COMMENTS

IMPLYING CONSTITUTIONAL RIGHTS

The constitution of a free government ought always to be construed in favor of human rights.

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I. INTRODUCTION

One definition of a "right" is "a power, privilege, faculty, or demand, inherent in one person and incident upon another."[1] A constitutionally protected right is not absolute but it is safeguarded from unreasonable diminution by governmental action.[2] Judicial review of official action affecting a constitutional right is greater than that normally applied. Ordinarily, federal courts only require a rational basis for legislative enactments,[3] but when a constitutional right is involved, strict scrutiny is applied and some compelling governmental interest must be shown before interference with such a right is permitted.[4]

Most fundamental rights are protected through the express language of the Constitution and the Bill of Rights,[5] but there are also rights which are deemed to require constitutional protection even though there is no explicit mention of them in the text. These implied rights have the same status as express constitutional rights and receive the same protection.[6]

The purpose of this Comment is to explore the development of implied rights by the Supreme Court. Illustrative cases will be summarized and

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* Remarks of Cong. R.B. Elliot (R. S.C.) on Civil Rights Bill, 43rd Cong., 1st Sess., 1874, *reprinted in* A. MCFARLAND, BLACK CONGRESSIONAL RECONSTRUCTION ORATORS AND THEIR ORATIONS 1869-1879, 112 (1976).

1. BLACK'S LAW DICTIONARY 1486 (rev. 4th ed. 1968). Rights can also be classified as absolute and relative. The former "are such as appertain and belong to particular men, merely as individuals or single persons"; the latter are rights "which are incident to them as members of society, and standing in various relations to each other." *Id.* at 1487.

2. For example, "[t]he most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic." Schenck v. United States, 249 U.S. 47, 52 (1919).

3. United States v. Carolene Products, Co., 304 U.S. 144 (1938) (due process clause); Railway Express Agency, Inc. v. N.Y., 336 U.S. 106 (1949) (equal protection clause).

4. *See, e.g.*, Shapiro v. Thompson, 394 U.S. 618 (1969): "[W]e reject appellants' argument that a mere showing of a rational relationship . . . will suffice to justify the classification . . . . [A]ppellees were exercising a constitutional right, and any classification which serves to penalize the exercise of that right, unless shown to be necessary to promote a *compelling* governmental interest, is unconstitutional." *Id.* at 634.

5. Sixty-three express rights have been identified. *See* Bertelsman, *The Ninth Amendment and Due Process of Law—Toward a Viable Theory of Unenumerated Rights*, 37 CIN. L. REV. 777, 778 (1968).

6. *See, e.g.*, Shapiro v. Thompson, 394 U.S. 618 (1969) (state could not show a compelling interest in one year residency requirement for welfare assistance where regulation violated the right to travel); Reynolds v. Sims, 377 U.S. 533 (1964) (legislative apportionment scheme voided because of interference with implied right to vote in state elections).

some theories justifying the creation of constitutional rights will be discussed. Criticism of the practice of implying rights will be outlined and some recent Court decisions will be viewed to determine the Court's present stance on implied rights.

II. SURVEY OF IMPLIED RIGHTS

The rights given protection by the Supreme Court can be grouped into three categories: A) rights implied without reference to any specific constitutional guarantee; B) rights associated with the first amendment; and C) rights implied because they are deemed fundamental. The cases which are summarized below do not represent an exhaustive list of these rights which might be labeled "implied"[7] but this survey will identify the factors leading to implication of the rights. The focus of this survey is on the initial recognition of each right. No effort has been made to trace subsequent developments.

A. *No Constitutional Reference*

The right to travel, initially recognized in 1867 in *Crandall v. Nevada*,[8] is perhaps the oldest implied right. A state tax imposed on every person leaving the state by common carrier was declared unconstitutional on the basis that the right to move freely throughout the nation is a right "independent of the will of any state."[9] The right to travel was considered to be necessary to prevent obstruction of a citizen's right to travel to the seat of the government. Although there was a subsequent attempt to limit the *Crandall* holding to situations in which a person is prevented from performing a gov-

7. This discussion is concerned with substantive rights, and not with implied causes of action which are in the nature of implied procedural rights. *See, e.g.*, Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 U.S. 388 (1971) (violation of the fourth amendment by federal drug agents gives rise to cause of action for damages). *See generally* Lehmann, *Bivens and Its Progeny: The Scope of a Constitutional Cause of Action for Torts Committed by Government Officials*, 4 HAST. C.L.Q. 531 (1977).

8. 73 U.S. (6 Wall.) 35 (1868). There is some evidence that the right to travel was recognized by the Court as a right inherent in national citizenship even before the fourteenth amendment was adopted. In the *Passengers' Cases*, 48 U.S. (7 How.) 283 (1849), the Court held unconstitutional Massachusetts and New York laws imposing taxes on alien passengers arriving in those states. Although Chief Justice Taney dissented in favor of the validity of the statute as it related to foreigners, with regard to American citizens he stated:

> Living as we do under a common government, charged with the great concerns of the whole Union, every citizen of the United States, from the most remote States or Territories, is entitled to free access, not only to the principal departments established at Washington, but also to its judicial tribunals and public offices in every State and Territory of the Union . . . . For all the great purposes for which the Federal government was formed, we are one people, with one common country. We are all citizens of the United States; and, as members of the same community, must have the right to pass and repass through every part of it without interruption, as freely as in our own States. And a tax imposed by a State for entering its territory or harbours is inconsistent with the rights which belong to citizens of other States as members of the Union, and with the objects which that Union was intended to attain. Such a power in the States could produce nothing but discord and mutual irritation, and they very clearly do not possess it.

Id. at 492. The right to travel was later expanded when the above statement was quoted in the majority opinion of the Supreme Court in *Crandall*. The Court concluded that those remarks "accord with the inferences which we have already drawn from the Constitution itself, and from the decisions of this court in exposition of that instrument." *Id.* at 49.

9. 73 U.S. (6 Wall.) at 44.

ernmentally related function,[10] the right has been given a much broader application.[11]

The right to travel is the only implied right which has not been tied in any manner to an explicit constitutional provision. Perhaps because it was decided in the nineteenth century, the Court felt more inclined to protect rights based on natural law concepts.[12] In *United States v. Guest*[13] it was observed that "although there have been recurring differences in emphasis within the Court as to the source of the constitutional right to interstate travel . . . all have agreed that the right exists."[14] It has been said that the right to travel was considered to be so elementary that it "was conceived from the beginning to be a necessary concommitant of the stronger Union the Constitution created."[15] Another possible explanation is that when *Crandall* was decided in 1867, the fourteenth amendment had not yet been adopted,[16] so there was no constitutional provision directed toward state action containing the flexible concepts of due process and equal protection. Although such an approach would have restricted its scope, the right to travel could possibly have been justified as an aspect of the first amendment right to petition for redress of grievances by coming to the seat of government. The next category of rights does rely upon that amendment.

B. *Rights Associated with the First Amendment*

The rights discussed in this section might be called "secondary" rights since their protection is necessary to safeguard freedoms already specified in the Constitution.[17] Since they are all tied to the first amendment,[18] it could be argued that the Court was not implying any new rights, but merely interpreting the scope of an existing right. Regardless of the label, it is not apparent from the express language of the amendment that rights to engage in

10. United States v. Wheeler, 254 U.S. 281, 299 (1920).

11. *See, e.g.*, Shapiro v. Thompson, 394 U.S. 618 (1969) (one year residency requirement for persons to become eligible for welfare assistance found to violate the right to travel); Dunn v. Blumstein, 405 U.S. 330 (1972) (residency requirements for voting privileges found violative of the right to travel). *But Cf.*, Sosna v. Iowa, 419 U.S. 393 (1975) (right to travel not violated by a law requiring one year residency before a divorce could be obtained).

12. *See* Grey, *Do We Have an Unwritten Constitution?*, 27 STAN. L. REV. 703 (1975), commenting on the tendency of the Court in early constitutional adjudication to grant recognition to natural law concepts more readily than in present times:

> [I]t was also widely assumed that judges would enforce as constitutional restraints the unwritten natural rights as well. The practice of the Marshall Court and of many of its contemporary state courts, and the writings of the leading constitutional commentators through the first generation of our national life, confirm this understanding.

Id. at 716.

13. 383 U.S. 745 (1966).

14. *Id.* at 759.

15. *Id.* at 758.

16. The fourteenth amendment was adopted in 1868.

17. Secondary rights are defined as arising only for the purpose of protecting or enforcing primary rights. BLACK'S LAW DICTIONARY 1487 (rev. 4th ed. 1968).

18. The first amendment provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. CONST., amend. I.

symbolic expression, to use a public forum, and to associate for the promotion of ideas or beliefs are all within its protection.

1. *Symbolic Expression*—The distinction between speech and conduct is said to lack content,[19] and in recognition of this, Supreme Court decisions protecting non-verbal communication give a greater scope to the first amendment than appears on its face. One of the earliest cases in this area is *Stromberg v. California*[20] which involved a law which banned the display of a red flag as a symbol of opposition to organized government.[21] The legislation was found to be unconstitutionally vague because it prohibited the opportunity for free political discussion, "an opportunity essential to the security of the Republic [and] a fundamental principle of our constitutional system."[22] According to Professor Tribe, this right "went through a troubled period of gestation in several decisions in the mid-1960's, and emerged as a fully viable creation in a group of decisions in the 1970's."[23]

Picketing can also be considered symbolic expression and the right to picket was upheld in *Thornhill v. Alabama*.[24] The public's right to know[25] gave impetus to the decision, in which the Court held that a statute which denied all forms of picketing was invalid. In *Thornhill*, picketers on strike over a labor dispute were arrested while peacefully marching. The importance of the public's interest in having information about the labor dispute was found to outweigh the state's interest in maintaining order, particularly since the statute made no distinction in the kind of picketing that was banned. Subsequent decisions demonstrate that the right to picket is not absolute.[26]

2. *Right to a Public Forum*—A 1939 decision, *Hague v. CIO*[27] addressed the right to use a public forum. The Court overturned a city ordinance which required a permit to use streets, highways, public parks and public buildings for public assembly. The difficulty of the ordinance, as the court viewed it, was its arbitrary suppression of free expression of views, rather than a concern for general peace and good order. The right of assembly, along with the historical use of parks and streets for public gatherings, were other factors in the decision.[28]

3. *Right of Association*—In *NAACP v. Alabama*,[29] associational rights were held to be encompassed by the guarantees of free speech and assembly.

19. TRIBE, AMERICAN CONSTITUTIONAL LAW 599 (1978) (hereinafter cited as TRIBE).
20. 283 U.S. 359 (1931).
21. *Id.* at 369.
22. *Id.* at 369.
23. TRIBE, *supra* note 19, at 688-89. (citations omitted).
24. 310 U.S. 88 (1940).
25. For a discussion of the right of access to government information, see Comment, *The Constitutional Right to Know*, 4 HAST. C.L.Q. 109 (1977).
26. The *Thornhill* decision does not apply when there is a need to prevent a breach of the peace. *See, e.g.*, Dennis v. United States, 341 U.S. 494 (1951).
27. 307 U.S. 496 (1939).
28. The *Hague* decision was distinguished in later cases. *See, e.g.*, Douglas v. Jeannette, 319 U.S. 157 (1943); Communist Party v. Subversive Activities Control Board, 367 U.S. 1, 89 (1961). *See also*, Kalven, *The Concept of a Public Forum: Cox v. Louisiana*, 1965 SUP. CT. REV. 1.
29. 357 U.S. 449 (1958).

The right was defined as the freedom to "engage in association for the advancement of beliefs and ideas [as] an inseparable aspect of "liberty" assured by the due process clause of the fourteenth amendment, which embraces freedom of speech."[30] In an attempt to oust the NAACP from Alabama, the state requested a list of all its members. The Court ruled that there was no substantial interest of the state to be protected by allowing review of the membership list, while there was a real danger of injury to the persons listed.[31] Associational rights include the furtherance of political views[32] and the right to join together for purposes of obtaining judicial redress[33] among others.[34]

C. *Fundamental Rights*

Like the right to travel, fundamental personal rights have no direct tie to any specific constitutional provision. However, most of the rights in this category have been implied by using either the Due Process Clause or the equal protection clause of the fourteenth amendment.[35] The greater number includes those which involve personal liberty and family relations. Thus, the Supreme Court has given constitutional protection to the right to marry and to procreate, or to avoid procreation, and to rights associated with child rearing. In addition, a political right, voting in state elections, is also among this group of implied rights.

In *Loving v. Virginia*[36] both the due process and the equal protection clauses of the fourteenth amendment were used to invalidate legislation that prohibited intermarriage of whites with other races. Since a racial classification was under review, the equal protection clause required strict judicial scrutiny.[37] After deciding that the state had not met the burden of proving a compelling interest to justify the classification, the Court held the statute also violated the due process concept of liberty, because marriage is one of the "basic civil rights of man."[38] Marriage was determined to be a vital personal right involving a freedom of choice that could not be infringed by the state.[39]

A quarter of a century prior to *Loving*, the Court had ruled that marriage and procreation are "fundamental to the very existence and survival of the race."[40] *Skinner v. Oklahoma*[41] invalidated an Oklahoma statute that

30. *Id.* at 460.
31. *Id.* at 466.
32. Buckley v. Valeo, 424 U.S. 1 (1976).
33. NAACP v. Button, 371 U.S. 415, 430-31 (1963) (Harlan, J. dissenting).
34. *See generally*, Raggi, *An Independent Right to Freedom of Association*, 12 HARV. CIV. RTS.—CIV. LIB. L. REV. 1 (1977).
35. U.S. CONST., amend XIV, §1 provides, *inter alia*:
> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.
36. 388 U.S. 1 (1967).
37. *Id.* at 12.
38. *Id.*
39. *Id.*
40. Skinner v. Oklahoma, 316 U.S. 535, 541 (1942).
41. *Id.*

required sterilization for habitual criminals, excluding those convicted of embezzlement. Recognizing the latitude accorded a state in exercising its police power, the Court held that the strict scrutiny test applied and that the distinction between criminals charged with embezzlement and criminals charged with other crimes was invalid.

The personal decision not to procreate was protected in *Griswold v. Connecticut*[42] by the Court's creation of a right of privacy. In that case, petitioners challenged a state statute prohibiting the use of contraceptives. While invalidating the law as a violation of liberty under the due process clause of the fourteenth amendment, and also citing the ninth amendment,[43] the Court held that the right to privacy "emanated" from certain zones of privacy which were created by other freedoms in the Bill of Rights.[44]

Meyer v. Nebraska[45] was the first case to give protection to a parents right to permit children "to acquire useful knowledge."[46] Also at issue was the right of a teacher to determine subjects to be taught elementary school children at a non-public institution.[47] Relying on the fourteenth amendment's protection of "liberty", the Court invalidated a state law that prohibited the teaching of any language other than English to children below the eighth grade.

The right of parents to "direct the upbringing and education of children under their control"[48] was more firmly established in *Pierce v. Society of Sisters*.[49] A private school challenged the Compulsory Attendance Education Act of Oregon because it required all children to attend a public school. The Court, again using the fourteenth amendment's due process clause, held the statute unconstitutional because it unreasonably interfered with personal liberty. Both *Pierce* and *Meyer* were decided during the *Lochner* era, but they have retained their vitality.[50]

In a democratic society it would seem axiomatic that the right to vote is fundamental. But it was not until 1964 in *Reynolds v. Sims*[51] that the Court held that there is a fundamental right to vote in state elections. The case

42. 381 U.S. 479 (1965).

43. U.S. CONST., amend. IX provides that "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."

44. 381 U.S. at 484-85.

45. 262 U.S. 390 (1923).

46. *Id.* at 399.

47. The *Meyers* decision approved "the State's power to prescribe a curriculum for institutions which it supports." *Id.* at 402. For a discussion of the distinction between the curriculum control of teachers in public and non-public schools, see Goldstein, *The Asserted Constitutional Right of Public School Teachers to Determine What They Teach*, 124 U. PENN. L. REV. 1293 (1976).

48. Pierce v. Society of Sisters, 268 U.S. 510, 534-35 (1925).

49. *Id.*

50. *See, e.g.*, Zablocki v. Redhail, 434 U.S. 374 (1978), where the right to privacy in family life is considered to encompass several previously implied rights, including the right to educate one's own children and the right to procreation. The *Lochner* era refers to the period when the Court was using substantive due process to invalidate legislation on a grand scale. A distinction has been drawn, though, between the *Lochner* era cases involving economic rights and those involving important social rights. *See, e.g.*, GUNTHER, CONSTITUTIONAL LAW 565 (9th ed. 1975):

> Yet the modern Court has *not* drawn from Lochner the lesson that *all* judicial intervention via substantive due process is improper. Rather, it has withdrawn from careful scrutiny in most economic areas but has maintained and increased intervention with respect to a variety of noneconomic personal interests.

51. 377 U.S. 533 (1964).

involved a challenge to Alabama's legislative apportionment scheme on the ground that it discriminated against voters in counties that had experienced a growth in population since the scheme was instituted. Finding the right to exercise the franchise to be necessary to preserve other basic civil and political rights, the Court used the strict scrutiny test to invalidate the redistricting plan. While *Reynolds* indicated that the right to vote in state elections is a constitutional right, the case has been construed to mean there is a constitutionally protected right to equality in the franchise.[52] Consequently, there is no right to have an election, only a right to "participate in state elections on an equal basis with other qualified voters" when an election is granted by the state.[53]

The above cases provide some clue to the types of interests which have been elevated to constitutional status. In *Meyer* the Court purported to outline the various rights included within the liberty which is protected by the fourteenth amendment. That amendment, said the Court,

> denotes not merely the freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.[54]

Not all of the items on this list have been held to be constitutional rights, but the theories which support implied rights are broad enough to support that result.

III. Theories of Implied Rights

A survey of the implied rights reveals that there are three interrelated factors which determine which rights are important enough to require constitutional protection: (1) the relationship of the activity with other protected rights in the Constitution; (2) the historical importance of the activity; and (3) the societal need for the protection of the activity. These three factors are used in varying degrees in all of the cases implying rights. The rights in the second category, *i.e.*, those associated with first amendment freedoms, focus more heavily on the relationship of the activity with the other protected rights.

The rights for which the need for societal protection is weighed, fall into the last category, *viz.*, those which are deemed to be fundamental to the concept of liberty. The earlier rights which lean toward common law principles, such as the rights to travel and to educate one's children, tend to be grounded in historical importance. "Importance" and "need" are, however, reflected in decisions in all three categories. The right to travel protects the important interests of performing governmentally related functions; the right to picket protects the public interest in receiving knowledge; the right to procreate is, of course, necessary to maintain the existence of the race; and

52. San Antonio v. Rodriguez, 411 U.S. 1, n.78 (1973).

53. *Id. See* Sailor v. Board of Education, 387 U.S. 105 (1967) (no requirement to hold election for school board members).

54. 262 U.S. 390, 399 (1923).

the right to exercise the franchise is an important vehicle for preserving other civil rights.

While these factors have justified implying constitutional rights, the Court has drawn no precise guidelines to indicate exactly when these factors are sufficient to support a constitutional right. Some commentators feel guidelines are needed to prevent the Court from using individual preferences in determining which rights should require constitutional protection.[55] Other theorists claim there can be no principled basis for the Court to use in implying rights.[56] A few authors have attempted to supply guidelines,[57] but others assert that no definite guidelines should be drawn.[58] Various theories have been offered to explain past decisions of the Court and as guides to future results. These theories will be summarized next to determine their consistency with the Court's reasoning in decisions in which implied rights have been announced.

A. *A Pure Interpretive Model*

The viewpoint that the Court should not imply rights that do not have a textual constitutional base has been characterized as the "pure interpretive" model.[59] This model would limit the Court to implying rights which flow directly from some constitutionally expressed right, and not those based on notions of fundamentalism or liberty.[60] Bork expresses this viewpoint:

> [T]he choice of "fundamental values" by the Court cannot be justified. Where constitutional materials do not clearly specify the value to be preferred, there is no principled way to prefer any claimed human value to any other. The judge must stick close to the text and history, and their fair implications, and not construct new rights.[61]

The pure interpretive model would probably support the rights discussed above which flow from the first amendment, but Bork claims that *Griswold, Meyer, Pierce* and *Skinner* were all unprincipled decisions.[62] If this is true, then *a fortiori* rights to housing, health or education would fare poorly under the pure interpretive model.[63]

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55. Grey, *Do We Have an Unwritten Constitution*? 27 STAN. L. REV. 703, 706 (1975); Redlich, *Are There "Certain Rights . . . Retained By The People"?*, 37 N.Y.U.L. REV. 787, 798 (1962).

56. *See, e.g.*, Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, (1971); Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L.J. 920 (1973). *See also* Karst, *Invidious Discrimination: Justice Douglas and the Return of the "Natural-Law-Due Process" Formula*, 16 U.C.L.A. L. Rev. 716, (1969); Kauper, *Penumbras, Peripheries, Emanations, Things Fundamental and Things Forgotten: The Griswold Case*, 64 MICH. L. REV. 235 (1965).

57. Bertelsman, *The Ninth Amendment and Due Process of Law—Toward a Viable Theory of Unenumerated Rights*, 37 CINN. L. REV. 777, 787 (1968); Kutner, *The Neglected Ninth Amendment: The "Other Rights" Retained by the People*, 51 MARQ. L. REV. 121 (1967).

58. Redlich, *supra* note 55, at 812, takes this viewpoint: "In this realm, as in others, there exists no purely objective set of criteria. That the criteria are loose, however, does not mean that they do not exist." *See also* Abrams, *What Are the Rights Guaranteed by the Ninth Amendment?*, 53 A.B.A.J. 1033 (1967).

59. *See* Grey, *supra* note 55.

60. Bork, *supra* note 56.

61. *Id.* at 8.

62. See text accompanying notes 41-48 *supra* for a discussion of these cases.

63. The Burger Court appears to have adopted the pure interpretative model as evidenced by its decisions in Lindsey v. Normet, 405 U.S. 56 (1972) (no right of access to housing of a particular quality) and San Antonio School Dist. v. Rodriguez, 411 U.S. 1 (1973) (education is not a fundamental personal right).

The advantages to this viewpoint are that it relieves the Court from the problems inherent in trying to give substance to vague concepts of "liberty" and "justice" and it requires no definition of what those concepts might mean in modern day society. It satisfies those who fear judicial abuse through too much power in the Court. The problems, though, are complex and overwhelming, for the limits placed on the Court's power to invalidate legislation that violates important, but unenumerated, freedoms would result in the potential failure of the Constitution to serve its broad goals. For example, the type of rights that were protected through notions of "liberty" and fundamental importance are those which few would say should *not* be given protection in our society. If there was no constitutional right to travel, or no right to procreate, or no right to marry, these liberties could easily be taken away through legislative action.[64]

On the other hand, the pure interpretive model is arguably consistent with Mr. Justice Douglass' search for the "penumbra" emanating from explicit guarantees, as exemplified by his statement for the Court in *Griswold*:

> [S]pecific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance. Various guarantees create zones of privacy. The right of association contained in the penumbra of the First Amendment is one, as we have seen. The Third Amendment in its prohibition against the quartering of soldiers "in any house" in time of peace without the consent of the owner is another facet of that privacy.[65]

Since penumbras can only emanate from express provisions of the Constitution, the rights thereby implied must necessarily be interpretive.

B. *Natural Rights*

Diametrically opposed to the interpretive model is the theory that concepts of "natural rights" should provide a basis for constitutional protection of unenumerated rights. Natural rights "are those which grow out of the nature of man and depend upon personality, as distinguished from those rights which are created by law and depend upon civilized society. Natural rights are those which are plainly assured by natural law."[66] The framers of the Constitution were aware of certain natural or "inalienable" rights based on natural law concepts, and these rights have been explicitly recognized through the ninth amendment.[67]

The concept of natural rights in itself has no meaning outside the rights attributed to it, and these rights are based on societal norms. When the Court holds that a particular activity is important enough to warrant constitutional protection because of its historical and social importance, it is recognizing that the activity is a natural right to members of this society. The rights to procreate, marry, vote, and travel easily fit into the category of

64. Grey, *supra* note 55, at 711-12, recognizes the implications of the pure interpretive model. According to him, without substantive due process, the federal government would be free to engage in "explicit racial discrimination" and the expressed freedoms in the Bill of Rights could not be protected under the due process clause of the fourteenth amendment. All of the rights implied because of their fundamentality could be cast aside.

65. Griswold v. Connecticut, 381 U.S. 479, 484 (1965).

66. BLACK'S LAW DICTIONARY 1487 (rev. 4th ed. 1968).

67. Bertelsman, *Ninth Amendment and Due Process of Law—Toward a Viable Theory of Unenumerated Rights*, 37 CINN. L. REV. 777, 779 (1968).

natural rights. It has been posited that the ninth amendment offers constitutional support for incorporation of a natural rights concept. In his concurring opinion in *Griswold*, Mr. Justice Goldberg stated:

> [T]he Ninth Amendment shows a belief of the Constitution's authors that fundamental rights exist that are not expressly enumerated in the first eight amendments and an intent that the list of rights included there not be deemed exhaustive.[68]

But a major problem continues to exist. What guidelines should the Court use in deciding that a claimed right has enough historical and social importance to receive constitutional protection?

One suggested method for defining the natural rights of persons in the context of modern society is by reference to the Universal Declaration of Human Rights,[69] a United Nations sponsored catalogue of rights regarded as essential for human liberty and development.[70] The Declaration includes, *inter alia*, the right of parents to direct their children's education, the right to sanctity of the home, the right to procreation and to freely choose a spouse, the rights of privacy and personal fulfillment and freedom of choice with respect to residence and occupation. A number of the rights found in the Declaration are the same as those which have already been given constitutional protection by the Supreme Court. Additionally, the United States has implicitly recognized the importance of the rights enumerated in the Declaration by virtue of its vote in support of that document. Thus, the Declaration would seem to provide an important source of law which might be given significant weight by the Court in determining whether a particular activity merits constitutional protection.

C. *The Classifying Approach*

While some writers recognize the need for the protection of unenumerated rights, they would limit the protection to those rights involving purely private, personal rights as opposed to social and economic rights. Thus, Patterson suggests that rights like travel and procreation can be implied through the ninth amendment, but not rights to housing and jobs.[71]

The potential difficulties in distinguishing personal liberties from economic rights were pointed out by Justice Stewart:

> [T]he dichotomy between personal liberties and property rights is a false one . . . The right to enjoy property without unlawful deprivation, no less than the right to speak or the right to travel, is in truth a "personal" right, whether the "property" in question be a welfare check, a home, or a savings account. In fact, a fundamental interdependence exists between the personal right to liberty and the personal right in property. Neither could have meaning without the other. That rights in property are basic civil

68. Griswold v. Connecticut, 381 U.S. 479, 492 (1965) (Goldberg, J. concurring).

69. G.A. Res. 217, U.N. Doc. A/810 (1948). The Declaration was adopted by the United Nations General Assembly on December 10, 1948.

70. See Kutner, *supra* note 57.

71. PATTERSON, THE FORGOTTEN NINTH AMENDMENT (1955).

> We can conceive that there is a possibility that this great declaration of individual liberty might be distorted into support for . . . the right to food, housing, medicine, etc. If, however, the [ninth] amendment should be used by either the legislative or judicial branches of our Government as the basis of such a public right, then it would be taken out of its natural meaning and setting.

Id. at 58.

rights has long been recognized.[72]

Although the implied rights discussed above seem to fall into the classification of "personal" rights,[73] the problem in using the classifying approach is that its methodology would prevent consideration of rights which may be necessary to protect important societal interests in the future. As technology develops and resources become scarce, constitutional rights to economic protection may become important enough to add them to the list of implied rights. The demand for a minimum level of basic necessities, like education, health, housing and employment, would be denied under Patterson's view unless it were argued successfully that such rights are personal in nature.

D. *Balancing Approach*

The determination of what interests should become constitutional rights could be decided on a case by case basis, by balancing the importance of the asserted right against the necessity for restrictions. This balancing approach was supported by Mr. Justice Marshall, in his vigorous dissent in *San Antonio v. Rodriguez*:[74]

> Although not all fundamental interests are constitutionally guaranteed, the determination of which interests are fundamental should be firmly rooted in the text of the Constitution. The task in every case should be to determine the extent to which constitutionally guaranteed rights are dependent on interests not mentioned in the Constitution. As the nexus between the specific constitutional guarantee and the nonconstitutional interest draws closer, the nonconstitutional interest becomes more fundamental and the degree of judicial scrutiny applied when the interest is infringed on a discriminatory basis must be adjusted accordingly.[75]

The approach closely resembles that used by the Court in the decisions discussed previously, particularly those involving rights associated with the first amendment. But several of the aforementioned rights discussed are not "firmly rooted in the Constitution." For example, the right to procreate was not connected to any constitutional mandate beyond that of personal liberty. While it was later tied to the right of privacy, as were the right to educate one's own children and the right to marry,[76] they were decided to be constitutional rights long before the right to privacy was expressly recognized.

If the balancing approach limits protection to those rights having a firm foothold in some already existing constitutional provision, it is more restrictive than the Court's previous approach. Yet it does contain the potential for flexibility. Since there is no constitutional language to which to refer in determining the extent to which constitutionally guaranteed rights are dependent on interests not mentioned, the Court must then look to external factors. These factors would presumably be the historical importance of the right and the importance of the right to society, the same factors used in supporting rights with no explicit constitutional reference.

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72. Lynch v. Household Finance, 405 U.S. 538, 552 (1972).

73. While the right to vote may not seem as clearly a personal as opposed to a social right, the Court explicitly declared that the right was a personal one. Reynolds v. Sims, 377 U.S. 533, 561 (1964).

74. 411 U.S. 1, 70-137 (1973) (Marshall, J. dissenting).

75. *Id.* at 102-103.

76. *See* note 50 and accompanying text.

This review of theories regarding implied rights reveals the great difficulty in trying to fashion guidelines in the area. While several of these theories are reflected in Court decisions, no one approach has been adopted by the Court. The failure to adopt a broadly applicable theory permits potential abuse of the Court's power. This potential for harm lies behind some of the criticism of implying rights. This issue is addressed in the next section.

IV. The Pros and Cons of Implying Rights

While "there was an original understanding, both implicit and textually expressed, that unwritten higher law principles had constitutional status,"[77] there are some who question the power of the Supreme Court to imply constitutional rights, and the wisdom of allowing the Court to exercise such a power.[78]

The criticism against the Court's implying rights falls into the following lines of argument. First, it is claimed that by invalidating legislation because of judicially imposed constitutional rights, the Court is usurping legislative power rather than exercising the normal judicial function of interpreting legislation,[79] thereby violating the separation of powers doctrine. Second, in the absence of textually expressed guidelines, the Court must use its own notions of what is "right" and what best serves the interest of justice.[80] It is argued that this "picking and choosing" procedure of defining constitutional rights grants too much power to the Court. Third, it is contended that for the Supreme Court to determine on an *ad hoc* basis what values are "fundamental" to society is unprincipled constitutional adjudication, violating the Court's responsibility to make decisions which are durable and neutral.[81]

These criticisms can be met by pointing to the intention of the Constitution's framers, the restraint exercised by the Court, and by weighing the benefits against the risks involved. That the Constitution was not intended to be limited to the freedoms listed in the Bill of Rights is seen in the ninth amendment, which states: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."[82] The historical background of this amendment supports the the-

77. Grey, *Do We Have an Unwritten Constitution?*, 27 STAN. L. REV. 703, 717 (1975).

78. See authorities cited in note 56 *supra*.

79. *See, e.g.*, Justice Black's dissent in *Griswold*:

> If these formulas based on "natural justice", or others which mean the same thing, are to prevail, they require judges to determine what is or is not constitutional on the basis of their own appraisal of what laws are unwise or unnecessary. The power to make such decisions is of course that of a legislative body.

Griswold v. Connecticut, 381 U.S. 479, 507-527 (1965) (Black, J. dissenting) (citations omitted).

80. Justice Black questioned the ability of the Court to reach judgments on fundamental interests except based on personal notions:

> He [Justice Goldberg] also states . . . that in making decisions on this basis judges will not consider "their personal and private notions." One may ask how they can avoid considering them. Our Court certainly has no machinery with which to take a Gallup Poll. And the scientific miracles of this age have not yet produced a gadget which the Court can use to determine what traditions are rooted in the "[collective] conscience of our people."

381 U.S. 479 at 519 (Black, J. dissenting) (citations omitted).

81. *See* Bork and Ely *supra* note 56.

82. U.S. CONST. amend. IX.

ory that the framers were afraid that a listing of a Bill of Rights might be construed to mean that those listed were the only rights which would receive constituional protection.[83] However, this amendment has never been used by a majority of the Court to imply rights.[84]

This survey of implied rights reveals that the Court has not often been inclined to exercise its power. Rather, the Court has used its power sparingly, and only when necessary to protect interests of a personal nature that are important to society. The potential for abuse is checked by the Court's history of restraint and should not be the basis for denying the important rights that do require the Court's protection. When the risks are weighed against the alternative, the former is minimized.

> [T]he risk in allowing judges to define the unenumerated rights is not as great as some would have us believe. True, there is some degree of unavoidable risk. But we must recognize, as did the framers of our Constitution, that to avoid the risk inherent in the concept of unenumerated rights is to surrender those rights. Surely, that remedy is worse than the malady.[85]

V. CONCLUSION

While there are difficulties in determining the guidelines to be used in determining implied rights, in the past the Court has solved the problem by looking at the historical, societal and constitutional relevance of the activity. Constitutional protection has been afforded to activities which are important in order to maintain the proper balance between individual freedoms and governmental interests. A restrictive attitude towards constitutional interpretation would cause the greatest harm to the groups in society that are without the power to influence the political processes, and would do injustice to the intentions of the framers of the Constitution to protect inalienable rights from governmental interference. The process of implying rights must be continued if the Constitution is to remain a viable instrument for all times.

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83. Madison noted and responded to this fear:

> It has been objected also against a bill of rights, that by enumerating particular exceptions to the grant of power, it would disparage those rights which were not placed in that enumeration; and it might follow, by implication, that those rights which were not singled out, were intended to be assigned into the hands of the General Government, and were consequently insecure . . . [B]ut, I conceive, that it may be guarded against. I have attempted it, as gentlemen may see by turning to the last clause of the fourth resolution [referring to the ninth amendment].

Griswold v. Connecticut, 381 U.S. 479, 489 (1965).

84. *See, e.g.*, PATTERSON, THE FORGOTTEN NINTH AMENDMENT (1955); Redlich, *Are there "Certain Rights. . . Retained by the People?,"* 37 N.Y.U.L. REV. 787, 808 (1962). *But see* Griswold v. Connecticut, 381 U.S. 479 (1965) (Goldberg, J. Concurring).

85. Bertelsman, *supra* note 57, at 796.