the structure of the privacy jurisprudence—which, in turn, helps promote human perfection. In this way, the Court serves moral goals.

**B. Reflections on the Countermajoritarian Difficulty**

One of the benefits of identifying this argument for judicial review is that it provides some insight into one of the central debates in American jurisprudence—the debate over the normative justification for judicial review. For generations, academic commentators have expressed concern about whether judicial review can be justified on principled grounds at all. As Erwin Chemerinsky and others have pointed out, participants in this debate typically begin from a common normative starting-point. They assume that the ultimate standard of justification for government decisions is the majority-will of the public.96 Thus, they embrace what might be called the principle of “majoritarianism.”97

Majoritarianism puts judicial review in a bad light. After all, the Court’s role appears, by its very nature, to be countermajoritarian. Thus, critics ask, how can judicial review be justified in a society dedicated to popular sovereignty, to rule by the people?98 Alexander Bickel famously labeled this problem “the

---

96*See, e.g., CHEMERINSKY, supra note 13, at 3 (“Virtually all participants in the debate . . . begin with the premise that democracy requires that decisions be subject to control by majority rule.”); STEPHEN MACEDO, THE NEW RIGHT V. THE CONSTITUTION 21–22 (1987) (observing that most theories about judicial review conclude that it is a “deviant institution” because they begin with assumption that America is dedicated to majority rule).

97In contrast to perfectionism—which is a variant of moral realism-majoritarianism is a “relativistic” concept. It is based on (i.e., is relative to) the values held by specific individuals or groups of individuals (at a given time and place). THE OXFORD COMPANION TO PHILOSOPHY, supra note 63, at 758 (defining ethical relativism as “view that moral appraisals are essentially dependent upon the . . . practices and norms accepted by a social group at a specific place and time”).

98ALEXANDER BICKEL, THE LEAST DANGEROUS BRANCH 16–17 (1986) (“[W]hen the Supreme Court declares unconstitutional a legislative act or the action of an elected executive, it thwarts the will of the representatives of the actual people of the here and now; it exercises control, not in behalf of the prevailing majority, but against it. . . . [I]t is the reason the charge can be made that judicial review is undemocratic.”); Raoul Berger, Els “Theory of Judicial Review,” 42 OHIO ST. L.J. 87,
Countermajoritarian Difficulty," and it has been deemed one of the "central problems of modern constitutional theory."

A generation of scholars have grown up struggling to solve this puzzle of judicial review. Like the critics, those trying to justify judicial review have tended to embrace, with little question, the majoritarian principle. Thus, they have focused their efforts on demonstrating that judicial review and majoritarianism can be reconciled. Their arguments, however, have been less than persuasive, at least when applied in the privacy context.

John Hart Ely, to cite one famous example, has argued that judicial review is not necessarily inconsistent with majoritarianism because representative governments sometimes fall short of expressing the majority’s sentiments. In these situations, a kind of “market” failure occurs in the political process.

87 (1981) (“[A]ctivisit judicial review is inconsistent with democratic theory because it substitutes the policy choices of unelected, unaccountable judges for those of the people’s representatives . . . .”).

BICKEL, supra note 98, at 16.


ELY, supra note 12, at 102 (asserting that the goal is to seek a mechanism to reflect “conventional values”). The claim that Ely’s philosophy rests on a majoritarian premise must be qualified in at least one important way. In Democracy and Distrust, Ely argues that the Court retains a role in protecting minority interests, even if the representative process is working perfectly to mirror majority desires. As Ely observes, even “though no one is actually denied a voice or a vote, representatives beholden to an effective majority [might be] systematically disadvantaging some minority out of simple hostility or a prejudiced refusal to recognize commonalities of interest, and thereby denying that minority the protection afforded other groups by a representative system.” Id. at 103. Ely, in short, sees a role for the courts in protecting minorities from the “tyranny of the majority.” This is a problematic admission for Ely, however, for it suggests that he holds implicit moral principles that can trump majority will. Once he acknowledges that certain values (e.g., “protecting minorities from animus”) transcend majority will, he opens himself up to rebuttal that other values (e.g., “protecting highly personal and intimate decisions”) should too. These comments are only meant to be suggestive. My goal is not to offer an ultimate assessment here of the consistency of Ely’s theory.

Id. at 102–03 (“The approach to constitutional adjudication recommended here is akin to what might be called an ‘antitrust’ . . . orientation to economic affairs—rather than dictate substantive results it intervenes only when the ‘market,’ in our case the political market, is systematically malfunctioning.”). Political market failure may occur for a range of reasons; for example, it may result from the disenfranchisement of a segment of the population.
Limited judicial intervention to fix this defect can make the representative system operate as a more accurate measure of majority will.103 Whatever power Ely's theory has in explaining certain aspects of judicial review,104 it fails to explain how privacy rights can be based on majoritarian premises. Those rights, after all, are designed to insulate certain activities from conflicting majority wishes.105 A right to abortion can not be explained as an attempt to make the democratic process work better.106 Ely more or less acknowledges this point: While he offers some prudential reasons why the Court's decision in Griswold is justified,107 he finds the Court's justification for other rights—such as the right to an abortion—incomprehensible.108 Some theorists have taken a slightly different tact in attempting to reconcile privacy rights with majoritarianism: They have supposed "some deep or hidden

103Ely offers an institutional argument why courts should take responsibility for fixing this problem. As Ely notes, "our elected representatives are the last persons we should trust" when the political process breaks down. Id. at 103. Courts, however, can step in to fix the failure of the political system because they are "comparative outsiders in our governmental system, and need worry about continuance in office only very obliquely." Id. Thus, the federal judiciary's insulation from the political process "put[s] them in a position objectively to assess claims" of unfairness in the political process. Id. See also John Hart Ely, Another Such Victory: Constitutional Theory and Practice in a World Where Courts Are No Different From Legislatures, 77 VA. L. REV. 833, 833 n.4 (1991) ("My own methodology for determining what issues are appropriately assigned to courts . . . is one rooted not in any supposed difference in reasoning capacity or political predilection between judges and other officials, but rather primarily in the fact that judges (at least federal judges) need not stand for reelection.").

104See Richards, Moral Philosophy, supra note 18, at 331 (claiming that Ely's argument provides a reasonable explanation for the Supreme Court's approach to "suspect classes" under the Equal Protection Clause).

105Jeremy Waldron, Moral Truth and Judicial Review, 43 AM. J. JURIS. 75, 80 (1998) ("Problems of judicial review arise when there is a legislative majority in favor of one position, and a majority of judges (say, in the U.S. Supreme Court) in favor of the opposite position."). See also Glucksberg, 521 U.S. at 720 (Rehnquist, C.J.) ("By extending constitutional protection to an asserted right or liberty interest, we, to a great extent, place the matter outside the arena of public debate and legislative action."); West Virginia Bd. of Educ. v. Barnette, 319 U.S. 624, 638 (1943) ("The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials.").

106Richards, Moral Philosophy, supra note 18, at 332 (noting that Ely's theory can not explain "the ideas of natural and human rights on which American constitutionalism builds, and on the conception of inalienable rights of the person, which cannot, no matter how fair the decision-making procedures, be transgressed"). Moreover, the Supreme Court has clearly stated that the Constitution, and the Due Process Clause specifically, does more than simply guarantee fair process. Casey, 505 U.S. at 846 (stating that for "at least 105 years," the Due Process Clause "has been understood to contain a substantive component . . . barring certain government actions regardless of the fairness of the procedures used to implement them") (internal citation omitted); Collins v. Harker Heights, 503 U.S. 115, 126 (1992) (same).

107ELY, supra note 12, at 102.

consensus of today’s values” that are deserving of heightened protection by the Court. In effect, those “deeper” majoritarian values trump the more superficial and transient beliefs of the current majority. Thus, for example, even if the public expresses aversion to the specific practice of abortion, the Court might conclude that a deeper, shared value about “liberty” or “freedom” might justify striking down the regulations just the same.

But one might be skeptical that a deep consensus really exists that can be distinguished from the public’s immediate views. Moreover, even if we assume that such a consensus exists, one might doubt that the judiciary is capable of identifying it. Indeed, if the public believes its principles apply in a certain way in a given case, who is a judge to say that the public has misapplied its principles, or that it embraces deeper, but neglected ideals? As Ely himself concludes, to justify judicial review on the ground that “the legislature does not truly speak for the people’s values, but the Court does, is ludicrous.”

Although this review of efforts to reconcile judicial review with majoritarianism is not comprehensive, it raises serious doubts about the feasibility of developing a coherent justification for judicial review in the privacy

---

109Bruce Ackerman, for example, argues that the Court has a role to play in defending the ideals generated through the “higher” politics of constitutional lawmaking—which define the nation’s political identity—from the positions adopted through the “everyday” politics of representative government. Bruce A. Ackerman, The Storrs Lectures: Discovering the Constitution, 93 YALE L.J. 1013, 1016, 1035–39, 1051 (1984). See also Croley, supra note 100, at 767 (discussing Ackerman). For further discussion of “deep consensus” theories, see Moore, Functional Kind, supra note 51, at 220 (referring to commentators that “suppose some deep or hidden consensus of today’s values that have eluded the legislature that passed the statute that is in question”). See also Chemerinsky, supra note 13, at 139.

110ELY, supra note 12, at 64 (questioning existence of such consensus).

111As Ely himself says, even if we assume—“though it’s virtually self-contradictory to do so—that there is a consensus lurking out there that contradicts the judgment of our elected representatives, there would still remain the point, sufficient in itself, that that consensus is not reliably discoverable, at least not by the courts.” Id. at 64.

112Id. at 68. See also Moore, Reality Revisited, supra note 45, at 2476; Wojciech Sadurski, Conventional Morality and Judicial Standards, 73 VA. L. REV. 339, 377–84 (1987) (critiquing “deeper consensus” theories). In addition to the criticism outlined in the text, it is worth noting that a fundamental ambiguity lies at the core of the deep consensus theories. These theories assume that conflicts between the public’s underlying premises and its concrete judgments should be resolved in favor of underlying principles. However, the theorists never explain the basis for making that choice. As John Rawls and others have suggested, individuals frequently face situations where underlying premises come into conflict with concrete convictions about specific disputes. Sometimes the result is a modification of the concrete conviction; sometimes the result is a reassessment and modification of the underlying premise. Sometimes both. RAWLS, supra note 40, at 20–21 (discussing movement towards reflective equilibrium). Why is the former result superior to the latter? Consensus theorists never say.
realm when starting from majoritarian premises. If those doubts are borne out, then efforts to justify judicial review must dispense with majoritarianism and look instead to justifying principles that are independent of public will. That is precisely what the theory of institutional liberal perfectionism does.

According to that theory, perfectionism—not majoritarianism—serves as the ultimate standard of justification. Moreover, the theory offers an argument why judicial review, used appropriately, can promote human perfection. For institutional liberal perfectionism, therefore, the Countermajoritarian Difficulty is no difficulty at all. Judicial review is justified in the deepest sense—on the grounds of moral principle.

Several years before his landmark ruling in Griswold, Justice Douglas commented on the premises of our constitutional structure. "The institutions of our society," he observed, "are founded on the belief that there is an authority higher than the authority of the State; that there is a moral law which the State is

---

113 Several commentators have suggested that judicial review cannot be justified from majoritarian, or any other relativistic, premise. See, e.g., Moore, Functional Kind, supra note 51, at 230 (stating that "the justification of judicial review is a wild and unseemly scramble" for any but those who believe in objective moral principles); Earl M. Maltz, Murder in the Cathedral -- The Supreme Court as Moral Prophet, 8 U. DAYTON L. REV. 623, 631 (1983) ("[T]he exercise of judicial review is fundamentally inconsistent with the theory of electorally accountable government. This fact does not necessarily condemn the practice; one can still argue that the abandonment of democratic principles leads to a better governed nation."). I am sympathetic to this view. However, the argument in this Article does not turn on identifying a knock-down proof that relativism fails to justify judicial review. As discussed more fully in the text below, this Article offers an argument for the Court’s role in protecting privacy interests against majority control. The burden thus lies on the relativist to explain how his theory can provide a plausible argument for the Court’s privacy doctrine.

114 This point has been made persuasively by Michael Moore, who contends that only a belief in moral realism (i.e., objective moral principles) can provide a coherent basis for judicial review. Moore, Reality Revisited, supra note 45, at 2475 ("A moral realist answers [the Countermajoritarian Difficulty] by stressing the objective values judicial review can protect that are sometimes of greater weight than . . . majority rule."); Moore, Functional Kind, supra note 51, at 229 ("When a moral realist judge today invalidates the expression of majority will that a statute presumptively represents, he does so in the name of something . . . beyond the power of a societal consensus to change."). Cf. Michael W. McConnell, A Moral Realist Defense of Constitutional Democracy, 64 CHI.-KENT L. REV. 89, 89 (1988) ("The doctrine of ‘moral realism,’ associated with the much older conception of natural right, holds that there is an objective standard of right against which we can judge the decisions made by representative institutions.").
powerless to alter . . . . ”115 As Douglas understood, moral rights against the
majority presuppose principles beyond majority control.116

V. THE BREADTH OF PRIVACY

The three premises described thus far offer an argument for the general
structure of the Court’s privacy jurisprudence. They explain why fundamental
interests deserve heightened protection, and why those rights can be superceded
by a compelling state interest. However, the specific scope of the Court’s privacy
jurisprudence—the actual decisions protected by the right to privacy—has yet to be
identified. This part addresses that subject.

A. The Essential Attributes of Personhood

The previous sections advance a standard for identifying fundamental
interests: These encompass decisions that significantly affect an individual’s
opportunities for fulfillment.117 Identifying fundamental interests thus requires a
court to identify those features of human activity that are essential to human
perfection, to the good life. These core aspects of human flourishing might be
called the “essential attributes of personhood.”118

Identifying these essential attributes is likely to prove controversial.
Different people have different views about what is fundamental to fulfillment.

constitutionality of “Sunday Closing Laws” under First Amendment). See also WILLIAM O.
DOUGLAS, AN ALMANAC OF LIBERTY 5 (1954) (“The source of these rights of man is God, not
government . . . . In fascist, communist, and monarchical states, government is the source of rights:
government grants rights; government withdraws rights. In our scheme of things, the rights of man
are unalienable. They come from the Creator, not from a president, a legislature, or a court.”).
116 As several commentators have pointed out, moral realism—a belief in objective moral
principles—is more consistent than majoritarianism with common ideas about the nature of
morality. Certainly, few would assert that the majority is always correct in its dictates. See
CHEMERINSKY, supra note 13, at 9 (“Even superficial inquiries into political and moral theory reveal
the normative bankruptcy of a purely procedural definition of democracy.”); ROBERT A. DAHL,
PREFACE TO DEMOCRATIC THEORY 36 (1956) (“No one except its enemies has ever defined
democracy to mean that a majority would or should do anything it felt an impulse to do.”); Richards,
SEXUAL AUTONOMY, supra note 36, at 977 (“[N]ot everything invoked by democratic majorities as
justified by ‘public morality’ is, in fact, morally justified.”). To believe that the majority is
sometimes mistaken is to assume that a standard of justification exists that transcends and is superior
to majority will.
117 See supra Part III.D.
118 Casey, 505 U.S. at 851. See also TRIBE, supra note 7, at 1307, §15-2 (“[A]fter all is said
and done, there is no escape, if the essence of personality is to be protected, from the attempt to
define, for a given time and place, wherein that essence lies.”).
Nonetheless, the goal here is not to demonstrate that one vision of human flourishing is correct and another is not. Rather, it is to ask what sorts of assumptions must be made about the nature of human flourishing to find the Court’s privacy jurisprudence justified. In effect, that means looking at the Court’s privacy decisions as reflecting implicit assumptions about the essential attributes of personhood. Justice Brennan viewed the Court’s privacy decisions in just this light. As he once observed, “[w]hen one studies the boundary that the text marks out, one gets a sense of the vision of the individual embodied in the Constitution.”

A straightforward illustration of this sort of analysis is provided by the Court’s holdings regarding bodily integrity. The Court has repeatedly said that an individual has a fundamental interest in physical security. These rulings can be seen as reflecting the notion that bodily integrity is an essential part of a fulfilled life—a judgment, I suspect, many readers share. A similar sentiment appears to underlie the Court’s belief that citizens have a fundamental interest in remaining free of government restraint. That position also appears to reflect the common view that coerced confinement constitutes a significant impediment to human flourishing.

More controversial privacy decisions can be located within the same framework. Consider, for example, the Court’s landmark ruling in Griswold v. Connecticut, in which the Court determined that married couples have a

119 William J. Brennan, Jr., The Constitution of the United States: Contemporary Ratification, 27 S. Tex. L. Rev. 433, 439 (1986) (speech delivered at Georgetown University Law Center, Oct. 12, 1985). See also Tribe, supra note 7, at 1308, §15-3 (“[T]he judiciary has thus reached into the Constitution’s spirit and structure, and has elaborated from the spare text an idea of the ‘human’ and a conception of ‘being’ not merely contemplated but required.”)

120 See, e.g., Cruzan, 497 U.S. at 287 (O’Connor, J., concurring) (“Because our notions of liberty are inextricably entwined with our idea of physical freedom and self-determination, the Court has often deemed state incursions into the body repugnant to the interests protected by the Due Process Clause.”); Washington v. Harper, 494 U.S. 210, 229 (1990) (“The forcible injection of medication into a nonconsenting person’s body represents a substantial interference with that person’s liberty.”); Winston v. Lee, 470 U.S. 753, 759 (1985) (“A compelled surgical intrusion into an individual’s body for evidence . . . implicates expectations of privacy and security of such magnitude that the intrusion may be ‘unreasonable’ even if likely to produce evidence of a crime.”); Breithaupt v. Abram, 352 U.S. 432, 439 (1957) (discussing “right of an individual that his person be held inviolable”).

121 Gerety, supra note 82, at 266 (stating that privacy, “whatever the sources of its normative commitments, must take the body as its first and most basic reference for control over personal identity”).

122 Foucha v. Louisiana, 504 U.S. 71, 80 (1992) (“Freedom from bodily restraint has always been at the core of the liberty protected by the Due Process Clause from arbitrary governmental action.”); Reno, 507 U.S. at 316 (O’Connor, J., concurring) (“The institutionalization of an adult by the government triggers heightened, substantive due process scrutiny.”).
fundamental interest in using contraception. The normative significance of this ruling might not be immediately clear. Contraception, after all, is not inherently valuable. But viewed as an implicit judgment about the nature of a fulfilled life, the significance of the right to use contraception becomes apparent. Protecting an individual's ability to use contraception is a way of giving an individual control over the decision whether to have a child. That decision, the Griswold Court implicitly ruled, has a profound effect on a person's welfare. Thus, decisions about childbirth, and about the means to control childbirth, must be presumptively left within the individual's control.

This interpretation of Griswold gains credibility when one sees how it clarifies the logic and internal consistency of the Court's other privacy rulings. For example, in Eisenstadt v. Baird, the Court addressed whether to extend Griswold, which was limited to married couples, to unmarried individuals. If Griswold signifies that decisions about childbirth are essential to the fulfillment of a married individual, then Eisenstadt raises the corresponding moral question: Are such decisions also essential to the fulfillment of unmarried individuals?

If the answer is yes, then no normatively significant reason exists for treating married and unmarried individuals differently. Unmarried individuals, as a result, would also have a fundamental right to use contraception. In Eisenstadt, the Supreme Court reached precisely this conclusion:

> It is true that in Griswold the right of privacy in question inhere in the marital relationship. Yet the marital couple is not an independent entity with a mind and heart of its own, but an association of two individuals each with a separate intellectual and emotional makeup. If the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.

This interpretation of the contraception line of cases also helps to clarify the Court's rationale in the abortion decisions. According to the analysis thus far, Griswold and Eisenstadt stand for the proposition that an individual has a protected interest in making decisions regarding childbirth, including the means necessary to carry out that decision. Viewed from this perspective, the ramifications for a woman's right to an abortion become patent. Abortion, after all, is

---

125 Id. at 453 (emphasis in original). See also Carey, 431 U.S. at 687 ("Griswold may no longer be read as holding only that a State may not prohibit a married couple's use of contraceptives. Read in light of its progeny, the teaching of Griswold is that the Constitution protects individual decisions in matters of childbearing from unjustified intrusion by the State.").
another means of controlling childbirth. Thus, the normative rationale that supports a fundamental interest in using contraception also supports a fundamental interest in deciding whether to have an abortion.

The Court has recognized just such a link between the Griswold line of cases and the abortion decisions. As it said in Casey:

It should be recognized, moreover, that in some critical respects the abortion decision is of the same character as the decision to use contraception, to which Griswold v. Connecticut, Eisenstadt v. Baird, and Carey v. Population Services International afford constitutional protection. . . . They support the reasoning in Roe relating to the woman's liberty because they involve personal decisions concerning not only the meaning of procreation but also human responsibility and respect for it.126

From the perspective of the moral framework outlined here, the right to abortion is the logical extension of the right to contraception.127 Roe, in this sense, follows from Griswold.128 Certainly, one might debate whether bodily integrity, freedom from coercion, or decisions about childbirth truly are essential to human fulfillment. But one who believes that the Court's privacy decisions are justified must adopt premises along these lines.

B. The Radical Scope of Privacy

This analysis highlights one of the great advantages of viewing the Court's privacy jurisprudence from this moral perspective: It illuminates the inner logic of the Court's decisions. Thus, the moral framework makes it possible to isolate the normatively significant feature of Griswold, and to trace how that holding leads to the Court's subsequent decisions in Eisenstadt and Roe. Indeed, from this perspective, we can see that these decisions are neither isolated nor unconnected. Rather, they form an internally consistent structure with a distinct moral architecture.

126Casey, 505 U.S. at 852–53.
127As the Casey Court pointed out, Roe might also be viewed as the logical extension of the decisions involving bodily integrity. Id. at 857 (“Roe, however, may be seen not only as an exemplar of Griswold liberty but as a rule (whether or not mistaken) . . . with doctrinal affinity to cases recognizing limits on governmental power to mandate medical treatment or to bar its rejection.”).
128This analysis, of course, does not address the other terribly difficult question in Roe—whether the State has a compelling interest in overriding a woman's fundamental right to an abortion. For further analysis of the concept of a "compelling state interest," which may have some relevance for the abortion debate, see infra Part V.C.
That being said, it must be noted that the moral framework outlined above is not able to provide support for each and every privacy decision. Specifically, this approach is incapable of offering a fully consistent explanation for the Court’s decisions regarding what might be called “associational privacy rights.” This inconsistency represents a serious challenge to our effort to identify a moral argument that “fits” the Court’s doctrine.

1. Associational Privacy

Associational privacy rights concern the Court’s decisions regarding certain kinds of human relationships. These rights have several facets. For example, one line of cases concerns a parent’s interest in childrearing. Two early twentieth-century decisions, *Meyer v. Nebraska*[^129^] and *Pierce v. Society of Sisters,*[^130^] have come to stand for the proposition that parents have a fundamental liberty interest in decisions affecting the care and support of their children.[^131^] Once again, the Court’s decisions can be seen as reflecting an implicit judgment about the kinds of activities essential to human fulfillment. Thus, *Meyer* and *Pierce* appear to rest on the widely shared belief that the welfare of parents depends fundamentally on their freedom to raise children as they see fit.

In subsequent cases, the Court extended this associational privacy right to include other important relationships. In *Loving* and related cases, the Court concluded that individuals have a fundamental interest in the marriage relationship.[^132^] In *Moore v. City of East Cleveland,*[^133^] a plurality of the Court found that individuals have a protected liberty interest in maintaining relationships among members of their extended families.[^134^] In reaching these decisions, the Justices

[^129^]: 262 U.S. 390 (1923).

[^130^]: 268 U.S. 510 (1925).

[^131^]: *Meyer,* 262 U.S. at 400 (“[T]he right of parents to engage [teachers] to instruct their children . . . [is] within the liberty of the Amendment.”); *Pierce,* 268 U.S. at 534–35 (similar). See also *M. L. B. v. S. L. J.,* 519 U.S. 102, 119 (1996) (agreeing that “the interest of parents in their relationship with their children is sufficiently fundamental to come within the finite class of liberty interests protected by the Fourteenth Amendment”) (internal citation omitted).

[^132^]: *Loving v. Virginia,* 388 U.S. 1, 12 (1967) (“The freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness.”); *Zablocki v. Redhail,* 434 U.S. 374, 383 (1978) (“Our past decisions make clear that the right to marry is of fundamental importance.”); *Turner v. Safley,* 482 U.S. 78, 95 (1987) (“[T]he decision to marry is a fundamental right.”); *Cleveland Bd. of Educ. v. LaFleur,* 414 U.S. 632, 639–40 (1974) (“This Court has long recognized that freedom of personal choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment.”).


[^134^]: *Id.* at 504 (“Ours is by no means a tradition limited to respect for the bonds uniting the members of the nuclear family. The tradition of uncles, aunts, cousins, and especially grandparents sharing a household along with parents and children has roots equally venerable and equally deserving of constitutional recognition.”).
clarified the nature of the individual's associational interest. Implicitly or explicitly, these decisions recognize that certain intimate and enduring relationships are vital to human fulfillment.\textsuperscript{135} Human beings, the Court acknowledges, are social beings with critical needs for emotional support and intimacy.

In \textit{Roberts v. United States Jaycees},\textsuperscript{136} the Court endorsed this interpretation of the privacy decisions. In that case, the State of Minnesota sued a private organization (the Jaycees) under the State's antidiscrimination law on the grounds that the group failed to admit women. In its defense, the Jaycees argued that the state law violated the members' right to associational privacy under the Due Process Clause.\textsuperscript{137} The Court, however, responded that only certain kinds of associations deserve heightened protection. Associations based on impersonal relationships, such as those in a "large business enterprise" (or private club), deserve minimal privacy protection.\textsuperscript{138} But, said the Court, intimate associations, such as the marriage relationship, warrant full protection as a fundamental interest. The protection afforded these associations, the Court explained:

reflects the realization that individuals draw much of their emotional enrichment from close ties with others. Protecting these relationships from unwarranted state interference therefore safeguards the ability independently to define one's identity that is central to any concept of liberty. . . . The personal affiliations that exemplify these considerations . . . are those that attend the creation and sustenance of a family—marriage . . . the raising and education of children . . . and cohabitation with one's relatives . . . Family relationships, by their

\textsuperscript{135}The Court has waxed eloquent about the importance of the spousal relationship, speaking of it as being "intimate to the degree of being sacred," an "association that promotes a way of life . . . a harmony in living . . . a bilateral loyalty." Griswold, 381 U.S. at 486. In \textit{Moore}, the Court affirmed the role that extended families play in providing individuals with the support and caring necessary for growth. 431 U.S. at 504–05 (plurality opinion) ("Over the years millions of our citizens have grown up in just such an environment, and most, surely, have profited from it. . . . Especially in times of adversity, such as the death of a spouse or economic need, the broader family has tended to come together for mutual sustenance and to maintain or rebuild a secure home life."). \textit{But cf.} Michael H. v. Gerald D., 491 U.S. 110 (1989) (plurality decision) (rejecting biological father's liberty interest in his child without scrutinizing strength of parental bond).

\textsuperscript{136}468 U.S. 609 (1984).

\textsuperscript{137}The Jaycees also argued that the statute violated their "right of association" under the First Amendment. The Court dismissed that claim, as well. \textit{Id.} at 628–29.

\textsuperscript{138}In several subsequent cases, the Court applied the \textit{Roberts} test to reject associational privacy claims involving non-intimate relationships. \textit{See, e.g., City of Dallas v. Stanglin}, 490 U.S. 19, 25 (1989) ("[T]he activity of these dance-hall patrons -- coming together to engage in recreational dancing . . . qualifies neither as a form of 'intimate association' nor as a form of 'expressive association' . . . [W]e do not think the Constitution recognizes a generalized right of 'social association' that includes chance encounters in dance halls."); \textit{New York State Club Ass'n, Inc. v. City of New York}, 487 U.S. 1 (1988) (using similar analysis for New York private club).
nature, involve deep attachments and commitments to the necessarily few other individuals with whom one shares not only a special community of thoughts, experiences, and beliefs but also distinctively personal aspects of one's life.\textsuperscript{139}

In short, intimate and enduring relationships deserve heightened protection because they play a critical role in human welfare. They are, in this sense, fundamental to fulfillment. We might call this fundamental interest the "right of intimate association."\textsuperscript{140}

2. The Right of Intimate Association

At least at first glance, the right of intimate association appears limited in reach. In the cases discussed above—and especially in Loving and Moore—the Court expressly restricted the fundamental interest to traditional family relationships. For example, in Loving, the Court spoke of marriage as a cornerstone of traditional family life.\textsuperscript{141} And in Moore, the Court discussed the important role extended families have long played in communities.\textsuperscript{142} But the same question asked about Griswold's scope might be considered here: Should the Court's protection for these intimate relationships be extended to non-traditional contexts, such as to unmarried couples or to homosexuals?

The answer depends on whether the normative rationale for these earlier cases applies in the non-traditional contexts. Roberts makes clear that the normatively significant feature of the associational privacy cases is the importance of enduring and intimate relationships to human fulfillment. In this light, whether the right to intimate association applies to, say, homosexual relationships, depends on whether decisions about intimate and committed relationships have a similar significance for these individuals. If, as I will assume, decisions about intimate relationships can have a major effect, for good and bad, on the welfare of all human beings, then the right of intimate association has an

\textsuperscript{139}Roberts, 468 U.S. at 619–20 (internal citations omitted). See also Christopher L. Eisgruber & Lawrence G. Sager, The Vulnerability of Conscience: The Constitutional Basis for Protecting Religious Conduct, 61 U. Chi. L. Rev. 1245, 1312–13 (1994) (discussing Roberts). As the Court explained, the relationships receiving heightened protection are "distinguished by such attributes as relative smallness, a high degree of selectivity in decisions to begin and maintain the affiliation, and seclusion from others in critical aspects of the relationship." Roberts, 468 U.S. at 620.

\textsuperscript{140}Karst, \textit{supra} note 8.

\textsuperscript{141}Loving v. Virginia, 388 U.S. 1 (1967).

\textsuperscript{142}Moore, 431 U.S. at 504–05.
extremely expansive reach. Arguably, it means that all committed, intimate relationships warrant protection from government intervention.\footnote{Karst, supra note 8, at 629 ("By 'intimate association' I mean a close and familiar personal relationship with another that is in some significant way comparable to a marriage or family relationship. . . . The connecting links . . . may take the form of living in the same quarters, or sexual intimacy, or blood ties, or a formal relationship, or some mixtures of these, but in principle the idea of intimate association also includes close friendship, with or without any such links.")} 

This conclusion calls into questions all efforts to regulate intimate relationships, including efforts to regulate committed homosexual relationships. As Kenneth Karst has written, protection for intimate associations means letting "a hundred familial flowers" bloom, including all "[f]amilies of choice, from lesbian mothers and their children to communes of the young and the old. . . ."\footnote{Yao Apasu-Gbotu et al., Survey on the Constitutional Right to Privacy in the Context of Homosexual Activity, 40 U. MIAMI L. REV. 521, 592 (1986) ("The definition of family need not depend upon the sexual practices of its members but by the presence or absence of the attributes [of intimacy] . . . Thus, the protection is for certain types of intimate relationships, and not for homosexuality or heterosexuality per se.").} Taken to the limit of its logic, the right of intimate association even raises questions about laws barring adulterous relations or incest among adults—at least in the context of enduring and committed relationships.\footnote{Id. at 687 (internal citations omitted).} 

Needless to say, this conclusion is plainly inconsistent with the Court's own jurisprudence. The Court, in Bowers, expressly rejected the idea that individuals have a right to homosexual relations.\footnote{In that case, the respondent, Hardwick, was "charged with violating the Georgia statute criminalizing sodomy by committing that act with another adult male in the bedroom of respondent's home." Bowers v. Hardwick, 478 U.S. 186, 187-88 (1986). The statute barred all sodomy, whether practiced by homosexuals or heterosexuals. However, the Court limited its decision to homosexual sodomy. Id. at 188 n.2 ("The only claim properly before the Court, therefore, is Hardwick's challenge to the Georgia statute as applied to consensual homosexual sodomy. We express no opinion on the constitutionality of the Georgia statute as applied to other acts of sodomy.").} And the Court has stated that the right of privacy does not extend to incestuous and adulterous relations.\footnote{Id. at 195 ("If respondent's submission is limited to the voluntary sexual conduct between consenting adults, it would be difficult, except by fiat, to limit the claimed right to homosexual conduct while leaving exposed to prosecution adultery, incest, and other sexual crimes . . . We are unwilling to start down that road."); Griswold, 381 U.S. at 498 (Goldberg, J., concurring) (noting that constitutionality of laws prohibiting adultery and fornication are "without doubt").} This points to a serious problem with the theory presented thus far. One who embraces the implicit premises of this theory must view, as morally justified, a series of associational rights that the Court has never accepted. How can this inconsistency be avoided? Specifically, is there a way to reconcile the theory of institutional liberal perfectionism with the Court's holding in Bowers? The following section considers, and then rejects, one potential answer.
C. State Interests and Moral Offense

One solution to this quagmire might seem obvious. One might agree that a right to homosexual sodomy exists, and yet conclude that such a right is outweighed by a compelling state interest. To be certain, the State did not justify Bowers in this manner. Still, this approach appears to offer at least one plausible way to explain the Court's bottom-line ruling in that case. But how plausible an argument is this in light of the theory of institutional liberal perfectionism? Assessing its appeal requires us to consider in further detail the concept of a "compelling state interest."

That concept is a rather mysterious one in the Court's jurisprudence. As Ash Bhagwat and others have observed, the Supreme Court has been hesitant to define the term with any specificity. Nonetheless, the concept takes on a distinct meaning when viewed against the backdrop of institutional liberal perfectionism, especially when illuminated by a clear understanding of the principle of liberty itself.

As noted previously, liberty authorizes state action only when necessary to protect one citizen from "harming" another. The harm principle, in other words, offers a standard for determining whether the State has a justification for interfering with individual autonomy. To be sure, this is a rather ambiguous standard. As numerous commentators have observed, just about anything can be said to harm another. Thus, one might say that the racist is somehow "harmed" by being forced to live in an interracial society, or the religious fundamentalist is "harmed" by living in a community where contraception or other sinful

---

148Cf. Carey, 431 U.S. at 685–86 ("That the constitutionally protected right of privacy extends to an individual's liberty to make choices regarding contraception does not, however, automatically invalidate every state regulation in this area. . . . [E]ven a burdensome regulation may be validated by a sufficiently compelling state interest."); Cruzan, 497 U.S. at 279 ("[D]etermining that a person has a 'liberty interest' under the Due Process Clause does not end the inquiry; 'whether [the individual's] constitutional rights have been violated must be determined by balancing his liberty interests against the relevant state interests."") (internal citation omitted).


150In addition to preventing one citizen from harming another, the State may also have an interest in requiring one individual to help another (e.g., through the redistribution of wealth). Because such social policies involve additional complexities beyond the scope of this Article, I do not address those situations here.

151See, e.g., Rubenfeld, supra note 2, at 758 n.112 ("One could also point to the offense that abortion, interracial marriage, and even apparently contraception may cause third parties."); TRIBE, supra note 7, at 1303 ("[V]irtually any action has non-trivial consequences beyond any perimeter defined in advance. . . . "). For similar arguments, see JOEL FEINBERG, THE MORAL LIMITS OF THE CRIMINAL LAW: HARM TO OTHERS 12 (1984); C. TEN, MILL ON LIBERTY 10–41 (1980).
products are available.\footnote{The mere fact that the government is tempted to enforce laws against incest, or against premarital cohabitation, demonstrates that someone is likely to be offended—harmed, if you will—by the prohibited conduct. John Hart Ely, Democracy and the Right to be Different, 56 N.Y.U. L. Rev. 397, 403 (1981) ("If it truly were the case that the conduct in question was not affecting the happiness of someone other than the actor(s), the government wouldn’t be intervening to prevent it. If no one else cared, there wouldn’t be a law against it, and if there were a law, it would not be enforced.").} The concept of harm, in other words, seems to beg the central question regarding how to distinguish constitutionally significant harms from insignificant ones.\footnote{This is a common criticism of the harm principle. Simon Lee, LAW AND MORALS 25 (1986) ("Merely incanting ‘harm-to-others’ is not sufficient to provide a recipe for when the law should enforce morality. At best, it provides a starting-point. At worst, it begs all the important questions."); Feinberg, supra note 151, at 12 (warning that without further clarification the “harm principle may be taken to invite state interference without limit”); Rubenfeld, supra note 2, at 758 n.112 (affirming need to adopt normative principle in order to offer convincing definition of “harm”). One writer has gone so far as to say that Mill's entire argument “is vitiated by the ambiguity in Mill's use of the word 'harm.'” J. R. Lucas, PRINCIPLES OF POLITICS 174 (1966), quoted in John Gray, MILL ON LIBERTY: A DEFENCE 49 (1996).}

Liberal perfectionism, however, provides some additional clarification. Asking whether a person is “harmed” in a morally significant way is equivalent to asking whether a given injury or setback will, as an objective matter, hinder the individual’s chance at fulfillment. The more an individual is hindered in seeking or achieving fulfillment, the greater he or she is harmed. Harms, in this sense, can vary in significance. Of course, almost anything one person does to another can impede the latter’s opportunity for self-fulfillment to some degree. Even verbal insults might “harm” an individual in this sense. But, as we have seen, where fundamental interests are involved, the harm must be more than marginal. It must be an extremely significant setback—a “compelling” harm.\footnote{This distinction between compelling and non-compelling harms explains why regulations that appear “paternalistic”—such as seatbelt laws—would survive judicial review under the moral theory developed here. Because seatbelt regulations constitute only a minimal intrusion on individual liberty, they require only a minimal state interest as justification. Any number of considerations—the cost of health care, the emotional trauma suffered by witnesses, the public’s belief in the sanctity of life—might suffice to justify the safety measure. In other words, by establishing a sliding scale of scrutiny, the moral theory outlined here leaves the State with rather broad discretion to regulate activities that do not significantly intrude on the “essential attributes of personhood.”}
What constitutes a compelling harm of this sort will be a subject of some controversy, but again that debate need not concern us here. Because our principal goal is to consider the implicit premises of the Court’s jurisprudence, the focus must be on the Court’s decisions regarding compelling interests. Although the Court has said little on the subject, it has made a few relevant observations. For example, the Court has indicated that certain matters of public safety or public health rise to the level of a compelling interest. Implicit in this judgment is that such harms pose a serious threat to the well-being of citizens. That conclusion, I suspect, is consistent with most readers’ own judgments.

In the Bowers case, the state interest at stake was of a different sort. Rather than focusing on public safety or health concerns, the State appears to justify the anti-sodomy law principally on the basis of the public’s opposition to homosexuality. Thus, the question there was whether “offense” to the public’s moral sentiments rises to the level of a compelling state interest.

Although the Court has never addressed that question directly, a response lies implicit in the Court’s privacy jurisprudence. The Court plainly considers privacy rights to serve as barriers to state regulation. But if moral offense alone is sufficient to constitute a compelling reason for state action, then such rights are useless as a bulwark against majority will. Just about every regulation of privacy rights could be justified on that basis. What use is a right to abortion, for example, if a majority could override it simply on the basis of its moral disapproval of the practice? Mill, at least, saw this point clearly. If moral disapproval were sufficient to justify government action, he wrote, “there is no violation of liberty which it would not justify.” The implication is that moral

\[\text{Salerno, 481 U.S. at 749 ("The government's interest in preventing crime by arrestees is both legitimate and compelling."); Fouche, 504 U.S. at 81 (same).}\]

\[\text{Schmerber v. California, 384 U.S. 757 (1966).}\]

\[\text{Arguably, the answer is explicit where the First Amendment is implicated. In that context, mere offense to others will not ordinarily justify government regulation of speech. Cohen v. California, 403 U.S. 15, 21 (1971); Coates v. City of Cincinnati, 402 U.S. 611, 615 (1971) (stating that under the First and Fourteenth Amendments, the State may not criminalize protected activity simply because conduct may be "annoying" to some people). See also Nancy A. Millich, Compassion Fatigue and the First Amendment: Are the Homeless Constitutional Castaways?, 27 U.C. DAVIS L. REV. 255, 325–26 (1994) ("The Court has also made it clear that mere public intolerance or animosity can never form the basis to limit constitutional freedoms."). Whether these cases settle the issue in the privacy context is debatable.}\]

\[\text{Moreover, if moral sentiments were deemed compelling, the narrowly tailored prong of the strict scrutiny test would be easily satisfied. Regulations implementing the moral sentiment—say, laws against miscegenation—would, by definition, be narrowly tailored to address the compelling interest.}\]

\[\text{Mill, supra note 55, at 158. See also HART, supra note 77, at 47 ("Recognition of individual liberty as a value involves, as a minimum, acceptance of the principle that the individual may do what he wants, even if others are distressed when they learn what it is that he does—unless,}\]
offense, as a general rule, cannot rise to the level of a compelling interest. In this light, the state interest in Bowers appears to be insufficient to override the right of intimate association.

This conclusion leaves us in a quagmire. The theory of institutional liberal perfectionism, as clarified by the Court’s privacy decisions, appears to justify an extremely broad reach for privacy rights—one that conflicts with the Court’s rulings regarding, among other things, homosexual sodomy. Efforts to find an alternative explanation for the Court’s ruling in Bowers—by pointing to a compelling state interest—have failed. Thus, if we are to develop an argument in support of the scope and structure of the Court’s jurisprudence, some additional, plausible limiting factor must be identified to reconcile the moral theory with the Court’s jurisprudence. Where can that principle be found?

VI. THE FORCE OF TRADITION

One possible approach is suggested by the Court’s decision in Bowers itself. In upholding a ban on homosexual relations, the Court explained that fundamental privacy interests include only those interests that are deeply rooted in the

of course, there are other good grounds for forbidding it. No social order which accords to individual liberty any value could also accord the right to be protected from distress thus occasioned.”).

Mill thus rejected the idea of “social rights”—the idea that each citizen has a right to ensure that “every other citizen shall act in every respect exactly as he ought; that whosoever fails thereof in the smallest particular violates my social right and entitles me to demand from the legislature the removal of the grievance.” Mill, supra note 55, at 158. As Mill concluded, “So monstrous a principle is far more dangerous than any single interference with liberty.” Id.

160This conclusion undercuts the most obvious justification for upholding the State’s ban on homosexual sodomy. It is possible, of course, to identify other possible justifications. For example, one might, in theory, argue that such criminal bans are justified as a means of fighting sexually transmitted diseases (STDs) or reducing health care costs. Bowers, 478 U.S. at 208 (Blackmun, J., dissenting) (raising, and then rejecting, similar argument). But these alternative rationales face significant obstacles under the strict scrutiny test, as well.

As a preliminary matter, merely asserting an interest does not make it compelling; some basis must be found for believing that the facts are true, and that the remedy will be effective. It is not at all clear, for example, that a ban on homosexual sodomy would lead to a significant reduction in STDs. It might increase the risks by pushing sexual relations underground. See, e.g., Karst, supra note 8, at 685 (requiring empirical evidence would undermine many laws against homosexuals). Further, even if such interests were deemed compelling, the State still would face difficulties demonstrating that the regulations were the least restrictive alternative available. For example, there are surely more narrowly tailored ways of reducing the prevalence of STDs than an outright ban on sexual relations. In short, these justifications for the anti-sodomy laws would be subject to challenge under either prong of the strict scrutiny test. In any event, these alternative justifications are somewhat make-believe. Government regulation of homosexuality is typically justified, not in terms of these substantive harms, but in terms of homosexuality’s conflict with deeply-held moral beliefs.
Nation's history and tradition. The Court concluded, did not specifically endorse homosexual sodomy. The Court’s opinion raises the question: Does “tradition” offer a plausible basis for limiting the theory of institutional liberal perfectionism in the privacy area?

A. The Failure of Tradition

One might be skeptical. Even apart from difficulties in defining what counts as a tradition, the concept faces practical and theoretical objections. One objection concerns the practical difficulty in defining the appropriate level of generality for the relevant tradition. Justice Scalia has argued that tradition should be interpreted at the most specific level feasible. In the case of gay rights, that means the Court should ask whether the nation’s traditions endorse the specific practice of homosexual sodomy. This appears to be the way the Bowers Court approached the issue: It focused on the nation’s long history of opposition to homosexuality.

But interpreting tradition at the level of specific practices is problematic, since it would generate results inconsistent with many of the Court’s other privacy rulings. Notably, the right to interracial marriage or to abortion cannot be found in America’s traditions. Perhaps because this approach would destabilize

---

161 Bowers, 478 U.S. at 192 (citing Moore, 431 U.S. at 503). The Court has made frequent references to “deeply held traditions” as a constraint on the scope of individual rights. See, e.g., Michael H., 491 U.S. at 122 (plurality opinion) (referring to “protections so rooted in the traditions and conscience of our people as to be ranked as fundamental”) (internal citations omitted).

162 Bowers, 478 U.S. at 192 (“Proscriptions against that conduct have ancient roots.”). See also id. at 197 (Burger, J., concurring) (“To hold that the act of homosexual sodomy is somehow protected as a fundamental right would be to cast aside millennia of moral teaching.”).

163 Those definitional questions are numerous: Is a tradition a reflection of positive law or social consensus? Must it be an uninterrupted set of values or can it ebb and flow? Should it be supported by a simple majority of citizens, or is some other proportion sufficient or necessary? Are the traditions that exist during certain times in our nation’s history—say during the ratification of the Bill of Rights or the Fourteenth Amendment—more significant than others? No obvious standard exists to answer these questions. Cf. LAURENCE H. TRIBE & MICHAEL C. DORF, ON READING THE CONSTITUTION 98 (1991) [hereinafter TRIBE & DORF, READING] (noting that traditions do not come with “instruction manuals explaining how abstractly they are to be described”). Laurence Tribe and Michael Dorf have also advanced a separate concern, which is that a single legal dispute might implicate multiple traditions, each calling for a different level of scrutiny. Laurence H. Tribe & Michael C. Dorf, Levels of Generality in the Definition of Rights, 57 U. CHI. L. REV. 1057, 1091 (1990) (noting that the abortion dispute might be viewed as implicating a tradition “regarding women’s reproductive freedom in general” or a “tradition regarding behavior that affects fetuses, as reflected in laws making feticide a crime when caused by someone other than the mother”).

164 See also Bowers, 478 U.S. at 210 n.5 (Blackmun, J., dissenting) (suggesting that the Court’s decision in Loving, striking down a miscegenation law, is inconsistent with the Court’s rationale in Bowers).
significant parts of the Court's privacy jurisprudence, the Court has never accepted the view that traditions must be defined in terms of the specific practice at issue in the case.\footnote{65}

An alternative approach is to interpret the concept of "tradition" at a higher level of generality. The problem with this approach is that tradition can be interpreted at various levels of abstraction, with each level having a different legal ramification.\footnote{66} Suppose the Bowers Court had characterized the relevant issue as the right of individuals to associate freely in their homes—or to engage in intimate and enduring relationships with others. Arguably, traditions supporting these latter rights exist. Why stop there? What stops us from looking to even higher levels of abstraction? Why not read the nation's traditions as representing a general distrust of government regulation—a broad ideal of liberty.\footnote{67} Doing so would completely eviscerate the concept of tradition as a limitation on the scope of institutional liberal perfectionism. In short, the concept of tradition seems fatally ambiguous: It cannot be read at the most specific level of generality without undermining vast stretches of Supreme Court precedent. And once read at higher levels of generality, the concept loses all fixed meaning.

A second line of criticism is more theoretical in nature, but just as damning. Justice Blackmun's dissent in Bowers reflects this line of attack. There, Blackmun declared:

Like Justice Holmes, I believe that '[it] is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was

\footnote{65} See, e.g., Casey, 505 U.S. at 847 (rejecting idea that "the Due Process Clause protects only those practices, defined at the most specific level, that were protected against government interference by other rules of law when the Fourteenth Amendment was ratified"); Michael H., 491 U.S. at 132 (O'Connor J., concurring in part) (affirming that the Court "has characterized relevant traditions protecting asserted rights at levels of generality that might not be 'the most specific level' available").

\footnote{66} Tribe & Dorf, Reading, supra note 163, at 100 ("[T]raditions, like rights themselves, exist at various levels of generality."). Justice Scalia, himself, has warned against the danger of indeterminacy once the Court permits tradition to be interpreted at higher levels of generality. Michael H., 491 U.S. at 127 n.6 (arguing that the Court has "no basis for the level of generality" it chooses once it looks beyond the "most specific level at which a relevant tradition protecting, or denying protection to, the asserted right can be identified").

\footnote{67} For language suggesting such a reading, see Poe, 367 U.S. at 543 (Harlan, J., dissenting) ("This 'liberty' is not a series of isolated points . . . . It is a rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints . . . ."); Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting) ("The makers of our Constitution . . . conferred, as against the Government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men.").
laid down have vanished long since, and the rule simply persists from blind imitation of the past.¹⁶⁸

The problem is that tradition seems unable to offer a persuasive moral argument for limiting the scope of the privacy doctrine. Why should someone who embraces perfectionism as a moral ideal consider tradition to be a relevant factor? After all, tradition has no necessary connection to objective morality. It can—and has—embraced injustice, backwards thinking, deeply rooted prejudices. One who embraces liberal perfectionism will not see tradition as inherently valuable; rather, the liberal perfectionist will embrace tradition only to the extent that it conforms with the individual’s own views about the morally-justified result. If tradition and moral principle conflict, it will be morality that will win out.

In sum, tradition seems an unattractive concept for limiting the moral theory. Not only is it impossible to define the scope of the principle, but it appears to lack normative significance as well. This criticism seems devastating, and the prudent course would appear to be to discard the concept altogether. But that approach, as the following section suggests, would be a mistake.

B. Lord Devlin and the Relevance of Traditional Morality

Tradition can be rehabilitated. The critical step is to reconceive tradition, not as an end in itself, but as a proxy for other valid normative concerns. What concerns might tradition embody? One answer is offered by Patrick Devlin, in his essay, The Enforcement of Morals.¹⁶⁹ A member of the British judiciary, Devlin published that classic work in response to a proposal by the so-called Wolfenden Committee to legalize “homosexual behaviour between consenting adults in private.”¹⁷⁰ Devlin criticized the Committee’s proposal for assuming that there is, in principle, a fixed “realm of private morality which is not the law’s business.”¹⁷¹ He argued, instead, that there is no inherent limit to the State’s authority to

¹⁶⁸Bowers, 478 U.S. at 199 (Blackmun, J., dissenting) (quoting Oliver W. Holmes, The Path of the Law, 10 Harv. L. Rev. 457, 469 (1897)). Blackmun’s statement echoes those of Enlightenment thinkers, like Thomas Jefferson and Tom Paine, who rejected tradition’s sway. See, e.g., Thomas Jefferson, Letter to Peter Carr, in The Life and Selected Writings of Thomas Jefferson 430–33 (Adrienne Koch & William Peden eds., 1944) (emphasizing value of human reason over stultifying traditions); The Oxford Companion to Philosophy, supra note 63, at 878 (for Tom Paine and others, “tradition is perceived as representing entrenched privileges holding back political and social progress, and it is to be contrasted with a vision of human beings controlling their own destinies with rational decisions and asserting rationally based rights”).

¹⁶⁹DEVLIN, supra note 71.

¹⁷⁰Id. at 2 (quoting proposal by “Wolfenden Committee on Homosexual Offenses and Prostitution”). The Committee issued its report in 1957.

¹⁷¹Id. at 105.
regulate. Under the right circumstances, the State could regulate even the most private relationships or acts, including homosexual relations.\textsuperscript{172}

Devlin appears to challenge the very idea of a sphere of privacy insulated from government regulation. Yet, a careful reading of his argument allows us to discern a limiting principle that can be incorporated into the moral theory of privacy discussed above. That principle, I will suggest, offers a plausible method for reconciling institutional liberal perfectionism with the Court’s own jurisprudence.

1. The Disintegration Thesis

Many, if not most, attacks on gay rights focus on the perceived sinfulness of homosexuality itself. Devlin, however, rejects these arguments for criminalizing homosexual conduct, an argument Devlin associates with the “Platonic ideal,” which assumes that “the State exists to promote virtue among its citizens.”\textsuperscript{173} For Devlin, the Platonic ideal is problematic, in part because it is inconsistent with the presumption of freedom that lies at the core of “Anglo-American thought.”\textsuperscript{174}

At the same time, Devlin is no defender of privacy rights. He advances a different argument for regulating homosexual conduct. That argument rests on concerns about social cohesion. According to Devlin, society is held together by shared values, beliefs, and traditions. When those values are challenged, society itself is threatened. In one well-known passage, Devlin states:

\begin{quote}
There is disintegration when no common morality is observed and history shows that the loosening of moral bonds is often the first stage of disintegration, so that society is justified in taking the same steps to preserve its moral code as it does to preserve its government and other essential institutions. The suppression of vice is as much the law’s business as the suppression of subversive activities; it is no more possible to define a sphere of private morality than it is to define one of private subversive activity.\textsuperscript{175}
\end{quote}

Society’s right to protect itself against disintegration is paramount, Devlin suggests, even if it means interfering with conduct that is otherwise morally

\begin{itemize}
\item \textsuperscript{172}See, e.g., \textit{id.} at 14 (rejecting “theoretical limits to legislation against immorality”).
\item \textsuperscript{173}\textit{id.} at 89.
\item \textsuperscript{174}\textit{id.} Devlin observed that it is against this paternalistic approach that “Mill’s words are chiefly directed.” \textit{id.}
\item \textsuperscript{175}\textit{id.} at 13–14. \textit{See also id.} at 114 (“It is generally accepted that some shared morality, that is, some common agreement about what is right and wrong, is an essential element in the constitution of any society.”); \textit{id} at 25 (“A man who concedes that morality is necessary to society must support the use of those instruments without which morality cannot be maintained.”).
\end{itemize}
worthy. Thus, says Devlin, "a society may legitimately enforce whatever shared moral beliefs bind its members together."  

Devin does not explain in any detail why society has a right to protect itself. He simply assumes that it is true. Several theorists have taken Devlin to task for this assumption. The perfectionist Robert George, for example, points out that certain societies are so evil and unjust that social disintegration would seem morally justified. Moreover, says George, "Devlin’s willingness to permit—indeed to require—the suppression of innocent or even honorable liberties (on the basis that mere prejudices are strongly held) means . . . that no civil liberty is safe from infringement nor is any individual or minority protected from oppression." In short, Devlin appears to offer a justification for preserving even the most coercive regimes.

Devin does not respond directly to this sort of criticism, but we can reconstruct a possible argument in his defense—one that even a liberal perfectionist might find appealing. The response acknowledges that social cohesion is not valuable for all societies, but it is valuable for any society worth preserving.

Consider again the issue of homosexuality. As we saw, the liberal perfectionist believes that protecting gay rights is morally justified as part of the right of intimate association. But assume, for the sake of argument, that extending privacy rights to homosexual relations would lead to a breakdown of social order, "plunging . . . that society into a state of social disorder akin to Hobbes’s state of nature." Under these circumstances, the liberal perfectionist might conclude that the Court should decline to extend privacy rights to homosexual conduct, on the grounds that it is better to preserve a society with a partial right of privacy than to have no society at all. That conclusion is certainly plausible.

To be sure, a belief that society is worth preserving rests on background principles of political morality. Although those principles remain hidden in

---

176 Devlin, in other words, does not take a stand on the objective merits of the prohibited conduct. Id. at 94 (“I have said that a sense of right and wrong is necessary for the life of the community. It is not necessary that their appreciation of right and wrong . . . should be correct.”). See also GEORGE, supra note 21, at 53 (“Devlin did not argue that society is justified in enforcing only true morality.”).

177 GEORGE, supra note 21, at 53.

178 Id. at 79–80. See also HART, supra note 77, at 19 (“If a society were mainly devoted to the cruel prosecution of a racial or religious minority, or if the steps to be taken included hideous tortures, it is arguable that what Lord Devlin terms the ‘disintegration’ of such a society would be morally better than its continued existence . . .”.

179 GEORGE, supra note 21, at 78. George thus excoriates Devlin for his willingness to “sacrifice the genuine interests of the minority who wish to perform [a morally justified] act for the sake of what Devlinism supposes to be the greater good of social cohesion.” Id.

180 Id. at 67 (discussing Hart’s views of Devlin).
Devlin’s theory, the liberal perfectionist would have a plausible argument for believing that the American system of government was worth preserving. That system, among other things, protects a significant sphere of individual liberty, even if it falls short of protecting certain rights that would be justified under ideal conditions. As a result, one who embraces institutional liberal perfectionism could reasonably conclude that it is better to limit the right of privacy, than to risk a state of anarchy where all rights would be vulnerable.

The bottom line is that social cohesion serves as a pragmatic constraint on the morally justified scope of privacy rights—at least where society itself is worth preserving.\textsuperscript{181} The implication is not that such a society should criminalize any act that violates traditional morality.\textsuperscript{182} As Devlin understood, not every shared value will be essential to social cohesion. Rather, the implication is that society should criminalize those acts which, left unchecked, would lead to the disintegration of the social fabric. For the perfectionist, that means that moral and political ideals should be extended to their full scope, short of social disintegration. In Devlin’s own words: “There must be toleration of the maximum individual freedom that is consistent with the integrity of society.”\textsuperscript{183}

2. The Disintegration Thesis Reconsidered

Even if the concept of tradition is interpreted in this way, one might still be skeptical that tradition offers a plausible justification for upholding laws criminalizing homosexual relations. As H.L.A. Hart notes, Devlin’s argument rests on an empirical assumption: It assumes that the decriminalization of homosexual relations would lead to social breakdown.\textsuperscript{184} Hart found that assumption exceedingly unlikely. The only way to believe that the relaxation of

\textsuperscript{181} Devlin, at one point, seems to recognize that this is an implicit assumption of his view. DEVLIN, supra note 71, at 101 (“It is the faith of the English lawyer, as it is of all those other lawyers who took and enriched the law that Englishmen first made, that most of what their societies have got is good.”).

\textsuperscript{182} Although hardly clear on this point, Devlin seems to suggest that one can measure the importance of a given tradition to social cohesion by the strength of the public’s animosity towards those who violate the tradition. Thus, in his view, only violations that trigger significant opposition are likely to be essential to cohesion. \textit{Id.} at 17 (“It is not nearly enough to say that a majority dislike the practice; there must be a real feeling of reprobation . . . . Not everything is to be tolerated. No society can do without intolerance, indignation and disgust.”). See also \textit{id.} at 13 n.1 (“I do not assert that any deviation from a society’s shared morality threatens its existence any more than I assert that any subversive activity threatens its existence.”). Ronald Dworkin has questioned whether intolerance, indignation, and disgust are reliable indicators of essential values. Ronald Dworkin, \textit{Lord Devlin and the Enforcement of Morals}, 75 YALE L. J. 986, 992–93 (1966).

\textsuperscript{183} DEVLIN, supra note 71, at 16. Devlin apparently views this test as highly significant, for he repeats it with emphasis in his preface. See \textit{id.} at viii.

\textsuperscript{184} Hart, supra note 57, at 3.
sexual mores would have such an effect, Hart suggested, would be to imagine that popular morality was a "seamless web," in which the elimination of one single strand—taboos against homosexuality—would cause the entire web to unravel.\(^{185}\)

Hart responded by asserting that, "[w]e have ample evidence for believing that people will not abandon morality, will not think any better of murder, cruelty, and dishonesty simply because some private sexual practice which they abominate is not punished by the law."\(^{186}\)

Although the issue is debatable, it does seem hard to believe that social stability today turns on whether homosexual sodomy remains criminalized or becomes constitutionalized. Indeed, as Robert George observes, "[m]any, ... perhaps even most, think that Hart carried the day inasmuch as Devlin failed to meet his challenge to produce hard empirical evidence to show that the erosion of a society's dominant morality places that society in danger of collapse."\(^{187}\) If Devlin's critics are right, then the disintegration thesis fails to justify Bowers—even if social cohesion is a relevant constraint on privacy.

This empirical criticism may appear decisive, but it does not completely undermine Devlin's claim. Again, one might be able to meet the challenge by reinterpreting the disintegration thesis in a more charitable light.\(^{188}\) It is broadly accepted that, when Devlin spoke about social disintegration, he was referring solely to the actual disintegration of society—that ground-shaking event when government dissolves and anarchy reigns in the streets.\(^{189}\) But one might recharacterize the thesis as expressing a concern, not only for social cohesion, but for the Court's "public legitimacy," that is, as expressing a concern for maintaining public support for the Court's power of judicial review.

\(^{185}\) HART, supra note 77, at 50–51. Devlin does not reject this interpretation. Rather, he states that "[s]eamlessness presses the simile rather hard but, apart from that, I should say that for most people morality is a web of beliefs rather than a number of unconnected ones." DEVLIN, supra note 71, at 115. Thus, Devlin suggests, "the law is required to guard the whole of public morality." Id.

\(^{186}\) H.L.A. Hart, Immorality and Treason, LISTENER, July 30, 1959, at 86. See also HART, supra note 77, at 50 ("No reputable historian has maintained this thesis, and there is indeed much evidence against it."). Moreover, says Hart, it is not clear that judicial decisions protecting disputed activities will undermine shared norms. Even if incest were deemed protected by a right of privacy, for example, one might doubt that shared morality would shift in favor of it or lose its force. Id. at 67 (similar).

\(^{187}\) GEORGE, supra note 21, at 65.

\(^{188}\) I make no claim that Devlin would support such a reinterpretation. Rather, my contention is simply that the revised approach makes the disintegration thesis a more persuasive argument for limiting privacy rights.

\(^{189}\) GEORGE, supra note 21, at 65. The vision is "akin to Hobbes's state of nature." Id. at 67.
Public legitimacy is the Court’s life blood. Lacking the power of the sword or purse, the Court must depend on public opinion for its authority. Repeated violations of the public’s core values, however, may leave the Court discredited, its rulings ignored or even resisted. In other words, even without the dissolution of society per se, the court’s role in the constitutional scheme might be undermined.

In this light, the liberal perfectionist could plausibly conclude that the Court must consider public perceptions when deciding on the proper scope of privacy rights. Although some might view public opinion as an inappropriate consideration for judicial decision making, it seems plain that the Court cannot ignore conventional or traditional morality entirely. If the Court ever loses legitimacy in the public’s eyes, it may find itself incapable of defending privacy rights against the majority at all. In this light, one can reasonably conclude that it is better to conserve judicial legitimacy by limiting the scope of privacy rights, than to sacrifice the entire constitutional project. If this argument is embraced, the Court would be justified in taking into account the strength of public opposition when deciding whether to extend privacy rights (or, for that matter, any right) to a new context.

This is not a novel insight. In *The Least Dangerous Branch*, Alexander Bickel offers several examples of how the Court, in exercising its power of review, takes into account considerations of “expediency”—including the force of public opinion. Bickel understood that considerations of public opinion cannot be ignored, and that those considerations can in theory overwhelm the dictates of principle. The challenge for the Court, Bickel suggested, was to find a way

---

190 *Casey*, 505 U.S. at 865 (“[T]he Court cannot buy support for its decisions by spending money and, except to a minor degree, it cannot independently coerce obedience to its decrees. The Court’s power lies, rather, in its legitimacy, a product of substance and perception that shows itself in the people’s acceptance of the Judiciary as fit to determine what the Nation’s law means and to declare what it demands.”). See also THE FEDERALIST NO. 78 (Alexander Hamilton) (stating that the judiciary "has no influence over either the sword or the purse. . . . It may truly be said to have neither FORCE nor WILL, but merely judgment").

191 See, e.g., BICKEL, supra note 98, at 244–72. For example, Bickel discusses how the Court’s remedial order in *Brown v. Board of Education* did not mandate the immediate desegregation of public schools. Rather, it only required desegregation “with all deliberate speed.” *Id.* Some have criticized the Court for stepping back from the principle of equality established in *Brown*. Bickel, however, saw the remedial order as a plausible attempt to balance considerations of principle (i.e., equality) with expediency (i.e., the South’s resistance to desegregation). *Id.* at 250. Cf. POSNER, supra note 17, at 250 (“[P]ublic opinion is not irrelevant to the task of deciding whether a constitutional right exists.”)

192 In situations where considerations of expediency prevent the Court from acting on principle, Bickel believed the Court should refrain from ruling at all. Thus, he argued that the Court should rely on its “almost inexhaustible arsenal” of procedural “techniques and devices” to avoid review. BICKEL, supra note 98, at 70. Bickel referred to these techniques as the “passive virtues.” They allowed the Court to act on principle when possible, and avoid acting at all when it was not. In this
to balance expediency and principle, in order to reach a resolution that serves the public interest.\footnote{See, e.g., Id. at 253–54 (referring to the “discretionary accommodation between principle and expediency”). Cf. Christopher Eisgruber, Justice and the Text: Rethinking the Constitutional Relation Between Principle and Prudence, 43 DUKE L.J. 1, 16 (1993) [hereinafter Eisgruber, Justice] (“Bickel recognized this connection between principle and prudence. He saw that although constitutional decisionmaking must appeal to the people’s sense of justice, it must also take into account that public opinion is obdurate in the way just described.”).}

Bickel did not say precisely how this balance should be made. But our analysis of the disintegration thesis offers some general guidance. The ultimate standard for acting is moral principle. Thus, the Court should strive to satisfy that standard whenever feasible. Expediency, by contrast, should be considered only when absolutely necessary to preserve the Court’s institutional legitimacy or preserve social cohesion. To be sure, what counts as “necessary” may not be amenable to precise calibration. That assessment will differ for different people, depending on their risk averseness and their impression of the Court’s institutional strength. But the general standard is clear. To use Devlin’s words: “There must be toleration of the maximum individual freedom” that is consistent with social cohesion and the Court’s legitimacy.\footnote{DEVLIN, supra note 71, at 16.}

Under this analysis, a concern for traditional morality (or simply “tradition”) can be viewed as a proxy for these deeper concerns—for preserving social cohesion and for protecting the Court’s institutional role. This is a limitation on the moral theory that even a liberal perfectionist can plausibly endorse. According to this reconstructed argument, the Court must extend privacy rights to their full breadth, within the constraints imposed by “tradition,” properly understood. The fourth premise, in short, establishes a prudential constraint on privacy:

(4) Prudential Premise: “Tradition” serves as a limitation on liberal perfectionism to the extent necessary to preserve social cohesion and the Court’s public legitimacy.

The four premises taken together might be called, simply, the Normative Theory.

C. Bowers Revisited

The fourth premise adds a new wrinkle to the assessment of what constitutes a fundamental interest. According to the first three premises of the Normative Theory, a fundamental interest represents a decision essential to human fulfillment. The fourth premise holds that, even where that standard is met, the
Court should refrain from finding a fundamental interest if doing so would undermine social cohesion or the Court’s public legitimacy. To put this conclusion another way, the Normative Theory advances a two-part test. The Court must first determine whether a fundamental interest exists based on the principles of liberal perfectionism. If it does, the Court must then assess whether such a holding would threaten institutional legitimacy and social cohesion.

How does the adoption of the two-part test affect our analysis of Bowers? Earlier sections suggested that a right to “intimate association” lies implicit in the Court’s privacy rulings—a right that extends at least to committed and intimate homosexual relationships. That conclusion means that gay rights are justified under the first prong of the two-part test. But that does not end the analysis. The second prong of the test asks whether a ruling in favor of gay rights would undermine the Court’s institutional legitimacy to such an extent that its function would be seriously compromised. The question, in short, is whether such a ruling is “beyond toleration.”

In the case of homosexual relations, the answer is debatable. One widely shared view is that the Court acted with excessive and unnecessary caution, and that a decision in favor of gay rights would have been ultimately and grudgingly accepted by the vast majority of Americans. If this view is correct—and many think that it is—the Court should have extended individual rights to enduring and committed homosexual relationships, and arguably to all sexual intimacies.

Another view, however, is certainly conceivable. This is the view that the public’s aversion to homosexuality was, at the time of the decision, so deep and powerful that a ruling in the respondent’s favor would have led to a public backlash—a backlash that would have caused significant damage to the Court’s long-run legitimacy. Given such a view, one could agree that gay rights is part of a right to intimate association, and yet still believe that the Bowers decision was correctly decided.

Both positions are at least plausible. But once again, the goal is not to resolve the debate. Rather, it is to ask what assumption must be made to find the Court’s holding in Bowers persuasive. For one who embraces the Normative Theory, the answer is plain. That individual would endorse Bowers only if he believed that considerations of expediency were overwhelming. Only such a

195Id.

196That would have meant the end of the anti-sodomy law at issue in Bowers, at least to the extent that it was based on moral offense. Offense to moral sensibilities, we have seen, does not rise to the level of a compelling state interest. See supra Part V.C.

197Certainly, one might disagree with that assumption. But such disagreement would mean that the individual would not find the Court’s jurisprudence persuasive in its entirety. This disagreement, in other words, would provide a basis for critiquing the Court’s decision.
belief would justify ignoring moral principle. To be clear, my contention is not that the Court itself favored this rationale. Rather, my contention is simply that, based on such an assumption, a person who embraced the Normative Theory could offer a plausible argument why Bowers was correctly decided.

This justification for Bowers is not one that hard line opponents of gay rights are likely to find entirely appealing. A decision based on “expediency” rather than “principle” is, in a sense, an unstable ruling. Should the public become more tolerant of alternative sexual orientations, or should the Court’s institutional position becomes stronger, the judiciary would be obligated to expand the scope of fundamental rights outwards, reversing the Bowers decision. Indeed, from the perspective of the Normative Theory, Bowers is no victory for justice. It is at best a temporary expedient to preserve judicial legitimacy and social stability.

VII. THE NORMATIVE THEORY APPLIED: Washington v. Glucksberg

One way to test the explanatory power of the Normative Theory is to apply it to one recent Supreme Court decision—Washington v. Glucksberg. The majority opinion in that case seems to represent a repudiation of an autonomy-oriented approach to privacy rights. It thus seems to pose a particular challenge to the Normative Theory.

A. A Fragmented Court

In Glucksberg, all nine members of the Court agreed that a state ban on “assisted suicide” survived constitutional review. Justice Rehnquist wrote the opinion for the Court, and he rejected out of hand the possibility that the “Due Process Clause includes a right to commit suicide which itself includes a right to

---

198 Even in this case, one might still criticize the way in which the Court ruled. Following Bickel’s analysis, a more appropriate way to respond to considerations of expediency might be to invoke the “passive virtues” and decline to rule at all. BICKEL, supra note 98, at 70–71.

199 Indeed, I think it clear that the Bowers Court did not embrace the dictates of the Normative Theory. As a preliminary matter, the Court rejected the idea that the Court’s decisions concerning the “family” or “marriage” embodied a principle that might be relevant to the issue of gay rights. Bowers, 478 U.S. at 191 (declaring that “[n]o connection between family, marriage, or procreation on the one hand and homosexual activity on the other has been demonstrated”). Furthermore, the Court got the balance between liberty and tradition exactly backwards. According to the Court, fundamental interests should be identified only if “deeply rooted in the Nation’s traditions.” This statement suggests that liberty should be extended only if supported by tradition. The Normative Theory, by contrast, says that liberty should be extended unless significantly opposed by tradition. The presumption, in short, should be in favor of extending the moral principle (i.e., expanding the scope of privacy rights), rather than in favor of preserving the status quo.

assistance in doing so.”201 His opinion can be read as a classic statement of the “tradition-based” approach to privacy. Rehnquist reaffirmed the test, outlined in Bowers, that privacy rights extend only to those liberties “which are, objectively, ‘deeply rooted in this Nation’s history and tradition.’”202 That test, Rehnquist suggested, made the case an easy one. As he observed, there is a “consistent and almost universal tradition that has long rejected the asserted right [in assisted suicide], and continues to explicitly reject it today, even for terminally ill, mentally competent adults.”203

In reaching this conclusion, the Chief Justice seemed to go out of his way to attack previous statements by the Court that were aligned with the Normative Theory. For example, Rehnquist sharply criticized the Casey Court’s affirmation that the Due Process Clause protects the “most intimate and personal choices a person may make in a lifetime.”204 As Rehnquist wrote, “[t]hat many of the rights and liberties protected by the Due Process Clause sound in personal autonomy does not warrant the sweeping conclusion that any and all important, intimate, and personal decisions are so protected.”205 To bring the point home, Rehnquist acknowledged that decisions relating to assisted suicide might be just as “personal and profound” as other decisions found to be protected by the Court under the Due Process Clause.206 But he found this to be irrelevant to the scope of privacy rights.

For defenders of privacy, the Court’s opinion is a bleak one. Its tone and aggressive criticism of Casey appear to foreshadow a renewed assault by conservative members of the Court on the very foundation of privacy rights. Perhaps the only comfort that privacy’s defenders can take from the opinion is that only three other Justices joined Justice Rehnquist’s opinion without qualification. Justice O’Connor, who was the fifth member of the majority, filed a separate opinion, which made clear that she disagreed with the Chief Justice’s tradition-based approach.207 Indeed, in significant ways, Justice O’Connor’s opinion seems more closely aligned with the concurring opinions of Justices Souter and Stevens.208 All three of these Justices found, or at least strongly

201 Id. at 723.
202 Id. at 720–21 (quoting Moore, 431 U.S. at 503).
203 Id. at 723. See also id. at 728 (“The history of the law’s treatment of assisted suicide in this country has been and continues to be one of the rejection of nearly all efforts to permit it.”).
204 Casey, 505 U.S. at 851.
205 Glucksberg, 521 U.S. at 727.
206 Id. at 725.
207 Justice O’Connor indicated that she signed on to the majority opinion to express her agreement that “there is no generalized right to ‘commit suicide.’” Id. at 736 (O’Connor, J., concurring).
208 Justices Breyer and Ginsburg joined Justice O’Connor’s opinion. Justice Breyer also filed a short concurring opinion of his own.
suggested, that a mentally competent, terminally ill patient who is experiencing great pain has a fundamental interest in controlling the time and manner of his death.\(^{209}\) The three voted to uphold the ban on assisted suicide only because they viewed the state restriction as a narrowly tailored response to a compelling state interest.

Despite these concurring opinions, the Court’s decision seems to raise questions about the validity of the Normative Theory. In light of Justice Rehnquist’s “majority” opinion, one can confidently conclude that four justices—and perhaps several more—would reject outright core elements of the moral theory outlined in this Article. Does this suggest that the Normative Theory fails to offer a “fit” with existing precedent?

The answer is no. As noted in the introduction, the goal of this Article is not to offer an argument for the specific reasoning of the majority’s holding in Glucksberg (or Roe or Bowers or any other decision). Nor is it to suggest that a majority (or even a minority) of the Justices would find the Normative Theory persuasive. Rather, the goal is simply to explore whether a plausible argument can be developed that fits the ultimate judgments in those cases. Such an argument would explain what must be assumed in order to find the Court’s bottom-line rulings justified. Thus, the central question remains: Does a plausible interpretation of the Normative Theory exist that provides support for the Court’s ultimate holding in Glucksberg?

B. The Normative Theory and Assisted Suicide

Applying the Normative Theory to this case is relatively straightforward. An initial question is whether the decision to commit suicide, or seek assistance in doing so, implicates a fundamental interest. The answer turns on whether the decision would have a profound effect on an individual’s well-being. The answer is certainly yes. After all, what decision is more critical to the individual than the decision whether to live or die? As the lower court in Glucksberg put it: “Like the decision of whether or not to have an abortion, the decision how and when to die is one of ‘the most intimate and personal choices a person may make in a lifetime,

\(^{209}\)Glucksberg, 521 U.S. at 736 (O’Connor, J., concurring) (assuming for the sake of argument that the Court would recognize a fundamental interest in assisted suicide under certain circumstances). See also id. at 745 (Stevens, J., concurring) (stating that a terminally ill patient’s decision whether to live or die is within the liberty interest protected by the Due Process Clause); id. at 782 (Souter, J, concurring) (strongly suggesting that the individual interest at stake is “fundamental,” but finding it unnecessary to reach that conclusion in light of the strength of the State’s interests).
'a choice' central to personal dignity and autonomy.'210 As a matter of principle, therefore, decisions about suicide, and assisted suicide, are fundamental interests.

But that conclusion does not end the matter. The question remains whether such a ruling would threaten the Court's institutional legitimacy. Such a result is conceivable if the Court were to declare a general "right to commit suicide, which itself includes a right to assistance in doing so."211 But the Glucksberg case does not require the Court to go so far. Arguably, by limiting its ruling to terminally ill patients, the Court could dispose of the case without significant risk to its legitimacy. If this is so, one who embraces the Normative Theory would have a plausible reason for concluding that terminally ill patients have a fundamental interest in life and death choices. This conclusion is at least roughly aligned with the views of Justices Souter, Stevens, and O'Connor, each of whom suggests, or at least assumes, that terminally ill patients have a fundamental interest in assisted suicide under certain circumstances.

Finding a fundamental interest in assisted suicide is just the initial step in the inquiry. As the Normative Theory suggests, a ban can still be justified so long as the State has a narrowly tailored policy that advances a compelling state interest. What does the Normative Theory say about this subject?

The first question is whether a compelling state interest exists. In Glucksberg, the State identified several reasons for its ban on assisted suicide, including an interest in: (1) preserving the sanctity of life; (2) protecting terminally ill patients from being coerced into suicide; and (3) protecting incompetent patients from making decisions contrary to their own welfare.

The first state interest is plainly insufficient to justify interference with a fundamental interest. It rests on the premise that assisted suicide conflicts with common moral sentiments regarding the sanctity of human life. As discussed earlier, the mere fact that an activity conflicts with an individual's moral beliefs does not alone provide a justification for infringing upon fundamental interests.212

The second rationale is more persuasive. As Ronald Dworkin has explained, this rationale reflects the fear that patients might be "coaxed into suicide by relatives or hospitals who did not want to bear the expense of keeping them alive, or by compassionate doctors who thought them better off dead."213 Plainly, the

210Compassion in Dying v. Washington, 79 F.3d 790, 813–14 (9th Cir. 1996). In his concurring opinion, Justice Stevens offered a similar argument, concluding that "[a]voiding intolerable pain and the indignity of living one's final days incapacitated and in agony is certainly 'at the heart of [the] liberty . . . to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life.'" Glucksberg, 521 U.S. at 745 (Stevens, J., concurring) (quoting Casey, 505 U.S. at 851). See also Richards, Sexual Autonomy, supra note 36, at 1015 n.245 ("The duration of one's life is a basic life choice, if anything is.").

211Glucksberg, 521 U.S. at 723.

212See supra Part V.C.

213RONALD DWORLIN, SOVEREIGN VIRTUE 470 (2000) [hereinafter DWORKIN, VIRTUE].
State has a compelling interest in preventing individuals from being coerced into killing themselves.

The third rationale is also compelling, although that might seem surprising at first. After all, the rationale reflects a paternalistic desire to prevent individuals from harming themselves. Thus, this rationale seems to violate the principle of liberty, which stands for the proposition that individuals should be left free to govern themselves. Nonetheless, as noted earlier, an exception to the liberty principle is often made for those deemed too incompetent or too immature to make decisions, such as juveniles or the mentally handicapped. Given this exception, the State might be justified in acting to prevent an incompetent, terminally-ill patient from killing himself or herself.

In sum, both the second and third rationales might justify infringements on fundamental interests. Again, this conclusion is at least broadly consistent with the conclusions offered by Justice Stevens, Souter, and O’Connor in their concurring opinions. All found, or at least strongly suggested, that a State has a compelling interest in protecting the terminally ill from making incompetent decisions or from being coerced into committing suicide.

The final question concerns whether a ban on assisted suicide is a narrowly tailored way to prevent such abuse. Even if protecting the incompetent or the vulnerable is a compelling interest, might it not be possible to screen out patients who are incompetent or acting involuntarily? This is an empirical question. The answer turns on the feasibility of developing such an administrative procedure. Both Justices Souter and O’Connor expressly found that no screening mechanism was presently available to accomplish this task. Although debatable, the conclusion is at least plausible.

---

214 Miller, supra note 55, at 69.
215 Glucksberg, 521 U.S. at 737 (O’Connor, J., concurring) (“The State’s interests in protecting those who are not truly competent or facing imminent death, or those whose decisions to hasten death would not truly be voluntary, are sufficiently weighty to justify a prohibition against physician-assisted suicide.”). See also id. at 749 (Stevens, J, concurring) (“[A] State’s prohibition of assisted suicide is justified by the fact that the ‘ideal’ case, in which ‘patients would be screened for depression and offered treatment, effective pain medication would be available, and all patients would have a supportive and committed family and doctor’ is not the usual case.”); id. at 782–83 (Souter, J., concurring) (discussing state interests in protecting individual from “involuntary suicide, and euthanasia, both voluntary and nonvoluntary”).

216 Although agreeing on the principal issues, Justices O’Connor and Souter disagreed on a subsidiary matter, regarding the deference owed to the legislature’s finding regarding the feasibility of developing a screening mechanism. Justice O’Connor, for one, concluded that the Court should defer completely to the superior institutional competence of the legislature. As she explained, “[t]here is no reason to think the democratic process will not strike the proper balance between the interests of terminally ill, mentally competent individuals . . . and the State’s interests in protecting those who might seek to end life mistakenly or under pressure.” Id. at 737 (O’Connor, J., concurring).

This conclusion, however, seems questionable from the perspective of the Normative Theory.
To recapitulate, one who embraces the Normative Theory could plausibly reach the following core conclusions: first, that terminally ill patients have a fundamental interest in deciding whether and how to die; second, that the State has a compelling interest in ensuring that individual decisions about suicide are voluntary and competently made; and third, that an absolute ban on assisted suicide is narrowly tailored, given the apparent lack of an effective screening methods for identifying incompetent and coerced patients. The implication of this analysis is that an individual who embraces the Normative Theory might agree with the Court’s conclusion that a ban on assisted suicide is constitutional. At the same time, that individual would find the opinions of the Court varying in their persuasiveness. Justice Rehnquist’s tradition-based approach would be unappealing. But the opinions of Justices O’Connor, Stevens, and Souter would appear to be more closely aligned with the core principles underlying the Court’s privacy jurisprudence.

VIII. CONCLUSION

This Article constitutes a challenge to the view that the Court’s privacy jurisprudence is unprincipled and incoherent. My claim, in contrast, is that the jurisprudence has a core logic. It is a logic based on a series of interlocking premises—a moral principle of perfectionism, a political premise of liberty, an institutional premise of judicial review, and a prudential concern for tradition. One who embraces all of these premises, in the way described, will have a plausible basis for believing that the Court’s jurisprudence is morally justified.

My objectives in outlining this theory are several fold. One is evaluative: To help individuals assess whether the Court’s jurisprudence is worthy of respect. According to the moral thesis, the Supreme Court’s privacy jurisprudence deserves our allegiance only if it serves moral purposes. Identifying the most

After all, the principle of liberty stands for the proposition that government is not well-suited for marking the proper balance between public and private interests. Thus, even assuming some deference is due to the superior fact-finding capabilities of the legislature, the principle of liberty suggests that the Court should not defer completely to the State. If it did, the Court would abdicate its institutional role as a check on government overreaching. See Dworkin, Virtue, supra note 213, at 470–71 (making similar point).

Justice Souter’s view appears more consistent with the Normative Theory. Like Justice O’Connor, Justice Souter concludes that the Court should defer to the legislature’s findings on this empirical matter. Glucksberg, 521 U.S. at 788–89 (Souter, J., concurring). But Justice Souter rejects the idea that the Court should abandon the field entirely, and he suggests that the Court might need to revisit the issue if evidence emerges that the legislature’s findings are unsupported. Id. at 788 (Souter, J., concurring) (“Sometimes a court may be bound to act regardless of the institutional preferability of the political branches as forums for addressing constitutional claims.”).

217 See supra Part VI.A and accompanying text (discussing defects in “tradition-based” approaches).
persuasive moral argument in support of the Court’s jurisprudence tells us what one must believe in order to find the Court’s privacy jurisprudence appealing.\textsuperscript{218} In that way, it helps us make an informed assessment of the doctrine’s appeal.\textsuperscript{219}

To be sure, nothing obligates the individual to find the Normative Theory appealing.\textsuperscript{220} An individual might conclude that human perfection is not a true moral premise; that liberty does not lead to perfection; or that the Court’s legitimacy would not be threatened by extending the right of intimate association to its full scope. Those are all plausible positions, and one who holds such views would have a basis for critiquing the court’s jurisprudence and for embracing a different position on privacy. The goal here is simply to identify, in the best light possible, an argument for the Court’s privacy jurisprudence. The ultimate persuasiveness of that argument is left for the reader to decide.

A second goal of this exercise is Socratic in nature. By clarifying premises, the Article seeks to challenge the reader to reflect on his or her own assumptions about privacy rights.\textsuperscript{221} Most of us tend to hold specific judgments about whether

\textsuperscript{218}Thus, if the individual finds the premises persuasive, and agrees with the way the premises are applied to the cases, she will have a basis for believing that the jurisprudence is justified. Conversely, if the individual finds the premises unpersuasive, or disagrees with the application of the premises to the case, she will have a basis for believing that the jurisprudence is not justified in its entirety.

\textsuperscript{219}Richards, Moral Philosophy, supra note 18, at 326 ("[A] reasonable decision on conflicting recommendations can be coherently expressed only in terms of an examination of each theory’s background arguments.").

Admittedly, this Article does not demonstrate that the Normative Theory is the only argument in support of the Court’s privacy doctrine, or that it is the most compelling. At least in theory, other arguments might be identified, even more persuasive ones. But since no other theory has yet been articulated with comparable explanatory power, one can proceed on the working assumption that the Normative Theory is the most persuasive available.

\textsuperscript{220}Technically, the premises constitute a “valid” argument for the Court’s privacy jurisprudence. As noted earlier, a valid argument is one in which the conclusion of the argument flows from the underlying premises. See supra notes 26–28 and accompanying text. A valid theory does not necessarily mean that the premises or the conclusion of the argument are correct. RUGGERO J. ALDISERT, LOGIC FOR LAWYERS 65 (1989) ("There is a distinction between the validity of a syllogism and the truth of its contents."); MACCORMICK, supra note 20, at 25 ("[T]he logical validity of an argument does not guarantee the truth of its conclusion; that the argument is valid entails that if the premise[s] are true, the conclusion must be true; but logic itself cannot establish or guarantee the truth of the premise[s].").

\textsuperscript{221}A principal objective of the Socratic method in legal instruction is to challenge students to clarify their assumptions (and the assumptions of the common law) and then to consider whether those assumptions offer a coherent basis for deciding cases. See, e.g., Leslie Pickering Francis, Law and Philosophy: From Skepticism to Value Theory, 27 LOY. L.A. L. REV. 65, 69–70 (1993) ("As originally conceived by Christopher Columbus Langdell, the ‘Socratic’ method was designed to encourage students to uncover for themselves the logical structure of common-law cases. Through responding to Socratic questioning, students would recognize hidden premises and chains of argument and would formulate and test legal principles against both real and hypothetical cases."); John O. Cole, The Socratic Method in Legal Education: Moral Discourse and Accommodation,
the Court’s rulings on matters such as abortion, homosexuality, assisted suicide, and contraception are correct. But these judgments are often “unreflective,” in the sense that we typically lack the ability to identify in any systematic way the moral principles that underlie these beliefs.222

Identifying the premises of the Court’s jurisprudence can spur individuals to clarify their own implicit assumptions. For example, the Normative Theory holds that perfectionism is a necessary premise of the privacy jurisprudence. As a result, an individual who finds the Court’s jurisprudence appealing, but rejects perfectionism, might be challenged to develop an alternative premise to support her position on privacy. Should she fail in that effort, the individual might be more ready to reconsider her opposition to perfectionism, or to reevaluate her position on the privacy decisions, in order to eliminate the apparent inconsistency in her views.223 In this way, by highlighting a link between premises and beliefs, this analysis encourages individuals to transform unreflective positions into more reflective ones.224

35 MERCER L. REV. 867, 869 (1984) (stating that the Socratic method seeks to “illuminate[] the various competing values that inhere in the problem and forces the student to see that it is his responsibility to order those values in a coherent and defensible way”).

222Esposito, Justice, supra note 193, at 20 (“People talking about justice will often feel they have described something important that they understand only imperfectly and can articulate only dimly.”). See also Oliver Wendell Holmes, Natural Law, 32 HARV. L. REV. 40, 40–41 (1918) (suggesting that individual convictions are a mix of emotions, intuitions, and beliefs—the “Can’t Helps” of our convictions—rather than reasoned judgments about political morality).

223If this process of reevaluation is successful, the individual will arrive at what Rawls calls “reflective equilibrium,” a position in which premises and judgments are in harmony. Reflective equilibrium, Rawls explains, “is an equilibrium because at last our principles and judgments coincide; and it is reflective since we know to what principles our judgments conform and the premises of their derivation.” RAWLS, supra note 40, at 20.

224At least one category of individuals might seem immune from this Socratic enterprise. Those are individuals who reject the Court’s jurisprudence and reject the Normative Theory. Since this position is perfectly consistent, the spur to reflection appears lacking. However, individuals who find the Court’s jurisprudence unpersuasive in its entirety often remain committed to specific parts of that jurisprudence. As a result, clarifying the premises of the Court’s jurisprudence can still encourage reflection regarding the premises of these doctrinal features. Consider, for example, an individual who finds the Court’s privacy jurisprudence unappealing in significant part. At the same time, the individual agrees that the Court has a limited role in defending privacy rights against majority rule. That belief, we have found, commits the individual to an objective, rather than a majoritarian, moral premise. Does the individual embrace objective moral principles? If not, how does she justify even a limited judicial defense of privacy? Suppose further that the individual acknowledges that privacy rights reflect “important” interests. That belief, we have seen, presupposes some standard for assessing what is important for human beings. Again, if perfectionism is not the standard, what is? Suppose, finally, that the individual believes that individual rights can be trumped by compelling state interests. If the individual does not adopt liberty as a political premise, how does she explain the balancing act? The point is that, by clarifying the premises of the Court’s privacy doctrine, individuals who embrace any core part of the privacy doctrine will,
The third and final goal of this endeavor is one of targeting: To highlight a theory of political morality warranting further scrutiny by moral and legal philosophers. Simply put, the academy can play an important role in assessing the appeal of this moral theory. This contention might seem surprising, given doubts expressed earlier about the possibility of proving that one version of the Good is better than another. But even without making substantive claims about the Good, theorists can evaluate the Normative Theory based on formal indicia of validity, such as on the theory’s internal consistency. A showing that the Normative Theory is internally inconsistent would undercut any contention that the theory can provide a valid argument in support of the Court’s privacy jurisprudence.\(^{225}\)

Questions about internal consistency are not idle concerns. A number of commentators have advanced arguments that, if sound, would raise questions about the appeal of the Normative Theory. To cite just one example, several theorists have argued that any attempt to justify liberty on instrumental grounds—in terms of an underlying moral principle—is untenable, since the liberty principle ultimately collapses into the core moral value.\(^{226}\) That objection poses a significant challenge to the Normative Theory, which seeks to justify liberty as a means to perfection.

Evaluating these and other attacks on the Normative Theory are beyond the scope of this Article. But if the Normative Theory really is the most persuasive argument in support of the Court’s privacy jurisprudence, these challenges cannot be ignored. The stakes, after all, are the coherence of an important part of our constitutional system. The battle over the Normative Theory is, in one sense, a battle over the inner consistency of the Court’s privacy jurisprudence. That battle must be joined.

---

\(^{225}\) See RICHARD B. BRANDT, FACTS, VALUES, AND MORALITY 120 (1996) (“These reflections illustrate one general requirement for a person holding a moral principle: It must be consistent with his other principles (taken along with knowable facts). If it is not, some revisions are called for. I think we all take this requirement for granted. . . .”); DWORIN, EMPIRE, supra note 21, at 189 (“[A] citizen can not treat himself as the author of a collection of laws that are inconsistent in principle. . . .”); DAVID LYONS, ETHICS AND THE RULE OF LAW 32 (1984) (“Moral positions can be discredited if they are internally inconsistent.”); HENRY SIDGWICK, METHODE OF ETHICS 341 (7th ed. 1907) (the “collision [of moral norms] is absolute proof that at least one of the formulae needs qualification”); Neil MacCormick, Coherence in Legal Justification, in THE PHILOSOPHY OF LEGAL REASONING: MORAL THEORY AND LEGAL REASONING 265, 265 (Scott Brewer ed., 1998) (“That a piece of reasoning be coherent as a whole is one commonly accepted criterion of its soundness as reasoning.”). Richard Posner himself appears to recognize that contradiction represents a sign of error in a moral theory. Posner, supra note 17, at 21 n.21 (“pointing out logical contradictions” is one “defensible way of criticizing a moral code”).

\(^{226}\) For further discussion, see JOHN GRAY, ESSAYS IN POLITICAL PHILOSOPHY 223 (1991) (arguing that liberty collapses into morality). A separate criticism might focus on the potential problem of incommensurability among human goods. See supra note 56. See also TARA SMITH, MORAL RIGHTS AND POLITICAL FREEDOM 94–96 (1995).
To conclude, clarifying the premises of privacy will not prove that the Court’s jurisprudence is properly structured or that the Normative Theory is worthy of respect. But it offers a number of important benefits: It helps individuals evaluate the persuasiveness of the Court’s jurisprudence, challenges them to reevaluate their own assumptions about privacy, and highlights a theory of political morality deserving further scrutiny. This approach might not provide a glimpse into the nature of objective morality, but it is a necessary first step in any fruitful discussion about the logic of the Court’s privacy jurisprudence.\textsuperscript{227}

\textsuperscript{227}RAWLS, supra note 40, at 52–53 ("[O]ur present theories are primitive and have grave defects. We need to be tolerant of simplifications if they reveal and approximate the general outlines of our judgments. . . . If the scheme as a whole seems on reflection to clarify and to order our thoughts, and if it tends to reduce disagreements and to bring divergent convictions more in line, then it has done all that one may reasonably ask.").