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The Presumption of Liberty and the Public Interest: Medical Marijuana and Fundamental Rights[†]

Randy E. Barnett^{*}

As part of this lecture series on lawyering in the public interest, I decided to talk about my pro bono involvement in the medical cannabis case of *Gonzales v. Raich*,¹ which I and three other lawyers brought on behalf of Angel Raich and Diane Monson. There are three topics I want to discuss: the first is how I got involved in doing this, which is a question I get asked all the time; the second is to describe the theory we took to the Supreme Court, which prevailed in the Ninth Circuit but was ultimately rejected by the Court on a vote of six to three; and finally, because the case still continues, I want to explain our current claims, which are based on the Due Process Clause of the Fifth Amendment and on the Ninth Amendment.

In particular, I want to talk to you about how our current theory relates to what you have all learned or should be learning in your constitutional law classes. I think the problems we face in our case illustrate the weakness of the current approach to using the Due Process Clause to protect liberty—that I am compelled, as a litigator, to remain within—and why a “presumption of liberty,” which I have argued for in my scholarship, would be preferable to the current approach.

I

So let me begin by telling you how I came to be doing this case. To understand my interest in this issue, you should know that I went

[†] This speech was delivered at Washington University in St. Louis School of Law as part of the 2005–2006 Public Interest Law Speakers Series. Minimal footnotes have been added.

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1. 125 S. Ct. 2195 (2005).

to law school solely because I wanted to be a criminal lawyer, and nothing but a criminal lawyer, since the age of ten. This passion was provoked by a television show that was popular in those days called *The Defenders*. After watching that program the only choice for me was whether I was going to be a prosecutor or a public defender. And, ultimately, I decided to be a prosecutor in the Circuit Court of Cook County, Illinois. I wanted to practice as a prosecutor in a state court because this is where the real crimes are prosecuted, as opposed to the squishy “crimes” that the federal government prosecutes.

So after law school I became an Assistant State’s Attorney in the Cook County State’s Attorneys Office in Chicago, ultimately working at Twenty-Sixth and California, trying murders, rapes, and armed robberies. It was a great job. I should say, however, that I did this prior to the heat-up of the so-called “War on Drugs”—a policy that I had and still have strong feelings about—and I would have had a very difficult time staying in the office once the prosecution of drug crimes really took off. Fortunately, I had an opportunity to leave for teaching before I had much to do with drug crimes.

Today, the situation is quite different. Now prosecutors have to spend more than half of their time participating in the War on Drugs. That might be a problem for some of you, in which case this is a compelling argument for going the other way and being a public defender. When I was a law student at Harvard Law School being a public defender was the sort of thing everybody thought they should do if they had an interest in criminal law. Nobody at an elite school wanted to be a prosecutor. To want to be a prosecutor was considered by many to be beneath contempt, especially if you wanted to be a lowly county prosecutor. Now I think the situation is reversed and a lot of students want to be prosecutors and do not want to be public defenders; but I would encourage you to consider strongly the public defender as opposed to the prosecutor route if for no other reason than the War on Drugs. If you need some reason to go one way as opposed to the other that is a very important one.

I tell you all this because my self-image as a lawyer was as a trial lawyer—somebody who could try a jury trial and is proud of being able to do that, but never as an appellate court lawyer. I did not do any appellate court work. In fact, in all the years that I was a law professor prior to taking on this and a related case, I did not do any

“consulting.” Many law professors “consult,” which is a fancy way of saying they practice law on the side, but I had not done this. I was strictly focused on teaching and scholarship and never once aspired to do appellate work.

So how did I end up arguing in the Supreme Court? Since 1988 I have been writing and thinking about the Ninth Amendment to the Constitution, which says “The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.”² I have to tell you what it says because I have a suspicion that it may not be strongly emphasized in your constitutional law classes. If you did not study the Ninth Amendment it is because the Supreme Court has basically ignored it for most of its history, along with a number of other clauses I discuss in my book, *Restoring the Lost Constitution*.³

The term “lost constitution” in the title of my book refers to these clauses, like the Ninth Amendment, that are read out of the Constitution and just aren’t there anymore as a practical matter. No lawyer could litigate on the basis of the Ninth Amendment or using the Privileges or Immunities Clause of the Fourteenth Amendment.⁴ These clauses are effectively redacted from the text. Still, I started writing about the Ninth Amendment because it always seemed like an interesting clause, and one that appealed to me ever since I was a law student. I figured, “well, now I had tenure,” so I should be able to write about any clause that was still literally in the Constitution, even if it was considered to be beyond the pale by scholars.

Sometime after my scholarship established me as an expert on the Ninth Amendment, I was contacted by Robert Raich, a lawyer for the Oakland Cannabis Buyers Cooperative. The OCBC had a case pending in the Northern District of California before Judge Charles Breyer, who is Justice Breyer’s brother. It seems that the judge had said, “Shouldn’t I think about the Ninth Amendment?” and asked the parties to brief the issue. So the lawyer went around the country

2. U.S. CONST. amend. IX.

3. RANDY E. BARNETT, *RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY* (2004).

4. U.S. CONST. amend. XIV, § 1.

trying to find somebody with some knowledge of the Ninth Amendment who could help them with their brief.

He came to me because, by then, the Ninth Amendment had become something of my own private amendment. The *National Law Journal* once even ran a story on legal scholars who specialized in the more obscure parts of the Constitution and one of the persons interviewed referred to me as “Mr. Ninth Amendment.” I guess there are worse things to be called. At any rate, I said I’d be happy to help out. When I had been previously asked about the Ninth Amendment by others it was rarely about an issue for which asserting the Ninth Amendment, properly understood, was appropriate. But this case was a perfect case for the Ninth Amendment. For one thing, it was a challenge to a federal law, not a state law. The Ninth Amendment, like the rest of the Bill of Rights before the so-called “incorporation doctrine,” applied only to the federal government. For another it involved a matter of personal liberty, which is the principal concern of the Ninth Amendment. Therefore, this suit by the Clinton administration to close down the OCBC was an ideal venue in which to assert the Ninth Amendment.

I helped write a few pages of the trial brief and also eventually sold the legal team on the idea that a Commerce Clause challenge to the Controlled Substance Act (CSA)⁵ would be a stronger claim, given the precedents of *United States v. Lopez*⁶ and *United States v. Morrison*.⁷ Although we did make a Commerce Clause claim in OCBC we eventually prevailed in the Ninth Circuit on the issue of “medical necessity.” I am not even going to tell you about medical necessity because we ultimately lost on it in the Supreme Court, eight to nothing. The only reason we did not lose nine to nothing is because Justice Breyer recused himself due to the fact that his brother was the trial judge in the case. I did not argue that case, but if I had I can assure you that the result would have been exactly the same. (It could not have been worse!)

After OCBC was remanded to the Ninth Circuit to assert our constitutional claims, Rob Raich asked me whether it would be useful

5. 21 U.S.C. §§ 801–904 (2000).

6. 514 U.S. 549 (1995).

7. 529 U.S. 598 (2000).

for us to bring another lawsuit that would have better facts for a Commerce Clause challenge. In the facts of the OCBC case, people go into the Oakland Cannabis Buyers Cooperative (and other cannabis buyers clubs or cooperatives) with money in their pocket and no cannabis and they come out of that club with less money in their pocket and cannabis. So some could say that what is going on inside the Oakland Cannabis Buyers Cooperative is an “economic” transaction. If this is how that activity is described then it is highly inconvenient for arguing, on the basis of *Lopez* and *Morrison*, that the federal government cannot reach this economic activity in order to effectuate its Commerce Clause power. What we wanted was a case that did not—in any way, shape, or form—involve any economic activity whatsoever and, therefore, bring us more closely under the doctrine, or what was supposed to be the doctrine, of *Lopez* and *Morrison*.

So we brought a case on behalf of two women. One was Diane Monson, a business woman in northern California who has severe back pain and spasms. She has tried all sorts of prescription drugs but they either do not provide relief for these symptoms or they have unacceptable side effects. Cannabis has been the only substance that works for her. She grows cannabis on her own property for her own consumption. Our other client was Angel Raich, after whom the case is named, who suffers from a variety of serious illnesses, some of which manifest themselves as a wasting syndrome. Cannabis is very effective in stimulating appetites and has been crucial to her maintaining her weight and her strength so she can continue to live. Unlike Diane, who grows it herself, Angel gets her cannabis from two caregivers who provide it for her at no charge.

I was one of the three lawyers who brought the lawsuit on behalf of these two women. To understand the current posture of the case, it is important to note that we originally asserted both Commerce Clause and Due Process Clause challenges. The former contends that it is beyond the powers of Congress under the Commerce Clause⁸ to reach inside a state and restrict this wholly intrastate, completely non-economic activity that is authorized by state law. For this reason, the

8. See U.S. CONST. art. I, § 8.

Controlled Substance Act is unconstitutional as applied to this wholly local activity. We also brought a Due Process Clause⁹ challenge, claiming that it violates the fundamental rights of our clients to enforce the Controlled Substance Act against them.

When I argued the case in the district court it was the first time I had set foot in a courtroom as a practicing lawyer in twenty years and I was quite nervous about it. In the district court we lost on both counts. We then went to the Ninth Circuit. By this time, it was not the first appellate court argument I had made. A month before I had made my first appellate court argument in the Oakland Cannabis Buyers Cooperative case on remand from the Supreme Court. The *Raich* appeal was therefore my second ever appellate court argument. There we prevailed, two to one. The two judges that ruled for us—Judges Harry Pregerson and Judge Richard Paez—were Carter and Clinton appointees respectively. The third judge, who dissented in our case, was Judge Arlen Beam, who sat by designation from the Eight Circuit and is a Reagan appointee. After our victory, the government petitioned for certiorari; their petition was granted and we then went to the Supreme Court, where I argued the case.

Given that, prior to these two cases, I had had absolutely no appellate court experience, arguing before the Supreme Court was quite an awesome thing to be doing, especially as it was nothing I ever aspired to do. I can tell you that, as much fun as I had doing it and as rewarding as it was, I honestly do not care if I ever do it again. It was really exciting, but I have no professional desire to become a Supreme Court litigator. My involvement in these cases has been rewarding but also very time consuming and emotionally draining. Law professors who do this sort of thing regularly tend not to do much scholarship, and it was my interest in scholarship that drew me to teaching. Nevertheless, it was an amazing experience, from which I learned a lot.

Having been a law professor for a very long time, and having been a trial lawyer, I am to the point in my career where I really do not get nervous very easily. I am not particularly nervous now, for example, even though I am speaking in front of a very large audience. For

9. See U.S. CONST. amend. V.

about six weeks before I argued in the Supreme Court, however, I was just anxious to the core. I had this thing in the pit of my stomach that you get sometimes. Everybody gets it, but I had it for at least six weeks. At first, I got it whenever I thought about the fact that I was going to be doing this and then I just started getting it randomly. I came to appreciate how people in high-stress jobs get ulcers. That part was awful.

I remember saying to my friend the night before—who was kind of my “best man” for the argument because he was there to take care of me and get me to the Court on time—that this was like having a case of the flu for the last six weeks. Some days you are feeling better and some days you are feeling worse but you are sick all the time. My anxiety was magnified by the fact that I also had three public moot courts scheduled in the three successive weeks leading up to the oral argument. So, actually, I had not one but four highly public events that I had to prepare for and experience, all while still teaching my normal load of classes. As I also said to my friend the eve of the argument, it would be really bad for our case if I was as anxious or nervous tomorrow as I was that night.

What was really amazing to me, therefore, was that in the morning, when I woke up to do the argument, I was perfectly calm. It was really quite remarkable and I thought “Well, maybe when I get to the Supreme Court I will get nervous,” but that didn’t happen. I then thought “Maybe when I get to the lawyer’s lounge I will get nervous,” but that didn’t happen. “Well, maybe when I get into courtroom I will get nervous,” and that didn’t happen. And then the hearing got started and I felt like was I was back in court, just like I had been when I was a prosecutor trying a case to a jury, which means you don’t feel exactly relaxed and normal. You’re up and you’re wired, which is what you want to be, but I wasn’t particularly scared. I believe one reason for my calm was because I was prepared and I felt prepared. Preparation is the greatest antidote for nervousness. Another reason may have been that I kind of willed myself to not be nervous by what I said the night before: that it would be bad if I was so very nervous.

I tell you this story because I hope it gives you some idea that the way to counteract nervousness is to be prepared, and so you realize that there is nothing wrong with being nervous. You should never be

afraid of being scared. It is actually a constructive thing. It gets you to do work you do not otherwise want to do. I did not want to do the work I had to do to prepare for that argument. I had other things to do. But being scared is a great motivator to get you to do the stuff you do not want to do. So you should really relish the fright, relish the anxiety, capture it, harness it, use it to your advantage, and don't blame the people who are making you frightened because you think that they are doing something wrong to you.

II

As you know, we lost the case in the Supreme Court six to three. I told you that I was going to spend some time talking about the theory of our case and why I think it is important from a public interest standpoint. So let me just say a few words about why I think our Commerce Clause claim failed. The primary issue turned out to be just how much deference the Court owes to a decision of Congress to regulate an activity under the Commerce Clause. The three dissenters, who accepted our argument, were being skeptical about Congress' claim that it really was necessary, under the Necessary and Proper Clause, to reach this wholly intrastate, non-economic activity in order to effectuate Congress' power over interstate commerce. They were expressing or reflecting the same skepticism about a claim of government power that had been manifested by the Court in *Lopez* and *Morrison*.

In contrast, the majority stood for largely unfettered discretion in the hands of Congress to make this kind of judgment. As clear as this was in Justice Stevens' opinion for the majority, it was even clearer in Justice Scalia's concurring opinion in which he explicitly emphasized the Necessary and Proper Clause. Now, Justice Scalia was perfectly correct to emphasize the Necessary and Proper Clause. This case was always a Necessary and Proper Clause case, as much as it was a Commerce Clause case. But Justice Scalia essentially took the position that Congress can do pretty much whatever it wants when it comes to the Necessary and Proper Clause. This stance is, in my view, a great distortion of the classic landmark Necessary and

Proper Clause case of *McCulloch v. Maryland*,¹⁰ but I won't go into why. Justice Scalia's stance is even a distortion of the New Deal cases that, which we never denied, greatly expanded congressional power.

So the issue in *Raich* really boiled down to how much discretion you want to put in the hands of Congress in making a decision to prohibit this kind of activity. Stop and think about this for a moment. If you look at the political lineup of the Court you have the more "liberal" members who dissented in *Lopez*, and again in *Morrison*. They wanted to uphold broad discretionary power in Congress. We could have won the case if we could have held the more "conservative" justices, the five justices in *Lopez* and *Morrison*; but we lost Justice Kennedy for reasons we can only speculate about since he joined the majority opinion without comment. And we lost Justice Scalia for reasons he explains in his concurring opinion.

As a result, the liberal side of the Court won. You have to give credit to the more liberal justices for putting their principled commitment to strong federal power and enormous discretion in the hands of Congress above their compassion for the thousands of persons who are suffering and dying. Those persons, the people of now eleven states, thought they should have a right to preserve their lives and alleviate their suffering by using cannabis, one of the most harmless intoxicating substances known to man.

That a commitment to strong federal power leads to so much suffering is instructive. After we won in the Ninth Circuit, my first interview by the press was on a public radio station from the Bay area. There I first said what ended up as somewhat of a mantra in our case: *federalism is not just for conservatives*. Federalism is good for a lot of people, not just for people who happen to be conservatives. In this case federalism would have been good for what you might think of as a "progressive" or liberal political side of this public policy issue—certainly the compassionate side. We contended that the states should get the opportunity to exercise their police power free of interference by the Commerce Clause power of the Congress. But the more "liberal" Justices, plus Justices Kennedy and Scalia's

10. 17 U.S. 316 (1819).

commitment to complete discretion in the hands of the federal government, undermined the states' ability to reach a progressive result.

Those of you who are interested in public interest law and who also might consider yourself as coming, loosely speaking, from the left side of the political spectrum really ought to think hard about what is really in the public interest when it comes to unlimited federal power. When I was growing up, most progressives seemed to assume they would be running the show forever. But now it is just as possible to entertain the possibility that all three branches of the federal government could conceivably be controlled by the people with whom progressives strongly disagree, and who could put their unfettered discretionary powers to ends that progressives reject.

Federalism enables states to perform as "laboratories of experimentation." But perhaps a better word today would be "diversity." That is its principal virtue. You can have up to fifty ways to try to figure out how to solve a social problem rather than a one-size-fits-all solution. In *Raich* we were arguing for a constitutional principle that would have allowed this sort of diversity to blossom. The diversity of federalism lost six to three ultimately because the more liberal members of the Court persistently rejected it and they managed to attract another vote to their side for reasons about which we can only speculate.

I do think, however, that it was better for the principle to lose six to three than eight to one or nine to nothing. When I went into this case I thought, "A loss is a loss. It doesn't make any difference how you lose." But after the decision my daughter said to me:

You know, I think that if you are going to lose the case, six to three is the best way to lose it. If you lose nine to nothing it makes it look like you did a horrible job or that you had no credible, serious argument. If you lose five to four you keep yourself up at night thinking about all the ways in which you could have gotten just one more vote. So six to three is perfect.

In addition to being perfect from a personal standpoint I now think it is also useful to get three votes from the standpoint of the constitutional principle we were defending. Our theory of the case was very well presented by Justice O'Connor in her dissenting

opinion, in which Chief Justice Rehnquist and Justice Thomas joined. While I entirely agree with Justice Thomas's separate dissent, we didn't litigate the case that way because that argument would only have gotten us one vote: his. Because we lost six to three our argument, together with that of Justice Thomas, is now enshrined in the U.S. Reports for all time. At least until there is another Commerce Clause development, *Raich* now goes into every casebook on constitutional law; and along with the majority opinion goes our theory as well. Our arguments are now preserved for students and others to think about for years to come. If we had lost nine to nothing no one would have learned of our analysis because no one puts the briefs of the parties into casebooks.

I hope you will consider the value of federalism and be regretful that our side lost—not only because you are sympathetic to medical cannabis, but because you feel badly that the principle of diversity through federalism also lost. And perhaps you now see this is a principle that would be in the public interest to see prevail.

III

Let me now discuss what survives. As I mentioned at the start of this talk, we made both Commerce Clause and Due Process Clause challenges to the Controlled Substances Act. Because the Ninth Circuit ruled for us on our Commerce Clause claim it did not reach our Due Process Clause challenge, though we did assert both theories in our brief to the Supreme Court. We conceivably could have put together a majority of justices, comprised of some who liked the Due Process claim and others who liked our Commerce Clause claim, but it turns out the Court does not like to operate that way. They just want to deal with one issue at a time and so they dealt with the Commerce Clause issue and remanded the case to the Ninth Circuit to consider all other surviving issues, which included our Due Process Clause challenge. This is what we are now arguing for in the Ninth Circuit.

While I think we have a very strong Due Process Clause argument, there are problems with the current doctrine used by the Supreme Court to protect liberty. Our Commerce Clause claim represented a modest challenge to the broad post-New Deal authority

that the Court has invested in Congress, which allows Congress broad discretion to decide how it wants to regulate the economy free of judicial oversight. How did the New Deal Court reconcile this broad reading of the Commerce Clause and Necessary and Proper Clause powers with the protection of liberty afforded by the Due Process Clauses of the Fifth and Fourteenth Amendments?

The New Deal Court's effort at reconciliation is to be found in the famous "Footnote Four" of *United States v. Carolene Products*.¹¹ While there is no need to memorize the lost Ninth Amendment, law students really should memorize Footnote Four because, to some degree, this footnote became the sole constitutional protection of liberty. In the body of the opinion in *Carolene Products* the Court adopts a "presumption of constitutionality" that attaches to any legislation—especially that which purports to regulate the economy. Footnote Four then qualifies the text by asserting that there is a narrower scope for the operation of the presumption of constitutionality when laws affect the rights or specific prohibitions of the Constitution—including portions of the Bill of Rights. (I am not, by the way, now dealing with the second and third paragraphs of Footnote Four, but only the first paragraph that deals with liberty protected by the Due Process Clause.)

So, essentially, the Court was saying, "Look, we are going to give blanket authority to the Congress"—the discretionary power that was affirmed in *Raich* six to three—"but this power is to be qualified by a protection of certain expressed prohibitions that are found in the Constitution," some of which are in the form of rights that are now referred to as "fundamental."

Notice, however, that Footnote Four refers to *expressed* prohibitions, so only that which is explicit in the Constitution can be used to qualify federal power. That's it. In the 1960s, when an unenumerated "right of privacy," which is not an "express prohibition" in the Constitution, was protected by the Court in *Griswold v. Connecticut*¹² all hell broke loose, even among those progressives who rejected the legal prohibition of contraceptives. Why? Because a "right of privacy" simply did not fit within the

11. 304 U.S. 144, 153 n.4 (1938).

12. 381 U.S. 479 (1965).

Footnote Four framework. *Griswold* challenged the safe harbor of Footnote Four, to which many New Deal progressives had become very accustomed in the post-Roosevelt, post-New Deal era.

Ever since 1965, courts and constitutional law scholars have been living with the dilemma of how to reconcile unenumerated rights like the right of privacy with Footnote Four's qualification of the otherwise unlimited deference given to Congress during the New Deal and afterward. The answer that has evolved doctrinally is the protection of only those unenumerated liberties that are deemed by the Court to be "fundamental." There are two different formulations of what makes a liberty fundamental, and sometimes courts run them both together: those rights that are "implicit in the concept of ordered liberty" and those rights that are "deeply rooted in the nation's tradition and history."

So the burden is now on the claimant litigating a Due Process Clause challenge to say that an unenumerated liberty is not just a mere "liberty interest," which gets no judicial protection, but is one of these heightened "fundamental rights" that is either deeply rooted in the nation's tradition and history or is implicit in the concept of ordered liberty. Until recently, at least, every claimant who makes a Due Process Clause challenge has to make that argument. Now, I'm not going to say much more about it at the moment but you should just put a little footnote here: *but see Lawrence v. Texas*,¹³ in which the Court did protect liberty without finding, as a threshold matter, that the liberty in question was deeply rooted in the nation's tradition and history. So *Lawrence v. Texas* doesn't fit the formula.

At this point, it is difficult to litigate on the basis of *Lawrence* as opposed to more familiar notions of fundamental rights, which is the way that most people (including most judges) still think about fundamental rights. For most judges, *Lawrence* was kind of a one-off case and they simply do not know what it means. Judges are still basically thinking of fundamental rights the same way as they thought of them before. So the burden is on us to argue and contend that our liberty is somehow "fundamental."

13. 539 U.S. 558 (2003).

You can all readily see the problem here for the protection of liberty. Those of you who are interested in protecting liberties—personal liberties as well as others—have to realize that this is what you still have to deal with. You have to show that the liberty or right in question was deeply rooted in the nation’s tradition and history or implicit in the concept of ordered liberty.

The first step toward showing this requires defining the liberty that is at issue in the case. To argue that a liberty is deeply rooted in the nation’s tradition and history or implicit in the concept of ordered liberty you have to say what the liberty is. So what is it? Well, in *Raich* we say the liberties we are protecting are the rights to preserve one’s life and to avoid needless pain and suffering. To me, those rights sound extremely fundamental. They sound like they are deeply rooted in our nation’s tradition and history. They even sound like they are implicit in the concept of ordered liberty. If this is true, then we ought to win in the sense that we shift the burden to the government who must now justify its prohibition on cannabis use as really necessary. Unless we prevail on our claim that the liberty in question is fundamental, the irrebuttable presumption of constitutionality will kick in and we lose.

How does the government characterize the right at stake? Quite predictably, it describes the liberty as the right to smoke marijuana or perhaps the right to smoke marijuana for medical purposes. Now that is a liberty that does not sound like it is deeply rooted in the nation’s tradition and history. Although some may disagree, it does not really sound implicit in the concept of ordered liberty. It sounds peripheral and oddball and, well, it sounds like “California.”

If the government’s characterization of the liberty in question is accepted, then it really seems like the Court is going to say that the liberty is not fundamental and therefore we would lose. The whole thing boils down, win or lose, to which formulation of the right is the correct one. Is it the one we say or is it the one the government says? Because, under current doctrine, whichever formulation the Court picks is going to determine the outcome of the fundamental rights analysis.

So, who is right? If you actually look at each one of these claims of what the liberty in question is there seems to be little doubt that both of them are at least descriptively accurate. The liberty at issue *is*

the liberty to smoke cannabis for medical purposes, but the liberty *also is* the liberty to preserve one's life and to avoid needless pain and suffering. Both characterizations are descriptively accurate. One is simply describing the conduct very narrowly and particularly and the other is describing the conduct at a more general level of abstraction; but they are both descriptively accurate. If this is true, then the outcome of the case depends almost entirely on which of two descriptively *accurate* characterizations of the conduct the Court decides to choose. In the end, the Court gets to decide how it wants to rule and then it can rule that way by how it chooses to describe the liberty in question.

Under this doctrine, then, there is simply no law to guide or constrain the courts. Judges may decide the result they want to reach for a variety of reasons and they can then pick the *accurate* description of the liberty that allows them to reach that result. The fact that courts can come out any way they want, depending on which of the accurate characterizations of the liberty they choose shows that there is something seriously wrong with current doctrine. This is one of the reasons to support the proposition that I defend in my book, *Restoring the Lost Constitution*, the subtitle of which is "The Presumption of Liberty."

IV

My proposal is that all liberties should be treated equally. Under my proposal, the government would have the burden to justify its restrictions on liberty, whether exercising its police power at the state level, or its enumerated powers at the federal level. Whatever power is being exercised, the government may justly (1) *regulate* the *rightful* exercise of liberty or (2) *prohibit wrongful* acts, but they may not (3) *prohibit rightful* exercise of liberty. In short, while all liberty may be reasonably regulated, the burden is on the government to show why the regulation of any particular liberty is truly necessary and proper. We should not just take the government's word for it. If a regulation of liberty is necessary to protect the rights of others in the community then that regulation can stand. Only if the activity *itself* is wrongful, however, can they prohibit the activity altogether. By "wrongful" I do not mean immoral or disapproved of; rather, I refer

to a subset of immoral acts that invariably violate the rights of others. Such are the kinds of rights violations that I became an Assistant State's Attorney to prosecute: murder, rape, armed robbery.

Consider how we now approach the liberties protected by the First Amendment—the rights of freedom of speech, press, and assembly. When it comes to these liberties we allow them to be reasonably regulated by so-called time, place, and manner regulations. No matter how upset you may be about the Supreme Court's Due Process Clause jurisprudence after hearing this lecture you cannot run out in the middle of the street and block traffic today in order to protest without first getting a permit to demonstrate. This is because the government is entitled to protect the liberties of your fellow citizens to travel to work or the store, as well as your liberty to protest. Therefore, the reasonable regulation of these liberties is constitutionally permissible, *provided* that the government is not improperly placing an undue burden on the exercise of liberty or discriminating against one viewpoint in favor of another.

As for the prohibition of wrongful acts, nobody contends that fraud is a “liberty” protected under the freedom of speech provision. Although fraudulent speech is literally “speech,” fraud is wrongful because it violates the rights of others. Engaging in fraudulent speech—which is not the same thing as false speech—can send you to jail. Nobody even thinks to argue there is a First Amendment protection of fraud or defamation, another species of wrongful speech that is not protected by the First Amendment. Just as the government now prohibits wrongful speech and regulates rightful speech, I propose simply that we take that same approach across the board with all liberties. No longer would we protect only those liberties that are somehow “fundamental.”

Distinguishing “fundamental rights” from mere “liberty interests” and protecting only the former is bad for liberty, bad for the public interest, and something that courts are not particularly qualified or authorized to do. For the Constitution says this: “The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.”¹⁴ And the Footnote Four

14. U.S. CONST. amend. IX.

formulation, even if expanded to include those unenumerated rights that courts deem to be “fundamental,” is a direct violation of this expressed conjunction of the Constitution itself. Or so those academics with tenure may contend. Perhaps someday, Article III judges with lifetime tenure will agree. Such a change of heart would be, I maintain, in the public interest.