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The Wages of Crying Wolf Revisited: The Essential Consanguinity of Lochner, Roe, and Eastern Enterprises Symposium: The Eleventh Amendment, Federalism, and Judicial Activism: Questions and Answers: Answer

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The Wages of Crying Wolf Revisited: The Essential Consanguinity of *Lochner, Roe*, and *Eastern Enterprises*

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> It [*Roe v. Wade*] is, nevertheless, a very bad decision. Not because it will perceptibly weaken the Court—it won't; and not because it conflicts with either my idea of progress or what the evidence suggests is society's—it doesn't. It is bad because it is bad constitutional law, or rather because it is *not* constitutional law and gives almost no sense of an obligation to try to be.[1]

In the immediate aftermath of the Supreme Court's landmark decision in *Roe v. Wade*,[2] Professor John Hart Ely struck a cautionary note about the methodology used to justify the result. He worried that the sweeping scope of the decision was difficult to justify, at least in textual terms when viewed against the absence in the Constitution of any mention of a right to an abortion or, more generally, even a "right of privacy." Because the Constitution "simply says nothing, clear or fuzzy, about abortion,"[3] Ely argued that the justices labored under a special obligation to ground the right in some identifiable constitutional value before disabling state governments from regulating abortion procedures.

This essay will explore—briefly and somewhat incompletely—the Supreme Court's creation and enforcement of unenumerated constitutional rights. Although some conservative commentators claim that liberal activist judges, like Justices William J. Brennan, Jr. and Thurgood Marshall, overstepped their institutional role by recognizing and enforcing unenumerated constitutional rights, the fact is that conservative justices have done exactly the same thing in the service of property rights. The interesting question—and the question that most legal scholars utterly fail to engage—is how to resolve the problem of federal judges calling decisions that they dislike "judicial activism" while, at the same time, creating new unenumerated constitutional rights themselves.

There are two intellectually honest potential solutions. Judges could admit, fully and frankly, that they create and enforce unenumerated constitutional rights. The challenge would be for the federal courts to offer up persuasive rationales justifying this practice and delimiting when it constitutes legitimate judicial behavior. After undertaking these definitional projects, the justices ideally would then honor these self-described justifications and limitations.

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1. John Hart Ely, *The Wages of Crying Wolf: A Comment on* Roe v. Wade, 82 YALE L.J. 920, 947 (1973).

2. 410 U.S. 113 (1973).

3. Ely, *supra* note 1, at 927.

Alternatively, federal judges could get out of the business of amending the Constitution by judicial fiat. This would mean that *Griswold v. Connecticut*[4] and *Planned Parenthood v. Casey*[5] should be overturned, but it would also mean that *Pennsylvania Coal Company v. Mahon*[6] and *Eastern Enterprises v. Apfel*[7] should be abandoned. If history provides any guidance, the justices are virtually certain not to follow such a course of action.

I. A PAGE OF HISTORY: THE SUPREME COURT ROUTINELY HAS CREATED AND ENFORCED UNENUMERATED CONSTITUTIONAL RIGHTS

The Supreme Court initially disclaimed any intention of creating unenumerated constitutional rights. Constitutional law casebooks invariably reprint the famous interchange between Justices Chase and Iredell in *Calder v. Bull*[8] to show that, as a general proposition, the federal judiciary only enforces textual constitutional rights. Justice Chase argued that "[t]here are acts which the Federal, or State, Legislatures cannot do, without exceeding their authority."[9] He explained that "[a]n ACT of the Legislature (for I can't call it a law) contrary to the great first principles of the social compact, cannot be considered a rightful exercise of legislative authority."[10]

Justice Iredell emphatically rejected Justice Chase's natural rights theory of federal judicial review. In his view, "[i]f any act of Congress, or of the Legislature of a state, violates those constitutional provisions, it is unquestionably void; though, I admit, that as the authority to declare it void is of a delicate and awful nature, the Court will never resort to that authority, but in a clear and urgent case."[11] He also observed that:

> The ideas of natural justice are regulated by no fixed standard: the ablest and the purest men have differed upon the subject; and all that the Court could properly say, in such an event, would be, that the Legislature (possessed of an equal right of opinion) had passed an act which, in the opinion of the judges, was inconsistent with the abstract principles of natural justice.[12]

Most contemporary commentators took the position that Justice Iredell had the better of this argument, and after *Calder* the Supreme Court largely abjured any

4. 381 U.S. 479 (1965).
5. 505 U.S. 833 (1992).
6. 260 U.S. 393 (1922).
7. 524 U.S. 498 (1998).
8. 3 U.S. (3 Dallas) 386 (1798).
9. *Id.* at 388 (Chase, J.).
10. *Id.*
11. *Id.* at 399 (Iredell, J.).
12. *Id.*

power to recognize and enforce unenumerated constitutional rights.[13]

Nevertheless, in *Dred Scott v. Sanford*,[14] one of the Supreme Court's most infamous decisions, the justices created and enforced an unenumerated constitutional right to take a human slave into a free federal territory without affecting his status as chattel property.[15] "[T]he power of Congress over the person or property of a citizen can never be a mere discretionary power under our Constitution and form of Government."[16] The Missouri Compromise, which prohibited slavery in certain United States territories, was void because:

> [T]he rights of property are united with the rights of person, and placed on the same ground by the fifth amendment to the Constitution, which provides that no person shall be deprived of life, liberty, and property, without due process of law. And an act of Congress which deprives a citizen of the United States of his liberty or property, merely because he came himself or brought his property into a particular Territory of the United States, and who had committed no offence against the laws, could hardly be dignified with the name of due process of law.[17]

Thus, no matter how careful the procedural values associated with the government's enforcement of the law abolishing slavery in certain territories, the law violated a substantive limitation on the scope of the federal government's power to regulate. Hence, the "substantive" aspect of the Due Process Clause ostensibly required the Supreme Court to invalidate the anti-slavery provisions of the Missouri Compromise.

Following the Civil War, the Supreme Court continued to recognize substantive limitations on government action as incidents of the concept of "due process of law."[18] With increasing regularity, the Supreme Court applied substantive due process to disallow state and federal labor and workplace safety regulations. *Lochner v. New York*,[19] a case in which the Supreme Court struck down a New York state law limiting the maximum number of hours that a person could be employed per day and per week in a bakery, serves as a kind of shorthand for the Supreme Court's jurisprudential approach during this time period.

Following the onset of the Great Depression, a variety of economic, social,

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13. *See* Washington v. Glucksberg, 521 U.S. 702, 756-59 (1997) (Souter, J., concurring) (discussing the Supreme Court's infrequent use of substantive due process to invalidate legislation in the pre-Civil War era).

14. 60 U.S. 393 (1856).

15. *See id.* at 499-552.

16. *Id.* at 449.

17. *Id.* at 450.

18. *See* Railroad Commission Cases, 116 U.S. 307, 331 (1886); Davidson v. New Orleans, 96 U.S. 97, 102 (1878); *see also* Washington v. Glucksberg, 521 U.S. 702, 759-61 (1997) (Souter, J., concurring) (listing and discussing early substantive due process cases in the post-Civil War era).

19. 198 U.S. 45, 53-58 (1905); *see also* Truax v. Corrigan, 257 U.S. 312, 327-30 (1921).

and political forces turned the tide against the practice of aggressive judicial review of progressive health, safety, and welfare legislation.[20] The Supreme Court contributed to this movement, sustaining virtually all state and federal economic and social legislation challenged before it, save when the legislation at issue implicated a fundamental right or utilized a suspect classification.[21] Thus, to a great extent, the Supreme Court simply abandoned its efforts to superintend the legislative process.

Since the Supreme Court's repudiation of *Lochner* and its jurisprudential kin, the received wisdom has been that the Supreme Court should not claim any generalized power to second-guess basic economic and social policies established by Congress or the state legislatures.[22] If economic or social legislation is "rational," that is to say, if it bears a rational relationship to a legitimate state interest, then it is constitutional.[23] On the other hand, if legislation burdens an enumerated constitutional right, and the right in question is "implicit in the concept of ordered liberty," the Supreme Court will apply heightened scrutiny.[24]

In 1965, in *Griswold v. Connecticut*, the Supreme Court overtly returned to the business of applying more than rational basis scrutiny to economic and social legislation, at least insofar as the legislation burdened an unenumerated, but nevertheless "fundamental," right.[25] After *Griswold*, substantive due process once again served as a basis for invalidating state and federal legislation.[26] This led conservative critics to suggest that, in the name of enforcing the "liberty" aspect of the Due Process Clause, the Supreme Court had resurrected the *Lochner* doctrine.[27]

If supporters of substantive due process protection of unenumerated liberty rights are intellectually honest, they must concede that the post-*Griswold* doctrine of substantive due process bears more than a passing resemblance to *Lochner*.[28] This concession, at least in my view, does not mean that the new substantive due process jurisprudence is either mistaken or illegitimate. Embrac-

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20. *See* ALFRED H. KELLY ET AL., THE AMERICAN CONSTITUTION: ITS ORIGINS AND DEVELOPMENT 454-522 (6th ed. 1983).

21. *See, e.g.*, W. Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937); United States v. Carolene Prods. Co., 304 U.S. 144 (1938).

22. *See* Ferguson v. Skrupa, 372 U.S. 726, 729-32 (1963); Williamson v. Lee Optical, 348 U.S. 483, 486-88 (1955); Ry. Express Agency v. New York, 336 U.S. 106, 109-10 (1949).

23. *See* Williamson, 348 U.S. at 486-88 ("The day is gone when this Court uses the Due Process Clause of the Fourteenth Amendment to strike down state laws, regulatory of business and industrial conditions, because they may be unwise, improvident, or out of harmony with a particular school of thought.").

24. *See* Duncan v. Louisiana, 391 U.S. 145, 148 (1968) (describing the process of selective incorporation of certain provisions of the Bill of Rights against state governments); *cf.* Barron v. Baltimore, 32 U.S. (7 Peters) 243, 247 (1833).

25. *See* Griswold v. Connecticut, 381 U.S. 479, 481-83 (1965).

26. *See* Troxel v. Granville, 530 U.S. 57, 63-67 (2000); BMW of North America v. Gore, 517 U.S. 559, 574-75 (1996); Planned Parenthood v. Casey, 505 U.S. 833, 851-53 (1992); Moore v. City of East Cleveland, 431 U.S. 494, 499-500 (1977); *In re* Winship, 397 U.S. 358, 361-65 (1970).

27. *See, e.g.*, ROBERT H. BORK, THE TEMPTING OF AMERICA 28-32, 141-45 (1990).

28. *See* Ronald J. Krotoszynski, Jr., *Fundamental Property Rights*, 85 GEO. L.J. 555, 555-68 (1997).

ing *Griswold* would, however, preclude an intellectually honest person from objecting to the judicial creation (or, if one prefers, "recognition") of other unenumerated constitutional rights, including rights associated with economic and property interests.[29]

Over the last twenty years, the Burger Court, and now the Rehnquist Court, have expansively interpreted the Takings Clause to provide significant protection of property rights.[30] Liberal commentators often have been sharply critical of these decisions, arguing that the federal courts generally should sustain statutes that limit land use in order to promote legitimate community interests.[31] Professor Laurence H. Tribe, for example, has suggested that the contemporary Supreme Court's protection of property rights under the Takings Clause "borders on fetishism."[32]

Critics of the "new and improved" Takings Clause jurisprudence are not generally as critical of other arguably activist Supreme Court rulings, notably including those involving abortion rights.[33] Methodologically, however, the process that the liberal *Roe* majority relied upon to recognize a right to terminate a pregnancy is identical to the process that the conservative majority has deployed to expand the scope of the Takings Clause.[34] It is intellectually dishonest simultaneously to praise one sort of activism but condemn another.

This is not to say that advocates of "judicial conservatism" have been paragons of intellectual consistency. President Richard Nixon, at the time he appointed Justices Rehnquist and Powell, said that he sought to nominate "judicial conservatives" to the bench. By this, he meant jurists who would not "twist or bend the Constitution in order to perpetuate his personal political and social views."[35] Ironically, he went on to call for his new appointees to re-orient constitutional criminal law to be more amenable to police officers and prosecutors:

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29. *See id.* at 583-90.

30. *See* Ronald J. Krotoszynski, Jr., *Expropriatory Intent: Defining the Proper Boundaries of Substantive Due Process and the Takings Clause*, 80 N.C. L. REV. 713 (2002); *see also* E. Enters. v. Apfel, 524 U.S. 498, 522-24 (1998) (plurality opinion) (applying the Takings Clause to invalidate federal statute imposing retroactive financial obligations on companies that once employed now-retired coal miners); Dolan v. City of Tigard, 512 U.S. 374, 383-86 (1994) (limiting conditional approvals of building permits by imposing a proportionately test to govern the nexus requirement applicable to conditional approvals of building permits); Nollan v. Cal. Coastal Comm'n, 483 U.S. 825, 831-36 (1987) (requiring a nexus between government-imposed conditions on permission to make improvements to land and the problems that government claims the improvements would cause).

31. *See, e.g.*, Gerald Torres, *Taking and Giving: Police Power, Public Value, and Private Rights*, 26 ENVTL. L. 1, 5-10 (1996).

32. LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 9-5, at 603 (2d ed. 1988); *see* LAURENCE H. TRIBE, CONSTITUTIONAL CHOICES 174-79 (1985).

33. *See* LAURENCE H. TRIBE, ABORTION: THE CLASH OF ABSOLUTES (1990).

34. *See* Krotoszynski, *supra* note 28, at 605-07.

35. 7 WEEKLY COMP. OF PRES. DOC. 1431 (Oct. 25, 1971).

> As a judicial conservative, I believe some court decisions have gone too far in the past in weakening the peace forces as against the criminal forces in our society. . . .[T]he peace forces must not be denied the legal tools they need to protect the innocent from criminal elements.[36]

Nor was President Nixon's inconsistency in calling for "judicial conservatives" to overrule binding precedents particularly unusual. Senators Orrin Hatch and Strom Thurmond routinely call for "judicial conservatism" while, at the same time, seeking doctrinal revolutions in existing case law.[37] Robert Bork's recent writings reflect this ideological multiple personality disorder.[38]

Not surprisingly, the justices themselves fall prey to this kind of loose, results-oriented reasoning. In the context of a substantive due process claim challenging the State of Washington's third-party child visitation statute, Justice Scalia opined that:

> [W]hile I would think it entirely compatible with the commitment to representative democracy set forth in the founding documents to argue, in legislative chambers or in electoral campaigns, that the state has *no power* to interfere with parents' authority over the rearing of their children, I do not believe that the power which the Constitution confers upon me *as a judge* entitles me to deny legal effect to laws that (in my view) infringe upon what is (in my view) that unenumerated right.[39]

This is all well and good; yet, Justice Scalia has not flinched from enforcing unenumerated rights in other contexts.

Strictly speaking, the First Amendment's Free Speech Clause does not apply to the states; it is only by process of incorporation that any provision of the Bill of Rights binds the state governments.[40] Yet Justice Scalia has embraced very broad interpretations of the Free Speech Clause. In *R.A.V. v. City of St. Paul*,[41] Justice Scalia wrote an opinion for the Court invalidating a hate-speech ordinance on the theory that "[t]he First Amendment generally prevents government

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36. *Id.* at 1432.

37. *See* Anthony Lewis, *Moving the Judges*, N.Y. TIMES, Apr. 27, 1998, at A15 ("I'm as strong a proponent of an independent judiciary as there is. . . . But where I get tough is where the judges want to make the law."); *Excerpts From Senate Hearings on the Ginsburg Nomination*, N.Y. TIMES, July 21, 1993, at A12 (providing Senator Thurmond's understanding of the proper relationship between the branches of the federal government, in which "the role of the judiciary is to interpret the laws"); Leo A. Weiss, *Democracy Doesn't Need Bork's Protection*, N.Y. TIMES, Oct. 2, 1987, at A34 (describing Senator Hatch's aversion to judges who "make laws").

38. *See* ROBERT H. BORK, SLOUCHING TOWARDS GOMORRAH 95-119 (1996); BORK, *supra* note 27, at 4-9, 15-18, 261-65.

39. Troxel v. Granville, 530 U.S. 57, 91-92 (2000) (Scalia, J., dissenting); *see* Stenberg v. Carhart, 530 U.S. 914, 956 (2000) (Scalia, J., dissenting) ("If only for the sake of its own preservation, the Court should return this matter to the people—where the Constitution, by its silence on the subject, left it—and let *them* decide, State by State, whether this practice should be allowed.").

40. *See* Barron v. Baltimore, 32 U.S. (7 Peters) 243, 247 (1833).

41. 505 U.S. 377 (1992).

from proscribing speech."[42] Because "[t]he First Amendment does not permit St. Paul to impose special prohibitions on those speakers who express views on disfavored subjects," the St. Paul ordinance failed to pass constitutional muster.[43]

Justice Scalia was not content to leave the matter of whether hate speech should be tolerated in St. Paul to the local city government. His reasons for doing so cannot plausibly be labelled either "textualist" or "originalist." Rather, adopting a very broad conception of the free speech guarantee, Justice Scalia prohibited a local government from picking free speech winners and losers, even within the universe of "fighting words" speech that arguably lies entirely outside the protection of the First Amendment in the first place.[44] Thus, *R.A.V.* may be characterized as an "activist" decision.

A truly committed textualist or originalist should begin by considering the text of the First Amendment, which provides in relevant part that "Congress shall make no law . . . abridging the freedom of speech."[45] On its face, the Amendment addresses itself not merely to the federal government, but to a specific branch of the federal government—the Congress. From a textual perspective, incorporating this guarantee against the Executive or Judicial Branches represents a stretch. Only by declaring the freedom of speech to be "implicit in the concept of ordered liberty" was the Supreme Court able to apply it against the states (and only then decades after the adoption of the Fourteenth Amendment).[46]

Even after "incorporating" the First Amendment, serious disagreements existed among the justices as to whether the liberty interest protecting the freedom of speech was entirely and exactly co-extensive with the Free Speech Clause. Justice John Marshall Harlan, for example, argued that federalism principles and proper application of substantive due process theory required the Supreme Court to give the states a greater margin of appreciation to regulate speech than the federal government should enjoy.[47] Although ostensibly committed to a strong form of federalism, Justice Scalia has never embraced Justice Harlan's bifurcated approach to protecting the freedom of speech.

Individual justices also have suggested that the federal courts owe some margin of appreciation to legislation aimed at suppressing social harms caused by speech activity. In the context of the speech squelching and anti-communist Smith Act, Justice Felix Frankfurter observed that "[p]rimary responsibility for

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42. *Id.* at 382.

43. *Id.* at 391.

44. *See* Chaplinsky v. New Hampshire, 315 U.S. 568, 571-72 (1942).

45. U.S. CONST. amend. I.

46. *See* Near v. Minnesota, 283 U.S. 697, 707 (1931) (incorporating the First Amendment against the states); *but cf.* Patterson v. Colorado, 205 U.S. 454, 461-62 (1907) (assuming for the sake of argument, but not holding, that the First Amendment applies to the states).

47. *See* Roth v. United States, 354 U.S. 476, 501-08 (1957) (Harlan, J., concurring in part and dissenting in part).

adjusting the interests which compete in the situation before us of necessity belongs to the Congress."[48] He described the Supreme Court's duty in free speech cases as "set[ting] aside the judgment of those whose duty it is to legislate only if there is no reasonable basis for it."[49]

Thus, the result in *R.A.V.* is hardly compelled by either the text of the First Amendment or its subsequent case history. Yet, Justice Scalia readily displaces the legislative judgment of the St. Paul city council to protect racist speech. This represents not merely the enforcement of an unenumerated right (at least as against the states), but also a very strong iteration of the unenumerated right. To be clear, I do not necessarily think that Justice Scalia's decision in *R.A.V.* was incorrect.[50] My point is that, objectively viewed, *R.A.V.* is an "activist" decision enforcing an "unenumerated" right.

Returning to the context of the Takings Clause, Justice O'Connor's plurality opinion in *Eastern Enterprises v. Apfel*[51] constitutes a very "activist" approach to applying the Takings Clause. At issue in the case was a retroactive funding mechanism to pay for health care benefits for retired coal miners. Congress imposed severe, retroactive funding obligations on the employers of now-retired coal miners in the Coal Industry Retiree Health Benefit Act of 1992. Under the funding mechanism, the Social Security Administration assessed Eastern Enterprises an annual premium in excess of five million dollars.[52] Eastern Enterprises brought a lawsuit challenging the assessment on substantive due process and Takings Clause grounds.

Writing for a plurality of the Justices, Justice O'Connor opined that the funding provision violated the Takings Clause by imposing severe, retroactive liability on the retired coal miners' former employers.[53] Because the funding provision did not comport with basic notions of "justice" and "fairness," it violated the Takings Clause.[54]

The plurality's approach to the Takings Clause effectively represents a re-

48. Dennis v. United States, 341 U.S. 494, 525 (1951) (Frankfurter, J., concurring).

49. *Id.*; *see* Beauharnais v. Illinois, 343 U.S. 250 (1952); *see also* LEONARD W. LEVY, LEGACY OF SUPPRESSION 176-248 (1960) (discussing the framing of the First Amendment and its original purpose, principally ensuring the freedom of the press); MARI J. MATSUDA ET AL., WORDS THAT WOUND: CRITICAL RACE THEORY, ASSAULTIVE SPEECH, AND THE FIRST AMENDMENT (1993) (discussing how the post-*Brandenburg* approach to the Free Speech Clause radically expands upon its historical scope); Richard Delgado, *Words That Wound: A Tort Action for Racial Insults, Epithets, and Name-Calling*, 17 HARV. C.R.-C.L. L. REV. 133 (1982) (arguing for the recognition of a tort action for hate speech and suggesting that such a tort would be more consistent with the original understanding of the scope of the Free Speech Clause).

50. Even if government may proscribe certain categories of speech, this does not mean that it enjoys the discretion to pick and choose which speech to suppress within the category based on either its content or, worse yet, its viewpoint. *See* Ronald J. Krotoszynski, Jr., *Dissent, Free Speech, and the Continuing Search for the "Central Meaning" of the First Amendment*, 98 MICH. L. REV. 1613, 1631 n.60 (2000).

51. 524 U.S. 498 (1998).

52. *See id.* at 517.

53. *See id.* at 528-29.

54. *See id.* at 523-24, 530-35.

vived doctrine of substantive due process protection for economic interests.[55] The text of the Takings Clause itself presupposes the legitimacy of the government's action: if government takes private property for a public purpose, it must pay just compensation.[56] In *Eastern Enterprises*, however, the plurality did not require the federal government to pay "just compensation," but simply voided the law. The remedy, disallowing the government action, seems more consistent with the *Lochner*-era doctrine of substantive due process than with the original understanding of the Takings Clause.[57]

In sum, critics simply use "judicial activism" as a label to describe results that they happen to dislike. Both liberal and conservative justices engage in the identification and enforcement of unenumerated and atextual constitutional rights.[58] For those who find this activity to be unseemly, there are two possible solutions: the Supreme Court can either attempt to get out of the business of enforcing atextual constitutional rights altogether, or it may rededicate itself to providing a persuasive rationale that explains when the creation and enforcement of atextual constitutional rights is appropriate.

II. LEARNING TO LIVE WITH THE WOLF: PRAGMATISM IN CONSTITUTIONAL LAW AND THE IMPORTANCE OF LEGAL PROCESS THEORY

It would be relatively easy for the justices to resolve the tension that presently exists in their individual and collective voting patterns. Rather than disclaiming any general intention to create and enforce unenumerated constitutional rights, the Supreme Court should candidly admit that, at least since *Dred Scott v. Sandford*,[59] it has done just that and has no intention of abandoning this practice.

The alternative would be for the justices to make a concerted effort to commit themselves to strict textualism, and even this represents a kind of false faith, because the text of many important provisions of the Constitution is so vague. Justice Hugo Black famously proposed a kind of strict textualism, allowing no room for the judicial recognition of any unenumerated rights. He followed this rule, even in the face of very hard facts.[60] It bears noting that he has been the

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55. *See* Krotoszynski, *supra* note 30, at 724-726, 736-738.

56. *See* U.S. CONST. amend. V ("nor shall private property be taken for public use, without just compensation").

57. *See* Krotoszynski, *supra* note 30, at 732-740.

58. It hardly seems reasonable to fault liberal justices for aggressively enforcing the concept of "due process of law," which, after all, does appear in the text of both the Fifth and Fourteenth Amendments, while reading the remedial provision of the Takings Clause ("just compensation") out of existence. Thus, whether or not a particular constitutional right is "unenumerated" is, to a large degree, in the eye of the beholder.

59. 60 U.S. 393 (1856).

60. For example, Justice Black would not have required states to observe, as a matter of constitutional law, the standard of guilt beyond a reasonable doubt in criminal and involuntary commitment judicial proceedings. *See In re* Winship, 397 U.S. 358, 377 (1970) (Black, J., dissenting) (noting that "[t]he Constitution thus goes into some detail to spell out what kind of trial a defendant charged with a

only justice committed to a rigidly textualist approach; even Justices Scalia and Thomas abandon textualism (and originalism) when the right claims appear at bar (for example, claims arising under the Free Speech Clause or the Takings Clause).[61] Thus, the problem of federal judges recognizing unenumerated constitutional rights remains.

Moreover, blanket condemnations of the judicial recognition of unenumerated rights are not likely to be effective. Indeed, crying "Wolf!" might even prove to be counterproductive. In his canonical article, Professor Ely argues that the principal danger of crying "Wolf!" inheres in desensitizing the justices and the academy to the real danger of unprincipled judicial decision making. In his view, because so many of the decisions of the Warren Court had provoked cries of "*Lochner*!," the jurisprudential epithet was losing all meaning (and effectiveness). Ely views *Roe* as a genuine danger to the institutional legitimacy of the Supreme Court; for him, the case justified not a false cry of "Wolf!," but rather constituted the real thing.

The answer to the problem might inhere in legal process values. For example, Ely posits a particular duty on the part of the Supreme Court to justify its decisions in terms of constitutional text. Because Justice Blackmun did not offer an adequate textual anchor for the newly minted right to terminate a pregnancy, Ely sees *Roe* as a radical break with past decisions:

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crime should have, and I believe the Court has no power to add or subtract from the procedures set forth by the Founders"). Similarly, while proclaiming, "I like my privacy as well as the next one," Black declined to find an unenumerated right of privacy in either the Fourteenth or Ninth Amendments. Griswold v. Connecticut, 381 U.S. 479, 510 (1965) (Black, J., dissenting). He went on to explain that:

> I repeat so as not to be misunderstood that this Court does have power, which it should exercise, to hold laws unconstitutional where they are forbidden by the Federal Constitution. My point is that there is no provision of the Constitution which either expressly or impliedly vests power in this Court to sit as a supervisory agency over acts of duly constituted legislative bodies and set aside their laws because of the Court's belief that the legislative policies adopted are unreasonable, unwise, arbitrary, capricious or irrational. The adoption of such a loose, flexible, uncontrolled standard for holding laws unconstitutional, if ever it is finally achieved, will amount to a great unconstitutional shift of power to the courts which I believe and am constrained to say will be bad for the courts and worse for the country.

Id. at 520-21; *cf.* Poe v. Ullman, 367 U.S. 497, 522, 539-45 (1961) (Harlan, J., dissenting) (arguing that conscientious enforcement of the concept of due process of law requires judges to analyze the fundamental fairness of laws and that the Constitution's text mandates that the federal judiciary undertake this task).

61. Both Justices Scalia and Thomas have voted to provide strong protections to commercial speech. *See, e.g.*, 44 Liquormart v. Rhode Island, 517 U.S. 484, 518 (1996) (Thomas, J., concurring in part and concurring in the judgment). It is clear that the Framers did not think Macy's flyers enjoyed significant protection under the Free Speech Clause; until the 1970s, commercial speech was assimilated into economic activity. *See* Valentine v. Chrestensen, 316 U.S. 52, 54-55 (1942); *see also* Bigelow v. Virginia, 421 U.S. 809, 818-26 (1975). As a matter of textualism or originalism, the commercial speech doctrine, at least as applied to the states, does not wash. *But see* Greater New Orleans Broadcasters Ass'n v. United States, 527 U.S. 173, 183-89 (1999) (invalidating ban on casino advertising in state where casino wagering is otherwise lawful).

> What is frightening about *Roe* is that this super-protected right is not inferable from the language of the Constitution, the framers' thinking respecting the specific problem in issue, any general value derivable from the provisions they included, or the nation's governmental structure. Nor is it explainable in terms of the unusual political impotence of the group judicially protected vis-a-vis the interest that legislatively prevailed over it.[62]

Thus, *Roe* was an especially bad decision, even when judged against other recent "activist" decisions.[63]

In Ely's view, the Constitution "simply says nothing, clear or fuzzy, about abortion."[64] Even if a general right of privacy might be inferred from various provisions of the Bill of Rights, this sort of inferential reasoning has concrete limits: "[I]t seems to me entirely proper to infer a general right of privacy, *so long as some care is taken in defining the sort of right the reference will support.*"[65] This, Ely suggests, the Supreme Court utterly failed to do.

Thus, for Ely, *Roe* represents a return to *Lochner*.[66] In fact, *Roe* is arguably a worse decision than *Lochner* because in *Roe* the Supreme Court imposed a compelling state interest test on abortion regulations whereas in *Lochner* the Court merely applied a test of reasonableness. If the Supreme Court may legitimately manufacture a right to terminate a pregnancy, giving little textual, precedential, or historical support for its decision, it becomes very difficult to criticize virtually any decision of the justices.

Ely laments that scholarly commentators had cried "*Lochner*!" too frequently during the Warren Court years, thus blunting the effectiveness of the charge.[67] He wryly observes that:

> One possible judicial response to this style of criticism would be to conclude that one might as well be hanged for a sheep as a goat: So long as you're going to be told, no matter what you say, that all you do is Lochner, you might as well Lochner. Another, perhaps more likely in a new appointee, might be to reason that since Lochnering has so long been standard procedure, "just one more" (in a good cause, of course) can hardly matter. Actual reactions, of

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62. Ely, *supra* note 1, at 935; *see also* Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 12-20 (1959) (arguing for principled constitutional adjudication and suggesting that the institutional legitimacy of the Supreme Court depends upon such behavior).

63. Ely, *supra* note 1, at 936-37 ("At times the inferences the Court has drawn from the values the Constitution marks for special protection have been controversial, even shaky, but never before has its sense of an obligation to draw one been so obviously lacking.").

64. *Id.* at 927.

65. *Id.* at 929 (emphasis added).

66. *See id.* at 937 ("According to the dissenters at the time and virtually all the commentators since, the Court had simply manufactured a constitutional right out of whole cloth and used it to superimpose its own view of wise social policy on those of the legislatures.").

67. *See id.* at 943-44 ("I do wish 'Wolf!' hadn't been cried so often. When I suggest to my students that *Roe* lacks even colorable support in the constitutional text, history, or any other appropriate source of constitutional doctrine, they tell me they've heard all that before.").

> course, are not likely to be this self-conscious, but the critical style of offhand dismissal may have taken its toll nonetheless.[68]

The problem, then, is that prudential patterns of institutional restraint will wear away over time, reducing the Supreme Court to little more than a National Council of Revision for various federal and state laws.[69]

Of course, Professor Ely's warning has proven to be prescient. *Bush v. Gore*[70] represents the culmination of the approach to constitutional adjudication that Justices Brennan and Blackmun pioneered—an approach now embraced from time to time by most (if not all) of the top incumbent members of the Supreme Court. Rather than honor disliked precedents, a justice should simply overrule them. If a majority can't be mustered to overrule, the conscientious justice should perpetually dissent from the disliked precedents. Further, rather than abstain from judicial intervention when the amending process is underway, the Supreme Court should simply extend[71] or preempt[72] the Article V proceedings. Under this approach, the Supreme Court does not merely have the last word on questions of constitutional meaning, but also has the power to usurp the processes of constitutional amendment itself.

Principled conservatives, like Justices John Marshall Harlan and Lewis F. Powell, responded to this new jurisprudential approach with abject horror. They consistently opposed the aggressive use of the power of judicial review to preempt political processes that might alter the structure of the Constitution itself. They argued forcefully that the Supreme Court labors under an obligation to exercise a modicum of self-discipline before interjecting itself into the most

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68. *Id.* at 944.

69. *Cf.* Ashwander v. Tenn. Valley Auth., 297 U.S. 288, 346-48 (1936) (Brandeis, J., concurring); ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 116-21, 127-33, 171-72, 200-07 (1962); Alexander M. Bickel, *The Supreme Court 1960 Term—Foreword: The Passive Virtues*, 75 HARV. L. REV. 40, 47-58, 79 (1961).

70. 531 U.S. 98 (2000).

71. *See* Harper v. Va. State Bd. of Elections, 383 U.S. 663, 666-67 (1966) (holding unconstitutional poll taxes applicable to state and local elections, notwithstanding fact that Twenty-fourth Amendment to abolish the poll tax for federal elections had been adopted only two years earlier); *cf. id.* at 680-82 (Harlan, J., dissenting) ("But the fact that the *coup de grace* has been administered by this Court instead of being left to the affected States or to the federal political process should be a matter of continuing concern to all interested in maintaining the proper role of this tribunal under our scheme of government.").

72. *See* Frontiero v. Richardson, 411 U.S. 677, 688 (1973) (plurality opinion) (opining that strict scrutiny should be applied to gender-based classifications that burden women as a matter of equal protection doctrine under the Fourteenth and Fifth Amendments, even though the Equal Rights Amendment was then pending before the states); *cf. id.* at 691-92 (Powell, J., concurring in part and concurring in the judgment) ("The Equal Rights Amendment, which if adopted will resolve the substance of this precise question, has been approved by the Congress and submitted for ratification by the States. By acting prematurely and unnecessarily, as I view it, the Court has assumed a decisional responsibility at the very time when state legislatures, functioning within the traditional democratic process, are debating the proposed Amendment. It seems to me that this reaching out to pre-empt by judicial action a major political decision which is currently in process of resolution does not reflect appropriate respect for duly prescribed legislative processes.").

contentious issues of the day. Harlan and Powell honored the doctrine of stare decisis and even applied holdings that they did not join when the questions arose as matters of first impression. In sum, they respected and observed the prudential doctrines that seek to limit the role of the Supreme Court in a system ostensibly dedicated to *democratic* self-government.

This commitment to a limited judicial role led these justices to support outcomes that might seem, and probably are, substantively unjust. *San Antonio Independent School District v. Rodriguez*[73] has always struck me as a decision imposing terribly high costs on innocents: the children of parents who happen to reside in poor school districts. Justice Powell was not insensitive to this either:

> The need is apparent for reform in tax systems which may well have relied too long and too heavily on the local property tax. And certainly innovative thinking as to public education, its methods, and its funding is necessary to assure both a higher level of quality and greater uniformity of opportunity.[74]

At other times, Justice Powell's commitment to justice overcame his commitment to formal process and legal doctrines. *Plyler v. Doe* arguably represents such an event.[75] Yet, in most cases, Justice Powell was a remarkably careful jurist.

The contemporary Supreme Court does not enjoy the benefit of a single justice as committed to institutional and legal process values as Justices Powell and Harlan. Justice Souter's approach to constitutional adjudication arguably comes closest to this ideal.[76] He has explained "that adjudication under the Due Process Clause is like any other instance of judgment dependent on common-law method, being more or less persuasive according to the usual canons of critical discourse."[77] Both Justices Harlan and Powell approached cases involving substantive due process in just this fashion.[78]

It is beyond the scope of this essay to promote the merits of Justice Harlan's approach to substantive due process doctrine. My argument is much more limited: since *Calder v. Bull*, justices of the Supreme Court have routinely claimed a right to recognize and enforce unenumerated constitutional rights. They have done so in order to invalidate both federal and state legislation. There is simply no reason to believe that they will cease engaging in the practice any time soon. Accordingly, the best result one could realistically hope

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73. 411 U.S. 1 (1973).

74. *Id.* at 58.

75. *See* 457 U.S. 202, 237-41 (1982) (Powell, J., concurring).

76. *See, e.g.*, Washington v. Glucksberg, 521 U.S. 702, 752, 756-73 (1997) (embracing Justice Harlan's approach to substantive due process doctrine).

77. *Id.* at 769 (Souter, J., concurring); *see* Poe v. Ullman, 367 U.S. 497, 541-45 (1961) (Harlan, J., dissenting) (describing the concept of due process of law as a kind of continuum and suggesting that "its content cannot be determined by reference to any code.").

78. *See* Griswold v. Connecticut, 381 U.S. 479, 500-01 (1965) (Harlan, J., concurring); Moore v. City of East Cleveland, 431 U.S. 494, 499-501 (1977).

to achieve would be the creation of a framework for the recognition of unenumerated constitutional rights and a meaningful commitment on the part of the justices to respect it.

CONCLUSION

Calls of "judicial activism" would be better framed as criticisms of the substance of the opinion at issue. In evaluating that substance, we should examine whether the opinion is persuasive. That is to say, does the opinion reflect reasons usually credited in constitutional adjudication, such as text, precedent, history, and tradition? To the extent that such values are not adequately accounted for, has the authoring justice provided some persuasive justification for the departure? Greater attention to legal process values, rather than criticisms of particular substantive outcomes, would better serve the federal courts and the academy.[79]

The Rehnquist Court is neither more nor less activist than the Burger Court, the Warren Court, and those that preceded them.[80] To be sure, the Rehnquist Court's activism benefits different constituencies than did the Burger and Warren Courts' efforts. Large corporations worried about the consequences of punitive damages awards have done quite nicely.[81] So have those pressing "regulatory" takings claims.[82] Women seeking access to abortions[83] and persons wishing the assistance of a physician in ending their lives[84] have not fared so well. And so it goes.

John Hart Ely was correct to cry "Wolf!" at *Roe*. Whenever the Supreme Court breaks major new jurisprudential ground without proffering an adequate explanation, the credibility of the Supreme Court as a judicial—as opposed to political—institution suffers. Indeed, over time, such behavior will expose the justices as little more than politicians dressed in black robes. In light of cases like *Bush v. Gore*, there is good cause to fret over the legal process values associated with contemporary constitutional adjudication. But the reflexive application of hackneyed labels will do very little to advance the dialogue.

In sum, the Rehnquist Court may be labeled "activist" by those who dislike its decisions. One is reminded of the school yard chant that "sticks and stone

79. *See* Ronald J. Krotoszynski, Jr., *The New Legal Process: Games People Play and the Quest for Legitimate Judicial Decision Making*, 77 WASH. U. L.Q. 993, 998-1010, 1047-51 (1999).

80. *But see* Michael J. Klarman, Bush v. Gore *Through the Lens of Constitutional History*, 89 CAL. L. REV. 1721, 1763 (2001) (describing the Rehnquist Court as "arguably" the "most activist in history").

81. *See* BMW of North America v. Gore, 517 U.S. 559, 574-75, 585-86 (1996).

82. *See* E. Enters. v. Apfel, 524 U.S. 498 (1998); Dolan v. City of Tigard, 512 U.S. 374 (1994); Lucas v. S.C. Coastal Council, 505 U.S. 1003 (1992).

83. *See* Webster v. Reproductive Health Servs., 492 U.S. 490 (1989).

84. *See* Washington v. Glucksberg, 521 U.S. 702 (1997).

may break my bones, but names will never hurt me." So too in this case: shrill attacks will do less to undermine the Rehnquist Court's legitimacy than careful and thoughtful critiques of the results in particular cases, and more importantly, the reasons offered in support of the results. *Bush v. Gore* represents a very good place to start. Let's go to work.[85]

85. For an early effort at analyzing *Bush v. Gore* from a legal process prospective, *see* Ronald J. Krotoszynski, Jr., *An Epitaphios for Neutral Principles in Constitutional Law:* Bush v. Gore *and Emerging Jurisprudence of Oprah!*, 90 GEO. L.J. 2087 (2002). *See also* Michael C. Dorf & Samual Issacharoff, *Can Process Theory Constrain Courts?*, 72 U. COLO. L. REV. 923 (2001).